SUPREME COURT OF THE UNITED STATES

No. 93–1121

ED PLAUT, ET UX., ET AL., PETITIONERS *v.* SPENDTHRIFT FARM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 18, 1995]

JUSTICE BREYER, concurring in the judgment.

I agree with the majority that §27A(b) of the Securities Exchange Act of 1934, 15 U. S. C. §78aa–1 (1988 ed., Supp. V) (hereinafter §27A(b)) is unconstitutional. In my view, the separation of powers inherent in our Constitution means that at least *sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment. And the statutory provision here at issue, §27A(b), violates a basic "separation of powers" principle—one intended to protect individual liberty. Three features of this law—its exclusively retroactive effect, its application to a limited number of individuals, and its reopening of closed judgments—taken together, show that Congress here impermissibly tried to *apply*, as well as *make*, the law. Hence, §27A(b) falls outside the scope of Article I. But, it is far less clear, and unnecessary for the purposes of this case to decide, that separation of powers "is violated" *whenever* an "individual final judgment is legislatively rescinded" or that it is "violated 40 times over when 40 final judgments are legislatively dissolved." See *ante*, at 17. I therefore write separately.

The majority provides strong historical evidence that Congress lacks the power simply to reopen, and to revise, final judgments in individual cases. See *ante*, at 7–10. The Framers would have hesitated to lodge in the legislature both that kind of power and the power to enact general laws, as part of their effort to avoid the "despotic government" that accompanies the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." The Federalist No. 47, p. 241 (J. Gideon ed. 1831) (J. Madison); *id.,* No. 48, at 249 (quoting T. Jefferson, Notes on the State of Virginia). For one thing, the authoritative application of a general law to a particular case by an independent judge, rather than by the

legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms. See, *e.g.*, 1 Montesquieu, The Spirit of Laws 174 (T. Nugent transl. 1886) (describing one objective of the "separation of powers" as preventing "the same monarch or senate," having "enact[ed] tyrannical laws" from "execut[ing] them in a tyrannical manner"); W. Gwyn, The Meaning of the Separation of Powers 42–43, 104–106 (1965) (discussing historically relevant sources that explain one purpose of separation of powers as helping to assure an "impartial rule of law"). For another thing, as Justice Powell has pointed out, the Constitution's "separation of powers" principles reflect, in part, the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS* v. *Chadha*, 462 U. S. 919, 962 (1983) (Powell, J., concurring in judgment). The Framers "expressed" this principle, both in "specific provisions, such as the Bill of Attainder Clause," and in the Constitution's "general allocation of power." *Ibid.;* see *United States* v. *Brown*, 381 U. S. 437, 442 (1965) (Bill of Attainder Clause intended to implement the separation of powers, acting as "a general safeguard against legislative exercise of the judicial function"); *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810) (Marshall, C. J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments"); cf. *Hurtado* v. *California*, 110 U. S. 516, 535–536 (1884).

Despite these two important "separation of powers" concerns, *sometimes* Congress can enact legislation that focuses upon a small group, or even a single individual. See, *e.g.*, *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468–484 (1977); *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U. S. 841, 846–856 (1984); *Brown, supra,* at 453–456. Congress also sometimes passes private legislation. See *Chadha, supra,* at 966, n. 9 (Powell, J., concurring in judgment) ("When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated"). And, *sometimes* Congress can enact legislation that, as a practical matter, radically changes the effect of an individual, previously entered court decree. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856). Statutes that apply prospectively and (in part because of that prospectivity) to an open-ended class of persons, however, are more than simply an effort to apply, person by person, a previously-enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals. Thus, it seems to me, if Congress enacted legislation that reopened an otherwise closed judgment but in a way that mitigated some of the here relevant "separation of powers" concerns, by also providing some of the assurances against "singling out" that ordinary legislative activity normally provides—say, prospectivity and general applicability—we might have a different case. Cf. *Brown, supra,* at 461 ("Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied"). Because such legislation, in light of those mitigating circumstances, might well present a different constitutional question, I do not subscribe to the Court's more absolute statement.

The statute before us, however, has no such mitigating features. It reopens previously closed judgments. It is entirely retroactive, applying only to those Rule 10b–5 actions actually filed, on or before (but on which final judgments were entered after) June 19, 1991. See 15

U. S. C. §78j(b) and 17 CFR 240.10b–5 (1994). It lacks generality, for it applies only to a few individual instances. See Hearings on H. R. 3185 before the Subcommittee on Telecommunications and Finance of the House of Representatives Committee on Energy and Commerce, 102d Cong., 1st Sess., 3–4 (1991) (listing, by case name, only 15 cases that had been dismissed on the basis of *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991)). And, it is underinclusive, for it excludes from its coverage others who, relying upon pre-*Lampf* limitations law, may have failed to bring timely securities fraud actions against any other of the Nation's hundreds of thousands of businesses. I concede that its coverage extends beyond a single individual to many potential plaintiffs in these class actions. But because the legislation disfavors not plaintiffs but defendants, I should think that the latter number is the more relevant. And, that number is too small (compared with the number of similar, uncovered firms) to distinguish meaningfully the law before us from a similar law aimed at a single closed case. Nor does the existence of §27A(a), which applies to Rule 10b–5 actions pending at the time of the legislation, change this conclusion. That provision seems aimed at too few additional individuals to mitigate the low-level of generality of §27A(b). See Hearings on H. R. 3185, *supra*, at 5–6 (listing 17 cases in which dismissal motions based on *Lampf* were pending).

The upshot is that, viewed in light of the relevant, liberty-protecting objectives of the "separation of powers," this case falls directly within the scope of language in this Court's cases suggesting a restriction on Congress' power to reopen closed court judgments. See, *e.g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised [or] overturned . . . by another Department of Government"); *Wheeling & Belmont Bridge Co., supra,* at 431 ("[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the

power of congress"); *Hayburn's Case*, 2 Dall. 409, 413 (1792) (letter from Justice Iredell and District Judge Sitgreaves to President Washington) ("[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a revision, or even suspension, by the Legislature itself").

At the same time, because the law before us *both* reopens final judgments *and* lacks the liberty-protecting assurances that prospectivity and greater generality would have provided, we need not, and we should not, go further—to make of the reopening itself, an absolute, always determinative distinction, a "prophylactic device," or a foundation for the building of a new "high wal[l]" between the branches. *Ante*, at 29. Indeed, the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens. See The Federalist No. 48 (J. Madison). That doctrine does not "divide the branches into watertight compartments," nor "establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U. S. 189, 209, 211 (1928) (Holmes, J., dissenting); see also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) (referring to the need for "workable government"); *id.*, at 596–597 (Frankfurter, J., concurring); *Mistretta* v. *United States*, 488 U. S. 361, 381 (1989) (the doctrine does not create a "hermetic division among the Branches" but "a carefully crafted system of checked and balanced power within each Branch"). And, important separation of powers decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree. See, *e.g.*, *Crowell* v. *Benson*, 285 U. S. 22, 48–54 (1932); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 551–555 (1935) (Cardozo, J., concurring). As the majority invokes the advice of an American poet, one might consider as well that poet's caution, for he not only notes that "Something there is that doesn't love a wall," but also writes, "Before I built a wall I'd ask to know/ What I was walling in or walling out." R. Frost, Mending Wall, The New Oxford Book

of American Verse 395–396 (R. Ellmann ed. 1976).

Finally, I note that the cases the dissent cites are distinguishable from the one before us. *Sampeyreac* v. *United States*, 7 Pet. 222 (1833), considered a law similar to §27A(b) (it reopened a set of closed judgments in fraud cases), but the Court did not reach the here relevant issue. Rather, the Court rested its conclusion upon the fact that Sampeyreac was not "a real person," while conceding that, were he real, the case "might present a different question." *Id.*, at 238–239. *Freeborn* v. *Smith*, 2 Wall. 160 (1865), which involved an Article I court, upheld a law that applied to all cases pending on appeal (in the Supreme Court) from the territory of Nevada, irrespective of the causes of action at issue or which party was seeking review. See *id.*, at 162. That law had generality, a characteristic that helps to avoid the problem of legislatively singling out a few individuals for adverse treatment. See *Chadha*, 462 U. S., at 966 (Powell, J., concurring in judgment). Neither did *United States* v. *Sioux Nation*, 448 U. S. 371 (1980), involve legislation that adversely treated a few individuals. Rather, it permitted the reopening of a case against the United States. See *id.*, at 391.

Because the law before us embodies risks of the very sort that our Constitution's "separation of powers" prohibition seeks to avoid, and because I can find no offsetting legislative safeguards that normally offer assurances that minimize those risks, I agree with the Court's conclusion and I join its judgment.