

6-21-1983

## 06-21-1983 Clerk Memo

Alan S. Madans

*Associate Justice, US Supreme Court*

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### Recommended Citation

Madans, A.S. Clerk Memo, Arizona Governing Comm. V. Norris, 463 U.S. 1073 (1983). Box 367, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

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June 21, 1983

Mr. Justice:

Re: Ariz. Governing Comm. v. Norris, 82-52  
LP's dissent

I think LP has done a satisfactory job with the dissent, but I do not find it persuasive on the liability question. LFP relies very heavily on the McCarran Ferguson Act, but the Court's decision does not regulate the business of insurance. Rather, the Court is using Title VII to regulate an employer's employment practices. The McCarran Ferguson Act has never permitted a State to authorize employment practices just because those practices involve insurance. Since the employer in Manhart was a self-insurer, LP's argument would have been much more appropriate in that case.

For reasons I have stated in my prior notes, and in my bench memo, I believe that Title VII should be construed to prohibit the employment practice at issue in this case. LFP presents an array of statistics to support his argument, and quotes from your concurrence in Manhart, but those statistics and quotes cannot overcome the fact that Manhart is on the books; that while you expressed doubts about the wisdom of the policy in Manhart, you agreed with the Court's judgment; and that this case is not, at least in my view, meaningfully distinguishable from Manhart as a matter of Title VII law. I continue to recommend that you join TM's opinion on the liability issue.

LFP's better argument, it seems to me, is that the decision here should not be retroactive. The remedial issue apparently is troubling SOC, and I think there is much merit to the idea of giving employers the benefit of the doubt here by requiring equal compensation only from the date of this decision. Because I think Manhart clearly foreshadowed the result here, however, I also find TM's position defensible. I hear that TM may be willing to compromise on retroactivity to get a Court for his whole opinion. Therefore, if you decide to go with TM on liability, and dislike TM's brand of limited retroactivity, you probably could persuade him to rewrite the remedy section. If you would like to write something in addition, I of course would be happy to draft an opinion for you.

ASM