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Will The Real Government Crony Please Stand Up?

A North Carolina court case involving pushy dentists showcases how bad laws let some people employ government power to block entrepreneurs.

By Ilya Shapiro
October 20, 2014

Under a 1943 Supreme Court decision called *Parker v. Brown*, state governments and private parties who act on state orders are typically immune from prosecution under federal antitrust laws. While private parties who create cartels face severe penalties, state governments can authorize the same anti-competitive behavior with impunity.

Pacific Legal Foundation (PLF) attorney Timothy Sandefur, also a Cato Institute adjunct scholar, explained in a recent *Regulation* article that exempting cartels protected by state law from federal law was "an extreme innovation in both antitrust law and federalism jurisprudence." "In virtually no other context can states exempt their citizens from the operation of federal statutes."

Still, the Supreme Court has held that this kind of immunity only applies if the private parties who engage in cartel behavior are "actively supervised" by state officials. A case in which the Court heard argument last week, *N.C. Board of Dental Examiners v. FTC*, presents an opportunity to expand on that directive.

Don't Whiten Teeth Unless You Pay Us

Beginning in 2003, the North Carolina Board of Dental Examiners issued cease-and-desist orders to beauticians and others who were offering teeth-whitening services (in which a plastic strip treated with peroxide is applied to the teeth to brighten them). Although teeth-whitening is perfectly safe—and people can even do it at home with an over-the-counter kit—the state's licensed dentists want to limit competition in this lucrative area. The Board is made up entirely of practicing dentists and hygienists, with no input from the general public, so it's not surprising that evidence later showed the Board's orders on this subject responded to complaints from dentists, not consumers.

The Federal Trade Commission charged the Board with engaging in anticompetitive conduct. Although the Board argued it should enjoy Parker immunity, the FTC, and later the U.S. Court of Appeals for the Fourth Circuit, rejected that argument, holding that the Board was not "actively supervised" by the state, but was instead a group of private business owners exploiting government power.

Whatever one's opinion of antitrust law—mine isn't too favorable because the law is typically too slow-acting to befit a dynamic marketplace—existing immunity doctrines are dangerous because they allow private entities cloaked in government authority to raise prices and restrict choice. Worse, state-established cartels frequently harm constitutional rights, such as the right to earn a living, by barring new businesses from opening. The North Carolina case is a prime example of private actors arbitrarily abusing government power to block entrepreneurs from entering an industry and providing for themselves and their families.

Occupational Licensing Laws Are a Government Racket

As George Will put it in his recent column on the case, occupational licensing laws and the monopoly power they grant "are growth-inhibiting and job-limiting, injuring the economy while corrupting politics. They are residues of the mercantilist mentality, which was a residue of the feudal guild system, which was crony capitalism before there was capitalism. Then as now, commercial interests collaborated with governments that protected them against competition."

Cato and PLF filed a Supreme Court brief supporting the FTC—you know it's a bad case when we're on the federal government's side!—arguing that courts should only rarely immunize private parties who act on government's behalf. The Fourth Circuit was not only correct in applying the "active supervision" requirement, but existing immunity doctrines are too lax.

Instead, courts should grant antitrust immunity to private entities acting under state law only where state law commands their restraint on competition, and where that restraint substantially advances an important state interest. This test would help protect the constitutional right to economic liberty against the only entity that can normally create monopolies and yet which today enjoys immunity from antimonopoly laws: the government.

Predicting the Supremes

Based on oral argument—the only observable part of the judicial decision-making iceberg—the justices may indeed go in that direction. Justice Elena Kagan posed and answered the question before the Court: "is there a danger that [the dental board is] acting to further its own interests rather than the governmental interests of the state? And that seems almost self-evidently to be true."

So even though the Supreme Court reverses lower courts upwards of two-thirds of the time (last term, it was 73 percent), it's highly unlikely it will do so here. Indeed, the conventional wisdom is that the Court took the case to clarify its *Parker* immunity doctrine after years of neglect by lower courts and abuse by states.

Ultimately, the *Dental Examiners* case indicates what happens when courts—both federal and state—are too deferential to legislatures—both federal and state—regarding economic regulations. All too often, getting the judiciary to enforce constitutional limits on government and protect individual liberty has been like pulling teeth.

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