Retroactivity: A Study in Supreme Court Doctrine as Applied

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RETROACTIVITY: A STUDY IN SUPREME COURT DOCTRINE "AS APPLIED"

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The judicial creation of a new rule of law raises the essential question whether that rule is to be applied retroactively or prospectively only. The consistency of the traditional mandatory retroactivity rule has given way to a more flexible retroactivity analysis. The change occurred in 1965 when the Supreme Court in Linkletter v. Walker *squarely faced a rule that, if applied retroactively, would have affected thousands of criminal convictions. The* Linkletter *doctrine has since defined the contours of federal retroactivity analysis to include three basic considerations: purpose of the rule in question, reliance by the parties on the rule, and effect of retroactive application on the administration of justice. An examination of Supreme Court decisions since 1975 and of lower federal court decisions since 1971 leads Professor Corr to challenge the utility of the retroactivity doctrine articulated by the Supreme Court; in short, the logical appeal of the purpose-reliance-effect triad does not transfer well into practical application. Given the confusion and inconsistencies currently present in the retroactivity analysis of lower federal courts, it is suggested that more useful guidelines be developed in this complex area of the law. More importantly, it is also suggested that doctrinal development should take into account the practical problems of applying doctrine, and not merely such considerations as fairness or the abstract logical appeal of a doctrine.*

> These questions [of retroactivity] are among the most difficult of those which have engaged the attention of [the] courts . . . .
>
> Chief Justice Charles Evans Hughes, 1940[1]

Chief Justice Hughes could not have known that he lived in the good old days, when retroactivity was simple. Only in the last twenty years have we come to appreciate just how difficult retroactivity analysis can be.

At first glance, retroactivity analysis seems quite straightforward. It is a process by which courts determine whether a new judge-made rule of law should be applied to events arising before the new law was promulgated. In order that those determinations be marked with some degree of fairness and

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

predictability, retroactivity analysis involves an attempt to develop rules or guidelines helpful to judges in their efforts to make just retroactivity decisions. Implicit in that effort is the prospect that in an appropriate circumstance a given decision will not have retroactive effect, but will apply only to cases or events arising after some particular date. Much of the difficulty in retroactivity analysis has arisen in the attempt to formulate workable rules or guidelines for determining when a decision will be held wholly or partially prospective.

Matters were not always so difficult. Indeed, prospectivity was alien to the common law, which simply assumed that new decisions would be applied retroactively.[2] Early American writers tended to treat displaced law as though it had never been the law.[3] In fact, this view is implicit in *Marbury v. Madison*,[4] in which Chief Justice Marshall assumed that a decision of unconstitutionality was simply a declaration of a preexisting state of affairs and rendered the law a complete nullity. This assumption was consistent with the concept of the eighteenth and nineteenth centuries that judges are discoverers rather than makers of law; thus, the need for any form of retroactivity analysis did not become obvious until well into the twentieth century. Some awakening has occurred in the federal courts in fits and starts over the past fifty years,[5] but it was not until 1965, when the Supreme Court decided *Linkletter v. Walker*,[6] that retroactivity analysis truly came to the fore.

Linkletter involved a petition for retroactive application of the earlier decision of the Supreme Court in *Mapp v. Ohio*,[7] in which the exclusionary rule was applied to warrantless searches conducted by state officers in violation of the fourth amendment. To apply *Mapp* retroactively would have affected convictions in "thousands of cases"[8] decided prior to *Mapp*, so in *Linkletter* the Supreme Court was forced to ponder whether in some circumstances it might be more appropriate to make a new rule partly or completely prospective in application. The Court concluded that the way to approach retroactivity was to "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."[9] The Court also considered the degree to which parties had relied on the pre-*Mapp* standards and the

2. *See* Linkletter v. Walker, 381 U.S. 618, 622-27 (1965).

3. *See* 2 J. WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649, 289 (1826), *quoted in* Flaherty, *Law and the Enforcement of Morals in Early America*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 53 (L. Friedman & H. Scheiber ed. 1978):

> [W]e have no laws diametrically opposite to those of England, for then they must be contrary to the law of God and of right reason, which the learned in those laws have anciently and still do hold forth as the fundamental basis of their laws, and that if anything hath been otherwise established, it was an errour and not a law, being against the intent of the lawmakers.

4. 5 U.S. (1 Cranch) 137 (1803).

5. For a good discussion of cases and literature on retroactivity prior to the 1960s, see Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

6. 381 U.S. 618 (1965).

7. 367 U.S. 643 (1961).

8. 381 U.S. at 636.

9. *Id.* at 629.

consequences retroactivity would have on the administration of justice.[10] Two years after *Linkletter*, in *Stovall v. Denno*,[11] the Supreme Court solidified those three elements—purpose, reliance, and effect—as a foundation upon which much (but not all) of the future retroactivity analysis of the Supreme Court would proceed. *Stovall* thereupon became an integral feature of what this article will term the "*Linkletter/Stovall* doctrine." Similarly, in *Chevron Oil Co. v. Huson*,[12] decided six years after *Linkletter*, the Supreme Court adopted a *Linkletter*-like doctrine for many civil cases subject to retroactivity analysis. *Linkletter*, therefore, had two important consequences. Its immediate effect was to make the rule of *Mapp* prospective;[13] its effect over time was to create a minor industry in which judges, practicing lawyers, and academics labored to establish just and predictable rules governing the applicability of law-changing cases.[14]

The surge of interest in retroactivity subsequent to *Linkletter* has never completely abated, but as the pace of Supreme Court proclamations on the subject has slowed,[15] the *Linkletter/Stovall* doctrine has assumed the appearance of greater definition and diminished malleability. It is, therefore, an opportune time to examine that doctrine and related analyses as they have matured—not so much for the quality of thought behind them, for that has been done many times,[16] but to determine the utility of *Linkletter/Stovall* and other approaches in trial and lower appellate courts, the arenas in which the day-to-day work of our judicial system is accomplished. No amount of doctrinal beauty, after all, can compensate for the disutility of a standard in application, so an evaluation of the *Linkletter/Stovall* standard must consider how it works as well as how it looks. Toward that end, this article will summarize Supreme Court decisions involving retroactivity since 1975, the year in which a summary was last undertaken.[17] The cases are addressed in chronological order, largely so that we may see the development of retroactivity from the stance of the lower courts that are trying to implement the doctrine. The article will then examine how well Supreme Court retroactivity doctrines actually

10. *Id.* at 637-38.

11. 388 U.S. 293 (1967). One student of the *Linkletter* doctrine believes the purpose-reliance-effect test was not clearly presented until *Stovall*. *See* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1566 (1975).

12. 404 U.S. 97 (1971).

13. 381 U.S. at 640.

14. The efforts of the Supreme Court until 1975 are chronicled in Beytagh, *supra* note 11. For other useful scholarly discussions, see, e.g., Currier, *Time and Change in Judge Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Haddad, *Retroactivity Should be Rethought: A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L., CRIMINOLOGY AND POLICE SCI. 417 (1969); McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12 (1967); Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Ostrager, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations*, 19 N.Y.L. FORUM 289 (1973); Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966); Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533 (1977).

15. Since 1975 the Supreme Court has addressed a retroactivity issue in less than ten cases.

16. See, e.g., the sources *supra* note 14.

17. *See* Beytagh, *supra* note 11.

work in the lower courts, using as a data base an investigation of more than two hundred federal district and circuit court decisions published since the end of 1971.[18] By treating Supreme Court pronouncements as preliminary, and focusing closely upon the application of those pronouncements in the lower courts, we can explore not only the full depth of retroactivity doctrine, but also in a broader sense evaluate the role of the Supreme Court as lawmaker.

I. THE SUPREME COURT 1975-1982

Professor Beytagh's synthesis of Supreme Court decisions addressing the *Linkletter/Stovall* and *Chevron* retroactivity doctrines included cases decided as late as June 1975.[19] Thereafter the rate with which retroactivity issues were brought before the Court dropped significantly. Decisions that have been made, however, provide important indications that within the Supreme Court the *Linkletter/Stovall* approach, at least, has lost momentum and is under pressure. The sources of that pressure are diverse; they include the creation of procedural requirements that restrict the use of *Linkletter*; the continued use of older retroactivity doctrines, the scope of which probably remains inviolate to both *Linkletter/Stovall* and *Chevron* expansion; and the articulation of proposals that *Linkletter/Stovall* should be entirely abandoned in determining the retroactivity of certain important categories of cases.

The first retroactivity case[20] to be decided after June 1975 helps demon-

18. Federal cases were used because the federal courts are peculiarly subject to the supervision of the Supreme Court. By contrast, state courts addressing state issues are under no obligation to use the retroactivity rules of the Supreme Court, Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932), and many states have developed their own approaches to retroactivity. *See, e.g.*, Perrello & Golembiewski, *Retroactivity of California Supreme Court Decisions: A Procedural Step Toward Fairness*, 17 CAL. W.L. REV. 403 (1981).

Cases decided in the last decade are particularly useful because it was only in late 1971 that the Supreme Court clearly adopted a *Linkletter/Stovall*-like retroactivity analysis for certain categories of civil litigation. *See supra* note 12 and accompanying text.

19. Beytagh, *supra* note 11.

20. Actually, the very first retroactivity question to be decided after June 1975 was outside the scope of standard retroactivity analysis entirely. Marks v. United States, 430 U.S. 188 (1977), arose in the wake of Miller v. California, 413 U.S. 15 (1973). *Miller* had altered the standard for separating obscenity from first amendment protected speech established earlier in Memoirs v. Massachusetts, 383 U.S. 413 (1966). The rules enunciated in *Miller* were, at one and the same time, beneficial and harmful to criminal defendants who might have anticipated the application of *Memoirs* to their cases. The Supreme Court had already decided that the benefits of *Miller* would be retroactively available to criminal defendants, Hamling v. United States, 418 U.S. 87, 102 (1974), and *Marks* resolved the question of the retroactivity of those portions of *Miller* harmful to defendants. That question was one of constitutional dimensions outside the scope of retroactivity analyses such as *Linkletter*, so the Court simply used *Marks* to restate the principle that under the fifth and fourteenth amendments changes in case law operating to the detriment of criminal defendants could not be applied retroactively. 430 U.S. at 196.

Interestingly, the conviction of Miller, the original defendant in Miller v. California, 413 U.S. 15 (1973), was ultimately allowed to stand. After the Supreme Court announced its new rule in *Miller* and remanded the case to the state courts, the state appellate court affirmed the conviction again, this time with a nod from the Supreme Court. Miller v. California, 418 U.S. 915 (1974) (appeal dismissed for want of a substantial federal question). The short time lag between remand and reaffirmation of the conviction suggests that Miller did not get a new trial, but only a review of his original conviction under the new rule of obscenity the Supreme Court announced on his first appeal. Assuming, as appears clearly to be the case, that the Supreme Court intended Miller to obtain the benefit of the new rule announced in his own case, the absence of a retrial raises a

strate the manner in which *Linkletter/Stovall* has been subdued. *Hankerson v. North Carolina*[21] addressed the retroactivity of *Mullaney v. Wilbur*,[22] in which the Court had held that jury instructions which require a criminal defendant to carry a burden of proof as to any element of a crime violate due process. In *Hankerson* the jury had received such instructions, and defendant made a *Mullaney* objection for the first time when his case came before the North Carolina Supreme Court on direct review. That court concluded that the instructions in *Hankerson* would have been error under the rule of *Mullaney*, but that *Mullaney* had no retroactive effect because the impact upon the administration of justice of releasing or retrying numerous convicted criminals would be devastating.

The United States Supreme Court took a different approach to *Hankerson*. At first the Court seemed to reaffirm the established *Linkletter/Stovall* approach to retroactivity. Citing primarily to *Ivan V. v. City of New York*,[23] a *Linkletter* offspring, Justice White's opinion for the Court restated the holding of several cases in the *Linkletter* line that when the primary purpose of a new rule is to enhance substantially the truth-finding function of criminal trials, neither reliance nor considerations of the impact of the rule upon the administration of justice can justify only prospectivity.[24]

If that had been the end of Justice White's analysis, *Hankerson* would have been a routine reinforcement of standard *Linkletter/Stovall* doctrine. In a footnote, however, Justice White also sought to ease the apprehension of the lower court that retroactivity for *Mullaney* would produce a wholesale release of convicted criminals. It was "unlikely," Justice White commented,

> that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See*, *e.g.*, Fed. Rule Crim. Proc. 30.[25]

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question as to what is meant by retroactivity. Should, for example, Miller have received a retrial on the theory that under the new rule his strategy at trial would have been different? If so, what burden, if any, should he have had to demonstrate how the old rule distorted the facts or his strategy at trial? The other side of that question, of course, involves a determination by the state courts as to the method they should use to decide when a command of retroactivity may be satisfied merely by appellate review. Should, for example, the lower courts borrow from *Linkletter* a consideration of the impact of the new rule upon truth determinations at trial as a standard for deciding when a case should be retried, as opposed to merely rereviewed? Another case in which retroactivity was a lesser issue came down in 1976. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) and *infra* note 115.

21. 432 U.S. 233 (1977).

22. 421 U.S. 684 (1975). The substantive holding in *Mullaney* was later undercut significantly in Patterson v. New York, 432 U.S. 197 (1977).

23. 407 U.S. 203 (1972). *Ivan V.* made retroactive the decision of the Supreme Court in *In re* Winship, 397 U.S. 358 (1970), which required juvenile courts to use the reasonable doubt standard.

24. 432 U.S. at 241, and cases cited therein. The conclusion in *Hankerson*, therefore, was that *Mullaney* would apply retroactively.

25. *Id.* at 244 n.8.

Thus, the suggestion was made that in collateral pleas for relief, retroactivity could be claimed only by those who had raised the issue in their own trials. The way in which such a rule would restrict the effect of a decision for retroactivity was demonstrated in *Wainwright v. Sykes*,[26] decided a week after *Hankerson*. *Wainwright* was not a retroactivity case, but involved a petition for habeas corpus on the ground that certain evidence used at trial should have been inadmissible. Defendant had not raised the issue at trial as required by state law, and state courts rejected the plea when it was raised for the first time on direct appeal. The Supreme Court also rejected the prisoner's plea for relief, reasoning that under the established line of authority habeas relief was unavailable to persons who did not raise their objections before the state courts in a timely manner, unless it could be shown both that there was good cause for the failure to object and that the defendant had been prejudiced by what had followed.[27]

Read in light of *Wainwright* and earlier cases,[28] Justice White's footnote in *Hankerson* suggests that large segments of an important body of retroactivity cases—collateral attacks on prior criminal convictions—might as a practical matter simply be beyond the scope of the traditional *Linkletter/Stovall* approach.[29] Only those petitioners who objected to the application of existing law or who could meet the *Wainwright* standards for failing to have done so would be entitled to make a collateral plea for the application of a law-changing decision made subsequent to their conviction. Because it is not a retroactivity case, *Wainwright* does not intimate whether its "cause and prejudice" standard can be met when a party failed to object to existing law simply because the question was novel.[30] But *Wainwright* and *Hankerson* do at least suggest that even a decision granting retroactivity will benefit only those parties with the foresight to have anticipated the law-changing case.

Wainwright and requirements for timely objection aside, *Hankerson* was also significant for the revival of another retroactivity approach that, while faithful to the roots of the *Linkletter/Stovall* doctrine, threatened to limit the doctrine as it had evolved. Justice Marshall stated the idea in his concurrence in *Hankerson*: the benefit of retroactive application of changes in constitutional law should be accorded to all criminal convictions not yet final when the Supreme Court announces its change.[31] For Justice Marshall, that principle was a restatement of a view he had held for several years,[32] but *Hankerson*

26. 433 U.S. 72 (1977).

27. *Id.* at 87.

28. The timely objection requirement discussed in *Wainwright* has a history predating *Hankerson*. *Id.* at 77. *See* Stone v. Powell, 428 U.S. 465 (1976); Estelle v. Williams, 425 U.S. 501 (1976).

29. Justice White's footnote in *Hankerson* spoke of insulating "past convictions" from the consequences of retroactivity, 432 U.S. at 244 n.8, but at that time the Court was silent about the use of a timely objection rule to stifle pleas in pending cases for retroactivity.

30. Recently the Supreme Court refused to address that question. *See infra* text accompanying note 84.

31. 432 U.S. at 245 (Marshall, J., concurring).

32. *See* Williams v. United States, 401 U.S. 646, 665-66 (1971) (Marshall, J., concurring in

was the first time Justice Powell rallied to that standard.[33]

The idea was first set out in 1969, when Justice Harlan dissented from a decision making a law-changing decision prospective:

> Upon reflection, I can no longer accept the rule first announced two years ago . . . which permits this Court to apply a "new" constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule. Indeed, I have concluded that *Linkletter* was right in insisting that all "new" rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the "new" decision is handed down.[34]

Justice Harlan explained that his criticism of the existing rule, which in some cases allowed complete prospectivity, did not focus merely upon the unfairness of giving relief to a chance beneficiary while other similarly situated litigants were not so favored. The criticism also took account of the damage general prospectivity could do the judicial rulemaking process. Positing a situation in which an appellate court announced a new rule subsequently adopted by the Supreme Court in a separate case—one in which the Supreme Court made its rule prospective—Justice Harlan wondered whether the Court would find itself obligated to reverse the appellate tribunal that had anticipated the new rule simply because the decision of the Supreme Court had been for prospectivity.[35] In the same dissent Justice Harlan also made clear that in most circumstances he would deny the benefit of retroactivity to collateral attacks upon criminal convictions.[36] But his advocacy of an approach that would au-

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part and dissenting in part) (criminal cases on direct review should be accorded the benefit of retroactivity).

33. 432 U.S. at 246-48.

34. Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). Justice Harlan's suggestion that he, not the majority, was truer to *Linkletter* referred to the passages in the majority opinion in *Linkletter* in which the Court held "that a change in the law will be given effect while a case is on direct review" and "no distinction [will be] drawn between civil and criminal litigation." 381 U.S. at 627. The intervening case that, in Justice Harlan's opinion, deviated from the true principle of *Linkletter* was Stovall v. Denno, 388 U.S. 293 (1967), in which the Court decided a retroactivity question in favor of prospectivity, save for the case at bar. That particular litigation received the benefit of the law changing rule:

> [The situation presents] an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably 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 decision-making.

Id. at 301. Justice Harlan had concurred in the prospectivity result in *Stovall*, *id.* at 303, a position he later renounced. 394 U.S. at 258-59.

35. Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

36. *Id.* at 260. It should be noted that while Justice Marshall embraced Justice Harlan's proposal to accord the benefit of retroactivity to all convictions not yet final, he disagreed with Justice Harlan's view that retroactivity might not be appropriate at all for collateral matters. On

tomatically apply to new constitutional rules retroactively to pending criminal cases has persisted, impeding the progress of the majority's contrary view.

Two years later Justice Harlan elaborated upon the same themes. Accusing the majority of adopting a rule that turned the lower courts into "automatons," he attacked as "indefensible" the 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 . . . ."[37] Appalling as the refusal to make new constitutional rules retroactive to pending criminal cases seemed to Justice Harlan, he saw an obvious difference when the plea before the Court was for retroactivity for collateral attacks:

> While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final.[38]

Whatever the merit of his position, Justice Harlan was never able to attract a majority of the Court during his tenure,[39] and there came a time when his view seemed on its way to sure demise.[40] Justice Powell's alignment with Justice Marshall on the issue in *Hankerson*, therefore, was important in keeping the flame alive.

Following *Hankerson*, the Court was silent on retroactivity issues until January 1979, when it released two per curiam opinions. *Harlin v. Missouri*[41] and *Lee v. Missouri*[42] addressed the retroactivity of *Duren v. Missouri*,[43] in which a provision of state law permitting women to abstain from jury duty was stricken as violating the sixth amendment right to a jury pool representative of the community. Neither *Harlin* nor *Lee* was of fundamental importance, but the cases did add some information to Justice White's terse footnote in *Hankerson*. *Harlin* indicated that the absence of a timely objection would not be fatal to a collateral attack if state courts somehow waived the defect,[44]

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that point Justice Marshall preferred a *Linkletter/Stovall* approach. Williams v. United States, 401 U.S. 646, 666 (1971). Justice Powell, on the other hand, seems to have accepted the totality of Justice Harlan's approach to retroactivity. *Hankerson*, 432 U.S. at 248.

37. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting).

38. *Id.* at 691. Justice Harlan also pointed out that in civil cases the overriding interest of society in finality made collateral attacks on final judgments almost unthinkable. He noted, "This is not to suggest that civil and criminal collateral attack ought necessarily to be precisely congruent in the federal system. But certainly it illustrates that the law has always perceived collateral attack as a problem quite different from direct appeal." *Id.* at 683 n.2.

39. *See* Williams v. United States, 401 U.S. 646, 656-58 (1971).

40. *See* Beytagh, *supra* note 11, at 1576-79.

41. 439 U.S. 459 (1979) (per curiam).

42. 439 U.S. 461 (1979) (per curiam).

43. 439 U.S. 357 (1979).

44. 439 U.S. at 459:

> The record did not reflect that petitioner had raised this objection in timely fashion in the trial court, but because the trial court had considered and rejected the contention on its merits in connection with petitioner's motion for a new trial, the Missouri Supreme

and both cases show that the requirement of a timely objection, which Justice White's footnote in *Hankerson* had attached only to jury instructions, went to other matters of law as well. As the opinion in *Lee* stated:

> We note that in any case in which a jury was sworn subsequent to *Taylor v. Louisiana* and the fair-cross-section claim based on exclusion of women was rejected on direct review or in state collateral proceedings because of the defendant's failure to assert the claim in timely fashion, relief is unavailable under 28 U.S.C. § 2254 [federal habeas corpus] unless the petitioner can show cause for having failed to raise his claim properly in the state courts.[45]

The Supreme Court decided only one retroactivity case in 1980. *Brown v. Louisiana*[46] involved the retroactivity of *Burch v. Louisiana*,[47] in which the Court had held that convictions for nonpetty offenses by nonunanimous juries of six persons or less violated the sixth amendment. Justice Brennan's opinion for the Court presented the standard three-factor analysis, and stressed the primacy of the purpose to be served by a new rule. Justice Brennan concluded that the purpose of *Burch* was to preserve the right to a jury trial and, at the same time, to protect the accuracy of fact determinations at trial. Thus, *Brown* determined that *Burch* was to be applied retroactively.[48] Justice Powell's concurrence in *Brown* restated the view he first adopted in *Hankerson*—law-changing decisions should be applied retroactively to all criminal cases pending direct review.[49] Moreover, Justice Stevens also adhered to that view. Counting Justice Marshall—who voted with the plurality in *Brown* but who has long espoused the view to which Justices Powell and Stevens are recent converts—three members of the 1980 Court believed that retroactivity should be automatic for changes of law relevant to pending criminal cases. Justice Harlan's view, although not yet adopted by any majority of the Court, had shown surprising vitality.

An important retroactivity decision was delivered by the Court early in 1981. *Firestone Tire & Rubber Co. v. Risjord*[50] involved a defendant who filed a motion to disqualify plaintiff's attorney. When the trial court denied the motion, defendant appealed to the Court of Appeals for the Eighth Circuit on the theory that such a denial was appealable under 28 U.S.C. § 1291.[51] The appellate court disagreed, but made its holding purely prospective—not appli-

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> Court reviewed the issue under its "plain error" rule . . . . The highest state court having reached and decided this issue, its judgment is subject to review in this Court.

See also Burch v. Louisiana, 441 U.S. 130 (1979), a direct appeal of a criminal conviction, in which the Supreme Court held that "[a]lthough petitioners did not raise the jury trial issue in the trial court, the Louisiana Supreme Court held that under state law it could consider petitioners' claim, and it disposed of that claim . . . . The federal question therefore is properly raised in this Court." *Id.* at 133 n.5. *Burch* is not a retroactivity case.

45. 439 U.S. at 462. *Accord* Harlin v. Missouri, 439 U.S. 459 (1979).
46. 447 U.S. 323 (1980).
47. 441 U.S. 130 (1979).
48. 447 U.S. at 327-29.
49. *Id.* at 337.
50. 449 U.S. 368 (1981).
51. 28 U.S.C. § 1291 (1976).

cable even to the case at bar—in light of its prior rule under which the appeal was permissible.[52] The Supreme Court, in an opinion by Justice Marshall, reversed the decision of the appellate court in favor of prospectivity, but upon a basis that took the decision outside the scope of *Linkletter*. As Justice Marshall wrote:

> the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.[53]

That analysis has a history deeper than those few cryptic sentences, devoid of any citations to authority, would suggest. Early in the 1970s the Supreme Court began to fashion an exception to standard *Linkletter/Stovall* retroactivity analysis for cases in which certain fundamental rights were at stake. In *United States v. United States Coin & Currency*,[54] a forfeiture action the Court treated as equivalent to a criminal prosecution, a narrow majority of the Court made retroactive its previous holding that federal tax statutes requiring gamblers to register and pay gambling taxes violated the fifth amendment freedom from self-incrimination.[55] The decisions at issue, Justice Harlan wrote, "dealt with the kind of conduct that cannot constitutionally be punished in the first instance. These cases held that gamblers in [the party in interest's] position had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them."[56] A determination that such cases demand retroactive application, Justice Harlan reasoned,

> follows *a fortiori* from those decisions mandating the retroactive application of those new rules which substantially improve the accuracy of the factfinding process at trial. In those cases, retroactivity was held required because the failure to employ such rules at the trial meant there was a significant chance that innocent men had been wrongfully punished in the past. In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity.[57]

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52. 449 U.S. at 372-73 (citing In re Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377, 378-79 (8th Cir. 1980)).

53. *Id.* at 379.

54. 401 U.S. 715 (1971).

55. The cases at issue were Grosso v. United States, 390 U.S. 62 (1968), and Marchetti v. United States, 390 U.S. 39 (1968).

56. 401 U.S. at 723.

57. *Id.* at 723-24. Justice Harlan added a footnote to restate his view that when a criminal case has not yet become final before the law-changing decision is announced, retroactivity should ipso facto be granted. *Id.* at 724 n.13.

Two years later, in *Robinson v. Neil*,[58] the Supreme Court accorded retroactive effect to its decision in *Waller v. Florida*,[59] in which the Court had held that the use of city and state law to afford two separate prosecutions for the same offense violated the constitutional guarantee against double jeopardy. Writing for the Court, Justice Rehnquist acknowledged that the breakthrough in retroactivity analysis that occurred in *Linkletter* made it possible to contemplate prospectivity for cases such as *Waller*. Neither prospectivity nor *Linkletter/Stovall*, however, were appropriate devices for double jeopardy:

> The guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.[60]

Both *United States Coin* and *Robinson* justify their retroactivity result without a *Linkletter* analysis in important part because *Linkletter/Stovall* affected constitutionally mandated matters of procedure, and was thus different from the substantive rights of freedom from self-incrimination and double jeopardy. That logic might have carried the Supreme Court to automatic retroactivity in *Gosa v. Mayden*[61] as well. *Gosa* resolved the retroactivity of *O'Callahan v. Parker*,[62] in which the Court had held that armed forces personnel were not subject to trial by court martial for nonservice offenses. Concluding that a *Linkletter/Stovall* approach was the correct method for addressing the retroactivity question, Justice Blackmun's plurality opinion distinguished *United States Coin* on the ground that it, unlike *Gosa*, involved conduct that ought not to have been punished in the first place.[63] Less convincingly, Justice Blackmun rejected the approach of *Robinson* because it, in some not clearly specified way, was different.[64] Only three members of the Court, under the leadership of Justice Marshall, thought *Gosa* should be controlled by *United States Coin* and *Robinson* because it was a jurisdictional matter.[65]

Justice Marshall's dissent in *Gosa* is useful for making explicit the idea that, at least in the eyes of a strong minority of the Court, *United States Coin*

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58. 409 U.S. 505 (1973).

59. 397 U.S. 387 (1970).

60. 409 U.S. at 509. Although *Robinson* is mentioned quite often in consonance with *United States Coin*, *see, e.g.*, United States v. Johnson, 102 S. Ct. 2579, 2589 (1982), at no point in his opinion did Justice Rehnquist mention *United States Coin*.

Also of some interest is that *Robinson* was a habeas petition, suggesting that when substantive and procedural issues may be distinguished, the Court is of one voice in holding that substantive questions should not be affected by the collateral or direct nature of the case in which retroactivity is sought.

61. 413 U.S. 665 (1973).

62. 395 U.S. 258 (1969).

63. 413 U.S. at 677.

64. Justice Blackmun explained that *Robinson* was different because it held that "guarantees not related to procedural rules 'cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis.'" *Id.* at 678.

65. *Id.* at 694. The discussion of *United States Coin*, *Robinson*, and *Gosa* relies in part on Professor Beytagh's work. *See* Beytagh, *supra* note 11, at 1579-91.

and *Robinson* reached a result of automatic retroactivity outside the scope of the *Linkletter* doctrine because they involved jurisdictional questions as well as nonprocedural constitutional rights. The decision in *Firestone Tire & Rubber Co. v. Risjord*,[66] therefore, did not break new ground. Instead, it reasserted the jurisdictional basis for *United States Coin* and *Robinson* that Justice Marshall and others had articulated in *Gosa*. Moreover, *Risjord* revived that analysis in a context involving no substantive right of any party, but only the purely procedural question of the timing of an appeal. Apart from representing a vindication of the dissent in *Gosa*, *Risjord* indicated that the *Linkletter/Stovall* approach would no longer be appropriate for law-changing decisions that restrict the subject matter jurisdiction of a court.[67] Had *Risjord* been the final word, such decisions could never have been primarily prospective in application. As subsequent decisions demonstrate, however, *Risjord* was far from final.

The other 1981 case to address a question of retroactivity was *Gulf Offshore Co. v. Mobil Oil Corp.*[68] The primary question in *Gulf Offshore* was the applicability of *Norfolk & Western Railway v. Liepelt*[69] to cases arising under the Outer Continental Shelf Lands Act.[70] *Liepelt* required a trial court to instruct the jury in cases arising under the Federal Employers Liability Act that personal injury awards are not subject to federal income taxation.[71] *Liepelt*, however, was decided while *Gulf Offshore* was pending on appeal, so the defendant in *Gulf Offshore* also raised the argument that *Liepelt* should have only prospective application.

In a footnote to *Gulf Offshore*, Justice Powell's opinion for the Court rejected the prospectivity argument as "insubstantial."[72] When a change in law occurs while a case is on direct appeal, he wrote, an appellate court must apply the new law to the case before it. Exceptions to that principle which might be permitted under *Bradley v. School Board of Richmond*,[73] Justice Powell explained, could not be activated in private civil suits "where the change does not extinguish a cause of action but merely requires a retrial on damages before a properly instructed jury."[74] The *Bradley* decision cited by Justice Powell is part of a line of cases calling for nearly automatic retroactivity for civil cases pending on appeal, a line of cases that had its antecedents in the era of Chief Justice Marshall. In that period, when Blackstone's advocacy of automatic retroactivity for law-changing decisions still enjoyed preponderant influence, the Supreme Court decided *United States v. Schooner Peggy*.[75] There

66. 449 U.S. 368 (1981).
67. *Id.* at 379.
68. 453 U.S. 473 (1981).
69. 444 U.S. 490 (1980).
70. 43 U.S.C. §§ 1331-1356 (1976 & Supp. IV 1980).
71. 45 U.S.C. §§ 51-60 (1976).
72. 453 U.S. at 486 n.16.
73. 416 U.S. 696, 716-17 (1974). The exception to automatic retroactivity might arise when retroactivity would work "manifest injustice," *id.* at 716, but that term is left undefined in *Bradley*.
74. 453 U.S. at 486 n.16.
75. 5 U.S. (1 Cranch) 103 (1801).

the Chief Justice wrote that appellate courts were obligated to apply the law as it currently exists, including changes intervening between the time of trial and final resolution of the appeal.[76] Later cases demonstrated that the principle was not limited to intervening legislation, but also included law-changing activity in which the basis was "constitutional, statutory, or judicial, [or even] where the change is made by an administrative agency acting pursuant to legislative authorization."[77] How, then, does the line of authority emanating from *Schooner Peggy* exist alongside *Linkletter* and *Chevron*?

Easily enough, as it happens. Justice Blackmun's opinion in *Bradley* drew the key distinction:

> This Court in the past has recognized a distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand, and its effect on a final judgment under collateral attack, on the other hand. *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). We are concerned here only with direct review.[78]

From the beginning, then, *Linkletter* was never intended to apply to civil cases pending before a court on direct review when a change of law occurs. For that sort of litigation, automatic retroactivity was commanded by *Schooner Peggy*.[79] Ironically, the original idea in the *Linkletter* criminal cases—that retroactive benefits should be accorded to all cases pending on direct review—suffered through a decade of inattention or outright rejection in criminal cases heard by the Court in the 1970s, while a substantially similar idea remained vital in civil matters.

The first five months of 1982 were quiet for the Supreme Court in the area of retroactivity. Only a few cases dealing with the developing rule of *Wainwright*[80] had even secondary significance for retroactivity doctrine, but they suggest that the *Wainwright* failure-to-object rule may preempt a significant body of cases in which *Linkletter/Stovall* decisions once held sway. In *Rose v. Lundy*[81] the Court held that a "mixed" petition for habeas corpus, consisting of issues that were raised in a timely fashion in state court and issues that were not so raised, could not be entertained in a federal court. A month later the Court held that under the *Wainwright* "cause and prejudice" test,[82] "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial."[83] And, tantalizingly, the Court felt the cases before it did not require it to:

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76. *Id.* at 110.

77. Thorpe v. Housing Auth., 393 U.S. 268, 282 (1969) (citations omitted). Only five years after the Supreme Court made *Schooner Peggy* applicable to intervening agency decisions, however, the Court reversed its position. Removing agency changes from the reach of *Schooner Peggy*, the Court directed instead that such a case should be remanded to the agency, which will then make its own retroactivity determination. NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974). *See infra* notes 246-50 and accompanying text.

78. 416 U.S. at 710-11 (footnotes omitted).

79. 5 U.S. (1 Cranch) at 110.

80. See *supra* notes 26-30 and accompanying text.

81. 102 S. Ct. 1198 (1982).

82. See *supra* notes 26-30 and accompanying text.

83. Engle v. Issac, 102 S. Ct. 1558, 1572 (1982).

> decide whether the novelty of a constitutional claim ever establishes cause for a failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair.[84]

Finally, in a third case the Court concluded that *Wainwright* barred a collateral attack upon a criminal conviction in which the objection was not timely, even if the same issue could have been raised on direct review under the "plain error" doctrine.[85]

As they relate to retroactivity questions, therefore, *Wainwright* and its progeny now permit collateral attacks upon prior convictions on the ground that the law has changed when: (1) a prisoner can show that he made a timely objection; (2) the state waives its timely objection rule; or (3) the prisoner can meet the "cause and prejudice" exception to *Wainwright*. As to the third possibility, it is not at all clear that the Supreme Court will find "cause" in the novelty of a new rule. Beyond those apparently limited exceptions, *Wainwright* now acts as a bar to collateral attacks upon prior convictions.

June 1982 proved to be as important in retroactivity matters as the previous five months had been quiet. In *Diedrich v. Commissioner*[86] the Court held that donors of property who attach a condition requiring their donees to pay applicable federal gift taxes must themselves recognize taxable income to the extent that the gift tax owed exceeds the donor's adjusted basis in the property. Writing for the majority, Chief Justice Burger took up the retroactivity issue in one cryptic footnote:

> Petitioners argue that even if this Court holds that a donee realizes income on a conditional gift to the extent that the gift exceeds the adjusted basis, that holding should be applied prospectively and should not apply to the taxpayers in this case. In this case, however, there was no dispositive Eighth Circuit holding prior to the decision on review. In addition, this Court *frequently* has applied decisions which have altered the tax law and applied the clarified law to the facts of the case before it. *See, e.g., United States v. Estate of Donnelly*, 397 U.S. 286, 294-95 (1970).[87]

Unfortunately, "frequently" is an assertion of fact rather than a standard. The lower courts are thus left to ponder the circumstances in which tax decisions should be made retroactive.

United States v. Johnson,[88] by contrast, reflected an attempt to present a more thoughtful approach to retroactivity analysis. *Johnson* addressed the ret-

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84. *Id.* at 1573 (footnotes omitted).

85. United States v. Frady, 102 S. Ct. 1584 (1982).

86. 102 S. Ct. 2414 (1982).

87. *Id.* at 2420 n.10 (emphasis added) (citations omitted). Note that the quoted material disregards the possibility that the taxpayer could have relied upon decisions in other circuits or even upon a blank slate.

88. 102 S. Ct. 2579 (1982).

roactivity of the holding of the Supreme Court in *Payton v. New York*[89] that "the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest."[90] By a five to four vote, *Johnson* made *Payton* retroactive, but the scope of retroactivity and the manner in which the decision was cast were more important than the immediate result. Writing for the majority, Justice Blackmun announced that the three-factor purpose-reliance-effect test—which he associated primarily with *Stovall v. Denno*[91]—would no longer be applicable to law-changing fourth amendment decisions affecting criminal litigation that was not yet final. Instead, the Court held that fourth amendment litigation not yet final would automatically be afforded the benefit of retroactivity—a position akin to that which Justice Harlan espoused more than a decade ago.[92]

Justice Blackmun reached that decision by recasting much of existing criminal retroactivity analysis. There were three categories of decisions, he explained, that had never been subject to the three-factor test of *Stovall*. The retroactivity of these cases had been decided merely "through application of a threshold test."[93] Those categories were: (1) cases in which the Court "merely has applied settled precedents to new and different factual situations;" (2) rules of criminal procedure that represented " 'a clear break with the past;' " and (3) rulings "that a trial court lacked authority to convict or punish a criminal defendant in the first place."[94] In all those circumstances, Justice Blackmun wrote, retroactivity was compelled without resort to a *Stovall* analysis. *Payton*, he acknowledged, fit none of those catagories, but that did not make it a decision subject to the three-factor retroactivity test of *Stovall*. Instead, it meant that Justice Harlan had been correct from the beginning—fourth amendment decisions such as *Payton* should "be applied retroactively to all convictions that were not yet final at the time the decision was rendered."[95]

The result, of course, is that the *Stovall* doctrine—or the *Linkletter/Stovall* doctrine—will apply in the future only to retroactivity petitions

89. 445 U.S. 573 (1980).

90. 102 S. Ct. at 2581.

91. 388 U.S. 293 (1967).

92. *See supra* notes 34-39 and accompanying text. The Supreme Court made explicit its decision that the new rule applied only to fourth amendment decisions. United States v. Johnson, 102 S. Ct. at 2594.

93. 102 S. Ct. at 2587 (footnotes omitted).

94. *Id* (quoting Desist v. United States, 394 U.S. 244, 248 (1969)).

95. *Id*. at 2594. It is not entirely clear from Justice Blackmun's opinion that he perceived a distinction between making a decision retroactive "to all cases still pending on direct appeal," *id*. at 2590, and making it retroactive "to all those cases which are still subject to direct review by this Court." *Id.* at 2586 (quoting Desist v. United States, 394 U.S. 244, 258 (1968) (Harlan, J., dissenting)). *See also id*. at 2590 (retroactivity for "all nonfinal convictions"); *id*. at 2594 (retroactivity for "all convictions that were not yet final"); *id*. at 2590 (retroactivity "to all cases pending on direct review"). The difference is important, for the application of retroactive benefits to all cases not yet final encompasses litigation that has not yet reached the appellate level as well as appeals pending when the law-changing decision was announced. Moreover, Justice Blackmun describes his new rule as "consistent with" the civil doctrine of *Schooner Peggy*, *id*. at 2583, but that doctrine seems only to apply to cases that were at the appellate level when the law-changing decision came down, and not to cases at some earlier stage of litigation. *See supra* notes 74-79 and accompanying text; *see also infra* notes 251-65 and accompanying text.

that were collateral attacks upon final convictions or direct appeals in which the fourth amendment was not at issue. Inasmuch as Justice Blackmun acknowledged that many of the collateral matters will not reach federal courts for failure to preserve issues with timely objections,[96] one result of *Johnson* is a substantial limitation upon the three-factor doctrine as it has developed.

The majority also used *Johnson* as an occasion to submit a few words regarding retroactivity in civil matters. Presumably, the comments were intended as clarification. Justice Blackmun wrote that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co. v. Huson*."[97] Taken literally, that would mean the doctrine of *Schooner Peggy* and other special analyses affecting certain civil cases[98] are destroyed. It is possible, of course, that the Supreme Court intends exactly that result. It may also be, however, that the Court simply seeks the more modest goal of ensuring that the *Chevron* approach is differentiated from *Linkletter/Stovall*.

Two bits of evidence support the latter thesis. The first is that the Court also cited *Schooner Peggy* approvingly, even to the point of suggesting that it was a model for the rule enunciated in *Johnson*.[99] Moreover, the Court spoke of *Chevron* as distinct from *Stovall* because *Chevron* had a "clear break" prerequisite the Court could not find in *Stovall* or other analyses relevant to criminal matters.[100] Such evidence is admittedly far from dispositive. It is also contradicted in some measure by the Court's use of *Chevron* in its very last retroactivity decision of the 1981 term—a case that, prior to *Johnson*, would arguably have called for application of one of the special retroactivity analyses.[101] But that evidence, in turn, is undercut by the Court's additional citation, in that same case, to one of the additional retroactivity analyses apparently outside the scope of *Chevron*.[102]

The last retroactivity case decided in June 1982 was *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[103] The Supreme Court held that portions of the Bankruptcy Act of 1978[104] granting jurisdiction over certain

96. 102 S. Ct. at 2594 n.20.

97. *Id.* at 2594-95 (citations omitted). The Court also used *Johnson* to make three lesser points. First, it suggested, if it did not say explicitly, that the reliance factor in some retroactivity analyses could be satisfied by "a near-unanimous body of lower court authority", *id.* at 2589 & n.15 (footnote omitted), but perhaps not by a body of lower court authority that was less than nearly unanimous. Second, the Court expressly rejected the notion that the logic of United States v. Peltier, 422 U.S. 531 (1975), required nearly automatic prospectivity for fourth amendment cases. 102 S. Ct. at 2592-93. Finally, the Court indicated that law-changing decisions substantially affecting the accuracy of fact-finding at trial would receive nearly automatic retroactivity under the *Linkletter/Stovall* rule. *Id.* at 2594 n.21.

98. *See supra* notes 50-60 and accompanying text; *infra* notes 236-50, 266-85 and accompanying text.

99. 102 S. Ct. at 2583.

100. *Id.* at 2587 n.12.

101. See *infra* notes 103-105 and accompanying text; see also *supra* notes 50-60 and accompanying text.

102. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2880 n.41 (1982) (citing Buckley v. Valeo, 424 U.S. 1, 142 (1976) (per curiam)). The approach in *Buckley* to retroactivity is described *infra* note 115.

103. 102 S. Ct. 2858 (1982).

104. 28 U.S.C. § 1471 (Supp. V 1981).

bankruptcy matters to non-Article III judges were unconstitutional. The Court used a *Chevron* approach to determine the retroactivity of its holding:

> It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively.[105]

The result seems reasonable enough. But the conclusion, and the rationale upon which it is based—reliance upon *Chevron* in a jurisdictional matter—do violence to the recently expressed intent of the Court that jurisdictional decisions will ipso facto apply retroactively.[106]

As the foregoing chronology may indicate, the 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. An assessment of the status of retroactivity analysis at the end of the 1981 term, therefore, should be primarily a statement of what is, and only a most guarded estimate of what may come.

Some directions nevertheless emerge. The first is that there is more than one retroactivity analysis; in fact, there are several, with the precise number unclear and possibly changing. The status of the analysis that has attracted the most attention over the past two decades, the *Linkletter/Stovall* approach, appears to be declining. That analysis, which was never a terribly reliable predictor of future retroactivity decisions,[107] now seems restricted to two bod-

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105. 102 S. Ct. at 2880 (footnote omitted).

106. *See supra* notes 50-60 and accompanying text. Justice Marshall, who wrote the majority opinion in *Risjord*, voted with the majority in *Northern Pipeline* without comment. Separate from the jurisdictional issue, one circuit believes that retroactivity was normally the rule for changes in law occurring before bankruptcy adjudication became final. *In re* Spell, 650 F.2d 375, 377 (2d Cir. 1981). Although that point of view is not necessarily inconsistent with the concern of the Supreme Court about the impact of retroactivity for *Northern Pipeline*, the Court of Appeals for the Second Circuit also added the following comment: "It is noteworthy that this rule was applied even though the result for the bankrupt was harsh." *Id. But see* Cle-Ware Indus. v. Sokolsky, 493 F.2d 863 (6th Cir.) (prospective application of new rule on attorney's fees in bankruptcy litigation), *cert. denied*, 419 U.S. 829 (1974).

107. *See* Vaccaro v. United States:

> Perhaps no other area of Constitutional law is more enshrouded in puzzlement and apparent logical inconsistencies . . . . A catalogue of some of the . . . retroactivity holdings demonstrates the perplexities. For example, while the right to counsel at a preliminary hearing where the defendant makes incriminating statements is retroactively recognized, the right to counsel during accusatorial police interrogation during which the accused makes incriminating statements is not retroactively enforced. Similarly, while the defendant's right to a fair, impartial and unbiased jury is retroactively effected, the right to an impartial judge may be given prospective application only. Likewise, the defendant is entitled to retroactive protection against the extrajudicial confessions of a co-defendant, but not of himself.
>
> Systematic exclusion of Blacks from juries call for retroactive vindication, but systematic exclusion of women apparently does not. Newly announced standards for determining the voluntariness of confessions are retroactive, but newly announced standards for determining the voluntariness of guilty pleas are not.

461 F.2d 626, 628-29 (5th Cir. 1972) (footnotes omitted).

ies of retroactivity issues—collateral attacks upon final convictions and direct appeals outside the scope of the fourth amendment—and is besieged even in the area of collateral attacks.

Moreover, the categories of cases outside the scope of *Linkletter/Stovall* are more numerous and may be growing. *Schooner Peggy* has always been a bulwark against *Linkletter/Stovall* expansion into civil cases pending on direct appeal.[108] *Vandenbark v. Owens-Illinois Glass Co.*[109] is similarly predominant in diversity litigation. *Johnson* now prohibits the use of *Linkletter/Stovall* in fourth amendment cases pending on direct appeal, and perhaps in all such cases in which the conviction is not yet final.[110] *Chevron*, for now, is identified as a distinct retroactivity analysis applicable at least to categories of civil cases not claimed by *Schooner Peggy* or *Vandenbark*.[111] Law-changing decisions restricting the jurisdiction of courts may[112] or may not[113] be subject to a special rule of automatic retroactivity. Even if they are not, there is no indication that such cases would otherwise be placed under the frayed banner of *Linkletter/Stovall*. Certain distinct bodies of law, "frequently" including tax law,[114] seem to be governed only by their own rules of retroactivity or prospectivity.[115] Finally, in one of the two areas that *Linkletter/Stovall* still dominates —criminal convictions under collateral attack—developing requirements for the timely objections threaten to reduce to a residue the number of cases actu-

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108. *See supra* notes 74-79 and accompanying text; *see also infra* notes 251-65 and accompanying text.

109. 311 U.S. 538 (1941). See *infra* notes 236-45 and accompanying text.

110. *See supra* notes 88-96 and accompanying text.

111. *See supra* notes 97-102 and accompanying text.

112. *See supra* notes 50-60 and accompanying text.

113. *See supra* notes 61-65, 103-06 and accompanying text.

114. *See supra* note 87 and accompanying text.

115. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (citations omitted) (commission appointments stricken because the process of appointment was unconstitutional). Concerning retroactivity:

> [i]t is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan.

Id. at 142 (citations omitted).

Note the absence of any reference to *Linkletter/Stovall* or *Chevron*, or any development of the three factors to be considered under those analyses. *See also* Hill v. Stone, 421 U.S. 289, 301 (1975) (making prospective a decision invalidating statutes restricting the electoral franchise for city bond elections; prospectivity justified because it is necessary "to avoid the possibility of upsetting previous bond elections in the States"); NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974) (when agency policy changes, court should remand so agency can make determination on retroactivity); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (reaching the same conclusion as *Hill*, 421 U.S. 289 (1975), with passing cite to *Linkletter*, and justifying prospectivity on the ground of retroactivity's "substantial inequitable results"). Notwithstanding the casual cite in *Cipriano* to *Linkletter* and the use of the "effect" factor of that analysis, both *Cipriano* and *Hill* are actually part of an older line of decisions calling for prospectivity when the process by which bonds are issued is stricken. *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

ally able to claim access to *Linkletter/Stovall*.[116] A relatively young doctrine may already have seen its best days.

The importance of developments in the Supreme Court, of course, is determined to a significant degree by the extent to which Supreme Court rules filter into the fabric of decision-making in the lower courts. It is within those less sublime bodies, those "pawns, foot soldiers, worker bees of law,"[117] that the great mass of our litigation is finally resolved. It would be useful, therefore, to examine retroactivity decisions covering the past decade in the lower federal courts. That body of information should help clarify the manner in which Supreme Court rules have been construed, the areas in which lower courts have struggled, and the reasons why lower courts experienced varying degrees of success or failure. A reader would be well advised to keep in mind, however, that the course of this examination may reveal as much about the state of judicial administration as about retroactivity decisions over the last decade. He may, in fact, discover that the efficient operation of a judicial system such as the United States enjoys depends as much upon careful supervision and administration of lower courts as it does upon development of well-reasoned doctrine.

The organization of the inquiry will proceed as follows: the application of the more complex doctrines of *Linkletter/Stovall* and *Chevron* will be examined first, particularly with a view to exploring the manner in which the substrata of those analyses operate together; cases involving other, more specialized retroactivity doctrines will next be discussed.

II. RETROACTIVITY AND THE LOWER COURTS

A. Linkletter/Stovall *and* Chevron

1. The Requirement of Novelty

It would seem to be implicit in the *Linkletter/Stovall* doctrine that the possibility of prospective application of a law-changing decision can arise only when the rule at issue is in some meaningful sense a new rule.[118] This notion, implicit in *Linkletter/Stovall*, was articulated in *Chevron Oil Co. v. Huson*, in which the Supreme Court held that prospectivity was a possible result only in

116. *See supra* notes 25-30 and accompanying text.

117. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 11 (1973).

118. Justice Clark's opinion in *Linkletter* makes it clear that the Court considered its rule in Mapp v. Ohio, 367 U.S. 643 (1961), the prospectivity of which was at issue in *Linkletter*, to be new law. Justice Clark noted, "Although *Mapp* may not be considered to be an overruling decision in the sense that it did not disturb [an] earlier holding . . . its effect certainly was to change law with regard to enforcement of the right." Linkletter v. Walker, 381 U.S. 618, 619 n.1 (1965); *cf.* United States v. Johnson, 102 S. Ct. 2579, 2587 (1982):

> when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

There was a time when novelty seemed no longer required in one category of cases, but the requirement was reinstated recently. *See infra* notes 286-301 and accompanying text.

cases in which a court first established that the decision at issue decided "a new principle of law" or addressed "an issue of first impression."[119] Even if *Chevron* had not been so explicit, however, it is fundamental that the rule whose retroactivity is at issue be a newly announced rule, for if it is not new, its application to pending or future cases would seem in no sense to fall under a retroactivity analysis.[120] It is at least arguable, therefore, that novelty has always been required before a court may undertake consideration of either the *Linkletter/Stovall* or *Chevron* analysis.

For the most part, the lower courts have accepted the logic of the novelty requirement. The circuit courts, in fact, have been emphatic in demanding novelty as a prerequisite to retroactivity analysis in both civil and criminal matters.[121] Even on this basic point, however, there are mavericks, some of whom may be found in the same circuits whose published opinions rely heavily upon the element of novelty. In *Jenkins v. United States Civil Service Com-*

119. 404 U.S. 97, 106 (1971).

120. *See* United States v. Johnson, 102 S. Ct. 2579, 2587 (1982).

121. *See* United States v. Ross, 655 F.2d 1159, 1162 (D.C. Cir. 1981) (en banc) (before prospectivity may be considered, there must first be an expansion of the exclusionary rule, not merely a restatement or application of an existing rule), *rev'd on other grounds*, 102 S. Ct. 2157 (1982); NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 757 (7th Cir. 1981) ("in the instant case, the matter seems settled for us because [*inter alia*] the new rule was not an unforeshadowed departure from the Board's previously existing practice"), *cert. denied*, 454 U.S. 894 (1982); Kremer v. Chemical Constr. Corp., 623 F.2d 786, 789 (2d Cir. 1980) (nonretroactivity not applicable because decision was foreshadowed in Second Circuit), *aff'd*, 102 S. Ct. 1883 (1982); Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1279 (7th Cir. 1980) ("Having decided that our ruling in this case establishes no new principle of law, it is unnecessary to address the remaining prongs of the *Chevron Oil* test"), *rev'd on other grounds*, 452 U.S. 205 (1981); Everson v. McLouth Steel Corp., 586 F.2d 6, 8 (6th Cir. 1978) (per curiam) ("Everson contends that our decision in *Guy* should not be retroactively applied. He relies on *Chevron Oil Co.* . . . In our opinion *Chevron Oil* is inapposite. In *Guy* we applied our ruling retroactively. We did not overturn previously established law"); United States v. Schleis, 582 F.2d 1166, 1173 (8th Cir. 1978) (en banc) ("we are convinced that *Chadwick* presents no question of retroactivity because, as we have previously held, we do not regard *Chadwick* as representing a departure from the Supreme Court's long-standing approach to the Fourth Amendment"); Bunker v. Wise, 550 F.2d 1155 (9th Cir. 1977) (retroactivity analysis unnecessary if operative case does not overrule clear past precedent or disrupt long accepted practice); United States v. Hart, 546 F.2d 798, 803 (9th Cir. 1976) (en banc) (no retroactivity because "decision announced no new rule of law; it did not represent any 'sharp break in the web of the law' "), *cert. denied sub nom.* Robles v. United States, 429 U.S. 1120 (1977); Ferguson v. United States, 513 F.2d 1011, 1013 (2d Cir. 1975) (operative case foreshadowed by two Second Circuit cases; operative case therefore lacked the novelty necessary for a consideration of prospectivity); Schaefer v. First Nat'l Bank, 509 F.2d 1287, 1294 (7th Cir. 1975) (no prospectivity analysis because operative case is not sufficiently new), *cert. denied*, 425 U.S. 943 (1976); United States v. Karp, 508 F.2d 1122, 1124 (9th Cir. 1974) ("the threshold question bearing upon the issue of prospective application of a rule under Linkletter v. Walker . . . is whether the decision states new principles of law or merely applies what has always been the law") *cert. denied*, 422 U.S. 1007 (1975); Mayer v. Moeykens, 494 F.2d 855, 857 (2d Cir. 1974), (operative case did not decide a sufficiently novel principle, so it is retroactively applied without consideration of other elements of retroactivity analysis), *cert. denied,* 417 U.S. 926 (1974); Jordan v. Weaver, 472 F.2d 985, 996 (7th Cir. 1973) ("new principle of law" factor is primary; "[o]nly if that test is satisfied, do we reach the second and third prongs"), *rev'd on other grounds sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

In Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit took the novelty requirement a step further. The court held that the operative decision was "a clear departure from established law when applied to informal rulemaking proceedings," and therefore concluded that it should operate prospectively, without further discussion of the other factors in a *Chevron* retroactivity analysis. *Id.* at 474.

mission,[122] a district court in the District of Columbia concluded that the decision at issue established no new principle of law. Nevertheless, the court went on to make an analysis of how the other prongs of *Chevron* would weigh in a retroactivity analysis.[123] In like manner the Eastern District of New York reported in *Novak v. Harris* that "the decision reached in *Goldfarb* inevitably followed from the precedent established by *Frontiero* and *Wiesenfeld*,"[124] but the court still felt obligated to examine the factors of "purpose" and "equity" before concluding that the operative decision— *Goldfarb*—should be applied retroactively.[125]

Although those cases may be at odds with both the logic of *Linkletter/Stovall* and *Chevron*, as well as with the precedents established in most of the circuits,[126] the deviation may have been beneficial and was almost certainly harmless. Courts are, after all, often inclined to provide alternate foundations upon which their decisions can rest by engaging in the potentially useful but technically extraneous discussions we term dicta. As long as such supplementary material does not contradict reasoning central to the case at bar—and there was no contradiction in the results of *Jenkins* and *Novak*—the apparent digressions do not constitute cause for alarm.

More troubling, however, is the decision in *Gunter v. Merchants Warren National Bank*.[127] Litigation began when the bank sued in state court for money owed and at the same time attached defendants' real estate under state rules permitting attachment in an ex parte proceeding. Defendants in the state suit responded by bringing action in federal court for damages and equitable relief, arguing that the preexisting rule of *Fuentes v. Shevin*,[128] which prohibits ex parte replevin of personalty, was applicable to real estate as well. The court agreed that *Fuentes* could be extended to include attatchments of real estate. Moreover, because the court also reported that "we do not regard *Fuentes* as departing from established principles of procedural due process,"[129] a conclusion that *Gunter* would apply retroactively would seem to have followed. In fact, however, the court reached almost the exactly opposite result. Refusing to give *Fuentes* "solely prospective effect," the court compromised:

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122. 460 F. Supp. 611 (D.D.C. 1978).

123. *Id.* at 613.

124. 504 F. Supp. 101, 104 (E.D.N.Y. 1980). Califano v. Goldfarb, 430 U.S. 199 (1977), struck down dependency requirements for widowers' (but not widows') Social Security benefits as violating the fifth amendment right to equal protection. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), held that a statutory grant of survivors' benefits to widows and a denial of such benefits to widowers violated the same constitutional right. Frontiero v. Richardson, 411 U.S. 677 (1973), held that a requirement that dependency be established before spouses of female military personnel were eligible for certain benefits, in the absence of a similar requirement for spouses of male military personnel, also violated the equal protection element of the fifth amendment due process clause.

125. 504 F. Supp. at 106-07; *accord* Cash v. Califano, 469 F. Supp. 129, 132-35 (W.D. Va. 1979), *aff'd*, 621 F.2d 626 (4th Cir. 1980); Forsyth v. Kleindienst, 447 F. Supp. 192, 196-99 (E.D. Pa. 1978), *modified on other grounds*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981).

126. *See supra* note 121.

127. 360 F. Supp. 1085 (D. Me. 1973) (three-judge court).

128. 407 U.S. 67 (1972).

129. 360 F. Supp. at 1091 n.17.

> Since a retrospective judgment would cast doubt on the validity of all real estate attachments in actions now pending in the Maine courts and would create a cloud on the title to any property hitherto sold pursuant to a real estate attachment, our decree will be prospective only and will have no effect on any attachments, other than the two attachments presently before us, which have been made prior to the date of this opinion.[130]

The need for novelty was cast aside because it led to retroactivity, and retroactivity led to consequences the court was unwilling to accept.[131] In essence, the effect factor identified as part of retroactivity analysis in *Linkletter* and *Chevron* was decisive, eclipsing any other considerations within or without the *Linkletter/Chevron* standard. That result was unusual not only for its apparent logical flaw in disregarding the absence of novelty, but also because among the *Linkletter/Chevron* factors, effect is not always predominant.

2. Priority Among the Factors

Most lower federal courts have attempted to follow the wavering command of the Supreme Court that the purpose factor set out in *Linkletter/Stovall* and *Chevron* be accorded primacy[132] in those approaches to retroactivity analysis.[133] Moreover, and also consistent with Supreme Court instruction,[134] the purpose factor usually receives greater deference when the newly announced rule is intended to enhance the accuracy of fact-finding at trial.[135] The importance the lower courts have accorded to accurate fact-find-

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130. *Id.* at 1091.

131. It should be mentioned that the *Gunter* decision applied to the parties before the court because the judges were concerned about the possibility that a purely prospective holding would strip litigants of their incentive to change the law and might otherwise fall short of the "case or controversy" requirement of Article III of the Constitution, which is now disregarded in retroactivity matters. *See supra* note 34.

132. The primacy of the purpose factor was recently restated in Hankerson v. North Carolina, 432 U.S. 233, 241 (1977). *Cf.* United States v. Johnson, 102 S. Ct. 2579, 2594 n.21 (1982).

133. *See, e.g.*, Battie v. Estelle, 655 F.2d 692, 697 (5th Cir. 1981) (purpose factor "clearly the most important"); United States v. Blake, 632 F.2d 731, 735 (9th Cir. 1980) (other factors important "only when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity"); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975) (purpose is primary factor), *cert. denied*, 427 U.S. 912 (1976); Brown v. United States, 508 F.2d 618, 625 (3d Cir. 1974) (same), *cert. denied*, 422 U.S. 1027 (1975); United States v. Grant, 489 F.2d 27, 32 (8th Cir. 1973) (same). *But see* NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 757 (7th Cir.) ("Since there is a presumption favoring retroactivity, all three *Chevron* factors must support prospective application in order to limit the retroactive effect of the decision"), *cert. denied*, 454 U.S. 894 (1981).

134. Hankerson v. North Carolina, 432 U.S. 233, 241 (1977).

135. *See, e.g.*, White v. Maggio, 556 F.2d 1352, 1355 (5th Cir. 1977) (retroactivity generally appropriate when purpose of new rule is to correct serious flaw in factfinding at trial); Harris v. Israel, 515 F. Supp. 568, 572 (E.D. Wis. 1981) (when purpose is determination of truth, that consideration will outweigh reliance and affect administration of justice); Owens v. United States, 383 F. Supp. 780, 786 (M.D. Pa. 1974) (same), *aff'd*, 515 F.2d 507 (3d Cir.), *cert. denied*, 423 U.S. 996 (1975). The lower courts have also tried to follow the rule of the Supreme Court that when truthfinding is not "substantially" affected, *Hankerson* v. North Carolina, 432 U.S. 233, 243 (1977), the purpose factor will not weigh so heavily in favor of retroactivity. In United States v. O'Shea, 479 F.2d 313 (1st Cir. 1973), Judge Coffin commented that while a particular rule was both "salutary and important" and went to the accuracy of sentencing procedures based on presentence reports, the court was obligated to weigh probabilities to determine whether erroneous reports were likely to have affected prison sentences significantly. *Id.* at 314. *Accord* Basset v. Smith, 464 F.2d 347,

ing becomes most obvious in cases in which fact-finding was held not to be a substantial purpose of a new rule. In *Martin v. Wyrick*,[136] for example, a state convict sought habeas corpus relief on the ground that he had been denied the right to represent himself, a right the Supreme Court subsequently recognized as constitutionally based.[137] The Court of Appeals for the Eighth Circuit introduced its retroactivity analysis by agreeing that purpose "is the paramount consideration."[138] But then, having concluded that the purpose of the rule at issue did not go substantially to fact-finding, the panel reasoned that the absence of an important fact-finding purpose behind the change in law "strongly suggests the rule should not be made retroactive."[139] Similarly, the Court of Appeals for the Third Circuit held that when a new rule of criminal procedure does not affect the determination of truth at trial, it should be applied only prospectively.[140]

Such cases are representative of the determination by the lower courts to follow faithfully the lead of the Supreme Court in establishing the priority of the purpose factor, but on this point there has also been considerable confusion and backsliding. A district court in California, ruling upon a federal convict's petition to vacate his sentence under a change of law promulgated by the Court of Appeals for the Ninth Circuit, reasoned that the reliance factor was "of utmost importance" and justified that position by citing the Supreme Court's view of its own power in the area of retroactivity: "Of course, overriding all of the specific criteria which govern the Court in this determination is the general rule that 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application.' *Linkletter v. Walker*, . . . 381 U.S. at 628."[141] Another district court, in Pennsylvania, reached the conclusion that "[t]his test [*Chevron*'s] is all inclusive; each aspect must be met."[142]

Such inconsistency in the district courts is not surprising, because all the circuits are not certain that the purpose factor is primary. The Court of Appeals for the District of Columbia Circuit, in fact, has twice concluded that the

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349 (5th Cir. 1972) ("[T]he [Supreme] Court has recognized that 'the extent to which a condemned practice infects the integrity of the truth-determining process at trial is a question of probabilities.' Stovall v. Denno, 388 U.S. 293, 298"), *cert. denied*, 410 U.S. 991 (1973).

136. 568 F.2d 583 (8th Cir.), *cert. denied,* 435 U.S. 975 (1978).

137. Faretta v. California, 422 U.S. 806 (1975).

138. 568 F.2d at 587.

139. *Id.*

140. *See* United States *ex rel.* Cannon v. Johnson, 536 F.2d 1013, 1016-17 (3d Cir.), *cert. denied*, 429 U.S. 928 (1976); *accord* United States v. Powell, 449 F. Supp. 562, 564 (E.D. Pa. 1978) (new constitutional rules the purpose of which is not to improve accuracy of factfinding receive prospective treatment).

141. Alaway v. United States, 345 F. Supp. 978, 982 (C.D. Cal. 1972). In fact, however, the passage this court cited in *Linkletter* did not stand so much for freedom to choose among the factors as for the view of the Supreme Court that while the Court had routinely permitted cases to be applied retroactively in the past, it was not bound to do so. Moreover, one commentator believes the Supreme Court has identified reliance as the *least* important factor in the *Linkletter* analysis. Blumenfeld, *Retroactivity after O'Callahan: An Analytical and Statistical Approach*, 60 GEO. L.J. 551, 571 (1972).

142. Retail Clerks Int'l Ass'n, Local 1357 v. Leonard, 450 F. Supp. 663, 666 (E.D. Pa. 1978).

purpose factor is secondary to reliance. *National Association of Broadcasters v. FCC*[143] was a suit to force a refund of certain fees paid to an agency. Plaintiffs and others had previously challenged the fee schedule of the agency in the Court of Appeals for the Fifth Circuit, but had lost in that court.[144] Some of those plaintiffs took the case to the Supreme Court and won, but the parties in the instant case—who were from different segments of the communications industry—had not pursued the case on appeal. Normally that lapse would have precluded plaintiffs in the case at bar from any relief, but the case was unusual because the agency had agreed, when litigating before the Fifth Circuit, that fees paid pending a judicial decision would be refunded in full if the litigation before the Fifth Circuit were decided against the agency. When the plaintiffs in the case at bar sued for refunds, however, the agency resisted repayment by calling for prospectivity of the Supreme Court decision on the ground that an agency should be able to rely upon its own rules.[145] The Court of Appeals for the District of Columbia Circuit was sympathetic to the reasoning advanced by the agency, and commented that "[b]y far the most important consideration of the four [factors][146] is the extent of justifiable reliance on the old rule."[147] Because the agency was unable to demonstrate that it had in fact relied upon its old rule, the court decided in favor of retroactivity.[148] It does seem clear, however, that the court's elevation of reliance to first priority made the case a closer decision than it might otherwise have been.

National Association of Broadcasters is arguably skewed by the agency's apparent attempt to avoid its earlier promise to refund, but the decision of the Court of Appeals for the District of Columbia in *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*[149] contained no such distorting facts. *Wachovia* involved a suit under the federal securities laws[150] and turned upon a determination of which of two statutes of limitations would be applied. The court had recently adopted the shorter of the two limitations, but at the time the cause of action arose and the suit was filed, the longer limitation had been in use. Citing *Chevron* as the guideline for its retroactivity analysis, the

143. 554 F.2d 1118 (D.C. Cir. 1976).

144. Clay Broadcasting Corp. v. United States, 464 F.2d 1313 (5th Cir. 1972).

145. 554 F.2d at 1131.

146. The court cited "the commentators" for the proposition that there were four factors to consider, including reliance and purpose. The other two factors identified were "the degree of finality of plaintiff's transaction" and "the element of surprise." *Id.* at 1132. Presumably the degree of finality factor is drawn from the effect factor the Supreme Court articulated in *Stovall*, *see supra* note 11 and accompanying text, but the concept might not take into account all that has been included in consideration of effect. *See infra* notes 206-15 and accompanying text. The element of surprise factor appears to be little more than mere surplus, as the concept would seem to be included in the notion of "reliance."

147. 554 F.2d at 1132.

148. "[The Fifth Circuit case] was a case of first impression, and since the FCC had notice almost from the time it adopted the schedule that it would be subject to challenge in court, there could be no justifiable reliance here; and indeed, the record demonstrates that there was none." *Id.*

149. 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

150. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1976); Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (1976).

court held that the reliance factor was "the first, and most fundamental factor,"[151] and that the plaintiffs were entitled to rely upon the law as it stood when they filed their suit. To clinch the decision, the court concluded that even if the purpose factor "suggests retroactive application . . . we think it outweighed by the first and third criteria, which overwhelmingly dictate that the decision be applied prospectively here."[152] Somewhat more tersely, the Court of Appeals for the Seventh Circuit reached the same conclusion: "The first factor for consideration [reliance] is decisive."[153]

Puzzling as such language may be, the apparently casual words of both circuits contain a clue that may explain how the two courts departed from the path marked by the Supreme Court—if indeed they actually departed therefrom. Both the Courts of Appeals for the Seventh and District of Columbia Circuits referred to reliance as the "first" factor in the established retroactivity analysis. In fact, reliance was listed in the earliest days of *Linkletter/Stovall* decisions as the second factor, and purpose was listed first.[154] When the Supreme Court decided *Chevron*, however, it inverted the order of the two factors, placing reliance first. At the same time, the Court mixed the reliance factor into the explicit language that established the novelty prerequisite, which had been only implicit in *Linkletter*.[155] Thus it happened that reliance was mixed with an element arguably more fundamental than any of the single factors—perhaps with the result of heightening its importance in the analyses of some courts diligently attempting to follow the lead of the Supreme Court. It is sobering to consider that on such happenstance, rules of law may turn.

3. The Sources of Purpose

Question of priority among the *Linkletter/Stovall* and *Chevron* factors aside, it is settled that a lower court making a determination of retroactivity must search for the purpose of the new rule and the impact retroactivity would have upon that purpose.[156] That directive is straightforward, even if it clearly leaves wide latitude to argue about the true purpose of any particular rule. Lower courts, therefore, have typically been able to examine the purpose of a new rule without becoming enmeshed in controversy about the scope or direc-

151. 650 F.2d at 347. *Cf.* Zweibon v. Mitchell, 606 F.2d 1172, 1180 n.47 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981), in which the Court of Appeals for the District of Columbia Circuit cited a criminal case from the *Linkletter* line for the proposition that fairness is a factor to be weighed only when the purpose of the rule in question does not clearly favor prospectivity or retroactivity. Although Judge Robinson sat on the panels of both *Wachovia*, 650 F.2d 342 (D.C. Cir. 1980) and *Zweibon*, there is no mention of *Zweibon* in the later decision.

152. 650 F.2d at 348.

153. Schaefer v. First Nat'l Bank, 509 F.2d 1287, 1294 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

154. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 297 (1967).

155. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) ("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed").

156. *Chevron*, 404 U.S. at 106-07; *Linkletter*, 381 U.S. at 629. *See also* Hankerson v. North Carolina, 233, 432 U.S. 241-43 (1977).

tion of their inquiry. An absence of controversy, however, does not preclude the possibility that a court has searched too far or in the wrong direction. The circumstance under which such misdirection may occur arises when a law-changing judicial decision affects a statute, either by changing its interpretation or by striking some portion of the statute as unconstitutional. In that situation courts are inclined to look beyond the purpose of the law-changing decision and to the purpose of the underlying statute. Whether such an investigation is authorized is unclear. *Linkletter* spoke of "weigh[ing] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect."[157] The Court did not consider what constituted "prior history" of the rule, for in *Linkletter* it was common knowledge that the exclusionary rule had a long history that was clearly relevant to the retroactivity analysis. *Chevron*, by contrast, spoke only of the purpose of the new rule.[158]

Whether or not an expansive approach to examining the purpose factor is in fact authorized, it undeniably may affect the outcome of retroactivity analysis. Often the effect will be beneficial. In *Travis v. Trust Company Bank*,[159] for example, plaintiff had sued under the Federal Truth in Lending Act,[160] and alleged that defendant had failed to disclose the assignment of a security interest as required by legislation. Initially, the pivotal question was whether the item assigned was a security interest. While the case was pending at trial, however, the Court of Appeals for the Fifth Circuit ruled in a separate case that the item at issue was indeed a security interest.[161] The focus of *Travis* therefore became the retroactivity of the intervening decision.

When the Fifth Circuit made its retroactivity analysis under *Chevron*, it examined the purpose of the federal legislation, not the intervening decision. The purpose of the statute in *Travis*, the panel explained, included an attempt to deter sharp lending practices and generally to ensure that lenders did not take unfair advantage of debtors. Moreover, the court noted, exceptions to the lender's disclosure obligations were to be strictly construed. The court therefore concluded that the purpose factor of the *Chevron* analysis weighed in favor of retroactivity, and decided in favor of retroactive application.[162] While *Travis* may demonstrate how readily the purpose factor may lead a court to debatable conclusions,[163] it also shows how an examination of the purpose of a statute relevant to the law-changing decision may be helpful to

157. *Linkletter*, 381 U.S. at 629. United States v. Johnson makes reference only to the purpose of the new rule. 102 S. Ct. 2579, 2594 n.21 (1982).

158. *Chevron*, 404 U.S. at 107-08.

159. 621 F.2d 148 (5th Cir. 1980).

160. 15 U.S.C. §§ 1601-1691(f) (1976 & Supp. V 1981).

161. Elzea v. National Bank, 570 F.2d 1248 (5th Cir. 1978).

162. 621 F.2d at 150-51.

163. One might wonder, for example, why this civil case might not be a suitable subject for the application of the then-popular principle that when deterrence is an intended purpose, prospectivity is appropriate more often than not. *Cf.* United States v. Peltier, 422 U.S. 531, 541-42 (1975). Moreover, the reference by the court to its obligation to construe strictly exceptions to the Truth in Lending Act would seem more relevant to the scope of the statute than to the "purpose" factor of a retroactivity analysis.

retroactivity analysis. For if the panel deciding *Travis* had looked only to the purpose of the law-changing decision itself, successful analysis might have been frustrated: the relevant portion of the law-changing decision turned wholly on that court's view of the language of the statute and a related regulation, without consideration of any policy that might have been considered a purpose under the *Chevron* doctrine.[164] Without examining the underlying statute, therefore, the court might have been unable to single out any purpose, a result that would have made an important part of the retroactivity analysis a sterile exercise.[165]

Other decisions suggest that examinations of the purpose of something other than the law-changing decision may at times be less benign. In *Crumpler v. Califano*,[166] for example, the plaintiff sought retroactivity for a Supreme Court decision striking as unconstitutional a provision of the Social Security Act providing benefits to surviving widows with children, but not to similarly situated widowers.[167] The statute violated the fifth amendment right to equal protection, the Supreme Court concluded, because by refusing to provide equal benefits to widowers, who might then be able to remain at home and care for their children, the provision reduced incentives and protections for women who might want to enter the workforce.[168]

Deciding in favor of retroactivity for that Supreme Court decision, the federal district court in *Crumpler* looked to the purpose of the Social Security Act. The legislation, the court concluded, was intended to make possible closer supervision of children in certain one-parent families, and retroactivity would serve that purpose.[169] Lost in the analysis was the question how the purpose of the fifth amendment—the real basis for the decision of the Supreme Court—would be served by retroactivity. It may have been that the result in *Crumpler* would have been the same had the court examined the purpose of the fifth amendment as the Supreme Court had presented it, but that result is far from certain. What seems clearer is that the lack of a better defined boundary for investigations of the purpose factor has left the lower courts in some disarray, a situation that created the possibility of glaringly different results—or, even less desirable, results based upon the use of whichever source of purpose suits the predisposition of a particular judge in a partic-

164. *See* Elzea v. National Bank, 570 F.2d 1248, 1249-50 (5th Cir. 1978).

165. Two other cases involving the Truth in Lending Act also used the purpose of the statute, rather than of the law-changing decision, for their retroactivity analysis. Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1290 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981); Brown v. Termplan, Inc., 459 F. Supp. 160, 162-63 (N.D. Ga. 1978). Another decision in which an examination of the underlying statute seemed to be beneficial was United States v. LePatourel, 593 F.2d 827, 831-32 (8th Cir. 1979) (statute of limitations for Federal Tort Claims Act). *See also* Rudolph v. Wagner Elec. Corp., 586 F.2d 90, 94 (8th Cir. 1978) (examination of purpose of Civil Rights Act of 1964 led to result that examination of law-changing decision would arguably have reached), *cert. denied*, 441 U.S. 924 (1979); Krilich v. United States, 502 F.2d 680, 685 (7th Cir. 1974) (examination of underlying policy of res judicata), *cert. denied*, 420 U.S. 992 (1975).

166. 443 F. Supp. 342 (E.D. Va. 1978).

167. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

168. *Id.* at 645.

169. 443 F. Supp. at 345-46.

ular case.[170]

170. The only Social Security Act case identified in the course of this survey that lays heavier emphasis upon the law-changing decision than upon the statute is Cash v. Califano, 469 F. Supp. 129 (W.D. Va. 1979), *aff'd*, 621 F.2d 626 (4th Cir. 1980). The court observed, "In any case, retroactive application would serve the purpose of replacement of pecuniary advantage as contemplated by the statute. More importantly, retroactive application would best serve the *Goldfarb* purpose of according 'equal value' to past contributions of female wage earners." *Id.* at 134. Affirming that decision, Judge Haynsworth demonstrated similar insight into the distinction between the purpose of the judicial decision and the purpose of the statute:

> The rule at issue here is the equal protection of female wage earners. Unlike the situation in *Linkletter*, where the rule was designed to implement a policy, here the rule and the policy are one . Retroactivity would simply insure that money paid into Social Security by a female wage earner would be available to her surviving spouse on the same terms as money earned and paid by a male wage earner is available to his spouse. The time of protection is expanded. In fact, like the situation presented in *Cathedral Academy*, nonretroactivity would retard application of the rule by permitting the Secretary to continue to violate constitutional rights mandated by the due process clause of the Fifth Amendment.

626 F.2d at 631. More typical of retroactivity decisions involving portions of the Social Security Act are Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975) (purpose of statute was to support dependents, who need to have other sources of funds replenished), *cert. denied*, 427 U.S. 912 (1976); Novak v. Harris, 504 F. Supp. 101, 105 (E.D.N.Y. 1980):

> The court finds that retroactivity would promote the legislative intent behind enactment of [the statute] and the purpose of [the law-changing decision]. Specifically, it would further the goal that funds paid into Social Security by a female wage earner should be available to her surviving spouse on the same terms as money earned and paid by a male wage earner.

See also Aznavorian v. Califano, 440 F. Supp. 788 (S.D. Cal. 1977) (purpose of Social Security Act is to benefit needy people), *rev'd on other grounds*, 439 U.S. 170 (1978). Jenkins v. United States Civil Serv. Comm'n, 460 F. Supp. 611 (D.D.C. 1978), took the same approach when examining the retroactivity of judicial decisions related to the Civil Service Survivor Annuities Act, 5 U.S.C. § 8341(a)(3)(A)(ii) (1976): "[Retroactivity] will further the purposes of the survivor annuity law by giving support to dependents and by extending 'benefits to surviving memebers of the immediate family of the annuitant, without regard to dependency.'" *Id.* at 613 (quoting Gentry v. United States, 546 F.2d 343, 353 (Ct. Cl. 1976)).

In all those cases the choice of purposes to be examined by each individual court may have been harmless to the result, or even beneficial. In other cases, however, an examination of the purpose of the statute may have led the court away from a diverging purpose behind the law-changing decision. *See* Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 41 (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978) (interpretation of statute of limitations for Title VII of 1964 Civil Rights Act not retroactive, partly because "Title VII evinces a strong policy in favor of airing employment discrimination grievances"), *cert. denied*, 440 U.S. 930 (1979); Hines v. Olinkraft, Inc., 413 F. Supp. 1360, 1365 (W.D. La. 1976) (purpose factor may support prospectivity because retroactivity of interpretation of statute of limitations "would not further the broad remedial policies of § 1981"). Such use of the purpose behind statues, rather than the often narrow purpose behind a judicial decision affecting portions of a statute, suggest that decisions relating to enactments such as Title VII or § 1981 would almost never be retroactive.

Even more obvious cases demonstrate how easily a court can err when it strays too far from the purpose of the law-changing decision. Atlantic Richfield Co. v. FEA, 463 F. Supp. 1079 (N.D. Cal. 1979), involved a suit by a company to force an agency to modify an order the agency had issued. The order, which would have forced the company to make repayments to a gasoline station operator for overcharges on rent, was issued under the authority of the Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h (1976 & Supp. V 1981), which gave the agency such authority to control oil-related prices as existed pursuant to the Economic Stabilization Act, 12 U.S.C. § 1904 (1976). Subsequent to the order of the agency, the Temporary Emergency Court of Appeals held that once the Economic Stabilization Act had expired, the agency had no authority to issue the type of order in dispute in the instant case. Shell Oil Co. v. FEA, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975). Because the Economic Stabilization Act had expired before the agency issued the order, the agency sought prospectivity for *Shell Oil*. Arguably the law-changing case should have been treated as a matter of jurisdiction, which might have received automatic retroactivity, *see infra* notes 266-85 and accompanying text, but instead the court made a *Chevron* analysis. Reasoning that a purpose of the Emergency Petroleum Allocation Act was to preserve the

4. Bases for Reliance

Of the three factors characteristic of both the *Linkletter/Stovall* and *Chevron* analyses, the one that perhaps stirs the greatest empathy is reliance. Prejudicing someone who relied upon existing rules through retroactive application of a change in those rules simply seems unfair, so it should come as no surprise that reliance has a lengthy history as a factor supporting prospective application of a new rule.[171] There must, of course, have been actual reliance before the factor can weigh in favor of prospectivity. Federal courts have treated as fundamental the notion that a party seeking relief from retroactivity must demonstrate that he actually depended upon the existing state of the law—that he took some action, or refrained from taking some action, in compliance with what he believed the law to be at the time he acted. In *Of Course, Inc. v. Commissioner*,[172] a corporate taxpayer was unable to resist retroactivity for an unfavorable new rule when it was "plain that the taxpayer was not influenced in any action taken by [the old rule]. Its decision to liquidate and the procedure followed would have been the same whether [the old rule] prevailed or not."[173] Similarly, in *Aiello v. City of Wilmington*,[174] a municipality argued against retroactivity for a law-changing decision on the ground that the new law, subjecting cities to legal as well as equitable remedies for civil rights violations, was a dramatic departure from precedent. The court rejected the argument, partly because the city was unable to show that "the earlier decision established a rule of substantive conduct on which the munici-

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competitive viability of small operators in various segments of the petroleum industry, the court held that retroactive application of *Shell Oil* would not serve that purpose. 463 F. Supp. at 1083. What the court ignored was that once the Economic Stabilization Act had expired, the Emergency Petroleum Allocation Act simply had no bearing on the issue of rents. In essence, the court had referred to the purpose of a statute which was, in the very nature of the law-changing decision, utterly irrelevant to the retroactivity analysis.

An analogue to the *Atlantic Richfield* decision is Bush v. Wood Bros. Transfer, Inc., 398 F. Supp. 1030 (S.D. Tex. 1975), in which a district court looked not to the purpose of the statute at issue, but to the purpose of the old, now overturned, case law that had construed the statute:

> The second criterion concerns the nature and operation of the past rule that is in question. The rule here was that during the pendency of an EEOC investigation, the § 1981 statute of limitations is tolled. The purpose of this rule was to implement the policy of encouraging plaintiffs to use every avenue of relief prior to instituting a civil suit. In *Johnson*, the Supreme Court has apparently come to the realization that the theory of the old rule does not operate in practice, however, [sic] there are presently numerous litigants who relied on the rule and refrained from instituting theoretically premature § 1981 actions prior to the conclusion of an EEOC proceeding. Thus, it is the opinion of this Court that the second criterion is also met inasmuch as the prior rule is presently in operation in the form of pending Title VII and § 1981 litigation and nonjudicial EEOC proceedings. The rule served a positive function which would be destroyed by the retroactive application of *Johnson*.

Id. at 1032-33. The melange of reliance and purpose aside, the court simply failed to comprehend how far afield it had gone—perhaps in part because the path was so poorly marked.

171. Even before *Linkletter*, reliance upon an established rule, or the possibility of unfair surprise, was identified as a factor that should operate in favor of prospective application of a new rule. *See* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 944-50 (1962), and cases cited therein.

172. 499 F.2d 754 (4th Cir. 1974) (en banc).

173. *Id.* at 759-60.

174. 470 F. Supp. 414 (D. Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980).

pality relied."[175]

At first glance it might seem that actual reliance should also incorporate the notion of good-faith reliance—that is, the sort of reasonable conduct citizens should be able to expect from one another. In fact, however, the Supreme Court has not always insisted upon that requirement. Particularly in the area of search and seizure, evidence obtained through unlawful conduct by law enforcement authorities has routinely escaped retroactive application of the exclusionary rule, because the police acted in reliance upon the nonapplicability of that rule. Any other approach would have reversed the result in *Linkletter* itself, making that decision retroactive. Justice Rehnquist may have best explained the reason for the absence of a good-faith requirement in search and seizure cases when he noted that "although the police in [two retroactivity cases involving unlawful searches] could not have been expected to foresee the application of the exclusionary rule to state criminal trials, they could reasonably have entertained no similar doubts as to the illegality of their conduct."[176]

Lower federal courts have followed the lead of the Supreme Court in search and seizure cases,[177] but in other areas an absence of good faith seems to count heavily against a plea for prospectivity. In *McKinnon v. Patterson*,[178] for example, convicts brought a civil rights action against prison officials for punishing the convicts without a sufficient hearing. The cause of action rested upon an appellate court opinion subsequently overruled by Supreme Court decisions, putting the prisoners in the anomalous position— for convicts[179]— of pleading for nonretroactivity for a law-changing decision. Both plaintiffs and defendants apparently believed that their respective sides of the case met the relevant tests of the old rule, but it was to the convicts that the judge directed a telling remark: "Plaintiffs rely upon the prior case law to obtain redress for past actions taken against them; plaintiffs do not allege that their own actions were authorized by the prior law."[180]

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175. *Id.* at 418. *Accord In re* Spell, 650 F.2d 375 (2d Cir. 1981) (neither party able to demonstrate reliance on old rule); United States v. Marshall, 471 F.2d 1051 (D.C. Cir. 1972) (per curiam) (Bazelon, C.J., dissenting)(no prospectivity when prosecution did not rely upon old rule).

176. United States v. Peltier, 422 U.S. 531, 538 (1975).

177. *See, e.g.*, United States v. Dien, 609 F.2d 1038 (2d Cir. 1979) (citing United States v. Peltier, 422 U.S. 531 (1975)); United States v. Calandrella, 605 F.2d 236 (6th Cir.), *cert. denied sub nom.* Kaye v. United States, 444 U.S. 991 (1979) (same).

178. 425 F. Supp. 383 (S.D.N.Y. 1976), *modified on other grounds*, 568 F.2d 930 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

179. Criminal defendants are constitutionally protected against retroactive application of law-changing decisions adverse to the defendants' interests. *See supra* note 20. Normally, therefore, criminal defendants and convicts raise retroactivity issues by pleading for retroactive application of decisions favorable to them.

180. 425 F. Supp. at 388. See also Brown v. Termplan, Inc., 459 F. Supp. 160 (N.D. Ga. 1978), in which a lender failed to make certain disclosures in the belief that the law did not oblige him to do so. Subsequently the Court of Appeals for the Fifth Circuit held that such disclosure must be made, Elzea v. National Bank, 570 F.2d 1248 (5th Cir. 1978), and the issue was the retroactivity of that holding. Refusing the lender's plea for prospectivity, the court commented, "A creditor should evaluate its credit terms so as to come within the spirit of the law as well as its letter. Otherwise, as here, the creditor may find himself outside of both." 459 F. Supp. at 163 (footnote omitted). Courts also seem to require that good faith continue for the entire period during which a

The issue of good faith aside, parties have shown impressive imagination in proposing variations upon which the reliance factor could rest. With varying degrees of success, they have offered prior judicial decisions, legislation, regulations, industry practice, and even the absence of standards by which conduct could be measured as foundations for reliance. As might be expected, reliance upon case law seems to have worked best.

Parties may choose the safest ground of all when citing prior Supreme Court decisions.[181] The lower courts are also inclined to consider favorably reliance based upon lesser judicial decisions,[182] an approach the Supreme Court has recently sanctioned.[183] The Supreme Court, however, seems to countenance a substantial body of decisions, preferably from the federal courts of appeals, in which "virtual unanimity" was achieved,[184] while the lower courts for many years have been content with considerably less persuasive precedent. In an appropriate circumstance, a lower court has let a single federal case serve as sufficient foundation for reliance,[185] and state decisons have also satisfied the requirement.[186] The lower courts are divided upon the appropriateness of reliance based upon authority subject to significant judicial dispute, or even scholarly criticism,[187] but it seems settled that reliance cannot be

party relied. *See* Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1073-74 (2d Cir. 1977) (no good faith reliance when a party's actions, arguably in good faith at one time, were later conditioned more by inertia than good faith).

181. *See* Bendix Corp. v. Balax, Inc., 471 F.2d 149, 156 (7th Cir. 1972) ("Whether [a 1950 Supreme Court case] was 'clear past precedent' to the Supreme Court in 1971, the unqualified pronouncement in that case undoubtedly made the doctrine clear enough to parties relying upon it from 1950 to 1971."), *cert. denied*, 414 U.S. 819 (1973).

182. *See, e.g.*, Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342 (D.C. Cir. 1980) (reliance upon circuit court decisions), *cert. denied*, 452 U.S. 954 (1981); Brown v. Mitchell, 598 F.2d 835 (4th Cir. 1979) (same); United States v. Walker, 569 F.2d 502 (9th Cir. 1978) (same), *cert. denied*, 435 U.S. 976 (1978); Williams v. Phil Rich Fan Mfg. Co., 552 F.2d 596 (5th Cir. 1977) (same); Krilich v. United States, 502 F.2d 680 (7th Cir. 1974) (same), *cert. denied*, 420 U.S. 992 (1975).

183. *See* United States v. Johnson, 102 S. Ct. 2579, 2589 n.15 (1982). *See also supra* note 87.

184. *See* United States v. Johnson, 102 S. Ct. 2579, 2589 n.15 (1982).

185. United States v. Dorszynski, 524 F.2d 190, 194 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976) (prior decision in District of Columbia Circuit was only appellate authority on point at time of reliance).

186. *See* Martin v. Wyrick, 568 F.2d 583 (8th Cir.) (reliance upon line of state court decisions), *cert. denied*, 435 U.S. 975 (1978). In Litwhiler v. Hidlay, 429 F. Supp. 984 (M.D. Pa. 1977), the court noted, "The fact that three dissenters in [the Pennsylvania Supreme Court case upholding patronage firings] argued for a position similar to the one which ultimately prevailed [in the law-changing United States Supreme Court case], does not render the Defendants' reliance on the majority view of the Pennsylvania Supreme Court unreasonable." *Id.* at 986.

187. *See, e.g.*, Aufiero v. Clarke, 639 F.2d 49, 51 (1st Cir.) (valid reliance upon "nearly unanimous" prior case law), *cert. denied*, 452 U.S. 917 (1981); Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978) (valid reliance upon Fourth Circuit decision although Seventh Circuit had taken contrary position), *cert. denied*, 442 U.S. 910 (1979). *But see* Holzsager v. Valley Hosp., 646 F.2d 792 (2d Cir. 1981). Prior to *Holzsager* the Second Circuit had upheld the constitutionality of New York's assertion of jurisdiction over parties pursuant to the doctrine of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). More importantly, the Second Circuit had upheld *Seider* jurisdiction even after the Supreme Court had delivered the important and related decision in Shaffer v. Heitner, 433 U.S. 186 (1977). *See* O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978). Nevertheless, after the Supreme Court overruled the *Seider* doctrine, the Second Circuit refused to make the new rule prospective, partly because "the volume of criticism of the *Seider* rule made the prospect of its continuing validity questionable." 646 F.2d at 797.

based upon a minority line of authority.[188]

A troubling question raised by one circuit is whether a court may examine the quality of reasoning in the cases upon which a party places his reliance. In *White v. Maggio*,[189] a state convict sought habeas corpus relief on the ground that his criminal trial had been tainted by the refusal of the state to let defendant's ballistics expert examine two bullets that were important evidence at trial. After the defendant had been convicted, the Court of Appeals for the Fifth Circuit held in an unrelated case[190] that such a denial of access to evidence was unlawful. The state pleaded for prospectivity on the ground that it had relied upon state decisions that had clearly approved the practice. The Fifth Circuit agreed that the line of authority had been undisputed, but still held for retroactivity. The reliance by the state, the court reasoned, was not particularly strong because other state decisions had endorsed pretrial inspections of such evidence as narcotics and weapons.[191] Thus a party's reliance was denied consideration because the party should not have relied upon a fairly settled body of law that was to the party's advantage but was, with the benefit of hindsight, not as well reasoned as the Fifth Circuit would have preferred.

In most circumstances a party may rely upon a statute or a regulation with as much confidence as upon case law. In *United States v. Peltier*[192] the Supreme Court found a satisfactory basis for reliance in "a validly enacted [federal] statute, supported by longstanding administrative regulation."[193] That holding would seem to have settled the matter, at least as far as federal statutes and regulations are concerned.[194] Even earlier, the Supreme Court had struggled with a case in which plaintiffs sought recovery of payments made to sectarian schools for educational services rendered pursuant to a state statute that was subsequently declared unconstitutional.[195] Although the holding in that cased focused more upon "the appropriate scope of federal

188. Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980) (party's reliance upon one prior district court decision insufficient when two other prior district court decisions reached a contrary result), *rev'd on other grounds*, 452 U.S. 205 (1981); Benedict Oil Co. v. United States, 582 F.2d 544 (10th Cir. 1978) (en banc) (no valid reliance upon Fourth Circuit decision when two other circuits and relevant IRS regulations reached a contrary result). An evenly split body of authority also may fail to provide a sufficient basis for reliance. Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979) (split of authority plus parties' awareness that Supreme Court is generally unfriendly toward the sort of acts undertaken undercuts assertion of reliance), *cert. denied*, 453 U.S. 912 (1981); Dasho v. Susquehanna Corp., 461 F.2d 11 (7th Cir.) (no valid reliance when two other circuits have reached contradictory results), *cert. denied*, 408 U.S. 925 (1972).

189. 556 F.2d 1352 (5th Cir. 1977).

190. Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975).

191. 556 F.2d at 1356.

192. 422 U.S. 531 (1975).

193. *Id.* at 541.

194. *See* United States v. Main, 598 F.2d 1086 (7th Cir.) (reliance upon federal tax code and IRS manual), *cert. denied*, 444 U.S. 943 (1979); Bailey v. Holley, 530 F.2d 169 (7th Cir.) (parole board regulations), *cert. denied*, 429 U.S. 845 (1976); Bergstrom v. Kissinger, 387 F. Supp. 794 (D.D.C. 1974) (regulation governing "selection-out" process for federal employees), *aff'd*, 530 F.2d 1093 (D.C. Cir. 1976).

195. Lemon v. Kurtzman, 411 U.S. 192 (1973).

equitable remedies" than upon principles of retroactivity,[196] the Supreme Court also noted that the schools had incurred expenses in reasonable reliance upon the statute, making retroactivity inappropriate. Most lower courts have followed that direction and have found sufficient reliance upon a variety of state statutes.[197]

One interesting case against that tide is probably no longer good law, but it raises an important point nonetheless. *Alexander v. Weaver*[198] addressed the retroactivity of a Supreme Court decision that held unconstitutional a state statute restricting the eligibility of certain categories of persons for Aid to Families with Dependent Children.[199] As part of their opposition to retroactive application of the Supreme Court decision, state officials argued that they had relied upon the state statute for direction —indeed, they were bound by it. The federal court demonstrated little sympathy, however, characterizing the state's statutory overlay to federal legislation as self-serving. The court refused the plea for prospectivity and reasoned:

> To permit this reliance as a defense against retroactive payments would allow any state to promulgate a statute of dubious constitutionality limiting the funds it must expend at the minimal risk of a subsequent finding of unconstitutionality (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of its existence.[200]

It is probably not necessary to adopt this jaundiced view of state legislative processes to agree that there might be special considerations regarding reliance upon a rule by a party who influenced the development of that rule. But as soon as agreement is reached upon that point, it becomes clear that such a concern can easily be taken too far. Public agencies, in particular, are often properly influential in the enactment of legislation they will enforce, and it does not seem consistent with the public interest to discourage their contributions to the legislative process by threatening them with deprivation of the right to rely upon rules they helped develop.[201] If *Alexander* is no longer law, then the point may be moot. A key question still remains, however: if we assume that reliance by a party who helped write the rule can sometimes be

196. *Id.* at 199.

197. *See, e.g.*, Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978) (statute sanctioning patronage appointments of deputy sheriffs), *cert. denied*, 442 U.S. 910 (1979); Kacher v. Pittsburgh Nat'l Bank, 545 F.2d 842 (3d Cir. 1976) (replevin statute); Pruett v. Texas, 470 F.2d 1182 (5th Cir.) (en banc) (sentencing statute), *aff'd*, 414 U.S. 802 (1973); Roemer v. Board of Pub. Works, 387 F. Supp. 1282 (D. Md. 1974) (three-judge court) (statute authorizing aid to sectarian colleges), *aff'd*, 426 U.S. 736 (1976).

198. 345 F. Supp. 666 (N.D. Ill. 1972) (three-judge court), *vacated and remanded*, 412 U.S. 914 (1973). The result in Lemon v. Kurtzman, 411 U.S. 192 (1973), *see supra* notes 195-96 and accompanying text, probably rendered *Alexander* devoid of precedential value.

199. Townsend v. Swank, 404 U.S. 282 (1971).

200. 345 F. Supp. at 673.

201. *See* Americans United For Separation of Church & State v. Board of Educ., 369 F. Supp. 1059 (E.D. Ky. 1974) (public agencies must rely upon law they administer and normally cannot obtain prior approval of their work from a court).

insufficient as a defense against retroactivity, the issue of where to draw the line remains unaddressed.

The last source from which reliance might be drawn may be described as any practice that does not rise to the level of a formally adopted statute, judicial decision, or administrative regulation. The likelihood that such a foundation for reliance will be accepted by a court is uncertain. The Court of Appeals for the Ninth Circuit, for example, has held that an industry custom is an insufficient basis for reliance.[202] In *Weinburg v. Mitchell*,[203] however, in which defendants in a civil suit sought prospectivity for a holding that the warrant requirement of the fourth amendment permitted no exception for warrantless wiretaps,[204] the same circuit reached a different result. "There may not have been any judicial authority for the warrantless wiretaps, but the executive branch had long proceeded on the assumption that surveillance exercised in the interest of national security was within its power."[205]

The Court of Appeals for the Fifth Circuit has also produced apparently inconsistent results. After a panel overturned a state practice of requiring incarcerated criminal defendants to wear prison garb at their trials, the court rejected the plea by the state for prospectivity. Although the state noted that the practice in question was an old one, free of prior judicial criticism or praise, the court responded magisterially, "Reliance on a blank slate is not enough."[206] By contrast, consider *Bassett v. Smith*,[207] in which a state prisoner sought habeas corpus relief because a jury instruction used in his trial was subsequently held to violate due process. The state sought prospectivity partly upon the ground that it had used the instruction in good faith for many years, and this time the Fifth Circuit accepted the argument:

> The State's reliance was concededly not founded upon any Supreme Court decision sustaining the Georgia or similar charges against a due process attack. Neverthless, the very absence of any action on the part of the federal courts condemning this nearly century-old practice of the Georgia courts prior to [the date of the law-changing decision] inevitably gave rise to the implication that the practice did

202. American Timber & Trading Co. v. First Nat'l Bank, 511 F.2d 980 (9th Cir. 1973), *cert. denied*, 421 U.S. 921 (1975).

203. 588 F.2d 275 (9th Cir. 1978). The *Weinberg* opinion makes no mention of American Timber & Trading Co. v. First Nat'l Bank, 511 F.2d 980 (9th Cir. 1973), *cert. denied*, 421 U.S. 921 (1975), discussed *supra* text accompanying note 202.

204. United States v. United States Dist. Court, 407 U.S. 297 (1972).

205. 588 F.2d at 277. Note that both *American Timber* and *Weinberg* were civil actions for damages. The cases seem to be distinguishable, if at all, upon the basis that in *Weinberg* defendants were former government officials who might be presumed to have been acting for the public good, rather than private gain. *See* United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), *rev'd on other grounds*, 102 S. Ct. 2157 (1982), in which Judge Wilkey, dissenting, suggested that a party should be able to rely upon a legal scholar's view of a Supreme Court decision.

206. Williams v. Estelle, 500 F.2d 206, 210 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 501 (1976).

207. 464 F.2d 347 (5th Cir. 1972), *cert. denied*, 410 U.S. 991 (1973). Judge Ainsworth, who wrote the opinion of the court in Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), discussed *supra* text accompanying note 206, cited *Basset* with the parenthetical "*but see*."

not offend the Constitution.[208]

Finally, three circuits, among them the Fifth Circuit, have recently addressed the retroactivity of *United States v. Mauro*,[209] in which the Supreme Court held that the Interstate Agreement on Detainers Act[210] required certain procedural protections for criminal defendants who were moved around the country for criminal prosecution. All three circuits concluded that *Mauro* should not be accorded retroactivity, partly because prosecutors were entitled to rely upon what the Third Circuit called "the unsettled state of the law prior to *Mauro*."[211]

5. Equity Breeds Success

The third factor of *Linkletter/Stovall* and *Chevron* is usually described either as a consideration of the equities, or the effect of retroactivity upon the administration of justice.[212] Although there are decisions in which this factor has received cursory[213] or confused[214] treatment, on the whole the analysis of

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208. 464 F.2d at 351. The panel noted, however, that "[t]he Georgia charge was never an object of scholarly or judicial praise." *Id.* at 352. *Cf.* Holzsager v. Valley Hosp., 646 F.2d 792, 797 (2d Cir. 1981) (no valid reliance upon old rule that had been heavily criticized).

209. 436 U.S. 340 (1978).

210. 18 U.S.C. app. §§ 1-8 (1976).

211. United States v. Williams, 615 F.2d 585, 593 (3d Cir. 1980). *Accord* United States v. Hill, 622 F.2d 900 (5th Cir. 1980); Brown v. Mitchell, 598 F.2d 835 (4th Cir. 1979). The panel in *Hill* was entirely different from the panel in Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974). *Williams*, which had been reversed by the Supreme Court on other grounds, was not cited in *Hill*.

212. In *Linkletter* the court pondered the implications of retroactivity for the judicial system. 381 U.S. at 637. In *Chevron* the court described the third factor as "the inequity imposed by retroactive application." 404 U.S. at 107.

213. *See, e.g.*, Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1290 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981):

> we note that defendants have failed to persuade us that retroactive application of our ruling will retard the operation of the [Truth in Lending Act] or cause undue hardship. The Act requires disclosure of security interests as defined by Regulation Z. Our ruling merely implements that requirement. It does not disturb any clear rulings or precedents on which defendants may have relied to their detriment. We can see no inequity in its retroactive application.

See also Matter of S/S Helena, 529 F.2d 744, 754 (5th Cir. 1976) ("a holding of retroactivity would not 'produce substantial inequitable results' in this case. It seems unlikely, for example, that the parties' conduct leading to the Helena-White Alder collision was in any way influenced by the pre-*Reliable Transfer* divided damages rule"); Radcliff v. Anderson, 509 F.2d 1093, 1096 (10th Cir. 1974), *cert. denied*, 421 U.S. 939 (1975) ("We believe that the principles of 'basic fairness' mentioned in *Robinson* and 'essential justice' mentioned in *Gosa* require that the *Lamb* decision be applied retroactively").

214. The list of cases in which the courts seem to have misconstrued the third factor is short, though some of the comments are rather stark. Jenkins v. United States Civil Serv. Comm'n, 460 F. Supp. 611 (D.D.C. 1978), was a class action for retroactive application of an earlier decision holding unconstitutional a federal statute requiring illegitimate children applying for Civil Service Survivor Annuities to show they had lived with the Civil Service parent. Addressing the third factor, the court said, "Furthermore, the equities weigh in favor of retroactive application in that the unconstitutional deprivation of benefits to the members of the class would otherwise go unremedied." *Id.* at 613. How that situation was more severe than *Linkletter*, in which persons denied a constitutional right remained in jail, is not clear.

The other particularly troubling case in this area is Woods v. Safeway Stores, Inc., 420 F. Supp. 35 (E.D. Va. 1976), *aff'd*, 579 F.2d 43 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979), in which an employee who was fired brought a grievance to a labor arbitration process but delayed making a complaint to the Equal Employment Opportunity Commission. The employee believed

this factor has produced a fairly consistent body of judicial opinion. The effect factor usually has weighed in favor of retroactivity if the court is unable to identify a consequence that is either fundamentally unfair[215] or otherwise laden with real-world implications for the operation of administrative or judicial bodies. *Novak v. Harris*[216] is representative of a number of district court cases in which pragmatic considerations influenced the result. The issue in *Novak* was whether a widower not dependent upon his deceased spouse was entitled to retroactive application of *Califano v. Goldfarb*,[217] in which the Supreme Court had held that the Social Security Act's dependency requirement for widowers was unconstitutional. The district court decided in favor of retroactivity for *Goldfarb*:

> Two significant points militate against nonretroactive application of *Goldfarb*. Specifically, this court is not dealing with a class of widowers; the court is concerned solely with a single claimant whose claim was pending at the time of the decision in *Goldfarb*. Although consideration should be given to the potential impact of granting retroactive effect in the present case, this court is cognizant of the concrete individual rights of the plaintiff, Harry Novak. Second, in measuring the hardships suffered by each party, the court initially must be satisfied that retroactive payment would produce substantial inequitable results. This court cannot conclude that an award of retroactive benefits to one person, for a period of some two and one-half years, would have any significant impact upon the fiscal integrity of the Social Security system. Indeed, it would be inequitable for Mr. Novak to be denied his right to widowers' benefits for a limited period of time because, during that period, there existed an unconstitutional gender-based requirement.[218]

Mr. Novak was fortunate that his lawyer did not bring a class action.[219] Aside

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that the statute of limitations for such a complaint was tolled pending the outcome of arbitration, but subsequently the rule was established that arbitration did not toll the statute. The court applied the new rule prospectively because "Title VII evinces a strong policy in favor of airing employment discrimination grievances." *Id.* at 41.

215. *See, e.g.*, NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), in which the Board promulgated a new rule providing back pay for unlawfully discharged striking employees who had not asked for reinstatement to their jobs. Holding in favor of retroactivity, the court said:

> retroactive application will not create substantial injustice or undue hardship for either party. The Board finds no valid reason for distinguishing between the status of an unlawfully discharged striker and of an unlawfully discharged working employee. Contrary to the Company's claim, the rule enforced here does not provide a windfall to striking employees but merely places the burden of undoing the wrong on the wrongdoer, where it seems properly to belong.

Id. at 757. *Accord* Haney v. Chesapeake & Ohio R.R., 498 F.2d 987 (D.C. Cir. 1974) (new rule requiring exhaustion of arbitration remedy; retroactivity appropriate because court will ensure that in subsequent litigation defendant will not raise defense of laches).

216. 504 F. Supp. 101 (E.D.N.Y. 1980).

217. 430 U.S. 199 (1977).

218. 504 F. Supp. at 106-07 (citations omitted).

219. Other cases also seem to have taken account of the presence or absence of a class in making a decision on retroactivity. Shannon v. United States Civil Serv. Comm'n, 444 F. Supp. 354 (N.D. Cal. 1977) (class relief available only to extent of readily retrievable records or when individual parties made requests on their own initiative), *modified on other grounds*, 621 F.2d 1030

from that pragmatic consideration, the decision in *Novak* is interesting for its use of an extension of the original *Linkletter/Chevron* line of thought. While the Supreme Court used those decisions to evaluate the burden retroactivity might impose upon the administration of justice in the courts, *Novak* and similar cases address the potential administrative impact of retroactivity.[220]

Beyond those wrinkles, the effect factor seems to be one over which the courts have exercised considerable discretion. In this area, civil and criminal cases alike evince a thoughtful, measured approach to the issue, producing decisions the analysis and results of which are difficult to criticize.[221] Equity, or basic fairness—concepts American courts encountered long before *Linkletter*—has produced consistent and reasonable results.

6. Differences Between *Linkletter/Stovall* and *Chevron*

As the Supreme Court recently made clear, it considers the *Chevron* analysis to be distinct, applicable uniquely to civil litigation.[222] It remains true, however, that *Chevron* developed in the wake of *Linkletter/Stovall* and appears to have borrowed heavily from the earlier doctrine.[223] Those circumstances may help explain why, over the past decade, lower courts have been considerably less clear in differentiating *Chevron* from *Linkletter/Stovall*, and when distinctions have been drawn, they may explain why such distinctions are not always the same as those the Supreme Court has identified.

The manner in which the Supreme Court first approached retroactivity in civil litigation at least allowed the possibility that the Court contemplated a close analogue to the retroactivity analysis emerging from the *Linkletter/Stovall* line.[224] Originally left unstated was how close the relationship was

(9th Cir. 1980); *cf.* Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975) (retroactivity ordered partly because government was unable to show that back payments to class will undermine trust fund), *cert. denied*, 427 U.S. 912 (1976); Brown v. United States, 508 F.2d 618 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975); Aznavorian v. Califano, 440 F. Supp. 788 (S.D. Cal. 1977) (same).

220. *But see* Gosa v. Mayden, 413 U.S. 665 (1973) (refusing retroactivity for O'Callahan v. Parker, 395 U.S. 258 (1969), because such a result would produce significant judicial and administrative costs).

221. Examples of particularly thoughtful analysis include Holzsager v. Valley Hosp., 646 F.2d 792 (2d Cir. 1981) (retroactivity not inequitable because party injured thereby will merely have failed to win a gamble on obtaining a more lucrative forum); Aufiero v. Clarke, 639 F.2d 49, 51 (1st Cir.) (prospectivity, because persons likely to be injured by retroactivity were "blameless"), *cert. denied*, 452 U.S. 917 (1981); Cole v. Stevenson, 620 F.2d 1055 (4th Cir.) (en banc) (retroactivity would produce an avalanche of reversals), *cert. denied*, 449 U.S. 1004 (1980); Rudolph v. Wagner Elec. Corp., 586 F.2d 90 (8th Cir. 1978) (no retroactivity because party who thereby loses could have prevented situation simply by filing a timely complaint), *cert. denied*, 441 U.S. 924 (1979); Woodall v. Pettibone, 465 F.2d 49 (4th Cir. 1972) (burden of retroactivity upon state is manageable because only 122 persons are affected), *cert. denied*, 413 U.S. 922 (1973); United States *ex rel.* Jones v. Rundle, 358 F. Supp. 939 (E.D. Pa. 1973) (prisoner seeking expungement of records of disciplinary actions taken without due process gets expungement because no great administrative burden is involved).

222. United States v. Johnson, 102 S. Ct. 2579, 2587 n.12, 2594-95 (1982).

223. Moreover, the Supreme Court once treated civil and criminal cases as essentially the same for retroactivity purposes. *See* Linkletter v. Walker, 381 U.S. at 627 ("no distinction [will be] drawn between civil and criminal litigation").

224. Until recently, the similarities between *Linkletter/Stovall* and *Chevron* have always seemed more important than the differences. *See* Beytagh, *supra* note 11, at 1582.

to be and in what circumstances the approaches to civil and criminal retroactivity cases nominally under the broad umbrella of *Linkletter/Stovall*—or perhaps more aptly, *Linkletter/Stovall/Chevron*—may begin to diverge. Thus, the Court of Appeals for the Tenth Circuit wrote that *Chevron* was an appropriate test for "conventional retroactivity analysis," a term that included many criminal cases, but that:

> [in] contrast, when the exclusionary rule is involved, retroactivity analysis focuses on whether the purposes underlying the exclusionary rule would be furthered by retroactive application. If neither judicial integrity nor deterrence of official misconduct would be enhanced by retroactive employment of the exclusionary rule, then it will be given prospective application only. *See United States v. Peltier*. . . .[225]

Even when courts have agreed that a distinction should be drawn between civil and criminal matters, the circuits have been unable to concur among themselves as to the consequences such categorization should produce. While the Court of Appeals for the Fifth Circuit commented that *Chevron* establishes a stricter test to be met before a court can decide in favor of prospectivity,[226] the Fourth Circuit concluded that in civil cases considerations of reliance and a need for stability in the law weigh in favor of prospectivity.[227] Two other circuits have joined in the fray. The Seventh Circuit has taken sides with the Fifth Circuit by holding that prospectivity will be more nearly preferred in criminal cases.[228] The Court of Appeals for the District of Columbia Circuit, on the other hand, has been more tentative, preferring an approach that seems to fall between that of the Fourth Circuit and that of the Tenth:

> Historically, prospectivity has been less common in civil than in criminal cases. This is at least partly due to the potential flood of *habeas corpus* petitions that looms if a court recognizes retroactively a procedural or substantive right of criminal defendants. No such threat arises in civil litigation where a retroactive decision can affect only suits pending in the courts or not yet brought, but cannot be raised by previously unsuccessful litigants. The prospectivity determination in both civil and criminal cases, however, remains a pragmatic one that turns on the expected impact of a retroactive overruling on the society and legal system.
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> . . . .
>
> [W]e think that a stronger case for prospectivity, rather than retroactivity, might be made in a criminal case involving the exclusionary rule, where the prophylactic purpose of that rule cannot be served by retroactive application and where the costs to society of retroactivity may be far greater. In a damage action the effect of the warrant rule articulated in the [law-changing decisions at issue in the case at bar] is to recognize a substantive right to compensation for injury. Retro-

225. Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979).

226. Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 501 (1976).

227. Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

228. Dasho v. Susquehanna Corp., 461 F.2d 11, 20 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972).

active application would therefore seem fully consonant with those decisions . . . .[229]

As it turns out, none of the positions enunciated in any of those decisions is the prevalent view, for the largest body of decisions simply treats *Linkletter/Stovall* and *Chevron* as essentially the same test. Some decisions make that point explicitly,[230] but the more common practice is to link the two decisions either by citing *Linkletter/Stovall* (or their criminal progeny) in a civil context,[231] or *Chevron* in a criminal matter.[232] Ironically, numbered among the circuits treating *Linkletter/Stovall* and *Chevron* as fungible are most of those that sought to explain the differences between the doctrines.[233]

The pronouncement of the Supreme Court in *United States v. Johnson*[234] should end the mixing of *Linkletter/Stovall* and *Chevron*. The confusion over the past decade, however, with undetermined implications for affected retroactivity decisions, is itself a most unfortunate result. It would seem that either the lower courts were unable to follow a clear lead, or that the Supreme Court

229. Zweibon v. Mitchell, 606 F.2d 1172, 1176-77, 1179-80 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); *accord* United States *ex rel.* Jones v. Rundle, 358 F. Supp. 939, 950 (E.D. Pa. 1973) (*Linkletter* applies to civil and criminal cases, "but other factors will become relevant because the effects of civil remedies may differ from criminal remedies").

230. Burkhart v. Saxbe, 448 F. Supp. 588, 599 n.22 (E.D. Pa. 1978) (with regard to retroactivity, "the [Supreme] Court apparently has not distinguished between civil and criminal cases or constitutional and nonconstitutional issues in developing this area of jurisprudence"), *modified on other grounds sub nom.* Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981); *cf.* Adams v. Carlson, 488 F.2d 619, 627 (7th Cir. 1973) ("Nor does it matter that *Miller* and this case arise in a civil rather than a criminal context").

231. Ruotolo v. Gould, 489 F.2d 1324 (1st Cir. 1974) (per curiam); Roemer v. Board of Pub. Works, 387 F. Supp. 1282 (D. Md. 1974) (three-judge court), *aff'd*, 426 U.S. 736 (1976); Wood v. United States Post Office Dep't, 381 F. Supp. 1371 (N.D. Ill. 1973), *aff'd*, 511 F.2d 1405 (7th Cir. 1975).

232. United States v. Blake, 632 F.2d 731 (9th Cir. 1980); United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979); United States v. Stewart, 595 F.2d 500 (9th Cir. 1979) (per curiam).

233. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981) (habeas case citing *Chevron*); United States v. Hill, 622 F.2d 900 (5th Cir. 1980) (criminal appeal citing *Chevron*); United States v. Petersen, 611 F.2d 1313 (10th Cir. 1979) (criminal appeal citing *Chevron*), *cert. denied*, 447 U.S. 905 (1980); Brown v. Mitchell, 598 F.2d 835 (4th Cir. 1979) (habeas case citing *Chevron*), *cert. denied*, 446 U.S. 916 (1980); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (appeal of agency decision citing *Linkletter*); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976) (appeal of agency decision citing *Linkletter*); Haney v. Chesapeake & Ohio R.R., 498 F.2d 987 (D.C. Cir. 1974) (civil appeal citing *Linkletter*).

Of interest is the degree of overlap in membership on the panels deciding the cases cited *supra* notes 225-27 and 229, and the apparently contradictory views from the same circuits cited in this footnote. Judge Ainsworth of the Court of Appeals for the Fifth Circuit wrote the opinions in *Battie* and Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 501 (1976), but he did not mention the *Williams* decision in *Battie*. The Supreme Court reversed *Williams* on other grounds, which may explain why it was not cited.

Both Judges Barrett and McKay sat on the panels of *Petersen* and Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979). Moreover, Judge Barrett wrote the opinion in *Petersen* and Judge McKay wrote the opinion in *Savina*. Nevertheless, *Petersen* does not cite *Savina*.

There is no overlap between the panel that sat for Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981), and the panels that sat for *National Ass'n of Broadcasters*, *Action for Children's Television*, and *Haney*. *Zweibon*, the most recently decided of the cases, does not cite any of the others.

234. See 102 S. Ct. 2579 (1982), discussed *supra* notes 96-97 and accompanying text.

was unable to offer one.[235]

B. Alternatives to Linkletter/Stovall *and* Chevron

1. Diversity

In diversity cases, the decision of the Supreme Court in *Vandenbark v. Owens-Illinois Glass Co.*[236] commands the lower courts to treat retroactivity as a substantive matter under the *Erie* doctrine.[237] As *Vandenbark* construes *Erie*, that means the federal courts are to apply the decision of the state supreme court prevailing at the time the federal judgment is to be entered, resulting in automatic retroactivity in diversity matters.[238]

The investigation made for this article included only a few diversity cases, but courts in most of those studied were able to apply the rule of *Vandenbark* routinely.[239] A few other cases, mostly in the Court of Appeals for the Fifth Circuit, raised the only troubling question to come to light: if *Vandenbark* is taken literally and federal courts sitting in diversity are to apply state rules announced while litigation is pending, how can a federal court uphold a state retroactivity rule that might, in particular circumstances, require prospectivity? In that respect, the eagerness in *Vandenbark* to adhere to *Erie* has produced a possibility of distorting the doctrine *Erie* meant to establish.[240]

The solution has been to take *Vandenbark* at somewhat less than face value, grafting onto it the larger *Erie* principle that federal courts should do what state courts would do in the same situation. *Downs v. J. M. Huber Corp.*[241] demonstrated the success of that approach. *Downs* turned upon the duty an owner of property owed to a business invitee. The trial court had applied the existing state rule that an owner had no duty to warn or protect invitees against obvious dangers of which the invitee should have been aware. While the case was pending on appeal, however, the state supreme court

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235. Assuming that some of the mixtures of the two analyses involved more than harmless error, are there now persons in prisons who can make collateral attacks upon the retroactivity decisions in their cases? Are they required to have preserved the issue with objections — that is, should they have more clearly understood than almost all the federal courts that *Chevron* and *Linkletter/Stovall* were different? See *supra* notes 26-30, 81-85 and accompanying text.

236. 311 U.S. 538 (1941).

237. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). While controlled by *Erie*, the rule of *Vandenbark* is also an outgrowth of the doctrine of United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). 311 U.S. at 541-42.

238. 311 U.S. at 543.

239. *See, e.g.*, Baker v. Outboard Marine Corp., 595 F.2d 176 (3d Cir. 1979); Samuels v. Doctors Hosp., Inc., 588 F.2d 485 (5th Cir. 1979). In many cases the principle of *Vandenbark* is applied without a reference to the Supreme Court case. Ettinger v. Central Penn Nat'l Bank, 634 F.2d 120 (3d Cir. 1980); Powers v. Bethlehem Steel Corp., 483 F.2d 963 (1st Cir. 1973); Avila v. Travelers Ins. Co., 481 F. Supp. 431 (C.D. Cal. 1979), *aff'd*, 651 F.2d 658 (9th Cir. 1981). *Vandenbark* has even been cited in nondiversity cases for the "settled rule" of automatic retroactivity when the law changes before a decision is final. Robinson v. Heilman, 563 F.2d 1304, 1307 (9th Cir. 1977) (per curiam); C. Blake McDowell, Inc. v. Commissioner, 71 T.C. 71 (1978).

240. Nelson v. Brunswick Corp., 503 F.2d 376, 381-82 n.12 (9th Cir. 1974); *see generally* 1A pt. 2 J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.307[3] (2d ed. 1982 & Cum. Supp. 1982-83).

241. 580 F.2d 794 (5th Cir. 1978).

changed the duty to one of reasonable care.[242] The panel of the Court of Appeals for the Fifth Circuit acknowledged its discomfort with the apparent requirement in *Vandenbark* for retroactivity even in circumstances in which the state might have preferred a different result. With that consideration in mind, the court made a more searching examination of the retroactivity issue than *Vandenbark* required. Noting that the state supreme court had typically been quite explicit when it displayed a preference for prospectivity, the court commented that in this instance no preference had been expressed in the state court.[243] Moreover, the law-changing decision had been foreshadowed by two earlier state decisions. The Fifth Circuit in *Downs*, therefore, made the state decision retroactive, as *Vandenbark* would have, but the court had traveled a more circuitous route than *Vandenbark* directs.[244] That apparent quirk in *Vandenbark* resolved, the Court of Appeals for the Fifth Circuit does not seem to have encountered further difficulty with the rule in diversity cases.[245]

2. Retroactivity for Agency Matters

Retroactivity for agency policies or practice is also covered by a special retroactivity rule:

> Appellate courts ordinarily apply the law in effect at the time of the appellate decision, *see Bradley v. School Board*, 416 U.S. 696, 711 . . . . However, a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.[246]

The direction is not free from ambiguity, establishing as it does only one factor—the purpose factor of *Linkletter* and *Chevron*—that the agency presumably must consider before reaching its decision. Also left uncertain is the

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242. Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. 1978). Note that when this circumstance arises in cases involving federal questions, nearly automatic retroactivity is achieved. *See supra* notes 68-79 and accompanying text; *see also infra* notes 251-65 and accompanying text.

243. 580 F.2d at 796.

244. 580 F.2d at 796-97.

245. In Harless v. Boyle-Midway Div., Am. Home Prods., 594 F.2d 1051 (5th Cir. 1979), decided a year after *Downs*, a panel of the Court of Appeals for the Fifth Circuit used its modified *Vandenbark* approach without a mention of the original problem:

> Appellant's third challenge to the employment of this statute as a defense centers around a decision by the Florida Supreme Court that declared the applicable statute unconstitutional subsequent to the trial below. *Linville v. State of Florida*, 359 So.2d 450 (Fla. 1978). The court in *Linville* failed to address the issue of retroactive application of their decision. While this may be some evidence of a reluctance to so apply its decision, the court's silence on this issue is certainly not conclusive evidence of a decision not to apply its decision retroactively. However, without any direct evidence that the court intended to apply its decision retroactively, we decline to apply *Linville* to the instant case.

Id. at 1057. Of some additional interest is the failure of the Fifth Circuit to give the law-changing decision the presumption of retroactivity that would be characteristic even of the *Linkletter/Stovall* or *Chevron* lines.

246. NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974). See *supra* note 77.

standard reviewing courts are to use when, after "the first instance," the agency's retroactivity decision arrives in the judicial arena on appeal.

In *NLRB v. Lyon & Ryan Ford, Inc.*,[247] the Court of Appeals for the Seventh Circuit faced precisely those questions. In the course of adjudicating a labor dispute, the Board had applied retroactively a new policy granting back pay to an unlawfully discharged striking employee. Prior to the Board's change of policy, it had for thirty years refused back pay to unlawfully discharged striking employees, granting it only to those who were unlawfully discharged while working.[248] When the Board's decision on retroactivity came before the court, it used the three-factor appoach of *Chevron* when it affirmed the agency analysis. Although the language the court used does not clarify the matter entirely, it appears that the panel was unaware of the inconsistency in reviewing a one-factor agency retroactivity analysis with the more elaborate mechanism of *Chevron*:

> In the instant case, the matter seems settled for us because the new rule was not an unforeshadowed departure from the Board's previously existing practice, and the Board has sufficiently demonstrated a basis for its view that retroactive application will further rather than retard the operation of the rule. In addition, retroactive application will not create substantial injustice or undue hardship for either party. The Board finds no valid reason for distinguishing between the status of an unlawfully discharged striker and of an unlawfully discharged working employee. Contrary to the Company's claim, the rule enforced here does not provide a windfall to striking employees but merely places the burden of undoing the wrong on the wrongdoer, where it seems properly to belong.[249]

The Board appeared to have made the determination of the purpose factor, while the assessment of the other two *Chevron* factors apparently was left to the court. Assuming that the court was as able as the Board to make a determination upon the novelty rule, it is difficult to understand how the judicial panel would normally be as well equipped as the Board to assess the effect factor of *Chevron*. Although the opinion in *Lyon & Ryan Ford* is unquestionably thoughtful, and the decision appears to be correct, the approach used—which may be exactly the one the Supreme Court mandated—raises more apprehensions than it resolves.[250] At the very least, it creates a possibility that an agency will carefully and correctly weigh the purpose factor—the sole factor assigned to it—only to be overturned upon judicial review when the court examines the other two factors. A more purposeless activity can hardly be imagined.

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247. 647 F.2d 745 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

248. *Id.* at 755.

249. *Id.* at 757.

250. The Court of Appeals for the Fourth Circuit had a much easier task in NLRB v. Cambridge Wire Cloth Co., 622 F.2d 1195 (4th Cir. 1980), in which it merely had to remand a matter to the Board so that the agency could make the initial retroactivity analysis.

3. *Schooner Peggy*

As we have seen, for civil cases on direct appeal, the Supreme Court has continued to respect the ancient rule of *Schooner Peggy*, which commands that in such litigation intervening changes of law will be applied retroactively.[251] The rule is subject to exceptions only when it will produce "manifest injustice,"[252] a term that remains undefined by the Court. For the most part, federal courts have experienced no difficulty in distinguishing the body of cases subject to *Schooner Peggy* from those that fall under *Linkletter/Stovall* or *Chevron*, and the result has been decisions that are, if nothing else, straightforward and easily reached.[253]

A particularly interesting demonstration of the rigor with which this rule operates arose in a decision of the Court of Appeals for the Third Circuit. *Zichy v. City of Philadelphia*[254] was a class action alleging sex discrimination in the city's approach to maternity leave for female employees. The district court granted summary judgment for plaintiffs, but while the case was pending on appeal the Supreme Court held that an employer's disability plan was not unlawful simply because it did not include pregnancy benefits.[255] Based upon the new rule of the Supreme Court, the Court of Appeals for the Third Circuit reversed and remanded the case so the district court could determine whether an amended complaint would permit plaintiff's case to continue on other grounds. On remand the lower court denied a motion to amend, and plaintiffs appealed.

Once again, however, a Supreme Court decision intervened, this time by a holding that an employer's policy forcing female employees who take maternity leave to lose accumulated seniority constitutes unlawful sex discrimination.[256] Addressing the argument that the second Supreme Court decision could not be permitted to overturn the law of the case developed during the

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251. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). See also *supra* notes 68-79 and accompanying text.

252. Bradley v. School Bd., 416 U.S. 696, 716 (1974). *See supra* note 73.

253. *See, e.g.*, Women's Health Serv., Inc. v. Maher, 636 F.2d 23 (2d Cir. 1980); Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978); Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977); California v. Italian Motorship Ilice, 534 F.2d 836 (9th Cir. 1976); Kinsman Marine Transit Co. v. Great Lakes Towing Co., 532 F.2d 1073 (6th Cir. 1976) (per curiam). The foregoing cases all involve intervening judicial lawmaking that was applied retroactively to cases on direct appeal, but the rule also applies to intervening statutory changes as well. Scarboro v. First Am. Nat'l Bank, 619 F.2d 621 (6th Cir.) (per curiam) (congressional amendment to Age Discrimination in Employment Act). Indeed, *Schooner Peggy* itself involved an intervening change of law through ratification of a treaty.

The Court of Appeals for the Fifth Circuit has held that a party's reliance upon the decision of the district court that has been appealed does not trigger an exception based upon "manifest injustice" to a *Schooner Peggy* result. McArthur v. Southern Airways, Inc., 569 F.2d 276, 278 (5th Cir. 1978) (en banc) (per curiam) (neither law nor equity compels such an exception), *cert. denied*, 449 U.S. 1014 (1980). No case was identified in which the "manifest injustice" exception was applied.

254. 590 F.2d 503 (3d Cir. 1979).

255. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

256. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

first appeal, the Court of Appeals for the Third Circuit simply opted for the *Schooner Peggy* rule:

> This court has a duty to apply a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case . . . . Here, the Supreme Court's decision . . . intervened between the first time the case was before us and this appeal. Therefore we are not bound by our prior holding.[257]

Even the law-of-the-case doctrine,[258] normally triumphant, had to change course to let the *Schooner Peggy* pass.

As settled as the practice is of retroactively applying law-changing decisions to civil cases on direct appeal, the appellate courts have been careful not to use the *Schooner Peggy* doctine outside the precise confines of the particular situation to which it applies—civil cases on appeal. That practice has been followed even when the facts of a case suggest that some expansion of the scope of *Schooner Peggy* would be consistent with the logic of the rule. In *Cates v. Trans World Airlines, Inc.*,[259] the Court of Appeals for the Second Circuit refused just such an opportunity to use the doctrine. Plaintiffs in *Cates* alleged racial discrimination. They initially survived a motion to dismiss their claim as time-barred because the district court reasoned that filing a Title VII complaint with the Equal Employment Opportunity Commission also tolled the statute of limitations for actions brought under 42 U.S.C. § 1981. The Supreme Court then held that filing a complaint with the Commission does not toll a statute of limitations applicable to section 1981,[260] and the trial court thereupon dismissed the complaint. On direct appeal, plaintiffs cited *Chevron* as a basis for applying prospectively the law-changing decision of the Supreme Court.

If ever a circumstance existed in which the rule of *Schooner Peggy* might appropriately be expanded beyond its current boundary, *Cates* would seem to present that circumstance. The lower court was, after all, still in a pretrial posture when the Supreme Court made its decision, so applying the new rule would not significantly disrupt the existing course of litigation any more than it would had *Cates* already gone through trial and was on direct appeal—in fact, it would represent a smaller disruption. Although the Second Circuit concluded that the new Supreme Court rule should apply retroactively, it did so without reference to any of the cases in the *Schooner Peggy* line. Instead, the appellate court simply held that the plaintiffs in *Cates* had delayed in asserting their rights and therefore did not have a good prospectivity plea under *Chevron*.[261] *Cates* and *Zichy* together suggest that the *Schooner Peggy* doctrine remains vigorous and flourishing, but only when it puts its roots into the very special soil of civil cases on direct appeal.

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257. 590 F.2d at 508.

258. *See* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.404 (2d ed. 1982 & Cum. Supp. 1982-83).

259. 561 F.2d 1064 (2d Cir. 1977).

260. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

261. 561 F.2d at 1073-74.

One reason why use of *Schooner Peggy* has not expanded becomes clearer in light of a few cases in which it was not used, especially upon consideration of the results that might have occurred had the doctrine been applied. In *Kelly v. West Baton Rouge Parish School Board*[262] black schoolteachers who had been laid off in a school system reorganization sued to recover their jobs, alleging that the dismissal process was tainted by racial bias and otherwise provided inadequate due process protections. Before the case reached appeal, the Court of Appeals for the Fifth Circuit decided another matter in which it established certain procedural requirements for such layoffs. That rule, however, was not made applicable to *Kelly*:

> The plaintiffs were laid off by the letter dated August 8, 1969. That was before *Singleton* [v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1979)] was decided. The defendants could not anticipate *Singleton's* subsequent holding that the criteria used in selecting the teacher to be laid off "shall be available for public inspection." Clearly, that part of *Singleton* is not retroactive.[263]

If the plaintiffs had lost at trial and had been on appeal at the time *Singleton* was decided, *Schooner Peggy* would have compelled a reversal, irrespective of what the defendants could have anticipated at the time of the layoffs.

The Court of Appeals for the Sixth Circuit expressed similar sentiments in an analogous situation. In *Cle-Ware Industries v. Sokolsky*[264] that circuit strongly disapproved a practice in bankruptcy matters of compensating two different attorneys for their respective work as counsel for the debtor and counsel for the debtor-in-possession. Arguably the inappropriateness of draining two different fees from "one and the same person" should have been manifest to all concerned, but the court nevertheless made its decision prospective only:

> In the present case . . . we are confronted by a situation where an able and experienced Bankruptcy Judge has followed this practice in accordance with previously established precedent in his District at a time when there was no precedent to the contrary in this Circuit. Two sets of attorneys have devoted considerable time and effort in this Chapter XI proceeding which resulted in the confirmation of a Plan of Arrangement continuing the economic life of Cle-Ware and its subsidiaries. The Bankruptcy Judge avoided the considerable expenses of a receivership, yet kept the debtor corporations functioning as a continuing enterprise.
>
> Appellants contend that no fee should be allowed to counsel for the debtor. This appears to be a question of first impression in this Circuit and we apply today's rule only prospectively. We are unwilling to make this rule applicable in the present case because of the obvious inequities that would result.[265]

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262. 517 F.2d 194 (5th Cir. 1975).
263. *Id.* at 199.
264. 493 F.2d 863 (6th Cir.), *cert. denied*, 419 U.S. 829 (1974).
265. *Id.* at 871.

Nevertheless, if the case had been on appeal when a similar law-changing decision came down in an unrelated case, the "obvious inequities" would not have mattered at all.

In both *Kelly* and *Cle-Ware* the predicament retroactivity would have created, and the perceived unfairness it would involve created the degree of appellate sympathy necessary to produce holdings of prospectivity. If those courts were correct in their estimate of the hardships a rigid rule of automatic retroactivity would impose, we are left to wonder why it is that automatic retroactivity for civil cases which happen to have reached the appellate stage of litigation is nonetheless acceptable.

4. Retroactivity for Jurisdictional Matters

Anyone familiar with retroactivity analysis who reads the recent Supreme Court opinions in *Firestone Tire & Rubber Co. v. Risjord*[266] and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[267] may well experience an overwhelming sense of déjà vu. A decade ago the Court seemed to present a bold requirement for retroactivity in law-changing cases that reduced the jurisdiction of a court,[268] only to draw back from that position in a subsequent case.[269] Then in 1981 the Court produced *Risjord*: "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only."[270] "Never" proved to be a very short time. In June 1982 the Court held that bankruptcy judges could not hear bankruptcy cases. In the words of the Court, "the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) [of the Bankruptcy Act of 1978] is unconstitutional."[271] The Court also held, without any reference to *Risjord*, that "our decision today shall apply only prospectively."[272]

The law in this area of retroactivity analysis has therefore undergone significant disruption recently, and it is difficult to determine which twist in the road will be the last. The experience of the lower courts in the last ten years, however, may be of value, because the decisions of the Supreme Court during the early 1970s seem also to be characterized by some of the confusion present in *Risjord* and *Northern Pipeline*. There is, however, an important difference between the decisions of the early 1970s and the more recent opinions. The difference arises from some of the language used in the earlier cases. Although *United States v. United States Coin & Currency*[273] and *Robinson v. Neil*[274]

266. 449 U.S. 368 (1981).
267. 102 S. Ct. 2858 (1982).
268. Robinson v. Neil, 409 U.S. 505 (1973); United States v. United States Coin & Currency, 401 U.S. 715 (1971). *See supra* notes 54-60 and accompanying text.
269. Gosa v. Mayden, 413 U.S. 665 (1973). *See supra* notes 61-65 and accompanying text.
270. 449 U.S. at 379.
271. *Northern Pipeline*, 102 S. Ct. at 2880.
272. *Id.*
273. 401 U.S. 715 (1971).
274. 409 U.S. 505 (1973).

ultimately came to be seen as cases whose results are based upon jurisdictional considerations,[275] their emphasis upon the importance of the constitutional rights at issue—self-incrimination in *United States Coin* and double jeopardy in *Robinson*—led some courts to believe that the decisions stood for retroactivity in cases involving fundamental, nonprocedural rights. In those cases the jurisdictional element in the Supreme Court decisions received correspondingly less weight.

The distortion that could thereby result was exemplified by an opinion from the Court of Appeals for the Tenth Circuit. *Radcliff v. Anderson*[276] addressed the retroactivity of a decision striking down a state statute that discriminated between the sexes by setting different maximum ages at which females and males could claim the benefit of juvenile court processes.[277] The law-changing case itself had directed that it would not apply retroactively,[278] and the *Radcliff* panel acknowledged that the old law had not damaged the accuracy or fairness of trial processes. Considered on those facts alone it might appear that the decision would be in favor of prospectivity, but in fact the court reached the opposite conclusion: "We believe that the principles of 'basic fairness' mentioned in *Robinson* and 'essential justice' mentioned in *Gosa* require that the [law-changing] decision be applied retroactively."[279]

Other courts successfully hurdled the fundamental-rights language, only

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275. *See, e.g.*, United States v. Johnson, 102 S. Ct. 2579, 2587-88 (1982).

276. 509 F.2d 1093 (10th Cir. 1974), *cert. denied*, 421 U.S. 939 (1975).

277. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972).

278. *Id.* at 20. No effort was made in this investigation to compile statistics on the number or percentage of cases in which both the law-changing decision and the retroactivity decision were announced at the same time. The impression gathered, however, is that only a minority of law-changing cases also contain a decision on the retroactivity issue.

279. 509 F.2d at 1096. Another case in which the fundamental-right language distorted the reasoning and result in a lower court is Baynor v. Warden, 391 F. Supp. 1254 (D. Md. 1975). The district court had to rule upon the retroactivity of a Supreme Court decision holding that time served on a vacated conviction had to be credited to the sentence handed down after a second trial:

> The new rule is clearly not procedural, having nothing to do with the use of evidence or with a particular mode of trial. It is rather a rule of substantive, fundamental constitutional law made mandatory on the states through the Due Process Clause of the Fourteenth Amendment. Hence, it is presumptively retroactive.

Id. at 1253-54. *Cf.* Brown v. Mitchell, 598 F.2d 835, 839 (4th Cir. 1979) ("the guarantee against double jeopardy is 'significantly different' from other new procedural guarantees which are generally non-retroactive"). Even in a particularly sophisticated analysis a court was unable to divorce itself completely from the fundamental right thesis. *See* United States *ex rel.* Williams v. Preiser, 360 F. Supp. 667 (S.D.N.Y. 1973) (abortionist convicted in 1966 sought release by pleading retroactive application of the famous abortion rights case of Roe v. Wade, 410 U.S. 113 (1973)), *aff'd*, 497 F.2d 337 (2d Cir. 1974):

> In *Roe v. Wade*, the Supreme Court established that a statute such as section 1050 of former New York Penal Law is violative of the Due Process clause of the fourteenth amendment. The Supreme Court did not expressly rule on the retrospectivity of its abortion decisions, but recent pronouncements by the Court as to this aspect of its constitutional adjudications of criminal cases strongly support the notion that a judicial decision as to a substantive freedom should be afforded retrospective effect.

360 F. Supp. at 668 (citing, *inter alia*, *Robinson v. Neil*). The court presented a thoughtful approach, certainly, but one which would have been better founded if it rested upon the inability of a court to punish a person for protected activity, rather than upon the fundamentality of the right protecting that activity.

to falter upon the split between *United States Coin/Robinson* and *Gosa*. In *United States v. Bodey*[280] the Court of Appeals for the Ninth Circuit abjured the use of a *Linkletter/Chevron*[281] analysis because the principle involved in the law-changing decision was a matter of double jeopardy, and therefore was controlled by *Robinson*.[282] The Court of Appeals for the Third Circuit, by contrast, took its hint from *Gosa* when it dealt with the retroactivity of a decision holding unlawful the procedure by which certain court martials had been convened.[283] The result, per *Gosa*, was the application of the *Linkletter/Stovall* analysis and a decision in favor of prospectivity.[284]

Notwithstanding the confusion, some retroactivity analyses in the last decade have been quite thoughtful.[285] For that reason, the area cannot simply be dismissed as a quagmire, even though recent Supreme Court decisions offer little evidence of clarification.

5. *United States v. Peltier*: The Retroactivity Analysis That Never Was

In 1975 the Supreme Court decided *United States v. Peltier*.[286] The decision made prospective an earlier holding that a warrantless automobile search by federal Border Patrol agents acting without probable cause at a substantial distance from the national border violated the fourth amendment.[287] The decision could have been fairly routine. Indeed, as Justice Rehnquist's majority opinion pointed out, the practice of the Court typically had been to make deci-

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280. 607 F.2d 265 (9th Cir. 1979).

281. It was the Court of Appeals for the Ninth Circuit that linked those two approaches. *See supra* note 232 and accompanying text.

282. "These cases [*Chevron* and *Linkletter*] were concerned with the applicability of new rules to parties who had relied on the old rules to their disadvantage. The Supreme Court specifically distinguished the *Linkletter* line of cases in a later double jeopardy decision." 607 F.2d at 268 (citing Robinson v. Neil, 409 U.S. 505 (1973)).

283. The law-changing case was United States v. Greenwell, 19 C.M.A. 460 (1970).

284. Brown v. United States, 508 F.2d 618 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975).

285. Such cases include Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975). The petitioner in *Blackburn* sought to overturn his conviction because at trial the prosecution used testimony of a victim of an earlier, similar crime — notwithstanding earlier acquittal of defendant on that charge. Subsequent to the conviction, the Court of Appeals for the Fifth Circuit held that a state was collaterally estopped from relitigating for any purpose an issue determined in a prior prosecution of the same defendant. Although the law-changing case was grounded in double jeopardy principles, the court did not mechanically conclude that the case was synonymous with *Robinson*. Instead, the court said the law-changing case was:

> rooted in the principle of double jeopardy, [but] its operation merely precludes the introduction of certain disfavored evidence. In light of the *Robinson* rationale it would be unreasonable for us to conclude that the Supreme Court in *Robinson* was addressing itself to the exclusion of evidence of prior crimes and, hence, intended *Robinson* to apply to procedural guarantees based upon the principle of double jeopardy. We therefore prefer to rest our decision upon the *Linkletter* line of cases.

Id. at 1017.

Another case, Holzsager v. Valley Hosp., 646 F.2d 792 (2d Cir. 1981), considered whether the rule of retroactivity for jurisdictional issues applied to in personam jurisdiction as well as subject matter jurisdiction. *Id.* at 798 n.4. *Holzsager* was decided in the period between *Risjord* and *Northern Pipeline*, so it is difficult to determine how the addition of *Northern Pipeline* affects the reasoning of *Holzsager*.

286. 422 U.S. 531 (1975).

287. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

sions on the exclusionary rule prospective.[288] *Peltier*, however, proved to be different, and that difference caused lower courts more than a little tribulation for seven years.

When *Peltier* had been before the Court of Appeals for the Ninth Circuit, that court had opted for retroactivity on the ground that the substantive law at issue had not altered sufficiently to justify prospectivity.[289] The dissenters, in turn, argued that the law-changing case erased a line of circuit court decisions as well as existing statutes and regulations approving the warrantless search.[290] The Supreme Court, however, gave little emphasis to the dispute over whether the law had changed sufficiently and concentrated instead upon the nature of the exclusionary rule and its particular requirements in the context of retroactivity.[291] The result was an analysis that departed somewhat from the standard *Linkletter/Stovall* approach. Although the majority opinion professed adherence to *Linkletter*,[292] Justice Rehnquist's reasoning in *Peltier* was rather special:

> Whether or not the exclusionary rule should be applied to the roving border patrol search conducted in this case, then, depends on whether considerations of either judicial integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that the evidence obtained by the Border Patrol in this case be excluded.[293]

In a nutshell that passage summarized the three foundations of the majority's holding: (1) the presence of a fourth amendment exclusionary rule problem; (2) the integrity of the judicial process; and (3) the prospect that unlawful police behavior might be deterred. Notably absent, as Justice Brennan's dissent pointed out, was any recognition of a requirement that the decision at issue be something substantially new before a claim of prospectivity could be invoked.[294] Justice Brennan also accused the majority of establishing a separate prospectivity rule applicable only to the fourth amendment and of "stand[ing] the *Linkletter* holding on its head by creating a class of cases in which nonretroactivity is the rule and not, as heretofore, the exception."[295]

Given the language used by both majority and minority, it would have been surprising if some lower courts had not concluded that *Peltier* established a special rule of retroactivity analysis for exclusionary-rule cases. A number of circuits did precisely that. Perhaps the Court of Appeals for the Fifth Circuit stated that position most baldly:

> We do not reach the question of whether or not a change in search and seizure law has occurred. The Supreme Court has held that

288. 422 U.S. at 535.
289. 500 F.2d 985, 988 (9th Cir. 1974).
290. *Id.*
291. 422 U.S. at 535-39.
292. *Id.* at 538.
293. *Id.* at 539.
294. *Id.* at 544-49.
295. *Id.* at 550.

> changes in the law of search and seizure are not retroactive where evidence seized by authorities was in good faith compliance with then existing constitutional norms.[296]

Other courts acted as though *Peltier* had changed nothing,[297] a view the Supreme Court would ultimately ratify in *United States v. Johnson*.[298]

In *Johnson*, however, the majority was unable to avoid dissembling. Justice Blackmun, who had joined the majority in *Peltier*, wrote for a majority in *Johnson* that included the only two *Peltier* dissenters remaining on the Court, Justices Brennan and Marshall. The *Johnson* majority adopted its own special rule for fourth amendment cases on direct appeal. Unlike *Peltier*, however, which had also been a case on direct appeal,[299] the new rule was one of retroactivity.[300] Moreover, and also with the assent of the two justices who had dissented in *Peltier*, the five-justice majority in *Johnson* explained that far from being a new approach, "*Peltier* resembles several earlier decisions that held 'new' Fourth Amendment doctrine nonretroactive, not on the ground that all Fourth Amendment rulings apply only prospectively, but because the particular decisions being applied 'so change[d] the law that prospectivity [was]

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296. United States v. Kranzthor, 614 F.2d 981, 982 (5th Cir. 1980) (per curiam) (citing *Peltier*). *Accord* Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979); United States v. Escalante, 554 F.2d 970, 973 (9th Cir.) (en banc), *cert. denied*, 434 U.S. 862 (1977); United States v. Martinez, 526 F.2d 954 (5th Cir. 1976) (en banc); *cf.* United States v. Hart, 546 F.2d 798, 803 (9th Cir. 1976) (en banc) ("special retroactivity doctrines affecting the exclusionary rule stated in *United States v. Peltier*" are irrelevant in retroactivity case involving law of entrapment), *cert. denied sub nom.* Robles v. United States, 429 U.S. 1120 (1977).

297. Some cases reject the distinction explicitly, while others do so simply by using the standard *Linkletter* or *Chevron* doctrine in the course of an analysis. An example of the former is United States v. Ross, 655 F.2d 1159, 1163 n.5 (D.C. Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 2157 (1982):

> It is true that the Court in *Peltier* did not set out this [novel] consideration as a separate inquiry, directing the courts instead to ask whether the police officer knew or should have known that his conduct was in accordance with the law. We believe, however, that the former inquiry is subsumed in the latter. If a decision develops no new law, then the police officer—who is charged with knowledge of the old law—should have known, and acted in a manner consistent with, the core doctrine.

See also United States v. Schleis: "While the meaning of the Court's language is not entirely clear, we do not read *United States v. Peltier* . . . as reflecting a new approach that an exclusionary rule would only be applied in cases of bad faith violations of the Fourth Amendment." 582 F.2d 1166, 1174 n.7 (8th Cir. 1978) (en banc).

Cases implicitly treating *Peltier* as merely a part of the *Linkletter/Stovall* line include United States v. Sotomayor, 592 F.2d 1219 (2d Cir.), (citing *Linkletter* and *Peltier*), *cert. denied sub nom.* Crespo v. United States, 442 U.S. 919 (1979); United States v. Walker, 569 F.2d 502 (9th Cir.) (same), *cert. denied*, 435 U.S. 976 (1978); United States v. Lenardo, 420 F. Supp. 1148 (D.N.J. 1976) (same). The apparent inconsistency in the view of the Court of Appeals for the Ninth Circuit in *Walker*, United States v. Escalante, 554 F.2d 970 (9th Cir), *cert. denied*, 434 U.S. 862 (1977), and United States v. Hart, 546 F.2d 798 (9th Cir. 1976), *cert. denied sub nom.* Robles v. United States, 429 U.S. 1120 (1977), is explained because the court has taken something of a unique view of *Peltier*, viewing it on the one hand as different and special to the exclusionary rule, but on the other hand as maintaining the requirement that there be a significant change in the law before prospectivity may be granted. For the retention of the novelty requirement, see *Escalante*, 554 F.2d at 973, and *Hart*, 546 F.2d at 803. For those readers unsatisfied with this explanation, it may be of interest that two of the judges who decided *Walker* sat on the en banc decisions in *Escalante* and *Hart*. *Walker* does not cite either of the earlier cases.

298. 102 S. Ct. 2579, 2591-94 (1982).

299. United States v. Peltier, 422 U.S. 531, 552 n.10 (1975) (Brennan, J., dissenting).

300. 102 S. Ct. at 2594. See *supra* notes 88-95 and accompanying text.

arguably the proper course.' "[301] Eight years ago *Peltier* presented itself as a new, special-purpose retroactivity analysis, and a number of lower courts took the decision at its word. More recently, those courts learned that for reasons related only tangentially to retroactivity, the opinion in *Peltier* is now held not to mean what it apparently said.

III. CONCLUSION

Conclusions about the state of retroactivity analysis in the federal courts can proceed along a number of lines, but some considerations will emerge as crucial regardless of the approach selected. Certainly it is clear that current retroactivity doctrines are complex and exist in uneasy harmony. Like an emulsion, the various approaches seem suspended in one configuration only until even a minor change occurs; then the entire structure may shift substantially before resting in some new, perhaps unforeseen, posture. That circumstance, of course, only highlights the impressive dedication circuit and district court judges have brought to their responsibility to follow the twisting, diverging, interlocking, and changing precedent the Supreme Court has established. That is not to say, of course, that lower courts are immune from error, or even outright carelessness. A sufficient number of cases demonstrates the contrary.[302] But for the most part, a reasonable conclusion would be that lower court judges have worked hard at their assigned task.

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301. *Id.* at 2592 (quoting Williams v. United States, 401 U.S. 646, 659 (1971); alterations by Court). Indeed, Justice Blackmun reasoned that to adopt the other view of *Peltier* would make all exclusionary rule decisions prospective. *Id.* at 2593. That, of course, may have been precisely what Justice Rehnquist had in mind when he fashioned the majority opinion in *Peltier*.

302. For example, in 1972, six months after the decision of the Supreme Court in *Chevron*, a three-judge district court in Illinois decided a class action for retroactive money payments to persons whom the state had not previously paid. The refusal of the state to pay had meanwhile been reversed as unconstitutional. When the state sought to use *Linkletter/Stovall* to argue for prospectivity, the court held that *Linkletter* and its progeny had developed in the context of criminal cases not strictly applicable to civil matters. Moreover, citing a 1968 case from the *Linkletter* line, the district court opined that the Supreme Court did not anticipate application of the three-tiered retroactivity analysis to civil cases. Then the court concluded that retroactivity was more appropriate because, *inter alia*, the right to receive the money had "vested" in the plaintiffs. Alexander v. Weaver, 345 F. Supp. 666, 671 (N.D. Ill. 1972) (three-judge court), *vacated and remanded on other grounds*, 412 U.S. 914 (1973). A year later, another district court, adjudicating a civil suit for monetary damages and an injunction in which retroactivity was an issue, wrote, "We note that all of the recent United States Supreme Court opinions dealing with the retroactivity problem have involved criminal procedures, not civil suits for monetary compensation and equitable relief." United States *ex rel.* Jones v. Rundle, 358 F. Supp. 939, 950 (E.D. Pa. 1973). Interestingly, both of the foregoing opinions were otherwise well reasoned.

Other courts, from time to time, appear to have felt free to develop their own rules of retroactivity. In United States v. James, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979), for example, the Court of Appeals for the Fifth Circuit reached its own special retroactivity result. The issue in *James* was the standard to be followed in determining the admissibility at trial of out-of-court statements by alleged coconspirators. The court used this case to overrule the prevailing test, but casually made its new rule effective only "in trials commencing after 30 days from the date of this opinion." *Id.* at 583. The court indulged in no further discussion of retroactivity, leaving us to ponder how much impression the Supreme Court made when it restated in Hankerson v. North Carolina, 432 U.S. 2323 (1977), its rule that in matters in which the purpose of a new decision goes substantially to more accurate determinations of truth at trial, retroactivity is likely to be the result. *See also* National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1132 (D.C. Cir. 1976) (four relevant criteria to be used for retroactivity analysis—"justifiable reliance," purpose of new rule, "degree of finality of plaintiff's transaction," and "element of surprise").

It would seem to follow that blame for whatever shortcomings may exist should properly be placed on the Supreme Court. In several important ways it is true that much of the confusion, both current and over the preceeding decade, is the product of several weaknesses in the approach of the Supreme Court to retroactivity. The Court has, for example, failed to provide any reasonable justification for its distinction between cases subject to *Schooner Peggy* and those governed by *Chevron*. It is easy to predict the result in a *Schooner Peggy* situation, and almost as easy to determine when the situation arises, but there has yet to be a valid explanation of the logic or reason why that rule and *Chevron* should coexist.

That odd amalgam of history and more recent jurisprudential thought aside, retroactivity analysis also shows an unfortunate side to the manner in which the Supreme Court undertakes to make rules. Some years ago Justice Harlan candidly acknowledged that he had viewed prospectivity less as a principled doctrine to be developed than as an opportunity to restrict the influence of substantive decisions with which he disagreed.[303] Justice Harlan subsequently abjured that approach,[304] but the subplot concerning retroactivity in exclusionary rule matters that may recently have presented itself[305] gives rise to a suspicion that something like Justice Harlan's earlier practice is still in evidence among the various factions on the Court.

Perhaps most disturbing of all has been the occasional quiet disregard by the Court of its own precedent, or even of its obligation to establish precedent. The former problem arose most recently in the conflict between the retroactivity approaches of *Risjord* and *Northern Pipeline*.[306] Perhaps it is wrong to term the inconsistency a conflict, for in *Northern Pipeline* the Court simply ignored altogether the clear principle upon which *Risjord* rested, presumably because in *Northern Pipeline* that principle would have led to unpalatable results. Such turnabouts are difficult enough for the lower courts, but it is more difficult still when the Supreme Court simply refuses to accept its rulemaking function—as it did in *Diedrich*, in which Chief Justice Burger advised all who might be interested that tax decisions are "frequently" retroactive.[307]

Criticism of flaws in Supreme Court doctrine must, in fairness, be tempered by a recognition that developing rules for retroactivity analysis has never been an easy matter.[308] Indeed, simplicity would have dictated that we settle for the old Blackstonian approach, which offered little but simplicity. But in the course of developing fairer, and necessarily more complex rules, the Supreme Court may have made the job of the lower courts more difficult than

303. Desist v. United States, 394 U.S. 244 (1968) (Harlan, J., dissenting). Justice Harlan noted, "I have in the past joined in some of those opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle." *Id.* at 258 (Harlan, J., dissenting).

304. *Id.*

305. *See supra* notes 286-301 and accompanying text.

306. *See supra* notes 50-60, 103-06 and accompanying text.

307. *See supra* notes 86-87 and accompanying text.

308. *See supra* note 1 and accompanying text.

it needs to be. Throughout the nearly two decades since *Linkletter*, the Court has concentrated exclusively upon developing doctrine. It has, in words Justice Harlan used to describe another phenomenon, "fish[ed] one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards,"[309] without systematically examining how well the doctrine has worked in the lower courts. Left largely to their own devices, the lower courts have managed fairly well, but the absence of supervision permitted a growth of inconsistencies and apparent divergence from the basic doctrines of retroactivity—particularly in the area of *Linkletter/Stovall* and *Chevron*—that has gone unchecked. It may be, as some have suggested, that the Supreme Court carries too heavy a workload to provide the sort of systematic supervision of the lower courts that is necessary.[310] Certainly it is true, however, that without such supervision the goal of developing and applying coherent doctrines in such areas as retroactivity is unlikely to be reached.

Retroactivity analysis also holds a lesson for those of us who, by virtue of employment or disposition, feel called upon to comment at length upon the workings of American courts. Writers addressing the state of progress of the federal courts in the area of retroactivity have concentrated primarily upon the development of doctrine at the Supreme Court level.[311] The work produced has almost invariably been thoughtful and probably useful to the Supreme Court in its own efforts to produce doctrine.[312] At the same time, however, commentators have often ignored the administrative underpinnings of the doctrine,[313] and that is a loss. The fact is that of two tasks before the Supreme Court—development of doctrine and supervision of the application of doctrine in the lower courts—the second seems to have been less well performed. The reason for that shortcoming may in part lie in the inability of the Court to devote sufficient resources to its monitoring function. Whatever the cause, it is scholarly commentators who have the time and resources necessary to assist in identifying problems in application of rules, and it is to that more tedious but vital task[314] that more effort should be directed. Doctrine remains, after all, only as good as its use.

309. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting).

310. *See, e.g.*, Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982).

311. *See supra* note 14.

312. It is difficult to read Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962), and not believe that the author's careful work influenced the opinion of the Supreme Court in *Linkletter*.

313. A notable exception is Beytagh, *supra* note 11, which puts forward the proposal that when the Supreme Court alters the law, it should hold a hearing to determine whether its new holding should apply retroactively.

314. For any who question the importance of the job, a simple test would be in order. That test would begin with reading a fair sampling of the circuit and district court opinions in the area of retroactivity while ignoring any thought of Supreme Court doctrine. The second part of the test would be to construct retroactivity doctrines solely from the sampling of lower-court opinions. The third part of the test would be to determine what similarity, if any, lower-court doctrine had to contemporary Supreme Court doctrine.