

The Burger Court Opinion Writing Database

*Western & Southern Life Insurance Co. v.
State Board of Equalization of California*
451 U.S. 648 (1981)

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

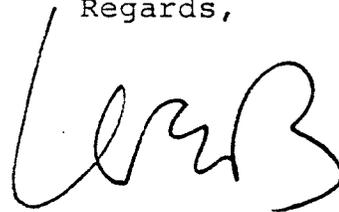
May 20, 1981

RE: 79-1423 - Western and Southern Life Insurance Co.
v. State Board of Equalization of California

Dear Bill:

I join.

Regards,

A handwritten signature in cursive script, appearing to read "Lewis B. Powell".

Justice Brennan

Copies to the Conference

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Rehnquist
Mr. Justice Stevens
Mr. Justice Powell
Mr. Justice Burger
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Marshall
Mr. Justice Brandeis
Mr. Justice Harlan
Mr. Justice Souter
Mr. Justice Ginsburg
Mr. Justice Breyer
Mr. Justice Alito
Mr. Justice Kagan
Mr. Justice Sotomayor

Mr. Justice Brennan
Circulated: MAR 27 1981

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1423

Western and Southern Life Insurance Company, Appellant,
v.
State Board of Equalization of California. } On Appeal from the Court of Appeal of California, Second Appellate District.

[March —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

California imposes two insurance taxes on insurance companies doing business in the State. A premiums tax, set at a fixed percentage of premiums paid on insurance policies issued in the State, is imposed on both foreign and domestic insurance companies and a "retaliatory" tax, set in response to the insurance tax laws of the insurer's home State, is imposed on some foreign insurance companies. This case presents the question of the constitutionality of retaliatory taxes assessed by the State of California against appellant Western & Southern Life Insurance Co., an Ohio corporation, and paid under protest for the years 1965 through 1971.

I

Section 685 of the California Insurance Code imposes a retaliatory tax on out-of-state insurers doing business in California, when the insurer's state of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California.¹ In computing the re-

¹When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines,

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 1, 1981

Re: No. 79-1423, Western & Southern Life Ins. Co. v. State Bd.
of Equalization

Dear Potter and Bill,

Would it not satisfy your concerns if I were to make the following changes?

On p.8, first full paragraph, to delete the sentence beginning "Classifications among taxpayers" and to substitute the word "Thus," for the phrase "Under that test," in the next textual sentence.

On p. 9, last sentence of the run-on paragraph, to substitute the phrase "such further inquiry" for the phrase "rational basis scrutiny under the Equal Protection Clause."

On p. 18, last two textual lines, to substitute "Court held that classifications in state tax laws "must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." Id., at 527."

In note 21, lines 3-4, to substitute the phrase "the Court's analysis" for the phrase "the rational basis test." Also, to replace the last sentence (other than the citations) with: "Their position has not been adopted by the Court, which has subsequently required no more than a rational basis for discrimination by States against out-of-state interests in the context of equal protection litigation."

On p. 20, first sentence of Part IV, to substitute: "In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions:" And to delete the opening phrase of the next sentence, through the colon.

On p. 23, to replace the phrase "the rational basis inquiry" in the first sentence of the first full paragraph with the phrase "our analysis."

Respectfully,

Justice Stewart
Justice Rehnquist

Bill

Brennan

STYLISH ...
SEE PAGES 9

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

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Re-circulated: APR 1 1981

No. 79-1423

Western and Southern Life
Insurance Company,
Appellant,
v.
State Board of Equalization of
California.

On Appeal from the Court
of Appeal of California,
Second Appellate District.

[March —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

California imposes two insurance taxes on insurance companies doing business in the State. A premiums tax, set at a fixed percentage of premiums paid on insurance policies issued in the State, is imposed on both foreign and domestic insurance companies and a "retaliatory" tax, set in response to the insurance tax laws of the insurer's home State, is imposed on some foreign insurance companies. This case presents the question of the constitutionality of retaliatory taxes assessed by the State of California against appellant Western & Southern Life Insurance Co., an Ohio corporation, and paid under protest for the years 1965 through 1971.

I

Section 685 of the California Insurance Code imposes a retaliatory tax on out-of-state insurers doing business in California, when the insurer's state of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California.¹ In computing the re-

¹When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines,

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

St, listic changes throughout
See pp. 8, 9, 18, 19, 20, 23, 24

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Brennan

Circulated: _____

No. 79-1423

Recirculated: APR 8 1981

Western and Southern Life
Insurance Company,
Appellant,
v.
State Board of Equalization of
California.

On Appeal from the Court
of Appeal of California,
Second Appellate District.

[March —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

California imposes two insurance taxes on insurance companies doing business in the State. A premiums tax, set at a fixed percentage of premiums paid on insurance policies issued in the State, is imposed on both foreign and domestic insurance companies and a "retaliatory" tax, set in response to the insurance tax laws of the insurer's home State, is imposed on some foreign insurance companies. This case presents the question of the constitutionality of retaliatory taxes assessed by the State of California against appellant Western & Southern Life Insurance Co., an Ohio corporation, and paid under protest for the years 1965 through 1971.

I

Section 685 of the California Insurance Code imposes a retaliatory tax on out-of-state insurers doing business in California, when the insurer's state of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California.¹ In computing the re-

¹ "When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines,

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 30, 1981

Re: No. 79-1423, Western & S.L.I. CO. v. Bd. of
Equalization

Dear Bill,

While I join Parts I and II of your opinion and agree with the conclusion you reach, it will probably not surprise you to know that I cannot join Parts III and IV as now written. My basic concern is with the reference to "the rational basis test," which, as you know, is totally at odds with my constitutional views.

Although my disagreement with Parts III and IV is thus fundamental, I believe a few very minor deletions would solve my problem, without at all compromising your views. The places in Part III and IV that I have identified (although there may be others) are as follows: the sentence at lines 13 and 14 of page 8; the phrase at the beginning of the sentence at the 6th line from the bottom of the same page; the last sentence of the runover paragraph at the top of page 9; the last textual sentence on page 18; two references in footnote 21 on pages 18 and 19; the phrase at the beginning of the first sentence of the first paragraph of Part IV on page 20; and the phrase in line 14 on page 23.

Sincerely yours,

Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 2, 1981

Re: No. 79-1423, Western & S.L.I. Co. v.
Bd. of Equalization

Dear Bill,

The changes you propose in response to my letter strike me as quite ingenuous and are entirely satisfactory. I have found one other place where the phrase is used that causes me concern. I hope you will be willing to change "rational basis scrutiny" in the first line of page 9 to "such scrutiny."

If the changes proposed in your letter, and this additional one, are made, I shall be glad to join your opinion.

Sincerely yours,

Justice Brennan

Copies to the Conference

P.S.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 3, 1981

Re: No. 79-1423, WESTERN & S.L.I. CO.
v. BD. OF EQUALIZATION

Dear Bill,

I am glad to join your opinion for
the Court.

Sincerely yours,

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 30, 1981

Re: 79-1423 - Western and Southern
Life Insurance Company v. State
Board of Equalization of California

Dear Bill,

I shall await the dissent in this
case.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 12, 1981

Re: 79-1423 - Western and Southern
Life Insurance Co. v. State Board
of Equalization of California

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 1, 1981

Re: No. 79-1423 - Western and Southern Life
Insurance Co. v. State Board of Equalization
of California

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

January 15, 1981

Re: 79-1423 - Western and Southern Life Insurance Co.
v. State Board of Equalization

Dear John:

In accord with our telephone conversation of Wednesday afternoon, I shall anticipate your dissent in this case. I appreciate your taking this burden on.

Sincerely,

HAB

Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 6, 1981

Re: No. 79-1423 - Western and Southern Life Insurance Co.
v. State Board

Dear Bill:

As you are aware, I am awaiting John's dissent in this case.

Sincerely,



Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 14, 1981

Re: No. 79-1423 - Western and Southern Life Insurance Company
v. State Board of Equalization of California

Dear John:

Please, of course, join me in your dissenting opinion.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1981

79-1423 Western and Southern Life v. State Board of
Equalization

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 31, 1981

Re: 79-1423 Western and Southern Life Insurance
Company v. State Board of Equalization of
California

Dear Bill,

I shall await the dissent of this case.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 1, 1981

Re: No. 79-1423 Western & S.L.I. Co. v. Board
of Equalization

Dear Bill:

After "reviewing the bidding", as Lewis has occasionally put it, I think my views are closer to those expressed by Potter in his letter to you of March 30th than they are to an outright dissent as to the constitutional validity of California's tax. You can have me as a "join" just as you can have Potter: by making the "few very minor deletions" which he suggests in his letter of March 30th.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 2, 1981

Re: 79-1423 - Western & S.L.I. Co. v. Board of
Equalization

Dear Bill,

I concur completely with Potter's comments in his letter of April 2 with regard to this case, though I think it might be more flattering to describe the proposed changes as "ingenious" rather than "ingenuous" as is the case with Potter. If you can see your way clear to make the additional change on page 9 I will be happy to join.

Sincerely,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

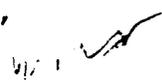
April 9, 1981

Re: No. 79-1423 Western & Southern Life Insurance
Co. v. State Board of Equalization of California

Dear Bill:

Please join me in your opinion of the Court.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 30, 1981

Re: 79-1423 - Western & Southern Life Ins.
v. State Board of Equalization of Cal.

Dear Bill:

After Clover Leaf and Rosewell, I should have learned the futility of dissenting from your persuasive opinions but I plan to give it another try in this case. It is my present intent to limit my dissent to the conclusion you reach at pages 21-23, to wit, that it is legitimate for California to discriminate against Ohio citizens in order to apply pressure on Ohio to conform its policies to California's will.

Under your analysis I would suppose that a state could require some out-of-state vehicles to obey different speed limits, truck length regulations, and emission standards than those applicable to vehicles that are licensed in states that follow the rules favored by the home state. In any event, I will try not to hold you up too long.

Respectfully,



Justice Brennan
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

Circulated: MAY 11 '81

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1423

Western and Southern Life Insurance Company, Appellant, v. State Board of Equalization of California.	}	On Appeal from the Court of Appeal of California, Second Appellate District.
--	---	--

[May —, 1981]

JUSTICE STEVENS, dissenting.

The practice of holding hostages to coerce another sovereign to change its policies is not new; nor, in my opinion, is it legitimate. California acknowledges that its discrimination against Ohio citizens within its jurisdiction is specifically intended to coerce the Ohio Legislature into enacting legislation favored by California. Today the Court holds that this state purpose is legitimate. In my opinion that coercive motivation is not an acceptable justification for California's discriminatory treatment of nonresidents.

The discrimination disclosed by this record is much more irregular than a simple preference for domestic corporations over foreign corporations. Some foreign insurance companies pay the same tax that domestic companies pay. Those that pay higher taxes than California companies do not all pay the same tax. Thus, for example, California taxes insurance companies incorporated in Ohio at a 2.5% rate, Montana companies at a 2.75% rate, and West Virginia and Idaho companies at a 3% rate.¹ The prevailing tax rate in

¹ Cal. Ins. Code, § 685 (West 1972). Idaho Code, § 41-402 (1977); Ohio Rev. Code Ann. § 5729.03; Montana Code Ann., § 33-2-705 (1979); West Virginia Code, § 33-3-14 and § 33-14-14a (Cum. Sup. 1980). As the Court's opinion indicates, *ante*, at 3, the amount of retaliatory taxes reflected by these small percentage differences is significant.