
ADMINISTRATIVE LAW — RETROACTIVE RULES — D.C. CIRCUIT HOLDS THAT EPA RULE MODIFYING CAP-AND-TRADE REGULATORY SYSTEM FOR HYDROCHLOROFLUOROCARBONS IS IMPERMISSIBLY RETROACTIVE. — *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010).

Agencies may not promulgate retroactive rules without express statutory authorization.¹ Retroactive rules take away or impair vested rights.² But “retroactivity rules are easy to state, less easy to apply.”³ Recently, in *Arkema Inc. v. EPA*,⁴ the D.C. Circuit, using vested rights analysis, held that the EPA’s 2010 Final Rule on Protection of Stratospheric Ozone⁵ would have an impermissibly retroactive effect.⁶ The majority concluded that the 2010 Final Rule was retroactive because it did not honor permanent intracompany baseline transfers of pollution allowances made under a 2003 Rule.⁷ However, rather than trying to divine what rights had been vested and when, the circuit court should have viewed the issue through the lens of primary and secondary retroactivity to clarify this inquiry.⁸ As Justice Scalia has suggested, while rules with a primary retroactive effect are prohibited unless expressly permitted by Congress, forward-looking rules may have a secondary retroactive effect as long as they are reasonable.⁹ The 2010 Final Rule is forward looking with reasonable secondary retroactive effects only and thus should be permissible. This primary-secondary framework provides more flexibility to agencies, simplifies courts’ analysis, and more accurately discerns inequitable rules.

Title VI of the Clean Air Act¹⁰ (CAA) required the EPA to use a market-based cap-and-trade system to protect stratospheric ozone.¹¹

¹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

² *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 268–69 (1994); *Nat’l Mining Ass’n v. U.S. Dep’t of the Interior (Nat’l Mining I)*, 177 F.3d 1, 8 (D.C. Cir. 1999); *cf. Bowen*, 488 U.S. at 219 (Scalia, J., concurring) (defining retroactive rules as those that “alter[] the *past* legal consequences of past actions”).

³ *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010); *see also Landgraf*, 511 U.S. at 270.

⁴ 618 F.3d 1.

⁵ Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, 74 Fed. Reg. 66,412 (Dec. 15, 2009) (codified at 40 C.F.R. pt. 82) [hereinafter 2010 Final Rule].

⁶ *Arkema*, 618 F.3d at 3, 10; *see also id.* at 7–9 (arguing that denial of recognition retroactively altered the consequences of past actions).

⁷ Protection of Stratospheric Ozone: Allowance System for Controlling HCFC Production, Import and Export, 68 Fed. Reg. 2820, 2851–52 (Jan. 21, 2003) (codified at 40 C.F.R. pt. 82) [hereinafter 2003 Rule].

⁸ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219–20 (1988) (Scalia, J., concurring).

⁹ *See, e.g., id.* (stating the difference between primary and secondary retroactivity).

¹⁰ 42 U.S.C. §§ 7401–7671q (2006 & Supp. III 2009).

¹¹ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. VI, sec. 602, §§ 601–618, 104 Stat. 2399, 2648–70 (codified at 42 U.S.C. §§ 7671–7671q). Section 607 of the Clean Air Act al-

Under the Act, hydrochlorofluorocarbons (HCFCs) are gradually phased out by annual percentage reductions against a baseline year.¹² Congress delegated to the EPA the authority to implement the statute.¹³ In 2003, the EPA promulgated a rule establishing baseline HCFC consumption allowances for each regulated entity.¹⁴ Seeking to provide maximum flexibility, the 2003 Rule allowed temporary transfers of current-year allowances and permanent transfers of baseline allowances.¹⁵ Moreover, regulated entities could make intercompany transfers or intracompany, inter-pollutant transfers.¹⁶ The 2003 Rule's language made clear that it was the governing framework for 2003 through 2009 and that a new rule would govern the next reduction period beginning in 2010.¹⁷

In 2009, the EPA promulgated the 2010 Final Rule to govern the 2010–2014 control periods.¹⁸ The EPA carried forward the 2003 baseline allocations along with adjustments from intercompany baseline transfers but did not honor intracompany, inter-pollutant baseline transfers.¹⁹ The EPA agreed with commenters that “adjusting the baselines to reflect intracompany, inter-pollutant transfers could create incentives for future manipulation.”²⁰

During the notice-and-comment period, only two companies — Arkema and Solvay — supported recognizing intracompany transfers,

lows companies below their pollution limit to trade extra allowances to other companies and to convert pollution allowances of one substance into another on an ozone depletion-weighted basis. See Clean Air Act § 607, 42 U.S.C. § 7671f. These amendments satisfied U.S. commitments under the Montreal Protocol. See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989).

¹² Clean Air Act §§ 602(b), 605, 42 U.S.C. §§ 7671a(b), 7671d.

¹³ Clean Air Act §§ 605, 607, 42 U.S.C. §§ 7671d, 7671f.

¹⁴ 2003 Rule, *supra* note 7, at 2851–52. According to the Montreal Protocol, the phase-out of HCFCs would begin by 2004 after the phase-out of the more destructive chlorofluorocarbons (CFCs) for which HCFCs were “transitional substitutes.” Brief of Respondent at 6, *Arkema*, 618 F.3d 1 (Nos. 09-1318, 09-1335) (quoting Protection of Stratospheric Ozone; Listing of Substitutes for Ozone-Depleting Substances, 65 Fed. Reg. 42,653, 42,655 (July 11, 2000) (codified at 40 C.F.R. pt. 82)). Because the EPA allocated HCFCs on a one-time basis, “allocations would remain the same from control period to control period Only through permanent transfers of allowances would a company’s baseline allocation be changed.” 2003 Rule, *supra* note 7, at 2823.

¹⁵ 2003 Rule, *supra* note 7, at 2835.

¹⁶ *Id.* at 2833. Intercompany transfers are transfers between two companies of allowances for the same or differing types of pollutants. An intracompany, inter-pollutant transfer is a conversion of some allowance of one type of HCFC into another on an ozone depletion-weighted basis.

¹⁷ *Id.* at 2823, 2836.

¹⁸ 2010 Final Rule, *supra* note 5, at 66,412.

¹⁹ *Id.* at 66,421 (“[T]he final allocation reflects adjustments due to inter-company transfers but not inter-pollutant transfers.”).

²⁰ *Id.* Because the EPA was reducing allocations on a “worst-first” approach, *id.*, a corporation anticipating a larger reduction in one pollutant could transfer its baseline allocation of that pollutant into a different form that would be reduced by a lesser percentage. That corporation could then make reciprocal current-year allowance transfers into the original type of HCFC, allowing it to avoid much of the reduction. See *Arkema*, 618 F.3d at 11 (Randolph, J., dissenting).

and not surprisingly, both would have benefited from permanent baseline transfers they had made during the 2003–2009 period.²¹ Hoping to extend the benefits of their past transfers, they filed a petition for review claiming the regulation was arbitrary and capricious because it failed to acknowledge or justify the change, misinterpreted the CAA, and was impermissibly retroactive.²²

The D.C. Circuit granted the petition for review in part, vacating the 2010 Final Rule's denial of recognition of intracompany baseline transfers under the 2003 Rule.²³ Writing for a divided panel, Judge Brown²⁴ singled out “whether the Agency ha[d] changed its interpretation of Title VI of the CAA” as the case's core issue.²⁵ A change in policy not only must be acknowledged and explained,²⁶ but also must not “retroactively alter the consequences of [the agency's] actions.”²⁷ After noting that the record “reflects that the EPA's practice under the 2003 Rule was to allow Petitioners' baseline transfers,”²⁸ Judge Brown concluded that the change was impermissibly retroactive.²⁹

The EPA had granted intracompany baseline transfers under the 2003 Rule to Arkema and Solvay.³⁰ According to the majority, “once the Agency has approved permanent changes to the baseline as a result of inter-pollutant transfers . . . , it cannot . . . undo these completed transactions.”³¹ Furthermore, despite the EPA's contention that it had “never maintained any policy allowing for the recognition of inter-pollutant transfers in perpetuity,”³² the court concluded that *permanent* baseline transfers must be carried over into the 2010–2014 stepdown period.³³ After all, businesses could reasonably expect

²¹ See 2010 Final Rule, *supra* note 5, at 66,421; Brief of Respondent, *supra* note 14, at 17. Arkema and Solvay transferred HCFC-142b baseline allowances into HCFC-22 allowances. Brief of Respondent, *supra* note 14, at 31–32. As HCFC-142b was determined to be the worse pollutant, its allocations were reduced to 0.47% of baseline while HCFC-22 allocations were reduced to 41.9% of baseline in 2010. 2010 Final Rule, *supra* note 5, at 66,428–29. Recognizing the transfers would have allowed the two companies to receive 38% and 912% more HCFC-22 allowances while each of the other companies received 16% fewer. *Id.* at 66,421.

²² See Joint Brief of Petitioners at 22–26, *Arkema*, 618 F.3d 1 (Nos. 09-1318, 09-1335).

²³ *Arkema*, 618 F.3d at 10.

²⁴ Judge Brown was joined by Chief Judge Sentelle.

²⁵ *Arkema*, 618 F.3d at 6.

²⁶ *Id.* at 6–7; see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009).

²⁷ *Arkema*, 618 F.3d at 7. Judge Brown, while criticizing the EPA's “awkward straddle” of denying that a change in policy occurred yet attempting to provide reasons for the change, *id.* at 6–7, did not deny that its reasonable explanation would “shield the Agency's *prospective* application of the [2010] Final Rule from an arbitrary and capricious challenge.” *Id.* at 9; see also *id.* at 10.

²⁸ *Id.* at 8.

²⁹ *Id.* at 9.

³⁰ *Id.* at 8.

³¹ *Id.* at 9.

³² Brief of Respondent, *supra* note 14, at 20.

³³ See *Arkema*, 618 F.3d at 9.

“changes to last beyond the particular stepdown period.”³⁴ Relying heavily on statements from two cases involving the National Mining Association,³⁵ the court held that the 2010 Final Rule “operates retroactively [to] take[] away or impair[] vested rights.”³⁶ According to the majority, because the new interpretation of the CAA “contradict[ed] . . . past practice, narrowing the range of options and altering the legal landscape, the Agency’s refusal to account for [past] baseline transfers . . . [was] impermissibly retroactive.”³⁷

Although Judge Brown implied earlier that the rule’s future effect was problematic because it thwarted expectations, in the end she wrote that the main shortcoming of the 2010 Final Rule was that it would have had the effect of undoing allowance transfers that the EPA previously treated as permanent.³⁸ The 2010 stepdown “did not give the EPA an opportunity to revisit the baseline transactions it previously approved.”³⁹

Judge Randolph dissented, arguing that the EPA never stated outright that “inter-pollutant transfers would permanently and forever alter the company’s baselines.”⁴⁰ He criticized the majority’s interpretation for failing to give the agency proper deference.⁴¹ Because the EPA never explicitly made available intracompany transfers in perpetuity, the EPA could have made them expressly unavailable by interpreting the 2003 Rule accordingly.⁴² As the 2010 Final Rule did not represent a change in policy, it was not retroactive.⁴³ Additionally, even if this rule were a change in policy, Judge Randolph contended that this change was not impermissibly retroactive because the “EPA’s 2010 regulations impose[d] no new liability or duty on petitioners.”⁴⁴ Furthermore, he argued that while the 2010 regulations thwarted the petitioners’ expectations, the rule did not impair vested rights.⁴⁵

³⁴ *Id.*

³⁵ According to the panel, “if a new rule is ‘substantively inconsistent’ with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively.” *Id.* at 7 (quoting *Nat’l Mining Ass’n v. Dep’t of Labor (Nat’l Mining II)*, 292 F.3d 849, 860 (D.C. Cir. 2002)).

³⁶ *Id.* (citing *Nat’l Mining I*, 177 F.3d 1, 8 (D.C. Cir. 1999)).

³⁷ *Id.* at 9 (citing *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006); *Nat’l Mining I*, 177 F.3d at 8).

³⁸ *Id.* at 10 (“The Final Rule is impermissibly retroactive not because it unsettled Petitioners’ expectations or imposed new liabilities on past conduct but quite simply because it attempted to undo the Petitioners’ inter-pollutant baseline transfers based on the EPA’s new interpretation of [the CAA].”).

³⁹ *Id.*

⁴⁰ *Id.* (Randolph, J., dissenting).

⁴¹ *Id.* at 11.

⁴² *Id.*

⁴³ *Id.* at 12.

⁴⁴ *Id.*

⁴⁵ *Id.*

The majority spoke only of vested rights, never considering Justice Scalia's framework of whether the retroactivity was primary or secondary. The court should have applied this framework, recognized that the Rule had only a secondarily retroactive effect, and permitted the Rule because it was reasonable.

A law or rule functions retroactively if it disturbs vested rights, imposes liability for past conduct, or creates a new duty with respect to completed transactions.⁴⁶ "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."⁴⁷ Because there is a presumption against retroactivity, an agency may not promulgate retroactive rules without explicit congressional authorization.⁴⁸

To determine whether a rule impairs rights already vested, a court must both define the right impaired and identify when the right vested in the holder.⁴⁹ The point at which the right vests in the holder is the relevant "retroactivity event"⁵⁰ — the date to be compared with the date of promulgation of the regulation.⁵¹ A right vests before the rule disturbing it is promulgated if the retroactivity event precedes the rule's promulgation. For example, in *Bowen v. Georgetown University Hospital*,⁵² the Supreme Court struck down a rule that retroactively changed Medicare cost limits for services already performed and reimbursed.⁵³

The unguided vested rights analysis adopted by the *Arkema* majority, however, is too blunt an instrument for determining whether rules that affect completed transactions have impermissibly retroactive consequences. After all, "almost every [rule] 'affects past transactions'"⁵⁴ and thus could be said to impair vested rights. The critical question, as articulated in Justice Scalia's *Bowen* concurrence, is whether the rule alters past legal consequences of past transactions ("primary" retroactivity) or is one of "exclusively future effect[,]. . . [which] can un-

⁴⁶ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *Nat'l Mining II*, 292 F.3d 849, 859 (D.C. Cir. 2002).

⁴⁷ *Landgraf*, 511 U.S. at 270.

⁴⁸ See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

⁴⁹ See Geoffrey C. Weien, Note, *Retroactive Rulemaking*, 30 HARV. J.L. & PUB. POL'Y 749, 761 (2007).

⁵⁰ *Landgraf*, 511 U.S. at 293 n.3 (Scalia, J., concurring in the judgments).

⁵¹ See Weien, *supra* note 49, at 759.

⁵² 488 U.S. 204.

⁵³ *Id.* at 207–08.

⁵⁴ Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1339 (2000).

questionably *affect* past transactions” (“secondary” retroactivity).⁵⁵ For example, suppose the IRS revises tax rules, making taxable once non-taxable income from trusts lasting twenty years. Assessing taxes on income of such a trust for the preceding ten years would alter the past legal consequences of past actions. However, imposing future tax assessments on such trusts would have only postenactment effect.⁵⁶ While primary retroactivity without express authorization is prohibited, a rule with reasonable secondary retroactivity should be permitted.⁵⁷ When judging the reasonableness of secondary retroactivity, the “familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.”⁵⁸

While the 2010 Rule certainly will *affect* the desirability of completed transactions,⁵⁹ it does not disturb vested rights, impose liability, or create a new duty with respect to such transactions.⁶⁰ In performing the vested rights analysis, the D.C. Circuit focused on the permanent baseline transfers that occurred in 2008 and 2009 as the vesting events.⁶¹ Thus, the court implicitly defined the rights as claims to the post-transfer baselines that vested at the time the transfers were approved and before the 2010 Rule was promulgated.

The doctrine of vested rights is inapplicable to this case because there is no vested right to a specific baseline.⁶² The overall purpose of

⁵⁵ *Bowen*, 488 U.S. at 219 (Scalia, J., concurring).

⁵⁶ *See id.*; *see also* John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12, 59 (1967) (“[S]tatutes which purport to have only post-enactment effect may also be classified as retroactive insofar as they bear importantly on prior events by affecting their future legal consequences as of the time the new law is adopted. . . . This is retroactivity in the secondary sense.”).

⁵⁷ *See Bowen*, 488 U.S. at 220 (Scalia, J., concurring); *Nat’l Ass’n of Indep. Television Producers & Distrib. v. FCC*, 502 F.2d 249, 255 (2d Cir. 1974) (“Any implication by the FCC that this court may not consider the reasonableness of the retroactive effect of a rule is clearly wrong.”); *Gen. Tel. Co. of the Sw. v. United States*, 449 F.2d 846, 863 (5th Cir. 1971) (“Where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable.” (citing *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153 (D.C. Cir. 1967))).

⁵⁸ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994); *cf. Bowen*, 488 U.S. at 220 (Scalia, J., concurring) (“A rule that has unreasonable secondary retroactivity — for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule — may for that reason be ‘arbitrary’ or ‘capricious’ . . .”). Courts should also consider: (1) How settled was the previous rule? (2) How big is the change? (3) How much reliance has there been on the continuance of the rule? (4) How much impact is there on regulated entities? (5) How much closer is the new rule to the intent or goals of the enacting statute? *Cf. Retail, Wholesale, & Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (discussing factors for retroactively applying a change in policy made through adjudication rather than rulemaking).

⁵⁹ *Cf. Bowen*, 488 U.S. at 219–20 (noting that secondary retroactivity affects the desirability of completed transactions).

⁶⁰ *Cf. Landgraf*, 511 U.S. at 280 (providing examples of prohibited retroactive effects).

⁶¹ *See Arkema*, 618 F.3d at 7–8.

⁶² This doctrine may be inapplicable for another reason. The 2003 Rule called for allowing permanent baseline transfers but did not define “permanent.” *See* 2003 Rule, *supra* note 7, at

the 2003 and 2010 Rules was to cap annual pollution by regulated companies, not to set baselines.⁶³ Moreover, while the 2010 Rule certainly renders completed baseline transfers “less desirable in the future,”⁶⁴ it does not undo completed transactions. It accepts the transfers for the 2003–2009 control periods but chooses not to recognize them when distributing allowances for 2010–2014.⁶⁵ Because the final effect of the Rule is to define the annual pollution caps for each regulated entity, the vested right is to pollute up to the specific cap and is not a vested right to a specific baseline in 2010–2014. The 2010 Rule is the legal grant of authority to produce HCFCs up to specified limits during the 2010–2014 period, and the EPA had the authority to set these limits as it wished.⁶⁶ Thus, the right to pollute did not vest until the 2010 Rule was promulgated. Any retroactive effect of the 2010 Rule must be secondary, as the Rule does not disturb a vested right.

The majority’s mistaken analysis stems from its focus on the interplay between the 2003 and 2010 Rules.⁶⁷ While the court viewed “[t]he critical question [as] whether the interpretation established by the new rule ‘changes the legal landscape,’”⁶⁸ any new rule was bound to change the legal landscape. A vested rights analysis is too broad and thus ineffective at determining whether a rule complies with the presumption against retroactivity, which requires that Congress pro-

2835. The majority interpreted “permanent” straightforwardly to mean in perpetuity, *Arkema*, 618 F.3d at 8, while the dissent read it to mean for the duration of the Rule’s control period (and as opposed to current-year transfers), *id.* at 10–11 (Randolph, J., dissenting). Each is a reasonable reading. Because the 2003 Rule is ambiguous regarding the lasting effect of permanent baseline transfers, the court should have granted the EPA substantial deference in interpreting its own rule. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (noting that “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”). Thus, the EPA’s interpretation of the 2003 Rule (that permanent baseline transfers are effective only during the duration of the rule) should have controlled absent plain error or inconsistency. See *id.* The majority may have denied *Seminole Rock* deference to the EPA because of inconsistency in interpreting the 2003 Rule. See, e.g., *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). If so, the majority should have stated this reason explicitly, particularly because there is a circuit split on this issue. Compare *id.* with *Warder v. Shalala*, 149 F.3d 73, 81–82 (1st Cir. 1998) (giving deference even to a changed interpretation). This circuit split is noted in *Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141, 1147 n.4 (7th Cir. 2001).

⁶³ See 2010 Final Rule, *supra* note 5, at 66,419 (“In this final action, . . . [the EPA] is not accounting for inter-pollutant transfers within a single company . . .”).

⁶⁴ *Bowen*, 488 U.S. at 219–20 (Scalia, J., concurring).

⁶⁵ 2010 Final Rule, *supra* note 5, at 66,421.

⁶⁶ See Clean Air Act § 606, 42 U.S.C. § 7671e (2006); see also *Arkema*, 618 F.3d at 3 (“Congress gave the Administrator substantial discretion, permitting the EPA to accelerate the phaseout . . .”).

⁶⁷ Directly after laying out its jurisdictional basis and standard of review, the majority stated that, “[a]t its core, this is a dispute over whether the Agency has changed its interpretation of Title VI of the CAA [since the 2003 Rule].” *Arkema*, 618 F.3d at 6.

⁶⁸ *Id.* at 7 (quoting *Natl’l Mining I*, 177 F.3d 1, 8 (D.C. Cir. 1999)).

vide express authorization to create retroactive rules.⁶⁹ Rather, the court should have asked whether the 2010 Rule's retroactivity was primary or secondary, altering past legal consequences or merely the desirability of past transactions due to an exclusively future effect.⁷⁰

In establishing pollution allowances for the 2010–2014 period,⁷¹ the 2010 Rule is a regulation of future conduct affecting the desirability of past transactions rather than altering past legal consequences.⁷² Legal liability does not attach until an entity fails to abide by the rules in the future.⁷³ Not only is this liability a future effect, but also companies would have fair notice before being found liable under the Rule, supporting a finding of reasonableness.⁷⁴

The 2010 Rule does not significantly affect settled expectations. Although frequent changes “would hamper allowance holders’ long-term planning,”⁷⁵ the companies knew that allocations would change in 2010 and that they would have to plan accordingly. Even though they may have expected baseline transfers to be carried forward, their planning was based not on the baseline, but on annual allowances. Because the annual allocation was changing regardless of whether baseline transfers would be carried forward, the 2010 Rule did not frustrate settled expectations or past investments.

“Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.”⁷⁶ However, adopting the primary-secondary framework will simplify the analysis, give courts more guidance, and provide agencies with more flexibility — all without threatening vested rights.

⁶⁹ See *id.* at 9 (noting that the EPA cannot undo completed transactions “without Congress’ express authorization”); see also *Bowen*, 488 U.S. at 208.

⁷⁰ *Bowen*, 488 U.S. at 219–20 (Scalia, J., concurring).

⁷¹ 2010 Final Rule, *supra* note 5, at 66,412.

⁷² Cf. H.R. REP. NO. 1980, at 49 n.1 (1946) (“The [APA’s] phrase ‘future effect’ does not preclude agencies from considering and, so far as legally authorized, dealing with past transactions in prescribing rules for the future.”).

⁷³ In this case, liability does not attach until a party exceeds its annual allowances. If the 2010 Rule had invalidated past transfers and imposed fines for emissions above the pretransfer allocations, it would have altered past legal consequences.

⁷⁴ Cf. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (“[A]s long as interpretive changes create no unfair surprise — and the Department’s recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here — the change in interpretation alone presents no separate ground for disregarding the . . . interpretation.” (citations omitted)). Ensuring that “a regulated entity ha[s] sufficient notice of an agency’s interpretation of a regulation before it may be punished for violating that regulation as interpreted” has been particularly important for the D.C. Circuit in cases decided under *Seminole Rock* deference. Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 74 (2000).

⁷⁵ 2003 Rule, *supra* note 7, at 2823.

⁷⁶ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).