

The Burger Court Opinion Writing Database

New Motor Vehicle Board of California v. Orrin W. Fox Co.

439 U.S. 96 (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

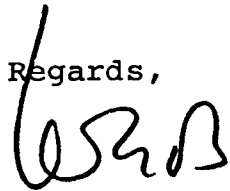
November 30, 1978

Re: 77-837 - New Motor Vehicle Board v. Orrin W. Fox Co.
77-849 - Northern California Motor Car Dealers v. Orrin W. Fox Co.

Dear Bill:

I join.

Regards,



Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
 Mr. Justice Black
 Mr. Justice Brennan
 Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Marshall
 Mr. Justice Stewart
 Mr. Justice White

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
 State of California et al.,
 Appellants,

77-837

v.

Orrin W. Fox Co. et al.

Northern California Motor Car
 Dealers Association et al.,
 Appellants,

77-849

v.

Orrin W. Fox Co. et al.

On Appeals from the United
 States District Court for
 the Central District of
 California.

[November —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the California Automobile Franchise Act, a motor vehicle manufacturer must secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee, if that existing franchisee protests the establishment of the competing dealership. The Act also directs the Board to notify the manufacturer of this statutory requirement upon the filing of a timely protest by an existing franchise. The Board is not required to hold a hearing on the merits of the dealer protest before sending the manufacturer the notice of protest.¹

¹ The pertinent provisions of the Automobile Franchise Act are as follows:

"ESTABLISHING OR RELOCATING DEALERSHIPS

"3062. In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 16, 1978

RE: Nos. 77-837 and 77-849 New Motor Vehicle Board of
California v. Orrin W. Fox Co.

Dear Bill:

Thank you very much for your comment on the above. Of course I'd prefer to make revisions to meet your concerns. Would I do that if I changed the sentences beginning "The narrow question" six lines from the bottom of page 8 and ending with the carryover paragraph at page 9 to read as follows:

"The narrow question before us, then, is whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers. Or, stated conversely, the issue is whether the right to franchise without delay is the sort of interest that may be terminated only on a case by case basis through prior individualized trial type hearings."

I am not circulating this to the Conference pending hearing from you.

Sincerely,

Bill

Mr. Justice Rehnquist

See p. 8

Mr. Justice Stewart
 Mr. Justice White
 ✓ Mr. Justice Marshall
 Mr. Justice Brennan
 Mr. Justice Black
 Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Burger
 Mr. Justice Rehnquist

11-20-78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
 State of California et al.,
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77-837

v.

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Northern California Motor Car
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On Appeals from the United
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 California.

[November —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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See Pages 1, 3, 7-11, 12

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Brennan
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Burger
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
State of California et al.,
Appellants,

77-837 v.

Orrin W. Fox Co. et al.

Northern California Motor Car
Dealers Association et al.,
Appellants,

77-849 v.

Orrin W. Fox Co. et al.

On Appeals from the United
States District Court for
the Central District of
California.

[November —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the California Automobile Franchise Act, a motor vehicle manufacturer must secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee, if that existing franchisee protests the establishment of the competing dealership. The Act also directs the Board to notify the manufacturer of this statutory requirement upon the filing of a timely protest by an existing franchise. The Board is not required to hold a hearing on the merits of the dealer protest before sending the manufacturer the notice of the requirement.¹

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Pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Brennan
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Burger
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
State of California et al.,
Appellants,
77-837 v.
Orrin W. Fox Co. et al.
Northern California Motor Car
Dealers Association et al.,
Appellants,
77-849 v.
Orrin W. Fox Co. et al.

On Appeals from the United
States District Court for
the Central District of
California.

[November —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the California Automobile Franchise Act, a motor vehicle manufacturer must secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchisee, if and only if that existing franchisee protests the establishment of the competing dealership. The Act also directs the Board to notify the manufacturer of this statutory requirement upon the filing of a timely protest by an existing franchise. The Board is not required to hold a hearing on the merits of the dealer protest before sending the manufacturer the notice of the requirement.¹

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 13, 1978

Re: No. 77-837 and 77-849,
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

P.S.
✓

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 14, 1978

Re: Nos. 77-837 & 77-849, New Motor Vehicle
Bd. of Cal. v. Orrin W. Fox Co.

Dear Bill,

Although I have joined your proposed opinion for the Court, I think that the points that Bill Rehnquist makes in his letter to you of today are all well taken.

Sincerely yours,

P.S.
✓

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 14, 1978

Re: 77-837 - New Motor Vehicle Board of
the State of California v.
Fox; and

77-849 - Northern California Motor
Car Dealers Association v.
Fox.

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

16 NOV 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
State of California et al.,
Appellants,

77-837

v.

Orrin W. Fox Co. et al.

Northern California Motor Car
Dealers Association et al.,
Appellants,

77-849

v.

Orrin W. Fox Co. et al.

On Appeals from the United
States District Court for
the Central District of
California.

[November —, 1978]

MR. JUSTICE MARSHALL, concurring.

Although I join the opinion of the Court, I write separately to emphasize why, in my view, the California Automobile Franchise Act is not violative of the Due Process Clause. As the Court observes, *ante*, at —, the California statute, like its state and federal counterparts, seeks to redress the disparity in economic power between automobile manufacturers and their franchisees. By empowering the New Motor Vehicle Board to superintend the establishment or relocation of a franchise, the statute makes it more difficult for a manufacturer to force its franchisees to accept unfair conditions of trade by threatening to overload their markets with intra-brand competitors.¹

¹ Although there is little legislative history on the California Act, the need for statutory constraints on manufacturers' ability to coerce their dealers is reflected in a variety of state and federal enactments. See, e. g., statutes cited *ante*, at — n. 5; H. R. Rep. No. 2850, 84th Cong., 2d Sess., 4-5 (1956); S. Rep. No. 2073, 84th Cong., 2d Sess., 2-4 (1956); *Forest*

p. 2

29 NOV 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
State of California et al.,
Appellants,

77-837 v.

Orrin W. Fox Co. et al.

Northern California Motor Car
Dealers Association et al.,
Appellants,

77-849 v.

Orrin W. Fox Co. et al.

On Appeals from the United
States District Court for
the Central District of
California.

[November —, 1978]

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¹ Although there is little legislative history on the California Act, the need for statutory constraints on manufacturers' ability to coerce their dealers is reflected in a variety of state and federal enactments. See, *e. g.*, statutes cited *ante*, at — n. 5; H. R. Rep. No. 2850, 84th Cong., 2d Sess., 4-5 (1956); S. Rep. No. 2073, 84th Cong., 2d Sess., 2-4 (1956); *Forest*

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: NOV 21 1978

Recirculated: _____

No. 77-837 - New Motor Vehicle Board v. Orrin W. Fox Co.
 No. 77-849 - Northern California Motor Car Dealers Association
 v. Orrin W. Fox Co.

MR. JUSTICE BLACKMUN, concurring in the result.

I agree with the Court when it concludes (a) that the District Court rightly refused to abstain under the rule of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); (b) that the appellees' delegation-of-power argument is unmeritorious; and (c) that the appellees' antitrust claims are also without merit. I am unsure, however, of the soundness of the Court's statements, ante, p. 10, that it is "unnecessary to decide whether the right to franchise constitutes a 'liberty' or 'property' interest protected by the Fourteenth Amendment," and that "[w]hatever the nature of the right, the California legislature

FILE COPY

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: _____

1st DRAFT

Recirculated: **NOV 27 1978**

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
State of California et al.,
Appellants,

77-837 v.

Orrin W. Fox Co. et al.

Northern California Motor Car
Dealers Association et al.,
Appellants,

77-849 v.

Orrin W. Fox Co. et al.

On Appeals from the United
States District Court for
the Central District of
California.

[December —, 1978]

MR. JUSTICE BLACKMUN, concurring in the result.

I agree with the Court when it concludes (a) that the District Court rightly refused to abstain under the rule of *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941); (b) that the appellees' delegation-of-power argument is unmeritorious; and (c) that the appellees' antitrust claims are also without merit. I am unsure, however, of the soundness of the Court's statements, *ante*, p. 10, that it is "unnecessary to decide whether the right to franchise constitutes a 'liberty' or 'property' interest protected by the Fourteenth Amendment," and that "[w]hatever the nature of the right, the California legislature accorded appellees all the process that was due." In view of this uncertainty on my part, I refrain from joining the Court's opinion.

We are concerned here only with the issue of the facial constitutionality of certain provisions of the California Automobile Franchise Act, Cal. Veh. Code Ann. §§ 3062 and 3063 (West) (Supp. 1978), and we are not confronted with any issue of constitutionality of the Act as applied.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 30, 1978

Re: No. 77-837 - New Motor Vehicle Board
v. Orrin W. Fox Co.
No. 77-849 - Northern California Motor Car
Dealers v. Orrin W. Fox Co.

Dear Lewis:

Thank you for joining my proposed concurrence in the result.

Bill Brennan's revision in his third draft prompts, I think, some changes in my writing. Obviously, he has tried to accommodate me, but I think the new draft still falls short.

I am circulating today a new draft of my own material. I shall, of course, not hold you to your joinder. If you wish to unhook, please do not hesitate to call me.

Sincerely,


—

Mr. Justice Powell

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: NOV 30 1978

No. 77-837 - New Motor Vehicle Board v. Orrin W. Fox Co.
 No. 77-849 - Northern California Motor Car Dealers
 v. Orrin W. Fox Co.

MR. JUSTICE BLACKMUN, with whom Mr. Justice

Powell joins, concurring in the result.

I agree with the Court when it concludes (a) that the District
 Court rightly refused to abstain under the rule of Railroad Comm'n v.
Pullman Co., 312 U.S. 496 (1941); (b) that the appellees' delegation-
 of-power argument is unmeritorious; and (c) that the appellees'
 antitrust claims are also without merit.

Changes throughout

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: NOV 30 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
 State of California et al.,
 Appellants,
 77-837 v.
 Orrin W. Fox Co. et al.
 Northern California Motor Car
 Dealers Association et al.,
 Appellants,
 77-849 v.
 Orrin W. Fox Co. et al.

On Appeals from the United
 States District Court for
 the Central District of
 California.

[December —, 1978]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring in the result.

I agree with the Court when it concludes (a) that the District Court rightly refused to abstain under the rule of *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941); (b) that the appellees' delegation-of-power argument is unmeritorious; and (c) that the appellees' antitrust claims are also without merit.

We are concerned here, basically, only with the issue of the facial constitutionality of certain provisions of the California Automobile Franchise Act, Cal. Veh. Code Ann. §§ 3062 and 3063 (West) (Supp. 1978); we are not confronted with any issue of constitutionality of the Act as applied.

It seems to me that we should recognize forthrightly the fact that California, under its Act, accords the manufacturer and the would-be franchisee *no* process at all prior to telling them not to franchise at will. This utter absence of process would indicate that the State's action is free from attack on procedural due process grounds only if the manufacturer and

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 29, 1978

No. 77-837 New Motor Vehicle v. Fox
No. 77-849 Northern California v. Fox

Dear Harry:

I would appreciate your adding my name to your concurring opinion in these cases.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 14, 1978

Re: Nos. 77-837 and 77-849 - New Motor Vehicle Board
of the State of California v. Orrin W. Fox Co., et al.

Dear Bill:

I voted with you at Conference on this case, and am certainly with you on the result. There are three points in the opinion which trouble me, and which I thought I would set before you to see if we might reach an accommodation. I of course will not dissent; the most I would do would be to write separately concurring in the result.

The first two are closely akin to one another, and involve the first two or three sentences after II on page 7, and the last full sentence on page 8. Both of these seem to me, though I may be wrong, to suggest a difference in what may be done by the legislature, in terms of substantive law, as opposed to an agency created by the legislature, in terms of substantive rulemaking. I would be happier to see those parts of the opinion phrased in terms of "no entitlement", rather than suggesting a distinction between what the legislature may do, and what an agency of the legislature may do.

The third point concerns the clause in the sentence on the first two lines of page 9, reading "like the right to be from official stigma or institutional restraints". "Institutional restraints", of course, give me no problem; "official stigma" as you may have guessed, gives me a good deal of

- 2 -

problem in view of Paul v. Davis. I realize that it gives you no problem at all, and if you can get your majority without me I will simply write separately, concurring in the result.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 20, 1978

Re: Nos. 77-837 and 77-849 New Motor Vehicle Board
v. Fox, et al.

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 13, 1978

Re: 77-837 - New Motor Vehicle Bd. of Calif.
v. Orrin W. Fox Co.
77-849 - Northern Calif. Motor Car Dealers
v. Orrin W. Fox Co.

Dear Bill:

In due course I shall circulate a dissent.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

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: NOV 22 1978

Re-circulated: _____

77-837 - New Motor Vehicle Board of the State of California
v. Orrin W. Fox Co.
77-849 - Northern California Motor Car Dealers Association
v. Orrin W. Fox Co.

MR. JUSTICE STEVENS, dissenting.

This case does not involve the constitutionality of any of the substantive rules adopted by California to govern the operation of motor vehicle dealerships and the conditions that must be satisfied to engage in that business. The case involves the validity of a procedure that grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been violated or is about to be violated.

In order to demonstrate that this is a fair characterization of this procedure, it is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision. It will then be apparent that there is no precedent for the Court's approval of this

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

1st PRINTED DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Regulated: **NOV 29 1978**

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
 State of California et al.,
 Appellants,
 77-837 v.
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On Appeals from the United
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[December —, 1978]

MR. JUSTICE STEVENS, dissenting.

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In order to demonstrate that this is a fair characterization of this procedure, it is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision. It will then be apparent that there is no precedent for the Court's approval of this unique and arbitrary process and that the three-judge District Court was correct in concluding that it deprived appellees of their liberty and property without the due process of law guaranteed by the Fourteenth Amendment.

p. 8

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: NOV 30 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-837 AND 77-849

New Motor Vehicle Board of the
 State of California et al.,
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77-837

v.

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Orrin W. Fox Co. et al.

On Appeals from the United
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[December —, 1978]

MR. JUSTICE STEVENS, dissenting.

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In order to demonstrate that this is a fair characterization of this procedure, it is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision. It will then be apparent that there is no precedent for the Court's approval of this unique and arbitrary process and that the three-judge District Court was correct in concluding that it deprived appellees of their liberty and property without the due process of law guaranteed by the Fourteenth Amendment.