OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: REYNOLDSVILLE CASKET Petitioner v. HYDE

CASE NO: No. 94-3

PLACE: Washington, D.C.

DATE: Monday, February 27, 1995

PAGES: 1-46

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IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

REYNOLDSVILLE CASKET CO., :

ET AL., :

Petitioners :

v. : No. 94-3

CAROL L. HYDE :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, February 27, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

WILLIAM E. RIEDEL, ESQ., Ashtabula, Ohio; on behalf of the Petitioners.

TIMOTHY B. DYK, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-3, the Reynoldsville Casket Company v. Carol Hyde.

Mr. Riedel.

ORAL ARGUMENT OF WILLIAM E. RIEDEL

ON BEHALF OF THE PETITIONERS

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

The general question that was before the Ohio supreme court was, should a decision that establishes a new rule of law apply to events that occurred before the date of the decision?

The specific issue before the Ohio court was, should the decision of this Court in Bendix v. Midwesco in June of 1988, wherein Ohio's tolling statute, 2305.15, was declared to be unconstitutional as being in violation of the Commerce Clause, apply to time-bar the respondent's lawsuit of August of 1987 for bodily injury arising out of a motor vehicle accident that took place between the parties in March of 1984, and at all times before and after this accident, Ohio had, continues to have, a 2-year statute of limitations for the filing of personal injury actions.

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QUESTION: The accident took place where, in Ashtabula County in Ohio?

MR. RIEDEL: It did, Your Honor.

QUESTION: The parties were Pennsylvanians?

MR. RIEDEL: Everybody. The petitioners, the corporation and its driver were residents of Pennsylvania. The respondent likewise was a resident of Pennsylvania.

Although the Ohio trial court and a court of appeals both answered the specific issue in the affirmative -- in other words, Bendix applies retroactively to the parties and the respondent's lawsuit was time-barred -- when the question was presented to the Ohio supreme court, it reversed the decisions of the lower court and stated that Bendix should not be retroactively applied to the parties in this case. It was not a unanimous decision. It was 5-2.

The rationale of the Ohio supreme court, the majority, for denying the retroactive application of Bendix, was essentially twofold, and it appeared in Parts I and Part II of the majority's opinion.

In Part II of the majority's opinion, the court placed its reasoning on this Court's decision in Harper v. Virginia, and that is clear because the majority stated, even if the Chevron case test has been replaced by Harper, the retroactive application of Bendix remains

impermissible.

QUESTION: Well, how do you overcome Harper, Mr. Riedel?

MR. RIEDEL: I overcome Harper by virtue of the constitutional issue. The violation in Harper was a real violation. There is no constitutional --

QUESTION: So you think there was no constitutional violation here or in Bendix? The statute was not unconstitutional?

MR. RIEDEL: In Bendix, the statute was unconstitutional.

QUESTION: And it is this very statute, is it not?

MR. RIEDEL: It is, but not in this case.

QUESTION: Excuse me? I mean, the holding in Bendix --

MR. RIEDEL: Yes.

QUESTION: -- was that the statute we're talking about --

MR. RIEDEL: -- was unconstitutional.

QUESTION: -- was unconstitutional.

MR. RIEDEL: Exactly. The supreme court of Ohio recognized the unconstitutionality of that statute in this case. The respondent has conceded to the unconstitutional -- of that statute in this case, in that

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sense.

QUESTION: I thought Harper had indicated that backward-looking relief is required.

MR. RIEDEL: Backward-looking relief for underlying constitutional violation. I don't believe that there was an underlying constitutional violation in this case.

The majority went on to state that Harper allows State courts to tailor their own remedies as they determine.

QUESTION: Excuse me, I'm really getting confused here. You're not running away from Harper. You like Harper, don't you?

MR. RIEDEL: I do.

QUESTION: Yes.

MR. RIEDEL: Yes. What I'm trying to do, Your Honor is, Justice Scalia, is distinguish why this majority opinion is wrong.

QUESTION: In that connection, it's my understanding that the only thing that counts in Ohio is the syllabus, that everything else is like a law review article, is that not so?

MR. RIEDEL: Yes.

QUESTION: So that we should look at just this one sentence. The syllabus said, the supreme court

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decision may not be retroactively applied to bar claims which accrued prior to the announcement of that decision. That's the holding of the court, and that's al that counts.

MR. RIEDEL: That is true, Justice Ginsburg, and what the majority went on to state was that Harper, their reading of Harper, allowed State courts to tailor their own remedy as they determine the manner in which a United States Supreme Court opinion was to be retroactively applied.

And what the majority's manner of tailoring in this case was, was to employ a provision of the Ohio constitution, Article I, section 16, and state that that prohibited the application of Bendix to the parties in this case, and specifically with regard to Article I and section 16, the majority stated, "We find that when there is a conflict between a State constitutional civil right, Article I, section 16, and a Federal rule of decision, the Bendix case, that is not rooted in the Constitution, such as retroactivity, the civil right prevails."

The rationale of the majority, in Part II of its decision, in denying full retroactivity to the parties in this case, is wrong, and that's been, I believe, so conceded by the respondent in this case. They state --

QUESTION: Suppose Chevron Oil, where there's

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still some vitality left to it. In that case, shouldn't we uphold the Ohio decision?

MR. RIEDEL: No, and I'd like to talk about that a little later, Justice Ginsburg, as to why, if Chevron is in fact applied, that even if it is applied, it would not achieve the result that the majority found in this case.

The respondent has conceded with the petitioners, we agree, that the clear command of the Supremacy Clause of the Constitution displaces all conflicting State's law. What is left, therefore, in this case to support the denial of full retroactivity of the Bendix decision is the logic of Part I of the majority's opinion, and whereas in Part II was premised upon the majority's reading of Harper, in Part I the court denied retroactivity by resort to a Chevron analysis, and again, that's clear because the court said, "If Chevron remains good law, then Chevron, not Harper, provides the proper test to apply to the present case."

Without quite saying so, I would submit that the majority had its doubts regarding the continued viability of a Chevron analysis. That's evidenced by statements in the majority's opinion that it is unclear whether Harper was intended to replace Chevron or supplement it: if Chevron remains good law, even if Chevron has been replaced by Harper, whether or not Chevron remains good

law.

Despite what I believe were legitimate reservations about Chevron, the court nevertheless went ahead and did a Chevron analysis, and although the majority did not so state, I would submit that its resort to Chevron was solely in the context of a choice of law analysis. In other words, the new law or the old law.

The issue of remedy, the second prong of the court's opinion, was discussed in Part II. In other words, when the court went on to say, Harper allows the courts to tailor their own remedy.

Part I of the opinion, its Chevron inquiry, the term "remedy" was never mentioned by the majority. It never used the term, because I would submit the court viewed Chevron as a vehicle for determining choice of law. Again, old law, resort to the continued use of the tolling statute, or new law, Bendix, 2305.15 is unconstitutional.

QUESTION: Mr. Riedel, is there any choice of remedies in this cas, or is the choice simply between a remedy and no remedy?

MR. RIEDEL: In this case, in my opinion, Justice Souter, there is no issue as to remedies. I believe it is a matter of application of the old law or the new law.

Just as the --

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QUESTION: Is it clear that we have old law and new law here? I thought that perhaps one reading of Bendix at least is that it relied on established legal principles, so it's not a change of law. There's not new law and old law, and that is a way to distinguish Chevron.

MR. RIEDEL: Well, in terms of courts that must follow this Court's decision, this Court's decision -- this Court in 1988 said in Bendix that that statute was unconstitutional.

QUESTION: Under settled legal principles.

MR. RIEDEL: Correct, and between 1988 and when the Ohio supreme court decided this case in February of 1994, those principles had not changed.

QUESTION: So you could just --

QUESTION: And that is my point, and I think -- isn't that a distinction between this case and Chevron?

MR. RIEDEL: No, I don't, sir. I don't think that is a distinction.

QUESTION: Couldn't you just as readily, then, answer my question by saying the choice is between applying Bendix and not applying Bendix, those are the only two choices?

MR. RIEDEL: Yes.

QUESTION: Okay.

MR. RIEDEL: Yes.

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QUESTION: But haven't -- under the Chevron-type approach, haven't we said, if the rule is clearly foreshadowed, it's not a new rule? I mean, that is certainly an argument that could be made here, even if Chevron remained.

MR. RIEDEL: That is true, and even if the court -- I don't believe that the Ohio court looked at Chevron in a remedial sense as you are talking about, but rather, a choice of law, but if --

QUESTION: Well, can we talk --

MR. RIEDEL: Sure.

QUESTION: -- about it here?

MR. RIEDEL: Sure. Even if you did it in a remedial sense, what occurred, in terms of, I think, a time frame in this case is significant to look at.

This accident between the parties occurred in March of 1984. Three days later, March 8 of 1984, the District Court for the Northern District of Ohio in Copley v. Heil-Quaker ruled this particular statute as being unconstitutional. June of 1987, the United States Court of Appeals for the Sixth Circuit in Bendix v. Midwesco, in a unanimous opinion, this statute is unconstitutional.

The respondent's lawsuit was still not filed. Respondent did not file this lawsuit until over 2 months later, August of 1987.

QUESTION: So that when the lawsuit was filed, the doubt about the validity of this statute was established under clearly settled principles --

MR. RIEDEL: That it would not --

QUESTION: -- but that's different than Chevron, and that's a way of distinguishing this case and Chevron, but you don't seem to want to accept that distinction.

MR. RIEDEL: That the -- the statute was clearly settled, I believe.

QUESTION: And I'm asking, isn't that different than the Chevron case, but you say no. You don't want to rely on that distinction.

MR. RIEDEL: Well, certainly, you know, the first test of Chevron is the overruling of past -- or clear past precedent, or deciding an issue of first impression whose resolution was not clearly foreshadowed. The lawsuit had not been filed. These decisions are out there. '84 and '87, this statute was unconstitutional.

QUESTION: It was so because this case relied on well-settled principles. It is different from Chevron.

You seem to be resisting this. I thought it was an argument in your favor. If you don't want to use it, you don't have to.

MR. RIEDEL: Okay. I'm sorry. I would like to use it, and I think I see your point.

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QUESTION: On a less profound level, Mr. Riedel, was it just coincidence that both the vehicles involved in this case were from Pennsylvania?

MR. RIEDEL: I believe so.

QUESTION: Any reason to know why the suit was brought in Ohio rather than Pennsylvania?

MR. RIEDEL: I do not know. I think that would be perhaps a proper question --

QUESTION: Could it have something to do with the statute of limitations and the tolling that would be possible under the old law in Ohio and not in Pennsylvania?

MR. RIEDEL: I don't know, Justice Ginsburg. I don't know.

QUESTION: Do you know what the statute of limitations would have been in Pennsylvania?

MR. RIEDEL: I think it is the same as Ohio.

QUESTION: And that's where under any theory the defendant always was, because the defendant is from Pennsylvania.

MR. RIEDEL: Everybody was from Pennsylvania, and so I believe the statute was likewise 2 years in Pennsylvania. The same rule would apply there.

QUESTION: What is the timing sequence? I've forgotten. When was the Bendix decision?

MR. RIEDEL: Bendix was decided in June of 1988. This Court decided Bendix in June of 1988. This accident occurred in March of '84. The lower court, the district court declaring the tolling statute in Ohio unconstitutional occurred 3 days after this accident. The 6th Circuit declared the same statute unconstitutional approximately 2 months before this lawsuit was filed.

QUESTION: But then it would have already too late.

MR. RIEDEL: Yes, ma'am. Yes.

QUESTION: So the only notice was the district court -- the only hint was the district court decision.

MR. RIEDEL: The district court and the Sixth Circuit.

QUESTION: Well, the Sixth Circuit you said came --

MR. RIEDEL: No.

QUESTION: -- when it would have already been too late under the 2-year limit.

MR. RIEDEL: Yes.

QUESTION: You said the district court decision --

MR. RIEDEL: Yes.

QUESTION: -- was 3 days after the accident.

MR. RIEDEL: Correct, yes.

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QUESTION: But that by the Sixth Circuit had decided, more than 2 years had elapsed since the accident.

MR. RIEDEL: That's correct, and so to address what you had asked me earlier about, if Chevron -- the Chevron test were applied to this case, which the majority attempted to do, or at least they said they were going to do in Part I of the opinion, clearly, they didn't even address the first issue in Chevron, the clear precedent or the foreshadowing argument, because what the Ohio majority said was, Bendix was the first time that any court of binding authority in Ohio State courts had ruled the tolling statute unconstitutional.

That's not the test from Chevron. The test from Chevron, at least the threshold, the first test, is clear past precedent or no clear foreshadowing. I would submit there was a lack of clear past precedent, the district court, the Sixth Circuit decision and, clearly, foreshadowing this Court's decision in June of 1988. The second factors, and the third factor from Chevron's --

QUESTION: I'm not following, because June of 1988 was much too late.

MR. RIEDEL: Yes.

QUESTION: The foreshadowing would have to have been while plaintiff still could have acted on time, so the only thing that could have been -- could count, the

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only decision, is the district court decision.

MR. RIEDEL: If the respondent wanted to rely upon the tolling statute and not the statute of limitations.

QUESTION: Had there been a Delaware case that had struck down a statute similar to this?

MR. RIEDEL: I believe it was in New Jersey.

QUESTION: Oh, it was in New Jersey.

MR. RIEDEL: Yes.

QUESTION: And what was the date of that case?

MR. RIEDEL: That was, I believe, '83, in that area. I believe that was -- or, I don't think it struck it down at that point, but it addressed -- it addressed the issue of a similar tolling statute in New Jersey under the Commerce Clause parameter.

QUESTION: Well, that was our case of Searle v. Cohn.

MR. RIEDEL: Yes.

QUESTION: And we didn't -- we simply have pretermitted that question when we gave our decision, did we not?

MR. RIEDEL: Yes. Yes.

The second and the third test, the Chevron test, the majority never even addressed those tests in this particular case. There was not one word said as to an

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analysis of two and three from Chevron.

What the court did say was that it didn't have to do that because the facts of the two cases were so similar, and I would submit that they're not similar facts, and that they're quite different, Chevron and this case.

What is also uniquely different about the two cases was the manner in which the constitutional challenge was raised. In Chevron, the issue was not raised until after this Court decided Rodriguez v. Aetna. In this case --

QUESTION: Would you refresh my recollection about Chevron? Was that a constitutional case?

MR. RIEDEL: Chevron had to do with which statute of limitations were going to apply to a Louisiana --

QUESTION: And was there any constitutional issue in it? I didn't remember one. That's why I was --

MR. RIEDEL: I don't think so, sir.

Again, going back to the distinction between Chevron and this case, Chevron, the issue was not raised until after this Court decided Rodriguez v. Aetna. In this case, at the very first moment, the petitioners raised the unconstitutionality argument of 2305.15, and the right to rely upon Ohio's 2-year statute of

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limitation.

There was no delay whatsoever on the part of the petitioners in this case. Petitioners did not rely upon anybody to raise the initial arguments that were ultimately ruled upon by this Court in Bendix in June of 1988.

Whether a finding that a decision is -- truly applies retroactively has any practical effect I believe depends upon the remedial implications of that finding. If equitable considerations are ignored, or are to be ignored in assessing the retroactive impact of a decision, as I read the Beam decision, Chevron does not apply to choice of law, we can discard that, but courts are permitted to shape the remedial calculus, then declaring a decision retroactive might be of little consequence.

Other courts will follow the lead of the Ohio court. Yes, it's retroactive, but -- but, State courts, we have the right to tailor our own remedies as we determine the manner in which a decision of the United States Supreme Court is to be applied retroactively.

That's exactly what the majority did in this case. Their resort to the latter inquiry resulted in conferring constitutional status on an unconstitutional statute.

I think there are two points clear from this

Court's decisions in Beam and Harper. All of this Court's rulings apply retroactively unless the Court expressly reserves judgment on the issue.

QUESTION: But we don't have to even assume that here, because I take it the choice-of-law issue is subject to stipulation.

MR. RIEDEL: Correct.

QUESTION: Okay.

MR. RIEDEL: It is. It has been stipulated.

And second, once a decision is applied retroactively to one set of parties, it must be applied retroactively to all similarly situated litigants.

Because 2305.15, the tolling statute, was declared to be unconstitutional by this Court in Bendix in June of 1988, thus permitting Midwesco Industries to avail itself of Ohio's statute of limitations, that same logic should apply to the parties in this case. Anything to the contrary is disparate treatment between similarly situated litigants.

I would respectfully request that the decision of the Ohio supreme court be reversed and this Court reinstate the decision of the lower courts.

Thank you.

QUESTION: Thank you, Mr. Riedel.

Mr. Dyk.

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ORAL ARGUMENT OF TIMOTHY B. DYK

ON BEHALF OF THE RESPONDENT

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

We, of course, do not take issue with the Harper decision on the choice-of-law issue, and I should make clear that in the oral argument before the Ohio supreme court, which came after the Harper decision, Mr. Eardley and Mr. Zulandt did not argue that the Ohio supreme court had any discretion with respect to the choice-of-law aspect of Harper.

We agreed then, we agree now, that the Ohio supreme court had no choice with respect to the choice-of-law issue, and that the first part of its decision suggesting otherwise is wrong.

QUESTION: That's the part that relied on the Ohio constitution?

MR. DYK: No, Your Honor. The second part of the Ohio supreme court decision relied on section I -- Article I section 16 of the Ohio constitution, the right to the remedy provision, and that second part of the Ohio supreme court's decision holds that the right to a remedy provision tolled the 2-year statute of limitations.

And I recognize that unfortunately the Ohio supreme court misperceived its role even in the second

part of the opinion, because what they suggested there was that the Ohio constitution trumps this Court's choice of law rules even if they apply to remedies, but I think what the Ohio supreme court really meant to say, or at least should have said, was that the remedial provisions in the Ohio constitution were consistent with Federal law, were consistent with the Harper case, and we believe that they were, in fact, consistent with the Harper case.

Harper, of course, did not preclude States from applying their remedial schemes to the vindication of Federal rights. A majority of this Court in American Trucking, in Beam, and in Harper, and individual justices have recognized that the issue of remedial discretion is an important one, and --

QUESTION: Well, Mr. Dyk, may I interrupt you there? The word "remedial" gets used throughout this case, but as I understand it, the only issue in this case is whether at some point in the future, or at the present time, for that matter, the savings statute is going to be applied or whether it isn't.

There's nothing to remedy from the past. The State hasn't been acting unconstitutionally. It hasn't been collecting taxes that it shouldn't have collected, and so on. The only question in this case is whether the savings statute is going to be applied or whether it isn't

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going to be applied.

MR. DYK: I don't understand that to be the issue at all, Justice Souter.

QUESTION: Then correct me on that.

MR. DYK: The savings statute, 2305.15, is unconstitutional. It is gone. There is no question about that. The --

QUESTION: So it's not going to be applied.

MR. DYK: It's not going to be applied. It is not --

QUESTION: What's left?

MR. DYK: What is left is the general principle, applied by the Ohio supreme court and reflected in the State constitutional provision, which provides for tolling the 2-year statute of limitations because of surprise to this plaintiff and other people similarly situated. In other words, it is quite a different rule of law.

QUESTION: But the -- isn't the effect of the tolling in effect to come up with a rule which is identical to the savings statute?

So that if you say, well, we will allow tolling as a result of surprise, we are in fact to that extent applying a kind of savings clause which would have been within the savings clause that everyone agrees is unconstitutional, and the analysis is turned into kind of

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a legal shell game.

We say, ah, well, the savings clause as written doesn't apply, but we've got something else just as good which has precisely the same effect.

MR. DYK: Well, Justice Souter, I do not think it has precisely the same effect. With respect to all future cases and all people who are on notice of the Bendix decision, their claims will be precluded unless they are brought within the 2-year statutory period.

QUESTION: But in this case, it will in fact have the same effect.

MR. DYK: It has the same result, but the reasoning is entirely different. The reasoning is not that foreign corporations should be subjected to suit indefinitely. That is not the ground for the State supreme court decision here. The ground for the State supreme court decision is that people who are surprised should have the benefit of tolling of the statute of limitations, and as the Eli Lilly case in --

QUESTION: Or to put it another way, foreign corporations should be subjected to suit indefinitely, brought by people who were relying on their ability to sue foreign corporations indefinitely.

MR. DYK: That --

QUESTION: I mean, it's just slicing out a small

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category of the unconstitutional statute, but it's still essentially applying the same statute.

MR. DYK: No, Justice Scalia, it is not applying the same statute, it is applying Article I, section 16 of the Ohio constitution, which has been applied routinely in other cases to save causes of action where people were not on notice that they should have brought the case.

QUESTION: But here, its effect is to preserve an unconstitutional statute for the benefit of those who are relying on the unconstitutional statute.

MR. DYK: Well --

QUESTION: That is what it does.

MR. DYK: That is true, but we think that there is nothing unusual about that. This Court in the area of Federal law in habeas corpus, in qualified immunity, with respect to statutes of limitations under Chevron, with respect to title VII, has recognized the appropriateness of protecting these reliance interests, and if --

QUESTION: Mr. Dyk, on the question of reliance interest, this case seems to me different from the Chevron Oil. Was there any reason why this plaintiff could not have sued either in Pennsylvania or in Ohio within the 2-year limitation?

MR. DYK: Let me see if I can explain, Justice Ginsburg, the situation. The accident took place in

Ashtabula, which is very close to the Pennsylvania border. The plaintiff retained shortly after the accident an Ohio lawyer who states that he relied on the tolling provision which was invalidated in Bendix in not bringing suit, and now one of the reasons for suing in Ohio rather than in Pennsylvania would be, for example, that the witnesses, the trial witnesses would not be subject potentially to subpoena in Pennsylvania, such as the State police officer or the ambulance --

QUESTION: Yes, but as far as suing in Ohio, the long arm had been long on the books. There was no impediment to suit in Ohio. The tolling for an out-of-State defendant had long ago become anachronistic, hadn't it?

MR. DYK: Well, I don't think it had become anachronistic. There was, in fact, no decision in the Ohio State system, and we are talking about the Ohio State system, suggesting that that tolling provision was in any way --

QUESTION: But what was the reason, Mr. Dyk, for the tolling provision originally? Why were statutes of limitations tolled against out-of-Staters?

MR. DYK: I think the reasons are articulated in this Court's decisions in Searle and Bendix, that it is sometimes difficult to use long arm statutes, and it is

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easier for people to use the tolling provision and rely on that, and that's what happened here.

QUESTION: Didn't the tolling provisions come in in a day when there were no long arms? Isn't that the derivation?

MR. DYK: Yes, they did, but they were interpreted to continue to have validity after the long arm statutes came in, and if a lawyer is sitting in his office in Ashtabula and trying to figure out when he's supposed to bring suit, he looks at the statutory provisions and he says, I have an indefinite period of time to bring suit, because I am dealing with an out-of-State corporation, and then he goes to research the law.

What does he find? What he finds is a New Jersey decision in mid-1983 saying that the New Jersey statute is unconstitutional, but the New Jersey statute is very different from the Ohio statute.

QUESTION: But you could not take into account the enormous difference between a world without long arms, where you had to put your hands on the defendant in the State, and the time when it was just a matter of sending notice by mail?

MR. DYK: Justice Ginsburg, the statute may not have been desirable policy, the statute may have not been necessary any more, but the statute was there on the

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books, and people relied on it, and they are, we think, entitled to rely on tolling provisions on the books that have never been questioned in the Ohio courts and that have been routinely applied.

QUESTION: How about the district court decision, Mr. Dyk?

MR. DYK: There were three district court decisions. Judge Potter had decided the statute was unconstitutional in two companion cases, one of which came up to this Court as Bendix. Judge Rubin and Judge Brown had reached opposite results. they held the statute constitutional. Now, none of these three decisions was reported or accessible to ordinary lawyers. We're talking 10 years ago, before LEXIS and WESLAW.

QUESTION: They weren't in Fed Supp, or --

MR. DYK: They weren't in -- none of the three was in Federal Supplement, but there was a conflict there in the district courts.

There was no Sixth Circuit authority on this, and there certainly was no authority in the Ohio court system suggesting in any way, shape, or form that this statute was invalid, and under this Court's decisions applying Chevron, we understand that you are entitled to look to the decisions within the forum, within the jurisdiction, and anyone doing that would not have found

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reason to believe that the statute was unconstitutional.

And as I started to suggest earlier, while this Court's decision in Searle might have raised a question about the New Jersey statute, the New Jersey statute was very different from the Ohio statute. The New Jersey statute required that you become licensed to do business in the State as a way of getting the statute of limitations to run. The Ohio statute had no such requirement in it. It merely required the employment of an agent for service of process.

Now, the difference between the two is significant, because under the New Jersey statute, when you registered you became liable to taxation in the State. The Ohio statute imposed no such requirement, and this Court in Searle suggested strongly at the end of its opinion that there was a critical difference between a statute like the New Jersey statute and a statute like the Ohio statute, so it wasn't so clear that even if this New Jersey decision were correct, that it would apply in Ohio.

Now, the only other published decision that came along was the decision of the Sixth Circuit in Bendix, which came along about 2 months before this plaintiff filed suit. Again, it's not a decision of the Ohio system. It was on review in this Court, but even if she were bound to look at that, if she'd looked at it we

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certainly think that filing suit approximately 2 months later was filing within a reasonable time and that Ohio, applying its right-to-a-remedy provision, could protect that interest legitimately.

QUESTION: Mr. Dyk, why isn't a basic Federal principle of equal treatment applicable here? You're talking about unfairness to the plaintiff whose lawyer might not have realized that tolling provisions were becoming obsolete, but what about Reynoldsville Casket point that Bendix got off? I am entitled to be treated the same way Bendix is treated. What about the disparity in the treatment of identically situated defendants?

MR. DYK: Well, there would not be normally a disparity in the treatment of identically situated people, because this Ohio constitutional provision would apply to any suit that was brought in Ohio. That issue apparently wasn't raised in the Bendix case. If they'd raised that issue, they would have been treated the same way as Mrs. Hyde. That is, that there would have been tolling of the statute of limitations as a result of this surprise factor.

We have suggested on our brief, and this is important, that we satisfy the Chevron Oil standard, which is --

QUESTION: Before you go -- I asked, why should

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we ever rule on the unconstitutionality of a statute of limitations, then? I mean, it's really a phony case.

Ohio can go ahead and pass all the unconstitutional statutes of limitations it wants, because there's no case in which I can see anybody has standing, because you know if you strike it down the Ohio supreme court's going to be say, well, yes, it was an unconstitutional one, but in light of the fact that you relied on it, we'll allow you to have that additional time. How do you ever get a lawsuit?

MR. DYK: But that happens all the time, Justice Scalia, and that is the law about adequate and independent State ground in this Court which is very similar. A lot of people --

QUESTION: Oh, but --

MR. DYK: -- bring cases with Federal issues in them. The Federal issue may not ultimately be responsive --

QUESTION: No, but Mr. Dyk, that goes to the -- doesn't adequate and independent State ground go to the choice of law? In other words, we would say, you can't raise this issue. You cannot, in effect, proffer the claim for relief, because there's some kind of a State bar.

We've passed that point. You've raised your

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claim, your claim is good, there is no question that Bendix applies, and it seems to me the question in this case is whether, in an instance in which there is no choice of remedy in the sense that there may be remedy A, B, or C, as in tax cases for example, in a case in which there is only one choice, and that is, if you apply the statute, if you apply the constitutional rule, you can't apply this statute, the alternative being that if you apply this statute, you are in fact not applying the constitutional rule, is there really any choice of remedy, and I would suppose that this case was distinguishable from the paradigm of the tax cases in which there are various alternatives.

There's just an either-or question here, and if you answer the remedial question differently from the choice-of-law question, you come back to what I suggested a moment ago. It's just kind of a shell game. Now you see it, now you don't.

MR. DYK: But Justice Souter, that happens frequently. It happens in Federal habeas, it happens in qualified immunity, it happens --

QUESTION: Ah, but Federal habeas I think is a slippery analogy, because in Federal habeas we've already -- the very premise in Federal habeas is that there has already been one completed process of direct

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appeals in which these kinds of issues can be raised. Federal habeas is a supplementary process.

There's nothing supplementary about this. The only way the defendants in this case can raise the constitutionality of the savings clause is the way they've raised it. This is their only shot.

MR. DYK: But Justice Souter, in at least two cases, Chevron Oil and St. Francis, this Court has held it appropriate to toll statutes of limitations under Federal law where there has been surprise. It is a traditional thing to have tolling of statutes of limitations where people are surprised.

QUESTION: Well, I would like to say there's a distinction because of the constitutional rule that we're dealing with here, although I recognize that there have been instances in which the Court has not immediately applied its constitutional rule, but even in those cases, I would suppose that the prospective application to the particular claimant was such that there was not being a denial of all relief simply by deferring constitutional relief.

Here, however, there's an either-or choice. This claimant gets it, or this claimant gets nothing.

MR. DYK: Well, I think that was true in Chevron and St. Francis also. It happens --

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QUESTION: Which were not constitutional cases.

MR. DYK: They were not constitutional cases, but they arose under Federal law, and I would have supposed, Justice Souter, that the States had greater authority than the Federal courts to define the appropriate scope of their statutes of limitations. They --

QUESTION: Well, you -- I'm sorry. I didn't mean to interrupt you.

MR. DYK: Well, I was going to refer to the Chase case, which recognizes that States can go so far as to revive an entirely expired statute of limitations. There are many State doctrines which preclude the litigation of Federal claims. Res Judicata is one of them. If this Court decides a case, the States are not obligated to go back and reopen closed cases.

QUESTION: But don't you think the States, the options open to the States are affected by Beam and Harper, because it seems to me that if the Ohio court can do what you want it to do, then all of the professions in Beam and Harper are very hollow, because in fact the statute can apply -- the ruling can apply in the first case, the ruling can therefore necessarily be retroactive, because there's no selective prospectivity, but it doesn't make any difference, because the remedial hand can simply

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take away what the choice-of-law hand hath given.

MR. DYK: Justice Souter, I don't believe that's true. First of all, the State at a minimum has to be an applying an established and legitimate principle of law to deny the Federal right. That's required by the Supremacy Clause, and here I think there's no question, there's not even an argument that Ohio was in any way discriminating against the Federal right, and I think it is clear from its case --

QUESTION: No, it's just saying, we won't honor it.

MR. DYK: We won't honor it, but it's not doing anything that's peculiar to the Federal right. It's treating State claims and Federal claims the same, and it's saying, when there's surprise we're going to protect people. That, we suggest, is a legitimate State interest.

QUESTION: But ordinarily that sort of legitimate State interest doesn't triumph over, you know, a flat declaration that the thing is unconstitutional from this Court on Federal grounds.

MR. DYK: But frequently, Mr. Chief Justice, it does. In the example of harmless error, which was discussed recently in this Court's decision in O'Neill, or forum non conveniens, there's a whole range of State remedial doctrines which may trump, if you wish to put it

that way, may trump the Federal right and may deny enforcement of the Federal right. It happens all the time.

QUESTION: But the harmless error doctrine is itself a Federal doctrine from Chapman v. California. It says a State may affirm a conviction if it's convinced that a constitutional error beyond a reasonable doubt did not cause any harm to the defendant.

MR. DYK: But the harmless error doctrine in a State court, in a State case, originates as a matter of State law, and the question is, is it consistent with this Court's rules. The same thing is suggested --

QUESTION: But even in that instance, Mr. Dyk, the very premise of applying harmless error is that there is nothing that requires a remedy, i.e., a mistake was harmless. Nothing need to be corrected.

Here, you are looking at a prospective application of a constitutional standard, and you are going in effect to deny this person the benefit of a constitutional rule.

Those cases aren't comparable.

MR. DYK: Justice Souter, I take the example of res judicata, for example. This Court says in Bendix that this tolling statute is unconstitutional. The State says, we have a rule of res judicata. We're not going to open

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closed cases.

Well, those closed cases remain closed, the people --

QUESTION: But those were cases at least, as I was saying about habeas, in which somebody had a shot at raising the issue, and you know,we can argue and give an instance as to whether the person was at fault or negligent, or what-not, for not raising the issue and prevailing, but in any event, there's no such arguable choice here. This is the only time, the only case in which this issue can be raised.

MR. DYK: Justice Souter, I don't agree with that. I think that this issue could have been raised, at least in theory, by Reynoldsville Casket, for example, bringing a declaratory judgment after the accident to have this provision of the Ohio statutes declared unconstitutional, and they --

QUESTION: You want them to go in and invite the lawsuit in order to get the benefit of a constitutional remedy?

MR. DYK: I'm merely suggesting that there is a remedy here, that it's not a situation in which there is no remedy available.

The traditional remedy, of course, is to raise it as a defense.

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MR. DYK: But for what it's worth, that still doesn't put them on par with the individual who has litigated, for example, a direct appeal on habeas, or has already had an opportunity for litigation in the normal, we assume the normal adversarial context under the res judicata rules.

You're saying, well, in order to avoid unconstitutionality, they should have taken the affirmative step of beginning their own litigation.

MR. DYK: Well, I'm --

QUESTION: And maybe they should have, but I mean, the two situations are not comparable.

MR. DYK: I'm not saying they should have. I'm saying that that is an option that was available to them. There is a potential remedy.

QUESTION: Well, you're saying they should have as a basis for justifying Ohio's result.

MR. DYK: Well, I think that Ohio is entitled to make the choice, as it does routinely and across the board. It is not discriminating against the Federal right. It is simply deciding a remedial issue.

QUESTION: But discriminating or not, it is in effect ruling that the Ohio constitution can make the Bendix decision prospective only in Ohio. That's the effect of it, is it not?

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MR. DYK: That is the effect of it, but not as a choice-of-law matter, as a remedial matter of saying that where people are surprised --

QUESTION: Whatever label you put on it, the result is a prospective application of a decision that this Court declared to be fully retroactive.

MR. DYK: Well, I do think the label reflects real substance underlying the Ohio rule of decision.

There is a huge difference, both as a practical matter and in theory between saying as a choice-of-law matter we refuse to apply Bendix retroactively and saying, we apply Bendix retroactively, we recognize that we are bound by --

QUESTION: But that, Mr. Dyk, is what Ohio said. I asked a question of Mr. Warren, is it isn't what -- under Ohio's own law what counts is the syllabus, and under the syllabus, section 16 of Article I of the Ohio constitution -- under that provision, recent U.S. Supreme Court decisions may not be retroactively applied to bar claims in State courts which accrued prior to the announcement of the decision. That is the holding of the Ohio supreme court.

MR. DYK: Yes, and Justice Ginsburg, in the syllabus they rely on Article I, section 16 of the constitution. They are -- which is a right to a remedy

provision.

They are relying on a right to a remedy provision, mistakenly saying that that trumps this Court's rules about retroactivity, but I think it is nonetheless clear what they are saying, even though they should have said it differently: that there is a right to a remedy here when you are surprised.

As this Court has frequently held in past cases involving State law, all sorts of law, where you are surprised you get the benefit of tolling of the statute of limitations, and we don't think that that's an exceptional thing, and it has been done at least twice by this Court in St. Francis and Chevron, and in Glaus, for example --

QUESTION: Well, however, you recast the decision, correct me if I'm wrong, I thought it was the statute of law of Ohio that the holding of the case, the case law comes out of the syllabus and not the opinion.

MR. DYK: The opinion may be used to interpret --

QUESTION: Clarify.

MR. DYK: Clarify and interpret the syllabus, and we agree that to the extent that they said that the Ohio constitution trumps some Federal principle, they were wrong.

What they should have said was, and this is what

we urged on them -- we did not urge to the contrary. What we urged on them was that the Ohio constitution, the right to a remedy provision, was consistent with Federal law, and that they could, at one and the same time, recognize that they were bound by the Bendix decision, but take account of the surprise factor by applying this right to a remedy, this provision of the Ohio constitution.

QUESTION: I suppose there's no reason why such a provision, if it's operative against Federal decisions, couldn't be applied to substantive matters as well. That is, if there is a surprise ruling by this Court that a particular substantive provision of Ohio law is unconstitutional, the Ohio court could say, well, you know, that's a surprise, and we're going to preserve expectations by not applying that retroactively.

MR. DYK: I would have a serious question about that, Justice Scalia.

QUESTION: Why? Why is that different from this?

MR. DYK: Well, first of all, if a decision of this Court says that a Federal right does not exist, Ohio could not continue to apply --

QUESTION: Not a Federal right doesn't exist, that the State -- the State substantive provision is unconstitutional, under which a plaintiff was suing.

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MR. DYK: And you would have to inquire, under those circumstances, whether the reasons that Ohio gave for preserving the State substantive provision were legitimate or illegitimate, and probably in most cases they wouldn't be legitimate. I don't think that --

QUESTION: Well, if they were legitimate, if they were genuinely protecting expectations, I guess you'd have to say its okay.

MR. DYK: I don't think we're arguing, Justice Scalia, that the State in all circumstances can preserve expectations. What we are saying is, we ask you to look specifically at this case. It involves the statute of limitations.

It is traditional both in Ohio and in the Federal system to toll statutes of limitations where there is surprise, and we are saying that in those limited circumstances it is legitimate for the Ohio supreme court to say, if there is surprise, we are going to toll the statute of limitations. We do it in other situations. We are going to do it in this situation.

That is a legitimate State interest. It is an established State interest. It is a nondiscriminatory State interest.

QUESTION: Mr. Dyk, can I ask you a more basic question? I fully understand your drawing an important

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distinction between the choice-of-law rule and the remedy rule, and you say here all you're doing is talking about remedy.

But is it not at least arguable that in this case we've held, as a matter of constitutional law, that it's a burden on interstate commerce to compel this out-of-State company to defend a lawsuit that's filed after the normal statute of limitations is run, in which event we're not really talking about remedy, but we're talking about whether or not we will allow another constitutional violation to take place?

MR. DYK: Well, I think the question is whether the Ohio supreme court's decision represents an independent constitutional violation, and it is not, we suggest, a violation of the Commerce Clause, it is a nondiscriminatory rule.

The petitioner in this case does not urge that the Ohio supreme court has violated the Commerce Clause. They are urging --

QUESTION: No, but they're arguing, as they did in Bendix, that requiring us to defend, unlike -- at a time when a local company would not have to defend, is itself a violation of the Commerce Clause.

MR. DYK: But the rule of Bendix rested on the notion of discrimination on the --

QUESTION: No, Justice Scalia's position rested on discrimination. The majority rested on balancing rocks against lions, or something like that, as I remember it.

(Laughter.)

MR. DYK: But what it held was applying Commerce Clause principles. Whether you characterize those as nondiscrimination principles, certainly the interest in the protection of interstate commerce was one side of the balance, and what we're suggesting here is that Ohio is not doing what it did in the foreign corporation provision. It is not saying that we are going to create a situation where foreign corporations do not get the benefits of the statute of limitations. That is not the holding at all. What they are saying that anybody who is surprised will --

QUESTION: But it is for Reynoldsville. Reynoldsville is being treated by the Ohio courts just the way Bendix was.

MR. DYK: But Mr. Chief Justice, I would not have understood that a foreign corporation can claim immunity from all State rules of law simply because it is an out-of-State corporation if it faces a nondiscriminatory rule, and we suggest that the rule of surprise here is a nondiscriminatory rule. It cannot claim a Commerce Clause violation any more than any

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corporation --

QUESTION: That's just another way of saying it's giving a different reason for the same unconstitutional violation.

MR. DYK: Justice Stevens, I don't think so. I think what it is doing is it's applying an entirely different rule of State law resting on other considerations which have nothing to do with whether they are a foreign corporation or a domestic corporation, that anyone can take advantage of the Ohio tolling rule which --

QUESTION: But that rule is shaped around the former Ohio tolling rule. It is entirely shaped around it.

MR. DYK: No --

QUESTION: You certainly would not allow them to bring the suit later than that rule would have allowed.

MR. DYK: Justice Scalia, it is not shaped --

QUESTION: You measure it by that rule.

MR. DYK: Justice Scalia, it is not shaped by the tolling rule that was held invalid in Bendix. If you look at the decisions that the Ohio supreme court cited in this case, the Hardy decision, the Eli Lilly decision, gong back to 1882, and --

QUESTION: You misunderstand me. I'm not saying

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that they're applying the same statute. They are applying a rule of surprise. But what are you enabled to do by reason of the surprise?

What you are enabled to do by reason of the surprise is to sue for as long as that old, unconstitutional would have allowed you to sue. Not any longer than that.

MR. DYK: Well, what it allows you to do is to sue for a reasonable time after the earlier statute was invalidated. We --

QUESTION: But that's an ongoing constitutional violation. What Ohio has done is to say that we cannot cease an ongoing constitutional violation, and that seems to a) questionable and b) distinguishable from Chevron.

MR. DYK: Justice Kennedy, I do not think it is distinguishable on the facts from Chevron, and I do think that applying the Chevron rule here suggests that we should prevail, but in our view the Chevron rule is too restrictive. This ought to be judged by other principles such as those articulated in Howard v. Rose, and the State limitation should be sustained unless it is discriminatory, not established, not reasonable. We think this one is reasonable.

QUESTION: Thank you, Mr. Dyk.

MR. DYK: Thank you.

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QUESTION: Mr. Riedel, you have 7 minutes remaining.

MR. RIEDEL: Mr. Chief Justice, I will waive the balance of my rebuttal argument.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 11:52 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)