Bill as Introduced

HB 104 - AS INTRODUCED

2017 SESSION

17-0180
09/10

HOUSE BILL ***104***

AN ACT repealing the commuters income tax.

SPONSORS: Rep. McGuire, Merr. 29; Rep. Phinney, Straf. 24

COMMITTEE: Ways and Means

ANALYSIS

This bill repeals the provisions of RSA 77-B, the commuters income tax.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 104 - AS INTRODUCED

17-0180
09/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Seventeen

AN ACT repealing the commuters income tax.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Repeal. RSA 77-B, relative to the commuters income tax, is repealed.

2 Effective Date. This act shall take effect 60 days after its passage.

Committee Minutes

Senate Ways and Means Committee

Sonja Caldwell 271-2117

HB 104, repealing the commuters income tax.

Hearing Date: April 5, 2017

Members of the Committee Present: Senators Sanborn, Daniels and Feltes

Members of the Committee Absent: Senators Giuda and D'Allesandro

Bill Analysis: This bill repeals the provisions of RSA 77-B, the commuters income tax.

Sponsors:
Rep. McGuire Rep. Phinney

Who supports the bill: Will Anderson, Darryl Perry (Liberty Lobby), Rep. Abrami

Who opposes the bill: no one

Who is neutral on the bill: no one

Summary of testimony presented:

Rep. Abrami stated that this has been on the books for many years but was proven unconstitutional along the line and never implemented. Rep McGuire is good at cleaning up old statutes. This bill just takes it off the books.

Sen. Sanborn declared he might have a conflict.

Carollynn Ward- DRA
This tax was enacted in 1970 to be imposed on non-NH residents who earn income in NH at a rate of 4%. The US Supreme Court, in 1975, said it was unconstitutional. It has stayed on the books. DRA doesn't administer it or collect any tax.
Sen. Feltes asked the name of the case from 1975.
Ms. Ward provided a copy of the case to the committee.

sc
Date Hearing Report completed: April 5, 2017

Speakers

SENATE WAYS & MEANS COMMITTEE

Date 4/5/17 Time 9:00 a.m. Public Hearing on **HB104**

(repealing the commuters income tax.)

Please check box(es) that apply.

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
☐	☑	☐	Will Anderson	Self
☐	☒	☐	Darryl W Perry	Liberty Lobby LLC
☐	☑	☐	Rep Pat Abramo	Rockingham 19
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Testimony

AUSTIN ET AL. v. NEW HAMPSHIRE ET AL.

No. 73-2060

SUPREME COURT OF THE UNITED STATES

420 U.S. 656; 95 S. Ct. 1191; 43 L. Ed. 2d 530; 1975 U.S. LEXIS 106

January 15, 1975, Argued
March 19, 1975, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

DISPOSITION: *114 N. H. 137, 316 A. 2d 165*, reversed.

SUMMARY:

Residents of Maine who were employed in New Hampshire petitioned the New Hampshire Superior Court for a declaration that the New Hampshire Commuters Income Tax violated the New Hampshire and United States Constitutions. The tax was levied on nonresidents' New Hampshire derived income and was, in effect, the only individual income tax levied by New Hampshire. After the cause was transferred directly to the New Hampshire Supreme Court, that court upheld the validity of the tax (*114 NH 137, 316 A2d 165*).

On appeal, the United States Supreme Court reversed. In an opinion by Marshall, J., expressing the view of seven members of the Court, it was held that a state commuters income tax which falls exclusively on the incomes of nonresidents and is not offset by other taxes imposed upon residents alone, violates the privileges and immunities clause of the United States Constitution (Art IV 2 cl 1).

Blackmun, J., dissenting, expressed the view that the appeal should be dismissed for want of a substantial federal question since the Maine residents paid the New Hampshire tax only because the law of Maine permitted such a tax.

Douglas, J., did not participate.

LAWYERS' EDITION HEADNOTES:

TAXES §25

income tax on nonresidents -- privileges and immunities clause --

Headnote:[1A][1B]

A state commuters income tax which falls exclusively on the income of nonresidents and is not offset even approximately by other taxes imposed upon residents alone, fails to satisfy the rule requiring substantial equality of treatment for the citizens of the taxing state and nonresidents taxpayers and violates the privileges and immunities clause of the United States Constitution (Art IV 2 cl 1).

STATUTES §32

nonresident taxpayers -- standing --

Headnote:[2A][2B]

Nonresident taxpayers have standing to challenge the validity of a state commuters income tax even though such taxpayers' total tax liability is unaffected by the

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account, cannot be squared with the underlying policy of comity that the Privileges and Immunities Clause requires. Pp. 665-666.

(b) The possibility that in this case Maine, the appellant taxpayers' State of residence, could shield its residents from the New Hampshire tax by amending its credit provisions does not cure, but in fact compounds, the constitutional defect of the discrimination in the New Hampshire tax, since New Hampshire in effect invites appellants to induce their representatives to retaliate against such discrimination. The constitutionality of one State's statutes affecting nonresidents cannot depend upon the present configuration of another State's statutes. Pp. 666-668.

COUNSEL: Charles W. Smith argued the cause and filed a brief for appellants.

Charles G. Cleaveland, Assistant Attorney General of New Hampshire, argued the cause for appellees pro hac vice. With him on the brief were Warren B. Rudman, Attorney General, and Donald W. Stever, Jr., Assistant Attorney General. *

* Jon A. Lund, Attorney General, and Jerome S. Matus and Donald J. Gasink, Assistant Attorneys General, of Maine, Kimberly B. Cheney, Attorney General, Benson D. Scotch, Deputy Attorney General, and Charles D. Hassel, Assistant Attorney General, of Vermont, filed a brief for the States of Maine and Vermont as amici curiae urging reversal.

William F. Hyland, Attorney General, pro se, Stephen Skillman, Assistant Attorney General, and Herbert K. Glickman, Deputy Attorney General, filed a brief for the Attorney General of New Jersey as amicus curiae urging affirmance.

JUDGES: MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, post, p. 668. DOUGLAS, J., took no part in the consideration or decision of the case.

OPINION BY: MARSHALL

OPINION

[*657] [***533] [**1193] MR. JUSTICE **MARSHALL** delivered the opinion of the Court.

[***LEdHR1A] Appellants are residents of Maine who were employed in New Hampshire during the 1970 tax year and as such were subject to the New Hampshire Commuters Income Tax. On behalf of themselves and others similarly situated, they petitioned the New Hampshire Superior Court for a declaration that the tax violates the Privileges and Immunities and *Equal Protection Clauses of the Constitution*s of New Hampshire and of the United States. The cause was transferred directly to the New Hampshire Supreme Court, which upheld the tax. *114 N. H. 137, 316 A. 2d 165 (1974)*. We noted probable jurisdiction of the federal constitutional claims, *419 U.S. 822 (1974)*, and on the basis of the Privileges and Immunities Clause of Art. IV, we now reverse.

I

The New Hampshire Commuters Income Tax imposes a tax on nonresidents' New Hampshire-derived income in [*658] excess of $ 2,000. [1] The tax rate is 4% except that if the nonresident taxpayer's State of residence would impose a lesser tax had the income been earned in that State, the New Hampshire tax is reduced to the amount of the tax that the State of residence would impose. Employers are required to withhold 4% of the nonresident's income, however, even if his home State would tax him at less than the full 4%. Any excess tax withheld is refunded to the nonresident upon his filing a New Hampshire tax return after the close of the tax year showing that he is entitled to be taxed at a rate less than 4%.

1 *N. H. Rev. Stat. Ann. § 77-B:2* II (1971) provides:

"A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income . . . less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax

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denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity. It provided:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens [***535] in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."

[**1195] The discriminations at which this Clause was aimed were by no means eradicated during the short life of the Confederation, [5] [*661] and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, [6] unless it was to strengthen the force of the Clause in fashioning a single nation. [7] Thus, in the first, and long the leading, explication of the Clause, Mr. Justice Washington, sitting as Circuit Justice, deemed the fundamental privileges and immunities protected by the Clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union, including "an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Corfield v. Coryell, 6 F. Cas. 546, 552* (No. 3,230) (CCED Pa. 1825).

5 James Madison, in a commentary on the plan of union proposed by William Paterson of New Jersey, wrote: "Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens [of other States] are entitled to equality of privileges by the Articles of Confederation." 1 M. Farrand, Records of the Federal Convention 317 (1911).

6 Charles Pinckney, who drafted the shorter version now found in Art. IV, § 2, cl. 1, see 37 Annals of Cong. 1129 (1821), assured the Convention that "[the] 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States [etc.] is formed exactly upon the principles of the 4th article of the present Confederation. . . ." 3 M. Farrand, *supra*, at 112. For an explanation of the deletion of certain phrases found in Art. IV of the Confederation in light of the Fugitive Slave and *Commerce Clauses of the Constitution*, see *Lemmon v. People, 20 N. Y. 562, 627 (1860)* (opinion of Wright, J.).

7 *Id., at 607* (Denio, J.); see *Paul v. Virginia, 8 Wall. 168, 180 (1869).*

[***LEdHR3] [3] [***LEdHR4] [4]In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky, 309 U.S. 83, 88* [*662] *(1940).* See *Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).*Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See *id., at 359.*

This consideration applies equally to the protection of individual liberties, see *Grosjean v. American Press Co., 297 U.S. 233 (1936),* and to the maintenance of our constitutional federalism. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, 347 U.S. 157, 164 (1954).* The Privileges and Immunities Clause, by making noncitizenship or nonresidence [8] [***536] an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, cf. [**1196] *Allied Stores of Ohio, Inc.* v. *Bowers, 358 U.S. 522, 532-533 (1959)* (BRENNAN, J., concurring), judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." [*663] *Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 82 (1920).* Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and

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"They pursue their several occupations side by side with residents of the State of New York -- in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $ 1,000 or $ 2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. . . . This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . but a general rule, operating to the disadvantage of all non-residents . . . and favoring all residents. . . ." *252 U.S., at 80-81* (citations omitted).

III

[***LEdHR1A] [***LEdHR5] [5]Against this background establishing a rule of substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax cannot be sustained. The overwhelming fact, as the State concedes, is that the tax falls exclusively on the income of [***538] nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone. [10] Rather, the argument advanced in favor [*666] of the tax is that the ultimate burden it imposes is "not more onerous in effect," *Shaffer v. Carter, supra*, on nonresidents because their total state tax liability is unchanged once the tax credit they receive from their State of residence is taken into account. See n. 4, *supra*. While this argument has an initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us.

10 The $ 10 annual resident tax and the tax on certain unearned income in excess of $ 600 would rarely equal, much less exceed, the 4% tax on nonresidents' incomes over $ 2,000. Appellant Logan, for example, with $ 33,000 of New Hampshire-derived income, paid $ 252 in taxes to that State; a resident with the same earned income would have paid only the $ 10 resident tax. Against this disparity and the disparities among nonresidents' tax rates depending on their State of residence, we find no support in the record for the assertion of the court below that the Commuters Income Tax creates no more than a "practical equality" between residents and nonresidents when the taxes paid only by residents are taken into account. "[Something] more is required than bald assertion" -- by the state court or by counsel here -- to establish the validity of a taxing statute that on its face discriminates against nonresidents. *Mullaney v. Anderson, 342 U.S. 415, 418 (1952).*

[***LEdHR6] [6]According to the State's theory of the case, the only practical effect of the tax is to divert to New Hampshire tax revenues that would otherwise be paid to Maine, an effect entirely within Maine's power to terminate by repeal of its credit provision for income taxes paid to another State. The Maine Legislature could do this, presumably, by amending the provision so as to deny a credit for taxes paid to New Hampshire while retaining it for the other 48 States. Putting aside the acceptability of such a scheme, and the relevance of any increase in appellants' home state taxes that the diversionary effect is said to have, [11] we do not think the possibility [**1198] that Maine could [*667] shield its residents from New Hampshire's tax cures the constitutional defect of the discrimination in that tax. In fact, it compounds it. For New Hampshire in effect invites appellants to induce their representatives, if they can, to retaliate against it.

11 The States of Maine and Vermont, *amici curiae*, point out that at least $ 400,000 was diverted from Maine to New Hampshire by reason of the challenged tax and Maine's tax credit in 1971, and that the average Maine taxpayer, appellants included, thereby bore an additional burden of 40 cents in Maine taxes. While the inference is strong, we deem the present record insufficient to demonstrate that Maine taxes were actually higher than they otherwise would have been but for this revenue loss.

[***LEdHR7] [7]A similar, though much less disruptive, invitation was extended by New York in support of the discriminatory personal exemption at issue in *Travis*. The statute granted the nonresident a credit for taxes paid to his State of residence on New York-derived income only if that State granted a substantially similar credit to New York residents subject to its income tax. New York contended that it thus "looked forward to the speedy adoption of an income tax by the adjoining States," which would eliminate the discrimination "by providing similar exemptions similarly conditioned." To this the Court responded in terms fully applicable to the present case. Referring to the anticipated legislative [***539] response of the neighboring States, it stated:

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tax on the New Hampshire-earned income, rather than New Hampshire. Where, then, is the injury? If there is an element of injury, it is Maine-imposed.

[*670] We waste our time, therefore, by theorizing and agonizing about the Privileges and Immunities Clause and equal protection in this case. But if that exercise in futility is nevertheless indicated, I see little merit in the appellants' quest for relief. It is settled that absolute equality is not a requisite under the Privileges and Immunities Clause. *Toomer v. Witsell, 334 U.S. 385, 396 (1948)*; *id., at 408* (Frankfurter, J., concurring). And I fail to perceive unconstitutional unequal protection on New Hampshire's part. If inequality exists, it is due to differences in the respective income tax rates of the States that border upon New Hampshire.

I say again that this is a noncase, made seemingly attractive by high-sounding suggestions of inequality and unfairness. The State of Maine has the cure within its grasp, and if the cure is of importance to it and to its citizens, such as appellants, it and they should be about adjusting Maine's house rather than coming here complaining of a collateral effect of its own statute.

REFERENCES

71 Am Jur 2d, State and Local Taxation 183

22 Am Jur Pl & Pr Forms (Rev ed), State and Local Taxation, Forms 273, 273.1, 275

USCS, Constitution, Article IV, Section 2, Clause 1

US L Ed Digest, Taxes 25

ALR Digests, Taxes 31

L Ed Index to Annos, Income Taxes; Nonresidents

ALR Quick Index, Income Taxes; Nonresidents; Privileges and Immunities; Taxes

Federal Quick Index, Income Taxes; Nonresidents; Privileges and Immunities; Taxation

Annotation References:

Validity and construction of statute taxing the income of nonresidents from trade, business, or other sources within the state. *64 L Ed 446.*

Who may raise objection that taxation statute contains an unconstitutional discrimination. *59 L Ed 106.*

Validity of municipal ordinance imposing income tax or license upon nonresidents employed in taxing jurisdiction (commuter tax). *48 ALR3d 343.*

Income tax on nonresident. 15 ALR 1326, 90 ALR 484, 156 ALR 1370.

Committee Report

New Hampshire General Court - Bill Status System

Docket of HB104

Docket Abbreviations

Bill Title: repealing the commuters income tax.

Official Docket of **HB104**:

Date	Body	Description
12/21/2016	H	**Introduced** 01/04/2017 and referred to Ways and Means **HJ 2** P. 16
1/11/2017	H	Public Hearing: 01/19/2017 01:50 PM LOB 202
1/20/2017	H	Executive Session: 01/19/2017 LOB 202
1/25/2017	H	Committee Report: Ought to Pass for 02/02/2017 (Vote 17-0; CC) **HC 9** P. 6
2/2/2017	H	**Ought to Pass**: MA VV 02/02/2017
2/22/2017	S	Introduced 02/16/2017 and Referred to Ways and Means; **SJ 7**

NH House	NH Senate

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Wednesday, April 12, 2017

THE COMMITTEE ON Ways and Means

to which was referred **HB 104**

AN ACT repealing the commuters income tax.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS

BY A VOTE OF: 4-0

Senator Lou D'Allesandro
For the Committee

Sonja Caldwell 271-2117

WAYS AND MEANS

HB 104, repealing the commuters income tax.
Ought to Pass, Vote 4-0.
Senator Lou D'Allesandro for the committee.