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 O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

Today the Court applies a new rule of retroactivity to impose crushing and unnecessary liability on the States, precisely at a time when they can least afford it. Were the Court's decision the product of statutory or constitutional command, I would have no choice but to join it. But nothing in the Constitution or statute requires us to adopt the retroactivity rule the majority now applies. In fact, longstanding precedent requires the opposite result. Because I see no reason to abandon our traditional retroactivity analysis as articulated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), and because I believe the Supreme Court of Virginia correctly applied *Chevron Oil* in this case, I would affirm the judgment below.

This Court's retroactivity jurisprudence has become somewhat chaotic in recent years. Three Terms ago, the case of *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (1990), produced three opinions, none of which garnered a majority. One Term later, *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. ___ (1991), 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. *Ante*, at 8–9.

If we had given appropriate weight to the principle of *stare decisis* in the first place, our retroactivity jurisprudence never would have become so hopelessly muddled. After all, it was not that long ago that the law of retroactivity for civil cases was considered well settled. In *Chevron Oil Co.*, we explained that whether a decision will be nonretroactive depends on whether it announces a new rule, whether prospectivity would undermine the purposes of the rule, and whether retroactive application would produce injustice. 404 U. S., at 106–107. Even when this Court adjusted the retroactivity rule for criminal cases on direct review some six years ago, we reaffirmed the vitality of *Chevron Oil*, noting that retroactivity in civil cases "continues to be governed by the standard announced in *Chevron Oil Co.* v. *Huson*." *Griffith* v. *Kentucky*, 479 U. S. 314, 322, n. 8 (1987). In *American Trucking Assns.*, *supra*, however, a number of Justices expressed a contrary view, and the jurisprudential equivalent of entropy immediately took over. Whatever the merits of any retroactivity test, it cannot be denied that resolution of the case before us would be simplified greatly had we not disregarded so needlessly our obligation to follow precedent in the first place.

I fear that the Court today, rather than rectifying that confusion, reinforces it still more. In the usual case, of course, retroactivity is not an issue; the courts simply apply their best understanding of current law in resolving each case that comes before them. *James B. Beam*, 501 U. S., at ___, ___–___ (SOUTER, J.) (slip op., at 3, 4–5). But where the law

changes in some respect, the courts sometimes may elect not to apply the new law; instead, they apply the law that governed when the events giving rise to the suit took place, especially where the change in law is abrupt and the parties may have relied on the prior law. See *id.*, at ___ (slip op., at 3). This can be done in one of two ways. First, a court may choose to make the decision purely prospective, refusing to apply it not only to the parties before the court but also to *any* case where the relevant facts predate the decision. *Id.*, at ___ (slip op., at 5). Second, a court may apply the rule to some but not all cases where the operative events occurred before the court's decision, depending on the equities. See *id.*, at ___ (slip op., at 5–7). The first option is called "pure prospectivity" and the second "selective prospectivity."

As the majority notes, *ante*, at 8, six Justices in *James B. Beam*, *supra*, expressed their disagreement with selective prospectivity. Thus, even though there was no majority opinion in that case, one can derive from that case the proposition the Court announces today: Once "this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review." *Ante,* at 8. But no decision of this Court forecloses the possibility of pure prospectivity—refusal to apply a new rule in the very case in which it is announced and every case thereafter. As JUSTICE WHITE explained in his concurrence in *James B. Beam*, "[t]he propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions." 501 U. S., at ___ (WHITE, J., concurring in judgment) (slip op., at 2–3).

Rather than limiting its pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well. See *ante*, at 9 (referring to our lack of

"`constitutional authority . . . to disregard current law'"); *ibid.* (relying on "`basic norms of constitutional adjudication'" (quoting *Griffith, supra,* at 322)); see also *id.*, at 6 (touting the "fundamental rule of `retrospective operation'" of judicial decisions). The intimation is incorrect. As I have explained before and will touch upon only briefly here:

> "[W]hen the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make [a] determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. *Chevron Oil* describes our long-established procedure for making this inquiry." *James B. Beam*, *supra*, at ___ (O'CONNOR, J., dissenting) (internal quotation marks omitted) (slip op., at 1–2).

Nor can the Court's suggestion be squared with our cases, which repeatedly have announced rules of purely prospective effect. See, *e.g.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982); *Chevron Oil*, *supra*, at 106–107; *Phoenix* v. *Kolodziejski*, 399 U. S. 204, 214 (1970); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); see also *American Trucking Assns.*, *supra,* at 188–200 (plurality opinion) (canvassing the Court's retroactivity jurisprudence); *ante*, at 1 (KENNEDY, J., concurring in part and concurring in judgment) (citing cases).

In any event, the question of pure prospectivity is not implicated here. The majority first holds that once a rule *has been* applied retroactively, the rule must be applied retroactively to all cases thereafter. *Ante*, at 8. Then it holds that *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), in fact retroactively applied the rule it announced. *Ante*, at 10–11. Under the majority's approach, that should end the matter: Because the Court applied the rule retroactively in

Davis, it must do so here as well. Accordingly, there is no reason for the Court's careless dictum regarding pure prospectivity, much less dictum that is contrary to clear precedent.

Plainly enough, JUSTICE SCALIA would cast overboard our entire retroactivity doctrine with precisely the "unceremonious `heave-ho'" he decries in his concurrence. See *ante*, at 8. Behind the undisguised hostility to an era whose jurisprudence he finds distasteful, JUSTICE SCALIA raises but two substantive arguments, both of which were raised in *James B. Beam*, *supra*, at ___ (SCALIA, J., concurring in judgment), and neither of which has been adopted by a majority of this Court. JUSTICE WHITE appropriately responded to those arguments then, see *id.*, at ___ (WHITE, J., concurring in judgment), and there is no reason to repeat the responses now. As Justice Frankfurter explained more than 35 years ago:

> "We should not indulge in the fiction that the law now announced has always been the law . . . . It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law." *Griffin* v. *Illinois*, 351 U. S. 12, 26 (1956) (opinion concurring in judgment).

I dissented in *James B. Beam* because I believed that the absolute prohibition on selective prospectivity was not only contrary to precedent, but also so rigid that it produced unconscionable results. I would have adhered to the traditional equitable balancing test of *Chevron Oil* as the appropriate method of deciding the retroactivity question in individual cases. But even if one believes the prohibition on selective prospectivity desirable, it seems to me that the Court today takes that judgment to an illogical—and inequitable—extreme. It is one thing to say that, where we have considered prospectivity in a prior case and rejected it, we must

reject it in every case thereafter. But it is quite another to hold that, because we did *not* consider the possibility of prospectivity in a prior case and instead applied a rule retroactively through inadvertence, we are foreclosed from considering the issue forever thereafter. Such a rule is both contrary to established precedent and at odds with any notion of fairness or sound decisional practice. Yet that is precisely the rule the Court appears to adopt today. *Ante*, at 8–9.

Under the Court's new approach, we have neither authority nor discretion to consider the merits of applying *Davis* v. *Michigan Dept. of Treasury*, *supra*, retroactively. Instead, we must inquire whether any of our previous decisions happened to have applied the *Davis* rule retroactively to the parties before the Court. Deciding whether we in fact have applied *Davis* retroactively turns out to be a rather difficult matter. Parsing the language of the *Davis* opinion, the Court encounters a single sentence it declares determinative: "The State having conceded that a refund is appropriate in these circumstances, see Brief for Appellee 63, to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Id.*, at 817 (quoted in part, *ante*, at 10). According to the majority, that sentence constitutes "`consideration of remedial issues'" and therefore "`necessarily'" indicates that we applied the rule in *Davis* retroactively to the parties before us. *Ante*, at 10 (quoting *James B. Beam*, *supra*, at ___ (opinion of SOUTER, J.) (slip op., at 8)). Ironically, respondent and its *amici* draw precisely the opposite conclusion from the same sentence. According to them, the fact that Michigan conceded that it would offer relief meant that we had no reason to decide the question of retroactivity in *Davis*. Michigan was willing to provide relief whether or not relief was required. The Court simply accepted that offer and

preserved the retroactivity question for another day.

One might very well debate the meaning of the single sentence on which everyone relies. But the debate is as meaningless as it is indeterminate. In *Brecht* v. *Abrahamson*, 507 U. S. ___ (1993), we reaffirmed our longstanding rule that, if a decision does not "squarely addres[s] [an] issue," this Court remains "free to address [it] on the merits" at a later date. *Id.*, at ___ (slip op., at 9–10). Accord, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952) (issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be taken as "a binding precedent on th[e] point"); *Webster* v. *Fall*, 266 U. S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents"). The rule can be traced back to some of the earliest of this Court's decisions. See Statement of Marshall, C. J., as reported in the arguments of counsel in *United States* v. *More*, 3 Cranch 159, 172 (1805) ("No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case"). Regardless of how one reads the solitary sentence upon which the Court relies, surely it does not "squarely address" the question of retroactivity; it does not even mention retroactivity. At best, by addressing the question of remedies, the sentence implicitly "assumes" the rule in *Davis* to be retroactive. Our decision in *Brecht*, however, makes it quite clear that unexamined assumptions do not bind this Court. *Brecht*, *supra*, at ___ (slip op., at 9–10) (That the Court "assumed the applicability of" a rule does not bind the Court to the assumption).

In fact, there is far less reason to consider ourselves bound by precedent today than there was in *Brecht*. In *Brecht*, the issue was not whether a legal question was resolved by a single case; it was whether our

consistent practice of applying a particular rule, *Chapman* v. *California*, 386 U. S. 18, 24 (1967), to cases on collateral review precluded us from limiting the rule's application to cases on direct review. Because none of our prior cases directly had addressed the applicability of *Chapman* to cases on collateral review—each had only assumed it applied—the Court held that those cases did not bind us to any particular result. See *Brecht*, *supra*, at ___ (slip op., at 9–10). I see no reason why a single retroactive application of the *Davis* rule, inferred from the sparse and ambiguous language of *Davis* itself, should carry more weight here than our consistent practice did in *Brecht*.

The Court offers no justification for disregarding the settled rule we so recently applied in *Brecht*. Nor do I believe it could, for the rule is not a procedural nicety. On the contrary, it is critical to the soundness of our decisional processes. It should go without saying that any decision of this Court has wide-ranging applications; nearly every opinion we issue has effects far beyond the particular case in which it issues. The rule we applied in *Brecht*, which limits the *stare decisis* effect of our decisions to questions actually considered and passed on, ensures that this Court does not decide important questions by accident or inadvertence. By adopting a contrary rule in the area of retroactivity, the Court now permanently binds itself to its every unexamined assumption or inattention. Any rule that creates a grave risk that we might resolve important issues of national concern *sub silentio*, without thought or consideration, cannot be a wise one.

This case demonstrates the danger of such a rule. The question of retroactivity was never briefed in *Davis*. It had not been passed upon by the court below. And it was not within the question presented. Indeed, at oral argument we signaled that we would *not* pass upon the retroactivity of the rule *Davis*

would announce. After conceding that the Michigan Department of Taxation would give Davis himself a refund if he prevailed, counsel for the Department argued that it would be unfair to require Michigan to provide refunds to the 24,000 taxpayers who were not before the Court. The following colloquy ensued:

> "[COURT]: So why do we have to answer that at all?
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> "[MICHIGAN]: —if, if this Court issues an opinion stating that the current Michigan classification is unconstitutional or in violation of the statute, there are these 24,000 taxpayers out there.
>
> . . . . .
>
> "[COURT]: But that's not—it's not here, is it? Is that question here?.
>
> "[MICHIGAN]: It is not specifically raised, no." Tr. of Oral Arg., O. T. 1988, No. 87–1020, pp. 37–38.

Now, however, the Court holds that the question was implicitly before us and that, even though the *Davis* opinion does not even discuss the question of retroactivity, it resolved the issue conclusively and irretrievably.

If *Davis* somehow did decide that its rule was to be retroactive, it was by chance and not by design. The absence of briefing, argument, or even mention of the question belies any suggestion that the issue was given thoughtful consideration. Even the author of the *Davis* opinion refuses to accept the notion that *Davis* resolved the question of retroactivity. Instead, JUSTICE KENNEDY applies the analysis of *Chevron Oil* to resolve the retroactivity question today. See *ante*, at 1–3 (opinion concurring in part and concurring in judgment).

The Court's decision today cannot be justified by comparison to our decision in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), which abandoned selective prospectivity in the criminal context. *Ante*, at 9. As I explained in *American Trucking Assns.*, 496 U. S., at 197–200, there are significant differences between

criminal and civil cases that weigh against such an extension. First, nonretroactivity in criminal cases historically has favored the government's reliance interests over the rights of criminal defendants. As a result, the generalized policy of favoring individual rights over governmental prerogative can justify the elimination of prospectivity in the criminal arena. The same rationale cannot apply in civil cases, as non-retroactivity in the civil context does not necessarily favor plaintiffs or defendants; "nor is there any policy reason for protecting one class of litigants over another." *Id.*, at 198. More important, even a party to civil litigation who is "deprived of the full retroactive benefit of a new decision may receive some relief." *Id.*, at 198–199. Here, for example, petitioners received the benefit of prospective invalidation of Virginia's taxing scheme. From this moment forward, they will be treated on an equal basis with all other retirees, the very treatment our intergovernmental immunity cases require. The criminal defendant, in contrast, is usually interested only in one remedy— reversal of his conviction. *That* remedy can be obtained only if the rule is applied retroactively. See *id*., at 199.

Nor can the Court's rejection of selective retroactivity in the civil context be defended on equal treatment grounds. See *Griffith*, *supra*, at 323 (selective retroactivity accords a benefit to the defendant in whose case the decision is announced but not to any defendant thereafter). It may well be that there is little difference between the criminal defendant in whose case a decision is announced and the defendant who seeks certiorari on the same question two days later. But in this case there is a tremendous difference between the defendant in whose case the *Davis* rule was announced and the defendant who appears before us today: The latter litigated and preserved the retroactivity question while the former did not. The Michigan Department

of Taxation did not even brief the question of retroactivity in *Davis*. Respondent, in contrast, actually prevailed on the question in the court below.

If the Court is concerned with equal treatment, that difference should be dispositive. Having failed to demand the unusual, prospectivity, respondent in *Davis* got the usual—namely, retroactivity. Respondent in this case *has* asked for the unusual. In fact, respondent here defends a judgment below that awarded it just that. I do not see how the principles of equality can support forcing the Commonwealth of Virginia to bear the harsh consequences of retroactivity simply because, years ago, the Michigan Department of Taxation failed to press the issue—and we neglected to consider it. Instead, the principles of fairness favor addressing the contentions the Virginia Department of Taxation presses before us by applying *Chevron Oil* today. It is therefore to *Chevron Oil* that I now turn.

Under *Chevron Oil*, whether a decision of this Court will be applied nonretroactively depends on three factors. First, as a threshold matter, "the decision to be applied nonretroactively must establish a new principle of law." 404 U. S., at 106. Second, nonretroactivity must not retard the new rule's operation in light of its history, purpose, and effect. *Id.*, at 107. Third, nonretroactivity must be necessary to avoid the substantial injustice and hardship that a holding of retroactivity might impose. *Ibid.* In my view, all three factors favor holding our decision in *Davis* nonretroactive.

As JUSTICE KENNEDY points out in his concurrence, *ante*, at 2, a decision cannot be made nonretroactive unless it announces "a new principle of law." *Chevron Oil*, 404 U. S., at 106. For purposes of civil

retroactivity, *Chevron Oil* identifies two types of decisions that can be new. First, a decision is new if it overturns "clear past precedent on which litigants may have relied." *Ibid.*; *ante*, at 2 (KENNEDY, J., concurring in part and concurring in judgment). I agree with JUSTICE KENNEDY that *Davis* did not represent such a "`revolutionary'" or "`avulsive change'" in the law. *Ante*, at 3 (quoting *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 499 (1968)).

Nonetheless, *Chevron* also explains that a decision may be "new" if it resolves "an issue of first impression whose resolution was not *clearly* foreshadowed." *Chevron Oil*, *supra*, at 106 (emphasis added). Thus, even a decision that is "controlled by the . . . principles" articulated in precedent may announce a new rule, so long as the rule was "sufficiently debatable" in advance. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1109 (1983) (O'CONNOR, J., concurring). Reading the *Davis* opinion alone, one might get the impression that it did not announce a new rule even of that variety. The opinion's emphatic language suggests that the outcome was not even debatable. See *ante*, at 2–3 (KENNEDY, J., concurring in part and concurring in judgment). In my view, however, assertive language is not itself determinative. As THE CHIEF JUSTICE explained for the Court in a different context:

> "[T]he fact that a court says that its decision . . . is `controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a `new rule' . . . . Courts frequently view their decisions as being `controlled' or `governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

In *Butler*, we determined that the rule announced in *Arizona* v. *Roberson*, 486 U. S. 675 (1988), was "new" for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989), despite *Roberson*'s repeated assertions that its rule was "directly controlled" by precedent. Indeed, we did not even feel bound by the opinion's statement that it was not announcing a new rule at all but rather declining to create an exception to an existing rule. While *Teague* and its progeny may not provide the appropriate standard of novelty for *Chevron Oil* purposes, their teaching—that whether an opinion is new depends not on its language or tone but on the legal landscape from which it arose—obtains nonetheless.

In any event, JUSTICE STEVENS certainly thought that *Davis* announced a new rule. In fact, he thought that the rule was not only unprecedented, but wrong: "The Court's holding is not supported by the rationale for the intergovernmental immunity doctrine and is not compelled by our previous decisions. I cannot join the unjustified, court-imposed restriction on a State's power to administer its own affairs." 489 U. S., at 818–819 (dissenting opinion). And just last Term two Members of this Court expressed their disagreement with the decision in *Davis*, labeling its application of the doctrine of intergovernmental immunity "perverse." *Barker* v. *Kansas*, 503 U. S. ___, ___ (1992) (slip op., at 1) (STEVENS, J., joined by THOMAS, J., concurring). Although I would not call our decision in *Davis* perverse, I agree that its rule was sufficiently debatable in advance as to fall short of being "clearly foreshadowed." The great weight of authority is in accord.[1]

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[1]*Swanson* v. *Powers*, 937 F. 2d 965, 968, 970, 971 (CA4 1991) ("[t]he most pertinent judicial decisions" were contrary to a holding of immunity and "the rationale behind the precedent might have suggested a different result in [*Davis* itself]"; "how the

In fact, before *Davis* was announced, conventional wisdom seemed to be directly to the contrary. One would think that, if *Davis* was "clearly foreshadowed," some taxpayer might have made the intergovernmental immunity argument before. No one had. Twenty-three States had taxation schemes just like the one at issue in *Davis*; and some of those schemes were established as much as half a century before *Davis* was decided. See *Harper* v. *Virginia Dept. of Taxation,* 241 Va. 232, 237, 401 S. E. 2d 868, 871 (1991). Yet not a single taxpayer ever challenged one of those schemes on inter-governmental immunity grounds until Davis challenged Michigan's in 1984. If Justice Holmes is correct that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious" are "law," O. Holmes, The Path of the Law, in Collected Legal Papers 167, 173 (1920), then surely *Davis* announced *new* law; the universal "prophecy" before *Davis* seemed to be that such taxation schemes were valid.

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intergovernmental tax immunity doctrine and 4 U. S. C. §111 applied to [plans like the one at issue in *Davis*] was anything but clearly established prior to *Davis*"); *Harper* v. *Virginia Dept. of Taxation*, 241 Va. 232, 238, 401 S. E. 2d 868, 872 (1991) ("[T]he *Davis* decision established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed"); *Swanson* v. *State*, 329 N. C. 576, 583, 407 S. E. 2d 791, 794 (1991) ("the decision of *Davis* was not clearly foreshadowed"); *Bass* v. *State*, 302 S. C. 250, 256, 395 S. E. 2d 171, 174 (1990) (*Davis* "established a new principle of law"); *Bohn* v. *Waddell*, 164 Ariz. 74, 92, 790 P. 2d 772, 790 (Ariz. Tax 1990) (*Davis* "established a new principle of law"); Note, Rejection of the "Similarly Situated Taxpayer" Rationale: *Davis v. Michigan Department of Treasury*, 43 Tax Lawyer 431, 441 (1990) ("The majority in *Davis* rejected a long-standing doctrine").

An examination of the decision in *Davis* and its predecessors reveals that *Davis* was anything but clearly foreshadowed. Of course, it was well established long before *Davis* that the nondiscrimination principle of 4 U. S. C. §111 and the doctrine of intergovernmental immunity prohibit a State from imposing a discriminatory tax on the United States or those who do business with it. The income tax at issue in *Davis*, however, did not appear discriminatory on its face. Like the Virginia income tax at issue here, it did not single out federal employees or retirees for disfavored treatment. Instead, federal retirees were treated identically to all other retirees, with a single and numerically insignificant exception—retirees whose retirement benefits were paid by the State. Whether such an exception rendered the tax "discriminatory" within the meaning of the intergovernmental immunity doctrine, it seems to me, was an open question. On the one hand, the tax scheme did distinguish between federal retirees and state retirees: The former were required to pay state taxes on their retirement income, while the latter were not. But it was far from clear that such was the proper comparison. In fact, there were strong arguments that it was not.

As JUSTICE STEVENS explained more thoroughly in his *Davis* dissent, *Davis*, *supra*, at 819—and as we have recognized since *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819)—intergovernmental immunity is necessary to prevent the States from interfering with federal interests through taxation. Because the National Government has no recourse to the state ballot box, it has only a limited ability to protect itself against excessive state taxes. But the risk of excessive taxation of federal interests is eliminated, and "[a] `political check' is provided, when a state tax falls" not only on the Federal Government but also "*on a significant group of state citizens* who can

be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government." *Washington* v. *United States*, 460 U. S. 536, 545 (1983) (emphasis added). Accord, *United States* v. *County* of *Fresno*, 429 U. S. 452, 462–464 (1977); *South Carolina* v. *Baker*, 485 U. S. 505, 526, n. 15 (1988).

There can be no doubt that the taxation scheme at issue in *Davis* and the one employed by the Commonwealth of Virginia provided that necessary "political check." They exempted only a small group of citizens, state retirees, while subjecting the remainder of their citizens—federal retirees, retirees who receive income from private sources, and nonretirees alike—to a uniform income tax. As a result, any attempt to increase income taxes excessively so as to interfere with federal interests would have caused the similarly taxed populace to "use their votes" to protect their interests, thereby protecting the interests of the Federal Government as well. There being no risk of abusive taxation of the National Government, there was a good argument that there should have been no intergovernmental immunity problem either. See *Davis*, 489 U. S., at 821–824 (STEVENS, J., dissenting).

In addition, distinguishing between taxation of state retirees and all others, including private and federal retirees, was justifiable from an economic standpoint. The State, after all, does not merely collect taxes from its retirees; it pays their benefits as well. As a result, it makes no difference to the State or the retirees whether the State increases state retirement benefits in an amount sufficient to cover taxes it imposes, or whether the State offers reduced benefits and makes them tax-free. The net income level of the retirees and the impact on the state fisc is the same. Thus, the Michigan Department of Taxation had a good argument that its differential treatment of

state and federal retirees was "directly related to, and justified by, [a] significant differenc[e] between the two classes," *id.,* at 816 (internal quotation marks omitted): Taxing federal retirees enhances the State's fisc, whereas taxing state retirees does not.

I recite these arguments not to show that the decision in *Davis* was wrong—I joined the opinion then and remain of the view that it was correct—but instead to point out that the arguments on the other side were substantial. Of course, the Court was able to "ancho[r] its decision in precedent," *ante*, at 3 (KENNEDY, J., concurring in part and concurring in judgment). But surely that cannot be dispositive. Few decisions are so novel that there is no precedent to which they may be moored. What is determinative is that the decision was "sufficiently debatable" *ex ante* that, under *Chevron Oil*, nonretroactivity cannot be precluded. *Arizona Governing Committee* v. *Norris*, 463 U. S., at 1109 (O'CONNOR, J., concurring). That, it seems to me, is the case here.

The second *Chevron Oil* factor is whether denying the rule retroactive application will retard its operation in light of the rule's history, purpose, and effect. 404 U. S., at 107. That factor overwhelmingly favors respondent. The purpose of the intergovernmental immunity doctrine is to protect the rights of the Federal Sovereign against state interference. It does not protect the private rights of individuals:

> "[T]he purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government . . . , but to prevent undue interference with the one government by imposing on it the tax burdens of the other." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 483–484 (1939) (footnote omitted).

Accord, *Davis*, 489 U. S., at 814 ("intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other"). Affording petitioners retroactive relief in this case would not vindicate the interests of the Federal Government. Instead, it lines the pockets of the Government's former employees. It therefore comes as no surprise that the United States, despite its consistent participation in intergovernmental immunity cases in the past, has taken no position here. Because retroactive application of the rule in *Davis* serves petitioners' interests but not the interests intergovernmental immunity was meant to protect—the Federal Government's—denying *Davis* retroactive application would not undermine the decision's purpose or effect.

The final factor under *Chevron Oil* is whether the decision "`could produce substantial inequitable results if applied retroactively.'" *Chevron Oil*, *supra*, at 107 (quoting *Cipriano* v. *City of Houma*, 395 U. S., at 706). We repeatedly have declined to give our decisions retroactive effect where doing so would be unjust. In *Arizona Governing Committee* v. *Norris*, *supra,* for example, we declined to apply a Title VII decision retroactively, noting that the resulting "unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits." *Id.*, at 1106–1107 (Powell, J., joined by Burger, C. J., BLACKMUN, REHNQUIST, and O'CONNOR, JJ.). There was "no justification" for "impos[ing] this magnitude of burden retroactively on the public," we concluded. *Id.*, at 1107. Accord, *id.*, at 1107–1111 (O'CONNOR, J., concurring); see *id.*, at 1075 *(per curiam)*. Similarly, we declined to afford the plaintiff full retroactive relief in *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 718–723 (1978) (STEVENS, J.). There,

too, we explained that "[r]etroactive liability could be devastating" and that "[t]he harm would fall in large part on innocent third parties." *Id*., at 722–723.

Those same considerations exist here. Retroactive application of rulings that invalidate state tax laws have the potential for producing "disruptive consequences for the State[s] and [their] citizens. A refund, if required by state or federal law, could deplete the state treasur[ies], thus threatening the State[s'] current operations and future plans." *American Trucking Assns., Inc.* v. *Smith*, 496 U. S., at 182 (plurality opinion). Retroactive application of *Davis* is no exception. "The fiscal implications of *Davis* for the [S]tates," one commentator has noted, "are truly staggering." Hellerstein, Preliminary Reflections on McKesson and American Trucking Associations, 48 Tax Notes 325, 336 (1990). The States estimate that their total liability will exceed $1.8 billion. Brief for Respondent SA–1; Brief for State of Utah *et al.* as *Amici Curiae* 12–13. Virginia's share alone exceeds $440 million. Brief for Respondent SA–1; Brief for State of Utah *et al.* as *Amici Curiae* 12–13. This massive liability could not come at a worse time. See Wall Street Journal, July 27, 1992, p. A2 ("Most states are in dire fiscal straits, and their deteriorating tax base is making it harder for them to get out, a survey of legislatures indicates"). Accord, 241 Va., at 239–240, 401 S. E. 2d, at 873 (such massive liability "would have a potentially disruptive and destructive impact on the Commonwealth's planning, budgeting, and delivery of essential state services"); *Swanson* v. *State*, 329 N. C. 576, 583, 407 S. E. 2d 791, 794 (1991) ("this State is in dire financial straits" and $140 million in refunds would exacerbate it); *Bass* v. *State*, 302 S. C. 250, 256, 395 S. E. 2d 171, 174 (1990) ($200 million in refunds "would impose a severe financial burden on the State and its citizens [and] endanger the financial integrity of the State"). To impose such liability on

Virginia and the other States that relied in good faith on their taxation laws, "at a time when most States are struggling to fund even the most basic services, is the height of unfairness." *James B. Beam*, 501 U. S., at ___ (O'CONNOR, J., dissenting) (slip op., at 10).

It cannot be contended that such a burden is justified by the States' conduct, for the liability is entirely disproportionate to the offense. We do not deal with a State that willfully violated the Constitution but rather one that acted entirely in good faith on the basis of an unchallenged statute. Moreover, during the four years in question, the constitutional violation produced a benefit of approximately $8 million to $12 million per year, Tr. of Oral Arg. 33, 36, and that benefit accrued not to the Commonwealth but to individual retirees. Yet, for that $32 million to $48 million error, the Court now allows the imposition of liability well in excess of $400 million dollars. Such liability is more than just disproportionate; it is unconscionable. Finally and perhaps most important, this burden will not fall on some thoughtless government official or even the group of retirees that benefited from the offending exemption. Instead the burden falls squarely on the backs of the blameless and unexpecting taxpayers of the affected States who, although they profited not at all from the exemption, will now be forced to pay higher taxes and be deprived of essential services.

Petitioners, in contrast, would suffer no hardship if the Court refused to apply *Davis* retroactively. For years, 23 States enforced taxation schemes like the Commonwealth's in good faith, and for years not a single taxpayer objected on intergovernmental immunity grounds. No one put the States on notice that their taxing schemes might be constitutionally suspect. Denying *Davis* retroactive relief thus would not deny petitioners a benefit on which they had relied. It merely would deny them an unanticipated windfall. Because that windfall would come only at

the cost of imposing hurtful consequences on innocent taxpayers and the communities in which they live, I believe the substantial inequity of imposing retroactive relief in this case, like the other *Chevron* factors, weighs in favor of denying *Davis* retroactive application.

Even if the Court is correct that *Davis* must be applied retroactively in this case, there is the separate question of the *remedy* that must be given. The questions of retroactivity and remedy are analytically distinct. *American Trucking Assns., Inc.* v. *Smith*, *supra*, at 189 (plurality opinion) ("[T]he Court has never equated its retroactivity principles with remedial principles"). As JUSTICE SOUTER explained in *James B. Beam*, *supra*, at ___ (slip op., at 3–4), retroactivity is a matter of choice of law "[s]ince the question is whether the court should apply the old rule or the new one." When the retroactivity of a decision of this Court is in issue, the choice-of-law issue is a federal question. *Ashland Oil, Inc.* v. *Caryl*, 497 U. S. 916, 918 (1990) *(per curiam)*.

The question of remedy, however, is quite different. The issue is not whether to apply new law or old law, but what relief should be afforded once the prevailing party has been determined under applicable law. See *James B. Beam*, *supra*, at ___ (SOUTER, J.) (slip op., at 4) ("Once a rule is found to apply `backward,' there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one"). The question of remedies is in the first instance a question of state law. See *ibid.* ("[T]he remedial inquiry is one governed by state law, at least where the case originates in state court"). In fact, the only federal question regarding remedies is whether the relief afforded is sufficient to comply with the requirements of due process. See

McKesson Corp. v. *Division of Alcoholic Beverages and Tobacco*, 496 U. S. 18, 31–52 (1990).

While the issue of retroactivity is properly before us, the question of remedies is not. It does not appear to be within the question presented, which asks only if *Davis* may be applied "nonretroactively so as to defeat federal retirees' entitlement to refunds." Pet. for Cert. i. Moreover, our consideration of the question at this juncture would be inappropriate, as the Supreme Court of Virginia has yet to consider what remedy might be available in light of *Davis*'s retroactivity and applicable state law. The Court inexplicably discusses the question at length nonetheless, noting that if the Commonwealth of Virginia provides adequate predeprivation remedies, it is under no obligation to provide full retroactive refunds today. *Ante*, at 12–14.

When courts take it upon themselves to issue helpful guidance in dictum, they risk creating additional confusion by inadvertently suggesting constitutional absolutes that do not exist. The Court's dictum today follows that course. Amidst its discussion of pre- and postdeprivation remedies, the Court asserts that a plaintiff who has been deprived a predeprivation remedy cannot be "confine[d] . . . to prospective relief." *Ante*, at 13, n. 10. I do not believe the Court's assertion to be correct.

Over 20 years ago, Justice Harlan recognized that the equities could be taken into account in determining the appropriate remedy when the Court announces a new rule of constitutional law:

> "To the extent that equitable considerations, for example, `reliance,' are relevant, I would take this into account in the determination of what relief is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine." *United States* v. *Estate of Donnelly*,

397 U. S. 286, 296 (1970) (concurring opinion). The commentators appear to be in accord. See Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733 (1991) (urging consideration of novelty and hardship as part of the remedial framework rather than as a question of whether to apply old law or new). In my view, and in light of the Court's revisions to the law of retroactivity, it should be constitutionally permissible for the equities to inform the remedial inquiry. In a particularly compelling case, then, the equities might permit a State to deny taxpayers a full refund despite having refused them predeprivation process.

Indeed, some members of this Court have argued that we recognized as much long ago. In *American Trucking Assns.*, 496 U. S., at 219–224 (dissenting opinion), JUSTICE STEVENS admitted that this Court repeatedly had applied the *Chevron Oil* factors to preclude the provision of monetary relief. In JUSTICE STEVENS' view, however, *Chevron Oil* determined the question of remedy rather than which law would apply, new or old. See 496 U. S., at 220 (*Chevron Oil* and its progeny "establish a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice-of-law principle applicable to all cases on direct review"); see also *ante*, at 6, n. 9 (reserving the possibility that *Chevron Oil* governs the question of remedies in federal court). If JUSTICE STEVENS' view or something like it has prevailed today—and it seems that it has—then state and federal courts still retain the ability to exercise their "equitable discretion" in formulating appropriate relief on a federal claim. After all, it would be wholly anomalous to suggest that federal courts are permitted to determine the scope of the remedy by reference to *Chevron Oil*, but that state courts are barred from considering the equities altogether. Not only would that unduly restrict state court "flexibility in the law of remedies," *Estate of Donnelly*, *supra*, at

297 (Harlan, J., concurring), but it also would turn federalism on its head. I know of no principle of law that permits us to restrict the remedial discretion of state courts without imposing similar restrictions on federal courts. Quite the opposite should be true, as the question of remedies in state court is generally a question of state law in the first instance. *James B. Beam*, 501 U. S., at ___ (SOUTER, J) (slip op., at 4).

The Court cites only a single case that might be read as precluding courts from considering the equities when selecting the remedy for the violation of a novel constitutional rule. That case is *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U. S. 18 (1990). *Ante*, at 13. But, as the controlling opinion in *James B. Beam* explains, *McKesson* cannot be so read. 501 U. S., at ___ (slip op., at 13) ("Nothing we say here [precludes the right] to raise procedural bars to recovery under state law *or demonstrate reliance interests entitled to consideration in determining the nature of the remedy* that must be provided, *a matter with which McKesson did not deal*" (emphases added)). Accord, *id.*, at ___ (slip op., at 12) ("[N]othing we say here precludes consideration of individual equities when deciding remedial issues in particular cases"). It is true that the Court in *McKesson* rejected, on due process grounds, the State of Florida's equitable arguments against the requirement of a full refund. But the opinion did not hold that those arguments were irrelevant as a categorical matter. It simply held that the equities in that case were insufficient to support the decision to withhold a remedy. The opinion expressly so states, rejecting the State's equitable arguments as insufficiently "weighty *in these circumstances*." *McKesson*, 496 U. S., at 45 (emphasis added).

The circumstances in *McKesson* were quite different than those here. In *McKesson*, the tax imposed was patently unconstitutional: The State of Florida

collected taxes under its Liquor Tax statute even though this Court already had invalidated a "virtually identical" tax. *Id.*, at 46. Given that the State could "hardly claim surprise" that its statute was declared invalid, this Court concluded that the State's reliance on the presumptive validity of its statute was insufficient to preclude monetary relief. *Ibid*. As we explained in *American Trucking Assns.*, the large burden of retroactive relief is "largely irrelevant when a State violates constitutional norms well established under existing precedent." We cited *McKesson* as an example. 496 U. S., at 183 (plurality opinion).

A contrary reading of *McKesson* would be anomalous in light of this Court's immunity jurisprudence. The Federal Government, for example, is absolutely immune from suit absent an express waiver of immunity; and federal officers enjoy at least qualified immunity when sued in a *Bivens* action. As a result, an individual who suffers a constitutional deprivation at the hands of a federal officer very well may have no access to backwards-looking (monetary) relief. I do not see why the Due Process Clause would require a full, backwards-looking compensatory remedy whenever a governmental official reasonably taxes a citizen under what later turns out to be an unconstitutional statute but not where the officer deprives a citizen of her bodily integrity or her life.

In my view, if the Court is going to restrict authority to temper hardship by holding our decisions nonretroactive through the *Chevron Oil* factors, it must afford courts the ability to avoid injustice by taking equity into account when formulating the remedy for violations of novel constitutional rules. See Fallon & Meltzer, 104 Harv. L. Rev. 1733 (1991). Surely the Constitution permits this Court to refuse plaintiffs full backwards-looking relief under *Chevron Oil;* we repeatedly have done so in the past. *American Trucking Assns.*, *supra*, at 188–200 (canvasing the Court's practice); see also *supra*, at 4,

18. I therefore see no reason why it would not similarly permit state courts reasonably to consider the equities in the exercise of their sound remedial discretion.

In my view, the correct approach to the retroactivity question before us was articulated in *Chevron Oil* some 22 years ago. By refusing to apply *Chevron Oil* today, the Court not only permits the imposition of grave and gratuitous hardship on the States and their citizens, but also disregards settled precedents central to the fairness and accuracy of our decisional processes. Nor does the Court cast any light on the nature of the regime that will govern from here on. To the contrary, the Court's unnecessary innuendo concerning pure prospectivity and ill-advised dictum regarding remedial issues introduce still greater uncertainty and disorder into this already chaotic area. Because I cannot agree with the Court's decision or the manifestly unjust results it appears to portend, I respectfully dissent.