CONSTITUTIONAL INTERPRETATION — FEDERAL STATUTES — NEW RULES OF FEDERAL LAW MUST BE GIVEN FULL RETROACTIVE EFFECT IN ALL CASES STILL SUBJECT TO DIRECT VIEW — *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2150 (1993).

Adam J. LaRosa

I. INTRODUCTION

The common and traditional meaning of the "judicial Power" pursuant to Article III, section 1 of the United States Constitution[1] is to say what the law is.[2] In addition, Article III, section 2 of the United States Constitution[3] provides that the Supreme Court adjudicates only "cases" and "controversies"[4] and does not promulgate new rules of constitutional law.[5]

---

[1]Article III, section 1 of the United States Constitution states in pertinent part that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[2]This view was first articulated by Chief Justice Marshall in Marbury v. Madison, 5 U.S. 137 (1803), wherein the Chief Justice declared, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Id.* at 177-78.

[3]Article III, section 2 of the Untied States Constitution states in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the Untied States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party; -the Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

[4]It is settled principle that "the nature of judicial review requires that we [the Supreme Court] adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule." American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 213 (1990) (Stevens, J., dissenting) (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987)). Integrity of judicial review requires that the new rule be applied to all similar cases currently pending on direct review. *Id.*

In this regard, Justice Harlan illuminated that:

Retroactive decision making[6] comports with both sections of Article III. Any other application of newly announced law is an unconstitutional usurpation

---

> [W]e [the Court] possess this awesome power of judicial review, this duty to bind coordinate branches of the federal system with our view of what the Constitution dictates, only because we are a court of law, an appellate court charged with the responsibility of adjudicating cases or controversies according to the law of the land and because the law applicable to any such dispute necessarily includes the Federal Constitution.

Mackey v. United States, 401 U.S. 667, 678 (1971) (Harlan, J., concurring in the judgment).

[5]*Id.* In *Mackey*, the Court further elaborated that:

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

Id. at 679 (Harlan, J., concurring in the judgment).

[6]The jurisprudence of retroactivity deals with three ways a court may apply a newly announced rule of law which significantly alters the pertinent body of law in existence prior to the announcement of the new rule. Francis X. Beytagh, *Ten Years of Non-Retrospectivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1557 n.2 (1975). First, pure prospectivity holds that a new rule should govern future cases only and not the party before the court or any previous or pending cases. *Id.* Second, modified prospectivity restricts the rule to the litigants bringing the suit and to prospective application. David T. Watters, *Retroactivity Refused: North Carolina Defies Supreme Court Precedent in* Swanson v. State, 70 N.C. L. REV. 2125, 2126 n.8 (1992). Finally, retroactive decision making permits the newly established rule to be applied to cases either currently in court or not barred by statutes of limitation, final judgment, or repose. *Id.*

Determining that lawmaking shall be left to the legislatures, Justice Black articulated that:

> [O]ne of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts.

James v. United States, 366 U.S. 213, 225 (1961) (Black, J., dissenting).

of legislative power.[7]

II. VIRGINIA'S CONSTITUTIONAL VIOLATION: THE REFUSAL TO APPLY RETROACTIVE RELIEF FOR IMPROPERLY ASSESSED TAXES

In light of the Court's decision in *Davis v. Michigan Department of Treasury*,[8] the State of Virginia, faced with a potential refund of some $440,000,000,[9] violated the traditional view of "judicial Power"[10] by refusing to

---

[7]Prospective decision making is, in effect, appellate lawmaking. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2444 (1991) (plurality opinion) (expounding that prospectivity provides courts the opportunity to act as a legislature). Specifically, the legislature declares new law which comes into existence on the day it is declared and has no force of law to any prior occurrences. *See id.* Thus, when a court declares a newly announced rule of law to only apply prospectively, the law has the same effect as one declared by a legislature. *See id.*

Traditionally, appellate lawmaking was considered unthinkable. Beryl H. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960). The theory was that judges are not to "pronounce a new law, but to maintain and expound the old one." *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (1765)). The judge's role is merely to find the pre-existing law and declare what is found. *Id.* Accordingly, prior judicial decisions are not the law, but rather, only evidence of the law. *Id.* Therefore, a judicial decision seemingly changing the law is not deemed to have changed it, but rather to have discovered what has always been the real meaning of the law. *Id.* As such, the traditional view followed that any change in the law must necessarily apply retroactively. *Id.*

[8]489 U.S. 803 (1989). Justice Kennedy, writing for the majority, held unconstitutional a Michigan tax which exempted all retirement benefits the State and local governments paid, but imposed a tax on those retirement benefits disbursed from all other employers, including the Federal Government. *Id.* at 805. Because the tax law provided preferential treatment to state employees and imposed a tax upon federal employees, Justice Kennedy concluded that it violated the doctrine of intergovernmental tax immunity. *Id.* at 817.

[9]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2535 (1993) (citation omitted). For a cogent discussion of the potential impact of retroactively applying the Court's ruling on an unconstitutional tax scheme similar to the one in *Harper*, see Watters, *supra* note 6.

[10]In reaction to the *Davis* decision, Virginia repealed its tax imposed on federal retirement benefits, VA. CODE ANN. § 58.1-322(C)(3) (Supp. 1988), where state and local retirement benefits were exempt. *Harper*, 113 S. Ct. at 2514 (citing 1989 Va. Acts, Special Sess. II, ch.3). In addition, Virginia imposed a statute of limitation governing the refund claims made pursuant to the illegal tax. *Id.* This statute, however, barred refund actions seeking taxes imposed prior to 1985. *Id.* Pursuant to this statute, refunds of state taxes on federal retirement benefits from 1985 through 1988 could have been made up to one year

provide retroactive relief for improperly assessed taxes.[11] Writing for the majority[12] in *Harper v. Virginia Department of Taxation*,[13] Justice Thomas reversed the decision of Virginia's highest court,[14] which denied retroactive

---

subsequent to the final judicial determination of whether Virginia must provide a refund of these taxes. *Id.* (citing VA. CODE ANN. § 58.1-1823(B) (Supp. 1992)). Generally, under Virginia law, applications for tax refunds must be made no longer than three years after the assessment. *Id.* (citing VA. CODE ANN. § 58.1-1825 (Michie 1991)).

[11]As a matter of state law, the Virginia Supreme Court held that a "ruling declaring a taxing scheme unconstitutional is to be applied prospectively only." Harper v. Virginia Dep't of Taxation, 401 S.E.2d 868, 873 (Va. 1991). Defending its decision on "independent and adequate state grounds," the Virginia court declared that it "previously . . . held that [its] Court's ruling declaring a taxing scheme unconstitutional is to be applied prospectively only." *Id.* (citations omitted). Virginia's retroactivity doctrine stated that "consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule." Fountain v. Fountain, 200 S.E.2d 513, 514 (Va. 1973), *cert. denied*, 416 U.S. 939 (1974), quoted in *Harper*, 401 S.E.2d at 874. This state-law doctrine is simply an adoption of the three-pronged analysis delineated in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

For an in-depth discussion of the three-pronged test developed in *Chevron Oil*, see *infra* notes 33-39 and accompanying text.

[12]*Harper*, 113 S. Ct. at 2513. Justice Thomas delivered the opinion of the Court, joined by Justices Blackmun, Stevens, Scalia, and Souter. *Id.* Justices White and Kennedy joined in Parts I and III. *Id.* Justice Scalia filed an opinion concurring in the judgment. *Id.* at 2520 (Scalia, J., concurring). Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice White joined. *Id.* at 2514 (Kennedy, J., concurring in part and concurring in the judgment). Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist joined. *Id.* at 2526 (O'Connor, J. dissenting).

[13]113 S. Ct. 2510 (1993). In *Harper*, petitioners, 421 military and federal civil service retirees, brought suit to compel the refund of state income taxes on their retirement benefits in the wake of states and local employees' benefits being exempted. *Id.* at 2514. Petitioners sought a refund of all taxes "erroneously or improperly assessed," VA. CODE ANN. § 58.1-1826 (Michie 1991), in violation of the nondiscrimination principle of *Davis*. *Harper*, 113 S. Ct. at 2514. Applying the test established in *Chevron Oil*, 404 U.S. at 106-07, *see infra* notes 33-39 and accompanying text, the trial court denied petitioners relief. *Harper*, 113 S. Ct. at 2514. The Court explained that an issue of first impression, not clearly foreshadowed, was decided in *Davis* and that prospectively applying *Davis* would not hamper its operation, while retroactively applying *Davis* would cause inequity, injustice, and hardship. *Id.*

[14]On appeal, Virginia's highest court affirmed. *Id.* The court declared that the decision in *Davis* must not be applied retroactively, and that a "ruling declaring a taxing scheme unconstitutional is to be applied prospectively only." *Id.* (quoting Harper v. Virginia Dep't

treatment to a previously applied[15] rule of federal law.[16] In so finding, Justice Thomas espoused that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law," accordingly, that interpretation "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[17]

---

of Taxation, 401 S.E.2d 868, 873 (Va. 1991)). Additionally, the court declined to uphold petitioners' contention that, as a matter of state law, refunds were due. *Id.* The court concluded that because the decision in *Davis* was not applied retroactively, taxes assessed prior to that decision were not erroneous or improper. *Id.* The United States Supreme Court granted *certiorari*, and pursuant to its decision in James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) (plurality opinion) (declaring that once a rule of federal law is announced and applied to the parties in the controversy, that rule must be provided full retroactive effect from all courts adjudicating federal law), vacated the decision of the Virginia Supreme Court and remanded the case for further consideration. *Id.* at 2515 (citing Lewy v. Virginia Dep't of Taxation, 111 S. Ct. 2883 (1991)).

Reiterating the holding in *Davis*, Justice Thomas held that Virginia is bound by that decision and found that the rule in *Davis*, which declared the tax scheme in *Harper* unconstitutional, applies retroactively. *Id.* at 2513-18.

[15]In *Davis*, Justice Kennedy declared that the United States did not consent pursuant to 4 U.S.C. § 111 to this discriminatory treatment. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808-17 (1989). 4 U.S.C. § 111 states in pertinent part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111. In this regard, the Justice noted that the discriminatory treatment of imposing taxes on federal benefits and not state and local benefits, violated the doctrine of intergovernmental immunity. *Davis*, 489 U.S. at 808-17.

Noting that Michigan conceded that a tax refund was proper, Justice Kennedy provided that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Id.* at 817. *See* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (Iowa 1931) (declaring that a taxpayer subjected to a discriminatory tax has reduction in subsequent taxes as a right of redress).

[16]*Harper*, 113 S. Ct. at 2514.

[17]*Id.* at 2517.

III. HISTORY OF THE RETROACTIVITY DOCTRINE AND THE IMPLEMENTATION OF PROSPECTIVE DECISION MAKING IN THE CRIMINAL AND CIVIL ARENAS

Over the past thirty years, the question of whether a rule announced by the Court applies retroactively has been complicated by the fact that the Warren Court and the Rehnquist Court took opposing views on this issue.[18] Although the Court's retroactivity jurisprudence in the past three decades has invoked numerous commentaries by legal scholars, these discussions are by no means new to legal theorists.[19] As noted in *Linkletter v. Walker*,[20] the idea that certain judicial decisions might not relate back and apply to practices engaged in prior to the Court's ruling did not arise in 1965.[21]

---

[18]Watters, *supra* note 6, at 2126-27. Prior to the Warren Court, the American judicial system required that all new decisions be applied retroactively to all future litigants who were not barred from bringing suit. *Id.* at 2126-27. In an attempt to eliminate unwanted results, however, the Warren Court, in Linkletter v. Walker, 381 U.S. 618 (1965), pronounced its first decision which declared a previous constitutional ruling not to be wholly retroactive and allowed particular judgments to only apply prospectively. Beytagh, *supra* note 6, at 1557. Notable changes in the Court's thinking have occurred since the pivotal decision of *Linkletter*, largely due to the change in membership of the Court. *Id.* Moreover, modifications of the doctrine of retroactivity by the Rehnquist Court brought the doctrine back to its position before the *Linkletter* decision. Watters, *supra* note 6, at 2127.

[19]*See, e.g.*, Beytagh, *supra* note 6 (examining the first ten years of prospective decision making and noting the pitfalls and proposing the adoption of procedural mechanisms to compensate for the unforeseen problems); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 54-56 (1970) (criticizing the Warren Court's failure to sufficiently justify its variable application of retroactivity and prospectivity); Watters, *supra* note 6 (examining the retroactive application of an unconstitutional tax); Jonathan Mallamud, *Prospective Limitation & The Rights of the Accused*, 56 IOWA L. REV. 321 (1970) (discussing the limitations of prospective decision making in cases which present substantial changes in the law).

[20]381 U.S. 618 (1965).

[21]*Id.* at 624-28. Justice Clark, writing for the majority in *Linkletter*, outlined the theory and history of America's retroactivity jurisprudence. *Id.* at 622. Justice Clark noted that at common law, no authority existed for the suggestion that judicial decisions only made law for the future. *Id.* As support, the Justice opined that Blackstone proffered that the role of the judiciary was not to "pronounce a new law, but to maintain and expound the old one." *Id.* at 622-23 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (1765)). *See* Kuhn v. Fairmont Coal Co., 215 U.S 349, 372 (1910) (Holmes, J., dissenting) (stating that judicial decisions have had retrospective operation for a thousand years). A new rule is in fact pre-existing law, and thereby reduces the role of the judiciary to finding the law and

While early common law was based on the Blackstonian theory that judges only declare what the law is,[22] American jurisprudence shifted to the notion that judges may, in fact, make law.[23] Justice Cardozo, a leading proponent of non-retroactivity,[24] facilitated this shift through the opinion in *Great Northern Railway v. Sunburst Oil & Refining Co.*[25] This shift created the rationale which allowed law that has been overruled to retain effect in cases previously decided. Accordingly, this decision empowered the Warren Court to revise criminal procedure and ensure that individuals convicted under an overruled law would not go free.[26]

---

then declaring what was found. Beyrl H. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960).

[22]*See* Beytagh, *supra* note 6, at 1560; Levy, *supra* note 21, at 2.

[23]Beytagh, *supra* note 6, at 1560. The Blackstonian view that judges do not make law, but instead are relegated to the task of finding and declaring what the law is, was denounced by Austin. Levy, *supra* note 21, at 28. *See* 2 AUSTIN, JURISPRUDENCE 655 (4th ed. 1879) (declaring that what hindered Blackstone was "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from the eternity, and merely *declared* from time to time by the judges"). Noting that Austin continuously maintained that judges do not merely discover law but, in fact, make law by filling in the vague or indefinite with judicial interpretation, Justice Clark explained that this view gained acceptance over a hundred years ago. *Linkletter*, 381 U.S. at 624 (citing Bingham v. Miller, 17 Ohio 445 (1848) (deciding that legislative divorces were illegal and void and that those previously granted were afforded immunization through prospective application of the newly enunciated rule in that case).

[24]As discussed by Justice Clark in *Linkletter*, Justice Cardozo insisted that solely retroactive application of new law was not consistent with reality "largely because judicial repeal ofttimes did 'work hardship to those who [had] trusted to its existence.'" *Linkletter*, 381 U.S. at 624 (quoting Cardozo, Address to the N.Y. Bar. Ass'n, 55 Rep. N.Y. State Bar Ass'n, 263, 296-297 (1932)).

It has been suggested that Justice Cardozo's concern for prospective decision making emanated from his experiences during law school. Levy, *supra* note 21, at 10 n.31. Enrolled in a two-year curriculum, which was then extended to three years, the Justice balked at acquiescing to the retroactive application of the school's new curriculum and thus, never obtained his law degree. *Id.*

[25]287 U.S. 358 (1932). Concerned with the potential for unjust results which retroactive decision making presents, Justice Cardozo enabled future courts to form the doctrine of prospectivity through his statement that the Constitution fails to prohibit a state's choice of prospective application of newly enunciated law. *Id.* at 364.

[26]Beytagh, *supra* note 6, at 1562.

Prospective application of newly announced law, "[o]ne of the Supreme Court's most fascinating jurisprudential experiments,"[27] became firmly established in *Linkletter v. Walker*.[28] In *Linkletter*, the Court handed down its first decision which declared a prior constitutional ruling not wholly retroactive.[29] Justice Clark, writing for the majority, announced the Court's view that the Constitution does not require, nor prohibit, retroactive decision making.[30] As a result, the Court noted that it possessed the authority to determine whether a new rule should apply prospectively or retroactively.[31] Additionally, Justice Clark opined that the question of whether a new law is retroactive is answered by considering the history of the rule, its effect and purpose, and whether retroactivity would enhance or retard its operation.[32]

Although five years later the Court extended prospectivity to civil cases in *Cipriano v. City of Houma*,[33] it was not until *Chevron Oil Co. v. Huson*[34] that the test for prospective application of a newly announced law

---

[27]*Id.* at 1557.

[28]381 U.S. 618 (1965).

[29]Beytagh, *supra* note 6, at 1557. *See* James B. Haddad, *"Retroactivity Should be Re-Thought": A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L. & CRIMINOLOGY 417 (1969) (emphasizing that *Linkletter* was the first time the Court held that it, along with the lower courts, could deny the "benefit of a constitutional right to a person equipped with a procedural remedy for challenging the lawfulness of present incarceration attributable to a denial of that constitutional right"). Prior to *Linkletter*, all Supreme Court decisions had retroactive effect, and thus a new rule applied to all pending cases as well as those arising after the rule was announced. Watters, *supra* note 6, at 2133.

[30]*Linkletter*, 381 U.S. at 629.

[31]*Id.* The Court in *Linkletter* professed that the exclusionary rule delineated in Mapp v. Ohio, 367 U.S. 643 (1961), did not apply to cases involving final convictions prior to the *Mapp* decision. *Linkletter*, 381 U.S. at 620. The Court reasoned that the deterrent purpose of the exclusionary rule would not be facilitated by retroactive application. *Id.*

[32]*Id.* at 629.

[33]395 U.S. 701 (1969). The Court in *Cipriano* held that a Louisiana law restricting participation to "property taxpayers" in revenue bond elections offended the Equal Protection Clause. *Id.* at 702. The Court professed that this holding was to apply purely prospectively. *Id.* at 706. The Court reasoned that retroactive application would have levied significant burdens on issuers or holders of such bonds. *Id.*

[34]404 U.S. 97 (1971).

was outlined.[35] What was to become known as the "*Chevron Oil* test" consisted of three separate factors which Justice Stewart found controlling in most cases.[36] The first prong of the *Chevron Oil* test is that "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."[37] The second prong is whether the purpose and effect of the rule at issue would be furthered by retroactive application.[38] Lastly, the Justice expressed that the inequity inflicted by retroactive application must be taken into consideration.[39] The three-prong test established in *Chevron Oil* proved an effective and resilient standard for retroactive application questions in civil cases over the next two decades.[40]

---

[35]*Id.* at 107-09. Writing for the majority, Justice Stewart held that a prior decision which applied a state statue of limitations for personal injury suits pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* (1964), was nonretroactive. *Id.* Acknowledging the history of retroactivity, Justice Stewart expressed:

> In recent years, the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process. . . . But the problem is by no means limited to that area. The earliest instances of nonretroactivity in the decisions of this Court - more than a century ago - came in cases of nonconstitutional, noncriminal state law. . . . It was in a noncriminal case that we first held that a state court may apply its decisions prospectively. . . . And in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases.

Id. at 105-06.

[36]*Id.* at 106.

[37]*Id.*

[38]*Id.* at 106-07. Taking language from Linkletter v. Walker, 381 U.S. 618 (1965), Justice Stewart indicated that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629.

[39]Chevron Oil v. Huson, 404 U.S. 97, 107 (1971). Justice Stewart stated that "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Id.* (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

[40]Watters, *supra* note 6, at 2134.

IV. THE COURT'S REJECTION OF THE PROSPECTIVITY "EXPERIMENT"

This shift towards prospectivty, however, was problematic[41] and had many critics.[42] The general thrust of the criticism was levied upon the fairness aspect of prospectivity in criminal cases.[43] This concern undoubtedly played a significant factor in the elimination of prospectivity in

---

[41]Prospectivity created the application, previously mentioned herein, described as "modified" prospectivity. *See supra* note 6. Modified prospectivity is similar to pure prospectivity because it does not require a newly enunciated rule to apply to all cases currently pending. Watters, *supra* note 6, at 2134 (citing James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2444 (1991) (plurality opinion) (stating that courts may apply a newly announced rule to the case within which it is pronounced and subsequently apply the old rule to all other cases arising upon facts predating the pronouncement)). Modified prospectivity differs from pure prospectivity, however, because although it applies new rules to future cases, it also applies the new rule to the case in which it was pronounced. Watters, *supra* note 6, at 2134. This anomaly, modified prospectivity, provided the Warren Court with the opportunity to change criminal procedure as well as keep those convicted under prior law in prison. *Id.* at 2135. Accordingly, the Court could now apply a new rule only to the party bringing the challenge and refuse to apply it to those whose appeals were final. *Id.*

[42]*See, e.g.*, Beytagh, *supra* note 6, at 1562 (noting that Justice Harlan, among others, complained of the "insidious" effects of nonretroactive decision making); Haddad, *supra* note 29, at 440 (declaring that "the prospective only technique" established in *Linkletter* should be provided a "respectful burial").

Modified propectivity had the original supporters of prospectivity criticizing the Court for enlarging the doctrine and creating dissimilar results among analogous litigants. Watters, *supra* note 6, at 2135 n.88. For example, Justice Harlan asserted that *Linkletter's* progeny ran contrary to judicial tradition by providing only certain litigants the benefit of new constitutional rules. *Id.* (citing Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)). Additionally, Justice Harlan argued in Mackey v. United States, 401 U.S. 667 (1971), that modified prospectivity was "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting the stream of similar cases to flow by unaffected by that new rule." *Mackey*, 401 U.S. at 679 (Harlan, J., concurring in the judgment).

For a complete discussion on the positions of various Justices, see Haddad, *supra* note 29, at 419-20.

[43]In 1987, the Court met head on the criticism of prospective application in criminal cases when it granted *certiorari* on Griffith v. Kentucky, 479 U.S. 314 (1987). *Griffith* dealt with the retroactivity of Batson v. Kentucky, 476 U.S. 79 (1986). In *Batson*, the Court held that the Equal Protection Clause prevented a prosecutor from using preemptory challenges to exclude jurors solely on the basis of that jurors race. Griffith v. Kentucky, 479 U.S. 314, 316 (1987) (relying on *Batson*, 476 U.S. at 79).

Griffith v. Kentucky.[44] The evolution of prospectivity, however, imparted significant ramifications on tax decisions.[45] Until this juncture, the Supreme Court characteristically permitted state courts to determine whether to apply a new rule retroactively.[46] Now armed with the ability to deny refunds for unconstitutional taxes through providing only prospective relief, state courts did just that.[47] This policy has since been modified. This process of modification was launched when the Court decided *McKesson Corp. v. Florida Alcohol & Tobacco Division*[48] and its companion case, *American*

---

[44]479 U.S. 314 (1987). In its holding, the Court in *Griffith* eliminated limits on the retroactivity of newly decided criminal rules. *Id.* at 322. The Court announced that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.*

The first basic norm of the judiciary is that a newly announced rule is to apply retroactively to all similar cases on direct review. *Id.* at 322-23. *See Mackey*, 401 U.S. at 679 (Harlan, J., concurring in the judgment) ("The Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.").

The second norm violated through selective application of newly announced rules is the principle of treating similarly situated litigants alike. *Griffith*, 479 U.S. at 323. *See* United States v. Johnson, 457 U.S. 537, 556 n.16 (1975) (explaining that the problem of selectively applying a new rule to cases pending on review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule).

While acknowledging violations of basic norms of the judiciary, the Court proceeded to declare, in a single footnote, that its decision avoided the area of civil retroactivity. *Griffith*, 478 U.S. at 322 n.8. The Court noted that civil retroactivity continued to be governed by the standard delineated in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). *Id.* See *supra* notes 33-39 and accompanying text for a discussion of *Chevron Oil* and the *Chevron* test.

[45]Watters, *supra* note 6, at 2135. For an in-depth discussion on the application of the doctrine of prospectivity denying refunds of unconstitutional taxes, see Philip M. Tatarowicz, *Right to a Refund for Unconstitutional Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 TAX LAW. 103, 116-44 (1987) [hereinafter Tatarowicz].

[46]Tatarowicz, *supra* note 45 at 116-17.

[47]*Id.* at 117. Tatarowicz noted that states relied on prospectivity to deny refunds. *Id.* As such, states retained taxes collected pursuant to laws which were later delineated unconstitutional. *Id.*

[48]496 U.S. 18 (1990).

Trucking Associations, Inc. v. Smith.[49]

In *McKesson*, Justice Brennan delivered the opinion for a unanimous Court,[50] establishing a constitutional right in a particular remedy by requiring states to provide "meaningful backward-looking relief to rectify any unconstitutional deprivation."[51] In its decision, the Supreme Court reversed the Florida court's determination that no refund of an unconstitutional liquor excise tax was required. Specifically, the Court held that the Fourteenth Amendment's Due Process Clause[52] requires that those paying taxes under duress of law[53] must be provided adequate constitutional post-deprivation remedies, such as a refund.[54] Justice Brennan subsequently specified remedies that Florida could impose which would provide petitioner with "all

---

[49]496 U.S. 167 (1990) (plurality opinion).

[50]*McKesson* was "one of the rare Supreme Court decisions to establish a constitutional right to a particular remedy." Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1824 (1991) (citing *The Supreme Court, 1989 Term - Leading Cases*, 104 HARV. L. REV. 129, 188-89 (1990)).

[51]*McKesson*, 496 U.S. at 31. The taxpayer in *McKesson*, a liquor distributor, paid a Florida liquor excise tax similar, except for what the Court in *McKesson* declared merely "cosmetic" changes, to a tax deemed unconstitutional in Baachus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984). *Id.* at 46. Although subsequent to the taxpayer's payment of the tax, the trial court determined that the tax was, in fact, in derogation of the Constitution and discriminated against interstate commerce. *Id.* at 22. The court refused, however, to provide a refund. *Id.*

[52]U.S. CONST. amend. XIV, § 1. The Due Process Clause states in pertinent part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" *Id.*

[53]*McKesson*, 496 U.S. at 31. From the language of *McKesson*, it appears that a state places a taxpayer under duress when the taxpayer is prompted to pay a tax at the time it is due or be subject to a penalty, and then, once remitted, allowed to initiate a post payment refund action wherein said taxpayer can challenge the illegality of the tax. *See id.* at 51.

[54]*Id.* Justice Brennan reasoned that in order to satisfy the guidelines of the Due Process Clause, the state must provide the taxpayer with a "fair opportunity to challenge that accuracy and legal validity of their tax obligation," prior to the imposition of the tax. *Id.* at 39. Moreover, a "clear and certain remedy," for all unlawful or erroneous tax collected, must be provided by the state, ensuring that the challenge of the tax is meaningful. *Id.* (citing Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280, 285 (1912)).

of the process it [was] due."[55]

Conversely, in *American Trucking Associations, Inc. v. Smith*,[56] a divided Court[57] upheld a decision of the Arkansas Supreme Court which denied retroactive relief for taxes violating the Commerce Clause.[58] Justice

---

[55]*McKesson*, 496 U.S. at 40. These remedies included reformulating and enforcing the liquor tax, in the contested years in a nondiscriminatory fashion, and retaining the taxes levied upon petitioner under this reformulated tax. *Id.* Another remedy suggested by Justice Brennan was a refund of the difference between the tax petitioner paid and the tax assessed if it extended the same rates that its competitors received. *Id.* *See* Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499 (1928) (alleviating discrimination through such refunds); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931) (same). The Court suggested a third remedy that the State collect the discriminatory tax from petitioner's competitors who previously benefitted from the reduced rate, thereby creating, in hindsight, a nondiscriminatory tax. *McKesson*, 496 U.S. at 40. *See Bennett*, 284 U.S. at 247 (expressing that a state could eliminate the discriminatory tax through a collection of additional taxes from the previously favored competitors). The final remedy suggested by the Court in *McKesson* was a combination of partially refunded taxes to petitioner and partially assessing the tax increases on the favored competitors, thereby creating a nondiscriminatory tax. *McKesson*, 496 U.S. at 40. Of these remedies, the Justice noted, the State may choose any, or one in which it alone establishes, so long as such relief satisfies the minimum requirements outlined in its decision. *Id.* at 51-52.

[56]496 U.S. 167 (1990) (plurality opinion).

[57]*Id.* at 170 (plurality opinion). Justice O'Connor wrote for a four Justice plurality in which Chief Justice Rehnquist and Justices White and Kennedy joined. *Id.* at 171 (plurality opinion). Justice Stevens wrote the dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined. *Id.* at 205 (Stevens, J., dissenting). Justice Scalia's vote decided the case. *Id.* at 200 (Scalia, J., concurring in the judgment).

[58]*Id.* at 183 (plurality opinion). In *Smith*, a group of truckers whose domiciles were not within Arkansas initiated suit. *Id.* at 172 (plurality opinion). Petitioners claimed that a "flat tax" on the use of Arkansas highways violated the Commerce Clause. *Id.* Petitioners argued that the Arkansas law imposed lower per-mile costs on in-state truckers than on out-of-state truckers. *Id.* After losing in state court, plaintiffs, seeking both declaratory and injunctive relief, appealed to the Supreme Court. *Id.* at 172-73 (plurality opinion). The case was placed on hold pending the ruling in American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987), in which the Court found a virtually identical Pennslyvania tax offended the Constitution. *Smith*, 496 U.S. at 173 (plurality opinion). In light of *Scheiner*, the Arkansas court's judgment in *Smith* was vacated and remanded for reconsideration. *Id.*

Justice Blackmun, acting as Circuit Justice, initially ordered Arkansas to escrow the taxes subsequently collected until a judgment on the merits was handed down. *Id.* at 174 (plurality opinion). Although the Arkansas Supreme Court determined the flat tax unconstitutional, the Arkansas court declined to order a refund of the taxes imposed prior to the escrow order. *Id.* Accordingly, plaintiffs appealed to the United States Supreme Court. *Id.* at 176 (plurality opinion).

O'Connor applied the three-part test enumerated in *Chevron Oil Co. v. Huson*[59] for nonretroactivity of civil litigation.[60] In so doing, the Court determined that *Scheiner* did not apply retroactively and that the state was not required to extend refunds to those burdened by the unconstitutional tax.[61] Casting the deciding vote, Justice Scalia essentially agreed with the dissent's conclusion that decisions should apply retroactively.[62] The Justice, however, ultimately concurred with the decision of the court on the basis of *stare decisis*.[63]

Justice Stevens, writing for the four dissenters in *Smith*, outlined the two issues that divide the retroactivity question.[64] The first, a question of pure federal law, is to determine the current state of the law at issue, and the second is to determine an appropriate remedy.[65] The Justice opined that constitutional rules may not be limited to only prospective application.[66]

---

[59]404 U.S. 97 (1971). For a review of the *Chevron Oil* test, see *supra* notes 33-39 and accompanying text.

[60]*Smith*, 496 U.S. at 176-200 (plurality opinion).

[61]*Id.* at 183 (plurality opinion). Determining that the *Scheiner* decision established a new rule, Justice O'Connor indicated that it was clear that retroactive application was not appropriate in deterring future government violations. *Id.* at 179-81 (plurality opinion). Considering the equities of applying the decision in *Scheiner* retroactively, the plurality in *Smith* determined that it was inequitable to so do. *Id.* at 182-83 (plurality opinion). The plurality found that retroactive application of the law would upset the reliance of state officials on the old rule, and would, thus, have potentially disruptive consequences for the citizens and the state. *Id.*

[62]*Id.* at 201 (Scalia, J., concurring in the judgment). Justice Scalia opined that prospective decision making is inharmonious with the judicial role of saying what the law is and not prescribing what it shall be. *Id.*

[63]*Id.* at 204-05 (Scalia, J., concurring in the judgment). Evidencing the "frailty of the Smith decision," Watters, *supra* note 6, at 2136, and agreeing with the dissent's attitude toward prospectivity, Justice Scalia viewed the Court's jurisprudence toward the dormant commerce clause as inherently unstable. *Id.* at 203-04 (Scalia, J., concurring in the judgment). Accordingly, the Justice adhered to *stare decisis* and refused to upset the settled expectations of the litigants, and thus, concurred with the plurality. *Id.* at 203-04 (Scalia, J., concurring in the judgment).

[64]*Id.* at 205 (Stevens, J., dissenting).

[65]*Id.*

[66]*Id.* at 212 (Stevens, J., dissenting). The Justice indicated that "[f]undamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review." *Id.* Moreover, Justice Stevens reiterated Justice Harlan's insight

Justice Stevens concluded that *Smith* should have been remanded for a determination of appropriate relief.[67]

Consequently, the Court's decision in *Smith* left unsettled the extent to which the retroactive effect of the Court's decisions could be modified in civil cases.[68] One year later, however, in *James B. Beam Distilling Co. v. Georgia*,[69] the Court profoundly limited prospectivity by requiring the retroactive application of civil decisions which declared a tax scheme unconstitutional.[70] Justice Souter announced the Court's divided opinion.[71] Specifically, the issue was whether the Court's decision in *Bacchus Imports, Ltd. v. Dias*[72] should retroactively apply to facts predating the *Bacchus* decision.[73] Providing a succinct history[74] on the doctrine of retroactivity

---

on retroactivity and expressed the view that "adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law." *Id.* at 213-14 (Stevens, J., dissenting). *See supra* notes 4-6 and accompanying text.

[67]*Id.* at 225 (Stevens, J., dissenting). While not rejecting *Chevron Oil* and similar cases that apply the principle of nonretroactivity in civil cases, Justice Stevens argued that the question of whether to apply traditional retroactive remedies should be addressed. *Id.* at 219-23 (Stevens, J., dissenting).

[68]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517 (1993).

[69]111 S. Ct. 2439 (1991) (plurality opinion).

[70]*Id.*

[71]*Id.* at 2441 (plurality opinion). Justice Souter was joined by Justice Stevens. *Id.* Justice White filed an opinion concurring in the judgment. *Id.* at 2448 (White, J., concurring). Justice Blackmun filed an opinion concurring in the judgment in which Justices Scalia and Marshall joined. *Id.* at 2449 (Blackmun, J., concurring). Justice Scalia filed an opinion concurring in the judgment, in which Justices Blackmun and Marshall joined. *Id.* at 2450 (Scalia, J., concurring). Justice O'Connor filed a dissenting opinion, joined by Chief Justice Rehnquist and Justice Kennedy. *Id.* at 2451 (O'Connor, J., dissenting).

[72]468 U.S. 263 (1984).

[73]*Beam*, 111 S. Ct. at 2441 (plurality opinion). Justice Souter explained that the tax at issue in *Beam* was an excise tax imposed on imported distilled spirits and alcohol, two times the rate of tax imposed on such items manufactured from Georgia-grown products. *Id.* at 2442 (plurality opinion). *See* GA. CODE ANN. § 3-4-60 (1982). Prompted by the finding in *Bacchus* that a similar Hawaii statute violated the Commerce Clause, petitioner, a Kentucky bourbon manufacturer and Delaware corporation, argued that Georgia's statute was correspondingly violative. *Id.*

Seeking a refund of $2.4 million, which consisted of all taxes paid pursuant to the

and the problems[75] incurred when new laws are applied prospectively,

---

excise tax in the years 1982 through 1984, the trial court held the tax unconstitutional. *Id.* The trial court, however, used the *Chevron Oil* analysis and found that the ruling should not apply retroactively and denied the requested refund. *Id.* Affirming on all counts, the Supreme Court of Georgia, using the *Chevron Oil* test, determined that the rule announced was a new one, the old rule was justifiably relied on by the litigants, and the unjust results that would arise from a retroactive application ought to be avoided through prospective application. *Id.* The Supreme Court subsequently granted *certiorari* on the retroactivity question. *Id.*

[74]Stating that the ordinary case is one in which the question of retroactivity does not arise and that courts generally apply settled precedents and principles of law to cases and events where those settled precedents antedate the case, Justice Souter noted an exception exists when the law changes. *Id.* at 2442-43 (plurality opinion) (citing Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60 (1965)). The Justice explained that it is only when the law changes that the question of retroactivity arises. *Id.* at 2443 (plurality opinion). Justice Souter illustrated that the paradigm cases involve one in which a court explicitly overrules precedent. *Id.* Additional cases include those in which precedent would have caused the outcome of the case to be decided differently and precedent upon which the litigants previously relied. *Id.* Justice Souter opined that the question of whether the old rule or new rule should apply is in one part a question of choice of law, between relation backward and the principle of only looking forward. *Id.* (quoting Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)). The Justice proffered that once a new rule is found to relate backwards the second part of the question is a question of remedies; that being, should the litigant succeeding upon the new rule, obtain the relief awarded if the rule had instead been an old one. *Id. See* McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div., 496 U.S. 18 (1989). While the choice-of-law question is federal in nature, the Justice opined that the remedial question is governed under state law when, as in this case, the case commences in state court. *Beam*, 111 S. Ct. at 2443 (plurality opinion). *See* American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1989).

[75]Describing the three ways within which the choice-of-law question may be resolved, Justice Souter first acknowledged that a fully retroactive decision may be applied to parties before the court, and those whose claims may be pressed by or against, in compliance with any procedural barriers like statutes of limitation and *res judicata*. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443 (1991) (plurality opinion) (claiming this practice as the overwhelming norm (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting))); Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment) (declaring retroactivity as keeping the tradition of the courts to deciding cases upon their best understanding of the current law); American Trucking Ass'ns, Inc. v. Smith 496 U.S. 167, 201 (1989) (Scalia, J., concurring in the judgment) (declaring prospective decision making as inharmonious with the judicial role)). Justice Souter proceeded by mentioning the failure of retroactivity taking notice of a litigant's reliance on subsequently abandoned cases. *Beam*, 111 S. Ct. at 2443 (plurality opinion) (citing Mosser v. Darrow, 341 U.S. 267 (1951) (Black, J., dissenting)).

Moving to the second way a choice-of-law question may be resolved, the Justice

Justice Souter found support for the Court's inevitable conclusion.[76]

---

examined pure prospectivity, whereby a new rule is neither applied to the litigants in the cases in which it is decided nor those to or against whom it may apply their conduct antedating that decision. *Id.* Listing the cases within which the Court has infrequently applied pure prospectivity, Justice Souter declared that the remedial aspect of the choice-of-law question was never eliminated. *Id.* at 2443-44 (plurality opinion) (citations omitted). Justice Souter proceeded to note the drawbacks of prospectivity. *Id.* at 2444 (plurality opinion). The Justice deciphered the rationale behind pure prospectivity as the inability to erase the past through a new judicial decision, thereby offending the basic norm of justice and fairness by applying the new rule to parties who relied on the old. *Id.* (citing Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)).

Justice Souter contended that pure prospectivity relaxes the force of precedent, minimizes the price of overruling, and provides courts with the means to act in the manner of legislatures. *Id. See* United States v. Johnson 457 U.S. 537, 554-55 (1982) (reiterating Justice Harlan's view that the refusal to apply newly announced constitutional rules retroactively loosens the forces of precedent and *stare decisis* "which ought to bear on the judicial resolution of any legal problem").

Justice Souter then turned to the final resolution of a choice-of-law question known as selective or modified prospectivity. *Beam*, 111 S. Ct. at 2444 (plurality opinion). When a court applies a new rule in this manner, the court applies the rule to the case within which it is announced, but returns to the old rule for all other cases arising on facts predating the decision. *Id.* Justice Souter maintained that the evolution of modified prospectivity occurred during the Court's formulation of new criminal law and that full retroactive application of newly pronounced criminal law would have disrupted the criminal justice system. *Id.* This would require retrial or release of innumerable prisoners found guilty under the old law. *Id.* (citing Johnson v. New Jersey, 384 U.S. 719, 731 (1966)). The Justice explained, however, that retroactive application could not be denied to criminal defendants on appeal. *Id.* The Justice rationalized this by illustrating that the sole reason that an appeal is taken is the hope of a reversal of a prior conviction, without this there would be no incentive to seek the review of a higher court. *Id.*

While modified prospectivity provides the means for momentous changes in criminal procedure, *see* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Katz v. United States, 389 U.S. 347 (1967), it in turn breaches the principle treating similarly situated litigants the same. *Beam*, 111 S. Ct. at 2444 (plurality opinion) (citing RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 69-72 (1961)). Indicating that it is not the judicial tradition to choose among similarly situated litigants who may or may not benefit from a newly pronounced rule of constitutional law, *id.* (quoting Desist v. United States, 394 U.S. 244, 258-59 (1969)), Justice Souter asserted that modified or selective prospectivity was abandoned in criminal cases in Griffith v. Kentucky, 479 U.S. 314, 328 (1987). *Beam*, 111 S. Ct. at 2444 (plurality opinion). The Justice noted, however, that the question of civil retroactivity was not disposed of in *Griffith* and that this case had again presented that issue. *Id.* at 2444-45 (plurality opinion) (citing *Griffith*, 479 U.S. at 328).

[76]Similar to the situation in *Harper* where the Court decided if a previous case, *Davis*, applied retroactively to the litigants before that Court, *see infra* notes 81-169 and accompanying text, Justice Souter examined whether the Court in *Bacchus* applied its rule to the litigants before that Court. *Id.* at 2445 (plurality opinion). Determining that the

Determining that the Court in *Bacchus* applied the rule decided therein retroactively to the litigants in that case, Justice Souter enunciated that it was erroneous to balk at applying a federal rule of law retroactively to similarly situated litigants, when the case announcing the rule had done just that.[77] In conclusion, the Justice posited that the *Chevron Oil* analysis may not be used to determine the choice of law question by relying on the particular equities[78] of the case at bar.[79] Justice Souter qualified this statement,

---

Court in *Bacchus* failed to reserve the question of whether its holding was to apply to the litigants before it, the Justice proffered that it is understood to be retroactively applied. *Id. But see* American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 297-98 (1987); *supra* notes 55-65 and accompanying text. Justice Souter then declared that any remedial consideration implied the settlement of the question being applied to the litigants before the Court. *Beam*, 111 S. Ct. at 2445 (citation omitted). Justice Souter opined that the remand by the Court in *Bacchus* for sole consideration of a pass-through defense is read as retroactively applying the Court's ruling. *Id.*

[77]Declaring that "principles of equality and stare decisis here prevail[ed] over any claim based on a *Chevron Oil* analysis," Justice Souter proclaimed that once the new rule in *Bacchus* was retroactively applied to the Hawaiian importer in that case, then the new rule should apply to cases not yet barred by final judgment or statutes of limitation when that rule was handed down. *Id.* at 2445-46 (plurality opinion).

Justice Souter undertook to sustain this opinion, declaring that *Griffith's* equality principle which requires that similarly situated litigants be provided analogous treatment, should not only apply to criminal law but to civil litigation. *Id.* at 2446 (plurality opinion). *See supra* notes 42-44 and accompanying text. The Justice explained that the need to limit retroactivity in collateral proceedings and on *habeas corpus* challenges in the criminal context does not exist in civil litigation where collateral attacks are a rare occurrence. *Beam*, 111 S. Ct. at 2446 (citing Griffith v. Kentucky, 479 U.S. 314, 331-32 (1987); Teague v. Lane, 489 U.S. 288 (1989)). Justice Souter additionally supported the rationale for following *Griffith* in the civil arena, contending that selective prospectivity is not an incentive to maintain civil litigation as it is in the criminal context. *Id.* (citing Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 215 (1965)).

The Justice concluded by propounding that public policy decrees that litigation eventually must end, as those who contested an issue are bound by the outcome of that contest, and matters once tried are considered settled forever between the parities. *Id.* at 2446-47 (plurality opinion). Accordingly, Justice Souter declared that civil retroactivity must to come to an end and not reopen the door closed by *res judicata*, repose, or by statutes of limitation. *Id.*

[78]*Beam*, 111 S. Ct. at 2447 (plurality opinion). Such equities include whether the litigants would suffer if the Court used retroactive application of the newly announced rule, and whether the litigants relied on the prior rule. *Id.*

however, by articulating that a discussion of equities should not be precluded when considering remedial issues.[80] Although three concurring opinions were filed,[81] the three concurring Justices agreed with Justice Souter's determination[82] of the retroactive effect of new law.[83]

---

[79]*Id.* (citing Simpson v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 681 F.2d 81, 85-86 (1st. Cir. 1982); Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 459 U.S. 1127 (1983)). *See also* Cameron S. DeLong, *Confusion in Federal Courts: Application of the* Chevron *Test in Retroactive-Prospective Decisions*, 1985 U. ILL. L. REV. 117, 131-32). This reasoning was justified because the applicability of law should not rely upon individual hardships, and that once chosen, retroactive application for any newly announced rule of law should be provided for all those seeking relief. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2447 (1991) (plurality opinion).

[80]*Id.* Confining the Court's opinion to the issue of choice of law, Justice Souter indicated that no determination is made as to the bounds of pure prospectivity nor to remedial issues. *Id.* at 2448 (plurality opinion). Justice Souter reversed the decision of the lower court and remanded the case for further proceedings, stressing that state law governs the remedial issue of this case. *Id.*

[81]*Id.* at 2248 (White, J. concurring in the judgment). Also filing a concurring opinion was Justice Blackmun, with whom Justices Marshall and Scalia joined. *Id.* at 2449 (Blackmun, J. concurring in the judgment). Additionally, Justice Scalia filed an opinion concurring with the decision of the Court, with whom Justices Marshall and Blackmun joined. *Id.* at 2450 (Scalia, J. concurring in the judgment).

[82]Justice Souter's opinion represented a transitional opinion for the Court. *See* Watters, *supra* note 6, at 2138. Although the three dissenting Justices, O'Connor, Kennedy and Chief Justice Rehnquist argued for retaining the equitable test in *Chevron Oil*, the three concurring Justices argued for a complete elimination of prospectivity from all constitutional decisions. *Id.*

[83]*Beam*, 111 S. Ct. at 2448-51 (plurality opinion). Although Justice White provided several reasons supporting this decision, the Justice criticized Justice Souter's speculation of pure prospectivity. *Id.* at 2448-49 (White, J., concurring in the judgment). Justice White also criticized the concurring opinion expressed by Justice Scalia which declared that prospective application is well-settled by prior decisions. *Id.* Justices Blackmun, Marshall, and Scalia believed that prospectivity was prohibited by the Constitution and enunciated that the Constitution required that all decisions should apply retroactively. *Id.* at 2450 (Blackmun, J., concurring in the judgment). *See id.* at 2450-51 (Scalia, J., concurring in the judgment). Accordingly, the Justices concluded that modified and pure prospectivity should be eliminated. *Id.* at 2448-51 (plurality opinion). *See id.* at 2451 (Scalia, J., concurring in the judgment). Justice Scalia specifically stated that:

> "[T]he judicial Power of the United States" conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the

V. RETROACTIVE DECISION MAKING REEMERGES AS THE DOMINATE JURISPRUDENTIAL DETERMINATION IN APPLYING NEWLY ENUNCIATED RULES OF LAW

When *Beam* was before the Court, *Harper v. Virginia Department of Taxation*[84] was being adjudicated in the Supreme Court of Virginia.[85] After the decision in *Beam* was handed down, the Court, having previously granted *certiorari* in *Harper*,[86] vacated that judgment and remanded *Harper* for further consideration in light of *Beam*.[87]

On remand, the Virginia Supreme Court denied relief for the second time.[88] Virginia's highest court reasoned that since Michigan consented to a refund, the Court did not rule on the retroactive applicability of the rule promulgated therein to the litigants before the Court.[89] Thereafter, the

---

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

Id. at 2451 (Scalia, J., concurring in the judgment) (citations omitted).

[84]401 S.E.2d 868 (Va. 1991).

[85]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2514-15 (1993).

[86]*Id.*

[87]*Id.* at 2515. For a cogent discussion of the decision in *Beam*, see *supra* notes 67-80 and accompanying text.

[88]*Harper*, 113 S. Ct. at 2515.

[89]*Id.* The Supreme Court of Virginia concluded that the application of the retroactivity analysis articulated in *Chevron Oil* was not foreclosed in *Beam* because the issue of retroactivity was not decided by the *Davis* Court. *Id.* Therefore, the Virginia Supreme Court reaffirmed its prior decision. *Id.*

United States Supreme Court once again granted *certiorari*.[90]

Justice Thomas, writing for the plurality, provided a brief history[91] of the

---

[90]*Id.* at 2516. Justice Thomas explained that when the decision in *Davis* was handed down, 23 states provided preferential tax treatment to those benefits received by state and local government employees. *Id.* at 2515. *See, e.g.*, ALA. CODE § 36-27-28 (1991), ALA. CODE § 40-18-19 (1985); IOWA CODE § 97A.12 (1984), *repealed*, 1989 Iowa Acts, ch. 228, § 10 (repeal retroactive to Jan. 1, 1989); LA. REV. STAT. ANN. § 47:44.1 (Supp. 1990); N.Y. TAX LAW § 612(c)(3) (McKinney 1987). *See generally* Harper v. Virginia Dep't of Taxation, 401 S.E.2d 868, 871 n.2 (1991). Justice Thomas noted that similar to the Virginia Supreme Court, other state courts had refused to apply *Davis* retroactively. *Harper*, 113 S. Ct. at 2515. *See, e.g.*, Bohn v. Waddell, 807 P.2d 1, 6 (Ariz. T.C. 1991); Sheehy v. State, 820 P.2d 1257 (Mont. 1991), *cert. pending*, No. 91-1473; Swanson v. State, 407 S.E.2d 791, 793-795 (N.C. 1991), *aff'd on reh'g*, 410 S.E.2d 490 (N.C. 1991), *cert. pending*, No. 91-1436, 113 S. Ct. 3025; Bass v. State, 414 S.E.2d 110, 114-15 (S.C. 1992), *cert. pending*, No. 91-1697; Lewy v. Virginia Dep't of Taxation, 111 S. Ct. 2883 (1991). The Justice, however, noted that other state courts had applied *Davis* retroactively and that some had ordered refunds as a matter of state law. *Harper*, 113 S. Ct. at 2515. *See, e.g.*, Pledger v. Bosnick, 811 S.W.2d 286, 292-93 (Ark. 1991) (concluding as a matter of federal law that *Davis* applies retroactively), *cert. pending*, No. 91-375; Reich v. Collins, 422 S.E.2d 846 (Ga. 1992) (holding *Davis* to apply retroactively), *cert. pending*, Nos. 92-1276 and 92-1453; Kuhn v. State, 817 P.2d 101, 109-10 (Colo. 1991) (ordering refunds in claims based on *Davis* as a matter of state law); Hackman v. Director of Revenue, 771 S.W.2d 77, 80-81 (Mo. 1989) (same), *cert. denied*, 493 U.S. 1019 (1990).

[91]The Justice commenced his discussion with the holding in Linkletter v. Walker, 381 U.S. 618 (1965), where the Court denied retroactive effect to new rules applicable to criminal law. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2515 (1993). For a full discussion of *Linkletter*, see *supra* notes 27-31 and accompanying text. The Justice explained that the decision in *Linkletter* rested upon an evaluation of the purpose of the rule, reliance on the previous law, and the impact on the execution of justice due to retrospective application. *Harper*, 113 S. Ct. at 2515. Addressing civil law cases, the Justice reiterated the *Chevron Oil* holding that denied retroactive effect for a newly applied principle of civil law when such a limitation avoids injustice and does not unduly undermine the purpose of the new rule. *Id.* For a full discussion of *Chevron Oil*, see *supra* notes 33-39 and accompanying text.

The Justice then justified the subsequent overruling of *Linkletter* by Griffith v. Kentucky, 479 U.S. 314 (1987), which promulgated that all newly declared rules pertaining to criminal law must be retroactively applied to all cases pending on direct review. *Harper*, 113 S. Ct. at 2516. This decision was justified, Justice Thomas explained, because the Court was no longer provided with the "'legislative' prerogative" to make new law retroactively or prospectively apply as the Court sees fit. *Id.* (quoting *Griffith*, 479 U.S. at 322). Additionally, Justice Thomas explained that the Court's change in the retroactivity doctrine was necessary and stressed that the principle of treating similarly situated parties alike was violated by selectively applying new rules either retroactively or prospectively. *Id.* Justice Thomas noted, however, that *Griffith* dicta stated that *Chevron Oil* continued to govern civil retroactivity. *Id.*

doctrine of retroactivity and articulated that the common law and case law recognized a general rule of retrospective effect of the Court's constitutional decisions.[92] Justice Thomas concluded this historical recapitulation by expounding that the Court, through *Griffith* and *Smith*, left unresolved the extent to which retroactive effect of the Court's decisions can be altered in cases applying civil law.[93] The Justice articulated that this indistinct area of the law has been clarified[94] by the Court's adoption of the rule of retroactive application of civil decisions in *Beam*.[95]

Justice Thomas proclaimed that *Beam* controlled the case before the Court, and as such, adopted a rule fairly reflective of the majority position in *Beam*.[96] The Justice held that when the Court applies a federal rule of law to parties before it, the rule is controlling and must be provided full retroactive effect in cases still on direct review and to all events, whether such events come before or after the announcement of the rule.[97] To this

---

Justice Thomas disclosed that the meaning of the *Griffith* dicta subsequently divided the Court in American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) (plurality opinion). *Harper*, 113 S. Ct. at 2516. *See supra* notes 55-65 and accompanying text for a full discussion of *Smith*. The Justice opined that despite Justice Scalia's concurrence with the plurality's holding, a holding derived out of the use of the *Chevron Oil* test, Justice Scalia shared the four dissenting Justices' belief that "prospective decision making is incompatible with the judicial role." *Id.* at 2517 (quoting *Smith*, 496 U.S. at 201 (Scalia, J., concurring in the judgment)).

[92]*Harper*, 113 S. Ct. at 2516.

[93]*Id.*

[94]*Id.* at 2517.

[95]111 S. Ct. 2439 (1991). *See supra* notes 67-80 and accompanying text. Justice Thomas noted that a majority of the Court in *Beam*, though not a unified opinion, announced that once a rule of federal law is decided and applied to parties before the Court, that decision must be given complete retroactive effect by any and all courts adjudicating federal law. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517 (1993). Justice Thomas stressed that the rule laid down in *Beam* was proclaimed to supersede "any claim based on a *Chevron Oil* analysis." *Id.* (quoting *Beam*, 111 S. Ct. at 2446 (plurality opinion)).

[96]*Id.*

[97]*Id.* Recounting language from *Beam*, the Justice explained that when the Court does not proclaim that the rule announced in a case is to be applied to the parties before the Court, the general rule is that rule of federal law is to be applied retroactively to the parties before the Court. *Id.* at 2518 (citing *Beam*, 111 S. Ct. at 2445 (plurality opinion)). Additionally, Justice Thomas expressed that once a rule has been applied retroactively by

effect, the Justice announced, the Court tore down the selective barriers of applying federal law in civil cases.[98]

Therefore, the Justice opined that the Virginia Supreme Court's attempt to distinguish *Davis*, on the grounds that the *Chevron Oil* test could still be applied because no ruling of the retroactive application was made toward the parties in that case, was without merit.[99] The Justice explained that the Court in *Davis* clearly applied the rule announced in that case retroactively when the Court stated that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund."[100] Reiterating that the Virginia Department of Taxation argued that the decision in the lower court rested on independently adequate state grounds,[101] and thus the Virginia Supreme Court had no obligation to apply the *Davis* decision retroactively, the Justice pronounced that this assertion could not be accepted by the Court.[102] This defense was rejected by Justice Thomas as being repugnant

---

the court announcing the rule, it is imperative that all courts apply the rule accordingly. *Id.* (citing *Beam*, 111 S. Ct. at 2445 (plurality opinion)).

[98]*Id.*

[99]*Id.*

[100]*Id.* (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 817 (1989)). Therefore, the Justice concluded that under the holdings in *Griffith*, *Beam*, and the approach to retroactivity followed in the case before the Court, Virginia's Supreme Court was required to apply *Davis* in the refund action before the Court. *Id.*

[101]*Id.* at 2518. Justice Thomas noted, however, that petitioners' contention that they were entitled to a refund under Virginia statute was rejected because the court reasoned that *Davis* did not apply retroactively. *Id.* Thus, the Justice concluded that taxes assessed prior to *Davis* were not erroneous or improper under the Virginia tax statute. *Id.* For a discussion of the Virginia statutes at issue see *supra* notes 10-13 and accompanying text.

[102]*Harper*, 113 S. Ct. at 2518. Justice Thomas professed that the Virginia court rejected petitioners' state-law contention because case law in Virginia declares that once a tax is deemed unconstitutional, that decision is to apply prospectively only. *Id.* at 2518 (citing Perkins v. Albemarle County, 198 S.E.2d 626, *aff'd and modified on reh'g*, 200 S.E.2d 566 (Va. 1973)). The Justice explained that the Virginia Supreme Court had incorporated the three-pronged test of *Chevron Oil* and the decision in *Griffith* into state law. *Id.* at 2519 (quoting Fountain v. Fountain, 200 S.E.2d 513, 514 (Va. 1973), *cert. denied*, 416 U.S. 939 (1974)).

to the Supremacy Clause.[103] In so finding, the Justice stated that the Supreme Court will not allow the federal retroactivity doctrine to be superseded by a contrary approach under state law.[104] Because the Court decided that *Davis* applied to the taxable years in petitioner's case, the decision below was reversed,[105] although the Court did not enter judgment in petitioner's favor.[106]

Stating that federal law does not automatically entitle petitioners to a refund, Justice Thomas reiterated the language of *Smith*, which held that Virginia must provide relief that is consistent with federal due process.[107] Justice Thomas noted that under the Due Process Clause,[108] a state may respond flexibly when it is discovered to have imposed an invalid discriminatory tax.[109] The Justice explained that if Virginia offered an

---

[103]U.S. CONST. art. VI, § 2. The Supremacy Clause states in full that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[104]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2519 (1993) (citing Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S 358, 364-66 (1932) (declaring that states may limit retroactive application of newly announced rules of state law); National Mines Corp. v. Caryl, 497 U.S. 922, 923 (1990) (per curiam) (enunciating that states may not extend their determination of the retroactivity of state law to an interpretation of federal law)).

[105]Justice Thomas refused to allow the Virginia court's judgment to stand on independent and adequate state law grounds. *Harper*, 113 S. Ct. at 2518. Defending this opinion, the Justice stated that the Virginia statute which provided remedies for illegal taxes failed to provide retrospective relief for taxable years prior to the *Davis* decision. *Id.*

[106]*Id.*

[107]*Id.* (citing American Trucking Assn's, Inc. v. Smith, 496 U.S. 167, 181 (1990) (plurality opinion)).

[108]U.S. CONST. amend. XIV, § 1.

[109]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2518 (1993) (citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39-40 (1990)). Justice Thomas proceeded to enumerate remedies that Virginia may employ. *Id.* (quoting *McKesson*, 496 U.S. at 39-40).

opportunity for taxes to be withheld while taxpayers challenged the validity of disputed tax assessments in a pre-deprivation hearing,[110] due process would be satisfied.[111] If no such remedy exists, Justice Thomas explained, a state is compelled to rectify the unconstitutional denial[112] by furnishing backward-looking relief.[113] Justice Thomas concluded by announcing that Virginia may choose the form of relief it will provide.[114] The Justice noted, however, that the choice must satisfy the minimum due process requirements previously outlined.[115]

VI. JUSTICE SCALIA'S DETERMINATION THAT PROSPECTIVE DECISION MAKING IS INCOMPATIBLE WITH JUDICIAL POWERS

Concurring in the opinion of the Court,[116] Justice Scalia expressed the irony in the dissent's[117] adherence to *stare decisis* to uphold prospective

---

[110]Such hearings, sufficient to satisfy due process concerns, include the authorization to taxpayers to petition the court to enjoin an imposed tax before paying said tax, or allowing taxpayers not to pay an imposed tax and interpose any objections as their defenses in a proceeding to enforce the tax. *Id.* (quoting *McKesson*, 496 U.S. at 36-37).

[111]*Id.* (quoting *McKesson*, 496 U.S. at 38).

[112]*Id.* This obligation is incurred when a taxpayer is placed under duress to promptly pay a tax before challenging its legality or suffer sanctions or seizures or property as a penalty. *McKesson*, 496 U.S. at 38.

[113]*Harper*, 113 S. Ct. at 2519 (quoting *McKesson*, 496 U.S. at 31). The Justice noted that such relief may be provided by awarding full refunds to taxpayers of invalid taxes. *Id.* at 2519-20 (citing Davis v. Michigan, 489 U.S. 803, 818 (1989) (quoting *McKesson*, 496 U.S. at 40)). Additionally, the Justice explained that relief may be offered by creating, in hindsight, a tax scheme which does not discriminate, such as a tax exemption to those burdened, or by burdening those who benefited from the discriminatory tax. *Id.*

[114]*Id.* at 2520.

[115]*Id.*

[116]*Id.* (Scalia, J., concurring).

[117]Criticizing Justice O'Connor's dissent, Justice Scalia explained that not only does prospective decision making run contrary to the doctrine of *stare decisis*, but that in Teague v. Lane, 489 U.S. 288 (1989), Justice O'Connor openly had rejected precedent controlling the application of retroactivity. *Harper*, 113 S. Ct. at 2520 (Scalia, J., concurring).

decision making.[118] Applying the reasons enunciated in *Teague v. Lane*[119] for abandoning *Linkletter*, Justice Scalia expressed that these reasons justified the abandonment of the retroactivity doctrine applied in *Chevron Oil*.[120]

Noting that one of the reasons *Linkletter* was abandoned was the fact that it failed to lead to consistent results, the Justice proclaimed that the same inconsistencies plagued *Chevron Oil*.[121] Moreover, Justice Scalia explained that *Linkletter* and the Court's general application of retroactivity, of which *Chevron Oil* was considered a central component, was in question and criticized by numerous commentators.[122] The final justification the Court used in *Teague* for departing from *Linkletter* relied upon the determination that less force is given *stare decisis* when intervening judgments removed the conceptual underpinnings of prior decisions.[123]

Justice Scalia then turned to the irony in the dissent's opinion, which argued for applying the doctrine of *stare decisis* to uphold prospective decision making.[124] The irony, the Justice enunciated, is that prospective

---

[118]*Id.* at 2520-24 (Scalia, J., concurring).

[119]489 U.S. 288, 302-05 (1989).

[120]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2520-21 (1993) (Scalia, J., concurring).

[121]*Id.* at 2521 (Scalia, J., concurring). Pointing to the opinions filed in *Harper*, Justice Scalia expounded that of the four Justices applying *Chevron Oil* to *Davis*, two would find that the decision applies retroactively and two would find to the contrary. *Id.*

[122]*See* Beytagh, *supra* note 6, at 1581-82; Fallon & Meltzer, *supra* note 49; Walter V. Schaefer, *Prospective Rulings: Two Perspectives*, 1982 S. CT. REV. 1; Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631 (1967); Mishkin, *supra* note 72.

[123]*Harper*, 113 S. Ct. at 2521 (Scalia, J., concurring). Justice Scalia argued that this justification supported a departure from *Chevron Oil* because *Griffith* had already returned the Court to the traditional view that prospective decision making did not belong in criminal cases for it violated the "basic norms of constitutional adjudication." *Id.* Expressing the view held in *Chevron Oil* that retroactivity provides similar problems in civil and criminal cases, the Justice contended that, after *Griffith*, *Chevron Oil* could only be maintained by rejecting its own reasoning and claiming that in civil and criminal cases, retroactivity application is different. *Id.*

[124]*Id.* at 2522 (Scalia, J., concurring).

decision making generally makes it easier to overrule precedent.[125] Declaring prospective decision making as the handmaid of judicial activism, the Justice professed that it was the enemy of *stare decisis*.[126]

Justice Scalia declared erroneous the dissent's view that the *Chevron Oil* test is the traditional analysis used to determine the retroactivity of a newly announced rule of law.[127] In so doing, the Justice espoused the "true *traditional* view" of prospective decision making as being "incompatible with judicial power, and courts lack the authority to engage in its practice."[128] The Justice found additional support for the traditional definition of retroactivity in that, before *Linkletter*, proponents of prospective decision making conceded that it contradicted traditional judicial practice.[129]

In attacking Justice O'Connor's statement, "when the Court changes its mind, the law changes with it,"[130] as being foreign to constitutional tradition, Justice Scalia reiterated the words of *Marbury v. Madison*[131] when

---

[125]*Id.* Prospective decision making "was formulated in the heyday of legal realism and promoted as a 'techniqu[e] of judicial lawmaking' in general, and more specifically as a means of making it easier to overrule prior precedent." *Id.* (quoting Levy, *supra* note 21, at 6).

[126]*Id.* Justice Scalia expressed that "the dissent is saying, in effect, that *stare decisis* demands the preservation of methods of destroying *stare decisis* recently invented in violation of *stare decisis*." *Id.*

[127]*Id.*

[128]*Id.* *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443 (1991) (plurality opinion); American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment); Desist v. United States, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting); Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932).

The Justice explained that in *Linkletter* the observation was made that "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2522 (Scalia, J. concurring) (quoting Linkletter v. Walker, 381 U.S. 618, 622-23 (1965)).

[129]*Harper*, 113 S. Ct. at 2522 (Scalia, J., concurring). *See* Levy, *supra* note 21, at 2 n.2; Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 594 (1917). *See also* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

[130]*Harper*, 113 S. Ct. at 2527 (O'Connor, J., dissenting) (quoting *Beam*, 111 S. Ct. at 2441 (plurality opinion)).

[131]5 U.S. 137 (1803).

the Justice enunciated that "the province and duty of the judicial department is to say what the law is," not what it shall be.[132] The Justice argued that the view of retroactivity as a characteristic of the judiciary is to maintain and expand old law and not to make new law.[133] Explaining the view that retroactive application is considered a prime distinction[134] between judicial and legislative power, Justice Scalia relied on a number of authorities which supported his conviction.[135] Reiterating the contention that prospectivity brought with it a disregard for *stare decisis*,[136] the Justice condemned the

---

[132]*Harper*, 113 S. Ct. at 2523 (quoting *Marbury*, 5 U.S. at 177).

[133]*Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (1765)). "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." 1 WILLIAM BLACKSTONE, COMMENTARIES 70 (1765).

[134]THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 91 (1868) (distinguishing a judicial decision from a legislative act in that the former is a determination of existing law in relation to a prior occurrence, while the latter is a determination of the law that shall be applied to future cases).

[135]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2522 (1993) (Scalia, J., concurring). Justice Scalia, citing numerous authorities for support, declared prospective decision making as a tool of judicial activism, derived out of indifference to *stare decisis*. *Id.* *See* Mishkin, *supra* note 72, at 65 (stating the prospective decision making smell of the legislative process); Robert Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 428 (1924) (declaring that prospectivity encroached on the privileges of the legislature); James v. United States, 366 U.S. 213 (1961) (Black, J., concurring in part and dissenting in part) (enunciating that prospectivity removed one of the inherent restraints on the Court from departing from the role of interpretation to enter the role of lawmaking); Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 34 (1969) (propounding prospective decision making as causing the Court to behave as a legislature); Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in the judgment) (declaring that prospective decision making tended "to cut [the courts] loose from the force of precedent, allowing [them] to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of stare decisis").

Justice Scalia professed that the contention that legislative power is provided through prospective decision making was never denied by its supporters. *Harper*, 113 S. Ct. at 2522 (Scalia, J., concurring). *See* Jonathan Mallamud, *Prospective Limitation and the Rights of the Accused*, 56 IOWA L. REV. 321, 359 (1970) (viewing prospectivity as a device augmenting the courts power to contribute to the development of the law, keeping with society's demands); Levy, *supra* note 21, at 6 (maintaining prospectivity as a conscious and deliberate technique of judicial lawmaking).

[136]*See* Earl M. Maltz, *Some Thoughts on the Death of* Stare Decisis *in Constitutional Law*, 1980 WIS. L. REV. 467 (indicating that though up to 1959 the Court had reversed only sixty constitutional issues, the following two decades saw the Court overrule in 47 occasions). Justice Scalia described these two decades as an era where "this court cast overboard numerous settled decisions, and indeed even whole areas of law, with an

dissent's attempt to save this jurisprudential tool of judicial activism with *stare decisis* and joined in the opinion of the Court.[137]

VII. JUSTICE KENNEDY'S ADHERENCE TO PROSPECTIVE DECISION MAKING IN CIVIL LITIGATION

Concurring in part and concurring in the judgment, Justice Kennedy was joined by Justice White.[138] Justice Kennedy briefly expressed the opinion that retroactivity in civil litigation should be governed by the *Chevron Oil* test.[139] Applying the *Chevron Oil* test to the litigants before the Court, the Justice concluded that *Davis* must be provided retroactive effect.[140]

VIII. JUSTICE O'CONNOR'S CONTINUED ADHERENCE TO *CHEVRON OIL*

Justice O'Connor,[141] in a four part dissent, emphatically denounced the Court's decision and simultaneously advanced a return to the *Chevron Oil*

---

unceremonious 'heave-ho.'" *Harper*, 113 S. Ct. at 2524 (Scalia, J., concurring).

[137]*Harper*, 113 S. Ct. at 2524 (Kennedy, J., concurring in part and concurring in the judgment). The Justice described the dissent's position as "paradoxical," concluding that prospective decision making is not protected by *stare decisis*, and that "no friend of *stare decisis* would want it to be." *Id.*

[138]*Id.*

[139]*Id.* Justice Kennedy expounded the view that "prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *Id.* (quoting American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 197 (1990) (plurality opinion)). Moreover, the Justice advanced that when a new rule of law is proclaimed, prospective application "avoids injustice or hardship to civil litigants who have justifiably relied on prior law." *Id.* (quoting *Smith*, 496 U.S. at 197 (plurality opinion)).

[140]Justice Kennedy determined that *Davis* failed to satisfy the condition that for a decision to be afforded prospective application it must announce a new rule of law. *Id.* Moreover, the Justice stated, the decision in *Davis* did not "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Id.* (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)).

[141]*Id.* at 2526 (O'Connor, J., dissenting). Justice O'Connor was joined by Chief Justice Rehnquist. *Id.*

test.[142] The Justice initiated the dissent with a brief history of retroactivity[143] and a discussion of pure and modified prospectivity,[144] thereafter quickly turning to the Court's decision in *Beam*.[145] Declaring that the Court's dictum[146] intimated that pure prospectivity should be prohibited,[147] similar to the prohibition the Court placed upon selective prospectivity, the Justice labeled this determination as "incorrect."[148]

---

[142]*Id.* Stressing a concern for the liability imposed on states by retroactively applying the rule in *Davis*, Justice O'Connor recommended adhering to *stare decisis* and returning to the un-muddled, traditional, retroactive analysis existent in *Chevron Oil*. *Id.*

[143]For a discussion of the development of the doctrine of retroactivity, see *supra* notes 18-80 and accompanying text.

[144]For a discussion of pure and modified prospectivity, see *supra* note 75 and accompanying text.

[145]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2527 (1993) (O'Connor, J., dissenting). Noting that there was no majority opinion in *Beam*, the Justice enunciated the Court's objection to selective prospectivity. *Id.* The Justice stressed, however, that the *Beam* decision by the Court has ended pure prospectivity. *Id.*

[146]Justice O'Connor noted that the issue of pure prospectivity did not come before the Court in this case. *Id.* at 2528 (O'Connor, J., dissenting). The Justice argued that the majority's position that "once a rule has been applied retroactively, the rule must be applied retroactively to all cases thereafter" and that the rule in *Davis* applied retroactively, ended the matter before the Court. *Id.* (emphasis omitted) The Justice maintained that as such, there was "no reason for the Court's careless dictum regarding pure prospectivity, much less dictum that is contrary to clear precedent." *Id.*

[147]Justice O'Connor cited the plurality's language referring to: (1) the "basic norms of constitutional adjudication," which requires the prohibition of selective prospectivity in the civil context, *id.* at 2517 (citing Griffith v. Kentucky, 479 U.S. 314, 323 (1987)), and (2) its language, which declares that the Court has "no more constitutional authority . . . to disregard current law or to treat similarly situated litigants differently." *Id.* (quoting American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting)).

[148]*Id.* at 2527 (O'Connor, J., dissenting). Justice O'Connor stressed that the plurality's position is inconsistent with the "long established procedure for making this inquiry" established in *Chevron Oil* and upheld in other cases. *Id.* at 2527-28 (O'Connor, J., dissenting). *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982); Chevron Oil Company v. Huson, 404 U.S. 97, 106-07 (1971); Phoenix v. Kolodziejski, 399 U.S. 204, 214 (1970); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969). *See also Smith*, 496 U.S. at 188-200 (plurality opinion).

In response to Justice Scalia's concurring opinion that all forms of prospective decision making should be eliminated, Justice O'Connor, after referring to Justice Scalia's

Adhering to notions of fairness and sound decisional practice, Justice O'Connor proclaimed that the issue of prospectivity was never considered in *Davis*.[149] The Justice opined that the Court inadvertently applied the rule announced therein retroactively, thus foreclosing the issue forever.[150] Relying on the Court's decision in *Brecht v. Abraham*,[151] Justice O'Connor declared that the Court in *Davis* never "squarely addres[sed]" the issue of retroactivity,[152] and as such, the Court remained "free to address [it] on the

---

"undisguised hostility to an era whose jurisprudence he finds distasteful," relied on Justice Frankfurter's explanation for the prospective application of newly announced rules of law: [w]e should not indulge in the fiction that the law now announced has always been the law . . . [i]t is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2527-58 (1993) (O'Connor, J., dissenting) (citing Griffin v. Illinois, 351 U.S. 12 (1956) (concurring in the judgment)).

[149]*Harper*, 113 S. Ct. at 2528-29 (O'Connor, J., dissenting). Justice O'Connor indicated that under the majority's rule, the Court did not consider the equities in applying *Davis* retroactively or prospectively; instead, the Court should have determined whether the rule was applied retroactively to the *Davis* litigants. *Id.* The Justice continued by stressing the majority's reliance on all but a single sentence in *Davis*, which, in the majority's view, "constitutes a 'consideration of remedial issues.'" *Id.* at 2529 (O'Connor, J., dissenting) (quoting James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2445 (1991) (plurality opinion)). *See* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 817 (1989) ("The State . . . conceded that a refund is appropriate in these circumstances . . . to the extent appellant has paid taxes pursuant to this invalid tax scheme [and appellant] is entitled to a refund.")

[150]*Harper*, 113 S. Ct. at 2528-29 (O'Connor, J., dissenting)

[151]113 S. Ct. 1710 (1993). Indicating that the single sentence the majority relies on in *Davis*, "'assumes' the rule . . . to be retroactive," Justice O'Connor contested that the *Brecht* decision explains that "unexamined assumptions do not bind this Court." *Harper*, 113 S. Ct. at 2529 (O'Connor, J., dissenting) (quoting *Brecht*, 113 S. Ct. at 1717). Justice O'Connor furthered this contention by emphasizing that the decision in *Brecht* was whether a legal question was determined due to the continuous practice of the Court in prior cases. *Id.* (citing *Brecht*, 113 S. Ct. at 1717). Indicating that the decision was not foreclosed due to the Court's prior practice, Justice O'Connor found no justification for the single retroactive application of *Davis* carrying more weight then the consistent practice in *Brecht*. *Id.* at 2529-30 (O'Connor, J., dissenting).

[152]Justice O'Connor propounded that the retroactivity question in *Davis* was never briefed, not passed upon by the lower court, nor was it within the question presented. *Id.* at 2530 (O'Connor, J., dissenting). Quoting from the transcript, the Justice declared that the Court signaled that it was not passing upon the question of retroactivity of the rule announced in *Davis*. *Id.* (citation omitted).

merits" at a future time.[153] The Justice continued to defend the dissent's position that selective prospectivity should not be abandoned in the civil context[154] and outlined numerous differences between civil and criminal cases.[155]

Justice O'Connor continued by propounding that principles of fairness required the employment of the *Chevron Oil* test and proceeded to evaluate the three factors[156] of this test to determine if the decision in *Davis* should apply nonretroactively.[157] Identifying two forms of decisions that may be

---

[153]*Id.* at 2529 (quoting *Brecht*, 113 S. Ct. at 1717). *See also* United States v. L.A. Trucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (declaring that issues not raised in argument or briefs nor discussed in the Court's opinion may not be held binding precedent); Webster v. Fall, 266 U.S. 507, 511 (1925) (enunciating that those questions which are neither brought to the court's attention nor ruled upon may not be considered precedents).

Justice O'Connor explained that the reason for the ruling in *Brecht* was to assure that the Court did not adjudicate an important issue by inadvertence or accident and does not bind itself to unexamined assumptions or inattention. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2530 (1993) (O'Connor, J., dissenting). Recognizing that the importance of not deciding significant legal issues *sub silentio*, with no thought or consideration, the Justice indicated that a failure to follow the rule in *Brecht* would be unwise. *Id.*

[154]Relying upon the aforementioned differences, Justice O'Connor proclaimed that the Court was not justified in comparing its decision in the case at bar with the prior decision in Griffith v. Kentucky, 479 U.S. 314 (1987). *Harper*, 113 S. Ct. at 2530 (O'Connor, J., dissenting).

[155]Expressing that the government's reliance interests are favored over defendant rights in criminal cases by nonretroactivity, Justice O'Connor indicated that the policy of favoring the individual in the criminal arena justifies the abolishment of prospectivity in this context. *Id.* (citing American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 197-200 (1990)). Justice O'Connor qualified this rationale regarding civil litigation, however, indicating that no such policy exists to favor one litigant over another, nor did any such favoritism exists to either side when a rule of law is applied nonretroactively. *Id.* (citing *Smith*, 496 U.S. at 198). Explaining that a litigant in a civil case, even when denied full retroactive application, may receive some benefit, Justice O'Connor indicated that the defendant in *Harper* will receive the benefit of having the tax declared invalid and being equally treated with all other retirees in future tax assessments. *Id.* at 2530-31 (O'Connor, J., dissenting) (quoting *Smith*, 496 U.S. at 198-99). Justice O'Connor proffered that the litigants in the criminal context differ in that they seek one remedy, reversal of their conviction. *Id.* at 2531 (O'Connor, J., dissenting). The Justice noted, however, that the remedy of reversing a conviction is only available if the decision is applied retroactively. *Id.* (citing *Smith*, 496 U.S. at 199).

[156]For a complete discussion of the *Chevron Oil* analysis, see *supra* notes 31-37 and accompanying text.

[157]*Harper*, 113 S. Ct. at 2531 (O'Connor, J., dissenting).

classified as new,[158] Justice O'Connor concluded that the decision in *Beam* failed to fall under either of these forms.[159] As to the second factor of the *Chevron Oil* analysis,[160] Justice O'Connor determined that applying *Davis* nonretroactively would not retard that decision's purpose or effect.[161] Justice O'Connor noted that the retroactive application of *Davis* would be no exception[162] to the typical detrimental effect[163] that retroactive application

---

[158]A decision may be defined as new if it overturns "clear past precedent on which litigants may have relied" or if it resolves "an issue of first impression whose resolution was not clearly foreshadowed." *Id.* (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)).

[159]*Id.* In determining that the decision in *Davis* did not reflect a change in the law, Justice O'Connor turned to the second type of decision that may be considered new and concluded that *Davis* was in no way clearly foreshadowed. *Id.* at 2532-33 (O'Connor, J., dissenting). Justice O'Connor posited that a decision may not be delineated as new when it is sufficiently debatable prior to the decision, falling short of being obviously foreshadowed. *Id.* at 2532 (O'Connor, J., dissenting) (citing Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983)).

Supporting this conclusion, the Justice noted that no taxpayer, in the close to fifty years that some twenty-three states had tax schemes similar to that in *Davis*, challenged those schemes upon intergovernmental immunity grounds before Michigan's tax scheme was challenged in *Davis*. *Id.* at 2532-33 (O'Connor, J., dissenting). In addition, the Justice expounded that, on its face, the tax scheme did not appear to discriminate, thus leaving the question open to debate. *Id.* at 2535 (O'Connor, J., dissenting).

[160]This factor asks whether denying to apply the new rule retroactively will undermine its operation in regard to its purpose, history, and effect. Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971).

[161]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2534 (1993) (O'Connor, J., dissenting). Determining the purpose of the doctrine of intergovernmental immunity as a protection of the Federal Sovereign's rights against interference by the state, and not as a protection of an individuals private rights, the Justice concluded that providing petitioners retroactive relief would not exonerate the Federal Government's interests. *Id.* The Justice explained that retroactive relief would serve only to benefit the Federal Government's past employees, not an interest the intergovernmental immunity doctrine was designed to protect. *Id.* As such, the Justice concluded that refusing to apply *Davis* retroactively would in no way undermine that decision's purpose or effect. *Id.*

[162]*Id.* at 2535 (O'Connor, J., dissenting). *See* Walter Hellerstein, *Preliminary Reflections on* McKesson *and* American Trucking Associations, 48 TAX NOTES 325, 336 (1990) (expounding the fiscal implications of the decision in *Davis* for the States as truly staggering). As noted by Justice O'Connor, states estimate their total liability could exceed $1.8 billion, Virginia's alone exceeding $440 million. *Harper*, 113 S. Ct. at 2435 (O'Connor, J., dissenting) (citation omitted).

of a ruling invalidating a state tax law would have on a state and its citizens.[164] Noting that this liability would be occurring at a time where states were already in "dire fiscal straits,"[165] Justice O'Connor concluded that imposing such a hindrance[166] on the states[167] would be the epitome of unfairness,[168] and as such, argued in favor of refusing *Davis*'s retroactive application.

Hypothetically concluding that *Davis* ought to apply retroactively, Justice

---

[163]Asserting that the Court has repeatedly declined retroactively applying decisions where injustice would occur, Justice O'Connor considered the third factor of the *Chevron Oil* test, whether inequitable results would occur if the decision in *Davis* were to apply retroactively. *Harper*, 113 S. Ct. at 2534-35 (O'Connor, J., dissenting). *See* Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) (declaring that the retroactive application of a Title VII decision was not justified due to the resulting unforeseen financial burdens on state and local governments, at a time when those entities were fighting to erase substantial fiscal deficits).

[164]*Harper*, 113 S. Ct. at 2535 (O'Connor, J., dissenting). Justice O'Connor stressed that "[a] refund, if required by the state or federal law, could deplete the state treasur[ies], thus threatening the State[s'] current operations and future plans." *Id.* (quoting American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 182 (1990) (plurality opinion)).

[165]WALL ST. J., July 27, 1992, at A2 (indicating that the majority of states are in a fiscal crisis and a deteriorated tax base has made it more difficult for them to emerge from their crisis).

[166]An imposition of liability of this magnitude would potentially disrupt and negatively impact Virginia's budgeting, planning, and delivery of basic state services. Harper v. Virginia Dep't of Taxation, 401 S.E.2d 868, 872-73 (Va. 1991).

[167]In Swanson v. State, 407 S.E.2d 791 (N.C. 1991), the court determined that the retroactive application of *Davis* would impose on North Carolina the liability of refunding $140 million, thereby intensifying that state's "dire financial straits." *Id.* at 794. *See* Bass v. State, 414 S.E.2d 110 (S.C. 1992) (noting that the $200 million in refunds that would be required to satisfy a retroactive application of *Davis* would inflict "severe financial burden on the State and its citizens [and] endanger the financial integrity of the State").

[168]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2535 (1993) (O'Connor, J., dissenting). Justice O'Connor argued that such a liability is not in proportion to the offense, for only $32 to $48 million in taxes was collected, whereas the imposition of liability to Virginia would exceed $400 million. *Id.* Additionally, the Justice noted that the burden would fall on the taxpayers who will be forced to pay increased taxes and forgo essential services in order to pay for a tax in which they did not profit. *Id.* at 2535-36 (O'Connor, J., dissenting).

O'Connor turned to the question of what remedy must be given.[169] Objecting to the Court's discussion of remedies, Justice O'Connor affirmed her disagreement with the Court's judgment that one deprived of any form of pre-deprivation remedy may not be restricted to prospective relief.[170] Justice O'Connor observed that commentators were of the same opinion[171] and noted that the majority erroneously cited a case[172] to support its position.[173] Recognizing the Court's restriction of authority to alleviate hardship through nonretroactive application of its decisions, Justice O'Connor asserted that, at a minimum, the Court must afford the ability of avoiding injustice through a consideration of equity when formulating a remedy[174]

---

[169]*Id.* at 2536 (O'Connor, J., dissenting). With this question, the Justice illustrated that the issue is what relief should be afforded the prevailing parties, not whether the new or old law is to apply. *Id.* The only question to ask is whether the relief afforded sufficiently complies with due process requirements. *Id.* (citing McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18, 31-52 (1990)). For a discussion of remedial determinations, see *supra* 103-10 and accompanying text.

[170]*Harper*, 113 S. Ct. at 2536 (O'Connor, J., dissenting). Recognizing Justice Harlan's belief that equity should be a determination of an appropriate remedy, United States v. Estate of Donnelly, 397 U.S. 286, 296 (1970) (concurring opinion), Justice O'Connor advanced just such a test. *Id.* at 2537 (O'Connor, J., dissenting).

[171]*See* Fallon & Metzer, *supra* note 47 (imploring novelty and hardship as a tool in constructing the remedial framework instead of the consideration of applying old law or new).

[172]Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2520 (1993) (citing McKesson Corp. v. Florida Alcoholic & Tobacco Div., 496 U.S. 18 (1990)).

[173]*Id.* at 2537 (O'Connor, J., dissenting). Justice O'Connor noted that the *Beam* Court, in asserting its holding, neither precluded recovery under state law nor precluded a demonstration of reliance interest to assist in determining remedies, "a matter with which *McKesson* did not deal." *Id.* at 2537-38 (O'Connor, J., dissenting) (citing James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2448 (1991) (plurality opinion)). In addition, the Justice highlighted that the Court in *Beam* did not prevent individual equities from being taken into consideration for a determination of remedial issues. *Id.* at 2538 (O'Connor, J., dissenting) (citing Beam, 111 S. Ct. at 2447 (plurality opinion)).

It is not that the Court in *McKesson* disallowed equitable issues to be a determination for remedial issues, Justice O'Connor explained, but that the Court determined that the states' equitable arguments were "insufficiently 'weighty in these circumstances.'" *Id.* (citing *McKesson*, 496 U.S. at 45) (emphasis omitted).

[174]For a cogent discussion of remedial issues, see Fallon & Meltzer, *supra* note 49.

for violations of newly decided constitutional rules.[175]

IX. CONCLUSION

The decision in *Harper* marks the completion of the Court's circular journey in its determination of the role prospective decision making shall play in the judicial arena.[176] Justice Thomas provided the outline for this journey in *Harper* by reexamining the history of prospectivity.[177] The question which remains is why did prospectivity, which smells of the legislative process and encroaches on the privileges of the legislature, command such a dominant role in the judicial system for nearly three decades?[178] Moreover, why does support remain for such a clear infringement on the Constitution?

As previously explained,[179] prospective decision making provided the means for numerous and marked changes in our legal system, most notably in the criminal arena. Arguably, these changes would have not have occurred if the Court was forced to apply these new rules of law retroactively.[180] The outcome, however, has never been a justification for the steps taken to achieve it, and the Court's steps were finally recognized as inharmonious with the Constitution in *Griffith*.[181]

While prospective decision making had a major impact on the adjudication of criminal law, it had similar implications on the adjudication of civil matters, especially where taxes were at issue.[182] Prospectivity allows the exceedingly convenient and less burdensome practice of declaring a tax

---

[175]*Harper*, 113 S. Ct. at 2538 (O'Connor, J., dissenting).

[176]The traditional view that "prospective decision making is quite incompatible with the judicial power," Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2522 (1993) (Scalia, J., concurring), was, for a time, abandoned only to reemerge once again as the dominate and correct determination. For a cogent discussion of the complete history of the retroactivity doctrine, see *supra* notes 18-80 and accompanying text.

[177]*See supra* notes 87-110 and accompanying text.

[178]*See supra* notes 1-80 and accompanying text.

[179]*See supra* notes 18-80 and accompanying text.

[180]*See supra* notes 18-39 and accompanying text.

[181]*See supra* notes 40-43 and accompanying text.

[182]*See supra* notes 44-46 and accompanying text.

unconstitutional, but refuses to require a refund of the invalid tax to continue, despite the harm to those who paid the tax. This treatment saved tax assessors from refunding substantial amounts of unconstitutional taxes, thereby helping to effectively avoid possibly irreparable financial distress.[183]

In dissenting from the decision in *Harper*, Justice O'Connor adhered to the perception that states will be detrimentally affected if forced to refund unconstitutional taxes. Once again, however, the end does not justify the means. By arguing for continued adherence to the *Chevron Oil* test and prospective decision making, Justice O'Connor erred in attempting to avoid the imposition of financial difficulties that a state might face through refunds of unconstitutional taxes.

Justice O'Connor's failed to recognize that states will not be forced, in all cases, to extend full refunds to those adversely effected by an unconstitutional tax.[184] The remedy the states must afford is only one which complies with the due process determinations. Moreover, and more importantly, Justice O'Connor, along with Chief Justice Rehnquist and Justice Kennedy, failed to acknowledge that prospective decision making removes one of the inherent restraints which courts encounter when departing from the role of adjudicating law to actually fabricating law.

---

[183]For a discussion of the liabilities facing states upon the refunding of an unconstitutional tax, see *supra* notes 154-61 and accompanying text.

[184]For a complete discussion of remedies available to those oppressed pursuant to unconstitutional taxes, see *supra* notes 103-10 and accompanying text.