CAPPER-VOLSTEAD & OUTPUT RESTRICTIONS: THE GOOD, THE BAD, AND THE UGLY

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ABSTRACT

Despite being nearly a century old, the Capper-Volstead Act still has unresolved questions regarding its scope. This article examines the meaning of "marketing" within the act and its impact on the ability of an agricultural cooperative to restrict output within the cooperative. The meaning of marketing under the act must be examined with two points in mind: (1) individual farmers face significant disadvantages in the market; and (2) the Capper-Volstead Act was passed largely as a response to how the federal antitrust laws negatively impacted agricultural cooperatives—to the detriment of the individual farmers within the cooperatives.

I. INTRODUCTION

Nearly a century has elapsed since Congress granted agricultural producers limited antitrust immunity with the passage of the Capper-Volstead Act, and yet—as recent court battles over output restricting agreements illustrate—agricultural producers and consumers alike still lack a clear picture as to the Capper-Volstead

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Act's outer limits. This paper seeks to shed light on whether agricultural producers within a single cooperative may agree to restrict output without violating the nation's antitrust laws. Scant caselaw exists on the matter, so answers must be sought within the text of the Capper-Volstead Act itself, in the legislative records, and in the confines of American history. Furthermore, this paper briefly explores the role of output restricting agreements in relation to modern agricultural policy. An understanding of basic economic principles can help light the way.

A purely chronological telling of the Capper-Volstead story may not paint the clearest picture to properly comprehend the historical, economic, and political underpinnings of the legislation. Thus, rather than plowing straight through modern American history, our story begins with a brief lesson in historical antiquity and key technological advances that transformed society and the agricultural market. After which, the story shifts into the early twentieth century with the passage of the Capper-Volstead Act, with a focus on the state of the agricultural industry at the time. From here, we flashback to the late nineteenth century and examine the origins and principles of the federal antitrust scheme which would spur Congress to pass the Capper-Volstead Act mere decades later. The article also provides examples of how the antitrust laws would theoretically apply to agricultural producers in contrast to other industries. Next, the story progresses to the modern era where the legality of output restrictions among agricultural producers within a single cooperative hinge on statutory interpretation. Finally, the story concludes with a brief look at how these output restrictions interact with modern agricultural policy.

II. BACKGROUND: AGRICULTURAL HISTORY

Historically, farmers had little reason to be concerned with markets, but the increased ease of transportation and the interconnection of distant geographical areas changed the dynamics of the economic landscape and the profitability of farming. This shift largely came about because of two types of advances in transportation: (1) the ability to transport water and (2) the ability to transport goods.

The advent of agriculture allowed human societies to cease hunter-gatherer lifestyles and remain fixed in one place.[1] A reliable food supply allowed members of society to specialize in different tasks which permitted different trades to emerge.[2] Initially, civilization flourished along riverbanks, but as irrigation techniques and the ability to transport water developed, civilization spread beyond

1. *See* GRAEME BARKER, THE AGRICULTURAL REVOLUTION IN PREHISTORY 6-8 (2006).
2. *See id.* at 1-8.

the river valleys.[3] Yet gravity, and the readily observable fact that water generally flows downhill, primarily served as a transport mechanism in only one direction. Civilizations could make water come to them, but sending goods back up the river proved more challenging. Thus, while the advent of agriculture allowed for the specialization of tasks and the subsequent development of irrigation technologies allowed societies to spread out from river valleys, societies still needed to retain an aspect of societal self-sufficiency.

Until the onset of the industrial revolution and the proliferation of railroads, markets for agricultural goods remained localized.[4] Farmers would satisfy their familial needs from their crop and then sell the excess on the local market.[5] But as cities flourished with the growth of manufacturing and society became more interconnected through advances in technology that allowed for transportation of goods in both directions—advancing to a world where tools used on the farm may have been manufactured a continent away—the local agricultural market morphed into a global market, and societal self-sufficiency decayed into an outdated model.[6]

III. THE GOOD: THE CAPPER-VOLSTEAD ACT

Congress originally passed the Capper-Volstead Act in 1922[7] in an effort to alleviate the effects of a market plagued by a significant disparity in bargaining power.[8] The agricultural industry epitomized a market where a large number of farmers each produced a small amount of a homogeneous product that was in turn

3. Stephanie Rost, *Water Management in Mesopotamia from the Sixth till the First Millennium B.C.*, 4 WIREs WATER e1230, e1230-31 (2017).

4. *See* BENJAMIN HORACE HIBBARD, MARKETING AGRICULTURAL PRODUCTS 11-12, 54 (1921).

5. *See id.* at 11-12.

6. *See id.* at 11-12, 54.

7. Capper-Volstead Act, ch. 57, 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. §§ 291-292 (2018)).

8. *See* 59 CONG. REC. 8034 (1920) (statement of Rep. Barkley) ("I do not consider that this measure grants any special privilege to agriculture. It rather appears to me that it is only confirming a natural right which agriculture ought to enjoy, whose exercise is not inimical to the legitimate interests of other people. No farmer can compete alone with the conditions that surround him. We all know that it is economically impossible for any individual farmer to compete with the conditions under which he must live. When he buys from a merchant he buys at the merchant's price, and he has no power to compel the merchant to reduce the price. When he buys agricultural machinery from implement houses he has no power as an individual to exercise a voice in determining the price he pays for it. When he sells his product, it matters not whether it be corn, wheat, live stock, tobacco, or anything else, he must sell it at a price dictated not by himself but by others who have had no part in its production.").

purchased by an oligopoly of middleman distributors.[9] The power rested in the hands of the middleman distributors who could pay farmers low rates for agricultural goods and then turn around and sell the same agricultural goods to consumers at a substantial profit.[10]

The first agricultural cooperatives in the United States appear to have been formed early in the nineteenth century,[11] with popularity increasing in the decades that followed the Civil War.[12] The cooperation effort among farmers likely gained steam due to necessity; the years before and after the Civil War featured an agricultural market with an overabundance of supply, and thus, farmers received depressed prices.[13] Congress believed that by collectively marketing and selling their agricultural goods, farmers could achieve economies of scale and avoid middleman distributors.[14] Collective purchases of inputs could achieve cost savings as well.[15] Congress believed such a scheme would allow farmers to earn a reasonable profit, and also potentially decrease prices for consumers.[16] However, by coordinating pricing and other marketing functions, agricultural producers who participated in these cooperatives soon faced the threat of running afoul of Section One of the Sherman Act, which prohibits agreements that unreasonably restrain trade in interstate commerce.[17]

If a group of farmers could band together to form a corporation rather than a cooperative, the farmers could avoid many of the Section One Sherman Act

9. *See* U.S. DEP'T OF JUSTICE, REPORT OF THE TASK GROUP ON ANTITRUST IMMUNITIES 11 (1977).

10. *See id.*

11. *See* Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, ANTITRUST SOURCE, Dec. 2010, at 1.

12. *See id.*; HIBBARD, *supra* note 4, at 8-9.

13. HIBBARD, *supra* note 4, at 8-10.

14. *See* 60 CONG. REC. 363 (1920) (statement of Sen. Smith) ("Secretary of Agriculture Wilson at one time declared that an investigation of the subject led him to the conclusion that what the farmer sold for $1, as an average when it reached the consumer cost the consumer $2. This has been due to unscientific sale by the farming classes resulting from their utter lack of organization and cooperative selling. If the farmers will in their localities make organizations broad enough for extensive cooperative selling the whole tendency will be toward enabling them to carry their products from the middle men more nearly to the ultimate consumer. While the farmer as the result of organization will receive more compensation for his labor, the ultimate consumer may expect to receive his product as a rule at a smaller cost.").

15. *See* J. WARREN MATHER & HOMER J. PRESTON, USDA, COOPERATIVE BENEFITS AND LIMITATIONS 2 (1980), https://perma.cc/JFJ5-EH4X.

16. *See* 60 CONG. REC. 363.

17. 15 U.S.C. § 1 (2018).

concerns that cooperatives generate without the need for an antitrust exemption.[18] But Congress recognized the impracticability of such a solution.[19] Congress elected to solve the issue by granting *limited* antitrust immunity to agricultural producers.[20] Repeatedly in Congressional debates, an emphasis was placed on allowing farmers to have the same advantages of a corporation by virtue of forming agricultural associations.[21]

The Capper-Volstead Act consists only of two sections. Section One contains the immunizing language, and Section Two grants certain enforcement powers to the Secretary of Agriculture that function as an administrative check against excessive pricing and monopolization concerns.[22] Because minimal caselaw exists as to whether the Capper-Volstead Act applies to output restrictions,[23] the text of the statutory language takes on heightened importance. As such, the text of Section One has been provided in full below:

18. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-77 (1984) (finding a parent company and its wholly owned subsidiary do not have "divergent" economic interests. Thus, a parent company and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.").

19. *See* 61 CONG. REC. 1033 (1921) (statement of Sen. Volstead) ("The objection made to these organizations at present is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity. When he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combination contrary to the Sherman Antitrust Act. Business men can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.").

20. *See, e.g., id.* ("It is objected in some quarters that this [legislation] repeals the Sherman Antitrust 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.").

21. *See id.* ("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."); *see also* 62 CONG. REC. 2057 (1922) (statement of Sen. Capper) ("Its purpose is to give to the farmer the same right to bargain collectively that is already enjoyed by corporations."); 62 CONG. REC. 2257 (1922) (statement of Sen. Norris) (stating the act would allow farmers to "combine with [their] neighbors and cooperate and act as a corporation.").

22. 7 U.S.C. §§ 291-292 (2018).

23. *Cf.* In re Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1154-57 (D. Idaho 2011) (noting the lack of caselaw on the matter and opining in dicta that output restrictions are beyond the scope of Capper-Volstead protection).

> 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.[24]

The Capper-Volstead Act does not expressly grant agricultural producers in a cooperative the ability to agree upon output restrictions.[25] To determine whether the Capper-Volstead Act permits such output restrictions, some scholars have focused primarily on the scope and meaning of the word "marketing."[26] Indeed, it may initially be difficult to envision a nonfrivolous argument where the text "processing, preparing for market, [or] handling" could reasonably construe a grant of limited antitrust immunity for agricultural producers to agree upon output restrictions.[27] How does one process, prepare for market, or handle a product that

24. 7 U.S.C. § 291 (2018) (emphasis in original).

25. *See* Varney, *supra* note 11, at 5 ("It does not mention specifically farmers acting collectively in planting their crops, or raising their animals, or in planning those activities. Some have argued that this absence of language suggests a broad construction of permitted activities.").

26. *See* Alison Peck, *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, 80 MO. L. REV. 452, 465-75 (2015) [hereinafter *The Cost of Cutting Agricultural Output*] (concluding "processing, preparing for market, [and] handling" encompass only post-production activities and focusing textualist portion of analysis on definition of "marketing" used in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*).

27. 7 U.S.C. § 292 (2018).

does not exist? Well, some scholars theorize that the text "preparing for market" is broad enough to encompass pre-planting considerations.[28] Arguably, a farmer's decision to clear new farmland, rent additional farmland, or to do neither are decisions the farmer makes in preparation for market. Additionally, the term marketing may encompass pre-production conduct.

Of course, the Capper-Volstead Act does not grant agricultural cooperatives with immunity for all anticompetitive conduct.[29] Section Two of the Capper-Volstead Act authorizes the Secretary of Agriculture to issue a complaint and notice of hearing upon an agricultural cooperative when the Secretary has a "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 . . . ."[30] After a hearing, if the Secretary still believes the association has unduly enhanced the price of an agricultural product through monopolization or restraint of trade, the Secretary shall direct "such association to cease and desist [the wrongful conduct.]"[31] If the association refuses to comply, the Secretary files a petition in district court seeking enforcement and notifies the Attorney General.[32] Thus, reading the two sections of the Capper-Volstead Act together, Congress made it clear that agricultural producers possess only limited antitrust immunity.[33]

IV. THE BAD: THE FEDERAL ANTITRUST LAWS

At this point, it may help to have a general understanding of what constitutes a federal antitrust violation. Being able to mentally process the theoretical scope of antitrust protection afforded under any given interpretation of the Capper-Volstead Act can provide substantial insight when taking into consideration the amount of protection Congress intended to grant agricultural producers. Armed with this knowledge, we can play the role of Goldilocks, without having to actually

28. *See* Varney, *supra* note 11, at 7 (noting that some scholars have argued that "preparing for market" is broad enough to include pre-planting activities, including how much to plant or produce; and "marketing" extends to determinations of "how much to produce for market").

29. *See* Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466-68 (1960) (holding that the Capper-Volstead Act does not immunize agricultural cooperatives from Section Two Sherman Act claims).

30. § 292.

31. *Id.*

32. *Id.*

33. *See* Kenneth R. O'Rourke & Andrew Frackman, *The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*, J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. BAR CALIFORNIA, Fall 2010, at 69, 84.

taste each bowl of porridge. For the purposes of this article, this brief overview shall be constrained to Sections One and Two of the Sherman Act, and Sections Four, Six, and Sixteen of the Clayton Act.[34] While other antitrust laws may have considerable impacts on the agricultural industry, these select laws lay a solid framework for understanding the unique position agricultural producers face in their market in contrast to other industries.

The federal antitrust regime originated in 1890 with the passage of the Sherman Act.[35] Section One of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . ."[36] For over a century, this language has not been taken literally.[37] Only "unreasonable" restraints of trade are prohibited.[38] Furthermore, while certain conduct—such as horizontal price fixing—will establish a per se violation,[39] most conduct is judged under the rule of reason.[40] In sum, a Section One Sherman Act violation requires an agreement that unreasonably restrains trade in interstate commerce.

The first element of a Section One Sherman Act violation has particular significance. Unilateral conduct cannot constitute a Section One Sherman Act violation.[41] As such, it is impossible for any single agricultural producer to violate Section One of the Sherman Act without collaborating in some way with at least one other party. The size of the agricultural producer has no bearing on this fact. However, because an agricultural cooperative is not one entity, but rather a group of several agricultural producers, any agreement on price would constitute a per se

34. For a more in-depth look at the federal antitrust laws, *see generally* EARL W. KINTNER ET AL., FEDERAL ANTITRUST LAW (2018).

35. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2018)).

36. 15 U.S.C. § 1 (2018).

37. *See* KINTNER ET AL., *supra* note 34, at § 8.2.

38. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 87 (1911) (concluding Congress did not intend to prohibit reasonable restraints of trade).

39. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (holding that "a [horizontal] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" constitutes a per se Section One Sherman Act violation).

40. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("Per se liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" (quoting Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. 679, 692 (1978))).

41. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (holding that absent an intent to monopolize a trader may "exercise his own independent discretion as to parties with whom he will deal; and . . . he may announce in advance the circumstances under which he will refuse to sell.").

horizontal price fixing violation under Section One of the Sherman Act—unless some basis in law grants an exemption. As noted in the previous section, because a corporation is one entity, it would not face this dilemma. In this sense, by granting agricultural producers limited antitrust immunity, the practical effect of the Capper-Volstead Act is to treat agricultural cooperatives akin to a corporation in at least some aspects.[42] To further illustrate the functional similarities, just as two different corporations could not agree to fix prices without violating Section One of the Sherman Act, two different agricultural cooperatives could not agree to fix prices without violating Section One of the Sherman Act.[43]

Unilateral conduct is governed by Section Two of the Sherman Act. Section Two of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."[44] However, the mere fact that a person or entity has a monopoly in a given market does not establish a violation of Section Two of the Sherman Act. A successful monopolization claim requires a showing of "(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."[45] Consistent with the theme that a Section Two Sherman Act violation requires intent, a successful attempted monopolization claim must show "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[46]

The Capper-Volstead Act does not grant agricultural producers within a cooperative protection from Section Two Sherman Act claims. Recall Section Two of the Capper-Volstead Act explicitly grants the Secretary of Agriculture the authority to take enforcement actions against an agricultural organization when the Secretary believes the organization has monopolized or restrained trade in interstate or foreign commerce and unduly enhanced price.[47] However, to this

42. *See* HIBBARD, *supra* note 4, at 11-12, 377 ("Farmers do not want special privileges; they want fairness.").

43. *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-77 (1984) (holding that entities are separate actors for purposes of the Sherman Act if they have "separate economic interests . . . pursuing divergent goals").

44. 15 U.S.C. § 2 (2018).

45. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

46. Spectrum Sports, Inc. v. Mcquillan, 506 U.S. 447, 456 (1993).

47. 7 U.S.C. § 292 (2018).

author's knowledge, the Secretary of Agriculture has never used this authority.[48] Regardless, Congress including Section Two in the Capper-Volstead Act further illustrates Congress did not grant agricultural producers with broad antitrust immunity. The grant of antitrust immunity does not appear to provide agricultural producers within a cooperative any privileges that corporations do not possess by default.

Despite the lack of enforcement actions brought by the Secretary of Agriculture, agricultural cooperatives do not go unpoliced regarding the antitrust laws. After seeing the Sherman Act develop in the courts for a little over two decades, Congress refined the federal antitrust regime with the passage of the Clayton Act in 1914.[49] Section Four of the Clayton Act grants a private right of action to those injured by a violation of the federal antitrust laws and states that a successful plaintiff shall recover treble damages as well as reasonable attorney's fees and costs.[50] However, a plaintiff must meet several additional requirements that go beyond those necessary to establish Article III standing in order to attain monetary relief.[51] These additional requirements help prevent duplicative recovery and overenforcement of the antitrust laws.[52]Additionally, Section Sixteen of the Clayton Act grants a private right of action for injunctive relief to those who face "threatened loss or damage by a violation of the antitrust laws . . . ."[53] These provisions allow private actors to help police antitrust laws, provide an incentive to litigate, and place this power in those who may have the best information regarding potential violations.[54]

Also worthy to note, Congress observed and acted upon a special need in the agricultural industry when the Clayton Act was passed. Congress included a provision that provided agricultural organizations with limited antitrust immunity

48. Michael A. Williams et al., *The OPEC of Potatoes: Should Collusive Agricultural Production Restrictions be Immune from Antitrust Law Enforcement?*, 11 VA. L. & BUS. REV. 399, 405 (2017).

49. *See* Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 and 29 U.S.C. §§ 52-53).

50. 15 U.S.C. § 15 (2018).

51. *See* KINTNER ET AL., *supra* note 34, at § 78.1 (stating that an antitrust plaintiff must show an injury-in-fact, which was proximately caused by the antitrust violation, that the plaintiff suffered harm to business or property, that the injury suffered was the type the antitrust laws were designed to protect against (antitrust injury), and the injury suffered must be sufficiently direct (antitrust standing)).

52. *See id.* at § 78.2.

53. 15 U.S.C. § 26 (2018).

54. *See* KINTNER ET AL., *supra* note 34, at § 78.2.

in Section Six of the Clayton Act.[55] However, this provision only extended to organizations "not having capital stock or conducted for profit."[56] Less than a decade later, Congress deemed the provision in Section Six too narrow, and passed the Capper-Volstead Act which expanded the limited antitrust immunity originally granted in Section Six of the Clayton Act to include organizations that had capital stock.[57] Section Six of the Clayton Act would not have allowed agricultural producers within a cooperative to conduct business on the same functional level as a corporation in hardly any capacity.

On the other hand, as noted above, the Capper-Volstead Act puts agricultural cooperatives on the same functional level as corporations in at least some capacities. The debate over the legal validity of output restrictions among agricultural producers within an agricultural cooperative has highlighted that the two have not been universally accepted as functional equivalents in all aspects. A corporation can determine how much product to produce[58] and can generally decide what price to charge for its products. However, corporations that engage in below-cost pricing as part of an anticompetitive scheme to force competitors out of business and gain a monopoly violate Section Two of the Sherman Act.[59] Remember, the Capper-Volstead Act does not immunize conduct that would violate Section Two of the Sherman Act.[60] The established scope of Capper-Volstead protection for agricultural cooperatives bears strong parallels to per se legal acts that corporations can perform.

V. THE UGLY: INTERPRETING CAPPER-VOLSTEAD TODAY

In an ideal world, Congress would write every statute in a clear and unambiguous manner so that all parties would understand the bounds of the law from the outset. Unfortunately, we do not live in such a world, and even courts cannot always agree on whether a statute is clear and unambiguous in the first instance or whether agencies deserve deference to interpretations of statutes they

55. *See* 15 U.S.C. § 17 (2018).

56. *Id.*

57. 7 U.S.C. § 291 (2018).

58. *See* Cent. Cal. Lettuce Producers Coop., 90 F.T.C. 18, 62 n.20 (1977) ("Beyond doubt, a single corporation can restrict its output, if it chooses, without incurring antitrust liability.").

59. *See* KINTNER ET AL., *supra* note 34, at § 16.8.

60. *See* Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 467 (1960) ("[T]he [Capper-Volstead] Act did not leave co-operatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative.").

administer.[61] Regardless, the first step in determining the meaning of a statute requires an examination of the text of the statute in question.[62] Theoretically, if the text only supports one reasonable position, the language of the statute controls.[63] But to further muddy the waters, courts lack a single precise terminology for even this initial step.[64] Now, if the text of the statute is ambiguous, courts must rely on additional resources to ascertain the intent of Congress.[65]

A. Capper-Volstead and Plain Meaning

A fair reading of the Capper-Volstead Act probably cannot lead to a single reasonable meaning from a pure textualist standpoint. As noted above, the Capper-Volstead Act grants limited antitrust immunity for agricultural producers "in collectively processing, preparing for market, handling, and marketing" their agricultural products.[66] A narrow reading of the word marketing likely precludes agriculture producers within a cooperative from entering into output restricting agreements. On the other hand, a broader reading of the word marketing could certainly include output restricting agreements among agricultural producers within a cooperative as immunized conduct. Arguments for both positions shall be discussed below.

When interpreting statutes, courts may consult dictionaries to provide guidance.[67] Additionally, courts interpret antitrust exemptions narrowly.[68] In a 1974 case, the Ninth Circuit interpreted the scope of marketing as used in Section

61. *See* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) ("Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible inquiry requires a taxing inquiry.").

62. *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'").

63. *See id.* (illustrating a situation where majority and dissenting justices clash over whether statutory text that initially appears to convey intent of Congress but produces absurd results should compel the court to ignore evidence to a contrary Congressional intent).

64. *See* 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2018).

65. *See id.* at § 45:5.

66. 7 U.S.C. § 291 (2018).

67. *See* Carcieri v. Salazar, 555 U.S. 379, 388 (2009) (utilizing dictionary definition to determine plain meaning of "now" as used in statutory text).

68. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 258 (1996) ("[E]xemptions [from the antitrust laws] should be construed narrowly").

One of the Capper-Volstead Act[69] by relying on the following definition of marketing from the 1953 edition of *Webster's New Collegiate Dictionary*: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information."[70] Clearly, marketing either is, or at least can be, a very loaded word. Aside from the laundry list of articulated activities that can fall within the scope of marketing, the language, "aggregate of functions . . . including among others," leaves room for an expansive scope of additional activities marketing may entail.[71] Or as the court in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.* succinctly stated, "We think the term marketing is far broader than the word sell."[72]

At least one scholar has argued that even the broad definition of marketing used in *Treasure Valley* does not appear to support a textual interpretation that the Capper-Volstead Act permits agricultural producers within a cooperative to agree upon output restrictions.[73] The argument latches onto the enumerated activities that fall within the scope of marketing and interprets them as depicting post-production activities:

> The definition relied on by the court in *Treasure Valley*, while broad enough to include conduct beyond selling, seems to exclude *pre*-production agreements to limit supply; the definition focuses on post-production activities. All of the enumerated activities are inherent in the general definition of "transferring title" or "moving goods." It is inapposite, on the other hand, to talk of "transferring title" to or "moving goods" that do not exist.[74]

As additional support for this position, the scholar construes several more recent dictionary definitions of marketing to similarly pertain to post-production activities, all of which at least explicitly include buying and selling as within the scope of marketing.[75] However, this position suffers from two—albeit certainly not fatal—flaws. First, actual market transactions—in agricultural markets themselves—refute the implied notion that the marketing definition used in

69. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 215-17 (9th Cir. 1974).

70. *Marketing*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1953 ed.).

71. *Id.*

72. *Ore-Ida Foods, Inc.*, 497 F.2d at 215.

73. *See The Cost of Cutting Agricultural Output*, *supra* note 26, at 470.

74. *Id.* at 467 (emphasis in original).

75. *Id.* at 468.

Treasure Valley encompasses purely post-production activities.[76] Second, modern dictionary definitions of marketing have even less bearing on the meaning of a word written nearly 100 years ago than a dictionary definition written in the early 1950s.[77]

Market participants in a wide array of markets enter into contracts for the purchase and sale of goods that do not yet exist on a regular basis. And farmers have been entering into forwards and futures contracts since at least the nineteenth century.[78] Both types of contracts are used as a form of risk management.[79] A farmer in Pennsylvania who enters into a forward contract in mid-January with a local restaurant, where the farmer agrees to sell his entire crop of tomatoes from the upcoming season for a predetermined price, makes a legally binding commitment—months before the crop is even planted. The farmer and restaurant undoubtedly enter into a contract for the respective sale and purchase of tomatoes, with performance due at a future date. In this example, the forward contract is clearly part of "[t]he aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, [and] . . . risk bearing."[80] A forward contract would also likely include a provision establishing the time and manner of transportation, yet another enumerated component in the marketing definition used in *Treasure Valley*.[81]

However, while the forward contract example illustrates that the scope of marketing can include pre-production functions that pertain to goods that do not yet exist, it does not necessarily demonstrate that output restricting agreements are a function of marketing. The very practical sentiment that an agreement which prevents the existence of a good cannot be one of "[t]he aggregate of functions involved in transferring title and in moving goods from producer to consumer" must at the very least give a statutory interpreter cause to pause.[82] Then again, an output restricting agreement certainly impacts real-world producer to consumer transactions. Perhaps a definition of "aggregate" is necessary? Hopefully not. By this point, a cynic, a savvy admirer of the English language, or a disciple of the

76. *See id.* at 467.

77. *See id.* at 468.

78. *See* Anne E. Peck, *The Economic Role of Traditional Commodity Futures Markets*, *in* FUTURES MARKETS: THEIR ECONOMIC ROLE 1, 4 (Anne E. Peck et al. eds., 1985).

79. ALLEN B. PAUL ET AL., FARMERS' USE OF FORWARD CONTRACTS AND FUTURES MARKETS 3 (Mar. 1976).

80. *Marketing*, *supra* note 70.

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

82. *See The Cost of Cutting Agricultural Output*, *supra* note 26, at 467-68 (alteration in original).

Judge Learned Hand school of statutory interpretation has probably by now grumbled rather grumpily about the emphasis on a sixty-six-year-old definition in a dictionary that was first printed thirty-one years after the Capper-Volstead Act passed Congress.

The reliance courts have placed on dictionaries to help interpret statutes has not gone without criticism.[83] Many words have more than one meaning, and the meaning of words can change over time.[84] Different dictionaries do not contain identical definitions, and the use of any one dictionary over another may be utterly arbitrary.[85] A dictionary printed either in the year a statute was passed, or perhaps the year preceding, would intuitively possess the best definition to help ascertain the meaning Congress intended a word to convey. The *Treasure Valley* court selected a dictionary that was twenty-one years old. However, the dictionary used in *Treasure Valley* was still more contemporary than representative of the Capper-Volstead era, having been first published thirty-one years after the Capper-Volstead Act was passed. The dictionary used in *Treasure Valley* may have been the oldest one with a respected name readily available. This author could not locate a dictionary originally published in 1921 or 1922 that included a definition for the word marketing.[86] However, several included a definition for market.[87]

B. Capper-Volstead and Interpretive Aids

Because a fair textualist interpretation of Section One of the Capper-Volstead Act probably leads to multiple reasonable meanings, additional resources must be used to ascertain the meaning of the statute. The legislative history offers support both for and against output restrictions. And the late Justice Scalia has warned against cherry picking and overreliance on legislative history to determine a statute's meaning.[88] As support for finding no antitrust exemption for output restricting agreements, some scholars have looked to similar, but not identical, language in the Fisherman's Collective Marketing Act.[89] Additionally, the Department of Justice, Federal Trade Commission, and the Department of

83. *See Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1440, 1444-48 (1994).

84. *See* ROBERT STOCKWELL & DONKA MINKOVA, ENGLISH WORDS: HISTORY AND STRUCTURE 187, 191-92 (2001).

85. *See id.* at 187, 177-92.

86. *Marketing*, *supra* note 70.

87. *See, e.g.*, *Market*, FUNK & WAGNALLIS DESK STANDARD DICTIONARY (1919).

88. ANTONIN SCALIA, A MATTER OF INTERPRETATION 31-36 (Amy Gutman ed., New ed. 1997) ("In any major piece of legislation, the legislative history is extensive, and there is something for everybody.").

89. *See* 15 U.S.C. § 521 (2018).

Agriculture have historically taken the stance that the Capper-Volstead Act does not permit output restricting agreements.[90] In addition to portions of the legislative history, arguments in favor of finding an antitrust exemption for output restricting agreements have relied on enforcement actions for the Fisherman's Collective Marketing Act, broad readings of prior caselaw, and economic efficiency justifications.[91] These positions shall be discussed below.

1. Capper-Volstead and Legislative History

The deepest well of legislative intent behind the Capper-Volstead Act lies within the records of the Congressional floor debates during the 66th and 67th sessions of Congress.[92] However, output restricting agreements were not explicitly debated. In recent litigation, counsel for an agricultural cooperative of potato farmers, who allegedly agreed upon acreage reductions for potato plantings, noted that neither the legislative history nor the statutory language evidenced a Congressional intent to exclude[93] output restricting agreements.[94] The argument highlighted the economic relationship and essential equivalence between price fixing and output restrictions as well as statements made by Senators Capper[95] and Volstead[96] during floor debates comparing conduct agricultural associations would be permitted to perform under the Capper-Volstead Act to conduct corporations could perform by default:

90. *See* Varney, *supra* note 11, at 5-7.

91. *See id.* at 7-8.

92. *The Cost of Cutting Agricultural Output*, *supra* note 26, at 475-76.

93. *Id.* at 476 (emphasizing impliedly by at least one scholar, lack of intent to exclude conduct from immunization does not necessarily equate to intent to include conduct for immunization).

94. Memorandum in Support of Motion to Dismiss Based on Copper-Volstead Act and Related Statutes at 16-17, In re Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141 (D. Idaho 2011) (No. 4:10-cv-307); *see also* In re Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1154-55 (D. Idaho 2011).

95. *See* 62 CONG. REC. 2057 (1922) (statement of Sen. Capper) ("Its purpose is to give to the farmer the same right to bargain collectively that is already enjoyed by corporations. The bill is designed to make affirmative and unquestioned the right which already is generally admitted, but which, in view of the Sherman law, is subject to nullifying interpretation by those whose interests are not identical with those of the farmer, and who for one reason or another may be in a position to obtain an interpretation advantageous to themselves and embarrassing or detrimental to the members of cooperative organizations.").

96. *See* 61 CONG. REC. 1033 (1921) (statement of Sen. Volstead) ("Business men can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.").

> Given the well-recognized equivalence between price and output agreements, it would be nothing short of extraordinary if the Capper-Volstead Act were interpreted to permit cooperatives to fix prices but not agree upon output. While explicit price agreements may be more common forms of permitted conduct under Capper-Volstead, nothing in the statutory language or the legislative history of the statutes suggests that indirect price setting through an agreement limiting supply falls outside the Capper-Volstead protections.
>
> As noted previously, one of the guiding principles underlying the protections afforded to agricultural co-ops is that it was important for farmers to have the ability to act collectively—in a manner analogous to a single corporation—in
>
> their dealings with powerful buyers. To that end, Congress plainly understood that the ability to make crucial marketing decisions such as what to produce, how much to produce and what price to charge for the production, all are critical to the success of a business enterprise.[97]

The strength of the argument rests on two points: (1) that multiple members of Congress made statements during floor debates to the effect that the Capper-Volstead Act would treat cooperatives akin to corporations, and (2) upon a point briefly noted above but discussed more fully below, that agricultural cooperatives may fix prices and how it would be shocking to allow that conduct but deny agricultural cooperatives from determining how much to produce. The court reached a determination on other grounds but proceeded to opine in dicta—in what the court conceded as an "extraordinary step"[98]—that the Capper-Volstead Act does not immunize output restricting agreements and rejected arguments to the contrary.[99]

Conversely, evidence in the legislative history could support an argument that Congress did not intend to allow an association of agricultural producers to agree upon output restrictions because of a focus on production. Representative Towner stated, "[T]he only object and purpose of the bill is to provide that when cooperative effort is necessary to facilitate and increase production it might be authorized and protected."[100] However, this statement probably cannot be taken at face value. If the only purpose of the law was to protect cooperation when cooperation was necessary to increase production, then surely Congress would have drafted a law that at least attempted to establish what situations would suffice to show a necessity of cooperation. Yet several other congressmen made

97. Memorandum in Support of Motion to Dismiss at 16-17.

98. *See In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. at 1152.

99. *See id.* at 1154-57.

100. 59 CONG. REC. 8026 (1920) (statement of Rep. Towner).

statements anticipating an increase in production.[101] Expectations of increased production would seem to jar with the idea of permitting output restrictions.

Could output restrictions be permissible if Congressional intent was to increase production? Possibly. If an agricultural association of lettuce farmers agreed to reduce lettuce acreage, nothing is to say those farmers could not plant other types of crops on that acreage. The effect would be to decrease the output of one crop and increase the output of another. Presumably, the new crop would not be a close substitute, as that would defeat the purpose of an output restriction.[102] Imagine a situation where the market has an overabundance of lettuce but a high demand for broccoli and the two food products are not considered reasonable substitutes. Now picture a specialized agricultural association of lettuce farmers, where the lettuce farmers agreed to restrict production of lettuce and instead plant broccoli on the restricted acreage. Then, the cooperative could retain its general specialization in lettuce while making a narrow but coordinated expansion into the broccoli market. The entire association would benefit from the coordinated effort by retaining unity of purpose and maintaining established trust. The alternative would be each member haphazardly deciding whether to cease producing lettuce altogether in lieu of some other crop and beginning the search for a means of marketing the new crop without the aid of the association.[103] In this scenario,

101. *See, e.g.*, 59 CONG. REC. 7852 (1920) (statement of Rep. Morgan) ("Never before was there a time in our history when there was greater need to encourage the development of our agricultural interests. Our population is rapidly increasing. The demand for food products grows annually by leaps and bounds. We may safely encourage any system that will bring the producers and consumers in closer contact; that will provide a more efficient and more economical system of marketing, manufacturing, transporting, and distributing the products of the farm."); 59 CONG. REC. 8034 (1920) (statement of Rep. Barkley) ("The world needs more production. It is essential. If production is to increase, the conditions of marketing the produce of the farms must be improved and simplified. This measure, we hope, will assist in accomplishing this result.").

102. Close substitutes are likely to fall within the same market if they have comparable prices. *See* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953) ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small.").

103. As history has illustrated by societal development, it is easier to specialize in a narrow range of tasks than to be a self-sufficient jack-of-all trades. If the depressed market lead to farmer A deciding to plant turnips, farmer B deciding to plant beets, farmer C deciding to plant potatoes, and farmer D deciding to plant lettuce, the specialized agricultural association probably cannot help them. Thus, for farmers A, B, and C any investment in time and trust with the specialized association is lost. But if the focus remains narrow, the agricultural association will be in a better position to accommodate the new needs of its members.

overall food production would not decrease. The lettuce market would trend back toward historic price and production levels as the surplus left the market. And the broccoli market would receive the supply that it demands. As the markets approach equilibrium, consumers would have the benefit of diverse products at reasonable prices.

Granted, the scenario presented immediately above may not be the most likely event in the real-world for farmers who prefer to produce monocultures. Still, from a theoretical standpoint, it is certainly plausible that output restricting agreements for specific crops could be permitted without reducing the overall food supply. Whether Congress contemplated agricultural associations as vehicles for farmers to smoothly transition between different food markets is a question in its own right. Unfortunately, the legislative history is not alone in providing mixed clues as to the intent of Congress.

2. Capper-Volstead and Fisherman's Cooperatives

The Fisherman's Collective Marketing Act contains similar, but not identical, language to that used in the Capper-Volstead Act. Congress modeled the former on the latter.[104] This difference in language may indicate that Congress intended for the scope of limited antitrust immunity for fishermen to be broader than that of farmers. The Fisherman's Collective Marketing Act allows fishermen to form associations and cooperate in "catching, producing, preparing for market, processing, handling, and marketing" fish.[105] The presence of the language "catching" and "producing" can be contrasted with the absence of "planting" or "producing" in the Capper-Volstead Act. Presumably, Congress intended for the Fisherman's Collective Marketing Act to have a broader scope; otherwise, the language would likely be superfluous. Dicta in caselaw conflicts as to whether the two acts immunize the same conduct. The Department of Justice and the Federal Trade Commission have taken stances against finding output restrictions for agricultural cooperatives, which one court took note of when opining on the legality of output restrictions for agricultural cooperatives and distinguishing the two marketing acts by their text. Yet at least one Federal Trade Commission case draws heavily on the Capper-Volstead Act in concluding that fishing associations may limit output. Additionally, differences between the two industries may have had an impact on the wording used.

Dicta in court opinions goes both ways as to whether the two acts immunize the same conduct. In a footnote of a decision holding that a catfish processer was

104. *See* KINTNER ET AL., *supra* note 34, at § 71.12.

105. 15 U.S.C. § 521 (2018).

neither a farmer under the Capper-Volstead Act nor a fisherman under the Fisherman's Collective Marketing Act, the court stated:

> Having reviewed the two statutes, the court finds that though there are some differences between Capper–Volstead and the Fisherman's Act, the two Acts provide exemptions from antitrust liability for essentially the same activities, the primary difference being the fact that one Act applies to the agricultural industry and the other to the fishing industry.[106]

Though it must be noted that both parties in the case agreed, given the circumstances, the outcome would be the same under either act.[107] In a more recent case, the court opined—noting the verbiage was unnecessary to the decision—on the legality of output restrictions among producers within an agricultural cooperative and found the plain language of the Capper-

Volstead Act did not permit them..[108] The court put considerable weight on the additional words catching and producing in the Fisherman's Collective Marketing Act, as well as on Department of Justice and Federal Trade Commission interpretations of the Capper-Volstead Act's scope.[109] This court did not define marketing but concluded it only encompassed post-production activities.[110]

Interestingly, two Federal Trade Commission cases have been used to support the notion the Capper-Volstead Act authorizes output restrictions. The first found that the Fisherman's Collective Marketing Act allowed an association of fisherman to refuse to fish while negotiating for their desired price.[111] The Commission observed this was a "limitation on production."[112] Quoting the Supreme Court, the Commission also observed "'the general philosophy of [Capper-Volstead] was simply that 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.'"[113] And the Commission acknowledged a corporation

106. United States v. Hinote, 823 F. Supp. 1350, 1352 n.4 (S.D. Miss. 1993).

107. *Id.*

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

109. *See id.* at 1155.

110. *See id.* at 1154.

111. *See* Wash. Crab Ass'n, 66 F.T.C. 45, 127 (1964).

112. *See id.*

113. *Id.* at 106 (alteration in original) (quoting Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960)).

"may produce in any volume that it likes."[114] While the language of the Fisherman's Collective Marketing Act and the Capper-Volstead Act are not identical, the Federal Trade Commission had no qualms latching onto Supreme Court language that equated agricultural cooperatives with corporations while analyzing a case under the Fisherman's Collective Marketing Act.[115] The words catching and producing are noticeably absent from Section VII of the Act where the "limitation on production" was discussed.[116] If the words catching or producing had been necessary to find the Fisherman's Collective Marketing permitted output restrictions, one must reason the words would have been present and discussed.

The second Federal Trade Commission case involves a proposed consent decree that would prohibit fishermen from agreeing to refuse to fish while negotiating price with purchasers unless as members of an association.[117] While this second case supports an acknowledgment that properly operated fishing associations may limit output restrictions, it scarcely offers tangent support that agricultural cooperatives may do so as well. Without the association, and the applicability of the Fisherman's Collective Marketing Act, the fishermen would be separate actors. An agreement of the kind prohibited by the consent decree, where separate actors refuse to deal with another trader, would likely constitute an illegal group boycott.[118] To prohibit such conduct among separate actors is unsurprising, and the proposed consent decree does not reference the Capper-Volstead Act.[119]Absent a discussion or reference to the Capper-Volstead Act, to say that fishing associations may limit output says little of what agricultural associations may do when the argument against the latter having the ability to restrict output revolves around the differing language of the statutes.

Notably, the nature and circumstances of the fishing industry differ greatly from those in the agricultural industry. Fishermen catch fish from common pool resources.[120] In order to avoid "Tragedy of the Commons" type dilemmas, users

114. *See id.* at 127.

115. *Id.* at 45.

116. *Id.*

117. Or. *ex rel.* Myers v. Mulkey, No. Civ.A. CV 97 234-MA, 1997 WL 599410, at *6 (D. Or. June 16, 1997).

118. *See* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) (discussing how group boycotts "cripple the freedom of traders" in case where retailers' competitor induced manufacturers and distributors to boycott plaintiff).

119. *See Mulkey*, 1997 WL 599410, at *1-7.

120. *See* Xavier Basurto, *Common-pool resource*, ECYCLOPAEDIA BRITANNICA, https://perma.cc/W55A-966L (archived Jan. 23, 2020) (discussing how fisheries are common pool resources).

of common pool resources must cooperate to avoid depleting the resource.[121] On the other hand, farmers grow crops almost exclusively on private land.[122] A farmer does not need cooperation from his neighbors during the planting phase to ensure the continued viability of his farmland. But this is not to say that all agricultural producers rely exclusively on private land. Approximately 40% of pasture in the United States is publicly owned.[123] Now certainly, it would seem quite peculiar to authorize fishermen who harvest their crop from common pool resources to cooperate in marketing, but not to authorize cooperative catching, production, and supply restrictions. A depleted resource would destroy the market, harming producers and consumers alike. The same concept holds true for agricultural producers of livestock who only have access to pasture on public lands. Perhaps an explanation for the differing language used in the Capper-Volstead Act and the Fisherman's Collective Marketing Act rests more in the greater salience of the common pool aspect of the fishing industry than in a differing Congressional intent.

3. Capper-Volstead and Economic Efficiency

The primary economic efficiency argument for finding the Capper-Volstead Act immunizes output restricting agreements centers around preventing waste. Courts have established that agricultural producers within a cooperative may agree to withhold product from the market when negotiating for a higher price.[124] Although the agricultural industry generally operates in a global market in the modern world, food products are still perishable, some more so than others. When a market for a perishable food product becomes saturated and producers withhold product for which they cannot attain an adequate price for, the product spoils.

121. *See generally* Garrett Hardin, *The Tragedy of the Commons*, THE GARRETT HARDIN SOC'Y (1968), https://perma.cc/N2ES-PMWK (explaining a tragedy of the commons type situation is where a common pool resource degrades as independent users utilize the resource in their own best interest, to the harm of society as a whole. However, cooperative use can help maintain resource quality).

122. ECON. RES. SERV., AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 16 (Keith Wiebe & Noel Gollehon eds, 2006 ed.), https://perma.cc/YWE5-K4V8.

123. *Id.*

124. *See* Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1188 (8th Cir. 1982) (finding that association of milk producers who agreed to withhold milk in effort to achieve higher prices were protected by the Capper-Volstead Act where none of the members were coerced and evidence did not show an intent to eliminate competition); N. Cal. Supermarkets v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (finding that association of lettuce producers who agreed to withhold lettuce from market that did not sell within established price range were protected by the Capper-Volstead Act).

Society would be in a better position if the producers had not produced the excess product in the first place. As one scholar has eloquently described the argument:

> Some have argued that, as part of "marketing," cooperatives are allowed to withhold a portion of their members' output from the market—for example, destroying it or donating it to charity—and that it would be more efficient to permit them to accomplish this directly with production limits. The argument continues that, as a matter of economic efficiency and common sense, it is counterintuitive to permit destruction of crops post-harvest but deny coordination upfront in the planting of those crops because permitting such an outcome results in unnecessary costs, wasted resources, opportunity costs, and negative environmental impacts.[125]

It is unimaginable any member of Congress in the history of the United States would support the proposition that an association of farmers could agree to destroy their excess crop, while citizens went to bed hungry—and yet deny the association of farmers the right to agree upon production limits in the first instance. Such a stance would be political suicide. While most farmers would likely prefer to donate unsold crops to charity rather than destroy them, the perishable nature of certain food products may not permit such action, especially if the farmers remain hopeful they can attain their desired price until the end of the product's life draws near.

VI. OUTPUT RESTRICTIONS AND MODERN FARM POLICY

Modern farm policy promotes food security and cheap food prices for consumers. The federal government grants billions of dollars in farm subsidies each year to keep the cost of food products low.[126] On its face, output restrictions among members of an agricultural association would seem to work against this cheap food policy. However, even if agricultural associations had a clear green light to restrict output within their own association, output restrictions would not be the problem in their own right.

In a competitive market, no single firm can impact price by changing its output.[127] A firm in a competitive market is a price taker and will produce output to the point where its marginal cost equals its marginal revenue.[128] Thus, a firm in a competitive market would only decrease output if circumstances changed such that the firm's marginal cost was greater than its marginal revenue. A firm or cartel

125. Varney, *supra* note 11, at 7.

126. *See* Adam Andrzejewski, *Mapping The U.S. Farm Subsidy $1M Club*, FORBES (Aug. 14, 2018), https://perma.cc/9FLV-4FW9.

127. *See* KINTNER ET AL., *supra* note 34, at § 9.4.

128. *See id.*

can only attain a monopoly profit if the firm or cartel has monopoly power.[129] The problem it would seem, regarding output restricting agreements, stems primarily from agricultural associations that are big enough to wield monopoly power over the market. As noted above, being a monopoly does not violate the antitrust laws; however, acquiring monopoly power through anticompetitive practices does violate antitrust laws.[130]

The Capper-Volstead Act does not immunize agricultural associations from Section Two of the Sherman Act.[131] Thus, any agricultural association that attempted to unilaterally acquire monopoly power through output restrictions would be engaging in anticompetitive conduct that would subject the association to Section Two Sherman Act claims. Thanks to Sections Four and Sixteen of the Clayton Act, the nation has an army of private actors who can help police agricultural associations that engage in predatory conduct.[132] The fear that agricultural associations would cause harm to consumers by utilizing output restrictions appears somewhat overstated. Agricultural markets of readily perishable goods, where a small number of large agricultural associations already exist, would be the most subject to consumer harm from predatory conduct. The key to limiting abusive power lies more so in keeping agricultural associations small enough that monopoly power is unattainable.

Agricultural producers in their individual capacities would face significant challenges in the market by themselves. Transportation and preservation technology will not go away; the global market for many agricultural products is here to stay. Thus, agricultural producers probably need some protection. But that is not to stay that behemoth associations of agricultural producers are necessary to balance the scales.

VII. CONCLUSION

Reasonable arguments exist to both support and condemn output restricting agreements among agricultural producers within an association. Ascertaining the intent of Congress will not get any easier as the years pass by and the Capper-Volstead Act nears its 100th birthday. Clarity will allow agricultural producers to coordinate their activities in the most beneficial fashion. An interpretation which finds that agricultural producers within an association may agree to restrict output

129. *See id.*

130. *See* Spectrum Sports, Inc. v. Mcquillan, 506 U.S. 447, 456 (1993); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

131. *See* Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 467 (1960).

132. *See* Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 and 29 U.S.C. §§ 52-53).

probably resonates best with the actions that associations have already been clearly permitted to undertake and would reduce waste. The incredible mental image of a congressman who would tolerate the destruction of food crops—while some people in the country lack money for food—but deny agricultural associations the ability to coordinate planting and output may be the most vivid portrayal of congressional intent, especially when considering permitted acts that agricultural associations may undertake.[133]

133. Author's note: Recent court cases involving the mushroom, egg, and dairy industry involved output restriction claims, but these cases were decided on other grounds and omitted from discussion.