The Burger Court Opinion Writing Database

Metropolitan Life Insurance Co. v. Ward

470 U.S. 869 (1985)

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

November 14, 1984

Re: 83-1274 - Metropolitan Life Insurance Company v. Ward

MEMORANDUM TO THE CONFERENCE:

At Conference this case was "up in the air." All agreed it was a close case, and I voted to affirm but said I could "join 4 or 5" to reverse to get the issue settled. Byron passed but later voted to reverse. Harry changed from affirm to reverse. Lewis voted to reverse, tentatively, but since has become firm.

After further contemplation and study, my vote is to reverse and, hence, I assigned the case to Lewis who was "reverse" on equal protection grounds.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

December 28, 1984

Re: No. 83-1274 - Metropolitan Life Insurance Co. v. W. G. Ward, Jr.

Dear Lewis,

I have been "struggling" with this and I may wind up joining the judgment. I'll wait on the dissent, but I doubt it will persuade me to affirm.

Regards,

Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1985

RE: No. 83-1274 - Metropolitan Life Insurance Co. v. W.G. Ward, Jr.

Dear Lewis:

This "not easy" case has had a somewhat tortured course since November but I am now satisfied with your Draft V and I join.

Regards,

WEB

Justice Powell

Copies to the Conference

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 21, 1984

No. 83-1274

Metropolitan Life Insurance Company
v. Ward

Dear Sandra,

Having now been apprised of the changes that occurred in my absence, I understand that Thurgood, Bill Rehnquist, you and I are in dissent in the above. Would you be willing to try your hand at the dissent?

Sincerely,

Bill

Justice O'Connor

Copies to Justice Marshall
Justice Rehnquist

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 22, 1985

No. 83-1274

Metropolitan Life Insurance Co. v. Ward

Dear Sandra,

I'm sorry for the delay in responding to your circulation My vote to affirm the judgment of the Alabama Supreme Court i firm and you have written a compelling dissent with which largely agree. I'm sure you can appreciate that some of you analysis touches on other areas in which we have taken differin approaches -- such as some aspects of Commerce Clause analysis and the role of federalism in the Equal Protection Clause. If you don't mind, I'd like to try my hand at some modest proposals that might accommodate us both. I'll try to have my suggestions to you by the end of next week. If you don't feel comfortable with them, I'm still sure that I'll be able to join most of the analysis in your opinion.

Sincerely,

Bill

Justice O'Connor

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

CHAMBERS OF
WM. J. BRENNAN, JR.

March 14, 1985

No. 83-1274

Metropolitan Life Insurance Company v. Ward

Dear Sandra:

Thank you again for patiently awaiting my response in this case. You have convincingly demonstrated that Alabama's insurance tax comports with the Equal Protection Clause, and I adhere to my vote to affirm the judgment below. I want to join your excellent opinion, but in its present form it makes a few arguments that conflict with some of my own long-standing views. I don't believe that any of these issues are central to the dissent, and with your indulgence I'd like to propose several small revisions and qualifications that would enable me to join.

Legitimate State Interests under the Commerce Clause

You discuss on p. 12 the variety of cases in which the Court has held that a State may legitimately favor the "home team" in the Commerce Clause context. For example, Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), is cited for the proposition that "[t]here is no doubt that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not." As you know, I have dissented from Alexandria Scrap and its progeny, and I am reluctant to endorse the quoted proposition. See, e.g., Alexandria Scrap, supra, at 821 ("protection of a State's own citizens from the burden of economic competition with citizens of other States" is not a "clearly legitimate local interest"). I would think that the central point should be that, although Members of the Court have disagreed with respect to the legitimacy of asserted State interests in the dormant Commerce Clause context, there should be no disagreement where Congress itself has authorized the challenged action and thereby legitimated the State's interests. What would you think of omitting the first sentence and the citation to Alexandria Scrap, beginning the paragraph with "A State may use its taxing power ...," and then inserting after the citation to Edgar v. MITE Corp. something like the following:

> Moreover, the Court has held in the dormant Commerce Clause context that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810-814 (1976). Although the Court has divided on the legitimacy of such interests where Congress has not spoken, see id., at 817 (BRENNAN, J., dissenting), surely there can be no dispute that they are legitimate where Congress itself has affirmatively authorized the States to promote such interests free of Commerce Clause constraints. Neither the Commerce Clause nor the Equal Protection Clause bars Congress from enacting or authorizing States to enact legislation to protect industry in one State "from disadvantageous competition" with less stringently regulated businesses in other States. Hodel v. Indiana, 452 U.S. 314, 329 (1981). See also Western & Southern, supra, at 669 (with Congressional approval, States may promote domestic insurers by seeking to deter other States from enacting discriminatory or excessive taxes).
>
> The majority's attempts to distinguish these precedents are unconvincing. . . . .

Federalism and Equal Protection

You argue on p. 16: "Groping for some basis for this radical departure from equal protection analysis, the Court perceives an implied constitutional prohibition against economic parochialism emanating from the Equal Protection Clause itself. This theory forces the Equal Protection Clause into an unaccustomed role that it cannot sustain without grave damage to the constitutional balance."

As support for his "economic parochialism" argument, Lewis of course draws on my concurring opinion in Allied Stores v. Bowers, 358 U.S. 522, 532-533 (1959). As I noted in Western & Southern, my 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." 451 U.S., at 667, n. 21. I am unwilling categorically to disavow my views in Allied Stores, however, and since the majority's opinion effectively adopts those views I cannot subscribe to your cited language as it currently stands. Recognizing that you do not necessarily agree with my Allied Stores approach, I nevertheless believe there is middle ground on which we both can stand.

I argued in Allied Stores that "[t]he Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other," and that "the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism." 358 U.S., at 532. It seems to me that these values are satisfied where Congress has legitimated the validity of the State's interests and authorized what might otherwise be illegitimate discrimination. As you cogently argue on pp. 17 and 18 of your opinion, federalism interests must not be viewed as a one-way street preventing even Congress from authorizing parochial discrimination. What would you think of something along the following lines to replace the sentences cited above:

> Groping for some basis for this radical departure, the Court draws heavily on JUSTICE BRENNAN'S concurring opinion in Allied Stores v. Bowers, 358 U.S. 522, 530 (1959), as support for its absolutist argument that "the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" Ante, at 8, quoting 358 U.S., at 533. As noted in Western & Southern, JUSTICE BRENNAN's interpretation 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." 451 U.S., at 667, n. 21. More importantly, to the extent the Court today purports to adopt these federalism views it entirely misses the point of the analysis. JUSTICE BRENNAN reasoned that "[t]he Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other," and that "the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism." 358 U.S., at 532. Accepting arguendo this interpretation for the sake of analysis, any federalism component of equal protection is fully vindicated in this commercial context where Congress itself has validated the legitimacy of the State's interests and has authorized what might otherwise have been discrimination against the "principle of federalism."
>
> Nor can the Court's analysis be reconciled with the McCarran-Ferguson Act and our decisions in Western & Southern and Benjamin. . . .

Miscellaneous Points

I have a number of other small points, almost all of which follow from my concern to emphasize the importance of Congress' authorization and to minimize or avoid discussion of the possible legitimacy of State interests in the absence of Congressional action.

1. P. 2, first full paragraph, fourth sentence: Could this sentence be recast along the following lines: "This tactic enables the Court to characterize State goals that have been legitimated by Congress itself as improper solely because it disagrees with the concededly rational means" etc.

2. Same paragraph, last sentence: Could you add "even where Congress has authorized such advantages" at the end?

3. P. 4, third and fourth sentences: It was the Alabama Circuit Court, not the Supreme Court, that made these findings. The Supreme Court denied certiorari.

4. P. 6, second sentence in Part II: I was in dissent in San Antonio and, while the general point is valid, I continue to take a less deferential posture where equal protection values are at stake. Would you lose much by omitting this sentence and the cite and simply proceeding on with "The policy of favoring local interests . . ."?

5. Pp. 16-17, carryover sentence: Would you consider adding the following underscored language: "Beyond guarding against arbitrary or irrational discrimination, as interpreted by the Court today this Clause now prohibits the effectuation of economic policies that elevate local concerns over interstate competition even where Congress has determined that interstate competition must yield to local concerns in this context."

6. P. 17, last paragraph, second sentence: You state that "[t]he dangers in importing Commerce Clause values to the Equal Protection Clause should be self-evident." As set forth above, I believe that it may well be appropriate to import such values in some circumstances. Moreover, this sentence arguably conflicts with your earlier argument that Commerce Clause values should be imported in the context of determining whether the State's interest is legitimate and with your criticism of the majority for failing to make this connection. See p. 13. Could the quoted language be eliminated? The next sentence thus would begin: "The Commerce Clause is a flexible tool. . . ."

If you could see your way to incorporating these proposals, or something like them, I'll be pleased to join. If you're not comfortable with these suggestions, I'll probably file a separate

dissent summarizing my views in a few paragraphs while emphasizing that I essentially agree with your fine opinion. Thanks again for your patience.

Sincerely,

Justice O'Connor

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 18, 1985

No. 83-1274

Metropolitan Life v. Ward

Dear Sandra,

Your proposals sufficiently answer my worries so that I'll be pleased to join your next draft. Thanks again for your patience and for your helpful accommodation of my views.

Sincerely,

Justice O'Connor

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 20, 1985

No. 83-1274

Metropolitan Life Insurance Co.
v. Ward

Dear Sandra,

Please join me in your second draft of the above.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 13, 1984

83-1274 -

Metropolitan Life Insurance Co. v. Ward

Dear Chief,

I first voted tentatively to affirm in the above case, but after the discussion, I passed. I now think it would be more consistent with prior cases to reverse. That is my vote.

Sincerely yours,

Byron

The Chief Justice
Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 6, 1984

83-1274 -

Metropolitan Life Insurance Company v. Ward

Dear Lewis,

Please join me.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 6, 1984

Re: No. 83-1274-Metropolitan Life Ins. Co. v. Ward

Dear Lewis:

I await the dissent.

Sincerely,

TM

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 28, 1985

Re: No. 83-1274-Metropolitan Life Insurance Company v. W. G. Ward, Jr.

Dear Sandra:

Please join me in your dissent.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1984

Re: No. 83-1274, Metropolitan Life Ins. Life Co. v. Ward

Dear Lewis:

I have one problem with the opinion now circulating.

You hold that the two purposes asserted here do not legitimate the Alabama tax. I agree. But, for me, it does not follow, as is asserted on page 12 of the second draft, that as applied to appellants the tax therefore violates the Equal Protection Clause. One or more of the other 15 asserted purposes may save it. Do you not agree?

Of course, the briefs here addressed the 17 asserted purposes and there is enough in the record for this Court to rule on them, even though the courts below adjudicated only two. In light of their rulings, with which we disagree, this for them was all that was necessary. I am willing to leave it to you whether to remand or to pass upon the other reasons.

Sincerely,

Harry

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 12, 1984

Re: No. 83-1274, Metropolitan Life Ins. Co. v. Ward

Dear Lewis:

Your suggested change in the last paragraph, plus the addition of a footnote similar to the old n. 5, alleviates my concern, and I join your opinion.

I might be a little happier if the last paragraph would read as follows:

> "We conclude that neither of the two purposes furthered by the preference tax statute addressed by the Circuit Court for Montgomery County, see supra at 3, is legitimate under the Equal Protection Clause. The judgment of the Alabama Supreme Court accordingly is reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

My joinder is firm, in any event.

Sincerely,

Harry

Justice Powell

cc: The Conference

11/29 30

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

From: **Justice Powell**

Circulated: NOV 30 1984

Recirculated: _____

LFP
I want the dissent

Dissent by SDO

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[December ——, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27-4-4 and 27-4-5, that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory

[1] The origins of Alabama's domestic preference tax statute date back to 1849, when the first tax on premiums earned by insurance companies doing business in the state was limited to companies not chartered by the state. Act No. 1 [1849] Ala. Acts 5. A domestic preference tax was imposed on and off throughout the years until 1945, when the State restored equality in taxation of insurance companies in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Act No. 156 [1945] Ala. Acts 196-197. In 1955, the tax was reinstated, Act No. 77 [1955] Ala. Acts 193 (2d Sp. Sess.), and with minor amendments, has remained in effect until the present.

[2] For domestic preference tax purposes, Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala. Code § 27-4-1(3). A corporation that does not meet both of these criteria is characterized as a foreign insurer. *Id.*, § 27-4-1(2).

Substantive change p. 5
Stylistic change p. 8
footnotes 5-end renumbered

12/06

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

From: **Justice Powell**

Circulated: _____

Recirculated: DEC 6 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[December ——, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27-4-4 and 27-4-5, that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory

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[2] For domestic preference tax purposes, Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala. Code § 27-4-1(3). A corporation that does not meet both of these criteria is characterized as a foreign insurer. *Id.*, § 27-4-1(2).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 11, 1984

83-1274 Metropolitan Life v. Ward

Dear Harry:

Thank you for your letter of December 11. I think you have a good point, and I will be glad to make the remand in this case more specific.

What would you think of changing the last paragraph to read as follows:

> We conclude that the Alabama domestic preference tax statute, as measured by the two purposes found to be legitimate by the Circuit Court for Montgomery County, see supra, at 3, violates the Equal Protection Clause as applied to appellants. The judgment of the Alabama Supreme Court accordingly is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

I then would add a footnote similar to n. 5 that was in my first circulated draft to state that some fifteen additional purposes were advanced by the state. As none of these was addressed by the courts below we express no opinion with respect to any of them.

Sincerely,

Lewis

Justice Blackmun

Copies to the Conference
LFP/vlr

Substantive changes p. 12

12/13

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

From: **Justice Powell**

Circulated: _____

Recirculated: DEC 14 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[December ——, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27-4-4 and 27-4-5, that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory

[1] The origins of Alabama's domestic preference tax statute date back to 1849, when the first tax on premiums earned by insurance companies doing business in the state was limited to companies not chartered by the state. Act No. 1 [1849] Ala. Acts 5. A domestic preference tax was imposed on and off throughout the years until 1945, when the State restored equality in taxation of insurance companies in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Act No. 156 [1945] Ala. Acts 196-197. In 1955, the tax was reinstated, Act No. 77 [1955] Ala. Acts 193 (2d Sp. Sess.), and with minor amendments, has remained in effect until the present.

[2] For domestic preference tax purposes, Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala. Code § 27-4-1(3). A corporation that does not meet both of these criteria is characterized as a foreign insurer. *Id.*, § 27-4-1(2).

December 29, 1984

PERSONAL

83-1274 Metropolitan Life v. Ward

Dear Chief:

Your personal note of December 28 indicating that you are "struggling" with this case concerns me.

Following the November arguments, one of the cases you assigned me was 83-240 Lawrence County v. Lead-Deadwood School District. Because Byron had written a dissent from denial of cert, you reassigned Lawrence County to Byron and said you would give me another case to write.

This turned out to be 83-1274 Metropolitan Life v. Ward. But at that time there were only three votes to reverse, including my own. At Conference you had voted tentatively to affirm, and Byron had "passed". I talked to Byron and he concluded - after further consideration - that he would join me in a reversal.

I then talked to you, as I was still one vote short. In response, you wrote on November 14 (letter enclosed), stating that you had changed your vote to "reverse on equal protection grounds." Indeed, your vote was necessary to enable you to make the assignment.

I have written the case precisely as it was argued on behalf of Metropolitan Life, and consistent with our equal protection cases in this area. The McCarran Act applies only to Commerce Clause cases. Also, my opinion remands the case for consideration on grounds alleged by the state but not decided. See Part IV, p. 12, and n. 10.

In short, I need your vote for a Court.

I therefore hope, after further consideration, you will stay with me and not merely join the judgment. After all, as the saying goes: "You got me into this case".

Sincerely,

The Chief Justice

lfp/ss

changes on pp.
1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13

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 22 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[February ——, 1985]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27-4-4 and 27-4-5, that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory

[1] The origins of Alabama's domestic preference tax statute date back to 1849, when the first tax on premiums earned by insurance companies doing business in the state was limited to companies not chartered by the state. Act No. 1 [1849] Ala. Acts 5. A domestic preference tax was imposed on and off throughout the years until 1945, when the State restored equality in taxation of insurance companies in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Act No. 156 [1945] Ala. Acts 196–197. In 1955, the tax was reinstated, Act No. 77 [1955] Ala. Acts 193 (2d Sp. Sess.), and with minor amendments, has remained in effect until the present.

[2] For domestic preference tax purposes, Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala. Code § 27-4-1(3). A corporation that does not meet both of these criteria is characterized as a foreign insurer. *Id.*, § 27-4-1(2).

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[March ——, 1985]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether Alabama's domestic preference tax statute, Ala. Code §§ 27-4-4 and 27-4-5 (1975), that taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause.

I

Since 1955,[1] the State of Alabama has granted a preference to its domestic insurance companies by imposing a substantially lower gross premiums tax rate on them than on out-of-state (foreign) companies.[2] Under the current statutory

[1] The origins of Alabama's domestic preference tax statute date back to 1849, when the first tax on premiums earned by insurance companies doing business in the State was limited to companies not chartered by the State. Act No. 1, 1849 Ala. Acts 5. A domestic preference tax was imposed on and off throughout the years until 1945, when the State restored equality in taxation of insurance companies in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Act No. 156, 1945 Ala. Acts 196-197. In 1955, the tax was reinstated, Act No. 77, 1955 Ala. Acts 193 (2d Sp. Sess.), and with minor amendments, has remained in effect until the present.

[2] For domestic preference tax purposes, Alabama defines a domestic insurer as a company that both is incorporated in Alabama and has its principal office and chief place of business within the State. Ala. Code § 27-4-1(3) (1975). A corporation that does not meet both of these criteria is characterized as a foreign insurer. § 27-4-1(2).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 19, 1985

Re: No. 83-1274 Metropolitan Life Insurance Company v. Ward

Dear Sandra,

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 30, 1984

Re: 83-1274 - Metropolitan Life Insurance Company v. Ward

Dear Lewis:

Please join me.

Respectfully,

John

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 21, 1984

No. 83-1274 Metropolitan Life Insurance Co.
v. Ward

Dear Bill,

I will be glad to try to draft a dissent in this case when the time comes.

Sincerely,

Sandra

Justice Brennan

cc: Justice Marshall
Justice Rehnquist

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 30, 1984

No. 83-1274 Metro. Life Ins. Co. v. Ward

Dear Lewis,

I shall be circulating a dissent in this case as soon as I can get around to it.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: FEB 16 1985

Recirculated: _____

SDO
Please join me in your dissent

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[February ——, 1985]

JUSTICE O'CONNOR, dissenting.

This case presents a simple question: Is it legitimate for a state to use its taxing power to promote a domestic insurance industry and to encourage capital investment within its borders? In a holding that can only be characterized as astonishing, the Court determines that these purposes are illegitimate. This holding is unsupported by precedent and subtly distorts the constitutional balance, threatening the freedom of both State and Federal legislative bodies to fashion appropriate classifications in economic legislation. Because I disagree with both the Court's method of analysis and its conclusion, I respectfully dissent.

Alabama's legislature has chosen to impose a higher tax on out-of-state insurance companies and insurance companies incorporated in Alabama that do not maintain their principal place of business or invest assets within the State. Ala. Code §§27-4-4 *et seq.* This tax seeks to promote both a domestic insurance industry and capital investment in Alabama. App. to Juris. Statement 20a-21a. Metropolitan Life Insurance Company, joined by many other out-of-state insurers, alleges that this discrimination violates its rights under the Equal Protection Clause of the Fourteenth Amendment, which provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws."

Jim ? I don't want !

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 15, 1985

Re: 83-1274 Metropolitan Life Insurance Co. v. Ward

Dear Bill:

I appreciate your willingness to suggest ways in which my Metropolitan Life dissent could be changed to meet some of your concerns. Though most of your suggestions cause no difficulty, I would prefer to substitute some alternate language for your suggestions for pp. 12 & 16.

With respect to legitimate State interests under the Commerce Clause, I can appreciate that the first sentence of the first full paragraph on page 12 of my dissent reads like an endorsement of the result in a case in which you dissented. Your suggestion is well taken and is, by and large, compatible with the analysis. My analysis starts from the premise, however, that the legitimacy of the state's purpose is a separate inquiry from whether one or another clause of the Constitution constrains the State from accomplishing that purpose in a certain way. I have stressed the factual record in this opinion to show how Alabama's tax is not merely a protectionist device but is intended to affect the market in ways that benefit the insurance consumer. This is the point I try to make in the paragraph beginning on the bottom of page 5, supported by the discussion in Part II. I think we would both agree that the purposes Alabama asserts are legitimate in the classic sense of governmental measures intended to benefit the general public and not merely some favored business enterprise.

Your Scrap dissent seems compatible with this view as you do not reject the legitimacy of the State's purpose of affecting collateral goals, i.e., insuring that the wrecked cars will be Maryland and not foreign hulks, through limiting its business to

in-state wrecking companies. But you argue that the chosen means must pass dormant Commerce Clause scrutiny. Likewise in your Allied concurrence you condemn protectionism for its own sake. I feel it is crucial to the analysis in the dissent not to cast doubt on the inherent "legitimacy" of the State's purpose after taking such pains to establish it. Thus I prefer to use slightly different wording than that which you suggest, though still, I hope, conveying the meaning you wished to convey. I do not believe it would in any way undermine either your Allied concurrence or your Scrap dissent to alter the suggested language to say on p. 12:

> "Moreover, the Court has held in the dormant commerce clause context that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not. Hughes v. Alexandria Scrap Corp., 426 U.S. 794. Although the Court has divided on the circumstances in which the dormant Commerce Clause allows such measures, see id., at 817 (BRENNAN, J., dissenting), surely there can be no dispute that they are constitutionally permitted where Congress itself has affirmatively authorized the States to promote local business concerns free of Commerce Clause constraints. Neither the Commerce Clause nor the Equal Protection Clause bars Congress from enacting or authorizing the States to enact legislation to protect industry in one State "from disadvantageous competition" with less stringently regulated businesses in other States. Hodel v. Indiana, 452 U.S. 314, 329 (1981). See also Western & Southern, supra, at 669 (with congressional approval, States may promote domestic insurers by seeking to deter other States from enacting discriminatory or excessive taxes).
>
> "The majority's attempts to distinguish these precedents are unconvincing . . . . . "

With respect to federalism and Equal Protection, may I suggest a similar shift of emphasis on p. 16 away from passing judgment on the legitimacy of the State purpose?

"Groping for some basis for this radical departure from equal protection analysis, the Court draws heavily on JUSTICE BRENNAN'S concurring opinion in Allied Stores v. Bowers, 358 U.S. 522, 530 (1959), as support for its argument that "the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.'" Ante, at 8, quoting 358 U.S., at 533. As noted in Western & Southern, JUSTICE BRENNAN'S interpretation 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." 451 U.S, at 667, n. 21. More importantly, to the extent the Court today purports to find in the Equal Protection Clause an instrument of federalism, it entirely misses the point of JUSTICE BRENNAN'S analysis. JUSTICE BRENNAN reasoned that "[t]he Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other" and that "the Equal Protection Clause, among its other roles, operates to maintain this principle of federalsim." 358 U.S., at 532. Favoring local business as an end in itself might be "rational" but would be antithetical to federalism. Accepting arguendo this interpretation, we have shown that the measure at issue here does not benefit local business as an end in itself but serves important ulterior goals. Moreover, any federalism component of equal protection is fully vindicated where Congress has explicitly validated a parochial focus. Surely the Equal Protection Clause was not intended to supplant the Commerce Clause, foiling Congress' decision under its commerce powers to "affirmatively permit [some measure of] parochial favoritism" when necessary to a healthy federation. White v. Massachussetts Council of Construction Employers, ____ U.S. ____, ____ (1983). Such a view of the Equal Protection Clause cannot be reconciled with

the McCarran-Ferguson Act and our decisions in Western & Southern and Benjamin."

Finally, may I suggest the following as a substitute for the change you suggest as miscellaneous point 6 of your letter?

> "The dangers in discerning in the Equal Protection Clause a prohibition against barriers to interstate business irrespective of the Commerce Clause should be self-evident. The Commerce Clause is a flexible tool of economic policy that Congress may use as it sees fit, letting it lie dormant or invoking it to limit as well as promote the free flow of commerce. Doctrines of equal protection are constitutional limits that constrain the acts of federal and state legislatures alike. See, e.g., Califano v. Webster, 430 U.S. 313 (1977); Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 Stan. L. Rev. 400-413 (1983). The Court's analysis casts a shadow over numerous congressional enactments that adopted as federal policy "the type of parochial favoritism" the Court today finds unconstitutional. White v. Massachusetts Council of Construction Employers, ____ U.S., at ____. Contrary to the reasoning in Benjamin....."

Your other suggestions generally pose no difficulty. If we can agree on these proposals I will incorporate them in the dissent.

Sincerely,

Sandra

Justice Brennan

Stylistic Changes Throughout
pp. 2, 4, 12, 13, 15, 17, 18, 19

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

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1274

METROPOLITAN LIFE INSURANCE COMPANY, ET AL., APPELLANTS *v.* W. G. WARD, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[March ——, 1985]

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL and JUSTICE REHNQUIST join, dissenting.

This case presents a simple question: Is it legitimate for a state to use its taxing power to promote a domestic insurance industry and to encourage capital investment within its borders? In a holding that can only be characterized as astonishing, the Court determines that these purposes are illegitimate. This holding is unsupported by precedent and subtly distorts the constitutional balance, threatening the freedom of both state and federal legislative bodies to fashion appropriate classifications in economic legislation. Because I disagree with both the Court's method of analysis and its conclusion, I respectfully dissent.

I

Alabama's legislature has chosen to impose a higher tax on out-of-state insurance companies and insurance companies incorporated in Alabama that do not maintain their principal place of business or invest assets within the State. Ala. Code §27–4–4 *et seq.* (1975). This tax seeks to promote both a domestic insurance industry and capital investment in Alabama. App. to Juris. Statement 20a–21a. Metropolitan Life Insurance Company, joined by many other out-of-state insurers, alleges that this discrimination violates its rights under the Equal Protection Clause of the Fourteenth Amend-

pp. 13

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

From: Justice O'Connor

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Recirculated: MAR 25 1985

3rd DRAFT

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[March 26, 1985]

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