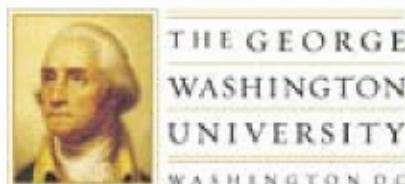


The Burger Court Opinion Writing Database

Reeves, Inc. v. Stake

447 U.S. 429 (1980)

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

April 25, 1980

✓

Re: 79-677 - Reeves v. Stake

MEMORANDUM TO THE CONFERENCE:

My vote is to affirm.

Regards,

WRB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1980

Re: 79-677 - Reeves v. Stake

Dear Harry:

As have others, I found this case close and difficult from the outset. The lineup reflects that reality.

You have written this narrowly and I join.

Regards,

WB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

April 28, 1980

RE: No. 79-677 Reeves v. Stake

Dear Byron, Lewis and John:

If Lewis can fit it in an already crowded schedule he'll try his hand at a dissent in the above. The assignment may be subject to further consideration if he's pressed for time.

Sincerely,

Brennan

Mr. Justice White
Mr. Justice Powell
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 4, 1980

RE: No. 79-677 Reeves, Inc. v. Stake

Dear Harry:

I'll await the dissent in the above.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 11, 1980

RE: No. 79-677 Reeves, Inc. v. Stake

Dear Lewis:

Please join me in the dissent you have prepared
in the above.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1980

Re: No. 79-677, Reeves v. Stake

Dear Harry,

I am glad to join your opinion
for the Court.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1980

Re: 79-677 - Reeves v. Stake

Dear Lewis,

Please join me in your dissenting
opinion.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1980

Re: No. 79-677 - Reeves v. Stake

Dear Harry:

Please join me.

Sincerely,

J.M.

T.M.

Mr. Justice Blackmun

cc: The Conference

~~AA BB~~ ~~AB~~
~~AB~~ ~~AB~~

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: JUN 04 1980

Recirculated: _____

No. 79-677 - Reeves v. Stake

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether, consistent with the Commerce Clause, U.S. Const., Art I, § 8, ch.3, the State of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents.

I

In 1919, South Dakota undertook plans to build a cement plant. The project, a product of the State's then prevailing Progressive political movement, was in response to recent regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people o

1-2-7-9

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: JUN 08

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-677

Reeves, Inc., Petitioner, | On Writ of Certiorari to the United
v. | States Court of Appeals for the
William Stake et al. | Eighth Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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I

In 1919, South Dakota undertook plans to build a cement plant. The project, a product of the State's then prevailing Progressive political movement, was initiated in response to recent regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people of this state." *Eakin v. South Dakota State Cement Comm'n*, 44 S. D. 268, 272, 183 N. W. 651, 652 (1921).¹ In 1920, the South Dakota Cement Commission ~~Progressive political movement, was in response to recent~~ regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people of this state." *Eakin v. South Dakota State Cement Comm'n*, 44 S. D. 268, 272, 183 N. W. 651, 652 (1921).¹

¹ It was said that the plant was built because the only cement plant in the State "had been operating successfully for a number of years until it had been bought by the so-called trust and closed down." Report of the South Dakota State Cement Commission 6 (1920). In its report advocating creation of a cement plant, the Commission noted both the sub-

STYLISTIC CHANGES

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: JUN 11 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-677

Reeves, Inc., Petitioner, | On Writ of Certiorari to the United
v. | States Court of Appeals for the
William Stake et al. | Eighth Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether, consistent with the Commerce Clause, U. S. Const., Art. I, § 8, ch. 3, the State of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents.

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¹ It was said that the plant was built because the only cement plant in the State "had been operating successfully for a number of years until it had been bought by the so-called trust and closed down." Report of the South Dakota State Cement Commission 6 (1920). In its report advocating creation of a cement plant, the Commission noted both the substantial profits being made by private producers in the prevailing market, and the fact that producers outside the State were "now supplying all the cement used in" South Dakota. Under the circumstances, the Commission reasoned, it would not be to the "capitalists[...] . . . advantage to build a new plant within the state." *Id.*, at 8. This skepticism regarding private industry's ability to serve public needs was a hallmark of Progressivism.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-677 - Reeves v. Stake

Lewis and I have agreed that we should not endeavor to bring this case down on Monday, June 16. His dissent is not yet circulated in print, a headnote has not been prepared, and I am circulating another printed draft today. The case therefore should go over a week.

HAB.

Pages: 6-7 & 9-10, and
footnotes renumbered

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: _____

3rd DRAFT

Recirculated: JUN 13 1980

SUPREME COURT OF THE UNITED STATES

No. 79-677

Reeves, Inc., Petitioner, | On Writ of Certiorari to the United
v. | States Court of Appeals for the
William Stake et al. | Eighth Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether, consistent with the Commerce Clause, U. S. Const., Art. I, § 8, ch. 3, the State of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents.

I

In 1919, South Dakota undertook plans to build a cement plant. The project, a product of the State's then prevailing Progressive political movement, was initiated in response to recent regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people of this state." *Eakin v. South Dakota State Cement Comm'n*, 44 S. D. 268, 272, 183 N. W. 651, 652 (1921).¹ In 1920, the South Dakota Cement Commission

¹ It was said that the plant was built because the only cement plant in the State "had been operating successfully for a number of years until it had been bought by the so-called trust and closed down." Report of the South Dakota State Cement Commission 6 (1920). In its report advocating creation of a cement plant, the Commission noted both the substantial profits being made by private producers in the prevailing market, and the fact that producers outside the State were "now supplying all the cement used in" South Dakota. Under the circumstances, the Commission reasoned, it would not be to the "capitalists['] . . . advantage to build a new plant within the state." *Id.*, at 8. This skepticism regarding private industry's ability to serve public needs was a hallmark of Progressivism.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1980

79-677 Reeves, Inc. v. Stake

Dear Harry:

I will try to circulate a dissent fairly promptly -
perhaps next week.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

No. 79-677, Reeves, Inc. v. Stake

From: Mr. Justice Powell

Circulated: JUN 16 1980

MR. JUSTICE POWELL, dissenting:

Recirculated: _____

The South Dakota Cement Commission has ordered that in times of shortage the state cement plant must turn away out-of-state customers until all orders from South Dakotans are filled. This policy represents precisely the kind of economic protectionism that the Commerce Clause was intended to prevent.

1/ The Court, however, finds no violation of the Commerce Clause solely because the State produces the cement. I agree with the Court that the State of South Dakota may provide cement for its public needs without violating the Commerce Clause. But I cannot agree that South Dakota may withhold its cement from interstate commerce in order to benefit private citizens and businesses within the State.

I.

The need to ensure unrestricted trade among the States created a major impetus for the drafting of the Constitution. "The power over commerce. . . was one of the primary objects for which the people of America adopted their government. . . ." Gibbons v. Ogden, 9 Wheat. 1, 190 (1824). Indeed, the Constitutional Convention was called after an earlier convention

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1980

79-677 Reeves v. Stake

MEMORANDUM TO THE CONFERENCE

I am adding the following footnote after the first sentence on page 7 of the Atex draft of my dissent:

" 3/ One distinction between a private and a governmental function is whether the activity is supported with general tax funds, as was the case for the reprocessing program in Alexandria Scrap, or whether it is financed by the revenues it generates. In this case, South Dakota's cement plant has supported itself for many years. See Tr. of Oral Arg. 27. There is thus no need to consider the question whether a State-subsidized business could confine its sales to local residents."

L.F.P.
L.F.P., Jr.

ss

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

6-13-80

Presented
1st DRAFT

From: Mr. Justice Powell
Circulated: JUN 13 1980
Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-677

Reeves, Inc., Petitioner, | On Writ of Certiorari to the United
v. | States Court of Appeals for the
William Stake et al. | Eighth Circuit.

[June —, 1980]

MR. JUSTICE POWELL, dissenting.

The South Dakota Cement Commission has ordered that in times of shortage the state cement plant must turn away out-of-state customers until all orders from South Dakotans are filled. This policy represents precisely the kind of economic protectionism that the Commerce Clause was intended to prevent.¹ The Court, however, finds no violation of the Commerce Clause solely because the State produces the cement. I agree with the Court that the State of South Dakota may provide cement for its public needs without violating the Commerce Clause. But I cannot agree that South Dakota may withhold its cement from interstate commerce in order to benefit private citizens and businesses within the State.

I

The need to ensure unrestricted trade among the States created a major impetus for the drafting of the Constitution. "The power over commerce . . . was one of the primary objects for which the people of America adopted their government. . . ." *Gibbons v. Ogden*, 9 Wheat. 1, 190 (1824). Indeed, the Constitutional Convention was called after an

¹ By "protectionism," I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market. I would exclude from this term policies relating to traditional governmental functions, such as education, and subsidy programs like the one at issue in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976). See pp. 5-7, *infra*.

with whom
MR. JUSTICE
BRENNAN, M.
JUSTICE WHITE,
and MISTER
JUSTICE STEVEN
join

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

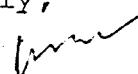
June 4, 1980

Re: 79-677, Reeves v. Stake

Dear Harry:

In light of the minor changes in footnote 8 which we discussed on the telephone, I am happy to join you.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Reeves - 79-677

I voted to Deny. This is

January 7, 1980

still
my ~~first~~
vote.

MEMORANDUM TO THE CONFERENCE

Re: 79-677 - Reeves v. Kelley;
79-5601 - Gomez v. Toledo; and
79-5386 - Tague v. Louisiana

After further study, I have decided to vote to grant certiorari in all three of these cases and I would be willing to join a summary reversal in Tague (79-5386) substantially for the reasons stated in the dissenting opinion of Justice Dennis.

Respectfully,



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 11, 1980

Re: 79-677 - Reeves v. Stake

Dear Lewis:

Your dissent in Reeves is excellent. I do have two suggestions that I wonder if you would consider:

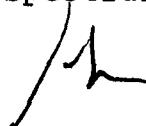
First, would you consider omitting footnote 5. Even though it is probably a correct characterization of the Court's opinion, I would hope in some future case to be able to find a limiting factor; this footnote may make it more difficult to do so.

Second, at the end of the first sentence on page 7--or perhaps some other suitable place--would you be willing to insert a footnote something along the following lines:

"The very fact that a State activity--such as the operation of a public school, or the hulk reprocessing program involved in Alexandria Scrap--is subsidized with general tax funds rather than being financed by the revenues it generates serves to distinguish between a governmental function and a private function. In this case it is perfectly clear that Idaho's cement plant has been profitable over the years. There is thus no need in this case to confront the question whether a State subsidized business could confine its sales to local residents."

In all events, I will join your dissent. If you would rather not make the subsidy point, I can write a separate paragraph or two of my own.

Respectfully,



Mr. Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 12, 1980

Re: 79-677 - Reeves v. Stake

Dear Lewis:

Please join me in your dissent.

Respectfully,



Mr. Justice Powell

Copies to the Conference