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## The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act

Alison Peck

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# The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act

Alison Peck\*

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## INTRODUCTION

In four cases pending in federal courts at the time this Article went to press, plaintiffs are claiming that producers of eggs, potatoes, mushrooms or milk violated the antitrust laws by agreeing to produce less. For example, a class of plaintiffs has alleged that members of an egg producers' cooperative raised the price that consumers pay for eggs by limiting the number of hens per cage, under a pretext of promoting animal welfare.<sup>1</sup> Another class of plaintiffs has alleged that a dairy cooperative paid certain producers to "re-tire" or slaughter their entire dairy herd and refrain from re-entering the business for a year.<sup>2</sup> In a lawsuit against potato growers, potato purchasers have alleged that the growers' cooperative raised potato prices when it paid farmers to limit the number of acres they plant.<sup>3</sup> A fourth lawsuit alleges that a mushroom growers' cooperative bought out competing mushroom farms and sold the land with restrictive covenants that prohibited mushroom production on the property.<sup>4</sup>

The defendants in these lawsuits have sought shelter from the antitrust laws based on the Capper-Volstead Act, which allows agricultural producers to "act together" in "collectively processing, preparing for market, handling, and marketing" their products in interstate and foreign commerce.<sup>5</sup> The defendants have claimed that Capper-Volstead allows them to engage in collective actions to limit production and therefore increase prices.<sup>6</sup> The plaintiffs argue that Capper-Volstead's exemption does not extend to agreements to limit production.<sup>7</sup>

No court has yet ruled on the defendants' claims that their production-limiting agreements are exempt under Capper-Volstead. In the case against potato growers, the district court stated that, in its view, the exemption does

1. Third Consolidated Amended Class Action Complaint at ¶¶ 10-18, *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-02002, 2014 WL 6388436 (E.D. Pa. Nov. 17, 2014) (No. 08-md-02002) [hereinafter *In re Eggs Third Consolidated Amended Class Action Complaint*].

2. Class Action Complaint at ¶¶ 1, 4, *Edwards v. Nat'l Milk Producers Fed'n*, No. C 11-04766 JSW, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014).

3. First Amended Class Action Complaint at ¶ 2, *In re Fresh & Process Potatoes Antitrust Litig.*, No. 4:10-MD-2186-BLW, 2014 WL 1847433 (D. Idaho May 8, 2014) (No. 4:10-MD-2186-BLW) [hereinafter *In re Potatoes First Amended Class Action Complaint*].

4. Revised Consolidated Amended Class Action Complaint at ¶ 7, *In re Mushroom Direct Purchaser Antitrust Litig.*, No. 06-0620, 2014 WL 5149082 (E.D. Pa. Oct. 14, 2014) (No. 06-0620) [hereinafter *In re Mushrooms Revised Consolidated Amended Class Action Complaint*].

5. Capper-Volstead Act, ch. 57, 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. §§ 291-92 (2012)).

6. *See, e.g., In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1150 (D. Idaho 2011).

7. *See, e.g., id.* at 1154.

not shield the agreement at issue in that case, but the court's ruling rested on other grounds.<sup>8</sup> The Department of Justice ("DOJ"), Federal Trade Commission ("FTC") and U.S. Department of Agriculture ("USDA") have made statements suggesting a narrow reading of the Act but have not taken action or issued binding decisions on the question.<sup>9</sup>

The debate over output-limitation agreements and the scope of Capper-Volstead has important implications for agricultural markets. The plaintiffs in the pending cases have alleged substantial consumer price increases over the period of the activities alleged in the complaint.<sup>10</sup> For example, the complaint against potato producers alleges that fresh potato prices increased by nearly fifty percent during the period of the agreement.<sup>11</sup> The egg products complaint alleges that egg prices were declared by the cooperative to be at "record levels" within four years of the production restrictions.<sup>12</sup> Agricultural producers, on the other hand, have hailed the measures for eliminating the boom-and-bust cycle in agricultural markets.<sup>13</sup>

In some cases, cooperatives may lose Capper-Volstead protection for violating other provisions of the Act. For example, the Act limits protection to cooperatives composed entirely of producers,<sup>14</sup> and courts have held that the presence of non-producers in the cooperative disqualifies the cooperative from the protections of Capper-Volstead.<sup>15</sup> In both the potatoes and the

8. *See id.* at 1154-57. The court denied the defendants' motion to dismiss based on the existence of disputed facts as to whether the cooperative in that case included members not eligible for Capper-Volstead protection. *See id.* at 1154. Thus, while the Capper-Volstead issue remains before the court on factual issues relating to cooperative membership, defendants have been placed on notice that the court will not uphold a claim for Capper-Volstead immunity for an output limiting agreement, even if its membership does not automatically disqualify the cooperative from Capper-Volstead protection.

9. *See infra* notes 65-69 and accompanying text.

10. *See, e.g., In re Eggs Third Consolidated Amended Class Action Complaint, supra* note 1, at ¶ 358; *In re Potatoes First Amended Class Action Complaint, supra* note 3, at ¶ 234.

11. *In re Potatoes First Amended Class Action Complaint, supra* note 3, at ¶ 234.

12. *In re Eggs Third Consolidated Amended Class Action Complaint, supra* note 1, at ¶ 358.

13. *See, e.g., John Miller, Grocers Sue Spud Growers Over Alleged Price Fixing, SEATTLE TIMES* (June 14, 2013), [http://seattletimes.com/html/business/technology/2021184846\\_potatopricefixxml.html](http://seattletimes.com/html/business/technology/2021184846_potatopricefixxml.html).

14. The Act's exemption applies to "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers . . ." 7 U.S.C. § 291 (2012); *see also* Case-Swayne Co., Inc. v. Sunkist Growers, Inc. (*Sunkist II*), 389 U.S. 384, 392 (1967) (discussing the legislative history of the membership requirement).

15. *See Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 822-23, 828-29 (1978) (holding that the presence of even one non-farmer in cooperative disqualifies it from Capper-Volstead protection); *Sunkist II*, 389 U.S. at 387-88, 403 (holding

mushrooms litigations, the district courts have held that the cooperatives violated the producers-only rule and therefore lost Capper-Volstead protection.<sup>16</sup> The Act also requires that the association be “operated for the mutual benefit of the members thereof”; that “no member of the association is allowed more than one vote”; that the association pay no “dividends on stock or membership capital in excess of [eight] percent per annum”; and that the cooperative “shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.”<sup>17</sup>

Carefully-managed cooperative associations, however, may ensure that all of these threshold requirements are met. The question then remains, what conduct is within the Act’s exemption from antitrust scrutiny? Case law has made clear that the “marketing” exemption extends to some post-production supply control methods intended to stabilize prices, such as a temporary agreement to withhold product from the market;<sup>18</sup> a lawsuit by a cooperative to prevent its members from selling outside the cooperative marketing agreement;<sup>19</sup> and option agreements by a cooperative to purchase excess supply from its members.<sup>20</sup> What remains unclear is whether agricultural cooperatives may also agree to control supply by limiting the amount their members may produce in the first place.

This Article concludes that agreements by a cooperative to limit the production of an agricultural commodity do not qualify for Capper-Volstead protection. None of the standard sources of statutory interpretation – the plain language of the statute, direct statements of congressional intent, or evidence of the purpose of the legislation – suggest that Congress intended to permit farmers to raise prices by agreeing to produce less. The textual exception for “marketing,” while susceptible to multiple interpretations, does not easily extend to agreements not to produce. This interpretation is strengthened when the statute is read as a whole, including the prohibition in Section 2 on conduct by cooperatives that unduly enhances consumer prices. And

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that a cooperative whose membership included 15% non-farmer packing houses was disqualified from Capper-Volstead protection); *Ripplemeyer v. Nat’l Grape Coop. Ass’n*, 807 F. Supp. 1439, 1457 (N.D. Ark. 1992) (denying Capper-Volstead protection to national grape cooperative whose members were contracted to sell grapes to wholly-owned processor subsidiary of cooperative). *But see Alexander v. Nat’l Farms Org.*, 687 F.2d 1173, 1186-87 (8th Cir. 1982) (granting Capper-Volstead protection to cooperative that inadvertently received membership donations from small number of non-farmers outside dairy industry), *cert. denied*, 461 U.S. 937 (1983).

16. *See In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1151-54 (D. Idaho 2011); *In re Mushrooms Direct Purchaser Antitrust Litig.*, 621 F. Supp. 2d 274, 284 (E.D. Pa. 2009).

17. 7 U.S.C. § 291 (2012).

18. *See Alexander*, 687 F.2d at 1188.

19. *See Holly Sugar Corp. v. Goshen Cnty. Coop., Beet Growers Ass’n*, 725 F.2d 564, 569 (1984).

20. *See Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981), *aff’d*, 715 F.2d 520 (11th Cir. 1983).

while the floor debates are ambiguous as to whether Congress contemplated pre-production supply controls, the legislative history makes clear that Congress's purpose in enacting the exemption was to eliminate the monopsony power wielded by intermediary purchasers of agricultural products, while simultaneously protecting consumers from higher food prices. Today, the substantial market power enjoyed by large agricultural cooperatives has successfully eliminated the problem of predatory "middlemen" in those markets. Allowing cooperatives to enter into agreements with members to limit production can only raise farm prices by charging consumers more, in contravention of the Act's clear purpose to protect consumers.

In Part I, this Article reviews the allegations of production-limiting agreements by cooperatives in the eggs, potatoes, mushrooms, and milk markets. Since the purpose of this Article is to offer a close reading of the Capper-Volstead Act, the Act is laid out in Part II. In Part III, an interpretation based on a textualist reading, supplemented by canons of statutory construction, point to the conclusion that Capper-Volstead does not extend to pre-production agreements to limit supply. Part IV canvasses the (slender) committee reports and (extensive) floor debates, which set forth scant discussion and conflicting statements on the question of production controls. Finally, Part V reviews federal farm policy on supply controls to support the conclusion that Congress did not intend the Act to permit private economic actors to raise consumer prices by limiting production.

Just because conduct is not exempt from antitrust scrutiny under the Capper-Volstead Act does not necessarily mean it will violate antitrust laws. Such allegations would have to be proven like any other antitrust claim, and the courts may apply a rule of reason analysis that tends to shield such actions from liability. Further research is necessary to consider the likely fate of production-limiting agreements in light of federal court interpretations of Section 1 of the Sherman Act.<sup>21</sup> Losing the Capper-Volstead exemption by

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21. To prevail on an antitrust claim, plaintiffs in the pending supply limitation suits would have to prove that the defendants violated Section 1 of the Sherman Act, which prohibits agreements among competitors in restraint of trade. 15 U.S.C. § 1 (2012). As a general rule, the Supreme Court has long held that agreements between competitors that place limitations on output constitute *per se* violations of Section 1 of the Sherman Act. *See, e.g.,* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (territory-allocation agreement by cooperative buying association for supermarkets); Hartford-Empire Co. v. United States, 323 U.S. 386, 397-98, 435 (1945) (licensing agreements by owners of glass-making patents that limited amount of production by licensees or refused licenses to limit overall supply); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 185-90 (1940) (coordinated program to buy surpluses of oil to avoid "disturbing influence" on prices). However, courts have made exceptions to the rule that supply controls are *per se* illegal where the industries at issue have special characteristics that justify the defendants' conduct. *See, e.g.,* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100-01 (1984) (output limitation on college football broadcasts); United States v. Nat'l Ass'n of Broadcasters, 536 F. Supp. 149, 156-57 (D.D.C. 1982) (output limitation on amount of commercial material broadcast per hour and number of commercial inter-

itself would, however, impose real costs on cooperatives, which would either have to avoid such conduct or factor in the cost of defending Sherman Act claims. Loss of the exemption would offer consumers potential benefits against supracompetitive prices, since output limitation measures by cooperatives would be subject to antitrust scrutiny and may be held to violate antitrust laws.

## I. OUTPUT-LIMITING AGREEMENTS IN THE COURTS

In the cases pending before federal courts, plaintiffs point to a variety of programs by defendant cooperatives that have the goal of reducing the overall supply of the relevant agricultural commodity. In most of these cases, defendants do not deny the thrust of the allegations: that members of the cooperative agreed to a program of coordinated action that had the purpose and effect of reducing supply and raising prices. Instead, defendants claim that their conduct is protected by the Capper-Volstead exemption. The types of agreements vary based on the commodity produced and involve different levels of coordinated action at the member and the cooperative levels.

### A. Eggs: Reducing the Number of Laying Hens

In the eggs litigation, the actions involve claims by both direct and indirect purchasers of shell eggs and processed egg products.<sup>22</sup> The defendants include individual egg and egg products producers and industry associations, United Egg Producers, Inc. (“UEP”) and United States Egg Marketers, Inc. (“USEM”).<sup>23</sup>

The plaintiffs allege that the defendants entered into a series of illegal agreements to raise the price of eggs by reducing the number of total laying hens in production.<sup>24</sup> The complaints allege that defendants, beginning in 1999, agreed to coordinated rates of flock molting (removing older hens from production), flock inventory and hatch reduction, and the reduction of egg

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ruptions). If a court were to find special conditions in agricultural markets that justify output limitations, plaintiffs would have to show that the defendants’ conduct violated the Rule of Reason, under which courts analyze the effects of the challenged restraint on competitive conditions in the market. *See Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

22. *See In re Eggs Third Consolidated Amended Class Action Complaint*, *supra* note 1 (pertaining to direct purchaser actions); Fifth Amended Consolidated Class Action Complaint, *In re Egg Prods. Antitrust Litig.*, No. 08-MD-02002, 2014 WL 6388436 (E.D. Pa. Nov. 17, 2014) (No. 08-MD-02002) [hereinafter *In re Eggs Fifth Amended Consolidated Class Action Complaint*] (pertaining to indirect purchaser actions).

23. *In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 875, 877 (E.D. Pa. 2012).

24. *See In re Eggs Third Consolidated Amended Class Action Complaint*, *supra* note 1, at ¶¶ 10-18.

supply.<sup>25</sup> The complaints also contend that the defendants agreed to adopt pretextual animal husbandry guidelines that required members to reduce the number of hens per cage and not to add additional cages to make up for the shortfall.<sup>26</sup> Finally, plaintiffs claim that defendants agreed to export excess supply at a loss and compensate each other for those losses in order to take advantage of higher prices in the domestic market.<sup>27</sup>

The complaints cite statements by defendants and industry publications that evidence an industry-wide agreement to limit supply of eggs through these programs. For instance, the plaintiffs allege that, in 1999, a UEP newsletter posed questions to producers: “Will the industry participate in a program to bring supply more closely in line with demand over the next 12 months? . . . You will also be asked if you would participate in a supply adjustment program.”<sup>28</sup> The complaint alleges that UEP’s members subsequently voted to adopt measures reducing the number of hens in production.<sup>29</sup>

In 2000, according to the complaints, UEP members adopted guidelines regarding the amount of cage space required for each hen, recommending that producers transition from forty-eight square inches per hen to sixty-seven to eighty-six square inches per hen.<sup>30</sup> After adopting these guidelines, in April 2002, the president of UEP gave a presentation at an industry conference entitled, “Cage Enhanced Production and its Affects [sic] on Selling Price, Production Costs and Consumption.”<sup>31</sup> The plaintiffs contend that, at the October 2002 annual board meeting of UEP, the defendants adopted a rule requiring that 100 percent of a producer’s egg houses follow the cage space requirements.<sup>32</sup> In an internal UEP memo, the complaint alleges, UEP explained that the rule was necessary because “[m]any producers said they would only commit to the program if 100% of facilities were required.”<sup>33</sup> The complaint cites an August 2003 editorial by a UEP representative stating that the cage space requirements were adopted by 200 companies owning more than eighty-two percent of the total laying hens in production nationally.<sup>34</sup>

According to the plaintiffs, the defendants took steps to enforce the cage space requirements. The complaint states that UEP’s July 2003 newsletter included an article entitled “Word of Caution,” which stated, “As producers continue to reduce their layer house capacity to meet the UEP Animal Husbandry Guidelines, please don’t make the mistake of building new facilities

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25. *Id.* at ¶¶ 11-13, 15.

26. *Id.* at ¶¶ 14, 17, 194-241, 414-26.

27. *Id.* at ¶¶ 18, 320-57.

28. *Id.* at ¶ 177.

29. *Id.* at ¶ 179.

30. *Id.* at ¶ 197.

31. *In re Eggs Fifth Amended Consolidated Class Action Complaint*, *supra* note 22, at ¶ 179 (pertaining to indirect purchaser actions).

32. *Id.* at ¶ 185.

33. *Id.* at ¶ 186.

34. *Id.* at ¶ 196.



to replace the lost number of birds.”<sup>35</sup> The direct purchaser plaintiffs allege that UEP contacted customers of members who withdrew from the UEP cage space certification program and urged them not to purchase eggs from those members.<sup>36</sup> In UEP’s May 2004 newsletter, a UEP representative wrote, “[T]he Animal Care Certified program is the only roadmap the industry has ever had for future planning. If you stay true to the program and manage it to meet the market demand, it can provide the industry with prolonged profits.”<sup>37</sup>

Although UEP initially indicated that its cage-space guidelines were motivated by concerns for animal welfare, the complaint alleges that this explanation was pretextual.<sup>38</sup> UEP hired a “scientific advisory committee” to review data and make recommendations, but the UEP member egg producers drafted the guidelines and did not release the scientific advisors’ recommendations.<sup>39</sup> The complaint quoted a presentation in which two members of the scientific advisory committee stated that the committee would have made different recommendations if it could have considered additional studies, “since these indicate that hens need and want more space than 72 sq. in.”<sup>40</sup> The FTC investigated UEP’s use of the “Animal Care Certified” label as potentially misleading to consumers, and on September 30, 2005, announced an agreement that UEP would no longer use the logo.<sup>41</sup>

As of June 2014, settlements had been preliminarily or finally approved between the direct purchaser plaintiffs and several defendants, while litigation continued on other claims.<sup>42</sup>

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35. *Id.* at ¶ 194; *In re Eggs Third Consolidated Amended Class Action Complaint*, *supra* note 1, at ¶ 247.

36. *In re Eggs Third Consolidated Amended Class Action Complaint*, *supra* note 1, at ¶¶ 226-41.

37. *Id.* at ¶ 267 (alteration in original).

38. *Id.* at ¶¶ 414-26.

39. *Id.* at ¶¶ 415-18.

40. *Id.* at ¶ 419.

41. See Letter from Mary K. Engle, Assoc. Dir., Federal Trade Commission, to Al Pope, President & Chief Exec. Officer, United Egg Producers (Sept. 30, 2005), available at [http://www.ftc.gov/sites/default/files/documents/closing\\_letters/united-egg-producers-uep/uepstaffopinionletter.pdf](http://www.ftc.gov/sites/default/files/documents/closing_letters/united-egg-producers-uep/uepstaffopinionletter.pdf). In the agreement, UEP agreed to replace the “Animal Care Certified” logo with a logo that read, “United Egg Producers Certified.™ Produced in Compliance with the United Egg Producers Animal Husbandry Guidelines. [www.uepcertified.com](http://www.uepcertified.com).” *Id.* The FTC decided not to recommend enforcement action, but indicated its intention to continue monitoring UEP’s use and advertising of the seal. *Id.*

42. See Order, *In re Processed Egg Products Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. July 30, 2014) (No. 08-md-02002) (granting preliminary approval of settlement between direct purchaser plaintiffs and defendants National Food Corporation, Midwest Poultry Services, LP, United Egg Producers, and United States Egg Marketers, and of second amendment to settlement agreement with Sparboe Farms); Order, *In re Processed Egg Products Antitrust Litig.*, No. 08-md-02002, 2014 WL 828083

*B. Potatoes: Buying Out Growers*

In the potatoes litigation, plaintiffs allege that defendants implemented policies that reduced the potato supply. In addition to post-production supply management techniques,<sup>43</sup> the complaint claims that the potato cooperative began an acreage-reduction program in Idaho<sup>44</sup> and later expanded that program throughout the United States<sup>45</sup> and Canada.<sup>46</sup> The complaint contends that the first acreage reduction program was implemented in Idaho in 2005 and reduced the potato crop by approximately fifteen percent, or 26,000 acres.<sup>47</sup> Under the program, potato growers bid on the price they would require to be paid to reduce acreage, and the cooperative accepted the lowest bids.<sup>48</sup> According to the complaint, the national acreage reduction program in 2005 reduced potato acres to their lowest level since 1959, down approximately 35,000 acres,<sup>49</sup> for an average potato price increase of twenty-three percent over 2004 prices.<sup>50</sup> Growers purportedly completed a “Planting Intention Form” at the beginning of the season, which the cooperative checked against actual plantings and documentation submitted to the USDA’s Farm Service Agency to verify that growers complied with their pledged reductions.<sup>51</sup> Growers that violated the restrictions were subject to fines of \$100 per acre.<sup>52</sup>

In 2006, the national cooperative announced a plan to reduce potato plantings by ten percent.<sup>53</sup> Non-complying members were required to pay an assessment of fifty dollars per acre, and members agreeing to reduce plantings by more than ten percent were eligible for the bid buy-down program.<sup>54</sup> In a 2006 presentation to members of the national cooperative, one producer-officer stated, “Cooperative growers must create orderly markets and grow the category . . . instead of fighting for a piece of it by zero-sum competi-

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(E.D. Pa. Feb. 28, 2014) (No. 08-md-02002) (granting preliminary approval of settlement between direct purchaser plaintiffs and defendant Cal-Maine Foods, Inc.).

43. Other supply control methods included coordinating potato shipments and donating potatoes to charity; price floors below which members agreed not to ship potatoes; and “shipping holidays” during which members would shut down shipments for eight hours. Class Action Complaint at ¶¶ 138-40, *Simon v. United Potato Growers of Idaho, Inc.*, No. 4:10-cv-00520 (C.D. Cal. June 23, 2010) (No. 4:10-cv-00520).

44. *Id.* at ¶¶ 141-42.

45. *Id.* at ¶¶ 145-53.

46. *Id.* at ¶ 154.

47. *Id.* at ¶ 142.

48. *Id.*

49. *Id.* at ¶ 155.

50. *Id.* at ¶ 156.

51. *Id.* at ¶¶ 170-71.

52. *Id.* at ¶ 174.

53. *Id.* at ¶ 159.

54. *Id.*

tion!”<sup>55</sup> The complaint alleges that the potato acreage reduction program was monitored through the use of field audits, GPS, aerial photography, and satellite imaging.<sup>56</sup>

The programs were continued in 2007 and 2008 and were even extended to interested non-members.<sup>57</sup> In 2008, potato growers nationally planted 80,000 fewer acres than in 2007.<sup>58</sup> The complaint cites data from the Idaho Potato Commission that, by the summer of 2008, a ten-pound bag of potatoes cost consumers fifteen dollars, more than a six-dollar increase from 2007.<sup>59</sup> Another study cited in the complaint found that national monthly fresh potato prices increased during the supply control period from seven dollars per hundredweight to \$10.19 per hundredweight.<sup>60</sup> As of the time the complaint was filed in 2010, the acreage reduction program was continuing.<sup>61</sup>

The district court denied the defendants’ motion to dismiss on Capper-Volstead grounds because the plaintiffs’ complaint involved allegations that the defendants conspired with entities excluded from Capper-Volstead protection, including non-members and non-producers.<sup>62</sup> The court held that these allegations presented questions of fact that could not be resolved on a motion to dismiss.<sup>63</sup>

The court’s opinion denying defendants’ motion to dismiss also addressed the scope of the Capper-Volstead exemption as applied to production-limiting agreements. The court noted that this portion of its opinion was not necessary to its decision, and that its decision to give an “advisory opinion” on the issue was an “extraordinary step” justified by the full briefing by the parties, the scant case law on the issue, and the desire for a “just, speedy, and inexpensive determination” of actions.<sup>64</sup> The court agreed with plaintiffs that “the Capper-Volstead Act excludes acreage reductions, production restrictions, or collusive crop planning.”<sup>65</sup> The court interpreted the plain meaning of the statute’s exemption of certain activities and held that the exemption did not encompass activities that occur prior to planting.<sup>66</sup> The court distinguished the cases relied on by defendants<sup>67</sup> and noted that both the DOJ

55. *Id.* at ¶ 162.

56. *Id.* at ¶ 169.

57. *Id.* at ¶¶ 178-79.

58. *Id.* at ¶ 183.

59. *Id.* at ¶ 184.

60. *Id.*

61. *Id.* at ¶¶ 191-92.

62. *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1154 (D. Idaho 2011).

63. *Id.*

64. *Id.* at 1152 n.5 (quoting FED. R. CIV. P. 1).

65. *Id.* at 1154.

66. *Id.* at 1154-55.

67. *Id.* at 1155-56 (distinguishing *Holly Sugar Corp. v. Goshen Cnty. Coop. Beet Growers Ass’n*, 725 F.2d 564 (10th Cir. 1984) (involving post-production supply controls); *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982) (same); *N.*

and the FTC had expressed similar opinions.<sup>68</sup> The court also noted that “individual freedom to produce more in times of high prices is a quintessential safeguard against Capper-Volstead abuse, which Congress recognized in enacting the statute.”<sup>69</sup>

### C. Dairy Cows: Herd Retirements

In *Edwards v. National Milk Producers Federation*,<sup>70</sup> plaintiffs allege that defendant dairy producers paid into a program by defendant National Milk Producers Federation (“NMPF”) to “strengthen and stabilize” raw farm milk prices.<sup>71</sup> The complaint states that defendant NMPF required member producers to pay into a program called Cooperatives Working Together (“CWT”), which then paid selected producers to prematurely “retire” (or slaughter) their dairy herds.<sup>72</sup> “These herd retirements required participating dairy farmers to destroy all of the dairy cows in all of their herds and, beginning on April 1, 2009, agree not to reenter the dairy farming business for at least one year.”<sup>73</sup>

According to the complaint, CWT stated that substantial industry participation – at least sixty-seven percent – was required to fund the necessary herd buy-outs, a level that was achieved in 2009.<sup>74</sup> A CWT officer was quoted in the complaint as saying that CWT had received information that “most producers view the decision to sell their herds through CWT as a long-term commitment which results in them exiting the business permanently.”<sup>75</sup> According to the plaintiffs, CWT expressed to its members that, “[i]n furtherance of ‘the program’s goals for eliminating milk production,’ . . . eligibility

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Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984 (N.D. Cal. 1976) (concluding that although cooperative exchanged information about planting, primary activity was to set price ranges); *In the Matter of Wash. Crab Ass’n et al.*, 66 F.T.C. 45 (1964) (finding that the Fishermen’s Collective Marketing Act at issue in the case contained different language than Capper-Volstead)).

68. *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d at 1155 n.9, 1156-57 (citing A REPORT OF THE U.S. DEPARTMENT OF JUSTICE TO THE TASK GROUP ON ANTITRUST IMMUNITIES (1977)); *In the Matter of Cent. Cal. Lettuce Producers Coop.*, 90 F.T.C. 18 (1977)).

69. *Id.* at 1156. At the time this Article went to print, the parties were discussing settlement. See *In re Potatoes*, 834 F. Supp. 2d 1141, Docket Entry Notice of Hearing (Apr. 29, 2015) (setting status conference for discussion of process and deadlines for motion for class certification and proposed settlement and notice of proposed settlement process to class).

70. No. C 11-04766 JSW, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014).

71. Class Action Complaint at ¶ 4, *Edwards v. Nat’l Milk Producers Fed’n*, No. C 11-04766 JSW, 2014 WL 4643639 (N.D. Cal. Sept. 16, 2014).

72. *Id.* at ¶¶ 3-4.

73. *Edwards*, 2014 WL 4643639, at \*1 (quoting Second Amended Consolidated Class Action Complaint).

74. Class Action Complaint, *supra* note 71, ¶ 71.

75. *Id.* at ¶ 44.

was limited to ‘a commercial dairy herd and . . . not cows that have been segregated . . . due to lower production.’<sup>76</sup>

The complaint alleges that the herd reduction program had a substantial impact on raw farm milk supply and milk prices. Plaintiffs cite an economic analysis produced for CWT which found that, from 2003-2010, the cumulative impact of the herd retirement program was to increase raw farm milk prices by more than nine billion dollars,<sup>77</sup> an effect tracked by the retail milk price.<sup>78</sup> Plaintiffs contend that the program led to the removal of more than 500,000 cows from production and reduction of the nation’s milk supply by approximately ten billion pounds.<sup>79</sup>

The defendants in *Edwards* moved to dismiss on Capper-Volstead grounds, arguing that Section 2 of the Act gave the Secretary of Agriculture exclusive or primary jurisdiction over antitrust claims against agricultural cooperatives.<sup>80</sup> In denying the motion, the court noted that the Supreme Court expressly rejected the proposition in a 1939 case, *United States v. Borden*.<sup>81</sup>

#### *D. Mushrooms: Land Retirement with Restrictive Covenants*

In the mushrooms case, plaintiffs have alleged that a mushroom-growers’ cooperative violated antitrust laws by eliminating competition from growers who were not cooperative members in order to control supply. The complaint alleges that the cooperative collected six million dollars in membership dues and a “Supply Control Assessment” and used three million dollars of those funds to purchase four competing mushroom farms and acquire lease options on two additional farms.<sup>82</sup>

For example, the complaint claims that the cooperative outbid a prospective mushroom grower to purchase a farm at auction in Dublin, Georgia that had an annual production capacity of approximately eight million pounds of mushrooms.<sup>83</sup> According to the allegations in the complaint, the cooperative entered into a land exchange three months later for another mushroom farm in Evansville, Pennsylvania, and in the transaction placed a permanent deed restriction on the Dublin farm prohibiting any business related to mushroom production.<sup>84</sup> The cooperative is alleged to have lost \$525,000 in the

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76. Second Amended Consolidated Class Action Complaint at ¶ 8, *Edwards*, 2014 WL 4643639 (No. C 11-04766 JSW) (emphasis in original).

77. *Id.* at ¶¶ 108-13.

78. *Id.* at ¶¶ 112-14, 119.

79. *Id.* at ¶ 1.

80. See Order Regarding Motion to Dismiss Consolidated Amended Complaint, *Edwards*, 2014 WL 4643639 (No. C 11-04766 JSW).

81. *Id.* at 4 (citing *United States v. Borden*, 308 U.S. 188, 204-06 (1939)).

82. *In re Mushrooms Revised Consolidated Amended Class Action Complaint*, *supra* note 4, at ¶ 72.

83. *Id.* at ¶¶ 73-74.

84. *Id.*

transactions.<sup>85</sup> The complaint further contends that the cooperative then sold the two parcels in the Evansville farm with similar deed restrictions at a collective loss of \$137,000.<sup>86</sup> The complaint alleges several other land transactions resulting in similar deed restrictions against growing mushrooms.<sup>87</sup> According to the complaint, these transactions eliminated at least fifty million pounds of mushroom supply.<sup>88</sup> Plaintiffs also allege other anti-competitive conduct aimed at coercing non-member growers to join the cooperative or refrain from selling mushrooms at prices below the price set by the cooperative.<sup>89</sup>

The DOJ filed a complaint against the cooperative in 2004.<sup>90</sup> The Final Judgment agreed upon by DOJ and the cooperative required the cooperative to eliminate all of the deed restrictions.<sup>91</sup> Plaintiffs in *In re Mushrooms* seek to recover for damages resulting from unlawful price increases of at least eight percent resulting from the cooperative's actions.<sup>92</sup>

In 2009, the district court in *In re Mushrooms* held that the mushroom cooperative was not entitled to Capper-Volstead protection because the cooperative included at least one non-grower member.<sup>93</sup> As a result, the court did not reach the question of whether Capper-Volstead exempts supply control activities like those allegedly undertaken by the cooperative.

## II. THE CAPPER-VOLSTEAD ACT

The Capper-Volstead Act was passed in 1922. Nearly a century later, agricultural producers and their customers dispute whether the Act exempts agreements by agricultural producers to limit the overall production of particular agricultural commodities. The Act is short, comprising only two sections. It is codified in the Agriculture title of the U.S. Code (Title 7), rather than in the Commerce and Trade title (Title 15) like key antitrust statutes such as the Sherman Act,<sup>94</sup> the Clayton Act,<sup>95</sup> and the Federal Trade Commission Act.<sup>96</sup> Section 1 of the Capper-Volstead Act is the focus of the pending lawsuits because of its exemption of certain coordinated conduct by agricultural producers. Section 1, reproduced in full, states:

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85. *Id.*

86. *Id.* at ¶ 74.

87. *See id.* at ¶¶ 75-79.

88. *Id.* at ¶ 8.

89. *Id.* at ¶¶ 4-8.

90. *See id.* at ¶ 85.

91. *See id.*

92. *Id.* at ¶¶ 3, 66, 79.

93. *See In re Mushroom Direct Purchaser Antitrust Litig.*, 621 F. Supp. 2d 274, 284 (E.D. Pa. 2009).

94. 15 U.S.C. §§ 1-7 (2012).

95. 15 U.S.C. §§ 12-27 (2012); 29 U.S.C. §§ 52-53 (2012) (Labor Title).

96. 15 U.S.C. §§ 41-58 (2012).

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

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

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.<sup>97</sup>

While the defendants in the pending lawsuits have relied on Section 1, it is worth noting that Section 2 authorizes the Secretary of Agriculture to enforce a broad range of antitrust violations by “such associations,” that is, those described in Section 1. Section 2 provides:

If the Secretary of Agriculture shall have reason to believe that 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.<sup>98</sup>

If the Secretary finds after a hearing “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 may issue an order “directing such association to cease and desist from monopolization

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97. 7 U.S.C. § 291 (2012).

98. 7 U.S.C. § 292 (2012).

or restraint of trade.” The association may appeal the order to the district court where it is organized, and the Secretary may seek enforcement of the order in such court if the association fails to comply.<sup>99</sup> Either party may present additional evidence in the district court, and the DOJ is charged with enforcing the order.<sup>100</sup> The court may issue a temporary injunction while the appeal is pending and a permanent injunction “or other appropriate remedy” upon conclusion.<sup>101</sup>

### III. THE TEXTUALIST READING: DEFINING “MARKETING”

The Capper-Volstead Act provides an exemption to agricultural producers for “collectively processing, preparing for market, handling, and marketing” their products.<sup>102</sup> The defendants in the *Potatoes* lawsuit have argued that agreements to restrict production fall within the definitions of these activities expressly protected by the Act.<sup>103</sup> The U.S. Supreme Court, the defendants argue, has held that the Act protects the right to engage in price-fixing<sup>104</sup> and by extension, it must also include other methods of stabilizing prices, such as controlling supply.<sup>105</sup>

The Supreme Court has held that statutory construction must begin with the language used by Congress, and courts must assume that the legislature intended the words of the statute to have their ordinary meaning.<sup>106</sup> From that point on, though, views on the proper sources of statutory interpretation diverge, with some judges looking to legislative history to provide clues as to the meaning or purpose of the statutory language,<sup>107</sup> while other judges spurn such practices, preferring to rely on textual sources like dictionaries and contextual clues.<sup>108</sup>

If the plain meaning of the Act clearly includes or excludes output restrictions, no review of legislative history is necessary. If the Act is ambiguous, on the other hand, a resort to legislative history may serve several func-

99. *Id.*

100. *Id.*

101. *Id.*

102. § 291.

103. Memorandum in Support of Motion to Dismiss Based on the Capper-Volstead Act and Related Statutes at 14-16, *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141 (D. Idaho 2011) (No. 4:10-MD-2186-BLW) [hereinafter *In re Potatoes Memorandum in Support of Motion to Dismiss*].

104. *Id.* at 14 (quoting *Md. & Va. Milk Producers Ass’n, Inc. v. United States*, 362 U.S. 458, 466 (1960)).

105. *Id.* at 15-16.

106. See *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014).

107. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863 (1992).

108. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36-41 (1997).



tions. First, it may shed light on the meaning of the language used by Congress and whether that language intentionally includes restrictions on production. Second, it may provide indirect evidence of congressional intent to include or exclude output restrictions from the protections offered by the Act. Third, it may offer insight into the purpose of the Act and whether exemption of output restrictions furthers that purpose. Before any resort to legislative history, then, it is necessary to consider whether the term “marketing” can plainly be held to include or exclude production controls.

### A. Ordinary Meaning

A textualist reading of the Act requires a court to hold that one or more of the terms identified by the statute – “processing,” “preparing for market,” “handling,” and “marketing” – encompasses output restrictions. The task of the courts, then, is to interpret the Act to determine whether those terms, individually or together, include agreements to restrict production.<sup>109</sup> A court reading the text need not find reasons for the legislature’s choice, but merely give effect to that choice as plainly expressed.<sup>110</sup> Courts will assume that the ordinary meaning of the language accurately represents the legislative purpose of Congress.<sup>111</sup> To shed light on the ordinary meaning of statutes, courts may consult common dictionary definitions of the words used by the legislature.<sup>112</sup>

Analyzing the words individually, the production-restricting agreements engaged in by the defendants appear to fall more closely within the meaning of the term “marketing” than any of the terms that precede it (“processing,” “preparing for market,” or “handling”). In *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*,<sup>113</sup> the Ninth Circuit relied on a definition from Webster’s New Collegiate Dictionary, which defined “marketing” as “[t]he aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among other things buying, selling, storing, transporting, standardizing, financing, risk bearing, and supply-

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109. The court’s advisory opinion in *In re Potatoes* was based on its reading of the term “marketing.” *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1171-72 (D. Idaho 2011).

110. *See* *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-18 (2002).

111. *See* *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985).

112. *See, e.g.,* *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009); *Smith v. United States*, 508 U.S. 223, 228-29 (1993), *superseded by statute on other grounds*, Pub. L. No. 106-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)); *Hernandez-Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 171-72 (1st Cir. 2011); *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 627 F.3d 1268, 1270 (9th Cir. 2010).

113. 497 F.2d 203 (9th Cir. 1974).

ing market information.”<sup>114</sup> The court found this definition sufficiently broad to protect a cooperative that acted as a bargaining agent on behalf of farmers.<sup>115</sup>

The definition relied on by the court in *Treasure Valley*, while broad enough to include conduct beyond selling, seems to exclude *pre*-production agreements to limit supply; the definition focuses on post-production activities. All of the enumerated activities are inherent in the general definition of “transferring title” or “moving goods.” It is inapposite, on the other hand, to talk of “transferring title” to or “moving goods” that do not exist.<sup>116</sup>

Other cases have followed *Treasure Valley* in relying on this dictionary definition of “marketing.”<sup>117</sup> In *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, the court expressly relied on the definition of “marketing” used in *Treasure Valley*.<sup>118</sup> The cooperative in that case exchanged information between growers and set a price band within which its members were authorized to sell.<sup>119</sup> The court held that the cooperative’s activities “fall within the term ‘marketing’ as broadly construed in *Treasure Valley*.”<sup>120</sup> Even if the construction of the term was broad enough to include the information-exchange and price-setting activity of that cooperative, the court nevertheless quoted the dictionary definition and emphasized that the cooperative was “supplying market information and performing other acts . . . involved in the transferring of title’ of the produce.”<sup>121</sup>

The defendants in the *Potatoes* litigation argued that *Central California Lettuce* supports exemption for supply controls because the lettuce cooperative limited shipments to those that could be sold within the agreed-upon price window.<sup>122</sup> These activities, however, still involved post-production restrictions on sales of existing produce. The “aggregate of functions” in

114. *Id.* at 215 (quoting WEBSTER’S NEW COLLEGIATE DICTIONARY (1953)) (internal quotation marks omitted).

115. *Id.*

116. *Cf. id.*

117. *See* N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 992 (N.D. Cal. 1976) (setting of price floor and ceiling by lettuce cooperative fell within definition of “marketing”), *aff’d sub nom.* N. Cal. Supermarkets, Inc. v. Cent. Cal. Producers Coop., 580 F.2d 369 (9th Cir. 1978); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, No. 75-140, 1979 WL 1723, at \*4 (D. Vt. Nov. 2, 1979) (price fixing by milk cooperative fell within definition of “marketing”), *aff’d in part, rev’d in part*, 635 F.2d 1037 (2d Cir. 1980); *cf.* *Newark Gardens, Inc. v. Mich. Potato Indus. Comm’n*, 847 F.2d 1201, 1208 (6th Cir. 1988) (holding that state potato commission activity was not within definition of “marketing” in Agricultural Fair Practices Act because it did not engage in the “sale or transfer of title in potatoes from grower to shipper to retailer to consumer[.]” rejecting analogy to *Treasure Valley*).

118. 413 F. Supp. at 991.

119. *Id.* at 986.

120. *Id.* at 992 (emphasis added).

121. *Id.*

122. *In re* Potatoes Memorandum in Support of Motion to Dismiss, *supra* note 103, at 14-16.

“transferring title” and “moving goods” must include refusal to transfer goods that do not meet the prescribed contract conditions. Those restrictions on transfer of goods fit much more comfortably within the *Treasure Valley* definition of “marketing” than the refusal to produce “goods” at all.

More recent dictionary definitions of “marketing” seem to similarly exclude production limitations. For example, Random House’s dictionary contains two definitions: “the act of buying or selling in a market,” and “the total of activities involved in the transfer of goods from the producer or seller to the consumer or buyer, including advertising, shipping, storing, and selling.”<sup>123</sup> This definition, like the one relied on in *Treasure Valley*, seems limited to activities relating to goods that actually exist. American Heritage lists a narrow definition nearly identical to the first Random House definition, and a second, broader definition: “The strategic functions involved in identifying and appealing to a particular group of consumers, often including activities such as advertising, branding, pricing, and sales.”<sup>124</sup> This broader definition, with its focus on fostering a relationship with a desired consumer, seems equally to exclude agreements not to produce and therefore to eliminate the consumer.

### B. *Noscitur a Sociis: Taking Clues from Neighboring Words*

The defendants in the *Potatoes* litigation stopped short of arguing that output-restrictions fall within the definition of “marketing,” relying instead on arguments for the economic identity between price-fixing and output restrictions. Similarly, instead of isolating any one term, the court in the *Potatoes* litigation considered the phrase “processing, preparing for market, handling, and marketing” as a whole.<sup>125</sup> The court expressed the opinion that this phrase “applies to acts done to an agricultural product after it has been planted and harvested.”<sup>126</sup>

The canon of *noscitur a sociis*, “words and people are known by their companions,”<sup>127</sup> instructs statutory interpretation when statutes use items in a list that share a common attribute, such as enumerations of prohibited or exempted conduct.<sup>128</sup> The Court has stated its assumption that legislatures

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123. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987).

124. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1075 (5th ed. 2011).

125. *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1155 (D. Idaho 2011).

126. *Id.*

127. *See* *Maracich v. Spears*, 133 S. Ct. 2191, 2201 (2013); *see also* *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012); *Bilski v. Kappos*, 561 U.S. 593, 603-04 (2010); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000).

128. *See* *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”); *see also* *S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 378 (2006) (rejecting application of canon to item not part of a list);

would be familiar with conventional canons of statutory construction when drafting statutes, and thus courts interpreting statutory language may fairly incorporate those canons into their readings of the text.<sup>129</sup> One empirical study of legislative drafting has confirmed that drafters recognize and rely on the principle expressed by the canon *noscitur a sociis* – that words in a list are defined in relation to each other.<sup>130</sup>

The Supreme Court has employed the “commonsense canon”<sup>131</sup> of *noscitur a sociis* to avoid giving “unintended breadth” to statutory terms.<sup>132</sup> In *United States v. Williams*, for example, the Court construed a statute prescribing criminal penalties for anyone who “advertises, promotes, presents, distributes, or solicits” child pornography.<sup>133</sup> Petitioners alleged that the statute was unconstitutionally overbroad or vague.<sup>134</sup> The Court held that two of the verbs, “promotes” and “presents,” had a wider array of possible meanings than the other three verbs, which clearly denoted a transfer of product.<sup>135</sup> The Court held that, in context, the verbs “promotes” and “presents” could be clearly understood to denote a transfer, whether commercial or noncommercial.<sup>136</sup> The Court used the other verbs in the list as guidance to choose the narrowest of multiple dictionary definitions of the disputed terms.<sup>137</sup> Other cases have similarly relied on the commonsense canon to narrow the meaning of potentially broader terms.<sup>138</sup>

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*Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (applying canon to list of terms used as examples to define another statutory term), *superseded by statute*, Paperwork Reduction Act of 1995, Pub. L. No. 104-37, 109 Stat. 163, *as recognized in In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997).

129. See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . .”); *see also U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (“We start with a common rule, with which we presume congressional familiarity, . . . that any waiver of the National Government’s sovereign immunity must be unequivocal . . . .”) (citing *McNary*, 498 U.S. at 496), *superseded by statute as stated in Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1006 n.15 (11th Cir. 2004).

130. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907, 952 (2013).

131. *United States v. Williams*, 553 U.S. 285, 294 (2008).

132. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

133. 553 U.S. at 295; *see* 18 U.S.C. § 2252A(a)(3)(B) (2012).

134. 553 U.S. at 288.

135. *Id.* at 294 (internal quotation marks omitted).

136. *Id.*

137. *Id.* at 294-95.

138. See, e.g., *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (interpreting the Real Estate Settlement Procedures Act’s prohibition on receiving “portion, split, or percentage,” defined as limited to receiving less than the entirety; “split” narrows potentially broader terms “portion” and “procedure”); *United States v. Sayer*, 748 F.3d 425, 435 (1st Cir. 2014) (finding phrase “substantial emotional distress” did not render cyberstalking statute overbroad under First Amendment where

While it is clear that the terms “processing,” “preparing for market” and “handling” apply to post-production activities, the term “marketing” is, in isolation, susceptible to broader meanings such as an agreement to limit supply. The Supreme Court has stated, however, that where “several items in a list share an attribute [the other items are interpreted] . . . as possessing that attribute as well.”<sup>139</sup> Thus, applying the canon of *noscitur a sociis* to read “marketing” in context with the other actions in the list supports the view that the term “marketing” applies only to post-production activities.

*C. Design of the Statute as a Whole: Reading Section 1 with Section 2*

Although the pending lawsuits focus on the conduct exempted by Section 1, the Capper-Volstead Act contains one (and only one) other section, which provides protection to the public from high prices. Another familiar canon of statutory construction requires that “the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”<sup>140</sup> Thus, to determine the meaning of “marketing” (or the phrase “processing, preparing for market, handling, and marketing”), courts must read those exemptions of Section 1 in light of the protections of Section 2. “Just as a single word cannot be read in isolation, nor can a single provision of a statute.”<sup>141</sup>

Section 2 provides that the Secretary of Agriculture may investigate and halt any conduct of an agricultural cooperative that “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 . . . .”<sup>142</sup> If the Secretary believes such conduct is occurring, he or she may issue a complaint, conduct a hearing, and for good cause order the association “to cease

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phrase was part of a list of serious criminal conduct including “kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress”); *Commodity Futures Trading Comm’n v. Worth Bullion Group, Inc.*, 717 F.3d 545 (7th Cir. 2013) (finding that the phrase “consumer financial institution” in the Right to Financial Privacy Act was limited by neighboring terms “bank, savings bank, card issuer[,] . . . industrial loan company, trust company, savings association, building and loan, or homestead association[,] . . . credit union,” and therefore extended only to institutions whose central purposes included extending consumer credit); *United States v. Kimsey*, 668 F.3d 691, 698 (9th Cir. 2012) (holding that the word “rule” in the Clayton Act contempt provision did not include standing rules of court where term is part of a list of items directly addressed to a party, including “writ, process, order, rule, decree, or command”).

139. *Beecham v. United States*, 511 U.S. 368, 371 (1994).

140. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013).

141. *Smith v. United States*, 508 U.S. 223, 233 (1993).

142. 7 U.S.C. § 292 (2012).

and desist from monopolization or restraint of trade.”<sup>143</sup> The section also provides for judicial review of any such order.<sup>144</sup>

By giving the Secretary of Agriculture the power to police monopolies or restraints of trade that “unduly enhance[]” prices, Section 2 makes clear that Section 1 does not give cooperatives carte blanche to engage in practices that raise consumer prices. Section 1 exempts some conduct that might otherwise be said to monopolize or restrain trade.<sup>145</sup> Section 2 recaptures any exempted conduct that monopolizes or restrains trade “to such an extent” that prices are “unduly enhanced.”<sup>146</sup>

The Secretary of Agriculture has never instituted an enforcement action under Section 2, so little guidance exists as to its meaning.<sup>147</sup> Undue enhancement has not been precisely defined, although the Secretary of Agriculture has proposed more than one definition,<sup>148</sup> and commentators have proposed others.<sup>149</sup> One way of understanding the difference between the exemptions for farmers under Section 1 and the protections for consumers under Section 2 is the notion of countervailing and supervailing market power.<sup>150</sup> Countervailing power would allow farmers to overcome the market failures that would otherwise prevent them from receiving fair prices from a buyers’

143. *Id.*

144. *Id.*

145. 7 U.S.C. § 291 (2012).

146. § 292.

147. See Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. Rev. 462, 491-92 (2013); DONALD A. FREDERICK, U.S. DEP’T OF AGRIC., ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 277-82 (2002), available at <http://www.rd.usda.gov/files/CIR59.pdf>. Commentators have suggested several possible reasons for the lack of enforcement under Section 2: the Secretary may police food prices more through enforcement of mandatory marketing orders than through monitoring of cooperative activities, see Ralph H. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623, 1636-37 (1980), cooperatives may have traditionally been too small to garner much attention, *id.*, the USDA’s mission to foster the development of cooperatives may be in tension with its role under Section 2, *id.*, or the limited remedies of Section 2 enforcement compared with the lure of treble damages under private antitrust statutes may prompt aggrieved parties to pursue litigation rather than complain to the Secretary, FREDERICK, *supra*, at 282.

148. See David L. Baumer, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 195-201, 202 nn.62-63 (1986) (summarizing four distinct statements by USDA on the meaning of undue enhancement).

149. See *id.* at 203 (price that exceeds equilibrium between countervailing and supervailing prices); Folsom, *supra* note 147, at 1636-37 (prices exceeding those that would ordinarily exist under conditions of effective competition in the relevant market).

150. See Baumer, *supra* note 148, at 202-03.

monopsony.<sup>151</sup> Supervailing power, on the other hand, goes beyond correcting market failures created by the buyers' monopsony and introduces a new market failure, allowing the sellers (farmers) to engage in monopolistic behavior to the detriment of consumers.<sup>152</sup> With countervailing power, farmers take money from predatory intermediaries, with prices to consumers remaining constant. With supervailing power, farmers take money from the end consumer. Section 2 may be read to protect consumers against the latter possibility.

The pending complaints in the potatoes, mushrooms, eggs, and dairy cases all allege that prices to consumers were artificially inflated as a result of the defendants' conduct.<sup>153</sup> The cooperatives at issue in those cases have achieved high market concentrations,<sup>154</sup> lowering or eliminating concerns about monopsony power of intermediary buyers in those markets. In essence, Capper-Volstead has already had its intended effect of cutting out intermediaries by allowing farmers to organize to engage in post-production activities connected with selling products. To allow farmers to engage in production-limiting agreements, which have the sole purpose of driving up prices to consumers, would exceed the level of protection provided to farmers by Section 1.

Capper-Volstead expressly exempts "marketing" from antitrust liability, but provides consumer protection from undue enhancement of prices. The forms of "marketing" that have been recognized as exempted by Capper-Volstead serve dual goals. In addition to increasing farmer incomes, the marketing exemptions also help to effectuate the terms of cooperatives' marketing agreements for existing stock, overcoming information asymmetries

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151. *Id.* at 198-99.

152. *Id.* at 199-201.

153. See *In re Eggs Fifth Amended Consolidated Class Action Complaint*, *supra* note 31, at ¶ 8; *Consolidated Amended Class Action Complaint*, *supra* note 2, at ¶¶ 78-79, 112-30; *In re Mushrooms Revised Consolidated Amended Class Action Complaint*, *supra* note 4, at ¶¶ 1,7, 62-63; *In re Potatoes First Amended Class Action Complaint*, *supra* note 3, at ¶¶ 4, 105.

154. For example, by 2008, 79 percent of milk produced in the United States was marketed by the largest dairy cooperative. See Robert G. Abrams et al., *United States: Private Antitrust Litigation*, ANTITRUST REV. OF THE AMS. 2014, Sept. 2013, at 35, available at <http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/LITIGATION/2013/Abrams-Foix-Commins-US-Private-Antitrust-Litigation.pdf>; see also *In re Eggs Fifth Amended Consolidated Class Action Complaint*, *supra* note 31, at ¶ 4 (alleging that defendant trade group United Egg Producers' members represented 96 percent of nation's laying hens during class period); *In re Mushrooms Revised Consolidated Amended Class Action Complaint*, *supra* note 4, at ¶ 2 (alleging that defendant Eastern Mushroom Marketing Cooperative controlled over 60 percent of Agaricus mushrooms grown in the United States and about 90 percent of all Agaricus mushrooms grown in the eastern United States during class period); *In re Potatoes First Amended Class Action Complaint*, *supra* note 3, at ¶¶ 10-13 (alleging that defendant United Potato Growers Association members accounted for 70 to 80 percent of fresh-market potatoes in the United States during class period).

and unequal bargaining power in the marketplace between the large number of sellers (farmers) and the small number of buyers (intermediaries). Production limiting agreements, by contrast, serve only to raise prices to the end consumer by limiting the number of products being marketed. To extend the term “marketing” to include conduct, such as production limitations, that has the sole effect of raising prices paid by the final consumer would appear to be contrary to the statute when Section 1 is read in conjunction with the consumer protection concerns of Section 2.

*D. Exemptions from the Antitrust Laws Should Be Interpreted Narrowly*

Supreme Court antitrust cases “consistently hold that exemptions from the antitrust laws must be construed narrowly.”<sup>155</sup> This rule applies not only to judge-made exemptions<sup>156</sup> but also to express statutory exemptions such as the Capper-Volstead Act.<sup>157</sup> Because antitrust laws theoretically ensure free markets, courts presume that Congress has carefully weighed the economic costs and benefits of departures from that rule and that those judgments should not be extended.

The rule was first articulated with respect to an express exemption in a 1956 case, *United States v. McKesson & Robbins, Inc.*<sup>158</sup> In that case, the Court was asked to interpret the exemption to Section 1 of the Sherman Act created by the “fair trade acts,” which permitted manufacturers to set minimum resale prices for wholesalers and retailers.<sup>159</sup> The Court held that the act did not exempt agreements between a producer-wholesaler and its wholesaler customer-competitors.<sup>160</sup> The Court dismissed economic policy arguments by both parties as inviting the courts to go beyond the limits on price fixing set by statute: “Congress has marked the limitations beyond which price fix-

155. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *see also* *Bankamerica Corp. v. United States*, 462 U.S. 122, 147-48 (1983); *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Labs. v. Portland Retail Druggists Ass’n, Inc.*, 425 U.S. 1, 11 (1976); *Fed. Mar. Comm’n v. Seatrains Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942).

156. *See, e.g.,* *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D. Pa. 1993) (narrowly construing baseball antitrust exemption recognized by *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922)).

157. *See* *Royal Drug Co.*, 440 U.S. at 231 (McCarran-Ferguson Act); *Abbott Labs.*, 425 U.S. at 11-12 (the Nonprofit Institutions Act); *Seatrains Lines, Inc.*, 411 U.S. at 733 (the Shipping Act); *McKesson & Robbins, Inc.*, 351 U.S. at 310-12 (Miller-Tydings and McGuire Acts).

158. 351 U.S. 305.

159. *Id.* at 309-10.

160. *Id.* at 310-12.



ing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy.”<sup>161</sup>

One court declined to apply this rule of construction to a case interpreting the Capper-Volstead Act, but that case involved interpretation of a term that was clearly defined in the Clayton Act.<sup>162</sup> In *Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc.*,<sup>163</sup> the plaintiffs argued that a cooperative that included foreign producers did not fall within the term “persons” entitled to the Capper-Volstead exemption.<sup>164</sup> The court rejected this argument because the language of the statute was “plain and unambiguous . . . .”<sup>165</sup> The court noted that Congress enacted Capper-Volstead to extend the protections of Section 6 of the Clayton Act, which expressly defines “persons” to include foreign corporations and associations.<sup>166</sup>

By contrast, the term “marketing” is not defined in the Capper-Volstead Act or the Clayton Act, and dictionary definitions of the term do not clearly and unambiguously apply to output restrictions.<sup>167</sup> The defendants in the *Potatoes* litigation, like the defendants in *McKesson*, urge an economic argument – specifically, the purported economic equivalence between price fixing and output restrictions – to support their position.<sup>168</sup> But the Capper-Volstead Act by its terms exempts only “processing, preparing for market, handling, and marketing . . . .”<sup>169</sup> Only a broad reading of the term “marketing” would include making agreements not to produce items for sale in the

161. *Id.* at 316. The Court relied on its 1942 decision in *United States v. Masonite Corp.*, in which it held that valid patents did not allow manufacturers to engage in price agreements with competitors who owned patents on similar, substitutable products. 316 U.S. 265 (1942). In *Masonite Corp.*, the Court held that the patent laws were “privileges restrictive of a free economy,” and therefore “the rights which Congress has attached to them must be strictly construed.” *Id.* at 280.

162. *Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc.*, 382 F. Supp. 2d 221, 225 (D. Mass. 2004).

163. *See id.*

164. *Id.* at 226.

165. *Id.* at 225.

166. *Id.*

167. *See* *Treasure Valley Potato Bargaining Ass’n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir. 1974).

168. *See In re Potatoes Memorandum in Support of Motion to Dismiss, supra* note 103, at 15-16. This purported equivalence is questionable in any event. While restricting supply may have the same effect on prices as price-fixing if *pricing agreements are uniformly observed*, producers who have already sunk costs into producing a product have an incentive to sell at any price equal to or higher than the cost of production – a price that may be lower than the agreement price. Such sales should have net efficiency gains since both buyers and sellers are better off. Under output-restricting agreements, however, production costs have not been incurred, so producers lack the incentive to recover those costs by selling at a price lower than the agreement price.

169. 7 U.S.C. § 291 (2012).

first place. Especially in light of the effect of scarcity on consumer prices, such a definition would be restrictive of a free economy and should be disfavored.

#### IV. INTENTIONALISM: AMBIGUITY SHOULD NOT OVERRIDE PLAIN MEANING

The plain meaning of the phrase “processing, preparing for market, handling, and marketing,” based on traditional tools of statutory construction, seems to point away from the conclusion that Capper-Volstead exempts production restrictions by cooperatives. To the extent that courts find ambiguity in the text, a review of legislative history may shed light on the intent of Congress in using the statutory language at issue and whether the purpose of the Act is consistent with output restrictions.

Judges continue to debate the extent to which courts may legitimately look to the legislative history of a statute in interpreting its meaning. Justice Breyer has argued that legislative history, while not “law,” is nevertheless “helpful in trying to understand the meaning of the words that do make up the statute or the ‘law.’”<sup>170</sup> Critics, like Justice Scalia, object that legislative history can be easily manipulated, offering “something for everybody.”<sup>171</sup>

The Supreme Court has stated that, “[i]f legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating.”<sup>172</sup> The most authoritative sources are the Committee Reports on the bill.<sup>173</sup> Statements by individual legislators should not be given controlling weight, but may provide evidence of congressional intent when they are consistent with the statutory language and other pieces of legislative history.<sup>174</sup> In the case of the Capper-Volstead Act, the Committee Reports on

170. Breyer, *supra* note 107, at 863.

171. SCALIA, *supra* note 108, at 36. This debate has also been the subject of extensive academic commentary. See, e.g., Gluck & Bressman, *supra* note 130, at 970-71 (empirical study of interpretive methodologies actually known and used by congressional staffers in drafting legislation); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1948 (2008) (analyzing textualist interpretations of jurisdictional statutes to test allegiance of textualism to reliance on plain language); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 2001 (2007) (empirical analysis comparing influence of textualist and intentionalist methodologies); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 1 (2006) (arguing for moderate statement of textualism to avoid risk of irrelevance from overstatement of differences from purposivism); John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (describing textualists’ view of legislative intent).

172. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 580 (1995).

173. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

174. *Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986); *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984); see also *Coors Brewing Co. v. Mendez-Torres*, 787 F.

the bill from both the Sixty-seventh Congress and the previous version of the bill in the Sixty-sixth Congress provide scant clues, numbering only a handful of pages in total.<sup>175</sup> Thus, the primary source of legislative intent for the Act is the floor debates in the Sixty-seventh Congress, as informed by debates in the Sixty-sixth Congress.

### A. Congress Did Not Debate Output Limitations

Congress did not expressly debate whether the Act would exempt agreements to restrict production.<sup>176</sup> Because of the lack of debate on the topic, it is difficult to conclude whether or not Congress intended for “marketing” to include limiting production.

A few comments supporting production controls can be drawn from the debates in the Sixty-seventh Congress that passed the Act and the Sixty-sixth Congress that debated a nearly-identical bill. In the House debates in the Sixty-seventh Congress, Representative Hersey advocated for the bill, saying, “It does away with the middleman, the speculator, and the importer; in brief, it enables the producers to act together for their mutual interests in the *planting*, care, and marketing of agricultural products.”<sup>177</sup> In the Senate, Senator Cummings stated, “I think [the farmer] is entitled to enter into his associations for the purpose of protecting himself not only in production but in marketing his products.”<sup>178</sup> In debates in the Sixty-sixth Congress, Senator Townsend said, “Without the right to determine the best market, without the right to cooperate in production and disposition of products, the farm will continue to be a very unprofitable, unsuccessful place where men and women can work.”<sup>179</sup> In the Sixty-seventh Congress, Senator Lenroot stated,

If the farmers of the United States could, through cooperation, have some control and agreement as to production and as to prices, not for

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Supp. 2d 149, 170 (D.P.R. 2011) (“The words of a legislative body itself, written or spoken contemporaneously with the passage of a statute, are usually the most authoritative guide to legislative purpose.” (quoting *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 33 (1st Cir. 2007) (internal quotation marks omitted))).

175. See S. REP. NO. 67-236 (1921) (three pages); H. REP. NO. 24 (1921) (three pages); S. REP. NO. 66-611 (1920) (two pages); H. REP. NO. 66-939 (1920) (two pages).

176. The defendants in the *Potatoes* litigation tacitly acknowledged this absence: In their brief in support of summary judgment, the defendants opened their discussion of legislative history by noting the lack of evidence to *exclude* supply agreements. *In re Potatoes Memorandum in Support of Motion to Dismiss*, *supra* note 103, at 16 (“[N]othing in the statutory language or the legislative history of the statutes suggests that indirect price setting through an agreement limiting supply falls outside the Capper-Volstead protections.”).

177. 61 CONG. REC. 1043 (1922) (statement of Rep. Hersey) (emphasis added).

178. 62 CONG. REC. 2266 (1922) (statement of Sen. Cummings).

179. 60 CONG. REC. 376 (1920) (statement of Sen. Townsend).

the purposes of making exorbitant profits, but so that they might at least secure back the cost of production, we would see in the United States immediately an upward turn toward prosperity. . . . [W]e are justified in enacting this legislation which will enable the farmers of this country to put themselves somewhat nearer an equality of bargaining power and control of output in production than other industries have to-day.<sup>180</sup>

While these statements suggest that the speakers believed production limits to be exempted, there was no direct discussion of the point in the House or Senate in either the Sixty-sixth or Sixty-seventh Congresses. These comments also appear to be inconsistent with statements made by other members of Congress that assume that cooperatives would not be allowed to limit production. For example, the notion that the bill was necessary to allow farmers to operate like other businesses, as stated by Senator Lenroot, was expressed frequently by many members of Congress throughout the debates.<sup>181</sup> Those remarks, however, do not necessarily suggest that the speaker presumed that the bill would permit farmers to control output. Instead, in many cases, the speaker advocated for the bill precisely because he believed that the structure of agricultural markets prevents farmers from restricting output the way corporations do. The exemption, the members argued, was needed to offset this hardship endemic to agricultural markets.

Remarks by Representative Volstead and Senator Hitchcock indicate an intent to put farmers on the same footing as other businessmen.<sup>182</sup> Senator Hitchcock stated,

. . . when there is a check in demand for the products which they are making [the manufacturers] can reduce the production[,] . . . discharge their men, cut down their forces, and run their factories upon what is called 25 or 30 percent capacity, and merely feed out to the market what it will consume at their prices . . .

The farmer can not do that. . . . He is not in a position to do as a manufacturer does. He can not control his markets and he can not make

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180. 62 CONG. REC. 2225 (1922) (statement of Sen. Lenroot).

181. *See, e.g.*, 62 CONG. REC. 2258 (1922) (statement of Sen. Norris) (“[I]t is not a square deal to say to the farm, ‘Everything you buy you must buy from a controlled proposition, a trust; the price of everything you sell will be fixed by another monopoly,’ and not give him an opportunity to get into the same kind of a game.”); 61 CONG. REC. 1044 (1921) (statement of Rep. Volstead) (“With [Section 2] in the bill, it seems to me it will give to these organizations a status of equality with other business concerns, and that is all the farmers ask.”); 61 CONG. REC. 1035 (1921) (statement of Rep. Reavis) (“This bill is for the purpose of permitting an organization that will place him on an equality with every other American business man and in some measure permit him to fix the price of his products.”).

182. *See* 61 CONG. REC. 1033 (1921) (statement of Rep. Volstead); 62 CONG. REC. 2262 (1922) (statement of Sen. Hitchcock).

his own prices, and he never ought to have been made subject to the provisions of the antitrust law.<sup>183</sup>

Similarly, Rep. Volstead argued,

Business men can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.<sup>184</sup>

Both of these quotes evidence concern about the disparity between farmers' situations and the situations of other businesses. Read in context, however, neither comment supports the notion that Congress intended for farmers under the legislation to be able to limit production the way that other businesses may do. Instead, the speakers argued that the legislation was necessary because they assumed farmers could not control production like other businesses, and thus required special protections from antitrust liability to enable them to engage in orderly marketing.<sup>185</sup>

For example, earlier in his comment, Senator Hitchcock supported the measure by stating,

I have said that the farmer never should have been included in the antitrust bills of the United States, the bills to prohibit the undue restraint of trade. The farmer is not in trade. His goods are marketed upon exactly the opposite theory from the marketing of the goods of men who are in trade.<sup>186</sup>

Senator Hitchcock's full remarks demonstrate congressional concern about various facts of agricultural markets that left farmers more vulnerable to market fluctuations than other businesses. Specifically, farmers are "price-takers."<sup>187</sup> Senator Hitchcock continued,

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183. 62 CONG. REC. 2262 (1922). The defendants in *Potatoes* pointed to testimony of Senator Hitchcock that would permit agricultural producers "to withhold and limit production from the market." *In re Potatoes Memorandum in Support of Motion to Dismiss*, *supra* note 103, at 18 (quoting 62 CONG. REC. 2277 (1922) (statement of Sen. Hitchcock)). That testimony referred only to withholding agricultural products already produced and did not deal expressly with agreements to limit production.

184. 61 CONG. REC. 1033 (1921).

185. *See id.*

186. 62 CONG. REC. 2262 (1922).

187. *See* MURRAY FULTON, FARMERS AS PRICE TAKERS: HOW FARM RETURNS ARE ESTABLISHED (2005) (publication of Canadian Agri-Food Policy Institute), available at [http://www.capi-icpa.ca/archives/pdfs/PapID6\\_MFulton.pdf](http://www.capi-icpa.ca/archives/pdfs/PapID6_MFulton.pdf); GARY W. BRESTER & J.B. PENN, STRATEGIC BUSINESS MANAGEMENT PRINCIPLES FOR THE AGRICULTURAL

A man with a manufacturing institution produces his product with a very accurate knowledge of what it costs to purchase his raw material and to employ his labor and he puts his product upon the market at a price which he himself fixes. The farmer, on the other hand, is compelled, when his product is ready for market, to sell it on the market at the prices which the buyers on that market fix. If it is wheat he is selling, he sells it at the price which the elevator in the town nearest to him offers for that wheat, and that elevator takes the price from the grain center nearest by, and that center takes it, perhaps, from the New York market, and that, perhaps from the London market.

So when the farmer markets his goods he is not marketing them at the price he puts upon them. The price at which he markets them has no relation whatever to the cost of production. He has labored nearly a year to produce his crop, and when it is produced he is compelled, through his necessities, almost immediately to throw it upon the market and take whatever price is offered to him.<sup>188</sup>

While supportive of the Capper-Volstead bill, Senator Hitchcock advocated a different approach to relieving these market pressures: an agricultural credit system that would allow farmers to withhold production from market until prices rise, thus rationalizing the supply of that product to the market:

My judgment is that this country should in some way develop a system of agricultural credit, so that the farmer may be relieved from that necessity of throwing his crop upon the market immediately after he has finished its production after months and months of labor. There ought to be some system of personal credit by which he could hold that crop for a few months and market it gradually, because the very necessities of the agricultural classes, which compel them to throw all their crops upon the market simultaneously and almost instantly, result inevitably in an undue depression of the market.<sup>189</sup>

The agricultural credit system advocated by Senator Hitchcock was in fact created, beginning with the passage of the first Farm Bill, the Agricultural Adjustment Act of 1933.<sup>190</sup> Numerous features of agricultural finance and

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PRODUCTION SECTOR IN A CHANGING GLOBAL FOOD SYSTEM 10 (1999), available at <http://ageconsearch.umn.edu/bitstream/29161/1/pip11.pdf>.

188. 62 CONG. REC. 2262.

189. *Id.*

190. See WILLARD C. COCHRANE & C. FORD RUNGE, REFORMING FARM POLICY: TOWARD A NATIONAL AGENDA 40 (1992). Certain aspects of the 1933 Act were held unconstitutional by the Supreme Court in *United States v. Butler*, 297 U.S. 1 (1936). After *Butler*, Congress quickly passed the Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, 49 Stat. 1148 (1937), which removed the processing tax struck down by *Butler*, and a number of statutes that formed the foundation for much of current federal farm policy: the Frazier-Lemke Farm Bankruptcy Act of

credit, farm commodity program payments, and marketing orders and agreements have eased the impact of unique market burdens on farmers.<sup>191</sup> To respond to market gluts at harvest time, for example, federal farm policy as early as 1938 introduced nonrecourse loans, which allow farmers to benefit from cyclical rises in market prices in months after harvest instead of having to sell the crop to pay creditors at harvest time when prices are lowest.<sup>192</sup> In the current version, the Marketing Assistance Loan program, farmers of designated crops are eligible to receive government loans at a specified per-unit price, pledging the crop as collateral.<sup>193</sup> If market prices are below the loan rate at maturity, the farmer may repay at the local market price and keep the difference as a “marketing loan gain.”<sup>194</sup> Alternatively, instead of taking a loan with the crop as collateral, the farmer may request a payment, called a “loan deficiency payment,” equal to the difference between the loan rate and the market price.<sup>195</sup>

The disparity between farm businesses and other businesses occupied much congressional attention and led to suggestions for additional reform of agricultural markets, either instead of or in addition to the bill under discussion. Numerous members pointed out that farmers, unlike other businesses, have limited power to set their own prices,<sup>196</sup> and that harvest gluts place

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1935, Pub. L. No. 74-384, 49 Stat. 942 (1935); the Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (1937) (codified as amended at 7 U.S.C. §§ 601-624, 671-674 (2012)); and the Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. §§ 1281-1293 (2012)).

191. For an overview of the history of farm policy, see Anne B. W. Effland, *U.S. Farm Policy: The First 200 Years*, in SUSAN A. SCHNEIDER, *FOOD, FARMING & SUSTAINABILITY: READINGS IN AGRICULTURAL LAW* 5-12 (2011); COCHRANE & RUNGE, *supra* note 190, at 39-63.

192. See COCHRANE & RUNGE, *supra* note 190, at 41-42 (nonrecourse loans in Agricultural Adjustment Act of 1938). “Nonrecourse” means that the collateral can be forfeited at the end of the term without penalty, and the government must accept the collateral and may not sue the farmer to recover any difference in value. See JIM MONKE, *FARM COMMODITY PROGRAMS IN THE 2008 FARM BILL* 12 n.22 (2008), available at [http://farmpolicy.typepad.com/farmpolicy/files/crs\\_report\\_farm\\_commodity\\_program\\_in\\_o8\\_fb.pdf](http://farmpolicy.typepad.com/farmpolicy/files/crs_report_farm_commodity_program_in_o8_fb.pdf).

193. See DENNIS A. SHIELDS, *FARM COMMODITY PROGRAMS IN THE 2014 FARM BILL* 11 (2014), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43448.pdf>.

194. *Id.* (internal quotation marks omitted); see also FARM SERVICE AGENCY, USDA, 2014 FARM BILL FACT SHEET: NONRECOURSE MARKETING ASSISTANCE LOANS AND LOAN DEFICIENCY PAYMENTS 3 (2014), available at [http://www.fsa.usda.gov/Internet/FSA\\_File/mal\\_ldp\\_2014.pdf](http://www.fsa.usda.gov/Internet/FSA_File/mal_ldp_2014.pdf).

195. SHIELDS, *supra* note 193, at 11; FARM SERVICE AGENCY, *supra* note 194, at 3.

196. See, e.g., 62 CONG. REC. 2262 (1922) (statement of Sen. Hitchcock) (“The farmer, on the other hand, is compelled, when his product is ready for market, to sell it on the market at the price which the buyers on that market fix.”); 62 CONG. REC. 2260 (1922) (statement of Sen. Simmons) (“[E]verything that he produces . . . must

farmers in an especially vulnerable position.<sup>197</sup> Several members, like Senator Hitchcock, advocated for a system of financial support for farmers.<sup>198</sup> These comments foreshadowed a new era of federal support for agriculture beginning in the inter-War period and continuing today,<sup>199</sup> characterized by programs such as the price and income supports of the Farm Bills,<sup>200</sup> the fed-

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be sold in the open market for whatever price this organized business, into whose hands his products falls, is willing to give.”); 62 CONG. REC. 2217 (1922) (statement of Sen. Calder) (“But this vast business was done largely by men who are unorganized, who were compelled to take whatever they could get for their products, who had no voice in naming the reward they should receive for the service they had performed.”); 61 CONG. REC. 1035 (1921) (statement of Rep. Reavis) (“Coming from an agricultural district, I state it as a fact that the farmer has always been compelled to take for his product the price that the purchaser offered, or he does not sell it.”).

197. *See, e.g.*, 62 CONG. REC. 2262 (1922) (statement of Sen. Hitchcock) (“He has labored nearly a year to produce his crop, and when it is produced he is compelled, through his necessities, almost immediately to throw it upon the market and take whatever price is offered to him.”); 62 CONG. REC. 2058 (1922) (statement of Sen. Capper) (“More and more it has become evident that the growers must have an opportunity to merchandise their products in an orderly way, instead of being compelled to dump them on a glutted market at prices below cost of production.”); 62 CONG. REC. 2052 (1922) (statement of Sen. Kellogg) (“[T]ake the fruit crop, the apple crop, the potato crop. It must be harvested at a certain time. . . . You can not dump all the production on the country at once and have the farmer receive a good price.”); 61 CONG. REC. 1033 (1921) (statements of Rep. Blanton and Rep. Volstead) (“MR. BLANTON. The purpose is, I take it, . . . to permit [farmers] to hold their products while there is a ‘bear’ market on that would take their property from them? MR. VOLSTEAD. Yes; the same as other corporations do.”); 60 CONG. REC. 360-61 (1920) (statement of Sen. Kellogg) (“Consequently the markets were glutted; people could not buy all the products when they were glutted, and at other seasons of the year they had to pay enormous prices and many times could not get fruit.”).

198. *See, e.g.*, 62 CONG. REC. 2263 (1922) (statement of Sen. Hitchcock) (“[W]e ought to have affirmative legislative provision under which we can build up a system of credit to help agriculture in carrying its crops a reasonable length of time, and marketing them in a gradual way.”); 61 CONG. REC. 1042 (1921) (statement of Rep. Summers) (“The fact is, our entire agricultural program should be built around a proper system of sale and distribution of agricultural products, with a properly adjusted credit system.”).

199. *See* Effland, *supra* note 191, at 5, 9-10 (describing that the advent of the fourth era of federal farm policy since 1924 “focused on direct government intervention to provide farm income support” through supply controls and price and income supports). Earlier eras had been characterized by land distribution and expansion of settlement (1785-1890); improved productivity through federal support for research and education (1830-1914); and limited market regulation, infrastructure improvements, and provision of economic information to help farmers compete in the new industrial age. *Id.* at 5-8.

200. The first Farm Bill focused on price supports through a combination of mandatory supply controls and government storage of surpluses. For a discussion of the creation of early farm income support programs, see ARTHUR M. SCHLESINGER, 2 THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL, 1933-1935, at 27-68 (1959).



eral farm credit system and direct government lending to agriculture,<sup>201</sup> and subsidized crop insurance and disaster assistance programs.<sup>202</sup>

Moreover, members of Congress assumed that the atomistic nature of agricultural production contained a built-in safeguard against monopolistic prices.<sup>203</sup> In committee reports and floor debates, Congress repeatedly expressed the belief that a farmers' monopoly was impossible.<sup>204</sup> Many members of Congress argued that high market prices resulting from coordinated marketing would always give farmers an incentive to increase production and bring down market prices.<sup>205</sup> Even if conditions have changed – for example, agricultural cooperatives operating under Capper-Volstead now exercise significant market power over certain commodity streams<sup>206</sup> – the members' understanding of agricultural markets at the time sheds light on their intent as to the scope of the exemption.

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For a discussion of the current state of federal farm programs, see SCHNEIDER, *supra* note 191, at 54-57; SHIELDS, *supra* note 193, *passim*.

201. The Farm Credit System, a network of federally-chartered financial institutions and related entities organized as borrower-cooperatives, specializes in providing credit to agriculture. See Christopher R. Kelley & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers*, 66 N.D. L. REV. 127, 132-49 (1990). The Farm Service Agency, in contrast, is a federally-owned bank that serves as a “lender of last resort” to agriculture, offering direct loans to agricultural entities. See SCHNEIDER, *supra* note 191, at 215-17.

202. See SCHNEIDER, *supra* note 191, at 93-114.

203. See, e.g., 62 CONG. REC. 2262 (1922) (statement of Sen. Hitchcock) (“[I]t is not possible, by reason of the very nature of the farmer’s business and because of the millions of men engaged in the industry, for the farmer to combine to anything like the same extent the manufacturer or mercantile interests can combine, for the purpose of affecting prices.”).

204. See, e.g., S. REP. NO. 67-236, at 2 (1921) (“Inasmuch as it is utterly impossible to establish a monopoly of any of the ordinary farm products, cereals, cotton, live stock, etc., an inhibition of monopoly must be unobjectionable to the producers.”); 62 CONG. REC. 2270 (1922) (statement of Sen. Lenroot) (“I am not at all afraid that this will be exercised in either event because . . . from the very nature of things monopoly is impossible in farm products.”); 62 CONG. REC. 2262 (statement of Sen. Cummins) (“We all know that cotton can not be monopolized, that wheat can not be monopolized, that corn or hogs or cattle, things that are grown in very large territories of the United States, can not be monopolized.”); 59 CONG. REC. 8035 (1920) (statement of Rep. Browne) (“It would be impossible for the millions of farmers scattered throughout the United States to ever form a trust that would be oppressive. If it was possible for them to do so, the Secretary of Agriculture under this bill could dissolve the association.”).

205. See, e.g., 60 CONG. REC. 2059 (1922) (statement of Sen. Capper) (“[A] farmers’ monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard.”).

206. See Abrams, *supra* note 154, at 35-36.

One question raised on the floor expressly referenced pre-production supply controls, but the resulting discussion was inconclusive. In the Sixty-sixth Congress, Senator Townsend referred to a debate earlier that week in the chamber about reviving the War Finance Corporation:<sup>207</sup>

[s]ome of the advocates of the measure suggested, in the specific case of cotton . . . that they were advising the farmers in their part of the country to refrain from growing cotton, and they were advocating a measure whereby the Government was to aid these farmers in holding their crops, even as against the proposition of a forced reduction in production.<sup>208</sup>

When Senator Townsend raised questions about this debate, however, he focused only on the right to withhold products already produced, “to hold their products until such a time as they feel it is proper for them to sell.”<sup>209</sup> He received a response from Senator Kellogg, who would become the floor leader for the bill before its passage in the Sixty-seventh Congress.<sup>210</sup> Senator Kellogg, an able lawyer known for his work as a “trustbuster” and who would later receive the Nobel Peace Prize,<sup>211</sup> replied that the bill did not create government-sponsored post-production supply controls:

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207. 60 CONG. REC. 362 (1920) (statement of Sen. Townsend). Congress created the War Finance Corporation in 1918 to support industry during and after World War I because of war-driven shortages of private capital. See Gerald D. Nash, *Herbert Hoover and the Origins of the Reconstruction Finance Corporation*, 46 MISS. VALLEY HIST. REV. 455, 456-57 (1959). The Corporation, which had begun as a war emergency agency, was revitalized in July 1921 as an agricultural credit bank. *Id.* at 459-60.

208. 60 CONG. REC. 362 (1920); see also 60 CONG. REC. 375 (1920). In an extended statement two days prior in debates about the War Finance Corporation, Senator Ransdell of Louisiana, a cotton grower himself, explained that cotton prices were so far below the cost of production that cotton growers would not be able to afford to plant a crop in 1921: “[U]nless some provision be made for the orderly marketing of this cotton . . . at a price at least approaching its cost, the people of the South will not be financially able to make another crop.” 60 CONG. REC. 273 (1920). Senator Ransdell quoted a letter in which English cotton manufacturer said, “The solution to the whole position rests with your people as to their ability to hold the goods (cotton). Our advice is ‘hold on like grim death.’” *Id.* Similarly, Senator Simmons argued in favor of permitting cotton growers “not to withhold [cotton] from the market, but to withhold cotton sales until there should be a cotton market and a market for cotton goods.” *Id.*

209. 60 CONG. REC. 362 (1920).

210. See FREDERICK, *supra* note 147, at 108.

211. See L. ETHAN ELLIS, FRANK B. KELLOGG AND AMERICAN FOREIGN RELATIONS, 1925-1929, at 235-36 (1961). Senator Kellogg, a Republican from Minnesota, served as Secretary of State in the Coolidge administration, as ambassador to Great Britain in 1923-25, and as an associate judge of the Permanent Court for International Justice in 1930-35. *Id.* at 6-10, 236. He was awarded the Nobel Peace Prize in 1929 for his work as co-author of a treaty to outlaw war. *Id.* at 206, 236.

Mr. President, I am not of the opinion that the Government should enter into a conspiracy with farmers or anybody else to hold products for the purpose of forcing the price up, and this bill does not authorize anything of the kind. It authorizes cooperation in collective processing, preparing for market, handling and marketing products in interstate and foreign commerce. That is the object of the bill, and that is what the bill is really for.<sup>212</sup>

No member of Congress responded about the possibility of pre-production supply controls.

*B. Indirect Statements Possibly Supporting or Opposing Output Limitations*

Other statements from the legislative history offer indirect evidence of congressional attitudes about pre-production supply controls, but again, the evidence is mixed. On one hand, several members of Congress emphasized that one of the goals of the Act was to *increase* production. For example, during the House debates in the Sixty-sixth Congress, Representative Morgan stated,

Our population is rapidly increasing. The demand for food products grows annually by leaps and bounds. We may safely encourage any system that will bring the producers and consumers in closer contact; that will provide a more efficient and more economical system of marketing, manufacturing, transporting, and distributing the products of the farm.<sup>213</sup>

This emphasis on increasing production was echoed by numerous representatives in the Sixty-sixth Congress.<sup>214</sup> In the Sixty-seventh Congress, Senator Capper stated that, with the clarification of the legal status of agricultural cooperatives, “farmers can do something to cut down the spread between the prices they now receive and those paid by consumers. Even though the farmers should keep all of this saving it will stimulate production, thus

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212. 60 CONG. REC. 362 (1920).

213. 59 CONG. REC. 7852 (1920).

214. *See* 59 CONG. REC. 8025 (1920) (statement of Rep. Hersman) (“ . . . I mention them to show the opponents of this bill that cooperative farm associations tend to increase production.”); 59 CONG. REC. 8026 (1920) (statement of Rep. Towner) (“ . . . the only object and purpose of the bill is to provide that when cooperative effort is necessary to facilitate and increase production it might be authorized and protected.”); 59 CONG. REC. 8028 (1920) (statement of Rep. Larsen) (“ . . . as we accomplish this it will increase production and solve the food problem for our too rapidly increasing city population.”); 59 CONG. REC. 8031 (1920) (statement of Rep. Upshaw) (“Production must be increased or the high cost of living will never come down.”).

insuring more adequate supply of necessities.”<sup>215</sup> In the Sixty-sixth Congress, one representative stated the point emphatically: “The world needs more production. It is essential. If production is to increase, the conditions of marketing the product of the farms must be improved and simplified. This measure, we hope, will assist in accomplishing this result.”<sup>216</sup>

On the other hand, other comments provide some indirect support for the notion that Congress did intend to allow output restrictions. For example, several members supported the notion that cooperatives should be permitted to withhold product already produced from the market to secure higher prices.<sup>217</sup> A few courts have upheld this right, including the Eighth Circuit in *Alexander v. National Farmers Organization*.<sup>218</sup> The right to withhold product from the market might, in its broadest form, include a right to restrict production in the first place.

Other members broadly gave support for any agreements that would increase prices for farmers. Senator Cummins stated that the bill would support combinations for three purposes: lowering costs of production, lowering the costs of marketing, and “increas[ing] the market price of the commodity.”<sup>219</sup> The senator couched his remarks, however, by noting that farm products were often sold below the cost of production.<sup>220</sup> Representative Husted claimed that the purpose of the bill was to allow farmers to organize in selling agencies or for “anything else that is necessary to enable them to increase the prices of their products.”<sup>221</sup> Since Representative Husted opposed the bill, however, his interpretation of its scope may be expected to be overstated.<sup>222</sup>

215. 62 CONG. REC. 2058 (1922).

216. 59 CONG. REC. 8034 (1920) (statement of Rep. Barkley).

217. See, e.g., 61 CONG. REC. 1033 (1922) (statements of Reps. Blanton and Volstead) (“MR. BLANTON: The purpose is, I take it, . . . to permit [farmers] to hold their products while there is a ‘bear’ market on that would take their property from them? MR. VOLSTEAD: Yes; the same as other corporations do.”); 60 CONG. REC. 312 (1920) (statement of Sen. King) (“[T]hey shall not only be permitted to combine for the purpose of marketing their products, but for the purpose of holding them for an indefinite period in order to secure higher prices . . .”).

218. 687 F.2d 1173, 1188 (8th Cir. 1982) (upholding cooperative’s withholding of milk from market for two weeks under Capper-Volstead Act), *cert. denied*, 461 U.S. 937 (1983); see also *N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 986-91 (N.D. Cal. 1976) (upholding agreement creating price band for lettuce sales and prohibiting shipments of unsold lettuce), *aff’d sub nom.* *N. Cal. Supermarkets, Inc. v. Cent. Cal. Producers Coop.*, 580 F.2d 359 (9th Cir. 1978); *Ewald Bros. Inc. v. Mid-Am. Dairymen, Inc.*, 877 F.2d 1384, 1390 (8th Cir. 1989) (upholding dairy option agreement and standby pool); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 643 (M.D. Ga. 1981) (upholding dairy standby pool), *aff’d*, 715 F.2d 520 (11th Cir. 1983).

219. 62 CONG. REC. 2264 (1922).

220. *Id.*

221. 61 CONG. REC. 1043 (1921).

222. See *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) (“In [opponents’] zeal to defeat a bill, they understandably

Where legislative history is ambiguous, the Supreme Court has held that it should not be used to override the text.<sup>223</sup> Since Congress never expressly debated the question of output limitations, and since statements may be gleaned either for or against the practice, the debates do little to shed light on congressional intent in using the terms “processing, preparing for market, handling, and marketing.”

#### V. PURPOSIVISM: RAISING PRICES TO FARMERS, BUT NOT TO CONSUMERS

While the legislative history suggests that members devoted little attention to the question of output restrictions, the legislative history strongly demonstrates the purpose of the exemption: to allow farmers to organize in order to eliminate predatory buyers. By allowing farmers to command higher prices from buyers and avoid the buyers’ mark-up to consumers, farm incomes would be increased without a corresponding rise in consumer prices. Protecting consumers from significant price increases was of paramount concern in both the House and Senate debates, and satisfying those concerns was critical to the bill’s passage. In light of this purpose, allowing agricultural cooperatives who have already succeeded in eliminating the monopsony power of intermediary purchasers to further raise prices by charging consumers more seems patently inconsistent with the Act’s purpose.

##### *A. The Purpose of the Act Was To Eliminate Speculation by Intermediaries*

The defendants in the *Potatoes* litigation argued that output-limitation agreements are protected by Capper-Volstead because “price-fixing and output restrictions are two sides of the same coin.”<sup>224</sup> The defendants cited an industrial organization textbook, which states that a “cartel can restrict output and let the demand curve determine price or raise price and let the demand curve determine output. The two approaches are equivalent.”<sup>225</sup> Some com-

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tend to overstate its reach.”); *see also* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951), *superseded by statute as recognized in In re Rubbermaid Inc.*, 87 F.T.C. 676 (1976).

223. *See* *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1267 (2011) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950) (declining to consult legislative history where history “is more conflicting than the text is ambiguous”), *superseded by statute as recognized in Ardestani v. I.N.S.*, 505 U.S. 129 (1991).

224. *In re Potatoes Memorandum in Support of Motion to Dismiss*, *supra* note 103, at 15.

225. *Id.* (quoting DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 124 (4th ed. 2004)).

mentators have supported this interpretation, although the court in *Potatoes* did not.<sup>226</sup>

The Supreme Court has recognized that price fixing and supply controls are economically equivalent. In *United States v. Socony-Vacuum*,<sup>227</sup> the major oil companies agreed to purchase surpluses in one regional market in order to stabilize prices in another regional market.<sup>228</sup> The Court equated supply controls with price fixing: “Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, [market] power may be found to exist though the combination does not control a substantial part of the commodity.”<sup>229</sup> Similarly, the Seventh Circuit in *Westinghouse Electric Corp. v. Gulf Oil Corp.*<sup>230</sup> reversed a ruling in which the trial court denied admissibility of evidence of supply controls, stating that the complaint centered not on supply controls but on price fixing.<sup>231</sup> On appeal, the Seventh Circuit stated, “an agreement to restrict the production of [goods] unquestionably is a price fixing arrangement.”<sup>232</sup> The court noted that, “[i]n fact, all serious attempts to establish a supracompetitive price must necessarily include an agreement to restrict output. Otherwise the monopoly price could never be maintained.”<sup>233</sup>

The fact that some form of supply control is necessary to maintain a price-fixing agreement, however, does not mean that Congress sought to exempt all forms of supply control from antitrust scrutiny in the Capper-Volstead Act. As the court noted in *Westinghouse*, supply control is necessary to maintain “supracompetitive” prices. The legislative history of the Capper-Volstead Act, however, is replete with evidence that Congress intended only to allow farmers to combine in order to eliminate the existing buyer’s monopsony and to obtain a reasonable profit. Members of Congress repeatedly stressed that the exemption was not intended to permit farmers to obtain supracompetitive prices, and they included Section 2 of the Act to ensure it.

Senator Kellogg introduced the bill in the Sixty-seventh Congress, stating, “The main object of the cooperative association is to get reasonable prices for the farmer, principally through lessening the cost of marketing and selling his products and cutting down the difference between what the farmer

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226. See *In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1154-55 (D. Idaho 2011). The court noted that Senator Capper in floor debates commented that “a farmer’s monopoly is impossible because . . . [farmers will produce more if the price is high].” *Id.* at 1157. The court held that Congress relied on this safeguard when enacting the Capper-Volstead exemption. *Id.* at 1156-57.

227. 310 U.S. 150 (1940).

228. *Id.* at 185-90.

229. *Id.* at 224.

230. 558 F.2d 221 (7th Cir. 1982).

231. *Id.* at 223.

232. *Id.* at 226.

233. *Id.*

receives and what the public finally pays. That is the main object.”<sup>234</sup> Other members of Congress did not mince words about the spread between farm and consumer prices, or the behavior of intermediaries. Senator Capper asserted, “[T]here is a wide margin representing the rake-off of the speculative middleman.”<sup>235</sup> One Senator referred to the “enormous spread” between the farm price and the consumer price as a “national scandal.”<sup>236</sup> Senator Hitchcock pointed out that lower farm prices did not benefit consumers, “because the middleman who carries these crops and purchases them at these cut-throat prices gets a materially higher price when the time comes for the consumers to buy them.”<sup>237</sup> Another Senator colorfully stated, “a policy can not always exist under which those who toil must toil at a loss and contribute to those who neither toil nor spin, but sit in their palaces at mahogany desks and draw in the rake-off in the shape of a middleman’s profit.”<sup>238</sup> Throughout the debates in both the Sixty-sixth and Sixty-seventh Congresses, members of Congress advocated for the bill for the purpose of eliminating the middleman’s mark-up.<sup>239</sup>

Members of Congress also repeatedly emphasized the view that elimination of the intermediary’s profit would result in lower prices for consumers, as well as higher prices to farmers. Senator Norris made this point plainly: “The farmers contend that the cooperation which they expect to bring about under the provisions of the bill . . . is for the purpose of reducing the cost to the consumer as much as it is to increase the price to the producer, and to eliminate unconscionable profits in the products.”<sup>240</sup> Senator Norris later indicated his agreement with this position: “I am just as anxious to protect the

234. 62 CONG. REC. 2049 (1922).

235. 62 CONG. REC. 2059 (1922).

236. 62 CONG. REC. 2121 (1922) (statement of Sen. Walsh).

237. 62 CONG. REC. 2263 (1922).

238. 62 CONG. REC. 2261 (1922) (statement of Sen. Norris).

239. *See, e.g.*, 62 CONG. REC. 2051 (statement of Sen. Kellogg) (“Everyone knows that the difference between the price the farmer receives for his products and the price the consumer pays is . . . exorbitant and unreasonable . . .”); 62 CONG. REC. 2216 (1922) (statement of Sen. Townsend) (“If by allowing cooperative understandings we can shorten the distance between producer and consumer and eliminate the toll gates on the way the farmer and the consumer will both be benefited.”); 62 CONG. REC. 2228 (statement of Sen. Phipps) (“In the past both producer and consumer have suffered seriously through speculation in essential food products on the part of the agencies standing between the two . . .”); 61 CONG. REC. 1043 (statement of Rep. Hersey) (“It does away with the middleman, the speculator, and the importer . . .”); 59 CONG. REC. 7852 (statement of Rep. Morgan) (“The so-called middlemen can not, of course, all be eliminated, but all unnecessary middlemen should be eliminated. The so-called middlemen should not be in a position to demand excessive profits.”); 59 CONG. REC. 8027 (1920) (statement of Rep. Mann) (“I represent the middleman. But I believe the present system is largely wasteful.”); 60 CONG. REC. 360 (statement of Sen. Kellogg) (“ . . . the price the consumer pays is inordinately high as compared with what the farmer receives.”).

240. 62 CONG. REC. 2259 (1922).

consumer as I am to protect the producer. I am not willing to do anything in favor of the producer that will be unfair or unjust to the consumer.”<sup>241</sup> Other Senators and Representatives expressed the view that the bill would benefit consumers,<sup>242</sup> in some cases expressly tying that benefit to an anticipated increase in agricultural production.<sup>243</sup>

*B. Congress Included Section 2 To Ensure That Consumers Would Not Pay Higher Prices*

To ensure that this benefit to consumers would be realized, Congress included Section 2, giving the Secretary of Agriculture power to police excessive price increases by cooperatives. In both chambers, supporters of the legislation emphasized that Section 2 was included to provide a safeguard against higher consumer prices – the ultimate concern of the Sherman Act and Clayton Acts from which the law provided exemption. When the bill was debated in the House, one of its supporters, Representative Sumners, gave this explanation of Section 2:

The farmers say they do not want an unfair profit. The farmers want a stable price and a fair profit. They do not want to hold up the American people. They say, “We are willing to stand up before the American people and defend any price that we ask the American people to pay.”<sup>244</sup>

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241. 62 CONG. REC. 2275 (1922).

242. *See, e.g.*, 62 CONG. REC. 2227 (1922) (statement of Sen. Phipps) (“[T]he intent and purpose of the bill is to provide better marketing facilities for the producers of farm products and to reduce the expense of marketing such products without increasing the cost to the ultimate consumer . . . .”); 61 CONG. REC. 1041 (1921) (statement of Rep. Sumners) (“This bill is intended . . . to eliminate much of the economic and food waste in distribution, and to divide that economy and to reflect it in greater agricultural prosperity and in reduced cost to consumers.”); 60 CONG. REC. 361 (1920) (statement of Sen. Kellogg) (“[T]he Government can permit, aid, and encourage the self-enterprise of the producer and the farmer to establish marketing conditions which will benefit him as well as the consumer, and we should not prevent that.”).

243. *See, e.g.*, 60 CONG. REC. 373 (1920) (statement of Sen. Walsh) (“ . . . far from the evils resulting to the public by reason of the organization of associations of this character they will contribute very largely to an increase food supply for the people of the country.”); 59 CONG. REC. 8022-23 (1920) (statement of Rep. Swope) (“The consumer should also be interested in this proposition, because it would mean that the money that in the past has been absorbed in a manner that decreased production would under this plan be applied in a way that would rather stimulate production, which ultimately means lower prices to the consumers.”).

244. 61 CONG. REC. 1042 (1921).



The statement was met with applause.<sup>245</sup> Representative Sumners continued, “We must not deny the people the necessary power to do the necessary things for fear they may abuse it. The thing to do is to give them the power, and then give the public a chance, too; and that is what this bill does.”<sup>246</sup>

The sponsor of the legislation, Representative Volstead, agreed.<sup>247</sup> Section 2 was necessary “because without that section the bill would be unfair to the public, and we ought not to pass anything that would be unfair to the public.”<sup>248</sup> Representative Volstead concluded that Section 2 – not just Section 1 – was necessary to “give these organizations a status of equality with other business concerns.”<sup>249</sup>

In the Senate, the floor leader of the bill, Senator Kellogg, introduced Section 2 as a consumer protection measure. After describing Section 1, Senator Kellogg stated:

Now, I come to the features for the protection of the public in the event that any restraint of trade or monopoly unduly enhances prices, for, after all, the principal object of the Sherman Act is to prevent great organizations of capital and business from getting control of the business of the country and enhancing prices to the damage of the public.<sup>250</sup>

Senator Capper added that Section 2 enhanced consumer welfare by “giv[ing] to consumers a protection which they do not now have as against middlemen, in that if such farmers’ marketing associations unduly enhance prices a complete and adequate remedy is provided in section 2.”<sup>251</sup>

When the bill was first introduced in the Sixty-sixth Congress, Senator Nelson introduced the bill, saying that its purpose was to allow farmers to operate without fear of prosecution under the Sherman Act – but immediately added that the bill protected consumers as well.<sup>252</sup> “Instead of giving them a free hand, as you might say, we provide in the second section that if they go to extremes, if they aim to enhance prices unduly or to create a monopoly, then the matter can be heard before the Secretary of Agriculture or the Federal Trade Commission . . . .”<sup>253</sup> Later in the debate, Senator Kellogg attested

245. *Id.*

246. *Id.*

247. *See id.*

248. 61 CONG. REC. 1044 (1921).

249. *Id.*

250. 62 CONG. REC. 2049 (1922).

251. 62 CONG. REC. 2058 (1922).

252. 60 CONG. REC. 314 (1920).

253. *Id.* The bill as drafted placed the power in the Secretary of Agriculture, while a proposed amendment of the Judiciary Committee would have placed the power in the Federal Trade Commission. 60 CONG. REC. 313 (1920).

that Section 2 would provide the same protection to consumers as did the Sherman Act.<sup>254</sup>

These debates show that the purpose of the Capper-Volstead exemption in Section 1 was to raise farm prices *and lower consumer prices* by making market intermediaries unnecessary. Section 2 was included to ensure that consumers would be protected from significant price increases. Although Section 2 has been largely a dead letter,<sup>255</sup> the inclusion of consumer protection provisions still stands to demonstrate that the purpose of the exemption in Section 1 is not consistent with supracompetitive price increases by cooperatives. Once a cooperative has formed and succeeded in eliminating the mark-up of market intermediaries, no justification exists within the purpose of the Act for permitting pre-production supply control agreements that serve to further increase farm prices at the expense of the consumer.

## VI. FEDERAL CONTROL OVER SUPPLY MANAGEMENT IN AGRICULTURAL POLICY

The history of federal farm policy supports the notion that the purpose of the law was not to permit private economic actors to engage in pre-production supply controls. Supply management is by no means a foreign concept in agricultural law. Supply control methods, however, have been adopted, adapted, and in some cases abandoned at the federal level as part of a complex federal strategy to rationalize supply and demand. Since the New Deal, federal farm policy has included a variety of attempts to control supply – both pre-production and post-production – in order to stabilize farm incomes without creating food scarcity. The waxing and waning of supply control policies have had complex interactions with, and at times negative effects on, other priorities of agricultural policy, such as food security and natural resource conservation. This complex balancing of interests has led to both ideological and political tension and nearly a century of evolution in policy tools used to balance supply and demand. Because of the complexity of supply management, this balancing act has been controlled largely by Congress and federal regulators – not devolved to private economic actors. To read the Capper-Volstead Act as permitting a broad exemption for output restrictions by private economic actors would represent a significant departure from a century of supply controls managed by government actors.

The movement toward supply controls began with the Agricultural Adjustment Act of 1933.<sup>256</sup> During World War I, Congress relied on exports to

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254. 60 CONG. REC. 363 (1920).

255. See *supra* note 147 and accompanying text.

256. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-04, 607-20, 623, 624, 627 (2008)).

Europe to keep supply in check and prices high.<sup>257</sup> When the war ended and European production recovered, farmers in the U.S. faced oversupply and critically low prices. The first “Farm Bill” included the concept of the domestic allotment plan, under which the government would effectively offer the farmer a price subsidy in return for an agreement to limit output.<sup>258</sup> In 1936, the Supreme Court in *United States v. Butler* held that the funding mechanism of the Agriculture Adjustment Agency (“AAA”) of 1933 usurped the powers reserved to the states in violation of the Tenth Amendment.<sup>259</sup> Congress responded in 1938 by passing new farm legislation that removed the tax on processors that had failed to pass constitutional muster but otherwise implemented a broad array of supply controls and income supports.<sup>260</sup> An era of tug-of-war ensued between the Supreme Court’s laissez-faire approach to economic regulation and Roosevelt’s New Deal vision of government intervention to stimulate markets, but the conflict was short-lived. The power of Congress to pass the Agricultural Adjustment Act of 1938 was ultimately sustained under the expanding conception of the Commerce Clause.<sup>261</sup>

A few years later, in *Wickard v. Filburn*,<sup>262</sup> the Supreme Court offered judicial insight into the incipient statutory scheme of farm programs.<sup>263</sup> In *Filburn*, the Court held that the Secretary of Agriculture had properly implemented the supply control provisions of the 1938 Act when it ordered a wheat farmer to destroy a portion of his crop.<sup>264</sup> The Court noted that the Act included a national acreage allotment for the coming wheat crop; loans and payments to wheat farmers in some circumstances; and a farmers’ referendum

257. See Devan A. McGranahan et al., *A Historical Primer on the US Farm Bill: Supply Management and Conservation Policy*, 68 J. SOIL & WATER CONSERVATION 67A, 67A (2013).

258. SCHLESINGER, *supra* note 200, at 36.

259. 297 U.S. 1, 78 (1936).

260. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. §§ 1281-82, 1291-92, 1301, 1303-04, 1321, 1326, 1329a, 1331-34, 1334b, 1335-36, 1338-39, 1341-42a, 1343-44, 1344b, 1345-46, 1348-50, 1357, 1359aa-59ll, 1361-68, 1371-79, 1379a-79j, 1383, 1385-93, 1501-18, 1520, 1521; 15 U.S.C. § 713c-1 (2012)).

261. See *Mulford v. Smith*, 307 U.S. 38, 47-48 (1939) (upholding the Agricultural Adjustment Act of 1938).

262. 317 U.S. 111 (1942).

263. The case is, of course, better known for its broad statement of the scope of federal jurisdiction under the Commerce Clause. *Id.* at 128. The Supreme Court has referred to *Filburn* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity.” *United States v. Lopez*, 514 U.S. 549, 560 (1995). The Court has generally declined to extend the Commerce Clause holding of *Filburn*. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587-88 (2012); *United States v. Morrison*, 529 U.S. 598, 610 (2000); *Lopez*, 514 U.S. at 560-61.

264. 317 U.S. at 130-31. *Filburn* was allotted 11.1 acres of wheat with a normal yield of 20.1 bushels per acre. *Filburn* planted 23 acres and harvested 239 bushels of wheat from the excess 11.9 acres. *Id.* at 114-15.

on a compulsory national marketing quota when supply was expected to exceed domestic consumption and export.<sup>265</sup> Thus, the Act and its amendments included pre-production allotments, price supports, and post-production quotas, with mechanisms for public participation by farmers. The Court explained:

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 percent of total production, while, during the 1920's, they averaged more than 25 per cent. . . . The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed in part at least to protect the domestic price received by producers. *Such plans have generally evolved toward control by the central government.*<sup>266</sup>

Throughout the history of agricultural supply management policy, the federal government has had to balance the goal of higher U.S. farm incomes against other goals. The federal government must balance the goal of raising farm incomes through supply management against the goal of producing adequate and affordable food for the nation's consumers. In the 1933 Farm Bill, the "Ever-Normal Granary" plan of Secretary of Agriculture Henry Wallace balanced nonrecourse loans, marketing quotas, deficiency payments to producers, and crop insurance to ensure food security for consumers as well as income security for producers.<sup>267</sup> In the 1960s, the Kennedy Administration initiated the Food Stamp Plan as part of a program to stimulate demand and reduce surpluses.<sup>268</sup>

In recent decades, political support for production controls has waned, and the 1996 Federal Agriculture Improvement and Reform Act provided income supports unrelated to production decisions and eliminated acreage allotments tied to price supports and land set-asides.<sup>269</sup> However, policies that have the effect of limiting production have been advanced primarily to serve resource conservation goals.<sup>270</sup> These conservation programs, which

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265. *Id.* at 115-16.

266. *Id.* at 125-26 (emphasis added).

267. COCHRANE & RUNGE, *supra* note 190, at 41-42; *see also* McGranahan, *supra* note 257, at 68A-69A.

268. COCHRANE & RUNGE, *supra* note 190, at 46. The two other prongs of the tripartite plan were providing food aid to poor nations and expanding commercial exports. *Id.* at 46-47.

269. BILL WINDERS, *THE POLITICS OF FOOD SUPPLY: U.S. AGRICULTURAL POLICY IN THE WORLD ECONOMY* 161 (2009).

270. These programs extend back to 1934, following the first of the Dust Bowl years, when the Soil Conservation and Domestic Allotment Act of 1935 added the

may also have the effect of removing land from production, have overlapped over the years with programs to reduce production. Because land retirement programs come at a cost to taxpayers, however, farm conservation programs have sought to employ government oversight to ensure that maximum public benefits are achieved. In land retirement programs, the federal government pays landowners to retire land from production, effectively “renting” the land in exchange for environmental benefits. The programs return value to taxpayers only if farmers set aside resource-sensitive lands or lands that offer significant ecosystem benefits. This may or may not significantly lower production, depending on the productivity of the land prior to retirement.

Currently, under the Conservation Reserve Program (“CRP”),<sup>271</sup> USDA’s Farm Service Agency (“FSA”) contracts with farmers to remove environmentally-sensitive land from production and to devote that land to use for conservation benefits.<sup>272</sup> In exchange for rental payments, participants in the CRP program establish long-term, resource-conserving plant species to control erosion, improve water quality, and develop wildlife habitat.<sup>273</sup> Similarly, under the new Agricultural Conservation Easement Program (“ACEP”), USDA’s Natural Resources Conservation Service (“NRCS”) provides technical and financial assistance through conservation easements to restore wetlands that are currently farmed or have been converted for farming.<sup>274</sup> In both

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Soil Conservation Service, now known as the Natural Resources Conservation Service, to the USDA. See DONALD WORSTER, *DUST BOWL: THE SOUTHERN PLAINS IN THE 1930s*, at 28-29 (1979); McGranahan, *supra* note 257. The Agricultural Adjustment Act of 1936, an emergency effort to work around the *Butler* ruling, paid farmers to switch from “soil-depleting” row crops to “soil-conserving” legumes and grasses, with the effect of taking acreage out of commodity crop production. COCHRANE & RUNGE, *supra* note 190, at 41-42. After the supply shortages and high prices of the 1940s, farm policy in the 1950s again faced a surplus problem. *Id.* at 45. This led to the creation of two new programs tied to conservation in the Agricultural Act of 1956: the Acreage Reduction Program (“ARP”), in which acreage was set aside and could not be harvested or pastured; and the first iteration of the Conservation Reserve Program (“CRP”), which encouraged farmers to shift less productive land to long-term conservation uses. *Id.* The ARP and early CRP fell into disuse after 1959, largely because they failed to reduce farm output. *Id.* In response, the Secretary of Agriculture tried to reduce production by lowering loan levels, a strategy that also failed. *Id.* at 45-46.

271. See Agricultural Act of 2014, Pub. L. 113-79, 128 Stat. 649 (2014). Average acreage enrolled in CRP from 1986-2013 was nearly 30.9 million, with average rental payment outlays of over \$1.5 billion per year. See Farm Service Agency, USDA, *CRP Enrollments and Rental Payments by State, 1986-2013*, available at <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp-st>.

272. See FARM SERVICE AGENCY, USDA, CONSERVATION FACT SHEET 1 (2014), available at [http://fsa.usda.gov/Internet/FSA\\_File/crp\\_general\\_fs.pdf](http://fsa.usda.gov/Internet/FSA_File/crp_general_fs.pdf).

273. *Id.*

274. See Agricultural Act of 2014, Pub. L. 113-79, § 2301, 128 Stat. 649 (2014); see also *Agricultural Conservation Easement Program*, USDA NATURAL RESOURCES CONSERVATION SERVICES, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited Apr. 8, 2015).

cases, however, funds are limited and enrollment priority is based on criteria established and administered by USDA.<sup>275</sup> In the case of CRP, for example, offers for CRP contracts are ranked based on an Environmental Benefits Index.<sup>276</sup> Under ACEP, NRCS prioritizes applications by evaluating the proposed easement's potential to protect and enhance habitat for migratory birds and other wildlife.<sup>277</sup>

The Wetlands Conservation Program and Highly Erodible Lands Program<sup>278</sup> also reduce production to some extent to achieve environmental gains.<sup>279</sup> Under these programs, FSA denies crop insurance eligibility to producers who have converted wetlands to cropland or who have planted in highly erodible lands without an approved soil conservation plan.<sup>280</sup> In contrast with CRP and ACEP, which provide financial incentives, these conservation compliance programs provide financial disincentives to bring environmentally-sensitive land into production.<sup>281</sup> Like CRP and ACEP, however, the production-limiting effects of conservation compliance are inherently dependent on federal administration, since indeed the programs only operate by denying producers financial support that they would otherwise receive under federal crop insurance programs.

Private economic actors do participate in pre-production supply controls through the Agricultural Marketing Agreements Act ("AMAA") of 1937, but only under the supervision and control of the Secretary of Agriculture.<sup>282</sup> The AMAA allows the Secretary or "any other person"<sup>283</sup> to propose a marketing agreement to control the quantity of fruits, vegetables, nuts, and milk produced with respect to any agricultural commodity.<sup>284</sup> Marketing agreements are voluntary agreements between the Secretary and producers,<sup>285</sup> but the Secretary may authorize an agreement only when he or she has reason to believe that average farm prices for the agricultural commodity are below fair exchange value,<sup>286</sup> and that a marketing agreement may help to stabilize price-

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275. *Id.*

276. See FARM SERVICE AGENCY, *supra* note 272. EBI factors for ranking contract offers include "[w]ildlife habitat benefits resulting from covers on contract acreage; [w]ater quality benefits from reduced erosion, runoff and leaching; [o]n-farm benefits from reduced erosion; [b]enefits that will likely endure beyond the contract period; [a]ir quality benefits from reduced wind erosion, and; [c]ost." *Id.*

277. See *Agricultural Conservation Easement Program*, *supra* note 274.

278. Agricultural Act of 2014 § 2611.

279. *Id.*

280. See SCHNEIDER, *supra* note 191, at 164-65.

281. See Agricultural Act of 2014 § 2611.

282. See Agricultural Marketing Agreements Act of 1937, 7 U.S.C. §§ 601-74 (2012).

283. 7 C.F.R. § 900.3(a) (2014).

284. See 7 U.S.C. § 608b(a) (2012).

285. 7 U.S.C. § 608(2) (2012).

286. § 608(1)(a).

es and contribute to orderly marketing of the commodity.<sup>287</sup> After a public hearing, a finding by the Secretary, and execution of the agreement by enough parties to effectuate its purpose,<sup>288</sup> the agreement may enter into force.<sup>289</sup> Marketing agreements are expressly exempted from the antitrust laws,<sup>290</sup> but only if the Secretary is an actual party to the agreements.<sup>291</sup> Marketing orders, another supply control measure authorized by the AMAA, are created solely at the direction of the Secretary and are binding upon all producers if accompanied by a marketing agreement and if the order is approved by two-thirds of relevant producers.<sup>292</sup> The AMAA exempts output-limitation agreements from the antitrust laws only with substantial federal oversight and numerous procedural safeguards.<sup>293</sup> As the Supreme Court has stated, the “obvious intention” of the power given to the Secretary by the AMAA is to provide a moderating function, authorizing only “what may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed.”<sup>294</sup>

This overview of U.S. agricultural supply management policy holds two lessons for interpretation of the Capper-Volstead exemption. First, supply management has existed throughout the history of U.S. farm policy and has involved a balancing of various factors, including provision of hunger relief and controlling consumer food prices; need for acreage set aside in conservation programs; and conservation compliance as an incentive to receive other federal farm program benefits. The complexity of this interplay of forces has required frequent adjustment and redirection of supply control policy at the federal level. Legislators and regulators, who are accountable to the public for the balance struck among these priorities, are in a different position than private agricultural cooperatives to implement supply controls.

Second, since policymakers were developing supply control mechanisms for federal farm policy by the early 1930s, it is unlikely that such mechanisms were outside the imagination of members of Congress who debated the Capper-Volstead Act a decade earlier. More likely, the omission of discussion of pre-production supply controls in the Act suggests that Congress was focused on a different purpose in crafting the exemption. That purpose is illustrated by repeated comments that the Act was intended to eliminate the middleman in marketing agricultural products, raising profits for farmers without raising prices to consumers. The allowance of some post-

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287. § 608(1)(b).

288. 7 C.F.R. § 900.14(a) (2014).

289. *Id.*

290. 7 U.S.C. § 608b(a) (2012).

291. *See United States v. Borden Co.*, 308 U.S. 188, 200-01 (1939); *see also* 1 JULIAN CONRAD JUERGENSMAYER & JAMES BRYCE WADLEY, AGRICULTURAL LAW § 10.3 (1982).

292. 7 U.S.C. § 608c(8)(A) (2012).

293. *See Agricultural Marketing Agreements Act of 1937*, 7 U.S.C. §§ 601-74 (2012).

294. *Borden Co.*, 308 U.S. at 199.

production supply controls, as the courts have stated, is necessary to any cooperative marketing arrangement and thus is an inevitable extension of the exemption provided by Section 1 of Capper-Volstead. Once such a marketing strategy is in place and has succeeded in eliminating monopsony power of intermediaries, however, little justification exists for extending the exemption to pre-production supply controls that would raise prices to consumers and involve private economic actors in a complex balancing act between policy goals at the federal level.

### CONCLUSION

The phrase “processing, preparing for market, handling, and marketing” in the Capper-Volstead Act does not appear to include output-limiting agreements, particularly when the ordinary meaning of the term is read in conjunction with the rest of the statute and in light of the rule in favor of interpreting antitrust exemptions narrowly. The legislative history shows that Congress did not debate pre-production supply controls, and indirect statements of intent do not provide sufficient evidence to overcome the conclusion based on a textualist reading of the Act. The purpose of the statute, as repeatedly stated in the debates, was to raise farmers’ profits by eliminating monopsony power of intermediaries without raising prices to consumers.<sup>295</sup> Members of Congress emphasized that the exemption was intended to increase, not decrease, production, and they included Section 2 of the Act to provide a safeguard against higher consumer prices.<sup>296</sup>

If the Capper-Volstead exemption is unavailable, the implications for cooperatives are real, but need not be devastating. First, some cooperatives, like those in the *Potatoes* and *Mushrooms* cases, already fail to qualify for Capper-Volstead protection because of violation of the Act’s other requirements. Second, associations that engage in output-limiting agreements may be able to defend those practices against Sherman Act claims by arguing that courts should apply the rule of reason to claims of agricultural supply controls and by showing a pro-competitive justification for the practices. Cooperatives would not be entitled, however, to dismiss such claims based on the Capper-Volstead exemption. Finally, agricultural cooperatives still have at their disposal a wide array of business practices at the post-production stage that courts have held they may legitimately rely upon to stabilize prices and control supply.

If the exemption is unavailable, consumers will be able to use the anti-trust laws to prosecute claims for substantial price hikes arising from output limitations. As long as the Secretary of Agriculture declines to use his authority under Section 2 of Capper-Volstead to monitor undue price enhancement, the consumer protection goals of Section 2 may be better effectuated by private plaintiffs. Price increases of the magnitude alleged by plaintiffs in the

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295. *See supra* Part IV.

296. *See supra* Part IV.B.



pending cases – as much as forty percent during the period of the output-limitation agreement – would otherwise avoid scrutiny. Plaintiffs would still be required to prove that defendants’ conduct was illegal under the antitrust laws.

Congress did give agriculture certain exemptions because of inherent difficulties endemic to agricultural markets, but those exemptions extend only as far as Congress intended. Output limitations – however effective in controlling supply and fixing prices – do not appear to be among the tools that Congress intended to exempt in passing the Capper-Volstead Act.