The Washington Post

Supreme Court has a chance to bring liberty to teeth whitening

By George F. Will
October 10, 2014

Come Tuesday, the national pastime will be the subject of oral arguments in a portentous Supreme Court case. This pastime is not baseball but rent-seeking — the unseemly yet uninhibited scramble of private interests to bend government power for their benefit. If the court directs a judicial scowl at North Carolina's State Board of Dental Examiners, the court will thereby advance a basic liberty — the right of Americans to earn a living without unreasonable government interference.

The board, whose members are elected by licensed dentists and dental hygienists, regulates the practice of dentistry in North Carolina. To the surprise of no one acquainted with human nature, the board wields its power for the benefit of fellow members of the cartel of licensed dental practitioners.

Writing in Regulation, the Cato Institute's quarterly, Timothy Sandefur of the Pacific Legal Foundation says the board protects the economic interests of those who elect it, by pretending to protect North Carolinians from the supposed danger of unlicensed people participating in the business of "teeth whitening." In this simple procedure, a peroxide-treated plastic strip is placed on teeth for a few minutes, brightening them.

Responding to complaints from licensed dentists seeking to monopolize teeth whitening, the board has issued at least 47 cease-and-desist orders to small-business owners who do whitening in stores and shopping malls. The board also asked the state's Board of Cosmetic Art Examiners to forbid licensed cosmetologists (Why are *they* licensed? So license-holders can profit by restricting entry into the cartel.) from offering teeth-whitening services.

When the Federal Trade Commission initiated an action against the dental board's behavior, the board said it could not be found in violation of federal antitrust laws because it enjoys "*Parker* immunity." The 1943 *Parker* case concerned a California law that is still operative. It empowers a majority of raisin growers, exercising, in effect, government power through a state board akin to North Carolina's dental board, to decide how many raisins can be produced and what prices may be charged.

The Supreme Court acknowledged that the purpose of California's law was "to restrict competition." It held, however, that the concept of state sovereignty means that private interests

acting in collaboration with a state government cannot be prosecuted for behavior that would violate anti-monopoly laws if engaged by private parties acting in concert without government involvement.

It was, Sandefur says, "an extreme innovation in both antitrust law and federalism jurisprudence" to exempt from federal law cartels protected by state law. "In virtually no other context can states exempt their citizens from the operation of federal statutes." This exemption's predictable result has been intensified rent seeking — private interests protected by compliant governments.

Parker immunity supposedly requires state governments to give "active supervision" to private factions enjoying government arrangements that restrict competition. In practice, this requirement is toothless. North Carolina's dental board says it should be *presumed* to act in the public interest.

When such government cooperation with rent-seekers is challenged, courts usually respond with the judicial shrug known as the "rational basis" test: They defer to any government regulation if they can discern or even imagine a rational basis for it, even if it patently enriches a faction by abridging the rights of other persons or the general public.

James Madison's Constitution contains the Supremacy Clause (federal law "shall be the supreme law of the land," regardless of state laws "to the contrary") because he knew that state legislatures, even more than the national legislature of an "extensive" republic, were susceptible to capture by self-seeking factions. Today, factions enrich themselves through occupational licensure laws unrelated to public safety.

Such laws 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.

The North Carolina case is an opportunity for the court to affirm an economic right — the right to earn a living — that is among what the 14th Amendment calls the "privileges or immunities" of national citizenship. Courts have abandoned the defense of these rights, and conservatives have encouraged this abandonment by careless, undiscriminating rhetoric denouncing "judicial activism." Tuesday's oral arguments might indicate whether the court will at last resume a properly active engagement in the defense of individual liberty against abridgements by governments that connive with rent-seeking factions.