

The Burger Court Opinion Writing Database

South-Central Timber Development, Inc. v. Wunnicke

467 U.S. 82 (1984)

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 9, 1984

Re: 82-1608 - South-Central Timber Development, Inc. v.
Wunnicke

Dear Byron:

I join but please show me joining Lewis' position
on the Commerce Clause.

Regards,

LSB

Justice White

Copies to the Conference

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82-1608-6320
CHIEF

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

CHAMBERS OF
THE CHIEF JUSTICE

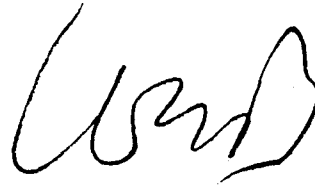
May 10, 1984

Re: 82-1608 - South Central Timber v. Wunnicke

Dear Byron:

Please add me after Lewis' name in his May 10
"snapper."

Regards,



Justice White

Copies to the Conference

AS-04 11 MAY 1984

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100

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 5, 1984

No. 82-1608

South-Central Timber Development,
Inc. v. LeResche

Dear Sandra and Bill,

We three were in dissent in the
above. Would you mind undertaking the
dissent Bill?

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice O'Connor
Justice Rehnquist

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

May 10, 1984

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

No. 82-1608

South Central Timber v. Wunnicke

Dear Byron,

I am sending to the printer the following snapper to your opinion in the above:

"I join the opinion of the Court because I believe Alaska's in-state processing requirement constitutes market regulation that is not authorized by Congress. In my view, the Court's treatment of the market-participant doctrine and the response of JUSTICE REHNQUIST point up the inherent weakness of the doctrine. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 818 (1976) (BRENNAN, J., dissenting)."

Cheers,



Justice White

Copies to the Conference

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

From: **Justice White**

Circulated: MAR 30 1984

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1608

**SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER v. ESTHER WUNNICKE, COMMIS-
SIONER, DEPARTMENT OF NATURAL
RESOURCES OF ALASKA ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

[April —, 1984]

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case to determine whether Alaska's requirement that timber taken from state lands be processed within the State prior to export violates the Commerce Clause. We hold that it does and reverse the judgment of the Court of Appeals for the Ninth Circuit.

I

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided, pursuant to 11 Alaska Admin. Code § 76.130, that "primary manufacture within the State of Alaska will be required as a special provision of the contract."¹ App. 35a. Under the primary-man-

¹The proposed contract, which the successful bidder on the timber sale would have been required to sign, provided:

"Section 68. *Primary Manufacture.* Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974."

BRW
Please show me as "not participating in the case"

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

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2, 15 + 16

From: Justice White

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2d
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER *v.* ESTHER WUNNICKE, COMMIS-
SIONER, DEPARTMENT OF NATURAL
RESOURCES OF ALASKA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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I

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided, pursuant to 11 Alaska Admin. Code §76.130, that "primary manufacture within the State of Alaska will be required as a special provision of the contract."¹ App. 35a. Under the primary-man-

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Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974."

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MAY 18 1984

Stylistic changes
and pp. 1, 10, 16, 18

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER *v.* ESTHER WUNNICKE, COMMIS-
SIONER, DEPARTMENT OF NATURAL
RESOURCES OF ALASKA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 22, 1984]

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I and II, and delivered an opinion with respect to Parts III and IV, in which JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

We granted certiorari in this case to review a decision of the Court of Appeals for the Ninth Circuit that held that Alaska's requirement that timber taken from state lands be processed within the State prior to export was "implicitly authorized" by Congress and therefore does not violate the Commerce Clause. We hold that it was not authorized and reverse the judgment of the Court of Appeals.

I

In September 1980, the Alaska Department of Natural Resources published a notice that it would sell approximately 49 million board-feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of sale, the prospectus, and the proposed contract for the sale all provided, pursuant to 11 Alaska Admin. Code §76.130, that "primary manufacture within the State of Alaska will be required as a special provi-

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 30, 1984

Re: No. 82-1608-South-Central Timber v. Wunnicke

Dear Byron:

Please show me as "not participating" in this one.

Sincerely,



T.M.

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

'84 MAR 33 A9:43

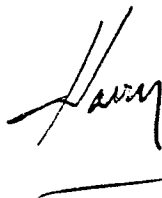
April 2, 1984

Re: No. 82-1608 - South-Central Timber Development, Inc.
v. Wunnicke

Dear Byron:

Please join me.

Sincerely,



A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 5, 1984

Re: No. 82-1608 South-Central Timber Development,
Inc. v. LeResche

Dear Bill:

I will be happy to undertake the dissent in this case. As I recall, you thought there was implied congressional consent, Sandra thought the state was a market participant, and I was generally uncertain. I will do what I can.

Sincerely,



Justice Brennan

cc: Justice O'Connor

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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SUPREME COURT OF THE U.S.
JUSTICE LEWIS F. POWELL

'84 APR 27 P3:26

April 27, 1984

82-1608 South-Central Timber v. Wunnicke

Dear Byron:

I agree with Parts I and II of your opinion, but would prefer not to address the Commerce Clause question.

My vote at Conference was to reverse on the "clearly delineated" federal policy issue. I thought we should remand for CA9 to consider respondents' "market participant" and Pike balancing arguments.

I did say that possibly I could go along - if we reached the Commerce Clause issue. It seems even more doubtful to me now that we should address it.

In sum, I will join you on the first issue, and simply say that as CA9 did not address the Commerce Clause question, the case should be remanded.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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

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SUPREME COURT, U.S.
JUSTICE MARSHALL

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

'84 MAY 10 P3:02

May 10, 1984

82-1608 South Central Timber v. Wunnicke

Dear Byron:

I believe the following is sufficient to state my thinking about this case.

JUSTICE POWELL, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. I would remand the case to the Court of Appeals to allow that court to consider whether Alaska is acting as a "market participant" and whether Alaska's primary-manufacture requirement substantially burdened interstate commerce under the holding of Pike v. Brice Church, Inc., 397 U.S. 137 (1970).

* * *

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

05/18

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

From: Justice Powell

Circulated: MAY 18 1984

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1608

**SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER v. ESTHER WUNNICKE, COMMIS-
SIONER, DEPARTMENT OF NATURAL
RESOURCES OF ALASKA, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

[May —, 1984]

JUSTICE POWELL, concurring in part and dissenting in part.

With whom Ch Justice Burger

I join Parts I and II of the Court's opinion. I would remand the case to the Court of Appeals to allow that court to consider whether Alaska was acting as a "market participant" and whether Alaska's primary-manufacture requirement substantially burdened interstate commerce under the holding of *Pike v. Brice Church, Inc.*, 397 U. S. 137 (1970).

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84 MAY 18 10:20

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

From: Justice Rehnquist

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER *v.* ESTHER WUNNICKE, COMMIS-
SIONER DEPARTMENT OF NATURAL
RESOURCES OF ALASKA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[April —, 1984]

JUSTICE REHNQUIST, dissenting.

In my view, the Court's line of distinction between the State as market participant and the State as market regulator is both artificial and unconvincing. The Court draws this line "simply as a matter of intuition," *ante*, at 15, but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause.* For example, the Court complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber processing market, *id.*, at 15, a classic example of a tying arrangement. See, *e. g.*, *United States Steel Corp. v. Fortner Enterprises*, 429 U. S. 610, 619-621 (1977). And

*The Court does offer one other reason for its demarcation of the boundary between these two concepts.

"[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it regulates the post-purchase activity of the purchaser, rather than merely the purchasing activity." *Ante*, at 16.

But, of course, this is not a "reason" at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition.

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4/22/84

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

From: **Justice Rehnquist**

Circulated: _____

Recirculated: APR 26 1984

P. 1

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER *v.* ESTHER WUNNICKE, COMMIS-
SIONER DEPARTMENT OF NATURAL
RESOURCES OF ALASKA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[April —, 1984]

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

In my view, the Court's line of distinction between the State as market participant and the State as market regulator is both artificial and unconvincing. The Court draws this line "simply as a matter of intuition," *ante*, at 15, but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause.* For example, the Court complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber processing market, *id.*, at 15, a classic example of a tying arrangement. See, *e. g.*, *United States Steel Corp.*

*The Court does offer one other reason for its demarcation of the boundary between these two concepts.

"[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity." *Ante*, at 16.

But, of course, this is not a "reason" at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition.

STYLISTIC CHANGES THROUGHOUT

SUPREME COURT OF THE UNITED STATES

No. 82-1608

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER *v.* ESTHER WUNNICKE, COMMIS-
SIONER DEPARTMENT OF NATURAL
RESOURCES OF ALASKA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 22, 1984]

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

In my view, the line of distinction drawn in the plurality opinion between the State as market participant and the State as market regulator is both artificial and unconvincing. The plurality draws this line "simply as a matter of intuition," *ante*, at 15, but then seeks to bolster its intuition through a series of remarks more appropriate to antitrust law than to the Commerce Clause.* For example, the plurality complains that the State is using its "leverage" in the timber market to distort consumer choice in the timber processing market, *id.*, at 15, a classic example of a tying arrangement.

*The plurality does offer one other reason for its demarcation of the boundary between these two concepts.

"[D]ownstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners; that is, it restricts the post-purchase activity of the purchaser, rather than merely the purchasing activity." *Ante*, at 16.

But, of course, this is not a "reason" at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition.

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

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JUSTICE JOHN PAUL STEVENS

'84 MAR 33 A9:43

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 30, 1984

Re: 82-1608 - South-Central Timber
Development v. Wunnicke

Dear Byron:

Please join me.

Respectfully,



Justice White

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 23, 1984

Re: No. 82-1608 South-Central Timber Development, Inc.
v. Wunnicke, Commissioner, Department
of Natural Resources of Alaska, et al.

Dear Bill,

Please join me in your dissent.

Sincerely,



Justice Rehnquist

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