Nonretroactivity in Constitutional Tax Refund Cases

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by

CARL D. CIOCHON

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CARL D. CIOCHON*

A lively, but little-noticed drama has been running for nearly two years now in Washington, D.C. The theme: Nonretroactivity in constitutional tax refund cases. The players: The Justices of the United States Supreme Court. At stake: Many millions of dollars in state tax revenues.

As befits any good drama, more is involved here than initially meets the eye. The cases are not just about money. Intertwined with the tax refund issue is a thought-provoking debate regarding the Court's civil retroactivity doctrine. The Justices' sharply differing views on the retroactivity issue reflect their differing visions of the Court's role as constitutional arbiter.

The drama revolves around a simple question: Whether a state will be required to refund monies collected under unconstitutional taxing schemes. With its June 1990 decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* the Court seemingly "handed . . . taxpayers a stunning victory," declaring that "the Due Process Clause of the Fourteenth Amendment obligates [states] to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." But in *McKesson's* companion case, *American Trucking Ass'ns v. Smith,* a sharply divided Court complicated issues that less than a hundred pages earlier seemed clearly resolved in the taxpayer's favor. In *Smith* the Court applied its little-known civil retroactivity doctrine to deny a refund after the state tax at issue had been held unconstitutional. Then, in June 1991 the Court decided *James B. Beam Distilling Co. v. Georgia,* further complicating this already complex issue. Faced with a question

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1. "Nonretroactivity" involves the issue of whether a new rule of law applies to events that occurred before the rule was established. See infra Part I for an overview of nonretroactivity.
differing only slightly from that decided in Smith, the Court reached a completely different result in Beam. 8

These constitutional tax refund cases have far-ranging implications. The past decade has witnessed an outpouring of landmark decisions on the constitutionality of state taxing schemes. 9 Moreover, several important cases are now working their way through various state court systems, likely heading towards eventual disposition in the Supreme Court. 10 Clearly, the tax refund issue will grow in importance in the coming years. Taxpayers who have paid taxes later declared unconstitutional will seek refunds, while the states will try to deny refunds whenever possible.

Smith illustrates the conflict between two competing interests: on the one hand, the taxpayers' desire for a refund of what was wrongly exacted; on the other hand, the state's desire to preserve the fisc. Unfor-

8. See id. at 2448.
10. For example, the Supreme Court's decision in Davis v. Michigan Dep't of the Treasury, 489 U.S. 803 (1989), poses a serious threat to state treasuries and likely will lead to a wave of litigation. See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1733, 1828 n.554 (1991); Hellerstein, Preliminary Reflections, supra note 3, at 336. In Davis the Court held that Michigan's taxation of retired federal employees' pension benefits violated the doctrine of intergovernmental immunity because it exempted from taxation the pension income of retired state employees. Davis, 489 U.S. at 817. At the time of the Davis decision, twenty-two other states had similar taxing schemes in place. Harper v. Virginia Dep't of Taxation, 401 S.E. 2d 868, 871 (Va.), vacated, 111 S. Ct. 2883 (1991). In Harper, the Virginia Supreme Court, addressing the question whether Davis should be applied retroactively, noted that Virginia alone faces a potential refund liability in excess of $440 million and ruled that Davis should not be given retroactive effect. Id. at 873-74; see also Bass v. South Carolina, 395 S.E.2d 171, 174-75 (1990) (per curiam) (holding that Davis should not be applied retroactively), vacated 111 S. Ct. 2881 (1991); cf. Hackman v. Missouri, 771 S.W. 2d 77, 81 (Mo. Sup. Ct. 1989) (en banc) (in wake of Davis, taxpayers entitled under state law to a refund if on remand they can prove state procedural requirements were met). The question whether federal law will require states to provide refunds under Davis remains unresolved. After its decision in Beam, the United States Supreme Court remanded to state courts several pending cases presenting that exact question for disposition in light of Beam. On remand, the Virginia Supreme Court reaffirmed its prior holding of nonretroactivity. Harper v. Virginia, 1991 Va. Lexis 146, at *7 (Nov. 8, 1991). It is questionable whether the Virginia court's ruling can withstand further appeal, since it seems to represent an incorrect application of Beam. See infra note 315.

tunately, the plurality in *Smith* did not confront this difficult problem head on. Instead, it extended the reach of its civil retroactivity doctrine and for the first time applied it to a constitutional tax refund case.\(^{11}\) In contrast, a different plurality of Justices in *Beam* apparently has narrowed the reach of the Court's civil retroactivity doctrine.\(^{12}\) Nevertheless, the *Beam* plurality's slightly modified approach is no more satisfactory than the one used in *Smith*; if anything, *Beam* further confuses already complex issues.

This Note argues that applying the civil retroactivity doctrine to constitutional tax refund cases is inappropriate. Part I provides an overview of the Supreme Court's retroactivity doctrine in both the criminal and civil contexts. Against this background, Part II analyzes the decisions of *McKesson* and *Smith*, revealing the failings both of *McKesson* itself and of the application of civil retroactivity in constitutional tax refund cases. It then examines the Court's decision in *Beam* and discusses the Justices' varying approaches to retroactivity. This Part concludes that the Court's current approach to these cases is inherently contradictory. Finally, Part III proposes a resolution. Taking a broader perspective, it argues that, though flawed, *McKesson* suggests a method for dealing with the difficult issues raised by constitutional tax refund cases in an above-board manner, one that takes proper account of the interests of both the state and the taxpayer.

I. Nonretroactivity: An Overview\(^ {13}\)

Should a decision establishing a new rule of law apply to conduct or events that occurred before the date of the decision? In other words,
should it be given retroactive effect? This deceptively simple question has vexed the United States Supreme Court for the past quarter century. For while the question may appear straightforward, in practice it raises a host of perplexing issues.

The following overview attempts to provide a framework for understanding the Court's retroactivity doctrine. It begins by describing the mechanics of nonretroactivity, surveys the development of the Supreme Court's retroactivity doctrine in the area of criminal procedure, and concludes with an analysis of the Court's civil retroactivity doctrine. But the reader should be forewarned: illogic and uncertainty have been the hallmarks of this complex doctrine's evolution. As one commentator puts it: "[T]he approach of the Supreme Court to retroactivity at any one moment is difficult to predict. Any given holding will at best clarify the present state of the law, or cast light upon past developments." 14

A. The Mechanics of Nonretroactivity

At the outset, it is critical to note that there are two distinct types of questions that raise retroactivity issues. In its usual sense, "retroactivity" refers to a choice of law problem: which rule, the old or the new, will be used to determine parties' relative rights and obligations? 15 A different question arises in the remedial context: once a party has established the existence of a legal right, what sort of retroactive relief should the court award as a remedy? 16 It is this inquiry that animates the law of remedies. 17 Each of these two types of questions raises different issues, problems, and concerns. Therefore, each type requires its own distinct "thread" of analysis. The constitutional tax refund cases in a sense weave together these two threads of retroactivity analysis, since they involve both remedial and choice of law questions. 18 Indeed, as subsequent sections of this Note illustrate, the intrusion of remedial concerns into the choice of law analysis is in large part responsible for the current controversy surrounding these cases. But controversy comes later; describing retroactivity's choice of law thread is the task to which this Note now turns.

only proper when there are clear demonstrations that a precedent must be overruled, that the new rule is the best of all possible replacements, and that the hardship on a party who has relied on the old rule outweighs the hardship on the party denied the benefit of the new rule).

15. See Beam, 111 S. Ct. at 2443.
16. See id.
17. DAN B. DOBBS, REMEDIES § 1.1, at 1 (1973).
18. In a recent article, Professors Fallon and Meltzer argue that the focus on retroactivity as a choice of law issue "lead[s] to a tangle of confusions." Fallon & Meltzer, supra note 10, at 1736. They propose that the proper framework for analyzing retroactivity questions lies in the recognition of "a general theory of constitutional remedies." Id.
Whether a new rule of law should apply retroactively is not a question necessarily answered with a simple yes or no. In fact, there are three alternatives available to a court confronting this question: retroactivity; pure prospectivity; or selective prospectivity. According to the retroactive method, all conduct open to some sort of judicial review is subject to the new rule. Such conduct can be divided into two categories: that which is still subject to direct review, and that which is subject only to collateral attack (e.g., writ of habeas corpus). The distinction between these two categories has often been critical to the Court's criminal retroactivity analysis.

In contrast to the retroactive method, under the pure prospective method the new rule applies only to conduct occurring after the court's decision. It does not even apply to the parties presently before the court.

Finally, selective prospectivity represents something of a compromise. Unlike the pure prospective method, selective prospectivity gives the successful litigant the benefit of the new rule, applying it retroactively to the claim from which it arose. Under this method, however, the new rule applies prospectively to all other conduct. That is, it does not apply to any other claims that arose before the date of the decision establishing the new rule.

The distinctions between these three methods have at times been crucial to the disposition of individual cases as well as to the general

19. Some commentators note the existence of a fourth alternative, the prospective-prospective method. E.g., Schaefer, supra note 13, at 639; Cameron S. DeLong, Note, Confusion in the Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions, 1985 U. ILL. L. REV. 117, 127; Note, Prospective-Prospective Overruling, 51 MINN. L. REV. 79, 81 (1966). However, it seems that the Supreme Court has never acknowledged the existence of this doctrine. See Beam, 111 S. Ct. at 2443 (noting the existence of "three ways in which the choice-of-law problem may be resolved"). Therefore, it will not be discussed in this Note.

20. The term "selective prospectivity" has been borrowed from Justice Souter's analysis in Beam. See Beam, 111 S. Ct. at 2444. The same concept also has been described as "quasi-prospectivity." See DeLong, supra note 19, at 124.

21. By "conduct" is meant the conviction, claim, transaction, or event that is the subject of litigation.

22. DeLong, supra note 19, at 125 (citing Comment, Prospective Application of Judicial Decisions, 33 ALA. L. REV. 463, 468 (1982)).

23. See infra notes 123-125 and accompanying text.


25. This method has been criticized on several grounds, see infra notes 105-111 and accompanying text. In particular, critics have noted that it may violate the "cases and controversies" requirement of Article III of the U.S. Constitution. See infra notes 326-332 and accompanying text (discussing Justice Scalia's objections on this ground); cf. Fallon & Meltzer, supra note 10, at 1797-1807 (addressing the Article III issue and concluding that prospective decisionmaking, though it may be unwise, is not unconstitutional).


27. Id. at 128. This approach also has been severely criticized, particularly because it treats similarly situated litigants differently. See infra notes 112-114 and accompanying text.
development of nonretroactivity. Indeed, the relative flaws and attributes of each method have been addressed in often confusing detail as the Court has struggled to develop a coherent retroactivity doctrine.

B. Nonretroactivity's Jurisprudential Underpinnings

The foregoing discussion of methods presents nonretroactivity as a fait accompli. And indeed, over the past several decades, the idea that courts may or even should decide some cases prospectively has become unremarkable, if not uniformly admired. But this relative acceptance of nonretroactivity is a fairly recent development—Linkletter v. Walker, decided in 1965, represents the Supreme Court's first departure from full retroactivity. The following sections describe the developments, jurisprudential and legal, that led up to Linkletter.

(1) The Nature of Law

A court's decision not to make a new rule retroactive reflects, at least implicitly, an acknowledgment that courts make and change law. This conception of the nature of law and the judicial role, now almost universally accepted, has not always prevailed. At common law, all judicial decisions were given retroactive effect. Conceptually, this rule of absolute retroactivity fit perfectly with the prevailing "declaratory" theory, generally attributed to Blackstone, that judges do not make laws, but merely discover and declare pre-existing ones. According to

28. See Beytagh, supra note 13, at 1557.
29. See, e.g., id. at 1599 (asserting that "nonretroactivity, for better or for worse, is an established part of our jurisprudence").
30. It could be argued that as a doctrine, nonretroactivity reached its peak in the mid-1970s and has been declining ever since. See infra notes 117-124 and accompanying text (surveying recent developments in the Supreme Court's criminal retroactivity doctrine that significantly restrict its reach); infra Part II.D. (discussing how the Beam decision evidences the current controversy and uncertainty over the scope and propriety of the Court's civil retroactivity doctrine).
32. Id. at 628.
33. See Fallon & Meltzer, supra note 10, at 1759 & n.147. Professors Fallon and Meltzer cite Justice Scalia's opinion in Smith as a possible rejection of this conception. In light of his later comments in Beam, however, it seems safe to say that even Justice Scalia agrees that courts make law: "I am not so naive . . . as to be unaware that judges in a real sense 'make' law." James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring). For a further discussion of Justice Scalia's views, see infra notes 257-262 and accompanying text (discussing his opinion in Smith) and infra notes 325-331 and accompanying text (analyzing his approach in the context of Beam).
35. See 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (stating that the duty of judges is not to "pronounce a new law, but to maintain and expound the old one."); see also Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) ("[Judicial decisions] are, at most, only evidence of what
Blackstone, the laws of God are supreme and any law that contradicts them necessarily is a nullity. Thus, if a court overrules an earlier decision, it is not saying that the old law was wrong, but rather that it was never law at all. A court plays its proper role within Blackstone's model only by giving a "new" rule of law full retroactive effect, applying it to all conduct, regardless of when the claim arose or the suit was filed.

The declaratory theory, and its focus on what law ought to be, became the target of criticism with the rise of legal positivism in the early nineteenth century. While agreeing that ideally law "ought to conform" to morals, John Austin argued that it does not always do so and advocated an approach that analyzes laws as commands made by the sovereign, not by God. According to Austin's "command theory," law is not found; rather, it is made, sometimes by judges acting as the sovereign's subordinate.

H.L.A. Hart, the leading modern positivist, agrees with Austin's criticism of Blackstone's declaratory theory, citing it as one root of the "evil" of formalism. But Hart rejects Austin's simple model of law as a series of imperative commands. Instead, he posits that legal systems are best understood as "a union of primary rules of obligation" (analogous to Austin's commands) and "secondary rules of recognition, the laws are; and are not themselves laws.") To call this the "Blackstonian theory" may be misleading: Sir Mathew Hale postulated a "declaratory theory" thirteen years before Blackstone's birth. See Linkletter, 381 U.S. at 623 n.7 (citing JOHN C. GRAY, NATURE AND SOURCES OF THE LAW 206 (1909)).

36. 1 BLACKSTONE, supra note 35, at *42.
37. See id. at *70.
38. See DeLong, supra note 19, at 119. If we accept Blackstone's basic premise regarding a court's proper role, the obvious corollary is that a court that engages in prospective decision-making usurps the legislature's power. Justice Scalia, in particular, has focused on this aspect of nonretroactivity. See infra notes 326-332 and accompanying text for a discussion of his views on this subject.
40. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 214-15 (5th ed. 1885)
41. Id. at 510.
42. Id. at 521, 621.
43. Fallon & Meltzer, supra note 10, at 1760.
44. Hart, supra note 39, at 609-10. The other root of this evil, according to Hart, is the preoccupation with the separation of powers, which he seems to attribute to Montesquieu. Id. at 610. The relationship between formalism and separation of powers will be discussed in the context of Justice Scalia's approach to nonretroactivity infra notes 326-332 and accompanying text.
46. Id. at 91 (emphasis added).
change, and adjudication," which ultimately are concerned with the ways in which government officials identify and apply primary rules. Hart recognizes that in analyzing specific situations under such general rules, a "penumbra of doubt" sometimes may shroud the inquiry, since it will not always be clear whether a certain rule applies or not. In these instances, "at the margin of rules," courts necessarily perform a rule-making function.

This facet of positivism—its acknowledgment that courts sometimes change rules—suggests a ground for explicitly distinguishing "old" law from new. In this sense, positivism may be viewed as providing a theoretical basis for departing from Blackstone's rule of absolute retroactivity. When a court declares a new rule, it is merely saying the old rule was "wrong," not that it was a nullity. By examining what actually is (rather than focusing on what ought to be), courts may take into account the fact of the old rule's prior existence—an existence that still may affect parties' rights and obligations today. And as the subsequent sections illustrate, it is practical considerations such as these that lie behind the development of nonretroactivity as a legal doctrine.

(2) The Evolution of the Supreme Court's Approach

The United States Supreme Court early declared its adherence to Blackstone's declaratory theory. In United States v. Schooner Peggy the Court held that a new law governing seizure of French ships, promulgated on December 21, 1801, was dispositive of a seizure that had occurred on April 23, 1800. Though lawfully seized according to the laws in existence at the time, the Schooner Peggy was returned to its owner under the rule established by the new law. Similarly, in Norton v. Shelby County the Court held that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

47. Id. at 95 (emphasis added).
48. Id. at 91-96.
49. Id. at 119-20.
50. Id. at 132.
51. See Fallon & Meltzer, supra note 10, at 1761 n.170.
52. Id. at 1760.
53. 5 U.S. (1 Cranch) 103 (1801).
54. Id. at 108.
55. Id.
56. 118 U.S. 425 (1886).
57. Id. at 442.
Over the years, however, the notion that judges sometimes do make law gained increasing acceptance. A progression of cases reflect the Supreme Court's implicit acknowledgement of this view. In 1932, in *Great Northern Railway v. Sunburst Oil & Refining Co.*, the Court held that no federal right was violated when Montana's highest court refused to give a new rule of law retroactive effect. Confronted with the argument that due process forbids nonretroactivity, Justice Cardozo, writing for the Court, stated simply that "[w]e think the federal constitution has no voice upon the subject." And in 1939 Chief Justice Hughes led the Court one step closer to rejecting outright the idea that law is found when, in *Chicot County Drainage District v. Baxter State Bank*, he declared that "the past cannot always be erased by a new judicial decision." The stage was set for *Linkletter* and the subsequent development of the Court's retroactivity doctrine.

C. Development of the Supreme Court's Criminal Retroactivity Doctrine

Although this Note focuses on retroactivity in the civil context, the doctrine first was developed in the area of constitutional criminal procedure. Indeed, the Court's criminal retroactivity doctrine provided both the foundation and the framework for the subsequent development of its civil retroactivity doctrine. Acquiring an understanding of the doctrine in the civil sphere requires familiarity with its origins in the criminal context. Therefore, the following sections survey the history, criticisms, and current status of the Court's criminal retroactivity doctrine.

(1) *Linkletter* and the Foundations of Nonretroactivity

*Linkletter v. Walker* arose in the context of the Warren Court's far reaching and controversial decisions in the area of constitutional criminal procedure. Specifically, the case presented the question whether the rule of *Mapp v. Ohio*, that illegally seized evidence is inadmissible in a state...
criminal trial, would apply to convictions that had become final before the date Mapp was decided.68

The Court in Linkletter began its analysis of the retroactivity issue by surveying its history. It concluded that, under United States v. Schooner Peggy,69 "a change in law will be given effect while a case is on direct review,"70 but that, with regard to a collateral attack on a final judgment, there is no "set 'principle of absolute retroactive invalidity.'"71 And after quoting Justice Cardozo's Sunburst opinion for the proposition that the Constitution does not address the subject of retroactivity,72 the Court listed three factors weighing upon the retroactivity question: first, the purpose of the Mapp rule; second, the reliance placed upon the pre-Mapp rule; and third, the effect retroactive application of Mapp would have on the administration of justice.73

Examination of Mapp in light of these three factors convinced the Court that its rule need not be given wholly retroactive effect.74 The purpose of the exclusionary rule announced in Mapp was to deter illegal police action.75 The Court reasoned that this purpose would not be served by applying the rule retroactively to final convictions, since the misconduct it was designed to deter (the illegal seizure of evidence) had already occurred.76 The Court then noted that both the accused and the states had justifiably relied on the pre-Mapp rule.77 Finally, it concluded that "[t]o make the rule of Mapp retrospective would tax the administration of justice to the utmost."78

Justice Black, joined by Justice Douglas, dissented, criticizing the "arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of Mapp by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions af-
firmed before June 19, 1961. These two related criticisms, that non-retroactivity constitutes arbitrary linedrawing and unfairly discriminates against similarly situated litigants, would animate future debates over the soundness of the doctrine.

The next important step in the development of the Court's retroactivity doctrine occurred with *Stovall v. Denno*, in which the Court held that the rules established in *United States v. Wade* and *Gilbert v. California*, relating to the presence of counsel at pretrial lineups, would apply only to conduct occurring after the date of those decisions. In *Stovall* the Court clarified its retroactivity analysis, specifically stating that it would balance the three factors it had introduced in *Linkletter*—purpose, reliance, and effect—to determine whether a new rule would be given retroactive effect. More importantly, in *Stovall* the Court departed from the rule of *Schooner Peggy*, recently cited with approval in *Linkletter*, that newly declared constitutional rules would, at the very least, apply retroactively to all cases still subject to direct review. Instead, the Court held that the outcome of the three-factor balancing test was wholly determinative of the degree of retroactivity, because "no distinction is justified between convictions now final... and convictions at various stages of trial and direct review." Thus, the Court concluded that the rules of *Wade* and *Gilbert* would not apply retroactively to either final convictions or to cases pending on direct review.

*Stovall's* rule of prospectivity did recognize one obvious and significant exception: both were given the benefit of the rule established in

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79. *Id.* at 641 (Black, J., dissenting).
80. *See infra* notes 110-114, 228, 313 and accompanying text.
81. 388 U.S. 293 (1967).
82. 388 U.S. 218 (1967).
83. 388 U.S. 263 (1967).
84. *See Stovall*, 388 U.S. at 300.
85. *See supra* text accompanying note 73. One influential commentator believes that these three factors were not clearly presented until *Stovall*, see *Beytagh*, supra note 13, at 1566, and the Court itself has at times implicitly endorsed this interpretation, see, e.g., United States v. Johnson, 457 U.S. 537, 543-44 (1982) (discussing the "three Stovall factors"). However, the three factors clearly are set forth and addressed in *Linkletter*. *See supra* text accompanying notes 73-78. Cf. *Corr*, supra note 13, at 747 (discussing what Professor Corr describes as the "Linkletter/Stovall doctrine").
86. *Stovall*, 388 U.S. at 297.
87. 5 U.S. (1 Cranch) 103 (1801).
88. *See supra* text accompanying notes 69-70.
89. *Stovall*, 388 U.S. at 301.
90. *Id.* at 300.
91. *Stovall*, 388 U.S. at 300-01. A similar, though not identical, result was reached in Johnson v. New Jersey, 384 U.S. at 719, 732 (1966) (holding that *Escobedo*'s rule relating to right to counsel and *Miranda*’s rule relating to right to silence apply only to trials begun after the decisions were announced).
their respective cases. In other words, the Wade and Gilbert decisions were made selectively prospective. The Court justified this seemingly disparate treatment of similarly situated defendants as "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." At the same time, it recognized that selective prospectivity raises equitable concerns:

Inequity results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decisionmaking.

Whether the doctrine, as it had developed, reflected sound decisionmaking, particularly in light of concerns regarding its fundamental fairness, would remain an open question, despite the Court's assurances to the contrary.

(2) Justice Harlan Dissents

From the outset, nonretroactivity sparked controversy. Justices Black and Douglas, for example, were consistently critical of the Court's early nonretroactivity decisions. But it was Justice Harlan, who had joined in several of those earlier opinions, who would prove to be nonretroactivity's most influential critic. In Desist v. United States, which addressed whether the rule announced in Katz v. United States, regarding the constitutionality of electronic eavesdropping, would be made retroactive was the first case to spark a dissent by Justice Harlan. Procedurally, Desist is notable for first recognizing the threshold question inherent in any retroactivity analysis: has the decision at issue, in fact, created a new rule of law? The Court concluded that Katz had indeed changed the law, and continued with an analysis of the three Linkletter/Stovall factors. After balancing these factors, it held that Katz should be given selectively prospective application.

92. See Stovall, 388 U.S. at 301.
93. See supra notes 26-27 and accompanying text for a description of selective prospectivity.
94. Stovall, 388 U.S. at 301. But see Desist v. United States, 394 U.S. 244, 256 (1969) (Douglas, J., dissenting) ("[T]here has heretofore been no impediment to producing only dictum through a 'case or controversy'; that tradition started with Marbury v. Madison."); Beytagh, supra note 13, at 1567 (discussing the "ill-advised dictum about Article III").
95. Stovall, 388 U.S. at 301 (footnote omitted).
96. Beytagh, supra note 13, at 1563.
99. See Desist, 394 U.S. at 248-49.
100. Id. at 249-51.
101. See id. at 246.
The Court's decision caused Justice Harlan to reevaluate nonretroactivity. After surveying the doctrine's evolution, he concluded that "'[r]etroactivity' must be rethought."102 Two years later in Mackey v. United States103 he expanded upon his earlier criticisms, mounting a comprehensive and ultimately influential analytical assault on the Court's retroactivity doctrine.104 In Justice Harlan's view, the Court's "ambulatory retroactivity doctrine"105 violated three norms of constitutional adjudication.106

First, he argued that the doctrine allowed, and even encouraged, unprincipled decisionmaking:

[The Linkletter] doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a "technique" that provided an "impetus... for the implementation of long overdue reforms, which otherwise could not be practicably effected."107

Constitutional decisions, according to Justice Harlan's criticism, should not be made out of a desire to limit other, personally distasteful decisions. Not only is such decisionmaking unwise in itself, but it had, he concluded, caused the Court's retroactivity doctrine to evolve in a completely haphazard and unpredictable manner.108

Second, Justice Harlan asserted that in deciding cases nonretroactively, the Court violated its constitutional mandate to "adjudicat[e] cases and controversies according to the law of the land."109 The Linkletter/Stovall factors of purpose, reliance, and effect, he asserted, were criteria that should inform the Court's substantive constitutional analysis.110 They should not, he implied, be manipulated so that the Court could make a new constitutional rule "wholly or partially retroactive or

102. Id. at 258 (Harlan, J., dissenting).
104. See id. at 677-702; see also Griffith v. Kentucky, 479 U.S. 314, 322 (1987) ("In Justice Harlan's views, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."); United States v. Johnson, 457 U.S. 537, 548 (1982) ("We now agree with Justice Harlan that '[r]etroactivity must be rethought'."). For a discussion of these two cases, and how they adopted Justice Harlan's approach, see infra notes 118-125 and accompanying text.
105. Mackey, 401 U.S. at 681 (Harlan, J., concurring and dissenting).
108. Id. at 676-77.
109. Id. at 678-79.
110. Id. at 681.
only prospective as it deems wise." In particular, Justice Harlan strongly criticized the Court’s practice of “[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule” as intruding on the province of the legislature.

Third, Justice Harlan argued that the Court’s selective application of new constitutional rules departed from the “basic judicial tradition” of treating similarly situated litigants similarly. Rules already determined to be wrong should not be applied to litigants whose cases are yet to be decided. Here, he echoed the sentiments that Justices Black and Douglas consistently had expressed ever since Linkletter.

Justice Harlan then cited several damaging effects of the Court’s existing approach. The continued use of selective prospectivity might, he suggested, deter litigants from pursuing claims based upon constitutional interpretations differing from those currently in force, since a defendant whose case was still subject to direct review would face the risk of not gaining the benefit of a new rule should a different litigant’s case be chosen as the vehicle for announcing the new rule. And more importantly, by mitigating the disruptive effects of rule-changing decisions, nonretroactivity allowed the Court to cut itself loose from the traditional guiding force of stare decisis.

These considerations led Justice Harlan to conclude that a different approach to retroactivity was necessary. He proposed that the Court return to Linkletter, and apply all new rules of constitutional law, at a minimum, to all cases still subject to direct review at the time of the rule-changing decision. This approach, in his view, was the only way to resolve the conflict between finality on the one hand, and principled and equitable decisionmaking on the other.

(3) Recent Developments in Criminal Retroactivity

In the criminal field Justice Harlan’s views have proven influential. Over the past few years, retroactivity has come almost full circle from Linkletter, as the Court has nominally adopted Justice Harlan’s sug-

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111. Id. at 677.
112. Id. at 679.
114. See, e.g., supra text accompanying note 79. It is worth noting, however, that while Justice Harlan proposed a rule of retroactivity only for cases still subject to direct review to solve this problem, Justice Black, in contrast, argued for complete retroactivity. Compare Desist, 394 U.S. at 260-69 (Harlan, J., dissenting) with Linkletter v. Walker, 381 U.S. 618, 652-53 (1965) (Black, J., dissenting).
115. Mackey, 401 U.S. at 680 (Harlan, J., concurring and dissenting).
116. See id. at 679-81; Desist, 394 U.S. at 258 (Harlan, J., dissenting).
117. See Beytagh, supra note 13, at 1572-73.
suggested approach to criminal retroactivity. In *Griffith v. Kentucky*, the Court held that the rule established by *Batson v. Kentucky* would apply retroactively to all cases still subject to direct review. In the process, it finally fully acknowledged the validity of the criticisms Justice Harlan raised eighteen years earlier in *Desist*: "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Therefore, the Court announced that new constitutional rules would apply retroactively to criminal cases still subject to direct review.

With its recent decisions in *Teague v. Lane* and *Butler v. McKellar*, the Court appears to have finished crafting the rough contours of its criminal retroactivity doctrine. First in *Teague*, and then in *Butler*, the Court adopted, at least in name, Justice Harlan's suggested approach to retroactivity in the context of habeas corpus: save in limited circumstances, new rules will not apply to convictions subject only to collateral attack. With these standards set, it appears that the Court's criminal retroactivity doctrine will see little more than fine tuning in the near future.

D. Nonretroactivity in Civil Cases

Keeping in mind the history and current status of the Supreme Court's criminal retroactivity doctrine, it now is necessary to travel back two decades to the beginnings of its civil retroactivity doctrine. In 1969 and 1970 the Court decided two very similar civil cases which raised collateral retroactivity questions. In *Cipriano v. City of Houma* the Court held that a Louisiana law giving only "property taxpayers" the
right to vote in elections called to approve the issuance of revenue bonds violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{127} In a one paragraph discussion at the end of the opinion, the Court stated that "[s]ignificant hardships would be imposed on cities, bond-holders, and others connected with municipal utilities if our decision today were given full retroactive effect."\textsuperscript{128} It therefore held that the decision would apply only where, under state law, the time for challenging the election result ha[d] not expired."\textsuperscript{129} In \textit{City of Phoenix v. Kolodziejski},\textsuperscript{130} the Court reached an essentially identical result with regard to elections authorizing the issuance of general obligation bonds.\textsuperscript{131}

These two cases deserve comment, primarily because the Court has relied heavily upon them in later decisions.\textsuperscript{132} First, in both cases the Court devoted only one paragraph to the retroactivity question; its analysis was neither exhaustive nor particularly illuminating.\textsuperscript{133} Second, it is worth clarifying the result reached in \textit{Cipriano}. There, the Court, in an unfortunate choice of wording, stated that it would "apply [its] decision in this case prospectively."\textsuperscript{134} In the very next sentence, however, the Court made it clear that it was not really applying the decision prospectively, but was merely limiting its application—the new rule would apply only to those challenges still subject to direct review; it would not apply to collateral attacks.\textsuperscript{135} Thus, the result in \textit{Cipriano} is directly analogous to that of \textit{Linkletter}, in which the new rule was held to apply to all convictions still subject to direct review, but not to those open only to collateral attack.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{127} Id. at 702.
\item \textsuperscript{128} Id. at 706 (citing \textit{Linkletter v. Walker}, 381 U.S. 618 (1965); \textit{Chico County Drainage Dist. v. Baxter State Bank}, 308 U.S. 371 (1939); \textit{Great N. R.R. v. Sunburst Oil & Ref. Co}, 287 U.S. 358 (1932)).
\item \textsuperscript{129} Id.
\item \textsuperscript{130} 399 U.S. 204 (1970).
\item \textsuperscript{131} Id. at 214.
\item \textsuperscript{132} \textit{See}, e.g., \textit{American Trucking Ass'ns v. Smith}, 110 S. Ct. 2323, 2338-39 (1990); \textit{id.} at 2351-52 (Stevens, J., dissenting).
\item \textsuperscript{133} This raises the question whether these cases deserve the attention they still receive today. For example, both Justice O'Connor's plurality opinion and Justice Stevens's dissent in \textit{Smith} devoted more space to the two cases than the Court had actually given to the retroactivity issue in the cases themselves. \textit{See Smith}, 110 S. Ct. at 2338-39 (plurality opinion of O'Connor, J.); \textit{id.} at 2351-52 (Stevens, J., dissenting).
\item \textsuperscript{134} \textit{Cipriano v. City of Houma}, 395 U.S. 701, 706 (1969) (per curiam) (emphasis added).
\item \textsuperscript{135} \textit{Id.} At least one commentator, focusing on the words used by the Court rather than the facts behind them, has cited \textit{Cipriano} as an example of pure prospective decisionmaking. \textit{See Beytagh, supra} note 13, at 1575-76 (1975). This interpretation cannot be squared with the facts of the case. Indeed, Justice Harlan, concurring in \textit{United States v. Estate of Donnelly}, 397 U.S. 286 (1970), cited \textit{Cipriano} as supporting his proposal that new decisional rules should always be applied to all conduct still subject to direct review. \textit{See id.} at 296 (Harlan, J., concurring).
\item \textsuperscript{136} \textit{See supra} notes 65-67 and accompanying text.
\end{itemize}
United States v. Estate of Donnelly,\(^{137}\) decided during the same term as Kolodziejski, is notable not for its holding, but rather for Justice Harlan's concurring opinion. Concerned that the majority's opinion "[might] point in the direction of a retroactivity quagmire in civil litigation not unlike that in which the Court has become ensnared in the criminal field,"\(^{138}\) Justice Harlan, analogizing from the criminal to the civil arena, reiterated several of the points he had made in his *Desist* dissent:

The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of parties to a transaction. Yet once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court. The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, . . . so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life.\(^{139}\)

Justice Harlan noted in conclusion that in the civil area the law of remedies provides courts with a measure of flexibility. Therefore, equitable considerations, such as reliance, should not determine whether or not a new rule be given retroactive effect, but may instead be taken into account in fashioning an appropriate remedy.\(^{140}\)

Despite Justice Harlan's warning, less than two years later the Court did ensnare itself in a civil retroactivity quagmire with its decision in *Chevron Oil Co. v. Huson*.\(^{141}\) Plaintiff Huson had suffered a back injury while working on an off-shore drilling rig located off the Gulf Coast of Louisiana and owned and operated by Chevron.\(^{142}\) He brought suit in


\(^{138}\) *Id.* at 295 (Harlan, J., concurring).

\(^{139}\) *Id.* at 295-96 (citation omitted). Justice Stevens, in his dissent in *Smith*, quoted this exact passage. *See* American Trucking Ass'n's *v. Smith*, 110 S. Ct. 2323, 2350-51 (1990) (Stevens, J., dissenting).

\(^{140}\) *Estate of Donnelly*, 397 U.S. at 296-97 (Harlan, J., concurring). Dissenting in *Smith*, Justice Stevens emphasized this point. *See* *Smith*, 110 S. Ct. at 2355-56 (Stevens, J., dissenting); *cf.* Fallon & Meltzer, *supra* note 10, at 1736-37 (proposing a general theory of "constitutional remedies").

\(^{141}\) 404 U.S. 97 (1971). *Chevron Oil* did not involve a constitutional issue, but instead revolved around a tort law statute of limitations question. For this reason alone, the wisdom of applying *Chevron Oil* in the context of tax refund cases is questionable. *See infra* Part II.C.(2).

\(^{142}\) *Chevron Oil*, 404 U.S. at 98.
federal district court a little more than two years after the accident.\textsuperscript{143} At the time the suit was initiated, a long line of federal court decisions supported the application of the admiralty doctrine of equitable laches to personal injury suits such as Huson's.\textsuperscript{144} However, while the case was in the discovery stage, the Court announced its decision in Rodrigue v. Aetna Casualty & Surety Co.,\textsuperscript{145} holding that state tort law, not admiralty law, governed suits such as Huson's.\textsuperscript{146} Relying on Rodrigue, the district court applied Louisiana's one-year statute of limitations for personal injury actions, and granted summary judgment for Chevron.\textsuperscript{147}

The issue before the Supreme Court was whether the new rule established by Rodrigue should be applied retroactively to bar Huson's claim. The Court began its analysis of the issue by stating that "[i]n recent years, the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process. But the problem is by no means limited to that area."\textsuperscript{148} After canvassing past cases, the Court identified three factors bearing on the nonretroactivity question.\textsuperscript{149} Thus was born the three-prong \textit{Chevron Oil} test.

First, the Court stated that the decision to be applied nonretroactively must have established a new principle of law, either by overruling clear past precedent, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.\textsuperscript{150} Second, citing Linkletter, it declared that a court must consider the history, purpose, and effect of the new rule to determine if retroactive application would further or retard the rule's operation.\textsuperscript{151} Third, it asserted that a court must consider whether retroactive application of the new rule would "produce substantial inequitable results."\textsuperscript{152}

The Court next examined the facts in light of these three factors. First, noting that Rodrigue had overruled a long line of Fifth Circuit precedent, the Court concluded that the case had established a new principle of law.\textsuperscript{153} Second, after finding that one of the primary purposes of Rodrigue's new rule was to provide a remedy to injured employees, the Court noted that applying the rule retroactively would contradict this purpose by denying relief to Huson.\textsuperscript{154} Finally, stating that its decision would "simply preserve [Huson's] right to a day in court," the Court

\begin{itemize}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.} at 99.
  \item \textsuperscript{145} 395 U.S. 352 (1969).
  \item \textsuperscript{146} \textit{Chevron Oil}, 404 U.S. at 99 (citing Rodrigue, 395 U.S. at 366).
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} at 105-06 (citations omitted).
  \item \textsuperscript{149} \textit{Id.} at 106.
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} \textit{Id.} at 106-07 (citing Linkletter v. Walker, 381 U.S. 618, 629 (1965)).
  \item \textsuperscript{152} \textit{Id.} at 107 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.} at 107-08.
\end{itemize}
concluded that, in contrast, retroactive application would “produce the most ‘substantial inequitable results.’”\(^{155}\) Therefore, the rule established in *Rodrique* was given purely prospective effect, and Huson’s claim against Chevron was remanded to the trial court.\(^{156}\) As embodied in *Chevron Oil*, the Court’s civil retroactivity doctrine would remain in the shadows, while criminal retroactivity continued to change and provoke controversy.

### II. Nonretroactivity in Constitutional Tax Refund Cases

For seventeen years *Chevron Oil* existed in relative obscurity, surfacing occasionally to wreak confusion in the lower courts,\(^{157}\) but otherwise evoking little interest. With its decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,\(^{158}\) *American Trucking Ass’ns v. Smith*,\(^{159}\) and *James B. Beam Distilling Co. v. Georgia*,\(^{160}\) however, the Court has brought civil retroactivity back into the limelight. This Part examines the *McKesson, Smith*, and *Beam* decisions. The examination reveals serious flaws in the Court’s current approach: *McKesson*, weakened by compromise, delivers much less than it seems to promise; *Smith and Beam*, illustrative of deep divisions in the Court, promise only uncertainty.

#### A. *McKesson*: Fundamental Fairness and the Right to a Remedy

In *McKesson*, the Supreme Court addressed the remedial question that is presented after a state tax is held unconstitutional as applied to the taxpayer: to what relief is the taxpayer entitled? Not surprisingly, the states have been extremely creative in finding ways to avoid paying refunds of unconstitutional state taxes.\(^{161}\) In *McKesson*, however, a unanimous Court seemingly set up a roadblock for states seeking to avoid paying refunds, holding that the Due Process Clause of the Fourteenth Amendment requires that states provide “meaningful backward-looking relief” to remedy any such unconstitutional deprivations.\(^{162}\) *McKesson*’s seemingly broad mandate has been hailed for its promise of fun-

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155. *Id.* at 108 (quoting *Cipriano*, 395 U.S. at 706).

156. *Id.* at 109. To be precise, only that portion of *Rodrique* applying to the statute of limitations would be made purely prospective; its other provisions, apparently, were to be applied retroactively. *Id.* at 108 n.10.

157. See *Corr*, supra note 13, at 781-84; *DeLong*, supra note 19, at 117-18.


161. See generally Philip M. Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 TAX LAW. 103 (1987) (discussing states’ methods of avoiding payment of refunds after a tax has been declared unconstitutional under the Commerce Clause).

damental fairness to taxpayers. The following sections examine McKesson and show that for the time being, at least, this promise rings hollow.

(1) The McKesson Decision

For several decades, Florida's liquor excise tax scheme, like that of many other states, had favored in-state products over out-of-state products. While such discrimination against interstate commerce was clearly forbidden under accepted interpretations of the Commerce Clause, the states had long assumed that the Twenty-first Amendment shielded their discriminatory tax schemes from the reach of the Commerce Clause. However, in Bacchus Imports, Ltd. v. Dias the United States Supreme Court held, inter alia, that the Twenty-first Amendment does not protect such discriminatory tax schemes. In light of Bacchus, the Florida Legislature revised its excise tax scheme. Instead of ending the discrimination, however, Florida made only cosmetic changes in the system, which still gave preferential treatment to in-state products.

Under Florida law, a taxpayer has no right to a predeprivation remedy; any challenge to a taxing scheme must be made in the form of a refund action after the tax has been paid. Petitioner McKesson, whose products did not qualify for preferential tax treatment, brought a refund action in Florida state court. The Florida Supreme Court agreed with McKesson that the taxing scheme was unconstitutional; however, it held that McKesson was not entitled to retroactive relief and refused to order

163. See Fallon & Meltzer, supra note 10, at 1829 ("[T]he great merit of McKesson lies in its promise for the future."); Hellerstein, Preliminary Reflections, supra note 3, at 334.
164. McKesson, 110 S. Ct. at 2242-43.
165. The Commerce Clause provides that "the Congress shall have Power . . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const., art. I, § 8. Professor Tribe notes that

Although the Constitution contains language explicitly limiting state interference with foreign commerce, nowhere does it explicitly limit state interference with interstate commerce. All of the doctrine in this area is thus traceable to the Constitution's negative implications; it is by interpreting "these great silences of the Constitution" that the Supreme Court has limited the scope of what the states might do.
166. Hellerstein, Preliminary Reflections, supra note 3, at 325.
168. Id. at 263.
169. McKesson, 110 S. Ct. at 2243. Specifically, the new statute deleted the express preferences for "Florida-grown" products, replacing them with preferential treatment of certain citrus, grape, and sugarcane products, all of which are commonly grown in Florida, but not most other states. Id.
170. Id. at 2251.
It based this decision on two grounds. First, it noted that the Division of Alcoholic Beverages and Tobacco had "collected the liquor tax in 'good faith reliance on a presumptively valid statute.'" Second, the court reasoned that, because McKesson probably had passed the extra cost of the tax on to its customers, allowing a refund would give McKesson a "windfall." McKesson petitioned for writ of certiorari to the United States Supreme Court and the Court granted the petition, consolidating the case with Smith.

The Right to "Meaningful Backward Looking Relief"

The question before the Court was "whether prospective relief, by itself, exhausts the requirements of federal law." The response was a resounding no:

"[I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

Thus the Court acknowledged the existence of a right—the Due Process Clause protects taxpayers from unconstitutional exactions—and held out the promise of a remedy should that right be violated.

In a footnote the Court distinguished the remedial question at issue in McKesson from the retroactivity question confronted in Smith. Although the Court's footnote seems confusing, the reason that there was no retroactivity issue in McKesson is simple: the Florida excise tax, clearly unconstitutional in light of Bacchus, was enacted after the Bacchus decision. Thus, the Court did not have to address the question whether Bacchus should be applied retroactively.

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171. Id. at 2244.
172. Id. (quoting McKesson v. Division of Alcoholic Beverages & Tobacco, 524 So. 2d 1000, 1010 (1988)) (footnote omitted).
173. Id. (citing McKesson, 524 So. 2d at 1010).
174. Id. at 2244.
175. Before reaching the remedial question, the Court addressed Florida's jurisdictional challenge. Florida had argued that the Eleventh Amendment to the U.S. Constitution barred the Court from exercising jurisdiction over McKesson's claim. Id. at 2244-45. This claim was quickly rejected, as the Court cited a long line of cases supporting its exercise of appellate jurisdiction over the final judgment of a state court involving an issue of federal law. Id. at 2245.
176. Id. at 2247.
177. Id.
178. Id. at n.15; see also American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2332-33 (1990) (distinguishing McKesson).
179. McKesson, 110 S. Ct. at 2243.
The Court's analysis was based on a series of little-known cases dating from the early part of this century that had involved similar claims. According to the "traditional" analysis developed in those cases: "Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." Next, the Court defined "meaningful backward-looking relief." It prefaced its analysis by stating that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." Thus, Florida could reformulate the contested tax as it deemed appropriate so long as it treated McKesson and its in-state competitors in a manner "consistent with the dictates of the Commerce Clause." The Court then provided three specific examples of remedies that would be appropriate. First, Florida could refund that portion of the tax that was discriminatory; that is, the difference between what McKesson actually paid and what it would have paid had it been taxed at the same rate as its in-state competitors. Second, Florida could assess and collect additional taxes from McKesson's competitors, thus undoing its past discrimination. In this regard, the Court noted that the Constitution imposes a limit on the retroactive assessment of taxes, and that such efforts "may not be perfectly successful." It concluded that "a good-faith effort to administer and enforce such a retroactive assessment likely would constitute adequate relief." Finally, Florida could implement some combination of a refund and a retroactive assessment on favored competitors so long as the result was a nondiscriminatory taxing scheme.

b. Florida's Equitable Arguments

The Florida Supreme Court had relied on two "equitable considerations" in refusing to grant McKesson retroactive relief. The United States Supreme Court, however, made short shrift of these two conten-
tions. First, responding to the assertion that the discriminatory tax had been implemented "in good faith reliance on a presumptively valid statute," the Court noted that the tax was virtually identical to that struck down in *Bacchus* and that Florida could "hardly claim surprise at the . . . invalidation of the scheme." It did recognize that, if justified, such reliance interests required protection. However, it asserted that "[a] State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases."

The Florida Supreme Court also had claimed that to allow McKesson a refund would be to give it a windfall since it likely had passed the cost of the tax on to its customers. After noting logical flaws in this argument, the Court completely rejected this "pass-on" defense: "The State cannot persuasively claim that 'equity' entitles it to retain tax monies taken unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place." In other words, the taxing scheme had been discriminatory precisely because it had forced out-of-state producers to charge higher prices for its products, thereby giving in-state producers a competitive advantage; McKesson had received no windfall. Moreover, the Court's rejection of these so-called "equitable considerations" suggests that Florida, having implemented an unconstitutional exaction, was in no position to argue the equities.

(2) *A Stunning Victory?*

Does *McKesson* truly represent a "stunning victory" for taxpayers? The Court did unanimously declare that due process requires a remedy for unconstitutional deprivations. Notwithstanding this declaration, however, three aspects of *McKesson* suggest that states still will be able to avoid paying refunds in many situations. First, by defining "meaningful backward-looking relief" broadly, the Court left states the opportunity to turn "meaningful" into meaningless. Specifically, states should pay particular attention to footnote twenty-three of the opinion, in which the Court discusses "good faith effort[s]" to retroactively assess additional taxes on those who benefitted from prior discriminatory

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191. *Id.* (citing *McKesson v. Division of Alcoholic Beverages & Tobacco*, 524 So. 2d 1000, 1010 (1986)).
192. *Id.* at 2255.
193. *Id.* at 2254.
194. *Id.* at 2255 (citing *McKesson v. Division of Alcoholic Beverages & Tobacco*, 524 So. 2d 1000, 1010 (1986)).
195. *Id.* at 2256 (footnote omitted).
schemes. This is especially relevant in light of the fact that due process also limits the states' ability to assess taxes retroactively. It seems likely that states may try to meet McKesson's requirements by assessing minimal retroactive taxes on those who had previously benefitted, on the theory that this represents a "good faith" effort to follow the dictates of due process.

Second, states certainly will note that McKesson encourages the implementation of various procedural requirements for tax refund actions. Unfortunately, the Court did not set any clear constitutional parameters for such procedural roadblocks. How strict can states be and still provide due process? Undoubtedly, this issue will be the subject of future litigation, as taxpayers challenge extremely strict procedural restrictions set up by the states in response to McKesson.

Finally, as Smith proves, the Court's retroactivity doctrine remains a potent weapon for denying refunds in constitutional tax cases. Cases like McKesson, where the constitutional violation was so clear that no nonretroactivity argument could credibly be made, may prove to be the exception. As the next section shows, the Court's retroactivity doctrine, and specifically the Chevron Oil test, poses significant problems for taxpayers seeking a refund of unconstitutionally exacted state taxes.

B. Smith: Nonretroactivity Strikes Back

In Smith the Court, faced with a choice of law rather than a remedies question, reached a remarkably different result from that reached in McKesson. Whereas McKesson was unanimously decided, Smith produced no majority opinion, as the Justices split hopelessly over the retroactivity issue. The following sections provide an overview of Smith. Part II.C. then analyzes the case in conjunction with McKesson. The analysis reveals that the different approaches to constitutional tax refund questions that the two cases represent are irreconcilably contradictory, suggesting that McKesson represents less of a victory for the taxpayer than the Court and commentators might have us believe.

197. McKesson, 110 S. Ct. at 2252 n.23.
198. In Welch v. Henry, 305 U.S. 134 (1938), the Court held that a two-year period "approach[ed] or reach[ed] the limit of permissible retroactivity." Id. at 151.
199. On remand in McKesson the Florida Supreme Court was careful to note that such retroactive assessments must comport with the requirements of due process. See Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 574 So. 2d 114, 115 (Fla. 1991). Indeed, two Justices of the Florida Supreme Court specifically mentioned footnote 23 of the McKesson opinion in their separate concurrences. See id. at 117 (Overton, J., concurring); id. at 118 (Grimes, J., concurring).
200. See infra Part II.C. (criticizing application of retroactivity doctrine in constitutional tax refund cases as inconsistent with McKesson).
(1) Factual and Procedural Background

In 1983 out-of-state truckers challenged Arkansas's newly enacted annual highway use ("HUE") tax in Arkansas state court, contending that the tax discriminated against out-of-state truckers in violation of the Commerce Clause. The taxpayers claimed that, as structured, the HUE tax discriminated against interstate commerce by imposing greater per-mile costs on out-of-state truckers than those imposed on in-state truckers.  

The trial court rejected the taxpayers' challenge. The Arkansas Supreme Court affirmed, holding that the tax was constitutional under a series of United States Supreme Court cases dating back over three decades. The taxpayers appealed to the United States Supreme Court, which held the case pending its decision in American Trucking Ass'ns v. Scheiner, which involved a similar constitutional challenge to two Pennsylvania highway use taxes.  

In Scheiner a five-four majority held that the Pennsylvania taxes at issue discriminated against interstate commerce in violation of the Commerce Clause, and remanded the case to the Pennsylvania Supreme Court. Because the Court's resolution of Scheiner bore on the constitutionality of the Arkansas HUE tax, the Court also remanded Smith to the Arkansas Supreme Court for reconsideration in light of its decision in Scheiner.  

203. Id. at 2327-28.
207. Smith, 110 S. Ct. at 2328.
208. Scheiner, 483 U.S. at 297-98. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, dissented on the grounds of stare decisis and state reliance on the Aero-Mayflower line. Id. at 302-03 (O'Connor, J., dissenting). Justice Scalia filed a separate dissent, also joined by Chief Justice Rehnquist, arguing that the Court's dormant commerce clause doctrine is constitutionally unsound. Id. at 304-06 (Scalia, J., dissenting).
209. Smith, 110 S. Ct. at 2328. The taxpayers then sought to enjoin the state from collecting any further taxes, or alternatively, to order an escrow of the taxes pending reconsideration of their constitutional claim. The Arkansas Supreme Court denied the taxpayers motion; but on appeal, Justice Blackmun ordered the State to "escrow the HUE taxes to be collected until a final decision on the merits in this case is reached." American Trucking Ass'ns v. Gray, 483 U.S. 1306, 1310 (1987) (in chambers), aff'd sub nom. American Trucking Ass'ns v. Smith, 110 S. Ct. 2323 (1990).
Finally, on March 14, 1988, the Arkansas Supreme Court, reconsidering the case in light of Scheiner, held the HUE tax to be unconstitutional.\(^{210}\) The Arkansas court further held, however, that under Chevron Oil,\(^{211}\) the Scheiner decision should not be given retroactive effect.\(^{212}\) After the taxpayers’ petition for a rehearing was denied, they sought a writ of certiorari to the United States Supreme Court. The Court granted the petition, and consolidated the case with McKesson, which was decided on the same day.\(^{213}\)

(2) The Plurality Opinion

According to Justice O’Connor’s plurality opinion, the only question before the Court was: “Did the Arkansas Supreme Court apply Chevron Oil correctly?”\(^{214}\) In reaching this question, it noted that, while Griffith v. Kentucky\(^ {215}\) recently had brought about substantial changes in the Court’s criminal retroactivity doctrine, “retroactivity of decisions in the civil context ‘continues to be governed by the standard announced in [Chevron Oil].’”\(^ {216}\)

The plurality also took care to distinguish the retroactivity question here at issue from the “distinct remedial question” at issue in McKesson.\(^ {217}\) According to the Smith plurality, the question before the Court was “whether there [has been] a constitutional violation in the first place.”\(^ {218}\) In other words, unless Scheiner was given retroactive effect, there was no constitutional violation until the date of the decision, and thus no remedy required under McKesson for any taxes levied before that date.

Applying the three-prong Chevron Oil test, the plurality held that Scheiner would not apply to taxation occurring before the date the rule established in Scheiner was decided.\(^ {219}\) First, it addressed the question of whether Scheiner had established a new principle of law: “We think it obvious that Scheiner meets the first test of nonretroactivity.”\(^ {220}\) Specifi-
cally, it found that *Scheiner* had overruled past precedent upon which "the State of Arkansas relied in enacting and assessing the HUE tax."^{221} In a brief, four sentence discussion, the plurality next addressed the "purpose and effect" prong of the *Chevron Oil* test.^{222} According to Justice O'Connor, the purpose to be furthered was the Commerce Clause's prohibition of state discrimination against interstate commerce.^{223} By finding that *Scheiner* had established a new rule of law, the Court already had determined that HUE was a legitimate taxing scheme up until *Scheiner* was decided. Therefore, Justice O'Connor concluded, retroactive application of *Scheiner* would not serve the purpose of the Commerce Clause, since "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce."^{224}

Finally, the plurality considered the equities of retroactive application of *Scheiner*. In this regard, it put great emphasis on the State's reliance upon past precedent, as well as the fiscal problems it might face if required to tender a refund.^{225} It then asserted conclusorily that "applying *Scheiner* retroactively would 'produce substantial inequitable results.'"^{226}

(3) The Dissenting Opinion

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented, characterizing the plurality opinion as "nothing more

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^{221} *Id.* at 2332. While the plurality's reading of *Scheiner* is not unreasonable, it is less than "obvious" that the *Aero Mayflower* line was, in fact, overruled. See American Trucking Ass'n v. Scheiner, 483 U.S. 266, 296 (1987) (stating that the *Aero Mayflower* precedents are still valid in certain situations). But see *id.* at 298 (O'Connor, J., dissenting) ("[T]he Court today directly overrules the holdings of at least three cases [including] ... *Aero Mayflower* ... "); see also infra notes 273-278 and accompanying text (discussing how this first prong of the *Chevron Oil* test lends itself to result-oriented decisionmaking).

^{222} More precisely, the second prong requires that the court "'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" *Chevron Oil* Co. v. Huson, 404 U.S. 97, 106-07 (1971) (quoting *Linkletter* v. Walker, 381 U.S. 618, 629 (1965)).

^{223} *Smith*, 110 S. Ct. at 2332.

^{224} *Id.* A closer examination of the facts reveals that things are not nearly so clear as Justice O'Connor would have us believe. See infra notes 279-285 and accompanying text (discussing flaws of *Chevron Oil*'s second prong).

^{225} *Smith*, 110 S. Ct. at 2333. Interestingly, the plurality did not recognize any equities, such as "fundamental fairness" weighing in the taxpayers' favor.

^{226} *Id.* at 2333 (quoting *Chevron Oil* Co. v. Huson, 404 U.S. 97, 107 (1971)). The taxpayers did win one small victory. Some had paid HUE taxes for the post-*Scheiner* tax year both before and after the date of the *Scheiner* decision. The Arkansas Supreme Court had held that the State's collection of these taxes was constitutional up until the date of Justice Blackmun's escrow order. However, the plurality held that the Arkansas Supreme Court had misapplied *Chevron Oil* and that the taxpayers probably had a valid claim for all taxes that were to be applied to the post-*Scheiner* tax year, no matter when paid. It therefore reversed and remanded with respect to this aspect of the state court's decision. *Id.* at 2335-36.
than a misreading of... *Chevron Oil Co. v. Huson.* Instead, the dissent would have dealt with the case in the same manner as *McKesson*, remanding to the state court to determine the appropriate backward-looking relief. In support of this approach, Justice Stevens raised two distinct arguments. First, echoing Justice Harlan's criticisms of nonretroactivity, he declared that "[f]undamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review." Second, he suggested that the plurality's approach wrongly tangled the two threads of retroactivity, asserting that *Chevron Oil* merely "establish[ed] a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice of law principle applicable to all cases on direct review."

In arguing for a per se rule of retroactivity with regard to conduct still subject to direct review, the dissent was essentially proposing that the recently established rule of *Griffith v. Kentucky* be extended to the civil area: "*Griffith* was a criminal case, but the force of its reasoning cannot properly be so limited." It then quoted at length from Justice Harlan's concurrence in *United States v. Estate of Donnelly,* paying particular attention to his assertion that the flexibility of the law of remedies allows consideration of equitable interests, such as reliance, in fashioning an appropriate remedy. This idea, the dissent intimated, was implicit in the *McKesson* holding and sufficient to ensure that the State's reliance interests would be protected.

In addition, the dissent argued that the plurality's decision was not faithful to precedent. In this regard, it cited *Cipriano v. City of Huoma* and *Phoenix v. Kolodziejski* as standing for the proposition that new decisional rules relating to the constitutionality of a state or local law should be applied retroactively to all civil cases not yet final.

The dissenters concluded this portion of their argument by declaring that "[t]he evenhanded administration of justice requires that we give [the taxpayers] the benefit of the same decisional rule that we applied in favor of the taxpayers in *Scheiner.*"

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227. *Id.* at 2346 (Stevens, J., dissenting).
228. *Id.* at 2355-56.
229. *Id.* at 2349.
230. *Id.* at 2353.
232. *Smith,* 110 S. Ct. at 2350 (Stevens, J., dissenting).
234. *Smith,* 110 S. Ct. at 2350-51 (Stevens, J., dissenting).
235. *Id.* at 2355-56.
238. *Smith,* 110 S. Ct. at 2351-52 (Stevens, J., dissenting) (citing *Cipriano,* 395 U.S. at 706; *Kolodziejski,* 399 U.S. at 214).
239. *Id.* at 2352.
The second part of the dissent's argument, that *Chevron Oil* merely established a remedial principle and not a choice of law provision, was based on "[c]lose examination of *Chevron Oil* and its progeny."240 This close examination began with *Chevron Oil* itself. The dissenters dismissed the plurality's interpretation of the case as being overbroad, instead characterizing the case as one involving "the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver."241 They then went on to fit the remainder of the Court's civil retroactivity cases into "a similar mold," concluding that "these cases are all remedy cases in which, as Justice Harlan explained, consideration of reliance might be appropriate."242

Justice O'Connor found the dissent's argument troublesome enough to offer a response. First, she stated that the decision neither unfairly favored the *Scheiner* litigants, nor unfairly disfavored the litigants currently before the Court.243 This assertion was based on the fact that in *Scheiner* the Court had addressed only the question of the Pennsylvania tax's constitutionality, and had faced no retroactivity issue comparable to the one now before it.244 Since the two cases had resolved completely different issues, reasoned Justice O'Connor, there was simply no basis for the argument that the two cases treated similarly situated litigants differently.245

Second, the plurality asserted that the dissent's argument that new decisions should be applied retroactively to civil cases which are pending on direct review was "little more than a proposal that we sub silentio overrule *Chevron Oil*."246 And indeed, the plurality's characterization is correct. For if the Court were to adopt Justice Harlan's suggested rule, a court faced with a factual situation similar to that of *Chevron Oil*, in which plaintiff's claim was pending on direct review at the time of the rule-changing decision, would have no choice but to apply the new rule retroactively.247

Next, the plurality disputed the dissent's contention that *Chevron Oil* merely stated a remedial provision: "While application of the princi-
pies of retroactivity may have remedial effects, they are not themselves remedial principles.” The plurality noted that commentators, federal appellate courts, and state courts all had considered *Chevron Oil* as a choice of law provision, not a remedial doctrine. And once again, the plurality’s characterization was correct. One need only look to footnote eight of *Griffith v. Kentucky* to see that in 1987, all four of the now-dissenting Justices had joined in an opinion which stated that “the area of civil retroactivity . . . continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*.” This footnote specifically cites *Chevron Oil* as the standard for civil retroactivity, not for a mere remedial principle.

Finally, the plurality declined the dissent’s invitation to extend *Griffith*, which had adopted Justice Harlan’s proposals regarding criminal retroactivity, to the civil sphere. It justified this decision with the statement that “there are important distinctions between the retroactive application of civil and criminal decisions that make the *Griffith* rationale far less compelling in the civil sphere.” But this conclusory assertion ignores the logic underlying *Griffith*. There, the Court quoted extensively from Justice Harlan’s opinions and went on to adopt his proposed reforms in the area of criminal retroactivity. What the plurality in *Smith* failed to acknowledge is that Justice Harlan recognized little conceptual difference between criminal and civil retroactivity. Nor did it need do so to meet the dissent’s argument, which never proposed that Justice Harlan’s approach be adopted by extending *Griffith* to civil cases. Instead, the dissent tried to reconcile two essentially irreconcilable concepts: it argued that *Chevron Oil* can coexist with a doctrine that applies new rules retroactively to all conduct still subject to direct review. By mischaracterizing *Chevron Oil* as a mere remedial principle, the dissent detracted from its strongest argument—namely,
that nonretroactive decisionmaking is inconsistent with basic norms of constitutional adjudication.

(4) The Concurring Opinion

Justice Scalia’s concurring opinion shows that Justice Harlan was right when he asserted that the Court’s nonretroactivity doctrine exists for all the wrong reasons. At the same time, the concurrence is notable for being the most straightforward of the three opinions filed in Smith.

Justice Scalia candidly admitted that he “share[s] Justice Stevens’ perception that prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.” He then went on to give an analysis of Smith that recalls Blackstone’s declaratory theory:

To hold a governmental act to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it . . . . [T]he question is not whether some decision of ours “applies” in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute . . . . Either enforcement of the statute at issue in Scheiner . . . was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision . . . .

Like Blackstone, Scalia focuses on what law ought to be; constitutional questions have right answers and previous “wrong” interpretations should be a nullity. Despite his forceful criticism of nonretroactivity, Justice Scalia concurred in the judgment because of his belief that the Court’s dormant commerce clause doctrine, on which the Scheiner holding was based, is “arbitrary, conclusory, and irreconcilable with the constitutional text.” In other words, he joined the plurality in order to limit the effect of a decision with which he disagreed. The phenomenon of Justices using nonretroactivity to limit distasteful rules was one of the evils cited by Justice Harlan twenty-one years earlier in Mackey.

258. See Mackey, 401 U.S. at 676 (Harlan, J., concurring and dissenting); supra text accompanying note 106.
259. Smith, 110 S. Ct. at 2343 (Scalia, J., concurring in the judgment).
260. Id. (emphasis in original)
261. See supra note 165.
262. Id. at 2344 (quoting DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 234 (1985)); see also Walter Hellerstein, Justice Scalia and the Commerce Clause: Reflections of a State Tax Lawyer, 12 CARDOZO L. REV. 1763 (1991) (“Being asked to examine Justice Scalia’s views on the Supreme Court’s dormant commerce clause jurisprudence is like being asked to examine the National Rifle Association’s views on gun control.”)
deed, Justice Scalia's opinion in *Smith* brings to mind once again Justice Harlan's declaration that retroactivity must be rethought.

C. Fundamental Fairness and Nonretroactivity

As the Court acknowledged in *Griffith*, retroactivity raises serious questions regarding the Court's role as constitutional adjudicator. Smith clearly illustrates how well founded those concerns are. A close examination of *Smith* reveals that the doctrine's application to constitutional tax refund cases, both in theory and as embodied in *Chevron Oil*, simply cannot be squared with norms of principled constitutional decisionmaking. Nor can it be squared with *McKesson*'s broad language; *Smith* illustrates how hollow "meaningful backward-looking relief" truly is.

(1) Nonretroactivity in Constitutional Tax Refund Cases

Justice Harlan's criticisms of nonretroactivity have been chronicled elsewhere in this Note. Nevertheless, they bear repeating, especially in light of *Smith*.

First, Justice Harlan was concerned that the Court's retroactivity doctrine encouraged unprincipled decisionmaking. The doctrine, he noted, had developed as an adjunct to the Court's revolutionary decisions in the area of criminal procedure; some Justices used nonretroactivity to limit the effect of decisions with which they disagreed, while others used it as a means of implementing changes which could not otherwise be practically effected.

The result in *Smith* illustrates the accuracy of this criticism. Justice O'Connor, the author of the plurality opinion, had authored one of the two dissents in *Scheiner*. Justice Scalia, author of the other *Scheiner* dissent, concurred in the result reached by the *Smith* plurality, candidly admitting that his reason for doing so was his belief that *Scheiner* was unsound. And Chief Justice Rehnquist, who had joined in both *Scheiner* dissents, joined the plurality in *Smith*. These facts suggest that at least three of the Justices who voted to deny the taxpayers' claim for retroactive relief were motivated by a desire to limit *Scheiner* as much as possible.

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265. See supra notes 103-114 and accompanying text.
266. See supra note 106 and accompanying text.
267. See id.
268. American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2345 (1990) (Scalia, J., concurring). Justice Powell, the fourth *Scheiner* dissenter, was no longer on the Court when *Smith* was decided. Justice Kennedy, who replaced Justice Powell, joined the plurality opinion.
269. Justice White was the sole member of the *Scheiner* majority to join the *Smith* plurality. Since he authored neither opinion, any theory regarding his switch of positions would be purely conjectural.
Justice Harlan also criticized nonretroactive decisionmaking as being inconsistent with the Court's constitutional mandate to "adjudicate cases and controversies."\textsuperscript{270} Justice Scalia also found this type of decisionmaking troubling, agreeing with Justice Harlan that it is not adjudication but legislation by judicial decision.\textsuperscript{271}

In this regard, it is worth noting the historical context in which Justice Harlan's criticisms were made. The Warren Court's extensive reforms of the law of constitutional criminal procedure were highly controversial. At times, it may have appeared that the Court was acting more like a legislature than a judicial body, using inappropriate cases as vehicles for the pronouncement of far-reaching new rules. Against this background, it should not be surprising that Justice Harlan, and others as well, were troubled by nonretroactivity.\textsuperscript{272}

The debate in Smith over civil retroactivity in a sense echoes the controversy that attended the Warren Court's landmark constitutional criminal procedure decisions three decades earlier. Like the Warren Court before, the Rehnquist Court has evidenced a willingness to "make law." Today, as then, this approach to constitutional adjudication makes some uneasy.\textsuperscript{273}

\noindent \textbf{(2) Chevron Oil and Constitutional Tax Refund Cases}

In addition to bearing out Justice Harlan's criticism of nonretroactivity, Smith shows that the Chevron Oil test is of little value in resolving the issues raised in constitutional tax refund cases. This is probably attributable to the fact that the test was designed to deal with a completely different question from that faced in cases such as Smith. What seemed appropriate when applied to a statute of limitations question in a personal injury lawsuit has proven highly inappropriate when used to determine whether taxpayers are entitled to retroactive relief from an unconstitutional state tax. In the context of these latter cases, each prong of the Chevron Oil test, as well as the ultimate result, is seriously flawed.

The first prong of Chevron Oil requires, as a threshold requirement, a finding that the decision to be applied nonretroactively established a

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\textsuperscript{270} Mackey v. United States, 401 U.S. 667, 678 (1971) (Harlan, J., concurring and dissenting); see supra notes 108-111 and accompanying text.

\textsuperscript{271} See Smith, 110 S. Ct. at 2343 (Scalia, J., concurring).

\textsuperscript{272} See Fallon & Meltzer, supra note 10, at 1739 ("If the non-retroactivity of the Warren Court's criminal procedure decisions attracted criticism for being unduly legislative, so did its substantive holdings."); Schwartz, supra note 13, at 767 ("Johnson v. New Jersey seems to be an intensely practical decision by a Court which was attempting to forestall an overly-hostile public reaction to Miranda . . . .").

\textsuperscript{273} Beam provides further insights into the Justices divergent conceptions of the Court's role as constitutional arbiter. See infra Part II.D.
new principle of law.\textsuperscript{274} While this is never an easy question to answer with a simple yes or no, it is particularly problematic in the field of state taxation. The past decade and a half has seen an outpouring of significant constitutional decisions in this area.\textsuperscript{275} Several cases have brought into question the continued validity of earlier constitutional decisions—taxing schemes that have long been thought constitutional are now subject to attack with the eventual outcome uncertain.\textsuperscript{276}

Given these circumstances, the first prong of the \textit{Chevron Oil} test seems almost absurdly simplistic. Several of the Court's decisions that have held a state tax unconstitutional, including \textit{Scheiner}, have been foreshadowed to some degree.\textsuperscript{277} But \textit{Chevron Oil} makes no mention of degrees of foreshadowing; instead, it requires a bright line be drawn, and gives virtually no guidance as to where to draw it. How foreseeable\textsuperscript{278} must a new rule be or not be to truly be a new rule? That question \textit{Chevron Oil} leaves to the courts' discretion.

Not surprisingly, the vagueness of this threshold question encourages abuse. Because it is so hard to pin down exactly what a new principle of law is, it is not hard to twist the test to reach the desired result. That is, a court wishing to limit the effects of a decision it thinks unsound can simply say "new principle of law," and move on to prongs two and three. And even where courts act completely in good faith, the lack of certainty inherent in this determination practically guarantees inconsistent results, court to court, case to case.\textsuperscript{279}

\textsuperscript{274} Chevron Oil Co. v. Huson, 404 U.S. 97, 108 (1971). The Court definitively established that the first prong of \textit{Chevron Oil} is a threshold question on the last day of its 1990 term. See Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202, 3204 (1990). Before \textit{Ashland Oil} there had been much uncertainty over this question. See generally DeLong, supra note 19.

\textsuperscript{275} Hellerstein, \textit{State Taxation}, supra note 9, at 223, 224 & n.5.


\textsuperscript{277} See \textit{Ashland Oil}, 110 S. Ct. at 3204 (holding that although Armco v. Hardesty, 467 U.S. 638 (1984), had extended reach of dormant Commerce Clause, it had not established a new rule of law and thus should be applied retroactively); American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 286, 295 (1987) (noting that its decision in \textit{Complete Auto Transit v. Brady}, 430 U.S. 274 (1977), had called into question many discriminatory state taxing schemes, including the one at issue in \textit{Scheiner}).

\textsuperscript{278} The first prong of the \textit{Chevron Oil} test asks whether the decision either overruled clear past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed. \textit{Chevron Oil}, 404 U.S. at 106.

\textsuperscript{279} Two recent Supreme Court cases provide evidence that this standard is too vague to be applied consistently. In \textit{Ashland Oil}, the Court interpreted the first prong of \textit{Chevron Oil}
Nor does the second prong of the *Chevron Oil* test, which focuses on the purpose of the new rule,\(^{280}\) add much to the inquiry in constitutional tax refund cases. The purpose element of the Court’s retroactivity doctrine is a direct descendant of *Linkletter*. There, the Court reasoned that the purpose of the exclusionary rule, which is to deter illegal searches, would not be furthered by retroactive application of *Mapp v. Ohio*.\(^{281}\) While inquiring into the purpose of the *Mapp* rule made perfect sense in light of those circumstances, transferring the purpose test to a case like *Smith* makes little sense at all.

The biggest problem with analogizing from *Linkletter* to *Smith* is that there is no comparably explicit purpose to the new rule established by *Scheiner*. What exactly is the purpose of declaring unconstitutional a state tax that discriminates against interstate commerce?\(^{282}\) The *Smith* plurality did not provide a clear answer, simply asserting that "[i]t is equally clear to us . . . that the purpose of the Commerce Clause does not dictate retroactive application of *Scheiner* . . . ."\(^{283}\)

In response to the taxpayers’ argument that the purpose to be served by retroactive application of *Scheiner* was the prevention of future discrimination against interstate commerce, the plurality resorted to circular reasoning. Having already established that *Scheiner* had created an unforeseeable, new principle of law, Justice O’Connor declared that “it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce."\(^{284}\) In other words, since the threshold question had been satisfied, the state’s actions before the decision establishing the new rule were per se legitimate, and retroactive application would serve no purpose at all.

This stretch of logic\(^{285}\) uncovers two inherent flaws in applying the purpose test to cases like *Smith*. First, for a court even to reach the

\[^{280}\text{Chevron Oil, 404 U.S. at 106-07; see supra note 150 and accompanying text.}\]

\[^{281}\text{Supra notes 219-220 and accompanying text.}\]

\[^{282}\text{The problem is not limited to Commerce Clause questions. It applies equally to taxes that violate the Equal Protection or Due Process Clauses. The values that underlie the Commerce Clause, the Due Process Clause, and the Equal Protection Clause are somewhat amorphous; to attribute one overriding “purpose” to any one of these concepts is to oversimplify complex issues.}\]

\[^{283}\text{American Trucking Ass’ns v. Smith, 110 S. Ct. 2323, 2332 (1990).}\]

\[^{284}\text{Id.}\]

\[^{285}\text{Fallon and Meltzer provide a hypothetical that illustrates the flaws in Justice O’Connor’s analysis:}\]

[I]magine that a taxpayer had failed to pay highway use taxes in 1985, and that the state promptly commenced a civil action to collect the unpaid taxes and a separate criminal action for failure to pay. Imagine further that the state obtained a civil
second prong, the threshold question must already have been satisfied. This may taint the whole purpose analysis, as it did in *Smith*. Second, the purpose test is so malleable that in most such situations it has little or no objective value. Unless there is a purpose as clear as that presented in *Linkletter*, which will not often be the case, the court can focus on whatever purpose leads to the desired result. In *Smith*, for example, the plurality did not effectively counter the taxpayers’ argument that *Scheiner*’s purpose was to prevent state discrimination against interstate commerce. Nor did it even address the possibility that *Scheiner*’s purpose was to provide a remedy for victims of unconstitutional state action. Instead, after a four sentence discussion, the plurality summarily dismissed the possibility that retroactive application of *Scheiner* would serve any purpose at all.286 *Smith* demonstrates how lacking in substance the second prong of *Chevron Oil* is. So vague that it provides no help in resolving the conflict presented in a case such as *Smith*, this malleable standard serves no legitimate purpose.

The third prong of the *Chevron Oil* test requires that the court consider whether retroactive application of the new rule would bring about an inequitable result.287 Although it conceivably may have had some limited value in earlier cases,288 this standard is so imprecise as to be almost meaningless in the context of a constitutional tax refund case. The reality is that in such cases the same two competing interests will always be at issue: on the one hand, the state will argue that it relied on a presumptively valid taxing scheme and cannot now afford to give a refund, while the taxpayer will argue that fundamental fairness requires an award of meaningful backward-looking relief. *Chevron Oil*’s simple ineq-

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Fallon & Meltzer, supra note 10, at 1767-68 (footnotes omitted).

286. *Smith*, 110 S. Ct. at 2332; see supra notes 221-223 and accompanying text.


288. For example, in *Chevron Oil* itself, retroactive application of the new rule would have deprived plaintiff, who had relied in good faith on the old rule, of any opportunity to recover for his allegedly serious injury. By holding that the new rule would not apply retroactively, the Court was merely preserving plaintiff’s right to a day in court; *Chevron* still would have the opportunity to defend on the issue of liability. See *Chevron Oil*, 404 U.S. at 108. Intuitively, this seems the equitable result.
uitable result inquiry provides little guidance to a court trying to balance these two legitimate competing interests.

Instead, this vague standard invites a court to focus on whatever inequity leads to the desired result. In Smith the Court discussed at length the hardships that retroactive application of Scheiner would have caused the State of Arkansas, concluding that "[a] careful consideration of the equities persuades us that Scheiner should not apply retroactively." This "careful consideration," however, was strikingly one-sided: not one equity weighing in the taxpayers' favor was cited. At a minimum, considerations of fundamental fairness to the taxpayer, who has been subjected to an unconstitutional levy, should have been considered. But because of the vagueness of the standard, no such meaningful analytical balancing of the equities was required.

Not only are all three prongs of Chevron Oil fundamentally flawed, but the all-or-nothing result that application of the test inevitably brings about will often be inappropriate in light of the true equities of the situation. Each prong of the test may be satisfied by the barest of margins, and yet no matter how compelling the taxpayers' case, there will be no retroactive relief. This result is particularly unsatisfying in view of the artificiality of Chevron Oil's threshold question. That is, the evidence may indicate that the "new rule" became foreseeable at some point in time well in advance of the decision that actually established it. But the threshold question requires that a bright line be drawn; and once a court has found that there was a new principle of law, assuming the other two prongs are satisfied, then there will be no remedy for any taxes levied before the date the new rule was officially recognized. Thus, even though the new rule might have been reasonably foreseeable several years before a court finally declared it, the rule would not be made retroactive for that interim period.

This result is made especially harsh by the fact that the Eleventh Amendment requires that an out-of-state taxpayer challenging a state tax obtain a final judgment from the taxing state's highest court before the United States Supreme Court may exercise appellate review. Thus, the state, in all likelihood, will be able to collect taxes while the case works its way through the state courts, secure in the knowledge that it may not be required to refund any taxes levied before the date the United States Supreme Court finally decides the case. In the final analysis, Chevron Oil works a harsh and inequitable result; one that cannot be reconciled with McKesson's promise of fundamental fairness.

289. See Smith, 110 S. Ct. at 2332-34.
290. Id. at 2333.
291. See supra note 175.
What Smith Says About McKesson

It is tempting to focus on the fact that McKesson was decided unanimously and conclude that the decision strongly favors fundamental fairness to the taxpayer. But this appearance of solidarity deceives. As Smith demonstrates, the thread that held the Court together in McKesson was fragile indeed. Thus, it is appropriate to ask again whether McKesson really represents much of a victory for the taxpayer. The answer is disappointing: McKesson’s promise is qualified by the Court’s apparent willingness to decide cases nonretroactively and by its ambiguously broad definition of backward-looking relief. Considered in conjunction, Smith and McKesson show that application of Chevron Oil in constitutional tax refund cases leads to illogic and uncertainty.

D. Curiouser and Curiouser: James B. Beam Distilling Co. v. Georgia

In its 1991 term the Supreme Court faced a virtual replay of the drama played out in Smith. Like Smith, James B. Beam Distilling Co. v. Georgia involved a retroactivity issue in the context of a Commerce Clause challenge to a state taxing scheme. Even more than Smith, Beam illustrates the sharp disagreement among the Justices regarding nonretroactivity: the case sparked five separate opinions, no one of which was joined by more than three members of the Court. Because the decision is so badly fragmented, Beam confuses at least as much as it clarifies. But it does provide fascinating insights into the problems that lie at the

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292. Cf. Fallon & Meltzer, supra note 10, at 1824, 1828-29 (lauding McKesson as one of the “rare” cases to recognize a constitutional right to a compensatory remedy); Hellerstein, Preliminary Reflections, supra note 3, at 325 (declaring that “[i]n McKesson the Court handed the taxpayers a stunning victory”).

293. See McKesson v. Division of Alcoholic Beverages & Tobacco, 110 S. Ct. 2238, 2247 n.15 (1990) (distinguishing Smith and foreshadowing the controversy that case reflects).

294. “Curiouser and curiouser!” cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English); “now I’m opening out like the largest telescope that ever was! Good-bye, feet!” (for when she looked down at her feet, they seemed to be almost out of sight, they were getting so far off). “Oh my poor little feet, I wonder who will put on your shoes and stockings for you now, dears? I’m sure I shan’t be able! I shall be a great deal too far off to trouble myself about you: you must manage the best way you can . . . .” LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND ch. 2 (1865).


296. Justice Souter wrote the plurality opinion in which Justice Stevens joined. Id. at 2441 (discussed infra notes 306-325 and accompanying text). Justice White, concurring in the judgment, wrote a separate opinion. Id. at 2448 (discussed infra note 319). Justice Blackmun, joined by Justices Scalia and Marshall, also concurred in the judgment. Id. at 2449 (discussed infra notes 334-337 and accompanying text). Justice Scalia also wrote a separate concurring opinion, in which Justices Blackmun and Marshall joined. Id. at 2450 (discussed infra notes 327-333 and accompanying text). Finally, Justice O’Connor, joined by the Chief Justice and Justice Kennedy, dissented. Id. at 2451 (discussed infra notes 340-352 and accompanying text).
heart of the nonretroactivity question and illuminates the divergent views of the individual Justices regarding the proper role of the Court as final arbiter of the Constitution. The following sections summarize *Beam*, paying particular attention to the Justices’ varying approaches to retroactivity. This sets the stage for Part III, which proposes a solution to the dilemma posed.

(1) Factual and Procedural Background

The question presented in *Beam* was whether the rule established in *Bacchus Imports, Ltd. v. Dias* would be applied retroactively. Georgia long had imposed a discriminatory excise tax on imported alcohol and distilled spirits. In its 1984 decision in *Bacchus*, the Supreme Court held that an essentially identical Hawaiian taxing scheme violated the Commerce Clause. In so holding, the Court rejected the long-accepted proposition that the Twenty-first Amendment to the United States Constitution removes state regulation of alcoholic beverages from the ambit of the Commerce Clause.

Following the Court’s decision in *Bacchus*, the James B. Beam Distilling Company (“James Beam”) sought a refund of all monies paid under the now unconstitutional Georgia tax. The state trial court, while agreeing that the tax violated the Commerce Clause, held that under *Chevron Oil*, *Bacchus* should not be given retroactive effect, and thus James Beam was not entitled to a refund of any monies paid prior to the date *Bacchus* was decided. The Georgia Supreme Court affirmed. It concluded that *Bacchus* had created a new rule of law by overruling past Georgia precedent, and that to give it retroactive effect would have frustrated the State’s reliance interests and led to an unjust result. The United States Supreme Court granted certiorari on the retroactivity issue one week after handing down its decisions in *McKesson* and *Smith*.

297. 468 U.S. 263 (1984). Interestingly, it was the Court’s ruling in *Bacchus* that lay behind the refund claim in *McKesson*. See *McKesson*, 110 S. Ct. at 2243; supra notes 163-168 and accompanying text.

298. *Beam*, 111 S. Ct. at 2441.

299. *Id.* at 2442.


301. *Id.* at 274-76; see *Beam*, 111 S. Ct. at 2453 (O’Connor, J., dissenting) (noting that prior to *Bacchus*, “an uninterrupted line of authority from this Court held that States need not meet the strictures of the so-called ‘dormant’ or ‘negative’ Commerce Clause when regulating sales and importation of liquor within the State”).

302. *Beam*, 111 S. Ct. at 2442. The precise amount demanded by James Beam was $2.4 million. *Id.*

303. *Id.*

304. *Id.* (citing James B. Beam Distilling Co. v. Georgia, 259 Ga. 363, 365, 382 S.E.2d 95, 96 (1989), cert. granted, 110 S. Ct. 2616 (1990)).

(2) The Plurality Opinion

Justice Souter, author of the plurality opinion (in which only Justice Stevens joined), began generally by reviewing nonretroactivity. He then turned to the question whether Bacchus should be given retroactive effect. He noted that in Bacchus, after striking down the Hawaiian tax, the Court remanded the case to the Hawaiian courts for determination of the appropriate remedy without making any mention of Chevron Oil or retroactivity. This fact led Justice Souter to conclude that "[b]ecause the Court in Bacchus remanded the case solely for consideration [of remedial issues], it thus should be read as having retroactively applied the rule there decided." Not only does this disposition distinguish Beam from Smith, but it allowed Justice Souter to rephrase the question before the Court so that it practically answered itself: "the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." The answer, Justice Souter predictably concluded, is yes.

By framing the issue in this manner, Justice Souter managed to avoid any sort of Chevron Oil analysis. But this did not stop him from pursuing a further discussion of nonretroactivity. He began by stating that "Griffith cannot be confined to the criminal law," asserting that, if anything, the rationale of Griffith applies with even more force in the civil sphere than it does in the criminal context. In particular, Justice Souter's discussion focused on two themes on which nonretroactivity's critics long have focused: fairness to litigants and adherence to the principle of stare decisis. This discussion, while saying little that has not already been said regarding nonretroactivity, is notable for what it leads to: the express rejection of selective prospectivity. "Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application."

306. See Beam, 111 S. Ct. at 2443-45. Surveying the three retroactive methods, Justice Souter concludes that while full retroactivity is "overwhelmingly the norm," pure prospectivity "tends to relax the force of precedent." Id. at 2443. Selective prospectivity, he asserts, "appears never to have been endorsed in the civil context." Id. at 2445 (citing American Trucking Assn's v. Smith, 110 S. Ct. 2323 (1990)).

307. Id. at 2445 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276-77 (1984)).

308. Id. (citations and footnote omitted).

309. In Smith the plurality specifically argued that since the Scheiner Court had remanded the case to the state court for determination of both retroactivity and remedial questions, it had not applied its new rule retroactively. See Smith, 110 S. Ct. at 2336-37 (plurality opinion of O'Connor, J.).

310. Beam, 111 S. Ct. at 2446.

311. Id.

312. See id. at 2447 (noting irrelevance of Chevron Oil to case at hand).

313. Id. at 2446.

314. Id. at 2446-48.

315. Id. at 2447-48.
Having asserted that *Chevron Oil* was inapplicable to the case,\textsuperscript{316} Justice Souter acknowledged that this later aspect of his *Beam* opinion "does limit the possible applications of the *Chevron Oil* analysis."\textsuperscript{317} To what extent Justice Souter would like to limit *Chevron Oil* is unclear, however. Though he "refuse[d] to speculate as to the bounds or propriety of pure prospectivity,"\textsuperscript{318} Justice Souter's plurality opinion suggested a willingness to limit or even eliminate the use of pure prospectivity.\textsuperscript{319}

On the whole, the plurality opinion seems a curious compromise. In criticizing selective prospectivity, it spoke of lofty goals like fairness and at least superficially paid homage to stare decisis.\textsuperscript{320} Yet Justice Souter stopped halfway, refusing to "speculate" regarding the propriety of pure prospectivity, and thus declining to accept Justices Blackmun and Scalia's invitation to outlaw all prospective decisionmaking.\textsuperscript{321} At the same time, the focus on fairness and stare decisis as militating against prospectivity clearly distances the plurality from the positivist approach taken by Justice O'Connor in her dissent.\textsuperscript{322} Indeed, Justice Souter's "middle-ground" result appears all the more unusual in light of the explanations offered in its support.

In criticizing selective prospectivity, Justice Souter essentially based his argument on Justice Harlan's familiar analysis.\textsuperscript{323} In rejecting only selective prospectivity, however, he made a distinction that Justice Harlan never did. While Justice Harlan certainly criticized selective

\textsuperscript{316} See id. at 2445, 2446.

\textsuperscript{317} Id. at 2447. In light of this limitation of *Chevron Oil*, it appears that the Virginia Supreme Court reached the wrong result by refusing to give *Davis v. Michigan*, 489 U.S. 803 (1989) retroactive effect. See *Harper v. Virginia*, 1991 Va. Lexis 146, at *7 (Nov. 8, 1991) (on remand) (discussed supra note 10). A straightforward reading of *Davis* suggests that the taxpayer there was given the benefit of the new rule, see *Davis*, 489 U.S. at 817 (citing Iowa Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931)), and thus that under *Beam*, all other litigants must receive its benefit as well.

\textsuperscript{318} Id. at 2448.

\textsuperscript{319} This interpretation of Justice Souter's refusal to speculate is supported by Justice White's concurrence on broader grounds. See id. at 2448 (White, J., concurring) (asserting that the plurality's result "would be true under any one of [three] suppositions"). Justice White apparently reads into the plurality opinion a threat to the continued viability of *Chevron Oil*, thus the separate concurrence. In response to the plurality's apparent invitation to further limit pure prospectivity, he asserts his unwillingness to "retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court." Id. at 2449.

\textsuperscript{320} Id. at 2446-48.

\textsuperscript{321} See infra notes 325-326, 332-335 and accompanying text.

\textsuperscript{322} See infra text accompanying notes 344-346.

prospectivity,\textsuperscript{324} his criticisms were not limited to that one method, but
instead encompassed the Court's entire retroactivity doctrine.\textsuperscript{325} Once
the Harlan analysis has been accepted, there is no basis for distinguishing
between the two types of prospective decisionmaking; each is equally un-
acceptable. Therefore, it makes little sense for Justice Souter to adopt
Justice Harlan's criticisms as his own, emphasize \textit{Griffith}'s relevance to
civil cases, and at the same time, refuse to speculate on the propriety of
pure prospectivity.

Considering the divisions among the Justices regarding civil retroac-
tivity, Justice Souter may deserve more credit for marshalling six votes
than this analysis has given him. Nevertheless, Justice Souter's refusal to
speculate seems destined to spark future speculation, for his opinion
leaves at least as many questions open as it answers.

(3) \textit{The Concurring Opinions}

While Justice White, author of a short concurring opinion, appar-
ently believed that Justice Souter's opinion went too far towards limiting
prospective decisionmaking,\textsuperscript{326} Justices Blackmun, Scalia, and Marshall
would go farther still and explicitly overrule \textit{Chevron Oil}. Though
clearly agreeing on this goal, Justices Blackmun and Scalia differed
slightly on its justification, as evidenced by the fact that each filed a sepa-
rate concurring opinion. Apparently, however, their differences are not
great; each joined the other's opinion, and Justice Marshall joined both.

Justice Scalia's analysis focused on the Constitutional text and, spe-
cifically, on the Constitution's allocation of judicial and legislative pow-
ers. The judicial power, as seen by Scalia, is "the power 'to say what the
law is,' . . . rather than decreeing what it is today \textit{changed to} or what it
will \textit{tomorrow} be."\textsuperscript{327} He protested that by deciding cases prospectively,
the Court acts like a legislature. Therefore, both selective \textit{and} pure pros-
pectivity are beyond the Court's constitutional power.\textsuperscript{328}

\textsuperscript{324} In this vein is his often-cited criticism of the Court's practice of "fishing one case
from the stream and then permitting a stream of similar cases subsequently to flow by unaf-
fected . . . ." \textit{Mackey}, 401 U.S. at 679 (Harlan, J., concurring and dissenting).

\textsuperscript{325} See, \textit{e.g.}, id. at 681 (describing the Court's "ambulatory retroactivity doctrine" as "an
inexplicable and unjustifiable departure from the basic principle upon which rests the institu-
tion of judicial review").

\textsuperscript{326} See supra note 318.

\textsuperscript{327} \textit{Beam}, 111 S. Ct. at 2451 (emphasis in original) (quoting \textit{Marbury v. Madison}, 5 U.S.
(1 Cranch) 137, 177 (1803)).

\textsuperscript{328} \textit{Id.} In \textit{Smith}, however, Justice Scalia apparently did not find it beyond the Court's
power to give \textit{Scheiner} prospective effect. See supra text accompanying notes 257-262.
For Justice Scalia, the concerns of equity and judicial integrity that animate Justice Harlan's (and Justice Blackmun's) criticism of nonretroactivity are irrelevant:

I would no more say that what [Justice Souter] calls 'selective prospectivity' is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law. Justice Scalia's analysis, echoing Blackstone and focusing on separation of powers concerns, recalls Hart's assertion that: "The root of this evil [formalism] is preoccupation with the separation of powers and Blackstone's 'childish fiction' (as Austin termed it) that judges only 'find,' never 'make,' law." While it would be unfair and inaccurate to label Justice Scalia as a naive adherent to Blackstone's declaratory theory, his conception of the judicial role clearly is more "formal" than that of either his fellow Justices or H.L.A. Hart.

Justice Blackmun agreed with Justice Scalia that prospectivity in any form "violates basic norms of constitutional adjudication." But while Justice Scalia's objections to prospectivity centered on the separation of powers, Justice Blackmun phrased his discussion more in terms of the judicial role than such formalistic concerns. Justice Blackmun observed that:

329. See infra notes 332-337 and accompanying text for a discussion of Justice Blackmun's criticism.

330. Beam, 111 S. Ct. at 2450 (Scalia, J., concurring). For additional insight into Justice Scalia's views on the admissibility of coerced confessions, see Arizona v. Fulminante, 111 S. Ct. 1246, 1263-66 (1991), in which Justice Scalia joined Chief Justice Rehnquist's holding that the admission of a coerced confession may be harmless error.

331. Hart, supra note 39, at 610.

332. See supra note 33 (noting Justice Scalia's acknowledgment in Beam that courts sometimes do make law).

333. A significant body of scholarship already exists analyzing Justice Scalia's opinions as formalist. See, e.g., Mark V. Tushnet, Scalia and the Dormant Commerce Clause: A Foolish Formalism?, 12 Cardozo L. Rev. 1717 (1991) (criticizing Justice Scalia's integrated approach to Commerce Clause cases); Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" Legal Process, 12 Cardozo L. Rev. 1597 (1991) (criticizing Justice Scalia's textualist approach to statutory interpretation). While his approach may recall formalism, Justice Scalia's ultimate conclusion regarding nonretroactivity is very similar to that reached by Justice Harlan (and Justice Blackmun): it is incompatible with the Court's duty to decide cases and controversies.

334. Beam, 111 S. Ct. at 2449 (Blackmun, J., concurring).

335. In this vein, Justice Blackmun states that:

The nature of judicial review constrains us to consider the case that is actually before us, and if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a government of limited powers.
By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.\(^{336}\)

This mention of the "*stare decisis* bullet" seems aimed directly at Justice O'Connor and her fellow dissenters, who evince a notable willingness to alter the law each time the opportunity presents itself. Justice Blackmun's analysis and proposed rule of retroactivity echo Justice Harlan's approach.\(^{337}\) They also coincide with H.L.A. Hart's views. For Hart, courts perform a rule-making function "at the margin of rules",\(^{338}\) that is, as an adjunct of their duty to adjudicate individual cases. Ultimately, their forays into rule-making should be carefully guided by considerations of *stare decisis* and legality.\(^{339}\)

(4) The Dissenting Opinion

In a dissent that flowed naturally from her plurality opinion in *Smith*,\(^{340}\) Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, criticized the approaches taken by Justices Souter, Blackmun, and Scalia.\(^{341}\) According to Justice O'Connor, Justice Souter erred in basing his conclusion on "'principles of equality and *stare decisis*.' . . . [For] both of these factors lead to precisely the opposite result."\(^{342}\) As for Justices Blackmun and Scalia's suggestion that all decisions automatic-

\(^{336}\) Id. at 2450.

\(^{337}\) Id. at 2450 (Blackmun, J., concurring).

\(^{338}\) Id. at 2449-50. Specifically, Justice Blackmun argues that prospective decisionmaking is inequitable and undermines the integrity of judicial review. *See id.; see also supra* notes 97-117 and accompanying text (discussing Justice Harlan's criticisms); *infra* Part III.A. (proposing adoption of Justice Harlan's approach).

\(^{339}\) *Hart,* *supra* note 45, at 132.

\(^{340}\) *See id.* at 132-35 (discussing courts' rule making function and the importance of predictability in a legal system); Fallon & Meltzer, *supra* note 10, at 1761 (According to Hart "[j]udges thus stick close to the lawbooks in rendering decisions, as they weigh and balance 'principles, policies, and standards' in a manner that is tightly structured by the nature of judicial office.")


\(^{342}\) *Beam,* 111 S. Ct. at 2451-52 (O'Connor, J., dissenting). Justice O'Connor does not mention Justice White's separate concurrence.

\(^{343}\) *Id.* at 2451 (quoting *id.* at 2446 (plurality opinion of Souter, J.)).
cally be given retroactive effect, Justice O'Connor noted that she already "explained last Term [in Smith] that such a rule ignores well-settled precedent in which this Court has refused repeatedly to apply new rules retroactively in civil cases." 343

Indeed, Justice O'Connor saw "no need to repeat that discussion." 344 She did take the time, however, to refute briefly the criticism that prospective decisionmaking is incompatible with the Court's role as constitutional adjudicator:

[Pr]ecisely because this Court has "the power 'to say what the law is,'" when the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. Chevron Oil describes our long-established procedure for making this inquiry. 345

Justice O'Connor's statement reflects a starkly positivist outlook; she apparently saw no conflict at all between nonretroactivity and the Court's role as constitutional arbiter. Neither the concern over norms of constitutional adjudication that animate Justice Blackmun's opinion, nor the focus on separation of powers that drives Justice Scalia's analysis, seem to matter much to Justice O'Connor. Simply because the Court has the power to say what the law is, it necessarily can say when and to whom it applies.

Most of Justice O'Connor's criticism was saved for Justice Souter and his asserted reliance on principles of equality and stare decisis. As for equality, Justice O'Connor declared that the plurality's focus on the relative fairness to the litigants in Bacchus and Beam was misplaced: "If Justice Souter is concerned with fairness, he cannot ignore Chevron Oil; the purpose of the Chevron Oil test is to determine the equities of retroactive application of a new rule." 346 In her view, the real inequity lies in "impos[ing] liability on every jurisdiction in the Nation that reasonably relied on pre-Bacchus law." 347 And with regard to Justice Souter's asserted reliance on stare decisis, Justice O'Connor contended that this principle "cuts the other way in this case. . . . A decision not to apply a new rule retroactively is based on principles of stare decisis. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law." 348 Here, however, Justice O'Connor unwisely injected remedial concerns such as reliance into the choice of law analysis. This led her to a conclusion—nonretro-

343. Id. (citing American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2327-43 (1990)).
344. Id.
345. Id. (citations omitted) (quoting id. at 2451 (Scalia, J., concurring)).
346. Id. at 2452.
347. Id.
348. Id. (emphasis in original).
activity works in concert with stare decisis—that is exactly opposite to
the logical one—nonretroactivity allows courts to change the law more
often by lessening the disruption such judicial activism otherwise would
cause.  

After criticizing the Court's decision, Justice O'Connor analyzed Beam under Chevron Oil. This analysis, strongly reminiscent of her plu-
rality opinion in Smith, leads, somewhat predictably, to the conclusion
that Bacchus should not be given retroactive effect.

More interesting than Justice O'Connor's by-the-numbers Chevron Oil analysis is her subsequent focus on the policy considerations underly-
ing her position. After noting that two identical refund actions, in which plaintiffs are seeking refunds of nearly twenty-eight million dollars, are
currently pending in the Georgia courts, she asserted:

To impose on Georgia and the other States that reasonably relied on
this Court's established precedent such extraordinary retroactive liabil-
ity, at a time when most States are struggling to fund even the most
basic services, is the height of unfairness.

We are not concerned here with a State that reaped an unconstitu-
tional windfall from its taxpayers. Georgia collected in good faith
what was at the time a constitutional tax. The Court now subjects the
State to potentially devastating liability without fair warning. This
burden will fall not on some corrupt state government, but ultimately
on the blameless and unexpecting citizens of Georgia in the form of
higher taxes and reduced benefits.  

Surprisingly, Justice O'Connor's dissent is the only one of the five Beam
opinions to address Georgia's legitimate fiscal concerns; the other four
opinions focus exclusively on the theory of retroactivity. By addressing

349. Perhaps more than anything else, Justice O'Connor's conclusion reflects the Rehn-
quist Court's sometimes ambivalent attitude toward stare decisis. In particular, Justice Scalia
and Chief Justice Rehnquist tend to discount the binding force of precedent. E.g., Robert A.
Burt, Precedent and Authority in Antonin Scalia's Jurisprudence, 12 CARDOZO L. REV. 1685,
1685 (1991) ("More openly than any other Justice sitting today, Antonin Scalia is ready to
reverse prior Supreme Court precedent); Fallon & Meltzer, supra note 10, at 1761 (citing the
Chief Justice's opinion in Butler v. McKellar, 110 S. Ct. 1212 (1990), as an arguable exemplar
of an "unconstrained" approach to judicial lawmaking).

350. See supra notes 218-225 and accompanying text (describing Smith plurality's applica-
tion of Chevron Oil); see also supra notes 273-289 and accompanying text (criticizing Smith
plurality's result-oriented analysis).

351. Beam, 111 S. Ct. at 2453-56 (O'Connor, J., dissenting) ("Bacchus easily meets the
first [Chevron Oil] criterion. . . . There is nothing in the nature of the Bacchus rule that dictates
retroactive application. . . . [T]he equities weigh heavily against retroactive application of
[Bacchus]."). This conclusion is especially predictable in light of the fact that Justices
O'Connor and Rehnquist both dissented from the rule-changing decision in Bacchus. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 278 (1984) (Stevens, J., joined by O'Connor and
Rehnquist, J.J., dissenting). Beam thus provides yet another example of an attempt to use
nonretroactivity to limit the effect of a distasteful decision. See supra notes 261-262, 266-268
and accompanying text (discussing this phenomenon).

retroactivity's potential practical impact, the dissent reminds us that the dilemma these cases pose arises from the conflict between fiscal stability and fundamental fairness.

Unfortunately, *Beam* is of little help in solving this dilemma; the Court seems hopelessly deadlocked when it comes to deciding constitutional tax refund cases. Suggesting the contours of a new approach is the task to which this Note now turns.

III. Proposal

The dilemma posed by the constitutional tax refund cases ultimately reflects the inherent conflict between fundamental fairness—the taxpayer's interest in obtaining relief—and fiscal stability—the state's interest in preserving the fisc. To date, the Supreme Court has failed to balance these competing interests in a fair and practical manner. Instead, the Justices have become caught up in a divisive jurisprudential debate over the propriety of prospective decisionmaking. As *Smith* and *Beam* illustrate, this focus on nonretroactivity has led to "a tangle of confusions."353

To clear away the confusion first requires untangling the two threads of retroactivity. The constitutional tax refund cases need to be understood in terms of two distinct retroactivity questions: first, the choice of law determination; and second, the remedial inquiry.354 While the Court professes to recognize and follow this distinction,355 much of the confusion created by *Smith* and *Beam* results from the tendency to intermingle these two discrete issues. This Note now attempts to untangle the two threads. First, it proposes that Justice Harlan's approach to the choice of law question be adopted. Second, it suggests the contours of a new remedial framework that builds upon the foundation provided by *McKesson*.

A. The Proper Choice of Law

Earlier parts of this Note have detailed the flaws in the Court's current approach to retroactivity in constitutional tax refund cases and described the confusion this approach has generated.356 Indeed, *Smith* and *Beam* demonstrate the acuity of Justice Harlan's vision, for the Court has sunk deep into a civil retroactivity quagmire. Not only did Justice Harlan foresee this happening, he also proposed the most sensible solution to the choice of law question: new rules should be applied retroac-

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353. See Fallon & Meltzer, supra note 10, at 1736.
354. See supra notes 15-18 and accompanying text.
356. See supra Parts II.C. & II.D.
tively to all cases still subject to direct review at the time of the decision.\footnote{357} The most compelling argument in favor of this approach is also the simplest—the practice of applying rules determined to be wrong to disputes not yet fully adjudicated is fundamentally inequitable.\footnote{358} In a system that aspires to do justice, courts should decide disputes according to their best current understanding of the law; to apply the "wrong" rule seems inherently unfair. Justice Harlan's approach guarantees the correct rule will be applied to all claims that still may be adjudicated.

A closely related justification for a rule of retroactivity is that prospective decisionmaking is incompatible with the common conception of judicial review. The Court plays its proper constitutional role by adjudicating cases and controversies according to its current understanding of the law; prospective decisionmaking, by contrast, is not adjudication, but legislation.\footnote{359} Moreover, nonretroactivity "conflicts with the norm of principled decisionmaking" by encouraging courts to decide cases on grounds other than the merits.\footnote{360} The proposed rule of retroactivity, on the other hand, comports with the Court's duty to decide cases and controversies and is fully compatible with commonly accepted norms of constitutional adjudication.

Once divorced from remedial considerations, the choice of law question is easily addressed. As the Court acknowledged by largely adopting his approach to criminal retroactivity,\footnote{358} Justice Harlan's arguments are compelling. And as discussed earlier, his arguments apply with at least equal force in civil cases. In the constitutional tax refund cases, however, the abstract appeal of a rule of retroactivity has been overwhelmed by the spectre of state treasuries drained by refund claims. Thus, \textit{Chevron Oil} survives despite the correctness of Justice Harlan's approach. This result exemplifies the error of tangling together the two threads of retroactivity.

\footnote{357. See United States v. Estate of Donnelly, 397 U.S. 286, 295-96 (1970) (Harlan, J., concurring); \textit{supra} text accompanying note 138. As Justice Souter notes in \textit{Beam}, the corollary issue—whether new rules should apply to conduct no longer subject to direct review—is far less relevant in the civil than in the criminal sphere, since "there is little opportunity for collateral attack of final [civil] judgments." \textit{Beam}, 111 S. Ct. at 2446. Although the situation may not often arise in the civil arena, according to Justice Harlan's approach, new rules should not apply retroactively if either the statute of limitations has run with no claim brought or if a final judgment has been entered. \textit{Estate of Donnelly}, 397 U.S. at 296 (Harlan, J., concurring).}

\footnote{358. \textit{See Estate of Donnelly}, 397 U.S. at 296 (Harlan, J., concurring).}

\footnote{359. Mackey v. United States, 401 U.S. 667, 676-81 (1971) (Harlan, J., concurring and dissenting). The criticism leveled here at nonretroactivity should be distinguished from that leveled by Justice Scalia. He argues that prospective decisionmaking is wrong because it is outside the Court's Article III powers. \textit{See Beam}, 111 S. Ct. at 2450 (Scalia, J., concurring). This discussion focuses not on specific Article III limitations, but rather on the norms of constitutional adjudication.}


Because of its focus on essentially remedial concerns, the Court has chosen to allow the wrong law to be applied. Legitimate concern for the state's fiscal stability should factor into the remedial inquiry. It should not, however, taint the choice of law decision. Proceeding from the assumption that a rule of automatic retroactivity is correct, the next section describes a remedial framework for resolving the second thread of the retroactivity dilemma.

B. Building a Better Remedy

It is within the remedial context that the basic conflict between fundamental fairness and fiscal stability must be resolved. To strike the proper balance between the two requires an understanding of the interests of both the taxpayer and the state. The solution proposed here takes inspiration from McKesson's discussion of fundamental fairness to the taxpayer. The next section of this Note examines the taxpayer's interests, concluding that the proper approach favors a certain remedy for unconstitutional deprivations. The subsequent section addresses the interests of the state, acknowledging that in rare circumstances these may override the individual's right to a remedy.

(1) McKesson and the Right to a Refund

Previous parts of this Note have suggested that McKesson delivers less than it promises. But McKesson is not so flawed as to be totally worthless. On the contrary, it reflects the concept that forms the basis of the proposed solution: the Fourteenth Amendment gives taxpayers the right to due process of law; violation of this right deserves a certain remedy.

In their recent article Professors Fallon and Meltzer posit that two underlying principles form the basis for the right to a constitutional remedy. The first is Marbury v. Madison's remedial ideal: for every violation of a right there must be a remedy. The second principle is structural: the existence of constitutional remedies helps ensure that the government acts within the bounds of the law. In the context of constitutional tax refund cases, the taxpayer's right to a remedy is founded on two interests. The first is equitable; individual wrongs should be righted. The second interest is more utilitarian. Imposing a remedy should deter future constitutional violations. McKesson's true significance lies in its implicit recognition of these principles.

Recall that in McKesson, the fact that Florida had provided no predeprivation relief was dispositive. Only because the state had pro-

362. See supra notes 195-199, 290-291 and accompanying text.
363. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
364. Fallon & Meltzer, supra note 10, at 1778 (citing Marbury, 5 U.S. (1 Cranch) at 163).
365. Id. at 1778-79.
vided no "procedural safeguards against unlawful exactions" was it required to render meaningful backward looking relief. In other words, *McKesson* provides the states with a clear choice: either provide taxpayers with a "meaningful opportunity" to challenge the exaction in a predeprivation hearing, or risk being required to remedy any unconstitutional deprivation. This insistence on predeprivation procedures is wholly consistent with the principles underlying the right to a constitutional remedy. By treating the availability of such procedures as a requirement, the Court emphasizes that it is protecting the individual's right to due process. Additionally, by focusing on governmental procedures, the Court properly emphasizes that the burden should be on the state to make sure its actions comport with constitutional requirements. This seems the ideal answer to the dilemma posed—the states move to protect their own fiscal interests by establishing fair procedures, thus ensuring that individual due process rights are protected.

This ideal, however, is of little use when confronted with the fact that today several states face potentially devastating retroactive tax refund liabilities. The following section considers the way in which state interests fit into the proposed framework.

(2) State Interests

Dissenting in *Beam*, Justice O'Connor protested that it "is the height of unfairness [to impose] such extraordinary retroactive liability, at a time when most States are struggling to fund even the most basic services." This potential threat to the public welfare, that retroactivity will adversely impact the state's ability to meet its responsibilities, is the only interest that should be weighed against the individual's right to due process of law. States' purported "equitable" considerations, such as reliance, should not factor into the equation, since the motivations of the individual government actor(s) responsible for the constitutional violation are irrelevant in this context. Whether or not any specific actor is blameworthy does not change the fact that the state has violated the taxpayer's due process rights by requiring payment of an unconstitutional levy. There simply is no reason not to require the state to return what

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366. *McKesson*, 110 S. Ct. at 2250; see *supra* text accompanying note 181.


368. *See Fallon & Meltzer, supra* note 10, at 182 ("[T]he great merit of *McKesson* lies in its promise for the future.").


has been wrongly exacted in these circumstances.\textsuperscript{372} Moreover, such a rule has a corollary benefit: its very certainty makes it a potential deterrent to future governmental misconduct.\textsuperscript{373}

This rule of strict liability must be tempered, however. As Justice O'Connor persuasively argues in \textit{Beam}, it would be inherently unfair to impose severe hardships on blameless citizens for the unwise actions of their legislators. Therefore, if a state facing massive retroactive liability demonstrates that requiring it to tender refunds would work a severe hardship on the state, then payment may be excused.\textsuperscript{374} A severe hardship must be understood to include only those situations in which the citizens of the state, as a collective body, clearly would face a substantial adverse impact, for example, by cuts in essential services or significant increases in taxes. Only if such a showing is made should the individual taxpayer's right to due process be subordinated to the public interest.

\textbf{IV. Conclusion}

One year before \textit{McKesson} and \textit{Smith} were decided, a prominent commentator noted that "[t]he Supreme Court's outpouring of significant state tax decisions in recent years has elicited little more than a yawn from most constitutional scholars."\textsuperscript{375} Since then, developments have brought the Court's state taxation decisions into the limelight. Facing potentially devastating retroactive liability, the states are now undoubtedly paying close attention to these developments. And at the academic level, the recent cases raise intriguing questions regarding the scope of constitutional remedies and the very nature of judicial review.

The discussion in this Note has focused on resolving the dilemma that animates constitutional tax refund cases: how to balance individual due process rights against the state's considerable interest in fiscal health. The analysis has illustrated the flaws in the Court's current approach. Tangling remedial and jurisprudential questions together, \textit{Smith} and \textit{Beam} do not address the dilemma in a fair and practical manner, but instead sow confusion regarding the current and future state of the law. This Note proposes a solution based on the remedial principles that un-


\textsuperscript{373} A certain rule also may encourage parties to choose settlement over lengthy litigation.

\textsuperscript{374} Professors Fallon \& Meltzer, on the other hand, believe that "a standard that weights fiscal distress would be extremely difficult for courts to administer." Fallon \& Meltzer, \textit{supra} note 10, at 1829-30. While there is truth in this assessment, courts make equally difficult assessments in other areas, particularly in calculating damages and in issuing and administering equitable relief. Undoubtedly, a multitude of economists, political scientists, and other experts would be prepared to testify as to what constitutes fiscal distress.

\textsuperscript{375} Hellerstein, \textit{State Taxation, supra} note 9, at 223.
derlie McKesson, one that attempts to squarely face the practical considerations which make these cases so difficult.