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Retroactivity and Legal Change: An Equilibrium Approach

Jill E. Fisch

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ARTICLE

RETROACTIVITY AND LEGAL CHANGE: AN EQUILIBRIUM APPROACH

Jill E. Fisch

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RETROACTIVITY AND LEGAL CHANGE: AN EQUILIBRIUM APPROACH

*Jill E. Fisch**

In this Article, Professor Fisch assesses current retroactivity doctrine and proposes a new framework for retroactivity analysis. Current law has failed to reflect the complexity of defining retroactivity and to harmonize the conflicting concerns of efficiency and fairness that animate retroactivity doctrine. By drawing a sharp distinction between adjudication and legislation, the law has also overlooked the similarity of the issues that retroactivity raises in both contexts. Professor Fisch's analysis, influenced by the legal process school, uses an equilibrium approach to connect retroactivity analysis to theories of legal change. Instead of focusing on the nature of the new legal rule, this approach emphasizes the context in which change occurs. If an area of the law is settled, a stable equilibrium, reliance interests are at their peak. Retroactivity thus presents serious fairness and efficiency concerns and should be disfavored. If the regulatory context is in flux, an unstable equilibrium exists, and retroactivity may be more appropriate. Professor Fisch's use of equilibrium theory improves doctrinal analysis of the temporal line-drawing associated with legal change and clarifies the relationship of retroactivity rules to law-making power.

One of the most complicated questions created by legal change is the temporal one: what limits, if any, should be placed on a new rule's application to transactions that predate the adoption of the rule? Retroactivity analysis attempts to answer this question by providing guidance as to the appropriate temporal limits for legal change.¹ Henry Hart and Albert Sacks, using the parlance of the Legal Process School, framed retroactivity analysis as a choice between an old and a new legal rule — a “conflict of laws in time.”² Determining the limits of legal change has been controversial. Courts, legislators, and com-

* Professor, Fordham Law School; Visiting Professor, Columbia Law School, Spring 1995. Earlier drafts of this Article were presented to faculty workshops at Columbia Law School, Brooklyn Law School, the University of Minnesota School of Law, the University of Arizona School of Law, and the Marshall-Wythe School of Law, College of William and Mary. I received many useful comments at each session. I am particularly grateful to Anne Alstott, Jim Chen, Richard Epstein, Dan Farber, Marty Flaherty, Phil Frickey, Mike Gerhardt, Abner Greene, Charles Koch, Henry Monaghan, Michael Stokes Paulsen, Dan Richman, Tony Sebok, Peter Strauss, Steve Thel, and my mother for their individual criticisms and suggestions. Gabrielle Lese, Columbia Law School Class of 1997, provided excellent research assistance.

¹ Rules of stare decisis also structure the temporal parameters of legal change and are closely related to the analysis of retroactivity considered in this Article, but direct exploration of the relationship is beyond this Article's scope. Takings, Ex Post Facto, and Contract Clause jurisprudence also pose related questions. See *infra* pp. 1072–73; cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 620 (William N. Eskridge, Jr. & Philip P. Frickey eds., rev. ed. 1994) (describing the Contract Clause limitation on retroactive application of a statute, but explaining that “the Constitution steps in to forbid not the retroactive imposition of a burden on primary conduct but the deprivation of an expected benefit from a previous exercise of a primary power”).

² HART & SACKS, *supra* note 1, at 616.

mentators have repeatedly debated the appropriate parameters for retroactivity analysis,³ and the debate shows few signs of abating.⁴

The general principle that statutes operate prospectively and judicial decisions apply retroactively⁵ is a matter of black letter law,⁶ but dissatisfaction with the application of this principle to various situations caused the Supreme Court to depart from the traditional approach.⁷ In the absence of an analytic foundation for the departures, however, the Court quickly discovered that its effort to inject flexibility into retroactivity doctrine was unworkable. The Court's doctrine has suffered from two shortcomings. First, it has failed to acknowledge the struggle animating traditional retroactivity doctrine: the effort to reconcile competing and often conflicting concerns about fairness and economic efficiency.⁸ Underlying these concerns are foundational assumptions about the process by which legal rules change. Second, in delineating the temporal scope of legal change, the Court's doctrine has traditionally relied on a sharp distinction between adjudication and legislation, even though new judge-made rules and statutory change both generate similar concerns.⁹ This distinction has caused

³ See Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820 (1985); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986); Saul Levmore, *The Case for Retroactive Taxation*, 22 J. LEGAL STUD. 265 (1993); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982).

⁴ Debate about retroactivity remains as pervasive in Congress as in the courts. See, e.g., H.R. 2256, 104th Cong. § 102 (1995) (proposing elimination of retroactive liability for environmental actions occurring prior to Jan. 1, 1987); S.J. Res. 8, 104th Cong. (1995); see also H.R. Res. 6, 104th Cong. § 106(d) (1995) (changing House rules to bar consideration of any measure that contains "a retroactive Federal income tax rate increase"); Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 106(B) (requiring House Committee Report on any bill or joint resolution "of a public character" to specify "[t]he retroactive applicability, if any, of that bill or joint resolution").

⁵ As discussed below in section II.A, it is difficult even to formulate a clear analytic distinction between retroactive and prospective lawmaking. See generally Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 374-81 (1977) (analyzing various efforts to define retroactivity).

⁶ See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student . . ." (quoting *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982)) (internal quotation marks omitted)).

⁷ See *infra* p. 1059.

⁸ Alternatively, the choice can be described as a conflict between rationality and reasonableness. This conflict is pervasive in legal analysis, see, e.g., Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996), although it has not been highlighted in discussions of retroactivity.

⁹ The analysis is complicated by the fact that analyzing administrative agency action under existing doctrine requires courts to characterize the nature of the action as either legislative or adjudicatory. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 215 (1988) (characterizing agency action as legislative and concluding that the agency lacked authority to promulgate a retroactive legislative rule); Abner S. Greene, *Adjudicative Retroactivity in Administrative*

the identity of the lawmaker, rather than the nature of the legal change, to drive the discourse.

Most recently, the Supreme Court's recognition of the intellectual poverty of its retroactivity analysis has led to efforts to formulate a more rational analytical structure, albeit with limited success. The Court has addressed retroactivity questions on at least seven occasions in the past five years,¹⁰ but its decisions, rife with separate opinions, reflect a variety of conflicting and confusing approaches. This Article deconstructs those approaches and, for the first time, relates retroactivity analysis to the broader process of legal change. The Article suggests that a comprehensive analysis of retroactivity requires a structure for understanding legal change and uses equilibrium theory to propose such a structure.

Equilibrium theory provides a framework for evaluating legal change as a function of the legal context into which that change is introduced. Rather than evaluating new legal rules in isolation — in terms of their novelty or foreseeability — equilibrium theory focuses the inquiry on the regulatory structure and seeks to characterize that structure in terms of its stability. Adoption of a new legal rule can, but need not, constitute a destabilizing influence on the underlying legal structure. Equilibrium theory thus provides a tool for judging stability within the legal system. This judgment clarifies the extent to which a legal change disturbs a stable system. It also helps determine the appropriate method of addressing the effect of that disturbance on the regulatory objectives of fairness and efficiency. Because selection of temporal limits is motivated by an effort to address the disturbance of stability effected by legal change, focusing on the disturbance permits a more principled approach to retroactivity analysis. Additionally, the process of deconstructing retroactivity doctrine provides further insight into the normative consequences of the traditional doctrinal relationship between a lawmaker's identity and its capacity to initiate legal change.

Law, 1991 SUP. CT. REV. 261, 261-69. See generally David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 972 (1965) (arguing that agencies should make greater use of rulemaking rather than adjudication, in part to help resolve uncertainty as to the consequences of regulated behavior).

¹⁰ See *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995) (rejecting the effort to limit retroactive application of a 1988 Supreme Court decision to claims accrued before its announcement); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1463 (1995) (invalidating a statutory attempt retroactively to change the law applicable to cases that had reached final judgment); *United States v. Carlton*, 512 U.S. 26, 35 (1994) (concluding that retroactive amendment of the Internal Revenue Code did not violate the Due Process Clause); *Rivers*, 511 U.S. at 300 (refusing to apply the 1991 Civil Rights Act retroactively); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66, 276-78 (1994) (adopting a presumption against construing a statute to have retroactive effect); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) (eliminating selective adjudicative prospectivity in civil cases); *General Motors Corp. v. Romein*, 503 U.S. 181, 190-91 (1992) (upholding a retroactive state statute against Due Process and Contract Clause challenges).

I. BACKGROUND OF RETROACTIVITY DOCTRINE

Although the general rule of adjudicative retroactivity had been followed by courts for hundreds of years,¹¹ in the 1960s the U.S. Supreme Court began to limit some decisions to prospective application.¹² Shortly thereafter, the Court started to apply new statutory rules to pending cases, even when the statute had been passed subsequent to the events giving rise to the litigation.¹³ Both of these developments represented departures from traditional retroactivity doctrine that eventually proved unsatisfactory. In its most recent decisions, the Court has substantially retreated from these departures, leaving some degree of ambiguity in its wake.

A. Adjudicative Retroactivity

The Court's departure from the general rule of adjudicative retroactivity was initially spurred by its reluctance to apply the Warren Court's criminal procedure decisions of the 1960s¹⁴ in a manner that would free the numerous defendants who had been convicted before the announcement of the new legal standards.¹⁵ Subsequently, the Court adopted a discretionary approach to adjudicative retroactivity in the civil context. The Court described this rule in *Chevron Oil Co. v. Huson*.¹⁶

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . [look] to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or

¹¹ Justice Scalia discusses the long history of adjudicative retroactivity in his concurring opinion in *Harper v. Virginia Department of Taxation*, 509 U.S. at 106-07 (Scalia, J., concurring).

¹² See *infra* note 15 and accompanying text.

¹³ See *infra* p. 1064.

¹⁴ See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964) (holding that the Sixth Amendment right to counsel attaches when a person becomes a criminal suspect); *Gideon v. Wainwright*, 372 U.S. 335, 335-45 (1963) (announcing a constitutional right to counsel in criminal cases); *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (applying the Fourth Amendment exclusionary rule to state officers).

¹⁵ As a result, in *Linkletter v. Walker*, 381 U.S. 618, 628 (1965), the Court adopted a discretionary approach to adjudicative retroactivity in criminal cases. Prior to *Linkletter*, the Court had occasionally departed from its general rule of adjudicative retroactivity. See, e.g., Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 916-21 (1962) (discussing pre-*Linkletter* cases). Justice Cardozo is generally credited with popularizing the idea of using prospective adjudication as a means by which to redress the hardship produced by some retroactive applications of judge-made law. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 146-49 (1921); see also Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 631-42 (1967) (describing Justice Cardozo's role in the historical development of prospective adjudication).

¹⁶ 404 U.S. 97 (1971).

retard its operation.' Finally, we have weighed the inequity imposed by retroactive application . . .¹⁷

The Court had adhered to the *Chevron Oil* test for more than fifteen years¹⁸ when consideration of prospective adjudication resurfaced. Again the Court first acted in the criminal context. In *Griffith v. Kentucky*,¹⁹ the Court repudiated the principle that courts engaged in direct review of a criminal conviction have discretion to limit a new rule of law to prospective application.²⁰ The Court based this conclusion upon constitutional principles. The Court held first that determining the temporal application of a new constitutional principle of criminal procedure was legislative rather than judicial in nature. Second, the Court concluded that applying different legal rules to similarly situated defendants based on which case reached the Court first was improper.²¹

Dictum in the *Griffith* opinion stated that the Court's holding had no application to civil cases, which continued to be governed by the *Chevron Oil* test.²² Subsequent decisions addressing adjudicative retroactivity in civil cases found the Court unable to agree on an appropriate method of analysis and, frequently, unable even to formulate a majority opinion. To date, the legal status of adjudicative nonretroactivity remains unclear.

In *American Trucking Ass'ns v. Smith*,²³ Justice O'Connor, writing for a plurality of four Justices, explicitly refused to extend *Griffith* to civil cases.²⁴ Instead, the plurality opinion reaffirmed the vitality of the *Chevron Oil* test and, applying that test, concluded that retroactive application of an earlier decision invalidating certain highway use taxes under the Commerce Clause would unfairly burden the state's

¹⁷ *Id.* at 106-07 (citations omitted) (quoting *Linkletter*, 381 U.S. at 629).

¹⁸ The discretionary approach to adjudicative retroactivity was often criticized. For example, Justice Harlan repeatedly argued against prospectivity. *See, e.g., Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); *Mackey v. United States*, 401 U.S. 667, 676-77 (1971) (Harlan, J., concurring in part and dissenting in part).

¹⁹ 479 U.S. 314 (1987).

²⁰ In *Teague v. Lane*, 489 U.S. 288 (1989), a plurality of the Court held that new constitutional rules of criminal procedure would not be applied retroactively in habeas corpus proceedings unless the rule at issue fell within one of two narrow exceptions. *See id.* at 310-11; *see also* Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371 (1991) (analyzing the *Teague* decision).

²¹ *See Griffith*, 479 U.S. at 322-23.

²² *See id.* at 322 n.8.

²³ 496 U.S. 167 (1990).

²⁴ *See id.* at 178 ("Although the Court has recently determined that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final, . . . retroactivity of decisions in the civil context 'continues to be governed by the standard announced in [*Chevron Oil*].'" (citations omitted) (alteration in original) (quoting *Griffith*, 479 U.S. at 322 n.8)).

current operations and future plans made in reliance on the tax revenues collected.²⁵

In its next decision on this issue, *James B. Beam Distilling Co. v. Georgia*,²⁶ the Court retreated further from *Chevron Oil*. *James Beam* considered the doctrine of selective or modified prospectivity, an intermediate practice that permitted courts to apply a newly announced rule in the case in which the rule was announced but to make the holding otherwise prospective.²⁷ Selective prospectivity, like the *Chevron Oil* test, allowed courts to distinguish among litigants, applying the new rule to some and the old rule to others. Under *Chevron Oil*, the relevant retroactivity criteria included the extent to which particular litigants had relied on the old rule. Selective prospectivity added a layer to the inquiry: a new rule could be applied to the litigants who got to the Court first but, under the *Chevron Oil* test, could be made nonretroactive as to those litigants whose cases had proceeded less rapidly.

The *James Beam* Court concluded that it was improper to treat similarly situated litigants differently. Instead, the Court held that a new rule of law that is applied to one set of litigants must be applied retroactively to all similarly situated litigants.²⁸ Although this conclusion might appear to follow directly from the reasoning in *Griffith*, the decision in *James Beam* was so difficult that it generated five separate opinions, none of which commanded the support of more than three Justices.

Justice Souter's opinion, which garnered the most support, reasoned that the same equality principles that applied in the criminal context also forbade differential treatment of similarly situated litigants in civil cases.²⁹ Thus, the doctrine of selective prospectivity could not stand. Because the Court had already applied its holding to one set of litigants, Justice Souter concluded that the holding had to be applied retroactively. Justice Souter explicitly stated, however, that he was not addressing the validity of pure adjudicative prospectivity.³⁰

²⁵ See *id.* at 182-83. Assessing the significance of the *American Trucking* decision was difficult for two reasons. First, although the opinion addressed principles of retroactivity in detail, the petition for certiorari did not ask the Court to overrule *Chevron Oil* based on *Griffith*. The only question before the Court was whether "the Arkansas Supreme Court appl[ied] *Chevron Oil* correctly." *Id.* at 178. Second, the fifth vote in *American Trucking* was provided by Justice Scalia, who concurred in the judgment because he believed that the new rule of law, of which the plaintiff sought retroactive application, was incorrect. See *id.* at 202-05 (Scalia, J., concurring in the judgment). Justice Scalia explicitly disagreed with Justice O'Connor's retroactivity analysis, stating that "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be." *Id.* at 201.

²⁶ 501 U.S. 529 (1991).

²⁷ See *id.* at 537 (explaining selective prospectivity).

²⁸ See *id.* at 540, 544.

²⁹ See *id.* at 540.

³⁰ See *id.* at 544 ("We do not speculate as to the bounds or propriety of pure prospectivity.").

Three Justices concurred in the judgment for conflicting reasons. Justice White agreed with the rejection of selective prospectivity but wrote separately to state his continued belief that the doctrine of pure prospectivity remained valid in the civil context.³¹ In contrast, Justice Scalia argued that principles of separation of powers rendered both pure and selective prospectivity unconstitutional. The nature of the judicial power, according to Justice Scalia, does not allow courts to announce principles of law divorced from their application to the pending case.³² Justice Blackmun also concluded that pure prospectivity was unconstitutional, but he based his reasoning on Article III's limitation of the Court's role to deciding actual cases or controversies.³³ Finally, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy in dissent, defended both the practice of purely prospective adjudication and the continued viability of the *Chevron Oil* test.³⁴

At the time of the decision, the impact of *James Beam* on prospective adjudication was impossible to measure. Only two Justices had clearly articulated their opposition to prospectivity, and four had reaffirmed their support for it. Thus, the reader of *James Beam* may understandably find a step unaccounted for in the Court's subsequent conclusion, in *Harper v. Virginia Department of Taxation*,³⁵ that *James Beam* spelled an end to adjudicative nonretroactivity. Although *Harper* and *James Beam* involved the same issue, Justice Thomas's five-Justice majority opinion³⁶ in *Harper* went further and appeared to invalidate pure, as well as selective, prospectivity.³⁷ This aspect of the opinion seemed to be dictum because the question of pure prospectivity was not implicated by the case.³⁸ Nonetheless, in a later decision, the Court characterized *Harper* as "establish[ing] a firm rule of retroactivity."³⁹ To date, no proffered rationale for this "firm rule" has commanded the support of a majority of the Court. Nor has the Court explained whether its apparent rejection of pure prospectivity is based on prudential considerations or is constitutionally compelled.

³¹ See *id.* at 546 (White, J., concurring in the judgment) ("The propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions.").

³² See *id.* at 549 (Scalia, J., concurring in the judgment).

³³ See *id.* at 547 (Blackmun, J., concurring in the judgment).

³⁴ See *id.* at 549-59 (O'Connor, J., dissenting).

³⁵ 509 U.S. 86 (1993).

³⁶ Justices Kennedy and White, although they concurred in part, did not join this aspect of the majority opinion and wrote separately to indicate their continued belief that pure prospectivity was valid and appropriate in certain cases. See *id.* at 110 (Kennedy, J., concurring in part and concurring in the judgment).

³⁷ See *id.* at 115 (O'Connor, J., dissenting) (quoting statements in the majority opinion in which "the Court intimates that pure prospectivity may be prohibited as well").

³⁸ See *id.* at 116.

³⁹ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994).

A 1995 Supreme Court decision, *Reynoldsville Casket Co. v. Hyde*,⁴⁰ provides the latest gloss on the issue. The Ohio Supreme Court had determined, relying in part on the Ohio Constitution, that the U.S. Supreme Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*⁴¹ could not be retroactively applied "to those claims already accrued when that decision was announced by the United States Supreme Court."⁴² The U.S. Supreme Court reversed, stating only that *Harper* governed the retroactivity of the *Bendix* decision.⁴³ The Court rejected reliance and other remedial considerations as bases for adjudicative nonretroactivity, distinguishing several previous decisions upholding nonretroactivity as involving circumstances in which "a set of special federal policy considerations . . . led to the creation of a well-established, independent rule of law."⁴⁴ The Court concluded that "a concern about reliance alone" does not justify "what amounts to an ad hoc exemption from retroactivity."⁴⁵ Thus, *Reynoldsville Casket* indicates both that fairness considerations are insufficient to justify adjudicative retroactivity and that the Supreme Court's determination of the temporal reach of a rule of federal law is independently binding on state courts under the Supremacy Clause.

B. Legislative Retroactivity

The Court's decisions in the legislative context have been characterized by similar vacillation between a flexible discretionary approach and a bright-line rule. Legislative retroactivity raises two distinct analytical issues: the existence of legal limitations on legislative power to regulate retroactively, and the interpretive principles to be used in assessing the extent to which legislation should be construed as retroactive. The former issue has received relatively little attention from the modern Supreme Court.⁴⁶ Despite general acceptance of the principle that "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact,"⁴⁷ the modern Court has been consistently deferential to legislative retroactivity. The principle of legislative nonretroactivity

⁴⁰ 115 S. Ct. 1745 (1995).

⁴¹ 486 U.S. 888 (1988).

⁴² *Hyde v. Reynoldsville Casket Co.*, 626 N.E.2d 75, 78 (Ohio 1994) (citing Section 16, Article I of the Ohio Constitution).

⁴³ See *Reynoldsville Casket*, 115 S. Ct. at 1748, 1752.

⁴⁴ *Id.* at 1751.

⁴⁵ *Id.*

⁴⁶ See *infra* pp. 1074-75 (discussing due process analysis of legislative retroactivity).

⁴⁷ *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) (alterations in original) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398, at 251 (Boston, Charles C. Little & James Brown 2d ed. 1851)) (internal quotation marks omitted).

found early support in the substantive due process and contract rights enforced by the Court prior to the New Deal, but the subsequent erosion of the doctrine of substantive due process curtailed any judicial inclination to subject retroactive legislation to intensive scrutiny.⁴⁸

Although these constitutional developments have resulted in substantial deference to legislative decisions to regulate retroactively, the Court has had some difficulty ascertaining when Congress has exercised that power. Many statutes do not expressly specify their temporal scope. The traditional presumption against legislative retroactivity suggests that, in the absence of clear statutory language, statutes should be interpreted to apply only to post-enactment transactions. However, restrictive readings of a statute's reach may be inconsistent with the legislative objective.

This concern led the Court in *Bradley v. School Board of Richmond*⁴⁹ and *Thorpe v. Housing Authority of Durham*,⁵⁰ cases decided during the same time period as *Chevron Oil*, to apply the statutory law in effect at the time of the decision, even though that law had been adopted subsequent to the events giving rise to the litigation.⁵¹ The *Bradley* Court explained this approach: "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."⁵² The *Bradley* Court then articulated an analytical framework resembling the *Chevron Oil* test in which the decision to apply a legislative change retroactively depended on "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights."⁵³ This framework gave the Court discretion to impose its views concerning the fairness of retroactive application and the extent to which retroactivity would serve the legislative objective. This heightened use of judicial discretion paralleled contemporaneous developments in adjudicative retroactivity.⁵⁴

Subsequently, as the Court retreated from its discretionary approach to adjudicative retroactivity, its analysis of legislative retroac-

⁴⁸ See, e.g., James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 102-23 (1993) (describing nineteenth-century decisions invalidating retroactive legislation on the ground of interference with vested rights and tracing the modern retreat from those principles).

⁴⁹ 416 U.S. 696 (1974).

⁵⁰ 393 U.S. 268 (1969).

⁵¹ See *Bradley*, 416 U.S. at 711; *Thorpe*, 393 U.S. at 281 ("[A]n appellate court must apply the law in effect at the time it renders its decision.").

⁵² *Bradley*, 416 U.S. at 711. The Court relied on *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), and on *Thorpe*. See *Bradley*, 416 U.S. at 715.

⁵³ *Bradley*, 416 U.S. at 717.

⁵⁴ See *supra* pp. 1059-63.

tivity also moved away from discretion and back to a traditional presumption against retroactive application. The Court's use of the traditional presumption in *Bennett v. New Jersey*⁵⁵ and *Bowen v. Georgetown University Hospital*⁵⁶ conveyed mixed signals about *Bradley*'s presumption of retroactivity. The Court moved to address the seeming inconsistency of the decisions in *Landgraf v. USI Film Products*⁵⁷ and *Rivers v. Roadway Express, Inc.*⁵⁸

Justice Stevens's majority opinion in *Landgraf*⁵⁹ acknowledged the "apparent tension" between the two lines of cases on legislative retroactivity⁶⁰ but denied the existence of a conflict.⁶¹ Instead, the Court sought to reconcile both lines of cases by reformulating its retroactivity analysis. Under *Landgraf*, new statutes are to be applied to pending cases, even absent specific legislative authorization, in three circumstances: when a court is considering the propriety of injunctive relief, when the statute addresses a court's jurisdiction, or when the statute changes procedural rules.⁶² The application of current law is justified in these cases, according to the Court, because it does not constitute true retroactivity. A statute only has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."⁶³ The "well-settled presumption" against retroactivity is only triggered when the statute has such "genuinely" retroactive effect.⁶⁴

The *Landgraf* majority opinion did a masterful job of reconciling a variety of apparently conflicting cases into a unified whole, at least as a descriptive matter. The Court reaffirmed the presumption against statutory retroactivity and qualified this presumption with exceptions that covered many prior decisions, including *Bradley* and *Thorpe*. As a normative matter, the Court explained that the presumption "is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation."⁶⁵

⁵⁵ 470 U.S. 632 (1985).

⁵⁶ 488 U.S. 204 (1988).

⁵⁷ 511 U.S. 244 (1994).

⁵⁸ 511 U.S. 298 (1994).

⁵⁹ The factual background of *Landgraf* and *Rivers* is discussed in more detail below. See *infra* pp. 1110-13.

⁶⁰ *Landgraf*, 511 U.S. at 264-65.

⁶¹ See *id.* at 273 (stating that there is "no conflict" between the *Bradley* principle that a court should "apply the law in effect at the time it renders its decision" and "a presumption against retroactivity when the statute in question is unambiguous" (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974))).

⁶² See *id.* at 273-79.

⁶³ *Id.* at 280.

⁶⁴ *Id.* at 277.

⁶⁵ *Id.* at 286.

The Court's decision in *Landgraf* can also be explained by concerns about notice and fairness similar to the concerns that animated the Court's analysis of adjudicative retroactivity in *Chevron Oil*. The *Landgraf* Court explained that the expanded damage provisions added to Title VII by the 1991 Civil Rights Amendments were "the type of legal change that would have an impact on private parties' planning"⁶⁶ and that, even when the law simply increases the remedies for previously illegal conduct, "a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past."⁶⁷

Neither the Court's renewed hostility to retroactive legislation nor its concerns about notice and fairness have caused it to invalidate explicitly retroactive legislation, but there are indications that these considerations have begun to permeate the Court's analysis. In *United States v. Carlton*,⁶⁸ the Court upheld congressional power to eliminate a tax deduction retroactively, even though the taxpayer-plaintiff had specifically structured his transaction in reliance on the existence of the deduction.⁶⁹ However, the Court cautioned that its review was limited in scope⁷⁰ and, in concluding that the statute was constitutional, expressly relied on the statute's "curative" effect⁷¹ and its relatively short period of retroactivity.⁷² Although the majority opinion reaffirmed the application of minimal rational basis scrutiny, the separate opinions of Justices O'Connor and Scalia⁷³ cast doubt on the applicability of the majority's reasoning beyond the specific facts of the case.

⁶⁶ *Id.* at 282.

⁶⁷ *Id.* at 283 n.35.

⁶⁸ 512 U.S. 26 (1994).

⁶⁹ *See id.* at 32-33.

⁷⁰ The Court required only that the statute be rationally related to a legitimate legislative purpose. *See id.* at 35.

⁷¹ *See id.* at 31.

⁷² *See id.* at 32-33. The Court distinguished legislation that created a "wholly new tax" or that involved a long period of retroactive effect. *Id.* at 34. The Court also highlighted tax legislation as an area in which Congress has customarily adopted statutes with short periods of retroactivity and in which taxpayer reliance on the existing provisions of the Internal Revenue Code is unreasonable. The Court found that this custom was "required by the practicalities of producing national legislation." *Id.* at 33 (quoting *United States v. Darusmont*, 449 U.S. 292, 296 (1981)) (internal quotation marks omitted). *But see* *Tate & Lyle, Inc. v. Commissioner*, 87 F.3d 99, 107-08 (3d Cir. 1996) (distinguishing *Carlton* and upholding an IRS regulation with a six-year period of retroactivity against a due process challenge).

⁷³ *See Carlton*, 512 U.S. at 36-38 (O'Connor, J., concurring in the judgment) (arguing that recognition of the need to raise revenue as a rational legislative purpose would legitimate every retroactive tax statute, and warning that the "governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose"); *id.* at 39-40 (Scalia, J., concurring in the judgment) (arguing that, under the majority's approach to substantive due process, legislation "eliminating the specifically promised reward for costly action after the action has been taken, and refusing to reimburse the [over \$600,000] cost" is "harsh and oppressive by any normal measure").

II. RATIONALIZING RETROACTIVITY ANALYSIS

A. *The Indeterminate Nature of Retroactivity*

A recurring problem with the Supreme Court's retroactivity analysis has been the Court's inability to comprehend the nature of retroactive lawmaking. The Court has traditionally characterized retroactivity as a binary construct within which the application of a new rule is either retroactive or prospective.⁷⁴ In *Landgraf*, the Court explained that a retroactive rule is one that "attaches new legal consequences to events completed before its enactment," whereas a rule that applies only to conduct occurring subsequent to its enactment is prospective.⁷⁵ This binary construct is artificial, however, and the Court's use of the construct to constrain the range of temporal options is too facile.⁷⁶

To begin with, a rule that is fully prospective should not apply to preenactment transactions at all; most rules that the Court would describe as prospective in fact affect prior transactions. For example, elimination of the tax deduction for interest on home mortgages, even if implemented in future taxable years, would have a substantial impact on existing homeowners.⁷⁷ Grandfathering provisions, which provide that transactions initiated under an old rule will continue to be governed by that rule, are tools used to limit the impact of a legal change and to achieve more complete prospectivity. Legislatures make limited use of grandfathering provisions, but the very existence of such provisions belies the notion that new legislative rules are generally prospective. In the absence of any retroactive effect, grandfathering would be unnecessary.⁷⁸

As an alternative to grandfathering, legislatures may use phase-in periods or postenactment effective dates, which moderate but do not eliminate the retroactive impact of new rules.⁷⁹ These transition peri-

⁷⁴ See, e.g., *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-38 (1990) (framing the issue as whether a statute should be applied retroactively to judgments entered before its effective date).

⁷⁵ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

⁷⁶ The practices of other countries with regard to legislative retroactivity differ substantially from the practices in the United States and demonstrate the wide range of approaches to the problem of retroactive lawmaking. See *infra* note 146 (describing Australian and Brazilian approaches to retroactive tax legislation).

⁷⁷ Professor Graetz provides a similar example: prospective repeal of the tax exemption for interest on an outstanding municipal bond. See Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 57-58 (1977).

⁷⁸ Takings jurisprudence serves an analogous function. Virtually all regulatory changes addressed by takings analysis are nominally prospective; compensation under the Takings Clause is transition relief for the retroactive effects of nominally prospective regulation. See, e.g., Kaplow, *supra* note 3, at 511-12 (analogizing transition issues in retroactivity and takings contexts).

⁷⁹ See, e.g., *Kaiser*, 494 U.S. at 831 (describing the congressional decision to delay a statutory effective date for six months after enactment "[t]o permit courts and the bar to prepare themselves for the changes wrought by the Act").

ods reduce the effect of new rules on contemplated transactions or transactions in progress at the time of adoption and, like grandfathering, reflect the fact that nominally or technically prospective rules have retroactive effects.⁸⁰

The retroactive impact of nominally prospective rules has led some commentators to describe two senses in which a rule can operate retroactively.⁸¹ Primary retroactivity describes rules that "change what was the law in the past";⁸² secondary retroactivity describes nominally prospective rules with retroactive effects. Although the scholars who initially drew this distinction recognized that both types of retroactivity present similar concerns and should be analyzed similarly,⁸³ courts have recently used the distinction to narrow the class of legal rules subject to retroactivity analysis by excluding legal changes that are nominally prospective.⁸⁴ The Ninth Circuit took this approach in *National Medical Enterprises, Inc. v. Sullivan*,⁸⁵ in which it characterized a Medicare regulation that limited reimbursement to Medicare providers as involving merely secondary retroactivity. Although the regulation "undeniably affected the *future* legal consequences of past transactions,"⁸⁶ it did not "alter[] the *past* legal consequences of past actions."⁸⁷ Accordingly, the court concluded that the regulation did "not violate any rule relating to retroactivity," such as the Supreme

⁸⁰ See generally Graetz, *supra* note 77, at 87 (arguing that phased-in or delayed effective dates are superior to grandfathering as a means of providing transition relief).

⁸¹ See, e.g., John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CAL. L. REV. 12, 58-59 (1967) (distinguishing between primary and secondary retroactivity); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 217-18 (1960) (distinguishing between "method" retroactivity and "vested rights" retroactivity); see also Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (defining retroactive rules as rules that "give[] to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute").

⁸² *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring).

⁸³ See, e.g., Hochman, *supra* note 81, at 692 (stating that nominally prospective statutes with retrospective effects should be included "within any discussion of retroactive legislation"); McNulty, *supra* note 81, at 59 ("[S]tatutes which purport to have only post-enactment effect may also be classified as retroactive insofar as they bear importantly on prior events by affecting their future legal consequences as of the time the new law is adopted.").

⁸⁴ Justice Stevens took this approach in *Landgraf*, stating that a statute does not operate "retroactively" merely because it defeats expectations or is applied to pre-enactment conduct. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994); see also *Landgraf v. USI Film Prods. and Rivers v. Roadway Express, Inc.*, 511 U.S. 244, 293 n.3 (1994) (Scalia, J., concurring in the judgments) (arguing that secondary retroactivity does not violate the presumption against retroactive application of statutes).

⁸⁵ 957 F.2d 664 (9th Cir. 1992).

⁸⁶ *Id.* at 671.

⁸⁷ *Id.* (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)).

Court's limitation on retroactive rulemaking by administrative agencies.⁸⁸

This Article does not accept a definitional distinction between primary and secondary retroactivity. In addition to constituting an improper reading of the work of early retroactivity scholars, the distinction is analytically incoherent.⁸⁹ Defining retroactivity in terms of the transition costs created by legal change demonstrates this incoherence. Although the effort to assess and address transition costs motivates retroactivity analysis,⁹⁰ these costs are largely unaffected by whether a legal change is nominally retroactive.⁹¹ For example, the distribution and wealth effects of a change in liability rule are no different in kind than the effects of a change directed to property values. A rule that retroactively imposes a million dollars in liability on a manufacturer for past pollution activities has the same wealth effect as the nominally prospective adoption of stricter emissions controls that reduce the value of the manufacturer's factory by a million dollars. Moreover, if the purpose of a statute is to deter harmful conduct, retroactive imposition of liability does not serve this objective, even though retroactive imposition can serve other legitimate ends, such as specifying a class of persons to bear the costs of previously harmful activities.⁹²

It is therefore possible to distinguish between nominally retroactive rules, which are explicitly directed at preenactment transactions, and nominally prospective rules, which expressly cover only postenactment transactions but have some effect on prior transactions. There are also distinctions within the category of nominally retroactive rules. For example, a lawmaker can limit the application of a rule to particular subclasses. A rule that applies only in subsequently filed litigation af-

⁸⁸ *Id.*; see also *Bowen*, 488 U.S. at 208 (rejecting the general authority of administrative agencies to engage in retroactive rulemaking).

⁸⁹ See, e.g., Kaplow, *supra* note 3, at 515 (criticizing the narrow definition of retroactivity employed by Munzer as unsatisfactory); William V. Luneberg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 156-58 (testing the distinction between primary and secondary retroactivity and concluding that "courts will be hard-pressed to invent principled distinctions between types of retroactivity").

⁹⁰ See, e.g., Kaplow, *supra* note 3, at 518 (framing retroactivity analysis in terms of the appropriate response to the transition costs created by changes in government policy).

⁹¹ See, e.g., Graetz, *supra* note 77, at 49-50 (describing the similarity in impact of nominally prospective and nominally retroactive laws and observing "the inadequacy of the analysis supporting widespread condemnations of nominally retroactive provisions, often accompanied by benign acceptance of prospective rules").

⁹² The allocation of these costs should be distinguished from the imposition of social or moral stigma. Retroactive civil liability need not convey any moral judgment about the propriety of previously permitted activity. To the extent that retroactive legal change attempts to convey moral judgments through punitive means, the implications of retroactivity might properly be addressed through a broader reading of the Ex Post Facto Clause. See, e.g., Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 323-26 (1993) (arguing that the Ex Post Facto Clause should apply to retroactive applications of punitive civil laws).

fects some, but not all, preenactment transactions. A rule that applies to all pending cases, regardless of when they were filed or when the events that gave rise to the lawsuit transpired, is more retroactive. Most retroactive are provisions such as section 27A(b) of the Securities Exchange Act of 1934, which apply a new rule to change the result in fully litigated final judgments.⁹³

Both courts and legislatures can control the temporal range of their lawmaking. Apart from the line-drawing associated with traditional retroactivity analysis, courts gain additional flexibility through the use of their equitable and remedial powers. One example is the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁹⁴ in which the Court struck down as unconstitutional the federal bankruptcy code's grant of jurisdiction to bankruptcy court judges.⁹⁵ Concerned about the impact of this decision on pending bankruptcy litigation, the Court stayed its decision, in effect providing a transition period to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."⁹⁶ In *Teague v. Lane*,⁹⁷ the Court achieved a similar result through the use of its remedial powers. By constraining the scope of the remedy provided through habeas corpus review, the Court limited the application of its constitutional criminal procedure decisions to a class of pending cases, thereby mediating between purely prospective application and full retroactivity.⁹⁸

Understanding the concept of retroactivity as a spectrum or range of temporal options rather than as a binary construct provides a better description of the nature and consequences of legal change, but even this analysis remains incomplete. Within the spectrum, the preceding discussion has relied on the *Landgraf* conception of retroactive rules as rules that change the legal effect of preadoption events. This conception is troubling, however, because the very components of the definition are themselves indeterminate. Stephen Munzer has observed, for example, that specifying the temporal scope of events to which a new rule is to be applied is definitionally insufficient; one must also specify

⁹³ See *infra* 1077-78 (discussing section 27A and the *Plaut* decision). The Civil Rights Act of 1990, S. 2104, 101st Cong. (1990), the bill vetoed by President Bush that preceded the statute addressed in *Landgraf*, would have applied retroactively to final judgments. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 255 n.8 (1994) (describing the retroactivity provisions of the 1990 bill); *id.* at 255-56 & n.9 (citing the retroactivity provisions as one reason for the veto).

⁹⁴ 458 U.S. 50 (1982).

⁹⁵ See *id.* at 87.

⁹⁶ *Id.* at 88.

⁹⁷ 489 U.S. 288 (1989).

⁹⁸ See *id.* at 305-10 (adopting Justice Harlan's position that new constitutional criminal procedure rules apply retroactively only to cases pending on direct review).

the nature of the application.⁹⁹ Munzer identifies two types of retroactive laws. Strongly retroactive rules are backward-looking; they change the legal consequences of prior events from the date at which the event occurred.¹⁰⁰ Thus, strong retroactivity operates as if the new rule had always been the law. Weakly retroactive rules are forward-looking; they change the legal consequences of prior events, but only from the date of the creation of the rule.¹⁰¹ To illustrate the contrast, Munzer describes a law retroactively validating a previously invalid marriage. If the law is strongly retroactive, the marriage is treated as if it had always been valid. If the law is weakly retroactive, the marriage is only valid from the date on which the validating law is adopted; the law does not erase the previous period of invalidity.¹⁰²

The *Landgraf* formulation is also troubling because it relies on a conception of legal rights or obligations that predates the adoption of a legal change without specifying where this conception comes from. The *Landgraf* Court stated that retroactive rules are rules that change the legal effects of preenactment conduct. In the absence of adjudication determining those effects, how is a court to ascertain whether they have been changed? It does not make sense to describe a retroactive rule as increasing a party's liability unless there has been some initial assessment of that liability. In the absence of judicial action fixing the rights and responsibilities of the parties, arguably no such liability exists. Looking at parties' expectations to determine if a legal change is sufficient to trigger heightened judicial scrutiny is one alternative, but this standard is also problematic.¹⁰³

Because the application of a new rule to post-adoption events is not considered retroactive, the *Landgraf* test also requires the decisionmaker to decide when the rule has been adopted. Determining the date of adoption is not always straightforward. Although the date when a statute is signed into law can be specified with precision, the date of the creation of another type of legal rule, like a judicial interpretation of that statute, is often less clear. Indeed, one difficulty in applying the *Chevron Oil* test is determining whether adjudication has created a new legal rule at all.¹⁰⁴

⁹⁹ See Munzer, *supra* note 5, at 373, 385-90.

¹⁰⁰ See *id.* at 383.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ These expectations can be wrong for many reasons having nothing to do with a retroactive change in the law. Clarifications in the law or the failure of lawmakers to enact expected changes can similarly defeat parties' expectations about the legal consequences of their actions. Under this reasoning, these situations should be treated analogously to retroactive lawmaking. See Kaplow, *supra* note 3, at 517-18.

¹⁰⁴ Professors Fallon and Meltzer provide an extended analysis of the "new rule" requirement of *Chevron Oil*. See Fallon & Meltzer, *supra* note 3, at 1796.

Finally, the specification of the relevant event is a key component of retroactivity analysis and, as the *Bradley* decision illustrates, may not be self-evident. In *Bradley*, the Court used a statute passed during the pendency of a lawsuit as the authority for an award of attorneys' fees.¹⁰⁵ Whether the Court's use of the statute even constituted retroactive application depended on one's construction of the relevant event.¹⁰⁶ If the relevant event was the commencement of litigation or the incurring of attorneys' fees, the statute was applied retroactively. If the operative event was the ultimate judgment awarding attorneys' fees, application of the statute was not retroactive.¹⁰⁷ Attorneys' fees are commonly awarded in a collateral proceeding at the conclusion of the case. The relevant event can therefore be defined in such a way as to render application of the statute in *Bradley* retroactive only if applied to previously terminated litigation.¹⁰⁸

The foregoing discussion underscores the problems associated with treating retroactivity in terms of bright-line categories. Nonetheless, these categories, as the following section discusses, have been central to the Court's analysis of the constitutional limitations on retroactive lawmaking. The discussion also suggests that formulating a precise definition of retroactivity is a difficult enterprise — one that is beyond the scope of this Article.¹⁰⁹ The elusive nature of a precise definition is not critical to the analysis in this Article because, although drawing a precise line between retroactive and prospective legal rules is difficult, classifying legal changes by degree and distinguishing between applications that have greater and lesser retroactive effects is possible. This distinction converts the evaluation of retroactive lawmaking from a binary issue into a quantitative analysis. Rather than asking

¹⁰⁵ *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 709–10 (1974).

¹⁰⁶ Justice Scalia has explained that the appropriate question is the determination of the relevant retroactivity event, which is to be determined by inquiry into the statutory purpose. See *Landgraf v. USI Film Prods. and Rivers v. Roadway Express, Inc.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring in the judgments). He has, of course, disclaimed the legitimacy of judicial inquiry into statutory purpose in other contexts. See generally Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 26–27 (1994) (describing Justice Scalia's rejection of legislative purpose analysis in favor of textual analysis).

¹⁰⁷ See *Landgraf and Rivers*, 511 U.S. at 289 (Scalia, J., concurring in the judgments) (“[A]pplication of an attorney’s fees provision to ongoing litigation is arguably not retroactive.”). However, the trial court entered the initial judgment awarding attorneys’ fees prior to the adoption of the statute. See *Bradley*, 416 U.S. at 706.

¹⁰⁸ The text of the statute at issue in *Bradley* offers support for characterizing the relevant event as the entry of final judgment. The statute authorized an award of fees “[u]pon the entry of a final order by a court of the United States.” *Bradley*, 416 U.S. at 709 n.12. No such final order had been entered in *Bradley* by the court of appeals (or the Supreme Court) prior to the enactment of the statute.

¹⁰⁹ Indeed, efforts to formulate a precise definition of retroactivity may be misguided. To the extent that various problems make an attempted definition incomplete, reliance on that definition will obfuscate the transition issues created by nominally prospective legal changes. For an example, see pp. 1117–18 below.

whether retroactivity is appropriate, we should ask what degree of retroactive impact is appropriate.

B. Constitutional Constraints on Retroactivity

The analysis of current retroactivity law in Part I demonstrates that prudential considerations rather than constitutional arguments have dominated the discourse about the appropriate scope of legal change. Several Justices have invoked constitutional support for their retroactivity analyses, but the Court has not fully confronted the issue of whether and to what extent the Constitution limits judicial or legislative ability to define the temporal effect of a new legal rule.¹¹⁰ Although a variety of constitutional provisions, such as the Contract,¹¹¹ Takings,¹¹² and Equal Protection Clauses, appear facially applicable to retroactivity analysis,¹¹³ doctrinal limits on the reach of these provisions have curtailed their impact on the temporal reach of

¹¹⁰ In the civil context, the Court as a whole continues to adhere to the principle set forth in *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), that the federal constitution does not speak to the issue of retroactive adjudication. *See id.* at 364-66. *Sunburst* only addressed the issue of whether the federal constitution prohibits a state court from adjudicating prospectively. *See id.* at 364. Article III may impose broader limitations on the federal government. The Court's failure to distinguish explicitly between the state and federal governments in this context leaves open the question of how constitutional limitations affect retroactivity in the federal lawmaking process. This question also raises interesting federalism issues that are beyond the scope of this Article.

¹¹¹ *See, e.g.,* *General Motors Corp. v. Romein*, 503 U.S. 181, 186-91 (1992) (concluding that, although retroactive legislation could violate the Contract Clause, a Michigan statute that retroactively overturned the state supreme court's interpretation of an earlier workers' compensation statute did not violate the Contract Clause because it did not impair any preexisting contractual obligation).

¹¹² *See, e.g.,* *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641-42 (1993) (observing that it would be "surprising" if the statute at issue violated the Takings Clause given that it did not violate the Due Process Clause (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)) (internal quotation marks omitted)). *See generally* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1 (1995) (describing limitations on the ability of takings jurisprudence to redress the costs of government action).

¹¹³ The constitutional doctrines applicable to the temporal reach of a new legal rule have been analyzed extensively elsewhere. *See, e.g.,* HART & SACKS, *supra* note 1, at 619-28 (discussing constitutional limitations on statutory lawmaking); J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910, 945-53 (1994) (evaluating the separation of powers implications of retroactive legislation); Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1073-75 (1993) (criticizing the courts for failing adequately to scrutinize retroactive economic laws for due process violations).

legal change.¹¹⁴ Even the Ex Post Facto Clause, with its explicit prohibition on retroactivity, applies only in the criminal context.¹¹⁵

The Due Process Clause appears to be most directly on point, but the Court has not subjected retroactive legislation to close due process scrutiny, requiring only that the legislation have some rational basis. The Court has made clear, however, that the retroactive operation of a statute is subject to a separate due process inquiry:

[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.¹¹⁶

In its opinion in *Carlton*, the Court suggested criteria for evaluating the rationality of retroactive legislation, including the remedial nature of the statute and the period of retroactive operation.¹¹⁷ These criteria are applied only according to the lenient requirement of "a legitimate legislative purpose furthered by rational means."¹¹⁸ Thus, although early decisions rendered in an era of rigorous due process review suggested theories under which retroactive legislation would have been especially problematic, the post-*Lochner* decline in substantive due process has undermined the premise of those decisions.¹¹⁹ Under current doctrine, the Due Process Clause does not prohibit retroactive legislation unless that legislation is harsh and oppressive.¹²⁰

¹¹⁴ See generally GERALD GUNTHER, CONSTITUTIONAL LAW 465-90 (12th ed. 1991) (collecting cases on the Takings Clause and the Contract Clause and observing that these provisions have not served as restraints on retroactive legislation when there is a sufficiently overriding public interest).

¹¹⁵ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798). But see THE FEDERALIST NO. 44, at 282-83 (James Madison) (Clinton Rossiter ed., 1961) (describing "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts . . . [as] contrary to the first principles of the social compact and to every principle of sound legislation" without expressly limiting the criticism to criminal legislation). A complete analysis of the Ex Post Facto Clause is beyond the scope of this Article, which addresses changes in civil rules.

¹¹⁶ *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (citation omitted) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)).

¹¹⁷ See *United States v. Carlton*, 512 U.S. 26, 30-33 (1994).

¹¹⁸ *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

¹¹⁹ See, e.g., *Carlton*, 512 U.S. at 34 (explaining that cases requiring greater judicial scrutiny were decided "during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded'" (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963))); Kainen, *supra* note 48, at 102 ("[R]etroactivity is a superfluous category in modern due process analysis."); Weiler, *supra* note 113, at 1072 (stating that the Court has never sustained a due process challenge to any retroactive economic law).

¹²⁰ See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) ("The Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation,

The Court has not identified an analogous due process limitation on adjudicative retroactivity. This silence is not surprising, given that adjudicative retroactivity was the exclusive practice for most of the period during which due process limitations would likely have been developed.¹²¹ Even when the experiment with prospective adjudication under the *Chevron Oil* test presented the opportunity for the Justices to use due process arguments in support of nonretroactivity, none did so. Those Justices who defended adjudicative nonretroactivity based on considerations of fairness, notice, and reliance never argued that these factors were of constitutional magnitude.

Indeed, the constitutionality of retrospective adjudication is so well established that constitutionally based objections have been raised instead against the prospective adjudication experiment. The most prominent objection is based on principles of separation of powers and constitutional conceptions of the judicial power. The narrower form of the constitutional objection to prospective adjudication is based on the case or controversy requirement.¹²² In *James Beam*, Justice Blackmun argued that a decision that does not affect the rights of the litigants appearing before the court but merely sets forth a rule of law applicable to future cases is not within a federal court's judicial power — a power limited to deciding only actual cases brought before it.¹²³

Justice Scalia's opinion in *James Beam* went further than Justice Blackmun's, arguing that the nature of the judicial power conferred upon the federal courts by the Constitution is inconsistent with prospective adjudication.¹²⁴ Justice Scalia's argument is based on what he described as the common law tradition embodied in the judicial

unless the consequences are particularly 'harsh and oppressive.'" (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938))).

¹²¹ Similarly, the Court has never taken the view that judicial changes in the law are subject to the Takings Clause. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1450-55 (1990) (suggesting that current doctrine does not treat judicial changes in the law as takings, but arguing that it should do so). Nor has the Court, in the modern era, read the Contract Clause to invalidate state judicial decisions undermining contractual expectations. See, e.g., *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924) (holding that the Contract Clause is "directed only against impairment by legislation"); Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1375 (1992) [hereinafter Thompson, *Judicial Impairment*] (describing the Supreme Court's continued adherence to this view).

¹²² See, e.g., *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 446 (1993) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)) (alteration in original)).

¹²³ See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring in the judgment) ("[T]his Court's function in articulating new rules of decision must comport with its duty to decide only 'Cases' and 'Controversies.'" (quoting U.S. CONST. art. III, § 2, cl. 1)).

¹²⁴ See *id.* at 548-49 (Scalia, J., concurring in the judgment).

power established by Article III¹²⁵ and is perhaps modeled most closely on Jeremy Bentham's conception of the judicial role.¹²⁶ Acknowledging that judges do "make" law, Justice Scalia nonetheless argued in *James Beam* that lawmaking in the judicial sense consists only of "the power 'to say what the law is' . . . not the power to change it."¹²⁷ In his view, one of the things that distinguishes judicial from legislative lawmaking is the permissible temporal scope of the lawmaking process. He elaborated on this point in *Harper*:

Fully retroactive decisionmaking [is] considered a principal distinction between the judicial and the legislative power: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases."¹²⁸

Thus, to the extent that the formalist distinction between legislative and judicial lawmaking powers depends on temporal limits on the lawmaking process, separation of powers considerations can be used to argue that adjudication should be exclusively retroactive.

However, opinions subsequent to *Griffith*, including *James Beam*, *American Trucking*, and *Harper*, indicate that a majority of the Court is unwilling to accept Justice Scalia's argument, at least outside the criminal context.¹²⁹ As described above, the plurality opinion in *American Trucking* explicitly rejected the applicability of *Griffith* to civil

¹²⁵ See *id.* at 549.

¹²⁶ See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 222-23 (1989) (describing Bentham's jurisprudence as both rejecting the existence of a common law independent of statutory law and maintaining that lawmaking, properly understood, refers only to legislation).

¹²⁷ *James Beam*, 501 U.S. at 549 (Scalia, J., concurring in the judgment) (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); cf. Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 349 (1994) (arguing that "[t]he business of the federal judiciary is deciding cases, not saying what the law is"); Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 390-91 (1994) ("The specialized function of courts is not law-interpretation, but deciding cases.").

¹²⁸ *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* *91 (Boston, Little, Brown & Co. 1868)) (alteration in original).

¹²⁹ Subsequent opinions also cast doubt upon the extent to which the result in *Griffith* was grounded in the Constitution. See *American Trucking Ass'n v. Smith*, 496 U.S. 167, 197-200 (1990) (plurality opinion) (analyzing policy reasons, not constitutional arguments, for limiting *Griffith*'s per se retroactivity rule to criminal cases); *Harper*, 509 U.S. at 120-22 (O'Connor, J., dissenting) (same); cf. *Harper*, 509 U.S. at 97 (relying on, but not expressly adopting, the "basic norms of constitutional adjudication" that animated [the Court's] view of retroactivity in the criminal context" in prohibiting selective retroactive application of federal law in noncriminal cases) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)).

cases.¹³⁰ In fact, despite the apparent retreat from *Chevron Oil*,¹³¹ a majority of the Court has never expressly recognized any constitutional limitation on adjudicative nonretroactivity.¹³²

Principles of separation of powers may similarly be relevant to legislative retroactivity by defining the nature and scope of the legislative power. The Court's recent decision in *Plaut v. Spendthrift Farm, Inc.*¹³³ considered the possibility that the nature of the legislative power may limit the temporal reach of legislation. *Plaut* involved a challenge to section 27A(b), which was added to the Securities Exchange Act of 1934¹³⁴ in order to undo the retroactive effect of the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.¹³⁵

Section 27A(b) directed courts to reopen securities fraud cases that had been dismissed on the authority of *Lampf*, even if the judgment in those cases had become final, if the cases had been timely filed under the applicable pre-*Lampf* limitations period.¹³⁶ In *Plaut*, the Court held that the congressional direction to reopen final judgments impermissibly interfered with the judicial power to decide cases and "to render dispositive judgments."¹³⁷ Under Article III, such judgments are subject to review only by higher courts — not by Congress.¹³⁸

¹³⁰ See *supra* pp. 1060–61.

¹³¹ See *supra* pp. 1060–63.

¹³² Justice Scalia's constitutionally based argument against nonretroactivity is difficult to reconcile with his concurrence in the judgment in *American Trucking*, an opinion that seems to suggest that an erroneous judicial decision may be applied nonretroactively. See *American Trucking*, 496 U.S. at 204–05 (Scalia, J., concurring in the judgment) (claiming that stare decisis considerations permit a Justice who dissented in a previous case to vote later in a way that denies retroactive application of the earlier case). For an attempted reconciliation, see Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 304–06 (1994).

¹³³ 115 S. Ct. 1447 (1995).

¹³⁴ Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387.

¹³⁵ 501 U.S. 350 (1991). In *Lampf*, the Court adopted a uniform federal statute of limitations for private securities fraud litigation under the 1934 Act. See *id.* at 354–62. The 1934 Act contains no express limitations period, and the *Lampf* Court found an appropriate period by borrowing one from another section of the statute. See *id.* at 358–62. This new limitations period was shorter than the period being used in most jurisdictions at the time of the *Lampf* decision, and many members of Congress believed that the new limitations period was too short. See, e.g., S. 1533, 102d Cong. (1991) (bill introduced by Sen. Bryan to lengthen limitations period); H.R. 3185, 102d Cong. (1991) (similar bill introduced by Rep. Markey). Although Congress debated replacing the period entirely, the eventual legislation simply overturned the aspect of the *Lampf* decision that applied its holding retroactively to pending cases. See generally Jill E. Fisch, *As Time Goes By: New Questions About Statute of Limitations for Rule 10b-5*, 61 FORDHAM L. REV. 5101, 5109–15 (1993) (describing the circumstances that gave rise to the *Lampf* decision and the congressional response).

¹³⁶ See 15 U.S.C. § 78aa-1(b)(1)–(2) (1994); *Plaut*, 115 S. Ct. at 1451–52.

¹³⁷ *Plaut*, 115 S. Ct. at 1453 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (internal quotation marks omitted).

¹³⁸ See *id.*

The *Plaut* decision relied in part on formal separation of powers principles.¹³⁹ The Court reviewed a series of historical sources that were consistent with Justice Scalia's formalist approach to separation of powers¹⁴⁰ and ascribed to the Framers a "sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts."¹⁴¹ Despite its apparent embrace of a rigid separation of powers framework, the Court based its conclusion on the narrower ground that Congress had improperly interfered with the conclusiveness of a court-entered judgment. That is, the only element of the adjudication process that the Court found to be exclusively judicial in nature was the power to render a judgment sufficiently final to preclude legislative revision:

When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." . . . Our decisions stemming from *Hayburn's Case* . . . have uniformly provided fair warning that such an act exceeds the powers of Congress.¹⁴²

Nevertheless, the Court expressly reaffirmed the power of Congress to revise judgments during the appellate process through retroactive statutory amendment.¹⁴³

Plaut's limitation on the lawmaking power of Congress stems from the conclusion that the power granted to courts by Article III is the power to make determinations in individual cases and to enter judgment based on those determinations. Under this interpretation of Article III, congressional lawmaking that interferes with that power usurps the judicial role and impermissibly crosses the line that separates legislative lawmaking from judicial lawmaking. The Court's holding in *Plaut* thus supports the idea of the Constitution as a source of temporal limits on the lawmaking process.

C. *Limitations of the Constitutional Analysis*

Reliance on constitutionally based arguments is problematic, even assuming that the Constitution's separation of powers structure mandates some temporal limits on federal lawmaking. The Constitution does not define retroactivity; the parameters of any constitutional limi-

¹³⁹ Although the respondents in *Plaut* argued that section 27A(b) violated both separation of powers and the Due Process Clause, the Court did not address the due process challenge because separation of powers provided a narrower ground for adjudication. *See id.* at 1452.

¹⁴⁰ *See id.* at 1453-56.

¹⁴¹ *Id.* at 1454.

¹⁴² *Id.* at 1456 (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)) (citations omitted).

¹⁴³ *See id.* at 1457 (holding that the distinction between final judgments and judgments that are still on appeal is implicit in Article III's creation of a judicial department).

tations are therefore inherently ambiguous.¹⁴⁴ Moreover, because application of a legal rule cannot be constrained within objective categories labeled "retroactive" or "nonretroactive,"¹⁴⁵ constitutional principles cannot definitively answer questions of legitimacy.¹⁴⁶ For example, recognizing that most new rules impose some retroactive effects undermines the claim that retroactive legislation necessarily violates the Due Process or Takings Clauses. Similarly, arguments that Article III requires retroactive adjudication, as articulated by Justice Scalia,¹⁴⁷ neglect the fact that most judicially created rules are only somewhat retroactive; long-established principles of adjudication limit the degree to which nominally retroactive rules impact prior events.¹⁴⁸ Finally, blurring the bright line between retroactivity and prospectivity weakens the separation of powers argument that the position of the lawmaker in the constitutional structure inherently limits the temporal reach of a legal rule.

Thus, seekers of constitutional solutions are reduced to the argument that the Constitution supplies outer limits on retroactivity analysis by requiring some minimum degree of retroactivity for judicial

¹⁴⁴ This ambiguity is present even in the criminal context, in which the Ex Post Facto Clause expressly addresses retroactive lawmaking. On one hand, the Court has held that neither retroactive civil legislation with punitive consequences nor retroactive application of certain new procedural rules violates the Clause. See Aiken, *supra* note 92, at 333-49. On the other hand, retroactively enhancing the punishment applicable to an offense through a rule of legislative or judicial origin is unconstitutional. See generally *id.* (analyzing the Court's limitation of the Ex Post Facto Clause in the civil context to cases involving unmistakably punitive statutes).

¹⁴⁵ See *supra* section II.A.

¹⁴⁶ See, e.g., Levmore, *supra* note 3, at 267 (describing the prospective-retroactive distinction as "elusive or even senseless" with reference to the economic effects of tax enactments). This conclusion is furthered by the recognition that our instincts about the "normal" temporal range associated with a particular method of legal change are the product of socialization rather than intuition. Practices vary substantially in other countries, even countries with similar legal systems. For example, the Australian government often announces legislation by media release at the time that it is proposed; if the legislation is enacted, it is effective from the date of the release, even though adoption of the legislation may not occur for some time. See Michael Gill, *New Approach Needed to Reduce Retrospective Law Problems*, AUSTRALIAN L. NEWS, Aug. 1986, at 5 (describing this practice as "government by media release"). Thus, tax legislation in Australia may be considerably more retroactive than most U.S. legislation. In contrast, the Brazilian Constitution goes beyond limiting the nominal retroactivity of tax legislation and limits its retroactive effect as well. See BRAZ. C.F. (1988) title VI, ch. I, § II, art. 150 (III) (a)-(b) (prohibiting the government from collecting taxes "for taxable events that occurred before the law that instituted or increased them went into force" and barring the collection of any taxes "in the same fiscal year in which the law that instituted or increased them was published"), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 79-80 (Albert P. Blaustein & Gisbert H. Flanz eds. & Keith S. Rosenn trans., BRAZIL Supp. 1993).

¹⁴⁷ See *supra* pp. 1075-76.

¹⁴⁸ The temporal reach of nominally retroactive rules may be limited by a variety of doctrines, including *res judicata*, statutes of limitations, the *Teague* limitations on the scope of habeas corpus, and the principles of finality discussed in *Plaut*. A jurisdictionally based constitutional analysis does not incorporate these doctrines and thus provides an inadequate descriptive claim about the current law of retroactivity.

decisions and prohibiting some varieties of retroactive legislation. This watered-down constitutional claim returns the discussion to a quantitative analysis of how much retroactive effect is permissible. Moreover, the indeterminate nature of retroactivity explains the Court's consistent return to policy considerations. Even if the Constitution provides some tools, such as due process, for limiting the temporal reach of new legal rules in extreme cases, there is a range of possible temporal applications to which the Constitution does not speak at all.

The separation of powers arguments for limiting adjudicative non-retroactivity are subject to additional problems. First, an analysis that defines temporal limits on lawmaking power by characterizing the lawmaking as legislative or judicial in nature is inherently circular. Justice Scalia has argued that the judicial power by its nature does not include prospective lawmaking power; judicial lawmaking must therefore be limited to pure retroactivity.¹⁴⁹ The only constitutional limit upon which Justice Scalia relies, however, is the requirement that courts exercise the judicial power; he cites no independent constitutional authority for the proposition that retroactivity is a definitional component of the judicial power.¹⁵⁰ If, in contrast, the judicial power were defined to include prospective adjudication, the constitutionally derived lawmaking power of the courts could not be subjected to temporal limitations on the grounds that the judicial power is "inherently" retrospective. This patent circularity is one of the most striking logical weaknesses of the separation of powers approach to retroactivity.¹⁵¹

Second, Justice Scalia's narrow characterization of the judicial power is based on a formalist approach to separation of powers doctrine. Although the thorny formalist-functionalist debate over separation of powers principles is too involved to resolve here, functionalist principles counsel a broader conception of the judicial role in lawmaking.¹⁵² Many recent cases addressing the tension between the legislative and judicial functions have favored a functionalist approach. For example, in *Mistretta v. United States*¹⁵³ the Court upheld against a

¹⁴⁹ See *supra* pp. 1075-76.

¹⁵⁰ See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (Scalia, J., concurring in the judgment).

¹⁵¹ It is thus also a logical weakness of the *Plaut* decision, which relied in part on such an approach. See *supra* p. 1078.

¹⁵² Functionalism rejects the theory that the Constitution sharply separates the powers accorded to each branch, arguing that "the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1465 (1995) (Breyer, J., concurring in the judgment) (citing THE FEDERALIST NO. 48 (James Madison)). Justice Breyer's opinion in *Plaut* is directly functionalist: he did not advocate an absolute prohibition against reopening final judgments but found the particular statute at issue unconstitutional because it "both reopens final judgments and lacks the liberty-protecting assurances that prospectivity and greater generality would have provided." *Id.* at 1465.

¹⁵³ 488 U.S. 361 (1989).

separation of powers challenge the power of the Federal Sentencing Commission to make substantive rules of a political nature, although the Court conceded that this power would generally be characterized as legislative.¹⁵⁴ Similarly, in *Freytag v. Commissioner*,¹⁵⁵ the Court held that Article I courts can exercise the federal judicial power.¹⁵⁶ Even Justice Scalia has acknowledged the difficulty of drawing a formal distinction between courts and Congress that is based on the truism that courts adjudicate and Congress legislates: "'Adjudication' . . . is no more an 'inherently' judicial function than the promulgation of rules governing primary conduct is an 'inherently' legislative one."¹⁵⁷

The nature of the judicial power has also changed over time, further weakening the notion that the definition of judicial power can serve as an objective benchmark for limits on retroactive lawmaking. Although common law adjudication persists, the judicial role has expanded to encompass constitutional and statutory interpretation. Whatever theory of constitutional interpretation one espouses, and whether or not one accepts the Supreme Court's claim of interpretive supremacy in *Planned Parenthood v. Casey*,¹⁵⁸ it is clear that constitutional interpretation involves the development of changing legal rules. Determining the Court's role in effecting those changes would require addressing the nature of, and justification for, constitutional change.

The judicial role has experienced even greater growth in the area of statutory interpretation. Statutory interpretation, which in recent years has spawned an entire jurisprudence of its own, may require courts to enter a lawmaking partnership with Congress.¹⁵⁹ In some areas, Congress has ceded the development of an entire field of law to the courts.¹⁶⁰ In the face of open-textured or minimalist legislative efforts that leave the bulk of the lawmaking function to the judiciary,

¹⁵⁴ See *id.* at 380-412.

¹⁵⁵ 501 U.S. 868 (1991).

¹⁵⁶ See *id.* at 889-90.

¹⁵⁷ *Id.* at 910 (Scalia, J., concurring in part and concurring in the judgment) (citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)).

¹⁵⁸ 505 U.S. 833, 868 (1992) (declaring that the Court is "invested with the authority to decide [the people's] constitutional cases and speak before all others for their constitutional ideals" (emphasis added)).

¹⁵⁹ See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 298-315 (1985) (arguing that some statutes, such as § 1983 and the Sherman Antitrust Act, require the federal courts to exercise broad lawmaking power in the common law tradition); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 330-31 (1989) (proposing a process of lawmaking in which the "present court and the departed legislature are collaborator-partners in creating statutory meaning"); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 9 SUP. CT. REV. 429, 436-47 (1994) (arguing for the integration of statutes and the common law into a unified, evolving system of lawmaking).

¹⁶⁰ The development of a private right of action for federal securities fraud is one obvious example. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (describing private actions under 10b-5 as "a judicial oak which has grown from little more than a legislative acorn").

courts have responded by incorporating traditionally legislative activities, such as policy analysis, into the judicial role.¹⁶¹

Some commentators have condemned judicial involvement with constitutional and statutory lawmaking as improper judicial activism.¹⁶² The foregoing discussion, however, demonstrates the difficulty of cordoning the modern lawmaking function into formalist categories. The extent to which judicial lawmaking is improper depends upon one's conception of the appropriate judicial role. The antiquated fiction that judges find law and legislators make it does not provide a sufficiently nuanced framework for determining rules of retroactivity. Separation of powers analysis simply cannot resolve the retroactivity debate.

The fact that the temporal scope of judicial lawmaking is a function of two interrelated doctrines, retroactivity and stare decisis, adds additional complexity. The rules of stare decisis govern the extent to which precedent controls a subsequent judicial decisionmaker. A weak doctrine of stare decisis renders much of retroactivity analysis inconsequential by reducing the extent to which a judicial decision creates generally applicable legal rules that must be given prospective effect by later courts.

Stare decisis and retroactivity can both be viewed as doctrinal boundaries for judicial lawmaking; the former is a substantive limitation, the latter a temporal one. The full extent of their relationship is beyond the scope of this Article. Nevertheless, it is important to observe that, although the Court has never explicitly addressed the constitutional status of retroactivity, the Court has concluded, with the concurrence of Justice Scalia, that stare decisis is not of constitutional magnitude.¹⁶³ Rather, the appropriate degree of fidelity to prior decisions is a matter of policy,¹⁶⁴ and whether stare decisis "shall be followed or departed from is a question entirely within the discretion of the court."¹⁶⁵ If the Constitution does not address the extent to which the judicial power is affected by the choice of stare decisis principles, there is no reason to infer a specific temporal context to the Constitution's grant of judicial power.

¹⁶¹ See POSNER, *supra* note 159, at 314-15.

¹⁶² See, e.g., Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 348-52 (1995) (describing "judicial restraint" criticism of the Court's activism on a variety of constitutional issues).

¹⁶³ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))); cf. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754-55 (1988) (questioning whether the doctrine of stare decisis is a constitutional imperative).

¹⁶⁴ See *Payne*, 501 U.S. at 828.

¹⁶⁵ *Hertz v. Woodman*, 218 U.S. 205, 212 (1910).

Justice Stevens has offered a final argument addressed to concerns about adjudicative retroactivity based on Article III.¹⁶⁶ Focusing on the remedial power of the courts, his dissent in *American Trucking* drew a distinction between the judicial decision to apply a rule and the legal effects of that application.¹⁶⁷ When a court applies a rule of law, Justice Stevens explained, it must address two distinct issues: how the rule affects the parties' respective rights and responsibilities, and what remedy, if any, is warranted by this assessment.¹⁶⁸ Courts can disassociate these issues to justify a decision not to award certain relief in connection with a retroactive rule on the theory that such relief would be unfair or contrary to the parties' expectations.¹⁶⁹ This distinction allows the Court to pay lip service to the principle of full adjudicative retroactivity while addressing the equitable considerations that have motivated nonretroactivity.¹⁷⁰

Viewing retroactivity purely in remedial terms, although appealing in theory,¹⁷¹ is unsatisfying. From the perspective of the litigant, winning the application of a particular rule of law has little value unless the litigant is entitled to the relief justified by that rule.¹⁷² The Court has remained unconvinced as well and has recently expressed skepti-

¹⁶⁶ See *American Trucking Ass'n v. Smith*, 496 U.S. 167, 212-24 (1990) (Stevens, J., dissenting).

¹⁶⁷ Professors Fallon and Meltzer have built upon Justice Stevens's dissent in *American Trucking* to develop a theory of constitutional remedies in which the use of new law as a constitutional concept justifies modifications in remedial doctrine to accommodate the burdens of full retroactivity. See Fallon & Meltzer, *supra* note 3, at 1779-1807.

¹⁶⁸ Justice Stevens described these issues as representing the two senses in which retroactivity may be used:

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

American Trucking, 496 U.S. at 209 (Stevens, J., dissenting).

¹⁶⁹ Courts use a variety of equitable principles, such as laches, unclean hands, and waiver, to deny litigants remedies to which they are otherwise entitled. Denying recovery under an otherwise valid contract based on the doctrine of unclean hands does not imply that the contract is invalid. Similarly, a judicial decision to withhold certain relief under a retroactive rule need not be the equivalent of refusing to apply the rule retroactively.

¹⁷⁰ See *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) ("To the extent that equitable considerations, for example, 'reliance,' are relevant, I would take this into account in the determination of what relief is appropriate in any given case.").

¹⁷¹ This view is also consistent with the principle that remedial legislation, because it does not change the nature of existing rights and causes of action, is more commonly and appropriately retroactive in nature than substantive legislation. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 296-97 (1994) (Blackmun, J., dissenting).

¹⁷² See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 156-57 (1986) (explaining that a pragmatist judge will reject prospective adjudication because people will not litigate novel cases but for the prospect that, if they succeed in persuading a judge to adopt a new rule, that rule will be applied in their own favor); LON L. FULLER, *THE MORALITY OF LAW* 57 (rev. ed. 1969) (arguing that it would be ironic if the only reward a successful litigant received for persuading a court to overrule a mistaken decision was "to have a now admittedly mistaken rule applied against him").

cism about whether the distinction between retroactivity and remedy is anything more than semantic.¹⁷³ Moreover, the remedial approach is subject to the same line-drawing difficulties associated with the *Chevron Oil* test. The approach requires the Court to determine whether a rule is "new" and, if so, whether equitable considerations justify remedial modifications. The problems associated with these determinations are considered in the next section.

D. Prudential Considerations

If the Constitution does not provide adequate tools to determine the temporal limits of judicial and legislative lawmaking — either because it does not speak to the question or because constitutional analysis requires threshold determinations about the nature of lawmaking and institutional roles — further development of retroactivity doctrine must look to prudential considerations. The rhetoric of the Court's retroactivity analysis has focused primarily on two prudential considerations: fairness and efficiency.¹⁷⁴ It is typically thought that prospective laws are more fair and that retroactive laws are more efficient. Closer analysis shows competing fairness and efficiency arguments both for and against retroactivity.

1. *Fairness Arguments.* — Fairness arguments about retroactivity are based on principles of equity and justice.¹⁷⁵ Commentators have suggested that fair retroactivity rules should provide notice of applicable legal standards and protect reliance interests.¹⁷⁶ There are good

¹⁷³ See *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1749 (1995) (questioning how a court could deny retroactive relief by characterizing its action as remedial without reducing *Harper* to merely "symbolic significance"). This concern is consistent with one of the central insights of legal realism: legal rules should not be defined in the abstract, but by their practical effects. See Karl N. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 459 (1930) ("[R]ules' . . . are what they do."); see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 838–39 (1935) (arguing that legal rules are defined by their consequences).

¹⁷⁴ Cf. Graetz, *supra* note 77, at 63–87 (using fairness and efficiency considerations to analyze the propriety of addressing the retroactive effect of legal change through grandfathering). More generally, the Court's analysis can be understood as an effort to mediate between the philosophical objectives of reasonableness and rationality. See Keating, *supra* note 8, at 311 n.1 (analyzing tort law in terms of reasonableness principles based on moral justice and rationality principles based on economic concepts and attributing the philosophical distinction between these approaches to Rawls and Kant).

¹⁷⁵ Justice Scalia's concurring opinion in *Bonjorno*, which cited various historical sources that decry retroactive statutes as unjust, is eloquent on this point. See *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring).

¹⁷⁶ See Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1191 n.2 (1962) (characterizing both Hochman and Slawson as considering fairness "the ultimate test of the validity of retroactive laws"). Protection of reliance interests arguably causes parties to determine the rules applicable to their conduct and act in accordance with those rules. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring in the judgment) (measuring whether a regulation constitutes a taking by the degree to which it interferes with "reasonable, investment-backed expectations").

reasons to promote these goals. The justice of a legal system is what gives its rules legitimacy. Notice enables people to predict the consequences of their transactions and increases the influence of legal rules upon primary conduct.

Fairness concerns are typically raised in support of prospective application of new legal rules. The Court's initial experimentation with prospective adjudication, the *Chevron Oil* test, was driven by fairness concerns.¹⁷⁷ *Chevron Oil* explicitly directs a court to inquire into the equitable aspects of application of a new rule, including whether a litigant's reliance on the prior rule should be protected. Those Justices and commentators who have defended use of the *Chevron Oil* test's discretionary approach to adjudicative retroactivity have been motivated by the need to protect settled expectations.¹⁷⁸ Fairness considerations also form the basis for opposition to retroactive legislation.¹⁷⁹ Fairness concerns can be used to justify substantive limits on retroactive lawmaking, transition relief to mitigate the costs imposed by retroactivity, and the presumption against retroactivity adopted as a rule of construction in *Landgraf*.¹⁸⁰

However, determining whether the application of a new legal rule to preadoption transactions is fair can be problematic. First, particularly in the context of civil litigation, the choice of which legal rule to apply is often a zero-sum game.¹⁸¹ If retroactive application of a new legal rule disfavors one litigant, it favors the other. To the extent that some degree of fairness is achieved by prospective application of a change in law that would disadvantage one litigant, it is exactly matched by the unfairness of not applying the change in law to a liti-

¹⁷⁷ See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 551 (1991) (O'Connor, J., dissenting) ("[T]he purpose of the *Chevron Oil* test is to determine the equities of retroactive application of a new rule.")

¹⁷⁸ See, e.g., *id.* at 552 ("[I]t is precisely in determining general retroactivity that the *Chevron Oil* test is most needed; the broader the potential reach of a new rule, the greater the potential disruption of settled expectations.")

¹⁷⁹ A substantial body of academic scholarship, particularly in the tax area, has analyzed the fairness of the temporal line-drawing associated with legislative change. See, e.g., Graetz, *supra* note 77, at 73-87; Levmore, *supra* note 3, at 273-79; Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129 *passim* (1996). Commentators are particularly able to evaluate the fairness of new tax laws because provisions such as grandfathering and delayed effective dates are commonly used in tax law to provide relief from the retroactive effects of legal change.

¹⁸⁰ See *Bonjorno*, 494 U.S. at 856 (Scalia, J., concurring) ("The presumption of nonretroactivity, in short, gives effect to enduring notions of what is fair, and thus accords with what legislators almost always intend.")

¹⁸¹ Dr. Shachar has argued more generally that transition gains necessarily equal transition losses. See Avishai Shachar, *From Income to Consumption Tax: Criteria for Rules of Transition*, 97 HARV. L. REV. 1581, 1586-90 (1984).

gant who successfully argued for legal change.¹⁸² Looking to the litigants' interests thus provides little guidance.

Second, although the argument that new rules upset expectations has intuitive appeal, the actual degree to which a new rule affects justified reliance interests varies considerably from case to case. Reliance depends upon the nature of the rule, the clarity and predictability of the law prior to the adoption of the new rule, the relative extent to which expectations about the rule affected the primary conduct to which the rule applies, and the degree to which these expectations were reasonable.¹⁸³ The case-specific nature of these factors is a weakness of the *Chevron Oil* test. *Chevron Oil* also suggested that reliance could be a function of the degree of novelty associated with a particular legal change.¹⁸⁴ This statement suggests ambiguity in identifying which legal changes constitute new rules for the purposes of *Chevron Oil* analysis. When a new rule is the result of a clarification by the Court or Congress of unsettled law — as opposed to an overruling or a change in interpretation — there is little reason to believe that parties have a reliance interest in any particular formulation of the rule.¹⁸⁵ Even if they do, their reliance may not be reasonable if the rule is unsettled.¹⁸⁶

The Court's effort to distinguish between substantive and procedural rules in its retroactivity analysis¹⁸⁷ appears to be motivated by

¹⁸² Downplaying this consideration is tempting when litigation involves a private litigant on one side and a government entity on the other. Civil liability is no less significant, however, when it is imposed on the government: the fact that the government bears the cost is not a defense to the imposition of unjustified liability, and the costs ultimately will be spread to individuals through the tax system.

¹⁸³ See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). The magnitude of the gain or loss resulting from legal change also affects the degree to which reliance interests are implicated. See, e.g., Graetz, *supra* note 3, at 1826 (arguing that the most significant fairness criterion may be the magnitude of the loss). There are practical problems with using magnitude as a means to assess fairness. See Levmore, *supra* note 3, at 272 n.13 (questioning whether a description of the degree of retroactivity should consider magnitude in relative terms, absolute terms, rate of return terms, or other terms).

¹⁸⁴ See *Chevron Oil*, 404 U.S. at 106; see also *United States v. Johnson*, 457 U.S. 537, 549-50 & n.12 (1982) (describing the different roles of novelty in triggering retroactivity analysis in criminal and civil cases).

¹⁸⁵ The Court could have addressed this concern by precisely formulating what constitutes a "new" rule of law for purposes of retroactivity analysis. One could argue that only an "overruling" change triggers the fairness considerations requiring prospectivity or *Chevron Oil*-type analysis. Initial commentary supporting nonretroactive adjudication focused on the transition costs of overruling decisions. See, e.g., Schaefer, *supra* note 15, at 631; Note, *supra* note 15, at 951. Nonetheless, application of *Chevron Oil*'s novelty requirement has led to conflicting analyses in the courts. See John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745, 763-66, 775-79 (1983).

¹⁸⁶ See, e.g., Graetz, *supra* note 3, at 1823-24 (arguing that transition relief should not be based on what people expect but on some normative vision of what they are entitled to expect).

¹⁸⁷ See *Landgraf v. USI Film Prods. and Rivers v. Roadway Express, Inc.*, 511 U.S. 244, 290-91 (1994) (Scalia, J., concurring in the judgments) (observing that the majority dictated that

the perception that substantive rules give rise to reliance interests in a way that procedural rules do not. However, the line between substantive and procedural rules is not sufficiently clear to provide a workable distinction.¹⁸⁸ Even if it were, the distinction is not a useful measure of reliance interests.¹⁸⁹ Substantive rules are not inherently more important to a litigant than procedural rules; both can be outcome determinative.¹⁹⁰ Procedural rules affect the degree and quality of access to the legal system and thus determine the protection afforded by substantive legal rules and remedies.¹⁹¹

A third problem with considering reliance interests is that nominally prospective rules can also defeat parties' expectations. As the Court observed in *Carlton*, "the detrimental reliance principle is not limited to retroactive legislation. An entirely prospective change in the law may disturb the relied-upon expectations of individuals"¹⁹² Changes in the tax laws, like the change at issue in *Carlton*, commonly present this type of concern.¹⁹³ Indeed, the temporal boundary drawn by bright-line retroactivity rules may be completely arbitrary.¹⁹⁴

procedural changes in the law will apply retroactively and substantive changes will not); cf. *Landgraf*, 511 U.S. at 275 n.29 (describing exceptions to the procedural test).

¹⁸⁸ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 392 (1989) (describing the distinction "between substantive and procedural rules" as a "logical morass"); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726-28 (1988) (explaining that the distinction depends on context).

¹⁸⁹ The Court has refused to accept the substance-procedure distinction as a basis for determining application of the Ex Post Facto Clause. See, e.g., *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) ("[B]y simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."); *Beazell v. Ohio*, 269 U.S. 167, 171 (1925) (holding that the constitutional prohibition against retroactive changes in the law does not apply to some procedural changes, but stating that "[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition").

¹⁹⁰ See, e.g., *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978) (applying retroactively a statute eliminating the amount-in-controversy requirement for federal question jurisdiction to a case on appeal).

¹⁹¹ As the *Bradley* Court recognized, the value of a substantive right depends in part on the availability of procedures to redress violations of that right. The purpose of statutes authorizing awards of attorneys' fees in public interest litigation is to facilitate access to judicial remedies. See *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 719 (1974). Moreover, the availability of attorneys' fees is central to the litigants' ongoing calculation of whether it is appropriate to settle, continue to litigate, or abandon the litigation. See Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 594-95, 632-35 (1991) (describing the economic analysis of a settlement decision based on the expected costs and benefits of settlement as opposed to further litigation).

Another aspect of the complexity and indeterminacy of the binary retroactivity construct is definitional. Application of a particular rule can often be characterized as either substantive or procedural, retroactive or prospective, depending on how one describes the objectives of the rule and the transactions to which it is directed. See *supra* p. 1072 (discussing the identification of the relevant retroactivity event).

¹⁹² *United States v. Carlton*, 512 U.S. 26, 33-34 (1994).

¹⁹³ See Logue, *supra* note 179, at 1133-34.

¹⁹⁴ See *Mhlungu & Four Others v. The State*, Case No. CCT/25/94 (Constitutional Court of South Africa June 8, 1995) (on file with the Harvard Law School Library). In *Mhlungu*, the court

2. *Efficiency Arguments.* — Although fairness arguments are typically used to support prospective lawmaking, efficiency is generally viewed as favoring retroactivity.¹⁹⁵ Efficient lawmaking can be defined as lawmaking that maximizes the net benefits of legal change. The traditional economic conception of rational or efficient legal change is based on the utilitarian conception of a net gain in social welfare without regard for distributional issues. This conception explains the failure of economic analysis to address the moral concerns of fairness arguments. Retroactivity could produce net social gain and yet impose clearly identifiable costs; there are winners and losers when a law is applied retroactively.¹⁹⁶

Efficiency arguments typically add an additional normative factor to the analysis: the assumption that legal change has occurred because of a determination that the new rule is an improvement.¹⁹⁷ The view that the new rule improves the operative legal principles supports the application of that rule to as broad a class of cases as possible.¹⁹⁸ This justification is particularly strong if the new rule is curative or restorative, that is, if it is designed to undo a rule perceived as mistaken.¹⁹⁹

Although his argument was not couched in economic terms, Justice White based his dissent in *Kaiser Aluminum & Chemical Corp. v.*

was called upon to interpret the plain language of Section 241(8) of the South African Constitution, which states that proceedings pending before the Constitution went into effect should "be dealt with as if this Constitution had not been passed." *Id.* at 1. The court nonetheless rejected a literal interpretation of Section 241(8) and held that the protections of the new Constitution applied retroactively to pending criminal proceedings on the ground that a circumstance as arbitrary as a one-day difference in the date of service of the indictment should not determine the difference between conviction and acquittal. *See id.* at 2-3.

¹⁹⁵ Accordingly, full retroactivity is generally supported by advocates of economic analysis. *See, e.g.,* Kaplow, *supra* note 3, at 615-16; Levmore, *supra* note 3, at 273-78; *see also* Graetz, *supra* note 3, at 1825 (describing the economic costs of transition relief).

¹⁹⁶ Because efficiency arguments about retroactivity are premised on the achievement of net or aggregate gains through broader application of new rules, and because these gains come at the expense of losses to others, the relevant concept of efficiency is Kaldor-Hicks efficiency. *See, e.g.,* Graetz, *supra* note 77, at 67-68 (choosing Kaldor-Hicks over Pareto efficiency). A legal change or outcome is Kaldor-Hicks efficient if it maximizes net aggregate social welfare — the sum of individuals' welfare — regardless of whether each individual is made better off. *See generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11-13 (3d ed. 1986) (describing the Pareto and Kaldor-Hicks conceptions of efficiency). Kaldor-Hicks efficiency raises normative issues because of the distributional questions posed by a legal change that improves the welfare of some at a cost to others.

¹⁹⁷ *See, e.g.,* *American Trucking Ass'n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) (arguing that it "does not make sense" to suggest that a decision can be applied prospectively when that approach would result in the Court enforcing an unconstitutional statute).

¹⁹⁸ *See, e.g.,* Levmore, *supra* note 3, at 306 n.71 (noting that retroactivity may be justified if reforms are desirable because it allows the reforms to be implemented more quickly).

¹⁹⁹ *See, e.g.,* *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 314-17 (1994) (Blackmun, J., dissenting) (defending the goal of applying "remedial and restorative" legislation broadly through retroactive application).

*Bonjorno*²⁰⁰ on this reasoning.²⁰¹ Justice White argued that a new federal statute providing a mechanism for calculating postjudgment interest should be applied retroactively to pending cases. In response to the majority's fairness argument that retroactive application changed the risk of appealing a judgment, Justice White argued that changing that risk was Congress's intention.²⁰² The Court would frustrate the objectives of the legislation by refusing to apply it to "precisely the kind of situation demonstrating the need for the amendment."²⁰³

The objectives of a new legal rule may also be undercut if people are able to avoid its application by rushing to complete transactions prior to enactment. Rules that impose new fees or taxes typically assume a base set of transactions to which the rule will apply. If people can avoid the rule by accelerating their transactions, the government's revenue goals will be harder to achieve. Similarly, efforts to avoid new legal rules may result in allocational inefficiency,²⁰⁴ provide windfalls to parties who can anticipate the legal change,²⁰⁵ or create disparate treatment for similarly situated transactions. Opportunistic avoidance of new legal rules is important outside the tax context as well. Removing transactions that would otherwise be covered by a legal change reduces the influence of all government regulation. For example, if people can avoid new building codes by starting construction before legislation is signed, the capacity of legislation to enhance safety standards is reduced. Retroactive lawmaking allows the lawmaker greater control over the class of transactions that are subject to new rules.

Even in circumstances in which the objectives of a new rule do not require retroactive application, engaging in the line-drawing associated with nonretroactivity may be inefficient. Prospective lawmaking may arbitrarily distinguish between classes of transactions based on the fortuity of when they were completed or, even more arbitrarily, the date upon which litigation commenced or concluded. To the extent that application of a new rule has wealth effects, partial application of the

²⁰⁰ 494 U.S. 827 (1990).

²⁰¹ See *id.* at 858 (White, J., dissenting). Justices Brennan, Marshall, and Blackmun joined Justice White's opinion.

²⁰² See *id.* at 860 ("I still do not understand why we should not apply new § 1961 to litigation in progress when we know that the principal reason for Congress' amendment of § 1961 was to change the risk of postjudgment litigation.").

²⁰³ *Id.* at 859.

²⁰⁴ See Levmore, *supra* note 3, at 273-74.

²⁰⁵ For example, during the partial shutdown of the federal government in November 1995, the Securities and Exchange Commission lost its ability to charge the full fee associated with the registration of securities. In anticipation of a budget agreement that would restore this power, hundreds of companies attempted to save an estimated \$23.7 million by registering securities during the shutdown. The subsequent budget agreement addressed this opportunism by granting the SEC authority to charge the higher fee for those registrations retroactively. See *S.E.C. Raises Fee in Stock and Bond Registration*, N.Y. TIMES, Nov. 22, 1995, at D3.

rule through nonretroactivity may cause some people to bear a disproportionate share of the burden. This concern motivated legislation that retroactively assessed user fees from successful litigants in the United States-Iran Claims Tribunal. In *United States v. Sperry Corp.*,²⁰⁶ the Court endorsed Congress's efficiency-based justifications for retroactivity, which included the need to collect sufficient fees to reimburse the government for its share of the costs of operating the Tribunal,²⁰⁷ the need to ensure that everyone who benefited from the existence of the Tribunal bore proportionate responsibility for these costs,²⁰⁸ and the need to prevent early users of the Tribunal from gaining a windfall at the expense of later litigants.²⁰⁹ The Court found that retroactivity directly furthered all of these objectives.

At a more general level of economic analysis, as Louis Kaplow has observed, the debate between retroactivity and prospectivity concerns the degree to which the government should provide transition relief when it changes legal rules.²¹⁰ Kaplow explains that a change in applicable legal rules is a risk that is functionally similar to other risks in the market.²¹¹ From a law and economics perspective, the market provides a better mechanism for addressing risk than does the government.²¹² Accordingly, Kaplow concludes that transition relief for new rules is generally inefficient.²¹³ In Kaplow's analysis, market actors assume the potential for legal change as one of a variety of risks, and the imposition of the costs of that change lacks a moral component justifying government mediation.²¹⁴ Kaplow's argument also depends on the contested empirical conclusion that the market is a better means of addressing the costs of legal change than are legal constraints on retroactive lawmaking.²¹⁵

Market remedies may be impractical solutions to some retroactive legal changes. For example, one might question whether market remedies such as insurance are viable options for addressing the impact of judicial decisions that retroactively eliminate sovereign immunity in

²⁰⁶ 493 U.S. 52 (1989).

²⁰⁷ See *id.* at 60. The statute explicitly stated that the fees were intended to reimburse the government for its costs in administering the Tribunal.

²⁰⁸ See *id.* at 64-65.

²⁰⁹ See *id.* at 65.

²¹⁰ See Kaplow, *supra* note 3, at 511-12, 598.

²¹¹ See *id.* at 512.

²¹² Economic analysis indicates that government interference with the market through transitional relief creates distortion and inefficiency. See *id.* at 529-50.

²¹³ See *id.* at 599, 602.

²¹⁴ See *id.* at 576-78.

²¹⁵ See *id.* at 535. Some scholars have criticized this conclusion. See, e.g., Logue, *supra* note 179, at 1131-32 (raising an argument for transition relief based on the efficiency of the government commitment to legal rules); J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155, 1162-66 (1989) (arguing that transition relief may be more efficient in the context of tax reform).

tort for public officials.²¹⁶ Insurance simply may not be available to address the risks that accompany some forms of legal change.²¹⁷ Retroactive lawmaking may also create unacceptable public costs. Retroactive application of the Warren Court's constitutional criminal procedure decisions, for example, would have freed thousands of convicted criminals. Retroactively changing a standard of civil liability may require the retrial of hundreds of cases.

The presence of transition costs creates conditions of path dependence:²¹⁸ even if a legal change is unquestionably an improvement, the costs associated with converting from the old rule to the new rule may constitute a barrier to change. A change that is efficient in the absence of such transition costs may not be economically superior once transition costs are taken into account.²¹⁹ Prospective lawmaking offers a solution to the path dependence problem by reducing the costs of the transition. If a new rule is more efficient with respect to future transactions, a lawmaker can adopt it exclusively for those transactions, thereby avoiding the transition costs associated with changing the applicable rules midstream for past or pending transactions.

3. *Application of Prudential Considerations.* — The Supreme Court's decision in *Lampf* illustrates how fairness concerns and efficiency concerns offer conflicting direction for retroactivity law. The *Lampf* decision, which shortened the limitations period applicable to most private securities fraud claims, was extremely controversial, primarily because it applied the new, shorter limitations period retroactively to dismiss cases that had been timely under the precedent applicable when they were filed. This aspect of the decision was heavily criticized, and Congress ultimately responded by enacting section

²¹⁶ In *Spanel v. Mounds View School District No. 621*, 118 N.W.2d 795 (Minn. 1962), the court developed an innovative solution to this problem. Intending to overrule the common law defense of sovereign immunity for municipalities, but concerned about the cost of such a decision, the court announced that it would eliminate the defense for torts "committed after the adjournment of the next regular session of the Minnesota Legislature." *Id.* at 796. The transition relief provided notice to municipalities of the possibility of future liability, allowed the legislature a chance to pass a statute that would preserve the defense uninterrupted, and afforded the legislature the opportunity to consider alternative means of effecting the transition.

²¹⁷ See, e.g., Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 572 (1984) (noting that private insurance markets have not provided coverage for the risks associated with regulatory changes such as rezonings); Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629, 634-37 (1976) (explaining how adverse selection in the insurance industry leads to market failure).

²¹⁸ See generally Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (stating that path dependence produces suboptimal equilibria due to the presence of transition costs).

²¹⁹ The metaphor, in terms of path dependence, is that descending one evolutionary peak is sometimes necessary in order to climb to the top of a neighboring, higher peak.

27A of the Exchange Act,²²⁰ which restored the prior limitations period for cases pending at the time of the *Lampf* decision. According to supporters of the legislation, imposing a different limitations period retroactively on litigants whose claims had appeared timely when filed was unfair.²²¹

Fairness concerns do not, however, require prospective application of the *Lampf* rule. The Supreme Court's choice of temporal limits in *Lampf* was a zero-sum decision. Protection of plaintiffs through enactment of section 27A came at the expense of defendants, who were forced to litigate cases that were not timely filed under the limitations period as more correctly interpreted by *Lampf*. Policy justifications support consideration of the interests of these defendants as well as the interests of the plaintiffs; the justifications include providing repose from old claims, protecting the legal system from stale claims, and reducing forum shopping. Indeed, concern about these policy implications thwarted congressional efforts to modify the limitations period after *Lampf*. Thus, there was a cost to retaining the cases rendered untimely by the *Lampf* holding.

Lampf also illustrates the fact-specific nature of reliance interests. Although the shortened limitations period rendered a variety of cases untimely, presumably the only plaintiffs with reliance-based claims of unfairness were the plaintiffs whose filings were not timely under *Lampf* but who, had they anticipated it, could have met the limitations period designated by the *Lampf* decision. Many of the claims rendered untimely by *Lampf* were simply discovered after the three-year statute of repose; plaintiffs could not have filed these claims in a timely manner even with 20-20 foresight. Therefore, a reliance argument cannot justify protection of these plaintiffs; their decision to file outside of the three-year period was not made in reliance upon an erroneous understanding of the law, but was constrained by their ability to ascertain the existence of a claim. As for the plaintiffs who would have been able to meet the *Lampf* deadline, protecting the reliance-based interest

²²⁰ Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (codified at 15 U.S.C. § 78aa-1 (1994)) (adding section 27A to the Securities Exchange Act of 1934).

²²¹ See, e.g., 137 CONG. REC. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan) (describing proposed section 27A as "only addressing the most immediate problem — the unfair application of the Supreme Court's *Lampf* decision to cases that were pending at the time that the decision came down" and stating that Congress was "correcting some of the most serious adverse affects [sic] the *Lampf* decision has wreaked upon pending cases"); 137 CONG. REC. H11811 (daily ed. Nov. 26, 1991) (statement of Rep. Dingell) (describing *Lampf* as producing a "completely unfair result [that] undermines the reliance of parties on precedent and significantly undermines the principle of stare decisis"); 137 CONG. REC. S10691 (daily ed. July 23, 1991) (statement of Sen. Bryan) ("[T]he *Lampf* decision will result in the dismissal of a great number of legitimate cases currently under litigation. Plaintiffs who have made good faith efforts to file suits under current law will see their cases evaporate due to new conditions imposed by the Supreme Court — conditions that cannot possibly be met.").

of plaintiffs who knowingly delayed filing is arguably inappropriate, although a variety of factors influence the decision of when to file a claim.

The uncertain vitality of the old rule in *Lampf* further weakens the case for protecting the plaintiffs' reliance interests. The decision followed a period of several years during which the rules governing statutes of limitations for private actions implied under federal law were in flux. In decisions outside the securities law area, the Court had signaled its dissatisfaction with the old procedures.²²² These decisions led several lower courts to question the merit of borrowing a limitations period for federal securities fraud from state law.²²³ The rule eventually adopted by the *Lampf* Court — borrowing a limitations period from another section of the federal securities laws — was anticipated in some lower court decisions.²²⁴ These indications that the law was unsettled limit the degree to which the *Lampf* decision can be characterized as an unfair surprise.

More generally, *Lampf* exemplifies the imprecision with which line-drawing between retroactive and prospective application addresses reliance interests. Even if the *Lampf* decision had been nominally prospective, it would have applied to all cases that had not yet been filed. Not even section 27A addressed *Lampf*'s application to unfilled cases. Consequently, *Lampf* irrevocably eliminated the ability of some prospective plaintiffs — specifically those plaintiffs for whom the pre-*Lampf* limitations period had not yet expired as of the date of the *Lampf* decision — to file claims. To the extent that these plaintiffs had relied on the old limitations period, their reliance interest does not appear to be different or less compelling than that of plaintiffs whose cases were pending. Protection of both reliance interests would require not only that Congress exempt pending cases from the new rule, but also that it provide a transition period to allow potential plaintiffs to file their claims.

In sum, the *Lampf* decision illustrates the practical and theoretical difficulties of basing temporal line-drawing on principles of fairness. Although the Court has not acknowledged these shortcomings, *Lampf* itself exemplifies the Court's dwindling effort to address fairness concerns through retroactivity doctrine. In *Reynoldsville Casket*, the Court clarified this position, expressly indicating that fairness and reli-

²²² See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1988) (holding that the Clayton Act provided a better source than state law for borrowing a limitations period for a claim under RICO); *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72 (1983) (holding that federal law provided a better source than state law for borrowing a statute of limitations for a federal statutory labor claim).

²²³ See Fisch, *supra* note 135, at 8106-08.

²²⁴ See, e.g., *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1549 (3d Cir. 1988) (en banc) (adopting a uniform federal limitations period for 10b-5 claims).

ance interests provide insufficient justification for adjudicative nonretroactivity.²²⁵

The retroactivity of the *Lampf* decision can be defended on efficiency grounds. Indeed, retroactive application may appear presumptively appropriate on the theory that *Lampf* reflects the correct statutory interpretation of federal securities law and that continued application of pre-*Lampf* limitations periods to previously filed cases would require courts to apply bad law.²²⁶ Retroactive application has the further advantage of avoiding differential treatment based on subjective factors, such as the degree of individual plaintiffs' knowledge or reliance. As the application of *Chevron Oil* principles illustrates, the case-specific reliance inquiry in statute of limitations cases is unworkable. Moreover, as indicated above, the section 27A distinction between filed and unfilled cases is completely arbitrary. However, as Congress observed in enacting section 27A, retroactive application of *Lampf* could frustrate the underlying objectives of the federal securities laws. Particularly problematic in *Lampf* was the fact that retroactive application allowed perpetrators of securities fraud scandals to escape accountability and to impose the costs of their wrongdoing on the general public.²²⁷ This public cost of retroactive application was central to the congressional decision to overrule the retroactive application of *Lampf*.²²⁸

III. RETROACTIVITY AND LEGAL CHANGE

Retroactivity doctrine has been fundamentally influenced by the legal process school. The legal process school, exemplified by the work of Lon L. Fuller,²²⁹ Henry M. Hart, Jr., and Albert M. Sacks,²³⁰ embarked on a search for process-based principles²³¹ by which to assign

²²⁵ See *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1749 (1995). But cf. *id.* at 1752 (Kennedy, J., concurring in the judgment) (arguing that in some extraordinary cases "courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions").

²²⁶ See *TGX Corp. v. Simmons*, 786 F. Supp. 587, 592 (E.D. La. 1992) ("The limitations period 'found' in *Lampf* thus did not represent a change in the law, but rather, a mere clarification what the law has always been [sic]. Courts such as the Fifth Circuit, which had previously applied other limitations periods to section 10(b) claims, had thus done so in error."), *rev'd on other grounds sub nom.* *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, 997 F.2d 39 (5th Cir.), *aff'd sub nom.* *Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 511 U.S. 658 (1994).

²²⁷ See Fisch, *supra* note 135, at 5113.

²²⁸ See *id.*

²²⁹ See, e.g., FULLER, *supra* note 172; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

²³⁰ See, e.g., HART & SACKS, *supra* note 1.

²³¹ See Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (book review) ("The legal process school focuses primary attention on who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made.")

responsibilities within the legal system.²³² Such principles were thought to be divorced from political influences and thus defensible independent of ideology.²³³

The influence of the legal process approach can be seen in retroactivity doctrine's effort to resolve the temporal application of legal change by reference to the institutional process through which the change occurred.²³⁴ The bright-line principle that judicial lawmaking is retroactive and legislation is prospective²³⁵ is ostensibly neutral in application and lends a process-based conception of legitimacy to rules adopted in conformity with it. If the nature of adjudication is backward-looking, then the retroactivity of judicial lawmaking is difficult to attack as unfair or inappropriate. Similarly, if the nature of legislation is forward-looking, then distinguishing between those affected by the adoption of a new statute and those whose conduct predated the statute's effective date does not seem arbitrary.

Subsequent scholars disagreed both with the descriptive claim that the legal process approach was value-neutral and with the substantive principles underlying its claimed legitimacy.²³⁶ The critical legal studies movement, for example, argued that the supposedly neutral principles of process were simply a means to mask the exercise of political power.²³⁷ Moreover, the procedures that appeared promising for

²³² This description is based on a synthesis of the efforts of Fuller, Hart, and Sacks. Each author had his own emphasis and approach, however. Fuller dealt to a large extent with the legislative process, and Hart and Sacks focused on adjudication. Fuller's theory sought to identify the principles legitimizing the legal system, see Fuller, *supra* note 229, at 364-65; Hart and Sacks were less interested in affirmatively constraining lawmaking power than in examining the consequences of allocating that power between institutions, see HART & SACKS, *supra* note 1, at 158-74.

²³³ See, e.g., Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1396 (1996) (describing the legal process effort to formulate neutral principles independent of substantive ideology).

²³⁴ The legal process school considered judicial lawmaking to be different from legislation in procedure rather than in content; courts can only use certain types of procedure in adopting legal rules and can only address certain types of legal problems. See, e.g., John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 92 (1995) (identifying procedural centrality as the legal process school's distinction between judicial tasks and the tasks of a democratically elected legislature); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 566-72 (1988) (describing the centrality of procedural rather than content-based limitations in the legal process approach). In particular, Hart and Sacks espoused a theory in which the principle of "reasoned elaboration" constrained decisional law. See, e.g., HART & SACKS, *supra* note 1, at 143-58.

²³⁵ Fuller explicitly included retroactive legislation as one of his eight elements of immorality in the law, thus grounding the general rule of prospective legislation in a moral norm. See FULLER, *supra* note 172, at 51-62.

²³⁶ See Rubin, *supra* note 233, at 1398-1402 (describing efforts by the law and economics and critical legal studies movements to discredit the legal process school).

²³⁷ See *id.* at 1401; see also Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 943-44 (1989) (book review) (describing how critical legal studies scholars revealed shortcomings in the legal process school's effort to be apolitical).

resolving private two-party disputes could not be applied as readily to the political and social policy struggles of the Cold War era and the civil rights movement.²³⁸

These shortcomings are mirrored more generally in existing retroactivity analysis.²³⁹ The substantive objectives of fairness and efficiency are, to a large degree, incommensurate.²⁴⁰ Even if one accepts the overly simplistic conclusion that prospective legal change is more fair and retroactive legal change more efficient, there is no obvious way to balance or choose between these factors. In the absence of a specification of substantive values of the sort that the legal process school sought to avoid, a process-based approach to retroactivity is inconclusive. This result may be unsurprising given the characterization of retroactivity doctrine as a subspecies of choice of law doctrine,²⁴¹ which is itself arguably indeterminate.²⁴² The result is nonetheless unsatisfying.

In recent years, the legal process school has reemerged as an influence in academic discourse. A group of scholars, sometimes described as engaged in the "new legal process," has sought to combine the process orientation of Hart and Sacks with newer insights provided by law and economics, critical legal studies, and public choice theory.²⁴³ The new movement is an effort to respond both to those who criticize law as indeterminate and to those who describe the lawmaking process as the naked exercise of political power. It attempts to integrate a structural approach with an understanding of the manner in which various sources of power, including market power and political power, impact the legal structure.²⁴⁴

This integration offers particular promise for retroactivity analysis. In viewing retroactivity as a choice of law question, the traditional legal process approach has cabined the temporal question within a framework that is, for the most part, devoid of substantive value judgments about either the external principles and policies motivating legal

²³⁸ See Rodriguez, *supra* note 237, at 943-44.

²³⁹ Although Hart and Sacks addressed questions of retroactive lawmaking in *The Legal Process* and recognized that their broader theory of adjudication blurred the traditional line between adjudication and legislation, see, e.g., HART & SACKS, *supra* note 1, at 341-44, 514-15, they made no effort to resolve the implications of their theory for retroactivity principles.

²⁴⁰ See, e.g., Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 68 (1994) (describing equity and efficiency as normative goals that, within the neoclassical model, "must be traded against each other").

²⁴¹ See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991) (plurality opinion) (stating that "retroactivity is properly seen in the first instance as a matter of choice of law"); McNulty, *supra* note 81, at 58-59 (describing retroactivity as a choice of law issue).

²⁴² See, e.g., Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 6 (1989) (stating that "modern choice-of-law analysis is indeterminate").

²⁴³ See Rubin, *supra* note 233, at 1406-29 (characterizing various modern academic approaches as variations on a new legal process approach).

²⁴⁴ See *id.* at 1411-33.

change or the manner in which legal change occurs. An examination of the jurisprudence of legal change can be used to formulate a predominantly process-based approach to retroactivity.

The first section of this Part develops the concept of a jurisprudence of legal change and distinguishes the process of legal change from the external criteria against which legal change is typically evaluated. The second section uses the tools of the new legal process to develop a process-oriented construct, equilibrium theory, as a means of contextualizing legal change. Finally, the third section uses equilibrium theory to deconstruct the implications of retroactivity for relative institutional power in effecting legal change.

A. *The Jurisprudence of Legal Change*

Retroactivity analysis involves an assessment of the appropriate consequences of legal change. The jurisprudence of legal change can be divided into two questions: the positive question of how legal change occurs, and the normative question of how it should occur. Each of these two inquiries can be subdivided into three further components: the external principles against which legal change is evaluated, the impetus for the change, and the manner by which the change is implemented.

The majority of modern jurisprudential theories are directed at the external principles underlying law and legal change. Both the law and economics theory of law as driven by market forces and the philosophical theory of legal reform based on John Rawls's *A Theory of Justice*²⁴⁵ provide external criteria by which to evaluate legal change. Similarly, the classic debate between natural law and positivism focuses on the extent to which legal rules are distinct from moral principles external to the legal system.²⁴⁶ This Article does not consider the underlying substantive evaluation of legal change, but focuses instead on the process by which legal change, however motivated, occurs.

The implementation of the principles motivating legal change is distinct from the source of those principles, yet the former issue has received relatively little attention. Herbert Hovenkamp has reflected on the characterization of legal change as evolutionary — incremental, cumulative, and connected through time in the sense that subsequent

²⁴⁵ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

²⁴⁶ See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 621-24 (1958) (defending positivism's distinction between what law is and what it should be); Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958) (criticizing Hart for overlooking the ways in which morality informs all law); see also Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 *passim* (1995) (describing the historical and analytical distinctions among positivism, legal realism, natural law, and the legal process school).

developments build upon earlier systems.²⁴⁷ According to Hovenkamp, a variety of evolutionary jurisprudential theories, some of which are based on Darwinian principles, use natural selection to explain how improvements will be preserved and inferior developments weeded out.²⁴⁸ Vincent Wellman provides an additional layer of analysis by subdividing evolutionary jurisprudential theories according to their developmental nature. Wellman categorizes developmental evolution as "teleological" and explains that teleology is distinctive because of "its idea of development because of or toward some identified goal, value, purpose or final point."²⁴⁹

The competing view is to characterize legal change as revolutionary in the sense that connotes a sudden and substantial alteration of the status quo. Hovenkamp states: "[The] theory of legal evolution enables one to avoid its more imposing cousin, legal revolution, by presenting legal change as continuous and connected through time."²⁵⁰ Hovenkamp describes revolutionary legal change as a "fallacy" because of its unarticulated normative assumption that evolutionary legal change is inherently legitimate: "[Evolutionary theory (incorrectly) suggests] that the law is always improving. Every change is self-proclaimed to be for the better."²⁵¹

Although traditional retroactivity doctrine is not tied to a jurisprudential conception of legal change, the rhetoric about efficiency and equity in the analytical debate masks an underlying fissure between efficiency advocates and fairness advocates concerning the nature of legal change. Efficiency advocates adhere to the neoclassical law and economics conception of legal change: changes in law reflect incremental reforms in accordance with externally derived principles such as wealth maximization.²⁵² This view supports the efficiency preference for retroactivity. To the extent that legal change is incremental and predictable, the equitable arguments for notice and reliance appear

²⁴⁷ See Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 215-16 (1982) (book review).

²⁴⁸ See Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 646-47 (1985).

²⁴⁹ Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 957 n.118 (1987).

²⁵⁰ Hovenkamp, *supra* note 247, at 215.

²⁵¹ *Id.* at 215-16.

²⁵² Richard Posner is frequently credited with being the first to propose that common law developments are systematically efficient. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1973). For further discussion of this efficiency argument, see Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 157 (1980); John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393, 393-94 (1978); and George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977). For a similar argument regarding statutory evolution, see ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 148 (1993), and Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254 (1977).

less compelling. The application of a new legal rule to a broader class of cases is most justified when the new rule reflects an improvement over the old law.

In contrast, fairness advocates generally doubt that legal change is either synonymous with improvement or consistent with any fixed objective.²⁵³ They are more apt to view legal change as the result of a power struggle, implementation of the values of a successful insurgent, or random experimentation in policy.²⁵⁴ The jurisprudential theories of public choice²⁵⁵ and critical legal studies²⁵⁶ reflect this perspective and are consistent with greater mistrust of retroactive lawmaking. In a legal system in which change is random or politically generated, predicting legal change is harder and burdening particular individuals with the costs of that change is more unfair. The lawmaker's ability to target precisely who will bear the costs of legal change through retroactive lawmaking also leads to greater concerns about retaliation or oppression if legal change is politically motivated.²⁵⁷

This conflict about the manner of legal change, once exposed, threatens to turn the debate over retroactivity rules into a debate over the relative merits, positive or normative, of substantive jurisprudential theories. The effort to divorce the construction of legal structure from such a complex substantive debate was one of the motivating principles behind the legal process movement.

An alternative approach that remains similarly faithful to neutral principles is to reject as unduly rigid the foregoing jurisprudence of legal change. It is unnecessary and unproductive to force the characterization of legal change into the binary construct of revolution versus evolution. Moreover, this binary construct masks the existence of two distinct components in the characterization of legal change: the magnitude of the change and the degree to which it is teleological. Although we typically expect an evolutionary change to be both incremental and

²⁵³ See, e.g., Ramseyer & Nakazato, *supra* note 215, at 1162-65.

²⁵⁴ See, e.g., Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 98 (1989) (describing legal change as a process by which rules "seek to effectuate wealth transfers from societal groups that possess relatively little political power to other, more powerful, groups and coalitions"); Ramseyer & Nakazato, *supra* note 215, at 1162-65 (describing legal changes as politically generated reorderings of winners and losers that provide no net social gain).

²⁵⁵ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 7 (1991) (surveying the findings of public choice theory).

²⁵⁶ See generally *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984) (discussing critical legal studies themes); Hasnas, *supra* note 234, at 95-98 (same).

²⁵⁷ See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2159 (1996); see also Daniel Patrick Tokaji, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 569-70 (1993) (discussing how retroactive legislation can target identifiable groups for political benefits).

focused in a particular direction, the two components need not be connected.

This Article offers a model of legal change, understood through the metaphor of equilibrium, in which both revolutionary and evolutionary legal change are sometimes possible. Rather than characterizing legal change systematically according to either a substantive legal theory or the structural role of a particular lawmaker, as the formalist separation of powers approach attempts to do, this Article claims that legal changes must be evaluated individually. The Article also rejects the rigidity of the jurisprudential categories, arguing that any given change falls somewhere along a spectrum between revolution and evolution, and that assessment of the nature of the change provides a way to consider its temporal scope.

It is impossible to classify a legal change in isolation, however. Herein lies a key deficiency in both the *Chevron Oil* and the *Landgraf* approaches to retroactivity. In analyzing the effect of a particular new rule, it is necessary to consider the change in context. A legal change is properly characterized as evolutionary or revolutionary based on its effect upon the particular legal context into which it is introduced. Equilibrium theory provides a methodology with which to conceptualize that legal context.

B. *Equilibrium Theory and Legal Change*

The concept of law as equilibrium is a product of the legal process school.²⁵⁸ In their pioneering work transforming the institutional competence questions nascent in *The Legal Process* into a modern framework consistent with public choice theory, Professors William Eskridge and Philip Frickey use a metaphor of equilibrium to describe the interaction of competing institutional forces in formulating and maintaining public law.²⁵⁹ If institutions such as the courts, Congress, and the executive branch are viewed as competing forces, then the balance of those forces in producing a particular regulatory context can be described as an equilibrium.

The equilibrium concept can be extended beyond the Eskridge and Frickey construct of institutional equilibrium. This Article borrows the use of equilibrium as a metaphor; rather than focusing on the balance between institutions, however, the Article follows the direction of Woodrow Wilson and Felix Cohen²⁶⁰ and looks to physics for an alter-

²⁵⁸ See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27–29 (1994).

²⁵⁹ See *id.* at 30–42.

²⁶⁰ See WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–55 (1908) (relating the traditional constitutional theory of checks and balances to the Newtonian physics idea of creating order through the balance of opposing forces); see also Cohen, *supra* note 173, at 827 (analogizing jurisprudence to modern physics).

native equilibrium conception to describe the stability of a regulatory context.²⁶¹

In physics, as in Eskridge and Frickey's model, a balance of forces produces equilibrium.²⁶² The state of equilibrium can be described as a coming to rest in which there is no tendency to change.²⁶³ Equilibria are further characterized according to the property of stability.²⁶⁴ A stable equilibrium is one that tends to return to the same resting point if disturbed by a change in relevant forces.²⁶⁵ An unstable equilibrium, in contrast, will not endure or return if disturbed but moves readily to a different equilibrium position.²⁶⁶ The explanation for the stability of an equilibrium position lies in its potential energy. In a stable equilibrium, potential energy is at a minimum. Because work is required to displace the equilibrium position, displacement is unlikely. In an unstable equilibrium, potential energy is at a maximum.²⁶⁷ Thus, internal energy is available to move to a new position once a disturbance occurs.²⁶⁸

A simple example illustrates these concepts. A coin can be placed in three possible equilibrium positions: heads, tails, or balanced on its edge. All three are equilibria because the coin will not move if nothing changes in the forces acting upon the coin — wind, gravity, and so forth. Heads and tails are stable equilibria because, even if the coin is disturbed slightly, it has a tendency to return to the original position. In contrast, the coin on its edge is literally and figuratively unstable. A disturbance will move the coin away from its equilibrium position,

²⁶¹ The physical and social sciences are rich with equilibrium theories. See, e.g., KENNETH B. HARVEY & GERALD B. PORTER, *INTRODUCTION TO PHYSICAL INORGANIC CHEMISTRY* 284-95 (1963) (describing equilibrium in the context of thermodynamics); ARTHUR J. VANDER, JAMES H. SHERMAN & DOROTHY S. LUCIANO, *HUMAN PHYSIOLOGY: THE MECHANISMS OF BODY FUNCTION* 83, 116, 133 (4th ed. 1985) (discussing chemical, diffusion, and osmotic equilibria); PAUL WONNACOTT & RONALD WONNACOTT, *ECONOMICS* 51-52 (4th ed. 1990) (describing demand/supply equilibrium).

²⁶² The forces acting upon an object are in balance when the sum of those forces is zero. See, e.g., DOUGLAS C. GIANCOLI, *PHYSICS: PRINCIPLES WITH APPLICATIONS* 161 (2d ed. 1985).

²⁶³ See, e.g., *THE ENCYCLOPEDIA OF PHYSICS* 406 (Robert M. Besancon ed., 3d ed. 1985) ("[E]quilibrium is obtained if the system does not tend to undergo any further change of its own accord. Any further change must be produced by external means.").

²⁶⁴ Eskridge and Frickey define a stable equilibrium as one in which "no implementing institution is able to interpose a new view without being overridden by another institution." Eskridge & Frickey, *supra* note 258, at 32.

²⁶⁵ See, e.g., FREDERICK J. KELLER, *PHYSICS* 202 (2d ed. 1993).

²⁶⁶ See *id.* Quantum physics may provide an even better analogy to legal change than classical physics. Under quantum theory, only certain levels of energy, known as quanta, are capable of being transferred to a system and thus disturbing an equilibrium. See, e.g., P.W. ATKINS, *QUANTA: A HANDBOOK OF CONCEPTS* 188-89 (1974). Two aspects of quantum theory are also applicable to legal change: the requirement that forces accumulate to a point at which they are capable of producing change, and the observation that fractional components of the necessary quanta are insufficient to produce a change.

²⁶⁷ See 1 ROBERT RESNICK & DAVID HALLIDAY, *PHYSICS* 291 (3d ed. 1977).

²⁶⁸ See *id.*

most likely causing it to fall into one of the two stable equilibrium positions. The concept of stability, even in the simple example of the coin, need not be absolute. A coin lying flat is in a stable equilibrium, but the coin will nonetheless be irrevocably disturbed if the table upon which it rests collapses. A larger and less predictable disturbance is thus required to do the work necessary to disturb a stable equilibrium than to disturb an unstable one. Using the terminology of the previous section, we can associate disturbance of a stable equilibrium with revolutionary change. In an unstable equilibrium, evolutionary change is sufficient to produce a new position.

Applying these concepts to legal change, a given regulatory context can be viewed as a legal equilibrium and described as stable or unstable based on its response to a disturbance. If legal treatment of an issue is in a state of stable equilibrium, the legal regime is not readily changed through small or incremental shifts in political forces — the type of shifts associated with evolutionary legal change. We can view stability as an indication that potential energy, the forces tending to produce legal change, is at a minimum. Accordingly, a stable equilibrium requires a significant influx of energy to produce a new legal context — the effort associated with revolutionary legal change.

Changes in legal rules can be expected in an unstable legal equilibrium, by contrast, because of its inherent potential for change. The magnitude of force necessary to produce a disturbance is modest. Accordingly, revolutionary legal change is not required to disturb an unstable equilibrium; evolutionary change is sufficient.

Characterizing a legal context as a stable or an unstable equilibrium is a proxy for evaluating the nature of the disturbance created by regulatory change. In contrast to previous efforts to understand legal change in terms of a new rule, such as the *Chevron Oil* test, equilibrium analysis focuses on the contextual setting. By analyzing legal context in terms of equilibrium theory, we can determine whether a particular legal change should be viewed as evolutionary or revolutionary. This assessment can then be used to formulate transition policy.

Whether one characterizes a particular legal context as stable or unstable is crucial. This Article develops the use of stable equilibrium as a legal standard for retroactivity analysis. A particular legal context is in stable equilibrium when the applicable legal rules are clear, have been promulgated by a higher legal authority, have persisted over time and in a variety of specific cases, and have not been widely criticized or questioned by lawmakers with comparable authority. The extent to which the government has attempted to induce reliance upon the legal status quo may also be relevant.²⁶⁹

²⁶⁹ Commentators dispute the degree to which the government should be permitted to make binding commitments about the legal consequences of transactions. Government commitment can be seen as an effort to tie the hands of future lawmakers and as an impediment to the operation

The foregoing factors characterizing a stable equilibrium are closely linked to the evolutionary/revolutionary characterizations of legal change described above. If a rule has persisted over time, if it has been applied in a range of cases, and if its contours have been set by a high lawmaking authority, then the rule is more difficult to change. People become accustomed to rules that have persisted over a period of time,²⁷⁰ and supplanting rules that have become widely known and understood creates an educational cost. Rules enacted by a higher authority are costlier to change as a matter of simple mechanics. The process associated with the Supreme Court overruling its own previous decision is more protracted and uncertain than the process of changing a rule created by a lower court; similarly, Congress cannot enact a replacement statute as easily as an administrative agency can amend its rules. When legal change in a higher authority's rule is accomplished, the adoption of the change indicates a greater force, or a different type of impetus, than that associated with incremental development, correction, and similar evolutionary processes.

These factors do not establish a bright-line rule. The stability of regulatory context is a matter of degree, and, in any given case, individual factors may point in opposite directions. This complexity makes equilibrium theory particularly useful for retroactivity analysis, however, because the theory's quantitative nature parallels the nonbinary nature of retroactivity. A standard-based approach also permits application of various factors without the specification of arbitrarily precise criteria.²⁷¹

Two examples demonstrate that the absence of a clear line separating stable and unstable equilibria does not indicate indeterminacy.²⁷² The first example is the determination of the statute of limitations for

of democratic principles. Nonetheless, the government's ability to commit may be efficient for the same reasons that private party commitment is efficient. Commitment can increase the influence of rules on primary conduct by ensuring that transactions undertaken within the bounds of the existing regulatory scheme will receive the anticipated legal benefits of that scheme. *See, e.g., Ramseyer & Nakazato, supra* note 215, at 1158, 1170 (arguing that laws can be viewed as binding commitments by Congress and that such commitments may be socially desirable). Resolution of this debate is beyond the scope of this Article, which does not take a normative position on the use of retroactivity policy to facilitate government commitment.

Situations in which the government has deliberately attempted to induce reliance on the stability of its rules are simpler. Because a stable equilibrium may promote regulatory objectives, the government's affirmative effort to establish stability should be reflected in the equilibrium analysis. This result could be achieved through a variety of approaches, such as holding the government accountable under a quasi-contract or regulatory estoppel theory.

²⁷⁰ *See Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.").

²⁷¹ *See HART & SACKS, supra* note 1, at 140.

²⁷² Unlike an effort to predict the resolution of an area of legal uncertainty, the characterization of equilibrium status is not prejudiced if conducted after the fact. A court can examine

a private claim of federal securities fraud, as addressed by the Supreme Court's decision in *Lampf*. Prior to *Lampf*, the rules specifying the statute of limitations applicable to a cause of action implied under a federal statute were unclear. With respect to federal securities fraud claims, application of the "old rule" of borrowing from state law did not provide clarity in the law because of ambiguity about which limitations period to borrow and about whether to borrow equitable provisions such as tolling doctrines also.²⁷³ Dozens of lower court decisions repeatedly examined the limitations question and came to different conclusions regarding which principles to apply.²⁷⁴

Before the *Lampf* decision, neither Congress nor the Supreme Court had made an authoritative statement regarding the appropriate procedure for determining the statute of limitations in federal securities fraud cases or the appropriate limitations period itself. The circuits that had spoken to the question had reached different conclusions.²⁷⁵ Commentators disagreed about the actual state of the law²⁷⁶ and the ideal limitations period.²⁷⁷ Thus, when *Lampf* adopted a new rule of limitations for federal securities fraud, the rule did not disturb a stable equilibrium.

Examination of the legal context of aiding and abetting liability in connection with securities fraud claims leads to the opposite result. The Supreme Court eliminated aiding and abetting liability for securities fraud claims in *Central Bank v. First Interstate Bank*.²⁷⁸ Prior to the Court's decision, the availability of an implied private right of action for aiding and abetting securities fraud appeared to be settled: every circuit that had addressed the question had upheld the existence of such a claim.²⁷⁹ The Securities and Exchange Commission consistently assumed the existence of aiding and abetting liability in deploying its enforcement authority.²⁸⁰ Explicit statements in two congressional reports acknowledged the existence of aiding and abet-

sources contemporaneous with the legal change, such as scholarly literature, lower court decisions, and legislative debate, to characterize the legal context.

²⁷³ See Fisch, *supra* note 135, at S103-04.

²⁷⁴ See *id.* at S106-08.

²⁷⁵ See *id.*

²⁷⁶ See, e.g., LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 1120 (3d ed. 1995) (noting a trend toward the use of state blue sky laws prior to 1991); Arthur F. Matthews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896, 924 (1990) (noting an emerging trend toward borrowing the express limitations period in other sections of the 1934 Act).

²⁷⁷ See, e.g., Committee on Fed. Regulation of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 658 (1986) (advocating congressional legislation setting the limitation at two years from discovery of the violation, with a four-year absolute cut-off).

²⁷⁸ 511 U.S. 164, 176-78 (1994).

²⁷⁹ See *id.* at 192 & n.1 (Stevens, J., dissenting) (noting that only the D.C. Circuit had not confronted the issue directly).

²⁸⁰ See *id.* at 197-98.

ting liability and noted its consistency with the remedial purposes of the securities laws.²⁸¹ Few commentators questioned the existence of the cause of action, although some questioned whether it was based on a fair reading of the statute.²⁸² The litigants in the *Central Bank* case themselves had not considered the issue worthy of Supreme Court review; the Court directed the parties to brief the question.²⁸³ Accordingly, the legal status of aiding and abetting liability was in a stable equilibrium, which the *Central Bank* decision disrupted.²⁸⁴

C. *Equilibrium Theory and Retroactivity*

1. *Retroactivity Rules for Stable Equilibria.* — A stable equilibrium can be disrupted, but only through the application of substantial force. Legal change in a stable equilibrium is characterized by paradigmatic or political shifts rather than by clarification or mere error correction. These characteristics are inconsistent with the foundational assumptions of incrementalism and improvement on which economic arguments about the efficiency of retroactivity are based.

The existence of a stable equilibrium justifies the protection of reliance-based interests. A longstanding legal rule that has engendered agreement among lawmakers and has been consistently and frequently applied is relatively predictable, and people's reliance on such a rule in planning their conduct is reasonable. That reliance imposes a cost on legal change. Protection of reliance is more efficient in the context of a stable equilibrium because the costs of compliance with existing legal rules — predicting the legal consequences of a planned transaction — are small.²⁸⁵ Greater compliance creates uniformity and certainty in transactions, discourages opportunistic behavior, and enhances the ability of legal rules to influence primary conduct. This argument also has a normative component. Stability and predictability in the law reflect values that are worthy of independent protection.

²⁸¹ See H.R. REP. NO. 100-910, at 27 n.23 (1988) (noting that express preclusion of respondeat superior liability under the Insider Trading and Securities Fraud Enforcement Act of 1988 does not affect the availability of aiding and abetting liability); H.R. REP. NO. 98-355, at 10 (1983) (advocating "the judicial application of the concept of aiding and abetting liability to achieve the remedial purposes of the securities laws").

²⁸² See, e.g., Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 83 (1981) (arguing that the imposition of secondary liability is inconsistent with the statutory language and legislative history).

²⁸³ See *Central Bank v. First Interstate Bank*, 508 U.S. 959, 959 (1993) (granting certiorari and ordering the parties to address the additional question "[w]hether there is an implied private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5").

²⁸⁴ See Strauss, *supra* note 159, at 512-13 (arguing that 18 years of congressional acquiescence in judicial imposition of secondary liability suggested "solidified consensus" about the status quo).

²⁸⁵ See, e.g., Cass, *supra* note 3, at 960 (arguing that predictability reduces the costs of decisionmaking and increases societal well-being by permitting individual behavior to adjust).

Finally, the government engenders greater respect for its laws and its lawmaking institutions if it can commit to the stability of its laws. A commitment to stability can increase the ability of rules to influence primary behavior by ensuring that transactions undertaken within the dictates of the existing regulatory scheme will receive consistent legal treatment in the future.²⁸⁶ Retroactive legal change undercuts this commitment. Those who have worked to secure the legal change obtain a windfall if the change is subsequently applied to pending or completed transactions, given the relative inability of the counterparty to those transactions to anticipate the change and protect itself contractually.

These arguments suggest that, at least in the context of a stable equilibrium, the lawmaker should avoid retroactivity. If the lawmaker concludes that the law is in a stable equilibrium and that the legal change is sufficient to disturb that equilibrium, the lawmaker should consider minimizing the costs of disruption by limiting the temporal application of the new rule or otherwise providing transition relief. Because the costs of disruption are similar whenever a new rule has retroactive effects, this approach should not be limited to rules that are explicitly retroactive.

The presumption against retroactivity in a stable equilibrium does not bar retroactivity completely. Retroactivity may be appropriate in certain circumstances: if the legal change is sufficiently small that either it does not disturb the equilibrium or the costs associated with the disturbance are minimal; if limited temporal application of the new legal rule or other transition relief adequately mitigates the impact of the disturbance; or if retroactive application is specifically necessary to achieve an important component of the regulatory goal that cannot be adequately achieved through prospective application.

Application of this standard involves two changes in the nature of judicial review of legislation. First, if the legislature has failed to specify the temporal application of a new rule, equilibrium theory suggests that courts should affirmatively minimize the application of the rule to pending and prior transactions. This expansion of the default rule transforms *Landgraf* from a narrow presumption based on textualist principles of statutory interpretation to a legal-process-influenced approach, which presumes that both nominal retroactivity and retroactive effects lie outside the ordinary scope of the legislature's objectives. Courts should assume that Congress seeks to avoid inadvertent retroactive effects if it disrupts a stable equilibrium.

Second, if the legislature has made an express determination of temporal scope, a reviewing court should focus on the degree to which

²⁸⁶ Cf. Logue, *supra* note 179, at 1132 (arguing that the failure of the government to keep its tax incentive commitments results in citizens demanding a higher return before responding to government incentives).

retroactive legislation is justified and apply the Due Process Clause more rigorously. Although the court should not substitute its judgment for that of the legislature, two issues regarding the legislative judgment are particularly within judicial competence: whether the temporal categories created by the rule are arbitrary in light of the legislative objectives, and the degree to which the government has committed itself to prior regulatory treatment.

Consideration of these questions does not require the Court to jettison its existing due process analysis. The first of these inquiries is a requirement of rational basis that is consistent with the current due process and equal protection framework.²⁸⁷ The second inquiry can be understood as a requirement of procedural due process.²⁸⁸ When Congress affirmatively invites parties to structure their transactions in reliance on existing legal rules, changing these rules without notice and an opportunity to mitigate the effects of the change violates important due process principles.

Although equilibrium theory's skepticism about retroactively applying rules that disrupt a stable equilibrium may superficially suggest a throwback to the pre-*Harper* acceptance of adjudicative nonretroactivity, closer analysis reveals that adjudication will rarely disturb a stable equilibrium. In part, this conclusion stems from the nature of the judicial function. The lawmaking power of the courts is restrained by their inability to control their lawmaking agenda in a way that the legislative power is not. Courts can make law only as a by-product of deciding cases and, for the most part, have little role in determining which issues come before them for decision. Within the context of deciding a particular case, courts are further constrained by the requirement that their rules be tied to an explicit text or to common law precedents. In either case, the reasoned elaboration that provides legitimacy to judge-made rules demands that a court employ accepted interpretive principles rather than making naked policy judgments.²⁸⁹

Nevertheless, adjudication sometimes bears a close resemblance to legislation. Decisions in which the Supreme Court overrules its own

²⁸⁷ See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1627-28 (1996) (holding that a Colorado statute that arbitrarily disadvantaged a single group without any rational objective for the classification violated the Equal Protection Clause).

²⁸⁸ The second inquiry is also similar to a breach of contract analysis. Kyle Logue draws an even stronger connection between evaluating the legitimacy of government behavior in breaching an express contract and evaluating the appropriate scope of retroactive legislation concerning tax incentive subsidies. See Logue, *supra* note 179, at 1138-52.

²⁸⁹ Commentators disagree on the extent to which interpretive principles constrain judges from making policy choices. See, e.g., Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 742-45 (1982) (arguing that "an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation"); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771-72 (1982) (questioning Fiss's analysis and arguing that judges' backgrounds and policies affect their choice of interpretive principles and their application of those principles).

precedent or fashions a new principle of constitutional law are examples of adjudication that may disrupt a stable equilibrium. Judicial lawmaking that upsets a stable area of the law resembles legislation in both the justification for the change and the need to address the consequences of the change.²⁹⁰ To the extent that courts adopt revolutionary legal change, they require the temporal flexibility of nonretroactivity.

The argument for allowing courts to address the consequences of judicially initiated legal change is particularly compelling with respect to constitutional legal change given the limited means of achieving such change outside of the courts. Because constitutional change frequently disrupts a stable equilibrium and because the magnitude of many constitutional changes is high, constitutional change can create substantial transition costs. If the Court overrules itself, these costs are even greater due to the reliance engendered by the prior precedent.

William Treanor and Gene Sperling describe how judicial overruling of a prior decision of unconstitutionality can revive previously unenforceable statutes with no additional legislative action.²⁹¹ Treanor and Sperling argue that judicial overrulings should not be able to revive these dormant statutes,²⁹² in part because revival would result in costs for the actors who have relied on the previous regime. The authors identify further systematic costs of revival, including interference with majoritarian lawmaking and infringement of political reliance interests.²⁹³ Their argument thus mirrors equilibrium theory; both seek to address the private and social costs associated with the retroactive effects of adjudication.

2. *Retroactivity Rules for Unstable Equilibria.* — Although stability is more common, the law is replete with areas in unstable equilibrium or a state of flux. These areas are the most common sites of legal change, both because change is relatively easy in an unstable equilibrium and because instability frequently reflects the need for correction, clarification, or evolution. Accordingly, the majority of situations requiring application of retroactivity analysis involve the introduction of new rules into unstable legal equilibria.

The presence of an unstable equilibrium indicates that legal change is predictable in the same way that the toppling of a coin balanced on its edge is predictable. Relatively little force is needed to effect change in an unstable equilibrium and, once that force is applied, the poten-

²⁹⁰ See Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. CHI. L. REV. 423, 427 (1994) (suggesting that the Court's need to reconsider its retroactivity principles at the time of the *Linkletter* decision was a result of the Warren Court's shift from evolutionary to revolutionary changes in the law of constitutional criminal procedure).

²⁹¹ See William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1902-03 (1993).

²⁹² See *id.* at 1906-07.

²⁹³ See *id.* at 1917-18, 1923-24, 1930.

tial energy within the system will drive it to a new equilibrium position.

The likelihood of legal change in an unstable equilibrium makes reliance on the legal status quo unreasonable and thereby mitigates potential fairness problems arising out of retroactivity. This contextual framework also minimizes the significance of the novelty or magnitude of the legal change, obviating some of the application difficulties of *Chevron Oil*. Indeed, equilibrium theory suggests that fewer expectations are upset by a large change when the law is in flux than by a small change to a stable equilibrium.

Traditional economic arguments for retroactivity are more compelling in the context of an unstable equilibrium. Because instability increases the cost of ascertaining and predicting the legal consequences of transactions, incurring these costs may also be wasteful, from a societal perspective, in the face of unsettled or conflicting legal rules. Protecting the expectations generated as a consequence of these expenditures through transition relief would be inefficient. Because instability is likely to create issues of line-drawing and other uncertainties of application, the broader scope of retroactive legal change allows uniform treatment and prevents opportunistic behavior. Broader temporal flexibility allows a lawmaker to avoid arbitrary distinctions in legal treatment generated by the clarification process by providing that a single rule applies to transactions without regard to the technical enactment date of a statute or the speed at which different cases proceed through the court system. Finally, an unstable equilibrium signals the market that there is a risk of legal change. This signal permits the market to respond to the possibility of legal change by developing mechanisms to facilitate bearing and shifting the risk associated with that change. To the extent that the market can address the risk of legal change, through insurance for example, the process functions best when the prospect of legal change is predictable.

Thus, equilibrium analysis suggests that the traditional hostility to retroactive legislation is misplaced in an unstable equilibrium. Indeed, the general tolerance for retroactive application of corrective or curative legislation can be explained by characterizing such statutes as legislative efforts to stabilize an unstable equilibrium. Equilibrium analysis also supports the considerable deference of existing due process analysis to the legislative judgment to regulate retroactively. The independent rational basis requirement for legislating retroactively, which is imposed by *Pension Benefit Guaranty*,²⁹⁴ is satisfied by the existence of an unstable equilibrium. The tenuous basis for reliance

²⁹⁴ See *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984).

interests within an unstable equilibrium provides a defense for retroactive legislation against claims that it is "harsh and oppressive."²⁹⁵

The same reasoning applies to judicial lawmaking. To the extent that judicial lawmaking most commonly occurs within the context of an unstable equilibrium, equilibrium analysis is consistent with a general rule of adjudicative retroactivity. Equilibrium analysis provides normative support for the intuition that adjudication should normally be retroactive. By identifying adjudication as prototypically evolutionary, the analysis explains why adjudication is generally constrained by a different calculus of rationality and reasonableness than is legislation. Equilibrium analysis also explains that, when judge-made law moves closer to revolution, it bears a greater resemblance to legislation. This analysis clarifies the circumstances under which adjudicative retroactivity may be inappropriate.

Equilibrium theory departs from existing retroactivity doctrine in its implications for judicial norms of statutory interpretation. The propriety of retroactive lawmaking in an unstable equilibrium supports rejection of the *Landgraf* rule of construction for statutes lacking an express specification of temporal scope. Although the *Landgraf* default rule has initial appeal because of its apparent clarity, it does not withstand scrutiny.

First, application of the *Landgraf* presumption is neither simple nor predictable. *Landgraf* does not provide that all statutes will be applied prospectively absent express indication to the contrary. Rather, the *Landgraf* opinion explains that the presumption is only triggered by statutes that are truly retroactive, as defined, somewhat incoherently, by the opinion.²⁹⁶ Justice Blackmun made a convincing argument in dissent that a presumption against retroactive legislation did not require prospective application of section 102 of the Civil Rights Act because the statute did not change the legal status of prior conduct; it merely increased the remedies available to redress conduct that constituted illegal discrimination under prior law.²⁹⁷ The latent ambiguity in *Landgraf* results from the Supreme Court's difficulty in defining retroactivity, an issue that is complicated by the unworkable distinction between nominal retroactivity and retroactive effect. Thus, the *Landgraf* rule requires an initial judgment by the courts as to whether a new rule is sufficiently retroactive to trigger the presumption of non-retroactivity. The circularity in this process is apparent.

²⁹⁵ *United States v. Carlton*, 512 U.S. 26, 30 (1994) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)) (internal quotation marks omitted).

²⁹⁶ See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268-73 (1994).

²⁹⁷ See *id.* at 297 (Blackmun, J., dissenting) (arguing that the presumption against retroactivity "need not be applied to remedial legislation, such as § 102, that does not proscribe any conduct that was previously legal").

Second, the *Landgraf* opinion supported its presumption against retroactivity with the rationale that prospective application was generally consistent with congressional intent,²⁹⁸ an assumption that is not necessarily true.²⁹⁹ More importantly, the ideal default rule is not necessarily the rule that legislators will select most often.³⁰⁰ Several scholars have argued that the political process constrains the use of retroactive legislation.³⁰¹ Public choice theory suggests that those targeted by the legislation have the ability to mobilize and often defeat retroactive laws.³⁰² If this observation is correct, it will be politically costly for Congress to specify that its rules will be retroactive. Congress is therefore unlikely to overcome a default rule of prospectivity even when it determines that retroactivity would be socially desirable.

Instead, selection of a default rule of retroactive application increases the likelihood that Congress will explicitly specify the range of application. This default rule encourages Congress to evaluate through the political process the extent to which its legislative goals are furthered by retroactivity and to balance those objectives against the political costs of retroactive legislation. Thus, a default rule of retroactivity may produce greater congressional attention to the costs and benefits associated with the temporal line-drawing than a default rule of prospectivity, if from a perspective of comparative institutional competence Congress is best situated to determine the temporal application of new legislation.

3. *Applying Equilibrium Theory to Retroactive Legal Change.* — The use of equilibrium theory to analyze the regulatory context offers a substantially different retroactivity framework than existing methodology. The implications of this new approach can most easily be understood in comparison to current doctrine.

This Article has, for example, criticized the rationale of the *Landgraf* decision. Existing process-based theories of statutory interpreta-

²⁹⁸ See *Landgraf*, 511 U.S. at 286.

²⁹⁹ See, e.g., *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 315 (1994) (Blackmun, J., dissenting) (arguing that only a crabbed reading of legislative purpose can support the conclusion that Congress, in enacting curative or corrective legislation, chooses to allow repudiated laws to survive); *Landgraf*, 511 U.S. at 286 (suggesting that Congress may have intended the 1991 Act to apply retroactively to pending cases but not to cases finally decided); see also Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 117-18 (1995) (arguing that silence is a common means of legislative compromise).

³⁰⁰ For an economic analysis of the role of default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91, 93-95 (1989), which concludes that the efficient default rule may differ from the rule that most bargainers would choose due to information costs and other problems with the bargaining process.

³⁰¹ See, e.g., Ramseyer & Nakazato, *supra* note 215, at 1171-72 (arguing that the possibility of retroactive legislation allows legislators to extract rents from vested interests that hope to maintain the status quo).

³⁰² See Krent, *supra* note 257, at 2174.

tion provide little guidance in situations like *Landgraf*. Should the legislative silence regarding the temporal application of the 1991 Amendments be viewed as a rejection of the retroactivity proposed and defeated in 1990? Or should the failure to include language limiting the 1991 statute's application to future conduct be viewed as an endorsement of retroactive application? Alternatively, if congressional silence is viewed as delegating to the Court the power to determine temporal application, what principles should the Court apply?

Equilibrium theory clarifies the analysis by defining a set of process-based principles common to both the legislative and the judicial decision. The policies implicated by the retroactivity question are the same regardless of whether Congress or the Court is the decisionmaker. Recognizing this equivalence frees the Court from the indeterminate task of reading some normative judgment into the absence of explicit congressional guidance. Instead, application of equilibrium theory encourages the Court to classify the regulatory framework within which the 1991 Amendments were adopted and to evaluate the temporal reach of the legislation in that light.

The different provisions of the 1991 Civil Rights Amendments at issue in the *Landgraf* and *Rivers* cases lead to different results under equilibrium analysis. The expanded damage provisions of section 102, the section at issue in *Landgraf*, marked a significant change in the potential monetary liability of an employer under Title VII.³⁰³ Before the amendments, an employer's liability was clearly limited to equitable remedies and back pay.³⁰⁴ These limitations dated from the enactment of the original statute in 1964.³⁰⁵ Adoption of broader damage provisions reflected a prototypical legislative choice between competing political values, the type of choice that characterizes revolutionary legal change. Accordingly, section 102 should be characterized as disturbing a stable equilibrium and, despite the statute's remedial nature, should only be applied prospectively.³⁰⁶ This conclusion provides guidance beyond the parameters of the *Landgraf* case. If application of the statute to cases arising before it was adopted is inappropriate, the statute should not be applied to continuous patterns of conduct predating enactment even if, as at least one commentator has sug-

³⁰³ See *Landgraf*, 511 U.S. at 253-55.

³⁰⁴ See *id.* at 252-53.

³⁰⁵ See *id.*

³⁰⁶ But see, e.g., *United States v. Alabama*, 362 U.S. 602, 604 (1960) (holding that an amendment to the Civil Rights Act of 1957, although silent as to its temporal reach, applied retroactively, presumably because of its remedial nature); *Ayers v. Allain*, 893 F.2d 732, 754-55 (5th Cir. 1990) (characterizing as remedial a provision of the Civil Rights Restoration Act of 1987 that overturned the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), and applying the provision retroactively). Karl Llewellyn identifies retroactive application of remedial statutes as a canon of construction. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 402 (1950).

gested, such application is technically consistent with the *Landgraf* holding.³⁰⁷

In contrast, *Rivers* arose in the context of an unstable equilibrium, with Congress acting to reverse the Supreme Court's 1989 decision in *Patterson v. McLean Credit Union*.³⁰⁸ Section 101 of the 1991 Amendments did not expand liability under § 1981 but rather restored liability that *Patterson* had eliminated. Prior to *Patterson*, circuit courts had generally concluded that § 1981 barred discriminatory firings; indeed, this conclusion was the law in the Sixth Circuit at the time of the events giving rise to the litigation in *Rivers*.³⁰⁹ *Patterson* destabilized the law by holding that § 1981 did not apply to discriminatory firings.³¹⁰ Congressional adoption of section 101 reversed this holding and returned liability for discriminatory discharge to its pre-*Patterson* status.³¹¹ Accordingly, section 101 should be viewed as an effort to address the unstable equilibrium created by *Patterson*.³¹²

This reading of congressional objective is consistent with the structure and legislative history of both the 1990 and 1991 amendments. Retroactive application would impair no reliance interests because no one was able to rely on a body of law in flux.³¹³ The legal status of discriminatory firings prior to the *Patterson* decision was unclear at best, but there was certainly no authority in the text of § 1981 or in appellate decisions that would have justified an employer's reliance on an interpretation that § 1981 did not apply to discharges. Prospective application of the statute created a number of arbitrary categories of employers whose liability depended on the timing of their termination decision and the speed at which the litigation progressed through the judicial system. Ironically, the *Rivers* decision rewarded defendant employers who injected sufficient delay into the process to ensure that their pre-1989 conduct was reviewed after *Patterson*. *Rivers* also rewarded the opportunistic behavior of employers who took advantage

³⁰⁷ See Leonard Charles Presberg, Comment, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of Landgraf v. USI Film Products and Rivers v. Roadway Express*, 28 U. RICH. L. REV. 1363, 1396-1404 (1994).

³⁰⁸ 491 U.S. 164 (1989).

³⁰⁹ See *The Supreme Court, 1993 Term — Leading Cases*, 108 HARV. L. REV. 139, 320 (1994) (explaining that the Sixth Circuit, like most other courts, had held § 1981 applicable to discriminatory discharge prior to the *Patterson* decision).

³¹⁰ See *Patterson*, 491 U.S. at 171.

³¹¹ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72.

³¹² Eskridge and Frickey describe the status of discrimination law following *Patterson* as an example of unstable equilibrium because, although the Supreme Court decision precluded awarding monetary damages, other lawmaking institutions favored monetary remedies for workplace discrimination. See Eskridge & Frickey, *supra* note 258, at 32.

³¹³ Although it might be argued that a Supreme Court precedent automatically stabilizes the legal context, both the inconsistency of *Patterson* with the views of other lawmaking institutions and the speed and degree of congressional response cast doubt on the stability of the post-*Patterson* law. See *id.*

of the legal uncertainty created by *Patterson* to engage in discriminatory conduct by gambling on the prospect that, although Congress was likely to respond to *Patterson*, the nature of the political process would make a retroactive response difficult. Accordingly, it would have been both efficient and fair for the Court to conclude that the applicability of § 1981 to discriminatory firings was in a state of unstable equilibrium and that, absent congressional direction to the contrary, section 101 should have been applied retroactively.

This analysis of *Landgraf* and *Rivers* demonstrates the application of equilibrium theory to traditional retroactivity analysis. As section II.A of this Article explains, however, retroactivity concerns are implicated in a much broader range of cases than the Supreme Court has recognized. The recent decision in *United States v. Winstar Corp.*³¹⁴ illustrates the applicability of equilibrium methodology to the analysis of legal change beyond the traditional retroactivity framework.

Winstar involved a challenge by several thrifts to changes in regulatory accounting principles imposed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").³¹⁵ In connection with the savings and loan crisis in the early 1980s, the federal government encouraged healthy thrifts to merge with failing ones.³¹⁶ As part of the inducement for these mergers, the Federal Bank Board offered various accounting incentives to facilitate the ability of the merging thrifts to meet the capital requirements imposed by federal law. Accordingly, each of the plaintiffs in *Winstar* merged with a failing thrift.³¹⁷ After these mergers, Congress enacted FIRREA, which prevented the plaintiffs from using the accounting incentives to satisfy the regulatory capital standards.³¹⁸ As a consequence of this rule change, many thrifts that were previously in full compliance with the legal capital requirements fell out of compliance. The plaintiffs were among these thrifts and were placed in receivership by the Office of Thrift Supervision.³¹⁹

The Court held for the plaintiffs in *Winstar*, finding that the government had entered into enforceable contracts with the plaintiffs and that the adoption of FIRREA had caused the government to breach

³¹⁴ 116 S. Ct. 2432 (1996).

³¹⁵ Pub. L. No. 101-73, §§ 301-308, 103 Stat. 183, 277-354 (codified as amended in scattered sections of 12 U.S.C.).

³¹⁶ The fear that the government would be unable to meet the demands on federal savings and loan insurance funds imposed by the multitude of thrift failures motivated this policy. See *Winstar*, 116 S. Ct. at 2442.

³¹⁷ The FSLIC and the Bank Board approved the terms of these "supervisory mergers." See *Winstar Corp. v. United States*, 64 F.3d 1531, 1535 (Fed. Cir. 1995) (en banc).

³¹⁸ See *Winstar*, 116 S. Ct. at 2446.

³¹⁹ The impact of FIRREA on the regulatory status of thrifts that engaged in supervisory mergers generated numerous lawsuits by thrifts that could not meet the new capital standards. See, e.g., *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 1003-04 n.3 (11th Cir. 1991) (citing cases).

these contracts.³²⁰ The Court held that, although the government could not be prevented from changing the law, it was liable to the thrifts for damages.³²¹ The Supreme Court's decision, however, demonstrates the problems inherent in the contractual approach. First, this approach requires the factual predicate of an enforceable contract. Other courts applying the new capital requirements have found either insufficient agreement to establish enforceable liability or a contractual right of the government to modify the contract terms through legislation.³²² Second, analyzing the case in contract terms is problematic because Congress, which caused the breach, was not a party to the contracts.³²³ Third, the contractual approach does not allow courts to assess the validity of applying the legal change to the plaintiffs; it simply permits a suit for damages.³²⁴ Fourth, and perhaps most troubling, the contractual approach creates a complex conflict between the government's ability to commit itself by contract and the sovereign power to effect legal change. The Court attempted to address this conflict in *Winstar* through three contractual doctrines, the unmistakability doctrine, the reserved powers doctrine, and the sovereign acts doctrine,³²⁵ but this effort led to a plurality opinion and little agreement among the Justices.

Application of the retroactivity principles described in this Article substantially improves the analysis of the regulatory change considered in *Winstar*. The new capital standards imposed by FIRREA were nominally prospective: thrifts had to satisfy these standards only after the effective date of the statute. Accordingly, traditional retroactivity doctrine did not require courts to subject the legislation to even the minimal due process scrutiny imposed under *Pension Benefit Guaranty*.³²⁶ Yet the problem faced by the plaintiffs arose precisely because of the retroactive effect of the legislation. FIRREA altered the

³²⁰ See *Winstar*, 116 S. Ct. at 2451-53.

³²¹ See *id.* at 2472.

³²² See, e.g., *Winstar Corp. v. United States*, 994 F.2d 797, 811-12 (Fed. Cir. 1993); *Guaranty Fin. Servs.*, 928 F.2d at 1001.

³²³ The Supreme Court resolved this issue by concluding that the Bank Board and the FSLIC had the authority to promise to pay damages if they could not provide the agreed-upon regulatory treatment. See *Winstar*, 116 S. Ct. at 2462.

³²⁴ In other lawsuits involving this issue, plaintiffs asserted that the legislation violated the Takings Clause. See, e.g., *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613-14 (D.C. Cir. 1992). However, plaintiffs generally have been unable to establish the predicate property right that is necessary for protection against a taking. See, e.g., *id.* (holding that, because Transohio did not have a property right that trumped Congress's power to regulate, no analysis was required under the Due Process or Takings Clauses).

³²⁵ See *Winstar*, 116 S. Ct. at 2453-61 (discussing the unmistakability doctrine); *id.* at 2461-63 (discussing the reserved powers doctrine); *id.* at 2463-65 (discussing the sovereign acts doctrine).

³²⁶ See, e.g., *Transohio*, 967 F.2d at 620 ("[T]his case does not raise any retroactivity questions . . ."). The Supreme Court's *Winstar* opinion noted the analogy to other doctrines imposing temporal limits on legislative change, such as takings jurisprudence and the Contract Clause. See *Winstar*, 116 S. Ct. at 2455-59.

ability of the thrifts to comply with regulatory capital requirements, thereby changing the legal consequences of the pre-FIRREA supervisory mergers. Analysis of the legislation in terms of its retroactive effect permits a more direct assessment of the question posed by the plaintiffs' claim: did Congress act inappropriately by changing the legal consequences of supervisory mergers after the plaintiffs had entered into the mergers?³²⁷

Analyzing the legislation in these terms does not necessarily lead to the conclusion that the regulatory changes are illegitimate or that the thrifts should win but requires the Court to focus on different analytical factors before reaching a conclusion. If, on one hand, the regulatory treatment of supervisory goodwill was in a stable equilibrium at the time the thrifts entered into the supervisory mergers, application of new regulatory standards that caused the thrifts to fall out of compliance should have been subjected to a more rigorous due process review.

There are indications in the *Winstar* record of the presence of a stable equilibrium. For approximately a decade, the Bank Board had agreed to the accounting practices used in the regulatory mergers.³²⁸ The Bank Board's use of the practices was undertaken "with Congressional consent";³²⁹ indeed, Congress affirmatively mandated "forbearance" two years before enacting FIRREA.³³⁰ In addition, the record suggests that the government affirmatively induced the plaintiffs to enter into regulatory mergers with the promise of stable regulatory treatment.³³¹ This factor, if supported by the evidence, further justifies enhanced judicial scrutiny of the retroactive effect of FIRREA. If the regulatory climate was one of stable equilibrium, the Court's inquiry should have focused on a factor never examined in this case: whether congressional objectives justified FIRREA's retroactive effect

³²⁷ Congress did provide a degree of transition relief in FIRREA. See, e.g., *Guaranty Fin. Servs.*, 928 F.2d at 996-97 (describing FIRREA's requirements for phasing out the use of supervisory goodwill in calculating core capital).

³²⁸ For example, Bank Board Chairman Richard T. Pratt testified before Congress in 1982 and explained the manner in which these accounting practices were being used to conserve FSLIC insurance. See *Housing and Urban-Rural Recovery Act of 1982: Hearings Before the Subcomm. on Hous. and Community Dev. of the House Comm. on Banking, Fin. and Urban Affairs*, 97th Cong. 1490 (1982) (statement of Richard T. Pratt, Chairman, Federal Home Loan Bank Bd.).

³²⁹ S. REP. NO. 101-19, at 9 (1989).

³³⁰ See William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 STAN. L. & POL'Y REV. 102, 114 n.14 (1990).

³³¹ Compare Brief for Respondents *Winstar Corp. & the Statesman Group, Inc.*, *Winstar* (No. 95-865), available in 1996 WL 143319, at *2-3 (claiming that "the regulators aggressively urged *Winstar* and *Statesman* — neither of which were previously involved in the savings and loan industry — to acquire the insolvent thrifts" and that "the key inducement" for the acquisitions "was the regulators' express contractual promise to accord regulatory capital treatment to supervisory goodwill . . . for the specified periods"), with Transcript of Oral Argument, *Winstar* (No. 95-865), available in 1996 WL 197422, at *5 (Apr. 24, 1996) (statement of Deputy Solicitor General Paul Bender) ("It's not clear who induced whom in these transactions.").

on the plaintiffs' ability to meet the compliance standards. The analysis proposed in this Article would require the Court to find a greater legislative justification than the general need to improve capital standards before allowing FIRREA to have such a powerful retroactive effect.

On the other hand, if the regulatory climate was more accurately described as an unstable equilibrium, the thrifts should not have been able to avoid the impact of the regulatory change through contract or other theories. Although the cases do not provide enough detail to permit a full evaluation of the regulatory climate, it is possible to describe the regulation of capital standards as being in a state of flux at the time of the mergers. The district court in *Transohio*, for example, found that "Transohio should reasonably have expected that Congress might change capital rules to meet a growing crisis in the comprehensively regulated savings and loan industry."³³² If the capital rules were in flux, the thrifts relied on the current legal treatment at their own peril, and the imposition of transitional relief would be inefficient.³³³ Rather, the thrifts should be viewed as having "wager[ed on] the chance that the rules would be changed against the potential return if they were not."³³⁴

Because *Winstar* and related cases have been litigated primarily on contractual theories of liability, resolving the question whether the accounting standards adopted by FIRREA should be applied to the regulatory mergers is difficult based on the existing record. Redefining the inquiry in terms of the appropriate retroactive effect of the statute clarifies the main issue as the temporal limits of regulatory change rather than the nature of government contracts. Even if the government's use of regulatory mergers and "accounting gimmicks" were, as one commentator describes it, an "insane" mistake,³³⁵ retroactivity analysis still would be the appropriate means of determining whether parties who entered into transactions under the prior law should bear the costs associated with a subsequent shift in government policy.³³⁶

³³² *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 605 (D.C. Cir. 1992).

³³³ Cf. Black, *supra* note 330, at 113 (arguing that providing compensation in this case would create an incentive "to suborn or simply fool an incompetent government official").

³³⁴ *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 999 (11th Cir. 1991). Similarly, under this description of the legal climate, the Supreme Court's conclusion that the contracts allocated the risk of legal change to the government in the absence of express contractual language to the contrary, see *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2451-52 (1996), awards the plaintiffs the type of windfall to which efficiency arguments in support of retroactivity are addressed.

³³⁵ Black, *supra* note 330, at 102.

³³⁶ See, e.g., Marianne Lavelle, *Failed S&L Has Its Day in Court*, NAT'L L.J., May 6, 1996, at A11 (quoting *Winstar* and Statesman's lawyer, who described the issue as whether the plaintiff thrifts in *Winstar* will have to bear the \$24 million cost of the government's change in bank regulatory policy).

This discussion demonstrates the utility of equilibrium theory for retroactivity analysis. As these cases illustrate, equilibrium theory offers a coherent yet general analytic framework that can be used with any underlying substantive field and without relying on the special cases and exceptions that riddle traditional retroactivity doctrine.³³⁷

IV. THE EFFECT OF RETROACTIVITY ON LAWMAKING POWER

Equilibrium theory's focus on the process of legal change also exposes the degree to which retroactivity rules affect institutional lawmaking power.³³⁸ The foregoing analysis has characterized legal change in the context of a stable equilibrium as revolutionary in nature. Examination of the lawmaking process has suggested that, as a descriptive matter, revolutionary legal change is most commonly associated with the legislative process and that adjudicative lawmaking is typically evolutionary. This distinction mirrors the traditional distinction between adjudicative and legislative retroactivity doctrine, which is based on a descriptive assessment of each branch's dominant lawmaking process rather than on normative principles about judicial and legislative power.³³⁹ To the extent that legislation disrupts a stable equilibrium, it should normally be prospective in application. Disruption of stable equilibria is consistent with a characterization of legislative lawmaking as based on politics and policymaking.³⁴⁰ Judicially created rules, in contrast, pose countermajoritarian difficulties if they are based entirely on policy justifications that are divorced from textual, precedential, or other coherence arguments.³⁴¹

Analyzing retroactivity doctrine in terms of legal change also has important normative implications. Retroactivity doctrine limits both the nature of legal change and the manner in which it occurs. The

³³⁷ See *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1750-51 (1995).

³³⁸ For an ambitious legal process approach to the issue of comparative institutional competence, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

³³⁹ The application of retroactivity analysis to lawmaking by administrative agencies casts further doubt on the validity of premising retroactivity rules on institutional identity because this premise would allow an agency to choose between retroactive and prospective legal change by choosing between adjudicatory and rulemaking procedure. See *supra* note 9.

³⁴⁰ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring in part and concurring in the judgment) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens."); Abner J. Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 541 (1982) (reviewing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)) ("Lawmaking by statute is not incremental; statutes are traumatic and . . . often rework entire areas of law.").

³⁴¹ See generally Cass, *supra* note 3, at 948-66 (providing an ideal model of judicial decision-making authority); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 370-71 (1984) (providing an overview of coherence theory in legal argument).

limits imposed shackle a lawmaker's ability to designate the temporal reach of a new legal rule. Alternatively, retroactivity rules can be viewed as a way of disciplining institutions for improper rulemaking.

Nonretroactivity, in particular, promotes alterations in the legal regime by allowing the lawmaker to reduce the transition costs associated with legal change. A lawmaker that can avoid some of the adverse consequences associated with legal change, or cater to interest groups by limiting the transactions that will be subject to a new rule, can adopt rules that would be too politically or pragmatically costly under a requirement of full retroactivity. If the retroactivity doctrine applicable at the time had compelled the Warren Court to apply its criminal procedure decisions to all cases on direct appeal and habeas, for example, the Court would have faced serious obstacles to recognizing broader constitutional protections for defendants. Similarly, the prospect of exposing municipalities to huge, uninsured liabilities might have deterred state courts contemplating the abolition of sovereign immunity for public officials in tort actions if temporal limitations on the effect of such holdings were not possible.

Recognizing the substantive impact of retroactivity doctrine on lawmaking power provides an alternative framework for evaluating adjudicative retroactivity. Flexible retroactivity rules allow the courts to address the costs of disturbing stable equilibria and, in turn, make courts more likely to do so.³⁴² Accordingly, a court that has the power to limit the temporal application of newly announced legal rules can more easily initiate substantial legal change.³⁴³

This Article does not take a position on the appropriate limits on judicial lawmaking.³⁴⁴ Equilibrium theory cannot resolve the substantive debate about whether courts should exercise lawmaking power; yet the analysis is helpful because it exposes the political overtones of the debate over judicial nonretroactivity.

³⁴² Courts and commentators recognized the threat that prospective adjudication posed to the legitimacy of the exercise of the judicial power during the initial state court experimentation with prospective adjudication in the nineteenth century. Critics of the practice viewed retroactive adjudication as discouraging courts "from indiscriminately modifying the law." Thompson, *Judicial Impairment*, *supra* note 121, at 1425.

³⁴³ Judicial mechanisms to afford transition relief need not duplicate legislative approaches. See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714-15 (Del. 1983) (fashioning a "quasi-appraisal" remedy to protect litigants who, believing the statutory appraisal remedy to be either ineffective or inapplicable, had not followed the required procedure). For example, the *Weinberger* decision was technically retroactive but protected plaintiffs' reliance interests by means analogous to prospective adjudication. The precision with which the court selected the class of plaintiffs entitled to this equitable remedy demonstrates a textured appreciation for the transition issues created by adoption of a new legal rule. See *id.* (applying the remedy in pending cases and in pending and proposed mergers in which prospective plaintiffs might have already lost the opportunity to perfect statutory appraisal rights).

³⁴⁴ Cf. Cass, *supra* note 3, at 994-96 (constructing a normative model of adjudication based on the objective of increasing the predictability of retroactive judicial decisions).

Equilibrium theory thus reveals that criticism of prospective adjudication may reflect concern about conferring too much lawmaking power on the courts.³⁴⁵ Acknowledging the substantive overtones of the retroactivity debate explains, for example, Justice Scalia's hostility to prospective adjudication. By endorsing a rule of full retroactivity for judicial lawmaking, Justice Scalia prevents the judiciary from addressing the costs of disturbing stable equilibria, thereby limiting the judicial power to initiate legal change. This approach is consistent with Justice Scalia's political preference for legislative lawmaking and judicial restraint.³⁴⁶

Even if limitations on judicial lawmaking were desirable,³⁴⁷ such limitations need not come from retroactivity doctrine. A variety of alternative mechanisms can be used to circumscribe the judicial role and to limit the extent to which adjudication disrupts stable equilibria. When the Court is engaged in common law adjudication or statutory interpretation, for example, it is likely to disturb a stable equilibrium only when it overrules its own precedent. The adoption of strong principles of stare decisis³⁴⁸ would cause instances of direct overruling to be rare.³⁴⁹ In the area of constitutional interpretation, judicial adoption of new rules, as well as overruling of prior precedent, can disturb a stable equilibrium. A substantive policy of limited judicial activism would reduce the frequency with which the Court develops new legal principles of constitutional origin. Similarly, increased ad-

³⁴⁵ See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 366 (1991) (Stevens, J., dissenting) (objecting to judicial selection of the proper statute of limitations for federal securities fraud as "a lawmaking task that should properly be performed by Congress"). Justice Stevens expressed this concern: "When the Court ventures into this lawmaking arena, however, it inevitably raises questions concerning the retroactivity of its new rule that are difficult and arguably inconsistent with the neutral, nonpolicymaking role of the judge." *Id.* at 367-68. It is ironic that the *Linkletter* Court premised its move to prospective adjudication on the work of John Austin, see *Linkletter v. Walker*, 381 U.S. 618, 623-24 (1965) (relying on the Austinian view of the judicial function), because, although Austin accepted the idea that judges as well as legislatures make law, he clearly preferred legislation to judge-made rules. See 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 661 (Robert Campbell ed., London, John Murray 5th ed. 1885).

³⁴⁶ Justice Harlan also took this position:

What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view.

Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in part and dissenting in part).

³⁴⁷ See generally Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 10-18 (1983) (outlining the "varieties of self-restraint").

³⁴⁸ See, e.g., Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177, 183 (1989) (advocating an absolute rule of stare decisis in statutory and federal common law cases).

³⁴⁹ Under the proposed model, the degree to which adjudicative nonretroactivity would conflict with the traditional rule of adjudicative retroactivity depends, in large part, on the choice of stare decisis principles. The doctrine of stare decisis operates as a gatekeeper, controlling the circumstances of judicially initiated legal change in the context of stable equilibria.

herence to principles of stare decisis would reduce the number of occasions on which the Court reinterprets settled principles of constitutional law.³⁵⁰

The impact of retroactivity doctrine on lawmaking power appears more clearly in the context of legislative retroactivity rules. A legislature that can adopt rules with retroactive as well as prospective effects can apply its policy preferences to a broader range of transactions than one limited to prospective rulemaking. Existing due process scrutiny of legislative retroactivity fails to consider two significant implications of this power. First, legislative retroactivity increases the power of the current legislature at the expense of prior legislatures. A rule allowing Congress to undo retroactively the laws enacted by a prior Congress favors the current majority view over decisions made by past majorities.³⁵¹ A consequence of such a rule is a general reduction in the impact of legislative rules due to the government's diminished ability to commit itself to a regulatory policy.³⁵²

Second, the legislature's ability to enact retroactive laws increases its power relative to the courts.³⁵³ *Plaut* illustrates the problems that arise when Congress and the Court disagree about the appropriate legal rule to apply to a particular transaction.³⁵⁴ Although the Court has frequently defended its decisions by alluding to Congress's ability to change a rule with which it disagrees, the history of the 1991 Amendments to the Civil Rights Act illustrates that the political impediments to retroactive legislation limit congressional power to correct a perceived judicial error in pending cases.³⁵⁵ Under *Plaut*, congressional power is subject to a still greater limitation. Due to the time constraints associated with the legislative process, there will invariably be a class of cases that will reach final judgment under the judicially adopted rule before legislatures can act. *Plaut's* restriction

³⁵⁰ Decisions that overrule prior holdings have become increasingly common. See Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467.

³⁵¹ See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 505-06 (1995) (arguing that this limitation upon the ability of one legislature to impose its will on a future legislature is a fundamental part of the traditional understanding of the legislative power); see also *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2453-55 (1996) (describing the development of American limitations on the absolute power of subsequent legislatures).

³⁵² See *supra* note 269. Frank Michelman explains that society suffers this "demoralization cost" because of the additional risk that uncompensated changes in government policy impose on future investment decisions. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

³⁵³ See *The Supreme Court, 1993 Term — Leading Cases*, *supra* note 309, at 318-19 (describing occasions on which Congress has retroactively overruled judicial decisions with which it disagrees).

³⁵⁴ See *supra* pp. 1077-78.

³⁵⁵ See *supra* note 93.

on legislative interference with final judgments entirely eliminates the prospect of legislative correction in those cases.

Thus, retroactivity rules impact both the ability of one lawmaking branch to affect the legal rules adopted by the other and the degree to which the courts can reserve for themselves the ultimate authority to determine the rule of decision in any particular case. The propriety of a particular balance of lawmaking authority may depend, in part, on the type of lawmaking involved. It may be more important to ensure that a subsequent legislature has the ability to overrule its predecessor than to facilitate the legislature's ability to overrule common law adjudication. The Supreme Court has not considered the adjudicative context — common law, constitutional law, or statutory interpretation — relevant to the determination of a court's authority to adjudicate non-retroactively. Under equilibrium theory, however, the very existence of a lawmaker with authority to supersede a judicially adopted rule affects the descriptive assessment of whether that rule disturbs a stable equilibrium, the normative question whether the disruption is appropriate, and the normative question central to retroactivity analysis: how the temporal reach of the new rule should be applied to address the consequences of legal change.

Ultimately, equilibrium theory modernizes the analysis of retroactivity doctrine by identifying analytical factors consistent with the approach of the new legal process school.³⁵⁶ Casting the retroactivity debate in terms of the respective responsibility of Congress and the courts for effecting legal change leads to an inquiry into comparative institutional competence. This inquiry requires an evaluation of the relative ability of Congress and the courts to assess and address the transition costs associated with adopting new legal rules. Equilibrium theory provides the tools for this analysis.

V. CONCLUSION

Judicial analysis of retroactivity has failed on two levels. The Court has struggled to articulate a conception of retroactive lawmaking and to develop a means by which to evaluate the appropriate temporal limits on lawmaking in various contexts. At a more fundamental level, the Court has failed to perceive the relationship between its analysis of retroactivity and the process of legal change. Arguments such as Justice Scalia's, which are framed in constitutional or historical terms, mask an underlying political viewpoint about the allocation of lawmaking power in our political system.

³⁵⁶ Cf. *The Supreme Court, 1993 Term — Leading Cases*, *supra* note 309, at 316 ("Traditional doctrines of judicial retroactivity and statutory nonretroactivity incorporate only the most simplistic vision of the relationship between Congress and the Court — that of the maker and the interpreter of law respectively." (footnote omitted)).

Using equilibrium theory, this Article exposes the assumptions about legal change that drive retroactivity principles. The Article explains that in the context of an unstable equilibrium our intuitions about the legitimacy of retroactivity are justified, and retroactive lawmaking is an appropriate and efficient means of clarifying, correcting, and incrementally adjusting the regulatory climate. In a stable equilibrium, however, legal change imposes considerable costs on individuals subject to the change and on the legal system as a whole. A doctrine that grants rulemakers the flexibility to adjust the temporal reach of legal change in order to minimize transition costs encourages the disturbance of stable legal equilibria.

By moving retroactivity analysis from the *Chevron Oil* test's fixation on the nature of the change to an evaluation of regulatory context, equilibrium theory emphasizes the framework into which legal change is introduced. Understanding the context of legal change furthers an assessment of the descriptive and normative consequences of the change. Because retroactivity rules constrain a lawmaker's ability to adjust the temporal reach of legal change and therefore to moderate the transition costs associated with legal change, retroactivity doctrine directly influences the cost and feasibility of effecting legal change. Retroactivity analysis is properly understood to be rooted in substantive views about the process of legal change. Exposing the political overtones of the retroactivity debate thus reveals its consequences for the relative lawmaking power of Congress and the courts.