ADJUDICATIVE RETROACTIVITY AS A PRECLUSION PROBLEM: *DOW CHEMICAL CO. V. STEPHENSON*

*DAVID LEHN**

INTRODUCTION

This past Term, *Dow Chemical Co. v. Stephenson*[1] presented the Supreme Court with a new question of retroactivity. The plaintiffs collaterally attacked an Agent Orange class settlement, arguing that they had not been adequately represented, and that therefore they were not bound by the settlement. The Court of Appeals for the Second Circuit agreed, basing its decision on the Supreme Court's holdings in *Amchem Products, Inc. v. Windsor*[2] and *Ortiz v. Fibreboard Corp.*[3] Both *Amchem* and *Ortiz* were decided long after the events that gave rise to the Agent Orange litigation, as well as after the Agent Orange class certification, settlement, and direct appeals.[4] Thus the appellate court applied *Amchem* and *Ortiz* "retroactively" to permit relitigation of a suit that was already final. An equally divided Supreme Court affirmed without discussion.[5] In this article I consider *Dow*'s unresolved question: should the appellate court have applied *Amchem* and *Ortiz* retroactively? In order to do so, I must examine the problem of retroactivity, that is, by what rule or principles should a court answer a given retroactivity question?

It seems natural for a court to apply existing law to adjudicate the dispute before it. But what should a court do if between the time the parties acted and the time the court adjudicates their dispute, the instant court or another court changes the relevant law—

* Managing Editor, *NYU Annual Survey of American Law*, 2003–04. J.D. candidate, New York University School of Law, 2004; A.B., Harvard University, 1999. Special thanks to Larry Kramer, Professor of Law, NYU School of Law. Thanks also to Oscar Chase and Mark Geistfeld, Professors of Law, NYU School of Law; Patrick Woolley, Professor of Law, University of Texas Law School; and my editor, Marie Pollio, NYU School of Law '04. Dedicated to Pat Jordan and George Bisacca.

1. 123 S. Ct. 2161 (2003) (per curiam).

2. 521 U.S. 591 (1997).

3. 527 U.S. 815 (1999).

4. Stephenson v. Dow Chem. Co., 273 F.3d 249, 251–55 (2d Cir. 2001).

5. *Dow*, 123 S. Ct. at 2161–62. Justice Stevens did not participate in the decision.

should it dispose of the case under the "new" law or the "old"?[6] Justice Holmes, for example, thought that new law should be applied retroactively, observing that "[j]udicial decisions have had retrospective operation for near a thousand years,"[7] but the Warren Court apparently did not feel bound by this tradition. The Warren Court sometimes overruled a precedent but disposed of the case before it according to the old law and reserved the new law's effect for future conduct. This practice, known as "prospective overruling,"[8] has continually caused much debate among members of the Court, both during the Warren years and since. As a result, the Court has frequently changed its approach to the retroactivity problem.

In order to understand the Court's various retroactivity rules, one must understand two distinctions that the Court has often considered significant. The first pertains to whether the court confronts the retroactivity question in the same case in which it changes the law or in another case. A court can create new law by confronting an issue of first impression, or by overruling or modifying precedent.[9] Whenever a court creates new law, it generates a retroactivity question with respect to the disputed transaction it is adjudicating. The court must decide whether to apply its new law or the law that existed at the time that the parties acted. This may be termed the "law-changing retroactivity question." That court also generates a retroactivity question for all other disputed transactions that preceded the law-changing decision. Courts adjudicating these other disputes must decide whether to apply the new law that the first court created or the law that existed at the time that the parties to these other disputes acted. In these other cases, it may be said that the change in law "intervened," thereby creating a "subsequent retroactivity question."[10]

6. I am concerned only with adjudicative retroactivity, i.e., the retroactivity problem generated by judicial change of law. Legislative change of law may raise a different set of issues. *See*, *e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244 (1994). *But see* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997) (arguing that legislative and judicial legal change should be analyzed similarly).

7. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

8. *E.g.*, Linkletter v. Walker, 381 U.S. 618, 622 n.3 (1965).

9. Ascertaining when a decision actually creates "new" law is a problem in itself. *See infra* notes 164–72 and accompanying text.

10. One might object that technically all retroactivity questions are subsequent to the change in law, but we may think of the law-changing retroactivity question as arising simultaneously with the change in law, and the retroactivity question in other cases as not arising until after the law has changed. Note that

The second distinction is between pending and final cases. Final cases are those "where the judgment . . . was rendered, the availability of appeal [was] exhausted, and the time for petition for certiorari ha[s] elapsed before [the law-changing] decision."[11] Pending cases are those that are not yet final but whose underlying conduct occurred prior to the law change. Pending cases may be, for example, unfiled, in discovery, at trial, or on direct appeal at the time that the law changes.

These two distinctions, or dichotomies, are mutually independent. Law-changing retroactivity questions can arise in both pending and final cases, as can subsequent retroactivity questions.

Driving the evolution of the Court's retroactivity jurisprudence has been the Court's shifting treatment of a handful of principles. One principle is the "judicial power" institutionalized by Article III of the Constitution.[12] Another is a principle of equality, that a court should treat similarly situated parties similarly. A third is that reliance interests should be protected. And a fourth is that finality interests should be protected. Frequently, the Court has turned to the doctrines of stare decisis and res judicata to protect the reliance and finality interests. Finally, the Court has also struggled with the choice between per se rules and balancing tests.

In this paper, I argue that the retroactivity rule should be the same regardless of whether the court confronts a law-changing retroactivity question or a subsequent one, and regardless of whether it confronts the retroactivity question in a case that is pending or in one that is already final. Further, the retroactivity rule should be a reliance-based cost-benefit test, with a rebuttable presumption in favor of prospectivity, in other words, in favor of withholding the new law's effect from disputes that occurred prior to the change in law.

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sometimes it will be necessary to discuss the sequence of *different* "subsequent" retroactivity questions. For example, first, a court changes the law and thus confronts the law-changing retroactivity question. Then, another court confronts a retroactivity question with respect to the same law; this may be termed, somewhat inelegantly, the "initial subsequent retroactivity question." Then yet another court may confront the same retroactivity question; this may be termed the "later subsequent retroactivity question." For the most part, however, the sequence of subsequent retroactivity questions is not important, and so I will tend to discuss only the law-changing and the subsequent retroactivity questions.

11. *Linkletter*, 381 U.S. at 622 n.5.

12. "The judicial Power of the United States shall be vested in one supreme Court. . . . The judicial Power shall extend to all Cases . . . [and] to Controversies . . . ." U.S. CONST. art. III, § 1, cl. 1, art. III, § 2, cl. 1.

In Part I, I briefly review the primary cases in the development of the Court's retroactivity jurisprudence. In Part II, I argue that Article III's "judicial power" provides a weak basis for a retroactivity rule. Even in its strongest form, it can answer only the law-changing retroactivity question, not the subsequent one. In Part III, I argue that although the principle of equal treatment may have some relevance for the retroactivity problem, it does not favor retroactivity over prospectivity, nor can it support a per se retroactivity rule. In Part IV, I develop the conception of retroactivity as a preclusion problem. I distinguish the retroactivity problem from other preclusion problems, such as those addressed by the doctrines of res judicata and stare decisis. I argue that it is a mistake to look to these other preclusion doctrines to solve the retroactivity problem.

Once I have exposed the inadequacies of Article III, the principle of equal treatment, res judicata, and stare decisis, I propose that the only viable solution to the retroactivity problem is a cost-benefit test. I contend that the reliance interest is at the heart of this test, while the finality interest is usually inapposite to it. In Part V, I examine some of the practical consequences of adopting a reliance-based cost-benefit retroactivity rule. And in Part VI, I consider the implications of my analysis for *Dow*.

I.
THE CASE LAW

Since the Warren Court developed the practice of prospective overruling, the Court has reformulated the law of retroactivity several times. In this Part, I illustrate the evolution of the law by briefly reviewing the key cases.[13]

Prior to the Warren Court, retroactivity questions were rarely acknowledged or analyzed expressly.[14] *Chicot County Drainage Dis-*

13. For a more comprehensive sense of the development of the law, see Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975); John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745 (1983); James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus,* 79 NW. U. L. REV. 1062 (1984–1985); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Fisch, *supra* note 6; Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998); Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999).

14. *See, e.g.*, Roosevelt, *supra* note 13, at 1117 ("[U]ntil the dramatic innovations of the Warren Court, the [retroactivity problem] did not have the same degree of importance.").

trict v. Baxter State Bank[15] is one of the exceptions.[16] A federal district court had entered a decree effecting a reorganization of municipal bonds that were in default. According to the decree, bondholders had one year to exchange their bonds for new ones, otherwise they would be prohibited from asserting any claim on their bonds. The plaintiff had failed to exchange his bonds before the deadline. Then, in *Ashton v. Cameron County District*, the Supreme Court invalidated the statute under which the district court had effected the debt reorganization.[17] With the time for appeals long past, the plaintiff sought to recover on his bonds by collaterally attacking the decree. He argued that the decree was void because, under *Ashton*, the district court had lacked subject matter jurisdiction. Thus *Chicot* presented a subsequent retroactivity question in a case already final. The Court rejected any "absolute" retroactivity rule in favor of a balancing test that examines "[q]uestions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application . . . ."[18] Nevertheless, the Court declined to undertake the cost-benefit analysis. Instead, it rejected the plaintiff's challenge on the ground that the claim was "res judicata," since the challenge could have been raised during the original proceeding.[19]

The modern era of retroactivity jurisprudence begins with the Warren Court's assault on state criminal procedure. The first key decision in the line of criminal retroactivity cases was *Linkletter v. Walker*.[20] The petitioner had been convicted of burglary on evidence seized without a warrant, and the state supreme court had affirmed his conviction. In *Mapp v. Ohio*, decided the following year, the Supreme Court incorporated the Fourth Amendment's exclusionary rule against the states.[21] The petitioner consequently sought a writ of habeas corpus, asserting *Mapp*. Thus the habeas petition presented a subsequent retroactivity question in a case already final. The Court in *Linkletter* thought that the pending/final

15. 308 U.S. 371 (1940).

16. *See* Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U. PA. L. REV. 650, 652 (1962) ("With regard to the particular past circumstances in which a constitutional overruling decision will not be given full retroactive application, the Court has never been more expositive [than in *Chicot*], and there are almost no decisions.").

17. 298 U.S. 513, 532 (1936).

18. *Chicot*, 308 U.S. at 374.

19. *Id.* at 378.

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

21. 367 U.S. 643, 655 (1961).

dichotomy was generally significant for retroactivity purposes. It laid down the following retroactivity rule: "a change in law will be given effect while a case is on direct review, . . . [but] the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to" the balancing test set out in *Chicot*.[22] The Court styled *Chicot*'s factors as the purpose of the new rule, the reliance placed on the old rule, and the effect that retroactive application of the new rule will have on the administration of justice.[23] Because the petitioner's conviction was already final at the time the Court decided *Mapp*, the Court analyzed the instant retroactivity question under the purpose-reliance-effect balancing test. It found that the balance tipped in favor of according the new law only prospective effect, and therefore denied the petition.[24]

In *Johnson v. New Jersey*,[25] the petitioner had been convicted of felony-murder based on confessions that arguably did not comply with the safeguards against self-incrimination erected in the Court's decisions in *Escobedo v. Illinois*[26] and *Miranda v. Arizona*.[27] Both of those cases were decided after the petitioner had been convicted and his appeals had been exhausted. The petitioner sought a writ of habeas corpus, asserting *Escobedo* and *Miranda*. Thus, like in *Linkletter*, the habeas petition presented a subsequent retroactivity question in a case already final. The Court again advocated the purpose-reliance-effect balancing test,[28] but rejected *Linkletter* to the extent that the *Linkletter* rule mandated that new law be retroactive in pending cases.[29] Yet the Court did not entirely revert to the simple cost-benefit rule of *Chicot*. It supplemented the balancing test by indicating that the *initial* subsequent retroactivity determination should control *later* subsequent retroactivity determinations.[30] Although the Court had applied the new law retroactively in the law-changing cases, that is, in *Escobedo* and *Miranda*, the Court had not yet addressed the subsequent retroactivity question. Without a prior subsequent retroactivity determination to follow, the Court turned to the purpose-reliance-effect test and found that the bal-

22. *Linkletter*, 381 U.S. at 627.

23. *Id.* at 636.

24. *Id.* at 640.

25. 384 U.S. 719, 721–22 (1966).

26. 378 U.S. 478, 492 (1964).

27. 384 U.S. 436, 478–79 (1966).

28. *Johnson*, 384 U.S. at 727.

29. *Id.* at 732.

30. *See id.* See *supra* note 10 for clarification of the phrases "initial subsequent retroactivity question" and "later subsequent retroactivity question."

ance tipped in favor of according the new law only prospective effect in both pending and final cases.[31]

In *Stovall v. Denno*, the habeas petitioner argued that his murder conviction had been based on witness identifications obtained by pre-trial exhibitions without notice to his attorney.[32] The petitioner claimed that the testimony should have been excluded according to the Court's decisions in *United States v. Wade*[33] and *Gilbert v. California*,[34] both of which were decided after his conviction had been affirmed. Thus the Court again confronted a subsequent retroactivity question in a case already final. As in *Johnson*, the Court favored the purpose-reliance-effect test in both pending and final cases,[35] but again it tinkered with the rule, holding that new law would be per se retroactive in the law-changing case.[36] Applying the purpose-reliance-effect test to the subsequent retroactivity question before it, the Court once again found that the balance tipped in favor of withholding the new law's effect in both pending and final cases.[37] The conviction stood.

The Court's criminal retroactivity odyssey concluded with *Griffith v. Kentucky*[38] and *Teague v. Lane*.[39] While in *Griffith* the Court confronted a subsequent retroactivity question in a pending case, in *Teague* it confronted a subsequent retroactivity question in a case already final, that is, on a habeas corpus petition. The defendant in *Griffith* sought the benefit of *Batson v. Kentucky*, in which the Court modified the showing a defendant must make to establish that the prosecutor's peremptory challenges were racially discriminatory;[40] the habeas corpus petitioner in *Teague* sought the benefit of *Taylor v. Louisiana*, in which the Court applied the fair cross-section requirement to the jury venire.[41] In *Griffith*, the Court held that new law is per se retroactive in pending cases, whether the retroactivity question is law-changing or subsequent.[42] In *Teague*, the Court held that new law is per se prospective in cases already final, again regardless of whether the retroactivity question is law-changing or

31. *Id.* at 732–33.
32. 388 U.S. 293, 296 (1967).
33. 388 U.S. 218, 237 (1967).
34. 388 U.S. 263, 273 (1967).
35. *Stovall*, 388 U.S. at 297, 300.
36. *Id.* at 301.
37. *Id.* at 300.
38. 479 U.S. 314 (1987).
39. 489 U.S. 288 (1989).
40. Batson v. Kentucky, 476 U.S. 79, 96 (1986).
41. Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975).
42. *Griffith*, 479 U.S. at 328.

subsequent.[43] The *Teague* Court, however, allowed two exceptions: new law is applied retroactively on habeas if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' ";[44] and new law is applied retroactively on habeas if the new law enhances the accuracy of the proceeding and is "'"implicit in the concept of ordered liberty"' "[45] or "implicate[s] the fundamental fairness of the trial."[46] Consequently, the Court held that the defendant in *Griffith* was entitled to the retroactive benefit of *Batson*,[47] while the defendant in *Teague* was not entitled to the retroactive benefit of *Taylor*, since the law established in *Taylor* did not fall within either of *Teague*'s exceptions.[48]

For a time, the Court treated civil retroactivity differently from criminal retroactivity. In *Griffith*, for example, the Court noted that civil retroactivity "continues to be governed by the standard announced in *Chevron Oil Co. v. Huson* . . . ."[49] In *Chevron*, the plaintiff timely sued his employer for injuries under a federal act.[50] While the trial was pending, the Court decided *Rodrigue v. Aetna Casualty & Surety Co.*,[51] in which it reinterpreted the act's relation to admiralty law. The defendant argued that *Rodrigue* required the application of the shorter state statute of limitations rather than the longer admiralty doctrine of laches, and that consequently the instant claim was time-barred. Thus *Chevron* presented a subsequent retroactivity question in a pending case. The Court adopted the purpose-reliance-effect balancing test, and it did not suggest any modifications depending on whether the case was pending or final, or on whether the retroactivity question was law-changing or subsequent.[52] In other words, it advocated a simple cost-benefit rule, as in *Chicot*. The Court found that the balance tipped in favor of with-

43. *Teague*, 489 U.S. at 310.

44. *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

45. *Id.* at 311 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

46. *Id.* at 312.

47. *Griffith*, 479 U.S. at 328.

48. *Teague*, 489 U.S. at 311, 314. Later, I propose an alternative interpretation of *Teague*. *See infra* Part IV.C.

49. *Griffith*, 479 U.S. at 322 n.8.

50. 404 U.S. 97, 98 (1971).

51. 395 U.S. 352 (1969).

52. *See Chevron*, 404 U.S. at 106–07.

holding the new law's effect, thereby preserving the plaintiff's cause of action.[53]

In *James B. Beam Distilling Co. v. Georgia*,[54] the Court began to align civil retroactivity with criminal retroactivity under *Griffith* and *Teague*. The plaintiff had been subject to a Georgia excise tax on liquor. Then, in *Bacchus Imports, Ltd. v. Dias*, the Court held that a similar Hawaii tax violated the Dormant Commerce Clause.[55] The plaintiff in *Beam* claimed that *Bacchus* also invalidated the Georgia law and that it was entitled to a refund of taxes collected before *Bacchus* was decided. Thus *Beam* presented a subsequent retroactivity question in a pending case. Justice Souter announced the opinion for a divided Court: *Chevron*'s balancing test *might* still control the law-changing retroactivity question,[56] but if that question is answered in favor of applying the new law retroactively, then the new law is per se retroactive in cases raising subsequent retroactivity questions.[57] If, however, the case is already final, the new law is not available at all.[58] Consequently, the Court found that because it had applied its holding in *Bacchus* to the parties before it, *Bacchus*'s new law was per se retroactive in *Beam*.[59]

In *Harper v. Virginia Department of Taxation*, the facts of which were similar to *Beam*'s, a majority of the Court "adopt[ed] a rule that fairly reflects the position of a majority of Justices in *Beam*: When this Court applies a [new] rule . . . to the parties before it, that rule is the controlling interpretation of . . . law and must be given full retroactive effect in all cases still open on direct review . . . ."[60] Because the Court had applied the new law retroactively in the law-changing case, it held that all subsequent retroactivity questions in cases not yet final, which included the instant retroactivity question, must be answered in favor of applying the new law retroactively.[61]

53. *Id.* at 109.
54. 501 U.S. 529 (1991).
55. 468 U.S. 263, 273 (1984).
56. *Beam*, 501 U.S. at 543 (opinion of Souter, J.).
57. *Id.*
58. *Id.* at 541.
59. *Id.* at 539–40.
60. 509 U.S. 86, 97 (1993).
61. *Id.* at 98–99. The Court was silent on whether if a law-changing retroactivity determination favored prospectivity, the new law would necessarily be prospective in subsequent retroactivity situations. The Court's reasoning in *Beam* would seem to support the position that the subsequent retroactivity determination should be the same as the law-changing determination regardless of whether the law-changing determination favors retroactivity or prospectivity. *See also infra* note 92.

Perhaps it would be useful here to recapitulate the various rules that the Court has established at one point or another.

Chicot, *Chevron*: A balancing test controls all retroactivity determinations.

Linkletter: If the case is pending, new law is per se retroactive. Otherwise, a balancing test controls the retroactivity determination.

Johnson: A balancing test controls the law-changing and *initial* subsequent retroactivity determinations. The initial subsequent retroactivity determination in turn controls *later* subsequent determinations.

Stovall: New law is per se retroactive when the retroactivity question is presented in the law-changing case. Otherwise, a balancing test controls the retroactivity determination.

Griffith: If the case is pending, new law is per se retroactive.

Teague: If the case is final, new law is per se prospective, with two exceptions.

Beam, *Harper*: If the law-changing retroactivity determination favored retroactivity, then the new law is per se retroactive in all pending cases that raise a subsequent retroactivity question. If the case is final, the new law is per se prospective.

Currently, *Griffith* and *Teague* together articulate the prevailing retroactivity rule in criminal cases: if and only if the case is pending will new law be retroactive, with two exceptions for cases already final. *Chevron* and *Harper* together articulate the prevailing retroactivity rule in civil cases: if the case is pending, a balancing test controls the law-changing retroactivity determination; if the balance favors retroactivity, the new law is retroactive in all other cases if and only if they are not yet final.[62] The *Griffith-Teague* rule accepts

62. Appellate courts have uniformly found that *Harper* preserves *Chevron*'s balancing test for law-changing retroactivity questions. *See* Shah v. Pan Am. World Servs., Inc., 148 F.3d 84, 91 (2d Cir. 1998); McKinney v. Pate, 20 F.3d 1550, 1565–66 (11th Cir. 1994) ("The *Chevron Oil* test has not been overruled, but its continued validity has been called into question [by *Griffith*]. . . . [However,] the *Griffith* Court's sole concern was criminal cases, a realm which is wholly distinct (as far as retroactivity is concerned) from civil cases. . . . [And] *Beam* and *Harper* stand only for the proposition that, once a rule of federal law is applied to the parties in the case in which it was announced, it must be applied retroactively."); Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 710 (4th Cir. 1994) ("It might not be reading too much into *Harper* and *James B. Beam* if we were to conclude that *Chevron*, adopting the test for determining when cases may be enforced prospectively, has lost all vitality. We are struck, however, by the notable absence in *Harper* of any statement that *Chevron* is overruled for use in civil cases involving a question of 'pure' prospectivity or that all prospective decisionmaking is prohibited."); *see also* David F. Shores, *Recovery of Unconstitutional Taxes: A New Approach*, 12

the pending/final dichotomy, but it rejects the law-changing/subsequent dichotomy. The *Chevron-Harper* rule accepts the pending/final dichotomy, and it also accepts the law-changing/subsequent dichotomy to an extent: for a given new law, the law-changing and subsequent retroactivity questions must have the same answer, but the analysis used to answer the law-changing retroactivity question differs from that used to answer the subsequent retroactivity question.

I will suggest over the course of this article that *Chicot* addressed the retroactivity question correctly, and that had its approach been followed more assiduously, the later confusion about retroactivity might have been avoided. The *Chicot* Court solved the retroactivity problem with a simple cost-benefit rule: courts should apply a balancing test regardless of whether the case is pending or final, and regardless of whether the case presents a law-changing or subsequent retroactivity question. The *Chicot* Court also recognized that res judicata is separate from retroactivity and yet that res judicata can render moot a given retroactivity question. And, although I will argue that the finality interest is not normally part of the retroactivity analysis, the *Chicot* Court was correct to include it among the interests to be balanced in that particular case. In the next three Parts, I scrutinize the Court's rationales for its various retroactivity rules and explain why the *Chicot* rule is the most viable retroactivity rule.

II.
ARTICLE III AND THE JUDICIAL POWER

Article III has proved to be a delphic guide to understanding the nature of the judicial power and the proper separation of federal powers.[63] Members of the Court who have considered the retroactivity problem have interpreted Article III in at least four different ways. Three interpretations are thought to yield a rule of per se retroactivity: that Article III limits courts to "finding" law; that it mandates applying the "best law"; and that it prohibits advisory opinions. The fourth interpretation is that Article III has no import for the retroactivity problem, and thus that prospectivity is

VA. TAX REV. 167, 213 (1992) ("After *James Beam* the choices are limited to retroactive application and pure prospectivity."). The Court has not done much to dispel any residual ambiguity about *Chevron*'s status. *See* Ryder v. United States, 515 U.S. 177, 184–85 (1995) (finding that "whatever the continuing validity of *Chevron Oil* after *Harper* . . .," *Chevron* would not apply in this case anyway).

63. *See generally* Linkletter v. Walker, 381 U.S. 618, 620 n.2, 622 n.3 (1965) (citing commentary on whether Article III solves the retroactivity problem).

constitutional.[64] In this Part, I argue that of the three interpretations that would mandate retroactivity, the first two amount to empty cant, and the third, if valid at all, can solve the retroactivity problem only for law-changing questions.

A. Finding Law and Making Law

One central debate about retroactivity revolves around whether courts find law or make law. According to the declaratory theory, law is objective and constant. It exists "out there," waiting to be "found" by a court. A change in law is really a correction: the previous statement of law simply resulted from "a failure at true discovery"; the "old" law was "never the law."[65] *Erie R.R. Co. v. Tompkins*[66] would seem to have rejected the declaratory theory,[67] and some Justices have thought the theory implausible,[68] but Justice Scalia continues to espouse a version of the theory. While Justice Scalia does not consider himself

> so naïve . . . as to be unaware that judges in a real sense "make" law[,] . . . they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than

64. Justice Cardozo averred that the "[C]onstitution has no voice upon the subject." Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932); *accord, e.g.*, *Linkletter*, 381 U.S. at 629. Justice Cardozo's holding in *Sunburst* has since been read narrowly to mean only that the Constitution does not preclude *state* courts from overruling *state* law prospectively. *Harper*, 509 U.S. at 100. But some justices still believe the Constitution has no voice upon the subject, even for federal courts. *See, e.g.*, Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 199–200 (1990) (O'Connor, J., plurality opinion) ("The Constitution does not prohibit the application of decisions prospectively only."); *Beam*, 501 U.S. at 546 (White, J., concurring in judgment). Also, the *Chevron* rule, which appears to still control law-changing retroactivity determinations in civil cases, *see supra* note 62, implies that the Constitution permits prospectivity.

65. *Linkletter*, 381 U.S. at 623.

66. 304 U.S. 64 (1938) (holding that there is no federal general common law).

67. *See, e.g.*, Roosevelt, *supra* note 13, at 1078, 1087–88.

68. Justice Cardozo called the declaratory theory "ancient dogma." *Sunburst*, 287 U.S. at 365. In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971) (Stewart, J.) (citation omitted), the Court declined to "indulge" the "fiction" that the law now has always been the law. Justice White intimated that either the declaratory theory is "naive" or it is a disconcerting deception. *Beam*, 501 U.S. at 546 (White, J., concurring in judgment). *See also* Fisch, *supra* note 6, at 1080–82 (finding the declaratory theory "inherently circular," excessively "formalist," and "antiquated").

decreeing what it is today *changed to*, or what it will *tomorrow* be.[69]

Neither Justice Scalia nor any other proponent of the declaratory theory, however, ever fully explains why the declaratory theory solves the retroactivity problem. Indeed, it seems to be taken for granted that the theory naturally mandates retroactivity.[70] The intuition seems to be that because the law does not actually change, the "new" law was in fact always also the "old" law, and consequently there is no retroactivity problem at all.[71]

This intuition is flawed. Even if the declaratory theory is valid, it still does not solve the retroactivity problem. This intuition overlooks the legitimate role that preclusion doctrines play in the legal system. Preclusion doctrines implicitly distinguish between decisions *now* and decisions *then*. They preserve the old decision for valid prudential reasons even if the court might reach a different result on the merits if it could hear the claim anew—indeed, even if on the merits the case was wrongly decided.[72] Yet their preclusive function is not inconsistent with the declaratory theory. They do not require that the law have "changed." For example, a court may adjudicate a dispute but obtain the wrong result because it misapplied the law; a later court hearing a collateral attack might arrive at a different result if it could, but res judicata precludes it from doing so.

The problem of retroactivity is best conceptualized as a preclusion problem.[73] Accordingly, a retroactivity rule, too, may legiti-

69. *Beam*, 501 U.S. at 549 (Scalia, J., concurring in judgment); *see also Harper*, 509 U.S. at 105–10 (Scalia, J., concurring in judgment); *Am. Trucking*, 496 U.S. at 201 (Scalia, J., concurring in judgment).

70. *See, e.g.*, *Linkletter*, 381 U.S. at 622–23 (discussing the declaratory theory); Roosevelt, *supra* note 13, at 1082 (The declaratory theory "will, of course, produce . . . uniformly retroactive result[s]."); Daniel J. Meador, *Habeas Corpus and the "Retroactivity" Illusion*, 50 VA. L. REV. 1115, 1116 (1964) ("Adherents to the [declaratory theory] would of course give 'retroactive' effect" to new law.).

71. *See* Roosevelt, *supra* note 13, at 1082–83.

72. *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong . . . ."); Mackey v. United States, 401 U.S. 667, 683 (1971) (Harlan, J., concurring in part and dissenting in part) ("Indeed, this interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from the cognizance of courts administering this collateral remedy. This has always been the case with collateral attacks on final civil judgments."); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403, at 31–34 nn.15–19 (2d ed. 2002); *see also infra* Part IV.A.

73. *See infra* Part IV.B.

mately bar relitigation even though the court would decide the case differently under the new law. Just as the res judicata bar is consistent with the declaratory theory, so too is prospectivity as a bar on applying new law.

The counterpart to the declaratory theory is the positivist theory, which acknowledges that courts do indeed make law. Once courts have this power, it is possible, unlike with the declaratory theory, to distinguish "new" law from "old." Decisions under the old law become "existing juridical facts," which militate in favor of withholding the new law's effect.[74] Nevertheless, it is sometimes claimed that even if courts can make law, Article III still mandates retroactivity because of what may be termed the "best law" rule. As the Court said in *Griffith*:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us . . . is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.[75]

Justice Blackmun put the point in the obverse: a court may not apply a law already "determined to be wrong."[76]

Yet the best law rule fails to solve the retroactivity problem for the same reason that the declaratory theory does: it does not recognize the legitimate role of preclusion doctrines. That a court hearing a collateral attack would decide the case differently were it open to relitigation does not undermine the legitimacy of the res judicata bar—indeed, that is the very point of res judicata.[77] And the doctrine of res judicata itself is surely part of the best current law.[78]

74. *Linkletter*, 381 U.S. at 624 (discussing the positivist theory).

75. Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring in part and dissenting in part)); *see also* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting) (A court must "determine the rights of litigants in accordance with [its] best current understanding of the law."); Desist v. United States, 394 U.S. 244, 255, 259 (1969) (Harlan, J., dissenting); Roosevelt, *supra* note 13, at 1117–24 (using the best law rule as the basis for the "decision-time model," according to which "[c]ourts should apply their current best understanding of the law to all cases before them, regardless of whether the best understanding at the time of the transaction would produce a different result").

76. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 547–48 (1991) (Blackmun, J., concurring in judgment).

77. *See supra* note 72.

78. *See, e.g.*, *Am. Trucking*, 496 U.S. at 214 (Stevens, J., dissenting) ("That current understanding may include judicial principles of res judicata and *stare decisis*

Therefore, the res judicata bar does not entail applying anything less than the best current law. Once the retroactivity problem is understood as a preclusion problem,[79] it is clear that prospectivity does not entail the application of "wrong" law, either.[80]

Therefore, the debate about whether courts find law or make it is irrelevant to the retroactivity problem. Neither the declaratory theory nor the best law rule is inconsistent with prospectivity.

B. The Prohibition on Advisory Opinions

Article III has sometimes been interpreted to prohibit advisory opinions, that is, judicial statements unnecessary to dispose of the case.[81] When a court overrules prospectively, then because it could have disposed of the case in exactly the same way without rendering any prospective announcement of new law, it necessarily renders an advisory opinion. For example, the Court in *Stovall*, compelled by the "necessity that constitutional adjudications not stand as mere dictum," mandated that new law be given retroactive effect.[82]

The prohibition on advisory opinions, however, is dubious, for numerous established judicial practices violate it.[83] Even if it is

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and legislatively prescribed statutes of limitations that protect interests in reliance and repose.").

79. *See infra* Part IV.

80. *Cf.* Fallon & Meltzer, *supra* note 13, at 1798 ("[A] court must apply the relevant law, but the relevant law includes the law of remedies," which can be used to impede the retroactive effect of new law.).

81. The Supreme Court has understood the prohibition to include a number of practices, including "[a]ny judgment subject to review by a co-equal branch of government," "pre-enactment review," "review of any state judgment for which there is or may be an adequate and independent state ground," "*[a]ny opinion . . . not truly necessary to the disposition of the case at bar*," and "[a]ny decision on the merits of a case that is moot or unripe or in which one of the parties lacks standing." Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644–45 (1992) (emphasis added) (citations omitted). Only the prohibition on unnecessary opinions has any bearing on the retroactivity problem. *See generally* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3529.1, at 293–308 (2d ed. 1984 & Supp. 2003); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 94–97 (5th ed. 2003) [hereinafter HART AND WECHSLER].

82. Stovall v. Denno, 388 U.S. 293, 301 (1967); *accord* Teague v. Lane, 489 U.S. 288, 315–16 (1989).

83. *See Teague*, 489 U.S. at 318 (Stevens, J., concurring in part and concurring in judgment) (observing that the Supreme Court often resolves constitutional questions even when the error is harmless); Fallon & Meltzer, *supra* note 13, at 1798–1802 (same); *see also* Beytagh, *supra* note 13, at 1615 (arguing that prospective overruling also does not violate a literal case-or-controversy requirement, since a court can reach the retroactivity question only within the confines of a valid case

valid, however, the prohibition does little to solve the retroactivity problem, since the prohibition can matter only for law-changing retroactivity questions, not subsequent ones. A court addressing a subsequent retroactivity question confronts the choice of applying the old law or applying the new law that was *created by another court*. This choice does not entail making a pronouncement unnecessary to dispose of the case, for the court merely need choose the law and apply it. Therefore, the prohibition on advisory opinions entrenches the law-changing/subsequent dichotomy,[84] resulting in a regime of "selective prospectivity"[85] wherein only the party that wins the change in law necessarily gets the benefit of the new law.[86] The patent inequality inherent in a regime of selective prospectivity has vexed the Court considerably, so I turn next to the principle of equal treatment.

III. THE PRINCIPLE OF EQUAL TREATMENT

The principle that a court must treat similarly situated parties similarly has become increasingly important in the Court's retroactivity jurisprudence. *Chevron*'s cost-benefit rule and *Stovall*'s mixture of a per se standard and a balancing test, both of which permit retroactivity determinations to vary from one case to another, gave way to *Griffith*'s and *Harper*'s rules, which require that law-changing and subsequent retroactivity questions be answered the same—and, notably, in favor of retroactivity. In this Part, I discuss three possible sources for the principle of equal treatment: Article III, stare decisis, and an independent fairness interest. I argue that Article III and stare decisis are invalid bases for a retroactivity rule. I also contend that, although the independent fairness interest is plausibly relevant to the retroactivity problem, it cannot support a per se rule.

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and will still resolve the dispute on the merits); Stephens, *supra* note 13, at 1564 ("Once the Court has power over the case and there is no conflict with the other branches regarding the issues to be determined, the content of the Court's resolution and the way in which its decision is to be implemented certainly fall within the Court's power."). *See generally* HART AND WECHSLER, *supra* note 81.

84. Note that the prohibition on advisory opinions is irrelevant to the pending/final dichotomy.

85. *See e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991).

86. The *Stovall* rule recognizes the limited power of the prohibition on advisory opinions by mandating law-changing retroactivity but permitting subsequent retroactivity questions to be answered by a balancing test. *See supra* text accompanying notes 32–37.

A. Article III

One basis for the principle of equal treatment is the "best law" interpretation of Article III.[87] The Court in *Griffith* mandated retroactivity (at least for all pending cases) because "it is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'"[88] The thought seems to be that if courts are required to apply the best law, then all retroactivity questions, whether law-changing or subsequent, will be answered the same. Equal treatment is thus a necessary consequence of the best law rule. This argument fails, however, for the same reason that the best law rule fails generally to solve the retroactivity problem: it does not account for the legitimate role of preclusion doctrines.[89] Preclusion doctrines, such as res judicata, tend to result in disparate treatment yet are part of the best law.[90] As a preclusion doctrine, a retroactivity rule may legitimately result in disparate treatment, too.

B. Stare Decisis

Another basis for the principle of equal treatment is stare decisis. Generally the doctrine of stare decisis promotes equal treatment because it ensures that all similar disputes are adjudicated under the same law.[91] The *Harper* rule accords stare decisis effect to the law-changing retroactivity determination, so that if the law-changing determination favored retroactivity, subsequent retroac-

87. *See supra* text accompanying notes 74–76.

88. 479 U.S. 314, 323 (1987) (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part)); *see also* Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting) ("And when [a] similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."); *cf. Beam*, 501 U.S. at 548–49 (Scalia, J., concurring in judgment) (finding no conceptual connection between the declaratory theory of adjudication and the principle of equal treatment).

89. *See supra* text accompanying notes 77–80.

90. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (rejecting the argument that where a similarly situated party had appealed successfully, "simple justice" compelled permitting relitigation of a case to which the res judicata bar properly applied).

91. *See infra* Part IV.B.

tivity determinations must also favor retroactivity.[92] But according stare decisis effect to retroactivity determinations entails a misapplication of the doctrine of stare decisis, and therefore is an unsound basis for the principle of equal treatment as a solution to the retroactivity problem.[93]

C. Fairness

The principle of equal treatment may also emanate from an independent fairness interest. The Court in *Griffith*, for example, said that "the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule."[94]

There are two problems with putting much weight on equality as an independent fairness interest to solve the retroactivity problem. First, equal treatment is a neutral principle, for one must always ask, "Equal treatment *in what respect*?" The Court has sometimes intimated that the principle of equal treatment supports only a regime of retroactivity, not of prospectivity. In *Griffith*, the Court was somewhat imprecise in defining the scope of the principle of equal treatment; the opinion can be read to say that the principle requires not only subsequent retroactivity but also law-changing retroactivity.[95] And in *Harper*, the Court held only that

92. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993) ("*Beam* controls this case . . . : When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law . . . ."); *Beam*, 501 U.S. at 537 (opinion of Souter, J.) ("[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* . . . ."). The Court in *Harper* and *Beam* did not explicitly state that a determination in favor of prospectivity should also be accorded stare decisis effect, though a consistent application of its reasoning would seem to require it. The Court in *Johnson v. New Jersey* also thought that stare decisis (or something like it—the Court was not explicit) was important to retroactivity, but it inexplicably would accord stare decisis-like effect only to a subsequent retroactivity determination, not to a law-changing one. *See supra* notes 25–31 and accompanying text.

93. *See infra* Part IV.B.3.

94. Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (quoting United States v. Johnson, 457 U.S. 537, 556 n.16 (1982) (Blackmun, J., plurality opinion)); *Beam*, 501 U.S. at 537 (opinion of Souter, J.) ("[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of . . . the rule of law generally.").

95. *Griffith*, 479 U.S. at 322–23. A more charitable interpretation is that the Court thought that the principle of equal treatment has import only for subsequent retroactivity questions; that law-changing retroactivity is mandatory for other reasons, namely, the best law rule, *see supra* text accompanying note 75; and that,

where a law-changing retroactivity determination favored *retroactivity*, subsequent determinations must also favor retroactivity.[96] It must be admitted, however, that the facts of *Harper* did not require it to reach the issue of whether subsequent retroactivity determinations must favor *prospectivity* where the law-changing determination favored prospectivity. If indeed intended by the Court, this selective application of the principle of equal treatment is unsustainable, since similarly situated parties might just as well be treated equally by protecting their reliance interest via "pure prospectivity,"[97] that is, by withholding the new law's effect both in the case presenting the law-changing question and in cases presenting subsequent retroactivity questions.

Second, the principle of equal treatment seems inconsistent with the Court's recent retroactivity jurisprudence, which purports to exalt the principle. The power of the principle of equal treatment turns on what it means for parties to be "similarly situated." Unfortunately, the Court has not articulated what that means. Justice Stevens, rejecting the law-changing/subsequent dichotomy underlying selective prospectivity, argued that "[t]he accidental timing of our decisions in two timely filed and currently pending cases should not, and has not in the past, produced such a difference in the law applicable to the respective litigants."[98] But the difference between a pending case and a final one also is often the result of "accidental timing," which suggests that the pending/final dichotomy violates the principle of equal treatment as much as the law-changing/subsequent dichotomy does.[99] Consequently, it is

therefore, in order to treat the parties in subsequent cases the same as those in the law-changing case, the new law must also be per se retroactive in all subsequent cases.

96. 509 U.S. at 97 ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . .").

97. *See e.g.*, Linkletter v. Walker, 381 U.S. 618, 621–22 (1965).

98. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 212 (1990) (Stevens, J., dissenting).

99. *See* Shea v. Louisiana, 470 U.S. 51, 63–64 (1985) (White, J., dissenting) ("The claim that the majority's rule serves the interest of fairness is equally hollow. Although the majority finds it intolerable to apply a new rule to one case on direct appeal but not to another, it is perfectly willing to tolerate disparate treatment of defendants seeking direct review of their convictions and prisoners attacking their convictions in collateral proceedings. . . . [I]t seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through

hard to see how the Court could—as it did in *Griffith*, *Teague*, and *Harper*—reject the law-changing/subsequent dichotomy on the ground that it violates the principle of equal treatment, yet accept the pending/final dichotomy.[100]

In *Beam*, Justice Souter tried to square rejecting the law-changing/subsequent dichotomy with accepting the pending/final dichotomy. He argued that the "independent interest[ ]" of finality gains force over time, as the equality interest loses force, so that at the point at which a case becomes final, the finality interest outweighs the equality interest.[101] This argument is unsound because the finality interest is generally inapposite to the retroactivity analysis.[102] Furthermore, the argument implies that the principle of equality is only one factor in solving the retroactivity problem. This implication is at odds with the per se character of the *Griffith* and *Harper* rules, which suggest that the principle is absolute.[103]

Of course, it is more sensible that the principle of equality should be only one factor among several. Fairness is an equitable interest, which normally is balanced against other relevant interests. For example, the doctrine of stare decisis establishes a preference for adhering to prior decisions, in part because such adherence results in greater uniformity of treatment; yet stare decisis permits precedent to be overturned where the benefits of the new law preponderate.[104] And the doctrine of res judicata protects the finality interest even though doing so may lead to similarly situated parties being treated differently.[105]

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the criminal justice system. The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others; the Court's new approach equalizes nothing except the numbers of defendants within the disparately treated classes."); *see also Griffith*, 479 U.S. at 331–32 (White, J., dissenting).

100. *See supra* text accompanying notes 38–48, 54–61.

101. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 542 (1991) (opinion of Souter, J.).

102. *See infra* Part IV.B.4.

103. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 278–79 n.32 (1994) ("While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity.") (citing *Harper* and *Griffith*); Roosevelt, *supra* note 13, at 1097 ("The current retroactivity jurisprudence in criminal law has thus moved towards bright-line rules—retroactivity on direct but not collateral review . . . ."). *But see* Stephens, *supra* note 13, at 1559 ("Essentially then the Court has created a presumption of retroactivity.").

104. *See infra* note 125 and accompanying text.

105. *See supra* note 90; *see also infra* note 122 and accompanying text.

The Court in *Johnson v. New Jersey* and *Stovall* seemed more comfortable with this flexible understanding of the principle of equal treatment. In *Johnson*, the Court rejected the pending/final dichotomy, finding that "[a]ll of the reasons set forth" for withholding the new law's effect in cases already final were also relevant to cases still pending.[106] Yet the Court accepted the law-changing/subsequent dichotomy by according stare decisis effect to subsequent retroactivity determinations but not to law-changing ones.[107] Then in *Stovall*, the Court again rejected the pending/final dichotomy because it found that "no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable."[108] Yet the Court again accepted the law-changing/subsequent dichotomy by holding that Article III mandates law-changing retroactivity but that a balancing test controls subsequent retroactivity determinations.[109] The Court acknowledged the potential for disparate treatment but dissipated the tension by reasoning that disparate treatment was an "unavoidable" and "insignificant cost for adherence to sound principles of decision-making."[110] Thus, although the Court surely thought that equality was desirable, it also thought that other considerations could be more important. For the Court in *Johnson* and *Stovall*, the principle of equality was to be protected where the situations really were equal on the merits, that is, where the balancing tests would yield the same result; equality was not significant in the abstract. By treating equality as only a consideration, which could be outweighed by other considerations, the *Johnson* and *Stovall* rules avoid the incoherence of both the *Griffith* and *Harper* rules.

Of all the Court's retroactivity rules, the simple cost-benefit rule found in *Chicot* and *Chevron* is best able in practice to treat parties equally regardless of whether the case is pending or final, and regardless of whether the case presents a law-changing or subsequent retroactivity question. The *Griffith* and *Harper* rules mandate retroactivity in pending cases and prospectivity in cases already final. The *Linkletter* rule mandates retroactivity in pending cases and calls for a balancing test in final cases. Similarly, the *Stovall*

106. Johnson v. New Jersey, 384 U.S. 719, 732 (1966).
107. *See supra* notes 25–31 and accompanying text.
108. Stovall v. Denno, 388 U.S. 293, 300–01 (1967).
109. *See supra* notes 32–37 and accompanying text.
110. *Stovall*, 388 U.S. at 301.

rule mandates retroactivity in the law-changing case and calls for a balancing test in subsequent cases. The mixture of per se retroactivity and balancing test, as in *Linkletter* and *Stovall*, will often result in disparate treatment because the balancing test has a clear tendency to favor prospectivity.[111] The most efficient rule for achieving equality (at least of outcome) would be to accord stare decisis effect to retroactivity determinations, regardless of whether the case presenting the subsequent retroactivity question is pending or final. The *Johnson* rule comes close to this, for it accords stare decisis-like effect to the initial subsequent retroactivity determination vis-à-vis later subsequent retroactivity questions.[112] But it is conceptually incorrect to accord stare decisis-like effect to retroactivity determinations.[113] The simple cost-benefit rule, in contrast, uses the same analysis for all retroactivity questions. To be sure, the cost-benefit analysis is fact-driven, so the outcome—whether new law is available retroactively or not—need not be uniform across cases, but, as just noted, in practice the balancing test consistently favors prospectivity. Therefore, if the Court is committed to the principle of equal treatment, the simple cost-benefit rule of *Chicot* and *Chevron* is the best sustainable retroactivity rule.

111. United States v. Johnson, 457 U.S. 537, 549–50 (1982) ("Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually compelled a finding of nonretroactivity."); *see also, e.g.*, Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) (O'Connor, J., plurality opinion) (balance tipped in favor of prospectivity); Chevron Oil Co. v. Huson, 404 U.S. 97, 109 (1971) (same); Mackey v. United States, 401 U.S. 667, 677 (1971) (same); City of Phoenix v. Kolodziejski, 399 U.S. 204, 213–15 (1970) (same); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (same); Desist v. United States, 394 U.S. 244, 249–54 (1969) (same); *Stovall*, 388 U.S. 293 (same); Johnson v. New Jersey, 384 U.S. 719 (1966) (same); Linkletter v. Walker, 381 U.S. 618 (1965) (same); Shah v. Pan Am. World Servs., Inc., 148 F.3d 84, 92 (2d Cir. 1998) (same). *But see* Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 710 (4th Cir. 1994) (balance tipped in favor of retroactivity); McKinney v. Pate, 20 F.3d 1550, 1566 (11th Cir. 1994) (same).

112. The *Johnson v. New Jersey* rule is troubling on its own; the Court did not explain why only the initial subsequent retroactivity determination, and not the law-changing retroactivity determination, should have stare decisis-like effect. *See supra* text accompanying notes 25–31.

113. *See infra* Part IV.B.3.

IV.
RETROACTIVITY AS A PRECLUSION PROBLEM

The common law contains a number of preclusion doctrines, such as res judicata (i.e., claim preclusion), collateral estoppel (i.e., issue preclusion), and even stare decisis.[114] They involve preclusion because they bar further inquiry for reasons other than the substantive merits of the claim. The problem of retroactivity, too, is a preclusion problem. In this Part, I first examine the scopes of the preclusion problems addressed by res judicata, collateral estoppel, and stare decisis. I show that while they often overlap, they are nonetheless distinct.[115] Next, I examine the interests considered by the various preclusion doctrines, finding that the doctrines are based on balancing tests that focus on reliance. Then, I explain how retroactivity is a preclusion problem, and I demonstrate how it overlaps these other preclusion problems yet is distinct from them. I suggest that the purpose-reliance-effect balancing test deployed in *Chicot*, *Linkletter*, *Chevron*, and other cases is consistent with the nature of preclusion doctrines. With this understanding of retroactivity in place, I argue that the Court's use of res judicata and stare decisis to solve the retroactivity problem is erroneous. Finally, I propose an alternative reading of *Teague* from that which I presented in Part I in order to salvage its holding in light of the arguments I make in this Part.

A. Traditional Preclusion Doctrines

1. Overlapping but Distinct Scopes

Res judicata addresses the question whether a claim that has already been brought may be brought again by the same party.[116] Collateral estoppel addresses the question whether an issue that has already been litigated and determined may be litigated again by the same party.[117] Stare decisis addresses the question whether a court

114. *See generally* 18–18B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE, §§ 4401–4478 (2d ed. 2002).

115. A similar analysis could be undertaken with respect to the other preclusive doctrines, but these are sufficient to illustrate the point. Furthermore, it is necessary to deal expressly with res judicata and stare decisis because the Court has looked to these doctrines in its retroactivity jurisprudence.

116. *See* 18 WRIGHT, *supra* note 72, § 4406, at 138–44; RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1980).

117. *See* 18 WRIGHT, *supra* note 72, § 4416, at 386–412; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980).

should follow the precedent set by another court's decision, where the two cases arise out of similar facts.[118]

Res judicata may appear to subsume collateral estoppel, for where res judicata applies, it is as if all the issues raised by the claim are pre-determined. Res judicata and collateral estoppel also interact in an important way: A party seeking to avoid the preclusive effect of res judicata may challenge the original, putatively binding judgment's validity in a collateral attack. Typically the party will argue that the original court lacked personal jurisdiction. The subsequent court will not permit this collateral attack to proceed, however, if it finds that the issue of personal jurisdiction was litigated and determined in the original proceeding.[119] Thus, collateral estoppel can ensure the preconditions for res judicata. But the two doctrines are distinct. Res judicata may apply even though collateral estoppel would not apply to the underlying issues. For example, a person who sued for rescission of a contract due to fraud might be barred from later suing for breach of that contract, even though the issue of breach was never actually litigated. Conversely, collateral estoppel may apply where res judicata does not. For example, collateral estoppel might fix a person's domicile in a matter entirely unrelated to the prior litigation; because the matter is entirely unrelated, res judicata would not apply.

Stare decisis and res judicata overlap to the extent that they both cut off litigation of a matter on the basis of a prior judgment, given a particular array of facts. If a person tried to bring a claim he had already litigated, a court could dispose of it expeditiously by applying the res judicata bar, or it could find that the original litigation provides a precedent that is "on all fours" with, and therefore controls the disposition of, the claim. But if the court looked to stare decisis rather than res judicata, it would be within its power to reject the precedent in favor of what it now considers a superior statement of the law.[120] Furthermore, the court could not dispose of the claim under res judicata unless the parties were also parties to the prior case.[121] Thus the relation between stare decisis and res

118. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (opinion of O'Connor, J.).

119. *See* 18A WRIGHT, *supra* note 114, § 4430, at 40–46.

120. *Compare, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981) (foreclosing the possibility of overcoming res judicata's preclusive presumption) *with Casey*, 505 U.S. at 854–55 (opinion of O'Connor, J.) (permitting several grounds on which to overcome stare decisis' preclusive presumption).

121. *Moitie*, 452 U.S. at 398 ("A final judgment on the merits of an action precludes the *parties or their privies* from relitigating issues that were . . . raised in [the previous] action.") (emphasis added); RESTATEMENT (SECOND) OF JUDGMENTS

judicata can be cast as follows: the former has broader but weaker effect than the latter.

2. Balancing Tests

Res judicata balances several public and private interests. Weighing in favor of preclusion are the goals of maintaining an authoritative legal system, avoiding inconsistent results, protecting the parties' reliance and repose interests in the judgment, and avoiding the expense of duplicative litigation. The countervailing interests include treating similarly situated parties similarly, resolving disputes accurately, and avoiding excessive litigation about whether res judicata applies.[122] Collateral estoppel balances the same constellation of factors as res judicata,[123] although the interest in repose is diminished in situations of non-mutual issue preclusion, wherein a person who was not a party to the original action tries to estop one who was a party.[124] Stare decisis balances interests such as protecting a party's reliance on precedent, treating similarly situated parties similarly, and avoiding repetitious litigation, which militate for adherence to precedent, and promoting progress toward more just and efficient laws, which militates against such adherence.[125] Each of these balancing tests tends to tip in favor of preclusion: as long as their preconditions are met, res judicata and collateral estoppel adopt an irrebuttable preclusive presumption; stare decisis adopts a similar presumption, but a party may rebut the presumption by showing that the new law will be substantially superior to the precedent.[126]

B. Retroactivity as a Preclusion Problem

1. The Scope of the Retroactivity Question

A retroactivity question arises whenever a court announces a new law: should a court adjudicate a dispute arising out of a transaction that occurred prior to the announcement of the new law ac-

§ 17 (1980) ("A valid and final judgment is conclusive *between the parties* . . . .") (emphasis added).

122. *See* 18 WRIGHT, *supra* note 72, § 4403, at 20–45; ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 31–33 (2001).

123. *See* 18 WRIGHT, *supra* note 72, § 4403, at 20–45.

124. *See id.* at 30; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326–32 (1979).

125. *See Casey*, 505 U.S. at 854–55 (opinion of O'Connor, J.); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991) (opinion of Souter, J.); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 204–05 (1990) (Scalia, J., concurring).

126. *See supra* note 120.

cording to the new law or according to the law at the time of the transaction? The retroactivity problem can thus be conceptualized as a preclusion problem: a court may afford a new rule only prospective effect even though the court implicitly finds the new law substantively superior to the old law and would dispose of the case differently under the new law. A court that determines that a new law should have only prospective effect thus precludes a sort of relitigation of the case, restricting the outcome to that which the old law dictates, for reasons other than the substantive merits of the claim.

2. The Balancing Test

Once retroactivity is understood as a preclusion problem, it is reasonable for it to be solved by a balancing test, such as the purpose-reliance-effect test of *Chicot* and *Chevron*. This is consistent with the way other preclusion problems are solved. Reliance should be the focus of the retroactivity balancing test, just as it is for other preclusion problems.[127] Res judicata and collateral estoppel protect reliance on a prior judgment, while stare decisis protects reliance on a precedent. With respect to the retroactivity problem, the parties have structured their conduct in accordance with the old law; prospectivity protects that reliance interest.

3. Overlapping but Distinct: Stare Decisis

Retroactivity and stare decisis are closely connected. Whenever a court overcomes stare decisis' preclusive effect to reject or alter controlling precedent, it must then decide whether to apply that new law to the parties before it. It, therefore, faces a law-changing retroactivity question. But this does not mean that law-changing retroactivity and stare decisis address the same

127. A number of commentators have treated the retroactivity problem as primarily about reliance, but for different reasons. *See, e.g.*, Fallon & Meltzer, *supra* note 13, at 1791–97 (proposing that retroactivity questions be resolved by a remedial analysis with reliance as a key factor); Fisch, *supra* note 6, at 1105–09 ("The existence of a stable equilibrium justifies the protection of reliance-based interests. . . . The likelihood of legal change in an unstable equilibrium makes reliance on the legal status quo unreasonable and thereby mitigates the potential fairness problems arising out of retroactivity."); Stephens, *supra* note 13, at 1573 ("Therefore, I would suggest an analysis which straightforwardly addresses those reliance interests, taking into consideration how well established the prior rule of law was, how clear it was, perhaps whether there was reason . . . to predict a change, all with the aim of deciding how justifiable a party's reliance on the prior rule was."); Corr, *supra* note 13, at 773 (Among purpose, reliance, and effect, "the one that perhaps stirs the greatest empathy is reliance.").

problems.[128] When a court adheres to precedent, stare decisis operates but no question of retroactivity arises. And a case of first impression presents no opportunity for stare decisis to operate yet does raise a law-changing retroactivity question. Therefore, the stare decisis problem and the law-changing retroactivity problem are distinct.

The relation between stare decisis and subsequent retroactivity questions seems even more compelling: according stare decisis effect to one retroactivity determination should answer the other retroactivity questions. The *Harper* rule demands that the law-changing retroactivity determination be accorded stare decisis effect with respect to subsequent retroactivity determinations.[129] The *Johnson* rule demands that the initial subsequent retroactivity determination be accorded stare decisis-like effect with respect to later subsequent retroactivity determinations.[130]

But these uses of stare decisis entail a fundamental misunderstanding of the nature of the doctrine of stare decisis. Stare decisis emanates from a concern to encourage and then protect reliance on prior holdings. A retroactivity determination, however, is not a judicial decision on which the parties in other cases presenting a retroactivity question can rely, for the subsequent retroactivity question arises precisely because the disputed transaction preceded the change in law and, necessarily, the law-changing retroactivity determination. Therefore, stare decisis has no import for subsequent retroactivity questions.

In fact, using stare decisis to resolve retroactivity questions is perverse. According stare decisis effect to retroactivity determinations generates a new retroactivity question once-removed from the primary retroactivity question of the case: whether the retroactivity determination itself should be retroactive. Furthermore, when a determination favors applying the new law retroactively, then according that determination stare decisis effect not only does not protect any reliance interest, it specifically undermines the only reliance interest actually present, namely, that in the old law. This

128. *But see* Stephens, *supra* note 13, at 1565 (noting that "[t]o the extent that a party has justifiably relied upon established law, . . . refusing to apply a new rule of law to that party is consistent with stare decisis"); *see also infra* note 177 and accompanying text.

129. *See supra* note 92.

130. *See id.*

"turn[s] the doctrine of *stare decisis* against the very purpose for which it exists."[131]

4. Overlapping but Distinct: Res Judicata

Retroactivity overlaps res judicata if the law applicable to the disputed transaction changes after the judgment is final. But res judicata and retroactivity are not identical. On the one hand, res judicata frequently bars relitigation even though no relevant new law has been announced. On the other hand, a retroactivity question may arise in pending cases: a law-changing retroactivity question can emerge on direct appeal, and a subsequent retroactivity question can emerge at any time between the relevant conduct and the direct appeal.[132]

Especially in its more recent cases, the Court has thought that the finality interest is central to solving the retroactivity problem. In *Harper*, the Court held that a new law "must be given full retroactive effect in all cases still open on direct review . . . ."[133] In *Teague*, the Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[134] Thus the Court incorporated the

131. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 204–05 (1990) (Scalia, J., concurring in judgment). But when a determination favors *prospectivity*, according it stare decisis effect is not similarly perverse, since prospectivity protects the reliance interest.

132. Note that collateral estoppel overlaps retroactivity in the same way that res judicata does; it is distinct for the same reasons res judicata is distinct.

133. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993); *see* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 540 (1991).

134. Teague v. Lane, 489 U.S. 288, 310 (1989) ("adopt[ing] Justice Harlan's view of retroactivity for cases on collateral review"); *see also* Mackey v. United States, 401 U.S. 667, 691–92 (1971) (Harlan, J., concurring in part and dissenting in part); United States v. Estate of Donnelly, 397 U.S. 286, 296 (1970) (Harlan, J., concurring in judgment) (arguing that the "critical factor" in determining whether a new law should be available retroactively is "the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. Just as in the criminal field the crucial moment is, for most cases, the time when a conviction has become final, see my *Desist* dissent, . . . so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*"); Desist v. United States, 394 U.S. 244, 260–64 (1969) (Harlan, J., dissenting) (arguing that retroactivity questions presented in a habeas proceeding are governed by "quite different factors," including finality, the efficient administration of justice, and the two "principal functions" of habeas); *But see infra* Part IV.C (proposing an alternative interpretation of *Teague*).

finality interest into its retroactivity analysis.[135]

The finality interest, however, is generally inapposite to the retroactivity problem. Finality focuses on the adjudication of the dispute, not on the conduct that gave rise to it. Trial procedures are followed so that the outcome may become authoritative. Achieving finality is one of the goals of adjudication and its attendant procedures. Compare retroactivity: The parties to a dispute engaged in their conduct not to achieve finality but some other objective, namely, the benefit of the substantive law under which they were acting. The finality interest is, to be sure, an instance of a reliance interest, but it is not the reliance interest relevant to the retroactivity problem, and so a valid retroactivity rule should not consider it.[136]

Nevertheless, there are three reasons why a retroactivity rule that deploys a balancing test in both pending and final cases, as the simple cost-benefit rule that I advocate would, does not mean that, in practice, settled disputes must always be relitigated under the new law. First, the balancing test will often favor prospectivity in practice.[137] Of course, this is a general point, not specific to retroactivity questions arising in cases already final.

Second, when applicable, res judicata will render moot the retroactivity question.[138] In such cases, new law will not be applied

135. Roosevelt, *supra* note 13, also builds the finality interest into his retroactivity rule. He seeks to develop a retroactivity rule that mandates retroactivity in pending cases and mandates prospectivity in cases already final. *Id.* at 1114. In his "decision-time model," he combines the best law rule with the finality interest to achieve this. According to the decision-time model, courts must apply the best understanding of the law at the time of their decision. This results, he believes, in automatic retroactive application of new law. *See supra* note 75 and accompanying text. But, Roosevelt claims, "[f]or a decision to survive collateral review, the reviewing court must assert not that the result would be the same if the case were litigated at the time of the collateral attack, but merely that the decision was correct when rendered." Roosevelt, *supra* note 13, at 1120. This is indeed true—but only with respect to *res judicata*. Roosevelt conflates res judicata and retroactivity, and consequently assumes his conclusion, namely, that new law is not retroactive in cases already final. Put another way, Roosevelt defines "decision" to include only pending and not final cases, and then deploys his decision-time model to justify prospectivity in cases already final. The decision-time model, therefore, is question-begging.

136. *See also, e.g.*, Griffith v. Kentucky, 479 U.S. 314, 332 n.1 (1987) (White, J., dissenting) ("'[T]he majority offers no reasons for its conclusion that finality should be the decisive factor.'") (quoting Shea v. Louisiana, 470 U.S. 51, 64 (1985) (White, J., dissenting)).

137. *See supra* note 111.

138. *See, e.g.*, Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 212 (1990) (Stevens, J., dissenting) (noting that the finality interest is "ordinarily and properly

retroactively, just as if the finality interest were protected by the retroactivity rule. But there is a real difference between res judicata rendering moot a retroactivity question and a retroactivity rule protecting the finality interest. If a retroactivity question arises in a case that is already final[139] but, perhaps because the original court lacked personal jurisdiction, res judicata does not properly apply, then the retroactivity question will not be moot. Yet, there will be a strong finality interest nonetheless. Consequently, if the retroactivity rule protects the finality interest, it will likely require that the new law be withheld. But if the retroactivity rule accounts for the finality interest only by recognizing that res judicata may render moot the retroactivity question, then it is possible that the new law will be applied retroactively in the case (depending on the other factors in the balance, of course).[140]

The third reason builds on the recognition that the finality interest is an instance of a reliance interest. In particular, the finality interest arises when the parties have relied on their performance of certain procedures for the resolution of their dispute. Therefore, where the law that is changed is a *procedural* law designed to ensure just and final dispute resolution, the finality interest in effect merges with the reliance interest that pertains to the retroactivity analysis under the cost-benefit rule.[141] In such cases, the balancing test should account for the finality interest. This explains why the Court in *Chicot* was right to include the finality interest in its balancing test.[142]

given expression in our rule[ ] of res judicata"); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401–02 (1981) (applying res judicata to render moot a retroactivity question); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378 (1940) (same).

139. *See supra* text accompanying note 11.

140. *Dow* is an example of just such a case. *See* discussion *infra* Part VI.

141. One may question whether identifying which laws are "procedural" for the purposes of retroactivity will prove as difficult as for the purposes of the *Erie* problem. *See* 19 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509 (2d ed. 1996) (discussing the distinction between substantive and procedural rules in the *Erie* context).

142. *See supra* text accompanying note 18. *Dow* also fits into this category of cases. *See infra* Part VI. Criminal laws that fit within *Teague*'s exception for accuracy-enhancing procedures will also generate a finality interest pertinent to the retroactivity balancing test, but criminal laws that fit within the exception for conduct that the state may no longer proscribe will not. See *infra* Part IV.C for further discussion of *Teague*'s exceptions.

C. Reconsidering Teague v. Lane

Previously, I said that the rule of *Teague* is that new law must be withheld in habeas corpus proceedings unless it fits within one of the exceptions.[143] The Court in *Teague* certainly gave the impression that it was addressing the *retroactivity* problem.[144] In later cases, the Court has reiterated that *Teague* establishes a *retroactivity* rule.[145] But if *Teague* is about retroactivity, then it must be wrong, for the pending/final dichotomy on which it is based is not valid in the retroactivity context.[146] I would like to propose an alternative approach to *Teague*, which will salvage much—but not all—of its holding. The alternative approach is to treat *Teague* as interpreting the habeas corpus statute, or, put another way, as pertaining to the scope of res judicata in criminal proceedings. Consequently, *Teague*'s real import for the retroactivity problem is to extend the *Griffith* rule to cases already final.

The habeas corpus statute ostensibly suspends res judicata for criminal convictions, providing relief from incarceration for any conviction "in violation of the Constitution or laws or treaties of the United States."[147] In *Teague*, however, the Court held that new law

143. *See supra* text accompanying note 43–46.

144. Examples include: couching its holding in the language of retroactivity, such as "*new* constitutional rules," Teague v. Lane, 489 U.S. 288, 310 (1989) (emphasis added); "we now adopt Justice Harlan's view of *retroactivity* for cases on collateral review," *id.* (emphasis added); "'costs imposed upon the State[s] by *retroactive* application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of th[e] application[,]'" *id.* (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment) (emphasis added); "[a]pplication of constitutional rules *not in existence at the time a conviction became final* seriously undermines the principle of finality which is essential to the operation of our criminal justice system[,]" *id.* at 309 (emphasis added); *see also* Fallon & Meltzer, *supra* note 13, at 1747 ("*Teague* . . . mak[es] retroactivity a threshold question . . . ."); Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273, 274 (1994) ("[I]n *Griffith v. Kentucky* and *Teague v. Lane*, [the Court] opted for a bright line distinction between direct appeals and collateral attacks on convictions.") (citations omitted).

145. *See* Bousley v. United States, 523 U.S. 614, 619–20 (1998) (characterizing *Teague*'s holding as applying only to "*new* constitutional rules") (emphasis added); Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) ("The dissent contends that this holding is inconsistent with the *retroactivity* rule announced in *Teague v. Lane*, but we think otherwise. *Teague* stands for the proposition that *new* constitutional rules of criminal procedure will not be announced or applied on collateral review.") (emphasis added) (citations omitted); Butler v. McKellar, 494 U.S. 407, 412–17 (1990) (looking to *Teague* to decide whether to apply a new law retroactively).

146. *See supra* Part IV.B.4.

147. 28 U.S.C. § 2254(a) (2000); *see also* 28 U.S.C. § 2255 (2000).

is generally not retroactive in habeas proceedings.[148] How can this general rule be squared with the statute? The Court started with "'not the purpose of the new rule . . . but instead the purposes for which the writ of habeas corpus is made available.'"[149] One purpose of habeas corpus is deterrence: "'the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'"[150] Another purpose of habeas corpus is to ensure that the incarceration does not violate substantive due process by imprisoning a person for "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[151] The final purpose of habeas corpus is to mitigate the risk of error by assuring conformity with procedures that enhance the accuracy of the proceeding and are "'"implicit in the concept of ordered liberty,"'"[152] that is, procedures that "implicate the fundamental fairness of the trial."[153] In drawing this narrow scope for habeas corpus, the Court reminded that it

> "never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." Rather, we have recognized that interests of comity and *finality* must also be considered in determining the proper scope of habeas review.[154]

Thus the Court read the habeas statute as suspending res judicata only where the habeas proceeding would serve one of these three purposes; otherwise, the finality interest compels precluding relitigation.

Now reconsider *Teague*'s putative retroactivity rule: new law is not available on habeas unless it fits within one of the two exceptions. First, note that the two exceptions merely restate two of the

148. *See supra* text accompanying notes 43–46.

149. *Teague*, 489 U.S. at 306 (quoting Mackey v. United States, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part)).

150. *Id.* (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)).

151. *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part)).

152. *Id.* at 311 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

153. *Id.* at 312.

154. *Id.* at 308 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (plurality opinion)) (citation omitted) (emphasis added).

purposes of habeas corpus: complying with substantive due process and ensuring fundamentally fair and accurate proceedings.[155] Second, while there is no exception for new laws that serve the deterrence purpose, it is a priori clear that there need not be such an exception. In fact, such an exception would be incoherent, since new law cannot retroactively deter conduct, for the conduct has already occurred.[156]

The *Teague* rule, therefore, does not alter habeas corpus for the purposes of retroactivity from the way it otherwise exists for old law. The statute suspends res judicata. The Court reads the statute's command functionally: new law and old law alike are available in habeas proceedings where they would serve one of the purposes of habeas corpus; the narrower scope of habeas for new law results only from the inability of new law to fulfill the deterrence purpose. The Court is concerned with the finality interest because it compels a narrow scope for habeas generally, not because of any relevance for the retroactivity problem in particular. In other words, *Teague* establishes a set of situations in which res judicata does not render moot the retroactivity question, namely, when the new law fits within one of the two exceptions. Therefore, *Teague* is not really about retroactivity; it is rather about the scope of habeas corpus, which is to say, the scope of res judicata in the criminal context.[157]

155. *See id.* at 311–13.

156. *Id.* at 306 ("'In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.'") (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

157. *See* Haddad, *supra* note 13, at 1076 (prior to *Teague*, criticizing the Court's use of a finality-based retroactivity rule to narrow the scope of habeas corpus, and arguing that the Court should contract its scope directly). Several commentators have argued that the nature of habeas corpus sometimes requires applying new law retroactively. *See* Meador, *supra* note 70, at 1117 ("To talk about a controversy over [habeas corpus] . . . in terms of 'retroactivity' is misleading. What the prisoner on habeas corpus complains of is the *presently continuing* confinement imposed in a manner which violates the Constitution as presently construed."); Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79–80 (1965) (suggesting that Meador goes too far, but agreeing with his basic point); Roosevelt, *supra* note 13, at 1121–23 (agreeing with Mishkin, and arguing that *Teague*'s exceptions are consistent with the decision-time model). But Meador's, Mishkin's, and Roosevelt's arguments for why new law must sometimes be retroactive on habeas corpus beg the question. Rather than explaining why the *retroactivity* analysis should differ in the two excepted classes of cases, they in effect declare that the cases are not really final. *See also supra* note 135 (arguing that Roosevelt's decision-time model is question-begging). Thus they conflate the problem of the scope of habeas corpus, that is, res judicata, with the problem of retroactivity.

Once this interpretation of *Teague* is accepted, it is clear that the Court in *Teague* merely extended to cases already final the *Griffith* rule, which mandates that new law be retroactive in all pending cases.[158] In *Teague*, the Court held that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated."[159] The Court had to reject the practice of announcing new law in habeas corpus proceedings because of what it had held in *Griffith*: if it were to announce new law in a habeas proceeding and the law did not fit within one of the exceptions, then the Court would violate the principle of equal treatment; and although pure prospectivity would solve this problem, it would violate Article III.[160] This reinterpretation of *Teague*, therefore, leaves the prevailing retroactivity rule, at least for criminal cases, as one of per se retroactivity regardless of whether the case is pending or already final, and regardless of whether the retroactivity question is law-changing or subsequent.[161]

V.
THE COST-BENEFIT RULE AND ITS PROBLEMS

So far, I have developed arguments to show that a simple cost-benefit rule is the only viable solution to the retroactivity problem. Article III, at best, can mandate law-changing retroactivity, but only if the prohibition on advisory opinions is valid. And in practice, a rule based on the prohibition will tend to result in disparate treatment of similarly situated parties. The principle of equal treatment cannot support a per se rule, even if it is a relevant consideration. Moreover, in practice the simple cost-benefit rule tends to yield uniform results more consistently than the other retroactivity rules that the Court has used. Stare decisis and res judicata address problems distinct from the retroactivity problem. The retroactivity problem is a problem of preclusion, and so is best solved by a reliance-based balancing test, such as the purpose-reliance-effect test. Neither the selection of factors to be considered by this test nor their relative

158. *See supra* notes 42, 75, 94 and accompanying text.

159. *Teague*, 489 U.S. at 316.

160. *Id.* at 315–16. Note that the Court in *Teague* emphasized the prohibition on advisory opinions, whereas in *Griffith*, it emphasized the best law rule. *See supra* Part II.

161. Of course, the bases of this rule—Article III and the principle of equal treatment—are not in fact capable of supporting such a retroactivity rule. *See supra* Parts II, III.

weights should depend on whether the retroactivity question is law-changing or subsequent, nor on whether the case is pending or final. Thus the cost-benefit rule: *all* retroactivity questions are to be resolved according to a reliance-based balancing test.[162]

Nevertheless, the cost-benefit rule encounters a number of practical problems. In this Part, I examine some of those problems.[163] In assessing the consequences of any particular law, we should consider how the rule affects the administration of justice, which has two dimensions: first, whether the application of the rule incurs any systematic difficulties; second, whether the nature of the rule threatens important systemic values or features.

A. Difficulties in Application

The most significant administrative problem with the cost-benefit rule is that it requires determining when a decision creates "new" law, since the balancing test is to be performed if and only if the law is new.[164] The Court has said that a civil law is new if the decision "overrul[es] clear past precedent" or if the decision addresses "an issue of first impression whose resolution was not clearly foreshadowed."[165] A criminal law is new, the Court has said, if it was "not *dictated* by precedent."[166] The Court has sometimes struggled to ascertain just how much a law was foreshadowed or dictated.[167] In *Harper*, Justice Kennedy did "not believe that [the

162. Some have thought that retroactivity in the criminal context should be handled differently from in the civil context. *See, e.g.*, *supra* note 49 and accompanying text; *infra* note 185 and accompanying text. A simple cost-benefit rule can still account for variations between the criminal and civil contexts, as by, for example, discounting the effect on the administration of justice in the criminal context (because of a systemic preference for criminal defendants over the state).

163. For additional problems with the test, which I will not discuss in this article, see Corr, *supra* note 13; Carl D. Ciochon, Note, *Nonretroactivity in Constitutional Tax Refund Cases*, 43 HASTINGS L.J. 419, 455–57 (1992) (observing that the purpose-reliance-effect test can be manipulated, such as by considering the purpose prong to be a threshold question and then defining the purpose in a result-oriented manner); Fisch, *supra* note 6, at 1086 (finding the purpose-reliance-effect test to be too "case-specific").

164. Compare a rule of per se retroactivity, such as *Griffith*'s: applying such a rule does not require ascertaining when the law is new, since it will be applied to the parties before the court regardless of whether it is new.

165. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (citation omitted).

166. Teague v. Lane, 489 U.S. 288, 301 (1989).

167. *See, e.g.*, Bousley v. United States, 523 U.S. 614, 620 (1998) (reversing the appellate court's finding that the law at issue was "new"); *Teague*, 489 U.S. at 342 (Brennan, J., dissenting) ("[T]he plurality's assertions that . . . [the] claim is too novel . . . are dubious. The requirement Teague asks us to impose does not go far beyond our mandates in [other cases]; indeed, it flows quite naturally from those

intervening decision] announced a new principle of law,"[168] but Justice O'Connor did, and in arguing the point she revealed the nonsense to which debates about newness tend to descend:

> I agree with Justice KENNEDY that [the intervening decision] did not represent a "'revolutionary'" or "'avulsive change'" in the law. Nonetheless, *Chevron* also explains that a decision may be "new" if it resolves "an issue of first impression whose resolution was not *clearly* foreshadowed." Thus, even a decision that is "controlled by the . . . principles" articulated in precedent may announce a new rule, so long as the rule was "sufficiently debatable" in advance.[169]

One can only wait in vain for insight into how a decision may be simultaneously controlled by precedent yet debatable. Likewise, illumination does not seem forthcoming on how something can be *clearly* foreshadowed.[170] The more difficult the newness inquiry in a particular case, the more difficult it is to determine whether the reliance interest merits protection, that is, whether the reliance was reasonable.[171] Several commentators have made progress toward resolving the problem of newness, but none purports to establish a bright-line rule.[172]

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decisions."); United States v. Estate of Donnelly, 397 U.S. 286, 293 (1970) (Contrary to the appellate court's finding, the Court found that the intervening decision "did not invalidate any statute, state or federal. It merely construed [the relevant statutory provision] in accordance with the clear language of the statute . . . .").

168. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 112 (1993) (Kennedy, J., concurring).

169. *Id*. at 123 (citations omitted).

170. Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 425 (1994), argues that "by focusing only on what is 'dictated' by past cases [as in *Teague*], the Court destabilizes the process of common law adjudication."

171. *See, e.g.*, Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 182 (1990) (O'Connor, J., plurality opinion) ("Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern . . . ."); *see also* Stephens, *supra* note 13, at 1533 n.137. In practice, the scope of "newness" is critical because the newness question is now a threshold inquiry. *See, e.g.*, Ashland Oil, Inc. v. Caryl, 497 U.S. 916, 918 (1990). How newness should be defined and what precise role it should play in the analysis are questions beyond the scope of this article, for as long as it is possible to announce new law—however rare it might be, however narrow the definition of "new"—the retroactivity problem will exist. And the solution to the retroactivity problem does not depend on how narrow or broad is the definition of "new."

172. *See* Fallon & Meltzer, *supra* note 13, at 1763–64, 1791–97 (treating newness as a matter of predictability, and arguing that the relative predictability affects how much the reliance interest merits protection); Fisch, *supra* note 6, at 1105–11 (focusing on the relative stability of the larger legal context and the degree to

The cost-benefit inquiry also suffers from the problem of whether reliance must have been actual or whether it can be presumed. The Court has tended to presume reliance where the law was new and retroactivity would have some detrimental effect.[173] Of course, the issue of actual or presumed reliance is not unique to the retroactivity problem. Other areas of law have confronted it and found workable solutions, so this problem does not seem insurmountable.[174]

B. Systemic Threats

One systemic problem created by the cost-benefit rule, insofar as it does not mandate retroactivity, is that it might undermine legal progress. The doctrine of stare decisis implies that precedent is overturned only if the new law would be superior to—more fair than, more efficient than—the old. To the extent that prospectivity impairs the mechanism for creating superior laws, it is undesirable. If a court can withhold a new law, people may have no incentive to try to change the law, since they will derive no benefit from winning the change.[175]

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which the new law disrupts that stability in determining whether to make a new law retroactive).

173. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 558 (1991) (O'Connor, J., dissenting) (noting that plaintiffs "made their business decisions according[ ]" to the old law, but saying nothing about whether the defendant, who was adverse to the new law, actually relied on the old law); Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971) (The Court said only, "It cannot be assumed that he did or could foresee that this . . . interpretation . . . would be overturned. The most he could do was to rely on the law as it then was."). *But see* Corr, *supra* note 13, at 773 (claiming that "[t]here must, of course, have been actual reliance[,]" though without providing support for this claim).

174. *Compare, e.g.*, Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856–57 (2d Cir. 1918) (Hand, J.) (requiring a showing of actual reliance to establish fraud), *with* Basic, Inc. v. Levinson, 485 U.S. 224, 238–45 (1988) (accepting the "fraud on the market" theory, which erects a rebuttable presumption of reliance in insider trading cases).

175. *See* Mackey v. United States, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part) ("Refusal to apply new constitutional rules to all cases arising on direct review may well substantially deter [some] from asserting rights bottomed on constitutional interpretations different from those currently prevailing in this Court."). *But see Am. Trucking*, 496 U.S. at 198–99 (O'Connor, J., plurality opinion) (arguing that the possibility of prospectivity in civil cases does not undermine the incentive since "even a party who is deprived of the full retroactive benefit of a new decision may receive some relief"); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 121 (1993) (O'Connor, J., dissenting) (same); *cf.* Beytagh, *supra* note 13, at 1613–14 (arguing that even a rule of mandatory prospectivity would not substantially impede legal change because "concerns about winning the battle but losing the war because of prospective application are unlikely to be sig-

But the simple cost-benefit rule merely creates a risk, not a certainty, that the benefit of the new law will be withheld. Consequently, pursuit of a change in law is open to an expected-value calculation. In some situations, the party's marginal benefit from the new law discounted by the risk of prospectivity will outweigh the litigation costs, and thus the party, if rational, will still pursue the law change.[176] A regime of mandatory retroactivity, by comparison, might impede the evolution of the law more than a regime that imposes a risk of prospectivity. If a court could not change the law without disrupting settled expectations, that is, could not overrule prospectively, then it might be disinclined to change the law at all. In fact, this was precisely Justice Harlan's hope when, arguing that new law must be retroactive (at least in pending cases), he said that prospectivity "cut[s] this Court loose from the force of precedent."[177] Many have noted that the Court's tolerance of prospectivity coincided with the Warren Court's efforts to remake criminal procedure, whereas the Court's preference for retroactivity coincided with the Burger and Rehnquist Courts' efforts to halt that revision.[178]

Furthermore, mandatory regimes, whether favoring retroactivity or prospectivity, are inefficient. Mandatory retroactivity sometimes disrupts the reliance interest even though the adverse party could not have anticipated the change. Mandatory prospectivity undermines the incentive to monitor and anticipate changes in the law, which is undesirable, especially in a common-law system. Only

nificant"). *But see Harper,* at 105 n.1 (Scalia, J., concurring in judgment) (questioning both the empirical and theoretical validity of Justice O'Connor's claim).

176. *See* Fallon & Meltzer, *supra* note 13, at 1806 ("[I]f legal novelty were only one element in a remedial calculus . . .[,] cases would be rare in which retroactive effect would so clearly be denied that litigants would have no incentive to raise colorable arguments.").

177. *Mackey*, 401 U.S. at 680 (Harlan, J., concurring in part and dissenting in part).

178. *See, e.g.*, *Harper*, 509 U.S. at 107–08 (Scalia, J., concurring) ("Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism . . . ."); Fallon & Meltzer, *supra* note 13, at 1745 (suggesting that the Court's liberal justices joined the conservative ones in *Griffith* because "non-retroactivity presumably had little allure [for them] given the dim prospects for another Warren-style expansion of defendants' rights in the age of the Rehnquist Court"); Roosevelt, *supra* note 13, at 1116 ("It is ironic that the Warren Court, under heavy criticism for the sin of 'judicial legislation,' adopted an analytical framework that admits to precisely that . . . ."); Stephens, *supra* note 13, at 1570 ("[T]he Court's current statements [in *Griffith* and *Harper*] regarding retroactivity doctrine seem in large measure an overreaction to the retroactivity decisions of the Warren Court.").

the cost-benefit rule consistently rewards those who anticipate predictable legal developments.[179]

Another systemic problem is that the cost-benefit rule allows the law to "shift and spring."[180] The analysis may favor applying a given new law retroactively in one case and only prospectively in another. The principle of equal treatment has been invoked to prevent such disparate treatment, but the principle cannot solve the retroactivity problem.[181] One practical way to achieve more consistent outcomes is through the use of equitable remedies.[182] Moreover, in practice the cost-benefit rule tends to yield a uniform result,

179. Consider also Fisch's argument that although it is often presumed that the decision to change the law implies a general improvement in the legal system, which in turn implies that applying the new law retroactively is efficient, prospectivity can achieve greater efficiency by eliminating transition costs and path dependence. She also notes that, conversely, prospectivity "may cause some people to bear a disproportionate share of the burden." Fisch, *supra* note 6, at 1088–91. Therefore, she rejects the tendency to treat the retroactivity problem as binary—*retroactive or prospective*—in favor of "equilibrium theory," which "ask[s] what degree of retroactive impact is appropriate" given the relative stability of the larger legal context. *Id.* at 1067–73.

180. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991) (opinion of Souter, J.).

181. *See supra* Part III.

182. *See, e.g.*, McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 51–52 (1990) (affording states flexibility to remedy retroactively an unconstitutional tax scheme); *see also* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 221–24 (1990) (Stevens, J., dissenting) (arguing that the remedy question is distinct from the retroactivity question, and that even with a rule of per se retroactivity, an outcome similar to prospectivity may be achieved via the law of remedies); United States v. Estate of Donnelly, 397 U.S. 286, 296 (1970) (Harlan, J., concurring in judgment) ("To the extent that equitable considerations, for example, 'reliance,' are relevant, I would take this into account in the determination of what relief is appropriate in any given case."); *see also* Ciochon, *supra* note 162, at 467–71 (arguing for a remedial approach to soften the harshness of per se retroactivity); Fisch, *supra* note 6, at 1070 ("[C]ourts gain additional flexibility through the use of their equitable and remedial powers."); Roosevelt, *supra* note 13, at 1119 ("Concerns of notice and reliance may have weight . . ., but they must be taken into account in a remedial calculus."). Some commentators have gone farther, arguing that the retroactivity problem should be subsumed or displaced entirely by a remedial analysis. *See* Fallon & Meltzer, *supra* note 13, at 1764–67 (arguing that the "legal relevance of novelty and unpredictability is best explained within the framework of the law of remedies"); Shores, *supra* note 62, at 215 (arguing for an exclusively "remedial approach" to new law because it "can be tailored to meet the needs of the situation"). *But see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 757–58 (1995) (prohibiting the remedial analysis from subsuming the retroactivity analysis). A purely remedial approach to the retroactivity problem is dissatisfying because it leaves unresolved the question of which law applies, so that it is not clear what should be remedied and why. *See* Fisch, *supra* note 6, at 1083 ("Viewing retroactivity purely in remedial terms, although appealing in theory, is unsatisfying.").

in particular favoring prospectivity.[183] And the cost-benefit rule does treat all determinations the same insofar as it applies the same test, that is, accounts for the same interests—which is not so for the Court's other retroactivity rules.[184]

Yet another systemic problem is heightened litigation costs. First, the possibility of winning the retroactive benefit of new law might increase the number of direct and collateral challenges. Second, the retroactivity determination itself must be litigated.

One way to remedy these systemic problems is through some degree of prophylaxis. Justice O'Connor has argued that a presumption in favor of retroactivity may be appropriate for determinations regarding criminal laws because the benefit a prisoner receives from new law will typically outweigh the attendant cost to the state, but that no such presumption is appropriate for retroactivity determinations regarding civil laws because "[n]ew decisions are not likely to favor civil defendants over civil plaintiffs; nor is there any policy reason for protecting one class of litigants over another."[185] But Justice O'Connor operates on too narrow a conception of the legitimate bases for a presumption. There need not be a general preference for one party over another; there need only be a recognition that the balance of factors will consistently tip for, or against, retroactivity, whichever party may be pursuing the new law.

What, then, should the presumption be? First, an irrebuttable presumption would operate much like a per se rule, which, as just argued, is undesirable.[186] A rebuttable presumption seems preferable. Second, the cost-benefit rule in practice tends to favor prospectivity. This accords with the general tendency of preclusion doctrines to disfavor relitigation: stare decisis' presumption is rebuttable, while res judicata's and collateral estoppel's are not.[187] So, it is more sensible for the presumption to favor prospectivity.[188]

183. *See supra* note 111.

184. *See supra* text accompanying notes 111–13.

185. *Am. Trucking*, 496 U.S. at 198 (O'Connor, J., plurality opinion); *see also* Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 121 (1993) (O'Connor, J., dissenting).

186. In contrast, res judicata's irrebuttable presumption may enhance efficiency by encouraging the parties to litigate all claims from the outset. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1980) (A valid and final judgment "extinguishe[s] . . . all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.").

187. *See supra* note 120.

188. While a presumption in favor of prospectivity can lessen the severity of the three systemic problems I have identified, it cannot address the problem of

In sum, a cost-benefit rule with a preclusive presumption provides a consistent way of addressing retroactivity questions, while also providing a way to account for a variety of important case-specific and systemic interests, including reliance and, *where appropriate*, finality.

VI.
ANALYSIS APPLIED: *DOW CHEMICAL CO. V. STEPHENSON*

I conclude by illustrating the implications of the Court's various retroactivity rules for *Dow Chemical Co. v. Stephenson*.[189] I also show how the analysis I have developed would apply to that case.

A. The Facts of Dow

Dow arose out of an Agent Orange "damages" class action.[190] The class included all military persons who served in Vietnam between 1961 and 1972 and were injured by exposure to Agent Orange.[191] On May 7, 1984, the class representatives and the defendants reached a global settlement for all present and future Vietnam Agent Orange claims.[192] Pursuant to the settlement agreement, the judge created a Payment Fund for the class. The Fund would commence January 1, 1985, and continue until December 31, 1994,[193] compensating class members for any injuries manifest between January 1, 1970, and December 31, 1994.[194]

In 1997, the Supreme Court decided *Amchem Products, Inc. v. Windsor*, in which it decertified an asbestos damages class covering

newness. A presumption in favor of retroactivity, however, could mitigate the newness problem.

189. 123 S. Ct. 2161 (2003).

190. The class was certified under Fed. R. Civ. P. 23(b)(3). In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

191. *Id.* at 728–29.

192. The agreement purported to be the "full and final settlement of all claims for compensatory damages . . . that arise out of or are based on, or could in the future arise out of or be based on, any of the matters alleged in the Complaint." In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 863 (E.D.N.Y. 1984).

193. In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396, 1417 (E.D.N.Y. 1985).

194. *Id.* at 1400–01. Disability payments would be made annually; death payments would be made by lump sum. *Id.* at 1420–21. The judge also created the Class Assistance Foundation, which would provide class-wide, non-cash benefits for 25 years, beginning January 1, 1985. *Id.* at 1431, 1434.

both present and future claimants.[195] The Court decertified the class because, *inter alia*, the divergent interests of the present and future claimants undermined the "structural assurance of fair and adequate representation . . . ."[196] Two years later, in *Ortiz v. Fibreboard Corp.*, the Court reached a similar conclusion for a "limited fund" class action, noting that "it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses . . . ."[197]

In 1998, in between *Amchem* and *Ortiz*, the *Dow* plaintiffs collaterally attacked the Agent Orange settlement.[198] The plaintiffs had not manifested injury until after the payment period had ended in 1994, and therefore they were entitled to no cash compensation at all.[199] The district court found their claims precluded by the original settlement, but the Court of Appeals for the Second Circuit reversed. The appellate court applied *Amchem* and *Ortiz* (which had been decided since the plaintiffs filed their collateral attack). According to the appellate court, the inclusion of both present and future claimants created "internal conflicts" within the class.[200] Consequently, the appellate court found that the plaintiffs had not been adequately represented, the original trial court did not have personal jurisdiction over them, and thus their claims were not precluded by the settlement.[201]

B. Answering Dow*'s Retroactivity Question*

Dow presents a subsequent retroactivity question in a case already final. The question is whether *Amchem*'s[202] new standard for adequate representation should apply retroactively.[203] Consider

195. 521 U.S. 591, 625 (1997).

196. *See id.* at 626–27.

197. 527 U.S. 815, 856 (1999). The class was certified under Fed. R. Civ. P. 23(b)(1)(B). *Id.* at 821.

198. Stephenson v. Dow Chem. Co., 273 F.3d 249, 255–59 (2d Cir. 2001).

199. *Id.*

200. *Id.* at 260–61.

201. *Id.*

202. Even though the appellate court applied both *Amchem* and *Ortiz*, for simplicity this paper will refer only to *Amchem*. Nothing is lost by this elision, however, since the Agent Orange litigation is, like *Amchem*, a damages class, not a limited fund class like *Ortiz*.

203. Whether *Amchem*'s statement of the law was actually "new" is a debatable point. *See* discussion *supra* text accompanying notes 164–78 on the problem of "newness." For purposes of this analysis, I assume that *Amchem* indeed announced new law.

the different ways in which the Court might have answered the retroactivity question. Under the *Linkletter* rule,[204] *Dow*'s retroactivity determination would be controlled by a balancing test, since the case is already final. The *Johnson* rule[205] would require that *Amchem*'s new law be applied retroactively: the Court in *Ortiz* applied *Amchem*'s new law retroactively,[206] so that determination should be accorded stare decisis-like effect with respect to *Dow*'s retroactivity question. Because *Dow* presents a subsequent retroactivity question, the *Stovall* rule[207] would call for a balancing test. If the conventional interpretation of *Teague*[208] is accepted, then, because the case is already final, the *Teague* rule would require that *Amchem*'s new law be prospective (assuming that *Amchem*'s new law did not fit one of the *Teague* rule's two exceptions). If the alternative interpretation I have developed[209] is accepted, however, then the *Teague* rule would mandate that *Amchem*'s new law be retroactive.

The *Harper* rule,[210] which is the prevailing retroactivity rule for civil cases, would require that *Amchem*'s effect be withheld, since the case is already final. Thus, the appellate court's decision conflicts with the prevailing law and should, if one accepts the *Harper* rule, be reversed.

But, as I have argued, all of these various retroactivity rules, including the *Harper* rule, are invalid. Their bases—Article III, the

204. If the case is pending, new law is per se retroactive. Otherwise, a balancing test controls the retroactivity determination. *See supra* notes 20–24 and accompanying text.

205. A balancing test controls all retroactivity determinations. But subsequent (not law-changing) determinations are accorded stare decisis effect with respect to other subsequent retroactivity determinations. *See supra* notes 25–31 and accompanying text.

206. *Ortiz* can be understood as presenting a subsequent retroactivity question with respect to *Amchem*'s new law, since the *Ortiz* class was certified two years before *Amchem* was decided. The Court in *Ortiz* resolved the question in favor of retroactivity, finding it "obvious" that *Amchem*'s new law applied to a limited fund class, not just a damages class, and accordingly applying the new law to decertify the class. Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

207. New law is per se retroactive if the retroactivity question is law-changing. Otherwise, a balancing test controls the retroactivity determination. *See supra* notes 32–37 and accompanying text.

208. If the case is final, the new law is per se prospective, with two exceptions. *See supra* notes 39–46 and accompanying text.

209. *See supra* Part IV.C.

210. If the law-changing retroactivity determination favored retroactivity, then the new law is per se retroactive in all pending cases that raise a subsequent retroactivity question. If the case is final, the new law is per se prospective. *See supra* notes 54–61 and accompanying text.

principle of equal treatment, stare decisis, and res judicata—cannot sustain them. The pending/final dichotomy, which underlies the *Harper* rule, and the law-changing/subsequent dichotomy are irrelevant to the retroactivity problem. The retroactivity question should be answered, as it was in *Chicot* and *Chevron*, according to the cost-benefit rule, which calls for the same balancing test regardless of whether the case is pending or final, and regardless of whether the retroactivity question is law-changing or subsequent. Because the cost-benefit rule forecloses at the outset neither retroactivity nor prospectivity, the appellate court's decision in *Dow* is not a priori incorrect.

Of course, the cost-benefit rule does allow retroactivity questions to be rendered moot by other preclusion doctrines. Res judicata could render *Dow*'s retroactivity question moot by barring the claim altogether, and collateral estoppel could render it moot by barring relitigation of the issue of adequate representation. The appellate court, however, reached the retroactivity question because it first found that "neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlement funds [e.g., the *Dow* plaintiffs]."[211] This decision was highly controversial.[212] If collateral attack was not available, then *Dow*'s retroactivity question was moot. But if the appellate court was right to permit the collateral attack, then the retroactivity question was not moot. For the remainder of this analysis, I assume that the appellate court was correct to permit the attack.

At this point, a practical difference is apparent between the *Harper* rule and the cost-benefit rule. The *Harper* rule withholds

211. Stephenson v. Dow Chem. Co., 273 F.3d 249, 257–58 (2d Cir. 2001).

212. Courts and commentators are divided on whether collateral attack should be available to challenge a finding of adequate representation. How one conceptualizes the adequacy finding can affect the retroactivity analysis under a balancing test. For example, Marcel Kahan and Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 782–83 (1998), think that the adequacy finding merely ensures that courts adhere to certain procedures; that is, the adequate-representation requirement serves a deterrence purpose much like habeas corpus as conceptualized by the Court in *Teague*. *See supra* part IV.C. Under this conception, retroactivity would be relatively impotent, and so the balance will almost surely tip in favor of prospectivity. On the other hand, Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 414–15 (2000), sees the adequacy finding as having substantive importance for purposes of accuracy and participation. According to this conception, applying *Amchem*'s new law retroactively could have real benefits, and so the balancing test could tip in favor of retroactivity.

new law from cases that are already final. Since the Agent Orange litigation is final, it would require that *Amchem*'s new law be withheld in *Dow*. The cost-benefit rule permits res judicata and collateral estoppel to render moot the retroactivity question, thereby yielding the same result as the *Harper* rule would. But since, according to the Second Circuit, res judicata and collateral estoppel do not apply here, then even though the case is already final, the cost-benefit rule would call for a balancing test to answer *Dow*'s retroactivity question. Under the cost-benefit rule, the new law could justifiably be applied retroactively even though the case is already final.

However, while the finality interest is normally inapposite to the retroactivity balancing test, it would be quite relevant in *Dow*. *Amchem*'s new law is procedural; its purpose is to facilitate a just and stable resolution of the dispute. The defendant's reliance interest in the old law of adequate representation is thus really a finality interest. If *Amchem*'s new law is applied retroactively, it not only upsets the defendant's reliance interest, but necessarily also the defendant's finality interest. Because the finality interest in *Dow* dovetails with the reliance interest, the balancing test for *Dow* must consider the finality interest. But unlike under the *Harper* rule, the finality interest under the cost-benefit rule would not be determinative.

Therefore, the appellate court's decision to apply *Amchem*'s new law retroactively is supportable, but given the weight that the reliance interest, which in this case includes the finality interest, tends to carry, plus the presumption in favor of prospectivity,[213] it seems more likely that had the appellate court undertaken a purpose-reliance-effect test, the balance would have tipped in favor of withholding *Amchem*'s new law. But I leave for another day a more thorough examination of how the balancing test would play out on the facts of *Dow*.

CONCLUSION

The prevailing rule for adjudicative retroactivity, as articulated in *Griffith*, *Teague*, and *Harper*, is not supportable. Article III is a dubious and perhaps irrelevant foundation for a retroactivity rule. The principle of equal treatment is better served in practice by a simple cost-benefit rule. Stare decisis and res judicata do not actually address the problem of retroactivity. The retroactivity problem is a preclusion problem best solved by a reliance-based balancing test, perhaps with a presumption against applying the new law ret-

213. *See supra* text accompanying notes 186–88.

roactively. The retroactivity rule, therefore, should be a simple cost-benefit rule: the balancing test should apply—and apply in the same way—irrespective of whether the retroactivity question is law-changing or subsequent, and irrespective of whether the case in which the retroactivity question arises is pending or final.