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AGRICULTURAL MARKETING COOPERATIVES AND SECTION 1 OF THE CAPPER-VOLSTEAD ACT: CONDITIONING (LIMITED) ANTITRUST IMMUNITY ON CAPPER-VOLSTEAD POLICY

by

Thomas W. Paterson* and Willard F. Mueller**

WP #84 December 1984

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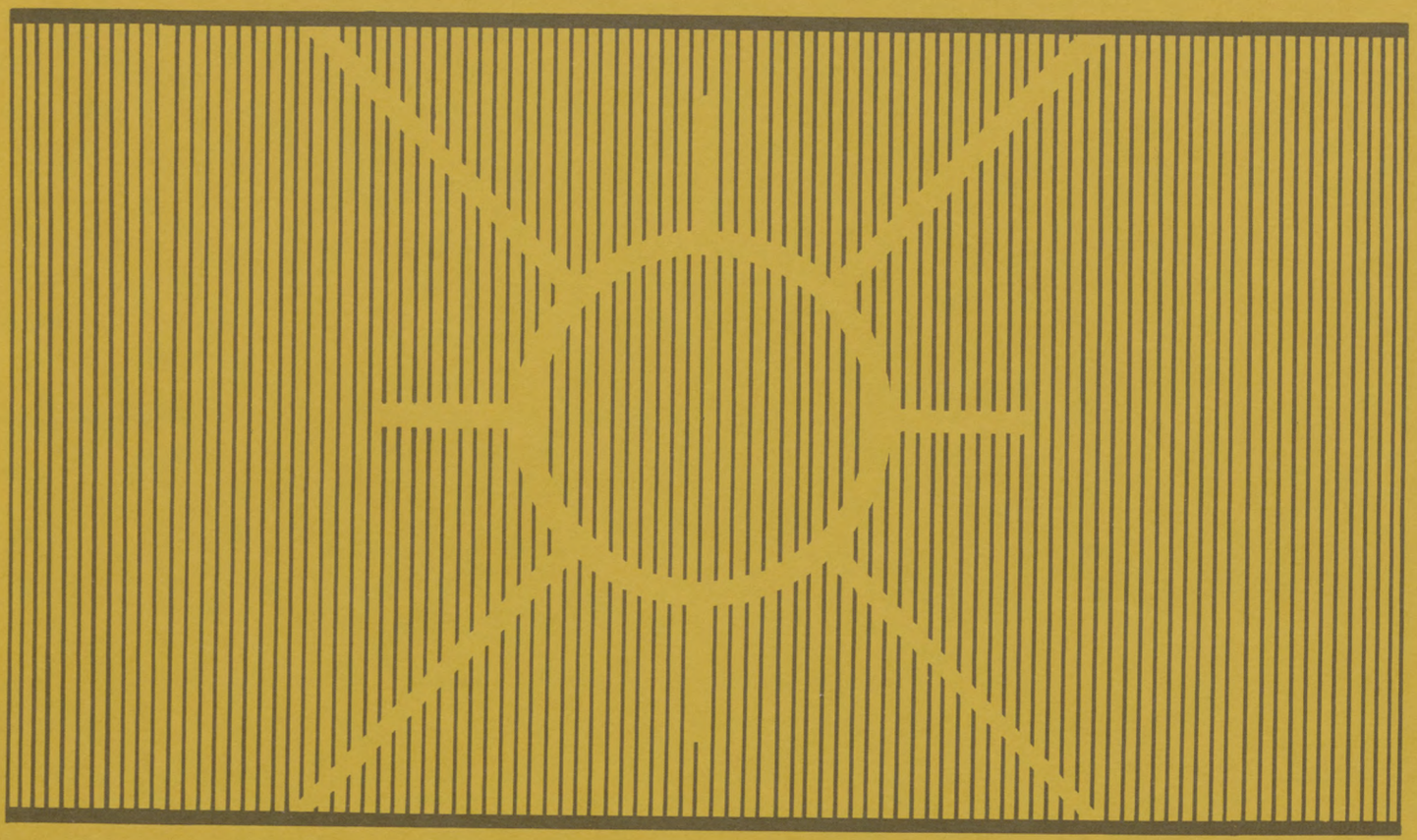

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Agricultural Marketing Cooperatives and Section 1 of the Capper-Volstead Act: Conditioning (Limited) Antitrust Immunity on Capper-Volstead Policy

I. Introduction

Agricultural marketing cooperatives in the United States are business associations whose principal purpose is to market farm products for producer members.[1] In 1980, there were 4,279 agricultural cooperatives engaged in some phase of marketing.[2] Net receipts from cooperative marketing exceeded $51.3 billion in 1982.[3] This represented about 30 percent of the value of agricultural products marketed at the first handler level in 1982.[4]

Agricultural marketing cooperatives are generally classified as being operating or bargaining cooperatives. In both types, farmers have combined for some purpose. Operating cooperatives are involved in the first stages of processing and marketing farm products.[5] Bargaining cooperatives represent producers in sales negotiations with first or second handlers. The bargaining cooperative seeks to enhance the terms of trade for members.[6]

Regardless of their purpose for the cooperative, farmers depend on the Capper-Volstead Act of 1922[7] for the authority to join together in cooperative associations without violating the antitrust laws.[8] Absent Capper-Volstead, a combination of farmers in a marketing cooperative might represent an unreasonable restraint of trade[9] and, in certain instances, might be characterized as a combination to monopolize trade

or commerce. Among other things, the Sherman Antitrust Act[10] prohibits combinations in restraint of trade[11] and combinations to monopolize any part of trade or commerce.[12] Section 5 of the Federal Trade Commission (FTC) Act[13] comprehends violations under the Sherman Act.[14] The Capper-Volstead authorization for farmer-combinations therefore extends to farmers certain protection from possible liability under the Sherman and FTC Acts.[15]

Capper-Volstead protection from antitrust liability is conditioned on the cooperative and its farmer members satisfying certain criteria.[16] These criteria are found in section 1 of the Capper-Volstead Act.[17] If the criteria are not satisfied, the cooperative is not entitled to protection from antitrust liability.[18] Even if the criteria are satisfied, a cooperative may still be subject to antitrust liability for conduct outside the scope of the Capper-Volstead Act.[19]

This article has two principal parts, both focusing on the central question of what qualifies a cooperative for Capper-Volstead protection from antitrust charges. First we review the case law on section 1 of the Capper-Volstead Act. Here we consider the minimum requirements for eligibility for Capper-Volstead protection. This is in contrast to identifying what conduct is outside the scope of Capper-Volstead protection.[20] In Part III we concentrate on the legal-economic meaning of the Capper-Volstead policy the Supreme Court announced in National Broiler Marketing Association v. United States.[21] We do this to determine if this policy restricts cooperative eligibility for antitrust protection.

II. Section 1 of the Capper-Volstead Act

A. Introduction

Section 1 of the Capper-Volstead Act provides that

> [p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes....[22]

Section 1 authorization for collective action is limited in several respects. Certain limitations serve to organize much of the case law on section 1 into three key issues: (1) who is a Capper-Volstead Act person; (2) who is a Capper-Volstead Act agricultural producer; and (3) which activities must a Capper-Volstead Act cooperative perform.

B. Who is a Capper-Volstead Act person?

The courts have not limited the meaning of who is a person under the Capper-Volstead Act to natural persons.[23] Instead, a "person" refers to several alternative organizational forms. Besides an agricultural producer who is organized as a sole proprietorship, a "person" includes a producer who is organized in a partnership or as a corporation.[24] Just as Capper-Volstead does not expressly constrain

the producer's decision on the form of legal organization best suited for his or her operation, neither does it restrict the size the operation can reach.[25]

C. Who is a Capper-Volstead Act agricultural producer?

Capper-Volstead authorizes collective action among those engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, or nut or fruit growers. In the early cases, the courts did not have much difficulty identifying who was not an agricultural producer. In United States v. Borden,[26] milk distributors were not treated as agricultural producers.[27] Twenty-one years later, the Court held that the private competing dairy processor and marketer with which the Maryland and Virginia Milk Producers Association had certain contractual arrangements was not an agricultural producer, either.[28] In Case-Swayne Co. v. Sunkist Growers, Inc.,[29] the Supreme Court rejected Sunkist's contention that Capper-Volstead protects any organizational structure provided growers receive the benefits of collective marketing.[30] The Court held that Capper-Volstead was intended to benefit only actual farmers and the associations they operate for their mutual help as producers.[31] The Court therefore denied Sunkist Capper-Volstead protection with respect to an alleged conspiracy with its privately owned and operated association members that did not grow citrus.[32]

The decisions in Borden, Maryland and Virginia Milk, and

Case-Swayne provide little policy guidance as to who is a Capper-Volstead agricultural producer. These decisions depend largely on statements in the legislative history of Capper-Volstead or on whether the person tilled the soil or raised livestock or produced livestock products. If the basic element in identifying who is a farmer is exposure to production risks, these decisions are inconsistent with the reality of an increasingly sophisticated U.S. production agriculture. As the organization and input base of agricultural production have evolved during this century, any number of parties have come to share in the responsibility and risks of agricultural production. In 1922 a crop producer might have borne all risks of production and market fluctuation. In the 1970's a crop producer might have entered into a preseason contract[33] with a processor, thereby sharing certain production and market risks. Because the organization of agricultural production has changed since passage of Capper-Volstead, some argued that so too should the definition of who is an agricultural producer. The Supreme Court addressed this issue in National Broiler Marketing Association v. United States.[34]

During the early 1970's, the National Broiler Marketing Association (NBMA) was a cooperative association performing various purchasing and marketing functions for its members.[35] Its membership included about seventy-five entities. These members were all involved in the production and marketing of broiler chickens.[36] All members were vertically integrated into various stages of broiler production.[37] Broilers being marketed often had been hatched in a member's hatchery

from eggs laid by the member's breeder flocks. Once the chicks were hatched, members would customarily contract with independent growers to raise the chicks until ready for slaughter. During this grow-out stage the members would provide the independent contractor with the necessary feed, veterinary services, and other supplies. Generally, the member would retain title to the chickens during this phase.[38] Once ready for market, the broilers would be shipped to processing plants which many of the members either owned or controlled and operated. There the broilers would be slaughtered and prepared for market.[39] Although this was the general pattern, six NBMA members did not own or control any breeder flocks or control any hatchery.[40] Three members did not own a breeder flock or hatchery or maintain a grow-out facility. These members would purchase chicks, place them with growers, and only later enter the production system.[41]

The Government charged NBMA with conspiring with its members and others to restrain trade in violation of section 1 of the Sherman Act.[42] NBMA answered, contending that because it was a cooperative association of agricultural producers, Capper-Volstead section 1 removed it from antitrust liability for the alleged conspiracy.[43] The district court concluded that all NBMA members had sufficient involvement in the production of broilers to be agricultural producers within the meaning of section 1.[44] The Fifth Circuit reversed, holding that not all NBMA members were farmers in the sense used in the Capper-Volstead Act.[45]

The specific issue on appeal to the Supreme Court was whether a

Capper-Volstead farmer includes a broiler producer who buys chicks and employs an independent contractor to raise the chicks until the ready-for-market stages.[46] The Court concluded that this limited involvement in breeding or hatching does not make a person a Capper-Volstead farmer.[47] In reaching its decision, the majority acknowledged that the Capper-Volstead Act allows certain agricultural producers to combine without being subject to antitrust liability.[48] But this immunity is conditioned on all members of the cooperative being agricultural producers. To determine whether the condition was satisfied, the majority had to identify who is a Capper-Volstead agricultural producer and whether all NBMA members were within the majority's definition. The majority's review of the legislative history of Capper-Volstead convinced it that the Act was designed to benefit agricultural producers who are exposed to the costs and risks of a fluctuating market and are not able individually to respond effectively to those costs and risks.[49] Congress expressly refused to extend the benefits of Capper-Volstead to the processors or packers to whom farmers sell their commodities, even if these parties choose to share certain costs and risks. The majority then reasoned that the economic role of those members not owning a breeder flock, a hatchery, or a grow-out facility was much like that of a processor or packer who enters into a pre-season contract or financing arrangement with a producer.[50] Hence, because not all NBMA members were Capper-Volstead farmers, the Court held that NBMA was not entitled to section 1 immunity from antitrust liability.[51]

Once the Court equated packers with those NBMA members not owning a breeder flock, hatchery, or grow-out facility, the holding in the case followed directly from Case-Swayne.[52] Because this ended the need for further inquiry, the Court did not address the potentially more interesting issue of whether, absent these members, the NBMA would have been entitled to section 1 protection.[53] Hence, the Court did not need to rely expressly on the policy it identified as underlying the Capper-Volstead Act.

Justice Brennan's concurring opinion develops the majority's policy.[54] Had the Court needed to go further, Brennan indicates that the relevant issue would have been whether a fully integrated agricultural producer performing its own processing or manufacturing is still a Capper-Volstead agricultural producer if also engaged in traditional farming activity.[55] Brennan's concern is that if such were the case, Capper-Volstead could be used as a shield permitting price fixing and territorial and market division.[56] According to Brennan, the more appropriate view is to define a Capper-Volstead agricultural producer in terms of what section 1 allows. That is, Capper-Volstead farmers are "persons engaged in agriculture who are insufficiently integrated to perform their own processing and who therefore can benefit from the exemption for cooperative handling, processing and marketing."[57]

Even without Brennan's concurrence, National Broiler stands for two propositions. First, Capper-Volstead protects only those persons directly engaged in the actual production of basic agricultural commodities. Second, Capper-Volstead is limited to those persons who are

exposed to the costs and risks of a fluctuating market and who are individually unable to respond effectively to such costs and risks.

D. Which activities must a Capper-Volstead Act cooperative perform?

Section 1 of Capper-Volstead enumerates activities which agricultural producers may collectively undertake to perform. These include processing, preparing for market, handling, and marketing.[58] There is no express indication in the Act as to whether a cooperative must perform all of these functions or whether it is enough that it perform one or several. Nor is it clear whether this list is exhaustive or merely representative of legitimate cooperative activity.[59] On these points, the case law has tended to address a couple issues: which basic activities must a cooperative perform to be eligible for Capper-Volstead protection and which activities do the terms, particularly marketing, comprehend.

The first indication of what the Supreme Court expected cooperatives to do was delivered in the form of what the Court expected cooperatives could do. In Maryland and Virginia Milk, Justice Black observed that Capper-Volstead makes "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."[60] The first major case to focus on which activities a cooperative must

perform and on the meaning of the section 1 terms was Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.[61]

In Treasure Valley, members of two potato bargaining cooperatives[62] sued two potato processors, Ore-Ida Foods, Inc. and J.R. Simplot Company.[63] The potato growers alleged that the processors agreed with each other to fix the prices offered to the growers, occasionally boycotted the potatoes grown by officers of the members' bargaining associations, and allocated growers among themselves.[64] The growers claimed that this conduct involved a combination leading to an unreasonable restraint of trade in violation of Sherman section 1 and monopolization or attempted monopolization of the relevant market, in violation of section 2 of the Sherman Act. The processors counterclaimed, asserting that the bargaining associations combined and conspired in restraint of trade.

The district court held that no violations of the antitrust laws had occurred.[65] On appeal to the Court of Appeals for the Ninth Circuit, a basic issue was whether either section 6 of the Clayton Act[66] or section 1 of the Capper-Volstead Act immunized the growers from the processor's counterclaim. The court held that the growers were immunized from antitrust liability on the alleged violations.[67]

The Ninth Circuit's decision rests on the law of agency and on a definition of marketing. The appeals court began by accepting the trial court holding that each cooperative was validly organized under section 6 of the Clayton Act.[68] The court next noted that under section 1 of Capper-Volstead, cooperatives can have a common marketing

agent.[69] From the law of agency, the court acknowledged that if the act of an agent is lawful, it is also lawful if the principals perform the same act. The court then held that if price fixing is within marketing, the two bargaining cooperatives could informally coordinate their negotiating efforts with the processors. To hold otherwise, according to the court, would be to impose serious legal consequences on an insignificant organizational distinction.[70] Having made this determination, the court had only to determine which activities a marketing agent can perform. If the agent can perform them so can the principals perform them together without the agent.

The court assessed what marketing comprehends in the context of the facts in the case. The court noted that the primary activities of the grower cooperatives included bargaining for their respective members on prices, terms, and conditions of preseason potato contracts.[71] In doing this, the two cooperatives coordinated their bargaining activity, trying to obtain similar contracts from each processor so that all member growers received the same price regardless of which cooperative they belonged to and the processor to whom each sold individually.[72]

The court concluded that contrary to the processors' claim, marketing involves more than selling.[73] The definition of marketing that the court offered identifies marketing as "'[t]he aggregate of functions involved in transferring title and in moving goods from producer to consumer, including <u>among others</u> buying, selling, storing, transporting, standardizing, financing, risk bearing, and <u>supplying</u>

market information.'"[74] According to the court, the cooperatives' bargaining activity required providing market information and performing other acts helpful for the sales the individual grower members would make to processors. These activities were all associated with the transfer of title to the potatoes and therefore were marketing functions. Since principals (the cooperatives) can lawfully do that which is lawful for their common agent and because the cooperatives' bargaining activities represented marketing functions lawful for an agent to perform, the court held that Capper-Volstead was satisfied.[75]

Treasure Valley stands for three relevant propositions. First, the marketing agency provision in section 1 authorizes two or more cooperatives informally to coordinate marketing activity among themselves, not needing to engage a separate marketing agent.[76] Second, the marketing agency provision also entitles cooperatives to antitrust protection even if they are only engaged in bargaining for their members. And third, included in marketing activity is price fixing on preseason contracts.

Treasure Valley does not answer whether producers can lawfully organize a cooperative for the sole purpose of price fixing. The issue is especially significant for agricultural bargaining cooperatives.[77] As illustrated in Treasure Valley, cooperatives may operate primarily to negotiate prices or price ranges that commodity purchasers are to pay member producers. From the producer's standpoint, this collective bargaining might not guarantee a sale or a preseason contract, but if the purchaser is to deal with a member, it must be at the negotiated

price. Collective bargaining serves to overcome the unequal bargaining power growers would otherwise expect to have in direct, individual price negotiations with a processor. The legitimacy of the bargaining cooperative is therefore of considerable importance to these growers.[78]

The issue of what a cooperative, particularly a bargaining cooperative, must do to be eligible for section 1 protection has been expressly addressed in Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative[79] and in Fairdale Farms, Inc. v. Yankee Milk, Inc.[80]

During the early 1970's, the Central California Lettuce Producers Cooperative (Central Lettuce), was a nonstock, nonprofit cooperative.[81] Its principal activity was to set prices, but it also undertook certain other activities related to marketing lettuce.[82] At weekly meetings during 1973 and 1974, member-growers sitting on the executive board determined pricing policy for the twenty-two members of the cooperative. Members conducted their own sales program, having agreed with other members to sell lettuce within the ceiling and floor prices Central Lettuce established. The cooperative did not ship, handle, harvest, or grow any lettuce. All sales negotiations were between buyers and member growers. During this time, Northern California Supermarkets, Inc. (Northern) was a retail grocer in northern California.[83] Northern purchased lettuce the grower members produced and marketed.[84]

In the suit, Northern charged Central Lettuce and its members on the executive board with an unlawful combination and conspiracy to

restrain trade in violation of section 1 of the Sherman Act.[85] Northern claimed that Central Lettuce and its members eliminated competition in the sale and marketing of fresh lettuce and raised, fixed, controlled, and established prices and price ranges for member sales. Central Lettuce asserted that section 6 of the Clayton Act and section 1 of the Capper-Volstead Act immunized it from the alleged antitrust violation.[86] Northern responded that section 6 and section 1 only authorize price fixing by a cooperative when it "is ancillary to and a necessary incident of otherwise legitimate collective activity."[87]

The district court granted Central Lettuce's motion for summary judgment.[88] The court held that section 6 and section 1, each and together, immunized the cooperative and its members from the alleged antitrust violation. With respect to immunity under Capper-Volstead, the court found Treasure Valley to be controlling.[89] To Northern's claim that price fixing, in and of itself, is not within the statutory protection for cooperatives, the court held that an agricultural cooperative can fix prices unless it engages in predatory practices or monopolization.[90] Moreover, one price does not need to be collectively set. The court reasoned that in terms of the restraint on trade, it is preferable to have collective action in setting a price range and allowing each member to undertake its own bargaining within that range than to require the cooperative to negotiate one price for all transactions.[91]

During the course of the private litigation in Central Lettuce, the Federal Trade Commission was conducting a parallel proceeding on

the same facts.[92] In 1974, the Commission issued a complaint charging Central Lettuce and its members with violating section 5 of the FTC Act by illegally agreeing among themselves on the prices at which members would sell their lettuce.[93] The administrative law judge (ALJ) held for the FTC, rejecting Central Lettuce's claim to Capper-Volstead immunity.[94] The ALJ found that the cooperative merely allowed a group of growers to "put into effect a plan to manipulate the market price and then go their separate ways."[95] According to the ALJ this was not compatible with section 1 because the members were not acting to counteract buyers' market power but were acting to manipulate price.[96]

On appeal, the Commission vacated the ALJ order and dismissed the complaint.[97] The Commission addressed two basic issues: whether a Capper-Volstead cooperative must engage in all enumerated functions and whether collective marketing includes price fixing.[98]

Unlike the analysis in the private Central Lettuce case, the Commission relied on the language in section 1 to hold that a cooperative does not need to engage in all enumerated activities.[99] The Commission noted that according to section 1 the functions are activities in which a cooperative may, not must, engage. Supporting this finding was the Commission's observation that Congress "has manifested no intent to mandate any particular degree of vertical integration as a precondition to Capper-Volstead immunity."[100]

The Commission then relied on the legislative history of Capper-Volstead and on the decisions in Treasure Valley and Central Lettuce to find that marketing includes price fixing.[101] The Commission rejected

as a moot formality the claim that Central Lettuce lost any protection because members sold to buyers at the established prices instead of the cooperative doing this for the members.[102]

Two mechanisms emerged from the Central Lettuce cases that allow a party to argue that a cooperative performing limited functions is entitled to section 1 protection from antitrust charges. The district court in Central Lettuce reasoned that because a less significant restraint of trade is imposed, a cooperative should receive protection when it performs only limited functions as well as a range of services. The FTC found that the entire issue could be handled by looking at the plain meaning of section 1. These decisions and Treasure Valley are uniform in the position that price fixing constitutes collective marketing.

Any doubt that these decisions would somehow be distinguished on their facts seems to have been removed. The Second Circuit reached a conclusion consistent with Central Lettuce in Fairdale Farms, Inc. v. Yankee Milk, Inc.[103] The Sixth Circuit has indicated its adherence as well.[104]

In Fairdale Farms, the plaintiff (Fairdale) was a producer and dealer-processor of milk.[105] During the 1970's, it bought and sold milk in Vermont, New York, and Massachusetts. At this time, Yankee Milk, Inc. (Yankee) was a milk producers' cooperative with about 6,000 New England farmers as members. Sometime during or after 1973, Yankee and six other area cooperatives organized Regional Cooperative Marketing Agency, Inc. (RCMA) as an agricultural marketing cooperative.

RCMA's primary function was to establish prices for member farmers' milk.[106] Between 1973 and 1975, farmers received milk prices generally higher than federal milk marketing order prices. Until 1974, Fairdale purchased a significant share of its milk from Yankee members. These purchases ceased in 1974, however, when Fairdale refused to pay prices in excess of those established under the federal milk marketing order.[107]

In 1976, Fairdale sued Yankee and RCMA, charging price fixing, monopolizing, and attempting to monopolize.[108] Yankee and RCMA answered that the Capper-Volstead Act protected them from antitrust liability. In response, Fairdale argued that a cooperative association organized for the sole purpose of fixing prices is not entitled to Capper-Volstead protection. The district court granted a Yankee and RCMA motion for summary judgment on the price fixing charge.[109]

On appeal, the Court of Appeals for the Second Circuit affirmed the lower court decision granting summary judgment on the price fixing charge.[110] In doing so, the court rejected Fairdale's claim that RCMA had to do more than just fix prices in order to receive section 1 protection.[111] The court reasoned that "[i]t would be strange indeed if participation in this portion of the marketing process, standing alone, would subject a cooperative to antitrust liability, when the exercise of the full range of activities covered by Capper-Volstead would not."[112] Finally, the court found that establishing price is an integral part of marketing.[113]

The Court of Appeals for the Sixth Circuit has expressed its

agreement with Fairdale Farms. In United States v. Dairymen, Inc.,[114] that court noted that the Capper-Volstead Act "permits an agricultural cooperative to be formed solely to fix the price at which its members products are sold."[115]

Treasure Valley, the Central Lettuce cases, and Fairdale Farms represent the current answers to what section 1 requires a cooperative to undertake and to whether price fixing represents marketing. A cooperative does not need to engage in all section 1 activities. According to these decisions, marketing includes price fixing. Indeed, the decisions indicate that it is presumptively lawful for a cooperative to be formed solely for the purpose of price fixing. Because the reasoning in Central Lettuce and Fairdale Farms does not rely on the marketing agent language in section 1, the logical extension is that it should be lawful for a cooperative to be formed solely for the purpose of engaging in any functions that can be characterized as being within processing, preparing for market, handling, or marketing.

E. Capper-Volstead policy as a constraint on eligibility for protection from antitrust charges

Depending on the cases relied on, the definition of a Capper-Volstead cooperative varies. Absent the policy the Supreme Court identified in National Broiler, section 1 case law on the issues raised in the preceding sections might arguably be summarized as follows: An

agricultural cooperative entitled to Capper-Volstead protection from antitrust charges is an association of business organizations; these business organizations are each directly engaged in agricultural production at the farm level and have combined in order to perform any function that can be characterized as being within processing or preparing for market or handling or marketing.[116] Introducing the National Broiler policy statement, a Capper-Volstead cooperative is all these things but its Capper-Volstead legitimacy also depends on satisfying Capper-Volstead policy. That is, each member is exposed to the costs and risks of a fluctuating market and is unable to respond effectively in an individual capacity to those costs and risks.

The majority in National Broiler relied on legislative history to explain its interpretation of Capper-Volstead policy.[117] The Court reasoned that Congress allowed joint activity in cooperatives in order to bolster farmers' "market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors."[118] This authorization was in response to a congressional perception that, acting individually, farmers were not able to deal effectively with market conditions. The perishable nature of their products gave them little choice as to when to sell. And concentration among buyers might mean they would have little choice as to whom they could sell. The result was that they could lose a good share of any potential profits from farming.[119]

An awareness of the policy identified in National Broiler serves to clarify why Congress authorized collective action.[120] It also

serves to place a policy constraint on when collective action is appropriate. Recent section 1 case law has focused on the activities a cooperative must perform to be entitled to Capper-Volstead protection from antitrust charges.[121] This case law has largely rejected or been silent on the policy statement in National Broiler.

The district court in Central Lettuce and the Second Circuit in Fairdale Farms both held that a cooperative can be formed for the single purpose of marketing. The authorization does not depend on the joint marketing agency language the Ninth Circuit relied on in Treasure Valley.[122] In reaching their holdings, the district court and the Second Circuit balanced the Capper-Volstead authorization for restraints of trade through collective action with the antitrust policy of promoting competition. The courts reasoned that in terms of the restraint imposed, it is preferable to allow a cooperative to engage in a single activity than to condition section 1 protection for that activity on the performance of a host of other activities. That is, these courts reasoned that the restraint on competition is less when a cooperative only markets than when it processes, prepares for market, handles, and markets members' production. A problem with these analyses is the implication that a cooperative can always be formed solely for the purpose of fixing price. The restraint on trade from a cartel of integrated producers will not necessarily be less than the restraint from the collective activities of nonintegrated producers. Moreover, the decisions would be at odds with National Broiler policy if used as authority to argue that a cooperative can be formed solely

to engage in price fixing even though it is comprised of members who are quite capable of responding effectively as individuals to the costs and risks of a fluctuating market. For these members, Capper-Volstead could be a shield to permit price manipulation.[123] The function for the exemption would be lost.[124] To be consistent with National Broiler, the district court decision in Central Lettuce and the Second Circuit decision in Fairdale Farms must be confined: Assuming a cooperative's members are unable to respond effectively to the price fluctuations and market risk each experiences individually,[125] the cooperative can be formed solely for the purpose of fixing price. If members are not vulnerable, cooperative price fixing alone may be a signal that Capper-Volstead protection is being asserted illegitimately.

The FTC holding in Central Lettuce that a cooperative can be formed solely to engage in marketing is based upon a statutory construction of section 1. Despite providing a reasonable argument on why cooperatives do not need to engage in all activities, the Commission rejected the ALJ concern that Capper-Volstead does not protect cooperatives having members with market power adequate to respond to market risks.[126] With this, the Commission stripped Capper-Volstead of the policy content the Supreme Court would identify in National Broiler. To be consistent with National Broiler, the FTC decision in Central Lettuce must be confined to the specific holding that a validly constituted cooperative may engage in any of the enumerated functions. The cooperative is validly constituted for Capper-Volstead purposes if, among other things, it functions

compatibly with Capper-Volstead policy.

Capper-Volstead policy goes beyond the Central Lettuce and Fairdale Farms holdings on what a cooperative must do. Although the Supreme Court identified the policy in National Broiler, its decision in that case does not operationalize its policy concerns. Left open was whether a cooperative passes muster on the issue of who is a Capper-Volstead farmer if it is similar to the National Broiler Marketing Association but all members are fully integrated into production.[127] Also in National Broiler, Justices Brennan and White expressed discomfort with allowing any organizational form to be a Capper-Volstead person.[128]

Whether Capper-Volstead policy will provide guidance in section 1 cases depends on understanding what the policy means and how it applies. In Part III we evaluate the legal-economic content of the policy, identifying how courts and cooperatives might assess compatibility with Capper-Volstead policy.

III. A Legal-Economic Analysis of Capper-Volstead Policy

A. Introduction

A producer's income from farming is a function of the inputs he uses, what he pays for the inputs, his output, and the price he receives per unit of the output. His income will vary according to input shortages that drive up cost on those inputs and the cost of substitutes, according to the quantity he produces with a given set of inputs subject to weather conditions from pre-planting through harvesting, and according to the unit price he receives for his output or costs he must incur to sell his output, as influenced by aggregate supply and demand and by his relative bargaining strength with commodity purchasers.

The Supreme Court's explanation in National Broiler of the costs and risks of a fluctuating market addresses two themes relevant to a farmer's income. According to the Court, Capper-Volstead represented congressional concerns with both the nature of production agriculture and the organization of the markets in which farmers compete. Cast in a current context, a farmer acting individually has only a limited ability to cope with the risks that might lead to undesirable sales terms for his output. Compounding these lower returns is the farmer's inability to negotiate with relatively powerful commodity buyers. With section 1 protection from antitrust charges, a farmer can join with other farmers to cope with the risks and uncertainties that might lead to undesirable sales terms. They might also be able collectively to

respond to buyers with market power by exerting their own market power or by bypassing first handlers altogether.

Given this interpretation of the Supreme Court's explanation of Capper-Volstead policy, we consider the basis for these concerns. To introduce this, we identify various factors influencing farm income, alternatives farmers have to respond to these factors, and limits on their ability to respond. Following this development of the risks and uncertainties associated with agricultural production and marketing, we assess how a farmer can use a cooperative to alter these circumstances. From this it becomes apparent that a marketing cooperative cannot respond to all factors influencing farm income. Rather, its focus is on terms of sale for a producer's output. Throughout this discussion our purpose is to isolate indicators of when a member may not be using a cooperative consistently with Capper-Volstead policy.

B. Factors influencing farm income

1. Risk and uncertainty in agriculture

The risk and uncertainty in agriculture that influence farm income can be associated with production and with price.[129] The risks and uncertainties in production are those factors responsible for variations in output. These factors may include weather, the prevalence of pests and disease, and other natural causes such as hail or fire. They are sources of risk or uncertainty because at the time a farmer or livestock producer makes a production decision, he does not

know the effects the factors will have on final production. Agricultural producers also experience risk and uncertainty on price and other sales terms. These are associated with variations in the prices paid for inputs yet to be purchased or output yet to be harvested. Supply or demand variability may also generate price variability.[130]

Farmers who are averse to income risk will take steps to respond to the risk.[131] There are two basic ways a farmer can respond.[132] He can act to reduce the total risk he faces and he can act to share the risk or to transfer it to someone for whom bearing the risk is less costly.

Farmers can reduce the risk associated with income variability in a variety of ways. The farmer can choose to produce less risky commodities. That is, the farmer can produce commodities less subject to production or consumption fluctuations or commodities where the requisite production technology is relatively interchangeable.[133] The farmer might also adopt production technologies less prone to variation in output. The farmer might diversify the commodities grown--say, planting several crops where high receipts on one might offset lower revenues from another. The farmer can invest in facilities to store his production, waiting for a price sufficiently high to offset storage costs. This might require assuming other risks by storing corn or feeding it to beef calves which will later be sold to packers. Farmers can acquire more information about price or production. Producers can also save in years of high receipts and in years of low receipts they

can borrow or seek off-farm employment.

Farmers have two primary motives for transferring or sharing risk. The risk may be transferred to an individual more able or willing to bear it.[134] By sharing risk with others, the risk each faces declines. This may also reduce the aggregate cost of the risk.[135]

Newbery and Stiglitz identify several institutional mechanisms for transferring or sharing risk in agriculture.[136] In certain share-cropping arrangements, the worker and the landlord share risks. Each's share is proportional to output. When a farmer enters into a preseason contract with a processor, the processor agrees to purchase production meeting certain standards. The processor purchases this production at a given price or at a price determined upon delivery using an agreed upon formula. Under this arrangement, the processor has assumed some of the risks associated with price.[137] In the limit, this could become a wage system where the producer becomes an employee paid a wage independent of production or price. Farmers can buy crop insurance to offset losses from hail, drought, or flood. They can use the futures market to hedge against price fluctuations.[138] If the producer is a large corporation owning a farm, the risks associated with profits from production are shared among corporate stockholders. The risk any one stockholder bears may be relatively slight. Finally, a farmer shares price risk with taxpayers when he participates in government market order, price support, or other programs.[139]

There are constraints on a farmer's ability to reduce risk or to transfer it or to share it with others. Many represent some form of

market failure. The production technologies or information necessary to reduce risk are unlikely to be sold in continuous units adaptable to each farmer's needs. For example, if certain market news services sell information packages, the farmer may not have access to the information if the minimum unit exceeds his demand. The farmer may also be limited in his ability to share or to transfer risk. This arises in a couple situations. If a farmer receives no reward for the inputs he uses, such as the quality of his management, he is not likely to use additional or better quality inputs. Unless the potential transferree or sharer can monitor input usage, this party is unlikely to accept any risks.[140] In addition, different farmers experience different degrees of risk. Those who might accept a farmer's risk may not be able to distinguish between farmers who are "good" risks and farmers who are "bad" risks. Since they cannot distinguish among them, they do not accept their risks.[141] The nature of the production itself constrains a farmer's ability to respond to risk. The more perishable the product, the shorter the time frame a producer has for marketing the product. Perishability may limit the number of outlets available to the producer. It may also confine him to taking whatever price is available just prior to the product beginning to deteriorate, even if it is only temporarily low.

2. Inferior bargaining power

If a farmer is in an inferior bargaining position relative to a

buyer, he may experience lower returns with considerable certainty. The farmer may also be subject to greater uncertainty as to how he will be treated and whether he will have an outlet for his production at prevailing market prices. To the degree market structure corresponds to bargaining power, it therefore comprehends unfavorable price and nonprice terms that may occur with certainty and the risk of even more undesirable sales terms.

Insofar as Congress was concerned that farmers had inferior bargaining power with buyers, Congress had in mind particular market structures. Inferior bargaining power suggests that Congress perceived that in a relevant market atomistically organized farmers sold their output to relatively few firms. For a given commodity, there would be a sufficiently large number of independently competing farmers in the market, none of whom could significantly affect the price of the relatively homogeneous commodity. Buyers, on the other hand, would be fewer in number and would be able to pay farmers a price less than the value of output to the buyer. As compared to the price and total output occurring if buyers were competitively structured, farmers would market less output overall and would receive a lower price.[142]

Market structure among commodity buyers and the potential for market power within a relevant geographic market depend on several factors. If the buyer is a processor and the minimum efficient processing plant is large relative to output in the relevant market, economies of scale may explain a small number of buyers in the relevant market. Other barriers to entry may enhance the market power a buyer

in such a situation might possess. There will be less new entry or incumbent firm expansion in processing the greater the capital requirements for a viable processing facility or the fewer locations available[143] or the more extensive is the requisite distribution system for the processed commodity. If an incumbent processor faces downstream buyers in numerous markets, the downstream buyers may be unwilling to risk the processor's reprisal by abandoning him in a particular market in favor of a new competitor, thereby discouraging new entry. In general, the less dependent a processor is on a given farmer's production, the more power the processor has. This might be because there are other producers, because the processor buys in more than one market, or because the commodity has numerous varieties, maturing dates, harvest periods, sizes, and grades that the processor can adjust to handle.[144]

An individual farmer's vulnerability to a buyer's terms will be expressed in the price he receives, how much he is able to sell, if any, and the nonprice terms of sale. For a buyer competing in an imperfectly structured market, the degree of a farmer's vulnerability to the processor or handler and hence the buyer's market power depend on several factors, all influencing the inelasticity of the farmer's shortrun supply function. The greater are shipping costs to a competing processor due to distance or a bulky output or both, the more buyers can depress price before farmers will sell to an alternative outlet. If the commodity--lettuce, for instance--has only a fresh market as opposed to fresh, frozen, and canned outlets, the farmer will

be more vulnerable to a buyer's terms. This is in contrast to the situation where the commodity--say, corn--can be used as an input for another farm commodity--such as fed beef. The nature of a commodity also influences a producers' vulnerability to a buyer's terms. If a commodity is perishable, a crop producer will sell at a price that covers harvesting and selling expenses and some of his investment rather than watch the crop rot in the fields or on the trees. Because animals continue to eat, a livestock producer must destroy his livestock or add to his investment by continuing to feed or sell and recover some of his investment. If feeding is too expensive or if he is not equipped to undertake further finishing, he must destroy the livestock or sell.

C. Agricultural marketing cooperatives and Capper-Volstead policy

1. Sales terms on output

Capper-Volstead policy anticipates that an individual farmer[145] will use an agricultural cooperative to respond to the risk and market power he cannot deal with effectively on his own. This has implications for whether a cooperative asserting Capper-Volstead protection from antitrust charges is entitled to protection. Eligibility will depend on whether each farmer-member is using the cooperative as a risk management device or as a means of negotiating with or bypassing buyers of raw commodities or both. As one

alternative for dealing with risk, a cooperative would serve to help a producer reduce or to accept risk from the individual member or to respond to factors limiting a producer's ability to reduce or to transfer risk. Or the cooperative could do all of these things. As a device for market power--the power to affect terms of sale to the farmer's advantage--the cooperative can either negotiate with or bypass first handlers.

Marketing cooperatives do not, however, address all aspects of farm income. A Capper-Volstead cooperative does not cover every dimension of input and output sales terms or extend to all aspects of production and price risk. Capper-Volstead authorizes collective processing, preparing for market, handling and marketing. It therefore is concerned with output; it does not comprehend input supplies or input prices.[146] And because a cooperative does not affect production,[147] the focus under Capper-Volstead must be on the terms of sale of a producer's output.

2. Marketing cooperatives and sales terms on output

In a system of perfectly organized and functioning markets, individuals would have a profit incentive to accept the production and price risks farmers seek to modify. In that system there would be no economic entity with market power; an impersonally set price would perfectly organize individual decisions.

As a business organization, the cooperative is an institution

farmers organize because markets do not perform perfectly. The cooperative is a response to some perception of market failure.[148] When producers of a certain commodity believe their terms of trade are unacceptable, they might organize either an operating or a bargaining cooperative.

In an operating cooperative, producers collectively undertake activities occurring past the farm level. This may involve "product procurement, sorting, preparing for market, storage, sales, transportation, and processing."[149] The underlying motive for organizing an operating cooperative is to increase farmer returns. The cooperative might accomplish this by earning some of the profits involved in marketing, by bypassing monopsonistically or oligopsonistically organized buyers, by organizing or performing marketing functions more efficiently, by exercising market power over terms of trade, or by ensuring that the producer has an outlet for his product.[150]

Through a bargaining cooperative, farmers join together to influence their terms of sale with the buyers each farmer would otherwise face on his own.[151] Sales terms include price or methods for determining price as well as such things as quality standards, grading procedures, settlement procedures or hauling allowances.[152] Bargaining cooperatives attempt to influence terms of trade in different ways. Some take title to members' production and negotiate sales terms with buyers.[153] In other bargaining cooperatives, members designate the cooperative as the exclusive bargaining or selling agent for their production.[154] Some bargaining cooperatives do not negotiate with

buyers but gather information and provide members with a forum for determining the common sales terms each will individually require from buyers.[155]

Operating and bargaining cooperatives use various methods to help members reduce the risk of unfavorable sales terms. When a cooperative provides or enhances the probability of an outlet for a member's production, this reduces the risk of not selling the output. By increasing the information members have about grading standards or delivery conditions or market forecasts, the cooperative may reduce a member's exposure to unfavorable price and nonprice factors. Through collective negotiation with buyers, a cooperative may deter a buyer from selectively discriminating against members on price or quality differentials or other sales terms. If the cooperative works to develop and expand markets for output, this may also reduce the likelihood of lower prices.

The cooperative can also accept some of the risk of price fluctuations the producer confronts. If a producer's output is ready for market at various times or if there are alternative outlets, the output might command a different price depending on when or where it is sold. If the producer sells to his cooperative, the cooperative can pay him in either of two general ways. It can keep track of the receipts on his output, these receipts being a function of what the cooperative received when it sold the output. Alternatively, and more realistically, the cooperative will combine or pool his output with that of other members. The cooperative will distribute this total

output between markets or outlets or sell it over a period of time or process it and sell the processed product. The cooperative then pays the producer his share of the returns net of his portion of operating and fixed costs. This price reflects an average received over the sales. The member's share may be measured by contribution according to physical volume, market value, quality, or some other agreed upon basis.[156]

As a response to factors limiting a producer's ability to reduce or transfer risk, the cooperative might undertake several functions. Collectively, producers may be able to overcome technological or informational lumpiness. By combining the output of many small producers to meet contract requirements, they may have access to futures markets for hedging. The producers acting together might also be able to afford better managerial or technical support. An operating cooperative engaged in processing may extend the nonintegrated producers' marketing time frame, thereby making perishability less a constraint on ability to respond to risk. Such a cooperative is also potentially a competitor with powerful proprietary firms. By giving nonintegrated producers an alternative outlet, the cooperative may also diminish proprietary firms' market power.

Aside from measures dealing with risk, a cooperative may enhance the return a producer receives for his output.[157] When an operating cooperative assembles or processes farm output, the producer will receive a price reflecting the value of his output and his share of any profits from the marketing activities. Mighell and Jones observe that

any long-run ability to return higher prices will depend on the cooperative developing a differentiated product with a special brand name and monitoring the quantity it permits to flow into the processed product.[158] Youde and Helmberger add that this market power is more available to a cooperative handling consumer products since "product identification and differentiation are easier to attain at that level."[159]

Whereas the operating cooperative might bypass existing proprietary firms, the bargaining cooperative is a means of collectively confronting first or second handlers. The enhanced returns farmers might receive are not necessarily coerced, however. Gains from bargaining may derive from the cooperative eliminating duplicative or inefficient functions and services.[160] The buyer may be willing to pay a higher price if the cooperative can assure him a dependable supply of a commodity of a reasonably uniform quality.[161] Or, if dealing with the cooperative instead of each of its members reduces transactions costs, some of the buyer's savings may be passed on to the cooperative or to producers directly.[162]

If a market were perfectly competitive with all producers having perfect information, a producer would not accept a price lower than the market price. When markets are not perfectly competitive with producers having only limited market information, buyers may pay a price less than producers would receive in a perfectly competitive market,[163] possibly exploiting a producer's lack of individual knowledge concerning market conditions and economic relationships.[164]

The bargaining cooperative is a means of countervailing a buyer's power. And, because bargaining subjects market terms to more scrutiny, a buyer is less able to exploit an individual farmer's lack of information.[165]

A bargaining cooperative's ability to countervail market power depends on several conditions. Only in certain circumstances will a cooperative have the potential for improving farmers' price and income, and these circumstances will not be satisfied for all commodities.[166] A principal requirement for the cooperative to raise price above the competitive level will be the cooperative's ability to control output.[167] Since the cooperative qua cooperative only controls the disposition of output among outlets,[168] this condition must be satisfied with some other mechanism--especially if there are a large number of producers and production occurs over a broad geographic area.[169] Hoos points to market orders as one alternative.[170] Mighell and Jones expect that market power will be confined to instances where production is narrowly limited as a result of particular climate or soil conditions.[171] Absent control over supply, the potential for price enhancement depends on the degree of competition among buyers for producers' output.[172] As competition among buyers "approaches the limit of perfect competition, the potential for farmer gains erodes away and disappears in the long run."[173] The potential for long-term gain from bargaining is therefore greatest when producers would otherwise encounter sub-competitive prices associated with monopsony or monopsonistic competition.[174] In situations of monopsonistic

competition, the cooperative's success in raising price toward the competitive level will depend on how jealously buyers guard their market share[175] and on how well the cooperative can manipulate buyers. The cooperative will be more successful the better it alters or threatens to alter the distribution of producers' output depending on buyer willingness to make price concessions.[176] Doing this will be more manageable the fewer uses the output has.[177] Helmberger and Hoos expect that the greatest gains from bargaining will be in processing fruits and vegetables, sugar beets, and fluid milk because conditions necessary for success are more prevalent with those commodities.[178]

3. Policy limits on access to Capper-Volstead

Several assumptions are basic to the notion that a producer is using a cooperative to address terms of trade in a manner consistent with Capper-Volstead policy. If the cooperative is to respond to risk, there must be exposure to risk and the producer must be risk averse. If the cooperative is to create market power, this suggests that absent collective activity a producer has insignificant market power relative to buyers.

A producer's exposure to the risk of fluctuating prices leading to lower returns or to undesirable non-price sales terms depends on the nature of his output, on market conditions, and on steps he has already taken to reduce his exposure. At the farm level, spot prices are likely to fluctuate for most commodities.[179] The atomistic nature of

production, a relatively homogeneous output, and unpredictable shocks to supply and demand dictate price fluctuations in the prices farmers receive as price takers. The more perishable the output, the more exposed is the farmer to the risk of having to take even a temporarily low price or of having to acquiesce to non-price sales terms that further reduce his economic profits.[180] In addition to whatever is possible with a cooperative, a producer may be able to reduce his exposure to undesirable sales terms. The producer may be able to use the futures market or he may participate in commodity price support programs. The producer might overcome the problem of perishability by integrating forward into processing.[181] If the processed product is less perishable, he may be able to withhold selling it at adverse terms. Alternatively, the producer organized as a large public corporation can transfer risk to its shareholders.[182] The more successful are these tools, the less exposed is the producer to risk and the less useful will a cooperative be as a risk management device.

The assumption that producers are risk averse and that the absence of risk aversion might provide a limit on eligibility for Capper-Volstead protection anticipates that we can discern risk preferences. This may be unrealistic. Perceiving individual risk preferences is no easy task and measurement tools are imperfect.[183] Generally, there will be considerable heterogeneity in risk preferences even among individuals having about the same business organization and personal characteristics.[184] And evidence indicates that, at least at the farm level, an individual's willingness to undertake monetary risk will

change from situation to situation.[185]

If a cooperative addresses undesirable sales terms that result from inferior bargaining power, this assumes that absent the cooperative the producer has insignificant market power in the relevant product and geographic market. The more competitively organized are producers in this market when they commit their output to the cooperative and the less competitively organized are buyers, the more likely the assumption will be met. This means that the absolute size of a producer is less important than his size relative to other sellers and to buyers.[186] Factors influencing the competitive organization of producer sellers include barriers to entry. If a producer vertically integrates to the point where he is able to differentiate his output, he raises the barriers to entry for other firms. Differentiation is more possible on consumer products than on products sold for further processing.[187] Investment, location, and access to resources will also affect the barriers to entry.[188] Given any barriers to entry, if a producer has a number of outlets for his product or for his output at various stages, he will be less subject to market power among buyers in any particular market.

Underlying the preceding arguments, though not ensuring that a producer satisfies Capper-Volstead policy, is his position relative to other producers and to buyers at the stage he commits his product to collective activity. The less integrated is the producer of a basic agricultural commodity, the more likely it is that the risk and market power assumptions will be met. When a producer undertakes various

vertical functions past harvesting a crop or selling livestock or selling an unprocessed animal product such as milk, the more steps he may have taken to limit his exposure to unfavorable sales terms or to a first handler's market power. Having the resources to undertake these activities may also indicate that the producer is organized or otherwise able to deal effectively with at least some risk or some buyers.

The activities an agricultural producer performs with respect to his output relative to those the cooperative performs provides certain insights as to whether the cooperative is entitled to Capper-Volstead protection. The more removed a cooperative is from basic agricultural production at the farm level when it begins to operate, the more possible it is comprised of producers Congress did not intend to protect. A cooperative of producers each vertically integrated into, say, processing may represent something quite different from a cooperative of many producers who are not vertically integrated. Acting individually, the nonintegrated producers are more likely to be fully exposed to middlemen in the marketing process. As price takers, they can use the cooperative to bypass or to organize their sales to these middlemen regardless of the competitive organization of buyers.[189] Through the cooperative they can respond to the market conditions each would otherwise face when offering his often perishable or bulky output to buyers. In contrast to the nonintegrated producer, the vertically integrated producer may face a qualitatively different set of market conditions at the point he individually offers his output to buyers.

By undertaking various post-production activities, this producer may have increased the number of outlets for his production, he may have changed the form of the output--say, by processing it to overcome perishability--so as to increase the time he has for marketing, or he may have differentiated the product--giving him some degree of market power. The vertically integrated producer who undertakes these activities has taken steps to address market conditions at the interface between the farm level and the market system. As Justice Brennan pointed out in National Broiler, when a producer integrates into processing, preparing, handling, and marketing, section 1 has little significance.[190] The producer has largely supplanted middlemen on his own instead of through a cooperative. Moreover, to the extent there are proprietary but non-producing firms performing some of the same vertical functions, the integrated producer and the proprietary firm face similar post-farm market conditions. They are also being compensated for some of the same activities, such as managing labor, that have nothing to do with production at the farm level[191] and the basis for Capper-Volstead protection in the first place. A difference between the two firms exists, however, if the vertically integrated producer can join a cooperative; the antitrust laws forbid similar action on the part of the proprietary firm.[192] Relative to a cooperative of nonintegrated producers, a cooperative of integrated producers may not be seeking to overcome product and market characteristics of basic agricultural commodity marketing at the farm level.

Vertical integration alone is only part of the story; the

direction is also important. A cooperative of processors who have integrated backwards into farm level production would be comprised of agricultural producers.[193] This cooperative might even deal with the same final buyers as do nonintegrated producers who have collectively integrated forward or as does a cooperative of producers who have individually integrated forward. Motivation, however, distinguishes backward from forward integration. Those producers starting at the farm level collectively or individually integrate forward to overcome the product and market characteristics they face. The processor integrating backwards is not concerned with market power of middlemen or sales terms on output at the farm level. His motivation may instead be to overcome uncertainty on the supply of a raw input needed for efficient operation of processing facilities.[194] It could also be to secure a captive outlet for the sale of farm inputs he manufactures.[195] For this firm, integration backwards to the farm-level could overcome the problems in Case-Swayne and National Broiler.[196] Appearances aside, however, this producer is motivationally dissimilar to those who begin at the farm level and integrate forward. A cooperative with these producers may therefore be ineligible for Capper-Volstead protection from antitrust charges.[197]

4. Operationalizing Capper-Volstead policy

For a cooperative to be entitled to Capper-Volstead protection from antitrust charges, it must satisfy the various provisions in

section 1.[198] From the case law the cooperative also knows that all of its members must be engaged in the farm-level production of an agricultural product.[199] From the preceding discussion of policy limits on access to Capper-Volstead,[200] the cooperative should appreciate as well that Capper-Volstead protection may still be in doubt if members are not using the cooperative for the reasons Congress anticipated.

From the preceding sections, certain observations are possible regarding whether a bargaining or an operating cooperative satisfies the policy component of Capper-Volstead. Protection from antitrust charges will be likely if all members are only engaged in the farm-level production of agricultural commodities. Protection will be particularly unlikely, though, if any members have integrated backwards into farm-level production from far down the marketing system. The harder case to assess is when the cooperative's members are engaged in farm-level production but have vertically integrated forward to perform certain functions with respect to the basic agricultural commodity prior to committing it to the cooperative. Here, the cooperative needs guidelines that operationalize policy concerns. Specifically, the cooperative needs to know at what point its members become so vertically integrated that the cooperative may be challenged on its eligibility for Capper-Volstead protection.

Guidelines might be developed from case law on who is a Capper-Volstead person, on what functions a Capper-Volstead cooperative must perform, or on who is a Capper-Volstead farmer. Each bears on Capper-

Volstead policy. When a member is a large publicly held corporation, it may not need a cooperative to respond to risk or market power. A rule that tied eligibility to firm structure or assets, though, would need to be developed for each situation and might still be only distantly correlated with Capper-Volstead policy. With respect to section 1 functions,[201] when a cooperative performs few of these for its members this may signal that members are individually able to deal effectively with risk and market power. It could mean, however, that a commodity--such as fresh vegetables--does not require certain functions--such as processing--before being consumed. All cooperatives cannot realistically be expected to undertake all section 1 activities.[202] But if this is further refined to mean that a cooperative performs few functions relative to those that are performed prior to selling to buyers, it is closer to the point. The flip side of this is that members are performing too many functions. That is, members are individually vertically integrated to the point that they are not using the cooperative compatibly with section 1 policy. The essence of the matter has two parts. First, a member is engaged in some farm-level activity--raising crops or feeding animals for meat or animal products. Second, at some point or over some spectrum of activities, the member is doing too much on his own relative to the cooperative and is no longer a Capper-Volstead farmer. Determining when this happens requires being able to identify a Capper-Volstead farmer by assessing what he does or does not do relative to what the cooperative does.

There are distinct advantages to defining a Capper-Volstead farmer in terms of what he does not do.[203] If a Capper-Volstead farmer were defined in terms of some upstream function he performs, such as tilling the soil,[204] this would not distinguish between those who perform only that function and those who might integrate downstream to a wholesale level.[205] Defining a Capper-Volstead farmer in terms of what he does not or cannot do comprehends the important upstream activities that encouraged Congress to grant agricultural producers special treatment under the antitrust laws. Such a definition is also more able to provide guidance in identifying the point beyond which an agricultural producer is no longer likely to be using a cooperative consistently with Capper-Volstead policy.

Although the National Broiler majority did not expressly designate who is a Capper-Volstead farmer, it associated Capper-Volstead farmers with a certain stage of agricultural production. Specifically, the majority said that Congress intended to protect the farmer bringing "his harvest to market."[206] Since the Court also said that Congress expected a farmer would use the cooperative "to deal with processors and distributors,"[207] this suggests that the farmer's harvest would not be in processed form. In support of this, Justice Brennan observed that while Congress would have allowed major meat packers, for example, to cooperate "with other producers in the common handling, processing, and marketing" of farm products, it did not authorize them to use Capper-Volstead to fix the price on their individually processed products.[208]

The majority and concurring opinions in National Broiler support the proposition that a Capper-Volstead farmer does not engage in processing or subsequent activities on his own. Justice Brennan refined the concern behind this by identifying three factors relevant to analyzing whether a cooperative is entitled to Capper-Volstead protection.[209] He said eligibility should depend on "the nature of the association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry."[210] Justice Brennan's last point would tend to grandfather in arrangements that have long been common to the industry.[211] The first two factors look at what the cooperative does relative to all functions performed prior to sale. Presumably, the more functions the cooperative undertakes from production to final sale, the more likely that it is comprised of Capper-Volstead farmers.

Not every cooperative is alike, even for the same commodity. An operating cooperative for one commodity may function differently from an operating cooperative for the same commodity produced elsewhere. It will certainly differ from an operating cooperative for another commodity. The same can be expected with bargaining cooperatives.

Recognizing that differences among cooperatives abound, some insights still derive from applying Justice Brennan's rule. An analytical starting point is with the commodity when title or control transfers to the buyer or the buyer takes possession. After accounting for history, under Justice Brennan's test the more functions the producer performs relative to the cooperative, the less likely the cooperative

is entitled to Capper-Volstead protection. Not every function is alike, however. Hence a cooperative should not expect it will be safe by performing the same number of functions as the member. For example, if a member grows, harvests, processes,[212] and delivers his output and the cooperative accepts delivery, stores, negotiates with buyers, and pays the producer, each performs four functions. But the functions are considerably unequal.

To assess compatibility with Capper-Volstead policy, a cooperative should consider several benchmarks related to value instead of the number of functions performed. There are three relevant values the commodity has: value as a basic agricultural commodity at the farm level, V_f; value when the vertically integrated producer commits it to the cooperative, V_c; and value when the proprietary firm takes title or receives it, V_b. The difference between V_c and V_f is post-farm value added by the producer. The difference between V_b and V_c is the value added by the cooperative. The value added reflects contribution of time, space, and form utilities.[213] To assess compatibility with Capper-Volstead, a cooperative should compare V_c with V_f. If value when an operating cooperative receives the commodity, V_c, is considerably greater than value at the farm level, V_f, the producer is being compensated primarily for activities going beyond basic agricultural production. If the ratio of V_c to V_f is greater than two, compensation for farm-level production is not the producer's principal source of income on the commodity and it may become more questionable whether the producer really needs the cooperative to cope with risk and

inferior bargaining power. For a bargaining cooperative, V_c will equal V_f or V_b or both. If the cooperative does nothing but bargain on a raw commodity at the farm level, V_c equals V_f equals V_b. When the cooperative bargains over an agricultural commodity in some post-raw form, V_c equals V_b and is greater than V_f. The more economically valuable post-farm activities a producer performs, net of those producers have historically undertaken, the larger is the ratio V_c to V_f. If the ratio exceeds two, producers are being compensated primarily for things other than producing basic agricultural commodities. In Central Lettuce, V_c was greater than V_f. Even if all producers had integrated forward, in National Broiler V_c was probably much greater than V_f. A guideline for a cooperative might therefore be that, after netting out the value of activities farmers have historically performed, it is more likely to be challenged on its assertion of Capper-Volstead protection from antitrust charges the greater is the ratio of V_c to V_f. When the ratio exceeds two, members are no longer primarily being compensated for producing basic agricultural commodities. A given value will be relatively more or less significant depending on whether the value added after basic production is associated with activities that lessen the producer's exposure to risk and market power. These might include steps taken to increase the number of outlets for production, changing the form of the commodity to extend the marketing time frame corresponding to a perishable product, or differentiating the product.

IV. Conclusion

An agricultural marketing cooperative represents a horizontal combination of agricultural producers. Absent Capper-Volstead section 1, the cooperative might be subject to Sherman and FTC Act proscription as an unreasonable combination or conspiracy in restraint of trade. To satisfy Capper-Volstead, case law indicates that--in addition to meeting certain voting, dividend, and operating requirements--the cooperative must be comprised of business organizations, each directly engaged in farm-level agricultural production and collectively performing any function that can be characterized as being within processing or preparing for market or handling or marketing.

Introducing the Supreme Court's statement of Capper-Volstead policy in National Broiler conditions these requirements. Policy makes clear that Congress passed Capper-Volstead intending producers would use cooperatives to deal with the risk and market power each is unable individually to deal with effectively. Congress did not intend to protect everyone engaged in farm-level production, however. There are certain policy guidelines a cooperative can use to assess its compatibility with Capper-Volstead policy. If all members are only engaged in farm-level production, protection is likely. Protection will be particularly unlikely in a cooperative of vertically integrated producers if any member has integrated backwards into farm-level production from far down the marketing system. In a cooperative of producers who have all vertically integrated forward, the likelihood of

protection can be assessed in terms of a quantified version of Justice Brennan's rule in National Broiler that looks at value added by the producer past the production of the basic commodity. For an operating cooperative, protection will be more likely the smaller is the ratio of commodity value when the cooperative receives the product, net of the value associated with the post-production activities farmers have historically performed, to commodity value at the farm level. For a cooperative only engaged in bargaining, protection will be more likely the smaller is the ratio of the value of the commodity the cooperative bargains on, again net of value attributable to functions historically performed, to the value of the basic agricultural commodity at the farm level. In either case, a given value will be more or less significant depending on whether the value added after basic production is associated with activities that lessen exposure to risk and market power. Certainly when the ratio exceeds two, producers are no longer primarily being compensated for producing the basic commodity. Although an imperfect measure, the greater is the ratio, the more open to question is a member's inability as an individual to deal effectively with risk and market power faced at the farm level. Although the guideline is only a guideline, the larger is the ratio, the more a cooperative should be on notice that if charged with an antitrust violation, it is likely to be denied its claim to Capper-Volstead protection.[214]

Notes

1. Agricultural Cooperative Service, Farmer Cooperative Statistics, 1982 2 (U.S.D.A., Cooperative Info. Rep. No. 1 sec. 27, 1984) [hereinafter cited as Farmer Cooperative Statistics, 1982].

2. Id. at Table 2.

3. Id.

4. Id. at 8-9. The firm to which a producer sells his farm-level production is the first handler. Cooperative market shares exceeded 30 percent for milk, sugar, rice, grain, soybeans, and cotton and cotton products. Id.

5. Knutson, "What is a Producer," in Proceedings of the National Symposium on Cooperatives and the Law 142, 143 (University of Wisconsin Center for Cooperatives 1974) [hereinafter cited as Knutson].

6. Terms of trade include price and nonprice factors such as quality requirements or delivery schedules.

7. 7 U.S.C. §§ 291-92 (1976).

8. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1976), also provides antitrust protection to agricultural cooperatives. A major difference between the two statutes is in terms of who is protected. Section 6 provides for a limited antitrust exemption for agricultural cooperatives not having capital stock. Capper-Volstead provides for limited antitrust protection regardless of whether the cooperative has capital stock. Though not synonymous, the two are treated similarly with respect to what are legitimate cooperative activities. Northern

California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984, 991 (N.D. Cal. 1976). The discussion in this article focuses on the Capper-Volstead Act. This is because cooperative case law has focused on Capper-Volstead. If a cooperative without capital stock is not entitled to Capper-Volstead protection, presumably it could still assert antitrust immunity under the Clayton Act. But, to the extent the policy motivating section 6 and the Capper-Volstead Act is similar, the discussion in the article is relevant to section 6 and conditions of its application.

9. A restraint of trade is a constraint on a firm's (here an agricultural producer's business) freedom of action. It is a constraint in the sense that the firm is no longer completely free to make or change its own price, output or other business decisions. Entering into a long-term supply contract with a cooperative is a restraint of trade, although perhaps not an unreasonable restraint, because the firm must abide by the contractual obligations or be liable for damages resulting from breach of the contract.

10. 15 U.S.C. §§ 1-7 (1976).

11. 15 U.S.C. § 1 (1976).

12. 15 U.S.C. § 2 (1976).

13. 15 U.S.C. § 45 (1976).

14. F.T.C. v. Cement Institute, 333 U.S. 683 (1948); Sunkist Growers, Inc. v. F.T.C., 464 F. Supp. 302 (C.D. Cal. 1979).

15. Maryland and Virginia Milk Producers Assn. v. United States, 362 U.S. 458 (1960); United States v. Borden, 308 U.S. 188 (1939);

Sunkist Growers, Inc. v. F.T.C., 464 F. Supp. 302 (C.D. Cal. 1979).

16. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967); Maryland and Virginia Milk Producers Assn. v. United States, 362 U.S. 458 (1960); United States v. Borden, 308 U.S. 188 (1939).

17. 7 U.S.C. § 291 (1976).

18. See citations at note 16 supra.

19. Treasure Valley Potato Bargaining Assn. v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974).

20. Paterson summarizes what various courts have said cooperatives cannot do in the context of Sherman section 2 monopolization. "Sherman Section 2 Monopolization for Agricultural Marketing Cooperatives" (forthcoming). See also Hufstedler, "A Prediction: The Exemption Favoring Agricultural Cooperatives Will be Reaffirmed," 22 Ad. L. Rev. 455, 461-63 (1969-70).

21. 436 U.S. 816 (1978).

22. 7 U.S.C. § 291 (1976).

Section 1 also requires that

> [s]uch associations [must be] operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum. And in any case to the following:
>
> Third. That the association shall not deal in products of nonmembers to an amount greater in value than such as are handled by it for members.

23. United States v. Maryland and Virginia Milk Producers Assn., 167 F. Supp. 45, 49 (D.D.C. 1958), rev'd in part on other grounds, 362

U.S. 458 (1960).

24. Id.

25. In Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984 (N.D. Cal. 1976), the plaintiff argued that Capper-Volstead only applies to "small struggling farmers," not big corporate businesses. 413 F. Supp. at 991. The district court rejected this, noting that nowhere in the Capper-Volstead Act is there a restriction on the size of Capper-Volstead growers. 413 F. Supp. at 993-94 n.11. But see National Broiler Marketing Assn. v. United States, 436 U.S. 816 (1978), for the view that Capper-Volstead protects small, nonintegrated farmers, 436 U.S. 840, 847 (White, J., dissenting), and certainly not the behemoths of agribusiness, 436 U.S. 829, 834-35 (Brennan, J., concurring).

26. 308 U.S. 188 (1939).

27. Id. at 205.

28. United States v. Maryland and Virginia Milk Producers Assn., 362 U.S. 458, 472 (1960).

29. 389 U.S. 384 (1967).

30. 389 U.S. at 390.

Sunkist membership included about 160 local associations representing close to 12,000 citrus growers. Each local association operated a packing plant where fresh fruit was prepared for market. Approximately fifteen percent of the local associations were private corporations and partnerships which owned and operated packing houses

for profit. These associations had contracts with growers to handle grower fruit for cost plus a fixed fee. 389 U.S. at 386-87.

31. 389 U.S. at 391.

32. Id. at 395-96.

33. A preseason contract is an agreement entered into between the grower and processor just prior to or at the time a crop is planted. The grower agrees to raise the crop; the processor agrees to purchase the harvest at a price arrived at through a formula reflecting quality and other production factors. The contract serves as a risk management device. Growers are assured of an outlet at a predictable price; processors are assured of deliveries needed to meet processing plans. See R. Mighell and L. Jones, "Vertical Coordination in Agriculture" (U.S.D.A., Agri. Econ. Rep. No. 19, Feb. 1963) [hereinafter cited as Mighell].

34. 436 U.S. 816 (1978).

35. Id. at 818.

36. Id. at 820.

37. Id. at 821.

38. Id. at 822.

39. Id. at 821.

40. Id. at 822.

41. Id.

42. Id. at 818.

43. Id.

44. Id. at 819.

45. Id.

46. Id. at 817-18.

47. Id. at 829.

48. Id. at 822.

49. Id. at 826-27.

50. Id. at 827-28.

51. Id.

52. 436 U.S. 829 (Brennan, J., concurring).

In Case-Swayne, the Court held that because Sunkist had private packers among its members, it was not comprised solely of agricultural producers and hence not entitled to immunity from antitrust liability. 389 U.S. 384, 395-96.

53. 436 U.S. at 828 n.21.

54. 436 U.S. at 429-40.

55. Id. at 834.

56. Id. at 835.

57. Id.

58. 7 U.S.C. § 291 (1976).

59. Justice Black's reference to these activities as being among the legitimate objectives for farmers under Capper-Volstead suggests that the list is merely representative. Maryland and Virginia Milk, 362 U.S. at 466.

60. 362 U.S. at 466.

61. 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974).

62. The two cooperatives were the Treasure Valley Potato

Bargaining Assn. and Malheur Potato Bargaining Assn.

63. 497 F.2d at 206.

64. Id. at 207.

65. 1973-1 Trade Cas. (CCH) ¶ 74,315 at 93,469-70 (D. Idaho 1973).

66. 15 U.S.C. § 17 (1976). See note 8 supra.

67. 497 F.2d at 217.

68. Id. at 210.

69. Id. at 214.

70. Id.

71. Id. at 215.

72. Id.

73. Id.

74. Id. (citing Webster's New Collegiate Dictionary (1953 Edition)). (Emphasis in the court's version.)

75. Id.

76. This is being generous. The district court held that the two cooperatives were entitled to protection under section 6 of the Clayton Act. 1973-1 Trade Cas. (CCH) ¶ 74,315 at 93,469-70 (D. Idaho 1973). The Circuit Court accepted each cooperative's individual legitimacy under section 6 but analyzed the case under Capper-Volstead. There was no analysis as to whether each cooperative was individually entitled to Capper-Volstead protection. The Circuit Court therefore used section 6 to bootstrap entitlement to Capper-Volstead instead of evaluating the entire case under Capper-Volstead. For this reason, there should be

only limited reliance on Treasure Valley as authority for what a cooperative must do to be entitled to Capper-Volstead protection from antitrust charges.

77. In a bargaining cooperative, agricultural producers have combined in order to increase returns to producer members. Activities which a bargaining cooperative might perform include contract negotiations with processors, price determination, dissemination of market information, production scheduling, and grade assurance. See Comment, "Agricultural Cooperatives: Price Fixing and the Antitrust Exemption," 11 U.C.D. L. Rev. 537 (1978).

78. Congress has given its support to producers in this situation by prohibiting those purchasing agricultural products from producers or their associations from engaging in certain practices. Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306 (1976). Under the Act, commodity buyers cannot discriminate against a producer on the conditions of sale because of the producer's membership in a cooperative or contract with a cooperative. 7 U.S.C. § 2302(b) (1976).

79. 413 F. Supp. 984 (N.D. Cal. 1976), aff'd, 580 F.2d 369 (9th Cir. 1978), cert. denied, 439 U.S. 1090 (1979).

80. 635 F.2d 1037 (2d Cir. 1980).

81. 413 F. Supp. at 985.

82. Id. at 986-87.

83. Id. at 985.

84. Id. at 987.

85. Id. at 985.

86. Id.

87. Id. at 987-88.

88. Id. at 994.

89. Id. at 991.

90. 413 F. Supp. at 993.

91. Id. at 992. See text corresponding to notes 122-25 infra.

92. Central California Lettuce Producers Cooperative, 90 F.T.C. 18 (1977).

93. Id. at 18-22.

94. Id. at 50.

95. Id. at 43.

96. Id.

97. Id. at 63.

98. Id. at 54-55.

99. Id.

100. Id.

101. Id. at 55-62.

102. Id. at 62.

103. 635 F.2d 1037 (1980).

104. United States v. Dairymen, Inc., 660 F.2d 192 (1981).

105. 635 F.2d at 1038.

106. Id. at 1039.

107. Id.

108. Id.

109. Id.

110. Id. at 1040.

111. Fairdale conceded that Yankee could fix the prices its members charged. Fairdale argued, however, that RCMA did not have the same right to fix prices, contending that (1) Capper-Volstead does not give associations of cooperatives this right and (2) a cooperative cannot be formed for the sole purpose of price fixing. The Second Circuit affirmed the lower court decision granting the cooperatives summary judgement on the first contention on the ground that RCMA was within the Capper-Volstead authorization for either marketing agencies in common or associations engaged in marketing. Id. at 1039-1040. Had the courts characterized RCMA as a common marketing agency, this might have ended the matter. Because the courts acknowledged that RCMA could be a cooperative association engaged in marketing, they reached the second contention which involves the issue of which activities Capper-Volstead requires a cooperative to perform.

112. Id. at 1040. See text corresponding to notes 122-25 infra.

113. Id.

114. 660 F.2d 192 (1981).

115. Id. at 194.

116. Of course, the cooperative would still need to meet the further provisions in section 1. See note 22 supra.

117. 436 U.S. at 824-27.

118. Id. at 826.

119. Id. at 825-26.

120. Absent National Broiler, Capper-Volstead policy is reduced to

Justice Black's assessment in Maryland and Virginia Milk that a cooperative should be given the same opportunities and responsibilities as a non-cooperative corporate organization. 362 U.S. 458, 466 (1960). While this may provide useful guidance on what a cooperative may not do, it does not provide much guidance on who is a Capper-Volstead person or producer or on which activities a cooperative must perform.

121. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981); Fairdale Farms, 635 F.2d 1037 (2d Cir. 1980); Central Lettuce, 580 F.2d 369 (9th Cir. 1979) (affirming the district court decision, 413 F. Supp. 984 (N.D. Cal. 1976)), cert. denied, 439 U.S. 1090 (1979)).

122. See text corresponding to notes 69-76, supra. Nor do they suffer from the same analytical flaws. See note 76 supra.

123. National Broiler, 436 U.S. 816, 835 (Brennan, J., concurring).

124. Id. at 836.

125. Case-Swayne, 389 U.S. 384, 395-96.

126. 90 F.T.C. at 49-50, 62-63.

127. National Broiler policy is clearly a binding constraint when the member asserting protection is not engaged in the production of raw agricultural products. Capper-Volstead does not extend to those engaged solely in processing or packing. National Broiler, 436 U.S. 826-27; Case-Swayne, 389 U.S. at 391-96. The open issue, though, is whether a producer integrated into processing or packing is still entitled to Capper-Volstead protection. National Broiler, 436 U.S. at 828 n.21.

128. In his concurrence, Justice Brennan asserted that Capper-Volstead does not protect the behemoths of agribusiness. 436 U.S. at 834-35. Justice White maintained that Capper-Volstead should mostly protect small nonintegrated farmers. 436 U.S. at 847 (dissenting opinion). Two years before the Supreme Court decision in National Broiler, the district court in Central Lettuce rejected the plaintiff's contention that Capper-Volstead only applied to "small struggling farmers," not to big corporate businesses. 413 F. Supp. at 991.

129. The risk farmers experience will be either systematic or nonsystematic. Systematic risk or just risk refers to events for which a probability of occurrence can be assigned. Nonsystematic risk or uncertainty refers to events for which a probability of occurrence cannot be assigned or the probability is subject to considerable disagreement. D. Newbery and J. Stiglitz, The Theory of Commodity Price Stabilization (1981) [hereinafter cited as Newbery]. The following discussion relies extensively on Newbery and on Mighell, supra note 33.

130. Systematic demand variability, the systematic and predictable change in the demand for a commodity, might derive from changing consumer incomes or variability in the price of other commodities. Nonsystematic demand variability arises from changes in tastes and preferences for different commodities as well as from changes in technology. Sources of systematic supply variability might include variability in rainfall and other production conditions, variability in

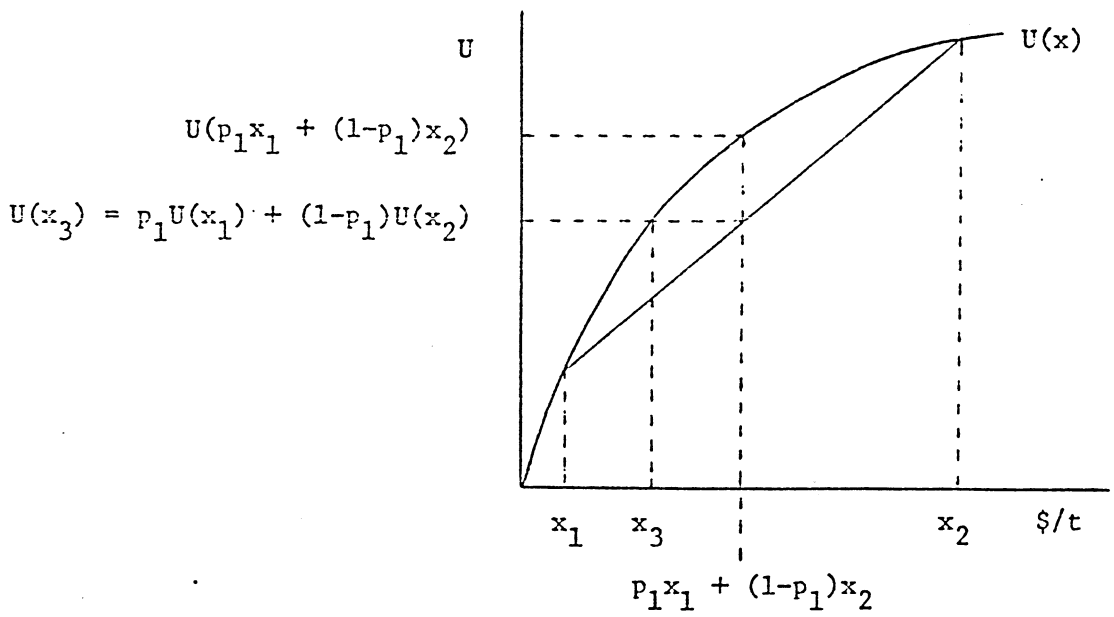
input prices, and variability due to price expectations--a high price this year leads to more production next year which might mean lower prices next year and less production the following year. Nonsystematic supply variability is primarily associated with changes in the technology for the specific commodity or its alternatives. Government policy changes may be difficult to predict and are a source of uncertainty for supply and demand. Speculators and arbitragers may also influence supply and demand. Newbery, supra note 129, at 49-52.

131. A farmer is risk averse if the most he would pay up front for a stream of income payments is less than the expected value of the income payments. The expected value of the income payments is the sum of each possible payment per time period multiplied by the probability of it occurring.

132. A farmer may anticipate uncertainty--that something might disrupt his price or production expectations but would not know what the event is nor its probability of occurring. To the extent a farmer provides for uncertainty, we include this in his responses to risk.

133. The flexibility of production assets affects a producer's ability to respond to risk. For example, tree fruit growers and dairy farmers have relatively little short-run flexibility. In contrast, annual crop producers may be able to shift from corn to soybeans or from peas to beans.

134. Risk aversion can be treated graphically as follows:



Assume the farmer is risk averse, with utility function U(x). Assume there are two possible net income flows available from farming, x_1 and x_2, where x_1 occurs with probability p_1 and x_2 with probability $(1-p_1)$. The expected value of farming profits is therefore $p_1x_1 + (1-p_1)x_2$. Because the farmer will only experience x_1 or x_2 in a given year, the utility of the expected value, $U(p_1x_1 + (1-p_1)x_2)$, is not relevant to him. What is relevant is the expected utility, $p_1U(x_1) + p_2U(x_2)$. The most that a rational farmer would be willing to pay up front is x_3, which is less than the expected value of $p_1x_1 + (1-p_1)x_2$. If the farmer can transfer risk to another party, the most he would be willing to pay to guarantee an income of x_2 is the difference between x_2 and x_3. If farmers face the same probability of receiving x_1 or x_2, there should be some party willing to provide, say, disaster insurance in

case the events responsible for x_1 occur. The maximum expected profit for the insurance company is this premium less the expected payment, $(x_2-x_3) - p_1(x_2-x_1)$, which is positive. A. Deaton and J. Muellbauer, Economics and Consumer Behavior 396-97 (1980).

135. The risk each faces declines if by sharing the risk of receiving a high return or a low return, producers each receive an average of the high and low returns. The cost of the risk declines for each risk-averse producer in utility terms by the difference between the utility of the expected value and the expected utility. In the diagram in note 134 supra, this would be $U(p_1x_1 + (1-p_1)x_2) - U(x_3)$.

136. Newbery, supra note 129, at 167-68.

137. Treasure Valley involved preseason contracts. See text corresponding to note 33 supra.

138. With hedging, a farmer offsets price movements. At planting time, for example, the farmer will sell a contract on a futures market, agreeing to deliver to the buyer a given quantity of a given quality of output on a specified date close to harvest. If between planting and harvest, the spot price--the price being paid in actual transactions--declines, the farmer might not receive what he expected from his production. But futures price generally parallels the cash price and would also decline. Since the farmer sold a contract to deliver at a high price, he can buy back his contract at a low price and make a profit on this futures transaction. By hedging, the farmer can use this profit to offset losses on the sale of his actual production. Had the spot and futures price increased, the farmer would offset the loss

on the futures market with the enhanced return from selling his production. The farmer uses the futures market to transfer price risk to the person willing to purchase his initial contract.

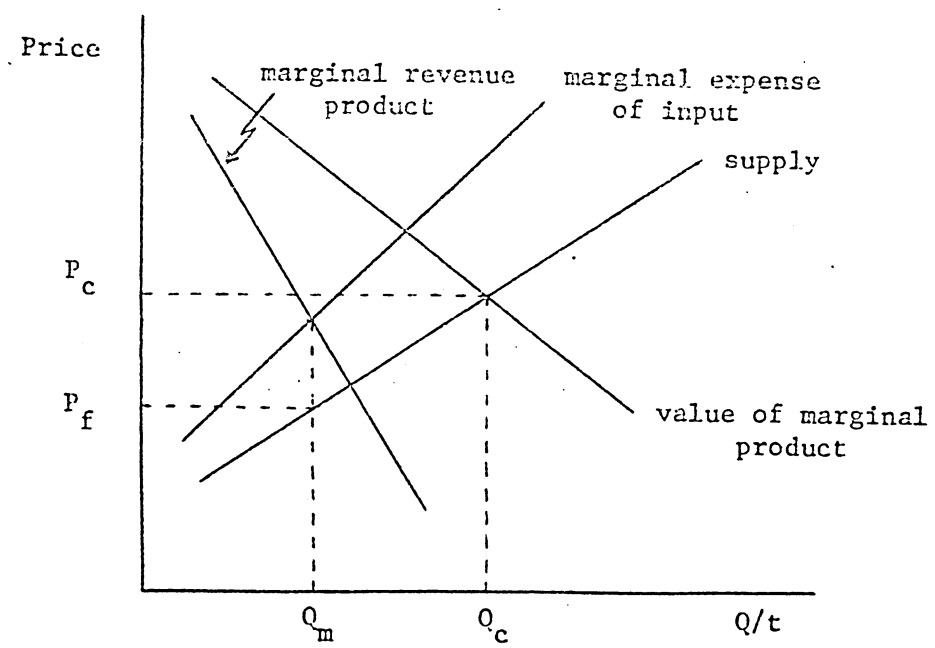
At various commodities exchanges, futures contracts (and representative contract units) were available in 1984 for, among other things, corn (5,000 bushels), oats (5,000 bushels), soybeans (5,000 bushels), wheat (5,000 bushels), barley (20 metric tons), flaxseed (20 metric tons), rapeseed (20 metric tons), rye (20 metric tons), feeder cattle (44,000 pounds), live cattle (40,000 pounds), hogs (30,000 pounds), cotton (50,000 pounds), and domestic sugar (112,000 pounds). The Wall Street Journal, Sept. 28, 1984, at 32.

139. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601, 602, 608a, 608b, 608d, 610, 612, 614, 624, 671-74 (1976), is the enabling legislation for federal marketing orders and agreements. State and federal orders variously authorize, for example, producer participation in control over volume marketed, distribution, or pricing of individual commodities in particular geographic regions. Jesse and Johnson review orders on fruits and vegetables in "Effectiveness of Federal Marketing Orders for Fruits and Vegetables." (U.S.D.A. E.S.C.S., Agri. Econ. Rep. No. 741, June 1981). Brandow summarizes farm program legislation affecting price in "Policy for Commercial Agriculture, 1945-71," in 1 A Survey of Agricultural Economics Literature 248-69 (Martin, ed. 1977).

140. This is referred to as a moral hazard issue. Newbery, supra note 129, at 165-66.

141. This is referred to as an adverse selection problem. Those more likely to seek a party to share risk may be those who are the "bad" risks. Id.

142. If a large number of farmers faces a large number of buyer-handlers for their output, farmers will supply quantity Q_c and receive price P_c. If a large number of farmers face a single buyer who is also a monopolist, the buyer's demand curve is the marginal revenue product curve, which gives the addition to total revenue he can expect from purchasing one more unit of input from farmers. Because the handler is the only buyer in the market, if he increases his purchases he must pay more for all purchases. The marginal expense of input shows the increase in total input cost attributable to purchasing one more unit of input from farmers. If the monopsonist maximizes profit, he will equate the marginal revenue from another unit of input with marginal cost. This occurs at quantity Q_m.



For farmers to supply Q_m, the monopsonist will pay price P_f. Relative to the competitive solution, the price exploitation from having a monopsonist-monopolist is the difference between P_c and P_f.

143. Factors limiting sites for processing facilities include zoning laws, access to transportation facilities such as an interstate highway or a railroad, and access to particular resources such as natural gas or water or an educated labor force.

144. For example, a milk buyer may prefer to deal with relatively large dairy farmers because the buyer can satisfy a larger proportion of his demand at a lower cost by going to fewer farms to pick up the milk. For the small or isolated milk producer to have an outlet, he may have to acquiese to such things as inconvenient pick-up times or paying more per unit relative to a large producer to have his milk hauled.

145. Case-Swayne, 389 U.S. at 395-96. See note 52 supra.

146. Agricultural supply cooperatives are an important source of farm inputs. Farm supply cooperatives handle feed, seed, fertilizer, petroleum products, farm equipment, and building supplies. In 1980 there were 4,952 farm supply cooperatives. Total net volume of farm supply cooperatives in 1982 exceeded $16.3 billion. Farmer Cooperative Statistics, 1982, supra note 1, at Table 2.

147. Collective processing, preparing for market, handling, and marketing does not include responding to factors responsible for variations in an individual member's output.

148. This is the theme Bunje, Freeman, and Cashman raise with

respect to bargaining cooperatives in "Panel Discussion: Bargaining in Practice," 45 J. Farm Econ. 1292, 1294, and 1298 (1963).

149. Knutson, supra note 5, at 143.

150. Id.

151. P. Helmberger and S. Hoos, Cooperative Bargaining in Agriculture: Grower-Processor Markets for Fruits and Vegetables 28 (1965) [hereinafter cited as Cooperative Bargaining].

152. Id.

153. Bunje refers to this type of bargaining cooperative as the marketing type. Cooperative Farm Bargaining and Price Negotiations 45-46 (U.S.D.A., Cooperative Info. Rep. No. 26, 1980).

154. Id. at 46-47.

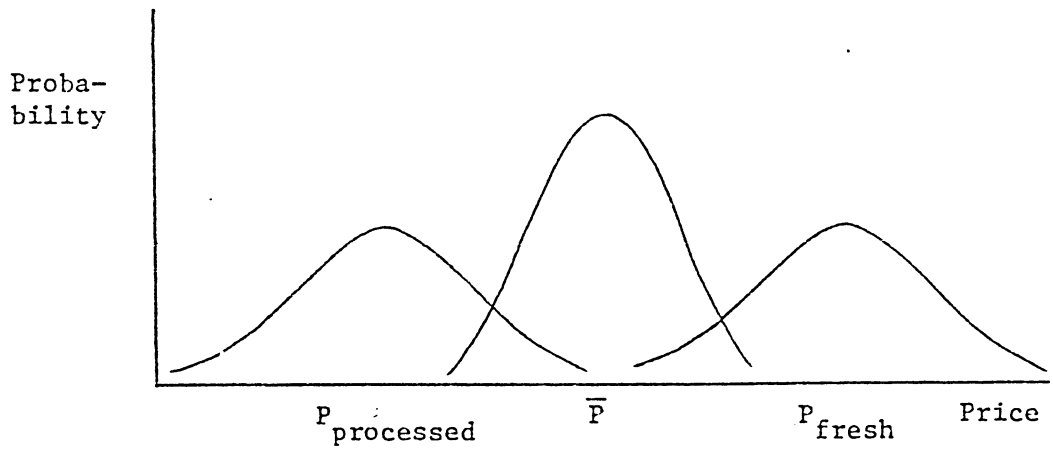
155. Id. at 48-51.

Bunje identifies two additional types of bargaining cooperatives. One corresponds to the National Farmers Organization (NFO) model where a producer designates the NFO as an exclusive agent in collective bargaining with buyers. Id. at 47-48. The other type refers to state-supported bargaining arrangements with provisions for arbitration. Id. at 51-52.

156. See generally Buccola and Subaei, "Optimal Market Pools for Agricultural Cooperatives," 67 Amer. J. Agri. Econ. (forthcoming).

Assuming a fresh and a processed market for production, the producer might receive either P_{fresh} or $P_{processed}$ depending on demand on the day he sold. If he sells to the cooperative he will receive $\bar{P}$, the pooled return from the fresh and processed markets. With pooling,

the probability of receiving a given price, $\bar{P}$, may increase.



157. Whether a cooperative unduly enhances the price of a commodity is the province of section 2 of Capper-Volstead, 7 U.S.C. § 292 (1976). As such, it is beyond the scope of this paper.

158. Mighell, supra note 33, at 39.

159. Youde and Helmberger, "Marketing Cooperatives in the U.S.: Membership Policies, Market Power, and Antitrust Policy," 48 J. Farm Econ. 23, 30 (1966).

160. Garver, "Collective Bargaining for Farmers - Issues and Choices," 46 J. Farm Econ. 1260, 1261 (1964).

161. Id.

162. Brandow, "The Place of Bargaining in Agriculture," in Cooperative Bargaining 27, 31 (U.S.D.A. F.C.S., Service Rep. No. 113, Aug. 1970).

Brandow observes that the cooperative may have its greatest

success in improving nonprice sales terms. Id. Helmberger and Hoos make the same point, emphasizing its importance in obtaining similar contract provisions in contract production agreements. "Economic Theory of Bargaining in Agriculture," 45 J. Farm Econ. 1272, 1279-80 (1963) [hereinafter cited as "Economic Theory of Bargaining"].

163. See note 142 supra.

164. "Economic Theory of Bargaining," supra note 162, at 1279-80.

165. Id.

166. Hoos, "Economic Possibilities and Limitations of Cooperative Bargaining Associations," in Cooperative Bargaining 12, 24 (U.S.D.A. F.C.S., Service Rep. No. 113, Aug. 1970) [hereinafter cited as Hoos].

167. If there is no output control, a price higher than the competitive level will stimulate a larger supply thereby lowering the market clearing price.

168. "Economic Theory of Bargaining," supra note 162, at 1272-73.

169. Hoos, supra note 166, at 20.

170. Id.

171. Mighell, supra note 33, at 40-41.

172. "Economic Theory of Bargaining," supra note 162, at 1277.

173. Id.

174. Id. at 1278.

175. Hoos, supra note 166, at 22.

176. Cooperative Bargaining, supra note 151, at 182.

177. Hoos, supra note 166, at 19. A single use might be, say, for fresh consumption. Bargaining is more complicated when a product has

fresh, canned, or processed outlets and has numerous maturing dates, grades, and sizes. Id.

178. "Economic Theory of Bargaining," supra note 162, at 1280.

179. The U.S.D.A. reports the following percentage changes in average crop and livestock prices between 1981 and 1982 (1982 and 1983): wheat -9.3 (2.0), rice -30 (-.6), corn -18.8 (26.2), oats -12.0 (-8.9), barley -16.5 (1.8), sorghum -15.3 (22.2), soybeans -16.5 (16.4), cotton -17.3 (13.9), tobacco 4.8 (-3.5), vegetables -6.8 (3.0), fruit 35.0 (-27.9), cattle -2.6 (-2.0), calves -6.6 (3.2), hogs 24.4 (-14.4), broilers -4.1 (9.0), turkeys -2.4 (-2.8), eggs -5.9 (7.8), and milk -1.2 (-.1). "Economic Indicators of the Farm Sector: Farm Sector Review, 1983" at 33 (U.S.D.A. N.E.D. E.R.S., Aug. 1984).

180. If a producer is desperate for an outlet, he may agree to deliver his product to the buyer or allow the buyer to reject part of his output.

181. An example is tart cherries. See D. Ricks, L. Hamm, and W. Chase-Lansdale, The Tart Cherry Subsector of U.S. Agriculture: A Review of Organization and Performance at 17-18 (N.C. 117, Monograph No. 12, U.W.-Madison, July 1982).

182. Since the corporation would be the cooperative member, it would--through its organizational structure--be able to transfer risk to its shareholders and hence would not be using the cooperative as a risk management device. It could, however, be using the cooperative to deal with inferior bargaining power it might experience as one of many competitively organized producers.

183. Young, "Risk Preferences of Agricultural Producers: Their Use in Extension and Research," 61 Amer. J. Agri. Econ. 1061, 1064-67 (1979).

184. Id. at 1067.

185. Id.

186. Size alone, then, would not justify Justice Brennan's suspicion of agribusiness members of cooperatives. See note 128 supra and text corresponding to note 208 infra.

187. See text corresponding to notes 158-59 supra.

188. Entry will be less likely the more capital intensive is the product at the point the producer commits it to the cooperative. If production is geographically concentrated and access to water or locations for post-farm level processing are limited, a producer may have more market power.

189. Not all gains from bargaining are due to coercing a powerful buyer. Lowering transactions costs may lead to a higher price for producers even when buyers compete independently. See text corresponding to notes 160-62 supra.

190. 436 U.S. at 834, 835-36 (concurring opinion).

191. The further from the farm level the producer integrates, the more he is being compensated for things other than growing a crop or raising livestock or producing animal products. The price he receives reflects the buyer's or the market valuation of the commodity as influenced by when and where the output is sold and in what condition. A buyer will likely pay more for a product the fewer functions he must

perform or pay a third party to perform prior to reselling the product. For example, if a producer delivers washed and boxed tomatoes to a grocery store at a time when the grocery store needs the tomatoes, the tomatoes have greater time, space, and form utility for the grocer than if the tomatoes were in the field. The grocer will accordingly compensate the producer for having done more than grow the tomatoes. Likewise, the grocer will pay more for broilers when the broilers are delivered slaughtered, packaged, and chilled. The value added between the farm level and the grocery store represents the time, space, and form utilities that the producer or a proprietary firm contributes.

192. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), prohibits combinations or conspiracies in restraint of trade.

193. They are agricultural producers in the sense that they are engaged in some stage of producing an agricultural product. Based on the Government's stipulation, this is how the majority in National Broiler would appear to have used the term. 436 U.S. at 820-21 and n.8.

194. Mueller and Collins, "Integration of Production, Processing, and Marketing," 39 J. Farm Econ. 1471, 1476 (1957).

195. This was apparently some of the motivation in National Broiler. Brown, "United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?" 56 N.C.L. Rev. 29, 39 (1978).

196. In those cases, some members were not involved in farm-level production. See text corresponding to notes 30-32 and 46-53 supra.

197. On the basis of policy, then, the Supreme Court might have denied protection to the National Broiler Marketing Association even if all members had been fully integrated into farm-level production. See text corresponding to note 53 supra.

198. See note 22 and corresponding text supra.

199. National Broiler, 436 U.S. at 822-24; Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 391-96 (1967); Maryland and Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458, 472 (1960); United States v. Borden Co., 308 U.S. 188, 205 (1939).

200. See discussion at Part III Section 3 supra.

201. Section 1 authorizes collective processing, preparing for market, handling, and marketing.

202. This practical limitation on what a cooperative can do does not appear in the decisions on the issue of what activities a Capper-Volstead cooperative must perform. See Part II Section D supra.

203. In National Broiler, Justice White recommended that a farmer be defined in terms of what he does: He accepts "substantially all of the risks of bringing a crop from seed to market." 436 U.S. at 849 (dissenting opinion). Justice Brennan urged that a Capper-Volstead farmer be defined in terms of what he does not do--that is, in terms of functions he does not perform. Id. at 835-36 (concurring opinion).

204. In National Broiler, the majority apparently rejected the Government's assertion that a farmer is someone who tills the land or husbands animals. 436 U.S. at 846 (White, J., dissenting). Justice Brennan summarizes the legislative history on activities of those whom

congressmen thought Capper-Volstead would protect. 436 U.S. at 832 n.1.

205. A further problem with a narrow definition is that a different one would have to be developed for each commodity Capper-Volstead covers.

206. 436 U.S. at 825. See also Maryland and Virginia Milk, 362 U.S. at 466 (referring to organizing by "farmer producers").

207. 436 U.S. at 826.

208. Id. at 839 n.3. Justice Brennan was referring to Mr. Swift and Mr. Armour. Id.

209. Id. at 836.

210. Id.

211. This mirrors the concern Justice Harlan expressed in Case-Swayne. There he said that the Court should not expose a cooperative to "antitrust liability extending far beyond the confines" of a given cause of action when the arrangement at issue was not intended to evade Capper-Volstead and private parties dealing with the cooperative had long gone without challenging the arrangement. 389 U.S. at 396-97 (1967) (concurring in part and dissenting in part). Justices White and Stewart thought similarly. Id. at 400 (concurring in the result).

212. Under the majority's mechanical rule in National Broiler, once the producer overtook some form of processing he would no longer be a Capper-Volstead farmer. See text corresponding to note 207 supra.

213. For a discussion of these utilities, see note 191 supra.

214. Again, this does not mean the cooperative is immune from the antitrust laws. Satisfying Capper-Volstead means that the cooperative organization is not subject to challenge as an unreasonable combination or conspiracy to restrain trade.