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## **An Agricultural Law Research Article**

# **New Generation Cooperatives and the Capper-Volstead Act: Playing a New Game by the Old Rules**

by

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# NEW GENERATION COOPERATIVES AND THE CAPPER-VOLSTEAD ACT: PLAYING A NEW GAME BY THE OLD RULES\*

New Generation Cooperatives (NGCs) are a growing force in the agribusiness sector. Allowing farmers to take advantage of traditional cooperative features, these new organizations not only collect and store agricultural commodities, but also process those commodities, capturing more of the consumer food dollar and returning it to farmers and the rural communities of which they are a part.

This note will examine the current state of the law regarding the Capper-Volstead Act and how it can limit the membership and operations of cooperatives. The legislative history of the Act will be reviewed, as will a number of Supreme Court and other federal cases interpreting the Act. The implications of these decisions for the NGC will then be reviewed, followed by suggestions for how courts and Congress can adapt the Capper-Volstead Act to “the new agriculture,” and how NGCs can adapt to the legal environment as it presently stands.

## I. INTRODUCTION—THE EVOLUTION OF THE MODERN COOPERATIVE

### *A. Origins of the Cooperative Principles*

The cooperative, which has been defined as “a corporation or association organized for the purpose of rendering economic services, without gain to itself, to shareholders or members who own and control it,”<sup>1</sup> saw its advent in the mid-nineteenth century. While informal cooperation among farmers began with agriculture itself, scholars generally deem a Rochdale, England, store formed in 1844 by a group called the Rochdale Society of Equitable Pioneers as the first entity

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1. Donald M. Barnes & Christopher E. Ondeck, *The Capper-Volstead Act: Opportunity Today and Tomorrow*, *AMERICAN COOPERATION* 1, at 6 (1998) (citing *United Grocers, Ltd. v. United States*, 186 F. Supp. 724, 733 (N.D. Cal. 1960)).

organized in the form of a modern “cooperative” and the first to espouse the principles that define such organizations.<sup>2</sup> Consisting partially of local weavers, the Pioneers formed what would resemble a modern consumer cooperative to provide food and clothing to its members at more reasonable prices and terms than other merchants in the area.<sup>3</sup>

Four principles were forged by the Pioneers to guide their enterprise, and those principles guide many cooperatives still today. They were:

- 1) Control of the cooperative was to be democratic, i.e. one vote per member;
- 2) Ownership was limited to patrons of the cooperative;
- 3) Net income was to be redistributed back to the patrons of the cooperative in proportion to their use of the cooperative, i.e., in patronage dividends; and
- 4) Specific caps on the returns to ownership capital were specified.<sup>4</sup>

These principles were to be a valuable export across the Atlantic Ocean to the United States and a struggling agriculture industry.

### *B. The Rise of Cooperatives in U.S. Agriculture*

At the dawn of the twentieth century, the United States began to assert itself as one of the dominant economic powers in the world. It was no coincidence that, at the same time, vast corporations and trusts were formed to agglomerate capital and seize upon the opportunities afforded by the prevailing economic climate. While these corporations might have aided economic efficiency, they also formed an intermediate link in the chain connecting America’s farms to its consumers. The businesses that dominated transportation and processing systems were viewed by farmers as “mere middlemen” who increased expenses in marketing agricultural products, and increased the costs of purchasing supplies,

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2. See WAYNE D. RASMUSSEN, *FARMERS, COOPERATIVES, AND USDA: A HISTORY OF AGRICULTURAL COOPERATIVE SERVICE* 3, (U.S. Dep’t of Agriculture, Agricultural Information Bulletin 621, 1991).

3. See *id.*

4. VICTORIA SAKER WOESTE, *THE FARMER’S BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA 1865-1945*, at 18 (1998).

leading farmers to be “fleeced both coming and going.”<sup>5</sup> Eventually, farmers realized that if they were to compete in the new marketplace, they, too, needed to somehow realize the increased economic efficiencies and market power afforded by the corporate business form. As a result, cooperatives started to gain popularity among America’s agricultural producers.

Using the Rochdale principles, many farmer cooperatives were formed, thus allowing their members to accumulate the economic power necessary for them to “hold their own” against the other players in the marketplace. Expectations of this rather new business form were high, as reflected in the statement of Harold G. Moulton, then-director of the Carnegie-funded Institute of Economics:

The growth of agricultural co-operative associations in recent years has given rise to the view that in this new form of organization is to be found the salvation of the American farmer. In a sense, the agricultural co-operative is regarded as a counterpart of the business corporation and of the trade association.<sup>6</sup>

As American agricultural producers started to adapt the Rochdale model to their respective circumstances, different types of cooperatives started to evolve, including production cooperatives (used to more efficiently cultivate and produce agricultural commodities), marketing cooperatives (designed to pool commodities into quantities of greater size and thus acquire market power, as well as to promote the commodities), purchasing cooperatives (used to accumulate and focus the buying power of the members, thus enabling them to acquire inputs at lower costs), and service cooperatives (formed to provide a specific service, such as credit, to producers).<sup>7</sup> Some of these cooperatives have grown so large as to become household names, including Farmland,<sup>8</sup> Sunkist,<sup>9</sup> and Ocean Spray.<sup>10</sup> The cooperative model has even seen widespread use in areas outside of agriculture, providing everything from group health-care packages to affordable legal services.<sup>11</sup> Indeed, many

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5. *Id.* at 20.

6. EDWIN G. NOURSE, *THE LEGAL STATUS OF AGRICULTURAL COOPERATION* vii (1927).

7. *See* RASMUSSEN, *supra* note 2, at 6-12.

8. *See* Farmland Cooperative Principles, *available at* [www.farmland.com](http://www.farmland.com).

9. *See* About Sunkist: A Healthy Success for 100 Years, <http://www.sunkist.com/about/>.

10. *See* Ocean Spray: About Us, <http://www.oceanspray.com/about/ata glance.asp>.

11. *See generally* PHILLIP J. DODGE, *A NEW LOOK AT COOPERATIVES* (The Public Affairs Committee, Inc. Public Affairs Pamphlet No. 487, 1972.)

cooperatives have begun to incorporate features of more than one operational type and to vertically integrate more stages of the production process, leading to something of a cooperative revolution.

*C. The Recent Resurgence of Cooperatives' Popularity and the Advent of the New Generation Cooperative*

As the twentieth century gave way to the twenty-first, farmers found themselves in a predicament yet again as decreasing profit margins and poor commodity prices led to dismal returns on farm investment. While the 1996 Farm Act (and its embrace of the Freedom to Farm philosophy) sought to give farmers greater production flexibility, poor physical and economic climates led to a record \$22.9 billion in direct payments to U.S. farmers in fiscal year 2000.<sup>12</sup> Given the same powerful motivators that lead to the surge in cooperative formation at the beginning of the century, farmers again sought a self-empowering solution. Hoping to recapture profits that were going to processors and marketers of intermediate and final goods, many farmers started to form a new type of cooperative.<sup>13</sup> Various called "value-added," "new wave," or "new generation" cooperatives, these new entities have a number of distinctive characteristics while still adhering to the basic principles of the cooperative concept.

At the heart of the NGC movement is the desire to revitalize rural communities by enabling local commodity producers to vertically integrate production, processing, and (in some cases) marketing of finished agricultural products.<sup>14</sup> In so doing, the NGC enables its members to recapture greater portions of the price paid by consumers for the finished product, i.e., revenues that would otherwise go to separate transporters, processors, and marketers (hence, the term "value-added cooperatives").<sup>15</sup>

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12. See Bart Fischer, *Revisiting U.S. Farm Policy and Its Environmental Impacts* (2001) (unpublished manuscript, on file with Oklahoma State University Department of Agricultural Economics), (citing 2002 USDA Farm Support Payments Summary, <http://www.ers.usda.gov/Data/FarmIncome/finfidmu.htm>).

13. See Mark Hanson, *Starting a Value-Added Agribusiness: The Legal Perspective 1* (Illinois Institute for Rural Affairs, 2000).

14. See Roger B. Brown & Christopher D. Merrett, *The Limited Liability Company Versus the New Generation Cooperative: Alternative Business Forms for Rural Economic Development*, Rural Research Report, Spring 2001, at 1-2.

15. See *id.*

While NGCs share the same defining characteristics as traditional cooperatives, they also carry a number of features that distinguish them from their predecessors.<sup>16</sup> Perhaps the most distinctive feature of NGCs is the means by which they simultaneously form their membership and accumulate a capital pool: the NGC sells shares in the cooperative that entitle (or require, in some cases) the buyer to deliver, and oblige the NGC to accept, a specified amount of commodity (this arrangement is commonly referred to as “delivery rights”).<sup>17</sup> The number of shares and their attendant delivery rights are calculated to provide the NGC with precisely enough raw commodity to efficiently operate its processing facilities, thus constraining the number of members the cooperative will allow.<sup>18</sup> This makes NGCs “closed” cooperatives in contrast to the “open” nature of most other cooperatives.<sup>19</sup>

These circumstances, in turn, define the remaining distinctions between NGCs and more traditional cooperatives. One of the principal rural developers involved in the “new cooperative revolution” has summarized these features:

- 1) The cooperative itself may make purchases of commodities to make up for any deficiencies caused by unused delivery rights.
- 2) Member shares and their delivery rights are transferable (subject to the approval of the NGC’s board of directors), and their prices will often reflect not only the par value of the shares, but their income potential.
- 3) Since the equity necessary for the operations of the NGC is usually accumulated by the initial sale of member shares, higher cash patronage dividends are returned to the members, rather than being retained to supply capital needs.<sup>20</sup>

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16. See Andrea Harris, Brenda Stafanson, & Murray Fulton, *New Generation Cooperatives and Cooperative Theory*, 11 JOURNAL OF COOPERATIVES 15, 16 (1996).

17. See *id.* Note that while the producer may view the delivery terms associated with the membership share as a privilege, it is also an obligation; should the producer be unable to deliver the specified quantity of the commodity, he or she will have to purchase a sufficient amount of the commodity elsewhere to fulfill their delivery requirement. *Id.*

18. See Christopher R. Kelley, *New Generation Cooperatives*, AGRICULTURAL LAW UPDATE, June 2000, at 4.

19. See *id.*

20. See WILLIAM PATRIE, CREATING “CO-OP” FEVER: A RURAL DEVELOPER’S GUIDE TO FORMING COOPERATIVES 2 (USDA Rural Business-Cooperative Service Report no. 54,

Bearing in mind both the resemblances and distinctions between the traditional cooperative and the NGC, let us now examine the legal environment in which the cooperative and its members must currently operate.

## II. TREATMENT OF COOPERATIVES UNDER THE ANTITRUST LAWS

### A. *Early Application of Antitrust Laws to Cooperatives*

The alliance of a number of independent producers, formed to raise their received prices and to affect commodity markets, may appear to be the textbook violation of antitrust law. It was precisely this circumstance that posed many problems for early cooperatives, as they were swept up in the tide of dismay at the perceived abuses of "big business." Indeed, prior to the passage of the Capper-Volstead Act, there were numerous prosecutions of farmer organizations for antitrust violations.<sup>21</sup>

As mentioned above, many farmers at the turn of the twentieth century believed the large corporate trusts to be the bane of their economic existence. They were not alone, and the general public discontent with the situation led Senator Sherman to introduce and eventually succeed in passing his Antitrust Act of 1890.<sup>22</sup> While it was apparent that Sherman did not intend the Act to negatively affect agriculture,<sup>23</sup> it was nevertheless held by the courts to preclude the combination of agricultural producers into alliances that allowed farmers to exert market power and thus improve their prices.<sup>24</sup> Thus, the early

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1998). Traditional cooperatives sometimes offered shares, sold for a nominal price, but many cooperatives simply form their membership by patronage.

21. See generally *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458 (1960). This opinion gives a brief but useful history of the treatment of agricultural cooperatives under the state and federal antitrust schemes before and after the passage of the Clayton and Capper-Volstead Acts.

22. 15 U.S.C. §§ 1-7 (2001).

23. Harold M. Carter, *Antitrust Aspects of Agricultural Cooperatives*, in 14 AGRICULTURAL LAW 137-7 (Neil Harl, ed., 2000), citing 15 U.S.C. § 15. Referring to the records of the Congressional debates regarding the Sherman Act, Carter notes Sherman's statement that the act was meant to benefit "especially agricultural people." *Id.* (citing 21 Cong. Rec. 2598 (1890)). Indeed, Sherman offered an amendment to the bill that would have explicitly exempted "arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products," but the amendment was not made part of the final act. *Id.* (citing 21 Cong. Rec. 2611 (1890)).

24. See *id.* (citing *Steers v. United States*, 192 F. 1 (6th Cir. 1911)).

efforts of farmer cooperatives were in no better position than they were before the Act.

The Supreme Court itself interpreted the Sherman Act to preclude combination of farmers into cooperatives that could then exert market power.<sup>25</sup> The Court took note of the failed attempts to amend the Sherman Act to exempt laborers and farmers, the end result was that “all these efforts failed, so that the act remained as we have it before us.”<sup>26</sup> Perhaps as a result of this pronouncement by the Supreme Court, or merely by their own interpretation, the lower federal courts proceeded with the antitrust prosecutions of agricultural organizations. An example is found in *Steers v. United States*,<sup>27</sup> where a group of Kentucky tobacco farmers maintained a pool of their commodity and withheld it from market in order to increase received prices.<sup>28</sup> Similarly, there was also widespread prosecution of cooperative farmer efforts under the state laws of the time.<sup>29</sup> For example, the Iowa Supreme Court found a hog marketing cooperative was in violation of state antitrust law for requiring its members to market all their hogs through the cooperative, and to pay a penalty for selling to the cooperative’s competitors.<sup>30</sup>

These successful prosecutions of farmers may have served as the motivating force behind a number of states’ attempts to modify their antitrust statutes so as to provide farmer exemptions. However, these early attempts at agricultural exemptions were often struck down as being unconstitutional.<sup>31</sup> An Illinois statute stating that the provisions of that state’s antitrust act “shall not apply to agricultural products or livestock while in the hands of the producer or raiser”<sup>32</sup> was struck down as violative of 14th Amendment equal protection, on the basis that distinguishing farmers for preferential treatment was “unreasonable.”<sup>33</sup> Other decisions by the Supreme Court rendered unconstitutional statutes

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25. Carter, *supra* note 23.

26. *See id.* (citing *Lowe v. Lawler*, 208 U.S. 274 (1908) (holding that a labor union was liable under the Sherman Act for restraining trade via a boycott of manufacturers)).

27. 192 F. 1 (6th Cir. 1911), *cited in* Carter, *supra* note 23.

28. *See id.* at 23.

29. *See* Carter, *supra* note 23 (citing *Maryland & Virginia Milk Producers Ass’n v. U.S.*, 362 U.S. 458 (1960)).

30. *See id.* (citing *Reeves v. Decorah Farmer’s Coop. Soc.* 140 N.W. 844 (Iowa 1913)).

31. *See id.* at 137-11.

32. *Id.* at 137-12 (citing *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

33. *Id.*



allowing producers to pool their commodities (as in *Steers*) in order to receive better prices than they could have by acting individually.<sup>34</sup>

These abortive state attempts to provide farmers a means of aiding themselves without imperiling their ventures with antitrust liability eventually caught the eye of federal legislators, leading to key changes in federal antitrust law.

### B. *The Capper-Volstead Act*

Legislators were forced to confront two essential facts that rendered an agricultural exemption to antitrust laws desirable. First, the farmer was subject to capricious physical variables that, in synergy with fluctuating commodity markets, made for wildly unstable input and output costs.<sup>35</sup> Second, as a result of their individualized production system, farmers had virtually no bargaining power in the commodity marketplace.<sup>36</sup>

These considerations first manifested themselves in the context of federal antitrust laws with the Clayton Act of 1914.<sup>37</sup> The Clayton Act ameliorated the antitrust provisions of the Sherman Act, providing that those bringing a successful suit for damages incurred by another's violation of the antitrust laws would be entitled to the now-familiar "threefold the damages by him sustained and the cost of the suit, including a reasonable attorney's fee."<sup>38</sup> While bolstering the enforcement of antitrust laws, the Clayton Act also specifically exempted, *inter alia*, non-stock farmer cooperatives from antitrust prosecution: "agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit . . . [shall not] be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."<sup>39</sup> At least in part, the Clayton Act was passed to protect unions, including agricultural ones, should the provisions of the Sherman Act be directed against them.<sup>40</sup>

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34. See, e.g., *Collins v. Kentucky*, 234 U.S. 634 (1914).

35. See Stephen J. Hawke, Note, *Antitrust Implications of Agricultural Cooperatives*, 73 KY. L.J. 1033, 1037 (1984).

36. See *id.*

37. 15 U.S.C. §§ 12-27a (2001).

38. Carter, *supra* note 23, at 137-17, (citing 15 U.S.C. §15).

39. 15 U.S.C. § 17 (2001).

40. See *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391 (1967) (hereinafter referred to as *Sunkist II*).

Still, the exemptions provided by the Clayton Act were not satisfactory to agricultural producers, and a massive national lobbying effort led by the National Farmers Union and the Grange called for greater measures.<sup>41</sup> The pressure of such lobbying efforts was so great that both presidential platforms in the 1920 elections mentioned the need for greater legal protection of the cooperative movement.<sup>42</sup> Shortly thereafter, a Joint Commission of Agricultural Inquiry was formed by Congress to examine the disparity between consumer prices and farmer receipts; the Commission eventually recommended the passage of legislation "to strengthen the legal position of cooperatives."<sup>43</sup>

The culmination of these efforts was the passage of a broader exemption from antitrust prosecution in the form of the Capper-Volstead Act.<sup>44</sup> The Capper-Volstead Act was intended generally to clarify the Clayton Act's exemptions, and specifically to extend limited antitrust protections to those agricultural organizations having capital stock.<sup>45</sup> While defining the parameters of those organizations to which it applies, the Capper-Volstead Act also sets forth a number of the cooperative principles:

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, [t]hat 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:

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41. Carter, *supra* note 23, at 137-19.

42. See *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1041 (2nd Cir. 1980).

43. See *id.* (citing KNAPP, *THE ADVANCE OF AMERICAN COOPERATIVE ENTERPRISE* 7-12 (1973)).

44. 7 U.S.C.A. §§ 291-292 (West through P.L. 107-56) (hereinafter *the Act*, or Capper-Volstead).

45. See Carter, *supra* note 23, at 137-19, (citing *Sunkist II*, 389 U.S. at 391 (1968)).

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 nonmembers to an amount greater in value than such as are handled by it for members.*<sup>46</sup>

Without these specific exemptions, virtually any cooperative with member equity and a mission to aid in the collective marketing of its commodity could be construed as an illegal “contract, combination, or . . . conspiracy”<sup>47</sup> under the Sherman Act. With the Capper-Volstead Act, however, agricultural producers were finally given the green light to form the cooperative organizations they needed to help themselves in the increasingly global marketplace.<sup>48</sup>

### *C. Interpretations of Capper-Volstead’s Scope by the U.S. Supreme Court*

Critical to Capper-Volstead’s impact on NGCs is its interpretation by the U.S. Supreme Court and other federal courts, and how far those courts are willing to extend its protections. Three Supreme Court cases have helped define the boundaries to the Act; these decisions and their progeny in the federal courts are examined below.

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46. 7 U.S.C.A. §§ 291 (West through P.L. 107-56) (emphasis added).

47. 15 U.S.C.A. § 1 (West through P.L. 107-23).

48. It is difficult to overstate the importance of the Capper-Volstead Act to the modern agricultural cooperative; it is perhaps due to its impact that the Act is sometimes referred to as the “Magna Carta” of cooperatives in the agricultural industry.” See Barnes & Ondeck, *supra* note 1, at 5.

1. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*  
(*Sunkist I*)

*Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*<sup>49</sup> was an antitrust suit brought against Sunkist and its wholly-owned subsidiary, Exchange Orange Products Company (Exchange Orange) for alleged restraint of trade in citrus fruits and citrus by-products.<sup>50</sup> In defense, Sunkist claimed that its activities were protected by the provisions of the Capper-Volstead Act.<sup>51</sup>

At the time of the suit, Sunkist consisted of 12,000 citrus producers who were organized into local associations that, in turn, operated packing houses.<sup>52</sup> These packing houses were then arrayed into district exchanges, and representatives of these exchanges served as members of the board of directors for the Sunkist cooperative.<sup>53</sup> This cooperative established another cooperative to develop by-products of oranges (Exchange Orange), and eventually, this subsidiary cooperative began processing operations to turn Sunkist members' produce into such by-products.<sup>54</sup>

Responding to charges that Sunkist's organizational structure (including the operation of the wholly-owned Exchange Orange subsidiary) was outside that contemplated by the Capper-Volstead Act the Court held that Sunkist was the type of organization "in the contemplation of the statutes" as a farmer cooperative, even if they were organized as separate legal entities.<sup>55</sup> The Court felt that such an organization fit squarely within the provisions of the Act: "[t]o hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts."<sup>56</sup>

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49. 370 U.S. 19 (1962) (hereinafter *Sunkist I*).

50. *Id.* at 20.

51. *Id.*

52. *Id.* at 21.

53. *Id.*

54. *Id.* at 22.

55. *Id.* at 29.

56. *Id.*

2. *Case-Swayne Co., Inc. v. Sunkist Growers, Inc. (Sunkist II)*

In *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*,<sup>57</sup> the U.S. Supreme Court directly examined the Capper-Volstead Act and the bounds of just who "a person engaged in the production of agricultural products" could (or rather, couldn't) be.<sup>58</sup> *Case-Swayne*, a juice manufacturer, brought charges against Sunkist under the Clayton and Sherman Acts, alleging that Sunkist had attempted to monopolize trade by severely limiting the amount of fruit *Case-Swayne* could obtain.<sup>59</sup> The Court of Appeals for the Ninth Circuit, hearing the case on appeal from the directed verdict granted in favor of *Case-Swayne* below, concluded that Sunkist met the dictates of the Capper-Volstead Act and thus should be entitled to antitrust protection.<sup>60</sup> The U.S. Supreme Court determined that the dispositive issue in the case was whether the membership of the Sunkist organization truly allowed the Sunkist organization to avail itself of the Act.<sup>61</sup>

At the time of the suit, Sunkist's membership was in most respects the same as it had been in *Sunkist I*, consisting of local producers organized into associations operating packing houses, with those houses organized into exchanges.<sup>62</sup> However, while roughly eighty-five percent of these local associations were composed exclusively of fruit growers, the remaining fifteen percent were private for-profit packing houses (hereinafter referred to as "packers") that grew no fruit of their own.<sup>63</sup> Instead, these packers were engaged with producers in a contractual (rather than cooperative) arrangement in which the packers handled each grower's fruit at cost, plus a fixed surcharge.<sup>64</sup>

Sunkist argued that Congress, in passing the Capper-Volstead Act, intended to protect "any organizational form by which the benefits of collective marketing inured to the grower."<sup>65</sup> As a result, Sunkist concluded, the participation of the packers should not serve to "taint" the

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57. 389 U.S. 384 (1967).

58. *See id.* at 386.

59. *Id.* at 389. *Case-Swayne* was also tangentially involved in the previous Sunkist case, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Co.*, 370 U.S. 19 (1962).

60. *See Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 369 F. 2d 449, 461-462 (9th Cir. 1967).

61. *Sunkist II*, 389 U.S. at 386.

62. *Id.* Note that the act permits cooperatives to join each other to form another cooperative. *See* 7 U.S.C. § 291.

63. *Id.* at 387.

64. *Id.*

65. *Id.* at 390.

entire organization; the contractual arrangements between the producers and these packers were such that there was no direct participation by the packers in the profits or losses of the marketing of the fruit—the packers were simply “pass-throughs” for the producer.<sup>66</sup>

The Supreme Court, however, did not agree with Sunkest's contentions. Citing the comments of one of the sponsors of the bill that would become the Capper-Volstead Act to the effect that the bill was meant to protect “only *actual producers* of agricultural products,”<sup>67</sup> and not those solely involved in the *processing* of those raw commodities into other products,<sup>68</sup> the Court then noted that the Capper-Volstead Act was a “special exception to a general legislative plan” contained in the Sherman and Clayton Acts, and thus the expanse of the exemption should be strictly limited to producers of agricultural products.<sup>69</sup> The Court delved even deeper into the legislative history of the Capper-Volstead Act and noted its belief that the only form of permissible

66. *Id.*

67. *Id.* at 391.

68. *See id.* at 392. Justice Marshall included in his opinion an excerpt from the debates regarding the passage of the bill that would eventually become the Capper-Volstead Act:

Mr. CUMMINS. \* \* \* Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?

Mr. KELLOGG. I think they are descriptive of the general subject. I think 'farmers' would have covered them all.

Mr. CUMMINS. I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis: They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

Mr. KELLOGG. Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

Mr. TOWNSEND. They must be persons who *produce* these things.

Mr. KELLOGG. Yes; that has always been the understanding.  
*Id.* (citing 62 Cong. Rec. 2052 (1922) (emphasis added)).

69. *Id.* at 393.

participation in an exempt cooperative by a non-producer entity was strict capital participation (noting that the Capper-Volstead Act was passed with the intention of allowing cooperatives to engage in capital accumulation through stock, something not allowed under the Clayton Act<sup>70</sup>); participation by the packers in this case added no capital, but rather amounted to the same type of market participation as that of the producers.<sup>71</sup> While Sunkist cited the express authorization within the Act to deal (albeit to a limited extent) in the goods of non-member producers,<sup>72</sup> and hence to deal in the produce handled by the packing houses, the Court pointed to the fact that Sunkist did not merely deal with the produce of the packers, but rather allowed them to be full members and to participate in the policy-making and control of the association.<sup>73</sup> As a result of the inclusion of non-producers in Sunkist's membership, the Court held that Sunkist could not avail itself of Capper-Volstead's protection, and was thus subject to antitrust liability.<sup>74</sup> Thus, the court pronounced what has become known as the "not even one" rule.

In a separate opinion, Justice Harlan took issue with the strict construction the majority applied to the Capper-Volstead Act, expressing his belief that the purposes of Congress in passing the Act would be better served in this particular case by not allowing the participation of the packers to eliminate all of Sunkist's antitrust immunity.<sup>75</sup> Feeling that the Court needed to take a more comprehensive view of the policy behind the Capper-Volstead Act and the circumstances at hand, Harlan noted that the organization that would eventually become Sunkist was one of the specific organizations mentioned in the debates on the Act as an example of the type of organization to fall under the Act's protection.<sup>76</sup> Justices White and Stewart, in an opinion concurring in the judgment, expressed a belief that participation in an otherwise Capper-

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70. See 15 U.S.C. § 17 (2001). Recall that the Clayton Act specified that organizations coming under its protection must "not hav[e] capital stock," whereas the Capper-Volstead Act explicitly notes that cooperatives can be "with or without capital stock." *Id.*

71. *Sunkist II*, 389 U.S. at 394-395.

72. See 7 U.S.C.A. § 291, stating "the association shall not deal in the products of *nonmembers* to an amount greater in value than such as are handled by it for members," (emphasis added) thus implying that a cooperative may handle the products of nonmembers while still retaining the protection of the act.

73. *Sunkist II*, 389 U.S. at 396.

74. *Id.*

75. See *id.* at 397 (Harlan, J., concurring).

76. See *id.* at 397-398, n.12 (Harlan, J., concurring).

Volstead eligible cooperative by an ineligible member should not destroy the immunity of the entire organization, but rather should only affect the transactions to which the ineligible entities were a party.<sup>77</sup>

### 3. *National Broiler Marketing Association v. United States*

The combination of strict construction, heavy reliance on legislative history, and narrow focus on the agricultural producer as sole beneficiary of Capper-Volstead protection would be revisited by the Court in another case a decade later, against the backdrop of the integrated poultry industry. The matter was no small concern in the eyes of the court, as it took the time to explicitly detail its motives in granting certiorari from the Fifth Circuit: "Because of the importance of the issue for the agricultural community and for the administration of the antitrust laws, we granted certiorari."<sup>78</sup> Commentators echoed the court's perception of the decision's gravity; many felt that the final decision would send ripples throughout the agriculture industry.<sup>79</sup> The end decision, however, would fall short of providing the bright-line rule for interpreting the Act so assiduously sought by the agricultural and legal community.<sup>80</sup>

In *National Broiler Marketing Ass'n v. United States*,<sup>81</sup> an action was brought against a Georgia marketing cooperative under the Sherman Act, alleging that the cooperative (the National Broiler Marketing Association [NBMA]) was in itself an illegal conspiracy in violation of the Act and not protected by the Capper-Volstead Act.<sup>82</sup> In pursuing its case from the district level to the Supreme Court, the United States sought injunctive relief against NBMA, namely that NBMA be compelled to reorganize in whatever manner was necessary to bring it into compliance with the antitrust laws.<sup>83</sup>

Throughout its procedural progression, the central issue in the case was whether chicken producers who used contract growers to raise the

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77. See *id.* at 401 (Harlan, J., concurring).

78. *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 818-20 (1978) (hereinafter referred to as *National Broiler*).

79. See Worth Rowley & Marvin Beshore, *Chicken Integrators' Price-Fixing: A Fox in the Capper-Volstead Coop*, 24 S.D. L. REV. 564, 565, (citing Charles G. Brown, *United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?* 56 N.C. L. REV. 29, 30).

80. See *id.*

81. *National Broiler*, 436 U.S. at 816.

82. *Id.*

83. *Id.* at 819.



chickens (from hatched chick to maturity) could be considered agricultural producers.<sup>84</sup> While all the NBMA members were integrated,<sup>85</sup> there were six (of the some seventy-five total members) that did not own their own breeding flocks or hatcheries but rather purchased chickens solely for the last phase of grow-out; there were also three members that had no production facilities of their own at all, but rather purchased chicks from other breeders and placed them with contract growers for the remainder of grow-out, finally collecting and processing the chickens at the end of the production process.<sup>86</sup> The issue of whether such operators could be considered farmers was critical to determining whether the NBMA as a whole qualified as a protected Capper-Volstead cooperative.

At the district court level, the case had been dismissed after the court held that all the members of NBMA were sufficiently involved in broiler production to qualify as "farmers" within the meaning of the Act.<sup>87</sup> The Court of Appeals for the Fifth Circuit, however, could not "squeeze these companies into farmers' boots"<sup>88</sup> and thus held that NBMA could not avail itself of the Act's protections.<sup>89</sup>

Revisiting its decision in *Sunkist II*, the Court noted that if an organization were to be afforded protection under Capper-Volstead, all of its members would have to qualify under that Act's dictates.<sup>90</sup> NBMA argued that all of its members, regardless of their particular configuration or practice, were subject to the economic variables that led to the Capper-Volstead Act's passage, and thus should be entitled to its protections.<sup>91</sup> Once more returning to the legislative history of the Act, the Court noted that it was the atomistic agricultural producer that the Act was meant to protect, and further noted that several attempted amendments extending protection to processors who "integrated" with producers contractually (but did not actually engage in production themselves) had been considered and rejected by Congress.<sup>92</sup> Thus, not

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84. *Id.* at 817-819.

85. *Id.* at 821. The economic term "integrated" in this context refers to a firm that encompasses more than one stage of the production process from raw commodity to finished consumer product (here, "vertical" integration).

86. *See id.* at 822.

87. *See U.S. v. National Broiler Marketing Ass'n*, 1976 WL 1232 (N.D. Ga. 1976).

88. *U.S. v. National Broiler Marketing Ass'n*, 550 F. 2d 1380, 1386 (5th Cir. 1977).

89. *Id.* at 1381-1382.

90. *National Broiler*, 436 U.S. at 822.

91. *See id.* at 826.

92. *See id.*

even a sharing of the identical risks by producers and processors would be sufficient to extend the antitrust shield around the processor.<sup>93</sup> Rather, the Court interpreted the phrase “persons engaged in the production of agricultural products” as limited by the phrase “as farmers, planters, ranchmen, dairymen, nut or fruit growers,” thus excluding those who “simply” processed agricultural products.<sup>94</sup> Since the NBMA members in question did not fit into the narrow exemption of the Act, the limited immunity of the entire organization was nullified, as inclusion of such a party in the membership left NBMA, like Sunkist, exposed to antitrust liability “a cooperative organization that includes them—or even one of them—as members, is not entitled to the limited protection of the Capper-Volstead Act.”<sup>95</sup>

While the majority opinion in *National Broiler* might seem to be a simple application of the “all or nothing” rule firmly established in *Sunkist II*, the separate opinions raise a number of issues that could define the treatment of NGCs under the Capper-Volstead Act, perhaps because the majority opinion provided seemingly little guidance for interpreting the Act’s application to integrated producers of other agricultural products.<sup>96</sup> The dissenting opinion, written by Justice White and joined by Justice Stewart, chided the majority for failing to define precisely who was a “farmer” as the term was contemplated by the Act.<sup>97</sup> Particularly, Justice White felt that whatever the definition relied upon by the majority, its result was under-inclusive, leaving out individuals “engaged in the production of agricultural products,” that encompassed, the dissent concluded, NBMA.<sup>98</sup> Placing greater emphasis on the ownership of the particular article of cultivation than on production facilities or actual cultivation practices, the dissent concluded that the poultry producers owned the chickens from hatching to final production, and thus, under a reasonable construction of the Act, were “producers.”<sup>99</sup>

Justice White proceeded to note that the activity of *processing* agricultural products was clearly permitted by the text of the Act for organizations under its protection; taking issue with other interpretations of the legislative history considering the addition of amendments that would have included parties who were engaged solely in processing (and

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93. See *id.*

94. See *id.* at 823.

95. *Id.* at 828-829.

96. See Rowley & Beshore, *supra* note 79, at 573.

97. See *National Broiler*, 436 U.S. at 840 (White, J., dissenting).

98. See *id.* at 844 (White, J., dissenting).

99. See *id.* (White, J., dissenting).

not production), White concluded that the objections to such proposals were based in the fact that they served to protect “processors *who were not also producers*.”<sup>100</sup> Justice White felt that the Act left open a two-way street: producers could unite to form integrated cooperatives that could then engage in processing operations, and, similarly, processors could integrate “back” to include production operations.<sup>101</sup> So long as neither form of organization dealt with the others’ commodities to no greater extent than their own,<sup>102</sup> it could still enjoy the protection of the Act.<sup>103</sup> The determinative factor for defining “farmer,” from Justice White’s perspective, was whether the party in question “partakes in substantially all of the risks of bringing a crop from seed to market . . . . This is what it means to be a farmer.”<sup>104</sup>

Justice Brennan took a different perspective in his concurrence to the majority opinion. Perhaps the most poignant observation from *National Broiler Marketing Association*, at least as far as the NGC is concerned, comes from Brennan’s opinion: “[T]he court reserves[] the question of ‘the status under the act of the fully integrated producer that not only maintains its breeder flock, hatchery, and grow-out facility, but also runs its own processing plant.’”<sup>105</sup> From his comments on the legislative history of the Act, it seems that his concern was focused on the direction of integration undertaken by cooperatives. By his interpretation, the Act was intended solely to allow “individual economic units at the farm level” to form cooperatives, thus supplanting the middlemen with whom they had theretofore contended, rather than allowing processors to integrate backward, obtaining farms and thus protection under the act.<sup>106</sup> However, some of Brennan’s statements could be taken to indicate a belief that farmer integration and cooperation beyond a certain point would be impermissible under the act,<sup>107</sup> or, perhaps even a contention

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100. *See id.* at 845 (White, J., dissenting) (citing 62 Cong. Rec. 2275) (emphasis added).

101. *See id.* at 847.

102. Referring to the “50% rule” found in the third proviso of the Act’s first section, “the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for nonmembers.” 7 U.S.C. § 291.

103. *National Broiler*, 436 U.S. at 847 (Brennan, J., concurring). Note, however, that this scenario was deemed a necessary evil accepted by the bill’s authors. *Id.*

104. *Id.* at 849 (Brennan, J., concurring).

105. *Id.* at 829 (Brennan, J., concurring).

106. *See id.* at 832-834.

107. *See id.* at 835-836 (Brennan, J., concurring). Brennan stated, for example:

that a farmer cooperative integrated forward into handling or processing is not entitled to Capper-Volstead Protection.<sup>108</sup>

*D. Subsequent Interpretation of Capper-Volstead by Lower Courts*

Following *Sunkist I*, *Sunkist II*, and *National Broiler*, a number of lower federal courts and state courts (dealing with state antitrust statutes whose language tracks that of Capper-Volstead) sought to apply the Supreme Court's view of Capper-Volstead immunity to a variety of other agricultural sectors.

1. *United States v. Hinote*

In *United States v. Hinote*,<sup>109</sup> a federal district court sought to pick up where the Supreme Court left off in *National Broiler*. In *Hinote*, antitrust charges were brought against the president of Delta Pride Catfish, Inc. (Delta Pride), a catfish processing business owned by catfish farmers;<sup>110</sup> by virtue of the number of shares they held in Delta Pride, catfish farmers were entitled to sell a given percentage of their production to Delta Pride for processing.<sup>111</sup> Amongst the companies with which Delta Pride was alleged to have conspired were two other catfish processors, Country Skillet Catfish Company ("Country Skillet," a division of ConAgra) and Farm Fresh Catfish Company (Farm Fresh).<sup>112</sup>

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At some point along the path of downstream integration, the function of the exemption for its intended purpose is lost, and I seriously doubt that a person beyond that point can be considered to be a farmer, even if he also performs some functions indistinguishable from those performed by persons who are "farmers" under the act.

*Id.* What lends some ambiguity to his statement, though, is the fact that, just as the Court's majority opinion did not explicitly define who was and was not a farmer, so Brennan's concurrence does not define what is meant by the term "agricultural production". If this term is taken to mean the cultivation and husbandry entailed in the farm-level production of agricultural products, this statement carries a much more ominous tone for NGCs than if it is simply taken to mean the production of agricultural (food and fiber) items.

108. See Rowley & Beshore, *supra* note 79, at 578.

109. 823 F. Supp. 1350 (S.D. Miss. 1993).

110. *Id.* at 1351, n 1.

111. *Id.*

112. *Id.* at 1352, n.2.

*Hinote* argued that any of its actions that might be found in violation of the antitrust laws would nevertheless be protected by Capper-Volstead.<sup>113</sup>

While Capper-Volstead permitted cooperative efforts among agricultural organizations, the “all or nothing” rule of *Sunkist II* and *National Broiler* dictated that that all of the alleged co-conspirators would have to qualify for Capper-Volstead protection for *Hinote* to prevail.<sup>114</sup> As a result, the court was compelled to examine whether both Country Skillet and Farm Fresh were respectively covered by the Act as well.<sup>115</sup> Both Country Skillet and Farm Fresh obtained their fish for processing by three means: 1) by using “feed grower contracts” whereby catfish fingerlings were placed with independent growers and then harvested by the companies when they reached market size, 2) by leasing ponds and raising the fish themselves, and 3) by simply buying fish on the open market.<sup>116</sup> Thus, there were again shades of *National Broiler* as members of a cooperative effort engaged in “quasi-farming” activities in addition to their processing businesses.<sup>117</sup>

As a result, the district court was faced with what, in its estimation, was exactly the situation contemplated by Justice Brennan’s concurrence in *National Broiler*: a fully integrated producer that engages in every stage of the production process for a commodity (even to the final consumer product), and a producer that contracts out a large portion of its production.<sup>118</sup> In essence, the court chose to adopt Justice Brennan’s interpretation of Capper-Volstead’s legislative history as weighing against the inclusion of processors integrated into producer agribusinesses,<sup>119</sup> going so far as to say that Brennan’s opinion

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113. *See id.* at 1352.

114. *Id.* at 1354 (citing *National Broiler*, 436 U.S. at 822-823). *Hinote* also claimed the protection of the Fisherman’s Collective Marketing Act (15 U.S.C. § 521). *Id.* at 1352. However, the court noted that the language of this act basically tracked that of the Capper-Volstead Act, with the exception of aquaculture references in the former where agricultural ones were used in the latter; the court explicitly stated that the analysis in the case would be virtually identical under either statute and thus proceeded solely under Capper-Volstead. *Id.* at 1354, n.7.

115. *Id.* The court noted that if it were examining the efforts of Delta Pride’s shareholders in processing and marketing their own fish, the company would fall squarely within the provisions of Capper-Volstead; it was solely the participation of Country Skillet and Farm Fresh that made the issue questionable. *See id.*, n.8.

116. *See id.* at 1353-1354.

117. *See id.* at 1355.

118. *See id.* (citing *National Broiler*, 436 U.S. at 821), n.21.

119. *See id.* at 1357.

represented the only viable interpretation of the Act and its legislative history.<sup>120</sup>

Another Brennan theme that caught the eye of the *Hinote* court was the apparent importance of the direction of the integration—while Brennan’s concurrence in *National Broiler* may have only *implied* a bias against backward integration, *Hinote* makes explicit mention of it.<sup>121</sup> This might also have led to the observation by the court that, at the time of their alleged antitrust violations, Country Skillet and Farm Fresh “purchased a substantial amount of catfish for processing from independent farmers who sold on the open market . . . these processors were thus acting as traditional ‘middlemen,’ the very group which Congress viewed as exploiting the true farmers it sought to protect under the Capper-Volstead Act.”<sup>122</sup> Indeed, the court went on to say that Country Skillet and Farm Fresh’s direct involvement in production was not enough to classify them as “farmers” under the Act.<sup>123</sup> As a result, whether by the direction of their integration or their primary nature as processors, the participation of these two firms with Delta Pride was sufficient to strip the latter of Capper-Volstead protection.

## 2. *Ewald Brothers Inc. v. Mid-America Dairymen, Inc.*

Relationships with processors were also at issue in *Ewald Brothers Inc. v. Mid-America Dairymen, Inc.*<sup>124</sup> In *Ewald Brothers*, it was alleged that Mid-American Dairymen (Mid-American, a milk marketing cooperative) lost its Capper-Volstead protection by virtue of its participation in a milk standby pool.<sup>125</sup> The pool was organized by a number of other dairy cooperatives, controlled by representatives from the member cooperatives, and was funded by financial contributions from those member cooperatives.<sup>126</sup> This fund was then used to purchase

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120. *See id.*

121. *See id.* at 1358. The *Hinote* court noted that Country Skillet and Farm Fresh were businesses formed to process and market catfish products; they were not formed for the purposes of “collective handling and processing—the very activities for which the exemption was created.” *Id.*, citing *National Broiler*, 436 U.S. at 835. “Also undisputed is the fact that Country Skillet and Farm Fresh have integrated downward to the farming level.” *Hinote*, 823 F. Supp. at 1358.

122. *Id.* at 1358-59.

123. *Id.* at 1359.

124. 877 F.2d 1384 (8th Cir. 1989).

125. *Id.* at 1385-86.

126. *Id.* at 1389.

option contracts on fluid milk, which could then be exercised, if needed, to meet seasonal shortfalls in production for the member cooperatives.<sup>127</sup>

The contention that this standby pool somehow tainted Mid-American's Capper-Volstead protection was based upon the fact that the pool entered into option contracts with three non-cooperative "proprietary" dairies.<sup>128</sup> The Circuit ultimately rejected this as a basis for withholding antitrust protection, noting that the non-cooperative dairies apparently never participated in the management of the pool, and at no time did the total amount of milk from these proprietary dairies exceed that of the cooperatives.<sup>129</sup> Acknowledging that *Sunkist II* and *National Broiler* had forbidden even one non-farmer processor to be a member of a protected cooperative, it also noted *Sunkist I*'s refusal to allow a hyper-technical reading of the Act to allow organizations "in reality owned by farmers for the benefit of farmers," to frustrate the Act's purposes.<sup>130</sup> While the court seemed to emphasize the lack of control exerted by the proprietary dairies over the standby pool (which stands to reason, since the proprietary dairies were linked to the pool solely via option contracts), and the fact that all official members of the pool were cooperatives, the court's mention of the various proportions of milk in the standby pool contributed by member cooperatives and non-member dairies leads one to wonder if it was using that proportionality as a device to measure the "participation" of the external entities, or rather was making an implied reference to the "fifty percent rule" of the Act.

### 3. *National Farmers Organization v. Associated Milk Producers, Inc.*

In *National Farmers Organization v. Associated Milk Producers, Inc.*,<sup>131</sup> the membership of a few non-producers in the National Farmers Organization (NFO) was alleged to eviscerate any Capper-Volstead immunity that organization might possess.<sup>132</sup> While an examination of the NFO rolls revealed that some non-producers were indeed included, those members were not allowed to market any commodities through the organization; indeed, the bylaws of the organization expressly provided

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127. *Id.*

128. *Id.*

129. *Id.* at 1390.

130. *See id.* at 1386 (citing *Sunkist I*, 370 U.S. 19, 28-29 (1962)).

131. 687 F.2d 1173 (8th Cir. 1982).

132. *See id.* at 1185. The members at issue had simply made \$25 contributions to the association; they had not sought to market any commodities whatsoever through the cooperative. *Id.*

that any member who ceased farming would automatically lose their membership.<sup>133</sup>

Distinguishing the members at issue in the case before them from the processors of *National Broiler*, the Eighth Circuit had to decide how narrowly to construe the membership requirements of Capper-Volstead.<sup>134</sup> While taking note of the Supreme Court's "not even one" rule, the Eighth Circuit determined that rule to be inextricably bound to the Supreme Court's analysis of the economic role of middlemen and the rationale of their exclusion from Capper-Volstead protection.<sup>135</sup> In the court's opinion, the fact that the non-producers at issue played no role in the contested commodity marketing activities, the fact that the organizational bylaws effectively nullified their membership should they ever be discovered to be non-producers, and the underlying policies of the Act, dictated a finding that the participation of such members should not eliminate NFO's limited immunity under the Act.<sup>136</sup> Arguably, this could be interpreted as allowing a de minimus exception to the "not even one rule," to the effect that members that would otherwise render a cooperative ineligible to receive the Act's protections would not have such an effect if their membership rights and privileges were so limited as to preclude exertion of any control of or participation in the marketing activities of the cooperative. Alternatively, it is possible that the court implicitly regarded these errant members as "capital only" participants, and thus permissible under the Act.

#### 4. *Ripplemeyer v. National Grape Cooperative Association, Inc.*

*Ripplemeyer v. National Grape Association, Inc.*<sup>137</sup> seems to pose the "outlier" among cases construing the Supreme Court's rulings in *Sunkist I & II* and *National Broiler*. In *Ripplemeyer*, conspiracy in restraint of trade was alleged between the National Grape Cooperative (National Grape) and its wholly-owned processing subsidiary, Welch. The District Court addressed, *sua sponte*, the applicability of Capper-Volstead protection to the actions of National Grape and Welch.<sup>138</sup> Citing *National Broiler*, the court apparently equated processors with "middlemen," stating that:

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133. *Id.*

134. *See id.* at 1186.

135. *See id.*

136. *See id.* at 1188.

137. 807 F. Supp. 1439 (W.D. Ark. 1992).

138. *See id.* at 1457.



. . . “middlemen,” if infiltrated into an otherwise exempt cooperative, are not to receive benefit of the Capper-Volstead exemption in antitrust litigation. . . . The Court has made clear that when agricultural industries vertically integrate, including non-farmer middlemen such as processors, the economic role of these middlemen exceeds the conduct Congress intended to permit through the Capper-Volstead exemption. Thus, the court finds that while the exemption provides a limited immunity to farm cooperatives from antitrust litigation, the uncontested nature and relationship of National and Welch foreclose application of the Capper-Volstead exemption.<sup>139</sup>

However, it is difficult to square the court’s finding regarding Capper-Volstead protection with that of the Supreme Court in *Sunkist I*. Recall from the facts of *Sunkist I* that Exchange Orange was a processor of citrus fruit by-products, formed as a wholly-owned subsidiary of Sunkist.<sup>140</sup> Further, recall that the Supreme Court, in *Sunkist I*, held that the circumstances of the Sunkist / Exchange Orange relationship did *not* preclude Capper-Volstead protection, refusing to grant too much weight to “organizational distinctions that are of *de minimis* meaning.”<sup>141</sup> The District Court in *Ripplemeyer* did not address this seeming contradiction as it eventually found that despite the unavailability of Capper-Volstead protection, no antitrust liability would attach to the actions of National Grape and Welch.<sup>142</sup>

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139. *See id.*

140. *Sunkist I*, 370 U.S. at 22. Exchange Orange might be distinguished from Welch in that Exchange Orange was originally comprised of Sunkist member associations until it was purchased by Sunkist and thereafter operated as a wholly-owned subsidiary. *Id.*

141. *Id.* at 29.

142. *See Ripplemeyer*, 807 F. Supp. at 1459. What makes this decision difficult to interpret is the fact that one of the three bases given by the court for refusing to find antitrust liability was the fact that Welch was a wholly owned subsidiary of National Grape and thus had a “unity of purpose.” *Id.* Thus, the allegations of conspiracy in violation of Sherman Act §1 were negated; “the separate entity requirement of a section 1 conspiracy is missing and National and Welch are incapable of a section 1 conspiracy as a matter of law.” *Id.* Add to this the fact that the court cited the *Sunkist I* language in support of its contention. *Id.*

### III. THE CHALLENGES POSED BY CAPPER-VOLSTEAD AND ITS INTERPRETATION TO NGC

Bearing in mind the rulings discussed thus far in this note and the context they create for interpreting the contours of Capper-Volstead's protection for cooperatives, the task for NGCs is now to determine just where they stand. As mentioned above, NGCs share many characteristics in common with traditional cooperatives<sup>143</sup> and to the extent that those characteristics are shared, the established decisions should be applicable to NGCs. What poses the interesting questions, though, are the unique structures and circumstances inherent to NGCs.

Given the tone of some decisions and opinions, the word "processor" may sometimes seem like a synonym of the Capper-Volstead anathema "middleman."<sup>144</sup> While the decision in *Sunkist II* makes it clear that those who engage in nothing more than processing operations may not be considered "farmers" under the Act,<sup>145</sup> there is still concern for those cooperatives integrating processing operations, as evidenced in Justice Brennan's concurrence to *National Broiler* and perhaps from the interpretation of the *National Broiler* opinion in *Ripplemeyer*.<sup>146</sup>

However, it is also important to note that the Capper-Volstead Act explicitly authorizes cooperatives to engage in "collectively processing, preparing for market, handling, and marketing of [agricultural products]."<sup>147</sup> Additionally, even Justice Brennan's concurrence in *National Broiler* noted, with approval, that the Act was intended to enable farmers "to combine with farmers and neighbors and cooperate . . . following their product from the farm as near to the consumer as they can."<sup>148</sup> It appears from the case law that processing operations that are entirely internal to the cooperative are allowed, as in *Sunkist I* where wholly-owned processing operations that were formed by the cooperative itself were permissible.<sup>149</sup>

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143. See Harris, Stafanson, & Fulton, *supra* note 16, at 16.

144. See, e.g., *National Broiler*, 436 U.S. at 831 (citing 62 Cong. Rec. 2257 (1922)). ("doing away in the meantime with . . . unnecessary middle men"). The student of property law may equate the connotation of "middleman" in cooperative antitrust law with that of the "mere squatter" when discussing the subject of adverse possession.

145. See *Sunkist II*, 389 U.S. at 535.

146. See *National Broiler*, 436 U.S. at 835-36 (Brennan, J., concurring). See Also *Ripplemeyer*, 807 F.Supp. at 1457.

147. 7 U.S.C. § 291 (2001).

148. *National Broiler*, 436 U.S. at 331, (citing 62 Cong. Rec. 2257 (1922)).

149. See generally *Sunkist I*.

However, *Sunkist I*, *Sunkist II*, and *National Broiler* together seem to stand for the proposition that while it is permissible for a farmer cooperative to form its own processing operations and still maintain Capper-Volstead protection, the merger or acquisition of external processing enterprises serves to nullify that protection. While the processors of *Sunkist I* were wholly-owned subsidiaries formed by the original cooperative, and whose members consisted solely of those members of that cooperative,<sup>150</sup> the processors of *Sunkist II* were independent organizations, not producing fruit on their own.<sup>151</sup> The processors of *National Broiler* were not engaging in processing operations on behalf of the cooperative, but rather were independent processors who had joined the cooperative to take advantage of its marketing efforts.<sup>152</sup> As noted in both the dissent and concurrence in *National Broiler*, though, there is still no bright-line rule for exactly how far a cooperative can vertically integrate its operations.<sup>153</sup>

While it would be illuminating to have an explicit statement by the Court regarding how it views the Capper-Volstead Act in the twenty-first century, the fact remains that the NGCs of today must operate in the legal environment as it stands. Given what one may infer from the opinions discussed above, what are the greatest potential challenges posed to the NGC insofar as the Act is concerned?

#### A. One Member / One Vote

The immense amount of capital required to get an NGC up and running<sup>154</sup> requires that the sale of membership shares generate enough equity capital to satisfy creditors, who often require that an NGC seeking debt financing secure forty to fifty percent of their capital in the form of investor equity.<sup>155</sup> Since delivery rights are tied to these membership shares, those producers that have much larger operations have an incentive to purchase more equity shares so as to allow ample delivery

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150. See *Sunkist I*, 370 U.S. at 22.

151. See *Sunkist II*, 389 U.S. at 387.

152. See *National Broiler*, 436 U.S. at 822.

153. See, e.g., *id.* at 840 (White, J. dissenting).

154. See, e.g., Christopher R. Kelley, *New Generation Farmer Cooperatives: The Problem of the "Just Investing" Farmer*, 77 N. D. L. REV. 185, 191-192 (hereinafter referred to as Kelley, *Just Investing Farmer*). Examples of the daunting startup costs for NGCs can be seen in the \$300,000 feasibility budget and \$12.5 million overall equity goal for the Dakota Growers Pasta Company. See *id.*

155. See HANSON, *supra* note 13, at 3.

rights for all of their production. However, under the Act, an organization must either permit each member to have only one vote, *or* limit the dividends returned to membership stock to only eight percent per annum.<sup>156</sup> Since the reason for establishing NGC is to increase farmer returns,<sup>157</sup> it seems highly unlikely that NGC would opt to come under the eight percent limitation, but rather would choose to limit each member to only one vote.<sup>158</sup>

Since NGCs are often oriented to one fairly specific goal (for example, the processing of wheat into baked goods), it is likely that the members have similar goals, and would not find the one-member / one-vote restriction distressing. However, it is still possible that the restriction might not sit well with large producers who realize that their comparatively large equity investments give them no greater control in the affairs of the NGC than the smallest producer.<sup>159</sup> Such a mind-set might be inadvertently exacerbated by what is often deemed to be one of the more attractive features of NGCs, that of increased member participation in decision-making.<sup>160</sup> As a result, larger producers might seek some means of securing more control of the organization. Limited by the one member / one vote rule, though, they might simply break their operation up into a handful of wholly-owned subsidiaries, perhaps taking what was a sole-proprietorship farm and creating a series of new entities (LLCs, corporations, or other state-recognized business forms). The farmer would then transfer a portion of his membership shares<sup>161</sup> and their corresponding delivery rights to these new businesses, thus making each a "member" of the cooperative having a vote.

Beyond the fact that such maneuvering could pose significant organizational issues to the NGC, it could pose even greater problems for

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156. 7 U.S.C. § 291 (2001). Recall that the Act specifies very specific standards for organizations that come under its protection: "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 percentum per annum."

157. See Kelley, *supra* note 18, at 4.

158. See PATRIE, *supra* note 20, at 2. Note, however, that cooperatives can structure the returns to the NGC as volume-based refunds rather than dividends; it is possible that an examining court would not construe such refunds as violative of the dividend restriction.

159. See Harris, Stafanson, & Fulton, *supra* note 16, at 24.

160. See generally PATRIE, *supra* note 20, at 2.

161. See Kelley, *supra* note 18, at 6. Transfer of ownership rights is permitted by many NGCs, although many also require that the transfer be approved by the cooperative's board of directors.

the NGCs Capper-Volstead protection. The problem posed by this is that each of these new organizations would have to pass muster under the Capper-Volstead tests. While it has been established that corporations and other business forms besides the sole-proprietorship may be members of cooperatives,<sup>162</sup> there has been no clear grant of permission for such actions. There appears to be almost no case law construing Capper-Volstead's "one-member / one vote" requirement,<sup>163</sup> and thus there is no way to know, with any degree of assurance, whether multiple corporate members of a cooperative under common control would be a violation of that rule. Further, should such a situation be found permissible, there still remains the danger that, given the "not even one" rule from *Sunkist II* and *National Broiler*, one of these component organizations will be found ineligible for Capper-Volstead protection, and thus expose the entire NGC enterprise to antitrust liability.

### B. "Just Investing" Members

Beyond their potential to revitalize rural communities with their primary and incidental impacts, the principal economic reason many NGCs are formed is to enable producers to capture more of the consumer food dollar by vertically integrating more stages of the processing and marketing chain, thus providing greatly enhanced patronage dividends to members.<sup>164</sup> Participation in these increased returns obviously requires the purchase of membership stock in the NGC and that stock's attendant delivery rights.

Invariably, however, all favorable investments attract attention, and it is conceivable that an investor might seek to obtain membership in an NGC—an investor with no intention of producing any commodity processed by the NGC, but simply hoping to realize a favorable return on his equity capital.<sup>165</sup> Since participation in the NGC would carry the obligation to deliver a specified quantity of the relevant commodity, the "just investing" member would have to purchase that commodity on the open market and arrange for its delivery to the NGC pursuant to the

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162. See Joseph J. Hlavacek & Timothy E. Troll, *Antitrust Law: Agricorporate Membership in Cooperatives—Is the Capper-Volstead Exemption a Threat to Farmers?*, 17 WASHBURN L.J. 525, 527 (1978).

163. A thorough search of all federal cases in the Westlaw database revealed no cases examining the "one member / one vote" requirement of the Capper-Volstead Act.

164. See Kelley, *supra* note 18, at 6.

165. See Kelley, *Just Investing Farmer*, *supra* note 154, at 186.

terms of the membership agreement.<sup>166</sup> Clearly, this leads to questions as to whether the membership stock in an NGC becomes, by virtue of such activity, a security under the Securities Act<sup>167</sup> and the Exchange Act,<sup>168</sup> and thus subject to the myriad of regulations invoked by such a classification.<sup>169</sup> Most importantly, such activity would appear indistinguishable from “middleman” behavior and would strongly resemble the speculative activities that were reviled in the early Capper-Volstead debates,<sup>170</sup> given the legislative history and case-law surrounding the Capper-Volstead Act, such activity, if known and permitted by the NGC, would almost certainly strip it of protection under the Act. Even the processors of *National Broiler* retained title to the chickens throughout the entire production process; an investor engaged in the activity described here would hold a far more tenuous connection to the cultivation process.<sup>171</sup>

### C. Fulfilling Deficiencies in Commodity Deliveries

Given the holding in *National Broilers Marketing Association*, it is possible that the greatest danger to the Capper-Volstead eligibility of a cooperative lies in simply seeing that it maintains optimally efficient operating capacity when its members are unable to fulfill their delivery rights. Recall that the sum of all delivery rights issued to members of an NGC are generally calculated to equal the optimally efficient capacity of the processing facility.<sup>172</sup> Aside from the problem of the “just investing” member, the simple inability of members to fulfill their delivery obligations due to crop failure or any other disruption in the production

166. *Id.*

167. 15 U.S.C.A. §§ 77a-bbbb (West through P.L. 107-203).

168. 15 U.S.C.A. §§ 78a-11 (West through P.L. 107-203).

169. See generally Frank A. Taylor & Patrick A. Reinken, *Are Financial Instruments Issued by Agricultural Cooperatives Securities?: A Framework of Analysis*, 5 DRAKE J. AGRIC. LAW 171.

170. See *National Broiler*, 436 U.S. at 833, (citing 59 Cong. Rec. 8033). “[T]his privilege is not to *dealers or handlers or speculators for profit*; it is limited to the producers themselves.” (emphasis added). See also *Sunkist II*, 389 U.S. at 392 (“To be sure, a principal concern of Congress was to prohibit the participation in the collectivity of the middleman, the speculator who bought crops on the field and returned but a small percentage of their eventual growth to the grower”).

171. See *National Broiler*, 436 U.S. at 828 (stating that the “production” activities of the processors “involves only the kind of investment that Congress clearly did not intend to protect”).

172. See Harris, Stafanson, & Fulton, *supra* note 16, at 16.

cycle might require those members to obtain the needed commodity from some outside source. Alternatively, the NGC might have to exercise its option to obtain the commodity elsewhere.<sup>173</sup> Either one of these situations, however, involve either the NGC members or the NGC itself dealing with agricultural products of others, that is, products that they had no hand in producing themselves.

One could draw an analogy from this situation to that of National Broiler Marketing Association, where the cooperative included members that took no part in the production of the chickens, but rather maintained title to them throughout the production process, contracting out the actual husbandry activities to others.<sup>174</sup> Does this mean that an NGC member who had to purchase commodity from an outside source was not really a producer, thereby tainting the NGC and neutralizing its Capper-Volstead immunity? Arguments could be made both for and against this proposition, but it seems likely that a court posed with it would engage in a factually intense analysis of whether the NGC member(s) in question reasonably believed they would be capable of providing the commodity by means of their own agricultural production activities, and followed through with good-faith efforts to do so. In arriving at the decision in *National Broiler*, the Supreme Court examined, inter alia, the economic and physical risks faced by farmers and their importance in the passage of the Capper-Volstead Act.<sup>175</sup> If a producer found to be a "farmer" within the meaning of the Act was forced to obtain a commodity from an outside source in order to fulfill his contractual obligation to the NGC as a result of the risks contemplated in the passage of the Act, it seems unlikely that such activity, in and of itself, would be sufficient to support a breach of that Act's protection.

There is, however, one more factor to consider. The Act explicitly states that a cooperative "shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."<sup>176</sup> This limitation could be critical in the event of an area-wide crop failure, perhaps caused by an extreme weather event, disease, or other mishap that affects a significant number of the NGC's members. The resultant shortage would most likely compel<sup>177</sup> the NGC to secure

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173. See PATRIE, *supra* note 20, at 1.

174. See *National Broiler*, 436 U.S. at 822.

175. See *id.*

176. 7 U.S.C. § 291 (2001).

177. See David K. Smith, *Crop Yield Uncertainty: Issues for New Generation Cooperatives*, 10 SAN JOAQUIN L. REV. 41. Given that an NGC is likely to require significant cash flow in order to service its financial obligations, and will likely have

some secondary source, perhaps from some other processor or commodity broker. At such a point, the NGC would again veer into potential problems in maintaining its Capper-Volstead protection.

#### IV. POLICY CONSIDERATIONS AND OPTIONS

While one may look at the problems faced by NGCs and simply dismiss them, since every business form has its advantages and disadvantages, the continued prosperity and development of this new business form could have far-reaching implications. As mentioned earlier, the United States has taken a fairly dramatic departure from traditional agricultural policy, moving toward the elimination of direct commodity support payments and other subsidies.<sup>178</sup> The shift was made in the hope that American farmers would be able to financially manage on their own (without the subsidies) and still provide the United States with a cheap, abundant, and safe food supply. However, even as our world faces a third millennium, many of the climatologic, biologic, and economic vagaries that have plagued farmers throughout the ages still persist. This has led to the huge emergency payments that have been necessary to help farmers survive in recent years.

In addition, the agriculture industry has seen an increasing pace of industrialization and integration. Mirroring the changes in the poultry industry in the 1950s, the swine industry has seen increasing levels of integration, and, in many respects, now exhibits arrangements such as those giving rise to the *National Broiler* case. Beyond numerous environmental concerns, there have been numerous calls of distress from independent producers who now face a marketplace where single integrated corporations control large portions of supply.

It would seem, therefore, that the fundamental rationales behind the Capper-Volstead Act are as valid now as they were in the early twentieth century. Perhaps they are even more so—in an era where there are calls for increased accountability for government spending, and “handouts” are decried, there exists a pressing need for self-help measures that will enable small businesses to grow and survive. Simultaneously, the depopulation of rural communities leaves those that still reside there

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contractual relationships with food merchandisers that must be fulfilled, it is reasonable to assume that an NGC would require some minimal throughput even in times of commodity scarcity.

178. See Fischer, *supra* note 12.



struggling to generate the business activity and asset values that, in turn, fund schools, public works, and emergency response systems.

The rise of the NGC presents the opportunity to reverse some of these trends. By capturing more of the consumer food dollar locally, not only can farmers retain more earnings and increase the value of their productive assets, but they can also create jobs. Those jobs, through the multiplier effect, have the potential to revitalize rural communities.

However, there remains the problem that these NGCs are still operating under a regime of statutes and case law built around the concept of the traditional cooperative. If the United States government is truly serious about bolstering the independence of the American farmer while still preserving its rural communities, affirmative actions need to be taken to foster the growth of the NGC.

### A. Judicial Action

As one can see from a review of *Sunkist II* and *National Broiler*, there are gaps in the definition of exactly who a “farmer” may be under the Capper-Volstead Act. Central to the issue of NGC operations is what the federal courts determine to be boundaries of permissible vertical integration—whether integration all the way from the farm gate to the supermarket shelf (so long as it is carried out by cooperatives with pure farmer memberships) will be allowed, or whether minor variances in organizational form, as in *Ripplemeyer*, will serve to strictly confine the evolution of the cooperative firm.

Clearly, a pronouncement from the Supreme Court on the matter would be useful, particularly if it clarified who should win the Brennan / White debate of *National Broiler*. Perhaps even more useful, though, would be a re-evaluation of the policy behind the Act. The legislative history of the Act plays a central role in virtually any opinion interpreting it, with the court’s take (be it explicit or implicit) on farm policy bolstering it.<sup>179</sup> Almost as ubiquitous is a pronouncement by the court that it will not read into the Act a different perspective on agriculture than was held by the legislators that passed it.<sup>180</sup> However, we face the eightieth anniversary of the Act, and to say that farming, the rural economy, and the global food market have changed dramatically in that

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179. See, e.g., *Hinote*, 823 F. Supp. at 1357 (citing both the legislative history of the act and Justice Brennan’s interpretation of that history in light of the policy underlying its passage and interpretation).

180. See, e.g., *National Broiler*, 550 F. 2d. at 1380.

period would be a gross understatement. Farmers, as both the providers of food and as private entrepreneurs, *must* deal with the economic environment as it exists today, not as it did in the early twentieth century. It seems that if the courts truly wish to give the Capper-Volstead Act its intended effect, namely to empower farmers to compete in a changing business climate, then the strictures of past decisions and, perhaps, a degree of their formalistic interpretation of the Act's language, must be loosened to allow farmer-based organizations the freedom to adapt. Thus, clarity must be provided in the bounds of integration and merger with processing enterprises so that NGCs may accomplish, by legitimate means, their objectives.

### *B. Congressional Action*

The courts should not be blamed for attempts to adhere to the laws of Congress, for that is their job—it is the job of Congress to interpret current conditions, form policy, and enact that policy through legislation. Thus, perhaps the best means of providing a stable legal environment for NGCs is an acknowledgment of their importance within the Capper-Volstead Act itself. The addition of language allowing the following NGC activities would provide farmers with a clear legal foundation for cooperative activities:

- 1) A provision making clear that “collectively processing” includes all the steps in taking a raw commodity from the field, through all the phases necessary to complete and market a finished consumer product;
- 2) Affirmative language indicating that a cooperative may acquire and operate as its own processing operations that may not have been previously operated as cooperative enterprises; and/or
- 3) Specific contingency provisions allowing NGCs to obtain raw commodity from brokers or other sources should its members be unable to fulfill their delivery obligations due to natural causes.

The countervailing concern for Congress, however, would be the possibility contemplated by Justice Brennan in *National Broiler* when he envisioned that non-farmers would integrate with cooperatives in order to obtain Capper-Volstead protection. Thus, Congress may also have to undertake the somewhat daunting task of formulating language

permitting *forward* integration by farmers while simultaneously prohibiting *backward* integration by non-agricultural firms.

### C. Private Action

Of course, a cooperative might choose to forgo some of the advantages bestowed by the cooperative form and simply choose another organizational arrangement. Indeed, some of the features of NGCs (particularly their capital-intensity) may make them suited for a corporate form, rather than the traditional patronage arrangement of cooperatives.<sup>181</sup> Some states have already recognized the need for enhanced flexibility in the agribusiness sector; Iowa, for example, has nine business forms farmers may choose from.<sup>182</sup> However, use of a non-cooperative business form would place these organizations outside the Act's protection, and thus render them unable to engage in alliances that would be permissible if they were cooperatives.

However, it is also possible that many organizations will still determine that the cooperative form is best for them. Thus, until reform is adopted by the courts and / or by Congress, NGCs will need to be mindful of the legal environment as it now exists and engage in conscientious self-policing, so as not to run afoul of the extant limitations. First and foremost, the NGC will need to carefully police its membership rolls.<sup>183</sup> Doing so will enable them to purge errant members and avoid "tainted" membership. Second, the cooperative must make sure that its members, current and potential, are well aware of the one member / one vote requirement. Clear understanding of this limitation may prevent later attempts by disenchanted members to increase their organizational control. Finally, the NGC may wish to consider substantial commodity storage capacity and / or insurance policies that will enable it to weather shortages in raw materials, rather than having to obtain those materials on the open market.

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181. See Lee F. Schrader, *Equity Capital and Restructuring of Cooperatives as Investor-Oriented Firms*, 40 JOURNAL OF AGRICULTURAL COOPERATIVES 41 (1989).

182. Scott Flynn, *Putting the New Generation Cooperative in Perspective Within the Value-Added Industry*, 85 IOWA L. REV. 1473, 1492. Among these forms are "general partnership, limited partnership, limited liability partnership, authorized limited liability company, authorized farm corporation, networking farmers corporation, networking farmers limited liability company, farmers cooperative association, and farmers cooperative limited liability company." *Id.*

183. See *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1185 (8th Cir. 1982).

## V. CONCLUSION

The final fate of the NGC revolution in agriculture ultimately lies in the hands of the American public, for it is by their direction to our legislatures and courts that our national perception of agriculture and, thus, our agricultural policy, is forged. If we are truly committed to the preservation of our small communities and our rural heritage, the time to renew our vision of that policy is now.

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