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THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-249

TITLE ROGER L. SPENCER, ET UX., Petitioners v.
SOUTH CAROLINA TAX COMMISSION, ET AL.

PLACE Washington, D. C.

DATE Wednesday, February 27, 1985

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Parr, you may proceed whenever you're ready.

ORAL ARGUMENT OF HENRY L. PARR, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

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

This is not a complicated case. Plain statutory language, legislative history, and holdings of this Court established the right of the Petitioners, Roger and Shirley Spencer, to the attorney's fees that they seek in this case.

This case arose because the legislature of South Carolina enacted an unconstitutionally discriminatory tax statute. That unconstitutional discrimination cost the Spencers approximately \$500. Fortunately, Congress had given the Spencers a remedy for this unconstitutional violation. In Section 1983 the Spencers had a federal cause of action, and in 1976 Congress had enacted what is now Section 1988, giving the Spencers the availability of attorney's fees to help them remedy constitutional deprivations just like this.

The Spencers decided to invoke their rights under Section 1988. They brought this action. Federal courts were not readily available to the Spencers

1 because of the Eleventh Amendment, the principles of
2 comity, and the Tax Injunction Act, so the Spencers
3 brought their case in state court.

4 They obtained the declaration that the statute
5 is unconstitutional, null and void, and of no further
6 effect in South Carolina. Unfortunately, the trial
7 judge in this case refused to grant the Spencers the
8 attorney's fees --

9 QUESTION: What kind of an action did they
10 bring?

11 MR. PARR: They brought an action under
12 Section 1983 and under the Constitution itself.

13 QUESTION: And did they purport to bring an
14 action under state law?

15 MR. PARR: They invoked Section 12-47-220.

16 QUESTION: Which is what kind of an action?

17 MR. PARR: It is a waiver of sovereign
18 immunity. I don't think it creates a cause of action
19 itself.

20 QUESTION: But is it a refund? Did they want
21 a refund of taxes?

22 MR. PARR: Yes, Your Honor.

23 QUESTION: That's really the state's remedy,
24 to sue for a refund, isn't it?

25 MR. PARR: Yes, Your Honor.

1 QUESTION: And as part of that your refund was
2 going to be based on the unconstitutionality of the law.

3 MR. PARR: That is correct.

4 Unfortunately, the trial judge did not
5 recognize his obligation to enforce federal law and
6 refused to consider the Spencers' request for attorney's
7 fees because he believed that he must follow the state
8 law which did not provide for attorney's fees in this
9 case. He noted, however, that the Spencers had obtained
10 only a tasteless victory, because he took notice of the
11 substantial amount of work that had been devoted to the
12 case and the substantial expense that the Spencers must
13 have incurred.

14 There is really no question that under the
15 Supremacy Clause, 1988 and 1983 are as much the law of
16 the land in South Carolina state courts as they are in
17 the federal courts. This Court has made that clear in
18 Testa v. Katt and numerous other opinions. There is
19 really no legitimate distinction between --

20 QUESTION: Mr. Parr, certainly there are some
21 limits to the broad proposition I understand -- for
22 instance, the Federal Rules of Civil Procedure, although
23 passed by Congress, are not the law in South Carolina
24 courts, are they?

25 MR. PARR: That's correct, Your Honor. I

1 don't think Congress intended for those rules to apply
2 in federal courts -- state courts.

3 QUESTION: So the question is whether Congress
4 intended Section 1983 to be mandatory on the state
5 courts.

6 MR. PARR: Well, I don't think that is the
7 question. In *Testa v. Katt* and in *Mondou* this Court
8 relied on the existence of jurisdiction to create an
9 implication of an obligation to exercise this.

10 It is true that under the Federal Employers'
11 Liability Act in *Mondou*, Congress had acknowledged that
12 state courts had concurrent jurisdiction; but in *Mondou*
13 this Court was careful to point out that Congress had
14 not attempted to order state courts to enforce that
15 act. This Court declared that the existence of
16 jurisdiction creates an obligation to exercise that.

17 Even if it were important to look into
18 Congress' intent, it is very clear that until the amount
19 requirement was eliminated in federal question cases,
20 there was a large category of 1983 actions that could
21 only be brought in state courts.

22 QUESTION: Well, you say the existence of
23 jurisdiction creates an obligation to exercise it. That
24 may seem collusive to you. It doesn't to me. What does
25 that mean?

1 MR. PARR: It means that when a court has the
2 judicial power to enforce a law and the law is
3 applicable in that court's domain, the court must
4 enforce that law under the Supremacy Clause.

5 QUESTION: Well, so that regardless of what
6 Congress intended, that rule applied?

7 MR. PARR: If Congress intended to give the
8 federal courts exclusive jurisdiction over a cause of
9 action, the state courts would not have the obligation
10 or the jurisdiction to enforce the law.

11 QUESTION: Well, but what if the intent of
12 Congress was to say federal courts have jurisdiction of
13 1983 controversies; state courts may take jurisdiction
14 of them if they want, but they don't have to?

15 Now, it's conceivable a Congress could have
16 had that intent, isn't it?

17 MR. PARR: It is conceivable that Congress
18 might have had that intent, except that I don't think
19 Congress would have enacted Section 1983 and left a
20 whole class of those cases without any forum in which
21 they could be brought.

22 QUESTION: But if Congress did have that
23 particular intent in mind, it would prevail over the
24 kind of assertion that the existence of jurisdiction
25 obligates one to exercise or whatever it was you said,

1 wouldn't it?

2 MR. PARR: I will concede that if Congress
3 specifically said we do not intend for state courts to
4 have to enforce this law, that the Supremacy Clause
5 would not require them to do so.

6 QUESTION: And what if we went back, even
7 though Congress hadn't expressly said it, and came to
8 the conclusion from reading the legislative debates that
9 that was exactly what Congress intended; wouldn't the
10 same conclusion be required?

11 MR. PARR: I think it would require a very
12 clear showing of congressional intent, and I am not
13 aware of any extensive debate on Section 1 of the 1871
14 Civil Rights Act which indicates that. In fact, this
15 Court has noted several times that members of Congress
16 who enacted Section 1983 anticipated enforcement in
17 state courts.

18 QUESTION: Well, are you arguing, Mr. Parr,
19 that Section 1988 is the tail of 1983 that follows the
20 dog when it goes into state courts?

21 MR. PARR: I'm arguing, Your Honor, just as
22 this Court declared in *Maine v. Thiboutot*, that Section
23 1988 attorney's fees are part of the remedies available
24 under Section 1983, and they come as one package. And
25 that the attorney's fees part of Section 1988 is a very

1 important part.

2 Congress made it very clear when it enacted
3 the Civil Rights Attorney's Fees Act that it wanted to
4 encourage people to vindicate their constitutional
5 rights, and that Congress had determined that many
6 people would be unable to do so without the availability
7 of attorney's fees.

8 Congress also made it clear that it expected
9 in many cases those attorney's fees to come from the
10 states. This is exactly the kind of case that we have
11 today. It's very clear that Congress' intent was for
12 people like the Spencers to have attorney's fees
13 available to them so that they would be able to
14 vindicate their constitutional rights.

15 QUESTION: Mr. Parr, are there any
16 circumstances in your view under which a state court
17 could refuse to entertain a Section 1983 claim?

18 MR. PARR: It can do so when its refusal to
19 entertain the claim does not frustrate Congress'
20 policy. As this Court recognized in *Herb v. Pitcairn*, a
21 court can apply a forum nonconvenience doctrine, or a
22 court can say I don't have jurisdiction over claims that
23 have been brought outside of the city.

24 QUESTION: How about failure to exhaust state
25 administrative remedies?

1 MR. PARR: That is a very subtle question
2 which this Court has yet to address and, I would like to
3 point out, need not address in this case, and not in a
4 category of cases like this in South Carolina, because
5 the state court in South Carolina has said exhaustion is
6 not required in tax cases when only constitutional and
7 legal issues are involved. But --

8 QUESTION: What about a jurisdiction that does
9 require it.

10 MR. PARR: In the other cases this Court would
11 have to look very carefully at the considerations that
12 led to its opinion in Patsy requiring exhaustion in
13 federal courts to see if those same considerations apply
14 in state courts.

15 I think this Court would also have to look
16 very carefully at the considerations Justice Brennan
17 noted in his concurring opinions in McNerney to see if
18 those same considerations apply to tax cases under 1983
19 in state courts. And then the Court would --

20 QUESTION: Well, I suppose exhaustion could be
21 a matter of a prerequisite to state court jurisdiction,
22 depending on how it's set up in the state.

23 MR. PARR: It could be, but if it were imposed
24 in a way to frustrate the intent of Congress, I don't
25 think that the Supremacy Clause would allow a state to

1 do that.

2 QUESTION: Could a state court pass an
3 anti-injunction act as a counterpart of the federal
4 anti-injunction act to preclude injunctive relief when
5 you're seeking a tax -- when you're making a
6 constitutional tax claim in a state court?

7 MR. PARR: I don't think a state court could
8 do that in a way that would frustrate the intent of
9 Congress.

10 QUESTION: Well, how would you know whether it
11 frustrated the intent of Congress?

12 MR. PARR: You would have to have a particular
13 case in front of you. In this case we have Section 1988
14 which says that the Spencers are entitled to attorney's
15 fees to encourage them to vindicate their constitutional
16 rights.

17 QUESTION: Well, suppose that in your case you
18 had sought injunctive relief from this kind of tax levy,
19 and South Carolina had a statute saying that the courts
20 do not enjoin the enforcement of the tax act. You have
21 to have some other remedy. You can't have an injunction.

22 MR. PARR: I don't think that the statute --

23 QUESTION: South Carolina has that type of
24 rule, doesn't it?

25 MR. PARR: Yes, Your Honor, it does have that

1 kind of rule.

2 QUESTION: Sure. All you can do is either --
3 if you're going to pay the tax, the only thing you can
4 do is sue for a refund.

5 MR. PARR: Well, the supreme court of South
6 Carolina has said that the statute prohibiting
7 injunctions is not enforceable unless there is an
8 adequate remedy at law, because the constitution of
9 South Carolina gives the circuit courts general
10 jurisdiction.

11 QUESTION: Well, what if the supreme court of
12 South Carolina was suing for a refund as an adequate
13 remedy; you nonetheless sought an injunction. The
14 supreme court of South Carolina says well, the
15 anti-injunction act prevails. Do you think 1983 would
16 prevent South Carolina from enforcing its
17 anti-injunction act in those circumstances?

18 MR. PARR: If there were a conflict between
19 1983 and the anti-injunction act passed by the state
20 legislature, 1983 would prevail. But I would like to
21 point out that there will not be any opportunities for
22 increased injunctions in cases like this under Section
23 1983.

24 This Court has made very clear in *L.A. v.*
25 *Madrano*, in *Rizzo v. Goode* that normal equitable

1 principles apply in 1983 actions. So when a taxpayer
2 comes into state courts under 1983, in South Carolina or
3 anywhere else, he will have to show that there is no
4 adequate remedy at law before he can get an injunction
5 enjoining the collection of state taxes. Since most
6 states provide refund actions that --

7 QUESTION: What about a declaratory judgment?

8 MR. PARR: Declaratory --

9 QUESTION: Do you think that a taxpayer just
10 couldn't come in and say -- the Spencers couldn't have
11 come in and just brought an action under state law to
12 say I want a declaratory judgment that this tax
13 provision is unconstitutional, because I don't want them
14 to be collecting it from me any more.

15 MR. PARR: In that case a declaratory judgment
16 would be bound by equitable principles as well if they
17 didn't also follow the refund system provided by state
18 law. And the state courts would apply normal principles
19 of equity to determine whether a declaratory judgment
20 was proper in that case.

21 But I do not think a state statute could
22 override Section 1983 -- Testa makes that very clear --
23 because the laws of Congress are supreme.

24 The Respondents say that the Tax Injunction
25 Act has modified Section 1983 in this case and deprived

1 the Spencers of their Section 1983 cause of action.
2 However, the legislative history of the Tax Injunction
3 Act shows that the Respondent's argument is wrong.

4 Senator Bone, the proponent of the Tax
5 Injunction Act, described it to Congress as a very short
6 bill affecting the jurisdiction of the federal district
7 courts. In the Congressional Record each time the bill
8 was presented to Congress, it was described as a bill to
9 affect the jurisdiction of the district courts.

10 The debate on that section was very limited.
11 There's no indication that anybody in Congress thought
12 they were depriving any taxpayer of any federal cause of
13 action. The statute itself says that the federal courts
14 shall not have jurisdiction when a plain, speedy and
15 efficient remedy may be had in the courts of the state.
16 It does not say when a remedy may be had under state law.

17 Senator Bone said that the statute would not
18 deprive any taxpayer of any equitable right or his day
19 in court.

20 QUESTION: And you wouldn't suggest that if
21 the Spencers had gone into federal court under 1983 they
22 could have successfully claimed that they should be in
23 federal court because the remedy in South Carolina was
24 insufficient because it didn't allow attorney's fees?

25 MR. PARR: I think that the rule of Testa v.

1 Katt would have made their argument erroneous, because
2 it would have been clear that the state courts were
3 obligated to enforce the federal law.

4 QUESTION: And so the Testa against Katt would
5 have made the state -- would have made the state give
6 attorney's fees, is that it?

7 MR. PARR: Would have made the state enforce
8 Section 1988, and therefore, there would have been a
9 remedy available in state courts.

10 QUESTION: Well, that just assumes you're
11 right in this case.

12 MR. PARR: And I would say likewise, if for
13 some reason the state courts were not obligated --

14 QUESTION: But you wouldn't think that just
15 per se that the unavailability of attorney's fees in a
16 state remedy would just make that remedy inadequate for
17 purposes of the Tax Injunction Act?

18 MR. PARR: I would say that, Mr. Justice
19 White. Congress has determined that when constitutional
20 rights are at stake, attorney's fees should be
21 available. This Court addressed a similar argument in
22 Rosewell. In that case the taxpayer said I cannot get
23 interest, and I'm entitled to interest under federal
24 law. This Court said that the taxpayers could not
25 proceed in federal court because it knew that the state

1 courts in that case would consider any federal claim to
2 interest.

3 Here, the petitioners, the taxpayers, have a
4 federal claim to attorney's fees; and therefore, if the
5 state does not make that available, I think the remedy
6 would be inadequate under the Tax Injunction Act.

7 As I repeat, as I said earlier, there is no
8 risk of increased injunctions in this case if the
9 Spencers prevail. Normal equitable principles govern
10 the availability of injunctive relief in tax cases in
11 South Carolina now, and they will even if Section 1983
12 is made available. There is no reason to think that
13 taxpayers will be able to totally disrupt state tax
14 systems by using 1983 to circumvent administrative
15 remedies. If Congress decides that that is a problem,
16 this Congress can remedy that problem, as it did in the
17 Civil Rights of Institutionalized Persons Act, which
18 this Court noted in its opinion in Patsy.

19 Furthermore, this Court has never held that
20 exhaustion does not apply in 1983 actions in state court
21 in tax cases. That is an issue that the Court would
22 have to address at a proper time. If exhaustion is
23 advisable, the Court can simply decree in the proper
24 case at the proper time that exhaustion is required
25 under congressional intent and the principles which

1 govern exhaustion.

2 That is not the issue before the Court in this
3 case. The Spencers complied with the state law and the
4 state procedures. They brought their case in state
5 court so that they could get the most reliable reading
6 of state law. They vindicated their constitutional
7 rights, and although it's not in the record, anyone else
8 who was affected by this statute. Their victory turned
9 out to be tasteless because the state court refused to
10 enforce federal laws.

11 QUESTION: May I ask you a question about the
12 scope of your position? The statutory language doesn't
13 say they must allow fees; it says they may allow fees,
14 as I remember it.

15 MR. PARR: That is correct, Justice Stevens.

16 QUESTION: And what is your position; that any
17 time you make a 1983 claim, and that supposing the Court
18 could grant relief to your client on state law grounds
19 alone without reaching the constitutional issue, would
20 you be entitled to fees then?

21 MR. PARR: Yes, you would, as this Court
22 pointed out in Maher v. Gagne when it cited the House
23 report on the Civil Rights Attorney's Fees Act, when
24 there is a substantial constitutional claim that would
25 justify federal jurisdiction under --

1 QUESTION: Does that mean that in every case
2 in which you've got two alternative theories -- one, a
3 state law claim that would not require reaching a
4 constitutional issue, and also a federal constitutional
5 claim -- that it becomes the duty of the trial judge to
6 make at least a summary appraisal of the merits of the
7 constitutional issue in order to decide whether you're
8 entitled to fees?

9 MR. PARR: Yes, Your Honor.

10 QUESTION: So that Congress, in effect, has
11 reversed one of our principles of constitutional
12 adjudication, that we try to avoid constitutional issues
13 whenever we can, and says in every case when one is
14 raised, you at least give a tentative appraisal of the
15 merits of the claim.

16 MR. PARR: Congress tried to accommodate that
17 principle to the extent that it could and also
18 accomplish what it wanted to accomplish. The House
19 report said that we understand that federal courts try
20 to avoid constitutional issues, so courts need only look
21 to see if they were substantial. They need not resolve
22 them in order to determine --

23 QUESTION: But -- and not only federal courts
24 but state courts must always take a good, hard look at
25 the federal constitutional claim, even though it's

1 perfectly clear that as a matter of state law you might
2 have prevailed under your state constitution. I don't
3 know if you could have in this case. But that's
4 basically your position.

5 MR. PARR: That is. It's based on the House
6 report and this Court's decision in Maher v. Gagne.

7 QUESTION: Mr. Parr, if you prevail here, are
8 you assured of getting attorney's fees?

9 MR. PARR: There has been no exercise of
10 discretion in the courts below, but the rule, as this
11 Court has acknowledged, is that attorney's fees are
12 normally available unless it would be unjust to award
13 them. This Court has acknowledged that Maher v. Gagne.

14 QUESTION: There is an element of discretion
15 so that you might win now and still not get fees
16 ultimately, I suppose.

17 MR. PARR: Our position is the discretion is
18 very limited and that there is no evidence in this
19 record of any unjustness in awarding attorney's fees to
20 the Spencers in this case.

21 QUESTION: The result suggested by Mr. Justice
22 Blackmun would make your victory even more tasteless, I
23 suppose.

24 (Laughter.)

25 MR. PARR: Yes, Your Honor.

1 QUESTION: Does South Carolina have any
2 limitation that the attorney's fee award can't be any
3 higher than the award in the lawsuit itself?

4 MR. PARR: No, Your Honor. The South Carolina
5 law would not give us any attorney's fees at all because
6 it follows the American rule regarding attorney's fees
7 which Congress --

8 QUESTION: No. I mean that you don't mean in
9 this situation generally is there any South Carolina
10 limitation on attorney's fees when they are allowed in
11 other --

12 MR. PARR: I know of no such limitation, Mr.
13 Chief Justice.

14 If there are no further questions --

15 QUESTION: Well, of course, if you knock a
16 statute out which reaches far longer than the Spencers.

17 MR. PARR: That is our position, Mr. Justice
18 Blackmun.

19 If there are no further questions --

20 QUESTION: I am sure that the framers of 1983
21 meant for it to apply to banks.

22 MR. PARR: I don't think they were thinking
23 about banks, Mr. Justice Marshall, but they were
24 thinking about people, individuals whose constitutional
25 rights had been deprived, and that is who is before the

1 Court today.

2 I would like to reserve the remainder of my
3 time, if I may.

4 CHIEF JUSTICE BURGER: Mr. Stevens.

5 ORAL ARGUMENT OF RAY N. STEVENS, ESQ.,

6 ON BEHALF OF THE RESPONDENT

7 MR. STEVENS: Mr. Chief Justice, and may it
8 please the Court:

9 A great deal of the Court's attention thus far
10 has been focused on exactly what South Carolina's courts
11 did not do. I think it is a very important part of this
12 case to look at exactly what South Carolina's courts did
13 do. And what they have done is that they have
14 vindicated the federal rights of a citizen of this
15 country and of the state of South Carolina. We think
16 that is all that the Constitution of this country
17 requires. Furthermore, we think that is all that
18 Congress has required.

19 What we have in this instance is a taxpayer
20 who is essentially arguing that the Constitution gives
21 him the authority to take a 1983 case into the state
22 courts and obtain a tax refund. That is just
23 incorrect. The authority for that position is given as
24 a Supremacy Clause. Well, this Court has held that the
25 Supremacy Clause itself does not grant rights. What it

1 does is that it secures rights which the Constitution
2 otherwise grants or that Congress has granted.

3 In this instance the Court on analogous cases
4 has found that the Supremacy Clause should not be given
5 the broad, expansive reading that the taxpayer does
6 here. And the cases that we have cited in our brief
7 show various instances in which a state court has
8 declined to receive a federal claim, and that this Court
9 has found those actions to be proper.

10 The cases that seem to be most telling are
11 those of Douglas v. New York, Herb v. Pitcairn, and
12 Missouri ex rel Southern Railway v. Mayfield. The last
13 case cited in particular says that the doctrine of forum
14 nonconvenience, which is purely one that the state had
15 adopted at its convenience for the parties, is one that
16 the state may use and refuse to hear a federal cause of
17 action.

18 We think that in this instance the Supremacy
19 Clause would not demand that the state of South Carolina
20 entertain the 1983 action. The question that must be
21 asked is does the state rule that is being applied, is
22 it applied neutrally, or does it single out federal
23 causes of action and prohibit the state from hearing
24 those?

25 We think that the correct application of that

1 rule in South Carolina is that we have a neutral rule.
2 The neutral rule that we use is the subject matter
3 jurisdiction of our own courts. Our courts have
4 jurisdiction over tax matters only in those instances in
5 which the taxpayer brings an action paid under protest
6 and then sues within 30 days to recover his money.

7 That is not an unusual position. This Court
8 has recognized such an argument in the case of Testa v.
9 Katt and Mondou v. New York. In those particular cases
10 this Court has said that the federal claim need not be
11 heard unless its ordinary jurisdiction as prescribed by
12 local law is appropriate to the occasion.

13 Well, what is the ordinary jurisdiction in
14 South Carolina which is appropriate to the occasion?
15 Well, here our courts have held in at least three
16 specific cases that if the courts did not have
17 jurisdiction over declaratory judgments, it does not
18 have jurisdiction over injunctive relief; it has
19 jurisdiction only over those cases where there is a
20 payment under protest, and an action is brought to
21 recover.

22 So in this instance we think South Carolina
23 has applied a very neutral rule. It excludes all state
24 actions, and it likewise would exclude all federal
25 actions.

1 QUESTION: But here there was a statement
2 under protest and an action to recover, wasn't there?

3 MR. STEVENS: That's correct, Your Honor. But
4 the reason there was a payment under protest is that was
5 the taxpayer's choice. He chose to use a state remedy
6 to get into court, and that is what our court heard his
7 claim under, a pure state remedy. He also filed, along
8 with his state remedy, the 1983 remedy. It is that
9 remedy that our court would not have taken jurisdiction
10 over had it come in solely by itself.

11 QUESTION: Well, but is it a sufficient
12 answer, as you suggest, this neutral principles point
13 that you're -- if Congress had said in so many words the
14 state courts of South Carolina must entertain 1983
15 actions?

16 MR. STEVENS: Your Honor, that point is well
17 taken. If Congress had said that, then the state courts
18 would not have any discretion. The matter would be
19 heard in the state of South Carolina. But that is a
20 critical question for this court, and the question is
21 has Congress decided the states must hear 1983 actions.
22 And we submit to the Court that they have not. The
23 question is not can they; the question is have they done
24 it.

25 Well, in this particular instance, the first

1 thing that we look at is the literal language of 1983.
2 Well, on the face of that statute, it does not say that
3 one must hear these actions in state court. So after
4 having reviewed the literal action, then we would next
5 proceed to the legislative history and decide if there
6 is anything in that history that would lead one to the
7 conclusion that Congress required states to hear 1983
8 actions, and especially those involving state tax
9 disputes.

10 QUESTION: Well, did I understand you to say
11 that the state court did acknowledge this as a 1983
12 action as part of its conclusion?

13 MR. STEVENS: The opinion of our South
14 Carolina supreme court does not expressly answer that
15 question. The claim, the complaint that was filed does
16 allege the 1983 remedy. Our courts --

17 QUESTION: Well, what did the trial court
18 think it was doing?

19 MR. STEVENS: The trial court thought that it
20 was giving relief under the payment under protest
21 provision of 12-47-220.

22 QUESTION: And not 1983?

23 MR. STEVENS: And not 1983, no, sir. It has
24 been our contention from the beginning of the case that
25 the courts did not have jurisdiction under 1983.

1 After having reviewed the legislative -- the
2 mere language of the statute, we looked at the
3 legislative history. This Court has delved into the
4 legislative history on several occasions, Monroe v. Pape
5 being a fairly thorough undergoing of 1983's legislative
6 history.

7 One of the primary purposes that this Court
8 found that Monroe v. Pape said that 1983 was enacted for
9 was to provide a federal remedy in a federal court.
10 Well, the legislative history was again looked into in
11 the case of Patsy v. The Board of Regents of the State
12 of Florida. In this case again this Court found
13 numerous reasons for deciding that there was sufficient
14 congressional intent for a federal remedy. And, in
15 fact, one of the reasons this Court found was that 1983
16 was designed to throw open the doors of the United
17 States courts.

18 Well, we surmise from that sort of legislative
19 history that Congress was looking to intending a federal
20 remedy in a federal court. It was not intending to make
21 1983 mandatory in the state court. And, in fact, this
22 Court, after some --

23 QUESTION: Do you think South Carolina in this
24 case could have -- say the South Carolina court said
25 well, we understand you're alleging a violation of the

1 Constitution as part of your suit for a refund, but we
2 just don't entertain federal constitutional claims in
3 our courts.

4 MR. STEVENS: Your Honor, they could not have
5 said that and survived constitutional muster.

6 QUESTION: Well, I know, but would they -- why
7 couldn't they have said that, which would have meant the
8 remedy was inadequate, and the taxpayers go to federal
9 court? Do you think he could have -- the taxpayer could
10 have said you must hear my constitutional claim; I'm not
11 asking you to hear it under 1983; I just insist you hear
12 it as part of my refund claim.

13 Do you think that South Carolina court would
14 have had to have heard it?

15 MR. STEVENS: They would have had to have
16 heard it if he had satisfied the jurisdictional
17 requirements of the state and 12-47-220, the South
18 Carolina --

19 QUESTION: Well, at least your submission
20 certainly is that South Carolina entertains
21 constitutional claims all the time.

22 MR. STEVENS: That's exactly right.

23 QUESTION: As part of the refund claim.

24 MR. STEVENS: That's exactly right.

25 And as this Court pointed out in Rosewell,

1 that is one of the -- as a matter of fact, that's
2 probably the criteria for determining if a state has an
3 adequate remedy; that is, does the state allow the
4 taxpayer to present any and all constitutional claims
5 that he thinks he's entitled to. Well, if a state does
6 that, their remedy is adequate. That is exactly what
7 South Carolina does. And, in fact, in this very case
8 additional constitutional claims were raised -- equal
9 protection, right to travel, privileges and immunities.
10 All of them were heard in the South Carolina court.

11 QUESTION: You say that as long as South
12 Carolina doesn't turn down federal constitutional
13 claims, it may decide just not to award attorney's fees.

14 MR. STEVENS: Yes, sir, in this instance,
15 until --

16 QUESTION: Or in any other instance that the
17 legislature -- if the South Carolina legislature says in
18 no case -- everybody pays his own attorney's fees, no
19 fee shifting at all in any case, you would say that
20 should go for federal constitutional claims as well.

21 MR. STEVENS: Yes, sir, until Congress directs
22 otherwise.

23 QUESTION: Yes, yes.

24 QUESTION: Well, will you -- in response to my
25 question to Mr. Parr, I said -- and I'll ask you now --

1 do you think when 1983 is in the state court, 1988 does
2 not follow it?

3 MR. STEVENS: Your Honor, my position would be
4 that if 1983 comes into the state court, 1988 does
5 follow it. And your --

6 QUESTION: You're saying then that 1983 wasn't
7 in the state court here.

8 MR. STEVENS: That's correct.

9 QUESTION: But the court of -- what did the
10 state supreme court say about that?

11 MR. STEVENS: The state supreme court said
12 that 1983 was, as I recall the decision, was in the
13 complaint but that it did not hear the complaint because
14 it already had given a remedy under the state statute,
15 and its language was not all that specific. But it is
16 our understanding the reason the court did not give it
17 is for jurisdictional reasons as well as the fact that
18 the state had an adequate remedy.

19 Your Honor, your analogy made earlier about
20 the 1983 dog with the tail of 1988, when these matters
21 are brought into state courts for state taxes, we have
22 much the situation of the 1988 tail wagging the 1983
23 dog. In our courts we have an adequate remedy --

24 QUESTION: That is true in a great many 1983
25 cases where the attorney's fees vastly exceed what's

1 involved economically; is that not so?

2 MR. STEVENS: That is so, Your Honor. But my
3 point in this instance is that in those instances,
4 Congress has decided that those states or those matters
5 need be heard, but in this case our question has
6 Congress decided these things must be heard in the state
7 courts.

8 One reason for finding that it need not be
9 heard in state court is that we already have a remedy,
10 and it is a remedy that Congress has recognized. What
11 we would like to point out to the Court is that in this
12 Title 28 United States Code 1341, more commonly known as
13 the anti-injunction statute, Congress recognized that
14 states had a rather elaborate and vast system of
15 handling state tax disputes. In that system payment
16 under protest was the primary vehicle for returning
17 state taxes to the taxpayer. In addition to that, the
18 Congress recognized that states required exhaustion of
19 administration remedies before they could proceed to
20 court.

21 In a similar type of atmosphere, this Court in
22 Smith v. Robinson and in Middlesex v. Sea Clammers has
23 found that where Congress knew of a particular remedy,
24 there is an intent that Congress wanted that remedy to
25 be used, and that 1983 not necessarily be the remedy

1 that the individual could pursue.

2 We think a similar approach is warranted in
3 this instance. Since Congress was well aware of the
4 states' remedies, it recognized those remedies, and
5 therefore, there is an intent for Congress to say that
6 the 1983 remedy was not required to be used in state tax
7 disputes.

8 Further pursuing that line of argument, for a
9 moment let's look at what might happen if 1983 is
10 allowed into the state tax system. First of all, it
11 seems to me that it does violence to the very purposes
12 for which 28 U.S.C. 1341 was enacted.

13 The purpose behind 1341 was to prohibit the
14 disruption of state and county finances. And, in fact,
15 what was happening was that foreign corporations would
16 be able to establish diversity jurisdiction, thereby
17 entering into federal court, obtain an injunction, and
18 would, in effect, be litigating with the state on the
19 basis of injunctions. The corporation would not have to
20 pay the taxes up front, and the state would be denied
21 the use of the revenues during the entire time of the
22 process.

23 Well, some of the very large corporations in
24 fact, for lack of a better word, were sort of holding
25 the states hostage. They were using this as a weapon to

1 compromise the amount of the tax.

2 Well, if 1983 is now available in the state
3 court for state taxes, the same result can occur. He
4 may come into state court, simply say I do not wish to
5 pay the tax on various constitutional grounds, and then
6 obtain an injunction from the state court.

7 The taxpayers say well, he could not get an
8 injunction. Well, to me that's a rather anomalous
9 argument. On one hand he is saying to the court I don't
10 have to recognize the existence of adequate state
11 remedies when I come into court under 1983, but once I
12 am in the court under 1983, I recognize that I cannot
13 get an injunction because there's an adequate state
14 remedy.

15 That seems somewhat circular to me. If he
16 comes into court under 1983, he brings in all of the
17 attributes of 1983. The very language of the statute
18 says that it may be filed in suits of equity as well as
19 it law. If he can file them in equity, then he is able
20 to obtain injunctions in the state court. So he will be
21 defeating the very purpose for which 1341 was enacted.

22 Secondly, under 1341 Congress was well aware
23 of the need for states to have exhaustion of
24 administrative remedies --

25 QUESTION: So you think the policy and indeed

1 the content of the anti-injunction act just ought to be
2 applied to the 1983 remedy in state courts? It just
3 shouldn't be available.

4 MR. STEVENS: Your Honor, that is correct,
5 because the question before the Court is did Congress
6 require 1983. Well, if the intent of Congress is
7 expressed in 1341, to prevent the very things that 1983
8 can be used for in the state court, that negates any
9 sort of intent that Congress required states to hear
10 these actions in their own courts.

11 The administrative exhaustion remedy would do
12 great violence to states. Many times taxes are
13 resolved, disputes are resolved before proceeding to the
14 courts due to administration exhaustion requirements.

15 Well, as this Court has found in Patsy, the
16 administration, exhaustion of administrative remedies
17 need not be pursued. That sort of idea, when expressed
18 in terms of state taxes, would lead to a great deal of
19 confusion and unnecessary burden to the state courts.
20 Again, that is a reason why Congress did not intend to
21 make 1983 mandatory.

22 QUESTION: What remedy short -- if you don't
23 want to pay -- is there an administrative remedy if you
24 don't want to pay your tax first? Can you go to a tax
25 court or something, or a commission?

1 MR. STEVENS: In South Carolina we have a
2 relatively new statute called the Administrative
3 Procedures Act statute. And after having an
4 administrative hearing, you may appeal that
5 administrative hearing to the circuit courts of our
6 state.

7 QUESTION: And keep your taxes unless you lose.

8 MR. STEVENS: Not necessarily, Your Honor.
9 The provision in our Administrative Procedures Act says
10 that the state may continue to do whatever it is it was
11 going to do. You may have to petition to the circuit
12 court to prevent them from doing it.

13 What would happen in state tax areas is that
14 the state would go ahead and collect its money because
15 of the very vital concern the state has for having its
16 revenue during the time that litigation is going on.

17 QUESTION: So for all practical purposes,
18 there's only one remedy really: pay and sue.

19 MR. STEVENS: That's correct, Your Honor. I
20 do not wish to mislead the Court. There is another
21 remedy called a claim for refund, but that is a
22 situation where the state already has the money, and you
23 are filing a claim for refund asking to get it back.
24 And when that is denied, then you --

25 QUESTION: That's an administrative --

1 MR. STEVENS: It has much of the
2 characteristics of an administrative function, yes, Your
3 Honor.

4 QUESTION: And if you get it turned down, then
5 you bring your suit for a refund.

6 MR. STEVENS: That's correct. But in both
7 instances the state already has its money.

8 One of the additional points that we think is
9 important for deciding: did Congress require states to
10 hear 1983 actions is that of there being the requirement
11 of a clear statement when Congress wishes to intrude
12 into a fundamental state area. I cannot conceive of a
13 more fundamental area than the ability of a state to
14 raise its own taxes. If that is the case, then where is
15 the clear statement in 1983 that it is to be made
16 mandatory upon the state? I do not believe that there
17 is a clear statement to that effect in 1983.

18 And in a similar vein, when Congress seeks to
19 waive the sovereign immunity of a state, it also must do
20 so by clear language. Well, in this particular
21 instance, this Court in Quern v. Jordan has found that
22 1983 does not contain a clear statement necessary to
23 waive the state sovereign immunity in a federal court.
24 That decision, of course, is based on the Eleventh
25 Amendment, and it is of course recognized that the

1 Eleventh Amendment is not applicable in state courts.
2 But the Eleventh Amendment does contain the very germ of
3 truth which is critical to this case; that is, that
4 states retain sovereign immunity when it is going to be
5 sued in its own court. The state ought to have the
6 right to not be sued in its own court unless Congress
7 has clearly said you may be sued in your own courts.

8 Well, the effect of Quern v. Jordan is to say
9 there is not a clear statement in 1983 to waive
10 sovereign immunity because it is not there. We think
11 the same rule applies in the state court, that the state
12 is not to be sued unless that statement is in the
13 legislation.

14 In summary, what we would like to present to
15 this Court are basically two things. First of all, in
16 order for 1983 to be found to be mandatory upon the
17 states, there has to be either a constitutional source
18 for that rule, or there has to be congressional
19 authority for that rule. The Constitution does not
20 provide that source, because that source has been
21 presented to this Court as being the Supremacy Clause.
22 The Supremacy Clause itself does not mandate that states
23 hear 1983. All that it requires is that they apply
24 federal law when they are hearing the particular claims
25 of the taxpayer. And South Carolina has done that.

1 They applied the federal privileges and immunities
2 provisions of the United States Constitution.

3 Secondly, in order for 1983 to become
4 mandatory in the state tax system, there has to be
5 congressional direction to that effect. The legislative
6 history, the literal language of 1983 does not support
7 such a contention.

8 It is our view that 1983 in a state tax matter
9 was never intended by Congress, and in fact, there are
10 adequate remedies in the state which provide the
11 taxpayer to vindicate any and all constitutional rights
12 that he may have.

13 QUESTION: May I ask one question before you --

14 MR. STEVENS: Yes, sir.

15 QUESTION: I don't know if the complaint is in
16 the papers before us or not, but were there separate
17 counts when the complaint was filed, one based on 1983
18 and another on Georgia provisions?

19 MR. STEVENS: Your Honor, there were numerous
20 counts in the complaint. 1983 was identified as a
21 particular count.

22 QUESTION: Did the factual allegations in the
23 1983 count differ in any respect from those on which the
24 Court granted relief? It seems to me that sometimes
25 these things are kind of formalistic. They basically

1 made a federal constitutional claim in more than one
2 count.

3 MR. STEVENS: Yes.

4 QUESTION: One of which was a 1983 count, and
5 another was a Georgia --

6 MR. STEVENS: Yes, sir. That's --

7 QUESTION: I mean a South Carolina --

8 MR. STEVENS: Yes, sir. That's correct.

9 Thank you.

10 CHIEF JUSTICE BURGER: Do you have anything
11 further, Mr. Parr?

12 ORAL ARGUMENT OF HENRY L. PARR, JR., ESQ.,

13 ON BEHALF OF THE PETITIONERS -- REBUTTAL

14 MR. PARR: Yes, Your Honor. I do have just a
15 few comments to make.

16 In response to your questions, I would like to
17 point out that the trial court, as noted in its opinion
18 on page 18-A of the petition for certiorari, stated that
19 plaintiffs have consolidated actions under 12-47-220 of
20 the South Carolina code and an action under 42 U.S.C.
21 Section 1983 and 1988. So the trial court in this case
22 did recognize that it had a 1983 action before it.

23 QUESTION: But it didn't address it.

24 MR. PARR: It did not address it.

25 QUESTION: Or decide -- or purport to decide

1 on that.

2 MR. PARR: That is correct. The supreme court
3 said the trial court did not address the Section 1983
4 claim. The supreme court did this not because of any
5 analysis of Testa v. Katt or the Supremacy Clause. It
6 simply noted that this Court had not yet ruled on that
7 precise issue.

8 In response to the Respondent's contention
9 that this is not a Section 1983 case, Congress has
10 clearly made Section 1983 available when there are
11 deprivations of constitutional rights. I don't think
12 Congress should be required to make a specific list of
13 all the possible deprivations of constitutional rights.
14 1983 could not be any more clear.

15 Also, as this Court noted in Maine v.
16 Thiboutot, Congress intended for fees to be available in
17 state courts. This Court pointed out that if fees were
18 not available in state courts, federalism concerns would
19 be raised, because there are 1983 cases which cannot be
20 brought into federal courts, and those 1983 plaintiffs
21 would be forced to come into state court without the
22 attorney's fees that Congress meant for those plaintiffs
23 to have.

24 The Respondents have attempted to expand the
25 intent of Congress in the Tax Injunction Act far beyond

1 what the legislative history indicates. The Tax
2 Injunction Act is not like the statutes the Court faced
3 in Sea Clammers and Smith v. Robinson. It is a very
4 short bill. It had only one purpose, and that was to
5 deprive federal district courts of jurisdiction in
6 certain kinds of cases under certain circumstances.
7 Congress was not trying to create a comprehensive
8 remedial scheme.

9 Our arguments regarding injunctions not being
10 available in state court any more than they already are
11 are based on Section 1983. Congress has not attempted
12 to alter the equitable principles which governed the
13 availability of injunctive relief. Therefore, if 1983
14 actions are available in state court, those same
15 principles will apply.

16 Exhaustion is not an issue in this case.
17 Although Respondents have fears of exhaustion and
18 circumvention of state remedies, that is not the
19 question before the Court. There was no failure to
20 exhaust here. The Court can address that in a future
21 case.

22 QUESTION: If I understood your friend
23 correctly, he suggested -- and maybe I didn't understand
24 him correctly -- that 1983 actions in the state courts
25 are in the category of cases that the state court can

1 take or leave. They can enforce 1983 or they can refuse
2 to do it.

3 MR. PARR: I think that is what the
4 Respondents have said. The Supreme Court of South
5 Carolina has said that 1983 is not available whenever it
6 supplements the remedies that are available under state
7 law, which would render 1983 redundant in most cases,
8 and deprive people like the Spencers of the attorney's
9 fees that Congress meant for the Spencers to have.

10 The Respondents have raised an issue of
11 sovereign immunity. This Court has ruled in Hutto v.
12 Finney that there is no sovereign immunity problem
13 regarding the availability of attorney's fees.

14 QUESTION: Well, as Justice Marshall
15 suggested, probably Congress in enacting 1983 wasn't
16 thinking about banks and bankers so much as it was
17 thinking about some other people.

18 MR. PARR: That's right. Including people
19 like the Spencers, as this Court pointed out in Monroe
20 v. Pape. And the issues regarding whether sovereign
21 immunity had been pierced by Section 1983 are not really
22 in this case. The Spencers obtained a declaratory
23 judgment despite the state's argument that there was no
24 jurisdiction. The state supreme court in this case
25 affirmed a declaration that the statute was

1 unconstitutional. As this Court noted in Pullian v.
2 Allen, Congress clearly meant for people like the
3 Spencers to have attorney's fees, even though some
4 doctrine of immunity might bar damages relief or other
5 types of relief.

6 If there are no -- oh, I would like to address
7 one further point.

8 In cases where Congress' intent is unclear
9 about the obligation of state courts, Testa makes the
10 rule clear. In Testa v. Katt and Mondou there was no
11 specific ruling by Congress of whether the state courts
12 were required to enforce the federal statutes. This
13 Court ruled in both cases that the Supremacy Clause
14 answered the question in those cases and required the
15 state court to enforce them.

16 The refusal to enforce the Spencers' federal
17 rights in this case is not based on a lack of
18 jurisdiction. It is based on state policy. The
19 Supremacy Clause does not permit the legislature of
20 South Carolina to instruct its courts to award only the
21 remedies that the state legislature wishes plaintiffs to
22 have.

23 QUESTION: What do you rely on specifically
24 for the determination that Congress wanted to require
25 states to entertain 1983 actions instead of just

1 allowing them to?

2 MR. PARR: My argument is not based on a
3 discernible intent to require states to entertain them.
4 My argument is based on Congress' intent that 1983
5 actions be available in state courts, and then applying
6 the rule of Testa that when Congress has given state
7 courts concurrent jurisdiction over a federal cause of
8 action, without making any more findings state courts
9 are obligated to enforce those federal causes of
10 action. That is a well-established principle, and I
11 think Congress follows it when it enacts federal causes
12 of action.

13 If there are no further questions --

14 CHIEF JUSTICE BURGER: Very well. Thank you,
15 gentlemen. The case is submitted.

16 We will hear arguments next in Mitchell
17 against Forsyth.

18 (Whereupon, at 1:55 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the
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[#]ROGER L. SPENCER, ET UX., Petitioners v. South Carolina Tax Commission, et al.

Docket# 84-249

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BY

Paul A. Richardson

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