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Prospective Overruling and the Judicial Role After "James B. Beam Co. v. Georgia"

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I. INTRODUCTION

"Was there ever such a profession as ours anyhow? We speak of ourselves as practicing law, as teaching it, as deciding it, and not one of us can say what law means."[1] Justice Cardozo's observation about the elusive nature of the American legal system lies at the heart of the controversy over retroactivity. Questions about whether judges may prospectively overrule the law raise fundamental issues concerning the nature of law and the proper role for the judiciary.

In 1991, the Supreme Court issued its latest opinion on prospective overruling and judicial rulemaking. In *James B. Beam Distilling Co. v. Georgia*,[2] the Court ruled that modified or selective prospectivity is impermissible.[3] The issue in *Beam* was whether the Court's decision in *Bacchus Imports, Ltd. v. Dias*[4] should apply retroactively. The *Bacchus* Court had invalidated a Hawaii liquor tax that distinguished imported

1. Margaret Hall, ed., *Selected Writings of Benjamin Nathan Cardozo* at 43 (Fallon Publications, 1947) (Address before the New York State Bar Association Meeting, Jan. 22, 1932) (*"Cardozo's Address"*).

2. 111 S.Ct 2439 (1991).

3. There are two types of prospectivity. Pure prospectivity means that the courts will apply the new rule only to cases arising after the rule's announcement. Courts applying modified or selective prospectivity will grant the litigant in the case relief but will not apply the new rule to other cases that arose before its announcement. Justice Souter explained the various forms of prospectivity and retroactivity in *Beam*. Id. at 2443-44.

4. 468 U.S. 263 (1984)

and local alcoholic products.[5] After this decision, the James B. Beam Distilling Company (Beam) sued Georgia seeking a refund of all taxes collected in 1982, 1983, and 1984, under a similar state tax statute.[6] The *Beam* Court concluded that *Bacchus* must apply retroactively.[7] Justice Souter, writing for the Court but joined only by Justice Stevens, concluded that the *Bacchus* decision must apply retroactively because selective or modified prospectivity is impermissible.[8] He ruled that considerations of fairness and stare decisis precluded the Court from applying different rules to similarly situated litigants.[9]

In one of three separate concurring opinions, Justice White agreed with Justice Souter that Beam should receive the benefit of the *Bacchus* judgement.[10] However, he emphasized that the *Beam* decision should have no effect on pure prospectivity, which should remain a viable judicial option governed by the Court's prior decisions.[11]

In a separate concurring opinion, Justice Blackmun argued that all prospectivity, whether selective or pure, is unconstitutional.[12] He reasoned that only legislatures have the power to promulgate new rules which will be applied only prospectively and that the limited nature of judicial review requires a court to decide the case before it based on whatever rule it decides is correct.[13] Justice Blackmun argued that to allow otherwise would weaken the doctrine of stare decisis by allowing the Court to avoid the disruption that necessarily results from its adoption of a new rule. Hence, he concluded that the combination of retroactive effect and stare decisis was necessary to constrain the Court from routinely announcing new rules.[14]

Justice Scalia, in the third concurring opinion, generally agreed with Justice Souter's reasoning.[15] However, he found the plurality's inquiry unimportant because he believed, like Justice Blackmun, that any sort of prospectivity was unconstitutional.[16] Citing *Marbury v. Madison*'s[17] description of judicial power, Justice Scalia argued that judges make law only as if they were finding it. He reasoned that a

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5. Id. at 273.
6. Ga. Code Ann. § 3-4-60 (Michie 1982).
7. *Beam*, 111 S. Ct. at 2441.
8. Id. at 2445-46.
9. Id. at 2446.
10. Id. at 2448-49 (White concurring).
11. Id. at 2449 (White concurring).
12. Id. at 2449 (Blackmun concurring).
13. Id. at 2450 (Blackmun concurring).
14. Id. (Blackmun concurring).
15. Id. (Scalia concurring).
16. Id. (Scalia concurring).
17. 5 U.S. (1 Cranch) 137, 177 (1803) (stating that it is the judiciary's power "to say what the law is").

judge's function is to discern what the law is, not to declare what it shall be.[18] Justice Scalia concluded that the difficulties inherent in this mandatory retroactivity serve to check the power of the judiciary and to discourage courts from overruling precedent.[19]

Justice O'Connor argued in dissent that *Bacchus* should not have applied retroactively either to itself or to the *Beam* case.[20] She concluded that Justice Souter misapplied the ideas of stare decisis and equality, and she further explained that both fairness and stare decisis supported prospective application.[21] As to constitutional criticisms, she referred to her plurality opinion in *American Trucking Associations v. Smith*,[22] in which she wrote that one of the Court's functions is to decide the retroactivity of new rules. Adopting a more pragmatic approach than that of Justice Scalia, Justice O'Connor reasoned that because the Court has the power under *Marbury* to say what the law is, when the Court changes its mind, the law changes as well.[23]

In the seventy-five years since commentators first began advocating prospective overruling as a judicial option,[24] courts have developed a wide variety of conclusions and applications.[25] The fact that five justices wrote separate opinions in *Beam* demonstrates the Court's continuing struggle with the issue.

This Recent Development examines the Court's most recent attempt to settle the prospectivity dilemma. Part II examines the legal history of prospectivity, the Court's movement to adopt prospectivity in the 1960s, and the Court's recent retraction of its authority to apply rules prospectively. Part III discusses the *Beam* decision and the five opinions it generated. Part IV analyzes the decision and argues that the Court's evolving reversion to retroactivity is misguided. Part V concludes that prospective overruling should continue to be a judicial option.

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18. *Beam*, 111 S. Ct. at 2451 (Scalia concurring).

19. Id. (Scalia concurring).

20. Id. (O'Connor dissenting).

21. Id. at 2451-52 (O'Connor dissenting).

22. 496 U.S. 167 (1990). See notes 78 to 97 and accompanying text.

23. 111 S. Ct. at 2451.

24. See Donald Canfield, *Speech to the South Carolina Bar Ass'n*, Rep. S.C. Bar Ass'n at 17-21 (1917); Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1, 7-9 (1960) (tracing the early origins of prospectivity).

25. See John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. Rev. 745 (1983) (tracing a number of different uses of the retroactivity doctrine).

II. LEGAL BACKGROUND

Until this century, the Court always had applied its decisions retroactively.[26] William Blackstone[27] provided the foundation for retroactive operation[28] with his description of the judiciary's function as enunciating the law in existence at the time of the case at bar. He believed that prior decisions served only as evidence of the law,[29] and that if the court overturned prior decisions, those prior decisions were not bad law, but rather were not law at all.[30] This declaratory theory necessarily implies retroactivity, for if the law had been there all along, the court's new decision did not change it.[31] Intellectual enthusiasm for scientific developments in the seventeenth and eighteenth centuries produced a characterization of law as an entity separate from judicial interpretation.[32] As scientists began to discover the fundamental laws of nature and mathematics, legal thinkers believed that judges could discover general rules which would govern society.[33]

The declaratory role of the judiciary thus became embedded in American legal heritage. Early in this century, however, legal commentators began to question the equities of making every new rule retroactive.[34] These writers were uncomfortable with the disruption to the settled expectations of parties that retroactive application caused.[35] They also considered the Blackstonian justification for retroactivity naive and outdated.[36] Modern realist jurisprudential theorists argued that the law should be determined and judged by its results, not by its adherence to neatly defined rules.[37] For example, Justice Cardozo argued that courts should rule prospectively when it is necessary to protect the

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26. See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes dissenting) (stating that judicial decisions have been retroactive for a thousand years).

27. See William M. Blackstone, 1 Commentaries at 69 (1765).

28. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962).

29. Blackstone, 1 Commentaries at 69 (cited in note 27).

30. Id. at 70.

31. See Note, 71 Yale L. J. at 908-09 (cited in note 28).

32. See Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. Cal. L. Rev. 1653, 1655 (1990).

33. Id.

34. See Charles E. Carpenter, *Court Decisions and the Common Law*, 17 Colum. L. Rev. 593 (1917); Robert Hill Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 Colum. L. Rev. 230 (1918); John Henry Wigmore, *Problems of Law* at 79-82 (C. Scribner's Sons, 1920).

35. Note, *Retroactive Effect of an Overruling Decision*, 42 Yale L. J. 779, 782 (1933).

36. See, for example, W. J. Adams, Jr., *Constitutional Law—Protection of Rights Acquired in Reliance on Overruled Decision*, 11 N.C. L. Rev. 323, 329 (1933) (referring to the Blackstonian justification as "antiquated dogma and useless fiction").

37. See *Cardozo's Address* at 31 (cited in note 1).

reliance interests of the parties.[38] The Supreme Court first heard the issue in *Great Northern Railway v. Sunburst Oil and Refinery Company*.[39] In an opinion by Justice Cardozo,[40] the unanimous Court allowed a state court to apply its decision prospectively. The Court concluded that nothing in the Constitution prohibited a state court from prospectively overruling a case.[41]

A. *The Beginning of Prospectivity:* Linkletter v. Walker

However, not until 1965, in *Linkletter v. Walker*,[42] did the Supreme Court hear the issue of prospective overruling. In *Linkletter*, the Court decided not to apply *Mapp v. Ohio*[43] retroactively. *Mapp* overruled *Wolf v. Colorado*[44] and applied the Fourth Amendment exclusionary rule to state officers. The Court would have cast thousands of convictions into doubt by giving retroactive effect to *Mapp*.[45] So, confronted with the practical difficulties of retroactive application in decisions like *Mapp*, *Gideon v. Wainright*,[46] *Escobedo v. Illinois*,[47] and soon thereafter, *Miranda v. Arizona*,[48] each of which forced fundamental changes in criminal procedure, the Court concluded that prospectivity is appropriate in some cases.[49] The *Linkletter* Court examined the prior history of the rule in question, the purpose and effect of the rule, and

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38. See id. at 33-35. Justice Cardozo articulated that prospectivity should apply when "the rule that we are asked to apply is out of touch with the life about us." This is so, Cardozo continued, when the rule "has been made discordant by the forces that generate a living law." Cardozo concluded, therefore, that "[w]e apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril." Id. at 34.

39. 287 U.S. 358 (1932).

40. One commentator has attributed Justice Cardozo's recurrent interest in retroactivity and reliance interests to an experience he had while in law school. After Justice Cardozo began his two year program at Columbia Law School, the administration extended the program to three years and required current students to stay a third year. Justice Cardozo refused, and never got his law degree. Levy, 109 U. Pa. L. Rev. at 10 n. 31 (cited in note 24).

41. *Great Northern Ry. v. Sunburst Co.*, 287 U.S. 358, 366 (1932).

42. 381 U.S. 618 (1965).

43. 367 U.S. 643 (1961).

44. 388 U.S. 25 (1949).

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

46. 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and ruling that a defendant is entitled to a lawyer in all criminal cases).

47. 378 U.S. 478 (1964) (ruling that once one becomes a suspect he or she has the right to a lawyer).

48. 384 U.S. 436 (1966) (ruling that suspects must be warned of their right to remain silent). In *Johnson v. New Jersey* the Supreme Court declared that the *Miranda* and *Escobedo* decisions were not retroactive. 384 U.S. 719 (1966).

49. The type of prospectivity at issue in cases like these usually was selective prospectivity. For example, in *Miranda*, the Court chose to rule on only four of the pending cases that raised *Miranda* types of claims. It denied certiorari on the other 129. See Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L. J. 533, 558-59

the question of whether retroactive application would further or retard its operation.[50] The Court concluded that retroactive operation of the *Mapp* rule would not serve the exclusionary rule's purpose of deterring official misconduct, that the state had relied on the pre-*Mapp* law not requiring exclusion, and that retroactive effect would require multitudes of hearings and retrials without really improving the accuracy of the judgements.[51] Accordingly, the Court ruled that the exclusionary rule would not apply retroactively to convictions that had become final before *Mapp*.[52]

The Court continued this balancing approach two years later in *Stovall v. Denno*.[53] In *Stovall*, the Court held that a newly enunciated right to have counsel present at line-ups[54] would not apply to cases where the line-ups were held prior to the announcement of these decisions.[55] The Court refined *Linkletter*'s purpose, reliance, and effect standard. To determine whether a decision would have retroactive application, the Court announced that it would look to the purpose the new standards serve, the extent of law enforcement authorities' reliance on the old standards, and the effect that a retroactive application of the rule would have on the administration of justice.[56] These elements enunciated in *Stovall*[57] remained the test in criminal cases until the Supreme Court decided *Griffith v. Kentucky*.[58]

B. *Prospectivity Applied to Civil Cases:* Chevron Oil Co. v. Huson

For civil cases, the Court adopted a test similar to the *Stovall* test. In *Chevron Oil Co. v. Huson*,[59] the issue was whether a state statute of limitations would apply to a personal injury case or whether the more lenient statute of limitations allowed under admiralty law would apply to the action. The plaintiff in *Chevron* had filed his action within the requisite time period for admiralty law, but not within the time period required under state law. Meanwhile, in a separate case, the Supreme Court had held that state law applied to situations such as that of the

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(1977). The practical effect of denying certiorari to 129 of 133 cases was that only four defendants benefitted from the Court's expansion of defendants' rights in *Miranda*.

50. *Linkletter*, 381 U.S. at 629.

51. Id. at 636-38.

52. Id. at 639-40.

53. 388 U.S. 293 (1967).

54. Id. The Supreme Court defined this right in *Gilbert v. California*, 388 U.S. 263 (1967), and *U.S. v. Wade*, 388 U.S. 218 (1967).

55. *Stovall*, 388 U.S. at 393. *Stovall* did apply the new rule to the defendant in the case. Id.

56. Id. at 297.

57. Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1743 (1991).

58. 479 U.S. 314 (1987). See notes 70-77 and accompanying text.

59. 404 U.S. 97 (1971).

plaintiff in *Chevron*.[60] In concluding that the state rule should not bar the plaintiff's suit, the Court first determined whether a nonretroactive application of the decision established a new principle of law. Further, the Court looked to the history, purpose and effect of the rule,[61] and the effect of retroactivity on its operation. Finally, the Court weighed the inequities that retroactive application imposed.[62] The Court believed it was necessary to protect parties who relied on an established rule. Thus, in refusing to retroactively apply the new rule the Court found both that the decision established a new principle and that inequities would result from retroactive application. The Court argued that the most any party could do was rely on the law as it existed.[63]

While nonretroactivity initially commanded broad support from both liberals, who viewed it as a basic necessity for achieving a just result, and conservatives, who saw it as a way of limiting the effect of these reforms,[64] the principle eventually drew heavier criticism. In 1969, Justice Harlan changed his stance on the issue and began to argue against prospectivity.[65] Even though he did not premise his criticism on the Blackstonian theory,[66] Justice Harlan felt that the framework the Court had developed since *Linkletter* resulted in inequitable outcomes.[67] In addition, he argued that nonretroactivity freed courts from following controlling precedent and allowed them to act as legislators by creating rules designed only for the future.[68] But Justice Harlan failed to convince a majority of the Court, and the *Linkletter* approach remained the standard through the years of the Warren Court. However, his views partially served as the basis for the Rehnquist Court's current reformulation of the retroactivity rule.[69]

C. *The End of Prospectivity in Criminal Cases:* Griffith v. Kentucky

In 1987, in *Griffith v. Kentucky*,[70] the Court followed Justice Harlan's approach in criminal cases. The Court held that new rules

60. *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352 (1969). In *Rodrigue*, the Court decided that state law, not admiralty law, applied to stationary artificial structures in the sea. Id. at 355.

61. *Chevron* at 106-07 (*Linkletter*'s language).

62. Id. at 107.

63. Id.

64. See *Mackey v. U.S.*, 401 U.S. 667, 676 (1971) (Justice Harlan concurring in part and dissenting in part).

65. Id. See also *Desist v. United States*, 394 U.S. 244 (1969).

66. See *Mackey*, 401 U.S. at 677.

67. See *Desist*, 394 U.S. at 258 (Harlan dissenting) (stating that he believed it generated "incompatible rules and inconsistent principles").

68. *Mackey*, 401 U.S. at 677.

69. See generally Fallon and Meltzer, 104 Harv. L. Rev. at 1744 (cited in note 57).

70. 479 U.S. 314 (1987).

must be applied retroactively to all criminal cases on direct review.[71] At issue in *Griffith* was whether *Batson v. Kentucky*[72] should have retroactive effect. The Court had held in *Batson* that the equal protection clause prohibited race-based peremptory challenges of potential jurors.[73] In an opinion Justice Blackmun authored, the Court drew heavily from Justice Harlan's opinions in *Desist* and *Mackey*.[74] Justice Blackmun concluded that nonretroactive application was a legislative, not a judicial function,[75] and that selective prospectivity violated the principle of treating similarly situated defendants the same.[76] Therefore, the Court abandoned all exceptions to applying retroactivity to criminal cases on direct review.[77]

However, in 1990, in *American Trucking Associations v. Smith*,[78] the Court refused to expand *Griffith* to civil cases. In *American Trucking*, a group of out-of-state truckers had alleged that an Arkansas highway tax violated the commerce clause since it charged higher costs to out-of-state truckers than to in-state truckers.[79] The plaintiffs lost in state court and appealed to the United States Supreme Court. Before the Court heard the appeal, however, the Court decided that a similar Pennsylvania tax was unconstitutional.[80] Accordingly, the Supreme Court ordered a remand of the Arkansas case to the state court.[81] While ruling that the tax was unconstitutional, the Arkansas Supreme Court denied the truckers relief[82] because it concluded that based on the *Chevron*[83] test it should not apply retroactively *Scheiner*. The truckers

71. Id. at 322.

72. 476 U.S. 79 (1986), overruling *Swain v. Alabama*, 380 U.S. 202 (1965).

73. Id. at 93-95. The Court previously had held *Batson* nonretroactive in habeas corpus cases. *Allen v. Hardy*, 478 U.S. 255 (1986).

74. See notes 64-68 and accompanying text. The *Griffith* decision was foreshadowed by *U.S. v. Johnson*, 457 U.S. 537 (1982), where the Court quoted Justice Harlan and concluded that "retroactivity must be rethought." Id. at 548 (quoting *Desist*, 394 U.S. at 258 (Harlan dissenting)). See also *Griffith*, 479 U.S. at 321-22.

75. *Griffith*, 479 U.S. at 322-23.

76. Id. at 323, 327. Defendants Batson and Griffith were tried in the same state court by the same prosecutor only three months apart. The Court believed that to allow the "fortuities of the judicial process" to determine the outcome of these cases would be unfair. Id. at 327.

77. Id. at 328. By "final or not on direct review," the Court meant to include cases where the availability of appeal was exhausted, the time for a certiorari petition had passed, or certiorari had been denied. See *U.S. v. Johnson*, 457 U.S. 537, 542 n.8 (1982) (citing *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)).

78. 496 U.S. 167 (1990).

79. Id. at 169-70.

80. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

81. *American Trucking Ass'ns v. Gray*, 483 U.S. 1014 (1987).

82. *American Trucking Ass'ns v. Smith*, 295 Ark. 43, 746 S.W.2d 377 (1988). The state court did allow a refund of the taxes that were ordered placed in escrow by Justice Brennan during the litigation. See 746 S.W.2d at 379.

83. See notes 59-63 and accompanying text.

promptly appealed again to the Supreme Court. Justice O'Connor, writing for a plurality of four, concluded that the *Chevron* test did require prospective application.[84] She reasoned that *Scheiner* was a clear break from past precedent, that retroactive application would not deter future violations, and that retroactive effect would have disruptive consequences for the state and its citizens.[85] She also argued that *Griffith*'s reasoning was inapplicable to this case because *Griffith* only represented an expansion of procedural protection for criminal defendants.[86]

In his dissent, Justice Stevens rejected Justice O'Connor's characterization of the question as a choice of law issue.[87] Rather, he argued that the *Chevron* line of cases were better read to present retroactivity as a remedial principle.[88] Justice Stevens reasoned that the tax had always been unconstitutional, even before *Scheiner*. Thus, he argued that the question before the Court was what remedy the truckers deserved and that this question was a state law issue, even though the Constitution delineated the minimal remedy.[89] Accordingly, Justice Stevens would have remanded the case[90] to the Arkansas Supreme Court to determine whether the truckers were entitled to relief on other grounds.[91]

Justice Stevens also heavily analogized to the *Griffith* opinion. He argued that the critical element in *Griffith* was not that it was a criminal case, but that it was not the judiciary's function to choose which law to apply to cases before it.[92] He contended that once a party is before the Court, the Court should decide the case based on its best current understanding of the law and not be concerned with disturbing settled expectations. That is, the Court ought not make choice of law determinations based on the equities presented by individual cases.[93] He rejected the premise that the *Chevron* analysis determined rights under

84. *American Trucking*, 496 U.S. at 183. The plurality consisted of Justices O'Connor, Rehnquist, White, and Kennedy.

85. Id. at 182-83 (plurality opinion) (giving, as an example, the inconvenience of refunding the money collected under the tax).

86. Id. at 197-98 (plurality opinion).

87. Id. at 209-12 (Stevens dissenting). Justice Stevens was joined in dissent by Justices Brennan, Marshall, and Blackmun.

88. Id. (Stevens dissenting).

89. Id. at 210-12 (Stevens dissenting).

90. Id. at 224-25 (Stevens dissenting).

91. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). *McKesson*, that was consolidated with *American Trucking*, involved a Florida tax that clearly violated the commerce clause under *Bacchus*. The Court ruled that the Constitution required Florida to provide retroactive relief to taxpayers. The different results in these two cases show the importance of the new law or clear break analysis to the Court.

92. *American Trucking*, 496 U.S. at 214 (Stevens dissenting).

93. Id. (Stevens dissenting).

the law and argued that the test only determined appropriate remedies.[94]

Justice Scalia provided the determinative vote in the case. From the outset, he declared that prospectivity is unconstitutional and adopted a Blackstonian theory that judges only find the law.[95] However, because he disagreed with the *Scheiner* decision and the Court's entire commerce clause approach, Justice Scalia refused to grant relief to the truckers.[96] He also emphasized the importance of the litigant's settled expectations and stated that the doctrine of stare decisis argued against awarding relief.[97]

III. Recent Development

The *Beam* case began when Beam brought an action seeking a refund of $2.4 million, the full amount of excise taxes that the company had paid in 1982, 1983, and 1984.[98] Beam alleged that the Georgia statute imposing the tax was unconstitutional under the commerce clause.[99] The trial court agreed that the tax was unconstitutional but refused to award any refund, declaring that its ruling would only apply prospectively.[100] Beam then appealed to the Georgia Supreme Court, which affirmed the lower court's judgement.[101] The Georgia Supreme Court agreed with the lower court that the tax was simple economic protectionism and was unconstitutional under the Supreme Court's ruling in *Bacchus*.[102] Further, it applied the *Chevron* analysis and affirmed the trial court's prospective application,[103] reasoning that the finding of unconstitutionality was a new rule since the statute had previously been upheld in the face of similar challenges.[104] The Georgia Supreme Court also balanced the equities involved in retroactive application. It reasoned that, on the one hand, Beam probably had already passed on the $2.4 million tax to Georgia consumers; accordingly, any refund would

94. Id. at 219-23 (Stevens dissenting).

95. Id. at 201 (Scalia concurring).

96. Id. (Scalia concurring).

97. Id. (Scalia concurring).

98. *Beam*, 111 S. Ct. at 2442.

99. See Ga. Code Ann. § 3-4-60 (Michie 1982). The statute doubled the excise tax for alcoholic beverages which were imported rather than produced from Georgia grown products. In 1985, after the Court's decision in *Bacchus*, the Georgia legislature amended the statute. 1985 Ga. Laws 665 § 2.

100. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95, 96 (1989).

101. Id.

102. Id. at 96.

103. The Georgia Supreme Court previously had adopted the *Chevron* test in *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983).

104. See *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939).

result in a windfall to alcohol producers.[105] The probable windfall argued against retroactive application. Yet, on the other hand, the Georgia Supreme Court reasoned that the state would have to refund at least $30 million[106] which it had collected in good faith under a statute that had withstood prior constitutional challenge. Given the inequity of granting alcohol producers a windfall while penalizing the state, and the justifiable reliance on the statute, the Georgia Supreme Court concluded that the rule announced in *Bacchus* would not apply retroactively.[107]

On certiorari, the Supreme Court[108] reversed and remanded the case to the Georgia Supreme Court for determination of appropriate relief. The case produced no majority opinion, and in fact, only one justice joined the Court's opinion as four other justices wrote separate opinions.[109]

Writing for the Court, Justice Souter rejected selective prospectivity and claimed not to comment on pure prospectivity.[110] Initially, he stated that the retroactivity question involved a choice of federal law since the question was whether to apply the old or the new rule.[111] He argued that once the Court decided to apply a law retroactively, remedial issues would arise.[112] Justice Souter then discussed the three options available to the Court.[113] He concluded that the Court had never applied *Chevron* to modified civil prospectivity[114] and that since *Bacchus* was applied retroactively, the Court needed to decide its further application in the case at bar.[115]

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105. *Beam*, 382 S.E.2d at 97.

106. At least two other suits were pending against the state in which producers were asking for over $28 million. Id. at 96-97.

107. Id. at 97. The dissenting justice argued that retroactive application was mandatory because the statute was void *ab initio* once it was found unconstitutional. That is, the statute must never have existed. Id. at 98 (Smith dissenting).

108. *Beam*, 111 S. Ct. at 2439 (1991).

109. Justice Souter wrote the plurality opinion and was joined by Justice Stevens. Justice White wrote a separate concurring opinion. Justice Blackmun filed a concurring opinion which Justices Scalia and Marshall joined. Justice Scalia filed a concurring opinion which Justices Blackmun and Marshall joined. Finally, Justice O'Connor filed a dissenting opinion which Justices Rehnquist and Kennedy joined.

110. *Beam*, 111 S. Ct. at 2448.

111. Id. at 2443.

112. Remedial issues are governed by state law. See *American Trucking*, 496 U.S. at 210-11 (Stevens dissenting).

113. *Beam*, 111 S. Ct. at 2442-44. Justice Souter discussed the options of full retroactivity, modified prospectivity, and pure prospectivity.

114. See id. at 2443.

115. Justice Souter read *Bacchus* to have applied its new rule to the parties in that case. Since the Court had remanded to the state court for a determination of the remedial issues without discussing retroactive application, he concluded that it had followed the normal practice of retroactive operation. Further, he reasoned that since the new rule had been applied in *Bacchus*,

Justice Souter argued that *Griffith*'s[116] equality principle applied in the civil context as well. He reasoned that to treat two similarly situated litigants differently by applying different rules of law, based solely on who brought the claim first, would be fundamentally unfair.[117] Thus, he concluded that the party in this case, Beam, must be given the same benefit of the new rule as was Bacchus. As to concerns about other potential litigants whose claims were barred by res judicata or statutes of limitation, Justice Souter admitted that the distinction seemed arbitrary. However, he concluded that the need for finality in civil cases requires some limitation on the retroactive effect.[118]

Finally, Justice Souter wrote that the choice of law issue should never depend on the equities of the litigant's individual claims to prospectivity.[119] He contended that the nature of precedent does not allow the law to shift and spring based on equitable principles.[120] Thus, Justice Souter limited the *Chevron* test to the determination of whether or not the new rule would apply to all litigants. In other words, he reasoned that individual equities present in a single case would have no bearing on the choice of law in that case.[121] Justice Souter then remanded the case to the state court for consideration of the remedial issues.[122]

Justice White, concurring in the judgment, agreed that *Bacchus* had extended the benefit of the new rule to Bacchus Imports.[123] He argued that since no precedent for applying selective prospectivity to civil cases existed, and since *Griffith* had abandoned the use of selective prospectivity in criminal cases, Beam should benefit from the *Bacchus* decision.[124] Justice White wrote separately, however, to emphasize the continuing vitality of pure prospectivity. He believed Justice Souter was inconsistent when he claimed not to speculate about the propriety

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the question in *Beam* was whether to apply the new rule in a new case, (i.e., modified prospectivity) not whether to apply it to itself (i.e., pure prospectivity).

116. See notes 70-77 and accompanying text.

117. *Griffith*, 479 U.S. at 327.

118. See *Beam*, 111 S. Ct. at 2446-47. Justice Souter proclaimed that "[f]inality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time." Id. at 2447.

119. Id. at 2447.

120. He stated, "The applicability of rules of law are not to be switched on and off according to individual hardship." Id. at 2448.

121. In other words, the *Chevron* test would apply only to cases in which courts were deciding pure prospectivity. Id.

122. Id.

123. Id. at 2448 (White concurring).

124. Id. at 2448-49 (White concurring). Justice White dissented in *Griffith* and still believed the Court's decision in that case to be wrong, but he followed its holding here on the basis of stare decisis. See id.

of pure prospectivity yet cited pure prospectivity cases[125] in his attack on selective prospectivity.[126] He emphasized his support for both the *Chevron* opinion and Justice O'Connor's opinion in *American Trucking*.[127] Finally, Justice White stated that he was unpersuaded by Justice Scalia's reasoning.[128]

Justice Scalia, although he agreed in an abstract way with Justice Souter's reasoning about the equality problems of selective prospectivity, thought Justice Souter did not go far enough. The problem with prospectivity, both selective and pure, was not inequality, but unconstitutionality, he argued.[129] Justice Scalia contended that prospectivity violates the fundamental separation of powers as envisioned by the framers.[130] Under Justice Scalia's theory, judicial power is limited to declaring what the law is,[131] as Justice Marshall wrote in *Marbury v. Madison*.[132] While claiming not to be so naive as to be unaware that judges do make law, Justice Scalia argued that they must make it only in the Blackstonian sense, as if they were finding it.[133] He reasoned that the inequities[134] imposed by mandatory retroactivity were intended as checks on the judicial power, designed to restrict the judiciary's ability to make law, presumably by taking away some of the incentive to overrule established decisions.[135] Hence, because of his view of the separation of powers, Justice Scalia argued that all prospectivity is unconstitutional.

For reasons very similar to Justice Scalia's, Justice Blackmun also concurred in the judgement.[136] Justice Blackmun believed that the Supreme Court's role under Article III of the Constitution is to decide cases and controversies only.[137] He reasoned that judicial review compels a court to decide the case actually before it and if that case requires the court to adopt a new rule it must do so only in the context of the case before it, applying the new principle to all concerned parties.[138]

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125. Id. at 2443 (Souter concurring).
126. Id. at 2449 (White concurring).
127. See notes 78-91 and accompanying text.
128. *Beam*, 111 S. Ct. at 2449 (White concurring).
129. Id. at 2450 (Scalia concurring).
130. Id. (Scalia concurring).
131. Id. at 2451 (Scalia concurring).
132. 5 U.S. (1 Cranch) 137, 177 (1803).
133. Scalia wrote, "[b]ut 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 *changed to*, or what it will *tomorrow* be." *Beam*, 111 S. Ct. at 2451.
134. Id. (Scalia concurring).
135. Id. (Scalia concurring).
136. Id. at 2449 (Blackmun concurring).
137. Id. (Blackmun concurring).
138. Id. at 2450 (Blackmun concurring).

He declared that to act in any other way would force the court to act as a legislature. Further, Justice Blackmun wrote that stare decisis compels retroactive effect of court decisions.[139] Finally, he argued that since retroactivity forces a court to consider the consequences of overruling its decisions, it makes it less likely that it will do so and gives stare decisis its vitality.[140]

Justice O'Connor, in dissent, accepted that the Court in *Bacchus* had applied its new rule to the parties before it,[141] but this was the extent of her agreement with the other four opinions in *Beam*. She rejected both Justice Scalia's and Justice Blackmun's characterizations of the judicial role.[142] She referred to her opinion in *American Trucking*[143] and reemphasized that because the Court has the power under *Marbury* to say what the law is, when the Court changes its interpretation, then the law itself changes.[144] Thus, she argued that the Court has an obligation to decide what law should apply to facts antedating the law-changing decision. She concluded that the Court should make this determination by applying the *Chevron* analysis.[145]

Justice O'Connor also addressed Justice Souter's opinion and concluded that the *Bacchus* Court should have made its new rule prospective,[146] and that to continue to apply that inaccurate decision retroactively would be inequitable.[147] Justice O'Connor reasoned that the *Bacchus* decision created a new rule which overruled a long line of Supreme Court authority holding that the Twenty-First Amendment exempted state liquor regulations from the negative commerce clause.[148] Thus, she concluded that Hawaii's reliance on precedent was well-placed. In addition, she observed that companies faced minimal hardship since they had passed on the cost of the tax to the Georgia con-

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139. Id. (Blackmun concurring).

140. Id. (Blackmun concurring).

141. Id. at 2451 (O'Connor dissenting).

142. Id. (O'Connor dissenting).

143. *American Trucking Assns. v. Smith*, 496 U.S. 167 (1990) (plurality opinion). See notes 78-91 and accompanying text.

144. *Beam*, 111 S.Ct. at 2451 (O'Connor dissenting).

145. Id. See notes 59 to 63 and accompanying text.

146. Justice O'Connor dissented in *Bacchus* based on the Twenty-First Amendment issue presented therein. The dissent did not mention *Chevron* nor the retroactivity issue. *Beam*, 111 S. Ct. at 2448 (White concurring).

147. Id. at 2448-49 (White concurring).

148. Id. at 2451-52 (O'Connor dissenting). See *Bacchus*, 468 U.S. at 278-79 (Stevens dissenting and explaining the novelty of the decision); *State Board v. Young's Market Co.*, 299 U.S. 59 (1936) (rejecting the same argument the Court eventually adopted in *Bacchus*); *Hostetter v. Idlewild Liquor Co.*, 377 U.S. 324, 330 (1964) (quoting *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939), (stating that "since the Twenty-First Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause")).

sumers.[149] In contrast, she concluded that Georgia and its citizens would face devastating liability.[150] Under this analysis, Justice O'Connor concluded that the *Bacchus* Court should have applied its new rule prospectively only.[151] She believed that to retroactively apply the *Bacchus* rule again in *Beam* would compound the problem.[152]

Justice O'Connor also argued that stare decisis and equality, Justice Souter's justifications for applying retroactivity, actually cut against using retroactivity.[153] She reasoned that because the *Bacchus* Court failed to even consider the retroactivity question, the *Bacchus* case was of no value in the analysis of the *Beam* case.[154] She believed that the Court should not follow a previous decision if it did not mention the issue currently under the Court's consideration. Justice O'Connor also reasoned that stare decisis allows those affected by the law to plan according to settled principles;[155] thus, prospectivity allows the Court to respect stare decisis even when it is compelled to change the law.[156] She concluded that if a *Chevron* analysis determines that retroactive operation would upset settled expectations in an inequitable manner, then stare decisis cuts against the Court's reasoning in *Beam*. Due to the inequity of retroactive application present in *Bacchus*, Justice O'Connor concluded that *Beam* should not compound that error.[157]

IV. ANALYSIS

While the *Beam* Court purported to consider only the limited question of selective prospectivity, it actually discussed other issues that portray the Court's evolving attitude toward pure prospectivity and the role of the judiciary in the American constitutional system. Even the Court's analysis concerning modified prospectivity was driven by the justices' views of the proper function of judges.

Narrowly read, the *Beam* decision is a question concerning the meaning of stare decisis and equality.[158] On these issues, Justice Souter

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149. See *Beam*, 111 S.Ct at 2454-55 (O'Connor dissenting). This is the same argument the Georgia Supreme Court used in *Beam*. See note 105 and accompanying text.

150. *Beam*, 111 S. Ct. at 2455 (O'Connor dissenting).

151. Id. at 2456 (O'Connor dissenting).

152. Id. (O'Connor dissenting).

153. Id. at 2451-56 (O'Connor dissenting).

154. Id at 2452 (O'Connor dissenting).

155. Id. (O'Connor dissenting).

156. See *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 191-93 (1991) (O'Connor plurality), and id. at 205 (Scalia concurring and arguing that retroactive liability would "*upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed . . . overruled prior law . . . [which] would turn the doctrine of stare decisis against the very purpose for which it exists").

157. *Beam*, 111 S. Ct. at 2452 (O'Connor dissenting).

158. Justices Scalia, Blackmun, and Marshall did not even reach this point.

argued that the most important consideration is treating similarly situated litigants the same.[159] He believed that the Court should apply the same rule to all litigants. By contrast, Justice O'Connor did not believe that an incorrect decision should bind future litigants simply to allow for judicial consistency.[160] These conflicting points of view are driven by two conflicting Supreme Court views of the proper role of the judiciary. Justice Scalia and Justice Souter believe that the Court has a limited role and should apply only settled principles of law to the cases before it. Hence, both justices argued for retroactivity in *Beam*, even though the equities of the case suggested that only prospective operation of the decision was appropriate. The need for formal judicial consistency was the driving force behind both opinions.[161]

In contrast, Justice O'Connor was more concerned with the equities of the case. In order to reach an equitable result, she was willing to allow inconsistency in judicial opinions and admit that the Court engages in a rulemaking function. She emphasized the outcome of the case rather than the neatness of the method the Court uses to reach that outcome.[162]

Justice O'Connor's approach to the judicial role is the more sound and proper of the two—courts should emphasize the outcomes of cases in order to assure just results.[163] While there is a certain appeal to the consistency of a more rigid system of law as espoused by Justices Scalia and Souter, the law should not be formulated solely according to how nicely it operates.

The pragmatic approach that Justice O'Connor advocates cuts in favor of the continuing vitality of prospectivity. Unfortunately, the Court seems to be returning to a formalistic approach to law that necessarily diminishes the use of prospectivity.[164] Those who espouse the pragmatic approach realize that judges do in fact make law. They discard the remnants of the Blackstonian theory that defines the proper role of the judiciary as "finding" the law. Once one concedes that judges do make law, the issue becomes when the courts should begin to apply the new law. Courts should resolve this issue of prospectivity according to the Supreme Court's analysis in *Chevron*. Further, when a Court

159. *Beam*, 111 S. Ct. at 2444.

160. Id. at 2451 (O'Connor dissenting) (arguing that since the *Bacchus* Court had not actually reached the retroactivity issue, the Court should not feel bound to apply its rule again simply for the sake of symmetry).

161. For a discussion of Justice Scalia's positivist legal philosophy, see Beau Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 La. L. Rev. 623 (1991).

162. Id. at 624-65, n. 10.

163. See *Cardozo's Address* at 31 (cited in note 1).

164. Posner, 63 S. Cal. L. Rev. at 1663 (cited in note 32).

makes a new law by overruling an old one, it has a responsibility to decide at what point the new law takes effect.

The foremost objection to prospective judicial rulemaking is that it is unconstitutional.[165] While commentators have described the constitutional problem in different ways, their primary concern is that prospective overruling is inherently legislative and is outside the judicial power.[166] In *Beam*, Justice Scalia contended that prospectivity is a separation of powers problem.[167] He reasoned that the founding fathers envisioned the function of the judiciary as finding the law as it exists—not as making the law. Justice Scalia realized that judges actually do make law, yet he argued that they make it only as if they were finding it and that they should not appear to be making it.[168] He declared that deciding what the law will be tomorrow, as opposed to declaring what it is today, is not a judicial function.[169]

Justice Blackmun framed the constitutional problem with prospectivity as a cases and controversies issue.[170] He declared that the Court only has the power to decide the actual cases before it. That is, the Court is limited to determining rules to guide its decisions only in the context of a present case, and it must always apply its holdings retroactively to the parties before it, whether or not the decision announces a new rule.[171]

The problem with the objection to prospectivity on the grounds that it allows courts to legislate is that the entire argument assumes that the judicary has a very limited role. The Blackstonian ideal that judges serve only as explorers of an already-existing world of law is outdated, yet its influence on jurisprudential theory lingers.[172] While most commentators will admit that judges do make law, many theorists will do so only when forced, and even then with a guilty conscience. Although everyone knows that judges make law, these theorists still cling to the belief that judges must act as if they were not making law. In many cases, including *Beam*, the Court makes new law.[173] Even so, the Blackstonian ideal of elderly, ornately-robed justices deciding each and every case based only on settled principles prevents the Court from ad-

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165. See notes 129-140 and accompanying text.

166. See Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 409 (1924). Tbis article was one of the first to object to prospectivity.

167. *Beam*, 111 S. Ct. at 2450 (Scalia concurring).

168. Id. at 2451 (Scalia concurring).

169. Id. at 2450-51 (Scalia concurring).

170. See notes 136-140 and accompanying text.

171. "To do otherwise is to warp the role that we, as judges, play in a government of limited powers." *Beam*, 111 S. Ct. at 2450 (Blackmun concurring).

172. Levy, 109 U. Pa. L. Rev. at 4-5 (cited in note 24).

173. See note 148 and accompanying text.

mitting that it actually is making law. Hence the Court is unable to completely fulfill its proper role and its duty to state when the decision will take effect and to which cases it will apply.

Justice Scalia's concurrence in *Beam* is an excellent example of the lingering effect of the Blackstonian ideal. Justice Scalia claims not to be so naive as to not realize that judges can actually make law,[174] and he does view judicial rulemaking as an essential component of the judicial process.[175] However, as Justice White noted in his concurrence in *Beam*,[176] Justice Scalia believes judges should never publicly admit that they make rules. That is, although judges make law, they should pretend that they were finding it.[177] Justice Scalia adopts this view to protect his stance on the importance of strictly construing the constitutional separation of powers.[178] Allowing the Court to overrule prospectively cannot be done without admitting that the judicial power is more than finding the law and applying it to a present case. However, the Court must make this very admission.

One commentator has framed the constitutional issue slightly differently.[179] He argues that the importance of separation of powers is to ensure that those who are politically accountable make as many decisions as possible,[180] so when legislatures are capable of making law, courts should allow them to do so. This scholar argues that this judicial abstention serves to preserve respect for the judiciary, thereby preserving judicial power. The problem with this view is that in most situations that require prospectivity, the legislature is either incapable of acting or has not acted. The rules that courts typically overturn are either constitutional interpretations, such as *Beam*, or judge-made rules. In the former case, the legislature cannot act, for even under the most narrow view of judicial power, the judiciary maintains the function of interpreting the Constitution. With respect to rules made by the judiciary, the legislature has not acted: the Court has created an incorrect rule and should act to correct it. If the Court waited for the legislature to correct the rule, the Court would ignore its responsibility to correct itself. The

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174. *Beam*, 111 S. Ct. at 2451 (Scalia concurring). See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176-77 (1989) (reprinting of a speech by Justice Scalia that gives a revealing look at his view of the function of the Supreme Court).

175. Scalia, 56 U. Chi. L. Rev. at 1185. He believes that higher courts must set down definite rules whenever possible so that lower courts and citizens can rely on them. He emphasizes the importance of predictability and consistency in Supreme Court rulemaking. See id.

176. *Beam*, 111 S. Ct. at 2449 (White concurring).

177. Id. at 2451 (Scalia concurring).

178. His view is simply that the legislature makes laws, the courts interpret them, and the executive enforces them.

179. See Note, 71 Yale L. J. at 930-34 (cited in note 28).

180. Id. at 930.

prospective effect of the overruling simply recognizes that people have relied on the old rule and that the Court should be reluctant to punish those who have relied on their decisions.

Courts have the power to give each of their decisions both retroactive and prospective effect, and, in fact, normal decisions have both retroactive and prospective effect.[181] Justices Scalia, Blackmun and others argue that the Court always must utilize its full power, although there is no constitutional provision which mandates that it do so. Their objection to prospectivity stems from the idea that the Court should not act as a legislature which promulgates rules but should operate only as an interpreter.[182] This objection ignores the reality of judicial rulemaking and supposes that the public is so naive as not to see what the Court is doing. As Justice O'Connor stated in *Beam*, since the Supreme Court is the final word on legal interpretation, whatever the Court says the law is, it is.[183] When the Court's interpretation changes, the law itself changes—no distinct body of law can exist apart from the Court's conclusion. Article III of the Constitution grants the Court this lawmaking power.[184]

A second objection to prospective overruling is that it diminishes the incentive to litigate.[185] That is, because litigants know that they may be denied the benefit of any new law, they will be less likely to appeal a decision based on novel theories. The result is a slower pace of legal change.[186]

This argument presumes, however, that prospectivity will become the normal mode of overruling. In fact, since actual instances of honest reliance are rare,[187] prospective overruling too seldom is used to slow

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181. See Levy, 109 U. Pa. L. Rev. at 15 n.48 (cited in note 24).

182. See notes 129-140 and accompanying text. Traynor disagrees: "For all too many generations we justified mecbanical retroactivity by the prim lore descended to us through Blackstone that judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed. Once suitably bundled up it was automatically retroactive, given the premise that it had been there all along in the bushes at the bottom of the garden. The devotees of the discovery theory majestically dispelled the fractious problem of the overruled decision. The overruling decision simply displaced it all the way back in time so that it never had a life it could call its own. Under the spell on such moonspining, American courts soon upheld a retroactive operation of decisions that they would have invalidated in statutes as contrary to the ex post facto clause, the impairment of contracts clause, or the due process clause of the Constitution." Traynor, 28 Hastings L.J. at 535 (cited in note 49).

183. *Beam* at 2451 (O'Connor dissenting). See note 141 and accompanying text.

184. See U.S. Const., Art. III.

185. Levy, 109 U. Pa. L. Rev. at 11 (cited in note 24).

186. See id.; Traynor, 28 Hastings L. J. at 546.

187. See *Cardozo's Address* at 34-35 (cited in note 1); Note, 71 Yale L. J. at 945-47 (cited in note 28). The theory of prospectivity argues for the protection of reliance interests only when they actually exist. The theory does not envision that every time the Court overrules itself it will have to act prospectively because someone may have relied on the old rule. Only when litigants have

the pace of legal change. In addition, even the possibility of benefiting from retroactive application of a new Court rule[188] should provide enough incentive to litigate.[189] In other words, the mere possibility that relief may be denied is not enough to discourage litigation.

Furthermore, institutional litigants, like Beam, would appeal even if they knew they would be denied retroactive relief.[190] Institutional litigants engage in multiple transactions and thus have a continuing interest in overturning the law, so the potential for prospective relief alone provides enough reward.

Commentators also are concerned that prospective overruling would be ineffective and lead to uncertainty about the Court's application of the new rule, since the language establishing the new rule is only dictum and courts may not consider themselves bound by the decision.[191] However, the language is not dictum. Two issues are present in a case involving the overruling of a decision. The first is whether the old rule is effective and whether a new rule should be announced. If a court decides to formulate a new rule, a second inquiry is necessary to determine how to give the new rule the most equitable effect.[192] This second decision is based on the reliance on the old rule and any hardship that retroactive operation may impose. Hence, this second inquiry is not dictum.[193] It is an essential part of the inquiry into the relief which should be granted. Further, even if the retroactivity decision is dictum, no uncertainty as to which law was applicable would result. After all, the reasoning in favor of prospective operation in the original case would have been to protect the reliance interests of the parties. The same Court would not refuse to apply the new rule[194] in a subsequent case, thereby chastising the party for relying on the Court's prior dictum.[195] The very purpose behind allowing prospective overruling is to allow the court to announce a new rule without requiring a harsh and unjust retroactive effect. To suggest that the same Court would then not apply the new rule is unrealistic.[196]

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justifiably relied on the old rule, as in *Beam* or *Bacchus*, does the Court consider prospectivity.

188. And in most cases it is more than just a possibility—there is a strong presumption for retroactive operation.

189. Traynor, 28 Hastings L. J. at 547.

190. See id.

191. Since no relief is granted in the present case, the language establishing the new rule is not part of the holding. It is no more than an attempted future ruling.

192. *Beam*, 111 S. Ct. at 2451-52 (O'Connor dissenting).

193. Traynor, 28 Hastings L. J. at 560 (cited in note 49).

194. In favor of the old rule which had been found inadequate.

195. "[T]he uncertainty would not be grievous, for litigants could assume with little likelihood of disappointment that the dictum would be followed when the opportunity arrived to turn it into a decision." *Cardozo's Address* at 36 (cited in note 1).

196. Some commentators have even suggested that the Court would be morally bound to

Proponents of mandatory retroactivity also suggest that it serves as a necessary obstacle to prevent courts from overruling prior decisions too easily.[197] As a matter of policy, this argument is flawed. There is no inherent value in maintaining a system whereby courts refuse to overrule their prior decisions. If a court decides that a present rule is unjust or invalid, why should the system erect obstacles to the creation of a just rule? The need for stability and predictability does not justify the perpetuation of bad law,[198] and legal systems should be designed to produce good law rather than rigidly adhere to the status quo.[199]

Prospective overruling forces courts and commentators to admit that judges do in fact make law. Only with this admission made can theorists determine the most appropriate parameters and responsibilities of judicial power. Hence, once an accurate understanding of the actual function and power of judges is formulated, judges can be more effectively criticized. The result will be increased effectiveness and accuracy of judicial rulemaking by increasing the amount of information the Court receives regarding belief as to the appropriate methodology in rulemaking.[200]

The Supreme Court did adopt prospectivity in *Linkletter* in 1965.[201] In the immediate years after *Linkletter*, the Court's power to make law was apparent to all. Unfortunately, the current Supreme Court is reacting to allegations of undue judicial activism. One result is a return to retroactivity. Justice Scalia, in particular, is determined to resurrect the corpse of the Blackstonian ideal. The effect of such action will be to obscure the judicial function and prevent honest analysis of the Court and its proper role. Not coincidentally, scholars and jurists objected to this during the forty year period preceding *Linkletter*.

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apply the new rule. See Albert Kocourek and Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 Ill. L. Rev 971, 995-96 (1935).

197. This objection was first suggested in Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 Harv. L. Rev. 1403, 1412 (1934). Justices Blackmun and Scalia also referred to the braking function retroactivity serves in *Beam*. See *Beam*, 111 S. Ct. at 2450 (Blackmun concurring); id. at 2451 (Scalia concurring).

198. Traynor, 28 Hastings L. J. at 539 (cited in note 49).

199. Justice Cardozo thought that "insistence . . . [on] the virtues of symmetry and coherence can he purchased at too high a price; that law is a means to an end, and not an end in itself; and that it is more important to make it consistent with what men and women really and truly believe and do than what judges may at times have said in an attempt to explain and rationalize the things they have done themselves." *Cardozo's Address* at 32 (cited in note 1).

200. "A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe." William O. Douglas, *Stare Decisis*, 4 Record of N.Y.C.B.A. 152, 175 (1949).

201. See notes 42-52 and accompanying text.

V. Conclusion

Prospective overruling is a valuable method of ensuring that the Supreme Court is able to change the law as society changes yet not upset the settled expectations of parties who have relied on the old law. Objections that prospectivity is unconstitutional ignore the reality of judicial rulemaking and the function that the Court actually plays in the American constitutional scheme. The Blackstonian ideal of declaratory decision-making is outdated. Prospective overruling allows the Court to reach the equitable result without interfering with the role of the legislature. Prospectivity should be judged by its ability to reach an equitable result, not by how well it fits together with rigid, outdated models of the judiciary.

K. David Steele