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A Fox in the Capper-Volstead Coop**

by

Worth Rowley and Marvin Beshore

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# CHICKEN INTEGRATORS' PRICE-FIXING: A FOX IN THE CAPPER-VOLSTEAD COOP

by WORTH ROWLEY\* AND MARVIN BESHORE\*\*

*Last term the Supreme Court wrestled with an anti-trust law question that appears to pose little difficulty: may giant, integrated agribusinesses take collective action in pricing and marketing any of their products? Surprisingly, the Court split on the matter and managed to avoid a clear answer. Here the authors show why great business organizations, whose dominance over farmers occasioned the exemptions to the antitrust laws accorded farmers, cannot exempt themselves from those laws by increasing that domination through integrating backward and co-opting the farmer's role.*

## INTRODUCTION

The Capper-Volstead Act,<sup>1</sup> passed in 1922, is perhaps the single most important piece of federal legislation which has affected the economic structure of American agriculture. By providing a limited exemption from federal antitrust laws, the Act has been successful in its goal of encouraging the growth of farmer cooperative marketing associations. But in the intervening half-century there have been enormous changes in the technology of American agriculture. Production and marketing systems which were unthought of in 1922 have come to dominate certain sectors of the agricultural economy.<sup>2</sup> It was inevitable that the reach of Capper-Volstead would be tested by what has been called the "new order" in agriculture. The test came in *United States v. National Broiler Marketing Association*.<sup>3</sup>

When the "chicken case" was presented to the Supreme Court, review was granted "[b]ecause of the importance of the issue for the agricultural community and for the administration of the antitrust laws . . ."<sup>4</sup> Commentators noted that the case presented an "explosive combination of economic realities and political tensions to the federal judiciary for evaluation in light of the

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\* Partner, Rowley & Green, Washington, D.C.; J.D. 1938 Northeastern University.

\*\* Associate, Rowley & Green, Washington, D.C.; A.B. 1970 Dickinson College, J.D. 1976 Georgetown University Law Center. The authors wish to recognize James M. Becker, Esquire for his assistance in preparation of this article.

1. 7 U.S.C. §§ 291-92 (1976).

2. The broiler industry, as we know it today for example, has developed since the 1930's. See Brown, *United States v. National Broiler Marketing Association: Will The Chicken Lickin' Stand?*, 56 N. CAR. L. REV. 29, 37-40 (1978).

3. 1975-2 Trade Cas. ¶ 60,509 (N.D. Ga. 1975), *rev'd*, 550 F.2d 1380 (5th Cir. 1977), *aff'd* 436 U.S. 816 (1978).

4. 436 U.S. at 820.

antitrust laws"<sup>5</sup> and that the issues "extend far beyond the broiler industry, and the impact of its final resolution will be felt throughout agriculture."<sup>6</sup> A leading national farm organization contended that the rights of bona fide farmers under Capper-Volstead could be "rendered meaningless" by an erroneous decision of the case.<sup>7</sup> In short, the broiler case was viewed with diverse anticipations by persons interested in agriculture and the antitrust laws.

The Supreme Court's resolution of the case, however, failed to satisfy these anticipations.<sup>8</sup> The decision was narrowly drawn, deciding, for all practical purposes, only the case itself and not establishing an interpretation of Capper-Volstead to control similar cases in the future. This article will examine the Supreme Court's decision in *National Broiler Marketing Association v. United States* and suggest a line of statutory construction that could be applied to resolve future chicken cases. First, however, to set the context, a brief review of the history and prior interpretation of the Capper-Volstead Act is necessary.

#### CAPPER-VOLSTEAD: THE STATE OF THE LAW

The Capper-Volstead Act was an effort by Congress to give agricultural cooperatives limited exemption from the antitrust laws. The Sherman Act of 1890,<sup>9</sup> the main piece of federal antitrust legislation, was intended to maintain competition throughout the American economy. Its basic provisions condemn (1) "[e]very contract, combination . . . or conspiracy, in restraint of trade"<sup>10</sup> and (2) acts of monopolization, attempts to monopolize, or combinations or conspiracies to monopolize any part of trade or commerce.<sup>11</sup> As agricultural cooperatives grew in numbers and effectiveness in the 1900's, farmers became concerned that cooperatives would be considered violations of the antitrust laws. It was feared that groups of farmers organizing to strengthen their bargaining power against the corporations they sold to would be viewed as "combinations" in "restraint of trade." To assure that the antitrust laws would not be used to prevent the formation of cooperatives, Congress in 1914 added Section 6 to the Clayton Act.<sup>12</sup> The amendment provided, in part, that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural, or horticultural organizations, instituted for the purposes of mutual help and not

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5. Brown, *supra* note 2, at 46.

6. *Id.* at 30.

7. Brief for American Farm Bureau Federation as Amicus Curiae at 2, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

8. *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

9. 15 U.S.C. §§ 1-7 (1976).

10. *Id.* § 1.

11. *Id.* § 2.

12. Clayton Act, ch. 323, § 6, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 17 (1976)).

having capital stock . . . ."<sup>13</sup> In addition, Section 6 specifically provided that such agricultural organizations or their members should not be construed as illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Section 6 was considered inadequate in two important respects. First, it failed to specify exactly which activities of agricultural organizations fell within its provisions. Second, Section 6 did not apply to cooperatives with capital stock—the kind of cooperatives that farmers felt were necessary to market products effectively.<sup>14</sup>

The Capper-Volstead Act was an effort by Congress to clarify the antitrust exemption for agriculture. Congress considered proposed legislation for nearly four years before passing the bill that became the Act in 1922.<sup>15</sup> Upon its enactment Senator Capper summarized the primary purpose of the Act as follows: "[T]o make definite the law relating to cooperative associations of farmers and to establish a basis on which these organizations may be legally formed . . . . [T]o give to the farmer the same right to bargain collectively that is already enjoyed by corporations."<sup>16</sup>

Section 1 of the Capper-Volstead Act extended the antitrust exemption of Section 6 of the Clayton Act to agricultural cooperatives with capital stock. Section 1 also authorized cooperatives to act together in "collectively processing, preparing for market, handling, and marketing" products through common marketing agencies and in the making of "necessary contracts and agreements to effect such purposes."<sup>17</sup> But while Section 1 thus freed farmers from fear of antitrust prosecutions because of their organization of cooperatives, the price for this freedom was exacted in Section 2 of the Act, which empowered the Secretary of Agriculture to issue a cease and desist order to any cooperative which "monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced by reason thereof . . . ."<sup>18</sup> Sec-

13. *Id.*

14. 436 U.S. at 824-25. *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391 (1967); *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458, 464-68 (1960). *See also* 59 CONG. REC. 7851-52 (1920) (remarks of Rep. Morgan); *Id.* 8017 (remarks of Rep. Volstead).

15. Predecessor bills were introduced in 1919 in both Houses of Congress. *See* S.845, 66th Cong., 1st Sess., 58 CONG. REC. 9646 (1919) and H.R. 7783, 7784 66th Cong., 1st Sess., 58 CONG. REC. 9811 (1919). Known as the Capper-Hersman bills, these proposals would have amended § 6 of the Clayton Act to allow for collective sales by producers' associations, corporate or otherwise. In 1920, Rep. Volstead introduced H.R. 13703, 66th Cong., 2nd Sess., 59 CONG. REC. 9763 (1920) and H.R. 13931, 66th Cong., 2nd Sess., 59 CONG. REC. 9766 (1920). Senator Capper introduced S.4344, 66th Cong., 2nd Sess., 59 CONG. REC. 9698 (1920), which was identical to H.R. 13931. In form, these bills provided for a new law rather than an amendment to the Clayton Act. Both Houses passed versions of the legislation but it died in conference. In 1921 the bills which were eventually enacted were introduced as H.R. 2373, 67th Cong., 1st Sess., (1921) and S.983, 67th Cong., 1st Sess. (1921).

16. 62 CONG. REC. 2057 (1922) (remarks of Sen. Capper).

17. 7 U.S.C. § 291 (1976).

18. 7 U.S.C. § 292 (1976). The section provides in full:

If the Secretary of Agriculture shall have reason to believe that

tion 2 was adopted very simply because of insistence by some legislators, especially in the Senate, that some restraint be placed upon the associations authorized in Section 1.<sup>19</sup>

A great body of case law has not developed under Capper-Volstead.<sup>20</sup> However, the broad parameters of the interface of the Act

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any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

19. The debate over putting limits on cooperatives was extensive, especially in the Senate, where the Judiciary Committee proposed an alternative proviso which would have prohibited establishment of or attempts to establish a monopoly. See S. REP. NO. 236, 67th Cong., 1st Sess. 1 (1921). However, because of arguments that such a prohibition was unnecessary and could eliminate economies, the price enhancement limitation was adopted. See 62 CONG. REC. 2157-69, 2281 (1922). The Congress hoped to have the best of all possible worlds: better prices for farmers without higher prices for consumers. As stated by Senator Norris, "[W]hat we are trying to do here is to give the producer a higher price for his product without hurting the consumer. . . . [W]e want to take away the profits of the middleman." 62 CONG. REC. 2269 (1922).

20. *United States v. National Broiler Marketing Ass'n*, 550 F.2d 1380, 1384 (5th Cir. 1977). There have been a number of articles discussing various Capper-Volstead issues. See, e.g., Hanna, *Antitrust Immunities Of Cooperative As-*

and the federal antitrust laws are clear. First, it has been settled since *United States v. Borden Co.*<sup>21</sup> that the Capper-Volstead Act did not entirely displace the Sherman and Clayton Acts for cooperatives. In *Borden*, the cooperative defendant argued that the Capper-Volstead Section 2 remedy was exclusive and that a criminal indictment under the Sherman Act could not be brought against the cooperative. Rejecting this, the Court held that the Section 2 remedy was merely supplementary and not intended to displace the entirety of the Sherman Act.<sup>22</sup> This holding was reaffirmed in *Maryland & Virginia Milk Producers Ass'n v. United States*.<sup>23</sup>

A second settled principle is that Capper-Volstead associations must be composed entirely of producers of agricultural products to be eligible for exemption from the antitrust laws. This was established in *Case-Swayne Co. v. Sunkist Growers, Inc.*, where the Supreme Court held that the Sunkist system was not protected by Capper-Volstead because proprietary processors participated in the control and policy making of Sunkist and nonproducer entities were members of the association.<sup>24</sup> Capper-Volstead only authorizes associations of *producers* to collectively market. As we shall see, this point was reaffirmed and applied in *National Broiler Marketing Ass'n v. United States*.<sup>25</sup>

Third, it is settled that any agreements or concerted action between a cooperative and a non-cooperative are not exempted from the antitrust laws. Thus, in the *Borden* case the Supreme Court held that a conspiracy among the cooperative suppliers and the dairies, health officials, and others in the Chicago milk market was not protected by the Capper-Volstead Act.<sup>26</sup> Consequently, contracts with processors, suppliers, competitors, or others entered into by cooperatives are reviewable under ordinary standards of antitrust law.<sup>27</sup>

Fourth, it is established that a single cooperative acting unilaterally receives no protection from Capper-Volstead if its actions

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*sociations*, 13 LAW & CONTEMP. PROD. 488 (1948); Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 ADMIN. L. REV. 455 (1970); Lemon, *Antitrust And Agricultural Cooperatives Collective Bargaining In The Sale Of Agricultural Products*, 44 N.D.L. REV. 505 (1968); Mahaffie, *Cooperative Exemptions Under The Antitrust Laws: A Prosecutor's View*, 22 ADMIN. L. REV. 435 (1970); Mischler, *Agricultural Cooperative Law*, 30 ROCKY MTN. L. R. 381 (1958); Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63 (1958); Lemon, "Capper-Volstead—Will It Ever Grow Up?", Ad. Law Rev. 22: 443 (April 1970); Note, *Agricultural Cooperatives—The Clayton Act and the Capper-Volstead Act Immunize the Concerted Price Bargaining Activities of Two Agricultural Cooperatives from Antitrust Liability*, 53 TEX. L. REV. 840 (1975).

21. 308 U.S. 188 (1939).

22. *Id.* at 206.

23. 362 U.S. 458 (1960).

24. 389 U.S. 384 (1967).

25. See notes 68-75 *infra* and accompanying text.

26. 308 U.S. at 204-05.

27. See, e.g., *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Sanitary Milk Producers, v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966) for applications of this principle.

are predatory and would constitute an attempt to monopolize or a monopolization in violation of Section 2 of the Sherman Act. The teaching of *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*<sup>28</sup> is that a cooperative once formed is subject to the same unilateral conduct proscriptions of the antitrust laws as any other corporation. Thus, in *Maryland & Virginia* the district court's dismissal of charges under Section 2 of the Sherman Act was reversed where the government alleged that the association had threatened and undertaken various actions to foreclose independent suppliers from the Washington, D. C. area milk market, which actions included the purchase of a competing dairy, interference of the shipment of non-members milk, and the boycott of a feedstore owned by a competing dairy.<sup>29</sup>

Finally, lower courts have established the proposition that producers and cooperatives may agree on the prices at which they will sell their products. *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*<sup>30</sup> held that two associations of potato growers could lawfully agree on the selling price of potatoes to processors, since such conduct fell within the meaning of collective "marketing"—an activity authorized by Section 1 of the Capper-Volstead Act.<sup>31</sup> Similarly, *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*,<sup>32</sup> held that a single lettuce cooperative could, through its individual members, lawfully set the prices at which the members would sell their lettuce. The court found that such activity was protected from the antitrust laws jointly by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act.<sup>33</sup> Both courts suggested that the outcomes may have been different had the challenged conduct included "predatory practices" in addition to agreement on prices.<sup>34</sup>

The heart of Capper-Volstead is this: farmers may jointly fix the prices of their products. The case law we have briefly reviewed adds gloss to this theme. *Only* farmers (and their cooperatives) may price-fix with Capper-Volstead immunity. Non-farmers may not be members of cooperatives and cooperatives may not conspire with non-cooperatives. Price-fixing under Capper-Volstead is a voluntary activity and coercion is not legitimized; predatory acts remain illegal.

Unless specifically authorized by statute (such as Capper-Vol-

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28. 362 U.S. 458 (1960).

29. *Id.* at 468. For applications of this case *see, e.g.*, *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (S.D. Tex. 1972).

30. 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974).

31. *Id.* at 215.

32. 413 F. Supp. 984 (N.D. Cal. 1976), *aff'd per curiam*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, — U.S. — (1979), [1979] 5 TRADE REG. REP. (CCH) ¶ 60,021.

33. *Id.* at 985.

34. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 993 (N.D. Cal. 1976); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213 (9th Cir. 1974).

stead), price-fixing is a violation of the Sherman Act, a felony<sup>35</sup> which also gives rise to treble damage civil liability. However, the elimination of price competition among competing sellers can also be a very profitable activity. Consequently, when the integrated producer-processors of broiler chickens decided to collectively raise their prices, they sought to bring themselves under the Capper-Volstead umbrella. When the Justice Department determined they were not entitled to Capper-Volstead protection, the broiler litigation was hatched.

#### OVERVIEW OF THE BROILER LITIGATION

As early as 1969 the Department of Justice considered whether integrated producers who contract with independents to perform part of the production process are entitled to Capper-Volstead protection. On November 24, 1969, the Department wrote a business review letter<sup>36</sup> indicating it did not intend to bring a criminal anti-trust action attacking the plan of National Egg Co., a cooperative of egg producers, to admit Ralston Purina Co. Ralston Purina was an integrated egg producer that contracted with farmers for the care of laying hens.<sup>37</sup> Two years later the Department changed its position. On November 17, 1971, the Department wrote a business review letter indicating it was unable to say it did not intend to sue the National Broiler Marketing Association (hereinafter the NBMA) should the NBMA admit Holly Farms Poultry, Inc. The letter also stated that integrators who contracted with growers for the raising of broilers were not farmers within the meaning of Capper-Volstead. In a simultaneous press release the Department took the position that agricultural cooperatives might lose their anti-trust protection if they admitted integrators.<sup>38</sup>

The case began 17 months later on April 16, 1973, when the Department of Justice filed a civil antitrust action against the NBMA for violation of Section 1 of the Sherman Act.<sup>39</sup> The NBMA is a non-profit cooperative association chartered under the Georgia Marketing Associations Act.<sup>40</sup> Its members are producers of broilers—young chickens which are slaughtered at seven to nine weeks of age, processed, and then offered for sale in “ready-to-cook” form.

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35. 15 U.S.C. § 1 (1976).

36. A business review letter may be obtained upon request from the Antitrust Division of the Department of Justice. In it the Department may indicate “its ‘present’ antitrust enforcement intentions with respect to a proposed course of action submitted to by a business, industry group or other enterprise.” [1978] 2 TRADE REG. REP. (CCH) ¶ 8559, *see* 28 CFR section 50.6 (1978).

37. *See* [1974] 5 TRADE REG. REP. (CCH) ¶ 50,194, at 55,358 and Brief for the United States at 6 n.7, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

38. *See* [1974] 5 TRADE REG. REP. (CCH) ¶ 50,194, at 55,359-2 and Brief for the United States at 6 n.7, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

39. [1976] 4 TRADE REG. REP. (CCH) ¶ 45,073, at 53,522.

40. GA. CODE ANN. §§ 65-201, *et seq.* (1966 and Supp. 1978).



Production of broilers involves five stages. First, breeder flocks that produce eggs to be hatched as broiler chicks must be raised, bred and placed. Second, the broiler eggs are hatched and the broiler chicks placed. Next, the broiler chicks are raised for a period of seven to nine weeks. This period is sometimes referred to as the grow-out stage. Fourth, the grown chickens are cooped and hauled to a processing facility. Finally, the broilers are prepared for market.<sup>41</sup>

Most of the members of the NBMA have accomplished what is called "vertical integration" of the broiler industry. This means that each member performs more than one of the five stages of production. Such members are often called integrators. Regardless of which stages of production the NBMA members participate in, they have at least one feature in common: all contract with independent growers to perform at least part, and usually a substantial part, of the grow-out stage.<sup>42</sup> The grower furnishes the land, buildings, equipment, water, electricity and labor used in raising the broiler chicks.

The government alleged in its civil antitrust action that the NBMA's members and others had combined to fix broiler prices and to restrict broiler production in order to increase broiler prices.<sup>43</sup> The NBMA asserted that it was a cooperative association of agricultural producers and therefore exempt from the antitrust laws by virtue of Section 1 of the Capper-Volstead Act.<sup>44</sup> The gov-

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41. 436 U.S. at 820-21. The Supreme Court's statement of the five stages of broiler production is taken verbatim from a stipulation of fact by the parties. Appendix at 7, Nat'l Broiler Mkt'g Ass'n v. United States, 436 U.S. 816 (1978).

42. *Id.* at 821.

43. The government alleged in its initial complaint, filed on April 16, 1973, that the parties to the conspiracy had agreed:

- (1) to exchange information about past, present, and future prices for broilers;
- (2) to establish and disseminate broiler prices;
- (3) to sell broilers at or above that price;
- (4) to report to NBMA surplus broilers that cannot be sold at that price;
- (5) to sell undergrades at agreed on discounts from the Grade A price;
- (6) to withhold broiler parts from the market in order to increase their price;
- (7) to exchange information about past, present, and future production of broilers;
- (8) to establish and disseminate broiler production guidelines;
- (9) to reduce the number of broilers available for marketing in accordance with such guidelines; and
- (10) to sell surplus broilers to customers in foreign countries.

See [1976] 4 TRADE REG. REP. (CCH) ¶ 45,073, at 53,522-53,523. After the lower court granted the NBMA's motion for partial summary judgment, United States v. Nat'l Broiler Mkt'g Ass'n, 1975-2 Trade Cas. ¶ 60,509 (N.D. Ga. 1975), the government filed an amended complaint on February 26, 1976. Among the changes in the second complaint was one in which the "[a]llegations of concerted action to establish and disseminate broiler production guidelines and to reduce the number of broilers available for marketing per such guidelines were eliminated." [1976] 4 TRADE REG. REP. (CCH) ¶ 45,073, at 53,523.

44. 436 U.S. at 818. For a full statement of NBMA's defenses, see its "Answer to Amended Complaint," Appendix at 97, Nat'l Broiler Mkt'g Ass'n v. United States, 436 U.S. 816 (1978).

ernment stipulated that ready-to-cook broiler chickens were "agricultural products" under the Capper-Volstead Act.<sup>45</sup> Prior case law has held that every member of the cooperative association must be a "person engaged in the production of agricultural products" within the meaning of the Capper-Volstead Act in order for the association to qualify for the antitrust exemption.<sup>46</sup> The government argued that because NBMA members did not own or work on the land on which broiler chicks were raised, but instead contracted with independents to perform the grow-out stage, they were not farmers, and thus the association was not entitled to the exemption.<sup>47</sup>

Both sides moved for partial summary judgment on the issue of whether the NBMA is exempt from the antitrust laws. The federal district court held that NBMA's members were sufficiently involved in broiler production to be classified as farmers within the meaning of the Capper-Volstead Act.<sup>48</sup> Accordingly, the court granted the NBMA's motion for partial summary judgment and denied the government's.<sup>49</sup>

In deciding the motions, the district court looked to two sources for insight. First, the court examined the legislative history of the Capper-Volstead Act, but concluded that it "sheds little light on the problem" of whether the NBMA's members were farmers.<sup>50</sup> Second, the court inquired whether broiler producers were treated as farmers under statutory schemes. The court found that the Fifth and Eighth Circuits had at the time held, respectively, that a poultry farm operator which contracted with independent growers to raise chickens and an egg processor that obtained its eggs from independent contract growers were engaged in "farming," as the term is used in Section 3(f) of the Fair Labor Standards Act<sup>51</sup> [hereinafter referred to as FLSA]. The lower court in *NBMA*, borrowing the approach of the courts in the FLSA cases, concluded that NBMA members were "farmers" because of the extent to which they retained ownership of the broilers during the grow-out phase, supplied services to growers, and bore substantial risks associated with broiler production.<sup>52</sup>

After the lower court's decision, the government amended its complaint, deleting all allegations that survived the partial sum-

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45. Appendix at 7, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

46. The leading case is *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967).

47. Brief for the United States at 11-13, *Nat'l Broiler Mkt'g Ass'n v. United States*, 486 U.S. 816 (1978).

48. *United States v. Nat'l Broiler Mkt'g Ass'n*, 1975-2 Trade Cas. ¶ 60,509 (N.D. Ga. 1975).

49. *Id.* at 67,223.

50. *Id.* at 67,221.

51. *Id.* 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).

52. *United States v. Nat'l Broiler Mkt'g Ass'n*, 1975-2 Trade Cas. ¶ 60,505, at 67,221-223.

mary judgment.<sup>53</sup> The parties stipulated that the government could bring a subsequent action reasserting the deleted claims.<sup>54</sup> The district court then granted final judgment in favor of NBMA.<sup>55</sup>

On appeal the Fifth Circuit reversed.<sup>56</sup> The court gave three reasons for holding that NBMA members are not farmers. First, the court asserted that at an "irreducible minimum" the ordinary and popular meaning of the word "farming" is "either husbandry of animals or crops, or farm ownership." NBMA members fall outside this definition since the independent contract growers husband the broilers on their own land.<sup>57</sup> Second, the court found support for its definition of farming in the legislative history of the Capper-Volstead Act.<sup>58</sup> Finally, the court noted that since the lower court decision, the law on whether broiler integrators were farmers under the FLSA had changed. Based on this change the court concluded that a holding that NBMA members are not farmers under Capper-Volstead is consistent with the treatment given broiler integrators by the Natural Labor Relations Board under the FLSA.<sup>59</sup>

The Supreme Court affirmed the Fifth Circuit's decision seven to two.<sup>60</sup> The Court decided the case on very narrow grounds, holding that the NBMA was not entitled to the antitrust exemption because three of its members owned neither a breeder flock nor a hatchery and maintained no "grow-out facility at which the flocks to which it holds title are raised."<sup>61</sup> Thus, unlike the Fifth Circuit, which held that antitrust immunity turns on whether members own or operate grow-out facilities, the Supreme Court held that it turns on ownership of one or more of a breeder flock, hatchery or grow-out facility. The majority left unanswered whether two types of broiler producers would be considered farmers under Capper-Volstead. The first is the fully integrated broiler producer; the second, the fully integrated broiler producer who also obtains some of his broilers from independent growers.<sup>62</sup> More significantly, the Supreme Court failed to articulate standards for evaluating the antitrust status of vertically integrated producers of other agricultural products. Only Justice Brennan in his concurring opinion and Justice White in his dissenting opinion, joined by Justice Stewart, shed some light on how the Court will face these larger issues.

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53. *United States v. Nat'l Broiler Mkt'g Ass'n*, 1976-1 Trade Cas. ¶ 60,801 (N.D. Ga. 1976). For the text of the government's amended complaint, see Appendix at 92, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

54. "Stipulation" in Appendix at 91, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

55. *United States v. Nat'l Broiler Mkt'g Ass'n*, 1976-1 Trade Cas. ¶ 60,801, at 68,457 (N.D. Ga. 1976).

56. *United States v. Nat'l Broiler Mkt'g Ass'n*, 550 F.2d 1380 (5th Cir. 1977).

57. *Id.* at 1386.

58. *Id.* at 1386-89.

59. *Id.* at 1389-90.

60. *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

61. *Id.* at 827.

62. *Id.* at 828 n.21.

## DISCUSSION OF THE SUPREME COURT OPINIONS

*Majority Opinion*

The Capper-Volstead Act provides, in part, that

[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . .<sup>63</sup>

Whether a cooperative association is entitled to the benefits of the Act depends on how this statutory language is interpreted. One interpretation was given by the majority in the Broiler Case. Writing for the majority, Justice Blackmun said that a "common sense reading" of the above language "leads one to conclude that not all persons engaged in the production of agricultural products are entitled to join together and to obtain and enjoy the Act's benefits."<sup>64</sup> He said this was because the broad phrase, "[p]ersons engaged in the production of agricultural products" is limited by the more specific phrase, "as farmers, planters, ranchmen, dairymen, nut or fruit growers."<sup>65</sup> This interpretation is significant because without it there would be almost no limit on those covered by Capper-Volstead. Everyone from the raiser of breeder flocks to the broiler processor is, in a broad sense, "engaged in the production of agricultural products."

Justice Blackmun drew support for his commonsense view—that the statute's specific language limits the broad language—from the legislative history of the Act. Specifically, he cited an exchange among Senators Cummins, Townsend, and Kellogg during a discussion of the Bill that became the Act.<sup>66</sup> Senator Kellogg, a supporter of the Bill, explained that it conferred benefits only on actual producers, not on those entities such as flour mills and packers, who could only be said to be agricultural producers in a broad sense.<sup>67</sup>

The majority's statutory interpretation means that the processor, packer, or other off-farm entity in the chain of production is not within the class of persons for whom the benefits of the Act

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63. 7 U.S.C. § 291 (1976).

64. 436 U.S. at 823.

65. *Id.*

66. *Id.* at 823-24 n.13. The exchange among the three Senators appears at 62 CONG. REC. 2052 (1922). For the same proposition Justice Blackmun cites a passage from the House Report on the bill that became the Act. It is stated in the passage that the aim of Section 1 is to exclude from the benefits of the Act "all but actual farmers and all associations not operated for the mutual help of their members as such producers." H.R. REP. No. 24, 67th Cong., 1st Sess. 1 (1921).

67. 62 CONG. REC. 2052 (1922).

were established. Thus, if such a person were a member of a cooperative association otherwise entitled to antitrust immunity, the association would lose its protection. This reading of the statutory language, however, does not answer the question of who qualifies as a "farmer" under the Act. This question, of course, was at issue in the Broiler case. While all but four NBMA members were processors,<sup>68</sup> each was also involved in one or more of the other stages of broiler production.<sup>69</sup>

To answer this question the majority examined further the legislative history of the Act. The Court found two things: first, that the Act was meant to aid "only those whose economic position rendered them comparatively helpless," not the "full spectrum of the agricultural sector";<sup>70</sup> and, second, that it was not meant to aid "processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk" of production.<sup>71</sup> The Court found support for these conclusions in Congressional debates generally, and in particular from the fact that Congress repeatedly rejected an amendment introduced several times by Senator Phipps.<sup>72</sup> The Phipps Amendment would have extended the benefits of the Act to the processor who enters what is known as a "pre-planting" contract with the producer. This is a contract entered before the producer has planted his crop whereby the processor agrees to purchase the crop at a price that depends on the price the processor gets for the processed product.

In light of its examination of the Congressional purpose, the majority decided that three members disqualified the NBMA from antitrust protection of the Act. Each of the three did not own a

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68. The definition of NBMA members who are processors includes members that own processing firms and members whose owner also owns a processing firm. Brief for Petitioner at 5 n.2, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

69. 436 U.S. at 821.

70. *Id.* at 826.

71. *Id.* at 826-27.

72. The Phipps Amendment would have added the following language to Section 1 of the Act after "nut or fruit growers" and before "may act together":

[A]nd where any such agricultural product or products must be submitted to a manufacturing process, in order to convert it or them into a finished commodity, and the price paid by the manufacturer to the producer thereof is controlled by or dependent upon the price received by the manufacturer for the finished commodity by contract entered into before the production of such agricultural product or products, then any such manufacturers . . .

62 CONG. REC. 2227, 2273-75, 2281 (1922). The legislative debates reveal that "contract" in the Phipps Amendment referred to the "preplanting" contract between producer and manufacturer, and not the contract between manufacturer and purchaser of the finished commodity, as one possible reading of the Amendment would suggest. *Id.* at 2227-28 (remarks of Sen. Phipps). Senator Phipps argued that the Amendment was necessary because under the typical pre-planting contract the farmer has a vital interest in the price obtained by the manufacturer for the finished product. By extending the benefits of Capper-Volstead to manufacturers who enter pre-planting contracts, the Amendment, Senator Phipps felt, would protect the farmer's interest in the price of the finished product. *Id.*

breeder flock or hatchery, and did not maintain a grow-out facility.<sup>73</sup> The roles played by these three members in the production of broilers are unclear from the majority opinion. The Court made clear, however, that *all* NBMA members were integrated.<sup>74</sup> Thus, the three members who owned neither breeder flock nor hatchery and maintained no grow-out facility were nevertheless “integrated”—engaged in more than one of the five stages of production. The Court concluded, however, that the economic role of the three members in the production of broiler chickens is

indistinguishable from that of the processor that enters into a preplanting contract with its supplier, or from that of a packer that assists its supplier in the financing of his crops. Their participation involves only the kind of investment that Congress clearly did not intend to protect.<sup>75</sup>

Thus, the Court decided the case by comparing the three NBMA members to certain processors and packers whom the Court had already determined from the legislative history were not entitled to the Act's protection.

The majority opinion leaves several significant questions unanswered. First, the Court did not specify what it was about the investment of the three NBMA members that made their economic roles in broiler production “indistinguishable” from the processor with a preplanting contract and the packer who helps the supplier finance his crops. In fact, while the majority said what the three members had not invested in—breeding facility, hatchery, or grow-out facility—it did not specify what they had invested in. Second, the Court did not indicate what type of investment would entitle the three NBMA members to antitrust protection of the Capper-Volstead Act. Third, the Court suggested that even if the three NBMA members had made the type of investment that would qualify them for antitrust protection, they might nevertheless be ineligible if “their economic position is such that they are not helplessly exposed to the risks about which Congress was concerned.”<sup>76</sup> Finally, the Court, having decided that three NBMA members were not farmers under the Capper-Volstead Act, said it was unnecessary to decide whether other NBMA members would qualify as farmers.<sup>77</sup> Specifically, the Court said it need not consider the status of “the fully integrated producer that not only maintains its own breeder flock, hatchery, and grow-out facility, but also runs its own processing plant,” or “the less fully integrated producer that, although maintaining a grow-out facility, also contracts with independent growers for a large portion of the broilers processed at its facility.”<sup>78</sup>

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73. 436 U.S. at 827.

74. *Id.* at 821.

75. *Id.* at 827-28.

76. *Id.* at 828 n.21.

77. *Id.*

78. *Id.*

*Concurring Opinion*

Justice Brennan agreed that the three members of the NBMA upon which the majority focused were not engaged in agricultural production as farmers.<sup>79</sup> Accordingly, under the rule of *Case-Swayne Co. Inc., v. Sunkist Growers, Inc.*, the NBMA was not entitled to antitrust exemption. Unlike the majority, however, Justice Brennan went on to suggest some considerations that in his view bear upon the broader question of the status of the fully integrated broiler producer under the Act.

Based on the Act's legislative history, Justice Brennan, like the majority, found that Congress did not intend for processors and packers to whom farmers sold their goods to enjoy the benefits of Capper-Volstead, even if the processor or packer assumed a share of the risk of agricultural production.<sup>80</sup> He drew support for this conclusion from the same sources as the majority—namely, the exchange during Congressional debates among Senators Cummins, Townsend, and Kellogg, and the rejection of the Phipps Amendment. Thus, Justice Brennan agrees with the majority that the specific phrase, “as farmers, planters, ranchmen, dairymen, nut or fruit growers” limits the broader phrase, “[p]ersons engaged in the production of agricultural products.” A person engaged in agricultural production who is not a farmer, planter, ranchman, nut or fruit grower, such as a mere processor, is not entitled to benefit from the Act.

Justice Brennan went beyond the majority to suggest that only the person in a position to join a cooperative for collective handling and processing may enjoy the benefits of Capper-Volstead. This view is expressed at two passages in his opinion. First, after examining the Act's legislative history, he concluded that it “demonstrates that the purpose of the legislation was to permit only individual economic units working at the farm level to form cooperatives for purposes of ‘collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.’”<sup>81</sup> Justice Brennan added that “[t]his focus [of the legislative history] on collectives to replace the processors and middlemen is the key to application of the Act's policies to modern agricultural conditions.”<sup>82</sup> Later in the opinion he states:

I seriously question the validity of any definition of “farmer” in § 1 [of the Act] which does not limit that term to exempt only persons engaged in agricultural production who are in a position to use cooperative associations for collective handling and processing—the very activities for which the exemption was created. At some point along the path of downstream integration, the function of the ex-

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79. 436 U.S. at 829 (Brennan, J., concurring).

80. *Id.* at 832-34.

81. *Id.* at 832-33.

82. *Id.* at 833.

emption for its intended purpose is lost, and I seriously doubt that a person engaged in agricultural production 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. The statute itself may provide the functional definition of farmer as persons engaged in agriculture who are insufficiently integrated to perform their own processing and who therefore can benefit from the exemption for cooperative handling, processing, and marketing.<sup>83</sup>

A possible interpretation of Justice Brennan's view is that any farmer integrated forward into handling or processing is not entitled to Capper-Volstead protection. Such a person is not in a position to participate in cooperative handling or processing. His status under this view would not change even if he invests in other stages of agricultural production.

This view goes beyond the majority's. The majority found that the Act was not meant to aid "processors and packers to whom the farmers sold their goods, even when the relationship was such that the processor and packer bore a part of the risk" of production.<sup>84</sup> Finding the economic role of the three NBMA members indistinguishable from that of such processors and packers, the majority decided that the three NBMA members were not entitled to Capper-Volstead protection. But the majority did not rule out the possibility that a processor could make an unspecified investment in other aspects of production and thereby qualify for Capper-Volstead protection. Under the suggested interpretation of Justice Brennan's view the processor still might not qualify, regardless of any investment or participation in other aspects of production.

On the other hand, this is just one possible interpretation of Justice Brennan's opinion. It is apparent that he did not go so far as to adopt it himself. He seems to have retreated from such a position, saying, "in my view, the nature of the Association's activities, the degree of integration of its members, and the functions historically performed by farmers in the industry are relevant considerations in deciding whether an Association is exempt."<sup>85</sup> Because the record did not contain evidence relevant to these considerations, Justice Brennan thought there was "no basis for appraising NBMA's entitlement to the exemption while it includes members whose operations are fully integrated whether or not they contract rather than perform the grow-out phase."<sup>86</sup> It is difficult to imagine what evidence the NBMA, or any other comparable association whose members process products separately, could present which would persuade Justice Brennan that the Association is exempt, given his view that only persons in a position to

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83. *Id.* at 835-36.

84. *Id.* at 827.

85. *Id.* at 836.

86. *Id.*



participate in collective handling and processing should benefit from the Act.

Justice Brennan drew upon two additional lines of reasoning to support the view that contract growers, but not integrators, are "farmers" under Capper-Volstead. First, he argued, as did the American Farm Bureau Federation as *amicus*, that exempting integrators from the antitrust laws might harm the independent contract grower, who falls within the class to be protected by the Act.<sup>87</sup> Exempt integrators could combine to dictate the terms upon which they deal with independent contract growers. Second, Justice Brennan pointed out that Congress in a context more recent than Capper-Volstead had viewed integrators as "handlers" and contract growers as "farmers."<sup>88</sup> In 1968 Congress enacted the Agricultural Fair Practices Act of 1967,<sup>89</sup> [hereinafter referred to as AFPA] designed to protect the bargaining position of individual farmers by prohibiting handlers from interfering with producers' rights to combine in cooperative associations. The AFPA's definition of producer<sup>90</sup> is identical to that of the Capper-Volstead Act, but the AFPA's legislative history makes it clear that Congress viewed integrated broiler producers as "handlers" to be prevented from preying on independent contract growers who Congress viewed as "producers."<sup>91</sup> Justice Brennan's favorable view of both lines of reasoning confirms that the NBMA would be hard-pressed to present evidence convincing him that it is entitled to the benefits of Capper-Volstead.

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87. *Id.* at 837. See also Brief for American Farm Bureau Federation as Amicus Curiae at 7-10, Nat'l Broiler Mkt'g Ass'n v. United States, 436 U.S. 816 (1978).

88. 436 U.S. at 829 (Brennan, J., concurring).

89. 7 U.S.C. §§ 2301 et seq. (1976).

90. Producer is defined in § 3(b) of the AFPA as "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower." 7 U.S.C. § 2302(b) (1976). The Capper-Volstead Act does not actually define producer, but extends its protection to the same group of persons who come under the AFPA's definition. 7 U.S.C. § 291 (1976).

91. 436 U.S. at 838 (Brennan, J., concurring). Section 2303(b) of the AFPA makes it unlawful for a handler knowingly "[t]o discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers . . ." 7 U.S.C. § 2303(b) (1976). A passage in the Senate Report explaining Section 2303(b) suggests that for purposes of the AFPA Congress considered integrated broiler producers as "handlers" and independent contract growers as "producers." The passage is as follows:

As introduced, [§ 2303(b)] prohibited discrimination in the terms of 'purchase or acquisition' of agricultural products. The committee found that this provision would be ineffective with respect to much that it was manifestly intended to prohibit. Thus a broiler contractor might furnish hatching eggs or chicks to a producer under a bailment contract where title remained in the contractor; or a canning company might furnish seeds or tomato plants to a producer under a similar arrangement. No 'purchase or acquisition' would be involved. The committee amendment would extend this provision to 'other handling' of agricultural products, thereby covering the examples just given and greatly broadening the scope of this provision.

S. REP. NO. 474, 90th Cong., 1st Sess., 5-6 (1967).

*Dissenting Opinion*

Justice White wrote a dissenting opinion that was joined by Justice Stewart.<sup>92</sup> Their interpretation of the statutory language and legislative history differs significantly from the majority and concurring interpretations. Justice White observed that broiler chickens are agricultural products—a fact stipulated by the parties. He also noted that integrators “produce” broiler chickens.<sup>93</sup> This conclusion was apparently supported in the dissent’s view by the fact that integrators own the animal from chick to dressed broiler and most own the breeder flock that lay eggs from which chicks are hatched. Having observed that broiler chickens are agricultural products and that integrators produce them, Justice White concluded that integrators are “engaged in the production of agricultural products as farmers, within the meaning of 7 U.S.C. § 291 (1976 ed.).”<sup>94</sup>

The dissent, not surprisingly, attacks a principal weakness of the majority opinion—its failure to explain why the economic role of the NBMA member, who owns neither breeder flock nor hatchery, and maintains no grow-out facility, is indistinguishable from that of the processor who enters a pre-planting contract with his supplier. Justice White argued that an important distinction is that the NBMA member is a producer of broilers, whereas the mere processor is not.<sup>95</sup> This distinction is significant for three reasons. First, “[t]he statute’s own words,” said Justice White, “are conclusive that the activity of processing by producers was to be exempted from antitrust scrutiny.”<sup>96</sup> The statutory language referred to is the third proviso of Section 1 of the Capper-Volstead Act. It provides that if an association is to qualify for the benefits of Capper-Volstead, it “shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.”<sup>97</sup> This language makes it clear, according to Justice White, that some association members could process more agricultural commodities than they produce, yet remain eligible for Capper-Volstead protection because their produce was contributed to the cooperative.<sup>98</sup> In addition, the language implied to the dissenters that just as producers could combine and become processors, large food processors could become producers and thereby obtain antitrust protection with respect to their own products and up to 50 percent of the products of others not even eligible for exemption.<sup>99</sup>

The second reason given by Justice White for the significance of the distinction between the NBMA member who is both proces-

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92. 436 U.S. at 840 (White, J., dissenting).

93. *Id.* at 844.

94. *Id.*

95. *Id.*

96. *Id.* at 845.

97. 7 U.S.C. § 291 (1976).

98. 436 U.S. at 845 n.12 (White, J., dissenting).

99. *Id.* at 847-48 n.14.

sor and producer and the mere processor is that the distinction was recognized in the legislative history of the Capper-Volstead Act. He cites a passage which suggests to him that Congress rejected the Phipps Amendment because it would have exempted processors who were not also producers.<sup>100</sup> He also refers to statements by Senators Walsh and Kellogg that processors who become producers are entitled to protection.<sup>101</sup>

Finally, the distinction is significant because the producer bears substantially more risk of agricultural production than the processor. Justice White argues that the only risk borne by the processor who enters pre-planting contracts with the producer is that final market price for the processed product will fluctuate.<sup>102</sup> The producer shares that risk with the processor and bears alone the other risks of agriculture, including the risk that feed and medicine prices will fluctuate, the risk that the animal will be damaged in transit, or the risk that it will die during the growing period. Justice White contends that NBMA members bear all these risks of the producer, whether or not they own breeder flocks, hatcheries or grow-out facilities, because of the "cost-plus" nature of the grow-out contracts. Thus, the majority erred in comparing the economic role of the NBMA members, who bear all the risks of production, with the Phipps-processor, who bears only one of the risks.

Justice White criticized the majority's explanation of why the economic role of the three NBMA members was indistinguishable from that of the processor who enters a pre-planting contract. While this criticism may be well founded, his own interpretation of the statute, that processors who become producers thereby qualify for exemption, has problems. In support of this interpretation he states that the statutory language clearly implies that some members of a cooperative association could process more than they produce and still retain the exemption. This statement is based upon the third proviso in Section 1 of the Capper-Volstead Act, which

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100. *Id.* at 845. The passage is from a statement by Senator Norris opposing the Phipps Amendment. He said:

The amendment . . . , as I understand, is simply offered for the purpose of giving to a certain class of manufacturers the right to be immune from any prosecution under the Sherman Antitrust Act, a repeal of the act, as far as certain manufacturers are concerned.

They are not cooperators; they are not producers; it is not an organization composed of producers who incorporate together to handle their own products; that is not it.

62 CONG. REC. 2275 (1922).

In relying on this passage Justice White is, of course, attaching significance to the fact that while Congress said non-producers should be excluded from the Act's coverage, it did not say anything about the status of processors who are also producers. This fact is significant only if one interprets Congress' silence as a statement that processors who are also producers qualify for Capper-Volstead protection.

101. 436 U.S. at 847-48 n.14. The statements by the Senators appear at 62 CONG. REC. 2157 (1922) (remarks of Sen. Walsh) and 62 CONG. REC. 2268 (1922) (remarks of Sen. Kellogg).

102. 436 U.S. at 846 (White, J., dissenting).

provides, in effect, that for a cooperative association to retain its exemption it shall not deal in the products of non-members to an amount which exceeds the value of products it handles for members.<sup>103</sup> It is apparent from the proviso that Congress contemplated that a cooperative association be permitted to handle products of non-members to a limited extent. The proviso applies to the cooperative association; nothing on its face suggests that it applies to individual members. Thus, there is no apparent reason to infer from it that the limitation contemplated applies to an individual cooperative member who is both processor and producer.

A second problem with his statutory interpretation is that it is based in part upon a questionable reading of the legislative history. In one passage Senator Walsh discusses whether processors of the day, such as Swift, Armour or Wilson, could qualify for exemption by becoming farmers. Senator Walsh concludes that a processor could become a farmer, join an association, and send the produce from his farm through the association.<sup>104</sup> The passage quoted by Justice White does not suggest, however, that individual processors who also produce are authorized to form cooperatives for the purpose of coordinating their individual marketing activities with respect to processed products.<sup>105</sup> In fact, the full discussion in which Senator Walsh's statement was made suggests, as Justice Brennan points out, that Congress did not intend to exempt processors with respect to their processing activities.<sup>106</sup> In a second passage relied upon by Justice White,<sup>107</sup> Senator Kellogg explained a proposed amendment to the Capper-Volstead Act as one under which the processor wanting to join a cooperative would have to be admitted if he was also a farmer.<sup>108</sup> The amendment would have added to Section 1 the proviso "[t]hat any person engaged in the same industry shall be admitted to membership in the association on equal terms with all others."<sup>109</sup> What Justice White fails to explain is the relevance of Senator Kellogg's remarks in light of the fact that the amendment was rejected by Congress.<sup>110</sup>

#### THE BROILER CASE: AN ALTERNATIVE APPROACH

The Court's decision may have been limited in the way that it was because no consensus could be reached among the majority Justices as to how the line between farmer/producer and non-

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103. The full text of the proviso is "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." 7 U.S.C. § 291 (1976).

104. 62 CONG. REC. 2156-57 (1922).

105. 436 U.S. at 847-48 n.14.

106. *Id.* at 839 n.3.

107. *Id.* at 847-48 n.14.

108. Senator Kellogg said: "The object being that a few farmers should not organize a corporation simply as a selling agency and not personally really be cooperative members." 62 CONG. REC. 2268 (1922).

109. For the text of the proposed amendment, see 62 CONG. REC. 2267 (1922) (remarks of the Reading Clerk).

110. 436 U.S. at 839 n.3.

farmer could be drawn to resolve this and future cases. Undeniably, a substantial number of the members of the NBMA were "engaged in the production of agricultural products as farmers" in their breeder flock or hatchery operations.<sup>111</sup> It was much less clear that they were the true "producer" in the grow-out stage.<sup>112</sup> But "many if not all" were processors, thus establishing their integrator status.<sup>113</sup>

The Court's difficulty in drawing a producer/non-producer line was not aided by the Department of Justice which, as the dissent acerbically noted, would have found the integrators to be farmers in the grow-out stage if they converted the contractor-grower into an employee or purchased the land under the grow-out facilities.<sup>114</sup> As the dissent also points out, this distinction could encourage integrators simply to integrate more completely, taking over for their own account a greater portion of the production sector in order to avail themselves of the Capper-Volstead exemption. If the use of the exemption by these corporate integrators was the Justice Department's reason for bringing the case, such a resolution would be anomalous.<sup>115</sup>

Justice White's dissent adopts the petitioner's position on the farmer/non-farmer line. Producers are those "who partake in substantially all of the risks of bringing a crop from seed to market, or, in this case, from chick to broiler."<sup>116</sup> Paying homage to the defeat of the Phipps Amendment, the dissent would require processors to assume more than the price element of production risk.<sup>117</sup> This test was made for the integrator. By tying the risk analysis to a "seed to market" scope, it is unclear where it leaves the farmer, such as the cattleman who performs only one part of the production line but at his sole risk.<sup>118</sup> It is clear it allows the integrator, such as the NBMA, to assert a 90% bearing of costs and risks in the

111. The Court opinion implies that all but six NBMA members owned or controlled breeder flocks or hatcheries where broiler chicks are hatched. *Id.* at 822.

112. Much of the argument in briefs before the Court concerned the status of the integrator strictly in the "grow-out" stage where the chicks were under care of an independent contractor. See Brief for the United States at 11-20; Brief for Petitioner at 13-19, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

113. "All of the members of NBMA are 'integrated,' that is, they are involved in more than one of the these stages of production." 436 U.S. at 821.

114. *Id.* at 846-47.

There is cause to applaud the majority opinion in some respects: most importantly in its studious avoidance of any embracing of the United States' point of view. . . . Under the United States' theory, an integrator . . . could achieve antitrust exemption by purchasing the land on which the grow-out facility was maintained . . . [o]r he could achieve protection by hiring his grower as an employee . . . (Mr. Justice White, dissenting).

115. *Id.* at 847.

116. *Id.* at 849 (White, J., dissenting).

117. *Id.* at 846.

118. See "Integrated Cattle Marketing: A Better Way," USDA, FCS Information No. 107, May 1977, attached to Petition for Certiorari at Appendix E, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

entire "seed to market" analysis.<sup>119</sup>

Underlying this line-drawing debate is an assumption that Capper-Volstead authorizes processors, who are also producers, to combine with respect to the marketing of the output of their processing plants. This premise should be examined.

The course of the NBMA litigation may have been irreversibly altered when it was stipulated in the district court that "ready-to-cook chickens are an agricultural product."<sup>120</sup> This seems to have foreclosed argument about whether, regardless of the producer status of the integrators, the association's activities were authorized by the statute. After all, on its face the statute requires not only that members of associations be "persons engaged in the production of agricultural products as farmers" but that the association's collective activity be with respect to "such products of persons so engaged."<sup>121</sup>

Original drafts of the statute limited the associations' dealings to the "products of their members."<sup>122</sup> At the request of cooperative representatives, however, the Senate amended the bill to allow for marketing of products of non-members. The Committee Report made clear that there remained a limitation "as to the character of the products in which they may deal," but felt that the amendment was necessary to assure "that degree of success which your committee would be glad to see attend their efforts." It was stated that "the persons mentioned therein are authorized to associate themselves 'in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce such products of persons so engaged' namely, agricultural products."<sup>123</sup>

The statute itself, taken as a whole, shows a consistent attempt to focus the benefits of the authorized associations at the farm level of the agricultural production sector. In the first place, there was a clear effort to limit the associations so that they could not function as investment vehicles like ordinary business corporations. This is apparent from the dividend limitation provision and the non-member business proviso. The dividend limitation requires that control of the association be maintained on a one-man, one-vote basis unless dividends on stock or membership capital are held below eight percent.<sup>124</sup> The House Report stated that

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119. Brief for Petitioner at 5, *Nat'l Broiler Mkt'g Ass'n v. United States*, 436 U.S. 816 (1978).

120. Appendix at 7. The Stipulation was "RTC [Ready-to-Cook] broilers are an agricultural product."

121. 7 U.S.C. § 291 (1976).

122. *See, e.g.*, H.R. 13931, 66th Cong., 2d Sess. (1920).

123. S. REP. NO. 236, 67th Cong., 1st Sess. 3 (1921).

124. The exact wording of the limitation is as follows:

*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.

“[t]his limitation of 8 per cent is designed to compel payment to the members of as large a part of the proceeds derived from the sale of their products as possible, instead of paying it as a dividend upon the money used as capital.”<sup>125</sup> The benefits of the association were to be distributed primarily to the farmers as farmers, not as capital investors.

This thrust is followed in the non-member business limitation. While as we have seen, the Congress saw fit to allow the associations to deal in non-members produce, this was limited to a minority value of the association’s business. This limitation was specifically designed to prohibit rich capitalists such as “Mr. Swift” and “Mr. Armour” who may own farms from forming an association for their own production and then using it as a vehicle, with all the privileges of the statute, to engage in ordinary commodity dealing for profit, such as grain trading.<sup>126</sup> Again, Congress sought to limit the benefits of the statute to producers in their capacity as producers and not as farm product dealers or middlemen.

An additional provision of the statute requires the operation of the Capper-Volstead associations for the “mutual benefit of the members thereof, as such producers.”<sup>127</sup> While the reason for this requirement is not spelled out in the legislative history, it appears to be founded upon the operation of cooperatives. Cooperatives, unlike ordinary for-profit stock corporations, distribute their profits (often called “savings”) on the basis of patronage rather than ownership share or capital.<sup>128</sup> Thus, where producers operate a cooperative manufacturing facility for citrus fruits, the profits of the plant are paid out in proportion to the amount of raw products supplied by each member. Profits from dealings in non-member goods may be allocated in a similar fashion. Thus, the cooperative may rightly be said to be operated for the mutual benefit of the member-owners as producers of the raw product, rather than in their capacity as owner-investors.

Taken together these statutory provisions show a consistent design to authorize association by farmers for the purpose and with the effect of getting a better price for the production of their farms. Concomitantly, there was an effort to restrict the operation

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7 U.S.C. § 291 (1976).

125. H. R. REP. NO. 24, 67th Cong., 1st Sess. 1 (1921).

126. See 62 CONG. REC. 2157 (1922) (Remarks of Senator Walsh); *Authorizing Association of Producers of Agricultural Products: Hearings on H.R. 2373 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 1st Sess. 27-28 (1921) (remarks of Sen. Walsh); *Id.* at 53 (remarks of Jno N. Preston); *Id.* at 186, 195 (remarks of Sen. Walsh); 62 CONG. REC. 2267 (1922) (remarks of Sen. Walsh).

127. Actual text reads: “Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers . . . .” 7 U.S.C. § 291 (1976).

128. See generally I. PACKEL, ORGANIZATION AND OPERATION OF COOPERATIVES 186-91 (1970); 18 AM. JUR. 2d *Cooperative Associations* § 2 (1965). In fact, the federal tax laws take into account this unique aspect of cooperatives. See I.R.C. §§ 1381-88.

of the associations as tools for capital investors, whether or not such investors happened to be farmers.

The legislative history further indicates that the purpose and function of the authorized associations was to move the products of farmers from the farm toward the ultimate consumer by collective activity as an alternative to individual dealing with middlemen, dealers or processors. An outstanding example of the type of activity Congress intended to ratify and hoped to generate was a livestock marketing cooperative in Minnesota cited by Senator Kellogg.<sup>129</sup> That association established coordinated shipments of cattle to the St. Paul stockyards, enabling the farmer-members to cut their transportation costs from \$25 per car load to about \$8 per load. The farmer netted more for his cattle, the middleman (railroad or broker) was displaced, and the consumer did not suffer. Similar economies were claimed in the handling of fruits in California, where it was asserted that since the formation of cooperatives, producer prices had dramatically risen with no change in consumer charges.<sup>130</sup>

The middlemen—dealers, processors, brokers and speculators—who dealt with the farmer for the production of his farm were the target of Capper-Volstead. By authorizing farmers to band together to bargain with or displace these middlemen, Congress hoped to give the men of the land a means to overcome their disadvantageous marketing position, whereby they might capture for themselves some of the middlemen profits.

The fundamental difficulty in the farmers' dealings with buyers was the great number of farmers versus the smaller number of dealers. The dealers were organized in large corporations which Congress viewed as aggregations of 30,000 or 40,000 businessmen collectively doing business through the corporate mechanism.<sup>131</sup> On the other hand, without a cooperative each individual farmer was on his own and his bargaining weakness was obvious. Farmers were price-takers.

Additionally, the perishability of certain farm products weakened the farmer-seller's hand even further. This was an important reason for authorizing cooperatives.<sup>132</sup> However, it is not clear

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129. 62 CONG. REC. 2052 (1922) (remarks of Sen. Kellogg).

130. *See, e.g.*, 62 CONG. REC. 2052 (1922) (remarks of Sen. Kellogg) ("I venture to say that not only have [the California fruit growers' associations] brought prosperity to the fruit growers but they have brought cheaper fruit to the people . . ."); 61 CONG. REC. 1039 (1921) (remarks of Rep. Mills); 59 CONG. REC. 8024-25 (1920) (remarks of Rep. Hersman).

131. H. REP. NO. 24, 67th Cong., 1st Sess. 2 (1921).

132. 59 Cong. Rec. 9141-9142 (1920) (remarks of Rep. Welling):

The products of the farm are usually perishable, and the individual farmer has not the facilities by himself alone of reaching the consumer before his products have spoiled. Nobody realizes this so well as the forces who, with abundant capital, have organized their business to take every advantage of the farmers' need in this regard. The remedy lies in permitting and encouraging the farmers to cooperate in building storage facilities for the protection and preservation of their products until they can ship them to the markets direct and thereby



that, as the dissent asserts, “[t]his one factor [perishability], more than any other, underlay the legislative recognition that allowing farmers to combine in marketing cooperatives was necessary for the economic survival of agriculture.”<sup>133</sup> In the first place, several of the major farm commodities, such as the grains, are not highly perishable. They can be stored and shipped long distances to market. Furthermore, the reports and debates emphasize the financial strength and organization of the dealers, rather than their inherent bargaining advantage where perishable products are concerned.<sup>134</sup>

To meet this marketing situation, collective handling, marketing or processing by farmers was authorized with respect to “such products of persons so engaged.” The “so engaged” language quite obviously refers back to “persons engaged in the production of agricultural products as farmers . . . .”<sup>135</sup> The Senate Report, as we have seen, noted that this language “restricted as to the character of the products in which [associations] may deal.”<sup>136</sup> There is no precise definition, however, of what is such an agricultural product in the statute and there has been no case law explaining it.

The language and logic of the statute, nevertheless, compel the conclusion that the “products of farmers” are raw agricultural products and that cooperatives were authorized to collectively market only such raw agricultural products. The raw products—wheat rather than flour, milk rather than butter, livestock rather than meat—were the subject of the marketing difficulties which the Capper-Volstead legislators sought to relieve. In establishing minimal structural limitations on the associations authorized, Congress sought to require that a higher price be paid for these farmers’ products. The purpose of the associations was to capture and pass benefits back to the farm level, to the farmer in his capacity as producer-seller of the raw produce.

What limited legislative reference there is to the meaning of the term “agricultural product” confirms this analysis. Whenever processors of any form were referred to, the contention was that they were not under the Act because they were not producers of agricultural products or because their products were not agricultural products. Flour mills, sugar refineries and meat-packing plants were all identified as beyond the purview of the statute because of the nature of their activity.<sup>137</sup> As the language of the stat-

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eliminate the waste and added expense now involved in our present expensive methods of distribution.

133. 436 U.S. at 840 (White, J., dissenting).

134. *See, e.g.*, H.R. REP. NO. 24, 67 Cong., 1st Sess. 2 (1921); 62 CONG. REC. 2058 (1922) (remarks of Sen. Capper).

135. 7 U.S.C. § 291 (1976).

136. S. REP. NO. 236, 67th Cong., 1st Sess. 3 (1921).

137. This is made clear from several passages in the legislative history, most of which are either quoted or referred to in the Supreme Court opinions. One is the exchange among Senators Cummins, Kellogg and Townsend:

Mr. Cummins: . . . 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

ute suggests, the legislators saw an identity between "farmers" and "agricultural products" which were the products of persons "engaged" as farmers.

Capper-Volstead authorized individual producers to combine for the purpose of marketing the raw produce of their farms. Raw agricultural products were the only products which were to be the subject of associations of individuals because these were the products which individual farmers needed to market collectively to maintain their position on the land.

If it had not been agreed that "ready-to-cook" broiler chickens were an agricultural product, the Department of Justice could have challenged the nature of the NBMA's collective activity. The NBMA members were, after all, processors, and the focus of their interest was the market for "ready-to-cook" chickens. The NBMA, according to the complaint, held regular price-information exchange meetings to "stabilize" the market for the packaged, cut-up chickens that their plants generated.<sup>138</sup> As integrated entities, the NBMA members had no marketing problems with respect to the live broilers which were raised on their contract farms. That problem was solved via their own processing facilities. As processors of broiler chickens, the NBMA members were in the precise marketing position vis-a-vis chicken farmers as were the meat packers vis-a-vis livestock producers. Since meat was not considered an agricultural product or the product of a person engaged in agricultural production as a farmer,<sup>139</sup> ready-to-cook broilers should not be any different.

The upshot of this analysis is that there is an implicit statement in Capper-Volstead which excludes integrated producer-processors from using the Act, at least for price-fixing of their processed products. The reason is that such integrators have no need for the statute's intended purpose—collective marketing of farm production. They have, as individuals, resolved their raw product marketing by deciding to process it themselves. Of course,

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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.

62 CONG. REC. 2052 (1922).

In another passage, Senator Norris, while criticizing the Phipps Amendment said:

I confess it is difficult for me to understand this amendment, but if I do understand it, it seems to me it is a dangerous amendment. I did not know that it would help the sugar factory men, because they do about as they please now. They do not need the protecting hand of Congress.

62 CONG. REC. 2274 (1922). See also remarks of Sen. Norris, note 100 *supra* and accompanying text.

138. See notes 43-45 *supra* and accompanying text. See also [1976] 4 TRADE REG. REP. (CCH) ¶ 45,073, at 53,522-53,523.

139. See note 137 *supra*.

producers of all types of goods often "need" price-fixing arrangements and this is the plea of the broiler producers.<sup>140</sup> But, if they are outside the statute, their plea is with Congress.

Mr. Justice Brennan's concurring opinion suggests the interpretation of the Act advocated here. He did not, however, ground his analysis directly in the language of the statute. He did conclude, essentially as we have, that the statute suggested a "functional definition of farmer as persons engaged in agriculture who are insufficiently integrated to perform their own processing and who therefore can benefit from the exemption for cooperative handling, processing, and marketing."<sup>141</sup> And further, "the purpose of the legislation was to permit only individual economic units working at the farm level to form cooperatives"<sup>142</sup> to collectively market their produce. What he did not say was that Congress had, in so many words, provided that very limitation by stating that individuals could only form cooperatives to collectively market raw agricultural products, the products of persons engaged in agriculture as farmers.

While we have contended that Capper-Volstead does not allow NBMA-like integrators to combine with respect to their processed products, it is clear that cooperative "integrators" were authorized to combine. Cooperatives are a farmer's means of integrating forward in the marketing process to supplement or displace other persons in the chain to the consumer. The extent of integration may be very limited, as in a bargaining cooperative,<sup>143</sup> or much more complete, as with a processing cooperative. Capper-Volstead explicitly recognized these various degrees of forward integration possible in cooperative associations in the authorizing language "jointly processing, preparing for market, handling and marketing." And price-fixing among cooperatives, whether they be processors or bargainers, was specifically authorized: "Such associations may have marketing agencies in common<sup>144</sup> . . . ." Thus, if the NBMA had been a cooperative of cooperative processors (a federation), its activities with regard to prices of ready-to-cook broilers would likely have been exempt.<sup>145</sup>

Congress intended this double-standard to increase competi-

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140. See Brown, *supra* note 2, 42-46.

141. 436 U.S. at 836.

142. *Id.* at 832.

143. See the discussion of the limited nature of the bargaining cooperatives' activities in Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984, (N.D. Cal. 1976), *aff'd per curiam*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, — U.S. — (1979), [1979] 5 TRADE REG. REP. (CCH) ¶ 60,021, and in Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974).

144. See 7 U.S.C. § 291 (1976).

145. Mr. John Miller, representing National Milk Producers' Association, a drafter of the legislation, stated that the marketing agency in common provision was inserted so that, for example, dairy cooperatives in New York "might well appoint a joint selling agency for their condensed milk. . . ." *Hearings on H.R. 2373, supra* note 126, at 76.

tion in the agricultural product handling markets. It was felt that cooperatives would displace unneeded middlemen, generate efficiencies, and cut handling and processing margins without raising prices to consumers.<sup>146</sup> The common agency provision was intended to assure that cooperatives would be able to compete with the largest proprietary handlers.<sup>147</sup> The limit on cooperative price collusion is the "undue enhancement" limitation set down in Section 2 of the Act.<sup>148</sup>

Our reading of the statute, while it would have resolved the NBMA litigation in a logical and clear-cut fashion, does not avoid all future issues of integrator status under Capper-Volstead. In the first place, the question of when an integrator becomes a farmer in the context of a contract-grower situation remains open and could be important in another case. Production risks should be considered more important on this issue than legal statuses such as who has title to land or crop or whether a grower is an employee or an independent contractor. Risks should be evaluated at each stage of the production process and not in the context of the full "egg to market" cycle. If the integrator assigns out the risk at any stage of production he should not be considered the producer of that product or commodity and his Capper-Volstead status should be assessed accordingly. Integrators should not be allowed to obtain the efficiencies of a segmental production chain and maintain producer status without assuming the primary risk at all points.

Secondly, it is possible that integrators would seek to achieve Capper-Volstead protection by forming a cooperative and turning their processing facilities over to the cooperative with little or no actual change in operations. This done, price-fixing of the cooperative's products could be permissible.<sup>149</sup> Any such combination should be closely scrutinized. If, for example, there are only changes in the form of the integrators' operations, the "cooperative" should be recognized as a sham such as that in *Elm Spring Farm, Inc. v. United States*,<sup>150</sup> where a dairy sought to become a cooperative of producers in order to take advantage of federal milk regulations.<sup>151</sup>

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146. See, e.g., 61 CONG. REC. 1044 (1921) (remarks of Rep. Hersey); 62 CONG. REC. 2059, 2061 (1922) (remarks of Sen. Capper); *Id.* at 2257 (remarks of Sen. Norris); *Id.* at 2227 (remarks of Sen. Phipps); H. R. REP. NO. 24, 67th Cong., 1st Sess. 2-3 (1921).

147. "There are a great many so-called farm elevators owned by associations of farmers. No large mill can afford to deal with these farm elevators as they can not contract to furnish enough grain to supply the needs of such a mill at all seasons of the year. [T]hey are forced to sell their grain to the large terminal elevator companies that usually dominate these so called line elevators." H.R. REP. NO. 24, 67TH CONG., 1ST SESS. 2 (1921).

148. See notes 17-18 *supra* and accompanying text.

149. See notes 143-45 *supra* and accompanying text.

150. 127 F.2d 920 (1st Cir. 1942).

## CONCLUSION

The Supreme Court's decision in *National Broiler Marketing Ass'n v. United States* sealed the fate of the NBMA<sup>152</sup> but did not establish a framework for determining the status under Capper-Volstead of future NBMA-like integrator associations. In future cases, consideration should be given to the activity of the association, as well as the producer-status of the members. Capper-Volstead was intended to enable farmers to collectively handle and market the raw products of their farms. Integrated agri-business concerns which process their own production have bypassed the marketing level for which collective activity under Capper-Volstead was authorized. Any attempts by integrated processors to use Capper-Volstead as a shield for price-fixing of processed products should be rebuffed as outside the statute.

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tions of integrators in their capacity as processors should not be entitled to any antitrust exemption.

152. The Justice Department announced on September 7, 1978 that it dismissed the suit by agreement with NBMA following the Association's decision to liquidate and dissolve. See [1978] 4 TRADE REG. REP. (CCH) ¶ 45,073, at 53,523.