

CHECKING OUT THE CHECKOFF: AN OVERVIEW AND WHERE WE ARE NOW THAT THE LEGAL BATTLES HAVE QUIETED

*Jennifer Williams Zwagerman**

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* This article was submitted as the author's thesis for completion of the L.L.M program in Agricultural Law at the University of Arkansas. Jennifer received her J.D. (with a certificate in Agricultural Law) from Drake University Law School in 2004 and her L.L.M in Agricultural Law from the University of Arkansas in 2008. She served as a former law clerk for the Honorable David R. Hansen, Eighth Circuit Court of Appeals and is currently practicing law in Iowa, focusing on food and agricultural law. All opinions expressed in this article are solely those of the author.

I. INTRODUCTION

Beef. It's What's for Dinner.[®] Got Milk?[®] Pork, the Other White Meat.[®] The Incredible, Edible Egg.[™] Sound familiar? Odds are, each of us has heard, said, or discussed one of the phrases listed above. On the surface, it may be unclear what each slogan has in common, aside from the fact they are used in advertising campaigns. The source of each slogan though, is what we will continue to discuss through these next few pages. The source for each of these slogans is a state or national checkoff advertising program. These programs exist in numerous shapes and forms, with various types of programs and markets. Some are voluntary, some mandatory, but most have been the subject of some controversy over the past 10 years.

Two of the most controversial have been the checkoff programs associated with the pork and the beef industries. Both programs have been the subject of litigation that rose to the level of Supreme Court review, but as will be discussed, the results of that review were markedly different for a number of reasons.

While the most recent Supreme Court checkoff decision in 2005 appears to have cooled the furor of this spate of checkoff litigation, the future of checkoff programs and where they are headed is far from crystal clear. In these next few pages, I will briefly review the history of checkoff programs, summarize the beef and pork checkoff program litigation, and take a look at where we are now in terms of the various programs.

II. CHECKOFF ADVERTISING

A. *Background*

When the term “checkoff” is used, beef and pork tend to come to mind. Many do not realize the extent of the checkoff programs that are active in the food and agricultural industries. A short list of major commodities with federal checkoff programs include: eggs, lamb, cotton, dairy and fluid milk, beef, corn, peanuts, pork, potatoes and soybeans.¹ In addition, there are federal checkoff

1. Agricultural Marketing Service, USDA Industry Marketing and Promotion, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateB&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=IndustryMarketingAndPromotion&acct=AMSPW> (last visited Apr. 21, 2009); see Wikipedia, Checkoff, <http://en.wikipedia.org/wiki/Checkoff> (last visited Apr. 21, 2009).

programs for sorghum, Haas avocados, watermelon, honey, mangos, blueberries, mushrooms and popcorn.² Not only are there federal programs, but state programs also exist, including programs for commodities such as the California table grapes, Washington apples, Arkansas wheat, Minnesota wild rice and Louisiana alligator.³ Industries can also operate independent programs of this type, such as that in place in the sugar industry.⁴

The federal research and promotion programs are operated pursuant to federal statute. Each program is authorized by its own federal statute and is based upon proposals made by the industry.⁵ Because of this, each program is unique, although certain requirements remain across the board. For example, no funds collected as part of the federal checkoff program can be used for lobbying.⁶ More specific examples of what checkoff funds can and cannot be used for will be identified later in the discussion of beef and pork program particularities. The general purpose for each checkoff program though, is the same: increase the market and demand for the product.⁷ Each individual marketing order also establishes a board of directors for each program, and must also provide specifics as to “who will be assessed, the assessment rate, and the procedures for collecting the funds.”⁸ In addition, information must also be included on how those who pay the assessment can change or terminate the checkoff program through a referendum.⁹ With the exception of a few newer programs, most federal programs require a referendum of affected producers to enact the program, and once enacted a referendum for alterations or suspension of the program.¹⁰

B. *Funding – Or Why A Checkoff is Not Necessarily a Checkoff*

The federal checkoff programs are generally funded through mandatory contributions from producers, processors, importers and others in the various

2. *Id.*

3. Susan E. Stokes, Farmers' Legal Action Group Inc., Update on Checkoff Litigation 11-13 (2004), http://www.flaginc.org/topics/pubs/arts/Checkoff_Update20040126.pdf.

4. Gary W. Williams, *Overview: Commodity Checkoff Programs*, CHOICES, Second Quarter 2006, at 53, <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-01.pdf>.

5. STEVEN A. NEFF & GERALD E. PLATO, FEDERAL MARKETING ORDERS AND FEDERAL RESEARCH AND PROMOTION PROGRAMS: BACKGROUND FOR 1995 FARM LEGISLATION 7 (1995), <http://www.ers.usda.gov/Publications/aer707/aer707a.pdf>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (stating that some new federal checkoff programs do not require an initial referendum, but instead require one at some specified later time in order for the program to continue).

industries associated with each commodity.¹¹ More properly called “assessments,” the term check off is somewhat misleading, as producers usually don’t need to “check off” anything to make the contributions to the federal marketing program, because they are generally assessed at the time each commodity transaction is made.¹² The assessment for each commodity is generally based on a percentage of the total transaction amount for the commodity in question, a fixed amount for each commodity unit that is part of the transaction, or in some cases a combination of both methods.¹³ Generally, funds that are collected as part of the checkoff program are collected by and managed by the governing board.¹⁴ One exception to this will be illustrated in the next section, discussing the beef checkoff.

III. WHERE’S THE BEEF

The national beef checkoff program has been in place since the mid-1980s.¹⁵ Prior to the national program many states had individual versions of a beef checkoff program in operation, and a voluntary federal program had been enacted in the mid-1970s.¹⁶ The 1985 Farm Bill authorized the establishment of a national checkoff program, a program that assess a \$1 per head “checkoff” on the sale of imported and domestic cattle in the United States, as well as imported beef and beef products.¹⁷ While the program was established in 1985, it did not become mandatory until it was approved by cattle producers through a national referendum in 1988.¹⁸

The Cattlemen’s Beef Promotion and Research Board (Beef Board) is in charge of the operations of the beef checkoff.¹⁹ The Beef Board’s 106 members are appointed by the United States Secretary of Agriculture and represent all segments of the beef industry.²⁰ Their role is to implement the federal orders related to the beef checkoff as well as make decisions involving how national

11. *Id.* at 8.

12. *Id.*

13. *Id.*

14. *See id.* at 7-8.

15. Press Release, Cattlemen’s Beef Board, Checkoff Travels Long Road in Search of Building Beef Demand (Sept. 25, 2006), http://www.beefboard.org/news/Release_2006_09_25_b.asp.

16. *Id.* (stating that some type of voluntary checkoff program has been active in the beef industry as far back as 1922).

17. Beef Research and Information Act of 1985, 7 U.S.C. § 2904(8)(C) (2006).

18. Cattlemen’s Beef Board, Who We Are, <http://www.beefboard.org/about/whoweare.asp> (last visited April 27, 2009) [hereinafter “Who We Are”].

19. *See id.*

20. *Id.*

funds are spent.²¹ The Beef Board itself generally does not run the programs it authorizes to be funded by checkoff dollars, but instead works with authorized organizations such as the National Cattlemen's Beef Association (NCBA), various universities, the Meat Export Federation (a non profit red meat export promotion organization), and the American National CattleWomen.²²

The simplest way to understand the beef checkoff program is to go through it step by step. First, every time a head of cattle is sold in the United States, a "checkoff" of one dollar per head is assessed.²³ That assessment is paid to Qualified State Beef Councils (SBCs), who coordinate and collect the funds in their states.²⁴ SBCs may keep up to fifty cents of every dollar collected for use in their states and the remaining funds go to the Beef Board for national programs and initiatives.²⁵ With the checkoff funds, states can implement their own programs, as well as participate in national programs at the state-level, as long as the individual state programs meet the requirements set forth in the Act.²⁶ The Beef Board collects assessments on imported beef and beef products directly, as well as funds from the five states that do not have Qualified State Beef Councils.²⁷

Checkoff funds are limited in how they may be spent, on both the state and national level. Funds cannot be used in any form to lobby the government or influence public policy, nor can they be used to promote any specific breed.²⁸ Funds, however, may be used for programs such as advertising, research and development, education, public relations and marketing programs and partnerships.²⁹

While many people outside the beef industry have never heard of the beef checkoff, it is likely they have seen the programs and advertising that it funds. The popular "Beef. It's What's For Dinner.®" advertising campaign is a checkoff program, and checkoff funds have been used to help develop many of the new "heat and eat" products you can find in stores today. In general, funds are used for research into new beef products, promotion of beef and beef products, and marketing and advertising support for both the industry as a whole and

21. *Id.*

22. NEFF & PLATO, *supra* note 5, at 7.

23. Who We Are, *supra* note 18.

24. *Id.*

25. *Id.*

26. *See id.*

27. Nat'l Cattlemen's Beef Ass'n, Who Collects Checkoff Assessments and How Do They Collect?, <http://www.beefusa.org/NEWSWhoCollectsCheckoffAssessmentsandHowMuchDoTheyCollect4053.aspx> (last visited April 27, 2009).

28. Who We Are, *supra* note 18.

29. *Id.*

specific products.³⁰ Funding is provided to universities and beef companies to help identify new cuts from the beef carcass, to companies to encourage the introduction of new beef products to the marketplace, and to restaurants to entice them to add new beef products to the menu. General advertising, such as not promoting any specific beef product, but rather just beef in general, is the cornerstone of the program. The main goal is to increase the demand for the beef commodity.

The institution of a mandatory checkoff has had its ups and downs in terms of how it has been perceived by the industry and producers. As you can imagine, when only a majority of beef producers are required to approve the mandatory checkoff program on a nationwide basis, there are bound to be numerous producers who oppose such a program. There has been litigation focusing on the beef checkoff for years, but it is within the past decade that two major cases, almost brought the beef checkoff to a halt.

IV. PORK...THE OTHER CHECKOFF

The pork checkoff dates back to as early as 1966, when representatives of pork producers in eleven states met and agreed to establish, and financially support if necessary, a voluntary pork checkoff program that would support and finance the programs of the National Pork Producers Council (NPPC).³¹ Initially, the assessment was five cents per pig in a six county area of Iowa and Illinois.³² Over time, that amount increased from a nickel up to twenty cents, and then to .3% of the market value of each hog.³³ The coverage area was also increased to sixteen states, still on a voluntary basis.³⁴

The program was expanded to a mandatory federal assessment program as part of the 1985 Farm Bill,³⁵ the same time that the national beef checkoff program was established. The Pork Promotion, Research and Consumer Information Act of 1985³⁶ created the National Pork Board to oversee and administer the checkoff program, as well as collect the assessment of 0.4 % of the market value of each hog sold in the market.³⁷

30. *Id.*

31. Pork.org, Pork Checkoff, <http://www.pork.org/newsandinformation/quickfacts/porkcheckoff1.aspx> (last visited April 27, 2009).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 2.

36. Pork Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 4801-4819 (2006).

37. Pork.org, *supra* note 31, at 2.

In many ways, the beef and pork checkoffs are strikingly similar. Like the beef checkoff, the pork checkoff's centerpiece is generic advertising to increase the demand for pork.³⁸ Both programs place a heavy emphasis on research and educating consumers about the commodity, from nutrition to recipes to information about various cuts,³⁹ and like beef, the pork checkoff utilizes organizations outside the National Pork Board to implement and run many of its checkoff programs.⁴⁰ As we'll discuss in the litigation section, in 2001 the Pork Board severed its ties with the NPPC (the NPPC is in many ways the pork equivalent of the NCBA). Unlike the beef program, the national Pork Board collects all assessments,⁴¹ but in many cases either allocates a percentage of the funds back to the states for state-level programs,⁴² or contracts with state pork groups to implement checkoff programs on the state level.⁴³

V. LITIGATION

A. Early

While the focus of the upcoming discussion will be on just a few beef and pork checkoff-related cases, these were not the first checkoff cases in which the Supreme Court was asked to consider the merits of an agricultural commodity checkoff program.⁴⁴ Nor were these the first cases involving these checkoff programs. In fact, there had been several other beef checkoff cases filed throughout the country before those we discuss in detail below, although none that reached the Supreme Court. While the Supreme Court was not a complete stranger to assessment programs, the *United States v. United Foods* and *Glickman v. Wileman Brothers & Elliot* cases involved markedly different issues than those presented to the court in the more recent pork and beef checkoff litigation. In fact, *Wileman Bros.* did not involve a stand-alone federal checkoff program like that

38. *Id.*

39. *Id.*; see *Who We Are*, *supra* note 18.

40. See generally *Pork.org*, *supra* note 31, at 2.

41. *Id.*

42. Iowa Pork Producers Ass'n, Mission Statement, <http://www.iowapork.org/AboutIPPA/OverviewMissionStatement/tabid/695/Default.aspx> (last visited April 27, 2009).

43. See Michigan Pork Producers Ass'n, History, <http://www.mipork.org/AboutUs/History/tabid/645/Default.aspx> (last visited April 27, 2009).

44. See *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997) (upholding mandatory assessment for generic advertising imposed upon California tree fruit growers as part of agricultural marketing order); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (invalidating mandatory mushroom checkoff).

of beef and pork, but instead involved a similar assessment required under a federal agricultural marketing order.⁴⁵

B. Pork

1. Pork Under Attack

One of the most important cases involving the pork checkoff was initiated in the early part of this decade. The case arose after a series of events that even years later remain confusing to many in the livestock industry. It began when a petition drive was initiated in 1998 seeking signatures supporting a referendum to determine whether there was continued support for the mandatory pork checkoff program.⁴⁶ According to the Pork Act, in order for a referendum to be called, fifteen percent of pork producers must sign the petition within a twelve month period.⁴⁷ The organizations collecting signatures turned the petitions over to the USDA.⁴⁸ A review indicated that the minimum number of valid signatures had not been obtained.⁴⁹ Despite this, then Secretary of Agriculture, Dan Glickman, decided that a voluntary referendum on the pork checkoff should be held, and a vote was conducted in September 2000.⁵⁰ The results, announced in early 2001, indicated that while the vote was close, the majority of pork producers who voted in the 2000 referendum did not support the mandatory pork checkoff.⁵¹ Secretary Glickman announced that the program would be terminated.⁵²

Soon after this announcement, the Michigan Pork Producers Association, the NPPC, and a number of individual Michigan pork producers appealed the decision to end the pork checkoff to the federal district court.⁵³ While the appeal disputed the validity of the counting method used in the referendum vote and the legality of termination based upon the voluntary referendum, the assorted plaintiffs also sought a temporary injunction to prevent the USDA from terminating

45. *Glickman*, 521 U.S. at 460-61.

46. *Mich. Pork Producers Ass'n, Inc. v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (W.D. Mich. 2001); *Farmers' Legal Action Group, Inc., Pork Checkoff*, <http://www.flaginc.org/topics/news/checkoff/index.php> (last visited April 27, 2009).

47. 7 U.S.C. § 4812(b)(1)(A) (2009).

48. *Campaign for Family Farms*, 174 F. Supp. 2d at 639.

49. *Id.*

50. *Id.*

51. *Id.*; see also *Farmers' Legal Action Group*, *supra* note 46 (noting that the final tally indicated that fifty-three percent of those voting in the referendum did not support the checkoff while forty-seven percent of those who cast a vote did so in favor of the checkoff).

52. *Campaign for Family Farms*, 174 F. Supp. 2d at 639.

53. *Id.*

the pork checkoff.⁵⁴ However, the hearing on the temporary injunction was not held because soon after the case was filed, a new administration took over at USDA and the new Secretary of Agriculture, Ann Veneman, decided not to terminate the pork checkoff program.⁵⁵ Instead, the USDA and the pork producers entered into a voluntary settlement agreement that allowed for continuation of the mandatory federal pork checkoff program, but required that the NPPC and Pork Board become separately operating organizations, with the Pork Board directly administering all funds from the pork checkoff program.⁵⁶ After the settlement was entered, the plaintiffs asked the court to declare the settlement lawful.⁵⁷ At that point, the defendants filed a cross-claim contesting the legality of the settlement, and later adding a claim asserting that the pork checkoff is forced commercial speech, a violation of the First Amendment. A similar First Amendment claim was addressed by the Supreme Court in the *United Foods* case.⁵⁸

It is the First Amendment claim that became the focus of this case in later litigation. Relying on the Supreme Court's decision in *United Foods*, the defendants claimed that the mandatory assessment violated pork producers' free speech and free association rights.⁵⁹ Specifically, the defendants "disagree[d] with the generic advertising of pork, *i.e.*, the 'Pork, the other White Meat' advertising program. . . assert[ing] that they raise hogs (animals), not pork (processed meat), and the Program supports a commodity they do not sell."⁶⁰ The defendants claimed that the pork checkoff is beneficial to packers and retailers to the detriment of the pork producers.⁶¹ Also raised by defendants were various other disagreements with the generic advertising program, the support of various name brand advertising for large processors, aspects of the research and educational programs supported by checkoff funds, and the "forced association with both the

54. *Id.*

55. *Id.*

56. *See id.*; see also Dale Miller, *USDA Reaches Settlement; Checkoff to Continue*, NAT'L HOG FARMER, Mar. 1, 2001, available at http://nationalhogfarmer.com/news/farming_usda_reaches_settlement/. Because the NPPC is a producer organization, it does not have the same types of restrictions on how its funds are used, such as those placed on use of checkoff funds that are overseen by the Pork Board. Because the entities were more or less one and the same, there were a number of concerns involving the use of restricted checkoff funds by the NPPC. The separation of the two entities separated checkoff funds from non-checkoff funds and resolved a number of the concerns raised about the interrelationship of these two entities.

57. *Campaign for Family Farms*, 174 F. Supp. 2d at 639.

58. *Id.* at 639-40.

59. *Mich. Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 774-75 (W.D. Mich. 2002).

60. *Id.*

61. *Id.*

Pork Board, the National Producers Council. . .and the state pork associations who are allocated 18 percent of the assessments for their own advertising.”⁶²

The main defense set forth against these various First Amendment claims was that there was no violation because the speech in question qualified as “government speech.”⁶³ Specifically, the plaintiffs aligned the speech and assessments associated with the pork checkoff with cases standing for the “propositions that the government may tax and assess for the purpose of government speech, that the government may employ private actors to perform its speech, and that the speech need not be agreeable to those taxed or assessed.”⁶⁴ This was an issue not argued by the Supreme Court in *United Foods* because it had not been briefed or argued in the appellate court.⁶⁵

In the end, the court decided that the pork checkoff did not qualify as government speech, instead classifying the pork checkoff as a “self-help program for pork producers.”⁶⁶ Despite the USDA’s involvement in the program, the Court held that this did not equate to government speech.⁶⁷ After denying the government speech defense, the court went on to hold that the pork checkoff was a violation of producers’ First Amendment free speech and free association rights, determining that the analysis in *United Foods* was more appropriate than that applied by the Supreme Court in *Wileman Bros.*⁶⁸ In finding the program unconstitutional, the court identified the “sincere philosophical, political and commercial disagreements” that some producers have with the speech associated with the checkoff.⁶⁹ In addition, it went further and noted the “commercial interests of objecting producers to such speech” in a market providing low returns in agriculture and where producers are required to pay for their competitor’s advertising and preventing producers from choosing to use their checkoff funds for their own advertising or even for basic hog production needs.⁷⁰ After finding the program unconstitutional, the court entered an injunction preventing the collection of further assessments under the Pork Act.⁷¹

62. *Id.* at 777.

63. *Id.* at 785.

64. *Id.*

65. *Id.*

66. *Id.* at 789.

67. *Id.*

68. *Id.* at 790-91.

69. *Id.* The court went so far as to call the pork checkoff “unconstitutional and rotten.”

70. *Id.*

71. *Id.* at 791-92 (The injunction was made effective 30 days from the date the Final Judgment was issued in order to allow time for an immediate appeal. The Circuit Court granted a stay pending the outcome of the appeal).

2. *Appealing for Relief*

The plaintiffs appealed the district court's ruling to the Sixth Circuit Court of Appeals, making four main arguments: 1) the pork checkoff qualifies as government speech; 2) even if not government speech, it is not compelled speech; 3) the pork checkoff is a "lawful restraint on commercial speech;" and 4) even if the pork checkoff violates producers' First Amendment rights, the district court order was overly broad as it "eliminates funding for programs that are constitutional."⁷² The appeals court affirmed the decision of the lower court, finding that "the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government."⁷³ After dismissing the government speech argument, the Court agreed with the district court's reliance upon the *United Foods* case, finding the two programs indistinguishable, and determining that the commercial speech analysis relied on by the appellants was inapplicable.⁷⁴ Finally, the Court determined that because the Pork Act had no severability clause, the proper remedy was to strike down the entire Act.⁷⁵

At this point, it appeared as though the future of the pork checkoff as a federal, mandatory program, was in serious doubt. A petition for certiorari was filed with the Supreme Court,⁷⁶ and a stay was granted until that petition was decided, allowing the checkoff to continue in operation.⁷⁷ However, at the same time that this case was moving towards the Supreme Court, another checkoff program was facing its own challenges. The beef checkoff was involved in litigation in both the Ninth and Eighth Circuits, and this litigation would have an effect on the certiorari petition before the Supreme Court involving the pork checkoff.

72. Mich. Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003).

73. *Id.* at 161.

74. *Id.* at 162-63.

75. *Id.* at 163-64.

76. Petition for Writ of Certiorari, Mich. Pork Producers Ass'n, Inc. v. Veneman, 544 U.S. 1058 (2004) (No. 03-1180).

77. Press Release, Farmers' Legal Action Group, FLAG Files Response with Supreme Court Urging End to Pork Checkoff (Apr. 20, 2004), <http://www.flaginc.org/topics/news/checkoff/index.php#20040420>.

C. Beef

1. Charter

In the late 1990s, Jeanne and Steve Charter, beef producers in Montana, refused to pay the beef checkoff fees assessed on their cattle sales.⁷⁸ The USDA instigated an enforcement action against the couple, and an administrative law judge assessed a civil penalty on the Charters for violating the Beef Act by their refusal to pay.⁷⁹ The ALJ's decision was upheld upon review, and the Charters then filed an appeal in the federal district court in Montana challenging, among other things, the constitutionality of the beef checkoff.⁸⁰

In the case, *Charter v. USDA*, the Charters sought to have the administrative decision overturned on the grounds that the beef checkoff "constitutes compelled speech and compelled association, both in violation of the First Amendment."⁸¹ The USDA's defense was two-fold: 1) the beef checkoff is not unconstitutional because it is government speech; and 2) even if not government speech, the program itself is within the bounds of constitutionality.⁸²

This was not the first case in which a federal court had heard arguments that the beef checkoff was unconstitutional though. As the *Charter* court noted, the Third Circuit had addressed the government speech issue as related to the beef checkoff in *United States v. Frame*.⁸³ In *Frame*, the court ultimately upheld the beef checkoff as constitutional.⁸⁴ The Third Circuit, while upholding the checkoff as constitutional, held though that the checkoff was not government speech, despite the fact that the nexus between the beef checkoff program and the USDA was so close, but that the checkoff program was instead constitutional commercial speech.⁸⁵ The *Frame* court held there was also no violation of the right to free association in that case.⁸⁶

Two district courts then later relied on *Frame* when faced with these constitutional questions, although arriving at two different end results. In *Goetz*

78. See *Charter v. USDA*, 230 F. Supp. 2d 1121, 1122 (D. Mont. 2002); see also Montana Judge Dismisses Challenge of Beef Checkoff, *supra* note 77.

79. Press Release, Cattleman's Beef Board, Montana Judge Dismisses Charters' Challenge of Beef Checkoff (Oct. 31, 2005), http://www.beefboard.org/news/Release_2005_10_31_a.asp.

80. *Charter*, 230 F. Supp. 2d at 1122; see also *id.*

81. *Charter*, 230 F. Supp. 2d at 1122.

82. See *id.* at 1123.

83. *Id.* at 1133.

84. *United States v. Frame*, 885 F.2d 1119, 1137 (3d Cir. 1989); see also *id.* at 1130.

85. See *Frame*, 885 F.2d at 1132-1133; see also *Charter*, 230 F. Supp. 2d at 1130-31.

86. *Frame*, 885 F.2d at 1131; see also *Charter*, 230 F. Supp. 2d at 1130-32.

v. Glickman, the court followed *Frame*'s analysis and determined that the beef checkoff was not government speech, and like the court in *Frame*, found no constitutional violations.⁸⁷ The Tenth Circuit upheld the district court's decision in *Goetz*, although using a different analysis.⁸⁸ The Circuit Court avoided the governmental speech issue and instead relied on the Supreme Court's decision in *Wileman Bros.* to determine the constitutionality of the beef checkoff.⁸⁹ The other court relying on the *Frame* decision was the District of South Dakota, in the case of *Livestock Mktg. Ass'n v. USDA*,⁹⁰ a case which will be discussed in detail in the next section.

The *Charter* court analyzed the *Frame* decision in detail, and found its reasoning for determining the beef checkoff was not government speech unpersuasive.⁹¹ The *Charter* court went on to say that because the other two district court cases had relied on *Frame*'s analysis, that they were unpersuasive as well.⁹² Instead, the court in *Charter* held that the checkoff-funded programs were in fact government speech.⁹³

The Court noted that "[t]he extent of control Congress and the USDA exercise over the beef checkoff program is extensive."⁹⁴ Specifically noted were the following facts: that the Secretary of Agriculture had the authority to appoint and remove the members of the Beef Board; the Beef Board was required to give notice of meetings to USDA in order to allow them to attend; the Beef Board is required to submit an audit to the USDA for each fiscal year of all its activities; the Secretary must approve all of the Beef Board's budgets, contracts and various other plans and programs before they can be put into effect; that the amount of the beef assessment was set by Congress; and "when the Beef Board [speaks], it [does] so on behalf of the Secretary of Agriculture and the government of the United States."⁹⁵ In short, the Beef Board was subject to the Secretary's perva-

87. *Goetz v. Glickman*, 920 F.Supp. 1173, 1180 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998).

88. *Goetz*, 149 F.3d at 1139.

89. *Id.*

90. *Charter*, 230 F. Supp. 2d at 1132-33 (citing *Livestock Mktg. Ass'n v. USDA*, 207 F. Supp. 2d 992, 995 (D. S.D. 2002)).

91. *Id.*

92. *Id.* at 1133.

93. *Id.* at 1138.

94. *Id.* at 1133 (The court in *Frame* also recognized the extent of the involvement USDA had with the beef checkoff, but relied in large part on one footnote in the concurrence of Justice Powell in the Supreme Court's decision in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), to determine that the government speech doctrine was inapplicable to the beef checkoff. It was in large part this reliance that the *Charter* court took issue with and felt was misplaced.).

95. *Id.* at 1137.

sive surveillance and authority and considerable government oversight.⁹⁶ In finding that the beef checkoff is considered government speech, the court held that “the Beef Board and the Qualified State Beef Councils are groups of private speakers the government utilizes to transmit a specific government message, the beef checkoff funded advertising is attributable to Congress and the USDA,” and is “non ideological, content-oriented government speech which does not violate free speech or free association.”⁹⁷

The Charters appealed the district court’s decision to the Ninth Circuit Court of Appeals.⁹⁸ The Court initially granted the appeal and heard arguments in March 2004.⁹⁹ However, at the same time this appeal was pending, the Supreme Court had before it the petition for certiorari in the case mentioned briefly earlier out of South Dakota: *Livestock Mktg. Ass’n v. USDA*.¹⁰⁰ The Supreme Court granted the petition for certiorari in the South Dakota case,¹⁰¹ and as a result, the Ninth Circuit vacated its earlier submission of the *Charter* case for decision in order to await the Supreme Court’s ruling.¹⁰²

2. LMA

a. *The Beginning*

Similarly to the case arising out of the pork industry, this case also began with a petition drive for a referendum, although in this case for the beef checkoff. After the Secretary of Agriculture determined that not enough valid signatures had been filed on petitions submitted by the Livestock Marketing Association (LMA) in the Association’s bid to force a referendum for the continuation of the beef checkoff, the Association took the debate over the beef checkoff to the courts.¹⁰³ The LMA filed a complaint in the District Court of South Dakota seeking: 1) that the Court declare that the Beef Act is unconstitutional as it violates beef producers due process and equal protection rights; 2) an injunction to prevent any further assessments from being collected by the Beef Board; 3) an injunction requiring that a referendum immediately be held or alternatively ordering that the USDA immediately determine whether one will be held; and 4) an order that the Beef Board be required to stop all “producer communication” ex-

96. *Charter*, 230 F. Supp. 2d at 1130.

97. *Id.* at 1140-41.

98. *Charter v. USDA*, 412 F.3d 1017, 1019 (9th Cir. 2005).

99. *Id.*

100. *Id.* (referring to *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005)).

101. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

102. *Charter*, 412 F.3d at 1019.

103. *Livestock Mktg. Ass’n v. USDA*, 207 F. Supp. 2d 992, 995 (D.S.D. 2002).

penditures and requiring that all funds used for these expenditures since 1998 (when the petition drive started) be returned to producers (approximately 10 million-plus dollars).¹⁰⁴ After the Supreme Court's decision in *United Foods*, LMA added claims that the beef checkoff violated its First Amendment rights as well.¹⁰⁵

The court granted a preliminary injunction preventing the Beef Board from using checkoff funds for further producer communications on specific topics including blocking referendums or influencing government policy regarding the beef checkoff or Beef Board in January 2001.¹⁰⁶ The First Amendment claims were then separated from the rest of LMA's claims, with the First Amendment claims going to trial in January 2002.¹⁰⁷

b. *First Amendment Wrangling*

The court began its First Amendment analysis by applying the analysis used by the court in *Frame*.¹⁰⁸ As briefly mentioned earlier, the *Frame* court recognized the relationship between the government, specifically the USDA, and the beef checkoff, but ultimately determined, relying in large part on the Supreme Court's decision in *Abood*, that the beef checkoff did not qualify as government speech.¹⁰⁹ Similarly, the court in the LMA case began its constitutional analysis of the compelled speech argument by quoting *Abood*.¹¹⁰ However, unlike the *Frame* court, the LMA court determined that not only was the beef checkoff not government speech, but that it was also not permissible commercial speech, and was therefore unconstitutional.¹¹¹ Instead, the court in LMA followed the analysis of the Supreme Court in *United Foods* when it invalidated the Mushroom Act and its checkoff promotion program.¹¹² The court rejected the idea "that the beef checkoff is part of a regulatory scheme, akin to what exists with regard to California tree fruit."¹¹³ The court held that the regulatory aspects of the beef industry dealt with the conduct of packers and stockyards, food safety concerns, and

104. *Id.*

105. *Id.* at 995-96.

106. *Id.* at 996; *Livestock Mktg. Ass'n v. USDA*, 132 F. Supp. 2d at 817, 824-25 (D.S.D. 2002).

107. *Livestock Mktg. Ass'n*, 207 F. Supp. 2d at 996.

108. *Id.* at 998-99.

109. *United States v. Frame*, 885 F.2d 1119, 1137 (3d. Cir. 1989).

110. *Livestock Mktg. Ass'n*, 207 F. Supp. 2d at 997 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)).

111. *Id.* at 1005-06.

112. *Id.* at 1001-02.

113. *Id.* at 1005.

the operations of livestock markets.¹¹⁴ One of the major differences between the tree fruit program upheld in *Wileman Brothers* and the beef checkoff, the court noted, was that cattle producers did not sell on a collective basis, and are not regulated at the farm level in the marketing of their cattle.¹¹⁵ And while the court recognized the numbers of interactions between USDA and the Beef Board, the court considered USDA's involvement as "ministerial" and that USDA's review of the Beef Board programs and paperwork was merely "pro forma" review.¹¹⁶ After finding that the beef checkoff was an unacceptable violation of LMA's First Amendment rights, the court struck down the Beef Act, prohibiting further collections and new expenditures as of July 15, 2002.¹¹⁷

c. *Appealing for Relief*

The USDA appealed to the Eighth Circuit Court of Appeals. Arguing for reversal, The USDA relied on the same arguments it set forth in the district court: 1) the promotions paid for by the beef checkoff are government speech; and 2) even if it is not government speech, the beef checkoff is constitutional "as regulation of commercial speech or as part of a broader regulatory scheme."¹¹⁸ In the time since the district court's ruling striking down the Beef Act, the *Charter* decision had been released by the court in Montana with essentially the opposite outcome.¹¹⁹

The Eighth Circuit, however, upheld the district court's decision and affirmed the district court's analysis of the issues. While considering the "quasi-governmental nature of the Beef Board . . . and the oversight, albeit limited, exercised by the Secretary over the generic advertising," the court determined that because the speech was not properly considered government speech, the "substantiality of the government's interest" in the compelled speech in question was "highly doubtful."¹²⁰ After determining that the advertising supported by the beef checkoff was not properly considered government speech, the court found the government did not have a "sufficiently substantial" interest in protecting the welfare of the beef industry to infringe on beef producers' and importers' free

114. *Id.*

115. *Id.*

116. *Id.* at 1005-06.

117. *Id.* at 1007-08. After striking down the Act, the court ruled that LMA's other claims regarding the referendum and Fifth Amendment were moot. The court's injunction was stayed by the Eighth Circuit pending the outcome of the appeal before that court. *See Livestock Mktg. Ass'n v. USDA*, 335 F.3d 711, 717 (8th Cir. 2003).

118. *Livestock Mktg. Ass'n*, 335 F.3d at 713.

119. *Charter v. USDA*, 230 F. Supp. 2d 1121 (D. Mont. 2002).

120. *Livestock Mktg. Ass'n*, 335 F.3d at 723.

speech rights by compelling them “to pay for generic beef advertising.”¹²¹ The Eighth Circuit then upheld the district court’s determination that the only proper remedy of these violations would be to strike down the Beef Act in its entirety.¹²²

The battle was not yet over in the fight for the beef checkoff. The USDA filed a petition for certiorari with the Supreme Court, seeking further review of the case, and hoping that the Court would recognize the importance of resolving this issue.¹²³ The Supreme Court granted the petition for certiorari in May 2004.¹²⁴ At the same time, the pork checkoff petition was pending before the Supreme Court, and the *Charter* appeal was before the Ninth Circuit. Upon the Supreme Court’s grant of the beef checkoff petition, the other two cases were more or less put on hold until the Supreme Court weighed in on the governmental speech issues. Governmental speech was an issue that the Court had not reviewed in either the *Wileman Bros.* or the *United Foods* cases. The Supreme Court heard arguments in the case of *Johanns v. Livestock Marketing Association* in December 2004.¹²⁵ The key issue before the Court was whether the advertising paid for by the beef checkoff was properly classified as government speech.¹²⁶

3. *The Supreme Court Speaks*

In May 2005, the United States Supreme Court released its decision in *Johanns* holding that the mandatory national beef checkoff program did not violate beef producers’ and importers’ First Amendment rights because it was protected government speech.¹²⁷ This opinion was the culmination of the litigation regarding the legality of the beef checkoff program, and the outcome of the *Johanns* case effectively ended some of the most contentious litigation the industry had seen on the constitutionality of checkoff programs.

LMA, the Respondents before the Supreme Court, maintained their argument that the speech funded by the beef checkoff was not government speech because it was controlled by the Beef Board and other nongovernmental enti-

121. *Id.* at 725-26.

122. *Id.* at 726.

123. *Livestock Mktg. Ass’n*, 335 F. 3d 711 (8th Cir. 2003), *petition for cert. filed*, 2004 WL 304352 (U.S. Feb. 13, 2004) (No. 03-1164).

124. *Livestock Mktg. Ass’n*, 335 F.3d 711, *cert. granted*, 541 U.S. 1062 (2004).

125. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

126. *See id.* at 555-56.

127. *Id.* at 566-67. (Justice Scalia wrote the opinion for the Court, joined by Chief Justice Rehnquist and Justices O’Connor, Thomas and Breyer. Justices Thomas and Breyer filed separate concurring opinions, and Justice Ginsburg filed an opinion concurring in the judgment. Justice Kennedy filed a dissent, as did Justice Souter, which Justice Stevens and Kennedy joined).

ties.¹²⁸ The Petitioners, including USDA and the Secretary of Agriculture, maintained that the beef checkoff was government speech and therefore did not violate the First Amendment rights of beef producers and importers.¹²⁹

Just over five months after hearing arguments in the case, the Supreme Court found in favor of the Petitioners.¹³⁰ In doing so, the Court determined that the beef checkoff funded message was effectively controlled by the government, as the government sets forth the overall message and certain aspects of the campaign supporting that message, while leaving the rest of the development and the details to the Beef Board.¹³¹ The Court stated that when it invalidated the mushroom checkoff in *United Foods*, it did so operating under the assumption that the speech in question was private speech – the issue of government speech was never a question in that case.¹³² In fact, the Court also pointed out that in the other cases generally relied upon to invalidate the checkoff as compelled speech, such as *Abood*, the speech involved was private speech, not government speech.¹³³

The Court held that “[t]he degree of governmental control over the message funded by the checkoff” establishes that the checkoff message is not controlled by non-governmental entities, and that “from beginning to end the message [is] established by the Federal Government.”¹³⁴ The Court also summarily rejected the challenge to the checkoff based on the method of funding for the message (targeted assessment versus general funds) and attribution of the message to “America’s Beef Producers.”¹³⁵ In a relatively short opinion, the Court summed up its ruling with the statement that “on the record before us an as-applied First Amendment challenge to the individual advertisements affords no basis on which to sustain the Eighth Circuit’s judgment, even in part.”¹³⁶

The concurring and dissenting opinions showed a range of thoughts on the issue. In his concurrence, Justice Breyer put forth the assertion that these programs were better classified as “a form of economic regulation,” but that he accepted the government speech doctrine as “a solution to the problem presented

128. *Id.* at 560.

129. *Id.* at 556.

130. *Id.* at 566-67.

131. *Id.* at 560-61.

132. *Id.* at 558.

133. *Id.* at 559.

134. *Id.* at 560-61.

135. *Id.* at 551.

136. *Id.* at 567.

by these cases.”¹³⁷ Justice Ginsburg, while concurring in the judgment, contended that although she resisted classifying the beef checkoff message as government speech, she nonetheless would find the assessment programs such as this (and *United Foods* and *Wileman Brothers*) “permissible economic regulation.”¹³⁸ Justice Souter’s dissenting opinion took the position that if the government speech doctrine was relied upon “to compel specific groups to fund speech with targeted taxes, [the government] must make itself politically accountable[.]”¹³⁹ That is, the message must indicate that it is a message from the government, not just a message from a private entity that the government supports.¹⁴⁰ Because the beef checkoff’s generic advertising lacks any indication that this message is from the government, Justice Souter would have upheld the Eighth Circuit’s decision and reliance upon *United Foods*.¹⁴¹

a. *The Aftermath*

The opinion left many wondering what would come next. While there was still some wrangling left to be done in the courts, the Supreme Court’s decision effectively ended the pending litigation challenging the constitutionality of the pork and beef checkoffs. The Supreme Court allowed the LMA to pursue the claims that had not been settled by the District Court.¹⁴² In March 2006, an agreement was reached between the USDA and the LMA and as part of the settlement and a stipulated dismissal was filed with the district court, bringing the case to a close.¹⁴³ The Ninth Circuit returned the *Charter* case to the district court for further decision on issues regarding attribution,¹⁴⁴ but at the request of the plaintiffs, the case was dismissed on October 21, 2005.¹⁴⁵ The Supreme Court granted the petitions for certiorari from the pork checkoff case and re-

137. *Id.* at 569 (Breyer, J., concurring). Justice Breyer also stated that he recognized he was in the minority on the economic regulation argument, and still professed that his dissent in the *United Foods* case was the “preferable approach.”

138. *Id.* at 569-70 (Ginsberg, J., concurring).

139. *Id.* at 571 (Souter, J., dissenting).

140. *Id.* at 571-72 (Souter, J., dissenting).

141. *Id.* at 572 (Souter, J., dissenting).

142. *Id.* at 567 (majority opinion).

143. Press Release, Cattleman’s Beef Board, Beef Checkoff Program Reaches Agreement with LMA (Mar. 3, 2006), http://www.beefboard.org/news/release_2006_03_03_a.asp.

144. *Charter v. USDA*, 412 F.3d 1017, 1020 (9th Cir. 2005).

145. Montana Judge Dismisses Challenge of Beef Checkoff, *supra* note 79.

manded the case back to the Sixth Circuit,¹⁴⁶ but no further litigation ensued and the case was dismissed by the plaintiffs in June 2006.¹⁴⁷

The pork and beef checkoff programs were not the only programs affected by this decision. A number of states had been preparing for the possibility of the disappearance of the national checkoff, and had been taking steps to reinstate or install state checkoff programs. Many of the state checkoff programs had been discontinued by the advent of the mandatory national programs.¹⁴⁸ States and various associations were able to take a break from the frantic preparations that were being made for the possibility of life after the checkoff. Other state and federal checkoff programs, whether the subject of litigation or not, also received a shot of confidence about the status of their programs and their ability to continue operating.

b. *Other Cases*

The status for some other checkoff programs remained unclear after the Supreme Court's ruling. A number of other cases were pending regarding various state and federal checkoff programs,¹⁴⁹ and several had been struck down at various levels prior to the Supreme Court's decision.¹⁵⁰ Other cases continued to work their way through the courts, even through 2008.¹⁵¹ Prior to the Supreme

146. *Mich. Pork Prods. Ass'n v. Campaign for Family Farms*, 544 U.S. 1058 (2005); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 567 (2005).

147. Press Release, Campaign for Family Farms, Campaign for Family Farms Dismisses Mandatory Pork Checkoff Lawsuit, Vows to Continue Work to Oppose Corporate Consolidation in the Livestock Industry (June 15, 2006) http://www.landstewardshipproject.org/pr/06/newsr_060615.htm. The pork checkoff case also involved the issue of free association, an issue not presented, and therefore not addressed by, the Supreme Court in the LMA case. With the dismissal of the pork checkoff case, this issue remained unresolved as applied to the checkoff, although the true centerpiece of the litigation was the free speech claim.

148. See ALA. CONST. art. IV, § 93.02; ALA. CODE § 2-8-3 (2008); ARK. CODE ANN. § 2-35-304 (2008); FLA. STAT. § 570.9135(2) (2005); 2004 Ga. Laws page no. 948, §3-1(b); IOWA CODE § 181.7A (2009); LA. REV. STAT. ANN. § 555.8(B) (2008); Todd Parker, Final Edition of 2005 Regular Session Highlights 1-2 (2005), available at <http://senate.legis.state.la.us/SessionInfo/2005/RS/Highlights/2005RSHighlights.pdf>. (Some of these states have laws or programs that would automatically reactivate should the national program no longer be in place. Other states added such language, or considered doing so, in response to the litigation previously discussed in this chapter).

149. See *Pelts & Skins, LLC v. Landreanu*, 365 F.3d 423 (5th Cir. 2004); *J.W. DeWit Farms v. Minn. Cultivated Wild Rice Council*, 393 F. Supp. 2d 847 (D. Minn. 2005).

150. See *Pelts & Skins*, 365 F.3d at 423; *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004); *Fla. Dep't of Citrus v. Graves Bros. Co.*, 912 So. 2d 1217 (Fla. 2005).

151. See *Delano Farms Co. v. Cal. Table Grape Comm'n*, 546 F. Supp. 2d 859 (E.D. Cal. 2008).

Court's decision in 2005, the national dairy, Louisiana alligator,¹⁵² Minnesota wild rice,¹⁵³ California table grapes, national avocado,¹⁵⁴ Florida citrus,¹⁵⁵ national honey,¹⁵⁶ national cotton, Washington apple, Arkansas wheat and the California plum checkoffs were all in various stages of litigation in both state and federal courts. The results had been mixed, which was not surprising based upon the various holdings in the beef and pork checkoff litigation. However, in almost every checkoff listed above, the *LMA* decision played a role in the future of the checkoff programs. A summary of a few of the impacted programs follows.

i. *National Programs*

The national dairy, Hass avocado, watermelon, honey, and cotton programs were all under fire. The Third Circuit had overturned a district court decision upholding the dairy checkoff program in 2004, placing it in the same state of confusion and uncertainty experienced by the beef and pork checkoffs.¹⁵⁷ When the Supreme Court vacated the Sixth Circuit's decision regarding the pork checkoff, it did the same for the Third Circuit's dairy checkoff decision – it granted the petition for certiorari pending at the time, vacated the ruling, and sent it back for further review consistent with the beef checkoff decision.¹⁵⁸ Shortly thereafter, the Third Circuit affirmed the original district court decision upholding the dairy checkoff as constitutional.¹⁵⁹

While other cases involving the honey, Hass avocado, watermelon and cotton checkoffs were not currently pending in the courts in 2005 at the time of the Supreme Court's ruling, administrative proceedings had been initiated and were pending. This led to a series of rulings on these checkoff programs in the courts in 2006 and 2007.¹⁶⁰ All four checkoff programs were upheld.

152. See, e.g., *J.W. Dewit Farms, Inc.*, 393 F. Supp. 2d at 847.

153. See, e.g., *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895 (9th Cir. 2003).

154. See, e.g., *Avocados Plus, Inc. v. Johanns*, No. 02-1798, 2007 WL 172305 (D. D.C. Jan. 23, 2007).

155. See, e.g., *Fla. Dep't of Citrus v. Graves Bros. Co.*, 889 So. 2d 831 (Fla. Dist. Ct. App. 2004).

156. See, e.g., *Am. Honey Producers Ass'n, Inc. v. USDA*, No. CV-F-05-1619 LJO, 2007 WL 1345467 (E.D. Cal. May 8, 2007).

157. *Cochran v. Veneman*, 359 F.3d 263, 268 (3d Cir. 2004), vacated, *Johanns v. Cochran*, 544 U.S. 1058 (2005); *Lovell v. Cochran*, 544 U.S. 1058 (2005).

158. *Johanns*, 544 U.S. 1058; *Lovell*, 544 U.S. 1058.

159. *Cochran v. Veneman*, No. 03-2522, 2005 WL 2755711 (3d Cir. Sept. 15, 2005) *aff'g* *Cochran v. Veneman*, 252 F. Supp. 2d 126 (M.D. Pa. 2003).

160. *Am. Honey Producers*, 2007 WL 1345467 (upholding honey checkoff); *Avocados Plus, Inc.*, 2007 WL 172305 (upholding avocado checkoff on "as applied" challenge); *Dixon v.*

ii. *State Checkoff Programs*

It was not just national programs under the microscope. The same debate was raging in relation to state programs across the country. The California dairy, plum and table grape programs, Florida citrus, Washington apple, Louisiana alligator and Minnesota wild rice checkoff programs were all facing litigation. The Louisiana alligator program was in the same place as the national dairy program. After working its way through the courts and being struck down as unconstitutional by the Fifth Circuit, a petition for certiorari was pending at the time of the beef checkoff decision.¹⁶¹ The Supreme Court granted the petition, vacated the Fifth Circuit's ruling and remanded for further proceedings.¹⁶² The Fifth Circuit then vacated its original ruling and remanded the case back to the district court.¹⁶³ Just prior to the Supreme Court's ruling in May 2005, the Minnesota wild rice checkoff was being debated in the District Court of Minnesota. In March 2005, the district court dismissed the claims against the checkoff.¹⁶⁴

The Florida citrus program was also caught in the period of limbo prior to the Supreme Court's decision. The program was initially found invalid by the state appellate court, but after the Supreme Court's 2005 decision the Florida Supreme Court quashed the state opinion and remanded the case for further proceedings.¹⁶⁵

One exception to the overall success of the checkoff programs facing litigation lies with the Washington apple checkoff program, which was found to be unconstitutional in 2003.¹⁶⁶ The Washington Apple decision resulted in the program undergoing major changes, including ending a domestic marketing program and reworking the legislation that created the program in order to provide for more government oversight.¹⁶⁷ Had the 2005 Supreme Court ruling been in place prior to the apple checkoff being struck down, it is possible the program would still be in place in its prior form today.

Johanns, No. CV-05-03740-PHX-NVW, 2006 WL 3390311 (D. Ariz. Nov. 21, 2006) (upholding watermelon checkoff); Cricket Hosiery, Inc. v. United States, 429 F. Supp. 2d 1338 (Ct. Int'l Trade 2006) (upholding cotton checkoff); Avocados Plus, Inc. v. Johanns, 421 F. Supp. 2d 45 (D.D.C. 2006) (upholding avocado checkoff on facial challenge).

161. Landreneau v. Pelts & Skins, LLC, 544 U.S. 1058 (2005).

162. *Id.*

163. Pelts & Skins, LLC v. Landreneau, 448 F.3d 743 (5th Cir. 2006).

164. J.W. DeWit Farms v. Minn. Cultivated Wild Rice Council, 393 F. Supp. 2d 847 (D. Minn. 2005).

165. Fla. Dep't of Citrus v. Graves Bros. Co., 889 So. 2d 831 (Fla. Dist. Ct. App. 2004).

166. *In re Wash. State Apple Adver. Comm'n*, 257 F. Supp. 2d 1290, 1291 (E.D. Wash. 2003).

167. Geraldine Warner, *Recent Decision Makes Commissions More Secure*, GOOD FRUIT GROWER, July 1, 2005, <http://www.goodfruit.com/issues.php?article=501&issue=18>.

The litigation related to the various California checkoff programs has a lengthy history, often dating back to the mid to late 1990s. The case involving the California state milk program began in the courts in the 1990's, with the most recent ruling coming just recently in 2008 when the California Court of Appeals affirmed the district court's order upholding the program.¹⁶⁸ The litigation related to the California plum checkoff also dates back that far. The California Supreme Court last ruled on the issue in 2004 when it overturned the appellate court's ruling that the program was unconstitutional and remanded the case for further proceedings.¹⁶⁹ The plaintiff in that action has moved on to question the federal program and is currently in the midst of administrative proceedings challenging assessments billed to that operation.¹⁷⁰ The California table grape checkoff program also had its most recent ruling in 2008.¹⁷¹ After initially being struck down by the Ninth Circuit in 2003,¹⁷² upon remand, the program received a grant of summary judgment from the district court in March 2008, dismissing the claims challenging the constitutionality of the program.¹⁷³

VI. TAKING A LOOK INTO THE CRYSTAL BALL

So what does the Supreme Court's holding in LMA hold for the future of checkoffs? For now, the answer may be found in the cases seen in the courts since mid-2005 and the resulting opinions. Courts are interpreting checkoff programs with leniency, and generally denying the constitutional challenges they are presented, despite the fact that the Supreme Court only addressed a limited aspect of a First Amendment free speech claim. For now, the brush is broad, and all First Amendment challenges appear to be treated similarly. Whether this remains the case is yet to be seen. What it does mean is that state and federal checkoff programs have gone from one of the most contentious and uncertain periods they have faced to a period of potential over confidence.

For example, less than four years after the Supreme Court's ruling in the beef checkoff case, the Beef Board is seeking changes to the process to make it easier to increase the amount of the assessment.¹⁷⁴ The request to Congress

168. Gallo Cattle Co. v. A.G. Kawamura, 72 Cal. Rptr. 3d 1, 2 (2008).

169. Gerawan Farming, Inc. v. A.G. Kawamura, 90 P.3d 1179, 1181-82 (Cal. 2004).

170. Gerawan Farming, Inc., 65 Agric. 42-43 (2006) (USDA ALJ decision denying Gerawan's claims regarding the constitutionality of the checkoff program and requiring payment of full assessments).

171. Delano Farms Co. v. Cal. Table Grape Comm'n, 318 F.3d 895 (9th Cir. 2003).

172. *Id.* at 899-900.

173. *Id.* at 951.

174. Chris Clayton, *Checkoff Changes on the Way?*, The PROGRESSIVE FARMER, Feb. 10, 2008, available at <http://www.dtnprogressivefarmer.com/dtnag/> (on file with author).

would allow a referendum on the issue of increasing the assessment if ten percent of producers signed a petition requesting such a referendum with a year period of time.¹⁷⁵ The same request also includes a proposal for a referendum at regular intervals regarding the continuation of the beef checkoff program if ten percent of beef producers sign a petition at USDA offices requesting one within a year period.¹⁷⁶ These dual requests are interesting for a number of reasons. First, a request to increase the assessment amount will be volatile. While the litigation may have died down for the present, the tensions underlying the cases remain, and could possibly rise to the surface if faced with the possibility of higher checkoff assessments. One also wonders if the request regarding periodic referendums is an attempt to soothe some who might be upset about the idea of increased assessments, or if it is perhaps a response to the issues raised in the various checkoff cases courts have seen over the past ten years. Either way, the next several years look to be interesting as checkoff programs attempt to move forward and adjust to a changing producer base and changing market conditions.

VII. CONCLUSION

After this cursory review of the major litigation regarding checkoff programs some may still be asking, "Why do we care?" Many assume that checkoffs affect only those that pay or those that receive the funds. To a large extent, that may be true. However, the better question for the average person is how he or she might be affected if there were NOT checkoff programs. As it is now, little to no government resources are used to support these checkoff programs. In fact, that is generally one of the requirements set forth in the enabling legislation. If these programs disappear, it is more than just advertising that will be lost. While you might enjoy seeing your favorite athlete or celebrity in the latest "Got Milk?" promotional advertisement or look forward to the famous "Rodeo" music in the beef advertisements, the checkoffs are so much more than advertising. While the focus of the litigation and, to be honest, a majority of the budget goes to advertising and promotion, the checkoff programs also fund a number of research projects and support numerous other programs.¹⁷⁷ With the support of checkoff dollars, new products have entered the market that have become staples on many dinner tables. Without the checkoff, whether these products would exist is something to question. For products available to us now, the question is whether they got there faster with funding received from check off programs and if they would have perhaps cost more without some of the development costs

175. *Id.*

176. *Id.*

177. NEFF & PLATO, *supra* note 5.

underwritten by another entity. Checkoff programs have also become a major supporter of nutrition programs and research.¹⁷⁸ While none of these programs are without controversy, the truth is that without checkoff dollars, the programs might not exist.

A number of these programs would still exist in some form if they were not supported by checkoff funds. Where the money for these programs would come from though is what might affect your “average” American. If the government finds these programs important enough to warrant government support and approval, one would think that if the checkoff funds disappeared that the demand for government funds would rise to the forefront. Not only would there be a possible effect on foods available to consumers, but there may also be an effect on the pocketbook, whether from increased food costs, or increased government expenditures on programs.

This is not meant to provide a response to the questions of whether checkoff programs are fair to producers, whether they are effective in their generic advertising, or even whether they are constitutional. Instead, it is meant to attempt to summarize the status of major checkoff litigation of the past decade, and attempt to explain why this should be of interest to those who do not pay the assessments themselves. While First Amendment litigation appears to have peaked in 2005, there is too much opposition to checkoff programs to think that that was the “last hurrah.” First Amendment challenges will continue to be made, and there is no doubt that new legal challenges will arise as well. For now, checkoff programs will continue to affect most every American; from much of the meat, fruit, vegetables and dairy products on our tables, to the cotton and wool clothing we wear, to the alternative fuels that power vehicles. How these programs adapt to changing industries and a changing agricultural community has yet to be seen.

178. NEFF & PLATO, *supra* note 5.