# JUDICIAL REVIEW OF RETROACTIVE RULEMAKING: HAS *GEORGETOWN* NEGLECTED THE PLASTIC REMEDIES?

> It is when things go wrong that the retroactive statute often becomes indispensible as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about and pick up the pieces.[1]

Judicial distrust for retroactive legislation[2] antedates Anglo-American jurisprudence.[3] Nevertheless, while courts have not universally sanctioned retroactive laws, retroactivity has become an accepted component of our judicial system.[4] Originally a doctrine of equity,[5] retroactivity has developed haphazardly, evoking hostility from the judiciary.[6] Courts

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1. L. FULLER, THE MORALITY OF LAW 53 (rev. ed. 1969).

2. Justice Story pointedly described retroactive legislation: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." Society for the Propagation of the Gospel v. Wheeler, 22 Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.). *See also* CORWIN, THE TWILIGHT OF THE SUPREME COURT, A HISTORY OF OUR CONSTITUTIONAL THEORY 199 n.16. (1935) (describing retroactive legislation as "legislation which operates upon past acts from a time anterior to its passage"). The constitutional prohibition against ex post facto laws has always been limited to criminal law and has never been extended to civil or regulatory law. *See* Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 944 (1948) [hereinafter Davis, *Administrative Rules*]. Therefore, discussion of ex post facto laws is beyond the scope of this Note.

3. *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 776 (1936).

> The bias against retroactive laws is an ancient one . . . .
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> In so far as the principle found its way into the law of the United States, it took the same form as a rule for construction of statutes, but when united with the doctrine of vested rights it was identified with the natural law and found its way into the system of constitutional limitations on governmental power.

*Id.* at 776.

4. *See infra* notes 27-30 and accompanying text.

5. *See infra* notes 22-23, 51-79 and accompanying text.

6. One scholar has noted that the ambiguous phrases which courts have used to articulate their disapproval of retroactive laws often are not grounded on sound reasoning.

> [P]hrases [such] as "a violation of fundamental principles," "repugnant to the common principles of justice and civil liberty," "against natural right," "contrary to the principles of general jurisprudence," and other similar epithets applied to such legislation which is held invalid, are but blinds to cover up the mental indisposition or inability to see the problem through, expressions of vague feeling that the law is very bad without being able to say just why.

Smith, *Retroactive Laws and Vested Rights II*, 6 TEX. L. REV. 409, 409 (1928) [hereinafter Smith, *Retroactive Laws II*] (citing Smith, *Retroactive Laws and Vested Rights I*, 5 TEX. L. REV. 231 (1927) [hereinafter Smith, *Retroactive Laws I*]).

and scholars are particularly critical of retroactive agency rules.[7]

To address increasingly complex societal problems, Congress delegates substantial lawmaking authority to federal administrative agencies.[8] Thus, one of the most distinctive and troublesome aspects of administrative law is the great discretion agencies possess in filling statutory interstices.[9] To check this virtually unbridled agency discretion, Congress

7. Perhaps one reason why courts disfavor retroactive rulemaking is because it vests broad authority in what may be politically unaccountable entities. *See* Davis, *Administrative Rules, supra* note 2, at 944-45. Davis stated that "[r]etroactive rules involve all the difficulties of retroactive statutes, complicated by the subordinate position of the agency, by the theoretical distinction between legislative and interpretative rules, and by the various doctrines concerning the authoritative weight of interpretative rules." *Id.* at 944. Davis, however, recognized that "[s]ince legislative rules are merely the administrative counterpart of statutes, the argument is plausible that legislative rules may be retroactive whenever a statute may be retroactive, since the fairness or unfairness is the same and judicial ideas of fairness are decisive." *Id.* Perhaps, then, because of subtle differences between legislation and administrative rulemaking, retroactive rules, unlike retroactive statutes, are not widely accepted. *See generally* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:23, at 109 (2d ed. 1979) (noting that courts are hesitant to find implicit the power to promulgate retroactive rules). *See also* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) (exploring the due process implications of retroactive legislation). *But cf.* Lee, *Legislative and Interpretive Regulations*, 29 GEO. L. J. 1, 29 (1940) (arguing that an administrative agency should be able to amend prior regulations retroactively, subject only to statutory limitations and due process limitations, similar to those on retroactive legislation).

Distinguishing between retroactive legislative rules and retroactive interpretive rules may be difficult. Davis has recognized that "legislative rules are the product of a power to create new law, and interpretative rules are the product of interpretation of previously existing law. Legislative rules may change the law but interpretative rules merely clarify the law they interpret." Davis, *Administrative Rules, supra* note 2, at 928. This Note identifies the extent to which courts should treat retroactive legislative rules differently than retroactive interpretive rules. *See infra* notes 27-32 and accompanying text.

8. The exigent economic conditions during the Great Depression prompted Congress to pass rush legislation, creating several new administrative agencies to enforce its laws. For a comprehensive historical discussion of federal governmental responsibility, see Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

The Supreme Court had held such rush legislation an unconstitutional delegation of authority. *See* Carter v. Carter Coal, 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). Subsequent reevaluation, however, revealed that this "nondelegation doctrine" was an inappropriate measure to check congressional delegation. The Court later began to tolerate rush legislation as a matter of pragmatic policymaking. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944). In fact, the Court has not invoked the nondelegation doctrine in forty years. One plausible explanation for the demise of the doctrine is that authorized agencies simply enforce politicized policy choices that, theoretically at least, are outside the sphere of judicial action. *See generally*, R. CASS & C. DIVER, ADMINISTRATIVE LAW: CASES AND MATERIALS 3-22 (1987). Similarly, Professor Davis has argued that the deterioration of the nondelegation doctrine is attributable to the other viable "safeguards" courts may employ to control broad agency discretion. *See* Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

9. For instance, enabling statutes are often silent as to whether an agency should proceed by

provided "person[s] suffering a legal wrong because of agency action" a right of judicial review under the Administrative Procedure Act (APA).[10] Hence, although administrative agencies might be less accountable to a constituency than Congress or the President, judicial review provides affected parties with adequate means to test the legitimacy of agency action.[11]

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rulemaking or by case-by-case adjudication, and agencies have substantial discretion in choosing the form with which to implement and establish policy. *See generally* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). One commentator defines "rulemaking" as "the part of the administrative process that resembles a legislature's enactment of a statute," and "adjudication" as "the part of the administrative process that resembles a court's decision of a case." Davis, *Administrative Rules*, *supra* note 2, at 919. *See, e.g.*, Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (the FTC "acts in part quasi-legislatively and in part quasi-judicially").

10. Pub. L. No. 89-554, 80 Stat. 381 (1976) (codified as amended at 5 U.S.C §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1988)). *See* 5 U.S.C § 702 (1988) (right of review). Section 706 of the APA sets forth the standards by which a reviewing court may overturn agency action. It provides in pertinent part that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law . . . .

5 U.S.C. § 706 (1988) (emphasis added). The APA does not dictate that an agency must act by rule or order, or that it must proceed formally or informally. Rather, the APA requires that, once an agency chooses one means over another, it must follow the procedures provided by the APA. For example, if an agency proceeds by formal adjudication or rulemaking, the APA requires the agency to keep a closed record and to base its decision on data compiled in that record. 5 U.S.C §§ 556-557. A reviewing court can overturn an agency decision only if the agency's decision is not supported by "substantial evidence." *Id.* § 706(2)(E).

On the other hand, if the agency proceeds informally, the APA does not expressly require that the agency establish a formal record. The Supreme Court, however, has required agencies that proceed informally to compile a factual record. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). This requirement is commonly referred to as the "hard look" doctrine. *See* Greater Boston Tel. Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). *See also* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). Agencies frequently proceed informally by following the APA notice and comment procedure because it is the most efficient method of administering the law. *See* 5 U.S.C § 553. *See also* R. CASS & C. DIVER, *supra* note 8, at 331.

Congress has also enacted judicial review provisions specifically tailored to an agency's unique needs. *See, e.g.*, Clean Air Act, ch. 360, § 307(b), Pub. L. No. 95-190, § 14(a)(79), (80), 91 Stat. 1404 (1977) (codified at 42 U.S.C. § 7607(b) (1982)); Immigration and Nationality Act, ch. 477, § 106, Pub. L. No. 87-301, § 5(a), 75 Stat. 651 (1961) (codified as amended at 8 U.S.C.A § 1105(a) (West 1970 & Supp. 1989)).

11. For a thoughtful discussion and evaluation of recent proposals for judicial review of con-

No court has decided that retroactive rules[12] are valid under the APA,[13] which generally governs agency actions. The United States Supreme Court recently had the opportunity to rule on this issue in *Bowen v. Georgetown University Hospital.*[14] In *Georgetown*, the Court decided only that the enabling provision of the Medicare Act[15] does not

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gressional delegations to administrative agencies, see McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977) (examining how judicial review controls broad congressional delegations). Conceptually, the judiciary is powerless to substitute its judgment for that of the executive branch. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws."). Nevertheless, it is the function of the judiciary to interpret statutes and the law generally. Marbury v. Madison, 5 U.S. 137 (1 Cranch 1803). A judicial check is especially necessary on administrative personnel who are making an increasingly large number of critical societal choices and yet are often not accountable to a definable constituency. *See* Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1257 (3d Cir. 1978). *See also infra* note 81. *Cf.* INS v. Chada, 462 U.S. 919 (1983) (judicial check is necessary because the Constitution authorizes the legislative branch only to amend the enabling statute and not to veto agency action). For a general discussion of the legitimacy of administrative decision making, see K.C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); J.O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); Steward, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). For two opposing approaches to judicial review of administrative rules, compare 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch.5 (1st ed. 1958) with B. SCHWARTZ, ADMINISTRATIVE LAW §§ 4.3-.4 (2d ed. 1982).

12. For purposes of clarity, this Note considers "rules" or "rulemaking" as informal, quasi-legislative agency promulgations made pursuant to the APA notice and comment procedures and "orders" or "adjudication" as quasi-judicial administrative policies issued in case-by-case adjudication. This Note argues that there is no compelling distinction between retroactive rules and retroactive adjudication to warrant separate analytical frameworks. *See infra* notes 90-96 and accompanying text.

One commentator has argued persuasively that the principles for analyzing the soundness of administrative orders operate equally well when analyzing the validity of rules. *See* Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L. J. 1, 23 (1985). Levin argues that the distinction between rulemaking and adjudication is "unfortunate" because the procedural devices an agency uses to implement its program should not affect the dividing line between judicial and administrative authority. *Id. Cf.* Smith, *Retroactive Laws II*, *supra* note 6, at 414-15 ("The distinction between retroactive laws made by the courts and those made by the legislatures, is a distinction of practicability and not a distinction of justice. That the one should provoke judicial epithets while the other is taken for granted, would indicate that the consideration of the subject has been sentimental rather than scientific."). There is, of course, the strong common law tradition that judicial pronouncements address only past conduct, whereas legislation establishes law for the future. *See Smead*, *supra* note 3, at 789 n.42.

Rather than focus on the means an agency employs to further its statutory mandate, this Note analyzes the equitable effect of administrative retroactivity. Thus, a plausible assessment of the retroactivity doctrine should begin with the threshold issue of whether equity calls for retroactivity.

13. Courts which have upheld retroactive rules have not done so under the APA's judicial review provision, § 706. 5 U.S.C. § 706 (1988). *See infra* notes 51-79, 90-96 and accompanying text.

14. 109 S. Ct. 468 (1988).

15. Pub. L. No. 89-97, 79 Stat. 291 (1965) (codified as amended at 42 U.S.C. § 1395 (1982 &

expressly authorize retroactive rulemaking by the Secretary of Health and Human Services (HHS),[16] choosing not to reach the broader issue of the validity of retroactive rules under the APA.[17] In a concurring opinion, however, Justice Scalia addressed at length the legitimacy of retroactive rulemaking, concluding that retroactive rulemaking is not "a permissible form of agency action under the particular structure established by the APA."[18]

This Note rejects Justice Scalia's position[19] and maintains that, notwithstanding the disfavor for retroactivity, retroactive rules are a valid form of agency rulemaking under the APA. Part I discusses the context in which retroactive rules may be necessary and introduces the *Georgetown* opinion. Part II then examines Supreme Court decisions prior to the APA, focusing on the equities and due process review of retroactivity, and discusses lower courts' review of retroactive rules. Finally, Part III analyzes and criticizes *Georgetown*, with particular emphasis on Justice Scalia's concurrence.

## I. BACKGROUND OF RETROACTIVE RULEMAKING

Courts infer that regulated persons and industries are aware[20] that

Supp. V 1987)). *See* 42 U.S.C. § 1395x(v)(1)(A)(ii) (1982) (authorizing the Secretary of the Department of Health and Human Services to "provide for the making of suitable retroactive corrective adjustments . . .").

16. 109 S. Ct. at 471, 474-75.

17. *Id.* at 475. The majority resolved the issue on statutory grounds, stating that it would not recognize a statutory delegation of authority to include retroactive rulemaking without express Congressional authorization. *Id.* at 471. This Note proposes that even if Congress fails expressly to authorize retroactive rulemaking, it is within an agency's valid discretion to promulgate retroactive rules, as long as the agency does not abuse its discretion under § 706 of the APA. *See infra* notes 80-96 and accompanying text.

18. *Id.* at 480 (Scalia, J., concurring).

19. *See infra* notes 42-47, 145-80 and accompanying text.

20. *See* Federal Housing Admin. v. Darlington, Inc., 358 U.S. 84 (1958). Informal agency action under the APA passes procedural due process muster because its procedural framework provides interested parties with an opportunity to be heard in the notice and comment process of informal rulemaking and a rudimentary opportunity to be heard in case-by-case adjudication.

Concerning informal rulemaking, § 553(b) of the APA requires agencies to publish the official text of proposed regulations in the *Federal Register*. 5 U.S.C. § 553(b) (1988). This requirement theoretically places interested parties on notice that the proposed regulations may affect their interests; more generally, the notice and comment process allows public participation in policymaking. *Id.* § 553. Upon publication of the text in the *Federal Register*, interested parties have an opportunity to comment on the proposed rulemaking by submitting written data. *Id.* § 553(c). Following the notice and comment period, the agency may publish a final regulation in the *Code of Federal Regulations* (CFR), which should incorporate a concise statement of basis and purpose. *Id.*

Congress may make occasional retroactive changes to effectuate its legislative aims.[21] Similarly, the Supreme Court has recognized that courts should work with administrative agencies "through coordinated action" to accomplish legitimate legislative ends.[22] Thus, with respect to congressional goals, the Court has recognized that administrative agencies possess equitable powers similar to those of courts of equity and therefore must be free to make decisions without the burden of relying solely on precedent.[23]

### *A. The Necessity of Retroactive Rulemaking*

Courts generally favor prospective application of rules when an agency responds to actions of parties who have relied in good faith on prior agency pronouncements.[24] Such affected parties find retroactive rulemaking unacceptable because it encroaches on past transactions and impedes the ability to plan future conduct with reasonable legal certainty.[25] Retroactive rules, however, may be necessary in some cases. For instance, agencies occasionally must adjust public programs retroactively in order to allocate limited funds fairly.[26]

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21. *See, e.g.*, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) ("[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors . . . and of the corresponding requirement that the administrative process possess *sufficient flexibility* to adjust itself to these factors") (Frankfurter, J.) (emphasis added); Silva v. Bell, 605 F.2d 978, 989 (7th Cir. 1979) (upholding Immigration and Naturalization Service policy interpretation that retroactively reissued 20,000 new visas to erroneously deprived immigrants "in the interests of justice").

22. United States v. Morgan, 307 U.S. 183, 191 (1939). Justice Stone, writing for the five-member majority, explained:

> In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. *Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.* Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.

*Id.* (emphasis added). *See also infra* notes 60-67 and accompanying text.

23. *Morgan*, 307 U.S. at 191.

24. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).

25. Hochman, *supra* note 7, at 692. *Cf.* 1 F. VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 493, at 491 (1942) (where original regulation inconsistent with statute or "unreasonable," an "amended regulation becomes the primary and controlling rule in respect of the situation presented, even as to past transactions").

26. It is important that administrative agencies possess the proper tools to handle the many

Conceptually, there are two fundamental types of retroactive rulemaking. An agency creates a curative rule when, without changing the substantive content of the rule, it retroactively remedies a procedural defect in the existing rule.[27] Curative rules are perhaps less offensive than noncurative rules because they merely impose the same liability on the affected party that would have attached had the agency promulgated the original rule correctly;[28] the affected parties should be on notice of that

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specialized problems that arise unexpectedly. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). Absolute proscription of retroactive rules could stifle the efficient administration of government. Assuming an administrative agency has acted within the scope of its delegated authority, judicial inquiry normally is limited to whether there has been an abuse of discretion. *See* 5 U.S.C § 706(2) (1988) (scope of review under the APA). *See also* McGowan, *supra* note 11, at 1123-26 (discussing judicial review of delegated rulemaking); Steward, *supra* note 11, at 1674-76 (same).

27. Note, *Retroactive Operation of Administrative Regulations*, 60 HARV. L. REV. 627, 629-30 (1947). It may be instructive to compare retroactive curative rules with retroactive curative statutes, about which one commentator has noted: "The Court's favorable treatment of curative statutes is probably explained by the strong public interest in the smooth functioning of government. It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called '*small repairs.*'" Hochman, *supra* note 7, at 705 (quoting Danforth v. Groton Water Co., 178 Mass. 472, 477, 59 N.E. 1033, 1034 (1901) (Holmes, C.J.)) (emphasis added).

28. Then-Chief Judge Cardozo aptly explained this point in Crommelly v. McLean, 123 N.Y. 474 (1890):

> If the thing omitted and which constitutes the defect be of such a nature that the legislature might by prior statute have dispensed with, or if something has been done, or done in a particular way which the legislature might have made immaterial, *the omission or irregular act may be cured by a subsequent statute.*

*Id.* at 490 (emphasis added). *See generally* Hochman, *supra* note 7, at 703-06 (discussing curative statutes). In supporting the validity of curative statutes, one commentator has noted:

> Moreover, the individual who claims that a vested right has arisen from the defect is seeking a *windfall* since, had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect.

Hochman, *supra* note 7, at 705-06 (emphasis added).

Cardozo's rationale arguably applies to curative rulemaking as well. There are two types of curative rules: "repromulgated" rules, or rules which courts have previously invalidated and are recreated and applied retroactively; and "corrective" rules, or rules which retroactively adjust a regulatory scheme, of which the agency intends to eliminate perceived defects. *Cf. id.* at 704-05 (recognizing two types of curative statutes).

Judicial review of corrective rules should focus on the affected parties' detrimental reliance on the previous rule and the degree to which the new rule abruptly departs from well-settled agency practice. *Cf. id.* at 696 (concluding that although courts look at a party's reliance, no one factor is determinative of validity of retroactive statutes). Perhaps, then, courts should review repromulgated rules, cases of second impression, with greater scrutiny. The rationale underlying such a heightened scrutiny analysis is that agencies often repromulgate rules in order to remedy an administrative procedural error when the agency first promulgated the rule.

The APA requires agencies to promulgate final substantive rules within 30 days prior to each

fact. Hence, with respect to curative rulemaking, judicial invalidation of a merely procedural defect should not strip the agency of its congressionally mandated authority to re-examine the faultily promulgated rule.[29]

A second type of retroactive rule involves a substantive change of an existing rule, which may or may not have a prior defect.[30] Such a retroactive rule may be necessary when a promulgated rule inadvertently or unjustly enriches one regulated class at the expense of another.[31] Nevertheless, the validity of such a retroactive rule may depend upon a weighing of congressional purpose and administrative necessity against hardship to persons who have benefited under the prior rule.[32] In short, both types of retroactive rules are important components in the agency's power to carry out Congress' delegation fairly and efficiently.

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rule's effective date. If an agency fails to do so, it may then promulgate a second rule retroactively. 5 U.S.C. § 553(d) (1988). Courts have generally held, however, that there should be greater judicial scrutiny when the agency has repromulgated the challenged rule with retroactive effect. *See infra* notes 97-118 and accompanying text. The burden of justifying the retroactive application should be placed on the agency. *See infra* notes 105-18 and accompanying text. *See also* Note, *supra* note 27, at 628-30 (providing illustrations of curative rulemaking).

29. A retroactive curative rule was at issue in Edwards v. McMahon, 834 F.2d 796 (9th Cir. 1987). In *Edwards*, a regulated party, rather than the federal agency, sought retroactive adjustments of welfare payments. *Id.* at 797-98. The district court compelled the Secretary of HHS to promulgate a retroactive rule to correct underpayments to former welfare-recipient petitioners. *Id.* at 798-99. On appeal, the Ninth Circuit agreed that HHS had to make corrective payments to the former recipients. *Id.* at 801. The court held that Congress clearly intended that HHS correct all underpayments to current *and* former recipients under the Aid to Families with Dependent Children Program (AFDC). *Id.* at 799-801. *See* 42 U.S.C. §§ 601-615 (1985). Although *Edwards* is unusual in that the governed, not the government, sought to invoke retroactive rulemaking, it aptly illustrates how retroactivity can prevent an unfair distribution of federal resources contrary to legislative intent.

30. *Cf.* Note, *supra* note 27, at 635 (concluding that "the ends of efficient administration may be served by permitting regulations to operate retroactively, without a consequent imposition of hardship," even if the agency substantively changes a prior defective regulation).

31. Suppose, for example, that the Department of Energy (DOE) promulgates a rule which sets a new price index to control artificially the price of certain scarce petroleum products. Assume further that the rule's purpose is to effectuate an economically uniform price of petroleum products in different regions of the country. If, after one year in effect, the rule causes Florida's petroleum costs to be twice those in Alaska, and if the agency predicts that the gap between the regions will continue to widen, the DOE may have to promulgate another price index rule to fix (retroactively) the price indexing. Such a retroactive rule assures that during a national economic crisis, one state's economy does not flourish at the expense of another. This example demonstrates that, despite its apparent unpopularity, retroactive rulemaking may be necessary to effectuate congressional response to defective legislation.

32. *See* Note, *supra* note 27, at 635. *Cf.* Hochman, *supra* note 7, at 711 (reasonableness of retrospective statute is function of statutory purpose and extent to which statute modifies existing right).

### *B.* Bowen v. Georgetown University Hospital

While the Supreme Court has not held retroactive rules per se invalid, it has never addressed specifically whether the APA authorizes an agency to promulgate reasonable retroactive rules.[33] In *Georgetown University Hospital v. Bowen*,[34] the District of Columbia Circuit Court of Appeals held that the APA does not authorize retroactive rulemaking. The Supreme Court granted certiorari,[35] creating the prospect that it would clarify the scope of an agency's authority to promulgate rules retroactively.

Justice Kennedy, writing for the unanimous Court in *Bowen v. Georgetown University Hospital*,[36] declined to reach the issue of whether the APA authorizes retroactive rulemaking.[37] In disposing of the case, however, he adopted a rule of statutory construction applying to all questions of retroactive rulemaking authority and requiring the agency to receive congressional *express* authority to promulgate retroactive rules.[38] The practical effect of this holding is the same as if the Court had expressly answered that the APA does not authorize retroactive rulemaking.[39] Nevertheless, the curious way in which the Court treated the issue,[40] as well as loopholes in the decision that the Court might later

33. *See generally* 2 K. DAVIS, *supra* note 7 at 109 ("[R]etroactive rules are valid if they are reasonable but are invalid if their retroactivity is unreasonable in the circumstances.").

34. 821 F.2d 750, 757 (D.C. Cir. 1987).

35. 485 U.S. 903 (1988).

36. 109 S. Ct. 468 (1988).

37. 109 S. Ct. at 475 (Scalia, J., concurring) ("I find it incomplete to discuss general principles of administrative law without reference to . . . The Administrative Procedure Act"). The D.C. Circuit had ruled, as an alternative holding, that the APA generally proscribes retroactive rulemaking. 821 F.2d at 757.

38. 109 S. Ct. at 471 ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.") While it did not proscribe retroactive rules per se, the Court's holding unduly narrows agency discretion. This Note argues that the *Georgetown* Court has created the impractical requirement that Congress amend enabling legislation for each agency that deems a retroactive rule necessary. *See infra* notes 142-44 and accompanying text.

39. As the APA merely fills in the gaps of any agency's organic statute, GELLHORN & BOYER, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 245 (1981), it gives the agency authority whenever the organic statute is silent on the issue. To cancel the APA's grant of authority, as well as to add to that grant, therefore, Congress *expressly* must address the issue in the individual agency's organic statute. Hence, by adopting the rule of statutory construction that Congress must expressly authorize retroactive rulemaking for such power to exist, the *Georgetown* Court implicitly has held that the APA does not offer any retroactive rulemaking authority.

40. One curiosity results from the fact that the new rule of statutory construction announced in *Georgetown* never was briefed officially before the Court. *See infra* note 139.

exploit,[41] leave open the possibility that it may decide differently a later case that again presents the APA retroactivity question.

In a concurring opinion,[42] Justice Scalia specifically agreed with the D.C. Circuit that the APA does not authorize retroactive rulemaking.[43] Scalia based much of his opinion on the APA's definition of "rule,"[44] which he read as requiring that a rule only have future effect.[45] Scalia also refuted the government's reliance on retroactivity case law[46] and its analogy to retroactive legislation, which has withstood constitutional attack.[47]

## II. AN HISTORICAL LOOK AT JUDICIAL REVIEW OF RETROACTIVE RULES

Historically, courts have reviewed retroactive rulemaking by agencies only for its appropriateness in the specific situation, apparently assuming that Congress gave agencies the power generally to make retroactive rules when needed.[48] In so reviewing agency action, courts appear to be divided in the standards they impose: some courts use a very deferential approach in reviewing the action, treating the agency's choice as if it were a question of discretion;[49] others scrutinize more closely, as if reviewing a question of law.[50]

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41. Despite the broad statutory construction language drafted by Justice Kennedy early in the opinion, the decision contains less sweeping pronouncements elsewhere. *See infra* note 140.

42. 109 S. Ct. at 475 (Scalia, J., concurring).

43. *Id.*

44. *See* 5 U.S.C. § 551(4) (1988).

45. 109 S. Ct. at 475-78 (Scalia, J., concurring). *See infra* notes 148-51 and accompanying text.

46. 109 S. Ct. at 478-79 (Scalia, J., concurring). *See infra* notes 164-72 and accompanying text.

47. 109 S. Ct. at 478-80 (Scalia, J., concurring). *See infra* notes 177-80 and accompanying text.

48. *See, e.g.* Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) (Court allows agency to repromulgate invalidated rule with retroactive effect, considering only the fairness of such retroactivity in the instant situation); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977) (court subjects a particular retroactive regulation to due process requirements only, ignoring any question whether agency has statutory authority to promulgate such a rule at all).

49. *See infra* notes 80-96 and accompanying text. In administrative law, a reviewing court is somewhat deferential to the agency when the court finds the appealed question one of discretion—that is, one in which Congress has left the decision to the agency. *See* Levin, *supra* note 12, at 24-25. Such review bears a close resemblance to the more deferential review accorded retroactive rulemaking by some courts.

50. *See infra* notes 97-118 and accompanying text. A reviewing court will implement near-plenary review of agency actions it determines to present questions of law—that is, questions to which the court feels Congress has spoken specifically. This exacting review closely approximates the less deferential review accorded retroactive rulemaking by some courts.

### *A. Retroactive Rulemaking—Deferential Review*

Two types of deferential review evolved for retroactive rulemaking: review based on equitable principles and relaxed due process review.

#### *1. The Equitable Underpinnings of Retroactive Rules*

Prior to the APA's enactment, the Supreme Court developed a body of retroactivity law grounded upon principles of equity, and thereby allowed an agency to promulgate retroactive rules when a court had struck a prior agency rule for statutory deficiency. In articulating the equitable nature of review, Justice Cardozo once described the equitable nature of retroactive rules as "plastic remedies,"[51] which furnish agencies with discretionary power to manage unique circumstances as they arise.[52]

In *Atlantic Coast Line Railroad v. Florida*,[53] the Supreme Court permitted the Interstate Commerce Commission (ICC) to amend an "order,"[54] which controlled freight rates, to cure the regulation's procedural defects, and to apply the amendment retroactively.[55] After the first regulation was struck for procedural defects, the agency repromulgated the same rule—with procedures corrected.[56] Treating the action as one in

51. Atlantic Coast Line R.R. v. Florida, 295 U.S. 301, 316 (1935) (Cardozo, J.).

52. Allowing agencies this equitable discretion is arguably requisite to the fair administration of congressionally mandated regulatory duties. Hence, in reviewing retroactive rules, courts should base their decisions on equitable considerations rather than the constraints of common-law precedent.

53. 295 U.S. 301 (1935).

54. Note that the *Atlantic Coast* Court used the term "order" to describe what was actually informal "rulemaking." *Id.* at 305. The "order" that the Court referred to was a directive from the Railroad Commission of Florida regarding lumber freight charges. *Id.* It required that "voluntary rates then in force" would "continue[] in effect as if officially prescribed." *Id.* The interchangeability of these terms may indicate the limited utility any distinction would have on retroactivity analysis. *See* Levin, *supra* note 12, at 9-14.

55. 295 U.S. at 306-08. Railroad carriers had collected freight charges in accordance with an ICC order. The Court declared the order void, however, because the commission's report did not contain the necessary factual findings. *Id.* at 306. *See* Florida v. United States, 282 U.S. 194 (1931) (reversing district court's approval of the rates). After supplementing the report with new factual evidence, the commission issued the same order. The Court confirmed the findings and approved the second order in Florida v. United States, 292 U.S. 1 (1934). 295 U.S. at 307. In the second order, the Commission explained that it issued the order because local rates resulted in revenue losses and were thereby unjustly discriminatory against interstate commerce. *Id.* Shippers, the state of Florida, and Florida's Railroad Commission each sought restitution for part of the money paid while the first order was in force. *Id.* at 307-08.

56. *Id.* at 305.

equity,[57] the Court decided that the new rule could apply retroactively, and placed the burden on the regulated party to show the unreasonableness of the Commission's retroactive rule.[58] Based upon the facts presented by the ICC, the Court concluded that it would not offend equity or good conscience to uphold the regulation.[59]

Similar to its decision in *Atlantic Coast Line*, the Supreme Court allowed the Secretary of Agriculture to issue a retroactive "order" in *United States v. Morgan*.[60] The district court had set aside an earlier rule, which decreased future stockyard rates, for procedural defects.[61] While the Secretary proceeded to fix the rates according to the proper procedures under the Packer and Stockyards Act,[62] various marketing agencies sought distribution of a court-established fund containing overpayments under the prior excessive rates.[63] The Court held that the Secretary could determine proper rates antedating the period after the second order only if barring retroactive action would cause "unjust and unreasonable" rates to control, contrary to the intent of the underlying statute.[64]

Writing for the *Morgan* Court, Justice Stone reasoned that a district court, when reviewing an agency's action that conforms with the provisions of its enabling act, "sits as a court of equity."[65] The Court explained that the public interest may affect the extent to which a court may fashion its remedies.[66] Thus, *Morgan* indicates that the judiciary

57. *Id.* at 311-13. The Court considered the action one for restitution, because the agency already had collected the rates required by the old regulation.

58. *Id.* at 318.

59. *Id.* at 317-18. Justice Cardozo noted that "[w]hat was injustice [in the unregulated rates] at the date of the second order of the Commission is shown beyond doubt to have been injustice also at the first. A situation so unique is a summons to a court of equity to mould its *plastic remedies* in adaptation to the instant need." *Id.* at 316 (emphasis added).

60. 307 U.S. 183 (1939). Again, the Court used the term "order" to refer to what was actually a "rule" of general application—the fixing of stockyard rates.

61. 307 U.S. at 185.

62. The Packer and Stockyards Act of 1921, ch. 64, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181-229 (1988)). Section 206 of the act provides in pertinent part that "[the Secretary shall] secure to patrons prescribed stockyard services at just and reasonable rates." *See* 7 U.S.C § 304 (1988).

63. When the district court set aside the first order, the court reinstated the original fees and created a fund comprised of the excessive rates. 307 U.S. at 192-93.

64. *Id.* at 192, 196.

65. *Id.* at 191. Justice Stone stated that the district court, when it stays the execution of a rate order and directs payment of excessive rates into the court, "assumes the duty of making disposition of the fund in conformity to equitable principles." *Id.*

66. *Id.* at 194.

and the agency must coordinate their action in order to attain the congressional end prescribed in the agency's enabling statute.[67]

In *Addison v. Holly Hill Fruit Products, Inc.*,[68] the Court extended the principles it had enunciated in *Morgan*.[69] Under the Fair Labor Standards Act,[70] the Administrator of the Wage and Hour Division promulgated a rule defining which "area[s] of production" could be exempt from regulation.[71] The Fifth Circuit Court of Appeals invalidated the Administrator's definition for exceeding its statutory authority.[72] However, the lower court upheld the rest of the exemption, thereby finding the employers in *Addison* exempt from the requirements.[73]

The Supreme Court in *Addison* agreed that the Administrator's first rule misconceived the bounds of his authority, but it refused to apply the exemption without the definition intended to limit that exemption.[74] Instead, the Court held that the Administrator could repromulgate the rule defining any exempted "area of production."[75] In the interest of fairness, the Court remanded the matter to the district court with instructions to stay the action until the agency made a valid determination consistent with the congressional directive.[76] The Court stated that retroactivity should generally be avoided, unless doing so in effect would lead to retro-

67. *Id.* at 191.

68. 322 U.S. 607 (1944).

69. *Id.* at 620.

70. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982 & Supp. V 1987)).

71. The act exempted from its minimum wage and maximum hour requirements employees in specified occupations "within the area of production" defined by the Administrator. 322 U.S. at 608-09. Certain employees who were erroneously excluded from the act's beneficial coverage brought suit challenging the rule. *Id.*

When first promulgated, the Administrator's rule utilized economic considerations in defining exemptions under the Fair Labor Standards Act provision. *Id.* at 609, 614. The Fifth Circuit found that the act permits the Administrator to define such areas geographically only. *Id.* at 618-19. Thus, the rule exceeded the Administrator's authority.

72. *See* 322 U.S. at 608-09.

73. *See id.* at 618-19.

74. *Id.* at 618-20. The Court noted that the Administrator would not have passed the regulation had he known it might operate as altered by the Fifth Circuit. *Id.*

75. *Id.* at 622-23. Although the Court upheld the rule's retroactivity, it expressed reservation in endorsing retroactivity as a general rule. *Id.* at 622. The Court, however, did recognize that retroactive rulemaking is legitimate in exceptional circumstances, "consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action . . . ." *Id.*

76. *Id.* at 620. The Court refused to define the term "area of production." *Id.* at 619. In permitting the agency to promulgate the second rule retroactively, the *Addison* Court presumed that the agency would retrospectively act as conscientiously within the powers charged by Congress as it would have done initially, had it acted within its statutory power. *Id.* at 620.

activity that conflicts with statutory and regulatory design.[77] The *Addison* Court suggested that, where circumstances dictate, an agency may "remold" a regulation consistent with a congressional directive.[78] Thus, *Addison* exemplifies the Court's willingness to permit an agency to modify retroactively a rule's substance in the interest of fairness and statutory compliance.[79] It is unclear, however, whether the principles of *Addison* extend to the promulgation of retroactive rules where a court has not found an original regulation unlawful.

### 2. *Relaxed Substantive Due Process Review of Retroactive Rules*

Pre-APA retroactivity decisions demonstrate that equitable principles may justify retroactive application of rules. The Supreme Court yielded to agency determinations, refusing to insist that an unlawful regulation was an impotent regulation.[80] When parties have challenged retroactive rules on due process grounds, many courts also have deferred to the agency's decision to act retrospectively.

The principles that courts have developed for assessing the due process validity of retroactive statutes do not necessarily apply to retroactive rules.[81] Intuitively, however, due process analysis of retroactive legisla-

77. *Id.*

78. *Id.* at 620 (citing *Morgan*, 307 U.S. 183 (1939)).

79. One recent lower court case which arose in the midst of the oil crisis of the 1970s relied on the Supreme Court's pre-APA retroactivity jurisprudence. In Mobil Oil Corp. v. DOE, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982), the Temporary Emergency Court of Appeals held that a retroactive rule is valid if failure to apply the rule retroactively would thwart the statutory purpose. *Id.* at 1090.

In *Mobil*, the DOE sought to promulgate two rules previously invalidated on procedural grounds. The court found it inappropriate to apply the rules retroactively because the DOE failed to show that the retroactive rule was "necessary to fulfill a statutory design." *Id.* at 1090. The court, however, did state that "adminstrative agencies have the authority, under limited circumstances, to issue retroactive rules," relying on *Addison*, *Atlantic Coast Line*, and *Morgan*. *Id.* at 1088-89. *See supra* notes 53-78 and accompanying text.

In dicta, the *Mobil* court commented that the scope of an agency's authority is more limited when promulgating a previously invalidated rule. *Id.* at 1088. However, the court also cited opinions involving retroactive interpretive rules, which courts traditionally have given less deference. *Id.* at 1088 (citing Standard Oil v. DOE, 596 F.2d 1029, 1063 (Temp. Emer. Ct. App. 1978); General Tel. v. United States, 449 F.2d 846, 863 (5th Cir. 1971)).

80. *See, e.g.*, United States v. Morgan, 307 U.S. 183, 196 (1939) ("[T]he administrative agency could prescribe rates only for the future, and the higher rates exacted were without the sanction of a valid order. But . . . the first administrative order was not a nullity.").

81. Retroactive rules may warrant greater scrutiny because, while Congressmen are directly responsible to their constituents, administrators are insulated from the electoral process. For a theory proposing circumstances in which retroactive legislation is justified, see Munzer, *A Theory of*

tion may serve as an analogy for retroactive rules because Congress may confer all of its power to an agency.[82] Thus, sampling due process review of retroactive legislation may cast some light upon what level of review courts should employ when analyzing retroactive rules.

The Supreme Court has never held that retroactive legislation involves a per se due process violation.[83] To the contrary, the Court has held that legislation readjusting rights and burdens is not unconstitutional solely because it upsets otherwise settled expectations[84] or because it creates a new duty or liability based on past acts.[85] The Court has consistently maintained that retroactive socioeconomic legislation is constitutional if it is both furthered by rational means and reasonable.[86] When courts review curative retroactive legislation,[87] a primary consideration is the strong public interest in facilitating the smooth functioning of government.[88] In any event, retroactivity is arguably the proper remedy in the

*Retroactive Legislation*, 61 TEX. L. REV. 425 (1982). *See also* 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 41.01-41.22 (4th ed. 1986).

82. At one time the Supreme Court articulated a doctrine limiting Congress' ability to delegate its authority to an agency. The Court later refuted this "nondelegation" doctrine. *See supra* note 8.

83. *See* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829) ("[r]etrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not condemned or forbidden by any part of [the Constitution]").

The Supreme Court has consistently found retroactive legislation constitutionally permissible. Because the substantive effects of retroactive legislation and quasi-legislative rules are similar, retroactive rules therefore might be constitutional. For a decision that agrees with this comparison, see Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977), discussed *infra* notes 90-96 and accompanying text.

84. *See, e.g.*, Fleming v. Rhodes, 331 U.S. 100 (1947); Carpenter v. Wabash R.R., 309 U.S. 23 (1940).

85. *See, e.g.*, Lichter v. United States, 334 U.S. 742 (1948) (renegotiation and recapture of excess profits on government contracts); Welch v. Henry, 305 U.S. 134 (1938); Funkhouser v. Preston Co., 290 U.S. 163 (1933); Northeastern Pharmaceutical & Chem. Co. v. United States, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (upholding the constitutionality of a CERCLA provision that retroactively affects the rights of past property owners).

86. *See, e.g.*, Pension Benefit Guar. Corp. v. Gray & Co., 467 U.S. 717, 729 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (notwithstanding retroactivity, there is a presumption of constitutionality and plaintiff must show that government acted arbitrarily or irrationally). *See also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); League v. Texas, 184 U.S. 156 (1902).

87. For a discussion of curative retroactive legislation, see *supra* note 27.

88. *See* Hochman, *supra* note 7, at 705. One should note that the government's interest has less weight when a retroactive law frees the government itself, rather than private parties, from obligation. *See, e.g.*, Perry v. United States, 294 U.S. 330, 350-51 (1935) (dealing with government's own obligations); Lynch v. United States, 292 U.S. 571, 576-77 (1934) (Congress precluded from canceling war risk life insurance policies). Recall, however, that retroactivity is suspect because it overturns vested property rights and impedes the ability of those affected to plan conduct with reasonable

interest of fairness.[89]

Similar concerns should apply in the context of retroactive rulemaking. For example, in *Adams Nursing Home of Williamstown, Inc. v. Mathews*,[90] the First Circuit Court of Appeals upheld the constitutionality of a retroactive rule promulgated by the Secretary of Health, Education and Welfare because the rule affected only "modest" interests and expectations.[91] In *Adams*, the Secretary promulgated a retroactive rule to recapture excessive payments it made to medicare providers.[92] The *Adams* court focused its inquiry solely on the due process implications of retroactivity.[93] The court weighed the affected party's reasonable expectations[94] against the Secretary's intention to remedy a perceived abuse of the medicare program, and concluded that the retroactive rule did not violate the due process clause of the fifth amendment.[95] To reach its

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legal certainty. Commentators traditionally have regarded retroactive laws with suspicion. For instance, one scholar has noted:

> That these [retroactive] laws were regarded as so subversive of justice as to call for express constitutional prohibitions, not unnaturally suggests that any sort of legislative retroaction should be looked upon with suspicion. Mr. Cooley observed that such laws were "exceedingly liable to abuse," and Mr. Justice Story, that they are "generally unjust." Chancellor Kent said that "a retroactive statute would partake in its character of the mischiefs of an ex post facto law, as to all cases of crimes and penalties, and in every other case relating to contract or property it would be against every sound principle."

*Smith, Retroactive Laws II, supra* note 6, at 413 (citations omitted). *See supra* notes 2, 3 and accompanying text. *See also* G. GUNTHER, CONSTITUTIONAL LAW 500 (11th ed. 1985); Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216 (1960).

89. *See supra* notes 51-79 and accompanying text.

90. 548 F.2d 1077 (1st Cir. 1977).

91. *Id.* at 1081-82.

92. *Id.* at 1078. The prior rulemaking scheme, designed to calculate "reasonable costs" in providing medicare services, proved subject to abuse. The Medicare Act authorized the Secretary to determine the "reasonable costs" of medicare providers to assure that private patients do not bear any of the expenses of medicare services. 42 U.S.C. § 1395x(v)(1)(A)(i) (1976). The Secretary originally promulgated a rule allowing providers to depreciate *any* capital assets used to serve medicare patients and treat such assets as a cost of providing medical care. 548 F.2d at 1078. This system left the providers the discretion to choose either straight-line or accelerated depreciation. *Id.* The Secretary later changed the reimbursement scheme because some providers chose the accelerated method to produce larger reimbursements in earlier years and then subsequently left the program. *Id.* The Secretary restricted future use of the accelerated method and sought to recapture retroactively the difference between the straight-line and accelerated methods. *Id. See* 20 C.F.R. § 405.415(d)(3) (1975).

93. 548 F.2d at 1080-82.

94. The court gave little credence to the actual expectations of Adams, a nursing home, because it determined that Adams' conduct, as well as that of other parties in its class, would not have differed if the agency had applied the retroactive rule at issue from the start. *Id.* at 1078, 1081.

95. *Id.* at 1082. In its analysis, the court did not rely upon any of the equitable principles

result, the court followed the directive of Supreme Court jurisprudence concerning the constitutionality of retroactive legislation.[96] Whether the *Adams* court recognized the role of the agency in balancing the equities or whether it merely applied relaxed due process review is of no consequence. In either case, the *Adams* court recognized the need to defer to an agency's discretion.

### *B. Retroactive Rulemaking—Intrusive Review*

Many courts refuse to recognize that the decision to promulgate a retroactive rule is a matter of agency discretion; these courts instead employ more intrusive tests. In applying these tests, the courts re-examine the underlying factual circumstances that prompted the agency initially to choose retroactivity. The reviewing court thus substitutes its discretionary judgment for that of the agency, rather than leave the balancing process almost entirely to the agency like other retroactivity decisions.[97]

The Sixth Circuit developed a three-prong test for reviewing a retroactive rule in *Mason General Hospital v. Department of HHS*.[98] The court applied this test to invalidate a retroactive rule[99] that the Secretary of Health and Human Services promulgated to recover what the agency

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developed by *Addison* or its predecessors. *See id.* at 1080-82; *supra* notes 51-79 and accompanying text. Rather, the court simply deferred to the findings of the Secretary.

96. *Id.* at 1082 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), for the proposition that the government is entitled to the benefit of any constitutional doubt).

97. *See supra* notes 51-79, 90-96 and accompanying text.

98. 809 F.2d 1220 (6th Cir. 1987).

99. The 1979 medicare malpractice rule was a "corrective measure" through which the Secretary of Health and Human Services revised the medicare provider malpractice apportionment system. 42 C.F.R. § 405.452(b)(1)(ii) (1985) (subsequently redesignated as 42 C.F.R. § 405.452(a)(1)(ii) (1985)). Under the pre-1979 system, HHS treated malpractice costs as one of many overhead expenses which providers pooled and HHS reimbursed providers based on the providers' "utilization ratio." The Secretary based the utilization ratio on the provider's ratio of hospital medicare patients usage to the total patient usage. Due to the precipitous increase in malpractice insurance costs, as well as other economic factors, including inflation, the Secretary concluded that HHS was paying a disproportionate share of malpractice insurance costs under the pre-1979 rules in violation of 42 U.S.C. § 1395x(v)(1)(A)(ii) (1972), which provided in part that the Secretary shall promulgate regulations to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." 42 C.F.R. § 405.452(b)(1)(ii).

After concluding that the reimbursements HHS made to providers under the pre-1979 rule were excessive, the Secretary eliminated malpractice insurance from inclusion in the general overhead expenses and replaced it with a scheme based on the provider's "actual" claim-loss costs in malpractice insurance arising from service to medicare patients. *Id.*

considered to be excessive payments it had made to medicare provider hospitals.[100] The district court below invalidated a 1979 rule[101] as "arbitrary and capricious" and an abuse of the Secretary's discretion.[102] The Secretary subsequently promulgated a retroactive rule in 1986, applying retroactively through 1979.[103] The Sixth Circuit, however, held that after the invalidation of the 1979 rule, the Secretary was not authorized to apply the 1986 rule retroactively.[104]

The *Mason* court characterized the retroactivity issue as a question of law,[105] regarding which the court would owe no overriding deference to the agency's decision.[106] In deciding by what standard to judge the

100. 809 F.2d at 1222, 1228. In *Mason*, the Secretary of HHS was authorized under § 1395x(v)(1)(A)(ii) to make "retroactive corrective adjustments." *Id.* at 1225 (quoting statute).

The Sixth Circuit joined six other circuits in invalidating the 1979 malpractice rule. *See* Bedford County Memorial Hosp. v. HHS, 769 F.2d 1017 (4th Cir. 1985); Menorah Medical Center v. Heckler, 768 F.2d 292 (8th Cir. 1985); DeSoto Gen. Hosp. v. Heckler, 776 F.2d 115 (5th Cir. 1985) (reinstating district court's invalidation of rule); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561 (11th Cir. 1985); St. James Hosp. v. Heckler, 760 F.2d 1460 (7th Cir.), *cert denied*, 474 U.S. 902 (1985); Abington Memorial Hosp. v. Heckler, 750 F.2d 242 (3d Cir. 1984), *cert. denied*, 474 U.S. 863 (1985). *But see* Humana of Aurora, Inc. v. Heckler, 753 F.2d 1579 (10th Cir.), *cert. denied*, 474 U.S. 863 (1985) (reversing district court and upholding Secretary's 1986 rule); Walter O. Boswell Memorial Hosp. v. Heckler, 749 F.2d 788 (D.C. Cir. 1984) (raising serious questions regarding the Secretary's rulemaking but ultimately remanding to agency).

101. The Secretary promulgated the 1979 malpractice rule to alter the method by which the government compensates hospitals for a portion of malpractice insurance costs attributable to medicare patients. 809 F.2d at 1222.

102. *Id.* at 1222. The district court based its invalidation on the Secretary's failure adequately to consider relevant comments on the proposed rule. *Id.*

103. *Id.* at 1223.

104. *Id.* at 1231.

105. *Id.* at 1228. In employing the APA judicial review framework, the court purportedly analyzed the retroactivity issue as a question of due process, rather than as a possible abuse of discretion. *Id.* at 1229. *See* 5 U.S.C. § 706(2)(A),(B) (1988). In treating the issue as a question of due process, the court would be justified in conducting de novo review as it is a settled principle that courts are the only authority on constitutional issues. *See* Levin, *supra* note 12, at 47-48. However, for a more deferential due process review, see *supra* notes 90-96 and accompanying text.

Rather than defer to HHS, the *Mason* court exercised de novo review, balancing the Secretary's statutory goals against the hospitals' private interests. 809 F.2d at 1230. First, the court noted that the 1986 formula was significantly similar to the 1979 formula, and that both marked a substantial departure from the prior utilization method. *Id.* at 1231. This fact, for the court, raised serious due process questions. *Id.* Second, the court found no overriding statutory interest in employing the new utilization method. *Id.*

106. *Id.* at 1224. The court of appeals did not employ the same standard of review as the district court below but instead found the question of retroactivity within its jurisdiction and carefully reviewed the Secretary's rule. *Id.* at 1223-24. In short, the *Mason* court substituted its judgment for that of the agency. The court reached this result by broadly interpreting a statutory provision of the Medicare Act, which entitles a provider to obtain expedited judicial review of any action "which involves a question of law." *See* 42 U.S.C. § 1395oo(f)(1) (1982). The court ignored a second perti-

agency in its retroactive rulemaking, the court considered three cases. The first, *Retail, Wholesale and Department Store Union v. NLRB*,[107] involved judicial review of an agency adjudication.[108] In *Retail Union*, the D.C. Circuit identified several factors it would consider in reviewing an order that the agency intends to apply retroactively.[109] The *Mason* court proceeded to cite *Mobil Oil Corp. v. Department of Energy*[110] and *Georgetown University Hospital v. Bowen*.[111] These cases both concerned retroactive rules rather than adjudicative orders.[112] Based on its assessment of those cases, the *Mason* court decided to apply a stricter standard than the one imposed in *Retail Union*,[113] due to its perception that rulemaking should be prospective whenever possible.[114]

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nent provision which grants the Secretary authority to make "suitable retroactive corrective adjustments." 42 U.S.C. § 1395x(v)(1)(A)(ii) (1982).

107. 466 F.2d 380 (D.C. Cir. 1972).

108. *Id.* at 393. In *Retail Union*, the order at issue required employers to give striking employees "fair consideration" for reinstatement until finding other suitable work. The D.C. Circuit struck down an attempt by the NLRB to apply the same order retroactively. The court held that the hardship which the order placed on the employer who had relied on the previous NLRB policy outweighed the public ends sought to be achieved by the new policy. *Id.*

In its decision, the *Retail Union* court relied heavily on the Supreme Court's decision in SEC v. Chenery Corp., 332 U.S. 194 (1947) (allowing the SEC to apply a previously invalidated adjudicatory order retroactively). 466 F.2d at 388-91.

109. The D.C. Circuit provided five "equitable factors" that might help courts resolve the retroactivity problems in the adjudication context:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite reliance of a party on the old standard.

466 F.2d at 390.

110. 678 F.2d 1083 (Temp. Emer. Ct. App. 1982).

111. Medicare & Medicaid Guide (CCH) ¶ 35,341 (D.D.C. April 11, 1986), *aff'd*, 821 F.2d 750 (D.C. Cir. 1987), *aff'd* 109 S. Ct. 468 (1988).

112. *Mason*, 809 F.2d at 1227-28.

113. *Id.* at 1228.

114. *Id.* The *Mason* court's assertion that retroactive rulemaking deserves closer scrutiny does not go unchallenged. Courts have utilized the *Retail Union* test in the context of rulemaking, possibly because of the parallels between retroactive adjudication and other forms of administrative retroactivity, such as retroactive rulemaking. *See* New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1112 (D.C. Cir. 1987) (applying *Retail Union* to review a retroactive interpretive rule); Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (applying SEC v. Chenery Corp., 332 U.S. 194 (1947), to uphold a retroactive interpretive rule); Leigl v. Webb, 802 F.2d 623, 628 (2d Cir. 1986) (Oakes, C.J. dissenting) (applying *Chenery* to argue against striking a retroactive interpretive rule); Aliceville Hydro Associates v. FCC, 800 F.2d 1147 (D.C. Cir. 1986); Pennzoil Co. v. DOE, 680 F.2d 156, 175 (Temp. Emer. Ct. App. 1982) (reviewing a retroactive interpretive rule), *cert. dismissed*, 459 U.S. 1190 (1983); Mapco Inc. v. Carter, 573 F.2d 1268 (Temp. Emer. Ct. App.

The court proceeded to expound a three-part balancing test, designed to assess the permissibility of retroactive rules: (1) the degree to which the originally promulgated rule was capricious or an abuse of discretion; (2) the existence, duration and departure from well-settled practice; and (3) the extent to which the rule was integral to effectuate the statutory purpose.[115]

Under its own framework, the *Mason* court concluded that the 1986 rule was invalid as applied retroactively to reporting periods beginning in 1979.[116] In formulating its test, the court followed the general directive of *Addison v. Holly Hill Fruit Products, Inc.*[117] Unlike *Addison*, however, the *Mason* court placed less emphasis on whether the rule was necessary to fulfill the statutory design. Instead, the *Mason* court independently balanced the equities at hand and concluded that retroactivity was un-

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1978) (same); National Helium Corp. v. FEA, 569 F.2d 1137, 1145 n.18 (Temp. Emer. Ct. App. 1977) (same). *But cf.* Texaco, Inc. v. DOE, 795 F.2d 1021, 1025-26 (Temp. Emer. Ct. App. 1986) (standard of review of agency's retroactive "action" is whether "decision was reasonable in the circumstances") (finding *Retail Union* factors "useful," but not determinative). *See supra* note 108.

Such parallels are easily discernible. First, often substantive curative rules, like adjudicatory orders, involve cases of first impression. Second, a corrective measure in a cost allocation scheme might depart abruptly from settled practice just as an adjudicatory order might overrule settled precedent. Third, it is plausible that affected parties could rely on a rule which an agency subsequently determines to be inefficient, as could a party to an adjudication. Fourth, corrective rules, like retroactive orders, impose some unforeseen burdens on the regulated parties. Finally, despite any reliance interests, a retroactive corrective rule, like a retroactive order, may be necessary to fulfill a statutory design.

From the perspective of the affected parties, while they do not have the benefit of a hearing before an administrative law judge in the rulemaking process, they do get some forum from which to be heard in the notice and comment required by the APA, 5 U.S.C. § 553 (1988).

115. 809 F.2d at 1228. *Mason*'s test is more intrusive than the five-part test of *Retail Union* in a number of ways. The question of the arbitrariness of the original rule, ignored in *Retail Union*, illustrates the *Mason* court's willingness to scrutinize the good faith of the agency in repromulgation. Also, whereas the *Retail Union* test inquires into the statutory interest in applying the new rule, the *Mason* decision asks whether the rule is *integral* to the statutory purpose. *Id.*

116. *Id.* at 1231. The *Mason* court distinguished "repromulgated" rules from "gap filling" rules in retroactivity analysis. *Id.* at 1228. The consideration of factors particularly relevant to repromulgated retroactive rules may set *Mason* apart from other courts which may not have appreciated this subtle distinction. As the court's test illustrates, the latter cases simply ask whether there was detrimental reliance, while the former involve questions aimed at why the rule was invalidated in the first place. The *Mason* test is the first to distinguish, and analyze separately, repromulgated rules and, in this respect, should prove useful to reviewing courts. One district court that applied the *Mason* factors to assess the validity of a retroactively repromulgated rule also considered the *Chenery* and *Retail Union* tests. *See* Leila Hosp. and Health Center v. Bowen, 661 F. Supp. 397, 403 (W.D. Mich. 1987) (promulgating retroactive rules is frequently within the delegated authority of an agency.) The Sixth Circuit subsequently reversed the district court. *See* Leila Hosp. and Health Center v. Bowen, 873 F.2d 132 (6th Cir. 1989).

117. 322 U.S. 607 (1944). *See supra* notes 68-79 and accompanying text.

necessary.[118] The *Mason* decision makes clear that the court was not willing to defer to the Secretary's decision to promulgate a retroactive rule.

## III. *BOWEN V. GEORGETOWN UNIVERSITY HOSPITAL*

In *Bowen v. Georgetown University Hospital*,[119] the Secretary of the Department of Health and Human Services (HHS) promulgated a retroactive rule[120] designed to collect, retrospectively, excessive reimbursement payments that the government had made to medicare service providers.[121] In 1979, the Secretary promulgated a "cost-limit" rule[122] that established an equation for measuring the amount medicare providers could recover as reimbursement for reasonable costs incurred. The cost-limit equation included a "wage index" reflecting the average salary levels of hospital employees in a geographic area.[123] In 1981, the Secretary amended the cost-limit rule to provide a new method for calculating provider costs.[124] The 1981 rule excluded federal government hospitals from the wage-index calculation.[125] Because the Secretary considered this a "minor" technical change,[126] the HHS promulgated the final rule without a notice and comment period as required by the APA.[127] Never-

118. 809 F.2d at 1228-29. The court emphasized that retroactivity "[i]n the context of administrative rulemaking, [trivializes] the procedures mandated by the Administrative Procedure Act." *Id.* at 1226.

119. 109 S. Ct. 468 (1988).

120. 49 Fed. Reg. 46,495 (1984).

121. A 1972 amendment to the Medicare Act empowered the Secretary to define "reasonable costs" for routine medical services in order properly to reimburse providers. Social Security Amendments of 1972, Pub. L. No. 92-603, § 223(b), 86 Stat. 1393 (amending 42 U.S.C § 1395x(v)(1)(A)). The act defines "reasonable cost" as the "cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v)(1)(A) (1982). This section authorizes the Secretary to establish limits on provider costs. *Id.* Pursuant to this authority, in 1974 the Secretary began publishing schedules of the limits placed on reimbursable hospital costs. 109 S. Ct. at 470. The Secretary used informal rulemaking as the means to implement this program.

122. 44 Fed. Reg. 31,806 (1979). The Secretary intended the 1979 cost-limit rule to apply prospectively to cost accounting periods beginning on or after July 1, 1979. *Id.* The Secretary promulgated the 1979 rule to furnish a formula for calculating the cap on reimbursable costs. *Id.*

123. *Id.*

124. 46 Fed. Reg. 33,637 (1981).

125. *Id.* The 1979 wage index included data from federal government hospitals. In the final notice of this change in the wage index, the Secretary stated that the amendment would "help improve the accuracy of the wage index adjustment [because federal hospitals] typically use national pay scales [that] . . . do not necessarily reflect area wage levels." *Id.* at 33,639.

126. *Id.* at 33,640.

127. *See* 5 U.S.C. § 553(c) (1988).

theless, the District Court for the District of Columbia invalidated the 1981 rule on the ground that it was arbitrary and capricious.[128]

In 1984, the Secretary repromulgated the wage-index rule and applied it retroactively to 1981.[129] The Secretary employed retroactive rulemaking to recoup the money the government previously had paid to providers in compliance with the district court's order invalidating the 1981 wage-index rule.[130] Seven hospitals in the District of Columbia challenged the Secretary's authority to promulgate the retroactive rule under the APA and the Medicare Act.[131] The Secretary argued that the government was entitled to correct retroactively the procedural defect in the 1981 rulemaking.[132] The Court, in a unanimous decision with one concurrence, struck the Secretary's retroactive rule.[133]

128. Several hospitals in the District of Columbia brought suit, alleging a violation of the APA's notice and comment procedure. *See* Saint Cloud Hosp. v. Heckler, No. 83-0223 (D.D.C. May 2, 1983) (remanded to Secretary to allow comments on the proposed change and in the interim settled appellee's accounts with the original schedule); District of Columbia Hosp. Ass'n v. Heckler, No. 82-2520 (D.D.C. May 2, 1983).

129. 49 Fed. Reg. 46,495 (1984). Having acknowledged the invalidity of the 1981 rule, *see* 48 Fed. Reg. 39,998 (1983), the Secretary published a Notice of Proposed Rulemaking in which he proposed to "reissue the 1981 wage-index rule." 49 Fed. Reg. 6175 (1984). After hearing objections from commentators on this proposed retroactive change, the Secretary repromulgated, verbatim, the 1981 wage-index rule. The proposed rule unambiguously provided that it would apply retroactively. 49 Fed. Reg. 46,495 (1984) (final notice "affirms the use of the wage index that was used to calculate the 1981 schedule of limits on hospital per diem inpatient general routine operating costs [and applies] to costs reporting periods beginning on or after July 1, 1981 . . .").

130. After repromulgating the 1981 rule retroactively, the Secretary refused to change the providers' wage limits for the 1982 and 1983 fiscal years and accordingly refused to alter the providers' reimbursement under the Medicare Act. 49 Fed. Reg. 46,495 (1984).

131. 109 S. Ct. at 470-71. As a result of the 1984 rule, the Secretary demanded the return of over $2 million in reimbursement payments from the hospitals. *Id.* at 471. The hospitals sought judicial review in the United States District Court for the District of Columbia under § 702 of the APA. *See* 5 U.S.C. § 702 (1988). They further claimed that the Medicare Act provided no authority for the retroactive rule. The Social Security Amendments of 1972 authorized the Secretary to make "suitable retroactive corrective adjustments" if, in the Secretary's judgment, the reimbursement is either inadequate or excessive. The Secretary's task is to measure accurately the proportion of the providers' total costs that are attributable to the "efficient" treatment of medicare recipients. This provision therefore delegates power to the Secretary to make, in his or her judgment, "corrective adjustments" when it appears that the system is not functioning effectively.

132. 109 S. Ct. at 472. The district court granted the hospitals' motion for summary judgment and the District of Columbia Circuit affirmed. 821 F.2d 750 (1987). The court of appeals concluded that the Secretary's asserted exception to the requirement that legislative rules operate prospectively only was at odds with the basic tenets of administrative law. *Id.* at 757. The court held, alternatively, that neither the APA nor the Medicare Act authorizes retroactive rulemaking. *Id.*

133. 109 S. Ct. at 475, 480.

### *A. The Court's Rule of Statutory Construction*

Writing for the *Georgetown* Court, Justice Kennedy adopted a rule of statutory construction—based on the general disfavor for retroactivity—that requires express congressional authorization for retroactive rulemaking.[134] After reviewing the statutory language and the legislative history behind the cost-limit provision, the Court concluded that Congress did not explicitly authorize the Secretary to promulgate retroactive rules.[135] Because the Court decided the case narrowly on the ground of statutory construction,[136] it did not reach the broader issue of whether the APA authorizes retroactive rulemaking.[137]

The sweeping nature of the rule of decision in *Georgetown* is open to criticism. The Court neither affirmed nor denied the appellate court's APA resolution of the case, but instead announced, almost arbitrarily, a

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134. *Id.* at 471, 474. "Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 471. *See also supra* note 38. Several lower federal courts have followed *Georgetown*'s requirement that Congress must expressly authorize an agency to promulgate rules retroactively. *See* Hennepin County v. Sullivan, 883 F.2d 85, 93 (D.C. Cir. 1989) (regulations pursuant to retroactive adjustment provision of Medicare Act do not permit changes in methods of computing provider costs); Leila Hosp. & Health Center v. Bowen, 873 F.2d 132 (6th Cir. 1989) (Secretary of HHS has no authority to promulgate retroactive cost-limit rules under Medicare Act); Minnesota Hosp. Ass'n v. Bowen, 703 F. Supp. 780 (D. Minn. 1988) (retroactive corrective adjustment provision of Medicare Act intended to apply to case-by-case adjustments). In a concurring opinion, however, Justice Scalia may have been more permissive in his interpretation of the requisite statutory authority. He stated:

> It may even be that *implicit authorization of particular retroactive rulemaking can be found in existing legislation*. If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute *may be interpreted to authorize a reasonable retroactive rule despite the limitation of the APA.*

109 S. Ct. at 480 (Scalia, J., concurring) (emphasis added).

135. *Id.* at 474. The Court noted that the House and Senate Committee Reports directly address the issue of retroactivity: " 'The proposed new authority to set limits on costs . . . would be exercised on a prospective, rather than retrospective, basis so that the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable'," *Id.* (quoting H.R. REP. NO. 231, 92d Cong., 1st Sess. 1, 83 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4989, 5070; and S. REP. NO. 1230, 92d Cong., 2d Sess. 188 (1972).

136. The Court did read the statute to permit the government to make retroactive corrections on a case-by-case basis. The Court looked at the language of the cost-limit provision, which authorizes adjustments for "a provider" when the calculated reimbursements are either too high or too low. *Id.* at 472. *See* 42 U.S.C. § 1395x(v)(1)(A) (1982). The Court pointed out that such individual adjustments are achieved through adjudication, and not rulemaking. 109 S. Ct. at 472.

137. *See id.* at 475 ("[t]he case before us is resolved by the particular statutory scheme in question"). Nevertheless, as previously discussed, the implication of Justice Kennedy's sweeping language would resolve, in practical terms, the APA question. *See supra* note 39.

new rule of statutory construction.[138] Indeed, the rule was never briefed officially before the Court.[139] Furthermore, several ambivalent passages in the Court's opinion cast doubt on the decision's breadth.[140] The Supreme Court might later use any one of these reasons, or all of them, to limit *Georgetown* to its facts or overrule its chosen form of disposition.

The *Georgetown* rule also raises a number of questionable implications. First, while the decision does not proscribe retroactive rulemaking per se, it likely will eliminate many agencies' discretion to promulgate a retroactive rule. No form of retroactivity review, whether based upon principles of equity or due process, supports this result.[141]

Second, the *Georgetown* holding is impractical because it curtails one method by which an administrative agency may exercise its expertise and take swift remedial steps in exigent circumstances. By requiring ad hoc, express congressional authorization for retroactive rulemaking, *Georgetown* limits the government's ability to rectify rules resulting in unjust enrichment or unfair disbursement of funds through retroactive rulemaking to instances where Congress amends the enabling legislation.[142] This

138. *Id.* at 471. Only Justice Scalia chose to address the grounds on which the D.C. Circuit based its opinion. *Id.* at 475-80 (Scalia, J., concurring).

139. An amicus curiae brief suggested the statutory construction approach. *See* Supplemental Brief for the Petitioner at 1-3, Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468 (1988) (No. 87-1097). The Court did not accept that brief. 109 S. Ct. 43 (1988). In a reply brief to the amicus brief, the Solicitor General attacked the rule, but this reply was conditioned on the Court's acceptance of the amicus brief. Supplemental Brief for the Petitioner, *supra*, at 1. Notwithstanding the absence of any position taken by the parties or amici in the case, the Court, or at least Justice Kennedy, clearly took the proffered statutory construction rule to heart.

Should the court ever choose to reexamine the APA question presented in *Georgetown*, the absence of adequate briefing might offer a route by which the Court can loosen the bindings of stare decisis.

140. For example, the Court stated: "The case before us is resolved by the particular statutory scheme in question." 109 S. Ct. at 475. Even within its seemingly sweeping statement of the appropriate rule of construction, the Court does not speak in absolute terms. *See id.* at 471 ("*as a general matter*" retroactive rulemaking authority must be express; "courts *should be reluctant* to find such authority absent an express statutory grant") (emphasis added); *id.* at 474 (absence of express statutory authority "*weighs heavily*" against ability to promulgate retroactive rules) (emphasis added). *Cf. id.* at 480 (Scalia, J., concurring) (congressional authority may be implicit). This language may allow the Court to distinguish or limit the *Georgetown* decision in future retroactive rulemaking cases arising under different agency statutes.

141. *See supra* notes 51-94 and accompanying text. When the language of a statute expressly delegates authority to an agency, courts owe no deference to the agency because the judiciary is the final authority on statutory interpretation. Courts, therefore, can exercise their own judgment as to whether an agency has fulfilled Congress' design. Levin, *supra* note 12, at 22.

142. In his concurring opinion, Justice Scalia stated that "if and when an agency believes that

result runs afoul of the Court's reasoning of *United States v. Morgan*[143] that courts and agencies should work cooperatively to achieve congressional aims.[144] As a practical matter, Congress cannot respond promptly to such issues or foresee all complications that might create the need for retroactivity.

### *B. Justice Scalia's Concurrence: Looking Beyond the Enabling Statute*

#### *1. The APA's Definition of "Rule"*

In a concurring opinion, Justice Scalia agreed that the Medicare Act does not authorize retroactive rulemaking.[145] In addition, he specifically addressed the APA issue.[146] Justice Scalia made explicit the Court's implicit holding that retroactive rulemaking is not a "permissible form of agency action under the particular structure established by the APA."[147] For him, the APA independently proscribes retroactive rulemaking.

Justice Scalia began by examining the APA's definition of "rule." Because section 551(4) of the APA defines "rule" as "[t]he whole or part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy . . .,"[148] the concurring Justice concluded that "[t]he only plausible reading . . . is that rules have legal consequences only for the future."[149] He accordingly rejected the government's argument that "future effect" refers merely to a rule's future effective date and does not prohibit retroactive rulemaking as a matter of law.[150] Justice Scalia maintained that blurring

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the extraordinary step of retroactive rulemaking is crucial, all it need do is persuade Congress of that fact to obtain the necessary ad hoc authorization." 109 S. Ct. at 480 (Scalia, J., concurring).

143. 307 U.S. 183 (1939).

144. *See supra* note 22 and accompanying text.

145. 109 S. Ct. at 475 (Scalia, J., concurring).

146. *See supra* note 137 and accompanying text.

147. 109 S. Ct. at 480 (Scalia, J., concurring).

148. 5 U.S.C. § 551(4) (1988) (emphasis added).

149. 109 S. Ct. at 475-76 (Scalia, J., concurring) (citing 5 U.S.C. § 551(4) (the APA's definition of "rule")).

150. The government asserted that "future effect" did nothing more than distinguish rules from orders. Brief for the Petitioner at 24, Bowen v. Georgetown Univ. Hosp., 109 S. Ct. 468 (1988) (No. 87-1097). Instead, the government construed "future effect" to mean "future enforcement." *Id.* Thus, according to the government, a rule cannot be enforced until an agency brings an enforcement proceeding, and if Congress intended to prohibit rules from affecting past transactions or events, it could have so provided. *Id.* at 25.

The government asserted that " '[w]hat distinguishes legislation from adjudication is that the former . . . *must be applied in a further proceeding* before the legal position of any particular individual will be definitely touched by it . . . .' " *Id.* at 24 (quoting J. DICKINSON, ADMINISTRATIVE JUSTICE

the distinction between rules, which have only future effect, and orders, which may apply both prospectively and retrospectively, would "destroy the entire dichotomy upon which the most significant portions of the APA are based."[151]

Justice Scalia's construction of the APA's definition of "rule" is flawed for several reasons. First, the Justice did not illustrate how the promulgation of retroactive rules would impair the APA's structure. His position that rules should have only *future effect* solely focuses upon *when* a rule applies and not to *what* transaction it applies.[152] Nor did Justice Scalia analyze or consider whether an agency's inability to promulgate a retroactive rule might actually hinder Congress' intent.

Second, Justice Scalia's evaluation of rules and orders proves too little because it fails to recognize explicitly that rules, like orders, can apply to only one party as well as a whole class.[153] Rather than distinguishing

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AND THE SUPREMACY OF LAW 21 (1927)) (emphasis added). The government also relied on the notion that administrative regulations "lay down general rules and leave them to be applied *in a later proceeding* to the facts of particular cases." *Id.* (quoting Davis, *Administrative Rules, supra* note 2, at 921) (emphasis added). *Cf.* Abbott Lab. v. Gardner, 387 U.S. 136, 187-93 (1967) (Fortas, J., dissenting) (explicating the old view of when an enforcement proceeding should be applied to an individual).

Scalia correctly pointed out that the government's reading of § 551(4) is too broad because all agency statements take effect in the future. 109 S. Ct. at 476 (Scalia, J., concurring).

151. *Id.* at 476. Scalia's argument that Congress did not intend to include retroactive rulemaking under the APA finds some support in the 1947 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT [hereinafter ATTORNEY GENERAL'S MANUAL]. *Id.* at 476-77. The Attorney General's Manual, published by the Justice Department, guides agencies in fulfilling the procedural requirements of the APA. 109 S. Ct. at 477 (Scalia, J., concurring). The document includes statements that Scalia reiterated in his opinion and that he believes are "out of accord with the Government's position." *Id.* According to the Manual,

> " 'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law. . . . [T]he entire Act is based upon a dichotomy between rule making and adjudication . . . . Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations . . . . Conversely, adjudication is concerned with past and present rights and liabilities."

*Id.* at 477 (emphasis in original) (quoting ATTORNEY GENERAL'S MANUAL, *supra*, at 13-14). At the same time, however, Scalia deemphasized the Attorney General's statement in the Manual that "[n]othing in this Act precludes the issuance of retroactive rules when otherwise legal and accompanied by the finding required by section 4(c)." *Id.* (quoting ATTORNEY GENERAL'S MANUAL, *supra*, at 37). According to Scalia, this statement permits only "secondary retroactivity," which alters the *future* legal consequences of past conduct, rather than the retroactivity involved in changing *past* legal consequences. *Id.*

152. *See* Brief for the Petitioner *supra* note 150, at 24.

153. *See* 5 U.S.C. § 551(4) (rule may be "of general or particular applicability"). The Attorney

rules from orders, it would be more appropriate to weigh the possible impact of retroactivity on the involved parties against the particular congressional goals. Thus, rather than focusing on the form of agency action in deciding whether retroactivity is valid, a court's analysis should center on the agency's substantive decision—whether by adjudication or rulemaking—to accomplish its legislative mandate. Otherwise, the concurrence's rigid dichotomy might thwart an agency's discretionary judgment in efficiently fulfilling congressional ends.[154]

Third, Justice Scalia's argument that rules can apply only *in futuro* proves too much. The APA is a procedural enactment that, by design, imposes no substantive restrictions on agency authority.[155] Moreover, if Congress intended the APA to prohibit certain agency action, it is unlikely that it would include such a measure in the statute's definitional section. The APA simply provides the parameters within which an agency has flexibility to function. Prohibiting retroactive rulemaking unnecessarily constricts agency discretion and flexibility necessary to address unpredictable governmental issues.

Finally, Justice Scalia's interpretation of "rule" in section 551(4) should condemn retroactive interpretive rules as well as retroactive legislative rules.[156] Yet, because a retroactive interpretive rule merely explains existing law, it may be less problematic than a retroactive legislative rule.[157] Prior to the promulgation of an interpretive rule, affected parties are on notice that the statute exists and are unsure only as to how the agency interprets the law. Notwithstanding Justice Scalia's construction of the definition of "rule," he concedes that retroactive interpretive rules may be legitimate.[158]

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General's Manual states that "[r]ule making is agency action which regulates future conduct of *either groups of persons or a single person* . . . ." ATTORNEY GENERAL'S MANUAL, *supra* note 151, at 13-14, *quoted in Georgetown*, 109 S. Ct. at 477 (Scalia, J., concurring) (emphasis added).

154. The APA's judicial review provision inhibits all unscrupulous agency retroactivity, regardless of whether the agency acted through rulemaking or adjudication. *See* 5 U.S.C. § 702 (1988). Assuming the enabling statute does not expressly require that an agency employ a particular medium, the agency's exercise of its legislative mandate may necessitate a retroactive order *or* a retroactive rule.

155. The APA sets out *procedures* by which an agency may act, not limits on the substance of that action.

156. Although *Georgetown* involved a legislative rule, Scalia's rationale is not limited to legislative rules.

157. *See supra* note 7.

158. 109 S. Ct. at 478 (Scalia, J., concurring). Scalia, however, avoided a literal inconsistency by characterizing interpretive rulemaking as adjudication. *See id.* at 478, 479; *infra* note 170 and accompanying text.

### 2. *Secondary Retroactive Rules*

After addressing the APA's definition of "rule," Justice Scalia excepted from the APA's prohibition rules that have only a "secondary" retroactive effect.[159] Secondary retroactive rules, according to his concurrence, have "exclusively future effect," but may render past transactions "less desirable in the future."[160] The concurring Justice concluded that secondary retroactivity merits treatment separate from retroactive rules that "[alter] the *past* legal consequences of past actions."[161] He indicated, however, that "unreasonable" secondary retroactive rules may have grave consequences and thus may be invalid as "arbitrary or capricious."[162]

Justice Scalia may be correct in concluding that secondary retroactive rules are less intrusive than other types of retroactive rules. Moreover, retroactive substantive rules may merit greater judicial scrutiny or caution. Justice Scalia, however, did not illustrate explicitly why secondary retroactive rules are permissible under the APA.[163] Central to his distinction between secondary retroactive rules and impermissible retroactive rules, therefore, is that § 551(4) of the APA defines a rule as having future *legal* effect.

### 3. *Retroactivity Precedent*

Rather than utilizing *Chenery* in the retroactive rulemaking context, as other courts have done, Justice Scalia simply used it to enunciate the

159. 109 S. Ct. at 477-78 (Scalia, J., concurring).

160. *Id.* at 477 (citing McNulty, *Corporations and the International Conflict of Laws*, 55 CALIF. L. REV. 12, 58-60 (1967), to support his definition of "secondary" retroactivity). For an example of a secondary retroactive rule, Scalia illustrated that the Treasury Department may promulgate a rule taxing income from trusts that previously had been nontaxable. *Id.* While the regulation does not affect the legal consequences of past transactions, the decision to tax those transactions in the future makes the past act less desirable, and, therefore, "affects" past transactions.

161. *Id.* (emphasis in original).

162. *Id.* Scalia cited two cases that analyzed retroactivity on the basis of reasonableness. These cases, however, did not establish a separate category of "secondary retroactivity." *See* National Ass'n of Indep. Television Producers & Distrib. v. FCC, 502 F.2d 249, 255 (2d Cir. 1974) (applying balancing test of SEC v. Chenery Corp., 332 U.S. 194 (1947) to determine that retroactive rule was unreasonable); General Tel. Co. v. United States, 449 F.2d 846, 863 (5th Cir. 1971) ("[t]hat rules of general application, though prospective in form, may ascribe consequences to events which occurred prior to their issuance does not, on that basis alone, invalidate them").

163. Scalia did state in conclusory fashion, however, that it was "erroneous . . . to extend this 'reasonableness' inquiry to purported rules that not merely affect past transactions but change what was the law in the past. Quite simply, a rule is an agency statement 'of future effect,' not 'of future effect and/or reasonable past effect.' " 109 S. Ct. at 478 (Scalia, J., concurring).

*general* differences between rulemaking and adjudication.[164] Justice Scalia criticized the government's reliance on case law that involved retroactive adjudication. In particular, he stated that "[t]he profound confusion characterizing the Government's approach to [retroactive rules] is exemplified by its reliance upon [*SEC v. Chenery Corp.*]."[165]

Justice Scalia next rejected the government's reliance on a pre-APA case, *Addison v. Holly Hill Fruit Products, Inc.*,[166] in which the Supreme Court upheld retroactive rulemaking.[167] In his view, *Addison* "does not stand for a general authority to issue retroactive rules before the APA was enacted, much less for authority to do so in the face of [the APA]."[168] He found it unclear whether the *Addison* Court required the agency to act by order or rule.[169] According to Justice Scalia, *Addison* did not involve an original legislative rule, but rather an interpretive rule.[170] Thus, he concluded, *Addison* may simply stand for the proposi-

164. *Id.* According to Scalia, *Chenery* and NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), which suggested that adjudication could not have a purely prospective effect, establish the " 'dichotomy between rulemaking and adjudication' upon which 'the entire [APA] is based.' " 109 S. Ct. at 478 (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 151, at 14). *See supra* note 114.

165. 109 S. Ct. at 478 (Scalia, J., concurring). *See* Brief for the Petitioner, *supra* note 150, at 16-17, 36-37 (citing *Chenery*, 332 U.S. 194 (1947)). To the contrary, the government maintained that *Chenery* provided a workable balancing test for weighing the permissibility of retroactive rules. *Id.* The *Chenery* Court, which upheld the retroactive application of law in the context of adjudication, provided that a reviewing court should balance the need for retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." 332 U.S. at 203. Other courts have followed *Chenery* in the rulemaking context as well. *See supra* note 114.

166. 322 U.S. 607 (1944). *See supra* notes 68-79 and accompanying text.

167. 109 S. Ct. at 478-79 (Scalia, J., concurring). Scalia recognized that the Court has never addressed whether the APA "authorizes" retroactive rules and sharply concluded that, "[i]f so obviously useful an instrument was available to the agencies, one would expect that [the Court] would have had occasion to review its exercise." *Id.* at 478. To counter such a conclusion, the government cited two federal court of appeals cases, Citizens to Save Spencer County v. EPA, 600 F.2d 844 (D.C. Cir. 1979) (sustaining a retroactive regulation under the Clean Air Act) and National Helium Corp. v. FEA, 569 F.2d 1137, 1145 n.18 (Temp. Emer. Ct. App.) (created in 1977) (finding a retroactive rule had no substantial detriment and was reasonable under the circumstances). *See* Brief for the Petitioner, *supra* note 150, at 21-22. Scalia concluded from the government's limited citation of cases sustaining retroactive regulations that retroactive rulemaking is "evidently not a device indispensable to efficient government." *Id.* at 480. However, these are not the only cases endorsing retroactive rulemaking since the enactment of the APA. *See supra* notes 90-96, 100 and accompanying text.

168. 109 S. Ct. at 478 (Scalia, J., concurring).

169. *Id.* at 479.

170. *Id.* For a discussion of the distinction between interpretive and legislative rules, see *supra* note 7.

tion that an agency may adjudicate retroactively when "an interpretive rule is held invalid, and there is no pre-existing rule which it superseded."[171] Alternatively, Justice Scalia asserted, *Addison* stands for the narrow proposition that Congress implicitly may authorize retroactive rulemaking where the agency would be contravening prior law through either action or inaction.[172]

Justice Scalia's assessment that *Addison* involved an interpretive rule is questionable. In defining "area of production," the rule at issue in *Addison* had the substantive effect of a law because the congressionally delegated authority to define the statutory exemption—"area of production"—effectively included authority to determine who was and was not exempt from the Fair Labor Standards Act.[173] Whether the Administrator in *Addison* acted through either legislative rulemaking or interpretive rulemaking essentially does not change the impact the rule had on industry.[174]

Justice Scalia's treatment of *Addison* might be more understandable if that case were an isolated instance in which the Court tolerated retroactive rulemaking. However, the concurrence neglected to refer to the equitable principles the Court stressed in the *Atlantic Coast Line*, *Morgan*, and *Addison* cases in sustaining retroactive rulemaking.[175] *Addison* may be a *unique* case, but equity does not embrace general rules. Instead, equity calls for case-by-case discretionary assessments based upon notions of fairness.[176] Therefore, Justice Scalia's attempt to narrow *Addison* to its facts overlooks its broader impact on the importance of equitable principles in assessing retroactivity.

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171. 109 S. Ct. at 479 (Scalia, J., concurring). *Cf.* Sam v. United States, 682 F.2d 925, 932 (Cl. Ct. 1982) (retroactive regulation reciting prior law proper, while retroactivity of regulation overruling prior policy ineffective without presence of certain factors).

172. 109 S. Ct. at 479 (Scalia, J., concurring). The Court would either be ordering the agency to rule retroactively—contrary to prior law—or to leave "area of production" undefined, removing one type of exemption contrary to the statute. *See supra* notes 70-71 and accompanying text.

173. *Cf.* NLRB v. Wyman-Gorman, 394 U.S. 759 (1969) (considering the delegated authority to define the term "employee" a rulemaking function).

174. 109 S. Ct. at 479 (Scalia, J., concurring). In short, Scalia assessed the *Addison* situation as calling for one of two results: either the Administrator had to promulgate a retroactive rule and "contravene normal law," or he had to abstain and thereby totally eliminate the congressionally prescribed exemption. *Id.*

175. *See supra* notes 51-78 and accompanying text. The government apparently did not brief these cases. *See* 109 S. Ct. at 478.

176. *See supra* notes 51-79, 89 and accompanying text.

### 4. *Analogy to Retroactive Legislation*

Finally, Justice Scalia rejected the government's contention that retroactive rulemaking is analogous to retroactive legislation.[177] Although the Court has held that retroactive legislation is constitutional if reasonable under the circumstances,[178] Justice Scalia rejected this as a valid basis for permitting retroactive rulemaking under the APA. He emphasized that the issue was not the constitutionality of retroactive rules, but "rather whether there is any good reason to doubt that the APA means what it says."[179] Hence, Scalia concluded that, without special congressional authorization, agencies cannot promulgate retroactive regulations.[180]

## IV. CONCLUSION

On one level, *Georgetown* constitutes a sharp break from the older retroactivity case law described in Part II. Those cases conceded that agencies had the authority to promulgate retroactive rules, differing only as to their understanding of the deference courts owe agencies in allowing specific instances of retroactivity.[181] In *Georgetown*, on the other hand, the Supreme Court decided that agencies lack the very authority—absent an express congressional grant—to promulgate such rules.[182] On another level, however, this recent decision falls into line with those earlier cases, albeit at one extreme. The Court in *Georgetown* presented a rule of statutory construction for interpreting the authority Congress gives agencies to rulemake retroactively. Like the earlier cases—and unlike Justice Scalia's *Georgetown* concurrence[183]—this disposition dictates the relationship between an agency and a court.[184] As proof of this assertion,

177. 109 S. Ct. at 479 (Scalia, J., concurring).

178. *See supra* notes 83-89 and accompanying text.

179. 109 S. Ct. at 479 (Scalia, J., concurring). Given the doubt cast on Justice Scalia's reading of the APA *see supra* notes 149-63 and accompanying text, and the merit to the argument that Congress can authorize an agency to do whatever Congress can do, this conclusion appears somewhat cursory.

180. *Id.* at 480.

181. *See supra* notes 80-96 and accompanying text.

182. *See supra* notes 134-37 and accompanying text.

183. Whereas the Court dealt with the question *Georgetown* presented through a rule of statutory construction, Scalia chose to rest his concurrence on the APA, Congress' general authorization to agencies. *See supra* notes 145-51, 159-62 and accompanying text. This ground necessarily implicates the relationship between Congress and the agency, rather than between the Court and the agency.

184. The earlier cases, resting their decisions on the equities or due process, *see supra* notes 51-78

nothing in *Georgetown* indicates that Congress can change the Court's mind with regard to this rule.[185]

Should the Court recognize and regret the sweeping nature of its *Georgetown* decision, the question would remain where to draw the line in deference to agency retroactivity. Given the potentially harsh consequences of retroactive rules, an abuse of discretion test might require an agency to bear the burden of justifying a rule's retroactivity.[186] This standard also would require that the agency, in its administrative record, articulate some rational basis for the retroactivity.[187] Nevertheless, retroactive rules are often the most efficient, fairest way to alleviate a problem unforeseen by the agency.[188] Additionally, every prior Supreme Court treatment of retroactive rules displayed a much greater willingness to work with the agency in producing a fair result.[189] In that their potential for inequity does not far exceed the same potential in retroactive adjudications, retroactive rules should be subject to little more judicial scrutiny. Less deference to the agency's decision—with *Georgetown*'s position at the extreme—strips agencies of one of their carefully utilized and most effective tools in carrying out their statutory mandate.

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and accompanying text, involved the relationship between the agency and the court: each answered the question what can the agency do within the limit set and enforced by the court. Similarly, the *Georgetown* Court established a rule of statutory construction, which reveals how a court must treat an agency's authority.

185. Because the Court's opinion is not based on the APA, Congress seemingly could not alter this rule of construction even if it chose to do so. Thus, in the wake of *Georgetown* to grant every agency retroactive rulemaking authority, Congress would have to amend every agency's organic statute.

The peculiarities of the Court's opinion, *see supra* notes 138-44 and accompanying text, might give one pause to wonder whether it would not be overruled or seriously limited given a retroactivity amendment to the APA.

186. *See* Mason Gen. Hosp. v. Department of HHS, 809 F.2d 1220, 1225 (6th Cir. 1987).

187. Under this test there would be a presumption of validity, but the reviewing court should accept the agency's post hoc rationalizations only with the utmost skepticism. As a general rule, the reviewing court should accept only contemporaneous views in the record. *See* Overton Park v. Volpe, 401 U.S. 402, 419 (1971) (post hoc rationalizations are not part of the "whole record"); *supra* note 10.

188. *See supra* notes 24-32 and accompanying text.

189. *See supra* notes 51-79 and accompanying text (discussing the Supreme Court decisions in *Atlantic Coast Line, Morgan,* and *Addison*).