

TO PROHIBIT A STATE FROM IMPOSING A DISCRIMINATORY
COMMUTER TAX ON NONRESIDENTS

—————
JUNE 25, 1999.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. HYDE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2014]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2014) to prohibit a State from imposing a discriminatory commuter tax on nonresidents, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 2014 provides that states must tax the income of residents and nonresidents in a substantially equal manner. The Committee hopes to codify the standard enunciated by the Supreme Court in *Austin v. New Hampshire*, 420 U.S. 656 (1974). That standard, affirmed by the Court in later cases, is a “rule of substantial equality of treatment for the citizens of the taxing state and the non-resident taxpayers.”¹ The case law, and this bill, are based on the Privileges and Immunities Clause, U.S. Const., art. IV, section 2, which provides that “citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

BACKGROUND AND NEED FOR THE LEGISLATION

The Privileges and Immunities Clause, provides that “citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”² The Supreme Court has held that the Clause “plainly and unmistakably secures and protects the right of a citizen of one State to travel into any other State . . . [and to] be exempt from any higher taxes or excises than are imposed by the [other] State upon its own citizens.”³ In applying the clause to states’ taxation schemes, the Court has required that such schemes follow a “rule of substantial equality of treatment for the citizens of the taxing state and the non-resident taxpayers.”⁴ The Court explained the rationale for requiring only *substantial* equality when it wrote:

As a practical matter, the Privileges and Immunities Clause affords no assurance of precise equality in taxation between residents and nonresidents of a particular State. Some differences may be inherent in any taxing scheme, given that, like many other constitutional provisions, the privileges and immunities clause is not an absolute, and that absolute equality is impracticable in taxation.⁵

Therefore, the Court’s analysis under the Clause focuses on “the practical operation and effect of the tax imposed.”⁶

Nonetheless, the Court has also held that disparate treatment of residents and nonresidents may be permissible under some circumstances, particularly “in analyzing local evils and in prescribing appropriate cures.”⁷ Specifically, such disparate treatment is allowed by the Clause if “(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against non-residents bears a substantial relationship to the State’s objec-

¹Austin, 420 U.S. 662. See also *Lunding v. New York Tax Appeals Tribunal*, ___ U.S. ___, 118 S.Ct. 766, 774 (1998).

²U.S. Const., art. IV, section 2,

³*Ward v. Maryland*, 79 U.S. (12 All.) 418, 430 (1870). See also *Shaffer v. Carter*, 252 U.S. 37, 56 (1920) (describing the Clause as securing the right of a citizen of any state to “remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to”).

⁴*Austin v. New Hampshire*, 420 U.S. 656, 662 (1974). See also *Lunding* 118 S.Ct. at 774 (1998); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U.S. 522, 527 (1919).

⁵*Lunding*, *id.* (alterations, citations, and quotations omitted).

⁶ *Shaffer*, 252 U.S. at 55; See also *St. Louis Southwestern R.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914)

⁷*Toomer*, 334 U.S. at 396.

tive.”⁸ Although the Court has written little to further define the “substantial reason” standard,⁹ commentators have written that the standard is the “mirror image” of a fundamental rights analysis and the exception to the Clause therefore covers those rights which are not fundamental.¹⁰

This bill, which codifies the common law standards elucidated by the courts, was introduced after the state of New York passed a law exempting New York state residents from New York City’s commuter tax.¹¹ The resultant situation is similar to that in Austin, where the Court struck down the discriminatory commuter tax.¹² The New York State Legislature specifically contemplated that the tax might be declared unconstitutional and provided, in the legislation itself, that in that eventuality, the commuter tax be repealed in its entirety.¹³ At the time of the Committee vote to report the bill, there were at least two pending lawsuits against New York, filed by the Attorney Generals of Connecticut and New Jersey.¹⁴ The judge in those cases has ordered New York to show cause why the law should not be ruled facially unconstitutional.¹⁵

HEARINGS

No hearings were held on this legislation.

COMMITTEE CONSIDERATION

On June 22, 1999, the the Committee met in open session and ordered reported favorably the bill H.R. 2014 without amendment by a recorded vote of 17 to 7, a quorum being present.

VOTE OF THE COMMITTEE

Motion to report favorably the bill. Passed 17 to 7.

AYES
Mr. Hyde
Mr. McCollum
Mr. Gekas
Mr. Coble
Mr. Smith
Mr. Gallegly
Mr. Canady
Mr. Bryant
Mr. Chabot

NAYS
Mr. Conyers
Mr. Nadler
Mr. Scott
Mr. Watt
Ms. Lofgren
Ms. Waters
Mr. Weiner

⁸Lunding, 118 S.Ct. at 774 (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)).

⁹See, e.g., Lunding, 118 S.Ct. at 774-75 (requiring a “standard of review substantially more rigorous than applied to [intra]state tax distinctions among, say, forms of business organizations or different trades and professions”).

¹⁰See, e.g., *The Supreme Court, 1997 Term—Leading Cases*, 112 Harv. L. Rev. 132, 141-42 (1998).

¹¹Senate Bill No. 5594, 222nd Leg., 1999-2000 Sess. (N.Y. 1999).

¹²See *Austin*, 420 U.S. at 665-68.

¹³N.Y. Senate Bill No. 5594 § 9.

¹⁴*Connecticut v. New York*, No. 99-111325 (N.Y. Sup. Ct. filed May 31, 1999); *Quinn v. Pataki*, No. 99-111322 (N.Y. Sup. Ct. filed May 31, 1999). See also *Igoe v. Pataki*, No. 99-111230 (N.Y. Sup. Ct. filed May 31, 1999) (lawsuit filed by individual residents of Connecticut and New Jersey).

¹⁵Letter from Hon. Jerrold Nadler, Member of Congress, to Hon. Henry Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives 1 (June 22, 1999) (on file with the Committee).

Mr. Barr
 Mr. Jenkins
 Mr. Cannon
 Mr. Graham
 Mr. Berman
 Mr. Meehan
 Mr. Wexler
 Mr. Rothman

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of Rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives.

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of Rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will have no budget effect for fiscal year 2000.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, clause 8, section 3 of the Constitution and in Article IV, clause 2, section 1 of the Constitution.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Prohibition on imposing discriminatory commuter tax on nonresidents

Section 1(a) prohibits states from imposing an income tax on nonresidents which does not treat them substantially equal to citizens of the state. The Committee obviously does not intend to prohibit states from treating nonresidents more favorably than they do their own citizens, if they so determine, as that is clearly a matter of internal choice over which the taxpayers who would be adversely affected have political control. Taxpayers of another state, if subject to disparate taxation, would clearly have no ability to rectify such treatment.

Section 1(b) designates both the District of Columbia and any political subdivisions of a state as states for purposes of section 1(a).

DISSENTING VIEWS

This legislation was introduced on June 7, was never referred to the Subcommittee on Commercial and Administrative Law, which has jurisdiction over the matter under Committee Rule V(b)(3), and has never been the subject of any hearings, administration comment, or any review of which we are aware. Because this legislation would affect tax laws in almost every state, we believe it merits the careful consideration this committee has neglected. For the reasons stated below, we respectfully dissent.

The bill would prohibit a state from “impos[ing] a tax on the income earned in the State by nonresidents unless the tax is of substantial equality of treatment for the citizens of the State and the nonresidents so commuting.” The legislation would appear to prohibit states from taxing non-residents more *or less* harshly than they do their own citizens. As discussed below, discriminatory treatment of non-residents in taxation is already prohibited by the Constitution. Thus, the proposed legislation would change existing law by barring more favorable treatment of non-residents by state tax laws. This change appears inadvertent.

According to the sponsor, the legislation was introduced to prevent New York State from exempting New York State residents from New York City’s non-resident income tax, while still allowing The City to collect such taxes from out-of-state residents who earned income in The City.¹ By its terms, however, it applies to all states that tax non-residents on income earned within their borders.

The legislation appears to be a response to legislation enacted by New York State which exempted residents of New York State from the payment of a non-resident income tax on income earned within The City, which has been in force for more than three decades.² It did so by changing the definition of “city nonresident individual” in sec. 1305(b) of the Tax Law³, and of “nonresident individual” in section 25-m(h) of the General City Law⁴ to mean a person who is not a resident of The City (as it is under current law) or the state, which effectively makes only residents of other states “non-residents.” The new law takes effect July 1, 1999. It has been challenged in numerous court proceedings. In one case brought by residents of New Jersey, a state trial court in New York has ordered the State to show cause why the legislation is not unconstitutional on its face.⁵

¹“To subject only out-of-state commuters to the New York City tax is unfair, unreasonable and may well be unconstitutional.” *New York City Commuter Tax*, (Statement by Rep. Bob Franks), <http://www.house.gov/bobfranks/nyctax.shtml>.

²S. 5594B, 1999 N.Y. Laws 5 (May 27, 1999).

³Sec. 1.

⁴Sec. 2.

⁵*Quinn et. al. v. Pataki et. al.* N.Y.Sup.Ct. No. 111322/99.

Constitutional Issues: The Supreme Court has held that the Privileges and Immunities Clause of the Constitution⁶ protects the rights of citizens of any state to “remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to.”⁷ As far back as 1871, the Court has held that a state may not discriminate substantially between residents and nonresidents.⁸ This principle has been interpreted by the court as requiring “a rule of substantial equality of treatment” (the same language which is used in H.R. 2014) for resident and nonresident taxpayers.⁹ This rule was reaffirmed by the Court as recently as last year.¹⁰ In both *Shaffer*, and in a companion case, *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), the Court held that non-residents deductions may be tied to in state activities, but struck down a particular tax because it denied to non-residents exemptions which were allowed to residents. The Court has, however, granted states substantial deference in evaluating their tax laws, requiring not precise equality, but rather that “the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents.”¹¹

This legislation deals with the very complex area of interstate taxation. It is not written specifically to address the New York and New Jersey case, but would apply to every jurisdiction in the United States. We believe that it is a mistake to report it with such undue haste without giving the Subcommittee the opportunity to hold hearings on it. The New York State legislation which gave rise to this bill is also the subject of pending litigation brought by citizens and officials of the States of New Jersey and Connecticut. A trial court in New York has already ordered the State to show cause why the law should not be ruled facially unconstitutional.

To the extent that this bill reflects the current state of constitutional jurisprudence, we have no objections, but the Committee should take the time to understand what other effect it may have nationally on state tax laws. This we have not done, and that is a mistake.

We do not necessarily approve of the New York law at issue, which summarily stripped the City of New York of its power, exercised for more than 30 years, to tax non-resident income, but only with respect to individuals who are not residents of New York City, but who are residents of New York State. The New York law would, therefore, allow New York City to continue to tax income earned by non-residents of New York State in New York City. This change has been estimated by New York City Comptroller to cut New York City tax revenues by approximately \$4 billion over the next decade. We believe that jurisdictions have the right to tax economic activities within their borders so long as it is done consistent with the requirements of non-discrimination as set out in the Constitution. New York’s law, until the enactment of this recent change, was constitutional. We believe the courts will quickly inval-

⁶U.S. Const. Art. IV, Sec. 2.

⁷*Shaffer v. Carter*, 252 U.S. 37 (1920).

⁸*Ward v. Maryland*, 12 Wall. (79 U.S.) 418, 424 (1871).

⁹*Austin v. New Hampshire*, 420 U.S. 656, 665 (1975).

¹⁰*Lunding, et. ux. v. New York Tax Appeals Tribunal, et. al.*, 522 U.S. 287 (1998).

¹¹*Travellers’ Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902).

idate this new law, but we do not think we should compound the error by rushing an ill-considered bill through the process without careful review.

Whatever the merits of the New York dispute with its neighboring states, the Committee needs to consider that this legislation would apply to every state which taxes income earned within its borders by non-residents. The normal process observed by our committee would be to assess the impact this legislation would have on the myriad state tax laws nationally, rather than focusing on one cross-border tax dispute. For example, Illinois has negotiated a reciprocal agreement on non-resident income taxes with Wisconsin, because Illinois found it was losing revenue to neighboring states. It has yet to conclude a similar agreement with Indiana. How would this legislation affect the ability of Illinois to protect its rights in dealing with neighboring states? We need to look at these issues.

We understand that this is a political hot potato in New Jersey and Connecticut, but that is no reason to rush this legislation through the process which could drastically alter state taxing authority without any review. For these reasons, we respectfully dissent.

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ROBERT C. SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
ANTHONY D. WEINER.

