

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: HENRY HARPER, ET AL., Petitioners v.

VIRGINIA DEPARTMENT OF TAXATION

CASE NO: 91-794

PLACE: Washington, D.C.

DATE: Wednesday, December 2, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HENRY HARPER, ET AL., :

4 Petitioners :

5 v. : No. 91-794

6 VIRGINIA DEPARTMENT OF :

7 TAXATION :

8 - - - - - X

9 Washington, D.C.

10 Wednesday, December 2, 1992

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:00 a.m.

14 APPEARANCES:

15 MICHAEL J. KATOR, ESQ., Washington, D.C.; on behalf of the
16 Petitioners.

17 GAIL STARLING MARSHALL, ESQ., Deputy Attorney General of
18 Virginia, Richmond, Virginia; on behalf
19 of the Respondent.

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C O N T E N T S

| | PAGE |
|------------------------------|------|
| ORAL ARGUMENT OF | |
| MICHAEL J. KATOR, ESQ. | |
| On behalf of the Petitioners | 3 |
| GAIL STARLING MARSHALL, ESQ. | |
| On behalf of the Respondent | 18 |
| REBUTTAL ARGUMENT OF | |
| MICHAEL J. KATOR, ESQ. | |
| On behalf of the Petitioners | 43 |

1 PROCEEDINGS

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 91-794, Henry Harper v. Virginia
5 Department of Taxation.

6 Mr. Kator.

7 ORAL ARGUMENT OF MICHAEL J. KATOR

8 ON BEHALF OF THE PETITIONERS

9 MR. KATOR: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This cases arises as the sequel to Davis v.
12 Michigan Department of the Treasury. Petitioners are
13 Federal retirees who, relying on Davis, sought refunds of
14 the taxes Virginia unconstitutionally imposed on their
15 pension. The court below denied petitioners their
16 refunds, principally holding that Davis was not to be
17 applied retroactively. This case presents the question
18 whether Davis must be applied retroactively, and if so
19 whether the Department of Taxation must refund petitioners
20 the taxes unconstitutionally imposed upon them.

21 In reaching its conclusion to apply Davis non-
22 retroactively, the court below relied on its application
23 of Chevron Oil v. Huson. Well, we submit that the lower
24 court's Chevron analysis is flawed in every respect. More
25 fundamentally we submit that the court below erred in even

1 reaching Chevron.

2 Foremost, retroactivity of Davis is compelled by
3 this Court's decision in Beam v. Georgia. In Beam this
4 Court rejected modified or selective prospectivity in the
5 civil arena. It held that if this Court applies its rule
6 to the parties before it in one case all other courts must
7 similarly apply that rule to litigants before them. Thus
8 for choice of law purposes the dispositive question here
9 is whether the Court applied its ruling to the parties in
10 Davis.

11 On this point there can be no real dispute. As
12 a result of this Court's holding Michigan paid and Paul
13 Davis received a refund of the taxes unconstitutionally
14 imposed on his pension. It is not important how or why
15 this Court reached that determination. It matters only
16 under Beam that it did. Accordingly, under Beam, the
17 court below was required to apply Davis retroactively.

18 The second point that we raise is our statutory
19 point. What the Department of Taxation is asking the
20 Court to do in this case is something that it has never
21 done before. It is asking the Court to use Chevron to
22 ignore the plain, unambiguous terms of a lawfully enacted
23 act of Congress. This is not anything that any of the
24 authorities that the Department of Taxation has cited in
25 its brief suggests that this Court has ever done. And

1 admitted, it would seem to me that there's no precedent
2 which would support it.

3 In enacting the Public Salary Tax Act in 1939
4 Congress said taxes imposed after December 31, 1938 must
5 be non-discriminatory. 50 years later Virginia says no,
6 that statute should go into effect December 31, 1988.
7 This Court cannot accept Virginia's equitable plea. They
8 say it's going to be very burdensome for us to comply with
9 the statute. Congress has spoken, and that, according to
10 this Court's precedent, is the end of the matter.

11 In our briefs we speak at great detail about the
12 Chevron analysis. We address the bounds and propriety of
13 prospectivity and we address the application of Chevron to
14 the facts of this case. As this Court has most recently
15 applied Chevron, it could not reach a case such as this, a
16 case against a governmental entity where there is no
17 contention that past precedent of this Court has been
18 overruled and where there is no suggestion that this Court
19 has answered a novel question of law in a revolutionary
20 manner.

21 Application of Chevron in any event yields
22 retroactive application of Davis as each element of that
23 analysis favors retroactivity. For these reasons as well
24 the court below erred in holding that Davis was non-
25 retroactive.

1 What I think is the tricky issue in this case is
2 not so much the choice of law issue. The more complicated
3 issue is the remedy issue. The court below offered two
4 reasons for denying petitioners' refunds. Its first
5 reason was that under Chevron Davis didn't need to be
6 applied retroactively. And that I submit is incorrect.

7 Its second reason was that under its own state
8 law analysis, its own state law retroactivity analysis,
9 Davis would not be applied retroactively. As this Court
10 made clear in Ashland Oil, in Beam, and the various
11 opinions in the American Trucking Association v. Smith,
12 the question of retroactivity of a decision of this Court
13 is a question of Federal law, not state law. The Virginia
14 Supreme Court was simply wrong in holding that as a matter
15 of state law you could deny retroactive effect to Davis.

16 The second thing that the Supreme Court of
17 Virginia did in its second opinion was it suggested that
18 no remedy was required here even if Davis is retroactive
19 because it can continue to consider the remedial, or the
20 equitable considerations of Chevron in the remedial
21 calculus. It can say even if the law is unconstitutional,
22 the statute is unconstitutional as declared by Davis,
23 nonetheless it can deny relief.

24 QUESTION: Well certainly the state can, in a
25 tax case the state can require a claimant to go through

1 the procedures required of other claimants for tax
2 refunds, can it not?

3 MR. KATOR: Certainly a state can structure its
4 tax refund statute in a way that provides it protection.
5 Certainly. That's not what we have here in this case.
6 The bottom line, as McKesson makes clear, is a clear and
7 certain remedy for the unlawful deprivation of property.
8 That's what we had in this case. Virginia seems to
9 suggest that McKesson only applies in the situation where
10 it's foreseeable at the time that the statute was enacted
11 that the statute would be challenged and likely
12 invalidated. And I submit that McKesson cannot be so
13 limited.

14 McKesson speaks in terms of constitutional due
15 process. The due process clause doesn't say you get due,
16 due process may not be taken in bad faith without due
17 process of law. It says property may not be taken without
18 due process of law. Their reading of McKesson is far too
19 parsimonious. In this case Virginia must provide a clear
20 and certain remedy, and their statute presumably does so.
21 If it doesn't, then the Constitution requires that a
22 remedy be provided.

23 QUESTION: Well, and I suppose the state can
24 also put a time bar on the remedy, that you must apply for
25 a refund or pay under protest within a certain amount of

1 time or you can't do it?

2 MR. KATOR: Certainly. As this Court held in
3 Beam and in McKesson, the states are allowed to erect
4 procedural barriers, procedural protections around them to
5 shield them from liability. And that's what most states
6 have done. They have created a system whereby the statute
7 of limitations, 3 years, whatever, within which to present
8 claims, and that's the procedure the petitioners have
9 followed in this case.

10 QUESTION: What are the limits in Virginia, the
11 statute of limitations or the time requirements on a tax
12 claim?

13 MR. KATOR: In an ordinary case it would be 3
14 years as a general rule. It's 3 years or I believe 60
15 days after your Federal return is corrected in a Federal
16 claim, piggy-backs it in that sense. In this particular
17 case, shortly after Davis was decided by this Court the
18 Virginia legislature met and amended its refund statute
19 for the explicit purpose of allowing Federal, the claims
20 of Federal, retroactivity of Davis to be resolved, it
21 amended the refund statute to say claims for refunds for
22 Davis type taxes may be submitted up to a year after final
23 resolution of the retroactivity of Davis. So in Virginia
24 the door is still open.

25 QUESTION: You are only extending it to a year

1 after this Court renders a decision in this case?

2 MR. KATOR: Well, perhaps this Court, perhaps
3 the Supreme Court of Virginia on remand. It's a little
4 unclear, but the door is still open in Virginia.

5 QUESTION: But how far back does that go?

6 MR. KATOR: Only to 1984 would be the first --
7 I'm sorry, 1985 would be the first tax year at issue, in
8 dispute in this case. Most of the petitioners filed their
9 refund claims in March, April of 1989, and that would have
10 entitled them to go back to 1985. So the tax years in
11 dispute are '85, '86, '87, and '88. Virginia didn't
12 impose the tax in '89.

13 QUESTION: I'm a little puzzled because they
14 make the argument in their brief that as long as you had a
15 prepayment procedure you don't have to have a host payment
16 refund claim. That seems a little inconsistent with what
17 you've just said. Is it -- you think it's perfectly clear
18 as a matter of Virginia law that -- have they already
19 decided that there is a remedy in this case?

20 MR. KATOR: In this case all the court has held
21 is that the reason its refund statute does not apply is
22 because of non-retroactivity of Davis.

23 QUESTION: Right.

24 MR. KATOR: In its second opinion it intimated
25 that it could continue to play the Chevron game with

1 respect to a remedy, but that's not anything that it had
2 done before.

3 We also challenge the assertion that there's any
4 meaningful predeprivation remedy in Virginia. In Virginia
5 the predeprivation remedy is essentially to go to the tax
6 commissioner and say I don't think I should have to pay
7 these taxes. In order to get judicial review of that
8 determination by the tax commissioner you must pay the
9 taxes and you are funnelled into the same refund procedure
10 that we filed, the petitioners filed in this case.

11 So because this case involves constitutionality
12 of the Virginia statute, the Virginia tax commissioner has
13 no authority to say the tax is unconstitutional to absolve
14 petitioners from paying that tax. Therefore there is no
15 meaningful predeprivation remedy.

16 QUESTION: Even if he had that authority, does
17 Virginia require you to go to the tax commissioner in
18 order later to ask for a refund?

19 MR. KATOR: No. And that's the second point,
20 Your Honor. Virginia doesn't require that you choose any
21 one particular route. It has various routes. And what
22 the argument seems to be is that well, you had this other
23 route you could have taken and therefore we can cut off
24 the route that you happened to choose to take. And I
25 submit that that would violate fundamental notions of due

1 process as in the Brinkerhoff-Faris case.

2 QUESTION: Virginia does not say you must go to
3 the tax commissioner? You can choose not to, pay the tax
4 and challenge it later, ask for a refund later, without
5 having gone to the tax commissioner?

6 MR. KATOR: You had to pay the tax first.

7 QUESTION: Yes, you have to pay it first.

8 MR. KATOR: Yes.

9 QUESTION: But I take it, or maybe it's not
10 correct, if you apply to the commissioner for a prepayment
11 remedy would that extend the period of time in which you
12 have to file your refund because the, I take it the
13 commissioner can hold your claim in abeyance while the
14 commissioner is determining it, and then if the
15 commissioner denies it I take it the refund remedy, the
16 limitation of the refund remedy begins to run from either
17 the denial or the payment.

18 MR. KATOR: Virginia does have a procedure
19 whereby you can preserve a refund claim in just that
20 manner. But the fact remains that in terms of getting an
21 unconstitutional tax refunded it can't be done unless you
22 go to court, and you can't go to court unless you pay the
23 tax.

24 QUESTION: But there is a functional difference
25 in the two routes in that if you apply for the

1 predeprivation, for the prepayment determination it is
2 going to have the effect of extending the period of time
3 in which you have to ultimately file a court action.

4 MR. KATOR: Yes, it would extend your statute of
5 limitations. It doesn't allow you to go back any further,
6 but it would extend the time that you could finally file
7 suit. But I don't see that that would necessarily reflect
8 on the meaningfulness of the predeprivation remedy because
9 the bottom line still remains unless you go to court you
10 can't get your money back, and unless you pay your taxes
11 you can't go to court. And that is what I see as the
12 central component of the predeprivation remedy that's
13 required.

14 QUESTION: Mr. Kator, I think you said that the
15 commissioner cannot relieve you of your tax liability on
16 grounds of unconstitutionality. Is that correct?

17 MR. KATOR: That's correct.

18 QUESTION: He can't forgive it. Can he make a
19 declaration of unconstitutionality and then say well, I'm
20 terribly sorry, I can't let you go but I admit that the
21 tax is unconstitutional?

22 MR. KATOR: I don't -- I suspect it's
23 conceivable that he could say I'm very sympathetic, I
24 think this tax is unconstitutional but there's nothing I
25 can do about it, but I know --

1 QUESTION: He cannot make a declaration of
2 unconstitutionality with any legally operative
3 significance, is that what you're saying?

4 MR. KATOR: Exactly. Not in Virginia, not in
5 the United States, and not in any jurisdiction that I'm
6 familiar with.

7 QUESTION: Don't they make another argument,
8 another argument that there's some sort of an equitable
9 doctrine of repose that the Virginia court can apply that
10 could be comparable to a statute of limitations when they
11 think there's gross unfairness in collecting a tax
12 retroactively?

13 MR. KATOR: The argument that I understand the
14 Department of Taxation to make is that the state has its
15 own retroactivity analysis, the Fountain v. --

16 QUESTION: I understood that to go not to the
17 question of whether the rule of law is retroactive but
18 whether there really is a state remedy. Obviously there
19 would not be if the statute of limitations had run or if
20 they had said in so many words you must file a pre, you
21 know, a prepayment challenge. But they say there's sort
22 of another thing, I don't know if there are any cases that
23 support it but that there's some sort of a, they can
24 create a doctrine of repose when they are confronted with
25 this sudden trauma that has come over the state.

1 MR. KATOR: Well, the only authority they cite
2 for that is the Fountain case and another one that was
3 decided on or about the same date, and those cases are
4 retroactivity cases. And they, the department, the
5 attorney general's office briefed Chevron in those cases
6 and the court came down, essentially following the Chevron
7 analysis in state law cases, and said this is how we apply
8 it.

9 I don't understand how Virginia could do that,
10 but that comes back to my, to the bottom line of our brief
11 which is if Virginia doesn't provide a remedy, then the
12 Constitution must and the Fourteenth Amendment takes over.
13 Petitioners are entitled to a clear and certain remedy for
14 the denial of their property, for the taking of their
15 property, and if Virginia's statute doesn't provide it
16 then the Fourteenth Amendment would.

17 And I think that this is an important point that
18 comes up not only in this case but is before this Court in
19 several other petitions that are pending.

20 QUESTION: May I just interrupt you right there?
21 Why would it require it if you acknowledge that a statute
22 of limitation would bar it? Anything barred by limitation
23 the Federal Constitution doesn't trump.

24 MR. KATOR: Correct.

25 QUESTION: Now why does the Federal Constitution

1 necessarily trumps this sort of, this new equitable
2 doctrine they're coming up with?

3 MR. KATOR: Because if it's new then there
4 wasn't a clear and certain remedy.

5 QUESTION: I see.

6 MR. KATOR: You have a Brinkerhoff-Faris
7 situation where they undermined your claim, your existing
8 claim. And that's what -- obviously this Court cannot say
9 Virginia's refund statute provides X. That's for the
10 Virginia Supreme Court to say. But what this Court can
11 say, and what we ask it to say, is that if Virginia's
12 refund statute doesn't provide a remedy then the
13 Fourteenth Amendment does.

14 And this is the issue, the Brinkerhoff-Faris
15 issue that I was mentioning. That's before the Court in
16 the Norwest Bank case that's on petition. It is also
17 before the case in, the Court in the Bass case which is
18 pending. Recently in Georgia in the, not in the Beam case
19 but in the Federal Retirees case, the Supreme Court of
20 Georgia held that yes, Davis must be applied retroactively
21 but its refund statute only applies to illegal taxes
22 collected under a valid statute and not illegal taxes
23 collected under an invalid statute. And therefore in
24 Georgia they tell us, notwithstanding what counsel for the
25 attorney, for Georgia told this Court in Beam, that the

1 only way to recover your taxes in Georgia is to pay them
2 under protest.

3 This is the kind of, these are the kinds of
4 defenses that are coming up in these cases now, and
5 they're before the Court.

6 QUESTION: Do you say that an even-handedly
7 applied requirement that you pay under protest in order to
8 recover cannot bar recovery?

9 MR. KATOR: I wouldn't say that, I wouldn't say
10 that it -- well, yes.

11 QUESTION: What's your authority for that?

12 MR. KATOR: Okay. Let me start with a case that
13 I'm more familiar with, which is the Bass case. In Bass
14 the supreme court said yes, you must pay under protest.
15 Well, the pay under protest provision in Bass had
16 previously been upheld by this Court as being not a plain,
17 speedy, and efficient remedy. I would suggest that in
18 that context you would not have, that would not be an
19 adequate remedy.

20 In, as a general rule, yes. That's what
21 McKesson stands for, that you can impose pay under
22 protest.

23 QUESTION: Well, why would the general rule, why
24 is the general rule not applicable, could it not be
25 applicable to this situation?

1 MR. KATOR: It could be, Your Honor, if it were
2 imposed in the future. If you try to impose it
3 retroactively, you can't.

4 QUESTION: Well, supposing that Virginia had in
5 1980, say before all of this litigation arose, adopted a
6 rule that in order to ever get a refund for a tax you have
7 to have paid it under protest and applied that even-
8 handedly up until now. Would that be an adequate bar to
9 recovery here to someone who had not paid under protest?

10 MR. KATOR: I think that that's what McKesson
11 holds, Your Honor.

12 QUESTION: I think it is too.

13 MR. KATOR: But that is not the situation that
14 we have here.

15 QUESTION: As I understand, you say what the
16 situation here is that you may go through a protest
17 procedure with the commissioner, but you need not. You
18 have the option of either using that or else paying the
19 tax and seeking a refund.

20 MR. KATOR: Yes, as is the case with many other
21 states. There are various ways to go about it.
22 Petitioner has elected this route.

23 If I may reserve my remaining time. Thank you.

24 QUESTION: Very well, Mr. Kator.

25 Ms. Marshall, we'll hear from you now. I think

1 it would be helpful to me and very likely to some of my
2 colleagues if sometime during your argument you would
3 describe to us what the Virginia tax recovery provisions
4 are.

5 ORAL ARGUMENT OF GAIL STARLING MARSHALL
6 ON BEHALF OF THE RESPONDENT

7 MS. MARSHALL: Let me begin with that. May it
8 please the Court and Mr. Chief Justice. Thank you.

9 The predeprivation remedy that Virginia has is
10 not limited just to the administrative proceeding here,
11 administrating proceeding that admittedly none of these
12 petitioners came forward in. It is also involves
13 predeprivation possibility of going to court in a
14 declaratory judgment. And actually the Perkins case,
15 which we cited to this Court, is in fact a declaratory
16 judgment case.

17 QUESTION: You say the procedure also involves
18 going to court. Is that an alternative?

19 MS. MARSHALL: Yes. Yes, Your Honor.

20 QUESTION: You can do one or the other, and
21 either one will be sufficient?

22 MS. MARSHALL: There are various predeprivation
23 remedies. They are set forth in our supplemental
24 appendix. They include not only the administrative
25 procedure which has been addressed here to the tax

1 commissioner, and I disagree with what was stated earlier.
2 The tax commissioner can exonerate a taxpayer from
3 payment. He may not be able to declare anything
4 unconstitutional, but he certainly can give a taxpayer
5 relief.

6 QUESTION: Ms. Marshall, are they -- I know they
7 are available but does the state say you must use those
8 and unless you use those you can't come in later, which is
9 what it seems to me it's saying here? These people came
10 in later and the state is now saying well, you could have
11 come in earlier and therefore we don't have to pay you.
12 And they're saying well, we could have come in later but
13 you, earlier but you didn't tell us we had to come in
14 earlier. Did the state tell them they had to come in
15 earlier?

16 MS. MARSHALL: Mr. Justice Scalia, the state
17 gives them an option under the regulations --

18 QUESTION: Okay.

19 MS. MARSHALL: -- which are part of our
20 submission in our brief. The regulations actually
21 encourage people to use the predeprivation remedies. What
22 I suggest to this Court is that the predeprivation remedy
23 or the remedy that this, these petitioners choose, and
24 they chose a post-deprivation remedy, when they choose
25 that, which was an option they have, they take that remedy

1 as it is in state law. And that remedy is not a mandatory
2 refund remedy in facts of this nature. For 2 decades
3 there has been --

4 QUESTION: Ms. Marshall, may I interrupt you
5 just a moment before you get into that? I just want to go
6 back to something you said before. I guess I have two
7 questions. The first is with respect to the declaratory
8 judgment remedy. Is that set out as a peculiar or a
9 particular ailment of the tax refund procedure or is there
10 simply a general statute in Virginia providing for
11 declaratory judgment remedies?

12 MS. MARSHALL: There is a general statute and it
13 is applied. We do not, in other words our tax exemption
14 or injunction statute does not bar that.

15 QUESTION: Okay.

16 MS. MARSHALL: Perkins itself, the case that our
17 supreme court relied on in forming and declaring the
18 nature of the refund remedy, which the option that these
19 petitioners took, relied on the Perkins case and it itself
20 was a declaratory judgment action.

21 QUESTION: Okay. Thank you. Now, my second
22 question goes to your statement that the commissioner
23 could forgive the tax but could not declare it
24 unconstitutional.

25 MS. MARSHALL: Well, whether he could or not,

1 that hasn't been litigated in Virginia, but the point is
2 whether these petitioners could have gotten relief and
3 they certainly could have gotten relief. He has the
4 authority to exonerate the taxpayer and the limitations of
5 the kinds of reasons you can argue to the commissioner is
6 unlimited for why you should be exonerated.

7 QUESTION: It may be, and I certainly will
8 accept your answer on that point, but isn't it clear that
9 unless he is able to declare the tax unconstitutional he
10 could not, as you put it, exonerate them on the kind of
11 claim that we have before us here?

12 MS. MARSHALL: No, I disagree. The regulations
13 in the statute, it's section 1821 of the Code,
14 specifically state that he can compromise the claim, he
15 can foreclose or not have any collection action or
16 assessment action --

17 QUESTION: Oh, I'm sure he has that general
18 power but isn't it equally clear that he could not legally
19 use that power without stating a legally sufficient
20 reason? In fact we've been saying unconstitutional, I
21 guess it's really a supremacy clause issue here, if
22 there's a difference. Unless he could say yes, under the
23 supremacy clause of the United States Constitution I may
24 not collect this tax given the Federal statute, then he
25 couldn't exonerate the taxpayer in this case.

1 MS. MARSHALL: Well, I mean, he is subject, of
2 course, to writs of prohibition and mandamus for arbitrary
3 actions, but, and certainly he is presumed to act in,
4 presumptively to act in good faith reliance on what a
5 reasonable interpretation of the law is. But he does have
6 the authority to exonerate. If the petitioner, for
7 example, had done that and had lost that case he could
8 then have brought it to a judicial body, a declaratory
9 judgment prior to paying the tax.

10 QUESTION: Well, if he had gone to the
11 commissioner first, not declaratory judgment first but if
12 he had gone to the commissioner first could he then have
13 sought judicial review without payment of the tax?

14 MS. MARSHALL: As a declaratory judgment, that's
15 correct.

16 QUESTION: I see.

17 MS. MARSHALL: That's correct.

18 QUESTION: May I ask though --

19 MS. MARSHALL: Yes.

20 QUESTION: Do you have any authorities in your
21 brief for the proposition that failure to pursue the
22 prepayment remedy bars an otherwise available post-payment
23 refund remedy?

24 MS. MARSHALL: Your Honor, that case has never
25 come before the court. In other words --

1 QUESTION: This is the first case?

2 MS. MARSHALL: That's -- well, I'm sorry --

3 QUESTION: And my second question --

4 MS. MARSHALL: Could I --

5 QUESTION: I'm sorry, I didn't mean to interrupt
6 you.

7 MS. MARSHALL: I wanted to say that the question
8 of what would have occurred had they taken any of these
9 other remedies has not been litigated in the Virginia
10 court.

11 QUESTION: I understand. I'm assuming that, I'm
12 accepting your statement they could have won if they had
13 done it that way. But the question I have is even so is
14 there anything saying their failure to do it that way bars
15 their post --

16 MS. MARSHALL: I suggest, Your Honor, that
17 Perkins and Capehart, the two cases in the 1970s, give
18 notice to the petitioners that if they choose this
19 particular remedy, which is one of several available
20 remedies, it comes with that limitation, the limitation
21 which has been engrafted on the law by our supreme court 2
22 decades ago. And I suggest that is notice to
23 petitioners --

24 QUESTION: What's the limit -- I'm not sure I --
25 that if they choose the post-refund remedy it comes with

1 what limitation?

2 MS. MARSHALL: It comes with the statutory
3 interpretation by the Virginia Supreme Court in Perkins
4 and Capehart that in cases where there is reliance by all
5 parties on the law and there would be a failure of the
6 administration of justice for that to be overturned --

7 QUESTION: I see.

8 MS. MARSHALL: -- that the remedy of refund is
9 not mandatory. The 1826, the part of our Code 1826 is not
10 mandatory.

11 QUESTION: I see. All right. Then my second
12 question is at what stage of this litigation did you first
13 advance this defense?

14 MS. MARSHALL: At the trial court. The Perkins
15 and Capehart cases --

16 QUESTION: You have argued all the way through
17 that there's no remedy here even if there is --

18 MS. MARSHALL: We have argued all the way
19 through. Yes, Your Honor.

20 QUESTION: And the -- why has not the Virginia
21 Supreme Court addressed that question before?

22 MS. MARSHALL: Well, Your Honor, I believe that
23 there are two things that the Virginia Supreme Court did
24 address, and there are various lens that this Court can
25 look at the case. If I may suggest, for example, this

1 Court could find that Davis is prospective, and if it
2 finds that for whatever reason this case is over because
3 there are no other legal issues for the Court to address.

4 If, however, this Court finds that it is not
5 prospective, we submit that you could still and should
6 still affirm the decision of the Virginia Supreme Court
7 below because the Virginia Supreme Court not only
8 determined under Chevron that it was prospective and
9 therefore not an erroneous or improper exaction of tax,
10 which is what 1826 requires, but it also had another leg
11 to its opinion in which it said that under 1826 and under
12 our precedents, Perkins and Capehart, we look in those
13 cases to the reliance of the parties and the factors of
14 the administration of justice in determining whether or
15 not our particular statutory state remedy encompasses the
16 facts that you petitioners have chosen to bring before us
17 and that you have, the route you have chosen to take.

18 QUESTION: Ms. Marshall, did Perkins and
19 Capehart make clear and did you argue in this case at the
20 trial court that the rule is different for post-payment
21 remedies than it is for the declaratory judgment remedy?
22 I mean, if I read Perkins and Capehart I would think that
23 that applies to all remedies from the Virginia Supreme
24 Court for taxes, whether you do it before or after.
25 You're arguing now though a very sophisticated and subtle

1 distinction between post-payment remedies and prepayment
2 remedies. Is that clear in Perkins and Capehart, that had
3 you come earlier we wouldn't play this equitable game, but
4 as it is you have come late and we have a different rule
5 for post-payment cases? Is that clear?

6 MS. MARSHALL: Let me suggest, Your Honor, that
7 I believe it is clearly derived from Perkins. Perkins was
8 a prepayment case. It was a declaratory judgment. And it
9 received the relief of the court from what was determined
10 to be an erroneous assessment methodology used by,
11 widespread. Similar here where this is used in 23 states,
12 that was used in many counties.

13 Capehart came later. Capehart paid the tax and
14 then asked for the refund, and Capehart's refund claim was
15 denied. So I suggest that the prepayment/post-payment is
16 really intrinsically in those two cases.

17 But whether you say have we litigated a lot of
18 cases in that area, no, Your Honor, we have not. But I
19 suggest to Your Honor for several reasons that whether you
20 find Davis to be retroactive or not, the Supreme Court of
21 Virginia should be affirmed because what Virginia has done
22 in the second part of its opinion is it looked to its
23 state law remedy and it has defined the scope even-
24 handedly and based on precedent that is 2 decades old. It
25 has defined the scope of that remedy.

1 And only, I would suggest, if this Court finds
2 that there is not, as we argue there is, a procedural bar
3 to these further Federal constitutional questions such as
4 due process, only if you find that that procedural bar
5 does not exist in this case would you be correct in
6 remanding this for the court below to consider those due
7 process issues. Petitioners have argued that the due
8 process issues were argued to the Virginia Supreme Court
9 in their reply brief at the supreme court stage, but we
10 argue there is a state procedural bar and certainly
11 putting it in your reply brief is not a proper way of
12 preserving the point. The assignments of error under
13 Virginia law clearly state what issues are waived and
14 which ones are not waived.

15 Speaking of McKesson, I'd like to mention also
16 that in McKesson not only did they violate clearly
17 established law at the time of the enactment and the
18 collection of the tax, but they protested the tax ahead of
19 time, as these people had the option to do, not the
20 requirement to do but the option to do. These people
21 never came forward and raised their hand.

22 Also in McKesson, their complaint was based on
23 two alternative grounds or theories of recovery, state law
24 refund and directly on the Constitution. That is not the
25 case here. These petitioners have chosen to put all of

1 their eggs into one basket, and that is into the basket of
2 the State Refund Act. And we submit that that state
3 remedy simply does not exist for them on the facts of this
4 case.

5 QUESTION: Ms. Marshall, you have made a
6 statement that I don't understand. Why have they placed
7 all their eggs in the basket of the state refund remedy?

8 MS. MARSHALL: When you look at their
9 complaints, which we reproduced in the appendix, the only
10 use they make of section 111 or the Federal law is to
11 establish or try to bootstrap themselves into the state
12 refund statute. In other words they did not bring a claim
13 on the Fourteenth Amendment. They did not bring a claim
14 on due process. There is no Federal grounded claim that
15 they have brought in their complaint. Moreover, when they
16 went --

17 QUESTION: But do they have such a claim until
18 you deny their request for compensation?

19 MS. MARSHALL: Well, in McKesson, McKesson
20 brought its claim both on Federal grounds and on state
21 grounds, and they suggest here, and even in the supreme
22 court, the Supreme Court of Virginia, the assignments of
23 error decide what is waived and what is put forward, and
24 yet in assignments of error they make no claim of
25 unconstitutionality or due process problems with the

1 remedial face of the case.

2 QUESTION: I assume there is no Federal
3 constitutional remedy if the state provides an adequate
4 refund remedy. So if their request for refund was granted
5 as they asked it to be there would have been no
6 constitutional claim.

7 MS. MARSHALL: But, Your Honor, when they
8 brought the claim they surely knew of Perkins and
9 Capehart. They knew it was not a mandatory remedy and
10 that it had certain limitations which we do suggest are
11 similar to the policies behind the statute of limitations
12 in repose to protect the reliance interest. And if
13 there's anything this case really is about, it is about
14 settled expectations and reliance interest.

15 QUESTION: It seems to me that's like saying a
16 capital, a capital defendant who pursues an appeal to the
17 state supreme court and is denied the basis of his appeal
18 cannot then come to this Court saying that that denial was
19 a violation of the Federal Constitution unless he has
20 before the state court anticipated the denial and argued
21 that the denial would be a violation of the Federal
22 Constitution. I'm not sure that that's true.

23 MS. MARSHALL: Well, of course, Your Honor, when
24 this case came to the Virginia Supreme Court the claim had
25 been denied. The Commonwealth was granted summary

1 judgment by the trial court. If there was any question at
2 that time that Virginia's procedural scheme had any
3 further Federal constitutional grounds, then certainly at
4 that time it should have been presented to the Virginia
5 Supreme Court.

6 QUESTION: No, but the state supreme court
7 didn't deny it on the ground there was no remedy. It
8 denied it because they thought there was no merit to the
9 claim. They thought the rule was not retroactive.

10 MS. MARSHALL: Again, Your Honor --

11 QUESTION: But they have never said that if the
12 rule is retroactive you don't have a remedy. At least
13 they haven't said it up until now.

14 MS. MARSHALL: Your Honor, that is a possible
15 way of reading the case below. I believe another way of
16 reading it is that it had an independent ground which said
17 regardless of the Federal retroactivity we have to look at
18 how our state statute and remedy that these petitioners
19 have chosen to pursue is written and how it should, and
20 how it has been applied in our courts. Now, if there is a
21 feeling in this Court that that is not clear in the
22 decision below it would certainly be an appropriate
23 disposition to remand it for consideration by the Virginia
24 Supreme Court.

25 The Virginia Supreme Court in my view had two

1 grounds for its state law rule. One is it was dependent
2 on Federal law. That said it followed, if it's not
3 retroactive it's not erroneous. But it went on to say
4 there are other reasons why, citing these 1971 cases, why
5 our particular, the particular remedy you have chosen
6 simply is not one that is available to you on these facts.

7 QUESTION: Ms. Marshall, before we get away from
8 the point, in case it should make a difference to me
9 later, can you tell me when the first, when the point was
10 either as a matter of pleading or briefing, when your,
11 when the claimants here first mentioned the Fourteenth
12 Amendment as a basis for their claim?

13 MS. MARSHALL: I believe it was in this Court.
14 They state in their brief in this Court that well, if the
15 statute does not give us, the refund statute does not give
16 us relief we have relief directly under the Fourteenth
17 Amendment.

18 QUESTION: Okay.

19 MS. MARSHALL: If you look at the assignments of
20 error it's very clear there were two issues they presented
21 to the Virginia Supreme Court. Your statute clearly on
22 its face requires that you give us a refund, and you have
23 wrongly applied Chevron below. Those were the two issues
24 that were presented.

25 I would like to suggest that it's very important

1 for the Court, whatever lens it sees this case through, to
2 focus on and to look at the reliance interest and the
3 settled expectations of the parties. It's also important
4 to look at the nature of the harm alleged. What is it
5 that Virginia is supposed to have done that was offensive
6 to Federal law? This is not a case, we suggest, where
7 there was any over-reaching. Virginia was not pushing the
8 envelope in any way of valid taxation. It turned out that
9 it was in fatal collision, unknown to it and unknown to
10 these petitioners who never came forward and raised their
11 hands and said there was a problem until after this
12 Court's decision in March of 1989.

13 But it was certainly reasonable both for the
14 petitioners and the 23 states who have, as you know, a
15 massive refund liability on this case of approximately
16 \$1.8 billion, it was reasonable for those states to
17 believe that they had a legitimate purpose to give
18 benefits to their own former state retirees, former state
19 employees. This was a legitimate purpose and the fact
20 that they had done it through an indirect benefit of taxes
21 rather than through a direct cash benefit did not appear,
22 and reasonably so, to be of any legal significance.

23 What Virginia did was it exempted its state
24 retirees, there are approximately 60,000 of those today.
25 Then it taxed the entire individual taxpaying public

1 identically, \$2.56 million. Fewer than 10 percent of that
2 are represented by the Federal retirees here. In other
3 words Virginia's state retirees are outnumbered by
4 citizens and voters who are Federal retirees by about 3 to
5 1. When you look at that number and you also consider,
6 which is in the record and the affidavit and the
7 legislative history, the disparity between the general
8 size of Federal retirement income and the size of state
9 retirement income you can do a rough estimate of what the
10 value was of the benefit now found to be offending under
11 Davis, and we don't dispute that. We quickly changed our
12 law immediately to conform with Davis. But that value of
13 the benefit given during the 4 years in issue here is
14 approximately \$8 million to \$12 million.

15 Now we suggest that the penalty here that is
16 being requested or demanded of a 100 percent refund, which
17 for Virginia alone now is approximately \$467 million, that
18 no Federal interest requires that. There is no Federal
19 interest or underpinning in the intergovernmental tax
20 immunity doctrine that would lead to that inequitable
21 result.

22 QUESTION: Are you suggesting -- excuse me.

23 QUESTION: You go ahead.

24 QUESTION: Are you suggesting the retroactivity
25 rule would be different if the discrimination was say

1 against women instead of one class of retirees and not
2 another?

3 MS. MARSHALL: Well, as you know, this was based
4 principally on the statute, and it was interpreted to be
5 simply Federal retirees versus state.

6 QUESTION: I understand, but I'm not sure that
7 answers my question.

8 MS. MARSHALL: Yes.

9 QUESTION: You're saying that on the, that
10 really for reasons I found very persuasive there really
11 was a discrimination here.

12 MS. MARSHALL: That's right.

13 QUESTION: But supposing it was discrimination
14 against a class that we're particularly interested in
15 protecting, say females. Would you make the same remedial
16 argument?

17 MS. MARSHALL: Oh, I think, Your Honor, that
18 that would be an Equal Protection claim and I think that
19 you would look to, if you were looking under a Federal
20 rule, you would look to all of the points which this Court
21 has established as a very workable and fair rule in
22 Chevron. Was it a new principle of law? Did everyone
23 rely on its being -- I believe for example --

24 QUESTION: Yeah, but you're making those
25 arguments -- I'm just asking you if your basic argument

1 about remedy would be different if it were a different
2 kind of discrimination, if it were a constitutional
3 discrimination against women rather than statutory
4 discrimination against some retirees and not the entire
5 population.

6 MS. MARSHALL: I think that goes to, Your Honor,
7 to the foreseeability of it and the reliance interest.
8 Even this Court under Title VII has found it's not --

9 QUESTION: It seems to me it's hard to argue
10 foreseeability when 8 members of the Court disagree with
11 you.

12 MS. MARSHALL: Well, Your Honor, we had a very
13 courtly dissent in that case, as you know, and we suggest
14 that what was unforeseeable to the states -- if it was
15 foreseeable we wonder why did not any one of these
16 petitioners come forward and, as they can, it doesn't cost
17 any money, come forward and ask for a legal opinion by the
18 highest legal officer of the state. If it was so
19 foreseeable at least since 1961, for example, or since
20 McCullough, why did not a single petitioner, there are
21 hundreds of thousands of them over the country who are in
22 the same boat, they had every economic interest to come
23 forward not only for a refund but taxpayers always have
24 motivations to come forward to exonerate themselves from
25 ongoing law. No one came forward. No one even --

1 QUESTION: They claim that they didn't have to,
2 and that gets back ultimately to the argument of whether
3 indeed your law required that they make that claim
4 beforehand or allows them to do it afterwards. It all
5 comes back to that, I suppose. They weren't behaving
6 unreasonably if they thought well --

7 MS. MARSHALL: I don't say that they were
8 behaving unreasonably. Nor was the state, Your Honor,
9 behaving unreasonably. We all found Davis and the fact
10 that there was a legal edifice out there that cast its
11 shadow in the direction of Davis. We found that that was
12 a surprise, the discrimination of a general tax doing a
13 legitimate government purpose to benefit state retirees,
14 the fact that that was somehow discrimination was a
15 surprise to all of us. We accept that now, but we also
16 believe, Your Honor, that there is no personal compensable
17 rights that these petitioners have suffered.

18 I suggested to you, for example, that there were
19 2.5 million taxpayers, and that the rough estimate of this
20 now found to be offending benefit that the state gave to
21 its own retirees was approximately \$12 million a year.
22 That comes to \$5 per taxpayer per year.

23 QUESTION: Well then it won't be hard to refund
24 it if it's --

25 (Laughter.)

1 MS. MARSHALL: Pardon? Your Honor, they have
2 never asked for that refund. They have asked for 100
3 percent refund, despite the fact that the refund is 10
4 times the amount of the offending benefit and despite the
5 fact that they, as a very small percentage of the 2.5
6 million, they did not fund the vast majority of this.

7 QUESTION: Well, they're asking for a refund
8 that is disproportionate to the amount of the
9 discrimination that was imposed?

10 MS. MARSHALL: Your Honor, I don't think there
11 was any discrimination based on the Federal Government,
12 but that has been decided in Davis.

13 QUESTION: Yes.

14 MS. MARSHALL: And what they're asking for is
15 roughly 10 times the amount of what was now found to be
16 the offending benefit that was given, and it was not
17 funded by these 200,000 people. It was funded by the
18 entire taxpaying public and corporate taxpayers who are
19 amici here.

20 QUESTION: Well, why do you say it's -- how do
21 you calculate that it's 10 times the amount of the --

22 MS. MARSHALL: This is a rough estimate based,
23 Your Honor, on the fact that there were very many fewer,
24 there were very many fewer state retirees in Virginia.
25 Virginia state retirees are about 60,000. Federal

1 retirees are about 200,000. In the record is also a
2 differential of, for example in 1982 the average Federal
3 retiree in Virginia got \$15,000 in income and the average
4 state retiree got less than \$5,000.

5 QUESTION: But are the class of Federal retirees
6 asking as refunds any more than they actually paid?

7 MS. MARSHALL: They are asking for 100 percent
8 tax exemption, and certainly the intergovernmental tax
9 immunity doctrine never entitled them to an exemption.
10 They have no personal harm which is really being redressed
11 here.

12 QUESTION: But Virginia I suppose has the choice
13 after a case like Davis to say that we will withdraw the
14 benefit we have given to state retirees and treat
15 everybody equally. But if you don't do that then you've
16 got to treat Federal retirees like state retirees.

17 MS. MARSHALL: Well, Your Honor, what I am
18 suggesting is that there is no Federal interest that is
19 being advanced by what really amounts to taking from these
20 2.5 million taxpayers a massive amount of what would
21 otherwise be state assets available for construction of
22 prisons and various services and transferring it to these
23 200,000 people. Whatever the intergovernmental tax
24 immunity purpose was, I don't believe it was to give a
25 personal benefit, unlike the equal protection clause and

1 the sex discrimination clause, where the purpose, the
2 Federal purpose of the statute, and even in commerce
3 clause, is to give a personal benefit to an individual.

4 QUESTION: Ms. Marshall, you describe this as
5 though it's a tort case, as though what's at issue is how
6 blameworthy was Virginia and how entitled to -- it's
7 really not that, it's just a matter of, it's a simple
8 Federal statute that says these people were entitled,
9 given your tax structure, to this amount of money. And
10 they come in and they say you took this money from us, you
11 shouldn't have done it.

12 MS. MARSHALL: Your Honor, the statute --

13 QUESTION: And, you know, end of problem as far
14 as this argument is concerned. Now, maybe they should
15 have made their protest earlier, but I don't see that this
16 is a tort question.

17 MS. MARSHALL: But, Your Honor, let's go back to
18 what is the remedial question. One thing that's very
19 clear is that the plain language of section 111 says
20 nothing about remedy. It has no hint that it was intended
21 to have any remedial prospect. That therefore we contend
22 is not, and it's not what they base their claim on. They
23 base their claim on 1826 of the Virginia Code. We suggest
24 to Your Honor that --

25 QUESTION: I don't know what you mean when you

1 said it has no remedial aspect to it. You mean you think
2 it could be disregarded by the states at will and --

3 MS. MARSHALL: Absolutely not, Your Honor.

4 QUESTION: -- nothing would happen?

5 MS. MARSHALL: And it was not. Once it was
6 declared in Davis that there was an unexpected, and I
7 think as J. Harvey Wilkinson, Judge Wilkinson said in the
8 Fourth Circuit, a totally unexpected collision between
9 these Federal statutes and what was thought to be a benign
10 and modest state benefit, once that was determined
11 Virginia changed its law immediately.

12 What I'm suggesting is that the
13 intergovernmental tax immunity doctrine requires no more
14 than that prospective change. This Court has cited
15 recently Justice Harlan in the state of Donnelly case.
16 Sometimes at the remedial phase recision is all that's
17 required, not money damages.

18 QUESTION: Well, in your position then if there
19 had been a predeprivation proceeding brought, either
20 administratively in the first place or by declaratory
21 judgment, it would have been appropriate let's say in the
22 latter instance for the court to say you're absolutely
23 right that you should not be assessed this tax, but the
24 only obligation Virginia has now is to change its law, and
25 therefore under no circumstances can you get a penny back

1 even though you win the case. Would that have been an
2 appropriate resolution?

3 MS. MARSHALL: At a minimum you would certainly
4 change the law, and that was appropriately done.

5 QUESTION: Well, I am talking about not minimums
6 but maximums. Would that have been a proper application
7 of Federal law?

8 MS. MARSHALL: It's a position of the tax
9 department that we would be in a totally --

10 QUESTION: Well now, excuse me, I don't want the
11 position of the tax department as such. Would that have
12 been a proper application of Federal law?

13 MS. MARSHALL: I do not believe so because there
14 would have been no reliance then by the state. In other
15 words they would have been put on notice that a sum
16 certain was under a cloud or a challenge of invalidity.

17 QUESTION: No, but there would have been
18 reliance at least with respect to the period for the tax
19 year in question. They would have budgeted their, they
20 would have passed their state budget on the assumption
21 that they were going to get this money. So they would
22 have had reliance.

23 MS. MARSHALL: In a declaratory judgment though
24 we're talking about a prepayment remedy. What the
25 declaratory judgment would say and what was said in

1 Perkins is we contend that this money that we have not yet
2 paid, you cannot rely on that because we are putting you
3 on notice that that money is under a claim of invalidity.
4 And in that case we believe the equities would not be the
5 same, that there would have been a refund remedy if the
6 time ran and they had to pay or a declaratory judgment --

7 QUESTION: But in the instance in which I gave
8 in which there was the declaratory judgment, following
9 that declaratory judgment the commissioner or the state
10 would have been under no obligation to do anything but go
11 ahead and collect the tax merely in hopes that the state
12 legislature would change the law?

13 MS. MARSHALL: No, Your Honor, I think that
14 after the declaratory judgment the tax collector, the tax
15 commissioner would be obligated to follow the declaration
16 of the law that it was an invalid tax and to withhold
17 exaction or collection of the tax --

18 QUESTION: Well, then the law --

19 MS. MARSHALL: -- and to refund.

20 QUESTION: Then the Federal statute implies
21 something other than prospective changes of the law as the
22 appropriate form of relief, which I think is the
23 proposition you were disputing a moment ago.

24 MS. MARSHALL: What I'm suggesting is that when
25 you do not take a predeprivation route and when you do not

1 base your claim for remedy directly on a Federal right,
2 either through a 1983 or through any other injunctive
3 action -- for example, Phillips was an injunctive action.
4 It was not a refund case.

5 QUESTION: Well, they were at least claiming a
6 Federal right here, you don't dispute that?

7 MS. MARSHALL: They were not basing their
8 claim -- if you look at their complaint we say it is based
9 solely on a refund statute which --

10 QUESTION: Well, it was based on a refund
11 statute, but their predicate for claiming the refund was
12 the claim of a Federal right, isn't that correct?

13 MS. MARSHALL: Your Honor, they used the Davis
14 decision in order to try to establish that the plain
15 language of the refund remedy statute applied, i.e. that
16 it was improper or erroneous.

17 QUESTION: I don't think we're getting anywhere.

18 MS. MARSHALL: So, Your Honors, I would suggest
19 that as a result of the law-changing decision that this
20 Court made in March of 1981 that this Court should affirm
21 the decision below.

22 QUESTION: Thank you, Ms. Marshall.

23 Mr. Kator, you have 10 minutes remaining.

24 REBUTTAL ARGUMENT OF MICHAEL J. KATOR

25 ON BEHALF OF THE PETITIONERS

1 MR. KATOR: Thank you, Your Honor. At the
2 outset let me clarify the issue of whether Virginia has a
3 declaratory judgment statute that would reach this kind of
4 claim. They don't. In fact Virginia has a statute in its
5 books that states that you may not file a declaratory
6 judgment for income taxes, and there is quite a bit of
7 case law that says you may not do so.

8 Let me also address the issue of whether or not
9 we raised a Federal claim. In each --

10 QUESTION: How can there be such diametric
11 opposition on such a fundamental point? You have cases
12 that --

13 MR. KATOR: I believe we did, we may have cited
14 the cases in our earlier papers in this Court. This has
15 not been an issue until this morning. But my recollection
16 from 3 years ago when I was looking at this is yes, indeed
17 Virginia has a statute, it says you may not file a
18 declaratory judgment. And I am certain that there is case
19 law, for one of the things that we thought about doing was
20 trying to enjoin the imposition of the 1988 taxes, which
21 were not due until May 1, 1989, and we found that we
22 couldn't do it. I regret that I don't have that authority
23 in front of me, but I submit that it would be very easy to
24 find.

25 QUESTION: Could you provide it, please? I'd

1 like to see it.

2 MR. KATOR: I'd be delighted to, Your Honor.

3 The second point is the history of the Fourteenth
4 Amendment claim, if you will. In each of our complaints
5 in this case, and several were consolidated, in each of
6 the complaints there was a claim that, under statement of
7 claims and Virginia is a notice pleading state, during the
8 years since 1985 plaintiffs have paid excessive taxes
9 which have been unconstitutionally and illegally exacted.
10 And the relief requested was a judgment for the refund of
11 all unconstitutionally assessed and collected taxes. I
12 don't understand how Virginia can state that there is no
13 constitutional claim alleged in these papers. There
14 certainly is. They suggest that we didn't put in our
15 petition our points of error, it's called.

16 QUESTION: Well, I think there are two different
17 constitutional violations at issue here, aren't there?
18 One is violation of the supremacy clause, and I take that
19 to be referring to a violation of the supremacy clause.
20 The other is a violation of the takings clause or the due
21 process clause in not giving you your money.

22 MR. KATOR: I think --

23 QUESTION: And I think they're saying you didn't
24 make that claim until now.

25 MR. KATOR: To be fair, Your Honor, we didn't

1 contemplate at the time that we filed our complaint, I
2 think that was before McKesson came down, I don't believe
3 that we were addressing that. But we moved for partial
4 summary judgment on the refund statute. If we have to go
5 back and move for partial summary judgment on the
6 Constitution, I believe it's fairly pled within the
7 complaint.

8 But the points of error, the circuit court for
9 Alexandria, where this case came from, issued its opinion,
10 and that's the opinion we appealed to the Supreme Court of
11 Virginia, solely on retroactivity of Davis. The issue
12 that is raised here was raised for the first time by the
13 attorney general in the Supreme Court of Virginia, and
14 that was a point that we raised in our reply briefs. We
15 said why are you raising this point here.

16 And the reason they were raising that point
17 there, and then at that time, was because that was after
18 the Supreme Court of South Carolina in its Bass case said
19 wait, we've got a better idea. We'll change our refund
20 statute and say it doesn't apply. And that's exactly what
21 Virginia, the attorney general is trying to convince its
22 court to do, and to its credit the Supreme Court of
23 Virginia has not at least yet gone and changed its refund
24 statute.

25 Another point that I think bears emphasis, if it

1 were so clear and certain that petitioners had no remedy
2 under the refund statute, why did the Virginia General
3 Assembly amend the statute to extend the statute of
4 limitations for petitioners to file their claims solely
5 and expressly for the purpose of allowing retroactivity of
6 Davis to be resolved? Certainly the legislature of
7 Virginia thought the refund statute applied, and perhaps
8 in retrospect maybe Virginia is right, it didn't apply it.
9 But it must now because the supreme, the legislature of
10 Virginia has amended it to say so.

11 QUESTION: Are you going to comment on Perkins
12 and Capehart?

13 MR. KATOR: Perkins and Capehart, Your Honor,
14 first of all those are what we would call modified
15 prospectivity cases. In both -- in Perkins the taxpayer
16 said your particular method of assessment is
17 unconstitutional, and the Supreme Court of Virginia said
18 you are right, we'll give you the remedy that you've asked
19 for, and in Capehart -- but we're going to apply that
20 prospectively only. And then in Capehart, when somebody
21 else in another county tried to do it, the Supreme Court
22 of Virginia said no, we said in Perkins prospective only
23 and that's what we meant.

24 The Supreme Court of Virginia in this case, and
25 this is at 15(a) of the cert petition, says Harper's state

1 law contention also fails for another reason. We
2 previously have held that this court's ruling declaring a
3 taxing scheme unconstitutional is to be applied
4 prospectively only. This is Virginia's state law
5 prospectivity doctrine, and it's simply inapposite in a
6 Federal question, in a case involving Federal
7 retroactivity.

8 QUESTION: What the state says, and now they may
9 be right or wrong, is that the post-deprivation remedy is
10 more limited than the predeprivation remedy, and that so
11 long as the predeprivation remedy is full they are not
12 required to give you a full post-deprivation remedy.

13 MR. KATOR: Your Honor, I think that that is an
14 accurate statement of McKesson, that if in fact they have
15 a full predeprivation remedy they can have no post-
16 deprivation remedy. But the critical point here is, what
17 McKesson's requirement is is a clear and certain remedy.
18 And it was anything but clear and certain, even after this
19 morning I submit, that Virginia's post-deprivation remedy
20 doesn't apply to this. If Virginia wants to change its
21 rules and say that its post-deprivation statute doesn't
22 apply, and there are people who have obtained refunds of
23 unconstitutional taxes under that statute --

24 QUESTION: That's not quite fair. What has to
25 be clear and certain is the availability of the

1 predeprivation remedy, not the non-availability of the
2 post-deprivation remedy.

3 MR. KATOR: Your Honor, I would submit that what
4 must be clear and certain is the bundle of routes
5 available to challenge the tax. And this brings us back
6 into Brinkerhoff-Faris. They simply can't say you have
7 two statutes, two means to challenge it available to you,
8 both adequate. One is an adequate predeprivation remedy
9 which -- don't misunderstand me. We dispute that there is
10 an adequate predeprivation remedy. But they can't say
11 you've got two routes and therefore since you have two
12 we're going to cut one off. That is unconstitutional.
13 That the Fourteenth Amendment prohibits. And that is what
14 I believe Virginia is arguing that its court should do. I
15 don't think that it's arguing --

16 QUESTION: I think Virginia is arguing that its
17 court has done that.

18 MR. KATOR: Well, I don't think that that can
19 fairly be read from the supreme court's opinion.

20 QUESTION: I realize that, but I just thought
21 that was what the state is arguing.

22 MR. KATOR: Okay.

23 QUESTION: Not that they should do it now, but
24 that they have already done it.

25 MR. KATOR: Correct, Your Honor, and my point is

1 I don't think that it is, it can be seen from that. I
2 think it also bears emphasis that when this case was
3 originally brought in the Eastern District of Virginia the
4 Virginia Attorney General pled the existence of the refund
5 statute as a plain, speedy, and efficient remedy. And I
6 don't think the significance of that should be lost on the
7 Court.

8 The bottom line as we see it, Your Honor, is
9 McKesson's requirement for a clear and certain remedy. I
10 don't think there's any real dispute that Davis must be
11 applied retroactively. That being so, there must be a
12 clear and certain remedy. What we ask this Court to do is
13 no more than say that it meant what it said in Davis, that
14 it meant what it said in Beam, and that it meant what it
15 said in McKesson, and on that basis to reverse the
16 decision below.

17 QUESTION: May I ask you one last question
18 before you -- the second part of the Virginia Supreme
19 Court opinion seems to me to be responding to this
20 argument that you made, and tell me if I am right on your
21 presentation. Did you argue that even if it's not
22 retroactive as a matter of Federal law it is in any event
23 retroactive as a matter of state law, and they said no to
24 that?

25 MR. KATOR: The argument was, my argument was

1 your refund statute says erroneous and illegal. That's
2 the legislature's conclusion of how it wants to gauge
3 this, and therefore you can't play the retroactivity game.
4 This is essentially the argument that was accepted by the
5 Supreme Court of Missouri in Hackman. In rejecting that
6 the Supreme Court of Virginia said no, the retroactivity
7 of Davis comes first and therefore, because we find that
8 Davis is not retroactive, it's not erroneous or illegal.
9 And moreover, just so you know, we have done this before.
10 That's essentially what their state law holding was.

11 If there are no further questions.

12 QUESTION: Thank you, Mr. Kator.

13 MR. KATOR: Thank you.

14 CHIEF JUSTICE REHNQUIST: The case is submitted.

15 (Whereupon, at 11:00 a.m., the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Henry Harper, et al., Petitioners v. Virginia Department

of Taxation

Case No.: 91-734

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)