The Economic Rationale for Marketing Orders

by

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INTRODUCTION

The purpose of this article is to give a perspective of marketing orders as they are authorized and used in the marketing of several agricultural commodities. It is not intended to be an analysis. Rather, it is intended to make something of a bridge between the "early years" of American agriculture, when many special policies and laws were developed, and the present, when most people have little reason to understand the origin of our rather developed pattern of agricultural marketing policy. Milk marketing orders are unique in their own right and are beyond the scope of this article. This article relates to fruits, vegetables, nuts and other specialty crops.[1]

I. EARLY AMERICAN AGRO-POLITICS

The conditions in which our democracy developed were especially favorable for agricultural interests. Most countries had come up from the dawn of history with a long pattern of development of both the economy and the pattern of economic policy. Political balances had been worked out between different sectors of the economy and different classes of society through decades and centuries of trial and error. After the American Revolution, a participative government was set up to relate to a universe that was balanced much differently than in other countries. The agricultural sector comprised a huge portion of the elec-

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[1] Specialty crops include greenhouse and nursery crops, herbs, turfgrass and Christmas trees.

torate. There was no industrial sector to accommodate the flow of immigrants, so they went to the free, or nearly free, land at the frontier. Many voters practiced "subsistence agriculture" as it would be classified in today's terms. They lived on a general farm, but had little marketable farm output. The first priority of the farm was to provide a living for the family.[2]

Consideration of the economics of this situation reveals a chronic pattern of overburdened markets. With a large segment of the population attempting to make a living in agriculture, the market for the saleable surplus from farms was much less attractive than one would find in other countries. In most countries, food production resources were meager and population levels were high in relation to food availability. The classic focus of economics was the balancing of scarce means among unlimited needs. Here, needs were limited while production was great. Because the focus of the Early American economy was different from the usual and typical problems, we were forced very early to develop policies to deal with overburdened markets.[3]

The politics of this situation favored the agricultural interests more than in any government in history. The participative nature of government which was chosen and the overbalancing of voters in farming was unprecedented. The form of voter representation chosen gives political advantage to geographic space—Wyoming's two senators vastly overrepresent their few constituents as compared to those representing California's millions. These conditions combined with the unusual economic conditions to enable and encourage a pattern of public agricultural infrastructure more developed than any in the world. It includes not only marketing orders, but also farmers' cooperatives, farm credit, rural electrification, the land grant universities, etc. All of these policies were unheard of in other countries. They made perfect sense here because of the special economic and political conditions.

A few more general observations may be useful. The role of large firms is interesting.[4] In most free market economies or sectors, there will develop a balance between the component of economic activity coordinated by markets and situations where coordination works best

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[2] *See generally* Everett E. Edwards, *American Agriculture—The First 300 Years, in* YEARBOOK OF AGRICULTURE 171, 171-276 (1940).

[3] *Id.*

[4] Private firms with a national or regional structure must have a governance structure simply to manage their operations. Accounting rules and many other standards are set up which make the management of the firm more orderly and at the same time make the markets and general business environment more orderly.

within the firm. R.H. Coase argued that large firms emerged to take advantage of those situations where coordination works best within the firm.[5] Where large firms are present, they may have an advantage in defining product or commodity characteristics. This seems to be true around the world. In America, large firms were not present on the frontier. It is likely that the resulting balance of public marketing machinery was influenced by this "more atomistic"[6] nature of traders in the American experience. Here the alternative to a public system of grades and standards was not a functional private one, but chaos.

One of the major themes of our new democracy was its break away from the general pattern of monarchy. This feature of our government glorified a general distrust of concentrated power. This distrust of power was also based in the massive ethnic diversity of our new nation. In this population of rugged individualists, instruments to combat the perceived evil effects of large firms or monopolies were attractive. There is a strong current of this feeling in our antitrust tradition as well as the policies for cooperatives and marketing orders.[7]

II. The Transition to Modern Times

How does this pattern from the earliest days of our nation translate to more modern times? Most of the marketing policies emerged in the early years of the twentieth century—some as late as the 1930's. It is not easy to document the transition from a pattern with great political sensitivity to rural issues to our modern, post-industrial society. It is our judgment, however, that most of this transition came in the second half of this century. In 1950, commercial farmers accounted for almost 40% of the rural population.[8] While this is not a majority, this population cohort was more organized than the others who worked in many different industries or were, for example, retirees. The well-developed agricultural infrastructure gave them organization, cohesiveness and voice. They were well integrated with, and natural leaders among, rural people. Agricultural interests were strongly represented at mid-

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[5] R.H. Coase, *The Nature of the Firm*, 4 Economica 368, 368-405 (1937).

[6] We mean, here, a nature determined by the existence of many small firms.

[7] Daniel I. Padberg & Alan Love, *Rationale for Public Intervention in Food and Agricultural Markets, in* Food and Agricultural Marketing Issues for the 21st Century (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1993, at 143, 148.

[8] M.C. Hallberg, The U.S. Agricultural and Food System: A Postwar Historical Perspective 23 (Northeast Regional Center for Rural Dev., Pa. State Univ., Univ. Park, Pa.) (Publication No. 55, 1988).

century.

Since that time, commercial farmers have become much larger and fewer. They now make up only slightly more than five percent of the rural population.[9] Further, they tend to be estranged from other rural people. They have vast assets as compared to their neighbors. Their interests are differentiated from the rural rank and file as well. On important issues, such as matters of environmental policy or labor concerns, they are likely to be a very small minority interest.

Much has been written about the industrialization of agriculture.[10] As a much more sophisticated industrial infrastructure has developed, there is less need for some of the provisions available in marketing orders. In some cases, the patterns of product definitions of large firms work better and the public one has been abandoned.[11] Vertical systems seem to be a more functional coordinating mechanism than classic markets in some commodities—such as poultry and pork.[12] Our broad national priorities have changed as well. With the rising concern for global competitiveness, and perhaps for many other reasons, we are much less concerned with antitrust. As a general matter, the special needs for more agricultural marketing infrastructure, as well as the facilitating political atmosphere have both disappeared with the transition to a more industrialized system.[13]

III. The Modern Meaning of Marketing Orders

Before assessing the significance of marketing orders as used today, it is necessary to see what they are doing. The following table shows a general pattern of applications which have been made of the permissive features in marketing orders for fruits and vegetables for 1964-65 and 1989.[14]

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[9] *Id.* at 44.

[10] Alan Barkema et al., *The Industrialization of the U.S. Food System, in* Food and Agricultural Marketing Issues for the 21st Century (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1993, at 3, 20.

[11] Marvin Hayenga & James Kliebinstein, *Grading Systems in Pork and Beef Industries, in* Re-Engineering Marketing Policies for Food and Agriculture (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1994, at 140, 145.

[12] "Vertical systems" refers to an integrated sector of the food economy where organizational administration has replaced the traditional patterns of buyers' and sellers' markets as an instrument of economic coordination.

[13] Padberg & Love, *supra* note 7, at 146.

[14] *See* John A. Jamison, *Marketing Orders and Public Policy for the Fruit and*

TABLE 1

FEATURES OF
MARKETING ORDERS

Marketing Order Provision	Percent of Orders Containing Provision 1965	1989
1. Control of Total Quantity or Surplus	17	20
2. Grade, Size, Maturity or Other Quality Control	96	93
3. Regulation of Flow to Market	19	20
4. Pack and/or Container Regulation	55	62
5. Assessment for Research	66	80
6. Assessment for Advertising and Promotion	0	80

Note: The number of marketing orders in use in 1965 was 47. The number in use in 1989 was 45.

These data relate to federal marketing orders. In both periods there was an approximately equal number of marketing orders promulgated under the authority of state laws.[15] The biggest change in use of marketing orders is provision 6 in Table 1: generic commodity promotional programs. These are programs where producers or first handlers of agricultural commodities are assessed fees on a per-unit basis (often called "check-off's") to support advertising programs for their commodities. In the mid-1960's, there were several state orders assessing check-offs for advertising, but no federal orders. Today, that is one of the most common ways the federal orders are used.[16] This is not a very contentious

Vegetable Industries, in 10 STAN. FOOD RES. INST. STUD. (1971); NICHOLAS J. POWERS, U.S. DEP'T OF AGRIC., FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS AND SPECIALTY CROPS 3-4 (Agric. Econ. Rep. No. 629, Mar. 1990); NATIONAL COMM'N ON FOOD MKTG., TECH. STUDY NO. 4, ORGANIZATION AND COMPETITION IN THE FRUIT AND VEGETABLE INDUSTRY (June 1966).

[15] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 3-401 to -406 (1994); CAL. FOOD & AGRIC. CODE § 58231 (Deering 1995); COLO. REV. STAT. § 35-28-121 (1994); FLA. STAT. ch. 573.101-.124 (1994); GA. CODE ANN. §§ 2-8-21 to -26 (1995); LA. REV. STAT. ANN. § 3:552.9 (West 1995); N.Y. AGRIC. & MKTS. LAW § 16 (Consol. 1994); TEX. AGRIC. CODE ANN. § 91.005 (West 1995); WASH. REV. CODE ANN. § 15.65.580 (West 1994); WYO. STAT. § 11-35-105 (1995).

[16] Walter J. Armbruster & John P. Nichols, *Commodity Promotion Policy, in* 1995

observation. Few are critical of enabling farm groups to advertise their products. The same is true of another frequent use of marketing orders—assessments for research (provision 5 in Table 1). Frequently, these assessments relate to marketing research. Research has been useful to improve marketing or product attributes or respond to emergencies which arise in the marketing of particular commodities. These activities are the sorts of things large firms in other industries would do. It is difficult for individual farmers to do much in either of these categories, but few critics would deny farmers the right to combine their funds toward advertising or conducting research about marketing.

In both periods, "pack or container" regulations (provision 4 in Table 1) were features used in a majority of federal marketing orders. These features do not seem terribly important or controversial. Historically, there have been efficiency consequences to standardization of pack or container. Agents throughout the distribution system have developed equipment and procedures for more efficient handling of the standardized unit. In addition, there are marketing advantages to standardized units of products or commodities. They facilitate reporting prices and all types of marketing information. They reduce deception and confusion. It is unlikely that this use of marketing orders is the focus of much criticism. Even where these standards are obsolete, they are not likely to do much harm. At the same time, it is clear that the "standardizing function" is more important in a past with many small producers than it will be in a future with vertically coordinated systems of private infrastructure focusing on unique product attributes.

The other three categories of provisions (numbered 1, 2 and 3 in Table 1) are more controversial because they are frequently, perhaps typically, used to change or restrict the flow of product to market. Many critics find the restriction of flow to market always to be anti-consumer in character. The typical behavior of monopolists is to restrict the quantity of products for which no close alternative is present, thereby requiring consumers to pay more. While we find this to be a very powerful argument, in our experience there are situations in which issues other than this one are important, and the anti-consumer aspects of quantity restriction may be outweighed by other factors.[17]

FARM BILL POLICY OPTIONS AND CONSEQUENCES (Tex. Extension Serv., Tex. A&M Univ., College Station, Tex.), Oct. 1994, at 177, 179.

[17] For example, being able to smooth out the flow to market enables producer cost reductions, improved product uniformity, better product quality, better market information and greater seasonal stability of products. *See* Michael McLoed, *Look Through the '90s: The U.S. Fruit and Vegetable Industry, in* THE CHANGING WORLD OF FED-

Quality restrictions (provision 2 in Table 1) are the most popular feature of marketing orders in both time periods. In earlier days, producers of fruits and vegetables for the fresh market were less able to produce a perfect, flawless product. There were more natural variations in size and other characteristics. There was a wider range of plant genetic material in production. Damage from pests was less controllable. In this situation, quality restrictions were quite a powerful quantity restriction. Many felt that use of this feature benefited the industry by building a better image with better fruit. It rewarded the best growers. In addition to restricting the quantity from local growers, it restricted the inflow of trade. As a general matter, importers are subjected to the same level of "discipline" which domestic growers impose upon themselves through marketing orders.

More recently, this feature has come into criticism because it encourages use of pesticides which may be higher than would be necessary to produce a less restrictive quality level.[18] It is also argued that quality standards may retard the introductions of new products.[19] In addition, the interference with trade has become a greater concern.

Regulation of flow to market is a feature of marketing orders which allows officials to determine conditions of excess from time to time throughout a marketing season and declare a "market holiday" in which producers are not allowed to ship to market.[20] There are no provisions to destroy output or reduce the total output by these actions. It may be that some perishable output is lost because of the enforced waiting period. The economic expectation is that overburdened markets can be relieved enough to prevent market chaos with a great deal of perishable product having no market outlet and a collapse of prices. Growers can take their losses in the field without the losses being compounded by harvesting, packing and shipping costs. These programs may be very useful for some commodities and not important for others.

Last, and clearly the most contentious, are marketing order features

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ERAL MARKETING ORDERS FOR FRUITS AND VEGETABLES (Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1992, at 34, 34.

[18] P.A. Mischen & Neilson C. Conklin, *The Role of USDA Grade Standards in Quality Determination, in* PESTICIDE USE AND PRODUCE QUALITY (Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1994, at 48, 51.

[19] Daniel I. Padberg & Phillip Kaufman, *Are Standards of Identity Obsolete or Redundant?, in* RE-ENGINEERING MARKETING POLICIES FOR FOOD AND AGRICULTURE (Agricultural & Food Policy Center, Dep't of Agric. Economics, Texas A&M Univ., College Station, Tex.), 1994, at 158, 161.

[20] For example, Florida tomato growers enacted a tomato moratorium, which halted tomato shipments for five weeks, in an attempt to bolster prices at the retail level.

which are designed to control the total market quantity or to control a part of output classified as "surplus." On the face of it, this seems to most directly insult consumer welfare. In addition to disapproval of critics on conceptual grounds, there are highly developed examples where the actual programs have worked to the disadvantage of consumers as well as producers. The California cling peach experience is perhaps the most famous.[21] In this arrangement, an analysis of the market was performed to determine the optimal "market quantity." A determination was made concerning what proportion of trees would provide the right market quantity. Every grower was required to save that proportion of trees and destroy the unripened fruit of the others. This arrangement led to returns above competitive levels, but they were soon diluted by increased plantings, increased waste, higher than necessary costs and bad publicity.

As the criticism of marketing orders which restrict output has heightened, a higher standard of economic behavior is being demanded of farm producers than we set routinely for other industrial producers of consumer goods. A particular brand of household appliance may be no more or less differentiated from competing brands than almonds are from pecans. A seller of microwaves or automobiles does a market analysis to arrive at an estimate of price and quantity for the normal factory output. When it turns out that the market is overburdened, manufacturers do not hesitate to restrict production. In many cases, they cause unemployment, passing the cost of reducing production on to others rather than bearing it directly as the farmer would. If consumers would benefit from overburdened markets for food commodities, why would they not also benefit from overburdened markets for automobiles or microwaves? In fact, consumers would not benefit much from an overburdened market for perishable food products where they would benefit directly from an overburdened market for consumer durables. Just because vegetable producers are not as big as General Electric, should they be required to use a more restricted set of marketing approaches?

Another reason for our concern with the criticism of marketing order provisions to restrict market volume is that not all uses of these provisions have led to negative results. In the mid-1970's, the tart cherry industry had production in a Northeast belt including the Great Lakes states to New Jersey.[22] There was a tendency for the trees to produce

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[21] Jamison, *supra* note 14, at 20.

[22] D.J. RICKS & LARRY HAMM, THE U.S. TART CHERRY SUBSECTOR (Dep't of Agric. Economics, Mich. State Univ., East Lansing, Mich.) (Staff Paper No. 85-60,

in alternate years, causing a large variation in output and prices. The resulting instability was a burden for producers, processors and distributors. After a great deal of study and discussion, a marketing order was instituted.[23] It had provisions for taking a share of the heavy production year's crop into frozen storage. In short years, these supplies were used to develop a larger and more stable market—involving the food service industry as well as conventional distribution. This program operated successfully for more that a decade until it was dissolved by a federal administration that did not believe in marketing orders, apparently for ideological rather than practical reasons. The complete explanation for this termination is complex. Large crops in consecutive years caused problems for the program. Many observers believed that the program was harassed by a hostile administration, which affected a grower referendum.[24]

We have another concern with the criticism of marketing orders on anti-monopoly grounds. The classic monopoly model relates to historic conditions of very low levels of living where the household obtains food by the direct purchases of a few food commodities. Sellers of those commodities may have had little competition, being controlled by the landed aristocracy. The monopoly strategy was to restrict the availability of the product and extract a higher price. Today, manufacturers buy those commodities and create thousands of products. The typical supermarket stocks almost 20,000 items, although some stock as many as 31,000.[25] In this environment, the typical selling strategy is expansive rather than restrictive. Any seller who wants to use a restrictive policy stands a very probable chance of losing market share quickly. There is a danger that the products will receive low visibility and drop out of contention. The classic monopolistic behavior is a persuasive conceptual argument, but it is not descriptive of the behavior of firms in the food market place.

1985).

[23] Coauthor Daniel I. Padberg was involved in the preliminary discussions and investigation into the feasibility of a tart cherry marketing order. The investigation culminated in the adoption of Order No. 930, which applied to eight states. *See* AGRICULTURAL MKTG. SERV., U.S. DEP'T OF AGRIC., PROGRAM AID NO. 1095, MARKETING AGREEMENTS AND ORDERS FOR FRUITS AND VEGETABLES 9 (1979); RICHARD HEIFNER ET AL., U.S. DEP'T OF AGRIC., A REVIEW OF FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, AND SPECIALTY CROPS: ECONOMIC EFFICIENCY AND WELFARE IMPLICATIONS 17 (Nov. 1981).

[24] *See* U.S. GEN. ACCT. OFF., GAO/RCED 85-57, THE ROLE OF MARKETING ORDERS IN ESTABLISHING AND MAINTAINING ORDERLY MARKETING CONDITIONS 44 (July 1985).

[25] PROGRESSIVE GROCER, 62ND ANNUAL REPORT OF THE GROCERY INDUSTRY, Apr. 1995 Supp., at 25, 48.

IV. Updating the Concept of Marketing Orders

It is an interesting idea to think we could take a historic instrument like marketing orders and redesign it to bring it into correspondence with modern food industry institutions. This is a first and primitive effort to do that. It will require highlighting situations in the environment which have changed and which are important to the design and function of marketing orders. It will require determining which features are not needed and what changes might improve marketing orders.

A. Emergence of the Multinational Food Manufacturer

Some marketing order commodities, like fresh market vegetables, would seem to be minimally affected by this event in the marketing system. Yet, selling products alongside the highly advertised brands of these giant conglomerates may make the ability to advertise and develop an image and some consumer awareness of a product more important. It makes it easier for a product to get lost. The expansive selling strategies of multinational firms also make monopolizing more difficult. The consumer is likely to completely forget the restricted product.

Marketing order commodities produced for sale to these giants are affected in several ways. Programs to control pack or containers, grade size and maturity (one of the most popular features) are not likely very important or necessary because the large firms have their own, often superior, handling methods and product definitions. Research and advertising is less important also. The large manufacturer does both research and advertising and it is unlikely that growers would find it useful to compete with them. Growers have typically done these things only when nothing would be done without their efforts.

Quantity control or surplus management will also be of little importance. The large firms will manage the quantity for their brands. Other producers not having contracts with large manufacturers will find the private label channel to be an economy alternative to the advertised brands. These channels of manufacturing and distribution have many alternatives for managing the quantity and quality variability of the commodity within the large firms in either manufacturing or distribution.

B. The Transition from Food Commodities to Food Products

The transition from food commodities to food products is a profound one. Commodities market themselves. They are unchanging through

time. Marketing consists of assembling information and making intelligent but reactive choices or decisions. Products require proactive marketing. They must stay up-to-date in their physical attributes. Advertising and selling effort is required. In competition with aggressively sold products, commodities need to maintain visibility and a good image. To accomplish this, a commodity needs something of a brain trust or collection of expertise and observation. It is difficult for individual producers to perform these functions. The research and advertising features of market orders have enabled commodities to perform much better in the environment of modern food marketing than they would have otherwise. This transition has made these provisions more important.

Beef and pork are good examples of the benefit a commodity can have from marketing programs operated by a functional commodity brain trust. The brain trusts have done an important job in managing the commodity public image. In the process, growers have become more exposed to the values and attitudes in the food market. The brain trust has gotten the trim specifications changed along with making a more lean image for red meat. This has been a very important turning point in the history of these industries.

It is true that neither beef nor pork obtained these marketing features through a marketing order. The reason was that they are so broadly produced that the voting procedures would have made putting a marketing order in place very difficult. Instead, these industries went with national legislation.[26] In other situations, commodities are not so broadly produced and it would be most difficult to get national legislation. For this reason, it is important to have these features available in marketing orders, a format especially accessible to specialty crops.

C. Increased Vertical Coordination[27]

Vertical coordination is essentially complete in poultry and is moving rapidly in pork. In addition, contracts between producers and manufacturers seem to be increasing in a number of commodities. Marketing orders have not been important in either poultry or pork, but do exist in some cannery crops. For the most part, these complex vertical sys-

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[26] R.L. KOHLS & JOSEPH UHL, MARKETING OF AGRICULTURAL PRODUCTS 370, 375 (1990).

[27] "Vertical coordination" refers to situations where integrating firms have acquired or built operations in position of their former buyers or sellers. The result is a network of subsidiaries conducting business rather than independent firms buying and selling to each other. Some of the units in these systems are linked by contracts, while others are owned.

tems will internally perform most of the functions of marketing orders. As such systems become more frequent and more developed, the role for marketing orders will be reduced.

D. The Industrialization of Agricultural Production

Industrialization is used to relate to many changes in the food marketing system, including some of the transitions discussed in previous sections. In this instance, it refers to the changing structure of farming. Accompanying the changes farmers have experienced in their political representation as discussed above, their role and stature in the market has changed also. During the first half of this century, over 90% of farmers were what we would call "subsistence farmers."[28] They produced many commodities, mostly for their own consumption. A few commodities were produced for specialized markets, but most of what was sold was unplanned surplus exceeding home consumption.[29] These "odds and ends" were difficult to handle in the marketing channel. Programs to control quality, size and maturity, as well as pack or container, were most important. Regulation of flow to market was also important.

Today's producer is much more specialized and functions more like an industrial producer. Families rarely consume the majority of the few farm commodities they produce. Very specialized genetics and mechanical equipment lead to the output of commodity attributes, often for contracts with industrial processors. The market does less coordinating; the more mature marketing infrastructure does more. In many situations, these changes may lead to less need for marketing orders. This is especially true where a large sophisticated manufacturer is involved. Where a farm commodity goes directly to sale to consumers, marketing orders may be more important. They give the commodity a sufficient infrastructure of its own to compete in an industrial food system.[30]

E. The Increase in Environmental Concerns

It is alleged that growers who are motivated to meet product standards, sometimes set within marketing orders, may apply more pesticide than is necessary for food production, and that environmental degradation occurs as a result. However, a study by Powers and Heifner concluded that there is little evidence regarding detrimental effects of

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[28] *See* Edwards, *supra* note 2.

[29] *See* Edwards, *supra* note 2, at 236-42.

[30] *See* KOHLS & UHL, SUPRA note 26, at 249.

grades on pesticide use.[31] In addition, the marketplace may dictate quality standards that are more restrictive. In view of large private firms in manufacturing and distribution, public product standards are less important. Cases where product standards conflict with environmental concerns may lead us to put less emphasis on the quality provisions of marketing orders for fresh produce.

F. Increased Emphasis on Trade

Features of marketing orders have been used to exclude imports.[32] In those situations, they served as trade policy in the absence of more formal and intentional policy. It is likely that this role will be superseded, since we currently have a much more developed trade policy coming on stream. The more likely role will be making the formal trade policies more difficult to operate. In earlier times, public marketing policies were the broadest bases for product definitions and other standards. Public standards could cut across conflicts among the many smaller private firms. Today, that is no longer true. The larger individual private firms span many countries. It may be easier to harmonize product definitions and other marketing arrangements if public definitions are emphasized less. In early America, public definitions reduced conflicts. Today, they may introduce unnecessary rigidities. This seems most obvious in quality regulations and pack/container policy. It may also apply to other quantity control policies.

V. Evaluation Criteria

We have long struggled with criteria to fit all these influences together.[33] Our preference is for favoring practical rather than theoretical criteria. Our theoretical criteria come from classic markets, while in practice we have departed from dependence on those markets where

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[31] Nicholas J. Powers & Richard G. Heifner, U.S. Dep't of Agric., Federal Grade Standards for Fresh Produce: Linkages to Pesticide Use 11 (Agric. Info. Bull. No. 675, Aug. 1993); *see also* R.D. Knutson et al., Economic Impacts of Reduced Pesticide Use on Fruits and Vegetables 6-8 (American Farm Bureau Research Found.) (Sept. 1993).

[32] Robert G. Chambers & David H. Pick, *Marketing Orders as Nontariff Trade Barriers,* 76 Am. J. Agric. Econ. 47, 47-54 (Feb. 1994).

[33] *See* L.C. Polopolus et al., Criteria for Evaluating Federal Marketing Orders: Fruits, Vegetables, Nuts, and Specialty Commodities 17 (1986); Heifner et al., *supra* note 23; G.F. Fairchild, *Observations on Fruit and Vegetable Marketing Orders, in* Re-Engineering Marketing Policies for Food and Agriculture (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1994, at 102, 102.

possible. Our efforts here are to consider each group of marketing order provisions and classify them into one of three groups: (a) always positive or neutral, (b) always negative or neutral, or (c) may be positive or negative.

A. Advertising and Research

There may be situations where these have been useless, but we are unaware of any situation where serious harm was done to anyone through these programs. In addition, we have the understanding that there are several experiences where both of these provisions (singularly and combined) have been a useful part of industry development.[34] It is easy for us to classify these as always positive or neutral.

B. Pack and/or Container Regulations

We believe these have been very useful in the past. There may be some current situations where they are still important. Conversely, it is our expectation that, in the future, these provisions and the regulations they support will protect obsolete marketing methods and arrangements more often than they will promote efficiency. We put them in the negative or neutral category.

C. Regulation of Flow to Market

Rate of flow regulations and the market holidays they enable are useful and effective instruments for fresh market crops. This is especially true where the producing industry is composed of large numbers of growers. The citrus orders in California have recently been very contentious, but it is our perspective that these programs are important in other cases.[35] We classify these provisions as positive or neutral.

D. Grade, Size, Maturity or Other Quality Control

Programs under these provisions have been very useful in the past in giving producing industries more discipline over both quality and quantity. More recently, they have produced some conflicts with environ-

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[34] For example, this has been the case with respect to Vidalia onions, Florida avocados and limes, watermelons, celery, and spearmint oil.

[35] For example, Florida celery; *see* RICHARD KILMER & TIM TAYLOR, PRICE DETERMINATION AND ACREAGE ADJUSTMENT BEFORE AND AFTER THE IMPLEMENTATION OF A MARKETING ORDER 13-15 (Dep't of Food & Resource Economics, Univ. of Fla., Gainesville, Fla.) (Staff Paper No. 383, May 1990).

mentalists.[36] Fundamentally, they are out of tune with the future. With producers and processors developing new and different products, and developing special uses for particular attributes, it seems that market-wide quality standardizing policy will be less useful as we embrace the future. In view of this perspective, we classify these as negative or neutral.

E. Control of Total Quantity or Surplus

There have been programs under this provision which had many of the characteristics of classic monopoly leading to waste and unnecessary costs to producers and higher than necessary prices to consumers.[37] At the same time, there have been successful experiences with surplus management programs under this provision. As a result of these observations, this goes into the "may be positive or negative" category.

CONCLUSION

While marketing orders represent a pattern of commodity marketing policy with roots in very early American history, it is our judgment that they will be able to serve some useful purposes in the future within our industrialized food system. The main focus of marketing orders is the fresh-product markets that do not have the services of a manufacturing industry. Marketing orders will enable the development and maintenance of a body of marketing expertise—a brain trust. Such a marketing nerve center could keep growers better informed about markets as well as develop and execute promotion programs. The advertising and research features of marketing orders will be the most important.

We would eliminate the quality control provisions and the pack and container provisions. In addition, it seems that the Secretary of Agriculture should consider carefully any programs under the quantity or surplus control provisions. Programs promulgated under this provision should be monitored throughout their existence because some of them have the capacity for abusive results.

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[36] Mischen & Conklin, *supra* note 18, at 52.

[37] *See* Jamison, *supra* note 14, at 17.