

# ORGANIZED ROBBERY: HOW FEDERAL MARKETING ORDERS AMOUNT TO UNCONSTITUTIONAL TAKINGS WITHOUT JUST COMPENSATION

*Wherever law ends, tyranny begins.*<sup>1</sup>

## I. INTRODUCTION

John Locke, one of America's most prominent philosophers of property rights, once expressed that fairness and justice for all citizens are the cornerstones of a modern democratic system.<sup>2</sup> Once the government exceeds its legal authority or in any way violates the law, it ceases to be in authority.<sup>3</sup> Instead, the government may be opposed as any other person might when invading the right of another.<sup>4</sup> This concept was recently exemplified by a farmer who had a substantial amount of his crop taken by the government without just compensation.

Most are unaware of the many rules and regulations that govern the farmers who grow crops that consumers enjoy and need. Farmers begin by purchasing acres of land to plant crops, which may take years of growing before they can be harvested for profit.<sup>5</sup> Farmers labor day and night in their fields cultivating and nurturing their crops.<sup>6</sup> Then, after all of their efforts, the government orders farmers to give up as much as half of their yield due to an outdated order on their crop requiring them to give up as much as half of the commodity they have produced.<sup>7</sup> These requirements are set forth by Federal Marketing Orders, which have

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<sup>1</sup> *Two Treatises of Government*, Locke, John, Section 202 of Chap. XVIII Of Tyranny, 1689.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Stephen A Neff, and Gerald E. Plato., *Should Federal Marketing Orders and Federal Research and Promotion Programs: Background for 1995 Farm Legislation*, 1995, at 1.

<sup>6</sup> *Id.*

<sup>7</sup> Michael Doyle, *At U.S Supreme Court, Rules for Valley Raisins get Scoopful of Arguments*, FRESNO BEE (Apr. 22, 2015), <http://www.fresnobee.com/news/business/agriculture/article19671717>.

been in effect since the Great Depression.<sup>8</sup> The overall purpose of a Federal Marketing Order is to stabilize the market and create a positive flow for supply and demand.<sup>9</sup>

In *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 192 L.Ed. 2d 388 (2015), one farmer took Locke's theory to heart and challenged the order.<sup>10</sup> The United States Supreme Court held that the marketing order requiring a raisin farmer to give up almost half of his crop was unconstitutional because he was not being compensated.<sup>11</sup> This case was a ten-year legal battle for Mr. Horne and made its way to the Supreme Court twice before he ultimately prevailed.<sup>12</sup>

This Comment will discuss the illegality of Federal Marketing Orders as a government program that harms consumers by raising the price of popular fruits, vegetables, or nut crops while denying farmers the constitutional and economic freedom to sell perfectly legal produce. Part II will explain the history of Federal Market Orders and their function. Part III will discuss the history and creation of the Raisin Administrative Committee. Part IV will review the *Horne* decision, which found a Federal Marketing order in violation of the takings clause of the Fifth Amendment of the United States Constitution. Part V will compare cranberries and almonds, two commodities with volume regulations similar to raisins, and apply the takings clause to those orders. This Comment will recommend in Part VI the reformation of other Federal Marketing Orders still in effect by assessing them under the new framework set forth by the Supreme Court. Finally, this comment will conclude that the use of Federal Marketing Orders in the future must be altered to properly protect the Constitutional rights of agricultural growers.

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<sup>8</sup> *Id.*

<sup>9</sup> John M. Halloran, *Federal Marketing Orders: Their History and Purpose*, 1994, at 52.

<sup>10</sup> *Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015).

<sup>11</sup> *Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015); Interview with Marvin Horne, Owner, Raisin Valley Farmer, in Selma, California (October 20, 2015).

<sup>12</sup> *Horne v. Dep't of Agric.*, 135 U.S. Ct. 2419 (2015); Interview with Marvin Horne, *supra* note 11.

## II. FEDERAL MARKETING ORDERS

### A. *What is a Federal Marketing Order?*

After the Great Depression, the American economy was in shambles.<sup>13</sup> Major effects of the Great Depression included banks losing money, industrial factories being forced to conduct massive layoffs, and the depletion of agricultural markets.<sup>14</sup> With regard to agriculture, the supply substantially outweighed the peoples' demand and ability to pay for their food.<sup>15</sup> In response, President Franklin Roosevelt introduced the New Deal with the goal to accomplish social and economic reform.<sup>16</sup> As part of Roosevelt's New Deal, in 1933 Congress passed the Agricultural Adjustment Act ("AAA") to provide economic relief to farmers.<sup>17</sup> The AAA raised farm prices by imposing restrictions on the quantity of agricultural commodities that could be produced.<sup>18</sup> The creation of the AAA would later give rise to the Federal Marketing Orders that exist today.<sup>19</sup>

Four years after the passing of the AAA, Congress enacted The Agricultural Marketing Agreement Act of 1937 ("AMAA") as an amendment to the AAA because there were concerns about its constitutionality.<sup>20</sup> Under the Declaration of Policy set forth in the statute, the purpose of the AMAA was to:

1. Establish and maintain orderly market conditions for agricultural commodities in interstate commerce.
2. Protect the interest of consumers by approaching the level of prices declared by Congress and the Secretary of Agriculture to be in the public interest and feasible in the current demand of domestic and foreign markets.
3. Establish and maintain production and marketing research as well as development projects.
4. Provide minimum standards of quality and maturity similar to inspection requirements for commodities.<sup>21</sup>

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<sup>13</sup> John M. Halloran, *supra* note 9, at 3.

<sup>14</sup> John Hardman, *The Great Depression and the New Deal*, 1999, at 1.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Federal Marketing Orders and Agreements: An Overview*, See generally The National Agricultural Law Center, 2005, at 2.

<sup>19</sup> *Id.*

<sup>20</sup> See generally The National Agricultural Law Center *supra* note 18, at 3; Stephen A. Neff and Gerald E. Plato, *supra* note 5, at 3.

<sup>21</sup> See *Agricultural Marketing Agreement Act of 1937*, 7 U.S.C. § 608(c)(6).

The AMAA has been amended several times since its enactment, but the overall structure has remained the same.<sup>22</sup> The AMAA regulates the prices of commodities when they are sold in interstate commerce to avoid a disruption in the value of the crops to both farmers and consumers.<sup>23</sup> In order to achieve that goal, the AMAA establishes marketing orders and marketing agreements for milk as well as twenty other commodities including fruits, vegetables, nuts, and specialty crops.<sup>24</sup>

Under the AMAA there are marketing orders and marketing agreements.<sup>25</sup> A commodity can be regulated by a marketing order or marketing agreement, which apply to handlers and growers of that particular commodity.<sup>26</sup> A handler, often referred to as a processor or packer, is a person that gives, transports, ships, or in any other way introduces the commodity into interstate commerce.<sup>27</sup> A grower is classified as a farmer, a person that grows the crops on his land.<sup>28</sup> The difference between a marketing order and a marketing agreement is that a marketing agreement binds the handlers and growers who voluntarily consent to it and sign it.<sup>29</sup> On the other hand, a marketing order binds all individuals and businesses classified as handlers in particular geographic locations covered by the particular order.<sup>30</sup> Marketing orders are determined by majority vote and are binding on everyone, even those who do not favor them.<sup>31</sup> For example, the Spearmint Marketing Order is binding on all handlers and growers in the far west, including

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<sup>22</sup> John M Halloran, *supra* note 9, at 1.

<sup>23</sup> *See Agricultural Marketing Agreement Act of 1937*, 7 U.S.C. § 608(c)(6).

<sup>24</sup> *See* United States Department of Agriculture, *Commodities Covered by Marketing Orders*, United States Department of Agriculture (<https://www.ams.usda.gov/rules-regulations/moa/commodities> (last visited Sept. 4, 2016) (covering almonds, apricots, avocados, cherries (sweet and tart), citrus, cranberries, dates, grapes, hazelnuts, kiwifruit, olives, onions, pears, pistachios, plums/prunes, potatoes, raisins, spearmint oil, tomatoes, and walnuts); *see also Federal Marketing Orders and Agreements: An Overview*, The National Agricultural Law Center, 2005, at 3-4.

<sup>25</sup> *See generally* The National Agricultural Law Center, *supra* note 18, at 3-4.

<sup>26</sup> Matt Milkovich, *Marketing Orders, Agreements Perform Different Functions*, (2011).

<sup>27</sup> The National Agricultural Law Center, *supra* note 18, at 3.

<sup>28</sup> *See Agricultural Marketing Agreement Act of 1937*, 7 U.S.C. § 608(c)(6).

<sup>29</sup> *See generally* The National Agricultural Law Center, *supra* note 18 at 4.

<sup>30</sup> *See generally id* at 3.

<sup>31</sup> *See generally id*.

Washington, Idaho, Oregon, and parts of Nevada and Utah.<sup>32</sup> The constitutional arguments addressed by the *Horne* case, which are also apparent in other commodities, are related to marketing orders.<sup>33</sup> Federal Marketing Orders are a large part of modern agriculture and many growers are impacted by their requirements.<sup>34</sup>

*B. How Marketing Orders are Established and Executed*

A Federal Marketing Order can be proposed in two ways.<sup>35</sup> First, the Secretary of Agriculture may request a Federal Marketing Order, or alternatively a handler may request one from the Secretary of Agriculture through a written application.<sup>36</sup> Handlers would choose to make such a request because they believe there is an issue in the industry regarding their commodity that needs further regulation.<sup>37</sup> One such issue that would compel a handler to make such a request, for example, could be a commercial marketing problem in that particular industry.<sup>38</sup> In response, handlers in that particular commodity may want a market order to regulate the way commercial marketing for their commodity is handled.<sup>39</sup> Handlers may be looking to solve that problem with more industry research, which may be too burdensome and expensive for one handler to accomplish on his own.<sup>40</sup>

The marketing orders operate through funds collected by committees made up of handlers and growers of the commodity, not the government or taxpayers.<sup>41</sup> Each marketing order for a commodity must have at least one of the following provisions in order to qualify as a marketing order: generic advertising, sales promotion, market research, quality control with inspection, supply management, volume control, and prohibition

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<sup>32</sup> See *United States Department of Agriculture*; 985 Spearmint Oil Marketing Order.

<sup>33</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

<sup>34</sup> See generally The National Agricultural Law Center *supra* note 18 at 3.

<sup>35</sup> See generally *id.* at 4.

<sup>36</sup> See generally *id.*

<sup>37</sup> Hoy Carman, *California Agriculture* 61(4), October-December 2007, at 1.

<sup>38</sup> *Federal Marketing Orders and Agreements: An Overview*, The National Agricultural Law Center, 2005, at 4; (a marketing problem that could arise would be volume regulation, research, or quality control).

<sup>39</sup> *Id.* (stating that a marketing problem that could arise would be volume regulation, research, or quality control).

<sup>40</sup> *Id.*

<sup>41</sup> John M. Halloran, *supra* at note 9, at 52.

of unfair trade practices.<sup>42</sup> After the request is completed, under regulations set forth by the AMAA and Administrative Procedure Act, an Administrator investigates the proposal to determine if there is good cause for the issuance of an order.<sup>43</sup> This involves a consideration of whether a marketing order will adhere to the declared policy of the AMAA for that particular commodity.<sup>44</sup>

If the Administrator determines that the proposed order will benefit the industry for a particular commodity and will adhere to the AMAA's declared policy, then there must be an opportunity for a hearing on the proposed marketing order.<sup>45</sup> The Administrator issues his recommended decision based upon each of the proposed findings or conclusions submitted by an interested handler.<sup>46</sup> He then has the option to approve or deny the request of the proposed marketing order.<sup>47</sup> If the Administrator approves the order, the Secretary of Agriculture holds a public hearing on the proposed marketing order and all producers in that jurisdiction can attend.<sup>48</sup> If it is determined to be in the public's interest and a simple majority of handlers favor it, then the proposed marketing order proceeds to a producer referendum.<sup>49</sup> The final step in establishing a marketing order requires a two-thirds majority vote from handlers in the proposed marketing order jurisdiction, and, once passed, that order is binding on all handlers.<sup>50</sup>

Once a marketing order is established for a particular commodity, a committee of handlers is created.<sup>51</sup> The committee is made up of handlers appointed by the United States Department of Agriculture ("USDA") as well as industry nominated handlers for that particular

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<sup>42</sup> Hoy Carman, *California Agriculture* 61(4), October-December 2007, at 2; *See Agricultural Marketing Agreement Act of 1937*, 7 U.S.C. § 608(c)(6).

<sup>43</sup> *Federal Marketing Orders and Agreements: An Overview*, The National Agricultural Law Center, 2005, at 4; *Administrative Procedure Act 5 USC 551-706* (governing the way in which administrative agencies, such as the United States Department of Agriculture, of the federal government may propose and establish regulations).

<sup>44</sup> *See generally Federal Marketing Orders and Agreements: An Overview*, The National Agricultural Law Center, 2005, at 4.

<sup>45</sup> *See generally id.*

<sup>46</sup> *See generally id.*

<sup>47</sup> *See generally id.* at 3.

<sup>48</sup> *See generally id.* at 4.

<sup>49</sup> *California Agriculture* 61(4), Carman, Hoy, October-December 2007, at 2. Handlers are also referred to as producers. *Id.*

<sup>50</sup> Hoy Carman, *California Agriculture* 61(4), October-December 2007, at 3.

<sup>51</sup> *Id.* at 3.

commodity.<sup>52</sup> The committee meets before each crop season to draft regulations.<sup>53</sup> These meetings are not open to the public nor are there records of the meetings kept.<sup>54</sup> The regulations that are made are enforced against all handlers of the commodity during its growing season.<sup>55</sup> There are many commodities that are impacted by marketing orders and each operates differently according to the needs of the industry.<sup>56</sup> One of the Federal Marketing Orders, which has now gained notoriety as a result of the *Horne* case, is the one that applies to raisins.<sup>57</sup>

### III. THE RAISIN ADMINISTRATIVE COMMITTEE

Under the Raisin Federal Marketing Order, the Raisin Administrative Committee (RAC) was created in 1949.<sup>58</sup> The RAC is comprised of thirty-five members who serve two-year office terms beginning on May 1.<sup>59</sup> The main function of the RAC is to collect delivery data weekly, collect shipment data monthly, publish an annual report of industry statistics that include policies of the industry, directly market into fifteen foreign nations, and collaborate with the USDA's Agricultural Marketing Service.<sup>60</sup>

RAC determines the allocation of raisins that growers are required to forfeit to the raisin reserve each year.<sup>61</sup> As a result, raisin farmers are required to grow and harvest their crop with their own funds, and then to give a certain annual percentage to the raisin reserve without making any profit on that portion.<sup>62</sup> Generally, growers ship their raisins to a raisin handler who physically separates the raisins per the marketing order; these are called the reserve raisins.<sup>63</sup> After the reserve raisins have been separated, the growers are then paid only for the remainder, referred to as free-tonnage raisins.<sup>64</sup> The RAC acquires title to the

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<sup>52</sup> *The High Cost and Low Return of Farm Marketing Orders*; L, James, 1985, at 4.

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 4.

<sup>59</sup> Mateusz Perkowski, *Raisin Ruling May Impact Crop Volume Controls*, Capitol Press, 2015, at 2.

<sup>60</sup> *Raisin Administrative Committee*; Schulz, Gary.

<sup>61</sup> Mateusz Perkowski, *supra* note 59, at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

reserve raisins and is given the discretion of how to dispose of the free-tonnage raisins.<sup>65</sup> The RAC can sell these particular raisins in noncompetitive markets such as to exporters, federal agencies, or foreign governments; can donate them to charities; or may choose to dispose of them by “any other means” consistent with the purposes of the raisin program.<sup>66</sup> Proceeds from money made as a result of RAC selling the commodities are used to pay back their cost first, then to pay back handlers, and if there is profit left over the farmer will get paid.<sup>67</sup> In theory, the raisin growers are supposed to receive any leftover proceeds from sales that RAC makes after any expenses.<sup>68</sup> However, as demonstrated by the *Horne* case, that typically does not occur.<sup>69</sup>

#### IV. *HORNE V. DEPARTMENT OF AGRICULTURE*: THE UNITED STATES SUPREME COURT LAYS THE FOUNDATION FOR FINDING MARKETING ORDERS UNCONSTITUTIONAL

##### A. *Horne v. Department of Agriculture*

In 2002 and 2003, the annual raisin reserve requirement was set to forty-seven percent.<sup>70</sup> As a result of the high percentage of raisins he would be required to forfeit, raisin farmer Marvin Horne changed the structure of his business.<sup>71</sup> The raisin marketing order applied only to raisin handlers, defined as any processor or packer of raisins.<sup>72</sup> To avoid the application of the marketing order, Horne stopped using a third party packer and instead purchased the equipment to process and pack the raisins that he grew to sell on his own.<sup>73</sup> The USDA still inspected the raisins as required by the quality control of the market order, but for

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<sup>65</sup> Mateusz Perkowski, *supra* at note 59, at 2.

<sup>66</sup> *Horne v. Dep't of Agric.*, 135 S.Ct. 2424 (2015).

<sup>67</sup> Mateusz Perkowski, *Raisin Ruling May Impact Crop Volume Controls*, Capitol Press, 2015, at 3.

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *See Horne v. Dep't of Agric.*, 135 S.Ct.2419 (2015).

<sup>70</sup> *See id.* at 2424.

<sup>71</sup> *See generally Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); Interview with Marvin Horne, Interview with Marvin Horne, *supra* note 11.

<sup>72</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); Interview with Marvin Horne, *supra* note 11.

<sup>73</sup> Interview with Marvin Horne, *supra* note 11.

outgoing raisins only.<sup>74</sup> The new business structure worked for Horne: under the statute he would not be considered a handler because he did not acquire any raisins, but instead sold his own.<sup>75</sup> Accordingly, when the USDA sent trucks to haul away his raisins, he refused to surrender his yield.<sup>76</sup> He was fined for the market value of the reserve raisins and for disobeying the market order, totaling a staggering \$700,000.<sup>77</sup> Horne brought suit against the USDA and RAC, arguing that the taking of his raisins without compensation was a violation of his Fifth Amendment rights.<sup>78</sup>

In 2007, Horne filed an administrative petition before the Secretary of Agriculture to modify the marketing order or exempt himself from RAC, at which point he first asserted that the physical taking of the raisins was a violation of his Fifth Amendment rights.<sup>79</sup> His petition was denied.<sup>80</sup> In 2009, Horne appealed the administrative decision to the United States District Court for the Eastern District of California.<sup>81</sup> The court concluded that Horne was subject to the marketing orders because he was considered a handler and, therefore, the AMAA applied to him.<sup>82</sup> The court also concluded that the fines imposed were not to be overturned because the court is limited in its jurisdiction to do so unless the fines are unwarranted in law or unjustified in fact.<sup>83</sup> Further, it was decided that the reserve requirement was not a violation of the Fifth Amendment as a physical taking without just compensation.<sup>84</sup> Instead, the court found that there was no physical taking of the raisins because the marketing order was a regulatory taking, a type of taking that allows the government to regulate the use of private property.<sup>85</sup> Horne then

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<sup>74</sup> Interview with Marvin Horne, *supra* note 11. Under the marketing order the USDA is required to inspect outgoing raisins for quality control and the USDA inspects incoming raisins from a farmer to a handler for payment and quality. *Id.*

<sup>75</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); Interview with Marvin Horne, *supra* note 11.

<sup>76</sup> Interview with Marvin Horne, *supra* note 11.

<sup>77</sup> Roger McEowen, *United States Supreme Court Says Raisin Marketing Order Effected Unconstitutional Taking*, 2015, at 2.

<sup>78</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

<sup>79</sup> *Id.* at 192.

<sup>80</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, (2015); see 7 U.S.C. § 608(c)(6).

<sup>81</sup> *Horne v. United States Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at \*21-22. (E.D. Cal. Dec. 9, 2009).

<sup>82</sup> *Id.* at 24-25.

<sup>83</sup> *Id.* at 79.

<sup>84</sup> *Id.* at 79.

<sup>85</sup> *Id.* at 79.

appealed to the United States Court of Appeals for the Ninth Circuit.<sup>86</sup> The Ninth Circuit affirmed the decision of the District Court, also concluding that they did not have jurisdiction over the Fifth Amendment taking issue claimed by Horne.<sup>87</sup> In 2013, Horne appealed yet again to the Supreme Court of the United States, where the prior rulings were reversed and the case was remanded.<sup>88</sup> The Supreme Court found that the Ninth Circuit had jurisdiction to decide if the USDA's obligation of fines and civil penalties on Horne, in his capacity as a handler, violated the Fifth Amendment.<sup>89</sup>

On remand in 2014, the Ninth Circuit held that the marketing order's procedures and the penalties that were imposed were not per se takings under the Fifth Amendment.<sup>90</sup> The Supreme Court has acknowledged three relatively narrow categories of regulations that identify a categorical, or per se, taking.<sup>91</sup> First, a per se taking exists if there has been a permanent physical invasion of real property.<sup>92</sup> A per se taking may also be found if a regulation deprives owners of all economically beneficial use of their real property.<sup>93</sup> Finally, the Supreme Court has found a per se taking occurs when a grant of a land use permit requires forfeiture of a property right.<sup>94</sup> However, if there is a specific government interest and the permit bears a rational relationship to that interest, then the permitting process will not be considered a taking.<sup>95</sup> Horne argued that the second category applied, but the USDA disagreed, arguing that the third category applied.<sup>96</sup> The Court ultimately applied the third category and found that the raisin marketing order did not constitute a taking under the Fifth Amendment because there was a sufficient connection and proportionality between the

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<sup>86</sup> *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071 (9th Cir. 2012).

<sup>87</sup> *Id.* at 1078-80.

<sup>88</sup> *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2054 (2013).

<sup>89</sup> *Id.* at 2064.

<sup>90</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1136 (9th Cir. 2014).

<sup>91</sup> *Id.* at 1136.

<sup>92</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1139 (9th Cir. 2014); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-38 (1982).

<sup>93</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1139 (9th Cir. 2014); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

<sup>94</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1139 (9th Cir. 2014).

<sup>95</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1139 (9th Cir. 2014); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>96</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1139 (9th Cir. 2014).

government's interests in stabilizing raisin prices and the reserve requirement, thus meeting the exception.<sup>97</sup>

In June of 2015, Horne again appeared in front of the United States Supreme Court after appealing the decision of the Ninth Circuit that there was not a taking of Horne's raisins.<sup>98</sup> In an eight to one decision, the Court held that the reserve requirement imposed by RAC was a clearly unconstitutional physical taking of Horne's personal property.<sup>99</sup> In the opinion, Justice Roberts concluded that any of the net proceeds that were made from the sale of the reserve raisins by RAC were required to be returned to the raisin farmers as compensation from the government for the taking.<sup>100</sup> It does not mean the raisins have been appropriated for government's use, but in this case the growers were not compensated for at least two years by the reserve.<sup>101</sup> Additionally, the Court held that in order to sell their crops through interstate commerce the government could not force raisin growers to relinquish their property without just compensation.<sup>102</sup> Marvin Horne's journey to fight for a change in his business and his success in doing so will change the way Federal Marketing Orders are applied to the raisin industry and other commodities that are similarly burdened.

*B. The Disagreement as to Whether Federal Marketing Orders Are Unconstitutional Takings*

The lonely dissent written by Justice Sotomayor in *Horne* argued that each and every property right of the claimant must be destroyed by governmental action before that action can be said to have effected a taking.<sup>103</sup> Sotomayor indicated that a small physical intrusion to install a cable box on a building owner's property in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) was a per se taking but insisted that forty-seven percent of Mr. Horne's raisins did not amount to a taking.<sup>104</sup> In *Loretto*, a New York law required a landlord to permit a cable television line to run through the property.<sup>105</sup> The landlord

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<sup>97</sup> *Horne v. USDA*, 750 F.3d 1128, at 1144 (9th Cir. 2014).

<sup>98</sup> *Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

argued that the physical occupation of property on his land under governmental control was a taking.<sup>106</sup> The Supreme Court agreed, finding the existence of a taking because it occupied permanent space on the building.<sup>107</sup> Justice Sotomayor argued that, unlike *Loretto*, the Raisin Federal Marketing Order did not deprive Horne of all his property rights. The Justice's decision was that the taking of raisins was a regulatory matter and not a physical taking of private property, so there was not a taking without just compensation pursuant to the Fifth Amendment takings clause.<sup>108</sup>

Supporters of Federal Marketing Orders argue that they are imperative to protect the market and allow the avoidance of monopolies by creating stable prices for the regulated commodities.<sup>109</sup> Proponents also point to the Federal Marketing Orders as stabilizing the market in which commodities are sold, which they assert in turn benefits consumers, farmers, and handlers.<sup>110</sup> Smaller farmers fear that without a marketing order, especially a provision regulating volume control, there would be a monopoly, resulting in only one person selling a particular commodity.<sup>111</sup> In such an event, the smaller farm would no longer be able to participate and consumers would not know what the price of that particular commodity would be.<sup>112</sup>

Supporters of Federal Marketing Orders contend that the decision of the *Horne* case should not affect other commodities' orders because the raisin marketing order operates differently and thus is the only circumstance under which there has been an unconstitutional taking.<sup>113</sup> Further, the dissent suggests that the raisins are fungible goods, and that the value that they carry is the revenue from their sale.<sup>114</sup> For this reason,

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2437 (2015).

<sup>109</sup> Madilynne Clark, *Big Picture-Marketing Orders have grower support*; CAPITAL PRESS, (May 28, 2015), <http://www.capitalpress.com/Opinion/Columns/20150528/big-picture-x2014-marketing-orders-have-grower-support..>

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); Merriam Webster defines fungible as: being of such a nature that one part or quantity may be replaced by another equal part or quantity in the satisfaction of an obligation. Oil, wheat, and lumber are *fungible*.

the contention is that the reserve requirement is not a taking because the growers voluntarily choose to grow raisins and therefore participate in the raisin marketing order.<sup>115</sup> According to the supporters, the raisin farmers that are not in agreement with the order can plant a different crop or “sell their raisin-variety grapes as table grapes or for use in juice or wine.”<sup>116</sup> As Justice Roberts stated in his opinion, “let them sell wine,” is not any more comforting to raisin growers than analogous replies have been to others in history.<sup>117</sup> Many supporters believe the marketing orders are constitutional and necessary to protect the market.<sup>118</sup> However, after an in-depth analysis of other marketing orders similar to that of raisins under the Fifth Amendment framework, it is clear that such is not the case.

### *C. The Fifth Amendment Takings Clause*

The Fifth Amendment of the United States Constitution states: “nor shall private property be taken for public use, without just compensation.”<sup>119</sup> The Takings Clause of the Fifth Amendment requires that when the government takes private property for public use there must be just compensation.<sup>120</sup> The term “property” as stated in the amendment extends to both tangible and intangible property, such as easements, personal property, contract rights, and trade secrets.<sup>121</sup> The taking by the government for public use comes in two ways, regulatory takings of property and governmental seizures of property.<sup>122</sup> An example of governmental seizure of private property occurs when there is a threat to public health or safety.<sup>123</sup> For instance, the government may destroy healthy livestock in a quarantine area to prevent the spread of disease to the public.<sup>124</sup> On the other hand, a regulatory taking is not so easily defined because it is not always clear what constitutes a taking.<sup>125</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Clark, *supra* note 109

<sup>119</sup> U.S. CONST. amend. V.

<sup>120</sup> U.S. CONST. amend. V.

<sup>121</sup> *See generally* Taking: an Overview; Cornell University Law School, 2015 at 1-2.

<sup>122</sup> *See generally id.* at 1.

<sup>123</sup> *See generally id.*

<sup>124</sup> *See generally id.* at 2.

<sup>125</sup> *See generally id.*

Many different cases have assessed the Takings Clause and the courts have explained when the government must compensate for a regulatory taking.<sup>126</sup> In one of the earliest takings cases, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, (1922), Pennsylvania permitted mining that would cause subsidence of homes and surfaces near residential properties.<sup>127</sup> A property owner brought suit to prevent the Pennsylvania Coal Company from continuing mining operations in those residential areas.<sup>128</sup> This case is an example of a regulatory taking in which just compensation for the value of the house is required.<sup>129</sup> The Supreme Court held that “[w]hile property may be regulated to a certain extent, if regulation goes too far, it constitutes a taking.”<sup>130</sup>

A more modern example of a taking is found in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, (1978).<sup>131</sup> The United States Supreme Court denied a takings claim brought by the owner of Grand Central Terminal against New York City because the Landmark Preservation Commission would not approve plans for construction of a fifty-story office building over Grand Central Terminal.<sup>132</sup> The Grand Central Terminal had been designated a landmark, and when the plans to build were denied the owner argued that the landmark preservation law constituted a taking without just compensation because it deprived him of the right to benefit from his land.<sup>133</sup> The Court considered three factors in determining if the landmark law was a taking under the Fifth Amendment: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation interfered with distinct investment backed expectations, and 3) the character of the governmental action.<sup>134</sup> The court ultimately held that:

[a] ‘taking’ may more readily be found when the interference with property had to be characterized as a physical invasion by the government, and when

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<sup>126</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

<sup>127</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>134</sup> *Id.*

interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>135</sup>

In *Horne*, the United States Supreme Court held that the takings clause applied to both real property and personal property.<sup>136</sup> Under the holding in *Horne*, the raisins under regulation of the Federal Marketing Order are personal property to the farmer and the reserve requirement of forty-seven percent set by RAC is a clear physical taking of that personal property.<sup>137</sup> While the government may regulate the sale of the raisins through the Federal Marketing Order, the physical taking of the raisins is different.<sup>138</sup> This is similar to *Pennsylvania Coal Co. v. Mahon* because the raisins, as property, may be regulated to a certain extent and that extent was the reserve amount set aside by RAC.<sup>139</sup> However, the regulation exceeded a constitutionally adequate extent when forty-seven percent of the raisins were to be placed in the reserve and there was not any compensation.<sup>140</sup> Both types of takings require compensation for the fair market value of property when there is a governmental seizure of private property.<sup>141</sup>

V. MARKETING ORDERS FOR OTHER COMMODITIES ARE SUFFICIENTLY SIMILAR TO THAT OF RAISINS SUCH THAT *HORNE* MAY BE APPLIED TO FIND AN UNCONSTITUTIONAL TAKING

The recent decision from the Supreme Court will allow other commodities with similar volume regulation provisions to be challenged. Federal Marketing Orders are now outdated regulations that harm the public interest and do not allow farmers the freedom to make their own business decisions.<sup>142</sup> The raisin marketing order is a clear example of a poorly functioning marketing order due to the unconstitutional volume regulation provision without any compensation.<sup>143</sup> The decision of the Supreme Court in favor of Mr.

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<sup>135</sup> *Id.*

<sup>136</sup> *Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, (2015); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>141</sup> Taking: *an Overview*; Cornell University Law School, 2015, at 2.

<sup>142</sup> James L., *The High Cost and Low Return of Farm Marketing Orders*, 1985, at 1.

<sup>143</sup> Interview with Marvin Horne, *supra* note 11.

Horne can be investigated and applied to the ten other commodities with a volume regulation in their marketing order.<sup>144</sup> In particular, almonds and cranberries both have volume regulation provisions in their marketing orders that give rise to the same concerns addressed in *Horne* with regard to raisins.<sup>145</sup> A majority group of farmers or handlers agree on the orders, which leaves a minority of dissenters with limited options or heavy fines for not complying.<sup>146</sup> Both cranberry and almond marketing orders have volume regulations similar to raisins and are close enough to also be considered unconstitutional.

#### A. The Cranberry Marketing Committee

The Cranberry Marketing Committee (CMC) was established in 1962 with a goal to annually develop a marketing policy that would provide economic analysis for the cranberry industry.<sup>147</sup> Under the marketing order, the CMC gathers production, acreage, and sales data from growers, handlers, and processors to predict how the crop will develop in the upcoming harvest year.<sup>148</sup> The committee's finding is then submitted to the Secretary of Agriculture to establish the volume regulation program.<sup>149</sup> Under the volume regulation program, the Secretary of Agriculture sets the "free" and "restricted" amount of cranberries that can be handled.<sup>150</sup> Under this program growers are required to deliver the crop to be inspected for quality requirements.<sup>151</sup> The free cranberries are marketed through any outlets while the restricted or withheld cranberries are held into a reserve pool and diverted into noncompetitive markets.<sup>152</sup> These noncompetitive markets

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<sup>144</sup> Perkowski, *Raisin ruling may impact crop volume controls*, Capital Press, 23 January 2015, at 2; *See*, United States Department of Agriculture there are ten commodities currently covered by Federal Marketing Order and have volume provisions: Almonds, Cherries(Tart),Citrus, Cranberries, Dates, Grapes, Prunes, Raisins, Spearmint Oil, Walnuts; *Federal Marketing Orders and Agreements: An Overview*, The National Agricultural Law Center, 2005, at 3-4.

<sup>145</sup> Perkowski, *Raisin ruling may impact crop volume controls*, Capital Press, 23 January 2015, at 2.

<sup>146</sup> James L., *The High Cost and Low Return of Farm Marketing Orders*, 1985, at 1.

<sup>147</sup> *See* David Farrimond, *Cranberry Marketing Order Volume Regulation*, at 1.

<sup>148</sup> *See id.* at 1

<sup>149</sup> *See id.*

<sup>150</sup> *See* Farrimond, *supra* note 147, at 2.

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

include international export, research and development, or charitable donations to certain governmental programs.<sup>153</sup> A handler can apply to the committee for a release of some of the cranberries, but is required to purchase them at a price equal to the fair market value of the cranberries.<sup>154</sup> The committee can then use the funds from that handler to purchase replacement cranberries from other handlers.<sup>155</sup>

In 1968, the producer allotment program was formed to make recommendations to the USDA regarding the market quantity of cranberries required to satisfy the total market demand and provide for adequate carryover into the reserve pool.<sup>156</sup> Similar to the volume regulation program, under the producer allotment program handlers must comply with the program's excessive allotments and cannot place surplus cranberries into the free market.<sup>157</sup> Instead of being sold in the free market, the overage is placed in noncompetitive markets.<sup>158</sup> In recent years, the withholding percentage required has ranged from ten to twelve percent.<sup>159</sup> To ensure that handlers and growers comply with the requirement that only a certain percentage of cranberries can be sold in the free market, the committee conducts audits.<sup>160</sup>

Raisins were mostly controlled in terms of the reserve requirement because almost half of any given raisin farmer's crop had to be placed in the reserve or else farmers would be heavily fined.<sup>161</sup> Similarly, cranberry farmers have to give a certain percentage of their crop to a reserve per the marketing order, which changes annually based on sales of previous years.<sup>162</sup> The cranberry marketing order has a volume regulation provision of twelve percent.<sup>163</sup> While this may not reach the severity of the forty-seven percent requirement in the raisin marketing order, especially depending on the size of the crop, it is no less a taking because the handlers are not getting compensated for the

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<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See* Farrimond, *supra* note 147, at 2-3.

<sup>157</sup> *Id.* at 2-3 (stating that excessive allotments are too much of the cranberry supply and not enough demand in the market).

<sup>158</sup> *See id.*, at 3.

<sup>159</sup> *See id.* at 1-2.

<sup>160</sup> *See id.* at 3.

<sup>161</sup> McEowen, *supra*, note 77 at 2.

<sup>162</sup> *Id.* at 3.

<sup>163</sup> Farrimond, *supra* note 147, at 3.

cranberries that have to be placed in the reserve pool.<sup>164</sup> Further, there is great potential for abuse in the way a market order functions, and this percentage could easily rise to more drastic levels.<sup>165</sup>

Unlike the raisin order, a cranberry handler may request a certain amount of cranberries from the reserve, but they must pay for those cranberries.<sup>166</sup> For a handler or grower to be required to re-purchase a commodity that they have already labored to produce is not only unfair but goes against the basic property theory set forth by philosopher John Locke which states that each person is entitled to the property produced through his own labor and when a person mixes his own labor with natural resources, he acquires property rights in the mixture.<sup>167</sup> Similar to *Horne*, the taking of cranberries can arguably be considered a clear physical taking because they do not profit off of the reserve raisins, and even if a handler re-purchases the cranberries they cannot be sold in the free American market.<sup>168</sup> As stated in *Penn Central*:

a taking may more readily be found when the interference with property had to be characterized as a physical invasion by the government, and when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>169</sup>

Here, there is an interference with the cranberries such that it can be characterized as a physical invasion by the government.<sup>170</sup> The amount of cranberries that are required to be withheld per the marketing order have to be bought back from the same people that had to give them up in the first instance.<sup>171</sup> The lesser percentage of cranberries taken is of no consequence because that does not change the nature of the taking for that percentage. The interference for cranberry handlers arises due to the outdated volume regulation of a Federal Marketing Order.<sup>172</sup> This

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<sup>164</sup>McEowen, *supra* note 77, at 2.

<sup>165</sup>Farrimond, *supra* note 147, at 3.

<sup>166</sup>*Id.* at 3.

<sup>167</sup>Farrimond, *supra* note 147, at 3; Alex Tuckness, *Locke's Political Philosophy*, *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.).

<sup>168</sup>Farrimond, *supra* note 147, at 3.

<sup>169</sup>*See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>170</sup>*See id.*

<sup>171</sup>*See id.*

<sup>172</sup>*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, (1978); Farrimond, *supra* note 147, at 3.

interference causes the price of cranberries to rise for consumers, and large amounts of cranberry crops are wasted each year.<sup>173</sup> While there are slight differences in the way the volume regulation is executed between these two marketing orders, applying the takings analysis to cranberries exemplifies the same unconstitutional situation that was found with regard to raisins.<sup>174</sup>

### *B. Almond Board of California*

In the United States, almond production accounts for approximately two-thirds of the world's almond production and eighty percent of all world trade.<sup>175</sup> Under the Federal Marketing Order, the Almond Board of California, formerly known as the Almond Control Board (ABC), was established in 1950.<sup>176</sup> The ABC participates in production, market research, advertising, and promotion in domestic and international markets, volume control, statistical analysis, and distribution.<sup>177</sup> The ABC is made up of ten annually elected members including five handlers and five growers.<sup>178</sup> The ten members come from the 6,000 almond growers and 104 almond handlers.<sup>179</sup> Together, they are responsible for establishing policies such as market prices of the almonds to be approved by the Secretary of Agriculture.<sup>180</sup>

Under the Federal Marketing order for all almonds, the ABC is allowed to set aside a certain percentage of almonds and place them into the reserve pool every year.<sup>181</sup> The reserve almond pool has two categories, unallocated reserve almonds and allocated reserve

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<sup>173</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, (1978); Farrimond, *supra* note 147, at 3.

<sup>174</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) Farrimond, *supra* note 147, at 3.

<sup>175</sup> John M. Crespi, *Do U.S. Marketing Orders Have Much Market Power? An Examination of the Almond Board of California*, July 2002, at 2.

<sup>176</sup> Richard Walcott, *The Almond Board of California is a What? Understanding Federal Marketing Orders*, CALIFORNIA ALMONDS (July 22, 2014), available at <http://www.almonds.com/blog/about-almond-board/almond-board-california-what-understanding-federal-marketing-orders>.

<sup>177</sup> *See About the Almond Board*, CALIFORNIA ALMONDS (2015) <http://www.almonds.com/consumers/about-the-almond-board/overview>.

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See Crespi, supra* note 175, at 6.

almonds.<sup>182</sup> The ABC may release the unallocated reserve almonds for sale with permission from the Secretary of Agriculture.<sup>183</sup> The allocated reserve almonds must be disposed of in approved outlets, such as almond butter, animal feed, and export markets.<sup>184</sup> For example, in 1999 the ABC set a record reserve that required twenty percent of the almonds to be withheld and placed in the reserve pool.<sup>185</sup> This allows the ABC to set supply so that it meets demand as needed in the year depending on the crop year.<sup>186</sup>

Compared to raisins and cranberries, almonds are not as controlled but still have the potential for substantial volume control.<sup>187</sup> The market order for almond farmers includes a provision that forces a farmer to give a certain percentage of their crop to a reserve, which changes annually based on sales in previous years.<sup>188</sup> The last restriction set by the almond marketing order for volume regulation was set at twenty percent.<sup>189</sup> While this does not rise to the same percentage taken with regard to raisins, again that does not change the constitutional analysis.<sup>190</sup> Regardless of the amount set to be reserved or the size of the crop, failure by the government to compensate the farmer for the amount that is taken is an unconstitutional taking in violation of the Fifth Amendment.<sup>191</sup>

Similar to the raisin order, an almond handler has to separate the almonds into allocated almonds and unallocated almonds.<sup>192</sup> In applying the taking standard from *Horne*, the Court used the rule from *Penn Central*.<sup>193</sup> With regard to almonds, there is governmental interference because almond farmers are required to place a certain percentage of their crop into a reserve pool and those almonds cannot be sold into the

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<sup>182</sup> *See id.* at 6.

<sup>183</sup> *See id.*

<sup>184</sup> *See id.*

<sup>185</sup> *See Crespi, supra note 175, at 22; Interview with Bryce Spycher, Sr. Specialist, Industry Services, Almond Board of California, Modesto, CA (September 30, 2015).*

<sup>186</sup> *See Crespi, supra note 175 at 6.*

<sup>187</sup> *Crespi, supra note 175 at 5.*

<sup>188</sup> Roger A. McEowen, *supra note 77, at 2; Farrimond, supra note 148, at 3.*

<sup>189</sup> *Crespi, supra note 175 at 5; Interview with Bryce Spycher, Sr. Specialist, Industry Services, Almond Board of California, Modesto, CA (September 30, 2015).*

<sup>190</sup> *Crespi, supra note 175 at 5; Interview with Bryce Spycher, Sr. Specialist, Industry Services, Almond Board of California, Modesto, CA (September 30, 2015).*

<sup>191</sup> *Crespi, supra note 175 at 5; Interview with Bryce Spycher, Sr. Specialist, Industry Services, Almond Board of California, Modesto, CA (September 30, 2015).*

<sup>192</sup> *Crespi, supra note 175 at 3.*

<sup>193</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

free market.<sup>194</sup> The physical invasion occurs by the government because they take the almonds in the reserve pool and they are used for government purposes like the export market or charities.<sup>195</sup> While there are slight differences in the way the volume regulation is executed between the cranberry and almond marketing orders, under the taking standard applied in the *Horne* case they are equally as unconstitutional as the raisin marketing order.

## VI. RECOMMENDATIONS FOR THE FUTURE OF FEDERAL MARKETING ORDERS

Marketing orders have been described as government-run cartels because they take advantage of consumers and hinder free market principles of American business, yet they are still enforced.<sup>196</sup> Now that *Horne* has established that marketing orders indeed have the capacity to be unconstitutional, all marketing orders should be assessed and reformed to more modern regulations that do not rise to the level of a taking without just compensation.<sup>197</sup> The *Horne* decision exploits Federal Marketing Orders as a violation of free market rights and now property rights for farmers in the industry, two rights that are held in very high regard in any business industry.<sup>198</sup> If the industry does not change the regulations set forth by Federal Marketing Orders, there will surely be many more suits similar to *Horne*. Potential litigation from other commodities in the industry would cost taxpayers thousands, even millions, if taken to the level of *Horne*.<sup>199</sup>

In the current economic market, there does not seem to be a need for Federal Marketing Orders any longer because the business of farming has changed.<sup>200</sup> Farmers have more channels to market, advertise, and sell their crop without the need for assistance from the USDA.<sup>201</sup> However, if volume regulation is absolutely necessary, then there

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<sup>194</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); John M. Crespi, *Do U.S. Marketing Orders Have Much Market Power? An Examination of the Almond Board of California*, July 2002, at 5.

<sup>195</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); Crespi, *supra* note 175 at 5.

<sup>196</sup> James L., *The High Cost and Low Return of Farm Marketing Orders*, 1985, at 1.

<sup>197</sup> *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

<sup>198</sup> *Id.*

<sup>199</sup> McEowen, *supra* note 77, at 3.

<sup>200</sup> Interview with Marvin Horne, *supra* note 11.

<sup>201</sup> *Id.*

should be clear and specific caps on the amount withheld before the marketing order is agreed upon, as well as mandatory compensation to the farmers for their crop. Reformation in this way will bring federal marketing orders within the boundaries of the Fifth Amendment.<sup>202</sup>

With specific regard to the raisin industry, the current state of the RAC is on hold until there is a clear solution to the problem.<sup>203</sup> There must be a major modification to the raisin marketing order's volume regulation provision.<sup>204</sup> As far as raisin farmers are concerned, there is a high potential for a class action lawsuit on the horizon to regain some of the loss due to the marketing order.<sup>205</sup>

## VII. CONCLUSION

In conclusion, major reform for all marketing orders, not just the raisin marketing order, is required to withstand constitutional scrutiny. Parts of the marketing orders have been proven to be unconstitutional and are causing more harm than good, not only for the farmers, but also consumers.<sup>206</sup> The only parties benefiting from the use of Federal Marketing Orders are the government and industry leaders such as the RAC.<sup>207</sup> Also, there is a strong belief that the AMAA is not serving its purpose to meet the needs of farmers and consumers because the AMAA is structurally still the same, but farming and the economy have drastically changed since it was first enacted.<sup>208</sup> Additionally, if the takings standard were to be applied to volume regulation provisions of other marketing orders such as cranberries and almonds, similar findings of unconstitutionality are bound to follow.<sup>209</sup> A drastic change between farmers, handlers, and the USDA is required. Unless volume regulation provisions of all marketing orders are assessed under the new

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Doyle, *supra* note 7.

<sup>209</sup> See Part V. of this comment at 81.

standard set forth by the Supreme Court in *Horne*, growers everywhere will continue to be subject to the organized robbery perpetuated by the government.

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