New Legal Challenges to U.S. Agricultural Cartels: The *Horne* Decision

Trevor Burrus

> Farm policy, although it's complex, can be explained. What it can't be is believed. No cheating spouse, no teen with a wrecked family car, no mayor of Washington, D.C., videotaped in flagrante delicto has ever come up with anything as farfetched as U.S. farm policy.
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> —P. J. O'Rourke (1991: 145)

U.S. agricultural policy is a complex mish-mash of carve-outs, cartels, and cronyism. Consequently, much of the agricultural world exists in the shadows: too obscure to attract genuine interest from laymen, and too boring to command the attention of any but the most hardened academics and policy wonks. Moreover, except when the Farm Bill occasionally comes up for reauthorization, the media rarely pays attention to what's going on in American agricultural policy.

Some of this complexity may be by design. According to Cato Institute adjunct scholar Daniel A. Sumner, Norfleet Sugg, former executive secretary of the North Carolina Peanut Growers Association and later head of the Agricultural Council of America,

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once explained that "the peanut program is so complicated; there's only three people in the world that actually understand how it works. It's my job to keep it that way" (Sumner 2012).

Sumner believes the programs are complicated by design: "Every time somebody proposes one more complicated government program, I can't help but think part of that is, the less the average taxpayer or the average analyst can figure out what this thing is about, or the average congressman for that matter, they throw up their hands and think, well, the industry must know what they're talking about."

Occasionally, certain silly agricultural programs get exposed, and the disinfecting power of sunlight helps slightly purify our foolish agricultural code. That's what happened at the Supreme Court in 2015, when, for the second time, the justices heard a challenge to the despotic powers of the Raisin Administrative Committee (RAC).

The RAC is one of several government-created agricultural cartels formed around certain commodities and certain regions. How many are there? Well, when questioned by the Supreme Court at oral argument, even the deputy solicitor general couldn't say for sure. "I think there's scores of them," he said, in a shocking display of ignorance before the highest court in the land.[1]

The RAC was created under what's called a "marketing order," a New Deal relic that proves that, no matter how silly the government program, once it is in place it is nearly impossible to remove. The 47-member RAC meets in an office in Fresno, California, and decides, among other things, how many raisins should be sold on the open market each year. They then can take the "excess" raisins from farmers and offer them nothing in return.

Usually, those who benefit from government-enforced supply controls and anticompetitive policies are reticent to challenge the hand that feeds them. Raisin growers and handlers (those who prepare, pack, and distribute raisins) have historically been no different, and the RAC has been generally free to operate its cartel without pushback. That is, until it met Marvin and Laura Horne, two raisin farmers who became fed up with the RAC's commands. The Hornes

[1]Tr. of Oral Argument at 57, Horne v. U.S. Dept. of Agriculture, 135 S. Ct _ (2015) (No. 14-275).

took the RAC to the Supreme Court twice, and when the dust had cleared they won resounding 9-0 and 8-1 victories and forever changed the ability of the RAC and other similar entities to take farmers' property without paying for it.

This is the story of the Hornes' case and its implications. But it is also the story of backward and antiquated agricultural policies that came out of the New Deal. Finally, it is the story of a laudable type of civil disobedience, and the incredible tenacity of the Hornes in their fight against government power and entrenched interests.

New Deal Command-and-Control Policies

The RAC can be seen as the product of two New Deal policies. One is the push toward cartelization that dominated much of New Deal thinking; the other is the doctrine of pricing parity.

More specifically, the RAC came from a 1949 amendment to the 1937 Agricultural Marketing Agreement Act (AMAA). The AMAA sought to create "orderly" marketing conditions via heavy-handed government controls. In part, this entailed cartelizing various industries and allowing them to govern themselves.

President Franklin D. Roosevelt had a strange tendency to think that cartels were the answer to the perceived shortcomings of free markets (see Powell 2004). The first major New Deal program, the National Industrial Recovery Act of 1933 (NIRA), empowered businesses to create "codes of fair competition" in order to "encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works." The law allowed for "the organization of industry for the purpose of cooperative action among trade groups," the "united action of labor and management under adequate governmental sanctions and supervision," and the "eliminat[ion] of unfair competitive practices" (NIRA §1).

In practice, this meant that industries were allowed to make the rules for themselves and their competitors, including setting prices, wages, hours, bookkeeping practices, as well as other, more industry-specific limitations. Those who violated the industry code could be either fined or thrown in jail. In one instance, Fred Perkins, a battery manufacturer in York, Pennsylvania, was sent to jail for refusing to raise his employees' wages. His attempts to explain that he could not remain in business while paying the mandated wage and that his employees preferred the lower wage to being out of a job fell on deaf ears (Folsom 2008: 53).

Some may object to my characterization of these New Deal organizations as "cartels," but in order to see this one only need look at the text of the NIRA. Section 5 of the NIRA says that any code of fair competition "shall be exempt from the provisions of the antitrust laws of the United States." Similar language is found in the AMAA. These clauses highlight the fact that such collusion, if undertaken outside the auspices of the government, would blatantly violate antitrust laws.

In *ALA Schechter Poultry Corp. v. United States* (295 U.S. 495 [1935]), the Supreme Court unanimously struck down the NIRA both as a violation of the Commerce Clause and as an unconstitutional delegation of legislative power. Writing for the Court, Chief Justice Charles Evans Hughes wrote: "We are of the opinion that the attempt, through the provisions of the Code, to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power" (295 U.S. at 550).

But Roosevelt's commitment to command-and-control "solutions" to the nation's economic woes would not be shaken by the Supreme Court. One month before he signed the NIRA, Roosevelt signed the Agricultural Adjustment Act (AAA). The AAA's goal was to restore "farm purchasing power of agricultural commodities or the fair exchange value of a commodity based upon price relative to the prewar 1909–14 level" (Rasmussen, Baker, and Ward 1976). This doctrine, called "parity," was a keystone of the New Deal and would also become part of the RAC's purpose.

In *United States v. Butler* (297 U.S. 1 [1936]), the Court ruled the AAA unconstitutional, striking another blow against a cherished Roosevelt program. The Court found that the taxing provisions of the AAA were an unconstitutional expansion of the federal taxing power. As Justice Owen Roberts wrote for six justices:

> The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement are but parts of the plan. They are but means to an unconstitutional end [297 U.S. at 68].

Although both the NIRA's cartelization schemes and the AAA's pricing parity schemes fell at the Supreme Court, both form part of the backdrop to the RAC.

The AMAA of 1937 was explicitly passed to recover some sections of the AAA that did not depend upon the unconstitutional expansion of the taxing power. As the preamble of the law read: "The following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and validated, and are reenacted without change."[2]

The Act's "marketing agreements" were similar to the cartelization provisions of the NIRA but without the broad scope of delegated legislative authority. The Act empowered the secretary of agriculture to maintain "orderly marketing conditions" in certain agricultural commodities. This included maintaining parity pricing as well as a variety of other constraints.

As amended, the AMAA is a collection of convoluted jargon, carve-outs, and bizarre forays into price fixing. Its prolix commandments and switchback logic are merely a taste of the head-scratching nature of American agricultural policy. For example, a set of 1985 amendments (7 U.S.C. 608c [5]) to the Act's long section on milk marketing orders lists the "minimum aggregate dollar amount" of the adjusted price for milk in over 40 different marketing-order regions, which not only include general regions like "Nebraska–Western Iowa" ($1.75) but also more specific areas such as "Paducah, Kentucky," ($2.39) and "Fort Smith, Arkansas" ($2.77). One cannot help but think back to the Emperor Diocletian's "Edict on Maximum Prices" from 301 A.D. (Erim et al. 1970).

At one point, while discussing apples, the Act explains that marketing-order provisions will apply to fruits "but not including apples, other than apples produced in . . . " followed by a list of 20 states. A few lines later, we are told that they will apply to "apples produced in the States named above except Washington, Oregon,

[2]AMAA, 7 U.S.C. 601 et. seq., www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5067868.

and Idaho." Reading between the lines, one can almost see the backroom deals and logrolling trades.

The complicated nature of American agricultural policy is not just an example of poor draftsmanship or an object lesson in the vagaries of logrolling, it is a boon to those who are the direct beneficiaries. And hidden in the AMAA is the authorization to create the RAC.

After World War II, the American raisin industry found its productive capacity was outstripping demand. During the war, both the U.S. government and other allies purchased large amounts of the relatively nonperishable dried fruit. It was a good time to be a raisin farmer (Nef 2000: 9–13).

Like those during the New Deal who sought to guarantee 1909–14 prices, postwar raisin farmers seemed to believe that the prices they enjoyed during the war should be maintained for their benefit. After a series of meetings, the growers prepared a proposal to create a raisin marketing order and submitted it to the U.S. Department of Agriculture. The proposal was discussed at a public hearing and a referendum of raisin producers was held. Federal Raisin Marketing Order 989 for Raisins Produced from Grapes Grown in California went into effect in August 1949.

Enter the Hornes

> [W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States. . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA. . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.
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> —Marvin and Laura Horne[3]

[3]Letter to the secretary of agriculture and the RAC; in 2002, the Hornes explained their grievances to the secretary of agriculture and to the RAC. Cited in Horne v. U.S. Dept. of Agriculture, 133 S. Ct. 2053, 2059 n.3 (2013).

Marvin and Laura Horne have been farming raisins on a vineyard in Kerman, California, since 1969. In 2001, being fed up with the overbearing actions of the RAC, the Hornes created Raisin Valley Farms in order to try to avoid mandatory compliance with the AMAA. Because the AMAA only applies to raisin "handlers" (those who package and sell the raisins), the Hornes believed they had devised a way to get their goods to market without going through a traditional handler (*Horne v. U.S. Dept. of Agriculture*, 133 S. Ct. 2053, 2058 [2013]).

The USDA disagreed, however, and ruled that the Hornes' reorganization of their farming practices did not exempt them from complying with the dictates of the RAC. Nevertheless, the Hornes continued to protest the RAC. They did not pay assessments for the 2002–03 or 2003–04 seasons, and they refused to allow "RAC inspection of the raisins they received for processing, denied the RAC access to their records, and held none of their own raisins in reserve" (133 S. Ct. at 2059).

The USDA went after the Hornes. The government argued that, because the Hornes were handlers for the purposes of the AMAA, they owed 47 percent of their 2002–03 crop and 30 percent of their 2003–04 crop. For the 47 percent the government offered no compensation, and for the 30 percent they offered a fraction of the value. The Hornes protested their classification as handlers and also raised a few affirmative defenses, including the claim that the taking of their raisin crop was in violation of the Fifth Amendment's prohibition on the taking of "private property for public use without just compensation."

A long legal battle commenced, starting first in administrative law courts. An administrative law judge (ALJ) ruled that the Hornes were "handlers" for the purposes of the statute. The Hornes appealed that ruling to a judicial officer, who upheld the ALJ's determination and assessed fines of $483,844 for the value of the raisins and $202,600 in civil penalties (133 S. Ct. at 2059).

The Hornes then sought judicial review of the USDA's decision in federal district court. Again, the judge agreed that they were "handlers" for the purposes of the statute. The judge also ruled that the reserve requirement did not constitute a physical taking. "[I]n essence," wrote the court, "the Hornes are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The Government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their 'reserve tonnage' raisins to the RAC is the admissions ticket" (133 S. Ct. at 2016).

On appeal to the United States Court of Appeals for the Ninth Circuit, the panel upheld the determination that the Hornes were handlers. It also concluded that it lacked jurisdiction to resolve the Hornes' takings claim. Essentially, the court ruled that, before bringing a takings claim, the Hornes had to terminate their present case, pay the fines, and then file a separate suit in the Court of Federal Claims. The Hornes appealed this ruling to the Supreme Court, and, in November 2012, the Court agreed to hear the Hornes' case.

Writing for a unanimous Court, Justice Clarence Thomas overturned the Ninth Circuit. A raisin farmer can raise a takings claim as an affirmative defense in an action initiated by the USDA, Thomas held, and the Ninth Circuit had jurisdiction to hear that claim without a separate filing in the Court of Federal Claims (133 U.S. S. Ct. at 2063).

Although it was a victory before the highest court in the land, the Supreme Court's decision only meant that the Ninth Circuit would hear the case again—this time on merits of the Hornes' takings claim. Even though the Hornes' saga was now a decade old, they would have to return to the Ninth Circuit to argue that the RAC's reserve requirement was an unconstitutional taking under the Fifth Amendment.

Again, the Ninth Circuit wasn't amenable to the Hornes' arguments. In an odd opinion, the court's ruling distinguished takings of real property (land) from takings of personal property. Because the court held that personal property is accorded less protection than real property, it held that the reserve-tonnage requirement was not a per se taking.[4] That distinction, as the Cato Institute's Center for Constitutional Studies pointed out in an amicus brief supporting the Hornes, has no basis in the Fifth Amendment's Takings Clause, which simply reads, "nor shall private property be taken for public use without just compensation." The Ninth Circuit further reasoned that Marketing Order 989 merely imposed a condition (the reserve requirement) on raisin growers in exchange for a benefit (orderly marketing conditions), and therefore was not a taking. After all, the Ninth Circuit said, the Hornes could avoid the reserve requirement by "planting different crops."

[4]Horne v. U.S. Dept. of Agriculture, 730 F. 3d 1128, 1143 (9th Cir. 2014).

The Ninth Circuit's strange opinion was quickly appealed and the Supreme Court agreed to hear the Hornes' case for a second time. This time they would get to the heart of the matter—namely, whether under the Fifth Amendment's Takings Clause, the RAC owes farmers compensation when it confiscates raisins.

Return to the Supreme Court

Almost 15 years after their fight against the RAC began, the Hornes found themselves in the Supreme Court for a second time. On June 22, 2015, the Court ruled 8-1 for the Hornes.

Writing for the majority, Chief Justice John Roberts made short work of the Ninth Circuit's dubious distinction between real and personal property: "Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home" (*Horne v. U.S. Dept. of Agriculture*, 135 S. Ct. 2419, 2423 [2015]).

For Roberts and the seven other justices in the majority, the reserve requirement was "a clear physical taking. . . . Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee." Both Justice Sonia Sotomayor's dissent and the government argued that it would be odd to call the reserve requirement a taking when the government could legally prohibit the sale of the raisins, which would produce essentially the same outcome. While "[a] physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower[,]" wrote Roberts, "[t]he Constitution . . . is concerned with means as well as ends."

Having found that the reserve requirement was a taking, Roberts went on to clarify that the Ninth Circuit's argument that the Hornes could "plant different crops" was constitutionally misguided: "'Let them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law."

Although eight justices agreed that the reserve requirement was a taking, three of those justices disagreed about how much compensation the Hornes were owed. Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Elena Kagan, wrote separately to say that the Hornes' case should be sent back to the lower courts to determine how much the loss of their raisins would have been offset by the benefits of higher prices and "orderly marketing conditions."

The Chief Justice, however, thought such a move unnecessary: "The Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government's effort to take their raisins. This case, in litigation for more than a decade, has gone on long enough."

Conclusion

In the aftermath of the decision, some commentators wondered whether the Hornes' case was a significant blow against New Deal agricultural programs. While an important constitutional decision, it is not the death knell for our byzantine agricultural policies. The government eventually answered the Court's question about how many programs operate like the RAC: seven—California almonds, dates, dried prunes, walnuts, tart cherries grown in seven states, and spearmint oil produced in five states.

Those programs, like the RAC, maintain prices with mandatory reserve requirements for which compensation is not guaranteed. Most marketing order programs, however, do not operate in that fashion. The Hornes' victory will only directly apply to those programs and it will not do so automatically. Future dissidents will have to bring their own cases.

More broadly, the Hornes' case affirms two important principles for all future takings cases. First, a direct physical taking is a per se taking. Second, the government cannot make a taking a condition for entering a lawful profession such as raisin farming. Finally, the Hornes' case is an important moral victory, albeit small, against the costly New Deal agricultural policies we continue to live under.

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