Note

Retroactivity Analysis After *Brand X*

James Dawson†

Under Brand X, *federal courts must reverse their own prior precedent in deference to an intervening agency decision if that agency decision is based on a reasonable interpretation of the statute. Thus, if the first-in-time court sets the law at* A, *and if a second-in-time agency later finds that* B *is a superior interpretation of the statute, then the third-in-time court must defer to the agency and move the law from* A *to* B. *But can law* B *be retroactively applied to a litigant who reasonably relied on the first-in-time court's opinion that the law was* A*? The answer to that question depends on which retroactivity standard applies to the* Brand X *problem, which in turn depends on the answers to two threshold legal questions. First, does the decision to move the law from* A *to* B *"change" the law, or does it merely "clarify" what the law has always been? Second, if the law has been changed, should that change be attributed to the second-in-time agency, which offered the "authoritative" interpretation of the statute, or to the third-in-time court, which decided whether to ratify that interpretation? Recent decisions have created circuit splits on both questions, and the Supreme Court has offered little guidance. This Note argues that a move from* A *to* B *does "change" the law, and that the third-in-time court, rather than the agency, is legally responsible for the change. In hopes of protecting reasonable litigants from the specter of retroactivity, this Note then proposes and defends a default rule for federal courts faced with the* Brand X *problem. In effect, this proposal would establish a rebuttable presumption that a small subset of administrative rules—all those which overrule first-in-time court precedents—should not become operational unless and until they are ratified by third-in-time federal courts.*

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Introduction

In the eight years since it was decided, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[1] has created a legal quagmire scarcely rivaled by any Supreme Court case from recent memory. Although Justice Scalia's dissent correctly predicted that *Brand X* would create "a wonderful new world . . . full of promise for administrative-law professors in need of tenure articles,"[2] lower court judges and regulated parties have been less than thrilled with the decision.

The *Brand X* saga began in the summer of 2003, when the Ninth Circuit construed the term "telecommunications service," as used in the Communications Act of 1934, to include a modem service.[3] Two years later, the Federal Communications Commission (FCC) disagreed, finding that modem service was not a telecommunications service.[4] When the issue returned to the Ninth Circuit following the FCC's ruling, the panel held that the court of appeals' original construction of the statute would trump the FCC's contrary opinion.[5] The Supreme Court reversed, holding that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its

1. 545 U.S. 967 (2005).
2. *Id.* at 1019 (Scalia, J., dissenting).
3. AT&T Corp. v. City of Portland, 216 F.3d 871, 876-77 (9th Cir. 2000).
4. Declaratory Ruling and Notice of Proposed Rulemaking *In Re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, 4831-32 (2002).
5. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1130 (9th Cir. 2003).

construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[6]

One of the most confusing issues raised by *Brand X* is the interplay between the court's previous precedent on one hand and the agency's intervening construction of the statute on the other. Writing for the Court, Justice Thomas attempted to resolve this tension by noting that the agency, and not the court, is the "authoritative interpreter" of ambiguous statutes.[7] The agency's power to render an authoritative interpretation, however, does not mean that the first-in-time court's holding was "legally wrong."[8] Indeed, these original interpretations may have been both perfectly reasonable and legally correct. But if the agency prefers a different construction that is also reasonable, then that construction must ultimately become the law. In so holding, *Brand X* obliterated the usual rule of "super-strong" stare decisis for statutory precedent[9] and "entered some nether world of impermanence hitherto unknown to our jurisprudence."[10]

This "nether world" creates what I call the *Brand X* problem. Suppose that a court makes the law *A* at T1 and that the agency later offers interpretation *B* at T2. Under *Brand X*, a court at T3 is required to make the law *B*, so long as *B* is a reasonable interpretation of the statute. But, when making this change, the T3 court might also seek to retroactively apply law *B* to a litigant who acted between T1 and T3 in reliance on the T1 court's opinion that the law was *A*. Thus, the *Brand X* problem: should such retroactivity be permitted?

In many instances, the *Brand X* problem can be avoided if the T1 court remands its case to the relevant agency instead of issuing a provisional interpretation that might later be overridden. This strategy—the so-called *Ventura* remand[11]—allows courts to interact with the "authoritative

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6. *Brand X*, 545 U.S. at 982.

7. *Id.* at 983.

8. *Id.*

9. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

10. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer Is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719, 724 (2002); *see* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 (2012) (Scalia, J., concurring in part and concurring in the judgment) ("In cases decided pre-*Brand X*, the Court had no inkling that it *must* utter the magic words 'ambiguous' or 'unambiguous' in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court.").

11. INS v. Orlando Ventura, 537 U.S. 12, 16 (2002) ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." (internal quotations omitted)); *see* Negusie v. Holder, 555 U.S. 511, 523 (2009); Garfias-Rodriguez v. Holder, 702 F.3d 504, 516 n.8 (9th Cir. 2012) (en banc) ("Our back-and-forth with the BIA may illustrate the wisdom of remanding to the BIA where the BIA has not previously interpreted the statute and where we believe the statute is ambiguous."); Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 84 (2013); Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1025-26 (2007). *But see Negusie*, 555 U.S. at 530-31 (Stevens, J., concurring in part and dissenting in part) (suggesting that the Court should provide its own interpretation and then remand, rather than remanding in the first instance).

interpreter," and is similar to a state-certification procedure under *Erie*.[12] But there are many practical complications with *Ventura* remands,[13] especially in the immigration context.[14] And, as of 2013, federal courts seem to avoid them.

This presents a significant problem—and one that is not going away.[15] In the wake of *Brand X*, some agencies have settled into an offensive posture, determined to override adverse court opinions and vindicate their readings of statutes. The Board of Immigration Appeals (determined to deport) and the Internal Revenue Service (determined to collect) have gone to war against the Ninth Circuit (determined to interpret statutes remedially). Many litigants have been caught in the crossfire of this war, reasonably relying on a T1 court decision only to find that decision yanked out from under them without warning. Their reliance interests have varied. Aging workers have relied on a court's first-in-time ruling to structure their retirement plans.[16] Thousands of taxpayers have relied on federal courts' interpretations of the Internal Revenue Code, only to find several months later that the IRS has overridden that interpretation and now seeks to apply tax obligations retroactively.[17] Still others have depended on T1 court precedent to accept plea bargains, going as far as to forfeit constitutional rights in reliance on a first-in-time court's construction of

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12. Watts, *supra* note 11, at 1015; *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

13. Remand, for example, will not guarantee that the agency ultimately issues a *Chevron*-eligible construction, and it won't solve the *Brand X* problem when the agency itself is a party in the matter that might otherwise be remanded. *See id.* at 1030-31. *Ventura* remands are also expensive and time-consuming. *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1309-10 (2002).

14. *Ventura* remands do little to solve the *Brand X* problem in the immigration context. This is true because even first-in-time courts of appeals are not always writing on a blank slate. On the contrary, these courts are sometimes confronted with immigration adjudications that have spoken directly to the issue but are not entitled to *Chevron* deference. In such a case, the court of appeals cannot simply remand the matter to the agency if it disagrees with the agency's construction of the statute. Instead, the court must offer its own interpretation, since the agency itself has already spoken on the issue (albeit in a nonprecedential manner).

15. In fact, the problem identified in this Note may grow exponentially depending on how courts resolve a number of open questions concerning the meaning of *Brand X*. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 558-59 (2011) ("Does *Brand X* mean, for example, that a federal agency interpretation can trump a state court's interpretation of what a federal statutory term means? How about a state *legislature's* interpretation—if the state legislature has passed a law to implement the federal statute based on its understanding of a federal statutory term? On the other side, could a state agency implementer's interpretation of a federal statute trump a federal judicial interpretation of that statute under *Brand X*?").

16. *See* AARP v. EEOC, 390 F. Supp. 2d 437, 443 (E.D. Pa. 2005), *aff'd on other grounds sub nom.* Am. Ass'n of Retired Persons v. EEOC, 489 F.3d 558 (3d Cir. 2007).

17. For a fuller dissection of this problem, see Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 GEO. WASH. L. REV. 1558, 1591, 1169-70 (2011), which discusses several "loopholes" under which the IRS can impose tax obligations retroactively. Many think the IRS has become completely untethered in its aggressive use of *Brand X* for policymaking purposes. *Id.* In 2010, for example, the IRS sought to increase collections by adopting a quirky interpretation of the words "gross income" as used in the Internal Revenue Code, notwithstanding the fact that the Supreme Court had already issued a contrary construction. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842-44 (2012).

a statute.[18] Some have rightly noted that the *Brand X* problem is "especially pernicious" in the immigration context.[19] Indeed, T1 court decisions often induce illegal aliens to come out of the shadows and apply for adjustment of status; after the law changes, the government often uses the same application as the basis for initiating removal proceedings against the alien.

Given the scope and urgency of this problem, the Ninth Circuit has bemoaned the total "absence of any guidance from the Supreme Court" on the retroactivity question.[20]

This Note provides an answer to the *Brand X* problem. When ratifying the agency's T2 interpretation that the law is *B*, T3 federal courts should assume that their decisions apply purely prospectively. Thus, law *A*, and not law *B*, should usually apply to litigants who acted at any time between T1 and T3. This rule stays true to *Brand X* by allowing the opinion of the "authoritative interpreter" to become law, but also ensures that lay litigants are not punished for their reasonable reliance on a T1 judicial decision.

In hopes of providing the background necessary to understand the *Brand X* problem, Part I of this Note offers a brief primer on the federal courts' existing retroactivity jurisprudence. This Part also introduces and clarifies the concept of prospectivity.

Part II introduces the *Brand X* problem through the lens of two recently decided cases from the federal courts of appeals.

Part III poses and answers two threshold legal questions that are necessary to determine which retroactivity test is appropriate for the *Brand X* problem: whether the law changed, and, if so, who changed it. In hopes of resolving a circuit split on these questions, I approach the issue by comparing the *Brand X* problem with the *Erie* doctrine.[21] Under *Erie*, a federal court sitting in diversity is obligated to defer to authoritative state law. But under *Brand X*, a T3 federal court is *not* obligated to defer to the T2 agency interpretation, and may instead reject any agency interpretation that it finds unreasonable. In light of the federal courts' ongoing role as gatekeeper, it must be the case that the law does not actually change until the T2 agency interpretation is ratified by the T3 federal court.

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18. *See* Nunez-Reyes v. Holder, 646 F.3d 684, 692-94 (9th Cir. 2011) (en banc) (noting that an untold number of aliens, relying on the Ninth Circuit's recently overturned decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), forfeited their constitutional right to a jury by pleading guilty to a drug possession charge with the understanding that such a plea would not have adverse immigration consequences).

19. Elliot Watson, Comment, *The Revival of Reliance and Prospectivity:* Chevron Oil *in the Immigration Context*, 36 SEATTLE U. L. REV. 245, 272 (2012).

20. Garfias-Rodriguez v. Holder, 702 F.3d 504, 520 (9th Cir. 2012) (en banc); *see* Watson, *supra* note 19, at 256, 273 (2012) (noting "[t]he Supreme Court's lack of guidance in the area of civil adjudicative retroactivity" and the "Court's incoherent jurisprudence on the subject").

21. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

In Part IV, I offer a defense of pure prospectivity. This technique allows federal courts to apply their new rules of law only to conduct postdating their decision.

Pure prospectivity is an appropriate response to the *Brand X* problem for at least three reasons. First, pure prospectivity allows courts to account for the fact that the *Brand X* situation (in which a "correct" judicial interpretation may be overturned by an agency) is fundamentally different from other cases of judicial decisionmaking (in which appellate courts reverse lower courts only because of legal error). Second, a rule of pure prospectivity allows litigants to act in reasonable reliance on the T1 rule between T1 and T3; without such protection, litigants would be forced to wait in an indefinite limbo while the T2 agency decided whether it wished to overturn the T1 rule (and while the T3 court decided whether it wished to ratify the T2 agency construction). And, third, a contrary rule would unjustly treat litigants who relied on the T1 court's opinion in the same way as litigants who relied on nothing at all, despite the important dissimilarities between the two situations.

Part IV also shows that the most frequent objections to pure prospectivity make little sense in the *Brand X* context. The first of these objections—that prospectivity promotes judicial activism by relaxing the force of precedent—is nonsensical in light of the fact that *Brand X* itself requires courts to abandon the principle of stare decisis. The second common objection to pure prospectivity is that it upsets the legal fiction that judges do not "create" law but rather "find" the law as it has always existed. But this declaratory theory of law breaks down in a post-*Brand X* world, since courts are often required to overrule their own "legally correct" interpretations in deference to a construction "created" by an administrative agency.

Building on this analysis, Part V suggests that T3 federal courts confronted with the *Brand X* problem should presume that their decision to move the law from *A* to *B* applies purely prospectively. The result of such a presumption is that law *A* will usually apply to litigants who acted before T3, and law *B* will usually apply to litigants who acted after T3. In effect, this proposal would require that a small subset of administrative rules—all those that overrule court precedents predating the rule's promulgation—must be ratified by a third-in-time federal court before they become operational.[22]

22. This proposal applies only to T2 agency opinions, and therefore would not affect the vast majority of agency statutory interpretation, which occurs before a court has weighed in on the precise issue that the agency is considering. Moreover, my proposal is only a default rule. For discussion of one situation in which the default rule might be displaced, see *infra* note 164.

I. Existing Retroactivity Jurisprudence

As a general matter, "[r]etroactivity is not favored in the law."[23] Motivated by the principles of due process and basic fairness, the Supreme Court has held that the Constitution requires that individuals "have an opportunity to know what the law is and to conform their conduct accordingly."[24] Thus, when some new rule purports to be retroactive—that is, when it "attaches new legal consequences to events completed before its enactment"[25]—courts proceed from the assumption that the rule cannot be applied to past conduct.

Over the past century, the Supreme Court has given that presumption shape by adopting particularized rules to determine if and when new rules can be applied retroactively. Some of those tests are fairly straightforward. After *Landgraf v. USI Film Products*, for example, it is black letter law that new legislation may not be applied retroactively absent explicit direction in the statute.[26] But things get more complicated from there. Especially in the area of judicial decisionmaking, the relevant law is uncommonly complex. The pages below offer a brief primer on retroactivity in courts and agencies.

A. The Judicial Retroactivity Cases

A federal court announcing a new rule of law theoretically has three options regarding the potential application of that rule: full retroactivity, selective prospectivity, and pure prospectivity. Full retroactivity, which applies the new rule against the instant parties and all future litigants, "is overwhelmingly the norm."[27] Selective prospectivity allows "a court [to] apply a new rule in the case in which it is pronounced, [but] then return to the old one with respect to all others arising on facts predating the pronouncement."[28] This technique, pioneered by the Warren Court,[29] was definitively rejected in *Harper v. Virginia Department of Taxation* (1993).[30] The final technique, called pure prospectivity, announces a new rule of law but applies that new rule

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23. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).
24. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).
25. *Id.* at 270.
26. *Id.* at 272-73.
27. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991).
28. *Id.* at 537.
29. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967); *see also Beam*, 501 U.S. at 537 (collecting cases); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738-44 (1991) (discussing Warren Court retroactivity jurisprudence).
30. 509 U.S. 86, 97 (1993).

neither to the instant litigants nor to any other party whose conduct predated the court's decision.[31]

The validity of pure prospectivity has been a divisive issue for decades. The Court's opinions on this topic have been described generously as "somewhat chaotic,"[32] and, not so generously, as the "jurisprudential equivalent of entropy."[33]

Much of this confusion results from the fact that the term "prospectivity" captures two independent concepts, each with a distinct doctrinal justification. The first concept uses prospectivity as a choice-of-law rule. On this view, a court that reverses precedent *A* and adopts new rule *B* will apply law *A* to all parties who acted when *A* was in force, but will apply law *B* to all conduct following the date of the court's decision. The second concept uses prospectivity as a remedial rule. On this view, the court will apply law *B* to all conduct—past and present—but may invoke its equitable powers to prevent the full consequences of law *B* from attaching to conduct that occurred when law *A* was in force.[34]

Both conceptions are faithful to the goals of Benjamin Cardozo,[35] who pioneered the technique of prospectivity in hopes of protecting litigants from the retroactive effect of a judicial decision reversing clear precedent on which the litigant had relied.[36] But there are, of course, important differences between the two theories of prospectivity. The choice-of-law conception is highly positivist, and the remedial conception is unabashedly realist. It is the latter conception—which dates at least to Justice John Marshall Harlan II[37]—that has enjoyed the most support in the academy. Professors Fallon and Meltzer, for example, persuasively argued in 1991 that the "simpler, remedial characterization is far more apt."[38]

The tension between these two conceptions of prospectivity came to a head in *American Trucking Ass'ns v. Smith* (1990).[39] There, Justice Stevens and three colleagues argued that pure prospectivity was permissible as a remedial

31. *Beam*, 501 U.S. at 536.

32. *Harper*, 509 U.S. at 113 (O'Connor, J., dissenting).

33. *Id.* at 114; *see also* Note, *Confusion in Federal Courts: Application of the* Chevron *Test in Retroactive-Prospective Decisions*, 1985 U. ILL. L. REV. 117, 128-36.

34. William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1932-33 & n.115, 1937 (1993).

35. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 146-47 (1921) (citations omitted).

36. *Id.*; *see* Great Northern R.R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932).

37. *See* United States v. Estate of Donnelly, 397 U.S. 286, 296-97 (1970) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 257-58 (1969) (Harlan, J., dissenting).

38. Fallon & Meltzer, *supra* note 29, at 1768.

39. 496 U.S. 167 (1990).

tool but was impermissible as a choice-of-law rule.[40] Justice O'Connor, also joined by three colleagues, argued that Justice Stevens had it "precisely backwards," and that prospectivity should be used as a choice-of-law rule in order to avoid "real and inequitable hardships in many cases."[41]

This disagreement was motivated by profound uncertainty over the meaning of the Court's decision in *Chevron Oil v. Huson* (1971).[42] That case allows federal courts to deny retroactive application to a new rule of law if retroactivity would impose undue "injustice or hardship" to the litigant.[43] In order to make that determination, *Chevron Oil* presents a three-part test.[44] Those three factors are: (1) whether the decision to be applied retroactively establishes a new principle of law; (2) whether retroactive application of the new rule would further or retard the operation of the rule in light of its history and purpose; and (3) whether retroactivity would produce substantial inequity.[45]

In her *American Trucking* opinion, Justice O'Connor cited to *Chevron Oil* for the proposition that prospectivity is permitted as a choice-of-law rule. In her view, *Chevron Oil* means that, at least sometimes, "a court should apply the law prevailing at the time of the conduct."[46] Justice Stevens dissented, claiming that *Chevron Oil* established a test for which *remedy* should be applied, rather than a test for which *law* should be applied.[47] Justice Stevens, drawing a comically unhelpful analogy between "*retroactive* effect" and "retroactive *effect*," argued that a new rule of law always *applied* to the instant litigants.[48] But just because the new law *applied* did not mean that it had the *effect* of applying.

The year after *American Trucking* was decided, *Chevron Oil* was at least partially overruled by *James B. Beam Distilling Co. v. Georgia* (1991).[49] In that case, a majority disapproved of selective prospectivity, but there was no opinion for the Court.[50] Selective retroactivity was not definitively rejected until *Harper* was decided two Terms later.[51]

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40. *Id.* at 218-19 (Stevens, J., dissenting).
41. *Id.* at 184 (plurality opinion).
42. 404 U.S. 97 (1971).
43. *Id.* at 106-07 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).
44. *Id.*
45. *Id.*
46. *American Trucking*, 496 U.S. at 191.
47. *Id.* at 214 (Stevens, J., dissenting).
48. *Id.* at 209.
49. 501 U.S. 529 (1991).
50. *Id.* at 540.
51. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993); *accord* Rivers v. Roadway Express, 511 U.S. 298, 312-13 (1994).

By banning selective prospectivity, *Harper* and *Beam* clearly overruled the section of *Chevron Oil* that called for a case-by-case test.[52] But even in the wake of these decisions, federal courts are not necessarily obligated to apply all new rules of law retroactively. Although these cases foreclose any option for *selective* prospectivity, they leave open the question of whether an option of *pure* prospectivity exists—that is, whether a court may choose to apply a new rule of law to future litigants only.[53]

In *Beam*, the Court split in an impressive four directions on the validity of pure prospectivity. Four Justices felt that pure prospectivity was sometimes appropriate,[54] three Justices felt that pure prospectivity was unconstitutional,[55] and two Justices declined to "speculate as to the bounds or propriety of pure prospectivity."[56] It was, fittingly, the opinion of two that spoke for the Court.

When *Harper* was decided the next year, things got even more confusing. Justice Thomas wrote an opinion for five Justices hinting that pure prospectivity was unconstitutional.[57] This might have settled the pure-prospectivity question once and for all *if* this observation had been necessary to the holding of the Court. Alas, the vote here was somewhat without meaning, given that the issue of pure prospectivity was mere dictum.[58]

The Court's most recent journey into the retroactivity thicket was *Reynoldsville Casket Co. v. Hyde* (1995).[59] The Respondents in that case advanced the remedial conception of prospectivity championed by Professors Fallon and Meltzer. Justice Breyer's opinion for a unanimous Court acknowledged that the remedial argument was "ingenuous[],"[60] but nonetheless held that litigants who "offer[] no more than simple reliance"[61] cannot avoid the application of *Harper* merely by arguing that the denial of relief was "based

52. *See Harper*, 509 US. at 97 (noting that the new rule would "prevail[] over any claim based on a *Chevron Oil* analysis" (internal quotation marks omitted)); *Beam*, 501 U.S. at 540.

53. *See* I LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-3, at 226 (3d ed. 2000) (noting that the *Harper* Court simply "did not hold that *all* decisions of federal law must necessarily be applied retroactively" and explaining that the Supreme Court has never expressly "renounced the power to make its decisions *entirely* prospective, so that they do not apply even to the parties before it").

54. *Beam*, 501 U.S. at 550 (O'Connor, J., dissenting); *id.* at 546 (White, J., concurring in the judgment).

55. *Id.* at 547 (Blackmun, J., concurring in the judgment); *id.* at 549 (Scalia, J., concurring in the judgment).

56. *Id.* at 544 (Souter, J., opinion of the Court).

57. *Harper*, 509 U.S. at 97; *id.* at 94 (noting that "[n]othing in the Constitution alters the fundamental rule of" retroactivity).

58. *See id.* at 116 (O'Connor, J., dissenting); *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1062 (1997) (discussing this dictum).

59. 514 U.S. 749 (1995).

60. *Id.* at 752.

61. *Id.* at 759.

on 'remedy' rather than 'non-retroactivity.'"[62] The *Reynoldsville Casket* decision "cast[s] doubt on the permissibility of invoking remedial discretion to deny relief for the violation of a 'novel' constitutional rule."[63]

In seeking to vindicate the remedial conception of prospectivity, the Respondents in *Reynoldsville Casket* attempted to draw two analogies to other areas of the law. One of these analogies was to collateral review of state court criminal convictions. Here, the Respondents cited to *Teague v. Lane*, in which the Court had held that a petitioner generally cannot receive federal habeas relief if such relief requires the habeas court to retroactively apply a rule of law that had not yet been established at the time of the petitioner's conviction.[64] The second analogy was to qualified immunity. Under that doctrine, public officials cannot be held liable under legal principles that were not "clearly established" at the time of their conduct.[65] The Respondents argued that the application of this rule necessarily required a departure from *Harper*, since a rule of full retroactivity would subject these officials to liability under the later-established law.

The Court quickly dismissed the habeas analogy by reasoning that the *Teague* doctrine represents not a remedial view of prospectivity but rather an overriding concern for protecting finality.[66] But the Court had trouble distinguishing the qualified-immunity example. Ultimately, Justice Breyer admitted that qualified-immunity doctrine "reflect[ed] certain remedial considerations," but held that such considerations were justified only by the "special federal policy considerations" at play in the qualified-immunity context.[67]

The lasting significance of *Reynoldsville Casket* is that a unanimous Court agreed that *Harper* does not apply to all cases. Although "simple reliance" is not enough to avoid retroactivity, the Court noted cryptically that litigants "may *or may not*"[68] be able to avoid retroactivity if they can show both a reliance interest *and* some "special circumstance" or "policy consideration" that makes retroactivity unfair.[69] Justice Breyer was less than forthcoming about precisely

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62. *Id.* at 754.

63. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 722 (6th ed., 2009) [hereinafter FALLON ET AL., FEDERAL COURTS]. It is worth noting that *Reynoldsville Casket* involved the retroactive application of a new *constitutional* rule, which is not precisely analogous to the *Brand X* problem. But the case for nonretroactivity may actually be stronger when dealing with statutes as opposed to constitutional law. *See id.* (discussing this difference).

64. 489 U.S. 288, 305-08 (1989).

65. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

66. *Reynoldsville Casket*, 514 U.S. at 758 (noting that the *Teague* principle represents not a remedial view but rather "a limitation inherent in the [retroactivity] principle itself").

67. *Id.* Applying *Harper* to the qualified-immunity context would eliminate such immunity, which in turn would disincentivize public service and impose enormous litigation costs.

68. *Id.* at 754.

69. *Id.* at 758-59.

what "special circumstance[s]" are needed to avoid *Harper*, suggesting only that the question would depend on "the kind of case, matter, and circumstances involved."[70] In the pages below, I hope to show that the *Brand X* problem is exactly such a "special circumstance," and that a T3 federal court would therefore be within its authority to apply its new rule purely prospectively.

Although *Reynoldsville Casket* did provide helpful clues about the contours of *Harper*, it did not cleanly resolve the question of whether *Chevron Oil* is still good law. Indeed, less than a month after *Reynoldsville Casket* was decided, the Court expressly acknowledged ambiguity over "the continuing validity of *Chevron Oil* after *Harper* . . . and *Reynoldsville Casket*."[71]

In light of "the Supreme Court's uncertain compass in charting" this area of the law,[72] it is not surprising that the courts of appeals have divided over the legitimacy of pure prospectivity. The Ninth and Eleventh Circuits have upheld the ongoing validity of *Chevron Oil*, both in en banc cases.[73] The D.C. Circuit has held that *Chevron Oil* is now bad law and that pure prospectivity is never permissible.[74] The Fifth Circuit believes that *Chevron Oil* has been repudiated, but that *Harper* leaves open the possibility of "pure prospectivity in an extremely unusual and unforeseeable case."[75] The Third Circuit has gone no further than to state the obvious: that the question is "unclear."[76] The Fourth Circuit had suggested that there is "serious doubt" as to the ongoing validity of *Chevron Oil*, but has noted that it was "struck . . . by the notable absence in *Harper* of any statement that *Chevron* [*Oil*] is overruled."[77]

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70. *Id.* at 755.

71. Ryder v. United States, 515 U.S. 177, 184-85 (1995); *see* FALLON ET AL., FEDERAL COURTS, *supra* note 63, at 54 n.3 (noting the Court's "evolution" from the "flexible test" of *Chevron Oil* towards the current doctrine, under which "the Court now permits little if any nonretroactive judicial decisionmaking").

72. Fallon & Meltzer, *supra* note 29, at 1757.

73. *See, e.g.*, Nunez-Reyes v. Holder, 646 F.3d 684, 692 (9th Cir. 2011) (en banc) (noting that the Ninth Circuit "remain[s] bound by *Chevron Oil*" because it had not yet been "explicitly overruled"); *see also id.* at 698 (Ikuta, J., concurring in part and dissenting in part) ("Although the reasons for severely limiting non-retroactive decision-making are clearly set out in *Harper*, the Court did not expressly overrule *Chevron Oil*. We therefore must continue to consider *Chevron Oil* where we are announcing a new rule of law for the first time and the parties have fairly raised the issue."); Glazner v. Glazner, 347 F.3d 1212, 1216-17 (11th Cir. 2003) (en banc) ("Although prospectivity appears to have fallen into disfavor with the Supreme Court, . . . the Court has clearly retained the possibility of pure prospectivity and, we believe, has also retained the *Chevron Oil* test, albeit in a modified form, as the governing analysis for such determinations in civil cases."). *But see* Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1087-90 (9th Cir. 2010) (declining to apply *Chevron Oil* and instead applying the *Harper* presumption favoring retroactivity).

74. United Food & Commercial Workers Int'l Union, Local No. 150-A v. NLRB, 1 F.3d 24, 35 (D.C. Cir. 1993).

75. Hulin v. Fibreboard Corp., 178 F.3d 316, 333 (5th Cir. 1999).

76. *See, e.g.*, Kolkevich v. Att'y Gen. of U.S., 501 F.3d 323, 337 n.9 (3d Cir. 2007).

77. Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd., 17 F.3d 703, 710 (4th Cir. 1994).

Part of the reason this area of the law is so confusing is because there is no unambiguous, agreed-upon language with which to discuss the relevant issues. Judges often state they are "against" pure prospectivity, but do not say whether they a're against a choice-of-law rule or a remedial rule or both, or whether they a're against pure prospectivity or selective prospectivity or both, or whether they have constitutional or policy-based objections or both.

In hopes of avoiding this type of confusion, a quick note on my argument is warranted. I do not take sides in the debate over the proper conception of prospectivity.[78] Rather, I hope to show that, under *either* the remedial or the choice-of-law theory, litigants who have fallen victim to the *Brand X* problem should not be subject to retroactive application of the agency's interpretation. Those who favor a robust remedial conception of prospectivity, such as Justice Stevens, should want to invoke the court's equitable powers to protect litigants who reasonably relied on the T1 court's interpretation. Those who reject remedial prospectivity except in certain "special circumstances," such as Justice Breyer, should hold that the *Brand X* problem involves "policy consideration[s]" that justify pure prospectivity.[79] Finally, those who favor the choice-of-law theory of prospectivity, such as Justice O'Connor, should find that, on balance, the equities dictate that the T3 court's opinion should apply prospectively only.

B. The Agency Retroactivity Cases

The Supreme Court has provided somewhat different retroactivity rules when an agency, rather than a court, has changed the law.

1. Retroactivity of Rulemakings

In *Bowen v. Georgetown University Hospital* (1988),[80] the Court held that Congress and administrative agencies (but not courts) must make a clear statement if they wish their new rules to operate retroactively. Barring such a statement, federal courts will make a default presumption of non-retroactivity.[81] Justice Scalia, concurring in the Court's judgment, found that this default rule

78. This issue has already been discussed extensively in the literature and is beyond the scope of my Note. If I were litigating a case involving the *Brand X* problem, I would probably urge the Court to hold that *Brand X* involves exactly the type of "special circumstances" that can justify remedial prospectivity under *Reynoldsville Casket*. This approach does justice to the Court's case law by acknowledging that pure prospectivity is an usual remedy that can only be invoked in extraordinary circumstances. Although the choice-of-law theory is attractive, it is ultimately less persuasive than the remedial conception. *See, e.g.*, Fallon & Meltzer, *supra* note 29, at 1743-46; Treanor & Sperling, *supra* note 34, at 1918.

79. *See, e.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758-59 (1995).

80. 488 U.S. 204 (1988).

81. *Id.* at 208.

was compelled by the Administrative Procedure Act's definition of the word "rule," which provides that only an "agency statement of general or particular applicability *and future effect*" will qualify.[82]

The Court considered the scope of this presumption in *Smiley v. Citibank* (1996).[83] In that case, a California court dismissed a suit in which the plaintiff had alleged that her credit card company charged her excessive fees. While a direct appeal was pending, a federal agency adopted a regulation clarifying that the ambiguous term "interest" in the National Bank Act included late fees. The plaintiff argued that the new rule could not be applied retroactively to resolve her case. The Supreme Court disagreed, noting that

> [t]here might be substance to [an argument against retroactivity] if the regulation replaced a prior agency interpretation—which, as we have discussed, it did not. Where, however, a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means.[84]

After *Bowen* and *Smiley*, the critical question in evaluating the retroactive application of agency rulemakings is whether the new rule "changes" the law or merely "clarifies" the law as it existed before the rulemaking. If the rule "changes" the law, it cannot be applied retroactively; if the rule "clarifies" the law, then retroactivity analysis is not implicated, since the law was the same both before and after the regulation. At least eight courts of appeals have employed some version of a change-versus-clarify analysis.[85] The Third Circuit and the D.C. Circuit have even developed elaborate tests to make this

82. 5 U.S.C. § 551(4) (2012) (emphasis added); *see Bowen*, 488 U.S. at 216-17 (Scalia, J., concurring).

83. 517 U.S. 735 (1996).

84. *Id.* at 744 n.3; *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("[T]he agency need not always provide a more detailed justification [for a policy change] than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example . . . its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters" (internal citations omitted)). Professor Watts has interpreted note 3 in *Smiley* to mean that "if a [new] rule simply clarifies legal principles that were in effect when the complained of conduct occurred, application of the rule cannot be viewed as impermissibly retroactive." Watts, *supra* note 11, at 1031 n.196. In the *Brand X* context, however, more than just "legal principles" were in effect when the litigant detrimentally relied—there was also a circuit court decision on point. Watts appears to cite *Smiley* for a slightly different point: if a federal court had not yet issued an interpretation of the statute, it could remand the question to the agency under *Ventura*, have the agency develop a rule, and then retroactively apply that rule, all without violating the Constitution.

85. *See* Levy v. Sterling Holding Co., LLC (*Levy II*), 544 F.3d 493, 506 (3d Cir. 2008) (collecting cases).

determination.[86] Other courts of appeals have deferred to the agency's opinion on the question of whether the new rule "changes" or "clarifies" the law.[87]

2. Retroactivity of Adjudications

The leading case in the area of adjudicative retroactivity is *SEC v. Chenery Corp.* (1947), in which the Supreme Court held that:

> retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.[88]

Courts have struggled to interpret *Chenery*. In particular, judges have had trouble balancing the *Chenery* factors in a way that leads to predictable and uniform results. In hopes of solving that problem, the D.C. Circuit developed a *Chenery*-based multi-factor test in *Retail, Wholesale & Department Store Union v. NLRB* (1972).[89] *Retail Union* presents a defendant-friendly test for determining whether retroactivity is appropriate when an agency changes the law.[90] The Ninth Circuit has joined three other courts of appeals in adopting the *Retail Union* balancing test to deal with situations in which a "new administrative policy [is] announced and implemented through adjudication."[91] By establishing a firm presumption against retroactivity, *Retail Union* has successfully mediated between an agency's occasional need to change its position and a regulated party's need to reasonably rely on existing rules.[92]

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86. *See id.* at 506-07; Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 860 (D.C. Cir. 2002).

87. *See, e.g.*, Heimmermann v. First Union Mortg. Corp., 305 F.3d 1257, 1260 (11th Cir. 2002) ("While not dispositive, an agency's determination that a new statement is a clarification of existing law, rather than an entirely new rule, is generally given much weight."); Pope v. Shalala, 998 F.2d 473, 485 (7th Cir. 1993). *But see Levy II*, 544 F.3d at 507 ("[W]e do not consider an enacting body's description of an amendment as a 'clarification' of the pre-amendment law to necessarily be relevant to the judicial analysis.").

88. 332 U.S. 194, 203 (1947).

89. 466 F.2d 380 (D.C. Cir. 1972).

90. *Id.* at 390. It is worth noting that both *Chenery* and *Retail Union* predate the Supreme Court's case law eliminating an option for selective prospectivity in the judicial context. When given the chance, the Court may hold that selective prospectivity is impermissible not just in judicial opinions, but also in the adjudication context. This would create an easily applicable bright line rule, but would displace much of the existing precedent from the courts of appeals.

91. Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982); *see id.* (applying the *Retail Union* factors and noting that, as a general matter, "the agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted"). The *Retail Union* test has also been adopted by the Second, Third, and Fifth Circuits. *See* McDonald v. Watt, 653 F.2d 1035, 1043-46 (5th Cir. Unit A Aug. 1981); E.L. Wiegand Division v. NLRB, 650 F.2d 463, 471 & n.5 (3d Cir. 1981); Lodges 743 & 1746, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft Corp., 534 F.2d 422, 452-54 (2d Cir. 1975).

92. Watson, *supra* note 19, at 257.

II. Two Approaches to the *Brand X* Problem

Given the complexities of the Supreme Court's retroactivity jurisprudence, the two courts of appeals that have confronted the *Brand X* problem could be forgiven for their confusion.

A. The Ninth Circuit Approach[93]

The Ninth Circuit saga begins with a statute as confusing as the *Brand X* problem itself: the Immigration and Nationality Act. Section 245(i) of the Act allows aliens who entered the United States without inspection to adjust their status to lawful permanent resident.[94] But section 212(a)(9)(C)(i)(I) of the same Act provides that no alien who had been unlawfully present in the United States for more than a year is eligible for adjustment of status.[95] Thus, "the plain language of the [Act] seem[ed] to make 'entry without inspection' both a qualifying and a disqualifying condition for adjustment of status."[96]

The first decisionmaker to weigh in on this conflict was the Ninth Circuit, which held in *Acosta v. Gonzales* that adjustment of status under section 245(i) was available to aliens who were otherwise inadmissible under section 212(a)(9)(C)(i)(I).[97]

The year after *Acosta* was handed down, the Board of Immigration Appeals (BIA) decided *Matter of Briones*. In that case, the BIA reached a conclusion that was exactly opposite to *Acosta*: aliens inadmissible under section 212(a)(9)(C)(i)(I) could not seek adjustment of status.[98]

When the issue returned to the Ninth Circuit in *Garfias-Rodriguez v. Holder*,[99] the panel decided that *Briones* was a reasonable interpretation of the

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93. For the sake of clarity, my summary of the *Garfias* litigation leaves out a few details. For example, I do not discuss a similar line of litigation that interprets the sister provision of the statute at issue in *Garfias*. In those cases, the Ninth Circuit construed sections 245(i) and 212(a)(9)(C)(i)(II) of the Act to allow for adjustment of status. Perez-Gonzales v. Ashcroft, 379 F.3d 783, 788-92 (2004). The Board of Immigration Appeals (BIA) later reversed that opinion. Matter of Torres-Garcia, 23 I. & N. Dec. 866, 868 (BIA 2006). When a petition for review of *Torres-Garcia* reached the Ninth Circuit, that court became the first in the country to overrule its own previous precedent in deference to an intervening agency decision under *Brand X*. Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1242-43 (9th Cir. 2007).

94. 8 U.S.C. § 1255(i) (2012).

95. *Id.* § 1182(a)(9)(C) (2012).

96. Matter of Briones, 24 I. & N. Dec. 355, 362 (BIA 2007) (discussing the section of the INA at issue in *Perez-Gonzales*, which was the sister provision of the section at issue in *Garfias*). *See supra* note 93.

97. 439 F.3d 550, 558 (9th Cir. 2006).

98. *Briones*, 24 I. & N. Dec. at 361-71. In *Briones*, the BIA expressly declined to decide whether to apply its new rule in the Ninth Circuit. *Id.* at 372, n.9. This hesitation is explained by *Acosta*, which had already established the opposite rule. Three years after *Briones*, the BIA announced in *Matter of Diaz and Lopez* that it would apply its interpretation to cases arising in the Ninth Circuit pursuant to its authority under *Brand X*. 25 I. & N. Dec. 188, 190-91 (2010).

99. 649 F.3d 942 (9th Cir. 2011).

statute. Citing *Brand X*, the court overruled its previous opinion in *Acosta* in deference to the agency's opinion in *Briones*.[100]

But that was not the end of the matter. The T3 panel was also faced with the difficult question of whether it could retroactively apply the T2 *Briones* rule to Francisco Javier Garfias–Rodriguez ("Garfias"), given that he had relied on the T1 court's decision in *Acosta*.[101] Garfias's counsel argued that retroactivity was impermissible, citing to the substantial reliance interests of his client and other aliens similarly situated. Those reliance interests varied, but usually included substantial legal and application fees. And, in many instances, undocumented immigrants had come out of hiding in reliance on *Acosta*, only to find that they might now be deported under *Briones*.

The *Garfias* panel, believing itself bound by a previous Ninth Circuit decision that permitted this type of retroactivity,[102] found that *Briones* could be applied retroactively against those who had relied on *Acosta*. This holding appeared to create an intra-circuit split with yet another Ninth Circuit case: *Nunez-Reyes v. Holder*.[103] In *Nunez-Reyes*, an en banc panel declined to apply its decision overruling previous circuit precedent to the instant litigant, noting that such retroactivity would upset notions of basic fairness and notice. In light of the Ninth Circuit's muddled case law, the Ninth Circuit voted to grant en banc review in *Garfias*.[104]

The *Garfias* en banc panel was understandably confused. Their case might have been governed by any of three competing lines of case law: (1) the Supreme Court's general retroactivity jurisprudence, as announced in *Harper*

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100. *Id.* at 949.

101. At this point, it is worth noting I have described the events at issue in *Garfias* in the order that the majority opinion describes them, rather than as they really happened. In reality, the first event in the sequence was *not* the *Acosta* decision. As it turns out, Garfias's original application for adjustment of status was filed four years before *Acosta* was decided. In reality, the first decisionmaker to weigh in on Garfias's case was an immigration judge, who held that Garfias was ineligible for adjustment of status. Garfias appealed that decision to the BIA. While his appeal was pending, the Ninth Circuit decided *Acosta*. Thus, Garfias did not really "rely" on *Acosta* at all; indeed, it would have been impossible for him to do so. At the Ninth Circuit, his attorneys claimed that Garfias's "reliance interest" took the form of a fee to *renew* his existing application in light of *Acosta*. This is nonsense. Since *Acosta* had not been decided at the time Garfias applied to adjust status, Chief Judge Kozinski was correct to note that Garfias was simply "not situated similarly to the class of individuals who applied for adjustment of status after *Acosta* and before *Briones*." Garfias-Rodriguez v. Holder, 702 F.3d 504, 530 (9th Cir. 2012) (en banc) (Kozinski, C.J., disagreeing with everyone). In fact, the *Garfias* majority was totally unable to identify any reliance interest held by Garfias that would have triggered a retroactivity analysis. *See, e.g., id.* at 516 n.9 (majority opinion). I adopt *Garfias* as a lens for examining the *Brand X* problem not because the litigant is emblematic of the injustices that this problem can reap; he is not. But *Garfias* does show an en banc court struggling with the *Brand X* problem, and the opinions represent the most recent and most thorough dissection of the issue.

102. *See* Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1087 (9th Cir. 2010).

103. 646 F.3d 684 (9th Cir. 2011) (en banc).

104. 672 F.3d 1125 (9th Cir. 2012).

and *Beam*; (2) the Supreme Court's exceptions to that rule, as announced in *Chevron Oil* and *Reynoldsville Casket*; or (3) the *Retail Union* test.

The Ninth Circuit could decide which of these three tests to apply only after answering two threshold legal questions: whether the law had been changed, and, if so, who changed it. If the law had not been changed, no retroactivity analysis would have been appropriate. If the law had been changed, then the question of who changed it would govern which test applied.

Ten of eleven judges agreed that *Briones*, by effectively reversing the circuit precedent of *Acosta*, had "changed" the law.[105] But on the second question, confusion reigned. In his opinion for the majority, Judge Bybee—a former administrative law professor—noted that

> the *Brand X* twist here complicates the situation somewhat: because we have determined that our prior decision in *Acosta* must be overruled in light of the BIA's decision in *Briones*, it is not clear whether we, as a judicial decisionmaker, have changed the law, or whether it is the agency that has changed the law. Thus, there are two possible answers to the retroactivity question: [*Chevron Oil*] or [*Retail Union*].[106]

The en banc panel fractured badly over that question. Judge Bybee's opinion for a seven-member majority found that *Retail Union* was the proper framework and that retroactivity was appropriate.[107] Judge Paez and Judge Reinhardt dissented, finding that *Chevron Oil* was the proper framework and that retroactivity was inappropriate.[108] Judge Gould agreed with the dissent that *Chevron Oil* was the proper framework, but agreed with the majority that retroactivity should attach.[109] Judge Graber wrote that it was "a close question whether [*Chevron Oil*] or [*Retail Union*] provides the better framework" but that, "under either framework, retroactive application of the new legal rule is appropriate."[110] Chief Judge Kozinski—captioning his opinion a "disagree[ment] with everyone"—thought the whole project of a retroactivity

105. Everyone but Chief Judge Kozinski agreed that *Garfias* changed the law. *See, e.g.*, *Garfias-Rodriguez*, 702 F.3d at 514 n.7 (majority opinion) (noting that the court's decision "effectively brought about the change in the law"); *id.* at 533 (Gould., J., concurring) ("[I]t is unmistakable that our decision establishes a new principle of law because we overrule clear precedent established by *Acosta v. Gonzales*."); *id.* at 550 (Paez, J., dissenting) ("There is no question that we announce a new rule of law in overruling *Acosta* in deference to *Briones*."); *accord* Nunez-Reyes v. Holder, 646 F.3d 684, 692 (9th Cir. 2011) ("There is no question that our decision today establish[es] a new principle of law . . . by overruling clear past precedent on which litigants may have relied." (internal quotations omitted)).

106. *Garfias-Rodriguez*, 702 F.3d at 504. It is not clear why the en banc panel did not give more consideration to the *Harper* rule, especially in light of its recent application in *Morales-Izquierdo*, 600 F.3d at 1088.

107. *Id.* at 517-20.

108. *Id.* at 550 (Paez, J., dissenting).

109. *Id.* at 532-33 (Gould, J., concurring).

110. *Id.* at 534 (Graber, J., concurring in part and dissenting in part).

analysis was unnecessary given the facts of the case.[111] Before signing off, Chief Judge Kozinski took a final swing at the panel, noting that, "[a]s an en banc court, we have a responsibility to bring clarity to our law. By the time lawyers in this circuit get through reading all of our opinions, they'll be thoroughly confused."[112]

B. The Third Circuit Approach

Unlike the Ninth Circuit, the Third Circuit's treatment of this issue has been somewhat terse and conclusory.

In the derivative suit *Levy v. Sterling Holding Co.* (*Levy I*), an LLC's managers sought disgorgement of short-swing profits under the Exchange Act of 1934. The LLC claimed that certain obscure provisions of the Act exempted them from liability. The Third Circuit disagreed, finding that the LLC was not exempt and that the profits should be distributed. The SEC, which has authority to interpret and implement the Exchange Act, then promulgated a rule clarifying that the LLC *was* exempt.[113] When the issue returned to the Third Circuit in *Levy II*, the court deferred to the SEC's regulations under *Brand X*.[114]

Faced with the now-familiar *Brand X* problem, the Third Circuit was confronted with the same two threshold questions: whether the law had changed, and, if so, who changed it.

The court never gave direct treatment to the question of who changed the law. But, by applying a test derived from administrative-law cases, the Third Circuit made clear that it thought the agency, and not the court, was responsible for the change. The court did not consider the fact that *its* opinion validating the SEC Rule, rather than the SEC Rule itself, was responsible for the formal shift away from *Levy I*.

In hopes of answering the question of whether the law had been changed or merely clarified, the Third Circuit developed an elaborate four-part test. That test asked

> (1) whether the text of the old regulation was ambiguous; (2) whether the new regulation resolved, or at least attempted to resolve, that ambiguity; (3) whether the new regulation's resolution of the ambiguity is consistent with the text of the old regulation; and (4) whether the new regulation's resolution of the ambiguity is consistent with the agency's prior treatment of the issue.[115]

111. *Id.* at 529-32 (Kozinski, C.J., disagreeing with everyone); *see supra* note 101.
112. *Id.* at 532.
113. 70 Fed. Reg. 46,080 (Aug. 9, 2005).
114. Levy v. Sterling Holding Co., LLC (*Levy II*), 544 F.3d 493, 495 (3d Cir. 2008).
115. *Id.* at 507 (internal citations omitted).

Applying this test, the Third Circuit found that the old rule was ambiguous, that the new rule resolved the ambiguity, that the new rule was somewhat consistent with the old rule, and that the new rule was consistent with the SEC's prior understanding.[116] Given these conclusions, the Third Circuit found that the new rule had clarified rather than changed the law.

III. Threshold Questions

In order to develop a rule that will govern the *Brand X* problem, any court will first need legally sound answers to two threshold questions.

First, the court will need to establish whether the law of the circuit has been changed when a court of appeals overrules prior precedent in deference to an intervening agency opinion. The Supreme Court has indicated that retroactivity analysis is only proper when some rule "attaches new legal consequences to events [that were] completed" before the rule became operative.[117] Thus, if the law has not been changed, then no retroactivity analysis is appropriate. When considering the *Brand X* problem, some have argued that the agency's view at T2 (as ratified by the T3 court) does not "change" the law in the manner required to trigger retroactivity analysis.[118] This argument is premised on the idea that there is no "law" at all before the T2 agency supplies the "authoritative" interpretation of the statute; since there is no law before T2, the law cannot have changed. I show that this argument is incorrect. The T1 court's interpretation is law, even if it is "provisional" instead of "authoritative." Thus, retroactivity analysis of some kind is appropriate.

Second, the court must determine who changed the law. Without an answer to this question, judges do not know which set of background assumptions should be used, and therefore cannot determine which retroactivity test is appropriate. If the agency has changed the law, *Retail Union* will be the appropriate framework. If the court has changed the law, either *Harper*, *Chevron Oil*, or *Reynoldsville Casket* will supply the rule. I show that the court, and not the agency, has changed the law.

A. The Erie *Connection*

Even before *Brand X* was decided, Professor Bamberger had likened the post-*Chevron* role of the federal agency to the post-*Erie* role of state courts and

116. *Id.* at 507-08.

117. Vartelas v. Holder, 132 S. Ct. 1479, 1491 (2012) (citing Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994)).

118. *See, e.g.*, Garfias-Rodriguez v. Holder, 702 F.3d 504, 530 (9th Cir. 2012) (en banc) (Kozinski, C.J., disagreeing with everyone).

legislatures.[119] In both cases, either the agency or the state court is the "authoritative" interpreter, and any first-in-time ruling by a federal court is merely provisional. In both cases, the lack of "authoritative" interpretive power is not itself grounds for a federal court to deny jurisdiction over the case at T1.[120] And, in both cases, the federal court's decision would stand as precedent in the federal courts only so long as the "authoritative interpreter" had not yet spoken to the question. On the whole, the analogy between *Erie* and *Brand X* is both powerful and telling.

But it is simply not correct, as Professor Strauss has argued, that the two situations are "quite the same."[121] On the contrary, there are a number of important differences between *Brand X* and *Erie*. For example, in an *Erie* analysis, the federal court is attempting to "predict" how the state court would rule.[122] But in a *Brand X* analysis, federal courts are not "predicting" how the agency would rule but rather are rendering their own independent interpretations of the statute.[123]

The most important difference between *Erie* and *Brand X*, however, is that a state court's opinion on a certified question of state law is immediately binding on the federal court, whereas an administrative agency's opinion is not.[124] On the contrary, T3 federal courts retain final authority to reject any T2 agency interpretation that they find unreasonable. But a federal court could never reject a state court of last resort's opinion on a matter of state law, even if the federal court thought that interpretation to be clearly erroneous.

Some commentators have referred to the federal courts' role in administrative law as one of "boundary setting."[125] Others have used the analogy of a sports referee, who oversees and supervises but does not participate.[126] No matter the nomenclature, the point here is that federal courts

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119. *See, e.g.*, Bamberger, *supra* note 13, at 1307-11 (2002) (noting three years prior to the Court's decision in *Brand X* that a first-in-time "court's choice of one reasonable construction of regulatory statutes" is merely "provisional" or "interim" since it can be overridden by a second-in-time agency).

120. *Id.* at 1307 (quoting Meredith v. Winter Haven, 320 U.S. 228, 234 (1943)); *see* Watts, *supra* note 11, at 1020 & n.135.

121. Peter L. Strauss, *"Deference" Is Too Confusing-Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1147 (2012).

122. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1461, 1466 (1997); Watts, *supra* note 11, at 1019 & n.126.

123. *See* Watts, *supra* note 11, at 1021-22.

124. Indeed, even agency views obtained through a *Ventura* remand must still be ratified by the federal court before they become law.

125. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 32-34 (1983); *see* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106-07 (1944) (similar); *see also* Crowell v. Benson, 285 U.S. 22, 89-90 (1932) (Brandeis, J., dissenting) ("[T]he function of the courts is not one of review but essentially of control—the function of keeping agencies within their statutory authority.").

126. Strauss, *supra* note 121, at 1150.

serve as a critical check on administrative agencies. Thus, even during the contemporary era of agency ascendancy, it remains true that "[a]n agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law."[127]

In the wake of *United States v. Mead Corp.*,[128] the federal courts' gatekeeping role has become even more robust. In modern administrative law, the check on agencies provided by the federal courts serves a number of important purposes. First and most importantly, the courts' review prevents rules that are "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute" from becoming law.[129] Courts also review whether the agency has authority to interpret the statute in the first instance, which is the only thing that prevents agencies from running wild and issuing interpretations over statutes that they do not implement.[130] And courts review agency rules to make sure that those rules do not contradict previous court opinions that have followed from "the unambiguous terms of the statute."[131] The health of these checks is essential, since without them Congress might hesitate to delegate authority to agencies, even if such delegation would otherwise be efficient.[132]

For these reasons, *Chevron* itself cemented the federal courts' gatekeeping role by clarifying that these courts will always remain "the final authority on issues of statutory construction."[133] Justice Stevens, the author of *Chevron*, has since insisted that courts "have not abdicated [their] judicial role" in the wake of *Brand X*.[134] In his opinion, "[t]he fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice."[135] Some commentators have insisted that the post-*Chevron* role

127. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 590 (1965).

128. United States v. Mead Corp., 533 U.S. 218 (2001).

129. *Id.* at 227.

130. *See id.*; Doug Geyser, Note, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129, 2166-67 (2006) ("[I]t is still the judiciary that decides whether the agency has been delegated authority to act in the first place."); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (noting that *Chevron* applies only to agency interpretations of those statutes "which [the agency] administers").

131. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

132. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits.").

133. *Chevron*, 467 U.S. at 843 n.9.

134. Negusie v. Holder, 555 U.S. 511, 530-31 (2009) (Stevens, J., concurring).

135. *Id.* at 531; *accord* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (noting that *Mead* "indicated that whether a court should give [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue").

of federal courts is even more robust than Justice Stevens imagines. On this view, judicial "review of the agency's judgment within its *Chevron* space for reasonableness . . . still ha[s] an element of statutory interpretation to it."[136]

These insights can hardly be overstated. Though federal courts are not *authoritative* interpreters of ambiguous statutes, they are the *final* authority—that is, they are the last-in-time interpreters. Unless and until the court ratifies an agency construction, that construction is not the law. In this sense, *Brand X* dealt a much less serious blow to the federal courts than did *Erie*. Even after *Brand X*, "the judiciary fulfills its *Marbury* duty to 'say what the law is' by defining the boundaries within which an agency may act."[137]

Thus, Bamberger's application of *Erie* principles to the *Brand X* problem glosses over a critical role that courts retain even after the loss of power they sustained in *Brand X*. It is not true, as he argues, that "the federal interpretation is no longer binding" after an agency hands down an opinion that contravenes the court's own.[138] On the contrary, the first-in-time federal court interpretation remains binding up until a third-in-time federal court approves the agency's reading.

B. Did the Law "Change"?

When Garfias first took his case to the Ninth Circuit, the "authoritative interpreter" of the Immigration and Nationality Act, the BIA, had not yet provided a construction of the statute. In light of this situation, the government argued that the agency's T2 opinion did not "change" the law in the manner required to trigger retroactivity analysis. Under this theory, the T1 court's opinion was a mere "non-authoritative interpretation" that had never truly been "the law." In his *Garfias* dissent, Judge Paez noted that this argument was "premised on the novel, and equally unsupported notion that judicial interpretations of ambiguous statutes are not an authoritative statement of the law where an agency with policymaking expertise has yet to issue its own interpretation."[139]

On the contrary, the government's argument does find some support in precedent. But so too does the argument of Garfias. Though Judge Paez's treatment of this question was somewhat offhanded, in reality a meaningful circuit split exists on the issue. Six circuits—the First, Fourth, Eighth, Ninth, Tenth, and the District of Columbia—have held that administrative rules "change" rather than "clarify" the law when they overturn prior circuit

136. Strauss, *supra* note 121, at 1162 (attributing this point to Professor Kevin Stack).

137. Geyser, *supra* note 130, at 2131-32.

138. *Id.* at 2154.

139. Garfias-Rodriguez v. Holder, 702 F.3d 504, 551 (9th Cir. 2012) (en banc) (Paez, J., dissenting).

precedent. Two other circuits—the Third and the Seventh—have held that such rules are "clarifications" rather than "changes."

The D.C. Circuit's approach is the most straightforward. Under that framework, a new rule will be found to have changed the law if that rule "is substantively inconsistent with a prior regulation, prior agency practice, or any Court of Appeals decision rejecting a prior regulation or agency practice."[140] The new rule will also be considered a change if it "reflects a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability."[141] Applying *Landgraf*'s assumption against retroactivity, the D.C. Circuit went on to hold that such changes to the law cannot be applied retroactively.[142]

In a series of cases dealing with the United States Sentencing Guidelines, four courts of appeals have agreed with the D.C. Circuit's reasoning. These cases are not precisely analogous to the *Brand X* context, since they deal with the Sentencing Commission's decision to correct a previous court interpretation by amending the commentary for the Guidelines, rather than an agency's decision to correct a prior court interpretation through a rulemaking or adjudication. But many courts have suggested that the two situations are basically identical, given that the actual text of the Guidelines is never altered. Since only the *commentary* is amended, the Commission is basically issuing an interpretation of the statute, just as an agency might do in an informal rulemaking.

Consider, for example, the case of *United States v. Chambers*.[143] There, the Fourth Circuit interpreted the ambiguous word "manager" in the United States Sentencing Guidelines to allow sentencing enhancements for members of a conspiracy even if they did not exercise control over co-conspirators.[144] The Sentencing Commission then amended the commentary on the relevant Guideline (but not the Guideline itself) to clarify that the word "manager" meant that the defendant must have exercised control over co-conspirators in order to receive the enhancement.[145] In a case heard after that amendment, the Fourth Circuit found that the amendment was "not a mere clarification because it works a substantive change in the operation of the guideline in this circuit. The amendment has the effect of changing the law in this circuit."[146] In nearly

140. Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859-60 (D.C. Cir. 2002).
141. *Id* at 860.
142. *Id.*
143. United States v. Chambers, 985 F.2d 1263 (4th Cir. 1993).
144. *Id.* at 1268.
145. U.S. SENTENCING GUIDELINES MANUAL § 3B1.1, application n.2 (effective Nov. 1, 1993).
146. 61 F.3d 1100, 1110 (4th Cir. 1995).

identical cases, the First,[147] Eighth,[148] and Tenth[149] Circuits have reached similar conclusions to the *Chambers* court.

The Third and Seventh Circuits have consistently disagreed. In the *Levy II* case mentioned above, the Third Circuit noted that it does "not take the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification."[150] Thus, in the Sentencing Guidelines cases, the Third Circuit has found that "merely because the [first-in-time] courts were resolving an ambiguity in the prior law by supplying a meaning that was neither stated in, nor clear from, the language of the application note, does not mean that the new wording has fashioned a substantive change in the Guidelines."[151] For both the Third and the Seventh Circuits, this conclusion is compelled by the fact that "it is the text of the [thing being interpreted]—not the courts' gloss on that text—that ultimately determines whether the amendment is a clarification or a substantive revision."[152]

Another argument for the Third Circuit's position was persuasively expressed by the Seventh Circuit in *Pope v. Shalala*, where the court held that "[a] rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been."[153] Chief Judge Kozinski of the Ninth Circuit endorsed this view in *Garfias*, noting that the case did not "merit retroactivity analysis because *Briones* didn't *change* the law; it *settled* the law."[154] Chief Judge Kozinski correctly noted that "*Acosta*'s interpretation of the statutory ambiguity clarified in *Briones* was provisional, not authoritative, for purposes of retroactivity analysis."[155] He was also correct to note that "[a]uthoritative interpreters operate by the Highlander principle: 'There can be only one.'"[156]

But none of this means that *Garfias* did not change the law. *Garfias* adopted the *Briones* rule and overrode *Acosta* on October 19, 2012. On October 18, an alien who had entered the United States without inspection would have been eligible for adjustment of status if he had litigated the issue in a federal court within the Ninth Circuit. On October 20, the same litigant would have

147. United States v. Prezioso, 989 F.2d 52, 54 (1st Cir. 1993).

148. United States v. Reedy, 30 F.3d 1038, 1039 (8th Cir. 1994).

149. United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991), *rev'd on other grounds*, Stinson v. United States, 508 U.S. 36 (1993).

150. Levy v. Sterling Holding Co., LLC (*Levy II*), 544 F.3d 493, 507 (3d Cir. 2008) (citing United States v. Marmolejos, 140 F.3d 488, 492 (3d Cir. 1998)).

151. *Marmolejos*, 140 F.3d at 492.

152. *Id.*; United States v. Fones, 51 F.3d 663, 669 (7th Cir. 1995).

153. 998 F.2d 473, 483 (7th Cir. 1993).

154. Garfias-Rodriguez v. Holder, 702 F.3d 504, 530 (9th Cir. 2012) (en banc) (Kozinski, C.J., disagreeing with everyone).

155. *Id.* at 531.

156. *Id.*

been ineligible for adjustment of status. Given these facts, the *Garfias* majority correctly concluded that its opinion "brought about [a] change in the law."[157]

Thus, in this circuit split, the six courts of appeals to find a "change" in the law have the better of the argument. The position of the Third and Seventh Circuits (and Chief Judge Kozinski) initially seems appealing, and certainly is understandable. But this position's fatal flaw is its failure to account for the possibility that a first-in-time court decision may simultaneously be both "the law" and "not authoritative."

The Supreme Court's jurisprudence on the retroactive effect of agency rules is instructive. In general, administrative rules cannot be applied retroactively. But if the rule merely "clarifies" the law, it *can* be applied to past conduct, since it does not upset settled expectations by "changing" the law. Last Term, Justice Kennedy clarified this idea in his dissenting opinion in *United States v. Home Concrete & Supply*.[158] There, he noted that the regulation at issue was not impermissibly retroactive since it "worked no change in the law, and instead . . . interpreted a statutory provision without an established meaning."[159] The phrase "established meaning" is key. In the *Brand X* context, a T2 agency interpretation that contravenes a T1 court opinion is not writing on a blank slate. Instead, the T1 court opinion represents the "established meaning" of the statute until T2. That "established meaning," though provisional and not authoritative, provides the first step of the *Brand X* dance.

The Court made the same point in a slightly different way in *Smiley v. Citibank*.[160] There, the majority found that it would pose no problem to apply a new agency regulation to "transactions that occurred at a time when there was no clear agency guidance."[161] Again, there is a key phrase: "no clear agency guidance." Only when there was "no clear agency guidance" before the rule can it be said that there was "no law." Indeed, the Court has held this opinion for decades. In 1936, for example, the Court unanimously rejected the argument that a new regulation was impermissibly retroactive by noting that the new regulation "pointed the way, *for the first time*, for correctly applying the antecedent statute."[162]

Whether it is' called an "established meaning" or "clear guidance" or a "first time" interpretation, the point here is the same: new agency regulations are only excused from retroactivity analysis when they write on a blank slate.

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157. *Id.* at 514 n.7 (majority opinion).
158. United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012).
159. *Id.* at 1853 (Kennedy, J., dissenting).
160. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996).
161. *Id.* at 744 n.3.
162. Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 135 (1936) (emphasis added).

This is not the case in the *Brand X* context, since the T1 court's "first-time" interpretation does provide "clear guidance" and "an established meaning" on which parties rely. Although the T1 court's interpretation of a statute *might* later be trumped by an agency construction at T2,[163] that T1 interpretation ordered the behavior of the parties between T1 and T2 and should therefore affect the way in which a court thinks about retroactivity.[164]

Put simply, provisional law is still the law. Admittedly, the force of that law is weak: the precedential value of these first-in-time court decisions is necessarily "limited to other courts within [the issuing court's] hierarchical sphere of command and [is] defeated as soon as the [agency] . . . reache[s] a differing, valid conclusion."[165] But the point remains valid: unless and until an agency overrules a court of appeals' interpretation of a statute, all courts within that circuit are obligated to observe that interpretation and to provide it with normal stare decisis effect. For this reason, the *Garfias* majority was right to find that, if the BIA had never issued *Briones*, then "*Acosta* would still be good law."[166]

In the end, the argument that *Briones* "settled" the law simply cannot be squared with the role of the federal courts in the wake of *Chevron*. An agency cannot override a court of appeals just by saying so. Under *Chevron* and *Brand*

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163. Although the Third and Seventh Circuits take for granted the fact that any "non-authoritative" interpretation will later be overridden by the agency, that assessment is far from true. The agency may choose not to decide the question, or it may simply never get the opportunity to do so. In either case, the court's "non-authoritative" interpretation will continue to control the outcome of cases decided under that statute.

164. The justification for pure prospectivity for litigants acting between T2 and T3 is somewhat different. It initially seems appealing to apply the rule of pure prospectivity only to litigants acting between T1 and T2, since they could not be sure whether the agency would ever issue a T2 opinion at all. On this reading, the T2 agency opinion places the litigant "on notice" that the T1 court opinion is in peril, and in so doing makes their further reliance on the T1 judicial opinion unreasonable. The flaw in this argument, however, is that the litigant cannot know for sure whether the T3 court will ratify the T2 agency opinion. Especially considering that the T1 court and the T2 agency have disagreed about the meaning of the statute, there is significant ambiguity over what the T3 court will ultimately decide. In certain situations, the T1 court may have indicated that its opinion did not follow from the clear language of the statute and that the agency should feel free to override that opinion at a later time. In such cases, it might make sense to displace my presumption against retroactivity, since the litigant's further reliance on T1 after T2 could be seen as unreasonable. But it is very hard to know whether a T1 court is deciding based on the "unambiguous language of the statute" or merely on the basis of their best guess as to the statute's meaning. *See, e.g.*, United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1844 (2012) (holding, perplexingly, that a T1 court's decision did not follow the unambiguous terms of the statute even though the T1 court had expressly stated that the statute was "unambiguous").

165. Strauss, *supra* note 121, at 1172; *see* Watts, *supra* note 11, at 1015 ("If an agency fails to exercise its congressionally-delegated interpretive powers, the courts remain free to impose their own interpretation in the interim."); *see also* Bamberger, *supra* note 13, at 1276 (noting that first-in-time court decisions should "have stare decisis effect," but "only until that agency sets forth its own permissible interpretation in a manner binding on the judiciary"); *id.* at 1311 (similar).

166. Garfias-Rodriguez v. Holder, 702 F.3d 504, 515 (9th Cir. 2012) (en banc); *see id.* at 531 (Kozinski, C.J., disagreeing with everyone) ("We do, of course, set the law of the circuit, which is binding on all the courts—until the agency speaks.").

X, the court of appeals must instead override *itself* by adopting the agency's interpretation.[167]

C. Who Changed the Law?

Once it has been determined that the law has changed, courts are free to advance to the second threshold question in the retroactivity analysis: who changed it? Only after answering this question can the court know which retroactivity test is appropriate to apply.

Despite the critical nature of this inquiry, the *Garfias* majority gave it short treatment. The question is, no doubt, a difficult one. The majority itself noted that "it is not clear for purposes of determining which retroactivity analysis applies whether we or the agency effectively brought about the change in the law."[168]

Commentary from the legal academy has done less to hedge on this question. Many have rallied to a rather black-and-white view: that, "[w]hen the agency acts with the requisite formality under *Mead* to acquire *Chevron* deference, *it* is changing the law."[169]

For the reasons explained in the *Erie* section above, this academic consensus is in error. A third-in-time federal court confronted with the *Brand X* problem should hold that it—the T3 court—is changing the law. This is the only interpretation that remains faithful to both *Chevron* and *Brand X*. Indeed, whether the court "adopt[s] a new rule because of changed views on a complex analysis of underlying law, or because of a simple flash of insight accepted and followed, or because of our duty to abide Supreme Court precedent, [*the court's*] *decision remains a judicial decision.*"[170] The fact that the T3 court's opinion ratifies a T2 agency decision does not change the inherently judicial nature of the act. Rather, as Justice Stevens has argued, the court's opinion demonstrates that "courts and agencies play complementary roles in the project

167. *Id.* at 533 (Gould, J., concurring) ("Indeed, although *Brand X* characterizes the subsequent and contrary agency interpretation here as authoritative, the BIA's interpretation does not become binding in this circuit until we defer to that interpretation."); *see id.* ("[I]t is our court that is announcing a new rule of law for our circuit, not the BIA.").

168. *Id.* at 514 n.7.

169. Geyser, *supra* note 130, at 2166 (emphasis added); *see id.* at 2165 ("[W]hen an agency acts in a manner entitled to *Chevron* deference, it is not reinterpreting the law in the face of a prior federal court construction; rather, the agency is changing the very body of law that needs to be interpreted, in the same fashion as Congress could do itself.").

170. *Garfias-Rodriguez*, 702 F.3d at 533 (Gould, J., concurring) (emphasis added); *accord id.* at 546 (Paez, J., dissenting). Although it does not say so explicitly, even the *Garfias* majority implicitly admits that it is the court, and not the agency, that changed the law. Buried in a footnote is the majority's admission that the court, and not the agency, "retain[s] ultimate authority to determine whether to defer to the agency's interpretation." *Id.* at 514 n.7 (majority opinion); *see also id.* at 518 & n.11.

of statutory interpretation" and that "[s]tatutory language may thus admit of both judicial construction and agency exposition."[171]

In *Garfias*, the Ninth Circuit ultimately decided that *Retail Union* provided the proper framework, and noted that it would treat the case "as we would if the agency had changed its own rules."[172] In so holding, the majority did not directly say that the agency rather than the court had changed the law; in fact, the majority noted in a cryptic footnote that it did "not mean to say . . . that the agency changed the law of this circuit."[173] In the majority's view, *Retail Union* was appropriate not because the agency had changed the law, but rather because the *Retail Union* test "allows us to take into account the intricacies of a *Brand X* problem, which are typically absent in a case where we have overruled our own decisions," such as *Chevron Oil*.[174]

It is not immediately evident why the *Brand X* situation is more similar to *Retail Union* than to *Chevron Oil*. In both *Retail Union* and *Chevron Oil*, the law rests where the final decisionmaker thinks it should be. In the *Brand X* situation, the law *does not* rest where the final decisionmaker (the court) thinks it should be. Rather, it rests where the *agency* thinks it should be. Thus, *Retail Union* and *Chevron Oil* are more similar to one another than either is to *Garfias*.

Once this explanation is taken off the table, it becomes clear that the Ninth Circuit's decision to adopt *Retail Union* for the *Brand X* context was little more than an ad hoc choice designed to arrive at the result that the court preferred. This is clear from the majority's reasoning, which ran together the discrete questions "who changed the law" and "which test should apply."[175] The panel may have been right that *Chevron Oil* was not "well adapted to the *Brand X* situation" and that it did not seem to be "the appropriate framework."[176] But this analysis begs the question. The majority decided which test it wanted to apply based only on its subjective view of the equities.

The real work in *Garfias* is being done by the court's conclusion that *Retail Union* is "more flexible than *Chevron Oil*." The *Chevron Oil* test might require a hard-and-fast rule that would apply to Garfias and all litigants similarly situated, whereas *Retail Union* would allow for a case-by-case analysis. The majority may have worried that, if it adopted the *Chevron Oil* test, it would have been compelled to issue a judgment with retroactive implication for all litigants who had relied on *Acosta*. After all, Garfias was an

171. Negusie v. Holder, 555 U.S. 511, 530-31 (2009) (Stevens, J., concurring).
172. *Garfias-Rodriguez*, 702 F.3d at 533 (majority opinion).
173. *Id.* at 514 n.7 (internal quotations omitted).
174. *Id.* at 518.
175. *Id.*
176. *Id.*

extraordinarily unsympathetic litigant who relied on *Acosta* significantly less than other litigants who were absent but similarly situated.[177]

IV. Defending Pure Prospectivity

It is certainly true, as the Court noted in *Rivers v. Roadway Express*, that the "essence of judicial decisionmaking . . . necessarily involves some peril to individual expectations."[178] But *Brand X* takes that peril to a new level. Its basic premise—that a court will be required to overrule prior precedent despite the fact that this precedent is not wrong—presents a whole class of recurring retroactivity problems that would have been unimaginable only a generation ago.

In this Part, I argue that a T3 federal court ratifying a T2 agency interpretation should usually apply its decision prospectively only. This approach can be justified under either the remedial conception or the choice-of-law conception of prospectivity.

Before diving into the nuances of this argument, a quick note on timing may be warranted. Suppose again that a court makes the law *A* at T1, that the agency offers interpretation *B* at T2, and that a court makes the law *B* at T3 with citation to *Brand X*. My argument is that law *B* should not apply to any litigant who acted at any time between T1 and T3. To be sure, the equitable interests are most persuasive for those who acted between T1 and T2; these litigants could not be sure whether the agency would ever exercise its authority to issue the T2 interpretation at all, and were therefore reasonable in relying on the court's construction at T1. The case for applying law *B* to litigants who acted between T2 and T3 is admittedly stronger, since those who acted during this period should have been on notice that the agency had issued T2 and that law *B* might soon become the law of the circuit under *Brand X*. Still, law *B* should not attach to conduct between T2 and T3, since litigants could not be sure whether the court at T3 would ratify the agency's decision at T2. Given the fact that the T1 court and the T2 agency disagreed over the meaning of the statute, it is truly unclear for those acting between T2 and T3 what the T3 court will ultimately say.[179] Unless and until the T3 court ratifies the agency's T2 interpretation, all litigants would be reasonable in relying on law *A*.

177. *See supra* note 101. The Ninth Circuit's choice of *Retail Union* may also have been an attempt to avoid the uncertainty surrounding *Chevron Oil*.

178. 511 U.S. 298, 312 (1994).

179. *See supra* note 164.

A. Understanding the Equities

Those who believe in prospectivity are occasionally willing to withhold retroactive application of a new rule of law when such retroactivity would "produce substantial inequitable results" or otherwise result in "injustice or hardship."[180] If a T3 court applied law *B* against a litigant who acted while the law was *A*, substantial inequities would result. This is true for several reasons.

First and most importantly, the application of law *B* to a litigant acting between T1 and T3 would unjustly penalize that litigant for relying on a T1 court decision that, in the words of the *Brand X* Court, was not "legally wrong."[181] This distinguishes the *Brand X* problem from normal cases of judicial retroactivity, which involve appellate courts overturning lower courts that *were* "legally wrong." Thus, litigants acting in reliance on the T1 court's opinion that the law is *A* have behaved much more reasonably than those who relied on either (1) nothing at all or (2) a poorly reasoned or otherwise "legally wrong" opinion. It makes sense to protect this doubly reasonable reliance by differentiating the *Brand X* problem from other cases of judicial decisionmaking.

Second, the mere potential that the T3 court's opinion might apply retroactively would force litigants to wait in a cruel limbo while the T2 agency decides whether or not it wants to disagree with the T1 court's construction of a statute. The formalistic application of *Harper*'s retroactivity presumption would force litigants to wait indefinitely on an agency interpretation of a statute that may never come. That wait might last years.[182] Indeed, since agencies are not obligated to respond to judicial decisions, the wait might last forever.

Finally, an option for pure prospectivity would promote fairness by allowing courts to treat the ex ante situation of statutory ambiguity differently from the ex ante presence of a clear rule.[183] The Supreme Court has indicated

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180. Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (quoting Great Northern R.R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932)); *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971).

181. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).

182. Suppose, for example, that a court of appeals issues an opinion allowing a certain class of aliens to adjust status, but does not indicate whether its new interpretation of the INA follows from the unambiguous words of the statute. Suppose further that, fifty years down the line, the BIA exercises its authority to overrule this decision, and that the T3 federal court defers to that interpretation under *Brand X*. Surely most observers would agree that it would be extremely unjust to apply the agency's new rule to a litigant who sought to adjust status forty-nine years after the T1 opinion. But this is exactly what a strict application of *Harper* would mandate, so long as the litigant's application to adjust status was still open at the time of the T3 decision. In order to avoid that inequity, courts should adopt a default rule of pure prospectivity, so that litigants can act in the indefinite period between T1 and T3 without having to fear that they may ultimately be hoodwinked by *Harper*.

183. *But see* Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1089 (9th Cir. 2010) .("[S]tatutory ambiguity alone has never been sufficient to render judicial interpretation of a statute non-retroactive."); *id.* at 1090 ("[A] subsequent judicial interpretation of the same statute based

on numerous occasions that retroactive application of a new rule may be inappropriate when the litigant had relied on a clear precedent that has been overturned; on the contrary, retroactivity raises fewer problems with the ex ante situation is one of sheer ambiguity. The *Brand X* problem is by definition an example of the former situation, since the litigant will have relied on some rule when she took action. This was the situation in *Garfias*, since the Ninth Circuit's "decision to overrule *Acosta* amount[ed] to a complete reversal of a settled rule of law upon which a vulnerable class of litigants reasonably and detrimentally relied."[184]

Detractors of the pure prospectivity approach will likely argue that employing *Chevron Oil* gives too much protection to litigants. Indeed, some commentators have already suggested that, in the wake of *Brand X*, litigants should be "on notice" that a T1 court's interpretation of a federal statute might later be overturned by the T2 agency. Given that reality, it might be said that no reliance is reasonable unless the court's constructions followed from the unambiguous terms of the statute—that is, unless the court's construction was made at *Chevron* step one. In the same vein, others have argued that litigants would be especially misguided if they relied on a T1 court's decision despite the fact that this decision has been contravened by pre-T1 agency guidance or by pre-T1 agency decisions that, while formal, concern only a related statutory provision.

There are a few problems with these arguments.[185] It may be true that an agency's related adjudications send signals as to how the agency might rule if it, and not the court of appeals, had provided the first-in-time interpretation. But reliance on prior agency adjudications is inherently less reasonable than reliance on prior court decisions. This is true because stare decisis binds courts but not agencies. After *FCC v. Fox Television Stations, Inc.*, agencies are free to change their own rules whenever they want, so long as they are moving from one reasonable rule to another.[186] Indeed, in *Brand X* itself, the Court noted that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."[187]

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on *Brand X* deference is no less precedential simply because it relied on agency expertise that was not available to the earlier judicial panel.").

184. Garfias-Rodriguez v. Holder, 702 F.3d 504, 553 (9th Cir. 2012) (en banc) (Paez, J., dissenting).

185. The "stare decisis" argument provided here applies mainly to litigants acting between T1 and T2. For a discussion of why retroactivity is inappropriate for litigants acting between T2 and T3, see note 164 and accompanying text.

186. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). Agencies cannot change positions *sub silentio*, and they must display an awareness that they are changing the law. *Id.*

187. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); *see, e.g.*, Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (approving agency interpretation even after the agency had reversed course on numerous occasions).

Therefore, Garfias had no way to know how the BIA would construe the INA if it were given a chance to do so. The BIA is a perfect example of agency unpredictability. This agency is composed of fifteen members who are each appointed by the Attorney General. During the George W. Bush administration, the appointment procedure was criticized for being highly politicized.[188] At any given time during this period—the period in which Garfias was litigating—the composition of the BIA could have shifted. With that shift, the BIA might have moved away from a previous precedent. Given that reality, it is simply not fair to suggest that Garfias should have taken hints from the BIA's previous decisions in this area.

B. Why Brand X *Is Different*

Although the Supreme Court has never squarely held that pure prospectivity is unconstitutional,[189] it has on several occasions hinted that this may be the case. In the Court's opinions on point, two distinct arguments have emerged against pure prospectivity. The first of these arguments, advanced by Justice Scalia, is that the Constitution empowers judges only to "say what the law *is*," and not to prescribe "what the law *will be*." The second argument against pure prospectivity is simply that it promotes judicial activism.[190] In this Section, I rebut these two legal arguments, focusing in particular on how *Brand X* upsets their theoretical underpinnings. I hope to show that the unique idiosyncrasies of the *Brand X* problem make pure prospectivity a valid legal technique in the administrative-law context, even if that technique remains dubious in other legal theaters.

I begin with Justice Scalia's argument, since it seems to have garnered the most support in the lower courts. This line of reasoning is premised on the important and oft-invoked legal fiction that a statute has only ever meant one thing.[191] The premise here is that when one court overrides a previous court's construction of the law, that previous construction disappears into the ether.

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188. *See, e.g.*, OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 68 (2008), http://www.justice.gov/oig/special/s0807/final.pdf.

189. *See* FALLON ET AL., FEDERAL COURTS, *supra* note 63, at 54 (noting that "the Court has not resolved [this] question directly").

190. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536-37 (1991) (Souter, J., opinion for the Court).

191. A slightly different way of phrasing this argument is that pure prospectivity creates "advisory opinions" that are ultra vires of the federal courts' Article III powers. *See* Teague v. Lane, 489 U.S. 228, 316 (1989) (implying that pure prospectivity is similar to "rendering advisory opinions"). This argument has been persuasively discredited elsewhere. *See, e.g.*, *Teague*, 489 U.S. at 318 (Stevens, J., concurring in part and concurring in the judgment); FALLON ET AL., FEDERAL COURTS, *supra* note 63, at 55 (noting that this argument "may not be tenable" in light of the prevalence of the "harmless error" doctrine); Fallon & Meltzer, *supra* note 29, at 1798-1800.

Everyone then pretends that the previous construction never existed. The one "true meaning" of the statute is the one that the court now adopts, and retroactive application of that rule presents no problem since the statute has always meant the same thing (even when it meant something else).

This "one meaning" fiction has long been the subject of vigorous debate. Writing more than fifty years ago, Justice Frankfurter insisted that judges "should not indulge in the fiction that the law now announced has always been the law."[192] The thinking here is that it would be much "more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law."[193] Others, such as Justice Scalia, have made the "one meaning" fiction a central part of their retroactivity jurisprudence. For Justice Scalia, this fiction is a way of avoiding prospectivity. In his view, "[p]rospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*."[194]

Alas, Justice Scalia's declaratory theory of law is ill-adapted for the post-*Brand X* world. In *Morales-Izquierdo v. Department of Homeland Security*, the Ninth Circuit noted that it is easy for modern courts

> to accept that the first time a court interprets an ambiguous statute, it is saying what the statute has always meant. . . . It is similarly plausible that when a superordinate court overrules the interpretation of an ambiguous statute by an inferior court, the superordinate court is correcting an "erroneous" interpretation of the statute and reaffirming what the statute has always meant. . . . But when a court overrules its own prior interpretation of an ambiguous statute in deference to an interpretation by an agency—an agency that lacks the constitutional authority to overrule the court's prior interpretation—the fiction that the statute has always meant one particular thing may appear to break down.[195]

Even after noting this "break down," the *Morales-Izquierdo* panel applied *Harper* anyway. In so doing, the panel noted that its legal fiction, though "ill equipped for a *Brand X* reality," was not so bad; all it did, in the end, was set up a situation that "is not markedly different from the case in which a federal court's interpretation of an ambiguous state law is overridden by a conflicting but authoritative interpretation of that law by a state court of last resort."[196] Yet again, the court copped out of the difficult legal quandary by analogizing to the *Erie* doctrine. But, as noted above, *Erie* is less analogous than it first seems.

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192. Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring).

193. *Id.*

194. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 105 (1993) (Scalia, J., concurring).

195. Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1088-89 (9th Cir. 2010) (citations omitted).

196. *Id.* at 1089.

The very premise of the "one meaning" fiction—that judges "find" the law as it has always existed—is ill-suited for the *Brand X* situation, in which *agencies* "create" the law. The first articulation of the "one meaning" fiction was provided by William Blackstone in his *Commentaries on the Laws of England.* There, Blackstone argued that statutes are laden with meaning even before judicial interpretation, and that judges merely "find" or "vindicate" that meaning.[197] Given the weight that modern judges place on evolving social mores, "[i]t would be only a slight exaggeration to say that there are no more Blackstonians."[198] Indeed, the Blackstonian perception is at odds with the circumscribed role of T3 federal judges faced with the *Brand X* problem: they can only approve or deny the construction that the agency has provided. Modern judges are not "finding" anything when conducting *Chevron* review, and they are not engaged in some Platonic search for the one true meaning of a statute. Indeed, their one and only job is to decide whether the agency's interpretation is reasonable.

The second major argument against pure prospectivity is that it promotes judicial activism by "relax[ing] the force of precedent [and] minimizing the costs of overruling," thus allowing "the courts to act with a freedom comparable to that of legislatures."[199] But this argument also makes little sense in a post-*Brand X* world, given that "the plain import of *Brand X* is the liberation of courts (and agencies) from stare decisis."[200] Indeed, *Brand X requires* courts to abandon stare decisis and overrule past precedents, even though those precedents are "legally correct." The modern reality—for better or worse—is that the strength of judicial precedent is at a historically low ebb. But the culprit here is not the tool of pure prospectivity, but rather the *Brand X* decision itself. The judges who do use pure prospectivity in a post-*Brand X* world are simply following the Supreme Court's instructions. They are not power-hungry activists. Put differently, third-in-time federal courts engaged in *Brand X* analysis simply do not have the type of judicial "freedom" that worried Justice Souter in *Beam.* On the contrary, they have only two options: ratify the agency's interpretation or reject it.

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197. 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (3d ed. 1884) ("[J]udges do not pretend to make a new law, but to vindicate the old one from misrepresentation."); *see* THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS *91 (1868) ("[I]t is said that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases."); *Morales-Izquierdo*, 600 F.3d at 1088 (noting "the ancient, but still powerful, legal fiction that statutes have content before they are interpreted by courts, and that courts 'find' that preexisting content").

198. Fallon & Meltzer, *supra* note 29, at 1759.

199. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536-37 (1991) (Souter, J., opinion for the Court); *see id.* at 547-48 (1991) (Blackmun, J., concurring); *id.* at 549 (Scalia, J., concurring in the judgment); James v. United States, 366 U.S. 213, 225 (1961) (Black, J., dissenting).

200. Geyser, *supra* note 130, at 2152.

V. A Default Rule for the *Brand X* Problem

Academics have long sought a workable way to protect litigants from the aggressive retroactive rulemaking of agencies such as the BIA and the IRS. Some have suggested that *Brand X* should simply not apply to the BIA,[201] while others have suggested that *Chevron* deference is inappropriate for the IRS.[202] These solutions are nice in theory, but at bottom propose unprincipled exceptions to the law of agency deference in hopes of achieving their preferred normative outcome. My suggestion for protecting these litigants is much simpler: federal courts should embrace pure prospectivity and revive *Chevron Oil*. When conducting the *Chevron Oil* analysis, courts should adopt a default presumption in favor of the litigant who acted between T1 and T3 in reliance on the T1 court's decision.

Under the default rule I propose, courts would begin by applying the basic *Chevron Oil* balancing test. But, when applying that test, courts should also use a presumption in favor of pure prospectivity. This presumption would resolve the retroactivity question in favor of the litigant whenever the balancing test is inconclusive or when there is insufficient information on any of the test's prongs. For those employing a choice-of-law theory, this presumption would also require pure prospectivity when the particular litigant "fails" the *Chevron Oil* test but the *class* of litigants affected by the ruling would "pass" it.[203] This requirement follows from *Beam*'s instruction that federal courts conduct a "generalized enquiry" under which litigants can assert their own equitable and reliance interests *and also* those of "all parties absent but similarly situated."[204] In the *Brand X* context, it is much better to be overinclusive than underinclusive. The occasional need to excuse an unsympathetic litigant from retroactivity is far outweighed by the aggregated equitable interests of all those similarly situated.

The great advantage of *Chevron Oil* is that it concisely identifies the two operative factors that most courts agree are relevant to the retroactivity inquiry: potential inequities for the litigant and the ongoing integrity of the statute.[205] Perhaps because of its utility as a brush-clearing tool, *Chevron Oil* has

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201. Darren H. Weiss, Note, *X Misses the Spot:* Fernandez v. Keisler *and the (Mis)appropriation of* Brand X *by the Board of Immigration Appeals*, 17 GEO. MASON L. REV. 889, 892 (2010).

202. Pruitt, *supra* note 17, at 1590-91.

203. This, for example, was the case for Garfias himself. *See supra* note 101.

204. *Beam*, 501 U.S. at 543 (Souter, J., opinion for the Court).

205. The first and third factors in the *Chevron Oil* test are really the same inquiry: so long as the law has been changed, it will usually be inequitable to retroactively apply it to the litigant. *See Garfias-Rodriguez*, 702 F.3d at 551 (9th Cir. 2012) (en banc) (Paez, J., dissenting) ("Our precedent suggests that, in the usual case, where the first factor is met, so is the third, because inequity necessarily results from litigants' reliance on a past rule of law."); *see also* Holt v. Shalala, 35 F.3d 376, 380–81 (9th Cir. 1994) (similar).

remained good law for almost thirty years.[206] The problem with *Chevron Oil*, on the other hand, is that the opinion does no't tell a court what to do when these two factors point in opposite directions (as they almost always do). In the absence of any guidance from the Supreme Court, lower courts have struggled to weigh the two factors. Some courts have engaged in ad hoc balancing tests, finding that one factor or another is "the most important."[207] Others have eschewed the entire concept of a balancing test, and have said that a particularly persuasive answer to any one of the *Chevron Oil* factors should be "dispositive[]."[208] Still others have surveyed circuit precedent and determined that, as a general pattern, the equitable considerations in the *Chevron Oil* test seem to "outweigh[]" any concern for the health of the statute.[209]

How can this problem be fixed? Ironically, the answer might lie with *Retail Union*. Although the five-part *Retail Union* test is clunky and confusing, it does provide one valuable tool: a default presumption.[210] By importing *Retail Union*'s presumption in favor of the litigant, courts applying *Chevron Oil* will finally be able to reach predictable results.

Even after adopting the default rule I propose, courts applying *Chevron Oil* would be free to allow retroactivity if, after considering "the prior history of the rule in question [and] its purpose and effect," they conclude that "retrospective operation will . . . retard" the rule's operation.[211] In some cases, the T2 agency may have a strong opinion about whether or not retroactivity would truly retard the rule's operation. If that is the case, then a court conducting *Chevron Oil* analysis could provide *Skidmore* deference to the agency's opinion.[212] After all, agencies may have a comparative advantage over courts in analyzing how badly pure prospectivity would damage a rule that they must administer. If agencies make an express finding that retroactivity would harm the operation of the rule, that finding may be owed *Skidmore* deference.[213]

How would this default presumption work in practice? Consider once more the case of Garfias. Under the test I propose, Garfias would ha've been

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206. Although *Chevron Oil* has been overruled to the extent that it calls for a case-by-case approach to retroactivity, the Court has never signaled that its basic premise is invalid. Nor has the Court overruled *Chevron Oil* writ large, even when given the opportunity to do so.

207. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1390 (9th Cir. 1990).

208. Gibson v. United States, 781 F.2d 1334, 1339 (9th Cir. 1986).

209. Int'l Ass'n of Machinists & Aerospace Workers v. Aloha Airlines, Inc., 790 F.2d 727, 736 (9th Cir. 1986).

210. Watson, *supra* note 19, at 257.

211. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

212. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

213. But probably not *Chevron* deference, since the question of whether retroactivity would further the purpose of the rule is not itself an interpretation of the statute. When it comes to the actual balancing test itself, agencies should not get deference, since they have no comparative advantage over courts in balancing equities.

excused from the retroactive application of the *Briones* rule. In my view, the Ninth Circuit's approach—an approach that resulted in a removal order against Garfias despite the fact that the equitable considerations "strongly favor[ed]" him[214]—is unworkable and unjust.

The *Chevron Oil* test asks courts to balance inequities posed to litigants against the harm that would be done to the new rule.[215] In *Garfias*, the inequities quite clearly outweighed the harm done to the rule. Garfias and those similarly situated paid thousands of dollars in legal and application fees in reliance on *Acosta*. And, more importantly, many undocumented immigrants came out of hiding in reliance on *Acosta*. The government now proposes to deport all of those litigants after having lured them into the open with the false promise of a chance at citizenship. A more unjust situation could hardly be imagined. As to the second prong of the test, allowing a limited number of undocumented immigrants to adjust status does no major violence to the INA. The BIA's interpretation will reign for all future cases. Thus, under my approach, the equities clearly outweigh the harm to the rule, and retroactivity would be deemed inappropriate.

Even if courts find that my proposed solution to the *Brand X* problem goes too far, one less drastic option is available: adopting the same default rule, but applying it only when the litigant's constitutional rights have been implicated.

Consider, for example, the case of Flavio Nunez-Reyes. In 2001, Nunez-Reyes was arrested in California for possession of methamphetamine. He was given the option of either receiving a jury trial or pleading guilty and completing a drug treatment program. California law provided that if he completed this program, his conviction would be expunged.

In *Lujan-Armendariz v. INS*,[216] the Ninth Circuit had held that the Equal Protection Clause required federal courts to treat expungement of a state conviction in the same manner as expungement of a federal conviction. An expunged federal conviction has no adverse immigration consequences. Thus, in reliance on *Lujan-Armendariz*, Nunez-Reyes waived his right to a jury trial and pled guilty to the drug conviction. His understanding was that his plea would not alter his federal immigration status or otherwise alert federal authorities to his unlawful presence in the United States.

Two years after *Lujan-Armendariz* was handed down, the BIA presented a contrary interpretation of the statute.[217] And, eight years after that, the Ninth

214. 702 F.3d 504, 523; *accord* Carrillo de Palacios v. Holder, 708 F.3d 1066, 1072 (9th Cir. 2013).

215. *Chevron Oil*, 404 U.S. at 106-07.

216. 222 F.3d 728, 732 (9th Cir. 2000), *overruled by* Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011).

217. *In re* Salazar-Regino, 23 I. & N. Dec. 223, 225 (BIA 2002).

Circuit decided in *Nunez-Reyes v. Holder* to overrule *Lujan-Armendariz* in deference to the BIA.[218]

The Ninth Circuit then conducted the now-familiar retroactivity analysis. After deciding that the *Chevron Oil* test was the proper framework, the court found that retroactive application of their new rule to Nunez-Reyes would clearly be unjust. In their view, "[i]t would be manifestly unfair effectively to hoodwink aliens into waiving their constitutional rights on the promise of no legal consequences and, then, to hold retroactively that their convictions actually carried with them the particularly severe penalty of removal."[219]

When the Ninth Circuit confronted the facts in *Garfias*, they were forced to determine whether retroactivity analysis would is appropriate under *Brand X*, and, if so, under precisely what conditions. While the en banc panel struggled between the *Retail Union* test and the *Chevron Oil* test, Judge Gould was already a step ahead. Having correctly concluded that *Chevron Oil* was the proper framework, he wondered whether some bright line rule could be used to resolve certain classes of *Brand X* cases. In hopes of crafting that rule, Judge Gould drew a clear distinction between the facts of *Garfias* and those of *Nunez-Reyes*:

> [U]nlike in *Nunez-Reyes* where there was detrimental reliance because the alien waived important constitutional rights by relying on *Lujan-Armendariz* which we then overruled, [in *Garfias*] the main interest implicated is the alien's prerogative to continue to conceal his unlawful presence, an interest that, the majority points out, is of no legal significance. . . . For these reasons, I conclude that our decision today should apply retroactively, hence my concurrence in the majority's result.[220]

This language stops short of suggesting a bright line rule for cases in which a constitutional right has been forfeited, but it does imply that almost all such cases will result in a finding of pure prospectivity. In truth, the adoption of a bright line rule would be both workable and just. After all, the greatest possible reliance interest is one that leads a litigant to forfeit a constitutional right.

VI. Conclusion

More than seventy years ago, the Supreme Court observed that "[t]he past cannot always be erased by a new judicial declaration."[221] Those words took on

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218. 646 F.3d 684, 692 (9th Cir. 2011) (en banc).

219. *Id.* at 694 (internal quotation marks omitted).

220. Garfias-Rodriguez v. Holder, 702 F.3d 504, 533 (9th Cir. 2012) (en banc) (Gould, J., concurring).

221. Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

a renewed meaning in light of *Brand X*, and to pretend otherwise would upset basic notions of fundamental fairness and judicial efficiency. Though the Ninth Circuit's decision in *Garfias-Rodriguez v. Holder* evinces an admirable concern with finding an equitable solution to the *Brand X* problem, so too does that opinion show the dangers of attempting to solve that problem by using tired tools of retroactivity analysis. Luckily, these dangers can be easily avoided if federal courts revive *Chevron Oil* and apply a presumption of pure prospectivity when confronted with the *Brand X* problem.