

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JASON RICHARDS, ET AL., Petitioners v. JEFFERSON
COUNTY, ALABAMA, ET AL.

CASE NO: 95-386

PLACE: Washington, D.C.

DATE: Tuesday, March 26, 1996

PAGES: 1-51

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IN THE SUPREME COURT OF THE UNITED STATES

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JASON RICHARDS, ET AL., :
Petitioners :
v. : No. 95-386
JEFFERSON COUNTY, ALABAMA, :
ET AL. :
- - - - -X

Washington, D.C.
Tuesday, March 26, 1996

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:
WILLIAM J. BAXLEY, ESQ., Birmingham, Alabama; on behalf of
the Petitioners.
WILLIAM M. SLAUGHTER, ESQ., Birmingham, Alabama; on behalf
of the Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-386, Jason Richards v. Jefferson County.
5 Mr. Baxley.

6 ORAL ARGUMENT OF WILLIAM J. BAXLEY

7 ON BEHALF OF THE PETITIONERS

8 MR. BAXLEY: Mr. Chief Justice, may it please
9 the Court:

10 This is a res judicata due process question that
11 we're here on today. To lead in, I'd like to give a short
12 quote out of a case of Chase National Bank v. Norwalk.
13 Justice Brandeis said, unless duly summoned to appear in a
14 legal proceeding, a person not a privy may rest assured
15 that a judgment recovered therein will not affect his
16 legal rights.

17 That quote was also cited by Mr. Chief Justice
18 in the Martin v. Wilks case and quoted along with some
19 other quotes from Justice Brandeis in that case.

20 The second little lead-in quote I'd like to
21 give -- because it was cited, the case was cited by the
22 respondent. It's a Fifth Circuit case, Southwest Airlines
23 v. Texas International, and they quoted Judge Widdeson as
24 saying, quote, denial of the opportunity to bring a suit
25 raises serious due process questions.

1 Further in the opinion, they quote, again, Judge
2 Widdeson, because res judicata denies a nonparty his day
3 in court, the Due Process Clause prevents preclusion when
4 the relationship between the party and the nonparty
5 becomes too attenuated.

6 In this instance, it's not only a attenuated
7 relationship, there's a nonexistent relationship. There's
8 absolutely --

9 QUESTION: Well, Mr. Baxley, there -- your
10 opponents cite a string of cases, many of them State
11 cases, in which some kind of claim preclusion doctrine, or
12 res judicata, if you will, has been applied despite a
13 change in the identity of the plaintiff taxpayer in suits
14 by citizens challenging tax laws in State court. Now,
15 there is that body of authority, and how do you deal with
16 that, and what's the extent of it?

17 MR. BAXLEY: All of those cases that they cited
18 in that footnote, only two or three of them do I think
19 really have application that they should have to be
20 arguable. All of them are State cases. I believe all of
21 them are State cases. I don't believe there's a single
22 case from this Court or even a circuit court that they
23 cited in that footnote.

24 I think common sense is the best answer. These
25 are cases that I think that the law, especially when

1 you're dealing with a constitutional right to have your
2 case litigated --

3 QUESTION: Well, you take the position that
4 there is no doctrine of claim preclusion in these citizen
5 taxpayer suits in State court?

6 MR. BAXLEY: I think the position that we would
7 take is -- was enunciated in your dissent, in Justice
8 O'Connor's dissent in the Harper v. Virginia case which
9 is --

10 QUESTION: But remember, that was a dissent.

11 MR. BAXLEY: But it did not conflict with the
12 majority, either --

13 QUESTION: It didn't carry the day.

14 MR. BAXLEY: -- and you quoted United States v.
15 L.A. Tucker Trucking Company and Webster v. Fall, and I
16 think your quote there was something to the effect that
17 questions which are merely lurk in the record have no
18 basis of precedent in --

19 QUESTION: Well, what if the court in the
20 Bedingfield case here had actually decided the issue that
21 you're raising now, would you be here?

22 MR. BAXLEY: It would be a closer question. I
23 think that --

24 QUESTION: And what is your answer? Would you
25 then be precluded, a new taxpayer, from bringing the same

1 challenge?

2 MR. BAXLEY: I think you could make a good
3 argument that you would not, because of nonprivity under
4 the law as set out by this Court, but I think that --
5 certainly I think that candidly the respondent would have
6 a stronger case, because here this argument, a major
7 constitutional right, has never, ever been decided by any
8 court at any time. It's never been argued.

9 It was mentioned in one amicus brief at the
10 Alabama supreme court level, just mentioned in passing.
11 You've got a trial court that wrote a five- or six-page
12 opinion that never touched on this major right.

13 QUESTION: Mr. Baxley, just to be clear on
14 what's at issue, if, in fact, the matter had been decided
15 in the prior suit, raised, litigated, and decided, then
16 really it wouldn't be too significant whether you put a
17 preclusion, it wouldn't be a plain preclusion, an issue
18 preclusion label on it, because you'd have precedent from
19 the highest court in your State.

20 You'd be bound by stare decisis, so it
21 wouldn't -- if they actually decided the question, if the
22 Alabama supreme court actually decided the question in the
23 Bedingfield case, then wouldn't you realistically be out
24 of court in your suit?

25 MR. BAXLEY: I think common-sensewise, yes. I

1 think you could argue that the claim -- I don't think
2 technically under the law that either res judicata or
3 collateral estoppel would apply.

4 QUESTION: But how about stare decisis?

5 MR. BAXLEY: Stare decisis I think would be --
6 would be enough to where it would make your burden almost
7 unable -- you couldn't overcome it, but I -- we don't have
8 that --

9 QUESTION: So your case really depends on this
10 issue not having been fully litigated and decided.

11 MR. BAXLEY: Not having been litigated in any
12 way, and I think that's the law from this Court,
13 repeatedly.

14 QUESTION: Well, what if the State of Alabama
15 decides to authorize taxpayer suits not in the sense of
16 people who are being subject to a tax, but in the sense of
17 challenging expenditure of public money? In other words,
18 any person in the State who pays taxes may challenge
19 the -- and I think many States have this. Do you think a
20 State has to allow more than one of those suits?

21 MR. BAXLEY: No, sir, I don't think they have
22 to --

23 QUESTION: Where there really isn't any personal
24 property interest at stake.

25 MR. BAXLEY: I think my answer there would be

1 that you pretty well hit it on the head in Martin v. Wilks
2 in your opinion, where you said it's really, the burden is
3 on the parties, on the parties that are litigating it to
4 determine what the issues are going to be.

5 When this issue was litigated in Bedingfield, if
6 the county had really wanted to come in and have the due
7 process -- I mean, and the due process rights provided and
8 the equal protection matter settled once and for all, they
9 could have brought it up. They know --

10 QUESTION: That -- I don't believe that's
11 responsive to my question. Listen, please.

12 My question was, if the State says, we're going
13 to authorize taxpayer suits, any taxpayer can come in and
14 claim that the public moneys are being misspent, and A
15 comes in and brings a taxpayer suit saying that you --
16 this is a violation, say, of the First Amendment, the
17 religion clause, for the State to spend money this way,
18 and then that's -- the highest court in the State decides
19 that case against that taxpayer.

20 And then taxpayer B, who wasn't a party to that
21 suit at all, comes in and says, now, I wasn't a party to
22 that suit, I'm bringing a taxpayer's action to challenge
23 that same expenditure of money under the same provision of
24 the Constitution.

25 Now, can a State say, we're just not going to do

1 that, this is a special kind of suit?

2 MR. BAXLEY: I think for the same reason, the
3 principle of stare decisis that Justice Ginsburg --

4 QUESTION: I'm not talking about stare decisis.
5 I'm talking about, maybe it's a brand-new supreme court of
6 Alabama now, and maybe the supreme court of Alabama might
7 be inclined to depart from its earlier ruling, but can the
8 State simply say, we're not going to entertain this
9 action?

10 MR. BAXLEY: I don't think they could and get by
11 a due process test if they preclude -- now, if -- in
12 your -- and what -- your example, if somebody came back
13 and raised -- you gave the First Amendment, raised the
14 First Amendment, it had already been decided, yes, I think
15 a statute that set that out would preclude others from
16 doing it.

17 But if then they, somebody came in and said,
18 now, wait a minute, this has not been decided on another
19 constitutional ground, then I don't think that a -- I
20 think a State statute --

21 QUESTION: What if the law of Alabama is that
22 anything that was -- might have -- was raised in the first
23 taxpayer's action might have been raised is just, it's all
24 over, there isn't going to be another suit, does that
25 violate some provision of the Federal Constitution?

1 MR. BAXLEY: Yes. I think it violates due
2 process.

3 QUESTION: Why?

4 MR. BAXLEY: Because this Court has held
5 basically that and the Alabama supreme court has held that
6 over and over, repeatedly.

7 QUESTION: Well, held -- are you talking -- you
8 say, held that. You suggest that the Alabama supreme
9 court and this Court has held that in the hypothetical
10 example I've given you it violates due process?

11 MR. BAXLEY: If you deny someone the right to
12 fully and totally litigate a constitutional issue, however
13 you cut him off, whether by case law or by a statute, then
14 it would not meet the test of this Court, that this Court
15 says the due process rights transcend and, so to speak,
16 would overcome -- whether it be case law at the State
17 level or a State statute --

18 QUESTION: Mr. Baxley, but in many of these
19 instances, these so-called taxpayer suits, you wouldn't
20 even have any right at all to be in court were it not for
21 the grace of the State that allows you to be kind of a
22 private Attorney General.

23 I would think -- your taxpayer is someone who is
24 paying tax and doesn't want to. These taxpayer suits,
25 where the taxpayer emerges to represent the public, are

1 quite a different animal, are they not?

2 MR. BAXLEY: Well, I think --

3 QUESTION: Do you have any due process right to
4 bring a case that, if you were in the Federal court,
5 they'd probably say you don't even have standing?

6 MR. BAXLEY: I think that you always have
7 standing if you've got a major constitutional right that
8 you say is being infringed upon.

9 QUESTION: That's not -- certainly not true. I
10 mean, let's assume that you have a -- I mean, we have
11 cases where the Constitution contains a statement of
12 accounts clause, and we have held that a private citizen
13 cannot sue, has no standing to sue to compel the
14 expenditures of the CIA to be disclosed under that
15 provision.

16 We say, maybe it violates the Constitution,
17 maybe it doesn't, but no individual has standing because
18 it's a generalized interest.

19 Now, we have that doctrine at the Federal level
20 because of separation of powers concerns, because we have
21 a distinctive Federal doctrine of separation of powers.
22 The States don't have to follow our separation of powers
23 doctrine, and if they choose to allow a suit in that
24 situation, why is it a denial of due process for them to
25 say, we're going to allow the suit, but only one, whereas

1 we don't allow the suit at all? How can they be in worse
2 shape constitutionally than we are?

3 MR. BAXLEY: I think the best answer there is a
4 case of this Court of *Waters v. St. Louis*, and it's so
5 parallel to the situation we have here.

6 The legislature of Missouri passed a law that
7 said cities of over 700,000 people can impose an
8 occupational tax on businesses and individuals, but they
9 said that on businesses and on proprietors that ran their
10 own businesses they could do it on the net and deduct
11 their taxes.

12 Before the tax actually went into effect, a
13 taxpayer in Missouri filed suit on constitutional grounds.
14 It got to this Court, and I believe it was Justice Jackson
15 who wrote the majority opinion --

16 QUESTION: But you very carefully and quite
17 appropriately pick a case in which there wouldn't have
18 been standing in Federal courts. All that has been
19 suggested by the Chief Justice and by Justice Ginsburg,
20 and I'm suggesting the same thing, is that you're casting
21 your net too widely, that there are certain -- you have --
22 there are certainly some actions in which the State allows
23 a citizen to proceed with a suit where we don't.

24 The construction of a bridge. If someone says
25 that the construction of a bridge is contrary to law --

1 the person is not harmed at all. He just says, I don't
2 like Federal money being spent for something it shouldn't
3 be spent for.

4 Could he bring suit in Federal court? No. He
5 can bring suit in many States simply on the ground that
6 this money shouldn't be expended by the county, or whoever
7 it is.

8 Now, your position is that although it's
9 perfectly okay to deny the suit to anybody, the State
10 cannot say, well, we'll allow the suit, but only once,
11 that the latter violates due process of law, but the
12 former does not.

13 That is not a very appealing proposition.

14 MR. BAXLEY: I think that the State does not
15 have the right to, by statute or any other way, cut off
16 someone's right to litigate a constitutional issue --

17 QUESTION: But if you have no right to begin
18 with under the Federal Constitution -- you have a
19 taxpayer, an actual taxpayer who doesn't want to pay tax
20 out of his pocket. Isn't that quite a different case from
21 what is labeled, taxpayer suit, and what that note in the
22 brief is of -- the other side is filled with what we call
23 taxpayer suits, where someone emerges as champion of the
24 public in general, but is no more affected than the public
25 in general.

1 MR. BAXLEY: Yes, Your Honor.

2 QUESTION: But we are talking about real
3 taxpayers, and that's a little different, isn't it?

4 MR. BAXLEY: We're talking about real taxpayers,
5 and in the Hansberry v. Lee, this Court said that the
6 State is free to call these actions whatever they want to.
7 They can call them virtual representation, they can call
8 them class actions, if they call them class actions they
9 can set certain rules, but the State cannot -- whatever
10 they call them, they cannot deny someone's due process
11 rights and --

12 QUESTION: Wait, do you say that a State can't
13 even authorize a class action and have the result of that
14 class action binding on members of the class?

15 MR. BAXLEY: I think they absolutely can, but I
16 also think you go back to the decision of this Court
17 3 weeks ago, roughly, in the Matsushita case, where -- and
18 your dissent, you say -- I'm sorry, Justice Ginsburg
19 dissent says that a State -- you can have these class
20 actions. I don't think this part of it conflicted with
21 the majority.

22 You still, even in a consent settlement you've
23 got to make sure that due process rights of the, and
24 adequate representation and things of that nature, that
25 they still have got to be fulfilled. You can't cut that

1 off in any way.

2 QUESTION: What was the name of your Missouri
3 case, Mr. Baxley?

4 MR. BAXLEY: Waters v. St. Louis, and there's -

5 - QUESTION: Where is it -- I don't see it in the
6 index to your brief.

7 MR. BAXLEY: Your Honor, it's in our -- I know
8 that it's in our -- oh, the amicus -- the amicus found
9 this case for us, the amicus of the counties found that
10 case and had that in their green brief, and then we, I
11 think, cited it in our reply brief.

12 QUESTION: Thank you.

13 MR. BAXLEY: But that was Water v. St. Louis,
14 and there is a concurring opinion, two sentences, one
15 paragraph, by Justice Douglas, joined in by Justice Black,
16 where Justice Douglas says that I'll go with the rest of
17 the Court on the reading that the Missouri supreme court
18 has not considered this scheme right now so it's not
19 right, but when it comes up again and is considered, this
20 case -- but I bow to their reading of the record, saving
21 for a future day the serious and substantial question on
22 the Equal Protection Clause raised by the regulations
23 which grant employers deductions for taxes paid the
24 Federal Government, yet do not allow employees a deduction
25 for the same tax.

1 Now, when this first case came --

2 QUESTION: Well, that sounds like a case in
3 which the employees and the employers all had some
4 property interest that was being taken away from them by
5 the tax.

6 I mean, they were being able -- they were being
7 required to pay the tax.

8 MR. BAXLEY: That's what we have here, Your
9 Honor.

10 QUESTION: I know it is, but the questions we
11 have been propounding to you are -- which you simply
12 haven't responded to, at least so far as I can tell, are
13 the other situations, where, as Justice Ginsburg puts it,
14 you have a taxpayer's action where the taxpayer is really
15 a private Attorney General saying, we don't like -- we
16 think this money is being spent in violation of the
17 Constitution, even though they suffer no particularized
18 injury, and the question is whether that kind of a case
19 isn't perhaps different.

20 MR. BAXLEY: I think it is different. I think
21 it's very different.

22 QUESTION: Well then, in order to agree with
23 you, we don't have to go as far as you initially urged us,
24 to say that in every case where a State allows suit it has
25 to allow that a later plaintiff can bring the same suit.

1 Let me put the question more specifically. Do
2 you believe that your client would have had standing under
3 Federal law to challenge what was done here if it had been
4 done by the Federal Government?

5 MR. BAXLEY: I think at the time of the first
6 action our client didn't have any standing, period,
7 because the scheme had not gone into effect yet.

8 QUESTION: No, but let's assume this scheme is
9 in effect and it's a Federal scheme rather than a State or
10 county scheme. It's a Federal scheme. Would there have
11 been standing under our Federal law of standing to sue?

12 MR. BAXLEY: Yes. Yes, Your Honor.

13 QUESTION: Well, it seems to me that that's the
14 only point you need sustain, that in the type of a lawsuit
15 where there would be standing under the Federal law of
16 standing, in that type of lawsuit, at least, you cannot
17 preclude a plaintiff who was not actually bound by the
18 first judgment.

19 MR. BAXLEY: I agree.

20 QUESTION: Can I agree with that more limited
21 proposition and perhaps find for you on that basis?

22 MR. BAXLEY: Your Honor, you can find for us on
23 any basis.

24 (Laughter.)

25 MR. BAXLEY: Yes, sir, I would concur totally.

1 I think that there are really four cases.
2 There's another case that I think is very much in point
3 about bringing this up again, when it involves a basic
4 constitutional right, and this was a case that, again,
5 they found for us. Respondents cited it.

6 It's Quong Wing v. Kirkpatrick, I believe, the
7 Montana case, and they cited it I suppose because it
8 looked like it was a horrible case for us on the equal
9 protection issue, but when I read that case, lo and
10 behold, Justice Holmes -- it was a case where the State of
11 Montana had imposed a what looked like blatantly
12 discriminatory tax aimed at the Chinese laundries.

13 And Justice Holmes mentioned in the opinion that
14 in oral argument he tried to ask the counsel that was
15 arguing about the equal protection issue and counsel
16 wouldn't respond, denied it, might have been asleep like I
17 was when Justice Scalia was asking me.

18 But Justice Holmes said in his opinion, he said
19 that we brought this up, this is going to come up again,
20 and when it does come up again, and laws are frequently
21 attacked by -- that the lawyers don't give the Court
22 anything to sustain them and we don't want to sustain
23 them, but when this issue comes up again, when it's
24 properly attacked, because it's a constitutional issue,
25 that if it comes up again we're going to rule with them.

1 So I would think that Justice Holmes would be
2 wondering -- if he thought that that opinion would be
3 cited in later days by people in the position of
4 respondents, saying that this opinion does not allow the
5 same party to attack it on the constitutional issue -- he
6 said they could. How horrified he would be if they said
7 that that opinion by Justice Holmes prevented every future
8 American of Chinese ancestry to not attack a ruling on
9 that basis because the issue could have been raised and
10 wasn't.

11 QUESTION: But here -- isn't it true that in
12 this case, although it wasn't litigated, it was raised in
13 the complaint, wasn't it, in the earlier case?

14 MR. BAXLEY: It was raised -- it was alluded to
15 in the complaint --

16 QUESTION: Well, they quote -- the allegation is
17 that the statute violates the equal Protection Clause.
18 It's not just alluded to, it was alleged in the --

19 MR. BAXLEY: It was alleged --

20 QUESTION: But not passed on by the --

21 MR. BAXLEY: It was not passed on by any court,
22 and I would cite there --

23 QUESTION: But it is clear that it could have
24 been raised in that case --

25 MR. BAXLEY: Yes.

1 QUESTION: -- because it was before the court.

2 MR. BAXLEY: In fact, I think --

3 QUESTION: What if they had -- what if they had
4 actually litigated it? Would you then take the same
5 position?

6 Say they'd offered evidence on the -- and the
7 trial judge had said, no, I don't think there's any merit
8 to it, and then the plaintiffs had said, well, we don't
9 think this is our strongest point, as a matter of tactics
10 we won't appeal the trial court's ruling, we'll just
11 accept the trial court's ruling --

12 MR. BAXLEY: I don't think that our position
13 would -- we might take that position, but I don't think
14 our -- we would succeed.

15 QUESTION: Well, wouldn't you still claim that
16 there was no privity?

17 MR. BAXLEY: Yes. Yes.

18 QUESTION: So on that --

19 QUESTION: But the key to your case is not
20 privity, then.

21 MR. BAXLEY: Not privity.

22 QUESTION: No.

23 MR. BAXLEY: We've got -- if you look at what --
24 issue preclusion, or collateral estoppel doesn't apply
25 here. We say res judicata doesn't apply.

1 In fact, I think this thing gets back to Justice
2 O'Connor's thing -- quote in that Harper case about it
3 lurking in the record. It lurked in the record here, but
4 it was never addressed.

5 QUESTION: Well, it lurked in the complaint --
6 it didn't lurk, it was there in plain English.

7 QUESTION: Mr. Baxley, is -- you said that
8 privity is not the key to your case. I thought it was one
9 of the keys to it.

10 I thought that was one of the prongs of your
11 argument, and if you won on that you would, on your view,
12 be entitled to win the case.

13 MR. BAXLEY: Yes, Your Honor.

14 QUESTION: The absence of privity.

15 MR. BAXLEY: Yes, Your Honor.

16 QUESTION: Yes.

17 MR. BAXLEY: The absence of privity is certainly
18 one of our strong arguments, and in every -- almost every
19 case that's cited in their briefs that in any way is
20 contrary to us is -- where you did have --

21 QUESTION: But I -- but the -- Justice O'Connor
22 raised it earlier. Aren't there a lot of statutes out
23 there and a lot of procedures in State courts where they
24 allow one challenge only to some kind of a public
25 expenditure of funds, or a new taxing statute? They just

1 simply don't allow a second.

2 MR. BAXLEY: I'm sure there are, but this is
3 not --

4 QUESTION: But they're all unconstitutional?

5 MR. BAXLEY: -- what we're talking about here.
6 No, sir. No, sir, not at all.

7 QUESTION: Typically it would be a statute
8 allowing a challenge to the issue of municipal bonds, or
9 something --

10 QUESTION: Sure.

11 QUESTION: -- where the bonds are going to be
12 sold, and they need a declaratory judgment in advance.

13 MR. BAXLEY: A validation suit.

14 QUESTION: Yes.

15 QUESTION: Bond validation-type suits.

16 Your Honor, I've thought about that, and I think
17 it would be appropriate here.

18 I think certainly you could have one challenge,
19 but however, I think you've got to look at what Hansberry
20 v. Lee says, and the danger of collusion, that you don't
21 want to okay in advance one challenge where there's
22 possible collusion, a friendly type suit to validate --

23 QUESTION: That's not alleged here, is it?

24 QUESTION: You don't have to get into that, do
25 you?

1 MR. BAXLEY: No.

2 QUESTION: You're not --

3 QUESTION: All you have to worry about is the
4 suit by the taxpayer who is actually paying the tax --

5 MR. BAXLEY: That's right.

6 QUESTION: -- and that's what you've got, and
7 you're claiming that in those cases --

8 MR. BAXLEY: That's right.

9 QUESTION: -- you've got to have some privity
10 for a -- issue or claim preclusion.

11 MR. BAXLEY: Yes, sir.

12 QUESTION: And we just finished discussing that
13 whole taxpayer suit category, and now we're into taxpayer
14 who says, I got this tax bill and I've paid it and I want
15 a refund, or the situation that you're in.

16 There's an occupational tax, and your client
17 says, it's not fair to make me pay that tax, so -- but why
18 isn't it fair for the State to say, it's good enough to
19 have in this category, too, one taxpayer with a good
20 lawyer fight out the case so we're going to apply in this
21 taxpayer as taxpayer area the same thing we apply in the
22 municipal bondholder's suit, and the people who want to
23 challenge the annexation of a county, or Mrs. Frothingham
24 who wants to challenge how public money is spent.

25 We're going to apply the same doctrine to all of

1 them. You get a good lawyer in suit number 1 and fight it
2 out, and that's it.

3 MR. BAXLEY: Because the -- I don't think you
4 can cut off someone's right to litigate a constitutional
5 issue that's affecting them, and -- but we don't have that
6 situation here. This is not an action that was allowed by
7 statute. It just came on a declaratory judgment.

8 And also, one important thing, and it goes back
9 to the question Justice Stevens asked, the complaint in
10 Bedingfield, the first action here, never at any time was
11 there any attack made on the exemption scheme. It had not
12 even gone into effect yet.

13 Probably most people didn't even understand it
14 at the time, because the tax hadn't started taking effect
15 yet, and so no one ever, even though it was in the
16 complaint with the equal protection part, nobody has ever
17 attacked the exemption scheme until the instant case right
18 here, and we submit there are some possibilities that
19 perhaps it would have been premature at the time
20 Bedingfield came on, since the tax was not being
21 collected.

22 It indicates that in Justice Jackson's opinion
23 in the St. Louis case. It might have been premature to
24 have attacked the exemption scheme as early as they did.
25 Justice Jackson mentions --

1 QUESTION: I don't understand that at all.

2 If it would be -- they didn't rule -- dismiss
3 the case as a whole because it was premature, did they?

4 Didn't they rule on the merits of what the --
5 the issues that were raised? I don't know why the
6 exemption issue would be any more premature than any other
7 issue.

8 MR. BAXLEY: Nobody had been collecting it from
9 them yet.

10 QUESTION: Yes, but they -- that's true of the
11 whole case, wasn't it?

12 MR. BAXLEY: Yes.

13 QUESTION: And the court nevertheless went ahead
14 and adjudicated the merits of the issues that it thought
15 important.

16 MR. BAXLEY: Yes, sir.

17 QUESTION: I don't understand your prematurity
18 argument.

19 MR. BAXLEY: That was just mentioned in the St.
20 Louis case, and the exemption scheme was definitely never
21 even attacked.

22 If I could be permitted to reserve the remainder
23 of my time.

24 QUESTION: Very well, Mr. Baxley.

25 Mr. Slaughter, we'll hear from you.

1 ORAL ARGUMENT OF WILLIAM M. SLAUGHTER

2 ON BEHALF OF THE RESPONDENTS

3 MR. SLAUGHTER: Mr. Chief Justice, and may it
4 please the Court:

5 I do not think it would be an exaggeration to
6 say that if this Court were to adopt the petitioners'
7 truncated view of the Due Process Clause with respect to
8 representational suits, that they would overturn several
9 hundred years of equitable development of class actions as
10 culminating in Rule 23 of the Federal Rule of Civil
11 Procedure.

12 QUESTION: Well, he claims that he's not
13 attacking class actions.

14 MR. SLAUGHTER: Justice Souter, I believe that
15 by trying to rest this case on the authority, among
16 others, of Martin v. Wilks, totally ignoring footnote
17 number 2, in which the Chief Justice reserved from the
18 implications of that case the whole panoply of
19 representational suits, first of all as typified by
20 Hansberry v. Lee, and also the second cite in the footnote
21 was Rule 23 of the Federal Rules of Civil Procedure --

22 QUESTION: But I think his point is that there
23 is no legitimate sense in which this can be called a
24 representational suit.

25 MR. SLAUGHTER: Well, I think he --

1 QUESTION: He is claiming that his clients want
2 to sue simply as taxpayers. They were not in privity with
3 any other taxpayers who were sued and, in fact, they want
4 to sue on an issue which was not litigated, and he is
5 saying that in no sense can you call a prior action a
6 representational suit as to my clients. I think that's as
7 far as his argument goes.

8 MR. SLAUGHTER: That may be his argument, but it
9 is both historically and factually incorrect. The laws of
10 Alabama have historically allowed, like the laws of other
11 States, declaratory actions in which private citizens act
12 as Attorney Generals to challenge public law --

13 QUESTION: But that is not -- we've just been
14 all around that. Let's concentrate on the case of a
15 taxpayer, a true taxpayer. This is not somebody who's
16 coming forward as a private Attorney General. This is
17 someone that the State of Alabama is saying, you owe an
18 occupational tax.

19 All right, that's standing in the Federal court,
20 and it's certainly standing in the Federal court, so let's
21 forget about the taxpayer suits of the kind where you
22 wouldn't have standing in Federal court, where you just
23 want everybody in the public, and nobody is hitting you in
24 your own pocket. Let's concentrate on those.

25 Now, I do not know of legions of precedent that

1 say, you can have a virtual class action without notice to
2 anybody in the class. That's what we're dealing with, and
3 that's what I'd like you to address.

4 MR. SLAUGHTER: Well, class actions under (b)(1)
5 and (b)(2), which he is trying to certify in the
6 petitioners' case, is exactly that kind of case.

7 (b)(1) is the class action which in the advisory
8 opinion was deemed suitable to test taxpayers' questions
9 on the bond issue --

10 QUESTION: That's usually an injunction case.

11 MR. SLAUGHTER: No. No -- I beg your pardon,
12 Your Honor, (b)(1), not (b)(2).

13 QUESTION: Give me an example of a money relief
14 case, a case involving money, where people can be cut out
15 without any notice.

16 MR. SLAUGHTER: (b)(1) is an appropriate
17 vehicle --

18 QUESTION: (b)(1) of what? What are you talking
19 about?

20 MR. SLAUGHTER: Rule 23 of the Federal Rules of
21 Civil Procedure, as well as Rule 23 of the Alabama Rules
22 of Civil Procedure, which are exactly identical.

23 Your Honor, if I may, this suit, the Bedingfield
24 case represents a stepping stone along the evolution of
25 English bills of peace, Justice Story's equity class

1 actions in the 19th Century --

2 QUESTION: Well, Bedingfield was not a class
3 action, was it?

4 MR. SLAUGHTER: Yes, it was.

5 QUESTION: I thought it was brought by --

6 MR. SLAUGHTER: It was --

7 QUESTION: It was two actions brought by
8 individuals in the City of Birmingham.

9 MR. SLAUGHTER: That is the important
10 distinction here, Your Honor, if I may make that.

11 There is essentially no difference whatsoever
12 between the Bedingfield case and if this had been a class
13 action brought and certified under Alabama Rule 23,
14 paragraph (b) (1), and there are --

15 QUESTION: Bedingfield was not -- let's clarify
16 this, if we may.

17 MR. SLAUGHTER: But it was a class action.

18 QUESTION: Was it brought --

19 MR. SLAUGHTER: In the name --

20 QUESTION: -- expressly as a class action --

21 MR. SLAUGHTER: No.

22 QUESTION: -- and allowed as such?

23 MR. SLAUGHTER: No, but it did not need to be in
24 order to be so treated for due process purposes, and
25 that's the precise point.

1 If we can go through and compare the cases --

2 QUESTION: Mr. Slaughter, how does your argument
3 stand against an important precedent in this Court, a case
4 called Mullane v. Hanover Bank, where the Court explained
5 if someone's interest is being affected there has to be an
6 effort to tell that person, not the best service that
7 money could buy, but some notice?

8 MR. SLAUGHTER: The distinction between due
9 process and Mullane v. Central Hanover Bank is that the
10 holders of the trust, common trust interest in that case
11 were not represented by anybody. The issue in this case
12 is whether you have --

13 QUESTION: Why weren't they represented by the
14 people who were there? There were some of the
15 beneficiaries there.

16 MR. SLAUGHTER: And that element to some degree
17 was used by the court as a justification for not requiring
18 a stricter standard of notice. The idea that some of the
19 people would in fact, local people in New York received
20 the notice, but nonetheless they felt that due process
21 required going the extra distance in that case.

22 QUESTION: Why, if -- assuming that -- I mean,
23 you may -- I think you may be right that (b)(2) is
24 implicated here, but I thought there's a mistake the State
25 court seemed to have made. They thought that this

1 taxpayer action was like the private Attorney General
2 taxpayer action, which is where these cases originated,
3 but that isn't this.

4 This is a case, isn't it, like a bunch of 10,000
5 people living in a city, and the city puts up some noxious
6 fumes, and all 10,000 people breathe them, so they want to
7 proceed against a nuisance, so there's a giant accident,
8 and it happens to kill or hurt 10,000 people, and there
9 you would have, let's say, a (b) (2) action for nuisance.

10 But very well, I didn't find any contrary
11 authority to the proposition that if you have a class
12 action of that kind, you have to give notice to the other
13 people. At least you give notice.

14 If Joe Smith is going to be the first person to
15 run in and sue the city for the nuisance, or the first
16 person to collect, Jones and 14,000 other people should at
17 least have notice of what's going on and a chance to talk
18 to the judge before they can be bound in res judicata. At
19 least, I don't know why that shouldn't be so.

20 MR. SLAUGHTER: Justice Breyer, neither under
21 (b) (1) or (b) (2) of Rule 23 is notice required.

22 QUESTION: I know it does not say that in the
23 rule. That's the basis of my question.

24 What I want to know is, I couldn't find any
25 authority that explained to me why there is not notice in

1 (b) (2), why there shouldn't be notice, how those class
2 actions work, or what conceivable thing was going through
3 the rulemaker's mind in not saying you should have notice,
4 given the precedent in the Supreme Court that you can't
5 take a person's action away from them without notice.
6 That's my question.

7 MR. SLAUGHTER: The explanation of that is to be
8 found in the history of Rule 23 and the version that
9 existed from 1938 to 1966. That version was, in fact,
10 merely a codification of the kind of historic equity class
11 action that had been governed by this Court's Rule 48 and
12 then Rule 38. It did not require any kind of
13 certification for a class, nor did it require any kind of
14 notice.

15 The nature of the class was defined by the jural
16 relationships between the members, by their common
17 identity, if you will, in terms of their interests which
18 were to be adjudicated.

19 QUESTION: Did they bind? I mean, I would have
20 thought --

21 MR. SLAUGHTER: And it was binding.

22 QUESTION: Why, because normally you'd think, in
23 a situation where you're proceeding against an injunction,
24 for example, for a nuisance, you would have thought the
25 first person to sue is going to win or lose, and then

1 stare decisis will take care of the rest.

2 But I was rather surprised that in such suits
3 that first person's suit could bind other people who
4 suffered from the nuisance on issues that were not
5 litigated.

6 Now, if, in fact, that did happen under (b) (2)
7 or this historic practice in equity, I'd like to know why
8 it happened, because it happening without notice would
9 seem, (a) very unfair, and (b) contrary to the precedents
10 of the Court that say you can't take a person's action
11 away from him without notice.

12 MR. SLAUGHTER: The notice provisions of current
13 Federal Rule 23 and all of the --

14 QUESTION: Do not relate to (b) (2), you're
15 right --

16 MR. SLAUGHTER: Neither to (b) --

17 QUESTION: -- and I'm asking why.

18 MR. SLAUGHTER: Neither to (b) (1) nor (b) (2).

19 Your Honor, my --

20 QUESTION: Mr. Slaughter, that's not quite
21 right, is it? There isn't mandatory notice because there
22 is such a variety of cases that come under (b) (1) and
23 (b) (2), but look at (d) (3), which instructs the court to
24 require for the protection of the members of the class or
25 otherwise for the fair conduct of the action that notice

1 be given in such manner as the court may direct.

2 I assume from that provision that in a case
3 comparable to the Mullane situation a district court, if
4 we were operating under the Federal rules and in Alabama,
5 since they have virtually the same rules, would say in
6 this kind of action you have to give notice. You don't
7 have to hire a process server, but you have to put a
8 summons and complaint in the mail, or --

9 MR. SLAUGHTER: I think that provision of the
10 rule is a very useful admonition and a very cautionary
11 one, and a very valuable tool in the management of class
12 actions, but I do not think it is mandatory for due
13 process analysis where you have plaintiffs, representative
14 parties who truly represent the class in a public and
15 impersonal question of the kind implicated in this case,
16 namely, just the constitutional validity of this tax.

17 QUESTION: Well, why isn't that -- why isn't
18 that not a (b) (1) or (b) (2) kind of suit, but, rather, a
19 (b) (3) suit? I mean, you're almost quoting (b) (3), the
20 court finds the question of law or fact common to the
21 members of the class predominate over any questions
22 affecting only individual members.

23 I mean, you're talking --

24 MR. SLAUGHTER: I submit, Justice Scalia, and I
25 believe the historical precedent for this kind of suit is

1 on my side, that in this kind of case there is really only
2 a pure public question in a purely legal sense.

3 Not in terms of the economic consequences of the
4 tax, or the differences in burden that may result from its
5 application, but for purposes of the litigation of the
6 pure legal question, there are no private rights involved,
7 and therefore --

8 QUESTION: Well, why isn't -- why isn't this a
9 property right here?

10 MR. SLAUGHTER: I beg your pardon?

11 QUESTION: Why isn't there a property right here
12 being asserted by the plaintiffs in the present action, a
13 right of action created by section 1983 authorizing
14 individuals to sue for violation of their individual,
15 equal protection rights? Now, why isn't it that kind of
16 claim being made here?

17 MR. SLAUGHTER: Well, the fact --

18 QUESTION: Isn't it?

19 MR. SLAUGHTER: Well, I agree, Your Honor, it is
20 a kind of --

21 QUESTION: And in order for a prior suit to
22 somehow take away that property right and that cause of
23 action, wouldn't we think due process would require some
24 kind of notice, and wouldn't we also think it would
25 require some kind of adequate representation of these

1 plaintiffs in the prior suit?

2 MR. SLAUGHTER: Absolutely, Your Honor.

3 QUESTION: Has there been any determination of
4 adequate representation in Bedingfield of these plaintiffs
5 and their suit?

6 MR. SLAUGHTER: You have put your finger on the
7 essential due process issue in this whole case, and the
8 one that we would submit, if it is due for remand, that
9 would be the first question that would be appropriate for
10 the Court to determine, namely the adequacy of the
11 representation in Bedingfield.

12 With regard to --

13 QUESTION: So long as the Court satisfies itself
14 that counsel is an adequate counsel, other people who
15 don't want to be represented by this counsel must be held
16 to whatever he achieves, is that the principle you're
17 urging for? I mean --

18 MR. SLAUGHTER: Yes --

19 QUESTION: -- I thought if I had a cause of
20 action, even if it involves a legal issue that's common to
21 causes of action that other people have, I'm entitled to
22 hire my own counsel and go litigate that myself.

23 You say that we can dispense with that, and we
24 can say, so long as we satisfy ourselves we have a good
25 lawyer in front of us, and that this lawyer is going to do

1 as good a job as any other, we can tell the other people
2 go away, you must be represented by this person. The
3 State can do that?

4 MR. SLAUGHTER: To a limited extent in this kind
5 of case, Your Honor, and --

6 QUESTION: What kind of case is that? What is
7 different --

8 MR. SLAUGHTER: And --

9 QUESTION: -- about this kind of case from the
10 cases that --

11 MR. SLAUGHTER: The litigation --

12 QUESTION: -- Justice Breyer was asking about?

13 MR. SLAUGHTER: The litigation of purely public
14 questions that are necessary to the operation of State and
15 local government with some degree of reliability and
16 finality. I understand --

17 QUESTION: What is the purely public question,
18 in your view?

19 MR. SLAUGHTER: Many, Your Honor. You mentioned
20 several earlier. For example, the validity of the process
21 for which bonds are issued, the validity by which a tax is
22 levied and collected.

23 QUESTION: The validity of any State statute?

24 MR. SLAUGHTER: Many, but --

25 QUESTION: Well --

1 MR. SLAUGHTER: -- more so with regard to those
2 that govern the nature of State and local government, and
3 I can't give you an ironclad rule to sort them out, but --

4 QUESTION: Well, why does a county occupation
5 tax govern the nature of government?

6 MR. SLAUGHTER: It does not govern the nature of
7 government, Your Honor. It is merely a kind of issue
8 that -- the levy of a tax is totally useless to a local
9 government if it can be challenged in endless litigation.

10 Now, admittedly, stare decisis after a certain
11 point may provide relief, but it has been the historic
12 Anglo-American practice to use res judicata in this
13 context rather than stare decisis.

14 QUESTION: When you say historic --

15 QUESTION: Can you think of anything more
16 governmental than the criminal law? Is it really your
17 position that when one individual challenges the
18 constitutionality of a particular criminal law provision
19 and loses, and maybe even chooses not to appeal, that
20 everybody else is bound by the decision that that criminal
21 law provision is constitutional?

22 You say, well, you had a fair run at it. This
23 person represented you.

24 MR. SLAUGHTER: No, that's -- absolutely not.

25 QUESTION: Why is that any different? I don't

1 understand that.

2 MR. SLAUGHTER: Because of the nature of the
3 representational suit, whether it be formally,
4 structurally certified as a class so that the
5 representative proceeds under those rules, or whether it
6 proceeds in the manner represented by Hansberry v. Lee,
7 and which was prior to the adoption of State rules --

8 QUESTION: Mr. Slaughter, why do we bother
9 having class actions at all? I mean, it's so much easier
10 just to say, champion, come forward, get yourself a good
11 lawyer, forget notice, it's much more efficient. If you
12 are right, then there's no need for a class action.

13 Why would anybody want to bother to go through
14 all that business of getting it certified, if all you have
15 to do is get somebody who is similarly situated, that
16 person gets a decent lawyer, and that's the end of it?
17 The case is decided once and for all for everybody.

18 MR. SLAUGHTER: Those who verge on the -- on
19 legal anarchy I think would advocate that, and there is a
20 strong --

21 QUESTION: But you are -- are you saying that
22 there are -- sometimes you do need a class action with the
23 court to certify the class and notice to the members. Can
24 you distinguish for me the cases where you do need a class
25 action, if that is your position, and those where you

1 don't?

2 MR. SLAUGHTER: I cannot distinguish all, but I
3 can tell you that the very class of case that we're
4 talking about today, cases which need to determine with
5 some degree of finality and reliability State and local
6 government issues do need the possibility of class
7 adjudication, whether it be in the traditional form which
8 I say the Bedingfield case was, or certified as a (b) (1)
9 or (b) (2) class, as the petitioners seek to do in this
10 case.

11 In either case, it would constitute a final
12 litigation of the matter, and would enable government to
13 proceed without the constitutional cloud of uncertainty
14 hanging over its head.

15 In that respect, I think class actions are very
16 useful, though they do conflict with this tradition in a
17 free society that Justice Scalia was talking about.

18 QUESTION: But isn't it true that in the
19 governmental context, normally the government feels
20 comfortable proceeding with all the risks, reliance on the
21 doctrine of stare decisis? Once they've got a -- the
22 supreme court of a State has ruled on and passed on most
23 of the issues, they figure things are okay.

24 And something -- somebody can always come up
25 with some new idea, but to say they have to have claim

1 preclusion to give the government authority sufficient
2 confidence to go ahead with their project seems to me
3 carrying it a little farther than you really have to.

4 MR. SLAUGHTER: Well, as I mentioned in our
5 brief, Justice Stevens, we are not going to insist on
6 claim preclusion in this case. I think an adequate
7 argument can be made for issue preclusion on the equal
8 protection case.

9 And admittedly -- admittedly, there are a number
10 of cases where, if a matter in question, for example, the
11 proper procedure for a bond issue had not been followed
12 and the prior test case only dealt with the legality of
13 its purpose, then clearly the second case would not be
14 blocked.

15 But in this case, the county, bond attorneys,
16 everyone relied upon the fact that the equal protection
17 argument had been raised in the earlier case, and assuming
18 that it was a class action that had the same preclusive
19 effect as a (b) (1) class action, it was deemed to be res
20 judicata with regard to that --

21 QUESTION: Mr. Slaughter --

22 QUESTION: But don't you --

23 QUESTION: -- I'm a little confused. You just
24 said you were not insisting on claim preclusion. Instead,
25 you said issue preclusion, but issue preclusion, or what

1 some people call collateral estoppel, requires not merely
2 the issue be raised, but that it be actually litigated,
3 and decided, and essential to the decision, and it's those
4 two things, actually litigated and decided and is central
5 to the decision, that you don't have with respect to the
6 equal protection claim.

7 MR. SLAUGHTER: With all due respect, Your
8 Honor, I think it is present in this case. First of all,
9 the customary rule with regard to judgments is that if an
10 issue was raised by the litigants, whether or not the
11 issue was sufficient, or whether or not the Court
12 specifically addressed it, if it was consistent with the
13 judgment and a contrary position would have negated the
14 judgment, then the decision of that issue is merged in the
15 judgment.

16 QUESTION: But that only goes to res judicata.
17 That does not apply in a claim preclusion situation. I
18 mean, Justice Ginsburg's very question is, I think, that
19 if you are going to insist on the position that they are
20 cut off on an issue which was not, in fact, litigated,
21 even though it may have been raised, then you've got to
22 rest your case on res judicata, not on issue preclusion.

23 MR. SLAUGHTER: Your Honor, what I am trying to
24 say in that argument, and for that purpose we cited Grubb
25 v. Public Service Commission of Ohio, was that as a rule

1 of decision, not -- having nothing to do with res
2 judicata, just what first of all was decided, before we
3 get to whether or not that decision precluded anything,
4 the proper rule is that the equal protection question was
5 decided in the case.

6 Now, whether it should then have preclusive
7 effect either on a res judicata or on an issue preclusion
8 basis was a different question.

9 QUESTION: Right, and that's the reason for
10 Justice Ginsburg's question and my question. If you are
11 saying, as I thought you were saying, that you didn't
12 insist on res judicata, that you were satisfied to rely on
13 issue preclusion, then you lose, it seems to me, on any
14 claim of issue preclusion on the res judicata point,
15 because it was not, in fact, litigated. It was merely
16 raised.

17 MR. SLAUGHTER: You're absolutely --

18 QUESTION: It may have cut off the parties to
19 the first case, but it is not going to cut off anyone
20 else.

21 MR. SLAUGHTER: On that point, you are correct,
22 Your Honor. If we cannot persuade this Court that the
23 appropriate rule of decision was that the equal protection
24 question was, in fact, decided by Bedingfield, then we may
25 indeed be vulnerable, unless the representational nature

1 of the class action of the suit is sufficient to invoke
2 the broader standard of claim preclusion.

3 QUESTION: Well, on that, could you go back to
4 Justice Stevens' and Justice O'Connor's question for just
5 a second, because it seemed to me that on -- there are two
6 equal protection claims, I think, that were raised.

7 One was 500,000, and they might have litigated
8 that one, I don't know, but the other one is the licensed
9 professionals versus the other, and that was stated in the
10 claim and then abandoned, all right, I guess, or they
11 never got to it, so think of the second one, all right?

12 Now, I take it no notice -- is there -- you were
13 talking about tradition, the tradition of these class
14 actions. Did you find any case -- because I couldn't find
15 one, but did you find a case which, going back as long as
16 you want in tradition, would say, take, e.g., a nuisance
17 run by the city that hurts 10,000 people, not a taxpayer
18 action that is a private Attorney General action -- that's
19 out of this case. This is more like a nuisance, or an
20 accident that hurts 10,000 people in their cars.

21 Did you find any case where the first person to
22 bring the nuisance suit would bind later people who did
23 not have notice on an issue that wasn't litigated?

24 That's the tradition that I think would be
25 relevant here, and I'm not saying there is or there isn't.

1 I'm saying I couldn't find such a thing, and I do see the
2 possibility of such a thing falling under (b)(2), and
3 maybe the appropriate action order thing that Justice
4 Ginsburg takes care of it, but did you find any such case?

5 MR. SLAUGHTER: No, I did not, Your Honor, and
6 that is precisely the reason why in the brief I said that
7 perhaps the Alabama supreme court painted too broadly with
8 the claim preclusion brush for purposes of due process,
9 and that it might be more -- a kinder and gentler due
10 process application if, in fact, it were limited to issue
11 preclusion.

12 QUESTION: And if that were so, then I guess it
13 wasn't just that there was no finding that the
14 representation was adequate. What concerns me more than
15 that is the fact that there was not even any notice.

16 MR. SLAUGHTER: Well, Your Honor, with regard to
17 this notice, I can answer nothing, other than usage that
18 has been sanctioned for many years as a settled practice
19 meets the requirements of due process, because in fact, if
20 you examine the history of this kind of representational
21 suit in equity, the precursor of Rule 23 between 1938 and
22 1966 and its present operation with regard to (b)(1) and
23 (b)(2) classes, which are the suitable vehicle for this
24 kind of public issue, notice is not required in order to
25 establish a class that is binding on all of the members of

1 that class, provided that there has been fair and adequate
2 representation of the class interest.

3 And that was the issue in Hansberry v. Lee,
4 which I submit governs this case completely. First of
5 all --

6 QUESTION: Mr. Slaughter, you mentioned that you
7 case is a little shaky on the claim preclusion part, but
8 you say it's solid on issue preclusion, and since you do
9 have a decision of the highest court of your State, is
10 there, in fact, any difference between stare decisis and
11 issue preclusion with respect to these issues, the ones
12 that were actually litigated and decided all the way up
13 the line in Alabama? Is there any significant difference
14 between those two labels?

15 MR. SLAUGHTER: Just the necessity of going
16 through the relitigation of this particular case again,
17 Your Honor, and the fact that if someone doesn't like the
18 opinion of the Alabama supreme court in that case, yet
19 another plaintiff may bring the public law equivalent of a
20 strike suit.

21 QUESTION: But you can always bring a suit, and
22 in both cases it seems to me the other side would move for
23 summary judgment and one case would say, issue preclusion,
24 and the other case would say, stare decisis.

25 MR. SLAUGHTER: But, Your Honor, I think you

1 would acknowledge that there is always a little bit more
2 of a chink to get through the opening provided by stare
3 decisis than there is with res judicata, because the law
4 evolves, and that is taken into account with stare
5 decisis.

6 QUESTION: There's a little more wriggle room.

7 MR. SLAUGHTER: More wriggle room, because you
8 have more cases. It is not the authority of the single
9 prior case, but all of the cases that may be of a similar
10 nature that are to be taken into account for stare
11 decisis.

12 QUESTION: May I ask you one question on the
13 distinction of stare decisis and preclusion? Can you cite
14 me any case in which a plaintiff was found to be barred by
15 res judicata, estoppel, whatever it might be, not stare
16 decisis, but a judgment in a case in which he was neither
17 a party nor a privity to a party?

18 MR. SLAUGHTER: If he was represented adequately
19 in the class, yes.

20 QUESTION: I'm saying no -- not class action,
21 because Bedingfield was not a class action.

22 MR. SLAUGHTER: Well, the most --

23 QUESTION: Can you give me a case that --

24 MR. SLAUGHTER: Yes. I think the Southwest
25 Airlines case versus the Texas International case is very

1 much on point in that regard, Justice Stevens, because the
2 privity, if you will, was created in that case by the
3 identity of interest in the single, narrow legal issue
4 that was presented, which was the litigation of the
5 validity of a Dallas ordinance prohibiting the use of Love
6 Field, and it had been decided earlier that that ordinance
7 violated Texas law.

8 All of the airlines who wanted to exclude
9 Southwest from Love Field had a tremendous economic
10 interest, but the court held that they were precluded from
11 further litigating that question because their legal as
12 opposed to their economic interest was indistinguishable
13 from that of the City of Dallas and others who had
14 litigated the same public question before, and that is a
15 case, I think, that meets your criteria.

16 Now, they had notice, though, in the sense of
17 actual notice, because of all the publicity attending the
18 case, but not necessarily legal notice within the
19 procedural requirements of Rule 23.

20 As I said earlier, I believe that this case is
21 really governed by *Hansberry v. Lee*, which stood for
22 several very fundamental points. One, I agree with the
23 petitioners that it said the States are free, subject to
24 Federal due process, to devise any kind of procedural
25 vehicle for representational suits they desire.

1 Secondly, those representational suits will bind
2 the members of the class who are represented.

3 Thirdly, it is a violation of due process if the
4 representative of the class has a conflict of interest or
5 does not adequately represent the members of the class,
6 and that was a specific holding in *Hansberry v. Lee*, and
7 finally, *Hansberry v. Lee* stands for the proposition that
8 the question of adequate and fair representation in this
9 kind of suit is a matter for retroactive examination by
10 the courts when *res judicata* becomes a question.

11 And in that regard, it is consistent with the
12 principle of Rule 23 that the certification of a class
13 does not establish its preclusive effect for the future.

14 QUESTION: Thank you, Mr. Slaughter.

15 MR. SLAUGHTER: Thank you.

16 QUESTION: Mr. Baxley, you have 3 minutes
17 remaining.

18 REBUTTAL ARGUMENT OF WILLIAM J. BAXLEY

19 ON BEHALF OF THE PETITIONERS

20 MR. BAXLEY: No question, *Bedingfield* was not a
21 class. Nobody ever considered it one, and contrast the
22 lack of notice there with what was deemed not sufficient
23 in *Martin v. Wilks*, where there, you had the Birmingham
24 Firefighters Association that appeared, these later
25 plaintiffs were members of the association, the court

1 ordered that notice be published in both Birmingham
2 newspapers for, I think, 30 days or so, they solicited
3 opinions, asked everybody to come in, these organizations
4 represented these people, you had much, much more notice-
5 type in the Martin v. Wilks than you had here, where you
6 had none, zero.

7 Secondly, it could have been a class. The
8 county, if they had wanted it to barr everything forever,
9 they could have come in -- the Rules of Civil Procedure
10 were in effect in Alabama for class actions 10 or 12 years
11 before Bedingfield.

12 The county didn't want to do that. They didn't
13 want to make it a class. They hoped nobody would ever
14 raise legal protection. They didn't want to litigate it
15 then, they don't want to litigate it today, they don't wan
16 to litigate it tomorrow, but that's the party that should
17 have made it that way by your dicta, or your ruling of
18 both parties are the ones that best know.

19 And lastly, in the Southwest Airlines case that
20 he mentioned just then, that was a very different
21 situation that the Fifth Circuit ruled in that instance.
22 The attorneys for the parties that were "nonparties" also
23 filed amicus briefs. They attended the -- they sat
24 through the actual first proceeding, there was a lot of
25 different fact situations different in the Southwest

1 Airlines case than here, where you had absolutely no
2 relationship

3 QUESTION: Of course, that was a Fifth Circuit
4 case, wasn't it?

5 MR. BAXLEY: Yes. Yes, Your Honor.
6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baxley.
8 The case is submitted.

9 (Whereupon, at 11:01 a.m., the case in the
10 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:

JASON RICHARDS, ET AL., Petitioners v. JEFFERSON COUNTY, ALABAMA, ET AL.

CASE NO: 95-386

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

BY Don Mani Federico

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