

# The Burger Court Opinion Writing Database

*United States v. Foster Lumber Co.*  
429 U.S. 32 (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

✓

October 18, 1976

Re: 74-799 United States v. Foster

Dear Harry:

This will confirm for the record that you will  
undertake a dissent in this case.

Regards,

WFB

Mr. Justice Blackmun

cc: Mr. Justice Brennan  
Mr. Justice Powell

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 26, 1976

RE: 74-799 - U.S. v. Foster Lumber Co., Inc.

MEMORANDUM TO THE CONFERENCE:

I voted to reverse in this case and will doubtless  
join the dissent that Harry will develop.

Regards,

WEB

✓

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 28, 1976

RE: 74-799 - United States v. Foster Lumber Co.

Dear Harry:

Please join me in your dissent.

Regards,

WRB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 28, 1976

RE: 74-799 - United States v. Foster Lumber Co.

Dear Harry:

Please join me in your dissent.

Regards,



Personal P.S.

You may do a  
Plano on this  
one!

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

October 20, 1976

MEMORANDUM TO: The Chief Justice  
Mr. Justice Powell  
Mr. Justice Blackmun ✓

RE: No. 74-799 United States v. Foster Lumber Co.

My records show the four of us are in dissent in  
the above. I understand Harry has already undertaken  
this one.

W.J.B. Jr.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

October 28, 1976

RE: No. 74-799 United States v. Foster Lumber Co.

Dear Harry:

Please join me in your dissenting opinion in the  
above.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

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

From: Mr. Justice Stewart  
Circulated: OCT 22 1976

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## SUPREME COURT OF THE UNITED STATES

No. 74-799

United States, Petitioner,  
v.  
Foster Lumber Company, Inc. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit.

[November —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 172 of the Internal Revenue Code of 1954, as amended, provides that a "net operating loss" experienced by a corporate taxpayer in one year may be carried as a deduction to the preceding three years and the succeeding five years to offset taxable income of those years.<sup>1</sup> The

<sup>1</sup> "Sec. 172. Net operating loss deduction.

"(a) *Deduction Allowed.*—There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term 'net operating loss deduction' means the deduction allowed by this subsection.

"(b) [as amended by Sec. 317 (b), Trade Expansion Act of 1962, P. L. 87-794, 76 Stat. 872, 889, and Secs. 210 (a) and 210 (b), Revenue Act of 1964, *supra*, 78 Stat. 47-49] *Net Operating Loss Carrybacks and Carryovers.*—

"(1) *Years to which loss may be carried.*—

"(A) (i) Except as provided in clause (ii) and in subparagraph (D), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

"(ii) In the case of a taxpayer with respect to a taxable year ending on or after December 31, 1962, for which a certification has been issued under section 317 of the Trade Expansion Act of 1962, a net operating

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 28, 1976

Re: No. 74-799 - United States v. Foster Lumber  
Co., Inc.

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 26, 1976

Re: No. 74-799, United States v. Foster Lumber Co., Inc.

Dear Potter:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 18, 1976

Re: No. 74-799 - U.S. v. Foster Lumber Co.

Dear Chief, Bill and Lewis:

This will confirm my discussion with each of you to the effect that I shall be glad to undertake the preparation of a dissent in this case.

Sincerely,

H. A. B.

The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Powell ✓

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 26, 1976

Re: No. 74-799 - U.S. v. Foster Lumber Co.

Dear Potter:

I shall have a dissent in your hands within a very few days.

Sincerely,

*Harry*

Mr. Justice Stewart

cc: The Conference

October 27, 1976

Re: No. 74-799 - U. S. v. Foster Lumber Co.

Dear Bill:

Lewis had some suggestions as to form, and for the most part I have tried to accommodate him in the printed draft. I feel I am correct in saying that there is no change in substance.

Sincerely,

HAB

Mr. Justice Brennan

October 27, 1976

Re: No. 74-799 - U. S. v. Foster Lumber Co.

Dear Lewis:

I have made a number of revisions in my draft in an endeavor to accommodate your suggestions. I think you will find most of them have been adopted. One that I did not adopt, however, concerns resolving any statutory ambiguity against the Government. We are concerned here with an income tax deduction, and I think the rule as to deductions is definitely the other way.

Sincerely,

HAB

Mr. Justice Powell

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

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## SUPREME COURT OF THE UNITED STATES

No. 74-799

United States, Petitioner,  
v.  
Foster Lumber Company, Inc. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit.

[November —, 1976]

MR. JUSTICE BLACKMUN, dissenting.

What is at issue here is whether a corporate taxpayer's fiscal 1966 net operating loss deduction, carried back from 1968, as provided for by § 172(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 172(a), was, to use the Government's and the Court's term, "absorbed" by the taxpayer's capital gain<sup>1</sup> for 1966, despite the taxpayer's inability to offset the deduction against capital gain.<sup>2</sup>

The Government's position is that the 1968 loss was "completely absorbed,"<sup>3</sup> in 1966 and is unavailable for any other "carry" year (here, fiscal 1967) of the taxpayer; the Government thus would deny the taxpayer *any* tax benefit whatsoever for the excess of its 1968 loss over its 1966 net operating income.<sup>4</sup> The Court today agrees. Because I feel the Court's conclusion is at odds with obvious congressional policies, defeats the purposes of both the capital gain and the "carry" provisions, and is the product of a wooden and unimaginative reading of the pertinent Code sections, I

<sup>1</sup> I use the term "capital gain" to mean the excess of net long-term capital gain over net short-term capital loss.

<sup>2</sup> See *Weil v. Commissioner*, 23 T. C. 424 (1954), aff'd, 229 F. 2d 593 (CA6 1956); *Chartier Real Estate Co. v. Commissioner*, 52 T. C. 346, 350-356 (1969), aff'd, 428 F. 2d 474 (CA1 1970).

<sup>3</sup> Tr. of Oral Rarg. 8.

<sup>4</sup> The parties agree that the carryback served to erase the taxpayer's small net operating income for fiscal 1966.

October 22, 1976

No. 76-799 Foster Lumber Company

Dear Harry:

Here is your first draft of a dissenting opinion, which you were kind enough to let me see.

I have, as you requested, undertaken some minor editing and rearranging. All of this is optional and to be ignored by you unless you think there is an improvement.

I have done nothing with the footnotes, nor have I tried to renumber them to the extent this may be necessary if you adopt the rearrangement of paragraphs.

You have a good, strong opinion that should be a "winner" if just one of our wayward Brothers is willing to see the light.

Sincerely,

Mr. Justice Blackmun

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 26, 1976

No. 74-799 United States v. Foster Lumber

Dear Potter:

I will await Harry's dissent.

Sincerely,



Mr. Justice Stewart

1fp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

October 28, 1976

No. 74-799 United States v. Foster Lumber

Dear Harry:

Please join me in your dissent.

Sincerely,

*Lewis*

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

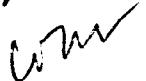
October 28, 1976

Re: No. 74-799 - United States v. Foster Lumber Co.

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 26, 1976

Re: 74-799 - U.S. v. Foster Lumber Co.

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

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

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## SUPREME COURT OF THE UNITED STATES

No. 74-799

United States, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Appeals  
Foster Lumber Company, | for the Eighth Circuit.  
Inc.

[November —, 1976]

MR. JUSTICE STEVENS, concurring.

MR. JUSTICE BLACKMUN advances persuasive policy arguments against the Court's reading of § 172. But the same arguments apply equally to the Code's treatment of an operating loss which occurs in the same year as an offsetting capital gain. In section 7 of his opinion MR. JUSTICE BLACKMUN seems to accept the necessity of a "wooden and unimaginative reading" of the statute in the "same year" situation though he rejects such a reading in a case involving different years. Since the statutory language seems rather plain in both situations, I think we have the same duty in both to resist the temptation to attempt any creative re-writing of the Internal Revenue Code. The relevant Code provisions were perfectly clear in 1939 and there is simply no basis for concluding that the 1954 Code was intended to achieve the result favored by MR. JUSTICE BLACKMUN, no matter how sensible such a result would be. Accordingly, as much as I would like to reach the result advocated by the dissent, I find the arguments in the Court's opinion, which I join, unanswerable.