The Burger Court Opinion Writing Database

EEOC v. Wyoming

460 U.S. 226 (1983)

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 16, 1982

Re: 81-554 - EEOC v. Wyoming, et al.

MEMORANDUM TO: Justice Powell
Justice Rehnquist
Justice O'Connor

I will put my hand to a dissent in this case.

Regards,

WEB

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: DEC 17 1982

Recirculated: _____

MEMORANDUM TO THE CONFERENCE

RE: 81-554—*EEOC* v. *WYOMING*

When I have more time, I will shorten this treatment. The following will show you the thrust of my dissenting views.

The Court decides today that Congress may dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. Although the proposed opinion reads the Constitution to allow Congress to usurp this very fundamental state function, I have reexamined that document to see where it grants to the national government the power to impose such strictures on the states. Those strictures are not required by any holding of this Court, and the Congress has not placed similar limits on itself in the exercise of its own sovereign powers to choose those who provide services for the nation.

The statute in issue, the Age Discrimination in Employment Act, 29 U. S. C. (and Supp. III) 621 *et seq.*, was first enacted in 1967 to ban discriminatory treatment in private employment based on age. Pub. L. 90-202, 81 Stat. 602. In 1974, when the Fair Labor Standards Act was extended to apply to the states in their capacities as employers,[1] the Age Act was similarly extended. Pub. L. 93-259, 88 Stat. 74. This extension has the effect of invalidating statutes such as

[1] The extension of the FLSA to the states was declared unconstitutional in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976).

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JAN 17 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[January ——, 1983]

CHIEF JUSTICE BURGER, dissenting.

The Court decides today that Congress may dictate to the states, and their political subdivisions, detailed standards governing the selection of state employees, including those charged with protecting people and homes from crimes and fires. Although the opinion reads the Constitution to allow Congress to usurp this fundamental state function, I have re-examined that document and I fail to see where it grants to the national government the power to impose such strictures on the states either expressly or by implication. Those strictures are not required by any holding of this Court, and it is not wholly without significance that Congress has not placed similar limits on itself in the exercise of its own sovereign powers. Accordingly, I would hold the Age Discrimination in Employment Act (Age Act) unconstitutional as applied to the states, and affirm the judgment of the District Court.

I

I begin by analysing the Commerce Clause rationale, for it was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967, see 29 U. S. C. § 621, and when it extended its protections to state and local government employers, see H.R. Rep. No. 93-913, 93d Cong., 2d Sess.—(1974).[1]

[1]The Age Act was extended to the states along with the Fair Labor Standards Act. Pub. L. 93-259, 88 Stat. 74. Extension of the FLSA was declared unconstitutional in *National League of Cities* v. *Usery*, 426 U. S.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 12, 1982

RE: No. 81-554 EEOC v. Wyoming, et al.

Dear Chief:

I'll try my hand at an opinion for the Court in this case.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: DEC 17 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[December ——, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

Under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1976 ed. and Supp. IV) (ADEA or Act), it is unlawful for an employer to discriminate against any employee or potential employee on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[1] The question presented in this case is whether Congress acted constitutionally when, in 1974, it extended the definition of "employer" under § 11(b) of the Act to include state and local governments. The United States District Court for the District of Wyoming, in an enforcement action brought by the Equal Employment Opportunity Commission (EEOC or Commission), held that, at least as applied to certain classes of state workers, the extension was unconstitutional. 514 F. Supp. 595 (1981). The Commission filed a direct appeal under 28 U. S. C. § 1252, and we noted probable jurisdiction. —— U. S. ——. We now reverse.

I

[1] See *infra*, at ——.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 20, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 81-554 -- EEOC v. Wyoming

In response to the views expressed by the Chief in his dissenting memorandum, I propose to add the following as a footnote off the second sentence in Part IV of the draft opinion:

We do reaffirm that when properly exercising its power under §5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers. See City of Rome v. United States, 446 U.S. 156, 179 (1980); accord, Dissent, post, at 9. We also note that, whatever else may be said about the §5 question in this case, the District Court erred in reading Pennhurst State School v. Halderman, 451 U.S. 1 (1981), as holding that Congressional action could not be upheld on the basis of §5 unless Congress expressly articulated its intent to legislate under §5, and in disposing of the §5 argument on the sole basis that

"nothing in the 1974 ... Amendments [to the ADEA] or their legislative history ... suggest[s] that Congress acted pursuant to any other power than the Commerce Clause." 514 F.Supp., at 599-600. Cf. Dissent, post, at 13-14.

It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under §5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," see, e.g., Fullilove v. Klutznick, 448 U.S. 448, 476-478 (1980) (BURGER, C.J.), for "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Miller, 333 U.S. 138, 144 (1948).

Our task in Pennhurst State School v. Halderman, supra, was to construe a statute, 451 U.S., at 15, not to adjudge its constitutional validity, see id., at 16 n.12. The Court characterized the question before it as whether "Congress intend[ed a certain statute] to create enforceable rights and obligations." Id, at 15. It then made the unremarkable statement, relied on by the

District Court, that "we should not quickly attribute to Congress an unstated intention to act under its authority to enforce the Fourteenth Amendment." Id, at 16. The rule of statutory construction invoked in Pennhurst was, like all rules of statutory construction, a tool with which to divine the meaning of otherwise ambiguous statutory intent. Here, there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States. The observations in Pennhurst therefore simply have no relevance to the question of whether, in this case, Congress acted pursuant to its powers under §5.

Sincerely,

WJB, Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 5, 1983

Re: No. 81-554 -- EEOC v. Wyoming

Dear John:

I hope that the enclosed changes, which I plan to incorporate in my next printed draft, meet the concerns you expressed in your memo of January 3, 1983.

I did not mean in my first draft to suggest that "the financial effects of ADEA on state and local governments would be insubstantial," merely that the very degree of uncertainty regarding both the direction and the extent of that effect precluded the sort of essentially legal holding which was so crucial in National League of Cities. As to the meaning of 4(f)(2), I have recast TAN 16 more narrowly to avoid doing unintended mischief to ADEA law. I still do think, however, that a fair reading of both the plain language and legislative history of 4(f)(2) supports my view that it does not apply exclusively to newly-hired older workers. Indeed, when Congress overruled the main holding in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), by passing the ADEA Amendments of 1978, 92 Stat.

189, it did not dispute the proposition, taken for granted in both the majority and other opinions in McMann, that §4(f)(2) did more than allow differential treatment of newly-hired older workers.

Finally, there may be no need to tell you that, in my heart of hearts, I agree with you that "the Commerce Clause gives Congress ample authority to impose economic burdens on states as well as other employers in its regulation of the employment market." I did not, however, see it as my mandate to overrule National League of Cities, and attempted instead simply to constrain its most pernicious implications.

To replace end of paragraph on pp. 13-14, from "In this case, nothing...":

> In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. Older workers with seniority may tend to get paid more than younger workers without seniority, and may by their continued employment accrue increased benefits when they do retire. But these increased costs, even if they were not largely speculative in their own right, might very well be outweighed

by a number of other factors: Those same older workers, as long as they remain employed, will not have to be paid any pension benefits at all, and will continue to contribute to the pension fund. And, when they do retire, they will likely, as an actuarial matter, receive benefits for fewer years than workers who retire early. Admittedly, as some of the amici point out, the costs of certain state health and other benefit plans would increase if they were automatically extended to older workers now forced to retire at an early age. But Congress, in passing the ADEA, included a provision specifically disclaiming a construction of the Act which would require that the health and similar benefits received by older workers be in all respects identical to those received by younger workers. ADEA §4(f)(2), 29 U.S.C. §623(f)(2) (1976 ed. and Supp. IV).16/

To replace sentence in n. 15 beginning, "Frankly, ...":

Frankly, we do not see how the State's financial ability to provide maximum benefits to game wardens who retire at age 55 would be anything but helped by eliminating the involuntary retirement

of workers eligible to receive those maximum benefits.

To replace first sentence of n. 17:

Even if the minimal character of the federal intrusion in this case did not lead us to hold that the ADEA survives the third prong of the Hodel inquiry, it might still, when measured against the well-defined federal interest in the legislation, require us to find that the nature of that interest "justifies state submission."

Sincerely,

WJB, Jr.

Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6, 9-10, 12-16

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JAN 7 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[January ——, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

Under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1976 ed. and Supp. IV) (ADEA or Act), it is unlawful for an employer to discriminate against any employee or potential employee on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[1] The question presented in this case is whether Congress acted constitutionally when, in 1974, it extended the definition of "employer" under § 11(b) of the Act to include state and local governments. The United States District Court for the District of Wyoming, in an enforcement action brought by the Equal Employment Opportunity Commission (EEOC or Commission), held that, at least as applied to certain classes of state workers, the extension was unconstitutional. 514 F. Supp. 595 (1981). The Commission filed a direct appeal under 28 U. S. C. § 1252, and we noted probable jurisdiction. 454 U. S. 1140 (1982). We now reverse.

I

Efforts in Congress to prohibit arbitrary age discrimina-

[1] See *infra*, at ——.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1-3, 9-12, 15-16

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JAN 21 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[January ——, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

Under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1976 ed. and Supp. IV) (ADEA or Act), it is unlawful for an employer to discriminate against any employee or potential employee on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[1] The question presented in this case is whether Congress acted constitutionally when, in 1974, it extended the definition of "employer" under § 11(b) of the Act to include state and local governments. The United States District Court for the District of Wyoming, in an enforcement action brought by the Equal Employment Opportunity Commission (EEOC or Commission), held that, at least as applied to certain classes of state workers, the extension was unconstitutional. 514 F. Supp. 595 (1981). The Commission filed a direct appeal under 28 U. S. C. § 1252, and we noted probable jurisdiction. 454 U. S. 1140 (1982). We now reverse.

I

Efforts in Congress to prohibit arbitrary age discrimina-

[1] See *infra*, at 4–5.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 21, 1982

Re: 81-554 - EEOC v. Wyoming

Dear Bill,

Please join me in your first draft with the addition you propose today.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 4, 1983

Re: No. 81-554 - Equal Employment Opportunity Commission v. Wyoming

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 21, 1982

Re: No. 81-554 - EEOC v. Wyoming

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 17, 1982

81-554 EEOC v. WYOMING

Dear Bill:

I will await the dissent.

Sincerely,

L. Lewis

Justice Brennan

Copies to the Conference

LFP/vde

December 20, 1982

81-554 EEOC v. Wyoming

Dear Chief:

I have written separately that I agree. But two or three relatively minor points occurred to me in reading your memorandum.

The short paragraph on page 5, written in terms of "turf", can be put in more lawyer-like terms. You might say something along the following lines:

> "If Congress were free to regulate state sovereignty in this area at all, at least it should not demand more restrictive regulation of state employment policies than Congress itself imposes upon federal employment."

As you suggest (p. 7, 8), the SG's reliance on the B.F.O.Q. provision is wholly unpersuasive. I would emphasize, somewhat more than you have, the fact that B.F.O.Q. claims often - if not usually - result in law suits. These are expensive and also divert state officials from their normal duties.

On p. 11 (third line of first full paragraph), your memorandum said you would "have little doubt" as to the applicability of Bradley and Murgia. This is a rather weak statement. I would say that "the precedential force of these decisions would require that we sustain the Wyoming Act".

The second paragraph commencing on page 11 talks about City of Rome and several other cases that seem to me to be essentially irrelevant. I do agree that Oregon v. Mitchell is used to make a good point.

I am glad you will file a vigorous dissent. In my view, our colleagues' decision in this case leaves very little of the principle of federalism upon which our government was founded.

Sincerely,

The Chief Justice

LFP/sfs

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 20, 1982

81-554 EEOC v. Wyoming

Dear Chief:

I agree with the substance of your memorandum and will await the dissenting opinion.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

January 18, 1983

81-554 EEOC v. Wyoming

Dear Chief:

I have sent you, under separate cover, a note joining in your fine dissenting opinion.

I am considering writing separately only to reply specifically to John Stevens. As I cannot get to this during this argument session, I will delay bringing down this case.

I have some ideas I would like to try out. They will relate solely to John's dissent and in no way cover the ground you have addressed so well.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 18, 1983

81-554 EEOC v. Wyoming

Dear Chief:

Please add my name to your dissenting opinion.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 24, 1983

81-554 EEOC v. Wyoming

Dear Bill:

I find that I failed to send you a note advising of my intention to add a few words in dissent in this case.

My apologies for overlooking this.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[February ——, 1983]

JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers* . . . to confer a power on the national government adequate to discharge its *central mission*." *Ante*, at 3 (emphasis added).[1] JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly decided, but also is inconsistent with the *central purpose* of the Con-

[1] The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1–2. Justice Rutledge declared that the "proximate cause of our national existence" was not the desire to assure the great "democratic freedoms"; rather it was the need "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: FEB 24 1983

FEB 24 1983

changes 1-12
particularly p. 5 n. 5

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[February ——, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' revisionist view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers* . . . to confer a power on the national government adequate to discharge its *central mission*." *Ante*, at 3–4 (emphasis added).[1] JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly de-

[1] The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1–2. Justice Rutledge declared that the "proximate cause of our national existence" was not the desire to assure the great "democratic freedoms"; rather it was the need "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

changes on pp. 1, 10-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: FEB 28 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[March 2, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, dissenting.

I join THE CHIEF JUSTICE's dissenting opinion, but write separately to record a personal dissent from JUSTICE STEVENS' novel view of our Nation's history.

I

JUSTICE STEVENS begins his concurring opinion with the startling observation that the Commerce Clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." *Ante*, at 1 (emphasis added). At a subsequent point in his opinion, he observes that "this Court has construed the Commerce Clause to reflect the *intent of the Framers* . . . to confer a power on the national government adequate to discharge its *central mission*." *Ante*, at 3–4 (emphasis added).[1] JUSTICE STEVENS further states that "*National League of Cities* not only was incorrectly de-

[1] The authority on which JUSTICE STEVENS primarily relies is an extrajudicial lecture delivered by Justice Rutledge in 1946. *Ante*, at 1–2. Justice Rutledge declared that the "proximate cause of our national existence" was not the desire to assure the great "democratic freedoms"; rather it was the need "to secure freedom of trade" within the former colonies. W. Rutledge, A Declaration of Legal Faith 25 (1947).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 19, 1983

Re: No. 81-554 EEOC v. Wyoming

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,

WHR

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1983

Re: 81-554 - EEOC v. Wyoming

Dear Bill:

As was true in National League of Cities, I remain persuaded that the Commerce Clause gives Congress ample authority to impose economic burdens on states as well as other employers in its regulation of the employment market. I also think the burden imposed by this statute is significantly smaller than that imposed by the Fair Labor Standards Act and that this case is therefore not controlled by National League of Cities. I am sure that I will end up joining your opinion, but I wonder if your draft sufficiently acknowledges the costs that the ADEA might impose on states.

I am not entirely persuaded by your conclusion on page 13 that the financial effects of ADEA on state and local governments would be insubstantial. You write that "nothing in the nature of the ADEA suggests that it would have such an effect." But, as the Chief's memorandum suggests, a plausible argument can be made that the aggregate of employment-related costs would increase if states were prohibited from imposing mandatory early retirement. These costs have at least three components: wages and salaries, pension costs, and other fringe benefits including disability coverage. As you acknowledge, older workers with seniority tend to receive higher pay. I have not studied Wyoming's pension plan, but it is not self-evident to me that pension costs would necessarily be reduced by eliminating involuntary retirement. On the one hand, some of those employees who are already eligible for maximum benefits would remain on the payroll and would therefore not draw pension benefits, and employees who retire later would actuarially be expected to receive pension payments for fewer years. On the other hand, if retirement benefits are calculated on the basis of years of service, persons

who retire after longer tenure would receive higher annual benefits. Depending on the balance of these factors, actual pension payments and required actuarial reserves might decrease, remain the same, or even increase.

The third component of employment costs, disability and other fringe benefits, might also increase. It is likely that older workers will have a higher incidence of disability for health reasons, requiring higher disability benefit payments and hence larger reserves or larger insurance premiums. You dismiss this possibility by suggesting, on page 14 and in note 16, that an employer could discriminate against older workers in the provision of disability benefits. I am not entirely convinced. The language of the statute itself permits an employer to observe the terms of a "bona fide employee benefit plan...which is not a subterfuge to evade the purposes of [the Act]." Although the excerpt from Senator Javits' comments supports your interpretation of this language, the cited comments by Senators Javits and Yarborough arose in the context of allowing pension plans to exclude newly-hired older workers, in order to eliminate a financial disincentive to giving jobs to persons protected by the Act. But reducing disability benefits for employees who continue to work after age 55 is a different matter; incentives may be less important because mandatory retirement is forbidden by the Act.

In short, I am not as confident as you are that employment-related costs would not be increased by the ADEA's ban on mandatory retirement. I wonder if we might not be better off to assume arguendo that these costs would be higher but nevertheless conclude that it is not a matter of sufficient importance to require the same result the Court reached in National League of Cities.

In addition, I think the first sentence in footnote 17 is a little garbled. It seems to say that we are holding that the ADEA does impair the states' ability to structure their internal operations. I also have a little difficulty with your reference to the "powerful federal interest in the legislation" because

my own view is that the statute places a significant burden on the interstate economy. Perhaps you could refer more narrowly to the strong, articulated federal interest in regulating the interstate labor market.

Respectfully,

Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 5, 1983

Re: 81-554 - EEOC v. Wyoming

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JAN 13 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[January ——, 1983]

JUSTICE STEVENS, concurring.

While I join the Court's opinion, a complete explanation of my appraisal of the case requires these additional comments about the larger perspective in which I view the underlying issues.

I

In final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution. It is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself. As I have previously noted, Justice Rutledge described the origins and purpose of the Commerce Clause in these words:

> "If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Con-

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2-3, 5-6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: FEB 18 '83

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[February ——, 1983]

JUSTICE STEVENS, concurring.

While I join the Court's opinion, a complete explanation of my appraisal of the case requires these additional comments about the larger perspective in which I view the underlying issues.

I

In final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution. It is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself. As I have previously noted, Justice Rutledge described the origins and purpose of the Commerce Clause in these words:

> "If any liberties may be held more basic than others, they are the great and indispensable democratic freedoms secured by the First Amendment. But it was not to assure them that the Constitution was framed and adopted. Only later were they added, by popular demand. It was rather to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Con-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

pp. 3, 5, 6

From: **Justice Stevens**

Circulated: _____

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-554

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT *v.* WYOMING ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

[February ——, 1983]

JUSTICE STEVENS, concurring.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

stylistic changes and p. 2

From: **Justice Stevens**

Circulated: _____

Recirculated: FEB 24 '83

4th DRAFT

SUPREME COURT OF THE UNITED STATES

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 20, 1982

No. 81-554 EEOC v. Wyoming

Dear Bill,

I will await the dissent in this case.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 10, 1983

No. 81-554 EEOC v. Wyoming

Dear Chief,

I am in general accord with your memorandum in this case and will wait for your dissent.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

No. 81-554 EEOC v. Wyoming

Dear Chief,

Please join me in your dissent.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 17, 1983

No. 81-554 EEOC v. Wyoming

Dear Lewis,

Please join me in your dissent.

Sincerely,

Sandra

Justice Powell

Copies to the Conference