In the

# Supreme Court of the United States

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| STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, AND STATE OF VERMONT, Plaintiffs, | ) | |
| vs. | ) | No. 69 Orig. |
| STATE OF NEW HAMPSHIRE, Defendant. | ) | |

Washington, D. C.
December 3, 1975

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| v. | : | |
| STATE OF NEW HAMPSHIRE, Defendant. | : | |

Washington, D. C.

Wednesday, December 3, 1975

The above-entitled matter came on for argument at 1:18 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

JOSEPH E. BRENNAN, Esq., Attorney General of Maine, State House, Augusta, Maine 04333; for the Plaintiff States.

BENSON D. SCOTCH, Esq., Assistant Attorney General of Vermont, Pavilion Office Building, Montpelier, Vermont 05602; for the Plaintiff States.

CHARLES G. CLEAVELAND, Esq., Assistant Attorney General of New Hampshire, State House Annex, Concord, New Hampshire 03301; for the Defendant State.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 69 Original, States of Maine, Massachusetts, and Vermont against New Hampshire.

General Brennan, you have had the benefit of the arguments that have just been completed, and of course we have had the benefit of them. So, we take it that you will pick up where they left off and give us something that you have not heard this morning and this afternoon.

ORAL ARGUMENT OF JOSEPH E. BRENNAN, ESQ.,

ON BEHALF OF THE PLAINTIFF STATES

MR. BRENNAN: Mr. Justice, sir, may it please the Court:

We will certainly try to. Much of our thunder frankly has been stolen in many respects.

The facts in this case really are not in dispute. The action of the plaintiff states is in their sovereign and proprietary capacities to recover funds diverted by the unconstitutional New Hampshire income tax. This tax was imposed in 1970. It was challenged in 1971 by Maine citizens with strong support from the State of Maine. It was held unconstitutional in March as violative of the privileges and immunities clause.

As we see it, the essential and altimate question is whether or not New Hampshire should benefit from such

unconstitutional conduct with this unconstitutional tax scheme by retaining the proceeds of that scheme, which amount to some $13-1/2 million which were diverted from the plaintiffs' treasury. We say that the plaintiffs are the appropriate parties. We say they were hurt, as was intended by the State of New Hampshire.

For the individual taxpayers to bring an action, assuming they could get over standing issue, assuming they could show some injury, would be, as has been said earlier, repetitious; it would be costly. Any damages that were awarded would have to be turned over to the plaintiff states. So, there would be absolutely no incentive for them to do it.

Q Would a class action be available to them?

MR. BRENNAN: I think a class action might be available, but again they would run into the same problem with standing. That class would not be hurt. The party that is hurt is Massachusetts, Maine, and Vermont. They bore the burden. Their treasuries did not receive money they would otherwise have received had not been for this unconstitutional tax.

Q Is there any way they could have avoided that along the lines Mr. Justice Rehnquist suggested in a question?

MR. BRENNAN: In reference to the possibility of retaliation, the cases of this Court have emphasized several times and as recently as Austin against the policy of

retaliation.

Q Other than retaliation.

MR. BRENNAN: There is no other way that I am aware of, Mr. Chief Justice.

Q Could you not change your law?

MR. BRENNAN: If we were to change our law, that would mean to amend the law not to give the tax credit. That in effect would be retaliation against our residents who work in New Hampshire, and we then would not be retaliating against our residents who may have worked in 39 other states where we give tax credits.

Q If you did not have your law in the first place, you would not be here today. I am just arguing my dissent, and I was alone. So, do not be concerned by it.

MR. BRENNAN: We submit that the states here are not stand-ins for the individual taxpayers, that they are suing in their own right, that under Article III, Section 2 of the Constitution, that the Supreme Court is the proper forum, that this section contempated that one state should not be compelled to go into the jurisdiction of another state to seek a solution. Therefore, the New Hampshire courts or administrative agencies are not the appropriate forum. And in reference to that retaliation, we feel that the decisions are clear, that the policy is against it, that the State of Maine should not try to visit double sins on its own taxpayers

just to retaliate for what was apparently going to be a short-lived illegal tax scheme.

The fact that the plaintiff states did not retaliate, it is suggested by New Hampshire that we should be barred. We submit that that type of argument really does not wash.

In Texas v. Florida, 306 US, where one state threatens to deprive the other of its lawful taxes, this creates an appropriate basis for action by this Court.

In essence we are saying--and much of it is just reiterating what has been said before--we are the real party in interest. We have been hurt. The individual taxpayers really would not hurt to any major degree. And if they did recover, they would have to turn the money over to us. And again, this is an action between states. This is the appropriate forum.

Any recovery the individuals got would be a nullity. The plaintiff states could not have avoided it without risking violating the privileges and immunities clause themselves or the equal protection clause.

Q Why would any recovery the individuals got be a nullity?

MR. BRENNAN: Then their tax returns would have to be amended to reflect that there was no payment to another state. So then the payments would have to be made to Maine, Massachusetts, and Vermont.

Q Is all that quite as clear as you make it sound?

MR. BRENNAN: I believe it is, Mr. Justice.

Q Do you need an injunction?

MR. BRENNAN: We need an injunction to get an accounting. We need an injunction because--

Q Do you need an injunction to force New Hampshire not to enforce its tax?

MR. BRENNAN: They could do it on their own. But at present, they sent out a notice right after this--

Q What was the result of Austin?

MR. BRENNAN: The result of Austin was they instructed the employers in their state to stop withholding taxes after March 19th. However, they instructed those people to continue to make payments for money that was collected prior to March 19th.

Q But as far as the future is concerned, the harm to Maine will not occur again?

MR. BRENNAN: Just to the extent that the money that was collected prior to Austin, they are going to require returns to be made next year, as I understand it, on monies that are characterized already as unconstitutionally taken from our citizens.

Q I gather that would be as to earnings up to March 19th.

MR. BRENNAN: Correct, Mr. Justice.

To refuse to allow us to file a complaint based on these facts would encourage petty retaliatory reaction in the future. It would encourage states to adopt tax laws of dubious legality in the knowledge that they may be able to return their ill-gotten gains.

On the other hand, to accept this complaint would further the policies of non-retaliation long articulated by this Court. It would place the states on notice that they must develop their taxing schemes with great care.

Finally, the Court should not adopt a rule which might encourage some states beset by immediate fiscal crisis to give less than careful care in adopting tax laws which may be unconstitutional. We would urge you very respectfully to permit the plaintiff states to file a complaint.

Mr. Scotch from Vermont has the other 15 minutes. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Scotch.

ORAL ARGUMENT OF BENSON D. SCOTCH, ESQ.,

ON BEHALF OF THE PLAINTIFF STATES

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

I come here to talk about the seriousness and the dignity of the complaint of the three plaintiff states against the State of New Hampshire. I originally had planned before

hearing the earlier argument to dwell principally on the question of retroactivity, for I think no other question raises the equities between the plaintiff states and New Hampshire better than the question of retroactivity.

In approaching this particular equities question, it seems to me we fall back immediately on this Court's own declarations in retroactivity cases. I think it is important to note that at the time New Hampshire adopted its commuters' income tax, one against Maryland had been decided by some 90 years previous.

Some 56 years ago in this very room Travis was argued. Since that time--

Q This room has only been here for about 40 years. [Laughter]

MR. SCOTCH: In this building, Your Honor.

Q No, the building has only been here for about--

MR. SCOTCH: The point is that as far as the case is concerned, certainly New Hampshire knew what they were doing. The books have not changed. The buildings may have. There has been virtually nothing since Travis and the date of the adoption of the commuters income tax that would have given any suggestion to New Hampshire that that tax could have been constitutional. I think this is very vital.

In the second Lemon v. Kurtzman case, this Court raised the question of whether decisions of the Court that

are of first impression, that declare new principles of law should be retroactively applied. I submit that at the time the commuters indome tax was adopted, certainly no case of first impression or any impression had been decided by this Court or even submitted to this Court that would have given them any comfort in the adoption of their commuters income tax case.

Very important in the question of retroactivity and in the question of equities is the subject of reliance. I think it is inherent in a number of the questions that the Justices have presented both in the earlier argument and in this argument. In the normal reliance situation, when in Lemon v. Kurtzman, the second decision, the Court speaks of the hard facts upon which people rely, people must rely, in making their decisions, obviously the Court is speaking of two classes of people. One class is the lawgiver; the other class is the reliance interest. And in each of the cases that the Court has decided in the retroactivity area, there has been a separation or bifurcation of the law-giving interest--either the legislatures or the courts, on the one hand--and upon those who rely on the other hand.

Thus, for example, in Lemon v. Kurtzman it was the non-public schools that were the reliance interest. Certainly they did not create the laws in which they had to make their decisions. The same thing in Chevron v. Huson or in the

frequent criminal retroactivity cases that come before this Court, most recently in the Peltier case, obviously the considerations that apply were those who were forced to rely to make their day-to-day judgments cannot make them on the basis of shaping their own law; they are put in a bind. Essentially the retroactivity cases, in my way of thinking, allocate or divide among two interest parties, both of which are essentially innocent in so far as being able to frame and shape the law.

In the case of New Hampshire adopting a commuters income tax case, we have a very, very different situation. As will appear in the record--and I will not repeat what is already in the record--at the time and prior to the time that New Hampshire adopted this tax, they were on very good notice from a task force report prepared for the governor that there were grave questions about the constitutionality of the commuters income tax case.

Mr. Hampe's opinion, which is also in the record, point's out how cleverly the bill is drafted. It separates those who might complain but will be unable to complain because they have no standing, from those who are the real targets, namely, the states.

I would submit to this Court that it appears clear from the legislative history of this act that if the three surrounding states did not have tax credits, the commuters

income tax of New Hampshire would have never been adopted.

The most important retroactivity-equities question that I think the Court ought to consider and that I want to address is the proposition raised by this Court in Linkletter. Will the rule whose retroactive application is sought tend to further or retard the effectiveness of the rule? And I would submit in this case the Court essentially is balancing for legitimate interests--and we concede that they are legitimate interests--on the part of the states to experiment with new types of taxation that fit new social and political and economic conditions within the country, balance that interest on the one hand with what I think is an equally serious interest, to deter what we refer to in our brief as predatory taxation or tax adventurism or the like. It is very, very important, we feel, to consider those interests as being very equal interests and to try to develop policies that will mediate between those interests.

I would submit that if a state acts with full knowledge of the consequences and with full knowledge of the potential impediments in a statute, and if that state later is not compelled to face the consequences of what it has done, then I would see no reason why any state should not adopt borderline legislation or perhaps legislation that goes well over the border. There are no sanctions. It takes three or possibly five years for these cases to wind their way through

the courts. There would be no sanction whatsoever.

Q Should we take all cases that take three to five years before they could get here?

MR. SCOTCH: No, Your Honor.

Q Is that a very good reason for our exercising original jurisdiction?

MR. SCOTCH: In our case, as distinguished from the previous case we heard today, Your Honor, this tax already has been declared invalid by this Court. This is not the situation that I think Pennsylvania, if I may allude to their argument, tried to suggest would develop if the Court took jurisdiction of this case.

It is not a very common situation where a legislative history has developed reflecting a direct intent to act against the treasury of a sister state and where indeed the legislative history indicates that unless the tax laws of the second state were not susceptible to this treatment, the tax would not be adopted at all. I think this would not be a large case finding decision in that sense.

Q But that is a part, presumably, of the law of the interstate commerce clause, and you say that you have got a very strong case here under that because of that fact. But if we start taking these cases, we are going to have to entertain arguments that are presumably a good deal less persuasive than yours once we let the cases in the Court.

MR. SCOTCH: I would simply urge, Mr. Justice Rehnquist, that in the case of the three plaintiff states here represented we did not come directly to the Court. We bided our time in Austin v. New Hampshire, and it was a long time and a costly time.

Q Did you finance any of that litigation?

MR. SCOTCH: We appeared as an amicus curiae, and ye, we did. We participated directly. We felt that was the proper route to go, not alone in terms of the limited original jurisdiction of this Court but in terms of giving New Hampshire the opportunity through their court system or through their legislators to recant, and they did not do so.

We feel at this point, with the tax having been declared unconstitutional, this is not a case finding decision. This is a very unusual set of circumstances, and we feel that we have gone to court in the right order, starting with the state where we ought to have started, and in that sense is not comparable at all to the condition of the suit by Pennsylvania against New Jersey, not to cast any suggestion about the merits of their original action. But we felt differently at the time and we so conducted ourselves.

I want to address myself to a point that has been raised in several connections by the Justices, and that is the so-called mitigation question. Why should not the states have repealed their credits? I want to draw a clear

distinction between cases like Massachusetts v. Missouri or Texas v. Florida where we are dealing with death taxes. The income tax credit is not only a fact of life today virtually throughout the country but in this particular instance our failure to grant the credit would have meant effective double taxation to our own citizens. And I would simply urge that in the economic realities of an income tax, particularly in today's economic conditions where wages in our particular part of the country are not high, doubling the income tax of our own citizens in order to redress the wrongs committed by New Hampshire did not come to us as a really viable alternative.

Q Mr. Scotch, I do not follow you on the doubling of the tax. I thought that New Hampshire had a credit. Am I in error as to that?

MR. SCOTCH: I believe they have a credit for their own citizens, but I believe the outcome, as conceded earlier in arguments where Pennsylvania made reference to the possible double taxation suggests, and together with New Hampshire's own brief in this matter, suggests that there would be no falling away of the New Hampshire tax in the event that we dropped our credit. All that would fall away is an entirely hypothetical tax that was imposed upon citizens of New Hampshire who worked in Vermont and the other two states that never could be applied because of the way it was drafted. But it is my understanding that our dropping of our tax credit would

directly involve double taxation unless of course, as suggested by the Court in the earlier argument, unless of course New Hampshire chose at that point to drop its commuters income tax, that is a completely speculative matter.

Q Really your distinction between death taxes double and income taxes double really boils down to nothing more than the idea that dead people cannot vote, does it not?

MR. SCOTCH: No, Your Honor. Even in the area of death taxes we found out in Texas v. Florida, where the rival claims are mutually exclusive, this Court will take jurisdiction. All I am suggesting is that--

Q Was not the real reason in Texas v. Florida that the combined asserted tax by all the states exceeded the state--

MR. SCOTCH: That is right. They were mutually exclusive.

Q --and finally this Court took jurisdiction?

MR. SCOTCH: Yes, Your Honor, that is correct.

Q That is a long slow road even there.

MR. SCOTCH: Yes, it was, Your Honor. What I am suggesting in answer to the argument Valenti non fit injuria is that we as a state need to consider the injuria. What or what kind of injury are we visiting upon our own citizens? Must we be compelled to take the corrective steps where there has been harm, deliberate harm, as will appear in the

statutory history of this act?

I think, talking of old common law doctrine, that it was clear common law doctrine that mitigation of damages need not be taken where the mitigation itself would be unreasonable or would cause undue harm to others. In fact, I think old common law cases going back to the 17th century make clear the right, for example, of the lord of the manor to defend the servant. And I would suggest an equal proposition in our case, that the states have not only the right to defend their citizens and the ability of a citizen to continue to work but probably a duty to do so. I would submit that it would have been a number of years before New Hampshire could have practically considered the repeal of its commuters income tax.

Talking of our own proprietary interests, I think it would be demonstrable, if a master is appointed in this case, to show that the incomes of many of our commuters are at such a level that the doubling of their income taxation would make it economically inconsequential for them to continue working. Many of our people--

Q I guess my problem, and I will not repeat it anymore, is that I fail to see the doubling of the tax, and it certainly was not true in Austin v. New Hampshire.

MR. SCOTCH: I believe--and of course this is a matter we can submit further written documents on--I believe

the tax is written in such a way that the benefit so-called of our dropping our credit would not accrue to our own citizens. That is a technical matter. I believe we are right on it, and we will leave it to New Hampshire perhaps to declare whether that is correct or not.

Q I guess my difficulty basically is to conclude that New Hampshire is such a rascal in all this.

MR. SCOTCH: We in Vermont of course have our own very strong views on New Hampshire, Your Honor.

Q This is nothing new.

MR. SCOTCH: I would like finally, if I may, to address a remark or two about Massachusetts v. Missouri. I find there is a very expansive if not a profligate reliance upon Massachusetts v. Missouri. That was a very simple case as I read the case. All the Court is saying in Massachusetts v. Missouri is that Massachusetts has not stated a cause of action. This was a case of rival but allegedly mutually exclusive claims. They turned out not to be mutually exclusive.

There was no allegation in Massachusetts' papers in Massachusetts v. Missouri that the Missouri tax is discriminatory or that in any way the tax violated any precept of the United States Constitution.

In their papers before this Court--in fact, the sole allegation that Attorney General Deever really is able to level

in Massachusetts v. Missouri is that the courts of Missouri will not hear Massachusetts' claim against the trustees of the trust. The attorney general of Missouri was able to give that the lie by stating in open court that of course the courts of Missouri would hear a claim by Massachusetts against the trustees, and that is all that Massachusetts v. Missouri decides. We are not claiming mutual exclusivity. We are claiming in effect a direct harm to the interests of our state, a calculated harm, and, if you will, a harm that in terms of common law analogies is very similar to a direct common law tort, although we have not so alleged. Perhaps that states the case a little strongly.

There is nothing that we can find in the Commonwealth of Massachusetts against Missouri that would lend the general proposition that tax cases that are otherwise justiciable may not come before this Court in original jurisdiction. It seems to me, if we make out a claim that the three plaintiff states were in fact the targets, perhaps some of these questions go to fact finding that could occur after a master is appointed. But we feel frankly they are adequately stated on the record submitted with our papers. We feel very strongly that on that type of theory, not a mutually exclusive theory, there is no reason why this Court ought not to on general principles of equity and common law take original jurisdiction of this case in the manner in

which water diversion cases or pollution cases are taken. For, in that sense, when we consider direct injury, there really is very little distinction between those classes of cases.

Q Mr. Scotch, it may not become relevant, but if this case proceeded as you would like to have it proceed and a special master were appointed, a jury were requested, as was fairly common 175 years ago, from whence would the jurors be drawn?

MR. SCOTCH: Well, Your Honor--

Q Perhaps we do not need to dwell on it. I thought you might have a ready answer for that.

MR. SCOTCH: Our answer would be we would hope not from the State of New Hampshire. We would certainly so argue. [Laughter]

Q I assumed that.

MR. SCOTCH: We would also of course rely upon the ability of the Court, as demonstrated time and again, to exercise what is inherently an equity jurisdiction. And of course we would argue that as an equitable matter a jury would be inappropriate.

Q Have you read Curtis v. Lother two years ago where we said that if you are going to award damages, you must have a jury in the federal system?

MR. SCOTCH: Our answer in that question, Mr. Justice Rehnquist, would be that I believe where a jury is called, the

question of liability is at issue. What we would argue in reply to that is that the question of liability, the question of the constitutionality of the tax at any rate, is a question which has already been disposed of by this Court. All that is left to do is add up the bill. How much in fact has New Hampshire diverted, assuming arguendo that our diversion argument will prevail?

I would submit to this Court that on the narrow question of adding up the tally and perhaps adding up the interest which we hope also will be added, that it is not only inappropriate to require a jury but that the jury would essentially--

Q That is not traditional damages. That is more of an accounting type.

MR. SCOTCH: And that again, Mr. Justice Rehnquist, reinforces the fact that essentially we are invoking your equity jurisdiction. The basic question of liability in our view already has been determined by this Court in a prior proceeding and a proceeding which, from our point of view, was the proper one to have brought and in which we participated.

I would like, if I might, in my remaining time to refer to an issue that was raised in the other argument that is not explicitly raised by New Hampshire but I think as a penumbral matter may certainly be brought up in connection with our case. And that is the question of whether the

individuals would be necessary parties if this Court were to take jurisdiction. And I would like to suggest an answer to that, that all three states have maintained their rights against their individual taxpayers and that if following our successful prosecution of this case in original jurisdiction any taxpayer of the State of Vermont would appear in a New Hampshire court claiming the same types of damages, our answer would be--and although it would be inappropriate for us to appear as parties, we ceetainly would apply to appear as amicus--our approach would be in that case to suggest to the trial court in New Hampshire that no claim remains. Any recovery that might be garnered by a citizen of Vermont in a court of New Hampshire would be matched by a contrary claim by Vermont against that citizen, based upon a revocation of the credit. Of course, that is a moot issue if we have already received that credit money directly back from New Hampshire.

I guess in short the answer would be no claim remains after our successful prosecution of this case in this Court.

Q Even though under your submission a Vermont commuter into New Hampshire was unconstitutionally required to pay taxes by New Hampshire?

MR. SCOTCH: That would be, Your Honor, damnum absque injuria. There has been no harm.

Q He sure thinks there is harm, I would imagine.

MR. SCOTCH: Not if he has been given full credit by the States of Vermont, Maine, and Massachusetts. He may have been harmed initially, but certainly any money that he would recover would be double recovery for him. He has been granted a credit. If he gets another payment from New Hampshire, he has been doubly enriched. We certainly would not tolerate that, and we would state in court that we would appear in New Hampshire in some appropriate forum to borrow that claim. We just do not think that is a viable possibility in the courts of New Hampshire.

In concusion I simply would say that although we recognize the fierce independent spirit that seems to be apparent today, particularly in our region of the country, that spirit ought to be guided under the mantle of the Constitution and not contrary to it or around it, that the main point I would like to leave with the Court is this is not an appropriate case to look at the intention of the legislature to see if any intentional wrong, intentional harm, was meant at the time they adopted their statute and in fact effectuated. Then I cannot imagine any such case ever being brought to this Court.

Thank you very much.

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

Mr. Cleaveland. I am sure you will agree that you will not need to repeat any of the arguments that your friend

from New Jersey made on behalf of the State of New Jersey.

ORAL ARGUMENT OF CHARLES G. CLEAVELAND, ESQ.,

ON BEHALF OF THE DEFENDANT STATE

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

I would have to confess that with the arguments that have gone before me, I am certainly in a position of being last. I hope that I shall not be found to be least. But to pass up any discussion whatsoever of the facts of the case, the way the case arose, which I think is very familiar to the Court, I had intended to outline the fundamental basis of our objection to this motion for leave to file, which is that this Court must in any such case find a basis upon an actual controversy in order to allow the original juridiction of this Court to be invoked.

We insist that there is no such controversy presented upon the complaint sought to be filed. The basis upon which we say that is the case is that in the cases of Texas v. Florida, Massachusetts v. Missouri, a standard was set out in which the plaintiff, a plaintiff state, seeking to invoke original jurisdiction must have suffered wrong through the action of the defendant state, furnishing ground for judicial redress or that the plaintiff must be asserting the right against the defendant state susceptible of enforcement.

The facts alleged in this complaint demonstrate

neither an injury in fact to the plaintiff sovereign states nor that the circumstance which they assign as an injury is in any way caused by an action of the State of New Hampshire.

If I may illustrate, if the injury assigned is the loss of tax revenue, the complaint fails to show that New Hampshire is the cause of it since the immediate cause of the plaintiffs' failure to collect the funds is in their own credit provisions by which they waive the collection of those funds voluntarily and within their own unfettered discretion.

The first requirement of a justiciable controversy between the states--namely that of an injury caused by the plaintiff state--was applied in the case of Massachusetts v. Missouri, and the Court held there that since the plaintiff had full constitutional power to tax, the subject matter, no intransigence of the defendant state Missouri, whether in the form of improper legislation or capricious administration of proper legislation would result in an injury to the plaintiff.

Simply put, the Court said, "Look, Missouri has a statute on the books which Massachusetts thinks ought to be construed so as to allow Massachusetts the unfettered right to tax." The Court said, "Okay, if that is what Massachusetts thinks, let them go into Missouri and challenge the State of Missouri to prove that to its court." The problem there was that Missouri seemed to be inclined to administer its statute in a way which Massachusetts could not agree with. The problem

there was that this Court found that either state could proceed in an exhaustive manner to assert and collect the tax that it felt to be due under its own statute.

That is still the situation in this case. If the plaintiff states think that they are entitled to the money, they have unfettered power to collect it, and they had that power since the beginning of the cause in question.

Q What would be the case under the present New Hampshire statute if Maine did not give it credit for the New Hampshire tax? Would under your present law you continue to collect the tax from people working in New Hampshire but who are residents of Maine?

MR. CLEAVELAND: I believe, sir, you are addressing the question that came up before, and that is, If during the existence of the New Hampshire tax, Maine had dissolved the credit, would New Hampshire still assert the tax?

Q That is not my question. Under the law as it was written, would it have been collected?

MR. CLEAVELAND: As the law was written, Your Honor, yes, that is correct. We do not have entirely a so-called sponge tax. It was not self-destructing in the sense that if cleared, it disappeared.

Q It may be that if Maine eliminated the credit, maybe New Hampshire would change its law. But under the law as it was written, the tax would still be payable.

MR. CLEAVELAND: That is correct, Your Honor. And the significance of that I think is this. Although it may be said that that would constitute a grounds for either the Austin case to have proceeded or this case to proceed, I think in the context of an equity consideration of this case, what this shows is that the only thing that the plaintiff states had to do in order to really throw New Hampshire's case into a cocked hat back in 1970 was to repeal that credit.

Q Why would that have done that?

MR. CLEAVELAND: Keep in mind, sir, that the New Hampshire court rendered its decision upon a finding of no substantial injury in fact. That was the only thing they decided. They did accept the jurisdiction of the case on a theory that they would allow standing to any taxpayer to raise just about any question at all, but they did find that they were not entitled really to raise a constitutional issue because they were not injured.

Q But repealing the credit would not have knocked the New Hampshire tax into a cocked hat.

MR. CLEAVELAND: I think it would, Your Honor, in the court. What I am saying is that as the case would have appeared in the New Hampshire Supreme Court--

Q Yes, but as far as New Hampshire, you are just saying that it would have been declared illegal.

MR. CLEAVELAND: The possibility is very real, Your

Honor. I think it is something which has to be considered.

Q But New Hampshire did not recognize that fact by any provision in its law that said that their tax is contingent upon another state granting it credit.

MR. CLEAVELAND: That is correct, Your Honor. I think the effect is one which has to be considered to some extent a hypothetical, but I think it is a fairly certain hypothetical, given the way the New Hampshire Supreme Court decided the case.

In summing up my discussion of Massachusetts v. Missouri, I think it is very easy to read that case as being dispositive of this case simply because the analogy is direct. Here the plaintiffs have the full power to tax irrespective of the validity of any New Hampshire statute, and their ills are entirely the product of their own forebearance in the form of this tax credit. This Court held in Austin that the validity of the New Hampshire statute may not turn upon the configuration of the statutes of another state, namely, Maine.

Just so, the power of the plaintiff states to have wholly prevented their losses and to recoup those losses now for that matter in no way depends upon the configuration of New Hampshire statutes.

Q You say that Maine and the other two states had a right to put a double tax on?

MR. CLEAVELAND: That is correct, Your Honor. In

Curry v. McCanless, Travis--

Q You sort of put "right" in quotes, do you not?

MR. CLEAVELAND: The right? Yes, I would say that they have the power; that they have the right I think in the legal sense is the same thing.

Q You mean double taxation is not an automatic indication of unconstitutionality?

MR. CLEAVELAND: Correct, Your Honor. What I am saying is that in the sense of an equitable consideration of the plaintiffs' rights now to come back against New Hampshire to recover the money, the fact that they could have taken action in 1970, which would have literally blown our statute out of the water constitutionally now should be held against them with respect to their right to claim--

Q I still do not understand how you can say double taxation is perfectly legal and then say that if Maine had repealed its credit in 1970, it would have blown your tax out of the water constitutionally.

MR. CLEAVELAND: From the standpoint of Maine alone, I am assuming now that--let us assume, for instance, the Shaffer v. Carter case. Two states have broad base income taxes. One of them reaches non-residents; the other one does not. The one in which the non-residents are reached is sued on the theory that that is unconstitutional. The holding of course is that it is not, even though it results in double

taxation and even though the state in which they reside does not grant a credit.

Q I thought you said a while ago New Hampshire would certainly be entitled to tax income earned within the state even if Maine taxed it also.

MR. CLEAVELAND: If both states have constitutional provisions, Your Honor, double taxation does not present any automatic constitutional conflict. The point I am trying to make is that if Maine had repealed its tax credit or, for that matter, administratively denied it to persons earning an income in New Hampshire on the theory that the New Hampshire tax is not a valid tax, therefore does not exist, therefore no credit, either of those two theories, that would have enhanced--

Q It would still be up to the tender mercies of the New Hampshire Supreme Court, would it not?

MR. CLEAVELAND: If you want to characterize them as tender mercies, Your Honor, yes, that is true.

Q I say that to raise a second point. How does that prevent them from maintaining their action here?

MR. CLEAVELAND: The thing that prevents them from maintaining any action here, Your Honor--

Q Because as I read the Constitution, it says the State of Maine does not have to go to the Supreme Court of New Hampshire if it has got an argument with the State of New Hampshire.

MR. CLEAVELAND: The question is whether it actually has an argument with the State of New Hampshire, Your Honor. The State of Maine was never a taxpayer to New Hampshire. The New Hampshire statute never had any application whatsoever to the State of Maine as a sovereign; it created no rights on behalf of the State of Maine, Massachusetts or Vermont and created no liabilities upon them. It simply ignored them.

Q Is that the essence of your entire position in this case?

MR. CLEAVELAND: In a way it is, Your Honor.

Q Do you need any better way if you are right on that?

MR. CLEAVELAND: I think it is sufficient. That is why I said, given that finding alone, I think Massachusetts v. Missouri is dispositive of this case. I think Mr. Justice Blackmun's dissent really comes home in the analysis of this case simply because any injury that the three states who are now plaintiffs have sustained is caused, as a matter of causality, is entirely attributable to the existence of those tax credits which they were in no wise constitutionally to maintain. And I think in terms of an equitable analysis of the case they should have been involved in this case from the beginning.

I noticed my brother argued that they felt that the proper procedure was to remain in the wings but to in essence

take part and aid the Austin plaintiffs in raising their constitutional question. If that is so, then where were they in the context of raising their arguments with respect to recovery of funds then?

I see a considerable element of the equitable doctrine of Latches applying here. A court of equity, which this Court has held itself to be when considering original actions, is very reluctant and should be very reluctant to award damages to a plaintiff to allow a recovery against a defendant when the plaintiff has in effect sat on its hands and allowed the injury to magnify many fold. That is the essence of my argument in saying that if they had simply taken the action in 1970 and had the courage of their convictions to do so, this case would have had an entirely different configuration in the New Hampshire Supreme Court. And the analysis and the theory upon which the New Hampshire Supreme Court held the tax to be valid could not have been made because it simply was not true as a matter of fact. The New Hampshire Supreme Court held that there was no substantial injury in fact. If Maine had repealed the tax credit, there clearly would have been. There would have been double taxation, and I admitted as much in my argument before this Court in Austin last spring.

Simply put, we think the claims here are not mutually exclusive in the sense of Texas v. Florida. They

are rather precisely analogous to that in Mass v. Missouri.

The second basis upon which a controversy can be maintained here is that there is a right susceptible of judicial enforcement. Assuming for the sake of argument that the Austin decision creates a right in someone to a money judgment on the theory that taxes have been collected improperly, that supposed right does not inure to the plaintiffs as sovereign states. These states were of course not taxpayers to New Hampshire. As I said before, the statute in New Hampshire had nothing to do with the three plaintiff states here.

The principles upon which the Austin case turn--that is, the privileges and immunities clause--do not operate for the benefit of sovereign states since they are not persons within the meaning of that provision.

If the right asserted here inheres in anyone, it inheres in the former taxpayers to New Hampshire who are citizens of the three plaintiff states. The state may not hold forth in this Court in such bulk litigation of private claims is settled beyond question. In New Hampshire v. Louisiana, Illinois v. Michigan, a long line of cases, this Court has denied a state the right to litigate claims on behalf of private citizens. In particular in Oklahoma v. Cook the Court held that a state is barred from litigating claims on behalf of citizens where the interest of the states arises

solely as a result of a statute of the plaintiff state. Simply put, that means that the Court was saying that a state may not legislate its way into the original jurisdiction of this Court. That, we submit, is what the three plaintiff states have done in effect with their tax credit provision.

The plaintiffs' attempted reliance upon the Missouri v. Illinois and Arizona v. California lines of cases is misplaced, we suggest. Firstly, these are uniformly instances in which the remedy of injunction was appropriate to halt the action or activity of the defendant state. That remedy is simply inappropriate here since the tax was effectively halted by the Austin case, which arose through conventional appellate channels.

Furthermore, the notion of enjoihing state taxation by application to the federal judiciary is the evil addressed and eliminated by the federal anti-tax injunction statute. Any resort to this Court on the theory of Missouri v. Illinois for an injunction is clearly in contravention of at least the spirit of that statute if not the substance of it.

I would mention in reply to a contention that the action taken by New Hampshire was directed at the treasuries of the three states and not a good faith effort to, if you will, experiment in valid state taxation, in the first place it is a question that comes upon the merits of the case, which is not before the bar now. Secondly, it is in large measure an issue

of fact which would, if the case is allowed to be filed, require reference to a master. And, third, it simply does not hold water. As Mr. Justice Blackmun said, he has trouble seeing the State of New Hampshire as being a rascal in this situation. Quite obviously so do I.

I think the merits of the case are something which need not be considered now and more appropriately should not be considered now because when the question is one of jurisdiction, a lack of jurisdiction is fatal to a case no matter how strong the case may be on the merits.

The third point I would like to raise is that the former taxpayers of New Hampshire are necessary parties to this action. This issue has been raised in the prior case and discussed. I would like to amplify it only to the point of saying that the complaint in this case assumed a very critical element, and that is that in the change between a recovery against New Hampshire by a taxpayer, assuming he has the right on the merits to that recovery, from there to that taxpayer's obligation to return that money to his own state on the theory that a credit was improperly allowed, there is an assumption that there is a direct equation there.

There is nothing in this complaint which goes to prove that that assumption is correct. It assumes that the taxpayers who are also citizens of those three plaintiff states have no rights whatsoever to interpose between a recovery from

New Hampshire, assuming the taxpayers were the ones to recover, and the obligation to return it to their own states. If the theory of the plaintiffs advanced in this complaint is true, that result would be reached without their interest being represented, without any opportunity for those plaintiffs to even present such a claim--if you will, a right of setoff or however you want to characterize it. There are certain retroactive problems which may arise in this connection. The point is that this assumption is made in the complaint. There is no opportunity for the taxpayers themselves to be heard on that matter if the case proceeds on the original jurisdiction of this Court.

If, on the other hand, one considers all right, let us being those plaintiffs in, then on the holding of California v. Southern Pacific Company in 157 US, the original jurisdiction of this Court is defeated, ousted, if you will, because the presence of citizens of the plaintiff states is beyond the jurisdiction of this Court. If they are necessary parties, they are also fatal parties. I submit that this equation, which is the basis of this complaint, and is precisely that watershed point upon which the plaintiff states assert their right to the money, is something which cannot be assumed over the backs of the taxpayers themselves who are the only ones who ever had anything to do with the State of New Hampshire.

This Court applies in consideration of original actions the accepted doctrines of common law and equity in systems of jurisprudence. This much was held in Texas v. Florida.

Again, to simply with respect to the application of the doctrine of Latches, the plaintiffs assert that the State of New Hampshire was in bad faith when it enacted the commuters income tax. We say to the extent the plaintiffs claim that New Hampshire should have known that the tax scheme was unconstitutional, so too the plaintiffs are also bound to have analyzed and known that law and should have responded from the beginning in a manner consistent with their convictions.

I think it is patently obvious that the great part, if not all, of the injury which they have now sustained or claim to have sustained could have been obviated by action taken in the original configuration of the case as it came before the New Hampshire Supreme Court.

It is also more likely the case that that same action can still be taken. I would point out that this Court in Austin remanded the Austin case to the New Hampshire Supreme Court for further proceedings, consistent with the opinion of this Court. At last check, that case is still before the New Hampshire Supreme Court, and there has been no action taken one way or the other. There has been no request for any action to

be taken by the New Hampshire Supreme Court, but it is still an open case in that regard. Any comment by me would be obviously speculation as to what the plaintiffs might want to do if they were compelled to go into the New Hampshire Supreme Court. But I certainly see no constitutional bar to them doing so. I think the New Hampshire Supreme Court is an available forum. I think a class action is certainly an available remedy. All of these things add up to one simple point: The entire claim that these three states bring is based upon this connection between their own taxpayers and their right to the funds. That was entirely within their control, and I think they should be now barred from this Court for a number of reasons, some of which are purely jurisdictional, some of which are equitable. But they all come down to the same point. It is now too late to come back and try to unwind a situation which could have been avoided with consummate ease.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:12 o'clock p.m. the case was submitted.]

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