The Burger Court Opinion Writing Database

Lafayette v. Louisiana Power & Light Co.

435 U.S. 389 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1977

Dear Bill:

Re: 76-864 City of Lafayette v. Louisiana Light & Power

In its present state your proposed opinion gives me some problems. I will try to pinpoint them before January 9.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

January 25, 1978

Re: 76-864 - City of Lafayette, La. v. La. Power and Light

Dear Bill:

I have been waiting on the dissenting opinions, none of which persuades me to reverse. However, I have problems and will write a brief concurrence describing my grounds of decision.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

1st DRAFT

Circulated: FEB 27 1978

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[February —, 1978]

MR. CHIEF JUSTICE BURGER, concurring.

This case turns, or ought to, on the District Court's explicit finding, unchallenged here, that "these plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized." There is nothing in *Parker* v. *Brown*, 317 U. S. 341 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality. *Parker* was a case involving a suit against state officials who were administering a state program which had the conceded purpose of replacing competition in a segment of the agricultural market with a regime of governmental regulation. The instant lawsuit is entirely different. It arises because respondents took the perfectly natural step of answering a competitor's federal antitrust complaint with a counterclaim alleging serious violations of the Sherman Act.

There is nothing in this record to support any assumption other than that this is an ordinary dispute among competitors in the same market. It is true that petitioners are municipalities, but we ought not ignore the reality that this is the only difference between the Cities and any other entrepreneur in the economic community. Indeed, the injuries

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

March 2, 1978

Re: 76-864 City of Lafayette, La. v. Louisiana Power and Light Co.

MEMORANDUM TO THE CONFERENCE:

I have concluded to preface my concurring opinion as follows:

"I join Part I of the plurality opinion and in the judgment."

Regards,

WEB

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

1 New ANS. 1, 3, 5

To: Mr. Justice [illegible]
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: MAR 2 [illegible]

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1978]

MR. CHIEF JUSTICE BURGER, concurring in Part I of the plurality opinion and in the judgment.

This case turns, or ought to, on the District Court's explicit conclusion,[1] unchallenged here, that "these plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized." There is nothing in *Parker* v. *Brown*, 317 U. S. 341 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality. *Parker* was a case involving a suit against state officials who were administering a state program which had the conceded purpose of replacing

[1] The District Court did not, of course, make a formal finding of fact to this effect since the counterclaim was disposed of on the basis of pleadings. Nonetheless, the District Court could reasonably conclude, as a matter of law, that the Cities are engaging in business activities which have as their aim the production of revenues in excess of costs. It certainly is the case that the Cities are attempting to provide a public service, but it is likewise undeniable that they seek to do so in the most profitable way. The Cities allege in their complaint, for example, that they have "been prevented from profitably expanding their businesses." App. 14. While it is correct that the Cities are ordinarily constrained from applying their net earnings as a private corporation would, this does not detract from their competitive posture and resulting incentive to engage in anticompetitive practices.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

FN 3, 4

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: _____

Recirculated: MAR 24 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[February —, 1978]

MR. CHIEF JUSTICE BURGER, concurring in Part I of the plurality opinion and in the judgment.

This case turns, or ought to, on the District Court's explicit conclusion,[1] unchallenged here, that "these plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized." There is nothing in *Parker* v. *Brown*, 317 U. S. 341 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality. *Parker* was a case involving a suit against state officials who were administering a state program which had the conceded purpose of replacing

[1] The District Court did not, of course, make a formal finding of fact to this effect since the counterclaim was disposed of on the basis of pleadings. Nonetheless, the District Court could reasonably conclude, as a matter of law, that the Cities are engaging in business activities which have as their aim the production of revenues in excess of costs. It certainly is the case that the Cities are attempting to provide a public service, but it is likewise undeniable that they seek to do so in the most profitable way. The Cities allege in their complaint, for example, that they have "been prevented from profitably expanding their businesses." App. 14. While it is correct that the Cities are ordinarily constrained from applying their net earnings as a private corporation would, this does not detract from their competitive posture and resulting incentive to engage in anticompetitive practices.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White

11-29-77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Parker v. *Brown*, 317 U. S. 341 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such restraints.

Petitioner-Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which the Cities

[1] See generally La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); La. Rev. Stat. Ann. § 33:621 (West 1950).

[2] La. Rev. State. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 19, 1977

Re: City of Lafayette v. Louisiana Power & Light, No. 76-864

Dear Lewis:

After having reviewed your opinion concurring in the judgment, I believe that if we disagree at all it is on very narrow grounds. I am always anxious to accommodate your always helpful views and I hope that I may in this case.

Addressing myself first to Part II of your opinion (slip op. at 3), I am most willing to make explicit that, given the procedural posture of this case, we are not called upon to decide whether the generally applicable remedies for violations of the antitrust laws will lie against a municipality. Certainly that is an important question which deserves briefing and argument and ought not to be decided by inadvertence, and in writing the draft opinion I did not wish to intimate that we answered it. I think that I can signal clearly that the question is an open one by making the following changes.

Page 11--substitute for the first full sentence:

The short answer is that it has not been regarded as anamolous to require compliance by municipalities with the substantive standards articulated in other federal laws which impose such liabilities upon "persons."

Page 12--Add new sentence following end of first sentence:

Although these cases indicate that the existence of these liabilities under a federal statute does not of itself justify the conclusion that Congress would have intended to exempt municipalities from its proscriptions, we are not in this case called upon to decide whether municipalities are subject to the same remedies as are private corporations.20A/

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

[New footnote 20A.] [primarily taken from your opinion pp. 1 & 4]

As has been observed many times, see, e.g., Slater, supra note 19, at 84, the Act's draftsmen perceived the Commerce Clause as narrowly limiting their power to reach activity solely within a State, as contrasted with interstate activity. The expansion of jurisdiction under the Sherman Act has permitted the confrontation of these evils in settings not envisioned when the Act was adopted. Hence, the automatic attachment of liability for treble damages to a finding of substantive liability may not always be appropriate in terms of what the Congress of 1890 would have intended, had it forseen the Act's application in the new settings. See Cantor v. Detroit Edison Co., 428 U.S. 579, 594-595, 598-599, 603 (1976); id., at 614-615, n. 6 (BLACKMUN, J., concurring in the judgment). It may be arguable that in view of the broad and general statement of policy incorporated in the Sherman Act, and the consequent broad role which Congress envisioned that the federal courts would have in implementing it, see note 30, infra, that the courts permissibly might develop limitations consistent with that policy even though the statute itself is silent.

In this case, however, neither the damage question nor any of those considerations are before us. The Court of Appeals remanded to the District Court. Consideration of damage issues in advance of the District Court's determination whether the challenged activity is covered by the antitrust laws would be premature.

Would these changes make it possible for you to join all of Part I of my draft, most of which you have already joined? With respect to Part II of my draft (slip op. at 18), which you address in Part I of your opinion, I am not quite clear what you find unacceptable. I would, however, be glad to try to accommodate any suggestions that occur to you.

Sincerely,

WJB, Jr.

Mr. Justice Powell
cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1978

RE: No. 76-864 City of Lafayette, La. v. La. Power & Light, etc.

Dear Thurgood and John:

Lewis and I have been exchanging memoranda in the above with the view to seeing if I could accommodate some reservations he has about my circulated opinion. I attach a copy of my draft with changes that, if made, will probably satisfy him to go along. Would you mind letting me have your reaction to them. I don't think I'd want to make them if either of you had strong objections.

You'll recall that the conference vote was 5 - 4 with the Chief Justice making the fifth to Affirm. His recent note to me that he has problems with my draft has not been further expanded upon so I am not in any position to know what troubles him.

Sincerely,

Bill

Mr. Justice Marshall

Mr. Justice Stevens

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Parker v. *Brown*, 317 U. S. 341 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such restraints.

Petitioner-Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which the Cities

[1] See generally La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); La. Rev. Stat. Ann. § 33:621 (West 1950).

[2] La. Rev. State. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 9, 1978

76-864 City of Lafayette v. Louisiana Power & Light

Dear John:

I have no objection to your circulating the concurrence. Indeed, I hope that it might persuade the Chief to join us.

Sincerely,

WJB, Jr.

Mr. Justice Stevens

Wm Brennan
0177

MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 10, 1978

Re: No. 76-864 City of Lafayette v. Louisiana Power & Light Co.

Dear Lewis:

I have, as I mentioned I would when we last discussed the case, asked Thurgood and John whether they could go along with the changes I was willing to make to reflect your concerns. John has agreed to go along with virtually all of the changes except footnote 20A. He feels that the change in text adequately indicates that the question of remedy and Harry's approach to it remains open, but that the footnote gives the impression that the Court already has accepted it. Thurgood concurs in these sentiments. Upon reflection, I agree that it would be problematic to retain the footnote and that the change in text coupled with the short footnote which I suggest replace 20A will do the job. I hope that you can find this acceptable.

I have made a number of other changes which I hope overcome the difficulties in the earlier draft which Bob Comfort and Carmen Legato discussed. If you can let me know that these are satisfactory, I will make stylistic changes and some changes in light of Potter's dissenting opinion and shortly circulate it.

Sincerely,

Bill

Mr. Justice Powell
cc. Mr. Justice Marshall
Mr. Justice Stevens

Encl.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

J. Chambers 8-12, 17, 19-23 1/10/78 ✓

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Parker v. *Brown*, 317 U. S. 341 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such restraints.

Petitioner-Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which the Cities

[1] See generally La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); La. Rev. Stat. Ann. § 33:621 (West 1950).

[2] La. Rev. State. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 11, 1978

Re: No. 76-864 City of Lafayette v. Louisiana Power & Light Co.

Dear Chief:

Lewis and I have been exchanging memoranda with a view to accomodating the concerns which Lewis had with the first draft I had circulated. As a result, I have prepared a revised draft which, as of this morning, Thurgood, Lewis and John have informed me they will join when circulated. The revised draft should be sent to the print shop later today, and, when ready will be circulated as a second draft. Meanwhile, I thought you might wish to have a copy of the revised draft, for which there are now four votes, to aid your consideration.

I will also be circulating a third draft incorporating stylistic changes and some changes in light of Potter's dissenting opinion.

Sincerely,

Mr. Chief Justice Burger

cc. Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Stevens

Encl.

Wm Brennan 6/1/77

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 13, 1978

Re: No. 76-864 City of Lafayette v. Louisiana Power & Light Co.

The enclosed second draft is the same as the marked-up draft which I sent to you earlier in the week, except for stylistic changes made on pages 1, 3, and 7-10. This copy is now being revised to include further stylistic changes and some changes in light of Potter's dissent. I will circulate a draft reflecting these changes shortly.

Sincerely,

WJB

Mr. Chief Justice Burger
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Stevens

Encl.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

TM files
Date?
1/13?

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Parker v. *Brown*, 317 U. S. 341 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

Petitioner-Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which the Cities

[1] See generally La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); La. Rev. Stat. Ann. § 33:621 (West 1950).

[2] La. Rev. State. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 18, 1978

Re: No. 76-864 City of Lafayette v. Louisiana Power & Light Co.

Third draft enclosed:

stylistic changes throughout
text on pages 21 through 26 has been substantially revised
footnote 40 has been deleted
footnotes 22, 33, 40, 42 & 46 have been added
other principal changes appear on pages 8-12, 17, 19-20

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr Justice Brennan

Circulated: _____

Recirculated: 11/9/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Parker v. *Brown*, 317 U. S. 341 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

Petitioner Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which petitioners

[1] See generally La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); La. Rev. Stat. Ann. § 33:621 (West 1950).

[2] La. Rev. Stat. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Stylistic Changes Throughout
See pp. 6, 10, 12, 21, 23, 24

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 3/16/78

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Parker v. *Brown*, 317 U. S. 338 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

Petitioner Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which petitioners

[1] See La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); see generally La. Rev. Stat. Ann. §§ 33:621, 33:361, 33:506 (West 1950).

[2] La. Rev. Stat. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Pages 1 + 12

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 3/17/78

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.*

Parker v. *Brown*, 317 U. S. 338 (1943), held that the federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

Petitioner Cities are organized under the laws of the State of Louisiana,[1] which grant them power to own and operate electric utility systems both within and beyond their city limits.[2] Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,[3] Louisiana Power & Light Company (LP&L), an investor-owned electric service utility with which petitioners

*Parts II and III of this opinion are joined only by MR. JUSTICE MARSHALL, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS.

[1] See La. Const. Art. VI §§ 2, 7 (a) (effective Jan. 1, 1975); La. Const. Art. XIV, § 40 (d) (1921) (effective prior to Jan. 1, 1975); see generally La. Rev. Stat. Ann. §§ 33:621, 33:361, 33:506 (West 1950).

[2] La. Rev. Stat. Ann. §§ 33:1326; 33:4162; 33:4163 (West 1950).

[3] The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Company, Inc. and Gulf State Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission and sale of electric power at wholesale and retail in Louisiana.

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

April 17, 1978

MEMORANDUM TO THE CONFERENCE

From: Mr. Justice Brennan

Re: Cases held for No. 76-864, City of Lafayette v. Louisiana Power & Light Co.

Circulated: 4/17/78

1. No. 77-440, Pleasure Driveway and Park District v. Kurek

Petitioners are a Public Park District which is a political subdivision of the state and owner and operator of municipal golf courses, and various individuals including officials of the Park District. Respondents are individuals each of whom for many years was employed as a greenskeeper and manager of one of the 5 golf courses and who, in addition, operated a golf pro shop at a golf course pursuant to a concession agreement. Count I of Respondents' complaint alleged a conspiracy between the Park District and a prospective concessionaire to monopolize the sale of pro line equipment and to force respondents to raise and fix the prices of golf equipment among themselves. The allegation was that pursuant to an agreement the prospective concessionaire submitted a sham high bid, and that the District Park used the bid as a lever to coerce respondents to raise and fix the prices of golf equipment so as to increase the District's concession fee which was a percentage of equipment sales. The

Reproduced from the Collections of the Manuscript Division, Library of Congress

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 29, 1977

Re: No. 76-864, Lafayette v. Louisiana Power & Light Co.

Dear Bill,

In due course I shall circulate a dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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: JAN 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1978]

MR. JUSTICE STEWART, dissenting.

In *Parker* v. *Brown*, 317 U. S. 341, a California statute restricted competition among raisin growers in order to keep the price of raisins artificially high. The Court found that California's program did not violate the antitrust laws but was "an act of government which the Sherman Act did not undertake to prohibit." 341 U. S., at 352. *Parker* v. *Brown* thus made clear that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 136.

The principle of *Parker* v. *Brown* controls this case. The petitioners are governmental bodies, not private persons, and their actions are "act[s] of government" which *Parker* v. *Brown* held are not subject to the Sherman Act. But instead of applying the *Parker* doctrine, the Court today imposes new and unjustifiable limits upon it. Henceforth, governmental action will be immune from the antitrust laws[1] only when

[1] As the Court acknowledges, *ante*, at 3 n. 8, *Parker* v. *Brown* did not create any exemption from the antitrust laws, but simply recognized that it was the intent of Congress that the Sherman Act should not apply to governmental action. It is thus hard to understand why the Court invokes the doctrine that exemptions from the antitrust laws will not be lightly implied by subsequent enactment of a regulatory statute. This rule, which

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 11, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-864, Lafayette v. Louisiana Power & Light

I propose to add the following at an appropriate point in my dissenting opinion in this case:

It is said in a separate opinion today that the Court's decision is limited to the "simple proposition" that "[w]hen a city operates a business, it must obey the laws which apply to private firms operating comparable businesses," and that it does not affect a city's performance of "normal governmental functions." But the Court's decision is not and cannot be so limited. It draws no such distinction, and applies equally to "regulation" -- surely a "normal governmental function" -- and "monopoly public service." Ante, at 21. Moreover, this "simple proposition" is not so self-evident as the concurring opinion seems to imply. Cf. e.g., § 115 of the Internal Revenue Code of 1954, 26 U.S.C. § 115; NLRB v. Natural Gas Utility District, 402 U.S. 600.

P.S.

P.S.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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: 26 JAN

2nd DRAFT

PAGES: 1, 2, 4-5, 8-13
FOOTNOTES RENUMBERED

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1978]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN,* and MR. JUSTICE REHNQUIST join, dissenting.

In *Parker* v. *Brown*, 317 U. S. 341, a California statute restricted competition among raisin growers in order to keep the price of raisins artificially high. The Court found that California's program did not violate the antitrust laws but was "an act of government which the Sherman Act did not undertake to prohibit." 341 U. S., at 352. *Parker* v. *Brown* thus made clear that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 136.

The principle of *Parker* v. *Brown* controls this case. The petitioners are governmental bodies, not private persons, and their actions are "act[s] of government" which *Parker* v. *Brown* held are not subject to the Sherman Act. But instead of applying the *Parker* doctrine, the Court today imposes new and unjustifiable limits upon it. Henceforth, governmental action will be immune from the antitrust laws[1] only when

*MR. JUSTICE BLACKMUN joins all but Part II-B of this opinion.

[1] As the Court acknowledges, *ante*, at 3 n. 8, *Parker* v. *Brown* did not create any exemption from the antitrust laws, but simply recognized that

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Mr. Justice Brenna
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr Justice Rehnquist
Mr Justice Stevens

Substantial change

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 13 MAR 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1978]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN,* and MR. JUSTICE REHNQUIST join, dissenting.

In *Parker* v. *Brown*, 317 U. S. 341, a California statute restricted competition among raisin growers in order to keep the price of raisins artificially high. The Court found that California's program did not violate the antitrust laws but was "an act of government which the Sherman Act did not undertake to prohibit." 341 U. S., at 352. *Parker* v. *Brown* thus made clear that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 136.

The principle of *Parker* v. *Brown* controls this case. The petitioners are governmental bodies, not private persons, and their actions are "act[s] of government" which *Parker* v. *Brown* held are not subject to the Sherman Act. But instead of applying the *Parker* doctrine, the Court today imposes new and unjustifiable limits upon it. According to the plurality, governmental action will henceforth be immune from the antitrust laws[1] only when "authorized or directed" by the

*MR. JUSTICE BLACKMUN joins all but Part II-B of this opinion.

[1] As the plurality acknowledges, *ante*, at 3 n. 8, *Parker* v. *Brown* did not

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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 24 MAR 1978

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5, 7-10

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[January —, 1978]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN,* and MR. JUSTICE REHNQUIST join, dissenting.

In *Parker* v. *Brown*, 317 U. S. 341, a California statute restricted competition among raisin growers in order to keep the price of raisins artificially high. The Court found that California's program did not violate the antitrust laws but was "an act of government which the Sherman Act did not undertake to prohibit." 341 U. S., at 352. *Parker* v. *Brown* thus made clear that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 136.

The principle of *Parker* v. *Brown* controls this case. The petitioners are governmental bodies, not private persons, and their actions are "act[s] of government" which *Parker* v. *Brown* held are not subject to the Sherman Act. But instead of applying the *Parker* doctrine, the Court today imposes new and unjustifiable limits upon it. According to the plurality, governmental action will henceforth be immune from the antitrust laws [1] only when "authorized or directed" by the

*MR. JUSTICE BLACKMUN joins all but Part II-B of this opinion.

[1] As the plurality acknowledges, *ante*, at 3 n. 8, *Parker* v. *Brown* did not

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 1, 1977

Re: No. 76-864 - City of Lafayette, La. v. Louisiana Power & Light Co.

Dear Bill:

I am awaiting Potter's dissent.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 10, 1978

Re: 76-864 City of Lafayette, Louisiana and City of Plaquemine, Louisiana, v. Louisiana Power & Light Co.

Dear Potter:

Please add my name to your dissent in this case.

Sincerely,

Mr. Justice Stewart

Copies to The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 1, 1977

Re: No. 76-864 -- Lafayette v. Louisiana Power & Light Company

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 10, 1978

Re: No. 76-864, City of Lafayette v. Louisiana Power & Light Co.

Dear Bill:

As modified by John's suggestions, your proposed changes are OK with me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: Mr. Justice Stevens

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

28 FEB 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–864

City of Lafayette, Louisiana, and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[March —, 1978]

MR. JUSTICE MARSHALL, concurring.

I agree with THE CHIEF JUSTICE, *ante*, at 7, that any implied "state action" exemption from the antitrust laws should be no broader than is necessary to serve the State's legitimate purposes. I join the plurality opinion, however, because the test there established, relating to whether it is "state policy to displace competition," *ante*, at 23, incorporates within it the core of THE CHIEF JUSTICE'S concern. As the plurality opinion makes clear, it is not enough that the State "desire[s] to insulate anticompetitive practices." *Id.*, at 25. For there to be an antitrust exemption, the State must "impose" the practices "as an act of government." *Ibid.* State action involving more anticompetitive restraint than necessary to effectuate governmental purposes must be viewed as inconsistent with the plurality's approach.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota
December 13, 1977

Re: No. 76-864 - City of Lafayette v. Louisiana Power & Light Co.

Dear Bill:

I, too, shall await the dissent.

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 10, 1978

Re: No. 76-864 - City of Lafayette v. Louisiana Power and Light Co.

Dear Bill:

I have read Potter's dissenting opinion. I shall try my hand at some additional paragraphs in dissent.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 23, 1978

Re: No. 76-864 - City of Lafayette v. Louisiana Power & Light Co.

Dear Potter:

I also am writing briefly in dissent. My dissent, however, indicates that I am joining your opinion except for part IIB. The dissent goes to the printer today and should be available shortly.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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: 1/24/78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Lousiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1978]

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE STEWART's dissent with the exception of Part II-B, but wish to note that I do not take his opinion as reaching the question whether petitioners should be immune under the Sherman Act even if found to have been acting in concert with private parties. To grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded officials of the States themselves. See *Parker* v. *Brown*, 317 U. S. 341, 351-352 (1943) ("[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450"). The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all. If the view that municipalities are not subject to the full reach of Sherman Act liability had commanded a majority, a remand for consideration of this more limited exception would be in order.

In light of the fact that the Court now has decided that municipalities are fully subject to Sherman Act liability, I must question the nonchalance with which the Court puts aside the question of remedy. *Ante*, p. 12 n. 22. It is a

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

pp. 1, 2

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: 3/14/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Lousiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1978]

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE STEWART's dissent with the exception of Part II–B, but wish to note that I do not take his opinion as reaching the question whether petitioners should be immune under the Sherman Act even if found to have been acting in concert with private parties. To grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded officials of the States themselves. See *Parker* v. *Brown*, 317 U. S. 341, 351–352 (1943) ("[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450"). The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all. If the view that municipalities are not subject to the full reach of Sherman Act liability had commanded a majority, a remand for consideration of this more limited exception would be in order.

In light of the fact that the plurality and THE CHIEF JUSTICE have concluded that municipalities should be subject to broad Sherman Act liability, I must question the nonchalance with which the Court puts aside the question of remedy.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

√

p. 2

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

Mr. Justice Blackmun

Circulated: _____

Recirculated: 3/22/78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Lousiana Power & Light Company. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1978]

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE STEWART's dissent with the exception of Part II-B, but wish to note that I do not take his opinion as reaching the question whether petitioners should be immune under the Sherman Act even if found to have been acting in concert with private parties. To grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded officials of the States themselves. See *Parker* v. *Brown*, 317 U. S. 341, 351-352 (1943) ("[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450"). The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all. If the view that municipalities are not subject to the full reach of Sherman Act liability had commanded a majority, a remand for consideration of this more limited exception would be in order.

In light of the fact that the plurality and THE CHIEF JUSTICE have concluded that municipalities should be subject to broad Sherman Act liability, I must question the nonchalance with which the Court puts aside the question of remedy.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 2, 1977

No. 76-864 City of Lafayette v. Louisiana Power

Dear Bill:

Although I agree with much that you have said in your opinion for the Court, and expect to join you in the judgment, I plan to write a brief concurring opinion.

As I joined Potter's dissent in Cantor, I do not wish to expand its reach. I therefore take a somewhat narrower view of the present case than the tenor of much of your fine opinion.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Powell

Circulated: DEC 15 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-864

City of Lafayette, Louisiana and City of Plaquemine, Louisiana, Petitioners, *v.* Louisiana Power & Light Company.

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

[January —, 1978]

MR. JUSTICE POWELL, concurring in the judgment and concurring in part.

I concur in Parts I–A and I–B (1) of the Court's opinion, and in so much of Part I–B (2) as holds that no general exclusion of municipalities from the reach of the antitrust laws exists outside the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943). Because much of the rest of the Court's opinion speaks in terms broader than necessary to decide the issue before us, I write separately.

I

The Sherman Act—phrased in the most general terms—reads more like a declaration of broad federal policy than a regulatory statute. As has been observed many times, see, *e. g.*, Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. L. Rev. 71, 84 (1974), the Act's draftsmen perceived the Commerce Clause as narrowly limiting their power to reach activity solely within a State, as contrasted with interstate activity. This perception was coupled with an intent not to interfere with the regulatory authority of the several States. H. R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890); 20 Cong. Rec. 1167 (1889) (remarks of Sen. Sherman); 21 Cong. Rec. 2456, 2460 (1890) (remarks of Sen. Sherman). But this Court's view of congressional power under the Commerce Clause expanded

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 28, 1977

No. 76-864 City of LaFayette v. Louisiana Power & Light Co.

Dear Bill:

Thank you for your letter of December 19, suggesting the possibility of changes in your opinion to accommodate my concerns.

Your proposed changes with respect to remedies, including the new footnote 20A, are entirely satisfactory. I believe there may well be sound reasons not to impose treble damages as a matter of course against municipal defendants.

My other concern is somewhat more broadly based. I joined Potter's dissent in Cantor, as the Court opinion seemed to undercut rather substantially the Parker exception. I would not wish to weaken Parker further, and possibly some of the rather broad language in your opinion might be so read in the future.

I believe, however, that the language that prompted me merely to concur in the judgment is not necessary to the rationale or force of your fine opinion. If you should be disposed to take this out, I will be happy to join you all the way.

Mr Brennan
05.77

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 11, 1978

76-864 City of Lafayette v. Louisiana Power

Dear Bill:

Thank you for your letter of January 10, enclosing a copy of your draft opinion marked-up to reflect the changes that you are willing to make to accommodate my views.

I agree that you have met them in substance. I would prefer to be more explicit with respect to the damage issue, but your draft now clearly leaves this open.

I appreciate you willingness to make these changes and am happy to join your opinion. I will so advise the Conference when you recirculate it.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: Mr. Justice Marshall
Mr. Justice Stevens

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 19, 1978

No. 76-864 City of Lafayette v. Louisiana Power & Light Company

Dear Bill:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 12, 1978

Re: No. 76-864 - City of Lafayette v. Louisiana Power & Light Co.

Dear Potter:

Please join me in your dissenting opinion.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 1, 1977

Re: 76-864 - City of Lafayette v. Louisiana Power & Light Co.

Dear Bill:

Please join me.

Respectfully,

JPS

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 9, 1978

Re: 76-864 - City of Lafayette, etc. v. Louisiana Power & Light Co.

Dear Bill:

Unless you think it would be poor tactics to do so, I would like to circulate the enclosed brief concurrence. I will reply a little later to your recent letter about changes in respect to Lewis' suggestions. I have some problems with the changes but feel sure we can work them out.

Respectfully,

JPS

Mr. Justice Brennan

Enclosure

WJB
Brennan
0177

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 9, 1978

Re: 76-864 - City of Lafayette v. Louisiana Power & Light Co.

Dear Bill:

Two of the proposed changes in the draft that you circulated to Thurgood and me on January 6 trouble me.

First, I cannot join an opinion which implies that the Court might one day accept Harry's view that the Court has power to deny treble damages at its discretion. Therefore, I would have to disassociate myself from most of your proposed footnote 20A, and I would hope you could revise the sentence in the text to read something like this:

> "But those cases do not necessarily require the conclusion that remedies appropriate for private corporations would be equally appropriate for municipalities; nor need we decide any question of remedy in this case."

Second, I would hope you could delete the words "considerations of federalism dictate that" in your footnote 30A.

Although I would prefer not to make some of the other changes, I think it is entirely appropriate for you to make them in order to enable Lewis to join you opinion.

Respectfully,

John

Mr. Justice Brennan

Copy to Mr. Justice Marshall

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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: 1/9/78

Recirculated: _____

76-864 - City of Lafayette, etc. v. Louisiana Power & Light Co.

MR. JUSTICE STEVENS, concurring.

When a city operates a business, it must obey the laws which apply to private firms operating comparable businesses. MR. JUSTICE STEWART to the contrary notwithstanding, not a word in Parker v. Brown, 317 U.S. 341, or National League of Cities v. Usery, 426 U.S. 833, contradicts this simple proposition. Nor does the Court today suggest that cities will violate the antitrust laws by performing their normal governmental functions. I therefore join its opinion.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 13, 1978

Re: 76-864 - City of Lafayette v. Louisiana Power

Dear Bill:

After reading your excellent opinion once again, I have concluded that I will withdraw my brief concurrence. I assume you will make some response to Potter's reference to National League of Cities, but even if you decide not to, I still think my extra comment is unnecessary because you have covered the point so effectively in your opinion. I think I will wait until you recirculate before I advise the Conference.

Respectfully,

John

Mr. Justice Brennan

Wm Brennan
DC177

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1978

Re: 76-864 - Lafayette v. Louisiana Power & Light Co.

Dear Bill and Potter:

This will confirm my oral advice that I have withdrawn my concurring statement.

Respectfully,

J.P.S.

Mr. Justice Brennan
Mr. Justice Stewart

Copies to the Conference