POST-*SMITHFIELD* AND *HAZELTINE*: AN EVALUATION OF THE CAPPER-VOLSTED ACT AS AN ALTERNATE MEANS OF MARKETING POWER FOR PRODUCERS

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I. INTRODUCTION

It has been well-documented that today's animal agriculture industry is increasingly characterized by consolidation of ownership, with four companies

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controlling 80% of the beef market and 60% of the pork market.[1] These food companies are no longer faced with the task of merely trading food *commodities*, but they must engage in a system of providing food *products*.[2] Coupled with the task of providing food products to the American public is the challenge of providing those products at a low cost to consumers; today's American consumer spends only a mere eleven to fifteen percent of his disposable income on food.[3] Moreover, American consumers expect that the food industry will continue to offer a variety of nutritious and convenient food products at a relatively low cost.[4] Commodity production systems of the past are not capable of meeting these consumer demands.[5] As a result, today's agricultural production sector continues to evolve into a system based on economies of scale, or a system that utilizes more efficient, large-scale production systems.[6]

Consequently, food industry processors have begun to acquire a supply "line-up" in these economies of scale systems, to ensure that enough inputs are available for processing and delivery to the consumer.[7] Production contracts have become an important device for acquiring these supplies; these contracts serve as the basis of increasing processor control within the livestock industry.[8] By using production contracts, a company will become "vertically integrated," a term that is used to describe a company that owns or controls each segment of animal pro-

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1. *See* Molly McDonough, *Down on the Farm*, A.B.A. J., Nov. 2003, at 18; *see also* Mary Hendrickson & William Heffernan, *Concentration of Agricultural Markets* (2005), *available at* http://www.nfu.org/documents/legislative/concentration_Tables_2004.pdf; *see generally* C. Robert Taylor, *Where's the Beef? Monopoly and Monopsony Power in the Beef Industry*, Agriculture and Resource Policy Forum (Auburn University) Mar. 2002, *available at* http://www.auburn.edu/~taylocr/topics/beef/beefmarginsforum.htm (discussing the impact of rapid consolidation in the meatpacking industry since 1980).

2. *See* Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLINE L. REV. 397, 399 (1995) (citing Mark Drabenstott, *Industrialization: Steady Current or Tidal Wave?*, CHOICES, Fourth Quarter 1994, at 4).

3. *See* Kelley, *supra* note 2, at 400; *see also* Patrick Duffey, *Cooperative – USDA Partnership Still Strong After 75 Years*, USDA RURAL COOPERATIVES MAGAZINE, SEPT./OCT. 2001, *available at* http://www.rurdev.usda.gov/rbs/pub/sep01/strong.htm (last visited Nov. 9, 2003).

4. *See* Dr. Tom Field, *Making a Living in the Age of Wal-Mart*, 10 FOOTHILL RANCHER 2, 3 (Spring 2002), *available at* http://ceplacer.ucdavis.edu/newsletterfiles/Foothill_Rancher992.pdf (last visited Nov. 9, 2003).

5. *Id.*

6. *See* id.

7. *See* Kelley, *supra* note 2, at 400; *see also* Field, *supra* note 4, at 3.

8. Kelley, *supra* note 2, at 399-400.

duction and processing.[9] The integrator will often enter into contracts with growers, who typically own the production inputs but are charged with following the production scheme set out by the integrator.[10] The contract sets out the details of the production scheme and binds the two parties together for a fixed number of production cycles.[11] The processor benefits from the contracts because the contracts ensure a captive supply. Similarly, the producer benefits because market access is now through an assured buyer/processor, and the risk of receiving low prices for products is minimized.[12] However, these production contracts do present disadvantages to agricultural producers; as a result, the production contracts have stimulated much public debate concerning the unfair economic effects such contracts may have on farmers.[13]

Critics of the industry's transformation to a more vertically integrated system purport that the family farmer is now simply a "serf with limited economic activity."[14] This characterization is largely a result of the economic principle that teaches when the number of buyers is reduced, an accompanying downward pressure on the prices paid to sellers will result.[15] Critics of vertical integration further assert that buyers/processors have increasing opportunities and incentives to manipulate the open cash market because the cash market is often the primary price discovery point for formula contracts and marketing agreements.[16] For example, while marketing agreements are often praised for the system of monetary premiums available for producers, rewarding those producers who provide animals with desirable carcass characteristics and providing incentive to others to raise such animals, these marketing agreements typically involve a base

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9. Glenn A. Hegar, Jr., *Adhesion Contracts, Debt, Low Returns and Frustration – Can America's Independent Contract Farmer Overcome the Odds?*, 22 HAMLINE L. REV. 213, 214 (1998).

10. *Id.*

11. *Id.* (citing Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207, 1224-28 (1995) and Neil H. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. ST. L. REV. 1051, 1051-60 (1995)).

12. Kelley, *supra* note 2, at 403.

13. Hegar, Jr., *supra* note 9, at 215.

14. *See* McDonough, *supra* note 1, at 18.

15. Roger A. McEowen et al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE J. AGRIC. L. 267, 273-74 (2002) (citing James M. MacDonald et al., *Competition and Prices in USDA Commodity Procurement*, 69 S. ECON. J. (2002)).

16. McEowen et al., *supra* note 15, at 275.

price originating from the cash, or open market sales.[17] It follows then, that if buyers can manipulate and significantly lower the prices offered in the open cash market, the ultimate price offered to producers via marketing agreements/production contracts will be lower than if the cash market (and, thus, the base price in the production contracts) was a true representation of the market price.[18]

This system of production contracts and a market characterized by large processor firm control has raised concerns amongst those involved in animal production about their ability to continue to operate.[19] In response to these heightened concerns surrounding agricultural production contracts, federal and state legislatures have taken steps to purportedly curtail food processors' expanding power and increase producers' limited marketing power.[20]

Part II of this Note will highlight federal and state legislative measures that have attempted to provide today's individual producers in the animal agriculture industry with economic protections. Part III will discuss the constitutional challenges against two such state measures, resulting in invalidation of the state laws on Dormant Commerce Clause grounds. The Dormant Commerce Clause argument appears to be the prevailing attitude of courts toward anti-corporate/packer laws.[21] Therefore, Part IV of this Note will focus on other legislative remedies that are already in place and provide the sought-after protection and bargaining power to producers, namely the Capper-Volsted Act. Part V will focus on the use of the Capper-Volsted Act as a multi-faceted remedy for all segments of the current animal industry, meeting family farmer demands as they struggle to survive and providing processors with the means to obtain consistent, high quality supplies.

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17. *See* Michael Boland et al., *Economic Issues with Vertical Coordination*, KANSAS STATE UNIVERSITY AG EXPERIMENT (Dec. 1999) at 2, *available at* http://www.agmanager.info/agribus/econissues/mf2431.pdf (last visited Nov. 29, 2003).

18. *See* Hegar, Jr., *supra* note 9, at 215.

19. *See id.* at 215-16.

20. *See* IOWA CODE § 9H.2 (2003); McEowen et al., *supra* note 15, at 268 (outlining the efforts of the federal government to add a packer ownership prohibition to the Farm Bill).

21. *See* S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 592-96 (8th Cir. 2003); Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 985-87 (S.D. Iowa 2003) (applying the Dormant Commerce Clause analysis).

II. LEGISLATIVE ATTEMPTS TO PROTECT PRODUCERS

A. *Federal Attempts*

On December 13, 2001, the United States Senate approved an amendment to the Senate Farm Bill, making it unlawful for a packer to own, feed, or control livestock intended for slaughter more than fourteen days prior to slaughter.[22] This amendment did not survive the House/Senate Conference Committee on the Farm Bill, largely because House conferees suggested that more study and definitive causal connections between captive supplies and low prices awarded to producers were needed prior to enacting legislation;[23] however, there continue to be efforts to enact such legislation.[24]

This federal attempt was largely a result of collaboration amongst several Midwestern legislators, whose constituent states had already enacted similar anti-packer measures.[25] Specifically, Iowa and South Dakota enacted legislation and passed a constitutional amendment, respectively, making it unlawful for a packer to own or control livestock within the state.[26] Both of these measures are based on purported protection of both individual farmer economic autonomy and environmental health and safety.[27] The next section contains a more detailed analysis of state measures to limit large firm control in the animal agriculture industry.

B. *State Measures*

Iowa Code Section 9H.2 was initially enacted in 1977 and was amended several times prior to 1999.[28] The stated purpose of this section was "to preserve free and private enterprise, prevent monopoly, and also to protect consumers."[29]

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22. McEowen et al., *supra* note 15, at 268.

23. *Id.*

24. *See* S. 27, 108th Cong. (2003) and H.R. 719, 108th Cong. (2003) (attempting to amend the Packers and Stockyards Act, 1921, to make it unlawful for a packer to own, feed, or control livestock intended for slaughter); *see also* S. 1644, 108th Cong. (2003) (attempting to amend the Packers and Stockyards Act, 1921, to limit the number of packer-owned swine that certain packers may slaughter in any calendar year); S. 325, 108th Cong. (2003) (attempting to amend the Agricultural Marketing Act of 1946 to increase competition and transparency among packers that purchase livestock from producers).

25. *See* McEowen et al., *supra* note 15, at 285-86.

26. IOWA CODE § 9H.2 (2003); S.D. CONST. art. XVII, § 21.

27. Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional – Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?*, AGRIC. LAW DIG. (Agric. Law Press, Eugene, Or.) Sept. 5, 2003, at 129.

28. IOWA CODE § 9H.2 (2003).

29. *Id.*

The mechanics of this section prevented cattle and swine processors from owning, controlling, or operating production facilities within the state of Iowa.[30] During the 2000 legislative session, Section 9H.2 was again amended, prohibiting any processor from "directly or indirectly contract[ing] for the care and feeding of swine in [Iowa]."[31]

The State of South Dakota enacted a constitutional amendment, substantially similar to the Iowa Code provision, in a 1998 referendum.[32] The constitutional amendment provided "no corporation or syndicate may acquire, or otherwise obtain an interest… in any real estate used for farming in this state, or engage in farming."[33]

Both state remedies were enacted with the expectation and goal of helping the family farm to survive.[34] Proponents argue that these "anti-corporate farming laws keep family farmers competitive and rural communities stable."[35] However, as one commentator has observed,

> [An] icon of the American imagination is the small family farm. Jefferson's agrarian concept of a nation largely populated by farmers and local merchants is kept alive by the popular belief that family farming is ideal. However, this agrarian concept of localized food production has not been uniformly supported by the consumers of the food and agri-business sector. We cling to Norman Rockwell's idealistic image of the family farm while we shop at the superstores of Wal-Mart and other multinational conglomerates.[36]

More importantly, in light of recent court decisions, it is clear that rural community stability will not be enough to sustain anti-corporate farming measures such as these against overriding constitutional concerns.[37]

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30. *Id.*

31. *Id.*; Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 983 (S.D. Iowa 2003).

32. *Compare* S.D. CONST., art. 17, § 21 *with* IOWA CODE § 9H.2 (2003).

33. S.D. CONST. art. 17, § 21 (defining corporation as "any corporation organized under the laws of any state of the United States or any country;" defining syndicate as "any limited partnership, limited liability partnership, business trust, or limited liability company" … but not "general partnerships, except general partnerships in which nonfamily farm syndicates or nonfamily farm corporations are partners;" defining farming as "cultivation of land for the production of agricultural crops … or the ownership, keeping, or feeding of animals for the production of livestock or livestock products").

34. McDonough, *supra* note 1, at 18.

35. *Id.* at 20.

36. Field, *supra* note 4, at 2.

37. *See* Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 993 (S.D. Iowa 2003); *see also* S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 597 (8th Cir. 2003).

III. JUDICIAL REVIEW AND INVALIDATION OF STATE MEASURES

A. Smithfield Foods, Inc. v. Miller

The State of Iowa has long been known as the largest hog producing state in America.[38] Coupled with this characterization as a hog producing mecca, Iowa also leads the nation in corn production.[39] This combination results in an economic setting where it is often cheaper to ship a feeder pig to Iowa for both feeding and slaughter than it would be to ship grain from Iowa to another state that produces hogs.[40] As a result, Iowa is quickly characterized as a prime location to send pigs for feeding and finishing.[41] Food processors also own production units in a quest to provide food products at a low cost to consumers. As a result, they too seek to enter Iowa's promised land of hog production.[42]

However, Iowa Code Section 9H.2 prohibits an out of state pork processor from contracting for hog care and feeding in Iowa if that out of state processor is the entity that is ultimately charged with the slaughter of those hogs.[43] Therefore, when Smithfield Foods,[44] based in the state of North Carolina, sought to establish a contract and financing relationship with Prestage-Stoecker Farms, Inc., an Iowa-based farming corporation, the Iowa Attorney General's Office threatened to file suit against Smithfield and assess a substantial amount of fines against the company.[45]

Smithfield responded to these threats by filing an action that challenged the constitutionality of Iowa Code Section 9H.2, asserting the statute violated the Dormant Commerce Clause of the United States Constitution.[46] On January 22, 2003, the Federal District Court for the Southern District of Iowa ruled that Iowa's anti-corporate farming statute was, in fact, unconstitutional on Dormant Commerce Clause grounds.[47]

The federal district court relied on the "negative" reciprocal, or the "dormant" aspect of the Commerce Clause, to invalidate the statutory scheme

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38. *Smithfield,* 241 F. Supp. 2d at 981.
39. *Id.*
40. *Id.*
41. *See id.*
42. *See id.*
43. IOWA CODE § 9H.2 (2003).
44. *Smithfield,* 241 F. Supp. 2d at 982 (characterizing Smithfield Foods [hereinafter Smithfield] as "the world's largest pork processor and hog producer" due to Smithfield's vertically integrated business model whereby Smithfield owns both hog production operations and pork processing facilities).
45. *See id.*
46. *See id.* at 987.
47. *See id.* at 994.

because it proscribes an individual state, such as Iowa, from engaging in economic protectionism.[48] A system of economic protectionism is undesirable because "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States."[49] Therefore, by encouraging economic isolationism, or prohibiting out-of-state access to in-state resources, a state is merely promulgating the very evil that the Dormant Commerce Clause was designed to prevent.[50]

Certainly, the notion of protecting the family farmer is important, and efforts must be made to ensure that these individuals are able to maintain their business. The federal district court recognized that attempts to protect family farmers are important, characterizing such efforts as "noble purposes."[51]

Nonetheless, the mechanics of this particular statutory scheme was too similar in nature to a previous protectionist and unconstitutional Iowa statute.[52] In *Kassel v. Consolidated Freightways Corp. of Delaware*, the United States Supreme Court was presented with a challenge to an Iowa statute that generally prohibited the use of 65-foot double-trailer trucks within its borders, while allowing 55-foot single-trailer trucks and 60-foot double-trailer trucks within the state of Iowa.[53] A trucking company that carried commodities through Iowa on its interstate highway system filed suit, alleging that Iowa's statutory scheme unconstitutionally burdened interstate commerce.[54] The Court determined the statute was protectionist in nature and stated that "Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways."[55]

In a similar manner, the district court in *Smithfield* determined that Iowa Code Section 9H.2 is a regulatory scheme that placed too high of an economic burden on out-of-state competitors.[56] In reaching this decision, the court followed the Supreme Court's analysis in *Kassel*, finding a state statute such as Section 9H.2 that has discriminatory effect on out of state businesses is sufficient

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48. *Id.* at 985 (citing New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988)).

49. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977) (quoting Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370 (1976) (quoting McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944)).

50. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 578 (1997).

51. Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 993 (S.D. Iowa 2003).

52. *See* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981).

53. *See id.* at 665.

54. *Id.* at 667.

55. *Id.* at 686 (Brennan, J., concurring).

56. *See Smithfield*, 241 F. Supp. 2d at 993.

evidence of economic protectionism.[57] Moreover, the court highlighted that the basis for the Commerce Clause was to ensure that every farmer and craftsman would have free access to every market in the nation and free competition between every producing area in the nation would exist.[58] As a result, the district court for the Southern District of Iowa[59] determined that Iowa Code Section 9H.2, prohibiting out-of-state businesses from operating within Iowa, coupled with its stated purpose of "…protect[ing] consumers," violated the Dormant Commerce Clause.[60]

B. South Dakota Farm Bureau, Inc. v. Hazeltine

The State of South Dakota enacted a similar measure to Iowa Code Section 9H.2 when it adopted a constitutional amendment, "Amendment E," in a 1998 referendum.[61] The purpose of Amendment E was to prohibit corporations, limited partnerships, limited liability companies and other business entities from engaging in farming and livestock production.[62] In essence, this proposed amendment was an "anti-packer" measure, seeking to eliminate processing entities' involvement in and/or ownership of any animal production within the state of South Dakota. Because this anti-packer measure was proposed as a constitutional amendment, it was scheduled to be on the November 3, 1998, South Dakota election ballot.[63] Pursuant to South Dakota law, any constitutional amendment must be accompanied by an Attorney General explanation.[64] The initial Attorney General explanation for Amendment E contained the warning, "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution."[65] However, this portion of the Attorney General's initial explanation did not appear on the final voting ballot for the constitutional amendment because the Supreme Court of South Dakota, in *Hoogestraat v. Barnett*, ruled that the inclusion of such a statement within the Attorney General explanation would exceed the scope of the Attorney General's statutory author-

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57. *Id.* at 985 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)).
58. *Id.* at 993 (citing H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (Jackson, J.)).
59. "[T]he case was scheduled for oral argument before the appeals court in October." McDonough, *supra* note 1, at 18.
60. *See Smithfield*, 241 F. Supp. 2d at 990-93.
61. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587 (8th Cir. 2003).
62. *See id.*
63. *See* Hoogestraat v. Barnett, 583 N.W.2d 421, 423 (S.D. 1998).
64. S.D. CODIFIED LAWS §§ 12-13-1, 12-13-9 (Michie 2004).
65. *Hoogestraat*, 583 N.W.2d at 422.

ity.[66] As a result, South Dakota voters were presented with a constitutional amendment proposal that did not contain the Attorney General's projection and warning that the amendment could ultimately be subject to a legal pitfall.[67] Subsequent to the *Hoogestraat* decision, Amendment E passed in the 1998 referendum.[68]

The Attorney General's prediction about the fate of Amendment E soon became a reality. Thirteen parties challenged the constitutionality of Amendment E, in a similar manner to the Iowa Code Section 9H.2 challengers, alleging that the South Dakota state constitutional amendment was unconstitutional pursuant to the Dormant Commerce Clause of the U.S. Constitution.[69] Plaintiffs based their challenge to the amendment on the United States Supreme Court's recognition, time and time again, that the Dormant Commerce Clause operates to prohibit states from enacting protectionist laws and serves to carry out "the Framers' purpose to 'preven[t] a State from retreating into economic isolationism or jeopardizing the welfare of the Nation as a whole' . . . ."[70] Plaintiffs asserted that Amendment E, as enacted, would operate contrary to that purpose because the amendment would serve as a means for South Dakota to retreat into economic isolationism.[71] The Eighth Circuit Court of Appeals accepted this argument and declared that Amendment E, South Dakota's anti-corporate farming measure, violated the Dormant Commerce Clause because it was motivated by and enacted with a discriminatory purpose.[72]

C. *Future of Anti-Corporate Laws*

The *Hazeltine* decision has been viewed by many as a mere foreshadowing of the future of anti-corporate/anti-packer law viability in other states, primarily because many states that have similar anti-corporate/anti-packer legislation are also located within the Eighth Circuit.[73] Commentators on the *Hazeltine* decision have observed that currently, the Eighth Circuit appears to be opposed

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66. *See id.* at 424.

67. *See* id.

68. S.D. CONST. art. XVII, § 21; *see also* S.D. Farm Bureau v. Hazeltine, 340 F.3d 583, 587 (8th Cir. 2003).

69. *See Hazeltine*, 340 F.3d at 587-89 The plaintiffs consisted of a mix of corporate entities, non-corporate entities, interest groups, and utility companies. The plaintiffs' action included claims that, upon enforcement of Amendment E, their entities would be put out of business, suffer a reduction in income, suffer de-valuation of land, be prevented from continuing to farm with certain entities, and would incur increased costs to acquire easements needed for business.

70. *Id.* at 593 (citing Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996)).

71. *See id.* at 588-89.

72. *See id.* at 592-98.

73. *See* McEowen & Harl, *supra* note 27, at 131.

to anti-corporate farming statutes.[74] As a result, commentators suggest it is reasonable to believe that the Eighth Circuit may continue to strike down anti-corporate farming laws in subsequent states.[75] This assumption is largely based on the portion of the *Hazeltine* opinion where the court relied on *H.P. Hood and Sons v. Du Mond*.[76] In *H.P. Hood and Sons, Inc.*, the Supreme Court adopted the economic theory of free trade as the framework for evaluating Dormant Commerce Clause cases, stating that the vision of the Framers was "that every farmer … shall be encouraged to produce by the *certainty* that he will have free access to *every market in the Nation*…."[77]

Coupled with the apparent judicial adoption of free trade economics, animal agriculture is an industry characterized by economies of scale.[78] Food processors seek to meet consumer demands for plentiful, satisfying, and cheap food.[79] As a result, food processors are faced with satisfying consumers while seeking to remain as operative business entities in this economies of scale system. Consequently, food processors are increasingly engaging in contract farming because these contracts enable processors to acquire inputs at a low per unit cost and spread costs over higher levels of production, while providing consumers with plentiful and relatively cheap foods.[80] This economic environment, coupled with the recent legal environment of courts declaring anti-packer and anti-corporate laws unconstitutional, leads to the conclusion that contract farming is likely here to stay. State efforts to enact protectionist legislation, seeking to aid those in animal production, has not withstood judicial scrutiny.[81]

The economic environment of the food production industry makes it clear that the independent producer will soon be a piece of America's history, unless farmers and policy makers seek an alternative avenue, in lieu of these unconstitutional attempts, to ensure that producers are aptly rewarded for their production efforts. It has been suggested that growers should organize themselves into growers' associations because "[i]ndividually, a grower cannot expect to have any input into the terms of a contract, but collectively, growers may be able to attain concessions from an integrator."[82]

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74. *See id.* at 130-31.

75. *See id.* at 131.

76. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949); McEowen & Harl, *supra* note 27, at 132, n. 32.

77. *Du Mond*, 336 U.S. at 539 (emphasis added).

78. *See* Field, *supra* note 4, at 3.

79. *Id.*

80. *See generally id.* at 2.

81. *See*, *e.g.*, Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978, 992 (S.D. Iowa 2003) (invalidating IOWA CODE § 9H.2 on constitutional grounds).

82. Hegar, Jr., *supra* note 9, at 256.

IV. EVALUATION OF THE CAPPER-VOLSTED ACT

A. *Capper-Volsted Act's Purpose: Resolving Bargaining Power Imbalance*

The notion of increased bargaining power through a collective association of agricultural producers is not a novel idea. While the official purpose of the Clayton Act of 1914 was to limit monopoly power, it hailed the use of collective associations of agricultural producers.[83] In fact, the Clayton Act contained a provision that exempted agricultural producer associations from antitrust laws.[84] However, Section 6 of the Clayton Act only protected those cooperatives that did not utilize capital stock.[85] This limitation ultimately operated as a barrier to many agricultural producers whose businesses were organized as corporations. Because producers "need capital and must have the privilege of paying dividends," many farmers did not feel as if they could organize in the manner permitted by Section 6 of the Clayton Act and continue to actively engage in agricultural production.[86] Thus, in 1922, Congress passed the Capper-Volsted Act (CVA), an attempt to aid farmers' economic situation as it served to protect agricultural cooperatives regardless of the business form, from antitrust laws.[87] The Act was designed:

> simply to give the growers or the farmers the same opportunity for successful organization and distribution of their products that the great corporations of America have enjoyed for many years…[T]he growers must have an opportunity to merchandise their products in an orderly way, instead of being compelled to dump them on a glutted market at prices below cost of production.[88]

Farmers were "perceived to be in a particularly harsh economic position" when the CVA was passed because they were subject to the sometimes harsh market conditions that plague agriculture without any means to individually respond to those conditions.[89] The agricultural production sector was characterized by farmers who often had little choice about whom to sell to and when to sell

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83. Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (current version at 15 U.S.C.A. § 17 (2000)).

84. *Id.*

85. *See* Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 355 F. Supp. 408, 410 (C.D. Cal. 1971).

86. H.R. Rep. No. 939, 66th Cong. 2d Sess. 1 (1920).

87. *See Case-Swayne Co*., 355 F. Supp. at 411; *see also* N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 989 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

88. 62 CONG. REC. S2058 (1922) (statement of Sen. Capper).

89. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 825 (1978).

their products.[90] Farmers of this period were seen as "caught" by the hands of processors and distributors because the processors and distributors were in a strong economic position within the market.[91] As such, processors and distributors had gained the reputation as entities that would take a "good share of whatever profits might be available to farmers from agricultural production."[92] Therefore, by allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and improve their ability to deal with adverse economic periods, powerful processors, and powerful distributors.[93] Therefore, the key aim of the Capper-Volsted Act was to place farmers in economic circumstances comparable to those afforded other businesses and large industries.[94] Congress sought to provide farmer-producers the opportunity to "otherwise carry on like a business corporation" without violating anti-trust laws.[95]

The underlying goal of helping farmers to thrive as other businesses do, in the confines of a unique industry setting, has been echoed in the years following the passage of the CVA. As the Supreme Court stated in *Tigner v. Texas* in 1940, there has been "general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy."[96] This "protection" of agriculture with public policy formation is appropriate due to the structure of our national economy, wherein agriculture expresses different functions and forces than the typical economic process.[97] The unique characteristics of agricultural production were highlighted by the United States District Court for the Central District of California, in *Case-Swayne Co., Inc. v. Sunkist Growers, Inc*.[98] In *Case-Swayne Co.*, the court described the uncertain nature of product yields within agricultural production, coupled with a farmer's inability to set a minimum price for the yields he is able to market.[99] Accordingly, in an attempt to counteract these disadvantages and achieve some economic stability, agricultural producers have utilized the CVA and developed cooperative associations.[100]

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90. *See id.*
91. *Id.*
92. *Id.* at 825-26.
93. *Id.* at 826.
94. *See* Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 355 F. Supp. 408, 411 (C.D. Cal. 1971).
95. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960).
96. Tigner v. Texas, 310 U.S. 141, 146 (1940).
97. *See id.* at 146.
98. *See* Case-Swayne Co., 355 F. Supp. at 409.
99. *Id.*
100. *See id.*

B. *Mechanics of CVA*

1. *The Grant of Bargaining Power*

As previously mentioned, Section 6 of the Clayton Act attempted to protect those in agriculture from antitrust litigation.[101] The subsequent promulgation of the Capper-Volsted Act, encouraging farmers to join together when marketing their products, does not operate so as to contradict the Clayton Act.[102] Rather, the first section of CVA[103] works in concert with Section 6 of the Clayton Act.[104] Section 6 of the Clayton Act provides "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural organizations . . . ."[105] However, this protection was only available for non-capital stock corporations, and the CVA simply served to broaden this provision of the Clayton Act, allowing the majority of producers, regardless of entity choice, to collectively act for certain purposes.[106] As a result, these two pieces of legislation, working together, serve to remove the majority of agricultural cooperative associations from the sweep of the antitrust laws.[107] The first section of the CVA provides the explicit eligibility requirements that producers must satisfy to enjoy the Act's protection from anti-trust actions.[108]

First, the individual or association must be engaged in the *production* of agricultural products.[109] The core of the CVA is that Congress only intended to extend antitrust protection to persons in agriculture engaged solely in *production*.[110] For example, an amendment to extend the protection to associations of manufacturers was rejected by the Senate.[111] While such protection might indirectly benefit farmers, as Senator Norris stated, Congress should not permit "a manufacturer of any product…agricultural or otherwise, to get a bigger profit

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101. *See* Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (current version at 15 U.S.C.A. § 17 (2000)).

102. *See* Capper-Volstead Act, 7 U.S.C.A. §§ 291-92 (West 1999).

103. "Persons engaged in the production of agricultural products…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." 7 U.S.C.A. § 291 (West 1999).

104. *See* Sunkist Growers, Inc. v. FTC, 464 F. Supp. 302, 309 (C.D. Cal. 1979).

105. Clayton Act, § 6, 15 U.S.C.A. § 17 (2000) (original version at ch. 323, § 6, 38 Stat. 731 (1914)).

106. *See Sunkist Growers, Inc.*, 464 F. Supp. at 309.

107. *See* United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970).

108. *See* 7 U.S.C.A. § 291 (2000).

109. *Id.* (emphasis added).

110. 62 CONG. REC. S2052-2053 (1922); H.R. REP. NO. 939 (1920) (emphasis added).

111. 62 CONG. REC. at S2275.

from the consumer on his product if he will agree to pay a part of the swag to the man who produces it."[112] In addition, the first section of the CVA provides that if a cooperative is to be eligible for CVA protection, no member of the cooperative can have more than one vote due to the quantity of stock owned, nor can such a cooperative pay stock dividends on stock in an amount greater than eight percent per year.[113] Furthermore, the cooperative must be organized such that the value of the products it markets for its members exceeds the value of the products marketed for nonmembers.[114]

Congress intended to guarantee antitrust immunity to producers that joined together under the CVA.[115] Today, consequently, an association of producers that meets the aforementioned requirements may "act together in associations…in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce" the products of those members in the association.[116] In addition, under this statutory frame, individual producers or producer-cooperatives may combine and obtain a quasi-monopoly power in a given market so long as it is achieved through natural growth, voluntary confederation and "without resort to predatory or anti-competitive practices."[117] Producers are able to organize in such a manner because of a broad interpretation of the term "marketing" in the CVA context.[118] One example of the "marketing" term interpretation is so broad that it suggests a cooperative has the ability to establish a floor price for the producers in the association, and no member will be allowed to sell his products below that price, regardless of the current "open market" price.[119] This amount of leeway afforded to producers to collectively "set" the prices which they will receive may invite some criticism. However, the CVA must be evaluated as a means of aiding producers in today's economic setting, coupled with a realization that the right to act cooperatively under the CVA does not authorize *any* combination in restraint of trade that agricultural producers may see fit to devise.[120] The limitations of the power the CVA gives to producers is addressed in the next section.

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112. *Id.* (statement of Sen. Norris).
113. 7 U.S.C.A. § 291 (2000).
114. *Id.*
115. United States v. Elm Spring Farm, Inc., 38 F. Supp. 508, 511 (D. Mass. 1941).
116. 7 U.S.C.A. § 291 (2000).
117. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1044 (2d Cir. 1980).
118. Donald A. Frederick, *Legal Rights of Producers to Collectively Negotiate*, 19 WM. MITCHELL L. REV. 433, 441 (1993).
119. *See* N. Cal. Supermarkets v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 992-93 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).
120. *See* Sunkist Growers, Inc. v. FTC, 464 F. Supp. 302, 309 (C.D. Cal. 1979); Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384, 395 (1967); Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1202 (9th Cir. 1975).

2. *Limitations on CVA "Power"*

As outlined above in the eligibility requirements section, a cooperative afforded protection under the CVA can only be composed of members that are all actually engaged in agricultural production. The Supreme Court has determined that "Congress did not intend to allow an organization with…non-producer interests to avail itself of the [CVA] exemption."[121] Therefore, an association that is not made up exclusively of growers will not be afforded the protection of the Act.[122]

The protection afforded to producer cooperatives pursuant to Section One of the CVA is further limited by Section Two of the Act. Section Two of the CVA was passed in response to fears that Section 1 might serve as a means for farmer cooperatives to engage in predatory activity.[123] "Predatory conduct is activity that is anti-competitive and has no business justification."[124] Accordingly, the Second Circuit has cautioned that a CVA cooperative "may neither acquire nor exercise monopoly power in a predatory fashion."[125] Other courts have similarly recognized that allowing cooperatives to engage in predatory conduct "would award agricultural cooperatives a very substantial 'privilege or special favor,'" and this would contradict the CVA's announced purpose.[126]

The Supreme Court has determined that Section Two of the CVA serves to qualify Section One's authorization to organize cooperatives and receive protection from anti-trust action.[127] Under Section Two, the Secretary of Agriculture has the power to issue a cease and desist order upon a finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been unduly enhanced.[128] That is, agricultural cooperatives that organize under the CVA are not completely immune from the operation of the Sherman or Clayton Acts.[129] Therefore, it is clear that while the CVA seeks

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121. *Case-Swayne Co*., 389 U.S. at 395-96.

122. *See*, *e.g.*, *id.* at 384 (determining that because certain members of the Sunkist Growers Association were not actually growers, the organization could not utilize the Capper Volsted Act as a defense to conspiracy to restrain trade).

123. *See* 7 U.S.C.A. § 292 (2000).

124. Frederick, *supra* note 118, at 442 (citing Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1183 (8th Cir. 1982)).

125. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1044 (2d Cir. 1980).

126. April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958).

127. *See* United States v. Borden Co., 308 U.S. 188, 206 (1939).

128. 7 U.S.C.A. § 292 (2000).

129. Sunkist Growers, Inc. v. FTC, 464 F. Supp. 302, 309 (C.D. Cal. 1979); *see also* Md. & Va. Milk Producer's Ass'n v. United States, 362 U.S. 458 (1960); United States v. Borden Co., 308 U.S. 188 (1939) (discussing examples of how the Sherman and Clayton Acts apply to CVA organized cooperatives).

to assure that agricultural cooperatives can obtain bargaining power, the mechanics of the Act do not allow cooperatives to abuse that power so as to engage in predatory practices themselves.[130]

V. CAPPER-VOLSTED ACT: AN ALTERNATIVE TO INVALIDATED LAWS

The Capper-Volsted Act was enacted in 1922;[131] admittedly, agriculture has changed remarkably since that time. The traditional agricultural setting involved producers performing all functions in the quest to provide an end-product to consumers; today's farmer is typically involved solely with the production segment of a farm business.[132] However, many concerns within the industry today are parallel to industry concerns prior to the drafting of the CVA. For example, as described *supra*, even though today's production environment is increasingly characterized by *companies* that own each segment of animal production and processing, the constant concern among producers is the ability to continue to function in the market because of financial strain.[133]

As a result of that financial strain, state legislatures have attempted to remedy these concerns.[134] Nevertheless, these measures have been, and it is assumed, will continue to be, ruled unconstitutional. A possible alternative to accomplish the same goals the invalid laws set out to accomplish is the Capper-Volsted Act. The following portion of this Note will describe (1) how the CVA eligibility requirements provide protection for the same group of individuals who sought protection under the unconstitutional measures, (2) how the CVA operates to address the same concerns the state schemes attempted to address, (3) how the CVA is free from constitutional concerns as compared to the invalidated statutes, and (4) how, even in today's advanced economy, the CVA can be utilized by agricultural producers to operate in concert with today's market economy.

A. *Capper-Volsted Act: Protects the Same Group of People*

Increased vertical consolidation in agricultural production with corporations owning each segment of the production chain has resulted in a high degree of animosity among food production marketing segments.[135] This animosity and

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130. *See* Frederick, *supra* note 118, at 442.

131. *See* 7 U.S.C.A. §§ 291-92 (2000).

132. *See* McDonough, *supra* note 1, at 18 (discussing state efforts to limit consolidation of farm ownership and the transformation of the "family farmer to a serf with limited economic opportunity").

133. *See* Hegar, Jr., *supra* note 9, at 214-15.

134. *See supra* Parts II-III.

135. *See* McEowen et al., *supra* note 15, at 271.

segregation amongst the different animal agriculture/food production segments is not a concept unique to today's consolidated setting, however.[136] Producers, at the time of CVA's passage, were also concerned about their marketing power compared to the processors, distributors, and marketers in agriculture.[137] As a result, it can reasonably be inferred that the CVA was intended to protect only those engaged in *production*.

Certainly, today's vertically integrated agricultural sector is distinguishable from the 1920's environment.[138] For instance, the pervasive vertical integration within agriculture has resulted in the evolution of large companies that own all segments, from production to retail.[139] Therefore, today, contrary to the 1920's, corporations are engaged in production.[140] Because the production sector is largely composed of corporations, production agriculturalists may initially respond to the notion that the CVA is the appropriate scheme to address their market power concerns with animosity.[141] Arguably, it initially appears that under the CVA, companies could further band together, assert they are involved in production agriculture and be immune from antitrust actions. This scenario would simply serve as an open door to inflate the environment criticized as yielding farmers who are merely "serfs with limited economic activity."[142]

However, because these corporations are involved in *all* aspects of production, processing, and marketing, the plain language of the CVA, coupled with court opinions construing the scope of the CVA, indicate that these corporate entities will not be able to avail themselves of CVA protection.[143] First, the plain language of the Act specifically enumerates those whom are eligible to avail themselves of its protection.[144] The Act was written specifically to aid the marketing power of agricultural *producers*.[145] Therefore, in a similar manner to today's anti-corporate farming measures that were enacted to prohibit "predatory middlemen" participation, the CVA also was intended to protect individuals solely engaged in agricultural production.[146]

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136. *See id.*
137. *See id.*
138. *See id.* at 270-71.
139. *See id*.
140. *See id.*
141. *See id.* at 271.
142. *See* McDonough, *supra* note 1, at 18.
143. *See* 7 U.S.C.A. § 291 (2000); *see*, *e.g.*, Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978); Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384, 386 (1967).
144. *See* 7 U.S.C.A. § 291 (2000).
145. *See id;* 62 CONG. REC. S2052 (Feb. 2, 1922) (statement of Sen. Kellogg).
146. *See* 7 U.S.C.A. § 291 (2000).

Court decisions determining who can avail themselves of CVA protection are in accord. In *National Broiler Marketing Association*, the U.S. Supreme Court determined that "any member that does not own a breeder flock or a hatchery, and only grows out birds" is not a "farmer," as intended by the CVA.[147] A cooperative organization that includes such a member is not entitled to CVA protection.[148] The Court described the broiler industry that has become highly departmentalized in recent years, with the stages of production divided among several enterprises, each with a highly specialized function.[149] In addition, certain stages of production that were traditionally performed by different persons or enterprises are now combined and controlled by a single entity.[150] Many producers in the marketing association at issue in *National Broiler Marketing Association* were also "integrated;" they were involved in more than one stage of production, either owning and operating a processing plant or contracting with independent growers for part of their flocks.[151]

In *National Broiler Marketing Association*, the Court strictly interpreted the CVA, extending its protection only to those solely engaged in agricultural production.[152] Furthermore, even under a scenario involving a cooperative that is composed of producer members as well as members engaged in other aspects of animal production, the Supreme Court has announced that CVA protection is not available for these cooperatives, either.[153] In *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*,[154] the Supreme Court held that the cooperative, Sunkist, could not avail itself of the protections of the Act because of the existence of non-grower members.[155] The Court's decision cited extensive legislative history indicating the Act's protection is to extend *only* to agricultural *producers* and not to those handling the produce between the points of production and consumption.[156] Iowa Code Section 9H.2 was initially drafted to protect those engaged solely in agricultural production.[157] Similarly, the South Dakota Amendment E stated that one

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147. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978).

148. *See id.*

149. *Id.* at 821.

150. *Id.*

151. *Id.*

152. *See id.* at 823.

153. *See* Case Swayne Co., Inc. v. Sunkist Growers, Inc., 355 F. Supp. 408, 410 (C.D. Cal. 1971).

154. *Id.* (finding that an organization of orange growers was not entitled to status of a qualified cooperative under CVA because 15% of its members were fruit *processors*).

155. *Id.* at 415.

156. *Id.* at 410.

157. IOWA CODE § 9H.2 (2003) (discussing an amendment to the statute that stated a purpose of the statute was to "*prohibit processors* from contracting for the care of swine"); *see*

of its purposes was to prohibit corporations from engaging in farming and livestock production.[158] As such, the factual scenarios prompting the drafting of Iowa Code Section 9H.2, South Dakota Constitutional Amendment E, as well as the scenarios that led to the *National Broiler Marketing Association* and *Case-Swayne Co.* are analogous situations, all prompted by the desire to protect individual producers.

As previously discussed in this Note, Iowa Code Section 9H.2 and South Dakota Constitutional Amendment E did not succeed in their efforts to protect individual farmers.[159] However, both the *National Broiler Marketing Association* and *Case-Swayne Co., Inc.* decisions establish that the CVA provides the opportunity for agricultural entities engaged solely in production to band together and increase their marketing power.[160]

B. *Marketing Power*

The over-riding purposes of the state anti-corporate laws were to "protect the economic autonomy of individual farmers and the environmental health and safety", to "keep family farms competitive and rural communities stable," and to "preserve free and private enterprise, prevent monopoly, and protect consumers."[161] The goal was to assure that individual farmers could financially survive. This goal arose as a result of today's agricultural industry's economic structure. Increasing vertical integration within agriculture has resulted in many "corporate farms" taking over the agricultural setting. As these powerful parties increase control, producers receive lower prices because they must stand in line and wait for payment from the corporations who own all aspects of retail processing and production. Thus, as the retail dollar is distributed from the retail store back to the producer, the producer is left with an increasingly lower, near non-existent profit. This scenario clearly led to an outcry from agricultural producers.

Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003) (holding IOWA CODE § 9H.2 unconstitutional).

158. S.D. CONST. art. XVII, § 21.

159. *See* IOWA CODE § 9H.2 (2003); *see also* McEowen & Harl, *supra* note 27, at 129.

160. *See* Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978) (requiring that all members who organize under the CVA must meet the statutory definition of "farmer"); *see also* Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) (holding it was not the intention of Congress to allow an organization with such nonproducer interests to avail itself of the exemption provided by the CVA).

161. IOWA CODE § 9H.2 (2003); McEowen & Harl, *supra* note 27, at 129.

While the legislation that attempted to solve this imbalance in marketing power was noble in its goals,[162] as with any business, the key to seller survival is the ability to negotiate with buyers. One commentator has suggested that farmers can respond to the imbalance between producers and processors by joining together in cooperative bargaining associations to negotiate with buyers on a collective basis.[163] In fact, "some producer groups have developed sufficient market presence to command processor attention."[164]

Therefore, through utilization of the CVA, producers could gain an improved bargaining position. Farmers will have the opportunity to join their products together. With this collection of assets, the cooperative, as a whole, will have the increased leverage to negotiate the final terms of sale. Moreover, because the CVA allows small producers to band together, compete in a market of much larger producers and sustain business, CVA cooperatives also serve to encourage free and private enterprise within animal agriculture, furthering the purposes of the invalid state anti-corporate laws.[165] The invalid state measures also sought to "prevent monopoly," "protect consumers," and "keep familiar farmers competitive and rural communities stable."[166] Again, CVA cooperative formation, in lieu of unconstitutional legislation, can address these concerns. Section two of the CVA expressly provides that the Secretary of Agriculture has the power to issue cease and desist orders in the event that monopoly type activity appears to be occurring.[167] Furthermore, it is reasonable to assume that by allowing *only* agricultural *producers* to band together, many new rural cooperatives will be built, helping business to grow in rural communities.

C. *Capper-Volsted Act: No Dormant Commerce Clause Concerns*

Although the state anti-corporate, anti-packer laws set out to protect the economic autonomy of individual farmers,[168] the mechanics by which these meas-

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162. *See generally* Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003).

163. *See* Frederick, *supra* note 118, at 433-34.

164. *Id.* at 452.

165. *See* 7 U.S.C.A. § 291 (1999); IOWA CODE § 9H.2 (2003); S.D. CONST. art. XVII, § 21.

166. *See* 7 U.S.C.A. § 291 (1999).

167. *Id.* at § 292.

168. *See* IOWA CODE § 9H.2 (2003); *see also* S.D. CONST. art. XVII, § 21 (stating that "No corporation or syndicate may acquire…any real estate used for farming in this state, or engage in farming").

ures operate often do not aid today's agriculture economic environment at all.[169] Rather, as discussed *supra*, these attempts are largely struck down on constitutional grounds because they inhibit the operation of a national economy.[170] Anti-corporate laws are increasingly characterized as promoters of economic protectionism and economic isolationism because the laws prohibit out-of-state producers from having access to instate resources.[171] However, utilization of the Capper-Volsted Act would result in producers and cooperatives joining *across state boundary lines* to take advantage of collective bargaining; as a result, the state protectionist issue is no longer at issue. As producers form cooperative associations, in lieu of seeking ways to change the current economic environment of agriculture, each farmer will see increased prices. Collectively, farmer cooperatives will bolster today's national economy.

D. *Capper-Volsted Act: Contributes to a Market Economy*

Today's animal agriculture industry largely consists of marketing agreements between producers and processors that value carcasses on an individual basis.[172] These agreements provide processors with a more accurate inventory system and provide producers with detailed information about all of their animals.[173] Producers can then incorporate this information into their production schemes, enabling them to raise animals that have characteristics that distributors, retailers, and, ultimately, consumers demand. Through cooperative formation, producers would still be able to avail themselves of this individual animal carcass information, all while using the increased marketing power available under the Act to receive a higher price for their efforts.

Certainly, the use of the CVA does not immediately dispel all concerns about the large increases in "contract farming." Individual farmers feel trapped and intimidated by the companies they supply.[174] Nevertheless, production contracts are an important device for processors to acquire needed supplies and re-

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169. *See generally* Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003) (holding that Iowa Code § 9H.2 is unconstitutional on its face and its intended purpose); S. D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003).

170. *See generally Smithfield*, 241 F. Supp. 2d at 978 (holding Iowa Code § 9H.2 is unconstitutional as applied to plaintiffs under Art. I, § 8 of the United States Constitution); *Hazeltine*, 340 F.3d at 583.

171. *See* Camps Newfound/Owatonnna, Inc. v. Town of Harrison, 520 U.S. 564, 578 (1997).

172. *See* Boland et al., *supra* note 17, at 1-2.

173. *See*, *e.g.*, 7 U.S.C.A. § 291 (1999).

174. *See* Kelley, *supra* note 2, at 400-402.

duce the inherent risks involved in agricultural production.[175] In light of processors' increasing dependence on production contracts, individual farmers should not feel trapped; rather, the formation of cooperatives should be encouraged, thereby "help[ing] farmers earn more of the consumer food dollar."[176] This is precisely what the CVA was designed to do. The Supreme Court in *Maryland and Virginia Milk Producers v. United States* announced that the CVA's aim was "to equalize existing privileges by changing the law…so the farmers can take advantage of it."[177] Furthermore, the Court explained that the general philosophy of the CVA was to simply afford producers the same competitive advantage that typical businessmen have by acting through cooperatives.[178] The Court also explained that those involved in agricultural production also have a responsibility – a responsibility to participate in a market economy, with the tools that are available and *not* to merely protect themselves from that market environment.[179] A similar theme resounds in today's courts, as the Eighth Circuit, in *Hazeltine*, adopted *H.P. Hood & Sons, Inc. v. Du Mond*'s "modern economic theory of free trade".[180]

Agricultural markets have certainly seen profound changes in the 82 years since the promulgation of the CVA; nevertheless, producers are still bound to participate in a national economy. The CVA does not vest cooperatives with unrestricted power to restrain trade nor does the CVA allow protectionist activity within the agricultural industry; rather, it simply allows farmer-producers to join together, set association policy, fix prices at which their cooperative will seek to bargain with processors and sell their produce, and otherwise carry on like a business corporation, without violating antitrust laws.[181]

VI. CONCLUSION

Subsequent to the *Smithfield* and *Hazeltine* litigation, it is reasonable to assume that contract farming will likely remain within animal agriculture. Through the utilization of the CVA, contract farming could remain in a manner that is acceptable to all segments of the industry. Because the CVA does not allow an unrestricted power to restrain trade, it is an attractive alternative to the state anti-corporate laws that were found to unlawfully restrain trade and com-

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175. *Id.* at 401.
176. Duffey, *supra* note 3, at ¶24.
177. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960).
178. *See id.*
179. *See id.* at 458 (emphasis added).
180. McEowen & Harl, *supra* note 27, at 131.
181. *Md. & Va. Milk Producers Ass'n*, 362 U.S. at 466-67.

merce.[182] Therefore, legal efforts should be focused on formation of cooperatives within a market economy, rather than on the promulgation of protectionist legislation. Producers and processors both will benefit from such a scenario. When producers band together as a cooperative and provide consistent, high quality products, they will be rewarded through higher prices. Processors' input needs will also be satisfied because they now have an agreement with a cooperative that can provide a greater quantity of more consistent products. Therefore, both segments of the production chain will reap rewards, while still providing consumers with a flavorful, consistent, healthful, and desirable food product.

182. *See generally* Smithfield Foods, Inc. v. Miller, 241 F. Supp. 2d 978 (S.D. Iowa 2003) (discussing the unconstitutionality of an Iowa statute forbidding certain pork producers from owning or controlling pork production); S. D. Farm Bureau v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (discussing whether or not a South Dakota Constitutional Amendment prohibiting corporations from acquiring land used for farming was valid).