

Agricultural Cooperatives: Antitrust Regulation and Governance in the Modern Age

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INTRODUCTION

While scanning the aisles of your local grocery store, you will inevitably come across a variety of brands, products, and packaging. If people were asked to describe the business structure behind these different brands, many would assume they were simply corporate entities. However, that is not the case when it comes to a few household brand names, such as Land-O-Lakes, Ocean Spray cranberries, and Welch's grape products.¹ Contrary to what one may assume, these three brands are actually the product of another form of business entity – the agricultural cooperative.²

These large cooperatives, responsible for placing recognizable products on grocery store shelves, are a far cry from their historical counterparts. In America, the use of agricultural cooperatives dates back to colonial times.³ Borrowing from the methods employed in England during the late 18th and early 19th centuries, American cooperatives were formed "primarily for the benefit of farmers."⁴ Cooperatives were also used to help farmers gain "economic clout" by banding together in either supply cooperatives or marketing cooperatives.⁵ Supply cooperatives were cooperatives in which farmers pooled inputs to keep their production costs low.⁶ Marketing cooperatives were

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¹ See U.S. DEP'T OF AGRIC., COOPERATIVE INFORMATION REPORT 59, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 1, 192-93 (2002).

² See *id.* at 192.

³ Karen Zimbelman, *History of Co-ops*, CO+OP WELCOME TO THE TABLE <https://www.welcometothetable.coop/food-coops/history-of-co-ops> [https://perma.cc/8VUU-PBJS] (last viewed Mar. 24, 2020).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

cooperatives in which farmers banded together to obtain the best prices for their products.⁷ Although the same tactics are currently used by large cooperatives, the size and power of these modern cooperatives create new concerns regarding the governing law and public policy.

While growth and expansion are often viewed as the objective of businesses, "[a]s a cooperative grows and encompasses potentially competing interests, some farmers may feel that they have lost control."⁸ Many of these large agricultural cooperatives do not resemble their "ancestors" and have grown into very powerful players in the agriculture market.⁹ Ocean Spray, for example, is owned by more than 700 cranberry growers dispersed across the United States, Canada and Chile and employs more than 2,000 individuals and oversees almost 20 cranberry receiving and processing facilities.¹⁰ This information provides insight to how Ocean Spray is able to generate approximately \$2 billion in revenue each year.¹¹

Similarly, Land O' Lakes was structured as an agricultural cooperative and is a multibillion dollar agricultural conglomerate.¹² In a "60 Minutes" interview Beth Ford, CEO of Land O' Lakes, described the entity as "farmer-owned" and joked that the farmers were actually *her* boss.¹³ Land O' Lakes operates in all fifty states and is established in over sixty countries around the world.¹⁴ In 2018, Land O' Lakes reported net sales of \$14.9 billion and net earnings of \$255 million.¹⁵ Agricultural

⁷ *Id.*

⁸ Jessica Fu, *New Federal Report Shows Dairy Cooperatives Struggling with Power Imbalances and Competing Interests*, THE COUNTER (Oct. 29, 2019), <https://newfoodeconomy.org/gao-report-dairy-coops-usda-gillibrand/> [<https://perma.cc/TB2H-FEWF>].

⁹ *See generally id.*

¹⁰ *Ocean Spray Cranberries Inc. Names Bobby J. Chacko President and Chief Executive Officer*, OCEAN SPRAY CRANBERRIES (Mar. 29, 2018), <https://news.oceanspray.com/2018-03-29-Ocean-Spray-Cranberries-Inc-Names-Bobby-J-Chacko-President-and-Chief-Executive-Officer> [<https://perma.cc/2NSP-LFXQ>].

¹¹ *Id.*

¹² Lesley Stahl, *Land O' Lakes CEO Beth Ford and The Changing Landscape of America's Farms*, CBS NEWS (Oct. 6, 2019), <https://www.cbsnews.com/news/land-olakes-ceo-beth-ford-and-the-changing-landscape-of-america-farms-60-minutes-2019-10-06/> [<https://perma.cc/6Q86-RX4J>].

¹³ *Id.*

¹⁴ *2018 Earnings Release*, LAND O' LAKES, INC. (Feb. 27, 2019), <https://www.landolakesinc.com/Press/News/2018-Earnings-Release> [<https://perma.cc/MLZ9-ZLA2>].

¹⁵ *Id.*

cooperatives also have the ability to generate a significant amount of revenue at the state level.¹⁶ For example, in 2001 the state of California received over \$8 billion in business revenue through agricultural cooperatives.¹⁷

As agricultural cooperatives develop, issues surrounding the continued protection provided for such cooperatives under Federal Antitrust Laws, as well as concerns with the lack of governance and representation for small-town farmers the traditional cooperatives were formed to empower, become more prevalent. The cooperative system was primarily designed to support the traditional family farmer.¹⁸ Change needs to occur in order for traditional family farmers to be supported because “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.”¹⁹

Part I of this Note will explain the nature and governance structure of agricultural cooperatives. Part II will conduct a thorough background analysis of the most important federal antitrust laws applicable to agricultural cooperatives. Part III will address the shortcomings of the continued application of the federal antitrust laws to agricultural cooperatives when considering the ever-evolving structure of the agriculture industry. Finally, Part IV will propose a plan to address the aforementioned shortcomings and other policy-based measures to better protect the individual, traditional family-farmers that federal antitrust laws were intended to empower.

This Note’s proposed reforms center around the premise that producer-members of agricultural cooperatives’ voices need to be heard. The best way to effectuate that change is to incentivize cooperatives to place producer-members on their board of directors or in positions of power. Amending federal antitrust laws to condition their application on certain governance structure requirements is an effective means of accomplishing that goal.

¹⁶ See Shermain Hardesty, *Positioning California’s Agricultural Cooperatives for the Future*, 8 GIANNINI FOUND. OF AGRIC. ECON. 7, 10 (2005).

¹⁷ *Id.*

¹⁸ U.S. DEP’T OF AGRIC. ET AL., *AGRICULTURAL COOPERATIVES IN THE 21ST CENTURY* 3 (2002).

¹⁹ Shannon L. Ferrell, *New Generation Cooperatives and the Capper-Volstead Act: Playing a New Game by Old Rules*, 27 OKLA. CITY UNIV. L. REV. 737, 771 (2002), http://nationalaglawcenter.org/wp-content/uploads/assets/bibarticles/ferrell_rules.pdf [<https://perma.cc/NJL5-MXH6>].

I. NATURE OF CONTEMPORARY AGRICULTURAL COOPERATIVES

A, General Framework

At a fundamental level, ownership, control, and benefits are the general principles of any business entity.²⁰ A cooperative is "a business that is owned and controlled by the people who use its services and whose benefits (services received and earnings allocations) are shared by the users on the basis of use."²¹ Three basic principles define the essence of a cooperative enterprise and establish a framework for assessing cooperative actions:

- (1) The User-Owner Principle, stating that the cooperative is owned by the people who use it;
- (2) The User-Control Principle, stating that the cooperative is controlled by the people who use it;
- and
- (3) The User-Benefits Principle, stating that the benefits generated by the Cooperative accrue to its users on the basis of their use.²²

Adherence to the User-Owner, User-Control, and User-Benefits principles is essential to maintain the integrity of the cooperative form.²³ Following the general form of the three tenants outlined above, agricultural cooperatives are generally: (1) owned and democratically controlled by the individuals that use the cooperative, such as through an elected board of directors; (2) financed mostly by the member farmers and those who use the cooperative; and (3) used to distribute earnings to member farmers as patronage refunds in proportion to the farmers' use of services.²⁴

²⁰ U.S. DEP'T OF AGRIC. ET AL., *supra* note 18, at 1.

²¹ *Id.*

²² *Id.*

²³ *See id.*

²⁴ STEVE D. MORRIS, U.S. GOV'T ACCOUNTABILITY OFFICE, DAIRY COOPERATIVES: POTENTIAL IMPLICATIONS OF CONSOLIDATION AND INVESTMENTS IN DAIRY PROCESSING FOR FARMERS 3 (2019).

1. Governance Structure

In terms of their structure, cooperatives are modeled after the corporation governance structure, but are organized under State law and modified and molded to fit the cooperative system of democratic ownership and control.²⁵ Member-owners elect the board of directors while the board of directors in turn hire a manager to oversee day-to-day operations.²⁶ In a corporation, the board of directors is responsible for serving the interests of investors with an eye on maximizing profits.²⁷ Alternatively, in a cooperative structure, the primary objective of the board of directors is to serve the interests of their members as users.²⁸ With this goal in mind, the selection and behavior of cooperative directors is much more personal, making the potential for agency issues much higher.²⁹ Therefore, the traditional cooperative and the investor-oriented firm (“IOF”) are polar organizational forms.³⁰

The best fit personnel to be on the board of agriculture cooperatives has given rise to debate due to the concern that farmer-members may not have the requisite business-savvy to effectively make board decisions.³¹ The question of future suitability for the organizational structures currently followed by cooperatives is an important issue presently being examined in the industry.³² When considering the rise of the "industrialization of agriculture" the final decision regarding the future suitability of the organizational structures has the potential to greatly shape local farmer's livelihoods and representation in the industry.³³

²⁵ U.S. DEP'T OF AGRIC. ET AL., *supra* note 18, at 10.

²⁶ *Id.*

²⁷ RURAL BUS. AND COOP. SERV., *Who Runs the Cooperative Business?*, U. S. DEP'T OF AGRIC. (Oct. 1994), <https://www.rd.usda.gov/files/publications/CIR%2045-5.pdf> [<https://perma.cc/PBW6-T2SA>].

²⁸ *Id.*

²⁹ *Id.* at 4; Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 491 (2013).

³⁰ FABIO R. CHADDAD & MICHAEL L. COOK, *THE EMERGENCE OF NON-TRADITIONAL COOPERATIVE STRUCTURES: PUBLIC AND PRIVATE POLICY ISSUES 2* (2003).

³¹ *See id.*

³² *Id.* at 11.

³³ *Id.*

B. Board of Directors Standard of Care

A separate body of law does not govern the standard of conduct for cooperative directors.³⁴ Rather, directors of cooperatives must conform with the standards of conduct applicable to corporate directors, and the cooperative itself must largely comply with corporate law.³⁵ Co-op directors have the same fiduciary duties of obedience, loyalty, and care that corporate directors must uphold.³⁶ For a corporate director, these duties are assigned to or incumbent upon someone who is a trustee or in a position of trust, such as a co-op director.³⁷

The duty of loyalty requires directors act in good faith, and the duty of care requires directors act with diligence, care, and skill.³⁸ Both the duty of loyalty and the duty of care are dependent upon the particular state's statutory or common law standard of director conduct.³⁹ The imposition of fiduciary duties and the ability of producer-members to assert claims if those duties are breached provide a check on abuses of power.⁴⁰ However, a breach in the directors' fiduciary obligations is not enough to combat the problems associated with member representation in agricultural cooperatives. More regulations and duties that seek to hold the board of directors accountable must be implemented to preserve agricultural cooperatives.

The changing landscape of the agriculture industry is causing some cooperatives to "compromise" the three principles by making them look less like cooperatives in the traditional sense.⁴¹ A 2019 U.S. Government Accountability Office report expressed concern for farmers' continued control over the cooperatives they are involved in and stated that control may be

³⁴ See generally JAMES BAARD, U.S. DEP'T OF AGRIC., THE CIRCLE OF RESPONSIBILITY FOR CO-OP BOARDS 6 (2003).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Roger McEowen, *What Is a Cooperative Director's Liability to Member-Shareholders and Others?*, LAW PROFESSOR BLOGS NETWORK: AGRIC. L. AND TAX'N BLOG (July 19, 2017), <https://lawprofessors.typepad.com/agriculturallaw/2017/07/what-is-a-cooperative-directors-liability-to-member-shareholders-and-others.html> [<https://perma.cc/282U-HKLS>].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See U.S. DEP'T OF AGRIC. ET AL., *supra* note 18, at 31.

affected by the "competing interests [and] voting structures" that have the potential to create power imbalances.⁴²

These changes have made some rethink the continued application of the Capper-Volstead Act to current day agricultural cooperatives. There are also concerns surrounding farmer-producer voices being swallowed up in the more corporate environment that cooperatives are starting to model. Change needs to occur to address these issues. As this is a complex area of law and policy, not all proposed changes will solve problems, but small incremental changes could help fix them.

II. LEGISLATIVE AND JUDICIAL HISTORY OF THE CAPPER-VOLSTEAD ACT

A. *Legislative History*

The 1920s in the United States was marked by tremendous economic prosperity and technological innovation.⁴³ American culture, style, and trends were "roaring" and the economy was booming as well.⁴⁴ In stark contrast to the prosperity being enjoyed by many citizens, the American farmer's business was struggling.⁴⁵ Despite the economic boom that occurred after the end of World War II, American farmers were dealing with the fact that the demand for agricultural products previously enjoyed during the War was in decline.⁴⁶ The decline in demand for American products in Europe post World War II can be explained in part by the European countries' ability to internally supply their products after they recovered from the devastation of war.⁴⁷ This disrupted the American farmer's expectation that demand for their products would remain stable

⁴² MORRIS, *supra* note 24, at 4.

⁴³ Nate Sullivan, *American Economy in the 1920s: Consumerism, Stock Market & Economic Shift*, STUDY.COM, <https://study.com/academy/lesson/american-economy-in-the-1920s-consumerism-stock-market-economic-shift.html> [https://perma.cc/R3VS-2BGG] (last viewed Oct. 30, 2019).

⁴⁴ *Id.*

⁴⁵ See Linda A. Cameron, *Agricultural Depression, 1920-1934*, MNOPEdia (Jan. 5, 2018), <https://www.mnopedia.org/agricultural-depression-1920-1934> [https://perma.cc/5QGT-EPC9].

⁴⁶ *Id.*; Carstensen, *supra* note 29, at 491-92.

⁴⁷ *Id.*

and resulted in a surplus, which caused prices for their products to decrease significantly.⁴⁸

Unsavory economic conditions for supplier farmers, such as those as the Great Depression began and following World War II, opened the door for large buyers of agricultural products to "bully" farmers into selling their products for lower prices.⁴⁹ Product buyers exploited the fact that there was a surplus and took advantage of the lack of bargaining power that farmers enjoyed due to the fact they needed to sell crops before they spoiled in light of unpredictable weather and environmental conditions.⁵⁰

Players in the industry developed ways to address this imbalance of power by banding together. Local organizations began to create local stores and shops to help serve the farmers interests.⁵¹ These informal efforts formed the basis for the cooperative structures' emergence in the United States.⁵² Agricultural cooperatives provide the means for individual farmers to more successfully negotiate with powerful players in a "large, rapidly consolidating [agricultural] business".⁵³ In the late 19th and early 20th centuries, due to economic pressures like those described above, farmers banded together to form cooperative associations to market their products and operate in the farming industry.⁵⁴ The agricultural cooperative movement was the reaction to a "lopsided industry made up of a handful of buyers" exerting their power over a large amount of disorganized sellers.⁵⁵

⁴⁸ Cameron, *supra* note 45.

⁴⁹ Jay L. Himes, *I Can't Make You Love Me If You Won't: Capper-Volstead Jilted by Sherman One*, ANTITRUST CONNECT BLOG (Feb. 14, 2012), <https://www.labaton.com/blog/i-cant-make-you-love-me-if-you-wont-capper-volstead-jilted-by-sherman-one> [<http://perma.cc/497B-VGTE>].

⁵⁰ *Id.*

⁵¹ Carstensen, *supra* note 29, at 462.

⁵² *See generally id.*

⁵³ Annalee Heath Leach, *The Almighty Railroad and the Almighty Wal-Mart: Exploring the Continued Importance of the Capper-Volstead Act to the American Farmer and the Agricultural Marketplace*, 32 HAMLIN J. PUB. L. & POL'Y 261, 268 (2010).

⁵⁴ JEAN M. PELTIER, *National council of farmer cooperatives, Response to the Commission's Request for Public Comment on antitrust immunities and exemptions*, 70 Fed. Reg. 28902 (May 19, 2005), http://ncfc.org/wp-content/uploads/2010/11/pdfs_members_only_lta_antitrust_task_force_NCFC%20Comments%20to%20AMC%20071505.pdf [<http://perma.cc/FRS7-K6W8>].

⁵⁵ Fu, *supra* note 8.

In sum, the support for agricultural cooperatives arose out of the economic theory of the "benevolent cartel."⁵⁶ Economists in the late nineteenth and early twentieth centuries believed that allowing certain industries to form cartels to make decisions as a collective group in pursuit of helping the overall national economy.⁵⁷ Economists in the modern age reject this theoretical foundation, but the laws resting upon that "benevolent cartel" theory are still in existence today.⁵⁸

B. Prosecution of Agricultural Cooperatives Before Capper-Volstead

Although cooperatives attained great size and power over time, that power attracted backlash and people called upon antitrust regulators to prosecute cooperatives under the Sherman Act.⁵⁹ The Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁶⁰ Although Section 7 of the Clayton Act provided agricultural cooperatives with some limited protection, the Clayton Act could not fully protect agricultural cooperatives from antitrust prosecution under the Sherman Act.⁶¹

Interestingly, an amendment was offered during Senate consideration of the Sherman Act itself that was designed to protect farmer cooperatives by exempting agreements between persons engaged in horticulture or agriculture made with the view of enhancing the price of their own products.⁶² Senators were concerned with the Sherman Act's potential negative impact

⁵⁶ John Roberti, Kelse Moen & Jana Steenholdt, *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, U.S. DEP'T. OF JUSTICE, <https://www.justice.gov/atr/page/file/1042806/download> [<http://perma.cc/6H7C-HRN3>] (last viewed Oct. 30, 2019) (proposing a four-prong test for determining when antitrust exemptions are appropriate).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Leah Douglas, *How Rural America Got Milked*, NEW FOOD ECONOMY (Jan. 18, 2018), <https://newfoodeconomy.org/how-rural-america-got-milked/> [<http://perma.cc/6UR6-KLMV>].

⁶⁰ 15 U.S.C. §§1–7 (1976).

⁶¹ Alan M. Anderson, *Agricultural Cooperative Antitrust Exemption-Fairdale Farms Inc. v. Yankee Milk Inc.*, 67 CORNELL L. REV. 396, 400 (1982).

⁶² U.S. DEP'T. OF AGRIC., ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER VOLSTEAD ACT, COOPERATIVE INFORMATION REPORT, 25-6 (1890) (referencing 21 Cong. Rec. 2606).

upon farmers in the wheat and cattle industry.⁶³ Senator William Stewart expressed his concern that farmers producing beef were forced to sell their product at "starvation prices" because of discrepancies in geographic demand for beef.⁶⁴ The amendment addressed the concern that the only way for farmers in one area to gain power and unite would be to prescribe a uniform price for their product, which would blatantly violate the Sherman Act.⁶⁵ The amendment passed a voice vote, but was never mentioned in the Judiciary Committee rewrite of the Sherman Act.⁶⁶

In 1908, the Supreme Court applied the antitrust laws with full force to labor and agricultural organizations in the case of *Loewe v. Lawlor*.⁶⁷ The Supreme Court acknowledged that there were repeated attempts to shield agricultural entities from prosecution but conceded to the fact that those attempts had failed.⁶⁸ The Capper-Volstead Act's passage resolved the ambiguity regarding the protection of agricultural cooperatives under federal antitrust laws through statutory clarification.

C. The Passage of the Capper-Volstead Act

In response to the inadequacy of the Clayton Act in protecting agricultural cooperatives from antitrust enforcement, Congress passed the Capper-Volstead Act of 1922.⁶⁹ The Capper-Volstead Act gives producers, through cooperatives, leeway to carry out certain acts and agreements that would be blatantly illegal under the Sherman Act.⁷⁰ For example, without the existence of the Capper-Volstead Act, agricultural cooperatives would be subject to the "per se" rule against price-fixing and they would surely be in violation of the Sherman Act because no defense or justification is normally allowed to defend against a

⁶³ *Id.* at 25.

⁶⁴ *Id.*

⁶⁵ *Id.* at 197.

⁶⁶ *Id.* at 25–27.

⁶⁷ William E. Peters, *Agricultural Cooperatives and the Antitrust Laws*, 43 NEB. L. REV. 73, 76 n.8 (1963) http://nationalaglawcenter.org/wp-content/uploads/assets/bibarticles/peters_agricultural.pdf [<http://perma.cc/3AXS-AMEC>].

⁶⁸ *Id.*

⁶⁹ Anderson, *supra* note 61, at 7.

⁷⁰ Christopher Ondeck & Elisa Kantor, *Capper Volstead Act Under Fire After 90 years* (Sept. 7, 2012), <https://www.thepacker.com/article/capper-volstead-act-under-fire-after-90-years> [<https://perma.cc/8SRN-2QHF>].

prosecution for price-fixing among horizontal competitors.⁷¹

The Supreme Court has even labeled the Capper-Volstead Act as the “Magna Carta” of agriculture due to the obvious privileges it affords agricultural cooperatives.⁷² The Act gives producers, through cooperatives, the leeway to reach agreements and work together in a way that antitrust law would normally condemn.⁷³ It also provides producers the permission to agree on prices, terms of sale, joint marketing practices and other activities.⁷⁴ “The Capper-Volstead Act refers exclusively to marketing functions of producer cooperatives and does not include purchasing (supply) or service functions.”⁷⁵ The text of the Capper-Volstead Act states:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. *Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes:* Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

⁷¹ FEDERAL TRADE COMM’N, *Guide to Antitrust Laws*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [http://perma.cc/FH24-EQPT].

⁷² Anderson, *supra* note 61, at 400.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ AGRIC. COUNCIL OF CALIFORNIA, *Exploring Farmer Cooperatives, Laws Affecting Agricultural Cooperatives* 4th ed. (1973), http://calagteachers.org/CCode/2018-2019/AgCouncil_CoopBookletWeb.pdf [http://perma.cc/CF8X-FLF9].

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.⁷⁶

The Capper-Volstead Act also empowers the Secretary of Agriculture to punish a cooperative for "undue price enhancement" or anticompetitive behavior, but there has never been a Secretary of Agriculture to utilize that power and no cooperative has even been found to have unduly enhanced prices.⁷⁷ The debate record surrounding the adoption of the Act supports the notion that the Act was intended to give agricultural cooperatives wide latitude in their operations so long as they operated in "good faith for the benefit of their members."⁷⁸

The Supreme Court has not shied away from expressing the legislative intent behind the passage of the Capper-Volstead Act. In *National Broiler Marketing Association v. United States*, the Court stated, "Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production."⁷⁹ This language and articulation of policy shows that the Supreme Court recognizes that the central purpose of agricultural cooperatives is to protect farmers from unfair bargaining from upstream, more powerful entities and persons in the industry.

In *National Broiler Marketing Association v. United States*, the Supreme Court pointed out the two dominant themes in the Capper-Volstead Act's legislative history.⁸⁰ First, Congress wanted to level out the bargaining power of farmers and

⁷⁶ 7 U.S.C. § 291 (1922).

⁷⁷ Douglas, *supra* note 59.

⁷⁸ Leach, *supra* note 53, at 272 (quoting H.R. Rep. 939, 66th Cong., 2d Sess. (1920), reprinted at 59 Cong. Rec. 8033).

⁷⁹ *National Broiler Marketing Ass'n. v. United States*, 436 U.S. 816, 825–26 (1978).

⁸⁰ *Id.* at 824–26.

middlemen.⁸¹ Second, the Court held that it was Congress's intention to keep the corporate entities with which the cooperative dealt from being given antitrust immunity under the Capper-Volstead Act.⁸² Simply put, the Capper-Volstead Act was interpreted to only apply to agricultural cooperatives, and not to other industry actors or entities.⁸³

Additionally, Supreme Court cases have routinely held that antitrust exemptions should be interpreted narrowly.⁸⁴ One of the overarching goals of federal antitrust law is to protect and ensure free markets in the American economy. According to the Supreme Court, any departure from the American norm of a free-market economy caused by exempting a class of people from prosecution should be interpreted narrowly.⁸⁵

Again in *Maryland and Virginia Milk Producers Ass'n v. United States*, the Supreme Court noted that the explicit language and legislative history of the Capper-Volstead Act makes it clear that the "general philosophy...was simply that individual farmers should be given, through their agricultural cooperatives acting as entities, the same unified competitive advantage...available to businessmen."⁸⁶ In light of how clearly the Supreme Court has explained the legislative intent of the Capper-Volstead Act, which is to give a voice to small-town farmers holding low-bargaining power, it is interesting the Act has not been revisited in light of current economic conditions.

It is worth noting that Capper-Volstead Act immunity does not shield agricultural cooperatives from prosecution for predatory conduct, illegal conspiracies, or combinations with non-cooperative entities.⁸⁷ Even under the Act, agricultural producers are not free to unduly enhance the prices they decide to charge to consumers, consolidate with or collaborate in anticompetitive conduct with non-producers, or engage in conduct that is intended to reduce competition and serves no legitimate business

⁸¹ *Id.* at 826.

⁸² *Id.* at 824.

⁸³ *See id.* at 827.

⁸⁴ Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 452, 473 (2015).

⁸⁵ *Id.*

⁸⁶ *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960).

⁸⁷ NAT'L COUNCIL OF FARMER COOP., RESPONSE TO U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, PUBLIC ROUNDTABLE DISCUSSION SERIES ON REGULATION & ANTITRUST LAW (2018).

purpose.⁸⁸ As the Supreme Court said in *Milk Producers Ass'n v. United States*, the Act's passage did not indicate "a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way."⁸⁹

This Note is not premised on the idea that the Capper-Volstead Act is a free-for-all green light for agricultural cooperatives to act as they wish and escape antitrust liability. Rather, this Note hopes to address the shortcomings of the Capper-Volstead Act and of agricultural cooperatives governance in hopes of mitigating the negative effects on individual farmers.

III. SCRUTINY OF ANTITRUST EXEMPTION FOR AGRICULTURAL COOPERATIVES

Changes in the agricultural industry have led competitors of cooperatives and legal scholars to ask whether the exemption is still needed, and whether this exemption has allowed farmers via cooperatives to restrict competition and raise prices.⁹⁰ Along with the issue of the continued existence of the Capper-Volstead Act in its current state, there are issues within agricultural cooperatives that raise governance problems and imbalances of power among members and the board of directors.

A. *Changing Nature of Agricultural Cooperatives*

Economic and legal scholars have scrutinized antitrust exemptions created by the Capper-Volstead Act, such as those for agricultural cooperatives, given the fact they were adopted nearly a century ago.⁹¹ Some scholars have argued that the theoretical foundations upon which some antitrust exemptions are premised are not reliable enough to justify the exemptions in today's

⁸⁸ U.S. DEPT. AGRIC., ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT, COOP. INFO. REPORT 59 (2009).

⁸⁹ *Maryland*, 362 U.S. at 466.

⁹⁰ MORRIS, *supra* note 24, at 2.

⁹¹ John Roberti, Kelse Moen & Jana Steenholdt, *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, U.S. DEP'T. OF JUSTICE, <https://www.justice.gov/atr/page/file/1042806/download> [<https://perma.cc/4M3E-E3J3>] (last viewed Jan. 20, 2021) (proposing a four-prong test for determining when antitrust exemptions are appropriate).

economy.⁹² On one end of the spectrum, some have called for outright repeal of the antitrust exemption for agricultural cooperatives.⁹³ Proponents of repeal argue that the Capper-Volstead Act was passed due to the Great Depression and the era's concern for the falling prices of agricultural products; but now lower prices are the explicit goal of competition law, running contrary to the original purpose of Capper-Volstead.⁹⁴

B. Impact on Producer-Members of Cooperatives

"Quite undeniably, consolidation is a game-changer for co-ops. Recent consolidation efforts are impressive, and they are changing the way co-ops are perceived, forcing co-op boards and managers to rethink strategy, and quite frankly, making producers nervous."⁹⁵ The increasing size and power of some agricultural cooperatives has threatened the "small-town" traditional class of farmers that cooperatives were originally created to support.

Consolidation among cooperatives is most prevalent in the American dairy industry. Following the trend of other areas in agriculture, the industry has consolidated at a quick pace in recent years.⁹⁶ Consolidation has triggered fears of underrepresentation for individual farmer-members in many cooperatives.⁹⁷ Although consolidation has occurred in many other industries, the effect within the cooperative system is remarkable and has had an impact that was not experienced previously by the agriculture industry.⁹⁸

A recent report promulgated by the Government Accountability Office addressed the consolidation of the dairy industry and its effect on farmer-members.⁹⁹ Simply put, consolidation means that more farmers are being represented and controlled by one single entity. The larger the number of

⁹² *Id.*

⁹³ *Id.* at 9.

⁹⁴ *Id.*

⁹⁵ Keri Jacobs, *Ag Cooperatives Consolidating Too**, 21 IOWA STATE UNIV. AG DECISION MAKER 2, 4 (May 2017), <https://www.extension.iastate.edu/agdm/articles/jacobs/JacMay17.html> [<https://perma.cc/NM7T-2JCS>].

⁹⁶ MORRIS, *supra* note 24, at 1.

⁹⁷ *Id.* at 4.

⁹⁸ Jacobs, *supra* note 95.

⁹⁹ MORRIS, *supra* note 24, at 1.

farmers under one cooperative umbrella, the more diversity exists among those farmers in terms of size, type of operation, and ownership.¹⁰⁰

Fifty years ago, cooperative membership was comprised of remarkably homogenous groups of farmers with similar crop rotations, with many members stemming from the same communities, cultural groups, and religious backgrounds.¹⁰¹ Cooperatives no longer resemble their historical counterparts, and their members bear even fewer similarities. With growth comes diversity, which is beneficial, but not necessarily conducive to an environment where every member of an organization is satisfied by the direction of the cooperative.

Due to this diversity resulting from consolidation, members of large cooperatives may have different expectations when it comes to the governance and leadership of the cooperative, which in turn makes it more difficult to represent the interests of individual farmers.¹⁰² The membership makeup of large cooperatives can be family owned, or cooperatives may be corporations with an abundance of resources at their disposal.¹⁰³ Discrepancies in membership-makeup can lead to another level of power imbalance even amongst members in and of themselves.¹⁰⁴

Cooperatives have to make decisions that will benefit the cooperative as well as benefiting the members, but as members bear fewer similarities and hold differing expectations that goal becomes increasingly more difficult.¹⁰⁵ Cooperatives cannot be "all things to all members," especially when a disconnect exists between member expectations and demographics.¹⁰⁶

As previously discussed, agricultural cooperatives traditionally rely on the premise of one-member one-vote. However, some states have allowed cooperatives to depart from this norm and give voting power to members proportionately based on productivity.¹⁰⁷ Such departures have also contributed to the issue of member underrepresentation in the face of industry growth. Fortunately, the Capper-Volstead Act places a

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ MORRIS, *supra* note 24, at 1.

¹⁰⁶ *Id.*

¹⁰⁷ Jacobs, *supra* note 95.

requirement that “one-member one-vote” be followed in order to enjoy the antitrust immunity afforded by the Act.¹⁰⁸

In opposition to arguments as to the negative impacts of consolidation, some farmers believe that growth is beneficial because it ensures they will have market security for their products.¹⁰⁹ Being under the umbrella of a large co-op entity ensures that someone will take their product off of their hands, and the farmers do not have to deal with the anxieties that stem from sitting on a surplus of product, reminiscent of the environment when Capper-Volstead was passed.¹¹⁰

IV. PROPOSALS FOR REFORM

Reform needs to occur due to the changing nature of agricultural cooperatives. That being said, many practical obstacles for any significant change to be implemented because of the long-standing history of cooperatives and the presence of powerful players advocating for the continuation of the status quo.¹¹¹ As with any changes of longstanding practice, small changes can be implemented to start towards the achievement of reform. These changes will make the system function better and work to the benefit of every player involved, ultimately helping consumers in addition to the people directly involved.

A foundational issue with cooperatives is the degree to which producers should be allowed to participate in the new institutional environment. If the goal of agricultural cooperatives is still the same, namely, to benefit both consumers and producers, “modifications to our current state and national legislation should be implemented and contemplated.”¹¹² Industry advocates vehemently defend continued application of the Capper-Volstead Act and have great influence in the political field.¹¹³

¹⁰⁸ 7 U.S.C. § 291 (1922).

¹⁰⁹ David Yaffe-Bellany, *Americas Dairy Farmers are Hurting*, N. Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/business/dean-foods-dairy-farmers-antitrust.html> [<https://perma.cc/RJ7X-MN4A>].

¹¹⁰ *See id.*

¹¹¹ Carstensen, *supra* note 29.

¹¹² FABIO R. CHADDAD & MICHAEL L. COOK, *THE EMERGENCE OF NON-TRADITIONAL COOPERATIVE STRUCTURES: PUBLIC AND PRIVATE POLICY ISSUES* 10 (2003).

¹¹³ Christopher Ondeck & Elisa Kantor, *Capper-Volstead Act under fire after 90 years*, THE PACKER (Sept. 7, 2012), <https://www.thepacker.com/article/capper-volstead-act-under-fire-after-90-years> [<https://perma.cc/8SRN-2QHF>].

A. Antitrust Exemptions

Economic and policy justifications supported the need for antitrust exemptions, much like economics and policy reasons have shaped the law in general.¹¹⁴ Yet, the idea that antitrust exemptions such as Capper-Volstead need to be removed is not of recent vintage.¹¹⁵

On the other hand, some scholars argue that more antitrust exemptions modeled after Capper-Volstead should be enacted to protect workers in the "gig" economy, such as Uber drivers and McDonald's franchisees.¹¹⁶ Some have called for the protection of Capper-Volstead to be generalized to apply to small businesses, workers, professionals, and other powerless actors in order to help combat the extreme concentrations of power seen today in the American economy.¹¹⁷ If protections like Capper-Volstead were extended to other industries, the same problem would face legislators in another 100 years once those protections have fulfilled their purpose and helped powerless players become powerful.¹¹⁸

B. Repeal of Capper-Volstead

Although some scholars have argued for complete repeal of the Capper-Volstead Act, 100 percent repeal of the Act is not the answer to the issues that cooperatives encounter in the modern age. The US Department of Agriculture stated in a Cooperative Information Report that the Capper-Volstead Act, though a uniform statute for years, is nevertheless a "living statute subject to continuous application and interpretation by cooperative leaders and advisers, competitors and their counsel, antitrust

¹¹⁴ Anne McGinnis, *Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform*, 47 U. MICH. J. L. REFORM 529, 533–34 (2014).

¹¹⁵ *Id.* at 547–48.

¹¹⁶ Miles Hadfield, *Trust Busting: How Can Tech Giants be Limited to Give Co-ops Room to Grow?* (Jan. 8, 2020), <https://www.thenews.coop/144792/topic/technology/trust-busting-how-can-the-tech-giants-be-limited-to-give-co-ops-room-to-grow/> [https://perma.cc/Q8DR-EN3C].

¹¹⁷ *Restoring Antimonopoly Through Bright Line Rules*, OPEN MKTS. (Apr. 26, 2019), <https://promarket.org/restoring-antimonopoly-through-bright-line-rules/> [https://perma.cc/R288-5SDD].

¹¹⁸ *Id.*

enforcement officials, and judges..."¹¹⁹ Complete repeal of a 100-year-old statute would be extremely difficult to implement and would shake existing expectations of cooperatives and alter the foundations upon which they have structured their existing operations.¹²⁰ Ultimately, the stickiness of a statute such as Capper-Volstead should be treated with caution.¹²¹

Additionally, the repeal of the antitrust exemption under Capper-Volstead that agricultural cooperatives enjoy may have negative side effects on farmers.¹²² If Capper-Volstead no longer existed, private plaintiffs would then have the opportunity to bring claims against agricultural cooperatives that did not exist when Capper-Volstead was in full effect.¹²³ An increase in the cooperative resource allocation toward litigation costs could hurt farmers downstream because attention would be diverted from the everyday operations of the cooperative to defend the cooperative from potential liability.¹²⁴

Repeal of the Capper-Volstead Act would also cause agricultural cooperatives around the country to have to restructure and rethink the way they do business.¹²⁵ Given the power of cooperatives and their corresponding "pull" in the political arena, the effect of repeal would make complete elimination of Capper-Volstead extremely difficult, if not impossible.¹²⁶

A less drastic approach to repealing Capper-Volstead would be to insert a sunset provision to slowly phase out the exemption afforded to agricultural cooperatives, giving the Government Accountability Office a chance to reassess whether the exemption is still needed.¹²⁷ A sunset provision would still result in the same unintended effects of complete repeal and therefore should be disregarded in favor of even more subtle changes in policy and governance of cooperatives.¹²⁸

¹¹⁹ DONALD A. FREDERICK, U.S. DEP'T OF AGRIC, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 1 (2002).

¹²⁰ Roberti, *supra* note 44, at 13.

¹²¹ *See id.*

¹²² Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 452, 491 (2015).

¹²³ *Id.* at 497.

¹²⁴ *See id.*

¹²⁵ Roberti, *supra* note 56, at 6.

¹²⁶ *See id.*

¹²⁷ McGinnis, *supra* note 114, at 551.

¹²⁸ Roberti, *supra* note 56, at 6.

C. Amendments to Capper-Volstead

Short of complete repeal of the Capper-Volstead Act, amending the Act to further certain policy goals would be a desirable and more discrete avenue. The Capper-Volstead Act already conditions its applicability upon a number of conditions:

“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.”¹²⁹

Additionally, the Supreme Court has ruled that a single non-farmer member in a cooperative disqualifies a cooperative from Capper-Volstead Act protection.¹³⁰ Arguably, the Court was endorsing the traditional cooperative view in their decision, and that reasoning should be extended to ensure that the board of directors is comprised of persons that have the best incentives to implement policies and make decisions in the best interest of preserving the traditional goals of cooperatives.

In order to ensure that cooperatives that qualify for the protection of the Capper-Volstead Act continue to embody the types of cooperatives the Act was intended to protect, additional conditions for its applicability should be created and included in the statute. One such condition that could potentially be added to the statute could address the problem of board representation

¹²⁹ 7 U.S.C. § 291 (1922).

¹³⁰ Craig Coleman & Richard Duncan, *Capper-Volstead Antitrust Exemption: Mushroom Growers and Distributors Don't Mix*, FAEGRE DRINKER BIDDLE & REATH (Apr. 20, 2009), <https://www.faegrebd.com/en/insights/publications/2009/4/cappervolstead-antitrust-exemption-mushroom-growers-and-distributors-dont-mix> [<https://perma.cc/7KB5-Q7AN>].

and the power held by external directors. Capper-Volstead could be amended to include an additional prerequisite conditioning applicability on a fair proportion of external directors and member directors on the cooperative's board of directors.

Although outside directors can strengthen boards by providing a broader perspective, steps need to be taken to ensure that boards remain true to the principles of traditional agricultural cooperatives.¹³¹ However, placing limits upon how a cooperative may be internally governed will likely generate pushback from executives charged with complying with those limits.¹³²

One issue resulting from encouraging producer-members to serve on the board of directors would be that producer-members already run successful farming operations and may not want to take on the responsibility or have the time to effectively serve on the board of directors for their agricultural cooperative.¹³³ Additionally, the producer-members may not have the specific business expertise needed to navigate the duties of a director compared to external directors, especially in the ever-expanding field of cooperatives.¹³⁴

D. Governance Structure Reform to Protect Members Interests

Agricultural cooperatives operate and move within the same realm as public corporations and are subject to the same types of "internal control systems", yet there has not been a spirited discussion when it comes to governance reform in the arena of agricultural cooperatives.¹³⁵ Although there is substantial evidence of abuse of power by managers of cooperatives, there is not a vast amount of precedent or case law about the governance of cooperatives.¹³⁶

As discussed previously, the increasing size and consolidation of the agriculture industry and the growth of agricultural cooperatives from small member-run organizations to goliaths such as Ocean Spray has sparked concern over

¹³¹ Hardesty, *supra* note 16, at 10.

¹³² *See id.*

¹³³ *Id.* at 10.

¹³⁴ *Id.*

¹³⁵ JENNIFER L. KEELING, COOPERATIVE PERFORMANCE AND BOARD OF DIRECTOR CHARACTERISTICS: A QUARANTINE INVESTIGATION 2 (2005).

¹³⁶ Cartensen, *supra* note 29, at 479.

member representation.¹³⁷ Other concerns arise when external directors, those that are not producer-members, are elected to serve on cooperative boards. Arguably, these directors do not have the same personal connection to the members as a producer-member would have and this could cause the director to consider factors apart from its members interests in making decisions.¹³⁸

Cooperatives often use their status to market their product to consumers.¹³⁹ For example, Organic Valley distinguishes itself by using its status as a cooperative to its benefit.¹⁴⁰ Organic Valley even uses the slogan "a cooperative of small organic family farms" and its products display personal stories and anecdotes from its local producer members to attract customers.¹⁴¹

State-level changes would be the best starting point to combat the governance issues infecting cooperatives in the modern age. Although more large-scale change would change the field more significantly, state level reform can work as a good first step to eradicate the issues discussed in this Note.¹⁴² Consumers' perceptions should not be deceived by marketing strategies such as that which Organic Valley implements, when in reality the product they are buying is the output of a huge company that may be disregarding the very farmers they are using to sell their product. States could enact laws or regulations limiting companies' ability to use their cooperative as a marketing tool based on annual revenue or factors showing that the cooperative is adequately taking into account their members' interests.

CONCLUSION

The divergence from traditional principles and industry-wide changes in the agriculture industry has revitalized the discussion regarding the Capper-Volstead Act and the governance structure of cooperatives. Additionally, representation of

¹³⁷ MORRIS, *supra* note 24, at 1.

¹³⁸ Karen Hakelius & Helena Hansson, *Members Attitudes Towards Cooperatives and Their Perception of Agency Problems*, 19 INT'L FOOD AND AGRIBUSINESS MGMT. REV. 26 (Oct. 5, 2016).

¹³⁹ Hardesty, *supra* note 16, at 7.

¹⁴⁰ *Id.* at 8.

¹⁴¹ *Id.*

¹⁴² *See id.*

members is decreasing as some agricultural cooperatives have compromised traditional principles of cooperative structure.¹⁴³

A foundational issue with cooperatives is to what degree producers should be allowed to participate in the new institutional environment. If the goal of agricultural cooperatives is still the same, namely, to benefit both consumers and producers, "modifications to our current state and national legislation should be implemented and contemplated."¹⁴⁴ Modifications should be implemented with an orientation towards the goal of incentivizing cooperatives to represent their respective members.

In order to protect the small-town family farmers that cooperatives were initially intended to benefit, representation at the board-level of producer members should be incentivized.¹⁴⁵ By conditioning Capper-Volstead's antitrust immunity on the representation of producer-members at the board level, cooperatives will be encouraged to prioritize and listen to the lower-level actors in their organization. Overall, the reforms proposed in this Note are a superior alternative to complete repeal of the Capper-Volstead Act and are realistic ways to give the power back to the individual farmers buried underneath "higher-ups" in new-age cooperatives that do not resemble their simpler ancestors.

¹⁴³ *See id.*

¹⁴⁴ CHADDAD & COOK, *supra* note 112, at 10.

¹⁴⁵ MORRIS, *supra* note 24, at 7.