Agricultural Cooperatives: Price-Fixing and the Antitrust Exemption

This article examines the antitrust immunity for agricultural cooperatives. It focuses on the price-fixing function of bargaining cooperatives and argues that cooperatives which engage solely in price-fixing should be granted exempt status.

John Perkins is a typical American farmer[1] who grows tomatoes in Central California. Before he plants his annual crop, Perkins receives a visit from the representative of a large canner who seeks to obtain a contract with him to supply a specific volume of produce.[2] Perkins enters into the negotiations with the canner's representative knowing that he represents the only large processing firm within practical delivery range of Perkin's farm. Perkins is only one of a hundred growers whom the canner's representative will visit this season. Whether the representative contracts with Perkins is thus a matter of relative indifference to the canner. But to Perkins, getting a contract is crucial. The choice facing him as an individual is to contract to sell on the proferred terms or not at all.[3]

John Perkins has another choice. He can join with other farmers in the locality under the aegis of a bargaining cooperative[4] and together

1. Family farms, those using predominantly family labor, comprise about 95% of all farms and produce 65% of all farm products sold in the United States. Although these percentages have fluctuated slightly, they have remained substantially the same for the last 30 years despite the decline in the total number of farms. In 1970, about 50% of the farms in the United States had less than $5,000 in value of sales per farm. The largest farms, those with sales of $100,000 or more, comprised less than 2% of the total number, yet they accounted for nearly a third of the marketings. *Hearings on H.R. 11654 before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., Ser. 28, at 17-19 (1972) [hereinafter cited as *Family Farm Act Hearings*] (testimony of J. Phil Campbell, Under-secretary, Dep't. of Agriculture).

2. Because of the size and speed of most of their operations, processors are interested in having an assured, even flow of product to pack. NATIONAL COMMISSION ON FOOD MARKETING, FOOD FROM FARMER TO CONSUMER 53 (1966).

3. *Id* at 53.

4. P. HELMBERGER AND S. HOOS, COOPERATIVE BARGAINING IN AGRICULTURE 5 (1965).

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they can fix the price of tomatoes. In this manner, Perkins can turn the tables in his negotiations with the canner's representative and become a price maker, not a price taker.

Bargaining cooperatives are voluntary economic institutions in which producers voluntarily join together to gain bargaining power.[5] These cooperatives engage in a wide range of activities including contract negotiation with processors, price determination, dissemination of market information, production scheduling and grade assurance.[6] The primary goal of the bargaining cooperative is to improve farmers' terms of trade. Because price is the most significant element in their terms of trade, price-fixing is the most important aspect of the bargaining function.[7]

Perkins and his fellow farmers might establish a special form of bargaining cooperative designed solely to set prices. In such a cooperative, farmers would agree to meet together, discuss commodity supply and anticipated demand, and fix prices. The cooperative as an entity would not actually bargain for the sale of farmers' products, but rather, individual farmer-members would bargain directly with the prospective purchaser.

Whether fixing prices without more is a legitimate function under the antitrust exemption established for agricultural cooperatives by section 6 of the Clayton Act and section 1 of the Capper-Volstead Act[8] is not

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5. *Id* at 5.

6. FARMER COOPERATIVE SERVICE, U.S. DEPARTMENT OF AGRICULTURE, INFORMATION NO. 90, BARGAINING COOPERATIVES: SELECTED AGRI-INDUSTRIES 3-11 (1973).

7. P. HELMBERGER, *supra* note 4, at 28.

8. The antitrust exemption for agricultural cooperatives is embodied in § 6 of the Clayton Act and § 1 of the Capper-Volstead Act. These acts provide:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1970);

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing . . . such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts *provided, however*, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
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> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

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clear. Unless the price-fixing activity of Perkins' bargaining cooperative is a legitimate function, the mere existence of the cooperative may be illegal per se under the antitrust laws.[9] Critics, including attorneys for the Federal Trade Commission,[10] the Antitrust Division of the Department of Justice,[11] and legal commentators,[12] seek reexamination of the agricultural cooperative antitrust exemption. In addition, consumer advocates fear that bargaining cooperatives might increase the price of food at the retail level.[13]

This article argues that the general antitrust exemption for agricultural cooperatives should encompass bargaining cooperatives which engage solely in price-fixing.[14] The article does not contend that such

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And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than as are handled by it for members.

7 U.S.C. § 291 (1970). Section 6 of the Clayton Act and § 1 of the Capper-Volstead Act are referred to hereinafter as the "Capper-Volstead exemption" or simply as, the "exemption."

9. In United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940), price fixing was held a per se violation of the Sherman Act. *See also* United States v. Container Corp. of Am. 393 U.S. 333 (1969).

10. FARMER COOPERATIVE SERVICE, U.S. DEP'T OF AGRICULTURE, SPECIAL REPORT NO. 23, PROCEEDINGS-20TH NATIONAL CONFERENCE OF BARGAINING AND MARKETING COOPERATIVES 36-44 (1976) (statement by Alfred F. Dougherty, Deputy Director, Bureau of Competition, Federal Trade Comm'n).

11. "We are taking a hard look at antitrust immunities enjoyed by particular industries . . ." Shenefield, Acting Asst. Atty. Gen. Antitrust Div. Address Before Financial Analysts Federation, Washington D.C. 20 (June 29, 1977). "I believe . . . that this is an appropriate time for Congress to reevaluate the need for and the scope of this immunity." *Hearing on Food Prices Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., 8 (1973) (testimony of T. Kauper, Asst. Atty. Gen. in charge of Antitrust Div., Dep't of Justice).

12. Comment, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VIRGINIA L. REV. 341 (1975).

13. FARMERS COOPERATIVE SERVICE, *supra* note 10, at 32-36 (statement of Ellen Haas, Board Member, Consumer Federation of America).

14. This article focuses on the price fixing function of bargaining cooperatives, although criticism of the exemption has generated a number of other issues which are currently the subject of considerable controversy. One issue is whether membership in an agricultural cooperative by large corporate agribusiness vitiates the cooperative's exempt status. The potential problem of corporate agribusiness membership in agricultural cooperatives was commented upon in the floor debates on the Capper-Volstead Act, 62 CONG. REC. 2156-2157 (1922) (remarks of Sen. Pomerene). Critics may infer from these comments that large corporations whose farm interests are incidental to their primary operations of processing, distributing, or retailing were not among the primary beneficiaries of the Act. *See also* Case-Swayne Co. v. Sunkist Growers, 389 U.S. 384, 393-95 (1967). A second issue is to what extent the individual members of a cooperative directly must be involved in the actual "production" of the agricultural commodity in order to ensure that the cooperative maintains its exempt status. This issue is currently before the Supreme Court in U.S. v. National Broiler Marketing Ass'n, 550 F. 2d 1380 (5th Cir. 1977), *cert. granted*, 98 S.Ct. 260 (1977). In *National Broiler*, the defendant was an association of integrated producers of broiler chickens who owned the flocks, made all production and marketing decisions, incurred 90% of the cost, and assumed the primary risk of market fluctuations. As the individual members contracted with growers for the ac-

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organizations are totally immune from antitrust constraints. Rather it argues that price-fixing should be considered a legitimate function within the meaning of the Clayton and Capper-Volstead Acts. The price-fixing function can be legitimate, of course, only if courts establish the legitimacy of the bargaining function of which price-fixing is a part.

There are three main arguments opposing inclusion within the exemption of the bargaining function and its included element of price fixing. First, critics argue that the exemption no longer serves its purpose since today's agricultural conditions differ substantially from those conditions that existed at the time Congress passed the acts creating the exemption.[15] Thus, even if bargaining and pure price-fixing come within the exemption, courts should deny the shelter of the exemption to those farmers who do not possess the characteristics of a farmer in 1922. Second, a cooperative which engages solely in bargaining functions is not engaged in "marketing" within the meaning of section 1 of the Capper-Volstead Act. Third, critics claim that the price-fixing function of a bargaining cooperative is immune from antitrust attack only if this function is ancillary to and a necessary incident of otherwise legitimate "marketing." This article directly addresses each of these arguments and concludes that the Supreme Court must recognize that bargaining cooperatives which engage solely in price-fixing come under the protection of the general antitrust exemption for agricultural cooperatives.

I. Purpose of the Exemption

The historical context in which Congress passed section 6 of the Clayton Act and section 1 of the Capper-Volstead Act demonstrates that Congress' intent was to enable farmers to affect their terms of trade. Congress passed the Clayton Act[16] in 1914, a time when the agricultural sector was enjoying stability and prosperity.[17] This prosperity stimu-

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tual husbandry and neither owned nor operated the farms, the Fifth Circuit held that they were not "farmers" within the meaning of Capper-Volstead. *Id* at 1386. The broiler integrators issue promises to be the tip of the iceberg as the use of contract growers by integrators in husbandry operations becomes more popular. *See also* Knutson, *Definition of Producer is Critical Policy Issue*, News for Farmer Cooperatives, Aug., 1974 at 17.

15. *See* comment, *supra* note 12, at 352-67.

16. Although exempting nonstock agricultural cooperatives, § 6 of the Clayton Act was not agricultural reform. It was labor law. Congress added the reference to agricultural associations without fanfare while the major controversy concerned industrial labor policy. *See generally* 51 Cong. Rec. 11163, 11673, 11845, 12130 (1914).

17. In 1912, Secretary of Agriculture Wilson stated:

> Most productive of all agricultural years in this country has been 1912. The earth has produced its greatest annual dividend. The prices at the farm are generally profitable, and will continue the prosperity that farmers have enjoyed for years . . . During the last 16 years the farmer has steadily increased his wealth production year by year, with the exception of 1911 . . . If the wealth produced

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lated cooperative activity.[18] The prevailing court interpretation of the Sherman Act,[19] however, prohibited simple farmer cooperative organizations and curtailed many cooperative efforts.[20] Section 6 of the Clayton Act thus was needed to exempt the organization and operation of such cooperative associations from the antitrust laws.[21]

The popularity of the farmer cooperative surged in 1920[22] in reaction to the depression and the resultant turmoil in the agricultural sector.[23] In an environment of falling prices and increasing production costs, farmers looked increasingly to cooperation in hopes of achieving price stabilization and economies of scale.[24] Farmers believed that through concerted action, they could achieve parity in bargaining power with intermediaries and in turn capture a fair market price.

Section 6 of the Clayton Act, however, applied only to cooperatives not utilizing capital stock.[25] The more ambitious cooperative efforts involving capital investment thus ran afoul of the Sherman Act and encountered restraint of trade prosecutions.[26] This failure of the Clayton Act to apply to capital stock cooperatives, as well as its failure to pro-

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> on farms in 1899 be regarded as 100, the wealth produced 16 years ago, or in 1896, is represented by 84, and the wealth produced in 1912 by 202.1.

J. KNAPP, THE RISE OF AMERICAN COOPERATIVE ENTERPRISE 100 (1969); U.S. DEPARTMENT OF AGRICULTURE, YEARBOOK 11-12 (1912); J. SCHIDELER, FARM CRISIS 1919-1923, at 6 (1957).

18. J. KNAPP, *supra* note 17, at 99-109.

19. 15 U.S.C. §§ 1-7 (1970). The Sherman Act of 1890 prohibits contracts, combinations, conspiracies in restraint of trade, and attempts to monopolize as well as monopolization.

20. *See, e.g.*, Burns v. Wray Farmers Grain Co., 65 Colo. 425, 176 P. 487 (1918); Reeves v. Decorah Farmers Coop. Soc'y, 160 Iowa 194, 140 N.W. 844 (1913); Ford v. Chicago Milk Shippers Ass'n, 155 Ill. 166, 39 N.E. 651 (1895).

21. The House and Senate Committee Reports on the bill that became the Clayton Act indicate a Congressional desire to make it clear that agricultural cooperatives meeting the statutory requirements would receive exempt status:

> In light of previous decisions of the courts and in view of a possible interpretation of the law which would empower the courts to order the dissolution of such organizations and associations, your committee feels that all doubt should be removed as to the legality of the existence and operation of these organizations and associations, and that the law should not be construed in such a way as to authorize their dissolution by the courts under the antitrust laws or to forbid the individual members of such associations from carrying out the legitimate and lawful objects of their associations.

H.R. REP. No. 627, 63rd Cong., 2d Sess. 16 (1914); S. REP. No. 698, 63rd Cong., 2d Sess. 12 (1914).

22. J. SCHIDELER, *supra* note 17, at 91.

23. *Id.* at 46-47. *See also* NEWS FOR FARMER COOPERATIVES, Aug. 1974, at 14.

24. J. SCHIDELER, *supra* note 17, at 91.

25. It is not clear why Clayton Act § 6 only recognized nonstock associations. When Congress passed the Act, nonstock associations were relatively unimportant as compared with stock cooperatives. M. ABRAHAMSEN, COOPERATIVE BUSINESS ENTERPRISE 193 (1976).

26. FARMER COOPERATIVE SERVICE U.S. DEPARTMENT OF AGRICULTURE, INFORMATION NO. 97 CAPPER-VOLSTEAD IMPACT ON COOPERATIVE STATUTE 4 (1975).

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vide functional guidelines to all cooperatives generated legislative reform efforts. Legislation was sought to give the farmer more bargaining power with intermediaries and to remove the capital stock prohibition of the Clayton Act to enable farmers to aggregate capital resources.[27]

The resulting legislation was the Capper-Volstead Act[28] of 1922. The Act promised farmers effective bargaining power, as well as the possibility of assuming intermediary functions such as storage, transportation, and processing.[29] In addition, the Act granted to cooperatives some of the operating characteristics of an individual corporation.[30] Congress thus anticipated that cooperatives would engage in the whole range of activities necessary to bring a commodity to the consumer, including, "collectively processing, preparing for market, handling, and marketing."[31]

> 27. Whenever a farmer seeks to sell his products he meets vast aggregations of capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of collectively negotiating for a fair price he is threatened with prosecution.

H.R. REP. NO. 24, 67th Cong., 1st Sess. 2 (1921).

> Middlemen who buy farm products act collectively as stockholders in corporations owning the business and through their representatives buy of farmers, and if farmers must continue to sell individually to these aggregations of men who control the avenues and agencies through and by which farm products reach the consuming market, then farmers must for all time remain at the mercy of the buyers.

62 CONG. REC., 2057-2058 (1922) (remarks of Sen. Capper). *See also* H.R. REP. NO. 24, 67th Cong., 1st Sess. 2 (1921).

28. 7 U.S.C. § 291 (1970). Section 6 of the Clayton Act and § 1 of the Capper-Volstead Act are often referred to collectively as the agricultural cooperative exemption. Indeed the only difference between the two acts is that the Clayton Act excludes cooperatives utilizing capital stock while the Capper-Volstead Act does not. Beyond this, the acts are indistinguishable. The argument has been made, however, that the two are not synonymous. This argument relies heavily on dictum from Justice Black's opinion in Maryland & Virginia Milk Producers Ass'n v. U.S., 362 U.S. 458, 466 (1960), to the effect that the activities enumerated in § 1 of the Capper-Volstead are "among" the legitimate objects of farmer organizations. The implication is that § 6 of the Clayton Act and § 1 of the Capper-Volstead Act, although overlapping, are not synonymous. *See* Northern Cal. Supermarkets v. Central Cal. Lettuce, 413 F. Supp. 984, 991 (1976). A close reading does not comport with this conclusion. Rather, the language implies that the acts are synonymous with respect to what constitutes "legitimate objects" and that the activities enumerated in § 1 of the Capper-Volstead are not exhaustive of all legitimate objects.

29. 62 CONG. REC. 2059-60 (1922) (remarks of Sen. Capper); 62 CONG. REC. 2257 (1922) (remarks of Sen. Morris).

> 30. . . .Business corporations have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to ordinary busines corporations so farmers can take advantage of it.

H.R. REP. NO. 24, 67TH CONG., 1ST SESS. 2 (1921).

31. 7 U.S.C. § 291 (1970).

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The major purpose of the exemption was to immunize from antitrust prohibition cooperative bargaining by organizations of farmers. Of all the tools given the farmer in the Capper-Volstead Act, cooperative bargaining actually enabled farmers to affect their terms of trade.[32] The other delineated functions set forth in the Capper-Volstead Act such as processing, handling, and preparing for market, although beneficial to farmers in cutting costs, are less effective than the bargaining functions in enabling the farmer to get a fair price from intermediaries.[33]

II. BARGAINING COOPERATIVES AND THE ANTITRUST LAWS

The term "bargaining" is descriptive of one of the functions of agricultural cooperatives. It includes, but is not limited to, contract negotiations with processors, price determination, dissemination of market information, production scheduling and grade assurance.[34] These activities are different from nonbargaining functions such as product procurement, preparing and processing for market, storage, sales and transportation. These activities fall within the general category of operational functions.[35] Modern agricultural cooperatives, however, do not fall neatly into either the operating or the bargaining category. A cooperative may perform operating functions and also collectively represent member-farmers in negotiations with processors.[36]

The term "bargaining" is without legal content because it does not appear in either the Clayton or Capper-Volstead Acts. Critics argue that the exemption only covers cooperatives that engage in operational functions and marketing since the language of the Capper-Volstead Act expressly allows farmers to engage in the operational functions of "processing, preparing for market, handling," and "marketing." In other words, operational functions must accompany bargaining func-

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32. KNUTSON, *supra* note 14, at 17-18. Mr. Knutson said:

> Bargaining cooperatives exist for the purpose of influencing the terms of trade in a market in the producers' interest. The concept is one of balancing the power position of the producer against that of the buyer. Out of this concept arises the justification once again that without an imbalance in producer market power relative to that of buyers, a basis for special legislative treatment of bargaining cooperatives would not exist . . . . Farmers have long been in the market position where acceptance of the market price was the norm. Operating cooperatives allow farmers to capture profits more efficiently. Bargaining involves different or additional marketing strategy—joint effort of producers to negotiate a price.

See also P. HELMBERGER, *supra* note 4, at 28, 75.

33. At the time Congress passed the Act, farmers had little opportunity to increase profits by cooperative economies in distribution. H. Price, *Possibilities of Improving Marketing Through Better Organization*, 5 J. FARM ECON. 129, 142 (1923).

34. FARMER COOPERATIVE SERVICE, *supra* note 6, at 10-11.

35. Knutson, *supra* note 14, at 17.

36. *Id* at 18.

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tions.[37] Under this approach, a cooperative performing only the bargaining functions would violate the anti-trust laws.[38] Proponents of this position never reach the issue of whether a cooperative may engage solely in price-fixing because price-fixing is simply one of several bargaining functions and thus illegal.

A. The Exemption for Agricultural Cooperatives has Vitality Today

The original purpose of section 1 of the Capper-Volstead Act, passed at a time of agricultural depression, was to augment the protections of the Clayton Act and increase farmers' then weak bargaining power.[39] This purpose still has vitality. Despite a dramatic change in the nature of agriculture since 1920, the bargaining position of farmers in the market place remains weak. Farm size has increased[40] and the number of farms has decreased[41] since the passage of the Capper-Volstead Act, but neither has substantially changed the position of the farmer. Moreover, the bargaining position of the farmer continues to weaken. While farming operations have become more concentrated since 1920, there also has been a corresponding change in the purchasing side of the market.[42] Fewer and larger buyers negotiate for farm products. Firms

37. Capper-Volstead § 1 uses "and" rather than "or" in "collectively processing, preparing for market, handling, and marketing." One common cannon of statutory construction is that interpretation of a statute must not do violence to its express language. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM L. REV. 527, 535 (1947). Thus, the argument can be made that Capper-Volstead § 1 expressly requires a reading in the conjunctive rather than the disjunctive. Such an interpretation would require a cooperative to engage in *all* the enumerated activities to receive exempt status.

38. Any actions taken by the farmer members having the effect of price stabilization or price fixing would constitute a horizontal restraint of trade which was held a per se violation of the antitrust laws in United States v. Trenton Potteries, 273 U.S. 392 (1926).

39. *See* text accompanying notes 16-33 *supra*.

40. *See generally* Note, *supra* note 12. In 1920, the average farm investment amounted to only $12,084. *Id.* at 359, *citing* STATISTICAL ABSTRACT OF THE UNITED STATES 637, Table No. 579 (53d ed. 1931) [hereinafter cited as ABSTRACT]. In 1974, a competitive one-person farm operation required an investment of between $150,000 and $650,000. *Id. citing* an address by R. Knutson before National Society of Accountants, Houston, Texas (August 8, 1974). Similarly, the size of the average farm has increased from 147 acres in 1920 to 385 acres in 1973. ABSTRACT, *supra* this note, at 585, Table No. 975 (94th ed. 1973).

41. In 1920, 32 million farmers operated close to 6.5 million farms, while in 1971, 9.4 million farmers operated fewer than 2.9 million farms. ABSTRACT, supra note 40 at 584-85, Tables 973 & 975 (94th ed. 1973). The Department of Agricultural predicts that by 1980, 95% of the agricultural products sold in the country will be produced by only 45% of the farms. *Family Farm Act Hearings, supra* note 1, at 40.

42. *See generally* NATIONAL COMMISSION ON FOOD MARKETING, THE STRUCTURE OF FOOD MANUFACTURING (1966). Between 20% and 25% of all food industries fall into the classification of "very highly concentrated" oligopolies, where four firms control 75% or more of the market. By comparison, only 9% of all U.S. manufacturing industries fall within this class. *Hearings on H.R. 9182 Before the Subcommittee on Monopolies and Commercial Law of the Committee of the Judiciary*, 94th Cong., 2d Sess. 496 (1976) [here-

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have been rapidly leaving the food manufacturing and retailing industries since World War II.[43] In the five years between 1967 and 1972 alone, over sixteen percent of all companies engaging in food manufacturing left the industry.[44] This decrease in the number of firms is primarily a product of merger within the industry.[45] As a result, the fifty largest companies now own close to sixty percent of total food manufacturing assets.[46] Although approximately 32,000 food manufacturing firms still remain, 100 of these firms make seventy percent of the profits.[47] In individual food lines, an small number of firms exert even greater control.[48] Concentration in grocery retailing is also high and showing a strong upward trend.[49] Fewer than four grocery chains dominate more than one-half of the cities in this country.[50] Nationally, one corporation owns a third of all the "convenience stores."[51] Farmers, thus, are the classic example of suppliers in a competitive market in which no one supplier can appreciably affect market price.[52] The ex-

inafter cited as *Food Industry Report Act Hearings*] (Appendix: statement of Honorable Edward Mezvinsky *citing* J. BAIN, INDUSTRIAL ORGANIZATION 124-133 (1959).

43. *Food Industry Report Act Hearings, supra* note 42, at 58 (statement of P. Dixon, Acting Chairman, Federal Trade Comm.).

44. *Family Farm Act Hearings, supra* note 1, at 40, *citing* UNITED STATES BUREAU OF THE CENSUS, CENSUS OF MANUFACTURES (1972).

45. The increase in concentration of food manufacturing assets within the 50 largest food manufacturers between 1950 and 1965 was due to mergers. Acquired firms were often large; many ranked among the larger food manufacturers prior to being acquired. In just three years, from 1969 through 1971, 46 companies were acquired. Thus, the food industries are facing a major threat to their small and medium firms. *Hearing Before the Subcommittee on Consumer Economics of the Joint Economic Committee*, 93rd Cong. 2d. sess. 39-40 (1974) [hereinafter cited as *Food Retailing and Processing Hearings*] (testimony of Russell C. Parker, Asst. to the Director, Federal Trade Comm'n).

46. *Id* at 39.

47. *Id* at 53 (statement of Jim Hightower, Codirector, Agribusiness Accountability Project).

48. In nine of the 30 food manufacturing industries, the four largest firms in each industry accounted for over 50% of the total value of shipments for that industry in 1972. The highest level of concentration was in the cereal industry; the four largest firms accounted for over 90% of industry shipments. *Food Industry Report Act Hearings, supra* note 42, at 432-33 (statement by Quentin West). Three firms sell 85% of all bananas. Gerber alone sells 60% of all baby food, and Campbell's Soup sells 90% of all soup. *Food Retailing and Processing Practices Hearings, supra* note 45, at 53.

49. Just 20 large grocery chains accounted for 40% of total grocery store sales in the United States in 1970. This was a one-third increase from the 30% controlled by the 20 largest chains in 1954. At the city level, concentration in grocery retailing is high and increasing. For the 200-plus metropolitan areas defined by the census, the four largest corporate grocery chains accounted for an average of 51.1% of sales in 1967. In 1954, the four-chain average was only 45.5%. *Food Retailing and Processing Practices Hearings, supra* note 45, at 40.

50. *Id* at 53 (statement of Jim Hightower, Codirector, Agribusiness Accountability Project).

51. *Id*

52. FARMER COOPERATIVE SERVICE, *supra* note 10, at 45 (statement by Don Paarlberg, Director of Agricultural Economics, Dep't. of Agriculture).

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emption for agricultural cooperatives originated largely as a self-help measure for farmers to combat exploitation and abuse from the purchasing side of the market place. But neither the exemption nor the so-called changed conditions of farming, including increased farm size, mechanization, and improved managerial and operational skills of farmers, have changed the basic market structure of agriculture. Farmers are today, as they were in the 1920's, price takers, and not price makers.[53] The agricultural cooperative exemption from the antitrust laws thus is still needed.

B. The Bargaining Functions of a Cooperative Constitute "Marketing" within the meaning of Capper-Volstead Section 1

Another argument advanced by those opposing expansion of the agricultural cooperative exemption is based on statutory construction. It is argued that cooperatives engaging solely in bargaining functions should not be covered by the exemption because they are not engaged in "marketing" within the meaning of the Capper-Volstead Act. The basis of this argument is that "marketing" includes only those acts which in the aggregate transfer title or actually effect the "sale" of a particular commodity. Only by performing all of these acts could a cooperative be considered to have engaged in the sale of a commodity.[54]

Courts should consider a cooperative which engages solely in bargaining functions to be engaged in "marketing" within the meaning of the Act.[55] To hold otherwise would be an overly narrow construction of the Capper-Volstead Act. Although bargaining associations predate the Capper-Volstead Act, their legality under the exemption has rarely been before the lower courts[56] and has never been before the United States Supreme Court.[57] A recent Ninth Circuit case, however, has re-

53. P. HELMBERGER, *supra* note 4, at 1. *See also Lessons for Farm Economists from Recent Antitrust Decisions*, 44 J. FARM ECON. 1589-1626 (1962).

54. FARMER COOPERATIVE SERVICE, *supra* note 10, at 23. *See also* FEDERAL TRADE COMMISSION, STAFF REPORT ON AGRICULTURAL COOPERATIVES 60-61 (1975).

55. 15 U.S.C. § 17 (1970), quoted note 8 *supra* The legal status of an agricultural cooperative is determined by the activities in which it engages. If the activities of the cooperative are "legitimate objects" the cooperative will possess exempt status. *See* note 29 *supra*

56. Prior to 1975, the first judicial treatment of a bargaining association was Waters v. National Farmers Organization, Inc., 328 F. Supp. 1229 (S.D. Ind. 1972). A farmer's association entered into contracts with processors covering selling prices and other conditions of disposal. It performed no other cooperative functions. The court without discussion held that the organization was entitled to Capper-Volstead immunity. *Id* at 1245.

57. In Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974), the Ninth Circuit held that performance of the bargaining function, without more, brought the cooperatives within the exemption. The plaintiff in this case petitioned for a writ of certiorari in the United States Supreme Court. The issues raised were limited to the anticompetitive practices of de-

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jected a narrow reading of the Capper-Volstead Act. In *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*,[58] the court held that performance of the bargaining function, without more, entitled a cooperative to exempt status. The principal function of the cooperative was ". . . to bargain collectively for the respective members as to prices, terms, and conditions of pre-season potato contracts."[59] The court held that the activities of the association in negotiating contracts for sale of potatoes by its members necessarily involved the exchange of market information and thus constituted "marketing" under the Capper-Volstead Act.[60] The court refused to read the Capper-Volstead Act to require the performance of all of the component functions constituting the "sale" of a commodity. "Marketing," the court said, "is far broader than the word sell."[61] Thus, according to the Ninth Circuit, a cooperative performing only the bargaining functions is engaged in marketing.

Because *Treasure Valley* employed a broad interpretation of "marketing," it will form the basis for further, more expansive readings of the Capper-Volstead Act. The Ninth Circuit is the only circuit court which has addressed the issue of what constitutes "marketing." Because there is no evidence that Congress intended a restrictive meaning of the term "marketing," other courts too should read the term according to its plain meaning. Only this interpretation will effectuate Congress' intent of enhancing the farmers' bargaining position in the market place.

Implicit in the *Treasure Valley* holding is that "processing, preparing for market, handling, and marketing" are to be read in the disjunctive. The *Treasure Valley* cooperatives were not involved in processing, pre-

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fendant processors. Thus, denial of certiorari was not a refusal by the Supreme Court to address the issue of bargaining cooperatives. *See id.* petitioner's Brief for Certiorari.

58. 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974).

59. *Id.* at 215.

60. The *Treasure Valley* Court first looked to *Webster's New Collegiate Dictionary* definition of marketing: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information." 497 F.2d at 215. The court then concluded that:

> The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transfering of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We seek no reason to give that word a special meaning within the context of the Capper-Volstead Act.

Id. Federal Trade Commission Deputy Director Dougherty has criticized this approach as contrary to the rule of strict construction of antitrust exemptions and as using a dated definition of marketing. *see* FARMERS COOPERATIVE SERVICE *supra* note 10, at 41. *See also* FEDERAL TRADE COMMISSION, STAFF REPORT ON AGRICULTURAL COOPERATIVES 60-61 (1975).

61. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d at 215.

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paring for market, or handling. Cooperatives which engaged only in marketing were granted exempt status. Thus a cooperative need not be engaged in all of the enumerated activities to fall under exemption.

C. A Cooperative which Engages Solely in Price-Fixing is Engaged in "Marketing" within the Meaning of Capper-Volstead Section 1

Critics of the agricultural cooperative exemption may also advance a final argument against construing the exemption as covering cooperatives that engage solely in price-fixing. This argument is that cooperatives which engage solely in price-fixing are not engaged in "marketing" within the meaning of the Capper-Volstead Act. The essence of this argument is that price-fixing, without more, does not constitute legitimate collective marketing. This argument is without merit. Mounting an effective counter-argument, however, is difficult since the court in *Treasure Valley* did not decide whether a cooperative which performs price-fixing without any accompanying market activities is exempt from the antitrust provision of the Sherman Act. The farmers in *Treasure Valley* were not engaged in pure price-fixing. A cooperative is engaged in pure price-fixing if its members do no more than meet and fix prices for a commodity for their mutual benefit. In *Treasure Valley*, there was collective marketing effort. The cooperative, rather than individual members, met with prospective purchasers to bargain for the various terms and conditions under which members would sell their products.

While *Treasure Valley* did not address the issue of whether price-fixing constitutes "marketing," the case leaves room for the argument that it does. The broad interpretation of "marketing" in *Treasure Valley* implies that there is no fixed formula of activities required to constitute "marketing." In fact, the case leaves unanswered the question of what minimum activities courts will require before granting a bargaining cooperative exempt status. Critics contend that price-fixing by itself does not constitute collective marketing.[62] Thus, it is argued that price-fixing is a legitimate function of a cooperative only where it is ancillary to and a necessary ingredient of other collective marketing efforts. Critics cite United States Supreme Court dicta[63] and the legislative his-

62. As one critic has said: "The Capper-Volstead Act itself refers to associations engaged in, 'collectively processing, preparing for market, handling, and marketing.' We believe this means something more than simply fixing prices." Address by Keith I. Clearwaters, Deputy Asst. Att'y. Gen. before the Dairy Conference of the American Farm Bureau Federation's 56th Annual Meeting, New Orleans, Louisiana 5-8, (January 6, 1975).

63. *See* Maryland & Va. Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 465 (1960), where the court said ". . . The full effect of Section 6 is that a group of farmers acting together as a single entity in an association cannot be restrained from lawfully carrying out the legitimate objects thereof . . ." This case was an antitrust action against a cooperative supplying approximately 86% of the milk purchased by all milk dealers in the metropolitan area of Washington D.C. The members of the coopera-

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tory of section 6 of the Clayton Act and section 1 of the Capper-Volstead Act[64] as authority for this proposition.

The United States Supreme Court, however, has recognized that price-fixing is a legitimate activity of cooperatives. Justice Black, writing in *Maryland and Virginia Milk Producers Association v. United States*,[65] described in dictum that the permissible range of activities of a cooperative includes price-fixing.[66] Moreover, Congress must have intended to allow farmers to fix prices through cooperative activity. Congress intended to grant farmers acting through cooperatives the same competitive advantage available to businessmen acting through corporations.[67] In a corporation, each shareholder is an owner. Through the corporation, shareholders are able to combine capital and establish unitary management and control. Such control necessarily includes the establishment of prices. The analogue of the shareholder in the corporate context is the farmer member of the cooperative. Just as shareholders fix prices through the corporation, Congress must have intended to allow farmers to fix prices through the cooperative.

The legislative history of the agricultural cooperative exemption suggests that Congress intended the exemption to cover cooperatives that engage in price-fixing. The exemption was originally designed to increase farmers' bargaining strength in the market place and make them price makers rather than price takers.[68] A strong argument thus exists that the practice of pure price-fixing is fundamental to the exemption.

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tive consisted of some 2,000 Maryland and Virginia farmers. In attempting to eliminate its competition in the area, the cooperative purchased the assets of a dairy in Washington. The Court held that a cooperative can lose its exemption if it monopolizes, attempts to monopolize, or engages in "predatory practices." *Id* at 463-468. *See* discussion accompanying note 28 *supra*.

64. *E.g.*, Mr. G. Carroll Todd, an Asst. United States Att'y Gen., stated in response to congressional questioning during consideration of the Capper-Volstead Act, that "the intention of Congress [in regard to section 6 of the Clayton Act] was that organizations of farmers, for the purpose of bargaining collectively, *and as a necessary incident of bargaining collectively*, to fix the price at which they should sell, was not in restraint of trade." *Hearing on S. 4344* before the Senate Comm. on the judiciary, 66th Cong., 2d Sess. 38 (1920) (emphasis added).

65. 362 U.S. 458 (1960). *See* discussion in text accompanying note 63 *supra*.

66. This referring to Capper-Volstead § 1 and Clayton Act § 6 indicates a purpose to make it possible for the farmer producers to organize together, set association policy, fix prices at which the cooperative will sell its produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws.

362 U.S. at 466. *See also* April v. National Cranberry Ass'n, 168 F. Supp. 919, 921-22 (D. Mass. 1958) in which the Court compared an agricultural cooperative with an individual business entity and noted that a single business enterprise may set for itself even wholly unreasonable prices without violating § 1 of the Sherman Act; *see also* Washington Crab Ass'n, 66 F.T.C. 45 (1964).

67. H.R. REP. NO. 24, *supra* note 30.

68. *See* text accompanying notes 16-33.

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This argument derives support from the fact that when Congress was considering the Capper-Volstead Act, it was fully aware that at least three then existing agricultural cooperatives engaged solely in price-fixing.[69] In fact, Senator Reavis, an important proponent of Capper-Volstead[70] mentioned during floor debate in the Senate that Congress was aware that Capper-Volstead would permit price-fixing.[71] Also, the legislative histories of the Clayton and Capper-Volstead Acts do not suggest that any other kind of marketing activity must accompany price-fixing for a cooperative to qualify for the exemption.[72]

Two further arguments support the inclusion of pure price-fixing cooperatives under the exemption. First, cooperatives which engage only in price-fixing are engaged in "marketing" as contemplated in the Capper-Volstead Act since price-fixing necessarily involves sharing of market information. *Treasure Valley* identified the exchange of market

69. First, the activities of New York's Dairymen's League were described at congressional hearings as "a plan under which the dairymen met and agreed amongst themselves upon a price at which they should sell their milk." G. Caroll Todd, former head of the Antitrust Div. of the Dep't of Justice, in response to a question from Senator Walsh, agreed that the activities of the Dairymen's League could be described as a "straight price-fixing agreement between independent producers." *Hearings on S. 4344 Before the Senate Comm. on the Judiciary*, 66th Cong., 2d Sess. 38 (1920). Second, Dallas Berry of the Maryland and Virginia Milk Producers Ass'n testified at the same hearings as to how that cooperative operated. The Association set two recommended milk prices each year: a winter price on October 1, and a summer price on May 1. Establishing these prices and informing the membership was the only function of the cooperative. *Id.* Third, the President of the National Milk Producers Federation described the prosecution of dairyowners in Chicago during the final set of Committee hearings, prior to the enactment of Capper-Volstead: "They were not convicted because they had asked a high price; they were not arrested for that, but they were arrested because it was charged that they had conspired to fix the price . . ." *Hearings on S. 2373 Before the Special Subcomm., Senate Comm. on the Judiciary*, 67th Cong., 1st Sess. 147 (1921).

70. Courts have frequently acknowledged that the views of a statute's sponsors reveal legislative intent with greater accuracy than do the fears and doubts of its opponents. *See, e.g.*, NLRB v. Fruit & Vegetable Packers and Warehousemen, 377 U.S. 58, 66 (1964); Schwegmann Brothers v. Calvert Distillers, 341 U.S. 384, 394-95 (1951).

71.
> This legislation is primarily inspired by the desire to put the farmer in a condition, through cooperation and organization, where in some measure he may overcome the difficulties that inhere in his business, that make cooperation and organization almost impossible, to relieve him in some measure from his natural handicaps and put him on an equal footing with all other businessmen of America and permit him in some measure to fix the price of the thing he raises.

61 CONG. REC. 1038 (1921) (remarks of Senator Reavis). *See also* 62 CONG. REC. 2223 (1922) (remarks of Sen. Lenrout).

72. Central Cal. Lettuce Producers Coop., [1977] TRADE REG. REP. CCH ¶21,337. In this action, the Federal Trade Commission contended that Central had violated § 5 of the Trade Commission Act by fixing prices. In holding that the price fixing activities of Central were exempt, the Commissioner examined the legislative histories of the Clayton and Capper-Volstead Acts. The commissioner determined that Congress did not address the question of whether any activity must accompany price fixing for a cooperative to qualify for exempt status.

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information as constituting "marketing."[73] Producers cannot fix prices in an information vacuum. The setting of prices necessarily involves a disclosure and discussion of commodity supply and anticipated commodity demand.

Second, a rule that requires a cooperative performing price-fixing to engage in marketing activities beyond the exchange of market information would lead to "ironic and anomalous" results.[74] The court in *Treasure Valley* defined "marketing" to include "buying, selling, storing, . . . and supplying market information."[75] Such a rule, however, would permit a cooperative to achieve exempt status only by engaging in additional activities that would result in a greater degree of economic integration.[76] As economic integration increases, the number of independent producers in the market decreases, resulting in declining competition. This result is contrary to the most fundamental premises of antitrust law. Moreover, granting exempt status to a cooperative which bargains for its individual members as well as fixes prices, and not to a cooperative which engages in pure price-fixing, is to make a meaningless distinction. If delegation of the bargaining function to the agent cooperative by member farmers is permissible, the redelegation of that function back to individual members should not be illegal. To hold otherwise allows form to triumph over substance.

In a recent case, the District Court for the Northern District of California upheld the exempt status of a cooperative which did little more than set floor and ceiling prices to which members were bound.[77] Each member of the cooperative acted independently for its own account in every material respect except price determination.[78] Although the cooperative engaged in other activities,[79] the court was of the opinion that

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73.
> The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.

Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d at 215.

74. ". . . It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption." Northern Cal. Supermarkets v. Central Cal. Lettuce, 413 F. Supp. 984, 992 (N.D. Cal. 1976).

75. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d at 215.

76. Northern Cal. Supermarkets v. Central Cal. Lettuce, 413 F. Supp. at 992.

77. Northern Cal. Supermarkets v. Central Cal. Lettuce, 413 F. Supp. 984 (N.D. Cal. 1976). This case is on appeal to the Ninth Circuit and is awaiting determination.

78. *Id* at 991.

79.
> Plaintiff and defendents agree that the primary activity of Central is to set prices or price ranges to which members are required to adhere in the sale of

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"even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection."[80] In *Central*, then, performance of activities other than price-fixing and exchange of market information were not factually significant and should not form a basis to distinguish the *Central* cooperative from a pure price-fixing cooperative.

The *Central* case is presently the only judicial statement on cooperatives engaged solely in price-fixing. The decision, however, is strong support for the argument that cooperatives engaged solely in price-fixing are covered by the agricultural cooperative exemption. Its rationale is logically consistent with the broad construction given "marketing" in *Treasure Valley* and with the legislative intent of section 6 of the Clayton Act and section 1 of the Capper-Volstead Act.

Even if courts establish that cooperatives engaging only in price-fixing are immune from the antitrust laws, however, these cooperatives are still subject to the same strictures as other businesses. The antitrust exemption is not a license for farmer cooperatives to violate the antitrust laws. In 1939, for example, the Supreme Court held that a cooperative will loose its exempt status if it combines and conspires with non-producers in restraint of trade.[81] In 1960, the Supreme Court construed the exemption to limit it to cooperative activities engaged in by individuals acting through corporations as entities.[82] Furthermore, agricultural cooperatives may not monopolize in violation of section 2 of the Sherman Act.[83] Failure to comply with these standards will subject a cooperative to criminal penalties or civil suits.[84] Also, section 2 of the

> their lettuce. The record indicates that Central also engages in other activities related to marketing of lettuce. For example, Central gathers and disseminates information concerning lettuce planting, harvesting, and shipment. Information is also exchanged by members concerning delinquent accounts and "chronic customer complainers." In addition, Central coordinates policies with respect to marketing practices which proved harmful to lettuce growers and has undertaken promotional campaigns aimed at bolstering lettuce sales.

Id at 987.

80. *Id* at 986.

81. United States v. Borden, 308 U.S. 188, 204-05 (1939).

82. Maryland v. Virginia Milk Producers Ass'n v. United States, 362 U.S. at 465-66. *See* discussion in text accompanying note 63 *supra*.

83. Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. at 463.

84. Two cases have served as the basis for lower court rulings in analogous situations. United States v. Borden, 308 U.S. 188 (1939); Maryland & Virginia Milk Producers Ass'n v. United States 362 U.S. 458 (1960). In Knuth v. Errie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968), *cert. denied*, 410 U.S. 913 (1973), the court held that a cooperative which conspired with independent processors to fix prices through a system of illegal rebates was not entitled to protection under the exemption. In North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189, 195-96 (5th Cir. 1965), the plaintiff recovered treble antitrust damages from a milk cooperative which boycotted plaintiff's operations. Otto Milk Co. v. United Dairy Farmers Coop. Ass'n 388 F.2d 789, 796 (3d Cir. 1967) involved a bona fide cooperative which conspired with an organization made up of cooperative members but not entitled to Capper-Volstead protection. The

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Capper-Volstead Act directs the Secretary of Agriculture to proceed against a cooperative when there is reason to believe that the cooperative had unduly enhanced the price of an agricultural product.[85]

Although the Supreme Court has not decided the issue,[86] a lower court has construed the agricultural cooperative exemption to encompass intercooperative agreements on the rationale that as Capper-Volstead specifically allows activity tantamount to merger,[87] any less extensive activity is permissible *a fortiori*. All such intercooperative activity, however, is subject to the same strictures as a cooperative acting alone.[88]

III. CONCLUSION

The originally intended purpose of the antitrust exemption for agricultural cooperatives was to assist farmers like John Perkins to achieve parity of power in the agricultural market place. This purpose still has vitality. The bargaining power gap in agriculture is essentially the same today as it was in 1922 when Congress passed section 1 of the Capper Volstead Act.

The price-fixing function of cooperative associations is the most effective weapon available to farmers to achieve parity of bargaining power. If the courts are to carry out the legislative intent behind the exemption, the legality of the price-fixing function must be made secure. The

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court held that the activities were not those of one organization and thus not within the protection of Capper-Volstead. In April v. National Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958), plaintiffs prevailed in their treble damages suit against a Capper-Volstead Association which employed purely predatory practices. The Court held discriminatory pricing by a milk cooperative not to be within the Capper-Volstead veil in Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476 (E.D. Mo. 1965).

85. Capper-Volstead Act § 2:

> If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof . . . (after a "show cause" hearing he may direct) such association to cease and desist from monopolization or restraint of trade. . . .

7 U.S.C. § 292 (1922). The Secretary of Agriculture has been criticized for failing to exercise his enforcement responsibilities under this statute. The Secretary has taken no action under § 2 of Capper-Volstead for 53 years. Comment *supra* note 12, at 379.

86. At first blush, Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod., 370 U.S. 19 (1962), appears to involve intercooperative agreements. The case involved three organizations, Exchange Lemon, owned by lemon-grower associations who were members of Sunkist, Exchange Orange, a wholly owned subsidiary of Sunkist, and Sunkist. The complaint alleged that the three had conspired in restraint of trade. The court, declining to define the scope of cooperative immunity, held that the three organizations were in effect one organization. *Id.* at 29-30. Whatever organizational distinctions existed were of de minimis meaning and effect. Thus, the Court did not discuss the legality of intercooperative agreements.

87. "Such associations may have marketing agencies in common. . ." 7 U.S.C. § 291 (1970), *quoted* note 8 *supra*.

88. FEDERAL TRADE COMMISSION, *supra* note 60, at 75-77.

United States Supreme Court, therefore, should establish that a cooperative may engage solely in the price-fixing function and still maintain its exempt status. A cooperative performing pure price-fixing thus should be considered to be engaged in "marketing," a legitimate object of cooperative activity under the Capper-Volstead Act.

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