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RAISINS, TEETH, COFFINS, AND ECONOMIC LIBERTY

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In Horne v. U.S. Department of Agriculture,1 the U.S. Supreme Court held that the Takings Clause of the Fifth Amendment to the U.S. Constitution2 requires that the Government pay just compensation when it takes personal property, and that the Government cannot make raisin growers relinquish their property without just compensation as a condition of selling their raisins in interstate commerce. Although the Horne decision sheds baleful light on a venerable anticompetitive government-sponsored agricultural cartel program, read in isolation, its public policy implications may appear to be rather limited. Nevertheless, upon closer examination, Horne may be seen more broadly as the latest in a series of federal judicial opinions that are beginning to erode, albeit ever so slightly, the armor of judicial precedents that have allowed special interest, protectionist

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[1] Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015).

[2] U.S. CONST. amend. V, cl. 4.

government laws and regulations to flourish, free from serious legal scrutiny.

This article proceeds as follows. After describing the background and nature of the agricultural marketing order program at issue in Horne, it describes the Horne holding and evaluates its implications for marketing orders and federal special interest regulation. Next, it examines the Supreme Court's 2015 North Carolina Dental Board decision, which reflects an increased willingness to subject state regulatory boards to federal antitrust scrutiny. It then explains that, taken in tandem, Horne and North Carolina Dental Board (considered in light of another relatively recent antitrust "state action" case, Phoebe Putney, plus several appeals court rulings) may hint at a gradual weakening of the routine judicial rubber stamping of governmental "public interest" regulatory schemes. Most significantly, special interest regulation may be subject to significant attack through the more robust application of equal protection analysis, even if it is only slightly constrained by takings and antitrust challenges. The article then concludes that, although this may not yet be the dawn of a judicially-sanctioned "economic libertarian moment," the distant horizon appears to be lightening a bit.

I. THE USDA AGRICULTURAL MARKETING ORDER PROGRAM

During the early 20th century, the U.S. agricultural industry experienced an economic boom. Increased consumer income, a growing population, plus more efficient transportation and distribution systems gave rise to increased demand and higher prices for many agricultural goods.[3] Despite the nation's growing prosperity, however, the fruit and vegetable sector faired differently; it struggled to

[3] U.S. Gov't Accountability Office, GAO-RCED-85-57, *Report to the Congress: The Role of Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions* 1

resolve an assortment of issues associated with its perishable products.[4] These problems included low consumer confidence in food quality, "unfair and discriminatory trade practices," and intense competition which "led to periods of shortages and high prices followed by periods of glut with low prices and waste."[5] Shortly after prices began to fall in the early 1920's, fruit and vegetable farmers experienced an additional problem—consumer income declined, and the entire country entered the Great Depression.[6] In an attempt to retain autonomy, several growers and handlers formed voluntary cooperative marketing associations to control production levels and restore commercial stability.[7] In 1937, in keeping with the New Deal's penchant for federal economic regulation, Congress passed the Agricultural Marketing Agreement Act of 1937 ("AMAA").[8]

In the name of the "public interest," the AMAA authorizes the Secretary of Agriculture to establish marketing orders with the primary purpose being to maintain "orderly market conditions" and "establish parity prices."[9] Marketing orders are initiated by the industry, overseen by administrative committees,[10] and enforced by

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(1985), *available at* http://www.gao.gov/assets/150/143204.pdf (hereinafter "U.S. Gov't Accountability Office").

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 2.

8 Act of June 3, 1937, Pub. L. No. 75-137, ch. 296, 50 Stat. 246, *codified as amended at* 7 U.S.C. § 601 *et seq.*

9 7 U.S.C. § 601, 602(1) (2012). Orderly market conditions refer to the formation of "an orderly flow of [the commodity] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4) (2012). Parity prices refer to the price that gives the commodity a comparable purchasing power to what it was during the base period; the base period is from 1910-1914. U.S. Gov't Accountability Office at 3.

10 Committees are comprised of select producers and handlers of a specific commodity, and they are responsible for administering the marketing orders.

the Agricultural Marketing Service of the U.S. Department of Agriculture ("USDA").[11] They have the full force and effect of law, and "regulate the production and sale" of fruits, vegetables, and certain specialty crops.[12] In particular, these orders are designed to reduce market price fluctuations and reduce losses due to crop perishability, by establishing detailed regulations such as volume controls on distribution, [13] minimum quality standards, [14] and market support tools[15]—all of which are mandatory.[16] For example, if growers were to violate a marketing order regarding volume control by distributing more than their specified sales allotment, they would be subject to fines issued by the federal government.[17]

Given their emphasis on volume limitations and price stability for producers, agricultural marketing orders function as antitrust-exempt, government-controlled agricultural cartels of the products they cover, in plain derogation of antitrust principles, that harm consumers.[18] This type of welfare-inimical arrangement, involving rent-

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[11] U.S. Dept' of Agric., *Agric. Marketing Serv., Marketing Orders and Agreements*, http://www.ams.usda.gov/rules-regulations/moa (last visited Aug. 13, 2015).

[12] Koretoff v. Vilsack, 614 F.3d 532. 534–35 (D.C. Cir. 2010).

[13] Volume controls are regulations that control how much of a commodity may enter a market.

[14] Minimum quality standards regulate a commodity's size, quality, grade, maturity, and type in order to increase its quality and improve consumer confidence.

[15] Market support tools include funding for market research, development projects, and promotional tools. U.S. Gov't Accountability Office at 36.

[16] *Id.* at 4.

[17] Michael McMenamin, *Tedious Fraud: Reagan Farm Policy and the Politics of Agricultural Marketing Orders*, CATO INSTITUTE (1983), http://www.cato.org/pubs/pas/pa030.html.

[18] Price-fixing/volume limitation cartels are formed when competing parties enter into an agreement "to reduce their output to agreed upon levels, or sell at an agreed upon price." Price-fixing schemes are said to be "naked" when they involve "no more than an agreement to restrict output or raise price[s]." Barred by federal antitrust law, "[n]aked price fixing is not only illegal per se, it is also a felony." HERBERT

seeking-induced regulatory capture to benefit privileged incumbents,[19] is not unusual, but it is a particularly pernicious one in that it involves a delegation to private parties to carry out regulatory tasks—backed, of course, by the full force of government enforcement.[20]

Since its inception in 1937, the AMAA has been subject to controversy. Numerous highly publicized cases of waste and abuse heightened national concern and prompted questions as to marketing orders' credibility.[21] For instance, in 1981 journalist Ann Crittenden harvested widespread discontent with marketing orders in her New

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HOVENKAMP, FEDERAL ANTITRUST POLICY 158–59 (4th ed. 2011). Agricultural marketing orders that limit output have long been recognized as cartels. *See, e.g.*, Trevor Burns, *Rebel Farmers and Government Cartels: How the New Deal Cartelized U.S. Agriculture*, FORBES (April 24, 2015) (agricultural marketing orders are "cartels [that] collude against consumers in ways that would be blatantly illegal in industries that don't enjoy government sanction"); James L. Gattuso, *The High Cost and Low Returns of Farm Marketing Orders*, HERITAGE FOUND. BACKGROUNDER No. 462 (Oct. 15, 1985), *available at* http://www.heritage.org/research/reports/1985/10/the-high-cost-and-low-returns-of-farm-marketing-orders (marketing orders are not needed to ensure stable supply, and such orders raise prices to consumers and reduce innovation).

[19] *See generally* Robert D. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575 (1982); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 WESTERN ECON. J. 224 (1967). Rent-seeking refers to the investment of resources in lobbying and related efforts to obtain special interest privileges from government that reduce overall social welfare. For a recent high-level discussion of the problem of special interest-generated crony capitalism, a fruit of the "rent-seeking culture," *see*, *e.g.*, Jim DeMint and Mike Needham, *The Crony Capital*, 19 THE WEEKLY STANDARD, No. 39 (June 23, 2014), *available at* http://www.weeklystandard.com/author/jim-demint.

[20] One would expect regulation that is directed by cartel beneficiaries themselves, rather than by mere government bureaucrats who serve as their implicit agents, to be most precisely focused on maximizing the anticompetitive effects of cartel rules.

[21] U.S. Govt't Accountability Office at 6.

York Times article in which she vividly described the California navel oranges scandal:

> From afar, it looks like a red haze on the horizon. But . . . it becomes clear that what lies in the distance really is mounds of oranges. . . . all abandoned to rot . . . hav[ing] been dumped under what is known as a Federal marketing order.[22]

Prompted by several highly publicized news accounts, along with rising concerns from the public sector, in 1985 the Government Accountability Office ("GAO") conducted a formal review to assess the benefits and shortcomings of marketing orders and to determine if the goals set forth in the AMAA were being fulfilled.[23] The GAO reviewed only nine of the forty-seven federal marketing orders, which covered eleven different commodities,[24] valued at $1.24 billion.[25]

The GAO's evaluation resulted in three major findings. First, two of the marketing orders—hops and spearmint oil—stifled competition by preventing new growers from entering the marketplace,[26] while one order—lemons—increased un-harvested (i.e., wasted)

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[22] Ann Crittenden, *Growers' Power in Marketing Under Attack*, N.Y. TIMES (Mar. 25, 1981), http://www.nytimes.com/1981/03/25/us/growers-power-in-marketing-under-attack.html.

[23] U.S. Govt't Accountability Office at 8.

[24] The 11 commodities reviewed in the 1985 report included "celery, lemons, peaches, pears, plums, nectarines, almonds, hops, spearmint oil, tart cherries, and walnuts." *Id.* at 9.

[25] The value of the 47 marketing orders, which covered 33 commodities, was estimated at $5.6 billion. *Id.*

[26] The marketing order responsible, an allotment program, restricted total sales by determining the number of farmers that could produce a certain commodity and the amount of that commodity that could be marketed. The hop marketing order specifically did not allow for the entry of new growers; whereas the spearmint oil order provided for minimal entry of new growers each year. *Id.* at 12–14.

crop.[27] Second, ten of the eleven commodities examined were found to be restrictive because they determined when, or even if, supplies were to go on the market.[28] Third, orders that governed commodity grade, size, and maturity required producers to improve their products' quality; these minimum quality standards increased consumer confidence, according to the GAO.[29]

The GAO made three additional findings concerning AMS's administration of the marketing orders program. First, AMS failed to provide adequate information and educational meetings to the agricultural industry and the public.[30] Second, the USDA's program operations manual had not been updated since its publication twenty years prior; therefore it lacked essential information.[31] Third, the USDA had no criteria to evaluate marketing order effectiveness.[32]

Before concluding its report, the GAO made two recommendations to the Secretary of Agriculture. First, AMS should "develop and apply criteria for measuring the performance of individual marketing orders and make the results available" to the public; and second, AMS should "update and keep current the operations manual for marketing orders."[33]

In response, the USDA affirmed its support for marketing orders, while stating that "its position is transcended by the administration's

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[27] The marketing order responsible, a prorate, limited the quantity of fresh lemons a handler may ship during a period of time. *Id.* at 14–15.

[28] The marketing orders responsible, reserve pools and market allocations, held storable crop off the market until prices improved and diverted supplies from the traditional market to develop new markets. Although the orders were clearly restrictive, reserve pools could potentially benefit consumers because excess supply from a good production year would be reserved for a later poor production year. *Id.* at 17–22.

[29] *Id.* at 23–29.

[30] *Id.* at 50–54.

[31] *Id.* at 54–55.

[32] *Id.* at 55–60.

[33] *Id.* at 60–61.

strongly held belief that all Americans would benefit most by a significantly reduced level of government interference in their business[es] and lives."[34] In reality, however, despite its general reference to reduced government interference, the USDA did not significantly reform the marketing order system. It merely commented that while its goal would be "to develop and implement policies in the public interest . . . it [would] not seek to encourage the development of *additional* governmental programs."[35] Furthermore, the serious problems highlighted by the GAO failed to move Congress. Rather than disposing of the nearly-rotten marketing order regulatory scheme, Congress preserved its existence.[36]

II. THE SUPREME COURT'S 2015 *HORNE* DECISION

Precisely thirty years after the GAO conducted its formal review in 1985, the marketing order program became subject to another formal review, this time by the U.S. Supreme Court in *Horne v. U.S. Department of Agriculture*.[37] Horne concerned a USDA California Raisin

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[34] *Id*. at 35.

[35] *Id*. at 35 (emphasis added).

[36] For an overview of the Federal Marketing Order Program's status in 1990, see generally Nicholas J. Powers, USDA Econ. Research Serv., *Agric. Econ. Report No. 629, Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops* (1990), *available at* http://naldc.nal.usda.gov/download/CAT10408634/PDF. This report justified marketing orders as a response to the risk that certain producers would "free ride" on collective efforts by a group of growers that sought to share the benefits of joint action. *See id.* at 1–4. A key benefit of joint action, of course, is cartel output restrictions, and such collective activity, which harms consumers, is condemned under U.S. antitrust law. To the extent particular forms of joint action are efficiency-enhancing (for example, collective institutional advertising to publicly promote the health benefits of a crop) and not anticompetitive, they can be carried out legally, without the need for marketing order restrictions. Furthermore, other sectors of the economy thrive well without government intervention akin to marketing orders. In short, "collective action" justifications for the retention of agricultural marketing orders are unavailing.

[37] 135 S. Ct. 2419 (2015).

Marketing Order, which requires growers to transfer a percentage of their crop to the Raisin Administrative Committee ("RAC"); the raisins owed to the RAC are called "reserve raisins."[38] The RAC then "sells, allocates, or otherwise disposes of the reserve raisins in ways it determines are best suited to maintaining an orderly market."[39] The RAC regulates the California raisin allocation requirement,[40] independently determines compensation prices, and retains unchecked discretion in deciding how reserve raisins should be sold and/or disposed.[41] Once all raisins have been peddled, and handlers compensated, the RAC then distributes any remaining profits to the growers.[42] This regulation creates a governmentally-constructed restriction on raisin sales which exploits consumers and violates free market principles.[43]

After years of cooperating with the Raisin Marketing Order, California raisin farmers Marvin and Laura Horne chose to handle their own raisins and thereby sought to avoid participating in the RAC scheme. The USDA, however, maintained that they were still subject to RAC regulation, and assessed them a $200,000 fine for failing to sacrifice their raisins, plus an additional $480,000 charge equal to the

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[38] The Raisin Administrative Committee is a government entity mainly comprised of raisin growers appointed by the Secretary of Agriculture. *Id.* at 2424.

[39] *Id.*

[40] The Raisin Administrative Committee ordered raisin growers to forfeit 47 percent of their crop in 2002–03, and 30 percent the following year. *Id.*

[41] Once the Raisin Administrative Committee acquires title to the reserve raisins, it may choose to either sell them in noncompetitive markets, release them to growers who agree to reduce raisin production, of dispose them in any manner consistent with the program's purpose. *Id.*

[42] *Id.*

[43] Alden Abbott & Elizabeth Slattery, *Supreme Court Decision Makes It Harder for Government to Take Personal Property From Americans*, DAILY SIGNAL (June 22, 2015), http://dailysignal.com/2015/06/22/supreme-court-decision-makes-it-harder-for-government-to-take-personal-property-from-americans/.

"missing" raisins' market value. The Hornes then brought suit, claiming that because the Raisin Marketing Order enabled the RAC to take their private property (raisins) for a public use (maintain an orderly market) without paying just compensation, the government clearly violated the Fifth Amendment's Takings Clause.[44] During this litigation, the crony capitalist nature of the California Raisin Order was made manifest, as the greatest beneficiaries of the order's cartel scheme, Sun-Maid Growers of California (the largest marketer of raisins in the world) and the Raisin Marketing Association (which represents farmers who produce 30 percent of the California raisin crop), filed an *amicus curiae* brief defending the Order.[45]

On June 22, 2015, the Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit[46] and held that "neither the text nor the history of the Takings Clause suggests that appropriation of personal property is different from appropriation of real property."[47] Moreover, the Court held that the regulation requiring producers to surrender some of their crop as a prerequisite to enter the raisin business is a *per se* taking.[48] Therefore, because the government "has a categorical duty to pay just compensation for a physical taking," regardless of whether the taking amounted to a full deprivation of economic value, the Hornes must be compensated.[49]

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[44] Horne, 135 S. Ct. at 2425.

[45] *See* Brief of Sun-Maid Growers of California and the Raisin Marketing Association as Amici Curiae in Support of Respondent, Horne v. U.S. Dep't of Agric. (Apr. 8, 2015) (No. 14-275), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-275_amicus_resp_sunmaidgrowers.authcheckdam.pdf.

[46] The Ninth Circuit rejected the Hornes' argument that the raisin marketing order amounted to a "per se taking, reasoning that 'the Takings Clause affords less protection to personal than to real property.'" Horne, 135 S. Ct. at 2425.

[47] Abbott & Slattery, *supra* note 43.

[48] Horne, 135 S. Ct. at 2430–31.

[49] *Id.* at 2429.

Significantly, eight Justices (Chief Justice John Roberts and Associate Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Samuel Alito, Roth Bader Ginsburg, Stephen Breyer, and Elena Kagan) clarified that the Government's Fifth Amendment duty to pay just compensation when it engages in a physical taking of property applies to personal property as well as to real property. No surprise there. Perhaps slightly more surprising—and encouraging, to believers in economic liberties—is that all of those Justices also agreed that the reserve requirement imposed by the RAC, in that it involves the transfer of title to the RAC (a loss of the entire "bundle" of property rights in the appropriated raisins), is a clear *physical* taking (an "appropriation"), and not mere regulation (such as a government sales limitation). Further, the eight Justices found that a governmental mandate to relinquish specific property as a condition of granting permission to engage in commerce constituted a *per se* taking, "at least in this case." Finally, the eight Justices also rejected any limitations on the duty to pay just compensation for physical takings, even though the property owner maintained a contingent interest in a percentage of the value of the property (set at the government's discretion). In short, by delineating a broad understanding of "physical takings" in this case, the eight Justices arguably narrowed somewhat the reach of the "regulatory takings" designation, which vaguely and unhelpfully triggers compensation only when a restriction on the use of property goes "too far."[50] That *eight* Justices were willing to do this suggests that this portion of the *Horne* decision will likely have a stable and long-lasting impact.

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[50] See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (determining whether a government restriction goes "too far" involved an "ad hoc" factual inquiry).

Chief Justice Roberts' five-Justice majority opinion (citing Supreme Court precedents) also held that the amount of just compensation must "be measured by 'the market value of the property at the time of the taking[.]'"[51], and, thus, in this case, had *already* been calculated by the amount of the fine assessed the Horne family ($483,843.53, based on the fair market value of the raisins). This test, which was rejected by the other four Justices, makes it much easier for growers seeking to avoid volume restrictions to specify precisely what they are owed—and makes it harder for the government to point to the alleged countervailing "benefits" of a marketing order (or other similar regulatory scheme) to effectively evade compensation requirements.

While this ruling promotes economic freedom and individual liberty,[52] it does not significantly constrain government regulatory authority.[53] As Justice Sonia Sotomayor highlighted in her dissent (and as the Supreme Court's majority opinion acknowledged), "the Government . . . can permissibly achieve its market control goals by imposing a quota without offering raisin producers a way of reaping any return whatsoever on the raisins they cannot sell."[54] Nevertheless, although Justice Sotomayor was correct that such quota-based

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[51] United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

[52] Alden Abbott, Raisins, Takings, and the Regulatory State, Truth on the Market (June 22, 2015), http://truthonthemarket.com/2015/06/22/raisins-takings-and-the-regulatory-state/.

[53] In fact, this holding is rather limited considering it "turn[ed] entirely on the conclusion that the raisin marketing order involve[d] a 'physical taking' of raisins. A more straightforward regulatory scheme under which the federal government directly limited production by raisin growers (much as the government did to a small wheat farmer in Wickard v. Filburn) likely would pass constitutional muster under modern Commerce Clause jurisprudence." *Id.*

[54] Horne, 135 S. Ct. at 2443 (Sotomayor, J., dissenting). Justice Sotomayor's comment ignored the fact that a regulatory output limitation quota without the full trappings of the existing marketing order scheme nevertheless could benefit incumbent

regulation would be within Congress's constitutional power over interstate commerce,[55] the current statutory scheme authorizes output restrictions through marketing order schemes, not through quotas set directly by USDA. Thus, absent further congressional action authorizing direct government-imposed quotas,[56] the USDA faces some risk of having to pay various growers harmed by "undercompensated" transfers to "middleman" committees provided for under marketing orders. Whether this risk will be sufficient to incentivize the USDA (or Congress, through legislation) to rescind the authority to impose volume limitations (and other restrictions on the competitive process) through marketing orders is, however, far from clear.

III. THE SUPREME COURT'S 2015 *NORTH CAROLINA DENTAL BOARD* DECISION

A few months before slightly raising the cost (measured in potential takings liability) of maintaining federally-supervised cartels in *Horne*, the Supreme Court placed an additional regulatory constraint on professional cartels operating under color of state law. The Court's February 2015 decision in *North Carolina State Board of Dental Examiners v. FTC* ("*North Carolina Dental Board*"),[57] affirming the invalidation of a North Carolina regulatory ban on tooth whitening by

raisin growers (and harm consumers and efficiency) by raising prices in cartel-like fashion.

[55] See Wickard v. Filburn, 317 U.S. 111 (1942) (Congress is authorized to limit the wheat production of a farmer for his own use).

[56] Such legislation, of course, would even more directly reveal the nakedly protectionist aim of certain marketing orders and, thus, could be difficult to enact. In particular, pure legislative quotas could prove harder to justify on "public interest" grounds than marketing order crop transfers allegedly designed to establish product reserves that could be deployed (at least in theory) to "smooth out" market pricing instabilities.

[57] 135 S. Ct. 1101 (2015). Justice Kennedy wrote the majority opinion. He was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Kagan, and Sotomayor. Justice Alito, joined by Justices Scalia and Thomas, dissented.

non-dentists, is the latest iteration in a long string of Supreme Court cases dealing with the applicability of federal antitrust laws to anticompetitive state enactments.

North Carolina Dental Board involved a North Carolina law that subjected the licensing of dentistry to a North Carolina State Board of Dental Examiners, six of whose eight members had to be licensed dentists. After dentists complained to the board that non-dentists were charging lower prices than dentists charged for teeth whitening, the board sent cease-and-desist letters to non-dentist teeth whitening providers, warning that the unlicensed practice of dentistry is a crime. That action led non-dentists to cease teeth whitening services in North Carolina.

The United States Federal Trade Commission ("FTC") (which, along with the U.S. Department of Justice, enforces the federal antitrust laws) learned about the board's letters and opened an investigation of the matter. The FTC ultimately held that the board's actions violated Section 5 of the Federal Trade Commission Act,[58] which prohibits unfair methods of competition. The U.S. Court of Appeals for the Fourth Circuit agreed, and the Supreme Court affirmed the Fourth Circuit's judgment, thereby invalidating the board's threatened actions against tooth whiteners.

The issue in *North Carolina Dental Board* was whether the Board's actions were sheltered from review under the federal antitrust laws by virtue of the so-called state-action doctrine, a New Deal-era doctrine first adopted by the Supreme Court in 1943 in the case of *Parker v. Brown*[59] and elaborated upon in subsequent judicial decisions. The state-action doctrine renders the federal antitrust laws inapplicable to an economic regulation adopted by a state in its sovereign capacity.

[58] 15 U.S.C. § 45 (2012).
[59] 317 U.S. 341 (1943).

In *North Carolina Dental Board*, the Court rejected the claim that state-action immunity applied to the board's actions.[60] The Court stressed that where a state delegates control over a market to a non-sovereign actor, as North Carolina did to its board, the state-action immunity doctrine applies only if the state itself accepts political responsibility for its delegation by actively supervising the private actor's decisions.[61] In particular, the Court relied on its 1991 decision in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*,[62] which held that in order for the state-action doctrine to apply, a state must clearly articulate an anticompetitive policy and actively supervise decisions by non-sovereign actors. In applying *Midcal*, the *North Carolina Dental* Court held that entities designated as state agencies are not exempt from active supervision when they are controlled by market participants, because immunizing such entities from challenge under the antitrust laws would pose the risk of self-dealing that *Midcal* sought to avoid.[63]

As the Court explained, the North Carolina Board did not contend that the state exercised any—let alone active—supervision of its anticompetitive conduct,[64] a concession that proved fatal to its case. The Court summarized "a few constant requirements of active supervision," specifically that the state supervisor (1) "must review the substance of the anticompetitive decision," (2) "must have the power to veto or modify particular decisions to assure they accord with state policy," and (3) may not itself be an active market participant."[65] The

[60] N.C. Dental Bd., 135 S. Ct. at 1110–17.
[61] *Id.* at 1111.
[62] Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
[63] N.C. Dental Bd., 135 S. Ct. at 1111–15.
[64] *Id.* at 1116.
[65] *Id.* at 1116–17.

Court cautioned, however, that "the inquiry regarding active supervision is flexible and context-dependent" and that "the adequacy of supervision otherwise will depend on all the circumstances of a case."[66] The Court emphasized that "active supervision" does not mean "potential supervision," stating that "the mere potential for state supervision is not an adequate substitute for a decision by the State."[67]

Justice Alito, joined by Justices Scalia and Thomas, dissented.[68] Stressing federalism principles, the dissent made much of the fact that the *North Carolina Dental Board* factual setting closely paralleled the scheme upheld in *Parker v. Brown*, which involved a self-interested state board dominated by raisin producers that orchestrated an anticompetitive cartel restriction in the production of raisins (in effect, a state predecessor of the federal RAC at issue in *Horne*). Thus, in the dissent's view, the North Carolina Dental Board, like the state raisin board in *Parker*, was a state sovereign entity entitled to federal antitrust immunity. Furthermore, as a practical matter, the dissent noted that the Court's decision would spawn confusion as to the legal status of particular boards and uncertainty as to what changes in the composition of state boards is required in order to satisfy the Court's new test.[69]

The dissent's lament that the majority opinion is hard to square with *Parker* appears correct, but that should not be a source of concern. Broadly read, the *Parker* doctrine has done much to embolden

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[66] *Id*. at 1116.

[67] *Id*. (citation omitted).

[68] *Id*. at 1117–23 (Alito, J., dissenting).

[69] *Id*. at 1122–23. Justice Alito also cautioned that "determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision." *Id*. at 1123.

welfare-inimical state anticompetitive restrictions generated by special interest rent-seeking. *Parker*, a product of New Deal jurisprudence, was handed down in a period when government regulatory schemes were broadly deferred to, and economic liberties given short shrift. An appropriate pruning back of *Parker* appears appropriate.

Fortunately, in recent years the Supreme Court has begun to evince an awareness of the economic welfare losses associated with anticompetitive state economic regulation, and has begun to gradually reduce the scope of the *Parker* doctrine's coverage. *North Carolina Dental*, which narrowed *Parker* immunity by imposing a greater active supervision requirement on self-interested state agencies, built upon the Court's 2013 decision in *FTC v. Phoebe Putney Health System, Inc.*,[70] which strengthened the *Midcal* "clear articulation" requirement by requiring states to spell out in detail anticompetitive authorizations. These decisions give greater scope for challenges to a variety of anticompetitive regulatory arrangements that fly under the color of state law. They place a new burden on states to carefully define and oversee anticompetitive schemes fostered by organized private groups. This burden exposes such schemes to negative publicity, thereby making it somewhat less likely that they will be retained or adopted in the first place.

In sum, like *Horne*, *North Carolina Dental Board* (especially when considered in tandem with *Phoebe Putney*) represents a helpful but small step in the direction of greater economic liberty. In its wake, state legislatures may still choose to create self-interested profes-

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[70] FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013). Specifically, the Court held in *Phoebe Putney* that a local hospital authority, given general corporate powers under Georgia state law, was not immune from federal antitrust scrutiny when it orchestrated an anticompetitive hospital merger, because the state law did not affirmatively contemplate that hospital authorities would displace competition by consolidating hospital ownership.

sional regulatory bodies; the states' essential sovereignty is not compromised. Now, however, state legislatures must (1) make it clearer up front that they intend to allow those bodies to displace competition and (2) subject those bodies to disinterested third-party review. Those changes should make it far easier for parties that would be harmed by special-interest regulation to spot and publicize welfare-inimical regulatory schemes and should thereby weaken the incentive and ability of rent seekers to undermine competition through state regulatory processes. All told, the burden that these constraints will impose on the states is relatively modest and should be far outweighed by the substantial welfare benefits that they are likely to generate.

IV. BEYOND *HORNE* AND *NORTH CAROLINA DENTAL* — EQUAL PROTECTION CHALLENGES TO STATE CONSTRAINTS ON FUNDAMENTAL ECONOMIC LIBERTIES

As we have seen, despite their merits, *Horne*, *North Carolina Dental Board*, and *Phoebe Putney* are inherently limited in their ability to preclude government from encroaching upon economic liberties. *Horne* does not require the federal government to dismantle marketing order cartels; it merely requires that the government pay farmers who seek to "opt out" for the value of any crop that has been taken. Furthermore, *Horne* does not prevent the government from avoiding the just compensation requirement by using regulatory quotas rather than marketing orders to achieve the same end. *North Carolina Dental Board* does not interfere with the ability of state governments to bestow anticompetitive special interest favor on licensed professions through self-interested state boards, as long as they create a regulatory layer to supervise those boards. Similarly, *Phoebe Putney* does not bar or limit state anticompetitive regulatory legislation; it merely requires that the authority to achieve anticompetitive ends be spelled out precisely. In sum, while these decisions make it a bit more cumbersome and awkward for government to establish and run economic special interest schemes, they do not prohibit such encroachments upon individual economic liberties. There is, however, another source of constitutional authority that may be invoked to more fundamentally challenge special interest government economic favoritism—the Fourteenth Amendment to the U.S. Constitution.[71]

The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment,[72] which forbids state laws that deny "equal protection of the laws," has been applied in modern times in a manner that is deferential to state regulatory schemes. In recent years, however, there have been signs that the Fourteenth Amendment "rational basis" test that applies to economic regulation may be applied more

[71] The following brief discussion focuses solely on the Equal Protection Clause of the Fourteenth Amendment. (My emphasis on this Clause reflects its importance in recent economic liberties case law, and the fact that, in my judgment, it is a more likely source of near-term vindication for economic liberties than other constitutional provisions.) Other possible sources of constitutional challenges to economic protectionism may include, for example, the Due Process Clauses of the Fifth and Fourteenth Amendments, the Privileges or Immunities Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, the Obligation of Contract Clause of Article I, and the Ninth Amendment. For a very brief overview of the various constitutional sources of protection for economic liberties, *see generally*, *e.g.*, Paul Larkin, David E. Bernstein, Randy E. Barnett, and Clark M. Neily, III, *Economic Liberty and the Constitution: An Introduction*, HERITAGE FOUND. SPECIAL REPORT No. 157 (Oct. 1, 2014), *available at* http://www.heritage.org/research/reports/2014/10/economic-liberty-and-the-constitution-an-introduction#_ftn49. Discussion of the implications of these provisions for economic liberties is beyond the scope of this article.

[72] U.S. CONST. amend. XIV, § 1.

expansively by the courts when it comes to analyzing anticompetitive licensing restrictions[73] and related affronts to one of the most basic civil rights of all: the right to earn a living.[74]

Specifically, in 2013, in *St. Joseph Abbey*,[75] the federal Fifth Circuit Court of Appeals ruled that Louisiana rules requiring all casket manufacturers to be licensed funeral directors—which prevented monks from earning a livelihood by making caskets—served no other purpose than to protect the funeral industry and thus violated the Fourteenth Amendment's Due Process and Equal Protection clauses. Notably, the Fifth Circuit held that protectionism, standing alone, does not provide a "rational basis" for a state law.

Since the Sixth[76] and Ninth[77] Circuit Courts of Appeals have also held that economic protectionism, standing alone, is insufficient to satisfy rational basis review, but the Tenth Circuit has held to the contrary,[78] the time is ripe for the Supreme Court to review this issue and perhaps delegitimize pure economic protectionism. Such a development could help erode the legal foundations for protectionist, anticompetitive state licensing schemes. Moreover, given that Fourteenth Amendment equal protection guarantees apply equally to the

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[73] *See, e.g.*, Dick M. Carpenter et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUSTICE (May 2012); Paul J. Larkin, Jr., *Co-opting the Criminal Justice System to Prevent Competition or to Serve Noncompetitive Interests*, HERITAGE FOUND. LEGAL MEMORANDUM No. 134 (Aug. 21, 2014) (collecting state laws imposing education, training, and licensing requirements on barbers, hair stylists, manicurists, and the like for the purpose of limiting entry into those lines of work), *available at* http://www.heritage.org/research/reports/2014/08/co-opting-the-criminal-justice-system-to-prevent-competition-or-serve-noncompetitive-interests.

[74] *See* Barsky v. State Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) ("The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.").

[75] St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

[76] Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

[77] Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).

[78] Powers v. Harris, 379 F.3d 1208, 1221–23 (10th Cir. 2004).

federal government, under Fifth Amendment "reverse incorporation,"[79] a strengthening of the rational basis requirement applicable to state economic regulation could bear dividends in the evaluation of protectionist federal regulatory requirements as well. Finally, the principle that "protectionism alone" is insufficient to provide a "rational basis" for legislation could, if accepted, be applied to a wide variety of laws and regulations that extend far beyond occupational licensing limitations, including laws that promote a wide variety of anticompetitive ends.[80] Any such broader applications would have to be developed over time, of course, and would be dependent upon the existence of a judiciary that is increasingly attuned to the constitutional vindication of economic liberties.

V. CONCLUSION

Over the last few years, invoking the Fifth Amendment's Takings Clause and free market antitrust principles, the Supreme Court has begun to chip away at venerable federal and state economic special interest cartel-like restrictions, by requiring government to jump through additional hoops to justify and maintain those socially costly

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[79] "[E]ver since *Bolling v. Sharpe* in 1954, the Fifth Amendment's Due Process Clause has been held to 'reverse- incorporate' the Fourteenth Amendment's Equal Protection Clause against the federal government." James W. Ely, Jr., *Due Process* Clause, in THE HERITAGE GUIDE TO THE CONSTITUTION 510 (David F. Forte & Matthew Spalding, eds., 2nd ed., 2014). *See* Bolling v. Sharpe, 347 U.S. 497 (1954); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

[80] Of course, defenders of such schemes as cartel-like agricultural marketing orders, licensing restrictions, and state-sanctioned mergers to monopoly could be counted upon to generate a host of "public interest" justifications (such as health and safety goals and consumer protection) to avoid summary condemnation. Judges would have to be willing to ferret out pretextual claims and fallacious arguments (for example, cartel restrictions are not needed to ensure high product or service quality) in evaluating such justifications, rather than engage in superficial reviews and rubber stamping of government claims, if economic liberties are to be accorded the sort of serious constitutional protection that courts grant to other civil liberties.

restraints. Some federal appeals courts are beginning to act even more boldly, by invoking the Equal Protection Clause of the Fourteenth Amendment to directly unravel protectionist government rules, rather than merely subject those schemes to additional burdens. It is to be hoped that, over time, this more vigorous and far-reaching constitutional approach may gain broader acceptance by the judiciary, consistent with the growing scholarly interest in the protection of economic liberties.[81] Such a judicially-generated strengthening of individual economic freedoms, and concomitant weakening of protectionist government schemes, would, to the extent it succeeds, substantially enhance economic welfare in a manner that is rooted in constitutional first principles.

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[81] During the early 1980s, Professor Bernard Siegan helped reignite scholarly interest in economic liberties protected by the Constitution. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). A great deal of research has followed and continues to be generated. For a representative sample of this work, *see, e.g.*, RICHARD A. EPSTEIN, TAKINGS (1985); DAVID E. BERNSTEIN, REHABILITATING LOCHNER (2011); and CLARK M. NEILY III, TERMS OF ENGAGEMENT (2013).