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The Supreme Court's Decision in the 'Raisin Case': What Does it Mean for Mandatory Marketing Programs?

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In *Horne et al. v. Department of Agriculture,* the U.S. Supreme Court ruled that the Raisin Marketing Order's volume-control program constituted an illegal taking of private property. We discuss the rationale for the program, the Court's opinion, and what this decision means for volume controls enacted under marketing order provisions, as well as the other functions that marketing orders commonly perform.

Also in this issue

In a decision announced on June 23 of this year, the U.S. Supreme Court ruled on an 8–1 basis in *Horne et al. v. Department of Agriculture* [576 U.S. _____ (2015)] that the reserve requirement implemented by the Raisin Administrative Committee (RAC) under the federal raisin marketing order represented an unconstitutional taking of property. In this article, we provide some brief background on federal marketing orders and mandatory marketing programs, discuss the raisin reserve program and volume-control provisions of marketing orders generally, examine the Court's opinion, and analyze the implications for marketing programs moving forward.

Background on Mandatory Marketing Programs

The Agricultural Marketing Agreement Act (AMAA) of 1937 authorized federal marketing orders. The legislation was enacted during the Great Depression and intended to improve the economic well-being of farmers. Around this same time, most states implemented similar legislation to enable marketing programs to operate within their boundaries. For example, the California Marketing Act was also enacted in 1937. Other authorizing legislation has been passed in succeeding years. In particular, the Commodity Promotion, Research, and Information (CPRI) Act of 1996 authorizes national programs for commodity promotion and research. Some mandatory marketing programs have also been authorized as "stand alone" pieces of legislation.

All mandatory marketing programs follow some basic principles. They are implemented voluntarily by producers and handlers (if the program's provisions impact handlers) of a specific commodity based upon a vote. Federal marketing orders require a two-thirds supermajority but the CPRI Act only requires a simple majority. Once a program is enacted, its provisions are mandatory for all producers and handlers who operate within the geographic boundaries established by the program.

Federal marketing orders operate subject to the approval of the U.S. Secretary of Agriculture while state programs are subject to the approval of the Secretary's state-level counterpart. Programs are funded by an assessment (often called a check off) on production paid by either producers or handlers, or in part by both. The programs are subject to periodic re-authorization votes and can also be terminated by a vote of producers or handlers.

Federal or state mandatory marketing programs can include a number of collective activities, with the specific purposes outlined in the program's charter. The most common activities by far are generic commodity promotion and funding for research on production and (increasingly) nutrition and health. Also common are quality standards, including the setting and administration of

Table 1. Federal Marketing Order Provisions

Commodity	Research & Promotion	Volume Control	Grade	Size	Quality
California Almonds	E	A			E
California Dates	E	A	E	E	
California Desert Grapes			E	E	E
California Dried Prunes	A	A	A	A	A
California Kiwifruit	A		E	E	E
California Olives	E		E	E	E
California Pistachios			E	E	E
California Raisins	E	A	E	E	
California Walnuts	E	A	E	E	
Colorado Potatoes	A		E	E	E
Cranberries-10 States	E	A			
Far West Spearmint Oil	E	A			
Florida Avocados	E		E	E	E
Florida Citrus Fruit	A	A	E	E	
Florida Tomatoes	A		E	E	E
Georgia Vidalia Onions	E				
Idaho-East Oregon Potatoes			E	E	E
Idaho-Oregon Onions	A		E	E	E
Oregon-Washington Pears	E		A	A	A
Oregon/WA Hazelnuts	A	A	E	E	
South Texas Onions	E		E	E	E
Tart Cherries-7 States	A	E	A	A	
Texas Oranges & Grapefruit	E		E	E	
Virginia-N. Carolina Potatoes		E	E	E	E
Walla Walla Onions	E		E	E	E
Washington Apricots	A		E	E	E
Washington Potatoes			E	E	E
Washington Sweet Cherries	A		A	A	A

Source: USDA, Agricultural Marketing Service. 2014 "Marketing Order Commodity Index. E=In effect, A=Authorized but not in effect.

grades and minimum quality requirements. Table 1 lists the federal marketing orders in place currently and the activities they are authorized to perform. Notably, volume controls, the subject of the Court's ruling, are infrequently authorized by federal orders and even less frequently implemented. No state program to our knowledge authorizes volume-control provisions.

In general, mandatory marketing programs have been popular with the producers who operate under their auspices. Most re-authorization votes succeed with a very high level of support, but occasionally programs are de-authorized. For example, the California Tree Fruit Agreement, as applied to fresh peaches and nectarines in California, was terminated in 2011, following the failure of a re-authorization vote to attain the necessary supermajority.

Despite their popularity, mandatory marketing programs have long been controversial. Some producers and handlers have questioned their effectiveness or challenged them in courts as unconstitutional infringements on their liberty to make their own production and marketing decisions. Prior to the raisin case, a handful of other cases came before the U.S. Supreme Court. The first was in 1939 (*U.S. v. Rock Royal Co-op, Inc.* [307 U.S. 533 (1939)] where a dairy cooperative asserted the Secretary violated due process (5th Amendment) and infringed on commerce rights reserved for the states (10th Amendment) because the cooperative's milk was not shipped out of state. The Court ruled 5-4 against the cooperative, establishing the constitutional justification for programs that would last for more than half a century. No new constitutional threat to the programs would emerge until the 1990s, when plaintiffs saw an opportunity to challenge the promotional aspects of the marketing programs.

The first case to reach the Supreme Court concerned the advertising of peaches, plums, and nectarines. In *Glickman v.Wileman Brothers & Elliott, Inc.* [521 U.S. 457 (1997)], the Court ruled that the advertisement was part of a larger regulatory scheme and not unduly violative of the plaintiff's First Amendment rights. The Court ruled four years later in *United States v. United Foods, Inc.* [533 U.S. 405 (2001)] that the federally mandated mushroom advertising program was not part of a larger regulatory scheme, and was, in this case, unconstitutional.

The 1997 and 2001 rulings created confusion, as programs sought clarification on just what constituted the extent of regulation. In 2005, the Court ruled the beef promotion program to be constitutional because it was a form of government speech (*Johanns v. Livestock Marketing Association* [544 U.S. 550 (2005)]). Unlike private speech, government speech is not subject to the First Amendment. This ruling effectively silenced First Amendment challenges to all of the programs.

None of the cases that reached the Supreme Court examined volume control. However, both the 1997 Glickman case and the 2001 United Foods case did note volume control as a criterion for determining whether a program was heavily regulated.

Some Basic Economics of Volume-Control Programs

Agriculture is unique among industries in that producers ordinarily do not know in advance the level of their production, given its dependence on weather conditions, infestations of pests, natural disasters, etc. This characteristic, in conjunction with demands where prices are very sensitive to the volume produced, can lead to highly volatile farm prices and "boom and bust" cycles.

Marketing orders were authorized and first implemented to promote "orderly marketing." The primary interest in the early years of such programs was in volume controls. This was the depression era, and it was well understood that demand for most agricultural products was unresponsive (inelastic) to price. This meant that reducing volumes produced would raise producer revenues and most likely also lower costs. Thus, volume controls could be an effective way to increase producer profits in the short run without overt government intervention in the form of price supports.

Another basic economic fact for many farm products is that the price responsiveness of demand differs depending upon the market outlet. For example, it is generally true that demand in export markets is more price sensitive than domestic (U.S.) demand and that for products with fresh and processed outlets (dairy is a prime example), the demand in the fresh outlet will be less price sensitive than in the processing outlets.

Of course, differing sensitivities to price across market segments applies to a great many products and services and businesses often exploit this fact in their pricing decisions. For example, strategies such as discounts for students and senior citizens are predicated on subgroups being more sensitive to prices than others.

Thus, volume controls or restrictions on sales of products into particular market segments have a strong basis in economic theory as a tool to increase producer incomes, which was the intent of the AMAA and its state-level counterparts. Attempts by individual producers to exploit these basic economic facts of agricultural markets would be futile, given the competitive nature of agricultural production. Any volume controls must be accomplished at the industry level, and federal marketing orders provided a platform to implement them.

The Raisin Case

California raisins have operated under both federal and state marketing programs in most years. The state program, which included both growers and handlers, was terminated based upon handler vote and then reconstituted to involve only growers. The state order assesses producers based on tonnage—primarily to fund research on production, post-harvest activities, nutrition, and marketing and communications for consumer education, trade and industry relations, and market development.

The federal order also supports research and promotion but, in addition, includes the volume regulation provisions that were at issue in *Horne*. The order mandates that the RAC set free and reserve tonnage for each crop year on a formulaic basis, considering production relative to trade demand by varietal type of raisin. The RAC held the title to the reserve and disposed of these raisins in "noncompeting"market outlets—mainly exports, charitable programs, and government food programs. Neither producers nor handlers received direct payment for reserve raisins, although a payment was often received if revenues from sale of the reserve raisins exceeded the RAC's costs of administering the program.

The raisin reserve program thus embodied elements of both a strict volume-control program and a market allocation program. It intended to divert raisins from the primary domestic market, where demand is inelastic, by funneling them in large part to existing and emerging export markets where demand is more elastic. Thus, new consumers could be created by introducing them to the product on a low-cost basis.

Marvin and Lena Horne and their family were both raisin growers and handlers, and they objected to the reserve program as an illegal taking of their property. They refused to comply with the program and were subjected to fines and civil penalties for their noncompliance. In the ensuing litigation, the government's position was upheld by the Ninth Circuit Court but was reversed by the Supreme Court, with the majority opinion written by Chief Justice Roberts. Only Justice Sotomayor dissented in the entire opinion. Justices Breyer, Ginsburg, and Kagen concurred in part and dissented in part.

The Court's Opinion

In reaching the court's opinion, the Chief Justice answered three questions: First, did the Fifth Amendment, which prohibits government taking of private property without compensation, apply only to real property and not to personal property? The Court found readily that it applied to personal property and, hence, to the Hornes' raisins.

Second, did the government, operating through the RAC, avoid the requirement to pay just compensation because the owners of the reserve raisins retained a contingent interest in them even after the RAC took possession, i.e., a return most often was eventually paid on the raisins? The majority answered this question in the negative, arguing that the contingent interest did not mean no taking had occurred, since the payment was at the RAC's discretion and on some occasions no payment had been made.

Finally, the Court answered in the affirmative ("at least in this case") the question of whether the requirement to relinquish property (i.e., reserve raisins) as a condition to engage in commerce (i.e., producing and handling raisins)

constituted a per se taking. Here, the Court distinguished *Horne* from two prior cases relied upon by the dissenters in *Horne*. In *Ruckelshaus v. Monsanto Co.* [467 U.S. 986 (1984)], the Court had ruled that requiring chemical companies to disclose trade secrets, in complying with disclosure requirements for health, safety and environmental considerations, did not constitute a taking because the companies received a valuable government benefit in exchange—the right to sell dangerous chemicals. The Court called raisins a "healthy snack" to distinguish the *Horne* and *Monsanto* cases.

Similarly inapplicable in the Court's eyes was *Leonard & Leonard v. Earle* [279 U.S. 392 (1929)], wherein the requirement that oyster packers remit 10% of their marketable harvest to the government did not constitute a taking because oysters were the property of the state (Maryland) under the law. Thus, the 10% assessment was viewed as compensation to the state for the privilege of extracting the oysters. Raisins, reasoned the Court, were private property, unlike the Maryland oysters.

Finally, in a portion of the case decided in favor of the plaintiffs on only a 5–4 basis, the Court rejected the government's contention that, upon ruling that an illegal taking had occurred, the case should be remanded to the Ninth Circuit to calculate what compensation should be due the Hornes. Here, the Court finally addressed, albeit in passing, the fundamental purpose of the reserve program, namely to increase returns to raisin growers through "orderly marketing." In reality, the marketing order was implementing a third-degree price discrimination scheme intended to support domestic prices by diverting raisins to alternative outlets better able to absorb them without impacting prices.

The Court seemed receptive to such arguments, noting that "the best defense may be a good offense," but chided the government for providing no evidence regarding the benefits that the petitioners might have received from the RAC's reserve program. Such benefits, however, might have been estimated rather easily using standard tools of economic analysis.

Discussion: Implications for Mandatory Marketing Programs Moving Forward

As we noted, volume-control programs conducted under the auspices of federal marketing orders have waned over time, even though volume-control provisions are authorized in several orders. Even the raisin order had not implemented a reserve program since 2009.

Reluctance to implement volume controls may be due to several factors. In some cases, growers are philosophically opposed to volume controls to the point where boards are unwilling to recommend them. In other cases, with California almonds representing a prime example, demand growth and favorable prices have eliminated the need to even consider volume controls. In another instance, the Cranberry Marketing Committee voted to implement volume control for the 2014 crop, but the Secretary of Agriculture rejected the plan because the proposal involved Canadian growers who were outside the auspices of the order. The tart cherry marketing order, however, had a volume-control policy in place as recently as the 2014/15 crop year.

Notably, the U.S. Department of Agriculture does not believe that the Court's opinion in *Horne* applies to any other federal marketing order that contains volume-control provisions. In a communication to the boards operating such orders, the department wrote the following:

> "The Supreme Court's decision in *Horne* addresses a narrow situation where, under the Raisin Marketing Order, the government, through an administrative committee, takes title to a crop held in reserve and may physically appropriate that crop. The decision does not address other types of volume controls or reserve programs. Because no other administrative committee physically appropriates and takes title to the agricultural product as part of a volume-control program, the Court's analysis in Horne will not affect the current operation of USDA's other marketing orders, which help to stabilize market prices and are tailored to an individual industry's marketing needs."

Implementing a volume-control program has most often been controversial even prior to the *Horne* decision. Our guess is that boards will be reluctant to recommend them to the Secretary in the aftermath of *Horne*, and any that are implemented will be challenged under *Horne*. However, the important takeaway from *Horne* is that the Petitioners challenged successfully a volume-control program that had unique features relative to other authorized volume-control provisions. Further, based on the court's opinion, the government failed to support an argument regarding the benefits Petitioners and other raisin growers likely derived from the program that might have found favor with the court. Most importantly, the court's opinion does not challenge in any way the existence of mandatory marketing programs and the functions they most often perform, such as funding research and promotions, and implementing grades and standards.

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