The Burger Court Opinion Writing Database

National League of Cities v. Usery

426 U.S. 833 (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

May 17, 1976

Re: (74-878 - National League of Cities v. Usery
(74-879 - California v. Usery

Dear Bill:

Please join me in your May 5 circulation.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 9, 1976

74-1303

MEMORANDUM TO: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Stevens

I am in dissent in eight of the cases on the March 8 Assignment List. I thought I might undertake the dissents in four of the eight: (a) No. 74-878 and 74-879, National League of Cities, in which Byron, Thurgood and John also voted to affirm; (b) No. 74-1222 and 74-1055, Wolff v. Rice, in which Thurgood also voted to affirm; (c) No. 74-730, Roemer v. Board of Public Works, in which Potter, Thurgood and John also voted to reverse; (d) No. 74-1646, Andresen v. Maryland, in which I am the lone dissenter.

This leaves (a) No. 74-1529, Henderson v. Morgan, in which Byron and Thurgood also voted to affirm. Would Byron be interested in taking that one? (b) No. 74-1492, Washington v. Davis, in which Thurgood and I voted to affirm. Would Thurgood care for that one? (c) No. 74-768, Brown v. G.S.A., in which John also voted to reverse. Would John care for that one? (d) No. 74-1303, Bishop v. Wood, in which Byron, Thurgood and Harry also voted to reverse. Would Harry undertake that?

Sincerely,

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 3, 1976

RE: Nos. 74-878 and 74-879 National League of Cities and State of California v. W.J. Usery, Jr., etc.

Dear Bill:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

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

From: Mr. Justice Brennan

Circulated: 6/8/76

Recirculated: _____

National League of Cities v. Usery - No. 74-878

MR. JUSTICE BRENNAN, dissenting.

The Court concedes, as of course it must, that Congress enacted the 1974 amendments pursuant to its exclusive power under Art. I, § 8, cl. 3 of the Constitution "To regulate Commerce . . . among the several States." It must therefore be surprising that my Brethren should choose this Bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For one hundred and fifty-two years ago Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful.

> "[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 9, 1976

RE: No. 74-878 National League of Cities v. Usery

Dear Bill:

Thanks so much for sending me the copy of your proposed changes. The only changes I shall make in response are the following:

(1) Line 14, p. 7, delete "a delegated power, like" so that the line will now read: "exercise of the commerce power, but rather".

(2) The first sentence on page 9 will be revised to read as follows: "Even more significant for our purposes is the Court's citation of United States v. California, a case concerned with Congress' power to regulate commerce, as supporting the rejection of the State's contention that state sovereignty is a limitation on Congress' war power."

(3) Delete "must be taken as overruling" from the end of line 2 and the beginning of line 3 on page 13, so that those lines will read, "and by its logic would overrule those cases. . . ." The sentence beginning on line 5 on the same page will read: "I cannot recall another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded rough-shod."

(4) I also propose to add the following to note 8: But, "however socially desirable the goals sought to be advanced . . . , advancing them through a freewheeling non-elected judiciary is quite unacceptable in a democratic society." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 699 (1976).

(5) The second paragraph of note 12 will be deleted.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 15, 1976

RE: No. 74-878 National League of Cities v. Usery

Dear Bill:

The word from the print shop is that my opinion in the above will not be ready until Thursday. I have taken advantage of this delay and gone over my draft again. Although I previously indicated that no more changes would be forthcoming,["An idle brain is the devil's shop,"] I am making the following additions:

(1) A new footnote 1, following the block quote at the top of page 2, reading:

> "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control, but a regard to the public good and to the sense of the people." The Federalist, No. 31, at 195 (J. Cooke ed. 1901) (A. Hamilton).

(2) The following will be added to old note 5:

> The Brethren intimate that Congress' war power is more properly viewed as "a prime purpose of the Federal Government's establishment" than the commerce power. Ante, at 20 n. 18. Nothing could be further from the fact. "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony' . . . .

> No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished." H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-534 (1949); see id., at 532-535.

(3) The following footnote will be added following "jurisprudence" at the bottom of page 11:

> My Brethren also ignore our holdings that the principle of state sovereignty held to be embodied in the Eleventh Amendment can be overridden by Congress under the Commerce Clause, Parden v. Terminal R. Co., 377 U.S. 184 (1964); Fitzpatrick v. Bitzer, slip op., at 6, 9 (1976). Although the Eleventh Amendment can be overcome by exercise of the power to regulate commerce, my Brethren never explain why the protections of state sovereignty they erroneously find embodied in the Tenth Amendment cannot similarly be overcome. Instead, they merely tell us which delegated powers are limited by state sovereignty, ante, at 9 n. 14, and which are not, id., at 20 n. 18, see also Kleppe v. New Mexico, ___ U.S. ___ (1976), but neither reason nor precedent distinguishing among those powers is provided.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

1, 2, 8-10, 14-16, 21-23

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

6/17/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-878 AND 74-879

The National League of Cities et al., Appellants,
74-878 *v.*
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74-879 *v.*
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[June —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

The Court concedes, as of course it must, that Congress enacted the 1974 amendments pursuant to its exclusive power under Art. I, § 8, cl. 3, of the Constitution "To regulate Commerce . . . among the several States." It must therefore be surprising that my Brethren should choose this Bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For 152 years ago Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful.

> "[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single govern-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 74-878 - National League of Cities v. Usery
74-879 - California v. Dunlop

I have just seen Harry's concurring opinion in the above and much as I regret it think I'll have to say something in my dissent in response to his suggestion that the Court "adopts a balancing approach." I'll do my best to get it out in time (the printer willing) to bring the case down on Friday but thought I should alert you promptly to my problem.

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 74-878 - National League of Cities & California
No. 74-879 v. Dunlop

I have sent to the Printer the following addition to my dissent at page 21 as sentences following the word "commerce" at the end of the second line:

> "My Brother Blackmun suggests that controlling judicial supervision of the relationship between the States and our national government by use of a balancing approach diminishes the ominous implications of today's decision. Such an approach however is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to the Congress."

W.J.B. Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 4, 1976

Nos. 74-878 and 74-879
National League of Cities v. Usery

Dear Bill,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1976

Re: No. 74-878 - National League of Cities v. Usery

Dear Bill:

Please join me in your fine dissent in this case.

Sincerely,

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1976

Re: No. 74-878 -- National League of Cities v. Usery

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

No. 74-878 - National League of Cities v. Usery
No. 74-879 - California v. Dunlop

From: Mr. Justice Blackmun

Circulated: 6/22/76

Recirculated: _____

MR. JUSTICE BLACKMUN, concurring.

The Court's opinion and the dissents indicate the importance and significance of this case as it bears upon the relationship between the Federal Government and our States. Although I am not untroubled by certain possible implications of the Court's opinion -- some of them suggested by the dissents -- I do not read the opinion so despairingly as does my Brother Brennan. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power

in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. See ante 18-19. With this understanding on my part of the Court's opinion, I join it.

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 6/22/76

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–878 AND 74–879

The National League of Cities et al., Appellants,
74–878 *v.*
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74–879 *v.*
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[June 24, 1976]

MR. JUSTICE BLACKMUN, concurring.

The Court's opinion and the dissents indicate the importance and significance of this case as it bears upon the relationship between the Federal Government and our States. Although I am not untroubled by certain possible implications of the Court's opinion—some of them suggested by the dissents—I do not read the opinion so despairingly as does my Brother BRENNAN. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. See *ante*, 18–19. With this understanding on my part of the Court's opinion, I join it.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 4, 1976

Nos. 74-878 and 74-879 National League of Cities

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

LFP/gg

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–878 AND 74–879

The National League of Cities et al., Appellants,
74–878 v.
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74–879 v.
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[May —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion for the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act,[1] and required employers covered by the Act to pay their employees a minimum hourly wage [2] and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week.[3] By this act covered employers were required to keep certain records to aid in the enforcement of the Act,[4] and to comply with specified child labor standards.[5] This Court unanimously upheld the Act as

[1] The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* (1940 ed.).
[2] 29 U. S. C. § 206 (a) (1940 ed.).
[3] 29 U. S. C. § 207 (a)(3) (1940 ed.).
[4] 29 U. S. C. § 211 (c) (1940 ed.).
[5] 29 U. S. C. § 212 (1940 ed.).

J

P. 16, 17

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: (5/4) 4th

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–878 AND 74–879

The National League of Cities et al., Appellants,
74–878 *v.*
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74–879 *v.*
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[May —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion for the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act,[1] and required employers covered by the Act to pay their employees a minimum hourly wage [2] and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week.[3] By this act covered employers were required to keep certain records to aid in the enforcement of the Act,[4] and to comply with specified child labor standards.[5] This Court unanimously upheld the Act as

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[3] 29 U. S. C. § 207 (a)(3) (1940 ed.).
[4] 29 U. S. C. § 211 (c) (1940 ed.).
[5] 29 U. S. C. § 212 (1940 ed.).

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

Circulated: MAY 5 1976

P. 16

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-878 AND 74-879

The National League of Cities et al., Appellants,
74-878 v.
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74-879 v.
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[May —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion for the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act,[1] and required employers covered by the Act to pay their employees a minimum hourly wage[2] and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week.[3] By this act covered employers were required to keep certain records to aid in the enforcement of the Act,[4] and to comply with specified child labor standards.[5] This Court unanimously upheld the Act as

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[3] 29 U. S. C. § 207 (a)(3) (1940 ed.).
[4] 29 U. S. C. § 211 (c) (1940 ed.).
[5] 29 U. S. C. § 212 (1940 ed.).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 21, 1976

Re: Nos. 74-878 and 74-879 - National League of Cities v. Usery

Dear Chief:

I appreciate your suggestions regarding the circulating draft opinion in this case, think the first of your three suggestions to be an excellent one and will use it very much "up front" so as to get that part of the message across early in theopinion.

The suggestion about stating that the amendments and regulations would cover sick leave, vacation pay, and the like runs into a difficulty that I confronted in several place in drafting the opinion. Because this was an action for injunction against the enforcement of the amendments and regulating them, it is not exactly clear just how broad the effects of the amendments and regulations is. If the case had come up in a proceeding by the Secretary to enforce the Act against a particular state or city, we would have the question in a much more concrete context. As it is, the government naturally tries to minimize the sweep of the Act, while the appellants try to maximize it. I think we are on sound ground in speaking the way we have about minimum wages and overtime, but I am not that certain about sick leave, etcetera. I have a feeling that we might be sticking our neck our for a fairly solid chop by the dissent if we included that reference.

Your third suggestion, about referring to the existence of the stay, likewise has much to commend it except for a certain fuzziness in the Conference action and the order actually entered in connection with the stay. The initial stay which you granted as Circuit Justice was quite plain in its meaning, but the stay granted by the Conference is not crystal clear as to its duration. If we raise this point in the opinion, and give the dissent any sort of an opening by which they can argue that most of the Act has not been stayed for over a year, and the states are still alive and well, it may detract from the point we are trying to make in the opinion.

As you can tell, I am ambivalent about both your second and third suggestions, and if you feel strongly about their being included notwithstanding the thoughts I have expressed, let me hear from you.

Sincerely,

Bill

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 9, 1976

Re: No. 74-878 - National League of Cities v. Usery

Dear Bill:

By way of rebuttal, or perhaps sur-rebuttal, to your changes in the dissent, the only change I will make is to our footnote which will be inserted at the end of the block quote on page 8, described on page 3 of my letter to you, to reflect the revision in the text of your dissent at page 7, line 14 thereof.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 9, 1976

Re: No. 74-878 - National League of Cities v. Usery

Dear Bill:

I have today sent to the printer the following changes in my proposed opinion in this case by way of response to your dissent:

Page 7, immediately before the first full paragraph on the page, a footnote after the word "employers" will be added to read as follows:

> "The dissent intimates, post, at __,__, that guarantees of individual liberties are the only sort of constitutional restrictions which this Court will enforce as against congressional action. It reasons that "Congress is constituted of representatives in both the Senate and House elected from the states. Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the states are in that sense decisions of the states themselves." Post, at 18. Precisely what is meant by the phrase 'are in that sense decisions of the states themselves' is not entirely clear from this language; it is indisputable that a common constituency of voters elects both a State's governor and its two United States Senators. It is equally

changed in accordance with letter 6/9/76

P. 7-9, 20-21

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

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–878 AND 74–879

The National League of Cities et al., Appellants,
74–878 *v.*
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74–879 *v.*
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[May —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion for the Court.

Nearly 40 years ago Congress enacted the Fair Labor Standards Act,[1] and required employers covered by the Act to pay their employees a minimum hourly wage [2] and to pay them at one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week.[3] By this act covered employers were required to keep certain records to aid in the enforcement of the Act,[4] and to comply with specified child labor standards.[5] This Court unanimously upheld the Act as

[1] The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* (1940 ed.).
[2] 29 U. S. C. § 206 (a) (1940 ed.).
[3] 29 U. S. C. § 207 (a)(3) (1940 ed.).
[4] 29 U. S. C. § 211 (c) (1940 ed.).
[5] 29 U. S. C. § 212 (1940 ed.).

HAB

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 25, 1976

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 74-878, National League of Cities v. Usery and No. 74-897, California v. Usery

No. 75-532, New Jersey v. Usery. Resp Secretary of Labor brought suit in D.N.J., seeking injunctive relief on his claim that New Jersey was in violation of the overtime compensation provisions of the Fair Labor Standards Act. Petr defended on the ground that the statute and regulations did not forbid its system of awarding compensatory time rather than premium wages for overtime work; that if the Act did require the system of overtime wages urged by the Secretary it was beyond the power of Congress; and that the Secretary's demand for compensation due was prohibited by the Eleventh Amendment. The DC rejected petr's defenses and ruled for the Secretary. CA 3 affirmed, citing Maryland v. Wirtz as controlling on the question of whether Congress was empowered to enact a statute having the degree of interference with sovereign state functions as did the instant application of the Fair Labor Standards Act.

No. 75-404, Indiana v. Usery. The facts in this case are esentially the same. The Secretary brought suits to compel the State of Indiana to comply with the Act in its operation of a number of state schools and hospitals. Petr State presented one statutory interpretation defense but has relied primarily upon its contention that the Act, as construed and applied, exceeds the power of Congress under the Commerce Clause. The DCs (the appeal was a consolidation of two DC suits) and CA 7 rejected these constitutional claims with a citation to Wirtz.

Both of these cases present challenges to the same provisions of the FLSA as were before us in Nat'l League of Cities. In both the claim which we sustained in that case, that application of that Act to sovereign States, cities and towns is beyond the power of Congress, has been urged as a defense to an enforcement action brought by the Secretary. Our holding in that case indicates the defense should have been sustained. I will vote to Grant, Vacate and Remand both cases for reconsideration in light of National League of Cities.

Sincerely,

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: 5/7/76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74–878 AND 74–879

The National League of Cities et al., Appellants,
74–878 *v.*
W. J. Usery, Jr., Secretary of Labor.

State of California, Appellant,
74–879 *v.*
W. J. Usery, Jr., Secretary of Labor.

On Appeals from the United States District Court for the District of Columbia.

[May —, 1976]

MR. JUSTICE STEVENS, dissenting.

The Court holds that the Federal Government may not interfere with a sovereign state's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his pay check, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck or from driving either the truck or the governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the state *qua* state, I have no doubt that they are subject to federal regulation.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1976

Re: 74-878 - National League of Cities v. Usery

Dear Bill:

Although I agree with your analysis and think you have written an excellent and persuasive opinion, I am reluctant to join it only because I am not sure that I completely share some of your extremely strong criticism of other decisions of the Court. Perhaps if time were available, I could review those cases and join you, but believe I will simply rest on the brief dissent which I have prepared. I repeat, however, that your analysis is powerful.

Sincerely,

John

Mr. Justice Brennan

WB