NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

USING TAKINGS TO UNDO GIVINGS

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INTRODUCTION

In *Horne v. United States*, the 2015 Supreme Court ruled that the reserve requirement in a raisin marketing order required compensation under the Fifth Amendment.[1] *Horne* has attracted attention for its implications for takings jurisprudence. Yet it is also interesting for the unlikely proposition that the plaintiff was a supposed beneficiary of a statute challenging what is, essentially, a statutory "givings" – or a government-provided financial windfall.[2] This Article considers the supposed beneficiary of a statute mounting a constitutional challenges to the law. Unwilling beneficiaries mount challenges to eliminate laws that, due to changed circumstances, no longer suit them, particularly when the opposition is a minority within an industry. This Article considers

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1 135 S. Ct. 2419 (2015).

2 Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001).

the extent to which future litigation might seek to dismantle additional sections of Farm Bill Legislation,[3] and other areas in which industrial conditions have shifted such that once-desirable statutory givings regimes are no longer wanted by their supposed beneficiaries.

Horne reflects the story of statutory ossification of New Deal legislation in the agricultural industry.[4] In the Dustbowl era, Congress passed a series of laws permitting legalization of cartels among farmers. Marketing orders allow farmers to restrict the flow to market of agricultural commodities to promote more orderly pricing. Since passage of early Farm Bill Legislation in the 1930's, the industrial economics of agriculture have changed profoundly. Agribusiness has shifted from millions of small farmers to a smaller number of growers, and sometimes consolidated oligopolies. Some farmers who believe they have differentiated products believe that marketing orders restrain their profits, although the orders generally benefit the growers within a specific commodity category. Some farmers believe that the laws that farmers desperately wanted in the 1930's no longer benefit them. The statute has ossified. Farmers are using regulatory takings claims, like *Horne*, to dismantle the marketing order system.

The recipient of a givings legislation is maintaining the broader, overarching givings regime but creating flexibility within it to respond to changed economic circumstances through the use of judicial takings challenges. Judicial challenges to particular statutory provisions, or administration of statutes, provide an avenue for industry or nongovernmental organizations to refine legislation in response to changed circumstances. Such use of litigation provides an alternative account to statutory ossification,

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[3] "Farm Bill Legislation" is an umbrella term collectively referring to a series of agricultural laws passed since 1937, which are updated every five years.
[4] *See infra* Part II.B.

showing that judicial challenges can provide a mechanism through which fixed legislation remains flexible enough to respond to changed circumstances. It also presents an intriguing public choice account of how an interested minority position within an industry group can control legislation after it is enacted. Then, I briefly turn to the broader question of whether takings claims are being used to overcome statutory ossification in other instances.

I. STATUTORY OBSOLESCE, TAKINGS, AND GIVINGS

Imagine an industry which lobbies Congress for special treatment—a system of givings, whereby it receives some benefit from the public coffers, like dairy farmers receiving milk subsidies, or timber owners receiving free firefighting services. Fifty years later, social and economic circumstances have changed. The very thing that the industry asked Congress for is no longer what it wants. Perhaps the milk subsidies restrict production, or the firefighting agencies that put out fires no longer follow the suppression technique best for timber harvest. [5] Yet, the law granting the original request remains. It's a peculiar problem. The industry secured the special treatment — a statutory givings regime — that it wanted at one point in history, but wants it no more.

The law offers a handful of solutions to either dismantle or work around outmoded statutes.[6] First, the most obvious solution is for the industry to lobby Congress to amend or abolish the law. But that's unlikely to work. It's expensive and requires near unanimity within the industry and public support. Statutes are sticky and

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[5] Karen M. Bradshaw, *A Modern Overview of Wildfire*, 21 FORDHAM ENVTL. L. REV. 445 (2010) (describing shifting landowner preferences for public wildfire services in response to changed wildfire suppression policies); Karen M. Bradshaw, *Backfired! Distorted Incentives in Wildfire Suppression*, 31 UTAH ENVTL. L. REV. 155 (describing the same as the prior article).

[6] Other solutions exist, but are so rare as to be outlandish, as with a constitutional amendment.

notoriously hard to unravel. It is difficult to obtain Congressional attention. Second, the industry might seek executive favor – changing the way in which the law is administered by agency officials while the language of the statute remains the same.[7] This is attractive for laws in which there is a high degree of administrative discretion, and where officials may be subject to capture. It requires, however, ongoing interaction with agencies, which might be slow, expensive, and mired in bureaucracy. Third, the industry might seek private solutions to circumvent undesirable aspects of the law. If yours is a minority position within an industry, however, this is difficult. The fourth technique, which is the focus of this Article, is that a member of the industry can litigate, claiming that the law it once requested was, in fact, unconstitutional.

The use of courts to overrule obsolete statutes is particularly well-suited towards givings regimes in which a minority of dissatisfied industrial actors no longer want the law. If a majority of industrial actors were opposed to the law, private action would likely proceed along legislative, executive, or private channels. But, when a minority within the group seeks to overturn the law, the judicial challenge is attractive. If an adequate constitutional challenge can be presented – admittedly, a high bar – and the funds and effort provided for litigation, then the industry has protection against unforeseen outcomes associated with statutes. Moreover, the potential for judicial challenge diminishes the importance of statutory perfection on the first instance, and guards against uneven enforcement in the future. The cost of any single actor undermining the law is high, which is why disgruntled actors might seek support from interest groups with litigation interests to fund litigation, or larger actors who do not publicly support the litigation but benefit from it nonetheless.

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[7] *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

Judicial oversight provides a permanent, structural protection against statutory obsolescence. Challenges form a latent, ever-present check on statutes becoming outmoded. Sunset provisions must be explicitly built into the language of a statute. *Horne* specifically considers the peculiar circumstance in which takings law — the idea that the government must compensate private citizens when taking their property for public use — is used to undo givings, in which public goods and benefits have been bestowed upon private individuals. The dynamic between a statutory givings regime and a judicial takings challenge is interesting, in that the very party that wanted the law — the beneficiary — preserves, through takings law, the option to dismantle it through judicial action at any time.

II. AN OVERVIEW OF MARKETING ORDERS

This Part explores an example of a supposed beneficiary of a law mounting a constitutional challenge to dismantle a law that no longer fits the industries' interest. It begins by briefly reviewing *Horne v. Department of Agriculture.*[8] Then, it overviews the history and mechanics of the marketing orders at issue in *Horne*. The conditions that prompted marketing order legislation have changed over time, such that the statute that once aided farmers is now believed by some farmers to artificially dampen profits. In fact, farmers are seeking to undo a statute that was designed to help them. The first line of attack was a First Amendment challenge against marketing orders requiring growers to contribute to advertising campaigns. This challenge received mixed reception in three Supreme Court cases decided between 1997 and 2012. When these attempts garnered mixed results, growers changed the basis of the constitutional challenge. In the 2015 case *Horne v. United States*, a raisin producer asserted a takings challenge instead against

[8] 133 S. Ct. 2053 (2013).

a different marketing order provision. In *Horne,* the Supreme Court ruled that at least some forms of marketing orders constitute a physical takings. This ruling effectively dismantled a statute that no longer suits some members of the industry it was intended to serve.

A. HORNE V. THE DEPARTMENT OF AGRICULTURE

In *Horne v. Department of Agriculture*, plaintiffs Marvin and Laura Horne alleged that the California Raisin Marketing Order requiring them to withhold a portion of raisins from sale in primary markets constituted a takings under the Fifth Amendment. The Hornes, like all raisin growers in California, were required to ship all raisins to a handler, who separated the raisins into two categories, with reserve raisins being disposed of through sale on secondary markets or donations, at its discretion.[9] The Hornes received a portion of the proceeds from the reserve raisins, and sold the remainder of their raisins in the primary market, where they received a presumed price benefit because of the restricted supply. In 2000, the Hornes refused to ship their raisins to the handler, and were fined the market value of the raisins — $480,000 — and a $200,000 civil penalty. After a long and complicated series of steps, the Ninth Circuit rejected the Hornes' argument that the reserve requirement was a *per se* taking, noting that "the Takings Clause affords less protection to personal than to real property" and that the Hornes retained an equity interest in the proceeds of sale.[10]

A majority of the Supreme Court ruled that the marketing order's reserve requirement constituted a clear physical taking, which required just compensation. Chief Justice Roberts wrote the majority opinion, which held that the government's categorical duty to pay just compensation for physically taking possession of an interest in property applied to personal property as well as real

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[9] The Hornes were both a producer and a handler for their crop of raisins. *Id.* at 2054.
[10] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139.

property.[11] The Court found that the duty to pay just compensation was not abrogated by the contingent interest in the value of the raisins held by the Hornes.[12] The Court also rejected the argument that the government could condition permission to engage in a particular form of commerce – here, selling the crop of raisins – on the reserve requirement.[13]

B. THE HISTORY OF MARKETING ORDERS

American agriculture has long benefited from government intervention designed to aid farmers and American consumers. Congress passed a series of laws allowing farming cooperatives to coordinate restrictions on supply, in ways that would otherwise violate antitrust laws. In 1890, Congress passed the Sherman Act,[14] which generally prohibited cartelization and collusion in industries. Passage of the Sherman Act prompted concern that antitrust law would dismantle agricultural cooperatives.[15] Congress responded to these concerns by passing a series of legislation exempting farmers from antitrust law. Section 6 of the 1914 Clayton Act included a provision stating that antitrust law should not prohibit agricultural cooperatives.[16]

Government assistance to farmers continued throughout the first half of the twentieth century.[17] Legislatively, Congress passed

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[11] *Horne*, 135 S. Ct. at 2426.
[12] *Id*. at 2428-29.
[13] *Id*. at 2430-31.
[14] 15 U.S.C. §§ 1-7 (1890).
[15] Christine A. Varney, The Capper-Volstead Act, Agriculture Cooperatives, and Antitrust Immunity, The Antitrust Source, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec 10 _Varney12_21 .authcheckdam.pdf.
[16] 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 17 (2006)).
[17] The government also funded irrigation projects prior to World War I and began making loans for emergency crop and feed loans in 1918. In 1929, the Federal Farm Board created a revolving fund of $500 million to finance farm products. Donald C.

the Capper-Volstead Act in response to declining produce prices.[18] The Act allowed cooperatives to guard against middlemen produce speculators, authorizing farmers to act "in collectively processing, preparing for market, handling, and marketing" produce.[19] The Act prohibits farmers from restraining trade "to such an extent that the price of any agricultural product is unduly enhanced."[20]

Subsequent legislation further empowered farmers to act cooperatively to stabilize markets. The 1933 Agricultural Adjustment Act authorized domestic agricultural producers to act collectively to stabilize markets. The Act noted:

> [T]hat the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[21]

Commentators have noted that the Agricultural Adjustment Act essentially created a domestic cartel, in which the government was the administrator.[22] This Act was followed by the Agricultural Adjustment Act of 1935.

In 1937, Congress passed the Agricultural Marketing Agreement Act ("AMA").[23] The focus of this Act was to "establish and maintain…orderly marketing conditions for agricultural

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Horton & E. Fenton Shepard, *Federal Aid to Agriculture Since World War I*, 19 AGRIC. HIST. 114, 116 (1945).
18 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. §§ 291-292 (2006)).
19 7 U.S.C. § 291.
20 7 U.S.C. § 292; *see also* Horton & Shepard, *supra* note 17, at 116.
21 7 U.S.C.S. § 601 (LexisNexis).
22 F.B. Graver, *Cartels, Combinations and the Public Interest*, 26 J. FARM ECON. 617 (1944).
23 44 Stat. 803 (1926) (codified as amended at 7 U.S.C. § 455 (2006)).

commodities in interstate commerce." The AMA was designed to stabilize specified agricultural commodities, such as fruits and vegetables, nuts,[24] milk,[25] and other miscellaneous commodities.[26] This was achieved by limiting the amount of each commodity allowed to reach the market, establishing quality control standards, and promoting programs for marketing products.

Situating this series of legislation against agricultural economics of the time demonstrates that Congress was responding to a set of concerns particular to the era. Most notably, agricultural markets at the time were plagued by bargaining power differentials between farmers and the processors, wholesalers, or retailers who bought from them; geographical separation created monopsony buying power for purchasers of agricultural commodities. There were many individual farmers, and few buyers of agricultural products.[27] The middlemen buyers were widely believed to be unscrupulous – buying produce inexpensively from farmers and selling it at a tremendous markup to food wholesalers. Congress was also responding to ongoing romanticization of rural American farmers, a narrative that continues through the present.[28] Public messaging at the time linked the plight of the rural farmer to the plight of America as a whole. Moreover, Congress was particularly cognizant of the need for food to support national security in the light of

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[24] 7 C.F.R. §§ 900–999 (fruits, vegetables, and nuts).

[25] 7 C.F.R. §§ 1000–1199 (milk).

[26] 7 C.F.R. §§ 1200–1599 (miscellaneous commodities).

[27] Varney, *supra* note 15, at 2 ("Small, individual farmers could sell their crops and livestock only to a few large corporate entities that then processed and distributed agricultural products.").

[28] Agriculture has long held a special place in the American consciousness. The term "agricultural fundamentalism" captures the "national importance of agriculture as an industry and farming as a way of life." Horton & Shepard, *supra* note 17, at 114; *The Effect of Terminated Federal Marketing Orders on Small Farms, and A Reflection of the Jeffersonian Spirit*, 22 SAN JOAQUIN AG. L. REV. 115, 115 (noting that "[s]ince the time of the nation's founding, the noble pursuit of agriculture was seen as an important aspect of American life").

world events. Having set forth the historical backdrop, the next section considers the modern mechanics of marketing orders created by legislation drafted decades ago.

C. MECHANICS OF MARKETING ORDERS

Marketing orders permit farmers to act collectively, in what would otherwise constitute a violation of antitrust law.[29] Marketing orders essentially legalize a cartel[30] in which producers may withhold farm products and create collective marketing campaigns.[31] Marketing orders are comprised of three techniques: (1) volume controls; (2) minimum quality controls; and (3) commodity promotion.[32] Volume controls, the marketing order at issue in *Horne*, directly control the volume of production. This mechanism requires producers to give a portion of their crop to the government, which then resells the commodity to secondary markets. Volume controls restrict the supply of commodities to the primary market, which in turn increases the price of goods. Volume controls are the most stringent form of marketing orders.

Each marketing order program is administered by the Agricultural Marketing Service ("AMS"), an agency within the United States Department of Agriculture ("USDA"). To create a marketing order, members of the industry hold a meeting where

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[29] Tina Lynn Saitone, *The Economics of Minimum Quality Standards Imposed by Agricultural Producer Organizations* (University of California, Davis, 2008) (on file with author) ("Rising out of the era of the Great Depression, marketing orders were instituted in an attempt to stabilize farm incomes and mitigate the adverse price movements that are common in agricultural commodity markets.").
[30] Tina L. Saitone & Richard J. Sexton, *Minimum Quality Standards, Industry Self Regulation, and Economic Welfare,* AGRICULTURAL ISSUE CENTER, UNIVERSITY OF CALIFORNIA, 2 (noting that marketing quality standards are "in essence as a legal cartel").
[31] Horton & Shepard, *supra* note 17, at 116.
[32] For a discussion of minimum quality controls and commodity promotion, see Part III.

the support for a program is assessed.[33] A steering committee of farmers, growers, and shippers prepare a proposal, which is sent to the Administer of AMS. AMS issues a notice of public hearing, at which a USDA Administrative Law Judge presides. Proponents for the marketing order bear the burden of proof. After the hearing, parties may file briefs with the administrative law judge, who issues a recommended decision. For a period of time, petitions for exceptions to the recommended condition may be filed. After considerations of exceptions, the USDA prepares a final decision. If the decision is favorable, a referendum is held by the producers. If two-thirds of the growers—by either volume or number—vote to approve the proposal, the Secretary of Agriculture issues the marketing order. The process takes up to eighteen months to complete. Once a marketing order is issued, the agreed-upon technique becomes mandatory for every grower within the industry.[34]

Although various legislation limits the power of these mechanisms to control prices, the historical enforcement of these provisions is limited.[35] The Secretary of Agriculture has never brought an action alleging that an agricultural marketing cooperative violated the undue price enhancement provision of Capper-Volstead Act.[36] The potential for antitrust suits, however, provides an implicit constraint on price fixing. Recently, major food retailers have brought charges against produce growers alleging

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[33] *How to Create a Marketing Order*, U.S. DEP'T AGRIC., http://www.ams.usda.gov/rules-regulations/moa/howto.

[34] Unlike marketing orders, "marketing agreements" are voluntary and apply only to their signatories; not to all members of the industry.

[35] Ralph H. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, COLUM. L. REV., 1623, 1635 (1980) (noting that "traditions of inaction force the conclusion that department enforcement of the antitrust provisions has failed").

[36] *Id.*

price fixing. *In re: Fresh and Process Potatoes Antitrust Litigation*,[37] a class action lawsuit, resulted in a $5.5 million settlement for price-fixing potato crops.[38] *Idaho Potato Growers* represents one of several legal challenges mounted in response to changed circumstances in the agricultural industry, which are outlined below.

D. MARKETING ORDERS AMIDST CHANGED INDUSTRIAL CHARACTERISTICS

Economic conditions surrounding American agriculture have changed considerably since the laws allowing marketing orders passed in the 1930's. Although the statutes of that era remain on the books, their animating purposes are obsolete. Even agency insiders acknowledge that "major elements of the USDA program are premised upon antiquated Depression-era economic and social policies that have been outgrown."[39] Most notably, the number of small family-run farms have declined and the industry has shifted towards large-scale corporate farming.[40] The balance of power between growers and middlemen has flipped – now there are a few large producers and many produce buyers. Some growers are contracting directly with food retailers, bypassing the middlemen altogether.

In response to these changed conditions, the marketing ordering system is under attack. In some commodity categories,

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[37] *Fresh Potatoes Antitrust Class Action Settlement*, TOP CLASS ACTIONS (July 2, 2015), https://topclassactions.com/lawsuit-settlements/closed-settlements/60974-fresh-potatoes-antitrust-class-action-settlement/.

[38] *Id.*

[39] Nancy S. Bryson, *An Essay: U.S. Food and Agriculture in the 21st Century: Is USDA Still Relevant?*, 2 J. FOOD L. & POL'Y 1, 2 (2006).

[40] Bradley John Kalebjian, *The Effect of Terminated Federal Marketing Orders on Small Farms, and A Reflection of the Jeffersonian Spirit*, 22 SAN JOAQUIN AG. L. REV. 115, 126-28 ("Since the AMAA's creation seventy-five years ago, agriculture has experienced many economic changes, the most significant being the decline of small family farms and a shift toward large-scale corporate farming operations.").

such as nectarines and peaches, large farm growers are using their size to terminate long-held marketing orders. Large producers are voting against marketing orders, and hold sufficient product volume to sway the vote. At least one commentator suggests that the dismantling of marketing orders not only reflects the shift towards corporate farming, but promotes it. Under this account, corporate farmer-handlers (who both handle and process agricultural commodities) are assuming committee seats and controlling volume-based votes on market orders, resulting in parties biased towards large farmers. Marketing orders are terminated despite majority votes by farmers because large volume producers control volume-based voting processes.[41] In commodities in which individual farmers do not have sufficient voting power to terminate marketing orders by vote, they are pursing judicial challenges to the legislation giving rise to the marketing ordering system.

Challenges to marketing orders are somewhat remarkable because they tend to benefit growers within an industry over time. Numerous agricultural economists have studied the overall effects of marketing orders on the American agriculture industry. The general findings suggest that growers have largely profited from marketing orders.[42] Numerous studies demonstrate that growers receive more for their product because of market conditions. Indeed, economists must analyze individual marketing orders prior

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[41] Kalebijan, *supra* note 40, at 133 (noting that in 2011 63% of nectarine producers and 62% of peach farmers voted to support marketing orders, but the orders failed because the farmers represented 36% of their crop volume, and thus failed to meet either the two-thirds farmer or volume based requirement necessary to pass the marketing order).

[42] THE ECONOMICS OF COMMODITY PROMOTION PROGRAMS: LESSONS FROM CALIFORNIA (Harry M. Kaiser, Julian M. Alston, John M. Crespi & Richard J. Sexton eds., 2005); Julian M. Alston, John M. Crespi, Harry M. Kaiser & Richard J. Sexton, *An Evaluation of California's Mandated Commodity Promotion Programs*, 29 REVIEW OF AGRIC. ECON. 40 (Spring 2007).

to going to vote — if the marketing order is not likely to benefit growers, it does not pass.

III. WHAT'S NEXT FOR AGRIBUSINESS

Horne suggests that the Supreme Court is open to striking down New Deal era statutes designed to benefit farmers.[43] What is next? The marketing order at issue in *Horne* was the most stringent form of marketing order, in which the government physically took excess raisins, which the Court found constituted a physical takings. This Part considers the implications of *Horne* on the foreseeable next line of attack within agriculture law — minimum quality standards and commodity promotion. It suggests that both are subject to takings challenges, then considers the viability of such challenges outside the context of agriculture.

A. MINIMUM QUALITY STANDARDS

Minimum quality standards are a form of marketing orders prohibiting products with undesirable attributions from entering the market. This includes small fruit, blemished fruit, and other products with cosmetic defects.[44] If produce does not meet that minimum standard, it may not enter primary markets.

Although minimum quality standards are ostensibly about produce quality, they are in fact used as a proxy for volume control — to restrict supply on the primary market and increase revenue. Standards become higher in years with an abundance of produce. Even though standards are set before the domestic produce season begins, they can change several times throughout the season. One

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[43] The vacancy created by the unexpected death of Justice Scalia may alter future litigation on that point.

[44] Tina L. Saitone and Richard J. Sexton, *Minimum Quality Standards, Industry Self Regulation, and Economic Welfare*, AGRICULTURAL ISSUE CENTER, UNIVERSITY OF CALIFORNIA 2 (2008) (noting that "the types of product attributes regulated in this setting are often visual, e.g., size, ripeness, blemishes, or other cosmetic defects").

agricultural expert described an example of the standards raising three times in a single year for a particular product, prompted by significant changes in yield.[45] Minimum quality standards "act as a form of volume control" that "mitigate asymmetric information."[46] Federal marketing orders can even serve as a non-tariff trade barrier by subjecting foreign imported produce to domestic standards.

There are currently 31 marketing orders operating under federal statutes, 29 of which have minimum quality standards.[47] States also allow producers to establish state marketing orders. Agricultural economists are skeptical of private ordering within industry with regard to minimum quality standards, noting that "industries operating under self-governance are unlikely to implement these welfare-enhancing MQS and, instead are likely to implement MQS in situations where they reduce net welfare."[48]

B. COMMODITY PROMOTION

Commodity promotion is the least stringent form of market order. It requires producers to pay a "check off" – essentially a tax – on every unit of produce sold to fund advertising campaigns, such as the "Got Milk?" campaign. For example, a farmer might have to pay ten cents per box of peaches sold to contribute to the campaign. Challenges to commodity promotion have reached the Supreme Court three times in the last fifteen years.[49] These cases have been framed as First Amendment challenges, essentially arguing that

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[45] Interview with Timothy Richards, Marvin & June Morrison Chair of Agribusiness and Resource Management, Morrison School of Agribusiness, Arizona State University.
[46] Saitone & Sexton, *supra* note 44, at 20.
[47] *Id.*
[48] *Id.* at 20.
[49] Johanns v. Livestock Marketing Ass'n, 125 S. Ct. 2055 (2005); United States v. United Foods, Inc., 533 U.S. 405 (2001); Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997).

mandated payment to marketing campaigns comprised compelled speech in violation of the First Amendment.[50]

An emerging shift in agriculture forecasts future discontent with the commodity advertising section of marketing orders. Some argue that agricultural products are no longer universally considered a commodity. Subcategories like certified Angus beef, grass-fed beef, and organic produce have emerged. Growers with products in subcategories are loathe to pay check offs for commodity promotion that lumps their differentiated products with broader market categories. Differentiated producers are required to pay for campaigns like "Got Milk?" or "Pork, the other white meat" that some believe undermine their unique market position.

C. BEYOND AGRICULTURE

Horne will undoubtedly be cited for future takings cases. But, the larger backdrop of the case — the supposed beneficiary of a statute suing to undo Congresses' statutory givings regime —might be a roadmap for future challenges to ossified or controversial statues. It is an open question whether there is something unique about takings that provides an avenue for such challenges, or if litigants are merely searching for any Constitutional deficiency in the passage of the law that may give way to abolition of the law or the functional equivalent of such.[51] Yet it is clear that those looking for a basis to challenge a law would be well-served to consider how ultimate givings could be paved to takings challenges.

Although one can imagine a litigation strategy devoted towards eliminating obscure and ossified statutes on Constitutional

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50 Robert C. Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195 (2005).

51 A takings finding does not, of course, abolish the law at issue in *Horne,* but functionally reaches the same result by forcing compensation for the raisins at issue, which undermines the entire program.

grounds, it is difficult to imagine the kind of public support and funding necessary for such an approach without an ideological agenda. But, with an ideological agenda of limiting government regulation in hand, precisely such an approach makes sense. And, if crafting a litigation strategy designed to dismantle New Deal big government, one would look for schemes precisely like the marketing orders in *Horne*.

The circumstances of agriculture may seem narrow, but the dynamics of using a taking challenge to manage a giving regime over time is more widespread. A litigation strategy might focus on examples where a government giving regime passed in response to an earlier action prompted some of the supposed beneficiaries to eventually reject the benefit.[52] Such instances, I argue, may be resolved through the courts – minorities attempting to veto a generally popular program by mounting concerns to procedural or constitutional aspects of the statute. Minority dissenters of a law – whether at the time of its original passage or decades later –

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[52] A close parallel to *Horne* exists in the mounting controversy of timber landowners mounting takings claims against the government for firefighting practices that burn private timber. On its face, this is an odd claim: the timberland owners are the presumed beneficiary of a publicly funded firefighting program that generally protects their land. All Americans – including those in urban centers far removed from timberlands – fund federal firefighting efforts of timberlands at a cost of hundreds of millions of dollars a year. Yet, the party that benefits the most from this service – a small group of industrial timberland owners – is maneuvering for takings compensation when firefighting decisions result in burned timber.

This situation parallels *Horne* in a number of interesting ways. Legislation that was passed in the distant past at the behest of industry is now challenged by the industry. The very party that benefitted from the legislation now considers themselves unfairly burdened by it. In some sense, the industry asks too much: it wants not only the public good of free fire protection, but also wants the protection provided according to its dictate of where and how the fire should be allowed to burn. If the government fails to follow industry edicts – say, by implementing a fire allowed policy, or setting backfire on private land – then the industry wants compensation for the perceived flaws.

preserve the option to undercut the law at any time by mounting a takings challenge.

In some way, this seems remarkable. If a rural area receives the givings of a highway through their land that will serve the economic interests of all residents, the individual whose property is taken to build the highway will of course object to the plan without adequate compensation. This is the foundation of the takings clause: that no individual should be required to bear an individualized cost for the benefit of all. The takings clause provides that government, representing the collective good, may take an individual's property, but must pay him for it.

What makes *Horne* remarkable to my mind, however, is that the litigants are not individual property owners, but rather members of an industry with robust norms and repeat transactions. If we believe that industrial groups operate in the shadow of the law, then why are individuals burdened by generally popular givings regimes mounting challenges that dismantle the regimes for all members of the industrial group? Why are they not sanctioned, paid, or bullied into reducing the complaint to a mere grumble instead of a Supreme Court case?

Agricultural economists are well aware of the net welfare gains produced by marketing order programs. Growers regularly engage with economists about the programs. Why, then, does the group not collectively act to restrict litigation by the overburdened member to permit increased collective gains? Why did other raisin growers — the majority of whom clearly were in favor of marketing orders — not pay, bully, or bribe Horne to prevent his lawsuit? Adherents to Coasian ideals would look to transaction costs; Ellickson's accolades might consider whether the changing industrial conditions in agriculture have degraded the system of industrial norm and self-help that one might suspect would supplant reliance on judicial intervention to solve the problem of a vocal dissident.

A final note on the vulnerability of statutes emerges here, in that judicial challenges introduce a temporal element of the veto option. The constitutional challenge functions as a kind of sunset provision, albeit one managed by the judiciary. At any point in the life of any law, parties may lodge constitutional challenges. The constant vulnerability of statutes to Constitutional challenges thus functions as a check on dated legislation. Although harmless legislation with little impact may remain on the books, dated laws that undermine the interests of a group with the funds and sophistication to mount a Constitutional challenge are subject to being struck down by courts. When one avenue of attack fails, as with the First Amendment challenge to commodity promotion, other avenues may be pursued so long as the parties have the funding to continue bringing cases.

CONCLUSION

The notion of statutory ossification suggests that laws, once passed, are relatively rarely revisited. As a result, law remains static – fixed at a particular point in time, and responsive to the conditions therein – instead of updating to new information and changed circumstances. This theory suggests that concerns about statutory ossification may be overstated; instead of building sunset provisions into the law, the tripartite system of government provides a built-in escape valve for legislation aiding legislation.

This approach allows selective usage of the law. Subsections of the industry that believe they are benefited by the laws may continue to use them until a legal challenge emerges. The very individuals who advocated for legislation at one point in history may no longer want the law at another point in time due to changed circumstances. Judicial challenges provide an alternative to seeking legislative amendment of a no-longer-popular law, which relies upon judicial relief instead of legislative outcome.

This Article suggests that constitutional challenges provide a kind of judicial sunset provision, in which obsolete statutes that no longer fit present circumstances may be eliminated without Congressional action. Moreover, judicial challenges do not require majoritarian support, meaning that a minority member or segment of an industrial group can unilaterally dismantle a now-unfavorable givings regime through a constitutional challenge. In agribusiness, one can expect to see such use of challenges with regard to minimum quality standards and commodity production. More broadly, one looking for fertile ground to statutory challenges would be well-suited to find areas in which the supposed beneficiaries of a law believe it no longer serves them.