THE PROSPECTIVITY PUZZLE

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As a general rule, decisions of the Texas Supreme Court apply retroactively. *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 748 (Tex. 2017); *Life Partners Inc. v. Arnold*, 464 S.W.3d 660, 685 (Tex. 2015); *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). In the common-law tradition, appellate decisions on novel questions do not "create new law" but only "recognize[] what the law was." *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999). By definition, this principle means that a new decision applies not only to the case before the Court but also to any other case raising the same issue.

But at times, the Court has asserted the power to issue prospective decisions—frequently limiting their effectiveness to the case before the Court, all future cases, and "cases currently in the judicial process in which the issue has been preserved." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 533 (Tex. 1998); *accord State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 720 (Tex. 1996); *Elbaor v. Smith*, 845 S.W.2d 240, 251 (Tex. 1992). This formulation means a litigant who had the foresight to anticipate a new rule will benefit from it, even though it may not have been the law at the time the issue was raised. *See, e.g., In re J. J.*, 617 S.W.2d 188, 188 (Tex. 1981). How does the effect of such a decision differ from decisions that apply retroactively? That question inspired this paper.

PRESERVATION AND THE PROSPECTIVITY PUZZLE

Even when a decision applies retroactively, a litigant cannot take advantage of a new ruling unless it had the foresight to preserve the argument in the trial court. The preservation requirement is familiar to all appellate lawyers:

> (a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. R. App. P. 33.1. The preservation requirement promotes judicial efficiency (allowing the trial court the first opportunity to rule on an issue and avoid any error) and fundamental fairness (assuring that neither the trial court nor the opposing party is surprised by an argument on appeal). It thus guards against "appeal by ambush." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 n.18 (Tex. 2009).

The Texas Supreme Court routinely declares that a party seeking to invoke a new rule from a recent decision—whether it applies retroactively or prospectively—must preserve it like any appellate complaint: "The complaining party on appeal is not relieved of the standard appellate requirements of preservation of error." *Elbaor*, 845 S.W.2d at 251 n.23. Even assuming that a new decision applies retroactively, the mere fact that the law has changed is no excuse for a failure to preserve error:

> Although the Supreme Court did not decide [a new rule] until later, [appellants were] required to object . . . in order to receive the benefit of a change in the law—to the extent there was one—on appeal.

General Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 921 (Tex. 1993); *see also St. Paul Sur. Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53 (Tex. 1998) ("Even though [a rule] was not yet the law, [appellant was] obliged to lodge a timely objection to preserve error."); *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 (Tex. 2015) (noting that a litigant securing reversal on the basis of an intervening change in law had preserved the "specific reasons" for reversal).

This line of authority gives rise to the prospectivity puzzle: What does it mean to say that a new rule applies retroactively, but only if the issue has been preserved? How does this version of retroactivity differ from decisions that apply prospectively, except for "all other cases currently in the judicial process in which the issue has been preserved"? As a practical matter, what is the difference between the two? Either way, litigants who had the foresight to preserve the issue will win, and those who did not will lose. Is this a distinction without a difference?

The distinction is between *preservation* and *error*. That is, when a decision applies retroactively, an action that was not error at the time of the trial court's ruling can become erroneous later. But such an error is a

ground for reversal only if it was anticipated and preserved. Put another way, such an error is not "fundamental" (meaning it is not so damaging to the integrity of the judicial process that it can be asserted for the first time on appeal).

Whether a ruling was *error* and whether it was *preserved* are distinct inquiries. Retroactivity affects the former inquiry but does not alter the latter. In other words, a litigant who wants to take advantage of a change in the law must anticipate it.

How does this circumstance differ from a decision that applies prospectively? Technically, when the Court limits a decision to apply prospectively, it is saying that contrary rulings prior to the date of the decision were not erroneous in the first place. The Court is not declaring that a new rule was *always* the law; it is saying the law is *changed* by the decision. Because the common-law tradition of judging depends on litigants with justiciable cases or controversies that present legal issues to the courts, the party who successfully prosecutes an appeal and secures a change in the law is essentially being rewarded for doing so—even though the trial court did not err—and the same benefit is afforded to any litigant that has preserved the issue.

The sum is this: Whether a decision applies retroactively or prospectively, preservation of error is *always* required; there is no exception for new legal rules based on new decisions. So what is the point of prospectivity?

RETROACTIVITY AND FINALITY: THE COLLATERAL ATTACK PROBLEM

Prospectivity doctrine focuses on the question of when the effectiveness of a Supreme Court decision *begins—i.e.*, is a new rule the law only when it is announced (prospective) or is that rule presumed to have been the law all along (retraoactive)? There is another, related question: When does the retroactivity of a new rule *end*? At what point is a litigant—even one who had the foresight to preserve the issue—barred from taking advantage of a new rule?

The Texas Supreme Court recently addressed this question, explaining that "retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted." *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 748 (Tex. 2017). Otherwise, new decisions "could be applied retroactively to allow collateral attack on a final judgment." *Id*. at 749. In cases involving procedural rights in litigation, there is no practical difference between retroactive and prospective decisions—either way, the decision governs cases "still in the judicial process" and future cases.

This bright-line rule is necessary to reconcile the presumption of retroactivity with res judicata law. "'That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of res judicata.'" *Id*. at 749 (quoting *Segrest v. Segrest*, 649 S.W.2d 610, 612 (Tex. 1983)). Otherwise, the stability of judgments would be called into question each time the Supreme Court issues a decision that changes the law—an intolerable threat to the rule of law:

> The reason for not allowing collateral attack on a final judgment is that such an attack would run squarely against principles of res judicata that are essential to a rational and functioning judicial system. "Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action." The policies behind res judicata "reflect the need to bring litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery." For any rational and workable judicial system, at some point litigation must come to an end, so that parties can go on with their lives and the system can move on to other disputes. We have recognized the "fundamental rule that it is the purpose of the law to put an end to litigation and expedite the administration of justice."

Id. at 750 (internal citations omitted).

As the Texas Supreme Court explained, this proposition is not controversial. "It is consistent with American law generally." *Id*. at 749. It is widely recognized that public confidence in the courts depends on applying most rulings retroactively; applying decisions prospectively invites public criticism that courts are making law rather than applying established legal principles, favoring some litigants over others, and undermining the stability and predictability of the law. But those same values demand that the retroactivity principle not destabilize judgments that are final and no longer subject to appellate review:

> "Once a court announces a new rule of law, the integrity of judicial review requires application of the new rule to all similar cases pending on review in which the issue had been preserved for appellate review, even if the decision constitutes a clear break with past precedent. Thus, generally, judicial decisions are applied retroactively to all civil matters that have not reached final judgment."

Id. n.24 (quoting 20 Am. Jur. 2d *Courts* § 149 (2016) (footnotes omitted)).

WHEN IS PROSPECTIVITY WARRANTED UNDER TEXAS LAW – IF EVER?

What, then, is the appropriate test for prospectivity? A quarter century ago, the Texas Supreme Court adopted a three-part test that had been formulated by the U.S. Supreme Court for this purpose:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> Second, ... [the court] must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.
>
> Finally, [the court must] weig[h] the inequity imposed by retroactive application, for where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Carrollton-Farmers Branch I.S.D. v. Edgewood I.S.D., 826 S.W.2d 489, 518-19 (Tex. 1992) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (alterations in original)).

Under this balancing test, prospective application may be warranted when a new legal rule comes as a surprise—frustrating reliance interests in the prior law—and the frustration of those reliance interests would be "damaging" to third parties by threatening "very serious disruption." *Id*. at 520-21. In blunt terms, a decision may be applied prospectively when the broader social costs of retroactive application would be too severe for the Court to tolerate.

Edgewood illustrated this scenario, as the decision in that case held the existing property tax scheme for school finance unconstitutional. That ruling could have been given retroactive effect, requiring that the tax be refunded to the taxpayers. But doing so would have been "devastating" to Texas schools. *Id*. at 520.

> [A] retroactive holding would severely disrupt school finances during the current school year. It would cause wasteful school closings, delays in payments to teachers and administrators, and inestimable damage to the children whose education could be interrupted for an indeterminable amount of time.

Id. at 521. Unwilling to bear this social cost, the Court reasoned that "it is impossible to give full retroactive effect to our decision without destroying the constitutionally guaranteed interests that it serves." *Id*.; *see also Life Partners*, 464 S.W.3d at 684 (explaining *Edgewood*).

That same year, in *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992), the Court applied the *Chevron Oil* test and decided to invalidate "Mary Carter" agreements on a prospective basis only "because retroactive application would create substantial inequitable results for litigants who would have to re-try their cases and re-enter the clogged court dockets of this state when they could not have known that such agreements would be held to be void as against public policy." *Id*. at 251. Therefore, the ruling was applied only to the *Elbaor* case, to cases tried after the date of *Elbaor*, and also "to those cases in the judicial pipeline where error has been preserved." *Id*.; *see also State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 719-20 (Tex. 1996) (applying the same rationale to similarly objectionable agreements).

Prior to the decision in *Edgewood*, the Texas Supreme Court did not generally apply the three-part test of *Chevron Oil*.[1] It simply looked to "fairness and policy," placing emphasis on "the extent of public reliance on the former rule and the ability to foresee a coming change in the law." *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). This approach was applied to new tort claims for loss of consortium,[2] as well as various other decisions affecting litigation rights. *See Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990) (holding that clarification of appellate deadlines in receivership actions would apply prospectively); *Duncan v. Cessna Aircraft Co*., 665

[1] *But see Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 628 (Tex. 1987) (discussing *Chevron Oil* and prospectively recognizing the unconstitutionality of a repealed statute governing property conveyances because retroactivity would undermine the stability of land titles).

[2] *See Sanchez*, 651 S.W.2d at 254 (allowing parents to recover mental anguish damages for the wrongful death of minor children in "all future causes as well as those still in the judicial process"); *Cavnar v. Quality Control Parking, Inc*., 696 S.W.2d 549, 556 (Tex. 1985) (extending *Sanchez* to claims of minor children following the death of parents for "all future cases as well as those still in the judicial process"); *Reagan v. Vaughn*, 804 S.W.2d 463, 468 (Tex. 1990) (prospectively allowing recovery for loss of parental consortium caused by permanent injuries to parents because retroactivity would "open up a pandora's box" in light of the tolling of limitations for minors); *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978) (prospectively allowing recovery for loss of spousal consortium "as a matter of sound administration and fairness").

S.W.2d 414, 434 (Tex. 1984) (holding that common-law comparative fault rule for strict liability cases would apply prospectively "because litigants and trial courts have justifiably relied on" prior cases holding the statutory scheme did not apply); *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979) (holding that ruling dictating jury instructions would apply to all future trials); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (limiting parental immunity prospectively).

It is unclear whether this approach to prospectivity remains good law today. Both the *Sanchez* approach to prospectivity and the three-part *Chevron Oil* test originated with the U.S. Supreme Court, but that Court has significantly retreated from its prior approach to prospectivity. The Texas Supreme Court has not done so in doctrinal terms, but actions speak louder than words. For all practical purposes, prospective decisionmaking appears to be dormant in the Texas Supreme Court.

The U.S. Supreme Court definitively repudiated prospective decisionmaking in civil cases (at least under federal law) in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993). In that case, a five-judge majority set forth the following rule:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. at 97. *Harper* jettisoned the *Chevron Oil* test, and in a withering concurrence, Justice Scalia bade it a cheerful and emphatic farewell: "Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*." *Id*. at 105 (Scalia, J., concurring). The device "is quite incompatible with the judicial power," he concluded, and "courts have no authority to engage in the practice." *Id*. at 106.

State courts remain free to limit the retroactive effect of state-law decisions—a principle that can be traced back to Justice Cardozo. *See Harper*, 509 U.S. at 100 (citing *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)). But in federal court, at least, the doctrine is dead.

The current vitality of the prospectivity principle in Texas law is uncertain. Since *Harper*, the Texas Supreme Court has cited the *Chevron Oil* test approvingly in two cases following the general rule of retroactivity. *Life Partners, Inc. v. Arnold*, 464 S.W.3d 660, 684-85 (Tex. 2015) ("Applying the *Chevron* factors," the Court adhered to the general rule of retroactivity); *Baker Hughes, Inc. v. Keco R.&D., Inc.*, 12 S.W.3d 1, 4-5 (Tex. 1999) (holding that the *Chevron Oil* factors "clearly do not weigh in favor of a prospective application" of a ruling denying the discovery rule for trade secrets claims). And it has alluded to the *Chevron Oil* test in reaffirming "the discretion to depart from this general rule where circumstances dictate that we should apply a decision prospectively," but in that case it declined to reach the issue due to an intervening law. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 503 (Tex. 1997) (on rehearing). But only once since *Harper* has the Court actually applied the *Chevron Oil* test to give a decision prospective effect.

In *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 719-20 (Tex. 1996), the Court prospectively invalidated the assignment of an alleged tortfeasor's claim against its insurer to the underlying plaintiff. The majority decision relied on the three-part *Chevron Oil* test, but its analysis was perfunctory. The decision in *Gandy* was largely founded on the public policy rationale of *Elbaor*, so it is no surprise that *Gandy* followed the prospectivity discussion rationale of its 1992 decision in *Elbaor* (presumably without even realizing that it had been called into question by *Harper*). *Gandy*, therefore, can fairly be characterized as the exception that proves the rule.

Chief Justice Wallace Jefferson alluded to the demise of *Chevron Oil* in *Southwestern Bell Telephone Co. v. Mitchell*, 276 S.W.3d 443, 450-51 (Tex. 2008) (Jefferson, C.J., dissenting), and since that time the Texas Supreme Court has not relied on the *Chevron Oil* test in any majority decision. The few other references to *Chevron Oil* since *Harper* have been in dissent. *See Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 255-56 (Tex. 2010) (Jefferson, C.J., dissenting) (arguing that a decision interpreting statutory deadlines in health care liability suits should apply with "pure prospectivity"[3] to avoid penalizing litigants who had relied on trial court orders purporting to modify the deadlines); *Centex Homes v. Buecher*, 95 S.W.3d 266, 277-78 (Tex. 2002) (Hecht, J., dissenting) (arguing that a decision invalidating disclaimers of certain implied warranties in residential construction should not apply retroactively because it would void "*hundreds of thousands* of agreements between home

[3] "Pure prospectivity" alludes to a practice in which a new rule is not even applied to the litigants before the Court, but is simply announced as a new rule going forward. Chief Justice Jefferson suggested in *Spectrum Healthcare* that, unlike the version of retroactivity repudiated in *Harper*, the viability of "pure prospectivity" remains an open question. Although that may be true as a technical matter, the proposal is difficult to square with *Harper* and it has not yet been adopted by either the U.S. Supreme Court or the Texas Supreme Court.

builders and home buyers") (emphasis in original); *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 133 (Tex. 1996) (Gonzalez, J., dissenting) (arguing that a decision construing language in mineral leases should not apply retroactively).

There appear to be only two other exceptions to the general rule since *Harper*, neither of which included any doctrinal discussion of rules governing retroactivity. In *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 533 (Tex. 1998), the Court prospectively adopted a common-law rule for calculation of prejudgment interest that conformed to a statute. And in *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 929 (Tex. 1998), the Court prospectively adopted a rule governing the allocation of settlement funds between actual and punitive damages. Both times, the Court simply declared that its new rule would apply to future cases "and to all other cases currently in the judicial process in which the issue has been preserved." As explained above, there is no practical difference between this approach and the general rule of retroactivity, since extending a new rule to all cases "currently in the judicial process in which the issue has been preserved" effectively extends the rule to the same class of litigants who would benefit from it under the general rule—namely, those who had the foresight to preserve the issue.

Without saying so explicitly, the Texas Supreme Court is following the path marked by *Harper*. As a judicial tool, prospectivity appears to be dead in Texas.

PROSPECTIVITY AND PROPERTY RIGHTS – A CAVEAT FOR THE FUTURE?

There is an important distinction to be drawn between procedural decisions affecting rights in litigation and substantive decisions that affect property rights or other sorts of primary conduct. Although prospectivity may be discredited in the former area, it remains to be seen what will happen in the latter.

Many of the contexts in which the Texas Supreme Court historically applied its version of the prospectivity principle involved changes in the rules governing rights and remedies in litigation. Consider the following:

- *Mobil Oil* involved settlement allocations
- *Johnson & Higgins* involved calculation of prejudgment interest
- *Gandy* involved the assignability of insurance claims in tort litigation
- *Elbaor* involved "Mary Carter" settlement agreements
- *Huston* involved appellate deadlines in receivership actions
- *Duncan* involved comparative apportionment for strict liability cases
- *Sanchez*¸ *Cavnar*, *Reagan*, and *Whittlesey* all involved tort recovery for loss of consortium
- *Felderhoff* involved parental immunity

In these contexts, what has been said above holds true. Because the rights in question arise only in the context of litigation, there is no practical difference between the general rule of retroactivity (subject to preservation) and a version of prospectivity that extends the new right to all cases in the judicial process in which the issue has been preserved. The outcome will be the same. In substance, these decisions adhere to the general rule of retroactivity and simply reiterate the preservation requirement. But there is another class of cases, involving changes in law that alter property rights or other primary conduct, for which reconciling the two doctrines is not so simple.

In the property rights context, the Texas Supreme Court is justly concerned that reliance interests in existing property rules—and the stability of property titles—not be undermined by new decisions. In prior decades, the Court limited decisions resolving thorny questions clarifying property rights to prospective application only. *See, e.g.*, *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 628 (Tex. 1987) (limiting a decision recognizing the unconstitutionality of a repealed statute governing property conveyances because retroactivity would undermine the stability of land titles); *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984) (holding that uranium is a mineral and not part of a surface estate, thereby clarifying the uncertainty created by prior decisions, but applying that ruling prospectively "[b]ecause of the extent of public reliance on our holdings" in the prior cases); *Friedman v. Texaco, Inc.*, 691 S.W.2d 586, 587 (Tex. 1985) (applying *Moser* rule to mineral leases executed prior to the earlier line of decisions despite the argument that no comparable reliance interest existed at that time); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978) ("The addition of negligence as a ground of recovery shall apply only to future subsidence proximately caused by future withdrawals of ground water from wells which are either produced or drilled in a negligent manner after the date this opinion becomes final."). These decisions illustrate that reliance interests are most vital where property rights are concerned, making a compelling case for prospectivity.

A particularly good example of the compelling character of property rights is *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21 (Tex. 1978). There, the Texas Supreme Court considered a claim for property damage due to subsidence resulting from excessive drainage of underground waters on an adjoining property. Recognizing that the right to produce water without restriction was well-established,

and had induced widespread reliance, the Court upheld a judgment for the defendant. *Id*. at 29. "Even though good reasons may exist for lifting the immunity from tort actions in cases of this nature, it would be unjust to do so retroactively. The doctrine of Stare decisis has been and should be strictly followed by this Court in cases involving established rules of property rights." *Id.*

At the same time, the Court signaled that it would adopt a new rule for cases "caused by future withdrawals of ground water from wells which are either produced or drilled in a negligent manner after the date this opinion becomes final." *Id*. at 30. The Court specifically distinguished property rights from personal injury cases:

> [I]t has been suggested that this new ground of recovery should be applied in the present cause of action. This is often done when a court writes or adds a new rule applicable to personal injury cases, but seldom when rules of property law are involved. This is because precedent is necessarily a highly important factor when problems regarding land or contracts are concerned. In deeds, property transactions, and land developments, the parties should be able to rely on the law which existed at the time of their actions.

Id. at 30-31 (citations omitted) (citing, *inter alia*, *Great Northern Ry. Co. v. Sunburst Oil and Refining Co*., 287 U.S. 358 (1932)).

Strictly speaking, the logic of *Harper* applies with equal force to all cases. But the greater reliance interest in a transaction founded on a settled property right or contractual obligation is self-evident, which maximizes the case for prospectivity. Little wonder that two of the post-*Harper* dissents arguing for retroactivity arose in this precise context. *See Centex Homes*, 95 S.W.3d at 277-78 (Hecht, J., dissenting) (implied warranties); *Heritage Res.*, 939 S.W.2d at 133 (Gonzalez, J., dissenting) (mineral rights).

In these cases, a change in the law affects substantive rights that are fixed, either by deed or by contract, and it is not possible to limit the new rule to cases "currently in the judicial process in which the issue has been preserved." A change in the character of a mineral right, or the enforceability of a contractual obligation, can destabilize rights that are currently thought to be stable and give rise to litigation whether otherwise none would have existed. The only way to resolve such cases is (i) to accept the general rule of retroactivity and the disruption of prior expectations, limited only by the statute of limitations (and perhaps the consolation that the "loser" under the new rule has had the benefit of a more generous legal regime than deserved prior to the limitations period) or (ii) to give prospective effect to the new legal rule, limited to transactions occurring after the date of its announcement. In earlier eras, the Court was willing to follow the latter approach—at least some of the time. Whether it will do so again, in the aftermath of *Harper*, remains to be seen.