Antitrust Law: Agricorporate Membership in Cooperatives –Is the Capper-Volstead Exemption a Threat to Farmers?

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And when that crop grew, and was harvested, no man had crumbled a hot clod in his fingers and let the earth sift past his fingertips. No man had touched the seed, or lusted for the growth. Men ate what they had not raised, had no connection with the bread. The land bore under iron, and under iron gradually died; for it was not loved or hated, it had no prayers or curses.[1]

I. Introduction

One of the principal characteristics distinguishing farming from other large segments of the economy is the business form in which production units operate. The sole proprietorship is the dominant form in farming, while industry and commerce are almost entirely dependent upon the corporation.[2] The farmer as sole proprietor is an independent entrepreneur entirely responsible for the success or failure of his farm.[3] In contrast, the corporation disperses entrepreneurial control, distributing responsibility among management personnel and ultimately among investors.

Entrepreneurial shifts are occurring in agriculture, however, largely as

1. J. STEINBECK, THE GRAPES OF WRATH (1939).
2. M. HARRIS, ENTREPRENEURSHIP IN AGRICULTURE 17 (n.d.).
3. *Id.*

a result of technological innovation and the advent of convenience-oriented food marketing. Significant decisions relating to inputs, production management, and marketing once made by the farmer are now made by parties not holding conventional ownership of the land.[4] The trend in agriculture is toward "property without power" in the farmer and "power without property" in the off-farm enterprise.[5] Eventually a new business form is expected to emerge to meet the requirements of modern agriculture as successfully as the corporate form has met the needs of commerce and industry.[6]

The farmer-owned cooperative, though hardly new to agriculture, is one business form which could rise to fulfill those requirements. The cooperative supplements the sole proprietorship, compensating for its shortcomings by providing the organizational advantages of the corporate form without significantly compromising entrepreneurial independence.[7]

With the passage of the Capper-Volstead Act in 1922,[8] Congress specifically recognized the value of cooperatives by granting farmers the right to "act together in associations" without violating the federal antitrust laws.[9] The courts have interpreted this exemption to give farmers not only the right to form cooperatives but also the power to use cooperatives to dominate markets.[10] Domination has not been the prevailing goal of the cooperative movement, however; rather, the goal has been to obtain a fair price for farmers on the open market. However, the disappearance of the open market and the accompanying shifts in entrepreneurial control from farm to off-farm corporations are forcing farmers to reconsider the role of cooperatives; domination of markets is now a pressing alternative.[11] A few cooperatives have already acquired significant portions of particular markets, and as a result have become large-scale operations.[12]

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4. Harris describes the impact as follows:
> Technological advance has meant that typical farm firms buy rather than produce increasing portions of their inputs. They are also producing more products to specification. Marketing arrangements to meet these new conditions have tended to create new relationships between farmers and suppliers of inputs and farmers and buyers of products. These new arrangements apparently give suppliers and buyers control over increasing portions of buying, producing and marketing activities.

Id. at 2. *See also* Heady, *The Agriculture of the U.S.*, SCIENTIFIC AMERICAN, Sept., 1976, at 107; Kyle, Sundquist & Guither, *Who Controls Agriculture Now?—The Trends Underway*, in WHO WILL CONTROL U.S. AGRICULTURE? 3 (North Central Regional Extension Pub. 32, 1972).

5. Harris, *Entrepreneurial Control in Farming*, in ECONOMIC RESEARCH SERVICE NO. 542, at 3 (1974).

6. M. HARRIS, *supra* note 2, at 1.

7. Decentralized, democratic control is a built-in safeguard preventing major shifts of farmer entrepreneurship to the cooperative. The safeguard is most effective in local cooperatives, but when the local cooperative is subservient to a regional or national cooperative substantial shifts in entrepreneurship may occur. M. HARRIS, *supra* note 2, at 63. *See generally* LEGAL PHASES OF FARMER COOPERATIVES (F.C.S. Information 100, 4th ed. 1976).

8. Ch. 57, 42 Stat. 398 (1922).

9. § 1, 7 U.S.C. § 291 (1970).

10. *See* text accompanying notes 27-34 *infra*.

11. Torgerson, *Time for a New Prevailing School of Cooperative Thought?* FARMER COOPERATIVES, Jan., 1977, at 8.

12. Several cooperatives now appear regularly among the largest five hundred industrial corporations:

To many the cooperative presents the only alternative to an agricultural system dominated by corporations. For this reason the Capper-Volstead exemption for cooperatives has been hailed as a Magna Carta for farmers.[13] This description of the Capper-Volstead Act, though once possibly appropriate, is questionable today. Cooperatives have also become havens for agribusiness corporations. This phenomenon has occurred because the term "farmer" was inexactly defined in the Capper-Volstead Act as "persons engaged in the production of agricultural products."[14] The consequence has been that corporations producing agricultural products have become members of or have formed cooperatives, and have been able to achieve the same measure of antitrust immunity which the Capper-Volstead Act clearly gave to the collective marketing activity of individual farmers.

To date, the courts have not interpreted the Capper-Volstead Act to exclude corporations.[15] The continued extension of this antitrust exemption to combinations of agribusiness corporations has serious implications for the survival of the independent farmer in agriculture. This note focuses on the issue of corporations in cooperatives and how the extension of antitrust immunity to such corporate combinations encourages shifts in entreprenuerial control from the farmer to agribusiness corporations.

II. The Antitrust Exemption for Agricultural Cooperatives

The antitrust laws[16] were enacted to remedy the abuses caused by the consolidation of industrial corporations which occurred during the American industrial revolution in the last quarter of the nineteenth century.[17] Both

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Ranking in Cooperative Sales Volume—$1,000

1976	1975		1976	1975
123	135	Farmland Industries, Inc.	1,840,398	1,507,805
137	141	Associated Milk Producers, Inc.	1,623,346	1,477,851
162	154	Agway Inc.	1,415,427	1,329,425
183	180	Land O'Lakes, Inc.	1,241,563	1,124,036
251	239	Gold Kist Inc.	892,902	815,151
354	359	CF Industries, Inc.	527,754	468,138
460	438	Dairlea Coop., Inc.	364,085	355,484

FARMER COOPERATIVES, June, 1977, at 25.

13. *See generally* Knapp, *History and Perspectives of Cooperative Structure under the Capper-Volstead Act and the Clayton Amendment*, in PROCEEDINGS OF THE NATIONAL SYMPOSIUM ON COOPERATIVES AND THE LAW 11 (1974).

14. § 1, 7 U.S.C. § 291 (1970).

15. *See* text accompanying notes 43-46 *infra*.

16. A basic summary of the antitrust laws is provided in FEDERAL TRADE COMMISSION, STAFF REPORT ON AGRICULTURAL COOPERATION 79 (1975) [hereinafter referred to as STAFF REPORT].

> The primary antitrust laws are the Sherman Act, 15 U.S.C. Secs. 1-7, the Clayton Act, 15 U.S.C. Secs. 12-27, and the Federal Trade Commission Act, 15 U.S.C. Secs. 41-58. Basically, the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade (Sec. 1), and forbids monopolization and attempts to monopolize (Sec. 2). The Clayton Act basically prohibits tying agreements (Sec. 3), price discrimination (Sec. 2), certain acquisitions of stock or assets which would substantially lessen competition or tend to create a monopoly (Sec. 7), and certain interlocking directorates (Sec. 8).

Id.

17. *See generally* Knapp, *supra* note 13, at 11.

farmers and the general public were the victims of combinations and monopolies. The pressure culminated in the passage of the Sherman Antitrust Act of 1890.[18] However, the Act had unforseen consequences for farmers; the prohibitions of the Act also applied to the infant marketing associations formed by farmers to offset the power of the few and organized buyers of agricultural products.[19]

A. Section 6 of the Clayton Antitrust Act

The antitrust roadblocks to the formation of agricultural cooperatives were removed when Congress approved an exemption for agricultural associations in section 6 of the Clayton Antitrust Act of 1914.[20] Section 6 of the

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18. Ch. 647, 26 Stat. 209 (1890). Most of the antitrust litigation against cooperatives is brought under sections 1, 2, and 3 of the Sherman Antitrust Act:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding one hundred thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . and any State or States or foreign nations, is declared illegal . . . .

15 U.S.C. §§ 1-3 (1976).

19. Before the passage of the Sherman Act an amendment to exempt agricultural associations was proposed. It was eventually eliminated as unnecessary. Knapp, *supra* note 13, at 11; 21 CONG. REC. 2726 (1890).

During the twenty-four year period between the Sherman Act and the passage of the Clayton Act, ch. 323, 38 Stat. 730 (1914), cooperatives became defendants in both state and federal antitrust suits. *See, e.g.*, Burns v. Wray Farmers Grain Co., 65 Colo. 425, 176 P. 487 (1918); Ford v. Chicago Milk Shippers' Ass'n, 155 Ill. 166, 39 N.E. 651 (1895); Reeves v. Decorah Farmers' Coop. Soc'y, 160 Iowa 194, 140 N.W. 844 (1913). To bar such prosecutions Congress granted cooperatives an antitrust exemption in section 6 of the Clayton Act, 15 U.S.C. § 17 (1976). Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 464 (1960).

20. 15 U.S.C. § 17 (1976). Congress' intent to encourage the formation of cooperatives without the fear of immediate liability for antitrust violations is reflected in the House Committee Report on section 6 of the Clayton Act.

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

H.R. REP. NO. 627, 63d Cong., 2d Sess. 16 (1914).

Section 6 of the Clayton Act provides,

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

15 U.S.C. § 17 (1976).

Clayton Act authorized farmers to pursue the "legitimate objects" of mutual benefit associations "not having capital stock or conducted for profit."[21] Section 6 did not effectively promote cooperatives, however, because the "legitimate objects" authorized under the Act were left undefined, and the stock prohibition prevented the Act from applying to the prevailing cooperative form of 1914.[22]

B. *The Capper-Volstead Act*

Farm groups dissatisfied with the limitations of the Clayton exemption pressured Congress for a change.[23] Finally, in 1922 Congress enacted the Capper-Volstead Act[24] to extend the antitrust exemption to capital stock cooperatives and to clarify the exemption granted by section 6 of the Clayton Act.[25] The Capper-Volstead Act specified the "legitimate objects" of these mutual benefit associations were "collectively processing, preparing for market, handling and marketing"[26] the products of the members. The capacity to finance their operations through the issuance of capital stock has enabled cooperatives to achieve their current position in the economy.[27]

C. *Judicial Interpretation of the Exemption*

Cases construing the antitrust exemption for agricultural cooperatives are few.[28] The Supreme Court has on four occasions[29] interpreted the ex-

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21. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 465 (1960).
22. Knapp, *supra* note 13, at 13.
23. *See* J. KNAPP, ADVANCE OF AMERICAN COOPERATIVE ENTERPRISES 5-34 (1974).
24. Ch. 57, 42 Stat. 388 (1922). Section 1 of the Act provides,

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing 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:
> *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
> 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 the products of non-members to an amount greater in value than such as are handled by it for members.

7 U.S.C. § 291 (1970).

25. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 391 (1967).
Most agricultural cooperatives are organized with capital stock and consequently do not receive the protection of section 6 of the Clayton Act.
26. § 1, 7 U.S.C. § 291 (1970).
27. Seven agricultural cooperatives are among the largest five hundred businesses in the United States. *See* table at note 12 *supra*.
28. As of 1977 only fourteen federal appellate cases directly dealt with the antitrust exemption for agricultural cooperatives. For a general survey and analysis of the cases *see* Annot., 20 A.L.R. FED. 924 (1974); 16F J. VON KALINOWSKI, BUSINESS ORGANIZATIONS §§ 51.01-.06 (1976); Note, *Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341 (1975).
29. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967); Sunkist Grow-

emption and did so in each case in accord with the traditional policy of construing antitrust exemptions strictly.[30] From these four cases it is clear the cooperative activity of farmers is not free from antitrust restrictions.[31] The exemption does permit cooperatives to achieve monopoly,[32] but the means employed must be legitimate and not predatory.[33] Likewise, farmers can not extend cooperative membership to nonfarmers.[34] The lower federal courts have often been more generous in their construction of the exemption.[35]

III. Corporations in Cooperatives: An Abuse of the Exemption?

The small family farm was the predominant production unit in agriculture when the Capper-Volstead Act was passed in 1922.[36] Consequently,

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ers, Inc. v. Winckler & Smith Co., 370 U.S. 19 (1962); Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); United States v. Borden Co., 308 U.S. 188 (1939).

30. The general purpose of the antitrust laws is the promotion of competition. Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958). However, the exemptions are authorized departures from the free enterprise system protected by the antitrust laws. *See* Clearwaters, *Antitrust Cooperatives—Some Current Views*, in PROCEEDINGS OF THE NATIONAL SYMPOSIUM ON COOPERATIVES AND THE LAW 47 (1974).

The Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (1933), empowers the Secretary of Agriculture to make marketing agreements with cooperatives and thereby exempt them from the antitrust laws. *Id.*, § 8(2), 7 U.S.C. § 608b (1970). This note discusses only the exemptions contained in section 6 of the Clayton Act and section 1 of the Capper-Volstead Act, 7 U.S.C. § 291 (1970).

31. The first Supreme Court case construing the exemption, United States v. Borden Co., 308 U.S. 188 (1939), eliminated any doubts that cooperatives might have complete immunity from the antitrust laws.

32. Hypothetically, an agricultural association could attain monopoly status without violating the antitrust laws. "It is not unlawful under the Antitrust Acts for a Capper-Volstead cooperative . . . to try to acquire even 100 percent of the market if it does it exclusively through marketing agreements approved under the Capper-Volstead Act." Cape Cod Food Prod. v. National Cranberry Ass'n, 119 F. Supp. 900, 907 (D. Mass. 1954); *see* Hufstedler, *A Prediction: the Exemption Favoring Agricultural Cooperatives Will be Affirmed*, 22 AD. L. REV. 455, 460-61 (1969).

33. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

34. In Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), the defendant cooperative lost its exemption because some of its members were packing houses that did not produce oranges. Likewise, in United States v. Borden Co., 308 U.S. 188 (1939), the exemption did not protect the cooperative when it conspired to maintain noncompetitive prices with dairy distributors, municipal officials, labor officials, and others.

The Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., 370 U.S. 19 (1962), held the agricultural exemption spares cooperatives from the antitrust laws in their interorganizational agreements. The Sunkist cooperative has subsidiary companies, but is itself directly owned by its grower-members. It thus differs from a true federated cooperative which is owned by local "centralized" cooperatives. Nevertheless, this case has been interpreted as judicial approval of the federated cooperative which has made the attainment of substantial economic power possible for cooperatives. *See* STAFF REPORT, *supra* note 16, at 79-81; Knapp, *supra* note 13, at 30.

35. Recently the lower federal courts have held two hybrid forms of cooperatives not existing at the passage of the Capper-Volstead Act qualify for the antitrust exemption. In Northern Calif. Supermarkets, Inc. v. Central Calif. Lettuce Producers Coop., 413 F. Supp. 984 (N.D. Cal. 1976), *appeal docketed*, No. 76-1456 (9th Cir. Mar. 8, 1976), a federal district court approved a "market information cooperative" in which the members meet primarily to determine high-low selling prices. A bargaining association which serves its members principally by representing them in contract negotiations with large potato processing firms was sanctioned by the Ninth Circuit Court of Appeals in Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *see* 53 TEX. L. REV. 840 (1975); text accompanying notes 70-73 *infra*.

36. The Census of Agriculture reveals approximately six million farming units existed in 1929, and a high percentage of agricultural commodities were produced by relatively

when Congress defined "farmer" as a person "engaged in the production of agricultural products,"[37] there may have been little reason to question whether a farmer could be anything but a natural person. Today, however, the language is no longer clear. Corporations now engage in the production of agricultural products and as legally recognized persons now fit within the letter of the Act.[38]

A. Legislative History of the Capper-Volstead Act

The congressional debates preceding the passage of the Capper-Volstead Act reflect little consideration of the possibility that corporations might become members of cooperatives.[39] Congress viewed cooperatives as devices for checking the power which the corporate form gave to buyers of farm products.[40] The most that can be said is the tone of the debates was generally anticorporate;[41] supporters of the Act often spoke of the small farm, not the large corporation, as the beneficiary of the legislation.[42]

B. Judicial Treatment of the Issue

The few federal courts confronting the issue have construed the Capper-Volstead Act narrowly and uniformly held the antitrust exemption available to cooperatives having corporate members. The issue has been presented to the Supreme Court twice and on both occasions the Court has

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small farms each owned or operated by an individual and his family. Kyle, Sundquist & Guither, *supra* note 4, at 4. The number of farms has dropped to less than three million today. *Hearings on H.R. 11654 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 18 (1972) (statement of J. Phillip Campbell) [hereinafter referred to as the *Family Farm Act Hearings*].

37. § 1, 7 U.S.C. § 291 (1970).

38. *See* Knutson, *What Is a Producer?*, in PROCEEDINGS OF THE NATIONAL SYMPOSIUM ON COOPERATIVES AND THE LAW 142 (1974).

39. However, Senator Walsh of Montana, who was active in the debates, considered whether a large milling company owning a farm would be protected by the Capper-Volstead exemption and stated he did not believe "that the word 'persons' here would include corporations. If there is any doubt about it, it might be corrected." 62 CONG. REC. 2121 (1922) (remarks of Senator Walsh).

40. *See id.* at 2051 (remarks of Senator Kellogg).

41. Senator Kellogg, one of the Act's main advocates, blasted the "oppressive power of wealth and great aggregations of capital or any other organization which may oppress the people." *Id.* at 2050 (remarks of Senator Kellogg).

42. Senator Kellogg spoke of farmers in the debates as individuals operating on a scale completely dissimilar to large corporations:

> Mr. President, of course, the farmer cannot consolidate his land into great holdings or into corporate ownership, and he should not do so. The hope of this Nation, the hope of any nation, the hope of the independence and the prosperity of our people, our very civilization, depends upon the *individual ownership* and proprietorship of the soil. Destroy that and you destroy the strength of the Nation. . . . The great aggregations of capital in this country undoubtedly are necessary in modern economic life, but the farmer cannot create such great aggregations of capital. The law should encourage him in his ownership, in the occupation of his farm, and in the cultivation of his own land, and should encourage him in the one way which it can do—in obtaining better marketing facilities for the products which he raises.

Id. (remarks of Senator Kellogg) (emphasis added). Senator Kellogg described "farmers" within the Capper-Volstead Act as "*people* who produce farm products of all kinds." *Id.* at 2052 (remarks of Senator Kellogg) (emphasis added).

Senator Capper of Kansas spoke of the Act's beneficiaries as small farms which did not operate in the form of corporations:

declined to decide it.[43] The question was most recently raised in *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*.[44] The court held the exemption was available despite the fact the principal members of the defendant cooperative are large corporations,[45] and the combination permits the members to control two-thirds of the local lettuce production.[46]

> The Capper-Volstead bill, so called, was designed simply to give to the growers or the farmers the same opportunity for successful organization and distribution of their products that the great corporations of America have enjoyed for many years. More and more it has become evident that the growers must have an opportunity to merchandise their products in an orderly way, instead of being compelled to dump them on a glutted market at prices below cost of production.
>
> Mr. President, every statesman looks forward to a condition as ideal when the whole country will be dotted with small farms, each operated by its owner. Every statesman deplores the spread of tenantry and insists that best citizenship can be developed only upon the individual system of farm production. Because of this peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization, which maintains individuality of production but enables them to unite for marketing purposes.

Id. at 2058 (remarks of Senator Capper).

43. In the first relevant case, Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960), the government contended at the trial court level that "farmers" should be limited to "natural persons" earning the majority of their income from, and actually working on, the farm. United States v. Maryland & Va. Milk Producers Ass'n, 167 F. Supp. 45, 49 (D.D.C. 1958), *aff'd in part, rev'd in part*, 362 U.S. 458 (1960). The district court did not look at the Act's legislative history, but rather at the impracticality of the government's argument—a person may be a farmer regardless of whether he is more occupied with nonfarm than farm activities. The trial court also concluded that if Congress intended to restrict "farmers" to natural persons, it could easily have done so, as it had elsewhere. *Id.* The court noted Congress in the Bankruptcy Act was specific:

> "Farmer" shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations . . . .

§ 1, 11 U.S.C. § 1(17) (1970). This definition of farmer was added to the Bankruptcy Act in 1938.

When this case reached the Supreme Court, it was unnecessary to decide the issue of corporate membership in cooperatives. The Court looked instead at the cooperative's illegal "predatory practices" and found no exemption based on these grounds. 362 U.S. at 470-73. By not discussing the issue the Supreme Court left doubts suggesting two possible conclusions: either the Court accepted the trial court's determination, or it was hesitant to decide the issue because of the probable repercussions of disqualifying corporate members.

The Ninth Circuit Court of Appeals in Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967), adhered to the position taken by the district court in *Maryland & Va. Milk Producers Ass'n* and also indicated the general definition of "person" in the United States Code includes "corporation." *Id.* at 461; 1 U.S.C. § 1 (1970). On appeal the Supreme Court mentioned that a small percentage of the cooperative's members were corporations but passed over this issue and decided the case on other grounds. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 386-87 (1967).

A 1972 profile of the Sunkist Growers cooperative revealed its membership includes large corporations: Berylwood Investment Co. (Kaiser Aluminum and Chemical Co.); Blue Goose Growers, Inc. (Pacific Lighting Corp.). Interlocking directorates involved Security Pacific National Bank, Newhall Land and Farming Co., and Valencia Water Co. *A Profile of California Agribusiness*, in AGRIBUSINESS ACCOUNTABILITY PROJECT 62 (1972) [hereinafter referred to as *A Profile of California Agribusiness*].

44. 413 F. Supp. 984 (N.D. Cal. 1976), *appeal docketed*, No. 76-1456 (9th Cir. Mar. 8, 1976).

45. *Id.* at 992 n.11; *see* discussion note 79 *infra*.

46. 413 F. Supp. at 987.

Although the courts agree corporations can acquire Capper-Volstead protection, it is not safe to assume the question is resolved. The cases are few and the "definitive case" remains undecided.

IV. Corporations in Agriculture

The courts considering the issue of an antitrust exemption for cooperatives having corporate members have done so without regard for the implications the exemption may have for independent farmers. The number of public investor corporations engaged in agricultural production is insignificant at present, but there is little doubt the corporate form is adaptable to food production and thus the corporation could emerge as the dominant production unit in agriculture.[47] To appreciate the consequences an antitrust exemption can have both for the independent farmer and for cooperatives, one must understand how the entrance of public investor corporations into agriculture reorients the entrepreneurial control of food production.

A. Independent Farmer Model

The independent farmer entrepreneur holds complete managerial control over his farm. He makes all of the organizational and operational decisions and assumes the consequences of these decisions, enjoying the profits or suffering the losses. Among the major attributes of entrepreneurial control are: owning the input resources and the resulting product; establishing the standards of husbandry; determining the time to produce, harvest, and market; judging the acceptability of the harvested product and the price to be obtained for the product.[48]

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47. According to the 1969 census farm corporations are approximately one percent of all commercial farms. USDA studies indicate approximately twenty percent of these are publicly owned. *See* M. HARRIS, *supra* note 2, at 85. *See also* Kyle, Sundquist & Guither, *supra* note 4.

The general assumption is that the persistent trend toward larger production units creates an attractive situation for the organizational form of the corporation, because the corporation can achieve the economies of scale necessary to remain competitive. Also, corporations are in a better position to assume the risks of new technological innovations. As such, the corporate form is likely to be a more efficient unit than the small sole proprietorship. *See id.* at 9; Breimyer & Barr, *Issues in Concentration Versus Dispersion*, in WHO WILL CONTROL U.S. AGRICULTURE? 17 (North Central Regional Extension Pub. 32, 1972).

Recent studies have challenged this assumption. One study concluded nearly all the economies of scale can be achieved by the modern fully mechanized one-man or two-man operation. Madden, *Economies of Size in Farming*, ECONOMIC RESEARCH SERVICE 35 (Agricultural Economic Report No. 107, 1967). However, the most efficient size, depending on the crop, ranged from 440 acres to 1,600 acres. The optimum farm size was once envisoned as 160 acres. *See* Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475 (1975).

48. M. HARRIS, *supra* note 2, at 10. Harris' model independent farmer does not earn off-farm income. Most of the farmers who are classified in high-, or middle-income groups are receiving substantial portions of their income from off-farm sources. Only the "poorest" farmers today meet Harris' model. *See* Kyle, Sundquist & Guither, *supra* note 4, at 6.

The model independent farmer thrives in an open market in which sellers of inputs, buyers of products, and production units are numerous. Any diminution in any attribute of the open market is likely to have consequences for farmer entrepreneurship. *See* M. HARRIS, *supra* note 2, at 12.

B. Family Farm Corporation

Initially it is important to distinguish the incorporated family farm business from other forms of corporate farming. The liberalization of corporate codes in the 1950s provided the incentive for many sole proprietor family-oriented farms to incorporate.[49] Incorporation does modify the sole proprietorship by shifting the status of the farmer from owner to employee. Generally, however, the change is in form only and does not substantially affect the actual entrepreneurial control of the farm. It is the public investor corporation and not the family farm corporation that represents the furthest departure from the independent farmer model.[50]

C. Public Investor Corporation

Public investor corporations enter food production for a variety of reasons. Some are organized solely for agricultural production, deriving the bulk of their income from the sale of the commodity produced.[51] Many investor corporations, however, enter food production for two primary reasons—diversification and achievement of a vertically coordinated food production system.[52]

1. Corporate Farming to Achieve Diversification

Investor corporations that engage in direct agricultural production for the purpose of diversifying are often large conglomerates. The farming operations of these conglomerates pale in comparison with their primary business activities, but these operations are usually larger than the typical family farm operation.[53]

Investor corporations often acquire farming operations to supplement

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49. *See* M. HARRIS, *supra* note 2, at 86. Among the advantages of incorporating are limited liability and more flexible estate and business planning. *See* Brugh, *Structuring the Farm and Ranch Operation for Business and Estate Planning*, 54 NEB. L. REV. 262 (1975); Harl, *Estate and Business Planning for Farmers*, 19 HASTINGS L.J. 271 (1968); Kelly, *The Farmer Corporation as an Estate Planning Device*, 54 NEB. L. REV. 217 (1975).

50. M. HARRIS, *supra* note 2, at 96. Incorporated family farms are often larger than average operations but generally remain closely held and are managed by one person. *See* Coffman & Scofield, *Corporations Having Agricultural Operations: Preliminary Report* II, in ECONOMIC RESEARCH SERVICE NO. 156, at 3 (1969).

Although entrepreneurship may remain relatively intact in the family farm corporation, some commentators contend it is the family farm corporation with a large operation that is the greatest threat to the small farmer. Describing the plight of the small farmer, one commentator noted,

> In most instances, the greatest threat to the small farmer and the small town is and will continue to be the neighbor who is operating at or near the minimum cost point per unit of output and is rapidly expanding his operation to remain at the point of minimum cost on the volume scale. This is the type of farm that is changing the structural face of agriculture.

Harl, *Farm Corporations—Present and Proposed Restrictive Legislation*, 25 BUS. LAW. 1247, 1257 (1970). *See also* Heady, *supra* note 4; Kyle, Sundquist & Guither, *supra* note 4, at 4.

51. M. HARRIS, *supra* note 2, at 95.

52. *See* Scofield, *Conglomerates in Agriculture*, in PROCEEDINGS OF THE FOURTEENTH NATIONAL CONFERENCE OF BARGAINING COOPERATIVES 69 (1970).

53. *Id.* at 71.

off-farm income or to obtain tax advantages.[54] Because the farming is generally direct, the entrepreneurial shift to the corporation is complete.

2. *Corporate Farming to Achieve Vertical Coordination*

Historically, the price on the open market governed production levels. However, the consolidation of agricultural production into fewer production units and the advent of brand name merchandising have significantly diminished the importance of the open market for many commodities.[55] In response to this change the strategy of participants in the modern market is steadily moving toward "closer coordination between the production of raw agricultural products and the subsequent stages through which these products move to the consumer."[56] Agricultural economists label this strategy "vertical coordination." Vertical coordination is market-oriented agriculture and is designed to produce a large volume of relatively uniform products. A close connection between the market and the farm is achieved because the commodity is tailored to fit perceived consumer demands.[57]

Vertical coordination ties together one or more successive stages of on-farm production with off-farm activity. These various stages can be harmonized through several means which differ significantly in the legal and economic relationships created.[58] The two primary means through which corporations achieve a vertically coordinated food production system are vertical integration and contract farming.[59]

a. *Vertical Integration*

Vertical integration is the form of coordination in which one firm engages in direct production and also in one or more related off-farm activities.[60] Generally these investor corporations were originally involved

54. *See* Green, *Corporate Accountability and the Family Farm*, in *Hearings before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d Sess. 3396 app. A (1971-1972).

55. *Family Farm Act Hearings*, *supra* note 36, at 20 (statement of J. Phillip Campbell); Breimyer & Barr, *supra* note 47, at 7.

56. *Family Farm Act Hearings*, *supra* note 36, at 21.

57. M. HARRIS, *supra* note 2, at 98; Breimyer & Barr, *supra* note 47, at 17.

58. M. HARRIS, *supra* note 2, at 99.

59. Mighell & Hoofnagle, *Contract Production and Vertical Integration in Farming—1960 and 1970*, in ECONOMIC RESEARCH SERVICE NO. 479 (1972). The terms "vertical coordination," "contract production," and "vertical integration" are often used interchangeably. Here "vertical coordination" is used as the comprehensive term. "Contract production" and "vertical integration" represent specific examples of vertical coordination.

Farmer cooperatives are often mentioned in connection with vertical coordination. Cooperation is an alternative method of attaining vertical coordination. Farmers use cooperatives to obtain a steady source of supplies or to provide access to markets. Cooperatives can thus be a third means through which corporations can vertically coordinate. Joint ventures are another form of cooperation through which a measure of coordination can be achieved. *See* Goldberg, *Profitable Partnerships: Industry and Farmer Co-ops*, 50 HARV. BUS. REV. 108 (1972).

60. Mighell & Hoofnagle, *supra* note 59. One commentator described vertical integration as "simply the effort of giant corporations to take over all phases of a food operation from 'seedling to supermarket' as one company puts it, or perhaps from 'conception to consumer' in the case of a livestock operation." Voight, *Farmer Cooperatives and the*

in food processing or retailing and have added production to assure a steady flow of quality products.[61] Vertically integrated corporations remove the farmer and take over production; the shift in entrepreneurship to the corporation is complete.[62]

b. Contract Farming

Many corporations indirectly coordinate production into an otherwise integrated system by contracting with farmers to raise the product.[63] Rather than removing the farmer the investor corporation enters into an agreement with him. A key element of each agreement is the extent to which entrepreneurial risks and control will be transferred from the farmer to the contracting firm.[64] The contract may be a marketing agreement preserving the farmer's independence or may be a production contract transferring virtually all of the entrepreneurial risks and prerogatives to the contracting firm.[65] The shift in entrepreneurship under the production contract can be so complete that from a management point of view the contract farmer is in no better position than is a laborer on a corporate farm.[66]

Public Interest, in PROCEEDINGS OF THE NATIONAL SYMPOSIUM ON COOPERATIVES AND THE LAW 63 (1974).

61. Mighell & Hoofnagle, *supra* note 59.

62. M. HARRIS, *supra* note 2, at 95. It has been estimated that total farm output under vertical integration between 1960 and 1970 increased from 3.9% to 4.8%. In 1970 significant percentages of particular field crops were produced under vertically integrated systems: vegetables for fresh market—30%; potatoes—25%; citrus fruits—30%; sugar cane—60%. These figures may also represent production of integrated farmer cooperatives. Food grains were among the least integrated sectors at 0.5%. Mighell & Hoofnagle, *supra* note 59.

63. Harris & Massey, *Vertical Coordination Via Contract Farming*, in ECONOMIC RESEARCH SERVICE NO. 1073, at 2 (1968); Mighell & Hoofnagle, *supra* note 59.

64. *See* Harris & Massey, *supra* note 63, at 74.

65. Both marketing and production contracts require the farmer to commit his production to the buyer before harvest. However, under the marketing contract this is all the farmer agrees to do. The production contract requires the farmer to submit to the buyer's specifications. Rhodes, *Policies Affecting Access to Markets*, in WHO WILL CONTROL U.S. AGRICULTURE? 37, 39 (North Central Regional Extension Pub. 32, 1972).

66. *Id.* Harris and Massey conducted a study of production contracts using ten criteria to measure in quantitative terms the proportion of entrepreneurial control and risk-sharing that was shifted from the farm to the off-farm firm. Transfers of risk and decision-making were examined in each of the three major steps in production: (1) acquiring the input (seeds, plants, or animals); (2) producing the commodity (all stages of raising a crop or feeding livestock); and (3) marketing the output (everything that happens between the farm and market). Harris & Massey, *supra* note 63, at 74.

Summarizing the report, Harris explains,

> Each contract was evaluated by standards set for each criterion, from no integration with a "0" score to complete integration with a score of "5". The sum of the respective scores of 10 criteria could range from 0 to 50, except that a contract that scored "0" would not have been included. The actual range was from 12 to 43 degrees of integration, with an average of 27.2 points for all 420 contracts covering 71 different commodities throughout the United States. A score of 43 points indicates almost complete transfer of selected entrepreneurial functions. Average score for commodities for which as many as 15 contracts were studied were: hybrid seed corn, 34.8; broilers, 31.1; sweet corn, 30.1; peas, 29.6; green and wax beans, 28.8; tomatoes, 24.8; and commercial eggs, 23.6 integration points.

M. HARRIS, *supra* note 2, at 114. Harris and Massey concluded that many vertical coordination contracts transferred substantial portions of entrepreneurial control from the farm to the off-farm firm.

Generally the farmer relinquishes entrepreneurship in exchange for market and price security. However, it is not uncommon for contracts to transfer complete control to the contracting firm leaving the farmer to bear all of the risks and uncertainties.[67] Farmers' bargaining associations have emerged in some sectors dominated by contract farming to offset the power of contracting firms. The association negotiates one contract for all farmer-members. A primary object of negotiation is to ensure transfers of entrepreneurial control to the contracting firm will be exchanged for market and price security.[68]

V. *Recent Litigation: Troublesome Implications for Farmers*

A. *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*

Recently the Ninth Circuit in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*[69] held farmers' bargaining associations were protected from the antitrust laws by the Capper-Volstead exemption. The case involved two bargaining associations which periodically meet and exchange information regarding negotiations with buyers to coordinate their bargaining efforts and secure similar contracts for the members of both associations. The complainant was a contracting firm alleging the activity engaged in by the two associations violates the antitrust laws and is not protected by the Capper-Volstead Act, because neither association is engaged in marketing potatoes. The contracting firm contended a farmers' association must collectively process, prepare for market, handle, or actually sell the product.[70] The appellate court disagreed, holding bargaining is a function of

Mighell and Hoofnagle estimated the total agricultural output under production contracts increased from 15.1% in 1960 to 17.2% in 1970. Sectors showing significant percentages under production contract in 1970 included: vegetables for processing—85%; sugar beets—98%; seed crops—80%; fluid-grade milk—95%; and broilers—90%. Mighell & Hoofnagle, *supra* note 59.

67. Harris & Massey, *supra* note 63, at 96. Students of agricultural economics view integration differently. According to one view integration increases as elements of entrepreneurship shift from the farm, and the off-farm firm assumes the major risks and burdens of production. Another view, however, considers integration to reach its maximum when the farmer forfeits all of his rights but loses none of the risks and burdens in the transfer of entrepreneuship. *Id.* at 95.

68. *See generally* BARGAINING IN AGRICULTURE (North Central Regional Extension Pub. 30, 1971). Bargaining, like contract farming, is a relatively recent innovation in agriculture. Bargaining is not an open market strategy and to a large extent is based upon the premise that open markets are deteriorating. To the extent open markets still exist in a particular commodity, the open market price may form a basis for negotiation; but generally where open markets exist, bargaining is not significant. *Id.* at 29.

69. 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974).

70. The legitimate activities of a Capper-Volstead cooperative are enumerated in the statute—"collectively processing, preparing for market, handling and marketing." § 1, 7 U.S.C. § 291 (1970). The two associations challenged were organized only for bargaining purposes and did not actually sell the potatoes of the farmer-members. The contracting firm urged a strict construction of the statute which would have excluded bargaining because it is not one of the enumerated activities. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d at 214.

Bargaining associations are often referred to as bargaining cooperatives. However, the use of the term "cooperative" is misleading, for unlike the conventional cooperative the bargaining association does not take possession of or in any way handle the product of its members. Torgerson, *Farm Bargaining and the Agricultural Fair Practices Act of 1967: Pressure in a Pressure Group Society*, in PROCEEDINGS OF THE FOURTEENTH NATIONAL CONFERENCE OF BARGAINING COOPERATIVES 3, 12 (1970).

"marketing" activity and is clearly protected by the Capper-Volstead Act.[71] The court also held the joint efforts of both associations are protected because "their organizational distinctions are de minimus."[72]

For farmers producing under contracts the *Treasure Valley* decision is a landmark. The combined strength which farmers attain through bargaining associations increases the probability that transfers of entrepreneurial control will be freely negotiated.

B. Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative

The value of the decision in *Treasure Valley* for farmers, however, is being undermined by subsequent cases. Because courts have not interpreted the Capper-Volstead Act to exclude corporations from cooperatives, the door opened to farmers by *Treasure Valley* is also a door opened to large agricorporations. This fact was made readily apparent by the decision of the federal district court in *Northern California Supermarkets*.[73]

The principal members of the defendant cooperative are large lettuce producing corporations.[74] The cooperative was formed for the primary purpose of setting price ranges to which members are required to adhere in the sale of their lettuce.[75] The cooperative does not handle the product; each member conducts its own sales program.

The plaintiff contended the price-fixing activity of the cooperative is not exempted from the antitrust laws by the Capper-Volstead Act, because the cooperative itself does not engage in selling, processing, handling, or bargaining. The contention was also made that Capper-Volstead protection does not extend to the cooperative because the grower-members are not "small struggling farmers but a group of big corporate businesses attempting to find shelter from the antitrust laws."[76]

The district court disagreed with both contentions. Closely following *Treasure Valley*, the court held the price-setting activity of the cooperative constitutes "marketing" within the meaning of the Capper-Volstead Act.[77]

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71. 497 F.2d at 215. The contracting firm was the defendant and challenged the associations' Capper-Volstead exemption in a counterclaim. The court stated the common meaning of "marketing" is broader than merely selling and includes "supplying market information and performing other acts that are a part of the aggregate of functions involved in transferring title to the potatoes." *Id.*

72. *Id.* at 217. The court based this conclusion on the Supreme Court's approval of the interorganizational dealings of cooperatives in Sunkist Growers, Inc. v. Winckler & Smith, Co., 370 U.S. 19, 29 (1962).

73. 413 F. Supp. 984 (N.D. Cal. 1976), *appeal docketed*, No. 76-1456 (9th Cir., Mar. 8, 1977).

74. Of the cooperative's twenty-two members, nine large companies were made defendants. One of these was the United Brands Co. *Id.* at 986 n.3.

75. *Id.* at 986-87. Secondary activities of the association include gathering and disseminating information on crop status, processing bad accounts and chronic customer complaints, organizing promotional campaigns, and coordinating marketing policies.

76. *Id.* at 991.

77. *Id.* at 992. The court held the cooperative's price-setting activity is within the definition of "marketing" adopted by the Ninth Circuit in *Treasure Valley*. The court also

The issue of corporations in the cooperative was discussed summarily in a footnote.[78]

The case is particularly significant because the issue of corporations in cooperatives was raised for the first time against a cooperative which did not in any way handle the members' produce.[79] Likewise, the issue was raised for the first time against a cooperative organized primarily by public investor corporations. The grave implications of the decision for farmers are apparent. Vertically integrated corporations that previously had no incentive to join or form cooperatives because there was no need for the "handling" services of the cooperative are now encouraged by the antitrust exemption to form their own price-fixing associations. These corporations are likely to affect the price which farmers producing the same commodity can obtain for their products. The holding also permits corporations to form their own exclusive handling cooperatives to compete with similar cooperatives organized by farmers.[80]

C. *Litigation in the Broiler Industry*

In 1978 the Supreme Court will decide in *United States v. National Broiler Marketing Ass'n*[81] whether the price-fixing activity of an association of broiler companies violates the antitrust laws. The defendant National Broiler Marketing Association (NBMA) raises the Capper-Volstead Act as a defense to the government's charges.

The broiler industry is dominated by contract growing.[82] Most broiler

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pointed out the absurdity of prohibiting price setting when less competitive activities such as collective bargaining are protected by the exemption.

78. *Id.* at 993 n.11. The court simply noted the language of section 6 of the Clayton Act and of the Capper-Volstead Act does not place limits on the size or the organizational form of farmers who become members of exempt cooperatives.

79. The Central California Lettuce Producers Cooperative was also challenged before the Federal Trade Commission; the issues were identical. The administrative law judge held the cooperative did not have Capper-Volstead immunity because, among other reasons, the defendant members were large agribusiness corporations and not the small farmers which the Capper-Volstead Act intended to protect. *See id.* at 993 n.11. The Commission reversed the administrative law judge adopting the reasoning of the district court in Northern Calif. Supermarkets, Inc. v. Central Calif. Lettuce Producers Coop., [1977] 3 TRADE REG. REP. (CCH) ¶ 21, 337 (July 25, 1977).

80. Sunkist, the cooperative challenged in Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967), is a handling cooperative.

Corporate producers that have integrated into processing, distribution, and retailing have little need for the handling services of a conventional cooperative. A good example is provided by the Central California Lettuce Producers Cooperative. Each member retains its individual trademark, negotiates for prices, and conducts its own sales program. The particular value of the cooperative for its members is its ability to reduce competitive pricing in the industry. Corporations that are only engaged in producing are more likely to need handling services. Conglomerates entering food production for diversification are also likely candidates for membership in handling cooperatives. *See A Profile of California Agribusiness, supra* note 43, at 62. Because the Capper-Volstead Act does not require cooperatives to accept all farmers who desire membership, investor corporations could form their own exclusive marketing and handling cooperatives.

81. 550 F.2d 1380 (5th Cir.), *cert. granted*, — U.S. —, 98 S. Ct. 260 (Oct. 11, 1977) (No. 77-117).

82. Approximately ninety-seven percent of the broilers are produced by vertically integrated firms contracting with farmers. *See Family Farm Act Hearings, supra* note 36, table at 28.

companies are corporations that have completely integrated their broiler production operation except for the actual raising of the chicks.[83] This stage is coordinated into the system through contracts with individual farmers called "contract growers." The vast majority of these contracts are production contracts which shift virtually all elements of entrepreneurial control to the contracting firm.[84] Because the entrepreneurial transfer is so complete the contract grower is often little more than a common farm laborer.[85] Whether a contract grower is a laborer or can still be considered a farmer will determine if the NBMA is protected by the Capper-Volstead Act.

The issue in the broiler litigation has been narrowly drawn. The Justice Department alleges the NBMA does not qualify for the antitrust exemption because its members do not own farms or engage in direct agricultural production and therefore are not "farmers" within the meaning of the

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83. The top twenty broiler contractors accounted for 49% of the total broilers slaughtered in 1969. Of these twenty firms, only one, Goldkist Inc., was a cooperative. It controlled 4.2% of the total production. *Id.* at 26.

The various stages of broiler production are coordinated by contracting firms that often own feed manufacturing facilities and processing plants. The only stage generally not performed directly by the contracting firm is the "grow out" stage from seven to nine weeks. This stage is handled by farmers called contract growers. As the name implies, the firm will contract with the grower to raise the chicks. Under this contract the firm retains title to the chicks, and agrees to supply the necessary feed, medicines, vaccines, and veterinary services. The firm makes all of the decisions with respect to the number of chick placements, diets, growing conditions, and the size at which broilers will be slaughtered. Most of these contracts with the grower offer minimum guaranteed payments. *See Bargaining at Work: Labor Problems, Commodity Marketing Experiences*, FARMER COOPERATIVES, May, 1977.

The openness of the market for broilers was diminished by feed companies competing for the business of broiler-growers. To obtain market security, the feed companies negotiated exclusive dealing contracts with growers. In exchange the company extended credit to the grower. Growers then emerged who were willing to grow on a profit-sharing basis; eventually some growers who lacked sufficient capital to invest in inputs were willing to work on a piece-wage basis. Individual entrepreneurship virtually disappeared; today almost all broilers are owned by integrators—feed companies, processors or combinations of the two. Rhodes, *supra* note 65, at 38.

Rapid technological advances following World War II also provided a catalyst for the move toward coordination and integration. Production developments in breeding, nutrition, housing, and disease control made it possible to produce one pound of broiler meat with less feed. Man-hours per thousand broilers decreased from 250 in 1940 to 15 in 1969. These advances provided the incentive for a high degree of coordination of all stages of broiler production. *Family Farm Act Hearings, supra* note 36, at 46.

84. In the Harris and Massey study a score of 43 points on the integration scale which was developed to study contracts indicated an almost complete transfer of entrepreneurial control from the farmer to the contracting firm. Forty-two contracts from the broiler industry were studied. The scores ranged from 21 to 42 with an average of 31.3. Transfers of entrepreneurship were relatively high in the areas of subject matter input decisions, ownership of chicks during production, price of chicks, and marketing decisions. Harris & Massey, *supra* note 63, at 89. Sample contracts from the broiler industry can be found in the *Family Farm Act Hearings, supra* note 36, at 34.

85. *See, e.g.*, Marcus v. Eastern Agricultural Ass'n, 32 N.J. 460, 161 A.2d 247 (1960), *rev'g per curiam* 58 N.J. Super. 584, 157 A.2d 3 (1959). The plaintiff in *Marcus* was a farmer producing broilers under an oral contract which transferred most of the supervisory control of the operation to the contracting firm. The plaintiff was injured in the course of his work and sought workmen's compensation benefits from the defendant. The question presented was whether the plaintiff was an independent contractor or an employee entitled to the benefits. The trial court held the plaintiff was an independent-contractor. The dissent argued the plaintiff was an employee because he retained little control over the management of the operation. The appellate court reversed adopting the opinion of the dissent.

Capper-Volstead Act.[86] NBMA counters contending the production contract prevalent in the industry makes the broiler company the real farmer, because the company maintains ownership of nearly all inputs and assumes most of the risks of production.[87]

The district court agreed with the NBMA[88] holding the term "farmer" in the Capper-Volstead Act is broad enough to encompass the activities of the broiler company members. The court focused its analysis on the transfer of entrepreneurial control under the production contract[89] and determined the contract growers are merely employees of the broiler companies.[90] The Fifth Circuit Court of Appeals reversed[91] holding the NBMA is not protected by the Capper-Volstead Act because Congress used the term "farmer" in its ordinary sense meaning "one who owns or operates a farm."[92]

Unfortunately, the narrow construction of the issue in the case obscures the underlying question—whether a cooperative composed largely of public investor corporations is entitled to an antitrust exemption. The decision of the court of appeals is not likely to cause the NBMA to dissolve. Defining "farmer" as the person who owns and operates the farm only encourages broiler companies to integrate completely and enter direct production. The result is the former contract grower is removed from the farm.[93] If the broiler companies establish their own corporate farms, the

86. 550 F.2d at 1385.

87. *Id.*

88. United States v. National Broiler Marketing Ass'n, 1975-2 Trade Cases ¶ 60,509 (N.D. Ga. 1976); *rev'd*, 550 F.2d 1380 (5th Cir.), *cert. granted*, — U.S. —, 98 S. Ct. 260 (Oct. 11, 1977) (No. 77-117).

89. *Id.* ¶ 60,509 at 67,221. Employing an analysis from cases construing "farmer" under other federal laws, the trial court examined the production risks assumed by the broiler companies to decide whether they were "farmers" or "producers" under the Capper-Volstead Act. The district court referred to decisions in which broiler companies under contract with growers were held to be farmers for purposes of the agricultural exemptions under the National Labor Relations Act, § 2, 29 U.S.C. § 152(3) (1970) and the Fair Labor Standards Act, § 13, 29 U.S.C. § 213 (1970). *See* NLRB v. Strain Poultry Farms, Inc., 405 F.2d 1025 (5th Cir. 1969); Wirtz v. Tyson's Poultry, Inc., 355 F.2d 255 (8th Cir. 1966). The court held the NBMA members to be farmers because they assume substantial risks of the enterprise. The NBMA members direct the "grow out" phase, assume the risks of disease and natural disaster, and face the perils of market fluctuations when selling broilers and buying feed.

90. 1975-2 Trade Cases at 67,222.

91. 550 F.2d 1380 (5th Cir.), *cert. granted*, — U.S. —, 98 S. Ct. 260 (Oct. 11, 1977) (No. 77-117).

92. *Id.* at 1386. The appellate court discounted the district court's analysis of shifting risks and burdens, focused its attention on the plain meaning of "farmer." Turning to the legislative history of the Capper-Volstead Act, the appellate court interpreted "farmer" to have the same meaning it had in 1922—"one who owns or operates a farm." The court drew two themes from the Senate debates on the Capper-Volstead Act.

> Congress meant to improve the bargaining position of farmers vis-a-vis corporate middlemen in order to increase farm income and, importantly, to stop the rise of tenancy and the migration of farm families to the cities. Second, Congress was convinced that the benefits afforded to farmers by Capper-Volstead should not be extended to include the corporate entities with which farmers dealt.

Id. at 1386-87. The court by defining "farmer" in accord with the meaning of the term in 1922 expressly rejected NBMA's contention the Act should be read in light of the realities of modern agriculture.

93. The broiler industry is not land-intensive. Consequently, large integrator companies would require relatively little capital to become actual producers. Moreover, the amount of capital required for entering production could be further reduced by acquiring farms by long-term leases rather than by purchase.

NBMA could be re-formed under the umbrella of the Capper-Volstead exemption.[94]

If the court of appeals had affirmed the district court's decision, the consequences for the contract grower would not have been much better. To hold the NBMA qualifies for the exemption could have the effect of eliminating the possibility for any meaningful contract negotiation in the broiler industry. Broiler companies operating under production contracts would be unwilling to negotiate the elements of entrepreneurial control; the return of any control to the grower could cause the association to lose its antitrust protection.[95] The wider effect of such a decision would be to establish the production contract in the broiler industry as the norm for antitrust protection. Contracting firms in other contract farming sectors would be encouraged to discard less restrictive contracts and adopt the production contract used in the broiler industry. Such a move would achieve not only a more closely coordinated production system for each firm but also the bonus of an antitrust exemption for any price-fixing association which these contracting firms might desire to form. The contract grower would have to secure his equities pursuant to state and federal labor laws.

VI. Conclusion: Available Options

A. Judicial Action

The NBMA case indicates the solution to the problem of corporations in cooperatives is not to be found in the courts. A judicial solution is unlikely because the language of the Capper-Volstead Act does not clearly permit the surgical removal of public investor corporations from cooperatives while leaving the family farm corporation unaffected. To perform the operation would be to engage in judicial legislation. Denying the exemption to the family farm corporation would subvert the goal of the Capper-Volstead Act, because only the formal label of incorporation distinguishes the family farm corporation from the production unit Congress intended to protect.[96]

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94. The re-formed NBMA will have no need for the handling and processing services traditionally offered by cooperatives, because each member by virtue of its fully integrated operation would already be performing these functions for itself. Like the lettuce producing members of the Central California Lettuce Producers Cooperative, the primary value of the association would be its ability to fix prices in the industry. *See* discussion note 80 *supra*.

95. For the association to retain its Capper-Volstead exemption each member would have to operate under a contract which shifts enough entrepreneurial control to the member to assure its continued status as a farmer. If one member should forfeit too much independence, the entire association would lose the exemption, because the Capper-Volstead Act does not permit a cooperative to have nonfarmer-members. *See* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

96. One commentator contends current congressional interpretation of the Capper-Volstead Act would prevent corporations in cooperatives from obtaining the exemption. He argues that Congress in passing the Agricultural Fair Practices Act, § 4, 7 U.S.C. § 2303 (1970) drew upon the Capper-Volstead definition of "producer" to define the grower-members of bargaining associations. Because the legislative history of the Agricultural Fair Practices Act indicates Congress excluded corporations from this Act, Knutson concludes Congress indirectly excluded them from the Capper-Volstead Act. Knutson, *supra* note 38, at 147.

B. Voluntary Action by Cooperatives

Farmer cooperatives could begin the process of removing corporations by purging their organizations of investor corporations. Such action would prevent the gravitation of power within the cooperative from the small individual interests to large agricorporate members. However, the gesture is likely to have little more than symbolic value. The evicted corporations could compensate by forming their own cooperatives. Ousting investor corporations may be counterproductive for farmers. The control they would obtain over the cooperative might be offset by weakened market position and the gravitation of economic power to the newly formed corporate cooperatives. As long as corporations have the incentive to form cooperatives the farmer is probably in a better economic position if he retains the investor corporation in the cooperative.[97]

C. Legislative Action

Describing the issue of corporations in cooperatives only in terms of an antitrust exemption begs the fundamental policy question which is whether investor corporations should be permitted to dominate agriculture to the exclusion of the independent farmer entrepreneur. This broader policy issue can only be resolved by legislative action.

To the extent legislators determine that policy considerations[98] favor retaining the independent farmer as a viable economic unit in agriculture, they must prevent large agribusiness corporations from obtaining the antitrust exemption for farmer cooperatives. The appropriate legislation could follow either one of two courses: limiting corporate access to agricultural production or limiting corporate access to cooperatives.

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97. Knutson, *supra* note 38, at 146.

98. The basic consideration is whether protection should be afforded on the basis of the unique nature of the farming activity or the production unit conducting the activity. Though modern technology has reduced some of the uncertainties, farming, unlike industry, remains subject to the variables of weather, availability of water, product spoilage, pests, and the biological rhythms of plants and animals. *See* M. HARRIS, *supra* note 2, at 17. Thus, the subservience of farming to these variables may justify the exemption regardless of the structure of the production unit. It was with these variables in mind that Justice Frankfurter noted the justification for a cooperative exemption:

> These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. . . . An impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy.

Tigner v. Texas, 310 U.S. 141, 145-46 (1939).

Favoring unit orientation are the sociological factors which enter into the equation. Rural communities surrounded by numerous small farms generally support more people and create a higher standard of living in the community. The "quality" of life generally suffers in rural towns surrounded by a few large farms employing farm laborers. *See* Larose, *Arvin and Dinuba Revisited: A New Look at Community Structure and the Effects of Scale of Farm Operations*, in *Hearings before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d Sess. 3355 app. A (1971-1972).

1. Limiting Corporate Access to Agriculture

A few states presently have laws which either restrict or prohibit ownership of farmland by public investor corporations.[99] These statutes distinguish the family farm corporation and exclude it from the harsher treatment of the investor corporation.[100] Generally these statutes focus only on the problem of corporate ownership of farmland, overlooking the issue of indirect corporate control through contract farming.[101]

Federal legislation limiting corporate access to agriculture has been proposed but remains unapproved. The proposed Family Farm Act[102] would prohibit large investor corporations from directly or indirectly engaging in farming. The Act would also specifically prohibit control through contract farming.[103]

2. Limiting Corporate Access to Cooperatives

Several states have special cooperative marketing laws which provide for the incorporation of farmer cooperatives.[104] Amending these laws to restrict cooperative membership to individual farmers or family farm corporations would have the effect of keeping investor corporations out of cooperatives if such restrictions were approved nationally.[105]

The unlikely success of a state-by-state approach to limiting the access of corporations to cooperatives or to agriculture makes amendment of the Capper-Volstead Act the most promising solution.[106]

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99. *See, e.g.*, KAN. STAT. ANN. § 17-5901 (1974); MINN. STAT. ANN. § 500.24 (Supp. 1974); N.D. CENT. CODE § 10-06-07 (1967).

100. *See* KAN. STAT. ANN § 17-5901 (1974); MINN. STAT. ANN § 500.24 (Supp. 1974); N.D. CENT. CODE § 10-06-07 (1967).

101. The current Kansas statute, KAN. STAT. ANN. § 17-5901 (1974), prohibits nonfamily farm corporations from engaging directly or indirectly in any activity related to the production of "wheat, corn, grain sorghums, barley, oats, rye or potatoes or the milking of cows for dairy purposes." *Id.*

Arguably, the Kansas statute, by prohibiting corporations from engaging "indirectly" in agriculture, would prohibit at least vertical coordination through the use of production contracts.

102. H.R. 11654, 92d Cong., 2d Sess. (1972).

103. Proposed bill H.R. 11654 provides,

> (c) No person, partnership, corporation, trust or conglomerate business entity engaged in nonfarming business in or affecting commerce and owning or controlling assets amounting to more than $3,000,000 or owning or controlling stock or other share of capital in one or more business entities in commerce with a total value of $1,000,000 or more . . . shall directly or indirectly engage in farming or production of agricultural products, or control, or attempt to control, agricultural production through the ownership or leasing of land for agricultural purposes or by contracts with others or by integration, merger or any other means of acquisition or control.

Id.

104. *E.g.*, KAN. STAT. ANN. §§ 17-1601 to -1636 (Supp. 1977) (Kansas Cooperative Marketing Act).

105. The Kansas Cooperative Marketing Act specifically defines a "person" entitled to become a member of a cooperative association to include "corporations." *Id.* The Act could be amended to restrict "corporations" to the type of family farm corporations permitted to own agricultural land under KAN. STAT. ANN. § 17-5901 (1974).

106. Many cooperative leaders discourage amendment of the Capper-Volstead Act

The primary objective of any amendment must be to eliminate the latent ambiguity of the term "farmer" as currently defined in the Capper-Volstead Act. However, to ensure the Act will continue to protect the individual farmer adequately, the term "farmer" must be defined to include the family farm corporation and exclude the public investor corporation.[107]

Amending the Capper-Volstead Act to prohibit investor corporation membership in farmer cooperatives would not address the broader issue of corporations in agriculture. It would, however, provide an adequate interim solution. Such an amendment would protect an important device through which farmers can control entrepreneurial shifts and assure that anticompetitive advantage will not be the primary incentive encouraging public investor corporations to enter agricultural production.

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because they fear amendments may also restrict the antitrust exemption for cooperatives. Commentators alarmed by the size which some cooperatives have attained are urging limitations. *See, e.g.*, L. KRAVITZ, WHO'S MINDING THE CO-OP? A REPORT ON FARMER CONTROL OF FARMER COOPERATIVES (Agribusiness Accountability Project, 1974); Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341 (1975).

To compete with corporate buyers and corporations that have integrated backward into production, farmers are being urged to use their cooperatives to integrate forward into processing, distributing, and even into retailing by obtaining consumer franchises to sell cooperative-branded products.

As cooperatives achieve integration and their size increases and number diminishes, they are likely to become the farmer's only access to markets rather than just another choice in an open market of many competing marketing firms. Cooperatives that choose to integrate vertically will likely need contracts with their members. If cooperatives adhere to the original ideal of maintaining farmer entrepreneurship, marketing contracts will prevail. However, like their integrated corporate counterparts, they may yield to the temptation to resort to production contracts to achieve uniformity and product control. The drive to become competitive may also foster significant compromises in the ideal of democratic control. Rhodes, *supra* note 65, at 41. To protect farmer entrepreneurship from overzealous management, legislation similar to that protecting the rights of members of labor unions may also be necessary.

107. Either of two courses may be appropriate: limiting the number of stockholders and the land ownership of the corporation, or restricting the sources of investment income.

KAN. STAT. ANN. § 17-5901 (1974) permits corporations with no more than ten stockholders to "own, control, manage or supervise, either directly or indirectly," up to five thousand acres.

Requiring corporations to derive a certain percentage of their income from agricultural sources would limit the participation of conglomerate corporations in cooperatives. To limit the participation of vertically integrated corporations it may be necessary to distinguish the various stages of integration, permitting only corporations which derive income from direct production. *See* Harl, *supra* note 50; Ridenour, *Kansas Farm Corporations: Some Observations and Recommendations*, 44 J.B.A.K. 241 (1975).