

THE EFFECT OF TERMINATED FEDERAL MARKETING ORDERS ON SMALL FARMS, AND A REFLECTION ON THE JEFFERSONIAN SPIRIT

I. INTRODUCTION

Since the time of the nation's founding, the noble pursuit of agriculture was seen as an important aspect of American life.¹ One of the earliest Americans to articulate the virtues of an agrarian lifestyle was Thomas Jefferson, whose passion for agriculture became a central component of what is known as the "Jeffersonian Democracy."² In a private letter to John Jay, interim Secretary of Foreign Affairs, Jefferson offered this advice about the merits of agricultural production in America: "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to its liberty and interests, by the most lasting bonds."³ Indeed, when it came to American prosperity, Jefferson put his faith in limited government and the civic minded and independent "yeoman farmer."⁴ Even to this day, protection of the virtuous small farmer remains a national concern.⁵

Support of the small family farm, however, was not just a cursory concept but a pragmatic presumption guiding American policy, both economically and socio-politically, since the nation's birth.⁶ An example of

¹ See, e.g., *History of the American West, 1860-1920*, LIBRARY OF CONG., <http://www.loc.gov/teachers/classroommaterials/connections/hist-am-west/history.html> (last visited Nov. 23, 2012).

² See WALLACE HETTLE, *THE PECULIAR DEMOCRACY: SOUTHERN DEMOCRATS IN PEACE AND CIVIL WAR* 13-15 (2001).

³ Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), in *THE WRITINGS OF THOMAS JEFFERSON*, 93 (Albert Ellery Bergh ed., 5th ed. 1907).

⁴ See HETTLE, *supra* note 2 at 13, 15.

⁵ See, e.g., *Public Opinion On Federal Agriculture Policy & Conservation*, BENENSON STRATEGY GROUP 2, www.iaenvironment.org/documents/Packard%20Farm%20Bill%20Conservation%20FINAL.pdf (last modified Sept. 29, 2011) (the public views family farms as a top priority of government policy).

⁶ Such farm support programs have been enacted throughout the nation's history. See generally Capper Volstead Act, Pub. L. No. 67-146, 42 Stat. 388 (1922) (codified as

this policy in action is a piece of New Deal era legislation called the Agricultural Marketing Agreement Act of 1937 (“AMAA” or “Act”).⁷ Implemented in response to economic hardship faced by small farmers in the 1920s, the Act allowed for the creation of industry mandates called marketing orders that provided price stability and served essential marketing functions (such as quality, packaging and advertising standards) for farmers’ benefit.⁸

Since the AMAA’s creation seventy-five years ago, agriculture has experienced many economic changes,⁹ the most significant being the decline of small family farms and a shift toward large-scale corporate farming operations.¹⁰ Despite these changes, however, the basic structure of the AMAA and marketing orders has remained virtually unchanged.¹¹ Consequently, many marketing orders fell out of favor with large farmers, and in 2011, the peach and nectarine marketing orders—two of the oldest and longest-standing orders under the AMAA—were terminated.¹² This caused small peach and nectarine farmers to lose access to marketing order functions they once relied on, a difficult reality that could hasten the decline of small farmers in the future.¹³

amended at 7 U.S.C. §§ 291-92 (2012)) (created antitrust exemptions for agricultural cooperatives); *See generally* Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (allowed subsidies to farmers in order to reduce crop surplus and keep the value of crops high); *See also* CHARLES A. MILLER, JEFFERSON AND NATURE: AN INTERPRETATION 211 (1988) (Jefferson advocated special tax exemptions for farmers).

⁷ *See* Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C. (2012)).

⁸ 7 U.S.C. § 602(1)-(5) (2012); *See* U.S. DEP’T OF AGRIC., AGRIC. MARKETING SERVICE, A REVIEW OF FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, AND SPECIALTY CROPS 5 (1980) [hereinafter REVIEW OF MARKETING ORDERS], available at <http://naldc.nal.usda.gov/download/CAT82770543/PDF>.

⁹ *See, e.g.*, U.S. DEP’T OF AGRIC., ECONOMIC RESEARCH SERVICE, SMALL FARMS IN THE UNITED STATES 27 (2010), available at http://www.ers.usda.gov/media/147007/eib63_1_.pdf.

¹⁰ *See id.* at 27-28.

¹¹ *See* Barry Pineles, *Marketing Orders and the Administrative Process: Fitting Round Fruit into Square Baskets*, 5 SAN JOAQUIN AGRIC. L. REV. 89, 107 (1995); *See* REVIEW OF MARKETING ORDERS, *supra* note 8, at 13.

¹² *See* Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011); *See generally* *Tree fruit industry changes*, ORANGE COVE & MOUNTAIN TIMES (Apr. 20, 2011, 5:16 PM), http://www.reedleyexponent.com/articles/2011/04/27/publications/orange_cove_and_mountain_times/doc4daf7616390ac519521325.txt (explaining that large farmers’ support for mandatory marketing orders diminished as they became more able to market and promote their own product).

¹³ *See* ORANGE COVE & MOUNTAIN TIMES, *supra* note 12 (describing the impact of peach and nectarine marketing order termination on the availability of research and marketing funds).

Today, it seems that the inability of government to recognize small farmers' interest in marketing order continuance marks a clear departure from the Jeffersonian view of an agrarian democracy, whose spirit was evident in the AMAA's creation. Action is therefore needed to reconcile these recent economic changes with the spirit and policy of the AMAA, to find an equitable solution that restores marketing order functions that protect small farmers and addresses the concerns of large operations.

Part II of this Comment will examine the United States Department of Agriculture's ("USDA") original policy objectives as well as the historical economic and legal context under which the AMAA was created. Part III will dissect the AMAA's administrative framework and detail the functions of marketing orders. Using the peach and nectarine industries as an example, Part IV will explore the gradual economic shift away from small family farms toward large corporate farms, and explain how this changed popular support for marketing orders, and eventually prompted the termination of some orders. It will then describe the impact of these terminations on the peach and nectarine industries and the effect on small farmers in particular. Part V will analyze the administrative shortcomings of marketing orders exposed as a result of the economic shift. It will also analyze how a failure to reconcile these economic changes, made evident by the USDA's ignorance of analytical administrative measures, exacerbated marketing order ineffectiveness. Part VI will reconcile the USDA's competing interests of economic efficiency and small farmer protection, and propose remedies that embrace the Jeffersonian spirit of protecting small farmers, while remaining cognizant of other economic interests.

II. SOWING THE SEEDS OF A JEFFERSONIAN DEMOCRACY

For most of America's early history, the growth of agriculture moved at a steady pace and survived with little government involvement.¹⁴ However, in 1803, President Jefferson executed the Louisiana Purchase which effectively doubled the size of the United States overnight.¹⁵ This rapid expansion of the American West ensured that agriculture would become a greater concern to the growing nation.¹⁶

¹⁴ See FRED A. SHANNON, *THE FARMER'S LAST FRONTIER* 4 (Henry David et al. eds., 1945) (explaining that there were very few adherents to government support programs before 1900).

¹⁵ See *Convention Between the United States of America and the French Republic*, U.S.-Fr., Apr. 30, 1803, 8 Stat. 206.

¹⁶ See generally ROWMAN & LITTLEFIELD PUBLISHERS, INC., *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803-1898* (Sanford Levinson & Bartholomew Sparrow eds., 2005).

Long after Jefferson's presidency, his convictions about the agrarian lifestyle and the virtuous "yeoman farmer" endured, and in the 1800s Republican congressmen sought to put the nation's newly acquired land directly in the hands of its citizenry.¹⁷ With the South's secession from the Union in 1861, Republicans passed the Homestead Act.¹⁸ This act gave applicants a 160-acre parcel of land at no cost, encouraging an unprecedented westward expansion, and dramatically increased land ownership to small families at a time when existing land-use policy made private ownership unattainable.¹⁹ Later census data reflected this growth with a record number of farms—6.4 million in 1910—a number that has been unmatched since.²⁰

Technological improvements soon did away with antiquities like the horse-drawn plow, and farmers started to gain access to bank credit that was previously unavailable.²¹ As a result of these advances, American agriculture experienced a boom in the late 1910s.²² However, challenges quickly followed prosperity when the agriculture industry found itself ill-equipped to handle the rapid increase in farm production.²³ European agriculture's quick recovery after World War I compounded the problem, with a resurgence of foreign production and a lower demand for Ameri-

¹⁷ See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970) (describing the Republican belief that giving western lands to free farmers would act as a barrier against slavery and would improve the conditions of urban poverty).

¹⁸ See generally *id.*; An Act to secure Homesteads to actual Settlers on the Public Domain, Pub. L. No. 37-64, 12 Stat. 392 (1862) (issued 160-acre parcels to citizens who agreed to homestead and make productive use of that land).

¹⁹ See, e.g., *The Homestead Act of 1862*, NAT'L ARCHIVES AND RECORDS ADMIN, <http://www.archives.gov/education/lessons/homestead-act/> (last visited Nov. 23, 2012).

²⁰ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1974 CENSUS OF AGRICULTURE, FARMS: NUMBER, ACREAGE, VALUE OF LAND AND BUILDINGS, LAND USE, SIZE OF FARM, FARM DEBT, at I-15 (1978), available at <http://agcensus.mannlib.cornell.edu/AgCensus/censusParts.do?year=1974> (follow hyperlink "02." under heading "VOLUME 2: STATISTICS BY SUBJECT").

²¹ See generally *The Federal Farm Loan Act of 1916*, Pub. L. No. 64-158, 39 Stat. 360 (increased credit to rural farmers); See generally GEORGE CONSTABLE & BOB SOMERVILLE, *A CENTURY OF INNOVATION: TWENTY ENGINEERING ACHIEVEMENTS THAT TRANSFORMED OUR LIVES* 73-84 (Stephen Mautner et al. eds., 2003) (describing the agricultural mechanization that took place during the early 1900s).

²² See, e.g., Jason Henderson, Brent Gloy & Michael Boehlje, *Agriculture's Boom-Bust Cycles: Is This Time Different?*, FED. RES. BANK OF KANSAS CITY ECON. REV., Oct.-Dec. 2011, at 85, 90, available at <http://www.kansascityfed.org/publicat/econrev/pdf/11q4HendersonGloyBoehlje.pdf> (describing the increase in price and demand that farmers enjoyed during the late 1910's).

²³ See, e.g., Pineles, *supra* note 11, at 90.

can crops.²⁴ By the end of the decade, excess domestic supply and lowered foreign demand made it harder for farmers to sell their crops, and this quickly pushed American agriculture into crisis.²⁵ A 1921 report to Congress corroborating these problems made clear that government intervention was necessary.²⁶

Later that year, President Harding called for a National Agriculture Conference to address the ongoing crisis.²⁷ Among those invited were economists, academics, bankers, industrial manufacturers and distributors, with farmers representing more than half of the nearly 500 delegates.²⁸ The four day conference gathered input from congressional committees and delegates, with much credence given to farmers' personal experiences and the effect the crisis had on their lives.²⁹ Farmers described the common problems they faced: long work days in the field, difficulty of managing bookkeeping after hours, and greatly diminished profit margins.³⁰

Various solutions were proposed, including regional agricultural infrastructure programs, price stabilization measures, credit programs, and the creation of an agricultural census.³¹ However, one of the most important solutions was a proposal for cooperative³² marketing legislation.³³ Recognizing the success of early agricultural cooperatives during the late 1800s and early 1900s,³⁴ a congressional committee stated, "Economic reforms along the lines of cooperative marketing and finance are readily translated into better homes,"³⁵ and upon conclusion, the committee reaffirmed their commitment to the family farm:

We strongly recommend the conservation of the American farm home. It offers the best opportunity for the development of ideal family life, in which

²⁴ See REPORT OF THE NAT'L AGRIC. CONFERENCE, H.R. REP. NO. 67-195 at 59 (1922) (Conf. Rep.); See also Henderson, *supra* note 22, at 85.

²⁵ See H.R. REP. NO. 67-195 at 6; See also REVIEW OF MARKETING ORDERS, *supra* note 8, at 4.

²⁶ See generally REPORT OF THE JOINT COMM'N OF AGRIC. INQUIRY, H.R. REP. NO. 67-408 (1921).

²⁷ See H.R. REP. NO. 67-195 at 3-4.

²⁸ *Id.* at 4.

²⁹ See *id.* at 1, 27-28.

³⁰ See *id.* at 28.

³¹ See *id.* at 185-86.

³² An agricultural cooperative is "a group of farmers who reside in the same vicinity acting together for their mutual benefit in the cultivating, harvesting, and marketing of their agricultural products . . ." *Industrial Comm'n v. United Fruit Growers Ass'n*, 103 P.2d 15, 17 (Colo. 1940).

³³ See H.R. REP. NO. 67-195 at 170.

³⁴ See generally REVIEW OF MARKETING ORDERS, *supra* note 8, at 4.

³⁵ H.R. REP. NO. 67-195 at 181.

the farmer and his wife are equal partners in work, social life, and business, and in which the children have an opportunity to become junior partners in the management of the farm and home.³⁶

More than a century after Jefferson's presidency, calls to preserve and protect the virtuous small farmer still echoed in congressional chambers.

A. Cooperative Marketing – A First Effort at Stability

With strong support from the National Agriculture Conference, Congress enacted its first effort at cooperative marketing, the Capper-Volstead Act.³⁷ This act allowed farmers to voluntarily produce, handle, and market their goods on a cooperative basis, while remaining exempt from prosecution under the Sherman Antitrust Act, a law that otherwise forbade businesses from entering into anti-competitive practices such as monopolization and collusion.³⁸ This exception marked a clear distinction, in Congress' view, between the detrimental monopolistic practices inherent to commerce and the reasonable economic supports aimed to help farmers survive in an increasingly complex market.³⁹ These cooperatives primarily implemented quantity controls to restrict supply and, in turn, increase price.⁴⁰ However, because of the cooperatives' voluntary nature, many farmers chose not to associate.⁴¹ This allowed non-associated farmers, called "free-riders," to take advantage of the reduced production of associated farmers.⁴² Thus, the cooperatives could not effectively control production or market prices and quickly fell out of favor.⁴³

B. The Agriculture Marketing Agreement of 1937 – A Second Shot

By the early 1930s, the United States sunk into the Great Depression which contributed to existing price instability.⁴⁴ It soon became difficult for small family farmers to turn a profit and they were "frequently left to the mercy of large handlers who could benefit from their market power

³⁶ *Id.* at 182.

³⁷ See Capper Volstead Act, Pub. L. No. 67-146, 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. §§ 291-92 (2012)).

³⁸ See generally *id.* (gave farmers immunity from antitrust suit, allowing them to form cooperatives).

³⁹ See e.g., Pineles, *supra* note 11, at 91.

⁴⁰ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 25.

⁴¹ See Pineles, *supra* note 11, at 93.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See Henderson, *supra* note 22, at 85.

and position.”⁴⁵ In response to these continued problems, Congress enacted the AMAA in 1937.⁴⁶

The AMAA had two goals: to obtain “orderly marketing conditions” for farmers, as well as “parity prices.”⁴⁷ In order to accomplish these goals, it allowed for the creation of marketing orders, agreements between the Secretary of Agriculture (“Secretary”) and farmers of particular crops produced in specific regional areas.⁴⁸ These orders were intended to impose on handlers⁴⁹ certain marketing functions desired by, and for the benefit of farmers,⁵⁰ and unlike the voluntary cooperatives that came before them, compliance was mandatory.⁵¹

Soon after the creation of the AMAA, marketing orders began to emerge.⁵² In 1939, peach farmers prompted the creation of a marketing order for their commodity,⁵³ and many crops followed, such as nectarines in 1958.⁵⁴ By the early 1980s, there were forty-seven marketing orders covering more than half of all fruit and nut crops and fifteen percent of vegetable crops, extending across thirty-four states.⁵⁵ Despite the growing number of marketing orders during these decades, administration of the AMAA proved to be complicated and, at times, unclear.⁵⁶

C. *The APA and RFA – Tying Up Administrative Loose Ends*

The creation of an unprecedented number of government programs during the era of the New Deal left a myriad of complicated statutory mandates extending over numerous administrative agencies, also confer-

⁴⁵ Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 SAN JOAQUIN AGRIC. L. REV. 3, 8 (1995).

⁴⁶ See Pineles, *supra* note 11, at 94.

⁴⁷ Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 7 U.S.C. § 602(1) (2012); See generally H.R. REP. NO. 468 (1937) (defining parity prices as target prices for crops that ensure farmers’ purchasing power stay in balance with the ever-increasing cost of inputs, therefore ensuring year-to-year profitability).

⁴⁸ 7 U.S.C. § 608b (2012); See REVIEW OF MARKETING ORDERS, *supra* note 8, at 2.

⁴⁹ “Handler” is defined in each marketing order, but generally refers to packers and shippers of agricultural commodities. See, e.g., 7 C.F.R. §§ 916.11, 918.7 (2010).

⁵⁰ See Bensing, *supra* note 45, at 8.

⁵¹ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 2.

⁵² See generally Fresh pears and peaches grown in California, 7 C.F.R. § 917 (2010).

⁵³ *Id.*

⁵⁴ Nectarines grown in California, 7 C.F.R. § 916 (2010).

⁵⁵ REVIEW OF MARKETING ORDERS, *supra* note 8, at 1.

⁵⁶ See Pineles, *supra* note 11, at 98.

ring vast unchecked power.⁵⁷ The AMAA was no exception, with many of its procedures seemingly ad-hoc in nature, and unpublished determinations frequently made with their rationale shrouded in mystery.⁵⁸ In response to these problems, Congress passed the Administrative Procedure Act⁵⁹ (“APA”) in 1946.⁶⁰ This act simplified administrative action by classifying all rulemaking into two categories of procedure: formal and informal.⁶¹ It provided that, any time an enabling statute (for our purposes, the AMAA) called for a hearing to issue a rule, formal rulemaking would be employed and a hearing would be conducted on the record in front of an administrative law judge.⁶² All other administrative action that did not call for a hearing would fall under informal rulemaking and would be accomplished through public notice-and-comment, with some exceptions for agency discretion.⁶³ With the creation of the APA, Congress hoped to correct the unchecked power of administrative agencies by requiring standardized procedures that could provide consistency and transparency.⁶⁴

In 1980, another improvement was made to administrative law, this time to reconcile hasty rulemaking by considering its potential impact on small businesses.⁶⁵ The Regulatory Flexibility Act,⁶⁶ (“RFA”) a measure seemingly Jeffersonian by nature, required that if a proposed regulation had a significant impact on a substantial number of small businesses, analysis would be conducted to determine the extent of the impact and whether less-burdensome alternatives exist.⁶⁷ The RFA certification would then be published alongside the final rule and its recommendations either followed or ignored.⁶⁸ Congress hoped that this act would encourage administrative agencies, when weighing alternatives, to

⁵⁷ See generally TOM C. CLARK, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9-11 (1947) (explaining the importance of formalized administrative procedures to remedy potential separation-of-powers issues).

⁵⁸ Pineles, *supra* note 11, at 98, 108.

⁵⁹ Administrative Procedures Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

⁶⁰ Pineles, *supra* note 11, at 98.

⁶¹ See 5 U.S.C. §§ 553-554, §§ 556-557 (2012).

⁶² See 5 U.S.C. § 556 (2012).

⁶³ See Pineles, *supra* note 11, at 99.

⁶⁴ See *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

⁶⁵ See The Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-12 (2012))

⁶⁶ *Id.*

⁶⁷ 5 U.S.C. §§ 603-604 (2012).

⁶⁸ See *A Guide to the Regulatory Flexibility Act*, U.S. SMALL BUSINESS ADMIN. 3 (1996) [hereinafter “RFA Guide”], www.fws.gov/policy/library/rgSBAGuide.pdf; See Pineles, *supra* note 11, at 104.

choose the outcome that would inflict the smallest burden on small businesses.⁶⁹

III. MARKETING ORDERS IN DETAIL

A. *Order Administration*

Creation, implementation, modification and termination of marketing orders are administrative actions guided by AMAA edict as well as the tenets of the APA and RFA.⁷⁰ Creation of an order begins with a collective farmer petition to the USDA.⁷¹ Upon a determination by the Secretary that a marketing order might be beneficial for the industry and tend to effectuate the purpose of the AMAA, a hearing is allowed that invokes the APA's formal rulemaking procedure.⁷² A hearing is held in front of an administrative law judge and, after formulation of a proposed rule, a period for public notice-and-comment is allowed.⁷³ Once a final recommendation of the industry's desired marketing order is complete, it is sent to the Secretary, who has full authority to approve or reject it.⁷⁴ If approved, the order is put to an industry vote and must be accepted by two-thirds of farmers, or any number of farmers who represent two-thirds volume of industry product.⁷⁵

Once a marketing order is established, a committee of farmers and handlers is chosen by the Secretary.⁷⁶ The committee exercises wide discretion to create and recommend yearly marketing goals for Secretary approval, and because of its makeup, it can utilize first-hand industry knowledge to make recommendations that best suit the interests of fellow farmers and handlers.⁷⁷ The recommendation process follows informal rulemaking procedure, though it does not require public notice-and-comment.⁷⁸ Modification of orders can be accomplished through formal or informal rulemaking, or simply by the Secretary's determination that the proposed modification tends to effectuate the purpose of the

⁶⁹ See Pineles, *supra* note 11, at 104.

⁷⁰ See generally *id.*

⁷¹ 7 C.F.R. § 900.3 (2012); See also REVIEW OF MARKETING ORDERS, *supra* note 8, at 2.

⁷² *Id.* 7 C.F.R. §§ 900.4-.11 (2012).

⁷³ *Id.*

⁷⁴ 7 C.F.R. §§ 900.12-.11.

⁷⁵ REVIEW OF MARKETING ORDERS, *supra* note 8, at 29.

⁷⁶ Pineles, *supra* note 11, at 101.

⁷⁷ See generally REVIEW OF MARKETING ORDERS, *supra* note 8, at 29-30 (describing how committees utilize first-hand industry knowledge to make recommendations to the Secretary).

⁷⁸ See Pineles, *supra* note 11, at 102.

AMAA.⁷⁹ Like modification, the procedure for terminating the order can be accomplished in a couple ways. First, the Secretary may exercise unilateral authority to terminate the order upon a determination that the order no longer tends to effectuate the purpose of the AMAA.⁸⁰ Second, farmers may request an industry termination vote, which requires a majority of farmers (representing fifty percent or more volume of product) vote to terminate the order.⁸¹ The last method of termination is by continuance referenda, which requires that an industry vote for continuance of the order take place periodically, usually every four years.⁸² In order for continuance to be granted, the order must be supported in the affirmative by the same two-thirds farmer or volume requirement that creation requires.⁸³

B. Order Functions

The functions of marketing orders can be broken into three main areas: quantity control, quality control, and market support.⁸⁴ Quantity control has the most direct impact on raising crop prices to “parity price” levels, and is accomplished through supply restriction and supported by the economic model of supply and demand.⁸⁵ This model suggests that lowered supply increases demand and raises crop prices.⁸⁶ These controls do not exist to take advantage of consumers by arbitrarily raising prices but to correct overproduction, a problem that is unique to agriculture.⁸⁷ Without controls, for example, an unexpectedly large crop could flood the market with excess quantity and cause prices to drop.⁸⁸ This could potentially hurt farmers and handlers saddled with the increased cost of harvesting or packaging excess quantity at a diminished profit, or even loss.

⁷⁹ *Id.* at 105.

⁸⁰ 7 C.F.R. § 906.55(b) (2012) (termination provisions of the Texas orange and grapefruit marketing orders).

⁸¹ *Id.* § 906.55(c).

⁸² Nectarines grown in California, 7 C.F.R. § 916.64(e) (2010); Fresh pears and peaches grown in California, 7 C.F.R. § 917.61(e) (2010).

⁸³ *See* 7 C.F.R. § 916.64(e); 7 C.F.R. § 917.61(e).

⁸⁴ *See* REVIEW OF MARKETING ORDERS, *supra* note 8, at 21.

⁸⁵ *See id.* at 25, 97.

⁸⁶ *See generally* DAVID BESANKO & RONALD BRAEUTIGAM, MICROECONOMICS 33 (Cindy Rhoads et al. eds., 2nd ed. 2004) (“If demand remains unchanged and supply decreases, a shortage altogether, thus leads to a higher equilibrium price.”).

⁸⁷ *See* REVIEW OF MARKETING ORDERS, *supra* note 8, at 88; *See also* Pineles, *supra* note 11, at 96.

⁸⁸ *See generally* MICROECONOMICS, *supra* note 89, at 33; *See* RICHARD J. SEXTON ET AL., RETAIL CONSOLIDATION AND PRODUCE BUYING PRACTICES 33 (2002) available at http://giannini.ucop.edu/Monographs/45_Produce.pdf.

With controls, excess quantity is either left unharvested or unsold, put into reserve pools and released in a controlled flow, or exported to foreign non-competitive markets.⁸⁹ This stabilizes year-to-year prices, removing some of the risk and uncertainty inherent in farming.⁹⁰

Quality control is another method of increasing crop prices and is largely accomplished through federally mandated inspections.⁹¹ These inspections enforce minimum quality standards with respect to maturity, appearance, or size, ensuring that the highest-quality product goes to market to meet consumer expectations, ultimately increasing price, demand, and farmers' return.⁹²

The third marketing order function, market support, aims to achieve "orderly marketing conditions" through packaging standardization, research, advertising and recordkeeping.⁹³ These functions do not directly affect price but serve a general marketing goal, to improve consumer perception over the long-term, and are modernly cited as the main purpose of marketing orders.⁹⁴ Research projects range from field research of new rootstock varieties⁹⁵ to lab testing of health benefits.⁹⁶ Recordkeeping serves another valuable industry function, whereby shipping information is gathered from handlers each year in order to set or predict prices and anticipate product excess or shortage.⁹⁷

The function of advertising, though not originally contemplated by the AMAA, has been adopted by most marketing orders and has become one of the most common aspects of market support today.⁹⁸ Advertising is conducted without respect to individual branding because of the all-

⁸⁹ See, e.g., 7 C.F.R. § 981.66(c) (2012) (reserve sales provisions of the California almonds marketing order); See REVIEW OF MARKETING ORDERS, *supra* note 8, at 27.

⁹⁰ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 57.

⁹¹ *Id.* at 21.

⁹² See *id.*

⁹³ See *id.* at 28.

⁹⁴ See *id.* at 1.

⁹⁵ See generally 2004 Research Projects, CALIFORNIA TREE FRUIT AGREEMENT (Dec. 8, 2004, 4:15 PM), <http://web.archive.org/web/20041208161556/http://www.caltreefruit.com/research/projects.asp> (accessed by searching for <http://www.caltreefruit.com/research/projects.asp> in the Internet Archive Index) (listing the various research projects funded by the peach and nectarine marketing orders in 2004); See Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

⁹⁶ Telephone Interview with Scott Johnson, CE Pomologist, Kearney Agricultural Research & Extension Center (Aug. 16, 2012); See also ORANGE COVE & MOUNTAIN TIMES, *supra* note 12.

⁹⁷ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 28.

⁹⁸ See Daniel I. Padberg & Charles Hall, *The Economic Rationale for Marketing Orders*, 5 SAN JOAQUIN AGRIC. L. REV. 73, 77-78, 87 (1995).

inclusive and mandatory nature of marketing orders.⁹⁹ Crops are advertised generically, with dancing raisins encouraging buyers to simply purchase “California Raisins”¹⁰⁰ and happy cows touting “Real California Milk.”¹⁰¹

Pursuant to the AMAA’s policy of supporting farmers, these marketing order functions are paid for by assessments on handlers by a per-unit (pound of crop or ton handled) basis.¹⁰² Foreign marketing, which has also become an important element of marketing orders, provides another source of funding whereby, upon application and formulation of a foreign marketing plan by the order, the USDA’s Market Access Program appropriates congressional funds for this specific purpose.¹⁰³

IV. A CHANGED ECONOMIC LANDSCAPE

A. *Shift from Family Farm to Corporate Farm*

For a period of three decades, from the AMAA’s creation in 1937 until the early 1970s, marketing orders expanded and thrived with little controversy, providing benefits to farmers, handlers and consumers alike.¹⁰⁴ Economic changes soon disrupted this balance, however. The shift from small family farms to large corporate farming operations during the twentieth century had a profound effect on the operation and practicality of marketing orders, which in many cases led to order termination.¹⁰⁵

As America transformed during the twentieth century from an industry-and-agriculture-dominated economy to a primarily service-oriented

⁹⁹ See generally Bensing, *supra* note 45, at 7 (providing at footnote 17 a litany of information regarding mandatory generic marketing requirements within marketing orders).

¹⁰⁰ See generally Harry Cline, *California raisins moving up consumption ladder once again*, WESTERN FARM PRESS (Apr. 9, 2008), <http://westernfarmpress.com/california-raisins-moving-consumption-ladder-once-again>. (detailing the history of the California Dancing Raisins campaign under the raisin marketing order, administered by the California Raisin Advisory Board).

¹⁰¹ See *Happy Cows TV*, CALIFORNIA MILK ADVISORY BOARD, <http://www.realcaliforniamilk.com/advertising/happy-cows-spots/> (last visited Nov. 23, 2012) (TV spots for the Happy Cows campaign under the milk marketing order, administered by the California Milk Advisory Board).

¹⁰² See Bensing, *supra* note 45, at 23; See REVIEW OF MARKETING ORDERS, *supra* note 8, at 31.

¹⁰³ See *Market Access Program Frequently Asked Questions*, U.S. DEP’T OF AGRIC., FOREIGN AGRIC. SERVICE [hereinafter “MAP FAQ”], <http://www.fas.usda.gov/mos/programs/maptoc.html> (last visited Nov. 23, 2012).

¹⁰⁴ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 2, 13.

¹⁰⁵ See, e.g., ORANGE COVE & MOUNTAIN TIMES, *supra* note 12.

one,¹⁰⁶ families moved out of rural agrarian regions to urban centers.¹⁰⁷ At its height, agriculture was the main source of income for nearly ninety percent of Americans, and today that number is less than five percent.¹⁰⁸ Even with the decline of family farms—down from 6.4 million in the early 1900s to fewer than 2.2 million today—the amount of land in production has steadily risen.¹⁰⁹ This consolidation of land has resulted in fewer but larger farms.¹¹⁰ The most recent economic recession of the late 2000s and an aging population of farmers exacerbated the family farm's decline.¹¹¹ Available credit and capital also became increasingly scarce as banks put harsher restrictions on lending.¹¹² These effects drove many small farms out of business, allowing capital intensive agricultural firms the opportunity to purchase small farms at depressed prices.¹¹³

The peach and nectarine industries have been no exception to this trend. In 1965, there were about 3,750 peach and nectarine producers,¹¹⁴ and that number was cut in half by 1995.¹¹⁵ Today, there are fewer than 500 producers,¹¹⁶ with one-fourth of those having incomes exceeding \$750,000.¹¹⁷ Consolidation of handlers also took place. In 1970, there were more than 700 peach and nectarine handlers,¹¹⁸ and that number dropped to 300 by 1995.¹¹⁹ Of those 300, only ten handlers (just three

¹⁰⁶ See *Employment status of the civilian noninstitutional population, 1941 to date*, UNITED STATES DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/cpsaat01.htm> (last modified Mar. 1, 2012).

¹⁰⁷ See *Urban and Rural Population: 1900 to 1990*, UNITED STATES DEP'T OF COMMERCE, UNITED STATES CENSUS BUREAU (1995), <http://www.census.gov/population/censusdata/urpop0090.txt.html> (last visited Nov. 23, 2012).

¹⁰⁸ See UNITED STATES DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *supra* note 106.

¹⁰⁹ See U.S. DEP'T OF AGRIC., *Agriculture Fact Book, Chapter 3*, at 24 available at <http://www.usda.gov/factbook/chapter3.pdf>.

¹¹⁰ *Id.*

¹¹¹ See generally Susan Montoya Bryan, *Nation's farmers, ranchers aging, USDA fears*, WASHINGTON POST (Apr. 9, 2012), http://www.washingtonpost.com/politics/nations-farmers-ranchers-aging-usda-fears/2012/04/08/gIQAPCem5S_story.html

¹¹² See Jim Prevor, *Pundit's Mailbag — Reshuffling The Tree Fruit Industry*, PERISHABLE PUNDIT (January 28, 2009) <http://www.perishablepundit.com/index.php?article=2036>.

¹¹³ See *id.*

¹¹⁴ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 14 tbl. 7.

¹¹⁵ See Nectarines and Peaches Grown in California; Suspension of Handling Requirements, 60 Fed. Reg. 30,994 (Jun 12, 1995).

¹¹⁶ See Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

¹¹⁷ See *id.*

¹¹⁸ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 16 tbl. 8.

¹¹⁹ 60 Fed. Reg. 30,994.

percent) had incomes exceeding \$5,000,000.¹²⁰ Today the number of handlers has dropped below 100, yet surprisingly, approximately half of those have reported incomes well over \$5,000,000.¹²¹

Agriculture has changed considerably since the AMAA's creation seventy-five years ago. One editorial columnist frankly stated, "Today's corporate farm is about as similar to a 1930s homestead as a massive air-conditioned tractor combine is to a team of horses."¹²² Indeed, the consolidation of small farms has greatly affected income distributions, making the vertically integrated corporate farm an industry norm.¹²³ Because of these economic changes, today's farmers have vastly different attitudes about the merits of marketing orders.

B. Loss of Industry Support and Marketing Order Terminations

As large farming operations grew, many expanded their efforts to perform a dual role as farmer-handlers and sought to advertise their own brands and take on other marketing functions.¹²⁴ These larger farmers soon grew concerned that the existing marketing order efforts conflicted with their own.¹²⁵ A cornerstone Supreme Court case, *Glickman v. Wileman Bros. & Elliot, Inc*, 521 U.S. 457, 460 (1997), exemplified this frustration.¹²⁶

Glickman involved numerous peach and nectarine farmer-handlers who were required to fund generic advertising through their federal marketing order, and believed this conflicted with their own advertising efforts.¹²⁷ They asserted that, because they were required to pay assessments to fund the marketing orders' advertising programs (of which they

¹²⁰ *Id.*

¹²¹ See 76 Fed. Reg. 66,602 (RFA analysis showing that more than half of all handlers have incomes more than six million).

¹²² Victor Davis Hanson, *Farm Subsidies: Welfare That Resists Reform*, IBDEDITORIALS.COM (Oct. 9, 2008, 4:08 AM), <http://web.archive.org/web/20081009040811/http://www.ibdeditorials.com/IBDArticles.aspx?id=278893934599144> (accessed by searching for <http://www.ibdeditorials.com/IBDArticles.aspx?id=278893934599144> in the Internet Archive Index).

¹²³ A vertically integrated farming operation is one that accomplishes all or most of the steps of agricultural production and marketing on its own. It purchases land and hires employees to farm the land, performs its own storage, packaging and branding, and can also have a transportation fleet and distribution network. It can perform research, marketing and export functions as well. See, e.g., CONSTABLE, *supra* note 21, at 73-84.

¹²⁴ See generally *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 460-66 (1997).

¹²⁵ See generally *id.*

¹²⁶ See generally *id.* at 457-506.

¹²⁷ *Id.* at 460-63.

did not approve), they had less available money to spend on their own branded advertising.¹²⁸ They asserted that this was a First Amendment issue of compelled speech.¹²⁹ The United States Supreme Court ultimately rejected Wileman Brothers' assertions on policy grounds, stating: "[t]he mere fact that one or more producers 'do not wish to foster' generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial."¹³⁰

In addition to advertising concerns, large farmer-handlers also believed marketing orders were slow to enforce packaging requirements, and that research was ineffective and did not suit their needs.¹³¹ They also viewed inspection provisions as unnecessary because large retailers began enforcing standards for incoming produce higher than what marketing orders required.¹³²

Marketing order frustrations, however, were not just held by large farmers. In the interest of efficiency, some of the high volume-bearing, corporate farms began to coordinate direct sale of their product to large retailers, exempting them from marketing order compliance altogether.¹³³ This cut out middle-market wholesalers who typically dealt with handlers within the marketing order, leaving fewer marketing options and increased frustration among small farmers.¹³⁴

Sentiment held by large farmer-handlers that the mandatory orders restrained their marketing options (and the concerns of small farmers) quickly spread across the fruit, nut and vegetable industries.¹³⁵ By the mid-1990s, twelve of the forty-seven orders which existed in the prior decade were terminated.¹³⁶ Most recently, 2011 marked the termination

¹²⁸ *Id.* at 470.

¹²⁹ *See id.*

¹³⁰ *Id.* at 477.

¹³¹ *See* Marni Katz, *State marketing order approved*, GOOD FRUIT GROWER (Aug, 2006), <http://www.goodfruit.com/Good-Fruit-Grower/August-2006/State-marketing-order-approved/>; *See* ORANGE COVE & MOUNTAIN TIMES, *supra* note 12.

¹³² *See* Melissa Hansen, *California peach and nectarine producers go it alone*, GOOD FRUIT GROWER (Jul, 2011), <http://www.goodfruit.com/Good-Fruit-Grower/July-2011/California-peach-and-nectarine-producers-go-it-alone/>.

¹³³ *See* RETAIL CONSOLIDATION AND PRODUCE BUYING PRACTICES, *supra* note 88, at 14-15, fig. 9; *See* REVIEW OF MARKETING ORDERS, *supra* note 8 at 57.

¹³⁴ *See* RETAIL CONSOLIDATION AND PRODUCE BUYING PRACTICES, *supra* note 88, at 14-15, fig. 9.

¹³⁵ *See generally* REVIEW OF MARKETING ORDERS, *supra* note 8, at 3.

¹³⁶ *See id.* at 1; *See, e.g.*, U.S. DEP'T OF AGRIC., ECONOMIC RESEARCH SERVICE, FEDERAL MARKETING ORDERS AND FEDERAL RESEARCH AND PROMOTION PROGRAMS 3 (1995) [hereinafter "1995 ERS Study"], available at <http://naldc.nal.usda.gov/download/CAT10697839/PDF>.

of the peach and nectarine marketing orders, two of the oldest and longest-standing orders under the AMAA.¹³⁷

C. Examining the Effects of Termination

Without a doubt, marketing orders have played a historically significant role in the preservation of small farms.¹³⁸ Quantity controls provided small farmers with the ability to reach more markets with greater efficiency than would have been otherwise attainable, and parity prices insulated farmers, ensuring profitability amid market fluctuations.¹³⁹ Quality controls and market support played an important role, and just months after termination, the peach and nectarine industries began to feel the adverse effects of the orders' absence, specifically in the areas of international marketing, recordkeeping and, most important, research.¹⁴⁰

These two orders have long served as a reliable and abundant source of funding for research projects,¹⁴¹ and in its final year the California Tree Fruit Agreement¹⁴² ("CTFA") spent \$500,000 of handlers' assessment-leveraged funds on research for peaches and nectarines.¹⁴³ Since termination, however, the CTFA has been forced to abandon all research projects.¹⁴⁴ These projects analyzed potential cancer-fighting benefits of peaches,¹⁴⁵ rootstock development, and pest-and-crop disease management.¹⁴⁶ Voluntary grower organizations, such as the California Grape and Tree Fruit League, have agreed to take on some projects for which its members have a shared interest, though these too will eventually expire.¹⁴⁷ Moving forward, research will likely be accomplished exclusively by the largest farmers who have the resources to fund it, and whose interests will be privately driven and serve little industry benefit.¹⁴⁸ Without marketing orders, small farmers are left without a dedi-

¹³⁷ See Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

¹³⁸ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 57.

¹³⁹ See *id.* at 61.

¹⁴⁰ See Hansen, *supra* note 132.

¹⁴¹ Telephone Interview with Scott Johnson, *supra* note 96.

¹⁴² The CTFA was the administrative organization that administered the peach and nectarine orders. See, e.g., *id.*

¹⁴³ ORANGE COVE & MOUNTAIN TIMES, *supra* note 12.

¹⁴⁴ Telephone Interview with Scott Johnson, *supra* note 96.

¹⁴⁵ ORANGE COVE & MOUNTAIN TIMES, *supra* note 12.

¹⁴⁶ See Hansen, *supra* note 132.

¹⁴⁷ Telephone Interview with Scott Johnson, *supra* note 96.

¹⁴⁸ See ORANGE COVE & MOUNTAIN TIMES, *supra* note 12 (expressing frustration with marketing orders, a large corporate farm owner stated, "I oppose the mandatory nature of marketing orders, not necessarily the activities that the marketing order performs. Our

cated outlet for tailored innovation in an increasingly technological industry.

In the final year of the orders' operation, the CTFA also spent 2.5 million dollars of foreign marketing funds obtained through the USDA's Market Access Program.¹⁴⁹ These funds assisted in the promotion of exports, which made up nearly a quarter of all peach and nectarines sold.¹⁵⁰ With the orders' termination, access to these funds has been cut off, and market support in foreign countries is restricted.¹⁵¹ This loss will have a substantial impact on farmers who do not have the resources to conduct foreign marketing.¹⁵² Another tangible loss suffered as a result of terminations has been the immediate halt of industry recordkeeping.¹⁵³ As recently as last year, this caused unavailability of industry data such as annual crop estimates, shipment data, as well as planting and removal trends, which will undoubtedly continue to affect large and small farmers alike.¹⁵⁴

Despite the AMAA's policy of protecting farmers, and its degree of success in doing so, the industry has willingly chosen to terminate marketing orders time and time again.¹⁵⁵ The palpable losses that result will likely reinforce a trend toward fewer and larger farming operations, aggravating the decline of small farmers in the future.¹⁵⁶ This disconnect between marketing order policy and execution exposes the recent shortcomings of order administration, as well as the USDA's disinterest in adapting to a changed economy, exposing its clear departure from the long-held policy of protecting small farmers.

V. A DISCONNECT FROM AMAA POLICY

Within the text of the USDA's final rule effectively ending the peach and nectarine orders, a terse explanation of its action was provided: "it

family voluntarily funds certain activities outside the marketing order. For example, several other shippers and I contributed to a campaign to publicize a study about a potential health benefit of peaches.").

¹⁴⁹ See Hansen, *supra* note 132.

¹⁵⁰ See *id.*

¹⁵¹ See Don Schrack, *Future of California Tree Fruit Agreement in jeopardy*, THE PACKER (Mar. 30, 2011), <http://www.thepacker.com/fruit-vegetable-news/122131424.html>.

¹⁵² See *id.*

¹⁵³ See Rand Green, *Calif. Stone fruit crop down about 18 percent*, THE PRODUCE NEWS (May 3, 2012), <http://theproducenews.com/index.php/markets-and-trends/7697-california-stone-fruit-crop-thought-to-be-down-about-18-percent-after-hailstorms>.

¹⁵⁴ *Id.*

¹⁵⁵ See 1995 ERS Study, *supra* note 136 at 3.

¹⁵⁶ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 68-69.

has been determined that the provisions of the orders no longer tend to effectuate the declared policy of the Act and should be terminated.”¹⁵⁷ However, it is not simply that the marketing orders failed to effectuate the declared policy of the Act but that, despite dramatic economic changes that occurred since the AMAA’s creation, the USDA has failed to reconcile the resulting procedural shortcomings, and failed to adhere to the analytical framework of the APA and RFA (which may have otherwise ensured rational rulemaking made within with the policy of the Act).¹⁵⁸

A. *Marketing Orders’ Recent Administrative Shortcomings*

Central to the issue is the shift toward large corporate farms and the implications this has on AMAA administration, giving rise to some of the same fundamental problems AMAA was originally created to prevent.¹⁵⁹

Though marketing order committees function as representative governments, farmers’ needs have not always been adequately represented by them.¹⁶⁰ Consequently, with a greater number of large farmer-handlers serving on committees, the risk of bias is increased.¹⁶¹ Large farmer-handlers sitting on committees in greater numbers have become empowered to propose changes that benefit themselves but harm small farmers. In 2005, peach and nectarine committee members proposed to modify the definition of “grower” under their orders to allow officers of corporate farms to serve on the committees as well.¹⁶² This modification, which was finalized the following year,¹⁶³ codified the committee’s ongoing practice and aggravated the risk of bias in favor of larger farmers, paving the way for more rapid changes by these emboldened corporate farmers. In the next three years, assessment rates charged to handlers were subsequently lowered and handler reporting requirements relaxed.¹⁶⁴ In 2007, mandatory inspection provisions were eliminated,¹⁶⁵ and domestic advertising soon followed.¹⁶⁶

¹⁵⁷ Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

¹⁵⁸ See Pineles, *supra* note 11, at 114-15.

¹⁵⁹ See *supra* Part II.B.

¹⁶⁰ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 56.

¹⁶¹ See *id.* at 57.

¹⁶² See Order Amending Marketing Order Nos. 916 and 917, 71 Fed. Reg. 41,345 (Jul. 21, 2006).

¹⁶³ *Id.*

¹⁶⁴ See Revision of Handling Requirements for Fresh Nectarines and Peaches, 72 Fed. Reg. 49,128 (Aug. 28, 2007).

Surprisingly, some of these modifications, and even the final rule terminating the peach and nectarine orders, were not pushed through unilaterally by the Secretary, but instead were subject to an industry vote of farmers, but because of the effect that high volume-bearing corporate farms had on voting results, these changes were passed.¹⁶⁷ Large corporate farms now represented a disproportionately high percentage of industry volume, and small farms constituted a smaller percentage.¹⁶⁸ This made it increasingly difficult for small farmers to reach the needed two-thirds volume requirement in the event that a simple two-thirds farmer vote could not be reached. Corporate farms, on the other hand, had a much easier time reaching volume-based voting requirements.¹⁶⁹

In late 2011, when the peach and nectarine marketing orders were put to continuance referendum, a clear majority of nectarine producers—sixty-three percent—voted to continue their order.¹⁷⁰ Sixty-two percent of peach farmers voted in support of their order.¹⁷¹ However, these smaller farmers only represented thirty-six percent of their respective crop's volume and therefore failed to meet the two-thirds farmer or volume-based requirement necessary for marketing order continuation.¹⁷² As a result of the disparate volume allocation between small and large farmers, the continuance referenda failed, causing termination of these two orders.¹⁷³

The problem of committee bias and the effect that volume disparities had on voting results mirrors the earliest problems that AMAA drafters sought to prevent: the potential for large industry members to take advantage of small farmers because of their market power and position.¹⁷⁴ Though this problem stands in stark contrast with the spirit and policy of the AMAA, the USDA has seemingly turned a blind eye to it. Similarly emblematic of the USDA's desire to depart from the Jeffersonian spirit is its repeated ignorance of the analytical framework of the APA and RFA.¹⁷⁵

¹⁶⁵ *See id.*

¹⁶⁶ *See* Schrack, *supra* note 151.

¹⁶⁷ *See id.*; *See* Hansen, *supra* note 132.

¹⁶⁸ *See* Hansen, *supra* note 132.

¹⁶⁹ *See generally* Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011) (voting results showing the influence that large farmers carried as a result of volume requirements).

¹⁷⁰ Schrack, *supra* note 151.

¹⁷¹ *Id.*

¹⁷² ORANGE COVE & MOUNTAIN TIMES, *supra* note 12.

¹⁷³ 76 Fed. Reg. 66,602.

¹⁷⁴ *See* Bensing, *supra* note 45, at 8.

¹⁷⁵ *See* Pineles, *supra* note 11, at 117-18.

*B. Ignorance of APA and RFA Rules and a Disregard
for the Jeffersonian Spirit*

Jefferson was a strong proponent of government support for farmers in the form of tax breaks and other exemptions.¹⁷⁶ He would have likely viewed the AMAA as a useful industry function, so long as it was implemented in a consistent manner like the federal bankruptcy laws he advocated.¹⁷⁷ The APA was created to ensure such consistent procedure.¹⁷⁸ In practice, however, the USDA's attempt to adhere to these procedures has been, at best, half-hearted.¹⁷⁹ Since the APA's creation, the USDA has routinely exercised unchecked power, often issuing regulations based on its own predetermined course of action, and selectively choosing comments as rationale to support its foregone conclusions.¹⁸⁰

Provisions of the RFA have also been met with similarly cavalier conduct, which is a greater disappointment considering the RFA's specific role in recognizing and mitigating the harmful small business impacts of administrative action.¹⁸¹ The result has been a surprisingly superficial level of analysis that only observes the most immediate impacts of regulations and ignores the lasting implications.¹⁸² In the final rulemaking that terminated the peach and nectarine orders, RFA analysis considered the prospect of not terminating the marketing orders, but quickly rejected this view simply on the grounds that the recent order modifications "failed to improve the programs enough to warrant continuing grower support," concluding that further refinement would be useless.¹⁸³ The analysis did not, in any detail, analyze what those modifications were or why they failed to improve the order.¹⁸⁴ It also did not observe the small business impact of keeping the orders in place.¹⁸⁵ After a litany of boilerplate analysis (present in all RFA certifications)¹⁸⁶ it went on to identify only the benefits to marketing order termination.¹⁸⁷ It identified a

¹⁷⁶ Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy*, 12 STAN. ENVTL. L.J. 3, 46-48 (1993).

¹⁷⁷ *See id.*

¹⁷⁸ *See* Pineles, *supra* note 11, at 98.

¹⁷⁹ *Id.* at 117-18.

¹⁸⁰ *See id.* at 111, 114-15

¹⁸¹ *See id.* at 113; *See* RFA Guide, *supra* note 68, at 1.

¹⁸² *See* Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*; *See* Pineles, *supra* note 11, at 113.

¹⁸⁷ *See* 76 Fed. Reg. 66,602.

reduced cost to handlers and growers but did not detail the extent of those costs or differentiate which costs were charged to farmers and which were charged to handlers.¹⁸⁸ It also identified a decreased paper-work burden on handlers,¹⁸⁹ but ignored the reality that these burdens were not something of which handlers typically complained.¹⁹⁰

VI. RECONCILING THE COMPETING INTERESTS OF SMALL FARMER PROTECTION AND ECONOMIC EFFICIENCY

A. *Putting the AMAA in its Proper Context*

A report conducted by the USDA in 1981 as part of a greater government initiative to reassess various regulatory programs furnished a straightforward justification for marketing orders.¹⁹¹ Appropriately subtitled “Economic Efficiency and Welfare Implications,” it provided that the use of marketing orders should be avoided unless they offer efficiency gains, or otherwise achieve some societal interest that supersedes the goal of efficiency.¹⁹²

The preservation of small family farms has long been a societal interest of government, though it is not based solely on romanticized Jeffersonian beliefs but also on the greater pragmatic concern that a reduction in farm numbers could have adverse economic implications across multiple industries, especially rural communities.¹⁹³ Coupled with the reality that free markets have the potential to create undesirable income distributions, government has frequently intervened with market controls designed to protect societal interests, and the AMAA is one example of such action.¹⁹⁴

Government has taken a hands-off approach to the AMAA in recent years, shown by the USDA’s failure to address AMAA shortcomings in light of economic changes, and failure to conform to the tenets of the APA and RFA.¹⁹⁵ It may well be the case that, as small farms began to disappear, so did the government’s societal interest in protecting them. If this is true, then the government may have been justified in allowing

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See* REVIEW OF MARKETING ORDERS, *supra* note 8, at 53.

¹⁹¹ *See generally id.*

¹⁹² *See id.* at 32.

¹⁹³ *See id.* at 57.

¹⁹⁴ *See id.* at 21.

¹⁹⁵ *See* Pineles, *supra* note 11, at 117-18; *See supra* Part V.A.-B.

the hand of the free market establish more efficient market conditions.¹⁹⁶ But if protection of the small farmer is still a societal interest that supersedes the interests of economic efficiency, action should be taken to correct marketing order shortcomings and require adherence to the existing analytical framework, or issue some alternative that confers similar benefits to farmers.

B. Maintain Marketing Orders

1. Correct Recent Administrative Shortcomings

If marketing orders are to remain as useful industry tools that provide benefits to farmers, they must be modified to reflect current industry needs. Before this can be done, however, order administration must be safeguarded to ensure equitable rulemaking that does not favor one class of farmer over another and that is backed by significant industry support.

A significant issue affecting equitable administration of marketing orders is the effect that large corporate farmers have had on membership and recommendations of committees.¹⁹⁷ To remedy this problem, marketing order committees should require greater small farmer and non-industry participation.¹⁹⁸ Small farmer committee representation should more closely reflect the percentage of small farmers in the given industry. The principal advantage of this would be simply to mitigate bias in favor of large corporate farmers and ensure that regulations are promulgated with all industry members in mind.¹⁹⁹ Similarly, non-industry committee participation would allow direct input from individuals with different viewpoints and less proprietary, profit-motivated interests. Since marketing orders function as a self-serving industry function, it is important that non-industry members constitute a small percentage of the committee membership, not a controlling majority.²⁰⁰ It is also important that the Secretary carefully select these industry members to adequately reflect the overall industry composition.

Another significant concern affecting equitable administration is the effect that high volume-bearing corporate farms have on voting results

¹⁹⁶ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 32 (conclusion reached through application of rule set forth in report).

¹⁹⁷ See *supra* Part V.A.

¹⁹⁸ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 79-80; "Non-industry" in this context refers to individuals with specialized knowledge of agriculture but without a direct financial interest in the given commodities. These individuals could be agricultural economists, academics, editors or researchers.

¹⁹⁹ See *id.* at 80.

²⁰⁰ *Id.*

and the risk of regulations being passed without adequate industry support.²⁰¹ To correct this imbalance, approval for order creation, modification, and termination should require broad acceptance by two-thirds of farmers *and* two-thirds of representative volume, rather than just one of these.²⁰² This would make it more difficult for marketing order changes to be made by a numerical minority of high volume-bearing farmers, who might unfairly benefit as a result of their market power and position.²⁰³ It would instead require support by a numerical majority of farmers, both large and small.²⁰⁴ Another useful change would be to remove the periodic continuance referenda or make it function like a termination vote, by requiring farmers vote (by a two-thirds farmer *and* volume majority) in favor of order termination instead of order continuance. This change would ensure that orders could not be terminated without widespread industry support.²⁰⁵

2. Prevent Procedural Abuses

Even with alleviation of these administrative shortcomings, marketing orders would still be susceptible to atrophy because of the USDA's ignorance of the APA and RFA's analytical framework.²⁰⁶ To protect against future abuse, all AMAA rulemaking should, at the very least, fall within the APA's lowest level of procedure, informal rulemaking, which requires the USDA establish a record for all of its determinations.²⁰⁷ Unilateral action by the Secretary should also be on record. These changes would ensure full transparency and consistency in the rulemaking process and trigger the RFA more often, which is also ripe for improvement.

The RFA certification needs to be followed not as the USDA deems sufficient but as it was intended, to ensure that small business impacts are adequately addressed.²⁰⁸ Analyses should determine the true extent of regulations' impact, both positive and negative. They should not only observe changes in monetary or paperwork burdens, but also long-term economic and societal impacts. In analyzing whether less-burdensome alternatives exist, they must conduct a similar, thorough analysis of those

²⁰¹ See *supra* Part V.A.

²⁰² See REVIEW OF MARKETING ORDERS, *supra* note 8, at 78-79.

²⁰³ See *supra* Part V.A.

²⁰⁴ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 78-79.

²⁰⁵ See *id.*

²⁰⁶ See generally *Pineles*, *supra* note 11, at 114-15 (discussing the "Cal-Almond" litigation which ensued as a result of the USDA's failure to conduct rulemaking consistent with the APA and RFA).

²⁰⁷ *Pineles*, *supra* note 11, at 117.

²⁰⁸ See *supra* Part II.C.

alternatives. This will ensure that all potential small business impacts are adequately addressed.

C. *Alternative Courses of Action*

Quality control, quantity control and market support are all important industry functions that provide benefits to consumers, handlers and large and small farmers alike.²⁰⁹ Absent marketing orders, a need for these functions still exists and can be partially satisfied by voluntary cooperatives, private enterprise, or alternative government programs.²¹⁰ Unfortunately, these are not perfect solutions.²¹¹ Voluntary cooperatives often give rise to the “free-rider” problem, which tends to diminish cooperative efforts.²¹² The private enterprise solution only confers benefits to those businesses which have the resources to engage in such marketing functions.²¹³ Finally, alternative government programs do not always ensure the level of funding generated by handler assessments.²¹⁴

It is fruitless to determine, for every crop and in every instance, which marketing order functions should remain and which should be discontinued, but economic trends offer some indication about the effectiveness of certain functions over the years. Those that have stood the test of time have been research, foreign marketing, and recordkeeping.

In the absence of a marketing order, research is one area in which small farmers have been hit hardest.²¹⁵ This function is already utilized through legislation allowing federal research on a crop-by-crop basis,²¹⁶ but where marketing orders might fund ninety percent of proposed research projects, the government funds considerably less.²¹⁷

Recordkeeping is another industry function that has proved to be of vital importance for all industry members, both large and small.²¹⁸ This function could be conducted through the USDA Agriculture Marketing Service’s Market News program, which already assists in the collection of price and sales data for numerous crops.²¹⁹ The concern, however, is

²⁰⁹ See *supra* Part III.B.

²¹⁰ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 33, 62, 66.

²¹¹ See *id.* at 64; See *supra* Part II.A.

²¹² See REVIEW OF MARKETING ORDERS, *supra* note 8, at 66.

²¹³ See *supra* Part II.A.

²¹⁴ Telephone Interview with Scott Johnson, *supra* note 96.

²¹⁵ *Id.*

²¹⁶ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 73.

²¹⁷ Telephone Interview with Scott Johnson, *supra* note 96 (estimating that the government only funds about five percent of proposed agricultural research projects).

²¹⁸ See Green, *supra* note 153.

²¹⁹ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 71-72.

that this would likely impose mandatory reporting requirements on farmers and could be burdensome.²²⁰

The foreign marketing function of marketing orders gathers congressionally-apportioned funds and implements a generic advertising campaign with those funds.²²¹ Absent an order, individual farmers could apply for Market Access Program funds directly through the Western United States Agricultural Trade Association (or similar organizations), whose goal is to help farmers expand to international markets.²²²

By far, one of the most controversial marketing functions is advertising.²²³ These programs have suffered immense dissatisfaction by large farmers who reasonably felt the marketing orders' advertising conflicted with their proprietary business interests.²²⁴ A voluntary option could be proposed but would be subject to the "free-rider" problem.²²⁵

Similarly, inspection and minimum grading standards are no longer critical components of marketing orders for most crops, as large retailers have chosen to take on these duties instead.²²⁶

Concerns about the potential imbalance of market power could be mitigated through the use of bargaining associations, which offer small farmers a means to sell their product. However, these lack ancillary market support functions.²²⁷

VII. CONCLUSION

The Jeffersonian spirit of protecting small farmers has long been an interest of American policy and served as a catalyst for marketing orders' creation. Today, however, it seems that the government has sought greener pastures of economic efficiency by embracing the large corporate farm and, in turn, casting the small family farmer aside.²²⁸ Emblematic of this change has been the USDA's repeated ignorance of the APA

²²⁰ See *id.* at 72.

²²¹ See MAP FAQ, *supra* note 103.

²²² See *id.*

²²³ See generally Jeremiah Paul, Comment, *Is a Grape Just a Grape? California Table Grape Commission's Mandatory Assessment Funded Generic Advertising Scheme vs. Grower's First Amendment Rights*, 21 SAN JOAQUIN AGRIC. L. REV. 207 (2012) (providing a more in-depth discussion on marketing order advertising concerns).

²²⁴ See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997).

²²⁵ See *supra* Part II.A.

²²⁶ See ORANGE COVE & MOUNTAIN TIMES, *supra* note 12; See Hansen, *supra* note 132.

²²⁷ See REVIEW OF MARKETING ORDERS, *supra* note 8, at 85.

²²⁸ See generally Hanson, *supra* note 122 (illustrating the shift in government focus through excessive corporate farm subsidies).

and RFA's analytical measures which exist to ensure otherwise equitable order administration.

As the government allowed the free hand of the market to control the industry, the administrative shortcomings of marketing orders were quickly exposed. Soon, order committees resembled cartels for large agricultural interests instead of representative industry voices as they were intended. Unfortunately, certain industries have now reached a tipping point, with their marketing orders terminated or on the brink of termination, and the loss of marketing functions palpable.²²⁹ Moving forward, the first step toward small farmer protection is for government to recodify its societal interest by adhering to the analytical administrative measures already in place, as well as the Jeffersonian spirit and policy that prompted the AMAA's creation.

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²²⁹ See *supra* Part IV.B.-C.

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