INTERPRETING AND ENFORCING SECTION 2

OF THE CAPPER-VOLSTEAD ACT

by
Edward V. Jesse
Aaron C. Johnson, Jr.
Bruce W. Marion*

WP-51 February 1981

*Edward V. Jesse and Bruce W. Marion are agricultural economists with the Economics and Statistics Service, U.S. Department of Agriculture, located at the University of Wisconsin-Madison. Aaaron C. Johnson, Jr. is Professor of Agricultural Economics, University of Wisconsin-Madison. The views expressed in this paper do not necessarily reflect those of the U.S. Department of Agriculture.

This paper attempts to synthesize and summarize discussion concerning the topic at an NC 117 Seminar held in Washington, D.C. on April 15, 1980. The major papers presented at the seminar were: Alden C. Manchester, "Agricultural Marketing Cooperatives and Antitrust Law" and Edward V. Jesse and Aaron C. Johnson, Jr., "Capper-Volstead Section 2: Defining and Identifying Undue Price Enhancement." Discussants were Ronald Knutson, Willard Mueller and James Shaffer. Portions of these papers are included in the present paper -- sometimes verbatim -- without the use of quotations.

INTERPRETING AND ENFORCING SECTION 2
OF THE CAPPER-VOLSTEAD ACT

In its 1979 report to President Carter, the National Commission for the Review of the Antitrust Laws and Procedures made two specific recommendations concerning the treatment of cooperatives:[1/]

--"Farmers should continue to enjoy the right to form agricultural cooperatives for the joint marketing of their produce. The antitrust treatment of cooperatives once formed, however, should be similar to that of ordinary business corporations. Specifically, mergers, marketing agencies in common, and similar agreements among cooperatives should be allowed only if no substantial lessening of competition results".

--"Section 2 of the Capper-Volstead Act should be amended to define more precisely the term "undue price enhancement" and the responsibility for enforcement of this provision should be separated from the promotional responsibilities either within or outside the Department of Agriculture".

These recommendations stimulated further examination of Section 2 of the Capper-Volstead Act.[2/] Given the limited antitrust immunities granted cooperatives in Section 1 of that Act, what constitutes a violation under Section 2? Specifically, what is "undue price enhancement," and what activities by an agricultural cooperative should be interpreted as monopolization and restraint of trade? We deal with these definitional problems first and then suggest procedures for monitoring and evaluating cooperative behavior for evidence of Section 2 violations.

Historical Setting

The first American cooperatives were organized prior to the Civil War, and the various farmer movements fostered their growth in the late 19th century and the first two decades of the 20th century. Dairy bargaining associations began shortly after 1900 and many commodity associations were formed between 1910 and 1930. By 1920-22, when the Capper-Volstead Act was under consideration, there were a number of large cooperatives. For example, Sun Maid Raisin Growers, American Cranberry Exchange, Burley Tobacco Growers Cooperative Association and California Fruit Growers Exchange (now Sunkist Growers) all had market shares of 60 to 90 percent. The Congressional Record indicates that Congress was well aware of these organizations.

The Sherman Act of 1890 had placed in jeopardy the legal status of cooperative associations. Like labor, cooperatives were early targets of private antitrust actions, targets at which Senator Sherman and other sponsors of the Act were not aiming in their attack on trusts.[3/] Under some early decisions, the mere act of forming a cooperative association constituted a *per se* combination in restraint of trade. In order to make the formation of a marketing cooperative immune from challenge, Congress enacted first Section 6 of the Clayton Act and later, the Capper-Volstead Act.[4/]

It is true that farmers were experiencing a post W.W.I depression when the Capper-Volstead Act was enacted. This heightened the perceived need for cooperatives; however, the need for a change in the law had gradually gained momentum since 1914 as it became clear that the Clayton Act had inadequately protected cooperatives from legal challenge.

Legislative Intent

The legislative intent of the Capper-Volstead Act is summarized by the Supreme Court in one landmark decision:

> "We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in Section 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage -- and responsibility -- available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

> Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it.

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws."5/

Review of the legislative history of Capper-Volstead reveals that the opponents of the bill alleged that it created a "class privilege" -- a step they viewed as undesirable. Proponents, in response, asserted repeatedly that this was not the case. Business men could pool their capital and organize a corporation. However, farmers could not practically pool their land and livestock into one corporation -- nor would it be desirable. Hence, Capper-Volstead was only to equalize the ability to organize a collective business entity -- not to create a class exemption from the Sherman Act.

Some may interpret from the above quote that Congress intended cooperatives to have all of the rights of a corporation, including control over production.6/ We are convinced this was not true. Neither the legislative history nor the language of Section 1 of Capper-Volstead support such an interpretation. In our opinion, "equal privileges" referred solely to the right to organize a cooperative organization -- which in turn could serve as the marketing agent for individual farmers.

The legislative discussion of Capper-Volstead indicates the strong concern of Congress for the depressed state of farmers, the "unconscionable profits" of "unnecessary middlemen", and the resulting unnecessarily high prices to consumers. The development and growth of cooperatives was widely perceived in Congress as a solution to these problems. Senator Capper's statement was typical:

> "Cooperative farmers' organizations will bring producers and consumers closer together. The excessive charges of unnecessary middlemen will be eliminated, and the cost of marketing, manufacturing, and distributing farm products will be greatly reduced. The producers and consumers will share equitably in the profits derived from cooperative business organizations among farmers. Prices will be stabilized, production will be more uniform and larger in the aggregate, the supply of food products will increase in proportion to the demand, speculation, gambling, and profiteering in food products will be curtailed, controlled, and in large measure prevented, and as a result the farmers will be more prosperous, the cost of living will be reduced, and the general public welfare will be benefitted." 7/

In 1981, this sounds like puffery. Cooperatives were to do all things good and noble, and in the process curtail the proverbial bad guy -- the middleman. However, the agricultural marketing system of 1922 was vastly different from our current system. Our current marketing system is often viewed as one of the most efficient in the world, but such a view was not held in 1922. For example, Sen. Capper commented:

> " . . for years evidence has been piling up to convince us that we have the most expensive marketing system in the world, also the most inefficient, if we except China . . . Under our present marketing system a bale of cotton passes through an average of nine hands from the time it leaves the farmer until it arrives at the mill." 8/

Senator Capper cited other examples of the inefficiency of agricultural marketing. In some cases, the buyer to whom the farmer sold his product represented a large company; in other cases he was a local dealer, commission agent or processor. In either case, the market alternatives for farmers were few.

> " . . . farmers must market collectively or, in the most correct sense, then they cannot market at all, but must usually turn over their products to a non-competitive buyer who operates the only elevator or milk station accessible to the farmers in that locality . . . The producer is being forced to sell his products for less than the cost of producing them, and the consumer is compelled to pay for these same products an excessive price, dictated solely by the greed of speculative parasites." 9/

Senator Capper clearly felt that marketing cooperatives would eliminate middlemen and streamline the marketing system. Where there were 5 or 6 profit takers in a system, he suggested a marketing cooperative would reduce this to 2 or 3. Instead of being forced to sell to local monopsonists, cooperatives would provide farmers with access to a much broader market. Given this perspective, Sen. Capper's claim that cooperatives would perform wonders no longer seems as unreasonable.

Although there was widespread support for the need for and benefits of cooperatives, there was considerable debate about the possibility of cooperatives developing monopoly power, particularly in local markets such as for milk, or for products produced in a small geographic area (e.g., raisins). Most Congressmen were convinced cooperatives could not develop monopoly power. After considerable debate, however, Section 2 was included to encourage passage of the bill, to make it clear that the public was to be protected, and to create public confidence in farmer cooperatives.

Capper-Volstead and the Sherman Act

Capper-Volstead was made necessary by the passage of the Sherman Act. Section 1 of Capper-Volstead established that the mere organization of cooperative marketing associations and the use by such associations of marketing agencies in common and "necessary contracts and agreements" are not violations of the Sherman Act. There was considerable debate within Congress about what Capper-Volstead meant vis a vis the Sherman Act. Did it mean that cooperatives were exempt from the Sherman Act? The proponents of Capper-Volstead argued that the bill did not exempt cooperatives from the Sherman Act once they were organized. However, some legislators noted that the Act would permit, at least legally, a cooperative monopoly to be formed.

Senator Walsh, Chairman of the Judiciary Committee, voiced particular concern about the possibility that the Act would allow local or geographic monopolies.

> " . . . Your committee sees no good reason why two, three, a half dozen, or a dozen co-operative associations might not properly be organized for the purpose of supplying a city with its milk, nor why, in the case of raisins, for instance, produced only within a limited area in the state of California, a monopolistic organization should be permitted and encouraged, rather than two or three co-operative associations organized and operating in similar lines."[10/]

The Senate Judiciary Committee proposed an amendment to the bill in both the 66th and 67th Congress to prevent this possibility.

> "Nothing herein contained shall be deemed to authorize the creation of, or attempt to create a monopoly, or to exempt any association organized hereunder . . . (from the Federal Trade Commission Act)."[11/]

This amendment, while adopted by the Senate, was opposed strongly by members of the House and was not included in the final Act. The House Judiciary Committee, of which Rep. Volstead was chairman, said in its report on the bill:

> "If it is safe not to place a limit upon the size of an ordinary corporation, there certainly is no reason to fear monopoly from farm associations. . . . In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity

from prosecution that corporations now enjoy." 12/

Thus, in this view, Capper-Volstead did not amend the Sherman Act but merely allowed cooperatives to be organized without being held in violation of the Sherman Act. If cooperatives were to unduly restrain trade or attempt to monopolize, they would still be subject to the Sherman Act and would also be subject to Section 2, Capper-Volstead.

What Constitutes a Violation of Section 2?

Section 2 provides the Secretary of Agriculture with the authority to issue a complaint against any cooperative which he has reason to believe "monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced..." Thus, a violation of Section 2 has three elements:

1. Monopolization or restraint of trade
2. Undue price enhancement
3. A cause-effect relationship between 1 and 2.

Monopolization and Restraint of Trade

The terms, "monopolization" and "restraint of trade," are both used in the Sherman Act and have been subject to court interpretation. Hence, to interpret monopolization and restraint of trade within the context of Capper-Volstead, we look first to the interpretations of these terms as used in the Sherman Act.

Section 1 of the Sherman Act makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ..." Every contract or agreement has some effect upon trade, but only those where the effect is unreasonable or undue are restraints of trade and therefore illegal. The Supreme Court stated in the Standard Oil Case of 1911:

"...the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Sherman Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade ..." 13/

Thus, by 1911, restraint of trade had been interpreted as "unduly restricting competition." The words "unduly" and "unreasonably" had the same meaning.

Section 2 of the Sherman Act makes it illegal for any person to "monopolize or attempt to monopolize, or combine or conspire with other person or persons, to monopolize any part of the trade or commerce ..." The Supreme Court has defined monopolization as follows:

"The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth and development as a consequence of a superior product, business acumen, or historic accident".[14/]

Monopolization must involve acts. Large size or market dominance, alone, are not illegal. The statute prohibits the possession of power to control prices or to exclude competitors from the market (the Courts' definition of monopoly power[15/]), provided there is also the intent and purpose to exercise that power.[16/] However, a company has not violated Section 2 when monopoly power has been "thrust upon it," as would be the case for the original entrant into a new field or where the market is so limited that only a single firm can economically supply it.

Finally, the courts have intepreted Sherman Act violations as involving damage to the public interest.

"The essential elements of an unreasonable restraint of trade or monopoly in violation of the Sherman Act are price control, production control and deterioration in quality. The fundamental test is a detriment to the public 17/

Let us now turn our attention to the meaning of monopolization and restraint of trade as used in Capper-Volstead Section 2. An apparent dilemma must be resolved. Cooperatives, just as other forms of business organization, are subject to Sherman Act proscriptions of monopolization and restraint of trade. Capper-Volstead Section 2 also prohibits monopolization and restraint of trade provided such acts result in undue price enhancement. Hence, the question is: How does the meaning of monopolization and restraint of trade within the Sherman Act differ from the meaning under Capper-Volstead Section 2? More specifically, how can an agricultural cooperative engage in acts which are exempt from the Sherman Act and yet stand in violation of Capper-Volstead Section 2?

Answers to this important question differ. Some interpret Capper-Volstead Section 2 as providing grounds for challenging undue price enhancement irrespective of cause. Advocates of this position argue that monopolization and restraint of trade as referenced in Capper-Volstead Section 2 are precisely the same activities referenced in Section 1, including the act of forming a cooperative. In other words, Section 1 tells what a cooperative can legally do, acts which prior to passage of Capper-Volstead were deemed in restraint of trade. Section 2 says that these acts, while exempt from antitrust prosecution, cannot be employed to the extent that price is unduly enhanced.

While this argument has appeal, we believe that the aims of Capper-Volstead, the contemporary interpretation of the Sherman Act at the time Capper-Volstead was passed, and the language of Capper-Volstead Section 2 indicate that Congress intended monopolization and restraint of trade to refer to acts beyond the mere formation of a cooperative or use of marketing agencies in common. The legislative debate on Capper-Volstead recognized that the Act could permit a legal monopoly. But even a market share of 80 or 90 percent was not a violation of Sherman, Section 2, unless the firm involved used its power to control prices or exclude competitors. Congress was convinced that farmer cooperatives -- even with high market shares -- would be unable to control prices or exclude competitors and hence develop unreasonable monopoly power.

> "Some economists have maintained that (this bill) might permit a possibility of abuse and create a monopoly. But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard."18/ (Sen. Capper).

Given their lack of control over supply, cooperatives would have to engage in other activities in order to develop monopoly power. The language of Capper-Volstead reflects this belief. If a cooperative "monopolizes or restrains trade ... to such an extent that the price of any agricultural product is unduly enhanced," the Secretary of Agriculture shall direct the cooperative "to cease and desist from monopolization or restraint of trade." Hence the relief called for is not necessarily dissolution of the cooperative -- the formation of which was made legal in Section 1 -- but the cessation of acts constituting monopolization or restraint of trade that have the effect of unduly enhancing prices.

In defining acts that may constitute monopolization or restraint of trade, the context of Capper-Volstead Section 2 must be considered. That is, given the actions permitted in Capper-Volstead, Section 1, what additional acts would give cooperatives the power to control prices, exclude competitions, or exploit a dominant market position? A "rule of reason" approach seems appropriate. For example, whereas marketing agreements with farmers may provide most cooperatives with no significant control over total supply, if the cooperative is a closed membership association with a dominant market position and if new competitors to the cooperative are unlikely because of entry barriers, long-term marketing agreements might be effective vehicles for controlling total production and thereby price. In that case, marketing agreements or closed membership might logically be viewed as acts of monopolization or restraint of trade. We believe the same approach is appropriate for considering mergers between cooperatives, full supply contracts, efforts by cooperatives to limit member production through quotas,and other cooperative activities.

Undue Price Enhancement

Capper-Volstead Section 2 is unique among antitrust laws in its proscription of certain performance -- an unduly enhanced price -- rather than conduct. But Congress did not by the language of Section 2 specify a performance standard, that is, a referent price, to be used as a benchmark for determining whether a price has been unduly enhanced. Consequently, it is necessary to examine materials extrinsic to the Act to provide an interpretation. We look to three sources: the legislative history of the Act, the Courts, and economic theory.

Congressional Guidelines

The proponents of Capper-Volstead were fully aware of and determined to forestall the "evils of monopoly" and thereby preserve the perceived virtues of competition. Senator King, who argued against Capper-Volstead, not because he opposed the bill but because he felt the appropriate procedure was to strengthen the Sherman Act, stated the position of his colleagues: "...the Sherman law was founded upon the conceptions of the common law. We believe in the principles of the Anglo-Saxon law, the principles which were announced by Adam Smith. We do not believe in monopolies, in trusts, in combinations in restraint of trade, in the destruction and strangling of competition. ...competition is fundamental in our industrial and economic life." 19/

This concern with preserving competition was rooted in a fear of the price-enhancing effects of monopoly. Senator Sterling cited Standard Oil: "'...the principle wrong which it deemed would result from monopoly -- that is, an enhancement of price...'"[20/] Under common law, forestalling and engrossing -- making greater the prices of victuals and other necessities of life -- was viewed as evil. In modern times the word "monopoly" had come to denote the same evil. But (again he cited Standard Oil), "'...common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to the harmful result but to the result itself...'"[21/] In his own words, "...the result, being the controlling thing, is an undue enhancement of price, and we may indifferently call it by the old common law name of engrossing or we may call it a monopoly."[22/] This clearly associates monopoly with the undue enhancement of price, a condition long viewed as an "evil" condition, and one that all agreed was to be avoided.

Although Congress was unanimous in the fundamental belief that monopoly should be avoided, divergent views existed on exactly what Capper-Volstead would create insofar as a monopoly was concerned, whether Section 2 was needed, and whether Section 2 was enforceable. Some legislators felt Section 2 was unnecessary. Senator McCumber said:

> " ... I do not like that section at all. I would leave it out entirely, so that there would be no restraint whatever, because I think it is impossible for the agriculturalists of the entire country, all of the food producers, so to combine as to prevent the sale of their products at a reasonable price." [23/]

Congress was very aware that Section 2 subjected cooperatives to a much more severe standard than that faced by non-cooperative organizations under antitrust. Comments on the uniqueness and fairness of the price standard in Section 2 included:

Senator Capper: "...it is the one case on record where any American industry, not a public utility, has deliberately consented to have a public official state when the price of its products is too high, and to discipline it for exercise of its price-fixing power." 24/

Representative Reavis: "Does not section 2 put a disability upon the farmer that is not put upon any other man, in that it allows the Secretary of Agriculture to tell him how much profit he may make, while nobody else is told how much he can make?" 25/

Senator Cummins: "The Standard Oil Co. can sell at any price it pleases. The Steel Corporation can sell at any price it pleases. The harvester company can sell at any price it pleases. There will be no one to control or to regulate them or to suggest that the price at which they are selling their products is an undue price; but the farmer will have it said to him that a certain price is greater than it should be..." 26/

Some legislators also felt Section 2 was unworkable. Senator Walsh, Chairman of the Senate Judiciary Committee, citing the difficulty of the Interstate Commerce Commission to determine when prices were "unreasonable," characterized Section 2 as "utterly valueless." 27/

Senator Cummins of Iowa also voiced concern.

"As I understand the Constitution under which we are passing laws, when we attempt to invest an administrative officer with an authority...we must give to him the rule or the guide which is to govern him in reaching his conclusion, whatever that conclusion may be. What is unduly enhancing the price of a given commodity? What is the test of a fair and reasonable price of a commodity which is simply the subject of general exchange in private enterprise and private industry? There is not a Senator here who can tell his fellow Senators what he would do under the authority that is bestowed upon the Secretary of Agriculture in this section. There is no guide: there is no standard." 28/

And if the absence of a standard was not bad enough, there was an even more serious question, namely:

"How would (the Secretary of Agriculture), how could he,

> undertake to determine whether the price had been enhanced by reason of the association and distinguish the influence of the association from the natural causes which determine under free competition the price of a commodity?" 29/

However, Sen. Kellogg, a strong supporter of the bill, felt the undue price enhancement provision was workable. Using a hypothetical cooperative selling livestock in St. Paul, he asked:

> "Is it not perfectly easy for the Secretary of Agriculture, with his Bureau of Markets, to determine, in light of the cost of production and in the light of market prices at other stockyards, whether or not their cooperative selling association has unduly enhanced prices?" 30/

Senator Lenroot also commented:

> "There is nothing more vague or more indefinite in the term 'undue enhancement of prices' than there is in the term 'undue restraint of trade.' One is just as shadowy as the other." 31/

In spite of the reservations in Congress about the need for, fairness of, and workability of the undue price enhancement provision, in the end, Section 2 was included in the Act. Although Congress made no real attempt to define "undue price enhancement," the legislative debate and use of terms such as "competition," the "forces of supply and demand," and "prices in other markets" suggests that Congress intended the "competitive price" to be the standard for Section 2. And they did intend so -- but in a particular sense. The real world offers an undifferentiated continuum where all differences are a matter of degree. So it is with the structure of markets: we find few, if any, with "large" numbers of sellers; we find few, if any, with a "single" seller. The economist's models of competition and monopoly are not observed in real-world markets. But to speak about real-world markets, we must make distinctions, distinctions that are at once meaningful and imprecise, meaningful in that they permit intelligent discourse, imprecise because all know they defy exact empirical definition. Thus, "competition" may be used to characterize a market setting wherein the participants (usually "large" in number) are more or less governed by impersonal forces, they have no control over their destiny; and "monopoly" may be used to characterize a market setting wherein the participants (usually "small" in number) are able to more or less control events and, hence, their destiny. It was, we believe, in this sense that competition and monopoly were used in the Congressional debates. Hence, the extensive use of the word competition was meant to characterize markets where "reasonable" prices would obtain.

Keep in mind too that Congress was firmly convinced that farmers through a marketing cooperative could not acquire monopoly power; thus, the cooperative would necessarily price its products under "competitive" conditions. This belief certainly influenced the language of the debates and Section 2. However, the framers of the Act did recognize the important distinction between the presence of a monopoly, on the one hand, and the possession and use of monopoly power to exploit the public in the form of higher prices on the other.

It is important to keep in mind that Congress expected cooperatives to lead to higher farm prices because of two different consequences. First, Congress clearly expected cooperatives to streamline the marketing system and eliminate middlemen by performing certain marketing functions. By eliminating several "toll gates" between the producer and consumer, cooperatives were expected to increase the returns to farmers. Second, Congress expected cooperatives to provide an alternative outlet for farmers, to operate in broader geographic markets with more buyers, and to strengthen the bargaining position of farmers. Agricultural economists in 1981 tend to focus on the market power effects of cooperatives; the framers of the Act placed equal or more emphasis on expected gains in efficiency. There is no evidence that Congress expected cooperatives to result in increased prices to consumers.

Supreme Court Guidelines

Because Section 2 of Capper-Volstead has never been invoked by a Secretary of Agriculture, neither an administrative nor a judicial definition of an unduly enhanced price exists. However, Capper-Volstead has been raised in defense by cooperatives charged with antitrust violations, hence the Supreme Court has ruled on the broad issue of antitrust exemption afforded farmer cooperatives by the Act.[32/]

In Borden, the cooperative acted in concert with others, such as distributors, "...in order to maintain an artificial and non-competitive price to be paid to all producers..." and "...to compel independent distributors to exact a like price from their customers...".[33/] The Court, after a review of the facts of the case, held that "(t)he right of...agricultural producers to unite (under Capper-Volstead)...cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise."[34/]

Sections 1, 2, and 3 of Sherman were at issue in Maryland and Virginia Milk Producers Association. The Court first affirmed its holding under Borden that Capper-Volstead does not afford complete antitrust immunity from Section 1 of Sherman; it then ruled that cooperatives were not exempt from Section 2 of Sherman -- attempts to monopolize and monopolization. These two cases taken together show clearly that the Court places a narrow interpretation on the extent of antitrust immunity afforded by Capper-Volstead, an interpretation in accord with the intent of Congress.35/

In ruling on a jurisdictional dispute in the Borden case, the Court made an important statement on the relationship between Capper-Volstead and Sherman:

> "...the procedure under Section 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section 1, so that if the collective action of such producers, as there permitted, results in the opinion of the secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under Section 1." 36 /

Thus, in its discussion of the fundamental questions of antitrust immunity and jurisdiction in antitrust cases involving farmer cooperatives, the Supreme Court made a clear distinction. If a farmer cooperative engages in such acts as conspiracy with others, market foreclosure, predation, or any other acts that are not deemed to fall under the legitimate activities of cooperatives as specified in Section 1 of Capper-Volstead, then the cooperative is subject to prosecution under the Sherman, Clayton, and FTC Acts. This is the case whether or not the Secretary of Agriculture initiates proceedings under Section 2 of Capper-Volstead.

On the other hand, it is possible, according to the Court, that a cooperative could engage in acts lawful under Section 1 of Capper-Volstead which in the opinion of the Secretary of Agriculture have the combined effect of unduly enhanced prices. It was to permit the Secretary to control such acts as taken under Section 1, that Section 2 was included. Thus, Section 2 of Capper-Volstead provides an auxiliary procedure intended as a qualification of acts authorized by Section 1.

While this important ruling does not directly address undue price enhancement, it does emphasize our previous conclusion regarding the interpretation of monopolization and restraint of trade under Capper-Volstead Section 2. Section 1 reads: "Such associations (of farmers) may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes." The courts have gradually bounded the set of "necessary contracts and agreements" deemed necessary to effect the purpose of the Act. The bounding process continues, but a large grey area consisting of acts which are not specifically prohibited remains -- acts which may constitute monopolization and restraint of trade if they result in an unduly enhanced price.

Guidelines from Economic Theory

A review of economic theory pertaining to the performance consequences of marketing cooperatives tends to support the expectations of early proponents of Capper-Volstead.[37/] By comparing cooperative and private firm price and output solutions in alternative market settings, it can be shown that open membership (OM) cooperatives tend to push performance toward maximum social welfare levels consistent with the structure of markets they face. Specifically, relative to private firms, OM cooperatives tend to reduce consumer prices while simultaneously increasing member returns, regardless of the cooperative's market share on the input and output sides. This result is premised on the assumption that an OM cooperative stands ready to accept all production that it is offered. Since the OM cooperative returns all net revenue to members, any attempt to restrict sales and thereby enhance output price would be met with surplus production by producers and potential producers responding to the higher raw product price. In essence, then, the OM cooperative does not possess market power.

Restricted membership (RM) cooperatives can yield quite different price and output solutions. In some structural configurations, RM cooperatives may restrict output below that associated with private firms, thereby resulting in welfare inferior solutions.

The attractive welfare implications of OM cooperatives are contingent on some important assumptions concerning cooperative behavior: (1) the cooperative operates as efficiently as the private firm, (2) all cooperative net revenue is returned to members, (3) the cooperative makes no attempt to limit member deliveries, and (4) the cooperative does not practice price discrimination. Violation of one or more of these assumptions permits an OM cooperative to possess and exercise market power, provided certain structural tests are met.

While theory does not provide a clear definition of undue price enhancement, it does show the relationship between the nature of competition in the marketplace and the degree of supply restriction in agricultural product markets. The exercise of market power, as manifested by restriction of supply to subcompetitive levels, is associated with excess firm profits, exclusion of primary producers seeking a market, or price discrimination. These are important guides in determining when market power might be evident.

A Standard for Undue Price Enhancement

We now return to the question of what constitutes an unduly enhanced price. Obviously, a precise numerical price standard is neither possible nor desirable. But a general guide seems plausible based on Congressional intent, court rulings on related antitrust matters, and theoretical considerations.

It is clear from the Congressional debates that the proponents of Capper-Volstead were fully aware of and determined to forestall the "evils of monopoly" and thereby preserve the desired "virtues of competition." But the mere existence of a monopoly was distinguished from the use of monopoly power to exploit the public in the form of higher prices. To paraphrase Senator Norris: there is no public concern with the presence of a monopoly if that monopoly is not using its power to the public injury; there is public concern when the monopoly does, by reason of the power of monopoly, increase the price to the consumer. We conclude from this that the framers of the Act used "competition" not to characterize a market possessing the competitive structure of the world of economic theory but rather to characterize a real-world market where the use of monopoly power in a socially undesirable sense is absent.

The courts in antitrust matters, especially under Section 2 of the Sherman Act have employed a similar approach: "For nearly ninety years it has engraved in law a firm national policy that the norm for commercial activity must be robust competition." [38] But "competition" is generally defined in terms of market conduct, not market structure or performance. Case law is clear on this point: a monopoly (usually defined empirically in terms of market share and entry conditions) lawfully acquired is not in violation of antitrust so long as the monopoly does not subsequently engage in anticompetitive conduct, either to maintain or to increase its market position. On the other hand, a monopoly unlawfully acquired by competition-stifling conduct is in violation of antitrust, whether or not it engages in such conduct subsequent to attaining its monopoly position.

Economic theory is useful in defining undue price enhancement in at least three ways. First, theory demonstrates the supply-restricting, price-enhancing market power of the private firm monopolist, verifying the Capper-Volstead debaters concern with the evils of monopoly. Second, theory shows how social welfare can be improved by the introduction of cooperative enterprise in concentrated market structures, provided the cooperative is comparable in operational efficiency to private firm rivals, and that it makes no attempt to limit membership or member deliveries, or to price discriminate. Finally, theory helps to explain how cooperative behavior changes when operating assumptions (e.g., open membership) are violated -- specifically, we can identify the necessary conditions for possession of market power by a cooperative.

In light of these three sources of intelligence concerning undue price enhancement, we conclude that an unduly enhanced price is a price associated with the exercise of monopoly power (or substantial market power). We do not believe that either the framers of Capper-Volstead or the Courts would deny market prices resulting from superior products, brand loyalty, innovative management, or provision of better services provided that once attained, these prices were not maintained by market foreclosure or other anticompetitive behavior. But we do believe that by Section 2, Congress meant to deny substantially enhanced prices resulting from monopoly power that is sufficient to restrict supply and that is maintained by foreclosing potential competitors or excluding potential primary producers.

In what follows, we attempt to clarify this notion of undue price enhancement in the context of a monitoring system for Section 2.

Enforcement of Section 2

Since the passage of the Capper-Volstead Act in 1922, no Secretary of Agriculture has brought action against an agricultural marketing cooperative under Section 2.[39/] Some, including Secretary Bergland, have argued that the reason for this apparent lack of activity is that, at least until recently, few cooperatives were large enough to influence price. While this argument may have merit, it is imperative that enforcement be more rigorous in order to avoid charges of conflict of interest and to increase public confidence.

Rigorous enforcement entails employment of a monitoring strategy to identify cooperatives possibly subject to prosecution. Elements of structure, conduct, and performance must be monitored, since ultimately, three questions must be answered affirmatively for documentation of a violation:

(1) Does the cooperative possess market power sufficient to unduly enhance consumer price? (structure)

(2) Has the cooperative engaged in acts which individually or in total constitute monopolization or restraint of trade? (conduct)

(3) Has the cooperative exercised monopoly power to such an extent that consumer price is unduly enhanced? (performance)

The first question suggests use of a screening system to identify cooperatives that possess sufficient market power to have the potential for raising consumer prices. The second requires a judgment on whether the cooperatives flagged in this screening have performed acts that may constitute monopolization or restraint of trade. Finally, for cooperatives judged to possess market power and to have engaged in acts of monopolization or restraint of trade, prices must be compared with a standard to determine whether they are unduly enhanced. A proposed monitoring system is discussed below in order of these critical questions.

Market Power Screening

The incidence (as opposed to the exercise) of market power can be assessed by examining the likely consequences of a firm's attempt to reduce or allocate sales. Whether cooperative or proprietary, the price effect of a firm's attempt to restrict output is dependent on the firm's market share. If small, the firm's competitors will simply pick up the slack, leading to a "dead end" termination of the attempt to exercise market power. With a large market share, the output-restricting firm risks unacceptable erosion of its share by potential competitors unless barriers to entry are high. If barriers exist, the firm will experience a higher price from its reduced sales level. If the firm is privately organized, it can reduce input acquisitions commensurate with its reduced sales, and increase firm profits.

Our interest in marketing cooperatives imposes an additional wrinkle in determining the incidence of market power. A firm must be capable of selecting its level of input use. For a proprietary firm, this poses no problem. The firm simply buys the quantity of inputs consistent with its selected level of output. For a marketing cooperative, the firm must employ some means of coordinating its output decision with the production and marketing decisions of its individual members in order to possess market power. Otherwise, cooperative members would respond to higher unit returns by increasing raw product production, leading to an erosion of prices or a build-up of surplus. The production response of members can be managed by restricting the number of members, restricting individual member deliveries, or price discrimination (diversion of surplus production out of the primary market). These methods would serve to balance acquisitions and sales and have the potential to increase member returns. Alternatively, the cooperative might absorb larger revenues from an increased output price, thereby avoiding stimulation of increased member production.

Based on the conditions necessary to possess market power, we propose a two-stage screening process to identify cooperatives which should be subjected to further scrutiny. The initial screening would be on traditional industrial organization structural dimensions. These include:

- Seller concentration and relative firm market share in markets in which cooperatives operate.
- Nature and extent of barriers to entry into markets in which cooperatives operate.
- Degree of product differentiation of the output of cooperatives.

Screening on the basis of structural dimensions could yield a subset of marketing cooperatives which, because of their size, high barriers to entry or sale of a differentiated product, might possess the potential for unduly enhancing prices. The second stage of screening would focus on the question of whether the cooperative is in a position to exploit this potential -- the relevant question is can the cooperative prevent its members from overproduction in the event market power is exercised. Basically, we are concerned with evidence relating to four methods of supply control:

- Membership policy -- does the cooperative restrict membership for reasons other than capacity constraints? Do potential members have an alternative outlet?
- Member supply control -- does the cooperative limit aggregate member receipts to levels well below plant capacity? Are stringent quality standards imposed on member deliveries?
- Surplus disposal -- does the cooperative employ price discrimination or market allocation schemes deviating from normal industry practice?
- Limitations on member returns -- do cooperative retains exceed industry norms? Are unit costs in line with competing firms? Are returns to members comparable to the returns realized by non-members?

These methods of supply control as well as other acts of conduct may or may not be interpreted as a monopolization and restraint of trade under Capper-Volstead Section 2. It is not necessary to make this judgment at the screening stage. The decision concerning whether conduct underlying cooperative market power represents monopolization or restraint of trade can be postponed pending a judgment on whether price has been unduly enhanced.

Price Enhancement Appraisal

When applied to the full set of agricultural marketing cooperatives, the proposed two-stage screening process would yield a much smaller subset of cooperatives likely to possess substantial market power. We are now left with the problem of determining if a cooperative has exercised market power as evidenced by an unduly enhanced price.

The concept of workable competition can serve as a useful operational framework in making this determination. We believe the question of undue price enhancement can be addressed by comparing price in the suspect market with the price that would be expected to obtain if the market were disciplined by the rigors of workable competition. Hence, if a comparable market can be indentified, then performance comparisons can be made. This is certainly not a novel suggestion. Indeed, one of the avid proponents of Capper-Volstead suggested this very procedure during the Congressional debates:

> "Is it not perfectly easy for the Secretary of Agriculture, with his Bureau of Markets, to determine, in light of the cost of production and in the light of market prices at other stockyards, whether or not their cooperative selling association has unduly enhanced prices (in a particular market)?" 40/

The large number and diversity of agricultural product markets suggest a high likelihood that such a comparison can be made.

To identify an appropriate comparable market and to conduct the requisite price analyses requires both a broad knowledge of market characteristics and research imagination. However, we firmly believe that successful analysis can be achieved by utilizing the expected interrelationships of prices among markets separated by time, form, and space.

For example, absent trade barriers, commodity prices at two locations will theoretically differ by no more than the cost of transporting the commodity between the locations or the differences in the cost of transporting the commodity to a common market. We would expect a reasonably close correspondence among prices in different regional markets if these markets are workably competitive. Spatial price maps should serve to identify misalignment. A price in the suspect market substantially in excess of prices expected on the basis of spatial differences from markets judged to be workably competitive would be evidence of undue price enhancement.

In some cases, it may be possible to identify an earlier time period when a suspect market could be judged to have been workably competitive. The appropriate test here would be to determine whether current prices, adjusted for factors other than the evolution of cooperative market power, are substantially higher than in the earlier period. Temporal analysis would be particularly relevant in cases of strong cooperative growth in some market, or to compare prices before and after cooperative mergers.

The concept of markets in form characterizes the situation where several finished products can be manufactured from the same raw product. Under workably competitive conditions the prices of each of the finished products and the price of the common raw product would all be interrelated through processing costs, and through transportation costs if space were an element of the overall market. Here the analysis would involve comparing a "suspect" price for a particular product with the prices of the other products and the price of the raw product.

Comparative market analyses, or pricing efficiency studies, are attractive for at least two reasons. First, the methodology is well-developed. Second, and of considerable practical importance, such studies often can be carried out using readily available published data. Hence, such analyses would not place a reporting burden on cooperatives.

However, there exist situations where published data would be inadequate to perform a market comparison analysis, especially where vertically-integrated cooperatives are selling branded products. Here price data would be collected from cooperatives, but the same type of analyses can be conducted; that is, appropriately adjusted selling prices can be compared with those in markets judged to be workably competitive.

In attempting to define what constitutes "undue" price enhancement, different approaches may be necessary for branded products than for commodities. In the case of branded products, the price enhancement that results from successful product differentiation must be distinguished from the price enhancement due to monopolization or restraint of trade.

Product differentiation activities have not been considered as violations of the Sherman Act. The combination of a large market share and strong brand, by itself, would probably not be considered monopolization. Some proprietary food manufacturers have been able to achieve substantial price premiums for their branded products. If private label products are used as a competitive norm, national brands such as ReaLemon, Heinz Catsup and Kellogg's Corn Flakes realize price premiums of 30 percent or more. Other manufacturer/processors have been less successful in this respect; Sun Maid Raisins and Del Monte Canned Peaches receive only modest premiums. On average, national brand grocery products were priced about 12 percent higher than their private label counterparts in 1974.[41/]

One could argue that cooperatives should be treated no differently than corporations; if Ocean Spray, Welch or Land-o-Lakes is able to achieve a 30 or 40 percent price premium for their brand, so be it. However, this hardly squares with our earlier conclusions that undue price enhancement should be judged relative to the price in workably competitive markets. Workably competitive markets rarely result in a 30-40 percent premium for one brand unless there are significant quality differences. In manufactured food products, the quality differences between national brands and top-line private labels are generally small.

Thus, we face a dilemma. Product differentiation activities have not been considered as restraints of trade or monopolization by the courts -- yet markets with one or two very strong dominant brands can hardly be considered workably competitive. We conclude that in this case, cooperatives should be treated in the same way as corporations. Higher prices stemming from product differentiation should not be considered price enhancement. Price enhancement due to factors other than the quality, reputation and image of products should be the focus of investigation.

In many cases, extremely high price premiums for a branded product are not sustainable without actions to exclude competitors or police competition. In the case of cooperatives, an "excessive" price premium will normally be impossible to maintain without control of members' output or allocation of supply to alternative markets, restricted entry of new members and/or actions to deter entry by potential competitors. Actions to control the quantity marketed under a particular brand would not be suspect. However, actions to restrict total supply or exclude competitors may constitute monopolization or restraint of trade.

The typical cooperative practices open membership and exercises no control over member output. In this case, high price premiums for branded products are likely to be temporary. If high price premiums persist in such a setting, superior products or marketing methods may be the cause, not monopolization.

The foregoing suggests some approaches for examining undue price enhancement. However, we expect that each inquiry into possible violations of Capper Volstead, Section 2, will need to proceed on a case-by-case approach, selecting those analytical tools that seem appropriate. The tools of price analysis or econometric models of structure-price relationships may be useful in determining how much prices have been enhanced. It may also be necessary to examine the cost of production, the returns to farm labor and capital, and the extent to which high returns have been capitalized into farm values for selected groups of farmers. Ultimately, enforcement of Section 2 will rely on value judgments by judges and economists as to how much price enhancement is too much.

Concluding Comments

The guidelines provided by this paper for interpreting and enforcing Section 2 of Capper-Volstead are imprecise. We have found no basis for defining a dividing line between "due" and "undue" price enhancement. Is a price 5, 10, 20 or 30 percent above a "competitive" price unduly enhanced? We see no way of making such a generalization. Like undue restraint of trade, we believe undue price enhancement must be determined on a case by case basis in a court of law.

While we have been unable to precisely define what would constitute a violation of Capper-Volstead Section 2, we have narrowed the bounds within which Section 2 should be interpreted and enforced. The prices of workably competitive markets are more appropriate as a norm for evaluating price enhancement than the theoretical norm of "pure competition." Further, that prices substantially above a workably competitive norm would be necessary before they should be considered "unduly enhanced;" modest price enhancement should be considered legal. Areeda and Turner comment that if Congress had <u>not</u> intended to give farmers acting together "a degree of price-setting power," Section 2 would be "superfluous." They conclude: "This implies that moderate enhancement of price is always permissible..."[42/]

The final report of the U.S.D.A. Capper-Volstead Study Committee proposes a different standard for judging undue price enhancement.

> "The statements of the proponents of the Act are replete with comments about building up the market power of farmers through cooperatives to offset the power of the buyers whom they faced. This leads to the conclusion that the legislative intent was that farmers were to be permitted to receive prices at least as high as those resulting from market power equal to that of the aggregate of firms with whom they must deal." 43/

Although the legislative record indicates the lack of market alternatives and the bargaining disadvantage of individual farmers were strong concerns of Congress, there is no evidence that equality of bargaining power was intended. As a standard for undue price enhancement, the prices resulting from equality of market power also would lead to anomalous results. A cooperative selling to firms with market power would be allowed to enjoy the fruits of market power whereas a cooperative selling to an atomistic market would be allowed no market power. For these and other reasons, we disagree with the standard proposed by the Capper-Volstead Study Committee.

We recognize the dangers of trying to fathom the intent of Congress 60 years ago, and of translating that to present day settings. What economic paradigm prevailed in the minds of legislators in 1920-22? What did they mean by terms such as "competition," "monopoly," and "equalize existing privileges"? There is ample room for conflicting interpretations.

Further, how much reliance should be placed on the statements of Congress 60 years ago in a very different economic environment? Should the underlying concerns of Congress be translated to the present day setting? These are difficult questions. In this paper, we have concentrated on the intent of Congress in 1920-22, the language of the Capper-Volstead Act, and court interpretations to determine what we believe was intended by Section 2. We have not attempted to define how cooperatives <u>should</u> be treated, given the economic realities of 1981. Willard Mueller has suggested:

> "...the performance of cooperatives should be judged within the context of an economy where varying degrees of market power are the rule, not the exception, and a public policy environment in which little has or is likely to be done about existing entrenched power.
> ...if it is deemed in the public interest to control directly the price performance of cooperatives that unduly enhance prices -- and I think there is merit in such a policy -- sound public policy argues for such a standard in all sectors of the economy.
> ...Unless something is done to cope with the pervasive problem of undue price enhancement in other areas, pleas for hard-line enforcement of Section 2 of the Capper-Volstead Act seem unjustified." 44/

Mueller's argument has appeal. The competitive problems posed by cooperatives may well be trivial when placed in a larger perspective. Still, Section 2 of Capper-Volstead remains. Regardless of the fairness or importance of its provisions, it is a law that the Secretary of Agriculture is responsible to enforce.

FOOTNOTES

1/Report to the President and Attorney General of the National Commission for the Review of the Antitrust Laws and Procedures, Washington, D.C., Government Printing Office, January 22, 1979.

2/An interagency task force was organized in 1978 to examine the enforcement of Section 2. Subsequently, the USDA proposed standards and procedures for carrying out the Secretary of Agriculture's responsibilities under Section 2. In response to a request from the USDA, NC 117 initiated a study on the "undue price enhancement" provision of Sec. 2: how should the term be interpreted and what guidelines should be followed in enforcement?

3/Senator Sherman, who believed the Sherman Act should not cover cooperatives, proposed an amendment specifying that the Act was not to be construed to prohibit "any arrangements, agreements, associations or combinations among persons engaged in horticulture or agriculture <u>made with the view of enhancing the price of their own agricultural or horticultural products."</u> (Emphasis added.) 50 Cong. Record, 2611. This language was originally accepted by the Senate in the Committee of the whole but was subsequently omitted in the rewrite of the bill.

4/The Supreme Court summarized the legal setting and Congressional intent as follows: "In the early 1900s, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives [citations deleted] and as a result eventually all states passed Acts authorizing their existence [citations deleted]. It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914 inserted Section 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws... The Capper-Volstead Act of 1922 extended Section 6 of the Clayton Act to capital stock agricultural associations..." Maryland & Virginia Milk Producers Association v. United States, 362 U.S. at 464-66.

5/Maryland and Virginia Milk Producers Assn. v. United States, 362 U.S. at 466 (1960).

6/The fundamental difference between a cooperative marketing association and a non-cooperative corporation is important to keep in mind. Whereas a corporation represents an organization of investors who have pooled their funds so that the corporation can engage in production and marketing activities, a farmer marketing cooperative is an association of business firms (farmers) who have pooled their marketing activities but not their production activities. Decision control in the two types of organizations differs sharply, particularly with respect to production decisions and whether to market through the central organization. The exceptions granted to cooperatives in Section 1 of the Capper-Volstead Act are for "persons engaged in the production of agricultural products" to act together in "collectively processing, preparing for market, handling and marketing ... such products of persons so engaged."

7/59 Cong. Rec. 7852. For a theoretical verification of this perception of the market performance effects of cooperatives in certain market structures, see James G. Youde and Peter G. Helmberger, "Marketing Cooperatives in the U.S.: Membership Policies, Market Power, and Antitrust Policies," Journal of Farm Economics, 48:3, Pl. II (Aug. 1966), pp. 23-36.

8/62 Cong. Rec., 2060-61.

9/62 Cong. Rec. 2058-59 (1922 -- Sen. Capper speaking).

10/Senate Report 236, 67th Congress, 1st Session (1922).

11/Ibid., portion in parenthesis is paraphrase of original.

12/House Report 24, 67th Congress, April 26, 1921.

13/Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, (U.S. Sup. Ct. 1911).

14/U.S. v. Grinnell Corp., 384 U.S. 563 (1966).

15/U.S. v. E.I. du Pont de Nemours and Co., 351 U.S. 378 (1956).

16/See for example the decisions of American Tobacco Co. v. U.S., 328 U.S. 781, 814 (1946), and U.S. v. E.I. du Pont de Nemours and Co., 351 U.S. 377, 393 (1956). The Supreme Court's view has varied concerning the additional acts that are necessary, given monopoly power, to constitute monopolization. In U.S. Steel, the Court stated, "...the law does not make mere size an offense or the existence of unexerted power an offense. It...requires overt acts..." However, Judge Hand ruled in the Alcoa case that Alcoa's expansion of capacity to meet the growth in demand was not "inevitable" and constituted "exclusion of competition." Thus, something more than the existence of monopoly power is required for a monopolization offense but how much more is not clear.

17/Wm. Filene's Sons Co. v. Fashion Originators Guild of America, Inc., 90 F. 2d 556 (CCA-1, 1937).

18/62 Cong. Rec. 2059 (1922).

19/62 Cong. Rec. 2223-24 (1922).

20/id., 2219.

21/id., 2219.

22/id., 2219.

23/60 Cong. Rec., 313.

24/62 Cong. Rec., 2059.

25/61 Cong. Rec., 1042.

26/62 Cong. Rec., 2265.

27/Senate Report 236, 67th Congress, July 27, 1921.

28/62 Cong. Rec., 2264 (emphasis added).

29/id., 2165 (emphasis added).

30/id., 2052.

31/62 Cong. Rec., 67th Congress, p. 2221.

32/See for example, United States v. Borden, 308 U.S. 188 (1939); Maryland and Virginia Milk Producers Assoc. v. U.S., 362 U.S. 458 (1960); Sunkist Growers Inc., et al. v. Winckler & Smith Citrus Products Co., et al., 370 U.S. 19 (1962); Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

33/Borden, 205.

34/id., 204-205.

35/See H.R. No. 24, 67th Cong., 1st Sess., 3.

> "In the event that associations authorized by (Capper-Volstead) shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law."

36/Borden, 206

37/A caveat is appropriate. Although proponents of Capper-Volstead expected cooperatives to improve technical and allocative efficiency, there is no direct evidence from the Congressional debate that they perceived cooperatives as competitive "pace-setters" -- a role suggested by modern theory of cooperatives operating without supply control or classified pricing.

38/Berkey Photo v. Eastman Kodak Co., CCH, Trade Regulation Reports, Paragraph 62,718 at 78.001.

39/Some cooperative price enhancement investigations have been conducted by the Secretary, mostly in response to third party complaints. See Manchester for a review of nine such complaints since 1969.

40/62 Cong. Rec., 2052 (emphasis added).

41/B. Marion, et al., The Food Retailing Industry: Market Structure, Profits and Prices, Praeger Publ., 1979, p. 116.

42/Areeda and D. Turner, Antitrust Law, Little, Brown & Co., 1978, Vol. I, p. 186-87.

43/U.S. Dept. of Agriculture, "Undue Price Enhancement by Agricultural Cooperatives: Criteria, Monitoring, Enforcement," Final Report of the Capper-Volstead Study Committee, June 1980.

44/W.F. Mueller, "The Capper-Volstead Exemption," Working Paper prepared for the Economic Advisor Panel, National Commission for the Review of Antitrust Laws and Procedures, Oct. 24, 1978, p. 4, 14, 15.