

The Burger Court Opinion Writing Database

Exxon Corp. v. Governor of Maryland
437 U.S. 117 (1978)

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 7, 1978

Dear John:

Re: 77-10; 11;12;47 Exxon Corp. v. Gov. of Maryland

I will await Harry's dissent in this case.

Regards,

WE Bjc

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

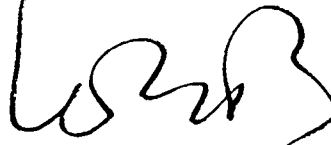
June 10, 1978

Re: 77-10, 77-11, 77-12, 77-47 and 77-64 -
Exxon Corp. v. Governor of Maryland

Dear John:

I join.

Regards,



Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 19, 1978

Re: No's. 77-10, et al., Exxon v. Maryland

Dear John,

I agree with your treatment in Parts II and III of the constitutional challenges to the Maryland statute and will probably join these Parts. I also agree with much you say in Part IV. However I am quite concerned about the inference that can be drawn from the juxtaposition of the text on page 15, following note 27, and note 27 itself: namely, that the Maryland statute sufficiently "regulates" private conduct to fall within the Parker doctrine.

I don't think we have ever extended Parker to a scheme such as this in which state regulation simply cuts off one mode of price competition -- localized price-cutting -- without replacing full competition in the marketplace with prices set through the political/regulatory process. Instead, I would suppose that the critical distinction between Parker and Schwegmann (mentioned in your note 27) is that, in the former, market forces were replaced by political/regulatory checks while, in the latter, market forces were only weakened and price-setting was then remitted to unregulated private decisionmaking. I had also thought that your Cantor stood for a similar proposition: that actual control or supervision through the political/regulatory process was the touchstone for the application of Parker. Finally, in Sears v. Stiffel, 376 U.S. 225, didn't we decide that state laws which like the Maryland law prohibited pro-competitive behavior are preempted if in conflict with the national policy in favor of full competition that underlies, e.g., the Sherman Act?

Am I wrong in thinking that the Maryland statute, if not governed by Schwegmann, at least falls somewhere between it and Parker? And if it does, is this the case in which to extend Parker protection so broadly, without briefing and with such an abbreviated discussion of the

Exxon v. Maryland
Page 2

problem? Is it possible to decide this point in the case simply by holding (as you have on pp. 12-14) that the conflict is too attenuated to support a holding of preemption?

I hope that something can be worked out on the Parker issue so that I will not have to write separately.

Sincerely,

Biss

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1978

Re: 77-10, Exxon v. Maryland

Dear John:

Thank you for your note. I am delighted that you can delete the sentence in which Parker is cited and note 27. I still think that the remaining text is problematic, however, and that it will necessarily be read as deciding much more than you intend. I think that could be remedied by making the following changes on page 15 which would bring the Sherman Act discussion within the framework of your excellent discussion of preemption: On line 3, insert the word "hypothetical" before the word "conflict." On line 5, insert the word "generalized" before the word "conflict." Finally, delete the sentence to which note 27 is appended.

If you could see your way clear to make these changes, I would be delighted to join your opinion.

Sincerely,

Bill

Mr. Justice Stevens
Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1978

RE: Nos. 77-10, 11, etc. Exxon Corporation v. Governor
Of Maryland

Dear John:

I do appreciate the consideration you've given my several suggestions. May I suggest the insertion after the word "competition" in the eighth line at page 15 of "in and of itself". If that appeals I'd be happy to consider the discussion finished and join.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1978

RE: Nos. 77-10, 11, etc. Exxon Corporation, et al. v.
Governor of Maryland, et al.

Dear John:

Please join me. I very much appreciate your patience
and kindness in accommodating my suggestions.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 6, 1978

Re: Nos. 77-10, 77-11, 77-12, 77-47, 77-64,
Exxon Corp. v. Governor of Maryland, etc.

Dear Chief,

Since I was disqualified (on the public record) in all of the earlier stages of this case, I would strongly prefer that the opinion for the Court not be assigned to me.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 19, 1978

Re: No. 77-10, etc., Exxon Corp v.
Governor of Maryland

Dear John,

I agree with your opinion for the Court
in these cases.

Sincerely yours,

P.S.
/

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 23, 1978

Re: 77-10 - Exxon Corporation v.
Governor of Maryland

Dear John,

I agree.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

77-10

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 7, 1978

MEMORANDUM TO THE CONFERENCE

Here are short explanations of my votes in last Tuesday's and Wednesday's cases:

Nos. 77-10, 77-11, 77-12, 77-47, & 77-64, Exxon Corp. v. Governor of Maryland - I vote, very tentatively, to affirm. I do not see how, even if the statute will eliminate the independents from retail competition, this will significantly burden interstate commerce since the amount of gasoline coming into the state will probably remain constant. I find the state's attempt to prohibit competitive price cutting more troubling, as it seems to be contrary to the general thrust both of §2(b) of the Robinson-Patman Act and of the Sherman Act. However, I am not convinced that the potential conflict is sufficiently real in this industry to warrant striking down paragraph (D) on pre-emption grounds. While I see nothing in §2(b) that would justify restricting the meeting competition defense as a matter of law to the shared customer situation, it is not clear to what extent as a practical matter the defense could be established without a shared customer.

No. 77-39, Pinkus v. United States - My position on obscenity is well known. There is no involvement of juveniles here, and yet the trial court gave an instruction that included them within the relevant community. I vote to reverse the conviction.

No. 76-1410, Agosto v. Immigration & Naturalization Service - I agree with Judge Hufstедler's dissent in the Court below that the case necessarily involved a decision on the credibility of petitioner and his sworn witnesses. The statute assigns that task to the district court and not to the court of appeals or to this Court. Therefore, I vote to reverse.

No. 77-335, Oppenheimer Fund v. Sanders - I vote to reverse. I think that the names and addresses of class members are discoverable under rule 26, but where new programming of the defendant's computer is required to produce this information, rule 33(c) requires that plaintiffs foot the cost.

No. 76-1621, McClellan v. McSurely - I certainly can't accept the Government's argument that any illegal activity is justified if there is some remote relationship to a legislative investigation. The facts here are not as extreme as the examples discussed at oral argument, but the Government offered no limiting principle. Until someone comes up with such a principle, I vote to affirm. Alternatively, given the deaths that have occurred and the likelihood that cases with facts like this are rare, I would be willing to DIG this one.

No. 76-1560, U.S. v. U.S. Gypsum Co. - I vote to affirm. I think a new trial is required because of the potential for prejudice arising out of the trial judge's private meeting with the jury foreman. I also believe that the trial court's Sherman Act instruction was error. In my view, either a purpose to affect prices or knowledge that one's conduct will inevitably affect prices is a prerequisite to conviction. I don't think, however, that the Robinson-Patman Act requires verification, or that a subjective purpose to set up a defense to a Robinson-Patman charge excuses what would otherwise be a violation of the Sherman Act.

Nos. 76-6637 & 76-6767, Daviage v. United States, & Scott v. United States - All of the difficulties with minimization suggest that this statute is far from ideal. But Congress in plain language required minimization, and I think we have to accept that judgment. Since the agents here did not make a good faith effort to minimize, I vote to reverse.


T. M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 18, 1978

Re: Nos. 77-10, 77-11, 77-12, 77-47, 77-64 -
Exxon Corp. v. Governor of Maryland, etc.

Dear John:

I shall wait for the dissent.

Sincerely,



T.M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL


May 30, 1978

Re: Nos. 77-10 etc. - Exxon Corporation v.
Governor of Maryland

Dear John:

Please join me.

Sincerely,



T.M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1978

Re: No. 77-10 - Exxon Corp. v. Governor of Maryland
and related cases

Dear John:

Because I remain convinced that the divestiture provisions of the Maryland statute discriminate against interstate commerce in favor of local gasoline dealers, I shall try my hand at a dissent to at least part III of your opinion. It seems to me that, by prohibiting most of the present out-of-state retailers from continuing their operations, the discrimination here even exceeds that in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, decided just last term.

Sincerely,



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: JUN 8 1978

Recirculated: _____

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64
Exxon Corp. v. Governor of Maryland

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

Although I agree that the Maryland Motor Fuel Inspection law ^{1/} does not offend substantive due process or federal antitrust policy, I dissent from Part III of the Court's opinion because it fails to condemn impermissible discrimination against interstate commerce in retail gasoline marketing. The divestiture provisions, Md. Code Ann., art. 56, §§ 157E(b) and (c) (Supp. 1977) hereinafter referred to as sections (b) and (c)), preclude out-of-state competitors from retailing gasoline within Maryland. The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more even-handed regulation. Sections (b) and (c), therefore, violate the Commerce Clause. ^{2/}

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1978

MEMORANDUM TO THE CONFERENCE

Re: Nos. 77-10, 77-11, 77-12, 77-47 and 77-64 -
Exxon Corp. v. Governor of Maryland

In response to John's new footnote 16, I shall add the
material enclosed to footnote 13 of the dissent.

HAB.

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

[New second paragraph to be added to footnote 13]

Footnote 16 of the Court's opinion, ante, p. 8, suggests that unconstitutional discrimination does not exist unless there is an effect on the quantity of out-of-state goods entering a State. This is too narrow a view of the Commerce Clause. First, interstate commerce consists of far more than mere production of goods. It also consists of transactions -- of repeated buying and selling of both goods and services. By focusing exclusively on the quantity of goods, the Court limits the protection of the Clause to producers and handlers of goods before they enter a discriminating State. In our complex national economy commercial transactions continue after the goods enter a State. The Court too permits a State to impose protectionist discrimination upon these later transactions to the detriment of out-of-state participants. Second, the Court cites no case in which this Court has held that a burden on the flow of goods is a prerequisite to establishing a case of unconstitutional discrimination against interstate commerce. Neither Hunt nor Dean Milk contains such a holding. In both of those cases the Court upheld the claims of discrimination; in neither did it say that a burden on the whole sale flow of goods was a necessary part of its holding. Regarding Hunt the Court cites to 432 U.S., at 347, which discusses only whether the appellants had met the \$10,000 amount-in-controversy requirement of 28 U.S.C. § 1331. As explained in part II-B, infra, this case presents a threat to the flow of gasoline in Maryland identical to the threat to the flow of milk in Dean Milk.

pp. 3, 4, 20

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: **JUN 13 1978**

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-10, 77-11, 77-12, 77-47 AND 77-64

Exxon Corporation et al.,
 Appellants,
 77-10 v.
 Governor of Maryland et al.
 Shell Oil Company, Appellant,
 77-11 v.
 Governor of Maryland et al.
 Continental Oil Company et al.,
 Appellants,
 77-12 v.
 Governor of Maryland et al.
 Gulf Oil Corporation,
 Appellant,
 77-47 v.
 Governor of Maryland et al.
 Ashland Oil, Inc., et al.,
 Appellants,
 77-64 v.
 Governor of Maryland et al.

On Appeals from the Court
 of Appeals of Maryland.

[June —, 1978]

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

Although I agree that the Maryland Motor Fuel Inspection
 law¹ does not offend substantive due process or federal anti-

¹ The presently challenged portions of the law were enacted four years
 ago and amended once since then. 1974 Md. Laws, ch. 854; 1975 Md.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 18, 1978

No. 77-10 Exxon Corp. v. Governor of Maryland

Dear John:

Please show at the end of the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST


May 22, 1978

Re: Nos. 77-10, 77-11, 77-12, 77-47 and 77-64 - Exxon
Corp., et al. v. Governor of Maryland

Dear John:

Please join me in your first draft of this opinion as
modified by your letter to Bill Brennan of May 19th.

Sincerely,



Mr. Justice Stevens

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

Mr. Justice Stevens

Dated: MAY 18 '78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-10, 77-11, 77-12, 77-47 AND 77-64

Exxon Corporation et al.,
 Appellants,
 77-10 v.
 Governor of Maryland et al.
 Shell Oil Company, Appellant,
 77-11 v.
 Governor of Maryland et al.
 Continental Oil Company et al.,
 Appellants,
 77-12 v.
 Governor of Maryland et al.
 Gulf Oil Corporation,
 Appellant,
 77-47 v.
 Governor of Maryland et al.
 Ashland Oil, Inc., et al.,
 Appellants,
 77-64 v.
 Governor of Maryland et al.

On Appeals from the Court
 of Appeals of Maryland.

[May —, 1978]

MR. JUSTICE STEVENS, delivered the opinion of the Court.

A Maryland statute provides that a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all "voluntary

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 19, 1978

RE: 77-10, et al., Exxon v. Maryland

Dear Bill:

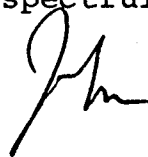
If it would make it easier for you to join my opinion, I would be happy to omit footnote 27 entirely. I certainly did not intend to imply that this case comes within the Parker doctrine.

The Parker doctrine, as I understand it, has reference to private conduct that would violate the Sherman Act if it were not mandated by state law. This case does not involve private conduct that would violate the Sherman Act either with or without the Maryland statute. In short, I think it is perfectly clear that this case is not remotely within the Parker doctrine.

The only reason I cited Parker is to point out how far out in left field the appellants' argument is. If the national policy in favor of competition prevents a state from enacting its own price fixing statute, surely that policy would equally prevent a state from delegating price fixing authority (either supervised or unsupervised) to private parties. Accordingly, we could not accept appellants' argument without overruling Parker.

Although all we say in the opinion is that Parker necessarily rests on the subordinate premise that a state has some power to regulate commercial activity even though the regulation has an anti-competitive effect, and I really don't see how anyone could quarrel with that statement, I will be happy to take that sentence out of the opinion if it would enable you to join it.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 25, 1978

Re: 77-10, etc. - Exxon Corp. v. Governor
of Maryland

Dear Bill:

The changes suggested in your most recent letter give me some concern. I am reluctant to state that the anticompetitive effect of the Maryland statute is "hypothetical." Most of the evidence submitted by the oil companies during the trial in the state court was aimed at showing that the Maryland statute would indeed be anticompetitive. The trial court found this evidence persuasive and used it as the support for its holding that the statute violated "substantive" due process. The trial court stated:

"Apart from restraining free competition, it was shown that divestiture would be harmful to competition in the industry, and would primarily serve to protect the independent dealers rather than the public at large." Joint Appendix at 130a.

As I view this case, it is unnecessary to determine whether or not the trial court's conclusion was correct. In my opinion, neither the Due Process Clause nor the Sherman Act invalidates state statutes solely because they have an anti-competitive effect, and I think that position is necessary to the resolution of this case (since the trial court's conclusion was certainly not clearly erroneous).

Respectfully,



Mr. Justice Brennan

Copies to the Conference

2 — p. 15
 Old p. 27 omitted

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: MAY 30 '78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-10, 77-11, 77-12, 77-47 AND 77-64

Exxon Corporation et al.,
 Appellants,
 77-10 v.
 Governor of Maryland et al.
 Shell Oil Company, Appellant,
 77-11 v.
 Governor of Maryland et al.
 Continental Oil Company et al.,
 Appellants,
 77-12 v.
 Governor of Maryland et al.
 Gulf Oil Corporation,
 Appellant,
 77-47 v.
 Governor of Maryland et al.
 Ashland Oil, Inc., et al.,
 Appellants,
 77-64 v.
 Governor of Maryland et al.

On Appeals from the Court
 of Appeals of Maryland.

[May —, 1978]

MR. JUSTICE STEVENS, delivered the opinion of the Court.
 A Maryland statute provides that a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all "voluntary

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 8, 1978

MEMORANDUM TO THE CONFERENCE

Re: 77-10, etc. - Exxon Corp. v. Governor
of Maryland

Unless anyone who has already joined objects,
I propose to add the following footnote on page 8
of the opinion:

"If the effect of a state regulation is to cause local goods to comprise a larger share, and goods with an out-of-state source to comprise a smaller share, of the total sales in the market--as in Hunt, supra, 433 U.S., at 347, and Dean Milk, supra, 340 U.S., at 354--the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods. The sales by independent retailers are just as much a part of the flow of interstate commerce as the sales made by the refiner-operated stations."

Respectfully,



STYLISTIC CHANGES THROUGHOUT

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

From: Mr. Justice Stevens

Circulated: _____

JUN 13 1978

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-10, 77-11, 77-12, 77-47 AND 77-64

Exxon Corporation et al.,
Appellants,
77-10 v.
Governor of Maryland et al.
Shell Oil Company, Appellant,
77-11 v.
Governor of Maryland et al.
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77-12 v.
Governor of Maryland et al.
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77-47 v.
Governor of Maryland et al.
Ashland Oil, Inc., et al.,
Appellants,
77-64 v.
Governor of Maryland et al.

On Appeals from the Court
of Appeals of Maryland.

[June —, 1978]

MR. JUSTICE STEVENS, delivered the opinion of the Court.

A Maryland statute provides that a producer or refiner of petroleum products (1) may not operate any retail service station within the State, and (2) must extend all "voluntary