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BACK TO THE FUTURE: THE SUPREME COURT'S RETROACTIVITY JURISPRUDENCE

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INTRODUCTION

A long time ago, in a place that must seem far away, the issue of retroactive application of a new legal rule was easily resolved. At common law, courts generally applied new rules retroactively; to do otherwise was to deny that the judiciary "rather than being the creator of the law was but its discoverer."[1] Retroactivity thus lies near the heart of the debate over the proper judicial role: Do judges make or find law?[2] According to the common law, "making law" entails discretionary policy decisions most akin to the legislative role.[3] The American federal constitutional system lodges such discretion in Congress. The courts, on the other hand, discover pre-existing principles of law and merely apply them to cases. In this view, when courts overrule a prior decision, they state not only what the law is, but what the law has always been. The overruled decision is not old law, but rather a failed attempt at discover-

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1. Linkletter v. Walker, 381 U.S. 618, 623 (1965); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *69-70; ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 49 (2d ed. 1953).

2. Legal realists have largely discredited the theory that judges merely "find" law. The realists argue instead that the tools of legal reasoning "are so flexible that they allow [judges] to assemble diverse precedents into whatever pattern [they] choose." MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 192 (1988) (citing KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960)). Oliver Wendell Holmes also denigrated the position that there exists a set of legal norms awaiting judicial discovery. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). The current debate over making versus finding law focuses on the need for judicial restraint, with those supporting full retroactivity arguing that it reduces the tendency to overrule prior decisions or to create new legal protections. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring).

3. *See* POUND, *supra* note 1, at 48-50.

ing the true law.[4]

Under common-law jurisprudence, retroactivity is quite simple: always and absolute. Courts, however, weighed down by practical considerations such as a party's substantial reliance on the "old" but now nonexistent rule, have found this lofty ideal hard to reach. Although full retroactivity may stimulate a comforting belief that the judiciary fits nicely within its traditional common-law role, it also defeats settled expectations and reasonable reliance on the stability of the law. A tension between theory and practice drives the retroactivity debate.

In *James B. Beam Distilling Co. v. Georgia,*[5] the Supreme Court threw its retroactivity jurisprudence into chaos. For over twenty-five years the Court had used some form of prospectivity in applying new legal rules. The various opinions in *Beam,* however, indicate that the Court may be moving the future of retroactivity back to the old common law.

Part I of this article summarizes the Court's retroactivity doctrine through the 1980s. Part II assesses the competing positions on the current Court as set forth in *Beam* and *American Trucking Associations v. Smith,*[6] and ultimately endorses Justice Scalia's historically-based retroactivity approach. Part III examines the implications of Justice Scalia's doctrine for other areas of constitutional law and theory beyond the narrow area of retroactivity.

I. Retroactivity through the 1980s

A. *Terms from the Retroactivity Debate*

Retroactivity, as with many other areas of the law, has its own language. The terms "final," "direct review," "collateral review," "full retroactivity," "pure prospectivity," and "selective prospectivity" have particular meanings in discussions of retroactivity. A working understanding of the terms is necessary to comprehend the retroactivity issue.

Procedurally, the Court's retroactivity doctrines have looked at whether a case was "final" or still subject to direct review on the date a new legal rule was announced. A case is considered final when it has come to judgment, all appeals have been ex-

4. *See id.*
5. 111 S. Ct. 2439 (1991).
6. 110 S. Ct. 2323 (1990).

hausted, and the time for filing a petition for a writ of certiorari has lapsed.[7] Any case on appeal in which a litigant makes a collateral attack on a final judgment is under "collateral review."[8]

A court announcing a new rule of law generally has three options regarding the intertemporal application of that rule: full retroactivity, pure prospectivity, or selective prospectivity. As used in this article, full retroactivity refers to the application of a new legal rule to the case in which the new rule was announced as well as in all cases that are not final.[9] Pure prospectivity commands that courts apply the new legal rule to neither "the parties in the law-making decision nor to those others against whom or by whom it might be applied to conduct or events occurring before that decision."[10] Selective prospectivity applies the new rule to the parties in the case announcing the rule, but does not apply the new rule to cases arising out of conduct predating the announcement of the new rule.[11]

B. Linkletter *and the Road to Chaos*

Until the landmark case of *Linkletter v. Walker*,[12] the Supreme Court routinely applied new constitutional rules to all cases, even those finalized before announcement of the new rule.[13] The Court had made exceptions to retroactivity when applying statutes[14] or overruling common-law rules,[15] but these exceptions were not based on any comprehensive theory. It was left

7. Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965).

8. Federal habeas corpus review is an example of a collateral attack on a final criminal conviction. *See* 28 U.S.C. §§ 2241 et seq. (1988). In the civil context, collateral review is rarer. For a discussion of several types of collateral review in civil cases, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.2, at 587-89 (1985).

9. This article earlier made reference to the old common law rule that applied a new legal rule to *all* cases regardless of whether the judgment or conviction was final. This extreme brand of retroactivity is much broader than the "full retroactivity" just described and is referred to as "common law retroactivity."

10. James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439, 2443 (1991) (Opinion of Souter, J.).

11. *See id.* at 2444 (Opinion of Souter, J.).

12. 381 U.S. 618 (1965).

13. *See id.* at 628-29. For a discussion of pre-*Linkletter* retroactivity theory, see John B. Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745, 746 (1983); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 57, 62-70 (1965); Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 718, 747-57 (1966).

14. *See* Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) ("The past cannot always be erased by a new judicial declaration.").

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

to the *Linkletter* Court to construct a far-reaching retroactivity doctrine compatible with practical concerns.

At issue in *Linkletter* was whether the Court should retroactively apply its decision in *Mapp v. Ohio*,[16] which held that in a criminal trial, state courts must exclude evidence seized in violation of the Fourth Amendment.[17] The *Mapp* Court had already applied the rule to the defendant in that case, thereby eliminating pure prospectivity as an option for the Court in *Linkletter*. Consequently, the Court faced a choice between selective prospectivity and full retroactivity.

Common law retroactivity would have devastated the criminal legal system by invalidating "thousands of cases" that had become final under the prior rule.[18] Conversely, denying the benefit of the rule to the *Linkletter* defendant after giving the defendant in *Mapp* the benefit of the rule would have violated the equitable principle that all those similarly situated should be treated alike.[19] Faced with this tension between practical and equitable factors, the Court compromised and announced a three-factor test for non-retroactivity: Courts must examine "the purpose of the [new] rule; the reliance placed upon the [old] doctrine; and the effect on the administration of justice of a retrospective application of [the new rule]."[20] After considering these factors, the Court decided that the rule in *Mapp* should not be applied retroactively.[21]

The three-factor test enunciated in *Linkletter* focused on the reliance of the parties before the court and the effect of the rule on the administration of justice, rather than on the proper role of the courts within the United States constitutional system.[22]

16. 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).

17. The exclusionary rule did not, of course, originate in *Mapp*. The rule had been in place in federal courts since Weeks v. United States, 232 U.S. 383 (1914). *Mapp* incorporated the rule against the States. *Mapp*, 367 U.S. at 655.

18. *Linkletter*, 381 U.S. at 636. The Court's concern was with cases that had become "final" as opposed to those on "direct review," and therefore not final. *See supra* notes 7-9 and accompanying text. Even after final conviction, collateral review through habeas corpus in the United States District Courts is still possible if the defendant is being held in violation of his constitutional rights. *See* PETER W. LOW & JOHN CALVIN JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS 690-91 (2d ed. 1989).

19. *See* Teague v. Lane, 489 U.S. 288, 305 (1989) (quoting Griffith v. Kentucky, 479 U.S. 314, 323-24 (1987)).

20. *Linkletter*, 381 U.S. at 636.

21. *See id.* at 640.

22. Throughout this article, discussion of the "nature of the rule" refers to the extent to which the new rule represents a break from precedent. Discussion of the "na-

Indeed, several commentators and the Supreme Court itself, in later cases, have taken for granted that the retroactivity analysis is *not* one of constitutional dimension.[23] The *Linkletter* approach left the retroactivity doctrine unmoored from the Constitution, unrestrained by any cognizable guiding principles, and highly manipulable.[24]

C. Chevron Oil: Linkletter's *Civil Sibling*

In *Chevron Oil Co. v. Huson*[25] the Court imported *Linkletter*'s focus on the nature of the parties and the legal rule into the civil context. *Chevron Oil*, like *Linkletter* before it, used a three-part test for non-retroactivity: (1) the rule is a "new" principle of law; (2) the rule's operation would be retarded by retroactive application; and (3) the equities of the case favor non-retroactivity.[26] The *Chevron Oil* Court did little more than appeal to *Linkletter* and other criminal cases in support of its new civil non-retroactivity test.[27] Almost twenty years later, in *American Trucking Associations v. Smith*,[28] the Court suggested the rationale behind the *Chevron Oil* test. The *Smith* Court emphasized the disruptive effect retroactivity has on parties' settled expectations.[29] This focus on the parties and their individual situations outweighed the countervailing interest in treating all similarly-situated parties (that is, all parties on direct review) alike.[30]

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ture of the parties" refers to the extent to which the court attempts to treat similarly-situated parties equally.

23. *See Beam*, 111 S. Ct. at 2443 (Opinion of Souter, J.) ("Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law . . . ."); *Linkletter*, 381 U.S. at 628 ("[T]here seems to be no impediment—constitutional or philosophical—to the use of [prospectivity]."); L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 11 UTAH L. REV. 11, 12 (1989) ("The Constitution does not speak to the retroactive or prospective application of Supreme Court decisions.").

24. *Cf. Beam*, 111 S. Ct. at 2451 (Scalia, J., concurring) (declaring that "selective prospectivity" and "pure prospectivity" are beyond the judicial power conferred by Article III); *id.* at 2449-50 (Blackmun, J. concurring); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1797-1805 (1991).

25. 404 U.S. 97 (1971).

26. *See id.* at 106-07.

27. *See id.* at 105-07. The Court does suggest that it has "recognized the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and non-constitutional cases." *Id.* at 106. Little attempt is made, however, to explore the different implications of retroactivity in the civil context.

28. 110 S. Ct. 2323 (1990).

29. *See id.* at 2333-35.

30. *See id.* at 2335.

D. Linkletter *Revised and Abandoned*

In *Griffith v. Kentucky*[31] the Court overhauled its criminal retroactivity doctrine. *Griffith* considered the retroactive effect to be given to the Court's decision in *Batson v. Kentucky*[32] in criminal cases on direct review. At stake in *Griffith* was the continued vitality of the *Linkletter* retroactivity test.

In *Griffith*, there were two criminal defendants, each of whom challenged his early 1980s conviction based on the Court's 1986 *Batson* decision. On direct review, the Court sustained the challenges, holding that "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."[33] Appealing to the text of Article III,[34] the Court noted that Article III courts are only authorized to decide cases or controversies.[35] Article III courts must decide all cases on direct review based on the Court's understanding of the law *at the time of review*, and not at the time the case arose or was originally adjudicated at trial.[36] The Court also relied on the equitable principle that

31. 479 U.S. 314 (1987).

32. 479 U.S. 79 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965), by modifying evidentiary showing needed to challenge prosecution's racially discriminatory use of peremptory challenges).

33. *Griffith*, 479 U.S. at 328.

34. Article III provides that the judicial power includes, *inter alia*, "all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to *Controversies* to which the United States shall be a Party, to *Controversies* between two or more states . . . ." U.S. CONST. art. III, § 2 (emphasis added).

35. *See Griffith*, 479 U.S. at 322. The *Griffith* Court made limited use of Article III as a basis for retroactivity doctrine.

36. *See id.* at 322-23. The Court cited extensively to the second Justice Harlan throughout its opinion. With regard to the Article III function of the judiciary, the Court quoted:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all . . . . In truth, the Court's assertion of power to disregard current law in the adjudicating of cases before us [on direct review], is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

Id. at 323 (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring)).

Justice Blackmun's brief appeal to Article III in his *Griffith* opinion went unnoticed in Teague v. Lane. 489 U.S. 288 (1989). In *Teague*, the Court strictly limited the retroactive application of new rules of constitutional and criminal procedure to cases on collateral review. *Id.* at 307-15. The *Teague* Court never recognized the constitutional implications in the decision. Justice Blackmun joined in Part I of Justice Stevens's concurrence, which advocated a wholesale adoption of Justice Harlan's analysis and made no mention of the judiciary's constitutional role. *See id.* at 319. Only Justice White, concurring in *Teague*, recognized that something more might be at stake. Justice White wrote:

similarly-situated defendants should be treated alike. In the retroactivity context, the litigant who arrives first at the Court's door should not receive the sole benefit of the new rule.[37]

The *Griffith* Court made an important theoretical departure from previous retroactivity doctrine when it dispensed with consideration of the nature of the rule involved. Throughout most of its opinion, the Court adopted the second Justice Harlan's position on retroactivity for all cases on direct review. Justice Harlan, however, had argued for an exception to that rule in cases where the new legal rule was a "clear break" from the prior law.[38] In an opinion written by Justice Blackmun, the *Griffith* Court rejected this argument, reasoning that "an engrafted exception based solely upon the particular characteristics of the new rule adopted by the Court is inappropriate."[39] With that stroke, Justice Blackmun freed the retroactivity analysis from considerations of the nature of the rule involved—that is, the extent of the rule's departure from past precedent.

As the 1980s ended, *Chevron Oil*, *Teague*, and *Griffith* ruled the retroactivity roost. Amorphous inquiries into such issues as equity, reliance, and the newness of a legal rule left little that was certain. It was in this context that the rumblings of a new retroactivity analysis surfaced in *Smith* and *Beam*.

II. *SMITH* AND *BEAM*: THE HERE AND NOW

A. American Trucking v. Smith: *The Beginning of the Beginning*

Justice O'Connor's plurality opinion in *American Trucking Associations v. Smith*[40] dutifully applied the *Chevron Oil* retroactivity

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> If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us; but because the Court's recent decisions dealing with direct review appear to have constitutional underpinnings, *see, e.g.*, *Griffith v. Kentucky*, [479 U.S.] at 322-23, correction of our error, if error there is, perhaps lies with us, not Congress.

Teague, 489 U.S. at 317 (White, J., concurring). Indeed, if retroactivity is governed by an understanding of the Court's proper constitutional role, then any different treatment for cases on collateral review must also draw on the Constitution and the judiciary's role therein.

37. The Court would violate this equitable principle by "[s]imply fishing one case from the stream of judicial review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." Desist v. United States, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting).

38. *See id.* at 248. The Court adopted Justice Harlan's view in United States v. Johnson, 457 U.S. 537, 562 (1982).

39. *Griffith*, 479 U.S. at 326.

40. 110 S. Ct. 2323 (1990).

test.[41] *Smith* addressed the retroactive application of *American Trucking Associations v. Scheiner*,[42] where the Court held that certain state taxes violated the negative commerce clause.[43] Justice O'Connor's opinion denying retroactive application was joined by only three other members of the Court.[44] Justice Scalia outlined his hybrid doctrine in an opinion concurring in the judgment,[45] and the remainder of the Justices joined in Justice Stevens's dissent.[46]

1. *Justice Scalia's Hybrid Approach*

Justice Scalia stated his position on retroactivity quite clearly: "[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."[47] This retroactivity theory derives from Justice Scalia's understanding of the Constitution's grant of "the judicial Power."[48] In his view, the only proper understanding of the judicial power is that of "*declaring* what the law already is," and not "*creating* the law."[49] Continuing in the same vein, he stated that "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."[50]

This analysis, although intuitively persuasive, begs the question that any inquiry into constitutional meaning must answer:

41. *See id.* at 2332-35 (O'Connor, J., plurality opinion).

42. 483 U.S. 266 (1987).

43. *See id.* at 284. The "negative" commerce clause is also called the "dormant" commerce clause. Although the Constitution gives Congress the power to regulate commerce, it is silent on the limits of such power. U.S. CONST. art. I, § 8, cl. 3. The Court is therefore left to interpret the extent of permissible state regulation given this "dormant" commerce clause power vested in the federal government. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-3 to 6-4, 6-13 to 6-14 (2d ed. 1988).

44. *See Smith*, 110 S. Ct. 2323, 2327-43 (O'Connor, J., plurality opinion) (joined by Rehnquist, C.J., White, J., and Kennedy, J.).

45. *See id.* at 2343-45 (Scalia, J., concurring).

46. *See id.* at 2345-56 (Stevens, J., dissenting) (joined by Brennan, J., Marshall, J., and Blackmun, J.).

47. *Id.* at 2343 (Scalia, J., concurring).

48. *Id.* (Scalia, J., concurring) (construing U.S. CONST. art. III, § 2, cl. 1). Justice Scalia has written that the Article III "judicial Power" is a "constitutional term of art." *Freytag v. Commissioner*, 111 S. Ct. 2631, 2654 (1991) (Scalia, J., concurring in part and concurring in the judgment) (arguing that "the Courts of Law" in the Appointments Clause refer only to courts that exercise Article III judicial power).

49. *Smith*, 110 S. Ct. at 2343 (Scalia, J., concurring) (emphasis in original).

50. *Id.* (Scalia, J., concurring).

From what extra-constitutional source do we derive the meaning of otherwise vague constitutional language—in this case, "judicial Power"?[51] The only hint Justice Scalia gave was that his understanding of the judicial power was "the common and traditional one."[52] By "common," perhaps he was referring to the plain meaning of judicial power, arguing that the term cannot possibly be understood otherwise. That rationale fails, however, because if the meaning truly were common there would be no debate. The "traditional" reference, on the other hand, implies that we must look at a prior, constant meaning of the judicial power, devoid of the so-called "equitable" and "practical" demands of the present. Unfortunately, while tradition is a start, without more—such as an explication of the relevant tradition and the limits of that tradition—Justice Scalia failed to answer the important interpretational question.

2. *Justice Stevens's Dissent*

In dissent, Justice Stevens employed Justice Blackmun's *Griffith* analysis. He appealed to the familiar principle of equal treatment for similarly-situated parties,[53] limiting its application only because of the need to have finality in litigation.[54] This analysis loosely tracked *Griffith* and *Teague* by mandating retroactivity for all civil cases on direct review, but *fully denying* retroactivity to final cases subject to *res judicata* or some other procedural bar.

B. *The Justices' Retroactivity Doctrines Teeter on the* Beam

Three of the four Justices who announced the Court's judgment in *Smith* found themselves in bitter dissent a little over a year later in *James B. Beam Distilling Co. v. Georgia*.[55] The *Beam*

51. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1060-65 (1990). Justice Scalia also has suggested that the meaning of "liberty" in the Due Process Clause should be derived from historical tradition, narrowly defined. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989); *see also* Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991) (discussing Justice Scalia's note 6 in Michael H. v. Gerald D.).

52. *Smith*, 110 S. Ct. at 2343 (Scalia, J., concurring).

53. *See id.* at 2349 (Stevens, J., dissenting) ("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.").

54. *See id.* (Stevens, J., dissenting).

55. 111 S. Ct. 2439, 2451-56 (1991) (O'Connor, J., dissenting) (joined by Rehnquist, C.J. and Kennedy, J.).

Court addressed the retroactive application of *Bacchus Imports, Ltd. v. Dias*,[56] which held that certain discriminatory state liquor taxes violated the Commerce Clause.[57] Once again, only now on the losing side, Justice O'Connor plodded through the *Chevron Oil* analysis, concluding that *Bacchus* deserved selective prospectivity.[58] In three separate opinions, as many as five Justices appeared ready to overrule or modify *Chevron Oil*.[59] Most importantly, Justice Scalia's concurring opinion expanded upon the approach to retroactivity he introduced in *Smith*.[60]

1. *Justice Scalia: Take Two*

Justice Scalia began his opinion in *Beam* by clearly reaffirming his understanding of retroactivity: Anything but full retroactivity "is impermissible simply because it is not allowed by the Constitution."[61] His opinion again contained language about "making versus finding" law as the essence of the Article III "judicial Power."[62] This time, however, Justice Scalia pinpointed the source judges should consult in forming a proper understanding of the judicial power's scope. He urged the Court to preserve the judicial power "as understood by our common law tradition" and "as [it] was understood when the Constitution was enacted."[63] This common law tradition, according to Justice Scalia, defined judicial power as the power "to say what the law is."[64] To tamper with this judicial function would be to "alter in a fundamental way the assigned balance of responsibilities and power among the three Branches."[65] Non-retroactive decisionmaking, according to Justice Scalia,

56. 468 U.S. 263 (1984).

57. *See id.* at 273.

58. *See Beam*, 111 S. Ct. at 2453-56 (O'Connor, J., dissenting). The dissenters would have given *Bacchus* purely prospective application, thus denying even the aggrieved party in *Bacchus* the benefit of the new rule. *See id.* at 2451 (O'Connor, J., dissenting). The majority in *Bacchus* never addressed the retroactivity of its decision, but unquestioningly gave the benefit of that decision to the parties before it.

59. *See id.* at 2441-48 (Opinion of Souter, J.) (announcing the judgment of the Court, joined by Stevens, J.); *id.* at 2449-50 (Blackmun, J., concurring); *id.* at 2450-51 (Scalia, J., concurring).

60. *See id.* at 2450-51 (Scalia, J., concurring).

61. *Id.* at 2450 (Scalia, J., concurring).

62. *See id.* (Scalia, J., concurring).

63. *Id.* (Scalia, J., concurring).

64. *Id.* (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

65. *Id.* at 2451 (Scalia, J., concurring). Justice Scalia's opinion reflects the sharp definition on which he has insisted in the separation of powers context. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

represents an unconstitutional power grab by the judiciary, rupturing the delicate boundaries separating the three governmental powers.

Justice Scalia also wove a strand of legal realism into his argument. Conceding that "judges in a real sense 'make' law",[66] he was adamant, however, that judicial power is appropriately exercised to make law "*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."[67] In this sense, the law has always existed, and the Court merely gives voice to its proper understanding. Unlike a legislature, the Court will be bound by that proper understanding. This does not mean that a past understanding of the law cannot be wrong. When a past understanding is abandoned, however, it must be abandoned in favor of the true understanding of the law and not merely because the Justices think that the existing rule is unwise or unjust.

In *Beam*, Justice Scalia finished what he started in *Smith*. He grounded his retroactivity doctrine in the Constitution's text, avoiding the future manipulability inherent in amorphous equity and policy standards. Justice Scalia also opted to derive the meaning of the text from the common-law meaning of judicial power at the time the Constitution was framed. Thus, in *Beam*, Justice Scalia finally broke the myth that the Constitution "has no voice upon the subject,"[68] and brought the doctrine of retroactivity back to its common law and constitutional roots.

2. *Justice Souter and Choice of Law*

Choice of law conjures images of *renvoi*, *lex loci delecti*, *lex loci contractus*, and—more recently—most significant relationships.[69] In a federal system, the issue of which sovereign's law shall apply in a given case poses interesting problems. Retroactivity, to Justice Souter, raises similar issues. Retroactivity is a choice of law problem—a choice between the old rule and the new rule.[70] Because the *Bacchus* rule had already been applied

66. *Beam*, 111 S. Ct. at 2451 (Scalia, J., concurring).
67. *Id.* (Scalia, J., concurring) (emphasis in original).
68. Linkletter v. Walker, 381 U.S. 618, 629 (1965) (quoting Great N. Ry. Co. v. Sunburst Oil Ref. Co., 287 U.S. 358, 364 (1932)).
69. *See generally* WILLIAM M. RICHMAN AND WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS (1984).
70. *See Beam*, 111 S. Ct. at 2443 (Opinion of Souter, J.).

to the parties in that case, pure prospectivity was not an option. Therefore, Justice Souter limited his *Beam* analysis to pure retroactivity and selective prospectivity.[71]

Choice of law doctrine in general balances many competing interests, such as comity between states, equity, uniformity of legal result, and prevention of forum-shopping.[72] Justice Souter's intertemporal choice of law analysis also focused on policy factors. Indeed, he stated that his decision was dictated by considerations of "equality and stare decisis."[73] He borrowed equality from the criminal context, stating that the principle "that similarly situated litigants should be treated the same, carries comparable force in the civil context."[74] Justice Souter determined that this first factor weighed heavily against selective prospectivity.[75]

Justice Souter's *stare decisis* analysis brought out another familiar retroactivity factor—reliance on the old legal rule. The parties' individual equities and reliance on the old rule have no place in his choice of law analysis.[76] *Stare decisis* commands that a new rule, once announced, must be followed in future cases. *Stare decisis* cannot be "switched on and off according to individual hardship."[77] Justice Souter thus used *stare decisis* to trump reliance as a factor in his retroactivity analysis. In doing so, he shied away from focusing on the nature of the parties, an idea used in the earlier retroactivity cases.

The logical conclusion of Justice Souter's analysis would be common law retroactivity,[78] but Justice Souter recognized limits to the retroactive effect of a new legal rule. The legal sys-

71. *See id.* at 2445-46 (Opinion of Souter, J.). In fact, Justice Souter states that the Court did "not speculate as to the bounds or propriety of pure prospectivity." *Id.* at 2448 (Opinion of Souter, J.).

72. *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991); RICHMAN & REYNOLDS, *supra* note 79.

73. *Beam*, 111 S. Ct. at 2446 (Opinion of Souter, J.).

74. *Id.* (Opinion of Souter, J.).

75. *See id.* at 2447 (Opinion of Souter, J.).

76. "Nor . . . are litigants to be distinguished for choice-of-law purposes on . . . whether they actually relied on the old rule and how they would suffer from retroactive application of the new." *Id.* (Opinion of Souter, J.) Justice Souter does not deny that reliance, although it has no bearing on the proper rule to apply, may very well influence remedial considerations. *See id.* at 2448 (Opinion of Souter, J.).

77. *Id.* at 2448 (Opinion of Souter, J.).

78. For example, suppose two identical causes of action are brought. If the first is decided under the old rule and becomes final on day one, but the second is decided under a new rule on day two, Justice Souter's arguments for *stare decisis* and equal treatment of the parties would allow collateral attack by the first party seeking to apply the new rule to his final case.

tem's need for finality prohibits application of a new legal rule to suits subject to *res judicata* or some other procedural bar and therefore not eligible for direct review.[79] In one sense, this prohibition treats those under procedural bar differently merely on the basis of the fortuitous movement of the court calendar. Justice Souter, however, stated—without argument or analysis—that the need for finality outweighs any possible inequity on that basis.[80] Therefore, Justice Souter opted for full retroactivity.

3. *Justice Blackmun's Opinion*

In concurrence, Justice Blackmun stated that any form of prospectivity lies beyond the Court's reach.[81] As he did in *Griffith*, Justice Blackmun appealed to the Article III "cases or controversies" language. He argued that the Court's function is 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 to apply it to the parties who brought us the case to decide."[82] He criticized the dissent for trying to "dodge the *stare decisis* bullet."[83] He stated:

> Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.[84]

Justice Blackmun concluded that all types of prospectivity breach the Court's obligation under the Constitution.

C. *Evaluating the* Beam *Approaches*

After *Beam*, the Court seemed poised to abrogate *Chevron Oil* and abandon prospectivity in the civil context.[85] Therefore, an analysis of the several approaches taken by the *Beam* opinions

79. *See Beam*, 111 S. Ct. at 2447 (Opinion of Souter, J.) (citing Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981)).

80. *See id.* (Opinion of Souter, J.).

81. *See id.* at 2450 (Blackmun, J., concurring).

82. *Id.* (Blackmun, J., concurring).

83. *Id.* (Blackmun, J., concurring).

84. *Id.* (Blackmun, J., concurring).

85. Lower courts have already interpreted *Beam* as modifying or abandoning the *Chevron Oil* test. *See, e.g.*, Bank of Denver v. Southeastern Capital Group, Inc., 770 F. Supp. 595, 596 (D. Colo. 1991) (applying the new rule "retroactively and without *Chevron* analysis"); Berning v. A.G. Edwards & Sons, Inc., 774 F. Supp. 480, 483 (N.D. Ill. 1991) (stating that "it is questionable whether the *Chevron*-type analysis . . . is still fully viable in light of *Beam*").

seems justified. Furthermore, because Justice Marshall, a vote for retroactivity, retired from the Court shortly after the *Beam* decision, it is worth speculating on the future of the doctrine.

1. *Justice Scalia: Article III as Retroactivity's Firm Foundation*

Retroactivity can only hope to achieve coherence and stability through Justice Scalia's analysis of the Article III judicial power, which places retroactivity analysis squarely within the Constitution.[86] The policy-based adventures from *Linkletter* to date have proved disappointing, with many flip-flops in the Court's jurisprudence. Justice Scalia hopes to end this uncertainty by placing retroactivity within a fixed meaning of the Article III judicial power.

Justice Scalia's invocation of the common law at the time of the Constitution's origin, although new to retroactivity, is a logical extension of his separation of powers analysis. The "make-find law" dichotomy at its heart differentiates the exercise of legislative and judicial power. If the Court does not remain on its side of the boundary, then it is necessarily encroaching on the legislative power. In this way, retroactivity can be logically framed as a separation of powers question. Placed in this context, Justice Scalia's separation of powers analyses supply the applicable rules.[87]

Justice Scalia's theory seems comprehensive in its acceptance of full retroactivity. One is struck, however, by a glaring exception: How does *Teague* fit within Justice Scalia's framework, when that case generally denies the retroactive application of new rules to cases on collateral review? In that case, Justice Scalia joined in Justice O'Connor's opinion for the Court; Justice Scalia has also joined in every majority opinion applying the *Teague* test thereafter.

86. For a summary and critique of other Article III theories of retroactivity, see Fallon & Meltzer, *supra* note 24, at 1797-1807.

87. For example, in *Morrison v. Olson*, Justice Scalia interpreted the Article II, § 2 phrase "inferior officers" in light of the meaning "in use at the time of the Constitutional Convention." 487 U.S. 654, 719 (1988) (Scalia, J., dissenting). In Mistretta v. United States, he appealed to the Framers' vision of the government to evaluate the validity of the United States Sentencing Commission. 488 U.S. 361, 426 (1989) (Scalia, J., dissenting). These decisions indicate Justice Scalia's preference for strict separation of the various government powers as defined at the time of the Constitution's origin. "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are." *Morrison*, 487 U.S. at 709 (Scalia, J., dissenting) (emphasis in original).

Because he has yet to write on the issue, it is unclear how Justice Scalia justifies his agreement with the *Teague* rule. In *Chambers v. NASCO, Inc.*,[88] Justice Scalia stated that the Article III "judicial Power" does not attach to courts until "they have been created and their jurisdiction established."[89] Perhaps non-retroactivity on habeas corpus review derives from the courts' limited jurisdiction on such review. In *Teague*, Justice O'Connor read narrowly the Court's jurisdiction on habeas corpus review.[90] For cases on collateral review, she stated that the focus is not on the nature of the rule or the nature of the parties, but rather on "the purposes for which the writ of habeas corpus is made available."[91] This collateral review of final judgments creates a tension between the interest "in readjudicating convictions according to all legal standards in effect when a habeas petition is filed" and the "interest in leaving concluded litigation in a state of repose."[92] Ultimately, Justice O'Connor limited the "scope of the writ," and the Court's jurisprudence thereunder, to review under the law at the time the conviction became final, with only two exceptions.[93]

The limited scope of jurisdiction under the writ of habeas corpus gives the best explanation of Justice Scalia's concurrence in *Teague*. For Justice Scalia, the Court must apply retroactively any new rule that *it announces*. Under *Teague*, the Court will not announce a new rule of law on habeas review except in two narrow cases. When the Court announces a new rule on habeas review in these limited areas, the new rule will always be applied retroactively.[94] Thus, *Teague*'s understanding of habeas collateral review is entirely consistent with Justice Scalia's retroactivity jurisprudence.

A historical understanding of the judicial, legislative, and executive powers has some critics, who assail such an approach as "formalist."[95] For example, Professor Sunstein argues that a

88. 111 S. Ct. 2123 (1991).

89. *Id.* at 2140 (Scalia, J., dissenting).

90. 489 U.S. 288, 305-07 (1989) (Opinion of O'Connor, J.).

91. *Id.* at 306 (Opinion of O'Connor, J.) (quoting Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part)).

92. *Id.* at 306 (Opinion of O'Connor, J.) (quoting *Mackey*, 401 U.S. at 682-83 (Harlan, J., concurring in part and dissenting in part)).

93. *Id.* at 307 (Opinion of O'Connor, J.). *See* Fallon & Meltzer, *supra* note 24, at 1734 (*Teague* held that "subject only to narrow exceptions, a federal habeas court should dismiss claims based on 'new' rules of constitutional law without reaching the merits.").

94. *Teague*, 489 U.S. at 316.

95. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421,

better understanding would address modern policy concerns and take "changed circumstances into account."[96] Efforts such as Justice Scalia's, which seek "to reinvigorate a literal approach to Article III",[97] are rejected in favor of a "functional" approach. This latter approach, according to Professor Sunstein, examines whether present practices undermine constitutional commitments that should be regarded as central.[98] Justice Scalia condemns this "totality of the circumstances" analysis as an "ad hoc approach to constitutional adjudication."[99] When the original understanding of our governmental structure is ignored, the definition of that structure becomes unprincipled and unpredictable.[100] Justice Scalia might agree that a functional retroactivity analysis may be a good first step because it would at least admit that the Constitution has something to say on the issue. Ultimately, however, functionalism would lead to the same policy-based quagmire in which retroactivity has been immersed since *Linkletter*.

2. *Justice Souter: Retroactivity as Choice of Law*

Justice Souter's analysis suffers from two main weaknesses. First, as with virtually all retroactivity analysis before it, his argument stands totally outside the Constitution.[101] Justice Sou-

492-500 (1987) ("Formalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader 'policy' concerns should not play a role in legal decisions."); *see also* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 918-26 (1988) (attacking "Article III literalism").

96. Sunstein, *supra* note 105, at 492-93.

97. *Id.* at 494. Sunstein attacks a formalist view of Article III as part of his opposition to removal of certain adjudicatory functions from the executive branch. *See id.*

98. *See id.* at 495. As to what commitments are "central," Professor Sunstein asserts that "it is the basic structural principles [that] play the critical role." *Id.* These principles include "unitary execution of the laws, avoidance of factionalism, protection against self-interested or unaccountable representation, and promotion of deliberation in government." *Id.* The Court's recent separation of powers decisions could be construed as adopting a functional approach. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988).

99. *Morrison*, 487 U.S. at 733-34 (Scalia, J., dissenting).

100. *See id.* at 733 (Scalia, J., dissenting) (declaring that functional analysis "will not be confined by any rule").

101. Curiously, one commentator has criticized Justice Souter's opinion because it "added nothing to the store of *constitutional* knowledge governing civil retroactivity questions that bedevil the judiciary." Bruce Fein, *Supreme Court Commentary: A Court of Mediocrity*, 77 A.B.A. J. 74, 79 (Oct. 1991) (emphasis added). This criticism implies that Justice Souter's opinion, or even recent retroactivity doctrine, has had something to do with the Constitution. Any such criticism misses the point. If there is a criticism of Justice Souter's position it should not be that he adds nothing to our understanding of

ter falls into the same factor-balancing analysis present in prior decisions. In *Linkletter*, *Griffith*, *Teague*, *Chevron Oil*, and *Smith*, the Court judged the relative weight to be given the factors of equality, reliance, and *stare decisis*.

In *Linkletter* the Court balanced the equitable principle—treating like parties alike—against reliance on the old law. In that case reliance won out and prospectivity was born. *Chevron Oil* also opted for prospectivity after weighing similar factors. In considering these same elements, with a dash of *stare decisis*, Justice Souter rejects selective prospectivity. What these decisions teach, if anything, is that the factors they balance are highly manipulable and do not point definitively toward one result or another. A retroactivity doctrine grounded in these factors will be inherently unstable.

The second and perhaps greater weakness is that Justice Souter does not persuasively argue the relevant policy factors. He begins with the equality principle—like cases must be treated alike. He argues that this principle applies with even greater force in the civil context because there is no civil analogue to criminal law collateral review.[102] In doing so, he ignores Justice O'Connor's arguments, in both *Smith*[103] and *Beam*,[104] that the *Griffith* rationale does not apply to civil cases. While equality is a primary concern in his argument, Justice Souter admits later that inequality may be a necessary evil when procedural bars prevent application of a new legal rule.[105] Principles of equality, unlike rules of law, *can* be "switched on and off."[106]

Justice Souter's argument regarding *stare decisis* also ignores Justice Scalia's opinion in *Smith*. As noted above, Justice Scalia argued that *stare decisis* is a flexible doctrine that need not command religious adherence. By resting his retroactivity doctrine in part on this "flexible" doctrine, Justice Souter risks that future Courts may find the rationale easy to overcome. If he must marshal these same retroactivity factors that have been debated for almost twenty-seven years, Justice Souter's analysis must more convincingly demonstrate how they support his

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the relationship between the Constitution and retroactivity, but rather that he fails to recognize that the relationship exists at all.

102. *See Beam*, 111 S. Ct. at 2446 (Opinion of Souter, J.).

103. *See Smith*, 110 S. Ct. at 2341-42 (O'Connor, J., plurality opinion).

104. *See Beam*, 111 S. Ct. at 2451 (O'Connor, J., dissenting).

105. *See id.* at 2446-47 (Opinion of Souter, J.).

106. *Id.* at 2448 (Opinion of Souter, J.).

position.[107]

3. *Justice Blackmun: Direction without Definition*

The language employed by Justice Blackmun hints at the familiar distinction drawn between judicial and legislative decisionmaking—that judges merely apply existing law to "cases or controversies," while legislatures make law governing future events. Highlighting this distinction is not enough to answer the retroactivity question; Justice Blackmun must also justify treating the new legal rule as the existing law.[108] One solution, as some have suggested, is to interpret "cases or controversies" to require the Court to apply the relevant "law" to the case at hand, with the various retroactivity doctrines determining the relevant law.[109] Justice Blackmun's approach, however, omits such an analysis, and is thus insufficient to guide future inquiry.[110]

4. *Justice Thomas: A New Vote for Full Retroactivity?*

After *Beam* it seemed that the Court might settle into retroactivity, at least when compared to selective prospectivity, for all civil and criminal cases on direct review. True to form, however, the doctrine is again in doubt since Justice Marshall's retirement from the Court. His replacement, Justice Thomas, will cast the deciding vote on the issue, but Justice Thomas's confirmation hearings did little to shed light on the specific question

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107. *See also Beam*, 111 S. Ct. at 2452 (O'Connor, J., dissenting) (criticizing Justice Souter's application of the *stare decisis* doctrine).

108. *Beam*, 111 S. Ct. at 2449-50 (Blackmun, J., concurring in judgment).

109. *See* Fallon & Meltzer, *supra* note 24, at 1797-807. This reading of the "cases or controversies" clause—suggesting a search for the relevant law—assumes that more than one legal rule may exist on a particular point. Justice Scalia's historical approach to retroactivity denies this assumption and therefore rejects this approach to retroactivity. Instead, Justice Scalia treats the law as constant, as if the overruled decision never existed and the overruling decision has always existed. He derives this legal fiction from the Article III "judicial Power." Departing from this proper understanding of retroactivity requires a choice between the old and new legal rules. Indeed, that is how Justice Souter is able to characterize retroactivity as a choice of law issue. *Beam*, 111 S. Ct. at 2443 (Opinion of Souter, J.) ("Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law."). Justice Scalia criticizes Justice Souter for assuming more than one appreciable legal norm. *Beam*, 111. S. Ct. at 2450 ("Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.").

110. Future inquiry will not be limited to retroactivity. At the end of its October 1990 Term, the Court addressed the federal district courts' inherent power to sanction litigants and attorneys. *See* Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).

of retroactivity. Then-Judge Thomas's professed agreement with Justice Scalia's reasoning in *Morrison*, however, sheds some light on his thinking.[111] As mentioned above, Justice Scalia's *Morrison* dissent urged that the Constitution's language defining government powers must be given the meaning at the time of its framing.

What does *Morrison* mean for Justice Thomas and retroactivity? Justice Thomas placed *Morrison*'s significance in its separation of powers reasoning.[112] Acceptance of Justice Scalia's dissent is an acceptance of Justice Scalia's historical definition of governmental powers and belief in the strict separation of those powers. Justice Thomas will probably implement this historical view in defining and limiting the Article III "judicial power." If Justice Thomas believes in this interpretation of governmental powers, he should join Justice Scalia by grounding retroactivity in an historical understanding of the Article III judicial power.

Since joining the Supreme Court, Justice Thomas has employed an historical understanding of the Constitution. For example, in *White v. Illinois*,[113] he urged the Court to abandon its recent interpretation of the Confrontation Clause[114] barring

111. In a speech before the Pacific Research Institute for Public Policy in San Francisco, then-Judge Thomas lauded *Morrison* as "the most important court case since Brown v. Board of Education." Linda Greenhouse, *Questions About Thomas, the Man, Obscured Clues About Thomas, the Jurist*, N.Y. TIMES, Oct. 27, 1991, § 4, at 1. In testifying before the Senate Judiciary Committee, Judge Thomas attributed the significance of Justice Scalia's *Morrison* dissent to its impact on separation of powers. *See id.* He disavowed any knowledge of a "second agenda" in *Morrison* regarding the validity of independent administrative agencies. *See id.*; *see also Hearings on the Nomination of Clarence Thomas to be an Associate Justice of the United States Supreme Court*, 102d Cong., 1st Sess. 69 (1991). Adopting such a formalistic approach in the interpretation of separation of powers doctrine would call into question the existence of independent administrative agencies. *See, e.g.*, Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 359 (1990) (noting that some critics argue that "the use of what has come to be called the administrative state is inconsistent with the separation of powers"); Susan B. Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 223 ("Some have argued that independent agencies . . . violate the separation of powers doctrine in the Constitution."); Michael L. Yoder, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 174 (1990) (arguing that formalism does not accommodate "the increasing amount of power accorded to administrative agencies").

112. *See* Greenhouse, *supra* note 121 (stating that then-Judge Thomas's agreement with Justice Scalia's *Morrison* dissent was based on his belief that "separation of powers [are] necessary to protect individual liberties").

113. 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in the judgment).

114. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .").

certain hearsay testimony offered at trial.[115] In *White* the prosecution offered hearsay testimony of a child abuse victim's account of her attack. The Court applied its line of precedent and concluded that the Confrontation Clause did not bar admission of this hearsay evidence. Justice Thomas, while agreeing with the Court's result, rejected its reasoning. Instead, he argued that the Confrontation Clause does not generally apply to the admission of hearsay. Justice Thomas focused on the historical meaning of the phrase "witnesses against him,"[116] concluding that the phrase, properly understood, did not include the out-of-court declarant of a hearsay statement.[117] He claimed that his reading of the Confrontation Clause "is faithful to both the provision's text and history."[118] For the relevant history, he pointed to the development of the "common-law right of confrontation . . . in England during the late 16th and early 17th centuries."[119] He analogized the purpose behind the English common law rule to the purpose behind the right incorporated in the Sixth Amendment.[120] In the end he adopted a reading of the Confrontation Clause that he claimed did not "extend beyond the historical evil to which [the clause] was directed."[121]

In *Hudson v. McMillian*[122] Justice Thomas embraced an historical reading of the Eighth Amendment guarantee against "cruel and unusual punishment."[123] A Louisiana inmate sued for monetary damages under section 1983[124] for injuries received when prison guards beat him. The Court held that the

115. *See, e.g.*, Idaho v. Wright, 110 S. Ct. 3139 (1990); Bourjaily v. United States, 483 U.S. 171 (1987); Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970).

116. *White*, 112 S. Ct. at 744 (Thomas, J., concurring in part and concurring in the judgment).

117. *Id.* at 747 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas ultimately concluded that:

> The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process.

Id.

118. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

119. *Id.* at 745 (Thomas, J., concurring in part and concurring in the judgment).

120. *Id.* at 745-46 (Thomas, J., concurring in part and concurring in the judgment).

121. *Id.* at 747 (Thomas, J., concurring in part and concurring in the judgment).

122. 112 S. Ct. 995 (1992).

123. U.S. CONST. amend. VIII.

124. 42 U.S.C. § 1983 (1988).

inmate could recover damages and set forth the standard for recovery under the Eighth Amendment.[125] Justice Thomas, again with Justice Scalia joining, dissented because he believed that the Eighth Amendment, historically understood, applies only "to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration."[126] Consistent with this historical understanding, a prisoner may recover only upon a showing of "serious injury" resulting from the "deliberate indifference" of state personnel.[127] The majority discarded any such serious injury requirement, a decision Justice Thomas characterized as "beyond all bounds of history and precedent."[128]

Just as Justice Scalia did in *Morrison*, Justices Thomas and Scalia stood apart in both *White* and *Hudson*, the lone voices for a strict, historically-faithful reading of the Constitution. Justice Thomas is unlikely to abandon the use of history, tradition, and the common law when turning to retroactivity. It appears highly likely that Justice Thomas will join Justice Scalia in grounding retroactivity in a proper understanding of the Article III "judicial Power."

III. Beyond Retroactivity

A. Brown v. Board of Education *and an Evolving Constitution*

Justice Scalia's Article III vision of courts finding law, not making it, raises questions in light of the Court's landmark *Brown v. Board of Education*[129] decision. The "make-find" distinction implies that, when a current decision overrules existing precedent, the overruled decision was never law, and the overruling decision always was the correct understanding of the

125. *Hudson*, 112 S. Ct. at 999-1000.

126. *Id.* at 1005.

127. *Id.* at 1006. Justice Thomas reasoned that the subjective intent standard of "deliberate indifference" and the historical restriction to official punishment were entirely consistent. *See id.* Deliberate indifference was "implicit in the traditional Eighth Amendment jurisprudence, which focuses on penalties meted out by statutes or sentencing judges." *Id.* Official punishment indicates the state's clear intent to inflict certain conditions on the prisoner, and is thus an accurate proxy for the requisite intent. Absent such official action, the prisoner must show that state personnel acted with the requisite intent.

128. *Id.* at 1010.

129. 347 U.S. 483 (1954).

law. In *Brown*, the Court overruled *Plessy v. Ferguson*.[130] *Plessy* articulated an understanding of the Equal Protection Clause that allowed separate but equal treatment of blacks. *Brown*, however, never suggested that *Plessy* was incorrectly decided in 1896, only that the Equal Protection Clause required a different result when interpreted in 1954.

Brown assumes that each case was correct when decided and that the meaning of the Equal Protection Clause had changed in the time between the two decisions. The theoretical assumption underlying Justice Scalia's retroactivity theory is that a current overruling decision is now and always was the correct understanding of the law. The overruled decision was incorrect when decided. This theoretical division between Justice Scalia and the opinion in *Brown*[131] suggests two different understandings of the Constitution and the judicial role. *Brown* treats the Constitution as having a meaning that changes over time. Justice Scalia eschews such an evolving understanding of the Constitution. The Constitution has a meaning derived from history and tradition that does not change with mere shifts in social attitudes and opinions. Once Justice Scalia finds the true meaning of Constitutional language, the logical conclusion is that prior, contrary decisions were wrong when decided and were not mere steps in the evolution of the Constitution. Justice Scalia faithfully fulfills the mission of one exercising the Article III judicial power.

B. *Justice Scalia and Right Answers in the Law*

Curiously, Justice Scalia set forth his seemingly absolute theory of retroactivity while concurring in a judgment that opted for selective prospectivity.[132] Justice Scalia dissented from *Scheiner*[133] and repeated that firm opposition to the Court's negative Commerce Clause jurisprudence in his *Smith* concurrence.[134] He based his *Smith* opinion in favor of selective pros-

130. 163 U.S. 537 (1896).

131. This distinction does *not* suggest that Justice Scalia thinks that *Brown* was incorrectly decided. Rather, consistent with his retroactivity doctrine, he would embrace *Brown* as a correct discovery of the meaning of the Equal Protection Clause. *Plessy* was, therefore, an incorrect attempt to find that Clause's proper meaning. Justice Scalia would not claim that the law had evolved from *Plessy* to *Brown*, but rather that *Plessy* never really was the law, but only a failed attempt to find the law.

132. *See Smith*, 110 S. Ct. at 2343-45 (Scalia, J., concurring).

133. *Scheiner*, 483 U.S. at 303-06 (Scalia, J., dissenting).

134. *Smith*, 110 S. Ct. at 2343 (Scalia, J., concurring).

pectivity on the commands of *stare decisis*.[135] His analysis proceeded in several steps. First, he stated his continued disagreement with the Court's negative Commerce Clause doctrine.[136] Second, he stated that he would not apply that doctrine to new types of cases.[137] Third, he believed that *stare decisis* required him to apply *Scheiner* to cases involving the same type of state law.[138] Fourth, *stare decisis* did not require him to apply *Scheiner* to taxes collected before the date of that decision.[139] Justice Scalia explained this fourth premise, which obviously contradicts full retroactivity, as follows:

> I think it appropriate, in other words—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.[140]

Thus, Justice Scalia exempts himself from the command of full retroactivity in cases where he dissents from an overruling.

Superficially, Justice Scalia's self-created "escape hatch" would seem to compromise his absolute view of retroactivity. If a decision of the Court is currently the law, Justice Scalia should be bound, as one exercising judicial power, to apply that rule retroactively regardless of his opinion as to its wisdom. This view, however, considers retroactivity from the perspective of the Court as a whole. Alternatively, one can look at the law from the individual Justice's viewpoint. On the day the Court decided *Scheiner*, Justice Scalia firmly believed that the law *is* and *was* the opposite of the *Scheiner* Court's holding. Individually, to Justice Scalia, the proper understanding of the law is the opposite of *Scheiner*. There is no retroactivity question for him because in his mind the proper understanding of the law has not changed and, therefore, is not being applied. Cases arising or already decided under the still "correct" (though now rejected) interpretation of the law need not be upset. *Stare decisis* and respect for stability in the law, however, influence

135. *See id.* at 2345 (Scalia, J., concurring).
136. *See id.* at 2343 (Scalia, J., concurring).
137. *See id.* at 2345 (Scalia, J., concurring).
138. *See id.* (Scalia, J., concurring).
139. *See id.* (Scalia, J., concurring).
140. *Id.* (Scalia, J., concurring).

Justice Scalia to apply the Court's "incorrect" understanding of the law to cases arising after its announcement.

Justice Scalia believes that the true understanding of the "law" exists apart from what a majority of the Court happens to agree upon, and rejects the legal realist position that law is merely a prediction of what courts will do in a particular case. Justice Scalia uses his legal method, which in many cases ties meaning to some historical notion, to derive and define the true understanding of the law. Once Justice Scalia finds that true understanding, he can reach the "correct" result in a given case.[141] Justice Scalia's *stare decisis* argument thus lays the groundwork for a modern refutation of legal realism.

C. *Increasing the Cost of a Conservative Revolution?*

The Supreme Court sits on the verge of reversing or modifying precedent in many areas.[142] Whether rooted in a hidden political agenda as some suggest,[143] or a proper understanding of the Constitution, a majority of the Court is poised to continue a conservative revolution of great breadth. At first glance, Justice Scalia's full retroactivity position may seem to block constitutional change because it increases the costs of such change.[144] Most of the cases, however, in which Justice Scalia urges change involve the restriction or abolition of previously protected rights.[145] Any change instigated by Justice Scalia

141. This conclusion places Justice Scalia and Professor Dworkin, although they employ different methods and may reach different results, in agreement at one level: Legal questions have correct answers. *See* RONALD DWORKIN, LAW'S EMPIRE 90-101 (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985). They divide, however, on how to arrive at such right answers. Justice Scalia, fearful that judges will be restrained only by their imaginations, employs "objective" criteria in an effort to discover the historical meaning of the Constitution. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); *see also* Cook, *supra* note 61. Professor Dworkin, conversely, seeks the "concepts" underlying constitutional provisions and attempts to extend and apply them to contemporary problems. *See* DWORKIN, LAW'S EMPIRE 90-101.

142. *See* HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 3-9 (1988).

143. *See id.* at xiv ("[C]onservatives took varying approaches to attain [their] goals, and . . . they finally settled on ideological judge-picking.").

144. Justice Scalia acknowledged such costs when he stated that full retroactivity will *promote* judicial restraint. *See Beam*, 111 S. Ct. at 2451 (Scalia, J., concurring). Justice Scalia admits that full retroactivity "poses 'difficulties of a practical sort'. . . when courts decide to overrule prior precedent." *Id.* He believes, however, that such "difficulties are one of the understood checks upon judicial law making." *Id.*

145. *See, e.g.*, White v. Illinois, 112 S. Ct. 736, 744 (1992) (Scalia, J., concurring in the judgment) (joining Justice Thomas's opinion advocating sharp limit on application of Confrontation Clause to hearsay testimony); California v. Acevedo, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring in the judgment). Justice Scalia employs an histori-

would not create rights, and would not thereby flood the Court with litigants seeking to vindicate their new rights.

Two recent cases are illustrative. First, in *Webster v. Reproductive Health Services*,[146] Justice Scalia advocated the abolition of the special protection accorded abortion in *Roe v. Wade*.[147] Overruling *Roe* would contract the stock of constitutional rights, and thus *reduce* the judicial workload. The judicial cost of overruling *Roe* retroactively would seemingly be slight.

Payne v. Tennessee[148] is another example of low-cost overruling. In *Payne*, the Court overruled *Booth v. Maryland*[149] and *South Carolina v. Gathers*,[150] wherein the Court held that victim impact evidence is not admissible at a capital sentencing hearing. After *Payne*, criminal defendants have *one less* avenue through which to challenge their convictions. The overruling in *Payne* does *not* threaten the judicial system with an onslaught of cases if applied retroactively, as *Mapp v. Ohio* did to the *Linkletter* court. In fact, retroactive application would do the opposite, by foreclosing an avenue of constitutional challenge to past criminal convictions.

Justice Scalia's retroactivity doctrine therefore poses little trouble for conservative constitutional change. In fact, full retroactivity may help to secure the longevity of such change. Professor Fein suggests that unless conservative opinions are well-reasoned, they will be susceptible to overruling by a future "liberal" majority.[151] Regardless of the reasoning involved, full retroactivity strengthens conservative precedent by making overruling in favor of expanded constitutional rights very costly. As noted in *Linkletter*, a rights-expanding decision could cause calamity to the judiciary if applied retroactively.[152] By

cal, restrained interpretation of the Constitution that often, but not necessarily, yields less constitutional protection than is sought by litigants. *See* Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring) (arguing that due process does not protect right to terminate medical treatment and nutrition). *But see* County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1671 (1991) (Scalia, J., dissenting) (arguing that detaining a person more than 24 hours after a warrantless arrest for a probable cause hearing violates the Fourth Amendment).

146. 492 U.S. 490 (1989).

147. 410 U.S. 113 (1973).

148. 111 S. Ct. 2597 (1991).

149. 482 U.S. 496 (1987).

150. 490 U.S. 805 (1989).

151. *See* Fein, *supra* note 111, at 75-76.

152. Linkletter v. Walker, 381 U.S. 618, 636-38 (1965).

raising the cost of overruling with full retroactivity, Justice Scalia increases the staying power of conservative precedent.

IV. Conclusion

In the twenty-seven years since *Linkletter*, a majority of the Supreme Court has consistently held that the Constitution is silent on retroactivity. In that time the Court's retroactivity jurisprudence has been unsettled, and always subject to change by the manipulation of the malleable policy factors serving as its foundation. In *Smith* and *Beam*, members of the Court appear ready to gut the old foundation in favor of a new, clearer vision of retroactivity as derived from and defined by a proper understanding of the Article III "judicial Power." The addition of Justice Thomas will no doubt help bring the future of the Court's retroactivity jurisprudence back to its common law roots.