NEW YORK LAW SCHOOL

NYLS Law Review

Volume 39
Issue 4 *VOLUME XXXIX, Number 4, 1994*

Article 7

January 1994

# HARPER V. VIRGINIA DEPARTMENT OF TAXATION: OF PERNICIOUS ABSTRACTIONS AND THE DEATH OF PRECEDENT

Robert J. Sweeney

# *HARPER V. VIRGINIA DEPARTMENT OF TAXATION*: OF PERNICIOUS ABSTRACTIONS AND THE DEATH OF PRECEDENT

## I. INTRODUCTION

Sometimes newly-minted law is challenged immediately. Yet it can happen that a law will be relied upon for many years before ripening into a controversy that is finally resolved by the courts. Many of this nation's state governments—some since the 1920s—have exempted state and municipal retirees' pensions from state income tax.[1] Prior to the late 1930s, the exemption did not affect federal workers because the "salaries of most government employees, both state and federal, generally were thought to be exempt from taxation by another sovereign under the doctrine of intergovernmental tax immunity."[2] However, in 1938, the Supreme Court held that a tax on the income of state and municipal employees was not unconstitutional.[3] The following year, in *Graves v. New York ex rel. O'Keefe*,[4] the Supreme Court held that a non-discriminatory tax on a federal employee's income did not violate the

---

1. *See* Duffy v. Wetzler, 579 N.Y.S.2d 684, 686 (N.Y. App. Div. 1992) (noting, in a review of the history of state taxation of pensions, that New York State has exempted the pensions of state and municipal workers since 1920, incorporating the exemption into statute and into the New York State Constitution), *vacated* 113 S. Ct. 3027 (1993) (case remanded for further consideration in light of *Harper*).

2. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 810 (1989). The doctrine of intergovernmental tax immunity traces its roots to *McCulloch v. Maryland*, wherein Justice Marshall made the statement, "[T]he power to tax involves the power to destroy . . . the power to destroy may defeat and render useless the power to create . . . ." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). Briefly described:

> The doctrine of intergovernmental tax immunity, first established in *McCulloch v. Maryland*, is directed at preventing state and local tax authorities from imposing burdens which interfere with the activities of the federal government and the exercise of congressional power. Over the past 50 years the scope of the intergovernmental tax immunity doctrine has been reduced. The imposition of a non-discriminatory economic burden upon a federally sponsored activity is no longer barred. However, taxes remain constitutionally invalid if they are discriminatory in nature. Even significant differences between entities being taxed will not justify disparate tax treatment unless the differences can be shown to be directly related to the inconsistent tax treatment.

Joshua J. Angel and Leonard H. Gerson, *Remaining Gains Tax Issues After Decision In '995 Fifth'*, N.Y. L.J., Oct. 30, 1992, at 1, 4 (citations omitted).

3. Helvering v. Gerhardt, 304 U.S. 405 (1938).

4. 306 U.S. 466 (1939).

doctrine of intergovernmental tax immunity.[5] Almost simultaneously, Congress enacted the Public Salary Tax Act,[6] in which it consented to the non-discriminatory state taxation of federal employees.[7] Thereafter, some states began to tax compensation—including pensions—paid to federal employees.[8] Yet, despite those changes in federal law, states continued to exempt the pensions of their own state and municipal retirees while taxing the pensions of other retirees, including, after 1939, the pensions of retired federal employees.[9]

In 1989 the Supreme Court abolished this state tax policy when it handed down its decision in *Davis v. Michigan Department of Treasury*.[10] In *Davis*, the Supreme Court held that a state scheme which taxed the pensions of retired federal workers but not the pensions of retired state workers was an unconstitutional violation of the doctrine of intergovernmental tax immunity.[11] Still, *Davis* did not resolve the question of the extent of states' refund liabilities stemming from that case or from other adverse tax decisions. For example, after *Davis*, many states acknowledged the unconstitutionality of their own pension tax laws but refused to refund the monies collected.[12] When federal pensioners subsequently litigated the issue, many of the state courts applied the doctrine of non-retroactivity,[13] consequently holding that the states need

---

5. *Id.*

6. Public Salary Tax Act of 1939, ch. 59, § 84a, 53 Stat. 574 (1939) (current version at 4 U.S.C. § 111 (1988)).

7. *See Davis*, 489 U.S. at 810-12.

8. *See, e.g.*, Duffy v. Wetzler, 579 N.Y.S.2d 684, 686 (N.Y. App. Div. 1992) (discussing the inception of taxation by the State of New York of federally paid compensation).

9. *See, e.g., id.* at 686 (1992) (noting that New York State has exempted the pensions of State and municipal workers since 1920, incorporating the exemption into its Constitution). In 1989 "at least" twenty states had "tax or pension statutes that included exemptions" for state workers. *Id.*

10. 489 U.S. 803.

11. *Id.*

12. *See, e.g., Duffy*, 579 N.Y.S.2d 684 (challenging New York State's refusal to refund unconstitutionally collected pension taxes, notwithstanding the *Davis* decision).

13. *See* Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (analyzing various forms of non-retroactivity and arguing that the doctrine is better employed as an additional factor to be considered when determining remedy, rather than as a tool for resolving temporal choice-of-law problems). The doctrine of non-retroactivity was developed in the 1960s by the Warren Court as a means of lessening the impact of many of that Court's precedent-shattering decisions. In barest outline, the doctrine could be applied

not refund the taxes.[14] The Supreme Court addressed state refund liability in a series of tax-related cases that followed the *Davis* decision culminating with its recent decision in *Harper v. Virginia Department of Taxation*.[15]

Where federal law is concerned *Harper* virtually abolished the doctrine of non-retrospectivity. The *Harper* Court held that if a court does not explicitly apply the rule of a case solely in a prospective fashion, no other court may thereafter deny retroactive relief to a litigant who wins as a result of that rule. Instead, the new rule must be applied "in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule."[16] By default this precept holds sway although the parties to the precedent-setting case never briefed the question of whether to apply the rule and although the deciding court never considered the issue. No matter how loudly the facts of a subsequent case might scream out for the equitable application of the non-retrospectivity doctrine, that doctrine may no longer be used if it was not employed in the first case.

The *Harper* decision also raised issues pertaining to state remedy law and federal procedural due process.[17] In an attempt to suggest that questions of retrospectivity might properly be considered in terms of remedy, the *Harper* Court reiterated the holding of an earlier case, *McKesson v. Division of Alcoholic Beverages & Tobacco*.[18] Just as it had three years earlier in *McKesson*, the *Harper* Court indicated that a taxpayer who is limited to post-deprivation process is entitled to backward looking relief, but a taxpayer who is afforded sufficient pre-deprivation

---

to a case in which the claimant based his or her legal theory on a prior (usually recent) Court decision which had overturned established precedent. The Court, using a balancing test, would then decide "whether . . . [the] 'new' constitutional decision should be denied retroactive effect." Id. at 1733-34. *See also* discussion *infra* notes 99-157 and accompanying text.

14. *See, e.g.*, *Duffy*, 579 N.Y.S.2d 684 (holding under the doctrine of non-retroactivity that New York State need not refund the unconstitutionally collected pension taxes).

15. 113 S. Ct. 2510 (1993).

16. *See id.* at 2517.

17. *See id.* at 2518-20. Justice Thomas wrote the *Harper* opinion which is broken down into three parts. Part I examines the background of the case. *See id.* at 2513-16. In part II, Justice Thomas addresses the question of whether a court may refuse to apply the rule of a previously decided case. *See id.* at 2516-18. In part III, he points out the limits of state law concerning remedy in relation to federal due process requirements. *See id.* at 2518-20.

18. 496 U.S. 18 (1990).

relief is not necessarily due a tax refund.[19] Like drowning men, several States grasped desperately at this portion of the *Harper* opinion. These states persisted in their refusal to provide tax refunds to affected federal pensioners. They argued that refunds were not due because adequate pre-deprivation process had been available to the federal pensioners who brought suit in the state courts after the *Davis* decision.[20]

Thus, three strands of constitutional doctrine can be traced through *Davis* and *Harper* and several other tax cases which intervened between the two. Those doctrines are intergovernmental tax immunity,[21] retrospectivity,[22] and remedy versus procedural due process balancing.[23] Yet, while the cases that addressed those doctrines answered certain Constitutional questions, they also raised other issues requiring resolution.

Part II of this note first surveys the development of the intergovernmental tax immunity doctrine, addressing the *Davis* decision and the cases which led up to it.[24] Second, it examines the legal controversy surrounding the various theories of non-retroactive application of judicial rules.[25] Third, Part II looks at the litigation spawned by the *Davis* decision, which ultimately led to the controversy decided in *Harper*.[26] Finally, Part II concludes with a discussion of the *Harper* decision, which arose because of *Davis* and in which the Court most recently attempted to deal with the issues concerning non-retroactivity.[27] Part III of this note examines the various state responses to the *Harper* decision and assesses the consequences of that decision. This note ends

---

19. *See Harper*, 113 S. Ct. at 2519-20.

20. Frank Jackman et al., *Tax Refund Suit Drags State Into High Court*, DAILY NEWS (New York), Feb. 23, 1994, at 13. "'Of 23 states affected by the . . . [*Davis*] ruling . . . eight [are] still fighting the retirees over the refunds . . . . Those cases involve hundreds of millions of dollars in taxes', the National Association of Retired Federal Employees said in court papers." *Id.*

21. *See* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 814-17 (1989) (holding taxation of federal pensioners, but not of state pensioners, violates intergovernmental immunity).

22. *See Harper*, 113 S. Ct. at 2517-18 (banning selective application of new rules). *See also* James B. Beam Distilling Co. v. Georgia, 509 U.S. 529, 537-38 (1991) (banning selective application of a new rule when it had been applied in the case deciding the new rule).

23. *See Harper*, 113 S. Ct. at 2519-20 (indicating that when a state denies sufficient pre-deprivation process, due process values require a minimum post-deprivation relief).

24. *See infra* notes 29-97 and accompanying text.

25. *See infra* notes 98-146 and accompanying text.

26. *See infra* notes 147-57 and accompanying text.

27. *See infra* notes 158-228 and accompanying text.

with an examination of the possible reasons why the state courts seemed so obstinate in refusing to follow Supreme Court precedent, and concludes that the unhappy (for the states) result of the *Davis/Harper* line of cases, coupled with the unintended lesson derived from them, might have caused the state courts to misinterpret those decisions.[28]

## II. FROM *DAVIS* TO *HARPER*

### A. *Intergovernmental Tax Immunity: Necessary Limit On the Power to Destroy or Pernicious Abstraction*

#### 1. Background to *Davis*

*Davis v. Michigan Department of Treasury* was the latest in a line of cases hinging on the doctrine of intergovernmental tax immunity dating back almost to the founding of this nation.[29] The doctrine arose from the seminal case of *McCulloch v. Maryland*.[30] The *McCulloch* Court held that the State of Maryland could not tax a branch of the federal bank.[31] In that decision, Chief Justice Marshall asserted that Congress's right to charter a bank was derived from the necessary and proper clause of the Constitution.[32] Chief Justice Marshall pointed out that among the congressional powers enumerated in the Constitution were the powers to raise money[33] and "to make all laws which shall be necessary and proper for carrying into execution . . ."[34] this power and others. He reasoned that in order for Congress to effectively exercise those powers, Congress required the authority to select the means necessary to achieve its desired ends. Because Congress required the authority, the Chief Justice

---

28. *See infra* notes 229-303 and accompanying text.

29. *See* 489 U.S. 803, 810 (1989).

30. 17 U.S. (4 Wheat.) 316 (1819). *See also supra* note 2.

31. *See McCulloch*, 17 U.S. (4 Wheat.) at 436-37.

32. *Id.* at 411-12. The necessary and proper clause grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

33. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ." U.S. CONST. art. I, § 8, cl. 1.

34. U.S. CONST. art. I, § 8, cl. 18.

concluded that Congress had the right to charter the bank—a reasonable means to a permissible end.[35]

Finally, Chief Justice Marshall explained that, because the Supremacy Clause[36] raised a federal governmental interest to a position of superiority over a conflicting state interest, and because the "power to tax involve[d] the power to destroy,"[37] a state should not have the authority to tax an instrument of the federal government.[38] He also argued that state citizens do not require similar protection because they possess the political power to take their own elected officials to task for any insidious or destructive taxes imposed upon them.[39] In contrast, the federal government does not have sufficient political protection from taxes imposed on it by a state government because most federal constituents are not also constituents of that state government.[40]

In the cases immediately following *McCulloch*, the intergovernmental tax immunity doctrine was used not only to proscribe state taxation of "direct government functions . . . but also . . . secondary or derivative transactions relating to the performance of governmental functions."[41] For example, the Court, in *Plowden Weston v. City Council of Charleston*,[42] relying on *McCulloch*, held that a tax on United States bonds was an unconstitutional interference with the legitimate power of the federal government.[43] The Court, in another early case, *Dobbins v. Commissioners*,[44] held that federal government employees were "instrument[s]" of the government whose salary could not be taxed by a

---

35. *See McCulloch* 17 U.S. (4 Wheat.) at 400-25.

36. The clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

37. *McCulloch*, 17 U.S. (4 Wheat) at 431.

38. *See id.*

39. *See id.* at 428-29.

40. *See id.*

41. 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW; SUBSTANCE AND PROCEDURE § 13.9(a), at 811 (1986).

42. 27 U.S. (2 Pet.) 449 (1829).

43. *Id. But see* People v. Commissioners, 71 U.S. (4 Wall.) 244 (1866) (holding that the owner of bank shares cannot deduct income proportionately derived from investments in government securities).

44. 41 U.S. (16 Pet.) 435 (1842).

state.[45] The Court used this same notion to exempt a state officer or employee from federal tax as well.[46] Other cases extended the doctrine to shield government leaseholders from taxation.[47]

As the body of law on intergovernmental tax immunity expanded, the underlying logic of that doctrine came under attack. For example, in *Panhandle Oil Co. v. Mississippi ex rel. Knox*,[48] the Court followed the traditional reasoning of Chief Justice Marshall in *McCulloch*, holding that the State of Mississippi could not tax gasoline sold to the United States Coast Guard by a private corporation. Yet, in his dissenting opinion, Justice Holmes criticized the majority's rationale:

> It seems to me that the State Court was right [in affirming the tax]. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates.[49]

Eventually the Court placed limits on the doctrine of intergovernmental tax immunity.[50] Subsequent cases held that states may assess that which is normally exempted from taxation as long as Congress

---

45. *Id.*

46. *See* Collector v. Day, 78 U.S. (11 Wall.) 113, 127-28 (1870) (holding that Congress may not impose a tax on an employee, i.e., an instrumentality, of the state).

47. *See* ROTUNDA ET AL., *supra* note 41, § 13.9(a), at 811 n.5.

48. 277 U.S. 218 (1938).

49. *Id.* at 223 (Holmes, J., dissenting).

50. *See* ROTUNDA ET AL., *supra* note 41, § 13.9(a), at 812; Bernard T. Ferrari, Washington v. United States: *A McCulloch Progeny*, 29 LOY. L. REV. 1164, 1166-67 (1983).

grants consent.[51] However, fine distinctions were sometimes drawn. States were permitted to tax the real property of federally chartered corporations,[52] but they could not tax the realty of corporations doing business with the federal government if Congress granted specific exemption from taxation to such corporations.[53]

Two recurrent themes run through the cases that deal with the doctrine's limits. First is the issue of congressional consent. A state may not tax a federal entity without it.[54] Second, a tax that is consented to by Congress is nonetheless impermissible if it discriminates against the federal government.[55]

---

51. *See, e.g.*, Van Allen v. Assessors, 70 U.S. (3 Wall.) 573 (1865) (Although Congress had authorized the states to tax the shares of national banking associations, the Court held unconstitutional a state tax of a banking association, the capital of which was wholly invested in U.S. stocks and bonds, because the tax adversely discriminated against such investments. The Court nonetheless rejected the argument that it was unconstitutional for Congress to permit a tax on the bonds). The *Van Allen* Court stated:

> It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. . . . But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act.

*Id.* at 585.

52. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) ("[the ban against taxation] does not extend to a tax paid by the real property of the bank"). *But see* Van Brocklin v. Tennessee, 117 U.S. 151 (1886) (indicating a state can't directly tax land owned by the United States).

53. *See* Thomson v. Union Pac. R.R., 76 U.S. (9 Wall.) 579 (1869).

54. *See, e.g.*, British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936) (holding a state may tax the profits under a federal lease if there is congressional consent); Baltimore Nat'l Bank v. State Tax Comm'n, 297 U.S. 209 (1936) (holding that a state can tax shares owned by a U.S. agency if Congress consents).

55. *See, e.g.*, United States v. County of Fresno, 429 U.S. 452 (1977) (holding that federally-owned housing provided to U.S. Forest workers as compensation was taxable as long as the tax was imposed on equally situated non-federal state citizens); United States v. City of Detroit, 355 U.S. 466 (1958) (holding that profits derived from government owned real property are taxable if the tax is non-discriminatory); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) (holding that the salaries of engineers employed by a private corporation which provides consultation to the federal government are not exempt from state taxes if the taxes are not discriminatory).

In the late 1930s and early 1940s, the Court "abruptly turned the tide" on the intergovernmental tax immunity doctrine.[56] In *James v. Dravo Contracting Co.*,[57] the Court held that an income tax on construction company earnings from government projects was not unconstitutional.[58] *Dravo* instituted the "legal incidence doctrine," rejecting the notion that a state tax placed a burden on the federal government.[59] "The essence of . . . [the legal incidence] doctrine is that a state tax is valid if not directly levied on the federal government, if not discriminatory, and if not declared invalid by Congress."[60] Soon after *Dravo*, in *Helvering v. Gerhardt*,[61] the Supreme Court held that it was not unconstitutional for the federal government to impose a non-discriminatory income tax upon the salaries of state employees.[62]

Following closely on the heels of *Gerhardt* the Court reversed the New York State Court of Appeals in *Graves v. New York ex rel. O'Keefe*,[63] holding that a state tax on the salary of an employee of the federally-created Home Owner's Loan Corporation did not unconstitutionally burden the federal government.[64] The *O'Keefe* Court found that the state tax was not a direct tax on the Home Owner's Loan Corporation, but rather a tax on the property of the individual taxpayer.[65] The Court further concluded that the tax on the employee's salary was non-discriminatory.[66]

In *O'Keefe*, the Court narrowly construed the intergovernmental tax immunity doctrine. The Court found that Congress had not intended for Home Owner's Loan Corporation employees to be exempt from state taxation because, upon enactment of the enabling legislation, Congress had been silent on the issue of employee immunity from state taxation.[67]

---

56. ROTUNDA ET AL., *supra* note 41, § 13.9(a), at 812.

57. 302 U.S. 134 (1937).

58. *Id.* at 161.

59. *See* Ferrari, *supra* note 50, at 1167 (footnotes omitted) (discussing *Dravo*).

60. *Id.*

61. 304 U.S. 405 (1938).

62. *Id.* at 424.

63. 306 U.S. 466 (1939).

64. *Id.* at 487.

65. *Id.* at 480.

66. *Id.* at 484-87.

67. *Id.* The *O'Keefe* Court stated:

> It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. . . . But there is little scope for the application of that doctrine to the tax immunity

Writing for the majority, Justice Stone determined that a "non-discriminatory general tax" on a government employee was neither an undue burden on the government nor unconstitutional unless explicitly exempted by Congress.[68]

In his concurring opinion Justice Frankfurter echoed the criticism made by Justice Holmes at an earlier time:[69]

> The arguments upon which *McCulloch v. Maryland* . . . rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion of *McCulloch v. Maryland.* Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged in a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' . . . All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions."[70]

Shortly after the *Gerhardt* decision, Congress passed the Public Salary Tax Act[71] which waived the immunity from state taxation previously given to federal employees.[72] However, *O'Keefe* was handed down before the amendment became law.[73] "In effect, § 111 simply codified the result in *O'Keefe* and foreclosed the possibility that subsequent judicial

---

> of governmental instrumentalities. . . . Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when . . . Congress has disclosed no intention with respect to the claimed immunity . . . there is no ground for implying a constitutional immunity.

*Id.* at 479-80.

68. *Id.* at 487.

69. *See supra* text accompanying note 50.

70. *O'Keefe*, 306 U.S. at 488-90 (Frankfurter, J., concurring) (citations omitted).

71. Public Salary Tax Act of 1939, ch. 59, § 84a, 53 Stat. 574 (1939) (current version at 4 U.S.C. § 111 (1988)).

72. 4 U.S.C. § 111 states, in part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

73. *See* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 811 (1989) (discussing the history of the doctrine of intergovernmental tax immunity).

reconsideration of that case might reestablish the broader interpretation of the immunity doctrine."[74]

Although both the Supreme Court and Congress had acted to shepherd the doctrine away from the realm of "'pernicious abstractions'"[75] by narrowly proscribing its limits, the intergovernmental tax immunity doctrine had by no means been entirely eliminated. For example, twenty years after the Public Salary Tax Act was enacted, in *Phillips Chemical Co. v. Dumas Independent School District*,[76] the Supreme Court held that an ad valorem tax on a company's use of federal realty was unconstitutional because the similar use of state land was taxed at a lower rate with no "significant differences" to justify the two classes.[77] Thus, although the challenged policy had been relied upon for many years, the Supreme Court in *Davis v. Michigan Department of Treasury*,[78] like the Michigan courts that first heard the case, was not without the guiding light of precedent when it found itself confronted with a federal pensioner's claim that a state tax, which exempted state retirees' pensions but not the pensions of federal retirees, was unconstitutional.[79]

### 2. *Davis*: Progenitor of *Harper*

*Davis v. Michigan Department of Treasury* arose because a retired federal worker residing in Michigan petitioned for a tax refund in state court. The pensioner claimed that the state income tax scheme, which exempted state pensions but not federal pensions, violated the intergovernmental tax immunity doctrine because it was unlawfully discriminatory.[80] The Supreme Court heard the case after the pensioner's claim failed in the Michigan courts.[81]

---

74. *Id.* at 812.

75. *O'Keefe*, 306 U.S. at 490 (Frankfurter, J., concurring).

76. 361 U.S. 376 (1960).

77. *Id.* at 387.

78. 489 U.S. 803 (1989).

79. *Id.* The *Davis* Court, in reviewing the history of the doctrine of intergovernmental tax immunity, examined several related cases beginning with *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), and including *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960). *See id.*

80. *See id.* at 805-07. The pensioner claimed "that the State's inconsistent treatment of state and federal retirement benefits discriminated against federal retirees in violation of 4 U.S.C. § 111, which preserves federal employees' immunity from discriminatory state taxation." *Id.* at 807.

81. *See id.* at 806-07.

As a threshold matter, the *Davis* Court found that pension income was taxable compensation within the meaning of *O'Keefe* and the Public Salary Tax Act.[82] The Court then inquired whether there were significant differences to justify the two taxpayer classes.[83] In making its determination, the Court rejected a "rational" basis analysis,[84] stating, "the relevant inquiry is whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'"[85] Applying this standard, the *Davis* court rejected as being "wholly beside the point" the argument that the tax preference served as an inducement to retain qualified employees.[86] Furthermore, the Court dismissed the somewhat true but over-inclusive argument that a tax preference equalized a disparity between the less "munificent" state pension benefits and the more generous federal pensions.[87] Accordingly, the Court agreed with the federal pensioner, holding that it was unlawfully discriminatory for a state to exempt the pensions of its own retired workers while subjecting federal pensions to an income tax.[88]

Justice Stevens' lone dissent reverberated with the prior criticisms leveled by Justice Holmes and Justice Frankfurter against the intergovernmental tax immunity doctrine.[89] He accused the Court of having forgotten "the *ratio decidendi* of our holding in *McCulloch v. Maryland.*"[90] Justice Stevens also pointed out that the facts of *Davis* did not support the original justification for the doctrine as offered by Chief Justice Marshall in *McCulloch v. Maryland.*[91] Justice Stevens argued

---

82. *Id.* at 808-09.

83. *See id.* at 816-17.

84. *See id.* at 816.

85. *Id.* at 816 (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

> In determining whether this standard of justification has been met, it is inappropriate to rely solely on the mode of analysis developed in our equal protection cases. We have previously observed that "our decisions in [the equal protection] field are not necessarily controlling where problems of intergovernmental tax immunity are involved," because "the Government's interests must be weighed in the balance."

*Id.* at 816 (quoting *Phillips Chem.*, 361 U.S. at 385).

86. *Id.*

87. *Id.* at 816-17.

88. *Id.* at 817.

89. *See id.* at 818-28 (Stevens, J., dissenting); *see supra* text accompanying notes 50, 70.

90. *Davis*, 489 U.S. at 828.

91. *See id.* at 821; *supra* text accompanying notes 36-40.

that there was no threat to the federal government from the Michigan tax on federal employees' pension income because the tax applied "equally to the vast majority" of state citizens.[92] This served as a political counter to any attempted unfairness of the state legislature.[93] Thus he concluded that a "discriminatory" tax should not result in a per se invalidation of that tax.[94]

Whether or not the doctrine is indeed based on "sterile refinements" that are "derived . . . from an unfortunate remark,"[95] it is difficult to give credence to an argument that claims *Davis* created "new" law. *Davis* merely confirmed the viability of the intergovernmental tax immunity doctrine.[96] Under the doctrine, Congress may consent to an otherwise impermissible state tax by remaining silent. Yet it is illegal discrimination for a state to impose a tax on federal pensioners when state pensioners are exempt from the tax. It is illegal even though "the vast majority" of the state's citizens are also included within the scheme, and despite the fact that the tax policy had been relied upon by the state and had gone unchallenged for half a century.[97]

### B. *Non-Retroactivity: Choice-of-Law Issue or Remedial Issue*

#### 1. The Controversy over Non-Retroactivity Prior to *Davis*

Unlike the intergovernmental tax immunity doctrine, which had its genesis in the early years of this Nation,[98] the notion of non-retroactivity[99] was developed much more recently, by the Warren Court in the last half of the current century.[100] Simply stated, the doctrine is

---

92. 489 U.S. at 818 (Stevens, J., dissenting).

93. *See id.* at 820 (Stevens, J., dissenting).

94. *See id.* at 821 (Stevens, J., dissenting).

95. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 488-89 (1939) (Frankfurter, J., concurring). *See supra* text accompanying note 70.

96. Davis v. Michigan Dep't of Treasury, 489 U.S. 803.

97. *Id.* at 821.

98. *See supra* text accompanying notes 29-47.

99. *See generally*, Fallon & Meltzer, *supra* note 13 (stating the doctrine has also been variously denominated "retroactivity," and "prospectivity" by the commentators and judges who refer to it); Timothy B. Sherman, Davis v. Michigan *and The Doctrine of Retroactivity: States' Refund for Taxation of Federal Pension Income*, 4 B.Y.U. J. PUB. L. 507 (1990) (same) (referring to the doctrine as "non-retrospectivity," and "retrospectivity").

100. *See* Fallon & Meltzer, *supra* note 13, at 1733-34.

such that a court, after balancing certain factors, may decline to apply to the case at hand a "new" rule that was announced in a previous decision.[101] The doctrine has sparked a great deal of debate.[102]

The debate grew out of two diametrically opposed views of the function of judges and courts.[103] Normally, once the Court decides a case, the ensuing rule applies retroactively.[104] This reflects the traditional view of judicial rule-making, the roots of which can be traced back to Blackstone.[105] In its most rigid form, this rule holds "that the function of courts is to apply the law, not make it, and that judges, once they have found the law, have no warrant to refuse to apply it."[106]

In contrast to this Blackstonian (or declaratory) outlook is the view that traces its lineage to the positivism of H. L. A. Hart and J. Austin, whereby judges are often required to make new law.[107] In essence, positivism views law as a "system of rules."[108] Although the courts should adhere to these rules, there are times when "their application is uncertain . . . [and] judges have no alternative but to make law."[109]

Once it is recognized that the court sometimes makes "new" law, the question arises: what, if anything, should be done with respect to cases where "old" law was applied but "new" law was later announced.[110]

---

101. *See id.* at 1733.

102. *See, e.g., id.* at 1734 ("non-retroactivity decisions attracted a swarm of protests").

103. *See id.* at 1758-64. The dispute focuses on whether judges "make law or rather find and declare it." *Id.* at 1758.

104. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 529-30 (1991) (holding that a state may not refuse to apply the rule promulgated in a prior case, where, in the prior case, the Court found that a state excise tax which discriminated against out-of-state producers was unconstitutional and remanded for remedial action) *See also infra* text accompanying notes 179-192.

105. *See* Fallon & Meltzer, *supra* note 13, at 1734. *But see* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 24-25 (1983), in which Judge Posner suggests that although it appeared Blackstone viewed a judge's proper role as "merely a passive transmitter" of the law, Blackstone was in fact "trying to rationalize judicial creativity in adapting the common law to contemporary social needs."

106. *Id.*

107. *Id.* at 1758, 1760.

108. *Id.* at 1760.

109. *Id.* (citation omitted).

110. *See generally id.* at 1738-58 (discussing the approaches taken by the Supreme Court to various aspects of this question).

One way to deal with the problem is to view prospectivity as a choice-of-law issue.[111] Thus, once a court has determined that:

> application [of the new law] would have a harsh and disruptive effect on those who relied on prior law[,] . . . [i]f the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply new law.[112]

Viewed from the choice-of-law perspective, there are three ways to apply a judicial decision. One is the traditional, Blackstonian method, which requires that if the "principles and precedents antedate the events on which the dispute turns," full retroactive application of the law is given both to the case before the court and to all similar cases, subject to procedural limitations such as the statute of limitations.[113] Another option is pure prospectivity, whereby the court announces a new rule but declines to utilize it in the case before it, applying the new rule only in future cases.[114] The third choice is selective retrospectivity which applies a rule to the case before the court, but the question of whether to apply it to other cases is left to the discretion of the courts deciding those cases.[115]

As an alternative to the doctrine from a choice-of-law perspective, it has been argued that the concept of prospectivity more suitably belongs within the framework of the law of remedy.[116] Proponents argue that this eliminates the difficulties and inconsistencies encountered when the selective or the pure form of prospectivity is employed as a temporal choice of law.[117] In response to the assertion that non-retroactive rule-making usurps legislative prerogative and violates Article III of the

---

111. *See, e.g.*, American Trucking Ass'ns v. Smith, 496 U.S. 167, 171, 179-81 (1990) (plurality opinion) (O'Connor, J.). In deciding whether to apply the rule of a prior case that held a highway use tax to be unconstitutional, the court applied a three-part balancing test. After weighing the three factors, the Court determined that the "new" rule from the prior case should not be applied to those events at issue which had occurred prior to the announcement of the "new" rule.

112. *Id.* at 191.

113. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991).

114. *See id.* at 536.

115. *See id.* at 537.

116. *See generally* Fallon & Meltzer, *supra* note 13.

117. *See id.* at 1797-1807.

Constitution,[118] proponents of the remedial viewpoint answer that it has not been unknown for the Court to give what could be "said to constitute a forbidden 'advisory opinion,'"[119] even in *Marbury v. Madison*.[120] An additional argument made by proponents of the remedial view is that the limited manner in which issues come before the Court sometimes constrains the Court from making rules that will bind all future parties.[121]

In response to the contention that non-retroactivity makes it too easy to change existing law,[122] proponents of the remedial framework argue that there is no "correct pace" at which change should occur.[123] Opponents of non-retrospectivity also assert that use of the doctrine has a chilling effect upon the law's development because a rational litigant would be less likely to assume the expense of litigation if there is a diminished chance of receiving a damage award.[124] In reply it is said that such an effect is unlikely, at least with certain types of litigation—tax litigation for instance—because a litigant has a stake in preventing future unconstitutional conduct as well as in seeking a refund.[125]

Advocates who wish to place non-retroactivity within the law of remedies claim there are two overriding principles which must be considered when addressing the law of constitutional remedies.[126] The first principle is that individual harms should be redressed.[127] The second principle is that the remedy should reinforce "structural values."[128] Proponents argue that the second principle is superior to the first and that an interest in redress of an individual harm may yield to an interest in the reinforcement of structural values.[129] Thus, for example, government decision-makers are granted qualified-immunity from tort

---

118. *See id.* at 1734.

119. Fallon & Meltzer, *supra* note 13, at 1798-99 (quoting Teague v. Lane, 489 U.S. 288, 316 (1989)).

120. 5 U.S. (1 Cranch) 137 (1803) (holding that the court lacked jurisdiction to issue mandamus directing the delivery of William Marbury's commission, yet taking the occasion to discourse at length on the subject of judicial supremacy).

121. *See* Fallon & Metzer, *supra* note 13, at 1806.

122. *See id.* at 1734.

123. *See id.* at 1804.

124. *See id.*

125. *See id.*

126. *See id.* at 1787-91.

127. *Id.* at 1787.

128. *Id.*

129. *See id.* at 1791.

liability because there is a need not to discourage governmental decision-making.[130] Seen in this light, it is argued that non-retroactivity has no place in deciding which law to apply to a particular case. Rather, non-retroactivity is simply one factor to be weighed along with many other factors in applying the two principles of Constitutional remedial decision-making to a case before the Court.

Nonetheless, the Supreme Court has, for the court, viewed the non-retroactivity doctrine as a choice-of-law question.[131] The Court first accepted and utilized the doctrine in the context of a criminal proceeding in *Linkletter v. Walker*.[132] In *Linkletter*, the Court weighed the consequences of retroactive application, and, as a result, declined to apply the exclusionary rule[133] which had been announced in the prior case, *Mapp v. Ohio*.[134] Subsequent to *Linkletter*, the Court refined the doctrine in *Stovall v. Denno*, establishing thereby a rule of selective prospectivity.[135] While in effect, the rule was applied in as many as twenty-five criminal cases.[136]

Initially, both activists and conservatives alike embraced prospectivity.[137] For a time, conservatives saw prospectivity as a means to limit the damage done by an activist court.[138] But conservatives soon suffered a change of heart. They came to view prospectivity as an aid to the Court in transforming the law because application of the doctrine alleviated the sometimes disruptive consequences of stare decisis.[139] The

---

130. *See id.* at 1792.

131. *See* American Trucking Ass'ns v. Smith, 496 U.S. 167 (1990) (plurality opinion) (O'Connor, J.). "[T]he Court has never equated its retroactivity principles with remedial principles." *Id.* at 189.

132. 381 U.S. 618 (1965).

133. *Id.* at 636-40.

134. 367 U.S. 643 (1961).

135. 388 U.S. 293 (1967) (holding, in a habeas corpus proceeding which collaterally challenged the admission of tainted evidence and which was argued and decided simultaneously with United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), that the rule announced in those cases, which excludes admission of such evidence, did not apply in the instant case). "Under *Stovall*, a new rule always applied to the case in which it was announced. Only in a second case did the Court determine whether the new decision would apply to other conduct occurring prior to announcement." Fallon & Meltzer, *supra* note 13, at 1741.

136. Fallon & Meltzer, *supra* note 13, at 1743.

137. *See* K. David Steele, *Prospective Overruling and the Judicial Role After* James B. Beam Distilling Co. v. Georgia, 45 VAND. L. REV. 1345, 1351 (1992).

138. *See* Fallon & Meltzer, *supra* note 13, at 1739-44.

139. *See id.* at 1743.

conservative position ultimately prevailed; in 1987 the Court handed down its opinion in *Griffith v. Kentucky*,[140] mandating "full retroactivity to criminal cases on direct review."[141]

The doctrine survived longer in the civil sphere. The Court, initially influenced by the *Linkletter* and *Stovall* decisions, adopted prospectivity in *Chevron Oil Co. v. Huson*.[142] *Chevron* was initiated by a worker who was injured on an off-shore platform. The *Chevron* Court recognized the validity of a prior decision which mandated application of the more restrictive Louisiana statute of limitations rather than the admiralty laches doctrine which had previously been adhered to and upon which the plaintiff had, in good faith, depended. Nonetheless, for reasons of reliance and equity, the Court held that it would not apply the "new" rule to the litigants in *Chevron*, thus allowing the plaintiff to proceed with his otherwise time-barred claim.[143]

In *Chevron*, in order to determine whether the rule in a previously-decided case should be given prospective-only effect in a case at hand, the Court promulgated a three-part test which was used in civil cases for twenty more years afterward.[144] The Court did not conclusively abandon the doctrine or the *Chevron* analysis until it decided *Harper v.*

---

140. 479 U.S. 314 (1987) (deciding whether the prohibition against the discriminatory use of peremptory challenges, previously declared unconstitutional in *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied retroactively to all cases on direct review, the court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

141. Fallon & Meltzer, *supra* note 13, at 1734.

142. 404 U.S. 97 (1971).

143. *Id.* at 98.

144. *See id.*at 106-07. The three-part Chevron test is:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied[,] . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . 'we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'. . . Finally, . . . [we must weigh] the inequity imposed by retroactive application.

*Id.* at 106-07 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965) (citations omitted).

*Virginia Department of Taxation*,[145] which was the direct offshoot of *Davis v. Michigan Department Of Treasury*.[146]

2. The *Davis*-spawned Litigation

*Davis*[147] led the Court to the prospectivity question because many states found themselves faced with dire economic consequences resulting from that decision. Twenty-eight states were affected due to the fact that the case had important consequences for a large number of state governments.[148] At least one state, Missouri, reacted by raising its sales tax to pay for refunds to federal pensioners.[149] Some states enacted legislation to eliminate from their tax laws those exemptions and exclusions which unlawfully discriminated between federal pensions on the one hand and state and local pensions on the other.[150] *Davis* also "spawned a mass of litigation in many States on behalf of Federal retirees seeking . . . refunds of taxes paid."[151]

Many states claimed *Davis* should only be applied prospectively.[152] They did so despite then-current uncertainty about the continued vitality of the non-retroactivity doctrine as derived from *Chevron*. This was because the *Griffith* decision had terminated the use of the doctrine in criminal matters.[153] More doubts about the viability of the doctrine

---

145. 113 S. Ct. 2510 (1993); *cf.* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 552 (1991) (O'Connor, J., dissenting) (asserting that the plurality's holding "seriously curtails . . . the *Chevron* inquiry").

146. 489 U.S. 803 (1989).

147. *Id.*

148. Carol Douglas, *States Vary in Pension Income Tax Equalization Measures*, 44 TAX NOTES 373, 373 (July 24, 1989).

149. *Id.*

150. *See id.*

151. Duffy v. Wetzler, 579 N.Y.S.2d 684, 686 (N.Y. App. Div. 1992) (Duffy was itself one of the many cases "spawned" by Davis), *vacated*, 113 S. Ct. 3027 (1993) (case remanded for further consideration in light of *Harper*). *See also* Albin C. Koch, *American Trucking's 'Catch-22' Should Not Affect Most Taxpayer Claims In Current State Tax Disputes*, 51 TAX NOTES 1043, 1054 (May 27, 1991) ("This issue is being contested in some 24 states, and large amounts of revenue are involved in most of them.").

152. *See, e.g.*, Duffy v. Wetzler, 579 N.Y.S.2d 684 (holding under the doctrine of non-retroactivity that New York State need not refund unconstitutionally collected pension taxes).

153. Griffith v. Kentucky, 479 U.S. 314 (1987). *See supra* note 144 and accompanying text.

were stirred up by a case decided soon after *Davis*. In *James B. Beam Distilling Co. v. Georgia*,[154] the Court held that "[it is error] to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."[155] Some states involved in post-*Davis* litigation nevertheless refused to make refunds to the affected pensioners, although they acknowledged the unconstitutionality of the exemption.[156] The shadow cast upon the non-retroactivity doctrine by the *Griffith* and the *James B. Beam* decisions was seemingly ignored. The rationale most frequently used by the states that still refused to provide tax refunds was that the *Davis* decision satisfied the three-part *Chevron* analysis.[157]

3. Three Attempts to Resolve the Controversy

a. *American Trucking*: Non-Retroactivity as a Choice-of Law Issue

Before the *Davis*-spawned pension cases reached finality, the Supreme Court decided three other cases that added to the brew of confusion and complexity. Each of the three concerned a state's refusal to refund unconstitutionally collected taxes.[158] Two, *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*[159] and *American Trucking Ass'ns*

154. 501 U.S. 529 (1991).

155. *Id.* at 540 (Souter, J., with one Justice concurring and four Justices concurring in the judgment).

156. *See, e.g.*, Michael T. Petrik, *Georgia: State Supreme Court Rules Out Davis-Type Case Refund*, 3 STATE TAX NOTES 836, 836-37 (Dec. 7, 1992) (relating the Georgia Supreme Court's denial of a refund to federal pensioners based on a narrow interpretation of state law which provides for refunds only if the tax is collected "illegally" as distinguished from "unconstitutionally"); James Morgan, *DOR Asks Extension To Act on Federal Retirement Income Claims*, 3 STATE TAX NOTES 601, 601 (Oct. 26, 1992) (Wisconsin Department of Revenue denying refunds for years prior to Davis case); John Spirtos, *Supreme Court: State Tax Preview*, 3 STATE TAX NOTES 492, 492 (Oct. 5, 1992) ("Virginia Supreme Court denied the taxpayers' claims for retroactive relief"); James Morgan, *Wisconsin: DOR Rejects Federal Retiree Pension Refunds*, 3 STATE TAX NOTES 51, 51 (July 13, 1992) (Wisconsin denied refunds pending further litigation).

157. *See, e.g.*, Duffy v. Wetzler, 579 N.Y.S.2d 684, 690-91 (using a *Chevron* analysis to determine that the tax relief due federal pensioners as a result of *Davis* need not be applied retroactively).

158. *See, e.g.*, Koch, *supra* note 152, at 1044-45 (expressing hope that the uncertainty created by two Supreme Court decisions would be resolved by the soon-to-be-decided third case).

159. 496 U.S. 18 (1990).

*v. Smith*,[160] were handed down a little over a year after *Davis*.[161] The third, *James B. Beam Distilling Co. v. Georgia*,[162] was decided a year after *McKesson* and *American Trucking*.

*American Trucking* concerned a suit brought by a truckers' association challenging an Arkansas flat-use tax on the ground that the taxing scheme interfered with commerce because out-of-state truckers paid proportionally more under the tax than in-state truckers.[163] Relying on precedent, the Arkansas court upheld the tax.[164] As a result, the petitioners appealed to the Supreme Court which "held" in abeyance the petitioners' appeal pending the outcome of a similar case then before the Court.[165] When the Court subsequently declared that a flat-use tax was unconstitutional,[166] it remanded *American Trucking* "for further consideration in light of *Scheiner*."[167]

When *American Trucking* later reached the Arkansas Supreme Court (after travelling a circuitous procedural route), that court used the *Chevron* test[168] to apply *Scheiner* prospectively, thus denying a tax refund to the out-of-state truckers.[169] On a writ of certiorari, the United States Supreme Court affirmed the decision of the Arkansas court.[170] Confusion resulted[171] for three reasons: (1) *American Trucking* was only

---

160. 496 U.S. 167 (1990).

161. *McKesson*, 496 U.S. 18 (argued Mar. 22, 1989, reargued Dec. 6, 1989) and American Trucking Ass'ns v. Smith, 496 U.S. 167 (1990) (argued Mar. 22, 1989, reargued Dec. 6, 1989). *McKesson* and *American Trucking* were consolidated by the court and argued just six days prior to when Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) was decided (decided Mar. 28, 1989).

162. 501 U.S. 529 (1991).

163. *See* 496 U.S. at 171-72.

164. *See id.* at 172.

165. *See id.* at 173.

166. American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

167. 496 U.S. at 173.

168. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). *See supra* note 145.

169. American Trucking Ass'ns v. Smith, 496 U.S. 167, 174-76 (1990).

170. *See id.* at 200 (remanding for a determination of what relief was entitled petitioners for their 1987-88 HUE tax payments).

171. *See, e.g.*, Koch, *supra* note 151 at 1046 ("The three opinions in *American Trucking* make it difficult to evaluate the durability of the Court's prospectivity doctrine.").

a plurality opinion;[172] (2) the Court had recently eliminated prospective judicial ruling in the criminal sphere;[173] and (3) on the same day that the Court handed down the *American Trucking* decision the Court also issued a seemingly contradictory companion decision—*McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*.[174]

Writing for the plurality in *American Trucking*, Justice O'Connor stated that "the Court has never equated its retroactivity principles with remedial principles."[175] Instead she insisted that a retroactivity issue always involves a temporal choice-of-law question.[176] According to Justice O'Connor, when on the rare occasion that a new law is announced—for example, when the Court reverses itself, as opposed to when the Court applies a settled principle to a controversy before it[177]—the court announcing that rule is presented with a choice. It must either apply the new rule from that time forward (thus applying the prior rule to conduct that occurred before the new rule was announced) or apply it retroactively.[178]

b. *McKesson*: Due Process and Retroactivity

In contrast, *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*,[179] a unanimous decision written by Justice Brennan and handed down in tandem with the *American Trucking* decision,[180] dealt with the permissible limits of a state's remedial measures when the state had collected taxes unconstitutionally.[181] As a result of an earlier Supreme Court decision, *Bacchus Imports, Ltd. v. Dias*,[182] which held that a Hawaiian excise tax scheme favoring local alcoholic beverage producers

---

172. The plurality opinion was written by Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Kennedy. Justice Scalia concurred in the result. Justice Stevens filed a dissenting opinion in which Justice Brennan, Justice Marshall and Justice Blackmun joined. 496 U.S. 167.

173. *See* Griffith v. Kentucky, 479 U.S. 314 (1987).

174. 496 U.S. 18 (1990).

175. 496 U.S. at 189.

176. *See id.* at 188-200.

177. For example, when the Court reverses itself, as opposed to when the Court applies a settled principle to a controversy before it. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991).

178. *See* 496 U.S. at 188-200.

179. 496 U.S. 18 (1990).

180. *American Trucking*, 496 U.S. at 176; *McKesson Corp.*, 496 U.S. at 26.

181. *See* 496 U.S. 18.

182. 468 U.S. 263 (1984).

was a violation of the Commerce Clause,[183] the State of Florida revised its similar excise tax scheme.[184] The revision was an exercise of form over substance. The Florida legislature merely "deleted the previous express preferences for 'Florida-grown' products and replaced them with special rate reductions for certain specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced there."[185] The plaintiff paid the tax and subsequently sued for injunctive relief and a refund.[186] The Florida trial court invalidated the tax, labelling it unconstitutional, but declined to order a refund. The Florida Supreme Court affirmed.[187] On a writ of certiorari, the United States Supreme Court reversed.[188]

The *McKesson* court acknowledged that a state's "exceedingly strong interest in financial stability" allows it to "employ various financial sanctions and summary remedies . . . in order to encourage taxpayers to make timely payments prior to the resolution" of a tax dispute.[189] The Court pointed out that "'[t]he rule being established [is] that apart from special circumstances[, the taxpayer] cannot interfere by injunction with the State's collection of its revenues, [and] an action at law to recover back what [the taxpayer] paid is the alternative left.'"[190] Thus, the taxpayer is effectively limited to post-deprivation process.[191] The *McKesson* Court elucidated the requirements of the post deprivation process:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in

---

183. *See* 486 U.S. at 273.

184. *See McKesson Corp.*, 496 U.S. at 23.

185. *Id.* at 23.

186. *See id.* at 24-25.

187. *See id.* at 25-26.

188. *See id.* at 26, 42.

189. *Id.* at 37. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that due process requirements dictate an analysis of the affected private interest, the government interest, and the risk of erroneous deprivation, and that a hearing conducted after the deprivation of a property interest can satisfy can due process). The *Mathews* Court indicated that retroactive payment was the proper remedy due a claimant upon a favorable post-deprivation finding. "Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments." *Id.* at 339.

190. 496 U.S. at 32 (quoting Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280, 285 (1912)).

191. *See id.* at 38-39.

> which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.[192]

c. *Beam*: A Further Attempt at Resolution

The third case, *James B. Beam Distilling Co. v. Georgia*,[193] like *American Trucking*, also concerned a state tax instituted in reliance on "settled" law subsequently overturned by the Supreme Court.[194] *Beam* was yet another plurality decision, and it was even murkier than *American Trucking*.[195] In contrast to *American Trucking*, *Beam* appeared to overrule the use of non-retroactivity with respect to federal law.[196] Just as Hawaii had done, the State of Georgia also imposed an excise tax which favored local producers of alcoholic beverages. The imposition of the discriminatory tax was based upon an understanding that the Twenty-first Amendment provided the states with "heightened" powers to regulate the trade in liquor.[197] After the Supreme Court, in *Bacchus Imports, Ltd. v. Dias*,[198] held that the Hawaiian excise tax scheme violated the Commerce Clause, an out-of-state liquor producer sued the State of Georgia to recover the back taxes it had paid prior to the *Bacchus* decision.[199] The state courts of Georgia applied the *Chevron* test,[200] and as a result, determined that the equities permitted the State to refuse

---

192. *Id.* at 31 (citation omitted).

193. 501 U.S. 529 (1991).

194. *Id.* Coincidentally, the overturning case was again Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

195. *See* 501 U.S. 529. The opinion announcing the judgment of the Court was written by Justice Souter, with only Justice Stevens joining. Justice White filed an opinion concurring in the judgment. Justice Blackmun filed an opinion concurring in the judgment in which Justice Marshall and Justice Scalia joined. Justice Scalia filed an opinion in which Justice Marshall and Justice Blackmun joined. Justice O'Connor filed a dissent in which Chief Justice Rehnquist and Justice Kennedy joined.

196. *See id.* "[We hold that it is] error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so . . . . Assuming that pure prospectivity may be had at all . . . its scope must necessarily be limited to a small number of cases . . . ." *Id.* at 540, 541.

197. *See id.* at 532-33.

198. 468 U.S. 263.

199. *See James B. Beam Distilling Co.*, 501 U.S. at 532.

200. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). *See also supra* note 145.

a refund for the years prior to the *Bacchus* decision.[201] The Supreme Court reversed.[202]

Justice Souter, writing for the majority in *Beam*, pointed out that although the *Bacchus* Court had not ordered Hawaii to make a refund, the Court had nonetheless applied the announced rule in that decision to the parties before it.[203] He stated that "the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it . . . ."[204] Justice Souter further stated that the Court correctly remanded the remedy determination to the State of Hawaii due to the intertwined nature of remedial matters with state law.[205]

Justice Souter argued that "selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally."[206] This was true, he said, for civil as well as for criminal proceedings.[207] Justice Souter concluded, "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so,"[208] and thus apparently overruled selective prospectivity.[209]

### 4. *Harper*: An Attempt to Sort it All Out

Four years after *Davis v. Michigan Department of Treasury*, where the Court held that it was unconstitutional for a state to exempt the pensions of its own retired workers from income tax while simultaneously taxing federal pensions,[210] and after the *McKesson*, the *American Trucking* and the *Beam* decisions which raised questions about the viability

---

201. *See* 501 U.S. at 533.

202. *Id.* at 534.

203. *See id.* at 539.

204. *Id.*

205. *See id.* at 535, 538.

206. *Id.* at 537.

207. *Id.* at 540.

208. *Id.*

209. The opinion did not overrule pure prospectivity. In several places, Justice Souter seemed to make arguments in favor of retaining the "pure" form of the doctrine. *See e.g., id.* at 541 (stating that in a civil context pure prospectivity may not deprive a litigant of all relief and also that pure prospectivity must be limited in scope).

210. *See supra* text accompanying notes 1-9.

of the doctrine of non-retroactivity,[211] the Supreme Court handed down *Harper v. Virginia Department of Taxation.*[212] *Harper* held that *Davis* applied retroactively.[213] In so doing the Court seemingly landed a knock-out blow to the fiscal well-being of the states involved in the *Davis*-spawned litigation, and to states involved in other tax-related litigation as well.[214]

*Harper* was initiated by federal pensioners in Virginia who claimed that *Davis* entitled them to tax refunds.[215] Like other states in which similar post-*Davis* taxpayer suits had occurred, Virginia hoped to limit the *Davis* rule to a prospective application and avoid paying refunds.[216] Because the offending tax was a violation of intergovernmental tax immunity rather than a per se violation of pensioners' rights,[217] and because the State of Michigan in *Davis*, "conceded that a refund is appropriate,"[218] the Supreme Court of Virginia concluded that the rule of *James B. Beam Distilling Co. v. Georgia*[219] did not apply because the question of retroactivity had not been litigated, thus leaving it free to apply the *Chevron* test.[220] As a result, the Virginia Court determined that taxpayer relief need only be prospective.[221]

---

211. *See, e.g.*, Walter Hellerstein, *Supreme Court Settles Some State Tax Issues While Creating Other Problems*, 75 J. TAX'N 180, 180-81 (Sept. 1991) (arguing that the *Beam* decision raises as may questions as it answers); Koch, *supra* note 151, at 1045 (expressing hope that the yet undecided *Beam* would clear up the uncertainty concerning the doctrine of prospectivity created by the *Smith* and *McKesson* opinions). *See generally supra* notes 158-209 and accompanying text.

212. 113 S. Ct. 2510 (1993).

213. *Id.* at 2519.

214. *See, e.g.*, Harvey Berkman et al., *Sentencing Commission Critical of Reforms*, NAT'L L.J., Mar. 7, 1994, at 5, (stating that "[a]t stake [in Barclays Bank PLC v. Franchise Tax Bd., 92-1384] is about $4 billion in possible tax refunds by California and the good will of the international trading community.").

215. *See Harper*, 113 S. Ct. at 2514.

216. *See, e.g.*, Joan Biskupic, *Justices Weigh Refunds of Illegal Tax*, WASH. POST, Dec. 3, 1992, at A4 (describing the Virginia State Attorney General's argument that a refund of such proportions would pose a hardship to the state).

217. *See supra* notes 29-97 and accompanying text.

218. Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 817 (1989).

219. *See supra* notes 193-209 and accompanying text.

220. *See Harper*, 113 S. Ct at 2514.

221. *See id.*

Justice Thomas, in his three-part majority opinion,[222] rejected the Virginia Court's conclusions, stating that, "[f]ar from reserving the retroactivity question, our response to the appellee's concession [in *Davis*] constituted a retroactive application of the rule announced in *Davis* to the parties before the Court."[223] Echoing *Beam*, the *Harper* Court held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends . . . [the] ban against "selective application of new rules."[224]

Thus the Court eliminated all non-retroactive ruling except, theoretically, for pure prospectivity.[225]

Justice Thomas did not end the *Harper* opinion with the rejection of selective non-retroactivity.[226] He proceeded, in part III of the decision, to repeat the due process admonitions of *McKesson*.[227] In the last part of the *Harper* decision Justice Thomas wrote:

> Because we have decided that *Davis* applies retroactively to the tax years at issue . . . we reverse the judgment below. We do not enter judgment for the petitioners, however, because federal law does not necessarily entitle them to a refund. Rather, the Constitution requires Virginia 'to provide relief consistent with federal due process principles.' . . . If Virginia "offers a

---

222. Part I of the opinion described the procedural background of the case *Id.* at 2513-16; part II dealt with retrospectivity *Id.* at 2516-18; and part III addressed due process considerations relating to the need for provision of adequate post-deprivation remedy. *Id.* 2518-20.

Justice Thomas delivered the opinion of the court, in which Justices Blackmun, Stevens, Scalia, and Souter joined, and in Parts I and III of which Justices White and Kennedy joined. Justice Scalia filed a concurring opinion. Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which Justice White joined. Justice O'Connor filed a dissenting opinion, in which Chief Justice Rehnquist joined. *Id.*

223. *Id.* at 2518.

224. *Id.* at 2517.

225. *Id.* *See supra* notes 113-15 and accompanying text (describing three forms of judicial rule-making).

226. *Id.* at 2518-20.

227. *Id.*

meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause.'[228]

## III. AFTER *HARPER*

### *A. The States' Response to* Harper

After *Harper* was decided, the Supreme Court vacated the judgments in pending similar cases and remanded those cases in consideration of *Harper*.[229] Yet, just as the post-*Davis* tax cases did not apply *Davis* uniformly,[230] and possibly as a result of the Court's dicta in the last section of the *Harper* opinion,[231] the affected states did not apply *Harper* uniformly. Some state courts ordered a refund.[232] In other states, the tax authorities simply directed that the monies be refunded without further challenge.[233] However, some states, possibly out of desperation found hope in the words "federal law does not necessarily entitle [the taxpayers] to a refund."[234] They resisted providing refunds to federal pensioners.[235]

---

228. *Id.* at 2519 (quoting American Trucking Ass'ns v. Smith, 496 U.S. 167, 181 (1990) and McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 38 n.21 (1990)) (citations omitted).

229. *See, e.g.*, Bass v. South Carolina, 414 S.E.2d 110 (S.C. 1992), *vacated*, 113 S. Ct. 3025 (1993) (case remanded for further consideration in light of *Harper*); Swanson v. North Carolina, 410 S.E.2d 490 (N.C. 1991), *vacated*, 113 S. Ct. 3025 (1993) (case remanded for further consideration in light of *Harper*); Duffy v. Wetzler, 579 N.Y.S.2d 684 (N.Y. App. Div. 1992), *vacated*, 113 S. Ct. 3027 (1993) (case remanded for further consideration in light of *Harper*).

230. *See supra* notes 147-57 and accompanying text.

231. *See supra* notes 224-25 and accompanying text.

232. *See, e.g.*, Hagge v. Iowa Dep't of Revenue and Fin., 504 N.W.2d 448 (Iowa 1993) (ordering a modified refund).

233. *See, e.g.*, *Public Plans: Wisconsin Commission Orders State To Refund Taxes To Federal Retirees*, BNA PENSION & BENEFITS REP., June 2, 1993.

234. Harper v. Virginia, 113 S. Ct. 2510, 2519 (1993).

235. *See, e.g.*, Martin Fox, *State Resists Refunding Tax to Pensioners*, N.Y. L.J., Oct. 25, 1993, at 1, 5 (indicating New York State and New York City may claim that adequate pre-deprivation process had been afforded the federal pensioners).

The State of Virginia has itself so far refused to refund money the its aggrieved taxpayers. *See* Steve Bates, *Court Denies Refund to Va.'s Federal Retirees*, WASH.

Those states which declined to make refunds offered several reasons for their refusal. One argument was that a violation of intergovernmental tax immunity, in theory, injures the federal government, not the taxpayer.[236] It followed, therefore, that the remedy need not necessarily look to the taxpayer, but rather to the federal government. Moreover, *Harper* left it to the Supreme Court of Virginia to fashion a remedy,[237] pointedly referring to the fact that "federal law does not necessarily entitle [the pensioners] to a refund."[238] Additionally, at least one state denied a refund on separate state grounds.[239]

As another alternative to providing relief in the form of a refund, The *Harper* opinion itself suggested the remedy of extending a discriminatory exemption favoring the federal pensioners.[240] The *McKesson* Court pointed out that a state could fashion a remedy whereby it retained the tax but eliminated its discriminatory nature by applying it retroactively to the class previously favored.[241] Interestingly, there are, as yet, no reports of a state taking either action.

---

POST, Jan. 11, 1994, at C1 ("An Alexandria judge has ruled that Virginia does not have to refund nearly $500 million in income taxes collected on federal pensions, saying the retirees could have protested the tax before paying it.").

236. *See, e.g.*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939). The Graves court stated:

> The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other.

*Id.* at 477-78.

237. *See* 113 S. Ct. at 2519-20

238. *Id.* at 2519.

239. *See* James B. Beam Distilling Co. v. Georgia, 437 S.E.2d 782 (Ga. 1993) (affirming, on remand from the United States Supreme Court, the state trial court's ruling that the liquor distributor was not entitled to a refund on the independent state grounds that it lacked standing because the cost of the offending tax was passed to the wholesalers, and, in the alternative, that sufficient pre-deprivation process was available to the appellant). *But see* McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 47 (1990) (rejecting the argument that an illegal tax had been passed-on to customers, indicating a "highly sophisticated theoretical and factual inquiry" is required to prove such a claim, and the refund was not a "windfall" because the injury made the petitioner poorer and put the petitioner at an economic disadvantage).

240. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2520 (1993) (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 818 (1989)).

241. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39-40 (1990).

*Reich v. Collins*,[242] a *Davis*-spawned case which was vacated and remanded by the United States Supreme Court for further consideration in light of *Harper*, is a typical example of a state court's continued refusal to provide a tax refund.[243] On remand, the Georgia Supreme Court held that the taxpayer received sufficient pre-deprivation relief.[244] Referring with approval to its latest decision in *James B. Beam Distilling Co. v. Georgia*,[245] the *Reich* court found that "the declaratory judgment remedies . . . as well as statutory injunctive relief remedies . . . provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the taxes fell due."[246] The court also found the due process requirements satisfied by the availability of an administrative tax hearing.[247]

Justice Carley's dissent in *Reich* found no such meaningful relief.[248] He pointed out that the direct appeal from an assessment permitted by Georgia law also required the taxpayer to "file a surety bond or other security."[249] The Justice also argued that the majority's remedies were perhaps inappropriate and that nothing in the tax statutes authorized a taxpayer to withhold payment while contesting a tax.[250]

---

242. 437 S.E.2d 320 (Ga. 1993).

243. *See id.*

244. *Id.* at 321-22.

245. 437 S.E.2d 782 (Ga. 1993). The case was decided on Dec. 2, 1993, the same day that *Reich* was handed down.

246. 437 S.E.2d at 321.

247. *Id.* at 322.

248. *Id.* at 323-25 (Carley, J., dissenting).

249. *Id.* at 323 (Carley, J., dissenting).

250. *Id.* at 324 (Carley, J., dissenting). *But cf.* Brief for Defendants-Appellants Wetzler, Che and Regan at 13-17, Duffy v. Wetzler, 93-07800 (N.Y. App. Div. 1993). Upon remand in light of *Harper*, the State and City of New York argued that New York's federal pensioners were not entitled to a refund because they had access to sufficient pre-deprivation relief. The appellants contended that the plaintiff taxpayers could have sought a declaratory judgment prior to retirement, or, upon retirement, could have withheld taxes while seeking such relief. In addition, the appellant stated the taxpayers could have withheld payment and obtained an administrative deficiency determination which is subsequently reviewable by a state court. The appellants further contended that there was no duress because the "the State Department of Tax and Finance has not for at least a decade required a bond be posted," id. at 16, because accrued interest is "not punitive and merely compensates the State for the taxpayer's use of its money," id. at 17, and "penalties authorized by the statute are all waivable for reasonable cause where the taxpayer has acted in good faith." *Id.*

On a writ of certiorari, the Supreme Court expressed its agreement with Justice Carley by delivering a sharp rebuke to the Georgia State Supreme Court.[251] Writing for a unanimous Court, Justice O'Connor stated that:

> [a state] has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as the scheme is "clear and certain." Due process . . . also allows the State to maintain an exclusively postdeprivation regime, or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs.[252]

Yet, Justice O'Connor indicated that it would be unfair to reconfigure state law in mid-stream.[253] Referring to the period of time in question, Justice O'Connor stated that the "average taxpayer" would obviously interpret Georgia law to entitle the taxpayer to a refund of an illegally collected tax.[254] Justice O'Connor also pointed out that Georgia had not previously required a refund-seeking taxpayer to lodge a protest prior to paying the tax and then bringing an action against the state.[255] At one point, Justice O'Connor likened the tactic used by the Georgia State Supreme Court to that of a sleazy used car salesman, characterizing the Georgia opinion as "'bait and switch.'"[256]

### B. *The Lesson of* Davis *and* Harper

> It must not be; there is no power in Venice
> Can alter a decree established:
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state: it cannot be.[257]

A "basic principle [of American jurisprudence is] that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected . . . as a permanent and

---

251. Reich v. Collins, 115 S. Ct. 547 (1994).

252. *Id.* at 550 (citations omitted).

253. *Id.*

254. *Id.*

255. *Id.* at 551.

256. *Id.* at 550.

257. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, lines 218-22 (William G. Clark & William A. Wright eds., MacMillan 1900) (1984).

indispensable feature of our constitutional system."[258] However, in deciding *Reich* the state courts of Georgia did not seem to demonstrate a great deal of respect for the Supreme Court's exposition of law.[259] Moreover, the State of Georgia was by no means alone in its failure to follow precepts laid down by the Supreme Court. Several other states used the same tactic as Georgia, seeking any way possible to elude refund liability to their federal pensioners.[260]

Nor were the pension refund cases of Georgia, New York and other states, which grew out of *Davis v. Michigan Department of Treasury*[261] and *Harper v. Virginia Department of Taxation*,[262] the only tax cases in which the states declined to refund illegally collected taxes in the face of a contrary federal law. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*[263] is an example of a similar attempt, by the State of Florida, to avoid paying a refund.[264] For that matter, *Harper v. Virginia* serves as a paradigm of state recalcitrance in the face of overwhelming federal law to the contrary.

In light of the extensive body of case law on intergovernmental tax immunity—caselaw which stretches back in time almost to the birth of this Nation[265]—one would be hard-pressed to give credence to an argument claiming that the rule of *Davis* should be applied prospectively merely because *Davis*'s outcome satisfies the three-part *Chevron* test.[266] In fact, *Davis* did not satisfy the first prong of the *Chevron* test because it did not "establish a new principle of law;" it neither overruled "clear past precedent" nor decided "an issue of first impression whose resolution was

---

258. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

259. *See supra* notes 248-253 and accompanying text. Indeed, on remand, the Georgia Supreme Court's decision in James B. Beam Distilling Co. v. Georgia, 437 S.E.2d 782 (Ga. 1993), which was handed down on the same day as the subsequently overturned *Reich* decision and which similarly denied a tax refund (based on independent state grounds), also smacks of an attempt at any cost to avoid ordering a painful refund.

260. *See, e.g.*, discussion *supra* note 246 (reviewing New York State's arguments in favor of denying refunds to federal pensioners).

261. 489 U.S. 803 (1989).

262. 113 S. Ct. 2510 (1993).

263. 496 U.S. 18 (1990).

264. *See supra* text accompanying notes 179-92.

265. *See supra* text accompanying notes 29-79.

266. *See supra* note 145.

not clearly foreshadowed."[267] *Davis* "clearly show[ed] that the Doctrine of Intergovernmental Tax Immunity has been applied for decades."[268]

That group of cases—*Harper*, *McKesson*, *Reich*, et al.—was not a shining episode in American jurisprudence. It seemed as if the judges sitting in those state courts refused to take away any lessons from the decisions of the Supreme Court. Their treatment of precedent was so cavalier that it "confuse[d] law students and [shook] their confidence in their books . . . ."[269]

Why did the state courts ignore the direction given them by the Supreme Court? Was the judiciary of those states guilty of willful behavior, or is there a less sinister explanation? A cynic might argue that such decision-making is not first-rate jurisprudence, but that it is the stuff of smart parochial politics. After all, *Harper* imposed a "crushing and unnecessary liability" on the states.[270] For example, the possible fiscal consequences of *Harper* included the necessity of making huge tax refunds and the concomitant scramble to replace desperately needed lost revenue.[271] It would be an understandably human reaction for a state

---

267. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (citation omitted).

268. Pledger v. Bosnick, 811 S.W.2d 286, 293 (Ark. 1991) (rejecting as inapposite the use of a *Chevron* analysis and affirming an order of the Arkansas Chancery Court that relied on *Davis* in ordering a refund of unconstitutionally collected pension taxes). "The fact that this issue has never been before . . . the Supreme Court . . . does not make this a new principle of law or a case of first impression, just a fresh statement of the applicability of a long standing doctrine." *Id.*

269. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 346 (5th ed. 1956). The above-mentioned quotation is to be found in the chapter of Plucknett's book that discusses the common-law development of the principle of precedent. Plucknett's words paraphrase a remark made by Chief Justice Prisot in 1454. Prisot stated that "'it would be a bad example to the young apprentices'" to reach a conclusion that was contrary to many prior decisions. Plucknett uses Prisot's words to point out that judges strove for jurisprudential consistency even during the nascent years of the common law. It is, Plucknett states, "perhaps . . . another way of saying that even a mere student in reading the case would detect its inconsistency with established principle, and would perhaps hardly credit what he read." *Id.* at 342-46.

270. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2526 (1993) (O'Connor, J., dissenting).

271. *See, e.g.*, Donald P. Baker, *Ruling May Force Va. to Refund Taxes on U.S. Pensions*, WASH. POST, June 19, 1993, § D, at 1 (describing the dire fiscal consequences of a refund). Prior to the *Harper* decision, it was estimated Virginia had a "refund exposure of $467 million and the total estimated refund exposure of all states involved in *Davis*-related litigation . . . [was] $1.8 billion." *Harper Oral Argument Addresses Taxpayer Remedy*, TAX ADMINS. NEWS (Federation of Tax Administrators, Washington, D.C.), December, 1992, at 136, 137.

judge, faced with such repercussions, to decline to impose that burden on his or her home state.[272]

If such a viewpoint is indeed correct, the consequences would be more serious than the confusion experienced by law students. It would represent the subversive introduction of "chaos into the legal system . . . ."[273] However, it is unlikely that such a cynical assessment is correct. The odds militate against so many state judges acting out of political expediency rather than out of a sense of duty engendered by the Constitutional principles of this nation. One suspects that most judges, like most people, want to believe their behavior is above reproach.[274]

Yet to say that most state judges do not intentionally ignore Supreme Court precedent simply begs the question; it does nothing to explain why many state courts do not follow seemingly obvious rulings of the Supreme Court. The answer may be less sinister than wilful disregard of Supreme Court precedent, although equally disturbing. Another explanation is that perhaps the state judges, trying as best they could to fashion a satisfactory solution to a disastrous and seemingly intractable dilemma, experienced a sort of jurisprudential cognitive dissonance,[275] the result of which was to find in the Supreme Court opinions meanings that were not in fact there. In other words, perhaps they saw what they needed to see. Judges, after all, are no less vulnerable to psychological phenomena than the rest of humanity.

The Supreme Court's curious approach to its own precedent could very well have been the factor that tipped the state courts toward reinterpretation and away from docile obedience. No doubt many state judges experienced conflict when they found themselves faced with such discordant Supreme Court opinion. The state judges were required to choose between, on the one hand, an argument that favored the fiscal

---

272. Of course, a truly cynical view of the *Davis* and *Harper* cases would be one that viewed the holdings of the state court judges as predictable in light of their obvious sympathy—as future state pensioners themselves—for the states' point of view and the outcome in the Supreme Court as the product of future federal pensioners.

273. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 157 (1990). The former Circuit Court judge argues that it is necessary for Supreme Court justices to re-examine precedent, although "lower courts are not free to ignore what the Supreme Court has said . . . ." *Id.* at 155-56.

274. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 126-35 (1995) (suggesting that judges derive the greatest satisfaction from the process of judging by adhering to the rules of that process).

275. Cognitive dissonance is the "term for the mental conflict that occurs when a person encounters anything discordant with his beliefs; the conflict can be resolved by changing the belief or—only too often—by reinterpreting the discordant material to make it consistent with the belief." STUART SUTHERLAND, THE INTERNATIONAL DICTIONARY OF PSYCHOLOGY 77 (1989).

well-being of their own state, and on the other hand, a mandate that required them to hurt their state by adhering to the precedent of the Supreme Court, a Court that seemed to have little regard for its own precedent.[276]

Of course, those Justices of the Supreme Court who chose to affirm intergovernmental tax immunity and to eliminate selective prospectivity no doubt see the matter from a different perspective. In his concurring opinion in *Harper*, Justice Scalia argued that his agreement with the rejection of selective prospectivity was based upon his reverence for the principle of stare decisis.[277] He stated that the doctrine of stare decisis was flexible and did not apply as strongly when the underlying logic of a precedent had been undercut,[278] as had the support for the civil prospectivity doctrine been undercut when the Court previously rejected the use of the doctrine in the criminal sphere.[279] He also said he saw "[p]rospective decisionmaking . . . as a practical tool of judicial activism, born out of disregard for *stare decisis*."[280] In his relatively brief concurrence in *James B. Beam Distilling Co. v. Georgia*, Justice Scalia asserted that selective prospectivity is not permitted by the Constitution because a judge does not make law but rather finds it; therefore a judge should simply apply the law as found instead of making choices about which law to apply.[281]

Such arguments are very much in accord with the beliefs of proponents of the "original understanding."[282] Robert Bork, like Justice

---

276. *See* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2528 (1993) (O'Connor, J., dissenting) (pointing out that the Court's rejection of selective prospectivity in *James B. Beam* and in *Harper* "was not only contrary to precedent, but also so rigid that it produced unconscionable results").

277. *See Harper*, 113 S. Ct. at 2520-24 (1993) (Scalia, J., concurring).

278. *See id.* at 2520-21.

279. *See id.*

280. *Id.* at 2522.

281. *See* 501 U.S. 529, 548-49 (1991) (Scalia, J., concurring). *But see* POSNER, *supra* note 105, at 24-25 (arguing that Blackstone's view of the role of judge as a neutral transmitter of the law was merely a rationalization for judicial creativity).

282. *See* BORK, *supra* note 273, at 155-60 (describing the status of the precedent principle within the approach to Constitutional Law taken by those who espouse the original understanding). An "original understanding" of the Constitution is defined as "what the public of [the time the Constitution was adopted] understood the words to mean." *Id.* at 144.

Historically, it is not unique for people to look backward to an idealized vision of a past, higher law. "[King] Cnut's laws were long popular in England, and in after years men looked back with respect to his reign," and later in time, Bracton used the plea rolls to discover the ancient cases which he supposed were purer statements of the law than

Scalia, argues that the principle of stare decisis is flexible, by which he means that a previous decision can be overruled if it is not good precedent for the reason that the constitutional amendment process is difficult.[283] Of course to Bork, the Constitution itself is good precedent;[284] so too are "precedents set by courts within a few decades of a provision's ratification since the judges of that time presumably had a superior knowledge of the original meaning of the Constitution."[285] Rules that are wrong but that are nonetheless "so accepted by the society, so fundamental to the private and public expectations of individuals and institutions . . . should not be changed now,"[286] although they should not be "followed in the future."[287] But rules that are wrong and that "remain unaccepted and unacceptable to large segments of the body politic" should be changed.[288]

Robert Bork's and Justice Antonin Scalia's views on precedent suggest the logic that impelled the Supreme Court to affirm, in *Davis*, the flawed doctrine of intergovernmental tax immunity, and to reject, in *Harper*, the useful, if limited, doctrine of prospectivity. The intergovernmental tax immunity doctrine, which was reaffirmed in *Davis v. Michigan Department of Treasury*,[289] had roots (though only in dicta) in *McCulloch v. Maryland*,[290] which was decided within a few decades of Constitution's ratification. By the lights of originalism, this made the doctrine a superior form of precedent,[291] as if it had been touched by the true cross. Never mind that the underlying logic of the doctrine had long since been shown to be nothing more than a pernicious abstraction.[292]

The "original understanding" also provided justification for the relentless attacks upon the doctrine of prospectivity—first in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco* and *American*

---

the corrupt doctrine of his time. *See* PLUCKNETT, *supra* note 269, at 10, 342-45.

283. *See* BORK, *supra* note 273, at 156.

284. *See id.*

285. *Id.* at 157.

286. *Id.* at 158.

287. *Id.*

288. *Id.*

289. 489 U.S. 803 (1989). Much of the majority opinion in *Davis* was a straightforward discussion of the long line of cases which presaged the *Davis* holding. The dissenting opinion did not dispute the import of those cases, but rather the basis for the doctrine.

290. *See* 17 U.S. (4 Wheat.) 316, 431 (1819); *see also* discussion *supra* note 2.

291. *See supra* notes 278-81 and accompanying text.

292. *See supra* text accompanying notes 48-50, 69-70, 89-94.

*Trucking Ass'ns v. Smith*,[293] then in *James B. Beam Distilling Co. v. Georgia*,[294] and finally in *Harper v. Virginia Department of Taxation*.[295] Unlike intergovernmental tax immunity, the prospectivity doctrine had a poor pedigree, having been originated less than thirty years earlier.[296] In one plurality opinion after another, certain members of the Court hammered away at the doctrine even though it had been clearly settled in *Chevron Oil Co. v. Huson* barely a generation prior to *Harper*.[297] At one point in his concurring opinion in *Harper*, Justice Scalia offered the following criticism of the doctrine: "It is so un-ancient that one of the current members of the Court was sitting when it was invented."[298]

Also, it was at best disingenuous for the Court to have chosen *Harper* as the weapon with which to attack the prospectivity doctrine. In view of the long, albeit flawed, line of cases that supported the *Davis* decision, it can fairly be said that Virginia and the other states that claimed *Davis* represented "new" law had come to the battle armed with pea-shooters.[299] In fact, *Harper* was little more than a straw man. By using it to overrule *Chevron* the Court avoided the hard case where the facts might cry out for the equitable application of the prospectivity doctrine. Such a case may be where, for example, a deserving litigant who had the misfortune to bring the right lawsuit at the wrong time might be cheated out of the opportunity to obtain a remedy.[300]

---

293. *See supra* notes 141-92 and accompanying text.

294. *See supra* notes 193-209 and accompanying text.

295. *See supra* notes 210-28 and accompanying text.

296. *See supra* text accompanying note 281.

297. *See supra* notes 144-46 and accompanying text.

298. Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2522 (1993) (Scalia, J., concurring).

299. *See* Pledger v. Bosnick, 811 S.W.2d 286, 293 (Ark. 1991) (pointing out that "[a] review of the extensive historical discussion in Davis will clearly show that the Doctrine of Intergovernmental Tax Immunity has been applied for decades").

300. *See, e.g.*, Hyde v. Reynoldsville Casket Co., 626 N.E.2d 75 (Ohio 1994). *Hyde* could have been such a case. It was factually closer to *Chevron* than it was to *Harper*. In *Hyde* the plaintiff relied upon an Ohio law that tolled the statute of limitations for out-of-state residents. *Id.* at 76. After commencement of the lawsuit, the United States Supreme Court, in Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988), declared the Ohio tolling statute unconstitutional.

However, in deciding *Hyde*, the Ohio Supreme Court, like the states involved in the tax litigation, either misinterpreted *Harper* or willfully ignored it. It flat-out refused to follow *Bendix*. The *Hyde* Court held that "[w]hether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision." 626 N.E.2d at 79. It

Thus the lessons of the Supreme Court's *Davis/Harper* line of cases might not be the lessons that were in fact intended by the Court. In law as in religion, there is always the chance that a group's fervently believed dogma is indeed true. Yet there is an even greater chance that non-believers will view such faith to be the result of egocentricity and arrogance. On the basis of the original understanding, Justices Scalia and Thomas might feel perfectly justified in affirming ill-founded law and in overturning the settled law of a recent time—a time, by coincidence, when most members of the Supreme Court had a decidedly non-originalist judicial philosophy. It was a coincidence remarked upon by Justice O'Connor,[301] and noticed no doubt by many state judges as well.

Proponents of the original understanding have argued that they act out of their own deep respect for "good" precedent when they overturn a "bad" precedent that overruled a "good" one.[302] But the point they make may be missed by a state judge who must decide whether or not to injure his state's fiscal well-being. Indeed the distinction might at best be viewed as a pernicious abstraction. At worst it might seem to some to be suspiciously similar to what happens in a legislature when one party wrests control from another party that has held power for some time—sleeves are rolled up in eager anticipation of the Herculean task of cleaning out the Augean dirty work of the opposition. Perceiving the rationale for a decision of the Supreme Court to be nothing more than a subterfuge for an exercise of raw political power, a state judge whose dispassion is already sorely tested might very easily find greater merit in a choice that favors his or her own fiscally beleaguered state. As Judge Posner points out, "rules bind because they are accepted, rather than being accepted

---

is noteworthy that the Dalkon Shield Claimants Trust filed an amicus curiae brief in the *Hyde* case. *See id.* at 76 n.1.

In a statute of limitations case like *Hyde*, the equities more strongly favor prospective application of the prior decision. In the tax cases, whatever the outcome, the taxpayer is afforded some measure of relief. If the prior ruling is applied retroactively, the taxpayer gets both backward- and forward-looking relief. If the prior ruling is only applied prospectively, the taxpayer still obtains forward-looking relief from the unconstitutional tax. However, if the prior ruling is applied retroactively in a statute of limitation case, a plaintiff who relied in good faith on the "old" law would be completely foreclosed from litigating his or her claim.

301. *See* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2528 (1993) (O'Connor, J., dissenting) (pointing to Justice Scalia's "undisguised hostility to an era whose jurisprudence he finds distasteful").

302. *See Harper*, 113 S. Ct. at 2522 (Scalia, J., concurring). "Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*." *Id.*

because they bind."[303] A judicial institution that is seen as lacking respect for its own prior decisions might have a difficult time gaining respect for its current determinations.

## IV. CONCLUSION

The Supreme Court chose to rely on long-established precedent in *Davis v. Michigan Department of Treasury*,[304] a case brought and won by a federal pensioner who claimed that a state income tax on his federal pension was unconstitutional because the state exempted the pensions of its own retired state workers.[305] The case presented a chance for the Court to renounce the stale doctrine of intergovernmental tax immunity, a doctrine built on the shifting sands of faulty reasoning. The Court chose to reaffirm it instead.[306]

In spite of *Davis*, many states refused to provide refunds in similar tax cases. They invoked the prospectivity doctrine to shield them from refund liability. The states claimed that *Davis* represented "new" law. Furthermore, many of their state courts agreed with that analysis. The Supreme Court, in *Harper v. Virginia Department of Taxation*,[307] declined to point out the obvious—that *Davis* did not represent new law. Instead it exploited the controversy, using it to take a final swipe at the prospectivity doctrine. Although the states applied it beyond its narrow and legitimate scope, the doctrine made more good sense as a temporal choice of law vehicle, rather than as a factor to be used in determining remedial issues. If the doctrine is not applied from a temporal choice of law perspective, some people will never get the chance to obtain any remedy. No matter how compelling their claim is, they will be foreclosed from suing.[308]

Following *Harper*, some state courts still refused to provide refunds to their federal pensioners.[309] An interesting question is why. Perhaps the state judges disagreed with the Supreme Court and wilfully disregarded the Court's mandates. It is, however, unlikely that so many judges would shirk their Constitutional duty.[310] Another, more credible answer is that

---

303. POSNER, *supra* note 271, at 133 (alluding to a statement made by Wittgenstein).

304. 489 U.S. 803 (1989).

305. *See id.*

306. *See supra* notes 80-97 and accompanying text.

307. 113 S. Ct. 2510 (1993).

308. *See supra* notes 210-28 and accompanying text.

309. *See supra* notes 229-56 and accompanying text.

310. *See supra* notes 270-72 and accompanying text.

the state judges sincerely thought their conclusions were correct. They did so because the dissonance created by the ruinous (to the states) Supreme Court decisions, coupled with the appearance that those decisions were born of arrogance, made it easy for the state judges to gloss over the outcome of those cases. The Supreme Court, in deciding those cases, may have been guided by the tenets of the original understanding, but the lesson taken away by the state courts may have been that precedent matters less than political expediency.[311]

*Robert J. Sweeney*

311. *See supra* notes 273-303 and accompanying text.