

The Burger Court Opinion Writing Database

Hughes v. Alexandria Scrap Corp.
426 U.S. 794 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 30, 1976

Re: 74-1607 - Hughes v. Alexandria Scrap Corp.

Dear Lewis:

Your memorandum of March 25 appeals to me. As I told you at lunch one day, I began to have reservations before your memorandum came around and after reviewing the oral argument. But do you need a term as colorful as "byzantine" rather than "complex", "intricate"?

You can treat me as generally in agreement, whichever way the vote finally goes.

Regards,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 30, 1976

Re: No. 74-1607 - Hughes v. Alexandria Scrap Corp.

Dear Lewis:

I am delighted to join your memorandum in this case, and very much hope that you will get a Court for it. My "join" is in no way conditional upon your accepting the suggestion I offer in the following paragraph.

In the second paragraph of your footnote 18 on page 14, you speak of the fact that appellee undertook to "build no new plant nor add additional machinery in reliance upon the prospect of receiving additional hulks under the Maryland bounty scheme". I would think that unless this sort of claim could be shown to rise to the level of a "taking" under the Fifth and Fourteenth Amendments, or unless it could be shown to amount to the "impairment of the obligation of a contract" within that prohibition, it would not be cognizable under the Commerce Clause. As I have understood our cases interpreting the latter, they do not have any significant component of contract or property interest.

Sincerely,
Bill

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 1, 1976

RE: No. 74-1607 Hughes v. Alexandria Scrap Corporation

Dear Lewis:

Even were I able to agree to your conclusion as to the Commerce Clause (and despite my conference vote I can't say that I could not) I could not join your Commerce Clause analysis emphasizing as it does that state action of the kind here forecloses application of usual Commerce Clause principles.

And on the Equal Protection section, much as I agree with your conclusion, it seems to me this is all tied up with our problems in Murgia, Nancy Dukes, Diaz, and the illegitimacy case Lucas. Indeed, the District Court opinion in this case relied heavily on the Fifth Circuit's Equal Protection analysis in Nancy Dukes and draws upon the original 1922 Royster case.

I'll probably write separately on the Commerce Clause point and if I come out in agreement with your result it will only be because, as you say in footnote 18, "the record contains no details of the bulk market prior to the bounty scheme. . . "

Whether I'll also say anything on the Equal Protection point will depend upon the outcome of the hassle we're now in as to what is proper equal protection analysis.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

HUGHES V. ALEXANDRIA SCRAP CORPORATION

FROM Mr. Justice Brennan
 ON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MARYLAND ~~Decided: 6/8/76~~

No. 74-1607

Decided June

~~Decided: 6/8/76~~

MR. JUSTICE BRENNAN, dissenting.

The Court continues its reinterpretation of the Commerce Clause and its repudiation of established principles guiding judicial analysis thereunder -- in this case shifting its focus from Congressional power arising under the Commerce Clause, see National League of Cities v. Usery, ___ U.S. ___ (1976), to the role of this Court in considering the constitutionality of state action claimed impermissibly to burden interstate commerce. Principles of legal analysis heretofore employed in our case^S ~~A~~ considering claims under the Commerce Clause, e.g., South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177 (1938); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Great A & P Tea Co. v. Cottrell, ___ U.S. ___ (1976), are ignored, ^{1/} and an area of state action plainly burdening interstate commerce, an area not easily susceptible of principled limitation, is judicially carved out and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1976

RE: No. 74-1607 Hughes v. Alexandria Scrap Corporation

Dear John:

In response to your concurring opinion I am making the following changes in my dissenting opinion, presently keyed to the circulated typed draft:

1. On page 13, following the citation, "Ante, at 14 n. 18", a new footnote will be added as follows:

The concurring opinion asserts that the interstate market in processing scrap metal allegedly burdened by Maryland's bounty scheme as amended "was previously too small to be significant." Ante, at ____ n.* Nothing in the record supports this factual judgment, as appellants themselves argue, Brief for Appellants, at 37-39; Appellants' Reply Brief, at 2-3, and as the Court below noted, 391 F. Supp. 46, 62.

2. Footnote 6 will be supplemented as follows:

The concurring opinion asserts that "by hypothesis," an hypothesis unsupported in the record, see infra, at ____ & n. ____ , "we are dealing with a business that is dependent on the availability of subsidy payments," "that [the] commerce, which is now said to be burdened, would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants," and that the "'burden' on the Virginia processor is caused by the non-receipt of the subsidy, regardless of whether or not Maryland elects to continue to subsidize its local plants." Ante, at ____ . With all

- 2 -

respect, however, the evidence and legal arguments are to the contrary. An uncontradicted affidavit in the record reveals that \$14.00 of the \$16.00 "subsidy" is customarily passed on to the scrap hauler, App. 79A, and the inability of the out-of-state processor to pass this subsidy on to the haulers, rather than simply the lack of subsidization of scrap processing itself, is alleged to burden interstate commerce by diverting scrap processing to Maryland.

The complaint alleges that "[a] substantial portion of the Plaintiff's business consists of the destruction and processing of vehicles acquired in interstate commerce from towers and other third persons in Maryland;" that the challenged amendment "enabl[es] Maryland scrap processors to provide financial inducements to [towers] while depriving the Plaintiff of the ability to provide the same;" that "[i]n consequence the Plaintiff is placed at a severe competitive and economic disadvantage with Maryland scrap processors because of the arbitrary diversion of [hulks] away from the normal channels of interstate commerce;" and that appellee has been "depriv[ed] . . . of a vital source of scrap, iron, steel and nonferrous scrap which normally moved in interstate commerce." App. 10A-11A.

The stipulated facts establish that the "market value of . . . hulks is heavily dependent upon the prices steel mills are willing to pay for . . . scrap [metal], which in turn is influenced by national and economic conditions," and that "[t]he result is relatively fierce competition by scrap processors for the acquisition of the available hulks." App. 59A.

An uncontradicted affidavit in the record asserts that "[t]he lifeblood of the scrap metal processing industry is old cars," that "[t]he primary source of Plaintiff's raw materials is trade in . . . hulks," and that "[a] very substantial portion of the Plaintiff's trade in old cars is derived from Maryland." "The ability to acquire eight year old and older [hulks] from Maryland . . . is of crucial importance to the conduct of Plaintiff's business," and the

- 3 -

market response to the challenged amendment which disabled appellee from passing the bounty on to the haulers "was an almost total abandonment of Plaintiff by its former regular [haulers participating in the bounty program]." "[I]n times of scarcity of old cars when the offering price is high and the competition [among scrap processors] for the available cars is sharpest, the ability to [pass the bounty on to the scrap haulers] which is, in effect, an offer of a higher price without increasing the cost of the raw material to the processor, imparts a distinct competitive edge to those processors fully able to participate in the bounty program." App. 74A-75A, 78A, 82A-83A.

Sincerely,



Mr. Justice Stevens

cc: The Conference

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice P. Marshall
 Mr. Justice Stevens

cc: Mr. Justice BRENNAN

6/15/76

WJS/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1607

Harry R. Hughes, etc., et al.,
 Appellants, } On Appeal from the
 v. } United States District
 Alexandria Scrap Corporation. } Court for the District
 of Maryland.

[June —, 1976]

MR. JUSTICE BRENNAN, dissenting.

The Court continues its reinterpretation of the Commerce Clause and its repudiation of established principles guiding judicial analysis thereunder—in this case shifting its focus from congressional power arising under the Commerce Clause, see *National League of Cities v. Usery*, — U. S. — (1976), to the role of this Court in considering the constitutionality of state action claimed impermissibly to burden interstate commerce. Principles of legal analysis heretofore employed in our cases considering claims under the Commerce Clause, e. g., *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177 (1938); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525 (1949); *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959); *Pike v. Bruce Church, Inc.*, 397 U. S. 137 (1970); *Great A & P Tea Co. v. Cottrell*, — U. S. — (1976), are ignored,¹ and

¹ "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pacific Co. v. Arizona*, 325

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 26, 1976

Re: No. 74-1607, Hughes v. Alexandria Scrap Corp.

Dear Lewis,

I agree with the memorandum you have circulated in this case.

Sincerely yours,

P. S.

Mr. Justice Powell

Copies to the Conference

file

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1976

Re: No. 74-1607 - Hughes v. Alexandria Scrap
Corp.

Dear Bill:

I join your dissenting opinion in this
case.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 10, 1976

Re: No. 74-1607 -- Hughes v. Alexandria Scrap Corp.

Dear Bill:

Please join me.

Sincerely,

T.M.

T. M.

Mr. Justice Brennan

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 5, 1976

Re: No. 74-1607 - Hughes v. Alexandria Scrap Corp.

Dear Lewis:

You have written a very persuasive opinion. I shall join it unless the resolution of the pending problems in Murgia, Dukes and Diaz contraindicates it. I would like to keep that option open, but for the moment you may regard me as in accord with you on the Hughes case.

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 10, 1976

Re: No. 74-1607 - Hughes v. Alexandria Scrap Corp.

Dear Lewis:

On reviewing the correspondence, perhaps my note of April 5 to you is not so clear as it might be. In any event, you may now regard me as a clear join.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 25, 1976

No. 74-1607 Hughes v. Alexandria Scrap Corp.

MEMORANDUM TO THE CONFERENCE:

The tentative vote at the Conference on this case was 6 to 3 to affirm the decision of the three-judge court invalidating the Maryland statute. I was assigned the opinion.

I undertook initially to write it in accord with the Conference vote. As you will recall (and as I have noted in the enclosed memorandum) the statute is Byzantine in its intricacy. Indeed, I am afraid I did not fully understand all of the intricacies at the time of our Conference discussion. In any event, after spending considerable time on this case, I concluded that it simply "would not write" - at least for me - in accord with my vote. I so informed the Chief Justice, and he agreed that I should circulate a memorandum reflecting my present view as to the proper disposition of the case.

Accordingly, I submit for your consideration the attached memorandum. This concludes that the Maryland statute, as amended in 1974, neither violates the Commerce Clause nor denies appellee equal protection of the laws.

I should add that a memorandum which John Stevens was generous enough to share with me contributed significantly to my "seeing the light". I acknowledge my indebtedness for this welcome assistance.

Lewis
L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice
Mr. Justice
Mr. Justice
- Mr. Justice ~~Rehnquist~~
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: ~~Mar 25, 1976~~

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1607

Harry R. Hughes, etc., et al.,
Appellants, } On Appeal from the
v. } United States District
Alexandria Scrap Corporation. } Court for the District
of Maryland.

[March —, 1976]

Memorandum of MR. JUSTICE POWELL.

This case involves a two-pronged constitutional attack on a recent amendment to one part of a complex Maryland plan for ridding that State of abandoned automobiles. The three-judge District Court agreed with appellee, a Virginia scrap processor that participates in the plan, that the amendment violated the Commerce Clause and denied appellee equal protection of the laws. We disagree on both points.

I

The 1967 session of the Maryland Legislature commissioned a study to suggest some way to deal with the growing aesthetic problem of abandoned automobiles. The study concluded that the root of the problem was the existence of bottlenecks in the "scrap cycle," the course that a vehicle follows from abandonment to processing into scrap metal for ultimate re-use by steel mills. At its 1969 session, the legislature responded by enacting a comprehensive statute designed to speed up the scrap cycle by using state money both as a carrot and as a stick.¹ The statute is byzantine in its intricacy,

¹ 1969 Maryland Laws, c. 556. The law, as amended, is codified at 6 Md. Code Ann. § 5-201 *et seq.*

1,15

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Douglas
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

Recirculated: MAR 21 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1607

Harry R. Hughes, etc., et al.,
 Appellants,
 v.
 Alexandria Scrap Corporation. } On Appeal from the
 United States District
 Court for the District
 of Maryland.

[March —, 1976]

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¹ 1969 Maryland Laws, c. 556. The law, as amended, is codified at 6 Md. Code Ann. § 5-201 et seq.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 30, 1976

Re: No. 74-1607 - Hughes v. Alexandria Scrap Corp.

Dear Lewis:

Please join me.

Sincerely,

WRW

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1976

Re: 74-1607 - Harry R. Hughes v. Alexandria
Scrap Corporation

Dear Lewis:

Because my analysis of the interstate commerce issue is so different from the argument in either brief, it occurred to me that it might be useful to you, in connection with your preparation of the majority opinion, to have a copy of the substance of what I propose to say. Potter invited me to prepare the dissent in this case.

I trust that the fact that I have committed these thoughts to writing will not operate as a waiver of my right to change my mind after reading what I am sure will be a much more persuasive argument for affirmance than I found in appellee's brief. If it accomplishes nothing else, perhaps that brief may induce us to consider imposing a page limitation rule for all but truly exceptional cases.

Respectfully,



Mr. Justice Powell

Copy to Mr. Justice Stewart

SUPREME COURT OF THE UNITED STATES

NO. 74-1607

Harry R. Hughes, Secretary of)
Transportation, State of Maryland,)
et al.)
Appellants,) Appeal from the United
v.) States District Court
for the District of
Maryland.
Alexandria Scrap Corporation,)
Appellee.)

[]

MR. JUSTICE STEVENS, dissenting.

It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market. This case is unique because the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap processing business.

By artificially enhancing the value of certain abandoned
hulks, Maryland created a market that did not previously exist. ¹

The program which Maryland created in 1969 included subsidies

free
1 It might be more accurate to state that Maryland substantially enlarged the market that was previously too small to be significant. But the analysis is the same whether we are dealing with the newly

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 26, 1976

Re: No. 74-1607 - Hughes v. Alexandria Scrap Co.

Dear Lewis:

Please join me.

Respectfully,



Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens
 JUN 9 1978
 Circulated:

Recirculated:

No. 74-1607 - Hughes v. Alexandria Scrap Corporation

MR. JUSTICE STEVENS, concurring.

The dissent creates the impression that the Court's opinion, which I join without reservation, represents a significant retreat from its settled practice in adjudicating claims that a state program places an unconstitutional burden on interstate commerce. This is not the fact. There is no prior decision of this Court even addressing the critical commerce clause issue presented by this case.

It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market. This case is unique because the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap processing business.

By artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist. The program which Maryland initiated in 1969 included subsidies

J
V

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 10 1976
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1607

Harry R. Hughes, etc., et al.,
Appellants, } On Appeal from the
v. } United States District
Alexandria Scrap Corporation. } Court for the District
of Maryland.

[June —, 1976]

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By artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist.* The program which Maryland inti-

*It might be more accurate to state that Maryland substantially enlarged the market that was previously too small to be significant. But the analysis is the same whether we are dealing with the newly

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 11, 1976

Re: 74-1607 - Hughes v. Alexandria Scrap Corp.

Dear Bill:

With all respect, may I suggest that if you really are convinced that there would be a significant interstate market for Maryland's abandoned hulks without any subsidy program, your dissent should be grounded on the proposition that the Maryland legislation is invalid because it is totally irrational.

In a more serious vain, I reread the portions of the briefs which you cited. They deal with the effect of the partial termination of the subsidy program in 1974, rather than the viability, apart from any subsidy, of the interstate market for hulks (as opposed to the interstate market for "scrap metal"). My opinion rests on the factual judgment that the availability of the bounty payments resulted in an artificially enhanced value for abandoned hulks, which in turn created either a market for the hulks that did not previously exist, or alternatively, enlarged a pre-existing market that the Maryland legislature considered too small to be significant. In either event, as I point out in my footnote, the economic analysis is the same.

It seems to me that the agreement of the parties described by the District Court on page 8a of the appendix to the Jurisdictional Statement, plus the fact that the Maryland legislature decided to authorize the subsidy program, provide sufficient support for my "factual judgment" to withstand your withering counterattack. In all events, notwithstanding my respect for your normally penetrating analysis, I am not persuaded that I need to modify my footnote or my opinion.

Respectfully,



Mr. Justice Brennan

Copies to the Conference