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Will Fresno raisin producer Porter Brown win his Supreme Court case 60 years later?

By Jeffrey M. Reid
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The U.S. Supreme Court recently heard oral argument in a case that could change long standing anti-trust laws with significant ties to Fresno history and industry. The court's decision may also bring a new legal basis to pursue economic liberties as Constitutional rights.

The case is Parker v. Brown, which involved a raisin-marketing cartel authorized by the California Agricultural Prorate Act of 1933. It allowed a committee of farmers, through the 1940 raisin marketing order, to limit the amount of raisin crop a producer could bring to market, and the price he could charge.

Porter L. Brown was a Fresno County raisin packer who was offended by these severe limitations on free market activities. He sued the committee that adopted the marketing order, to stop what he considered unconstitutional conduct. His case reached the Supreme Court in 1942, and was argued on his behalf by G. Levin Aynesworth, a Fresno attorney, while another, Strother P. Walton, helped write the brief defending the raisin cartel.

Porter Brown lost. The Supreme Court held that it did not violate the Commerce Clause or the Sherman Act anti-trust law. States thereby became immune from suits for anti-competitive activities that they conducted or authorized as a sovereign entity in our federal system.

Powerful industries and professions have a habit of bending state legislatures to their will. State legislators now have Parker v. Brown immunities as a license to authorize private actors to conduct activities that would otherwise violate federal anti-trust laws. That power protects favored special interests and establishes barriers to entry for new industry disrupters.

The "special interest protections" the Supreme Court is evaluating is the North Carolina Board of Dental Examiners. That dentistry board, established by state law, is primarily comprised of dentists selected by dentists. It is working to eliminate the disruptive competition of unlicensed small business owners who provide teeth whitening services. Teeth whitening products are available over the counter, and the services help people put peroxide-treated plastic strips on their teeth. The North Carolina Board of Dental Examiners issued cease and desist orders to a number of these small businesses. The Federal Trade Commission directed the dentistry board to stop that harassment, and has alleged that the board's arrangements are not protected by Parker v. Brown immunity.

Except for the interesting Fresno connections to the legal doctrines, the case might be of interest solely to North Carolinians wanting a whiter smile. However, there is an important reevaluation of the "conservative" perspective of constitutional principles in play.

Over the last approximately 40 years, "conservative" constitutional doctrine generally sought to constrain judicial efforts to confirm various constitutional "rights" not explicitly stated in its text, such as "rights" to welfare benefits. Recently, conservatives are more willing to be accused of supporting judicial activism, especially where it protects economic liberties. The new strain of conservatism perceives a broad array of interests protected by the 4th Amendment and other constitutional provisions.

Under this perspective, property rights explicitly protected by the Constitution are understood to go beyond simple physical possessions. The Constitution's protection of property rights should be properly understood in the context of natural rights, including the right to earn a living at a trade or profession without unreasonable interference from the government.

Under the older "conservative" principles, the "privileges and immunities" of citizens protected by the Constitution's 14th Amendment had limited meaning. Under the new perspective, the "privileges and immunities" clause may be a powerful tool to protect economic liberties of citizens against the overreach of all governments, including state governments, despite their Parker v. Brown anti-trust immunity. For that reason, the recent case has a number of "friend of the court" briefs filed by liberty oriented organizations, such as the Institute for Legal Justice, the Pacific Legal Foundation, and the Cato Institute.

Interestingly, Porter Brown's lawsuit was initiated based on claims that his constitutional rights were being violated. It was the Supreme Court that brought into the case the consideration of anti-trust laws. Brown's 1943 suit conceived of his constitutional rights in a fashion that older "conservative" perspectives rejected, but which modern conservative constitutional principles endorse.

The North Carolina Dentistry Board presents the Supreme Court the opportunity to reconsider Parker v. Brown, and perhaps begin to affirm a constitutional basis to protect citizens against governments who sanction monopolies and other barriers to new market entrants. All citizens, particularly young entrepreneurs, should welcome this reexamination.