

# A New Look At The California Marketing Act of 1937

## I. INTRODUCTION TO CALIFORNIA AGRICULTURE

### A. DEPRESSION AMID PLENTY

California is without doubt the leading agricultural state in the country.<sup>1</sup> A study of the agricultural statistics for 1970 reveals California's preeminence in both agricultural output and diversity.<sup>2</sup> California's 1970 gross cash receipt from farm marketings totaled 4.49 billion dollars, nearly 10 percent of the nation's total.<sup>3</sup> In terms of diversity, California produces over 230 commercial crops, whereas most states barely produce half a dozen.<sup>4</sup> In the production of 48 of these commercial crops and livestock commodities, California leads the nation.<sup>5</sup> In fact, a large number of these are specialty crops which can only be grown in California due to unique soil and climatic conditions.<sup>6</sup>

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<sup>1</sup>CALIFORNIA DEPARTMENT OF AGRICULTURE, CALIFORNIA AGRICULTURE 1970, A REPORT ON CALIFORNIA'S PRINCIPAL CROP AND LIVESTOCK COMMODITIES 4 (1971) (hereinafter cited as CALIFORNIA AGRICULTURE 1970).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>CALIFORNIA DEPARTMENT OF AGRICULTURE, WHAT WE DO IN THE CALIFORNIA DEPARTMENT OF AGRICULTURE 1 (1970) (hereinafter cited as WHAT WE DO).

<sup>5</sup>Crop and livestock commodities in which California leads the nation include: alfalfa seed, almonds, apricots, artichokes, asparagus, avocados, blackeye beans, boysenberries, broccoli, brussel sprouts, cantaloupe, carrots, cauliflower, celery, cut flowers, dates, eggs, figs, flower seeds, garlic, grapes, ladino clover seed, lemons, lettuce, lima beans, melons, nectarines, nursery stock, olives, onions, peaches, pears, peppers (bell), peppers (chili), persimmons, plums pomegranates, potted plants, prunes, rabbits, safflower seed, spinach, squash, strawberries, sugarbeets, tomatoes, turkeys and walnuts. CALIFORNIA AGRICULTURE 1970, *supra* note 1, at 5.

<sup>6</sup>Specialty crops grown only in California include, almonds, apricots, artichokes, avocados, brussel sprouts, dates, figs, garlic, grapes, ladino clover seed, nectarines, olives, persimmons, chili peppers, pomegranates and prunes, CALIFORNIA AGRICULTURE 1970, *supra* note 1, at 5.

Despite California's impressive record for agricultural output (many would say because of it), agriculture is considered the depressed sector within the state's economy.<sup>7</sup> A 1972 study released by the University of California, Agricultural Extension confirms the recent historical tendency toward lower returns to capital invested in agriculture than in other industries within the state.<sup>8</sup> California growers have been earning a low 3 to 5 percent on their capital investment despite the low liquidity and high risks involved in this type of economic venture.<sup>9</sup>

This same study foresees a continuing income disadvantage for agriculture in general compared to other industries.<sup>10</sup> This prediction is based on (1) the high inelasticity of demand for agricultural products (i.e., a relatively small increase in quantity output results in disproportionately sharp price declines); (2) the continuing capacity of California farmers to produce excess, price-depressing quantities; (3) the probability that the prices paid by farmers for their input goods and services will rise faster than the prices they receive for their farm products.<sup>11</sup>

The low rate of return on farm investments have taken its toll of small farmers. Since 1950 there has been a steady decline in the number of farming units in California and a corresponding consolidation of land ownership in those remaining.<sup>12</sup> The following chart records this change:<sup>13</sup>

Year	No. of Farms	Ave. Size of Farms (in acres)
1950	144,000	260
1955	124,000	316
1960	108,000	359
1965	82,000	461
1970	58,000	634
1971	56,000	654

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<sup>7</sup>AGRICULTURAL EXTENSION, UNIVERSITY OF CALIFORNIA, MAJOR ECONOMIC STUDIES, *Finance* 1, 3 (1972) (hereinafter cited as *Finance*).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>CAL. DEPT. OF AGRICULTURE, CALIFORNIA: NUMBER OF FARMS, LAND IN FARMS AND SIZE OF FARM 1950-1971 (1971) (hereinafter cited as CALIFORNIA: NUMBER OF FARMS).

<sup>13</sup>*Id.*

During the 1960's alone the number of farms were cut by one-half to the present number of 56,000.

According to present estimates, University of California economists predict 20,000 farmers will go out of business during the 1970's.<sup>14</sup> Most of these will be the smaller farmers who will be unable to keep pace with the increasingly high cost of farming. The investment level per California farm is expected to be nearly \$600,000 in 1980, double the investment in 1970.<sup>15</sup>

#### B. GROWTH OF A FEUDAL COUNTRYSIDE

Almost mirroring the demise of the small California farmer has been the phenomenal growth of the giant corporate farms in California. An interesting study by the University of California, Agricultural Extension Service in 1970 revealed that 3.7 million acres of California farmland are now controlled by 45 large corporate farms.<sup>16</sup> Thus, each averages over 90,000 acres. This represents over 10 percent of the state's total farmland<sup>17</sup> and a much higher percentage of the prime irrigated land.

Although most of the corporate farms engage only in agricultural production, a few are merely the agricultural arm of still larger conglomerate enterprises which are attempting to establish footholds in California agriculture.<sup>18</sup> Tenneco, Inc., the 34th largest U.S. corporation, has become the most widely publicized conglomerate to move into California farming within recent years.<sup>19</sup> The conglomerates, such as Tenneco, Inc., see vast profits accruing in the future to those vertically integrated enterprises that control every stage of the food production and distribution process from the seedling to the supermarket.<sup>20</sup>

The average California farm in 1971 has grown to 654 acres,<sup>21</sup> nearly double the size of the average farm in 1969.<sup>22</sup> If the cur-

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<sup>14</sup>*Finance*, *supra* note 7, at 1.

<sup>15</sup>*Id.*

<sup>16</sup>UNIVERSITY OF CALIFORNIA, AGRICULTURAL EXTENSION SERVICE, A STATISTICAL PROFILE OF CALIFORNIA CORPORATE FARMS 27 (Dec. 1970).

<sup>17</sup>In 1970 there were 36.8 million acres of California land devoted to farming. CALIFORNIA: NUMBER OF FARMS, *supra* note 12.

<sup>18</sup>Barnes, *The Vanishing Small Farmer*, THE NEW REPUBLIC, June 12, 1971, at 22, col. 2. (hereinafter cited as *The Vanishing Small Farmer*).

<sup>19</sup>Sacramento Bee, November 6, 1971, at 1, col. 1.

<sup>20</sup>*The Vanishing Small Farmer*, *supra* note 18, at 22.

<sup>21</sup>CALIFORNIA: NUMBER OF FARMS, *supra* note 12.

<sup>22</sup>*Id.*

rent estimates on farm consolidation are realized (from 56,000 to 44,000 farming units by 1980),<sup>23</sup> the average California farm will begin to approach 1,000 acres by 1980. The social consequence of this trend toward land concentration is twofold:<sup>24</sup> one, the gradual elimination of the rural middle class; two, the elimination of the traditional means of social and economic advancement for the state's farmworker.

The vitality of community life in rural California is dependent on the continued existence of a sizeable middle class within the farm communities.<sup>25</sup> It is this group that provides the support for better schools, the money to maintain the churches and the people who run the active civic groups within the community. It is the small farmer together with the retail, service and professional people who serve him who have traditionally composed the bulk of the rural middle class. As the number of small farmers decline, some sociologists fear the size of the rural middle class will diminish leaving behind only a wealthy upper-class composed of corporate managers and large farmers and an impoverished lower class of exploited farm workers.<sup>26</sup>

The farm workers have also suffered from the trend toward larger farming units. We expect poor Americans to lift themselves up the economic ladder, yet by the elimination of the small farming unit we knock out the bottom rungs.<sup>27</sup> In the past an ambitious farm worker could reasonably hope to one day buy his own plot of land. The traditional scenario was for a farmworker to rise to a foreman then to a tenant farmer and ultimately to a small land owner. Many of the present farmers began in just this way. This is fast becoming an impossibility.<sup>28</sup> It is this writer's view that it is the loss of this means of economic and

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<sup>23</sup> AGRICULTURAL EXTENSION, UNIVERSITY OF CALIFORNIA, MAJOR ECONOMIC STUDIES, *The Structure of Agricultural Markets* 1, 2 (1971) (hereinafter cited as *The Structure of Agricultural Markets*).

<sup>24</sup> P. Barnes, *The Case for Redistribution*, THE NEW REPUBLIC, June 19, 1971, at 14, col. 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> University of California economist predict the investment level per California farm will rise to \$600,000 by 1980, double the amount required in 1970. *Finance*, *supra* note 7, at 1.

social mobility within the agricultural structure which has most contributed to the growing frustrations among the state's young farm workers. Today's farmworkers no longer view their impoverished status as a temporary one from which they can begin their climb up the economic ladder. Trapped within the laboring class, poorly educated, they see no means of individual escape. Increasingly, unionization looms as the only viable means for their collective advancement.

### C. NEED FOR CONCERTING MARKETING EFFORTS

Most of today's independent farming operations have grown to the point where there are no longer any economies of scale left to be exploited.<sup>29</sup> Economist Leon Garoian of the University of California noted this fact in a recent speech to the state's agricultural industry.<sup>30</sup>

We've got to continue to stress on more efficiency in farm production, but I want to make it very clear that in my judgement we've reached some sort of equilibrium in this thing; that the turnip doesn't have much blood left in it.<sup>31</sup>

He urged farmers to "look beyond the front gate" and to focus their attention on the marketing of their farm commodities.<sup>32</sup>

Farmers traditionally have been price-takers within the marketplace. Because of the relatively large number of producing units within each commodity sector, individual farming units have a negligible influence on total supply and hence a negligible influence on price. Because the processors and retailers are fewer in number than producers, they have more bargaining power than do unorganized and individual farmers.<sup>33</sup>

The retailing structure, for example, is already characterized by a high degree of concentration.<sup>34</sup> The top 50 chain retail food companies accounted for 45 percent of total grocery store sales in 1969.<sup>35</sup> As a result of their strong bargaining position, the chain food stores in 1969 were able to earn a 19 percent return on

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<sup>29</sup>Address by Dr. Leon Garoian, Conference on Major Economic Issues in California Agriculture, January 24, 1972, University of California, Davis.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*The Structure of Agricultural Markets*, *supra* note 23, at 3.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

their investment in their regular food stores and a 16.2 percent return on their discount stores.<sup>36</sup> Since the mid-1960's the returns of food processors, not characterized by as high a degree of concentration, have been about 11 percent of owner equity.<sup>37</sup> Returns for farmers as a group, on the other hand, have moved downward since the mid-1960's and are below the levels for retailers and processors. In 1968 farmers had a hapless 3.1 percent ratio of returns to asset equities.<sup>38</sup>

It is this writer's view that the continuing decline in the number of farming units within the state is largely due to the farmer's lack of bargaining power in the marketplace. It is only through concerted marketing efforts that the state's independent farmers will be able to preserve a role for the small but efficient farming unit within California agriculture.

#### D. CALIFORNIA DEPARTMENT OF AGRICULTURE

In comparison to the Federal government, the role which California or any state can play in assisting their local agricultural sectors is limited and largely supportive. Agricultural problems are generally national in scope and are most effectively attacked on the Federal level. The interstate nature of the problems and the limitations of state jurisdiction would, in most instances, make any program by one state futile if not ridiculous.

Although limited in scope, the State of California does play an essential role in regulating and assisting its domestic agricultural industry. A brief description of the main divisions within the California Department of Agriculture and their primary functions will suggest the scope of this role.<sup>39</sup> The Division of Animal Industry protects the state's livestock and poultry against diseases through a comprehensive program of inspections, vaccinations, border checks and veterinary research. It also guards the state's consumers against adulterated food by enforcing sanitation, quality and labeling standards. The Division of Plant Industry similarly protects the state's food and fiber against harmful crop pests and plant diseases through a

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<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 4.

<sup>39</sup>WHAT WE DO, *supra* note 4.

parallel program of inspections, border checks and plant and insect research. The Division of Inspection Services protects the state's consumers by regulating the use of pesticides and other chemicals used in farm production as well as by inspecting farm commodities to see that they meet basic quality standards. The Division of Marketing Services assists the state's growers and handlers by providing them with current marketing information as well as by providing them with comprehensive regulatory schemes to assist them in the marketing of their farm commodities. It is this latter area, the power to regulate the marketing of California farm commodities, which is of paramount interest to us here.

California's agricultural supremacy, which rises to virtual monopoly in many specialty crops, placed within the grasp of the state's regulatory jurisdiction the opportunity to effectively influence, to a degree, the price which the nation pays for certain California farm commodities. It is not surprising that California has enacted legislation, as have other states in less favorable positions, which attempts to provide comprehensive regulatory schemes for the favorable marketing of its domestic farm products. The California legislature since 1933 has largely turned over the power to regulate the marketing of farm commodities to the affected growers and handlers themselves subject to the approval of the California Director of Agriculture.<sup>40</sup> The remainder of this article explores the historical background against which this legislation was enacted, the text of the legislation itself and the reasons why it has failed to help the small farmer meet his basic marketing needs.

## II. HISTORICAL BACKGROUND

### A. CHAOTIC CONDITIONS

California's present marketing legislation grew out of the chaotic conditions which afflicted its agricultural sector early in this century and the destructive trade practices which exaggerated them.<sup>41</sup> This was a period of laissez faire marketing at its fiercest. California's fruit and vegetable industry was particularly chaotic. This sector was characterized by thousands

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<sup>40</sup>CAL. AGRIC. CODE § 58601-60015 (West 1968).

<sup>41</sup>C.E.B., CALIFORNIA FARM AND RANCH LAW 275 (1967) (hereinafter cited as C.E.B.).

of relatively small growers and shippers who competed among themselves for the nation's markets.<sup>42</sup> Each grower put in his crop and harvested it with the hope that the market price would cover his cost of growing, shipping and marketing. Any price which did not cover these fixed costs resulted in a loss which the grower bore alone. This unregulated situation was plagued by instability and fluctuating markets which had an exaggerated impact on the livelihood of the producers.<sup>43</sup>

This unregulated scramble for the nation's markets led to destructive trade practices as well.<sup>44</sup> It was in the interest of each grower to get to the market first, with the most, and with what looked like the best. The desire for each to reap the premium prices paid on early shipments invariably led to the shipping of insufficiently ripe produce to market. The necessity for each to sell all of his crop led to a flooding of the markets during peak season with much produce of marginal quality. The wish for each to make his produce more attractive to the buyers often led to the deceptive packaging of high quality produce over the more inferior ones as well as to the use of improper sampling and false grading. It goes without saying that such destructive trade practices had an adverse effect on consumer acceptance of California fruits and vegetables.<sup>45</sup>

## B. EFFORTS AT COOPERATION

Growers sensed very early the need for an organized approach to the marketing of their produce.<sup>46</sup> Cooperatives were formed which attempted to regulate the volume and quality of produce which went to market. Although these cooperative efforts did enjoy some measure of success, the inability to compel all members of an agricultural commodity sector to participate proved to be the inherent weakness of this type of program. The recalcitrant minority who refused to join the cooperative undermined the efforts of the majority by selling all their produce at the improved market price at the expense of the members who

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<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>J. FOYTIK, AGRICULTURAL MARKETING ORDERS, CHARACTERISTICS AND USE IN CALIFORNIA, 1933-1962, 2 (1962) (hereinafter cited as FOYTIK).



had restricted their own volume to make the better price possible.<sup>47</sup>

### C. THE GREAT DEPRESSION AND THE MARKETING ORDER APPROACH

California agriculture was devastated by the 1929-1933 depression. Domestic and foreign demand for California produce dropped cataclysmically while the volume shipped to market continued unabated.<sup>48</sup> Gluts developed and prices plummeted. The farm parity price ratio dropped from 92 percent in 1929 to 58 percent in 1932.<sup>49</sup> Attempts at cooperative marketing programs proved to be ineffective. The desperate times called for desperate action.

In May of 1933 the Federal government passed the sweeping Agricultural Adjustment Act which included, *inter alia*, provisions for industry-wide marketing and production controls. Three months later, in June, California followed suit by passing its own state Agricultural Adjustment Act to supplement the Federal program as well as the Agricultural Prorate Act which provided for the use of marketing orders to control surpluses.<sup>50</sup> This was the statutory beginning of both the state and federal programs which have attempted to stabilize farm income through a regulation of agricultural marketing.<sup>51</sup>

The marketing order approach was essentially an extension of the cooperative programs which were tried with only limited success in the years prior. Government legislation remedied the principal defect by invoking its police powers to compel all members of a commodity sector to abide by the wishes of the majority. Both California and the Federal government passed enabling legislation which permitted each commodity sector to decide

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<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 3.

<sup>51</sup>*Id.*

whether any marketing program was to be employed and, within statutory limits, the nature of that program.

Today, only one federal law, the Agricultural Marketing Agreement of 1937, provides for the use of marketing orders.<sup>52</sup> In California virtually all the marketing programs are now promulgated under the California Marketing Act of 1937.<sup>53</sup> The California law is in many respects broader and more liberal than its federal counterpart<sup>54</sup> and is examined in some detail in the following section.

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<sup>52</sup>U.S.C.A. § 601, 602, 608a, 608b, 608c, 608d, 610, 612, 614, 624, 671-674 (1964).

<sup>53</sup>Today 36 commodities are covered by the marketing orders promulgated under the CALIFORNIA MARKETING ACT OF 1937 while only two, processing pears and brussel sprouts, are enacted under the AGRICULTURAL PRODUCERS MARKETING LAW. California Department of Agriculture, Tabular Outline of Active Marketing Programs and Marketing Agree 1-6 (Revised June 1971) (hereinafter cited as Tabular Outline).

<sup>54</sup>Professor J. Foytik lists the following differences between the California and federal marketing laws:

1. California programs are geared toward maintaining in business enough "efficient" producers to "meet demand" likely to develop. Some controls of federal programs cannot be operated during seasons when farm prices exceed parity.
2. All agricultural commodities are eligible for a state program. Federal programs cannot be used for some products. Those excluded are most fruits and vegetables for canning and freezing, livestock, poultry (except turkeys), several livestock products (except turkey hatching eggs and dairy products), most major field crops, and a few others.
3. State programs can be applied to producers, or handlers, or both. Federal programs, although intended to increase net returns to producers, are applied directly only to handlers.
4. California programs regulate commodities produced and marketed within the state. They can be applied to "preparation for market" even though the ultimate consumption occurs in another state. Federal programs regulate movement to interstate and foreign markets. Federal and not state programs must be used if regulations are to apply to supplies originating in more than one state.
5. A state program does not include both a marketing order and a marketing agreement at the same time. Federal programs normally utilize marketing orders incorporating terms parallel to those embodied in companion marketing agreements. The one major exception is fluid milk, in which case only marketing orders are used.
6. Commodity promotion can, and often is, financed from funds collected under state programs. Such expenditures are prohibited for federal programs.
7. A state program, generally, requires approval by two-thirds of all members in an industry. A federal program requires approval of two-thirds of the members voting in a special referendum.

### III. THE CALIFORNIA MARKETING ACT OF 1937

#### A. STATUTORY PURPOSE

The legislature prefaced the California Marketing Act of 1937<sup>55</sup> with language which reflects the chaotic conditions which prompted its passage. "It is hereby declared that the marketing of commodities in this state in excess of reasonable and normal market demands therefor...results in an unreasonable and unnecessary economic waste of the agricultural wealth of this state."<sup>56</sup> The legislature then declares the marketing of farm commodities "...to be affected with a public interest."<sup>57</sup> And it promises "...to aid producers in preventing economic waste in the marketing of their commodities...and to aid producers in restoring and maintaining their purchasing power at a more...reasonable level."<sup>58</sup>

#### B. DELEGATION OF AUTHORITY TO THE DIRECTOR OF AGRICULTURE

The California legislature has delegated broad authority to the state Director of Agriculture<sup>59</sup> to issue marketing orders pursuant to the Marketing Act which must be complied with by all members of the affected agricultural sector.<sup>60</sup> The Director is not authorized, however, to issue marketing orders which are either inconsistent with federal regulatory powers<sup>61</sup> or which contain provisions not enumerated in the Marketing Act.<sup>62</sup>

#### C. CONTENTS OF A MARKETING ORDER

The contents of a marketing order are determined by the needs of the particular agricultural commodity in need of regulation.

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8. California laws specify maximum assessment rates. No such limit is set by federal legislation.

FOYTIK, *supra* note 46, at 5.

<sup>55</sup>CAL. AGRIC. CODE § § 58601-59293 (West 1968).

<sup>56</sup>CAL. AGRIC. CODE § 58651 (West 1968).

<sup>57</sup>CAL. AGRIC. CODE § 58653 (West 1968).

<sup>58</sup>CAL. AGRIC. CODE § 58652 (West 1968).

<sup>59</sup>Hereinafter referred to as Director.

<sup>60</sup>CAL. AGRIC. CODE § 58742 (West 1968).

<sup>61</sup>*Id.*

<sup>62</sup>CAL. AGRIC. CODE § 58881 (West 1968).

There are no fixed formulas. Although the Marketing Act enumerates fourteen specific provisions which may be properly contained within a marketing order,<sup>63</sup> not all of them have proved equally useful. The five provisions most frequently invoked include the establishment of research studies, commodity promotion, quality regulation, rate-of-flow restrictions and volume control.<sup>64</sup>

Marketing orders may compel all producers of a specific commodity to pay a pro rata assessment on their output to support research studies on the production, processing, or distribution of their particular commodity.<sup>65</sup> Professor Foytik<sup>66</sup> has described most research studies as

...short-term investigations of current operating problems which are specific in nature and require immediate attention. They include, for example, studying maturity standards, developing methods of testing and grading in conformity to specifications, improving container and packing methods, developing alternative methods for car loading and refrigeration, developing sampling forecasts of prospective production, improving harvesting and packing equipment and crop varieties, surveying consumer demand attitudes and preferences, and collecting information on retail prices and movement.<sup>67</sup>

Marketing orders may similarly compel affected producers to support programs of advertising and other forms of sales

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<sup>63</sup>A marketing order may contain provisions for: control and elimination of surplus by means of a stabilization fund; limitation of volume sold during specific periods; allocation of the quantity each handlers may process or distribute; regulation of the period for processing; pooling of surplus commodities to be sold in common; grading standards of quality, condition, size, maturity, or pack and inspection procedures; advertising and sales promotion, elimination of unfair trade practices; funds for production adjustment benefits; funds for educational programs to assist quality improvement; an official brand name or label; control and elimination of harmful insects.

CAL. AGRIC. CODE §§ 58882-58895 (West 1968); CAL. AGRIC. CODE § 58895 (West Supp. 1971).

<sup>64</sup>FOYTIK, *supra* note 46, at 17.

<sup>65</sup>CAL. AGRIC. CODE § 58892 (West 1968).

<sup>66</sup>Associate Professor of Agricultural Economics and Associate Agricultural Economist in the Agricultural Experiment Station and on the Giannini Foundation of Agricultural Economics, University of California, Davis, California.

<sup>67</sup>FOYTIK, *supra* note 46, at 18. Currently, 32 marketing programs out of 36 have provisions for research studies. It is by far the most used provision. Tabular Outline, *supra* note 53, at 7.

promotion which attempt to stimulate demand for their product.<sup>68</sup> The language of the statute is broad but it does spell out three advertising practices which are prohibited: one, the use of private brand names; two, the use of false or misleading claims; three, the use of disparaging attacks on other commodities.<sup>69</sup>

Marketing orders may impose uniform grading standards based on "...quality, condition, size, maturity or pack..."<sup>70</sup> These restrictions are imposed with the expectation that the price for the farm commodity will improve due to the reduction of supply to only those of good quality and the stimulation in demand by giving the consumer a better and more uniform product.<sup>71</sup>

Marketing orders may regulate the period during which commodities may be "...processed, distributed, or otherwise marketed within this state."<sup>72</sup> By prorating the amounts which handlers may ship during given periods, a uniform flow of shipments to the nation's markets may be maintained. Marketing seasons for many perishable commodities are relatively short in duration with numerous growers going to market at the same time. Rate-of-flow restrictions tend to smooth out the scarcity-glut-scarcity cycle which reflects the coming and going of the harvest season. In this way exaggerated price fluctuations can be reduced.<sup>73</sup>

Marketing orders may also limit the total volume of a commodity which may be released to the nation in any growing season.<sup>74</sup>

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<sup>68</sup>CAL. AGRIC. CODE § 58889 (West 1968).

<sup>69</sup>*Id.* Currently, 28 marketing programs out of 36 have provisions for research studies. Tabular Outline, *supra* note 53.

<sup>70</sup>CAL. AGRIC. CODE § 58888(a) (West 1968).

<sup>71</sup>Currently, 17 marketing orders have incorporated quality regulations of one kind or another. Commodities covered are: early apples, dry beans, lima beans, citrus, dried figs, grapefruit, desert grapes, dry-pack lettuce, cling peaches, clingstone peaches, fresh peaches, bartlett pears, fall and winter pears, canning hardy pears, poultry and turkeys, brussel sprouts, and processing strawberries. Tabular Outline, *supra* note 53.

<sup>72</sup>CAL. AGRIC. CODE § 58886 (West 1968).

<sup>73</sup>Only one marketing order incorporates rate-of-flow regulations at the present time: desert grapes. Tabular Outline, *supra* note 53, at 3.

<sup>74</sup>CAL. AGRIC. CODE § 58883 (West 1968).

Provisions are made so that each producer receives his pro rata share of the volume which goes to the country's primary markets. The excess volume is siphoned off into non-competitive channels such as "...secondary outlets, export markets, stabilization pools or the dump pile."<sup>75</sup> The purpose is clear: to raise price by reducing supply.<sup>76</sup>

#### D. COMMODITIES CURRENTLY REGULATED

Commodities currently covered by California marketing orders include apples, apricots, globe artichokes, asparagus, avocados, dry beans, lima beans, bush berries, brandy, citrus, dried figs, grapefruit, desert grapes, extracted honey, dry-pack lettuce, milk, cling peaches, clingstone peaches, fresh peaches, Bartlett pears, winter and fall pears, fresh plums, poultry and turkeys, dried prunes, raisins, rice, Brussel sprouts, strawberries and wine.<sup>77</sup>

#### E. DEVELOPMENT OF MARKETING ORDERS

New marketing programs are initiated by representatives of the interested commodity sector.<sup>78</sup> These representatives decide upon a marketing program which they feel best solves their marketing problems. Next, a series of discussions take place between the interested industry representatives and officials of the California Department of Agriculture.<sup>79</sup> When the Department is satisfied that the statutory minimums are met, it drafts a proposed marketing order and calls for public hearings on it.<sup>80</sup>

The Department is required to publish notice of the hearings in certain newspapers<sup>81</sup> and it also must mail notice of all those

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<sup>75</sup>FOYTIK, *supra* note 46, at 23.

<sup>76</sup>Currently 5 marketing programs have incorporated volume controls of one type or another. They are: lima beans, dried figs, desert grapes, cling peaches, and canning and freezing cling peaches. Tabular Outline, *supra* note 53.

<sup>77</sup>California marketing orders are published only in mimeographed form and may be obtained by writing to the Division of Marketing Services, California Department of Agriculture, 1220 "N" Street, Sacramento, California 95814.

<sup>78</sup>C.E.B., *supra* note 41, at 277.

<sup>79</sup>*Id.*

<sup>80</sup>CAL. AGRIC. CODE § 58771 (West 1968).

<sup>81</sup>CAL. AGRIC. CODE § 58772 (West 1968).

in the industry who might be directly affected by the new marketing orders.<sup>82</sup> Marketing experts and others with relevant special knowledge may also be invited to attend.<sup>83</sup>

The hearings have been ruled quasi-legislative in nature and have been likened to those held by legislative subcommittees when they are considering new legislation.<sup>84</sup> Neither the Administrative Procedure Act<sup>85</sup> nor the strict rules of evidence apply in this situation.<sup>86</sup> However, the hearing itself is conducted under oath and all interested parties are given a reasonable opportunity to present their views and to offer their supporting evidence.<sup>87</sup> It is crucial that both proponents and opponents present all their available evidence at this hearing because new evidence cannot be introduced in any latter judicial attacks on the validity of the regulations.<sup>88</sup> The Department is required to maintain a complete record of all proceedings.<sup>89</sup> At the close of the hearings, the Department officials must review the evidence to determine whether the proposed regulations meet the Marketing Act's legislative standards, whether the interest of the consumer is protected, and whether the regulation is suitable to meet the marketing problems posed.<sup>90</sup>

If the Department finds the proposed marketing order to be acceptable, it must first submit the proposed regulations to a vote of the affected producers who must approve it before it may issue the new marketing orders.<sup>91</sup> Approval may be obtained by either the "written assent method" or by the "referendum method." Under the "written assent method," the proposed order only becomes effective when 65 percent of the producers who produce for market 51 percent of the commodity approve by written assent or when 51 percent of the producers who produce for market at least 65 percent of the commodity approve by written assent.<sup>92</sup> It is clear that this method requires wide-

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<sup>82</sup>CAL. AGRIC. CODE § 58773 (West 1968).

<sup>83</sup>C.E.B., *supra* note 41.

<sup>84</sup>Ray v. Parker, 15 Cal. 2d 307, 101 P.2d 682 (1940).

<sup>85</sup>Brock v. Superior Court, 109 Cal. App. 2d 598, 241 P.2d 287 (1952).

<sup>86</sup>Ray v. Parker, 15 Cal. 2d 305, 101 P.2d 681 (1940).

<sup>87</sup>CAL. AGRIC. CODE § 58782 (West 1968).

<sup>88</sup>Brock v. Superior Court, 109 Cal. App. 2d 607, 241 P.2d 292 (1952).

<sup>89</sup>CAL. AGRIC. CODE § 58782 (West 1968).

<sup>90</sup>CAL. AGRIC. CODE § § 58811, 58813, (West 1968).

<sup>91</sup>CAL. AGRIC. CODE § 58993 (West 1968).

<sup>92</sup>CAL. AGRIC. CODE § 58993(a)(b) (West 1968).

spread industry approval for passage.<sup>93</sup> An alternate and somewhat easier means of gaining approval is called the "referendum method." The proposed marketing order can also become effective if a referendum is held in which at least 40 percent of all the producers vote and in which out of those who vote 65 percent of the producers who produce for market 51 percent of the commodity approve or 51 percent of the producers who produce 65 percent of the commodity for market approve.<sup>94</sup> The period for voting under the "referendum method" is limited to 30 days.<sup>95</sup>

## F. ADMINISTRATION OF MARKETING ORDERS

The Director of Agriculture is charged with the broad responsibility of administering and enforcing the marketing order.<sup>96</sup> The Director also has the authority to issue the specific rules and regulations by which the marketing orders are carried out.<sup>97</sup> The Director, in turn, usually delegates most of the responsibility of administration to an advisory board of appointed industry representatives.<sup>98</sup> This advisory board supervises the program, recommends an annual budget, handles disputes which may arise, suggests the promulgation of specific regulations to carry out the program, employs a staff to implement its policies and advises on amendments to the marketing order.<sup>99</sup>

The cost of administering the program must be borne by the industry itself through assessments on output.<sup>100</sup> To ensure that the marketing orders are being complied with, inspectors

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<sup>93</sup>*Id.*

<sup>94</sup>CAL. AGRIC. CODE § 58993(c) (West 1968).

<sup>95</sup>CAL. AGRIC. CODE § 58895 (West 1968). In addition, CAL. AGRIC. CODE § 58991 requires that if handlers are affected, assent must be given by handlers who handled 65 percent of the volume of the commodity regulated or by 65 percent of the handlers engaged in handling the commodity. CAL. AGRIC. CODE § 58992 requires that if processors of canned fruits or vegetables, or of canned or packed dried fruits are affected, the assent must be given by 65 percent of the processors who processed 65 percent of the commodity. Handlers or processors are affected if the proposed marketing order requires any affirmative action on their part. The practical effect of this requirement is the elimination of all marketing programs which require the assistance of handlers or processors when the implementation of such a program would adversely affect their interest.

<sup>96</sup>CAL. AGRIC. CODE § § 58711, 58712 (West 1968).

<sup>97</sup>CAL. AGRIC. CODE § 58610 (West 1968).

<sup>98</sup>FOYTIK, *supra* note 46, at 35.

<sup>99</sup>*Id.*

<sup>100</sup>CAL. AGRIC. CODE § 58921 (West 1968).



may be authorized.<sup>101</sup> These inspectors have the authority to gain entrance <sup>102</sup> and to hold commodities for reasonable periods of time so that on site inspections can be made.<sup>103</sup>

#### G. VIOLATIONS OF MARKETING ORDERS

A violation of a marketing order is a misdemeanor with each day constituting a separate offense.<sup>104</sup> Penalties for each violation may include fines up to 500 dollars and imprisonment up to 6 months.<sup>105</sup> Civil penalties may also be provided for under the Marketing Act.<sup>106</sup> Special fines may be assessed for the exceeding of certain commodity quotas or allotments.<sup>107</sup> Moreover, the court is authorized to enjoin further violations and may order specific performance.<sup>108</sup> The state attorney general or any district attorney may institute an action upon request by the Director or upon his own motion if he has reason to believe a violation has occurred.<sup>109</sup>

#### H. TERMINATION OF MARKETING ORDERS

Marketing orders may be terminated in three ways: (1) they may be revoked by the Director;<sup>110</sup> (2) they may be repealed by the affected industry;<sup>111</sup> (3) they may lapse after a given period of time.<sup>112</sup> The Director may revoke any marketing order which fails to accomplish the purpose of the act<sup>113</sup> or which has fallen

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<sup>101</sup>CAL. AGRIC. CODE § 59282 (West 1968).

<sup>102</sup>*Id.*

<sup>103</sup>CAL. AGRIC. CODE § 59283 (West 1968).

<sup>104</sup>CAL. AGRIC. CODE § 59233 (West 1968).

<sup>105</sup>*Id.*

<sup>106</sup>CAL. AGRIC. CODE § 59234 limits the civil penalty to an amount not to exceed 500 dollars for each offense. In *People v. Paramount Citrus Association*, 177 Cal. App. 2d 505, 2 Cal. Rptr. 216 (1960) the court affirmed a judgment of 17,000 dollars in civil penalties.

<sup>107</sup>A person who knowingly exceeds a commodity quota, allotment, or marketing percentage fixed under a marketing order may be held liable for a fine equal to the current market value of the excess, or up to three times this value.

CAL. AGRIC. CODE § 59235 (West 1968).

<sup>108</sup>CAL. AGRIC. CODE § 59248 (West 1968).

<sup>109</sup>CAL. AGRIC. CODE § § 59240, 59241 (West 1968).

<sup>110</sup>CAL. AGRIC. CODE § 59081 (West 1968).

<sup>111</sup>CAL. AGRIC. CODE § 59082 (West 1968).

<sup>112</sup>CAL. AGRIC. CODE § 59086 (West 1968).

<sup>113</sup>CAL. AGRIC. CODE § 59081 (West 1968).

into disuse for three consecutive marketing seasons.<sup>114</sup> The affected industry may repeal any marketing order if 51 percent of the producers who produce 51 percent of the marketed product request within a 90 day period that the regulations be lifted.<sup>115</sup> The marketing order may lapse by its own terms or by its failure to be reapproved at least once every 5 years.<sup>116</sup>

## I. CONSTITUTIONALITY OF THE MARKETING ORDER APPROCH

The state and federal constitutionality of the California marketing order approach to agricultural regulation is well-settled and is no longer litigated.<sup>117</sup> The first constitutional attack was mounted in 1936 by a group of disgruntled lemon growers who protested the volume limitation restrictions imposed on their crop.<sup>118</sup> The California District Court of Appeal held that the restrictions did not contravene the Commerce Clause<sup>119</sup> of the federal Constitution even though virtually all the nation's lemons were grown in California and that 99 percent of the fresh lemons crop was bound for out-of-state markets.<sup>120</sup> In the following year, 1937, a similar volume limitation program on oranges and grapefruit reached the California Supreme Court.<sup>121</sup> The major arguments centered around the constitutionality of the statutory provisions which delegated the authority for the issuance of marketing orders to the Director of Agriculture and to the persons in the affected industry.<sup>122</sup> The court held that

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<sup>114</sup>CAL. AGRIC. CODE § 59087 (West 1968).

<sup>115</sup>CAL. AGRIC. CODE § 59082 (West 1968).

<sup>116</sup>CAL. AGRIC. CODE § 59086 (West 1968).

<sup>117</sup>Interview with Herbert L. Cohen, Department Counsel, California Department of Agriculture, in Sacramento, California, December 17, 1971.

<sup>118</sup>*Agricultural Prorate Com. v. Superior Court*, 5 Cal. 2d 550, 55 P.2d 495 (1936).

<sup>119</sup>U.S. CONST. ART. 1, § 8.

<sup>120</sup>The court held that the state has the right to impose regulations upon any commodity produced in the state before such commodity has entered interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in interstate commerce. This holding was predicated on the theory that a commodity enters into interstate commerce and ceases to be subject to state control only when the commodity actually commences its journey from one state to another. *Agricultural Prorate Com. v. Superior Court*, 5 Cal. 2d 567, 55 P.2d 553 (1936).

<sup>121</sup>*Brock v. Superior Court*, 9 Cal. 2d 291, 71 P.2d 209 (1937). 114 A.L.R. 127 (1938) contains an excellent annotation on this case.

<sup>122</sup>*Id.* at 296, 71 P.2d at 212.

the legislative power was not unconstitutionally delegated and found nothing unlawful about providing for the consent of those to be regulated.<sup>123</sup> In 1943, the U.S. Supreme Court held that a California volume limitation program on raisins (1) was not contrary to the Sherman Anti-Trust Act since the act did not apply to state action; (2) was not preempted by the mere existence of the federal Agricultural Marketing Agreement Act alone without the promulgation of any inconsistent federal regulation; (3) was not an unlawful burden on interstate commerce.<sup>124</sup>

## J. REVIEW OF MARKETING ORDERS

Each marketing order maps out the steps by which an aggrieved party may have the marketing order reviewed. Some complicated marketing programs, such as the one for processing cling peaches, contain a relatively elaborate review process replete with time limitations, hearing procedures and multi-levels of review (initial review by the advisory board with the right of appeal to the Director).<sup>125</sup> Other marketing programs of a less ambitious nature, such as the one for California apricots, simply contain a one-line provision for a written petition to the Director.<sup>126</sup> In all cases, however, the aggrieved party must exhaust his administrative remedies before he will be allowed judicial review.<sup>127</sup>

As stated earlier, the issuance of a marketing order is viewed as a quasi-legislative (as opposed to quasi-judicial) act on the part of the Director.<sup>128</sup> Since the hearings required are not of the judicial type but are of the nature of legislative hearings, there can be no *de novo* review of these proceedings.<sup>129</sup> Judicial

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<sup>123</sup>*Id.* at 299, 71 P.2d at 213.

<sup>124</sup>*Parker v. Brown*, 317 U.S. 341 (1943).

<sup>125</sup>CALIFORNIA DEPARTMENT OF AGRICULTURE, GROWERS MARKETING ORDER FOR PROCESSING CLING PEACHES AS AMENDED, 1970-1971, art. XV § A, B, C 31, Effective April 27, 1970.

<sup>126</sup>CALIFORNIA DEPARTMENT OF AGRICULTURE, GROWERS MARKETING ORDER FOR CALIFORNIA APRICOTS, art. VII, ? D 9, Effective April 14, 1971.

<sup>127</sup>*Brock v. Superior Court*, 109 Cal. App. 2d 609, 241 P.2d 293 (1952). *People v. Coit Ranch, Inc.*, 204 Cal. App. 2d 56, 21 Cal. Rptr. 878 (1962).

<sup>128</sup>*Brock v. Superior Court*, 109 Cal. App. 2d 598, 241 P.2d 287 (1952).

<sup>129</sup>*Id.* at 605, 241 P.2d at 291.

review of the quasi-legislative regulations may be by writ of mandamus, an action for declaratory relief, or an injunction depending on the situation and the type of relief necessary. The trial court's scope of review, however, is limited to the text of the record compiled by the Director to determine: (1) whether the regulation was arbitrary, capricious, and completely lacking in evidentiary support; (2) whether the correct procedure was followed in its promulgation; (3) whether notice of hearings were given as required by the statute.<sup>130</sup> No new evidence can be introduced to attack the validity of the regulations even though it was unavailable at the time of the hearings.<sup>131</sup>

#### IV. A NEED FOR REFORM

The foregoing analysis reveals a unique form of governmental regulation. The intent of the regulation is to raise and stabilize the income of the industry under consideration by encouraging collusive business practices and by enforcing them with the police power of the state. Moreover, the state delegates to the affected industry itself the responsibility to make the regulations and to administer them. The statutory intent is diametrically opposed to that of the antitrust legislation with which the public is more familiar.

The Marketing Act, however, has not proven to be an unbridled grant of power to California's agricultural sector for the exploitation of the nation's consumers. In fact, very real limitations have severely hampered the effectiveness of the statute.<sup>132</sup> There are two primary reasons why the Marketing Act has failed to give farmers greater bargaining power in the marketplace.

First, the scope of the Marketing Act has been limited to the control of marketing. There are no provision for the control of production.<sup>133</sup> Although a marketing order can regulate the

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<sup>130</sup>*Id.* at 604, 241 P.2d at 290.

<sup>131</sup>*Id.* at 603, 241 P.2d at 292.

<sup>132</sup>Statistics show the number of farming units within California showed a slight increase during the 1930's and 1940's. U.S. BUREAU OF THE CENSUS, CENSUS OF AGRICULTURE 1964, 7 (Vol. 1, Part 48, California, 1964). From this we can infer that this measure along with other forms of assistance were sufficient to meet the crisis of Depression and War in California. As noted before, however, there has been a steady decline in the number of farming units since 1950. California: Number of Farms, *supra* note 12.

<sup>133</sup>OPS. CAL. ATTY. GEN. No. 70-225 (1971).

amount any grower can market in any season, it cannot regulate the amount the grower can produce in that season.<sup>134</sup> Each grower must be allowed to market his fair share of the total commodity sector's output for each year.<sup>135</sup> Any real attempt to increase the price of farm commodities by use of volume controls has historically proven short-lived.<sup>136</sup> The higher prices have inevitably led to a self-defeating over-stimulation of production by existing and new producers in subsequent marketing seasons.<sup>137</sup>

Second, there seems to be real difficulty in gathering the statutory number of farmers who control the requisite amount of acreage to agree on new marketing orders. Farmers have traditionally been a mutually-suspicious lot of individualists who jealously guard their freedom to produce as they see fit. The marketing programs which have been passed have usually

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<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>To illustrate this problem, assume that in the initial marketing season 100,000 tons of a given agricultural commodity were produced in the state; that marketing research revealed that by limiting the volume released to the primary market to 90,000 tons, a substantially better price could be extracted from the commodity buyers than if all 100,000 tons were released; and that this favorable price would more than justify the siphoning-off of the excess to secondary markets. If a volume-limitation program were instituted under the Marketing Act to take advantage of this situation, it would require each producer to withhold 10 percent of his output for that marketing season. This would limit aggregate output by 10 percent (i.e., 10,000 tons of the total output of 100,000 tons would be withheld leaving 90,000 tons to be marketed). In the initial year, as this illustration shows, the volume-limitation program can be an effective device for the raising of farm income. This type of economic benefit has proven to be short-lived. The higher price received in the initial marketing season has inevitably led to a self-defeating over stimulation of production by existing and new producers in the following marketing seasons. Remember that each producer has a right to market his proportionate share of the aggregate amount released to the primary market based on the amount he produces in each marketing season. In terms of the above illustration, in the subsequent marketing season aggregate production has tended to rise, say, to 120,000 tons. However, to maintain the same price received in the initial year (assuming demand remains unchanged) volume must again be reduced to 90,000 tons. This means 30,000 of the 120,000 tons produced must be withheld in the subsequent year. Each producer would be required to withhold 25 percent (30,000 tons/120,000 tons) of his crop. The additional cost of producing a non-marketable surplus decreases the profitability of production. This tendency toward larger and larger surpluses has tended to continue until all the advantage created by the volume-limitation program is eliminated.

been limited to those which are either strictly necessary for the industry's survival or those which are relatively unobtrusive.

The above two defects in the Marketing Act could be remedied through legislative action. First, an amendment could be passed which would allow marketing orders to limit the production of agricultural products. This would give the industry a direct means of combating its biggest problem: persistent over-production. Second, the statutory requirement for approval of new marketing orders should be lowered to 50 percent of the farmers who control 50 percent of the marketable product. The present requirement of 65 percent of the producers who produce for market 51 percent of the commodity or 51 percent of the producers who produce for market 65 percent of the commodity<sup>138</sup> is too high to permit any type of imaginative and aggressive marketing program to be enacted. This is true not only because of the inherent difficulty of getting farmers to agree on any marketing order but also because the growing concentration of land ownership has given to a few growers the ability to thwart the wishes of the majority of smaller growers who may not control the requisite 65 percent of the acreage.

Even if these two reforms were made, there still would remain effective checks on the possible abuse of this statute. First, the Director is charged with the responsibility of seeing that the interests of the consumer<sup>139</sup> and the minority producer is protected. He may refuse to promulgate any marketing order which seeks to raise prices to unreasonable levels or which works a hardship on the minority producer.<sup>140</sup> Second, the existence of many substitute farm commodities also checks the extent to which prices can be maintained at artificially high prices.<sup>141</sup> If the price of apricots gets too high, the consumer can always switch, say, to pears or peaches. Each agricultural commodity is always in competition with others.

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<sup>137</sup>FOYTIK, *supra* note 46, at 24.

<sup>138</sup>CAL. AGRIC. CODE § 58993(a)(b) (West 1968).

<sup>139</sup>CAL. AGRIC. CODE § 58811 (West 1968).

<sup>140</sup>*Id.*

<sup>141</sup>FOYTIK, *supra* note 46, at 24.

## V. CONCLUSION

The polarization of rural California grows as the small farmer gradually disappears from the scene. The continuing consolidation of farming units has created the specter of an emerging feudal countryside within rural California. Only a new awareness of the problems of rural California and a reevaluation of our state's farm policy can stop this specter from becoming a reality. The continuing decline in the number of farming units within the state reflects in large measure the small farmer's lack of bargaining power in the marketplace. Reform of the Marketing Act of 1937 would go a long way toward restoring some measure of bargaining power to the state's farmers. It would give them an effective tool for organizing concerted marketing programs. The present Marketing Act has failed to do this.

*Floyd D. Shimomura*