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 KENNEDY, with whom JUSTICE WHITE joins, concurring in part and concurring in the judgment.

I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision. "[P]rospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 197 (1990) (plurality opinion). When a court promulgates a new rule of law, prospective application functions "to avoid injustice or hardship to civil litigants who have justifiably relied on prior law." *Id.*, at 199 (internal quotation marks omitted). See *Phoenix* v. *Kolodziejski*, 399 U. S. 204, 213–215 (1970); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969) *(per curiam)*; *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 422 (1964). And in my view retroactivity in civil cases continues to be governed by the standard announced in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971). Thus, for the reasons explained by JUSTICE O'CONNOR, *post*, at 1–5, I cannot agree with the Court's broad dicta, *ante*, at 7–9, that appears to embrace in the civil context the retroactivity principles adopted for criminal cases in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). As JUSTICE O'CONNOR has demonstrated elsewhere, the differences between the civil and criminal contexts counsel strongly against adoption of *Griffith* for civil cases. See *American Trucking Assns., Inc*. v. *Smith*, *supra*, at 197–199. I also cannot accept the Court's conclusion, *ante*, at 8–11, which is based on JUSTICE

SOUTER's opinion in *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. ___, ___ – ___ (1991) (slip op., at 9–12), that a decision of this Court must be applied in a retroactive manner simply because the rule of law there announced happened to be applied to the parties then before the Court. See *post*, at 5–11 (O'CONNOR, J., dissenting); *James B. Beam Distilling Co.* v. *Georgia*, *supra*, at ___ – ___ (O'CONNOR, J., dissenting) (slip op., at 2–4). For these reasons, I do not join Part II of the Court's opinion.

I nonetheless agree with the Court that *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), must be given retroactive effect. The first condition for prospective application of any decision is that it must announce a new rule of law. *Ashland Oil, Inc.* v. *Caryl*, 497 U. S. 916, 918 (1990) *(per curiam)*; *American Trucking Assns., Inc.* v. *Smith*, *supra*, at 179; *United States* v. *Johnson*, 457 U. S. 537, 550, n. 12 (1982); *Chevron Oil Co.* v. *Huson*, 404 U. S., at 106–107. The decision must "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Id*., at 106. Because *Davis* did neither, it did not announce new law and therefore must be applied in a retroactive manner.

Respondent argues that two new principles of law were established in *Davis*. First, it points to the holding that 4 U. S. C. §111, in which the United States consents to State taxation of the compensation of "an officer or employee of the United States," applies to federal retirees as well as current federal employees. Brief for Respondent 16–18. See *Davis*, 489 U. S., at 808–810. In *Davis*, however, we indicated that this holding was "dictate[d]" by "the plain language of the statute," *id.*, at 808, and we added for good measure our view that the language of the statute was "unambiguous," "unmistakable," and "leaves no room for doubt," *id.*, at 809, n. 3, 810. Given these characterizations, it is quite implausible to contend that in this regard *Davis* decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, *supra*, at 106.

The second new rule respondent contends the Court announced in *Davis* was that the state statute at issue discriminated against federal retirees even though the statute treated them like all other state taxpayers except state employees. Brief for Respondent 18–26. See *Davis*, *supra*, at 814, 815, n.

4. The *Davis* Court, however, anchored its decision in precedent. We observed that in *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376 (1960), "we faced th[e] precise situation" confronting us in *Davis*, and so *Phillips Chemical* controlled our holding. 489 U. S., at 815, n. 4. To be sure, JUSTICE STEVENS in dissent disagreed with these contentions and attempted to distinguish *Phillips Chemical*. 489 U. S., at 824–826. The Court, however, was not persuaded at the time, and I remain convinced that the Court had the better reading of *Phillips Chemical*. A contrary holding in *Davis*, in my view, would have created a clear inconsistency in our jurisprudence. Under *Chevron Oil*, application of precedent which directly controls is not the stuff of which new law is made.

Far from being "revolutionary," *Ashland Oil Co.* v. *Caryl*, *supra*, at 920, or "an avulsive change which caused the current of the law thereafter to flow between new banks," *Hanover Shoe, Inc.* v. *United Shoe Machinery Co.*, 392 U. S. 481, 499 (1968), *Davis* was a mere application of plain statutory language and existing precedent. In these circumstances, this Court is not free to mitigate any financial hardship that might befall Virginia's taxpayers as a result of their state government's failure to reach a correct understanding of the unambiguous dictates of federal law.

Because I do not believe that *Davis* v. *Michigan Dept. of Treasury*, *supra*, announced a new principle of law, I have no occasion to consider JUSTICE O'CONNOR's argument, *post*, at 21–25, that equitable considerations may inform the formulation of remedies when a new rule is announced. In any event, I do not read Part III of the Court's opinion as saying anything inconsistent with what JUSTICE O'CONNOR proposes.

On this understanding, I join Parts I and III of the Court's opinion and concur in its judgment.