# The Burger Court Opinion Writing Database

## *Cantor v. Detroit Edison Co.*

428 U.S. 579 (1976)

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

June 15, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

Dear Harry:

Please show me as joining your concurring-dissenting opinion in this case.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

Dear Harry:

I acknowledge today's revision of your earlier draft concurrence in which you now concur in the judgment.

Please show me as joining you.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 28, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

Dear Harry:

Since I am now writing separately to help John get a "partial Court," I will not join your concurrence.

Regards,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 28, 1976

Re: 75-122 - Cantor v. Detroit Edison

Dear John:

Since our latest conversation I have concluded that I can come nearer to providing a Court than previously. The attached concurrence will give five votes on Parts I and III.

This should enable us to get the case down by Wednesday if we have a Wednesday sitting.

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 24 1976

Recirculated: _____

Re: No. 75-122 - Cantor v. Detroit Edison

MR. CHIEF JUSTICE BURGER, concurring in the judgment and in Parts I and III of the Court's opinion.

I concur in the judgment and in Parts I and III of the Court's opinion. I do not agree, however, that Parker v. Brown, 317 U.S. 341, can logically be limited to suits against state officials. In interpreting Parker, the Court has heretofore focused on the challenged activity, not upon the identity of the parties to the suit.

> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (emphasis added).

If Parker's holding were limited simply to the nonliability of state officials, then the Court's inquiry in Goldfarb as to the County Bar Association's claimed exemption could have ended upon our recognition that the organization was "a voluntary association and not a state agency . . . ." 421 U.S., at 790. Yet, before determining that there was no exemption

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 13, 1976

RE: No. 75-122 Cantor, dba Selden Drugs v. The Detroit Edison Company

Dear John:

This is a splendid opinion. Please join me.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1976

Re: No. 75-122, Cantor v. Detroit Edison Co.

Dear John,

I shall in due course circulate a dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

From: Mr. Justice Stewart

Circulated: MAY 13 1976

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1976]

MR. JUSTICE STEWART, dissenting.

The Court today holds that a public utility company, pervasively regulated by a state utility commission, may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform. I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of "the prospect of massive treble damage liabilities" [1] payable ultimately by the companies' customers.

The starting point in analyzing this case is *Parker* v. *Brown*, 317 U. S. 341. While *Parker* did not create the "so-called state-action exemption" [2] from the federal antitrust laws,[3] it is the case that is most frequently

[1] Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 728 (1974).

[2] *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788.

[3] The progenitor of that doctrine in this Court was *Olsen* v. *Smith*, 195 U. S. 332, a decision relied on by *Parker* to support the proposition that when a State, acting as sovereign, imposes a restraint on commerce, that restraint does not violate the Sherman Act. *Parker* v. *Brown*, 317 U. S. 341, 352. *Olsen* involved a challenge to the validity of a Texas law fixing the charges of pilots

1, 2-3, 23-24, 25

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: JUN 9 1976

**2nd DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that a public utility company, pervasively regulated by a state utility commission, may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform. I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of "the prospect of massive treble damage liabilities"[1] payable ultimately by the companies' customers.

The starting point in analyzing this case is *Parker* v. *Brown*, 317 U. S. 341. While *Parker* did not create the "so-called state-action exemption"[2] from the federal antitrust laws,[3] it is the case that is most frequently

[1] Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 728 (1974).

[2] *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788.

[3] The progenitor of that doctrine in this Court was *Olsen* v. *Smith*, 195 U. S. 332, a decision relied on by *Parker* to support the proposition that when a State, acting as sovereign, imposes a restraint on commerce, that restraint does not violate the Sherman Act. *Parker* v. *Brown*, 317 U. S. 341, 352. *Olsen* involved a challenge to the validity of a Texas law fixing the charges of pilots

2-8, 10-12

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

Circulated:

Recirculated:

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that a public utility company, pervasively regulated by a state utility commission, may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform. I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of "the prospect of massive treble damage liabilities" [1] payable ultimately by the companies' customers.

The starting point in analyzing this case is *Parker* v. *Brown*, 317 U. S. 341. While *Parker* did not create the "so-called state-action exemption" [2] from the federal antitrust laws,[3] it is the case that is most frequently

[1] Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N. Y. U. L. Rev. 693, 728 (1974).

[2] *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 788.

[3] The progenitor of that doctrine in this Court was *Olsen* v. *Smith*, 195 U. S. 332, a decision relied on by *Parker* to support the proposition that when a State, acting as sovereign, imposes a restraint on commerce, that restraint does not violate the Sherman Act. *Parker* v. *Brown*, 317 U. S. 341, 352. *Olsen* involved a chal-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 14, 1976

Re: No. 75-122 - Cantor v. The Detroit Edison Co.

Dear John:

Please join me in your suggested opinion in this case.

Sincerely,

Mr. Justice Stevens

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 14, 1976

Re: No. 75-122 -- Lawrence Cantor, dba Selden Drugs Company v. The Detroit Edison Company

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

HAB

April 19, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Dear John:

This is just a comment on some unimportant matters in connection with your footnotes 33 and 34 on page 16 of your proposed opinion.

1. In footnote 33 you refer to Potter's "dissenting" opinion in Otter Tail. Is it not one in which he concurred in part and dissented in part, and should it not be so described?

2. Footnote 34 looks a little strange to me because you state "we have repeatedly said" and then cite to Potter's "dissenting" opinion. Would it not be better to direct the cite to the Silver case which, after all, is the source?

Sincerely,

HAB

Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 19, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Dear John:

I may write separately in this case, and in any event I shall probably await the dissent.

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 24, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Company

Dear John:

I am not yet at rest in this case and probably will not be by Thursday. I may write. I merely ask that you give me a few more days.

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Dear John:

My "contribution," concurring in part and dissenting in part, is at the Printer. It should be around in a few days.

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 6/4/76

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75-122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1976]

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I agree with the Court insofar as it holds that the fact that anticompetitive conduct is sanctioned, or even required, by state law does not of itself put that conduct beyond the reach of the Sherman Act. Since the opposite proposition is the ground on which the Court of Appeals affirmed the dismissal of this suit, I agree that its judgment must be reversed. Otherwise, my views in several respects depart from those of the Court.

## I

As to the principal question in the case, that of the Sherman Act's pre-emptive effect upon inconsistent state laws, it is, as the dissent points out, one of congressional intent. No one denies that Congress could, if it wished, override those state laws whose operation would subvert the federal policy of free competition in interstate commerce. In discerning that intent, however, I find somewhat less assistance in the legislative history than does the dissent. It is true that the framers of the Sherman Act expressed the view that certain areas of economic activity were left entirely to state regulation. The dissent quotes several of these expressions. *Post*, at [pp. 17–20]. A careful reading of those statements reveals,

June 23, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Dear John:

I appreciate the effort you have made to accommodate with your recirculation of June 18. After further and careful consideration, I have concluded that I still should write separately, but I am now concurring in the judgment. This gives you a court for the judgment and to that extent, I believe, is helpful. The xeroxed copy being currently circulated will indicate what I have done.

Sincerely,

HAB

Mr. Justice Stevens

cc: The Chief Justice

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Because of the jam in the Print Shop, I circulate xeroxed copies of proposed changes in my concurring opinion. I hope that the changes are sufficiently clear.

HAB.

2nd

~~1st~~ DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

with whom the Chief Justice joins,

[June —, 1976]

MR. JUSTICE BLACKMUN, concurring in ~~part and dissenting in part~~ the judgment.

I agree with the ~~Court~~ plurality insofar as it holds that the fact that anticompetitive conduct is sanctioned, or even required, by state law does not of itself put that conduct beyond the reach of the Sherman Act. Since the opposite proposition is the ground on which the Court of Appeals affirmed the dismissal of this suit, I also agree that its judgment must be reversed. ~~Otherwise, my views in several respects depart from those of the Court.~~

My approach, however, is somewhat different from that of the plurality.

## I

As to the principal question in the case, that of the Sherman Act's pre-emptive effect upon inconsistent state laws, it is, as the dissent points out, one of congressional intent. No one denies that Congress could, if it wished, override those state laws whose operation would subvert the federal policy of free competition in interstate commerce. In discerning that intent, however, I find somewhat less assistance in the legislative history than does the dissent. It is true that the framers of the Sherman Act expressed the view that certain areas of economic activity were left entirely to state regulation. The dissent quotes several of these expressions. *Post*, at [pp. 17–20]. A careful reading of those statements reveals,

pp. 1, 5, 7, 8, 9, 10, 11

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 6/25/76

**2nd DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1976]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I agree with the plurality insofar as it holds that the fact that anticompetitive conduct is sanctioned, or even required, by state law does not of itself put that conduct beyond the reach of the Sherman Act. Since the opposite proposition is the ground on which the Court of Appeals affirmed the dismissal of this suit, I also agree that its judgment must be reversed. My approach, however, is somewhat different from that of the plurality.

## I

As to the principal question in the case, that of the Sherman Act's pre-emptive effect upon inconsistent state laws, it is, as the dissent points out, one of congressional intent. No one denies that Congress could, if it wished, override those state laws whose operation would subvert the federal policy of free competition in interstate commerce. In discerning that intent, however, I find somewhat less assistance in the legislative history than does the dissent. It is true that the framers of the Sherman Act expressed the view that certain areas of economic activity were left entirely to state regulation. The dissent quotes several of these expressions. *Post,* at [pp. 17–20]. A careful reading of those statements reveals,

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 14, 1976

No. 75-122 Cantor v. Detroit Edison

Dear John:

In accordance with my vote at the Conference, I will await the circulation of Potter's dissent.

Sincerely,

L. Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 19, 1976

No. 75-122 Cantor v. Detroit Edison

Dear Potter:

Please join me in your dissent.

Sincerely,

L. Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 21, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Dear Potter:

Please join me in your dissent.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 4/12/76

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75-122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, v. The Detroit Edison Company. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

In *Parker* v. *Brown*, 317 U. S. 341, we held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective.

The Michigan Public Service Commission pervasively regulates the distribution of electricity within the State and also has given its approval to a marketing practice which has a substantial impact on the otherwise unregulated business of distributing electric light bulbs. Assuming, *arguendo*, that the approved practice has unreasonably restrained trade in the light bulb market, the District Court [1] and the Court of Appeals [2] held, on the authority of *Parker*, that the Commission's approval exempted the practice from the federal antitrust laws. Because we questioned the applicability of *Parker* to this

[1] 392 F. Supp. 1110 (ED Mich. 1974).
[2] 513 F. 2d 630 (CA6 1975).

P.18

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 4/14/76

Recirculated: _____

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

In *Parker* v. *Brown*, 317 U. S. 341, we held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective.

The Michigan Public Service Commission pervasively regulates the distribution of electricity within the State and also has given its approval to a marketing practice which has a substantial impact on the otherwise unregulated business of distributing electric light bulbs. Assuming, *arguendo*, that the approved practice has unreasonably restrained trade in the light bulb market, the District Court [1] and the Court of Appeals [2] held, on the authority of *Parker*, that the Commission's approval exempted the practice from the federal antitrust laws. Because we questioned the applicability of *Parker* to this

[1] 392 F. Supp. 1110 (ED Mich. 1974).
[2] 513 F. 2d 630 (CA6 1975).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 20, 1976

Re: No. 75-122 - Cantor v. Detroit Edison Co.

Dear Harry:

Thanks for your suggestions on footnotes 33 and 34. I will make appropriate corrections on the next draft, but will also probably wait until I see whether Potter's dissent requires some other change in the opinion.

Sincerely,

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 19, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

MEMORANDUM TO THE CONFERENCE

Since the Print Shop is so busy, I am re-circulating page 18 of my proposed opinion with a typewritten insert.

Respectfully,

JPS

Attachment

J

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

MEMORANDUM TO THE CONFERENCE

My compliments to Justice Stewart for the fine quality of his dissenting opinion. I do not propose to change my draft, but in response would make these observations.

I do not believe the prospect of massive treble damage liability is nearly as horrendous as he fears. Most activities of regulated utilities are not even arguably illegal, regardless of whether or not they receive some sort of exemption from the antitrust laws. And, of course, the absence of an exemption does not mean that an activity is unlawful.

Some problems may arise when a utility engages in marketing activities that are only indirectly related to its principal business. This case involves the distribution of light bulbs. The next may involve toasters, heating units, or electric fans. The filing of a tariff may include a discount schedule that would violate the Robinson Patman Act if followed by an unregulated company, or a joint distribution agreement with a Westinghouse distributor that would violate the Sherman Act if not exempt. Under Justice Stewart's rationale, if I understand his opinion, the response of the State Commission would determine whether or not such a tariff would confer antitrust immunity.

On the other hand, the refusal to extend the Parker rationale to this essentially unregulated area does not imply any rejection of its rationale in another area in which a state's regulatory policy is truly involved. In this case--unless the State Commission is to have carte-blanche authority to grant almost any application for an

exemption from the federal antitrust laws--it is hard to believe any significant State policy is involved when Michigan allows the utility either to have, or not to have, a lamp exchange program at its option. You will remember that some Michigan utilities do, and some do not, have such programs.

In short, I have no quarrel with the lucid exposition of Justice Stewart's position. I remain convinced, however, that it would open a gaping hole in the fabric of the Sherman Act to allow every state commission in the country to grant exemptions from this extremely important federal statute. I also remain convinced that it would be a mistake to try to fashion a black letter rule which would decide every hypothetical case in which a Parker v. Brown defense might be asserted.

Respectfully,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

Dear Harry:

The novel proposition advanced in Part IV of your opinion comes as such a surprise that I would like to take the time to reflect on the need for an addition to my opinion to discuss it.

It is akin to a suggestion which has been proposed to Congress on several occasions by groups who were understandably concerned about the unfairness of a mandatory treble damage award being applied to conduct which was at least arguably lawful at the time it took place. As I am sure you know, Congress has consistently rejected such suggestions even though there are many considerations of fairness which support them.

One of the problems which concerns me is the desirability at this time of a debate within the Court on the scope of the remedy that may be appropriate after trial. Indeed, in my draft I tried to avoid even expressing any opinion of the sufficiency of the allegations in the complaint.

Some of the hurdles that will have to be overcome before reaching the remedy issue include (a) the sufficiency of the complaint; (b) the significance of the plaintiff's failure to obtain a class certification; (c) problems of proving a violation of law in the face of what I am sure will be a persuasive justification of the practice by the utility (although I recognize that your opinion indicates a good deal of skepticism about the probability of a successful defense); (d) the question whether this retailer can establish the fact of damage; (e) the usual problems of measuring the amount of damage when the evidence is bound to be speculative; and (f) finally, the impact in the context of the entire trial

of the tariff provision which the defendant proposed and must obey until it proposes a substitute. I am not clear in my own mind how many of these problems should be discussed in order to place in proper perspective your conclusion that this defendant has available a defense to the damage claim unless the plaintiff succeeds in proving bad faith.

The whole problem is so interesting that I would like to turn my attention to it immediately but I feel obligated first to finish up the two Court opinions that I have not yet circulated before doing so.

In the meantime, if any other Members of the Court have any views about the desirability of a full discussion of the remedy issue at this posture of the case, I would welcome them.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

P.S. If I do write an additional section to the opinion, I will include a discussion of Noerr. I must confess that I have some difficulty understanding the applicability to this case. The railroads did not seek the passage of laws regulating their own conduct. Compliance by the truckers with the legislation which the railroads were advocating could not conceivably have given rise to any violation of the Sherman Act. The only Sherman Act issue related to the joint activities of the railroads. In contrast, in this case, there is no suggestion that the utility violated the law by requesting approval of its tariff. The only question is whether it gets an immunity bath for everything which it is able to include in one of its tariffs without encountering disapproval from a state commission.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 18, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

Dear Chief and Harry:

In the interest of making every effort to obtain a Court for the disposition of this case, I have drafted a new Part IV of my proposed opinion and made some changes in Part III. I have tried to overcome the obstacles to your willingness to join my opinion insofar as I can identify them in Harry's opinion. Frankly, apart from the question of possible treble damage liability (which I do not reach because it was not argued) I do not see very much difference in our approaches.

Specifically, you will note that I have added a discussion of Noerr and Goldfarb and have made it perfectly clear that there is no intent to overrule Parker. Indeed, I have gone a step further than Harry by pointing out that even if the suit against the State officials had succeeded, it would not necessarily have followed that private parties would have violated the Sherman Act. All I have really tried to accomplish by writing the opinion narrowly is to avoid expressing any views on issues not presented either in this case or in Parker.

In any event, if either of you has any specific difficulty with the draft, perhaps you could identify it for me and I would be happy to see whether there is any irreconcilable difference between us.

Respectfully,

John

The Chief Justice
Mr. Justice Blackmun

Copies to the Conference

Pg. 12, M, 19-23

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 18 1976

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 75–122

Lawrence Cantor, dba Selden Drugs Company, etc., Petitioner, *v.* The Detroit Edison Company. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April —, 1976]

MR. JUSTICE STEVENS delivered the opinion of the Court.

In *Parker* v. *Brown*, 317 U. S. 341, we held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the *Parker* rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective.

The Michigan Public Service Commission pervasively regulates the distribution of electricity within the State and also has given its approval to a marketing practice which has a substantial impact on the otherwise unregulated business of distributing electric light bulbs. Assuming, *arguendo*, that the approved practice has unreasonably restrained trade in the light bulb market, the District Court [1] and the Court of Appeals [2] held, on the authority of *Parker*, that the Commission's approval exempted the practice from the federal antitrust laws. Because we questioned the applicability of *Parker* to this

[1] 392 F. Supp. 1110 (ED Mich. 1974).
[2] 513 F. 2d 630 (CA6 1975).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1976

PERSONAL - cc: The Chief

Re: 75-122 - Cantor v. Detroit Edison Co.

Dear Harry:

Many thanks for taking on the additional work involved in revising your separate opinion. I really think it is most helpful that you are able to concur in the judgment without dissenting in part.

I must confess, in all candor, that I am still somewhat troubled about the effect of the portion of your revised draft which expresses the firm opinion that treble damages may not be awarded. You may well be correct, but I wonder about the wisdom of expressing a firm opinion on such an important and novel proposition without the benefit of any argument addressed to the issue.

Sincerely,

John

see his 6/14

Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 25, 1976

Re: 75-122 - Cantor v. Detroit Edison Co.

MEMORANDUM TO THE CONFERENCE

The Chief and I have had some conversations which may lead to his joining my opinion. We therefore decided not to bring the case down on Monday.

Respectfully,

JPS