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Agriculture, Antitrust and Agribusiness: A Proposal For Federal Action

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AGRICULTURE, ANTITRUST AND AGRIBUSINESS: A PROPOSAL FOR FEDERAL ACTION

By SENATOR JAMES ABOUREZK*

The protection of the family farm and rural society must become a high priority for this country. The mass exodus from rural to urban America is due, in part, to the absentee ownership and control of the agricultural means of production in this nation. This article discusses this ever-increasing problem and the steps that have been taken in the past and can be taken in the future on both the federal and state levels to prevent the demise of the family farm. The author proposes, as a significant weapon in this battle, a federal act that would amend the present antitrust laws to include within their prohibitions corporate control or ownership of agricultural interests.

INTRODUCTION

Since the time when Senator Gaylord Nelson of Wisconsin and I first introduced the Family Farm Antitrust Act,[1] we have agreed on its basic premise: "It is in the interest of the country that the family farm be preserved."[2] The vitality of this nation is integrally bound up with the health of rural America, and, specifically, with the economic health of the population that comprises rural America. For this reason, I am especially disturbed by those who assert the inevitable demise of the backbone of rural America: the family farm. This is also the reason, in an effort to reverse or at least significantly abate our headlong descent into a state of corporate feudalism, that I helped author a bill, S. 1458, and introduced it in the ninety-fourth Congress. That bill provides "for the continued existence of the family farm, by protecting family farms against the monopolization of the agricultural industry."[3] The measure is directed at changing the nature of "agribusiness." At the present time vertical integration[4] in agricultural industry by "corporations engaged in the processing, distributing, and retail industries, and other conglomerate corporations, tends to create

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1. The bill was first introduced as the Family Farm Antitrust Act of 1973, S. 950, 93d Cong., 1st Sess. (1973) but was not enacted. It was reintroduced April 17, 1975, as the Family Farm Antitrust Act of 1975, S. 1458, 94th Cong., 1st Sess. (1975) [hereinafter cited as Act]. A copy of S. 1458 is appended to this article.

2. 119 CONG. REC. S. 4817 (daily ed. Feb. 21, 1973) (remarks of Sen. Nelson).

3. Act § 2(a)(1).

4. Vertical integration is the integration of successive backward or forward steps in the production, financing, or distribution of goods or services.

monopolies in the agricultural industry."[5] These monopolies force the independent farmer to leave the land because he cannot compete profitably with the corporate giants.

At the outset, let me emphasize that I am not referring to the incorporation of a family enterprise. Incorporation of family farms, farms owned and operated by the people who live on them, would still be perfectly permissible under the proposed legislation. I am referring to nonfarm, absentee interests: the conglomerate corporation whose principal endeavor, for example, is not the production of agricultural commodities, except insofar as such production can be used by it in the furtherance of its nonfarm activities such as food processing or food distribution.[6] Rarely, if ever, are these activities pursued in the same vicinity as the land on which the produce is grown or the livestock or poultry is raised. That, combined with the inexorably increasing size of individual farms, is producing severe dislocation and undesirable economic and social conquences.

HISTORICAL CONTEXT AND DEVELOPMENTS

Average farm size increased from 175 to 390 acres between 1940 and 1972. Between 1940 and 1970, the number of workers on family farms decreased by sixty percent, the number of hired farm workers decreased by fifty-seven percent, and the number of farms themselves decreased by fifty-five percent.[7] Those figures are attributable, in part, to an increasing reliance on technological methods that require the utilization of less manpower to produce greater amounts of agricultural products. It would be neither prudent nor desirable to arbitrarily curb the introduction or use of advanced technology, nor the research and development that produces it. We do need, however, to curb the artificial demand for increased farm size and its concomitant unwanted consequences.

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5. Act § 2(a)(2).

6. The questions "who is a 'farmer'" and "who is not a 'farmer'" have, as yet, no well-defined answers. The United States Bureau of the Census defines "farm operator" as "a person who operates a farm either doing the work himself or directly supervising the work. He may be the owner, a member of the owner's household, a salaried manager, or tenant, rentor, or sharecropper . . . . The farm operator may or may not live on the farm." That definition, of course, includes the very kind of absentee farm interest that the Act is designed to eliminate. *See* Rhine, *Down on the Farm . . . And Back to the Facts*, 10 THE CONFERENCE BD. 12 & n.2 (May 1973) [hereinafter cited as Rhine]. Another definition of "farmer" concerns the degree of risk taken in the production of the commodities involved. *See* 7 U.S.C. § 291-92 (1970). Sections 291 and 292 allow farmers to participate in Capper-Volstead Agricultural Cooperatives which are exempt from antitrust restrictions. The United States Department of Justice, in challenging what it alleges to be price-fixing activities of the National Broiler Marketing Association is really seeking to clarify the necessity-of-risk factor. *See* United States v. National Broiler Marketing Ass'n, Civ. No. 18173 (N.D. Ga., filed April 16, 1973). *See also* Note, *The Definition of "Farmer" Under the Treasury Regulations to the Internal Revenue Code of 1954: Hi-Plains v. Commissioner of Internal Revenue*, 20 S.D.L. REV. 671 (1975).

7. Rhine, *supra* note 6, at 16.

Both economic and social consequences flow from the growing trend toward conglomerate, rather than family-owned or operated, farms. One result of conglomerate farming is absentee ownership of farmland; ownership moves from rural areas to metropolitan ones.[8] Such diversion of revenue triggers other unfortunate consequences based on the rural depopulation that generally follows. These consequences include the loss of local business enterprises which depend for their existence on the availability of local capital, a decrease in the amount of local tax revenue and a decline in the amount of contributions to local religious organizations.[9] As Senator Nelson has pointed out,

> [s]uch businesses as implement dealers, hardware stores, lumberyards, and feedstores must have a good number of prosperous farmer-customers to stay in business. The number of farm families in a trade area also is an important factor because of its direct effect on such businesses as grocery stores, drugstores, newspapers, and filling stations.[10]

Another undesirable result of the trend toward corporate farming is the inevitable concentration of land in fewer and fewer hands. It is a trend which is just as undesirable—and perhaps more so—in rural areas as it is in urban areas. Consumers, both urban and rural, end up paying higher food prices when those prices are administered by a few giant corporations. Problems are created in urban areas by the influx of displaced rural inhabitants. As the smallest towns become unlivable, so do the largest cities which must face troubling problems such as over-crowding, rising unemployment and swelling welfare rolls.[11]

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8. It is very clear that you are going to have a large proportion of the total profits generated by farm operations leaving the local communities if the farms have absentee owners. Obviously, a higher proportion of this profit will go where the owner is located. If these owners are located in large metropolitan centers, this is income and revenue that is lost to the local community from which it emanated. *Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business on the Role of Giant Corporations in the American and World Economies*, 92d Cong., 1st, 2d Sess. pt. 3, at 4003 (1973) (statement of Professor Richard D. Rodefeld) [hereinafter cited as *Senate Hearings*].

9. *Id.* at 4002-03.

10. 119 CONG. REC. S. 4817 (daily ed. Feb. 21, 1973) (remarks of Sen. Nelson).

11. Testifying before the Senate Select Committee on Small Business, Professor Richard D. Rodefeld of the Department of Sociology, Michigan State University, cited data collected from communities in which (1) large-scale corporate farms, and (2) smaller, "family farms" predominated:

> [T]here are in fact large and significant differences for the various characteristics. My conclusions in interpreting these data are these. In terms of the effects for the communities, this data would suggest that levels of age, education, and residential stability will decline. The number and variety of voluntary organizations will decline.
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> . . . Economic stratification will increase, level of living will decline, and the amount of revenue available to be spent in the local community will decline. *Senate Hearings, supra* note 8, at 4003.

See also SENATE SPECIAL COMM. TO STUDY THE PROBLEMS OF AMERICAN SMALL BUSINESS, SMALL BUSINESS AND THE COMMUNITY, 79th Cong., 2d Sess. (Comm. Print 1946), *reprinted in Senate Hearings, supra* note 8, pt. 3A, at

Perhaps, as Senator Nelson has stated, the greatest problem that we face is the "development of public policies that have equated goodness with bigness, quality with size."[12] Not long ago, a Pennsylvania farmer, in discussing the effects of modern "agribusiness" techniques, indicated that he thought "this talk about the benefits of agribusiness is hogwash . . . . I ate as good [during the Great Depression] as I've ever eaten and I'll tell you why. We had a couple of acres in the back and my mother and father knew how to grow vegetables on that land."[13] Of course, no one would advocate a return to depression-era living conditions, but solid indications exist that there may well be an optimum farm size beyond which there is no need to grow. According to the economic research service of the United States Department of Agriculture, "a number of studies of crop-farming situations in various states were reviewed [in the preparation of a 1967 report] . . . . In most of these situations, all of the economies of size could be achieved by modern and fully mechanized 1-man or 2-man farms."[14] The Department of Agriculture study also showed that while " 'moderate sized farms' may well be the most efficient units and economies of size will not necessarily be reached in increasing farm size," the total profit derived from larger than optimum efficient farms may frequently increase.[15] However, such an increase in total profit relates to volume and not to efficiency.

INABILITY OF EXISTING ANTITRUST LAW TO DEAL WITH DETRIMENTAL EFFECTS OF AGRIBUSINESS

At first glance, it would appear that there are several federal antitrust statutes on the books which would deal with the problems caused by agribusiness. Theoretically, these statutes should forestall the ruinous economic and social consequences attributable to corporate ownership or to control of farm land and concentration of farm land in a few, corporate nonfarm hands. In fact, the Department of Justice has taken precisely that position.

During his testimony on H.R. 11654,[16] which was introduced in the ninety-second Congress, Deputy Assistant Attorney General,

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4465-4616, *and reprinted in Hearings on the Effects of Corporation Farming on Small Business Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. 295-441 (1968).

12. 119 CONG. REC. S. 4818 (daily ed. Feb. 21, 1973) (remarks of Sen. Nelson).

13. Zito, *But How're 'Ya Gonna Keep 'Em Down on the Farm?*, The Washington Post, Jan. 10, 1975, § B at 3, col. 5.

14. UNITED STATES DEP'T OF AGRICULTURE, ECONOMIES OF SIZE IN FARMING: THEORIES, PROCEDURES AND A SELECTED REVIEW OF STUDIES iii (Agricultural Economic Report No. 107, 1967), *reprinted in Senate Hearings, supra* note 8, at 3743-3829.

15. *Id.*

16. H.R. 11654, 92d Cong., 1st Sess. (1972). This bill was called the Family Farm Act. The protection of the family farm was the avowed purpose of the bill and it was similar to, in method and language, the Family Farm Antitrust Act of 1975.

Antitrust Division, Bruce B. Wilson indicated that the Department of Justice believes that

> existing law is adequate to deal with any anticompetitive effects arising from vertical integration or conglomerate organization. There seems to be no valid reason why the case-by-case approach used elsewhere should not be retained in the agricultural sector as well.[17]

Mr. Wilson was referring, of course, to such existing law as section 7 of the Clayton Act[18] and sections 1 and 2 of the Sherman Antitrust Act.[19] Section 7 of the Clayton Act reads, in part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[20]

This section, under which most of the existing law concerning mergers and acquisitions has developed, is, however, inherently unsuitable in its present form for application to the agricultural sector of the economy. The section prohibits only the acquisition of the assets or stock of another existing corporation; more specifically, the prohibition extends only to the acquisition of the stock of a corporation "engaged also in commerce."[21] The majority of farm property in this country is not incorporated, thus such property is, by definition, excluded from any "protection" afforded by section 7. Furthermore, there is no prohibition in section 7 against such indirect means of control as the leasing of farm property or the control of farm production through contract or other agreement. These indirect forms of control may be just as ruinous as direct corporate ownership. They are far more insidious because the independent farmer retains the illusion of control over his own land or other facilities. In summary, the Clayton Act was not designed for the protection of the agricultural industry against corporate control, whether that control is exercised directly or indirectly, nor is it adequate for such control.

Sections 1 and 2 of the Sherman Act prohibit contracts, combinations or conspiracies in restraint of trade, and monopolizing, attempting to monopolize, combining or conspiring to monopolize any

17. *Hearings on H.R. 11654 and Similar Bills Before the Anti-Trust Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 78 (1972) [hereinafter cited as *House Hearings*].
18. 15 U.S.C. § 18 (1970).
19. *Id.* §§ 1, 2.
20. *Id.* § 18.
21. *Id.*

part of interstate trade or commerce, respectively.[22] Thus the prohibitions of the Sherman Act, in contrast to the prohibitions of section 7 of the Clayton Act, are not confined to corporate activities. They are, however, no more potentially effective in stemming the tide of conglomerate control of rural farm land because the Department of Justice is less likely to act under them until the allegedly violative conduct has progressed to a point where a challenge will be successful. This point will be reached only when the likelihood of a monopoly situation is easily documented or perceived.[23]

Because of the reluctance to act on the part of the Department of Justice, very little law on mergers and acquisitions has developed under section 1 of the Sherman Act; what does exist deals only with horizontal mergers.[24] Agricultural mergers, however, are almost always of the vertical or conglomerate type,[25] and, in my view, it is doubtful that the application of the Sherman Act to vertical mergers, typical in the agricultural industry, would be particularly successful. This is because the relevant market for agricultural products is likely to be so broadly delineated that even a pronounced trend toward concentration in a given area would not be considered anticompetitive. In addition, the all-too-well-known uncertainties associated with agricultural pursuits may well convince a court that actions otherwise in violation of the antitrust laws are permissible because they are "reasonable."[26]

Even assuming the sufficiency of existing antitrust laws to prevent or slow the current trend toward a corporate, conglomerate takeover of the agricultural industry, the fact remains that the Department of Justice has not yet brought a single case under any of these laws to challenge the acquisition of independent farms by nonfarm corporations. In 1972, in answer to a question put to him by the Chairman of the House Judiciary Committee, Congressman Emanuel Celler, Deputy Assistant Attorney General Wilson indicated that he thought the Department of Justice was undertaking "a number of investigations" in the area of agricultural antitrust,

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22. *Id.* §§ 1, 2.

23. In a landmark horizontal merger case, United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964), brought under section 1 of the Sherman Antitrust Act, the Supreme Court announced the accepted formula for determining the legality of mergers under section 1. According to the Court, the merging companies must be "major competitive factors in a relevant market," so that "the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of section 1." *Id.* at 671-72. Because the farms that are being acquired or controlled generally do not themselves constitute "major competitive factors in a relevant market" the activities of the acquiring farms would probably not qualify as section 1 violations. *Id.*

24. Horizontal mergers are those between firms in the same strata of production of the same product or service.

25. Vertical mergers are those between firms in different stages of production of the same product or service. Conglomerate mergers are those between firms in different product or service lines.

26. Reasonable actions are those considered to be "reasonably ancillary" to a lawful, main purpose and, therefore, are not prohibited.

but that, to his knowledge, "the Department of Justice in [the] area of [antitrust violations by conglomerate corporations] has [not] filed any cases as of yet."[27] In support of Wilson's testimony, the Acting Assistant Attorney General indicated in a letter to Chairman Celler that

> the only case dealing with [vertical integration by corporations extended into agricultural production] was *United States v. United Fruit Co.*, Civ. 4560, E.D. L.A. 1956, which charged that the defendant monopolized and restrained interstate and foreign commerce in bananas in violation of the Sherman and Wilson Tariff Acts. It was settled by a consent judgment entered in 1958 . . . . While this case did not turn solely on integration into agricultural production, the defendant's dominance in the production of bananas in Central America was as integral an element as its control over the transportation and importation phases of the banana industry.[28]

Even at present, the Department of Justice has yet to bring any case to trial challenging this aspect of nonfarm corporate activity.[29] One exception to this lack of interest is found in the Department's examination of the activity of those who seek the protection and immunity afforded agricultural cooperatives by the Capper-Volstead Act[30] but who are probably not the "farmers" contemplated by the Act.[31] Such activity is not, however, sufficient to prevent the erosion of an agricultural system based on the existence of the family farm whose continued existence is in imminent danger. It is one thing to deny a corporation exemption from antitrust suit under the Capper-Volstead Act, but it is another to then bring an antitrust suit against the corporation and obtain successful results. Furthermore, legal action taken under authority of this Act may have a detrimental effect by challenging legitimate farmer-owned cooperatives; this may leave the farmer in an even worse position because the co-op can be a means by which farmers offset some of the other advantages of investor-owned corporations.

STATE LEGISLATION DIRECTED AT REDUCING CORPORATE INFLUENCE IN AGRICULTURAL INDUSTRY

At least five states have statutes in effect that prohibit all or some forms of corporate agricultural endeavors.[32] The newest of

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27. *House Hearings, supra* note 17, at 80.
28. *Id.* at 82 (letter dated April 11, 1972).
29. According to former Attorney General William O. Saxbe, there are currently pending fourteen antitrust cases affecting food companies and "a far greater number" of agricultural antitrust violations are now under investigation. Friedman, *Food Prices: Who Gets the Money?*, The National Observer, Jan. 4, 1975, at 4, col. 1-4.
30. 7 U.S.C. §§ 291-92 (1970).
31. *See* United States v. National Broiler Marketing Ass'n, Civ. No. 18173 (N.D. Ga., filed April 16, 1973).
32. KAN. STAT. ANN. § 17-5901 (1974); MINN. STAT. ANN. § 500.24 (Supp. 1974); NO. DAK. CENT. CODE § 10-06-01 (1960); OKLA. STAT. ANN.

the state laws was enacted by South Dakota.[33]

Of the states that have sought to curb the incursion of nonfarm corporations into agricultural industry, however, only one, North Dakota, absolutely forbids corporate farming;[34] farm cooperatives, however, are exempted in cases in which seventy-five percent of the members reside on the farms or are principally dependent on farming for their income.[35] North Dakota is also the only state prohibiting corporate farming which requires divestiture by nonfarm corporations of farmland in North Dakota acquired prior to a specified date.[36] In this respect, the North Dakota law is similar to the provisions proposed in S. 1458 which would require persons, to whom section 3(a) of the Act applies, to divest themselves "within 5 years after the enactment of that Act, of any property or other interest held by [them] in violation of the provisions of that subsection."[37]

Kansas prohibits corporations from engaging, directly or indirectly, in the agricultural or horticultural business only with respect to the products specified in the act: wheat, barley, corn, grain sorghums, oats, rye or potatoes, or the marketing of cows for dairy purposes.[38] Minnesota and South Dakota each permit corporations that had acquired farm land prior to specified dates to retain ownership or control of such land or interests.[39] Minnesota does, however, maintain an absolute maximum, 90,000 square feet, with certain exceptions, on the amount of farm land any one corporation may hold.[40] Curiously, the Oklahoma statute specifically exempts from the prohibition against corporate farming "corporations engaged in food canning operations, food processing or frozen food processing insofar as such corporations engage in the raising of food products for aforesaid purposes."[41]

Statutes that would prohibit corporation farming are under consideration in several states. Montana is considering a bill which is largely similar to the provisions contained in S. 1458.[42]

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tit. 18, § 951 (Supp. 1974); S.D. COMPILED LAWS ANN. ch. 47-9A (Supp. 1974).

33. S.D. COMPILED LAWS ANN. ch. 47-9A (Supp. 1974). *See* Comment, *The South Dakota Family Farm Act of 1974: Salvation or Frustration for the Family Farmer?*, 20 S.D.L. REV. 575 (1975).

34. NO. DAK. CENT. CODE § 10-06-01 (1960).

35. *Id.* § 10-06-04.

36. *Id.* § 10-06-03.

37. Act § 3(c)(2).

38. KAN. STAT. ANN. § 17-5901 (1974).

39. Minnesota allows corporations that owned farmland as of May 20, 1973 to maintain the lands. MINN. STAT. ANN. § 500.24(2) (Supp. 1974). South Dakota allows corporations that owned or leased farmland prior to July 1, 1974, to maintain the lands. S.D. COMPILED LAWS ANN. § 47-9A-5 (Supp. 1974).

40. MINN. STAT. ANN. § 500.22(3) (Supp. 1974).

41. OKLA. STAT. ANN. tit. 18, § 953 (1971).

42. H.B. 132, 43rd Montana Legislative Assembly (1973).

PROPOSED FEDERAL LEGISLATION

It is clear that not only do an insufficient number of states now have laws prohibiting corporate farming, but also that the statutes which exist vary widely in their ability to meet the threat to the vanishing family farm. Also, there is no indication that the Department of Justice has substantially altered the position it took in 1972 when Bruce Wilson testified that he saw no clear economic need for such a drastic step as the Family Farm Act to control corporate farming. The Department's statistics revealed that between 1960 and 1970 there had been seventy-seven acquisitions of firms engaged in farming or ranching. Wilson stated the Department of Justice's feeling that vertical integration and conglomerate organization are not bad *per se*.[43]

Those statistics may not accurately reflect the actual situation, however. One commentator recently observed that the existence and extent of corporate farming in Montana is largely unrevealed in the Census of Agriculture and is also unknown to the State Department of Agriculture.[44] There is little reason to believe that any more accurate information exists about the extent of vertical integration in the agricultural industry in the entire country. Testimony during the 1972 hearings held by the Senate Select Committee on Small Business revealed that the data collected by the Department of Agriculture and the Census of Agriculture show only the number of farm operating units, and not the ownership or control of those units. Accordingly, if a corporation owns or leases, for example, ten farm units within a single state or in several states, there is no accurate data concerning the total amount of farm property owned or controlled by that corporation. In fact, the data would indicate that ten corporations are doing business, not that there is, or may be, any significant concentration of ownership. Obviously, the "growing concentration of economic power in corporate farm entities" is understated.[45]

The substance of the proposed federal Family Farm Antitrust Act is contained in section 3 which provides that no *person* whose nonfarming assets exceed 3,000,000 dollars shall engage in farming either directly or indirectly. This prohibition applies to any person, any corporation or "any other means of acquisition or control of another person who is engaged in farming."[46]

As with the North Dakota Act, there are exemptions to S. 1458. The first is that an organization which is tax exempt under section 501(a) of the Internal Revenue Code of 1954 is also exempt from S. 1458 to the extent that its farming activities do not result in un-

43. *House Hearings, supra* note 17, at 78.
44. MacDonald, *The Family: How Are You Going to Keep Them Down on the Farm?*, 35 MONT. L. REV. 88, 90 (1974).
45. *Senate Hearings, supra* note 8, at 3995-96, 4001.
46. Act § 3(a).

related business income which is taxable under section 511 of the Internal Revenue Code of 1954. The reference to sections 501(c) and (d) incorporates the myriad organizations shielded from federal income taxation including corporate and noncorporate charitable groups, civic organizations, fraternal societies and religious or educational organizations. The organizations exempted under this section are generally associations organized for social or charitable benefit, not for commercial profit.[47] S. 1458, however, does provide that farming activities would be exempt only to the extent that such income is "related" business income. "Unrelated" business income from farming activities would include income from selling goods or providing services not substantially related to performance of exempt functions.[48] For example, a liberal arts college receiving "unrelated" business income from the operation of a dairy farm would not be exempt under S. 1458. A charitable horticultural organization devoted to improving wheat strains, on the other hand, would be exempt from the Act despite its receiving income from a farm business because the income is "related" to its exempt function.

The second general exemption includes cooperative corporations that come within the Capper-Volstead Act.[49] Under that Act, persons engaged in production of enumerated farm products may form a cooperative that is exempt from antitrust law as along as it meets the requirements of the Act and does not engage in restraint of trade, nor does not unduly enhance prices or engage in activities prohibited by section 292 of the Act.[50] The Capper-Volstead exemption is limited to associations made up entirely of agricultural producers. According to the Supreme Court, the "Congress did not intend to allow an organization with such nonproducer interests to avail itself of the Capper-Volstead exemption."[51]

Section 3 of S. 1458 also allows a corporation five years from enactment to divest itself of its farm property so long as during that time the corporation does not enlarge its activities or interests. If it is unable to divest itself of the property within this time, the Secretary of Agriculture is authorized to purchase the property at its fair market value provided the corporation can convince the Secretary of its good faith effort at divestiture.[52] A further permissive provision of the Act is that if a creditor, beneficiary or intestate successor acquires such property under a forfeiture, devise or intestate succession, he may hold the property for two years before his retention of the land will constitute a violation of the Act.[53]

47. INT. REV. CODE OF 1954, § 501.
48. Treas. Reg. § 1.512(b).
49. 7 U.S.C. §§ 291-92.
50. *Id.* § 292.
51. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 395-96 (1967).
52. Act § 4(a).
53. *Id.* § 3(a).

The Family Farm Antitrust Act would fill an overly large gap between the present federal antitrust laws and state corporate farming laws. It would do this by making it a *per se* violation of the Clayton Act for corporations or persons "engaged in commerce (or affecting commerce) in a business other than farming, whose nonfarming business assets exceed $3,000,000"[54] to own or control the means of farm production. Furthermore, because the amendment creates a *per se* offense, it would not be dependent upon statistical analysis to become effective. Such analysis is a prerequisite to the enforcement of the Clayton and Sherman Acts[55] and substantially impairs the ability of the prosecutor to prove his case. There would be no need under the Family Farm Antitrust Act to show actual monopoly power, intent to monopolize, or a trend toward undesirable concentration in the agricultural industry. The Act would, therefore, be much more valuable, than is either the Sherman Act or the Clayton Act, to the independent farmer who needs an ally in the struggle to maintain his independent status. Certainly the Family Farm Antitrust Act would be more desirable from the vantage point of the independent farmer, than section 5 of the Federal Trade Commission Act,[56] which seeks to prevent broadly defined "unfair practices."

One potential problem that surfaced during the hearings on the earlier version of S. 1458 concerned the constitutionality of requiring the divestiture of lawfully acquired lands.[57] The new measure provides, however, for sale to the Farmers Home Administration, at

> fair market value any property or interest of which a person is required to divest himself . . . if that person establishes to the satisfaction of the Secretary [of the Department of Agriculture] that he is otherwise unable to divest himself of such property or interest in accordance with requirement of [the applicable subsection].[58]

There is a very similar divestiture requirement contained in the North Dakota statute.[59] This provision has been challenged, and its constitutionality has been upheld by both the Supreme Court of North Dakota and the United States Supreme Court in *Asbury*

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54. *Id.*
55. *See, e.g.*, the statistical analysis and accompanying tables in Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
56. 15 U.S.C. § 45 (1970).
57. *House Hearings, supra* note 17, at 85-86.
58. Act § 4.
59. No. DAK. CENT. CODE § 10-06-03 (1960):
> Any corporation, either domestic or foreign, which, on or since July 29, 1932, has acquired or hereafter shall acquire any rural real estate, used or usable for farming or agriculture, by judicial process or operation of law or pursuant to section 10-06-05, shall dispose of such real estate, except as is reasonably necessary in the conduct of its business, within ten years from the date that it was so acquired.

Hospital v. Cass County.[60] Analysis of the case reveals that the legislation proposed herein can survive a variety of constitutional and other attacks.

At issue in the *Asbury* case was whether legislation which required all corporations, both foreign and domestic, to dispose of all farm land within ten years of the passage of the state Act. The plaintiff hospital was a nonprofit, out-of-state corporation, and it brought an action in state court for a declaratory judgment that the measure was unconstitutional. The North Dakota Supreme Court twice upheld the measure,[61] and the hospital appealed to the United States Supreme Court.

The hospital first contended that the statute violated the due process clause because it would be "unable to salvage an investment."[62] The Court rejected this argument, stating that the due process clause did not require that a foreign corporation recover its investment. All that was mandated was that the corporation have a "fair opportunity to realize the value of the land."[63] The ten year period was found sufficient for this purpose in lieu of substantial evidence to the contrary.

The Court next considered the hospital's theory that the equal protection clause was violated because land companies and cooperatives were exempted from the law. The Court noted that the state possessed a broad classification power which could be exercised in a manner "relevant to the legislative purpose."[64] The Court stated: "The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made."[65] Furthermore, the Court stated the rule:

> Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it.[66]

Presumably referring to its examination of the record, the Court noted that the legislature may have believed that allowing land companies and cooperatives to hold agricultural land could actually advance the goal of forbidding corporate ownership. This finding, together with the presumption of constitutionality, resulted in the

60. 326 U.S. 207 (1945), *aff'g* 73 N.D. 469, 16 N.W.2d 523 (1944). The issues discussed in the United States Supreme Court case and the North Dakota Supreme Court had been thoroughly discussed on intermediate appeal in Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943).

61. Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943); 73 N.D. 469, 16 N.W.2d 523 (1944).

62. 326 U.S. 207, 212.

63. *Id.*

64. *Id.* at 214.

65. *Id.*

66. *Id.* at 215.

holding that the North Dakota statute did not violate the equal protection clause.[67]

While the North Dakota Act and S. 1458 are not completely identical, the broad language of *Asbury* indicates that any analogous challenge to S. 1458 would be unsuccessful. The application of this case to the Federal Family Farm Antitrust Act is sound because the broad power ascribed to the states to regulate commerce within their boundaries is comparable to the power of Congress, under the Commerce clause,[68] to regulate entities engaged in, or affecting, commerce.

Thus the requirement that corporations holding prohibited property or interests in farm land divest themselves of such property or interests, coupled with the assurance that such divestiture will be accomplished at the fair market value of the property or interests, should fall well within the Court's view of the due process clause as espoused in *Asbury*. Furthermore, neither the equal protection clause nor the due process clause will prevent the federal government from disallowing most kinds of corporations other than cooperative corporations.

CONCLUSION

It is in the national interest that the family farm in the United States be provided government protection and encouragement to survive in the coming years. The trend toward corporate ownership and control of the agricultural means of production threatens not only the existence of the family farm, but also the position of all American consumers. Existing federal antitrust legislation, however, is inappropriate to deal with the conglomerate take-over of agricultural production in this country because it was not designed to deal with the vertical integration characteristic of corporate farming. Furthermore, although a few states have attempted to control or prohibit agribusiness enterprises, these individual state efforts have been uncoordinated with and dissimilar to one another. This article has proposed a workable antitrust bill for agriculture and has demonstrated its constitutionality. This measure, or one similar to it, should be quickly enacted by the United States Congress.

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67. The most recent legal assault on the constitutionality of the North Dakota Act occurred in Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971). For a third time, the allegation of the denial of equal protection was heard by the North Dakota Supreme Court. The respondent in that case correctly asserted that, under the Act, a nonfarm corporation could own farmland for ten years before divestiture but a farming operation could not be incorporated at all. He urged that because the farm corporation was denied the right to own land for ten years before divestitute, the corporation was denied equal protection. The court dismissed this contention, stating that if *any* corporation attempted to engage in farming, the ten year grace period would not apply. The ten year grace period had been included only to allow corporations to divest themselves of land which was held for a nonfarming purpose.

68. U.S. CONST. art. 1, § 8, cl. 3.

APPENDIX
S. 1458

A Bill [t]o amend the Clayton Act to provide for additional regulation of certain anticompetitive developments in the agricultural industry.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Family Farm Antitrust Act of 1975".

FINDINGS; DECLARATION OF POLICY

SEC. 2. (a) The Congress finds that—

(1) in order to nurture the private enterprise system, it is desirable to protect consumers and small businesses, and to provide for the continued existence of the family farm, by protecting family farms against the monopolization of the agricultural industry;

(2) vertical integration of the agricultural industry by corporations engaged in the processing, distributing, and retail industries, and other conglomerate corporations, tends to create monopolies in the agricultural industry, to foster anticompetitive trade practices in that industry, and to produce unfair competition for family farms; and

(3) the anticompetitive forces at work within the agricultural industry, by threatening the existence of the family farm, are causing population shifts from rural areas to urban areas which rob the rural areas of productive population and increase the problems of already overcrowded urban areas.

(b) The Congress declares that it is the policy of the United States, and the purpose of this Act, to restore competition to the agricultural industry and to provide for the continued existence of the family farm.

AMENDMENT OF THE CLAYTON ACT

SEC. 3. (a) The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12-27) is amended by inserting after section 8 the following new section:

"SEC. 8A. (a) Except as provided in subsection (b), no person engaged in commerce (or affecting commerce) in a business other than farming, whose nonfarming business assets exceed $3,000,000, shall—

"(1) engage, directly or indirectly, in farming or the production of agricultural products,

"(2) control, or attempt to control, agricultural production through the ownership or leasing of land for agricultural purposes, or

"(3) participate in farming through corporate integration or merger, or by any other means of acquisition or control of another person who is engaged in farming.

"(b) The provisions of subsection (a) shall not apply to—

"(1) any organization described in section 501(c) or (d) of the Internal Revenue Code of 1954 exempt from tax under section 501(a) of such Code to the extent that the farming activities of that organization do not result in unrelated business income taxable under part III of subchapter F of chapter 1 of such Code; or

"(2) any farmer owned and controlled cooperative, corporation, or association which meets the requirements of the Act entitled "An Act to authorized association of producers of agricultural products", approved February 18, 1922 (42 Stat. 388; 7 U.S.C. 291-292 (the Capper-Volstead Act)), or as defined in section 15(a) of the Agricultural Marketing Act of 1929 (49 Stat. 317; 12 U.S.C. 1141).

"(c) Any person to whom subsection (a) applies, who was engaged in activities on the day before the date of enactment of the Family Farm Antitrust Act of 1975, which on the day after such date would (but for the provisions of this subsection) be in violation of subsection (a), shall not be considered to be acting in violation of the provisions of that subsection during the 5 years following the date of enactment of that Act if he—

"(1) does not undertake any new, or increase or expand any existing, activity or interest in violation of that subsection during those years, and

"(2) divests himself, within 5 years after the date of enactment of that Act, of any property or other interest held by him in violation of the provisions of that subsection.

"(d) It shall not be a violation of the provisions of subsection (a) for any creditor, beneficiary, or intestate successor to acquire, pursuant to forfeiture, devise, or the laws of intestate succession, and hold for not more than 2 years any property or other interest, which acquisition and holding would violate such provisions but for this subsection."

(b) Section 11 of such Act (15 U.S.C. 21) is amended by—

(1) striking "sections 2, 3, 7, and 8" where it appears in subsection (a) and (b) and inserting in lieu thereof "sections 2, 3, 7, 8, and 8A"; and

(2) striking "sections 7 and 8" where it appears in subsection (b) and inserting in lieu thereof "sections 7, 8, and 8A".

(c) The first paragraph of the first section of such Act is amended by inserting immediately before "and also this Act" the following: "the Family Farm Antitrust Act of 1975".

ASSISTANCE TO THE SECRETARY OF AGRICULTURE

SEC. 4. (a) The Secretary of Agriculture, acting through the Farmers Home Administration, is authorized and directed to acquire at fair market value any property or interest of which a person is required to divest himself under subsection (c) or (d) of section 8A of the Act of October 15, 1914 (38 Stat. 730; 15 U.S.C. 12-27), as amended by this Act, if that person establishes to the satisfaction of the Secretary that he is otherwise unable to divest himself of such property or interest in accordance with requirements of that subsection.

(b) The Secretary shall sell at the then prevailing market value any property acquired under subsection (a) as soon as practicable, but in no event later than 2 years after the date on which such property was acquired by him under that subsection.

(c) The Secretary shall prescribe such rules and regulations as may be necessary to carry out the provisions of this section.

(d) There are authorized to be appropriated to the Secretary of Agriculture such sums as may be necessary to carry out the provisions of this section.