In the

Supreme Court of the United States

ROBERT J. LENHAUSEN,

Appellant,

vs.) No. 71-685

LAKE SHORE AUTO PARTS CO., et al.,

Appellees,

and

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Appellants,

vs.) No. 71-691

CLEMENS K. SHAPIRO, et al.

Washington, D. C.
January 15, 1973

Pages 1 thru 50

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Washington, D. C.

Monday, January 15, 1973.

The above-entitled matters came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM J. SCOTT, ESQ., Attorney General of Illinois, Chicago, Illinois; for Appellant (71-685)

APPEARANCES (Cont'd):

AUBREY F. KAPLAN, ESQ., Assistant State's Attorney,
Chicago, Illinois; for Appellants (71-691).

ARNOLD M. FLAMM, ESQ., 33 North Dearborn Street,
Chicago, Illinois; for Appellees (71-685).

LOUIS L. BIRO, ESQ., 221 North LaSalle Street,
Chicago, Illinois; for Appellees (71-691).

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in two consolidated cases, 71-685, Lehnhausen against Lake Shore Auto Parts, and 71-691, Barratt against Shapiro.

Mr. Scott, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM J. SCOTT, ESQ.,

ON BEHALF OF THE APPELLANT (71-685)

MR. SCOTT: Mr. Chief Justice, and may it please the Court:

The cases before the Court this morning involve the legitimate and reasonable attempt of the representatives of the people of the State of Illinois to bring an archaic and unworkable tax structure into accordance with the problems of our modern-day society, and to bring a taxing system that was based, from the time when Illinois was an agricultural State over 100 years ago, into line with the concepts of today when we are one of the largest industrial States in the nation.

The tax under consideration was the personal property tax which was unworkable, unjust and unfair to the people of our State. In its administration, it varied completely throughout the State.

The bulk of the funds came from the assessments on corporations that were easy to ascertain and easy to enforce due to the fact that we could dissolve a corporation if they

failed to file their papers and pay the tax.

The tax on individuals was administered variously throughout the 102 different counties.

One example of the discrepancy was that the down-State agricultural community, the individuals paid $27 million in 1970, and in the industrial areas of Chicago, it was less than $2 million.

It was virtually impossible to ascertain the intangibles, and in some of the means of assessing they took into consideration that to tax it at the full rate would be almost a confiscation of the property.

For that reason, the Legislature elected officials and members of the delegation to the new Constitutional Convention all strive to develop an orderly way of phasing out this tax.

Along with that proposition, the Legislatures of the State in 1969 also voted to impose a State income tax on the State for the first time.

That income tax was held constitutional by the Supreme Court of Illinois, despite the fact that there was a difference in classification in the tax rate for corporations and individuals.

During that same year, the Legislature, by a joint resolution of the Senate and the House, overwhelmingly placed a referendum before the people of the State, stating that the

new article to be adopted by the people would eliminate an ad valorem tax on individuals.

That resolution was adopted overwhelmingly. Somewhere between seven and eight out of every person in the State voted for it.

The new Constitution took this into consideration with an orderly phase-out of the personal property tax. And they provided that for any tax that was eliminated before January 1, 1971, that there could be no new tax placed on to substitute for it, realizing that this had been the main purpose of our State income tax and that the budgets of the local school districts and local governments had been determined accordingly.

However, with the desire to completely phase out the personal property tax by 1979, the delegates to the Constitutional Convention provided that any taxes that were eliminated on personal property after January 1, 1971 -- in other words, the day after this constitutional amendment to the 1870 Constitution were to become effective -- would have to be replaced by a substitute source of revenue on that same source.

So we are talking about a question of whether or not there is any meaningful tax relief for the individual citizens of Illinois, as was designated by the Legislature, by their elected officials, by their delegates to the

Constitutional Convention, in line with the will of the people of this State.

In the case at hand, the Lake Shore Auto Parts Corporation attacked the constitutionality of the revenue article providing for the personal property tax, saying that by virtue of the amendment to the 1870 Constitution the revenue article became unconstitutional, claiming that it violated the Federal Constitution under equal protection of law.

Faced with that possibility, that the revenue article would be unconstitutional and that over $300 million worth of finances every year would be lost to the school district, resulting in complete chaos in our local government, the Supreme Court of Illinois ruled that the revenue article was not unconstitutional because of the amendment but went on to rule that the amendment to the Constitution was unconstitutional under the Federal Constitution.

In doing so, they reacted with the consideration of the existing fact that a new constitution had been adopted by delegates representing the people of the State, and had been adopted by the people of the State, and that that constitution specifically recognized the facts involved in the Article 9 amendment to the previous constitution and provided for a complete phasing out of the personal property tax.

And that new constitution also placed on the State,

for the first time in history, the responsibility for the primary funding of education in this State, that it was an attempt to modernize our whole taxing structure and to deal with the responsibilities of government.

And that under this reasonable scheme it was designed to remove the tax first from the people that had been treated most unjustly, and then to systematically remove the tax completely.

And that the responsibility of financing the schools and local governments would be met by other forms, such as our new State income tax, and based on the constitutional obligation that the primary responsibility for education in the State now became a State function.

Q I gather as to ad valorem taxes against corporations, is there a phasing-out time table?

MR. SCOTT: Yes, sir.

Q Is that in a provision of the existing constitution or something that's being --

MR. SCOTT: Yes. What had happened was that in 1970 the State convened a Constitutional Convention, and for the first time in 100 years revised our Constitution completely.

In that Constitution, the delegates specifically took notice of this problem that we had in personal property tax and provided for a phasing-out completely of the personal property tax by 1979.

Q That's actually written?

MR. SCOTT: It is actually written into the new Constitution.

Q And automatically will become effective unless the Constitution were again amended?

MR. SCOTT: It will automatically become effective and the provision realizing that a great deal of the financial support of our school system was based on the personal property tax,and by far the bulk of it based on the personal property tax on corporations --

Q And did you say earlier, if I might interrupt, $300 million raised by the property tax against corporations alone?

MR. SCOTT: The total tax now is somewhere in the nature of $350 million --

Q Raised by taxes only against corporations.

MR. SCOTT: Only by personal property.

Of that amount, somewhere between $50 and $75 million of it, comes from individuals, and approximately $300 million of it comes from the corporations.

Back in 1970, we were talking about $300 million for the total package.

Q But now the first step was to eliminate property tax as against the individual?

MR. SCOTT: Against individuals, which was done by

an amendment to the old constitution at the time that the State income tax went into effect.

Q Now then, when was the next step?

MR. SCOTT: The next step was a convening of a new Constitutional Convention, which provided that any other taxes that hadn't gone into effect as of the effective date of that amendment, January 1, 1971, that any other taxes would be phased out no later than 1979.

Q Any other could mean only taxes against corporations, property tax against corporations, could it?

MR. SCOTT: That was our contention.

Any other, as against individuals, is what they specified, and, of course, the Supreme Court of Illinois in this case had indicated that the distinction between individuals and corporations, which is one of the points under consideration --

Q I am still puzzled, Mr. Attorney General. I still don't understand. Do you have anywhere a reference to the actual language of the Constitutional Convention?

MR. SCOTT: Yes, we do. We have it in our brief.

Q Could you give me just the page.

Is it at page 4 of your brief in that footnote?

MR. SCOTT: Page 4 in the footnote, that on or before January 1, 1979, the General Assembly shall abolish all ad valorem personal property tax, and concurrently therewith

and thereafter shall replace all revenue loss by units of local government and school districts as a result of the abolition of the ad valorem personal property tax, subsequent to January 2, 1971, taking into cognizance the fact that on January 1, 1971, under the Article 9, Section A amendment to the old Constitution, that the tax on individuals would have been eliminated.

Q But this is not self-operative. It requires a law of the General Assembly abolishing, doesn't it?

MR. SCOTT: It would require that the Legislature orderly phase it out and replace it --

Q Suppose the Legislature didn't do what this requires them to do?

MR. SCOTT: Well, then we would have complete chaos and we would have lost the --

Q I am familiar in my own State with constitutional provisions which have directed the Legislature to do something back in 1947 and they haven't done it yet.

MR. SCOTT: Well, it would have left us in a situation that we would be in today if the argument of the Lake Shore Auto Parts Corporation is upheld, that we would have no source of revenue for financing the State.

The practical number here, for example, for the taxes of '70, '71, '72, that are under consideration, is $1 billion, and so that it is the financing of the

school districts of our State.

Q Has the General Assembly, as yet, introduced any legislation similar to Subsection (c)?

MR. SCOTT: The most important factor that happened, and I think should be recognized by this Court and was not involved in the majority decision of the Supreme Court, is that the State, for the first time in history, did pass an income tax to give us a source of revenue, and that that has gone into effect, and that there is a distinction there, a 4% rate on corporations and a 2½% rate on individuals.

And what this provision in the Constitution is saying is that when you do take off the tax as to corporations that there has to be some type of compensating Statewide tax.

Q Are you suggesting that the new income tax, quote, is that compensating tax?

MR. SCOTT: It is the vehicle that now exists for the first time.

For 100 years, it was held that we could not have an income tax.

We presented the case in 1969 to the Supreme Court and due to the fact that the economics and structure of the State had changed they reversed themselves and ruled that it was constitutional to have an income tax in Illinois and also

that it was constitutional to make the differential in the classifications between corporations and individuals, which is the basis that the delegates to the Constitutional Convention were operating on, and that the whole program was an orderly and designed one to change our method of financing to a more equitable and realistic one for the State.

Q As I understood one of the arguments that you have alluded to, but stressed in your brief, is that in terms of trying to collect this tax from individuals it was totally uneconomic because the cost was more than the reward and that only -- was it 2% -- of the total tax came from individuals and 98% -- about -- from corporations?

MR. SCOTT: Well, it varied throughout the State.

The farmer, of course, was faced with the problem that his tractor was sitting there in the field. It was enforceable. The assessor could see it.

The vast bulk of the holdings in the State, of course, as far as individuals, would be common stocks and bank accounts that could be shifted out of the State.

And so that the problem that the enforcing officers had was that to go in on an assessment of an individual on his automobile, for example, would cost us more in court cases to collect than the tax was worth.

Q You haven't addressed yourself to the power of the State to have one tax on corporations which is not applicable

to anybody else, at least, you haven't directly for me.

MR. SCOTT: Well, as I mentioned in there, our income tax case, our own Supreme Court took cognizance of a number of cases that had existed in the U.S. Supreme Court that said that it is possible to classify as to ownership, that it is possible to do that in a property tax case such as in the Allied Stores case of Ohio, which came after the Quaker City Cab case, which was in 1959, one of the most recent cases which permitted classification of property tax proposed on the basis of the identity of the owner.

At the time that the Illinois Supreme Court upheld the distinction between the corporations and individuals in income tax, they referred to other cases, such as Lawrence v. Mississippi, where Justice Stone, who was one of the distinguished dissenting judges in the Quaker City Cab case, along with Justice Brandeis and Justice Holmes.

Justice Stone said States have unrestricted power to tax those domiciled within them, so long as that tax is imposed upon property within the State or privileges enjoyed there and it is not arbitrary or unreasonable.

In this case, it was the State income tax relieving domestic corporations, but not ones from outside the State, on income from activities carried on outside of the State.

And this was held not to violate the Equal Protection Clause.

There have been many cases that permit the State to single out property of corporations and subject it to taxation, to the exclusion of all others.

And I submit to the Court that the Illinois Constitution, the Illinois Statutes, the Illinois law, the Federal Constitution, the Federal law, does permit our State to single out property of a corporation and to subject it to taxation to the exclusion of all others, that in doing so that the Legislature reflected the will of the people of the State.

And I respectfully ask that the Court take this into consideration and reverse the judgment of the Supreme Court of Illinois.

Q Mr. Scott, let me ask a question about the constitutional provision that Justice Brennan inquired about which is on the footnote on page 4 of your brief.

Supposing that the Legislature of Illinois does nothing more than it has already done between now and 1979, and this constitutional provision remains as it is.

Would the ad valorem tax be automatically unconstitutional as of 1979, even though the Legislature does nothing more about it?

MR. SCOTT: That's right. And so that the incentive, of course, on the Legislature is that we would have no way of replacing this tremendous volume of revenue for our school districts.

So it is inconceivable that having gone through the anguish of placing the income tax on the State, that the Legislature would do nothing to finance the schools.

Certainly, the whole attempt here is to have a responsible and reasonable approach to this tremendous problem of financing local government, and specifically the schools, of our State.

Q Your answer to Justice Rehnquist is that automatically, even if your Legislature does nothing under Section C, on January 1, 1979, the ad valorem personal property tax, even as against corporations, is abolished?

MR. SCOTT: It would violate the Illinois Constitution.

Q No, no. But if your Legislature does nothing, as this requires it to do, nevertheless, are you saying that the --

MR. SCOTT: That's my interpretation.

Q Mr. Scott, do you know whether other States draw that same distinction between corporations and individuals and whether their doing so has been upheld against constitutional attack?

MR. SCOTT: Well, I think one of the important factors of this case is that all of the States, like Illinois, are going through this transition. Forty-eight of the 50 States do have some type of a personal property tax. Ours,

of course --

Q Might I suggest that Illinois is way at the end of the line in getting to this point?

MR. SCOTT: We had a very real problem in ever amending our constitution. It took us 100 years to get it done.

Q That's why I made my statement. I think you are way behind the times.

But coming to my question, do you know of any other State which draws this same distinction between corporations and individuals, which distinction has been upheld against constitutional attack?

MR. SCOTT: No, I don't. Generally speaking, the --

Q I suggest that there are some. It might well be worth investigating.

MR. SCOTT: Thank you.

The chief of our Appellate Division died of a heart attack. He had been the person that had been handling this case, and without the benefit of his consultation it may well be that we have overlooked those.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Kaplan.

ORAL ARGUMENT OF AUBREY F. KAPLAN, ESQ.,

ON BEHALF OF THE APPELLANTS (71-691)

MR. KAPLAN: Mr. Chief Justice, and may it please the Court:

The issue in this case, as we see it, is whether or not a State's highest court can disregard the constitution of that State and its own prior decisions in determining whether or not a classification for tax purposes is valid.

Q That would be a Federal question, wouldn't it?

MR. KAPLAN: I believe that the determination of the validity of a classification as whether or not it is offensive to the Fourteenth Amendment would be.

Q Yes, but not as respect what the State constitution means it requires.

MR. KAPLAN: I believe that whether a State court determines, resolves, a case in accordance with its own law or completely disregards its own law, its own case law, and its own constitution in deciding a case, is a Federal question.

It seems to me that litigants who present pleadings, arguments, all the way through the case -- may I call Your Honors' attention to the Appendix, and I think it's page 1, where in Relevant Docket Entries there is only one relevant docket entry which antedates the approval by the electorate in Illinois of the 1970 constitution, you see.

And throughout the litigation, the State's Attorney

of Cook County and the Attorney General, as well, have relied on --

Q I notice that under your trial court, in this case, it is invalidated both under the State and under the Federal Constitution. But Justice Schaefer, as I read his opinion, relied only on the Fourteenth Amendment.

MR. KAPLAN: Justice Schaefer --

No, Your Honor, Justice Schaefer relied on the superseded Illinois Constitution of 1870 to invalidate 9(a).

Q Then we don't have a Federal question?

MR. KAPLAN: Well, I think the Federal question is must -- are litigants deprived of a fair trial and due process of law when a State court refuses to observe its own case law and its own constitution, which was in effect at the time of the decision?

You see, the 1970 Constitution came into effect on July the 1st, 1971.

The opinion handed down by Justice Schaefer appeared about 10 days later.

Now the case law in Illinois -- as a matter of fact, with opinions written by Justice Schaefer -- say that the Illinois reviewing courts must decide cases in terms of the law as it exists at the time of the decision and not at some prior time.

Not only that, Justice Schaefer, in an opinion

written shortly before this, in the Hamer case, which appears --

Q At page A-15 of the Petition for Writ of Certiorari -- I think it must be about the last page of Justice Schaefer's majority opinion -- he says, "We hold, therefore, that the discrmination produced by Article 9(a) violates the Equal Protection Clause of the Fourteenth Amendment. Apart from that discrimination, the validity of the Revenue Act does not challenge."

Now that sounds to me like a holding under the Federal Constitution.

MR. KAPLAN: Yes.

Q It's not a ruling on the Due Process question that you now present.

MR. KAPLAN: Well, we are raising it because Justice Schaefer limited his examination of the governing law to Illinois 1870 Constitution.

The Illinois 1870 said that you could not -- that personal property tax must be uniform and it must be applied to everyone.

The 1970 Constitution provides specifically for classification and it provides that the classes may be relieved of the tax in series -- page 7 of our brief, personal property tax, which is Section 5 of the Illinois Constitution of 1970.

It says that the General Assembly may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes, and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

In other words, under the 1970 Constitution, you can make any kind of a reasonable classification that doesn't offend the Fourteenth Amendment and it will be all right.

And it also says that if you make nine classifications, you can take it off in Classification One this year, Classification Two the next year, and as long as that is not offensive to the Fourteenth Amendment, that is, if the classes are drawn properly, that will be valid.

Now, this was impossible under the 1870 Constitution.

Now, I think that it is clear that the 1970 Constitution of Illinois was in effect at the time of the decision.

The cases which stand for the proposition that the reviewing court must use the 1970 Constitution in determining this case are also in the brief, and I don't think that they require any elaboration.

So, it is simply a question of which Illinois Constitution governs. And by using the wrong one -- it is wrong in terms of the precedent of that Court -- I think that the people of the State of Illinois have been denied a fair

trial. Particularly, since all pleadings, all briefs, every presentation to each and every court, both the Illinois Supreme Court and those before it, were predicated on the assumption that the 1970 Constitution was in effect and, in addition, we have cases from the Illinois Supreme Court which anticipate the effective date of a constitutional provision.

In the Hamer case -- and, again, this is an opinion from Mr. Justice Schaefer -- the case was disposed of after 9(a) had been adopted by the people, but before its effective date.

And, in that case, the rule was invoked sua sponti by the court.

That was in December 1970.

We have every reason to expect that the 1971 Constitution would be the controlling law in deciding this case -- should be.

We anticipated that. We relied on it.

And, gentlemen, the rules were changed after the game was played, and this is what we object to.

Q You say, after the amendment was either adopted or it was so far along that it couldn't be altered?

MR. KAPLAN: Well, the 1970 Constitution had been adopted by the people.

Q And when was the opinion that you spoke of?

MR. KAPLAN: Let me give Your Honor the chronology.

The 9(a) was approved by the people of Illinois on November 3, 1970. It was to go into effect on January 1, 1971.

The new Constitution of Illinois was approved by the electorate December 15, 1970, and was to go into effect July 1, 1971.

Now, the only event reflected in the opinions -- relevant docket entries -- that antedates the day when the 1970 Constitution was approved by the people of Illinois, was the filing of the first complaint in the Lake Shore case, and every subsequent filing came in after December 15, 1970.

Based on the precedent set by that court, the court should have -- if it was going to follow its own rules and its own declarations -- decided this case in terms of the 1970 Constitution.

And the 1970 Constitution specifically permits classification and for removal of the personal property tax from some classes and not other. It compels replacement of that tax in 1979, and the imposition of a tax to replace the revenues lost.

And this is another very important point, because I think Your Honors must appreciate that this decision emasculates the revenue article of the 1970 Constitution and totally perverts the intent of the people and their expectation.

To paraphrase what was to happen -- and there has been some dispute about what is the definition of the term "individuals."

The Attorney General has emphasized the approach that says individuals are everybody except corporations.

The State's Attorney has emphasized an approach which says individuals are -- means only the non-business property of natural persons.

Now, our approach is based on custom and usage in the nomenclature of property tax administration in Illinois. For example, the law requires everyone in Illinois to file a schedule with his assessor. There are basically three classes of schedules. One of them is titled individuals. The other is businesses and the third is corporations.

Every lawyer in Illinois who deals in tax matters, if asked what "individuals" means, he says that is the non-business property of natural persons, because that's all that's left if you separate unincorporated businesses and corporations from the entire pie of those subject to the personal property tax.

All right, now -- that's the kind of a definition argument that we were fighting about before, and our position is that by either definition it is valid.

Now, what was intended is this. Individuals were to be excused from the tax on January 1, 1970. I beg your

pardon, 1971.

January 2, 1971, to January 1, 1979, the tax was to remain on non-individuals.

Now, on January 1, 1979, or before, that tax was to be replaced by another tax, or the revenue was to be replaced by another tax -- I beg your pardon -- and that tax, if it was to be an income tax -- would be an exception to the 8 to 5 differential provided in the income tax provisions of the Illinois 1970 Constitution.

What happens -- so the result of that would actually be to preserve the status quo with respect to who pays the personal property tax in Illinois, because, as everyone concedes, corporations or businesses pay about -- over 90% of it.

Q Do you agree with your colleague that the -- the Attorney General -- that this is an automatic phase-out, whether the Legislature acts or does not act before 1979?

MR. KAPLAN: Your Honor, I confess I do not have the answer to that question, but I would anticipate that we may be here in 1971 --

Q '79, you mean.

MR. KAPLAN: I beg your pardon. 1981, I think, is about the timing.

Q On the '79 problem.

MR. KAPLAN: Yes.

I don't know, really. I think -- I am confident that if the Legislature refuses to act, every effort will be made to compel them to do so. How that will come about, I don't know.

But the point that I am trying to make is this, that if you invalidate the exoneration of individuals, then everyone is subject to that tax after January 1, 1971, and, therefore, everyone is subject to the replacement tax. And, if the replacement tax is an exception to the 8 to 5 ratio, then it would be uniform.

And the effect of this is to shift the burden of the personal property tax from businesses and corporations back to the wage earner.

This is what happens under Justice Schaefer's decision. And this is what we object to. And this is the reason we feel it is so important that the decision of the Illinois Supreme Court be reversed.

And we think we are on good grounds. This court did ignore its own constitution. It did ignore its own prior decisions. It did enter a decision which, in effect, nullified the revenue of the new constitution, and we urge that they be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Kaplan, thank you.

MR. KAPLAN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Flamm.

ORAL ARGUMENT OF ARNOLD M. FLAMM, ESQ.,

ON BEHALF OF THE APPELLEES (71-685)

MR. FLAMM: Mr. Chief Justice, and may it please the Court:

At the risk of running out of time on my prepared argument, I would like to begin by addressing myself to a few of the questions that have come from the bench.

I am well aware that it is not the function or the obligation of this Court to construe Section 5(c) of the new Illinois Constitution with regard to the supposed ultimate abolition of personal property taxation in Illinois.

I must strongly disagree with the Attorney General's opinion. I think that it is not self-executing, and furthermore, as we have suggested in our brief and refer to a very important article on the subject, it could not be executed by the Legislature even if it wanted to.

So that I think personal property taxation in Illinois, on whatever categories it is permissible, is going to be with us until the constitution is again amended.

Some reference was made to the relative difficulty of collecting the tax from individuals as compared to collecting it from corporations.

Apparently, some 90-some percent is collected from corporations, but that, I can assure the Court, has nothing to do with any administrative ease. It has to do with one

fact only and that fact is that individuals vote at elections and they vote for or against tax collectors, whereas, corporationsddo not have the privilege of voting.

Q As a practical matter, isn't there something to that argument that it is much easier because corporations, for the most part, have got to keep inventories, they've got Federal tax records which are open to the examination of local --

MR. FLAMM: Well, it is quite true, Your Honor, that as a general rule, I mentioned this in our brief, that corporate property tends to be more visible and is therefore more easily assessed,

But certainly, automobiles, for example, of individuals, there is not the slightest problem with assessing that, and yet, as is pointed out by the Legislature in its argument, in the city of Chicago,no attempt at all is made to assess automobiles at any figure.

I am suggesting that to some extent there is a visibility factor which differentially discriminates against corporations, but essentially the problem is not an administrative problem. It is a problem of the will to collect taxes.

And in terms of the arbitrariness of the whole taxing system, it is far more arbitrary with respect to corporations than it is with respect to individuals.

Individuals, no matter where they live --

Q But, Mr. Flamm, if that difference which the Attorney General referred to between down-State and Chicago is correct, I would suggest that it is very largely a matter of visibility rather than corporate versus individual.

MR. FLAMM: Certainly, down-State where there are farm property which is relatively visible, they do get a significant proportion of their revenue from farmers.

The biggest proportion throughout the State comes from public utilities which, of course, are, as Chief Justice mentions -- obviously, file personal property schedules and they can't hide their property.

But in terms quite apart from who pays most, in terms of the intraclass differentials, which is the most arbitrary assessment, among corporations it is far greater than among individuals, because individuals, no matter where they live, pay a relatively small tax which bears no relation to any property they own but, as a politically adjusted or determined matter, maybe it is a percentage of their real estate tax bill or a percentage of their -- depending on the kind of car they have -- but it, at least, is a small amount.

I don't mean to make too much of an issue over this. I don't think it is directly relevant.

As to Justice Blackmun's inquiry, I am confident, I know for a fact there is no other State which has anything comparable, or even purports to discriminate against corporations

for purposes of property taxation.

In terms of alternative revenue sources, the argument has been made that Article 9(a) was a means of relieving the wage earner, or creating a more equitable tax system. Well, perhaps so, but certainly there are alternatives.

In fact, since the decision of this case by the State Court, the Legislature has adopted an alternative, a flat $5,000 exemption from personal property taxes for corporations and individuals which,no doubt, will have substantially the same effect of this proposed amendment without creating any Federal constitutional problem.

It may create some serious State problems, but no Federal problem, I think.

Q Do you see any parallel to this situation and the statutes in quite a number of States that exempt the first five or ten or fifteen thousand dollars of value of owner-occupied property?

MR. FLAMM: Well, the fact that it is the first X number of dollars, I don't see any problem with.

I think,certainly,the Fourteenth Amendment does not prohibit --

Q It certainly discriminates against the apartment owner, apartment building owners, doesn't it not?

MR. FLAMM: Well, I think another example might be

that many States have exemptions for persons over 65 years of age, and I certainly would concede that there is some parallel there, but I think the difference is that the exemption for homeowners, or for aged homeowners, can be justified on the basis, in the case of the aged ones, that they have no longer a source of income. But it is not simply based on ownership, as such, but is based on the fact that older people presumably no longer have a regular source of income yet their tax bills keep going up year after year, and --

Q Go back to the homestead exemption. There is a direct discrimination between corporate owners of big apartment buildings as against the individual who owns and lives in his own house.

MR. FLAMM: Well, if there is a discrimination -- you say discrimination against corporate owners of apartment buildings, but they would be, as I understand it, in the same category as an individual owner of an apartment building.

The discrmination certainly is against apartment buildings as compared to single family homes.

We see no constitutional problem with that. That is based on the kind of property, rather than the nature of the ownership.

Q Also there is a difference of treatment between people who rent houses, who own houses for rental, and those

who own houses to live in.

MR. FLAMM: Well, I think that's a valid -- that is based on the nature or use of the property and even in the -- back in the California Railroad tax cases, 90 years ago, Justice Field specifically recognized that a classification based on the nature or use of the property is a valid one.

It is only the classification based on the nature of the ownership, at least particularly corporate ownership as against noncorporate ownership, that was the offending violation in his view.

If I may return to my prepared text --

MR. CHIEF JUSTICE BURGER: We will enlarge your time to three minutes to compensate,and will enlarge your colleague's time two minutes.

MR. FLAMM: Well, I must say that I appreciate the Court's term, but I am not a colleague of the M. Weil Company, because we are opposed on a very important issue over here, Your Honor.

MR. CHIEF JUSTICE BURGER: I am using the term in a broad sense.

MR. FLAMM: Thank you.

In some ways, I suppose, this is a rather old-fashioned sort of a lawsuit.

On its central issue, the facts are essentially identical to those which were before this Court 90 years ago

in Santa Clara County v. Southern Pacific.

The Santa Clara case, of course, served to establish the fundamental principle that corporations are persons within the meaning of the Fourteenth Amendment, and in a very real sense, I suggest, it is that doctrine which is under challenge today as a consequence of the ill-conceived constitutional amendment proposed by the Illinois Legislature.

I represent Lake Shore Auto Parts Company, as you know, personal property taxpayer in Cook County.

Now we initiated this litigation in the Circuit Court of Cook County and Lake Shore did so, I will freely admit, not because of any desire to vindicate the abstract rights of corporations, and even less from any desire to pay homage to the memory of Justice Field, who promulgated the original doctrine here. Our intention, obviously, was to free ourselves from the yolk of a burdensome tax, a tax which is not merely burdensome but which is, at least in Illinois, arbitrary, scandalous and a source of disrespect for the courts and for the judicial process.

I need not labor that point because the Attorney General himself agrees fully with us on that score. If there is any doubt, beyond that, it is removed, I think, by the official explanation of the amendment prepared by the Illinois General Assembly.

That document, which is appended as Exhibit A to

our brief, is a complete and all-inclusive statement of the intention of the Legislature. It leaves no room for surmise as to what might have been intended.

The interesting thing, I think, about that official explanation is that every evil of the personal property tax set forth therein is fully as applicable to corporations as it is to individuals.

One may re-read that time after time, I think, and find no clue in there as to why the General Assembly eliminated the tax only on individuals.

The principles set forth in the Santa Clara case, or originally announced there, and adopted more firmly in the Quaker City Cab case in 1925, has gone unchallenged in this Court for almost 40 years.

It has been accepted as a matter of doctrine that States may not discrminate for property tax purposes as against corporate ownership, as such.

On one occasion, admittedly in 1920, this Court departed from that rule in the Fort Smith Lumber Company case -- that's a very brief opinion by Mr. Justice Holmes, who upheld the discriminatory statute on the ground that the Arkansas Legislature might conceivable have been acting in furtherance of a permissible State policy, namely, a policy of discouraging ownership of corporate stock by corporations.

It has generally been accepted, I think, that that

case has been overruled effectively by Quaker City Cab.

At any rate, Fort Smith has been hardly ever cited by anyone in the 60 years, 40 years, 50 years, since it was decided. It has passed into limbo.

As a matter of fact, in the Allied Storage case, this Court refrained, I think, rather significantly, from even citing the Fort Smith Lumber case.

Now the Allied Storage case is a difficult case, I will concede. We've discussed it at great length in our brief. I just don't think there is time to try to get into it in the oral argument.

We recognize the problem. We think the Attorney General has interpreted that case in a manner far more broadly than the language of the case warrants.

The real issue, I take it, here, is not what the law has been but what the law should be.

Shall the accepted rule be changed so as to permit State Legislatures free reign in indulging their natural propensities to tax only those property owners who lack the power to vote, while exonerating from tax those who do not -- who do -- possess that potent weapon, and who are in all other respects identically situated?

Now the State here argues, and most specifically in its reply brief, that this discriminatory tax is not really a property tax at all. It is really a franchise tax which

masquerades as a property tax.

They say that the Legislature imposed it on corporations as the price for granting corporations the privilege of doing business in Illinois.

Now that's an interesting argument. It was originally raised in the Santa Clara case 90 years ago. It was rejected there by Justice Field on the ground that, whatever might have been, that simply was not the purpose of the tax.

And the Legislature in California there, and in Illinois here, did not impose the tax as a franchise tax, did not intend it as a franchise tax, and there is not a word in the official argument or explanation to suggest that it is a franchise tax.

When, as, and if a State Legislature adopts a franchise tax in the form of a property tax -- no one ever has yet, to my knowledge -- there will be time enough for this Court to consider whether that is a valid form of taxation.

Certainly, traditionally, courts in general, and this Court in particular, have generally treated the two forms of tax, that is a property tax on one hand and excise tax, including a franchise tax, as being mutually exclusive.

Now, maybe they are wrong. I realize there is nothing God-given about that distinction. And when Moses came down

from Mount Sinai and looked at his tablet, there was nothing said there about preserving the distinction between property taxes and non-property taxes.

But I think the distinction is so imbedded in our law in the Constitution of the United States, in the Constitution of all States in this Union, in the decisions of this Court, in State Court decisions, in economic theory, in legal theory, that to now say that it is all a mistake, there really is no inherent difference, I think that would be to show, if nothing else, disrespect to a great deal of thought that has gone into the subject over the past 200 years.

I might just quote four sentences from an Illinois Supreme Court decision in Reef v. Barrett, decided in 1934, at 355 Illinois, where the Court says, and this is quite typical, I think, of judicial thinking, in general:

"A property tax is levied merely for the purpose of raising revenue and is levied against property. It does not seek, or in any wise attempt to control the use, operation or regulation of the property. When the tax is raised, the mission of the property tax has been fulfilled. A property tax has nothing whatever to do with the question of privilege, license or permission."

I turn, in the time remaining, to the second issue which we have raised in our brief, that is, the propriety of

the remedy decreed by the Illinois Supreme Court.

And the Court understands, I trust, that we agree with the Illinois Supreme Court's holding on the invalidity of the discrimination. We strongly disagree with its holding on the remedy.

Now, the trial court in Lake Shore had sustained our position that the appropriate remedy was to invalidate tax on all taxpayers, the personal property tax on all taxpayers.

In reaching that conclusion, the trial judge considered the question of the appropriate remedy was essentially one of ascertaining the presumed intention of the people of Illinois, that is whether they would have approved this amendment if they had known that its effect was going to be to abolish personal property to taxes in toto.

And in an oral opinion rendered from the bench, the trial court said, and I quote:

"There was no doubt in the minds of anyone that it would have passed overwhelmingly even without the words 'as to individuals.'"

That's quoted at page 54 of our brief and page 46 of the record.

Now the Illinois Supreme Court reversed on this issue and, in doing so, that court made no pretense of ascertaining anyone's intention.

Q (inaudible)

MR. FLAMM: Well, under traditional holdings on the subject, I think it is.

I recognize that how one goes about ascertaining the intention of the people on a subject they have never voted on -- I don't know the answer to that question, but I think theoretically --

Q (inaudible) the last word as far as this Court is concerned?

MR. FLAMM: Well, Your Honor, that's, of course, a touchy question because I am aware that we face that problem over here and I cannot say with any great confidence that it is not.

We developed the argument in our brief at considerable length. I think, to go back to the old case of Guinn v. United States, this Court said there that if the State court has not pronounced State law on the subject to the remedy, then this Court is free to do so.

Now, in subsequent decisions, this Court certainly has honored a State court decision where the State court has made a finding on the question of intention, but the problem with the Illinois Supreme Court's decision here is that they made no pretense of finding anything. They simply, after holding the discrmination to be invalid, they said, therefore the amendment must fall.

And there is not a reason given. One can read that opinion, I suggest, time after time, and not know why they reached that result rather than the result reached by the trial court.

Now, if this Court is satisfied that that is a determination, a ruling, a finding by the State Supreme Court, then I have to confess I am beaten because the court -- if that is the case, it is a State ruling.

We have argued that it is not a State ruling. We further argue that, at least in this case, to permit this sort of a result would have a severely chilling effect on the assertion of equal protection rights, at least in the field of taxation, because if a taxpayer knows that he can't win even if he wins, he is still going to end up subject to the tax, there aren't very many people going to challenge taxing statutes.

I am aware this is the first time this argument has been advanced in a property case context as distinguished from a free speech or voting rights case.

I am also aware that this Court, quite properly, has awarded priority and precedence to personal rights as compared to property rights, but I think, at least I hope, that property rights are still a matter entitled to protection under the Equal Protection Clause, and I think if the Illinois Supreme Court can do this to us we can forget about any

challenges to any taxing statutes in Illinois, at least.

And I might say that there are now on the books in Illinois, to my knowledge, two or three taxing statutes enacted in the last year or two, which,quite obviously, are unconstitutional under the State constitution.

Nobody has brought a challenge to them and I daresay nobody is going to because they foresee the kind of result that they are going to get.

We have argued this point in our brief at some length. I can't deny the problem. In fact, we, at one point, sought to withdraw from this case after the court denied our -- after the court dismissed our appeal.

We sought to appeal, as the Court recalls, directly from the judgment below, on the ground that the remedy violated our constitutional rights.

The Court dismissed that appeal for want of jurisdiction. And at that point, feeling rather discouraged, we asked leave to get out entirely.

You wouldn't let us out, so we are back in and we are still in. We have rethought the matter and I hope that we are still in the ballgame on this issue.

I say we are opposed on the question of the remedy, but most vociferously by the four school districts which appear in this Court as amicus.

More disturbingly,we are opposed on this issue by

M. Weil and Sons, one of the respondents in the Shapiro case.

That's disturbing because M. Weil and Sons purports to represent a class of all corporations, including Lake Shore.

The finding to that effect that we have argued is clearly void, having been entered without a semblance of due process of law, but nevertheless, having purported to represent all corporations. He now takes the position that the court below is correct and asks this Court to affirm, even though the result would be to grant no benefit at all to any corporations, including Lake Shore, and including M. Weil and Sons, but Mr. Biro will address the Court on that subject and perhaps he can explain his position.

Q There is now in Illinois an income tax in effect? Or was its effective date postponed for a while?

MR. FLAMM: The income tax has been in effect since prior to the adoption of any -- of this amendment.

Q That's imposed at varying rates and varying exemptions to both individuals and corporations?

MR. FLAMM: It is a flat rate tax with a differential rate on corporations and individuals with rather substantial exemptions to it, yes.

Q But that's now presently in effect?

MR. FLAMM: It is presently in effect, Your Honor.

With the two minutes I have remaining, I would address myself to one argument that has beenmade here and has

been made by the school districts, is that somehow chaos would result if the decision below were affirmed, that the school districts would lose $300 million.

Now, I am very much concerned with school districts' financing. My wife happens to be on a school board, as a matter of fact, so I get both sides of the picture.

There is no shortage of means in Illinois to raise alternative sources of revenue.

My time is up. I thank the Court for its attention.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Flamm.

Mr. Biro.

ORAL ARGUMENT OF LOUIS L. BIRO, ESQ.,

ON BEHALF OF THE APPELLEES (71-691)

MR. BIRO: Mr. Chief Justice, and may it please the Court:

At no time in any of the constitutional history of the State of Illinois, in the context of the constitutions of the State of Illinois, in either the laws and/or the statutes of the State of Illinois, has the State ever recognized a tax on property or an exemption on property predicated on the type of ownership of that property.

Now, obviously, I am excluding the (inaudible) corporations, etcetera.

The Supreme Court of Illinois, in the instant cases that are before this Court now, did nothing more and nothing

less than follow the same principle that has been enunciated throughout the judicial history of our State during that time.

And, that is, to be valid a classification of property, for the purposes of property tax imposition or exclusion, must be based on, related to, or refer to, the differences, if any, in the property itself, or the characteristics of the property itself, and in one instance, perhaps, even the form of the property itself.

And, in order to find any support under the law, particularly under the Fourteenth Amendment of the Constitution, as we see it, the Supreme Court of Illinois, I think, succinctly touched on this, although the other gentlemen who have appeared here beforehand do not seem to agree.

And, if the Court will look at the Attorney General's Appendix at page 29, there is a quote in the opinion, and if I may -- I know the Court is not particularly anxious -- it is a very short section that I have taken out of the Court's opinion --

Q Justice Schaefer's opinion?

MR. BIRO: Justice Schaefer's opinion, yes.

And, if I may --

Q What page, Mr. Biro?

MR. BIRO: Page 29 of the Attorney General's Appendix, I am sorry.

It is the handbook, Justice.

"The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property."

If the property is owned by A, it is taxable.

If it is owned by B, it cannot be taxed.

Of course, the Equal Protection Clause of the Fourteenth Amendment does not prohibit classification, and absolute precision is not required of the States in drawing the lines between classes.

Nevertheless, the State may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

I respectfully point out that the question was asked before about differences that might appear in other States.

The question as to -- has not the question come up before of distinctions that were in there?

And I think the word "guise" is probably the most important word in the latter part of Mr. Justice Schaefer's words here, because of the fact that what has happened here is that there is no doubt but that the soverign State has gotten itself into one horrendous morass that it cannot find --

could not find a way -- to extricate itself.

I respectfully point out, as an attorney, as an officer of the court, that I certainly, as a citizen of the State have compassion and have an understanding.

As a parent, I understand the need for money, but I do not think that it is a judicial approach to say that the ends justify the means.

And, regardless of what the problem is, certainly the courts of this land have to face up to the approach that was taken, and if the approach that was taken is not proper, then it is encumbent upon the courts to take the unpopular, if you will, position to say that we must look at it the way it is.

In effect, what Article 9 did is to place the property itself on one side and say that the type of ownership is really going to be the criterion,

And I respectfully submit to you that what they are talking about is a privilege tax.

This is not a property tax if you do it this way. You are taking a privilege tax and --

Now, as I stated, the Illinois Constitution of 1870, the Illinois Constitution of 1970, contains in its revenue articles, no word that has the spelling out of the word "individual."

The Illinois Revenue Act of 1939, the word individual

does not appear.

That designation appears, I respectfully submit, for the first time in Article 9(a), which is the article that comes before this, and seeks to prohibit a taxation that is nowhere actually imposed, because if you read our constitution, and you read our Revenue Act, there is no place where it says a, quote, individual shall pay this tax, or an individual shall pay that tax.

With due deference to Mr. Kaplan, who pointed out to this Court that it is accepted among the members of the legal profession that the word "individual" has a specific meaning, I stand before this Court and tell you that this is one member of the bar who does not know what individual means.

I do not find it in our statute. I do not find it in our constitution, and suddenly, for the first time, there is language that says that was given to the electorate, if you will, that individuals shall be exempt.

Now, Article 9(a) purports to prohibit the taxation of personal property by valuation, by, as to, individuals.

Nowhere in all of Article 9 does the word "individual" appear.

Nowhere in the Revenue Act of 1939 does the word "individual" appear.

Nowhere does Article 9 impose a tax by valuation on

an individual.

And the Illinois Constitution does not direct that any tax shall be levied on an individual.

The corporations -- M. Weil and Sons -- I can't speak. Obviously, you heard Mr. Flamm, who is not in accord with me. M. Weil and Sons respectfully submit that unless the exclusion of Article 9(a) applies to us also -- by -- I am speaking of corporations.

I don't know what an individual is. I don't know where the distinction comes in --

Q The Illinois Supreme Court settled that question when it said on page A-11 of the Petition for Writ of Certiorari -- that's a copy of Justice Schaefer's opinion.-- "We conclude that the meaning of Article 9(a) is that ad valorem taxation of personal property owned by a natural person or by two or more natural persons, as joint tenants or tenants in common, is prohibited."

Now, doesn't that purport to answer the question of what is meant by individual?

MR. BIRO: It purports to answer it, obviously, insofar as the Court is concerned, but I am respectfully pointing out that -- in my brief, I point out to this Court that I take issue with the ultimate conclusion that was raised in there.

Q But that's a matter of Illinois law, and the meaning

of that provision in 9(a) we must take. We here -- that's not a Federal question. It is a matter of definition and that has been settled by the Illinois Supreme Court.

MR. BIRO: I unfortunately came to the conclusion, Your Honor, and for that reason I touched on it in my brief only to the extent that I felt that it should be brought to this Court's attention.

Q Mr. Biro, would you consider a partnership to be within the definition enunciated by the Illinois Supreme Court? Two natural persons form a partnership?

MR. BIRO: Evidently. I am assuming that from what the Illinois Supreme Court has stated in this case, that, in effect, we are back at exactly the same taxing procedure that we were at prior to the time that the question was raised in these cases before that Court.

So that, Mr. Flamm states he does not understand why I appeared here.

Unfortunately, we attorneys unfortunately -- or maybe it's fortunately -- obviously cannot always see all issues the same way.

With due respect to this Court, I notice that there are, quote, split decisions that come down.

It was my feeling that in the case, as it was brought up initially, that my client's interests were not adequately protected.

It was also my feeling that -- I hear figures thrown around constantly as to how much money is collected in Cook County. And, unfortunately, in a State such as ours, we tend to be two States when people talk about us, because we have the same difficulty that the State of New York seems to have, up-State, down-State and a large metropolitan area, and the rest of the State.

And, obviously, to a great extent the southern part of our State is the agricultural basis. As a result of that, when figures are put out as to what money is collected and what money is not collected, it is my feeling that if there was an unconstitutional attempt made here, and if my client, my corporate entity, if you will, was going to be put in the position where it was going to be forced to pick up part of the slag that was dropped because of improper action, regardless of what amount of money that would be saved by it, I felt that I was adequately and properly representing my client in following through on that.

I state only that we get down to a basic question, if the Court please, that Article 9(a) is constitutionally offensive.

I feel it violates the Fourteenth Amendment of the Federal Constitution, and I respectfully submit that this Court should so hold.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Biro.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:15 o'clock, a.m., the oral arguments in the above-entitled case were concluded.)