The Revival of Reliance and Prospectivity: *Chevron Oil* in the Immigration Context

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I. INTRODUCTION

In 1889, the Supreme Court recognized Congress's plenary power to regulate immigration.[1] In 1952, Congress passed the Immigration and Nationality Act (INA), which Congress has continually revised subject to the political and economic norms of the period.[2] The INA is a highly technical statute and its provisions have prompted much litigation. According to one judge, immigration cases make up forty-six percent of the Ninth Circuit's workload.[3] Through the INA, "Congress has developed a complex scheme governing admission to our nation and status within our borders,"[4] which has led to the present intricate and changeable nature of immigration law.[5]

In addition to its complexities, immigration law may result in severe consequences that oftentimes exceed the punishments in criminal law. While being present in the United States without permission is not a "crime,"[6] a removal order often triggers greater hardship than a criminal sentence. Families are separated, lives are dismantled, and frequently, the

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1. *See* Chae Chan Ping v. United States, 130 U.S. 581, 604–06 (1889).

2. *See* Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT'L LAW 471, 471 (1998).

3. In 2007, Judge Carlos T. Bea remarked that "[i]n the Ninth Circuit, I think . . . [immigration appeals] are up to forty-six percent of our cases." Judge Carlos T. Bea, Ninth Circuit, Debate at the 2007 National Lawyers Convention: Immigration, Amnesty, and the Rule of Law (Nov. 16, 2007), *available at* http://www.fed-soc.org/publications/detail/immigrati on-amnesty-and-the-rule-of-law-event-audiovideo.

4. Plyler v. Doe, 457 U.S. 202, 225 (1982).

5. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 517 (M.D. Pa. 2007) (holding that the determination of a right to remain in the United States required a complex legal analysis involving multiple federal statutes, prior court decisions, adjudicatory bodies, appeals, and exceptions); Won Kidane, *Immigration Law as Contract Law*, 34 SEATTLE U. L. REV. 889, 889 (2011) ("[I]mmigration law is a conundrum of a sort—very difficult to teach to law students, let alone explain to the ordinary migrant new to the American legal system.").

6. Conversely, crossing a U.S. border illegally is a misdemeanor. *See* 8 U.S.C. § 1325; *Plyer*, 457 U.S. at 205 ("Unsanctioned entry into the United States is a crime . . . .").

deportee is not permitted to return to the United States.[7] The Supreme Court has "long recognized that deportation is a particularly severe penalty,"[8] and there are a string of Supreme Court and circuit court decisions affirming the criminal and punitive nature of deportation.[9]

Regardless, deportation is not a criminal punishment, but a "civil sanction."[10] The civil nature of immigration proceedings means that various constitutional protections that apply in the context of a criminal trial are absent in a removal hearing.[11] This includes the Constitution's absolute prohibition against ex post facto laws—laws that apply retroactively.[12] The Constitution's bar on ex post facto laws and the presumption against retroactive legislation are rooted in Supreme Court jurisprudence.[13] It reflects a basic notion of fairness that individuals will not be punished for relying on prior legislative acts, that they will have an opportunity to know what the law is, and that they will have the ability to conform their conduct accordingly.[14] A presumption against retroactive legislation exists in the civil setting as well, but varying exceptions and Supreme Court inconsistencies and discrepancies make this area of law unpredictable.[15] The technical complexities, the conflicting agency and

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7. *See* 8 U.S.C. § 1182(a)(9)(B)(i). Deportees remain unable to return to the U.S. either permanently, or in some instances, until a certain amount of time has elapsed, for example, five, ten, or twenty years. *Id.*

8. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (internal quotation marks omitted) (finding that "deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes").

9. *See, e.g.*, Barber v. Gonzales, 347 U.S. 637, 642–43 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' . . . and should be strictly construed."); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (reading a deportation statute narrowly "because deportation is a drastic measure"); Bridges v. Wixon, 326 U.S. 135, 154 (1945). Additionally, Immigration and Customs Enforcement (ICE) significantly expanded its criminal enforcement policies in the past decade. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651, 653 (2009).

10. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . .").

11. There are various substantive and procedural safeguards mandated in criminal proceedings that are not required for immigration proceedings, including the right to a government-appointed lawyer, prohibitions on ex post facto laws, double jeopardy, and cruel and unusual punishment, the guarantee of a jury trial, and the standard of proof beyond a reasonable doubt. *See* Flemming v. Nestor, 363 U.S. 603, 612–17 (1960); Compean, 24 I. & N. Dec. 710, 726 (U.S. Dep't of Justice Jan. 7, 2009) ("The Sixth Amendment right to effective assistance of counsel in criminal cases does not apply because removal proceedings are civil."), *vacated*, 25 I. & N. Dec. 1 (Bd. of Immigration Appeals June 3, 2009).

12. Calder v. Bull, 3 U.S. 386, 389 (1798).

13. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

14. *See generally* Collins v. Youngblood, 497 U.S. 37 (1990).

15. *See generally* Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1565 (1998).

circuit court decisions, and the punitive nature of deportation make retroactivity within immigration law even more convoluted.

A hypothetical may help demonstrate the unique dangers that detrimental reliance and conflicting rules of law pose in the immigration context: a Mexican couple and their ten-year-old child cross the border illegally near the Tijuana San Ysidro port of entry and begin living in Los Angeles. Because the boy entered illegally, the INA prohibits the child from legalizing his status through most immigrant or non-immigrant visa processes within the U.S.[16] For twelve years the boy works illegally, saves money, and avoids detection. Then, Congress passes a law allowing certain aliens to apply for a waiver and adjust their status without having to return to their country of origin. The statute is ambiguous as to whether aliens, who entered illegally, may also apply for the waiver to adjust their status. The issue goes to the Ninth Circuit and the court rules that the waiver *does* apply to aliens who entered illegally. After this rule of law is announced, the boy comes out of hiding, hires an immigration attorney, pays the application fee of over $1,000, a fine of $1,000, and a waiver fee of over $500, and applies to adjust his status to that of a Legal Permanent Resident based on the Ninth Circuit's ruling.

Meanwhile, the agency in charge of executing immigration laws, the Board of Immigration Appeals (BIA), reviews the Ninth Circuit decision and issues a conflicting opinion that the waiver does *not* apply to aliens who entered illegally. Five years after its original decision, the Ninth Circuit revisits the issue and, based on principles of agency deference, gives effect to the BIA's interpretation. Meanwhile, the agency already accepted the boy's application fees, but never adjudicated the

16. *See* 8 U.S.C. § 1255(a). To be eligible for adjustment of status, the immigrant must be "admitted or paroled," meaning the boy must have entered the U.S. through a valid point of entry and presented himself to a Customs and Border Patrol agent. *Id.* To gain an immigrant or non-immigrant visa, the boy must depart from the U.S. and attempt to obtain the requisite visa at a U.S. consulate in Mexico. *See Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://uscis.gov (last visited Sept. 4 2012) (follow "Green Card" hyperlink; then "Green Card Processes and Procedures" hyperlink). But when the boy leaves the United States he becomes automatically inadmissible by virtue of his unlawful presence in the United States. *See* 8 U.S.C. § 1182(a)(9)(B)(i). To return to the U.S., the boy must not only be eligible for a visa, but now that he is inadmissible, he must illustrate that the denial of his visa will result in extreme hardship—hardship beyond the norm—to his parents or wife, assuming that they have Legal Permanent Resident (LPR) or United States Citizenship (USC) status. *See id.* § 1182(a)(9)(B)(v). If the boy's spouse or parent is not an LPR or USC, then the boy cannot return for ten years. *See id*. § 1182(a)(9)(B)(i). If his parent or spouse has the requisite status, but cannot illustrate that they would suffer hardship beyond what is normally suffered from separation, then the boy cannot return for ten years. *See id.* While the United States Citizen and Immigration Services reviews the application for a visa and waiver for unlawful presence, which can last from a few months to a few years, the boy must remain in Mexico.

application during the five-year period when the controlling interpretation of the law was in his favor. After the subsequent conflicting Ninth Circuit decision, the agency denies the boy's application and instead places him in removal proceedings.

In the five years that passed between the Ninth Circuit's two conflicting opinions, a great number[17] of individuals, like the boy, relied on the prior ruling, came out of hiding, spent their life savings on immigration attorneys and fees, and were then placed into removal proceedings after the agency accepted their applications and fees, then denied the applications based on the Court's subsequent decision. By applying the Ninth Circuit's decision retroactively, the boy and potentially hundreds of similarly situated individuals will be removed to their country of origin after acting to their detriment, by paying the thousands of dollars in application fees to the government and coming out of the shadows, in reliance on a previously announced rule of law. The potential unfairness of the retroactive application of law is manifest and contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations."[18]

This hypothetical is based on *Gonzales v. U.S. Department of Homeland Security* (*Duran Gonzales*), which, at the time of writing this Comment, is pending petition for rehearing en banc at the Ninth Circuit.[19] The Ninth Circuit first reheard *Duran Gonzales* in light of another recent Ninth Circuit decision, *Nunez-Reyes v. Holder*, but the three judge panel of *Duran Gonzales III* ultimately dismissed the plaintiff's action on October 25, 2011, applying the previously announced rule of law retroactively.[20] Plaintiffs then filed for a petition for rehearing en banc on December 9, 2011.[21] *Nunez-Reyes*, an en banc decision, addressed the question of *when* the court may apply a new rule of law to past events in the immigration context.[22] While factually distinct from *Duran Gonzales*,

17. The plaintiffs in *Duran Gonzales*,alleged that there were hundreds of prospective class members who filed applied for I-212 waivers in reliance on the rule announced in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *See* Gonzales v. U.S. Dep't of Homeland Sec., 239 F.R.D. 620 (W.D. Wash. 2006), *vacated and remanded*, 508 F.3d 1227 (9th Cir. 2007).

18. Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994) (considering whether section 102 of the Civil Rights Act of 1991 should be applied retroactively).

19. Gonzales v. U.S. Dep't of Homeland Sec. (*Duran Gonzales II*), 508 F.3d 1227 (9th Cir. 2007); *see also* Duran Gonzales v. U.S. Dep't of Homeland Sec. (*Duran Gonzales III*), 659 F.3d 930, 932 (9th Cir. 2011). For a discussion of the complex procedural history of *Duran Gonzales*, see *infra* Parts V and VI.

20. *Duran Gonzales III*, 659 F.3d at 939.

21. Petition for Rehearing En Banc, *Duran Gonzales III*, 659 F.3d 930 (No. 09-35174), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Duran-petition-rehearing-en-banc-final.pdf.

22. Nunez-Reyes v. Holder, 646 F.3d 684, 691–94 (9th Cir. 2011).

Nunez-Reyes applied a new rule of law to aliens *prospectively* only and, importantly, required the use of a test laid out in the Supreme Court's decision *Chevron Oil Co. v. Huson*.[23] The *Chevron Oil* test weighs reliance interests when deciding whether or not to apply an agency decision retroactively.[24] The Ninth Circuit's decision to use the *Chevron Oil* test to assess retroactivity is significant because, for the first time, circuit courts are recognizing that immigration cases do not fit squarely within the traditional civil context. Due to the very high stakes involved in immigration proceedings, upsetting reasonable, settled expectations based on the law in place at the time may result in severe consequences that transcend criminal punishment.[25]

Using *Duran Gonzales* as an example, this Comment discusses how courts determine when and if conflicting rules of law should be applied retroactively to aliens. Specifically, it argues that the holding in *Nunez-Reyes* and its use of the *Chevron Oil* test should be applied broadly to limit the retroactive application of law in certain immigration cases. Part II of this Comment gives a brief overview of Supreme Court retroactivity jurisprudence, the discretionary application of adjudicative retroactivity as described in *Chevron Oil*, and the Court's recent shift toward a more conservative approach. Part III discusses how administrative law affects that framework and how courts apply it after the Supreme Court, in *Chevron USA*[26] and *Brand X*,[27] adopted a policy of extreme agency deference.[28] Part IV discusses the Ninth Circuit's *Nunez-Reyes* decision. Part V traces the complex procedural and factual history of *Duran Gonzales* as well as the Ninth Circuit and BIA cases surrounding it. Part VI discusses the Ninth Circuit's recent decision of *Duran Gonzales III* and explains why it failed to apply *Nunez-Reyes* appropriately. Finally, Part VII offers a brief conclusion.

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23. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

24. *Nunez-Reyes*, 646 F.3d at 690.

25. *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1951) (Jackson, J., dissenting) (stating that deportation is a "penalty," "a drastic measure," "and at times the equivalent of banishment or exile"); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (noting that deportation may result in "loss . . . of all that makes life worth living"); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[T]o be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and oftentimes most severe and cruel.").

26. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

27. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

28. A full analysis of the Supreme Court's retroactivity jurisprudence and the interplay of agency law is beyond the scope of this Comment. For example, this Comment does not focus on the difference between primary and secondary retroactivity, the distinction between selective and pure retroactivity, or the specific constitutional limitations on retroactivity, nor does it examine in detail when courts do and do not defer to agency interpretation.

II. OVERVIEW OF CIVIL RETROACTIVITY

Retroactivity has a tortured history in the Supreme Court. Traditionally, the Court has distinguished between retroactive legislation by Congress and retroactive adjudication by the judiciary.[29] An assumption exists that statutes operate prospectively, while court decisions may apply retroactively to the parties under direct review.[30] Put simply, while Congress cannot create new laws that presently penalize prior conduct, judges may, through adjudication, issue decisions that affect previous behavior. While the origin of the doctrine traces back to the writing of the Constitution,[31] it was not formulated until a series of criminal law decisions in the 1960s.[32] Due to similar concerns of finality, fairness, reliance, and stare decisis, retroactivity presents a similar problem in both criminal and civil contexts.[33]

The first court to part with the traditional rule of retroactive application was *Linkletter v. Walker*, a criminal case decided in 1965, which held that a subsequent adjudication is subject to no set "principle of absolute retroactive invalidity" but instead that there are cases where the interests of justice make the rule prospective.[34] Thus, a determination of retroactivity depends on "weighing the merits and demerits in each case."[35]

Since *Linkletter*, the traditional rules for both civil retroactive legislation and adjudication began to erode. The Supreme Court formulated new tests that involved increased levels of judicial discretion in both areas. In the legislative context, the Court remained faithful to the principle that retroactive legislation is unjust, subject to few exceptions.[36] Conversely, adjudicative retroactivity has grown more complex and contra-

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29. *See* SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

30. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 311−12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student . . . .").

31. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

32. For an overview of the Warren Court decisions, see Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002).

33. Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994) ("[W]hile the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule.").

34. Linkletter v. Walker, 381 U.S. 618, 627 (1965). For a more complete explanation of *Linkletter* and its progeny, see Stephen I. Vladeck*, AEDPA,* Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 601−04 (2009).

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

36. *See, e.g.*, Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711 n.15 (1974) ("[T]he effect of a subsequent ruling of invalidity on a prior final judgment under collateral attack is subject to no fixed 'principle of absolute retroactive invalidity' but depends upon consideration of 'particular relations . . . and particular conduct.'"); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 282–83 (1969).

dictory in the past forty years. Like *Linkletter*, the Supreme Court's earlier cases were rooted in principles of fairness; however, the current state of the doctrine has been described as "inconsistent,"[37] frustrating,[38] and "somewhat chaotic."[39]

A. Adjudicative Retroactivity, Chevron Oil v. Huson*, and Its Progeny*

Generally, adjudicative rules are announced in the case under direct review. Because pre-existing facts are involved, and because the newly announced judicial decision applies to those facts, the new rule of law may apply retroactively to the parties under review.[40] The Supreme Court changed this general rule and developed a discretionary approach to civil-adjudicative retroactivity when it decided *Chevron Oil v. Huson* in 1971.[41]

Chevron Oil involved an action brought by the family of a workman injured on an oil drilling rig off the coast of Louisiana.[42] Three years after his injury, and during the discovery phase of the lawsuit, the relevant choice-of-law rule was overruled by *Rodrigue v. Aetna Casualty & Surety Co.* through its interpretation of the Lands Act.[43] The effect of *Rodrigue* was substantial: it shortened the statute of limitations for personal injury cases to one year, and, if applied retroactively to the plaintiff in *Chevron Oil*, would have time-barred his claim.[44]

After discussing prior civil cases, which refused to apply new rules retroactively, the *Chevron Oil* Court established a three-factor test to determine when a court's newly announced rule should only apply prospectively.[45] First, the judicial decision must announce a new principle of

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37. Stephens, *supra* note 15, at 1565.

38. William Reed Huguet, Note, Hulin v. Fibreboard Corp.-*In Pursuit of A Workable Framework for Adjudicative Retroactivity Analysis in Louisiana*, 60 LA. L. REV. 1003, 1004 (2000) ("[T]he temporal effects of judicial decisions continues to frustrate jurists and United States Supreme Court Justices alike.").

39. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 113 (1993) (O'Connor, J., dissenting). Justice O'Connor described the history of the doctrine:

> Three Terms ago, the case of *American Trucking* . . . produced three opinions, none of which garnered a majority. One Term later, *James B. Beam* . . . yielded five opinions; there, no single writing carried more than three votes. As a result, the Court today finds itself confronted with such disarray that, rather than relying on precedent, it must resort to vote counting: examining the various opinions in *Jim Beam*, it discerns six votes for a single proposition that, in its view, controls this case.

Id.

40. *Harper*, 509 U.S. at 86–87.

41. Chevron Oil Co. v. Huson, 404 U.S. 97, 106–09 (1971).

42. *Id*. at 98-99.

43. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).

44. *Chevron Oil*, 404 U.S. at 98−99.

45. *Id*. at 106−07.

law.[46] A new rule is only a "new principle of law" if it overrules past precedent *on which the parties relied*, or alternatively, interprets an issue of first impression, the resolution of which is not obvious.[47] Second, the court "'weigh[s] 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.'"[48] This factor looks at the overall policy of the rule and examines whether retroactive enforcement furthers that policy. Finally, the court considers whether the decision "could produce substantial inequitable results if applied retroactively."[49] This involves assessing the inequity that is imposed by retroactive application, usually due to good faith reliance on a previous rule of law.[50] For example, because immigration law often concludes in a removal order, the resulting inequity may be substantially higher than it would otherwise be in a traditional civil setting. Essentially, the three-factor test resembles a traditional balancing-of-equities approach.[51]

In *Chevron Oil*, the Supreme Court found that the three factors weighed in favor of applying the new rule only prospectively.[52] *Rodrigue* was a case of first impression, and because it was decided three years after the plaintiff's injury, the Court found that he had relied on the prior rule, that he could not foresee that it would be overturned, and that applying the new law retroactively would be unfair.[53] Additionally, because the goal of the Lands Act was to provide "comprehensive and familiar remedies" to individuals like the plaintiff, retroactive application of the ruling in this case would defeat this purpose by denying the plaintiff a remedy.[54]

The Supreme Court strictly adhered to the *Chevron Oil* test for fifteen years but continues to debate its vitality, making the area of adjudicative retroactivity far from settled.[55] The subsequent string of opinions are confusing and conflicting, and they create a series of complex issues.[56] While it appears that subsequent Supreme Court decisions eroded

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46. *Id*. at 106.

47. *Id*.

48. *Id*. (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

49. *Id.* at 107 (quoting Cipriano v. City of Houma, 395 U.S. 701, 704 (1969)).

50. *See id*.

51. Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 354 (2003). In this article, Levin provides an overview of a balancing of the equities approach.

52. *Chevron Oil*, 404 U.S. at 107.

53. *Id*. at 107–08.

54. *Id*. at 108.

55. *See generally* Stephens, *supra* note 15.

56. A thorough evaluation of Supreme Court jurisprudence on civil adjudicative retroactivity is beyond the scope of this Comment. For a full explanation of each case and the varying opinions,

the importance of the *Chevron Oil* test,[57] it was never expressly overruled.[58] Instead, the policy concerns of fairness and reliance, which were paramount in *Chevron Oil*, have been replaced by a more "classical" view that focuses on two primary concerns with prospectivity: (1) that a prospective application of an adjudicatory rule will result in inequity among parties; and (2) that prospectivity is a form of "judicial activism."[59]

Post-*Chevron Oil* decisions favored the retroactive application of law because it was central to the equal treatment of individuals.[60] Shifting toward a classical approach, the Court reasoned that fundamental notions of fairness dictate that similarly situated parties be treated similarly.[61] A retroactive application of the decision allows for equality because the new rule applies to all cases and prevents the Court from conferring the new rule in a single case.[62] The Court was concerned that if new rules were applied prospectively to only those who first brought the issue to a court, those parties would be the only ones to take *advantage* of the new rule.[63] Importantly, this view is concerned with rules that might be advantageous, rather than rules that might be punitive.

Also inherent in the classical view are unflinching principles concerning the separation of powers—the Court considered its larger role as a rule interpreter rather than a rule maker.[64] Specifically, Article III of the Constitution only permits federal courts to hear "cases" or "controversies."[65] Because the judiciary does not have the power to "create" law, a new rule resolving a specific controversy must be applied to all similar cases pending on direct review. Therefore, as Justice Scalia noted in *American Trucking Ass'ns v. Smith*, "prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."[66]

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doctrines, and principles, see Stephens, *supra* note 15. *See also* Meir Katz*,* Comment, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review,* 25 CARDOZO L. REV. 1979 (2004).

57. *See* Harper v. Va. Dep't of Taxation*,* 509 U.S. 86, 87–88 (1993).

58. Nunez-Reyes v. Holder, 646 F.3d 684, 688–94 (9th Cir. 2011).

59. *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); Ashland Oil, Inc. v. Caryl, 497 U.S. 916 (1990); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990); Griffith v. Kentucky, 479 U.S. 314 (1987).

60. *See Beam*, 501 U.S. at 530.

61. *Id*.

62. *See id*. at 540–44 (holding that according to principles of equality and stare decisis, it is error for a court to refuse to retroactively apply a law when it was applied to the case announcing the law).

63. *Id*.

64. *Id.* at 544.

65. U.S. CONST. art. III, § 2, cl. 1.

66. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., dissenting); *see* Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (Harlan, J., concurring) ("In truth, the Court's asser-

Justice Scalia's approach equates prospectivity with "judicial activism" because the law has always been the law, and courts merely state what it is.[67] Prospectivity would create two rules of law where Congress created one, and judges do not have the power to "create" law in this manner.[68] To avoid judicial activism, this view engages in a "legal fiction" by pretending that the prior judicial interpretation of the law never existed. Even though there are successive conflicting interpretations of a statute, the law can only have one true meaning and, therefore, has always "meant" the same thing. The subsequent rule applies retroactively because that is what the law has *always* been, even when the subsequent rule is diametrically opposed to the previous one. This classical approach denies judges' status as lawmakers and elevates retroactivity to a constitutional mandate.[69]

This reasoning was espoused in both *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Department of Taxation*, yet both cases resulted in multiple opinions and no clear standard. *Beam* produced five separate opinions in which, according to Justice Souter, "principles of equity and stare decisis . . . prevail[] over any claim based on *Chevron Oil* analysis."[70] Justice Scalia concurred in the judgment and wrote separately to expressly disapprove of the judicial activism inherent in prospective-only application.[71] The majority of the opinions did not apply the *Chevron Oil* test. Conversely, the dissenters applied *Chevron Oil*, argued for prospectivity, and based their opinions on the "potentially devastating liability without fair warning" for the "blameless" defendants.[72]

Harper involved retired federal employees attempting to take advantage of a previously announced Supreme Court decision—they sought refunds for state income taxes and argued that a prior rule should

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tion of power to disregard current law in adjudicating cases . . . that have not already run the full course of appellate review, is quite simply an assertion that [its] constitutional function is not one of adjudication but in effect of legislation.").

67. *See Am. Trucking*, 496 U.S. at 201 (Scalia, J., dissenting); *see also Beam,* 501 U.S. at 549 (Scalia, J., concurring) (noting that judges have the power "'to say what the law is,' not the power to change it" (citation omitted) (quoting Marbury v. Madison*,* 5 U.S. (1 Cranch) 137 (1803))).

68. *See Beam*, 501 U.S. at 550 (Blackmun, J., concurring) ("Unlike a legislature, we do not promulgate new rules to 'be applied prospectively only' . . . ."); *see also* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 106 (1993) (Scalia, J., concurring) ("The true *traditional* view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice.").

69. *See generally Harper*, 509 U.S. 86.

70. *Beam,* 501 U.S. at 540.

71. *See id.* at 549 (Scalia, J., concurring).

72. *Id.* at 558 (O'Connor, J., dissenting). Chief Justice Rehnquist and Justice Kennedy joined Justice O'Connor's dissent.

apply retroactively to them.[73] The rule at issue in *Harper* was benevolent rather than penal. Relying on *Beam*, *Harper* adopted a rule that a new judicial rule of law will generally be applied retroactively to all cases *pending on direct review*, even if events predate or postdate the court's announcement of the rule.[74] Because the lower court did not apply the holding to the parties in that case, the Supreme Court reversed.[75] Thus, in cases where the rule has already been retroactively applied to the parties on direct review, that application trumps *Chevron Oil*.[76] The Court did not, however, overrule *Chevron Oil*, nor did it provide further guidance as to when it should be applied.

Beam, *Harper*, and other post-*Chevron Oil* cases disregarded reliance interests and created a presumption of retroactivity. They ignored the "individual hardships"[77] that occur when adjudicative authorities issue contradicting opinions. Specifically, they disregarded "whether [individuals] actually relied on the old rule and how they would suffer from retroactive application of the new."[78] Equality and principles of separation of powers replaced reliance as the foremost protected value, and reliance was relegated to remedy law.[79]

Even with the Supreme Court's shift in policy, its opinions remained fractured: *Chevron Oil* was never expressly overruled, there is no clear doctrinal stance on the issue of adjudicative retroactivity, and circuit splits are common.[80] Specifically, the Court has never specified when lower courts may use the *Chevron Oil* test. Therefore, this Comment argues that because the consequences in immigration law are more severe than other areas of civil law, courts should apply the *Chevron Oil* test in evaluating retroactivity concerns in immigration cases, just as the Ninth Circuit did in *Nunez-Reyes*.[81]

B. A Working Framework in Legislative Retroactivity: Landgraf v. USI Film Products

In the immigration context, the circuit courts and the BIA are usually the authorities that announce new rules. Certainly, Congress has amended and promulgated new portions of the INA, but the majority of

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73. *Harper* 509 U.S. at 89–92.
74. *Id.* at 97.
75. *Id.* at 97–100.
76. *Id.* at 98.
77. *See* Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987).
78. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (1991).
79. *See* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 198 (1990).
80. *See generally* David N. Mark, *Retroactivity of Statute of Limitations Ruling Under the Influence of Jim Beam*, 29 IDAHO L. REV. 361 (1993) (discussing *Chevron Oil*'s continuing vitality).
81. Nunez-Reyes v. Holder, 646 F.3d 684, 689 (9th Cir. 2011).

the new rules come from administrative and judicial interpretation, rather than agency rulemaking or congressional enactment.[82] Accordingly, this Comment is largely dedicated to discussing adjudicative retroactivity. Yet, because the post-*Chevron Oil* cases are difficult to apply, analyzing retroactive legislation provides a helpful working framework.

For retroactive legislation, the Supreme Court formulated a clear framework in a 1994 case, *Landgraf v. USI Film Products*.[83] The *Landgraf* Court held that when Congress enacts new legislation, absent an express prescription of the statute's reach, courts must determine retroactivity by inquiring "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[84] The Court retreated toward its traditional presumption that the statute should not apply retroactively unless there is a "clear congressional intent favoring such a result."[85]

The *Landgraf* opinion embodied concerns about notice and fairness similar to those that animated the Court's analysis of adjudicative retroactivity in *Chevron Oil*. The framework weighed fairness concerns along with legislative objectives and renewed the Court's hostility toward retroactive legislation.[86] While not a bright-line rule, *Landgraf* provides a workable framework for lower courts to address retroactive legislation. Conversely, there is no Supreme Court precedent equivalent to *Landgraf* to guide lower courts in addressing adjudicative retroactivity.[87]

C. The Ninth Circuit's Montgomery Ward *Test*

Due to the Supreme Court's lack of guidance in the area of civil retroactive adjudication, the Ninth Circuit adopted its own test in *Montgomery Ward & Co. v. FTC* in 1982.[88] The court adopted a new test that clarified whether a new agency rule should apply retroactively.[89] Under the *Montgomery Ward* test, if the agency adopts a new rule, the court must consider five factors to determine whether the new rule applies retroactively:

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82. For a list of laws amending the INA, see *Public Laws Amending the INA*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://uscis.gov (last updated June 2012) (follow "Laws" hyperlink; then "Public Laws Amending the INA" hyperlink).

83. 511 U.S. 244 (1994).

84. *Id*. at 280.

85. *Id.*

86. *Id.* at 265–73.

87. This is primarily the case because of the concerns emphasized in the "classical" approach, as articulated by Justice Scalia. *See supra* Part II.A.

88. 691 F.2d 1322 (9th Cir. 1982).

89. *Id.* at 1333.

> (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 unsettle 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 the reliance of a party on the old standard.[90]

The factors recognize that the agency has an interest in applying its decision retroactively; however, those interests are balanced with the potentially unfair application to the individual.[91] Unique to the *Montgomery Ward* test, in the civil adjudicatory context, is a presumption *against* retroactivity and its emphasis on detrimental reliance in deciding whether to apply a new rule retroactively.[92] In the immigration context, the Ninth Circuit used the *Montgomery Ward* test several times to prohibit the retroactive application of a newly announced BIA rule.[93]

Montgomery Ward was the Ninth Circuit's response to unclear Supreme Court jurisprudence. Both *Landgraf* and *Montgomery Ward* demonstrate that it is necessary to consider reliance interests because the potential for unfairness is significant. That danger is even greater in immigration cases because of the combination of judicial deference to agencies and the penal nature of these cases. Agency deference increases the danger of inequitable retroactive application in two ways. First, it limits judicial review of agency adjudication. Second, it creates conflicting rules of law between the circuit courts and the agency. The potential dangers of agency deference are discussed in Part III, which explores the administrative law decisions affecting retroactivity in the immigration context.

III. INCREASING AGENCY DEFERENCE: *CHEVRON USA* AND *BRAND X*

> *"The dynamics of the three branches of Government are well understood as a general matter. But the role and position of the agency, and the exact locus of its powers, present questions that are delicate, subtle, and complex."*[94]

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90. *Id*.

91. Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007).

92. Great W. Bank v. Office of Thrift Supervision, 916 F.2d 1421, 1431 (9th Cir. 1990).

93. *See Miguel-Miguel*, 500 F.3d at 950−51; Chang v. United States, 327 F.3d 911, 917−18 (9th Cir. 2003).

94. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 536 (2009) (Kennedy, J., concurring).

Unlike traditional civil and criminal cases, an administrative agency adjudicates cases based on its own interpretation of the controlling statute. The Supreme Court confronts those statutory issues with the agency's interpretation in mind. Because of the agency's expertise in the particular area of law[95] and Congress's decision to provide agencies with the power to execute the law, courts must acknowledge agencies' authority to interpret the statutory scheme at issue.[96] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron USA*) the Supreme Court mandated this congressional deference.[97]

Chevron USA requires courts to defer to agency interpretation when the underlying statute is ambiguous. Agency deference, or "Chevron deference," replaces the de novo judicial review of the agency's legal conclusions.[98] Applying Chevron deference to an ambiguous statute is a two-step test.[99] First, the court determines whether the statute's plain terms "directly . . . [address] the precise question at issue."[100] If the intent of Congress is clear, then the court and the agency must give effect to the unambiguously expressed intent of Congress because an unambiguous statute "contains no gap for the agency to fill."[101] If the court determines "Congress has not directly addressed the precise question at issue," the court defers to the agency's interpretation and asks whether the agency's answer is based on a permissible construction of the statute.[102] If the statute is unclear and the agency's construction is reasonable, then the court accepts that construction of the statute.[103] This deference reflects the agency's expertise and Congress's allocation of power to the agency to properly execute the law.[104] While there are exceptions to Chevron deference,[105] it is a dominating principle in administrative law.

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95. *See* Ryan M. Carson, Note, *Chinks in the Armor: Municipal Authority to Enact Shoreline Permit Moratoria After* Biggers v. City of Bainbridge Island, 31 SEATTLE U. L. REV. 177, 210−11 (2007) ("Agencies are given deference because it is presumed that some measure of added competence or expertise is present within the agency, more so than the general legislative body.").

96. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 841–42 (1984). "The adoption of the 'Chevron doctrine,' as it is commonly known, has spawned a vast range of issues for litigation and scholarly commentary." Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 572 (2007)..

97. *Chevron USA*, 467 U.S. at 841–43.

98. *Id.* at 842–44.

99. *Id.* at 842.

100. *Id.*

101. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).

102. *Chevron USA*, 467 U.S. at 843.

103. *Id*.

104. *See generally* United States v Mead Corp., 533 U.S. 218 (2001). Chevron deference is especially warranted if the agency's interpretation involves highly technical policy considerations that the federal courts have no experience in. *Id*. As a result, when litigants challenge "the wisdom of [an] agency's policy," rather than its reasonableness under the relevant statute, the challenge must

The Supreme Court went even further in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, requiring Chevron deference to agencies' legal conclusions whenever a circuit court decision conflicted with an agency's conclusions and those conclusions were based on an ambiguous statute.[106] In *Brand X*, the Supreme Court deferred to the Federal Communications Commission's interpretation of a federal statute even though it conflicted with existing Ninth Circuit precedent.[107] Circuit court precedent only controls if it stems from an unambiguous statute,[108] but courts must defer to an agency's reasonable interpretation of an ambiguous statute that carries the "force of law."[109] Importantly, the *order* in which courts and agencies construct a statute does not limit the deferential weight accorded to the agency.[110] Thus, when an agency issues a subsequent opinion and it conflicts with prior circuit court precedent, the circuit court must overrule its precedent and defer to the agency's interpretation. This is because *Brand X* extends Chevron deference—even when courts interpret an ambiguous statute before the agency does.[111]

The BIA, within the Executive Office for Immigration Review, is the principal federal administrative agency to which Congress delegated the authority to adjudicate the INA through the Attorney General and the Department of Justice.[112] Chevron deference applies to the BIA as it interprets the INA—the BIA provides meaning to those provisions of the INA that are ambiguous.[113] Through BIA's case-by-case adjudication, it

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fail: "federal judges–who have no constituency–have a duty to respect legitimate policy choices made by those who do." *Chevron USA,* 467 U.S. at 866.

105. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587-88 (2000) (holding that when agency actions lack the force of law—such as opinion letters and policy statements—the Circuit Court may interpret the law de novo because the agency has not been delegated authority to administer it).

106. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

107. *Id*. at 968–69.

108. *Id*. at 982.

109. *Id*. at 982–83. Although the Court did not define "force of law," the Ninth Circuit subsequently concluded that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference." Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1157 (9th Cir. 2008) (deciding whether statutory rape under § 261.5 of the California Penal Code is sexual abuse of a minor for immigration purposes, but not applying the *Chevron* doctrine to the BIA's interpretation because the BIA's ruling did not carry the force of law).

110. *Brand X*, 545 U.S. at 983.

111. *Id.*

112. 8 U.S.C. § 1103(a)(1).

113. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 416 (1999); Renteria-Morales v. Mukasey, 551 F.3d 1076, 1081 (9th Cir. 2008).

bridges the INA's statutory gaps,[114] and published decisions by the BIA meet the "force of law" requirement.[115] If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron USA* requires federal courts to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.[116] Therefore, the Ninth Circuit must, generally, defer to the BIA's construction of the INA, even if it believes that construction to be erroneous.

Judicial deference to the BIA, however, is not always appropriate. A court's prior judicial construction of a statute will trump the agency's construction if the court decision follows from the unambiguous terms of the statute.[117] If the statute is unambiguous there is no room left for agency discretion.[118] *Chevron USA* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[119] Even though the court's interpretation of an ambiguous statute is not authoritative, a different agency construction does not indicate that the court's holding was necessarily legally incorrect.[120]

It is within the agency's power to choose a different construction of the statute because it is the authoritative interpreter of such statutes—within the limits of reason.[121] In all other respects, the court's prior ruling remains binding law.[122] The precedent has not been "reversed" by the agency any more than a federal court's interpretation of a state's law can be said to have been "reversed" by a state court that adopts a conflicting—yet authoritative—interpretation of state law. In practice, however, circuit courts will usually reverse a prior position once a subsequent and

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114. *See Aguirre-Aguirre*, 526 U.S. at 416; *see also Brand X*, 545 U.S. at 982 ("[I]t is for agencies, not courts, to fill statutory gaps.").

115. *See Renteria-Morales*, 551 F.3d at 1081.

116. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

117. *Id.* at 865–66.

118. *Id.*

119. Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740−41 (1996).

120. *See Chevron USA*, 467 U.S. at 843.

121. *Id.*

122. *Id*. For example, the court's rulings would trump agency interpretations to which *Chevron* deference does not apply. *Id*.

conflicting agency interpretation has been issued, and the particular issue reaches the circuit court in a later case.[123]

In sum, under the Supreme Court's *Chevron USA* and *Brand X* decisions, the BIA need only issue an opinion that carries the force of law—making it eligible for Chevron deference—to set aside the Ninth Circuit's interpretation. Then, under *Brand X*, circuit courts are forced to overrule precedent unless they can show that the statute was unambiguous, the ruling did not carry the force of law, or the BIA's interpretation was arbitrary, capricious, or manifestly contrary to the statute.[124]

This extreme deference to the BIA, coupled with the Supreme Court's post-*Chevron Oil* retroactivity jurisprudence discussed in Part II, can result in fundamental unfairness when an alien acts in reliance on prior circuit court precedent that is later supplanted by a new administrative rule, placing the alien in a detrimental position. Aliens rely on valid circuit court precedent, the court defers to the BIA and changes its rule, and the court then applies that rule retroactively to those aliens. In 2011, the Ninth Circuit recognized the inequity that reliance and retroactivity can have in the immigration arena when it refused to apply a new administrative rule retroactively in *Nunez-Reyes v. Holder*.[125] Part IV of this Comment traces the *Nunez-Reyes* decision and its use of *Chevron Oil* to alleviate the unfairness of retroactivity in the immigration context.

IV. RELIANCE INTERESTS AND *CHEVRON OIL* REVIVED: *NUNEZ-REYES V. HOLDER*

In deciding *Nunez-Reyes*, the Ninth Circuit overruled its prior decision in *Lujan-Armendariz v. INS*.[126] *Lujan-Armendariz*—on the basis of equal protection theory and the Federal First Offender Act (FFOA)—provided that a vacated, expunged, or otherwise set-aside state conviction for first time, simple possessory offenses of controlled substances nullified the effects of the conviction on one's immigration status.[127] It created an exception to the general rule, applicable only in the Ninth Circuit, that convictions expunged pursuant to state rehabilitative statutes

123. *See, e.g.*, Duran Gonzales II, 508 F.3d 1227, 1235 (9th Cir. 2007) (holding that the BIA's decision *In Re Honorio Torres-Garcia* precluded the Ninth Circuit's previous and conflicting construction of an amendment to the INA).

124. *See* 5 U.S.C. § 706. Derived from the Administrative Procedure Act, the "arbitrary and capricious standard" is interpreted very narrowly.

125. 646 F.3d 684 (9th Cir. 2011).

126. *Id.* at 688; Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000).

127. *Lujan-Armendariz*, 222 F.3d at 736. For example, a crime of shoplifting, a crime of moral turpitude making it a deportable offense under the INA, could be waived under the FFOA and the rule announced in *Lujan-Armendariz*. *See id.*; *see also* 8 U.S.C. § 1227.

would not be given effect.[128] Of every circuit court, the Ninth Circuit was the only one to adopt this interpretation and apply the FFOA to state convictions.[129] Thus, it was only a matter of time before *Lujan-Armendariz* would be overturned—the only question was to what extent. *Nunez-Reyes* answered that question by overturning *Lujan-Armendariz* and holding that the FFOA could no longer be applied to state criminal convictions.[130] But the court found retroactivity concerns with the application of this new rule and specifically limited its decision to apply only *prospectively* to aliens convicted *after* the publication of *Nunez-Reyes*.[131]

In finding that the new rule should not be imposed retroactively on people who had been convicted prior to the new rule being announced, *Nunez-Reyes* applied *Chevron Oil*'s three-factor test.[132] The *Nunez-Reyes* court, sitting en banc, recognized the complexities of the Supreme Court's retroactive adjudicatory jurisprudence and acknowledged that decisions like *Harper* and *Beam* cast doubt on whether the *Chevron Oil* test is still good law.[133] *Nunez-Reyes* held that while the "default principle" is to apply the court's decision retroactively, the court found itself "bound by *Chevron Oil*" because "all three of [its] requirements . . . are met."[134] The court laid out the requirements: (1) a civil case, (2) an announcement of a "new rule of law," and (3) the new rule's lack of a relationship to the court's jurisdiction.[135] The new rule must apply to all similarly situated parties, meaning that the court cannot pick and choose to whom the decision applies prospectively and to whom it applies retroactively.[136] If the court does not have the jurisdiction to apply the new law prospectively, it cannot do so. [137] Because *Nunez-Reyes* involved a civil case, where the court announced a new rule of law that did not concern its jurisdiction, the court applied the *Chevron Oil* test.[138]

Finding that *Chevron Oil* applied, the *Nunez-Reyes* court then proceeded through the three-step *Chevron Oil* test to decide if the newly announced rule should apply retroactively. The first step in the *Chevron*

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128. *Lujan-Armendariz*, 222 F.3d at 737.

129. *See, e.g*., Gill v. Ashcroft, 335 F.3d 574, 576 (7th Cir. 2003); Vasquez-Velezmoro v. INS, 281 F.3d 693, 695 (8th Cir. 2002).

130. *Nunez-Reyes*, 646 F.3d at 688.

131. *Id*. at 690.

132. *Id*. at 691 ("We apply the three-pronged test outlined in Chevron Oil . . . .").

133. *See id*. The *Nunez-Reyes* court noted that, in *Harper*, "the Supreme Court cast serious doubt upon the continuing vitality of the Chevron Oil test." *Id.* (citations omitted).

134. *Id.* at 692.

135. *Id.* at 691.

136. *Id.* at 690.

137. *Id.* at 691.

138. *Id*. at 692 ("In this civil case, we announce a new rule of law that does not concern our jurisdiction. The Chevron Oil test applies.").

Oil test requires that the court announce "a new principle of law." [139] For example, under the prior rule in *Lujan-Armendariz*, aliens pleaded guilty to certain crimes knowing that their convictions could be expunged and not affect their immigration status.[140] *Nunez-Reyes* established a new rule by overruling *Lujan-Armendariz*, a precedent upon "which previous litigants may have relied."[141] Moreover, in determining whether a court announced a "new principle of law," the *Nunez-Reyes* court considered the clarity of the prior rule and stressed the importance of reliance interests.[142] Specifically, the court considered whether aliens would suffer a penalty if they could not rely on the old rule and whether they could "make a fully informed decision" based on the conflicting rules of law.[143] Because of the consistent application and reliance on the rule in *Lujan-Armendariz*, the court found that *Nunez-Reyes* declared a new principle of law.[144] Importantly, the first step of the *Chevron Oil* test, as analyzed by the *Nunez-Reyes* court, considers retroactivity apart from agency deference. The court did not use *Chevron USA* or *Brand X* to defer to the BIA, but instead focused on reliance interests to determine that a new rule of law had been announced.[145]

The court proceeded to the second step of the *Chevron Oil* test by considering the "effect and purpose" of the new principle of law and analyzing whether "retroactive operation will further or retard that rule's operation."[146] The court acknowledged that while Congress intended state-law convictions to have adverse immigration consequences, Congress also intended that aliens receive the constitutional protections of the justice system.[147] Under *Lujan-Armendariz*, aliens could plead to certain categories of offenses before having a jury trial, resulting in the uninformed waiver of their constitutional rights.[148] And while the waiver of one's constitutional rights was important, the court also held that the retroactive application of the *Nunez-Reyes* rule would not further immigration laws because "[c]ontrary to their understanding that there would be *no* immigration consequences, the actual consequence is the severe penalty of removal."[149] Thus, because aliens relied on the prior rule, and

139. *Id.*
140. Lujan-Armendariz v. INS, 222 F.3d 728, 732-34 (9th Cir. 2000).
141. *Nunez-Reyes*, 646 F.3d at 692 (citations omitted).
142. *Id.* at 693−94.
143. *Id.*
144. *Id.* at 694.
145. *Id.*
146. *Id*. at 699.
147. *Id.* at 699–700.
148. *See generally* Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000).
149. *Nunez-Reyes*, 646 F.3d at 694.

would be severely penalized because of that good-faith reliance, the resulting inequity is sufficient to retard the rule's ultimate operation.[150]

The third step asks whether the application of the new rule "could produce substantial inequitable results if applied retroactively."[151] The court found the facts of *Nunez-Reyes* "easily" satisfied this step because of the fundamental unfairness in promising aliens no legal consequences and then "[holding] retroactively that their convictions actually carried with them the particularly severe penalty of removal."[152] The court also cited an Eleventh Circuit case, in which the court determined that "[i]t would be inequitable to punish those parties for following the clearly established precedent of this Circuit."[153] Because of the reliance on a clear precedent, and the severe resulting penalty, the court found that the respondents satisfied the third step of the *Chevron Oil* test.[154]

In analyzing each step of *Chevron Oil* test, the court focused on the reliance interests that a retroactive application would affect—interests that have lain dormant since *Chevron Oil*. *Nunez-Reyes*'s emphasis on reliance issues exemplifies the unique nature of immigration law and highlights its punitive aspects, which create a greater potential for unfairness. When retroactivity is an issue in an immigration case, it is insufficient to treat it like any other civil or administrative case. The Ninth Circuit's application of *Chevron Oil* is a reaction to the inequity of applying agency deference and retroactivity to aliens that are penalized for relying on clear precedent. The decision in *Nunez-Reyes* is a unique doctrinal position that should be broadened and expanded in the immigration context. Unfortunately, a three-member panel of the Ninth Circuit recently narrowed the *Nunez-Reyes* holding in *Duran Gonzales v. U.S. Department of Homeland Security* (*Duran Gonzales III*).[155] Part V of this Comment will trace the complex procedural history and analysis of *Duran Gonzales II* and *III*.

V. *DURAN GONZALES V. DEPARTMENT OF HOMELAND SECURITY I* AND *II*

This section explains the series of *Duran Gonzales* cases, the facts of which are used to set up the hypothetical at the beginning of this Comment. It will trace the Ninth Circuit's reaction after the BIA promulgated a conflicting interpretation of an ambiguous immigration statute

150. *Id.*

151. *Id*. at 694 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971)).

152. *Id*. (citations omitted).

153. *Id*. (quoting Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 545 (11th Cir. 2002)).

154. *Id.*

155. 659 F.3d 930 (9th Cir. 2011).

and the affect of the retroactive application of that subsequent interpretation on aliens who relied on the prior Ninth Circuit rule.

The statute at issue is the Legal Immigration Family Equity (LIFE) Act, which was enacted on December 21, 2000, and altered the INA to allow for certain previously ineligible aliens to remain in the country while seeking to adjust their own status.[156] Section 245(i) of the LIFE Act was ambiguous as to whether previously deported aliens who subsequently re-entered without inspection could apply for a discretionary waiver—an "I-212 waiver"—along with their adjustment of status application.[157] This ambiguity was of vast importance to a number of aliens, present in the U.S. illegally, who could not apply for an adjustment of status (to a Legal Permanent Resident) because they had previously entered without inspection, entered on visas that prohibited adjustment of status, or overstayed their visas and thus were generally ineligible for adjustment of status.[158] Section 212(a)(9)(C)(i) renders immigrants who re-enter the U.S. without inspection inadmissible, but permits them to apply for a waiver once they have remained outside the U.S. for ten years.[159] Thus, for many immigrants, the LIFE Act was an opportunity to waive their prior re-entry, adjust their status, and remain in the country legally. Yet, the ambiguity of the LIFE Act opened the door for judicial and administrative interpretation.

In 2004, the Ninth Circuit was faced with the task of resolving the LIFE Act's ambiguity in *Perez-Gonzalez v. Ashcroft*.[160] The court held that the LIFE Act did, in fact, waive an alien's illegal re-entry bar and allow aliens to adjust their status under § 245(i) if the alien applied for, and was granted permission to reapply for, admission after deportation via the discretionary I-212 waiver.[161] Significantly, the court expressly rejected the argument that § 245(i) did not apply to aliens who had re-entered without inspection and admission after having been deported.[162]

Approximately two years later, the BIA issued a conflicting decision. It decided *Matter of Torres-Garcia*, and disagreed with the conclusion in *Perez-Gonzalez* by holding that inadmissibility based on §

156. *See* U.S.C. § 1255(i).

157. *See* 8 C.F.R. § 212.2(e). The law states that "an applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status . . . by filing an application" for permission to reapply for an I-212 waiver." *Id*.

158. *See* Gonzales v. U.S. Dep't of Homeland Sec., 239 F.R.D. 620 (W.D. Wash. 2006), *vacated and remanded*, 508 F.3d 1227 (9th Cir. 2007).

159. 8 U.S.C. § 1182(C)(i).

160. Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004).

161. *Id*. at 788–92.

162. *Id*. at 790 ("[Section] 245(i) clearly contemplates that some aliens who have entered the country without legal admission can receive adjustment of status.").

212(a)(9)(C)(i) (re-entry without admission) cannot be cured with a I-212 waiver.[163] Thus, *Torres-Garcia* prohibited the filing of I-212 waiver forms with applications for adjustment of status after removal of the alien and the alien's re-entrance without being inspected and admitted.

Before the *Perez-Gonzalez* decision in 2004, the named plaintiffs in *Duran Gonzales* had been living illegally without detection.[164] While they had previously been deported, each re-entered the United States without inspection and remained unlawfully.[165] Because of the plaintiffs' deportation and illegal reentry, they were unable to adjust their statuses to that of legal permanent residents based on their inadmissibility under § 212(a)(9)(C)(i) of the INA.[166] After the Ninth Circuit's *Perez-Gonzalez* decision, the plaintiffs in *Duran Gonzales* came out of hiding, paid thousands of dollars to immigration attorneys, and in addition, each applicant paid the government approximately $3,000.[167] The plaintiffs submitted all the proper forms and fees to the United States Citizenship and Immigration Services (USCIS) for adjudication, and the USCIS accepted the fees and applications.[168]

Adjudication of adjustment of status applications can take years to process. While the plaintiffs' applications were pending, they appealed the BIA's interpretation in *Torres-Garcia*, relying on the Ninth Circuit's *Perez-Gonzalez* decision. The matter did not reach the Ninth Circuit until 2007, when the Ninth Circuit, in *Duran Gonzales II*, rejected the plaintiff's argument that the ambiguous statute should be construed in their

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163. Torres-Garcia, 23 I. & N. Dec. 866, 876 (BIA Jan. 26, 2006). The BIA held as follows:

> As discussed above, 8 C.F.R. § 212.2 does not purport to implement section 212(a)(9)(C)(ii) of the Act. Even if the regulation were applicable, however, we could not interpret it in a manner that would allow an alien to circumvent the statutory 10-year limitation on section 212(a)(9)(C)(ii) waivers by simply reentering unlawfully before requesting the waiver. After all, it is the alien's unlawful reentry without admission that makes section 212(a)(9)(C)(i) applicable in the first place. . . . We find that the more reasonable interpretation of the statutory framework discussed above is that an alien may not obtain a waiver of the section 212(a)(9)(C)(i) ground of inadmissibility, retroactively or prospectively, without regard to the 10-year limitation set forth at section 212(a)(9)(C)(ii).

Id.

164. Duran Gonzales II, 508 F.3d 1227, 1231 (9th Cir. 2007).

165. *Id.*

166. Section 212(a)(9)(C)(i) bars aliens who are deported and illegally re-enter, like the plaintiffs in *Duran Gonzales*, from being admitted to the U.S. for ten years.

167. To complete the adjustment of status process, immigrants must pay: (1) a $1,000 penalty to excuse their entry without admission; (2) general form filing fees for the adjustment of status process amounting to $1,490; and (3) a $585.00 fee to apply for an I-212 waiver that allows immigrants to reapply for admission after having been deported. *Forms*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://uscis.gov (last visited Sept. 4, 2012) (follow "Forms" hyperlink).

168. *See Duran Gonzales II*, 508 F.3d at 1231.

favor, and instead deferred to the BIA's decision in *Torres-Garcia*.[169] The Ninth Circuit based its decision on the Supreme Court's decisions in *Brand X* and *Chevron USA*, stating that it would no longer follow the rule in *Perez-Gonzalez* and would instead defer to the BIA's reasonable interpretation of the statute.[170] Importantly, *Duran Gonzales II* overruled *Perez-Gonzales* not because it was an unlawful interpretation of § 245(i), but because the agency promulgated a contrary interpretation of an ambiguous statute, which the court deferred to under *Brand X* and *Chevron USA*.[171] Thus, the Ninth Circuit adopted the *Torres-Garcia* rule and remanded to the district court pursuant to that decision.[172]

The Ninth Circuit's decision in *Duran Gonzales II* was the first decision in the country to use *Brand X* to defer to an agency's interpretation of an ambiguous statute that contradicted a circuit court's prior interpretation.[173] The question remained whether the Ninth Circuit's overruling of *Perez-Gonzalez* in *Duran Gonzales II* would be retroactively applied to the plaintiffs, who acted in reliance on the previous rule.[174] No court had addressed a situation where an agency's new rule conflicted with the circuit court's precedent, individuals relied on the new rule, and the circuit court deferred to the agency decision pursuant to *Brand X* and *Chevron USA*.[175] On remand to the district court, the plaintiffs argued that the new rule announced in *Duran Gonzales II* should not apply retroactively, but the district court never addressed the retroactivity concerns and dismissed the plaintiff's claims.[176] The plaintiffs appealed the district court's decision to the Ninth Circuit in *Duran Gonzales III*, stating that the district court erred in failing to conduct any retroactivity analysis.[177] The primary issue in *Duran Gonzales III* was whether the new rule, an-

169. *Id.* at 1236 ("Accordingly, *Brand X* requires us to review our prior opinion in *Perez-Gonzalez* in light of the BIA's subsequent decision in *In re Torres-Garcia*. If we conclude that *Perez-Gonzalez* was based, at least in part, on ambiguity in the applicable statutes, then pursuant to *Chevron* and *Brand X* we must give deference to the agency's resolution of these ambiguities in *In re Torres-Garcia*.")

170. *Id.* at 1241–42.

171. *Id.*

172. *Id.* at 1242–43.

173. *Id.*

174. *See* Opening Brief for Plaintiffs-Appellants at 16, Duran Gonzales III, 659 F.3d 930 (9th Cir. 2011) (No. 09-35174), 2009 WL 3459943. The plaintiffs stated, "[T]he retroactivity question now presented is whether the new rule should be applied to those class members who had already filed their applications before the new rule was announced, i.e., in reliance on the old rule under which they were eligible to have their waiver applications adjudicated." *Id.*

175. *See id*.

176. *See* Gonzalez v. U.S. Dept. of Homeland Sec., No. C06–1411–MJP, 2009 WL 302283 (W.D. Wash. Feb. 6, 2009).

177. *Id*.

nounced in *Duran Gonzales II*, should be retroactively applied to the plaintiffs.

The plaintiffs argued that the district court should have applied either the Ninth Circuit's *Montgomery Ward* test, the *Landgraf* test, or the *Chevron Oil* test.[178] Conversely, the government relied on recent Supreme Court retroactivity cases, such as *Harper* and *Beam*, stating that there exists a presumption of retroactivity, which disallows the application of *Chevron Oil* or any other retroactivity test.[179]

While *Duran Gonzales III* was pending, another Ninth Circuit panel issued the decision *Morales-Izquierdo v. Department of Homeland Security*.[180] *Morales-Izquierdo* applied the *Duran Gonzales II* rule retroactively to a different plaintiff.[181] Similar to the plaintiffs in *Duran Gonzales*, the plaintiff in *Morales-Izquierdo* applied for an I-212 waiver before the BIA's *Torres-Garcia* decision, and argued that the *Duran Gonzales II* rule should not apply retroactively.[182]

The *Morales-Izquierdo* court refused to apply the *Duran Gonzales* rule prospectively because, even though § 245(i) of the LIFE Act was ambiguous, and the meanings the BIA and the Ninth Circuit ascribed to the LIFE Act were inherently inapposite, a statute can only have one meaning and, pursuant to *Brand X* and *Chevron USA*, the agency decides that meaning.[183] It adopted the classical approach espoused by Justice Scalia, which provides that a prospective application would create two rules from the same single authority—an impermissible form of judicial activism in which the court would be legislating instead of adjudicating.[184] Additionally, because *Duran Gonzales II* overruled *Perez-Gonzalez* pursuant to agency deference, it is not a new rule of law that would make prospective application impermissible.[185] In support of its conclusion, the court cited the Supreme Court's decision in *Harper*, stating that "new judicial decisions interpreting old statutes have long been applied retroactively to all cases open on direct review, 'regardless of

178. *See* Plaintiff's Reply Brief at 17, *Duran Gonzales III*, 659 F.3d 930 (No. 09-35174), 2009 WL 3459945.

179. *See* Brief for Defendants-Appellees, *Duran Gonzales III*, 659 F.3d 930 (No. 09-35174), 2009 WL 3459944.

180. Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1081 (9th Cir. 2010).

181. *Id.*

182. *Id*.

183. *Id*. at 1086−88.

184. *Id*. at 1089. "'[T]he Court's assertion of power to disregard current law in adjudicating cases . . . that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.'" *Id.* (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)).

185. *Morales-Izquierdo*, 600 F.3d at 1090.

whether . . . events predate or postdate' the statute-interpreting decision."[186]

Interestingly, shortly after the panel decision of *Morales-Izquierdo*, the Ninth Circuit issued its en banc decision, *Nunez-Reyes*, reviving the civil retroactivity test from *Chevron Oil*.[187] Accordingly, the *Duran Gonzales* plaintiffs argued that because of the similar reliance interests present in *Nunez-Reyes*, the court should not apply the *Duran Gonzales II* rule retroactively because the *Chevron Oil* test applies.[188] Plaintiffs emphasized their reliance interests: they had paid a large sum of money for counsel, immigration fees, and fines, and much worse, they had been subjected to summary removal and separation from their lawful permanent resident and U.S. citizen families because they had relied on a previously announced Ninth Circuit rule.[189]

Conversely, the government argued that *Morales-Izquierdo* held that the rule announced in *Duran Gonzales II* applied retroactively to all cases open on direct review.[190] It attempted to limit *Nunez-Reyes*, stating that *Nunez-Reyes* mandates a *Chevron Oil* test only when an alien waives his or her *constitutional* rights.[191] Because no constitutional rights were at stake in *Duran Gonzales*, the reliance interests were not sufficient to warrant a prospective application.[192] The next Part of this Comment will explore the Ninth Circuit panel's decision in *Duran Gonzales III*, which downplays reliance interests, narrows *Nunez-Reyes*, and, ultimately, does very little to further genuine retroactivity jurisprudence.

VI. *DURAN GONZALES III*

After the BIA issued its conflicting *Torres-Garcia* decision, the Ninth Circuit deferred to the BIA in *Duran Gonzales II*, then applied that rule retroactively in *Morales-Izquierdo*, and issued its en banc decision in *Nunez-Reyes*, which revived *Chevron Oil* in the immigration context.

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186. *Id.* (quoting Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993)).

187. *See generally* Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011).

188. *See* Supplemental Brief of Plaintiffs-Appellants at 4, Duran Gonzales III, 659 F.3d 930 (9th Cir. 2011) (No. 09-35174), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/duran-gonzalez-supplemental-brief-2011-08-24.pdf.

> The en banc opinion in Nunez-Reyes makes clear that it was incumbent on the District Court to engage in a retroactivity analysis to determine whether the new rule announced in this case should be applied prospectively only. Specifically, Nunez-Reyes clarifies that the District Court should have applied the three factor test laid out in *Chevron Oil Co. v. Huson*. . . .

Id. at 3.

189. *Id.* at 8.

190. *Morales-Izquierdo*, 600 F.3d at 1088.

191. *Id.*

192. *Id.*

The Supreme Court's lack of guidance in the area of civil adjudicative retroactivity gave the Ninth Circuit the opportunity, in deciding *Duran Gonzales III*, to create a new guiding principle in this complex area of immigration law. With the facts in *Duran Gonzales*, the court could have extended *Nunez-Reyes*, mandated the application of *Chevron Oil*, and limited the fundamental unfairness that results when the BIA and circuit courts issue conflicting decisions. Instead, the *Duran Gonzales III* panel issued a narrow holding, denied prospective-only application, and did little to direct future retroactivity concerns.[193]

After recounting the involved procedural history, the court discussed *Morales-Izquierdo* and *Nunez-Reyes* in turn.[194] The court reasoned that *Nunez-Reyes* stood for a presumption of retroactive application, and that if a new rule is to be applied only prospectively, this should be announced in the decision itself.[195] Because *Duran Gonzales II* did not expressly limit its holding to prospective application, as the court did in *Nunez-Reyes*, the Ninth Circuit could not now limit the holding in this way.[196] Therefore, *Duran Gonzales II*'s retroactive effect was automatic as soon as it was published without a prospective-only limitation.[197] This, of course, is the opposite of legislative retroactivity, in which a new statute applies only prospectively unless the statute contains a clear mandate of retroactivity.[198]

Regardless, the court held that *Duran Gonzales II* was not silent as to retroactivity because the final paragraph stated, "[P]laintiffs as a matter of law are not eligible to adjust their status because they are ineligible to receive I–212 waivers."[199] Essentially, the court relied on the rule from *Harper*, which states that a new judicial rule of law applies retroactively to the parties on direct review.[200] By stating that the plaintiffs are ineligible, *Duran Gonzales II* automatically applied the rule retroactively to the plaintiffs. But there is a stark contrast between the plaintiffs in *Harper*, who were attempting to take *advantage* of a change in the law, and the plaintiffs in *Duran Gonzales*, who are being *punished* for it.

Finally, the court determined that "our opinion in *Morales–Izquierdo*, . . . held that *Duran Gonzales II* applies retroactively, and we are bound by that decision."[201] In sum, the *Duran Gonzales III* panel lim-

193. *See generally* Duran Gonzales III, 659 F.3d 930 (9th Cir. 2011).
194. *Id.* at 933-39.
195. *Id.* at 938-39.
196. *Id*. at 939.
197. *Id.*
198. Landgraf v. USI Film Prods., 511 U.S. 244, 244 (1994).
199. *Duran Gonzales III*, 659 F.3d at 934.
200. *Id.*
201. *Id*. at 939.

ited its analysis to constraining external factors. It skirted the retroactivity issues recently revived in *Nunez-Reyes* and instead focused on circumspect stare decisis concerns, stating that "because we determine that we cannot retroactively revise *Duran Gonzales II* to have only prospective application, we need not determine whether we would limit *Duran Gonzales II* to prospective application if we could."[202] Because *Morales-Izquierdo* expressly applied the new rule retroactively, and because *Duran Gonzales II* applied its new rule to the plaintiffs, the court was bound by those decisions.[203] In so holding, the *Duran Gonzales III* panel made several errors in its analysis.

First, the court incorrectly concluded that it was bound by *Morales-Izquierdo* instead of *Nunez-Reyes.* The subsequent en banc decision of *Nunez-Reyes* mandated the application of *Chevron Oil* when there is a new rule of law announced in a civil case that does not concern a court's jurisdiction.[204] Thus, *Morales-Izquierdo* conflicted with *Nunez-Reyes* in holding that when an agency rule is adopted pursuant to *Brand X*, it *must* be applied retroactively.[205] Because the cases conflicted on this point and the reasoning in *Morales-Izquierdo* was superseded by *Nunez-Reyes*, *Duran Gonzales III* was incorrect in relying on *Morales-Izquierdo* when that authority is irreconcilable with *Nunez-Reyes*.[206]

Further, the court erred in stating that a decision to apply the new rule prospectively must be announced in the decision itself. The court reasoned that because *Duran Gonzales II* did not consider the application of the *Chevron Oil* factors, it precluded the possibility of doing so subsequently.[207] But a host of lower courts have applied *Chevron Oil* after an appellate court reversed precedent without deciding the retroactivity issue.[208] Moreover, *Nunez-Reyes* never stated that a prospective-only ruling must be announced at the time the new rule is announced.

The bulk of the court's reasoning for affirming *Morales-Izquierdo* and rejecting *Nunez-Reyes* and *Chevron Oil* is relies on the Supreme Court's recent cases discussing civil-adjudicative retroactivity such as *Harper*, *Beam,* and *Rivers v. Roadway Express.* As noted in Part II, these cases use a "legal fiction" to preclude prospective-only application of

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202. *Id*. at 940.

203. *Id.*

204. Nunez-Reyes v. Holder, 646 F.3d 684, 688–89 (9th Cir. 2011).

205. Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1081 (9th Cir. 2010).

206. *See* Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1019 (9th Cir. 2006) (holding that where the reasoning of a prior authority is irreconcilable with the reasoning of an intervening higher authority, a panel is bound by the intervening higher authority).

207. *Duran Gonzales III*, 659 F.3d at 938−39.

208. *See, e.g*., Shah v. Pan Am. World Servs., Inc., 148 F.3d 84, 91 (2d Cir. 1998); Holt v. Shalala, 35 F.3d 376, 380 (9th Cir. 1994); B.B. ex rel. J.B. v. Haw. Dep't of Educ., 483 F. Supp. 2d 1042, 1049–50 (D. Haw. 2006); Carrol v. Sullivan, 802 F. Supp. 295, 303 (C.D. Cal. 1992).

adjudicatory rules. This "fiction" is that when there are two conflicting judicial constructions of a statute, the court will treat the subsequent interpretation as if it was the *original* and only interpretation. Rather than treating the two conflicting rules as separate (and applying them as such), the court pretends that the first rule never existed. The Supreme Court reasoned that to do otherwise would create two rules when Congress has only promulgated one, turning the judiciary into legislative "activists" rather than passive interpreters.

While this reasoning may be effective in traditional civil adjudicatory cases, it does not take into account *Brand X*, where the agency's interpretation prevails, and the unique concerns of immigration law, where reliance interests result in severe consequences. *Brand X* holds that the agency is the "authoritative interpreter . . . of such statutes," and this extreme deference generates conflicting rules of law between the agency (BIA) and circuit courts.[209] Aliens that put faith in the prior circuit court rules can be deported because they relied in good faith on a binding, published rule of law that was then changed pursuant to *Brand X*. Thus, this "legal fiction" of treating the conflicting rules equally, which was only recently espoused by the Supreme Court, is especially pernicious because it causes fundamental inequities and has disastrous consequences for immigrants.

Finally, and most importantly, the court erred in limiting the application of *Nunez-Reyes*. *Nunez-Reyes* recognized the inequity of retroactivity in cases applying *Brand X*, and decided that the *Chevron Oil* test was necessary to alleviate that unfairness. But the *Duran Gonzales III* court chose to narrow the *Nunez-Reyes* decision by stating that the reliance issues there were more significant because they rose to the level of waiving one's constitutional right:

> [T]he situation in *Nunez–Reyes* is distinct from that presented in this appeal. In *Nunez–Reyes*, the petitioner and others similarly situated waived constitutional rights in reliance on our prior opinion. . . . Here, the Plaintiffs, in relying on *Perez–Gonzalez*, did not waive any constitutional right, although they did disclose to the government their illegal presence within the country. Whatever weight might be given to such reliance, it is considerably less than that given to the waiver of a constitutional right.[210]

Yet, *Nunez-Reyes* never limited its holding to cases in which constitutional rights were at stake. As discussed in Part IV, the fact that the respondents in that case would be waiving their right to a jury trial was

209. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).
210. *Duran Gonzales III*, 659 F.3d at 940–41.

neither a threshold requirement for whether the *Chevron Oil* test applied, nor a necessary reliance interest. The constitutional right, the waiver of a jury trial, was discussed only *after* the court decided that the test should apply. And even though the respondents would have waived a constitutional right in reliance on the prior rule, making their case stronger, it was never a requirement that constitutional rights be at stake. The threat of removal may be an even more convincing reliance interest. Moreover, the application of *Chevron Oil* has never required a constitutional right. Indeed, *Chevron Oil* was not a constitutional challenge, but a question of statutory interpretation.[211]

Therefore, the *Duran Gonzales III* court erred in not binding itself to the holding in *Nunez-Reyes*. Had it done so, the court would have concluded that because *Duran Gonzales* involved a civil case in which the court announced a new rule of law that did not concern its jurisdiction, the *Chevron Oil* test applied. Given the strength of the reliance interests in that case, it is unlikely that the court would then have applied *Duran Gonzales II* retroactively to the plaintiffs.

VII. CONCLUSION

Duran Gonzales III's reasoning is flawed in several respects, and more importantly, it is a step backward from addressing the important issues that *Nunez-Reyes* attempted to alleviate. The Ninth Circuit's decisions in *Nunez-Reyes* and *Duran Gonzales III* reflect the same conflicting principles in the Supreme Court's adjudicative retroactivity jurisprudence. *Nunez-Reyes* is a return to *Chevron Oil*'s reliance-based principles, while *Duran Gonzales III* affirms the reasoning in *Morales-Izquierdo* that "when a court interprets a statute, even an ambiguous one, and even when that interpretation conflicts with the court's own prior interpretation, the new interpretation is treated as the statute's one-and-only meaning."[212] Where *Nunez-Reyes* elevated reliance principles, *Duran Gonzales III* distinguished and narrowed them. Given the Supreme Court's incoherent jurisprudence on the subject, it is not surprising that the Ninth Circuit is struggling to produce a clear consensus. This Comment argues that it should favor the principles of reliance to create a clear driving principle in the immigration context.

This argument is furthered by the administrative law principles discussed in *Chevron USA* and *Brand X*. Under *Brand X*, the court in *Duran Gonzales II* was obligated to adopt the agency's new rule. When courts are required to reverse precedent based on a conflicting agency rule,

211. *See generally* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

212. Morales-Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1076, 1090 (9th Cir. 2010).

principles of fundamental fairness inherent in this country's Constitution, weigh against applying that rule retroactively.[213] *Brand X*'s effects cannot be overstated. That decision will continue to create the same issues present in *Duran Gonzales*.[214] The Ninth Circuit, the circuit that handles the most immigration appeals in the country, should generate a guiding principle that reflects the inequity of retroactivity in immigration law. It began with *Nunez-Reyes* and the application of *Chevron Oil*, and it should rehear *Duran Gonzales III*, en banc, and extend the *Nunez-Reyes* holding in that case.

213. *Id*.

214. *See* Plaintiff's Petition for Rehearing En Banc at 2, *Duran Gonzales III*, 659 F.3d 930 (No. 09-35174), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Duran-petition-rehearing-en-banc-final.pdf.