SUPREME COURT OF THE UNITED STATES

No. 91–794

HENRY HARPER, ET AL., PETITIONERS *v.* VIRGINIA DEPARTMENT OF TAXATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 18, 1993]

JUSTICE SCALIA, concurring.

I am surprised to see an appeal to *stare decisis* in today's dissent. In *Teague* v. *Lane*, 489 U. S. 288 (1989), JUSTICE O'CONNOR wrote for a plurality that openly rejected settled precedent controlling the scope of retroactivity on collateral review. "This retroactivity determination," the opinion said, "would normally entail application of the *Linkletter* [v. *Walker*, 381 U. S. 618 (1965)] standard, but we believe that our approach to retroactivity for cases on collateral review requires modification." *Id.*, at 301. The dissent in *Teague* was a sort of anticipatory echo of today's dissent, criticizing the plurality for displaying "infidelity to the doctrine of *stare decisis*," *id.*, at 331 (Brennan, J., dissenting), for "upset[ting] . . . our time-honored precedents," *id.*, at 333, for "repudiating our familiar approach without regard for the doctrine of *stare decisis*," *id.*, at 345, and for failing "so much as [to] mention *stare decisis*," *id.*, at 333.

I joined the plurality opinion in *Teague*. Not only did I believe the rule it announced was correct, see *Withrow* v. *Williams*, 507 U. S. ___, ___ (1993) (SCALIA, J., concurring in part and dissenting in part) (slip op., at 4), but I also believed that abandonment of our prior collateral-review retroactivity rule was fully in accord with the doctrine of *stare decisis*, which as applied by our Court has never been inflexible. The *Teague* plurality opinion set forth good reasons for abandoning *Linkletter*—reasons justifying a similar abandonment of *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). It noted, for example, that *Linkletter*

"ha[d] not led to consistent results," *Teague*, *supra*, at 302; but neither has *Chevron Oil*. Proof that what it means is in the eye of the beholder is provided quite nicely by the separate opinions filed today: Of the four Justices who would still apply *Chevron Oil*, two find *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), retroactive, see, *post*, at 2 (KENNEDY, J., concurring in part and concurring in judgment), two find it not retroactive, see *post*, at 11 (O'CONNOR, J., dissenting). Second, the *Teague* plurality opinion noted that *Linkletter* had been criticized by commentators, *Teague*, *supra*, at 303; but the commentary cited in the opinion criticized not just *Linkletter*, but the Court's retroactivity jurisprudence in general, of which it considered *Chevron Oil* an integral part, see Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1558, 1581–1582, 1606 (1975). Other commentary, of course, has also regarded the issue of retroactivity as a general problem of jurisprudence. See, *e.g.*, Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731 (1991); Schaefer, Prospective Rulings: Two Perspectives, 1982 S. Ct. Rev. 1; Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967); Mishkin, Forward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 58–72 (1965).

Finally, the plurality opinion in *Teague* justified the departure from *Linkletter* by implicitly relying on the well-settled proposition that *stare decisis* has less force where intervening decisions "have removed or weakened the conceptual underpinnings from the prior decision." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989). JUSTICE O'CONNOR endorsed the reasoning expressed by Justice Harlan in his separate opinions in *Mackey* v. *United States*, 401 U. S. 667 (1971), and
Desist v. *United States*, 394 U. S. 244 (1969), and noted that the Court had already adopted the first part of Justice Harlan's retroactivity views in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). See *Teague*, *supra*, at 303–305. Again, this argument equally—indeed, even more forcefully—supports reconsideration of *Chevron Oil*. *Griffith* returned this Court, in criminal cases, to the traditional view (which I shall discuss at greater length below) that prospective decisionmaking "violates basic norms of constitutional adjudication." *Griffith*, *supra*, at 322. One of the conceptual underpinnings of *Chevron Oil* was that retroactivity presents a *similar* problem in both civil and criminal contexts. See *Chevron Oil*, *supra*, at 106; see also Beytagh, *supra*, at 1606. Thus, after *Griffith*, *Chevron Oil* can be adhered to *only by rejecting the reasoning of Chevron Oil*—that is, only by asserting that the issue of retroactivity is *different* in the civil and criminal settings. That is a particularly difficult proof to make, inasmuch as *Griffith* rested on "basic norms of constitutional adjudication" and "the nature of judicial review." 479 U. S., at 322; see also *Teague*, *supra*, at 317 (WHITE, J., concurring in part and concurring in judgment) (*Griffith* "appear[s] to have constitutional underpinnings").[1]

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[1]The dissent attempts to distinguish between retroactivity in civil and criminal settings on three

What most provokes comment in the dissent, however, is not its insistence that today a rigid doctrine of *stare decisis* forbids tinkering with retroactivity, which four Terms ago did not; but rather the irony of its invoking *stare decisis* in defense of prospective decisionmaking *at all*. Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was

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grounds, none of which has ever been adopted by this Court. The dissent's first argument begins with the observation that "nonretroactivity in criminal cases historically has favored the government's reliance interests over the rights of criminal defendants." *Post*, at 9. But while it is true that prospectivity was usually employed in the past (during the brief period when it was used in criminal cases) to favor the government, there is no basis for the implicit suggestion that it would usually favor the government in the future. That phenomenon was a consequence, not of the nature of the doctrine, cf. *James* v. *United States*, 366 U. S. 213 (1961), but of the historical "accident" that during the period prospectivity was in fashion legal rules favoring the government were more frequently overturned. But more fundamentally, to base a rule of full retroactivity in the criminal-law area upon what the dissent calls "the generalized policy of favoring individual rights over governmental prerogative," *post*, at 9, makes no more sense than to adopt, because of the same "generalized policy," a similarly gross rule that no decision favoring criminal defendants can ever be overruled. The law is more discerning than that. The dissent's next argument is based on the dubious empirical assumption that civil litigants, but not criminal defendants, will often receive some benefit from a prospective decision. That assumption does not hold even in this case: Prospective invalidation of Virginia's taxing scheme would afford petitioners the

formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent. B. Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960). Thus, the dissent is saying, in effect, that *stare decisis* demands the preservation of methods of destroying *stare decisis* recently invented in violation of *stare decisis*.

Contrary to the dissent's assertion that *Chevron Oil* articulated "our traditional retroactivity analysis," *post*, at 1, the jurisprudence it reflects "came into being," as Justice Harlan observed, less than 30 years ago with *Linkletter* v. *Walker*, 381 U. S. 618 (1965). *Mackey*, *supra*, at 676. It is so un-ancient that one of the current members of this Court was sitting when it was invented. 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. See *ante*, at 6; *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. ___, ___ (1991) (slip op., at 4) (opinion of SOUTER, J.);

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enormous future "benefit," *post*, at 10, of knowing that others in the State are being taxed more. But empirical problems aside, the dissent does not explain why, if a receipt-of-some-benefit principle is important, we should use such an inaccurate proxy as the civil/criminal distinction, or how this newly-discovered principle overcomes the "basic norms of constitutional adjudication" on which *Griffith* v. *Kentucky*, 479 U. S. 314, 322 (1987), rested. Finally, the dissent's "equal treatment" argument ably distinguishes between cases in which a prospectivity claim is properly raised, and those in which it is not. See *post*, at 10–11. But that does nothing to distinguish between civil and criminal cases; obviously, a party may procedurally default on a claim in either context.

American Trucking Assns., Inc. v. *Smith*, 496 U. S. 167, 201 (1990) (SCALIA, J., concurring in judgment); *Desist*, *supra*, at 258–259 (Harlan, J., dissenting); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 365 (1932). *Linkletter* itself recognized that "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." 381 U. S., at 622–623. And before *Linkletter*, the academic proponents of prospective judicial decisionmaking acknowledged that their proposal contradicted traditional practice. See, *e. g.*, Levy, *supra*, at 2, and n. 2; Carpenter, Court Decisions and the Common Law, 17 Colum. L. Rev. 593, 594 (1917). Indeed, the roots of the contrary tradition are so deep that Justice Holmes was prepared to hazard the guess that "[j]udicial decisions have had retrospective operation for near a thousand years." *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372 (1910) (dissenting opinion).

JUSTICE O'CONNOR asserts that "`[w]hen the Court changes its mind, the law changes with it.'" *Post*, at 4 (quoting *Beam*, *supra*, at ___ (O'CONNOR, J., dissenting) (slip op., at 1)). That concept is quite foreign to the American legal and constitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw power. The conception of the judicial role that he possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law *is*," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (emphasis added)—not what the law *shall be*. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W. Blackstone,

Commentaries 69 (1765). Even when a "former determination is most evidently contrary to reason . . . [or] contrary to the divine law," a judge overruling that decision would "not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id.*, at 69–70. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id.*, at 70 (emphases in original). Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." T. Cooley, Constitutional Limitations 91 (1868). The critics of the traditional rule of full retroactivity were well aware that it was grounded in what one of them contemptuously called "another fiction known as the Separation of powers." Kocourek, Retrospective Decisions and Stare Decisis and a Proposal, 17 A. B. A. J. 180, 181 (1931).

Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disregard for *stare decisis*. In the eyes of its enemies, the doctrine "smack[ed] of the legislative process," Mishkin, 79 Harv. L. Rev., at 65, "encroach[ed] on the prerogatives of the legislative department of government," Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 428 (1924), removed "one of the great inherent restraints upon this Court's depart[ing] from the field of interpretation to enter that of lawmaking," *James* v. *United States*, 366 U. S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part), caused the Court's behavior to become "assimilated to that of a

legislature," Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 34 (1969), and tended "to cut [the courts] loose from the force of precedent, allowing [them] to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis*." *Mackey*, 401 U. S., at 680 (Harlan, J., concurring in judgment). All this was not denied by the doctrine's friends, who also viewed it as a device to "augmen[t] the power of the courts to contribute to the growth of the law in keeping with the demands of society," Mallamud, Prospective Limitation and the Rights of the Accused, 56 Iowa L. Rev. 321, 359 (1970), as "a deliberate and conscious technique of judicial lawmaking," Levy, 109 U. Pa. L. Rev., at 6, as a means of "facilitating more effective and defensible judicial lawmaking," *id.*, at 28.

Justice Harlan described this Court's embrace of the prospectivity principle as "the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation," *Mackey*, *supra*, at 676. The Court itself, however, glowingly described the doctrine as the cause rather than the effect of innovation, extolling it as a "technique" providing the "impetus . . . for the implementation of long overdue reforms." *Jenkins* v. *Delaware*, 395 U. S. 213, 218 (1969). Whether cause or effect, there is no doubt that the era which gave birth to the prospectivity principle was marked by a newfound disregard for *stare decisis*. As one commentator calculated, "[b]y 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions." Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467. It was an era when this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious

"heave-ho." See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961) (overruling *Wolf* v. *Colorado*, 338 U. S. 25 (1949)); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (overruling *Betts* v. *Brady*, 316 U. S. 455 (1942)); *Miranda* v. *Arizona*, 384 U. S. 436, 479, n. 48 (1966) (overruling *Crooker* v. *California*, 357 U. S. 433 (1958), and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958)); *Katz* v. *United States*, 389 U. S. 347 (1967) (overruling *Olmstead* v. *United States*, 277 U. S. 438 (1928), and *Goldman* v. *United States*, 316 U. S. 129 (1942)). To argue now that one of the jurisprudential tools of judicial activism from that period should be extended on grounds of *stare decisis* can only be described as paradoxical.[2]

In sum, I join the opinion of the Court because the doctrine of prospective decisionmaking is not in fact protected by our flexible rule of *stare decisis;* and

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[2]Contrary to the suggestion in the dissent, I am not arguing that we should "cast overboard our *entire* retroactivity doctrine with . . . [an] unceremonious heave-ho." *Post*, at 5 (emphasis added; internal quotation marks omitted). There is no need. We cast over the first half six Terms ago in *Griffith*, and deep-sixed most of the rest two Terms ago in *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. ___ (1991)—in neither case unceremoniously (in marked contrast to some of the overrulings cited in text). What little, if any, remains is teetering at the end of the plank and needs no more than a gentle nudge. But if the entire doctrine had been given a quick and unceremonious end, there could be no complaint on the grounds of *stare decisis*; as it was born, so should it die. I do not know the basis for the dissent's contention that I find the jurisprudence of the era that produced the doctrine of prospectivity "distasteful." *Post*, at 5. Much of it is quite appetizing. It is only the cavalier treatment of *stare decisis* and the invention of prospectivity that I have criticized here.

because no friend of *stare decisis* would want it to be.