A TALE OF TWO COURTS: THE ALASKA SUPREME COURT, THE UNITED STATES SUPREME COURT, AND RETROACTIVITY

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I. INTRODUCTION

Whether out of homage to superior wisdom, judicial economy, desire for uniformity, or simple agreement, many state courts look to decisions of the United States Supreme Court for guidance on state constitutional issues or other issues where an analogy from federal law might be helpful. Many state supreme courts, such as the Alaska Supreme Court,[1] expressly reserve the power to interpret protections under their state constitutions more broadly than similar protections under the federal Constitution. At times, those courts that faithfully adhere to this republican spirit find sharp division within their ranks.[2]

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1. *See* Roberts v. State, 458 P.2d 340, 342 (Alaska 1969) ("We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."); Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) ("We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land."); *see also* State v. Hempele, 576 A.2d 793, 800 (N.J. 1990); State v. Boland, 800 P.2d 1112, 1114 (Wash. 1990); Pool v. Superior Court, 677 P.2d 261, 271 (Ariz. 1984); State v. Arrington, 319 S.E.2d 254, 260 (N.C. 1984).

Professor Lawrence Sager has argued that state courts should independently construe their state constitutional provisions. Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985); *see also* Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 724 (1991). As Professor Sager explains:

> State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgments differ.

Sager, *supra*, at 975-76.

2. For example, the New York Court of Appeals, the highest court of that state, recently refused to adopt the United States Supreme Court's "open fields" doctrine for the state constitutional search and seizure provision. People v. Scott, 593 N.E.2d 1328 (N.Y. 1992). This decision provoked vigorous dissent from judges who viewed this wholesale

A state court may adopt a United States Supreme Court rule, constitutional or otherwise, without independent analysis or justification. A troublesome issue arises, however, should the Supreme Court reconsider that rule: Is the state court's adoption of federal precedent automatically called into question? If the state court advanced no independent support for the adopted federal rule, it seems logical that change in the underlying federal rule would require reconsideration, if not abandonment, of the derivative state rule. Indeed, this situation often arises when a court fails to articulate sufficiently the rationale or basis for its decision.[3]

This type of ambiguity exists in Alaska law in the area of the retroactivity of new legal rules.[4] Retroactivity issues generally arise when a court either overrules one of its prior decisions or announces a rule governing a particular area of law which has not been previously addressed. In such situations, the issue is whether the new rule will be applied to other cases either pending at the time of the announcement of the new rule, or filed after the announcement of the new rule but based on events occurring prior to its announcement.

In deciding the retroactivity question, some state courts have adopted a version of the United States Supreme Court's retroactivity jurisprudence. The Supreme Court has generally treated the retroactivity of civil and criminal rules as different matters, applying a separate set of retroactivity rules in each area. The late 1980's, however, witnessed a revision of the Court's criminal retroactivity jurisprudence and the 1990 term ended with

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rejection of Supreme Court precedent as "New Federalism" gone wild. *Id.* at 1348 (Bellacosa, J., dissenting).

3. Professor Joseph Goldstein argues that the United States Supreme Court has a duty to set forth expressly the principles underlying its constitutional decisions:

> If Ours is to be an "intelligent democracy," if Our revolutions are to be peaceful, We the People . . . must be able to learn, from our Own reading of the Constitution and the Supreme Court's constructions of it, what rights We have and do not have, what values are and are not protected, and what limits are and are not imposed on those who govern on Our behalf. For then We can meet Our responsibility as informed citizens to respond to what the Court did and why it did it.

JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 6 (1992). Professor Goldstein's point applies equally to non-constitutional rules. As the Alaska Supreme Court has recognized, the efficacy of law rests upon public consent and acceptance. *See* discussion *infra* text accompanying notes 146-147. A judiciary that neglects its duty to communicate its decisions to the public, in language the public can understand, may erode that acceptance as well as the law's basis in the informed consent of the governed.

4. As used in this article, the term "new legal rule" refers solely to rules of judicial origin. The question of retroactivity of legislative enactments presents a separate question beyond the scope of this article. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974); Fairbanks N. Star Borough Sch. Dist. v. Crider, 736 P.2d 770 (Alaska 1987); *see also* Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

civil retroactivity on the verge of a new day. How will state courts respond to these changes?

Retroactivity doctrines are generally framed with reference to the procedural posture of the case in question. Courts distinguish between cases on *direct review* and *collateral review*. A case pending on appeal before it has become final is considered on direct review. After a case has become final, a further attack on the judgment is considered on collateral review. Thus, distinguishing between these types of review depends upon whether a case is *final*. A case is generally considered final when the litigants have exhausted all avenues of direct appeal and the time for applying for a writ of certiorari has lapsed.[5]

Courts generally discuss four options when considering the application of a new legal rule. First, a court may use "pure retroactivity" by applying the new legal rule to all cases that come before it, whether on collateral or direct review. Second, a court may use "full retroactivity" by applying the new legal rule to all cases not final, i.e., cases on direct review, on the date of the rule's announcement. Third, a court may apply the new legal rule with "selective prospectivity," restricting application of the rule to the case announcing the new rule, all cases filed after that date, and selected cases filed before that date.[6] Fourth, a court may resort to "pure prospectivity," restricting the application of the rule to those cases filed after the date the new legal rule was announced.[7] Courts sometimes choose a hybrid of these four methods, attempting to tailor their decisions to the specifics of particular cases.[8]

The United States Supreme Court has recently reconsidered the retroactivity issue. Part II of this article briefly analyzes the Court's retroactivity jurisprudence as it has developed from the early 1960's to the present. Part III analyzes the Alaska Supreme Court's reliance upon the United States Supreme Court's retroactivity decisions and addresses the desirability and likelihood that the Alaska Supreme Court will follow the United States Supreme Court's change in this area.

II. FEDERAL RETROACTIVITY IN FLUX

The United States Supreme Court has developed parallel doctrines of retroactivity in the civil and criminal contexts. These doctrines, while

5. Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). The Alaska Supreme Court has also applied a concept of finality. *See infra* notes 188, 267 and accompanying text.

6. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2444 (1991).

7. *See id.* at 2443 (opinion of Souter, J.).

8. *See infra* text accompanying note 189.

never achieving identity, have recently converged towards a consistent approach. Significantly, the Supreme Court appears poised to recognize that retroactivity is an issue of constitutional nature, rooted in a proper understanding of the role of the judiciary.[9]

A. *Linkletter*, *Griffith*, and *Teague*: Retroactivity and Constitutional Criminal Procedure

For about 180 years, the United States Supreme Court utilized the pure retroactivity approach in applying new rules of constitutional law.[10] While the Court occasionally experimented with some form of prospectivity in applying statutes[11] or common law rules,[12] it held the line on the pure retroactivity of constitutional decisions. Pure retroactivity made sense in light of the traditional common law notion that judges "found" law and legislatures "made" law.[13] Under this theory, when a judge announced a new legal rule, the judge was really only "finding" the true law and giving it voice. The old rule was merely an incorrect attempt to "find" the true law and, thus, was never really the law. Since the new rule had always been law, the new rule automatically applied to *all* cases. To do otherwise -- to apply a rule only prospectively -- meant that the judge had "made" a new rule of law for application in the future.[14] Such *in futuro* lawmaking, with its attendant elements of discretion and policymaking, more precisely embodied the legislative function. Thus, a judge who refused to apply a new legal rule retroactively was thought to exceed legitimate judicial authority and usurp a portion of the legislative power.

The legal realists discredited this theoretical distinction between finding and making law. The "find-make" law distinction masked the actual discretion that judges exercise. Today, the remnants of the "find-make" law debate focus on the proper role of the judiciary (active or restrained) in our legal system.[15] As Justice Scalia has noted, the modern proponents of retroactivity recognize that "judges in a real sense 'make' law . . . as judges make it, which is to say as though they were 'finding' it -- discerning what the law *is*, rather than decreeing what it is today *changed*

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9. *See generally* Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'Y 595 (1992) (endorsing a historically based retroactivity approach).

10. *See* Linkletter v. Walker, 381 U.S. 618, 623 (1965).

11. *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

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

13. *See Linkletter*, 381 U.S. at 623.

14. *Id.*

15. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment).

to, or what it will tomorrow be."[16] Retroactivity, then, can be conceived of as a struggle to define the proper role of the judiciary.

Retroactivity theory, however, evidenced a significant degree of tension when confronted with the practical realities of the law, especially during the Warren Court's revolution in constitutional criminal procedure. As the Court expanded the constitutional protections of the criminally accused, the Court faced the possibility of upsetting thousands of otherwise final criminal convictions.[17] The common law requirement of pure retroactivity would have thrown the federal judicial system into chaos as prisoners flooded the courts with challenges to their convictions on writs of habeas corpus. To allow such wholesale challenge to state criminal convictions would thwart the states' reasonable reliance on the old legal rules.

1. Linkletter v. Walker. This tension in retroactivity analysis peaked in *Linkletter v. Walker*.[18] In *Linkletter*, the defendant sought retroactive application of *Mapp v. Ohio*[19] to his case on collateral review.[20] *Mapp* had applied the Fourth Amendment exclusionary rule to the states through the Fourteenth Amendment.[21] Consequently, the *Linkletter* Court had to choose one of the four retroactivity methods in applying the landmark constitutional criminal procedure case.[22]

The Court's analysis in *Linkletter* revolved around two conflicting considerations. On the one hand, the Court considered the *equitable* principle that like parties in litigation should be treated alike. Since *Mapp* applied its rule to the defendant in that case, equity required that the rule be applied to all parties in the same position, i.e., cases arising before announcement of the rule in *Mapp*. On the other hand, the Court recognized the practical reality of our modern criminal justice system. Pure retroactivity would threaten convictions in "thousands of cases" that

16. *Id.* (emphasis in original) (Scalia, J., concurring in the judgment).

17. *See Linkletter*, 381 U.S. at 636.

18. 381 U.S. 618 (1965). For discussions of the pre-*Linkletter* retroactivity doctrine, see Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 57, 62-70 (1965), and Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 747-57 (1966).

19. 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).

20. *Linkletter*, 381 U.S. at 621 ("[The defendant's] final conviction was long prior to our disposition of [*Mapp*].").

21. *Mapp*, 367 U.S. at 655. The exclusionary rule prohibits the introduction at trial of any evidence obtained in violation of the defendant's fourth amendment rights.

22. Pure prospectivity was impossible because the *Mapp* Court applied its new rule to the litigants in that case. Thus, the *Linkletter* Court faced only three choices: pure retroactivity, full retroactivity, or selective prospectivity.

had become final under the pre-*Mapp* rule.[23] Similarly, full retroactive application of *Mapp* would defeat convictions gained through good faith governmental reliance on the pre-*Mapp* state of the law. To apply a new rule of criminal procedure retroactively would defeat these states' justifiable reliance.

The Supreme Court reconciled the conflicting reliance-equity principles by employing a three-pronged test for retroactivity. When deciding whether to apply a new legal rule retroactively, courts would weigh: (1) "the purpose of the [new] rule," (2) "the reliance placed upon the [old] doctrine," and (3) "the effect [up]on the administration of justice of a retrospective application of [the new legal rule]."[24] This test applied equally to cases on direct and collateral review.[25]

Applying its three-pronged test, the *Linkletter* Court declined to apply *Mapp* retroactively.[26] The second and third *Linkletter* factors largely consisted of the reliance considerations discussed above. The Court reasoned that the government relied upon pre-*Mapp* law in gaining convictions; to review these final convictions under *Mapp* would wreak havoc on the justice system.[27] The Court also considered the purpose of the rule announced in *Mapp*. The Court noted that "*Mapp* had as its prime purpose the *enforcement* of the Fourth Amendment through the inclusion of the exclusionary rule within its rights."[28] In other words, the Court concluded that the very purpose of the exclusionary rule is to *deter* state officials from *future* Fourth Amendment violations.[29] Retroactive application, then, could have no impact upon future Fourth Amendment violations. In sum, all of the *Linkletter* factors weighed against applying *Mapp* retroactively.

In *Linkletter*, retroactivity as a legal doctrine was a product of both theory and practice. In theory, similarly situated parties should be treated alike. In practice, however, such treatment threatened to overload the legal system. It is noteworthy that the *Linkletter* Court, in formulating its decision, did not rely on either the constitution or a conception of the proper role of the judiciary.[30] Instead, the Court focused on the parties

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

24. *Id.* at 636.

25. *Id.*; *see also* Stovall v. Denno, 388 U.S. 293 (1967) (making no distinction between such types of review).

26. *Linkletter*, 381 U.S. at 640.

27. *Id.* at 637-38.

28. *Id.* at 636 (emphasis added).

29. *Id.*

30. *See id.* at 628 ("[T]here seems to be no impediment -- constitutional or philosophical -- to the use of [prospectivity] . . . ."); *see also* L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989

to the case, addressing the issues of equity for similarly situated defendants and the justified reliance of the government. The Court struck a balance in favor of the government; the *Linkletter* test is largely a method of determining when government reliance upon an old rule of law was reasonable or justifiable. Indeed, the second *Linkletter* factor expressly and directly measures reliance.[31] Similarly, the third factor indirectly measures government reliance; because the government relied on the old legal rule, significant complications arise for the administration of justice when such reliance is undercut. In contrast, the competing equity principle did not appear either directly or indirectly in the *Linkletter* test. Thus, in weighing the equity-reliance principles, *Linkletter* tipped the scale in favor of reliance.

2. Griffith v. Kentucky *and* Teague v. Lane. The *Linkletter* standard stood largely intact until two cases decided in the late 1980's.[32] In *Griffith v. Kentucky*[33] and *Teague v. Lane*[34] the Court made a wholesale review of its criminal retroactivity doctrine. Both cases involved the issue of retroactive application of the Court's decision in *Batson v. Kentucky*,[35] in which the Court determined the evidentiary showing needed to challenge the prosecution's racially discriminatory use of peremptory challenges. *Griffith* addressed this issue for cases on direct review, while *Teague* considered the issue for cases on collateral review.

The *Griffith* Court scrutinized the *Batson* challenges of two criminal defendants, one convicted in state court and one in federal court. Both defendants appealed their convictions to the United States Supreme Court on writs of certiorari, i.e., on direct review, and the Court heard the cases in tandem.[36] The Court decided that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."[37] This holding rejected the *Linkletter* standard, instead setting a bright-line rule for all cases on direct review. The Court would no longer weigh the ambiguous factors of the law's purpose, governmental reliance, and practicality.

UTAH L. REV. 11, 12 (1989) ("The Constitution does not speak to the retroactive or prospective application of Supreme Court decisions.").

31. *See supra* text accompanying note 24.

32. For a discussion of retroactivity under the *Linkletter* regime, see John B. Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. REV. 745 (1983).

33. 479 U.S. 314 (1987).

34. 489 U.S. 288 (1989).

35. 476 U.S. 79 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965)).

36. *Griffith*, 479 U.S. at 320.

37. *Id.* at 328.

Griffith struck the reliance-equity balance squarely in favor of the equity principle, departing significantly from prior criminal procedure retroactivity jurisprudence.[38]

The *Griffith* holding also had a secondary significance. As discussed above, *Linkletter* relied on equity and practicality in support of its selective prospectivity doctrine, never placing retroactivity within the framework of either the Constitution or the role of the judiciary in our American legal system.[39] However, the *Griffith* Court included a constitutional basis for its decision. Justice Blackmun, writing for the Court, appealed to the proper role of Article III courts in our constitutional system.[40] Under the Article III "cases and controversies" requirement, federal courts must decide cases by applying the Court's understanding of the law at the time the cases come before them.[41] As the Court explained:

> "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 [on direct review] ... is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."[42]

For the first time, the Supreme Court recognized the larger, structural implications of the retroactivity question. In effect, the Court was defining its own role and considering its place within the constitutional world of separated powers.

Two years later, in *Teague*, the Supreme Court had the opportunity to define further its role in the retroactivity context. The defendant in *Teague* came to the Court on collateral review.[43] He challenged his conviction based on *Batson*, which was decided after his conviction had become final. The Supreme Court held that new legal rules generally should not apply

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38. *Id.* at 327-28.

39. *See supra* note 31 and accompanying text.

40. *Griffith*, 479 U.S. at 322. Under Article III, the judicial power extends to "all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... to *Controversies* to which the United States shall be a Party, to *Controversies* between two or more states ...." U.S. CONST. art. III, § 2 (emphasis added).

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

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

43. *Teague*, 489 U.S. at 295. Teague stood trial and was convicted in an Illinois state court. The Illinois appellate court and state supreme court both affirmed Teague's conviction. When the United States Supreme Court denied Teague's writ of certiorari in 1983, Teague's conviction became final. Following the Supreme Court's decision in *Batson* in 1986, Teague mounted a collateral attack against his conviction on a federal writ of habeas corpus.

retroactively to cases on collateral review.[44] The Court achieved this result by narrowly construing federal habeas corpus jurisdiction. Article III courts must operate within their congressional grant of jurisdiction.[45] The *Teague* Court construed the federal habeas corpus statute[46] as granting federal courts jurisdiction to review state court convictions only under the law at the time a defendant's conviction becomes final.[47] Under this interpretation, the Court effectively never faces the issue of retroactivity on collateral review in criminal cases; federal courts are not granted authority to entertain habeas corpus attacks based on assertions of new legal rules.[48]

The Court's general rule, however, has two exceptions. First, federal courts may hear habeas petitions based on a new legal rule that places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe.'"[49] In such cases, a state cannot justly hold an individual for commission of an act the state truly had no authority to forbid. Second, courts are to give habeas litigants the benefit of a new legal rule that is essential to "the fundamental fairness that must underlie a conviction or . . . [to] obtain[] an accurate conviction."[50] When federal courts hear cases falling into these categories, they must apply the new legal rules retroactively. In this limited way, *Teague* is consistent with *Griffith*: courts that properly have jurisdiction over a criminal case asserting or seeking the benefit of a new legal rule may apply the new rule retroactively.

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44. *Id.* at 306-07.

45. *See* Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2140 (1990) (Article III judicial power does not attach to courts until "they have been created and their jurisdiction established.") (Scalia, J., dissenting).

46. 28 U.S.C. § 2241 (1988) (defining the Court's power to grant a writ).

47. *See Teague*, 489 U.S. at 306-07. This interpretation of the federal habeas corpus statute raises a troubling question: Can Congress restrict the Supreme Court's *direct review* jurisdiction to cases that do not assert novel legal theories or rules? The justices in *Teague* ignored this greater implication of their decision. Underlying the entire discussion, however, is a question of how much Congress can constitutionally restrict the jurisdiction of Article III courts. *See* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 129-45 (1982); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); Charles L. Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841 (1975); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Appellate Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981).

48. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1734 (1991) (*Teague* held that "subject only to narrow exceptions, a federal habeas court should dismiss claims based on 'new' rules of constitutional law without reaching the merits.").

49. *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

50. *Id.* at 315.

The *Griffith* language concerning Article III did not appear in *Teague*. Justice Blackmun, the author of the Article III rationale in *Griffith*, did not write separately in *Teague*. Instead, he joined in Part I of Justice Stevens' concurrence, which made no mention of the constitutional origins of retroactivity. Justice White stood alone in recognizing that something more -- something of a constitutional nature -- could be at stake: "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us; but because the Court's recent decisions dealing with direct review appear to have constitutional underpinnings . . . [,] correction of our error, if error there is, lies with us, not Congress."[51] After *Teague*, the structural and constitutional origins of retroactivity, at least in the criminal context, were left unclear.

B. *Chevron, Smith, and Beam*: Civil Retroactivity and a Return to Constitutional Foundations

A revolution in the Court's civil retroactivity jurisprudence has been long in arriving. Until recently, the Supreme Court has applied the *Linkletter*-like balancing approach developed in *Chevron Oil v. Huson*.[52] However, in the last two years, at the initiative of Justices Scalia, Marshall, and Blackmun, the Court has moved toward a doctrine of full retroactivity in civil cases. Perhaps most significant, however, is that all three justices have appealed to the Constitution and structural concerns in making their arguments.

1. Chevron *and the Three-Factor Test.* For a period of five years after *Linkletter*, the Supreme Court addressed retroactivity only in the context of constitutional criminal procedure.[53] In 1971, the Court first discussed the viability of prospectivity in civil cases in *Chevron Oil Co. v. Huson*.[54] In *Chevron*, the Court reached the issue of whether a federal statute absorbed its statute of limitations from applicable state law or whether federal courts should supply the statute of limitations from federal common law.[55] The Court found that the outcome in *Chevron* was controlled by the rationale of a prior decision, *Rodrigue v. Aetna Casualty & Surety Co.*,[56] which held that a federal statute absorbed substantive state law on the same

51. *Id.* at 317 (citations omitted) (White, J., concurring).

52. 404 U.S. 97 (1971).

53. *See, e.g.*, Desist v. United States, 394 U.S. 244 (1969); Mackey v. United States, 401 U.S. 667 (1971); Hill v. California, 401 U.S. 797 (1971).

54. 404 U.S. 97 (1971).

55. *Id.* at 100-05.

56. 395 U.S. 352 (1969).

point.[57] Because the *Chevron* suit arose and was commenced before the Court's decision in *Rodrigue*, the Court had to decide the retroactivity of the *Rodrigue* precedent. Retroactive application of *Rodrigue*, and of the state statute of limitations, would have time-barred the plaintiff's claims.

In its brief discussion of civil retroactivity, the Court made reference to the *Linkletter* line of criminal cases[58] and other cases in which the Court claimed to "have recognized the doctrine of non-retroactivity outside the criminal area many times."[59] From these cases, the Court developed a *Linkletter*-like three-pronged test. Under the *Chevron* test, prospectivity was determined by examining: (1) whether "the decision to be applied nonretroactively . . . establish[es] a new principle of law," (2) "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," and (3) "the inequity imposed by retroactive application."[60] The *Chevron* Court concluded that to apply *Rodrigue* retroactively to bar the plaintiff's claims violated every prong of its newly-enunciated test.[61] This decision ushered in the *Chevron* era, during which *non-retroactivity* became an option in civil cases.

The Court's treatment of *Chevron* resembled its disposition of *Linkletter*; both confronted the equity-reliance conflict, yet discussed retroactivity without any mention of the Constitution or the proper role of Article III courts. First, weighing in favor of retroactivity was the equity principle that similarly situated parties should be treated alike.[62] In other words, it is inequitable to give the benefit of a new rule to the party in the case announcing it but not to parties arriving at the courthouse door shortly thereafter. Under this argument, justice should not rely on the mere fortuity of a case's progress through the judicial system.

However, in tension with this equitable consideration was the concept that courts should protect parties' reasonable reliance on current, accepted legal rules.[63] Thus, parties' settled expectations weigh against retroactivity. In striking a balance between these competing principles, the Supreme Court came down forcefully, as it had six years earlier in *Linkletter*, on the side of reliance, settled expectations, and non-

57. *Id.* at 365-66.

58. *Chevron*, 404 U.S. at 105-06.

59. *Id.* at 106.

60. *Id.* at 106-07 (citation omitted). A decision establishes a new rule 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." *Id.* at 106 (citation omitted).

61. *Id.* at 107-08.

62. *Id.*

63. *Id.*

retroactivity. Indeed, the first and third factors of the *Chevron* test expressly seek to protect parties from the disruption of sudden changes in the law.

2. Smith *and* Beam*: Whither the Constitution?* Rumblings of an impending constitutional revolution in civil retroactivity doctrine, parallel to the changes in the criminal context, did not emerge until 1990 in *American Trucking Ass'ns v. Smith*.[64] Indeed, a constitutional revolution was not possible in an area in which the Supreme Court had not acknowledged the influence of the Constitution. Justice O'Connor's plurality opinion in *Smith* applied *Chevron*, leaving that standard intact for the time being. Justice Scalia, however, clearly stated a contrary position: "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."[65] Like Justice Blackmun's opinion in *Griffith*,[66] Justice Scalia grounded his position in Article III and a proper understanding of the role of courts thereunder.[67] Those courts exercising the Article III "judicial Power" must confine themselves to "*declaring* what the law already is," resisting the temptation to "*creat*[*e*] . . . law."[68] These postulates led Justice Scalia to the inevitable conclusion that "since the Constitution does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense."[69]

Mere invocation of Article III, however, does not answer the question of why retroactivity is inherent in the judicial power. The following inquiry plagues any attempt at constitutional interpretation: How do we discover the specific meaning of otherwise broad and vague constitutional language?[70] In the present context, the relevant text consists of two simple words: "judicial Power." Any inferences regarding the inherent authority of, or limitations on, those exercising the "judicial Power" must

64. 496 U.S. 167 (1990).

65. *Id.* at 201 (Scalia, J., concurring in the judgment).

66. *Griffith*, 479 U.S. at 328; *see supra* notes 40-42 and accompanying text.

67. *Smith*, 496 U.S. at 200-04 (Scalia, J., concurring in the judgment).

68. *Id.* at 201 (Scalia, J., concurring in the judgment).

69. *Id.* (Scalia, J., concurring in the judgment).

70. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (1990); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1060-65 (1990).

come from outside the text. In *Smith*, Justice Scalia barely identified his extra-textual sources, making only a passing, unexplained reference to tradition.[71]

In a concurring opinion in *James B. Beam Distilling Co. v. Georgia*,[72] Justice Scalia answered the interpretive question he had raised just a year earlier in *Smith*. *Beam* addressed the retroactivity of the Court's decision in *Bacchus Imports, Ltd. v. Dias*,[73] regarding the negative commerce clause and certain state taxing statutes. The *Bacchus* Court applied its holding to the parties before it; thus, the *Beam* Court was limited to the choices of full retroactivity, pure retroactivity, and selective prospectivity.

In *Beam*, Justice Scalia argued that the proper understanding of the "judicial Power" must be sought from "our common law tradition . . . as it was understood when the Constitution was enacted."[74] According to this common law understanding, judges only wield the power "'to say what the law is.'"[75] If judges attempted to do more, to move into the proverbial realm of *making* law, judges would "alter in a fundamental way the assigned balance of responsibility and power among the three Branches."[76] As discussed above, full retroactivity is consistent with the limited judicial role of finding law.[77] Therefore, Justice Scalia concluded, only full retroactivity would confine judges to the "judicial Power"; anything less would depart from the proper understanding of that term and skew the balance of power in our constitutional system.[78] Justice Scalia, however, gained only two other votes (Justices Marshall and Blackmun) in support of his constitutional theory of retroactivity.[79]

Justices Souter and Stevens were the other two votes supporting the judgment in *Beam*. Justice Souter, author of the plurality opinion joined by Justice Stevens, rested his decision on a conception of retroactivity as a choice-of-law question.[80] Justice Souter saw retroactivity as posing a choice between an old legal rule and a new legal rule. In analyzing the question, Justice Souter used the twin principles of equity and reliance

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71. *Smith*, 496 U.S. at 201 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)) (Scalia, J., concurring in the judgment).

72. 111 S. Ct. 2439 (1991).

73. 468 U.S. 263 (1984).

74. *Beam*, 111 S. Ct. at 2450 (Scalia, J., concurring in the judgment).

75. *Id.* at 2450-51 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177) (Scalia, J., concurring in the judgment).

76. *Id.* at 2451 (Scalia, J., concurring in the judgment). Justice Scalia has consistently advocated a strict separation of powers among the three branches of government. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

77. *See supra* text accompanying notes 13-14.

78. *Beam*, 111 S.Ct. at 2450-51 (Scalia, J., concurring in the judgment).

79. *Id.* at 2450 (Scalia, J., concurring in the judgment).

80. *Id.* at 2441-48.

upon which both *Linkletter* and *Chevron* were predicated.[81] Justice Souter, however, reached a conclusion contrary to that found in those two cases. He largely dismissed the reliance principle on the belief that the "applicability of rules of law are not to be switched on and off according to individual hardship."[82] Instead, he relied on "principles of equality and stare decisis here prevailing over any claim based on a *Chevron* . . . analysis."[83] The only limit Justice Souter placed on this equitable principle was the judicial system's need for finality.[84] Justice Souter concluded that equity foreclosed the option of selective prospectivity, but refused to "speculate as to the bounds or propriety of pure prospectivity."[85]

After *Beam*, civil retroactivity remains uncertain. In *Beam*, five justices voted to reject selective prospectivity in civil cases. The Court also had three firm votes to reject full prospectivity: Justices Scalia, Marshall and Blackmun; Justices Souter and Stevens may eventually provide additional votes. Justice Souter's strong support of the equity principle in analyzing retroactivity, while perhaps not persuasive or desirable,[86] signals his implicit rejection of the reliance principle. This rejection of the reliance principle undercuts the entire basis of *Chevron* and, therefore, may provide the needed votes to kill any form of prospectivity in civil cases. Conversely, the equity principle loses its strength in the context of full prospectivity. Similarly situated litigants receive the same treatment; *all litigants* are denied the benefit of the new rule. Since the equity-reliance approach relies so heavily upon an individual justice's balancing of those

81. *See supra* notes 31, 60-62. Those two cases struck the balance in favor of the parties' reliance interests and settled expectations.

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

83. *Id.* at 2446.

84. *Id.* at 2446-47.

85. *Id.* at 2448. Of course, since pure prospectivity was not at issue in *Beam*, any discussion of the topic was merely a dictum. Justice Souter indicates that such a discussion is inevitable given the divergent opinions in *Beam*. Indeed, Justice White castigated Justice Souter for this language concerning pure prospectivity. As Justice White argued, to refuse expressly to speculate in such a way is to suggest that a day would soon come when the Court should and will consider the issue. According to Justice White, this suggestion was bothersome because of its implicit assertion that pure prospectivity was an open question instead of an issue previously settled by *Chevron*. *Id.* at 2448-49 (White, J., concurring in the judgment).

86. Elsewhere, this author has argued against the "equity-reliance" approach to retroactivity. *See* McGreal, *supra* note 9. As evidenced by the inconsistency between the *Chevron* decision and Souter's *Beam* opinion, the outcome of any balancing of the equity-reliance factors depends upon the weight an individual justice places upon each factor. Justice Scalia's Article III approach has the twin advantages of contributing to the proper constitutional definition of the judicial role and bringing a degree of certainty to the area of retroactivity.

principles, we must wait until the issue of full prospectivity arises to see whether the Justices will complete a civil retroactivity revolution.

III. RETROACTIVITY IN THE ALASKA SUPREME COURT

A. The Roots of Retroactivity

The Alaska Supreme Court first considered the possibility of prospective application of a new legal rule three years before the United States Supreme Court's *Linkletter* opinion. In *City of Fairbanks v. Schaible*,[87] the court addressed the city's claim of immunity from liability for damages arising from a firefighter's negligent rescue attempt. The former District Court for the Territory of Alaska had determined immunity questions by distinguishing between governmental and proprietary functions performed by the city.[88] If the plaintiff's claim arose from performance of a governmental function, then the city was immune from liability. The territorial district court had held previously that a municipal fire department performed a governmental function.[89]

In *Schaible*, the Alaska Supreme Court reconsidered the governmental-proprietary function distinction. The court ultimately discarded the distinction, holding that a city "which maintains a fire department, may be held liable for injuries resulting from negligence connected with the department's fire-fighting activities."[90] Nonetheless, this holding did not dispose of the case before the court.

In a brief paragraph, the court considered whether its new rule regarding municipal immunity should apply to the parties in the case. Noting that municipalities likely had relied on the decisions of the territorial district court, the court reasoned that pure prospectivity would "avoid hardship on the municipalities."[91] Nevertheless, the court concluded that: (1) the new rule should apply to the parties in *Schiable*; but (2) in future cases, the new rule would apply "only to actions arising out of occurrences *after the date of this opinion.*"[92] Thus, the court applied a form of selective prospectivity based on a reliance rationale a full three years before the United States Supreme Court decided *Linkletter*. Absent

87. 375 P.2d 201 (Alaska 1962).

88. *See, e.g.*, Tapscott v. Page, 17 Alaska 507 (D. Alaska 1958); City of Fairbanks v. Gilbertson, 16 Alaska 590 (D. Alaska 1957); Carr v. City of Anchorage, 114 F. Supp. 439 (D. Alaska 1953).

89. *See Gilbertson*, 16 Alaska at 594.

90. *Schaible*, 375 P.2d at 208.

91. *Id.* at 211.

92. *Id.* (emphasis added).

from the court's discussion, however, was any reference to the competing principle of equity for similarly situated parties.

B. Criminal Procedure: Clinging to *Linkletter*

1. *Applying Federal Law: Its Erratic Outcomes.* The Alaska Supreme Court did not revisit the issue of retroactivity until after the United States Supreme Court's landmark decision in *Linkletter v. Walker*.[93] Beginning with *Martinez v. State*,[94] the court decided a string of seven criminal retroactivity cases in which it encountered the *Linkletter* test for questions of federal constitutional rights and adopted that test for questions of state constitutional criminal procedure. The first four cases applied federal retroactivity principles derived from United States Supreme Court precedent.[95] The remaining three cases involved state law and, thus, the Alaska Supreme Court was free to formulate its own retroactivity principles.[96]

In *Martinez*, the appellant argued that his Sixth Amendment right to counsel had been violated when he was not appointed counsel immediately upon his arrest.[97] Much of the court's analysis in *Martinez* depended on the retroactive effect given to *Miranda v. Arizona*[98] and *Escobedo v. Illinois*,[99] both of which had extended the rights of the accused under the United States Constitution. While *Miranda* and *Escobedo* applied their holdings to the defendants in the two cases, the extent of their retroactivity was not clear until *Johnson v. New Jersey*.[100] Applying the *Linkletter* test, the *Johnson* Court held that *Miranda* and *Escobedo* would apply only to cases in which trial had begun after the date of the decisions.[101] In essence, the *Johnson* Court applied a form of selective prospectivity.

In *Martinez*, the Alaska Supreme Court applied the United States Supreme Court's holding in *Johnson*. Under the *Johnson* date-of-trial approach, *Escobedo*, but not *Miranda*, applied retroactively to the litigants in *Martinez*. The *Martinez* holding illustrates the inconsistency attendant

93. 381 U.S. 618 (1965).

94. 423 P.2d 700 (Alaska 1967).

95. Fresneda v. State, 458 P.2d 134 (Alaska 1969); Roberts v. State, 453 P.2d 898 (Alaska 1969); Soolook v. State, 447 P.2d 55 (Alaska 1968); Martinez v. State, 423 P.2d 700 (Alaska 1967).

96. Rutherford v. State, 486 P.2d 946 (Alaska 1971); Judd v. State, 482 P.2d 273 (Alaska 1971); Gray v. State, 463 P.2d 897 (Alaska 1970).

97. *Martinez*, 423 P.2d at 704.

98. 384 U.S. 436 (1966).

99. 378 U.S. 478 (1964).

100. 384 U.S. 719 (1966).

101. *Id.* at 733.

to selective prospectivity as applied in *Johnson*. A judge's trial calendar should not determine the rights of an accused. If reliance were the interest the Court intended to protect, the logical date for prospective application would be the date of the government's alleged violation of those rights, i.e., the date the government *actually relied* on a particular legal norm. Instead, by choosing the date of trial, the Supreme Court adopted a purely arbitrary date for retroactivity; *trial* is a date with little or no relation to the government's reliance interest. Under this rule, the defendant is given a "window of new rights," a period of time between the government's offending conduct and the commencement of trial in which new constitutional protections could arise.

Soolook v. State,[102] decided one year after *Martinez*, further illustrates the weakness of the *Johnson* rule. Soolook was arrested for murder in early 1966. Before arrest he was warned of his right to remain silent and his right to an attorney. Nevertheless, Soolook twice confessed to the murder, once to police and once to the district attorney. These confessions took place several months *before* the Supreme Court's decision in *Miranda*, in which the Court established the requirement that detailed warnings be given to an accused. The police, therefore, had *relied* on the pre-*Miranda* state of the law which required only that a defendant's confession be voluntary under the totality of the circumstances.[103] However, because Soolook's case *came to trial after* the decision in *Miranda*, Soolook was entitled to the benefit of the *Miranda* decision. Soolook's two confessions were scrutinized under *Miranda* despite the government's good faith reliance on pre-*Miranda* law at the time of his confession.[104] Cases like *Soolook* illustrate how imperfectly the Supreme Court's date-of-trial selective prospectivity rule actually protects the government's reliance interest.

The Alaska Supreme Court next applied United States Supreme Court retroactivity precedent to criminal federal precedent in *Roberts v. State*.[105] In *Roberts*, a third party accidentally overheard an incriminating phone conversation involving the accused. The third party had access to this conversation because the phone company had mistakenly connected her line with the accused's home line. This mistaken connection violated the Federal Communications Act ("FCA").[106] The Supreme Court had held

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102. 447 P.2d 55 (Alaska 1968), *cert. denied*, 396 U.S. 850 (1969).

103. *See, e.g.*, Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

104. *Soolook*, 447 P.2d at 59. The court nevertheless deemed Soolook's confession admissible. *Id.* at 61.

105. 453 P.2d 898 (Alaska 1969), *cert. denied*, 396 U.S. 1022 (1970).

106. 47 U.S.C. § 605 (1988).

in *Lee v. Florida*[107] that a federal exclusionary rule prohibited the admission of evidence gained in violation of the FCA.[108] In *Fuller v. Alaska*,[109] however, the United States Supreme Court had limited *Lee* to cases that went to trial after the date of the *Lee* decision.[110] Consequently, the Alaska Supreme Court had to once again apply an illogical, trial date-based form of selective prospectivity to determine an accused's rights under the federal Constitution.[111] Because Roberts went to trial *before* the United States Supreme Court decided *Lee*, he did not retroactively receive the benefit of that rule.[112] Thus, in *Roberts*, the date-of-trial worked in favor of the government, upholding the state's reliance on the pre-*Lee* status of the law. As *Martinez* and *Soolook* clearly illustrate, however, the State does not always win this lottery of the trial court calendar.

In *Fresneda v. State*,[113] the Alaska Supreme Court addressed the retroactivity of the rule in *Chimel v. California*,[114] an issue not yet decided by the United States Supreme Court.[115] The court held that *Chimel* applied "to cases pending on direct review in this court as of the date of the *Chimel* decision."[116] In reaching this holding, the court did not specifically consider the *Linkletter* factors. Instead, it utilized the retroactivity approach articulated by Justice Harlan's dissenting opinion in *Desist v. United States*.[117] In *Desist*, Justice Harlan's analysis advocated retroactivity for all decisions on direct review,[118] a position similar to that later adopted by the Supreme Court in *Griffith*.[119] Although the court's brief reference to Harlan's dissent signalled a possible departure from the *Linkletter* approach, the court never returned to this type of retroactivity analysis.

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107. 392 U.S. 378 (1968).

108. *Id.* at 386-87.

109. 393 U.S. 80 (1968).

110. *Id.* at 81.

111. A date-of-trial rule arbitratily sets the date of prospective effect and thwarts the government's good faith reliance on existing legal rules.

112. *Roberts*, 453 P.2d at 904.

113. 458 P.2d 134 (Alaska 1969).

114. 395 U.S. 752 (1969) (holding that police can search an arrestee and the area in her immediate control incident to a lawful arrest).

115. *Fresneda*, 458 P.2d at 143 & n.28.

116. *Id.*

117. 394 U.S. 244 (1969).

118. *Fresneda*, 458 P.2d at 143 & n.128 (citing *Desist*, 394 U.S. at 257-59 (Harlan, J., dissenting)).

119. *See supra* text accompanying notes 33-42.

2. *The* Linkletter *Standard Adopted.* In *Martinez, Soolook, Roberts,* and *Fresneda,* the Alaska Supreme Court applied federal law and, thus, did not address the appropriate retroactivity doctrine for state precedent. These cases, however, influenced the Alaska Supreme Court in later state law cases. This section traces the court's adoption of the *Linkletter* retroactivity test.

In *Gray v. State,*[120] the court addressed the retroactivity of its decision in *Speidel v. Alaska,*[121] which granted an accused the right to be present at a pre-sentencing conference. Although the court acknowledged *Linkletter* and its progeny,[122] it adopted a distinct two-part test for analyzing the retroactivity issue, which emphasized "(1) the *purpose* to be served by the rule; [and] (2) the effect on the *administration of justice* of a retroactive application of the new rule."[123] This test did not expressly consider "the *reliance* placed upon the [old] doctrine,"[124] the factor supporting prospective application in *Linkletter.* In its place, the court added a practical consideration under the "administration of justice" prong: "whether there were a substantial number of convictions based on the criminal procedural law before the new rule was laid down."[125] Applying this rule, the *Gray* court held that *Speidel* should be applied prospectively.[126]

An "administration of justice" criterion extends beyond the reliance rationale which supported prospectivity in *Linkletter.* This criterion includes an *element* of reliance in that a retrial based on retroactivity upsets the government's settled expectations placed in the validity of the first prosecution. However, this criterion also includes an efficiency consideration with respect to the practical effect that retrials place on a court's caseload. A substantial number of petitions to set aside convictions could paralyze the courts and disrupt or even halt the administration of justice. In holding that *Speidel* should be applied prospectively, the *Gray* court relied on this efficiency rationale, referring to the "number of convictions" the *Speidel* rule would disturb.[127]

While not directly addressing the reliance factor, the *Gray* court's decision was consistent with a reliance rationale. As discussed previously, the United States Supreme Court tied prospective application to the date

120. 463 P.2d 897 (Alaska 1970).
121. 460 P.2d 77 (Alaska 1969).
122. *Gray,* 463 P.2d at 912 n.35.
123. *Id.* at 913 (emphasis added).
124. *Linkletter,* 381 U.S. at 636 (emphasis added).
125. *Gray,* 463 P.2d at 913.
126. *Id.*
127. *Id.*

trial commenced. This rule created a window of rights where the government's reliance interests could be defeated.[128] In *Gray*, however, the court tied prospectivity to the government conduct complained of, i.e., the pre-sentencing conference.[129] The court concluded that *Speidel* applied "only to presentence conferences held after the date of the *Speidel* decision."[130] This rule recognized that the government conduct, not the arbitrary commencement date of trial, marks the accurate time for measuring governmental reliance on a legal rule.

A year later, in *Judd v. State*,[131] the Alaska Supreme Court adopted the full *Linkletter* test in what remains its most extensive discussion of criminal retroactivity. The *Judd* court addressed the retroactivity of *Fresneda*, in which the Alaska Supreme Court interpreted and extended the United States Supreme Court's rule announced in *Chimel*.[132] *Judd* presents a curious, hybrid case. In cases where the Alaska Supreme Court merely applies a federal constitutional precedent, federal law has supplied the relevant retroactivity rules. In *Judd*, however, the court addressed the retroactivity of its own decision in *Fresneda*, a case in which the Alaska Supreme Court interpreted and extended the United States Supreme Court's decision in *Chimel*. In *Judd*, the Alaska Supreme Court applied its own state rules of retroactivity. The *Judd* court's treatment of *Fresneda*, therefore, suggests that although federal precedent controls the application of federal retroactivity rules, state precedent which interprets and extends federal precedent is subject to state retroactivity rules.[133]

The *Judd* court began its analysis of state retroactivity principles just as the *Linkletter* Court had in the federal context, stating that "there is no constitutional requirement of retroactive application of decisions; the [Alaska Supreme] Court is free to announce a decision as retroactive or prospective."[134] In support of this proposition, the court recited the holdings of *Linkletter* and its progeny.[135] The court noted the United States Supreme Court's inconsistency in identifying the date for prospective application of a new legal rule.[136] In applying *Escobedo* and

128. *See* discussion *supra* p. 29.

129. *Gray*, 463 P.2 at 913.

130. *Id.*

131. 482 P.2d 273 (Alaska 1971).

132. *Fresneda* applied the *Chimel* decision to an issue arising under the Alaska Constitution. *Fresneda*, 458 P.2d at 143 ("The search . . . went beyond the limits set forth in *Chimel*."). *See supra* note 114.

133. *See Judd*, 482 P.2d at 276-80.

134. *Id.* at 276.

135. *Id.*

136. *Id*; *see supra* text accompanying notes 100-101.

Miranda, the date of trial controlled,[137] while in other cases, the Supreme Court chose the date of the government's offending conduct[138] or the date illegally obtained evidence was introduced at trial.[139]

Next, the Alaska Supreme Court thrust itself into an evaluation of the competing equity and reliance factors that have given the Supreme Court so much difficulty.[140] The court noted the common law doctrine of pure retroactivity as based on the "find-make" distinction.[141] The court concluded that the Supreme Court had adopted the "contrary view that if *justifiable reliance* had been placed upon an earlier judicial decision by those persons affected by it, the courts were required to consider this factor in determining whether subsequent changes in the law would be retroactive."[142] The court then adopted the full three-prong test articulated by the Supreme Court in *Linkletter*.[143] The court further noted that *Gray*'s two-prong analysis was consistent with the holding because the reliance factor was not necessary to the resolution of *Gray*.[144]

Applying the *Linkletter* test, the court concluded that *Fresneda* applied only to searches conducted after the *date* of the *Chimel* decision.[145] In framing this holding, the court resolved its earlier quandary regarding the proper date of prospectivity. By adopting the date-of-conduct approach, the court signalled its continued recognition and support of the reliance rationale.

The *Judd* court focused mainly on the reliance principle in adopting the prospectivity analysis of *Linkletter*. However, the court added an additional rationale, expressing concern with respect to public confidence in the law:

> [T]he public [has] relied upon the previous statements of the law, and . . . the great impact of and respect for the law in our society is based on such acceptance by the public generally. A change for the future can be digested but the application of a new interpretation to past conduct which

137. Johnson v. New Jersey, 384 U.S. 719 (1966).

138. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (considering the retroactivity of the decisions in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967)).

139. *See, e.g.*, Fuller v. Alaska, 393 U.S. 80 (1968) (addressing the retroactivity of Lee v. Florida, 392 U.S. 378 (1968)).

140. *Judd*, 482 P.2d at 278-79.

141. *Id.* at 277; *see supra* text accompanying notes 13-16.

142. *Judd*, 482 P.2d at 277 (emphasis added).

143. *Id.* at 278.

144. *Id.*

145. *Id.* at 279.

> was accepted by previous judicial decisions leads us to confusion and a hesitancy to accept any theory except one of gamesmanship with corresponding disrespect for our whole system of laws.[146]

If the stability of legal norms cannot be trusted and if the rules of the game can be changed *ex post*, public confidence and trust in the law is eroded. Since law relies heavily upon public acceptance for its validity and viability, a legal doctrine that threatens this acceptance must be disfavored. This argument is a logical corollary to the reliance principle; defeating justifiable reliance engenders distrust of and frustration with the legal system.[147]

In a concurring opinion, Justice Rabinowitz assailed the majority's adoption of prospectivity, expressing "geminous reservations as to whether this court possesse[d] the authority to decree, or as a matter of policy should hold, that a constitutional decision in a criminal case need not be given retroactive application."[148] He observed that the majority found "reliance to be the controlling criterion regarding prospective or retroactive application of constitutional adjudications."[149] Justice Rabinowitz set forth three arguments against prospectivity: equal protection, "the government's dereliction," and the efficacy of a practicality-based argument under Alaska law.[150] First, according to Justice Rabinowitz, prospectivity discriminates among criminal defendants based upon the timing of their cases. While this arbitrary classification would not constitute a suspect classification for equal protection purposes,[151] it does work a denial of an express constitutional right: the protection against unreasonable searches and seizures. Thus, it can be argued that the classification should be subject to strict scrutiny under the fundamental rights strain of equal protection.[152] Although Justice Rabinowitz did not make this argument explicitly, it seems implicit in an invocation of equal protection.

Justice Rabinowitz also criticized the *Fresneda* decision for applying *Chimel* only to cases on direct review at the time of the *Chimel* decision. He noted that *Judd* would have been on direct review at that time but for

146. *Id.* at 278-79.

147. *See id.*

148. *Id.* at 280 (Rabinowitz, J., concurring).

149. *Id.* at 282 n.5 (Rabinowitz, J., concurring).

150. *Id.* at 281 (Rabinowitz, J., concurring).

151. Suspect classes under equal protection analysis are generally limited to race, national origin, and alienage. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to 16-13, at 1451-66 (2d ed. 1988).

152. *See id.* § 16-7, at 1454.

delays caused by the state.[153] He found it unfair to penalize a criminal defendant for delays attributable to the prosecution.[154]

Third, Justice Rabinowitz addressed the *Gray* court's discussion of the practical difficulties of applying criminal procedure guarantees retroactively.[155] Many defendants would have to be retried, placing an extra burden on the legal system. Justice Rabinowitz noted, however, that in *Baker v. City of Fairbanks*[156] the court had rejected such "expediency oriented decision making."[157] The *Baker* court rejected an expediency rationale because it "would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency."[158] For this reason, Justice Rabinowitz rejected expediency-based justifications for the prospective application of constitutional rights.

After *Judd*, Alaska followed the *Linkletter* approach to the retroactivity of criminal precedents. *Judd*'s adoption of *Linkletter* rested on two grounds: the government's strong reliance interest and *Linkletter*'s weight as persuasive federal precedent. In the absence of constitutional restraints, such as those advanced by Justice Rabinowitz or Justice Scalia, the court struck a balance between the equity-reliance principles. In that balance, the weight fell consistently with then-current federal precedent, in favor of reliance.

Only four months later, the court again addressed the question of retroactivity in criminal cases. This time, in *Rutherford v. State*,[159] the court split over the proper application of the *Judd* retroactivity test.[160] The *Rutherford* court also expanded upon the core considerations under each prong of the *Judd* test.

Rutherford involved the retroactive effect of the court's decision in *Glasgow v. State*,[161] which overruled *Goss v. State*.[162] *Goss* previously held that an accused's right to a speedy trial was waived if not asserted.[163] The *Rutherford* court began its retroactivity analysis by

153. *Judd*, 482 P.2d at 281 (Rabinowitz, J., concurring).

154. *Id.* (Rabinowitz, J., concurring).

155. *See supra* text accompanying note 127.

156. 471 P.2d 386 (Alaska 1970).

157. *Judd*, 482 P.2d at 281 n.3 (Rabinowitz, J., concurring).

158. *Baker*, 471 P.2d at 394 (citation omitted).

159. 486 P.2d 946 (Alaska 1971).

160. *See id.* at 956 (Connor & Rabinowitz, JJ., joining, dissenting in part) ("It is only in the use of the [*Judd*] criteria that we differ.").

161. 469 P.2d 682 (Alaska 1970).

162. 390 P.2d 220 (Alaska), *cert. denied*, 379 U.S. 859 (1964).

163. *Goss*, 390 P.2d at 222.

setting forth the *Judd* three-prong test and explaining its Supreme Court lineage.[164] The court then examined the *Judd* test, first noting that "a review of the decisions of the Supreme Court of the United States dealing with retroactivity questions indicates that the starting point in analysis is the purpose criterion."[165] Yet again, the court's retroactivity analysis looked to the Supreme Court for guidance and, it seems, highly persuasive authority.

Next, the *Rutherford* court specifically addressed the purpose criterion. The court, again citing United States Supreme Court precedent, identified a general rule that "[w]here the purpose of the new rule is primarily related to the integrity of the verdict, the application thereof has generally been extended to all cases."[166] Where the newly prohibited government conduct affects the fact-finding process, the resultant inaccuracy increases the likelihood that the jury will render an improper verdict, possibly resulting in the conviction of an innocent person. In this way, constitutional criminal rights are valued in relation to their effect on the trial process and *not* as ends in themselves. This rationale allowed the *Rutherford* court to distinguish *Judd*, because "[t]he problem in search and seizure cases is not the reliability of the evidence obtained, but rather the constitutional propriety of the methods used by the investigating authority to obtain it."[167]

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164. *Rutherford*, 486 P.2d at 952.

165. *Id.*

166. *Id.* (citing Williams v. United States, 401 U.S. 646 (1971) (opinion of White, J.)).

167. *Id.* at 953. This holding makes sense in light of the Supreme Court's application of the *Mapp* exclusionary rule. That rule addresses the admissibility of evidence obtained by a search made in violation of the Fourth Amendment. The Supreme Court views the purpose of the exclusionary rule as the deterrence of improper police conduct. United States v. Leon, 468 U.S. 897 (1984). The interests protected by the Fourth Amendment are the accused's privacy interests in her person and her property, as opposed to the interest in protecting against having unreliable evidence admitted at trial. Indeed, the evidence excluded is often quite reliable and at times may be dispositive of guilt or innocence. The focus of exclusion, then, must be the police conduct. When exclusion of evidence does not deter police conduct, the rule does not apply. For example, when the police rely in good faith on a defective warrant, exclusion of the evidence obtained would not deter future police misconduct. Because the police were unaware, a court may reason, they were not engaging in deterrable misconduct. *See id.* at 919-20.

Similarly, when the court decides the retroactivity of a new criminal rule, the court must identify the underlying purpose of that rule. If the reasonable search and seizure requirement focuses on deterring police misconduct, then retroactivity will not (and cannot) achieve that end. The police will act in good faith reliance on current law, not tempering their actions in the face of possible changes of the law, regardless of retroactive application of a legal rule. Retroactivity will *not* change police behavior and, thus, does not achieve the central purpose of the Fourth Amendment. If, on the other hand, the purpose of the new legal rule is to increase the accuracy of criminal verdicts, then the state can achieve that purpose by providing the accused with a new trial preserving the newly announced safeguards.

Turning to the rule announced in *Glasgow*, the *Rutherford* court first found that the speedy trial guarantee served many purposes, one of which was to enhance the accuracy of criminal verdicts.[168] Second, the court dismissed any governmental reliance on the old rule in *Goss*.[169] Indeed, the court suggested that any reliance on *Goss* was unjustified because several Supreme Court precedents had cast doubt upon its continuing viability:

> Reliance upon the holding in *Goss* would be a valid consideration only to the extent that such reliance was justified. Prior to our decision in *Glasgow*, the United States Supreme Court . . . substantially undermined the theoretical validity of the *Goss* holding. Although *Glasgow* was decided on state constitutional grounds, we relied heavily upon the language of [the Supreme Court] . . . [I]t is simply difficult to see how any actual reliance upon *Goss* could be considered to have been justifiable.[170]

Third, the court minimized the effect of the *Glasgow* rule on the administration of justice.[171] The court concluded, therefore, that *Glasgow* must, at the very least, be applied to the litigants in *Rutherford*.[172]

The dissenting opinion co-authored by Justices Connor and Rabinowitz illustrates the malleability of the *Judd* analysis.[173] The dissenters faulted the majority on its analysis of each factor in the *Judd* test. First, the dissenters dismissed the assumption that delay rendered all trials unreliable.[174] The dissent also argued that governmental reliance on the old *Goss* rule "was probably much greater than the majority opinion implie[d]."[175] The dissent did not view Supreme Court precedent as clearly fatal to *Goss*, at least not to the extent that official reliance on that

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168. *Rutherford*, 486 P.2d at 954.

169. *Id.*

170. *Id.* at 954-55. This language conforms with the court's insistence elsewhere that it must at the very least protect federal constitutional rights and may construe the Alaska Constitution more broadly than the federal constitution. *See* Roberts v. State, 458 P.2d 340, 342 (Alaska 1969). The Supreme Court had expanded the federal constitutional right to a speedy trial beyond the rule in *Goss*. *See* Miranda v. Arizona, 384 U.S. 436 (1966). Thus, the Alaska Supreme Court was required to give at least as much protection as the federal constitutional rule. *See* Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) ("[W]e must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment.").

171. *Rutherford*, 486 P.2d at 955 (holding that retroactive application of *Glasgow* would not "empty the jails").

172. *Id.* at 952 & n.20, 955 & n.27. The government attempted to bring the defendant in *Rutherford* to trial over a fourteen-month period. The court decided *Glasgow* during this period. Although the *Rutherford* court did not so state, its opinion appears to limit its holding to cases where *Glasgow* was decided during the delay in trial. *See id.* at 952 n.20.

173. *See id.* at 956-59 (Connor & Rabinowitz, JJ., joining, dissenting in part).

174. *Id.* at 956-57 (Connor & Rabinowitz, JJ., joining, dissenting in part) ("[I]t cannot be safely assumed that mere lapse of time will necessarily render convictions unreliable.").

175. *Id.* at 957 (Connor & Rabinowitz, JJ., joining, dissenting in part).

rule was unjustified.[176] Finally, the dissent suggested that "the most serious aspect of the majority's opinion will be its implications for the administration of justice,"[177] stating that retroactivity would "bestow an unexpected windfall upon a number of ill-deserving convicted felons."[178]

The majority and dissent in *Rutherford* arrived at opposite conclusions on *each* of the three *Judd* factors. The *Judd* court foreshadowed such uncertainty in applying the three-part test when it took solace "in the fact that the law review writers have the same problem that we have."[179] Indeed, that court described retroactivity as "a value judgment" with the court's task as "making the necessary policy decisions."[180] Despite these difficulties, *Linkletter*, in the form of *Judd*, was in Alaska jurisprudence to stay.

3. Judd *Applied.* In the period between *Rutherford* and the United States Supreme Court's decision in *Griffith*, the Alaska Supreme Court applied the *Judd* standard in eight cases. This section briefly sketches the court's holdings in these cases as they relate to the application and development of the *Judd* test.

In *Lauderdale v. State*,[181] the court announced a new rule that an individual charged with driving while intoxicated has a right to examine the components of the breathalyzer unit used to determine the driver's blood-alcohol level. The court held that refusal of this right denies the accused's due process right to a fair trial[182] and violates the Alaska Rules of Criminal Procedure.[183] The court then addressed the retroactive application of its decision. The court first found that the purpose of the new rule was to ensure a fair trial.[184] While this factor was given virtually dispositive weight in *Rutherford*, the *Lauderdale* court found that the next two factors in the *Judd* test weighed heavily against retroactive application. The court noted that the police likely had relied on the prior law and had in good faith routinely discarded the disposable parts of the breathalyzer tests.[185] The court also considered that "many hundreds, if

176. *Id.* at 957-58 (Connor & Rabinowitz, JJ., joining, dissenting in part).

177. *Id.* at 958 (footnote omitted) (Connor & Rabinowitz, JJ., joining, dissenting in part).

178. *Id.* (Connor & Rabinowitz, JJ., joining, dissenting in part).

179. *Judd*, 482 P.2d at 279.

180. *Id.* at 278.

181. 548 P.2d 376 (Alaska 1976).

182. *Id.* at 381.

183. *Id.* at 380, 382; *see* ALASKA R. CRIM. P. 16(b)(7) (mandating disclosure to an accused).

184. *Lauderdale*, 548 P.2d at 383.

185. *Id.*

not thousands" of convictions would be upset by retroactive application of the *Lauderdale* decision.[186]

After weighing these competing factors under the *Judd* analysis, the *Lauderdale* court concluded that "the rule we have adopted here will be applied *mainly* prospectively."[187] Significantly, the court qualified its holding with the word "mainly." The court held that its decision would apply differently to three classes of cases: (1) prospectively "to those cases where breathalyzer tests have been administered after the date of this opinion"; (2) retroactively to the petitioners in the *Lauderdale* case itself; and (3) retroactively "[t]o cases pending in the courts which have not been completed prior to the date of this opinion, and where requests or motions for production . . . have been made prior to the date of this opinion, or are made after the date of this opinion."[188] The *Lauderdale* court gave no indication of *why* it reached this result. Despite the language of prospectivity, when the three classes are aggregated, the *Lauderdale* court effectively opted for full retroactivity, along the lines of *Griffith* and *Teague*. In other words, the *Lauderdale* court applied the new rule to *all cases* not final as of the date that the new rule was announced.

Nonetheless, several questions remained after *Lauderdale*. Why did the court ostensibly pick and choose who would receive the benefit of the *Lauderdale* decision instead of openly adopting a full retroactivity rule? Would a full retroactivity rule guide future decisions? The court found that it had great, if not absolute, discretion to mold a flexible rule of retroactivity based on the facts of the particular case before it:

> "A state supreme court has unfettered discretion to apply a particular ruling either purely prospectively, purely retroactively, or partially retroactively, limited only 'by the juristic philosophy of the judges . . . their conceptions of law, its origin and nature.' The decision is *not a matter of law, but a determination based on weighing the merits and demerits of each case.*"[189]

Thus, the *Lauderdale* court did not adopt a bright-line rule as the United States Supreme Court had done in *Teague* and *Griffith*. While the *Rutherford* decision had indicated that certain considerations, such as a new rule's purpose to ensure a fair trial, would be dispositive of the retroactivity issue, the *Lauderdale* court adopted an absolute balancing test, with the court free to weigh the *Judd* factors and fashion its own case-specific conception of the appropriate retroactivity rule.

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186. *Id.*

187. *Id.* (emphasis added).

188. *Id.* at 383-84.

189. *Id.* at 382 (emphasis added) (quoting Warwick v. Alaska, 548 P.2d 384, 393 (Alaska 1976)).

In *Gordon v. State*,[190] the court mechanically applied the *Judd* test to its decision in *State v. Buckalew*,[191] which forbade judges from participating in the plea bargaining process. In *Gordon*, the court held that the *Buckalew* decision should be applied only prospectively. The court based its decision upon the potential effects of retroactive application on the administration of justice.[192] The court analyzed the "administration of justice" criterion by considering two distinct factors: the number of prior convictions affected by the new rule and the difficulty in determining the amount of prejudice to each defendant.[193] The court held that each factor weighed heavily against retroactive application of the *Buckalew* holding.[194]

In *Cruse v. State*[195] and *Prenesti v. State*,[196] the court summarily concluded that prospective application was appropriate for the holding in *Oveson v. Municipality of Anchorage*.[197] *Oveson* announced a new rule applicable to the appeal of criminal cases in which the defendant pleaded *nolo contendere*.[198] The decision required parties in such cases to stipulate with trial court approval that the issue reserved for appeal would be dispositive of the whole case.[199] In brief footnotes, the *Cruse* and *Prenesti* decisions summarily stated that *Oveson* applied prospectively only to pleas entered *after* the date of the *Oveson* opinion.[200]

The court in *State v. Glass* ("*Glass II*")[201] analyzed the *Judd* factors by appealing to the distinction previously announced in *Rutherford* between rules enhancing the fairness of trial and rules furthering other purposes. *Glass II* addressed a new evidentiary rule excluding certain warrantless electronic recordings of an accused's conversations. The electronic surveillance rule served to deter the police from unwarranted invasions of an individual's privacy.[202] The court noted, as discussed above in

190. 577 P.2d 701 (Alaska 1978).

191. 561 P.2d 289 (Alaska 1977).

192. *Gordon*, 577 P.2d at 706 ("The impact on the administration of justice . . . is the most important factor here."). The court applied *Buckalew* to pleas taken after the date of that decision. *Id.*

193. *Id.* (citing Gray v. State, 463 P.2d 897, 913 (Alaska 1970)).

194. *Id.*

195. 584 P.2d 1141 (Alaska 1978).

196. 594 P.2d 63 (Alaska 1979).

197. 574 P.2d 801 (Alaska 1978).

198. *Id.*

199. *Id.* at 803 n.4.

200. *Cruse*, 584 P.2d at 1144 n.3; *Prenesti*, 594 P.2d at 64 n.1.

201. 596 P.2d 10 (Alaska 1979).

202. *Id.* at 14.

connection with *Rutherford*,[203] that retroactive application of the rule could *not* deter police misconduct occurring prior to the date of the decision.[204] Thus, the *Glass II* court opted to apply the new rule prospectively.[205] In dissent, Justice Rabinowitz urged the court to adopt a retroactivity rule like that employed in *Fresneda v. State*.[206] In *Fresneda*, the court applied the rule announced in *Chimel v. California*[207] to all cases pending on direct review as of the date of the *Chimel* decision.

In *Gonzales v. State*,[208] the defendant petitioned the court to reconsider its retroactivity decision in *Glass II* and to adopt Justice Rabinowitz's dissent. The *Gonzales* court refused to so hold,[209] and Justice Rabinowitz renewed his objection to the decision against retroactive application.[210]

Six years after the *Gonzales* decision, then-Chief Justice Rabinowitz had an opportunity to write for the court on the retroactivity issue in *Farleigh v. Municipality of Anchorage*.[211] *Farleigh* involved the retroactive application of the Alaska Court of Appeals' decision in *Municipality of Anchorage v. Serrano*.[212] *Serrano* held that the state violates an accused's due process rights when the prosecution does not make reasonable efforts to allow the defendant an opportunity to verify the results of a breathalyzer test.[213] Chief Justice Rabinowitz set forth the *Judd* test as the controlling retroactivity analysis.[214] In analyzing the *Judd* factors, the Chief Justice announced a bright-line rule based on a proposition originally announced in *Rutherford*: "where a new rule serves to ensure defendants a fair trial, it *must be retroactively applied* at least to any case which was *not finally disposed of* at the time the rule was announced, provided that the defendant raised the point in the trial court."[215] In a footnote, Chief Justice Rabinowitz suggested that the

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203. *See supra* notes 166-167 and accompanying text.

204. *Glass II*, 596 P.2d at 14.

205. *Id.* at 15.

206. *Id.* at 15-16 (citing Fresneda v. State, 458 P.2d 134 (Alaska 1969)) (Rabinowitz, J., dissenting). For a discussion of *Fresneda*, see *supra* notes 113-116 and accompanying text.

207. 395 U.S. 752 (1969).

208. 608 P.2d 23 (Alaska 1980).

209. *Id.* at 24-25.

210. *Id.* at 26-27 (Rabinowitz, J., dissenting).

211. 728 P.2d 637 (Alaska 1986).

212. 649 P.2d 256 (Alaska Ct. App. 1982).

213. *Id.* at 259.

214. *Farleigh*, 728 P.2d at 639.

215. *Id.* at 640-41 (footnote omitted) (emphasis added); *see supra* text accompanying note 166.

court should consider the next two *Judd* factors -- reasonable reliance and the efficient administration of justice -- only in deciding whether the new legal rule should receive broader retroactive application.[216]

In *Farleigh*, Chief Justice Rabinowitz restructured the retroactivity analysis; the court's inquiry into the purpose of the new rule serves as a threshold test which determines how the remainder of the analysis should proceed. If the new rule's purpose is to ensure a fair trial, then it must at least be applied retroactively to all cases not final on the date of the new rule's adoption. Retroactive application in other cases is determined by consideration of the next two *Judd* factors. However, if the rule's purpose is other than ensuring a fair trial, the purpose factor favors neither retroactivity nor prospectivity. The court must then consider the remaining two *Judd* factors to decide the retroactivity issue.

4. *Whither* Griffith? At the time of the United States Supreme Court's decision in *Griffith*, the Alaska Supreme Court still employed the *Linkletter* test (as announced in *Judd* and refined by later decisions) for retroactive application of new criminal rules. In *Griffith*, however, the Supreme Court discarded the *Linkletter* test in favor of the full retroactive application of new rules in all cases on direct review.[217] The *Griffith* Court eliminated any consideration of purpose, reliance, or administration of justice. Nonetheless, in the period since the *Griffith* decision, the Alaska Supreme Court has clung to the *Linkletter*-based *Judd* test in two decisions: *Briggs v. State Department of Public Safety*[218] and *State v. Wickham*.[219]

In *Briggs*, decided about one month after *Griffith*, the court addressed the retroactivity of its decision in *Champion v. State Department of Public Safety*.[220] *Champion* had extended the due process holding in *Municipality of Anchorage v. Serrano*[221] to drivers license revocation proceedings.[222] In *Briggs*, Chief Justice Rabinowitz, again writing for the court, referenced his prior opinion in *Farleigh* regarding the importance of the purpose inquiry to the determination of the retroactivity issue.[223] Although the language of *Farleigh* indicated that the purpose factor would be dispositive, Chief Justice Rabinowitz also discussed the remaining *Judd*

216. *Farleigh*, 728 P.2d at 640-41 n.4.
217. *See supra* text accompanying notes 36-38.
218. 732 P.2d 1078 (Alaska 1987).
219. 796 P.2d 1354 (Alaska 1990).
220. 721 P.2d 131 (Alaska 1986).
221. 649 P.2d 256 (Alaska Ct. App. 1982); *see supra* text accompanying notes 212-213.
222. *Champion*, 721 P.2d at 132-33.
223. *Briggs*, 732 P.2d at 1081 n.4.

factors and concluded that neither factor weighed against retroactivity.[224] He noted that, under *Serrano*, police already were required to preserve the remnants of a breathalyzer test, regardless of its later possible use. Thus, the court concluded that retroactive application of *Champion* was appropriate.[225]

The *Briggs* court next addressed the scope of this retroactive application. Because *Serrano* clearly foreshadowed the holding in *Champion*, the court held that *Champion* applied to all cases pending on the date of the *Serrano* decision, or in which the breathalyzer test was administered after the date of the *Serrano* decision.[226]

The court's decision in *Briggs* is based on the conclusion that *Champion* did not announce a new rule, but was instead merely the application of *Serrano* to a new context, drivers license revocation proceedings.[227] As discussed in *Metcalfe v. State*[228] and *State v. Glass* ("*Glass II*"),[229] the application of pre-existing rules is not subject to the retroactivity analysis. If the court was in fact guided by this conclusion, it is unclear why Chief Justice Rabinowitz chose to analyze the issue under the *Judd* test.

The *Briggs* court made no mention of *Griffith* in its analysis. This omission may be explained by the close proximity in time of *Briggs* and *Griffith*. Such an omission three years later, in *Wickham*, however, is more

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224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 1083.

228. 593 P.2d 638 (Alaska 1979).

229. 596 P.2d 10 (Alaska 1979); *see supra* text accompanying notes 201-206. The Alaska Supreme Court addressed the issue of when a rule is "new" for retroactivity purposes in *Metcalfe* and *Glass II*. *Metcalfe* applied the United States Supreme Court's decision in United States v. Chadwick, 433 U.S. 1 (1977). *Chadwick* invalidated a warrantless police search of an individual's footlocker which had been lawfully seized and which the police had probable cause to believe contained contraband. *Id.* at 5, 15-16. *Chadwick* was a straightforward application of existing Supreme Court precedent to a new set of facts, and thus, did not announce a "new" legal rule. *See id.* at 9-11.

Glass II presented a different type of case. In *Glass II*, the Alaska Supreme Court addressed the retroactive application of its own decision in State v. Glass ("*Glass I*"), 583 P.2d 872 (Alaska 1978). *Glass I* involved a legal issue of first impression in Alaska: whether warrantless electronic monitoring of a defendant's conversation violated the defendant's rights under the Alaska Constitution. Unlike the *Chadwick* decision, *Glass I* was not controlled by prior case law. Thus, the *Glass I* court could not merely apply an *existing* legal rule. It had to formulate its own rules and principles to guide its decision. In doing so, the court considered and announced a new principle of law governing electronic monitoring of defendants. In analyzing the retroactivity of *Glass I*, the *Glass II* court announced the general rule that when "a decision simply applies an established rule of law, even in a new factual situation, the question of retroactivity does not arise. The question of retroactivity arises only when a court announces a new rule of law." *Glass II*, 596 P.2d at 9-11. The *Glass II* court held that *Glass I* announced a "new rule of law" and therefore applied the *Judd* test to determine the retroactivity issue. *Id.* at 12-13.

difficult to explain. Throughout the early application of the *Judd* test, the Alaska Supreme Court generously referenced the United States Supreme Court precedent as guidance and persuasive authority. As Alaska's retroactivity jurisprudence developed, however, the court narrowed its focus to *Judd*, *Rutherford*, and their progeny for precedent. As the court became more insular on this issue, perhaps it felt less tied to the Supreme Court's retroactivity doctrine.

The Alaska Supreme Court's decision in *State v. Wickham*[230] presents an illustration of how the court has avoided tackling the merits of *Griffith*. In *Wickham*, the court adopted the United States Supreme Court's decision in *Luce v. United States*,[231] which held that a defendant must testify at trial to complain of improper impeachment by a prior conviction.[232] The court made no mention of *Griffith* and its implications for the *Judd* line of cases. Instead, the court applied the three *Judd* factors and held that its adoption of *Luce* applied only prospectively.[233] While it might be reasonable to stand by the line of established Alaska precedent in the area of retroactivity, it still seems proper to consider the merits of the *Griffith* approach before retaining a separate state approach to retroactivity analysis, especially in light of the court's original reliance on the now-abandoned *Linkletter* approach. To date, the Alaska Supreme Court has not done so.

C. Civil Retroactivity: All's Quiet on the Alaskan Front

Retroactivity in civil matters has *not* been nearly as tumultuous in Alaska law. From the first cases in 1974 until the present, the Alaska Supreme Court has largely applied the Supreme Court's *Chevron* test.[234] This section references many of these cases, but more closely searches for *why* the Alaska Supreme Court adopted and maintained the *Chevron* test.

In *Schreiner v. Fruit*,[235] the court quoted the *Chevron* test and rested its retroactivity holding on an application of that test.[236] This cursory treatment of retroactivity continued in *State v. McCracken*[237] and *Kaatz v. State*.[238] In *McCracken*, the court decided the retroactivity issues by merely citing *Chevron*, without discussing or expressly adopting that

230. 796 P.2d 1354 (Alaska 1990).
231. 469 U.S. 38 (1984).
232. *Id.* at 43.
233. *Wickham*, 796 P.2d at 43.
234. *See supra* notes 60-62 and accompanying text.
235. 519 P.2d 462 (Alaska 1974).
236. *Id.* at 466-67.
237. 520 P.2d 787 (Alaska 1975).
238. 540 P.2d 1037 (Alaska 1975).

decision.[239] The *Kaatz* decision adopted a pure comparative negligence scheme which the court gave retroactive application in certain cases, but without reference to any factors, tests, considerations, or authority governing its analysis or decision.[240]

In *Warwick v. State ex rel. Chance*,[241] the court again failed to squarely address the question of the appropriate civil retroactivity test. Faced with the retroactive application of collective bargaining provisions in the public sector, the court quoted and applied the *Chevron* test, but added a curious caveat, stating that "[w]hile we do not consider [the *Chevron* test] to be binding on the court in all cases, the criteria can be considered here."[242] The court ultimately concluded that the rule should be applied retroactively.[243] *Warwick* was typical of the Alaska civil retroactivity cases running through 1979 that applied *Chevron* without discussing in depth the proper civil retroactivity test.[244] However, in *Plumley v. Hale*,[245] the court did announce a guiding principle for civil retroactivity. The court held that "[a]bsent special circumstances, a new decision of this court will be given effect in the case immediately before the court, and will be binding in all subsequent cases in which the point in question is properly raised . . . ."[246]

Finally, in *Commercial Fisheries Entry Commission v. Byayuk*,[247] the court settled on a civil retroactivity test and discussed its application. *Byayuk* addressed the retroactivity of the court's decision in *Commercial Fisheries Entry Commission v. Templeton*,[248] which addressed the Limited Entry Act[249] and the assessment of classification points in the fishing permit application process.[250] The court adopted a four-part test, identical to the *Chevron* test, in analyzing the retroactivity of the civil *Templeton* precedent:

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239. *McCracken*, 520 P.2d at 789-90 n.6.

240. *See Kaatz*, 540 P.2d at 1049-50.

241. 548 P.2d 384 (Alaska 1976).

242. *Id.* at 394.

243. *Id.* at 396.

244. *See, e.g.*, H.A.M.S. Co. v. Elec. Contractors of Alaska, Inc., 566 P.2d 1012 (Alaska 1977); Moore v. State, 553 P.2d 8 (Alaska 1976).

245. 594 P.2d 497 (Alaska 1979).

246. *Plumley*, 594 P.2d at 502-05 (finding that court's interpretation of "final passage" within recorded vote requirement provision of Alaska Constitution deserved prospective application but, in fairness to present litigants, applying rule to instant case).

247. 684 P.2d 114 (Alaska 1984).

248. 598 P.2d 77 (Alaska 1979).

249. ALASKA STAT. § 16.43.010-.990 (1987).

250. *Templeton*, 598 P.2d at 79-80.

> 1) whether the holding either overrules prior law or decides an issue of first impression whose resolution was not foreshadowed;[251]
>
> 2) whether the purpose and intended effect of the new rule of law is best accomplished by a retroactive or prospective application;
>
> 3) the extent of reasonable reliance upon the old rule of law; and
>
> 4) the effect on the administration of justice of a retroactive application of the new rule of law.[252]

The *Byayuk* court held that the first part of the newly adopted civil retroactivity analysis -- the question whether a new legal rule is involved -- acts as a threshold test.[253] As discussed in the criminal context,[254] retroactivity is *not* an issue if the court merely applies an existing rule of law. The *Byayuk* court found that it faced a new legal rule and then addressed the substance of its newly adopted test.[255]

The court first considered the "purpose and intended effect" of the new rule,[256] labelling the purpose factor as "the single most important criterion" in the civil retroactivity test.[257] Indeed, where the new rule's purpose strongly favors retroactivity, the second factor of government reliance "is of minimal importance."[258] The court found that the purpose of the *Templeton* rule was to avoid "unjust discrimination" in the allocation of fishing licenses.[259] The *Byayuk* court found that it could serve the purpose of *Templeton* -- avoiding unjust discrimination -- only by retroactively applying the presumably "just" allocation rule of *Templeton.*

The *Byayuk* court explained that analysis of the remaining retroactivity factors, reasonable reliance and administration of justice, serves two distinct functions: (1) they weigh with the "purpose" factor to determine retroactive or prospective application; and (2) they determine the *extent* of either retroactive or prospective application.[260] This reiterates the broad discretion announced in *Lauderdale* for the Alaska Supreme Court to craft retroactivity rules on a case-by-case basis.[261] *Byayuk* suggests that the court may do the same thing in the civil context, considering reliance and

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251. This prong of the test merely states the fact, stated throughout this article, and specifically discussed *supra* at note 229 and accompanying text, that retroactivity deals only with the application of *"new"* legal rules.

252. *Byayuk,* 684 P.2d at 117.

253. *Id.*

254. *See supra* note 229.

255. *Byayuk,* 684 P.2d at 118.

256. *Id.*

257. *Id.*

258. *Id.* at 119.

259. *Id.* at 118.

260. *Id.* at 119.

261. *See supra* text accompanying note 189.

administration of justice in determining the extent of retroactive or prospective application.

In the face of the clear purpose against unjust discrimination, the *Byayuk* court accorded less weight to the importance of the reliance and administration of justice factors.[262] In doing so, the court weighed the hardship to *both* the government and the affected private citizens. The court found that the government's reliance and interest in mere administrative convenience through avoiding re-evaluation of claims could not outweigh the litigants' interests in having their claims properly and justly evaluated.[263] Thus, the court concluded that it should give *Templeton* retroactive application.[264]

The *Byayuk* court next considered the appropriate extent of retroactive application for *Templeton*, i.e., from what point in time should *Templeton* be retroactively applied. The court defined the "extent of retroactivity" as a question of fairness to which the discussion of "general retroactivity is wholly applicable."[265] In assessing the fairness issue, the court considered the equity principles discussed above. The court noted that non-retroactivity would discriminate arbitrarily based on "the fortuitous fact that [some] cases were processed more promptly" than others.[266] Based largely upon this fairness rationale, the court applied *Templeton* fully retroactively; in other words, *Templeton* applied even to cases already final.[267] The fairness analysis made the "extent" inquiry malleable, able to fit the court's conception of equity, justice and fairness.

The court has applied the *Byayuk* civil retroactivity doctrine on several occasions.[268] The court has not recognized the retroactivity revolution taking place in the Supreme Court.[269] In looking to *Linkletter* and *Chevron*, the Alaska Supreme Court relied on the persuasive authority of the Supreme Court's holdings. Thus, the question arises: Should the Alaska Supreme Court follow the lead of its federal sibling? The next section examines this issue.

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262. *Byayuk*, 684 P.2d at 119-20.

263. *Id.* at 120.

264. *Id.* at 121.

265. *Id.*

266. *Id.*

267. *Id.*

268. *See, e.g.*, Metcalf v. Felec Servs., 784 P.2d 1386 (Alaska 1990); Morrison v. Afognak Logging, Inc., 768 P.2d 1139 (Alaska 1989); Truesdell v. Halliburton Co., 754 P.2d 236 (Alaska 1988); Suh v. Pingo Corp., 736 P.2d 342 (Alaska 1987); Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986); Cashen v. Commercial Fisheries Entry Comm'n, 686 P.2d 1219 (Alaska 1984); Ship Creek Hydraulic Syndicate v. Department of Transp. and Pub. Facilities, 685 P.2d 715 (Alaska 1984).

269. *But see Suh*, 736 P.2d at 347-49 (Matthews, J., dissenting).

D. Reliance, Equity, or the Constitution?

There are three main bases for deciding retroactivity questions: reliance, equity, and constitutional considerations. Originally, in *Linkletter* and *Chevron*, the Supreme Court recognized reliance to be the crucial consideration.[270] *Griffith* and Justice Souter's *Beam* opinion signalled a shift to emphasizing equity.[271] Complicating this mix are fleeting references in *Griffith* and Justice Scalia's strong language in *Beam* endorsing a constitutional view.[272] Through all of this, the Alaska Supreme Court has held fast to the *Linkletter* and *Chevron* analyses.

Justice Matthews' dissent in *Suh v. Pingo Corp.*,[273] is the court's only reference to the recent federal retroactivity revolution.[274] Yet even this reference did not confront the central challenges of *Griffith* and *Beam*. Justice Matthews quoted *Griffith* as the court's "normal rule of retroactivity,"[275] but did *not* mention the sharp break with *Linkletter* that was marked by *Griffith*. *Griffith* called into question the entire reliance-equity balance struck in *Linkletter* and *Chevron* and adopted by Alaska.

With *Griffith* and *Beam* largely unexamined by the Alaska Supreme Court, Alaska retroactivity would seem open to re-assessment. The remainder of this section discusses issues and possible resolutions that may result from such a reconsideration. Although framed in terms of the Alaska Supreme Court's resolution of these issues, this section also provides a blueprint for litigants arguing retroactivity questions.

Do *Griffith* and *Beam* really present problems for Alaska retroactivity? On one level the answer is clearly "no." The Supreme Court's decisions on retroactivity, whether based on prudential or constitutional considerations, *are not* binding on the Alaska Supreme Court.[276] However, to the extent that the court relied on the persuasive authority of *Linkletter* and *Chevron* in formulating the *Judd* and *Byayuk* standards, *Griffith* and *Beam* at least question the foundations of Alaska retroactivity law. In its analysis of Alaska criminal retroactivity, the Alaska Supreme Court cited extensively to federal precedent and ultimately adopted the federal *Linkletter* standard. In doing so, the court largely mimicked the Supreme Court's balancing of the reliance-equity principles. Similarly, on

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270. *See supra* notes 18-31, 54-63 and accompanying text.

271. *See supra* notes 38, 83.

272. *See supra* notes 40-42, 74-78.

273. 736 P.2d 342 (Alaska 1987).

274. *Suh*, 736 P.2d at 347-49 (Matthews, J., dissenting).

275. *Id.* at 348 (Matthews, J., dissenting).

276. *See* American Trucking Ass'ns v. Smith, 496 U.S. 167, 175-76 (1990) ("When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.").

questions of civil retroactivity, the court's early decisions cited to *Chevron* without independent discussion or analysis. Again, the court ultimately adopted federal precedent in *Byayuk*, expressly applying a *Chevron* clone test to subsequent cases. When the Supreme Court reconsidered *Linkletter* and *Chevron*, the indisputable bases for Alaska retroactivity, it became time, at the very least, for the court to *reconsider* the state's position on this important issue.

If the Alaska Supreme Court reconsiders its retroactivity doctrines, this reconsideration could occur on two fronts: (1) a re-balancing of equity and reliance; or (2) an analysis grounded in constitutional separation of powers. First, the court could follow *Griffith* (and Justice Souter's approach in *Beam*), and re-balance the reliance-equity principles. Both the *Griffith* court and Justice Souter's *Beam* opinion shifted the balance away from reliance toward equity. Similarly, the Alaska Supreme Court has suggested a de-emphasis of the reliance factor in cases such as *Farleigh* and *Byayuk*, where the court has stressed the *purpose* consideration.

In re-balancing the reliance-equity principles, the court would have two options for change. First, the court could follow *Griffith* in holding that equity requires a rule of full retroactivity for all cases not final on the date of the new rule. Alternatively, the court could strengthen its presumption in favor of retroactivity, overcoming that presumption only when retroactivity would work extreme hardship or unfairness. The first option would be a bright-line rule with the advantage of establishing certainty in the law of retroactivity. Conversely, the second option reserves a substantial amount of discretion for the court to tailor its decision to the equities of a particular case. The court's consistent emphasis on, and utilization of, a flexible, malleable retroactivity approach suggests that the court might prefer the latter option.[277]

The second front for re-analyzing *Judd* and *Byayuk* would consider Justice Scalia's proposal of a constitutionally based retroactivity doctrine. Justice Scalia's proposal, being based in the nature of the Article III "judicial Power,"[278] would *not* bind Alaska courts. The Alaska Constitution, however, similarly grants the "judicial power" to the judges of the state.[279] Thus, Justice Scalia's argument regarding the proper understanding of the role of the judiciary applies with equal strength within Alaska's tripartite system of separated powers. To the extent that Justice Scalia's view gains support on the Supreme Court, its persuasive authority for Alaska courts should increase.

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277. *See supra* text accompanying notes 189, 265-267.

278. U.S. CONST. art III, § 1.

279. ALASKA CONST. art. IV, § 1 ("The judicial power of the state is vested in a supreme court, a superior court, and the courts established by the legislature.").

A deeper look at Justice Scalia's position, however, calls into question its validity for Alaska law. Justice Scalia appealed to the common law understanding of the "judicial Power" *at the time of the Constitution's framing*. As Justice Scalia noted, many of the framers adhered to the traditional "find-make" distinction in defining the proper role of the judiciary.[280] If Justice Scalia's historical approach is utilized, we would appeal to the meaning of the phrase "judicial power" at the time of the framing and ratification of the Alaska Constitution. In the time since the framing of the federal Constitution, the "find-make" distinction has been discredited. Indeed, the *Linkletter* Court thoroughly rejected this view when constructing the first modern retroactivity doctrine. Amidst these events, the Alaska Constitution was framed and ratified. In other words, the nature of the judicial role had changed at the time of the framing and ratification of the Alaska Constitution. Thus, a Justice Scalia-like historical argument might actually provide a constitutional basis *in support of* the decisions in *Judd* and *Byayuk*; at the very least, it might suggest that the Alaska "judicial power" is *not* bound up in the outmoded "find-make" conception of the judicial role.

IV. CONCLUSION

Only one point comes out of this retroactivity discussion: at present, Alaska and federal retroactivity law are not consistent with each other. The republican spirit imbued in our federal system allows Alaska to part ways with federal precedent on this issue. The United States Supreme Court's doctrines announced in *Griffith* and *Beam* may not be appropriate for Alaska in light of the Alaska Supreme Court's subsequent decisions or the Alaska Constitution. Indeed, the Alaska Supreme Court has shown a strong preference for flexibility and ad hoc balancing on the question of retroactivity. If the court chooses to retain this doctrine of flexibility, however, it has a responsibility to address the non-federal bases of this choice, independently justifying this choice to those the decision will most deeply affect: the people of the State of Alaska.

280. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment).