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The Raisin Act: Regulation or Confiscation?

*Horne v. Department of Agriculture*¹

Yelena Bosovik

I. INTRODUCTION

In *Horne v. Department of Agriculture*, the United States Supreme Court settled the jurisdictional issues arising under the Agricultural Marketing Agreement Act (“AMAA”).² Specifically, the Court considered whether farmers – as handlers – can file suit in federal court to challenge an administrative decision; and while in administrative proceedings, if the farmers can raise a takings claims as an affirmative defense.³ This case is significant because for the first time, it opened the doors for federal courts to have the jurisdiction to consider whether a reserve condition imposed on the sale of a commodity, like raisins, constitutes a taking worthy of compensation under the Fifth Amendment. On remand from the U.S. Supreme Court, the Ninth Circuit Court of Appeals did indeed consider this issue, and held that reserve pool seizures under federal marketing orders do not constitute takings. However, despite making great strides in formalizing marketing order litigation, the courts did not make the complete jump to reforming what is a broken – and in some instances, unconstitutional – scheme.

This note begins by setting forth the facts and events that have narrowed takings claims jurisprudence. Although the cornerstone is the U.S. Supreme Court’s decision, which set the jurisdictional and procedural guidelines for marketing order challenges, this note primarily focuses on what the Ninth Circuit did on remand with the U.S. Supreme Court’s

¹ *Horne v. Dep’t of Agriculture*, 133 S.Ct. 2053 (2013).

² *Id.* at 2056. The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs “in the current of interstate or foreign commerce or . . . directly burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof.” 7 U.S.C. § 608c(6)(A) (2012).

³ *Id.* at 2056.

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instructions. The second section examines the legal precedent of takings claim cases, and the historic use of marketing orders. The third section provides both the U.S. Supreme Court's and the Ninth Circuit's legal analysis. The final section discusses the policy concerns and implications of this decision. The conclusion drawn is that by failing to consider the policy concerns behind reserve pool requirements, the Ninth Circuit improperly held that no taking occurred in this case.

II. FACTS AND HOLDING

In *Horne v. Department of Agriculture*, petitioners Marvin and Laura Horne were owners and operators of Raisin Valley Farms in California.⁴ Under the authority of the AMAA, the Raisin Administrative Committee (“RAC”) issued a marketing order setting up reserve pools for annual raisin production as a supply-side price control mechanism.⁵ Under the Marketing Order's reserve requirements, raisin producers must file certain reports with the RAC, and must deposit a certain portion of their annual production (“reserve-tonnage”) with the reserve pool.⁶ The raisins held in the reserve pools are not to be sold on the domestic market, but may be sold to handlers for resale in overseas markets, or given at no cost to secondary, noncompetitive domestic markets, such as school lunch programs.⁷ The farmers are then only paid for the “free-tonnage,” or the remains of a year's raising production that is available for sale on the open market once the “reserve-tonnage” has been given to the RAC.⁸ Raisin farmers, in other words, must give a portion of their crop to the government in order to keep raisin prices at a certain level.

The Hornes attempted to get around the reserve program by selling directly to vineyards, therefore declassifying themselves as handlers.⁹

⁴ Although this case note is focused on the decision that came down from the Supreme Court of the United States in 2013, it also takes into account the decision of the Ninth Circuit Court of Appeals on remand, and the subsequent issues for which the U.S. Supreme Court once again granted certiorari for on January 16, 2015. At this time, the U.S. Supreme Court has not ruled on *Horne II*.

⁵ *Horne*, 133 S. Ct. at 2057.

⁶ *Id.*

⁷ *Id.* at 2058.

⁸ *Id.*

⁹ *Id.* at 2058-59.

However, in 2001 the United States Department of Agriculture (“USDA”) informed the Hornes that their operation nonetheless made them handlers under the AMAA, and they must pay in the required reserve amounts for the 2002-2004 crop years.¹⁰ Petitioners refused to comply, and administrative proceedings were initiated by the Administrator of the Agriculture Marketing Service for violations of the AMAA and the Marketing Order.¹¹ The Hornes denied the allegations and raised several affirmative defenses, including that the Marketing Order violated the Fifth Amendment’s prohibition against taking property without just compensation.¹²

In 2006, an Administrative Law judge ruled the petitioners were handlers and thus subject to the Marketing Order.¹³ The court rejected the Hornes’ takings defense based on a view that “handlers no longer have a property right that permits them to market their crop free of regulatory control.”¹⁴ On appeal, a judicial officer upheld this ruling and fined the Hornes \$202,600 in civil penalties, \$8,783.39 in assessments for the two crop years, and \$483,843.53 for the value of the California raisins that petitioners failed to hold in reserve for two crop years.¹⁵

The Hornes then filed a complaint in Federal District Court seeking judicial review of the USDA’s decision.¹⁶ The court upheld the original ruling against the Hornes and found that the transfer of title from the farmers to the RAC did not constitute a physical taking.¹⁷ Specifically, the court quoted *Evans v. United States*, stating that the Hornes were “paying an admissions fee or toll – admittedly a steep one – for marketing raisins. The Government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing to title to their ‘reserve tonnage’ raisins to the RAC is the admissions ticket.”¹⁸

On appeal, the Ninth Circuit held that: (1) the Hornes were “handlers”

¹⁰ *Id.* at 2059.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2059-60.

¹⁵ *Id.* (citing *Cla-Lamond, Inc. v. United States*, 30 Fed.Cl. 244, 246-247(1994)).

¹⁶ *Id.* at 2059.

¹⁷ *Id.* at 2060.

¹⁸ *Id.* (quoting *Evans v. United States*, 74 Fed. Cl. 554, 563-564 (2006)).

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subject to marketing order provisions; (2) the takings claim was premature until farmers availed themselves of the process provided by the Tucker Act;¹⁹ and (3) the fines imposed on the raisin farmers did not violate the Excessive Fines Clause.²⁰

The Supreme Court of the United States granted certiorari and held that: (1) the AMAA provides a comprehensive curative blueprint that withdraws Tucker Act jurisdiction in the Court of Federal Claims over farmers' takings claim in their role as handlers — as a result, the Hornes were entitled to file suit in California district court; and (2) a farmers' takings claim can be raised as an affirmative defense in USDA enforcement proceedings.²¹

On remand, the Ninth Circuit affirmed the district court, holding that: (1) the Hornes had standing, as raisin handlers, to bring suit challenging diversion of third-party producers' raisins; and (2) the Raisin Marketing Order was not a physical per se taking of reserved raisins.²² Specifically, the court said that because the Hornes did not actually hand over any of their raisins to the reserve committee as they were required to do by the Order, the only way they can make a Takings Clause argument is to allege that the penalties imposed on them constituted a taking.²³ As such, the Court concluded that the imposition and collection of penalties and fines does not violate the Takings Clause, because if the receipt of reserved raisins does not violate the Constitution, neither does the imposition of a penalty.²⁴

¹⁹ Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction on all claims for just compensation under the Takings Clause. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). However, with the Supreme Court's ruling in *Horne*, "handlers" are now permitted under the AMAA to raise takings claims in Department of Agriculture enforcement proceedings under § 28 U.S.C. § 608c(14)(b). Sarah Jenkins and Bruce Jones, Supreme Court Decides *Horne v. Department of Agriculture*, Faegre Baker Daniels (June 10, 2013), available at <http://www.faegrebd.com/20062> (last visited Feb. 19, 2016).

²⁰ *Horne v. U.S. Dep't of Agriculture*, 673 F.3d 1071, 1080-82 (9th Cir. 2011) (rev'd on appeal).

²¹ *Horne*, 133 S.Ct. at 2058 (2013).

²² *Horne v. U.S. Dep't of Agriculture*, 750 F.3d. 1128, 1136, 1144 (9th Cir. 2014).

²³ *Id.* at 1137.

²⁴ *Id.* at 1137-38 (citing *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013) (considered the issues of how to analyze a takings claim when a "monetary exaction," rather than a specific piece of property, is the subject of the claim. In that case, the court held that "monetary exactions" as a condition of a land use permit must satisfy

Furthermore, because there is a sufficient nexus between “the means and ends of the Marketing Order,” the reserve requirement under the Raisin Marketing Order does not constitute a taking under the Fifth Amendment.²⁵

The Supreme Court of the United States again granted certiorari on January 16, 2015.*

II. LEGAL BACKGROUND

A. *Constitutional Protections of the Takings Clause*

The Fifth Amendment of the United States Constitution states, in part, that the government shall not take private property for public use “without just compensation.”²⁶ The purpose of the Takings Clause is “to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁷ Historically, courts have implicitly recognized three types of takings. First is the government’s exercise of the power of eminent domain.²⁸ For example, in *Loretto v. Teleprompter Manhattan CATV, Corp.*, the Supreme Court held that permanent physical invasions of real property are a per se taking.²⁹ Second is unintentional taking, or inverse condemnation through physical invasion.³⁰ For example, regulations depriving owners of all economically beneficial use of their real property also constitute a per se taking.³¹ Third, the government may take private property using its police power in order to regulate property interests, requiring the government to pay compensation to private property owners.³² This third type of property taking is at issue in this case.

requirements that government’s mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development)).

²⁵ *Id.* at 1144.

²⁶ U.S. CONST. amend. V.

²⁷ *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

²⁸ Mary A. Viviano, *The Takings Clause: A Protection to Private Property Rights in Federal Oil and Gas Leases*, 24 *Tulsa L. Rev.* 43, 49 (1988).

²⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-38 (1982).

³⁰ Viviano, *supra* note 28.

³¹ *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

³² Viviano, *supra* note 28.

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But not every use of the police power restricting an owner's property rights qualifies as a taking. Traditionally, the Supreme Court engages in an ad hoc factual inquiry on a case-by-case basis to determine if a "taking" has occurred.³³ As such, the Court identified several factors to guide its analysis. First, a court may look at the economic impact of the regulation on the claimant.³⁴ Second, it is important to consider the character of the governmental action.³⁵ For example, a court may more readily find a taking when the government physically invades the property rather than when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."³⁶ Although traditionally takings cases revolve around the transfer of property to the government or another private third party, "the Takings Clause applies to other state actions that achieve the same thing."³⁷ Courts have also set bright line rules regarding takings cases. For example, a permanent physical occupation of property authorized by the government is a taking.³⁸ So too is a regulation requiring a property owner to permanently "sacrifice all economically beneficial uses of his or her land."³⁹

When analyzing a constitutional takings claim, a court applies a two-step test.⁴⁰ First, the court must determine whether the government action constitutes a taking.⁴¹ If the answer is yes, then Fifth Amendment requirements are triggered and the court must investigate whether the government provided just compensation to the property owner.⁴² However, in general, the Supreme Court has found that the imposition and collection of

³³ *Id.* at 50.

³⁴ *Penn Cent. Transp. Co v. City of New York*, 438 U.S. 104, 124 (1978). *See also* *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("There is not set formula to determine where regulation ends and taking begins.").

³⁵ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

³⁶ *Id.*

³⁷ *Stop the Beach Renourishment, Inc. v. Florida Dep't. of Environmental Protection*, 560 U.S. 702, 713 (2010).

³⁸ *Arkansas Game and Fish Comm'n v. U.S.*, 133 U.S. 511, 518 (2012). *See also*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

³⁹ *Arkansas Game and Fish Comm'n*, 133 U.S. at 518.

⁴⁰ *Horne v. U.S. Dep't of Agriculture*, 750 F.3d 1128, 1136 (9th Cir. 2014), *rev'd* 135 S.Ct. 2419 (2015).

⁴¹ *Id.*

⁴² *Id.*

penalties and fines does not violate the Takings Clause.⁴³ This brings us to the Supreme Court’s cases dealing with unconstitutional takings.

In *Koontz v. St. Johns River Water Management Dist.*, the Court set out the standard for analyzing a takings claim when a “monetary exaction,” rather than a specific piece of property, is the subject of the claim.⁴⁴ In that case, petitioner, a landowner, sued St. Johns River Water Management District, alleging that the district’s denial of land use permits, unless he funded offsite mitigation projects on public lands, amounted to a taking without just compensation.⁴⁵ The Supreme Court held that “the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan*,⁴⁶ even when the government denies the permit and even when its demand is for money.”⁴⁷

In *Nollan*, the California Coastal Commission conditioned the grant of a permit to build a beachfront home if the owners would allow an easement to pass across a portion of their property in order to make it easier for the public to access a park.⁴⁸ After exhausting the administrative appeals process, the Nollans filed a petition for a writ of administrative mandamus with the Superior Court, alleging that the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.⁴⁹ The case eventually made it up the Supreme

⁴³ *Id.* at 1137. *See* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2601 (2013) (listing of cases) (“This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.”).

⁴⁴ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2599 (2013).

⁴⁵ *Id.* at 2588.

⁴⁶ *Id.* at 2603. *See also* *Horne v. U.S. Dep’t of Agriculture*, 750 F.3d 1128, 1142 (9th Cir. 2014) *rev’d* 135 S.Ct. 2419 (2015) (“[T]he distillate of the *Nollan/Dolan* rule appears to be this: if the government seeks to obtain, through the issuance of a conditional land use permit, a property interest the outright seizure of which would constitute a taking, the government’s imposition of the condition also constitutes a taking unless it: (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process.”).

⁴⁷ *Koontz*, 133 S.Ct at 2603.

⁴⁸ *Nollan v. California Coastal Comm’n*, 438 U.S. 825, 828 (1987)

⁴⁹ *Id.* at 828-29. Although the Superior Court ruled in favor of the Nollans, the Court of Appeals reversed the judgment, bringing the case to the Supreme Court of the United States. *Id.* at 830-31.

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Court, which held that the absence of a “nexus” between the condition and the Commission’s interest to provide the public with beach access constituted a taking and required the government to compensate the Nollans accordingly.⁵⁰ This set the following standard for Takings Clause cases: “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an ‘out-and-out plan of extortion.’”⁵¹

In *Dolan*, the City of Tigard conditioned the approval of petitioner’s building permit on the dedication of a portion of her property for flood control and traffic improvements.⁵² Building on the *Nollan* decision, the Supreme Court examined the “required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.”⁵³ First, the Court found the city’s requirement that the petitioner dedicate a portion of her property for flood and drainage system improvement, as a condition of her building permit to expand a commercial property, had a nexus with legitimate public purposes.⁵⁴ Second, the Court held that because the city’s public purpose was not proportional to the condition imposed on the petitioner, the permit constituted a taking.⁵⁵

As such, under *Nollan* and *Dolan*, a permit condition is an unconstitutional taking if the condition does not have the requisite nexus with a public purpose or if the condition is too onerous.

B. History of AMAA and Federal Marketing Orders

As the economy of the Great Depression aggravated overburdened and unstable markets, Congress sought to help farmers obtain a fair value for their agricultural products.⁵⁶ So, as part of the New Deal, President Roosevelt passed the Agricultural Adjustment Act of 1933, authorizing restraints on production of agricultural commodities.⁵⁷ Facing constitutional scrutiny, the

⁵⁰ *Id.* at 837, 841-42.

⁵¹ *Id.* at 838. (quoting *J.E.D. Associates, Inc. v. Atkinson*, 584 A.2d 12, 14-15 (1981)).

⁵² *Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994).

⁵³ *Id.* at 377.

⁵⁴ *Id.* at 387.

⁵⁵ *Id.* at 391, 394.

⁵⁶ *Zuber v. Allen*, 396 U.S. 168, 174 (1969).

⁵⁷ Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders*

Act was revised in 1935, and again in 1937.⁵⁸ The original Agricultural Adjustment Act authorized the Secretary of Agriculture to:

“[I]ssue licenses permitting processors, associations of producers, and other to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof.”⁵⁹

The purpose of the AMAA is to “establish and maintain orderly agricultural-commodity marketing conditions and fair practices.”⁶⁰ To do so, marketing orders are utilized to set uniform prices, product standards, and other conditions for all producers in particular agricultural markets.⁶¹ Orders exist for milk⁶² and for approximately 35 types of fruit, vegetables, nuts, and specialty crops.⁶³

Although the initial Act of 1933 faced constitutional scrutiny, it was

Regulating Fruit and Vegetable Crops Under Agricultural Marketing Agreement Act of 1937, 5 SAN JOAQUIN AGRIC. L. REV. 3, 5 (1995).

⁵⁸ *Id.*

⁵⁹ *Zuber*, 396 U.S. at 174 (1969) (quoting Agricultural Adjustments Act § 8(3), 7 U.S.C. § 601 et seq. (2012) (original version at 48 Stat. 31, 35).

⁶⁰ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 457 (1997).

⁶¹ *Id.*

⁶² Milk marketing orders are different from orders for other specialty crops. As such, this article will not discuss the case law behind marketing orders concerning the milk markets. However, it is important to note that a lot of AMAA litigation concerns milk marketing orders.

⁶³ National Agricultural Law Center, *Marketing Orders Overview*, <http://nationalaglawcenter.org/overview/marketingorders/>.

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quickly revised by Congress, and since then marketing orders have been repeatedly held constitutional under Congress's power to regulate interstate commerce.⁶⁴ The constitutionality of the revised AMAA of 1937 was challenged in *U.S. v. Rock Royal Co-op*.⁶⁵ In that case, the Supreme Court upheld the Act's authority to set minimum prices and establish equalization pools, and held the Secretary's delegation in establishing marketing orders constitutional.⁶⁶ When issues arise concerning the authority to make economic adjustments, courts consider whether the legislation in question "states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits."⁶⁷ The AMAA satisfies these requirements.⁶⁸

The Administrative Procedure Act sets out the process for establishing marketing orders.⁶⁹ Any person, including the Secretary, may propose a marketing order through a formal written application process.⁷⁰ The Secretary then investigates whether the proposed order will further the policy of the AMAA to stabilize market conditions for the particular agricultural commodity in question.⁷¹ A notice and an opportunity for hearing are mandatory for any proposed order.⁷² Following the hearing, the Secretary issues a decision either recommending a marketing order or denying the proposal.⁷³ Marketing orders are implemented by administrative committees of producers appointed by the Secretary, and must be approved by two-thirds of all the affected producers or by producers who market at least two-thirds of the volume of the commodity.⁷⁴ Producers⁷⁵ impacted by the AMAA are referred to as "handlers," which the Act defines as "processors, associations

⁶⁴ *U.S. v. Rock Royal Co-op*, 59 S.Ct. 993, 998-1000 (1939).

⁶⁵ *Id.* at 997-98.

⁶⁶ *Id.* at 1010-16.

⁶⁷ *Id.* at 1013.

⁶⁸ *Id.*

⁶⁹ National Agricultural Law Center, *supra* note 63.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*; *see also* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. at 461-62.

⁷⁵ 7 C.F.R. § 989.11 (a producer not impacted by the Marketing Order is a "person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins.").

of producers, and others engaged in the handling” of covered agricultural commodities.⁷⁶ These committees also have the authority to impose assessments on producers to fund the administrative expenses of marketing orders, including product advertising, research, and inspection services.⁷⁷ Handlers who violate a marketing order may be subject to civil and criminal penalties.⁷⁸ The Secretary may terminate a marketing order at any time if “the order obstructs or fails to effectuate the declared policy of the AMAA.”⁷⁹

The Raisin Marketing Order is at issue in *Horne*.⁸⁰ Originally promulgated in 1960, the Raisin Marketing Order was created to “stabilize producer returns by limiting the quantity of raisins sold by handlers⁸¹ in the domestic competitive market.”⁸² This order is administered by the Raisin Administrative Committee (“RAC”), which is authorized to set up annual reserve pools of raisins that are not to be sold in the open domestic market.⁸³ After reviewing annual crop yields, raisin inventories, and shipments, the RAC makes a recommendation to the Secretary as to whether a reserve pool should be established.⁸⁴ In 2002, the RAC set the reserve tonnage rate at 47 percent, bringing in 22.1 million pounds of raisins.⁸⁵ In 2003, the committee set the rate at 30 percent, and brought in 38.5 million pounds of raisins.⁸⁶

The Raisin Marketing Order was challenged in *Lion Raisins, Inc. v. U.S.*, where a raisin producer sued the United States for unconstitutional taking that allegedly occurred when the RAC resolved to use reserve money

⁷⁶ 7 U.S.C. § 608c(1) (2012).

⁷⁷ *Glickman*, 521 U.S. at 462.

⁷⁸ 7 U.S.C. §§ 608a(5-6) (2012); 7 U.S.C. § 608c(14)(A) (2012).

⁷⁹ 7 U.S.C. § 608c(16)(A)(i) (2012).

⁸⁰ *Horne*, 133 S. Ct. at 2054.

⁸¹ 7 C.F.R. §989.15 (According to the Raisin Marketing Order, a handler under the jurisdiction of the act is “(a) [a]ny processor or packer; [a]ny person who places . . . raisins in the current of commerce from within [the state of California] to any point outside thereof; (c) [a]ny person who delivers off-grade raisins . . . into any eligible non-normal outlet; or (d) [a]ny person who blends raisins [subject to certain exceptions].”).

⁸² *Horne*, 133 S. Ct. at 2057.

⁸³ *Id.*; see also 7 U.S.C. § 608c(6)(E) (2012); 7 C.F.R. §§ 989.54(d) and 989.65.

⁸⁴ *Horne*, 133 S. Ct. at 2057.

⁸⁵ Jennifer F. Thompson, *U.S. Supreme Court grants cert in Horne v. U.S.D.A aka The Raisin Takings Case*, LIBERTY BLOG (January 16, 2015), <http://blog.pacificlegal.org/u-s-supreme-court-grants-cert-horne-v-u-s-d-aka-raisin-takings-case/>.

⁸⁶ *Id.*

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generated by designated year to subsidize raisin export programs for two subsequent years.⁸⁷ After the Court of Federal Claims granted the government's motion to dismiss, the raisin producer appealed.⁸⁸ On appeal, the Court of Appeals held that (1) Takings Clause claims are within the Court of Federal Claims' Tucker Act jurisdiction; (2) the handler's action was not cognizable as a Takings Clause claim in the Court of Federal Claims, since it essentially alleged that RAC had violated AMAA by implementing regulations; and (3) the producer's action was not cognizable as a Takings Clause claim in the Court of Federal Claims, since handler's exclusive remedy was administrative and judicial review mechanism of AMAA.⁸⁹ The Supreme Court declined review of this decision.

III. INSTANT DECISION

Before the Hornes' substantive claims could be heard, the U.S. Supreme Court had to make some procedural decisions. The first issue the Court considered was jurisdiction. The government argued that the plaintiff's case was properly dismissed on ripeness grounds.⁹⁰ The government relied on *Williamson County General Regional Planning Commission v. Hamilton Bank of Johnson City*,⁹¹ wherein the plaintiff alleged that the Regional Planning Commission's zoning decision constituted a taking of property without just compensation.⁹² In that case, the Supreme Court found the plaintiff's claim was not "ripe" because it had not been pursued in state court. In *Horne* though, the Supreme Court held that the court's reasoning⁹³ in *Williamson* did not extend to the Hornes' claims in this case because the

⁸⁷ *Lion Raisins, Inc. v. U.S.*, 416F.3d 1356 (Fed. Cir. 2005).

⁸⁸ *Id.* In a second action, this same raisin producer sued the United States alleging that RAC's taking without just compensation of approximately 2,230 of its storage bins. The Court of Federal Claims once again granted the government's motion to dismiss and the handler appealed. These two claims were consolidated.

⁸⁹ *Id.*

⁹⁰ *Horne*, 133 S. Ct. at 2061.

⁹¹ *Horne*, 133 S. Ct. at 2055 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

⁹² *Id.*

⁹³ *Id.* at 2061-2062 (In *Williamson County*, the Supreme Court found that the plaintiff's claim was not yet ripe because the plaintiff 1) could not show that he was injured by the government's action and 2) had not sought compensation through the proper channels provided by the state.); see *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-194 (1985).

AMAA already provides a comprehensive remedial scheme, which withdraws Tucker Act jurisdiction over a handler's takings claim.⁹⁴ Based on this, the Ninth Circuit held that jurisdiction existed and the Hornes were able to proceed with their takings claim.⁹⁵

The second issue before the Supreme Court was whether a handler may raise a takings-based defense in a USDA-initiated proceeding.⁹⁶ Relying on congressional intent, it was determined that the grant of jurisdiction includes the power to raise constitutional issues presented to and rejected by the agency.⁹⁷ The Court pointed out that allowing handlers to raise such a defense does not diminish the incentive to file direct challenges to marketing orders, because a handler who refuses to comply with a marketing order is still liable for monetary penalties if the constitutional challenge fails.⁹⁸ In conclusion, the Court held that the Hornes had raised a cognizable takings defense and that the Ninth Circuit erred in declining to adjudicate it.⁹⁹

It was then up to the Ninth Circuit to resolve the substantive constitutional issues. First, the Ninth Circuit set out to identify which property was allegedly taken from the Hornes.¹⁰⁰ In the court's view, the Hornes linked the imposition of a penalty for not turning over their raisins to a taking.¹⁰¹ To resolve the issue, the court relied on *Koontz*¹⁰² to rule that if the receipt of reserved raisins does not violate the Constitution, neither does the imposition of penalties for non-compliance.¹⁰³ As such, the court found that because the government neither seized the raisins from the Hornes nor removed money from the Hornes' bank account, no "paradigmatic taking"¹⁰⁴ occurred.¹⁰⁵

⁹⁴ *Horne*, 133 S. Ct. at 2055.

⁹⁵ *Id.* at 2062.

⁹⁶ *Id.* at 2063.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2055-56.

⁹⁹ *Id.* at 2063-64.

¹⁰⁰ *Horne*, 750 F. 3d. at 1137.

¹⁰¹ *Id.*

¹⁰² See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013).

¹⁰³ *Horne v. U.S. Dep't of Agriculture*, 750 F.3d 1128, 1138 (9th Cir. 2014).

¹⁰⁴ *Id.* ("A "paradigmatic taking" occurs when the government appropriates or occupies private property.") *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

¹⁰⁵ *Id.*

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The Ninth Circuit then proceeded to address the Hornes' claim that the Marketing Order, through a regulation, constitutes a categorical taking.¹⁰⁶ After a lengthy discussion¹⁰⁷ about which type of analytical framework to use, the court decided to follow the *Nollan/Dolan* rule¹⁰⁸ since it most closely controls the kind of use restriction at issue in this case.¹⁰⁹ To start, a distinction was made between absolute and conditional requirements.¹¹⁰ Because the Hornes voluntarily chose to sell their raisins in interstate commerce, the seizure of their raisins was merely a condition on the Hornes' use of their crops.¹¹¹ As in *Nollan* and *Dolan*, where conditions were set, respectively, on the granting of an easement and a transfer of title, in this case the "loss of possessory and dispositional control...[also] conditionally grant[ed] a government benefit in exchange for an exaction."¹¹² The Ninth Circuit then applied the *Nollan/Dolan* test, concluding that because the structure of the reserve requirement is roughly proportional to Congress's goal of ensuring an orderly domestic raisin market, there was a sufficient nexus between the Marketing Order and ensuing results.¹¹³ As such, no Fifth Amendment taking had occurred.¹¹⁴

IV. COMMENT

This case raises a number of serious questions about the extent to which the Fifth Amendment protects entrepreneurs – particularly, farmers – against government seizure of private property under the guise of economic

¹⁰⁶ *Id.*

¹⁰⁷ The Court declined petitioner's argument to apply the rule in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that permanent physical invasions of real property constitute a per se taking. According to the Ninth Circuit though, *Loretto* applies only to a total, permanent physical invasion of real property, and since the Raisin Marketing Order concerns personal property, *Loretto* is not applicable to this case. *Id.* at 1139. Secondly, the Court added that because the Hornes were not completely divested of their property right, even with respect to the reserved raisins, the framework of *Loretto* does not apply.

¹⁰⁸ See legal background discussion for the *Nollan* and *Dolan* discussions.

¹⁰⁹ *Horne*, 750 F.3d at 1143.

¹¹⁰ *Id.* at 1142.

¹¹¹ *Id.*

¹¹² *Id.* at 1143.

¹¹³ *Id.* at 1144.

¹¹⁴ *Id.*

regulation. Specifically, the second time around, the three issues before the U.S. Supreme Court are:

“(1) Whether the government's ‘categorical duty’ under the Fifth Amendment to pay just compensation when it ‘physically takes possession of an interest in property,’ *Arkansas Game & Fish Comm’n v. United States*, applies only to real property and not to personal property; (2) whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion; and (3) whether a governmental mandate to relinquish specific, identifiable property as a “condition” on permission to engage in commerce effects a per se taking.”¹¹⁵

This note focuses primarily on the first issue and the constitutional and policy implications arising from this decision. In analyzing any takings claim, the most important initial step is to determine whether the action in question actually constitutes a taking. Unfortunately, the Ninth Circuit erred in its analysis from the beginning. It took advantage of the situation at hand to narrow the definition of a taking, simultaneously devaluing property rights of all sorts. A layman’s illustration of the facts at hand demonstrates the gravity of the situation. Based on the marketing order, and subsequently the courts’ decisions, in 2003-2004, the Hornes would have been required to turn over 306 tons of raisins (that’s 30 percent of their crop) to the USDA in return for nothing.¹¹⁶ The year before, they would have had to give up nearly half of their raisins and would have received less than their cost of production in return.¹¹⁷ Despite these egregious results, the Ninth Circuit nonetheless ruled that no taking occurred and that the Hornes were not entitled to compensation, even had they complied with the Marketing Order and handed over as much as half of their annual crop yields.

In reaching its conclusion that no taking happened in this case, the

¹¹⁵ Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, 2015 WL 1048424 at i. (U.S. 2015).

¹¹⁶ Amicus brief: Brief for the Cato Institute, National Federal of Independent Business, National Association of Home Builders, 2015 WL 1048420 at 2.

¹¹⁷ *Id.*

Ninth Circuit split a lot of hairs and focused on *de minimis* technicalities that hold little constitutional power. For example, the court made a point to distinguish between real and personal property. According to *Lucas v. South Carolina Coastal Council*, Fifth Amendment Takings Clause affords less protection to personal property than to real property.¹¹⁸ Specifically, the Ninth Circuit relied on the Supreme Court’s statement that:

“[I]n the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale).”¹¹⁹

However, the Ninth Circuit failed to address other persuasive authority that speaks to the contrary. For example, the U.S. Court of Federal Claims (which, prior to the Supreme Court’s holding in this case, was the primary source for litigating challenges to federal marketing orders), held in *Maritrans, Inc. v. U.S.* that the Takings Clause does not afford less protection to personal property than real property.¹²⁰ Similarly, a D.C. Court of Appeals has also affirmed that, in dicta, the Supreme Court has expressly included personal property within the category of property that might be subject to per se taking.¹²¹ In fact, in most of its cases on this issue, the Supreme Court has reaffirmed the per se doctrine without any distinction between real and personal property.¹²² The reality is that differentiating between real and personal property for purposes of the Takings Clause is an artificial distinction with no legal foundation. Both real and personal property have the same potential to lose all economic value upon a government invasion. Thus, the Ninth Court erred in placing so much emphasis on the fact that raisins, as

¹¹⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992).

¹¹⁹ *Horne v. U.S. Dep’t of Agriculture*, 750 F.3d 1128, 1139-40 (9th Cir. 2014) (*quoting* *Lucas*, 505 U.S. at 1027-28).

¹²⁰ *Maritrans, Inc. v. U.S.*, 40 Fed. Cl. 790 (1998).

¹²¹ *Nixon v. U.S.* 978 F.2d 1269, 1285 (D.C., 1992) (*citing* *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 (1989)) (distinguishing between money, which is not subject to the per se doctrine because it is fungible, and “real or personal property”).

¹²² *See, e.g., F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252 (defining the category of cases to which the per se doctrine applies as those where a seizure of property involves “required acquiescence” to a permanent invasion of the property).

personal property, are entitled to less constitutional protection than real property.

If the court will not recognize the constitutional issues with the mechanism of the current raisin marketing order, then it should at the very least consider the policy implications. Granted, it is true that, as the Ninth Circuit pointed out in its conclusion, the courts are not institutionally equipped to modify wholesale complex regulatory regimes like this, but the courts still have significant influence in encouraging legislators to make necessary changes.

From a macroeconomic perspective, it is time to reconsider this residual program from the Great Depression. Marketing orders were originally utilized to stabilize market prices on certain commodities. However, since some of these marketing orders – like the raisin one in question here – no longer serve a legitimate public concern, perhaps it is time to allow the markets to do the job on their own. Specifically, moving back to competitive prices may better help price reflect the market value of certain commodities – like raisins. Ironically, in an effort to stabilize supply, and subsequently market prices, marketing orders are having the opposite effect, which costs the American economy millions in wasteful overproduction.¹²³

One of the justifications for marketing orders is that they stabilize farmers' incomes by protecting a commodity market from wide variations in market prices based on unpredictable events like weather. Although that is a valid concern, there are other ways markets can be stabilized which do not require the government taking significant portions of private citizen's property in the name of the greater good. For example, as many farmers already do, buyers and sellers of commodities can self-insure their crops through the options market. By taking advantage of open markets, the risk is spread across growers, distributors, and consumers. There is no evidence that uncontrolled industries are any more unstable or disorderly than those regulated by orders.¹²⁴ Granted, different studies analyzing the impact of marketing orders have shown contradictory results, but the results are often

¹²³ James L., *The High Cost and Low Returns of Farm Marketing Orders*, THE HERITAGE FOUNDATION (Oct. 15, 1985), <http://www.heritage.org/research/reports/1985/10/the-high-cost-and-low-returns-of-farm-marketing-orders>.

¹²⁴ *Id.*

so minimal in either direction that no firm conclusion can be drawn on marketing orders' success. For example, one study found that non-dairy market orders impose a cost of 0.7 cents to 7 cents per capita on consumers, and gains to producers ranging from \$478 to \$4,912.¹²⁵ On the other hand, around the same time, another study found that the order system did not result in higher average prices for consumers.¹²⁶

If federal regulation is determined to be absolutely necessary for markets to function efficiently, then there are other volume control options at the government's disposal. For example, an agency's arsenal includes shipping holidays, prorates, market allocations, and marketing allotments.¹²⁷ Although each of these options limits, in some shape or form, how farmers sell their produce, they are not as invasive as reserve pools which physically take property from farmers. For example, shipping holidays prohibit handlers from sending produce to the market during periods – usually a few days or a week – when farm prices decline due to temporary oversupply.¹²⁸ Similarly, marketing allotments are essentially quotas where growers are allowed to only sell up to their allotted quantities.¹²⁹

In fact, if the government wanted to keep its current reserve pool scheme, it could potentially improve things by pairing the reserve pool requirements with marketing allotments. In doing so, the reserve pool could help smooth out annual supplies and prices by carrying supplies from large crop years over to small crop years. Granted, this is precisely what the Raisin Marketing Order intends to do with the creation of its reserve pools. According to the Order, a committee is established and tasked with selling

¹²⁵ NICHOLAS J. POWERS, FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS, AND SPECIALTY CROPS 18 (1990), available at <http://naldc.nal.usda.gov/naldc/download.xhtml?id=CAT10408634&content=PDF>.

¹²⁶ Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, 73 AM. J. AG. ECON. 581 (1991).

¹²⁷ NICHOLAS J. POWERS, FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS, AND SPECIALTY CROPS 23-9 (1990), available at <http://naldc.nal.usda.gov/naldc/download.xhtml?id=CAT10408634&content=PDF>.

¹²⁸ *Id.* at 23.

¹²⁹ *Id.* at 29. Marketing allotments are the most controversial of the marketing order regulations because they have the most potential market power. Specifically, growers can cooperatively act as a monopoly if the marketing order completely covers production of the crop. The potential result is that a monopoly sells less products at higher prices than competitive producers. *Id.*

the reserve raisins in a manner “intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available.”¹³⁰ However, in their complaint, the Hornes pointed out that they have not received any reserve pool sale proceeds since the mid-1990s.¹³¹ For example, in the 2002-03 crop year, the reserve committee designated 47 percent of that year’s crop as reserve tonnage, which it then sold for \$970 per ton; however, none of that money was paid back to the raisin producers.¹³²

Regardless of whether you look at the case from a constitutional takings standpoint or from a policy perspective, it is clear the Ninth Circuit’s holding in *Horne* is inconsistent with legal precedent and modern economic needs.

V. CONCLUSION

In conclusion, as the Supreme Court considers *Horne* this second time around, it should reverse the Ninth Circuit’s decision and hold that at the very minimum, forced seizure of raisins for reserve pool requirements under a federal marketing order does constitute a compensable taking under the Fifth Amendment. Furthermore, in doing so, the Court should take a firmer stance on the relevance and efficiency of reserve pools, as well as the overall need for reform of federal marketing order schemes.

**Editor’s Note: On June 22, 2015, the United States Supreme Court held, in a 5-4 decision, that the Fifth Amendment requires the government to pay just compensation when it takes personal property, just as it when it takes real property. In this case, any net proceeds the raisin growers received from the sale of the reserve raisins goes to the amount of the compensation they have received for that taking; it does not mean the raisins have not been appropriated for government use. The government cannot make raisin growers relinquish their property without just compensation as a condition of selling their raisins in interstate commerce.*

¹³⁰ 7 C.F.R. § 989.67(d)(1).

¹³¹ *Horne v. U.S. Dep’t of Agriculture*, 673 F.3d 1071, 1076 (9th Cir. 2011) (rev’d on appeal).

¹³² *Id.*