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***183 CURDLING THE COMPETITION: AN ECONOMIC AND LEGAL ANALYSIS OF THE
ANTITRUST EXEMPTION FOR AGRICULTURE**

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*184 INTRODUCTION

THE mention of agriculture conjures up in the public mind visions of a farming family struggling to make a living off the land. Similarly, 'agricultural cooperative' evokes images of several individual farmers banding together to take their produce to market. Few people perceive agriculture and cooperatives as large, profitable business enterprises. Yet, Land O'Lakes is a cooperative whose \$3.8 billion in sales for 1982 ranked it at number 100 on the 'Fortune 500.' [\[FN1\]](#)

Many agricultural cooperatives have developed enormous economic power. When Associated Milk Producers, Inc. (A.M.P.I.) signed its antitrust consent decree in 1975 it had almost 40,000 members, and its sales qualified it as number 141 on the 'Fortune 500.' [\[FN2\]](#) A.M.P.I. conducted business in twenty-two of the sixty-two Federal Milk Marketing Orders, [\[FN3\]](#) ranging from the Chicago area through Memphis and Wichita to San Antonio; [\[FN4\]](#) the cooperative had market shares in excess of ninety percent in half of these areas.

*185 The current size of cooperatives and the economic power they now wield are in sharp contrast to the early 1900's when farmers marketed their produce individually and, as a result, had little bargaining power with their large corporate customers. Congressional passage of the agricultural antitrust exemption [\[FN5\]](#) encouraged the formation of agricultural cooperatives [\[FN6\]](#) intended to countervail the monopsony [\[FN7\]](#) power then held by the corporate purchasers. Over time, with the help of regulation and permissive application of antitrust principles to cooperative activities, the balance of power has shifted. In some markets, cooperatives enjoy a monopoly position-- they supervise buyer power. [\[FN8\]](#) The consequence of this shift is that inordinately high prices must be paid for produce and those inflated costs are passed on to consumers.

The current administration appears determined to reduce price supports, and hence prices. It is reasonable to expect the cooperatives to respond by trying to maintain prices. This requires a strong cooperative and cooperation between cooperatives. If the past is any gauge of the future, the cooperation of some smaller cooperatives and independent farmers may only be gained through threats and coercion. The path to high prices for the larger cooperatives may be again littered with casualties. Vigorous antitrust enforcement may be essential to maintain healthy competition in agricultural markets.

This article asserts that, when the agricultural antitrust exemption is confined to its intended borders, cooperative monopolization, anticompetitive activities, and unreasonably high *186 consumer food prices can each be addressed under the antitrust laws. [\[FN9\]](#) Previous writings by both lawyers and economists have analyzed the status of cooperatives under the antitrust laws, but no single paper has analyzed the subject simultaneously from an economic and legal standpoint. Moreover, much of the legal argument to date has rested on inadequate economic foundations. Similarly, the economic analyses have relied on unrealistic assumptions or have been hampered by flawed reasoning on topics like the ability of cooperatives to control supply and the necessity of their doing so. The resulting legal analysis

has twisted and misconstrued the plain language of the statute as well as the intent of the congressional framers of the agricultural exemption.

This article uses the dairy industry to illustrate the extent of the monopoly problem that now exists in some agricultural markets. It presents an economic model for determining the extent of cooperative market power and detecting undue price enhancement in a manner consistent with legislative intent. [\[FN10\]](#) On these economic foundations is built a legal analysis which demonstrates how the antitrust laws may be used to combat cooperative monopolization, anticompetitive mergers, and undue price enhancement. [\[FN11\]](#)

I. ORIGINS OF THE AGRICULTURAL EXEMPTION

A. Prevailing Conditions in the Early 1900's

Prior to the late nineteenth century, farmers traditionally sold their produce directly to consumers. However, the development of urban centers disrupted this practice and middlemen emerged to take over the intermediate steps between harvest and market--transportation, sorting, processing, and retail sales to consumers. As the physical and economic distance between farmer and consumer widened, a growing lack of complete supply and demand information made it increasingly difficult for individual *187 farmers to make accurate market predictions before locking themselves into production decisions for the next harvest. [\[FN12\]](#) The generally high perishability of agricultural products, the technological inability to store them for very long, and the absence of efficient transportation left many individual farmers dependent on one or a few handlers (processors or distributors). On many occasions the middlemen abused this power. [\[FN13\]](#) In an effort to force down prices, the middlemen could simply threaten not to buy; the prospect of rotten vegetables or spoiled milk was often enough to make the farmer capitulate. In the dairy industry, where individual farmers were dependent on handlers for weighing milk to specify its volume and for testing its butterfat content, short-changing was a common practice.

From the farmers' perspective the market was atomistic and localized. [\[FN14\]](#) There were numerous individual producers who were isolated, unorganized, and had small market shares at their doorsteps. In contrast, the buyers were often corporate entities, few in number and able to choose from alternative sources of supply. The handlers usually assumed responsibility for transporting the product from farm to market, leaving them literally 'in the driver's seat.' Even when the farmers were able to execute contracts with the handlers, breaches were difficult to detect and costly to remedy. [\[FN15\]](#) In order to countervail the power wielded by *188 the middlemen, farmers sought to organize. Joint efforts in marketing and transportation were thought to achieve two producer goals: (1) a more economical and efficient system of production and distribution, and (2) more equitable distribution and control of the benefits of the production and distribution system. [\[FN16\]](#)

The growth of the cooperative movement was fraught with uncertainty as to its status under the antitrust laws. The very getting together of farmers to agree on price and to jointly market their products could be considered an agreement in restraint of trade, [\[FN17\]](#) and some cooperatives were found guilty of antitrust violations by the courts. [\[FN18\]](#) Though most states eventually passed statutes authorizing the existence of agricultural cooperatives and exempting them from antitrust liability, [\[FN19\]](#) many observers questioned the constitutional validity of these laws. [\[FN20\]](#)

*189 B. Section 6 of the Clayton Act

In order to put to rest the uncertainty surrounding cooperatives and the antitrust laws, Congress, via section 6 of the Clayton Act, [\[FN21\]](#) exempted from the reach of the Act 'the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help . . . lawfully carrying out the legitimate objects thereof.' [\[FN22\]](#) The House and Senate Reports evince a limited purpose--simply to allow farmers to form cooperatives without the very existence of the organizations subjecting them to antitrust prosecution, as was the case previously. [\[FN23\]](#) The 'legitimate objects' of cooperatives included countervailing the power of the purchasers: 'individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage--and responsibility--available to businessmen acting through corporations as entities.' [\[FN24\]](#) However, Congress *190 did not intend to authorize cooperatives to engage in anticompetitive activities forbidden to corporations. [\[FN25\]](#)

C. The Capper-Volstead Act

Cooperatives flourished in the years following the enactment of section 6 of the Clayton Act but two serious problems remained. First, exempt cooperatives could not issue capital stock, which was thought to be necessary to effectively countervail the power of corporate middlemen. [\[FN26\]](#) Second, the question remained *191 as to what constituted the 'lawful carrying out' of the 'legitimate objects' of cooperatives. [\[FN27\]](#) Congress passed the Capper-Volstead Act to resolve these issues. [\[FN28\]](#)

*192 Capper-Volstead expanded the section 6 exemption to cooperatives with capital stock, identified the legitimate objects of such cooperatives as collectively processing, handling, and marketing products for the mutual benefit of members, [\[FN29\]](#) and provided for administrative regulation of cooperative activity. [\[FN30\]](#)

*193 Section 1 of the Act allows cooperatives and their members to act collectively in ways that could otherwise be prosecuted as restraints of trade. For example, members may use the cooperative to jointly set prices and market their products.

Section 2 of the Act supplements the existing forces (i.e., competition in the market place [\[FN31\]](#) and existing antitrust law [\[FN32\]](#)) expected to prevent countervailing power from becoming supervailing power. The Secretary of Agriculture is charged with responsibility for taking action against any 'undue enhancement' of agricultural prices that results from concerted farmer activities. [\[FN33\]](#) While administrative action was not meant to be the exclusive *194 means of regulating cooperative activity, [\[FN34\]](#) it was considered an integral part of the overall scheme. Section 2 limits the powers granted by section 1 and makes it clear that unduly enhancing agricultural prices is not among the 'legitimate objects' of cooperatives. [\[FN35\]](#) In essence, the Capper-Volstead Act removes such activities as price fixing from the per se [\[FN36\]](#) category of antitrust violations and subjects them to scrutiny under a 'rule of reason': [\[FN37\]](#) Do the activities unduly enhance prices? [\[FN38\]](#) The contemporaneous literature envisioned the following scheme: (1) that the position of the cooperative would be firmly established as a legitimate business enterprise; (2) that the Department of Agriculture would decide whether prices had become unduly enhanced; and (3) that cooperatives would stand on equal footing with corporations in regard to permissible practices under the antitrust laws, meaning that the Federal Trade Commission would retain the power to act where unfair trade practices were present *195 and the Department of Justice could intervene when a cooperative had 'so monopolized the market machinery as to deprive non-members of an outlet for their products' or otherwise acted in restraint of trade. [\[FN39\]](#) 'In short, Congress in 1922 intended to allow farmers to organize with limited powers for the purpose of counteracting a specific problem: it did not intend to create organizations to replace one system of adverse market conditions with another.' [\[FN40\]](#) Congress intended its legislation to advance and satisfy two needs--an increase in farmer income and protection of consumers from unjustifiably high prices. [\[FN41\]](#)

D. The Economic Roots of the Exemption

How could Congress expect the countervailing power of cooperatives to raise farmers' incomes without having the effect of raising consumers' prices? At what point is a price unduly enhanced? The answer to the first question can be found by exploring the economic concepts of monopoly and monopsony power and their interplay. The answer to the second question has been the subject of debate among agriculture policy experts, lawyers and economists. It will be shown here that, with proper economic and legal analysis, 'undue price enhancement' is capable of reasonably precise definition.

1. Market Power

In a purely competitive market, neither buyers nor sellers control the terms of trade. Individual buyers and individual sellers are all price takers; the competitive price will be determined *196 by the intersection of the demand curve and the supply curve. [\[FN42\]](#) In economics, 'market power' is the generic term for the ability of a buyer or seller to affect the terms of trade. [\[FN43\]](#) When the sellers have market power, however minimal, it is referred to in economics as 'monopoly power.' [\[FN44\]](#) Sellers can profit from the exercise of monopoly power by acting together to restrict the quantity offered for sale, thus raising the price to buyers. The gains from doing this exceed the value of lost sales from diminished output. [\[FN45\]](#)

'<*197 Monopsony power' is defined in economics as market power in the hands of the buyer. Buyers profit from the exercise of monopsony power by agreeing to reduce the amount of goods or services purchased and offering sellers the lowest price they will accept for the level of output. While the buyers lose some value by reducing their purchases, the amount of that loss is less than the amount gained by the lowered purchase price. [\[FN46\]](#) Not all exercises of market power are so great as to be of antitrust concern, and virtually all commercial transactions involve the presence of some economic power. [\[FN47\]](#) Some applied economists and most lawyers and judges reserve the use of such terms as 'market power' and 'monopoly power' for situations where the power exceeds the level they consider to be 'significant.' However, in strict economic terms, 'market power' encompasses even minimal amounts of power. Hence, one standard economic model is *198 referred to as 'monopolistic competition.' [\[FN48\]](#) The use of these terms in economics is free of value judgment. In some cases, the existence of monopoly power is even facilitated by statute and considered to be positive, e.g., the power that accrues to the holder of the typical patent. [\[FN49\]](#)

When either monopoly power or monopsony power is exercised in the input or wholesale market, the effect on consumers is identical--prices rise and the availability of the product falls. [\[FN50\]](#) This is because consumers have downward sloping demand curves. For example, if dairy farmers combined to exercise monopoly power and raised the price of milk, their wholesale customers, the milk processors, would purchase less milk. Processors would then have less milk to offer to consumers and, if the consumer demand curve is downward sloping, the consumer price would rise. Conversely, if processors drive down the price they pay for raw milk, this also raises consumer prices. This result occurs because, in the face of lower prices, farmers will curtail output, which leaves processors with less supply for consumers, and which will drive up the consumer price. [\[FN51\]](#)

'Countervailing power' neutralizes monopoly or monopsony power and results in lower consumer prices. When buyers have monopsony power, increasing countervailing power [\[FN52\]](#) in the hands of the sellers enables them to raise the selling price. The *199 end result of this is to lower consumer prices because a greater quantity is transacted. [\[FN53\]](#) This continues until the price to the sellers and that paid by consumers reach the 'competitive' [\[FN54\]](#) level. [\[FN55\]](#) As the sellers' power reaches the point where it exceeds that of *200 the buyers, i.e., when they begin to supervail [\[FN56\]](#) buyer power, prices to sellers continue to rise. However, consumer prices also rise, as the quantity of available product decreases. [\[FN57\]](#) Thus, one *201 cost of supervailing power is higher consumer prices.

The foregoing economic analysis demonstrates Congress' rationale and expectations in allowing farmers to gain countervailing power. [\[FN58\]](#) In some markets, individual farmers faced buyers with monopsony power. Middlemen were able to restrict purchases to suppress the price down the supply curve. Congress intended to allow sellers to combine forces so that they would be able to exert pressure up the supply curve, increasing both farmer prices and the quantity sold. The effect of monopsony power would decline until it was canceled out by the sellers' countervailing power. At that point both quantity and price would be at the competitive level. Equally important, consumers would also benefit from enabling the sellers to countervail buyer power because there would be more product on the market at a lower price.

2. Undue Price Enhancement

While Congress believed that countervailing buyer power was a legitimate goal for farmer cooperatives, achievement of supervailing power was not. Nonetheless, control over supply to a market, a necessary ingredient of supervailing power, was an express goal of some of the most vigorous proponents of the cooperative exemption. [\[FN59\]](#) This created a danger that the means chosen to create countervailing power might actually lead to the creation of supervailing power. Though most members of Congress doubted that supervailing power could actually be achieved in agriculture, [\[FN60\]](#) some economists recognized the need for caution:

There is, however, here, as in other large-scale business organizations, the possibility that the mere size and weight of the centralized control might be used to dominate the market and to cause prices to take on a monopolistic *202 character. . . . It is clearly evident, . . . that when a co-operative pool acquires the power and claims the right to withhold a product from market, either temporarily or permanently, it begins to move out of the clearly lighted area of distributive efficiency into a twilight zone of market control in which public opinion is pretty sure to assert its right to examine, and possibly to restrict market adjustment or manipulative activities. [\[FN61\]](#)

In anticipation of this potential problem, Congress made it clear, in section 2 of the Capper-Volstead Act, that cooperatives were not allowed to unduly enhance prices. While the legislative history lacks precise economic models

by which undue price enhancement can be determined, [\[FN62\]](#) a definition can be derived based on Congress' statements of what the Act was intended to accomplish and what it was intended to prevent. [\[FN63\]](#) The key to ***203** understanding undue price enhancement lies in the distinction between countervailing power and supervailing power. Countervailing power pushes the price to farmers up the supply curve toward the competitive level. The point at which monopsony power is completely neutralized (countervailed) is the competitive point. The competitive amount is sold at the competitive price. Once farmers achieve supervailing power, they push the price up the demand curve and the quantity sold declines. Less product is then sold to consumers, and at a higher price. These enhanced prices are not necessitated by countervailing the monopsony power of processors, but are the direct result of supervailing power. Simply put, prices are unduly enhanced when they exceed the level that corresponds to equality of bargaining power. Prices that result from supervailing power are unduly enhanced. [\[FN64\]](#) Application of this rule of reason to cooperative price fixing or other concerted activity should not be any more difficult or complicated than the application of other economic principles to market behavior ***204** in antitrust cases. [\[FN65\]](#) To some extent, courts already deal with the concept of undue price enhancement when they assess the damages caused by an illegal price fixing agreement. [\[FN66\]](#)

II. COOPERATIVES IN TODAY'S DAIRY INDUSTRY

Since the passage of the Capper-Volstead Act, regulatory and technological developments have contributed to a radical change in the nature and structure of agricultural markets. Through an examination of the dairy industry, it will be shown that some cooperatives have achieved significant market power which supervails buyer power and unduly enhances prices. Proper analysis of the geographic scope of markets and the relationship between market share and market power demonstrates the need to prune cooperative power in some markets.

A. Changes in Regulation and Technology

Since the Depression, the Secretary of Agriculture has gained a measure of influence over the structure of agricultural markets. Congress has charged the United States Department of Agriculture (USDA) with administration of various price enhancing schemes which, in addition to raising individual farmers' incomes, further augment cooperative power. Cooperatives' exploitation of the regulatory system has often been a significant factor in their achieving supervailing power. [\[FN67\]](#)

In the early 1900's local sanitary requirements caused an increase in the cost of producing milk for fluid consumption. [\[FN68\]](#) For ***205** farmers to invest in specialized assets for the production of Grade A milk, [\[FN69\]](#) they needed to charge a higher price than Grade B milk commanded in order to recoup their costs. However, whenever the supply of Grade A milk exceeded the demand for fluid milk, the excess had to be sold for manufacturing use, at Grade B prices. In times of surplus, competition tended to drive all Grade A prices down to Grade B levels. The competitive solution, an annual price cycle for Grade A milk, was an imperfect way of compensating farmers for investment in Grade A facilities. Depending upon farm and market conditions, in some years this might overcompensate and in other years undercompensate, making investment in Grade A facilities a risky proposition. Farmers desired to eliminate this risk and in some markets cooperatives were able to institute classified pricing schemes under which farmers would be paid higher prices for milk which actually went into fluid use. [\[FN70\]](#)

The Depression brought collapse in the demand for milk. [\[FN71\]](#) Despite significantly lower Grade A prices, excess Grade A milk abounded, forcing prices down to Grade B levels. Several markets exploded into violent warfare between buyers and sellers. Some buyers reneged on classified pricing agreements while others used 'lock-outs' to force Grade A prices to the Grade B level, and others cheated on weights and tests. Some producers engaged in 'strikes,' setting up roadblocks to keep out competing milk in order to force the Grade A price above that of Grade B. [\[FN72\]](#)

***206** 1. Classified Pricing

In order to restore orderly marketing, assure an adequate supply of milk, and raise farmers' income, Congress passed the Agricultural Marketing Agreements Act (AMAA) in 1937. [\[FN73\]](#) The two major features of the AMAA that are relevant to this article are the classified pricing scheme and the marketing order system. Under classified pricing, Grade A milk is divided into two classes. Class I is milk that actually goes into fluid uses and Class II is the surplus, which goes into manufacturing uses in competition with Grade B milk. [\[FN74\]](#) A minimum price for Class I milk is set by regulation

and the Class II milk is sold at the lower, Grade B price. Class I and Class II revenues are pooled and each Grade A farmer receives a 'blend price,' which is the average per hundred weight price for all Grade A milk sales. [\[FN75\]](#)

This classification system raises the incomes of Grade A farmers by exploiting demand elasticities. [\[FN76\]](#) Class I demand is relatively inelastic, so increased Class I prices raise total revenues. Class II demand is elastic, so the Class II sale of any milk forced out of fluid use by the higher Class I price raises total revenues yet again. This double effect raises total revenues, and hence the farmers' price, for each additional quantity sold. [\[FN77\]](#) Farmers can ***207** potentially use classified pricing either to countervail or to supervail buyer power. [\[FN78\]](#) Classified pricing can be used to supervail buyer power without controlling the total supply of milk. Simply by controlling the supply to the Class I market a cooperative can achieve a supervailing price in this Class I market. It can then channel the excess into Class II markets and achieve a net gain for its members. [\[FN79\]](#) Surplus Grade A milk beyond the reserves reasonably necessary to meet unanticipated market conditions is a clear sign that prices are the consequence of supervailing power. [\[FN80\]](#)

2. The Federal Order System

The Federal Order System, the other important aspect of the AMAA, applies classified pricing to specified geographic markets, or 'Orders.' [\[FN81\]](#) The 'allocation provisions' [\[FN82\]](#) and 'compensatory ***208** payments' [\[FN83\]](#) provisions discriminate against handlers who go outside their Order for raw milk. This affects the size of the area to which a buyer may reasonably turn for alternative sources of supply. [\[FN84\]](#) For cooperatives, the costs of these provisions decline as their market shares are greater, so most long distance movements of raw Grade A milk are only economically feasible for cooperatives ***209** with large market shares in the receiving order. [\[FN85\]](#)

Some locality restrictions are necessary in order for the system to function smoothly. Otherwise, distant suppliers might sell milk to local processors at a price below the minimum that local producers are permitted to charge, thus undermining the whole scheme. [\[FN86\]](#) However, the ability to erect barriers, once provided, can be exploited. In practice, these Market Order provisions assure that almost all buyers (with the exception of a large cooperative) must pay substantially more than the local Order price for milk purchased from distant sources. Market Order provisions, though promulgated by the Secretary of Agriculture, must be voted upon by the producers within the Order. Indeed, the local cooperatives frequently propose the provisions of the Order and a cooperative is permitted to 'block vote' for its member producers. [\[FN87\]](#) Thus, the local bias inherent in the system becomes magnified. The effect is that submarkets are determined by regulatory jurisdictions, although, since the barriers are imperfect, wider geographic markets may become relevant for some analytical purposes. [\[FN88\]](#)

***210** 3. Price Supports

After passing several temporary measures, Congress in 1949 enacted a permanent price support system for the dairy industry. [\[FN89\]](#) Under this program, milk prices are raised to some percent of 'parity' [\[FN90\]](#) through Commodity Credit Corporation [\[FN91\]](#) purchases of butter, milk powder, cheese, and other manufactured dairy products. One function of the system is to moderate price fluctuations, especially the natural decline during spring-time when production is greatest. The plan is also designed to raise farmer income by increasing the price of milk.

4. Technological Advances

Technological advances have bolstered the market power enhancing effects of regulation. On-farm refrigeration facilities allow for longer farm storage and insulated transportation and refrigerated storage facilities lengthen the amount of time milk can be held before processing. [\[FN92\]](#) Transportation improvements enable a regional cooperative to move milk great distances without spoiling. [\[FN93\]](#) Unlike the 1920's when surplus milk might gain little salvage value through on-farm churning, under the Federal Order system, surplus milk processed into cheese receives the same blend price as the milk processed for fluid uses.

B. Cooperative Markets and Market Shares

Since 1950, cooperative growth has been tremendous, resulting in increased concentration and surging market power. Cooperatives are now a vital force in the dairy industry. [FN94] In the absence of direct evidence, [FN95] market power can be inferred from a *211 cooperative's behavior in the market [FN96] or from the size of a cooperative's share of the market. Proper analysis of market share and its relationship to market power requires at the outset a definition of the market in which a cooperative operates. Some of the judicial refusals to invoke the antitrust laws against cooperatives have been rooted in erroneous market definitions resulting in a misapprehension of the level of cooperative market power. [FN97]

1. Defining the Market

For antitrust purposes, a market consists of a group of products and an associated geographic area such that (in the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products in that area could increase its profits through a small but significant and non-transitory increase in price (above prevailing or likely future levels). [FN98] There are two aspects of a market which must be considered: (1) the product(s) within the market; and (2) the geographical boundaries of the *212 market. [FN99] In the dairy industry, definition of the relevant product *213 market is relatively simple but defining the geographical bounds is more complex.

a. Product Market

In antitrust litigation involving dairy cooperatives, courts have generally ruled that Grade A milk constitutes a product market. [FN100] The courts have applied the 'practical indicia' of markets *215 test formulated in *Brown Shoe Co. v. United States* [FN101] and found: Production of Grade A milk requires specialized assets; processors of fluid milk are prohibited from processing Grade B milk in the same plant; Grade A milk prices are regulated and only Grade A milk may be used for fluid consumption. [FN102] Proponents of a wider product market definition have argued that the relevant market is all raw milk. This would include Grade A and Grade B. This claim is based on the fact that some Grade A milk goes into manufactured products in competition with Grade B milk. [FN103] While 'all milk' may be a relevant product market with regard to sales for cheese manufacturing, when the focus of inquiry is fluid milk, this argument fails. [FN104] The major focus of this paper is milk *216 for fluid uses, therefore, as analyzed here, the product market is Grade A milk.

b. Geographic Market

In litigation involving alleged antitrust violations by dairy cooperatives, the scope of the relevant geographic market has been the subject of considerable controversy. [FN105] At one end of the spectrum are those who argue that the market is no wider than the applicable Federal Order. [FN106] Each of the Orders is designed around an individually competitive sphere for the sale of processed fluid product. Practical limitations on purchasing milk from far outside the Order, which are imposed by the Federal system, lend some support to the argument that markets should be deemed congruent with Federal Orders. [FN107] Indeed, in virtually all economic studies in which milk prices are compared or correlated with cooperative market share, the markets are identical to the Orders. [FN108] At least two courts have held the relevant market to be the Federal Order in which the cooperative was primarily centered. [FN109]

*217 At the other end of the spectrum are the proponents of the widest geographic market imaginable--for instance, all milk east of the Rocky Mountains. [FN110] The technological feasibility of long-distance milk shipment and the fact that some milk does move across Orders are two points cited in support of this broad definition.

In defining the geographic scope of a cooperative's market for antitrust purposes, one must consider the area in which the cooperative operates and the area to which purchasers can practicably turn for alternative sources of supply. [FN111] Consideration of geographically localized areas ('submarkets') is proper under the Sherman Act's condemnation of monopoly of 'any part' of trade or commerce. [FN112] In *Tampa Electric Co. v. Nashville Coal Co.*, [FN113] the *218 Supreme Court identified economic principles that must be kept in mind when analyzing geographic markets. The question is not where a purchaser actually bought supplies, [FN114] but rather, where one should reasonably or practicably find a competitive alternative if the market were competitive. [FN115] Therefore, the area in which the buyer actually made purchases cannot be determinative of the scope of the market when the gravamen of the complaint is that

the seller foreclosed all reasonable alternatives, forcing the buyer, at great cost and inconvenience, to go far afield for its necessary supply. 'If one is to base empirical delineation of the extent of a market upon observations of which sellers are in fact utilized by buyers, the key problem is to differentiate the factor of necessity from that of convenience.' [\[FN116\]](#) The same logic can be ^{*219} used when the inquiry arises from claims that competitors have been injured: what is the area to which competitors can reasonably turn to market their products? If a seller cannot practicably turn to a broader area to find purchasers, the smaller area can be called a 'submarket' for those purposes. Proper definition of a relevant market is generally viewed as a prerequisite to further inquiry. The use for which the market definition is desired is one factor in the definition itself: The market must be 'relevant.' [\[FN117\]](#) Thus, in some instances the market may be as small as an Order [\[FN118\]](#) and in others, it may be a multistate area. The bottom line is that the relevant market must be defined in a manner which reflects reality. If a market is defined too broadly, the market power of the firms within the market will be understated. If one delineates too narrow a market, the result will be an inflation of the market power of the market participants.

2. Cooperative Market Shares

The dairy industry, like other agricultural sectors, has grown increasingly concentrated over the years. Producers have declined in number [\[FN119\]](#) at the same time production has increased. [\[FN120\]](#) Technological advances have resulted in economies of scale and specialization which have induced less efficient farmers to sell their operations.

Cooperatives are now a vital force in the dairy industry. By 1974, nearly eighty-eight percent of the milk producers delivering ^{*220} to Federal Orders belonged to cooperatives. [\[FN121\]](#) In December 1973, over ninety-nine percent of the milk delivered in twenty-five of the sixty-one Federal Market Orders was delivered by cooperative members. In forty-six markets, the percentage of procedures belonging to cooperatives exceeded ninety. [\[FN122\]](#) Literally hundreds of cooperative mergers in the 1960's and 1970's yielded several large regional cooperatives. [\[FN123\]](#) Associated Milk Producers, Inc. (AMPI) has substantial market shares from the Wisconsin-Chicago area south through Western Tennessee, Arkansas, Oklahoma, and most of Texas. [\[FN124\]](#) Dairymen, Inc. (DI), formed in 1968 from eight separate cooperatives, now dominates all of the Federal Order markets to the south and east of Kentucky with the exception of those in Florida. Mid-America Dairymen (Mid-Am) has large market shares in several of the markets in areas around Kansas and Missouri. Through the use of what is known as the Standby Pool, [\[FN125\]](#) these three major cooperatives and several others were able to keep farmers in unregulated upper-midwestern areas from shipping to any regulated market unless requested to do so by the dominant cooperative in the market. Once the operation of the Standby Pool was limited by consent decrees, [\[FN126\]](#) the producers voted for Federal Order regulation which keeps that milk from competing in other markets. Federations, ranging ^{*221} from relatively loose agreements between cooperatives to align prices, to tighter organizations known as 'superpools,' have evolved as another means of amalgamating cooperative market shares. [\[FN127\]](#)

C. Cooperative Market Power

While market shares in many Orders are of the size often associated with monopoly, [\[FN128\]](#) concentration alone is not an automatic indicator of monopoly power. [\[FN129\]](#) Moreover, it has been argued that certain fundamental differences between cooperatives and corporations, i.e., the inability to control total supply and the voluntary nature of membership, militate in favor of more generous standards by which the relationship between cooperative market share and cooperative market power should be assessed. [\[FN130\]](#) These arguments are not totally meritless, but they ignore ^{*222} important factors that ameliorate these superficial differences.

A cooperative that wishes to charge a monopoly price faces a challenge in that it must restrict supply at the same time that its individual members will want to increase their production to take advantage of the higher selling price. [\[FN131\]](#) Dairy cooperatives are helped in this regard by classified pricing and the relative inelasticity of the total supply of milk. The monopoly price is typically exacted as a premium above the federally mandated Class I price. [\[FN132\]](#) Since demand for Class I milk is essentially inelastic, an increase in price will have a negligible effect on sales. [\[FN133\]](#) In terms of controlling supply to maintain the monopoly price, all that is necessary is to control the supply of Class I milk because any excess production goes into Class II for which demand is almost infinitely elastic. Even with increased Class II sales, a Class I premium yields a net benefit to cooperative members since the blend price received by them will, on average, be increased by the premium times the proportion of Class I sales. [\[FN134\]](#) Moreover, since the supply of milk is inelastic, [\[FN135\]](#) short run supply will remain stable ^{*223} and the cooperative will have little long run competition

from new entrants.

Even with stable supply, a cooperative charging a premium still faces the theoretical threat of competition from members who could splinter and form a rival cooperative. By undercutting the premium, the defectors could sell all of their milk as Class I and pocket all of the premium. [\[FN136\]](#) Eventually, competition between former members and the original cooperative would drive the price back to the Federal Order level. But, practical limitations and overt acts by cooperatives have enabled the large cooperatives to maintain control over membership despite the attractiveness of defection and competition.

Despite technological advances, milk is still highly perishable. This and the fact that cows must be milked daily means that milk for fluid consumption cannot be stockpiled. This makes the farmers and the buyers unusually vulnerable since neither can afford to wait for a better price at a later date. Cooperatives with supervailing power have exploited this vulnerability by creating disincentives intended to discourage purchases from competing cooperatives or individual producers. Handlers have been charged variable prices, depending on the proportion of milk they purchased from competitors or whether they changed their rate of purchase over the annual production cycle. [\[FN137\]](#) Buyers have been presented with 'all or nothing' contracts, which required them to purchase their full supply from the cooperative or nothing at all. [\[FN138\]](#) A related measure has been to lock buyers into 'committed supply contracts' whereby a certain proportion of each buyer's needs must be met by the cooperative. [\[FN139\]](#) Cooperatives *224 have vigorously enforced contractual limitations in the activities of members and buyers, [\[FN140\]](#) thus circumscribing the opportunities for farmers to form competing cooperatives. Finally, where former members or independent producers have tried to compete, dominant cooperatives have responded with predatory pricing in order to keep customers from switching to the competition. Cooperative members will be less likely to splinter and try to compete if they know they will be met by predation. [\[FN141\]](#)

In addition, economies of scale prevent individual farmers from splintering and competing alone. Unless a sufficient number of producers located within practicable pickup distances were to resign from the cooperative at the same time, increased fixed operating costs would absorb the difference between the blend price and prorated premium. [\[FN142\]](#) If, as often happens, the expiration dates of the membership agreements vary, [\[FN143\]](#) the logistics of forming splinter groups will be even more cumbersome.

Thus, neither alleged lack of control over (total) supply nor alleged lack of control over membership necessarily serve to provide a meaningful distinction between cooperatives and corporations for the purpose of analyzing the relationship between market share and market power.

*225 D. Market Power and Cooperative Conduct

An examination of the behavior of dominant cooperatives confirms a positive correlation between high market share and monopoly power. From a perusal of the reported antitrust cases, a smorgasbord of predatory or competition-stifling activity unfolds. In order to increase or maintain market dominance, cooperatives have used boycotts, compelled customers to deal with them on an exclusive basis, interfered with the shipment of nonmembers' milk, imposed tying provisions, and conspired with non-producers to fix artificially high prices. [\[FN144\]](#) Courts have not hesitated to find cooperatives liable for monopolization or attempts to monopolize in the face of such activity. [\[FN145\]](#) Regardless of the legality of predatory or anticompetitive acts, such endeavors would not be undertaken without the expectation of gain, [\[FN146\]](#) nor would the cooperative be able to engage in such acts without substantial market power.

The presence of price discrimination [\[FN147\]](#) is a manifestation of *226 the monopoly power wielded by cooperatives. [\[FN148\]](#) In the milk industry, discriminatory pricing takes the form of premiums over Federal Order Class I prices. [\[FN149\]](#) In the early 1960's, approximately one-third of the Federal Order markets had over-order premiums. The frequency increased to seventy-eight percent of the markets in June 1970 and reached ninety-six percent of the markets in June 1976. [\[FN150\]](#) In a competitive market, if producers could receive higher payments over the blend price from some buyers than from others, they would compete for these higher price outlets by offering price advantages. Eventually, through competition, prices would reach equilibrium and there would no longer be price discrimination. The fact that cooperatives are able to effect sustained discriminatory pricing indicates that they have achieved supervailing power. Simple countervailing power would result in all buyers within the same market paying the same price.

Moreover, the existence of price discrimination undermines the argument that over-Order premiums represent payment

for services provided by the cooperative that would otherwise have to be performed at the handler's expense. Only a cooperative with supervailing power could force a handler with ninety percent Class I utilization to pay ninety cents over the Order price while a competing handler with seventy-five percent Class I utilization *227 pays only seventy-five cents above the Order price for the same milk and the same package of services. Furthermore, since the premiums are not payments for services that otherwise must be performed by handlers, the cost of discriminatory pricing is often passed directly to the consumer. [FN151] Countervailing seller power yields a decrease in consumer prices while supervailing power, through discriminatorily high Class I premiums, increases consumer prices.

Statistical studies examining the relationship between cooperative market share and premiums lend further support to the conclusion that market shares in excess of sixty to seventy-five percent give rise to substantial market power. Robert T. Masson, using information supplied by the USDA regarding dominant cooperative share and Class I premiums, tested whether the existence of premiums in excess of ten cents per hundredweight was positively correlated with cooperative market shares. [FN152] It was concluded, with an error rate of less than 0.001, that cooperatives with market shares greater than seventy percent are significantly more likely than cooperatives with lower market shares to have substantial Class I premiums. [FN153] David L. Baumer had access to more detailed information from the USDA, permitting examination of such factors as entry barriers and transportation costs. [FN154] Relating dominant cooperative market share to Class I premiums, he found a strong statistical relationship for the year 1974 and the year mid-1974 to mid-1975. After accounting for other factors such as transportation costs, most cooperatives with market shares above the sixty to seventy percent level appeared to have substantial premiums. Moreover, he found that higher cooperative market share was related to significantly higher retail milk prices. [FN155]

*228 The studies by the USDA [FN156] and Emerson Babb et al., [FN157] seem at first blush, to refute the correlation between market share and premiums, but closer examination reveals no significant contradiction. The USDA study suffers from three material defects: (1) it set too high a statistical burden of proof for administrative policy making or civil litigation; (2) it used an inappropriate statistical test for the correlation of market shares and premiums; (3) it failed to take into account the effect of antitrust consent decrees on the activities of two major cooperatives. The USDA study, using the same data as Baumer, found that high market share cooperatives had higher premiums, but ruled the finding to be insignificant, because there was a greater than one-out-of-twenty chance for error. [FN158] But that standard, while perhaps the appropriate threshold for scientific research, exceeds the level necessary for administrative economic policy. Given the test used, the study's equations reveal a nine-out-of-ten chance of relationship which is well above what could be termed the 'preponderance of the evidence.'

The statistical test used by the USDA was a 'two tailed test,' designed to answer the question, 'Did high market share cooperatives have considerably different--higher or lower--prices from low market share cooperatives?' However, low market share cooperatives almost never charge any premium, so high market share cooperatives will not show lower prices and nothing will appear on the low end tail of the test. The effect of anything appearing on the high end tail is thus diminished by one half. [FN159] The proper test would simply focus on whether high market share cooperatives have higher prices than low market share cooperatives. Based on the data reported in the study, the question would be answered in the affirmative, with a less than one-out-of-twenty chance for error. [FN160]

Another factor which tends to bias the USDA findings is the *229 consent decrees in *United States v. Associated Milk Producers, Inc.*, [FN161] and *United States v. Mid-America Dairymen, Inc.*, [FN162] which had a significant effect on milk prices from mid-1975 on. The data for the pre-consent decree time periods show a significant relationship between market share and premium. [FN163] The conclusion that the market share/premium relationship is unstable over time [FN164] fails to note that what has been identified is pre- and post-consent decree time periods. Lastly, the study points to the fact that AMPI, a major cooperative, showed a statistically significant negative relationship. [FN165] Yet, the lower premiums cited occurred during the year following the consent decree.

Thus, with the appropriate standard of proof, the appropriate statistical tests, and due regard for the effect of the antitrust cases, the USDA study confirms, rather than refutes, a correlation between high market share and premiums.

The study by Babb, Bessler, and Pheasant found a positive *230 correlation between market share and premiums for the years 1965 through 1972, with a less than one-out-of-twenty chance for error. For the years 1973 through 1977, the study shows that the positive relationship continues to exist, but with a greater than one-out-of-twenty chance of error. [FN166] The discrepancy for 1973 can be explained by the effect of Federal Phase III price controls in 1973 which caught and held AMPI's prices at low levels. [FN167] From mid-1975 on, the pricing structure throughout the AMPI region was significantly lowered and the effect of the Standby Pool was dissipated by the signing of the consent decree

in Associated Milk Producers, Inc. [\[FN168\]](#) Shortly thereafter, the consent decree in Mid-America Dairymen was signed, [\[FN169\]](#) with similar procompetitive effect. [\[FN170\]](#) Several high market share markets would hence have lower premiums due to antitrust enforcement policy, not because cooperatives lacked monopoly power. Thus, if the time periods affected by price controls and consent decrees are omitted, Babb's study shows a positive relationship between market share and premiums, with a less than one-out-of- twenty chance of error. [\[FN171\]](#)

The behavioral and empirical evidence compels a conclusion that cooperatives with market shares in excess of sixty to seventy-five percent possess--and use--monopoly power. Contemporary dairy cooperatives have, in many markets, exceeded countervailing power and now possess and exercise supervailing power. The differences between dairy cooperatives and corporations in this regard are thus not very real. Therefore, no justification exists for judging the relationship between cooperative market *231 share and cooperative market power by a standard different from that employed for corporations. [\[FN172\]](#)

III. THE ANTITRUST LAWS AND SUPERVAILING COOPERATIVE POWER

The antitrust laws, if properly applied, can provide an effective antidote to supervailing cooperative power. However, in spite of the Supreme Court's clear statements that the Clayton section 6/Capper-Volstead exemption is limited in scope, courts and prosecutors have allowed many abuses to persist unabated. [\[FN173\]](#) This may be due to the fact that no one has simultaneously analyzed the legal and economic roots of the exemption and carried both analyses to their logical conclusions. The last section of this paper melds these two modes of analysis and suggests a cohesive standard by which to examine cooperatives which will serve the goals of the Capper-Volstead Act. Congress intended only to give farmers countervailing power and to provide them with 'the same unified competitive advantage--and responsibility' as corporations. [\[FN174\]](#) As a threshold matter it must be remembered that without an exemption, the mere formation of a cooperative association designed to raise prices by joint action is a restraint of trade. [\[FN175\]](#) As noted previously, the sole purpose of creating a limited exemption was to permit farmers to act together and to carry out the 'legitimate objects' of cooperative association. [\[FN176\]](#) Among such legitimate objects and activities are marketing members' products, bargaining on behalf of members or member associations, processing members' products, fixing the prices at which members' products will be sold, and even representing *232 100% of the producers. [\[FN177\]](#) However, cooperatives are not 'free to engage in practices against other persons in order to monopolize trade or to restrain and suppress competition with the cooperative.' [\[FN178\]](#) Nor may a cooperative use its dominant position in the market place, even if lawfully obtained, 'as a lever further to suppress competition.' [\[FN179\]](#) Thus, there are also legal constraints on the manner in which cooperatives may achieve their legitimate objects. Furthermore, anticompetitive mergers should be distinguished from Capper-Volstead's authorization of 'marketing agencies in common' [\[FN180\]](#) and should be enjoined. Finally, built into the Capper-Volstead scheme is the untapped potential for substantial corrective measures if any cooperative activities result in unduly enhanced prices. [\[FN181\]](#) Monopolization, anticompetitive mergers, and restraints of trade that unduly enhance prices can and should be addressed under antitrust law when the agricultural exemption is limited to its intended proportions.

A. Monopolization

An agricultural cooperative, either singly or in combination with other cooperatives, may willfully attain 100% of a market, as long as it is achieved by the voluntary association of its members and through voluntary agreements. [\[FN182\]](#) However, cooperatives are liable under section 2 of the Sherman Act if they attain or exercise *233 a monopoly position through 'predatory practices,' [\[FN183\]](#) 'competition-stifling practices,' [\[FN184\]](#) or 'anticompetitive activities.' [\[FN185\]](#) Such behavior is 'so far outside the 'legitimate objects' of a cooperative that . . . they would constitute clear violations of Section 2 of the Sherman Act.' [\[FN186\]](#) Cooperatives and corporations are subject to the same test for illegal monopolization. Recently, however, some federal circuit courts of appeal have created a separate standard for cooperative monopolization: absent proof of predatory conduct in achieving monopoly power, there will be no liability. This differs from treatment of corporations which are liable for suppressing competition whether they are attempting to achieve monopoly power or attempting to stifle competition through the monopoly power they have already achieved. As will be shown below, there is no basis for such disparate treatment.

The Sixth, Eighth, and Ninth Circuits adhere to the principle that the Capper-Volstead Act was intended to allow cooperatives to act like business corporations but 'did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative.' [\[FN187\]](#) These circuits

have held cooperatives to the same monopolization standards as corporations. The Sixth Circuit recognized that a cooperative may lawfully achieve a monopoly position as long as it does so through voluntary membership or voluntary agreements with other cooperatives, but held that it will be liable under section 2 of the Sherman Act where it engages in predation or where it undertakes anticompetitive practices with the intent to stifle competition even if those practices also have a ***234** legitimate business justification. [\[FN188\]](#) The Eighth Circuit has enunciated a similar standard, holding that a cooperative may obtain a monopoly position 'so long as it is achieved through natural growth, voluntary confederation, and without resort to predatory or anticompetitive practices.' [\[FN189\]](#) In addition, a court may sustain a Sherman section 2 charge when a cooperative uses anticompetitive activities that may have some business justification, but where these practices are used with the intent to 'stifle or smother competition.' [\[FN190\]](#) Moreover, the court should look at the cooperative's conduct as a whole to discern whether it is exclusionary. [\[FN191\]](#) The Ninth Circuit has held that there exists no basis for disparate treatment of cooperative and corporate monopolization and has specifically approved the application of the standard announced in *United States v. Grinnell Corp.* [\[FN192\]](#) to the cooperative realm. [\[FN193\]](#)

***235** A more recent decision has expressed the Grinnell rule in terms equally well suited to cooperatives: Even if that power has been legitimately acquired, the monopolist may not wield it to prevent or impede competition.

....

The mere possession of monopoly power does not ipso facto condemn a market participant. But, to avoid the proscriptions of §2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market. [\[FN194\]](#)

The Ninth Circuit takes a similar view of the Grinnell rule and holds that even if a firm has legally acquired monopoly power, it may not engage in practices that 'unnecessarily exclude competition' from the marketplace. 'It is no answer to the charge to say that these practices are not 'predatory' but 'honestly industrial'--that is, of a kind an ordinary enterprise might utilize with impunity.' [\[FN195\]](#) The Sixth Circuit has found monopolization where a monopolist's conduct 'had the effect of deterring entry and restricting the ability of competitors to expand.' [\[FN196\]](#)

***236** Courts have not hesitated to strike down cooperative monopolization upon proof of predatory practices. [\[FN197\]](#) However, some courts and commentators have ignored the teachings of *Maryland & Virginia Milk Producers Association v. United States* [\[FN198\]](#) and have moved toward requiring proof of predation as the sine qua non of illegal monopolization. [\[FN199\]](#) The Second Circuit, in *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, [\[FN200\]](#) rejected the application of Grinnell to cooperatives on the ground that 'the formation, growth, and operation of a powerful cooperative is obviously a 'willful acquisition or maintenance of such power' and will rarely result from 'a superior product, business acumen or historic accident.' [\[FN201\]](#) It held that a Sherman section 2 claim may only be sustained upon proof of the acquisition of monopoly power by 'other, predatory means.' [\[FN202\]](#) The Eleventh Circuit, relying heavily on *Fairdale Farms*, affirmed a district court holding that monopolization was not possible without predation in a case [\[FN203\]](#) involving the same defendant and many of the same practices as the Sixth Circuit case of *United States v. Dairymen, Inc.* [\[FN204\]](#) One district court has even limited proof of predation to acts that have been found to be predatory in the past. [\[FN205\]](#)

***238** The wholesale rejection of the Grinnell standard by the *Fairdale Farms* court and its follows fails to take into account that this rule can easily be applied to agricultural cooperatives. [\[FN206\]](#) Cooperative growth due to voluntary membership or agreements, higher quality product, better service to members or customers, more efficient operation, and the like, is permissible, even if it results in monopoly power. But the acquisition or maintenance of that power via anticompetitive behavior or competition stifling activity (whether or not it is deemed 'predatory') is not among the 'legitimate objects' of cooperation. [\[FN207\]](#) The appropriate cooperative monopolization standard is one that strikes a balance between accommodating cooperative countervailing power on the one hand, and preventing the agglomeration of supervailing power by anticompetitive means on the other. The Grinnell standard strikes this balance. [\[FN208\]](#)

Due to weak enforcement of antitrust rules, cooperatives have been able to achieve supervailing power. In the dairy industry ***239** this has been accomplished by anticompetitive means as well as by voluntary membership and natural growth. Many cooperative practices, while not predatory in the sense of being devoid of business justification, are

undertaken with the intent and effect of reducing, hindering, or eliminating competition. [\[FN209\]](#) Supervailing power has also been achieved through a combination of devices, which standing alone may appear to be innocuous, but in combination are anticompetitive. Monopoly power achieved by use of these non-predatory yet anticompetitive means is every bit as nefarious as monopoly power achieved by predation.

B. Mergers

Cooperative mergers have proved to be an effective and popular way to concentrate and increase cooperative market power. In the dairy industry, the largest cooperatives have attained their monopoly positions in part through the acquisition of competing cooperatives. [\[FN210\]](#) Cooperative-cooperative mergers should be subject to the same scrutiny under section 7 of the Clayton Act [\[FN211\]](#) as corporate mergers and mergers of cooperatives with non-cooperatives. *240 Antitrust exemptions are not to be lightly implied, but must be based on clear expressions of congressional intent, and should be narrowly and strictly construed. [\[FN212\]](#) Yet, cooperative-cooperative mergers have never been challenged and there appears to be a perception that they are exempt. Unable to point to statutory language or legislative history to support immunity, the proponents of a merger exemption try to draw an analogy between mergers and the activities enumerated in the Capper-Volstead Act. However, upon close inspection, this analogy disintegrates. Since a clear expression to make cooperative mergers immune is conspicuously absent from both section 6 of the Clayton Act and the Capper-Volstead Act, there is no basis for failing to subject cooperative mergers to Clayton section 7 scrutiny. [\[FN213\]](#)

The Supreme Court has steadfastly refused to imply an antitrust exemption unless it is absolutely necessary to effectuate the statutory scheme. [\[FN214\]](#) Thus, the Supreme Court had no difficulty holding that the merger between a dairy cooperative and a competing proprietary processor was proscribed by section 7 of the Clayton Act. The Court's opinion in *Maryland & Virginia Milk* included a lengthy analysis that clearly stated that cooperative transactions are subject to the same rules as those of corporations. [\[FN215\]](#) Nor is there any reason to expect that the Court would imply an exemption for the merger of two cooperatives. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.* [\[FN216\]](#) the Court was careful to point out that the cooperatives accused of conspiring were one entity: 'In practical effect and in the contemplation of the statutes Clayton section 6 and Capper-Volstead it was one 'organization' or 'association' [\[FN217\]](#) and thus incapable of conspiring with itself. [\[FN218\]](#) At the same time, the Court emphasized *241 that its decision 'in no way detracts from earlier cases' holding cooperatives to the same responsibilities as corporations and narrowly construing the scope of the antitrust exemption. [\[FN219\]](#) Subsequent Supreme Court decisions have continued to confirm the cooperative exemption to the narrowest possible borders. [\[FN220\]](#)

Yet, considerable uncertainty surrounds the status of cooperative mergers. [\[FN221\]](#) Neither the Justice Department nor the Federal Trade Commission has ever challenged an inter-cooperative merger, despite staff reports arguing in favor of closer scrutiny. [\[FN222\]](#) The perception persists that inter-cooperative mergers are immune from antitrust law. [\[FN223\]](#) The immunity argument seems to rest on two grounds: (1) under Capper-Volstead's authorization of 'marketing agencies in common,' two independent cooperatives could engage in so much joint action as to be equivalent to a merger; (2) since two competing cooperatives could permissibly dissolve and the members recombine into one larger cooperative, the distinction between that form of voluntary membership growth and merger is de minimis. Essentially, a supposed de facto functional equivalence supplies the rationale for an implied immunity. However, under closer scrutiny, these arguments fail, as they conceal significant differences between merger on the one *242 hand and joint marketing or dissolution/recombination on the other.

Merger, in which one or both competing firms cease to exist and a new, single entity emerges, is the most durable and permanent method of combination and concentration. [\[FN224\]](#) It involves the comingling of assets, liabilities, members, and identities, and is exceedingly difficult to unravel once it is consummated. Joint marketing agreements, on the other hand, are limited in scope and duration. Those areas not covered by the agreements remain open to competition between the cooperatives. The agreements may be terminated, or not renewed, enabling the cooperatives to withdraw their assets and members from the agreement and to resume complete competition with relative ease. No matter how far-reaching the agreements, the individual cooperatives retain their identities, not only with regard to their customers, but via-a-vis their members as well. Moreover, even joint marketing agreements are subject to the proviso that they not be used to monopolize [\[FN225\]](#) or unduly enhance prices. [\[FN226\]](#) The substantial legal and economic differences between mergers and joint marketing agreements preclude their being treated as functional equivalents.

The argument that there is a de minimis distinction between merger and dissolution/reformation is equally frail. Most

of the mergers between dairy cooperatives have been effectuated either by majority vote of the membership or by the Board of Directors. The membership contracts are then carried over into the new cooperative, without giving individual members the opportunity to 'opt out.' Membership agreements have been vigorously enforced by the merged cooperatives. Economic theory suggests that if increasing market power were the goal of the merger, farmers would be more likely to vote in favor of it if all members would be bound to the merger. [\[FN227\]](#) Nor is opting out of the new *243 cooperative on the expiration of the membership contract a realistic alternative. In addition to taking over the supply contracts of the predecessor cooperatives, the new cooperative may have already established full supply contracts in the market. To make matters more difficult, some cooperatives have deliberately staggered membership renewal dates so that farmers on economically efficient milk routes would not be free at the same time. [\[FN228\]](#) In this respect, mergers frustrate, rather than further, the goal of voluntary farmer association.

Dissolution and recombination is neither as risk-free nor as simple as it appears on its face. Once a cooperative decides to dissolve, the individual members must make a voluntary decision to 'opt in' to the new organization. Because their membership is not automatic, members are also free to form new cooperatives, join competing cooperatives, or remain independent. In addition, there is no guarantee of sales for the new entity. Supply contracts with customers must be either cancelled or sold. In disposing of these and other assets, the dissolving cooperative must fulfill its fiduciary duty to return full value to the membership. The greater risk and difficulty of dissolution/reformation make it a considerably less attractive and less reliable means of amalgamating cooperative power than merger. [\[FN229\]](#) The same risk and *244 complication also demonstrate that the difference between the two is more than de minimis. [\[FN230\]](#) Moreover, mergers prevent fragmentation from performing its expected role as a natural check on the growth of cooperative power. [\[FN231\]](#)

Thus, there is no basis, in law or fact, to exempt cooperative mergers from Clayton section 7 scrutiny. The Secretary of Agriculture has acknowledged that section 7 liability should not place an undue burden on cooperatives. [\[FN232\]](#) This is not to say that all cooperative mergers should be forbidden. Only those which may cooperative mergers should be forbidden. Only those which may substantially lessen competition or tend to create a monopoly should be subject to sanctions. In reviewing a proposed merger, the economic factors of the commodity, the markets, and the cooperatives involved, including membership provisions, should be considered. This is analogous to the treatment given corporate mergers.

Section 7 of the Clayton Act [\[FN233\]](#) is a prophylactic statute, aimed at stopping one method of monopolization in its incipency. Section 2 of the Sherman Act [\[FN234\]](#) is used to repair the damage after monopolization has occurred or has been attempted. A merger or series of mergers that is consummated without challenge under Clayton section 7 may, nevertheless, form the basis for Sherman section 2 liability. At least one circuit has held that cooperatives may not use mergers as a means of monopolization or as a part of an anticompetitive scheme when done by coercion, fraud, or other unlawful means. [\[FN235\]](#) This argument is especially *245 compelling when the goal of the merger is not to gain greater efficiency or countervailing power, but to gain supervailing power. Mergers are simply not among the means delineated in the Capper-Volstead Act by which cooperatives may achieve their 'legitimate objects.'

Therefore, cooperative mergers should be subject to the same antitrust scrutiny as corporate mergers. Given the Supreme Court's refusal to imply antitrust exemptions where they are not expressly granted, there is no basis for asserting immunity for cooperative mergers. Analogies between cooperative mergers and permitted cooperative activities fade under close examination. Equally important, the anticompetitive potential of cooperative mergers is no less, and in light of permitted concerted activity, perhaps greater, than that of corporate mergers. The Justice Department and Federal Trade Commission should take immediate steps toward enforcing section 7 of the Clayton Act against cooperatives.

C. Undue Price Enhancement

Section 1 of the Capper-Volstead Act permits Farmers and cooperatives to engage in price-fixing. [\[FN236\]](#) The Act does this by permitting farmers to set prices jointly through a cooperative, by authorizing 'marketing agencies in common' and 'necessary contracts and agreements to effect such purposes' [\[FN237\]](#)--behavior that would otherwise be improper and constitute a per se illegal restraint of trade. [\[FN238\]](#) Section 2 [\[FN239\]](#) subjects cooperative price fixing to review by the Secretary of Agriculture under a rule of reason: these activities are permitted as long as they do not cause *246 prices to become unduly enhanced. [\[FN240\]](#) The Secretary of Agriculture is charged with responsibility for taking corrective action whenever a cooperative causes unduly enhanced prices through monopolization or restraint of trade. This section was hailed by its sponsors as an integral part of the scheme and was designed to protect consumers from any ill effects of farmer cooperation. [\[FN241\]](#) The Supreme Court has held that section 2 is a supplement to the courts'

enforcement powers under the antitrust laws. [\[FN242\]](#) Despite evidence that supervailing cooperative power has unduly enhanced prices, [\[FN243\]](#) no Secretary of Agriculture has ever taken action pursuant to this section. [\[FN244\]](#)

The Secretary's inaction can be attributed, in part, to a misapprehension of the grounds upon which action can be taken as well as a misunderstanding of the remedies available once a violation has been found. [\[FN245\]](#) A further obstacle is presented by the Secretary's failure to formulate a precise, economically determinable definition of undue price enhancement. [\[FN246\]](#) The Secretary's position is that before action can be taken under section 2, in addition *247 to unduly enhanced prices, there must be separate evidence of monopolization or restraint of trade by one or more cooperatives, [\[FN247\]](#) i.e., activity that is already beyond the purview of the section 1 exemption. The Secretary starts with the premise that 'very few, if any, cooperatives have the power to restrict entry of new producers, . . . or to restrict access to markets.' [\[FN248\]](#) He therefore concludes that 'undue price enhancement would have to rest on the other practices, most of which would be illegal whether or not they resulted in undue price enhancement.' [\[FN249\]](#) The proposed USDA monitoring process would shield entire markets from monitoring unless they exhibited such 'other practices.' [\[FN250\]](#)

Such a construction of the reach of section 2 makes it completely redundant, rather than supplementary, and is contrary to its intended scope and purpose. Congress was concerned that prices might be unduly enhanced as a result of farmers getting together and discussing and agreeing on prices, allocating territories and customers, or uniting in a single entity to market their products. [\[FN251\]](#) These are all activities which, but for section 1, would be considered acts of monopolization or restraints of trade. [\[FN252\]](#) It *248 was from this danger that legislators sought to protect the public when they gave the Secretary enforcement powers as a supplement to existing antitrust laws. [\[FN253\]](#) Thus, in order to fulfill his regulatory responsibility under the Capper-Volstead Act, the Secretary must take action whenever 'the prices charged by any of these associations are excessive.' [\[FN254\]](#) The causes of such unduly enhanced prices, sufficient to trigger action under section 2, may be a price fixing agreement between cooperatives; mergers or federations of cooperatives; marketing agreements, including joint marketing and market allocation; clauses in contracts with members or customers; even the very existence of a price setting cooperative facing little or no competition. In short, any concerted activity by farmers to affect prices restrains trade. If it unduly enhances price it should be subject to action under section 2, regardless of whether the activity rises to the level of predation or involves nonfarmers. [\[FN255\]](#)

A further impediment to effective enforcement under section 2 of the Capper-Volstead Act is the Secretary's unduly restrictive view of the remedies available. This rests on: (1) the previously described misconception of the definition of restraint of trade or monopolization to which a cease-and-desist order may apply; [\[FN256\]](#) and (2) the belief that a cease-and-desist order may not be used for structural relief against a single cooperative. [\[FN257\]](#) The very text of the statute contradicts the USDA view. If a cooperative 'monopolizes or restrains trade . . . to such an extent that prices are unduly enhanced' thereby the Secretary is required to issue an order directing such association to cease and desist from monopolization or restraint of trade. [\[FN258\]](#) The statute requires that the offending cooperative be ordered to stop doing whatever caused *249 the undue price enhancement. [\[FN259\]](#) The remedy must be tailored to address the cause of the problem. This extends to 'structural' relief as well. A merger may be dissolved, membership contracts may be canceled or modified, or a 100% market share may be relinquished if necessary to counteract unduly enhanced prices. 'Section 2 . . . has for its purpose the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture.' [\[FN260\]](#)

The third obstacle to the realization of the intended benefits of section 2 is the needlessly elusive definition of undue price enhancement. Within the same paragraph, the Secretary poses two separate tests:

[T]he standard for judging undue price enhancement turns on whether a farmer cooperative has managed to go beyond the level of equality in market power in negotiating price and trade terms. Prices to farmer cooperatives that significantly exceed the level associated with equality of market power would constitute undue price enhancement. [\[FN261\]](#)

No justification is given for the leap from 'beyond equality' to 'significantly beyond equality,' nor can one be found. The competitive price that results from equality of bargaining power, or from countervailing power, [\[FN262\]](#) is the goal of the Clayton section 6/Capper-Volstead scheme. A price that results from supervailing power is an unduly enhanced price, [\[FN263\]](#) whether or not it is 'significantly' above the competitive level.

Unduly enhanced prices have existed in the dairy industry for some time. Cooperatives with high market shares generally possess supervailing power which manifests itself in over-Order premiums on Class I milk in excess of those on Class II milk. [\[FN264\]](#) To the extent that they do not reflect the value of services provided *250 to buyers, those premiums represent the amount by which prices have been unduly enhanced. In many cases, this amount is quite high.

[FN265]

The Secretary's powers under section 2 are not exclusive. [FN266] Nor does his failure to act mean that the causes of unduly enhanced prices are immune from attack. If the statutory scheme providing the limited antitrust exemption for agriculture is viewed as a whole, a new argument emerges. Farmers were to be protected from the reach of the antitrust laws when they acted together to achieve their 'legitimate objects.' [FN267] Beyond enhancing marketing efficiency, the only legitimate object of cooperation is countervailing power. [FN268] Activities in pursuit of countervailing power, enumerated in Capper-Volstead section 1, are immune from the antitrust laws, as are any other specifically exempted activities. As long as farmers, through their cooperatives, achieve their legitimate objects, they enjoy the benefits of an antitrust exemption. But, once they engage in activities that are not in pursuit of those legitimate objects, the exemption is lost. [FN269] Section 2 of the Capper-Volstead Act makes it clear that undue price enhancement is not a legitimate object of cooperation. Hence, if cooperation results in unduly enhanced prices, the antitrust exemption ceases to operate. It follows that the Justice Department, Federal Trade Commission, and private litigants may institute actions against concerted farmer activity that achieves an illegitimate object such as supervailing power or unduly enhanced prices. This would reach behavior that, but for the exemption, would violate the Sherman or Clayton Acts, such as price fixing agreements, pooling arrangements, restrictive membership agreements, improper use of high market share--anything, in short, *251 that restrains trade if the result is prices that are unduly enhanced.

Thus, properly used, the second section of the Capper-Volstead Act provides a powerful and expeditious tool for maintaining the delicate balance of power Congress sought to achieve. At great cost to the consuming public, the Secretary of Agriculture has shirked his responsibility to supervise cooperative pricing. However, a creative approach that analyzes the statutory scheme in its totality can ameliorate undue price enhancement, the principal evil of supervailing power, and can also combat high consumer prices.

CONCLUSION

Agricultural cooperatives have played an important role in increasing economic efficiency and bettering farmers' market position. However, in some markets, cooperatives have come to wield substantial monopoly power. The causes of this include regulatory neglect and judicial misapplication of economic theory and legal analysis. Supervailing cooperative power results in unduly enhanced prices. This cost is ultimately borne by the consumer.

The time has come for a fresh look at the agricultural exemption, its goals and its limits. This re-examination must start with sound economic analysis that takes into account the realities of markets and the practical indicia of market power. A legal analysis can then be built upon that economic foundation to fulfill the intention of the exemption's framers--to foster countervailing power while preventing the attainment of supervailing power. Viewed as a whole, the Capper-Volstead and Clayton Acts state that as long as cooperatives pursue their 'legitimate objects,' they enjoy limited immunity from the antitrust laws. But there is no haven for practices that serve illegitimate objects. Undue price enhancement, stifling of competition, merging, or otherwise collaborating to attain supervailing power need not be tolerated.

Failure to administer the exemption so that cooperatives are held to the same responsibilities under the antitrust laws as are corporations can only encourage the spread of supervailing power to new agricultural markets. In addition, the Department of Agriculture must accept its responsibility to ensure that concerted farmer activity does not unduly enhance prices. The Department must develop an economically and legally sound plan for enforcement. If courts and administrators fail to prune the *252 dimensions of the exemption to its originally intended proportions, congressional intervention will be necessary to prevent consumers from paying the price of supervailing cooperative power.

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[FN1]. 'Fortune 500' is an annual directory ranking by volume of sales the largest United States industrial corporations. See FORTUNE, Apr. 29, 1985, at 316. As a prerequisite for inclusion in the Fortune 500, all companies must have derived more than 50% of their sales from manufacturing and/or mining. Sales include rental and other revenues but exclude dividends, interest, and other non-operating revenues. Id.

Other large dairy cooperatives are Associated Milk Producers, Inc., at 151 (S15) for 1982; Mid-America Dairymen, at 255 for 1984; Dairymen, Inc., at 266 (S50) for 1982; Wisconsin Dairies Cooperative, at 485 for 1982; Michigan Milk Producers Association, at 438 for 1984. The cooperative rankings followed by an (S___) ranking were ranked at that level in the Fortune Service 500; the 500 ranking is where they would have ranked in the industrial 500. Id. at 266- 85; id., May 2, 1983, at 226-54; id., June 13, 1983, at 152-73.

[FN2]. [United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 32-33 n.1 \(W.D. Mo. 1975\)](#), aff'd, [534 F.2d 113 \(8th Cir.\)](#), cert. denied, [429 U.S. 940 \(1976\)](#); FORTUNE, May 1975, at 214 (ranking for 1974).

[FN3]. For a discussion of the Federal Milk Marketing Orders, see infra notes 81-88 and accompanying text.

[FN4]. See P. M. Eisenstat, R. T. Masson, & D. Roddy, An Economic Analysis of the Associated Milk Producers, Inc. Monopoly 84-85, filed with the court in [United States v. Associated Milk Producers, Inc., 394 F. Supp. 29 \(W.D. Mo. 1975\)](#), aff'd, [534 F.2d 113 \(8th Cir.\)](#), cert. denied, [429 U.S. 940 \(1976\)](#).

[FN5]. The principal statutes granting this exemption are the Clayton Act, [15 U.S.C. § 17 \(1982\)](#), and the Capper-Volstead Act, [7 U.S.C. §§ 291- 292 \(1982\)](#). These acts will be referred to collectively as 'the antitrust exemption,' 'the agricultural exemption,' 'limited immunity,' etc. The primary antitrust laws of relevance to this paper are the Sherman Act, [15 U.S.C. §§ 1-7 \(1982\)](#) and the Clayton Act, [15 U.S.C. §§ 12-27 \(1982\)](#).

[FN6]. An agricultural cooperative is an association of farmers that jointly conducts processing, preparing for market, handling, or marketing of products. S. OPPENHEIM, G. WESTON & J. MCCARTHY, FEDERAL ANTITRUST LAWS, CASES, TEXT AND COMMENTARY 32 (4th ed. 1981).

[FN7]. For a definition and discussion of 'monopsony power,' see infra text accompanying footnote 46. See also R.C. LIPSEY & P.O. STEINER, ECONOMICS 345 (5th ed. 1978).

[FN8]. 'Countervail' is defined as '[t]o counterbalance; to avail against with equal force or virtue; to compensate for, or serve as an equivalent of or substitute for.' BLACK'S LAW DICTIONARY 316 (5th ed. 1979) (emphasis added). When the power relationship moves beyond balance to one in which the previously weaker party is now dominant, that party can be said to have 'supervailing' power. See NEW CENTURY DICTIONARY 1898 (H. Emery & K. Brewster eds. 1963) (prefix 'super' is defined as 'over, beyond, exceedingly, to excess').

[FN9]. It has been argued by some commentators that, while a monopoly problem may exist, the current statutory framework does not permit a judicial remedy. See, Note, Trustbusting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives, 61 VA. L. REV. 341, 368 (1975) (analysis of possible limits on antitrust exemptions with conclusion that under the most conservative interpretation of antitrust laws, such laws do not reach anticompetitive behavior in agricultural sector). See also 33 A.B.A. ANTITRUST L.J. 1, 7-13 (1967) (general view of exemptions).

[FN10]. For a discussion of the pertinent legislative intent behind the Clayton and Capper-Volstead Acts, see infra notes

21-41 and accompanying text.

[\[FN11\]](#). For a discussion of undue price enhancement, see *infra* notes 59-66 and accompanying text.

[\[FN12\]](#). See Note, *supra* note 9, at 352-54. See also R. FONES, J. HALL & R. T. MASSON, MILK MARKETING: A REPORT OF THE U.S. DEPARTMENT OF JUSTICE TO THE TASK GROUP ON ANTITRUST IMMUNITIES 30-44 (1977) (discussing history of problems facing farmers in early 1900's); E. GAUMNITZ & O. REED, SOME PROBLEMS INVOLVED IN ESTABLISHING MILK PRICES 20-27 (U.S. Dep't of Agriculture, Agricultural Adjustment Administration 1937) (tracing development of milk marketing cooperatives as response to producers' difficulties in assembly and distribution of milk).

[\[FN13\]](#). See A. KORPELA, FEDERAL FARM LAW MANUAL 263-64 (1956) (deception was common in farm products markets).

[\[FN14\]](#). E. GAUMNITZ & O. REED, *supra* note 12, at 20-23 (discussing segregation of milk-production and milk-distribution units); A. KORPELA, *supra* note 13, at 3. Korpela states that individual farmers were very dependent on far-off city markets. *Id.*

[\[FN15\]](#). For a further discussion of unscrupulous tactics used by dairy handlers and other agricultural 'middlemen,' see E. GAUMNITZ & O. REED, *supra* note 12, at 20-23 (farmers need equal bargaining position); Harris, Classified Pricing of Milk: Some Theoretical Aspects, U.S. DEPT OF AGRICULTURE, AGRICULTURE MKT. SERV. TECH. BULL. NO. 1184 20-23 (1958) (increased scale of middlemen gave them monopsony power, forcing farmers to desperately accept extremely low prices); Knapp, Capper-Volstead Impact on Cooperative Structure, U.S. DEPT OF AGRICULTURE, FARMER COOPERATIVE SERV., INFORMATION NO. 97 at 3 (1975) (farmers need market power to protect themselves from big business).

For a discussion of the inadequacy of legal remedies for contractual disputes, see Knoeber, An Alternative Mechanism to Assure Contractual Reliability, 12 J. LEGAL STUD. 333 (1983). For a general discussion of contractual reliability, see Klein, Crawford & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & ECON. 297 (1978).

[\[FN16\]](#). See E. G. NOURSE, THE LEGAL STATUS OF AGRICULTURE COOPERATION 11-24 (1928) (analysis of producers' goals sought to be achieved through cooperatives).

[\[FN17\]](#). See L. SULLIVAN, ANTITRUST 219-20 (1977) (restraints of trade are contracts or combinations that tend or are designed to eliminate or stifle competition).

[\[FN18\]](#). See e.g., [Ford v. Chicago Milk Shippers' Ass'n](#), 155 Ill. 166, 39 N.E. 651 (1895) (purpose of arrangement between corporation and stockholders was to fix prices and control amount of milk shipped); [Reeves v. Decorah Farmer's Cooperative Soc'y](#), 160 Iowa 194, 140 N.W. 844 (1913) (so long as competition is regarded as life of trade, all combinations, contracts, arrangements, or agreements made to stifle it are regarded as unlawful).

[\[FN19\]](#). See [Maryland and Virginia Milk Producers Ass'n v. United States](#), 362 U.S. 458, 464 (1960) (noting passage by state legislatures of legislation authorizing existence of agricultural cooperatives); E. G. NOURSE, *supra* note 16, at 51-72; Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 ROCKY MTN. L. REV. 181, 191 n.29 (1948) (collecting state statutes declaring that agricultural cooperatives are not in restraint of trade).

[\[FN20\]](#). See, e.g., [Connolly v. Union Sewer Pipe Co.](#), 184 U.S. 540, 556- 65 (1902) (holding Illinois statute granting

antitrust exemption to 'agriculturalists [and] live stock raisers' to be repugnant to fourteenth amendment equal protection); In re [Grice, 79 F. 627, 645-50 \(N.D. Tex. 1897\)](#) (state statute granting exemption from state antitrust legislation to 'agricultural products in hands of original producer and raiser' held violative of fourteenth amendment equal protection), rev'd on other grounds, [Baker v. Grice, 169 U.S. 284 \(1898\)](#). See also [Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 142-43, 62 So. 542, 549 \(1913\)](#) (public policy violated by agricultural contract restraining trade); [Ford v. Chicago Milk Shippers' Ass'n, 155 Ill. 166, 178, 39 N.E. 657, 651 \(1895\)](#) (conspiracy to regulate milk prices not exempt); [Reeves v. Decorah Farmer's Cooperative Soc'y, 160 Iowa 194, 205, 140 N.W. 844, 848 \(1913\)](#) (exceptions to antitrust laws not applicable).

[FN21]. [15 U.S.C. §§ 12-27 \(1982\)](#).

[FN22]. Id. [§ 17](#). The full text of § 6 reads:

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

Id.

[FN23]. See H.R. REP. NO. 627, 63d Cong., 2d Sess. 16 (1914). The report provides:

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

Id. See also S. REP. NO. 698, 63d Cong., 2d Sess. 12 (1914).

[FN24]. [Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 \(1960\)](#) (emphasis added). The literature of the early 1900's dealing with the growth of the cooperative movement is replete with references to the need to bargain collectively and share market information in order to countervail the power of the middlemen. It was thought that by developing efficient marketing and distribution systems, the return to the farmer could be raised at the same time that the price to the consumer could be lowered. E. G. NOURSE, *supra* note 16, at 15-16; E. GAUMNITZ & O. REED, *supra* note 12, at 20- 26. Gaumnitz and Reed stated that:

[t]hemajor points stressed seem to be that consumers should be charged reasonable prices and that farmers should receive fair prices, depending on market conditions. Much emphasis was placed on the inequality of the bargaining power of producers in negotiations with distributors, and on the belief that cooperatives could render certain services more efficiently, could by joint action promote the use of their product, and the like.

Id. at 25.

[FN25]. In construing the applicability of § 6 of the Clayton Act to a labor organization's secondary boycott, the Supreme Court stated:

[T]here is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. Any by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.

[Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469 \(1921\)](#) (emphasis added). Accord [Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 805 \(1945\)](#) (Court declined to interpret Clayton Act as manifesting congressional purpose to exempt labor unions from Sherman Act).

The Supreme Court expressly approved the application of this reasoning to agricultural organizations. See [Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 464-65 \(1960\)](#). See also [United States v. King, 250 F. 908 \(D.](#)

[Mass. 1916](#)). The district court in King stated that blacklisting and secondary boycotts cannot 'be held to be a lawful carrying out of the legitimate objects of such an association . . . [T]hey are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.' *Id.* at 910.

[\[FN26\]](#). The legislative debates relating to the Capper-Volstead Act exhibit this concern. For example, Representative Hersman stated that 'the farmer of today finds that his associations must have capital stock in order to handle his business most effectively.' 59 CONG. REC. 8025 (1920). A House report provided:

Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products . . . Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members.

H.R. REP. NO. 24, 67th Cong., 1st Sess. 2 (1921). As one supporter stated: Businessmen 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. 61 CONG. REC. 1033 (1920) (Remarks of Rep. Volstead). In addition, while the legality of nonprofit associations was assumed, the status of for-profit cooperatives remained unclear. Knapp, *supra* note 15, at 3.

[\[FN27\]](#). Some commentators have characterized the problem as stemming from the fact that § 6 of the Clayton Act was intended chiefly as an exemption for labor. They claim the exemption for agriculture was added as an afterthought, without consideration of the differences between cooperatives and unions. See, e.g. Lemmon, *The Capper-Volstead Act--Will It Ever Grow Up?*, 22 AD. L. REV. 443, 444 (1970) (little recognition given to differences between unions and cooperatives); Note, *supra* note 9, at 354 (broader implications of agricultural exemption largely left unnoticed by Congress in its enactment of § 6 as primarily a labor law). Yet, E.G. Nourse, writing in 1928, shortly after the Capper-Volstead Act was passed, stated that there was considerable public and congressional awareness of the for-profit nature of most existing cooperatives. E.G. NOURSE, *supra* note 16, at 248. The Clayton Act exemption was purposely limited to 'truely co-operative organizations instituted for the purpose of mutual help, without capital stock, and . . . not conducted for profit.' *Id.* While it was, perhaps, not as extensive an exemption as the farmers wanted, Nourse considered it 'a tangible victory to have secured an affirmative statement.' *Id.* In any event, clarification of the protected activities was recognized as desirable:

While it seems evident that Congress intends that the farmer shall not be prosecuted for acting collectively in the marketing of his product, yet the Federal Law is such that these prosecutions may be threatened or actually brought against him. The farmer does not relish the possibility of being prosecuted for an alleged violation of law, even though he feels fairly certain that he would not be convicted.

62 CONG. REC. 2059 (1922) (statement of Sen Capper). '[I]t is rather uncertain what these farm organizations can lawfully do or what are 'the legitimate objects thereof.'" 59 CONG. REC. 8023 (1920) (statement of Rep. Swope).

[\[FN28\]](#). See 7 U.S.C. §§ 291-292 (1982). [Section 1](#) of the Act, entitled 'Authorization of [Agricultural Products Producers] Associations; powers generally,' provides:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

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

And in any case to the following:

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

[7 U.S.C. § 291 \(1982\)](#).

[FN29]. [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 466 (1959) (quoting Capper-Volstead Act, 7 U.S.C. § 291 (1982)). See also [Case-Swayne Co. v. Sunkist Growers, Inc.](#), 389 U.S. 384, 391 (1967) (Capper-Volstead Act was intended to clarify exemption for agricultural organizations and to extend it to cooperatives having capital stock); [Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.](#), 370 U.S. 19, 28 (1962) (Capper-Volstead Act sets out this immunity in greater specificity: persons engaged in production of agricultural products may act together with or without capital stock); Hufstедler, A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed, 22 AD. LAW REV. 455, 458-59 (1970) (no question that Act was intended to extend exemptions of Clayton Act, § 6, to cooperative corporations with capital stock).

[FN30]. 7 U.S.C. § 292 (1982). Section 292 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. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

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

Id.

[FN31]. Many legislators doubted that agricultural cooperatives would be able to manipulate the supply or price of their products: 'But 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.' 62 CONG. REC. 2059 (1922) (remarks of Sen. Capper). Independents, new entrants, world markets, and substitute products were expected to provide additional competition against the cooperative. E.G. NOURSE, *supra* note 16, at 429; Note, *supra* note 9, at 357 (discussing limits on abuse of power).

[FN32]. See H.R. REP. NO. 24, 67th Cong., 1st Sess. 3 (1921). The House report provides:

In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.

Id. See also 61 CONG. REC. 1033 (1921) (statement of Rep. Volstead) ('It is objected in some quarters that this repeals the Sherman Act as to farmers. That is not true any more than it is true that a combination of two or three corporations violates the act. Such combinations may or may not monopolize or restrain trade.').

[FN33]. [7 U.S.C. § 292 \(1982\)](#). For the text of [§ 292](#), see supra note 30. As the legislative history points out, this section gives [t]he Secretary of Agriculture [the] power to prevent these organizations from exploiting the public. . . . But in the event that any such association should monopolize or restrain trade so as to unduly enhance the price of any agricultural product ample provision is made in the bill to protect the public. . . . In the event an association fails to abide by his judgment it can not only be hailed into court but a temporary injunction can at once be issued against it. H.R. REP. NO. 24, 67th Cong., 1st Sess. 2-3 (1921).

[FN34]. [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 462-63 (1959) (court rejected contention that § 2 of Capper-Volstead was intended to give Secretary of Agriculture primary jurisdiction, and thereby exclude any prosecutions at all under Sherman Act); [United States v. Borden Co.](#), 308 U.S. 188, 206 (1939) (no ground for saying that limited procedure is substitute for provisions of Sherman Act, or permits the sort of combination and conspiracies charged unless Secretary of Agriculture takes action); [Sunkist Growers, Inc. v. Federal Trade Comm'n](#), 464 F. Supp. 302, 309-10 (C.D. Cal. 1979) (court rejected proposition that Secretary of Agriculture's power to issue cease and desist orders was by itself sufficient means of regulation).

[FN35]. The legislative history explains this: Briefly, [§ 2] gives the Secretary of Agriculture power to prevent these associations from exploiting the public. . . . This bill directs the Secretary of Agriculture to supervise these associations . . . determining whether the prices charged by any of these associations are excessive. That is one of the duties that somebody must perform to safeguard the public. H.R. REP. NO. 24, 67th Cong., 1st Sess. 2-3 (1921).

[FN36]. See S. OPPENHEIM, G. WESTON & J. McCARTHY, supra note 6, at 19. Per se violations are agreements that are deemed inherently anticompetitive. Where such an agreement exists, there is no need for a court to determine if it unreasonably restrains trade. Id.

[FN37]. See [Standard Oil Co. v. United States](#), 221 U.S. 1 (1911) (rule of reason prohibits unreasonable restraints of trade and this must be judged by examining alleged restraints and their actual effect on competition). For a discussion of the relationship between the rule of reason and the per se doctrine, see L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 72 (1977).

[FN38]. Congress was well aware of the rule of reason and its application to restraint of trade and monopolization at the time it passed the Capper-Volstead Act. In presenting the bill to the Senate, Senator Sterling said that it 'is exactly in conformity with the principles laid down in the opinion of Chief Justice White [in [Standard Oil Co. v. United States](#), 221 U.S. 1 (1911)]. The bill conforms to the rule of reason, both in regard to contracts in restraint of trade and in regard to attempts to create a monopoly.' 62 CONG. REC. 2219 (1922) (remarks of Sen. Sterling).

[FN39]. E.G. NOURSE, supra note 16 at 260-61 (discussing congressional debate on bill).

[FN40]. R. FONES, J. HALL & R.T. MASSON, supra note 12, at 75 (discussing Capper-Volstead purposes).

[FN41]. See 62 CONG. REC. 2058 (1922) (statement of Sen. Capper). The Act protects consumers in case farmer marketing associations attempt to unduly enhance prices. Id. The Act also addresses the problem of farmers who are receiving low prices for their products. Id. at 2059.

[FN42].

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
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[FN43]. See E. GELLHORN, ANTITRUST LAW AND ECONOMICS 67-83 (1981). Market power does not exist in the perfectly competitive market because consumers and sellers alike are only price-takers in such a market. *Id.* at 53.

[FN44]. See E. M. SINGER, ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 63-72 (1968). Monopoly power is the power to fix prices, exclude competitors, or control the market within a geographic area. *Id.* at 63. See also *infra* note 47.

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[FN47]. In economics, market power or monopoly powers is the ability of a seller to influence the price of its product, e.g., any slope on a demand curve. Pure competition is the only market structure in which sellers have no market power. F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 11 (2d ed. 1980). Market power in vertical supply situations arises in essentially three contexts. One is the structural monopoly/monopsony context with which antitrust law deals. The second context is in markets in which 'ex post small numbers opportunism' may occur--where there are many firms, but after individual agreements are made, individual firms may take advantage of each other in violation of the agreed upon terms. The third context is the situation in which, because of the problems occasioned by one of the two previous situations, firms find it advantageous to vertically merge. Klein, Crawford, & Alchian, *supra* note 15, at 297-98 (quoting and citing O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 26-30 (1975)).

[FN48]. E. H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (8th ed. 1965). The thesis of this book is that both monopolistic and competitive forces combine to determine prices, and therefore the hybrid theory of monopolistic competition offers an illuminating approach to the study of the price system.

[FN49]. See R. C. LIPSEY & P. O. STEINER, *supra* note 7, at 290. A patent is a grant of some privilege, property, or authority by a government. *Id.* In the United States it is an exclusive grant to market, produce, and use for seventeen years. 35 U.S.C. § 154 (1982). Patent laws are thought to provide an incentive for innovation by granting a temporary monopoly to the innovator, thereby lengthening the short-run period during which super-normal profits can be earned. R. C. LIPSEY & P. O. STEINER, *supra* note 7, at 290.

[FN50]. This presumes that the state of competition in other markets remains unaltered and that only one side, either buyer or seller, is given power. There has been some confusion in the literature because some authors alter competition in more than one market at a time. See, e.g., Fellner, 'Competitive' Output in Bilateral Monopoly, 64 Q.J. ECON. 648-50 (1950); Morgan, Reply, 64 Q.J. ECON. 650-52 (1950). Scherer discusses this effect on consumers under two different (but unaltered) states of processor final product competition. F. M. SCHERER, *supra* note 47, at 299-301, 306-07 (AVP on page 300 is equal to firm MRP in long run equilibrium; MRP on page 300 is curve marginal to that).

[FN51]. For a discussion of the relationship between consumer prices and producer prices in connection with

countervailing power, see *infra* note 54.

[FN52]. For a discussion of monopsony power and its relation to consumer prices, see *infra* note 54.

[FN53]. Industrial contracts often specify both price and quantity. In a bilateral monopoly, such quantity contracts should, when practical, be set at the quantity for which market cost equals marginal revenue product ($MC = MRP$), even if there is supervailing power. See, e.g., F. M. SCHERER, *supra* note 47, at 300; Machlup & Taber, *Bilateral Monopoly, Successive Monopoly, and Vertical Integration*, 27 *ECONOMICA* 101 (1960). For a further discussion of the issue of practicality of contracts, see O. WILLIAMSON, *supra* note 47.

This is not true in agriculture. Nicholls noted that for bilateral monopoly in agriculture the industrial type of quantity contract is less likely to occur. See W. NICHOLLS, *IMPERFECT COMPETITION WITHIN AGRICULTURAL INDUSTRIES* 166-78 (1941). See also Nicholls, *Book Review*, J. POL. ECON. 82 (1943) (reviewing W. NICHOLLS, *A THEORETICAL ANALYSIS OF IMPERFECT COMPETITION WITH SPECIAL APPLICATION TO THE AGRICULTURAL INDUSTRIES* (1941) (extension of theory of imperfect competition)). Essentially, aggregation of sellers into a collective organization, e.g., a cooperative or a union, will generally result in agreements which quote price and then leave buyers and sellers to transact as much as they wish, or can, at that price. N.B. A 'full supply' contract is not a quantity contract of the type mentioned here because it does not specify total quantity, but merely the proportion of total quantity that will be obtained from some source. Further, if there are oligopoly or oligopsony elements in a market (rather than pure monopoly and monopsony), again fixed quantity contracts are less likely. See Machlup & Taber, *supra* at 112. Under these conditions it is generally accepted that if the agreed price is less than the competitive price, the quantity transacted will be what the sellers are willing to supply at this price (i.e., on the supply curve). Similarly, if price is above the competitive price, the quantity will be determined from the demand curve. Much of what has been called the 'indeterminacy' (see, e.g., F. M. SCHERER, *supra* note 47, at 299) of bilateral monopoly depends upon what assumptions are involved; what power relationships are in other markets and whether these are being changed in the model (see *supra* note 50); what information the transactors have (see *supra* note 50); or whether agreements are price quotes, or also have specified quantity terms. For agriculture, and dairy in particular, the typical arrangement is of the price quote variety, hence part of the 'indeterminacy' is eliminated. The remaining indeterminacy is primarily what price will be selected, i.e., countervailing or supervailing, which, in turn, will determine quantity.

[FN54].

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[FN55]. This is another area in which the literature evidences confusion because different authors have addressed different problems, often with implicit assumptions in their analyses. For a comprehensive review of the literature up to 1960, see Machlup & Taber, *supra* note 53. Machlup and Taber even refer to what is here called a 'competitive' result as a 'monopoly' result. *Id.* at 111. This follows a semantic jump from a mathematically equivalent problem and is justified in their context by the assumption that the input buyer is a monopolistic seller for final product. Hence, once the seller has countervailed, the buyer becomes only a 'simple monopolist' rather than one which exploits monopsony as well. This distinction based upon other markets is a source of semantic confusion between Fellner, *supra* note 50, and Morgan, *supra* note 50. Scherer reserves the term 'competitive' for removal of not only all input buyer and seller power ($MRP = MC$) but also the removal of the buyer's final product market power. F. M. SCHERER, *supra*, note 47, at 300, 306. He uses the term 'countervailing' where $MRP = MC$. *Id.* The discussions in Fellner, *Prices and Wages under Bilateral Monopoly*, 61 *Q.J. ECON.* 503, 527 (1947) (how bilateral monopoly affects price and wages); Morgan, *Bilateral Monopoly and the Competitive Output*, 63 *Q.J. ECON.* 34 (1949); Fellner, *supra* note 50; and Morgan, *supra* note 50, center on which term should apply. If one considers the effects of competition in an input market and varies only the degree of competition in that market alone, then the condition $MC = MRP$ reflects competitive equilibrium in that market. Scherer's use of AVP follows Morgan. See F. M. SCHERER, *supra* note 47, at 306-07 (Scherer's AVP is equal to firm MRP). Put in another fashion, $MC = MRP$ will occur if neither buyer nor seller tries to restrict output or purchases in order to induce the other party to alter price (i.e., if they both act as 'price takers').

[\[FN56\]](#). For a definition of supervailing power, see *supra* note 8.

[\[FN57\]](#). When sellers impose higher prices, but prices remain below P_c , buyers will be willing to purchase as much as they can at such prices; their demand at these prices exceeds the available supply. However, if the sellers impose a price above P_c , buyers do not demand as much as Q_c at these prices. As buyers buy less product, they will have less final product to sell to consumers, driving the consumer price up as well. For a discussion of the relation of demand and price, see *infra* note 64 and accompanying text. For a discussion of the relationships discussed in this footnote, see *supra* note 54.

[\[FN58\]](#). See 62 CONG. REC. 2059 (1922) (statement of Sen. Capper) (noting interrelation of price, supply, and demand).

[\[FN59\]](#). E. G. NOURSE, *supra* note 16, at 160-63 (cooperatives attempted to control supply).

[\[FN60\]](#). For a discussion of the congressional view on this subject, see *supra* note 31 and accompanying text.

[\[FN61\]](#). E. G. NOURSE, *supra* note 16, at 163-64.

[\[FN62\]](#). Nor has a formulation been developed through litigation. The Secretary of Agriculture has yet to bring an action against a cooperative for undue price enhancement. Since the passage of the Capper-Volstead Act, there have been only seven United States Department of Agriculture (USDA) investigations of possible undue price enhancement. A. C. MANCHESTER, *THE STATUS OF MARKETING COOPERATIVES UNDER ANTITRUST LAW* 47 (U.S. Dep't of Agriculture, Economic Research Serv. 1982); Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623, 1634-35 (1980).

[\[FN63\]](#).

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[\[FN65\]](#). Cf. 1979 REPORT, *supra* note 63, at 8 (problem of determining when prices have been unduly enhanced will be neither more nor less complicated than use of any other competitive price norm, A. C. MANCHESTER, *supra* note 62, at 25 (undue price enhancement should be judged under rule of reason).

[\[FN66\]](#). For a discussion of the complexities involved in proving a Sherman Act violation, see E. GELLHORN, *supra* note 43, at 233-40.

[\[FN67\]](#). Some commentators have suggested that federal regulation of agriculture, via governmentally sanctioned, industry-wide restrictive agreements, may have an even greater price enhancing effect than private anticompetitive behavior by cooperatives. See, e.g., A. Masson, *The Economic Effects of Marketing Orders*, in F. LIPSON & C. BATTERTON, *STAFF REPORT ON AGRICULTURAL COOPERATIVES* 152 (Bureau of Competition, Federal Trade Commission 1975) (governmental regulation facilitates establishment and maintenance of cooperative dominance and

inflated prices). Regardless of the desirability of regulatory overhaul, anticompetitive activity carried on under the cover of the marketing orders can, and should, be prosecuted under the antitrust laws. *Id.* Cf. [Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.](#), 338 F. Supp. 1019, 1023-24 (S.D. Tex. 1972) (activities designed to achieve monopoly position even if under cover of federal milk order may still violate antitrust laws).

[FN68]. By 1937, typical sanitary regulations covered not only minimum chemical requirements and maximum bacteria count, but also the type of barn flooring, milk-house construction, manure disposal, inoculation of herds, cooling temperature, etc. E. GAUMNITZ & O. REED, *supra* note 12, at 122; Harris, *supra* note 15, at 12-18.

[FN69]. Only Grade A milk, milk which met the sanitary standards, could be put to fluid use. Grade B milk could only be used in manufacturing.

[FN70]. R. FONES, J. HALL & R.T. MASSON, *supra* note 12, at 29. Under 'blend price' payment plans, buyers were charged different prices based on the milk's actual use. The cooperative collected all milk payments and remitted to each Grade A farmer the average (blend) per gallon (or hundred weight, cwt.) price, regardless of the ultimate disposition of the particular farmer's milk. Under 'base-surplus' systems, each farmer was allocated a quota of milk production for which the Grade A price would be paid. Any amount produced in excess of the 'base' received the lower Grade B price. H.R. DOC. NO. 152, 74th Cong., 1st Sess. 2-29 (1935). For an overview of the development of classified milk pricing, see R. FONES, J. HALL & R.T. MASSON, *supra* note 12, at 25-30; E. GAUMNITZ & O. REED, *supra* note 12, at 27.

[FN71]. See A. KORPELA, *supra* note 13, at 15, 18 (demand for milk and dairy products contracted dramatically).

[FN72]. See J. BLACK, *THE DAIRY INDUSTRY AND THE AAA* 127 (1935) (recounting Chicago milk strike of 1934); Harris, *supra* note 15 at 12-13; Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J.L. & ECON. 51, 52 (1967) (setting forth willingness of producer groups to employ milk strikes and violence to affect unstable milk prices); D.L. Baumer, *Federal Regulation of the Dairy Industry: Costs, Benefits, and Legal Constraints*, 11 (Ph.D. dissertation, 1980) (available at Main Library, University of Virginia) (citing instances of milk strikes, lockouts, and violence in the 1930's as a result of milk price instability).

[FN73]. Agricultural Marketing Agreements Act, ch. 296, § 3, 50 Stat. 248 (1937) (codified at [7 U.S.C. §§ 671-674 \(1982\)](#)). Many of the features of the AMAA had been contained in The Agricultural Adjustment Act of May 12, 1933, Pub. L. No. 10, 48 Stat. 31 (1933) (codified as amended at [7 U.S.C. §§ 601- 624 \(1982\)](#)). The AMAA also provides for the arbitration, with the consent of the parties, of disputes concerning milk if the Secretary of Agriculture finds that the policy of the AMAA (restoring orderly marketing) would be adversely affected by such disputes. [7 U.S.C. § 641 \(1982\)](#). The AMAA further leaves unaffected those marketing agreements, licenses, orders, and other provisions enacted under the Agriculture Adjustment Act. *Id.* §§ 673-674.

[FN74]. See [7 U.S.C. § 608 \(1982\)](#) (breakdown of federal Milk Orders and procedures for determining classification of milk and milk products). More classes are sometimes designated, but all non-Class I milk is treated similarly and often called Class II milk. See *infra* note 77.

[FN75]. For a discussion of the blend price and its effect upon the marketplace, see *infra* notes 78-80 and accompanying text.

[FN76]. See E. GELLHORN, *supra* note 43, at 54-55.

[FN77]. When demand is inelastic, raising price or reducing quantity will raise total revenues because the percentage

increase in price exceeds the percentage decrease in quantity sold. When demand is elastic, manipulation of price or quantity has the opposite effect. The demand for Class II milk will have greater elasticity: (a) the more consumers' demand for manufactured milk products is elastic; (b) the greater the supply and supply elasticity of Grade B milk; and (c) the more important price supports are in determining milk prices. See Ippolito & Masson, *The Social Cost of Government Regulation of Milk*, 21 J.L. & ECON. 33 (1978). On a national basis, Class II demand may not always be elastic. But local Class II demand may be elastic due to inter-local competition of butter and cheese products. Furthermore, nationally, all blend prices can rise even if Class II demand is not elastic. All that is required is that the milk diverted from Class I have a lower marginal revenue in Class I than in Class II, a condition which unambiguously exists. It should also be noted that what is referred to here as Class II milk has, at times, been referred to or sub-designated as Class III, Class IV, etc. All experts agree, however, that non-Class I milk is, in effect, closer to Class II than Class I. For consistency and ease of explication, only the Class I/Class II distinction will be made here. For contrasting views on classified pricing, see Harris, *supra* note 15; Ippolito & Masson, *supra*; Kessel, *supra* note 72.

[FN78]. E. GAUMNITZ & O. REED, *supra* note 12, at 29-31; Harris, *supra* note 15, at 5.

[FN79]. For a discussion of the power of dairy cooperatives to control supply in current markets, see *infra* notes 134-72 and accompanying text.

[FN80]. E. GAUMNITZ & O. REED, *supra* note 12, at 108-26. Gaumnitz and Reed were two agricultural economists who worked on the institution of the Federal Order classified pricing system. They were careful to avoid the pejorative, using terms such as 'complex competition' in place of 'monopolistic competition,' *id.* at 75 n.84, and 'arbitrary pricing' instead of 'monopoly pricing,' *id.* at 108, or our 'supervailing pricing.' Gaumnitz and Reed's argument is developed over the entire book and demonstrates that when Grade A milk supply expands beyond demand plus 'necessary reserve,' buyer power has been more than countervailed; Class I prices are too high for the public interest; and the Government should find it imperative to reduce prices because of supplies 'from new sources.' See *id.* at 108-26, 129, 161, 177; see also *id.* at 131 n.24, 158 (setting forth some caveats).

[FN81]. Whether a handler (buyer) is subject to one Order or another depends on the area in which it makes most of its Class I sales. Within an Order, a minimum Class I price is prescribed which partially takes into account the cost of transporting milk from logical alternative sources.

[FN82]. 'Allocation provisions' determine the minimum prices to be paid when a buyer purchases bulk milk from handlers regulated by other Orders. Roughly, a buyer must pay the prevailing Federal Order prices at the location of the other handler plus transport costs (and any cooperative premium and any seller profit for this milk). If the milk is allocated as Class I milk, the Federal Order price at the originating handler's location may be lower than at the buyer's location. This price difference will be at least offset, however, by transportation costs, making the federally required cost of the imported Class I milk at least as high as that of local Class I milk unless the selling handler volunteers to take a loss on the shipment. Milk allocated to Class II will generally not have a lower price in any other location, so the federally required payment is no lower, whereas transport costs must be added. Thus, the federally required cost of Class II milk from outside the buyer's Order will be substantially greater than for local Class II milk (again, unless the seller volunteers to take a loss on the sale). The 'allocation provision' sets the maximum amount eligible for the preferred Class I designation. Often, much of the milk is 'down allocated' to the more costly Class II. A similar provision applies for milk from a handler who is not regulated under any federal order. Under some conditions a buyer can avoid the allocation provisions by purchasing directly from distant farmers. However, as a practical matter, milk that is to be shipped any great distance (e.g., more than 150 or 200 miles, depending on time, terrain, temperature, etc.) is generally best 'reloaded' from farm pickup tankers through refrigeration stations to over-the-road haulers. In practice, reloading will generally subject the milk to point-of-origin regulation, and hence to allocation provisions.

[FN83]. 'Compensatory payments' are payments that must be made to producers within an Order for any Class I milk imported from other sources not regulated by a Federal Order. Thus, it is a kind of 'import tax.' Included in this category are areas in which there is no regulation and areas in which there is state regulation but no federal regulation.

[FN84]. The allocation and compensatory payments provisions combine to operate as a 'tax' on imported milk. The proceeds of the 'tax' are redistributed in a fashion that discriminates in favor of the imports of any large cooperatives within the Order. The proceeds of the compensatory payments are distributed to the producers in proportion to their market shares within the Order. Thus if a cooperative with 90% of the market in an Order imports milk, 90% of the 'tax' it pays gets remitted to it; a small cooperative with only 10% of the market gets back only 10% of the 'import tax' it pays; a handler pays the 'tax' and gets nothing back. The implicit tax on outside milk that is allocated 'down' to Class II converts to an implicit subsidy as local milk is 'promoted' to Class I.R.T. Masson & Eisenstat, *Welfare Impacts of Milk Orders and the Antitrust Immunities for Cooperatives*, 62 AM. J. AGR. ECON. 270 (1980). For a more detailed discussion of the mechanics by which milk produced outside a Federal Order is subject to discrimination, see J. HAMMOND, B. BUXTON & C. THRAEN, *POTENTIAL IMPACTS OF RECONSTITUTED MILK ON REGIONAL PRICES, UTILIZATION, AND PRODUCTION* 20-23 (Agricultural Experiment Station, Univ. of Minn. 1979) (discussing pricing orders and possible discrimination); AGRICULTURAL MKT. SERV., DAIRY DIV., U.S. DEPT OF AGRICULTURE, *SUMMARY OF MAJOR PROVISIONS IN FEDERAL MILK MARKETING ORDERS* 8 (1981). Other Federal Order provisions, such as 'supply plant qualification' requirements, 'diversion' requirements and 'point of pricing provisions,' complement the provisions discussed above in limiting the availability of outside milk as a reasonable alternative for processors.

[FN85]. See supra note 84. Importation may also occur where, through monopoly power or shortages, the local Class I and Class II prices are so high that they exceed the cost of outside purchases plus the 'tax' plus transport. It may also occur where a processor is cut off by local producers and is forced to look outside the Order to meet its sales commitments. See *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608 (M.D. Ga. 1981) (defendant milk marketing association refused to sell to plaintiff processor, thereby forcing plaintiff to purchase milk outside Order), aff'd, 715 F.2d 520 (11th Cir. 1983), cert. denied, 465 U.S. 1051 (1984).

[FN86]. The purpose of the Federal Order system is to encourage regular and stable local supply relationships between farmers and processors. It is designed to keep processors from pressuring producers to cut their prices under the threat of importing milk from distant markets and to keep distant producers from dumping their occasional surpluses into the Order and depressing prices.

[FN87]. 7 U.S.C. § 608c(12) (1982) (few issues upon which block voting is not permitted). Today, the largest cooperative in almost every Order has in excess of 50% of the market--a majority of the votes. For a discussion of how some cooperatives have used the Federal Order system to their advantage, see A. Masson, supra note 67, at 152-56.

[FN88]. Two factors tend to moderate barriers in some areas or at some times: (1) large supplies of milk located within easy shipping distance (e.g., less than 150 miles) of more than one Federal Order market center; (2) short supplies of local Grade A milk (regulatory barriers are intentionally lowered and the cost disadvantage is not great when over 95% of the local milk is used for Class I). A third factor in some areas is surpluses of state-regulated milk under base-surplus plans in nearby locations. Where these supplies are large and persistent however, additional regulatory barriers may be created. For a further discussion of geographic markets, see infra notes 105-18 and accompanying text.

[FN89]. Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1054 (1949) (codified as amended at 7 U.S.C. §§ 1421-1468 (1982)). See S. REP. NO. 1130, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S. CODE CONG. & AD. NEWS 2407 (purpose of Act is to stabilize prices of agricultural commodities).

[FN90]. See 15 U.S.C. § 714 (1982). The parity price is meant to give the farmer the same purchasing power he had during some chosen base period.

[FN91]. Id. The Commodity Credit Corporation (CCC) was formed for the purpose of stabilizing, supporting, and protecting farm income and prices.

[FN92]. See A. KORPELA, *supra* note 13, at 3 (today's farmers are much more efficient due to better technology).

[FN93]. In addition, a large cooperative does not suffer much deterrence in the face of the 'tax' on inter-order shipments. For a further discussion of inter-order barriers, see *supra* notes 82-88 and accompanying text.

[FN94]. For a discussion of cooperatives' market power, see *infra* notes 128- 71 and accompanying text.

[FN95]. Market power is power over price and, if wielded, gives high margins: $(\text{Price}-\text{Marginal Cost})/\text{Price}$. Market power is demonstrated if one can prove that $(P-MC)/P$ is high and sustained. In economic terms, this is the best evidence of market power, and where present, should moot the need for indirect evidence such as market behavior and market share. See R.A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 125 (1976). As stated by Posner: If we knew the elasticity of demand facing a group of sellers, it would be redundant to ask whether the group constituted an economically meaningful market. The effect of other sellers on the ability of the members of the group to collude effectively would be automatically registered. . . . It is only because we lack confidence in our ability to measure elasticities . . . that we have to define markets instead.
Id.

[FN96]. For a discussion of behavioral indicia of market power in the dairy industry, see *infra* notes 147-72 and accompanying text.

[FN97]. For a discussion of proper market definition, see *infra* notes 98-118 and accompanying text.

[FN98]. U.S. Dept. of Justice Merger Guidelines, 2 TRADE REG. REP. (CCH) 4501 (1985). See also L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 41 (1977):

To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price or volume. If sufficient supply would promptly enter from other geographic areas, then the 'defined market' is not wide enough in geographic terms; if sufficient supply would promptly enter in the form of products made by other producers which had not been included in the product market as defined, then the market would not be wide enough in defined product terms. A 'relevant market,' then, is the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.

Id.

[FN99]. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) (area of effective competition must be determined by reference to product and geographic markets). In economic analysis, product market definition and geographic market delineation are two sides of the same coin. Once it is recognized that a market is smaller than the entire universe, market definition becomes a matter of line drawing. In a purely theoretical economic market, the products of the competing sellers are both undifferentiated and at a single location. See A.C. PIGOU, *THE ECONOMICS OF STATIONARY STATES* 78 (1935). Buyers will pair with sellers on the basis of lowest price. When prices are equalized, buyers will have no preferences among sellers and pairing will be random. Changes in prices outside the market will have a minimal effect on the pairing of sellers and buyers within the market. Conversely, changes within the market would have an immediate and significant impact on the units within that market. Id.

A. Marshall proposes a somewhat less restrictive definition of a theoretical market:

Thus the more nearly perfect a market is, the stronger is the tendency for the same price to be paid for the same thing at all parts of the market: but of course if the market is large, allowance must be made for the expense of delivering the goods to different purchasers. . . .

A. MARSHALL, *PRINCIPLES OF ECONOMICS* 325 (1920).

In Marshall's terms, the perfect market is a chain linking of perfect substitutes, within a 'gap,' to other goods. For

Washington, D.C., and Denver to be in the same market would require a base area (i.e., somewhere in the Mid- West) and the price in Denver would be Mid-West plus transport and likewise in Washington, D.C. Hence, at 10-cent price rise in Denver which is not also associated with a 10-cent rise in both the Mid-West and Washington, D.C., is inconsistent with all three cities being in the same market. Real world markets do not fit the theoretical definitions exactly, since products are differentiated in characteristics and in space. Thus, economists have tried to derive 'common sense devices' to take into account the vagaries of real markets, such as marked gaps in the chain of substitutes. F.M. SCHERER, *supra* note 47, at 60.

This 'chain of substitutes' theory is attributed to John Robinson. J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 5 (1933). Under this rubric, if gasoline stations A through Z were spaced along a highway every two miles, in determining whether A and Z are in the same market, one looks at A's actions to see whether they have an effect on B, at B's actions to see whether they affect C, and so on, until Y's actions are examined for their effect on Z. If each is observed to have a significant effect on its neighbor there are no 'breaks' in the chain between A and Z and they are said to be in the same market. It is immaterial to this approach whether a 10-cent change in A's price would have an appreciable influence on Z's business. They are said to be in the same market because A and B are clearly linked, B and C are linked, etc. Robinson talked of the breaks in terms of 'cross-elasticities,' a term that later became important in the development of judicial market definitions.

Edward Mason noted that for applied work, the Robinsonian definition was flawed in that it could, in many instances, combine in the same market firms which had no competitive interaction. On the premise that two firms which had no influence on each other should not be in the same market, he focused on a seller of a product at a point in time and identified its competitors. The seller plus competitors--zones of competitive interaction--constitute a market. Mason, *Price and Production Policies of Large-Scale Enterprise*, 29 AM. ECON. REV. 61, 68-69 (1939). For example, for the gasoline stations above, B may have competitive interactions with only A and C; C with only B and D, etc. Thus, A-B-C might be one market, while B-C-D might be another. Depending on the focus or purpose of the inquiry, a firm may 'be' in more than one market.

The Mason approach is similar to that adopted by the court in [Tampa Electric Co. v. Nashville Coal Co.](#), 365 U.S. 320 (1961). In Tampa, plaintiff, a producer of electric energy, entered into a 20-year requirements contract with defendant coal producer by which the defendant agreed to supply each year a maximum total requirement of 2,250,000 tons. *Id.* at 322. The defendant subsequently sought a declaration that its contract with the plaintiff violated § 3 of the Clayton Act since, by the terms of the contract, it would supply amounts exceeding the total consumption of coal in peninsular Florida. *Id.* at 323. In rejecting the 'quantitative substantiality' of a contract as determinative of whether that contract restrains trade, the Court stated the need to define the relevant market in product and geographic terms and to estimate the extent of the percentage of the foreclosure of competition of the market resulting from the contract. *Id.* at 325-30. No illegality would result unless the contract were found to 'work a substantial . . . lessening of competition in the relevant competitive market.' *Id.* at 333. In determining the relevant market in which the defendant operated, the Court considered the area to which the plaintiff, as buyer, could reasonably turn for alternative sources of supply. *Id.* at 331-33. The Court concluded that the relevant effective area of competition was the area in which these producers operated and in which they were willing to compete for the consumer potential. *Id.* Those within that area would be the competitors of the defendant vis-a-vis the plaintiff. *Id.*

The approach of the Court in Tampa reflects reality. Wherever one observes some systematic pairing of buyers and sellers, that realm is, presumptively, a 'market.' The presumption can be overcome by examining the degree of insularity, i.e., how much change in price or other factors will decouple those buyers and sellers and cause them to pair with those outside the 'market.' *Id.* See Mason, *supra*, at 68-69.

[FN100]. See e.g., [Alexander v. National Farmers Org.](#), 687 F.2d 1173 (8th Cir. 1982), *aff'd* in part and *rev'd* in part in re [Midwest Milk Monopolization Litig.](#), 510 F. Supp. 381 (W.D. Mo. 1981); [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), 512 F. Supp. 608 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984); [United States v. Dairymen, Inc.](#), 1978-1 Trade Cas. (CCH) ¶62053 (W.D. Ky. 1978), *aff'd* in part and *rev'd* in part, 660 F.2d 192 (6th Cir. 1981).

In [National Farmers](#), various dairy cooperatives brought reciprocal antitrust actions arising out of the fierce power struggles in the Midwest milk industry during the late 1960's and early 1970's. 687 F.2d at 1179. Reviewing the district court's findings, the Eighth Circuit found that four cooperatives, Mid-America Dairymen, Inc., Associated Milk Producers, Inc., Central Milk Producers Cooperative, and Associated Reserve Standby Pool Cooperative, had conspired to monopolize and to eliminate competition in the Grade A milk market in violation of § 2 of the Sherman Act. *Id.* at 1191. In considering whether a relevant product market had been established, the Eighth Circuit stated that raw Grade A milk is a relevant product market. . . . [T]he findings show that only Grade A milk may be used for fluid products for human consumption; that Grade B milk, by definition, cannot be a substitute for or be interchanged with Grade A milk

for Class I uses; that demand for Grade A fluid products is relatively inelastic; that production of Grade A milk requires stricter sanitary methods and necessitates conversion costs and higher production costs than Grade B milk; that Grade A milk is supported by minimum federally regulated prices, while Grade B prices are established in the open market; and that 'premium' prices negotiated by cooperatives primarily relate to Grade A milk used for Class I purposes. In any commercially meaningful sense, Grade A milk is thus a relevant product market for antitrust purposes and has been deemed such in other milk monopolization cases.

[Id. at 1191-92](#) (citations omitted).

In *Kinnett Dairies*, plaintiff dairy processor brought a civil antitrust action against defendant milk marketing association alleging, in part, violations of [§ 1](#) and [§ 2](#) of the Sherman Act and [§ 2](#) and [§ 3](#) of the Clayton Act as a result of defendant's involvement with other marketing associations and its individual conduct toward plaintiff and other dairy processors with regard to price fixing, sale and distribution of milk within a Federal Milk Marketing Order. [512 F. Supp. at 611-14](#). In its consideration of the relevant product market pertaining to the charge of unlawful monopolization under [§ 2](#) of the Sherman Act, the district court stated:

Producers in the industry are recognized as either Grade A or Grade B. Grade A producers generally receive more for their milk than Grade B producers. To be a Grade A producer, a farmer must meet . . . standards . . . with respect to both production and storage. These standards are much more strict with respect to Grade A milk than Grade B. In addition, production of Grade A milk requires a higher initial capital investment than Grade B production Consequently, a producer does not simultaneously produce Grade A milk and Grade B milk from the same facilities.

Grade A milk is distinguishable not only in terms of who produces it, but also in terms of who [sic] its customers are. A customer (processor) who processes milk into both fluid and manufactured form at one location can, for sanitation reasons, receive only Grade A into its plant. Also, only handlers receiving Grade A milk from producers are subject to regulation under federal milk marketing orders.

[Id. at 623-24](#). The district court thus concluded that 'Grade A milk is generally recognized in the industry as a distinct product and line of commerce for fluid consumption' [Id.](#)

In *Dairymen, Inc.*, the United States sought injunctive relief against certain alleged monopolistic practices followed by defendant milk marketing association over a period of three years. In determining the relevant product market, the district court stated that:

while Grade A and non-Grade A milk both originate in raw milk, they have unique production facilities, distinct customers, distinct prices and specialized vendors. However, this finding must be qualified by noting that in many instances the customers for Grade A milk are often customers for non-Grade A milk, and that in many instances the sellers of Grade A milk can also be sellers of non-Grade A milk Also, . . . Grade A milk can be used for the same purposes as non-Grade A milk, and the facilities in which non-Grade A milk is produced can be changed without great cost to facilities for the production of Grade A milk.

[1978-1 Trade Cas. \(CCH\) ¶62,053, at 74,540](#). The court went on to note, though, that as the demand for milk is divided into two primary markets--the first for fluid milk products and the second for manufactured milk products-- the market for fluid milk is effectively segregated from that for manufacturing milk. [Id.](#) Thus, the court concluded that Grade A milk constituted the relevant product market to test defendant's alleged anti-competitive practices. [Id.](#)

[\[FN101\]. 370 U.S. 294 \(1962\)](#). In *Brown Shoe*, the United States brought suit to enjoin consummation of a merger of two corporations on the ground that its effect might be to lessen competition substantially or to create a monopoly in the production, distribution, and sale of shoes, in violation of [§ 7](#) of the Clayton Act. [Id. at 296](#). Discussing determination of the relevant product market, the Court stated:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

[Id. at 325](#) (footnotes and citation omitted).

[\[FN102\]](#). For a discussion of courts determinations that Grade A milk constitutes a relevant product market because of its unique production facilities, distinct customers, distinct prices, and specialized vendors, see *supra* note 100.

[\[FN103\]](#). See, e.g., [Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 \(M.D. Ga. 1981\)](#), *aff'd*, [715 F.2d 520 \(11th](#)

[Cir. 1983](#)), cert. denied, [465 U.S. 1051 \(1984\)](#); *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶ 62,053 (W.D. Ky. 1978), aff'd in part and rev'd in part, [660 F.2d 192 \(6th Cir. 1981\)](#). In both these cases, defendant argued that the relevant product market was all raw milk. [Kinnett Dairies](#), [512 F. Supp. at 623](#); *Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶62,053, at 74,540. For a further discussion of *Kinnett Dairies* and *Dairymen, Inc.*, see supra note 100. The 'all milk' argument is essentially an application of the Robinsonian definition of markets, see supra note 99, since for some uses, Grade A and Grade B milk are substitutes. Further, Grade A and Grade B prices tend to move together, but this is due to the regulatory formulae which set the prices, and not unfettered market forces.

[FN104]. In order to charge a high price to cheese manufacturers, a cooperative would need a monopoly of both Grade A and Grade B milk. But, to charge a high price to milk bottlers, one needs only to monopolize Grade A milk. One could say that 'all milk' is a 'market' and 'Grade A milk' is a 'submarket,' relevant when the inquiry focuses on fluid milk. The market/submarket distinction is of little economic significance (an economist would call both 'markets'), especially since market lines cannot be drawn with absolute precision. Since the courts speak in terms of markets and submarkets, such legal fictions will be used here as well. It could be said that the outer bounds of a market are the 'market' and inner bounds define 'submarkets'. What is important is that the conceptualization of the market or submarket reflect the actualities of competition and influence, and that it be relevant to the inquiry.

[FN105]. See, e.g., [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), [512 F. Supp. 608, 624 \(M.D. Ga. 1981\)](#) (plaintiff contended that the relevant geographic market was the FMO-7 area (Georgia) while defendant contended that the relevant geographic market encompassed portions of fourteen states), aff'd, [715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#); *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶62,053, at 74,538 (W.D. Ky. 1978) (plaintiff contended that relevant geographic market was limited to specified Federal Orders--but excluded solely state regulated areas--in southeastern states in which defendant produced milk; defendant contended that relevant geographic market included state regulated areas of production in southeastern states as well as Federal Order areas in these states and additional midwestern states in which defendant's milk was marketed), aff'd in part and rev'd in part, [660 F.2d 192 \(6th Cir. 1981\)](#). For a further discussion of *Kinnett Dairies* and *Dairymen, Inc.*, see supra notes 100 & 103.

[FN106]. See [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), [512 F. Supp. 608, 624 \(M.D. Ga. 1981\)](#), aff'd, [715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#).

[FN107]. For a discussion of allocation provisions and compensatory payments and their market-restricting effects, see supra notes 82-88 and accompanying text.

[FN108]. See, e.g., 1976 REPORT, supra note 63, at 38 (Federal Orders examined as markets in analysis of price enhancement by milk cooperatives); Babb, Bessler & Pheasant, Analysis of Over-Order Payments in Federal Milk Marketing Orders, AGR. EXP. STA. BULL. NO. 11 (9179) (analyzing cooperative market shares and premiums within Federal Orders); R. T. Masson & Eisenstat, supra note 84, at 270 (correlating premiums and market shares within Federal Orders); D. L. Baumer, supra note 72, at 25 (consideration of regulation of Federal Orders as markets).

[FN109]. See, e.g., [North Texas Producers Ass'n, v. Metzger Dairies, Inc.](#), [348 F.2d 189, 193-94 \(5th Cir. 1965\)](#) (court found market to be Dallas- Fort Worth area), cert. denied, [382 U.S. 977](#); [Bergjans Farm Dairy Co. v. Sanitary Milk Producers](#), [241 F. Supp. 476, 483 \(E.D. Mo. 1965\)](#) (market was defined as St. Louis area), aff'd, [368 F.2d 679 \(8th Cir. 1966\)](#).

[FN110]. For examples of the argument that the relevant geographic market should extend well beyond the Federal Order, see supra note 103 (discussion of defendants' arguments in [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), [512 F. Supp. 608 \(M.D. Ga. 1981\)](#), aff'd, [715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#); *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶62,053 (W.D. Ky. 1978)). As in the product market dispute, this argument seeks to apply Robinsonian terms to define the geographic limits of the market. For a discussion of the product market dispute, see supra notes 100 & 104 and accompanying text. For a discussion of the Robinsonian analysis, see supra note

99.

[FN111]. See [United States v. Philadelphia Nat'l Bank](#), 374 U.S. 321, 357 (1963) (in determination of relevant geographic market, proper focus is on 'the geographic structure of supplier-customer relations'); [Tampa Electric Co. v. Nashville Coal Co.](#), 365 U.S. 320, 331 (1961) (relevant geographic market is market in which competitors effectively compete and to which purchaser can practicably turn for supplies). In [United States v. Dairymen, Inc.](#), 660 F.2d 192 (6th Cir. 1981), the Sixth Circuit reversed the district court for failing to undertake this analysis of the relevant geographic market and, on remand, directed that the district court 'determine the relevant geographic submarkets on the basis of commercially significant areas in which [Dairymen, Inc.] operated and in which [Dairymen, Inc.'s] customers could turn to other suppliers.' *Id.* at 195. For a further discussion of Dairymen, Inc., see *supra* notes 100, 103 & 105.

The identification of the relevant geographic market through the consideration of the area in which a cooperative operates and to which purchasers can turn for alternative sources of supply is essentially the Mason approach. See Mason, *supra* note 99, at 68-69.

[FN112]. [15 U.S.C. § 2 \(1982\)](#) (penalizing any attempt to monopolize or any combination or conspiracy to monopolize 'any part of the trade or commerce among the several States'). This inquiry is relevant for Sherman Act as well as for Clayton Act purposes. [United States v. Grinnell Corp.](#), 384 U.S. 563, 572-73 (1966) (Court saw no reason to differentiate between 'line' of commerce in context of Clayton Act and 'part' of commerce in context of Sherman Act); [International Boxing Club, Inc. v. United States](#), 358 U.S. 242, 251 (1959) (application of Sherman Act to trade or commerce in localized geographical area); [United States v. Paramount Pictures, Inc.](#), 334 U.S. 131, 173 (1948) ('[a]ny part' is construed to mean an appreciable part of interstate or foreign trade or commerce'). But see Comment, Relevant Geographic Market Delineation: The Interchangeability of Standards in Cases Arising Under Section 2 of the Sherman Act and Section 7 of the Clayton Act, 1979 DUKE L.J. 1152 (1979). The author of the comment cited the subsequently reversed district court opinion in *United States v. Dairymen, Inc.*, as the sole legal authority for his position. *Id.* at 1166-68, 1183. The district court in *Kinnett Dairies* cites, as its authority, the same district court opinion in *United States v. Dairymen, Inc.* and the above-mentioned comment. [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), 512 F. Supp. 608, 640 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984).

[FN113]. [365 U.S. 320, 327 \(1961\)](#). The Tampa Court held that in a given case it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account economic factors. *Id.* For a discussion of Tampa, see *supra* note 99.

[FN114]. See [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), 512 F. Supp. 608, 639 (M.D. Ga. 1981) (relevant geographic market is that physical area in which sellers of particular product can practicably turn for such products as indicated by actual movements of milk) (emphasis added), *aff'd*, 715 F.2d 520 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984).

[FN115]. F. M. SCHERER, *supra* note 47, at 60-61 (defining market in terms of substitutability of one competitor's product for another); R. A. POSNER, *supra* note 95, at 128; see also [Case-Swayne Co. v. Sunkist Growers, Inc.](#), 369 F.2d 449, 456-57 (9th Cir. 1966) (seller's area of operation should be used only to narrow market definition when seller does not serve all of a larger market, not to expand it beyond what would otherwise be economically sensible), *rev'd on other grounds*, 389 U.S. 384 (1967); T. VON KALINOWSKI, 16B BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATIONS § 8.02(2)(b) (1985) (availability of buyers important factor).

[FN116]. Steiner, Markets and Industries, 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 579 (1968) (emphasis added). Failure to distinguish between factors of necessity and those of convenience when making empirical observations of market behavior can be fatal to the integrity of a market definition. The result can be a severely overstated or understated market, causing an artificially diluted or concentrated estimate of market power. In defining markets, one must beware of products or areas that become substitutes by virtue of anticompetitive activity. '[A]t a high enough price even poor substitutes look good . . .'. R. A. POSNER, *supra* note 95, at 128. As Scherer reasons, in this regard the courts have shown conspicuous inattention to the key question of how much prices can be elevated before drawing supplies from other

points included at the margin of the relevant market. In other words, how broadly a market is defined is really a question of how much elevation of prices is to be tolerated before inferring that unacceptable monopoly power exists. F. M. SCHERER, *supra* note 47, at 549 n.111 (emphasis in original).

[FN117]. See, e.g., *supra* note 104 (discussion of cheese manufacturers versus milk bottlers).

[FN118]. Markets may in some cases be even smaller than the Order. For example, within the Texas Order there are at least five different markets. Pricing patterns are determined by and vary between these markets and 'competitive credits' are granted between these markets.

[FN119]. The decline in producer numbers is often used as a justification for leniency in the application of the antitrust laws. See Comment, *Agricultural Cooperatives: Gain of Market Power and the Antitrust Exemption*, 27 S. DAK. L. REV. 476, 493 (1982) (since concentration in the food processing industry has also increased, agriculture is nearly a 'model of perfect competition').

[FN120]. In 1924 there were about 89 billion pounds of milk produced per annum. This increased to 102 billion in 1937 and 116 billion in 1949. ECONOMIC RESEARCH SERV., U.S. DEPT OF AGRICULTURE, DAIRY STATISTICS THROUGH 1960 at 303 (Statistical Bull. 1 1962). By 1982, milk was produced at an annual rate of 135 billion pounds. CROP REP. BD., STATISTICAL REP. SERV., U.S. DEPT OF AGRICULTURE, MILK PRODUCTION 4 (Feb. 15, 1983).

[FN121]. Memorandum from R. W. March, Deputy Director, Dairy Division, Agricultural Marketing Serv., U.S. Dep't of Agriculture, to all Market Administrators (August 19, 1975) (discussing cooperatives in Federal Milk Market Orders).

[FN122]. DAIRY DIV., AGRICULTURAL MARKETING SERV., U.S. DEPT OF AGRICULTURE, PERCENTAGE OF PRODUCERS BELONGING TO COOPERATIVE ASSOCIATION, PERCENTAGE OF PRODUCERS BELONGING TO DOMINANT COOPERATIVE, AND WEIGHTED OVER- ORDER PAYMENTS ON CLASS I MILK, BY FEDERAL ORDER MARKETS 1 (1975).

[FN123]. R. FONES, J. HALL, & R. T. MASSON, *supra* note 12, at 169-70.

[FN124]. In 1971 AMPI controlled over 90% of the milk supply in 11 Federal Order Markets. *Id.*

[FN125]. The Standby Pool is basically territorial allocation among horizontal competitors. Producers in regulated markets paid unregulated producers in the Upper-Midwest not to ship milk south unless requested. One purpose of the Standby Pool was said to be to have a ready reserve of surplus milk available if there were shortages in more southern markets. The dominant purpose, however, was to prevent processors in the southern markets from undermining high cooperative prices through imports from the Upper-Midwest. But for the Capper-Volstead Act, the Standby Pool would be a per se violation of [§ 1](#) of the Sherman Act.

[FN126]. The legality of the Associated Reserve Standby Pool Cooperative was not directly challenged in two antitrust cases brought by the Department of Justice. See [United States v. Associated Milk Producers, Inc.](#), 394 F. Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *United States v. Mid-America Dairymen, Inc.*, 1977-1 TRADE CAS. (CCH) ¶61,508 (W.D. Mo. 1977). However, the consent decrees entered in these cases placed some limitations on the operation of the Standby Pool.

[FN127]. The superpool agreement in the Chicago area set up a single agency as the marketing agent for all of the primary cooperatives in the area. Although the largest cooperative had only 40% of the market, the superpool represented 90-95% of the market. In [United States v. Associated Milk Producers, Inc.](#), 394 F. Supp. 29 (W.D. Mo. 1975), aff'd, 551 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976), an antitrust action against the nation's largest milk cooperative, the parties submitted a consent decree, the provisions of which did not challenge the validity of the cooperative superpool arrangement. The consent decree was subsequently approved by the district court. 394 F. Supp. at 44-46. Similarly, in *United States v. Dairymen, Inc.*, the challenge was not to the superpool arrangement itself, but, rather to its use in a predatory fashion. 1978-1 TRADE CAS. (CCH) ¶62,053, at 74,546 (W.D. Ky. 1978), aff'd in part and rev'd in part, 660 F.2d 192 (6th Cir. 1981). In *Kinnett Dairies, Inc. v. Dairymen, Inc.*, the legality of the superpool arrangement was upheld as a justified marketing activity by an agricultural association within the meaning of the Capper-Volstead exemption. 512 F. Supp. 608, 633 (M.D. Ga. 1981), aff'd, 715 F.2d 520 (11th Cir. 1983), cert. denied, 465 U.S. 1051 (1984). For a further discussion of *Dairymen, Inc.*, and *Kinnett Dairies*, see supra notes 100, 103, 105 & 111.

[FN128]. Market shares as low as 55-60% have been held to be 'monopoly power or near monopoly power.' [Bergjans Farm Dairy Co. v. Sanitary Milk Producers](#), 241 F. Supp. 476 (E.D. Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966). Monopoly power will almost certainly be found where the market share exceeds 70%. See Warlich & Brill, *Cooperatives Vis-a-Vis Corporations: Size, Antitrust and Immunity*, 23 S. DAK. L. REV. 561, 566-67 (1978) (discussing market share (relative size) as key to all monopolization charges).

[FN129]. See, e.g., [United States v. Aluminum Co. of America](#), 148 F.2d 416 (2d Cir. 1945) (60 to 64% market share is not necessarily monopoly power).

[FN130]. See, e.g., [Fairdale Farms, Inc. v. Yankee Milk, Inc.](#), 635 F.2d 1037, 1040 (2d Cir. 1980) (noting fundamental differences between cooperative and corporation), cert. denied, 454 U.S. 818 (1981); A.D. MANCHESTER, supra note 62, at 31, 37 (stating that basis of cooperative market power is different from corporations, mandating different conclusions from equal market shares); McCormick, *Modification of the Agricultural Cooperative Exemption: Good or Bad?*, 48 A.B.A. ANTITRUST L.J. 565, 575 (1979) (unique structural features of agriculture require different treatment from that accorded other businesses); Comment, supra note 119, at 493 (noting reliance by cooperatives on support of their membership and resulting inability of cooperatives to control supply of commodities).

[FN131]. For a discussion of the basis of the 1920's sentiment that a producer monopoly would be impossible to maintain, see supra note 31.

[FN132]. Premiums, or 'over-order payments,' sometimes represent payment for services the cooperative provides to the processor in addition to an increase in selling price. At least to the extent that the premium exceeds the value (to the buyer) of services provided by the cooperative, it is only by virtue of its market power that a cooperative can force a buyer to pay such an inflated price. A.C. Manchester observes that premiums, or 'over-order payments' coincided with the above-described growth of huge regional cooperatives and federations. He goes on to note that premiums are a 'handy indicator,' used by some analysts as a measure of undue price enhancement. A. C. MANCHESTER, supra note 62, at 48.

[FN133]. See W. NICHOLLS, *IMPERFECT COMPETITION WITHIN AGRICULTURAL INDUSTRIES* 184 (1947) (Class I demand is normally inelastic).

[FN134]. The basic blend price received by each farmer is determined by utilization of milk in the entire Order and is distributed across the entire Order as a single per hundred weight (cwt.) price for all milk. But, if a seller charges a premium, the seller keeps the premium; if the seller is a cooperative, the premium is distributed to the members in addition to the blend price. Thus, if a cooperative charges a \$1.00 per cwt. premium on Class I milk and has 50% Class I sales, the members receive blend price plus \$.50 per cwt. Since price supports and low product shipping costs make the demand for Class II milk highly elastic, especially on a local Order basis, large premiums on Class II milk are

relatively infrequent.

[FN135]. Halverson, The Response of Milk Production to Price, 40 J. FARM. ECON. 1101 (1958) (discussing inelasticity of milk supply and production response to price); Whipple, An Analysis of Reconstituted Milk Pricing Policy, 65 AM. J. AGRIC. ECON. 207 (1983) (considering impact on milk supply of alteration in pricing provisions); Wilson & Thompson, Demand, Supply, and Price Relationships for the Dairy Sector, Post-World War II Period, 49 J. FARM. ECON. 360 (1967) (proposing model allowing for simultaneity of supply and demand estimates and concluding that supply of milk is inelastic with respect to its average price).

[FN136]. If a cooperative with 50% Class I sales charged a \$1.00 per cwt. premium, members would receive blend price plus \$.50 per cwt. for all milk sold (assuming the entire premium was passed on to members). A splinter group could charge a \$.90 Class I premium and, if it achieved 100% Class I sales, pay its members blend price plus \$.90 per cwt.--a \$.40 gain.

[FN137]. See, e.g., [Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608, 619 \(M.D. Ga. 1981\)](#) (in several instances cooperative retaliated against handlers' purchases from rival sources by shutting off supply on short notice), [aff'd, 715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#).

[FN138]. See e.g., *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH) ¶ 62,053 at 74,541 (W.D. Ky. 1978) (attempt by defendant cooperative to force processors to execute full supply contracts in order to eliminate competition and control prices), [aff'd in part and rev'd in part, 660 F.2d 192 \(6th Cir. 1981\)](#).

[FN139]. See, e.g., [Alexander v. National Farmers Org., 687 F.2d 1173, 1198 \(8th Cir. 1982\)](#) (cooperative secured substantial committed supply agreement from purchaser after threatening supply cutoff).

[FN140]. *Id.*

[FN141]. R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 337.

[FN142]. Few individual dairy farms produce enough to fill a full sized milk tanker truck. Since the cost is about the same whether the truck is full or not, the per cwt. cost of transport rises as the quantity transported decreases. In addition, to the extent that over-Order premiums represent payment for services to buyers provided by the cooperative, the splinter group will either have to keep the price high enough to cover those costs, or not provide the service and charge a lower premium. For instance, in 1975, Dairymen, Inc., charge an average premium of \$1.00. Of this, the cooperative maintained that \$.28 per cwt. covered 'such services as field and laboratory services, disposing of daily and seasonal surpluses, hauling costs that are not recovered from producers, payrolling, and a number of services incidental to supplying handlers under a full supply contract.' 1976 REPORT, *supra* note 63, at 46. Some fraction of these services was of value to buyers, so a splinter group would have to supply them or offer a yet better price. Services to members reflect how much splinter group producers must earn to find splintering an attractive alternative. Of course, a fringe competitor (or any cooperative in a competitive market) cannot pass on such costs in the form of higher premiums.

[FN143]. See *United States v. American Milk Producers, Inc.*, 394 F. Supp. 20, 47 (W.D. Mo. 1975) (setting forth provisions in AMPI consent decree designed to address this and similar problems), [aff'd, 534 F.2d 113 \(8th Cir.\)](#), cert. denied, [429 U.S. 940 \(1976\)](#).

[FN144]. For an exhaustive compendium of predatory cooperative practices, see Hufstedler, *supra* note 29, at 462. For more recent cases involving predation by cooperatives, see *United States v. Dairymen, Inc.*, 1978-1 Trade Cas. (CCH)

¶ 62,053 (W.D. Ky. 1978), aff'd in part and rev'd in part, [660 F.2d 192 \(6th Cir. 1981\)](#); [Alexander v. National Farmers Org.](#), [687 F.2d 1173, 1191 \(8th Cir. 1982\)](#). See also R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 30-44; Eisenstat, Masson & Roddy, *supra* note 4, at 529-92.

[FN145]. [Maryland & Va. Milk Producers Ass'n v. United States](#), [362 U.S. 458, 469 \(1960\)](#) (dairy cooperative's acquisition of competing processor tended to create monopoly or substantially lessen competition); [Otto Milk Co. v. United Dairy Farmers Cooperative Ass'n](#), [388 F.2d 789 \(3d Cir. 1967\)](#) (defendant cooperative association engaged in unlawful conspiracy in restraint of trade and endeavored to monopolize marketing of milk in southwestern Pennsylvania); [North Texas Producers Ass'n v. Metzger Dairies, Inc.](#), [348 F.2d 189 \(5th Cir. 1965\)](#) (association engaged in monopolistic practices), cert. denied, [382 U.S. 977 \(1966\)](#); [Bergjans Farm Dairy Co. v. Sanitary Milk Producers](#), [241 F. Supp. 476 \(E.D. Mo. 1965\)](#) (dairy producers cooperative engaged in conspiracy to fix retail prices of milk with intent to monopolize), aff'd, [368 F.2d 679 \(8th Cir. 1966\)](#). But see [Kinnett Dairies v. Dairymen, Inc.](#), [512 F. Supp. 608, 624 \(M.D. Ga. 1981\)](#), aff'd, [715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#). The Kinnett court used a Robinsonian market definition and found that the cooperative never possessed market power and, in light of that, held that such activities as refusals to deal, imposition of full or committed supply contracts, cutting off plaintiff's hauling operation, and cutting off customers who tried to buy from competitors were not predatory. *Id.* at 633-38. For a discussion of Robinsonian analysis, see *supra* note 99.

[FN146]. Gains would be made in terms of increased profits, increased market shares, or protection of already high shares from erosion by competitors. In many cases, such gains could only be accomplished by charging super-competitive (monopoly) prices and/or by eliminating competitors.

[FN147]. See R. C. LIPSEY & P. O. STEINER, *supra* note 7, at 244. Price discrimination is the sale of the same item to different consumers at a different price for reasons not associated with cost. *Id.*

[FN148]. Price discrimination is a symptom of market power generally. *Id.* at 243-44. Persistent price discrimination is of particular importance for antitrust analysis because it requires for its success, the exercise of monopoly power. *Id.* R. A. Posner noted that 'persistent [price] discrimination is very good evidence of monopoly.' R. A. POSNER, *supra* note 95, at 62-65. Indeed, E. G. Nourse identified price discrimination by cooperatives as one of the difficult issues to be confronted in the future if cooperative power evolves beyond counteravailing to supervailing power. E. G. NOURSE, *supra* note 16, at 436-39.

[FN149]. The classified pricing scheme automatically injects a degree of price discrimination into the market, since it requires handlers to pay varying prices based on their utilization of an undifferentiated product. Producers, on the other hand, receive a uniform price, the blend price, throughout the Order based on Order-wide utilization--plus whatever premium the individual cooperative is able to charge. Discussion of discriminatory pricing, therefore, will be in terms of the prices charged above the Federal minimums, and their influence on the prices received by member-producers. The following example illustrates the way in which premiums are a form of price discrimination. If a cooperative is able to charge a \$1.00 per cwt. premium on Class I milk, and delivers the same services to all of its customers, members nonetheless receive blend price plus \$.75 per cwt. from a handler with 75% Class I utilization but receive blend price plus \$.90 per cwt. from a handler with 90% Class I utilization.

[FN150]. 1976 REPORT, *supra* note 63, at 13-14. Premiums have constituted five to ten percent of the raw milk price, a substantial markup for an homogeneous intermediate good. *Id.* at 13. The effect at retail may have been as high as five to ten cents per gallon.

[FN151]. D. L. Baumer, *supra* note 72, at 99. For an analysis of the societal costs, see Ippolito & Masson, *supra* note 77.

[FN152]. R. T. Masson, *The Relationship Between Federal Order Market Shares and Class I Premiums* (1976) (on file at United States Department of Justice, Antitrust Division, Economic Policy Office) (demonstrating correlations between high market shares and substantial premiums).

[FN153]. *Id.*

[FN154]. D. L. Baumer, *supra* note 72, at 112. If no barriers existed to the free sale of milk, there would be no correlation between cooperative concentration and effective Class I prices or over-Order payments. On the other hand, if there were barriers, there would be a positive correlation between the two. For a further discussion of this examination and results, see *infra* note 155 and accompanying text.

[FN155]. In 1974 and 1975, where the dominant cooperative had a market share in excess of 60%, retail milk prices were three to five cents higher. D. L. Baumer, *supra* note 72, at 133.

[FN156]. 1976 REPORT, *supra* note 63.

[FN157]. Babb, Bessler & Pheasant, *supra* note 108.

[FN158]. 1976 REPORT, *supra* note 63, at 68.

[FN159]. Thus, when a two-tail test is inappropriately used, the correlation between the cooperative market share and price will have to be higher in order to be recorded as statistically significant. A finding of statistical significance at the .05 level (a market power coefficient high enough that such a value would only appear by chance less than one in twenty times if the actual relationship between price and cooperative market share were zero) actually means that market share is statistically significant at the .025 level, which is a very high level of statistical significance.

[FN160]. 1976 REPORT, *supra* note 63, at Appendix II. The data also show higher premiums where market share exceeds 40%. *Id.* at 68, 70.

[FN161]. 394 F. Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1975). The consent decree, by eliminating AMPI's ability to coerce non-members to join the cooperative, attempted to allow both non-members and former members of AMPI to compete with the cooperative association. 394 F. Supp. at 52. The consent decree enjoined AMPI, in part, from:

Using threats, coercion, or undue influence to induce any producer to join or refrain from terminating its membership in defendant or to deliver its milk to defendant; entering into any membership or marketing agreement with any member-producer which binds such member-producer to deliver milk to defendant for a term in excess of one (1) year, except any such contract may provide for automatic renewal for succeeding periods of one (1) year, if either party does not give notice of termination at least thirty (30) days prior to the termination date of such contract and provided that defendant will promptly provide any member-producer, who so requests, with written notice of the termination date of his contract and the dates on which he can effectively give notice of termination of said contract; compelling or attempting to compel any member-producer to enter into any contract, agreement or understanding which restricts the right of said member-producer to sell any milk to any processor after said member-producer has lawfully terminated his membership and marketing agreement or contract with defendant. . . .
Id. at 52-53.

[FN162]. 1977-1 Trade Cas. (CCH) ¶61,509 (W.D. Mo. 1977). The consent decree enjoined the cooperative from entering into any exclusive hauling agreements. *Id.* at 71,983. Any sales agreement that contained certain agreements

as to times, supplies, and price was prohibited. *Id.* at 71,982-983. Lastly, the cooperative had to divest itself of certain assets, and was prevented from acquiring plants for a period of five years without informing the Government. *Id.* at 71,983-984.

[FN163]. 1976 REPORT, *supra* note 63, at 66 ('Over-Order Payments for 1974 and 1974-1975').

[FN164]. *Id.* at 74.

[FN165]. *Id.* at 74-75.

[FN166]. BABB, BESSLER & PHEASANT, *supra* note 108, at Appendix B.

[FN167]. The AMPI region covered almost 25% of the markets studied by Babb, Bessler, and Pheasant. *Id.* at 96.

[FN168]. For a discussion of the Associated Milk Producers result, see *supra* notes 125-26 & 161.

[FN169]. For a discussion of the Mid-America Dairywomen result, see *supra* note 162.

[FN170]. See R. T. Masson & Eisenstat, *supra* note 84 (showing that consent decrees themselves had pro-competitive significance).

[FN171]. The results for 1974 remain weaker than one chance out of twenty, but how much weaker is not reported. All three alternative studies did find 1974 significant at this level. Babb, Bessler, and Pheasant also used a pooled test to see whether there is a stable relationship across time between the cooperative market share within each Order and the premiums in that Order. They conclude that, since the results of the pooled test did not have results supportive of the market share/premium relationship with a statistical chance of error of less than one-out-of-twenty, no market share/premium relationship exists--despite the individual year results. BABB, BESSLER & PHEASANT, *supra* note 108, at 103. This is methodologically incorrect. USDA will not provide the data Babb used to other researchers to use in appropriately specified statistical tests.

[FN172]. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand, in considering Alcoa's 90% market share, stated, 'That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.' *Id.* at 424. Subsequent courts have attempted to establish a more precise standard by which to measure monopolization: 70% or greater market share would be enough to find monopoly power; 50% or less seems to be less than is required and between 50% and 60% might be enough to find a dangerous probability of monopolization in an attempt-to-monopolize case. See Warlich & Brill, *supra* note 128, at 566-67 (collecting cases and discussing requisite market share necessary for finding of monopoly power).

[FN173]. For a discussion of cases construing the agricultural exemption broadly, see *infra* notes 200-205.

[FN174]. *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960) (emphasis added).

[FN175]. *Id.* at 465.

[FN176]. *Id.*

[FN177]. See [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203, 214-16 (9th Cir.) (legitimate objects include handling and marketing), cert. denied, [419 U.S. 999 \(1974\)](#); Hufstedler, *supra* note 29, at 459 (discussing judicial interpretation of 'legitimate objects' of cooperation).

[FN178]. [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 467 (1960). See also [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203, 211 (9th Cir.) (citing Maryland & Virginia Milk in support of the idea that cooperatives are not per se illegal, but become unlawful when engaging in anticompetitive activities), cert. denied, [419 U.S. 999 \(1974\)](#).

[FN179]. See [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 472 (1960). See also [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203, 211-13 (9th Cir.) (discussing legitimate goals of cooperatives, and if they strive only to achieve legitimate goals, validity of such cooperatives), cert. denied, [419 U.S. 999 \(1974\)](#).

[FN180]. [7 U.S.C. § 291 \(1982\)](#).

[FN181]. One commentator has called [§ 2](#) 'potentially . . . the most potent provision of any antitrust law' since it enables a regulatory agency to deal directly with a firm's performance in the market place rather than merely the structure of the industry. W. F. MUELLER, THE CAPPER-VOLSTEAD EXEMPTION 14 (N.C. Project 117, Working Paper Series, WP-27 1979). For a discussion of the Secretary of Agriculture's regulatory authority under [§ 2](#), see *supra* notes 31-38 and accompanying text.

[FN182]. [Fairdale Farms, Inc. v. Yankee Milk, Inc.](#), 635 F.2d 1037, 1039- 40 (2d Cir. 1980) (Act does not restrict cooperative size), cert. denied, [454 U.S. 818 \(1981\)](#). However, the Secretary of Agriculture may order a cooperative to cease and desist from monopolization if prices are unduly enhanced, regardless of the means by which the monopoly was obtained). [7 U.S.C. § 292 \(1982\)](#).

[FN183]. [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 467 (1960). See [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203, 216 (9th Cir.) (cooperative loses its exemption if it engages in predatory practices), cert. denied, [419 U.S. 999 \(1974\)](#); [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), 512 F. Supp. 608, 637 (W.D. Ga. 1981) (citing prior predatory practices cases), *aff'd*, 715 F.2d 520 (11th Cir. 1983), cert. denied, [465 U.S. 1051 \(1984\)](#); [Bergians Farm Dairy Co. v. Sanitary Milk Producers](#), 241 F. Supp. 476, 484 (E.D. Mo. 1965) (predatory acts used to gain control of market are illegal), *aff'd*, [368 F.2d 679 \(8th Cir. 1966\)](#).

[FN184]. See [Maryland & Va. Milk Producers Ass'n v. United States](#) 362 U.S. 458, 463 (1960) (no intent by Congress to immunize cooperatives engaged in competition-stifling practices from prosecution).

[FN185]. *Id.* at 468.

[FN186]. *Id.*

[FN187]. *Id.* at 467. See [Alexander v. National Farmers Org.](#), 687 F.2d 1173 (8th Cir. 1982); [United States v. Dairymen, Inc.](#), 660 F.2d 192 (6th Cir. 1981); [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203 (9th Cir.), cert. denied, [419 U.S. 999 \(1974\)](#).

[FN188]. [United States v. Dairymen, Inc.](#), 660 F.2d 191, 195 (6th Cir. 1981). The Sixth Circuit held in *Dairymen, Inc.* that the district court erred in requiring a showing of predatory conduct. According to the Sixth Circuit, the key is whether the defendant used its full supply contracts, committed supply contracts, and exclusive hauling contracts with intent to stifle competition. If competition-stifling intent is present, a practice that has economic justification will be found illegal. *Id.*

[FN189]. [Alexander v. National Farmers Org.](#), 687 F.2d 1173, 1182 (8th Cir. 1982) (if there is anti-competitive activity that has economic justification, that is done lawfully but is done with unlawful intent to stifle competition, it is illegal).

[FN190]. *Id.* at 1183 (quoting [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 463 (1960); citing [United States v. Dairymen, Inc.](#), 660 F.2d 192, 195 (6th Cir. 1981)). It is the means by which monopoly power is acquired that is important. Thus, a particular merger of two cooperatives, while it may be immune from Clayton § 7 liability, may form part of a competition-stifling pattern of activity or an important means of attaining market power, in violation of Sherman § 2. [Alexander v. National Farmers Org.](#), 687 F.2d 1173, 1182 (8th Cir. 1982). Cf. Warlich & Brill, *supra* note 128, at 566 (cooperatives may not extend market power in ways not intended by Congress).

[FN191]. [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 472 (1960); [Alexander v. National Farmers Org.](#), 687 F.2d 1173, 1206-07 (8th Cir. 1982). The Sixth Circuit in *United States v. Dairymen, Inc.* directed the district court, on remand, to 'determine whether there were less exclusionary methods in which [*Dairymen, Inc.*] could achieve its legitimate goals.' 660 F.2d 192, 195 (6th Cir. 1981).

[FN192]. 384 U.S. 563 (1966). The Grinnel standard states that:
The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.
Id. at 570-71.

[FN193]. See [Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.](#), 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203, 205 (9th Cir.), cert. denied, 419 U.S. 999 (1974). At least one commentator specifically approves of the application of Grinnell to cooperatives. See Note, The Agricultural Cooperative Antitrust Exemption-- Fairdale [Farms, Inc. v. Yankee Milk, Inc.](#), 67 CORNELL L. REV. 396, 413-14 (1982) (Grinnell test would not burden cooperatives).

[FN194]. [Berkey Photo, Inc. v. Eastman Kodak Co.](#), 603 F.2d 263, 274-75 (2d Cir. 1979) (plaintiff alleged that monopolistic practices of defendant caused it to lose sales in camera and photo finishing markets and to pay excessive prices for supplies), cert. denied, 444 U.S. 1093 (1980).

[FN195]. [Greyhound Computer Corp. v. IBM](#), 559 F.2d 488, 498 (9th Cir. 1977) (footnotes omitted), cert. denied, 434 U.S. 1040 (1978). Discussing the exercise of these practices by IBM in light of its monopoly power, the Ninth Circuit continued:

If the jury concluded IBM possessed monopoly power in the leasing of general purpose computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket. The question is whether the jury could have found that the alleged practices were in fact adopted, and, if so, whether they had the prohibited effect.

Id. at 498 (footnote omitted). Accord, [California Computer Prods., Inc. v. IBM](#), 613 F.2d 727, 735 (9th Cir. 1979) (plaintiff need show only that monopolist's acts 'unnecessarily excluded competition' from relevant market, not that monopolist possessed specific intent to eliminate competitor).

[FN196]. [Borden, Inc. v. Federal Trade Comm'n](#), 674 F.2d 498, 514, (6th Cir. 1982), vacated, 461 U.S. 940 (1983). In *Borden*, the finding of monopolization was based on defendant's maintenance of a premium price for its reconstituted lemon juice, extensive advertising to increase product differentiation, selective promotional allowances, and use of price reductions in areas of little competition to subsidize price reductions in areas of intense competition, while possessing a market share in excess of 75%. [674 F.2d at 510-15.](#)

[FN197]. See [Maryland & Va. Milk Producers Ass'n v. United States](#), 362 U.S. 458, 469 (1960) (acquisition of dairy by cooperative association for purpose of eliminating largest purchaser of non-association member milk, eliminating association's prime competitor in Government milk contract bidding, forcing producers to deal exclusively with association, and increasing association's control of market violated Sherman and Clayton Acts); [Otto Milk v. United Dairy Farmers Cooperative Ass'n](#), 388 F.2d 789, 797 (3d Cir. 1967) (cooperative's activities in inducing retailers to stop handling plaintiff's products constituted restraint of trade in violation of Sherman Act); [North Texas Producers Ass'n v. Metzger Dairies, Inc.](#), 348 F.2d 189, 196 (5th Cir. 1965) (cooperative unlawfully engaged in tactics including boycotts of retailers handling plaintiff's milk to compel plaintiff to deal exclusively with it, thereby increasing its share of the market), cert. denied, 382 U.S. 977 (1966); [Bergjans Farm Dairy Co. v. Sanitary Milk Producers](#), 241 F. Supp. 476 (E.D. Mo. 1965) (dairy cooperative conspired to fix retail price of milk in violation of Sherman Act), aff'd, [368 F.2d 679](#) (8th Cir. 1966). See also Hufstедler, *supra* note 29, at 462 (collecting cases in which predatory trade practices were found).

[FN198]. [362 U.S. 458 \(1960\)](#) (Capper-Volstead does not insulate anti-competitive cooperative conduct from antitrust sanctions and, therefore, cooperatives are to be treated equally with corporations under the antitrust laws, thereby incurring liability for anticompetitive practices). For a further discussion of the principles of *Maryland & Virginia Milk*, see *supra* notes 174-179 and accompanying text.

A particularly prescient law student, analyzing the effect of *Maryland & Virginia Milk* on future jurisprudence, wrote: Some may contend that the opinion holds only those trade practices and methods of competition that can be styled 'predatory' as outside the 'legitimate objects' of a Capper-Volstead cooperative. This would be to suggest that the court has promulgated special standards for an exempt class under the antitrust laws . . . In light of the entire opinion such a position seems misleading, and a last ditch attempt to give new life to the concept of a class privilege for agricultural cooperatives. . . . In addition, cooperatives are amenable to standards gauging the conduct of business corporations. Note, *Agricultural Cooperatives and the Antitrust Laws: A New Departure*, 36 IND. L.J. 497, 502 n.27 (1961).

[FN199]. For a discussion of cases in which courts have required proof of predation as a prerequisite to a finding of monopolization by a cooperative, see *infra* note 200-205 and accompanying text.

In discussing the judiciary's approach to a charge of alleged monopolization by a cooperative, one commentator has noted that "[t]he contest then is to determine whether or not the activity is a 'legitimate object' of an association or whether it constitutes a 'predatory trade practice.'" Hufstедler, *supra* note 29, at 459. The effect of this standard is to create a much narrower class of interdicted activities without regard to the economic effects of such activities. Predation is generally associated with business behaviors that would 'not otherwise enhance profits but which are utilized to enlarge the predator's market share with the expectation that this will lead to a long run gain in profits.' Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 741 (1981).

[FN200]. [635 F.2d 1037, 1045 \(2d Cir. 1980\)](#), cert. denied, 454 U.S. 818 (1981). In *Fairdale Farms*, a milk producer brought an antitrust suit against two agricultural cooperatives alleging that they had illegally fixed raw milk prices. [635 F.2d at 1038.](#)

[FN201]. [635 F.2d at 1045](#) (citations omitted).

[FN202]. *Id.* This departure has been lauded by at least two commentators. See, e.g., Comment, *supra* note 119, at 492-94 (congressional intent was to allow exemption in absence of predation); Note, *Antitrust Law--Fairdale Farms, Inc. v. Yankee Milk Inc.--The Right of Agricultural Cooperatives to Possess Monopoly Power*, 7 J. CORP. L. 339, 351 (1982) (prosecution allowable only when predation or undue price enhancement is present).

[FN203]. [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), 715 F.2d 520 (11th Cir. 1983), aff'g [512 F. Supp. 608, 642 \(M.D. Ga. 1981\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#).

[FN204]. [660 F.2d 192 \(6th Cir. 1981\)](#). The Kinnett Dairies decision suffers from other infirmities. The court also concluded that, even if the Capper-Volstead Act provided no immunity, Dairymen, Inc., could not be found to have monopolized, 'lacking monopoly power in the relevant geographic market.' [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), [512 F. Supp. 608, 643 \(M.D. Ga. 1981\)](#), aff'd, [715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#). However, the court's definition of the relevant market is inappropriately wide in scope, since it refused to consider 'submarkets', thus diluting the court's estimation of the strength of Dairymen, Inc.'s market power. [512 F. Supp. at 643](#). For a discussion of the appropriateness of submarkets in Sherman Act cases, see supra note 112 and accompanying text.

[FN205]. [GVF Cannery, Inc. v. California Tomato Growers Ass'n](#), [511 F. Supp. 711, 715 \(N.D. Cal. 1981\)](#). The district court for the Western District of Kentucky in Kinnett Dairies went almost as far when it cited Fairdale Farms as shedding light on the meaning of predatory as '[t]he use of such tactics as picketing and harassment . . . boycotts . . . coerced membership . . . and discriminatory pricing.' [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), [512 F. Supp. 608, 642 \(M.D. Ga. 1981\)](#) (citing [Fairdale Farms 635 F.2d 1037](#)), aff'd, [715 F.2d 520 \(11th Cir. 1983\)](#), cert. denied, [465 U.S. 1051 \(1984\)](#). The court went on to conclude: 'In the present case, we have heard nothing of coerced membership, nor of picketing and harassment, nor of boycotts, nor of discriminatory pricing . . . The evidence of 'such tactics' is conspicuously absent.' [512 F. Supp. at 642](#). The Kinnett Dairies case was based in part upon different prices depending upon a handler's use of non- member milk (stip. S254) and upon classified pricing--price discrimination--in raw milk prices. Trial Tr. at 235-55, 517-26.

[FN206]. See [Berkey Photo, Inc. v. Eastman Kodak Co.](#), [603 F.2d 263, 274- 75 \(2d Cir. 1979\)](#), cert. denied, [444 U.S. 1093 \(1980\)](#). For a discussion of the reformulation of the Grinnell standard by the Second Circuit in Berkey Photo, see supra note 194 and accompanying text.

[FN207]. [Maryland & Virginia Milk](#), [362 U.S. at 466](#) (no congressional intent to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on competitors).

[FN208]. [Cape Cod Food Products, Inc. v. National Cranberry Ass'n](#), [119 F. Supp. 900 \(D. Mass. 1954\)](#) is widely cited in support of a broad antitrust exemption for cooperatives. Yet, examination of the jury instructions reveals that the means by which market power was gained was the operative factor-- essentially, the Grinnell standard.

There is nothing unlawful under the Sherman Act or any other antitrust act in trying to get even 100 percent of the market through skill, efficiency, superiority of product, or like entirely laudable steps. It is not unlawful . . . for a Capper-Volstead cooperative . . . to try to acquire even 100 percent of the market if it does it exclusively through marketing agreements approved under the Capper-Vosltead Act. . . . [I]t is not a violation of the Sherman Act or any other anti-trust act for a Capper-Volstead cooperative to acquire a large, even a 100 percent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling.

On the other hand, it would be a violation of the law and it would be a prohibited monopolization for a . . . group of persons to seek to secure a dominant share of the market through a restraint of trade which was prohibited, or through a predatory practice, or through the bad faith use of otherwise legitimate devices.

Id. at 907 (emphasis added).

[FN209]. Examples of anticompetitive dairy cooperative activities that may not be labeled by courts as predatory include: exclusive dealing or full supply contracts which lock out competitors; mergers of cooperatives which have, as an important aspect, the elimination of competition; pooling practices which foreclose competition; manipulation of regulations with the aim of keeping competing product or sellers out of the market; exclusive hauling requirements; agreements with other cooperatives to allocate territory or customers; discriminatory pricing or service charges; the use of litigation or threats of litigation to deter customers from buying from competitors; refusals to honor membership termination notices or to reveal termination dates; maintenance of reserve supplies far in excess of needs of members; supply cut-offs or threatened cut-offs to induce customers to accede to unilateral demands; supply contracts of long

duration; surcharge where customers bought from a competing supplier; etc. See, e.g., [Alexander v. National Farmers Org.](#), 687 F.2d 1173, 1190-93 (8th Cir. 1982); [Kinnett Dairies, Inc. v. Dairymen, Inc.](#), 512 F. Supp. 608, 624 (M.D. Ga. 1981), aff'd, 715 F.2d 520 (11th Cir. 1983), cert. denied, 465 U.S. 1051 (1984).

[FN210]. Between 1968 and 1972, 217 local cooperatives merged to form four large regional cooperatives: AMPI; Dairymen, Inc.; Mid-America Dairymen, Inc.; and Milk, Inc. R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 173.

[FN211]. [Section 7](#) of the Clayton Act provides in relevant part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create monopoly.

[15 U.S.C. § 18 \(1982\)](#).

[FN212]. [Otter Tail Power Co. v. United States](#), 410 U.S. 366, 372 (1973) (implied exemptions disfavored); [United States v. Philadelphia Nat'l Bank](#), 374 U.S. 321, 350-51 (1963) (implied immunity based on regulatory statute strongly disfavored); [United States v. Borden Co.](#), 308 U.S. 188, 198-99 (1939) (refusing to find implied immunity where not expressly granted).

[FN213]. Cf. [United States v. Borden Co.](#), 308 U.S. 188, 198-99 (1939) (there must be clear repugnance between old and new laws to support implied repeal of statutory provision).

[FN214]. See, e.g., [Gordon v. New York Stock Exchange](#), 422 U.S. 659, 682- 83 (1972) (proper approach wherever possible is to reconcile antitrust laws and regulatory scheme); [Silver v. New York Stock Exchange](#), 373 U.S. 341, 357-60 (1963) (repeal is implied only if necessary to make statute work).

[FN215]. [362 U.S. at 468-70](#).

[FN216]. [370 U.S. 19 \(1962\)](#).

[FN217]. [Id. at 29](#).

[FN218]. [Id. at 30](#).

[FN219]. *Id.* The court was referring to the principles laid out in [United States v. Borden Co.](#), 308 U.S. 188 (1939) (no antitrust exemption for activities with non-cooperatives) and [Maryland & Virginia Milk](#), 362 U.S. 465 (cooperatives have same rights and responsibilities as corporations).

[FN220]. See [National Broiler Marketing Ass'n v. United States](#), 436 U.S. 816, 828-29 (1978) (depriving cooperative of all immunity if even one member is non-farmer).

[FN221]. While concluding that the law as presently written subjects cooperative mergers to Clayton [§ 7](#) scrutiny, the National Commission for the review of Antitrust Laws and Procedures recommended that the law be amended to remove

uncertainty. Some commissioners also suggested that in the meantime, the Justice Department of Federal Trade Commission bring a test case. REPORT TO THE PRESIDENT AND ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 302, 314 n.32 (1978) [hereinafter cited as NATIONAL COMMISSION'S REPORT].

[FN222]. See R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 211-17; F. LIPSON & C. BATTERTON, *supra* note 67, at 52-59 (discussing history of application of antitrust laws to cooperative activity and concluding that Clayton § 7 should apply to intercooperative mergers).

[FN223]. Both the Federal Trade Commission and Justice Department Reports acknowledge this perception, without attribution. *Id.* See also Note, *supra* note 9, at 348; Note, *supra* note 193, at 413. Warlich and Brill find no legal basis on which to infer such an exemption but opine that a merger exemption is an 'apparent probable.' Warlich & Brill, *supra* note 128, at 583. In addition, Manchester states that inter-cooperative mergers 'should be regarded as entirely within the scope of the . . . exemption.' A.C. MANCHESTER, *supra* note 62, at 33.

[FN224]. A merger not only increases the surviving firm's market share, but decreases the number of competitors. R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 205-06.

[FN225]. Maryland & Virginia Milk, 362 U.S. at 472; Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 217 (9th Cir.), cert. denied, 419 U.S. 999 (1974). It would be anomalous, indeed, to hold that agreements between cooperatives must pass muster under Sherman § 2, but that cooperatives may merge with impunity, regardless of the competitive consequences.

[FN226]. 7 U.S.C. § 292 (1982).

[FN227]. Cooperatives trying to achieve supervailing power find that their greatest threat is the free rider problem. Absent an expectation of predatory or exclusionary tactics on the part of the cooperative, a producer's most favorable position would be to vote to require all other producers to form a single cooperative with the intention of being able to free ride the Class I monopoly prices. The membership policies described above tend to ameliorate the free rider problem and minimize the risk to the new entity. Cooperative mergers aimed at achieving countervailing power or increasing efficiencies do not incur the same risks--the interests of all producers are maximized by joining the new entity. As long as the new cooperative does not face higher costs than individual farmers and does not institute supervailing prices, all products will be sold at the competitive price, whether by a member or by a non-member; one cannot free ride efficiencies. An efficiency- or countervailing power- oriented merger might be the equivalent of dissolution and reformation and may not run afoul of Clayton § 7.

[FN228]. R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 215-17. There is evidence that some cooperative mergers may have been coerced; that they may have been partly the result of misleading information; or that they may have flowed, in part, from special deals given to members of the farmer cooperatives' boards of directors. P. M. Eisenstat, R. T. Masson & D. Roddy, *supra* note 4, at 173-81. Dairyman, Inc., bound its new merged members to a two- year initial term (based on an ambiguously worded membership contract) and filed suit to enforce these terms. Trial Tr. at 4106, 4113-4115, 4121 *United States v. Dairyman, Inc.*, 1978-1 Trade Cas. (CCH) ¶62,053 (W.D. Ky. 1978) (Shelor testimony) (discussing contractual relationships of coop members), *aff'd in part and rev'd in part*, 660 F.2d 192 (6th Cir. 1981).

[FN229]. Cooperatives appreciate this difference. Studies show that mergers far outnumber dissolutions. R. FONES, J. HALL & R. T. MASSON, *supra* note 12, at 217. The risks increase as the object of the merger moves from countervailing to supervailing power.

[FN230]. It has been suggested by some commentators that a merger in which members were truly free to opt out of the new enterprise and be reimbursed the value of the membership shares is identical, for all practical purposes, to an increase in cooperative size through voluntary accession of new members. Hulbert, Legal Phases of Farmer Cooperatives, U.S. DEPT. OF AGRICULTURE, FARMER COOPERATIVE SERV., INFORMATION NO. 70 at 24 (1970); Mahaffie, Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View, 22 AD. L. REV. 435, 441 (1970) (if two exempt cooperatives merge, new cooperative will be exempt); Note, *supra* note 9, at 374-75. However, this type of merger presumably allows the new cooperative to take over the supply contracts of its predecessors. This could render the ability of individual members to opt out and compete virtually meaningless, if most sources of customers were foreclosed. While this option appears to address the voluntary membership problem, the voluntariness may be more symbolic than real and the competitive implications are the same as with any other merger.

[FN231]. For a discussion of 'natural' limits on cooperative power, see *supra* note 31 and accompanying text.

[FN232]. See NATIONAL COMMISSION'S REPORT, *supra* note 221, at 302 (testimony of Secretary of Agriculture Bob Bergland).

[FN233]. [15 U.S.C. § 18 \(1982\)](#).

[FN234]. [15 U.S.C. § 2 \(1982\)](#).

[FN235]. [Alexander v. National Farmers Org.](#), 687 F.2d 1173, 1206-08 (8th Cir. 1982) (overriding issue is one of tactics and intent). See also [Maryland & Virginia Milk](#), 362 U.S. at 472.

[FN236]. [Fairdale Farms](#), 635 F.2d at 1039 (establishment of price is an integral part of marketing); [Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.](#), 497 F.2d 203, 217 (9th Cir.) (not unlawful for cooperatives to agree to set fair price), cert. denied, 419 U.S. 499 (1974).

[FN237]. [7 U.S.C. § 291 \(1982\)](#).

[FN238]. Price fixing agreements are an illegal restraint of trade under the Sherman Act, regardless of the alleged reasonableness of the prices as fixed. See [Addyston Pipe & Steel Co. v. United States](#), 175 U.S. 211, 235-38 (1899) (agreement of pipe manufacturers which had purpose and effect of limiting prices was illegal restraint of trade under Sherman Act); [United States v. Joint Traffic Ass'n](#), 171 U.S. 505, 559-62 (1898) (voluntary association of railroad companies which created uniform rates was illegal restraint of trade); [United States v. Trans-Missouri Freight Ass'n](#), 166 U.S. 290, 340-42 (1897) (association of railroad companies which fixed uniform rates was unlawful restraint of trade even if rates were reasonable).

[FN239]. [7 U.S.C. § 292 \(1982\)](#).

[FN240]. For a discussion of the Secretary of Agriculture's authority, see *supra* notes 33-41 and accompanying text.

[FN241]. For a discussion of the statutory scheme, see *supra* notes 31-36 and accompanying text.

[FN242]. [United States v. Borden Co.](#), 308 U.S. 188, 205-06 (1939) (§ 2 of Capper-Volstead is not substitute for judicial remedies under Sherman Act, but is added check upon cooperatives that may be exercised by Secretary of Agriculture);

[Maryland & Virginia Milk, 362 U.S. at 462-63](#) (allowance of Secretary of Agriculture to issue cease and desist order does not give Secretary exclusive jurisdiction, but merely creates another remedy in addition to provisions of Sherman Act).

[FN243]. For a discussion of the measurement and use of cooperative market power, see *supra* notes 128-71 and accompanying text.

[FN244]. See Folsom, *supra* note 62, at 1635-37. In response to a petition filed with the USDA charging undue price enhancement in the dairy industry, a Capper-Volstead committee was convened to investigate, but held no hearings. The Committee identified twelve markets involving six cooperatives in which there was 'evidence of prices which are possibly out of line with market forces.' 1976 REPORT, *supra* note 63, at 53. The Committee recommended that, despite the fact that the activities of dairy cooperatives 'may have resulted in undue price enhancement, . . . action by the Secretary would be superfluous' because the Justice Department had just signed consent decrees with two of the six cooperatives and had an action pending against a third. *Id.* No further action was taken by USDA.

[FN245]. Other commentators ascribe the lack of enforcement activity to an inherent conflict of interest between the Secretary's responsibilities under Capper-Volstead and USDA's role as the champion of agriculture and promoter of cooperative growth. See, e.g., Folsom, *supra* note 62, at 1631; Note, *supra* note 9, at 368.

[FN246]. For a discussion of USDA's four different definitions of undue price enhancement, see *supra* note 63.

[FN247]. 1979 REPORT, *supra* note 63, at ii. The proposals from this committee envision a two-step process: (1) deciding 'whether evidence of undue price enhancement exists'; (2) identifying 'monopolization or restraint of trade . . . where evidence of possible undue price enhancement has been found.' *Id.* at iii. See also E.V. JESSE, A.C. JOHNSON & B.W. MARION, *supra* note 63, at 9-11; A.C. MANCHESTER, *supra* note 62, at iv, 38.

[FN248]. 1979 REPORT, *supra* note 63, at 10. The Secretary fails to mention that the inability to restrict total supply is irrelevant to the ability to enhance prices where a classified pricing scheme is in effect. For a discussion of classified pricing and supervailing power, see *supra* notes 134-44 and accompanying text.

[FN249]. 1979 REPORT, *supra* note 63, at 10.

[FN250]. *Id.* at 15. The types of conduct that would make a cooperative a candidate for further monitoring include: restrictions on output; restrictions on entry of new members; coercively obtained full-supply contracts; other practices which foreclose markets to others; anticompetitive agreements between cooperative and noncooperatives; restrictions on exit of members (the focus would be on the length of the membership contracts, with no mention of staggered expiration dates). This is nothing more than a compilation of cooperative practices that the courts have found to be predatory and violative of the Sherman Act. *Id.* See [Alexander v. National Farmers Org., 687 F.2d 1173, 1193 \(8th Cir. 1982\)](#); Hufstedler, *supra* note 29, at 459.

[FN251]. For a discussion of the congressional intent behind [§ 2](#), see *supra* notes 33, 35 & 38.

[FN252]. For a discussion of the activities and organizations specifically cited by Congress as the types that would be illegal if [§ 1](#) had not been enacted, see *supra* notes 17, 18, 24 & 29 and accompanying text and note 36. The Supreme Court noted, '[[Section 2](#)] of the Capper-Volstead Act is auxiliary and was intended . . . as a qualification of the authorization given to cooperative agricultural producers by [§ 1](#), so that if the collective action of such producers, as there permitted, results in . . . monopolization or unduly enhanced prices, [the Secretary] may intervene and . . . control

the action thus taken under [\[§ 1\]](#). [United States v. Borden Co., 308 U.S. 188, 206 \(1939\)](#).

[\[FN253\]](#). For a discussion of Congress' intent to allow the Secretary of Agriculture enforcement power as another safeguard against anticompetitive activity, see *supra* notes 33-34. For a discussion of cases adopting this view of the Secretary's enforcement power, see *supra* note 242.

[\[FN254\]](#). H.R. REP. No. 24, 67th Cong., 1st Sess. 3 (1921). The Secretary 'shall' act if he has 'reason to believe' that there is undue price enhancement. [7 U.S.C. § 292 \(1982\)](#).

[\[FN255\]](#). [United States v. Borden Co., 308 U.S. 188, 206 \(1939\)](#) (Secretary may take action if he determines there is monopoly or undue price enhancement).

[\[FN256\]](#). 1979 REPORT, *supra* note 63, at 53. For a discussion of the Secretary's standards for issuing cease-and-desist orders, see *supra* note 247 and accompanying text.

[\[FN257\]](#). 1976 REPORT, *supra* note 63, at 25.

[\[FN258\]](#). [7 U.S.C. § 292 \(1982\)](#).

[\[FN259\]](#). [United States v. Borden Co., 308 U.S. 188, 206 \(1939\)](#) (Secretary may control action taken under exemption granted by [§ 1](#) of Capper-Volstead Act).

[\[FN260\]](#). S. REP. No. 236, 67th Cong., 1st Sess. 2 (1921).

[\[FN261\]](#). 1979 REPORT, *supra* note 63, at 8 (emphasis added) (discussion of how far prices must move before violation is found).

[\[FN262\]](#). For a discussion of the effect of countervailing power and how it will result in a competitive price, see Graph 4 and accompanying discussion, *supra* note 54.

[\[FN263\]](#). For an economic analysis of how supervailing power can result in unduly enhanced prices of products, see Graph 5 and accompanying discussion, *supra* note 64.

[\[FN264\]](#). For a discussion of how cooperatives with high market shares can usually achieve excess premiums, see *supra* notes 131-41 & 147-55 and accompanying text.

[\[FN265\]](#). According to USDA's own data, from 1974 through mid-1976, over- Order premiums exceeded fifty cents per hundredweight for at least one year in fourteen different markets. 1976 REPORT, *supra* note 63, at 43.

[\[FN266\]](#). See *supra* note 242.

[\[FN267\]](#). Clayton Act § 6, [15 U.S.C. § 17 \(1982\)](#).

[FN268]. [Maryland & Virginia Milk, 362 U.S. at 466-67](#) (purpose of law indicates that farmers should be allowed to organize to compete on equal footing with corporations to whom they sell their produce).

[FN269]. [Id. at 467](#) (if associations allowed by Capper-Volstead Act engage in any activity forbidden by Sherman Act, association will be subject to penalties under Sherman Act). Cf. [National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 828-29 \(1978\)](#) (complete loss of immunity when one member of cooperative is not producer).

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