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**Benevolent monopoly: The legal transformation of agricultural  
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Saker, Victoria Alice, Ph.D.

University of California, Berkeley, 1990

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**Benevolent Monopoly: The Legal Transformation  
of Agricultural Cooperation, 1890-1943**

**By**

**Victoria Alice Saker**

**B.A. (University of Virginia) 1983  
M.A. (University of California) 1985**

**DISSERTATION**

**Submitted in partial satisfaction of the requirements for the degree of**

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**in**

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**in the**

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**of the**

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**DOCTORAL DEGREE CONFERRED**

**DECEMBER 19, 1990**

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"Benevolent Monopoly: The Legal Transformation of  
Agricultural Cooperation, 1890-1943"

by

Victoria Alice Saker

Abstract

The history of American law reflects in large measure how social and economic privileges have been promoted and regulated by law. This study examines how farmers won and used the privilege of extensive immunity from the anti-trust laws at both the state and federal levels. Agricultural cooperatives, on the grounds that they were "benevolent" monopolies, were exempted from anti-trust liability. The changed legal status of cooperatives paved the way for significant changes in the relationship between government and agriculture during the twentieth century.

In the Progressive Era, legislatures generally viewed cooperatives as deserving of special treatment. The courts, however, regarded cooperatives with suspicion, particularly because cooperatives resembled corporations in form and function. The California Associated Raisin Company (CARC) tested prevailing assumptions about the legitimacy of monopoly in agriculture. It combined the traditional cooperative ideal of economic democracy with the legal powers of commercial corporations. The control the CARC exerted over supply and price was ultimately challenged in federal court. But Congress passed the Capper-Volstead Act of 1922 in time



to moot the litigation. The Capper-Volstead Act extended anti-trust immunity to all cooperatives, specifically those organized according to the California model. State cooperative marketing laws subsequently enacted and ratified by the courts completed the revision of their old anti-monopoly prejudice.

The transformation in the legal status of cooperation helped to direct agriculture's fortunes under the New Deal. Federal and state marketing laws regulating agricultural production and prices extended cooperation's market control to the public sphere. The Supreme Court upheld the state's authority to enact such laws in the case of Parker v. Brown (1943), validating the federal/state division of regulatory authority that they represented. The modern legal status of agricultural cooperatives stems from the example of the CARC. Its significance lies not so much in how it benefited the raisin growers but in the availability of this new legal form for cooperating farmers in the rest of the nation. The history of cooperation reveals as well an important legal dimension in the process by which the shift to a highly commercialized agriculture took place.

*Harry K. Schwiter 8/1/90*

For Keith

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## LIST OF ABBREVIATIONS

AFBF	American Farm Bureau Federation
<u>AG</u>	<u>Associated Grower</u>
BAE	U.S. Bureau of Agricultural Economics
CAGE	California Almond Growers' Exchange
CARC	California Associated Raisin Company
CFGE	California Fruit Growers' Exchange
<u>CR</u>	<u>Congressional Record</u>
CWGA	California Walnut Growers' Association
DOJ	U.S. Department of Justice
<u>FMR</u>	<u>Fresno Morning Republican</u>
FPNP	Franklin P. Nutting Papers, Bancroft Library, University of California, Berkeley
FTC	U.S. Federal Trade Commission
MTKP-B	M. Theo Kearney Papers, Bancroft Library, University of California, Berkeley
MTKP-FHS	M. Theo Kearney Papers, Fresno City and County Historical Society, Fresno
NA	National Archives and Records Administration, Washington, D.C.
NA-SB	National Archives and Records Administration, Western Regional Center, San Bruno, Cali- fornia
NA-WNRC	National Archives and Records Administra- tion, Washington National Records Center, Suitland, Maryland
NCFCMA	National Council of Farmers' Cooperative Mar- keting Associations
<u>PRP</u>	<u>Pacific Rural Press</u>
SMCA	Sun-Maid Corporate Archives, Kingsburg, Cali- fornia
<u>SMB</u>	<u>Sun-Maid Business</u>
<u>SMH</u>	<u>Sun-Maid Herald</u>
USDA	U.S. Department of Agriculture

Cooperation contemplates no violence, it subverts no order, it expects no gift nor asks any favor, it keeps no terms with the idle and it will break no faith with the industrious, it touches no man's fortunes, it seeks no plunder.

George Rogers Holyoake  
History of Cooperation, 1905

The welfare of this whole community is so bound up in the prosperity of the raisin business, and the progress of that business is so dependent on organized and more or less public action, that raisin affairs have always been treated, and properly treated, as public affairs.

Chester H. Rowell  
Editor, Fresno Morning Republican, 1909

## INTRODUCTION

During the Progressive Era, a nation already weary of corporate combination and economic consolidation learned that yet another industry had come under the domination of a powerful trust. What was both amazing and distressing about this particular trust, however, was that it arose not in high finance or in heavy industry but in agriculture--a time-honored occupation symbolizing the soul of the nation and the bedrock of a virtuous republican citizenry. By 1918, the California Associated Raisin Company of Fresno, California (CARC), had become the largest agricultural trust in American history, controlling 88 percent of the nation's raisin producers and commanding total authority over prices. The CARC posed a stark contrast to the hallowed notion of the independent farmer, whose intimate relationship with the land conferred self-sufficiency, competitiveness, and even nobility.

The CARC was no ordinary trust. It was a farmers' cooperative association. As such it was built on the foundation of a unique philosophical heritage and an accommodating American legal culture. But its combination of old ideals and new legal forms evoked public outcry. By using centralization, managerial efficiency, and monopoly to transform the marketing of agricultural commodities, the

CARC--and other cooperatives like it--controlled the availability and prices of agricultural commodities. The idea that the nation's food supply might be governed by trusts or monopolies disturbed many Progressive Era Americans.<sup>1</sup> The law not only permitted these trusts to exist but also did little to check their excesses.<sup>2</sup> The raisin growers' organization boldly flaunted this privilege to monopolize. Its unique blend of cooperative ideals and corporate powers ultimately furnished the test case by which the legality of modern cooperation would be determined.

To understand the clash of legal and economic visions that the CARC precipitated, we must return to an intellectual crossroads that has not seen scholarly traffic for some time. The history of the American agricultural cooperative movement has been considered largely as it relates to other major historical issues, such as the rise of Populism, the

---

<sup>1</sup>I use the term "monopoly" in this study to refer to the contemporary understanding of consolidation, meaning a high level of economic control and market power. I do not mean to imply that cooperatives possessed all of the economic functions economists attribute to "true" monopolies. I thank Martin Shapiro for clarification on this point.

<sup>2</sup>For general background on the economic changes of the period and the social tensions that accompanied industrialization, see Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (New York, 1963); Ellis W. Hawley, The New Deal and the Problem of Monopoly (Princeton: Princeton University Press, 1966); Fred A. Shannon, The Farmer's Last Frontier: Agriculture, 1860-1897 (New York: Holt, Reinhart & Winston, 1945); James A. Garraty, The New Commonwealth, 1877-1890 (New York: Harper & Row, 1968); and Arnold Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Gloucester, MA: Peter Smith, 1976).

anti-trust movement, or the Farm Crisis of the post-World War I era.<sup>3</sup> Indeed, the history of agricultural cooperation has been written largely by agricultural economists.<sup>4</sup>

Recent scholarship places cooperatives squarely within the realm of the economic analysis of market behavior.<sup>5</sup> Neither agricultural historians nor legal scholars have focused much attention on cooperatives, despite the fact that they gener-

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<sup>3</sup>On Populism, see Lawrence Goodwyn, Democratic Promise: The Populist Moment in America (New York: Oxford University Press, 1976); on anti-trust policy, see Hans B. Thorelli, The Federal Antitrust Policy: Origination of an American Tradition (Baltimore: Johns Hopkins University Press, 1955); and William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act (New York: Random House, 1965); a new perspective is supplied in Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics (New York: Cambridge University Press, 1988); agriculture in the post-war era is ably treated in James Shideler, Farm Crisis, 1919-1923 (Berkeley and Los Angeles: University of California Press, 1959).

<sup>4</sup>The best study of law and the cooperative movement remains Edwin G. Nourse, The Legal Status of Agricultural Cooperation (New York: Macmillan Co., 1928). The only work treating cooperation as a historical movement is Joseph Knapp, The Rise of American Cooperative Enterprise, 1620-1920 (Danville, IL: The Interstate Printing and Publishing Company, 1969); and The Advance of American Cooperative Enterprise, 1920-1945 (Danville, IL: The Interstate Printers and Publishers, 1973). Knapp's work, more encyclopedic than analytical, leaves room to interpret the movement in a broader interdisciplinary context.

<sup>5</sup>For the economic theory of cooperatives, see Richard B. Heflebower, Cooperatives and Mutuals in the Market System (Madison: University of Wisconsin Press, 1980); and David B. Cobia, ed., Cooperatives in Agriculture (Englewood Cliffs, NJ: Prentice Hall, 1989). The law and economics approach is supplied by Willard F. Mueller, Peter G. Helmsberger, and Thomas W. Paterson, The Sunkist Case: A Study in Legal-Economic Analysis (Lexington, MA: D.C. Heath and Co., 1987).



ated an immense amount of legislation and litigation after 1890.<sup>6</sup> In short, never has the movement been considered on its own terms, as an economic, social, and legal phenomenon that transformed government regulation of private enterprise and the economic status of American farmers during the twentieth century.

The history of agricultural cooperation offers historians fertile grounds for examining the interactions between government regulation, economic development, and legal change. It raises important questions about associationalism, ideology, and substantive due process during the Progressive Era. The cooperative movement challenged prevailing notions of anti-trust policy and asserted the farmers' right to control their economic lives through instrumental uses of law. But the cooperative movement accomplished far more than simply providing farmers with a legal form for collective economic action. Cooperatives and the

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<sup>6</sup>Contemporary observers during the 1920s remarked at length on the transformations in state and federal policy resulting from the growth of the cooperative movement. These include Stanley M. Arndt, "The Law of California Co-operative Marketing Associations," 8 California L.R. 281 (1920); Henry W. Ballentine, "Co-operative Marketing Associations," 8 Minnesota L.R. 1 (1923); Charles L. Goldberg, "Co-operative Marketing and Restraint of Trade," 12 Marquette L.R. 270 (1928); Theodore R. Meyer, "The Law of Cooperative Marketing," 15 California L.R. 85 (1927); John D. Miller, "Farmers' Co-operative Associations as Legal Combinations," 7 Cornell L.O. 293 (1922); Matthew Tobriner, "The Constitutionality of Cooperative Marketing Statutes," 17 California L.R. 19 (1928). Since then, little has been written on cooperatives other than specialized agricultural law treatises.

attendant ideology of cooperation created a distinctive social and legal culture within which farmers attained the legal privilege to monopolize. Cooperation gave farmers a sense of empowerment in the face of rapid social and economic change.

This conception of cooperation as a privileged right to monopolize emerged out of a particular historical context in which agrarian radicalism and the impulse to consolidate collided in spectacular ways. Anxious to make horticulture profitable, California growers took the idealism and radical equality of traditional cooperation and combined it with a sense of pragmatic entrepreneurialism. They did so out of necessity. Traditional cooperation had emerged from collective purchasing experiments in nineteenth-century Rochdale, England; it relied heavily on volunteer labor, in-person cash transactions, and low overhead. But what California growers needed was a more efficient and profitable method of marketing their produce across the country. As specialized fruit and nut crops became more integrated into the national diet, the importance of California marketing cooperatives became magnified, and the legal change they triggered signifies that agriculture's response to industrialization was more imaginative and more influential than has previously been recognized. The legal privileges won by the cooperative movement in California show that people seemingly far removed from traditional national power elites substantially

influenced public regulation of private enterprise. They did so in ways which were undoubtedly self-serving. But the historical significance of cooperation requires that the gains of the cooperative movement be placed in the context of its philosophical meaning and social vision in addition to its economic aims.

Scholars of California history have generally recognized that Golden State agricultural producers put cooperation to work in spectacular ways. California fruit growers scored successes with cooperation after the cooperative organizations of the Grangers and Populists had become a bitter symbol of agriculture's economic distress. Nearly every contemporary treatise on cooperation remarked on the significant developments taking place in California.<sup>7</sup> Recent work has focused particularly on the success of the citrus growers' organization, the California Fruit Growers' Exchange (CFGE), and with good reason. The citrus industry played an instrumental role in the settlement and development of Southern California in attracting farmers to the area, and later it epitomized the health and wealth that

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<sup>7</sup>For example, see Herman Steen, Cooperative Marketing: The Golden Rule in Agriculture (New York: Doubleday, Page, & Co., 1923); Edward J. Wickson, Rural California (San Francisco: Rural State and Province Series, 1922); John Lee Coulter, Cooperation Among Farmers (New York: Sturgis and Walton Co., 1911); John W. Lloyd, Cooperative and Other Methods of Marketing California Horticultural Products, University of Illinois Studies in Social Science, 8:1 (1919); Henry E. Erdman, "The Development and Significance of California Cooperatives, 1900-1915," Agricultural History, 32 (1958), 179-184.

awaited newcomers in a land of unparalleled beauty and temperate climate. To California historians such as Kevin Starr and Walton Bean, the CFGE was the model California cooperative, combining industry-wide monopoly with an adherence to the Rochdale ideal of equity and democratic participation.<sup>8</sup> Today--renamed Sunkist Growers, Inc.--it ranks among the largest agricultural cooperatives in the nation; despite formidable legal challenge, its market share remains an impressive 70 percent.<sup>9</sup>

Starr, Bean, and other historians rightly stress the accomplishments of California agricultural cooperation, but they chalk up these accomplishments as purely the result of economic factors.<sup>10</sup> These scholars have neglected the fact

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<sup>8</sup>Kevin Starr, Inventing the Dream: California Through the Progressive Era (New York: Oxford University Press, 1985), 161-62; Walton Bean and James J. Rawls, California: An Interpretive History, 4th ed. (New York: McGraw-Hill Book Co., 1983), 199-200; see also Rahno Mabel MacCurdy, The History of the California Fruit Growers' Exchange (Los Angeles: George Rice & Sons, 1925), 7-10; and Murray Benedict, "The Economic and Social Structure of California Agriculture," in Claude Hutchinson, ed., California Agriculture (Berkeley: University of California Press, 1946), 395-435.

<sup>9</sup>Mueller, Helmberger, and Paterson, The Sunkist Case, 4-7, 185-86. The Federal Trade Commission issued a formal complaint against Sunkist in 1976 for allegedly monopolizing 76 percent of the citrus production of California and Arizona. The case was settled by consent agreement in 1980, with Sunkist agreeing to refrain from making certain acquisitions that increased its market share.

<sup>10</sup>For instance, the convenient parallel between geography and production areas, the fact that almost no other areas in the country were producing these crops, and the fact that commodities such as lemons, oranges, and grapefruits were luxuries to Eastern consumers.

that Californians were able to alter the traditional conception of cooperation so extensively because they relied on the legal system to provide a suitable framework.<sup>11</sup> In California, lawyers and growers worked within a sympathetic legal culture that enabled them to mold the concepts of cooperative and corporation into a new legal form. In so doing, they redefined the legal relationships among agricultural producers, the market, and the state. And it was in the raisin vineyards, not the citrus orchards, that this legal innovation took place.

Thus the trust-building by the raisin growers represents far more than a market-dictated drive for efficient economies of scale. A new meaning of cooperation emerged out of the raisin growers' organization, and while the economic and environmental conditions that gave rise to this new meaning of cooperation were indeed exceptional, the result established cooperation as a vital component of national and state public policy. Cooperation illustrated the special place reserved for farmers in American culture; cooperation provided the vehicle by which the state could set agriculture apart from other commercial interests with-

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<sup>11</sup>A recent article that sheds light on growers' use of law to solve agricultural problems is Howard Seftel, "Government Regulation and the Rise of the California Fruit Industry: The Entrepreneurial Attack on Fruit Pests, 1880-1920," Business History Review, 59 (Autumn, 1985): 369-402. But in arguing that pest regulation was the growers' primary goal, Seftel places the cart before the horse. As the growers themselves recognized, post-harvest regulations were useless unless the marketing problems were solved.

out violating constitutional norms of equality and due process. The raisin growers' success reinforced the sense that agriculture deserved special treatment and confirmed the belief that cooperatives could use monopoly to improve their condition at little or no social cost. By World War I, the CARC "was heralded far and wide as an example for farmers to copy everywhere."<sup>12</sup> Their form of cooperation enabled the raisin growers to cope with economic change in much the same way that urban industrialists did--and more successfully than the labor union movement so often linked to agriculture. And, when the raisin monopoly became powerful and seemingly unresponsive to economic conditions, the CARC earned expressions of condemnation and criticism similar to the invective cast at the robber barons.

The history of cooperation reveals as well a surprising willingness among Californians to flout the rule of law when other growers or the market itself threatened to impede their attempts to monopolize through cooperation. Night-riding, the practice of coercing growers into joining or remaining members of the cooperative, habitually surfaced when the community was called upon to demonstrate loyalty to the cooperative. Among California raisin growers, the life of the cooperative justified extra-legal violence and intimidation; the obligation to support the organization overrode

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<sup>12</sup>O.B. Jesness, "Relation of Cooperative Marketing to the Adjustment of Agricultural Production," Journal of Farm Economics, 7 (1925), 181-82.

a grower's right to economic independence. Cooperation's privileges were grounded in positive law; cooperation's moral force was rooted in a higher authority.

Ultimately, this study inquires into the nature of the relationship between law and markets, a field divided over questions of interpretation. Did American constitutionalism, as James Willard Hurst has eloquently argued, set up a largely promotional framework in which the clash of economic interests fueled "a release of entrepreneurial energy," and in which the market served merely to set up the parameters within which that energy could be expended?<sup>13</sup> Or, as Critical Legal Studies scholars have responded, was American law the handmaiden of elite interests, promoting nothing but atomistic, chaotic, self-interested activity that imposed its social costs on the poor and disenfranchised while the legal system looked the other way?<sup>14</sup>

The recognition that inequality permeates American history does not, I think, necessarily mean that we must jettison faith in constitutionalism. Equality and freedom may be seen as neither mutually exclusive nor mutually rein-

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<sup>13</sup>The best expressions of this argument are in James Willard Hurst, Law and the Conditions of Freedom in the 19th Century U.S. (Madison: University of Wisconsin Press, 1956); Hurst, Law and Markets in U.S. History: Different Modes of Bargaining Among Interests (Madison: University of Wisconsin Press, 1982).

<sup>14</sup>Morton Horwitz, The Transformation of American Law, 1780-1860 (Cambridge, MA: Harvard University Press, 1978); Robert Gordon, "Critical Legal Histories," Stanford L.R., 36 (1984): 57-125.

forcing. How the interplay between them works out over time and place forms one cornerstone of the legal historian's enterprise. To impose some normative scheme of rationality on this process is, I agree, counter-productive; but it is just as fruitless to approach the record with cynicism, assuming that individuals act solely out of economic self-interest. Law indeed serves particular interests, often those interests that are already best served by the dominant legal and economic system. In his later work, Hurst has conceded the inequitable distribution of privilege in American history, but he has qualified this concession. In evaluating the interactions between law and markets over time, for example, he argues that private interests continually engage public mechanisms of legal control. That is, in seeking interested results, individuals are checked as much as promoted by law. Hurst believes the historical record is ambiguous; the interaction between law and markets does not always produce equitable outcomes, but the record is "mixed enough so that realistic appraisal cannot simply label the market an instrument or bulwark of oppression."<sup>15</sup>

This study bears out the notion that interactions between law and markets can be better understood by placing economic behavior in the context of ideology. My aim here is to examine how individuals manipulated law and legal forms, not only to benefit themselves but also to fulfill a

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<sup>15</sup>Hurst, Law and Markets, 64.



well-defined philosophy of collective action. Thus I am interested both in the rise of the CARC and its eventual decline. I am fascinated by the evolution of legal privileges for cooperatives and by the ways the raisin growers acted upon those privileges. I examine the role of legal institutions in promoting and regulating agricultural enterprise and the very human dynamics that drove cooperation in the raisin industry. I look at both the Fresno bankers whose support made organization possible and the Fresno growers whose "night-riding" imposed a reign of terror in the raisin-growing community and undercut the very spirit of cooperation they sought to uphold. What is important, it seems to me, is to understand the motives that induced people to act as they did. Cooperation furnishes a case study of belief and behavior, of doctrine and ideology.

For example, the incidents of night-riding revealed the lengths to which many individuals were willing to go to protect the economic institution so closely linked to the community's prosperity. The night-riders' selective persecution of disloyal growers was premised on the idea that because cooperation benefitted the community, no one should be permitted to undermine the CARC. To do so was to strike at the heart of the community itself. The majority of the raisin growers saw no contradiction between their unwavering belief in the cooperative creed and their violent means of imposing that belief on others. From their per-

spective, they remained true to the ideal and its vision of an interdependent agricultural community. None of this, of course, justifies the oppression of the minority who preferred to go it alone. And not all victims of the night-riders were without remedies; either through private lawsuits or by selling their lands they could escape the cooperative. But understanding the connection between the majority's instrumental approach to law and their conception of the community's best interests helps to explain why night-riding took place. Cooperation transcended the sharp racial, ethnic, and class divisions within the raisin-growing community. The immigrants and ethnic minorities "belonged" to the cooperative just as much as the Euro-American growers, because the participation of all was vital to the success of the cooperative. Understanding the resistance to night-riding reveals that cooperation was neither completely persuasive nor beyond the limits of the law, as the poignant statements of oppressed growers illustrate.

The history of cooperation shows that imaginative and creative uses of the law flourished in unlikely places. Before we dismiss this as a conservative retrenchment aimed at securing material gain for a select elite,<sup>16</sup> or as an isolated attempt by farmers to shield themselves from the

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<sup>16</sup>For an example of this view, see Grant McConnell, The Decline of Agrarian Democracy (New York: Atheneum, 1968).

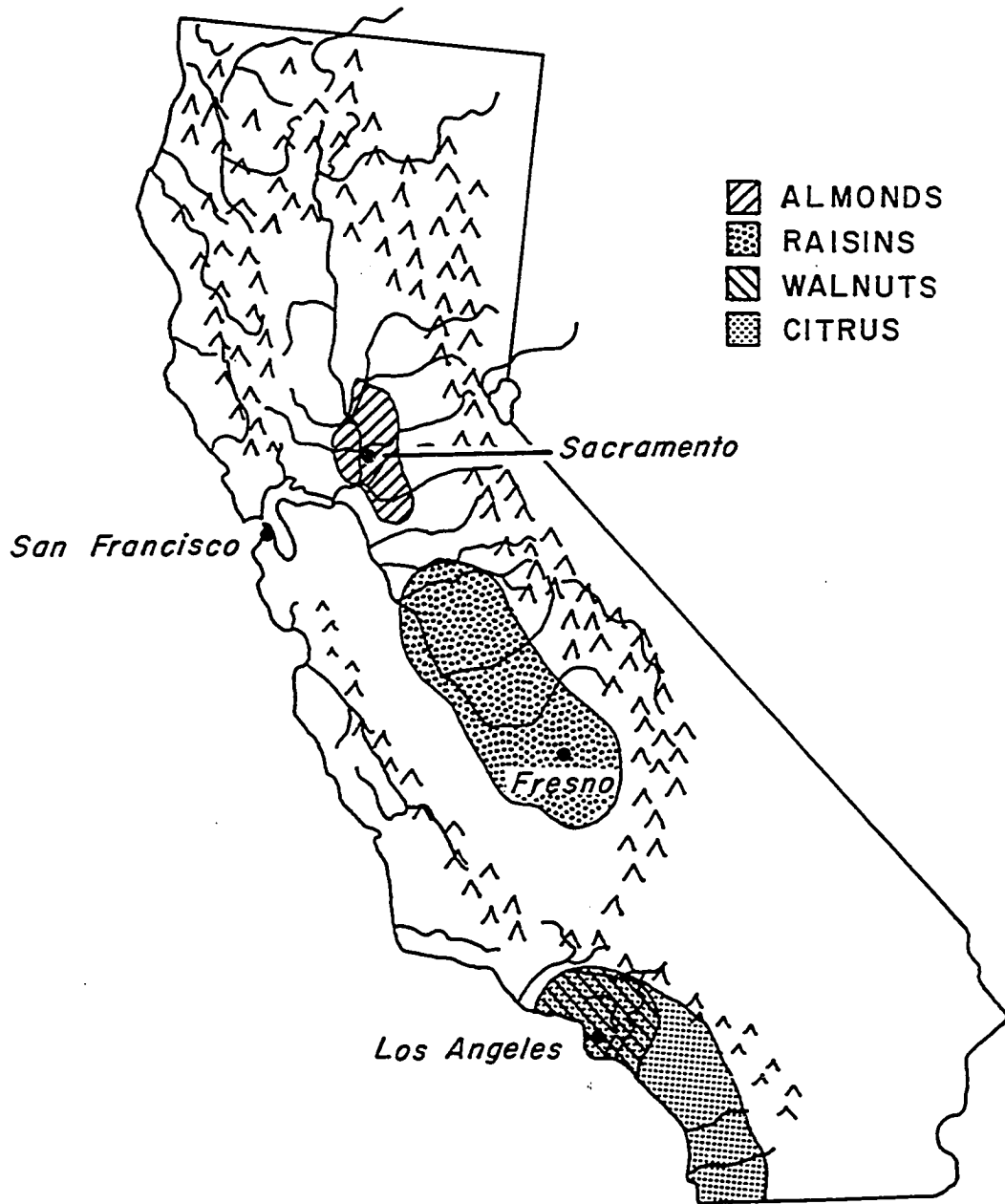
domination of big business,<sup>17</sup> we must investigate the historical experiences of the raisin growers themselves. They did not claim to be particularly wealthy, prominent, or powerful; neither did they consider themselves helpless and unable to deal with the conditions they faced. Their belief in the moral order of cooperation underlay their legal experimentation and their crusade for recognition of their new legal form. Their strategy provided a bridge between the nineteenth-century agrarian political culture of opposition to emerging forms of industrial enterprise and the twentieth-century agricultural business culture.<sup>18</sup> They created a middle ground between government regulation of private enterprise and economic individualism.<sup>19</sup> Their success instilled the gains of cooperation in state and federal law.

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<sup>17</sup>Hofstadter, The Age of Reform, 113-14.

<sup>18</sup>I am indebted to James Gregory for pointing out this theme.

<sup>19</sup>Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," 72 California L.R. 217 (1984); Scheiber, "Economic Liberty and the Constitution," in Essays in the History of Liberty: Seaver Institute Lectures at the Huntington Library (San Marino, CA: The Huntington Library, 1988), 75-100.



1. Agricultural production regions in California, c. 1900

PART I. COOPERATION AND THE PROBLEM OF MONOPOLY

## CHAPTER 1

### AGRICULTURE'S "GOLDEN RULE": COOPERATION IN AMERICAN CULTURE

When co-operation becomes general, there will be no great private fortunes, no involuntary poverty, no international trade rivalry, and, therefore, no war. Co-operation will turn the economic and social interests of the world into the channels of peace and goodwill.<sup>1</sup>

Nineteenth-century ideas of cooperation inspired dreams of a society in which industrialization was compatible with egalitarian social relations. In the marketplace, cooperation could enable workers and farmers to obtain a just return for the fruits of their labor. Cooperation also shaped the thought of late nineteenth-century economists, politicians, and intellectuals. They were captivated by cooperation's hopeful vision of an industrialized yet Christian society, freed from the inexorable edicts of social Darwinism and laissez-faire capitalism by its commitment to a cooperative moral order.<sup>2</sup>

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<sup>1</sup>"Association a Power," SMH, 3:8 (March 1918): 3.

<sup>2</sup>For general background on the economic changes of the period and the social tensions that accompanied industrialization, see Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (New York: Random House, 1963), 23-130; Fred A. Shannon, The Farmer's Last Frontier: Agriculture, 1860-1897 (New York: 1945); James A. Garraty, The New Commonwealth, 1877-1890 (New York: Harper & Row, 1968); and Arnold Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Gloucester, Mass: Peter Smith, 1976). The essays in Herbert B. Adams, ed.,

Cooperation achieved a hallowed place in American economic life between 1865 and 1920. It inspired dreams of a "cooperative commonwealth." Its adherents included social theorists, economists, and a majority of the nation's farmers. The attractiveness of cooperation's social vision and economic theory won many converts. By 1920, in the words of an American Farm Bureau Federation writer, cooperation had become the "golden rule of agriculture."<sup>3</sup> Emerging out of extensive public debate over the virtues of cooperation, a peculiarly American form of cooperation paid homage to the social vision of traditional cooperation while at the same time reinterpreting it to fit new circumstances.

#### The Economic Theory of Agricultural Cooperation

Cooperation came to the U.S. from Europe, where by 1850 it played an important role not only in agriculture but also in banking, industry, labor, and consumer purchasing. In England, Denmark, Sweden, and Germany, cooperatives originated in the late Middle Ages as local pools. Most typical were the creamery rings and cheese pools of Switzerland and Denmark. By the time of the Industrial Revolution, European farmers pioneered the idea of cooperative rural credit

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History of Cooperation in the United States (Baltimore: Johns Hopkins University Press, 1888), illustrate the spread of cooperation into different sectors of the economy.

<sup>3</sup>Herman Steen, Cooperative Marketing: The Golden Rule in Agriculture (New York: Doubleday, Page, & Co., 1923).

societies and cooperative stores for the purchase of farm implements. Cooperative factories and mills also sprang up after 1815. These organizations were primarily unincorporated pools, dependant on private capitalists for financing and lacking formal legal identity.<sup>4</sup>

A group of English textile workers transformed the basic idea of cooperation in the mid-nineteenth century by devising both a specific legal character and a broad philosophical foundation for cooperation. After repeated strikes failed to bring improvements in wages and living conditions, twenty-eight weavers established a cooperative store in the town of Rochdale in 1844. Despite considerable opposition from local shopkeepers, the store slowly built up a loyal clientele of buyers and investors from among the town's laborers.<sup>5</sup>

What set the Rochdale store apart from earlier cooperative purchasing societies was the institutional framework the weavers formulated to govern financing, profit-sharing,

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<sup>4</sup>On the history of cooperation in Europe, see Eliot G. Mears and Mathew O. Tobriner, Principles and Practices of Cooperative Marketing (Boston: Ginn and Co., 1926), 366-91; Edwin G. Nourse, The Legal Status of Agricultural Cooperation (New York: Macmillan, 1927), 25-35; Steen, Cooperative Marketing, 1-4; John Hanna, The Law of Cooperative Marketing Associations (New York: The Ronald Press Co., 1931), 3-4; H. Clyde Filley, Cooperation in Agriculture (New York: John Wiley & Sons, 1929), 17-18; and C.R. Fay, Cooperation at Home and Abroad (London, 1908).

<sup>5</sup>On the beginnings of the Rochdale cooperative store, see Filley, Cooperation in Agriculture, 18-21; Steen, Cooperative Marketing in Agriculture, 3; Hanna, Law of Cooperative Marketing, 3-4.



and membership. Their plan was at once simple and revolutionary. It emphasized participation according to contribution of goods or patronage rather than investment of capital. Of the twelve original Rochdale Principles, as they were first published in 1860, four emerged repeatedly in subsequent cooperative practice: (1) business or services performed at cost, on a cash basis, with profits paid out to members in proportion to business transacted; (2) democratic control--one person, one vote; (3) paying out limited dividends on invested capital, usually eight percent; (4) ownership limited to members--those who patronized the store or who belonged to the occupation the cooperative was established to serve patrons. Also included were limits on the amount of stock any individual could own and the social duty to educate people in the tenets of cooperation.<sup>6</sup>

The Rochdale Principles turned the private corporation into a radically public, non-profit collective. Each of the principles revised an aspect of private market relations. The first principle, for example, simplified operations by eliminating extensive management and accounting practices and reducing interest; it also made profit contingent on participation rather than wealth. The democratic structure

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<sup>6</sup>David G. Barton, "Principles," in David Cobia, ed., Cooperatives in Agriculture (Englewood Cliffs, NJ: Prentice Hall, 1989), 24-32, esp. 27; Hanna, Law of Co-operative Marketing, 3-4; Joseph A. Knapp, The Rise of American Cooperative Enterprise, 1620-1920 (Danville, IL: The Interstate Printing and Publishing Company, 1969), 8-15.

of the second principle ensured that no individual would have a greater say in the affairs of the organization than anyone else, regardless of invested capital, amount of patronage, or number of shares owned. By restricting interest dividends and membership, the cooperative could keep hostile interests out and restrict benefits to participants. In short, unlike regular corporations, where ownership and control (or management) were divorced, Rochdale cooperatives closely linked ownership and management. They also provided the possibility that corporations could be made less exploitative and more socially accountable.<sup>7</sup> The implicit assumption of the Rochdale principles was that cooperative enterprise could both achieve efficiency through economies of scale and reduce friction between workers and employers.<sup>8</sup>

Philosophically, the cooperative movement steered a middle ground between its socialist heritage and the laissez-faire conservatism of nineteenth-century capitalism. The Rochdale weavers owed a real debt to earlier utopian

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<sup>7</sup>Edwin G. Nourse, "The Economic Philosophy of Cooperation," American Economic Review, 12:4 (December, 1922), 579; on the separation between capital and management in regular corporations, see Adolf A. Berle, Jr., and Gardner C. Means, The Modern Corporation and Private Property (New York: The Macmillan Company, 1933), 89; Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (Cambridge, Mass.: Harvard University Press, 1977), 377-483.

<sup>8</sup>Nourse, "The Economic Philosophy of Co-operation," 577; Anon., review of George J. Holyoake, The History of Cooperation, in The Nation, 83:2147 (August 23, 1906), 170-71.

socialists such as Robert Owen and Francois Charles Marie Fourier. But despite this radical influence, Rochdale cooperation took an essentially conservative turn: "[British cooperation] 'began in a desire for equality; but not by pulling down the rich to the pitiful level of the poor, but by teaching the poor how they might raise themselves to the level of the rich. The early cooperators sought equality through equity.'"<sup>9</sup> The idea of equity, then, did not entail systemic redistribution of capital but improvement of the lot of the poor through self-help and fair distribution of the fruits of their collective efforts. The goal was not to attack the capitalist system but to enable more people to share in the benefits of that system.

It was precisely the Rochdale emphasis on profit sharing and self-sufficiency that appealed to Americans. By the time of the Civil War, the Rochdale store had become an international success story. In 1859, New York Tribune editor Horace Greeley published English historian George Jacob Holyoake's book on the Rochdale pioneers, Self-Help by the People. The book fed the rising interest in cooperation that was developing even before the Civil War.<sup>10</sup> After war's end, the increasing pace of economic change precipitated greater experimentation with cooperation. As indus-

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<sup>9</sup>George Jacob Holyoake, History of Cooperation (London: T.F. Unwin, 1906), quoted in Mears and Tobriner, Principles of Cooperative Marketing, 14-15.

<sup>10</sup>Knapp, Rise of American Cooperative Enterprise, 30.

trialism advanced in the post-bellum era, American farmers viewed the Rochdale principles as the ideal solution to the problems of agricultural marketing. Agrarian reformers believed that cooperation might teach farmers how to be better entrepreneurs, to raise their standard of living, and in short to flourish in a modern, industrial society.<sup>11</sup>

#### Cooperation in Nineteenth-Century American Agriculture

The fundamentals of cooperation consistently surfaced in the agrarian movements of the late nineteenth century. Farmers and their leaders agreed that cooperation could help solve agricultural problems. They were less certain, however, of how to put its ideals into practice, as the agrarian protest movements made clear. Neither the National Grange of the Patrons of Husbandry (better known as the Grange) nor the Farmers' Alliance (the Populists) fully capitalized on the intellectual and economic potential of cooperation. The failure of their cooperatives contributed to the collapse of both these protest movements, as described below. Nevertheless, American experimentation with coopera-

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<sup>11</sup>Knapp, Rise of American Cooperative Enterprise, 29-30. For examples of early promotional jeremiads on cooperation, see Edward F. Abrams, The Modern Farmer in his Business Relations (San Francisco: N.J. Stone Co., 1899), and John Lee Coulter, Cooperation Among Farmers: The Keystone of Rural Prosperity (New York: Sturgis and Walton Co., 1911).

tion proceeded in new and innovative ways in California.<sup>12</sup>

The rapid pace of post-bellum economic change supplied farmers with ample incentive to cooperate with one another. Industrialization changed both the methods of agricultural production and the ways in which farm products were marketed. The mechanization of plowing, planting, and harvesting, together with the expansion of transportation networks, helped to integrate farmers into the national agricultural market. But linking to distant urban markets carried disadvantages, principally the necessity of dealing with the railroads, terminal market agencies, commission

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<sup>12</sup>On the Granger movement, the standard work remains Solon Justus Buck's, The Granger Movement: A Study of Agricultural Organization and Its Political, Economic and Social Manifestations, 1870-1880 (Cambridge, MA: Harvard University Press, 1913). The Populists have drawn considerably more attention, beginning with John D. Hicks, The Populist Revolt (Minneapolis: University of Minnesota Press, 1931), who evaluated the Populists' political crusade, and Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (New York: Random House, 1955), which portrayed the Populists as trying to recapture the romantic agrarianism of their preindustrial past. Lawrence Goodwyn took on both Hofstadter and Hicks in Democratic Promise: The Populist Moment in America (New York: Oxford University Press, 1976), arguing that the Populists were at the center of a "movement culture" linked to labor radicalism and frontier agrarian discontent. The work has attracted much debate. See, for example, Alan Brinkley, "Richard Hofstadter's The Age of Reform: A Reconsideration," Reviews in American History, 13:3 (September 1985): 462-480; and Martin Ridge, "Populism Redux: John D. Hicks and The Populist Revolt," ibid., 13:1 (March 1985): 142-154. Other works in the Goodwyn mold include Robert C. McMath, Jr., Populist Vanguard: A History of the Southern Farmers' Alliance (Chapel Hill: University of North Carolina Press, 1975); and Steven Hahn, The Roots of Southern Populism: Yeoman Farmers and the Transformation of the Georgia upcountry, 1850-1890 (New York: Oxford University Press, 1984).

brokers, and wholesalers. Farmers believed that these middle merchants speculated in agricultural commodities by buying low from farmers and selling high to retailers. The dominance of a few firms in urban markets seemed to support the agrarian complaint that farmers were at the mercy of "virtual monopolies" that denied them a fair livelihood.<sup>13</sup> In the early 1870s, historian Jonathan Periam wrote that the cause of the farmers' problem lay not in overproduction but in a dysfunctional marketing system:

The farmer . . . . blamed much of his plight on an unfair system of "interchange," whereby he was forced to pay excessive toll in marketing his products, and excessive prices for his purchased supplies; and he was vehement in his resentment of all "monopolists" and "middlemen." As the farmer saw his condition, he was "fleeced both coming and going."<sup>14</sup>

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<sup>13</sup>Andrew W. McKay, Federal Research and Educational Work for Farmer Cooperatives, 1913-1953, U.S. Department of Agriculture, Farmer Cooperative Service, Report 40 (January, 1959): 3; Lance E. Davis et al., American Economic Growth: An Economist's History of the U.S. (New York, 1972), 369-419. For works treating agricultural development during this period, see Murray Benedict, Farm Policies of the U.S., 1790-1900 (New York: The Twentieth Century Fund, 1953); Gilbert Fite, The Farmer's Frontier, 1865-1900 (New York: Holt, Rinehart and Winston, 1966); Paul W. Gates, The Farmer's Age: Agriculture, 1815-1860 (New York, 1960); Paul W. Gates, History of Public Land Law Development, Report to the Public Lands Commission. Washington: Government Printing Office, 1968; reprint, New York: Arno Press, 1978; and Fred Shannon, The Farmer's Last Frontier: Agriculture, 1865-1900 (New York: Holt, Rinehart and Winston, 1945).

<sup>14</sup>Jonathan Periam, A History of the Origin, Aims, and Progress of the Farmers' Movement (1874), 196-99, quoted in Knapp, Rise of American Cooperative Enterprise, 46-47.

These complaints gave rise to the "serious divisions within the agrarian ranks" that arose in the first fifteen years after Appomattox. Historians are still examining the sources and dynamics of the agrarian protest movements that originated about that time. What is uncontroverted, however, is that several of the major farmers' organizations turned to cooperative marketing to "address the problems generated in a more competitive market economy."<sup>15</sup>

During the 1870s, the Granger movement sought to safeguard agriculture from marketing and transportation monopolies through political means. The primary strategy of the Grange was to secure legislation to regulate railroads at the state level.<sup>16</sup> Rectifying the imbalances in the marketing system, while a chief concern of Grange rank and file, was a secondary priority of the national leadership. This ordering of priorities hindered the development and success of Granger cooperatives.

Beginning in 1871 and 1872, state and regional granges in the Midwest and South set up cooperative purchasing

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<sup>15</sup>Morton Rothstein, "Farmer Movements and Organizations: Numbers, Gains, Losses," Agricultural History, 62:3 (Summer, 1988): 166-67.

<sup>16</sup>More than anything else, the Grangers sought to break up the railroads' control over freight rates and routes served; their chief weapon was legislation to regulate rates, which the railroads attacked in court. The Grangers were less successful in obtaining laws to regulate and tax business corporations; as a result, they had little impact on the marketing system. Buck, The Granger Movement, 238-78; Shannon, The Farmers' Frontier, 309-11.

agencies and consumer stores that dealt in farm equipment. As the Grange grew, the locals expanded into marketing as well, concentrating mainly in grain, cotton, livestock, tobacco, and wool. Most Granger cooperatives were unincorporated, with most of the transactions delegated to local agents. The organizations attempted to address all the needs of their members, marketing "nearly everything their members produced, from green onions to dressed beef." The failure to specialize and to adopt legally rigorous cooperative forms took its toll on the movement. By 1875, most of the Granger cooperatives had failed entirely; others were converted to purely commercial operations or reduced to doing business for non-members. Granger membership noticeably dropped, due in part to the disillusionment of farmers who hoped for quick solutions to agricultural problems.<sup>17</sup>

The Grange attempted to head off farmer dissatisfaction over the failure of these cooperatives. In November, 1875, the executive committee propounded a set of rules to govern future cooperative organization; the rules echoed the basic Rochdale principles of patronage dividends, limited capital,

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<sup>17</sup>Buck, The Granger Movement, 69-71, 244; Steen, Cooperative Marketing, 4-5; Knapp, Rise of American Cooperative Enterprise, 47-57; Hanna, Law of Cooperative Marketing Associations, 5; McKay, Federal Research and Educational Work, 9-10. Buck credits the Granger cooperatives with having rendered valuable business training to the farmers, as well as with having spread the gospel of cooperation more generally throughout the country. For a view of Granger cooperatives less celebratory than Buck's, see George Cerny, "Cooperation in the Midwest in the Granger Era, 1869-1875," Agricultural History, 37:3 (1963): 187-205.



selling on a cash basis, and giving each member one vote in the affairs of the association. The move was a popular one, but it came too late to sustain the Grangers as a national political movement. The cooperative stores organized along the lines of the 1875 plan overextended themselves by incorporating joint-stock companies that expanded into the manufacturing of farm equipment. These cooperatives sustained heavy losses, and most were out of business by the end of the decade. In effect, as historian Solon J. Buck concluded, the Grangers adopted the winning strategy too late to help their cause:

It was a distinct misfortune, both for the order of Patrons of Husbandry and for the advancement of cooperation, that the National Grange did not begin to propagate the principles of the Rochdale system until after the effectiveness and often disastrous consequences of the early attempts had disgusted many of the Patrons with the idea of cooperative stores and the rapid decline of the order had begun.<sup>18</sup>

Short-lived and inefficient, the Granger cooperatives nonetheless familiarized farmers with the Rochdale principles. Since the Grange turned to Rochdale principles late in its history, the failure of its co-ops reflected less on the potential of cooperation to solve agricultural problems than on specific errors committed by well-meaning but poorly

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<sup>18</sup>Buck, The Granger Movement, 258; Steen, Cooperative Marketing, 5; Knapp, Rise of American Cooperative Enterprise, 51-55; McKay, Federal Research and Educational Work, 9-10.

informed farmer managers. As a result, American farmers were by no means disenchanted with cooperation as the Grangers ceased to exert political force in the farm states. Indeed, one historian credits the Grangers with instilling Rochdale cooperation "deep into the hearts of American farmers."<sup>19</sup>

After the decline of the Grange, farmers sought the opportunity to put the Rochdale principles to work. The Farmers' Alliance, which took form during the decline of the Grangers in the late 1870s, provided that chance. The movement originated in northeastern Texas, and it was there that Alliance cooperatives achieved their greatest successes. The Alliance initially copied the Grangers' organizational structure, organizing local co-ops that handled purchasing and established cooperative grain elevators and cotton sales yards. By 1889, the crown jewel of the Alliance cooperatives was the Texas State Exchange, founded by Alliance leader C.W. Macune in 1887. This co-op was decidedly non-Rochdalian; it had a capital stock of \$500,000, held by 25 stockholders who served as trustees for the Alliance members. Yet Macune promoted the Exchange by referring to its underlying adherence to the democratic egalitarianism of Rochdale cooperation. The Exchange, he told the Alliance's 1888 convention, was "pure and simple

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<sup>19</sup>Buck, The Granger Movement, 258-61, 274-78; Knapp, Rise of American Cooperative Enterprise, 56-57.

cooperation . . . . It is calculated to benefit the whole class, and not simply those who have surplus money to invest in capital stock; it does not aspire to, and is not calculated to be a business for profit in itself." Alliance cooperatives were Rochdalian in theory but not in practice. Problems with credit--the opposition of banks and merchants began to disable the Exchange in 1888--and the inability of impoverished farmers to pay their assessments contributed to its downfall the following year. The Alliance's purchasing and marketing cooperatives in other states recorded a "mixed" record of accomplishment. After 1890 the Alliance turned its attention to the underlying problem of credit and focused its political energies on the greenback issue.<sup>20</sup>

Despite the fact that leaders such as Macune spoke in Rochdalian terms, and notwithstanding the Alliance's political kinship with "labor radicalism and Greenbacker ideology,"<sup>21</sup> the Populists failed to make more than an attrac-

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<sup>20</sup>Goodwyn, Democratic Promise, 110-53 (quoted passages appear at 139 and 143). Macune was by no means the only farm leader to preach the Rochdale gospel and engage in the practice of joint-stock business enterprise; California cooperative organizers did the same thing. See chapters three and four.

<sup>21</sup>Robert C. McMath, Jr., "Sandy Land and Hogs in the Timber: (Agri)Cultural Origins of the Farmers' Alliance in Texas," in Jonathan Prude and Steven Hahn, eds., The Countryside in the Age of Capitalist Transformation (Chapel Hill: University of North Carolina Press, 1985), 206.

tive rallying cry out of cooperation.<sup>22</sup> Like the Grangers before it, the Farmers' Alliance staked a great deal of its political capital on cooperation. Neither group, however, produced cooperatives that were commercially successful for more than a few years. In part this failure was due to the nagging problems of undercapitalization and lack of credit and in part due to the leaders' misdirected ambition. Instead of focusing on exclusive service to members and devising organizations to address specific marketing problems, which varied among crops and regions, Granger and Alliance cooperatives tried to accomplish too much, attempting to replace manufacturers in the 1870s and bankers in the 1880s. Yet their proselytizing of the Rochdale creed inspired the intellectual agenda of late nineteenth-century American social reformers.

#### Alternative Conceptions of Industrial Society

The prominence of the agrarian protest movements in

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<sup>22</sup>Some of Goodwyn's critics allege that the Populists did not achieve the successes with cooperatives that he attributes to them. Theodore Salutos and Gilbert Fite suggested that Goodwyn's emphasis on cooperatives was "exaggerated and underresearched;" Robert W. Cerny asserted that Goodwyn wrongly cast Nebraska Populists as a "shadow movement" that detracted from the force of the Populist message in the rest of the nation; and Stanley B. Parsons, Karen Toombs Parsons, Walter Killiae, and Beverly Borgers produced a statistical study arguing that the cooperative movement did not play an extensive role in Populism. Martin Ridge, "Populism Redux," Reviews in American History, 13:1 (1985): 142-54, and sources cited at n. 24-26; Parsons, Parsons, Killiae, and Borgers, "The Role of Cooperatives in the Development of the Movement Culture of Populism," Journal of American History, 69 (1983): 866-85.

national politics catapulted the cooperative movement to the forefront of intellectual preoccupation with the moral order of industrial society. The Rochdalian vision of peaceful industrial relations applied a soothing salve to a nation rocked by strikes, riots, and militant labor unionism. The Haymarket riot in 1886 and the great Chicago railroad strike in 1894 sparked fears of communism and radicalism as well as the possibility that the economic accomplishments of industrialization could be undone by uncompliant labor.<sup>23</sup> At the same time, genuine concern at the scope of industrial combination and the concentration of wealth and property raised questions about the wisdom of unbridled faith in the immutable laws of supply and demand. Cooperation bridged the gap between rich and poor, labor and capital. As industrial strife deepened during the 1890s, economists and intellectuals critical of the status quo proposed cooperation as the solution to the nation's problems.

To American intellectuals in the utopian tradition, articulating a "redemptive politics" to rescue society from the miasma of industrial conflict meant finding a language of equality with which to reconceive economic relations.<sup>24</sup>

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<sup>23</sup>For an extended discussion of this period and the conservative reaction, see Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Gloucester, MA: Peter Smith, 1976).

<sup>24</sup>The concept of "redemptive politics" and the material in this paragraph comes from John C. Thomas' discussion of the Social Gospel, utopianism, and late-nineteenth century critiques of American society in Alternative America: Henry

Cooperation furnished that language. The social criticism of Henry George, for example, relied on the cooperative concept of participant equality within a capitalist system, rather than a more radical attack upon the system itself:

"The ideal social state," he wrote in the 1880s, after the publication of Progress and Poverty, "is not that in which each gets an equal amount of wealth, but in which each gets in proportion to his contribution to the general stock."<sup>25</sup>

In addressing the plight of American workers and farmers George linked their advancement--their political and economic redemption--to the cause of reform in society generally.

The "idea of competitive cooperation secured by natural altruism and an educative politics" supplied an acceptable middle ground between rampant consolidation and unbridled socialism.<sup>26</sup> To Henry George, Henry Demarest Lloyd, and other advocates of the Social Gospel reform movement, cooperation could be used to reeducate the corporate class, reduce or eliminate monopoly, and create a "new social union" while retaining the basic foundations of private

George, Edward Bellamy, Henry Demarest Lloyd and the Adversary Tradition (Cambridge, MA: Harvard University Press, 1983), 218-19. Thomas alludes to the Rochdale weavers as the originators of the "'moral economy which persisted in America as a philosophy of true producers who formed a naturally cooperative community based on shopfloor solidarity'" (364).

<sup>25</sup>Quoted in Thomas, Alternative America, 190.

<sup>26</sup>Thomas, Alternative America, 191.

enterprise and avoiding a descent into socialism.<sup>27</sup>

Thus, as Lloyd's attack upon the Standard Oil Company in Wealth Against Commonwealth shaped social criticism during the 1890s, the Rochdale paradigm continued to influence the course of the cooperative movement, if only to set the standard from which cooperatives deviated in practice. Cooperatives, particularly marketing organizations, struggled to remain faithful to the Rochdale principles. Joint-stock cooperatives found it difficult to maintain true equality among their members; one student of Nebraska cooperation observed in 1920 that "in the various groups the stock became gradually concentrated in the hands of a few members until they lost such semblance of truly co-operative companies as they might have had and were withdrawn one by one from the ranks of the independents."<sup>28</sup> That the distinction between cooperation and combination tended to become blurred was no secret. As the manager of the Farmers' Grain Company of Omaha observed, "All combinations among capitalists are but instances of cooperation among those who are interested."<sup>29</sup> Another writer despaired that cooperation could furnish any effective check to monopoly:

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<sup>27</sup>Henry Demarest Lloyd to Annie L. Diggs, n.d., quoted in Thomas, Alternative America, 344.

<sup>28</sup>Maurice H. Weseen, "The Cooperative Movement in Nebraska," Journal of Political Economy, 28 (1920): 478.

<sup>29</sup>C. Vincent, "Co-operation Among Western Farmers," The Arena, 31 (1904): 286.

"But at present cooperation, while successful in several notable instances and susceptible of being made successful in a great many more, is unequal to the gigantic task. It is defective in capital, in method, in unanimity of ideas, and unanimity of purpose."<sup>30</sup> Or, put another way by a columnist for The Arena, "It is vain to preach the Golden Rule one day in the week while the competitive scramble the other six overshadows the higher teaching and becomes the accepted standard."<sup>31</sup>

This despair was widespread but far from universal. Not all observers of politics and economic development were ready to abandon cooperation as a tool of reform. To succumb to the theory that "soulless industrialism" would always triumph over cooperation--"the greatest cause of the twentieth century"--was to concede that reform was impossible, the laws of the market immutable, and the human will vanquishable.<sup>32</sup> The theory of cooperation was sound; the challenge lay in adapting its form to the needs of farmers and workers, educating them in its true principles, and recognizing its limits. Cooperation did not eliminate

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<sup>30</sup>Duncan MacArthur, "Co-operative Business vs. the Trusts," The Arena, 24 (1900): 9.

<sup>31</sup>Lydia Ross, "The Morality of Co-operation," The Arena, 23 (1902): 184.

<sup>32</sup>"Co-operation at Home and Abroad," The Nation, 97:2517 (September 25, 1913): 281; C.Y. Roop, "A Conversation: The Rochdale Co-operative Movement in California," The Arena, 29 (1903): 541.



competition; it enabled people to unite against it. As the foremost historian of the movement, George Jacob Holyoake, instructed: "Cooperation may mitigate reckless competition, but it does not destroy competition itself."<sup>33</sup> Proponents of cooperation increasingly emphasized the theme of collective action as the twentieth century progressed: "Competition means a struggle for victory over fellow-competitors: cooperation means a united struggle for victory over toil and sorrow and ignorance."<sup>34</sup>

Few writers had in mind the kind of sweeping changes in cooperative form that would occur during the Progressive Era. California growers seeking to put cooperation to work in extraordinary conditions found it necessary to go beyond the calls for education and collectivism. Looking to the law to organize agricultural enterprise, California growers combined the ideals of Rochdale cooperation with the forms and management practices of the industrial corporation. Their innovative reinterpretation of the traditional form of cooperation, and their amazing success with the form they created, set out a new foundation for the cooperative movement, one that frightened economists and distressed lawyers preoccupied with the prevalence of monopoly in the American economic order. Staying true to both the ideal and form of

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<sup>33</sup>George Jacob Holyoake, The History of Cooperation, 2 vols. (New York: D. Appleton & Co., 1905), II: 674, quoted in book review, The Nation, 83:2147 (August 23, 1906): 171.

<sup>34</sup>Ross, "The Morality of Co-operation," 189.

Rochdale cooperation, Granger and Alliance cooperatives quickly folded. Departing from Rochdale form, the California organizations expressed a new vision of cooperation, one which prized efficiency as much--if not more than--equality.

California Cooperation: The Rochdale Creed Revised

In California, a different set of economic, social, and geographic circumstances provoked further experimentation with the Rochdale model. After the state entered the Union in 1850, California's agriculture became commercialized and profit-oriented. Its primary markets during this time were local--the miners in the Sierras and the denizens of San Francisco. Within three decades, growers began to produce specialized, non-staple commodities such as fruits and nuts for which the best markets lay across the continent and across the Atlantic. American farmers and European immigrants who came to California were familiar with Rochdale cooperation and the agendas of the agrarian protest movements. Their primary economic concern was how to transcend the impediments to efficient and profitable marketing.<sup>35</sup>

In the major specialized fruit and nut industries, cooperators merged the democratic framework of the Rochdale-style cooperatives with the efficiency, orderliness, and

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<sup>35</sup>The best statement of the "associational impulse" in California agriculture remains H.E. Erdman and Grace H. Larsen, "The Development of Agricultural Cooperatives in California," California Agricultural Experiment Station, Giannini Foundation of Agricultural Economics, Miscellaneous Publications, February 20, 1964.

economic control of the modern corporation. California cooperatives became synonymous with the tools of combination, marketing contracts, and commodity marketing. Organizers learned early to build bridges to the banks, a connection both agriculture and capital found beneficial because of the close relationship existing between agriculture, economic growth, and prosperity in the state.

But cooperation was not merely an economic tool. Because commodity and community lines were more nearly congruent in California than elsewhere, cooperation played an important role in ordering society, too. Unlike their midwestern counterparts, many of the prominent California growers were also merchants, lawyers, bankers, and other professionals. They were sophisticated entrepreneurs, gentlemen farmers who turned to horticulture as an investment. Due to their stake in both production and trade, these growers had a direct interest in participating and supporting cooperation. Not all of the antagonism between growers and bankers was eliminated in California--rural credit remained a problem well into the twentieth century--but the lessening of the inherent tension between production and capital removed one of the major impediments that had undermined Alliance cooperatives. It also provided a different economic and social foundation for the organization of cooperatives in a state whose agriculture vitally depended on efficient marketing.

During the last two decades of the nineteenth century, growers in almost every horticultural crop experimented with cooperation. In the citrus industry, this experimentation took the form of local associations--community organizations that depended on neighborly bonds among growers. This kind of cooperative was a relatively inexpensive way for a community to construct packing houses and establish systems to grade and pack fruit. But these local associations were highly informal; in most cases there was no provision for collective marketing, and even where there was, growers still retained the option of selling through commission brokers. The local associations were no match for the national selling system that was in place by the 1890s.<sup>36</sup>

The citrus growers in Southern California pioneered the ideas of the federated cooperative and the exchange system of marketing. After recognizing the limitations of local associations in the early 1890s, the growers joined nineteen local associations together to form an industry-wide exchange in 1895. This agency, the Southern California Fruit Exchange (SCFE), stood as the capstone of a multi-tiered marketing organization. It oversaw both the local associations, which handled packing and other processing operations, and the district exchanges, which did the actual

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<sup>36</sup>Orange growers were outproducing their home markets as early as the 1870s. Rahno Mabel MacCurdy, The History of the California Fruit Growers Exchange (Los Angeles: George Rice and Sons, 1925), 11; McKay, Federal Research and Education Work, 11-12.

selling. Each level, sovereign in its own sphere, was in theory ultimately accountable to the growers.<sup>37</sup> The SCFE hired sales agents to represent the growers in eastern markets and concentrated on disseminating market information to the growers.<sup>38</sup>

The legal structure of this cooperative copied that of Granger cooperatives. The SCFE was incorporated under California's general incorporation law on October 3, 1895, with a capital stock of \$10,000 and par value of stock at \$100 per share. Eight local associations participated in the incorporation of the SCFE. Its purposes were not restricted to the marketing of citrus fruit but encompassed commercial powers appropriate to a selling agency. Its cooperative nature was established in the distribution of shares; each of the eleven original stockholders held one share apiece. Only growers were permitted to become members, and the cooperative returned all profits from citrus sales to the growers in proportion to their contributions.<sup>39</sup>

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<sup>37</sup>Henry E. Erdman, The California Fruit Growers Exchange: An Example of Cooperation in the Segregation of Conflicting Interests (New York: American Council Institute of Pacific Relations, 1933), 12-15.

<sup>38</sup>Knapp, Rise of American Cooperative Enterprise, 86-87; MacCurdy, History of the California Fruit Growers' Exchange, 22-33; Erdman, The California Fruit Growers' Exchange, 8-9; Steen, Cooperative Marketing, 40.

<sup>39</sup>The Exchange's other powers included engaging in brokerage, auction, and commission marketing; conducting a shipping business; purchasing transportation vehicles; acquiring lands, stock, bonds, notes, franchises, privileges, and other real property; lending and borrowing money; and

The SCFE marked an important stage in the evolution of cooperation. It originated and then institutionalized the features of the confederated exchange system. Its tiered structure was reaffirmed in 1905 when the SCFE was reorganized and renamed the California Fruit Growers' Exchange (CFGE).<sup>40</sup> Its share of the crop grew from 46 percent in 1905 to 72.5 in 1921, as it proved by its specialized marketing operations that it could reduce some of the risks of shipping perishable fruit and the occurrence of gluts and waste. The CFGE established a sophisticated network of marketing brokers and transportation routes that enabled it to track every carload of fruit sent to urban auctions. The CFGE prided itself on its efficiency; at any given time, economist Ira Cross reported in 1911, its directors knew

exactly how much of the crop is being put upon the market each day, where it is being sent, and what prices it is bringing. . . . [The system] also prevents the glutting of the market by directing shipments to those cities not sufficiently supplied with fruit. The Exchange has reduced the cost of packing, selling, and collecting by one-half, and as a consequence during the past year

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establishing stores, warehouses, and offices. MacCurdy, History of the California Fruit Growers' Exchange, 77-78; Knapp, Rise of American Cooperative Enterprise, 239; Steen, Cooperative Marketing, 42.

<sup>40</sup>Both the SCFE and its successor were organized with capital stock; after the Clayton Act was passed in 1914, giving non-stock cooperative associations an exemption from federal anti-trust laws, the CFGE reorganized as a non-stock organization. It raised funds by levying an assessment on each box of fruit shipped. Edward J. Wickson, Rural California (San Francisco: Rural State and Province Series, 1922), 302.

netted a clear gain of over \$3,000,000 for its members.<sup>41</sup>

With innovative advertising campaigns, the "Sun-Kist" name became familiar to the reading public; shrewd managers, such as G.H. Powell, former U.S. Bureau of Plant Industry economist, and attorney George Farrand, an expert in cooperative organizations, helped bring the CFGE national and international fame. By 1920, wrote Herman Steen, the CFGE had become the model agricultural cooperative: "The California Fruit Growers' Exchange has dominated the marketing of the California citrus crop during almost the entire period of its history. It is the world model for cooperative marketing of perishable products."<sup>42</sup>

The California Fruit Growers' Exchange emerged as the prototypical federated cooperative, due to its size, efficiency, and brand-name recognition. But citrus was not the only commodity in which commodity-based organization was

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<sup>41</sup>Ira Cross, "Cooperation in Agriculture," American Economic Review, 1 (1911): 542. Other accomplishments included the reduction of packing costs from \$.40-.50 in 1895 to \$.30 in 1911, through the elimination of commercial packing profits, and the purchase of packing supplies at cost for all member associations. The CFGE also reduced the costs of selling and accomplished a lowering of freight rates and refrigeration charges. John W. Lloyd, Cooperative and Other Methods of Marketing California Horticultural Products, University of Illinois Studies in Social Science, 8:1 (1919): 15-18.

<sup>42</sup>Steen, Cooperative Marketing, 47-48; John Lee Coulter, Cooperation Among Farmers (New York: Sturgis and Walton Co., 1911), 198-214; H. Clyde Filley, Cooperation in Agriculture (New York: John Wiley & Sons, 1929), 186-205.

taking place during the Progressive Era. The California Walnut Growers' Association (CWGA) was organized in 1912. It too arose as a federation of local associations for which it served as a central marketing agency. By 1917, the CWGA controlled 70% of the California walnut crop and counted 75 percent of the state's producers as members. The CWGA operated on a non-profit basis, returning its income to the growers in proportion to their contribution. It emphasized efficient selling through the reduction of costs on a volume basis.<sup>43</sup> Another cooperative that successfully organized statewide was the California Almond Growers' Exchange (CAGE). Although much smaller than the other two, it followed the pattern of federation established in citrus and walnuts and soon asserted similarly authoritative control over almonds. Formed in 1910, the CAGE built its own shelling and packing plant in Sacramento in 1914 and controlled 80 percent of the crop by 1917.<sup>44</sup>

The last major California horticultural cooperative to

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<sup>43</sup>Lloyd, Cooperative and Other Methods of Marketing, 11, 19; Carlyle Thorpe, "California Walnuts and Their Cooperative Marketing," California's Magazine, 1 (1915): 481-84; Rolf Waldemar Ordal, "History of the California Walnut Industry" (Ph.D. diss., University of California, Berkeley, 1952), 167-206; California State Commission of Horticulture, "Benefits of Cooperation," Monthly Bulletin, 1:9 (August, 1912), 621.

<sup>44</sup>Lloyd, Cooperative and Other Means of Marketing, 11; Carl Albert Scholl, An Economic Study of the California Almond Growers Exchange (Ph.D. diss., University of California, Berkeley, 1927); Elizabeth M. Riley, The History of the Almond Industry in California, 1850-1934 (M.A. thesis, University of California, Berkeley, 1948).



be discussed here arose in the raisin industry. The California Associated Raisin Company was incorporated in 1912 and began business in 1913 only after 76 percent of the growers promised to participate. It extended its crop control to the unprecedented level of 88 percent by 1918 while building an impressive national selling network.<sup>45</sup>

These cooperatives, and the others that were organized in more specialized commodities, differed widely as to their structure, size, marketing practices, and interpretation of cooperative principles.<sup>46</sup> But in the larger context of the cooperative movement and its intellectual tradition, the California cooperatives departed from past practice. Generally, both federated and centralized cooperatives marketed only one commodity.<sup>47</sup> Growers could belong to both the prune and citrus organizations if they raised plums and oranges, but the walnut cooperative, for example, did not

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<sup>45</sup>Erdman, "Development and Significance of California Cooperatives," 182. See chapter 3 for the history and development of the CARC.

<sup>46</sup>For descriptions of the other cooperatives and the commodities they marketed, see Erdman, "Development and Significance of California Cooperatives," 182-84; Steen, Cooperative Marketing; Filley, Cooperation in Agriculture.

<sup>47</sup>There were a few exceptions, most notably the California Prune and Apricot Growers' Association, formed in 1917. The organization primarily marketed prunes, however. Steen, Cooperative Marketing, 30. It is not entirely clear whether the idea of commodity-based marketing originated first in California or in Denmark, where it also appeared during the 1880s. University of California agricultural economists Henry Erdman and Edwin Voorhies disagreed on the origin of the idea and never resolved the dispute. Interview, Grace Larson, 24 February 1989, Berkeley, California.

market almonds. What set California cooperatives apart was their reliance on two peculiar economic conditions of California agriculture: the natural monopoly conferred by the geography and climate, and the concentration of the producers in relatively compact areas. The innovation of commodity-based organization, then, arose not out of any particular idea of cooperation but out of the simple fact that California growers were gathered into communities defined both by geography and by the range of commodities under cultivation.

Because California agriculture originated as a highly commercialized enterprise,<sup>48</sup> Golden State marketing cooperatives tended to act more like regular business corporations than like Rochdale democratic collectives. They incorporated as regular commercial corporations with capital stock rather than under the 1895 state cooperative incorporation law.<sup>49</sup> Regular corporate status entitled them to raise

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<sup>48</sup>Cletus Daniel, Bitter Harvest: A History of California Farmworkers, 1870-1941 (Ithaca: Cornell University Press, 1981), 15-39.

<sup>49</sup>On the California cooperative organization law, see chapter 2. Even the CFGE, extolled by many scholars as the best example of traditional cooperation, was itself initially incorporated with capital stock. Not until 1916, after the passage of the Clayton Act gave cooperatives a definite incentive to organize on a non-stock basis, did the CFGE reorganize under the 1909 California non-stock association law. Nourse, The Legal Status of Agricultural Cooperation, 64 at n. 14. By the time the California cooperatives became famous during the 1910s, people had already forgotten that Rochdale cooperatives carried capital stock. The trend towards non-stock cooperation arose in response to anti-trust litigation, described in chapter 2.

capital stock, an important asset when it came time to seek financial assistance from local banks. They used "iron-clad contracts" to bind their members to deliver all of what they produced each year, for the life of the contract, usually five years but in some cases longer. If the commodity required packing facilities, the cooperatives compelled members to contribute capital to build and maintain them. Establishing the marketing networks and hiring field sales representatives also required substantial investment. The cooperatives raised the needed capital by selling stock, requiring growers to pay membership fees, securing loans from the banking establishment, or providing in their by-laws that no services would be performed unless a certain percentage of acreage or tonnage were committed to the cooperative (see Table 1-1).<sup>50</sup>

Further, to the dismay of Eastern buyers, the California cooperatives exercised their market control in ways that directly challenged the old selling apparatus. For example, the cooperatives set their own prices, instead of leaving that function to auction houses and wholesale

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<sup>50</sup>Aaron Sapiro, "The Law of Cooperative Marketing Associations," Kentucky Law Journal, 15 (1926): 1-21; Theodore R. Meyer, "The Law of Cooperative Marketing," California Law Review, 15 (1927): 85-112. On the use of outside financing, see Erdman, "Development and Significance of California Cooperatives," 181; and J.L. Nagle, "Deciduous and Citrus Co-operate," PRP, 89 (January 23, 1915): 104: "[I]t was suggested by the banks with whom we were doing business that, in order to establish a more concrete basis of credit, we incorporate on a stock basis."

Table 1-1. California Cooperatives, 1919

Name	Members	Capital stock	Interest paid	Fix prices? <sup>a</sup>	1919 sales (millions)	Market share (%)
Cal. Fruit Growers' Exchange	11,000	none	none	No	\$54.6	75
Cal. Assoc. Raisin Company	10,000	\$1,650,000	8%	Yes	\$42.5	88
Cal. Prune & Apricot Growers	10,000	\$1,088,000	none	Yes	\$22.0	75
Cal. Peach Growers Inc.	6,000	\$1,000,000	8%	Yes	\$10.0	80
Cal. Fruit Exchange	3,000	\$ 100,000	10%	No	\$10.1	30
Central Cal. Berry Growers	240	none	none	No	\$ 1.5	33
Sebastopol Apple Growers	500	\$ 40,890	none	Yes	\$ .7	80
Cal. Walnut Growers Assoc.	3,000	none	none	Yes	\$12.4	80
Cal. Almond Growers' Exchange	3,700	none	none	Yes	\$ 3.0	85
Cal. Lima Bean Growers	1,400	none	none	No	\$15.0	60
Cal. Bean Growers' Assoc.	1,566	none	none	No	\$ 2.4	37
Pacific Rice Growers' Assoc.	487	\$ 25,000	none	No	\$14.0	76
Assoc. Milk Producers	200	\$ 95,815	5%	Yes	\$ 2.9	65
Imperial Valley Assoc. Milk Producers	400	none	none	No	\$ 2.0	60
San Diego Milk Producers' Assoc.	62	none	none	No	\$ .4	85
Cal. Milk Producers Assoc.	600	\$ 100,000	none	No	\$ 2.1	80
Northern Cal. Milk Producers' Assoc.	1,400	none	none	No	\$ 3.5	50
Poultry Producers of Cent. Cal.	1,500	\$ 250,000	8%	No	\$ 4.6	50
Poultry Producers of S. Cal.	525	\$ 45,204	none	No	\$ 1.3	35

Source: Edward J. Wickson, Rural California (San Francisco: Rural State and Province Series, 1922), 302.

<sup>a</sup>Wickson's determination of cooperatives' price-fixing practices was based on the presence or absence of a price schedule, such as that used by the California Associated Raisin Company. If no price schedule were published, Wickson concluded that the cooperative did not fix prices but, as was the custom of the California Fruit Growers' Exchange, determined prices through distribution quotas at end-markets.

exchanges. The California producers asserted control over the marketing of their crops, and they publicly claimed that their right to do so was inalienable. CAGE president George W. Pierce told the 1920 California Fruit Growers and Farmers Convention, "Are not we, the food producers of America, the ones who hold the key to the situation? If we get together as producers, cannot we control the situation? It is in our hands, I believe, and we can, if we see fit, get together and control the situation in the interests of the producer."<sup>51</sup>

It was just such rhetoric that alarmed economists and traditionalists who viewed the Rochdale principles as sacred text. The agricultural economist Edwin G. Nourse wrote in 1922, "This militant cooperation . . . exalts the 'new cooperation American style' along lines of big business bargaining efficiency and ruthlessness. It is producer cooperation, legalistic in philosophy, monopolistic in spirit, and zealous for control of the market."<sup>52</sup> The profit-motive of the California cooperatives particularly distressed economists and lawyers who believed that the agricultural groups had turned the basic idea of cooperation on its head. Ira Cross, a professor at the University of California, made

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<sup>51</sup>George W. Pierce, "Address," Proceedings of the Meetings, 53rd Convention of California Fruit Growers and Farmers, November 9, 1920, in California State Department of Agriculture, Monthly Bulletin, 9:12 (December, 1920): 606.

<sup>52</sup>Nourse, "The Economic Philosophy of Cooperation," American Economic Review, 12:4 (December, 1922), 585-86.

this point in 1911, commenting on the citrus organization:

[A] factor exceptionally characteristic of cooperative enterprises in California is that all of them seem to have been organized with but one object in mind, and that is to make money for themselves . . . The California Fruit Growers' Association exists solely because it can earn greater profits for its members than can be obtained by any other marketing arrangement. It is difficult to see wherein this point of view differs from that which characterizes the stockholders of the ordinary business corporation.<sup>53</sup>

California growers angrily denied that their cooperatives were anything but legitimate business enterprises. If their operations seemed unseemly in their commercial orientation, they responded, it was because Californians recognized what other American farmers did not: agriculture was a business, and farmers deserved a just return on their labor. Answering the charge that California cooperatives illegally restrained trade, State Market Director Harris Weinstock contended that no monopoly could ever be established in agriculture, in California or anywhere else:

In my opinion, there is but one way in which the farmers can establish a monopoly. To do this, they must control the land, all the labor and all the capital in the world. . . . [E]ven if it were possible for the producers of any one product in any one country to monopolize the crop of that particular country and to attempt to exploit the public by demanding unfair prices, their end would in due course be defeated by stimulation created for increased production of the same product in

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<sup>53</sup>Cross, "Cooperation in California," American Economic Review, 1 (1911): 543, 544.

other lands.<sup>54</sup>

Similar avowals that cooperatives did not illegally fix prices, repeated often and prominently, soon became accepted truth. Treatises and textbooks on cooperation adopted the cooperatives' contention that they did not manipulate the market. H. Clyde Filley, in a work published in 1929, remarked of the California Walnut Growers' Association:

It is, of course, almost unnecessary to add that the management of so successful an organization entertains no delusions about 'price fixing.' According to its own statements the Association sells its product at a price based on the law of supply and demand, rather than upon cost of production or the desire of any group of growers for a high price.<sup>55</sup>

Herman Steen, editor of an American Farm Bureau Federation newspaper in Iowa and the author of a panegyric on cooperation, came to the same conclusion regarding the pricing policies of the CFGE: "The price for oranges and lemons is determined by the amount available at a given time at the point of consumption and not by their total supply in California. . . . The exchange endeavors to control the supply in each consuming market and thus controls the conditions which determine the price. This is not price-fixing, but it

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<sup>54</sup>Harris Weinstock, "Legislation Affecting Agricultural Cooperative Movements," Proceedings of the 54th Convention of Fruit Growers and Farmers, October 24, 1921, in California State Department of Agriculture, Monthly Bulletin, 10:10 (October, 1921): 414.

<sup>55</sup>Filley, Cooperation in Agriculture, 384.

is intelligent merchandising."<sup>56</sup> Even University of California agricultural economist Henry E. Erdman, writing in the late 1950s, was taken in by the argument that the cooperatives did not tamper with prices. Only the California Associated Raisin Company, he said, "grounded on the reef of price control." In truth, the CARC would prove to be the only cooperative unfortunate enough to get caught in the act.<sup>57</sup> Cooperatives' impact on the market--on supply, distribution, and prices--was direct and palpable. Whether that impact constituted illegal monopoly, as critics charged, or intelligent, efficient collective marketing, as cooperative leaders contended, remained a murky issue.

What offended critics' sensibilities was not so much that California cooperatives affected the market but the degree to which their market control appeared to lose sight of the traditional ideals and the social vision of Rochdale cooperation. The California leaders extolled their organizations' efficiency, their expert management, and their use of advertising to increase demand for their commodities as proper methods of collective marketing. CWGA President Charles Teague described his cooperative's commercial attributes as "true cooperative principles." But he was refer-

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<sup>56</sup>Steen, Cooperative Marketing, 47.

<sup>57</sup>Erdman, "Development and Significance of California Cooperatives," 182. The CARC was prosecuted by the federal government under the Sherman Anti-Trust Act in 1920 for, among other things, illegally fixing prices. See chapter 4.



ring not to one-person, one-vote, patronage dividends, nor to any other Rochdale concept; instead, he meant such qualities as "Regulated, scientific distribution; selling in accordance with the law of supply and demand at reasonable prices; improvement of standards of grade, pack and methods of handling; elimination of speculation and lowering of cost by selling direct to the jobber or wholesaler; increasing consumption through national advertising . . . ." Teague believed that the importance of the citrus and walnut organizations lay not just in their impressive market control but in the fact that they did not manipulate the market in illegitimate ways: "If any group of producers has in mind that by creating a cooperative selling agency they can artificially manipulate prices by limiting production or by arbitrary action of that character, they are destined to fail and should fail."<sup>58</sup>

Nevertheless, because the California cooperatives stressed market control and did not literally adhere to the Rochdale principles, their leaders were constantly pressed to explain themselves. SCFE General Manager A.H. Naftzger declared before the 1901 Fruit Growers' Convention, "Cooperation is not a trust or 'combine' in the modern sense of these terms. It is a matter of regret that the great

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<sup>58</sup>Teague, "Cooperation Versus Speculative System of Marketing," n.d. but 1920/1921, File 1, Box 2, Charles C. Teague Papers, Bancroft Library, University of California, Berkeley.

organizations of California fruit-growers are sometimes referred to as 'combines.' We hear of the 'raisin combine,' the 'prune combine,' etc., as though they were conspiracies, offensive or defensive, or both, which they are not."<sup>59</sup>

As much as cooperative officials stressed commercial efficiency in defending themselves against charges of monopoly and combination, however, they could also be heard singing strains of the Rochdale hymn. California agricultural leaders believed in all sincerity that the kind of cooperation they had fashioned out of their frontier commercial agriculture was in fact compatible with the goals of traditional cooperation. They simply accomplished those goals in different ways, born of necessity--and despera-

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<sup>59</sup>A.H. Naftzger, "Needs of Co-operation, Transportation, Etc.," Proceedings of the 25th California State Fruit Growers' Convention, California State Board of Horticulture, Seventh Biennial Report (Sacramento: Superintendent State Printing, 1901), 128. But other growers saw no reason to conceal the monopolistic tendency of their organizations. At the same convention, an official of the California Raisin Growers' Association (a predecessor of the CARC) remarked that all cooperatives, regardless of their structure or the commodities in which they dealt, "are organized practically for the same purpose and with the same general object in view, which is to limit competition in traffic of transportation companies, in the output of the product of the manufacturer, and of the production of the farmer and fruit-grower." T.C. White, "Co-operation Among Raisin Growers," ibid., 161. But the citrus growers managed to avoid the "trust" label; economists seemed satisfied that the CFGE "has never attempted to create a monopoly or to fix prices." Filley, Cooperation in Agriculture, 202. The difference between federated and centralized cooperatives may have helped to create this impression; observers perceived federated cooperatives as more democratic, thus less of an economic threat to the centralized cooperatives, in which power was concentrated at the top, with fewer of the safeguards of traditional cooperatives.

tion.<sup>60</sup> The California emphasis on getting better returns for producers--the profit motive--may have seemed to economists like Nourse and Cross like a crass deviation from the Rochdalian vision. But it reflected a pragmatic difference between the Rochdale weavers and the California fruit growers. The Rochdale principles were devised for and most aptly applied to collective purchasing, such as was done by cooperative stores. California fruit producers needed to market their goods in large volumes, in order to take advantage of the economy of scale in bulk dealing. They also needed a means of bargaining with the middle merchants, to avoid being saddled with all the risks of marketing perishable and semi-perishable fruit. The corporations they formed to carry out these functions were cooperative in several particulars. But they were structured for commercial efficiency and financial competency, in order to compete with commercial shippers, packers, and distributors.<sup>61</sup>

The habit of prominent cooperative officials to claim the Rochdale vision as their own tended to obscure the difference between their enterprise and that of traditional cooperative purchasing. In 1904, citrus grower A.H. Naftz-

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<sup>60</sup>Some sources went so far as to say that desperation among the growers was required for launching a successful cooperative. See, for example, Filley, Cooperation in Agriculture, 188 ("The action of the citrus producers of California, like the action of the farmers of the Grain Belt, was based upon necessity").

<sup>61</sup>I am indebted to Morton Rothstein for calling this point to my attention.

ger coupled his defense of the economic aims of California cooperatives with an invocation of the eminent historian of English cooperation, George Rogers Holyoake, and the Rochdale ideal of the members' common interest in their organization: "Cooperation as applied to California's fruit industry seeks to end the warfare of competition, to put the growers into relationship of mutual helpfulness instead of perpetual antagonism . . . . Cooperation is not the absorption and loss of the individual in the mass, but is rather the reaching of an understanding among the individuals by which they act together, and not each individual at war with every other one."<sup>62</sup> A prune grower from San Jose elaborated on this theme at the same meeting: "[H]istory proves that cooperation is the handmaid of civilization, for where cooperation begins, there barbarism ends. The absolute right of the individual, namely, the right to do what one pleases, is most fully exemplified in savage life, but is brought under restraint when communities cooperatively establish laws for the protection and benefit of all its members."<sup>63</sup>

The revelation that cooperation could lend itself to

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<sup>62</sup>Naftzger, "Needs of Co-operation, Transportation, Etc.," 128-29.

<sup>63</sup>C.D. Harvey, "Stumbling-Blocks in the Way of Co-operation," Proceedings of the 30th State Fruit-Growers' Convention, December 6-9, 1904, in Report of the Commissioner of Horticulture (Sacramento: Superintendent State Printing, 1905): 288.

such a profit-oriented enterprise as California agriculture and still evoke deeply-held beliefs in a cooperative commonwealth was both surprising and encouraging to Progressive-era Americans. California cooperatives departed starkly from their Granger and Populist predecessors; they avidly employed corporate powers, binding contracts, and collective market control. But their commercial success was undisputed. In 1910, a Missouri agricultural extension economist reported, the CFGE marketed \$58 million worth of fruit and collected all but \$318 of its accounts; after fifteen years of operations, eighty percent of the growers still shipped through the association. The CFGE was, by this account, "the greatest cooperative concern in the country."<sup>64</sup> An editor of the Pacific Rural Press observed with complete sincerity, "the average Californian [regards the CFGE] as an approximately perfect example of co-operation."<sup>65</sup>

By World War I, cooperatives in California had established a new standard for American cooperation. The California fruit organizations were leading the way for the nation's farmers to return to cooperation as the means of prosperity: "The impetus for these [new efforts in cooperation] came largely from the remarkable success of the coope-

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<sup>64</sup>W.H. Chandler, "Progress in Co-operative Fruit Marketing," Missouri Experiment Station, Bulletin 97 (1911), reprinted in PRP, 82 (August 5, 1911): 104.

<sup>65</sup>D.J. Whitney, "Growers' Co-operative Marketing Organizations," PRP, 84 (August 10, 1912): 128.

rative producers of California," wrote a contributor to World's Work in 1921.<sup>66</sup> The inspiration lay not in the hallowed ideals of equality and democracy, the writer noted, but in the fruit growers' astute application of the ideals of scientific management and efficiency: "Large cooperative units can avail themselves of competent sales managers, command full information of world market conditions, make advantageous arrangements for financing, prevent dumping, and promote an orderly distribution of the product. These are essential features of the California system . . ." <sup>67</sup>

The American Review of Reviews editorialized in 1925: "This idea of cooperative marketing is not new, but it has had an amazing expansion in successful practice during the past ten years. California has led the way, and the farmers of the entire country owe a debt of gratitude to the enterprise of the producers of that State."<sup>68</sup> California's dramatic commercial success appeared to exemplify the very traits of private entrepreneurship that Americans found so appealing during that time, so much so that few stopped to examine the conceptual distance between the theory of egalitarian cooperation and the practice of efficient collectivism with which cooperation, due to the California example, had become

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<sup>66</sup>Henry J. Haskell, "The Great Farm Movement Toward Cooperation," World's Work, 41 (1921): 548.

<sup>67</sup>Haskell, "The Great Farm Movement," 549.

<sup>68</sup>"The Progress of the World," American Review of Reviews, 72:2 (August, 1925): 118.

synonymous. Their success ensured that cooperation would continue to present a vibrant alternative to both unbridled competition and the concentration of wealth in American society.<sup>69</sup>

From the late nineteenth century into the twentieth, deep and lasting alterations were made in the form and purpose of agricultural cooperation. The Rochdale principles provided the philosophical touchstone for the American cooperative movement. But as the movement changed course, cooperative structure was altered to fit new economic imperatives. California cooperatives were different both in kind and in purpose from the Granger and Alliance cooperatives that preceded them. Yet their leaders described these organizations and justified their economic practices in the same language of egalitarian cooperation used to describe the Rochdale exemplar.

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<sup>69</sup>Administrative support for cooperation greatly expanded during this period. At the federal level, the U.S. Department of Agriculture established the Office of Markets and Rural Organization in 1908 to oversee cooperative work. The Office of Markets stressed private initiative and the distribution of market information rather than direct involvement in the actual conduct of the organizations. Many states set up similar agencies to assist farmers in organizing cooperatives; one of the most active was California's State Markets Bureau, formed in 1915 and first directed by Harris Weinstock, a member of Hiram Johnson's Progressive administration. Grace H. Larsen, "A Progressive in Agriculture: Harris Weinstock," Agricultural History, 32 (1958): 187-93; James C. Malin, "The Background of the First Bills to Establish a Bureau of Markets, 1911-1912," Agricultural History, 6:3 (July, 1932): 107-29; J.T. Horner, "U.S. Government Activities in the Field of Agriculture Prior to 1913," Journal of Farm Economics, (1928): 429-60.

The tendency of California cooperators to rely on the Rochdale theory not only obscured real differences in form and purpose but also complicated the processes of legal reform required for its acceptance in prevailing legal culture. From the 1890s through the Progressive Era, legal barriers existed to cooperation generally and to the market-control-oriented California organizations in particular. These barriers were lodged in the edifice of state and federal anti-trust law. The stated determination of California growers to regulate markets through cooperatives stirred up ancient antagonisms towards combination and consolidation. Using the appeal of cooperation to diffuse that hostility proved an effective strategy, one that would win for farmers legal privileges that eluded labor and other interest groups for decades.



## CHAPTER 2

### ANTI-TRUST LAW AND THE LEGAL STATUS OF COOPERATIVES

Association is the master word of modern days; it is the key to efficiency, power and equality. Corporations are associations of capital for profit; labor unions are associations for the profit of its [sic] members; co-operative associations are for the profit of all the people who choose to associate.

Sun-Maid Herald, 1918<sup>1</sup>

American courts in the late nineteenth-century viewed cooperation as antithetical to free competition in the market. From the 1890s well into the twentieth century, state and federal courts ruled that cooperatives illegally restrained trade when they fixed prices and controlled the distribution of agricultural commodities. The Iowa Supreme Court provided a typical expression of judicial attitudes towards cooperatives in 1914, when it ruled that a by-law requiring members to pay a fee for selling outside the cooperative stifled competitive freedom. The opinion stated: "[H]ere there is freedom of trade in form, but annexed thereto is a fine or penalty for exercising such freedom. This is restraint of trade, or rather restraint of competition. That such fine or penalty made the society an illegal

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<sup>1</sup>"Association a Power," SMH, 3:8 (March 1918): 3.

one is to our minds too clear for argument."<sup>2</sup>

Agricultural cooperatives generally lost in anti-trust suits between 1890 and 1922 because courts saw no difference between them and regular corporations. The law offered them scant basis for ruling otherwise. While the economic function and social purposes of cooperatives sharply diverged from the profit motives and managerial style of regular corporations, cooperatives were chartered under the same general incorporation laws as regular corporations. Legally, the two were indistinct. Compounding the problem was the growing hostility among Americans towards trusts and monopolies. State and federal courts were far more interested in cooperatives' market behavior--their tendency to monopolize, fix prices, and restrain competition--than in their avowed primary purposes--to educate farmers, increase their bargaining power, and claim a bigger share of agricultural profits for producers. Reflecting this legal and political climate, courts rigidly applied the same rules devised in cases involving commercial firms, industrial manufacturing, and corporate trusts to agricultural cooperatives accused of restraining trade.

Distinguishing corporations from cooperatives, moreover, was like separating parent and child; they were separate legal entities but shared common purposes and practices.

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<sup>2</sup>Reeves v. Decorah Farmer's Co-op. Society et al., 160 Iowa 194 (1913), 194, 205 (discussed in text below at n. 104).

The judiciary did not view the commercial nature of the corporation as compatible with the democratic, mutual-benefit purposes of the cooperative. When cooperating farmers appeared in the dress of regular corporations, courts suspected a ruse, perceived a similarity of intent and effect from a similarity of methods, and held that despite their benevolent purpose, cooperatives violated the anti-trust policy's ban on monopoly. At the same time, the state legislatures and Congress sought to promote cooperation and protect farmers from the anti-trust laws, but they did so in ambiguous ways. Until Congress finally ended the debate with new legislation in 1922,<sup>3</sup> the courts consistently used corporate form to evaluate the market behavior of cooperatives, thwarting the state legislatures' efforts to promote cooperation.

#### The Sherman Act and the Supreme Court

The growth of the cooperative movement coincided with the rise of industrial trusts. During the 1880s, consolidation in several major industries catapulted the "trust problem" into the forefront of national politics.<sup>4</sup> The

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<sup>3</sup>See chapter 3.

<sup>4</sup>Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 W.Va.L.R. 173, 191 (1985); on the political and social currents of the trust movement, see Hans B. Thorelli, The Federal Antitrust policy: Origination of an American Tradition (Baltimore: Johns Hopkins University Press, 1955), 54-163; Glenn Porter, The Rise of Big Business, 1860-1910 (New York: AHM Publishers, 1973); Alfred D. Chandler, Jr., "The Beginnings of 'Big Business'"

trend towards "trustification" accelerated during the 1890s, assisted by New Jersey's adoption in 1888 of an incorporation law for holding companies.<sup>5</sup> Public hatred of the trusts knew no limits. Judicial treatment of mergers, consolidations, and trusts was far less straightforward. The Anglo-American common law tradition specified that agreements in restraint of trade were illegal if they tended to create a monopoly, to increase prices, to suppress new entry or continued enterprise of others in the industry, or in other ways effected a concerted effort by a few to control the participation of others in the market. In general the courts applied the standard of reasonability to determine the validity of contractual arrangements affecting competi-

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in American Industry," Business History Review, 33 (1959): 1-31; Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. (New York: Vintage Books, 1955), 22-59.

<sup>5</sup>The trust, construed narrowly, was a legal device by which shareholders of several corporations gave up their shares and voting control in exchange for trust certificates. The trustees were empowered not only to run the combined firms as one but also to buy and sell the stocks of companies engaged in related businesses. William Letwin, Law and Economic Policy In America: The Evolution of the Sherman Antitrust Act (New York: Random House, 1965), 8-9, 55-70; McCurdy, "Knight Sugar Decision," 330-40; Naomi Lamoreaux, The Great Merger Movement in American Business, 1895-1904 (Cambridge and New York: Cambridge University Press, 1985), 1-6; Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (Cambridge: Harvard University Press, 1978), 319-336; Thorelli, The Federal Antitrust Policy, 2, 76-80. See also Ralph L. Nelson, Merger Movements in American Industry, 1895-1956 (Princeton: Princeton University Press, 1959); and Eleanor M. Fox and Lawrence A. Sullivan, Cases and Materials on Antitrust (St. Paul, MN: West Publishing Co., 1989), 22-33.

tion.<sup>6</sup> As historian Martin J. Sklar noted, "the intent or effect of the restraint, rather than the fact of the restraint or its form or extent, figured as the controlling consideration at common law."<sup>7</sup>

Statutes enacted during this period added an additional set of legal rules to the common law cannon on restraint of trade, without substantially clarifying how that cannon was to be interpreted in specific controversies. In 1890, Congress passed the Sherman Act.<sup>8</sup> Historians now believe that the Sherman Act, "anchored to the common law," did

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<sup>6</sup>For example, the sale of the good will associated with a business could be legally protected with an agreement by the seller not to compete against the buyer, although the courts usually imposed time and spatial limitations on covenants not to compete. U.S. Bureau of Corporations, Trust Laws and Unfair Competition (Washington, D.C.: Government Printing Office, 1916), 33-34, 423-27 (state common law cases); 157, 204-05 (state anti-trust statutory provisions). But agreements not to compete, made solely to benefit one person or firm or to encourage monopoly, were prohibited by law in several states. Ibid., 157 at nn. 3-4.

<sup>7</sup>Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics (New York: Cambridge University Press, 1988), 100. Whether the standard of reasonability was universally adopted by U.S. federal and state courts in common law restraint of trade cases before 1890, as Sklar contends, is still a subject of historiographical debate. See, e.g., Peter Carstensen, "Dubious Dichotomies and Blurred Vistas: The Corporate Reconstruction of American Capitalism," Reviews in American History, 17 (1989): 404-11. Most historians seem to agree at least on the conclusion that courts generally judged cases on their own facts and that common law principles on monopoly and restraint of trade functioned more as general guidelines than as strict rules. Thorelli, The Federal Antitrust Policy, and Letwin, Law and Economic Policy.

<sup>8</sup>26 U.S. Stats. at Large 209 (July 2, 1890).

little more than codify Anglo-American antipathy towards monopoly and combinations in restraint of trade.<sup>9</sup> Congress was also careful not to intrude on the well-recognized authority of the states to regulate state-chartered corporations and economic enterprises under the commerce clause.<sup>10</sup> The law was limited to combinations operating in interstate commerce and refrained from authorizing direct federal regulation of corporate structure.<sup>11</sup> Federal lawmakers intended to deal with the trust question according to well-recognized principles of dual federalism and common law standards of reasonableness, both awash in the tideflow of public sentiment.<sup>12</sup>

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<sup>9</sup>McCurdy, "Knight Sugar Decision," 304-05.

<sup>10</sup>Sklar, for instance, recognizes that Congress's concerns about the permissible extent of the federal commerce power influenced the framers--and redrafters--of the Sherman Act. Corporate Reconstruction, 116. But he is far less interested in the jurisprudential implications of dual federalism than the earlier works of Thorelli and Letwin.

<sup>11</sup>26 U.S. Stats. at Large, secs. 1 and 2, 209; McCurdy, "Knight Sugar Decision," 324; Letwin, Law and Economic Policy, 85-95; Thorelli, The Federal Antitrust Policy, 184-214.

<sup>12</sup>Historians have long been interested in anti-trust law and policy in relation to both the rise of big business during industrialization and the impact of anti-trust on economic and social equality. Hans Thorelli's The Federal Antitrust Policy (1955) remains the touchstone of this scholarship; also important are Hofstadter, The Age of Reform: From Bryan to F.D.R. (1955), Gabriel Kolko, The Triumph of Conservatism (London: The Free Press of Glencoe, 1963), and Letwin, Law and Economic Policy (1965). The last few years have witnessed important calls for reexamination of the origins and historical significance of anti-trust policy and the accommodation of capitalist interests that it has been said to represent. Martin Sklar's ambitious book,

The Supreme Court's handling of the Sherman Act during the 1890s reflected these jurisprudential and political perspectives. The Court settled the federalism questions in U.S. v. E.C. Knight Co. (1895),<sup>13</sup> holding that federal authority to regulate combinations did not extend to operations involving production and manufacturing. The decision in Knight, far from gutting the Sherman Act as contemporary observers feared,<sup>14</sup> delineated the broad realm of interstate and foreign commerce within which the federal government was free to go after cartels and monopolies. Labor, to the detriment of the nascent trade unionization movement, belonged in the federal sphere, as the Court ruled in In re

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The Corporate Reconstruction of American Capitalism (1988), is one attempt at revision. While Sklar has provided a compelling new perspective on the historical role of the corporate class, viewing business entrepreneurs as a social class as much as labor, farmers, women, blacks, or any other social group (1-40), his legal analysis misconstrues doctrine at several points. For example, he neglects to recognize how state anti-trust law--both statutory and judge-made--shaped federal conceptions of monopoly and restraint of trade, both before and after the Sherman Act (93-105, 117-45). While this study does not address these questions directly, it contributes a different perspective in considering the issue of organizational structure on judicial interpretation of the anti-trust laws, and it considers for the first time the special place of agriculture in anti-trust policy.

<sup>13</sup>156 U.S. 1 (1895).

<sup>14</sup>See McCurdy, "Knight Sugar Decision," and Sklar, Corporate Reconstruction, 125-26, for the contemporary legal community's reaction to Knight--that U.S. Attorney General Richard Olney bungled the case. McCurdy argues, and Sklar concurs, that Olney could not have altered the Court's decision because the facts in the case meshed so squarely with the tenets of dual federalism.

Debs (1896).<sup>15</sup> So, too, did railroad cartels and industrial combinations that reached beyond the limits set out in Knight into interstate distribution, as the Court made clear in U.S. v. Trans-Missouri Freight Association (1897),<sup>16</sup> U.S. v. Joint-Traffic Association (1898),<sup>17</sup> and U.S. v. Addyston Pipe and Steel Co. (1898).<sup>18</sup>

In these decisions the Court, through Justice Rufus Peckham, rejected the common law standard of reasonability and adopted a strict construction of the statute. Once the Court determined that the combinations operated in interstate trade, it followed that they came within the federal regulatory power. The Court concluded that the statute's ban on "every restraint of trade" condemned each one. The railroad cartels in Trans-Missouri and Joint-Traffic fell because the railroads concertedly fixed rates and penalized members who failed to abide by the agreement.<sup>19</sup> The pipe

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<sup>15</sup>United States v. Debs et al., 64 Fed. 724 (C.C.N.D. Ill. 1894); In re Debs, 158 U.S. 564 (1895). For further discussion of the Debs case and its place in judicial "conservatism" during the late nineteenth century, see Arnold Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (Gloucester, Mass: Peter Smith, 1976), 219, 222.

<sup>16</sup>166 U.S. 290 (1897).

<sup>17</sup>171 U.S. 505 (1898).

<sup>18</sup>78 Fed. 712 (C.C.E.D.Tenn. 1897); on appeal, 85 Fed. 271 (C.C.6th Cir. 1898); 175 U.S. 211 (1899).

<sup>19</sup>Justice Rufus Peckham wrote the Court's opinion in both cases. Justice Edward D. White, joined by Justices Stephen Field, Horace Gray, and George Shiras, Jr., dissented in Trans-Missouri, fearing that the Court's reasoning



manufacturers' elaborate scheme to maintain prices and to eliminate outside bidders for coveted urban construction contracts palpably affected competition.<sup>20</sup>

The direct impact of the cartels on interstate commerce, particularly on prices and competition, controlled the Court's holdings.<sup>21</sup> In other cases involving associations to control manufacturing, prices, and distribution, the Court adhered to this rationale. If there were only a negligible impact on interstate commerce, as in Hopkins v. U.S. and Anderson et al. v. U.S., both decided immediately after Joint-Traffic and involving urban livestock commission market associations, then the federal government was powerless to proceed against it.<sup>22</sup> In Peckham's view, the live-

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imposed a literal standard which no contract could pass. Trans-Missouri, supra n. 16, at 292, 326, 328, 332, 341-42. The Trans-Missouri dissenters, reduced to three by the retirement of Justice Field, did not even file an opinion in Joint-Traffic. Joint-Traffic, supra n. 17, at 562, 568-69.

<sup>20</sup>Judge William Howard Taft wrote for the Sixth Circuit Court of Appeals in Addyston Pipe, supra n. 18. The Supreme Court, again speaking through Peckham, upheld Taft's ruling, noting "The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed." Id. at 238. But Peckham limited the injunction against the pipe manufacturers' association to contracts for sales in interstate commerce only.

<sup>21</sup>In fact, the Interstate Commerce Act, passed in 1887, explicitly regulated the railroads on the basis of their direct involvement in interstate commerce. Thorelli, The Federal Antitrust Policy, 468.

<sup>22</sup>Hopkins v. U.S., 171 U.S. 579 (1898); Anderson et al. v. U.S., 171 U.S. 604 (1898). In Hopkins the Court declared that whatever restraint of trade existed was for the state

stock exchanges provided "services . . . in the nature of a local aid or facility provided for the cattle owner."<sup>23</sup> Such combinations were planted squarely within the states' regulatory yards.

The Trans-Missouri, Joint-Traffic, and Addyston Pipe cases set out the reach of the federal regulatory power under the Sherman Act. They also represent, in the view of leading historians of U.S. anti-trust policy, the high-water mark of the Supreme Court's literal reading of the Sherman Act.<sup>24</sup> As mergers increased between 1898 and 1904,

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to remedy; in Anderson the Court held that the agreement did not restrain trade at all.

<sup>23</sup>The issue of the associations' effect on prices was extraneous, since they did not directly affect interstate trade; however, had Peckham believed the associations came within the commerce power, he likely would have found their price-fixing arrangements as abhorrent as he did the railroads'. Hopkins v. U.S., supra n. 22, at 588.

<sup>24</sup>In upholding Judge Taft in Addyston Pipe, according to Thorelli, the Court embarked on the long and torturous path towards the eventual triumph in 1911 of the "rule of reason" in the Standard Oil and American Tobacco cases. Thorelli, The Federal Antitrust Policy, 37 at n. 113, 466-70, 562, 599; Standard Oil Co. of New Jersey et al. v. United States, 221 U.S. 1 (1911); American Tobacco Company v. United States, 221 U.S. 106 (1911); Sklar, Corporate Reconstruction, 147-48. The "rule of reason" refers to the Court's acceptance of the common law standard of reasonability in determining whether a given combination violated the law. Factors such as size thus did not constitute per se violations of the Sherman Act, particularly in Section 2 cases in which the Court had to consider not only the appearance of monopoly but "the existence of unfair practices as evidencing an attempt to monopolize." Bureau of Corporations, Trust Laws and Unfair Competition, 17. The Court did not, however, overrule its previous decisions but distinguished them from the reasoning in the Standard Oil and American Tobacco cases; neither did the acceptance of the rule of reason render the Sherman Act completely impotent.

Progressive reformers became increasingly dissatisfied with the dual federalism structure of the Sherman Act and the Supreme Court's interpretation of it. During the Roosevelt, Taft, and Wilson administrations, political pressure on Congress to amend the anti-trust laws escalated as the states abdicated their responsibility to police the trusts. They found that it was easier and more economical to adopt New Jersey's liberal incorporation laws than to regulate the trusts, dissolve horizontal combinations and lose tax revenues.<sup>25</sup>

The states remained vigilant in regulating cooperative incorporation, however. Simply stated, the Supreme Court implicitly reserved control of cooperatives to the states under the E.C. Knight distinction between production and commerce. Since few cooperatives were in a position to monopolize beyond the local level, their controls over marketing and distribution rarely extended into interstate

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The Supreme Court ordered both the Standard Oil and American Tobacco combinations to be dissolved. Ibid., 17-21. What is noteworthy for this study, as will become apparent in my discussion of state anti-trust cases involving cooperatives, is that as influential as federal case law was in state courts, the adoption of the rule of reason did little to spare cooperatives from state judges' assumption that they were inherently monopolistic. See text below at p. 107.

<sup>25</sup>Lamoreaux, The Great Merger Movement in American History, 1-13; McCurdy, "Knight Sugar Decision," 335-42.

commerce.<sup>26</sup> This result did not, however, guarantee farmers inherently friendlier forums. While many states actively sought to promote agricultural interests by establishing and maintaining a sympathetic legal climate for cooperation, the courts did not share this priority. To overcome judicial indifference to the special status of cooperatives required a great deal of legislative tenacity. The state legislatures tried two approaches. First, they immunized farmers from the operation of the anti-trust laws through explicit statutory exemptions. Second, when the courts struck those exemptions as unconstitutional, the legislatures responded by providing a separate set of enabling laws under which farmers could organize.

#### The States Move to Protect Farmers, 1890-1902

Nearly all the states enacted their own anti-trust statutes, many before 1900, to regulate trusts in intrastate commerce.<sup>27</sup> Besides codifying common law prohibitions on

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<sup>26</sup>One exception was the Aroostock Potato Association of Massachusetts, which controlled 75% of the aroostock potatoes entering interstate commerce and enforced its control through blacklists and boycotts. A federal court enjoined the Association's activities as constituting a secondary boycott in direct restraint of interstate commerce. United States v. King, 229 Fed. 275 (D.C.D.Mass. 1915), same result on new indictment, 250 Fed. 908 (D.C.D.Mass. 1916).

<sup>27</sup>For compilations of these statutes and lists of cases decided thereunder, see U.S. Industrial Commission, Reports, II: Trusts and Industrial Combinations (Washington: Government Printing Office, 1900); and U.S. House of Representatives, Committee on the Judiciary, J.J. Speight, ed., Laws on Trusts and Monopolies (Washington: Government Printing Office, 1913).

contracts and combinations in restraint of trade, the state laws also defined monopoly more precisely than either the common law or the Sherman Act. Many states specifically outlawed price-cutting and exclusive dealing contracts, typically employed by trade associations to decrease competition.<sup>28</sup> The detail and specificity of the state laws posed a marked contrast to Congress's broad generalizations in the Sherman Act. They also outlawed some of the specific practices that cooperatives tended to employ to obtain better prices. The laws were "particularly severe as to all conduct designed to raise the price or diminish the production of food-stuffs."<sup>29</sup>

The states' anti-trust policies resonated with judicial attitudes towards trusts. During the 1890s and well into the twentieth century, state courts treated organizations of corporate capital, working people, and cooperating farmers alike. All constituted trusts.<sup>30</sup> In cases involving combinations or pools of individual competitors, state courts examined the structure of the combination--particularly the character of agreements to buy or sell to one person or firm, the concentration of capital, the ability to enhance prices, or any tendency to monopolize--to determine

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<sup>28</sup>Bureau of Corporations, Trust Laws and Unfair Competition, 143-230.

<sup>29</sup>John Hanna, "Cooperative Associations and the Public," 29 Michigan L.R. 148, 163 (1930).

<sup>30</sup>Sklar, Corporate Reconstruction, 11.

whether the combination violated the anti-trust laws.<sup>31</sup> In interpreting the state laws, the state courts drew on common law precedent and the model offered by Justice Peckham's anti-trust jurisprudence.

In stark contrast to the broad prohibitions of the anti-trust laws, state legislatures attempted to insulate farmers from the penalties those laws imposed. Between 1889 and 1897, eleven states--Georgia, Illinois, Indiana, Louisiana, Michigan, Mississippi, Montana, North Carolina, Tennessee, Texas, and Wisconsin--exempted farmers from the opera-

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<sup>31</sup>See, e.g., Central Ohio Salt Company v. Guthrie, 35 Ohio St. 666 (1880) (pool agreement to regulate prices and production struck as tending to monopolize); Jones v. Fell, 5 Fla. 510 (1854) (pilots' association not per se illegal); More v. Bennett, 140 Ill. 69 (1892) (court refused to enforce agreement of association of stenographers not to compete against each other); People v. New York Board of Fire Underwriters, 54 How.Prac. 228 (1875) (association formed to set uniform rates not in restraint of trade); Santa Clara Valley Mill & Lumber Co. v. Hayes et al., 76 Cal. 387 (1888) (combination of lumber manufactures to control prices, limit supply void as against public policy); Richardson v. Buhl, 77 Mich. 632 (1889) (Diamond Match Company struck as trust arrangement in restraint of trade), among others. For cases upholding such agreements, see Central Shade-Roller Co. v. Cushman, 143 Mass. 353 (1887) (manufacturers organize corporation to handle all sales valid use of selling agent); Gloucester Isinglass & Clue Co. v. Russia Cement Co., 154 Mass. 92 (1891) (agreement among glue manufacturers held valid because not an "item of public necessity"); Over v. Bryam Foundry Co., 37 Ind.App. 452 (1906) (contract for purchase of entire output of firm not void under common or statutory law because it did not cover entire supply of commodity). See Bureau of Corporations, Trust Laws and Unfair Competition, 36-57, for an extended analysis.

tion of their anti-trust statutes.<sup>32</sup> Farmers clearly had political clout at the state level in some states. The Farmers' Alliance and the Populists pushed for reforms during the 1890s that, whatever their radical implications, challenged political leaders to respond to the needs of agriculture.<sup>33</sup> Initially, there was strong sentiment even in Congress to spare farmers from the force of the Sherman Act, but the Senate Judiciary Committee removed the provision, apparently acting on the conviction that Congress should make no exceptions to the law.<sup>34</sup> At the state level,

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<sup>32</sup>Michigan (1889), North Carolina (1889), Mississippi (1890), Louisiana (1890), Wisconsin (1893), Texas (1895), Illinois (1893), Montana (1895), Georgia (1896), Indiana (1897), and Tennessee (1897). U.S. Industrial Commission, Trusts and Industrial Combinations, 127-29, 192-96, 141-42, 118-20, 254-56, 230-35, 87-89, 162-63, 79-80, 95-96, 226-27. Illinois, Louisiana, Mississippi, Montana, Texas, and Wisconsin also included laborers and labor unions in the exemption; South Dakota and Nebraska exempted labor but not agriculture. Other exemptions appeared less frequently. Alabama exempted railroads where the combination was approved by the state railroad commission. Texas and Mississippi codified the common law rule that contracts for the sale of good will with a business that contained agreements not to compete with the buyer were not void; Missouri exempted insurance combinations in large cities; and North Carolina handed out immunities by the bushel, to charitable institutions, lumber, cotton, wool, fishing, trucking, canning, and merchants "not interested in a trust." Ibid. at 195. By 1900, twenty-eight states had anti-trust statutes on their books; four others had constitutional provisions.

<sup>33</sup>See discussion in chapter 1.

<sup>34</sup>Senator Sherman himself added the exemption, which also included labor organizations, as an amendment to his original bill. Thorelli, The Federal Antitrust Policy, 174, 176, 190, 193, 232; Nourse, The Legal Status of Agricultural Cooperation, 241-246.

farmers effectively swayed legislatures in the Midwest and South, a success apparently due as much to a long-standing tradition of agrarian political participation as to Populist influence.<sup>35</sup>

The state exemptions posed a legal dilemma. Although many states wanted to provide explicit protection to farmers, the legislatures failed to link this policy to cooperation. Most of the exemptions stayed the operation of the statutory penalties against "agricultural products while in the hands of the producer or raiser" or, in a few states, "combinations of farmers." In theory, this permitted farmers to fix prices and enter into agreements to secure control over marketing. The statutes only indirectly implied that farmers might do these things through cooperatives; in fact, the laws said nothing about the ways in which farmers might employ their anti-trust immunity in the market. More critically, the statutes offered the judiciary little justification for setting cooperatives apart from corporations or other combinations. In essence, the laws granted a substantial legal privilege without specifying how that privilege could be used.

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<sup>35</sup>Only five of the eleven states that historian Lawrence Goodwin labels as major centers of Populist activity were among the twelve that exempted agriculture from their anti-trust laws: Georgia, Louisiana, Mississippi, North Carolina, and Texas. Stanley B. Parsons, Karen Toombs Parsons, Walter Killiaie, and Beverly Borgers, "The Role of Cooperatives in the Development of the Movement Culture of Populism," Journal of American History, 69 (1983): 866-885.



Litigation challenging agriculture's statutory exemptions revealed a gap between legislative intentions and judicial interpretations. The legislatures had not made the exemptions very specific; they applied in some cases to producers and in other cases to products. To a judiciary burdened with an unwieldy body of constitutional, statutory, and common law rules for supervising monopolistic behavior, the exemptions raised troubling questions of statutory and constitutional interpretation. Further, as the following discussion will show, the incorporation of cooperatives under general laws led judges to focus on specific anti-trust violations rather than on the legislatures' purpose in exempting agriculture. Late nineteenth-century state and federal courts were far more preoccupied with preserving competition than with examining the legal nature of agricultural cooperatives.

To proponents of cooperation, the courts' concern with the black-letter-law of anti-trust came as a setback. The 1895 case of Ford v. Chicago Milk Shippers' Association<sup>36</sup> appeared particularly damning. In Ford, the Association fixed prices on the milk it sold and, through agreements with its members, determined the amount of milk that urban dealers would receive. When Ford, a member of the association, sold milk to an outside dealer, the Association sued to recover its share of the proceeds. Ford refused to pay

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<sup>36</sup>155 Ill. 166 (1895).

on the grounds that the Association's price-fixing violated the state's anti-trust statute. Illinois law defined trusts as

a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First--to creat or carry out restrictions in trade. Second --to limit or reduce the production, or increase or reduce the price of merchandise or commodities  
 . . . .<sup>37</sup>

The Illinois Supreme Court agreed with Ford. The judges regarded the issues of the Association's corporate structure and market behavior as dispositive of its standing under the law. They reasoned that the Association's price-fixing was inherently illegal under the statute because it hampered competition and the free flow of commerce: "[T]he association [and] its members . . . . carry out a scheme [by which they] limit the amount to be sold within the corporate limits of the city of Chicago."<sup>38</sup> Thus, the Association was guilty of restraining trade and its contracts for purchase of milk were held unenforceable.<sup>39</sup>

Since an agricultural commodity was the subject of the litigation, early twentieth-century treatise writers credi-

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<sup>37</sup>Act of June 20, 1903, Laws of Illinois, 1893, p. 192, compiled in U.S. Industrial Commission, Report on Trusts and Industrial Combinations, 87.

<sup>38</sup>Ford, 155 Ill. at 178.

<sup>39</sup>Id. at 179.

ted the case with initiating judicial hostility towards agricultural combinations. Edwin G. Nourse and John Hanna blamed the decision for ruling that farm organizations restrained trade when they attempted to obtain fair prices for producers.<sup>40</sup> Their analysis, however, removed the case from its larger and more pertinent context: judicial interpretation of restraint of trade under the anti-trust statutes. Seen in that light, the case is less an indication of the judiciary's animosity towards agricultural organizations--since the court never considered the cooperative nature of the milk dealers' association--than it was a signal of the standards that judges intended to apply before awarding the special treatment that legislatures intended for farmers to receive.

In deciding the milk dealers' case, the Ford court was more concerned with articulating the proper rules mandated by statutory and common law than it was with determining whether agriculturalists deserved exceptional treatment under that law. In fact, the opinion staked out no new ground in analyzing the technical legal issues that the dispute raised. To answer the question of whether the milk dealers' association restrained trade, the court looked at

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<sup>40</sup>Edwin G. Nourse, The Legal Status of Cooperation (New York: Macmillan, 1928), 333-34; John Hanna, The Law of Cooperative Marketing Associations (New York: The Ronald Press Company, 1931), 253. See also Frank Evans and E.A. Stokdyk, The Law of Agricultural Co-operative Marketing (Rochester, NY: The Lawyers Co-operative Publishing Company, 1937), 16, 90, 95.

its market behavior. The court did not even consider the legal significance of the fact that the trade being restrained dealt with an agricultural commodity.

Because of its preoccupation with analyzing the Association's market behavior, the court did not consider the issue that Nourse and Hanna considered essential: the constitutionality of the exemption for "agricultural products or live stock while in the hands of the producer or raiser" contained in the Illinois anti-trust law. The simple reason for this omission was that the defendant did not claim it as a defense. In reviewing the facts, the court did not deem it applicable. The Association was an organization of dealers, not of producers. By the time the Association handled the "agricultural products" it marketed, the milk had long since left "the hands of the producer."<sup>41</sup>

Neither did the Milk Shippers merit special treatment by virtue of their ostensibly cooperative purpose. The Association's object was to secure for producers "a just return for the sale of [their milk]; to rid the field of city distribution of irresponsible and dishonest dealers; to establish a central bureau of information for the shipper's benefit; and to secure to the dealer of milk a pure, whole-

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<sup>41</sup>In fact, the Association did not even assert a claim to immunity under the exemption; instead, its lawyers conceded that it was an illegal combination under the statute and sought recovery on the grounds that the anti-trust statute imposed an unconstitutional taking of the right to do business. 155 Ill. 166, at 170.

some, honest quality of that product."<sup>42</sup> In fixing prices and controlling supply, the Association was employing market practices essential to cooperative marketing, to achieve the result of obtaining fair prices for farmers. But the Illinois Supreme Court was wholly uninterested in the cooperative character of the milk dealers' association. It was organized as a regular corporation and the court treated it accordingly. The benevolence of its aims did not dissipate the court's preoccupation with its market behavior.

Other state jurisdictions contemporaneously came to the same conclusion. In New York, the high court considered whether the Milk Exchange of New York City had restrained trade when it acted as a commission broker.<sup>43</sup> The Exchange did not buy and sell milk itself; rather, it acted as an intermediary between the producer and the milk dealer. Incorporated under New York law, its by-laws specified that the Exchange had the power to "make and fix the standard or market price at which milk shall be purchased by the stockholders of the company." Any stockholders who purchased milk at any other price forfeited their stock.<sup>44</sup> Citing a litany of cases involving similar associations, the court ruled that the Milk Exchange hampered competition and enhan-

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<sup>42</sup>Id. at 177.

<sup>43</sup>People of the State of New York v. The Milk Exchange, 145 N.Y.Rep. 267 (1895).

<sup>44</sup>Id. at 271.

ced prices at the expense of the public, in violation of the common law: "'That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and, therefore, illegal, is too well settled by adjudicated cases to be questioned at this day.'"<sup>45</sup>

The Ford and Milk Exchange cases, then, told farmers and their legislators that judges would examine cooperatives' market behavior under the same rules used for other private entrepreneurs accused of monopolizing supply or restraining trade. Implicitly, the decisions held that cooperatives had to differ from regular corporations in organic structure as well as purpose before courts would look at their market behavior in a new light. But neither case tested the validity of the statutory exemptions for agriculture. That issue did not take long to surface. In a series of cases decided between 1897 and 1902, litigants explicitly asserted that the exemption in the Texas, Illinois, and Georgia anti-trust statutes denied them the equal protection of the laws. These cases presented the opposite side of the coin from the Ford and Milk Exchange cases; in none of them was an agricultural cooperative a party to the litigation. As a result, instead of evaluating cooperatives' market behavior, the courts focused on the

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<sup>45</sup>Id. at 274 (quoting Arnot v. Pittston & Elmira Coal Co., 68 N.Y. 558, at 565 (1877)).

issue of whether the legislatures had provided sufficient, reasonable grounds for distinguishing agriculture from other trades and occupations.

In 1897, a Texas federal circuit court considered the case of In re Grice, a petition for writ of habeas corpus for a man awaiting new trial for criminal violations of that state's anti-trust law.<sup>46</sup> The petitioner, William Grice, directly attacked the statute on two grounds: first, as an infringement upon his liberty to enter into business contracts, and second, as a denial of equal protection because it exempted agricultural producers.<sup>47</sup> Construing the statute literally, the court concluded that the legislature had exceeded its regulatory authority because it had outlawed all combinations regardless of size or scope:

[I]t would seem . . . that the act was intended only to prevent oppressive and unreasonable combinations. There is no such limit, however, within its four corners. . . . Neither is there any limitation to the amount of capital combined with skill and acts. A small capital, with a minimum of skill, is as much prohibited as the largest amount.<sup>48</sup>

As a result of the legislature's failure to "condemn only acts which are oppressive by reason of their magnitude," the court was disinclined to assume that the legislature inten-

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<sup>46</sup>In re Grice, 79 F. 627 (C.C.S.D.Tex. 1897).

<sup>47</sup>Id. at 638-40.

<sup>48</sup>Id. at 641.

ded to distinguish between reasonable and unreasonable restraints of trade. Consequently, when it turned to the petitioner's equal protection argument, the court had no trouble finding that the legislature had failed to provide a reasonable justification for permitting agricultural producers to do what members of all other trades were prohibited from doing:

Two citizens may combine, therefore, for the purpose of fixing prices; one, by doing so, committing a crime, and the other, by doing so, performing a laudable act. If this is equality before the law, within the meaning of the constitution, we had better revise the constitution. . . . What ground can there be for setting aside, as this act has done, four-fifths of the citizens of Texas as an exempt class from the punishment for felony, because they are producing farmers?<sup>49</sup>

The court then speculated on the legislature's intention in enacting the exemption. In defense of the statute, the state had contended that "the principal reason for granting to so large a body of citizens absolute immunity from punishment for felony for combining in restraint of trade is the fact that they are utterly unable to avail themselves of the great privilege thus granted" because they were physically scattered across the state. After paying tribute to farmers' "integrity and . . . the independence and importance of [their] calling," the court scornfully dismissed the state's argument and its implicit assumption

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<sup>49</sup>Id. at 648.



that farmers "ha[ve] any privilege or rights on account of [their] location or occupation." The court could see no constitutionally valid distinction between agriculture and any other trade. "If there is any one thing evident from a careful study of the Act," the opinion continued, "it is that it is aimed to favor the agricultural classes and is against the merchant and mechanic, and all the others, without either reason or justice."<sup>50</sup>

Five years later, the U.S. Supreme Court followed the reasoning of the Texas circuit court and struck the Illinois anti-trust law. In Connolly v. Union Sewer Pipe Co.,<sup>51</sup> Thomas Connelly purchased pipe from the company in Illinois; upon his refusal to pay, the pipe company sued him for the price. In his defense he alleged that the Union Sewer Pipe Company, an Ohio corporation, was monopolizing interstate commerce in sewer and drainage pipes in violation of Illinois law, and that under the statute contracts contributing to restraint of trade were void and unenforceable.<sup>52</sup> After dismissing the Pipe Company's procedural claims as to its lack of jurisdiction in the case, the Supreme Court turned away Connolly's common law and Sherman Act defenses on the grounds that neither invalidated a con-

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<sup>50</sup>Id. at 649.

<sup>51</sup>184 U.S 540 (1902).

<sup>52</sup>Id. at 541-45.

tract that did not itself restrain trade.<sup>53</sup>

Then Justice John Marshal Harlan, speaking for a 7-1 split court, turned his attention to the Illinois anti-trust statute. Since the state law contained the provision that buyers could plead the statute as a defense in a suit for the price, the Pipe Company could only recover if the entire statute were constitutionally defective or if in fact no restraint of trade were involved. Under the supremacy clause of the federal Constitution, no state could use its police powers to infringe on federal constitutional rights.<sup>54</sup> Like the federal circuit court in Texas, Justice Harlan took seriously the possibility that the legislature had inadequately justified the special privilege it had granted to farmers. By the terms of the statute, farmers could engage in any of the prohibited practices, including combining to restrict the sale of agricultural commodities and livestock, to fix prices for the purpose of precluding

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<sup>53</sup>Connolly argued that under both common law and the federal anti-trust statute the Pipe Company was barred from recovering on contracts for sale of goods. The Court held that the common law's prohibitions on monopoly did not void a contract for sale of property legally acquired, since the contract did not play any role in enforcing or contributing to the combination. *Id.* at 549. Neither did the Sherman Act overturn otherwise legal business transactions; unlike the state law, the Sherman Act did not stipulate that any contracts made by a combination for sale of property would be illegal. The Court concluded that Congress did not intend to give buyers the right to plead the illegal character of the combination as a defense in a suit for the price: "Th[e] combination may have been illegal, and yet the sale to the defendants was valid." *Id.* at 550-52.

<sup>54</sup>U.S. Constitution, Article VI.

free competition, and to increase or otherwise control prices to the public. But individuals or firms in any other occupation or trade stood to suffer stiff fines if they did likewise.<sup>55</sup>

In Justice Harlan's view, the case fell directly in line with the Court's evolving Fourteenth Amendment jurisprudence. Quoting with approval the Court's 1885 decision in Barbier v. Connolly and its 1886 landmark opinion in Yick Wo v. Hopkins,<sup>56</sup> Harlan held that the Illinois statute violated the right of non-farmers--including corporations--to equal protection of the laws because it accorded farmers privileges that the state denied to everyone else. Harlan saw no difference, for purposes of anti-trust regulation, between agriculture and other forms of economic enterprise. Rather, he said, farmers, merchants, and tradesmen "are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like

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<sup>55</sup>Illinois Anti-Trust Act of 1893, in U.S. Industrial Commission, Trusts and Industrial Combinations, 87-89.

<sup>56</sup>113 U.S. 27 and 118 U.S. 356, respectively. In Barbier, the Court upheld a San Francisco ordinance requiring all laundries to be housed in brick buildings. While the law was aimed at Chinese businesses typically located in wooden buildings, Justice Stephen Field upheld it as a valid health and safety regulation that applied to everyone in the business, regardless of race. In Yick Wo, the Court struck a municipal ordinance regulating laundries housed in wooden buildings on the grounds that its selective enforcement against Chinese laundry owners denied them the right to equal protection.

conditions, as the State may legally prescribe."<sup>57</sup> Thus, when a state regulated combinations in trade, it could not constitutionally prohibit them in one business belonging to "the same general class" and permit them to exist in another:

[I]f combinations of capital skill or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful.<sup>58</sup>

Harlan found nothing in the statute, implicit or otherwise, to show that the state had made anything other than an arbitrary classification. As illustration, he distinguished the high court's decision in American Sugar Refining Co. v. Louisiana,<sup>59</sup> in which the justices had brushed aside equal protection objections to a license tax the state levied on persons in the business of refining sugar; the tax did not apply to farmers grinding their own sugar. There the Court had found a reasonable basis for the distinction. The state had intended to tax the commercial business of sugar refining, not the incidental home use of refined sugar by farmers

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<sup>57</sup>Connolly, 184 U.S. 540, 560.

<sup>58</sup>Id. at 563-64.

<sup>59</sup>179 U.S. 89 (1900).

on their own farms.<sup>60</sup> There, the Court said, the power to tax did not "impair or destroy rights that are given or secured by the supreme law of the land."<sup>61</sup> The Illinois statute, on the other hand, sought to "regulate the enjoyment of rights and the pursuit of callings connected with domestic trade" in a way that promoted the interests of one class of citizens at the expense of another:

It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce.<sup>62</sup>

Two months after the Supreme Court's decision in Connolly case, the Georgia high court followed suit and struck that state's anti-trust law statute on the same grounds. Brown v. Jacobs' Pharmacy Company was an action by a retail druggist for an injunction against the local branch of a national druggists' association, formed for the purpose of maintaining prices.<sup>63</sup> Jacobs resigned his membership when the local refused to permit him to cut prices. When he

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<sup>60</sup>Connolly, 184 U.S. 540, 563.

<sup>61</sup>Id. at 563.

<sup>62</sup>Id. at 563.

<sup>63</sup>115 Ga. 429 (1902).

proceeded to undersell them, the members retaliated by inducing drug manufacturers and wholesalers to boycott him. Jacobs sued, alleging that the local was engaged in a conspiracy to destroy his business and seeking to enjoin the local from carrying out the boycott. In its defense, the association contended that the anti-trust statute could not support the plaintiff's complaint because it denied non-farmers the equal protection of the laws.<sup>64</sup>

The court gave Jacobs his equitable relief on common law grounds, enabling it to strike the statute without sanctioning the defendant's conspiratorial conduct. The court spent twenty one pages discussing the application of common law rules pertaining to conspiracies and contracts in restraint of trade, relying heavily on the Trans-Missouri, Joint-Traffic, and Addyston Pipe opinions for guidance, and gave but a single paragraph to the equal protection issue. Since the Georgia exemption was identical to the Illinois law struck in Connolly, the Georgia court simply concluded that the Supreme Court's ruling controlled the outcome in Brown. The state judges were far less interested in the Georgia legislature's purpose in enacting the exemption for agriculture than they were in punishing the druggists' association for its unlawful acts against Jacobs.<sup>65</sup> The availability of common law authority to strike the associa-

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<sup>64</sup>Id. at 429-33.

<sup>65</sup>Id. at 432, 438, 453.

tion's acts enabled the court to obtain the result it preferred without contradicting the brand-new rule in Connolly.

The technical nature of anti-trust law and the legal defects of the statutory exemptions directed the courts' rulings in Ford, Milk Exchange, Grice, Connolly, and Brown. In Ford and Milk Exchange, agricultural associations, despite their cooperative character and the fact that they restrained trade in order to carry out cooperative purposes, were held to the same standards as associations in other commodities. In all these cases, state and federal judges ruled that it was no more acceptable for agricultural combinations to fix prices than for manufacturing trusts, particularly when both organizations' existence stemmed from the same legal category. They also signaled that if public policy required a different treatment for agriculture, the legislatures had to provide a legally sound rationale for such a distinction in the statute. When non-farmers tested the exemptions for agriculture in the Illinois, Texas, and Georgia state anti-trust laws, judges adhered to the logic of the law rather than the shifting currents of public policy.

The states' attempts to protect farmers from the anti-trust laws proved counter-productive. As Grice, Connolly, and Brown illustrated, the exemptions not only failed to achieve the legislature's purpose of immunizing farmers but also imposed two additional obstacles for agricultural

cooperatives to overcome. The first problem was the imprecision of the statutes. Since the Illinois statute, copied in Texas and in Georgia, failed to specify what kinds of contracts or combinations farmers could engage in under the exemption, judges were free to examine cooperative associations' market behavior on the same basis as other kinds of combinations. The second problem was that the exemptions made no attempt to show that agriculture was among those "businesses affected with a public purpose," a special class of businesses that were subject to special regulation under the doctrine of Munn v. Illinois.<sup>66</sup> As a result, the courts had license to strike the statutes without having to consider the merits of the larger policy that the legislatures intended to effect. The legislatures did not articulate this policy very clearly; they apparently meant that cooperatives merited special treatment because they imposed only reasonable restraints on trade. By fixing prices to obtain fair returns for producers, cooperatives made it possible for farmers to remain in business and serve the public. But

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<sup>66</sup>Munn v. Illinois, 94 U.S. 113 (1877). In the categories of late nineteenth-century government-business jurisprudence, one certain way for legislatures to justify a classification (the legal act of giving one interest preference over another) was to declare that the business being regulated served a public purpose. See Harry N. Scheiber, "The Road to Munn: The Concept of Public Purpose in the State Courts," Perspectives in American History, 5 (1971): 329-402; and Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897," Journal of American History, 61 (1975): 970-1005.



since courts considered price-fixing inherently illegal under the statutes, and since cooperatives were structurally indistinct from other corporations, the immunity conferred on agricultural producers did not withstand judicial scrutiny.

What was of consequence to the courts was the nature of the restraint of trade in each case. Anti-trust law required a close examination of the facts, including the economic features of the combination and the kind of contract at issue in the case. If the contract contributed to the monopoly, as in Ford and Milk Exchange, it was invalid. If, however, it assisted the parties in making a legal exchange of goods or services, notwithstanding the fact that one of them was part of a trust or a monopoly in restraint of trade, the courts severed it from the application of the anti-trust laws, as was the outcome in Connolly. Throughout the period of these cases, the judicial preoccupation with the scope of monopoly and the control of combinations over production or distribution of commodities remained a constant measure of the legality of the arrangement. The Supreme Court's rulings in E.C. Knight, Trans-Missouri, Joint-Traffic, and Addyston Pipe functioned as controlling law. The law of cooperative marketing as such had yet to be born, but these cases provided legislatures with the constitutional ground rules the courts would require in order to sanction any classification.

The decisions that statutory exemptions for agriculture denied equal protection of the laws, then, were not framed by judicial antagonism towards cooperation per se but by an insistence that legislatures follow established constitutional norms for distinguishing agriculture from other forms of commerce for the purposes of dispensing legal privilege. The imperatives of anti-trust law and the Fourteenth Amendment dictated that all trades be treated alike unless the legislatures explicitly provided otherwise. The courts' conclusion that agriculture did not warrant the legislative privilege of anti-trust immunity followed directly from the legislatures' failure to provide the constitutional basis for the favors they desired to bestow.<sup>67</sup>

In light of judicial decisions that it was unconstitutional to exempt farmers by explicitly naming them as a privileged class, a few states tried more subtle ways to accomplish their purpose. California, one of the few states that did not pass an anti-trust law before 1900, passed the Cartwright Act in 1907 to deal with trusts generally and

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<sup>67</sup>I have found only one exception to this general rule in my examination of the decennial digests. In 1903, the Missouri Supreme Court held that a statutory exemption for insurance companies did not not condemn the anti-trust law under either the state or federal constitution, under the rationale that insurance was a public utility that the state could regulate. State ex rel. Crow v. Continental Tobacco Co., 177 Mo. 1, 75 S.W. 727 (1903). But by 1913 the Missouri legislature had removed the exemption from the law. Williams, Laws on Trusts and Monopolies, 171-87 (citing Missouri Revised Statutes 1913, ch. 98).

amended the law in 1909 to provide for special cases.<sup>68</sup> The amendment permitted agreements to form combinations or associations "the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry."<sup>69</sup> This benign statement was immediately perceived by agricultural interests as giving implicit sanction to the purposes and methods of cooperation.<sup>70</sup> The use of combination and monopoly to increase competition in marketing horticultural products was such an accepted principle of agricultural cooperation in California that no one tested the amendment in court until the early 1920s, and the courts upheld the law.<sup>71</sup> Colorado adopted an identical provision in 1913.<sup>72</sup>

Kentucky tried a different, though ultimately no more

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<sup>68</sup>Cal. Stats. 1907, ch. 530, p. 984; Cal. Stats. 1909, ch. 362, p. 593.

<sup>69</sup>Cal. Stats. 1909, ch. 362, at 594.

<sup>70</sup>Nourse, Legal Status of Agricultural Cooperation, 362; Stanley M. Arndt, "The Law of California Co-operative Marketing Associations, 8 California L.R. 280, 284-85 (1920); Theodore R. Meyer, "The Law of Co-operative Marketing," 15 California L.R. 85, 95 (1927).

<sup>71</sup>Anaheim Citrus Fruit Assn. v. Yeoman, 51 Cal. App. 759 (1921); Poultry Producers of Southern California, Inc. v. Barlow, 189 Cal. 278 (1922). On cooperatives and monopoly in California, see Arndt, "Law of Co-operative Marketing Associations," 287-88; Carl Plehn, "The State Market Commission of California," American Economic Review, 8 (1918): 1-26, at 8.

<sup>72</sup>Colorado Statutes, ch. 161, Acts 1913, Section 2, quoted in Nathan B. Williams, Laws on Trusts and Monopolies (Washington: Government Printing Office, 1913), 64.

successful, tack. There, tobacco buying was concentrated "in the hands of a small number of buyers practically dominated by a single 'trust.'" In 1906, the legislature declared the existence of a state of emergency and enacted the Tobacco Pooling Law. This statute authorized field crop producers to "combine, unite, or pool . . . for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually."<sup>73</sup> The state supreme court agreed that the emergency justified the legislation, holding that the act was "classification but not exclusion" and that in granting farmers the privilege to engage in pools and combinations the legislature reasonably exercised its police power.<sup>74</sup> The state court held its ground even when non-farmers charged that the statutes were invalid under the

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<sup>73</sup>Laws of Kentucky, 1906, ch. 117, compiled in Williams, Laws on Trusts and Monopolies, 127-28; Nourse, Legal Status of Agricultural Cooperation, 159.

<sup>74</sup>Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137 (1908). Because the act did not discriminate on its face, and the defendant fell within the classification, no equal protection issue was raised: "What effect, if any, the privilege of combination conferred on farmers, to the end that a greater price might be obtained for the product raised by them, would have on other classes of persons if the act in its terms excluded other persons from its operation and effect, or if other persons were complaining, is not now before [the Court]" (146-47). In Commonwealth v. Hodges et al., 137 Ky. 233 (1910), the court said, "[This] is simply a case where the Legislature regarded a certain class of contracts of sufficient public importance to make their violation a misdemeanor." Id. at 249.

authority of Connolly.<sup>75</sup>

In considering the constitutionality of Kentucky's pooling statute, the U.S. Supreme Court accepted the legislature's finding that the agricultural emergency sufficiently endangered the public welfare to warrant the legalization of agricultural pools. In International Harvester v. Kentucky (1914), the court acknowledged that a constitutional basis existed to justify the legislative classification in the pooling statute; Connolly therefore did not apply. But Justice Oliver Wendell Holmes, speaking for six other justices, struck the law on grounds of vagueness. Holmes ruled that the pooling statute was part of the larger fabric of the state's anti-trust policy, which included both constitutional and statutory provisions; accordingly, the rule governing prices of pooled commodities was the "real value" standard set out in the state constitution to regulate all

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<sup>75</sup>Commonwealth v. Hodges, 137 Ky. 233 (1910); Commonwealth v. Malone, 141 Ky. 441 (1911). The only meaningful curb the court placed on the Burley Society was to condemn the practice of night-riding, through which agents of the pool coerced farmers into pooling their tobacco and terrorized anyone daring to hold out. The court upheld the acquittal of a farmer indicted for selling pooled tobacco to outside dealers, because he had joined only under threats of property damage and bodily injury. Commonwealth v. Reffitt, 149 Ky. Rep. 300 (1912). On the night-riders, see Harry H. Kroll, Riders in the Night (Philadelphia: University of Pennsylvania Press, 1965); and Dewey W. Grantham, Jr., "Black Patch War: The Story of the Kentucky and Tennessee Night Riders, 1905-1909," South Atlantic Quarterly, 59 (1960): 215-225.

combinations.<sup>76</sup> In Holmes's view, the state had led farmers into a blind alley. Kentucky permitted them to pool in order to obtain the "real value" of their crops; "real value" meant the "'market value under fair competition, and under normal market conditions.'"<sup>77</sup> But to avail themselves of the privilege, farmers had to guess what prices would have obtained under perfect market conditions. This, Holmes asserted, was simply absurd:

To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers,<sup>78</sup> is to exact gifts that mankind does not possess.

The Kentucky pooling law represented the most generous attempt to permit farmers to combine with impunity. But neither explicit exemptions contained in the anti-trust laws nor the separate statutory authorization for farmers' pools survived judicial scrutiny. Even where a state avoided the

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<sup>76</sup>"[A]ny combination [created] for the purpose of controlling prices [was] lawful unless for the purpose of with the effect of fixing a price that was greater or less than the real value of the article." International Harvester Co. v. Kentucky, 234 U.S. 216, 220-21 (1914).

<sup>77</sup>International Harvester, 234 U.S. 216, 221 (quoting Commonwealth v. International Harvester Co. of America, 147 Kentucky 564, 566 (1912)).

<sup>78</sup>International Harvester v. Kentucky, 234 U.S. at 223-24; Collins v. Kentucky, 234 U.S. 634 (1914); and Malone v. Kentucky, 234 U.S. 639 (1914), decided on same grounds as International Harvester.

Connolly equal protection problem and provided a constitutional basis for the classification, the Supreme Court insisted that the classification fit seamlessly into the larger web of anti-trust law. The judicially crafted barriers to anti-trust exemptions erected in Connolly and International Harvester forced the states to devise other means of immunizing farmers from the penalties of anti-trust violations. They turned to the legal status of the cooperative itself.

#### Cooperative Corporations and the Legislatures

The decisions in Ford, Grice, Connolly, and International Harvester both paralleled and precipitated state experimentation in the legal status of cooperatives.<sup>79</sup> Cooperatives, like all corporations, were creatures of the state. As such, their plans of organization and operation lay within the states' power to regulate. As the Rochdale principles became more popular and more integrated in standard cooperative practice during the late nineteenth century, legislatures gradually came to see that the principles could provide the basis for a legal distinction between agricultural cooperatives and regular business corporations. From 1865 through 1920 many states enacted

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<sup>79</sup>Most contemporary writers did not consider the possible relationship between the early restraint of trade cases and the separate incorporation statutes. See, e.g., Nourse, The Legal Status of Agricultural Cooperation, and Hanna, The Law of Cooperative Marketing Associations.

separate incorporation laws for cooperatives that codified some or most of the Rochdale principles. Rather than addressing the sticky problem of whether cooperatives violated the anti-trust laws, these statutes expressed the legislatures' conceptions of the public interest in cooperation and the underlying public policy that cooperatives served.

The Rochdale principles formatively influenced the character of American agricultural cooperatives. They bridged the chasm between the commercial orientation of business corporations and the social vision of cooperation. The aim of traditional cooperation, as Edwin G. Nourse later described it, was to deemphasize the importance of capital and profits as such and replace them with participation and equal sharing in risks and benefits:

[Farmers] were trying to organize a naturally decentralized type of industry for the large-scale operations demanded in a scientific, commercialized, and capitalistic day, while at the same time preserving the personal independence and dynamic element of individual participation and reward which seemed to be threatened under some forms of modern industrialization.<sup>80</sup>

These "forms of modern industrialization," however, shaped the legal form of cooperatives as much as the Rochdale principles themselves. When farmers began organizing cooperatives on a large scale after the Civil War, they naturally turned to incorporation to facilitate the operation of

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<sup>80</sup>Nourse, The Legal Status of Agricultural Co-operation, 23.



consumer purchasing societies and marketing pools. General incorporation laws were geared towards the organization of for-profit, commercial corporations. Some state laws and constitutions required all corporations to adhere to orthodox practices such as voting according to number of shares and distribution of profits according to investment.<sup>81</sup> It was only after the Grangers popularized the Rochdale principles during the 1870s that farmers began to notice differences between cooperation and regular corporation.

The Grangers precipitated the movement for separate incorporation of cooperatives. Local Granger societies incorporated cooperative purchasing stores and operated them according to Rochdale standards.<sup>82</sup> Nearly all of these stores went out of business before 1880, but they spread the gospel of Rochdale cooperation across much of the Midwest and upper South. A few states passed special laws to institutionalize various aspects of Rochdale cooperation. In 1865, Michigan gave associations the power to regulate shareholding, voting, and dividend payments. Massachusetts passed a law in 1866 that fixed the capital stock of cooper-

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<sup>81</sup>Nourse, Legal Status of Agricultural Co-operation, 37-38.

<sup>82</sup>Solon Justus Buck, The Granger Movement: A Study of Agricultural Organization and Its Political, Economic, and Social Manifestations, 1870-1880 (Cambridge: Harvard University Press, 1913), 237-78; Andrew W. McKay, Federal Research and Educational Work for Farmer Cooperatives, 1913-1953, USDA, Farmer Cooperative Service, Service Report 40 (January 1959), 7-10.

ative associations at \$50,000, limited each member to one vote, and required all shares to be paid in cash, in full. Nine other states--California, Pennsylvania, Minnesota, Connecticut, Ohio, Kansas, Wisconsin, Montana, and Tennessee--enacted variations on the Massachusetts "one man, one vote" laws between 1868 and 1895.<sup>83</sup>

The main principle behind Rochdale cooperation, the ideal of "mutual benefit," supplied the cornerstone of these laws. But none of them specifically distinguished cooperatives from corporations. Instead, states singled out different aspects of Rochdale cooperation. The Wisconsin law provided that transactions with non-members be conducted in cash, and Kansas stipulated only that each member have one vote. The Pennsylvania legislature spelled out detailed requirements for limited voting, patronage dividends, and stock ownership.<sup>84</sup> All of these statutes were essentially hybrids, offspring of rudimentary elements of corporate organization and Rochdale principles. All of them retained one of the corporation's most fundamental attributes: capital stock, the standard measure of ownership, investment, and assets. Seen in an extreme light, the Granger coopera-

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<sup>83</sup>Nourse, Legal Status of Agricultural Co-operation, 39-43; Filley, Cooperation in Agriculture, 87; Hanna, Law of Cooperative Marketing Associations, 26-39.

<sup>84</sup>Laws of Wisconsin, 1837, Chapter 126; Kansas Session Law of 1887, Chapter 116; Laws of Pennsylvania, 1868; see also Nourse, The Legal Status of Agricultural Co-operation, 40-43.

tives and others that followed during the 1880s were no more than "ordinary stock corporations serving members and non-members alike, being 'co-operative' in no other respect than that their stock was owned by farmers."<sup>85</sup> At the very least, as Edwin G. Nourse astutely noted, "neither profits as such nor capital as such were [sic] eliminated."<sup>86</sup>

Nourse's observation was correct; nonetheless, these early laws did attempt to change the role of capital stock in cooperative corporations. In regular corporations, capital stock denoted the amount of capital that the organization kept in reserve as collateral; any excess constituted surplus and could be distributed to the shareholders.<sup>87</sup> Since cooperatives distributed profits according to patronage, it was unnecessary for capital stock to serve as the basis of dividend payments. In "one man, one vote" states there was no relationship between voting power and the number of shares held. Further, most Rochdale laws limited capital stock to a nominal sum, \$1000 in Wisconsin and \$5000 in Iowa, and restricted the transferability of stock certificates to preserve the permanent relationship between the

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<sup>85</sup>Meyer, "The Law of Co-operative Marketing," supra n. 70.

<sup>86</sup>Nourse, The Legal Status of Agricultural Cooperation, 51.

<sup>87</sup>Charles B. Elliott, The Law of Corporations (Indianapolis: Bobbs-Merrill, 1923), 328-29.

member and the organization.<sup>88</sup> Despite these statutory declarations that capital stock played a different role in cooperation than it did in regular corporations, its presence in cooperative structure "perpetuated the ordinary corporation idea that capital stock is the primary claimant to benefits from the operations of the organization."<sup>89</sup>

The California legislature was first to sever the link between cooperatives and capital stock. In 1895, the legislature enacted a bill, sponsored by the Farmers' Alliance, with more radical implications than any previous Rochdale statute.<sup>90</sup> The law entirely eliminated capital stock (and with it the intimate relationship between stockholding and voting) and construed membership as personal, non-transferable, and, above all, equitable: "In such association[s] the rights and interest of all members shall be equal, and no member can have or acquire a greater interest therein than any other member has. . . . [E]ach member shall be

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<sup>88</sup>Nourse, The Legal Status of Agricultural Cooperation, 48 at n. 27, 53.

<sup>89</sup>Ibid. The USDA later attempted to distinguish how cooperatives used capital stock. O.B. Jesness, "Cooperative Purchasing and Marketing Organizations Among Farmers in the United States," USDA Bulletin 547 (Washington: Government Printing Office, 1917), 64-65.

<sup>90</sup>Nourse, The Legal Status of Agricultural Cooperation, 54; Ira Cross, "Cooperation in Agriculture," American Economic Review, 1 (1911): 535-544. The bill had other influential supporters, including David Lubin, founder of the International Institute of Agriculture and an enthusiastic proponent of national marketing systems in Europe and the U.S. Nourse, The Legal Status of Agricultural Co-operation, 94-95.

entitled to cast one vote and no more."<sup>91</sup>

In 1909 California passed a law supplementing the 1895 act. The 1909 statute specified that only persons engaged in "the production, preserving, drying, packing, shipping, or marketing" of agricultural products could participate in organizations organized under the 1895 act. The statute also gave the associations the power to determine policies on voting and shareholding.<sup>92</sup> The California laws conveyed the message that a deeper, more lasting bond linked the members of a cooperative: they practiced the same trade, specifically qualifying them for membership, and they accepted the financial limitations and responsibilities of a non-stock association. The 1909 law further departed from the Rochdale gospel in giving associations license to deviate from the "one man, one vote" principle. This provision meant that members could vote in proportion to acreage, number of trees, tonnage of production, or any other measure of patronage the cooperative deemed appropriate. It also meant that some members might have more votes than others. These provisions conceded what California growers already knew: Rochdale cooperation, in its traditional form, did not suit their financial or marketing needs. In fact, the organizations representing the citrus, raisin, peach and

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<sup>91</sup>Cal. Stats., ch. 183, p. 221 (1895), at 222 ("An Act to provide for incorporation, operation, and management of cooperative associations").

<sup>92</sup>Cal. Stats., ch. 26, p. 16 (1909).

apricot, and lima bean growers were all incorporated under general laws rather than the cooperative association laws, because all of these specialized crops required capital for storage, grading, packing, marketing, and shipping operations.<sup>93</sup>

Most states that passed separate incorporation laws chose to follow the stock organization model. Between 1900 and 1920, nineteen states did so. Wisconsin's and Nebraska's were particularly influential, serving respectively as the model for thirteen and four other states. The Wisconsin law limited individual stockholding to \$1000 and permitted no more than one vote per shareholder; it also set the payment of dividends at no more than six percent and specified that excess revenues be diverted into a reserve fund to be used, among other things, for educating people in cooperative principles.<sup>94</sup> The Nebraska law defined cooperatives as any enterprise which distributed part or all of its

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<sup>93</sup>Herman Steen, Cooperative Marketing: The Golden Rule in Agriculture (New York: Doubleday, Page & Co., 1923), 21-50, 260-66; Nourse, The Legal Status of Agricultural Cooperation, 64 at n. 14.

<sup>94</sup>Wisconsin, Laws 1911, ch. 368; followed by Michigan Public Acts 1913, Act No. 398; South Dakota Laws 1913, ch. 145; Washington Session Laws 1913, ch. 19; Massachusetts Laws 1913, ch. 447; New York Laws 1913, ch. 454; Virginia Acts 1914, ch. 329; Iowa Laws 1915, ch. 218; Wyoming Laws 1915, ch. 145; North Carolina Public Laws 1915, ch. 144; South Carolina Laws 1915, No. 152; Oregon Laws 1915, ch. 226; Rhode Island Acts 1916, ch. 1400; Oklahoma Session Laws 1919, ch. 147; Hanna, Law of Co-operative Marketing Associations, 33 at n. 17; Nourse, Legal Status of Agricultural Cooperation, 45-48; Filley, Cooperation in Agriculture, 86-88.

earnings on a patronage basis. It also allowed associations to regulate the ownership and transfer of stock.<sup>95</sup> Only seven other states adopted the basic idea of the non-stock cooperative before 1914: Nevada, Washington, Alabama, Florida, and Oregon, Idaho, and New Mexico.<sup>96</sup> Most copied the California nonstock laws, and many also had laws for incorporating capital stock organizations as well.<sup>97</sup> Separate incorporation laws did not mean that cooperatives were completely free to do as they pleased in the market place. As one commentator noted, "Very few of the newly passed statutes made any mention of public policy--very few of them intimated that the enabling law was to be protection against the attacks on subsequently organized pools because of restraint of trade."<sup>98</sup> All the cooperative incorporation statutes specified that in no case were cooperatives permitted to engage in unlawful activities such as price-fixing

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<sup>95</sup>Nebraska Laws 1911, ch. 32; followed by Indiana Laws 1913, ch. 164; Colorado Laws 1913, ch. 62; North Dakota Laws 1915, ch. 92; Florida Laws 1917, ch. 7384. Hanna, Law of Co-operative Marketing Associations, 31-32; Nourse, Legal Status of Agricultural Co-operation, 45-48; Filley, Cooperation in Agriculture, 86-88.

<sup>96</sup>Nevada Laws 1901, ch. 60; Washington Laws 1907, p. 255; Alabama Act of Special Session 1909, p. 168; Florida Laws 1909, ch. 5598; Oregon Laws 1909, ch. 190; Idaho Laws 1913, ch. 54; New Mexico Session Laws 1915, ch. 64. Hanna, Law of Cooperative Marketing Associations, 35-38, 113.

<sup>97</sup>These included Oregon, Florida, Washington, and California itself. Hanna, Law of Cooperative Marketing Associations, 33 at n. 17; 36 at n. 19.

<sup>98</sup>Charles L. Goldberg, "Co-operative Marketing and Restraint of Trade," 12 Marquette L.R. 270, 273 (1928).

and regulation of production or consumption. These new incorporation laws did not provide anti-trust exemptions to the persons who organized associations under authority of the new laws. But the legislatures apparently intended for the separate incorporation laws to provide the legal basis for distinguishing between cooperatives and regular corporations.

The judiciary, however, found that the elements of this distinction confused rather than clarified its conceptions of the legal status of cooperatives. In some states, cooperatives did not sell capital stock; in others, cooperatives could offer preferred and common shares, voting and non voting stock, or other modifications of the same formula. In moving towards non-stock organizations, California and the states that followed its lead embarked on a new interpretation of the Rochdale principles. But even this development did not really resolve the question of whether cooperatives could have capital stock and still operate in a "cooperative" manner. In cases decided after Connolly, judges looked to the structure of the organization and to its market practices to determine its economic character. The incorporation statutes did not completely clarify judicial understanding of cooperatives' use of operating capital and the nature of cooperative profits. The doctrinal overlap between corporation and cooperative embedded in the new incorporation statutes thus arose as a critical issue after



the statutory exemptions were toppled.

#### Corporate Cooperatives and the Courts

While the new specifications for the handling of capital stock indicated a discernable trend towards codification of the Rochdale principles, they did not eliminate judicial confusion as to the legal status of cooperatives and their impact on the market. Despite the loss of farmers' statutory anti-trust exemptions in the Grice, Connolly, and Brown cases, the cooperative movement continued to grow after 1900. In 1908, President Roosevelt's Secretary of Agriculture proudly reported, "[I]t is safe to say that at the present time more than half of the 6,100,000 farms are represented in economic cooperation."<sup>99</sup> Over 12,000 cooperative organizations came into being nationwide between 1900 and 1920. Of that number, over half--6,690--arose in the Midwest, where grain and dairy farmers banded together in local selling associations. Cotton and tobacco associations sprang up in the South. Farmers made and sold butter and cheese cooperatively in Minnesota and Wisconsin. In the West, particularly Colorado and California, fruit, nut, and vegetable growers experimented with merchandising techniques

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<sup>99</sup>"Report of the Secretary," U.S. Department of Agriculture Yearbook for 1908 (Washington: Government Printing Office, 1909), 167.

for their hard-to-market crops.<sup>100</sup>

Anti-trust problems dogged farmers' cooperatives as opponents used their economic muscle to curb cooperative activity. Cooperative grain elevators in particular "had tough sledding." Competing elevator companies and grain dealers, "abetted by the railroads," boycotted cooperatives and any buyers who did business with them.<sup>101</sup> The cooperative associations fought back by adopting maintenance clauses in their members' contracts. These clauses specified that "members should pay their company a small amount per bushel for all grain sold outside the organization."<sup>102</sup> Between 1890 and 1920, in the words of economist Edwin G. Nourse, "The maintenance clause was coming into considerable vogue as a means of assuring permanent support and giving the necessary stability to farmers' associations."<sup>103</sup> The maintenance clauses gave the opponents of cooperative elevators another point of attack against cooperatives. In states which had not yet adopted separate incorporation

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<sup>100</sup>R.H. Ellsworth, "Statistics of Farmers' Selling and Buying Associations, United States, 1865-1931," Division of Cooperative Marketing, Federal Farm Board, Bulletin, 9 (June, 1932): 23-33, 34-35, 40-47, 71.

<sup>101</sup>Ellsworth, "Statistics of Farmers' Selling and Buying Associations," 41; Andrew W. McKay, Federal Research and Educational Work for Farmer Cooperatives, 1913-1953, USDA Farmer Cooperative Service, Service Report 40 (January 1959), 14-15.

<sup>102</sup>McKay, Federal Research and Educational Work, 12-14.

<sup>103</sup>Nourse, The Legal Status of Agricultural Cooperation, 337.

statutes, cooperatives were defenseless against such charges. And even where capital stock associations were authorized by law, judges were not convinced that they presented no unreasonable barriers to competitive freedom.

The muddy delineation between cooperative and corporation in the capital stock association laws proved of little assistance to cooperatives attempting to protect their patronage. In Iowa, the conflict between the legislature's prerogative in promoting cooperation and juridical anti-trust rationales torpedoed cooperatives' attempts to carve out a place in the market. In Reeves v. Decorah Farmers' Cooperative Society (1913),<sup>104</sup> the Iowa Supreme Court considered the complaint of a hog buyer who had to compete against the cooperative in buying for the Chicago pork market. Although Iowa had a capital stock cooperative incorporation law, the Decorah cooperators had organized in 1911 as a for-profit corporation under the state's general incorporation statute with a capital stock of \$20,000. Its 350 members had subscribed just \$4,000 at the time of the litigation. Moreover, the Decorah Society's purpose came straight out of the cooperative canon: to "establish a market where the farmers would receive for their hogs what they were worth in Decorah" by acting "primarily as a sel-

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<sup>104</sup>Reeves v. Decorah Farmers' Cooperative Society, 160 Iowa 194, 140 N.W. 844 (1913).

ling agency for its members."<sup>105</sup> The Society's by-laws required members to sell all their livestock to the organization, and any member selling to a competitor had to pay a forfeiture of five cents per one hundred pounds sold.

The plaintiff argued that the Society's use of a maintenance clause belied its benign purposes. He attacked the maintenance clause as void under the common law, since it imposed a penalty for contractual non-performance. He also alleged that the Society's true aim was to drive him--and all hog dealers in Decorah--out of business, retaining a monopoly for itself. As proof, he claimed that in order to remain competitive, he had to offer prices that were at least five cents higher than the Society's.<sup>106</sup>

Without statutory relief from the anti-trust laws, the Decorah Society bore the brunt of the court's anti-trust analysis. Under both statutory and common law, any unreasonable interference with competition was void.<sup>107</sup> The court looked at the cooperative's structure and its effect on competition and found nothing to indicate that the Decorah Society was anything other than an ordinary, for-profit commercial corporation. It was undeniably organized as such;

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<sup>105</sup>Id. at 196. Nourse notes that the Society had never intended to make a profit in order to pay out dividends. In two years' time it did \$433,639 worth of business but had just \$29 in its coffers. The Legal Status of Cooperation, 337.

<sup>106</sup>Id. at 198-200.

<sup>107</sup>Id. at 201-02, 205.

further, the association conducted a commercial business by purchasing hogs outright rather than a cooperative enterprise by acting merely as a selling agent to obtain fair prices for members.<sup>108</sup>

The controlling issue in the case was the by-law's impact on competition with other hog buyers, including the plaintiff. The court ruled that the by-law imposed a restraint upon trade because farmers doing business with it were required to sell to no one else or forfeit a part of their profits.<sup>109</sup> The court cited approvingly the decision in Brown v. Jacobs' Pharmacy Co. as an implicit comment on the coercive effects of the Decorah Society's by-law on its members. The by-law bid the plaintiff and other hog buyers out of the market and was thus invalid:

Plaintiff was placed at a disadvantage and could not compete with the society in purchasing hogs from its members, and the members were not free to deal with the plaintiff. If they dealt with him, he either forfeited his profits, by reason of having to pay too much for his hogs, or they forfeited a part of the purchase price as a penalty for selling to another. To our minds, this was undue restraint of competition, or, as the term is now understood, 'restraint of trade.'<sup>110</sup>

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<sup>108</sup>"[T]he association was operated on a basis of outright purchase from the farmer and sale for the account of the society rather than merely shipping the product of the members and remitting to them the proceeds less costs of handling." Nourse, The Legal Status of Agricultural Cooperation, 339.

<sup>109</sup>Reeves, 160 Iowa 194, 205.

<sup>110</sup>Id.

The court's conception of the members' relationship to the cooperative paralleled the Progressive-era juridical understanding of the relation between an employee and a labor union. No confluence of interest united the individual and the organization; rather, the organization encumbered the market freedom of the individual. In this sense, Reeves was the agricultural equivalent of the Supreme Court's decisions in Adair v. U.S. (1908) and Coppage v. Kansas (1915).<sup>111</sup> In those cases, the Court struck labor legislation that prohibited employers from discriminating against labor unions, on the theory that the government could not infringe on the rights of both laborer and employer to deal freely in the market. While the labor cases involved constitutional due process rights and the cooperative case statutory and judge-made anti-trust law, the result was the same and the underlying agenda consistent. The Reeves court's fundamental concern was preserving the market and the right of individuals to compete freely:

So long as competition is regarded as the life of trade, all combinations, contracts, arrangements, or agreements made to stifle it, or which may have that effect, are regarded as unlawful, . . . so long as such restraints are reasonable and just. But, where disconnected with some other contract and made enforceable by fine or penalty, we think they come within the ban of the law.<sup>112</sup>

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<sup>111</sup>208 U.S. 161 (1908) and 236 U.S. 1 (1915).

<sup>112</sup>Reeves, 160 Iowa 194, 204-05.

In 1914, the Iowa Supreme Court reaffirmed this decision in Ludowese v. Farmers' Mutual Cooperative Co.<sup>113</sup>

Judicial condemnation of the anti-competitive effects of maintenance clauses resounded in other jurisdictions. In 1913, the Alabama Supreme Court decided Georgia Fruit Exchange v. Turnipseed,<sup>114</sup> and the Reeves logic permeated its opinion. Turnipseed tested the authority of a Georgia cooperative to compel an Alabama farmer-member to abide by a membership agreement. Incorporated in the agreement were the following conditions: the farmer agreed to ship all his fruit through the Exchange, to pay a 10 percent commission on all sales the Exchange handled for him, to pay five percent to the Exchange if he did his own selling, and to purchase Exchange stock at \$10 per share. Moreover, none of the Exchange's membership agreements would go into effect unless it secured control of 60 percent of the 1909 crop, which it apparently accomplished. That year, Turnipseed shipped thirty-one car loads of peaches outside the Exchange without paying the five percent commission.<sup>115</sup>

The Alabama constitution and anti-trust statute outlawed pools, price-fixing, monopolies, and restraint of com-

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<sup>113</sup>Ludowese v. Farmers' Mutual Cooperative Co., 164 Iowa 197 (1914). There the cooperative defended the maintenance clause as liquidated damages rather than a forfeiture, but the court held that Reeves was controlling.

<sup>114</sup>Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 S. 544 (1913).

<sup>115</sup>Turnipseed, 9 Ala. App. 123, 124-25.

petition, providing the court with ample ammunition to fire at the Exchange's membership agreement. Like the Decorah Society, the Exchange was incorporated as a regular corporation, with a modest amount of capital stock; it had the additional misfortune to be a Georgia corporation doing business in Alabama without having registered under Alabama law.<sup>116</sup> Under these circumstances, the Alabama court was even less inclined than its Iowa counterpart to consider the Exchange's cooperative purposes as ameliorating the application of anti-trust principles to the membership agreement.

The court held that the membership agreement violated common law and statutory prohibitions on monopoly, under the rationale of Ford v. Chicago Milk Shippers. The court found that the Exchange unreasonably restrained trade because the operation of the membership agreement was conditioned on a sufficient subscription of stock and fruit production. It also illegally enhanced the prices paid to farmers, and its requirement of 60 percent control gave the Exchange a "commanding position in fixing the price of peaches in this section of the country." The maintenance clause, requiring the farmer to pay the Exchange a commission even when he did his own selling, struck the court as particularly insidious, since it forced the farmer to sell through the Exchange or else pay a higher commission than the market imposed. The court construed the maintenance clause as a penalty and

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<sup>116</sup>Turnipseed, 9 Ala. App. 123, 126.



released Turnipseed from his obligations under the contract.<sup>117</sup>

The Reeves, Ludowese, and Turnipseed decisions seemed to demonstrate a consistent refusal among state courts to permit cooperatives with capital stock to hamper free trade even if their purpose in doing so was to accomplish cooperative goals. Even though the cooperatives in each case used capital stock differently and had different dividend policies, the courts treated the presence of capital stock as a per se indication of the organization's commercial, for-profit motive. As a result, the courts interpreted the maintenance clauses in their least favorable light--as a means of further centralizing capital and exerting greater power in the marketplace, both of which, in the minds of jurists, tended to restrain trade unreasonably. The judicial understanding of cooperation had come to rely on a strict construction of the Rochdale principles; in order to be cooperative, the organization had to disavow any intention of amassing commercial profits or capital in any form, including capital stock. The implicit assumption, that cooperatives needed no capital to conduct agricultural commerce, was analytically flawed, since it ignored the financial requirements for marketing agricultural commodities. But it reflected a concern about what would happen if powerful, highly capitalized corporations acting under the

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<sup>117</sup>Turnipseed, 9 Ala. App. 123, 136-40.

guise of farmers' cooperative associations gained undue control over commodity marketing. The neat separation between nonstock and stock organizations functioned as a convenient yardstick by which the courts measured the legality of cooperatives. When Congress adopted state juridical concepts of cooperative organization in 1914, it reproduced the ambiguity and incompleteness of state cooperative organization law.

Congress Reconsiders Federal Antitrust Policy, 1911-1914

In keeping with their traditional role in regulating corporations and agricultural production, the states took the lead in promoting cooperation through incorporation statutes. The federal government promoted cooperation far less vigorously. Its activities were confined largely to supporting farmers' organizations through the research and educational subagencies in the USDA.<sup>118</sup> But the formal restraints of dual federalism were again tested between 1911 and 1914, when federal court decisions in two Sherman Act cases forced Congress to reconsider its decision not to specify whether the Sherman Act applied to farmers and laborers. In what contemporary observers saw as a victory for cooperation, Congress enacted laws to protect farmers from federal prosecution. Beginning in 1912, Congress's

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<sup>118</sup>J.T. Horner, "U.S. Government Activities in the Field of Agriculture Prior to 1913," Journal of Farm Economics, (1928): 429-60.

annual appropriations to the Department of Justice for enforcing the anti-trust laws forbade any use of the money to prosecute agricultural associations. Then, in the Clayton Act of 1914, Congress exempted labor unions and non-stock cooperatives from the Sherman Act.

Both the Clayton Act and the appropriations riders set out more clearly the political sentiment that farmers deserved special treatment under the anti-trust laws. But neither action substantively advanced the legal status of agricultural cooperatives. Congress still conceived of farmers' organizations in terms of loose, voluntary associations. True, the states had developed a legal form for cooperation, but their anti-trust exemptions had been struck; federal law provided the exemption but not the legal form. Congress's actions only widened the gaps between legislative and judicial regulatory priorities and further constrained farmers in adapting traditional cooperative principles to the changing dynamics of agricultural marketing.

Two federal cases resurrected the issue, deferred in the Sherman Act but very much on the minds of the courts, as to whether laborers and farmers came within the federal ban on combinations. The first case, Steers v. U.S., involved the Kentucky night-riders. Resorting to their usual tactics, they took possession of a shipment of unpooled tobacco as it lay on the Dry Ridge, Kentucky, train station plat-

form, bound for Cincinnati.<sup>119</sup> A federal grand jury returned the first criminal indictments ever issued under the Sherman Act against twelve members of the Burley Tobacco Society, organized under the 1906 Pooling Law. Eight were convicted of conspiracy and fined. On appeal, the appellants claimed that since the single shipment they commandeered had an insignificant and indirect impact on interstate commerce, the federal courts had no jurisdiction. The Sixth Circuit dismissed this argument and upheld the convictions, noting that the night riders had "wholly stopped" interstate commerce by hijacking the tobacco. Further, nothing in the Standard Oil and American Tobacco cases dictated that "a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition."<sup>120</sup> The court held that the appellants' actions in compelling the growers and the station manager to assist them in taking possession of the tobacco constituted a conspiracy "directed against tobacco which was in the course of shipment out of the state."<sup>121</sup> The decision's commerce clause analysis was sound; however, the political backlash from the federal prosecution of farmers under the Sherman Act aroused such public indignation that President Wilson later commuted all

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<sup>119</sup>Steers v. U.S., 192 F. 1 (C.C.E.D.Ky. 1911).

<sup>120</sup>Id. at 5.

<sup>121</sup>Id. at 6-7.

finer to payment of the costs of the suit.<sup>122</sup>

The outcry over Steers was but a whimper compared to the fury aroused by the Danbury Hatters' Case, Loewe v. Lawlor, decided in 1908.<sup>123</sup> A hat manufacturer, with a plant in Danbury, Connecticut, was boycotted by a local of the American Federation of Labor for refusing to discriminate against non-union labor. Because the hats made in Danbury were shipped into interstate commerce, the union's boycott paved the way for a Sherman Act suit for treble damages. The Court, speaking unanimously through Chief Justice Fuller, ruled that since Congress had not specifically exempted laborers and farmers from the Sherman Act, they were included within its prohibitions: "[Congress] made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them."<sup>124</sup>

Labor unions were particularly victimized by the federal courts' willingness to enjoin them under the Sherman Act from boycotting anti-union employers.<sup>125</sup> But aside from

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<sup>122</sup>Williams, Laws on Trusts and Monopolies, 37.

<sup>123</sup>Loewe v. Lawlor, 208 U.S. 274 (1908).

<sup>124</sup>Id. at 301-02.

<sup>125</sup>The Bureau of Corporations noted in its 1915 report, Trust Laws and Unfair Competition, that the federal courts consistently ruled against labor unions during the 1890s. The leading cases include United States v. Debs et al. and In re Debs, supra n. 15; United States v. Workingmen's Amal-

Connolly and Steers, no federal court had been called upon to decide anti-trust controversies involving agriculture, farm pools, or cooperative organization. Nevertheless, the potential reach of the federal commerce power alarmed both labor and agricultural leaders. They feared that the DOJ would prosecute labor unions and farmers' combinations instead of the big industrial trusts that the Sherman Act was supposed to check.<sup>126</sup> The Supreme Court's adoption of the rule of reason in 1911 further undermined public confidence in the Sherman Act as an effective weapon for controlling the trusts.<sup>127</sup>

As a result, early in the Wilson administration leaders of agricultural and, especially, labor organizations began agitating for anti-trust law reform on two fronts: restricting the enforcement powers of the Antitrust Division of the DOJ and outright revision of the Sherman Act. The labor

amated Council of New Orleans, 54 Fed. 994 (C.C.E.D.La. 1893); Loewe v. Lawlor, supra n. 123; and Coppage v. Kansas, supra n. 111.

<sup>126</sup>As Representative Fitzgerald (Democrat, New York) noted in 1913, "[T]he attitude of the last Republican administration [Taft] was such that there was grave reason to believe hat it would have taken much more pleasure in prosecuting labor organizations and farmers' organizations than it would have taken in prosecuting the industrial combinations that had been so oppressive to the country." Cong. Rec., 50:1 (April 21, 1913), 302.

<sup>127</sup>U.S. House, Committee on the Judiciary, Report on the Federal Anti-trust Law, 62d Congress, 2d sess., 1912, in U.S. Senate, Committee on the Judiciary, Hearings on H.R. 15657, 63d Congress, 2d. sess., 1914; Hofstadter, The Age of Reform, 251.

movement played a far more visible role in lobbying for these reforms than the cooperative movement. Labor leaders such as Samuel Gompers, president of the American Federation of Labor, were well known in the halls of Congress,<sup>128</sup> while the agricultural sector's primary lobbyist was the Farmers' Educational and Cooperative Union of America, at best only a regionally oriented association.<sup>129</sup> The Farmers' Union, as it was known, "maintained cordial relations with organized labor," however,<sup>130</sup> and this alliance preserved the political link between agriculture and labor, originally forged in the Sherman Act debates. The movement to set labor and farmers apart in federal anti-trust policy dovetailed with growing Congressional sentiment from 1911 to 1914 in favor of revising the Sherman Act.<sup>131</sup>

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<sup>128</sup>See, for example, Gompers' testimony on the Bartlett-Bacon Antitrust bill before the House Judiciary Committee, Hearings on Trust Legislation, 63d Congress 2d sess., December 16, 1913, 12-29.

<sup>129</sup>Grant McConnell, The Decline of Agrarian Democracy (New York: Atheneum, 1969), 36-43.

<sup>130</sup>McConnell, Decline of Agrarian Democracy, 38.

<sup>131</sup>Gompers himself reinforced the traditional alliance between labor and farmers in his testimony before the House Judiciary Committee in 1913: "We say that we have been in cooperation with the associated farmers of the country; the Farmers' National Union, the Society of Equity, and others have all been with us and we with them." Hearings on Trust Legislation, 19. On Gompers and the labor movement generally, see Christopher L. Tomlins, The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960 (Cambridge: Cambridge University Press, 1985), 60-82, 120-21; on the movement to revise the Sherman Act, see Sklar, Corporate Reconstruction, 330-31; Hofstadter, The Age of Reform, 113, 251; and Letwin, Law and Eco-

Changing the substantive law of the anti-trust policy proved far more difficult than simply attaching conditions to the Executive Branch's enforcement of the law, so Congress turned its attention to the DOJ first. In 1913, House Democrats from the Midwest and South attached a rider to the sundry civil appropriations bill containing the \$250,000 allocated to the DOJ specifically for enforcement of the anti-trust laws. The rider read:

[N]o part of this money shall be spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours or or bettering the conditions of labor, or for any act done in furtherance thereof, not in itself unlawful: Provided further, That no part of this appropriation shall be expended for the prosecution of producers of farm products and associations of farmers who cooperate and organize in an effort to and for the purpose to obtain and maintain a fair and reasonable price for their products.<sup>132</sup>

This bill sailed through the House, aided by a rule that prevented amendments to any part of it unless the entire

conomic Policy, 273-76.

<sup>132</sup>CR, 50:1 (62d Congress, 1st sess., April 21, 1913), 302. The DOJ's entire budget amounted to some \$10,000,000, any of which could be spent on anti-trust enforcement. A special allocation for the Anti-trust Division, including the rider, was first made in 1912, to address the Division's failure to act under President Taft and "to relieve the administration of the excuse that it was hampered by a lack of funds." Ibid. (remarks of Rep. Fitzgerald, D-MA). President Taft vetoed the entire appropriations bill because he considered the rider unconstitutional. CR, 50:1 (April 21, 1913), 302; 50:1 (May 5, 1913), 1105 (President Taft's veto message to 61st Congress).



bill was recommitted to committee.<sup>133</sup> Opponents in the Senate put the friends of labor and agriculture to the test, however. Business interests flooded the chamber with letters of protest.<sup>134</sup> Some senators opposed all exemptions simply as a matter of principle. Others contended that the proviso did not endow labor unions and farmers with privileges they did not already have; if they violated the Sherman Act by using, for example, a secondary boycott, the government was free to proceed against them. Still others questioned the practice of enacting substantive policy in an appropriations law.<sup>135</sup> In both houses, however, the debate focused almost exclusively on labor. Even those who favored the rider did not address cooperatives except to aver that the logic used to proceed against labor unions could conceivably be used against farmers as well.<sup>136</sup> After six weary

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<sup>133</sup>CR, 50:1 (April 22, 1913), 318-19.

<sup>134</sup>CR, 50:1 (May 5, 1913), 1105 (letters from Cadillac Motor Car Co., The Atlanta Builders' Exchange, and the U.S. Chamber of Commerce printed in record).

<sup>135</sup>CR, 50:3 (May 5, 1913), 1103-1112 (remarks of Senator Borah (Idaho), Senator Townsend (Michigan), Cummins), 1189-1197, 1269-1292. Many senators were concerned about the implications of the Danbury Hatters' case and believed that explicit exemption for labor was necessary to make Congressional intent clear. Their opponents focused on the unconstitutionality of class legislation and the questionable practice of writing substantive law into appropriations bills.

<sup>136</sup>CR, 50:3 (May 5, 1913), 1114 (remarks of Senator Bacon: "There can be no question of the effect that the same logic or system of reasoning which brings the court to the conclusion that the antitrust law does cover agreements among laborers will also be used to rule that agreements

weeks of debate the Senate passed the bill in June, 1913, and President Wilson immediately signed it. An identical proviso was included in annual appropriations bills almost every year thereafter until 1928.<sup>137</sup>

Sixteen months later, when Congress passed the Clayton Anti-Trust Act, congressional thinking about the legal status of cooperatives embraced one aspect of the state-level statutory developments.<sup>138</sup> Besides specifying some of the prohibitions implicit in the Sherman Act,<sup>139</sup> the Clayton Act also enlarged on the substantive policy contained in the appropriations rider. Section 6 provided that:

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among agriculturalists for the purpose of endeavoring to get the best prices for their products will also be unlawful and under the ban of this law . . .")

<sup>137</sup>CR, 50:4 (June 17, 1913), 2015, 2275; U.S. Statutes at Large, 38:1, ch. 3, p. 53 (Public Law 3, June 23, 1913); 38:1, ch. 223, p. 652 (Public Law 161, August 1, 1914); 38:1, ch. 75, p. 866 (Public Law 263, March 3, 1915); 39:1, ch. 209, p. 312 (Public Law 132, July 1, 1916); 40:1, ch. 26, p. 155 (Public Law 20, June 12, 1917); 40:1, ch. 113, pp. 681-82 (Public Law 181, July 1, 1918); 41:1, ch. 93, pp. 336-37 (Public Law 73, November 4, 1919); 42:1A, ch. 204, p. 613 (Public Law 229, June 1, 1922); 42:1B, ch. 21, p. 1080 (Public Law 377, January 1, 1923); 43:1, ch. 204, p. 217-18 (Public Law 153, May 28, 1924); 43:1, ch. 364, p. 1027 (Public Law 502, June 30, 1926); 44:2, ch. 195, p. 343 (Public Law 156, April 29, 1926); 44:2, ch. 189, p. 1194 (Public Law 658, February 24, 1927). There was no rider in the 1925 appropriations bill.

<sup>138</sup>38 U.S. Statutes at Large 730 (October 15, 1914).

<sup>139</sup>In particular, see Section 2 (prohibition on discriminatory pricing), Section 3 (exclusive dealing and restrictions on resale), Section 7 (mergers and holding companies), and Section 8 (interlocking directorates). Letwin, Law and Economic Policy, 273-76; Bureau of Corporations, Trust Laws and Unfair Competition, 132-37.

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>140</sup>

In this section, Congress recognized two assumptions central to the cooperative movement. First, agricultural combinations differed from regular industrial combinations in legally significant ways, particularly their for-profit status and their mutual-benefit organizational purpose. Second, Congress deemed these differences germane to anti-trust policy and saw in them sufficient grounds for freeing agricultural organizations from per se liability.<sup>141</sup> This was precisely the argument offered by counsel for the Farmers' Union during congressional debate on the bill:

The exclusive object of these capitalistic combinations is invariably predatory profit and not

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<sup>140</sup>Clayton Anti-Trust Act, supra n. 138, §6 (emphasis added).

<sup>141</sup>As the majority report of the House Judiciary Committee commented, the object of the section was to make it clear to the courts that such organizations as described in the Act did not "come within the scope and purview of the Sherman anti-trust law" in the same way as "industrial corporations and combinations." House Rep. 623, Report on H.R. 15657, May 13, 1914, in U.S. Senate, Committee on the Judiciary, Hearings on H.R. 15657, 63d Congress, 2d sess. (Washington: Government Printing Office, 1914), 36.

the mutual help, education, cooperative and fraternal production designed to increase principally the all-around individual and collective efficiency of its many members that characterize farmers' cooperative and educational unions and organizations.<sup>142</sup>

But Congress' study of state cooperative incorporation law was at best incomplete.<sup>143</sup> Using the presence of capital stock by which to judge the anti-trust culpability of cooperatives was far from an unambiguous standard. In many states, cooperatives could organize under either capital-stock or non-stock laws. Few state legislatures had settled the question of whether non-stock associations were inherently cooperative and capital stock organizations inherently corporate. Only a small minority of the House Judiciary committee spelled out the problems that Section 6 raised:

There can be no doubt that as to "consumers, agricultural, or horticultural" organizations this limitation [to non-stock organizations] is a fatal defect. Every organization of farmers which aims to cooperatively bargain as to the products of its members is "conducted for profit," and many of

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<sup>142</sup>J.H. Paten, general counsel for the Farmers' Educational and Cooperative Union of America, to Rep. Victor Murdock (D-Kansas), April 13, 1914, in CR, 51:7 (63d Congress, 2d. session, April 23, 1914), 7146.

<sup>143</sup>This interpretation is all the more likely if one accepts James Guth's contention that Senator John Walsh, a Montana Republican who knew little about cooperatives, was the author of Section 6. James Guth, "Farmer Monopolies, Cooperatives, and the Intent of Congress: Origins of the Capper-Volstead Act," Agricultural History, 56 (1982): 73. Apparently California cooperative attorney Aaron Sapiro claimed to have had some role in composing the provision. James Shideler, Farm Crisis, 1919-1923 (Berkeley: University of California Press, 1957), 8.

them have "capital stock." . . . As soon as farmers combine to get better prices for their products, or to sell directly to consumers, this paragraph affords them no relief from the anti-trust laws.<sup>144</sup>

Experts closely associated with the cooperative movement agreed that the distinction between capital stock and non-stock organizations was not indicative of the cooperative purpose of the organization. G. Harold Powell, a former USDA economist and president of the California Fruit Growers' Exchange, laid out the "fundamental principles of co-operation" in a circular published just as the Clayton Act became law. Powell suggested that state and federal statutes define cooperative in relation to specific Rochdale principles rather than incorporation and capital stock. True cooperatives, he asserted, were those "which are formed exclusively for the benefit of the members; whose voting power is based on equality of membership; whose membership is confined exclusively to active producers; . . . and whose earnings are distributed on the basis of the product, rather than on the capital contributed by each member."<sup>145</sup> But the

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<sup>144</sup>House Rep. 623, Report on H.R. 15657, May 13, 1914, in U.S. Senate, Committee on the Judiciary, Hearings on H.R. 15657, 63d Congress, 2d sess. (Washington: Government Printing Office, 1914), 118 (minority report of Reps. John M. Nelson and A.J. Volstead).

<sup>145</sup>G. Harold Powell, "Fundamental Principles of Co-operation in Agriculture," Circular No. 123, University of California Agricultural Experiment Station (October, 1914): 2. Powell did recommend, however, that cooperators avoid incorporating under the stock incorporation laws because of the difficulty of restricting transactions involving capital

legal system did not yet recognize the full range of cooperative practices because in its system of formal categories cooperatives resided with ordinary corporations.

Legal conceptions of cooperation focused on capital stock to the exclusion of factors such as voting, membership, and patronage dividends. Under the Clayton Act, only non-capitalized cooperatives could enjoy the privilege of anti-trust exemption. The distinction between capital stock and non-stock organizations, however, confused rather than clarified the legal status of cooperatives under the anti-trust laws because it did not reflect the entire range of cooperative practices or their philosophical foundations. And, while the states by this point had not completely sorted out the complex array of ideas associated with cooperation, Congress unwittingly truncated the process by setting up a litmus test that constricted the range of cooperative organizations exempt from prosecution under federal law.

#### The Importance of Capital Stock

In subsequent cases, state courts took their cues both from the Clayton Act and from the Supreme Court's adoption of the rule of reason in the Standard Oil and American Tobacco cases. These decisions did not depart from the structural approach to cooperatives and anti-trust law that

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stock into the hands of non-producers.

had accompanied the division of regulatory duties under dual federalism. To determine what constituted a reasonable restraint of trade, most courts looked to the intent and purpose of the cooperative; what constituted intent and purpose according to the Clayton Act was corporate structure, rather than the aim to secure fair prices and to engage in volume selling and buying. The bifurcated incorporation structure of the state statutes and, after 1914, the Clayton Act controlled judicial reasoning in these cases. The courts' Janus-faced interpretation of the Clayton Act and the incorporation statutes placed cooperatives in a perilous position. Farmers had to choose between adopting corporate features necessary to cooperative business operations and claiming the federal anti-trust exemption. And, even though the DOJ was barred from taking cooperatives to court under federal law, state courts still vigilantly scrutinized claims that agricultural cooperatives restrained trade.

The state courts continued to construe cooperative practice and corporate structure as mutually exclusive, following Reeves. One example is Burns v. Wray Farmers' Grain Co., decided in Colorado in 1918.<sup>146</sup> The Wray cooperative was regularly incorporated with a capital stock of \$10,000, doing business in grain, hogs, and coal for 230 stockholders. Its maintenance clause specified that members

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<sup>146</sup>Burns v. Wray Farmers' Grain Co., 65 Colo. 425 (1918).

could sell to competing dealers in the town of Wray as long as they paid the Grain Company one cent per bushel. The Grain Company sued Burns when he refused to pay for the 3500 bushels he sold outside the company. Burns appealed after losing at trial, arguing that the by-law was invalid as a restraint of trade and a bar to free competition. The court reiterated the standard common law rule governing contracts in restraint of trade: the contract was illegal if it reduced competition, effected a monopoly, maintained prices, "or by other means hampered or obstruct[ed] the course of trade as it would be carried on if left to the control of the natural law governing trade or commerce."<sup>147</sup>

Lacking Colorado precedent on maintenance clauses, the court looked to the Iowa court's decisions in Reese and Ludowese, which presented "practically the same identical question." The Colorado court concluded that the effect of the by-law was to increase prices, ultimately driving competitors out of business in Wray and giving the Grain Company a monopoly. Just how much of a monopoly the Grain Company could secure with only 230 members the court did not specify. The judges were spooked by the for-profit corporate character of the Grain Company; unlike the Decorah Society, which acted merely as a selling agent and never paid dividends, the Grain Company paid its stockholders dividends every year. The court concluded that the Grain

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<sup>147</sup>Id. at 428.



Company was in business to profit itself rather than its members and deemed the by-law an unreasonable restriction on the rights of the stockholders to sell to whom they pleased. The court was more concerned about the injury inflicted upon the public than the possibility that the stockholders had freely chosen to abide by the conditions of membership in the Grain Company, imposed for the purpose of assuring the patronage of the stockholders. The court concluded that "the by-law in the instant case is less necessary as a fair protection to the stockholders than it was in the Iowa case, and therefore the restraint would be unreasonable in a greater degree than it was in that case."<sup>148</sup>

The judiciary's conclusion that only non-stock organizations were truly cooperative began to soften towards the end of the decade. In Ex parte Baldwin County Producers' Corporation (1919), an Alabama cooperative had incorporated under general laws, shunning the state's 1909 non-stock law. Nevertheless, the Alabama supreme court found that its purpose was "mutual benefit through the application of cooperati[ve] . . . principles." Overturning a lower court finding that the respondent was a regular corporation, the court held that its by-law "prima facie . . . was valid and not ultra vires" or in restraint of trade, since the organization was providing services to members at cost rather

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<sup>148</sup>Id. at 431-32.

than making profits for itself.<sup>149</sup>

The same year, the New York Court of Appeal gave the same construction to the facts raised in Castorland Milk and Cheese Association v. Shantz and Bullville Milk Producers' Association v. Armstrong.<sup>150</sup> Both plaintiffs were dairy cooperatives, regularly incorporated with small amounts of capital stock. Their marketing agreements specified liquidated damages of \$2 and \$10 per cow, respectively, in case of failure to deliver to the associations. The opinion writers in both cases viewed the corporate structure of the associations as complimentary to their economic purpose. As Judge Seeger wrote in Armstrong: "It seems to me that the agreement in question constitutes a valid and binding contract, and is not void as being against public policy and in restraint of trade. . . . It cannot be said that an agreement such as this would tend to restrain trade or stifle competition; on the contrary, it seems to me that it encourages competition by bringing a new creamery into being."<sup>151</sup>

The courts in Baldwin, Armstrong, and Shantz implicitly rejected the Reeves rule that capital stock, regardless of the amount, constituted prima facie evidence of capitalistic

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<sup>149</sup>Ex Parte Baldwin County Producers' Corporation, 203 Ala. 345 (1919).

<sup>150</sup>Castorland Milk and Cheese Assn. v. Shantz, 179 N.Y.S. 131 (1919); Bullville Milk Producers' Assn. v. Armstrong, 178 N.Y.S. 612 (1919).

<sup>151</sup>Bullville, 178 N.Y.S. 612 at 613.

purpose. Instead, the courts simply accepted cooperatives' use of capital stock and maintenance clauses for cooperative ends: "The incorporators of this association desired to engage in the business of shipping milk and it was quite necessary that they be assured of the continued patronage of their members in order to justify the association in going to the expense of acquiring and erecting a creamery."<sup>152</sup> These rulings departed from the judiciary's preoccupation with capital stock. World war, depression, and federal litigation over cooperatives led Congress to finish the job and recast anew the legal form of cooperation after 1920.

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<sup>152</sup>Id.

### CHAPTER 3

#### AGRICULTURE'S MAGNA CARTA: THE CAPPER-VOLSTEAD ACT

The farmer is not in a position to do as a manufacturer does. He can not control his markets and he can not make his own prices, and he never ought to have been made subject to the provisions of the antitrust law.

Senator Gilbert M. Hitchcock, R-Nebraska, 1922<sup>1</sup>

Despite legislative attempts to clarify the legal status of cooperatives during the 1910s, some of the most powerful agricultural marketing organizations in the country became the objects of federal and state anti-trust prosecutions after World War I. Lawsuits against raisin and milk producers' cooperatives lent credence to the farmers' contention that federal law on cooperatives provided insufficient guidance in determining what practices were permissible and what actions legitimately required government intervention. The political uproar that followed forced Congress to consider new legislation to govern cooperatives. Congress was primarily concerned with two issues: the scope and nature of agricultural monopoly and the locus of federal regulatory authority over cooperatives.<sup>2</sup>

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<sup>1</sup>CR, Senate, 67th Congress, 2d sess., February 8, 1922, p. 2263.

<sup>2</sup>For the history of these lawsuits and the political movements in Congress for new legislation on cooperatives, see James Guth, "Farmer Monopolies, Cooperatives and the Intent of Congress: Origins of the Capper-Volstead Act,"

Many in Congress believed that cooperation furnished an attractive solution to the post-World War I economic crisis. There was considerable political capital to be gained from cooperative marketing legislation as well; the national farm groups and the newly-formed Farm Bloc threw their support behind the idea. But there were major stumbling blocks to overcome as well: the fear that farmers would abuse the privilege to extort excessive prices from consumers and the issue of who should regulate cooperatives. The bill's proponents dismissed the first problem as unlikely for most agricultural commodities, particularly staple crops in which producers were scattered over large parts of the nation. The second issue was resolved by giving authority over prices to the Secretary of Agriculture, who could resort to the courts if farmers refused to comply with his orders. Just what authority the Department of Justice (DOJ) retained to prosecute farmers under the Sherman Act was unclear.<sup>3</sup>

Yet observers regarded the Capper-Volstead Act as the

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Agricultural History, 56 (1982): 67-82.

<sup>3</sup>James Guth implies that the DOJ was completely shut out of federal regulation of cooperatives under the anti-trust laws. Guth, "Farmer Monopolies," 67-82. Guth rightfully debunks the notion that Congress intended for the DOJ and the Federal Trade Commission to "retain their basic responsibilities under the antitrust laws." But his account of the political currents underlying the act does not examine actual administration of the law, in which the respective duties of Agriculture and Justice were actually defined.

"Magna Carta" of cooperative marketing.<sup>4</sup> The law extended the Clayton Act exemption to cooperatives with capital stock, a broader and more permissive stance than any previous enactment, state or federal. But the law itself was just as much an expression of Congress's preoccupation with monopoly and prices as a charter of liberty for cooperatives. Rather than ending the debate on the proper structure of cooperatives, the Capper-Volstead Act reinvigorated the dispute over the role of such fundamentals as capital stock, membership, and voting.

The Capper-Volstead Act emerged from the "farm crisis" that besieged the country after World War I. In the four years after the Armistice, agriculture traveled from the crest of prosperity to the trough of depression. Agricultural prices benefitted from wartime inflation. But the boom did not last, and as the nation settled in for a long period of postwar isolationism and conservatism under Republican presidents Harding and Coolidge, farmers suffered. Prices reached a nadir in 1921, but even after some improvement occurred in 1922 and 1923, farm prices remained much lower than retail prices for finished goods. The crisis mandated federal assistance to farmers, a move that expanded wartime governmental involvement in agricultural affairs. As historian James Shideler put it, "[I]f governmental

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<sup>4</sup>A. Ladru Jensen, "Economic and Legal Thought on Cooperatives," Journal of Farm Economics, 31 (1949): 899.

policy could change the conditions of agriculture during a war emergency, government might also be used on behalf of agriculture during an economic emergency."<sup>5</sup>

The move to enact protective legislation for agricultural cooperatives, then, was a response to the larger economic crisis of the postwar period. The American Farm Bureau Federation, the Farmers' National Council, and the National Board of Farm Organizations were all organized in 1919 to promote farmers' interests at Washington. These groups supplemented and extended the influence of the venerable Patrons of Husbandry and the Farmers' Union. All these organizations became highly visible in pushing for such legislative plums as rural credit, emergency loans, and the repeal of daylight savings time. They also took a keen interest in the progress of the cooperative marketing legislation, since they believed that "farmers' relief from the extortion of monopoly in manufacture and commerce is to be found in cooperation."<sup>6</sup>

At the same time, however, in the view of federal authorities, cooperation was furnishing not the relief from monopoly but simply another form of it. The raisin growers

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<sup>5</sup>James H. Shideler, Farm Crisis, 1919-1923 (Berkeley and Los Angeles: University of California Press, 1957), 1, 19.

<sup>6</sup>Shideler, Farm Crisis, 24-27 (quoting American Farm Bureau Federation, Resolutions Adopted at Organization Meetings Held in Chicago November 14, 1919, and March 19, 1920, 2-4).

were not the only agricultural producers experiencing difficulties with the federal government. Beginning in 1917, the DOJ instituted Sherman Act suits against the organizations of dairy farmers in Chicago, New York, and other major cities. In an effort to force urban milk distributors to pay better prices, dairy cooperatives staged "milk strikes" in Chicago and New York. In defiance of the anti-trust laws, they fixed prices, boycotted milk distributors, cornered supplies, diverted shipments from their intended destinations, and "us[ed] economic sanctions to keep members (and nonmembers) 'in line.'"<sup>7</sup> State officials quickly filed suit to enjoin the cooperatives from further obstruction of trade, and the DOJ considered action of its own. In 1920, U.S. attorneys procured indictments against the milk producers at New Orleans.<sup>8</sup>

The controversies surrounding the raisin and milk producers demonstrated the defects of Section 6 of the Clayton Act. As the farmers' groups saw it, when cooperatives succeeded in exerting any influence over prices, the DOJ deemed that influence violated the anti-trust laws. Neither the Clayton Act nor the annual appropriations riders deflected prosecutorial attention.<sup>9</sup> Generally, farmers

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<sup>7</sup>Guth, "Farmer Monopolies," 69.

<sup>8</sup>Guth, "Farmer Monopolies," 76.

<sup>9</sup>The farm sector had never been completely satisfied with Section 6 of the Clayton Act. Immediately after its passage in 1914, George Farrand, attorney for the California



wanted the freedom to cooperate in the form and manner they deemed appropriate, with capital stock and dominant market control if they so chose. In particular, the milk producers sought protection from DOJ "harass[ment]." The farm interests dismissed the monopoly problem with the claim that cooperatives placed "reasonable organizational restraints" on competition for the legitimate purpose of securing better prices for agricultural commodities.<sup>10</sup> Preoccupied with

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Fruit Growers' Exchange, commented on the law's ambiguity, noting, "If its purpose was to exempt [non-stock] labor unions and farmer organizations . . . from the effect of all anti-trust laws, more apt language could have been used to convey that idea." Farrand, "The Federal Trade Commission Act and the Clayton Bill, Remarks to the Board of Directors of the California Fruit Growers Exchange," November 11, 1914, "Cooperation" File, Correspondence of the Secretary of Agriculture, Record Group 16, National Archives, Washington, D.C. (hereafter RG, NA).

<sup>10</sup>Jensen, "Economic and Legal Thought on Cooperatives," 898. With one exception, the courts had provided little guidance as to the limits of the Clayton Act exemption. In U.S. v. King, 250 Fed. 908 (1916), a Massachusetts district court held that cooperatives could not engage in tactics prohibited by the Act, in this case a secondary boycott enforced against non-members through blacklists and threats. The case reinforced the farmers' fear that under the Sherman Act they were fully liable for combinations that restrained trade; they believed that this interpretation of Sherman rendered the Clayton Act exemption a virtual nullity. As Franklin D. Jones, one of the attorneys for the raisin packers in U.S. v. CARC, wrote, "The section was so drawn that such an organization [a non-stock cooperative] or its members committing acts of a character violating the anti-trust acts remained liable to the penalties of these laws." Jones, "The Status of Farmers' Co-operative Associations Under Federal Law," Journal of Political Economy, 29 (1921): 596. But the Clayton Act only permitted farmers to engage in activities that were not "otherwise illegal," and the court had ruled in labor cases that secondary boycotts were prohibited by the Sherman Act. The farm groups, then, were misconstruing the court's decision as antagonistic to farmers when it was merely hostile to illegal interference with

their own problems, they were uninterested in defining the standards by which the difference between presumably legal cooperation and potentially illegal monopoly could be ascertained.

As its constituents were being "harassed" by federal authorities, the USDA stood diffidently off to the side, declining to become involved in interpreting the anti-trust laws. Under President Wilson, Secretary David Houston was overtly unsympathetic to farmers; his successor, Edwin A. Meredith, was only slightly less so. While the milk producers were battling state prosecutions, the USDA solicitor under Meredith, William M. Williams, warned Bureau of Markets officials not to endorse any of the suspect practices. Indeed, his counsel was to let the DOJ handle such matters. "Some of the practices are so flagrant," he cautioned in 1918, "that it would seem that the best policy on our part would be to call the attention of the Department of Justice to them." Even under President Coolidge, the Department maintained a distinct distaste for policing trust-like behavior.<sup>11</sup> Prior to passage of the Capper-Volstead Act,

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interstate commerce.

<sup>11</sup>Williams to Warber, October 3, 1918, Records of the Office of the Solicitor, Box 58, RG 16, NA. The narrow scope of the Clayton Act exemption helped to chart the Department's conservative course. The work of the Bureau of Markets was confined to assisting only those organizations formed without capital stock. Cooperatives formed on a stock basis, or organizations "which approached a violation of the anti-trust laws," could not appeal to the Department for assistance. In one case, Williams reported to Meredith,

then, the USDA took no active interest in administering the anti-trust laws in cases involving farmers.

Confronted with the vehemence of the DOJ, the passivity of the USDA, and the unsatisfactory status of federal law, the farm groups turned to Congress for redress. In May, 1920, the Capper-Hersman bill, sponsored by the National Board of Farm Organizations, was introduced in the House. The bill extended the Clayton Act exemption to all "associations, corporate or otherwise, with or without capital stock . . . any law to the contrary notwithstanding." By its terms, if an association were organized for the "mutual benefit of the members," adhered to the one-person, one vote principle, and paid no more than eight percent dividends on its capital, it could enjoy a sweeping immunity from the federal anti-trust laws. Under Section 2 of the bill, the Secretary of Agriculture was to determine if any association "restrains trade or lessens competition to such an extent that the price of any agricultural products [sic] is unduly enhanced." Upon such a finding, after notification and hearings, the Secretary could order the association to "cease and desist" from price-enhancing practices. If the association refused to comply the Secretary could file suit in federal district court, and the DOJ would enforce any

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a Bureau of Markets official "exceeded his authority and got us into trouble with the Department of Justice." Williams to Warber, October 3, 1918, *ibid.*; Williams to Harrison, March 8, 1920, Records of the Office of the Solicitor, Box 60, RG 16, NA.

orders issued by the court.<sup>12</sup>

It took two sessions for the farm bloc to get the bill through Congress. In 1920, the bill easily passed the House, where opposition was minimal. But the Senate was troubled over what the bill would do to existing anti-trust law, particularly since it did not provide specific standards as to what constituted "unduly enhanced" prices. Attempting to allay these fears, Senator Underwood asserted that the rule of reason laid down by the Supreme Court would still apply to agricultural organizations; the bill would merely "provide a new method of enforcing the law." Skeptics were unpersuaded. If, as the bill's supporters claimed, cooperatives came under the rule of reason by virtue of being reasonable restraints upon trade, then no federal prosecution of farmers could stand, and there was no need for legislation to permit them "to avoid the consequences of the Sherman antitrust law." The Senate amended the bill before approving it, transferring regulatory powers from the Secretary of Agriculture to the Federal Trade Commission. Congress recessed before a conference commit-

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<sup>12</sup>Text of H.R. 13931, CR, House, May 28, 1921, p. 7851. The bill was named for Senator Arthur Capper of Kansas and California Rep. Hersman; the following year, Minnesota Rep. Andrew Volstead reintroduced the legislation in the House, hence the change in the name of the act. The inclusion of capital stock organizations was apparently due to the influence of Western cooperatives, particularly the California fruit organizations. Remarks of Senator Smith and Senator Walsh, CR, Senate, December 15, 1920, 364-65.

tee could reconcile the two versions.<sup>13</sup>

The USDA was surprisingly unhelpful to the farm groups as the legislation was debated in Congress. As James Guth noted, "The USDA's posture was a continuing source of frustration" to the farmers.<sup>14</sup> The Department was internally divided over both the possibility that agricultural cooperatives could monopolize trade and the undesirable responsibility of enforcing the legislation, "sure to generate complaints from consumers, middlemen, and urban politicians."<sup>15</sup> There was also the issue of funding. Outgoing Secretary Edwin Meredith, drafting his opinion on the bill for Senate Judiciary Committee Chair Knute Nelson, expressed doubt "whether the Secretary of Agriculture would have any funds with which to carry out the provisions of the bill."<sup>16</sup> Enforcement would surely be problematic, even with appropriate funding. Meredith's assistant, F.R. Harrison, told his boss the bill would impose on the Department "a very large responsibility which . . . will be exceedingly difficult,

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<sup>13</sup>CR, Senate, December 14, 1920, pp. 316-18 (remarks of Smith, D-Ga.; Dillingham, R-Vt); December 15, 1920, 360-76; Guth, "Farmer Monopolies," 78.

<sup>14</sup>Guth, "Farmer Monopolies," 77.

<sup>15</sup>Ibid.

<sup>16</sup>Meredith to Nelson, May 26, 1920, "Bills (Senate)" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

under all the circumstances, to execute."<sup>17</sup> Even Henry C. Taylor, the chief of the Bureau of Agricultural Economics, which oversaw much of the Department's work with markets and cooperatives, was reluctant to endorse the bill. Taylor informed the Secretary, "Personally, I would rather the Federal Trade Commission would handle the matter" as long as it relied on USDA cost estimates for evaluating prices.<sup>18</sup> Only the head of the Office of Farm Management saw a larger issue at stake. Asher Hobson worried that these official statements from Departmental higher-ups manifested a lack of interest in the bill's larger purpose. Hobson urged the Department to state for the record its support for the "general purpose of the bill--to relieve farmers' cooperative buying and selling organizations from undue and harassing litigation."<sup>19</sup> But no official declaration of support came from the USDA until Henry C. Wallace took over as Coolidge's Secretary of Agriculture in 1921; accordingly, the Department made no move either to oppose the Senate amendments or to facilitate conference committee deliberations before Congress adjourned in December, 1920.

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<sup>17</sup>Harrison to Henry C. Taylor, May 8, 1920, "Bills (House)" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

<sup>18</sup>Taylor to Harrison, December 21, 1920, "Bills (House)" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

<sup>19</sup>"Memorandum," Hobson to Harrison, June 2, 1920, "Bills (Senate)" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

The next year, the farm groups brought intense political pressure to bear on "Old Guard opposition" to the cooperative movement. This move was fortified by another Supreme Court decision in early 1921 that narrowly interpreted the scope of the Clayton Act. The case of Duplex Printing Press Co. v. Deering construed Section 6 to mean that labor and horticultural associations were not permitted to engage in activities outside their "normal and legitimate objects." The Clayton Act, in other words, did not authorize "any activity otherwise unlawful."<sup>20</sup> The Court's ruling in Duplex Printing was consistent with earlier judicial interpretation of the Clayton Act<sup>21</sup> and echoed the position of the bill's opponents in the Senate in 1920. But the decision galvanized the newly-organized Farm Bloc into making the cooperative marketing bill its top priority during the Sixty-Seventh Congress. According to James Shideler, "[T]he farm groups vigorously argued the necessity for special federal legislation if the cooperative movement was to fulfill its objectives and put agriculture on a stable economic base."<sup>22</sup>

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<sup>20</sup>Duplex Printing Co. v. Deering, 254 U.S. 443 (1921), 469.

<sup>21</sup>See discussion of U.S. v. King, 250 Fed. 908 (1916), n. 10, above.

<sup>22</sup>Shideler, Farm Crisis, 169. The Farm Bloc was formed by a group of senators from agricultural states in May, 1921, to formulate "legislation beneficial to agriculture." Richard B. Lowitt, George R. Norris: The Persistence of a Progressive, 1913-1933 (Urbana: University of Illinois

The bill was reintroduced in April, 1921, with two major changes. The Capper-Hersman bill authorized associations to handle the products "of their members"; the Capper-Volstead bill, H.R. 2373, broadened this definition to include the commodities "of such persons so engaged" in agricultural production. The change meant that cooperatives were not restricted to doing business exclusively for members. But the second alteration tossed a bone to the anti-monopoly hounds in the Senate; the sweeping anti-trust exemption ("any laws to the contrary notwithstanding") was dropped. Instead, the exemption was to be inferred rather than explicit; the bill simply authorized the existence of all associations meeting the specified criteria. Interpretation of the anti-trust laws as applied to cooperatives was left to the Secretary of Agriculture under the enforcement powers granted in Section 2.<sup>23</sup>

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Press, 1971), 172-73. Lowitt contends that most of the bloc's members, including Nebraska Republican Norris, deserted the group when it became apparent that the farm bloc was "being used for partisan political purposes" by the incumbent Republican administration. The only biographer of Arthur Capper implies that the Farm Bloc thwarted as much as facilitated the President's agricultural relief program. Homer E. Socolofsky, Arthur Capper: Publisher, Politician, and Philanthropist (Lawrence: University of Kansas Press, 1962). Capper's own memoir, The Agricultural Bloc (New York: Harcourt, Brace & Co., 1922) is too self-congratulatory to be useful on this point.

<sup>23</sup>Compare drafts of H.R. 13931, CR, House, May 28, 1920, p. 7851, with H.R. 2373, in U.S. Congress, Senate, Committee on the Judiciary, Association of Producers of Agricultural Products, Hearings, 67th Cong., 1 sess., June, 1921, p. 139 (hereafter 1921 Hearings).



The House quickly passed the bill, leaving the Senate to recapitulate its fears about monopolies and extortionist prices in committee and on the floor.<sup>24</sup> Montana Democrat John Walsh, the opposition leader in the Senate, sympathized with farmers but made it clear that he in no way intended to promote illegal monopolies: "I intend to make the law so that those who do not intend to organize a monopoly can do cooperative marketing, and those who intend to organize a monopoly can not organize a monopoly."<sup>25</sup> Still troubled by the bill's vague language on monopolistic behavior and pricing, the Senate Judiciary Committee again amended the bill. With Walsh leading the way, the committee deleted the entire enforcement section and added in its stead an anti-monopoly provision that forbade the "creation of or attempt to create a monopoly" or any behavior prohibited under the Federal Trade Commission Act of 1914.<sup>26</sup>

The committee's amendments reflected the conviction that despite the claims of the farm groups, there was no need to protect farmers from the anti-trust laws. When they did violate the law, this belief ran, they deserved to be prosecuted. Walsh, for example, was "frightened" by the "image of 85,000 dairymen from six states bargaining collec-

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<sup>24</sup>For the House actions in 1921, see CR, House, May 4, 1921, pp. 1033-46.

<sup>25</sup>1921 Hearings, 139.

<sup>26</sup>CR, Senate, Feb. 2, 1922, p. 2050.

tively with New York milk dealers."<sup>27</sup> The CARC was repudiated as "a confessed monopoly," a worst-case scenario come true.<sup>28</sup> But even such fierce opponents of monopoly as Walsh believed those cases were exceptions, arising over commodities that were grown in a limited area (raisins) or that were highly perishable and incapable of shipment over long distances (milk). By contrast, staple crops such as wheat, corn, oats, rye, and barley were dispersed across several states and had no special spoilage considerations; accordingly, the committee concluded, most farmers were incapable of establishing monopolies. "Of course," Walsh said at the Judiciary Committee hearings, "I agree that in the vast multitude of cases, and in regard to the vast majority of the products, the question [of monopoly] never would arise." If farmers were generally incapable of concertedly fixing prices, then it followed that they needed no exemption from the anti-trust laws, only a Congressional declaration that they could conduct routine business without worrying about litigation. Walsh contended that the amendments were sufficient to remove the "peril, if there be peril, of prosecution" under Section 1 of the Sherman Act.<sup>29</sup>

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<sup>27</sup>Guth, "Farmer Monopolies," 73.

<sup>28</sup>CR, Senate, February 6, 1922, p. 2157.

<sup>29</sup>CR, Senate, Feb. 4, 1922, p. 2123. Walsh's statement reflected the feeling among the opposition that the charges of DOJ harassment were greatly exaggerated. In fact, the farm sector's demand for relief from the DOJ overshadowed the problem of distinguishing between monopolies and cooper-

But the farm lobbyists were horrified at Walsh's changes. By default, they argued, these amendments left all farmers, not just the milk producers and raisin growers, where they already were--at the mercy of the DOJ. To the farm groups, this result was unacceptable. As California attorney Aaron Sapiro informed Senator Capper, "The Walsh amendment . . . will not give to the growers of the United States any important single thing which they do not have now in their rights, and will do definite harm to cooperation. . . . [T]he farmers' organizations would rather see no legislation at all than such an act."<sup>30</sup>

Such an outcome was hardly likely in view of the widespread political support for agricultural relief generated by the farm organizations and the congressional Farm Bloc.<sup>31</sup>

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atives. Instead, the farm groups played their role as victims of a vengeful Attorney General to the hilt and professed innocence at all charges of possible monopoly. Thus, the amendments stripped away the pretext for the bill, compelling its proponents to carry the farmers-as-victims characterization still further. Senator Thomas Sterling of South Dakota argued that the amended bill "upon its face invites a prosecution as for the offense of monopolizing or attempting to monopolize. Ambitious U.S. district attorneys or persons envious of or feeling that their business might possible be injured by a company or an association of farmers would be quick to seize upon section 2 of the Sherman Antitrust Act for the purpose of instituting a prosecution." CR, Senate, February 7, 1922, p. 2218; Shideler, Farm Crisis, 113.

<sup>30</sup>CR, Senate, February 2, 1922, p. 2058.

<sup>31</sup>The immense political advantage in championing the cause of farmers meant, of course, that the cooperative marketing bill at times became a political football, lobbied by President and Congress, Republicans and Democrats, agricultural representatives and urbanites alike. See Shideler,

President Harding endorsed the bill in the midst of Senate debate in January, 1922. Indeed, apart from the anti-monopoly forces in the Senate, the only serious support for the Judiciary Committee bill came from Secretary Wallace and his solicitor, R.W. Williams. Like their predecessors, they preferred to avoid the sole responsibility of regulating cooperatives under the vague language of the enforcement section in the House bill. Since the farm groups lobbying for the bill disclaimed any intent to monopolize or "unduly enhance" prices, Williams argued, the Senate version of the bill was consonant with the purposes of the original House bill, that is, to protect farmers from DOJ harassment.<sup>32</sup>

Williams may have had the better legal argument, but the farm groups had the votes. In the bitter debate that followed, the Senate rejected the Judiciary Committee amendments. Nebraska Republican George Norris disarmingly confirmed the anti-monopoly forces' worst fear. The bill in fact legalized cooperatives to exist as agricultural monopolies with the power to fix prices:

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Farm Crisis, 95-123, 217-42; and Socolofsky, Arthur Capper, 145-65.

<sup>32</sup>Wallace to Senator George Norris, April 30, 1921, "Bills" File, Correspondence of the Secretary of Agriculture, RG 16, NA. Williams, like Walsh, saw no need to make explicit what was inherent in the law. After the Senate hearings, Williams told the Secretary, "Unless you believe that organizations of agricultural producers should be authorized to engage in monopolies and methods of competition which, with respect to other persons, are held to be unfair, the bill, even with the Senate amendment is very satisfactory." Williams to Wallace, August 2, 1921, ibid.

[T]his power given to the Secretary of Agriculture will never be exercised; but the Senate must not get away from the proposition that it is the price, after all, which is the foundation of it all. . . . The farmer wants to get a higher price for his product, and that is going to be the object of his organization, and if he can organize and get a higher price without increasing the price to the consumer, everybody will say amen to it. . . . So there is no use trying to dodge the proposition that it is a price-fixing proposition, for it is.<sup>33</sup>

The bill passed the Senate by a margin of 58 to 1 on February 8 and became law ten days later.<sup>34</sup>

The debate on monopoly and federal regulatory authority obscured what would become the most significant aspect of the new law, from both the perspective of the USDA and the cooperative movement. This was the legal form to which Capper-Volstead cooperatives would have to conform in order to come within the exemption. The law in its final form required cooperatives either to adhere to the one-person, one-vote principle or to the eight percent limit on dividends; and in all cases to do no more business with non-members than with members. Walsh added the 50 percent non-member business limit during the last days of debate, in an at-

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<sup>33</sup>CR, Senate, February 8, 1922, p. 2270.

<sup>34</sup>CR, Senate, February 8, 1922, pp. 2282, 2582. The House quickly agreed to the Senate changes and President Harding signed the bill on February 18; CR, House, February 11, 1922, pp. 2453-55, 2523, 2582, 2715, 3172; Capper-Volstead Act, 42 U.S. Statutes at Large 388 (February 18, 1922); Guth, "Farmer Monopolies," 80-82; Shideler, Farm Crisis, 113-14, 169-70.

tempt to limit both the scope of the anti-trust exemption and the ability of cooperatives to drive other producers out of the market: "It ought not to be placed in the power of this monopolistic organization to drive out of existence and out of the business in which they are engaged the men who do not happen to come in."<sup>35</sup> Walsh argued that only persons who derived their principal living from farming should be entitled to the exemption. The idea was apparently so self-evident that no other senator rose to comment on it. In fact, during the two years the legislation was under consideration, little attention was paid to the specific nature of the cooperative associations being authorized. The legal definition of cooperation in the bill came from the original version authored by the National Board of Farm Organizations in 1920 and was incorporated in the revised bill the following year.<sup>36</sup>

The Capper-Volstead Act was a definite victory for the agricultural bloc. Far from marking "the beginnings of a legislative definition of a true cooperative," however, the law represented merely another stage in the evolving legal status of cooperatives.<sup>37</sup> Congress had finally addressed

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<sup>35</sup>CR, Senate, February 8, 1922, p. 2268.

<sup>36</sup>S. Rep. 236, in CR, Senate, February 3, 1922, pp. 2121-22; February 8, 1922, pp. 2267-69, 2270-71; Shideler, Farm Crisis, 27.

<sup>37</sup>Jensen, "Economic and Legal Thought on Cooperatives," 899.

the defects of the Clayton Act by recognizing the overlap between cooperative and corporation, particularly the farmers' need for capital stock. As Asher Hobson of the USDA publicly proclaimed, "This legislation merely tends to grant to cooperative organizations some of the privileges of the business organization."<sup>38</sup> At the same time, the law acknowledged the distinctive character of the association formed "for the mutual benefit of the members thereof."<sup>39</sup> But the law's breakthrough in the legal form of cooperation was more a pragmatic consolidation of different cooperative features than a considered rendering of a philosophical ideal. It explicitly adopted only two features that could be clearly identified as Rochdalian--the principles of one person, one vote and membership restricted to producers. The law's authors and Congress cribbed the dividend limit from the state capital-stock laws. The 50 percent limit on business conducted for non-members came from Walsh, whose understanding of cooperation was informed by the traditional grain elevators, creameries, and shipping associations at work in Montana, not the large-scale, centralized, market control-oriented corporations in milk and horticultural

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<sup>38</sup>Hobson, "Farmers' Co-operative Associations: Their Legal and Legislative Aspects," American Economic Review, 11 (1921): 225.

<sup>39</sup>Capper-Volstead Act, enabling clause.

ture.<sup>40</sup>

Indeed, Congress's deliberation on the legal form of cooperatives came as an afterthought to the acrimonious debate on monopoly, prices, and enforcement. Congress was so concerned with the prospect of illegal prices that, even when Walsh's amendment called attention to the legal form of cooperatives, the Senate gave little thought to the issue. Instead, Congress was responding to the specific defect in the Clayton Act--the restriction of the exemption to non-stock organizations. The "philosophy of cooperation [that] triumphed in the formulation of the Capper-Volstead Act" catered to the desires of individuals who "desired to continue the capital-stock type of organization and to secure for it as great freedom of action as for those organized under the more extreme non-stock form."<sup>41</sup> As long as the democratic voting principle was observed, cooperatives could resemble and behave as much like regular corporations as they pleased. The only bar on the economic activities of these organizations was the slippery slope of "unduly enhanced" prices, for which Congress provided no guidance either to the cooperatives or to the official who had to determine at what point prices became legally intolerable.

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<sup>40</sup>For discussion of the state capital stock laws, see chapter 2 of this study; on Walsh's understanding of cooperation, see Guth, "Farmer Monopolies," 73.

<sup>41</sup>Edwin G. Nourse, The Legal Status of Agricultural Cooperation (New York: Macmillan & Co., 1928), 254.



In analysis that must be seen as tinged with understatement, Edwin G. Nourse wrote in 1928 that "the law is rather ambiguous as an expression of cooperative doctrine."<sup>42</sup>

And, as it turned out, during the first decade after the law's passage and beyond, it was not on the question of price but legal form that farmers demanded the interpretive judgment of the USDA. Requests came to the Department from farmers and cooperative organizers seeking to determine if their associations would come under the blanket of immunity conferred by the statute. The USDA consistently informed inquiring correspondents that "all associations desirous of obtaining [the law's] benefits must have only producers as stockholders."<sup>43</sup> And the Department also adhered to a literal reading of federal jurisdiction in interstate commerce. In a public statement on the new law in March, 1922, the Secretary noted that the Capper-Volstead Act "does not change or supercede laws of the various states affecting or relating to the regulation of cooperative associations." The Act would not pertain to purely intrastate transactions.<sup>44</sup> Despite Congress's ardent interest in prices, no

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<sup>42</sup>Nourse, Legal Status of Agricultural Cooperation, 256.

<sup>43</sup>Wallace to A.S. Ennis, July 17, 1922, Microfilm Records M440, Reel 165, Correspondence of the Bureau of Agricultural Economics, Records of the Secretary of Agriculture, RG 16, NA.

<sup>44</sup>"Statement Relative To and Text of Capper-Volstead Act," March 7, 1922, "Bills (H.R. 2373)" File, Correspondence of the Secretary of Agriculture, RG 16, NA; for state-

Secretary of Agriculture has ever invoked the Section 2 powers as to price.<sup>45</sup>

The enthusiasm that the new law generated among farmers was perhaps the law's greatest immediate accomplishment. Despite the fact that Congress had given little substantive thought to the legal form of cooperation, the Capper-Volstead Act did in fact broaden the class of organizations entitled to exemption from the anti-trust laws. That in itself was a significant victory for farmers. But how farmers would enjoy the fruits of that victory was far less certain. The enforcement provision placed cooperatives under the presumably friendly--but inexperienced--supervision of the USDA. While the law mandated that relationship only as to the question of prices, the USDA found itself playing a much greater role in the administration of the criteria for the legal form of Capper-Volstead coopera-

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ments relating to cooperative organization and interstate trade, see ibid.; for Departmental advice to cooperatives regarding prices and contracts for purchase and sale of commodities, see Wallace to A.S. Ennis, July 17, 1922, Correspondence of the Secretary of Agriculture, Bureau of Agricultural Economics, M440, Reel 165; RG 16, NA; Will L. Barter to USDA, February 5, 1923, Williams to Barter, February 26, 1923, "Marketing, Cooperative, Capper-Volstead Act, Miscellaneous" File, Records of the Office of the Solicitor, Box 59, RG 16, NA.

<sup>45</sup>Richard B. Heflebower, Cooperatives and Mutuals in the Market System (Madison: University of Wisconsin Press, 1980), 37; Jensen, "Economic and Legal Thought on Cooperatives," 899; Guth, "Farmer Monopolies," 81.

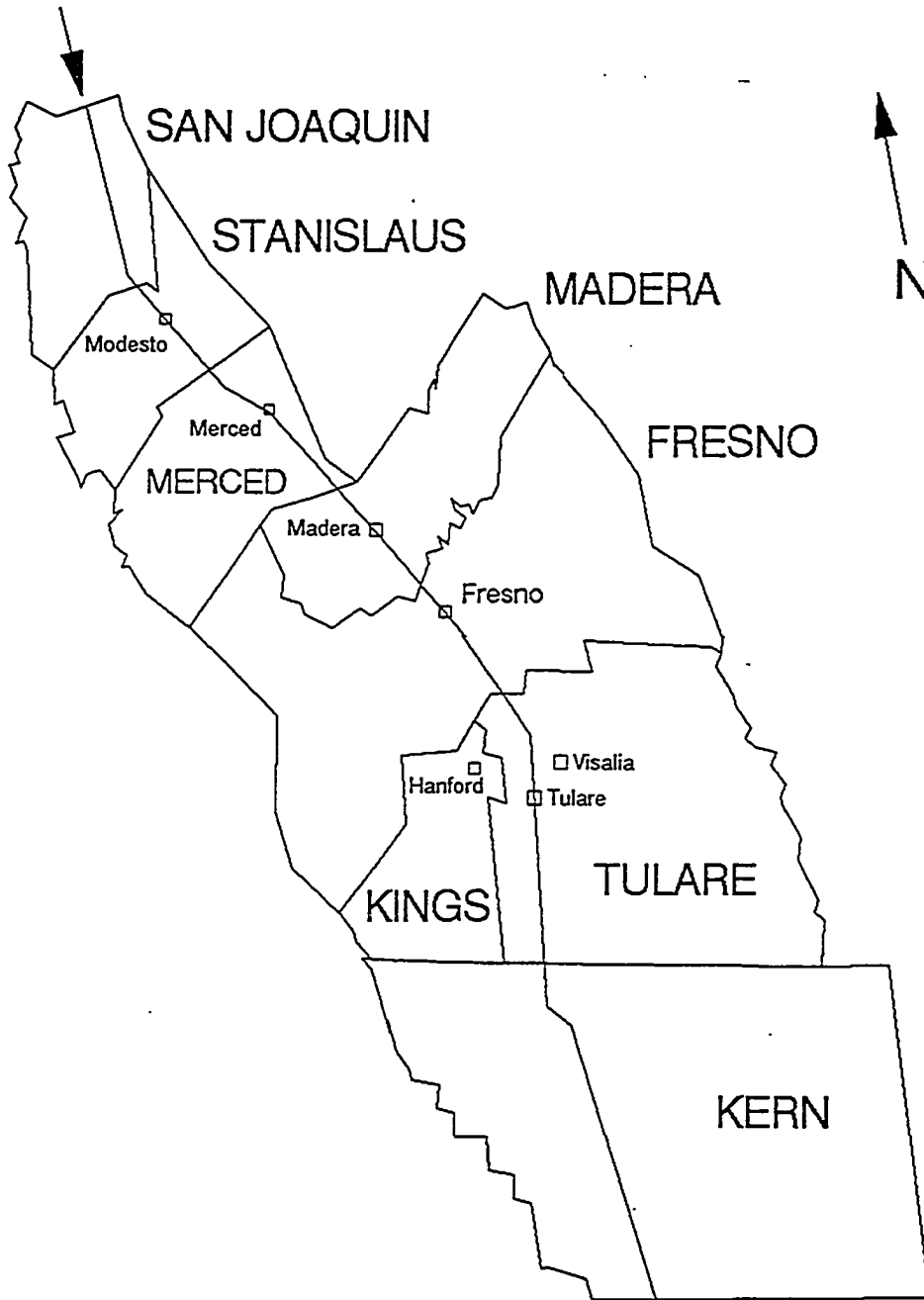
tives than Congress anticipated.<sup>46</sup>

The questions of administration would be largely settled before the onset of the Great Depression. The Capper-Volstead Act to this day stands as the single most important federal statute regulating agricultural cooperatives. It grants cooperatives substantial freedom to combine producers, consolidate marketing operations, and exert control over prices short of "unduly enhanc[ing]" them. And, while changed attitudes towards monopoly in general and the political need to respond to the post-war agricultural crisis helped to win votes for the act, one important reason for its passage arose out of the raisin vineyards in California's Central Valley.

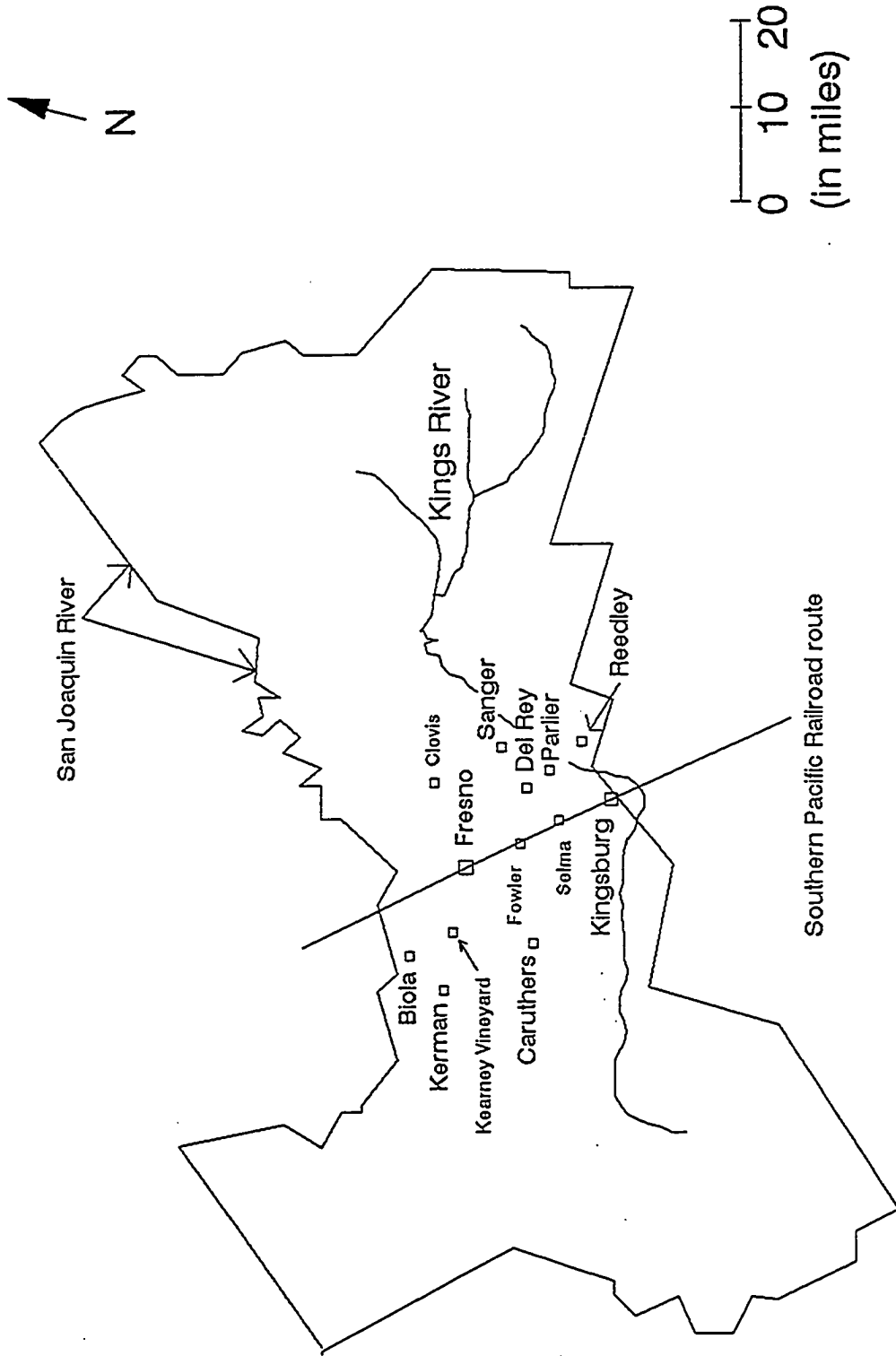
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<sup>46</sup>This role engendered conflict with the DOJ. The DOJ was unwilling to concede that the law preempted its authority to prosecute anti-trust violations. As the Attorney General's assistant, A.T. Seymour, informed Secretary Wallace in late 1923, "[T]he question whether this Department regards that act as preventing prosecution under the Federal Anti-Trust Act has been under consideration by the Department, although the Department has expressed no conclusion thereon." A.T. Seymour to Secretary of Agriculture, November 25, 1923, "Cooperative Marketing" File, Box 59, Records of the Office of the Solicitor, RG 16, NA.

### Southern Pacific Railroad route



### 2. The California raisin industry region



3. The raisin-growing communities of Fresno County, California.

PART II. COOPERATION AND THE PROBLEM OF APPLICATION

## CHAPTER 4

### CREATING AN "AGRICULTURAL TRUST" IN THE CALIFORNIA RAISIN INDUSTRY

This is an era of trusts and combinations. . . . Our sole aim from now on should be to apply this principle of combination in all our affairs so as to secure the greatest economy in production and in placing our products on the markets of the world.

M. Theo Kearney, President, California Raisin  
Growers Association, 1899<sup>1</sup>

The rise of commercial horticulture in California's Central Valley challenged prevailing legal assumptions regarding agricultural monopoly. Experimenting with economics and law, growers created a new style of cooperation that emphasized efficient business practices and corporate organization. The organizations they developed transformed the traditional cooperative idea of equity into industry-wide monopoly--and ultimately succeeded in changing federal law to accommodate the new ideal. As a California observer noted in 1899, "The principle of cooperation in [agriculture] for marketing purposes is identical with that of the cooperation of capitalists in what are called 'Trusts.'"<sup>2</sup>

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<sup>1</sup>Kearney, "Address Before the State Fruit Growers' Convention, December 14, 1899, On the Organization of the Raisin Growers for the Sale of Their Raisins," File 5, Box 1, M. Theo Kearney Papers, Fresno City and County Historical Society, Fresno, California (hereafter MTKP-FHS).

<sup>2</sup>Edward F. Adams, The Modern Farmer in His Business Relations (San Francisco: N.J. Stone Company, 1899), 440.

Of California's many horticultural crops, raisins first produced this concept of cooperation as agricultural trust. From 1890 to 1912, growers, bankers, lawyers, and other people with interests in the welfare of the industry and the Central Valley towns it spawned tried new ways of meshing cooperation and market control. The natural environment and the peculiar economic dynamics of the raisin industry created fertile grounds for experimenting with cooperation.<sup>3</sup>

The influence of the traditional model of Rochdale cooperation was strongly felt in California, particularly among European immigrants who had experienced the system firsthand. But exceptional economic conditions called for new approaches to cooperation. Spearheading the cooperative movement in the raisin industry was a flamboyant, eccentric Irish emigre named M. Theo Kearney. His belief that agricultural cooperatives should copy the methods and structure of industrial trusts supplied the philosophical cornerstone of the California Associated Raisin Company (CARC), formed in 1912. The CARC's dogged emphasis on market control and efficiency signaled the birth of a new breed of agricultural cooperative, one that emerged out of Kearney's pioneering

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<sup>3</sup>Charles C. Colby, "The California Raisin Industry--A Study in Geographic Interpretation," Annals of the Association of American Geographers, 14 (1924): 49-108; W.Y. Spence, "Success After Twenty Years," SMH, 3:4 (November, 1917): 4-5; H.E. Erdman, "The Development and Significance of California Cooperatives, 1900-1915," Agricultural History, 32 (1958): 179-84.



efforts to create an "agricultural trust."<sup>4</sup>

Agriculture in the Central Valley, 1850-1890

The natural environment and the singular dynamics of commercial horticulture were intimately connected with the rise of cooperation in the raisin industry. Since the 1870s, people have cultivated raisin grapes in California's Central Valley, a long, level plain stretching 450 miles from Redding in the north to Bakersfield in the south and averaging 70 miles in width. The Central Valley lies between the coastal ranges, which intercept the cold air currents off the Pacific Ocean, and the frosted peaks of the Sierra Nevadas, which rim the state's eastern border and deflect the Canadian jet stream. The elevations protect the valley in between from extreme temperatures and snow. As a result, winters are short, mild, and rainy and summers long, hot, and dry. The Valley was once an inland seabasin, the repository of water from the San Francisco Delta and the melted runoff from the Sierra snows. By the time the state entered the Union in 1850, all that remained of the Valley's ancient geography were huge tableaus of drylands and marshes, watered by a network of rivers streaming down from the mountains.<sup>5</sup>

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<sup>4</sup>Adams, The Modern Farmer, 490.

<sup>5</sup>Ann Foley Schuering, ed., A Guidebook to California Agriculture (Berkeley: University of California Press, 1983), 1; Gilbert Fite, The Farmers' Frontier, 1865-1900 (New York, 1966), 157-58; Edward J. Wickson, Rural Califor-

The pastoral landscape of giant ranchos that dominated California during its Mexican period changed rapidly after the gold rush and statehood. By 1860, the state's population swelled by 300,000, and many Americans turned to farming to support themselves and their families. During the first twenty years after statehood, wheat literally put California agriculture on the map. The demand of English and Irish wheat buyers for the "soft, white California product" was practically insatiable, and the trade soon linked the state to international agricultural markets. But beginning in the 1870s, however, wheat became the ancien regime of California agriculture.<sup>6</sup>

nia (San Francisco: Rural State and Province Series, 1922), 13-16; Elna Bakker, An Island Called California, An Ecological Introduction to its Natural Communities, 2d ed. (Berkeley: University of California Press, 1971), 144-45. For further analysis of the geology of the Central Valley, see Crane S. Miller and Richard Myslop, California: The Geography of Diversity (Pomona: California State Polytechnic University, 1983), 59-60; and Robert W. Durrenberger with Robert B. Johnson, California: Patterns on the Land, 5th ed. (Palo Alto: Mayfield Publishing Company, 1976), 2-8.

<sup>6</sup>On Mexican agriculture, see Frank Adams, "The Historical Background of California Agriculture," in Claude B. Hutchinson, ed., California Agriculture (Berkeley: University of California Press, 1946), 17-33, and Wickson, Rural California, 27-75. For a discussion of agriculture after 1850, see Rodman Paul, "The Beginnings of Agriculture in California: Innovation vs. Continuity," California Historical Quarterly, 52 (1973): 16-27, 19. On the rise of the wheat trade, see Paul, "Beginnings of Agriculture," 19-23; Wickson, Rural California, 75-83; Morton Rothstein, "West Coast Farmers and the Tyranny of Distance: Agriculture on the Fringes of the World Market," Agricultural History, 49 (1975): 272-80; on its decline, see Rothstein, "The California 'Wheat Kings,'" Working Paper Series, Agricultural History Center, University of California, Davis, 1985; Carey McWilliams, Factories in the Field, (Boston: Little, Brown,

Aided by technological developments, California farmers turned to horticulture on an industrial scale: the commercial production of specialized fruit crops such as oranges, grapefruit, lemons, pears, peaches, prunes, apricots, walnuts, almonds, table and wine grapes, and raisins.<sup>7</sup> The completion of the transcontinental railroad, the construction of irrigation projects, and the advent of agricultural settlements in the Valley contributed to the growth of horticulture. The rise of fruit canning and drying firms--plus the technology to support them--and the increasing mechanization of farmwork were also important. But the unusual climate presented problems of disease, insects and other pests, and spoilage that confounded scientists and growers for years. Despite these difficulties, horticulturalists persevered. By 1880 industrial horticulture became a

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1939), 17; Adams, "Historical Background," 33-35; and Bean and Rawls, California, 199-200.

<sup>7</sup>Determining what pomological crops the land would support took a great deal of experimentation and persistence. California horticulturalists worked from the experiences of mission farmers and of pioneers such as William Wolfskill, who had set up experimental orchards in citrus and deciduous fruits prior to statehood. The formation of the California State Agricultural Society in 1854 gave farmers an organization within which to exchange information and through which to influence legislature policy. Adams, "Historical Background of California Agriculture," 39; Gerald Nash, State Government and Economic Development (Berkeley: Institute of Intergovernmental Studies, 1964), 63-65.

permanent fixture in the state's flourishing economy.<sup>8</sup>

The land speculators who bought up huge chunks of Central Valley land well understood the relationship between transportation, irrigation, and settlement. The land speculators from San Francisco, William S. Chapman, Isaac Friedlander, Edmund Jannssen and Frederick Roeding, the cattle barons Henry Miller and Charles Lux, and bankers William C. Ralston, Nicholas Luning, and A.J. Pope took advantage of liberal homesteading laws and acquired lands in Fresno County during the 1860s and 1870s. While some of these investors had agricultural operations of their own, their primary enterprise was to make money by selling their tracts off in small parcels to farmers.<sup>9</sup> They persuaded friends at the

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<sup>8</sup>The state legislature, the various agricultural societies, and the new University College of Agriculture at Berkeley all assisted growers with these problems. Nash, State Government and Economic Development, 135-49; Donald J. Pisani, From the Family Farm to Agribusiness: The Irrigation Crusade in California and the West (Berkeley: University of California Press, 1984), 2-11; Bean and Rawls, California, 199-201; Benedict, "Economic and Social Structure of California Agriculture," 399; Cletus Daniel, Bitter Harvest: A History of California Farmworkers, 1870-1941 (Ithaca: Cornell University Press, 1981), 40-70.

<sup>9</sup>Edith Catharine Meyer, "The Development of the Raisin Industry in Fresno County, California" (M.A. thesis, University of California, Berkeley, 1931), 21-38; Feramorz Young Fox, "Co-operation in the Raisin Industry of California" (M.A. thesis, University of California, Berkeley, 1912), 2-3. Agricultural colonies like the ones at Fresno proliferated in Southern California as well. Robert G. Cleland, The Cattle on a Thousand Hills: Southern California, 1850-1880 (San Marino: The Huntington Library, 1951), 157-59. On land colonization in California generally, see Robert V. Hine, California's Utopian Colonies, (New Haven: Yale University Press, 1966; repr., Berkeley: University of California Press, 1983).

Central Pacific and Southern Pacific to build rail lines through the valley. They incorporated irrigation companies to claim water from the San Joaquin and Kings rivers.<sup>10</sup> They established an extensive system of colony farms in and around Fresno with water rights appurtenant to the land.<sup>11</sup> They even supplied some tracts with canals and irrigation works that would carry the river water to the peach orchards and grape vineyards that settlers planted after the mid-

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<sup>10</sup>I. Teilman and W.H. Shafer, The Historical Story of Irrigation in Central California (Fresno: Williams and Son, 1943), 3-5. The doctrine of prior appropriation, gradually adopted by state courts during the nineteenth century, enabled landowners whose tracts did not lie adjacent to streams to assert claims to the flow and physically remove the water to use for irrigation. Joseph Sax and Richard Abrams, Water Law (St. Paul, Minn.: West Publishing Co., 1985); Donald Worster, Rivers of Empire: Water, Aridity and the Growth of the American West (New York: Pantheon Books, 1985), 88-96; and Pisani, From the Family Farm to Agri-Business, 30-53. For studies showing how California's peculiar water law developed, see Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America," Law and Society Review, 10 (1976): 235-66; and M. Catherine Miller, "Riparian Rights and the Control of Water in California, 1879-1928: The Relationship Between an Agricultural Enterprise and Legal Change," Agricultural History, 59 (1985): 1-24.

<sup>11</sup>Virginia M. Thickens, "Pioneer Agricultural Colonies of Fresno County," California Historical Society Quarterly, 25 (1946): 21; Schyler and William K. Patterson. M. Theo Kearney: Prince of Fresno. A Biography of Martin Theodore Kearney (Fresno: The Fresno City and County Historical Society, 1988), 7-8; Wallace W. Elliot, History of Fresno County, California, rept. ed. (Fresno: Valley Publishers, 1973), 111-115; Teilman and Shafer, The Historical Story of Irrigation in Central California, 5-15. According to Wickson, the irrigated communities were larger and more successful than non-irrigated settlements where growers had to stake their own claims to water and provide their own canals. Rural California, 79-82.

1870s.<sup>12</sup> In Fresno County alone developers connected over 300,000 acres to private canals during the 1870s. Other private irrigation works sprung up in the Central Valley as subdivision proceeded.<sup>13</sup>

The agricultural colonization schemes touched off a population explosion and created a landholding pattern that were crucial to the rise of the raisin industry. Between 1875 and 1885 landowners laid out over fifteen other colonies in Fresno and Tulare counties.<sup>14</sup> Towns such as Selma, Kingsburg, Reedley, and Sanger began to dot the landscape along the Southern Pacific's main route and branch lines.

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<sup>12</sup>Thickens, "Pioneer Agricultural Colonies," 19; Rehart and Patterson, M. Theo Kearney, 6. These systems were haphazardly engineered and constructed, resulting in drainage problems, flooding, and alkali accumulation. Charles C. Colby, "The California Raisin Industry--A Study in Geographic Interpretation," Annals of the Association of American Geographers, 14 (1924): 79-80.

<sup>13</sup>Fresno County Centennial Committee, Fresno County Centennial Almanac (Fresno, CA: Privately printed, 1956), 33-34. During the nineteenth century, in matters of irrigation as in other areas of enterprise, Californians tended to trust private entrepreneurs more than government to construct what were, in effect, public works. Nash, State Government and Economic Development, 188-206; Pisani, From the Family Farm to Agribusiness, 154-55; and Mansel Blackford, The Politics of Business in California, 1890-1920 (Columbus: Ohio State University Press, 1977). For assessments, generally critical, of California irrigation policy, see Donald Worster, "Hydraulic Society in California: An Ecological Interpretation," Agricultural History, 56 (1982): 503-15; and Pisani, From the Family Farm to Agri-Business, 440-52.

<sup>14</sup>Thickens, "Pioneer Agricultural Colonies," 24-36, 169-76; Lilbourne Alsip Winchell, History of Fresno County and the San Joaquin Valley (Fresno: Arthur H. Cawston, 1933), 9-11.

Promotional literature extolled in effusive terms the benevolent climate and the profitability of fruit farming:

Fresno County, A Wonderfully Prosperous District in California. The Land of Sunshine, Fruits, and Flowers. No Ice. No Snow. No Blizzards. No Cyclones. If you desire a delightful home and prosperity **Get a Fruit Farm in Fresno County.** Surrounding the town of Fresno, there are 34 colonies, embracing areas of 320 to 9,000 acres each, now occupied by thousands of prosperous families, in fruit farms of 10 to 40 acres each. More than half of these people never farmed before.<sup>15</sup>

The news of the Fresno colonies attracted settlers from the eastern U.S., Denmark, Sweden, Norway, Germany, Italy, Turkish Armenia, Portugal, Russia, Mexico, China, and, after 1900, Japan. This miniature melting pot greatly contributed to the growth of the raisin industry. The Armenians, Italians, and Portuguese brought their skills at viticulture and raisin drying.<sup>16</sup> Since these groups tended to settle with

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<sup>15</sup>Circular, s.d. [but 1887], M. Theo Kearney Papers, File 5 (Printed Materials, 1887-1903), Box 1, MTKP-FHS. Chapman and Kearney advertised several of their colonies with pamphlets such as this one. Rehart and Patterson, M. Theo Kearney, 9.

<sup>16</sup>Thickens, "Pioneer Agricultural Colonies," 35-38, 169-77; Meyer, "Development of the Raisin Industry," 52-61; Ben R. Walker, The Fresno County Blue Book (Fresno: Arthur H. Cawston, 1941), 46-49, 233; Ralph Moradian, "Armenians," in Fresno County Centennial Committee, ed., Fresno County Centennial Almanac, 139; Nectar Davidian, The Seropians: First Armenian Settlers in Fresno County, California (Berkeley: Privately published, 1965), 3-14; "Fresno: Where Half the World's Raisins Come From," pamphlet (Fresno: Fresno County Chamber of Commerce, September 2, 1922); Wilson Wallis, Fresno Armenians (to 1919), ed. Nectar Davidian (Lawrence, Kansas: Coronado Press, 1965), 35-74.

relatives or friends from their native lands, the colonies set up pockets of ethnicity that later figured prominently in the struggle over cooperation.

The colony settlements attracted diverse communities of immigrants and situated them on small farms well suited to raisin growing. Even after the colonies began to disband in the late 1880s and early 1890s, the landholding pattern they instituted endured. Contemporary observers boasted about the importance and extent of small farms in the Central Valley. George West, the State Viticultural Commissioner for the San Joaquin district, remarked in 1891, "Large tracts of land in all the counties of the valley are being subdivided and sold in tracts of from ten to fifty acres, many of which are bought by people who intend settling upon the land purchased and embarking their all in the raisin business." By decade's end, M. Theo Kearney's own land colonization schemes had extended this pattern to lands outside the original colonies: "Thousands of families," he wrote, "are now settled on twenty and forty acre fruit farms about Fresno."<sup>17</sup>

The prevalence of small farms in the Central Valley contradicts conventional wisdom about farm size in Califor-

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<sup>17</sup>Report of the State Viticultural Commission (Sacramento: State Superintendent of Printing, 1892), quoted in Fox, "Co-operation in the Raisin Industry," 4; M. Theo Kearney to N.W. Aldrich, June 1, 1897, File 1, Box 1, M. Theo Kearney Papers, Bancroft Library, University of California, Berkeley (hereafter MTKP-B).



nia. Historians have generally concluded that due to the strength of Mexican rancho land claims, the lack of enforcement of federal land laws, and the dominance of the railroads in state and federal politics, farm size--as indicated by statewide average farm size--remained much larger in California than in the Midwest (see Table 4-1). But statewide farm size masks the differences between huge cattle ranches and wheat farms, on the one hand, and smaller fruit-growing farms, on the other. Small farms were ideal for horticulture. Unlike field and grain crops or cattle ranges, fruit farms did not require much land to be profitable. In fruit-growing industries, single families could and did run farms with their own labor. The value per acre of fruit was and still is higher than the value per acre for field crops such as wheat or for cattle ranching. In addition, citrus fruit, dried apricots, peaches, prunes, raisins, and nuts were all luxuries to Gilded Age Americans. These commodities commanded prices high enough to make small farms profitable.

This was especially true in the raisin industry. In the seven California counties constituting the bulk of the raisin industry, a majority of the farms were smaller than fifty acres (see Table 4-2). In Fresno County almost three quarters of the farms measured less than one hundred acres in size. In all raisin counties except Madera, which had little raisin acreage in 1910, the median farm size lay

**Table 4-1**  
**Farm Size in California and Percent Change**  
**from Previous Decade by Year, 1860-1920**

Size (in Acres)	1860	1870	1880	1890
	< 3	0	0	143
3-9	829	2,187 (+163)	1,064 (- 51)	2,827 (+165)
10-19	1,102	1,086 (- 1)	1,430 (+ 32)	4,010 (+180)
20-49	2,344	3,064 (+ 31)	3,475 (+ 13)	7,691 (+121)
50-100	2,428	3,224 (+ 33)	3,969 (+ 23)	5,796 (+ 46)
100-499	6,541	12,248 (+ 87)	20,214 (+ 65)	24,531 (+ 21)
500-1000	538	1,202 (+123)	3,108 (+159)	4,367 (+ 41)
1000+	262	713 (+172)	2,531 (+255)	3,672 (+ 45)
Total	18,716	23,724 (+ 26)	35,934 (+ 51)	53,295 (+ 48)
Average Farm Size	446	482 (+ 8)	462 (- 4)	405 (- 12)

Size (in Acres)	1900	1910	1920
	< 3	1,492 (+272)	1,269 (-15)
3-9	5,354 (+ 89)	9,324 (+74)	13,793 (+ 49)
10-19	8,236 (+105)	11,932 (+45)	17,370 (+ 46)
20-49	13,110 (+ 70)	20,614 (+57)	31,723 (+ 54)
50-99	8,067 (+ 39)	10,801 (+34)	15,034 (+ 39)
100-499	26,201 (+ 7)	24,556 (- 6)	26,888 (+ 10)
500-999	5,329 (+ 22)	5,119 (- 4)	5,052 (- 1)
1000+	4,753 (+ 9)	4,693 (- 1)	4,906 (+ 5)
Total	72,542 (+ 36)	88,197 (+22)	117,670 (+ 33)
Average Farm Size	397 (- 2)	316 (-20)	250 (- 21)

Source: California State Board of Agriculture, Report of the State Statistician, in 59th Annual Report for 1912, (Sacramento: California State Printing Office, 1913), 67-69; California State Board of Agriculture, Annual Statistical Report for 1921 (Sacramento: California State Printing Office, 1923), 44.

Table 4-2  
**Farm Size in Raisin Industry Counties, 1910 and 1920**  
 Ranked as a percentage of total number of farms  
 1910

	<u>Fresno</u>	<u>Tulare</u>	<u>Kings</u>	<u>Sutter</u>	<u>San Bernar- dino</u>	<u>San Diego</u>	<u>Madera</u>
<u>Acres</u>							
< 3	0.1	0.0	0.0	0.0	2.5	0.9	0.0
3-9	4.2	4.2	3.7	6.5	19.2	10.2	2.2
10-19	9.5	9.6	8.6	11.5	31.1*	15.0	3.6
20-49	51.8*	31.0	35.0	16.2	23.8	18.0*	13.2
50-99	9.7	16.0*	20.5*	10.4*	9.4	11.7	4.0
100-174	9.7	14.8	15.6	14.0	7.0	14.6	28.1*
175-259	2.2	4.9	4.1	9.6	2.3	6.3	4.7
260-499	3.2	9.0	7.2	14.0	2.5	10.7	11.5
500-1000	1.9	4.8	2.2	8.9	1.1	6.7	10.2
1000+	1.7	4.9	2.3	8.4	.06	5.6	23.9
n =	6,245	4,021	1,837	873	2,949	2,298	573
Average size	177.2	259.9	203.5	441.5	70.7	363.1	1083.2
Raisin acreage	81,538	23,076	18,461	4,615	3,538	2,461	1,846

Note: \* indicates that the median falls within this range.  
 Percentages may exceed 100 due to rounding error.

Source: Annual Report of State Statistician, in California State Board of Agriculture  
 59th Annual Report for 1912 (Sacramento: California State Printing Office, 1913), 70-71,  
 135; Annual Report of the State Statistician, in Statistical Report of the California  
 State Board of Agriculture for the Year 1916, 16; George C. Husman, "The Raisin In-  
 dustry," U.S. Department of Agriculture, Bulletin No. 349 (Washington, D.C.: U.S.  
 Printing Office, March 17, 1916), 3.

Table 4-2, continued

	<u>1920</u>						
<u>Acreage</u>	<u>Fresno</u>	<u>Tulare</u>	<u>Madera</u>	<u>Kings</u>	<u>Kern</u>	<u>Merced</u>	<u>Stanislaus</u>
< 3	0.1	0.2	0.8	0.4	4.0	0.3	5.5
3-9	3.6	4.0	2.5	4.0	3.8	3.8	7.2
10-19	9.9	10.9	4.6	9.1	7.4	7.8	14.4
20-49	57.6*	39.8*	33.7	38.0*	31.7	43.0*	45.2*
50-99	14.6	18.5	14.5*	19.8	15.3*	20.2	14.8
100-174	6.6	11.3	15.9	13.4	17.6	9.6	7.4
175-259	1.7	3.6	2.8	3.9	3.3	3.5	2.1
260-499	2.4	5.5	10.6	5.7	8.8	3.2	2.6
500-999	1.3	2.8	5.7	2.2	5.3	3.7	2.8
1000+	1.7	1.5	8.4	2.9	6.3	4.8	3.0
n =	8,917	6,372	1,402	2,171	2,020	2,846	4,566
Average size	148.0	170.2	382.8	232.9	741.1	394.4	164.0
Raisin acreage	186,331	56,544	17,897	15,260	8,288	6,696	5,095

Note: \* indicates that the median falls within this range. Percentages may exceed 100 due to rounding error.

source: Statistical Report of the California State Board of Agriculture for 1921 (Sacramento: California State Printing Office, 1923), 44-45, 221.

between twenty and one hundred acres. Moreover, this trend continued as the century progressed. In 1920, even more small farms came into operation, reducing the median farm size in Tulare, Kings, and, most strikingly, Madera. Part of this trend can be attributed to the increase in raisin vineyards, which typically ranged between ten and sixty acres in size. As growers in some counties shifted their grapes to table use (Sutter) and wine (San Bernardino and San Diego), growers planted raisin vineyards in Kern, Merced, and Stanislaus counties. Many of those new vineyards were less than 100 acres in size, as shown by the decrease in the number of farms larger than 100 acres. Fresno, the state's largest raisin producing county, increased both its raisin acreage and its proportion of farms under fifty acres.

Thus, while the colony settlements and the rise of commercial horticulture by no means completely democratized California landholding, they did significantly diversify the Mexican and corporate-farm landholding pattern in ways that historians have not yet recognized. This is especially important for the history of cooperation because the state's specialized horticultural industries were filled with growers of all sizes, ranging from single family plots to giant estates. Growers therefore had different economic interests in the industry and could not be counted to act in concert merely by virtue of their status as growers. Accordingly,

in attempting to organize an industry, cooperative leaders had to worry just as much about the small growers as the large ones. If enough growers with twenty acre tracts remained outside the association, they could undermine it just as easily as one grower with 1000 acres. In effect, cooperation balanced out the economic inequities of land-holding: the threat of staying out of the cooperative gave the small growers leverage over the industry that they would not otherwise have had. Such was the case in the raisin industry as the boom and bust cycle of the late nineteenth century impelled growers to seek solutions in cooperation.

#### Growth of the Raisin Industry to 1890

The completion of the railroad, the development of irrigation, and the availability of land created a boom in raisins during the 1870s. Agricultural entrepreneurs planted raisin grapes in various parts of the state, including the upper Sacramento Valley, Riverside, the El Cajon Valley near San Diego, and the coastal counties of Orange, Los Angeles, and San Bernardino. But the vineyards at Fresno, where Muscat grapes were first planted in 1873, proved the most profitable because of the irrigation facilities established by the colony developments, the network of rivers and streams running through the county, and the arid climate. It was no accident that the raisin industry developed where and when it did. As geographer Charles Colby concluded in 1924, "This striking localization of the industry in the

Central or Fresno District has come about through the gradual capitalization of several assets of both the social and the natural environment of that district."<sup>18</sup>

The area of the Central Valley in and around Fresno was (and remains today) "the one district in all California [that] is most suited to [raisin] culture." The three main varieties of raisin grapes, Muscat, Sultana, and Sultan-tinia (Thompson Seedless), grow well in the sandy loam of the piedmont alluvial plain. The soils are relatively uncompacted, permitting the development of extensive root systems. Raisin vines require a dormant season with only moderate frosts, and in Fresno winter temperatures rarely drop beneath 25° F. Pruning and plowing operations are still possible in winter because hard freezes are so rare. In spring, the vines need relatively uninterrupted sunshine for optimal flowering and budding. Fresno's dry summers are ideal for fruit maturation, although there is occasional danger from high winds and excessive heat. Because of the aridity, the grapes can usually be safely sun-dried, a process which takes two to three weeks. While the chance of September rain is rare, the risk of a disastrous rain at this point in the season is real (see Table 4-3).<sup>19</sup>

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<sup>18</sup>Colby, "Geographic Interpretation," 58, 60-76.

<sup>19</sup>Colby, "Geographic Interpretation," 58, 80-85, 87-88; Imperial Fresno: Resources, Industries and Scenery, Illustrated and Described (Fresno: The Fresno Republican Publishing Co., 1897), 12-13.

Table 4-3  
 Dry-Season Rainfall at Fresno, 1890-1925  
 (in inches)

Year	June	July	August	Harvest		November
				September	October	
1890	0.00	0.00	T	1.26*	0.00	0.22
1891	0.02	0.00	0.00	0.27	0.00	0.21
1892	0.06	0.00	0.00	T	0.34	0.39
1893	0.00	T	0.00	0.01	0.02	0.16
1894	1.16	T	T	0.75*	0.37	0.27
1895	0.00	T	T	0.07	0.16	0.19
1896	0.00	0.07	0.15	0.06	1.28*	1.46
1897	T	0.00	T	T	1.19*	0.22
1898	0.00	0.00	0.00	1.12*	0.03	0.34
1899	0.66	0.00	0.00	0.00	2.01*	1.52
1900	T	T	0.00	0.16	0.33	4.61
1901	T	T	T	0.59*	0.56*	0.86
1902	T	0.00	T	0.00	0.42	2.25
1903	T	0.00	0.00	0.00	0.00	0.68
1904	0.00	0.00	0.00	1.78*	3.21*	0.08
1905	0.00	0.00	0.00	T	0.00	0.96
1906	T	T	0.00	T	0.00	0.73
1907	0.24	0.00	T	T	1.08*	0.00
1908	0.00	0.01	0.00	0.15	0.02	0.66
1909	0.08	0.00	0.00	0.00	0.72*	2.79
1910	T	T	0.00	1.00*	0.45	0.24
1911	T	T	0.00	0.01	0.09	0.17
1912	T	T	0.00	0.10	0.01	0.85
1913	0.10	0.33	T	T	T	1.86
1914	0.23	T	T	0.22	0.26	0.11
1915	0.00	0.00	0.00	T	0.00	0.30
1916	0.00	T	0.08	0.38	1.16*	0.28
1917	0.00	T	T	T	0.00	0.35
1918	0.01	T	0.00	0.53*	0.11	1.81
1919	0.00	0.00	0.00	0.29	0.29	0.04
1920	0.03	0.00	0.15	T	0.84*	0.99
1921	0.01	0.00	0.00	0.21	T	0.26
1922	0.12	T	T	0.00	0.52*	0.62
1923	T	0.00	0.00	0.25	0.37	0.10
1924	0.00	0.00	T	0.00	0.64*	0.73
1925	0.02	0.14	T	0.00	1.79*	0.20
Average rainfall					0.22	0.50
Median rainfall					0.01	0.16

(\*) indicates rainfall sufficient to damage raisins.

Source: U.S. Department of Agriculture, Weather Bureau, Climatic Summary of the United States: Section 17--Central California (Washington, D.C.: Government Printing Office, 1934), 17-5, 17-10.



In addition to the favorable natural environment, starting a vineyard during the 1870s and 1880s required both capital and labor. In addition to purchasing or renting the land, growers had to buy wooden drying trays and farm implements such as plows and pruning equipment. Intensive labor was and is still required to maintain the vineyards during the year, and this need doubled or tripled at time of harvest. The grapes have to be picked by hand, preferably at the moment when their sugar content is 22 percent or more, and then laid in the trays to dry in the sun. After about a week to ten days, workers invert the trays to expose the undersides. Then they stack the trays to "sweat" the raisins, equalizing the moisture content throughout the fruit. Because timing is essential to proper curing, the growers were "not unwilling to pay a high price for the necessary labor," which during the late nineteenth century was supplied by a pool of Japanese, Mexican, Indian, and Italian immigrants.<sup>20</sup>

The growth of the industry after 1870 was nothing short of spectacular. Vineyards of all sizes made money during the boom of the 1880s. Horticulture did not require much land, and while it took years for vines to come into bearing, growers could plant field crops such as alfalfa in the interim. During the boom, raisin growing seemed like a secure investment, with land prices ranging from \$50 to \$200

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<sup>20</sup>Colby, "Geographic Interpretation," 83-87.

an acre and annual profits as high as \$450. Naturally, the industry's economic success spurred even more planting. By 1890 growers in Fresno County alone had planted and grafted raisin grapevines on 30,000 acres of land--half the state's total. In 1890 and 1891, 20,000 more acres were planted. Since it took three years for the vines to come into bearing, the effects of the boom were not really felt until 1893 and 1894, when the industry produced 85 million and 103 million pounds, respectively (see Table 4-4).<sup>21</sup>

The expansion of the 1880s took place despite the fact that the industry had not developed outlets for its excess production. At the time, few in the industry even recognized that overproduction might be costly. Once growers "learned the lessons of irrigation," they believed, their only duty was to produce as many raisins as possible, and the packers and fruit merchants would take care of finding markets for the crop. Initially, Fresno's merchant-packers did exactly that. They purchased raisins outright from the growers and routed the crop through established trade chan-

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<sup>21</sup>Gustav Eisen, The Raisin Industry: A Practical Treatise on the Raisin Grapes (San Francisco: H.S. Crocker & Co., 1890), 55, 169; Fox, "Co-operation in the Raisin Industry," 1-3; "Report of the State Statistician," in 59th Annual Report of the California State Board of Agriculture, 1912 (Sacramento: California State Printer's Office, 1913), 135-37; W.Y. Spence, "Success After Twenty Years," SMH, 3:4 (November, 1917): 4; Will Payne, "Cooperation--The Raisin Baron," Saturday Evening Post, 182:4 (April 30, 1910): 14; Harrington Willson Cochran, "The Results of Co-Operation in the Raisin Industry of California" (M.A. thesis, University of California, Berkeley, 1915), 7-8; Colby, "Geographic Interpretation," 93-94.

Table 4-4  
 Estimated Raisin Production and Farm Prices  
 in California, 1872-1912

Year	Tonnage	Price to Grower (cents/pound)	Year	Tonnage	Price to Grower (cents/pound)
1872	60	n.d.	1893	42,500	3.5
1873	60	n.d.	1894	51,500	1.5
1874	90	n.d.	1895	45,500	1.8
1875	110	n.d.	1896	34,000	3.0
1876	190	n.d.	1897	47,000	2.0
1877	320	n.d.	1898	40,500	4.5
1878	480	n.d.	1899	36,000	6.3
1879	650	n.d.	1900	47,000	3.8
1880	750	n.d.	1901	37,000	3.0
1881	900	n.d.	1902	54,000	3.0
1882	1,500	n.d.	1903	60,000	3.8
1883	1,400	n.d.	1904	40,000	2.0
1884	1,750	n.d.	1905	45,000	1.8
1885	5,000	n.d.	1906	50,000	3.0
1886	7,000	n.d.	1907	75,000	6.0
1887	8,000	n.d.	1908	65,000	4.0
1888	9,630	n.d.	1909	70,000	1.5
1889	9,870	n.d.	1910	62,500	2.0
1890	19,000	2.0	1911	65,000	3.5
1891	26,000	3.0	1912	95,000	n.d.
1892	28,500	4.5			

Sources: California Cooperative Crop Reporting Service, California Crop Report, 1927, U.S.D.A. and California Department of Agriculture Special Publication No. 86 (Sacramento: California State Printing Office, 1928), 35; R.L. Nougaret, "Status of California Grape Industry," California Department of Agriculture Special Publication No. 11 (Sacramento: California State Printing Office, 1921), 35; Statistical Report of the California State Board of Agriculture, 1921 (Sacramento: California State Printing Office, 1923), 219. 8

nels to the East. The immense natural advantages of California agriculture and the state's growing scientific awareness of proper cultivation practices led many farmers to believe that economic success was within easy reach. As a Pacific Rural Press columnist wrote in 1893, "[O]ur natural advantages are superior, our methods good, and our opportunities excellent. Let us do our best to take advantage of them."<sup>22</sup>

"Taking advantage" of the "natural opportunities" was one thing; the physical and financial obstacles of fruit marketing presented a host of different problems. The vast distance between producer and ultimate consumer kept market transactions in a mysterious shadow. Frequently, a lack of information about market demand and transportation tie-ups led to gluts in some cities and shortages in others. The railroads charged freight rates that Californians viewed as exorbitant and discriminatory. In addition, during the decades before the state enacted grading and quality standardization laws, growers sometimes shipped infested and rotten fruit to market in order to avoid taking outright losses. Transportation, market demand, and standardization problems were, perhaps, endemic to an economy that sprang up practically overnight, was centered around specialized

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<sup>22</sup>Rehart and Patterson, M. Theo Kearney, 25-26; "Fresno: Where Half the World's Raisins Come From," pamphlet; "Fruit Culture in Its Infancy," PRP, 45 (January 7, 1893): 22.

commodities for which there was no pre-existing demand, and whose consumers lived three thousand miles away.<sup>23</sup>

In response to these problems, the marketing system was reorganized. In 1889, the commission system replaced the practice of purchasing raisins outright from the growers. In commission buying, packers paid the growers an advance upon delivery of the crop and returned what was left after selling in the East, minus the costs of packing, shipping, and sales commissions. With the institution of this system, the economic interests of the growers and middle-level merchants--the packers, brokers, railroads, and wholesalers --were irretrievably severed.<sup>24</sup> The commission system en-

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<sup>23</sup>Rahno Mabel MacCurdy, The History of the California Fruit Growers Exchange (Los Angeles: George Rice and Sons, 1925), 9; "Raisin Growing in California," in Statistical Report of the California State Board of Agriculture, 1921 (Sacramento: State Printing Office, 1923), 136, 219; Howard Seftel, "Government Regulation and the Rise of the California Fruit Industry: The Entrepreneurial Attack on Fruit Pests, 1880-1920," Business History Review, 59 (Autumn, 1985): 369-402; H. Clyde Filley, Cooperation in Agriculture (New York: John Wiley & Sons, 1929), 206-08; F.M. Righter, "Cured Fruit Marketing," PRP, 55 (May 7, 1898): 294; George C. Husmann, "The Raisin Industry," U.S.D.A. Bulletin 349 (Washington, D.C.: Government Printing Office, 1916), 2-4; Statistical Report for 1912, 134-39; Henry E. Erdman, "The Development and Significance of California Cooperatives, 1900-1915," Agricultural History, 32 (1958): 179-84.

<sup>24</sup>A commission broker is a firm or individual which only negotiates sales on behalf of either buyers or sellers. They do not physically handle the merchandise, nor take title to it. A commission merchant is a receiver who handles more than half his volume on consignment from growers or shippers. A jobber purchases more than half of his volume from wholesale handlers in the local market and sells chiefly to retail outlets. Growers regarded this firms with "suspicion" and believed that middlemen imposed extra costs on both consumers and producers by conducting inefficient--

abled the processors to set their own prices and force growers to assume the risks of loss during shipment. The commission selling system thus shifted the costs of what was essentially an industry-wide problem--oversupply and low prices--on the individual growers.<sup>25</sup> With limited bargaining power and no other ways to get their fruit to market, growers found a ready scapegoat in the middlemen. Charges of speculation filled the pages of agricultural journals and newspapers. By 1890, one economist noted, the commission system "threatened [to] ruin . . . the entire fruit industry of the state."<sup>26</sup>

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and sometimes speculative--transactions. Edwin G. Nourse, Agricultural Economics (Chicago: University of Chicago Press, 1916), 465, 484-85, 524-30, 534-35.

<sup>25</sup>U.S. Tariff Commission, Grapes, Raisins and Wines, Report 134, 2d Series (Washington, D.C.: Government Printing Office, 1939), 142-43; "How Cooperation Developed the Raisin Industry, 1922(?)" TMs [photocopy], Corporate Archives, Sun-Maid Raisin Growers of California, Kingsburg, California (hereafter SM Archives); Meyer, "Development of the Raisin Industry," 79-80; Cochran, "Results of Cooperation in the Raisin Industry," 9-10; J.M. Bragg, "History of Cooperative Marketing in the Raisin Industry to 1923" (M.A. thesis, University of California at Berkeley, 1930), 23; and Wallace Smith, Garden of the Sun, (Fresno: Max Hardison--A-1 Printers, 1960), 518-19.

<sup>26</sup>John W. Lloyd, "Cooperation and Other Organized Methods of Marketing California's Horticultural Products," University of Illinois Studies in the Social Sciences, 8:1 (1919): 10; see also Carl Plehn, "The State Market Commission of California: Its Beginnings, 1915-1917," American Economic Review, 8 (1918): 2; Ira B. Cross, "Cooperation in California," American Economic Review, 1 (1911): 535-44; Bean and Rawls, California, 199-211; and Henry E. Erdman, The California Fruit Growers' Exchange: An Example of Cooperation in the Segregation of Conflicting Interests (New York: American Council Institute of Pacific Relations, 1933).

Exacerbating the problem of overproduction was the depression of 1893. That year, prices fell to one cent per pound from five cents a pound in 1891; land values plummeted accordingly and the spigot of agricultural credit dried up.<sup>27</sup> Also in 1893, Congress removed the tariff on imported raisins, and Spanish raisins cost less in Eastern cities than raisins hauled in from California by train. Raisin-growing was no longer the sure way to riches its promoters had promised during the 1880s. Growers tore out thousands of acres of vines and put in other crops. The banks held mortgages on many of these vineyards, but with improved lands selling for as little as \$35 an acre, foreclosing was actually unprofitable. In 1894, the industry lapsed into an economic depression that would last nearly twenty years.<sup>28</sup>

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<sup>27</sup>The Pacific Rural Press reported in 1897 that land in the San Joaquin Valley was available for \$20 an acre, compared to the 1887 price of \$100; improved fruit land commanded a mere \$40, down from \$250 in 1890. "The Field: Present Prices of Agricultural Lands in California," PRP, 54 (July 17, 1897): 39; see also Winchell, History of Fresno County, 150-51; Walker, Fresno Blue Book, 102-04.

<sup>28</sup>Report of the State Statistician for 1912, 136-37; Fox, "Results of Cooperation," 22, 25-26 (citing assessors' records showing a decrease of 14,000 acres in production in 1894 and 1895); Rehart & Patterson, M. Theo Kearney, 26; M. Theo Kearney to Aldrich, June 1, 1897, File 1, Box 1, MTKP-B; Colby, "Geographic Interpretation," 91-92; Lloyd, Co-operative and Other Organized Methods of Marketing California Horticultural Products, 41; Bragg, "History of Co-operative Marketing," 24; Meyer, "Development of the Raisin Industry," 80; Adams, The Modern Farmer, 464-65; Spence, "Success After Twenty Years," SMH, 3:6 (January, 1918): 6-7; "Present Prices of Agricultural Lands in California," PRP, 54 (July 15, 1897): 39; "The Raisin Limit," PRP, 54 (July 31, 1897): 67; "Note and Comments," PRP, 54 (October 9, 1897): 227.

In addition, the industry continued to diversify socially. As the industry grew during the 1880s, American and northern European settlers were joined by other immigrants. These newer arrivals came from lands outside the racial confines of western Europe; they were also willing to take menial jobs that Euro-Americans took pains to avoid. In the climate of racial intolerance that permeated California, few of these newcomers found a ready welcome. Hindu, Chinese, and Mexicans worked as field hands, the lowest rank in agriculture. After the Exclusion Acts stopped further Chinese immigration in 1882, Californians pointed to still another "yellow peril," the influx of Japanese and Filipino immigrants.<sup>29</sup> The Japanese were not merely interested in working for wages; they started as laborers and then became tenants or owners of vineyards. Resentment against Asian and Hindu immigrants ran so high that in 1911 California passed an alien land law to prevent them from acquiring

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<sup>29</sup>Sources on the experience of the Chinese include Sucheng Chan, This Bittersweet Soil: The Chinese in California Agriculture, 1860-1910 (Berkeley, University of California Press, 1986); Alexander Saxton, The Indispensable Enemy (Berkeley: University of California Press, 1971); Gunther Barth, Bitter Strength: A History of the Chinese in the United States, 1850-1870 (Cambridge, Mass.: Harvard University Press, 1964); and Roger Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (Berkeley: University of California Press, 1962). The Chinese were adept at using the U.S. legal system to claim their right to enter the country despite legislative barriers and hostile immigration officials. Lucy Salyer, "Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891-1905," Journal of American History, 76 (June, 1989): 91-117.



land.<sup>30</sup>

The hostility that Euro-American settlers bore towards Asian immigrants produced extensive, formal legal constraints on alien immigration and landowning in California. But in Fresno, Tulare, and Madera counties, the limits on Asian immigration did not completely dissipate racial tensions. Beginning in the 1880s, settlers from Turkish Armenia came to live and grow raisin grapes in Fresno, Tulare, and Madera counties. Armenians came to the U.S. to escape the despotic Turkish occupation. Most of them initially settled in New England, near the Presbyterian missionaries who had visited them and converted them during the 1860s. Then George and John Seropian came to Fresno in 1881, started a successful dried fruit packing firm, and others--farmers, fruit packers, merchants, and lawyers--soon followed. The Armenians kept to themselves. They built their own churches, maintained familial bonds, and retained their lan-

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<sup>30</sup>Meyer, "Development of the Raisin Industry," 52. For statements indicative of contemporary attitudes towards the Chinese, Japanese, and Hindus, see Chester H. Rowell, "Chinese and Japanese Immigrants--A Comparison," Annals of the American Academy of Political and Social Science, 34 (1909); "California and the Oriental: Japanese, Chinese, and Hindus," Report of State Board of Control of California to Gov. William D. Stephens (Sacramento: California State Printing Office, 1922). Farmers were mostly concerned about the suitability of different immigrant groups for field labor and the danger of foreign ownership of land. "Free Japs," PRP, 50 (October 26, 1895): 258; "Gleanings," PRP, 50 (November 2, 1895): 276; H.P. Stabler, "The California Fruit Grower and the Labor Supply," PRP, 64 (December 13, 1902): 373; and G.H. Hecke, "The Labor Supply from a Fruit Grower's View Point," PRP, 74 (December 28, 1907): 405.

guage. The businessmen and merchants provided credit in exchange for patronage.<sup>31</sup> They bought land voraciously, quickly earning a reputation for paying almost any price for choice vineyards. As a columnist told readers of the Saturday Evening Post in 1910, "It was, and still is, characteristic of [Armenians] to want the very best land almost regardless of price."<sup>32</sup>

The Armenians' land hunger, their highly competitive business ethic, and their success in agricultural and business led members of the dominant white culture to view them with a sense of "race prejudice." To Euro-Americans, the

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<sup>31</sup>Davidian, The Seropians: First Armenian Settlers in Fresno County, 3-7. According to Charles Mahakian, 80,000 Armenians came to the U.S. between 1899 and 1928; in 1910, California's Armenian population numbered 4100, 3900 of which resided in the Central Valley. The Armenians had three separate religious sects, each with their own church, in Fresno: Apostolic, Congregational, and Presbyterian. The Armenian churches retained their native language, instituting English only when Armenian youth began to fall away. Mahakian, "History of Armenians in California," 46-51. For further analysis of the sociology of Armenian culture in California, see Richard F. LaPierre, "The Armenian Colony in Fresno County, California: A Study in Social Psychology" (Ph.D. diss., Stanford University, 1930).

<sup>32</sup>Payne, "Cooperation--The Raisin Baron," 14. Payne reported a fruit packer's tale about Armenian bargaining tactics: "They're like this[;] an Armenian looks over your vineyard and likes it. He asks you what you'll take for it. You tell him you don't want to sell it at all. But he says he wants to buy it and he's got the money in his fist to pay down on it. 'Name a price,' he says. You think the easiest way is just to bluff him off, so you name a price you think he won't pay. You say, 'All right, you can have it for four hundred and fifty dollars and acre.' 'I'll take it,' says Mr. Armenian. 'Here's a hundred and fifty dollars an acre down; balance on yearly payments.'" Ibid.

Armenians' retention of native customs, language, dress, and social organizations set the immigrants apart despite their European origin. Fresnoans looked on them as a "racial unit, separate and distinct from other inhabitants of the County."<sup>33</sup> The ethnic antagonisms would have grave implications for the subsequent history of cooperation in the raisin industry.

Ethnic differences notwithstanding, the depression of the 1890s affected all growers, whether they had ten acres or a hundred. The newspapers of the Central Valley were filled with discussion of market conditions and their causes. Growers met in schools and churches to analyze the causes: variations in quality within the same crop packages, price fluctuations during the selling season, the tendency for the bulk of the crop to come onto the market at the same time, competition (or the lack of it) between eastern selling agencies, and foreign competition. The growers felt intense pressure to sell their raisins quickly in order keep mortgages current; the perennial problem of agricultural credit pestered horticultural growers all over the state. The "stampede" at harvest time became an annual ritual. Any suggestion that overproduction was to blame, however, the growers regarded as treasonous. The growers figured that a unified front in the raisin district would

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<sup>33</sup>Wallis, Fresno Armenians, 70-74; Mahakian, "History of Armenians," 69-70.

help to stabilize selling conditions in the East. They concluded that their only hope of economic survival lay in cooperation, which would enable them to fix the price that packers and merchants would pay for their raisins.<sup>34</sup>

#### Early Experimentation with Cooperation

Cooperation, at least at the local level, was not new to California.<sup>35</sup> The first formal association in the raisin industry was organized in 1889 to help growers improve the quality of grading and packing. As the economic crisis spread, other local cooperatives sprang up; however, they never handled more than one-quarter of the crop, and they tended to act independently of each other and in direct competition with the commercial packers. Like any cartel, they lacked the authority to enforce pooling agreements. They were also chronically in debt. With many of the small

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<sup>34</sup>Fox, "Cooperation in the Raisin Industry," 24; Adams, The Modern Farmer, 462; "Gleanings," PRP, 51 (October 19, 1895): 243; "A Home Market vs. the Consignment System," PRP, 51 (February 1, 1896): 66 ("[If] the California growers and the California handlers unite against the system of consigning to the East, there is no serious obstacle to [the] destruction [of the consignment system]."); "Fresno Raisin Industry," PRP, 52 (February 8, 1896): 82; E.F. Adams, "The Issue Held to be Between the Californian and the Eastern Merchant," PRP, 52 (February 15, 1896): 100; and "The Raisin Situation in the East," PRP, 52 (October 17, 1896): 242; Spence, "Success After Twenty Years," SMH, 3:4 (November, 1917): 5; "The Raisin Problem," Pacific Rural Press, 45 (February 4, 1893): 94.

<sup>35</sup>The citrus growers of Southern California were probably the first to experiment with marketing cooperatives. MacCurdy, The History of the California Fruit Growers' Exchange, 7-10.

growers short of cash and unable--or unwilling--to purchase stock subscriptions, the locals were left without capital to secure bank loans for paying crop advances to the growers. To stay afloat, most ended up turning to the commission packers for assistance, with the result that they ended up doing neither their own packing nor their own selling. Cooperation on a local level did not accomplish independence from the commercial packers and commission selling system: "[W]eighted down by debt, and the neighborhood quarrels which were its result, nearly all the cooperative packing-houses gradually fell into the hands of the commission packers by sale or lease."<sup>36</sup>

As prices continued to fall in 1891 and 1892, industry leaders--wealthy men, including the towns' bankers, merchants, and lawyers, who turned to agriculture as an investment--realized that the local associations did not furnish a permanent solution to the growers' distress. Instead, they focused on the need for the entire industry to participate--not only growers but also packers and merchants. Bankers in Fresno, Sacramento, and San Francisco also believed that cooperation was in their interest as well as the growers', because stable prices meant current mortgage payments, and the banks could make more money lending

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<sup>36</sup>Adams, The Modern Farmer, 460-61; Charles L. Goldberg, "Co-operative Marketing and Restraint of Trade," 12 Marquette Law Review 270, 272 (1928); Fox, "Cooperation in the Raisin Industry," 7.

to producers in prosperous agricultural industries than lending in depressed commodities. For the first time in the history of California agriculture, public discourse about cooperation stressed the importance of assuring the compliance of "all who have raisins in proper condition for the markets of the world."<sup>37</sup>

Early cooperation in the raisin industry was dogged by the questions of who should qualify for an industry-wide cooperative and how to control the market behavior of the participants. Growers, bankers, and packers tried several different formulas of cooperative organization, none of which worked. An informal pool set up in 1892 collapsed when the packers refused to honor their commitment. Even if the agreements had been enforceable at law, the association had no way to control the growers and packers who remained outside the pool and were "free-riders" on the efforts of others. The next year, industry leaders obtained the legislature's approval of a bill to compel the packers and merchants to participate in the pool; but Governor Henry S. Markham vetoed it, as a Fresno paper reported, because he

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<sup>37</sup>Filley, Cooperation in Agriculture, 209; Spence, "Success After Twenty Years," SMH, 3:4 (November, 1917): 5-6 (quoting resolution passed at mass meeting of growers in Fresno, California, June 23, 1892). While the citrus growers of southern California had already established seven or eight local cooperatives by 1890, they had not yet begun to network them together in an industry-wide monopoly. Spence, "Success After Twenty Years," ibid.; on early organization in the citrus industry, see MacCurdy, History of the California Fruit Growers Exchange, 3-10.

believed the combination of growers, commission brokers, and packers would tend to monopolize the industry.<sup>38</sup>

By 1894, then, the shortcomings of the local cooperative associations had become plain: they could not raise adequate capital or obtain credit for packing and marketing operations, and they were easily undermined by the desertion of growers and packers. Further, they provided an unstable foundation for an effective industry-wide association. Unlike the citrus industry, where local cooperatives were already beginning to form the nucleus of California's industry-wide alliance between growers and packers, in the raisin industry the local organizations and the packers never joined forces. The packers' proposals for "million dollar corporations" in 1895 and 1896 drew scant support because growers distrusted the banks that were furnishing the money. In 1896, the growers discussed replacing the middlemen with their own representatives. The commission packers and merchants contended in reply that "they were as legitimately related to the raisin business as are the growers themselves." Managers of the short-lived industry-wide associa-

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<sup>38</sup>PRP, 43 (July 9, 1892): 18; Fox, "Cooperation in the Raisin Industry," 10-11; Spence, "Success After Twenty Years," SMH, 3:4 (November, 1917): 5, 16; SMH, 3:5 (December, 1917): 6; PRP, 44 (August 27, 1892): 39; Fox, "Cooperation in the Raisin Industry," 10-12; Fred K. Howard, "History of Raisin Marketing in California," unpublished MS, n.d. (but 1922), SM Archives; "The Raisin Growers at Fresno," PRP, 45 (February 11, 1893): 126; "The Week," PRP, 45 (April 1, 1893): 274; "The Week," PRP, 45 (April 15, 1893): 326 (reporting dispatch from Fresno Morning Republican).

tions of the 1890s could not reconcile the economic and ethnic divisions among the industry's 3,000 producers, some twenty commercial packing firms, and Fresno's banking and mercantile establishment.<sup>39</sup>

The industry's failure to agree on a formula of cooperation seemed to intensify the cruel effects of the depression. The San Francisco Chronicle's agricultural editor noted that impoverishment was falling on rich and poor alike:

Not only were small raisin-growers in real distress, but the largest financial interests of the raisin districts had become thoroughly alarmed. . . . [B]anks and capitalists had large landed interests in the valley, which were rapidly depreciating in value. The entire mercantile community was seriously involved. . . . Real estate in the towns became unsaleable, and mortgage foreclosures on improved property were frequent.<sup>40</sup>

The growers' support for cooperation had not wavered. Many in the industry still believed that only through cooperation could they obtain better prices from the packers. But what was needed was to form an organization that combined prevailing ideas of cooperation and maintained the allegiance of the various groups within the industry.

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<sup>39</sup>Fox, "Results of Cooperation," 14-16, 19-24; Spence, "Success After Twenty Years," SMH, 3:5 (December, 1917): 6; ibid., 3:6 (January, 1918): 6; "The Situation at Fresno," PRP, 51 (March 28, 1896): 194 (emphasis in original); "The Week," PRP, 45 (April 15, 1893): 326; Adams, The Modern Farmer, 462-63.

<sup>40</sup>Adams, The Modern Farmer, 465.



Such a plan would require a creative interpretation of California law on cooperative organization. That law offered growers two choices. They could incorporate as a regular joint-stock corporation under an 1878 law. But cooperatives organized under that law could not could not impose restrictions on stock transfers; thus they could not control the number or the identity of members or prevent the stock from falling into unfriendly hands.<sup>41</sup> In 1895, the legislature enacted a cooperative incorporation statute that construed membership as personal, non-transferrable, and, above all, equitable: "In such association[s] the rights and interest of all members shall be equal, and no member can have or acquire a greater interest therein than any other member has. . . . [E]ach member shall be entitled to cast one vote and no more."<sup>42</sup> But in dispensing this privilege the legislature took away another one. Cooperatives organized under the 1895 law were to be "non-stock" associations, that is, having no capital stock.

This binary approach to cooperative organization did not suit the needs of the raisin growers. To dislodge the packers' absolute control over selling and distribution, a raisin cooperative required sufficient capitalization to fix prices and finance crop advances. But for the organization

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<sup>41</sup>Cal. Stats., ch. 561, p. 883 (April 1, 1878).

<sup>42</sup>Cal. Stats., ch. 183, p. 221 (March 27, 1895), at 222.

to be cooperative the capital stock had to be distributed widely, to avoid concentration of shares in a few hands, and no shareholder could have more than one vote, regardless of shares held. This limitation would prevent "the monopolization of cooperative enterprises" by speculators and non-producer investors. To do all of these things required, in the words of an observer in 1918, "a Moses to lead [the growers] out of the wilderness."<sup>43</sup>

#### The "J.P. Morgan of the Central Valley"

M. Theo Kearney, the Valley's largest individual raisin grower, led the drive to organize the first successful growers' cooperative, the California Raisin Growers' Association, in 1898. But he was no Moses. Born in Ireland in 1841, he arrived in California in 1870 and promptly made his way into San Francisco society. He was among the investors who established the colony settlements in Fresno County during the 1870s and made a small fortune on his investments. During the boom in vineyard lands in the late 1880s he sold off hundreds of acres in small tracts to raisin growers. Many of these farms reverted to him after the

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<sup>43</sup>Both the local cooperatives and the early industry organizations were incorporated as regular corporations, but with limited capital stock, usually less than \$50,000. Meyer, "Development of the Raisin Industry," 81; Richard Ely, "Introduction," in Herbert B. Adams, ed., History of Cooperation in the United States (Baltimore: Johns Hopkins University Press, 1888), 9; see Fox, "Results of Cooperation," 20, and Spence, "Success After Twenty Years," SMH, 3:5 (December, 1917): 6-7.

depression of 1893, when the growers could no longer make payments. The foreclosures left him with over 1,000 acres of raisin vineyards, "which at prevailing prices promised to ruin him." The foreclosures also earned him a reputation for being coldhearted and unsympathetic to the growers' plight. While it is not clear that reputation was deserved, he apparently had few friends and made enemies easily. He was elitist in his social views and did not attempt to hide his disdain for what he believed was the growers' unsophisticated approach to cooperation.<sup>44</sup> He was not significantly involved in the cooperative movement prior to 1898, regarding the attempts to organize as unsound.<sup>45</sup>

When he did begin to assert a more visible role in the industry, it was less as a new Moses and more as the "J.P. Morgan of the [Central] Valley."<sup>46</sup> His plan for organization shunned the legal scheme established for cooperatives

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<sup>44</sup>Rehart and Patterson, M. Theo Kearney, 3-21. According to Kearney, the depression saddled him with \$500,000 worth of raisin vineyards. Growers declined his offers to extend time on mortgages and to pay the growers' taxes and irrigation rates, because the low prices made it impossible for growers to recover their production costs. Kearney to Aldrich, U.S. Tariff Commission, June 1, 1897, File 1, Box 1, MTKP-B; Fox, "Results of Cooperation," 30. For sympathetic views of Kearney's elitism and personality, see Bragg, "History of Cooperation," 11-12, and William E. Smythe, "A Benefactor of the State," Out West, 25 (1906): 146-150; for a critical assessment, see Fox, "Results of Cooperation," 30-31, and sources cited therein.

<sup>45</sup>Kearney to Board of Directors, California State Raisin Growers Association, June 13, 1893, File 1, Box 1, MTKP-B.

<sup>46</sup>Payne, "Cooperation--The Raisin Baron," 15.

by the 1895 non-stock cooperative organization law. Instead, Kearney told a meeting of several hundred leading growers in May, 1898, they would adopt the form and practice of an industrial trust: "The only practical remedy is to pool our crops, control the quality and quantity when offered for sale, and the price at which the output shall be sold." The pool was to be run by the California Raisin Growers' Association (CRGA). Kearney avoided the limitations of the 1895 non-stock law and incorporated the CRGA under California's regular incorporation laws with \$500,000 in capital stock. Shareholding was limited to growers, who purchased shares for \$5 in proportion to their contribution to the state's crop. The CRGA dealt with the commercial packers as the agent for its members. The packers who wanted to purchase CRGA raisins signed contracts that bound them to buy and sell raisins at CRGA prices.<sup>47</sup>

The most inventive feature of Kearney's plan was that he made its operation contingent on the sign-up of 75 percent of the growers. This was the first time in California

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<sup>47</sup>Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 8-9. Apparently Kearney adopted this plan, with some changes, from a model developed in the wine industry with less spectacular results. "Raisin Growers' Plans," PRP, 55 (May 21, 1898): 334; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 8; Fox, "Results of Cooperation," 28-29, 32; Adams, The Modern Farmer, 465-67; Adams, The Modern Farmer, 517-24: "[The wine-makers' corporation] is more substantial than the cooperative societies concerned in other fruit products for the reason that wines are non-perishable and more staple than other products. It is an effective Trust as long as it controls the output" (emphasis mine).

or in the nation that anyone had expressly linked cooperative organization and market control. Kearney believed that cooperative monopoly blended harmoniously with the best interest of the public as well as the growers: "'I maintain,'" he asserted, "'that the public good takes precedence over all the private interests, and the liberty loving people of our country have pretty thoroughly established the principle that the will of the majority shall be the law of the land.'"<sup>48</sup> The rhetoric proved effective. By the start of the 1898 harvest 90 percent of the raisin acreage was committed to the pool through grower contracts. Prices doubled from the previous year, from 1.5 cents to 3.08 cents per pound.<sup>49</sup> Kearney had succeeded in creating an organization with enough capital to keep the packers at bay but which maintained the growers' special relationship to the cooperative. By stressing participation, he also united a

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<sup>48</sup>"Progress with the Raisin Growers," PRP, 55 (May 28, 1898): 342; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 9.

<sup>49</sup>"Progress of the Raisin Pool," PRP, 56 (August 10, 1898): 117; "The Raisin Combine Solid," PRP, (October 8, 1898): 234; "Success of the Association," PRP, (November 5, 1898): 303; Kearney, "The California Raisin Industry," address to the California Fruit Growers' Convention, November 29, 1898, PRP, 56 (December 10, 1898): 380; "A Significant Success," PRP, 56 (December 17, 1898): 394; Howard, "History of Raisin Marketing," 23-43; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 9; Meyer, "History of the Raisin Industry in Fresno County," 82; Rehart and Patterson, M. Theo Kearney, 30; Adams, The Modern Farmer, 467-68.

fractious group of growers.<sup>50</sup>

The support of the Fresno banking interests was critical to the CRGA's success. The bankers believed that cooperation would strengthen the market and enable growers to pay their mortgages on time. As president, Kearney appointed some friendly bankers to the CRGA board of directors. Three of the seven trustees--T.C. White, John McMullin, and Louis Einstein--were bankers as well as growers. As for the unfriendly bankers, in the words of a Fresno historian, "Kearney's main policy was . . . to force better loan conditions for the farmers by threatening to establish his own banking system." Kearney himself put the matter bluntly: "[W]e loosened [the packers'] grip on the needy growers by arranging with the banks to let the growers have money on orders [from the CRGA]."<sup>51</sup>

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<sup>50</sup>Kearney recognized that newly-arrived Italians, German-Russians, and Armenians held the key to the organization's success. He helped the immigrants to acquire land and used his formidable oratorical skills at mass-meetings to keep people in line. Still, he had enemies, including Chester H. Rowell, the editor of the Fresno Republican, and many of the town's leading bankers and businessmen. Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 8; Rehart and Patterson, M. Theo Kearney, 33; Payne, "Cooperation--The Raisin Baron," 15; Bragg, "History of Cooperation," 12; Fox, "Results of Cooperation," 31.

<sup>51</sup>The other trustees were L.S. Chittenden, owner of a large vineyard in Kings County; Alfred Sayre, a Madera county grower; and full-time raisin growers W.S. Porter and Robert Boot. Kearney included no Armenian growers in the CRGA directorate. Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 8-9; Editorial, PRP, 55 (June 11, 1898): 370; Howard, "History of Raisin Marketing in California," 5; "Address of M. Theo Kearney before the State Fruit Growers' Convention," San Jose, December 14, 1899, pamphlet,

The packers, too, had become convinced that collective action would serve their interests. They were willing to relax the absolute control they had over selling and distribution as long as their investments in their own businesses were protected: "With [this] essential granted, they were willing that an organization of growers should control pretty much everything else, including the fixing of prices, and were ready to enter into such contracts with the growers' organization as should assure to the latter complete control of the business." The tacit agreement was that the packers would forebear from obstructing the cooperative if the growers stayed out of the packing business.<sup>52</sup>

Despite the fact that the association was dependent on the goodwill of the bankers and packers, Kearney refused to accept their bargain. He did not trust the packers to act in the growers' interests. "In my judgment," he told the state fruit growers' convention in December, "to make our organization a complete success, it is absolutely necessary to eliminate all conflicting interests. . . . [W]e cannot

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File 5, Box 1, MTKP-FHS; Walker, Fresno Blue Book, 104; Rehart and Patterson, M. Theo Kearney, 30.

<sup>52</sup>Adams, The Modern Farmer, 466; Meyer, "History of the Raisin Industry in Fresno County," 81; Walker, Fresno Blue Book, 104. The packers had no objection when the CRGA took action to maintain prices, such as buying up the crops of outside growers and selling substandard raisins to the wineries. "The Raisin Combine Solid," PRP, 56 (October 8, 1898): 234; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 9; Fox, "Cooperation in the Raisin Industry," 32-33.

blend the interests of the commercial packer with the interests of the grower any more than we can blend oil and water." Kearney had grand ambitions for the CRGA. He wanted it to control not only selling and distribution but also packing and brand-name advertising--in short, to control the crop from harvesting through wholesale marketing. In January, 1899, he proposed that the association become independent of the commercial packers by building its own packing plants, funded by an assessment of \$2 on each acre under contract to the CRGA.<sup>53</sup> In short, Kearney was reneging on the tacit understanding that the CRGA would not encroach on the packers' side of the business.

In so doing, however, Kearney departed "radical[ly]" from the ideals of traditional cooperation. Building up capital through assessments was not part of the canon of cooperation; under the 1895 non-stock law, cooperatives could raise capital only through nominal membership fees. Some in the industry also contended that an organization with independent capital and monopoly control of the crop would violate the anti-trust laws. At the CRGA meeting in January, 1899, the growers voted instead to revise the packers' contracts to include more stringent penalties for breach. The crop contract was also amended to change the

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<sup>53</sup>Kearney, "The California Raisin Industry," PRP, 56 (December 19, 1898): 380; R.C. Allen, "Raisin Culture," PRP, 57 (January 28, 1899): 52; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 9.



CRGA from an outright pool to a marketing agent.<sup>54</sup> The growers' skepticism at Kearney's plans played into the hands of the directors, particularly the bankers. They obtained the growers' consent to reorganize the CRGA under California's 1895 non-stock cooperative law, bringing it more clearly under the banner of traditional cooperation and also limiting its ability to raise its own capital. This move gave the bankers greater leverage against Kearney in directing the cooperative's affairs.<sup>55</sup>

The 1899 season was a successful one for the CRGA. It set a price floor of six cents that governed the market. But Kearney had grander ambitions. To achieve them, he attempted to instruct the growers in the "masterful business ability" necessary for successful cooperation. This meant adopting the methods and purposes of the industrial trust.

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<sup>54</sup>Kearney, "Address Before the State Fruit Growers' Convention, December 14, 1899, On the Organization of the Raisin Growers for the Sale of Their Raisins," File 5, Box 1, MTKP-FHS; R.C. Allen, "Raisin Culture," PRP, 57 (January 28, 1899): 52; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 9-11. The packers' 1899 contract reduced packing fees by 25% and commissions on sales by 33%, and it specified that the packers would forfeit \$4 per ton if they violated any of the terms. Instead of transferring full title to the raisins to the CRGA, the growers gave it a 5% interest in their raisins in exchange for marketing services performed by the CRGA. "Fruit Marketing," PRP, 57 (January 7, 1899): 22; Fox, "Cooperation in the Raisin Industry," 33-34; Adams, The Modern Farmer, 468.

<sup>55</sup>"Fruit Marketing," PRP, 57 (January 7, 1899): 22; Spence, "Success After Twenty Years," SMH, 3:7 (February, 1918): 11; Fox, "Cooperation in the Raisin Industry," 34; Smith, Garden of the Sun, 521-22; Articles of Incorporation and By-Laws of the California Raisin Growers' Association, April 1, 1899, File 5, Box 1, MTKP-FHS.

In January, 1900, he announced a plan to convert the CRGA into a trust. The plan featured a new growers' contract that became known as the "yellow slip." By its terms the growers "agreed to convey to the directors of the Association as trustees half a cent a pound on the next season's crop for investment in packing houses."<sup>56</sup> The CRGA was going into the packing business.

By April 1, 1100 of the CRGA's 2500 members had signed the yellow slips, enough to enable the CRGA directors to proceed with the second plank of the plan. On April 6, they incorporated the California Raisin and Fruit Packing Company and sold half its \$1 million capital stock to the commercial packers. The CRGA purchased its half with loans using the yellow slip proceeds as security. But other members were unhappy with these new developments. The new company was not cooperatively organized; further, the directors were taking full salaries from both the CRGA and the new packing company. At a growers' meeting in April, Kearney defended the decision to incorporate the packing company under the joint-stock law with an attack on the cooperative incorporation law of 1895: "[T]hat law is not a tried law; it is a new-fangled idea; it is a very unsatisfactory business law." Kearney also told the growers that the double salaries were necessary to keep qualified officers in the Association's

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<sup>56</sup>Fox, "Cooperation in the Raisin Industry," 36.

employ.<sup>57</sup>

Meanwhile the packers were cultivating opposition to the yellow slip contracts. They opposed any attempt by the growers' organization to build its own packing plants: "They had no intention of going out of business, at least [not] without a struggle, and they had many supporters among the growers and businessmen, many of whom believed it inadvisable to attempt to eliminate the packers." Not even Kearney was able to smooth over the divisions in the industry. The packers saw to it that fewer than 60% of the growers signed the new contracts by May, 1900. The directors concluded that the membership had repudiated the yellow slip contract. To stabilize the cooperative's operations, the banks stepped in to mediate a new contract for the CRGA and the packers to cover the 1900, 1901, and 1902 seasons.<sup>58</sup>

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<sup>57</sup>Fox, "Cooperation in the Raisin Industry," 35-37; "Editorial," PRP, 59 (January 6, 1900): 2; Spence, "Success After Twenty Years," SMH, 3:8 (March, 1918): 8; M. Theo Kearney, Fresno County, California (Fresno: Privately published, 1904), 17; Fresno Republican, April 15, 1900, 1.

<sup>58</sup>"Review of the Fruit Season," in 7th Biennial Report of the State Board of Horticulture for 1899-1900 (Sacramento: Superintendent of State Printing, 1901), 38. Kearney publicly censured growers who refused to sign the yellow slips, singling out Armenians in particular. Payne, "Cooperation--The Raisin Baron," 44. Under the new arrangement, the packers were to deal with the CRGA as one body and exclusively handle CRGA raisins for the crop years 1900, 1901, and 1902. The CRGA had to maintain 90% control over the growers in order for the compromise to go into effect. Fox, "Cooperation in the Raisin Industry," 38-39; "The Raisin Arrangement Proceeds," PRP, 59 (May 19, 1900): 309; Spence, "Success After Twenty Years," SMH, 3:8 (March, 1918): 8.

Kearney angrily reproved the growers for their disloyalty, and when they refused his request for an increase in salary, he resigned as president.<sup>59</sup>

In Kearney's absence, the packers and bankers proceeded on the basis of their mediated agreement. The contract required the CRGA to control 90 percent of the raisin acreage. Fulfilling this condition proved difficult: "Many of the growers held out to the last, and only signed after all the influence possible was brought to bear upon them . . . . Many of these held out on account of their sympathies for Mr. Kearney, others because they believed they had certain advantages in being outside of the association." Despite the fact that the CRGA did not meet the 90 percent condition, the packers still went ahead with the agreement. But the packers' generosity proved to be of little help to the CRGA because the 1900 price of 6-1/2 cents collapsed, due to heavy sales by outsiders, increased imports, and a 14,000 ton carryover from the 1899 crop. At the spring, 1901, mass-meeting, Kearney again proposed that the weaknesses of the CRGA be remedied by increasing both its borrowing power

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<sup>59</sup>Fox, "Cooperation in the Raisin Industry," 38-39. Kearney's sense of self-importance knew few limits. On May 22, he sent the growers a circular letter denouncing his opponents, whom he identified as bankers and speculators, "animated by an intense desire to tear down the man who has stood as the rock of Gibraltar, guarding and protecting the interests of the growers during their progress from poverty to prosperity." Kearney, circular letter to growers, May 22, 1900, File 1, Box 3, MTKP-B. See also Rehart and Patterson, M. Theo Kearney, 33; Spence, "Success After Twenty Years," SMH, 3:8 (March, 1918): 8.

to \$500,000 and the president's salary. The subsequent growers' election demonstrated Kearney's enduring popularity--he was again elected president--but his proposals were nevertheless defeated.<sup>60</sup>

Developments in the courts, however, gave Kearney a second chance. In a case involving the California Cured Fruit Association, a prune cooperative, a California Superior Court held that the cooperative could not enforce a clause of the crop contract that entitled it to collect liquidated damages from any grower who failed to deliver crops, on the grounds that the contract illegally restrained trade. The prune growers' legal setback alarmed the directors of the CRGA because the raisin growers' contract was similar to the one struck by the courts. The decision enabled Kearney to try to do two things at once: remedy whatever legal weakness lay in the crop contract and restructure the corporate identity of the CRGA.<sup>61</sup>

Kearney proposed replacing the growers' existing crop contracts with a lease agreement. Under this lease, all growers would rent their vineyards to the CRGA, which would pay them 95% of the net proceeds as wages for services per-

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<sup>60</sup>"Review of the Fruit Season," 7th Biennial Report of the State Board of Horticulture, 38; Fox, "Cooperation in the Raisin Industry," 42-43; "Agricultural Review," PRP, 61 (May 25, 1901): 321; Spence, "Success After Twenty Years," SMH, 3:8 (March, 1918): 9.

<sup>61</sup>San Francisco Call, April 9, 1901; "The Raisin Situation," PRP, 62 (July 20, 1901): 36.

formed in maintaining the vineyards and producing the crop. Legally, Kearney told the growers, "The Association will be the owner of the crop." As owner of the crop and employer of the growers, the CRGA could not be accused of restraining trade because it no longer constituted a combination of independent producers. To evade the limitations of the California non-stock cooperative law, Kearney suggested that the CRGA reincorporate under the laws of New Jersey. His plan called for a capital stock of \$500,000, to be issued as fully paid, non-assessable shares; "therefore," Kearney said, "growers will have no greater liability than under our present association law."<sup>62</sup>

To confirm the wisdom of his plan, Kearney noted that other powerful corporations had done exactly the same: "The Steel trust, and many other very wealthy corporations, have chosen to be incorporated in New Jersey, and we have closely followed the forms and papers of the Steel trust on file . . . for the obvious reason that these papers were prepared by some of the most able corporation lawyers in the country." Kearney was aware of the then-current trend in incorporation law, that New Jersey's incorporation statutes had the fewest restrictions on corporate structure and the fewest tax burdens of any state in the union. And he saw no

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<sup>62</sup>"The Raisin Situation," PRP, 62 (August 31, 1901): 140; Fox, "Cooperation in the Raisin Industry," 44; "Reorganization of Raisin Association Completed," Fresno Morning Republican, June 5, 1901, Clippings File 2, Box 5, MTKP-B.

legal barrier to applying New Jersey corporation law to the problem of cooperation in the raisin industry: "The most able business men in American have selected New Jersey to incorporate in, and the capital represented by them is simply enormous. . . . What is good enough for them must surely be good enough for us."<sup>63</sup>

New Jersey incorporation carried still another advantage. The CRGA would have the power to compel growers to abide by their crop contracts without exposing itself to liability under the anti-trust laws:

It will be noticed that New Jersey corporation law gives us all the advantages that we may desire of the co-operative law of this State, under which we are now organized, it . . . will aid us in creating a much stronger organization than our present one, and it provides us with corporation law which has already been thoroughly established in the courts. This latter is a most important gain over our present status.

The CRGA had strayed far from the idea of a voluntary association as Kearney moved it towards a mandatory combination: "The growers . . . as a whole will not keep within [cooperatives] unless they are forced to. They cannot be held

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<sup>63</sup>"Reorganization of Raisin Association Completed," Fresno Morning Republican, June 5, 1901, Clippings File 2, Box 5, MTKP-B; "A New Proposition Made to Growers Under the Lease," October 28, 1901, File 1, Box 3, Kearney-Bancroft. On New Jersey incorporation and tax law, see Christopher J. Grandy, "The Economics of Multiple Governments: New Jersey Corporate Chartermongering, 1875-1929," Ph.D. diss., University of California at Berkeley, 1987; Charles W. McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," Business History Review, 53 (1979): 304-42.

together on honor and sentiment alone.'" Other growers had come to similar conclusions about the pernicious effects of free-riders. "There is no plan," Alex Gordon told a gathering of fruit growers, "there is no man, there is no power outside of the intervention of the Almighty that can make all of the raisin-growers get together into an association."<sup>64</sup>

But the rest of the industry did not share Kearney's enthusiasm for the steel trust model of corporate power. The other growers among the CRGA directors supported his plan only to preserve the CRGA, not out of loyalty to or admiration for Kearney or his ideas. Edward J. Wickson, editor of the Pacific Rural Press, wryly noted, "It does not look very wholesome for co-operation when the force of organization is largely occupied in cracking the skulls of recalcitrant members." Few growers believed that their crop contract was invalid, but many feared that Kearney's plan would take control over their crops, their land, and their organization away from them and give it to the directors under a scheme that hardly seemed cooperative. The packers and banks staunchly opposed any new reorganization that gave

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<sup>64</sup>Kearney to Raisin Growers, circular letter, November 1, 1901, File 1, Box 3, MTKP-B; "Editorial," PRP, 62 (December 14, 1901): 370; remarks of Alexander Gordon, Proceedings of the Thirtieth Fruit-Growers Convention, San Jose, December 6-9, 1904, in Biennial Report of the Commissioner of Horticulture for the Year 1904 (Sacramento: Superintendent of State Printing, 1905): 312.



the CRGA independent packing facilities and financing.<sup>65</sup>

Instead of trying to allay the growers' fears, Kearney gave them an ultimatum. He set 75 percent as the minimum acceptable level of grower commitment to the New Jersey lease. The growers declined to meet this standard in time for the 1901 harvest, even after a trial court invalidated the growers' old membership contract in mid-October. On December 10, the directors voted to abandon the lease. A month later, a growers' committee recommended that the CRGA continue operations under its California charter. This action ended all consideration of the New Jersey plan. In a final ignominy, Kearney himself was voted out of office in March, 1902.<sup>66</sup>

Kearney's opponents claimed that his defeat meant that the sound notion of cooperation had prevailed over the dangerous method of corporate trust. As his successor proclaimed, "We have not a trust, but we are an association of men engaged in producing from the soil. We have a

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<sup>65</sup>"The Raisin Situation," PRP, 62 (August 31, 1901): 140. Directors D.D. Allison, Alex Gordon, and Robert Boot (all prominent growers) told a meeting of growers that they preferred to endorse the contract rather than to see the Association fold. Payne, "Cooperation--The Raisin Baron," 15; Wickson, "The Raisin Situation," PRP, 62 (August 31, 1902): 140.

<sup>66</sup>"Editorial," PRP, 62 (December 14, 1901): 370; "Editorial," PRP, 63 (January 4, 1902): 2; "Editorial," PRP, 63 (January 11, 1902): 22; "Editorial," PRP, 63 (April 12, 1902): 246; Spence, "Success After Twenty Years," SMH, 3:8 (March, 1918): 9; Fox, "Cooperation in the Raisin Industry," 45-50.

right to organize, without seeking to enhance the product at the expense of someone else, but to get what [we] are entitled to." The CRGA found the going a little rough; at the end of the 1902 season the association still had 5,000 tons of raisins on hand. But its goal was not to achieve independent economic power but to return to the older model of voluntaristic, non-capitalized cooperation. This move earned it the praise of the Pacific Rural Press, whose editor lauded the CRGA's handling of the 1902 crop as "the most brilliant and successful marketing operation yet accomplished by growers in California."<sup>67</sup>

The older model, however, simply did not work for the raisin industry. The 1903 crop was the CRGA's last. Many growers, particularly Armenians, distrusted the new management and refused to renew their contracts. Some delivered their raisins to outside packers under cover of darkness. Unable to sell all the raisins produced by its remaining members, the CRGA announced in August, 1904, that it would suspend business for that season. A packers' combine took

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<sup>67</sup>The industry produced a record crop of 106,000,000 pounds, of which the CRGA handled approximately 80 percent. Growers received a price of 3-4/5 cents--adequate, but far lower than the high of 1899. "The Week," PRP, 65 (April 18, 1903): 242; Fox, "Cooperation in the Raisin Industry," 50-52; Spence, "Success After Twenty Years," SMH, 3:8 (March 1918): 9; "The Cooperative Raisin Packers' Associations," PRP, 64 (September 13, 1902): 166; "California Raisin Growers' Association," PRP, 64 (October 11, 1902): 239; "Raisin Marketing This Year," PRP, 64 (November 15, 1902): 310; "Agricultural Review: Fresno," PRP, 64 (November 29, 1902): 343.

over the unsold stock and financial obligations of the growers' association.<sup>68</sup>

The collapse of the CRGA did not impel the industry to adopt Kearney's "new form of co-operation," either. After a disastrous 1904 harvest, Kearney organized a group of "large growers and business men" that incorporated two companies under Nevada law. One would function as the pooling agent; the other would own and operate packing houses and conduct marketing. Growers held stock in proportion to their acreage, and the crop contract incorporated the yellow slip concept. But only half of the growers signed up, and lacking sufficient capital to build its own packing plants, the cooperative was forced to contract with the commercial packers and return all funds derived from the yellow-slip.<sup>69</sup>

Kearney denounced this bargain as a pact with the devil. The packers responded in kind. In a public statement, they said, "Mr. Kearney [will tell] the growers that we are opposed to him because we cannot control him. In answer to this we wish to say that our principal reason is that we cannot make a contract with Mr. Kearney that he will

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<sup>68</sup>"The Raisin Association," PRP, 66 (July 4, 1903): 15; Smith, Garden of the Sun, 523; Proceedings of 30th Fruit Growers' Convention, 312; Fox, "Cooperation in the Raisin Industry," 51; Spence, "Success After Twenty Years," SMH, 3:8 (March, 1918): 12; Payne, "Co-operation--The Raisin Baron," 44.

<sup>69</sup>Fox, "Co-operation in the Raisin Industry," 64-66; Spence, "Success After Twenty Years," SMH, 3:9 (April, 1918): 6; Remarks of Alex Gordon, Proceedings of 30th Fruit Growers Convention, 312.

respect." The other directors decided that the packers were more necessary to the CRGC than Kearney was, and they refused to abrogate the agreement. When he resigned in yet another salary dispute, the directors returned all growers' contracts and disbanded the company.<sup>70</sup>

Lonely and embittered, Kearney died at sea on May 27, 1906, leaving a legacy of contradictory ideas.<sup>71</sup> On the one hand, a "powerful packing-marketing corporation" carried undeniable appeal; on the other, traditional cooperation was deeply rooted in American agriculture. In assessing this legacy, historians have concluded that Kearney's cooperative movement failed because the industry was simply not yet ready for it. In addition, his ideas were too sophisticated for most growers to understand.<sup>72</sup>

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<sup>70</sup>Fresno Republican, April 3, 1904, quoted in Fox, "Cooperation in the Raisin Industry," 58, 67; "Agricultural Review: Fresno," PRP, 71 (March 3, 1906): 135; Rehart and Patterson, M. Theo Kearney, 37.

<sup>71</sup>Rehart and Patterson, M. Theo Kearney, 42. Kearney left behind an epitaph for himself that indicates not only his high opinion of his own endeavors but also his disgust at those whom he attempted to educate: "Warning--here lies the body of M. Theo Kearney, a visionary who thought he could teach the average farmer, and particularly raisin growers, some of the rudiments of sound business management. For eight years he worked strenuously at the task, and at the end of that time he was no further ahead than at the beginning. The effort killed him."

<sup>72</sup>Rehart and Patterson, M. Theo Kearney, 37. For typical assessments of Kearney, see, Bragg, "History of Cooperative Marketing in Raisins," 14 ("[Kearney's] community was not ripe yet for understanding . . . advanced ideas"); and Rehart and Patterson, M. Theo Kearney, 36 ("[The growers] were particularly opposed to an organization that would demand funds from them to create a grower-operated packing

On closer examination, this interpretation oversimplifies the complex array of interests in the industry and their stake in cooperation. The growers, packers, bankers, merchants, and other affiliated entrepreneurs all generally supported the idea of industry-wide monopoly. But each group had its own image of such a cooperative. To many growers, Kearney's vision of a raisin "trust" did not seem cooperative. His models--the steel trust and out-of-state corporation law--were unfamiliar tools. And he made no attempt to allay their fears about the attendant anti-trust problems. Kearney's proposals for assessments on each member's share of the proceeds and for million-dollar capitalized corporations required the growers to sacrifice their own earnings at great risk. As much as they liked Kearney and wanted him as their leader, in the end the growers refused to accept the financial risks of his organizations.

Worse, as his support among the growers evaporated, Kearney recklessly alienated powerful interests in the industry. His disavowal of traditional cooperation, and his burning ambition to get into the packing business, frightened the packers and bankers. As important as the growers' prosperity was to the Valley's economy, the packers and bankers had no intention of permitting a growers' organiza-

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concern. While many growers continued to support some kind of limited company, they had little interest in any ambitious and expensive enterprise").

tion to usurp their control over the industry's fortunes. Ironically, Kearney's deepest desire--to ensure that only the growers profited from growing and selling raisins--reflected an essential assumption of traditional cooperation. But the means by which he sought to achieve this end had little in common with prevailing understandings of cooperation.

After Kearney's death in 1906, other prominent growers continued to experiment with his methods. They came to the same conclusion that he had: to succeed, a raisin cooperative had to control a monopoly of the growers, finance the sale of the crop to the packers, and raise sufficient capital to build packing houses, conduct marketing operations, and protect the market from free-riders and other hostile interests. The industry tried several capitalized pools after 1906. None worked. By 1912, the experience convinced a group of prominent growers, lawyers, and bankers that "no plan to organize the raisin growers could succeed without a ready paid-in cash capital."<sup>73</sup>

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<sup>73</sup>A succession of "million-dollar companies" had been drawn up by industry committees between 1907 and 1912. Many of the architects drew directly on their experiences with the Kearney associations and attempted to remedy his failures by adhering more closely to traditional cooperation, particularly by limiting stock ownership to growers. Spence, "Success After Twenty Years," SMH, 3:10 (May, 1918): 6-7; John W. Preston, opening statement before the Federal Trade Commission, In Re California Associated Raisin Company, Investigation upon Application of Attorney General under Section 6(c) of the Federal Trade Commission Act, Transcript of Proceedings, Washington, D.C., 1 (November 24, 1919): 333, typescript, Franklin P. Nutting Papers, Bancroft Library.

This group resurrected Kearney's ideas for an "agricultural trust" and organized the California Associated Raisin Comapny in November, 1912. The CARC rapidly became the trust that Kearney had dreamt of: by 1916, it had a capital stock of \$1.5 million, a network of cooperatively-owned packing houses, and a market share of 88 percent.<sup>74</sup> While the raisin industry was unwilling to follow Kearney during his lifetime, he set in motion the evolution of cooperation into a new legal form. His conception of the cooperative as a distinctive kind of corporation that was legally privileged to conduct a monopoly was ingrained in the operating philosophy of the CARC. It would also cast in sharp relief the cooperative movement's most pressing legal problem: establishing a growers' trust without violating the anti-trust laws. By employing the structure of a regular corporation to fulfill the purposes of an agricultural cooperative, the CARC straddled the legal fence that separated corporation and cooperative. Maintaining that position in the face of dogged local opposition and official federal skepticism proved a delicate balancing act in the decade to follow.

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<sup>74</sup>Louis C. Levy, History of the Co-operative Raisin Industry of California, (Fresno, California: Privately published, 1928), 11.

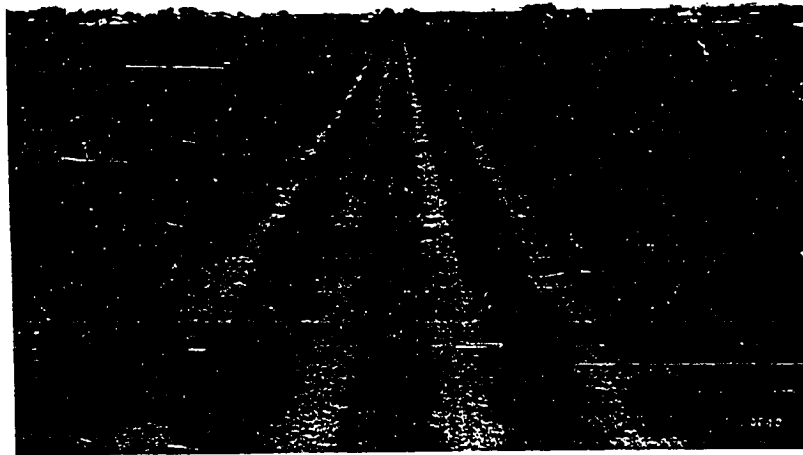


4. Armenian immigrants harvesting wine grapes, Fresno County, c. 1885. Most Armenians quickly became landowners and moved out of the ranks of fieldworkers. 217  
Courtesy Fresno Historical Society Archives.

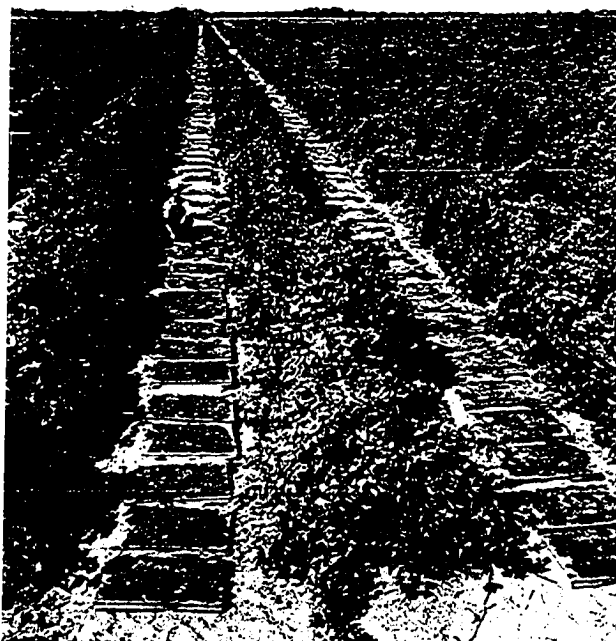




5. Nest'ell Vineyard, Fresno, California, c. 1900. The vines have just been planted. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



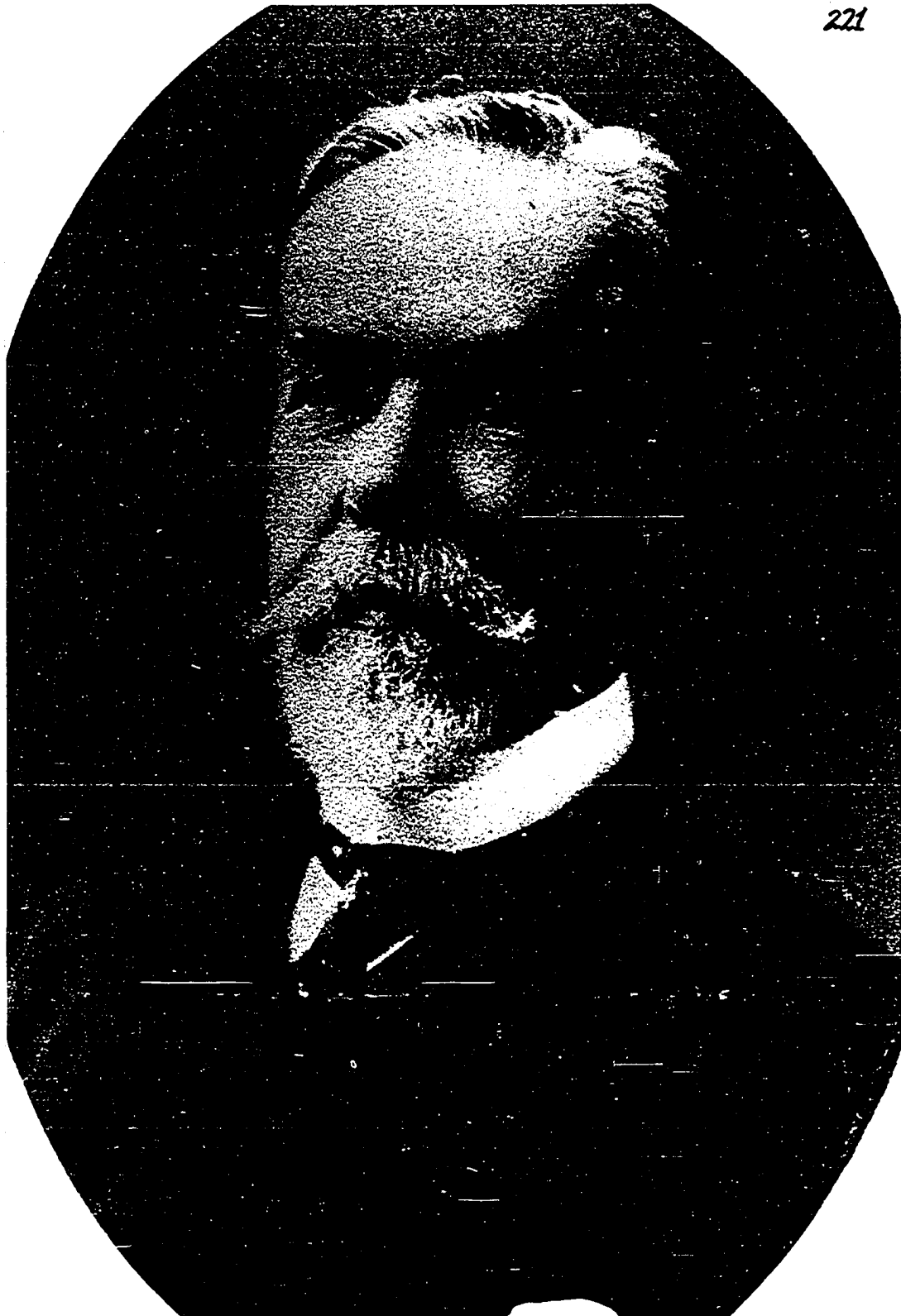
6. One-year-old Muscat raisin vines, c. 1924. These vines would bear marketable fruit in their third or fourth season. Canes measured ten to fifteen feet on average. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



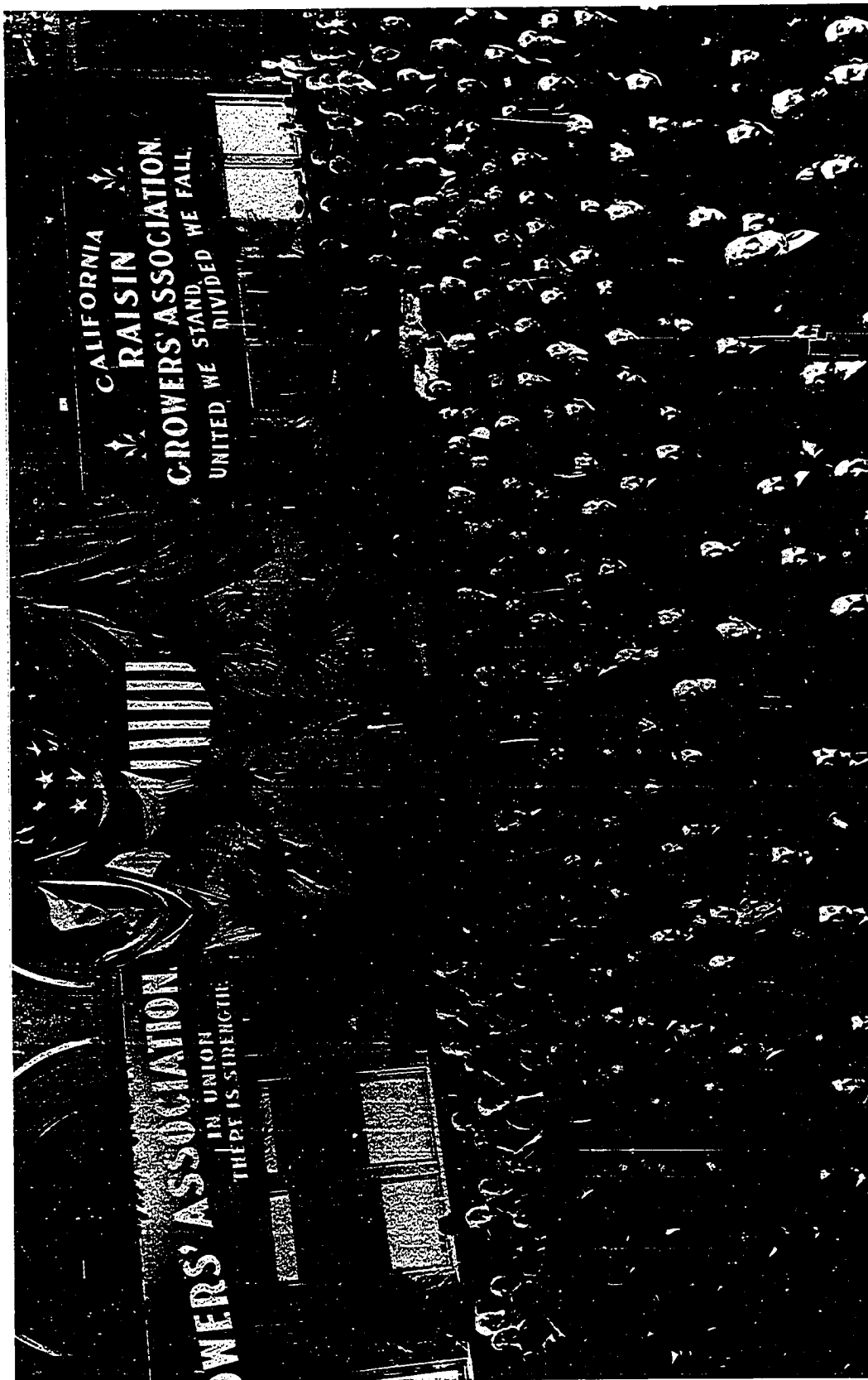
7. Harvested raisins drying in wooden trays, c. 1924. Note the size of the vines compared to the farmworker. Sun-drying raisins and other dried fruit was an efficient method of curing, since unseasonable rains presented the only major risk to the crop. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



8. Sweat boxes stacked in a vineyard, c. 1924. "Sweating" the raisins equalized the water content throughout the fruit, making the grapes pliable (and edible) after sun-drying. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



9. M. Theo Kearney, age 61, in 1903. Courtesy Fresno Historical Society Archives.



10. Members at mass meeting, California Associated Raisin Growers, Fresno, 1902. Kearney sits alone at the presiding table. Courtesy Fresno Historical Society Archives. 22 22

## CHAPTER 5

### COOPERATIVE OR CORPORATION? BUSTING THE RAISIN TRUST

Call us a trust, if you want to, but we're a benevolent one.

Wylie M. Giffen, President  
California Associated Raisin Company, 1920<sup>1</sup>

The California Associated Raisin Company symbolized the raisin growers' belief that the right to monopolize--to conduct a "benevolent trust"--was the inalienable right of agricultural cooperatives. But this right did not go unchallenged. The major commercial raisin packing firms in Fresno contended that the CARC was no benign farmers' cooperative but a "corporate trust" controlled by "big business." National trade associations representing urban wholesalers and retailers joined the battle against what eastern newspapers had come to call the "raisin trust."<sup>2</sup>

In some respects, the levelling of anti-trust charges and name-calling was a strange reversal of economic roles. Farmers had long been the chief accusers in the anti-trust movement; in 1919, when the CARC's control over the nation's raisin supply became common knowledge, farmers themselves became the accused. But farmers were relatively well pro-

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<sup>1</sup>Quoted in Herman Steen, "Story of the California Raisin 'Trust,'" Hoard's Dairyman, 60 (October 15, 1920): 532.

<sup>2</sup>Ibid.

tected against prosecutions for federal anti-trust violations, through Section 6 of the Clayton Act and the DOJ appropriations riders. And, while state courts had exhibited marked hostility towards cooperatives, California had never sued a cooperative under state law.<sup>3</sup> Any test of the CARC's power to monopolize--and the legality of its structure--would require a direct, uncontrovertible violation of the Sherman Act. As the CARC's opponents discovered, proving a federal anti-trust case against a cooperative made for a tough, uphill fight.

#### The Corporate Structure of the CARC

The California Associated Raisin Company's organic structure was unique among agricultural cooperatives. Two decades of trial and error convinced lawyers and leading growers that a raisin industry cooperative had to depart from the traditional cooperative form, characterized by "nominal capital stock and operated wholly in the interest of the membership of which they are composed, with no profits to anyone except to the producers themselves." Instead, they combined traditional cooperative principles with the regular commercial corporation, resulting in an organization "partly speculative and private, sometimes with considerable capital, and partly co-operative, sharing something of the benefits of large business with the produ-

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<sup>3</sup>See chapter 2.

cers who use them."<sup>4</sup> Their brainchild, the CARC, was a producers' cooperative with capital supplied by friendly supporters who happened not to be producers. The CARC embodied a formula of cooperation that suited both the growers and the Fresno financial community: "Business and professional men for the first time saw [an organization] that looked good from a business point of view."<sup>5</sup>

From a legal point of view, however, few aspects of the CARC's structure looked cooperative. Its organizers, including Fresno attorneys William A. Sutherland, his partner Hector Barbour--later to represent Fresno in Congress--H.H. Welsh, and M.K. Harris, drew up the CARC's Articles of Incorporation and By-Laws to provide for general incorporation with a capital stock of one million dollars, divided into 10,000 shares of \$100 each. This capital came from bankers, merchants, urban professionals, and wealthy growers as well as twenty-acre growers, who would all earn from 6 to 8 percent interest on their investment. Instead of following the Rochdale rule of one-man, one-vote, all shareholders had one vote for each share owned. The intimate democracy of Rochdale membership and voting had been altered in favor of a more impersonal representative structure resem-

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<sup>4</sup>B.A. Woodford, "Organized Fruit Marketing," PRP, 81 (March 25, 1911): 232.

<sup>5</sup>Harrington W. Cochran, "The Results of Cooperation in the Raisin Industry of California" (M.A. thesis, University of California, Berkeley, 1915), 66.



bling corporate shareholding.<sup>6</sup>

In fact, voting rights mattered little in the CARC. Under a Voting Trust Agreement, elected trustees controlled all shares. This was to prevent speculative purchases of stock by "interests hostile to raisin producers," such as brokers, jobbers, and wholesalers.<sup>7</sup> The trust arrangement was a definite innovation in cooperative organization. And, just as M. Theo Kearney had done with the CRGA fourteen years before, the trustees represented all the interests in the industry, not only growers but also bankers, packers, merchants, lawyers, and even utility company managers (see Table 5-1).

It was in the area of grower membership that the CARC most strikingly departed from traditional cooperative practice. Since stockholding served the purpose of raising capital rather than tying growers to the organization, the CARC had to secure control over the crop through another device.

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<sup>6</sup>"Original Voting Trust Agreement" and "Amended Articles of Incorporation, and By-Laws of California Associated Raisin Company," in Fred K. Howard, History of the Sun-Maid Raisin Growers, (Fresno, CA: Fred K. Howard, 1922), 19-22, 35-41. On the part played by Fresno attorneys, see Louis Levy, History of the Cooperative Raisin Industry of California (Fresno, California: Privately printed, 1928), 6; W.Y. Spence, "Success After Twenty Years," Sun-Maid Herald, 3:11 (June, 1918): 7.

<sup>7</sup>Many growers pledged personal notes to purchase the stock. James M. Bragg, "History of Cooperative Marketing in the Raisin Industry to 1923" (M.A. thesis, University of California, Berkeley, 1930), 66; Walter V. Woehlke, "Raising the Price of the Raisin: Get[ting] Together Pays the Growers," Country Gentleman, 79 (1914): 2039; Spence, "Success After Twenty Years," SMH, 3:11 (June, 1918): 7.

Table 5-1  
Trustees of the California Associated Raisin Company  
and their Occupations, 1912

	Grower	Banker	Raisin Packer	Merchant	Attorney	Utility Company Official	Other
Hector Burness	x	x		x			lumberman
J.J. Eymann	x	x					
Lucien Franciscini	x						
Levi Garrett		x					
Wylie M. Giffen	x			x			
Hans Graff							
James Madison	x		x <sup>a</sup>				
R.K. Madsen	x				x		
J.L. Norman	x	x					
William R. Nutting	x		x <sup>a</sup>				
E.F. Pickerill	x	x					
William Parlier	x					x	
A. Grant Robinson	x						grain farmer
H.H. Welsh	x <sup>b</sup>				x		oil investor
A.G. Wishon	x <sup>b</sup>						
ten others			occupation unknown				

Source: W.Y. Spence, "Success After Twenty Years," Sun-Maid Herald, 3 (1917)-5 (1919).

<sup>a</sup>Both Madison and Nutting resigned their partnerships in commercial raisin packing firms before accepting their directorships in 1912.

<sup>b</sup>Wishon did not purchase a vineyard until 1918.

Sutherland, Welsh, and Harris devised a crop contract for the growers to sign. This contract bound the growers to sell all that they produced to the CARC at guaranteed prices. For Thompson Seedless raisins, which most growers were then planting, the price was 3-1/2 cents per pound. For its part, the CARC was obliged to "use its best efforts to resell said raisins at prices higher than those paid" to the growers, and whatever excess it obtained would be returned to the growers minus 1/4 cent per pound to cover "taxes and insurance." The CARC "expressly" specified that it would not bind itself to any contract unless growers representing at least 60 percent of the raisin acreage signed up. However, if the CARC obtained contracts covering 75 percent of the industry, it would pay an additional 1/4 cent per pound, and for 85 percent control another 1/4 cent. The contract had a term of three years, with the CARC reserving its option to renew for another two. With 4,400 of the state's 6,500 growers representing 76 percent of the acreage under contract, plus \$800,000 in stock subscriptions, the CARC had become a highly capitalized horizontal combination by the time it opened its doors in April, 1913.<sup>8</sup>

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<sup>8</sup>"First Crop Contract," n.d. but covering years 1913, 1914, 1915, in Howard, History of the Sun-Maid Raisin Growers, 23-25; Harold Steen, Cooperative Marketing: The Golden Rule in Agriculture, (New York: Doubleday, Page, & Co., 1923), 23; Bragg, "History of Cooperative Marketing," 64, 66; W.Y. Spence, "The California Associated Raisin Co.: Organization of the Company," SMH, 3:12 (July, 1918): 6-7, 14. Spence reported that the 1/4 cent per pound retained from excess profits would meet "expenses and interest char-

The CARC directors reflected the intimate connection between raisin growing and the commercial establishment of the Central Valley. The president, Wylie M. Giffen, was the son of a Presbyterian minister who brought his family to California from Pennsylvania in 1889. A man of little formal education, he purchased land on easy terms during the depression of the 1890s, and by 1912 his 4,200 acres ranked among the industry's largest individual holdings. Like other large-scale farmers, he believed that cooperation was essential to his own well-being. From the experience of the Kearney cooperatives at the turn of the century, he had come to see that no grower could bargain with the packers and commission merchants alone and hope to gain in the long run. "Individualism," he concluded, "was a myth."<sup>9</sup> James Madison, the general manager, had immigrated to California in 1892 from Denmark, whose dairy cooperatives were world-famous. During the 1890s he acquired several hundred acres of vineyards, purchased an interest in an Alaska salmon canning plant, and owned half of a Fresno raisin packing firm. Though a packer, "he had the mental attitude common to many Danes which permitted him to accept the idea of cooperation as a perfectly normal practical means of ac-

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ges," but it was not specified what those expenses were.

<sup>9</sup>Bragg, "History of Cooperation," 21, 24; Spence, "Organization of the Company," 7; Lilbourne Alsip Winchell, History of Fresno County and the San Joaquin Valley (Fresno: A.H. Cawson, 1933), 279-81.

complishing an economic purpose."<sup>10</sup> Of the five other directors, none was a full-time grower. Hector Burness managed a banking and mercantile firm. A.G. Wishon was a hydroelectric engineer and manager of the San Joaquin Light and Power Corporation. Hans Graff was a Fresno merchant, like Madison a Dane by birth. H.H. Welsh was an attorney and W.R. Nutting the former president of a raisin packing firm. These men recognized the need for broad-based grower participation, but that participation would be set within the framework of a powerful, centralized organization.<sup>11</sup>

The CARC's organizers, officers, and directors saw no contradiction between traditional cooperative ideals and the corporate combination they had created. Attorney Sutherland, describing the legal character of the association, pointed out that "the new company was not purely cooperative, but a stock company, while at the same time . . . it was to be conducted as the associated effort of the raisin growers." As proof of the growers' central role, the directors made incorporation "contingent upon the affiliation of at least 60 percent of the raisin growers." The CARC's "unique form" carried the "great advantage of economical operation by the handling of a large volume of business and . . . of being considered the ruling factor in the markets."

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<sup>10</sup>Spence, "Organization of the Company," 7; Bragg, "History of Cooperation," 55.

<sup>11</sup>Spence, "Organization of the Company," 7.

But to Giffen and Madison, the CARC's primary role was to represent the associated interests of agricultural producers. It was this aspect of the CARC's organization that they emphasized in public statements. In April, 1913, Madison reported to the Fresno press, "[the CARC] has been created by the largest percentage of growers ever joined together in the history of the state." Declaring that they were "more concerned with getting a good prices [sic] for raisins than for the dividends," Giffen, Madison, and the trustees confidently proceeded on the assumption that their grafting of cooperative and corporation was not only legal, but just.<sup>12</sup>

The growers themselves agreed with this assessment. Raisin prices had been consistently demoralized since the depression of 1907. Most of the growers were apparently willing to forget the "friction" of the Kearney years, wrote the CARC's own historian in 1917, "and they knew that under efficient leadership a permanent organization could be developed that would pay them a living price for their crops." One thousand growers attended the mass-meeting in Fresno on November 15, 1912, described by Fresno county horticultural commissioner Fred K. Howard as "the largest

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<sup>12</sup>Spence, "Organization of the Company," 7; Howard, History of the Sun-Maid Raisin Growers, 9; Steen, Cooperative Marketing, 23; Edward J. Wickson, "The Raisin Realization," PRP, 84 (November 2, 1912): 420; D. J. Whitney, "Sunrise for the Raisin Industry," PRP, 84 (November 23, 1912): 492; Bragg, "History of Cooperative Marketing in the Raisin Industry," 67.

meeting of its kind since the days of the old California Raisin Growers Association." The CARC endeared itself to the growers by immediately purchasing all surplus raisins still in growers' hands after the holiday selling season (known as the carryover), which in the spring of 1913 amounted to 25,000 tons. The CARC paid growers 2-3/4 cents per pound, the Pacific Rural Press reported, "at a time when independent packers would offer no more than 1-3/4 to 2 cents a pound." The growers' major reservation was how their organization would be construed under the anti-trust laws, even with the newly-enacted appropriations rider on the books. At one of the first growers' meetings, held to encourage them to sign crop contracts, one of the growers asked H.H. Welsh whether the contracts and methods they were using were likely to be deemed illegal. An observer later recounted Welsh's reply: "'Well, I think we will have to admit that we are a trust, but we claim to be a good trust,' and he smiled as he said it."<sup>13</sup>

#### Building a Benevolent Trust

The raisin growers' "good trust" quickly took control

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<sup>13</sup>Spence, "Organization of the Company," 6-7; Howard, History of the Sun-Maid Raisin Growers, 9; Whitney, "The Raisin Company," PRP, 85 (February 1, 1913): 139; Wickson, "Farm Organization Not a Trust," PRP, 85 (March 1, 1913): 258; U.S. Federal Trade Commission, Investigation in re California Associated Raisin Company, Transcript of Hearings, typescript, testimony of E.L. Chaddock, v. 1 (November 20, 1919), 129, Carton 6, FPNP (hereafter FTC Hearings Transcript).

of the industry. By the beginning of May, growers had committed over 115,000 acres of vineyards, representing about 75,000 tons out of a total crop of 90,000 tons, to the CARC. Many of the growers were apparently pleased with the Association's prices and its plan for controlling the industry. The general feeling among the growers was that the Association provided smallholders with "a feeling of security although it still means hard work and plenty of it to get results." After buying up the carryover raisins, Giffen and Madison purchased three small cooperative packing houses, but they proved too small to handle the CARC's stock. The natural answer was to negotiate with the packers. Madison requested the packers to attend a meeting at which they would be informed of the terms of doing business with the CARC.<sup>14</sup>

These negotiations revealed the CARC management's loftiest ambitions. The packers had thought that the CARC "was to be purely a farmers' cooperative organization dealing with the raw product only." At the meeting, Madison and Giffen hinted that the CARC would ultimately enter the business of processing and selling as well. This revelation

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<sup>14</sup>Report of Special Agent Arthur M. Allen, "In Re Raisin Trust," May 5, 1913, 7-8, Case No. 60-166-21, Special Section, Raisin Trust; Bureau of Investigation Files, Box 560, Central Classified Subject Files, Bureau of Anti-Trust Investigation; Records of the Department of Justice, Record Group 60 (RG 60); National Archives, Washington, D.C. (NA); Spence, "Early Negotiations With the Packers," SMH, 4:3 (October, 1918): 4-5.



shattered the fragile solidarity of the packers, who could not even agree on a price to charge the CARC for packing its goods. Giffen and Madison proceeded to contract with the packers on an individual basis, forcing them to scramble to obtain the best possible terms for themselves.<sup>15</sup>

The agreement between the CARC and the packers left no doubt as to who controlled the crop. The packers were to process the raisins, sell them at prices set by the CARC, and receive five dollars per ton as their share. Further, the packers were to assume the expense and risk of holding their portion of the surplus from each preceding crop year, a cost that growers had borne in previous years. Finally, the packers were bound not to process any raisins other than those of the CARC. The deal was a bitter pill forced on the packers by the CARC's relatively strong bargaining position and the packers' own disunity. In effect, they believed, the agreement "reduced them to . . . becoming exclusive agents which . . . made them practically nothing but employees [of the CARC]." Of the twenty one private packing companies doing business in Fresno, sixteen eventually signed contracts with the CARC during the summer of 1913.<sup>16</sup>

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<sup>15</sup>Chaddock testimony, FTC Hearings Transcript, v. 1 (November 20, 1919), 113-119.

<sup>16</sup>Bragg, "History of Cooperative Marketing in the Raisin Industry," 72; Thomas Gallagher and Robert O'Connor, Assistant U.S. Attorneys, to Attorney General, February 11, 1916, File 1, Box 559, RG 60, NA; Spence, "Early Negotiations With the Packers," 4-5; Bragg, "History of Cooperative Marketing in the Raisin Industry," 74-75, 77. On the

The so-called "inside" packers who signed with the CARC were not entirely happy about the terms of their contract. But they believed that as long as the CARC did its packing through them--and refrained from building packing plants of its own--the growers' organization was no threat to their businesses. As one packer informed his East coast customers that year, "The [capital stock] money is not to be used in the purchase of or building of packinghouses but it is to be used as a working capital to enable the CARC to purchase outright from the growers, resell the raisins as the market requires them, and to hold them at a time when the market is supplied." But even this "working capital" gave the CARC far greater market power than any of its predecessors. And Giffen and Madison had not attempted to conceal their ambition to have the CARC eventually do its own packing. One of the inside packers, the Bonner Packing Company, warned its customers of the CARC's economic power even before the subscription campaign closed on April 1:

From present indications we believe that the CARC will be in a position . . . of being the one factor to control the raisin market and the future destiny of the raisin industry. Their contracts are absolute contracts of purchase at a minimum price . . . which will establish the value of the [1912] crop goods . . . much higher than prices we are now quoting.

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form and operation of the packers' contract, see Agent Allen's report, September 2, 1913, Exhibit A (copy of contract with Phoenix Packing Company), September 25, 1913, Box 560, RG 60, NA.

And the raisin cooperative's ability to fix prices, so difficult to maintain in past years, was now well-respected in the East: "Prices are guaranteed against the decline of the California Associated Raisin Co. until April 1st, 1914. This guarantee is about all the protection necessary, as the Association controls absolutely the Raisin industry in California, and are in position to set and control prices."<sup>17</sup>

The packers' communications to brokers and wholesalers in the national trade stirred up feelings of deep animosity towards the CARC. Complaints reached the DOJ's offices at Washington a week after the subscription campaign closed in April. A bakery company in Detroit acidly remarked, "This smells like the work of rabid republican 'protectionists' instead of pure democracy that we were supposed to get under the present regime. It looks as though some one had put one over on the present administration." An Illinois wholesale grocers' firm asserted that the Raisin Company was "the most extreme airtight monopoly that we have ever come in contact with." And a Massachusetts wholesaler called the CARC "the worst of all Combines or Trusts."<sup>18</sup>

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<sup>17</sup>Trade circular, Bonner Packing Company, Fresno California, March 29, 1913; trade circular, Bonner Packing Company, March 25, 1913, both in Box 560, RG 60, NA; trade circular, T.S. Southgate & Co., August 14, 1913, File 1, Box 559, RG 60, NA.

<sup>18</sup>William S. Courtland, Special Assistant to the Attorney General, to A. Bruce Bielaski, Chief, Bureau of Investigation, April 8, 1913, Box 560, RG 60, NA; trade circu-

Dealers in agricultural commodities perceived the CARC not as a benevolent farmers' organization but as an economic force in its own right. They feared its capacity to corner the market, and they believed that it violated federal law. The Arkansas Brokerage Company put the matter in succinct terms: "[F]rom the nature of the California Associated Raisin Company, it appears to us that it is a combination in restraint of Interstate Commerce and in violation of the Sherman Anti-Trust law." A Detroit wholesaler called for a public inquiry, remarking sarcastically that "if the Government does not investigate this Trust they should not touch any of the others." The DOJ immediately ordered the U.S. Attorney in San Francisco, J.L. McNab, to authorize a special agent to investigate the CARC's operations.<sup>19</sup>

Neither McNab nor Arthur M. Allen, the special agent, was particularly sympathetic to the complaints of the trade and the packers. McNab informed Attorney General James McReynolds that he was "not disposed to think that any immense trust exists," insofar as the CARC represented the culmination of years of effort to place the raisin industry

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lars, Bonner Packing Company, Fresno, March 25, 1913, March 29, 1913, ibid.; W.L. Sheill to Rep. E. R. Bathrick, February 19, 1914, Box 559, File 1, RG 60, NA; George W. Mueller, Mueller, Platt & Wheeland Co., to Attorney General James McReynolds, November 8, 1913, ibid.

<sup>19</sup>R.E. Russell to Attorney General, July 31, 1913; The Daniels, Cornell Co. to DOJ, July 30, 1913; Carroll Todd, Assistant to the Attorney General, to J.L. McNab, April 15, 1913, all in File 1, Box 559, RG 60, NA.

on a stable footing and protect the growers' investment in their vineyards. Allen's report of May 3, 1913, informed McNab that the CARC did not contemplate doing business in interstate trade. It was possible that the CARC would do its own packing and marketing if the private packers refused to pack and sell its raisins, he noted, but "at most its object was to steady prices and enable the grower to receive an annual price that was remunerative rather than a high at one time and one so low at another that he could not meet his expenses." Allen seconded Madison and Giffen's view that under the conditions then prevailing in the raisin industry, the growers' organization was serving a legitimate need--stabilizing the industry--and that its having capital stock was not per se a violation of the anti-trust laws. Allen concluded that if the Association carried out its threat to do its own packing and marketing by by-passing the private packers, it would certainly be conducting interstate business; however, the Association's goal appeared to be the reduction of prices paid by the consumer, which they intended to accomplish by setting a maximum on the prices charged by the packers.<sup>20</sup> Officials in Washington were less

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<sup>20</sup>The Association's officers believed that they were not breaking the law but urged the Department to inform them if they were. Madison told Allen that the Association's prices for 1913 were reasonable in view of prices for the preceding six years and that the packers and jobbers were merely upset at the loss of "enormous and unreasonable profit[s]." The purpose of the organization, Madison noted, was to "sav[e] many small growers of raisins from actual bankruptcy." Madison to Allen, September 3, 1913, copy in Allen

sanguine. The San Francisco office of the Bureau of Anti-Trust Investigations received instructions in July to monitor the situation and report to the DOJ the results of the CARC's agreement with the packers, plus any actions taken by the "Packers' Combine."<sup>21</sup>

By the time the 1913 crop was harvested in October, the DOJ decided that the CARC's actions merited official investigation. The CARC had concluded its first year's operations having sold the bulk of the 1912 carryover, increased its authorized capital to \$1.5 million, and won over suspicious jobbers in the Eastern trade through its price-fixing practices. The CARC did not wait long to begin its own packing operations, leasing a big packing plant in September and processing part of the 1913 crop. The packers continued to make their displeasure known through trade channels and directly to the DOJ. As the CARC continued to buy and lease packing plants throughout the raisin district during the next two years, the Attorney General's office in Washington continued to urge Albert Schoonover, the U.S. Attorney in Los Angeles, to investigate. It would be almost three years before Schoonover did so, the work delayed due to a heavy

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Special Report, September 2, 1913, Box 560, RG 60, NA; McNab to Attorney General, April 21, 1913, File 1, Box 559, RG 60, NA; Allen Reports, "In Re Raisin Trust--Violation of the Anti-Trust Law," May 3, 1913, May 5, 1913, Box 560, RG 60, NA.

<sup>21</sup>Fowler, memorandum to Bielaski and Allen, July 14, 1913, Box 560, RG 60, NA.

trial caseload in the Los Angeles office.<sup>22</sup>

In the interim the CARC continued to integrate both horizontally and vertically.<sup>23</sup> Horizontally, the CARC maintained its control over the crop by suing growers who breached their contracts, often successfully, and by signing up newcomers. Vertically, it consolidated control of the crop in its raw form, when the growers delivered to the packing houses, with shipping and sales to through the wholesale trade. The CARC also set up a nationwide network of salespeople and brokers that sold raisins only under the CARC's brand, "Sun-Maid," and monitored market conditions for the head office. To support the work of the sales network and promote its brand, the CARC invested hundreds of thousands of dollars of its profits into a national advertising campaign. As Madison and Giffen had promised, the CARC expanded into the packing business, building up a district-wide system of packing houses under its control

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<sup>22</sup>Spence, "Winning Confidence of Eastern Trade," Sun-Maid Herald, 4:4 (November, 1918): 23; Spence, "Associated Established on Firm Foundation," ibid., 4:5 (December, 1918): 6, 23; Carroll Todd/Albert Schoonover correspondence, March 11, 1914 through January 24, 1916; Todd memo to Bielaski, January 21, 1916, all in File 1, Box 559, RG 60, NA.

<sup>23</sup>For definitions of the concepts of vertical and horizontal combination and their use by trusts, see Thomas P. McCraw, Prophets of Regulation (Cambridge, MA: Harvard University Press, 1984), 70-72, 98-101. Until the formation of the CARC, no industry-wide cooperative had succeeded in controlling both supply and marketing. U.S. Tariff Commission, Grapes, Raisins and Wines, Report No. 134, 2d ser. (Washington, D.C.: U.S. Tariff Commission, 1939), 129-34.

through leases and outright purchases of the business of seven other packers. To finance these operations, the CARC increased its authorized capital stock to \$2.5 million in August, 1914.<sup>24</sup>

As the CARC expanded its reach into the national market, some DOJ officials became convinced that it was conducting business in interstate commerce in restraint of trade. In February, 1916, two of Schoonover's assistants filed a preliminary report on the activities of the CARC. Thomas Gallagher and Robert O'Connor told the Attorney General that the CARC had the power to set prices for the entire industry: "Working upon the basis of this plan of organization [the Voting Trust Agreement], the contracts with the growers, contracts with packers and leases of their plants, the California Raisin CARC [sic] has absolutely fixed and determined the price of raisins as appears from circulars issued by packers under contract with it." Since packers under contract to the CARC could handle only Sun-Maid raisins, the packers in effect became agents of the CARC, enabling the CARC to fix the price at which raisins

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<sup>24</sup>"New Design Adopted for Sun-Maid Carton," SMH, 1:1 (August 1915): 5; "Big Advertising Campaign Started," ibid., 8-9; "Thousands of Dollars of Free Advertising for Raisins," ibid., 10, 20; F.P. Webster, Report In Re California Associated Raisin Co., Alleged Violation of Sherman Act, April 19, 1916, Box 560, RG 60, NA; "Historical Data, Sun-Maid Raisin Growers," February 12, 1946, unpublished manuscript, History of Sun-Maid Raisin Growers of California, Sun-Maid Corporate Archives, Kingsburg, California (SMCA); Levy, History of the Cooperative Raisin Industry of California, 7.



would be sold to the trade.<sup>25</sup>

While it was still unclear whether the CARC's prices had resulted in higher prices to the consumer, the two assistant U.S. attorneys noted that the CARC had eliminated a great deal of the excess profit margin normally exacted by the trade: "[T]herefore [the CARC] may pay a price to the growers that will cover the cost of production, about two cents per pound, and a reasonable profits to the grower on his investment and labor and yet leave such a wide margin for commissions and middlemen's profits as to actually, in the end, reduce the price to the consumer."<sup>26</sup>

Gallagher and O'Connor understood that the case would not be determined simply on the issue of price. They knew that the CARC was one of the nation's largest and most successful farmers' organizations, and in pursuing their investigation they would have to step carefully. Supporting the CARC's contention that it was a growers' organization was the fact that the stock was mostly owned by growers, and even stockholders who were not growers had a direct interest in the welfare of the raisin industry. The attorneys noted that the CARC enjoyed widespread public support in the San Joaquin valley:

There are probably fifty thousand people in the

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<sup>25</sup>Gallagher and O'Connor to Attorney General, February 11, 1916, 11-13, File 1, Box 559, RG 60, NA.

<sup>26</sup>Ibid.

valley who are directly interested in the association by reason of contracts with the association and the ownership of stock. . . . [A]ll bankers, merchants and tradesmen, architects and builders, artisans, laborers and professional men within the raisin district are interested in the maintenance of the association because they believe that its operations have increased and stabilized their own business and trades and increased the value of their properties, whether it be country property or city property.

Gallagher and O'Connor noted that the strong community support for the CARC would make it difficult to find an impartial jury in a criminal suit, should the government choose to prosecute.<sup>27</sup>

The Attorney General's assistant in Washington, G. Carroll Todd, was more interested in an issue that the preliminary report failed to address: how did the CARC plan to handle the decision to exercise the option in the growers' crop contract? Todd's question was both timely and pertinent. The first contract was due to expire on April 1, 1916, unless the option extending it for two more years were exercised. Maintaining its dominant hold over the growers was vital to both the CARC's identity as a cooperative and its strong market control. And Todd knew that how it handled the crop contract would determine the CARC's control over prices and distribution, factors central to the ques-

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<sup>27</sup>Before submitting their final recommendations, the attorneys requested the special agents to determine how many packers and how many growers were members or did business with the Association, in order to determine the extent and impact of the Association's control over prices. Gallagher and O'Connor to E.M. Blanford, February 11, 1916, ibid.

tion of its status under the anti-trust law.<sup>28</sup>

Maintaining that market control had not been easy. As early as 1913, breach of contract by growers had been a problem for the CARC. During that year's harvest the directors accused several packers of inducing growers to break their contracts by keeping their plants open at night so that the growers could deliver under cover of darkness. The packers regularly offered lucrative prices to outside growers that tempted CARC members as well. Their offers created the incentive for some members to "free-ride", meaning in this case that they delivered to the CARC when its prices were higher but could jump ship and sell to the packers when their prices were better.<sup>29</sup> In addition to grower breach of contract, the CARC's control over the growers was undermined by new vineyards coming into production whose owners did not sign contracts and by the sale of farms under contract to new owners not under contract.<sup>30</sup>

Ironically, the CARC's own balance sheet became another cause of grower disenchantment. In 1915, Giffen reported gross sales on all varieties of raisins of \$7,765,361.48.

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<sup>28</sup>Todd to Schoonover, February 28, 1916, Box 559, RG 60, NA; D.J. Whitney, "Success of the Raisin Company," PRP, 87 (January 31, 1914): 129, 137.

<sup>29</sup>This is a classic economic problem in cooperation. See Steen, Cooperative Marketing, 318-40.

<sup>30</sup>Spence, "Associated Established on Firm Foundation," SMH, 4:5 (December, 1918): 6; Bragg, "History of Cooperative Marketing in the Raisin Industry," 82, 84-85.

Of this, \$4,713,926.23 represented the advance paid to growers guaranteed by the crop contract. The costs of packing, selling, brokerage commissions, storage, insurance, advertising, and taxes pulled down another \$2,272,913.90. After the CARC deducted its 1/4 cent per pound share, \$358,009.44, there was \$420,511.63 in excess profits to distribute among the growers. The directors declared a dividend for the stockholders of six percent. Impressive as this record was from a commercial perspective, it left "a great many people" feeling that the organization cost too much to operate and that the real profits went to the shareholders and employees of the CARC. This sentiment could potentially undermine the CARC's attempts to extend its control over the growers.<sup>31</sup>

The matter of the disposition of profits, depending on how management handled it, might force the CARC to declare whether it was ultimately a for-profit corporation or a growers' cooperative association. Under the crop contract, the 1/4-cent fund was to cover the CARC's expenses, itemized as "taxes and insurance." But what were these expenses? How much money did the 1/4-cent fund bring in? In the pages of the Sun-Maid Herald Wylie Giffen hastened to explain what the CARC had done with its \$358,000. Over half--almost

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<sup>31</sup>California Associated Raisin Company, "Statement to Stockholders," and "Statement to Growers," September 30, 1915, SMH, 1:4 (November, 1915): 6-7; Wylie M. Giffen, "Further Analysis of Annual Statement," ibid., 1:5 (December, 1915): 2-3; "A Dividend Declared," ibid., 5.

\$190,000--went to pay office salaries and interest on loans borrowed to purchase the carryover crop in 1913. Staff expenses were high, Giffen said, because the contracts of 6,500 growers, 3,600 stockholders, and sixteen packers required constant and precise accounting. The CARC also sustained a loss of \$62,000 on specialized varieties of grapes that brought lower prices than the CARC paid to the growers. Finally, business expenses such as printing, postage, telephone, taxes, insurance, attorneys' fees, and rent totaled \$65,000. This left "a net profit of \$110,028," from which the stock dividends would be paid. Any leftover funds would remain on the CARC's books as a surplus. But lest the growers believe the CARC was failing to protect their interests, Giffen pointed out that "the fact still remains that three crops, aggregating 300,000 tons, have been sold under very trying financial conditions and every grower has gotten 3-1/4 cents or more, a record not equaled since the raisin business has become a real factor in our industrial life." In fact, the CARC's control had brought growers prices in excess of the advance on Muscat raisins and an even better return on Thompsons (see Table 5-2):

**Table 5-2**  
**CARC's Share of the Raisin Crop and Prices,**  
**1912-1920**

Year	Tonnage		CARC Share of Crop (%)	CARC Price (¢/lb)	
	State	CARC		Muscat	Thompson
1912	34,426	24,512	71.2	n.a.	n.a.
1913	65,930	59,770	90.7	3.5	3.9
1914	91,000	73,660	80.9	3.3	4.6
1915	127,100	98,405	77.4	3.6	5.0
1916	132,000	105,100	79.6	4.2	6.6
1917	163,000	127,000	77.9	4.9	6.9
1918	167,000	149,710	89.6	5.3	6.9
1919	182,593	159,260	87.2	10.4	12.0
1920	173,528	152,499	87.9	11.2	14.8

Sources: R.B. Forrester, Report upon Large Scale Co-operative Marketing in the United States (London: H.M. Stationery Office, 1925), 141; "Annual Financial Report, California Associated Raisin Company," Associated Grower, 1:9 (September, 1921): following 26, at viii; ibid., 5:1 (January, 1923): 16.

In part, this achievement was due to the favorable arrangement worked out with the packers, which restricted their profits to "\$5 a ton instead of \$10 or \$15 per ton, as is commonly supposed." He appealed to the growers to have faith in their organization and to look upon it as an investment in their own future:

And after all, is not the feeling of respect that you have for yourselves as from day to day you go in and out among your neighbors, a feeling deep down in your heart that you have done right, that you have contributed something toward the permanent prosperity not alone of yourselves but of the whole community, is not this feeling worth more than the difference of a few dollars in the price

of your products?<sup>32</sup>

Giffen's appeal was ultimately a moral one, speaking not in terms of profits and loss but in the language of cooperation that had ostensibly united the growers in the first place.

Whether the growers would find this persuasive was another matter. As the CARC's profits mounted during the term of the crop contract, the problem of how to keep dissatisfied growers in line became more pressing. The CARC used every organ of publicity at its disposal to exhort growers to honor their agreements, including the Fresno Morning Republican and the Sun-Maid Herald. As the end of the first term neared, Giffen and the directors had to decide whether or not to renew the crop contract. Their decision to do so tested whether growers felt the moral commitment to cooperation that Giffen urged upon them. And it revealed just how deeply some members took Giffen's message to heart. During the campaign to renew the contract, growers turned to night-riding, a practice made infamous in the Kentucky tobacco fields and characterized by mobs, intimidation, threats, and physical injury, to persuade

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<sup>32</sup>Giffen, "Complete Analysis of Annual Statement," SMH, 1:4 (November, 1915): 4-5, 20; Giffen, "Further Analysis of Annual Statement," ibid., 1:5 (December, 1915): 3.

their neighbors to join the cooperative.<sup>33</sup>

On January 1, 1916, the CARC announced in the Sun-Maid Herald that it would exercise the option, but only if growers committed an additional 15,000 acres to the CARC by April 1. The Board of Directors informed the members that the CARC could probably prosper more by continuing in business as a private packer. The directors contended that no cooperative could guarantee prices to the growers without at least 60% control of the crop. To preserve this level of market control, the directors announced a three-month campaign for obtaining the additional acreage. They appealed for support not only to the growers but also to the community at large:

Our appeal is a community appeal, as every person is either directly or indirectly prospered in proportion as the raisin industry prospers. . . . [E]specially do we appeal to the growers. First to you who are on the outside that you quit [sic] yourselves like men and in the interest of the common good lay aside the slight advantage which you now have. And secondly, to you who are already members of this organization that you should for the next three months, forgetting everything

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<sup>33</sup>On night-riding in the dark tobacco fields of western Kentucky and Tennessee, see Morton Rothstein, "Farmer Movements and Organizations: Numbers, Gains, Losses," Agricultural History, 62:3 (Summer, 1988): 177-78; and Harry H. Kroll, Riders in the Night (Philadelphia: University of Pennsylvania Press, 1965). On the connection between Kentucky night-riding and the California raisin industry, see Report of Special Agent F.P. Webster, May 18, 1916, Box 560, RG 60, NA: "Mr. Giffen stated that there was a man by the name of Black, a raisin grower in the community, who was from Kentucky, who had requested the Association to use the methods that they do in Kentucky, such as night riding, etc., to make the growers sign up with the Association."



else, spend your time and your influence towards the perpetration of the organization that has brought about your emancipation.<sup>34</sup>

The campaign to exercise the option was a battle of both words and deeds. The CARC conducted its crusade in print; zealous growers ran theirs in the vineyards. A typical announcement appeared in the January, 1916, Sun-Maid Herald: "RALLY TO THE SUPPORT OF THE RAISIN INDUSTRY! HELP THE CALIFORNIA ASSOCIATED RAISIN CO. TO STRENGTHEN ITS CONTROL! IT'S NOW OR NEVER!" For the next three months, the Herald ran broadsides exhorting the growers to sign; articles from brokers, lawyers, and wholesalers testifying to the popularity of the Sun-Maid brand; statements from the directors attacking the methods of the outside packers and attesting to the prosperity achieved through cooperation. One of the CARC's full-page advertisements in the Fresno Morning Republican drew a graphic analogy between the fate of the CARC on the one hand and the fundamental relationship between prosperous agriculture and American society on the other. The ad pictured the signing of the Declaration of Independence over a drawing of three men hanging from a tree labeled "Tree of Uncertainty." The ad read:

The spirit of our forefathers should be manifested by the raisin growers right now. The Independence of the United States depended not only on cooperation, but ALL the States participating in the

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<sup>34</sup>Board of Directors, California Associated Raisin Company, "Shall We Go On?" SMH, 1:6 (January 1916): 2-3.

cooperation. So it is with the Raisin Growers. The Independence of the Raisin Growers depends of the co-operation of ALL the growers. . . . If the Raisin Association does not secure 15,000 acres the Raisin Growers will hang on a limb of the tree of uncertainty. They will swing to and fro in an a[tmos]phere of doubt and despair for just as sure as the sun rises and sets, raisin prices will be demoralized if the California Associated Raisin Co. should lose control of the Raisin Crops.<sup>35</sup>

The Sun-Maid Herald pointed to two revered historical figures in instructing the growers to sign up: "It was the immortal Lincoln who said this nation could not permanently endure half slave and half free; it was the world's greatest teacher who 2000 years ago said, 'Every kingdom divided against itself is brought to desolation;' and we say that this community should not be divided against itself."<sup>36</sup>

Out in the vineyards, growers preferred more direct methods. One of the more benign strategies was to persuade local merchants and banks to boycott any grower who refused to sign with the CARC. When that did not work, groups of night-riders assembled in caravans on horseback or in cars and made their rounds. The mob would stop at the farm of a grower known to be a non-member or to sell outside the CARC.

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<sup>35</sup>SMH, 1:6 (January 1916): 12-13; William L. Walton, "How the Outside Packer Would Do It," SMH, 1:7 (February, 1916): 7; "Holland's Say Raisin Co. Responsible for Local Prosperity," ibid., 10; "Samples of Newspaper Advertisements Appearing in All Parts of the United States," ibid., 11; "Don't Be Blind," ibid., 12-13; broadside, FMR, February 6, 1916, reprinted in FTC Hearings Transcript, v. 1 (November 24, 1919), 379-381.

<sup>36</sup>"Thrusts from Under the Umbrella," SMH, 1:2 (September, 1915): 11.

There the mob's leader would call out the grower, urge him to sign up, and threaten to burn his house, farm buildings, and equipment if he refused or even hesitated. In some cases the mob cut down or burned grape vines. A leading packer later recalled a case "where a grower was let out on a bridge over a canal with a rope around his neck and yanked into the water and then yanked out." In another case, later reported to the DOJ, the child of an outside grower was beaten up in the public school in Fresno, in full view of the teacher; his father promptly signed with the CARC.<sup>37</sup>

Ethnic differences exacerbated the tension over the campaign. Growers who had been in the Central Valley longest and had persevered through hard times were most likely to join the mobs. To them, outside growers were traitors and ought to be treated accordingly. Often, immigrant Germans, Japanese, and especially Armenians, who lacked strong ties to the Anglo-American community, were the night-riders' victims. Existing as sub-communities within the industry, these groups responded in different ways to the atmosphere of racial intolerance in the state, an atmosphere charged even more highly by the presence of the cooperative and the campaign's pressure to conform. The Germans tried

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<sup>37</sup>Franklin P. Nutting, "Interview re Sun-Maid Litigation," typescript of interview (1955), Regional Oral History Office, Bancroft Library, University of California at Berkeley, 38-39; F.P. Webster, Special Agent, Report to the Attorney General, April 22, 1916, Box 560, RG 60, NA. Webster noted that the reporting witness believed that Giffen did not condone such acts.

to assimilate as quickly as possible, a difficult task after World War I began in 1914. The Japanese tried to become self-sufficient landowners and compliant members of the community, ambitions that were complicated by enactment of the Alien Land Law.<sup>38</sup> Despite the racial tensions that pervaded Progressive-Era California, the CARC membership policy was an open one, for economic reasons.<sup>39</sup> The Armenians preferred to maintain their culture, religion, and economic independence.<sup>40</sup> Their marked refusal to join made them easy targets for the night-riders.

By the beginning of March, 11,000 new acres had been

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<sup>38</sup>Timothy J. Lukes and Gary Y. Okihiro, Japanese Legacy: Farming and Community Life in California's Santa Clara Valley (Cupertino, CA: California History Center, 1985); Sucheng Chan, This Bitter-Sweet Soil: The Chinese in California Agriculture, 1860-1910 (Berkeley: University of California Press, 1986); Nutting, "Interview with Franklin P. Nutting," 4-8, 28-29.

<sup>39</sup>It is difficult to determine what the ethnic profile of the CARC membership was during these years; I have been unable to locate any extant membership roll or other CARC documents that list growers. From the anecdotal evidence presented at the FTC hearing in 1919, it appears that no growers were automatically excluded on account of race or ethnicity; while cooperation did not erase racial or cultural distinctions, the economic power of the CARC persuaded Anglo-American growers that it was far more important to extend the monopoly than to undermine it by excluding growers, whatever their ethnicity. On the economics of cooperatives and market control, see Richard B. Heflebower, Cooperatives and Mutuals in the Market System (Madison: University of Wisconsin Press, 1980), 17-23.

<sup>40</sup>Charles Mahakian, "History of the Armenians in California" (M.A. thesis, University of California, Berkeley, 1935); and Richard F. LaPierre, "The Armenian Colony in Fresno County, California: A Study in Social Psychology" (Ph.D. diss, Stanford University, 1930).

signed up and the campaign intensified as the April 1 deadline neared. Since the Fresno press refused to publish reports of night-riding, opposition packers leaked word of the incidents to other agricultural journals in the state. The California Fruit News, a Southern California journal, favored the more traditional style of cooperation practiced by the citrus growers in the California Fruit Growers' Exchange. Its editor suggested that the CARC was taking advantage of its status as a cooperative by engaging in tactics

which, in very many instances, would have been denied by law to an individual or group of individuals less complete than a large proportion of the producers in a particular community. In other words, methods contrary to the spirit and intention of our trust and monopoly legislation have been allowed because, as is well known, we only as yet administer such legislation against individuals or the few and overlook it when it applies to the many.<sup>41</sup>

In reply, Giffen disavowed any direct link between the CARC and the night-riders. He argued that the CARC had simply told the 3,000 outside growers that if it were to continue to guarantee prices, more of them would have to help carry the load. But he added, self-righteously, that "we do not concede the moral right of most men to sell their raisins to the independent packers." Only after the campaign was

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<sup>41</sup>Editorial, California Fruit News, January 29, 1916; "4000 Acres More and the Options Will Be Exercised," SMH, 1:8 (March, 1916): 1; FTC Hearing Transcript, v. 1 (November 24, 1919), 384-389.

successfully concluded did the Sun-Maid Herald rebuke the perpetrators and renounce their tactics, although the CARC refused to return contracts allegedly obtained under duress. Giffen even issued rules on night-riding to guide future campaigns: "But now that we have passed the crisis, we wish to say that from this time on no contracts will be taken by mob violence and even night riding will only be permitted in its milder forms."<sup>42</sup>

The option renewal campaign produced a sign-up of 32,000 new acres and gave the CARC control over eighty-five percent of the crop. The California Citrograph applauded the results: "It would have been a tremendous blot to cooperative marketing, had this most successful association discontinued." But the packers contended that the added acreage only worsened the situation. They accused the CARC of becoming peremptory and arbitrary in its dealings with them and with the trade.<sup>43</sup> Prompted by the packers' com-

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<sup>42</sup>Giffen's Reply to Rowley, SMH, 1:8 (March 1916): 3-4; "Night-Riding," SMH, 1:9 (April, 1916): 2. A month later, Giffen told a DOJ investigator that during the campaign the officers of the Association had "stepped in and warned [the members] not to use such tactics, telling them the Association could not exist if such methods were used." Report of Special Agent F.P. Webster, May 9, 1916, Box 560, RG 60, NA.

<sup>43</sup>California Citrograph, March, 1916, 9-10. After the campaign ended, Madison instructed the packers not to sell to anyone except "at such prices and upon such terms and conditions as may be prescribed from time to time by the Associated Raisin Company" (emphasis in original). F.P. Webster, Report In Re California Association Raisin Co., April 19, 1916, Box 560, RG 60, NA; see also Webster reports dated April 22, April 24, April 25, April 28, and May 13,

plaints, the DOJ resumed its investigation in the wake of the campaign. Special agents spent the rest of the year compiling reports on the business of the CARC and its relationship to the growers. They collected evidence on the packers' charges that the CARC discriminated in its trade practices, fixed prices, and that its grower contracts restrained trade under the Sherman Act.<sup>44</sup>

In April, 1917, U.S. Attorney Schoonover submitted his final report to the Attorney General. Schoonover noted that were it not for the fact that the CARC had capital stock on which it paid dividends to the stockholders it would come under the Clayton Act exemption, rendering the packers' complaints groundless. Although the Clayton Act did not apply, Schoonover argued, neither did the CARC's conduct bring it under the operation of the Sherman Act, since the interests of all its 3600 stockholders, of which all but 160 were growers, were directly linked to the fate of the CARC and none held shares for speculative purposes. The crop contract furnished proof that the CARC was not organized for profit, since the CARC bound itself to "use its best efforts" to sell the raisins for higher prices than that specified in the contract and to return the excess to the growers. The CARC would bear any losses on re-sale. In

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1916, ibid.

<sup>44</sup>See the reports file, April, 1916, through March 1917, Box 560, RG 60, NA.

addition, Schoonover believed that the CARC was not responsible for the coercive and violent methods used in the option renewal campaign: "I am well satisfied that any conduct of this kind on the part of any of the growers is wholly without the knowledge and sanction of the association." Finally, on the issues of the CARC's market behavior, Schoonover concluded that the CARC was guiltless of discriminating against any concern wishing to do business with it. Prices to the consumer had actually dropped below 1890 levels, and the CARC had succeeded in eliminating the "speculative profits made by the middlemen prior to the organization of the association." He indicated that he had spoken with Giffen and Madison about changing the CARC to a non-stock basis in order to conform to the Clayton Act, but they indicated that years of experience in the raisin industry had taught them that no cooperative could succeed without its own capital. He found no grounds for a criminal prosecution or for an injunction based on unreasonable restraint of trade. What he did find was a working example of a commercial agricultural cooperative:

In making this recommendation, I realize, of course, that there is practically a combination here that could absolutely control the price of raisins both to the jobber and to the consumer, but I am equally well satisfied that so long at least as the present management continues, those prices will not be increased, but, on the contrary, every effort will be made to decrease



them.<sup>45</sup>

DOJ attorneys in Washington rejected Schoonover's analysis--and, by implication, the premise of the "benevolent trust." To G. Carroll Todd and Lincoln C. Clark, special assistants to the Attorney General, the CARC's control over the nation's supply of raisins and absolute ability to fix prices constituted a threat to the consuming public. The CARC's stockholding structure (under which only 45% of the growers under contract owned shares) and the VTA indicated that the CARC was not a true growers' combination and not, as Schoonover implied, capable of earning the Clayton Act exemption through the elimination of its capital stock. "It seems to me," Clark wrote to Todd, "that the California Associated Raisin Company as now constituted and conducted is a combination in violation of the Sherman Law. . . . I am unable to see any distinction between a pool of commodities which are the product of agriculture and a pool of commodities which are the result of manufacture."<sup>46</sup>

Clark's reasoning cut at the heart of the assumption underlying the Clayton Act and the appropriations rider: the assumption that the law could give agricultural producers privileges denied to ordinary commercial corporations.

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<sup>45</sup>Schoonover to Attorney General, April 4, 1917, File 1, Box 559, RG 60, NA.

<sup>46</sup>Memorandum, Lincoln Clark to Carroll Todd, June 6, 1917; Todd to Schoonover, July 27, 1917, File 1, Box 559, RG 60, NA.

During the Progressive Era, the Supreme Court repeatedly struck down this type of "class legislation" as in violation of the equal protection clause of the Fourteenth Amendment.<sup>47</sup> To Clark, the fact that the growers directly benefited from the CARC's operations did not obviate the illegal methods used in those operations. Todd, Clark's supervisor in the Department, concurred that the CARC was a combination acting in restraint of trade in violation of Sherman. But Todd concurred with Schoonover's recommendation that no action be taken, due to the confusion reigning in the lower federal courts over how to apply the "rule of reason" announced in the Standard Oil and American Tobacco cases, decided by the Supreme Court in 1911.<sup>48</sup> a reprieve, but it proved to be temporary. In 1919, the CARC raised prices by 100% over the previous year, provoking an investigation by the Federal Trade Commission. On the basis of the FTC findings the DOJ concluded that the restraints of the Clayton Act and the appropriations rider no longer applied and filed suit in federal court.

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<sup>47</sup>For example, Union Sewer Pipe Company v. Connolly, 184 U.S. 540 (1902). Chapter 2 analyzes the early judicial response to cooperatives and their special treatment by state legislatures.

<sup>48</sup>Curiously, the government attorneys did not mention the appropriations rider. Todd to Schoonover, July 27, 1917, File 1, Box 559, RG 60, NA; Standard Oil Co. v. United States, 221 U.S. 1 (1911); American Tobacco Company v. United States, 221 U.S. 106, establishing the rule that the Sherman Act banned only those restraints upon trade that were unreasonable in scope, are discussed in chapter 2.

"All the Elements of a Ruthless Trust Monopoly"

The DOJ deferred prosecuting the CARC in 1917 until its attorneys could prove that the raisin growers' organization violated the Sherman Act. As the CARC grew in size and expanded its reach over the national market, its trade practices came under even greater federal scrutiny. Incidents during the campaign to sign the growers to a new contract in 1918 and the CARC's pricing policies in 1919 gave the DOJ the legal basis for prosecution.

After the Department deferred action against the CARC in early 1917, the owners of the leading packing firms in Fresno continued to pepper the Department with fresh complaints and new information about the CARC's operations. Dissatisfied with the DOJ's conservative course, two of the packers took their case to the FTC during 1917 and 1918. One complaint was lodged by J.B. Inderrieden, a packer headquartered in Chicago, and the other by Franklin P. Nutting, whose American Seedless Vineyard Company had been packing and selling the Thompson Seedless variety of raisins since the 1890s.<sup>49</sup>

The FTC, created in 1914, was a relatively new agency,

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<sup>49</sup>On the complaints of the packers, which included the American Seedless Raisin Company (ASRC), the J.B. Inderrieden Company, and Guggenheim and Company, see Franklin P. Nutting to ASRC, July 10, 1918; Nutting to Alex Goldstein, July 18, 1918; *ibid.*, July 20, 1918; Nutting to Simon W. Hathaway, July 22, 1918; Nutting to ASRC, August 2, 1918; all in File 2, Carton 3, FPNP. The FTC took no action on these complaints.

with untested regulatory powers.<sup>50</sup> The FTC was in the middle of a huge investigation of the meat-packing industry and the control of Armour & Company over the nation's processed foods. The Commission's agents conducted interviews of the personnel of several California cooperatives, including the CARC; however, the FTC was too preoccupied with the Armour case to take action against the CARC.<sup>51</sup> But from the evidence its agents gathered, the Commission drew some ominous conclusions:

It appears that a corporate device is being employed at Fresno, California, which is clearly intended to appear as a co-operative institution but which is really a private corporation with all the powers and privileges of a private corporation. Whether or not this instrument is now in good hands does not appear conclusively, but it does appear that, up to now, it has not been used for evil. However, it is a weapon too powerful to be permitted to exist for it is quite conceivable that a single man or a single large interest might obtain all of the capital stock or a majority of it and turn the corporation into an instrument of oppression as to the farmers and extortion as to the consumers. It has all the elements of a ruthless trust monopoly.<sup>52</sup>

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<sup>50</sup>See McCraw, Prophets of Regulation, 80-152, for an account of the origins of and political climate surrounding the FTC during this period.

<sup>51</sup>On the investigations of the FTC's agents, see Investigation Files, Cooperative Marketing, Boxes 1318, 1319, 1920, and 1387; Records of the FTC, RG 122; National Archives and Records Administration, Washington National Records Center, Suitland, Maryland (NA-WNRC); and Investigation Files, Perishable Foods, Boxes 3553, 3555, 3556, 3612, and 3614, RG 122, NA-WNRC.

<sup>52</sup>William B. Colver, Chair, FTC, "Memorandum to the Commission in the Matter of the Raisin Situation," August 2, 1918, File #3, Box 559, RG 60, NA. Colver's memo included a

Nowhere were these "elements" more pronounced, the packers asserted, than in the CARC's relationship to the growers. The option of the first crop contract expired with delivery of the 1917 crop. In December of that year, the CARC announced a campaign to secure growers' signatures on a new three-year contract and set 125,000 acres as the goal. This contract differed from the first in some important respects. In order to put an end to the problem of vineyard acreage being lost to the Association due to sale or tenancy, this new contract ran with the land; succeeding owners or tenants were bound to the contract just as if they had been parties to it. In addition, if the previous owner failed to notify the Association of the transfer, that person was still personally bound by the contract and liable for damages unless he filed a notice of the transfer with the Association. To guard against breach of contract, growers would henceforth forfeit liquidated damages of 2 cents for every pound of raisins sold outside the CARC.

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list of proposed changes in the by-laws of the Association that would bring it into compliance with the anti-trust laws. He recommended that public officials be appointed as trustees and that every phase of the operations of the Association be conducted under the supervision of the state and federal governments, thus enabling the Association to "exercise all the powers that it has now for good and yet would be utterly helpless for evil." Colver was reluctant to recommend the issuance of a formal order "which would practically destroy the corporation," because he was unwilling to entrust the packers with the growers' interests. Ibid.

Finally, the contract raised the guaranteed price paid to the growers to 3-1/2 cents per pound. The new contract was expressly designed to correct the "defects" of the old one.<sup>53</sup>

The Sun-Maid Herald conducted a full-scale publicity campaign during the early months of 1918. Its pages were filled with articles, poems, sayings, photographs, and growers' letters testifying to the importance of the new contract, emphasizing the need to bring the outside growers into the fold, and generally singing the praises of the CARC. The CARC even appealed to wartime patriotism: "Would you sell your raisins to an outside packer, just because you thought the Associated was pretty sure to get the required acreage? WOULD YOU SELL POWDER TO GERMANY JUST BECAUSE YOU ARE PRETTY SURE THAT AMERICA IS GOING TO WIN THIS WAR?" The stakes were higher than ever before: the campaign not only determined the CARC's future control of the industry but also constituted a referendum on the underlying philosophy of cooperation that the CARC represented:

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<sup>53</sup>Howard, History of Sun-Maid Raisin Growers, 27-28; FTC Hearing Transcript, v. 1 (November 25, 1919), 390-93; W.Y. Spence, "The California Associated Raisin Co.," SMH, 5:3 (October, 1919): 8; "Agreement, California Associated Raisin Company, 1918, 1919, 1920," Exhibit A, Defendant's Reply Points and Authorities, October 25, 1920, folder B-67(2), U.S. v. California Associated Raisin Company, Box 76, Equity Case Files, 1913-1938, Eastern District of California, Fresno; Records of the U.S. District Court, RG 21, National Archives and Records Administration, San Francisco Branch, San Bruno, California (NA-SB).

IS COOPERATION AMONG THE RAISIN GROWERS OF CALIFORNIA TO BE A SUCCESS OR A FAILURE? There is no use to mince words. If the growers will sign up the new contract, the California Associated Raisin Company, their great co-operative organization, will become greater, more powerful, and more useful to the community, and continued prosperity will be assured. If the contracts are not signed the growers will lose control of their business and we must be prepared for a return to the era of ruinous competition and resultant low prices.<sup>54</sup>

Many growers quickly signed new contracts; after one month, almost half of the industry was in the CARC corral. Yet the recruiters noticed a "puzzling apathy" among growers still unsigned: "Here is a simple business proposition offered to the growers, which they all endorse, and which each admits is most necessary for his welfare, and yet--THOUSANDS are standing aloof--hesitating, waiting, delaying." Fred A. Seymour, who succeeded Madison as managing director in 1916, instructed the CARC recruiters to focus on the "growers' minority," those who had not been under contract or who were hesitating to sign the second. It was vital that the CARC obtain the signatures, as the Board of Directors explained in a campaign circular:

California has taken the lead of every state in the Union in intelligent marketing of farm products, and your own organization was a pioneer in this work. Our success so far has been heralded far and wide, giving courage and support to many

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<sup>54</sup>See the issues of the SMH, 3:5 (December 1917): 3:6 (January 1918), and 3:7 (February 1918); "Straight From the Shoulder, by Sweat Box Joe," SMH, 3:6 (January, 1918): 15; "The Campaign Is On," editorial, SMH, 3:5 (December, 1917): 14.

similar movements in other lines, so that the result of the campaign upon which we now enter determines not alone of the prosperity of ourselves, but in a much larger measure than we realize, affects the welfare of the state. The eyes of California are upon us today, and let no man falter!<sup>55</sup>

As the end of the campaign approached, however, recruiters turned into night-riders, adopting what an outside packer euphemistically termed "strenuous methods" to obtain signatures. A mob of twenty growers presented their German neighbor with a petition signed by thirty-two people "to have [him] arrested as a German spy" if he refused to sign. Although he was advised that the mob was powerless to carry out the threat, he signed anyway.<sup>56</sup>

The mobs and their excursions became a central focus of community life in the raisin districts:

The idea was to get 15 or 20 automobiles, go out to a grower's ranch. The automobile party consisted of their neighbors, sometimes a dozen men of the community. One day they declared a holiday in Fresno, shut up the stores, and all the merchants formed caravans. There would be a dozen automobiles go to a man's place, get a man surrounded, and put all kinds of pressure and persuasive methods trying to compel that man against his will to sign this contract.

The case of an Armenian grower named Rustigian whose wooden

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<sup>55</sup>F.A. Seymour, Assistant to the President, "Growers' Apathy Puzzling," SMH, 3:6 (January, 1918): 2; campaign circular reprinted in FTC Hearings Transcript, v. 1 (November 24, 1919): 393.

<sup>56</sup>Testimony of E.L. Chaddock, Chaddock & Co., FTC Hearings Transcript, v. 1 (November 20, 1919), 136-37.



raisin trays were destroyed by arsonists actually made the Fresno papers. The CARC reimbursed Rustigian for his loss, but the perpetrators were fined only \$5, due to "the sentiment in the community."<sup>57</sup>

The "sentiment of the community" towards the Armenians was even more hostile and intolerant than it had been during the renewal campaign of 1916. Most of the outside growers were immigrants or newly enough arrived to be deemed "foreigners" by people of long standing in the industry. By one packer's estimate, nearly half of the growers were Armenian, "increasing their control from year to year, buying out the other people. . . . Their method of operation [was] to buy improved property on a long-time contract, on small payments, and work it out." The Armenians kept to themselves, living in discrete communities within the raisin district.<sup>58</sup> Growers of northern European extraction jumped to the conclusion that the Armenians were always first to sell to the outside packers. Accordingly, while Germans and southern

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<sup>57</sup>Ibid., 137, 138-39. The attorney for the Association subsequently extracted the admission from E.L. Chad-dock, the packer, that the Association offered a \$1000 reward for the arrest and conviction of "anybody committing any act of depredation." The Fresno Republican denounced the responsible parties in an editorial. Ibid., at 228-29.

<sup>58</sup>Richard T. LaPierre's unpublished Ph.D. dissertation, "The Armenian Colony in Fresno County, California: A Study in Social Psychology," (Stanford University, 1930), explores the sources and manifestations of these attitudes and documents the degree to which the Armenians had established a presence in farming and the professional occupations. See chapter 4.

Europeans were also targeted, the Armenians again bore the brunt of the extra-legal violations. But the night-riders went after all unsigned growers, indicating that while racial hostility spurred the "sentiment of the community" against certain ethnic groups, economic self-interest was the primary motivation.<sup>59</sup>

Frightened by the prospect of losing their land and perhaps their lives, Armenian growers were unable to resist the tactics of the mobs. Charles Bonner, another of the five outside packers, described an exchange he had with an Armenian neighbor named Kapibian who had routinely sold raisins to him. Kapibian assured Bonner that he would not join the CARC. Less than a month later, he changed his mind:

"Mr. Bonner, I got to tell you I was awful scared. The people came after me the other day, a lot of

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<sup>59</sup>The FTC Hearings Transcript is the source for almost all the information on night-riding during the 1916 and 1918 campaigns. Unfortunately, coming to light in the context of an adversary proceeding, the evidence presented probably does not tell the whole story. It is impossible to know how many incidents of night-riding occurred in the industry. The DOJ records in the National Archives do not contain the special agents' reports on night-riding during the contract campaigns. During the FTC hearings, the outside packers portrayed the Armenians as helpless, easily scared, and disloyal to the packers, whose contempt for them as a group practically jumps off the pages of the transcript. The oral memoirs of outside packer Franklin P. Nutting reflect the same attitude (28-42). Thus, the real story of night-riding in the raisin industry during those years has yet to be fully unearthed. When night-riding broke out again in the 1920s, the DOJ's agents did a much better job of interviewing the people involved and detailing the incidents. See chapter 6.

these men, and they came and they just scared me, make me scared of my life, and they make me sign the contract. I couldn't help it. I told them Mr. Bonner just like father to me, I can't do business with the Association. I got to do business with Mr. Bonner. They say, 'No, you got to sign this. If you don't sign this we drive you out of this country.' I scared for my life. I had to sign it."<sup>60</sup>

When a mob told the Missikian brothers that they would be hounded out of the community if they did not join, Bonner took them to an attorney who drew up affidavits to serve on the CARC as proof of the coercion. But the brothers refused to sign them, afraid that they would lose their farms.

The mobs understood the power of fear. On their visits to vineyards, "some member of the so-called caravan would say in a whisper loud enough to be heard by the grower, 'Do you think the rope is strong enough?' [T]hereupon the grower would sign." In the words of the packer Franklin P. Nutting, even in tiny farm towns "the terrorism . . . was terrific."<sup>61</sup>

CARC leaders publicly disavowed all such methods but claimed they had no authority to stop the violence. Bonner personally confronted Giffen with the cases that had come to his attention. All Giffen would do, Bonner recounted, was

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<sup>60</sup>Testimony of Charles Bonner, FTC Hearings Transcript, v. 2 (November 28, 1919), 936-37.

<sup>61</sup>Ibid., 938-39; Nutting, "Affidavit on Temporary Restraining Order," U.S. v. CARC, September 20, 1920, File 12, Carton 2, FPNP; Nutting, "Interview with Franklin P. Nutting," 39.

express his regret:

"Why, of course everybody knows we don't approve of these methods," [Giffen said,] "but it is beyond us to control it. There is a pretty strong sentiment in this community and it is probably surprising that there is not a little more violence and lawlessness; but there is not anything that we can really do to stop it." So I suggested to him the advisability of publishing a letter. He said that it would not do, that he could not do it. So that was the end of our interview.<sup>62</sup>

The packers believed that the CARC was itself directly involved in harassing growers. Charles Bonner cited the example of an employee of the Alta Irrigation District identified as Cobb, who was neither a minority immigrant nor a typical outside grower; he remained independent on principle, he said, not because he profited from free-riding. Nevertheless, during the campaign his employers informed him "that if he did not sign up with the Raisin Association he would lose his job. So he went out and thought it over, and made some inquiries, and he found out that Mr. Madison had been down there before the directors of the District and had made the request of them that they put it up to him just in that way that he should join the CARC or that he should lose his job." Cobb resigned rather than capitulate. His courage did not go unpunished. His automobile was vandalized, his tires slashed, and he and his wife received an anonymous threat:

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<sup>62</sup>Testimony of Charles Bonner, FTC Hearings Transcript, v. 2 (November 28, 1919), 942.

Cobb and Woman: We did without your rotten help. You are a low-down pair of skunks. You are a disgrace to all honest persons. You are a pair of dirty thieves. You are eating what we created, a better price for our raisins. The day of judgment will come when you will be called before the Bar, and can you truthfully say you have never done your fellow creature a wrong? You will be condemned, and your rotten souls cast in condemnation into a pit of hell-fire where it rightly belongs. [Signed,] Humanity.<sup>63</sup>

The note's religious imagery and allusions to eternal judgment echoed the dogmatism of an evangelical jeremiad. . The righteous tone--all "humanity" served as signatory--testified to the forcefulness of the CARC's presence in the community. To the night-riders at least, its existence was a higher end to which all persons having any connection to the raisin industry whatsoever were compelled to swear allegiance, even if that meant the compromise of other valid principles or cultural beliefs.

The gospel of cooperation had its own set of immutable principles that, as in both religion and law, were fixed, binding, and universal. The omnipotence of the CARC was illustrated in the story of the Fresno preacher who sermonized on "what Jesus would do with this California Associated Raisin Company contract." The moral of the sermon "was that Jesus would sign up." To the CARC and its devotees, anyone who dared to remain outside committed an act of aggression towards the cooperative and the community it served. Refus-

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<sup>63</sup>Ibid., 944-46.

ing to sign was not simply an exercise of individual economic freedom; it was a deliberate choice that undermined the collective efforts of those who joined the cause. The results of the campaign testified to the persuasiveness of the believers. With over 9,200 growers under contract, the CARC now controlled 88 percent of all of the raisin acreage in the San Joaquin Valley, exceeding the campaign goal of 125,000 acres by 6,530.<sup>64</sup>

The CARC's successful campaign was beginning to tax the limits of the legal understanding of this cooperative enterprise. The implications of night-riding were clear: The proponents of cooperation believed that outside growers threatened the viability of the CARC because they enhanced the market position of CARC's competitors. No cooperative, however, had the right to coerce agricultural producers to become its members. The attitude of CARC members and directors that night-riding and other forms of harassment supplied proper means of maintaining their organization alarmed DOJ officials. But they felt constrained to act until the CARC's economic behavior definitely placed it outside the protective penumbra of the Clayton Act and the appropriations rider.

The new crop contract gave the CARC greater market

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<sup>64</sup>Ibid., 946; testimony of E.L. Chaddock, FTC Hearings Transcript, v. 1 (November 22, 1919), 140, 223; Giffen, "Victory!" SMH, 3:7 (February, 1918): 1; Giffen, "The Final Results," SMH, 3:8 (March, 1918): 1.

power than ever. Giffen and the directors decided that nothing should stand in the way of attaining a complete monopoly over the market. This policy entailed two separate steps. The first followed closely upon the heels of the successful contract campaign. With firm control of the growers, swelled coffers, and enough money from the  $\frac{1}{4}$  cent fund to build an impressive array of new packing plants, the CARC believed that it no longer needed the services of the packers and decided not to renew their packing contracts after they expired in 1917.<sup>65</sup> In April, 1918, Giffen informed the packing firm of Chaddock & Co. that it no longer intended to sell raisins to them or any packer for them to pack but would only sell raisins already packed by the CARC in its brand new plants. Instead of acting as manufacturers and processing the raisins for market, under this arrangement the packers would be little better than retail customers. The CARC was making its first move to eliminate the packers entirely: "[I]n other words we feel that the Association is able to and should sell the raisins and retain for the growers whatever profit there may be in packing."<sup>66</sup>

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<sup>65</sup>Attorneys for the packers later alleged that the  $\frac{1}{4}$  cent fund was developed to protect the Association against possible losses should market prices dip below the growers' contract price. The fund accumulated so much money that by 1919 the Association had a surplus of \$323,000 even after paying stock dividends. Statement of John W. Preston, FTC Hearings Transcript, v. 1 (November 20, 1919), 82.

<sup>66</sup>F.A. Seymour, Assistant to the President, CARC, to Chaddock & Co., April 10, 1918, quoted in FTC Hearings Transcript, v. 1 (November 20, 1919), 123.

This course of action carried serious consequences for free competition in the raisin industry. Giffen's decision meant that the packers would not be able to obtain raisins for their own customers. Packer E.L. Chaddock confronted Giffen and accused him of attempting to put the packers out of business. According to Chaddock, Giffen gave a disarming reply:

Well, it may be cold-blooded to say so, but we cannot see where the packers have ever been of any very great benefit to the raisin business, and we have decided that it is to the interest of the growers to have the profit which you have been making, and we have determined that the easiest way to bring that result is to eliminate the packers if possible; and while we are sorry that it affects your firm adversely--we have always been on very friendly terms with you and we hate to see you injured--at the same time we have made up our minds that we want the profit that you packers are making, for our growers, and we have made up our minds to have it.<sup>67</sup>

George H. McCandless of the American Seedless Vineyard Company, reported no greater success in pleading with Giffen: "I [told Giffen] that [the CARC's decision] was practically confiscating our business, that if we could not get supplies, our twenty years' effort was gone for nothing. . . . Mr. Giffen replied, 'We are determined to have the profits you packers have been making, for our own growers.'" The commercial packers later reported to the FTC that, as a consequence of the CARC's decision not to sell to them, they

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<sup>67</sup>Testimony of E.L. Chaddock, FTC Hearingss Transcript, v. 1 (November 20, 1919), 126.



lost an average of 75% of their business.<sup>68</sup>

The second plank of the new CARC policy concerned prices. Prices on the 1918 crop were fixed by the U.S. Food Administration as part of the emergency controls during wartime. The growers' new contract specified a floor of 4 cents per pound for Muscats, 3/4 of a cent higher than the first contract. The Food Administration set a price of 5½ cents for a crop estimated at a record-high 175,000 tons, using figures supplied by the CARC. Giffen and his chief aide, Fred A. Seymour, were pleased with the price and expected that it would yield sufficient profit to cover increased labor costs and higher costs of "everything used in the vineyard." But the weather did not cooperate. Heavy rainfall during the critical drying season in early fall damaged the bulk of the crop, completely destroying 30,000 tons of raisins and leaving most of the rest too wet and mouldy to pack. The shortage of saleable raisins not only reduced growers' income but also meant that few raisins from the 1918 crop would be carried over into 1919.<sup>69</sup>

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<sup>68</sup>Testimony of George H. McCandless, FTC Hearings Transcript, v. 1 (November 24, 1919), 503-05; Chaddock testimony, ibid., 121-22.

<sup>69</sup>Testimony of George H. McCandless, FTC Hearings Transcript, v. 1 (November 24, 1919), 540; statements introduced in evidence by John W. Preston, attorney for packers, ibid., 569-70; F.A. Seymour, "Concerning 1918 Crop Raisin Prices," SMH, 4:1 (August, 1918): 1; H.G. Johnson, "New Raisin Prices Assure Fair Profit," ibid., 2; editorial, "Good Season Ahead," ibid., 8; Seymour, "Concerning 1918 Crop Raisin Prices," ibid., p. 1; Editorial, "Concerning Rain Damage," SMH, 4:4 (November, 1918): 5.

Normally the absence of a carry-over would be good news for the industry, but 1919 proved to be anything but a normal year. During the spring months, the independent packers sold their 1919 crop of raisins on contracts for delivery at a future date, as was their custom, at a record price of 10 cents per pound (see Table 4-1, p. 247 above). Demand was incessant and the packers were desperate to lay their hands on raisins. In their frenzy to find raisins still in growers' hands, the packers circulated rumors that the CARC's 1919 prices would be no higher than 1918 levels. In fact, they had no way of knowing what the CARC's 1919 prices would be. But they hoped that they could scare growers into selling to them and gambled that growers would still profit from selling outside the CARC even with the liquidated damages to pay.<sup>70</sup> Giffen finally resorted to the pages of the Sun-Maid Herald to deny the rumors and remind the growers to honor their contracts when the CARC named its prices in August. Giffen himself did not believe that the 10-cent price would hold up for long. But post-war economic conditions confounded his predictions. On August 22, the CARC's Board of Directors issued a price schedule that shocked the entire national trade: Sun-Maid brand raisins would retail in 1919 for the princely sum of 15 cents per pound. Bowing to the pressure from growers who would have been "ungovernably dissatisfied with a price much lower than

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<sup>70</sup>Nutting, "Interview with Franklin P. Nutting," 41.

[what] the independent [packers] were offering," CARC fixed prices to the growers at 10.5 cents per pound.<sup>71</sup>

Post-war inflation precipitated the new, higher price. As Giffen told the growers, "[T]hese prices are admittedly a result of a very unique situation as far as market conditions are concerned and though it may be proper to take advantage of this situation, we do not believe that these prices can be maintained for a long period of time." Temporary market conditions notwithstanding, the packers were furious; the CARC's price would bring between eight and ten million dollars more to the industry that year but they would not share in the bounty. They had no raisins to sell. The jobbers and wholesalers were angry because the CARC's selling policy of "firm at opening price" compelled them to commit to their purchases before the price was named, usually months later. Now they were legally bound to take delivery of raisins that they would not have purchased had they known the price at the time of the sale. Few retailers believed that consumers would buy raisins at CARC prices.<sup>72</sup>

The packers joined forces with jobbers and wholesale

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<sup>71</sup>Giffen, "The Price of 1919 Raisins," SMH, 4:12 (July, 1919): 1-2; FTC Hearings Transcript, v. 1 (November 25, 1919), 577-83; "Raisin Prices for 1919," SMH, 5:2 (September, 1919): 1; Bragg, "History of Cooperative Marketing in Raisins to 1923," 184 (quoting William R. Camp, Journal of Political Economy, 32:3 (June, 1924): 307).

<sup>72</sup>"Raisin Prices for 1919," SMH, 5:2 (September, 1919): 1-2; George H. McCandless to Nutting, September 12, 1919, Nutting to McCandless, October 23, 1919, File 13, Carton 5, FPNP.

grocers across the nation and poured their complaints into the DOJ. Many of the letter-writers accused the raisin growers' organization of gross profiteering at the expense of the nation's consumers. Some went even further, blaming the agricultural associations of California and their natural monopolies for the high cost of living. As one indignant grocer in Pennsylvania noted, "The California people seem to get away with things that no other state attempts." The U.S. Attorney General, A. Mitchell Palmer, promised swift investigation of the charges.<sup>73</sup>

The high prices in the raisin industry played directly into Palmer's hands. One of the major domestic issues confronting the Wilson administration after the war was the high cost of living. Retail prices, including food prices, doubled between 1915 and 1920, and the Attorney General saw that swift action on his part could serve his political ambitions. Palmer was eager to nail the CARC, but the DOJ was bound by federal law not to pursue farmers' organizations. This prohibition, however, did not operate on the FTC. Under an obscure clause of the Federal Trade Commission Act of 1914, the Attorney General delegated the case to the Commission. The FTC scheduled a hearing in Washington

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<sup>73</sup>See the various letters from jobbers, wholesalers, and retailers to the DOJ, dated August and September, 1919, File 1, Box 559, RG 60, NA; Fred R. Drake to A. Mitchell Palmer, August 23, 1919, Palmer to Drake ("I am very much interested in what you say about the California Raisin Growers' Association"), August 26, 1919, File 3, Box 559, RG 60, NA.

for November, 1919, and requested all interested parties to be present and give their evidence.<sup>74</sup> What the commissioners expected to take three or four days stretched into two weeks as the commission and attorneys for the DOJ, the CARC, the packers, and the wholesale grocers locked horns over the legality of the CARC's selling practices, its control of the growers, and its corporate structure.

Both sides brought out big legal guns for the hearing. John W. Preston, a former assistant U.S. Attorney from San Francisco, led the packers' charge against the CARC. Preston, by his own admission, had never set foot on a raisin vineyard. But he fought the packers' cause as if it were his own. The packers also hired Joseph E. Davies, former chief of the U.S. Bureau of Corporations. Representing the National Wholesale Grocers' Association was the New York firm of Breed, Abbott, and Morgan. Counsel for the CARC was former California state Assemblyman William A. Sutherland, a Fresno attorney who was a good friend of Wylie Giffen and had served as legal advisor to the CARC since its inception. At the same time, California congressmen Barbour and Hersman introduced a bill in the House that would specifically

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<sup>74</sup>This was the first time an Attorney General invoked the authority under Section 6(e) of the Federal Trade Commission Act. Palmer to William B. Colver, Chairman, FTC, September 30, 1919, File 3, Box 559, RG 60, NA; Stanley Cohen, A. Mitchell Palmer: Politician (New York and London: Columbia University Press, 1963), 156-70; Colver to William A. Sutherland, Colver to John W. Preston, October 10, 1919, File No. 20-1-1-2, Box 30, Docket Section, General Files, RG 122, NA.

exempt farmers' organizations from the anti-trust laws. If the FTC and the DOJ wanted to prosecute the CARC, they would first have to dodge the bullet of congressional opposition.<sup>75</sup>

The Commission's decision would affect not only the subsequent life of the CARC but also the course of agricultural cooperation. By the terms of the Attorney General's charge to the FTC, Preston had only to prove that the CARC's 1919 prices violated the "fair and reasonable" standard of the Sherman Act. But he wanted to do far more than roll back prices for the 1919 crop. With agricultural interests dominating California public policy, Preston knew that only in the federal forum would he have the chance to prove that the cooperative had violated the law:

It is our contention that the California Associated Raisin Company is now and during its entire existence has been operating in violation of the anti-trust laws of the United States, that it is not in substance, or from any other standpoint, under any exemption from the operations of that law. We contend also that in view of the fact that it is so operating, it has obtained and does now maintain a complete, thorough and air tight monopoly on the production of raisins and upon the marketing of the same.<sup>76</sup>

Preston's argument rested on two claims: "[F]irst, this is

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<sup>75</sup>Statement of Preston, FTC Hearings Transcript, v. 1 (November 25, 1919), 562; Breed, Abbott & Morgan to Alex Goldstein, September 22, 1919; Goldstein to Breed, Abbott & Morgan, October 28, 1919, Carton 7, FPNP.

<sup>76</sup>Opening Statement of John W. Preston, FTC Hearings Transcript, v. 1 (November 20, 1919), 11-12.

a monopoly, not a natural one but an artificial one, and to show that the prices of 1919 are unreasonable and unfair, and [second], we are also here to show . . . that this is not, never has been and never can be a farmers' cooperative organization."<sup>77</sup>

On the issue of price, Preston built his case on two major premises: 1) the CARC's control over the crop was so extensive as to permit it to dictate prices to the rest of the industry; and 2) the CARC's estimates of the costs of production were far higher than those of the commercial packers. These two factors, Preston argued, demonstrated that the CARC's prices were unreasonable under the Sherman Act. Independent packers E.L. Chaddock, Franklin P. Nutting, and Charles G. Bonner all testified to the damage their firms had suffered from the CARC's decision to take over packing operations for the industry. Preston also offered evidence from the CARC's own publications, including the Sun-Maid Herald and trade circulars furnished to the jobbers, to establish that the CARC's price-fixing was directly linked to its control over the growers and its expansion into the packing business. And Chaddock and Nutting emphatically testified that the CARC's 1919 price was unreasonable and unfair because production costs had not sufficiently changed to justify the increase over 1918 price

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<sup>77</sup>Statement of John W. Preston, FTC Hearings Transcript, v. 1 (November 24, 1919), 327-28.

levels:

Mr. Preston: I want to know if it is not a fact that this price is an arbitrary price fixed by the Association according to their own sweet will.

[Chaddock]: Absolutely.

Q: Does the cost of production necessarily enter into it at all?

A: This year I think it has been more a question of how much the traffic would bear.<sup>78</sup>

Bonner supplied the complainants' evidence on production costs. The packer's estimate for what it cost to pack the raisins included packing house labor, carton materials, boxes, fuel, and overhead--costs incurred from the moment packers took delivery of the raisins. Between 1918 and 1919, Bonner testified, these costs increased at the rate of 1/4 cent per pound. Since the CARC's price also included the grower's costs, Preston asked Bonner to include the cost of growing the raisins in his figures. The packers estimated the growers' costs (including the year-around care of the vineyards and harvesting expenses) at 3.175 cents per pound in 1918 and 3.9 cents per pound in 1919, just under three quarters of a cent increase per pound. Thus, Preston concluded, a reasonable price for 1919 would have been 6-1/2 cents per pound, or 1 cent more than the 5-1/2 cent

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<sup>78</sup>Testimony of E.L. Chaddock, FTC Hearings Transcript, v. 1 (November 20, 1919), 89-290, 1104-1118 (quoted exchange at 274); testimony of Franklin P. Nutting, ibid., v. 1 (November 25, 1919), 597-731; testimony of Charles G. Bonner, ibid., v. 2 (November 28, 1919), 907-1103.



price set by the government in 1918.<sup>79</sup>

In rebuttal, Sutherland attempted to return the debate to the question of the fundamental nature of a growers' organization. As a growers' cooperative, he contended, the CARC's costs more accurately reflected the true costs of the grower. In cross-examining Bonner, Sutherland got the packer to admit that there were costs accruing to the growers that the packers had not included in their own estimates. Sutherland broke down the tasks of a season's work in a vineyard into specific operations, such as weeding, pruning, burning brush, plowing and cross plowing, and other maintenance work that the growers routinely performed. And Sutherland added the tasks unique to curing raisins: spreading the grapes on wooden trays to dry, turning the trays over halfway through the curing process, and special measures to protect the raisins from rain damage. Each operation bore its own valuation, Sutherland argued. The growers were entitled to payment for the work they performed themselves, not just compensation for the labor they had to hire. And when one crop was not profitable due to circumstances beyond the growers' control, as had occurred in 1918 with the harvesttime rains, their organization was entitled to make up the shortfall the following year. That was the reasoning behind the 1919 crop prices. Sutherland's argu-

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<sup>79</sup>On the cost figures and estimates by the packers, see Bonner testimony, FTC Hearings Transcript, v. 2 (November 28, 1919), 878-887.

ment pointed out the basic difference between the commercial packers, who computed the growers' costs on a much narrower scale, and the CARC, whose purpose was to gain financial remuneration for the growers based on the value of their own labor and their capital investments, and to protect them from unforeseeable losses.<sup>80</sup>

Sutherland's cross-examination shifted the debate over price from a presumption against the CARC, whose price appeared on its face to be illegal, to a toss-up between two different measures of what a just price could be. Had this been the only issue before the Commission, the CARC might have prevailed. But in order to succeed on his price theory, Sutherland had to show that the CARC was in fact a growers' cooperative organization, entitled to control the supply and set prices for benefit of the growers. Proving that claim was far more difficult than showing the reasonableness of the CARC's 1919 price; in fact, Sutherland readily conceded on the third day of the hearing that "there is no contention, never has been and never will be any contention that this concern is within the proviso of Section 6 of the Clayton Act." But he nonetheless argued that the CARC, although not organized strictly as a cooperative,

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<sup>80</sup>See Sutherland's cross examination of Bonner, FTC Hearings Transcript, v. 2 (November 28, 1919), 967-1019, in which the two men discuss the value of the grower's own labor and the costs of equipment not included in the packers' estimate, such as horses, harnesses, cars, wagons, and trays.

was "within the spirit of the Clayton Act and within the intent of Congress."<sup>81</sup>

But Preston challenged Sutherland's interpretation of federal law. He reeled off what he argued was overwhelming evidence of the CARC's corporate character: the capital stock, the fact that bankers and merchants held shares, the voting trust agreement, the CARC's entry into the manufacturing side of the business, its predatory actions towards the other packers, and the night-riders' intimidation of the same people whose interests the CARC was supposed to represent. Preston cast the CARC as a powerful, financially independent corporation that dominated not just the market but the entire life of the raisin-growing community. In his closing statement, Preston pleaded for the commission to recognize what he saw as the true nature of the CARC:

Gentlemen, you cannot endorse a monopoly such as this. This concern is admittedly a profit-sharing stock corporation. So long as it remains such, and monopolizes as it admits it does more than 90 per cent of a product, both in production and distribution, you cannot endorse it. If you put the stamp of approval upon an organization of that character, the injury that would result to the

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<sup>81</sup>Statement of W.A. Sutherland, FTC Hearings Transcript, v. 1 (November 24, 1919), 331; ibid., (November 25, 1919), 723. Sutherland stated the same position to the DOJ; see Sutherland to Henry S. Mitchell, Assistant Attorney General, September 24, 1919, File 3, Box 559, RG 60, NA: "I think you must agree that (barring the mere fact that our company is corporate in form) the California Associated Raisin Company is in fact a cooperative concern in the highest sense and is at least embraced by the Congressional intent that farmers' organizations shall be exempted from the operation of the anti-trust laws."

nation would be without any method of reckoning.<sup>82</sup>

The Commission agreed. In its report to the Attorney General dated June 8, 1920, the Commissioners rejected the CARC's claim that its price was reasonable and held that the CARC had violated both the Sherman and Clayton Acts:

In the absence of a showing of a greater increase in the cost of production, there having been no diminution in production but rather a slight increase over 1918, after considering the diminishing purchasing power of the dollar, our conclusion is that the price fixed by the Raisin Company for the 1919 crop was in excess of a fair and reasonable price.

The Commission then outlined its recommendations for "readjustment" of the operations of the CARC. The recommendations required the CARC to choose between the two doctrinal alternatives that dichotomized the entire cooperative movement. The CARC could change its organic structure and become a true cooperative in the meaning of the Clayton Act. These changes included the elimination of capital stock, the elimination of profit-based operations, and the restriction of membership to raisin growers. Or, the CARC could retain its corporate identity and cease those market practices prohibited under the Sherman Act. Under this alternative the Commission recommended that the CARC cancel all price-fixing contracts, refrain from engaging in exclusive deal-

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<sup>82</sup>Statement of Preston, FTC Hearings Transcript, v. 2 (December 3, 1919), 2059.

ing, cease purchasing the carry-over and all production controls, and restore competition in the packing industry by selling off some of the plants it had acquired. If the CARC did not comply with these requirements, it would face the Sherman Act's penalty of dissolution.<sup>83</sup> Either way, the FTC intended to thwart the CARC's attempt to breed a new species of agricultural organization.

The DOJ transmitted the Commission's findings to the CARC in early July, taking the CARC's attorney by "surprise." Sutherland did not expect the Commission to hand down such a thorough condemnation of the CARC's structure. And, with only a few months until the 1920 harvest, the CARC feared that the DOJ's threat to prosecute would jeopardize the confidence of the raisin trade and the stability of the raisin-growing community. The CARC postponed its decision on prices for the 1920 crop while it weighed its options.<sup>84</sup>

Finally, in late July, Giffen revealed the CARC's decision. The CARC would take its chances in litigation rather than voluntarily dissolve:

You have indicated to us that we can avoid a prosecution by making a lower price and reducing our control to 60%. We have given these sugges-

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<sup>83</sup>FTC Report to the Attorney General, June 8, 1920, 19-20, 23-24, File 3, Box 559, RG 60, NA.

<sup>84</sup>Sutherland to Henry S. Mitchell, July 6, 1920; Mitchell to Sutherland, July 7, 1920; Sutherland to Mitchell, July 9, 1920; Giffen to Mitchell, July 16, 1920; Mitchell to Giffen, July 20, 1920; Giffen to Mitchell, July 20, 1920, all in File 3, Box 559, RG 60, NA.

tions very careful thought . . . and as a Board of Directors have unanimously concluded that the acceptance of either one of these suggestions would destroy us as an organization. Of course, we have hoped and prayed that a prosecution might be avoided, but when confronted with taking the chance of a prosecution or accepting your suggestions we have decided to take the former if you still feel that is necessary. As we see it there is at least some hope that we can win in a law suit, and there is no hope at all for the continuance of an organization like ours under the suggestions that you lay down.

In essence, Giffen was calling the DOJ's bluff. The CARC directors believed that the growers preferred their brand of cooperation to free competition among the packers. "[W]e have watched the raisin business for 30 years and, to say the least, we believe that the evils connected with it under the present arrangement are so much less, both from the producer's and consumer's point of view, than under the old competitive basis, that we cannot see our way clear to give up this organization without a struggle." Despite the federal government's findings against the CARC, Giffen believed that the CARC itself should determine what was best for the industry and the trade.<sup>85</sup>

But once the FTC determined that the CARC was not entitled to the legal protections for farmers' cooperatives, the CARC had few defenses to a federal prosecution. The guardians of the nation's anti-trust law, the Attorney General's staff in the DOJ and the Commissioners of the FTC,

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<sup>85</sup>Giffen to Mitchell, July 26, 1920, Case No. 60-166-21, File 3, Box 559, RG 60, NA.

now viewed the CARC as a serious threat to free competition in the market. Since there was no longer any question as to whether the CARC could claim protection under the Clayton Act or the appropriations rider, the DOJ could proceed under the Sherman Act, treating the CARC like any ordinary commercial organization. When the CARC refused to choose from the alternatives outlined by the FTC and proceeded to set prices for the 1920 crop, Attorney General Palmer instructed the U.S. Attorney at Los Angeles, Robert O'Connor, to file suit on September 8, 1920, disregarding O'Connor's warnings of the political and economic backlash that would follow.<sup>86</sup>

In the district court proceedings, the Department litigated the issues of the degree to which the CARC conducted a monopoly of the raisin trade, whether that monopoly was operated in restraint of trade, and whether the CARC's

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<sup>86</sup>Bill of Complaint and Petition, U.S. v. CARC et al., B-67 in equity, U.S. District Court, Southern District of California, Northern Division, in Case No. 60-166-21, File 3, Box 559, RG 60, NA; case file, U.S. v. CARC, B-67, Folder 2, Equity Case Files, 1913-1938, RG 21, NA-SB. Palmer was determined to litigate as soon as possible. On September 5, he instructed Robert O'Connor, now U.S. Attorney for Los Angeles, to prepare to file the bill the DOJ had drawn up. O'Connor asked for a delay and, in an encoded telegram, explained why: "Filing bill at this time would array every person interested California fruits not merely members this association and would positively mean losses twenty five thousand votes to Democratic Party in November making certain defeat Senator Phelan and losses this state for Governor Cox." Palmer's response was characteristically ruthless: "Please immediately file bill as directed . . . . Telegraph me immediately when this has been done." Palmer to O'Connor, September 5, 1920; O'Connor to Palmer, September 7, 1920; Palmer to O'Connor, September 8, 1920, File 3, Box 559, RG 60, NA.

control of the crop affected interstate commerce. The government argued that the growers' crop contracts established a conspiracy because through those contracts the CARC acquired control over a predominant share of the commodity. But the defense characterized these agreements as perfectly legal agreements covering production, exempt from the Sherman Act under the rule established in U.S. v. E.C. Knight,<sup>87</sup> and contended that it had entered into no interstate agreements to control sales.<sup>88</sup>

The government could not prove the existence of an interstate conspiracy to the satisfaction of the court, putting out of reach the ultimate remedy of dissolving the CARC. But the CARC was not completely beyond the reach of the law. The case was settled in January, 1922, with a consent decree that permanently enjoined the CARC from engaging in market practices prohibited by the Sherman Act.<sup>89</sup> The court said nothing, however, about the legal

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<sup>87</sup>195 U.S. 1 (1896).

<sup>88</sup>Plaintiff's Points and Authorities, U.S. v. California Associated Raisin Company; Defendant's Reply Points and Authorities, October 25, 1920, Case No. B-67, Folder 2, Box 77, Equity Case Files, 1913-1938, RG 21, NA-SB.

<sup>89</sup>The specific practices included obtaining crop contracts through coercion, making selling contracts where prices were made contingent on future market conditions; decreasing competition by purchasing packing plants and packing businesses of competitor firms; exclusive dealing or discriminating in any way among purchasers of raisins; making the packers into selling agents of the Association; making any purchase of raisins to fix prices; or restricting production in any way. Consent Decree, U.S. v. CARC, January 18, 1922, Folder 1, Box 76, Equity Case Files, 1913-



issue of the CARC's a corporate identity.

By the time the decree was signed, that issue was moot. The CARC suit and several anti-trust actions against urban milk producers' cooperatives galvanized farm leaders into action. With the help of the newly formed American Farm Bureau Federation and the Congressional farm bloc, the milk producers agitated for protection against future law suits.<sup>90</sup> The Capper-Volstead Act was signed into law in February, 1922. The law extended Section 6 of the Clayton Act to cover cooperatives that, like the CARC, issued capital stock and paid dividends on subscribed shares. But this added privilege did not confer upon cooperatives license to engage in practices that violated the anti-trust laws. The Capper-Volstead Act simply recognized that in order to be competitive, some farmers' organizations would require independent capital and access to credit. In enacting the statute, however, Congress recognized that cooperatives could properly borrow from the corporate form and still comply with the nation's policy on free, competitive markets.<sup>91</sup>

During the first ten years of the operation of the California Associated Raisin Company, federal anti-trust

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1938, RG 21, NA-SB.

<sup>90</sup>See chapter 3.

<sup>91</sup>Capper-Volstead Act, 42 U.S. Statutes at Large 388 (1922).

laws and state incorporation statutes lacked provision for a cooperative organization with the corporate attributes of capital stock, for-profit operations, commercial integration. At base the administrative system and the courts worked according to a strict distinction between corporation and cooperative set up by the statutes. It was necessary for Congress to provide a legislative remedy to the dilemma posed by the CARC, both because conditions in California provided a ripe atmosphere for experimentation with the cooperative and corporate forms and because administrative bodies and courts tended to interpret the statutes strictly.

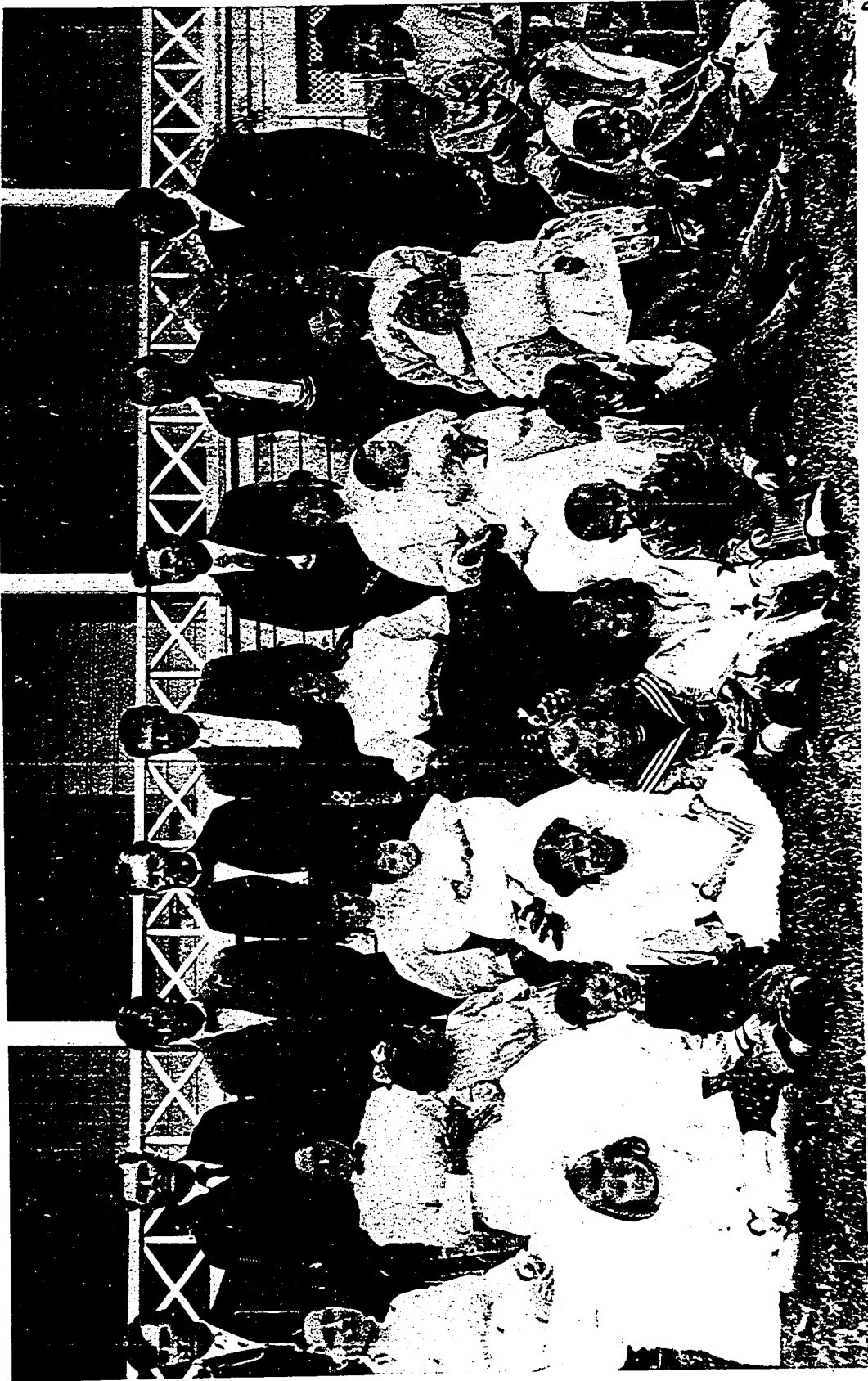
The CARC's attempt to combine cooperative and corporation also challenged prevailing conceptions of corporate power and the centralization of market control. The underlying paradox of the cooperative movement was that it aimed to empower a group of people whose occupational identity was inextricably linked to a romantic myth that was in turn ingrained in American culture.<sup>92</sup> The leaders of the raisin industry in California turned the image of the yeoman farmer on its head. They were shrewd businessmen. They sought the assistance of lawyers, bankers, and commercial interests in their community. They knew how the balance of economic power worked in their industry and they built the CARC to

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<sup>92</sup>For an insightful treatment of the Jeffersonian ideal of the yeoman farmer, see Henry Nash Smith, Virgin Land: The American West as Symbol and Myth (Cambridge: Harvard University Press, 1950), 123-54.

take advantage of that structure. The CARC took the traditional gospel of cooperation and retooled it to suit the commercial dynamics of the raisin industry. But no less than other cooperating farmers, the raisin growers believed that their organization fulfilled the essential promise of agricultural cooperation. That promise gave farmers the right to determine their own economic destiny within a participatory, egalitarian corporate body.

The CARC's innovative form and its notoriety caused it to be mischaracterized and misunderstood. From the perspective of the DOJ, the CARC's power to monopolize supply, control interstate marketing, and fix prices appeared to result in an unreasonable restraint of trade. But its political and economic importance prompted congressional reconsideration of the legal status of agricultural cooperatives. Just as the CARC had shrewdly capitalized on the gap between anti-trust policy goals and political sympathy for farmers during the 1910s, it would take advantage of the new status provided in the Capper-Volstead Act during the 1920s.



11. Wylie M. Giffen (second from left, top row) and Giffen Family, c. 1908.  
Courtesy Jean Giffen Wiley.

## CHAPTER 6

### THE "RAISIN KU KLUX KLAN" AND THE DECLINE OF THE BENEVOLENT MONOPOLY

The recent raisin drive here was a reign of terror, a blot on the good name of the San Joaquin Valley, and, more still, a disgrace to civilization.

Augustus Jewett, raisin grower, 1923<sup>1</sup>

The Capper-Volstead Act legalized the CARC's organic structure. But the law's importance to the CARC was not limited to that issue. During the 1920s, the CARC, renamed the Sun-Maid Raisin Growers of California, used the law to get out from under the thumb of the Attorney General, to avail the cooperative of the Secretary of Agriculture's sympathetic intervention, and to evade responsibility for crimes committed during the course of reorganization and contract campaigns. The night-riders' terrorist tactics earned a fitting epitaph--the "Raisin Ku Klux Klan"--but in the end could not prevent the dissolution of the benevolent monopoly Sun-Maid claimed to exemplify.

The Capper-Volstead Act expanded cooperatives' freedom

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<sup>1</sup>Jewett to Ralph H. Colvin, May 30, 1923, in Report of Special Agent Ralph H. Colvin, June 1, 1923, File 60-166-29, Anti-Trust Section, Records of the Department of Justice, Record Group 60 (RG), National Archives (NA) (hereafter Colvin Report).

in the marketplace. The law meant that cooperatives could not be sued for anti-trust violations on the basis of market share alone. But Congress never intended for cooperatives to limit the production of their members. Nor could they deny membership to any qualified farmer or attempt to dictate the prices at which non-members could sell their goods.<sup>2</sup> As the case of Sun-Maid demonstrated, a cooperative's market control depended not only on anti-trust immunity for the organization but also on the good sense of the producers not to overproduce. No cooperative could legally control industry-wide surpluses; decisions on how much to plant remained the individual farmer's. Increasing surpluses exerted terrific downward pressure on prices, undermined the market control of cooperatives, and dulled the legislative victory farmers won in 1922. In effect, the market undermined Sun-Maid's benevolent monopoly, and even the extralegal methods of the night-riders could not keep it in place.

#### The Rebirth of Sun-Maid

The only instance during the 1920s in which the Secretary of Agriculture was asked to intervene in the economic affairs of a farmers' cooperative arose in the California raisin industry. During debate on the bill, the CARC main-

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<sup>2</sup>E. Dale Odom, "Associated Milk Producers, Incorporated: Testing the Limits of Capper-Volstead," Agricultural History, 59 (1985): 41-42.

tained a low profile, to distance its own legal problems from the larger cooperative movement so as not to damage the bill's chances. President Wylie Giffen and CARC attorney Carl Lindsay did permit themselves the luxury of an appearance before the Senate Judiciary Committee. "We have never taken any particular interest in the passage of this law," Lindsay informed the committee.<sup>3</sup> The CARC's strategy was to avoid the suggestion that it was using the legislation to escape the litigation; instead, Lindsay declared, the cooperative intended to stand up to the Justice Department on its own, without accepting legislative relief. Lindsay, who replaced William A. Sutherland as counsel for the CARC after the suit was filed, told the committee he did not believe "the Capper-Volstead bill . . . [would] affect in any material way the activities of the CARC. I do not think that we will fall within the provisions of the bill, and I am quite sure that it will give to us no greater protection than we have at the present time, under the law."<sup>4</sup>

Once the bill became law, however, the CARC raced to

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<sup>3</sup>Testimony of Carl Lindsay, in U.S. Congress, Senate, Committee on the Judiciary, Association of Producers of Agricultural Products, Hearings, 67th Cong., 1 sess., June, 1921, 38-39 (hereafter 1921 Hearings).

<sup>4</sup>Ibid. Lindsay used the opportunity to defend the CARC from the charges of the lawsuit, asserting that no monopoly was possible even in raisins (because of foreign competition and the absence of tariffs) and justifying the CARC's 1919 and 1920 price levels on the grounds that damage due to frost and higher production costs warranted higher prices. Ibid., 42-43.

avail itself of the legal protection the law offered. Guided by new management, the cooperative underwent wholesale reorganization and restructured the relationship between itself and the growers. In its efforts to bring itself under the blanket of Capper-Volstead, the CARC enabled Secretaries of Agriculture Henry C. Wallace and William Jardine to make pivotal interpretations of the cooperative form required by the law. In return, the CARC gained the USDA's blessing for evasions of the law's restrictions on producer-only membership and stock dividends.

With the consent decree and the Capper-Volstead Act materializing almost simultaneously, CARC President Wylie M. Giffen had good reason to speak confidently of the cooperative's fortunes. Speaking to the growers from the pages of the Associated Grower, Giffen dismissed the restraints of the decree as "work[ing] no hardship" on the CARC since none of the enjoined practices were used in current policy.<sup>5</sup> The new federal law signaled a new beginning for the cooperative: "With our eyes alert and our heads erect," Giffen exhorted, "let us move forward with a greater determination than ever to make the Sun-Maid Raisin Growers the greatest

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<sup>5</sup>Giffen, "Government and Raisin Growers Reach Agreement," AG, 3:2 (February, 1922): 5. Giffen denied that the cooperative had ever engaged in or condoned night-riding and coercion; as for selling "firm at opening price," the preferential contract with California Packing Corporation, the restriction of supply in any way, or any other market control tactic complained of by the government, Giffen declared "We . . . are only enjoined from doing thing[s] that we have never done and never expect to do" (ibid., 6).



cooperative marketing agency in the world."<sup>6</sup> Part of this new beginning rested with a new name. One day before the Capper-Volstead Act became law, the CARC legally changed its name, becoming the Sun-Maid Raisin Growers.<sup>7</sup> As its announcement made clear, the organization was taking advantage of its highly popular brand name; it also sought to identify itself as a growers' organization. But, as staff member Al C. Joy hastened to add, the association was the "same in every way" as the old one.<sup>8</sup> A less obvious but perhaps more telling reason for the change was to distance the organization from the just-concluded litigation. The new name furnished a sober official commentary on the damaging consequences of the litigation, more telling than anything Giffen said in print.<sup>9</sup>

Even with the aid of the new name and the new federal anti-trust exemption, marketing raisins during the post-war years proved a perilous business. The agricultural crisis of the early 1920s hit the raisin industry hard. Post-war

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<sup>6</sup>Ibid.

<sup>7</sup>In re Application of California Associated Raisin Company for Change of Name, Case No. 28348, Fresno County Superior Court, February 17, 1922.

<sup>8</sup>Al C. Joy, "Sun-Maid Raisin Growers," AG, 3:3 (March, 1922): 5.

<sup>9</sup>Not until several years had passed did the new management give a more frank assessment of the impact of the consent decree on Sun-Maid: "[It] put the Sun-Maid organization in a disadvantageous position in further competition." Ralph P. Merritt, "California Cooperatives Set an Example," Review of Reviews, 72 (1925): 155.

inflation, exacerbated by the CARC's own price levels and sustained by the heightened demand for raisins at the onset of Prohibition, pushed prices to an all-time high of fourteen cents per pound in 1921. The next year, the agricultural journals reported, "the bottom dropped out of the raisin market." The inflated prices drew four thousand growers into the industry between 1919 and 1922. They more than doubled the acreage planted to raisin grapes, from 322,000 to 664,000. When these vines came into bearing in 1922, the market was inundated with a 237,000-ton crop.<sup>10</sup>

Even with 93% of the crop under its control by virtue of the 1921 contract campaign, "serious financial problems" confronted Sun-Maid. The crop contract guaranteed the growers an advance of 4 cents per pound on Muscat and Thompson seedless varieties; riding the crest of the boom, growers netted 11.2 cents in 1920 and 14 cents the following year. At the same time, a surplus was accumulating at an alarming rate. Out of the 1920 and 1921 crops, an average of 35,000 tons remained unsold at the end of the selling season. Sun-Maid spent \$2.4 million on advertising to sell these huge

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<sup>10</sup>For prices, see "Raisins: California Leads the World in a World-Wide Industry," Western Canner and Packer (July, 1934): 10; on the economic problems in 1921 and 1922, C.F. Tucker, "Sun-Maid Side-Lights," California Cultivator, 62:7 (February 16, 1924): 187, 194; Robert Welles Ritchie, "Rescuing a Raisin Maid," Country Gentleman, 88:27 (July 7, 1923): 3; S.Q. Grady, "How to Help Move 20,000 Tons of Thompsons in 5 Cent Packages," AG, 2:8 (August, 1921): 6; P. Malloch, "Report of the Raisin Industry in California (1929)" TMs [photocopy], 1, Giannini Foundation of Agricultural Economics Library, University of California at Berkeley.

crops and invested an additional \$3.5 million in building and leasing packing plants up and down the valley. Meanwhile, speculation in raisin prices and vineyard values led to the planting of 56,000 more acres in 1921 and another 40,000 more in 1922. Wylie M. Giffen was reduced to selling to the independent packers--something he had sworn never to do in 1918--in order to find buyers for Sun-Maid raisins. But he could not change the inevitable consequences of oversupply and underconsumption. With the nation stuck in postwar depression and consumers in open revolt against high prices generally, Sun-Maid's prices had to drop. As harvest began in 1922, "frenzied ranchers were mortgaging themselves up to the eyes to set out new miles of vines." Giffen announced that growers would net only 5.75 cents per pound on Muscats, rather than the 9.5 cents they had made the previous year (see Table 6-1).<sup>11</sup>

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<sup>11</sup>Tucker, "Sun-Maid Side-Lights," 194; 1921 Crop Contract, Sun-Maid Raisin Growers, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA; Franklin Bell, "Raisin Advertising Appropriation," AG, 4:1 (August, 1922): 5; Giffen, "The Raisin Option and the Packers," ibid., 7; Giffen, "The 1922 Raisin Prices," ibid., 4:2 (September, 1922): 5; Robert Welles Ritchie, "Rescuing A Raisin Maid," Country Gentleman, 88:27 (July 7, 1923): 4; J.A. Bragg, "History of Cooperative Marketing in Raisins to 1923" (M.A. thesis, University of California, Berkeley, 1930), 214.

**Table 6-1**  
**Estimated Raisin Production and Farm Prices**  
**in California, 1920-1928**

Year	State Crop (in tons)	Carry- over <sup>a</sup>	SM Share (%)	Prices	
				Muscats	Thompsons
1920	173,528	n.d.	87.9	11.2	14.8
1921	155,000	36,000	82.7	7.0	8.1
1922	190,000	34,000	75.9	5.75	6.5
1923	195,000	86,000	n.d.	2.475	2.5
1924	220,000	186,000	n.d.	2.9	2.89
1925	240,000	67,000	n.d.	3.77	3.25
1926	245,000	59,000	n.d.	n.d.	n.d.
1927	285,000	108,000	n.d.	n.d.	n.d.
1928	290,000	124,000	n.d.	n.d.	n.d.

<sup>a</sup>Carryover includes all unshipped stock held by Sun-Maid and all independent packers. These figures are probably inflated because they measure all stock on hand, not the unsold surplus.

Sources: S.W. Shear and R.M. Howe, "Factors Affecting California Raisin Sales and Prices, 1922-1929," *Hilgardia*, 6:4 (September, 1931): 74-75; Annual Financial Report, California Associated Raisin Company, *AG*, 1:9 (September, 1920): following page 26, at viii; Wylie M. Giffen, "Analysis of 1921 Raisin Crop Returns," *AG*, 5:1 (January, 1923): 12; Giffen, "The 1922 Raisin Prices," *AG*, 4:2 (September, 1922): 5; "Statement of Net Proceeds From Sale of 1923 Crop Raisins," *SMB*, February 15, 1926, pp. 8-9; "Statement of Net Proceeds From Sale of 1924 Crop Raisins," *SMB*, June 15, 1926, 8-9; "What the Members Ask," *SMB*, November 15, 1927, 9.

The new policy provoked strong protest, if not outright mutiny. Apparently, growers accused Sun-Maid of spending too much money on the national sales force and the clerical staff in the Fresno headquarters, for Giffen hastened to answer the charges in the Associated Grower. Defensive and anxious, his response did not assuage the disappointment of growers who had joined the industry or expanded their acreage in hopes of profiting from the postwar boom:

[E]ven were some of these criticisms just, even if our labor costs are a dollar or two higher than they should be, even if we are spending a few thousand dollars in advertising more than you believe that we should . . . the prices we are getting for raisins as compared with the price we

would be getting if there was no organization is at least three to one . . . since it is the judgment of the writer that at no time since the autumn of 1920 raisins without an organization would have been worth over 2¢ a pound.<sup>12</sup>

The days when Sun-Maid could simply name its price were over. Giffen's decision was ordained not only by the weight of the carryover and slumping demand but by the heavy debt Sun-Maid had taken upon itself. During the 1910s, the cooperative financed its expansion with short term loans and the ¼ cent reserve fund; in 1922 it still owed members their final settlement on the 1920 crop, and it was out of money. Sun-Maid borrowed \$8 million to pay the advance, using warehouse receipts for the crop as collateral.<sup>13</sup> When news of Sun-Maid's financial problems became public, the banks cut off its credit, forcing Sun-Maid to pay the growers in notes payable on demand. These notes were "put out in such quantities as to bring about an ever-present danger of bankruptcy should any number of these notes be presented for

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<sup>12</sup>Giffen, "The 1922 Raisin Prices," 21. The charges ranged from overspending to outright nepotism; the following year a DOJ agent reported, "the offices of the association became a sort of 'orphans' home' for relatives and friends of officers of the association." Colvin Report, 3.

<sup>13</sup>DOJ agent Ralph H. Colvin, later reported this figure at \$9 million, \$8 million of which had come from a bank with close connections to Sun-Maid. Attorney W.A. Sutherland, who left his practice in the midst of the CARC litigation, became president of the Pacific-Southwest Trust & Savings Bank, of which the Fresno branch was owned by Wylie Giffen. Colvin Report, 3.

payment."<sup>14</sup>

In 1921, Sun-Maid's fragile financial stability was shattered by the news that growers had been overpaid for the 1920 and 1921 crops. Giffen had the unenviable task of announcing that members would receive statements for the so-called bill-backs. Most of the overpayments had come on specialized varieties and distillery stock raisins, and almost all amounted to less than one-tenth of a cent per pound. Yet Giffen knew that the announcement would not improve morale among the membership:

Our disappointment in being forced to make this accounting of our stewardship to you is as great as yours can possibly be in receiving it, but in spite of this disappointment we are submitting this settlement to you without an apology as we have made every effort . . . to sell each variety at the highest possible price and have found it impossible to get more on the declining market that has prevailed for the past two years.<sup>15</sup>

It is impossible to tell how many growers were affected by the billback, or how severely. Even with the billback, Sun-

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<sup>14</sup>Ralph P. Merritt, "Sun-Maid Program," AG, 5:3 (March, 1923): 5 ("The contract calls for payment to our Growers at an average price of \$85.00 per ton, yet the banks would only loan us \$70.00 and \$80.00 per ton); Ritchie, "Rescuing A Raisin Maid," 4; Ralph P. Merritt to Henry C. Wallace, May 31, 1923, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

<sup>15</sup>Giffen, "Analysis of 1921 Raisin Crop Returns," AG, 5:1 (January, 1923): 11. For the schedule of final settlements of the 1921 crops and the billback on the 1920 crop, see ibid., 12. Growers still netted far in excess of the guaranteed advance on all varieties except the special grades of Malagas and Feherzagos, used only in baking and wine-making.

Maid still paid far in excess of the 4 cent advance on the standard varieties--7.1 cents on Muscats and 8.1 on Thompsons--enough to cover growers' production costs. The real problem for Sun-Maid was that the decreased profit margin reduced the amount of capital available to pay operating expenses, including interest on stock and plant mortgages. In all, Sun-Maid ended up paying the growers about \$4.25 million more for raisins than it received for them, while simultaneously borrowing \$9 million to finance the crop. The banks, accordingly, lost all confidence in Sun-Maid's financial stability and quietly demanded both Giffen's ouster and a complete reorganization of the cooperative.<sup>16</sup>

Unwilling to dump Giffen, whom the community respected as honest and selfless--he never took a salary from CARC in twelve years as an officer<sup>17</sup>--the Board of Directors settled

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<sup>16</sup>Bragg, "History of Cooperative Marketing in Raisins to 1923," 115; Forrester, Report upon Large-Scale Cooperative Marketing, 48. The DOJ later noted that the officers and directors of Sun-Maid had personally signed the bank loans and thus were "personally liable therefor." Colvin Report, 3.

<sup>17</sup>Wylie Giffen quietly resigned as president in November, 1923, giving Merritt the title to go with the responsibilities. Giffen had little choice; he had lost his own vineyards due to the financial crisis. Of Giffen attorney Louis C. Levy said, "From shirt-sleeves to millionaire and bank president, and back to shirt-sleeves usually requires three generations. It is said Mr. Giffen made the course in fourteen years." Giffen paid his debts and avoided bankruptcy; he emerged to lead the Grape Stabilization Program during the early 1930s. Bragg, "History of Cooperative Marketing in Raisins to 1923," 215; "Ex-President Giffen," AG, 5:11 (November, 1923): 12; Jean Giffen Wiley, "Three Generations of Giffen Ranchers in California's San Joaquin Valley, 1989," TMs [photocopy], p. 32A, furnished by Wiley

for a new managing director. They chose someone with close ties to the financial community: Ralph P. Merritt, a former employee of the Miller and Lux cattle firm, comptroller of the University of California, and Food Administrator for California under Herbert Hoover during World War I. In 1921, Sacramento bankers had turned to Merritt to solve the surplus problems in the California rice industry; he came through spectacularly, organizing the California Rice Growers' Association and selling the entire forty million pound surplus to Japan, "which had never imported a ton of rice in its history."<sup>18</sup> To the banks, then, Merritt was the white knight of agriculture, a man of education and experience upon whom they could rely to solve the daunting financial problems arising from the depression. Merritt seemed ideal for the job of reorganizing Sun-Maid, securing its finances, and eliminating the "liability" of the crop advance. It would not be an easy task. The "necessity of reducing costs while increasing the volume of sales" was, in Merritt's words, like "'carry[ing] a ten ton load on a one ton

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to author.

<sup>18</sup>Ralph P. Merritt, "After Me Cometh A Builder:" The Recollections of Ralph Palmer Merritt (Berkeley and Los Angeles: Regional Cultural History Project and Oral History Project, 1962), 3-4, 112-17; Ben R. Walker, "Merritt, Man of Accomplishments," FMR, April 2, 1923, 11. The sale of California rice to Japan was all the more remarkable for the price Merritt extracted (he got the Japanese to pay \$3 per 100 pounds, rather than the \$2.25 they offered) and for the anti-Japanese prejudice that permeated the state at the time.



truck."<sup>19</sup>

After taking office on January 24, Merritt devised a plan for a reorganized Sun-Maid, "to take its place but not assume its liabilities." Merritt's plan called for the organization of two separate companies. One, the Sun-Maid Raisin Growers of California (SMRGC), would be organized under the California cooperative law as a growers' cooperative, adhering to the one-person, one-vote principle and limiting membership to producers. This organization, Merritt hoped, would "qualify in every respect as a true cooperative association" under the Capper-Volstead Act. It would "become a marketing association owned and managed exclusively by growers of raisins."<sup>20</sup> In short, the SMRGC adopted a

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<sup>19</sup>Ritchie, "Rescuing a Raisin Maid," 4; Tucker, "Sun-Maid Side-Lights," 194. Merritt had no experience in raisin production or marketing, and one competitor believed he was appointed president of Sun-Maid in order to pacify Fresno bankers who had been financing Sun-Maid's crop advances and trusted no one else to manage the company. Franklin P. Nutting, "Interview In Re Litigation Involving Sun-Maid," (transcript of interview, Regional Oral History Office, Bancroft Library, University of California, Berkeley, 1955), 53-59; George E. Popovich, "History of the Sun-Maid Organization and its Antecedents, 1958" TMs [photocopy], p. 18, Corporate Archives, Sun-Maid Raisin Growers of California, Kingsburg, California (hereafter SMCA).

<sup>20</sup>Merritt to Wallace, March 1, 1923, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA. The concept of separate incorporation for the warehousing/packing facilities and marketing functions was not new; Wylie Giffen had done the same thing in 1914, and attorney Aaron Sapiro was recommending the idea to tobacco, cotton, and wheat farmers in the rest of the nation. William E. Ellis, "Robert Worth Bingham and the Crisis of Cooperative Marketing in the Twenties," Agricultural History, 56 (1982): 99-121.

more traditional cooperative form than its predecessor.

To handle the capital-intensive processing and packing operations, a second company, the Sun-Maid Raisin Growers' Association, would be organized under Delaware law.<sup>21</sup> The Delaware Sun-Maid would take title to all capital assets of the old Sun-Maid, including plants, equipment, and the existing \$3.7 million in capital stock. Any investor could purchase non-voting preferred stock in the Delaware company, but its common stock would remain in the treasury of SMRGC. Thus the Delaware Sun-Maid would operate as a subsidiary of the California cooperative, but without the limits on capital and membership incumbent upon cooperatives. Merritt's goal was to increase the capitalization of the Delaware company to \$8 million, by adding \$2.5 million in new Delaware stock subscriptions and selling bonds in the plants and equipment for another \$2 million.<sup>22</sup> Since "the raisin grow-

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<sup>21</sup>The subsidiary was organized because under California law all stock had to carry voting privileges and thus non-producers buying stock in the cooperative would have the right to vote. The subsidiary was necessary, then, not so much to protect the integrity of the growers' cooperative, though that was an attractive argument to make in its favor, but because the growers could not furnish all the capital their organization needed. Merritt to Wallace, March 1, 1923, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

<sup>22</sup>The bonds would be gradually retired through the use of a sinking fund, funded by a \$4 per ton charge levied on all members. Growers would receive the face amount in preferred stock of the Delaware company, and, once "sufficient working capital ha[d] been accumulated," the money would be used to pay off the bonds. Merritt to Wallace, March 1, 1923, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

ers had no money," this new capital would have to come from the community. The banks would support Merritt's plan only if the crop advance guarantee were eliminated, so he called for a two-faceted campaign: to secure stock subscriptions for the Delaware company and procure signatures on a revised crop contract.<sup>23</sup>

Before proceeding with the campaign, however, Merritt sought Secretary Wallace's approval for the plan. After flying to Washington to confer with the USDA, Merritt committed the plan to writing and laid out the cooperative's claim to Capper-Volstead status: "It seems to us by this method we will successfully accomplish our purpose of providing a basis for the necessary financing, without sacrificing the cooperative principle, and that the arrangement complies in letter and spirit with the Capper-Volstead Act." Lloyd S. Tenny, chief of the Bureau of Agricultural Economics (BAE), summarized the findings of the Department's conference with Merritt: "Inasmuch as the Capper-Volstead Act provides that associations of growers may make contracts for

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<sup>23</sup>Ritchie, "Rescuing a Raisin Maid," 4; Merritt to Wallace, March 1, 1923, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA; "Valley Bankers to Aid Growers," FMR, March 27, 1923, 1. One of the banks most closely interested in Sun-Maid's affairs was W.A. Sutherland's Pacific Southwest Trust and Savings Bank. Sutherland helped to engineer temporary financing for Sun-Maid during the reorganization period; he informed growers that the demand notes would be acceptable as collateral for bank loans, and he urged them to seek loans rather than demand payment from Sun-Maid before the reorganization was completed. Ibid., 2.

processing and otherwise handling their products, we all agreed that there was no fundamental reason why the Raisin Growers could not have such a subsidiary organization and still come within the meaning of the Act."<sup>24</sup> Wallace, having been fully briefed by his subordinates in the BAE, endorsed the plan: "I am much pleased with the way you are proceeding with the reorganization of this association to meet the requirements of the Capper-Volstead Act." He added only one caveat: "It is understood that all steps taken by the Sun-Maid Raisin Growers of California with respect to the contemplated reorganization and all methods of operation which will be employed by it will be consistent with the terms of the consent decree entered against it in 1920 [sic]." The USDA, at least in early 1923, regarded the new Sun-Maid as legally identical to the old CARC and thus bound by the limitations of the settlement of U.S. v. CARC in 1922. But in all other respects, the plan met with the Department's approval.<sup>25</sup>

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<sup>24</sup>Memorandum, Tenny to Wallace, March 31, 1923, "Sun-Maid Raisin Growers" File, Records of the BAE, RG 83, NA.

<sup>25</sup>Wallace to Merritt, March 10, 1923, "Sun-Maid Raisin Growers" File, Drawer 58, General Correspondence, RG 83, Records of the BAE, NA; also in "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA, and Reel 166, M440, Correspondence of the Secretary of Agriculture. The exchange of letters in March followed a less congenial correspondence with the DOJ in February, in which an assistant Attorney General reminded the Secretary that Capper-Volstead did not cover organizations that included non-producers. At this point, at least, the DOJ was taking an active role in interpreting the Capper-Volstead Act. Assistant Attorney General to Wallace, February 20, 1923,

What Merritt did not realize was that in separating the marketing and processing functions he was conceding the point that M. Theo Kearney and Wylie Giffen had insisted upon: the growers' cooperative should handle both the pooling of the crop and the manufacturing processes. Cooperative and corporation, united in the CARC, were divorced in the reorganized Sun-Maid. Ostensibly formed to accomplish the purposes of a "true growers' cooperative," the new Sun-Maid Raisin Growers of California gave control over the most capital-intensive parts of the raisin business to a corporation that nominally was subordinate to the growers' organization but in fact operated according to the imperatives of the financial community. Unlike Giffen, Merritt did not have a life-long connection to the industry as either a grower or a cooperative manger; he adhered to a model of capital/farmer relations he developed during his years with Miller and Lux. In the desperate times of the early 1920s, the Fresno banks and the USDA were extremely interested in preventing the impending failure of Sun-Maid. Merritt's plan to avert collapse appealed to most people as the best route back to "fifteen cent raisins."<sup>26</sup>

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File 60-166-29, Anti-Trust Division, RG 60, NA.

<sup>26</sup>Colvin Report, 20. Merritt's claim to the occupation of raisin grower stemmed from his part-ownership of his friend Herbert Hoover's ranch near Wasco, which had "some" acres of raisin vines. Whether this connection gave his attorney the right to claim on his behalf that he had "personally suffered along with others in the industry by reason of the stress thru [sic] which we have gone," however, is

"What Relief Has Grower?"

With the Department's approval in his pocket, Merritt launched the campaign for stock subscriptions and contract signatures on April 2. The simultaneous timing of the two campaigns was about all they had in common. The stock campaign jumped off to a fast start. The bankers, whom a DOJ agent would later describe as "the men behind the guns," immediately started a public crusade. They proclaimed their support in full page advertisements and provided growers with blank contracts and subscription forms.<sup>27</sup> Within three days, Sun-Maid raised \$1 million in subscriptions. Aided by a timely and sympathetic visit to Fresno by Secretary Wallace, the fund rose to \$1,834,900 by April 17.<sup>28</sup> Merritt also called upon the "financial powers" of San Francisco and Los Angeles for assistance, and "bank heads and industrial captains" in those cities contributed \$250,000 and \$150,000, respectively. One Fresno banker summarized the financial

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another matter. Harry M. Creech, Sun-Maid Raisin Growers, to L.M. McLeod, December 8, 1924, "Miscellaneous Information" File, Packing Plant Vault, SMCA.

<sup>27</sup>"Fresno Banks Back Raisin Growers," FMR, April 3, 1923, 10. Signing the ad were two branches of the Bank of Italy, the Growers' National Bank, the Pacific Southwest Trust and Savings Bank (Sutherland's bank), United Bank and Trust Co., and Valley Bank. See also "Bankers Endorse Sun-Maid Plan," AG, 5:3 (March, 1923): 8.

<sup>28</sup>Ritchie, "Rescuing a Raisin Maid," 4; Memorandum, Lloyd S. Tenny to Wallace, March 31, 1923, Drawer 58, Sun-Maid Raisin Growers, RG 83, NA. Wallace's handwritten comment on the memo read: "Mr Tenny: Had a fine meeting at Fresno 4-9-23."

community's position: "'If this thing falls through it will put the whole of the San Joaquin Valley back twenty years. . . . and the whole cooperative idea throughout the United States will get a black eye." On April 26, the date of the industry's Raisin Day festival, Merritt announced that the stock subscription drive had gone over the top.<sup>29</sup>

But the crop contract had not fared nearly as well, despite the efforts of a highly centralized, coordinated recruitment force. Sun-Maid organized teams of growers, bankers, merchants, and insurance brokers to run the drives in each of sixteen districts under the leadership of Sun-Maid publicity director Al C. Joy. Nevertheless, these teams signed up only 60 percent of the acreage by Raisin Day, well short of Sun-Maid's 85 percent goal. The terms of the contract was not as attractive as Sun-Maid's two previous crop contracts. The new agreement increased the liquidated damages from 2.5 cents to three cents per pound. Further, growers would bear the loss incurred in marketing the 1922 crop, from which a carryover of 75,000 to 80,000 tons remained on hand. Most important, many growers were disgruntled at the loss of the guaranteed advance. All the new contract offered was a promise to make "as large an advance per pound as in [Sun-Maid's] judgment financial and market

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<sup>29</sup>Ritchie, "Rescuing a Raisin Maid," 4; "Campaign Extended Ten Days," FMR, April 26, 1923, 1.

conditions will justify."<sup>30</sup>

To growers who "had lost their farms" and others who "were looking over the brink," this promise rang hollow. The growers were being asked to give up the very guarantee that had first set the CARC apart from the independent packers in 1914. But Sun-Maid management and the banks now saw the guarantee as a "millstone weight," dragging the cooperative into bankruptcy. At a Raisin Day mass meeting, Wylie Giffen--a figurehead symbolically leading the charge on the contract campaign--told the growers that the advance had to go: "'We have fooled ourselves for a time with the guarantee under the old contract. A guarantee we make to ourselves is absolutely worthless. . . . The only price we can obtain is the price the crop will bring.'" The pro-Sun-Maid growers in attendance pleaded for time to obtain more signatures. Merritt gave them until May 5 to bring in the 25 percent still required.<sup>31</sup>

Cognizant of the terms of the consent decree, Sun-Maid leaders instructed the solicitation teams not to resort to violence or coercion. "We have heard of coercion," Merritt

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<sup>30</sup>"Captains In Sun-Maid Drive Are Announced," FMR, March 27, 1923, 13; Colvin Report, 5-6, 18-19; "Growers Call Mass Meeting," FMR, April 25, 1923, 1; 1923 Crop Contract, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA; also published in AG, 5:4 (April, 1923): 8.

<sup>31</sup>Tucker, "Sun-Maid Side-Lights," 194; Giffen quoted in Ritchie, "Rescuing a Raisin Maid," 3; "Raisin Acreage Drive Extended Through May 5th," Fresno Bee, April 26, 1923, 1.



said. "We do not want this drive put over by any other than lawful and proper means." And from Giffen came words that would later prove ironic: "Let us do nothing in this campaign that would leave a blot on it. I do not believe that I have ever been so proud of men as I have during these last anxious days of the drive when they have worked under pressure day and night to save the association. I am proud to be with an organization that can inspire men to such deeds." Probably recalling "such deeds" from 1916 and 1918, and perhaps anxious to prevent their recurrence, a group of prominent Armenian growers formed an Armenian Drive Committee to bring all unsigned Armenians into the Sun-Maid fold. The leaders of the Armenian community who had prospered were now starting to sound like the industry establishment. Committee chair A. Setrakian declared, "[N]o man who expect[s] to live on this side of the ocean or whom [sic] want[s] to be an American citizen should stay out of this organization."<sup>32</sup>

It soon became obvious that the Raisin Day speeches, rather than fostering restraint, only encouraged the industry's tendency towards violence. The next day, a mob numbering between 75 and 100 men called on the home of Nazaret and Ashken Der Torosian around midnight. The Der

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<sup>32</sup>"Campaign Extended Ten Days," FMR, April 26, 1923, 1, 5. The paper reported that a few incidents of night-riding had taken place before Raisin Day, but that no serious injuries or reports of property damage had resulted.

Torosians leased the ranch from Abraham Kulekjian, who had gone to Los Angeles to "escape signing the raisin association contract." His tenants were not so fortunate. The mob surrounded the house and shouted to the frightened inhabitants, "Come out, you black Turks, your house is on fire." As the mob began to break windows and the doors, someone in the house found a rifle. Two shots were fired, hitting W.L. Osterhaut in the right leg and right arm. The bullet shattered his knee, and the leg was later amputated. The Der Torosians were placed under arrest on charges of attempted murder. The police arrested them both because, due to Mr. Der Torosian's inability to speak English, they were unsure as to who fired the gun. Mrs. Der Torosian claimed it was she, but the sheriff and district attorney doubted her story, believing that she was covering up for her husband. The night-riders-turned-witnesses swore that "not one member of the party was armed" and no one had threatened the Der Torosians prior to the shooting.<sup>33</sup>

The shooting at the Der Torosian home was far from an isolated event. A reporter said that Fresno during the

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<sup>33</sup>"Woman Admits Shooting Man at Monmouth," FMR, April 29, 1923, 1, 6. The leader of the local recruitment committee told the paper, "I know all in the party to be level headed men, and after learning that no return of the shooting had been made, felt satisfied that not one was armed." The men explained that they came at midnight because no one had been home during the day. These defenses did not, however, explain the presence of two different caliber bullets found at the scene--the 30-30 rifle bullet from the Der Torosian gun and a bullet from a handgun. "Jury Will Shift Ranch Shooting," Los Angeles Times, May 1, 1923, 9.

final week of the campaign "was like a city besieged, so tense the excitement, so poignant the realization of the issue hanging in the balance." One group of contract solicitors became known as the "Hard Egg Squadron" because it went after the "hard eggs" who were holding out until the last possible minute. One recruiter described his method: "'Found my man down a sixty-foot well and I went down the ladder after him. The son-of-a-gun signed by the light of a match.'" Another unwilling grower was dunked in a horse trough until, "when he had been resuscitated, his John Hancock went on the dotted line." For the most part, the press adopted the attitude of a reporter for the Country Gentleman and dismissed the night-riders as "some enthusiasts [who] lost their heads."<sup>34</sup>

But as the campaign's closing date neared, the violence escalated. The Fresno County grand jury, already called to investigate the Der Torosian shooting, began to look into other allegations of coercion connected to the campaign. At the town of Yettem, near Visalia, grower K. Khpehigian and Constable I.D. Sayre were wounded in separate incidents; in Biola, Philip Folmer was charged with assault with a deadly weapon in the shooting of Albin Johnson, who had been soliciting a signature from Folmer's Japanese tenant farmer. Another mob tied a rope around the neck of a defiant grower and tossed him into the San Joaquin River three times before

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<sup>34</sup>Ritchie, "Rescuing a Raisin Maid," 4.

the man "shook the water from his eyes and hair like a water spaniel and 'voluntarily' signed up." The papers reported that at least two other "objectors" also "'voluntarily'" affixed their names to Sun-Maid contracts after receiving baths in nearby irrigation ditches. A black grower attempted to dispel the mob with references to higher authority; the Fresno Morning Republican reported his exchange using dialect: "'Ah is rasslin' wif de Lawd and he ain't done tol' me to sign up.'" The night-riders gave the man an hour to think about it. On their return, spotting the "nice new rope which the delegation leader carried," the grower capitulated: "'Ah done rassled wif de Lawd and he advises me to sign up." One desperate grower appealed directly to the Secretary of Agriculture; his telegram poignantly described "the worst type of coercion being used to force raisin growers signing fifteen-year contract Today about fifty men came to my ranch dragged me from disc destroyed vines threatened death burn buildings cut all vines isolate my family if I do not sign sunmaid contract what relief has grower?" Wallace's answer offered him none: "I am very sorry indeed to learn that there is a diversity of opinion there which has led to incidents of the sort you mention."<sup>35</sup>

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<sup>35</sup>"Grand Jury to Investigate Raisin Frays," FMR, May 3, 1923, 1; "Fresno Celebrates Signing of Sun-Maid Contracts by 14,000 Growers of Raisins," San Francisco Chronicle, May 7, 1923, 4; A.W. Sunderman to Wallace, May 3, 1923; Wallace to Sunderman, May 5, 1923, "Fruits" File, Correspondence of the Secretary of Agriculture, RG 16, NA.

Fresno District Attorney George R. Lovejoy urged all growers with any complaints of violence, property destruction, or coercion to come forward and give evidence to the grand jury. Anticipating "raisin riots," the grand jury geared up for a long session.<sup>36</sup>

Meanwhile, the drive ground practically to a halt. On May 3, 79.8 percent of the acreage was under contract, leaving 16,484 acres unsigned with two days left. While continuing to disavow any knowledge of the night-riding, Merritt applied his own sort of leverage to the growers. He announced that if the campaign failed to sign up the necessary acreage, Sun-Maid would immediately file for bankruptcy, bringing "ruin" and "demoralization" on the raisin industry and leaving the growers once again at the mercy of the independent packers.<sup>37</sup> Merritt also reminded members that Sun-Maid was "still operating under the court consent decree" and that no coercion could be used to maintain the organization.<sup>38</sup> Clearly, though, it was the night-riders who forced across the final signatures in the last two days.

When the campaign ended on May, all admissions of

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<sup>36</sup>"Grand Jury Anticipates Raisin Riots," FMR, May 4, 1923, 13. The paper noted that the district attorney's office was researching the law on the crimes of riot and rout and was preparing to "press charges of riot against growers who engage in the destruction of property."

<sup>37</sup>"Bankruptcy For Sun-Maid Raisin Growers Monday If Acreage Campaign Fails," Fresno Bee, May 3, 1923, 1.

<sup>38</sup>"Raisin Drive At Standstill," FMR, May 4, 1923, 1.

violence and coercion were silenced by official expressions of victory and success. The numbers were impressive. Over 14,000 growers, representing 270,000 acres, signed the new contract. Merritt proclaimed the campaign a "great victory" marked by "comparatively few cases of violence." Giffen was more circumspect; he noted that while the successful drive would enable Sun-Maid to weather the storm of readjustment, prices would probably never return to their previous high levels.<sup>39</sup> The USDA issued a press release that waxed rhapsodic:

[U]nder the plan worked out, the raisin growers have not only maintained the most desirable principles of cooperative marketing, but will have the benefit under the law of the most modern form of cooperation control. Under the new system devised by Managing Director Merritt with governmental approval, the requirements of the Capper-Volstead Act have been met and it is expected that the new set up will be accepted as the standard pattern for other cooperative marketing organizations throughout the United States.<sup>40</sup>

The Fresno Morning Republican, apparently forgetting all it had published during the previous week, boasted that "Class feeling between American, Armenian, Italian and Russian faded away into insignificance on the last few days as the need for unity became apparent. Americans and Armenians

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<sup>39</sup>"Victory Crowns Drive," FMR, May 6, 1923, 1; Giffen, "New Era is Here," ibid.

<sup>40</sup>D.M. Reynolds, Press Release, April 25, 1923, "Sun-Maid Raisin Growers" File, Correspondence of the BAE, RG 83, NA.

worked side by side for the common good which the association will produce for all."<sup>41</sup>

Testimony presented to the Fresno grand jury belied this rosy picture. A Del Ray couple told of the destruction on their ranch: about an acre of raisin vines chopped down, several windows broken, and miscellaneous other damage to the house. M. Samgochian said that a mob of "marauders" chopped down 375 vines on his ranch. Members of the Sanger Chamber of Commerce then paid him a visit, telling him "he had better look at his vineyard and then sign the contract before he got into more trouble." In fact, Samgochian had already signed up with Sun-Maid. District Attorney Lovejoy bravely condemned the night-riders and provided the first official expression of sympathy for the victims: "Just because a campaign is on is no excuse to go into a neighbor's home and shoot him and his family, burn his house, and otherwise destroy his property." Lovejoy promised swift prosecutions of all indicted persons.<sup>42</sup>

The news of the grand jury's action prompted a response from Sun-Maid. The day after Lovejoy's statement, Merritt published a notice in valley newspapers addressed to growers "who may claim to have signed the Sun-Maid crop contract against their will or under coercion." Anyone who had been

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<sup>41</sup>"Victory Crowns Drive," 1.

<sup>42</sup>"Shooting is Investigated by Grand Jury," FMR, May 6, 1923, 1A.

victimized by the night-riders could submit an affidavit outlining the events and the names of the night-riders. Upon making its own investigation of the complaint, Sun-Maid would cancel the contract. But many growers still feared reprisals if they accepted Sun-Maid's offer. Out of 14,000 growers who signed contracts, less than fifty-five asked for theirs to be cancelled. Sun-Maid made no decisions on these contracts until the fall.<sup>43</sup>

Sun-Maid's action apparently absolved the local authorities from any responsibility to prosecute. The following day, the grand jury declined to issue indictments in the four cases it heard, suspended all other investigations, and adjourned indefinitely. The foreman reported that the grand jury had no grounds to indict anyone: "Virtually all of the evidence offered . . . was either hearsay, indirect, or not positive identification to warrant the prosecution of any persons." Part of the problem lay in the intense pressure brought to bear on victims not to come forward or identify their assailants. In one case, a woman testified that members of a mob destroyed vines and left word with her daughter that they would return to injure her. But the daughter told the grand jury that she had made up the

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<sup>43</sup>"Notice to Any Growers," FMR, May 8 and 9, 1923; "Contracts Signed Under Coercion to Be Relinquished," ibid., May 23, 1923, 1. Sun-Maid put the number of requests at 34; the DOJ representative asserted that 54 growers submitted affidavits attesting that they had been coerced; Colvin Report, 7-8. On the disposition of these contracts see text below at n. 49.



threats to compel her mother to sign. A man claimed that he had been severely beaten and had the rope burns and scars on his back to prove it, but the jury could not produce a unanimous vote on the indictment. Not surprisingly, given the tension in Fresno, few witnesses were willing to come forward. Finally, Lovejoy's own commitment to prosecuting the night-riders flagged after the campaign closed. He promised to present all complaints and evidence to the grand jury, but since "just when the grand jury will hold its next session [was] unknown," growers had little reason to believe their complaints would be taken seriously. By the end of May, both the district attorney and grand jury had washed their hands of the matter.<sup>44</sup>

The scandal might have received no further attention had not two of the independent packers quietly rung up their friends in the DOJ. The Rosenberg and Guggenlime packing firms "protested to Washington" that coercion was being employed in the drive to gather signatures. Henry A. Guiller, assistant to the Attorney General, and H.N. Ellis, who

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<sup>44</sup>"Grand Jury Stops Probe of Raisin Riots," FMR, May 9, 1923, 9; "Fresno Celebrates Signing of Sun-Maid Contracts," San Francisco Chronicle, May 7, 1923, 4; Lovejoy to Gerald Thomas, Sun-Maid Raisin Growers, May 31, 1923, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA ("in no case was their [sic] sufficient evidence in any alleged case of coercion to justify the returning of an indictment"). The grand jury deemed direct accusations and oral testimony of violence and property damage as "insufficient" and "indirect" evidence. But neither the district attorney nor the grand jury took the trouble to inspect the vineyards, where there was abundant evidence in the form of ruined vines.

worked for the U.S. Attorney, dispatched agent Ralph H. Colvin to investigate. Sun-Maid promptly issued a grandiose denial: "'Reports of illegal methods used during the drive were greatly exaggerated and the investigator will find that repeatedly the association urged with every effort through public utterance that the workers desist from any coercive methods.'"<sup>45</sup> Confident of the USDA's support, Merritt hardly blinked at Colvin's arrival. The agent's mission was to determine whether Sun-Maid had violated the consent decree's prohibitions against the use of "coercion, intimidation or duress" in sign-up campaigns.<sup>46</sup>

The evidence that the Fresno grand jury considered "hearsay, indirect," and inconsequential was, in Colvin's eyes, significant and conclusive. Colvin believed that the association had motive, means, and opportunity to incite violence and encourage intimidation in defiance of the consent decree. Sun-Maid management and the banks, he said, wanted desperately to keep the cooperative out of bankruptcy. They had built a "machine" to reorganize the cooperative, fueling it with "outrages, personal violations, de-

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<sup>45</sup>"Echo of Raisin Drive is Heard," FMR, May 29, 1923, 11. Both the Rosenberg and Guggenheimer firms immediately denied that they were responsible for the presence of the federal agent, and Colvin himself informed the paper that no complaints had been received by the firms. He did not reveal how the Department had learned about the coercion, however. "Deny Local Firms Asked Probe," FMR, May 30, 1923, 4.

<sup>46</sup>Colvin Report, 1.

struction of property, etc., perpetrated by 'committees' of volunteer workers." In a week of interviews, Colvin gathered evidence of what he believed amounted to "literally hundreds of cases" involving night-riders, destruction of property, intimidation, harassments, and boycotts. In addition to the Der Torosians and other cases in the newspapers, Colvin described an incident in which one grower warned the mob away with a shotgun "which he did not use" but was nevertheless arrested on a charge of "assault with a deadly weapon with intent to commit murder." The grower was apparently "so disgusted with the present state of 'American freedom'" that he sold his farm at a great loss. Elmer Erickson, one grower who was willing to give Colvin his name, told the agent that the contract he was forced to sign "became smeared with blood from cuts [he] received in the struggle." Knowing that they could not submit the bloodied paper to Sun-Maid, the night-riders tried to get him to sign another one, but he refused. Colvin noted that "many individuals" echoed Augustus F. Jewett's characterization of the campaign as a "reign of terror" conducted by the "Raisin Ku Klux Klan."<sup>47</sup>

In Colvin's view, the quantity and quality of evidence

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<sup>47</sup>Colvin Report, 5, 8, 15, 12. Jewett claimed to have senatorial connections--he told Colvin that both Hiram Johnson and Shortridge were lifelong friends--yet even he was unwilling to commit details to writing or to permit Colvin to disclose his name, for fear that "the Raisin K.Klux Klan" [sic] would seek revenge. Ibid., 13.

substantiating the accusations of the coerced growers was never in doubt. He could not give an exact figure for the "numbers of persons [who] desired to lodge complaints" because he lacked a stenographer to take their evidence. But he confidently asserted that he "could have continued taking these statements indefinitely," as they were "easily susceptible of proof." To Colvin, whose outrage at what he saw and heard was exceeded only by his sympathy for the victims, it was clear that criminal acts had taken place during the course of the campaign, that Sun-Maid was ultimately responsible for these acts, and that the local authorities refused to discharge their duties and prosecute the guilty. Regarding the consent decree, Colvin wrote, "it is self-evident that the Sun-Maid Growers by means of the coercive, high-pressure methods used in securing contracts, are . . . 'limiting, restricting, and preventing others from freely competing to secure contracts.'"<sup>48</sup>

Colvin found disingenuous Sun-Maid's official statements discouraging coercion and the steps that Merritt took to avoid any direct involvement in the work of the solicitation committees. Sun-Maid admitted that most of the night-riding was the work of "growers who had always been associa-

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<sup>48</sup>Colvin Report, 7-8, 11, 15-16 (quoting section 3 of the decree). Colvin reported with disgust that District Attorney Lovejoy advised dissenting growers "to 'sign up' and avoid further trouble." Lovejoy "frank[ly]" admitted that he personally stood to lose \$12,000 had the campaign failed. Ibid., 23-24.

ted with the Sun-Maid" and who linked their fortunes to the cooperative's continuing success. But the directors depicted night-riding as a regrettable but unavoidable hazing ritual. Growers initiated into the Sun-Maid way through dunkings, beatings, and threats "initiated" their unsigned neighbors in the same way. But Colvin did not believe that the "reign of terror" established by the campaign was due solely to zealous extralegal behavior; he held Sun-Maid directly responsible for the acts of its members. Indeed, he saw Sun-Maid's published statement that it would return all contracts obtained under coercion--and the 34 contracts actually returned to growers--as an admission of complicity, if not guilt. Other growers wanted their contracts back too, but they "fear[ed] to make demand, in dread of still further violence and destruction of property." In view of the continued harassment that dissenting growers were likely to suffer, from which the district attorney was willing to provide "damned little" protection, Colvin strongly recommended that special assistants Guiler and Ellis hold a conference with the independent packers, some representative growers, and Sun-Maid officers. Such a meeting would provide "valuable information" for "the determination of a policy to be pursued in this case."<sup>49</sup>

The DOJ's policy in the Sun-Maid case, as Colvin well knew, was to enforce the consent decree in U.S. v. CARC.

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<sup>49</sup>Colvin Report, 10, 12, 24-25.

Guiler and Ellis, stationed in San Francisco and Los Angeles, respectively, intended to ride herd on Sun-Maid officials. Colvin's report gave them ample grounds to suspect that, on the issue of grower coercion, Sun-Maid had violated at least one count of the consent decree. Six weeks after Colvin filed his report, Fresno was rife with rumors that another Sherman Act suit was in the works.<sup>50</sup> It appeared that the Attorney General, Harry Daugherty, was no more inclined towards mercy than his predecessor. Further, he intended to enforce the consent decree, unpersuaded that the Capper-Volstead Act removed his jurisdiction in the case or that Secretary Wallace's stamp of approval was enough to excuse Sun-Maid. When Daugherty initiated a preliminary investigation, the locals greeted the news with hostility. "If the government can extend forgiveness to wealthy manufacturers' combines in the East," the Fresno Bee commented, "it is to be wondered why the farmers are to be harassed through the courts with a policy of vengeance rather than justice."<sup>51</sup>

Unlike his predecessor, Merritt adopted a conciliatory

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<sup>50</sup>"Is the Government to Persecute the Farmers?" Fresno Bee, July 18, 1923, "Sun-Maid Raisin Growers" File, Historical Files of the Fresno Bee, Fresno, California.

<sup>51</sup>"Is the Government to Persecute the Farmers?" July 18, 1923; "Energy Needed for Work, Not Lawsuits," Fresno Bee, July 19, 1923, "Growers Under U.S. Probe On Reports of Drive Violence," July 19, 1923, Bee Historical Files. Curiously, the DOJ has no extant records regarding this investigation.

posture. Rather than alienate the DOJ, he deemphasized the significance of the investigation, saying it was merely a "friendly action" initiated at his request to remove "any question of alleged coercion in obtaining contracts." But this "friendly action" soon sufficiently frightened Merritt that he quickly began negotiations with Daugherty's lieutenants in San Francisco. These meetings were hardly casual conversations; in addition to the U.S. attorneys for Los Angeles and San Francisco, Secretary Wallace also attended. At stake in the Sun-Maid case was the actual meaning of the enforcement provision of the Capper-Volstead Act. The DOJ conducted the investigation as if no doubt existed as to its authority. U.S. Attorney John T. Williams laid down an ultimatum. If Sun-Maid did not eliminate the liquidated damages clause, the lien on the land, and the cause of action in equity for non-performance from the crop contract, he would seek the cooperative's dissolution. Despite its statutory authority, the USDA was practically invisible at the negotiations. Wallace, relegated to the role of observer at the meetings, counseled Merritt to "yield on all points of difference."<sup>52</sup>

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<sup>52</sup>"Merritt States Action Brought At Own Request," Fresno Bee, July 19, 1923; "Alter Raisin Crop Contract Edict of U.S.," Fresno Bee, August 4, 1923; Special Assistant Henry A. Guiler to Attorney General Harry M. Daugherty, File 60-166-29, Anti-Trust Section, RG 60, NA. Filing suit was in fact a last resort; the Department hoped to avoid litigation in order to curry political favor for the Administration. U.S. Attorney Williams told his boss, "I have lived here all my life and know the conditions generally. I be-

In the end, Merritt did not have to concede much. In his oral memoirs he described how he managed to get the DOJ to back down: he appealed to President Harding. In August, 1923, Merritt did not have to go far to find the President; he was travelling with his wife and was laid up in San Francisco, ailing and penniless. Merritt claimed that he arranged for Harding to convalesce at Pebble Beach Lodge, a favor for which Harding was so grateful he promised to see to it that the investigation was terminated. The next day, Harding died, but not, it would seem, before keeping his promise to Merritt. A few weeks later, the Fresno papers announced that a full settlement had been reached in the raisin case.<sup>53</sup>

The DOJ dropped all objections to the crop contract and agreed that the reorganized Sun-Maid cooperative belonged under the aegis of the USDA. The only concession the Attorney General won was the symbolic statement that "evidence had been collected showing conclusively that coercion had been resorted to in some instances to compel growers to sign

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lieve that with the cooperation and collaboration of my many powerful friends here in California, who have absolute confidence in my integrity of purpose as your subordinate here, that we could bring about beneficial results for you . . . without the necessity of instituting legal proceedings." Guiler to Daugherty, September 20, 1923, *ibid.* For further analysis of the Department's political motivations in the case, see text below at n. 55.

<sup>53</sup>Merritt, "After Me Cometh A Builder," 125-26; "Sun-Maid Raisin Controversy is Closed by U.S.," Fresno Bee, September 13, 1923, Bee Historical Files.



the new contracts." But the Justice attorneys would not get the chance to present that evidence in court; the crop contract and its provisions belonged "under the jurisdiction of the Secretary of Agriculture." A few days later, in a prominently publicized interview, assistant Attorney General William D. Riter assured Merritt that the newly reorganized Sun-Maid now fell "entirely within the Capper-Volstead Act and need fear no prosecution from the Federal Government under the anti-trust statutes."<sup>54</sup>

Merritt's explanation for the outcome of the case is not the only one, however. Attorney General Daugherty was anxious to make himself a credible candidate for the presidency after Harding's death. He saw an opportunity to gain political capital by proceeding with restraint against Sun-Maid and other West Coast commercial interests accused of anti-trust violations. Daugherty and U.S. Attorney Williams carefully chose the tactic of assembling the accused in conference and giving them a chance to identify and remedy illegal trade practices. This method avoided both costly litigation and "unnecessary and perhaps unfair publicity." It also had the effect, Williams told his boss, of building an "intense admiration for your administration of the law." The only problem with the outcome in the raisin case, as

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<sup>54</sup>"Sun-Maid Raisin Controversy is Closed by U.S.," Fresno Bee, September 13, 1923; Guiler to Daugherty, September 20, 1923, File 60-166-29, Anti-Trust Section, RG 60, NA; "Sun-Maid O.K., Declares Aid to Daugherty," San Francisco Chronicle, September 16, 1923, 1.

Williams saw it, was that Riter had upstaged the Attorney General by appearing to take credit for the settlement. "We had planned here a most emphatic and vigorous commendation of yourself by the Fresno Republican and the Fresno Bee, with the idea of carrying the commendation of these papers into the other papers of this state and eventually to the Associated Press wire." A conference with Merritt set things straight: "[I]t is now generally understood and known in the San Joaquin Valley that the Attorney General of the United States not only caused certain ill practices in the Raisin Growers' Association to be corrected, but, because of the constructive manner in which he acted the Raisin Growers' Association was saved and that its membership and their friends are most grateful to you." In this light, ceding jurisdiction to the Secretary of Agriculture neatly disposed of a tricky political problem.<sup>55</sup>

Merritt had survived his first crisis at Sun-Maid. He had successfully warded off federal litigation that would have crippled the cooperative and set a damaging precedent for the cooperative movement still trying to secure the benefits conferred by the Capper-Volstead Act. He accomplished this feat, of course, at the expense of those grow-

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<sup>55</sup>Guiler to Daugherty, September 20, 1923, File 60-166-29, Anti-Trust File, RG 60, NA. Guiler promised to try to obtain "the commendation, above referred to, to which you are entitled" after the Sun-Maid reorganization had been "finally and fully concluded to your satisfaction. . . . I believe it is coming to you and would be a most pleasing action for many reasons."

ers who were mowed down by the Sun-Maid juggernaut. Eventually, it appears, most of the growers submitting affidavits alleging coercion obtained their freedom to sell elsewhere. Even after the settlement was announced, however, the DOJ continued to receive complaints from growers seeking release from their contracts and protection from ongoing harassment. By then, the DOJ had come to the conclusion that the Sun-Maid "reforms are being carried out in good faith." Special Assistant Guiler was not willing, however, to extend that presumption to growers complaining of coercion. To those like V.N. Cooley of Yuba City, who were poor and looked to the government to "make [Sun-Maid] deal fairly with those of us who are contemptuously referred to as outsiders," the DOJ turned a deaf ear.<sup>56</sup> The DOJ's decision to leave all matters involving cooperatives and anti-trust violations to the Secretary of Agriculture proved to be a fateful one.

#### "Law Became a Travesty"

The action of federal officials in 1923 freed Sun-Maid from the restraints of the consent decree. With the exception of Special Agent Colvin, neither local nor federal law enforcement officials deemed the charges of coercion worthy

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<sup>56</sup>Harry M. Creech, Sun-Maid Raisin Growers, to Henry A. Guiler, September 17, 1923; Guiler to Seymour, November 1, 1923; Sebastian, Salvatore, and Vincent Faso to Guiler, October 29, 1923; H.J. Wildgrube to Department of Justice, October 3, 1923; V.N. Cooley to Attorney General, October 17, 1924; all in File 60-166-29, Anti-Trust Section, RG 60, NA.

of investigation, much less prosecution. The organization of the subsidiary corporation with capital stock and non-producer stockholders won the approval of the Secretary of Agriculture under the Capper-Volstead Act. Small wonder that Merritt could express gratification at the "friendly spirit" of the DOJ and the "helpful and constructive attitude" of Secretary Wallace. Indeed, the legal apparatus for maintaining the benevolent trust seemed complete.<sup>57</sup>

But this legal apparatus had its limits. As Merritt discovered when the new Sun-Maid attempted to reap the benefits of its privileged status, the cooperative's immunity extended only to marketing. Congress had made it clear during the Capper-Volstead debates that no cooperative was to control production when its effect was to enhance or fix prices, corner the market, or eliminate competition among purchasers. But this conviction, and the strength of Sun-Maid's market control, rested on the assumption that the market could absorb all that growers produced. This assumption did not hold true; the industry's production began exceeding demand in 1921 and continued to do so throughout the decade (see Table 6-1, page 301 above). The surpluses sent prices into a downward spiral, and, despite Sun-Maid's attempts at stabilization, the industry remained depressed. Through advertising, the development of such products as

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<sup>57</sup>"Advisory Council Hears of Continued Progress," AG, 5:10 (October, 1923): 6.

raisin bread, and alternate outlets for raisin by-products, Merritt tried desperately to find new markets for all the raisins. But the carryovers were too large. The result was that despite the legal sanction for Sun-Maid's reorganization, Sun-Maid could not maintain the benevolent monopoly its leaders had worked so hard to build. Hundreds of growers exercised their right to withdraw from their contracts in 1924. When the DOJ undertook an investigation of the complaints about night-riding that followed those withdrawals, the Secretary of Agriculture quickly exercised his Capper-Volstead prerogative to squelch all inquiries. Sun-Maid forced federal officials to reaffirm the legal privileges of the benevolent monopoly.

Merritt went about marketing the 1923 and 1924 crops confident, for the first time, of Sun-Maid's financial and legal stability. Freed from the four-cent guarantee, in 1923 Sun-Maid paid growers 2.475 cents for Muscats and 2.5 cents for Thompsons, financed with \$10 million in loans from the Federal Intermediate Credit Bank and a syndicate of Fresno banks. These prices were the lowest in years, but the Associated Grower nonetheless claimed that "it is more satisfactory since it is based on business facts, and not on speculative futures."<sup>58</sup> The following year prices improved marginally, to 2.5 and 2.9 cents. But production costs had

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<sup>58</sup>"Advisory Council Hears of Continued Progress," AG, 5:10 (October, 1923): 6; "The Raisin Crop Advance," ibid., 10.

risen drastically; irrigation rents had skyrocketed due to drought. Many growers found themselves on the verge of bankruptcy. One plaintive plea addressed to Merritt came from John C. Rorden, a Selma grower: "Last year we had a good crop with small prices, this year we have a small crop and we must have at least seven cents to keep the farmers on their places." A.B. Bevans echoed Rorden's belief: "I prefer right now to abandon my farms, rather than wait two years for certain bankruptcy. At the present time, I can salvage \$100,000 or \$150,000 in cash, whereas if I attempt to farm on a basis of 3-1\2 cent raisins, there is nothing but absolute bankruptcy ahead." To make matters worse, Sun-Maid announced that it had taken a loss on the 1922 crop amounting to \$4.25 million.<sup>59</sup>

Talk of billbacks incited some growers to open revolt. Discontent raged among growers who felt they had been coerced to sign the 1923 contract and others who refused to sign only to find that Sun-Maid still considered them bound to deliver under the 1921 contract.<sup>60</sup> Merritt recognized the

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<sup>59</sup>John C. Rorden to Merritt, September 24, 1924; A.B. Bevans to Merritt, November 6, 1924, both in "Miscellaneous Information" File, Packing Plant Vault, SMCA; "Full Payment of Old Associations Debts Assured by Adoption of Merritt's Plans," AG, 6:7 (July, 1924): 8; Milo L. Rowell, Trustee, Sun-Maid Raisin Growers, to Members, September 29, 1924, File 60-166-29, Anti-Trust Section, RG 60, NA.

<sup>60</sup>V.N. Cooley to Attorney General, October 17, 1924; H.C. Goodwin, Sun-Maid Raisin Growers, To Members of the Sun-Maid Raisin Growers Who have not signed the New Contract of 1923, May 29, 1923; A. Simi to Henry A. Guiler, U.S. Attorney, October 15, 1924; File 60-166-29, Anti-Trust

obvious: "It would be unthinkable to attempt to collect so large a sum from the membership."<sup>61</sup> In June, 1924, he announced a plan by which the debt would be absorbed by the Delaware corporation and no billbacks would have to be collected from the members. Under this complicated plan, the old Sun-Maid (the renamed CARC) would go through bankruptcy. The directors promised dollar-for-dollar liquidation of the assets so that all debts, including growers' notes, would be paid in full. But what Sun-Maid gave with one hand it took away with the other; retiring the billback effectively retired what Sun-Maid owed its members for previous years' crops. Further, Sun-Maid would refrain from collecting the billback only as long as it maintained 85 percent control; growers would be protected from the billback if they remained members of the cooperative. To J.T. Turner, a grower in Tulare, this was a raw deal: "[I]t is queer and dishonorable to flatly refuse to pay demand notes to the growers who have loaned their money to carry the association along." For many growers, the arrangement to dispose of the billback was little consolation for a crop year in which they failed to regain the costs of produc-

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Section, RG 60, NA. To avoid paying the full advance guaranteed by the 1921 contract, Sun-Maid paid two cents in cash and gave growers notes for the remainder. The notes were not negotiable, as V.N. Cooley discovered; "no banks will cash them." Cooley to Attorney General, October 17, 1924, ibid.

<sup>61</sup>"Full Payment of Old Associations Debts Assured," 8.

tion.<sup>62</sup>

To counteract this development, Merritt doggedly went about the work of enlarging raisin markets and finding new outlets for the large crops. The sales network was extended to markets in Europe and China; domestically, Sun-Maid pushed for tariff protection and spent millions of dollars on advertising. To increase industrial use of raisins, Sun-Maid introduced a new pack of Muscat raisins for bulk baking and cooking use and built a raisin syrup manufacturing plant at a cost of \$2 million. Merritt also eliminated specialized and unprofitable packs of raisins and focused on the standard Thompson and Muscat varieties most commonly purchased by consumers. Finally, Sun-Maid strived for greater economy in its packing operations, staff, and overhead expenses. "What greater demonstration," Merritt asked rhetorically, "of the finer qualities of cooperative marketing could one ask for?"<sup>63</sup>

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<sup>62</sup>"Full Payment of Old Associations Debts Assured," 8; Rowell to Sun-Maid Raisin Growers, September 29, 1924, File 60-166-29, Anti-Trust Section, RG 60, NA; "Liquidating Old Association," California Cultivator, 62 (February 16, 1924): 195; "How About Next Year?" AG, 6:9-10 (September-October, 1924): 12; Jay L. Reed, Sun-Maid Comptroller, to Gentlemen [Fresno bankers], June 25, 1924; Turner to Merritt, September 18, 1924; A.M. Thomas to Merritt, November 5, 1924; all in "Miscellaneous Information re Company" File, Packing Plant Vault, SMCA.

<sup>63</sup>F.A. Stewart, "Old Sun-Maid Entirely Replaced by New," AG, 6:1 (January, 1924): 5; "Sun-Maid's Gross Expenses Reduced Sharply," SMB, December 15, 1924, 5; Merritt, "California Cooperatives Set an Example," Review of Reviews, 72 (1925): 157.



Many growers had an answer: better prices. After the announcement of the 1922 billbacks and the less-than-robust prices of 1923 and 1924, growers openly criticized Merritt, accusing him of mismanagement and bad-faith dealing. A Selma grower expressed the deepening dissatisfaction many in the industry felt: "If our raisins cannot be marketed for more than 2-1/2 [cents] per lb in view of the fact of constantly increasing cents of production, overhead expenses and taxes, then I truly believe I might as well go it alone, even if I cannot expect anything but failure." A Dinuba rancher with 143 acres told the Sun-Maid management, "It will be impossible for the growers to pass through even one more year such as the last two have been." The directors realized that the discontent was serious; they urged "loyal members" to help obtain complete compliance with the crop contract by reporting all "suspicious movement of raisins, night running of trucks, statements of intention to deliver Sun-Maid raisins anywhere else than to a Sun-Maid receiving station." But this announcement was greeted with derision. Grower Hans Dahl informed Merritt, "You have as yet got the chance to regain and earn our confidence but you will not have it forever, we can be led and also forced to a certain extent but we are human beings and there is a limit to the amount of coercion we can stand."<sup>64</sup>

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<sup>64</sup>Rees Davis to Sun-Maid Raisin Growers Co., September 25, 1924; A. B. Bevans to Merritt, November 6, 1924, both in "Miscellaneous Information" File, Packing Plant Vault, SMCA;

Dahl was, in effect, threatening to trump Sun-Maid's ace. The growers' crop contracts gave them the privilege to withdraw from Sun-Maid every two years. This provision, a legacy of the 1922 consent decree, was intended to provide some respite to growers who had been coerced but had not been able to secure the cancellation of their contracts. Sun-Maid also had the right to cancel its obligations under the contract upon providing the growers with written notice.<sup>65</sup> But Sun-Maid was far more interested in keeping members in the association than in cutting them loose. During the summer of 1924, Merritt sought Secretary Wallace's approval to ask growers to waive their right to withdraw; further, he desired to do this before the 1924 crop was delivered in September in order to assure the bankers that "the association will remain intact." Merritt addressed this request to the USDA rather than the DOJ because, as he told Wallace, "[A]t the present time we are under the

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"Sun-Maid Moves to Compel 100% Delivery," SMB, September 15, 1924, 11; Hans Dahl to Merritt, November 2, 1924, "Miscellaneous Information" File, Packing Plant Vault, SMCA; see also letters of Stanley Moffatt, October 15, 1924; Charles M. Kiggins, October 16, 1924; A.M. Thomas, November 5, 1924; Augustus F. Jewett, October 9, 1924; all in ibid.

<sup>65</sup>"The Seller is hereby given the right to file with the Buyer, between December 29 and December 31 of either of the years 1924, 1926, 1928, 1930, 1932, 1934, and 1936 a written notice of his desire to withdraw from this contract as to any or all of the varieties of raisins covered hereby, and thereupon said contract shall be cancelled as to the designated variety or varieties of the crops of the succeeding years of the contract period." 1923 Crop Contract, Sun-Maid Raisin Growers, "Associations File," Correspondence of the Secretary of Agriculture, RG 16, NA.

jurisdiction of the Secretary of Agriculture and no longer under the Department of Justice or the consent decree." Wallace's "concurrence in this plan" was all the authorization Sun-Maid required for the "quiet undertaking" of soliciting waivers.<sup>66</sup> At first, Wallace's staff intended to tell Merritt that the Secretary had no jurisdiction over the "manner in which [cooperatives] organize or with the terms of their contracts," only over arrangements that restrained trade to the point of "unduly enhanc[ing]" prices, and that Merritt should take his inquiry to the Attorney General. But at the insistence of Lloyd S. Tenny, chief of the BAE, the letter was rewritten to give Merritt the ringing endorsement he sought. "No reason is apparent to this Department, from the standpoint of the Capper-Volstead Act, why you may not . . . obtain waivers from those [growers] who desire to execute them."<sup>67</sup>

During the late summer and fall, Sun-Maid proceeded to offer growers the opportunity to execute waivers. Unfortunately, there is no way to know just how many waivers Sun-Maid obtained. Merritt kept his promise to keep the whole thing a "quiet undertaking," and the Sun-Maid Business never

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<sup>66</sup>Merritt to Wallace, June 9, 1924, "Sun-Maid Raisin Growers" File, Subject Files, General Correspondence of the BAE, RG 83, NA.

<sup>67</sup>Wallace to Merritt, draft, "Sun-Maid Raisin Growers" File, General Correspondence, Records of the BAE, RG 83, NA; Wallace to Merritt, June 30, 1924, Reel 168, M-440, Microfilm Correspondence of the Secretary of Agriculture, RG 16, NA.

published any figures. Instead, Sun-Maid announced that its future membership policy would be governed by the will of the community. While the Directors stated that "from a standpoint of community prosperity the control should be as nearly 100 per cent as possible," they would leave it to the growers to decide whether Sun-Maid would operate on "a monopolistic or competitive basis." Merritt made a series of appearances at meetings in twenty-two different towns, in order to drum up support for the association and attract new members into the fold before the withdrawal period began on December 24. "Don't listen to rumors," the Sun-Maid Business urged. "Listen to President Merritt instead. He knows what he is talking about."<sup>68</sup>

Despite Sun-Maid's bold assertion that it could succeed without monopoly control, two things were clear: one, that Merritt and the directors preferred to maintain the monopoly; and two, that the withdrawal period in December was certain to reflect both discontent with the organization and the "sheer economic pressure" and "acute financial distress" that many growers felt. Some informed Sun-Maid in advance that they planned to withdraw. Tulare grower J.T. Turner warned Sun-Maid, "I intend to live up to my contract until the 24th of Dec. After that - no more Association for me until they can or will in my opinion do what is right - and

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<sup>68</sup>"Membership Policy is Adopted by Sun-Maid," SMB, January 15, 1925, 4; "Merritt Will Make Report in 22 Speeches," SMB, October 15, 1924, 4-5.

just by the growers."<sup>69</sup>

When the waiver period concluded on December 31, from all public accounts it appeared that Sun-Maid had maintained its monopoly. The Fresno Morning Republican announced that only about 300 of Sun-Maid's 16,500 members filed withdrawal notices, covering about 15,000 acres. Most of the withdrawals came from Fresno County, where 250 growers with an average vineyard size of 35 acres withdrew. The withdrawals dropped the association's control from 87.5 to 82 percent. The newspapers reported that far fewer growers withdrew than expected, presumably because Merritt gave persuasive speeches. But Fresno attorney M.B. Harris later told the DOJ that Sun-Maid's control was reduced "considerably below 85% and possibly as low as 65%."<sup>70</sup>

Clearly the situation was more desperate than Sun-Maid

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<sup>69</sup>Merritt to Wallace, June 9, 1924, "Sun-Maid Raisin Growers" File, Correspondence of the BAE, RG 83, NA; "Financial Relief for Members Repaid By Sales," SMB, April 15, 1925, 5; Turner to Merritt, September 18, 1924, "Miscellaneous Information" File, Packing Plant Vault, SMCA.

<sup>70</sup>"Withdrawal Period Ends for Sun-Maid Growers' Members," FMR, January 1, 1925, 15 ("the total number is much less than was generally expected"); "Small Percentage of Raisin Growers Leave Association," FMR, January 4, 1925, 1 ("Large numbers of the foreign element, who had apparently been favoring withdrawal up til the time of the annual report made by Ralph P. Merritt . . . have openly come out in support of the association"); Joint Summary Report, Agents C.W. Hughes, N.H. Castle, and W.H. Treadwell, in re California Associated Raisin Company, Sun-Maid Raisin Growers, Sun-Maid Raisin Growers of California, Sun-Maid Raisin Growers Association, Violation of Decree of January 18, 1922, December 31, 1925, 27, "Sun-Maid Raisin Growers" File, Subject Files, Correspondence of the BAE, RG 83, NA (hereafter Joint Summary Report).

was willing to acknowledge publicly. One sign of Sun-Maid's hidden turmoil was the way in which the cooperative quickly moved to close ranks. The directors scheduled a "referendum period" for January 26 to February 14, for the purpose of giving "the community and membership" the chance to engage in "a thorough consideration of the problems involved" if Sun-Maid switched to a competitive basis. As the Fresno Morning Republican described it, the referendum period would permit "the community to invite desirable growers who have withdrawn or who have not been members to join." If the referendum period failed to yield sufficient sign-ups to maintain the monopoly, Sun-Maid announced that it would exercise its right to withdraw from the contracts of certain growers. Specifically, the cooperative would "weed out" members "who by temperament are not suited to cooperative effort." The unsuitable included "those malcontents who by habit have indicated that they cannot be expected to live up to their contract[s]," and "that portion of the alien element who do not understand American principles and who persistently refuse to co-operate upon American lines."<sup>71</sup> This statement was at most a face-saving gesture;

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<sup>71</sup>"Members and Community Have Their Responsibility," SMB, January 15, 1925, 5; "Small Percentage of Raisin Growers Leave Association," FMR, January 4, 1925, 1: "Growers of the foreign element who have shown themselves unable to cooperate along American lines will be asked to leave the association." It was clear which "foreign element" the paper had in mind; of the 21 withdrawing growers named, 10 were Armenian.

it meant, ironically, that Sun-Maid intended to kick out those who least wanted to stay: the financially besieged, the resentful victims of the night-riders, and the "alien element"--Armenians. Almost half of the withdrawing growers in Fresno County were Armenians, as shown in Table 6-2:

**Table 6-2**  
**Armenian Growers Withdrawing from Sun-Maid, by County, 1924**

County	Acreage withdrawn	No. of Armenians withdrawing	% of total withdrawals (n)
Stanislaus	9	0	0 (1)
Madera	280	0	0 (2) <sup>a</sup>
Merced	1100	0	0 (1)
Kings	410	1	10 (10)
Kern	400	8	25 (8)
Fresno	10000	112	48 (234) <sup>a</sup>

<sup>a</sup>Includes one Japanese grower.

Source: "Small Percentage of Raisin Growers Leave Association," FMR, January 4, 1925, 1; "Sun-Maid Raisin Withdrawals in [Fresno] County Total 234," FMR, January 5, 1925, 1, 5.

The referendum period, then, belied Sun-Maid's brash claim that the withdrawals did not affect its strength in the market. In fact, Sun-Maid did not intend to let any member leave the association without a fight. The Fresno Morning Republican, ever supportive of Sun-Maid, published the names of 256 growers who withdrew from the association, both to invite public censure upon them and to identify them as tar-

gets for the night-riders.<sup>72</sup>

When the referendum campaign began, the usual pressure tactics immediately surfaced. The Kerman Chamber of Commerce denounced all "disloyal" growers and resolved to withhold "any credit or business courtesy" from all withdrawn Sun-Maid member. The resolution urged all Valley chambers of commerce to do likewise. Twenty businessmen--including former CARC attorney W.A. Sutherland and state senator M.B. Harris--formed a general referendum committee to supplement Sun-Maid's own campaign apparatus. Complaining of the "lethargy" displayed by "business men who are vitally affected by the condition of the raisin industry," the referendum committee promptly secured the contracts of several large growers and two banks that owned vineyard properties.<sup>73</sup> The Fresno Morning Republican pleaded with the "big growers" to recognize their "community responsibility" to "come in" to the association. Forty merchants and firms pleaded for growers to "accept our friendly and neigh-

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<sup>72</sup>"Sun-Maid Raisin Withdrawals in County Total 234," FMR, January 5, 1925, 1.

<sup>73</sup>"Chamber Raps Growers Who Quit Sun-Maid," FMR, January 7, 1925, 6; "Business Men to Interview Large Growers," FMR, February 8, 1925, 1A; "Prominent Business Men on Committee to Sign Big Growers," FMR, February 10, 1925, 9. The growers signing up were Jens Kjar, H.B. Neilsen, R.J. Venn, Hugh Sparkman, and J.W. Meux; the banks included the Pacific Southwest Trust and Savings Banks and the First National Bank of Fresno. Among the other members of the business committee were Milo Rowell, trustee for the old Sun-Maid organization, and A. Emory Wishon, vice-president of the San Joaquin Light and Power Corporation and a former CARC director.



borly urging that full support be given to the Sun-Maid Raisin Growers' Association." More pointedly, Merritt warned, "those who are not with us are against us. No outside grower has contributed an ounce in favor of the community's stability of prosperity. No business man need hope for profit unless he supports Sun-Maid." Kingsburg growers took Merritt's cue and resolved to "refrain from associating with slackers in any matter either, business, religiou[s], fraternal, or civic relation, thereby demonstrating our disapproval and condemnation of their willingness to sacrifice the community welfare of all for their individual selfishness and greed."<sup>74</sup>

Despite the confident assertion of one Sun-Maid official that "the time of the night-rider is past," allegations of violence and coercion surfaced during the referendum period.<sup>75</sup> On February 9, attorney Tom Okawara complained to the Fresno sheriff that his clients, K. Yaji and S. Miyamoto, were assaulted by a mob and forced to sign Sun-Maid contracts. Members of the mob were apparently angered at the news that the two Japanese growers had placed their

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<sup>74</sup>"The Big Grower's Responsibility," FMR, February 10, 1925, 1; "To the Raisin Growers," advertisement, FMR, February 12, 1925, 8; "Highlights In Merritt Speech At Dedication," FMR, February 9, 1925, 1; "Growers Vote Ostracism of Non-Members," FMR, February 11, 1925, 2.

<sup>75</sup>"Time of Night Rider Past, Madera Raisin Men Told By Collins," FMR, January 7, 1925, 7.

acreage under contract to independent packers.<sup>76</sup> Yaji and Miyamoto's complaint was but the first; the next day, the Fresno Morning Republican reported that 400 acres of vines (2850 in all) belonging to K. Arakelian had been destroyed by a mob of 300 men. Arakelian, "one of the largest vineyard owners in the Valley," had helped sign up Armenian growers in 1923. But he had become disenchanted, breached his contract with Sun-Maid by delivering elsewhere, and refused to pay liquidated damages. Sun-Maid's suit to collect the damages was still pending when the night-riders raided his farm; the litigation no doubt exacerbated the mob's animosity. Another victim, Godfrey Jensen, reported that a caravan consisting of about 20 vehicles cut down "four or five acres of vineyard" and about 100 of his peach trees. H.E. Thiele reported to the newspaper that a mob had destroyed six acres of vines on his ranch in Oleander. Upon receiving "numerous reports" of similar incidents, District Attorney Lovejoy called for grand jury investigations. No doubt remembering the results of past investigations--and knowing where Lovejoy's sympathies lay--some complaining growers declined to press charges and instead sought to secure the return of their contracts. Lovejoy advised them

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<sup>76</sup>"Violence is Alleged By 2," FMR, February 11, 1925. The paper gave no details as to the landholders' status; it is probable that they were tenants.

to take that matter up with Sun-Maid.<sup>77</sup>

Outwardly, Sun-Maid gave every indication that no victim of the night-riders would be held bound by the contract. E.G. Hughson, chair of the Sun-Maid general referendum committee, announced that "all contracts obtained through acts of coercion or violence" would be returned, not because of the injustice perpetrated on the victim but because of the "harm which is done to the Sun-Maid organization through acts of this nature." Merritt got into the act as well, telling Fresno merchants that "local disorder would have a deleterious effect on Sun-Maid markets." "Members who were forced to sign," he said with perfect candor, "do not make desirable members." From the Sun-Maid point of view, the real problem was the "un-American" growers who heaped "filthy abuse" on the Sun-Maid solicitors and refused to sign. A day before the campaign was to end, Merritt called upon the referendum workers to exercise restraint in the face of this extreme provocation: "Whoever raises his hand against his neighbor raises his hand against his community. Any disturbance here is quickly magnified by those opposed to us and is used for the injury not only of Sun-Maid but also of the cooperative movement everywhere."<sup>78</sup>

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<sup>77</sup>"Mob Destroys Vineyard, It Is Reported," FMR, February 12, 1925, 1, 2.

<sup>78</sup>"Contracts Obtained Through Coercion Will be Returned," FMR, February 12, 1925, 9; "Merritt Warns Against Coercion by Workers in Soliciting of Contracts," FMR, February 13, 1925, 1.

Merritt had little sympathy for the coerced; as far as he was concerned, these growers got what they deserved. His only interest was ensuring that the good name of Sun-Maid was not besmirched by the activities of the night-riders.

The grand jury proceeded with its investigation of the night-riding incidents with somewhat more attention to duty than it had displayed in 1923. The first subpoena was issued to Merritt himself, although he appeared for the purpose of "conferring regarding the best means to prevent disturbances," not to answer the allegations. The grand jury held Sun-Maid blameless for the violence, deeming Merritt's appearance "not in any sense an indication that Sun-Maid [was] responsible for disorder which has occurred, or connected with it in any way." Instead, the grand jury considered each case to be a matter of individuals acting on their own initiative, not at the behest of Sun-Maid. The victims, some of whom "wore bandages and had indications of rough treatment," identified their attackers before the grand jury. Ten persons were arrested on these complaints and charged with battery and malicious mischief; all pleaded not guilty and were released without bail. The prosecutor later dropped the charges for lack of evidence. All the grand jury did was to recommend that the sheriff be given more assistance in suppressing the riots. None of the accused implicated Sun-Maid; the defendants asserted that the violence was more an "expression of community displeas-

ure with certain unpopular citizens, rather than an outbreak connected with the campaign to obtain raisin contracts." Although not referred to by name, the Arakelian case was cited as proof: "The most prominent grower molested is not even being solicited to sign up with the Sun-Maid and is said to be unacceptable to the Sun-Maid even if he signed up voluntarily."<sup>79</sup>

The referendum period closed on February 14 with Sun-Maid adhering to its blame-the-victim theory of the night-riding. The referendum chairman noted that in its last days more signed contracts had come in, along with "reports . . . concerning the most abusive treatment of solicitors who, in spite of provocation, kept their heads and avoided trouble."<sup>80</sup> The referendum committee announced that it had conducted "personal investigations" of the incidents and concluded that "in almost every instance that they were either wholly unfounded, grossly exaggerated, or the result of direct provocation on the part of the outside growers." But the campaign itself fell short of the brilliant successes of previous campaigns. In a departure from past prac-

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<sup>79</sup>"Alleged Acts of Violence Being Probed," FMR, February 14, 1925, 11, 14; "Court Actions Dismissed," FMR, February 25, 1925, in File 60-166-29, Anti-Trust Section, RG 60, NA. The newspaper also shielded Sun-Maid; it did not report that Merritt was subpoenaed but implied that he had appeared voluntarily as a demonstration of Sun-Maid's good will in the community.

<sup>80</sup>"Sun-Maid Referendum Period to Close Tonight," FMR, February 14, 1925, 11, 12.

tice, the cooperative declined to release figures on its crop control after the campaign closed. Another indication that the monopoly had begun to slip was the announcement that Sun-Maid would proceed with its "withdrawal" period in which it would cancel the memberships of undesirable growers--in essence, anyone disloyal enough to complain of coercion--between February 21 and March 1.<sup>81</sup> Sun-Maid's decision to proceed with the withdrawal period signaled the beginning of the cooperative's transformation from monopoly control to competitive operations.

When the withdrawal period ended on March 1, Merritt made a valiant attempt to salvage Sun-Maid's monopoly over the industry. The withdrawals had reduced the cooperative's control, he conceded, but these merely rid the cooperative of its untractable members. With its marketing and merchandising policies, by-product conversion processes, and famous brand name, Sun-Maid still controlled the trade channels for California raisins. Merritt believed Sun-Maid's monopoly could rest not on uncooperative growers but on commercial dominance. "A new era in agricultural cooperation is just beginning," Merritt wrote in Sun-Maid Business, "wherein the results of the work of any group of loyal growers is to be

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<sup>81</sup>"No Statement of Control Follows Referendum Close," FMR, February 15, 1925, 1, 2; "Association's Withdrawal Period Opens," FMR, February 21, 1925, 11. The referendum committee reported that it believed that a number of growers had signed willingly but were claiming they were coerced in order to evade their obligations to Sun-Maid. "To Weed Out Contracts of Some Growers," FMR, February 18, 1925, 11, 12.

retained for their exclusive benefit instead of extended to those who have borne no share in the expense and responsibility." By eliminating the "temperamentally unsuited," Sun-Maid could confine the benefits of cooperation to those who supported the organization. This new policy necessarily meant relinquishing the goal of "concentrating in the cooperative the largest possible acreage." But the change put Sun-Maid "in a stronger position than before, although the volume of control is smaller." Henceforth, Sun-Maid would conduct its business through a "combination of both monopolistic and competitive tactics."<sup>82</sup>

The switch to a partially competitive, partially monopolistic organization represented Sun-Maid's first public retreat from the benevolent monopoly theory of cooperation. From a purely economic standpoint, it was a wise move. The restrictive membership policy enabled Sun-Maid to cut its losses in respect to several crucial items on its balance sheet: the 1922 billbacks and the expense of enforcing crop contracts. Sun-Maid had already announced its intention to collect the billback from any grower who declined to remain a member of the association. And the new membership rules would eliminate the need to "supervise delivery of the crop" and litigate disputes over members' "contractual obliga-

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<sup>82</sup>Merritt, "Now We Can Go To Work," SMB, March 15, 1925, 3; "Sun-Maid's Position Strengthened By Future Plans," ibid., 4-5; "Growers to Combine Monopolistic and Competitive Tactics," Fresno Bee, March 1, 1925.

tions."<sup>83</sup> After the referendum period ended, Merritt and Sun-Maid Trustee Milo Rowell proceeded to complete the bankruptcy of the old Sun-Maid and the transfer of its assets--including the 1922 billbacks--to the new association.<sup>84</sup>

But in the view of new DOJ attorneys in California, the benevolent monopoly still remained bound by the consent decree. Frustrated by the inaction of the Fresno grand jury, many growers took their complaints to the U.S. Attorney and the Department's antitrust expert, Henry A. Guiler, in San Francisco. Michael Jensen, for one, issued an "appeal for justice" from a situation in which "the criminal decide[s] if he have comitted [sic] a crime." A.J. Seymour, the Attorney General's assistant in Washington, was eager to

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<sup>83</sup>"Sun-Maid's Position Strengthened By Future Plans," 4; "Membership Regulations Tightened by Sun-Maid," SMB, April 15, 1925, 10. Sun-Maid in fact won almost all suits contesting provisions of the crop contract. "Important Legal Victories Won For Members," ibid., 13. But victories by growers were not unheard of. John L. Rugeir sued Sun-Maid for the cancellation of his contract and won. Rugeir v. Sun-Maid Raisin Growers of California, Case No. 36845, Fresno County Superior Court, Entry of Judgment, June 24, 1925, in "Sun-Maid Raisin Growers" File, Correspondence of the BAE, RG 83, NA.

<sup>84</sup>"Creditors Adopt Plan To Pay All Debts of Old Raisin Company," Fresno Bee, September 11, 1925. The plant called for the retirement of the \$4.25 million in old Sun-Maid debts by paying the growers up to \$4 per ton in stock of the Delaware corporation instead of cash; this was permitted by a clause in the growers' contract. This scheme was a convoluted though no less effective way of debt-laundering; the growers would end up paying the billback through \$4 per ton deductions on the crops of 1925 through 1939. Sun-Maid's claim that it was "protecting" the growers from having to pay the billback worked a deceptive sleight-of-hand.



reopen the question of whether Sun-Maid had violated the consent decree. He disputed the cooperative's claim that it was "acting wholly within the privileges granted by the Capper-Volstead Act." But Attorney General Harlan F. Stone, who had succeeded the scandal-ridden Harry J. Daugherty and had just been nominated to the Supreme Court, decided to leave the matter for his successor to handle. In November, the San Francisco attorneys in the Western Anti-Trust Section took the initiative. The west coast lawyers had been battling combinations in the food processing industry during the 1920s; unlike their superiors in Washington, they did not believe that Sun-Maid was completely immune from the anti-trust laws. The allegations of Reedley grower Frank Hamm regarding the 1925 referendum campaign gave H.H. Atkinson, an assistant in the Western Section, the pretext to reopen investigations into possible violations of the consent decree.<sup>85</sup>

The new Attorney General, John G. Sargent, agreed and dispatched three special agents to Fresno in early December. In two weeks C.W. Hughes, W.H. Treadwell, and M.H. Castle interviewed nearly 100 people, including the bankruptcy referee in the Sun-Maid case, a member of the Fresno grand jury, several Fresno lawyers, Merritt, and scores of grow-

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<sup>85</sup>Jensen to Department of Justice, March 29, 1925; Seymour, Memorandum for the Attorney General, February 25, 1925; Atkinson to Attorney General, November 14, 1925, all in File 60-166-29, Anti-Trust Section, RG 60, NA.

ers. The agents found evidence that the referendum period was a time of unchecked mob-rule, in which the night-riders flouted the law in the name of Sun-Maid and ruled the raisin district with terrorist tactics. Thirty-seven growers told the agents that they had been beaten, threatened, and coerced into signing contracts or waivers. Many of the witnesses accused Sun-Maid of direct involvement in the coercion, identifying association employees, Sun-Maid Advisory Council members, and bankers affiliated with Sun-Maid as members of the night-riding mobs. The growers asserted that the mobs chopped down over 23,000 grape vines and severely assaulted twelve people; the response of the sheriff and the district attorney, according to the victims, was that they were "too busy" to investigate. The testimony of the victims--whose descriptions of the mobs' behavior were remarkably consistent--was poignant and compelling. Carl Peterson reported that one night-rider had informed him, "'We have taken the law into our hands and you will have to sign.'" Frank Hamm, whose pleas had prompted the investigation, told the agents that the president of the Dinuba Chamber of Commerce had told him, "'We go and get the contracts no matter how we get them.'" One solicitor even admitted Sun-Maid's involvement to grower Henry Gussman: "'I am put on by the association to make the growers sign the contracts.'"<sup>86</sup> The agents received an impassioned plea from the editor of the

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<sup>86</sup>Joint Summary Report, 41, 59, 46-47.

Clovis Tribune to document the "outrageous methods and violence" used during the campaigns:

[A] virtual reign of terror existed throughout the districts surrounding Fresno, judges and officers of the Court were intimidated until law became a travesty and its executives became co-conspirators with the crooked officials of the Raisin association who were inciting criminal acts, coercion, violence and bloodshed to force signatures to an illegal contract.<sup>87</sup>

The DOJ agents found that the night-riders attacked as many white growers as Armenian, tended to victimize smallholders, and destroyed over 20,000 acres of vines, as shown in Table 6-3:

**Table 6-3**  
**Profile of Growers Alleging Coercion and**  
**Their Accused Attackers, 1925 Referendum Period**

Total number of complaints:	37
<hr/>	
Ethnicity/Citizenship	
U.S.	15
Armenian-Native	7
Armenian-U.S. citizen	6
German-Russian	6
Italian	1
Danish	1
Unknown	1
Ranch size	
Median	20
Mean	71.1
Mode	20
Total number of grape vines destroyed	25,070
Average number of vines destroyed per ranch (n = 20)	1,253.5
Number who signed 1923 contract under duress	11
Number who later secured return of contract (continued)	8

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<sup>87</sup>H.E. Armstrong to M.H. Castle, December 22, 1925, File 60-166-29, Anti-trust Section, RG 60, NA.

Table 6-3, continued

Occupation of Night-Riders  
Identified by Witnesses

Rancher	Merchant	Sun-Maid Employee	Urban Professional*	Law Official
24	2	3	6	1

\*Denotes city occupations including newspaper editor, postmaster, high school principal, and veterinarian.

Source: Compiled from Joint Summary Report, 27-63.

The agents had almost completed their work when, on December 22, the Fresno Morning Republican broke the news of the investigation. A front-page story reported that the DOJ was again investigating Sun-Maid on the basis of growers' complaints. Contacted by the Associated Press, Atkinson confirmed that an investigation was in progress but provided no other details.<sup>88</sup> The story threw a wrench into the DOJ's careful plans. Attorney General Sargent immediately demanded to know from his subordinates if they had leaked the story: "That investigation should have been made quickly and without publicity . . . Publicity at this time most unfortunate and we must overcome effect of unauthorized statements." Atkinson denied that he had disclosed the story to the press and that the investigations had been conducted as discretely as possible. Nevertheless the USDA

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<sup>88</sup>"3 Operatives Investigating Sun-Maid Here," FMR, December 22, 1925, 11, 18. It was both coincidental and significant that an announcement of a Ku Klux Klan meeting appeared next to the Justice Department story (18).

was offended at the DOJ's interference in the affairs of a Capper-Volstead cooperative. The DOJ attempted to smooth ruffled feathers in the USDA by stating that its investigation was confined to the question of consent decree violations. On that issue alone, Atkinson told his boss, he had gathered plenty of evidence: "A great deal of coercion or intimidation was used . . . to compel growers to sign with the association. The feeling has been very bitter among many around Fresno because of such methods."<sup>89</sup>

But the evidence uncovered by the DOJ agents was not enough to salvage the investigation. Merritt poured a stream of frantic telegrams into the office of Secretary of Agriculture William M. Jardine, asking him to prevail on the Attorney General to issue a "statement that will restore confidence publicly and do something to repair this untold damage." On December 23, Merritt received immediate assurances that the matter "will be settled by conference" between Agriculture and Justice that same day.<sup>90</sup> But the special agents continued to press Merritt for information and documentation of Sun-Maid's affairs, an act which Mer-

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<sup>89</sup>Sargent to H.H. Atkinson, December 23, 1925; William J. Donovan to William M. Jardine, December 24, 1925; Atkinson to Attorney General, December 24, 1925; all in File 60-166-29, Anti-trust Section, RG 60, NA.

<sup>90</sup>Merritt to Jardine, December 22, 1925, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA. Merritt also wired the office of his friend Commerce Secretary Hoover, in case his help would be required; Merritt to Frank M. Russell, December 22, 1925; Russell to Merritt, December 23, 1925, ibid.

ritt believed "violates [the] understanding and agreement for administering cooperative matters thru [sic] Department [of] Agriculture." He protested the "continued harassment thru instigation of department Justice activities." And he asserted that the independent packers were calling the shots in the administration of federal law: "Department justice becomes agency for action against any cooperative by any opposing element without protection to farmers." BAE chief Tenny assured Merritt that the problem was being dealt with at the highest levels of government. In Tenny's opinion, the investigation had been initiated by West Coast Justice attorneys, not by anyone in Washington; thus, he believed, the entire affair was an internal DOJ problem, unrelated to federal policy regarding cooperatives.<sup>91</sup>

Resolution of this "most difficult" situation came about through a meeting between Sargent and Jardine on December 24. As a result of this conference, both departments issued statements that agreed in no particulars except two: the press reports of the investigation were "wholly unauthorized and unfounded," and Sun-Maid was in fact "operating under the provisions of the Capper-Volstead Act, under the jurisdiction of the Department of Agriculture." In view

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<sup>91</sup>Merritt to Jardine, December 23, 1925; Russell to Merritt, December 23, 1925; Russell to Merritt, December 24, 1925, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA; Tenny to Merritt, December 29, 1925, "Sun-Maid Raisin Growers" File, Correspondence of the BAE., RG 83, NA.

of those facts the DOJ agreed to quit its investigation. Sargent presumed that Jardine would resume the inquiry, since the "Secretary probably has power under Capper-Volstead Act to afford [a] remedy if necessary."<sup>92</sup>

The USDA intended to do no such thing. The USDA interpreted the consent decree to apply only to the CARC, which was no longer in existence; thus, "the 'consent decree' rendered against the old company would be without force as to the new." In addition, the DOJ had fully concurred in the legality of Sun-Maid's membership and financial affairs in 1923. In the view of USDA attorneys, the DOJ's acquiescence in the reorganization, bankruptcy, and membership arrangements imposed a kind of estoppel on investigations related to the consent decree: "[O]nly the highest and most imperative reasons would justify a departure from the conclusions reached in 1923 that the affairs of the Sun-Maid were in conformity with the law."<sup>93</sup>

Apparently the evidence compiled by the special agents

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<sup>92</sup>Russell to Merritt, December 23, 1925; Russell to Merritt, December 24, 1925, Merritt to Russell, December 24, 1925, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA; Press Release, Department of Justice, December 29, 1925, File 60-166-29, Anti-Trust Section, RG 60, NA; Statement for the Press, Department of Justice, December 29, 1925, "Associations" File, Correspondence of the Secretary of Agriculture, RG 16, NA; Sargent to Atkinson, December 28, 1925, File 60-166-29, RG 60, NA.

<sup>93</sup>L.S. Hulbert, Statement Relative To Investigation of the Sun-Maid Raisin Growers of California By Representatives of the Department of Justice, December 28, 1925, 2, 7, File 60-166-29, Anti-trust Section, RG 60, NA.

did not warrant such a departure. Sargent politely but firmly requested from Jardine "an expression of your views" on the Sun-Maid case. The DOJ took the position that Sun-Maid continued to operate under the consent decree and such any violation of the decree necessarily came under its jurisdiction. But the USDA, particularly Tenny of the BAE, did not want the exceptional case of Sun-Maid to set the dangerous precedent of narrowing the Secretary of Agriculture's authority under Capper-Volstead. In preparing the USDA's reply to Sargent, Tenny reasserted the USDA's position that only the CARC, not Sun-Maid, was bound by the consent decree. To deal with the division of responsibilities under the law in general, Tenny sought to "lay down a broad and fundamental principle" to guide future policy. Any "questions of violence or intimidation . . . would be dealt with by the local authorities." Matters involving "restraint of trade resulting in undue enhancement of prices" would be the responsibility of the USDA. This left, as Tenny intended, little room for the DOJ to become involved in the affairs of cooperatives: "Any situation that might arise with any cooperative organization," according to Tenny, "would be handled either by local authorities or by the Department of Agriculture." Jardine endorsed Tenny's view of the case, and to Merritt's satisfaction Tenny closed



the file.<sup>94</sup>

The idea that prosecuting acts of coercion and violence should be left to local authorities gained independent acceptance in the DOJ as well. To the exasperation of the Western Anti-Trust Section, the Washington staff attorneys decided they had no legal basis for holding Sun-Maid to the terms of the consent decree. The CARC had reorganized to conform to Capper-Volstead, and the new Sun-Maid purchased the assets of the bankrupt Sun-Maid free and clear of all liabilities. Accordingly, assistant attorney general H.B. Teegarden concluded, the DOJ had no authority to prosecute such crimes as assault and malicious mischief. The special agents' evidence that Sun-Maid employees were involved in the night-riding was not enough to link the cooperative to the illegal activities. "Outrageous as the situation in the raisin growing country of California is," Teegarden said, "it is nevertheless outside Federal jurisdiction."<sup>95</sup>

The conclusions of the DOJ and the USDA were drawn with particular aims in mind. The DOJ was hamstrung by its past acquiescence in Sun-Maid's organization and conduct during

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<sup>94</sup>Tenny to Russell, February 3, 1926; Jardine to Attorney General, February 4, 1926, "Sun-Maid Raisin Growers" File, Correspondence of the BAE, RG 83, NA; "Department of Justice Investigation is Satisfactorily Settled," SMB, January 15, 1926, 5: "The prompt action by the Federal officials proved conclusively that Sun-Maid enjoys and retains the full confidence of the Government."

<sup>95</sup>Teegarden Memorandum for Mr. Myers, February 3, 1926, "Sun-Maid Raisin Growers" File, Correspondence of the BAE, RG 83, NA.

the 1923 contract campaign. Once Attorney General Daugherty agreed that Sun-Maid was operating under the Capper-Volstead Act, Attorney General Sargent had little basis for reversing that judgment. In no case was the Secretary of Agriculture about to permit the DOJ to renege on its agreement. Secretary Jardine sought to protect his own authority under Capper-Volstead and to ensure that no cooperative would have to worry about possible harassment from the DOJ. The night-riding admittedly presented a sticky problem, which both departments preferred to avoid. They disposed of it by declaring that only the local authorities--who had refused to take the complaints in 1923 and 1925 seriously--had the authority to enforce law and order in the raisin growing districts.

The disposition of the case may have satisfied federal scruples about Capper-Volstead authority and Sun-Maid's particular case. But it left individuals in the Central Valley with little protection from the mobs that materialized during Sun-Maid contract campaigns. Growers who continued to present their pleas to the DOJ hoping to gain protection from mobs did so in vain. "I cant [sic] believe," Michael Jensen wrote in December, 1926, "that the Government will let the officials of a organization [sic] send mobs out to rob and destroy property for their own personal benefit."<sup>96</sup>

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<sup>96</sup>Jensen to H.H. Atkinson, December 13, 1926, File 60-166-29, Anti-Trust Section, RG 60, NA.

Jensen's poignant plea reflected the desperation of those growers who had struggled to maintain their freedom and their property in the face of oppressive community sentiment. The growers, however, were not without other remedies. Some simply breached their contracts and delivered to other packers, risking breach of contract suits. Crop contracts had been upheld in California and other states.<sup>97</sup> Accordingly, with the law on its side, Sun-Maid dismissed almost all its complaints, presumably because the defendants agreed to pay liquidated damages as called for in the contract (see Table 6-4).

**Table 6-4**  
**Disposition of Sun-Maid Breach of Contract Cases,**  
**1921-1925**

Dismissed (%)	Settled (%)	Unknown (%)	Change of Venue (%)	Won By Grower (%)
81.25	3.125	6.25	6.25	3.125
Armenian Defendants (%)		Armenian Plaintiffs (%)		Japanese Defendants (%)
71.88		3.125		6.25

n = 32.

Source: Docket Books, Plaintiffs, A-G, Defendants, A-E, Fresno County Superior Court, 1880-1930, Fresno County Courthouse, Fresno, California.

But others challenged the very nature of the membership relationship established in the contracts. K. Arakelian,

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<sup>97</sup>See chapter 7.

whose refusal to pay liquidated damages had provoked the night-riders in 1925, and Paul Mosesian both won relief from the contract from a state appeals court in 1928.<sup>98</sup>

In both cases, the court upheld the legality of the liquidated damages provision and carefully noted that neither case "involve[d] either the moral or prestige of a cooperative association." Sun-Maid lost because neither defendant belonged to "a cooperative association." Neither one had signed a contract with the California cooperative; they had both signed with the CARC in 1921 and the old Sun-Maid assigned those contracts to the new Sun-Maid in 1923. The court held that the assignment did not bind the defendants to be members of the cooperative: "So far as this action is concerned it is simply one where a co-operative association is seeking damages from an outsider for refusing to be bound by the terms of a contract made with a corporation organized for profit, of which contract the plaintiff has become the assignee."<sup>99</sup> The Sun-Maid Business, in an

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<sup>98</sup>Sun-Maid Raisin Growers of California v. Paul A. Mosesian and Son, Inc., 90 Cal.App. 1 (1928), and Sun-Maid Raisin Growers of California v. K. Arakelian, Inc., 90 Cal.App. 10 (1928).

<sup>99</sup>Mosesian, 90 Cal.App. 1, 4. The rule laid down elsewhere was that liquidated damages was an appropriate remedy for a cooperative association in seeking redress for breach by members because it had no other way of estimating actual damages. Anaheim Citrus Fruit Association v. Yeoman, 51 Cal.App. 759 (1924). But this rule did not apply to regular commercial corporations, who did not stand to suffer the loss of prestige arising from member breach and did not share the same purpose as cooperatives, whose mission of service to members through greater economy of service and

attempt to downplay the impact of the rulings, claimed that "the Mosesian and Arakelian decisions have no significance in cooperative law and no bearing on the relations between Sun-Maid and its members." It was wrong on both counts. The cases furnished a sure way for growers to break the 1921 contracts, and they supplied judicial insight into the special nature of a true cooperative association: "There is a marked distinction between cases such as the one with which we are dealing," the court said in Mosesian, "where the defendant entered into a contract for the sale of grapes with a corporation organized for profit, and one where the contract exists between members of a co-operative organization."<sup>100</sup>

As it turned out, few growers required the remedy provided by the Mosesian and Arakelian cases. The 1925 referendum period chiseled the first cracks into the facade of the benevolent monopoly. Sun-Maid won the broad power to control marketing under the Capper-Volstead Act. The USDA stood ready to defend cooperatives' privileges under the law; the DOJ had given up trying to enforce the consent decree. Sun-Maid and its adherents could even coerce growers with impunity while federal administrators looked the other way. But this dispensation did not provide the means

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common shipping facilities set them apart from other forms of business. Ibid. See Chapter 7 of this study for consideration of marketing contracts and liquidated damages.

<sup>100</sup>Mosesian, 90 Cal.App. 1, 7.

to control prices, eliminate surpluses, or mandate prosperity. Ultimately, the market itself undermined the benevolent monopoly.

#### Decline of the Benevolent Monopoly, 1926-1928

The market did not bear out Merritt's confident assertion that Sun-Maid could prosper as a competitive business. The withdrawals in 1924 severely crippled Sun-Maid's ability to maintain prices because the cooperative no longer controlled the disposition of surplus raisins. With more growers on the outside selling to independent packers, Sun-Maid was unable to prevent a return to the unregulated selling of pre-cooperative days. The result was a flooded market, depressed prices, and, in 1928, bankruptcy for Sun-Maid and an inglorious exit for Merritt. The Sun-Maid president realized that without the power to control supply, the benevolent monopoly could not ensure prosperity for the industry. But he could only "strongly recommend" to the growers that they plant no more vines and produce fewer raisins.

As Merritt and the Sun-Maid directors discovered, membership and crop control became the least of the cooperative's problems after 1923. Sun-Maid was without power to curb the industry's production. The bane of the raisin industry, the annual carryover, remained a consistent feature of production during the 1920s. The 86,000 ton carryover in 1923 took almost three years to sell; although the following three years produced smaller carryovers (due to

loss from spoilage), the cumulative effect was demoralizing.<sup>101</sup> On top of that burden, the growers had to bear the costs of the advertising and marketing programs, which each year ate up \$2.5 million out of a \$30 million dollar crop. Thus, despite Sun-Maid's program of financial austerity--for which Merritt unflinchingly took credit in the pages of the Sun-Maid Business--the growers' returns decreased in relation to retail prices as the decade progressed. As raisin prices returned to pre-CARC lows, many growers lost their vineyards to foreclosure. One observer estimated that nearly 80,000 acres reverted to the banks. By 1927, this attrition reduced Sun-Maid's crop control to 67 percent.<sup>102</sup>

The 1927 crop signaled the beginning of the end. Prices were slumped, shipments moved sluggishly, and Merritt accused the independent packers of "ruthless" price-cutting at Sun-Maid's expense. But the real cause of the problem,

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<sup>101</sup>"1923 Crop Final Settlements Rendered and Checks Mailed," SMB, February 15, 1926, 4; "Analysis By Receiving Classification and Pool 1923 Crop Raisins," ibid., 9; "Progress Payment Authorized on 1924 Pools," SMB, July 15, 1925, 5; Merritt, "Who Killed Cock Robin?" SMB, April 15, 1926, 3.

<sup>102</sup>Popovich, "History of the Sun-Maid Organization and its Antecedents," 20; Merritt, "Who Killed Cock Robin?" 3; "Sunland Methods Proving Successful in English Raisin Markets," SMB, April 15, 1926, 4; Malloch, "Report on the Raisin Industry," 1; "Members' Acreage, October 31, 1927," Document #270, SMCA. The decline in membership between 1925 and 1928 was due to both the alienation of many white members--through depression, falling prices, and violence--and the movement of many Armenians from their farms in Fresno to the cities, particularly Los Angeles. Charles Mahakian, "History of Armenians in California" (M.A. thesis, University of California, Berkeley, 1935), 46-51.

according to Merritt, was that "Sun-Maid has no control of raw material and therefore of markets." Merritt acknowledged that Sun-Maid's loss of control stemmed from the 1924 withdrawals and meant that the cooperative could no longer assure profitable returns to the growers. The best way to improve prices, he said, was to "pull out" vineyards and plant something else. But Sun-Maid could only recommend such a course, and few growers took his advice. Merritt decided to issue a new \$5.5 million bond offering to cover Sun-Maid's mounting debts. The cooperative also borrowed another \$10 million from the banks, "but the final crash of prices in 1928 all but wrecked the association." The banks and investors insisted on reorganization. The secured creditors "resorted to remedies available to them" and took over the Delaware corporation and its assets.<sup>103</sup> Six months later the banks fired Merritt, the California cooperative filed for bankruptcy, and a mere thirty-two percent of the state's raisin growers counted themselves as Sun-Maid members. Not until the Farm Board paid off the banks with federal loans in 1931 did control of the Delaware corporation revert to

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<sup>103</sup>Merritt, "Who Threw the Brick," SMB, November 15, 1927, 3; Popovich, "History of the Sun-Maid Organization," 20; Malloch, "Report of the Raisin Industry," 2; Merritt, "After Me Cometh A Builder, 120-136; Popovich, "History of the Sun-Maid Organization," 18-21; U.S. Tariff Commission, Grapes, Raisins, and Wines (Washington: Government Printing Office, 1939), 155-56; Malcolm H. Watson, "An Analysis of Raisin Marketing Controls under the California Agricultural Prorate Act," (M.S. thesis, University of California at Berkeley, 1940), 16.



the growers.<sup>104</sup>

In five years, Sun-Maid's control dropped from 93 percent control to just over thirty; it went from being the toast of the cooperative movement to its scapegoat. An Australian observer noted that "Sun-Maid is criticized from end to end of the Valley, and the lesson of its fall should not be lost." The lesson was, he instructed, the simple truth that "the only thing which could have saved the situation would have been authority to destroy the carryover of 100,000 tons, or the loss of a season's crop."<sup>105</sup> In other words, the marketing monopoly was not enough for the cooperative to succeed. Organized, profitable marketing was impossible as long as control of the supply was left to the individual decisions of 16,000 growers. The economic power that Sun-Maid lacked--the ability to control supply through production controls or destruction of the surplus--the law did not sanction. As a result, even the sympathetic invocation of the Capper-Volstead Act failed to prolong the heyday of the benevolent trust.

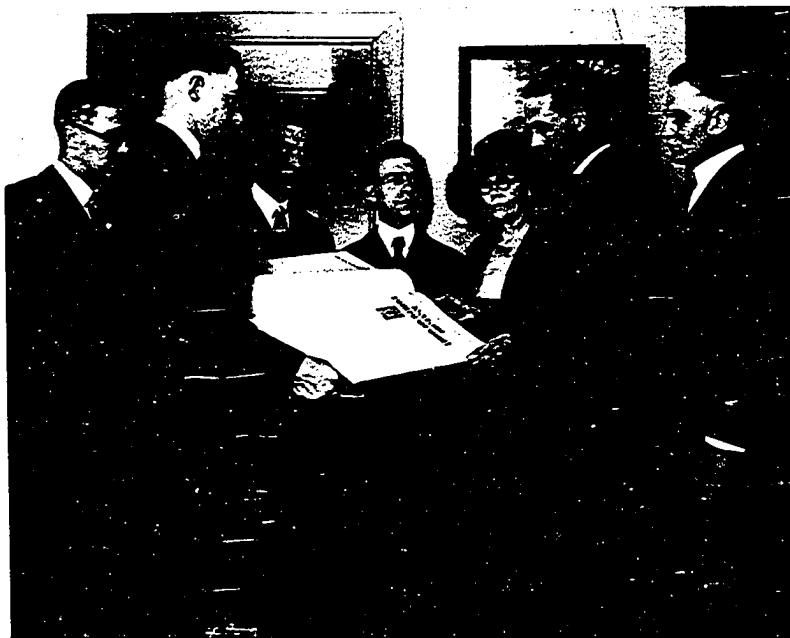
The decline of Sun-Maid indicated that the marriage of cooperation and monopoly required more than an indulgent

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<sup>104</sup>Popovich, "History of the Sun-Maid Organization," 21; Merritt, "Now It Can Be Told," SMB, June 15, 1928, 3; Memorandum relating to the conversation, n.d., Document #291; Merritt to Board of Directors, Sun-Maid Raisin Growers of California, n.d. [August 30, 1928], Document #303; "Strictly Confidential Information for Members of Sun-Maid Raisin Growers of California," December 1928, Document #318, SMCA.

<sup>105</sup>Malloch, "Report on the Raisin Industry," 2.

body of law. In the end, it required precisely the cooperative spirit that Sun-Maid boosters proclaimed with their words and undermined with their deeds. But even as Sun-Maid collapsed, the cooperative movement continued to ride the crest of a nation-wide legal revolution.



12. Ralph P. Merritt receiving testimonial from Sun-Maid staff on his departure for meetings of President Coolidge's Agricultural Conference, December 1924. This photo appeared in the Sun-Maid Business to show Merritt's influence in national political circles. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



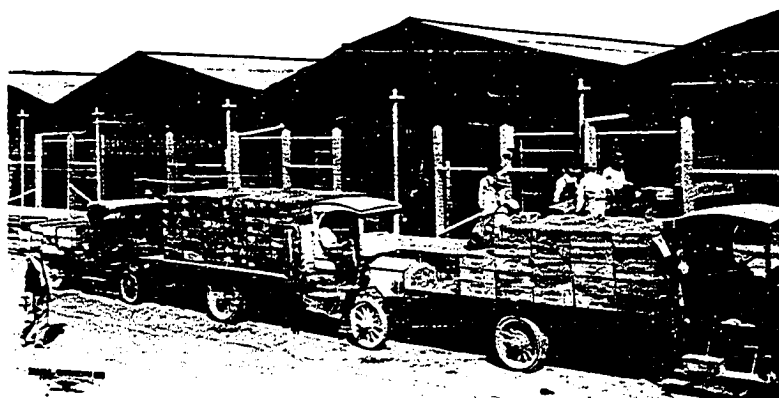
13. Aerial view, Packing and Receiving Plant #4, Sun-Maid City, Fresno, California, c. 1930. Built in 1918 at a cost of \$2.5 million, it was at the time the largest food processing plant in the nation. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



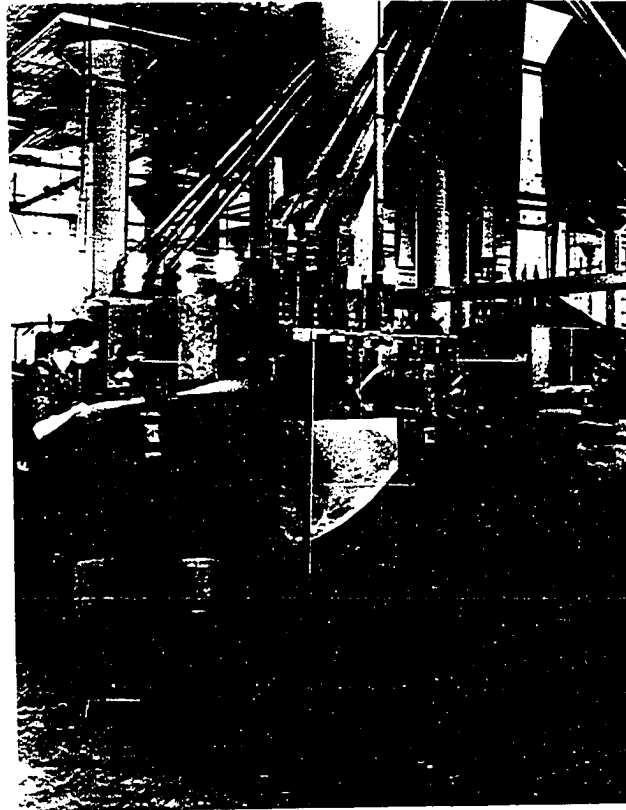
14. Ralph P. Merritt with Secretary of Agriculture William M. Jardine, Los Angeles, June 1925. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



15. Horse-drawn caravan of Sun-Maid raisins in Hamburg, Germany, c. 1925. By 1924, Sun-Maid raisins were sold not only in Europe but also in China and Japan. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



16. Trucks delivering raisins to storage sheds at Plant #4, Fresno, California, 1926. To make operations more efficient, Merritt devised a date delivery system by which growers brought their crops to Sun-Maid receiving plants on assigned days. The date delivery system made it possible for Sun-Maid to estimate how much tonnage to expect throughout the harvest season. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



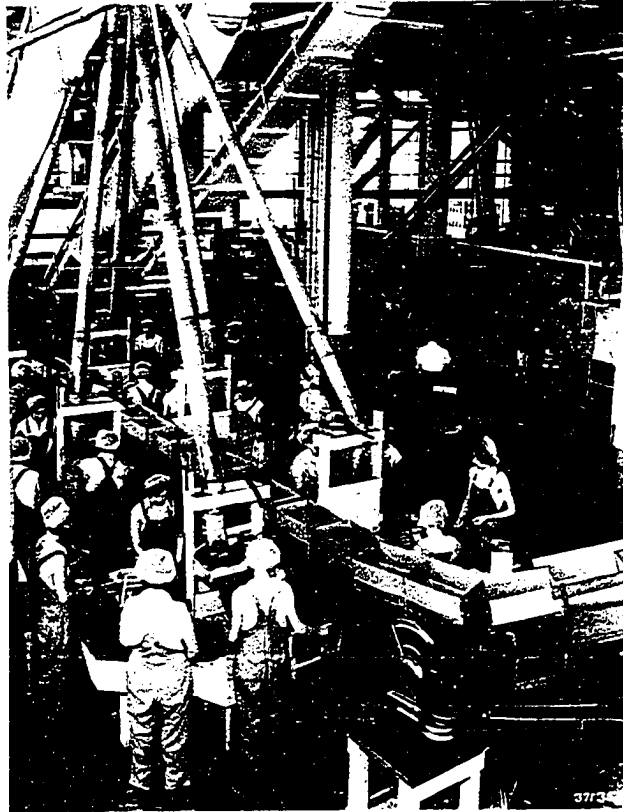
17. Stemming machines, c. 1925. The stemming machine was invented around 1900 and the patent sold to the old California Raisin Growers' Association. When competing packers copied the machinery, the raisin growers' association sued in federal court and won an injunction. The technology of raisin processing was essential to large-scale development of the industry. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



18. Raisins passing through checks for debris, c. 1928. This process is still done manually today. Courtesy Sun-Maid Raisin Growers, Corporate Archives.

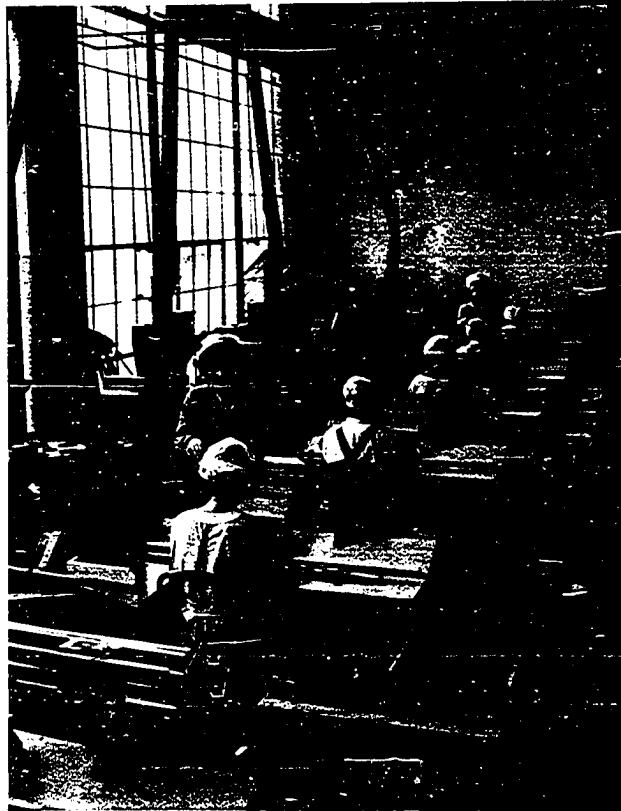


19. Bulk packing machine and 25-pound cartons, Plant #4, Fresno, c. 1930. Courtesy Sun-Maid Raisin Growers, Corporate Archives.



20. Women workers packing 2-pound cellophane packs, c. 1935. From the industry's beginnings in the 1880s, women did the bulk of the packing work including, as here, the mechanized packing jobs. Courtesy Sun-Maid Raisin Growers, Corporate Archives.





21. Women workers packing 5-cent "Little Sun-Maid" cartons, c. 1935. The nickel packs were another successful Sun-Maid marketing ploy. Courtesy Sun-Maid Raisin Growers, Corporate Archives.

PART III. COOPERATION AND THE PROBLEM OF FEDERALISM

## CHAPTER 7

### THE STATE COOPERATIVE MARKETING LAWS

The only people in the United States who may and who have the power to organize without limitation are the farmers of the United States. No industry can do what the farmer may do if he will by organization. Only the farmer can have a complete unlimited monopoly and still be in any measure within the law.

Aaron Sapiro, 1926<sup>1</sup>

As the Sun-Maid Raisin Growers, the original benevolent monopoly of California agriculture, flourished and faltered during the 1920s, a movement swelled among the states to make cooperation's legal privileges available to farmers nationwide. Through the adoption of new laws to authorize the existence of cooperative marketing associations and exempt them from the anti-trust laws, many states sought to enlist the aid of the cooperative movement in responding to the post-war political and economic crisis. Uniform state cooperative marketing laws spelled out in greater detail how the government-business partnership was to work in agriculture. They also signified a wider acceptance of the cooperative movement's central premise: economic equality for farmers. The North Carolina Supreme Court took judicial notice in 1924 that "[T]he cooperative system is the most

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<sup>1</sup>Quoted in William C. Brooker, Cooperative Marketing Associations in Business (New York: Privately printed, n.d. [1940]), 69.

hopeful movement ever inaugurated to obtain justice for and improve the financial condition of farmers and laborers."<sup>2</sup>

The state laws of the 1920s stand as the high-water mark of the cooperative movement's legal revolution. They were the brainchild of California attorney and cooperative expert Aaron Sapiro. "Exhibit[ing] an unusually happy combination of brains and enthusiasm," Sapiro capitalized on the California model of cooperation worked out in the raisin and citrus industries and then developed further in his work at the California State Markets Bureau.<sup>3</sup> Central to Sapiro's conception of cooperation was his belief that cooperatives compensated for the individualistic mode of agricultural production. By enabling farmers to combine for purposes of marketing and distribution, cooperatives preserved the fundamental freedom of producers to control their own property--no cooperative could legally dictate how much farmers could plant--but they also enabled farmers to capture more of the proceeds from their labor. The state cooperative marketing laws proceeded on the assumption that cooperatives served the public by stabilizing agricultural markets. They permitted farmers to use the tools of combination and pooling without fear of prosecution. And they defined a new relationship between the private cooperative

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<sup>2</sup>Tobacco Growers' Cooperative Assn. v. Jones, 185 N.C. 261, at 271 (1923).

<sup>3</sup>John Hanna, The Law of Cooperative Marketing Associations (New York: The Ronald Press Co., 1931), 44.

and the public, specifically endowing farmers with a responsibility to serve the public interest even as they sought better returns for themselves.

Legal stumbling blocks abounded, however. Distrust of combinations and trusts still permeated legal thought on cooperatives. In addition, the decision in Connolly v. Union Sewer Pipe Co.,<sup>4</sup> overturning an exemption for farmers in the Illinois anti-trust law, remained a leading case in the law of legislative classification and equal protection under the 14th Amendment. But many lawyers and judges believed the new statutes set the cooperative movement on a different constitutional footing. As Mathew O. Tobriner noted in 1928, the constitutionality of the cooperative marketing laws rested on both the special status of the farmer and the distinctive nature of the cooperative associations as chartered under the statute. The earlier anti-trust laws fell because they permitted farmers to engage in acts that were prohibited to all others. The new laws, he contended, simply set out a broad policy and specifically appointed cooperatives to carry out that policy: "Farmers are not distinguished from bankers, business men, or laborers[;] but cooperative associations for 'orderly marketing' [are distinguished] from illegal schemes of monopoly. Whereas one class of persons cannot be privileged to evade the law, special immunity may be conferred upon a well-

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<sup>4</sup>184 U.S 540 (1902).

defined type of organization, governmentally supervised."<sup>5</sup>

But this explanation did not solve the fundamental legal issue dogging the cooperative movement: did cooperatives in fact restrain trade, and if so, did they do so unreasonably? Or were cooperatives simply another, albeit unique form of private combination? The state laws did not authorize cooperatives to engage in price-fixing, limit production, or decrease competition. But if cooperatives were not permitted to do these things, why did they need immunization from the anti-trust laws? Sapiro himself knew that California cooperatives indeed lessened competition by fixing prices, guaranteeing them against later decline, and requiring the participation of well over half the industry before they would begin operations. And anyone paying attention to the fate of Sun-Maid recognized that in California cooperation and monopoly enjoyed a symbiotic relationship. The state laws, however, removed cooperatives' legal status from the category of anti-trust and placed it in the realm of legislative discretion to declare public policy. Once the states decided that cooperation served a legitimate public interest, few courts stopped to determine whether they violated the anti-trust laws in the process. It was left to the Supreme Court to put the brakes on the cooperative movement's legal revolution. This it did indir-

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<sup>5</sup>Mathew O. Tobriner, "The Constitutionality of Cooperative Marketing Statutes," 17 California L.R. 18, 28 (1928).

ectly, through the tool of substantive due process.

Aaron Sapiro and the Spread of Commodity Marketing

Aaron Sapiro burst upon the national agricultural scene in 1919 with a series of speeches heralding the "California style" of cooperative marketing. Born and educated in California, Sapiro made a name in the West as the legal counsel for Harris Weinstock, chief of the California State Market Commission, from 1915 to 1919.<sup>6</sup> Together, Weinstock and Sapiro oversaw the organization of nearly twenty marketing cooperatives in commodities ranging from poultry to lima beans to honey. Although he lacked experience in agriculture and the law of cooperative organizations, Sapiro proved a quick study. He and his law partners in San Francisco drew up the by-laws and articles of incorporation for each new cooperative, "borrow[ing] freely from the documents of

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<sup>6</sup>Sapiro was born in San Francisco in 1884 and was orphaned at the age of nine. Sent to Cincinnati to study for the rabbinate, he changed his mind, returned to California, and took his law degree from Hastings Law College of the University of California in 1911. Weinstock made a fortune with his half-brother, David Lubin, as dry-good merchants in San Francisco. Both spent their lives in public service, Lubin as the organizer of the International Institute of Agriculture in 1905 and Weinstock as a state official under Progressive Governor Hiram Johnson. Sapiro and Weinstock met through social and religious connections in 1905; Weinstock served as a mentor to the young lawyer and hired him at the Bureau of Markets at its inception in 1915. The men severed their close friendship over a business quarrel towards the end of Weinstock's tenure as chief of the Market Bureau. Grace H. Larsen and Henry E. Erdman, "Aaron Sapiro: Genius of Farm Co-operative Promotion," Journal of American History, 49 (1962): 243-250; "Aaron Sapiro, 75, Lawyer, is Dead," New York Times, November 25, 1959, 29.

existing co-operatives [and] adapting them to the peculiar needs of each commodity." Sapiro had what observers conceded was an uncanny ability to persuade and excite people about the possibilities of cooperative marketing; his speeches made "'the signing of a cooperative agreement seem as vital to social justice and progress as the Magna Charta.'" The work generated wide publicity within the state and began to attract the interest of farmers nationwide during 1919. Sapiro's synthesis of the legal features of exemplary California cooperatives evolved into what he began promoting as the "California plan" for marketing cooperatives.<sup>7</sup>

From 1919 to 1923, Sapiro spoke at meetings and conventions all over the country and Canada, presenting his plan not only to farmers but to bankers, politicians, indeed, - anyone who would listen.<sup>8</sup> His genius lay in both his presentation and in his conceptualization of the farmers' problem. As his biographers Larsen and Erdman noted,

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<sup>7</sup>James Waterman Wise, Jews Are Like That (New York: Bretano's, 1928), 168 (quoted in Larsen and Erdman, "Aaron Sapiro, Genius," 247, 250); Annual Report of the State Market Director of California, 1-4 (Sacramento: California State Printing Office, 1916-1919); Aaron Sapiro, "Cooperative Marketing of Conditions," United States Investor, 34:39 (September 29, 1923): 2242.

<sup>8</sup>On Sapiro's campaign to spread cooperation's message, see Herman Steen, Cooperative Marketing; The Golden Rule in Agriculture (New York: Doubleday, Page, & Co., 1923); Joseph G. Knapp, The Advance of American Cooperative Enterprise, 1920-1945 (Danville, IL: The Interstate Printers and Publishers, Inc., 1973), 7-16, 54-71.



Sapiro's achievement consisted in presenting his interpretation of the experiences of California co-operatives to a national audience in an attractive package, and in making a quick and extensive sale of his ideas. . . . If his simple directions were followed, the Sapiro plan virtually assured success in agriculture and improvement of the farmers' lot.<sup>9</sup>

In short, Sapiro was a good salesman with a good product to sell. His plan was little more than a revised version of the model worked out in the California citrus and raisin industries. Sapiro's "eight commandments of commodity of cooperative marketing" reflected the structure and management practices of those organizations. In particular, Sapiro stressed organizing according to commodity rather than geography; limiting membership to growers; democratic control by members; securing crop control through a long-term binding contract; pooling all crops according to grade and disposition of profits by patronage dividends; expert management of the organization and reliance on established business principles; orderly marketing throughout the season; and monopoly control to insure sufficient influence over the market. These organizations were solely marketing agencies. True farmers' marketing cooperatives, Sapiro claimed, avoided political causes, left problems of capital and financing to the neighborhood bankers, and--in true Progressive style--relied on experts to manage the coop-

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<sup>9</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 251.

erative's affairs "on the best established commercial principles."<sup>10</sup>

Indeed, in Sapiro's hands, the gospel of cooperation shed all aspirations of economic reform and instead placed the farmers' fate in the hands of existing institutions, particularly the banks. Marketing cooperatives worked within the established commercial order, Sapiro insisted. There was no need for cooperative credit unions, farmers' banks, or even capital stock, he said--a comment undoubtedly welcome to the banking and loan associations to whom it was addressed--because "the best thing [farmers] can do is let the farmer run his business and let the banker run his. . . . We have found in California that the banks are the best friends the farmers have when the farmers are handling the business end of their own particular industry."<sup>11</sup> Even though experience in California showed that the banks were often fair-weather friends, their willingness to support the

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<sup>10</sup>Knapp, Advance of American Co-operative Enterprise, 9; Sapiro, "True Co-operative Marketing," reprint from Journal of the American Bankers' Association (1920): 6, in Papers on Cooperative Marketing (Berkeley: bound pamphlets, University of California Library). William E. Black adds non-stock organization to the list. Black, "The Sapiro Cooperative Philosophy: Its Relevance to Modern Cooperatives," Paper presented at the Graduate Institute of Cooperative Leadership, University of Missouri, July 17, 1984, 3-4. The CMAs created a new category--non-profit--which tended to confuse the distinction between capital stock and non-stock organizations. See text below, at n. 37.

<sup>11</sup>Sapiro, "Cooperative Marketing of Conditions," 2246; Sapiro, "True Cooperative Marketing," 2-4, both in Papers on Cooperative Marketing.

cooperative movement played an essential role in maintaining the farmers' monopoly.

Sapiro's conception of cooperation relied on close legal ties between cooperatives and members. The raisin growers' innovation of the "conditional minimum"--the amount of acreage without which the cooperative would not do business--provided the first step in both establishing the monopoly and in securing the allegiance of a majority of the industry. "With this arrangement," Sapiro boasted, invoking a commercial metaphor, "the cooperatives start as solidly as a bank." But the bank metaphor became strained when Sapiro applied it to the crop contract. The "iron-clad" contract tied "those growers . . . to each other under as tight a contract as can be drawn." Besides binding the growers for a term of years, the contracts came with tested remedies: liquidated damages and the equitable remedy of specific performance. But it was hard to see how, as Sapiro claimed, the contract exemplified the same link to the growers as bank accounts did to depositors: "We use strong clauses in just the same way as if a bank were being organized."<sup>12</sup> The contract's remedies for nonperformance indicated that at heart the relationship between the organization and the member was not completely free; a depositor could always withdraw funds from the bank, but growers could not withdraw

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<sup>12</sup>Sapiro, "True Farmer Co-operation," World's Work, 46 (1923): 90.

from membership as they pleased. The contract imposed a kind of serfdom on the growers. But Sapiro claimed that it created an efficient system in which farmers learned how to run the business of agriculture--merchandizing the crops for the profit of themselves and their communities:

The cooperative associations of California have unified communities. They have brought all classes together. They have shown how the growers can help and serve each other; how the growers can contribute to the prosperity of the merchants and the merchants to the well-being of the growers. They have shown how the banking system, as it now exists, can help the growers merchandise their crops and insure regular and permanent prosperity to the great agricultural districts.<sup>13</sup>

Sapiro contended that cooperative marketing was a "purely economic means" of solving an economic problem. It fit seamlessly into the web of commercial institutions that controlled credit and capital in the U.S. economy. Cooperative marketing did not rend the threads of that web; rather, it merely reinforced them and spread their protective cover to the farmers who had been previously left out. This vision of cooperation no doubt meshed nicely with early twentieth-century bankers' visions of economic relations. But even Sapiro could not resist alluding to cooperation's traditional vision of a society united by a commonality of interests: "The justification of cooperative marketing is that it has been the means of a more progressive form of

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<sup>13</sup>Sapiro, "True Cooperative Marketing," 7.

living and a superior type of citizenship."<sup>14</sup> But as a lawyer, he knew that what he promoted as an economic solution to an economic problem was in fact crafted in the form of a highly technical legal concept. The California cooperatives were, after all, creatures of law. And Sapiro, steeped in the legality of California cooperation, articulated cooperation's traditional vision in a language that heralded farmers' self-sufficiency while advocating a confluence of social interests, bound together by legal relationships and instruments. Bankers, merchants, editors, educators, and all community leaders were as much a part of this vision as the producers themselves.

Sapiro promoted this plan with such intensity and dedication that it became known as the Sapiro Plan, and the cooperative movement of the early 1920s became a virtual personality cult. A leader in the Southern cotton industry described Sapiro's effect on his audiences: "Sapiro is a dynamic speaker. His ability to convince his audience of the soundness and importance of his proposals is almost incomparable. . . . As an economist, he is usually right, rarely entirely wrong. As a dramatic speaker he is superb. As a logician he is diabolically clever. As an evangelist he is without a peer . . . "<sup>15</sup> Sapiro's electric charisma

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<sup>14</sup>Sapiro, "True Farmer Cooperation," 96.

<sup>15</sup>Robert H. Montgomery, The Cooperative Pattern in Cotton (New York: The Macmillian Co., 1929), 48; Knapp, Advance of American Cooperative Enterprise, 9-10.

and his drive to spread the gospel of cooperation appealed to farmers everywhere in the nation. By 1921, commodity marketing became a fixture in cotton, tobacco, and wheat, the nation's largest agricultural crops. The cooperative movement blossomed under his careful cultivation. At least fifty-five cooperative associations were organized under the Sapiro plan by 1923.<sup>16</sup> That year, Sapiro helped launch the Canadian wheat pools.<sup>17</sup> He became a regular figure in high agricultural policy circles, advising the American Farm Bureau Federation (AFBF) and James R. Howard, its president, on the relationship between business and agriculture. He "assisted prominently" in the formation of the National Council of Farmers' Cooperative Marketing Associations (NCFCMA), an organization devoted specifically to Sapiro's commodity marketing program. For a while, he even had the ear of Secretary of Agriculture Henry C. Wallace. By 1926, one-tenth of American farms marketed their production through 8,135 different cooperatives, doing an aggregate business in excess of one billion dollars in over one hun-

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<sup>16</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 257. They indicate that contemporary sources put the numbers higher, at sixty-six cooperatives with a total business of \$400 million; Sapiro himself estimated the number at sixty. Ibid., 258.

<sup>17</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 257; W.A. MacLeod, "The Canadian Wheat Pools," News for Farmer Cooperatives, July, 1944, 8-9.

dred different commodities.<sup>18</sup>

But reservations about the efficacy of commodity marketing soon surfaced. Sapiro's insistence on strict adherence to the commandments of commodity marketing alienated national agricultural leaders who wanted to employ more traditional cooperative concepts. At the height of his popularity, he began to draw criticism for the legal fees his firm commanded and for being abrasive and even unethical in his dealings with farmers. Most critically, his cooperatives were not repeating the successes of their California counterparts. The gems of his work, the Burley Tobacco Cooperatives in Kentucky and the Tri-State Tobacco Growers Cooperative Marketing Association of North Carolina, South Carolina, and Virginia, began to fail in 1923. Both were having trouble with disloyal growers; despite the "iron clad" contracts, their share of the markets decreased between 1923 and 1926. They and other Sapiro cooperatives eventually went into receivership.<sup>19</sup> The California commodity marketing plan depended more on locality than Sapiro

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<sup>18</sup>Knapp, Advance of American Co-operative Enterprise, 59; Larsen and Erdman, "Aaron Sapiro: Genius," 260-62; Mathew C. Tobriner, "Legal Aspect of the Provisions of Cooperative Marketing Contracts," 12 American Bar Association Journal 23 (1926). According to Tobriner, 90 percent of dried fruits, 70 percent of tobacco, 65 percent of nuts, 25 percent of milk and 15 percent of cotton was marketed collectively.

<sup>19</sup>William E. Ellis, "Robert Worth Bingham and the Crisis of Cooperative Marketing in the Twenties," Agricultural History, 56 (1982): 99-121.

would admit; it was difficult to control commodities such as wheat and tobacco when the producers were scattered across several states. Sapiro cooperatives also suffered from inexperienced management, sloppy organization, and inattention to the local political context.<sup>20</sup>

As the cooperatives declined, the fervor Sapiro had created over the possibilities of commodity marketing gradually died down. New officers in the AFBF, mostly from the Midwest and South, were far less enamored with commodity marketing than their predecessors. They doubted--correctly, as it turned out--that the achievements of the California fruit and nut cooperatives could be duplicated in tobacco, cotton, and livestock, because these commodities were produced over much more extensive areas and marketed in entirely different ways. When Sapiro and the AFBF failed to resolve their philosophical and personality differences, he was forced to resign in early 1924. The split nearly wrecked the AFBF--many of its rank and file members were staunch believers in Sapiroism--and it had the additional effect of distancing Sapiro from national agricultural policy. The Farm Bureau left the business of cooperatives to its less influential rival, the NCFCA. The Bureau of Agricultural Economics in the USDA published bulletins

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<sup>20</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 265-66. Growers deserted the cooperatives despite the fact that many state courts held that the contracts were enforceable. See text below at n. 62.



detailing other methods of organizing cooperatives. Talk in national political circles shifted from commodity marketing to the McNary-Haugen "dumping" legislation--a plan to dispose of agricultural surpluses by selling them overseas at rock-bottom prices. By 1926, Sapiro's "days as an effective promoter of co-operatives were over."<sup>21</sup>

The falling out between the AFBF and Sapiro was only one reason for Sapiro's fall from national political prominence. Not surprisingly, he had incurred the enmity of the middle distributors, the scapegoats of his advocacy for the farmers. In 1924, one shipping agent complained to Secretary Wallace, "We people who are in this business think it advisable that the United States Department of Agriculture investigate the manipulations of this Sapiro at once, for the protection of all concerned."<sup>22</sup> The counterattack upon Sapiro transcended economics. Also in 1924, Henry Ford's Dearborn Independent warned of the "Jewish attempts to seize control of the agricultural and horticultural resources and

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<sup>21</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 260, 267; Grant McConnell, The Decline of Agrarian Democracy (New York: Atheneum, 1977), 60-61; Knapp, Advance of American Cooperative Enterprise, 67-71. For a more extensive treatment of McNary-Haugen, see James Shideler, Farm Crisis, 1919-1923 (Berkeley: University of California Press, 1959).

<sup>22</sup>F.J. Hatch to Calvin Coolidge, February 14, 1924, "Marketing" File, Correspondence of the Secretary of Agriculture, Record Group 16 (RG), National Archives, Washington, D.C. (NA).

production of America."<sup>23</sup> Stories and editorials such as these continued for the next three years, criticizing Sapiro-style cooperation for departing from the "economic statesmanship" and "democratic participation" of traditional cooperation.<sup>24</sup> Even prominent Californians debunked Sapiro's self-professed role as "the savior of a people" and unhesitatingly informed the USDA that they did not wholeheartedly support him.<sup>25</sup> But it was the Ford newspaper that continued to raise the specter of a Jewish conspiracy to take over American agriculture. When Ford refused to accede to Sapiro's repeated demands for retractions, Sapiro filed suit in 1925 for libel and defamation, accusing him of anti-Semitism and asking \$1 million in damages. The suit was settled out of court in 1927 with Ford agreeing to publish an apology and a retraction and pay Sapiro's court costs and

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<sup>23</sup>Robert Morgan, "Jewish Exploitation of Farmers' Organizations," Dearborn Independent, April 19, 1924, 4.

<sup>24</sup>E.M.K., "Producer of Commodity Cooperation," The New Republic, January 24, 1923, 221. Sapiro appealed to Felix Frankfurter, then professor of law at Harvard University, for assistance in refuting the "falsehoods" and "misstatements" in the New Republic piece. Sapiro to Frankfurter, January 29, 1923, Document #100855, Numerical Files, RG 83, Records of the Bureau of Agricultural Economics, NA.

<sup>25</sup>Dallas H. Gray to Henry C. Taylor, January 3, 1923, Document #84377, Numerical Files, Records of the BAE, RG 83, NA: "There is little question but that Sapiro has done some good by stirring up the idea of co-operation, but it seems to me very hard to reconcile myself to a man who opposes the co-operative movement on the one hand and is continually promoting those movements of co-operation sponsored for by himself."

attorney's fees.<sup>26</sup> The suit added an anti-climatic post-script to Sapiro's role in the cooperative movement.

As much as his name was linked with the rise of the movement during the early 1920s, however, Sapiro's departure from the scene in 1927 did not completely deflate it. His was not the only version of cooperative marketing available to farmers, only the most popular and the most discussed. He called the nation's attention to the promise of cooperative marketing at a time when farmers needed imaginative solutions to the problems of depressed prices and chronic surpluses. In propagating the California plan he challenged the dominant Rochdale model of joint-stock corporations that were so prevalent in the Midwest; he was first to proclaim that California cooperation departed from Rochdale cooperation and that this departure was good for the movement.<sup>27</sup> Whether his economic theory was is debatable; the failure of so many Sapiro organizations suggests that the academic economists and U.S.D.A. staffers who decried his theory of cooperation through coercion may have had grounds for their criticism.<sup>28</sup> The dogmatism and inflexibility of

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<sup>26</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 267.

<sup>27</sup>Sapiro, "True Farmer Cooperation," 86. Sapiro even went so far as to label the use of the Rochdale model, designed for consumer cooperatives, for producers' marketing organizations as "one of the most egregious blunders committed in agricultural America." Ibid.

<sup>28</sup>The agricultural economist Edwin G. Nourse was one of Sapiro's chief antagonists. Nourse spelled out his attack on commodity marketing in academic journals; like Henry C.

the Sapiro plan, in the view of the economists, proved a "fundamental weakness." As Edwin G. Nourse told a convention of the National Association of State Marketing Officials in 1923, "Cooperative organization wisely handled can accomplish great and permanent gains in the way of net price for the growers; but it does this not by power to coerce the market so much as by skill in meeting the market."<sup>29</sup>

The most remarkable legacy Sapiro left to American agriculture was neither his originality, nor his synthesis of law and economic theory, nor even his evangelical promulgation of commodity marketing, although for all of these he was both credited and pilloried.<sup>30</sup> Rather, his most lasting contribution to public policy and agricultural cooperation lay in the legislative arena, the Uniform State

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Taylor of the BAE, he preferred the citrus growers' model of economic democracy to the monopolistic, autocratic organizations promoted by Sapiro. For a sample of his thought, see "The Economic Philosophy of Cooperation," American Economic Review, 12:4 (December, 1922): 577-97. The citrus growers and their allies also opposed Sapiro, probably because he distorted the democratic, voluntary spirit they extolled. Thus G. Harold Powell, manager of the California Fruit Growers' Exchange, and O.B. Jesness, a USDA specialist on cooperatives, publicly supported Nourse. Knapp, Advance of American Cooperative Enterprise, 557, at n. 1-2.

<sup>29</sup>Larsen and Erdman, "Aaron Sapiro: Genius," 263; Nourse, "Some Fundamentals of Cooperative Marketing," Proceedings of the National Association of State Marketing Officials, 5 (December, 1923): 16-17 (quoted in Knapp, Advance of American Cooperative Enterprise, 75).

<sup>30</sup>See, for example, Silas Bent, "Three City-Bred Jews That the Farmer Trusts," Outlook, 134 (August 8, 1923): 553-56; "Aaron Sapiro on Cooperation," The Farmer, 41:11 (March 17, 1923): 5.

Cooperative Marketing Acts. This law, which Sapiro wrote in 1921, codified anti-trust exemption for cooperatives at the state level, sanctioned the contractual remedies of liquidated damages and specific performance, and enumerated special liberties for cooperatives that the Capper-Volstead Act only hinted at. Forty states passed versions of Sapiro's model statute between 1921 and 1926; seven others passed cooperative marketing laws that differed in several particulars but echoed the fundamental ideal embodied in Sapiro's statute.<sup>31</sup> It was thus at the state level, and largely because of Sapiro's influence and ambition, that the true legal revolution of cooperative marketing was waged and won during the 1920s.

#### The Uniform State Cooperative Marketing Acts

The standard state cooperative marketing acts (CMAs) established a new statutory regime for cooperatives. They codified the implicit anti-trust immunity of the separate incorporation statutes. They echoed Congress' declaration in the Capper-Volstead Act that agricultural associations formed for the mutual benefit of their members were not inherently in restraint of trade. The CMAs even went beyond federal policy and provided a specific statement of purpose that linked the economic benefits of cooperative marketing to the public interest. By creating a classification for

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<sup>31</sup>Hanna, Law of Cooperative Marketing Associations, 44 at n. 35.

cooperatives lodged in the public interest, the laws swept away the constitutional and common law objections lodged in the Connolly and Reeves cases ten and twenty years earlier.<sup>32</sup> The CMAs established the reasonable basis for legislative classification for which the courts had been calling since the 1890s. They did so by relying on older legal categories such as private rights, market freedom, and the reasonability of restraints upon trade as well as a new conceptualization of the public interest in agriculture.

Rather than setting farmers apart from other entrepreneurs under the general anti-trust policy, the CMAs declared that the anti-trust laws no longer applied to cooperative associations operating under the statute. The legislatures made it clear that this was so not because the farmers deserved a privilege withheld from everyone else but because cooperatives served the public interest by ordering markets and stabilizing the nation's food supply while maintaining reasonable prices to consumers. Cooperatives earned extraordinary privileges at law because they served an important public purpose. The difference between the earlier anti-trust exemptions and the new CMAs was that the latter ex-

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<sup>32</sup>Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) (striking the Illinois anti-trust law because its exemption for farmers violated the equal protection clause of the 14th Amendment); Reeves v. Decorah Farmer's Co-op. Society et al., 160 Iowa 194, 140 N.W. 844 (1913) (voiding a marketing agreement between a cooperative and a producer on the grounds that its fines levied against growers who breached constituted a penalty and unreasonably restrained trade).

plicitly stated this public purpose.<sup>33</sup>

The CMAs declared that it was in the public interest to permit growers to organize in large-scale combinations in order to ensure agricultural prosperity. The Kentucky version of the act, written by Sapiro and named for former circuit judge Robert W. Bingham, a Sapiro colleague and a director of the Burley Tobacco Association, was Sapiro's favorite version of the statute and the most copied as well.<sup>34</sup> His conception of the economics of cooperative marketing permeated the Bingham Act's influential declaration of policy in Section 1: "to promote, foster, and encourage the intelligent and orderly marketing of agricultural products through cooperation, to eliminate speculation and waste, to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done, and to stabilize the marketing of agricultural products."<sup>35</sup> This declaration linked cooperative marketing to the accomplishment of specific economic goals: agri-

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<sup>33</sup>Hanna, The Law of Cooperative Marketing Associations, 47; Theodore R. Meyer, "The Law of Cooperative Marketing," 15 California L.R. 85, 95 (1927).

<sup>34</sup>On Bingham's role in the passage of the act in Kentucky and the Burley Tobacco Growers' Association, see Ellis, "Robert Worth Bingham and the Crisis of Cooperative Marketing in the Twenties," 102-05; Hanna, Law of Cooperative Marketing Associations, 46 at n. 37.

<sup>35</sup>The Bingham Co-operative Marketing Act, Acts of Kentucky, 1922, Chapter 1, in Edwin G. Nourse, The Legal Status of Agricultural Co-operation (New York: The Macmillan Co., 1928), 470; Sapiro, "The Law of Cooperative Marketing Associations," 15 Kentucky L.J. 1, 7 (1926).

cultural stabilization and orderly marketing. As Section 5 of the Bingham Act proclaimed:

[T]he public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops.<sup>36</sup>

Cooperatives were in a unique position to achieve these goals due to their special structure, non-profit status,<sup>37</sup> and the mutual benefit that bound all members together in a common enterprise. The public interest in cooperation rendered it "reasonable to make a distinct class of these

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<sup>36</sup>Bingham Act, sec. 5, in Nourse, Legal Status of Agricultural Cooperation, 472.

<sup>37</sup>Non-profit was not the same as non-stock, although confusion arose as to the distinction between the two. Non-profit associations could still have capital stock; what made a cooperative non-profit was the manner in which it distributed the gains of its operations: "The essential idea in the term 'non-profit' is clearly that such corporations are not designed primarily to pay dividends on invested capital but to provide a system and method by which the member can effect the sale of his products." Hanna, Law of Cooperative Marketing Associations, 50. In characterizing cooperatives as non-profit, Sapiro probably meant to appeal to cooperatives' special nature--the intimate connection between membership and benefit. But cooperatives were no less profit-oriented than regular corporations; to imply, as the use of the non-profit label suggested, that cooperatives made no profits from their operations was inaccurate. David Cobia, ed., Cooperatives in Agriculture (Englewood Cliffs, NJ: Prentice Hall, 1989), 3.



co-operative associations of producers . . ." <sup>38</sup>

Having established the public policy of cooperative marketing, the statutes flated away the anti-trust objections to cooperation. Section 28 of the Bingham Act and Subsection ww of the California version provided:

Associations are not in restraint of trade. Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state. <sup>39</sup>

The point of this explicit declaration was to make clear to the courts that public policy on cooperatives had changed. No longer were cooperatives subject to anti-trust statutes or the common law on restraint of trade. Instead of prohibiting behavior in restraint of trade and exempting farmers from that prohibition, the CMAs defined cooperatives as a separate class of specially regulated private organizations that did not inherently restrain trade. As one legal commentator wrote in the Yale Law Journal, "agricultural associations not organized for profit are . . . in the situation of labor unions, and although their purpose is to establish

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<sup>38</sup>J.P. Chamberlain, "The Co-operative Marketing Act," 8 American Bar Association Journal 416, 417 (1922).

<sup>39</sup>Cal. Stats. ch. 103, p. 222 (1923); Cal. Civ. Code, Title 23, secs. 653aa-xx; Bingham Act, sec. 28, in Nourse, Legal Status of Agricultural Cooperation, 488.

a monopoly they are not for that reason illegal."<sup>40</sup> Thus, cooperatives could engage in pooling and bind members to deliver through tying contracts; but the statutes, as academic lawyers were relieved to discover, did not legalize coercion, secondary boycotts, or other activities prohibited by the Clayton Act.<sup>41</sup>

Underlying the reasoning of the CMA anti-trust dispensation was the assumption, also voiced in Congress during the Capper-Volstead debates, that cooperatives were incapable of monopolizing in such a way as would harm the public. As the primary spokesperson for the CMAs, Sapiro devised a production theory of agriculture to support this assumption. "[T]he peculiar character of agricultural industry," he wrote in the Kentucky Law Journal in 1926, "is individual in production whereas other industries are characterized by group production." This production theory argued that the decentralized structure of individual production prevented long-term combination; thus, farmers required a different scheme of organization to achieve efficient distribution and equitable returns for the producers. Sapiro point-

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<sup>40</sup>Note, "Opposition to Co-operative Marketing," 32 Yale L.J. 819, 823 (1923). The writer relied on the Clayton Act for the labor union analogy; most legal observers still had no other way of conceptualizing the cooperative enterprise except the comparison to labor unions.

<sup>41</sup>Note, "Opposition to Cooperative Marketing," 823 at n. 18; Gerard C. Henderson, "Cooperative Marketing Associations," 23 Columbia L.R. 91 (1923); Howard B. Wilson, "Legal Status of Cooperative Marketing Movement," 14 American Bar Association Journal 576 (1928).

ed to the raisin industry as an example of the inexorable cycle of agricultural production: If at any time prices became excessive, new producers would rush to enter the industry, and the resulting overproduction would bring prices back into line. Under this theory, he declared, no cooperative could monopolize indefinitely; the natural laws of supply and demand would balance the cooperative's control over price. "Thus, there is an automatic protection to the public and a constant threat to the growers themselves if they abuse their power through organization."<sup>42</sup>

The CMAs' provisions for cooperative structure and marketing contracts were all built upon the production theory. Since cooperatives presented no inherent threat to market freedom, marketing contracts were released from the taint of anti-trust violation: "[T]he marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered

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<sup>42</sup>Sapiro, "The Law of Cooperative Marketing Associations," 3, 7; see also Sapiro, "True Farmer Co-operation," World's Work, 46 (1923): 84. The production theory was incorporated into Section 5 of the Bingham Act; Nourse, Legal Status of Agricultural Cooperation, 471-72. But twenty-nine states omitted this provision and substituted stiffer requirements for public supervision of cooperatives: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Virginia, Washington, and Wyoming. Hanna, Law of Cooperative Marketing Associations, 52 at n. 51. The omission indicates that legislators justified the anti-trust exemption with the safeguard of public supervision rather than the production theory of agriculture. See text below at n. 53.

not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."<sup>43</sup> This dispensation freed cooperatives to enter into long-term contracts with members for the sale of their produce. The specifications for these contracts resembled those employed in California. From the raisin growers' 1918 contract, Sapiro lifted the provisions for resale of the crop by the cooperative; paying to members the retail price minus the costs of marketing, overhead; and limiting dividends to no more than eight percent. Most of the other states adopted the Bingham Act's section on marketing contracts with only minor changes--shortening the term of the contract or providing the growers with the privilege to withdraw each year.<sup>44</sup>

The major difference among the states as to the marketing contracts concerned legal title to the commodities. Fourteen states omitted Sapiro's provision that title to the crops passed to the cooperative upon delivery and opted

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<sup>43</sup>Cal. Stats. Ch. 103, p. 229, sec. 65300 (1923); Bingham Act, sec. 17, in Nourse, Legal Status of Agricultural Cooperation, 482-83.

<sup>44</sup>Bingham Act, sec. 17, in Nourse, Legal Status of Agricultural Cooperation, 482-83; Hanna, Law of Cooperative Marketing Associations, 82-85. The CARC innovations of giving the association a lien on the land and having the contract run with the land were not, however, incorporated into the Bingham Act. While they were popular among California cooperatives because they provided specific remedies in case of grower breach, even Sapiro deemed them too "drastic" for the uniform act. Nourse, Legal Status of Agricultural Cooperation, 200-02; on CMA remedies for breach of contract, see text below at n. 47.

instead for the older practice of agency contracts. Under these contracts, cooperatives never owned the goods they handled; instead, with the grower retaining title until final delivery, the cooperative acted merely as a marketing agent. By contrast, the outright purchase and sale contracts, in passing title to the crop to the association, greatly enhanced the market power of cooperatives. They enabled cooperatives to pledge the crop as collateral for loans and to conduct pooling more efficiently.<sup>45</sup>

The agency contracts hedged the broad grant of market power in the CMAs. Their prevalence indicated that legislators in many states were still troubled by the possibility of monopoly, in spite of Sapiro's production theory. Under the outright sale and resale contract, the parties stood

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<sup>45</sup>Hanna, Law of Cooperative Marketing Associations, 82 at n. 92; Eliot G. Mears and Mathew O. Tobriner, Principles and Practices of Cooperative Marketing (Boston: Ginn and Co., 1926), 118. According to Mears and Tobriner, sale and resale contracts were especially vital for non-perishable crops, whose storage and shipping required extensive financing. But in California, where they argued the perishable/non-perishable distinction held true in twelve "representative" cooperatives, the division occurred more according to the financial needs of the cooperative rather than the perishable nature of the commodities. The alfalfa, almond, bean, berry, milk, pear, and walnut organizations, which were federated cooperatives with decentralized packing and grading functions, used agency contracts; while the peach, poultry, prune and apricot, raisin, and olive growers--all centralized, highly capitalized organizations with extensive marketing facilities--used purchase and sale contracts. Ibid., 119. To Mears and Tobriner, as to many other lawyers, the distinction between the two kinds of contracts was an important development in the evolution of the common law. In the litigation, however, it took a backseat to issues of constitutional law and public policy.

"merely as the buyer and the seller" rather than mutually interested grower and cooperative association. Under the Sapiro contract, the "legal relation between the grower and the association undergoes a radical change" because the grower relinquished "an important element of ownership" in his crops. The agency contract, in effect, was an anti-monopoly provision, designed to prevent the cooperative from acquiring unchecked control over the supply of any commodity. It also sought to maintain the independence of the growers in the marketplace--which, perhaps, was little more than a legal fiction given the cooperatives' plenary authority under the CMAs.<sup>46</sup>

Despite the division of legislative opinion on the nature of the sales contract, nearly all the states went along with Sapiro's daring ideas for remedies available to cooperatives when growers breached their contracts. Section 18 of the Bingham Act gave cooperatives the right to liquidated damages and the equitable remedies of specific performance and injunction against delivery to persons or firms other than the cooperative. The liquidated damages were to approximate the grower's share of the overhead and marketing costs. Further, the statute instructed, "such clauses providing for liquidated damages shall be enforce-

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<sup>46</sup>Henderson, "Cooperative Marketing Associations," 94.

able as such and shall not be regarded as penalties."<sup>47</sup> In one sentence the Bingham Act overruled the Iowa and Colorado courts' decisions in Reeves v. Decorah Farmers' Co-operative Society and Burns v. Wray Farmers' Grain Co.<sup>48</sup> And, in granting the equitable remedies of specific performance and injunction, the CMAs also went beyond the earlier cooperative incorporation statutes, which had left cooperatives to their remedies obtainable through "fundamental principles of common law."<sup>49</sup> Finally, the law made it a misdemeanor to induce a member to breach his marketing contract, an act punishable by both fines and civil damages. The fourteen states that did not enact this section provided cooperatives with other safeguards, such as criminalizing the spreading of false rumors about a cooperative's finances, management, or business conduct.<sup>50</sup> These provisions cured

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<sup>47</sup>Bingham Act, sec. 18, in Nourse, Legal Status of Agricultural Cooperation, 483-84; Henderson, "Cooperative Marketing Associations," 97-98.

<sup>48</sup>Reeves, supra n. 32; and 65 Colo. 425, 176 P. 487 (1918). Even before the enactment of the CMAs, state courts in Alabama, California, and New York upheld liquidated damages in spite of the adverse decisions in Reeves and Wray. See Ex parte Baldwin County Producers' Co., 203 Ala. 345 (1919); Bullville Milk Producers' Assn. v. Armstrong, 178 N.Y.Supp. 612 (1919); Castorland Milk & Cheese Co. v. Shantz, 179 N.Y.Supp. 131 (1919); Poultry Producers of Southern California v. Barlow, 189 Cal. 278, 208 P. 93 (1922) (discussed in text below at n. 84).

<sup>49</sup>Nourse, Legal Status of Agricultural Cooperation, 198.

<sup>50</sup>Bingham Act, sec. 26, in Nourse, Legal Status of Agricultural Cooperation, 487; Hanna, Law of Cooperative Marketing Associations, 102-103.

what Sapiro termed "the easiest way to destroy a cooperative"--undermining the "cooperative spirit" by offering better prices to the outsiders or destroying the cooperative's reputation.<sup>51</sup>

The clause granting cooperatives the remedies of specific performance and injunction was the single most important provision of the CMAs. The ability to enforce marketing contracts, as the California associations had discovered, was absolutely essential to crop control and efficient marketing. Without the power to compel growers to deliver and to prevent them from selling outside the association, a contributor to the California Law Review wrote, "the existence and continued success" of cooperatives would be "put in peril." Further, the public policy of cooperative marketing hinged on effective enforcement of contracts: "[T]he need of, and a strong public policy in favor of, such cooperative marketing organizations, justify the relaxation of the letter of the old technical rules and the granting of specific performance in order to prevent the defeating of the greater equities" at stake.<sup>52</sup>

In exchange for these legal privileges, the CMAs imposed on cooperatives what Sapiro saw as an obligation to

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<sup>51</sup>Sapiro, "The Law of Cooperative Marketing Associations," 4.

<sup>52</sup>Note, "Equity: Specific Performance of Co-operative Distribution Contracts," California L.R., 10 (1922): 518, 521.



serve the public. The Bingham Act authorized the appointment of "public directors"--directors selected by the governor, marketing commission, or any other public body--to represent the public on the governing body of the cooperative. All but six states included this provision. In addition, thirty-six states required cooperatives to report annually on their business operations, including the amount of capital stock, number of shareholders, total expenses, indebtedness, and balance sheets. Some states went even further and empowered agricultural officials to make periodic inspections of all records.<sup>53</sup> These requirements came directly from the practices Harris Weinstock and Sapiro developed in the California State Markets Bureau. They provided a way for public officials to check up on the activities of the cooperatives both in terms of their economic efficiency and their service of the public policy laid out in the statute.

Nevertheless, the enactment of the CMAs, despite variation among the states as to specific provisions, generously granted special privileges to farmers. By 1926, when thirty-eight states had passed versions of the Bingham Act, Sapiro could justly claim that "farmers are the only great

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<sup>53</sup>Bingham Act, secs. 12 and 20, Nourse, Legal Status of Agricultural Cooperation, 478-79, 484; Hanna, Law of Cooperative Marketing Associations, 69-70, 90-91. Minnesota, New Hampshire, Washington, Wyoming, New Jersey, Florida, and Utah were the states providing for additional public safeguards. Ibid., 91-92.

producers of actual commodities who may form the tightest type of combination, for both domestic and foreign trade, without interference of law by reason of the form or fact of organization."<sup>54</sup> The legal status of cooperatives took even fuller form than that set out in either the Capper-Volstead Act or the state cooperative incorporation laws. The CMAs designed a scheme for both the structure and the behavior of cooperatives that retained the essence of Rochdale cooperation while incorporating Sapiro's quest for efficiency in marketing.<sup>55</sup> As a result, farmers enjoyed greater latitude than ever in horizontal combination and market control. At decade's end, a Denver lawyer reflected on the import of the legislation: "[I]n various aspects of cooperative marketing the farmer has been accorded special legal favors and privi-

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<sup>54</sup>Sapiro, "The Law of Cooperative Marketing Associations," 6.

<sup>55</sup>The Rochdalian features of CMA associations included patronage dividends; one-person, one-vote; and marketing services conducted at cost for the benefit of the members rather than at a profit for the stockholders. The newer style of cooperation was reflected in two features derived from the Capper-Volstead Act: eight percent limit on dividends and a 50% maximum on business conducted for non-members. On the question of capital stock, Sapiro's preference was for non-stock associations, but many states permitted cooperatives to have capital stock up to a certain limit, as long as they did not operate for profit. The evolution from traditional cooperation to Sapiro cooperation was evidenced in Sapiro's preference for the term "association" rather than "cooperative"--the former conveying the idea of an efficient business rather than the simple pooling operations of early Rochdale marketing cooperatives. Henry W. Ballantine, "Cooperative Marketing Associations," 8 Minnesota L.R. 1 (1923).

leges of his own."<sup>56</sup>

#### Cooperative Marketing and Legislative Classification

Judicial reaction to the new special legal status of cooperatives was both immediate and extensive. The overwhelming legislative acceptance of the new policy provoked, as Aaron Sapiro predicted it would, a cascade of lawsuits testing both the constitutionality of the acts and the privileges and powers devolved on the associations.<sup>57</sup> How the courts would respond, given the broader context of the post-war economic emergency and the binding nature of precedent in both anti-trust and constitutional law, was a dynamic question. Endorsing the new public policy--a policy that endowed cooperative associations with broad legal privileges to carry out purposes deemed beneficial to the public interest--cut across the precedents laid down in Connolly, Reeves, and their progeny. To uphold the CMAs, the state courts had to find a way to reconcile the earlier cases with the new policy--or else abandon the older precedents altogether. To Sapiro, addressing the bench and bar of the state that had decided Reeves, the way was clear: since the CMAs radically revised the legal structure of cooperative marketing associations, the Reeves decision stood merely as

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<sup>56</sup>Wilson, "Legal Status of Cooperative Marketing Movement," 581.

<sup>57</sup>Sapiro, "The Law of Cooperative Marketing Associations," 14.

the relic of an earlier era; whether distinguished or discarded, it was no longer relevant: "With the formulation of a modern and enlightened public policy it is inevitable that the Iowa courts, too, will bow to the right of the legislature to declare public policy and will follow the weight of authority that cooperative marketing associations organized along these lines are not monopolistic or in restraint of trade."<sup>58</sup>

The state judiciary soon bore out Sapiro's prediction. Twenty state high courts upheld the constitutionality of the Cooperative Marketing Acts between 1922 and 1927. But they did so largely on the grounds of the economic imperative underlying the new policy and Sapiro's economic theory of agricultural production rather than a thorough analysis of the impact of cooperatives on trade. Instead of articulating a legal theory of cooperative marketing with its own constitutional justification, the courts simply deferred to the legislatures' assertion that economic conditions justified the new public policy. This approach yielded an overwhelming affirmation of the new cooperative marketing statutes as well as a substantial personal triumph for Aaron Sapiro, who personally appeared or filed briefs in almost half of the cases decided during the 1920s. But the results carried drawbacks as well. For one, the decisions had the

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<sup>58</sup>Sapiro, "Cooperative Marketing," 8 Iowa L.B. 193, 210 (1923).

effect of confining the legal status of cooperatives to the statutes alone; if cooperatives were not organized under the new laws, courts held them to be inherently in violation of anti-trust law. This ruling left cooperatives organized under the cooperative incorporation laws of the 1910s out in the cold. Another effect of the courts' rulings was to uphold the general policy but construe the remedies in sections 18 and 26 narrowly and according to common law rules rather than the statutory goals.<sup>59</sup> In general, however, the courts endorsed the new policy with few reservations, enlarged the power of cooperatives to enforce their marketing contracts, and articulated the legal basis for the relationship between cooperatives and the public interest.<sup>60</sup>

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<sup>59</sup>This meant that while cooperatives won the right to equitable remedies against members who breached their contracts, they did not always enjoy similar success with regard to third party intervenors (private firms and individuals who induced members to breach) or tenants who refused to deliver even though their lessors belonged to the association. See text below, at n. 102.

<sup>60</sup>Scores of law review articles summarized the new trends in the law of cooperative marketing and credited Sapiro with effecting, almost single-handedly, the marked transformation in the legal status of cooperatives. Most also agreed with the substantive conclusions reached by the state courts, that cooperatives did not restrain trade and the CMAs effected a valid public policy. See, e.g., John D. Miller, "Farmers' Co-operative Associations as Legal Combinations," 7 Cornell L.Q. 293 (1922); Henderson, "Cooperative Marketing Associations," supra n. 41; Edmund Brown, Jr., "Cooperative Marketing of Tobacco," 1 North Carolina L.R. 216 (1923); Henry W. Ballantine, "Co-operative Marketing Associations," 8 Minnesota L.R. 1 (1923); Mathew O. Tobriner, "Cooperative Marketing and the Restraint of Trade," 27 Columbia L.R. 826 (1927); Theodore R. Meyer, "The Law of Cooperative Marketing," 15 California L.R. 85 (1927); Charles Goldberg, "Cooperative Marketing and Restraint of

The exceptions to this general trend were few but significant. The courts did not resort much to the prevailing ethos of Lochnerism--the judicial conservatism that mandated striking down state regulations as unconstitutional interferences with 14th Amendment rights of due process and equal protection. In this context, the state courts' widespread acceptance of the CMAs--and their deference to legislative prerogative--stands out as exceptional. The CMAs infringed on private property and contract rights; further, they empowered individuals to control the market in the name of the state and for a public good that the statute only hazily defined. The judicial inclination to permit this public interference in private commerce demonstrates the courts' sensitivity to the political importance of cooperative marketing. They began to draw the constitutional line and invoke the sacred creed of liberty of contract at the point where defenses of private rights could be made without undermining the existence of the cooperatives. In a few jurisdictions, then, third parties to marketing contracts, such as tenants and independent private dealers, could wriggle out of the grip of the CMAs. The courts presumed that cooperatives did not restrain trade; they simply took

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Trade," 12 Marquette L.R. 270 (1928). Only a few of these writers suggested a less roseate assessment of the CMAs; see Tobriner, "The Constitutionality of Cooperative Marketing Statutes," 17 California L.R. 19 (1928); and Milton Keegan, "Power of Agricultural Co-operative Associations to Limit Production," 26 Michigan L.R. 648 (1928).

Sapiro and the statute--which pledged no unreasonable interference with trade--at their word.<sup>61</sup>

In considering the constitutionality of the CMAs, the state courts confronted sizeable obstacles left by common and statutory anti-trust case law. Decisions such as the 1902 Connolly case may have seemed irrelevant to such advocates of cooperation as Sapiro, but to the courts they presented the difficult task of reconciling precedent with the new policy. The Supreme Court had held in Connolly that states could not except farmers from the general policy outlawing trusts and combinations in restraint of trade. The CMAs simply declared that cooperative associations were not combinations in restraint of trade. Pinning down the distinction between the two was so difficult that the high courts of Texas and Oregon, first to rule on the constitutionality of their respective CMAs, avoided the issue and upheld the statute as a valid exercise of legislative authority.<sup>62</sup>

In 1923, the North Carolina Supreme Court, speaking through Chief Justice Walter Clark, handed down what became

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<sup>61</sup>On Lochnerism, see Charles Warren, "The New Liberty Under the 14th Amendment," 39 Harvard L.R. 431 (1926); Charles W. McCurdy, "The Roots of Liberty of Contract: Major Premises in the Law of Employment, 1867-1937," unpublished paper presented at Boalt Hall School of Law, University of California at Berkeley, March 13, 1987.

<sup>62</sup>Hollingsworth v. Texas Hay Assn., 246 S.W. 1068 (Tex. Civ.App. 1922); Oregon Growers' Co-op. Assn. v. Lentz, 107 Ore. 561, 212 Pac. 811 (1923).

the leading case on the constitutionality of the CMAs: Tobacco Growers' Co-operative Association v. Jones.<sup>63</sup> In Jones, the association sued to obtain the statutory remedies of injunction against delivery elsewhere and liquidated damages from a member who had breached his contract. Clark held that the legislature's purpose in enacting the law was to protect the public by stabilizing agricultural markets; this purpose was grounded in the economic crisis of the post-war period, on the dangers of which Clark expounded at length in dicta. The rationale of the decision lay in the fact that the legislature had not permitted cooperative associations to do anything illegal but simply laid out the means for cooperatives to serve the public interest and the growers alike: "Instead of creating a monopoly, the object is by a rational method of putting the raw product on the market from time to time as there is a legitimate demand for its manufacturers, and by the extension of credit to farmers to enable this to be done, to prevent a monopoly of the tobacco industry by those who manufacture it."<sup>64</sup> Clark's elegant homily on the need for cooperation and his obvious faith in the statutory protections against potential abuse of the privileges granted to cooperatives indicated that he

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<sup>63</sup>185 N.C. 265, 117 S.E. 174 (1923).

<sup>64</sup>185 N.C., at 275.



found the Sapiro creed persuasive.<sup>65</sup> In Clark's view, the statute set out a "perfect regime" for achieving its stated purposes because it enabled farmers to help themselves at no cost to anyone else:

The producers are paying all the costs and assuming all the responsibilities of these cooperative associations. They are taking all the risks. They are asking no assistance from the public treasury. They are forcing no one to join, and they are exacting no inordinate prices for their product. They are associating themselves as authorized by the statute, like other persons, and they have signed mutual and fair agreements among themselves which will be futile unless those who have signed such agreements can be held to abide by the terms of their contracts.<sup>66</sup>

The Jones decision paved the way for numerous other state courts to find, as it did, that cooperatives "never can become a monopoly" due to the safeguards in the stat-

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<sup>65</sup>The tone of this opinion subjected Clark to accusations of unjudicial conduct; Edwin G. Nourse quoted attorney J.G. Mitchell as saying, "This opinion always impressed me as utterly lacking in judicial tone. The jurist who wrote it was noted as holding that the courts had little or no right to declare statutes unconstitutional." Nourse, Legal Status of Agricultural Cooperation, 367-68, at n. 5. Clark may have been a bit effusive in his support for cooperation, and his reasoning had far more to do with prevailing economic conditions than immutable legal principles, but Mitchell's criticism hinted at a preference for the conservative judicial style of the Lochner era, during which courts actively struck state regulation on the grounds that the state had no authority to interfere with the freedom of individuals to make their own bargains in the marketplace.

<sup>66</sup>Jones, 185 N.C., at 277.

ute.<sup>67</sup> Less than two months later, the Kansas Supreme Court upheld that state's CMA and its provisions for equitable remedies against breach of contract in Kansas Wheat Growers' Association v. Schulte.<sup>68</sup> In the following two years, Mississippi, Texas, Wisconsin, Kentucky, Tennessee, Arkansas, Alabama, Minnesota, Nebraska, Colorado, Iowa, Indiana, Ohio, and South Carolina followed suit.<sup>69</sup> All the courts agreed that cooperatives organized under and operated according to the Cooperative Marketing Act presented no threat to free

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<sup>67</sup>The decision, however, was far from theoretically sound. As economist Edwin G. Nourse noted, the court employed "somewhat extravagant" expressions of economic theory; in fact, Clark was so certain that cooperatives operated in the public interest that he relied on the statutory purpose to exonerate the association, without investigating the association's own practices and possible tendency towards monopoly, price-fixing, or production controls. Nourse, Legal Status of Agricultural Cooperation, 371.

<sup>68</sup>Kansas Wheat Growers' Assn. v. Schulte, 113 Kan. 672, 216. P. 311 (1923).

<sup>69</sup>Brown v. Staple Cotton Co-op. Assn., 132 Miss. 859, 96 So. 849 (1923); Texas Farm Bureau Co-op. Assn. v. Stovall, 113 Tex. 273 (1923); Potter v. Dark Tobacco Growers' Co-op. Assn., 201 Ky. 441, 257 S.W. 33 (1923); Dark Tobacco Growers' Co-op. Assn. v. Mason, 150 Tenn. 228, 263 S.W. 60 (1924); Dark Tobacco Growers' Co-op. Assn. v. Dunn, 150 Tenn. 614, 266 S.W. 308 (1924); Arkansas Cotton Growers' Co-op. Assn. v. Brown, 168 Ark. 504 (1925); Warren v. Alabama Farm Bureau Cotton Exchange, 213 Ala. 61 (1925); Minnesota Wheat Growers' Co-op. Marketing Assn. v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925); Nebraska Wheat Growers' Assn. v. Norquest, 113 Neb. 731, 204 N.W. 798 (1925); Rifle Potato Growers' Co-op. Assn. v. Smith, 78 Colo. 171, 240 Pac. 937 (1925); Clear Lake Co-op. Livestock Shippers' Assn. v. Weir, 200 Iowa 1293, 206 N.W. 297 (1925); Dark Tobacco Growers' Co-op. Assn. v. Robertson, 81 Ind. App. 51, 150 N.E. 106 (1926); List v. Burley Tobacco Growers Co-op. Assn., 114 Ohio St. 361, 151 N.E. 471 (1926); South Carolina Cotton Growers' Co-op. Assn. v. English, 135 S.C. 19, 133 S.E. 542 (1926).

competition in the marketplace. Before the World War and passage of the CMAs, cooperatives were regarded as illegal combinations; now, the legislatures had seen fit to revise that conclusion. It was, as the Wisconsin high court wrote in Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal,<sup>70</sup> simply a matter of adjusting the law to meet changed circumstances:

Such combinations and agreements have been condemned by the law because their existence was regarded as prejudicial to the public interest. If in the course of time changing conditions should give rise to economic views and public opinion wiping out the prejudice hitherto entertained with reference to such combinations and they should come to be regarded as beneficial rather than injurious to the public interest, there is no doubt of the power of the legislature to completely reverse the public policy of the state with reference to such combinations and agreements and to promote rather than suppress the same.<sup>71</sup>

The question of whether cooperatives inherently violated common and statutory laws that prohibited combinations in restraint of trade was settled by deferring to the legislature's authority to define which combinations were illegal and which were not. The CMAs settled that issue in favor of the cooperatives. Accordingly, the courts held that as long as cooperatives abided by the statutory conditions, they did not restrain trade. In Nebraska Wheat Growers' Association v. Norquest (1925), the court simply assumed that CMA coop-

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<sup>70</sup>182 Wis. 571, 197 N.W. 936 (1923).

<sup>71</sup>Id. at 588-59.

eratives did not threaten competition: "That it [the plaintiff] is without the evil aimed at by antitrust laws is proved by its being open to all, its profits, if any, divided without preference, and there being nothing within its scope or procedure which tends to control prices, restrain trade, or prevent competition."<sup>72</sup> This test, derived from the purpose of the statute, laid the burden of proving anti-trust violations on the party challenging the CMA; if no proof of the cooperative's tendency to lessen competition were presented, the courts assumed no violation. As the Indiana court noted in Dark Tobacco Growers' Co-operative Association v. Robertson, (1926), "[Appellant] has neither coerced nor suppressed any competition. It has not arbitrarily fixed or maintained prices. It has not been guilty of unfair or fraudulent rivalry. It has not limited production or created an artificial scarcity."<sup>73</sup> No court except Mississippi stopped to reconcile the earlier rulings in Ford v. Chicago Milk Association, People v. Milk Exchange, or Georgia Fruit Exchange v. Turnipseed;<sup>74</sup> the Mississippi

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<sup>72</sup>Nebraska Wheat Growers' Assn. v. Norquest, 113 Neb. 731, 204 N.W. 798 (1925), at 734.

<sup>73</sup>Robertson, supra n. 69, at 115 (1926). See also Dark Tobacco Growers' Co-op. Assn. v. Dunn, Minnesota Wheat Growers' Assn. v. Huggins, and Potter v. Dark Tobacco Growers' Co-op. Assn., supra n. 69.

<sup>74</sup>Ford, 155 Ill. 166, 39 N.E. 651 (1896); Milk Exchange, 145 N.Y. 267, 39 N.E. 1062 (1898); Turnipseed, 9 Ala. App. 123, 62 So. 542 (1903), discussed in chapter 2 of this study.

court distinguished them as presenting direct evidence of price-fixing (Ford and Milk Exchange) or as having been overruled by higher courts (Turnipseed).<sup>75</sup> Most courts seconded the sentiments of the Minnesota court in Minnesota Wheat Growers Co-operative Marketing Association v. Huggins: "The citizenom of the state is not complaining."<sup>76</sup>

But for some courts, such as Iowa, precedent was not easily waved aside. Even as it recognized the purpose of the statutory section granting remedies and enforcement powers to the contracts, the Iowa court refused to vitiate state anti-trust law. Instead, it adhered to a strict reading of the statute and held that since the CMA contained no repeal clause, the earlier anti-trust statute remained valid. As long as a cooperative acted merely as a selling agency--as opposed to a buyer's trust--it was protected by the CMA.<sup>77</sup> Colorado, another state with an antipathetic precedent on its books (Burns v. Wray Farmers' Grain Co.<sup>78</sup>) upheld its state's CMA on similarly narrow grounds in Rifle Potato Growers' Association v. Smith: "[T]he Act of 1923 changes the public policy of this state and the contract in

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<sup>75</sup>Brown v. Staple Cotton Co-op. Assn., supra n. 69.

<sup>76</sup>Huggins, supra n. 69, at 475.

<sup>77</sup>Clear Lake Co-op. Live Stock Shippers' Assn. v. Weir, supra n. 69, at 299-300.

<sup>78</sup>Burns, supra n. 48. See chapter 2.

this case follows the Act."<sup>79</sup>

The tendency of courts to grant the premises of the statute and uphold it on policy grounds gradually evolved into the hardened judicial attitude that the CMAs defined all policy with respect to cooperatives. Reinforcing this attitude was the statute's clause permitting cooperatives to reorganize in accordance with its conditions. Any cooperative activity conducted outside the scope of the statute, then, became tainted as less than legitimate. Since courts upheld the CMAs primarily on policy grounds, this approach constricted the legal forms available to cooperatives. A Texas appeals court made this clear in Fisher v. El Paso Egg Producers' Assn., decided in 1925. There the defendant cooperative was not organized under the CMA; it purchased eggs outright from its members rather than as a selling agent; thus, it was culpable under the anti-trust law: "Had appellee association perfected an incorporation as the act itself, under which clearly it was organized and as its contracts show its members contemplated it should do, it would have been relieved of the questions presented."<sup>80</sup> Colorado followed this rule in two cases following Rifle Potato, holding that the CMA did not apply retroactively and contracts antedating the CMA did not come under its provi-

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<sup>79</sup>Rifle Potato Growers' Assn., supra n. 69, at 174.

<sup>80</sup>Fisher v. El Paso Egg Producers' Assn., 278 S.W. 262 (Tex.Civ.App. 1925), at 264.

sions.<sup>81</sup> Sapiro-style cooperation had indeed gained acceptance as the only kind of "true cooperative marketing association" permissible under the law.<sup>82</sup> Traditional Rochdale cooperatives--organized with capital stock under the cooperative incorporation laws--did not constitute legally valid forms of cooperation. But it was the CMA cooperatives that achieved the degree of anti-trust exemption denied to traditional cooperatives.

A notable omission from the roll of states upholding the CMAs, however, marred the forward progress of the cooperative movement. In California, fountainhead of Sapiro's commodity marketing ideal and the one state in which cooperatives had in fact been prosecuted as monopolies in violation of federal anti-trust law, doctrine and politics complicated judicial interpretation of the CMA and thwarted Sapiro's attempts to put a suitable case before the Supreme Court. The sources of this difficulty can be glimpsed in cases that preceded the enactment of the CMA. In Anaheim Citrus Fruit Association v. Yeoman, decided in 1921,<sup>83</sup> the cooperative sued for liquidated damages as set out in its by-laws. The appellate court held that liquidated damages were an appropriate remedy under the California Civil Code,

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<sup>81</sup>Atkinson v. Colorado Wheat Growers' Assn., 77 Colo. 559, 238 P. 1117 (1925); Colorado Wheat Growers' Assn. v. Thede, 80 Colo. 529, 235 P. 30 (1927).

<sup>82</sup>Sapiro, "Cooperative Marketing," 205-06.

<sup>83</sup>51 Cal.App. 759, 197 P.959 (1921).

which permitted the parties to fix liquidated damages in advance when it proved impractical to estimate actual damages. No question of anti-trust violation was raised in the case. Neither was anti-trust at issue in Poultry Producers of Southern California v. Barlow,<sup>84</sup> handed down in July, 1922, with facts similar to Yeoman. There was one major difference; in addition to asking for liquidated damages, the plaintiff cooperative sought the equitable remedy of specific performance and injunction against the defendant's selling to anyone other than the cooperative. The Supreme Court upheld the award of liquidated damages but denied specific performance on a technicality: lack of mutuality. The contract imposed more obligations on the member than on the cooperative, but the Civil Code required contracts to be mutually binding before specific performance could be awarded. Thus the court held it had no alternative but to leave the cooperative to its remedy at law. In dicta, however, the court indicated that if the code requirement were not present, it would grant the relief requested because of the distinctive nature of the marketing contract:

Were it not for the doctrine of mutuality of remedy as a prerequisite to the equitable relief here demanded, there would seem to be no good reason for denying respondent the more adequate relief that would be thus afforded to marketing corporations such as this which are more or less dependent for their efficient maintenance and operation upon [their] ability to specifically

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<sup>84</sup>Barlow, supra n. 48.



enforce the mutual obligations of their members.-  
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The California CMA was passed in direct response to the Barlow case.<sup>86</sup> But the next appellate case did not involve the statute. Instead, Poultry Producers of Central California v. Murphy, decided in November, 1923, gave the court the opportunity to reaffirm Barlow and the appropriateness of the common law remedy of liquidated damages.<sup>87</sup> Murphy, however, had a strange twist that Barlow did not. Murphy, the producer, had signed the membership agreement but not the marketing contract; the court held him to his promise to sign the marketing contract, giving the cooperative specific performance in effect if not in name. Nevertheless, Sapiro --who had argued both Barlow and Murphy--came away without judicial sanction for the cooperatives' right to specific performance. His best chance for such a decree was the case of California Prune and Apricot Growers' Association v. Pomeroy Orchard Company, decided by a trial court in late 1924. The lower court followed Barlow rather than the CMA, dissolved the temporary restraining order against three

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<sup>85</sup>Barlow, supra n. 48, at 295.

<sup>86</sup>Note, "Specific Performance: Contracts Specifically Enforceable: Contracts for the Co-operative System of Distribution of Agricultural Products under Section 653pp, California Civil Code," 12 California L.R. 147 (1925).

<sup>87</sup>Murphy, 64 Cal.App. 450, 221 P. 962 (1923).

growers, and left the cooperative to its legal remedy of damages. By the time the appeal reached the California Supreme Court, all three defendants had sold not only all their prunes but also their orchards, mooting the issue of whether the lower court properly dissolved the injunction. The Court recognized that the case raised larger policy questions that were important to "the people of the state of California," but ruled that a mooted action was not the proper case in which to decide those questions.<sup>88</sup> As a result of the mooted appeal in Pomeroy, the California judiciary never ruled on the legality of equitable remedies or indeed on the constitutionality of the state's CMA.<sup>89</sup>

California was not the only state to give the CMA a qualified reception. Other state courts chose a less direct route to accomplish the feat of endorsing the policy while whittling away the broad enforcement provisions. The pattern established in Jones and other leading cases in the Midwest and South was to uphold in general terms the consti-

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<sup>88</sup>California Prune and Apricot Growers' Assn. v. Pomeroy Orchard Company, 195 Cal. 264 (1925).

<sup>89</sup>In a case subsequent to Pomeroy, an intermediate appellate court affirmed the remedy of liquidated damages, but the court again avoided construing the statute and adjudicated the dispute on common law rules alone. California Canning Peach Growers v. Downey et al., 243 P. 679 (1925). Another case not construing the statute involved a marketing contract that expired before the CMA was enacted; the cooperative sought liquidated damages for past injury, instead of specific performance to compel future compliance with the contract. California Bean Growers' Assn. v. Rindge Land and Navigation Co., 199 Cal. 168, 248 P. 658 (1926).

tutionality of the act as a valid exercise of legislative authority to declare public policy. Then, once the CMAs had been sustained as an expression of public policy in favor of cooperative marketing, some courts restricted the conditions under which equitable remedies could be imposed.

The legality of allowing cooperatives recourse to equitable remedies for breach of the marketing contract varied over time and across jurisdictions. Prior to the adoption of the CMAs, states had divided over the issue of liquidated damages. Iowa, of course, had held in the Reeves and Ludowese cases that they restrained trade and imposed an illegal penalty.<sup>90</sup> Alabama followed this result in Georgia Fruit Exchange v. Turnipseed, Colorado in Burns v. Wray Farmers' Grain Co.<sup>91</sup> But later in the 1910s decisions in New York, Alabama, and Indiana upheld liquidated damages as a reasonable estimation of damages for which no adequate remedy at law existed.<sup>92</sup> In addition, the California decisions in Yeoman and Barlow also upheld liquidated damages at common law.

The early CMA cases gave unqualified assent to the

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<sup>90</sup>Reeves v. Decorah Farmers' Co-op. Society, *supra* n. 32; Ludowese v. Farmers' Mutual Co-op. Co., 164 Iowa 197, 145 N.W. 475 (1914).

<sup>91</sup>Turnipseed, *supra* n. 74; Burns, *supra* n. 78.

<sup>92</sup>Castorland Milk and Cheese Assn. v. Shantz, Bullville Milk Producers' Assn. v. Armstrong, Ex parte Baldwin County Producers' Co., *supra* n. 48; Burley Tobacco Society v. Gillaspay, 51 Ind. App. 583, 100 N.E. 89 (1912).

liquidated damages provision. Oregon jumped on the bandwagon with a common law decision in 1921, Phez Co. v. Salem Fruit Union, and another case two years later, Oregon Growers' Co-operative Association v. Lentz, in which it favorably construed the equitable remedies provision of the CMA.<sup>93</sup> The Kentucky Supreme Court laid down the rule on liquidated damages in Potter v. Dark Tobacco Growers' Cooperative Association:

It would be utterly impossible to ascertain the damage that would result to the co-operative effort from a breach . . . by one or more of their members, and it was both wise and provident, if not essential for attainment of their purposes, that they agree on a basis for estimating same, and the legislature . . . expressly authorized them so to do, although that right clearly existed without such express authority.<sup>94</sup>

Since there was no evidence to suggested that the amount fixed in the contract was unreasonable, the court counted it as proper damages rather than a penalty. The test had become one of reasonability rather than per se invalidity as a penalty. Certainly that signified an improvement over the result in Reeves, but the standard was far from universally adopted, contrary to Sapiro's public assertion.<sup>95</sup>

For example, New York applied the reasonability test to

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<sup>93</sup>Phez, 103 Ore. 514, 201 P. 222 (1921); Oregon Growers' Co-op. Assn. v. Lentz, 107 Ore. 561, 212 P. 811 (1923).

<sup>94</sup>Potter, supra n. 69, at 448.

<sup>95</sup>Sapiro, "The Law of Cooperative Marketing Associations," 11.

a dairy cooperative and found that its liquidated damages exceeded its actual marketing costs by over \$1100. Despite its recognition that the bargain was one in which it would be nearly impossible to estimate actual damages, the court held that the cooperative had made no attempt to do so: "It can hardly be said that such an amount has any fair relationship to damages which would ordinarily be suffered in like circumstances."<sup>96</sup> The penalty rule, then, lived on.

Similar hedging took place with other remedies. The right to specific enforcement of the contract, for example, was designed to ensure that the member would actually deliver his crop to the cooperative. Kentucky's supreme court enthusiastically supported this provision, indicating that it thought the remedy proper even if there were no express statutory authorization.<sup>97</sup> Minnesota, in Minnesota Wheat Growers' Co-operative Marketing Association v. Huggins,

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<sup>96</sup>Dairymen's League Co-op. Assn. v. Holmes, 202 N.Y. Supp. 663, at 674 (1924). The New York statute involved was not a CMA but a corporation code provision entitling non-profit associations to liquidated damages; the difference between the two is less relevant than the court's willingness to enforce the reasonability rule in such a way as to call into question the customary method of fixing liquidated damages. California cooperatives imposed a set cost per unit marketed (for example, 2 cents per pound of raisins). The Dairymen's League damages ran \$10 for each cow up to 30 and \$3 for each cow above 30; defendant Holmes happened to have 330 cows, enough to run his tab well over the marketing costs for his contribution--the figure the court chose as the proper estimate of damages. The court recognized the difficulty of estimating actual damages but still it chose a method to do so when the amount of liquidated damages appeared unreasonable.

<sup>97</sup>Potter, supra n. 69, at 448.

framed the issue in terms of the parties' intent: "We must conclude that the parties intended that the contract would be enforced, and it will be."<sup>98</sup> But other jurisdictions, rather than award specific performance, enjoined the member from selling to anyone other than the cooperative. The difference was slight but significant. Specific performance forced the member to deliver to the cooperative, and as several courts ruled, this constituted involuntary servitude that unjustly infringed on the liberty of the individual to deal freely in the market. Some courts, like Kansas in Kansas Wheat Growers' Association v. Schulte, believed that an injunction would achieve the desired result of actual delivery: "The only adequate remedy is injunction, preventing the member from selling to others and thus forcing the delivery of the wheat to the association."<sup>99</sup> But no injunction could recover crops already sold to outsiders or, as Sapiro found in Pomeroy, prevent growers from selling their lands and escaping their obligations.

Even in cases that upheld specific performance, courts imposed limits on the remedy. The leading case of Oregon Growers' Co-operative Association v. Lentz refrained from

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<sup>98</sup>Huggins, supra n. 69, at 486. Other decisions granting specific performance were Brown v. Staple Cotton Co-op. Assn., Nebraska Wheat Growers' Assn. v. Norquest, Dark Tobacco Growers' Assn. v. Dunn, Texas Farm Bureau Cotton Assn. v. Stovall, supra n. 69; and Hollingsworth et al. v. Texas Hay Assn., (Tex. Civ. App.), 246 S.W. 1068 (1922);

<sup>99</sup>Schulte, supra n. 68, at 685.

extending the injunction to cover all the defendant's lands, in addition to the nineteen acres named in the contract. Even assuming that the contract covered all the defendant's property, the court held that it was inappropriate to award the remedy until an actual breach occurred with respect to those additional lands.<sup>100</sup> The rule of geographic limitation was followed in a Washington case that came on the heels of Lentz. In Pierce County Dairymen's Association v. Templin, the trial court awarded an injunction covering not only the defendant's lands in Pierce County but any lands in "adjoining counties." On appeal, the state high court restricted the order to Pierce County alone.<sup>101</sup>

The most damaging constructions of the CMA remedies arose in relation to two important elements of Sapiroism: the "conclusive presumption" that a member was responsible for the delivery of all crops produced by tenants, effectively binding the tenants when they were not parties to the contract; and the enforcement powers and criminal penalties against third parties for willfully inducing members to breach their contracts and deliver elsewhere. The first was intended to safeguard the interests of the cooperative when the landowner was no longer directly responsible for production and delivery of the crop. The second addressed a problem that had acutely undercut the strength of the tobac-

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<sup>100</sup>Lentz, supra n. 93, at 585-86.

<sup>101</sup>Templin, 124 Wash. 567, 215 P. 352, at 574 (1923).

co associations in the upper South--the tendency of private warehouses and brokers to coax growers to break their contracts, undermining the association's crop control. The Kentucky appellate courts hastened to authenticate these provisions. Feagain v. Dark Tobacco Growers' Cooperative Association (1924) ruled that the tenant, once he became aware of the contract, "merely stepped into the shoes" of the landowner and so assumed all contractual obligations. To hold otherwise, the court reasoned, would enable all landowners to "defeat [their] obligations" and thwart the state's purpose in enacting the statute.<sup>102</sup> The Kentucky Supreme Court also upheld the remedies against third-party interference, in Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Association (1925).<sup>103</sup> In that case the court extended its reasoning in Potter, where it had ratified the general policy underlying the Bingham Act, to cover agreements the statute sought to protect: "If the contract is one in furtherance of a legislatively declared purpose, than it was no doubt competent for the legislature to throw such restraints around it as were reasonably necessary to protect its integrity." Thus the imposition of criminal penalties against the third party was well within the legislature's power "to preserve the integrity of the con-

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<sup>102</sup>Feagain, 202 Ky. 801, 261 S.W. 607, at 803 (1924); see also Dark Tobacco Growers' Cooperative Assn. v. Daniels, 284 S.W. 399 (1926).

<sup>103</sup>Liberty Warehouse, 208 Ky. 643, 271 S.W. 695 (1925).



tract."<sup>104</sup>

But other jurisdictions saw the matter not in terms of the proper exercise of legislative power but of the need to protect the private rights of third parties who were merely acting upon their constitutional freedom in the market. Less than one month after Kentucky decided Liberty Warehouse, Minnesota struck the entire section dealing with third party penalties for inducing breach. In Minnesota Wheat Growers Co-operative Marketing Association v. Radke, the court's preoccupation with liberty of contract took precedence over the legislature's avowed purpose in enacting the regulation, despite the fact that the court had upheld the CMA just two months before. The obligations mutually and voluntarily undertaken by the association and its members, legal and enforceable on their own terms, did not encompass individuals not a party to the agreement: "[N]o consent can be imputed to nonmembers. No contractual relation exists between them and the association or its members." Thus, the state could not make it a crime for a third party "who has used no effort, or held out no inducement for a member of a co-operative market [sic] association to breach his contract with the association." This constituted an impermissible interference with the rights of that third party: "In other words, the section attempts to

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<sup>104</sup>Id. at 650. The remedies for third party interference were also upheld in Texas. Hollingsworth et al. v. Texas Hay Assn., supra n. 98.

prevent all dealings between members of a co-operative marketing association and outsiders in respect to products contracted for by the association, no matter how free from legal malice or devoid of inducements the conduct of the outsiders may have been, provided they knew that the product was under contract."<sup>105</sup>

The strong language of the Minnesota court, invoking the liberty of contract "assured by both state and Federal Constitutions," indicated that judges had reached the limits permitted by prevailing adherence to liberty of contract doctrine. State courts that had approved the statutory policy of cooperative marketing in the early part of the 1920s were finding ways to blunt the power of the legislature by mid-decade. Five months after upholding the CMA in Bekkedal (1923), the Wisconsin court modified the restraining order along the lines of the Minnesota Radke decision. As long as the third party did not induce breach in any way by interfering with the contract between the association and the member, he was free to purchase tobacco from those "who shall have voluntarily breached their contract" with the association. The court perceived "no reason . . . why appellants should be denied the privilege of buying" from members who terminated their membership of their own accord.<sup>106</sup> The concern of judges in both Wisconsin and

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<sup>105</sup>Radke, 163 Minn. 403, 204 N.W. 314, at 406 (1925).

<sup>106</sup>Bekkedal, supra n. 70, at 598-99.

Minnesota was to protect the "ordinary course of a legitimate business" from what could potentially become an oppressive cooperative regime.<sup>107</sup> As long as the third parties committed no tort in inducing breach, the courts held, there was no reason why they should be barred from purchasing in the market like anyone else. Unlike the Kentucky court, these courts held that the particular problems of tobacco marketing and the legendary interference of warehouses and commission brokers did not provide sufficient justification for overriding the constitutional rights of independent third parties.

Other courts employed similar language and the liberty of contract rationale to narrow the cooperatives' authority to enforce marketing contracts against tenants. North Carolina required express statutory authorization for such a rule, and in its absence the court held that no member was liable for the tenant's failure to deliver.<sup>108</sup> Louisiana struck the entire subsection relating to tenants. Despite Sapiro's appearance and argument on behalf of the cooperative in Louisiana Farm Bureau Cotton Growers' Cooperative Association v. Clark, the court ruled that the statutory presumption that the landlord controlled the disposition of all crops produced on the land deprived the tenants of

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<sup>107</sup>Radke, supra n. 105, at 407.

<sup>108</sup>Tobacco Growers' Cooperative Assn. v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924).

property without due process of law. The state could not enforce the remedies for breach against the tenant: "These particular clauses . . . are unconstitutional, null, and void, as being a patent invasion by the Legislature of this state of the constitutional right to liberty of contract, secured to the tenants of defendant under the Fourteenth Amendment to the Constitution of the United States."<sup>109</sup>

The courts used the liberty of contract rationale to defeat the purpose of the CMAs only with regard to third parties. Where the grower members were concerned, there was no infringement of liberty of contract because, as the courts presumed, all members joined freely. "Farmers are characteristically meticulous," the Minnesota court grandly stated in Huggins; "no one . . . is forced to join [but] does so voluntarily." Thus, the court ruled, "Defendant . . . assumed the obligation of his contract because he wanted to."<sup>110</sup> The statute neither took property without due process nor infringed on a person's right to bargain freely in the market. Rather, it enabled farmers to form associations for their mutual benefit with the protective arm of the state to protect them from member breach.

Members did attempt to evade the obligations of their

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<sup>109</sup>Clark, 160 La. 294, 107 So. 115 (1926). The court reached the same result in Louisiana Farm Bureau Cotton Growers' Co-op. Assn. v. Bannister, 161 La. 957, 109 So. 776 (1926); and Louisiana Farm Bureau Cotton Growers' Co-op. Assn. v. Bacon et al., 164 La. 126, 113 So. 790 (1927).

<sup>110</sup>Huggins, supra n. 69, at 475, 483.

contracts by attacking the statutes as unconstitutional class legislation. Scarcely a case was tried where counsel for the grower failed to cite Connolly v. Union Sewer Pipe Co. But to assert the unconstitutionality of the classification the growers had to prove that the statute denied them their right to equal protection of the laws. This proved a difficult task because the growers belonged to the class distinguished by the statute, putting them in the position of challenging the very privileges agricultural interests had fought so hard to win.

In cases such as Potter, then, where the dispute pitted the association against one of its own members, courts perceived no equal protection problem. The issue revolved around the reasonability of the classification. The Kentucky court wholeheartedly approved of the statute's purpose; it then endorsed the means by which it achieved that purpose--the separate classification of farmers in associations specially organized to carry out economic policies in the public interest: "[I]n our judgment, it is because of basic economic conditions affecting vitally not only the farmers but also the public weal, that the classification based upon agricultural pursuits is reasonable, just, and imperative for the good of the entire nation and every citizen thereof." Why was the classification reasonable in 1923 when it had not been twenty years before? Because public opinion, reflected in the Clayton and Capper-Volstead

Acts as well as the flood of CMAs, disclosed the arrival of "an enlightened public policy," the goals of which were served rather than undermined by classification and combination.<sup>111</sup>

But simple judicial agreement with the policy of the CMAs did not fully dispose of the Connolly rule requiring the classification to be rational and reasonably related to the purpose of the statute. As the Minnesota court noted in Huggins, "The question of classification presented is one of the power of the legislature and not the policy of the exercise of the power." In order to distinguish Connolly, then, the courts had to determine whether the classification in the CMAs met the 14th Amendment's requirement "that the law have the attributes of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such but on persons according to their relation."<sup>112</sup>

The reasonability of the relation between the classification and the purpose of the statute rested in the peculiar nature of agricultural marketing and the state's legitimate aim in stabilizing agricultural markets. The CMA's purpose and the activities in which it authorized cooperatives to engage were legitimate; they neither permitted farmers to manipulate supply, production, or prices nor gave some

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<sup>111</sup>Potter, supra n. 69, at 445-46.

<sup>112</sup>Huggins, supra n. 69, at 482.

producers an advantage over others. The Wisconsin court in Bekkedal, in finding the classification constitutional, relied on the difference between cooperatives and illegal trusts to illustrate its reasoning:

That there is an inherent difference with reference to the resulting effect to society between a combination of a strong and powerful few who are able to get together and exercise a complete control over a particular industry or commodity essential to social existence, and a combination of farmers, each weak in his individual strength and power, numbering into the millions and scattered far and wide, is reasonably apparent. . . . To say that society cannot prohibit combinations which are detrimental without at the same time striking down co-operative associations which are beneficial, is to deny the most fundamental basis of all classification.<sup>113</sup>

In other words, the rule of reason devised by the Supreme Court to blunt the literalism of Sherman Act case law also applied to the literalism of equal protection in legislative classification cases. The classification was made for a valid purpose; it applied equally to all within the class, and it did not countenance acts otherwise illegal. The state courts could not move the Connolly boulder from the road, so they--like the Supreme Court itself--went around it instead.<sup>114</sup> As the Minnesota court noted, "The purposes of

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<sup>113</sup>Bekkedal, supra n. 70, at 594-95.

<sup>114</sup>While the Supreme Court had not explicitly overruled Connolly (and did not do so until Tigner v. Texas, 310 U.S. 141 (1940)), signs from the Taft Court indicated that the rule was being relaxed. The Wisconsin court, among others, looked to Justice Louis Brandeis's dissenting opinion in Truax v. Corrigan, 257 U.S. 312 (1921), in which the Justice eloquently

our co-operative marketing law are broad and of course include everyone alike. No one engaged in this occupation, no matter how little, is excluded therefrom." Thus, Connolly could be easily evaded: "The law in question classifies an industry and makes this law apply with absolute equality to all of those who bring themselves within the conditions imposed by the law and we are of the opinion that it in no way violates the Fourteenth Amendment."<sup>115</sup>

The state courts endorsed this view so overwhelmingly that few legal commentators undertook to examine its premises. Most lawyers were persuaded that Sapiro's commodity marketing plan was legally sound and that its acceptance marked the inexorable evolution of judicial acceptance of the new policy. Mathew O. Tobriner was among the few who

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argued in support of the state's right to legislate on behalf of organized workers. Other state legislative classifications upheld during this time included a Pennsylvania law exempting bituminous coal from a tax on all anthracite coal mined in the state (Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)); the exemption of sugar cane farmers from the tax on processed sugar in Louisiana (American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1901)); protective laws for women workers (Muller v. Oregon, 208 U.S. 412 (1908)); a law prohibiting combinations among makers or sellers of products but not among purchasers (International Harvester Co. v. Missouri, 234 U.S. 199 (1914)); a law setting out special rules for the issuance of crop insurance (National Fire Insurance Co. v. Wanberg, 260 U.S. 71 (1922)). But the Court went the other way in cases dealing with child labor, minimum wage laws, and laws supporting the right of organized workers to strike and to be paid in legal tender rather than company scrip. Adkins v. Children's Hospital, 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918); Coppage v. Kansas, 236 U.S. 1 (1915).

<sup>115</sup>Huggins, supra n. 69, at 480, 482; see also Potter, supra n. 69, at 447.



viewed with skepticism the CMAs and the courts' rationale in endorsing them. Writing in the California Law Review in 1928, he professed no enduring attachment to the precedent in Connolly, and he acknowledged that the special case of the farmer might justify separate classification. But he argued that the CMAs did not enable cooperatives to do anything they were not previously entitled to do under the separate incorporation laws, and in fact Sapiro organizations in fruit, tobacco, wheat, and dairy engaged in the very activities the courts presumed they would not. To buttress this argument, Tobriner presented the results from his co-authored textbook on cooperative marketing: many cooperatives routinely fixed prices; further, they would have imposed production controls to deal with chronic surpluses if they could have gotten away with it. It was customary not only to fix prices at the beginning of the selling season but to guarantee them against later decline, not only in the raisin industry but also in other dried fruits and the urban milk cooperatives. The Minnesota Wheat Growers Association set minimum prices and bound members and dealers alike to its schedules. These activities, Tobriner asserted, made it illogical, if not unconstitutional, for the courts to evade Connolly. If the mechanisms in the statute for protecting the public proved ineffectual, what grounds remained for the classification itself? Tobriner concluded, ominously, "It is apparent that the language of

the Connolly case does specifically condemn the cooperative association; and even if the decision itself may be avoided the words can not be."<sup>116</sup>

The real problem, as Tobriner pointed, out, was that in their rush to distinguish Connolly away, the courts chose not to examine the activities of the cooperatives under the anti-trust laws. With the courts unwilling to accept the fact that cooperatives could and did violate the anti-trust laws, the constitutionality of the CMAs rested on rickety pilings. In order to sustain the classification in the CMAs, the courts ended up saying that farmers did not enjoy a privilege denied to everyone else--the privilege to restrain of trade--because cooperatives did not violate the anti-trust laws. As Tobriner noted, this approach reduced the courts "to narrow the statutes to a mere declaration of existing law." Thus, Connolly, weakened by subsequent rulings,<sup>117</sup> was not the primary problem. It was the absence of judicial findings as to whether cooperatives in fact re-

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<sup>116</sup>Tobriner, "The Constitutionality of Cooperative Marketing Statutes," 17 California L.R. 19, 29 at n. 34 (1928). Whether or not a court deemed the cooperative to be acting in unreasonable restraint of trade, Tobriner contended, the CMA proffered no meaningful shield. If cooperatives violated the anti-trust laws, the CMA was no bar to prosecution: "if the legislature has differentiated between two harmful organizations, the court might well incline to hold that the legislature has done so arbitrarily. The statute, then, is unconstitutional" (29). If the cooperative did not restrain trade, the CMA was superfluous, and its constitutionality was irrelevant.

<sup>117</sup>See cases cited n. 114.

strained trade, and, if so, whether the CMAs properly exempted them from the anti-trust laws. The state court rulings during the 1920s all presumed that cooperatives could not monopolize the commodities they marketed; that the marketing contracts were a legitimate means of securing membership; and that the statute's guarantees of public supervision provided sufficient protection against restraint of trade. Indeed, the sentiment expressed in the Dunn case was typical of judicial attitudes towards cooperation: "We are impressed with the idea that co-operative marketing of farmer products is an economic necessity."<sup>118</sup>

Tobriner's suggestion was a conservative legal idea but a radical political concept: return the classification to one of farmers rather than cooperatives. Classification of farmers was reasonable, by virtue of their exceptional marketing problems.<sup>119</sup> Classification of cooperatives was not, despite the public supervision provided in the CMAs, because their proclivity to restrain trade meant that they were no different from any other illegal combination. But his recommendation fell on deaf ears. Connolly had prohibited separate classification of farmers under the anti-trust laws. As long as that precedent remained good law, few legislatures would dare to classify according to personhood

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<sup>118</sup>Dunn, supra n. 69, at 620.

<sup>119</sup>Tobriner, "Constitutionality of Cooperative Marketing Statutes," 34.

or occupation. The strict equality of Lochner jurisprudence presumed that all people stood on equivalent economic footing regardless of their status. It was expedient both legally and politically to distinguish according to organizations like special corporations in order to dispense public privileges to individuals. Sapiro's statutes provided an attractive, alternative method of exempting farmers from the anti-trust law.

The courts, satisfied with the legislatures' declaration of an apparently reasonable policy to meet the economic necessity, looked no further than the constitutional issue in Connolly for grounds to uphold the statutes. The state courts' failure to inquire more rigorously into the market behavior of cooperatives is surprising, given the larger context of the era of substantive due process in constitutional jurisprudence. But an explanation may lie in the fact that state courts took for granted the special status of cooperatives. Few public officials differed with this assessment. Indeed, its widespread acceptance at the administrative level contributed to the courts' disinclination to undertake a more rigorous examination of the trust-like behavior of cooperatives.

#### Cooperatives and Substantive Due Process

The federal courts shared the state judiciary's sympathy with the economic plight of the farmer. They, too,

were disinclined to investigate the market behavior of cooperatives and determine whether their restraint of trade was permissible under anti-trust law. The only consideration of cooperatives' anti-trust status arose when non-farmer litigants asked the courts to reconcile the anti-trust laws' ban on all combinations in restraint of trade with the CMAs' exemption for agricultural associations. The Supreme Court gave the Bingham Act and the public policy of cooperative marketing its wholehearted approval in an appeal of the Kentucky Court of Appeals decision in 1928. But, when presented with the claims of persons who did not belong to the class exempted in the statute, the Supreme Court invoked the doctrine of substantive due process to protect property rights from state regulation.

With the state courts unwilling to reconcile the absolute bans contained in their anti-trust laws with the exemption for agricultural associations in the CMAs, some litigants took their claims to federal court. In 1925, four commercial creameries sued to enjoin Colorado from enforcing that state's anti-trust law against them. The plaintiffs in Beatrice Creamery Co. v. Cline<sup>120</sup> argued that the anti-trust law was unconstitutional because the Colorado CMA permitted farmers to engage in activities for which they were being prosecuted. The federal district court, quoting at length

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<sup>120</sup>Beatrice Creamery Co. v. Cline, 9 Fed.2d 176 (D.C.D.Colo. 1925).

from the equal protection analysis in Connolly, agreed. The district court was willing to say what the state courts would not, though it cited no evidence for its conclusion: "Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the Act would, in fact, be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black."<sup>121</sup> In other words, the state could not have it both ways; it could either prohibit all combinations that restrained trade, or it could parcel out dispensations as it pleased and send them up against the Connolly edifice. Since the CMA was the more recent statute, it stood as the legislature's current statement of policy, and accordingly the state anti-trust act fell. The district court reached this conclusion because the cause of action and the facts exactly duplicated the controversy in Connolly; the only difference was that the exemption for farmers was contained in a separate statute rather than the one under direct attack. But the result was the same.

When a case testing the constitutionality of the CMAs reached the Supreme Court, however, it did not present the same contrast between a state anti-trust law and the cooperative marketing law. In fact, Sapiro could not have chosen

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<sup>121</sup>Id. at 177.

a better case to argue before the Supreme Court than the appeal by the warehouse company in Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Marketing Association (1928).<sup>122</sup> The Kentucky legislature had had the foresight to repeal its anti-trust act the year it passed the Bingham Act. Accordingly, the strategy employed in Beatrice Creamery was not available to the attorneys for the warehouse company, and they had to attack the Bingham Act by arguing that it conflicted with the common law. This approach necessarily diluted the force of the Warehouse Company's equal protection claim. It also enabled the Supreme Court to mimic the state courts and avoid consideration of whether cooperatives actually violated the anti-trust laws.

The Supreme Court adhered to the findings of the state courts and held unanimously that the Bingham Act did not violate the 14th Amendment. Speaking through Justice McReynolds, the court confined the Warehouse Company's federal claims to the sole question of whether the penalties levied against third parties for inducing breach of contract violated the equal protection clause. On this issue the Court found no problem, because the statute did not differentiate among potential violators of the provision: "The statute penalizes all who wittingly solicit, persuade, or induce an association member to break his marketing contract. It does not prescribe more rigorous penalties for

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<sup>122</sup>Liberty Warehouse, 276 U.S. 71 (1928).

warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen." Thus, Connolly did not apply; it presented the problem in which one firm "was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference--no one could lawfully do what the Warehouse Company did."<sup>123</sup>

The anti-trust claims were dispatched with similar myopic logic. Counsel for the Warehouse Company pleaded with the Court to hold that the association comprised "a new form of combination" with a "necessary tendency . . . to suppress competition in trade between the States."<sup>124</sup> But the Court found no allegation in the brief that the Burley Tobacco Association burdened interstate commerce; hence no federal anti-trust statute was material. And the Warehouse Company's reliance on the common law proved to be a rope of sand: "A State may freely alter, amend, or abolish the common the law within its jurisdiction." With no state anti-trust law on the books, the Warehouse Company could not prove that the combinations authorized by the Bingham Act would otherwise have been unlawful: "Undoubtedly the State had power to authorize formation of corporations by farmers

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<sup>123</sup>Id. at 91.

<sup>124</sup>Id. at 77-78.



for the purpose of dealing in their own products."<sup>125</sup> The constitutionality of the Bingham Act rested, as the state courts had found, in the validity of the statute's purpose and the reasonability of the classification effecting that purpose: "The co-operative marketing statutes promote the common interest. . . . The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint--not immunity from reasonable regulation to safeguard the public interest."<sup>126</sup>

The narrowness of the ruling in Liberty Warehouse--and the judicial confusion over the legal status of cooperatives--became apparent two years later. The case of Frost v. Corporation Commission of Oklahoma,<sup>127</sup> challenging not the CMA but a separate statute regulating entry into the business of cotton ginning, brought into clear relief the larger problem of whether cooperatives, compared to other entrepreneurs, deserved special privileges at law. Frost pitted the philosophy of cooperation--as articulated in the CMAs and accepted by the courts--against the goal of protecting private property rights and competition in the market from arbitrary state interference. This time, the cooperatives lost, as the Supreme Court sharply limited the authority of states to confer privileged market positions on coopera-

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<sup>125</sup>Id. at 89, 90.

<sup>126</sup>Id. at 96, 97.

<sup>127</sup>278 U.S. 515 (1929).

tives.

In Frost, the Court considered a series of Oklahoma statutes regulating the cotton ginning industry. The laws declared cotton ginning to be a "public business" and cotton gins to be a public utility subject to state regulation. Anyone seeking to enter the field had to present the state's corporation commission with a "satisfactory showing of public necessity" in order to obtain a license to gin cotton. In 1925 the state amended the law to permit cooperatively owned gins to avoid the rigorous standard of public necessity. Cooperative gins could enter the business by presenting the Commission with a petition signed by one hundred citizens attesting to the need for a new gin. The plaintiff was regularly incorporated and licensed to gin cotton under the pre-1925 requirements, and he sued to enjoin the Commission from issuing a permit to a cooperative ginning company.<sup>128</sup>

Justice George Sutherland, speaking for a six-to-three majority, ruled that Oklahoma had violated the plaintiff's Fourteenth Amendment rights by permitting cooperatives to evade the more rigorous standard of showing public necessity. Sutherland decided the case on the grounds that the public nature of the business conferred a franchise on Frost and with it a property right protected by the Fourteenth Amendment. Clearly, Sutherland was disturbed at the im-

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<sup>128</sup>Id. at 517.

balance of market power that the 1925 exemption created in favor of the cooperative. Throughout the opinion, he referred to the cooperative gin company as a corporation--as if it were in form and in practice identical to the plaintiff.<sup>129</sup> In effect, Sutherland did not acknowledge that cooperatives held a special place in the public interest; while he did not say so, his reasoning showed that he did not trust them to act in the public interest. It was left to Justice Brandeis, joined by Justices Stone and Holmes, to recapitulate the cooperative commonwealth ideology that underlay the CMAs.<sup>130</sup>

What swayed the majority in Frost was the lack of legislative direction on the issue of the potential abuse by cooperatives of their advantages in the market. Without sufficient or clear statutory guidelines, Sutherland feared, there was nothing to prevent cooperatives from subverting the free market's competitive rules. He ruled the Oklahoma law unconstitutional because cooperatives behaved like regular corporations without being burdened by the same restraints.<sup>131</sup> And of course, no state or federal court had

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<sup>129</sup>See, for example, id. at 524.

<sup>130</sup>Id. at 532-34. Brandeis grounded the legitimacy of the statute in the legislature's declaration of cotton ginning as a utility subject to regulation in the public interest; it was perfectly reasonable for the legislature to conclude that cooperative gins offered a solution to the problem of the extortionate rates being charged by existing, privately incorporated gins.

<sup>131</sup>Id. at 524.

ruled on the issue.<sup>132</sup>

The ruling had grave implications for cooperatives and the policy of exempting them from liability for trust-like behavior. The state could not permit cooperatives to monopolize when regular corporations were already in the field or equally entitled to enter. Further, cooperatives had to be very careful about the ways in which they asserted privileges other than those granted in the CMAs, since, as the outcome in Frost made clear, comparisons of the privileges granted in the CMAs with prohibitions or restrictions imposed on non-cooperatives brought Connolly into play. In the view of Walton Hamilton, a Yale Law School constitutional law scholar, Frost ended fifteen years of judicial promotion of the cooperative movement.<sup>133</sup> Certainly the decision exposed the complexity and confusion in the law of cooperative marketing while doing little to remedy the disorder.

The cooperative marketing laws constituted a broad legislative movement in which considerable diversity reigned

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<sup>132</sup>Walton H. Hamilton, a noted public law scholar, argued that the CMA cases made it clear that cooperatives could not violate the anti-trust laws. The courts, he noted, "insist[ed] that a strict compliance with statutory provisions is a condition essential to the enjoyment of exceptional privileges. But such instances of disapproval and admonition indicate at most that there are limits of tolerance beyond which the cooperatives will not be permitted to go." Hamilton, "Judicial Tolerance of Farmers' Cooperatives," 38 Yale L.J. 936, 942 (1929). No court, however, had attempted to define those limits, much less enforce them.

<sup>133</sup>Id.

among the states. State and federal statutes alike declared cooperation to be in the public interest, and they declared that exemptions from anti-trust laws and income taxes served this public policy. The courts, however, were uncertain about the permissible scope of these exemptions, especially in light of the fact that cooperatives often competed against regular corporations in the course of doing business. The judiciary was simply reluctant to engage in the fact-finding necessary to determine whether cooperatives actually violated the anti-trust laws. The result by 1929 was a stand-off, with the consequence that no one was sure of the limits of cooperatives' legitimate behavior.

The CMAs revised the legal status of cooperatives by conceptualizing farmers' relationship to the market in terms of the public benefits of cooperation. But Sapiro's new conceptualization of the public purpose of cooperation relied on economic justification rather than legal categories. The state courts, more sensitive to the immediate political context of agricultural distress, were more willing to support the new policy and the means that the legislatures selected to accomplish it. The federal courts, including the Supreme Court, hesitated to address the broader legal issues involved in the CMAs, confined their rulings to the narrow questions of legislative prerogative, and ultimately drew the line when presented with substantive due process challenges to the extraordinary status of coopera-

tives. This tenuous resolution did not perdure through the economic and legal crisis that followed.

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## CHAPTER 8

### FROM MARKET CONTROL TO PUBLIC MONOPOLY

Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California [law], for stabilizing the marketing of agricultural products.

Chief Justice Harlan F. Stone, Parker v. Brown, 1943<sup>1</sup>

Concerns about the implications of the Supreme Court's decision in Frost v. Corporation Commission of Oklahoma<sup>2</sup> soon gave way to fears that the nation's economy was about to collapse. Nine months after the decision, the stock market crashed, millions of urban workers were thrown into unemployment, and farmers' distress became more acute than ever. Cooperation's practical limits became painfully clear as the "Depression Decade" began. Cooperatives, because they exerted no control over agricultural production, were powerless to reduce the increasing commodity surpluses that kept prices down. The spiral of high production and low prices enclosed farmers--and so many others--in a vicious cycle of poverty amid plenty.<sup>3</sup>

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<sup>1</sup>Parker v. Brown, 317 U.S. 341, 367 (1943).

<sup>2</sup>278 U.S. 515 (1929).

<sup>3</sup>Broadus Mitchell, Depression Decade: From New Era Through New Deal (New York: Holt, Rinehart & Winston, 1947), 69-70.

The Depression changed the course of American economic development. The crisis called for new responses from government, particularly in agriculture. According to historian Van L. Perkins, even the nation's captains of industry agreed that "something would have to be done for agriculture and that government would have to play a major role in any relief effort."<sup>4</sup> The New Deal, President Franklin D. Roosevelt's legislative answer to the Depression, delivered a wholesale restructuring of government/business relations. It did so by putting conventional tools such as price controls, the subsidization of agricultural exports, and cooperation to use in new ways.

Although it did not significantly alter the larger structure of American economic enterprise, and in fact reinforced what one historian has called "economic nationalism,"<sup>5</sup> the New Deal broke down significant practical and doctrinal barriers to federal involvement in private enterprise. This was particularly true in agriculture, where the cooperative movement furnished a ready model to guide government/business interactions in the new economic order. Further, California's legislative counterpart to the New Deal supplied the means for redesigning the relationship between the federal government and the states, at least in

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<sup>4</sup>Van L. Perkins, Crisis in Agriculture: The Agricultural Adjustment Administration, 1933 (Berkeley: University of California Press, 1969), 2.

<sup>5</sup>Mitchell, Depression Decade, 180.



regard to agriculture. The result, on one level, changed agricultural regulation from the private market control model of cooperation to public monopoly instituted and enforced by statute. On another level, the legal watershed left intact the cooperative's role as an agent of public policy in stabilizing agricultural markets.<sup>6</sup>

#### A New Deal for Agriculture

The aim of the New Deal's agricultural program was simple: to promote scarcity and thereby raise commodity prices for farmers. As the form and methods of the Agricultural Adjustment Act (AAA)<sup>7</sup> made clear, this goal was to be accomplished using familiar means. At the time the act was passed in May, 1933, the nation's farmers were so desperate for government intervention that they hardly cared what form it took. The only potentially revolutionary feature of the AAA was that the Roosevelt administration, in the words of Broadus Mitchell, "intended it to be the basis of long-time policy."<sup>8</sup>

The AAA sought to restore farm prices in four distinct ways. The first was direct restriction on production and withholding surpluses from the market. Second, farmers would receive subsidies in exchange for restricting output.

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<sup>6</sup>Bruce L. Gardner, The Governing of Agriculture (Lawrence, KS: The Regents Press of Kansas, 1981), 49.

<sup>7</sup>48 U.S. Statutes at Large 31 (May 12, 1933).

<sup>8</sup>Mitchell, Depression Decade, 187.

Third, excise taxes on processors financed the benefits. Finally, the government would encourage or require marketing orders--agreements among farmers, cooperatives, processors, and distributors--that regulated prices for the farmers' benefit.<sup>9</sup> The success of the program rested on the legality of the government's restrictions on production. The Federal Farm Board Act of 1929, which supplied much of the inspiration and theory behind the AAA agricultural control program, emphasized efficient market control through cooperatives. But the Farm Board Act reforms were purely voluntary; the government could not impose taxes or otherwise penalize non-participants. Neither did the Farm Board law give cooperatives any authority to control production and compel participation. The AAA supplied the missing links between the goal of agricultural stabilization and the means of monopoly.<sup>10</sup>

During the first few years of the New Deal, AAA programs were instituted for basic staple crops such as wheat, corn, cotton, and tobacco. For these crops, drastic measures were required to "restrict output to something like normal requirements."<sup>11</sup> In addition to imposing taxes on

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<sup>9</sup>Agricultural Adjustment Act, 48 U.S. Statutes at Large 31 (May 12, 1933); Mitchell, Depression Decade, 187-88.

<sup>10</sup>Mitchell, Depression Decade, 64; Murray R. Benedict and Oscar C. Stine, The Agricultural Commodity Programs: Two Decades of Experience (New York: The Twentieth Century Fund, 1956), 379-80.

<sup>11</sup>Mitchell, Depression Decade, 189.

processors and acreage quotas on producers, the government resorted to outright destruction of agricultural surpluses. Cotton farmers plowed up 10,000,000 acres, tobacco farmers destroyed 12,000 more, and livestock raisers killed over 6 million pigs. But the voluntary controls and destruction programs did not sufficiently reduce the surpluses, and in 1934 the government turned to more coercive measures, such as fining producers when they exceeded their quotas.<sup>12</sup>

The AAA was applied to other commodities besides the major staple crops. In specialized non-cash crops, particularly California horticultural crops, AAA proved more effective. The walnut and citrus industries, already controlled by strong cooperatives, not only accepted AAA programs but also thrived under them. In these commodities, governmental control eliminated the free riders that often undermined cooperatives, since once a majority of producers chose to adopt an AAA program everyone in the industry had to participate. In citrus and walnuts, AAA supplied ways to control industry-wide surpluses, impose comprehensive quality control measures, and in effect ratified the premise that market control made agriculture both efficient and stable.<sup>13</sup>

For the most part, however, historians have concluded that the AAA was fraught with administrative problems. Vio-

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<sup>12</sup>Mitchell, Depression Decade, 192.

<sup>13</sup>Benedict and Stine, The Agricultural Commodity Programs, 383-85.

lations of marketing agreements were commonplace. Often the interests of large commercial producers dominated the structure of AAA programs, particularly in staple crops. AAA administrators did a poor job of protecting smaller farmers, tenants, and sharecroppers from the fate of the Okies. And the law's larger goal of governmental production and price controls died a relatively quick death at the hands of farmers who maintained a "traditional preference . . . for freedom to produce, process, sell or buy with a minimum of government interference."<sup>14</sup> The Supreme Court also assisted AAA opponents by gutting the processing tax and acreage control provisions in the case of U.S. v. Butler et al. (1936).<sup>15</sup> The Court found that Congress had overstepped the bounds of federal authority to regulate intrastate economic activity: "Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance."<sup>16</sup>

The Court's decision in Butler left intact the marketing order provisions, which Congress reenacted in the Agri-

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<sup>14</sup>Benedict and Stine, The Agricultural Commodity Programs, xvi; Mitchell, Depression Decade, 197-202. Mitchell notes that nature supplied a better check on the surplus than the AAA; droughts and floods destroyed ten times more wheat than the AAA program controlled. Ibid., 197, 202-05.

<sup>15</sup>297 U.S. 1 (1936).

<sup>16</sup>Id. at 22.

cultural Marketing Agreement Act of 1937.<sup>17</sup> This law "placed greater reliance on price-support loans" such as those pioneered by the Commodity Credit Corporation (CCC) in 1933, which enabled corn farmers to receive funds for surpluses kept on the farm.<sup>18</sup> These "nonrecourse loans" and CCC cooperation became an integral part of AMAA marketing orders after 1939. The new legislation, coupled with a state stabilization program in California, supplied the New Deal's more lasting contribution to national farm policy, one that relied much more on complimentary federal and state regulatory structures than the original AAA.

In California, fruit and vegetable crop farmers had an alternative to federal production controls. In 1933, the state enacted the Agricultural Prorate Law, substantively identical to the first AAA.<sup>19</sup> The purpose of the prorate act was to "provide means for relief from the price lowering effects of increased production" by permitting a majority of growers to compel the entire industry to divert a portion of their crops from the market.<sup>20</sup> The authors of the law, Uni-

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<sup>17</sup>50 U.S. Stats. at Large 246 (1937).

<sup>18</sup>Benedict and Stine, The Agricultural Commodity Programs, 191-93.

<sup>19</sup>California Agricultural Prorate Act of 1933, Statutes of California, 1933, ch. 754, p. 1969 (June 15, 1933) (Deering's California Code, Food and Agriculture Code §§54000; Civil Code §§653aa-yy (1980)).

<sup>20</sup>Prorate Act, §1, pp. 1969-70; Malcolm H. Watson, "An Analysis of Raisin Marketing Controls Under the California Agricultural Prorate Act" (M.S. thesis, University of Cali-

versity of California professor E.A. Stokdyk and farm leader Edson Abel, expressly intended for the law to address the surplus problem. They believed that an effective prorate program had to control the entire production of the regulated commodity. Because production of many specialized horticultural crops was centered in discrete areas within the state, proration seemed well suited to the problem of marketing agricultural surpluses.<sup>21</sup>

The prorate law offered a solution steeped in New Deal economic philosophy. It established a regulatory commission whose members represented the various interests of the industry being regulated as well as economic experts.<sup>22</sup> Upon petition by two-thirds of the growers or a majority vote in special elections, the Prorate Commission was empowered to set up proration zones for each industry. A local program committee, nominated by growers and processors and selected by the Commission, ran the marketing program. The costs of administration were distributed evenly to all the producers

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fornia, Berkeley, 1940), 11.

<sup>21</sup>E.A. Stokdyk, "Economic and Legal Aspects of Compulsory Proration in Agricultural Marketing," University of California Agricultural Experiment Station Bulletin No. 565 (December, 1933), 18.

<sup>22</sup>Prorate Law, §2, p. 1970. On the economic thought of New Deal agricultural planners, see Ellis Hawley, The New Deal and the Problem of Monopoly (Princeton, NJ: Princeton University Press, 1966), 188-94.

through the assessment of fees on all crops marketed.<sup>23</sup> But the statute's language on just what the committee would do--"determine the method, manner, and extent of prorating"--was vague and lacked direction.<sup>24</sup> While the law erected elaborate administrative machinery to run the proration programs, it neglected to provide substantive regulatory goals to guide the programs' administrators.

Amendments in 1935 set out more exact specifications for petitioning the Commission, holding elections, and instituting prorates; further, it defined different kinds of proration programs and the ways in which they could be administered.<sup>25</sup> One important addition was the institution of surplus pools, through which prorate committees could divert surplus crops to relief and charitable organizations and keep them off the market. To achieve the goals of the Act and minimize production surpluses, the Program Committee was also empowered to secure packing facilities, cooperate with similar agencies in California, other states, or the federal government.<sup>26</sup> Under the 1935 amendments, the form and function of the prorate law in regulating particular commodities

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<sup>23</sup>Prorate Act, §§9, 10, 11, 21, pp. 1973-74, 1977-78. Growers would receive certificates for the amount of their deliveries; no processor could accept produce without an accompanying certificate. *Id.*, §§20, 21, p. 1977.

<sup>24</sup>Prorate Act, §18, p. 1976.

<sup>25</sup>Prorate Act, Cal Stats. 1935, pp. 1527-1543.

<sup>26</sup>Statutes of 1935, §§19.1, 21.1, p. 1537-38.

became both more specific and more intrusive. By 1937, California had applied its prorate law to fifteen different commodities in an attempt to alleviate the agricultural distress caused by the Great Depression.<sup>27</sup> Unlike its federal counterpart, the prorate law survived judicial scrutiny; the California Supreme Court upheld the statute in Agricultural Prorate Commission v. Superior Court (1936).<sup>28</sup>

The federal and state laws provided a broad array of remedies for the agricultural crisis, some compulsory, some voluntary. AAA added horticultural crops to the list of basic commodities regulated by the statute in 1935, but the initiative still had to come from the farmers. Under the prorate law, horticultural producers had to request regulation by majority vote. In the raisin industry, arriving at such a consensus--and formulating an effective stabilization program--proved elusive throughout much of the Depression Decade.

"Twelve Thousand Raisin Growers Have Implicit Faith  
in the New Deal"

The California raisin industry flirted with federal and

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<sup>27</sup>The crops were tomatoes, sweet potatoes, asparagus, lettuce, olives, prunes, figs, apricots, pears, apples, grapes, lemons, artichokes, and celery--all perishable or semi-perishable commodities in which surplus usually led to total waste. C.H. Kinsley, "Some Notes on Proration," PRP, 136 (December 10, 1938): 568; Donald L. Kieffer, "This Prorate Law--What is It?" PRP, 136 (July 16, 1938): 46; "The Most Prorates," PRP, 141 (January 11, 1941): 21.

<sup>28</sup>5 Cal. 2d. 550 (1936).



state help during the first half of the New Deal. Torn between traditional farmer autonomy on the one hand and Sun-Maid, a market-control-oriented cooperative reduced to a symbolic presence by insolvency, on the other, raisin growers and packers could not agree on whether their industry needed public regulation, much less on the form that regulation should take.

Sun-Maid was in no position to help. Even before the onset of the Depression, the cooperative had been reduced to the competitive status of an ordinary commercial packer. A massive bail-out by the Federal Farm Board was required to reduce the cooperative's indebtedness and return control of the cooperative to grower directors. This was accomplished by 1931 with a combination of commodity loans, loans to retired Sun-Maid's bonded indebtedness, and a federally sponsored raisin marketing pool. Fresno banks ended up writing off \$6,000,000 in Sun-Maid commodity loans. The loss of local financial support, combined with the effects of the Depression, reduced Sun-Maid to the same economic status as its competitor packers. The U.S. Tariff Commission wrote in 1939 that Sun-Maid's significance as a cooperatively organized company lay only in the "check on other packers" that a grower-owned processor offered.<sup>29</sup> The coop-

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<sup>29</sup>From 1932 to 1935 Sun-Maid handled only 35 percent of the California raisin crop. U.S. Tariff Commission, Grapes, Raisins, and Wines, Report No. 134, 2d series (Washington: Government Printing Office, 1939), 156.

erative controlled neither the commercial packers nor even a simple majority of the producers.

The lack of strong leadership was clearly apparent during the early years of the New Deal. Infighting among the packers, including Sun-Maid, delayed implementation of a AAA program for raisins. Late in 1933, a raisin growers' committee sent a desperate telegram to President Roosevelt, informing him that the packers were impeding the work of AAA economists and asking him to intercede. "Twelve thousand California raisin growers have implicit faith in you and the New Deal," the committee wrote.<sup>30</sup>

It took six months for the AAA to come up with an agreement both packers and growers would accept.<sup>31</sup> In May, 1934, the Agricultural Adjustment Administration set up a license and marketing agreement for California raisins. The program required packers to pay a minimum price for 85 percent of the raisins they purchased, which they could then sell freely. Only 15 percent of the 1934 crop would be held off the market, with the packers bearing the costs of control. A Control Board, representing Sun-Maid, the other packers, and the growers' committee, decided when and in

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<sup>30</sup>J.M. Eueless, Chairman, California Raisin Growers Committee, to Franklin D. Roosevelt, November 9, 1933, "Raisins--California, 1933-34" File, Box 75, RG 136, NA.

<sup>31</sup>Budd A. Holt to H.R. Wellman, Memorandum, March 15, 1934, "Raisins--California" File, Box 75, RG 136, NA.

what quantities to market the surplus.<sup>32</sup> After one year, Congress eliminated the provision for minimum prices.<sup>33</sup> The raisin program could have been continued under the amendments, since the marketing agreement specified that it would continue to run as long as the Control Board and the Secretary of Agriculture, Henry A. Wallace, approved.<sup>34</sup>

But the packers, led by Sun-Maid, pulled out. In August, 1935, ten packers informed Secretary Wallace that they no longer supported the control program and "respectfully request[ed] that you terminate said Marketing Agreement."<sup>35</sup> Their complaint was not that the program was ineffective. As the chief of the AAA's General Crops Section informed the Secretary, both sides agreed that the marketing agreement "was responsible for substantial increases in the

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<sup>32</sup>"Tentatively Approved Marketing Agreement for the California Raisin Industry," May 21, 1934, "California, 1933-1942" File, Box 75, Fruit and Vegetable Branch, RG 136, Records of the Production and Marketing Administration, NA. The agreement became effective May 29. Press Release, Agricultural Adjustment Administration, May 29, 1934, "Raisins--California, 1933-34," Box 75, RG 136, NA.

<sup>33</sup>Benedict and Stine, The Agricultural Marketing Programs, 374.

<sup>34</sup>H.R. Wellman to J.W. Tapp, Memorandum, May 5, 1934, "Raisins--California, 1933-34" File, Box 75, RG 136, NA.

<sup>35</sup>American Seedless Raisin Company et al. to Secretary of Agriculture, August 9, 1935; A. Setrakian, Chairman, Committee of 140, to Henry A. Wallace, August 20, 1935, "Raisins, California, 1934-36" File, Box 75, RG 136, NA.

total returns to raisin growers for the 1934 crop."<sup>36</sup> The problem lay in the refusal of some packers to participate, which meant that the others had to bear the costs of surplus control for the entire industry. As J.M. Leslie, president of Sun-Maid, explained to the growers: "[T]he tremendous loss resulting from failure of enforcement of the 1934 crop control program fell solely upon the processors of raisins, including [Sun-Maid], who had lived up to the obligations imposed upon them by that program."<sup>37</sup> It was not possible to develop a program to correct the problem in time for the 1935 season, and accordingly the General Crops Section recommended immediate termination of the license. In September, Wallace complied.<sup>38</sup> So ended federal surplus control for raisins during the New Deal.

Sun-Maid officials believed that no governmental intervention was necessary. With the help of federal loans and by diverting grapes into by-products at record levels, Leslie believed that Sun-Maid could control whatever surplus might result from the 1935 crop.<sup>39</sup> Given the outcome of the

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<sup>36</sup>P.R. Taylor, "Memorandum to the Secretary," September 12, 1935, "Raisins--California, 1934-36" File, Box 75, RG 136, NA.

<sup>37</sup>J.M. Leslie to Growers, February 29, 1936, SMCA.

<sup>38</sup>Ibid.; "Order Terminating the Marketing Agreement for Packers of California Raisins, As Amended," September 14, 1935, "Raisins--California, 1934-36" File, Box 75, RG 136, NA.

<sup>39</sup>Leslie to Growers, August 27, 1935; February 29, 1936, SMCA.

AAA program, Leslie believed that no federal program could evenly distribute the costs of compliance among all growers and packers. In addition, economic conditions were improving; the AAA program cleaned up the 1933 surplus and disposed of the entire 1934 crop. Leslie confidently informed the membership in 1936 that Sun-Maid inventory was at its lowest in twenty years. Further, he estimated that the 1936 crop would yield 30,000 tons less than the 1935 crop. The favorable combination of small carryover and short crop supported the Sun-Maid management's view that the cooperative could stabilize the market on its own.<sup>40</sup>

The market did not bear out Leslie's predictions after the 1935 crop year. While the total annual surplus peaked in 1933, it continued to accumulate as production increased. The 1935 crop came in at 203,000 tons, as opposed to the Sun-Maid's figure of 180,000 tons; the 1936 crop of 182,000 tons exceeded Leslie's projection by 32,000.<sup>41</sup> The inaccurate estimates pointed out Sun-Maid's inability to control either industry-wide carryovers or seasonal surpluses (see Table 8-1):

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<sup>40</sup>Grower Letters, September 1, 1936, September 1, 1936 (two letters of same date).

<sup>41</sup>Leslie's estimates are in Leslie to Growers, September 1, 1936, SMCA. Crop forecasting was made especially difficult because of the different uses possible for raisin grapes: "From year to year varying percentages of raisin grapes are shipped fresh for table use, crushed by vintners, and dried into raisins. The three-way choice complicates the problem of forecasting the dried tonnage." Watson, "Analysis of Raisin Marketing Controls," 26.

**Table 8-1**  
**California Raisin Crop Statistics, 1928-1938**

Year	Tons Produced	Tonnage Carried over	Price Per Ton (\$)	
			Farm	Packed
1928	261,000	120,000	40	83
1929	215,000	84,000	61	98
1930	192,000	81,000	59	94
1931	169,000	69,000	60	102
1932	262,000	58,000	39	66
1933	195,000	105,000	57	84
1934	171,000	100,000	64	86
1935	203,000	80,000	56	82
1936	182,000	60,000	70	96
1937	247,000	50,000	63	80
1938	294,000	85,000	47	72

Source: Malcolm H. Watson, "An Analysis of Raisin Marketing Controls Under the California Agricultural Prorate Act" (M.S. thesis, University of California, Berkeley, 1940), 85-86.

Because of the initial ambiguity of the state prorate law and Sun-Maid's optimistic crop forecasts for 1935 and 1936, no one attempted to initiate a prorate program for raisins for those years. But Sun-Maid's failure to control the surplus changed growers' attitudes toward the state law. With the packers no longer willing to support federal AAA programs for raisins, growers turned to the state law for help. In the spring of 1936, the Fresno branch of the American Farm Bureau Federation met with Sun-Maid officials to ask them to support a drive to collect signatures on a raisin prorate petition, the first step in an industry-wide election to determine support for a prorate. William N. Keeler, Sun-Maid's general manager, had nothing to say in support of this proposal, even denying that the industry had

a surplus problem. He claimed that an election would not be a trustworthy indicator of "wholehearted community support."<sup>42</sup> Indeed, response to the sign-up campaign was tepid at first, due to an April frost that helped shore up raisin prices. During the harvest season, Leslie and the Board of Directors continued to insist that Sun-Maid's own inventory control program would maintain prices for the 1936 crop: "Sun-Maid has not supported the Proposed Raisin Prorate Program because experience shows it cannot be enforced regardless of legality."<sup>43</sup>

But Sun-Maid, as a result of its own managerial and financial difficulties, no longer exerted the degree of market control it once had. The 1936 season produced a crop of 182,000 tons and a surplus of 60,000. Both figures represented decreases from 1935, but Sun-Maid had not made good on its promise to dispose of the surplus. The results of the 1936 harvest made it clear that Sun-Maid no longer controlled the industry. But its management did not believe that the state could do so either. Leslie and Keeler refused to concede that the economic crisis of the Depression had

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<sup>42</sup>Minutes of Meeting, Sun-Maid General Manager Keeler and Prorate Program Organizers, March 1936, Sunland Sales Cooperative Association Notebook, SMCA; Fresno Bee, "Sun-Maid Reaffirms Stand in Opposition to Prorate Plan for Raisin Industry," September 29, 1937, 8-A.

<sup>43</sup>Watson, "Analysis of Raisin Marketing Controls," 17-18; Leslie to Growers, September 1, 1936; Sun-Maid Press Release, November 24, 1936, SMCA; "At Last A Raisin Prorate," PRP, 134 (March 6, 1937): 331; "Sun-Maid's Position on Prorate," Fresno Bee, November 5, 1936.

changed the relationship between cooperatives and the market. As a result, for two years they contended that no annual surplus existed to warrant a prorate, steadfastly invoked the cooperative's legal and economic prerogatives, and insisted that the cooperative was fully capable of handling the seasonal rush each September.<sup>44</sup> Sun-Maid's attitude severely tested the raisin growers' "implicit faith in the New Deal." But ultimately the cooperative would itself convert to the new economic creed.

#### Proration in the Raisin Industry

Although Sun-Maid's officers were united in their opposition to proration, its membership was divided over the issue. Some growers stayed in rank and supported management. But a significant share joined the leaders of the proration sign-up drive after the disastrous 1936 season. These people, the farm journal Pacific Rural Press reported, included "growers of every farm organization and various branches of the industry." By March, 1937, over half of Sun-Maid's membership had signed a petition calling for the Commission to hold public hearings. According to the Pacific Rural Press, growers supported proration because they were "tired of being trimmed every year and deprived of the advantages of profitable prices, even in the years of small

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<sup>44</sup>Sun-Maid 1937 Crop Advance Offer, SMCA; "Sun-Maid Advance Set at \$60 Ton," Fresno Bee, August 9, 1937, 1; "Sun-Maid Reaffirms Stand in Opposition to Prorate Plan for Raisin Industry," Fresno Bee, September 29, 1937, 8-A.



crops."<sup>45</sup>

The Prorate Commission held the hearings during the summer of 1937 and appointed representative growers and packers to a program committee in charge of developing a marketing program. The members of the committee, however, could not even agree on an estimate of the 1937 raisin harvest, much less on the substance of the proration program. On August 20 the committee adopted Sun-Maid's figures of a 1936 carryover of 35,000 tons and a 1937 crop of 225,000 tons.<sup>46</sup> The committee also agreed with Sun-Maid that its marketing plan was sufficiently sound that no prorate was necessary--a decision that shocked the industry. As the Pacific Rural Press reported, "It is difficult to understand just how [cancellation of the prorate] can be done without inadvertently kicking the State Prorate Commission some place between the eyes."<sup>47</sup>

Openly deferential to Sun-Maid, the committee agreed with the cooperative's plan for taking care of the 1937 crop. The plan called for a \$70 cash advance to members and

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<sup>45</sup>Leslie to Growers, September 1, 1936, SMCA; "At Last a Raisin Prorate," PRP, 133 (March 6, 1937): 331; Watson, "Analysis of Raisin Marketing Controls," 17. Watson also noted, "It should not be overlooked . . . that a substantial portion of the growers never actively joined in the effort to place the marketing of raisins under prorate." He did not elaborate. Ibid., 19.

<sup>46</sup>Watson, "An Analysis of Raisin Marketing Controls," 19-21, 26; Donald L. Kieffer, "They Said, 'Too Few Raisins to Prorate,'" PRP, 134 (August 28, 1937): 246.

<sup>47</sup>"They Said, 'Too Few Raisins To Prorate,'" 246.

non-members alike, and possible additional payments for a total of \$80. The Pacific Rural Press predicted, "If this works out, Sun-Maid is the hero."<sup>48</sup> But the plan did not "work out." Prices dropped by \$5.00 immediately after the Committee's announcement. On September 10, the Prorate Commission ordered the Committee to reconsider its decision, but the Committee still could not determine the size of the projected 1937 surplus. On October 1 the Prorate Commission went over the Committee's collective head and handed down its own program. In addition, the Commission decreed that all future actions of the Program Committee would be subject to review and possible "'disapproval'" by the Commission--a power not laid out in the statute. The Program Committee refused to implement the new plan, effectively stalemating formulation of a 1937 program.<sup>49</sup>

Sun-Maid officials were pleased at this turn of events. The administrative apparatus for the Prorate Law appeared to be hopelessly scrambled. Although Sun-Maid's public image had taken a beating, Leslie believed the cooperative could still market over half of the 1937 crop, which he estimated at 220,000 tons. Using federally funded commodity loans,

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<sup>48</sup>"They Said 'Too Few Raisins to Prorate,'" 246; Grower Letters, July 28, 1937; Sun-Maid circular, 1937 Crop Advance Offer, SM Archives, also published in the Fresno Bee, August 9, 1937, 1.

<sup>49</sup>Donald L. Kieffer, "Most Raisin Growers Still Want 1937 Prorate," PRP, 134 (September 18, 1937): 326; Watson, "An Analysis of Raisin Marketing Controls," 26-28.

Sun-Maid offered growers \$60 per ton, not quite as much as its initial \$70 advance but \$5 more than other packers were willing to pay. The cooperative proudly announced to the trades that its advances alone, "based upon a careful analysis of inventory and other conditions, have been and remain today the sole stabilizing factor." In a public statement, Sun-Maid declared, "With the threat of further interference apparently removed it is hoped that both grower and trade markets will respond to the normally stabilizing effect of Sun-Maid's advances, but injury already done will be difficult to repair."<sup>50</sup>

Some of the injury was self-inflicted. In December, the cooperative ran out of money when the guaranteed \$60 advance led more growers to sell more raisins to Sun-Maid than it expected. Sun-Maid was forced to stop purchasing raisins from growers, and prices dropped to \$55. For two months, the industry held its breath while Leslie and Keeler negotiated additional financing from the Central Bank for Cooperatives of the Federal Farm Credit Administration. The crisis was severe enough, in the view of the Pacific Rural Press, to warrant government assistance: "If Sun-Maid gets additional government help to hold up the price of raisins, everything should work out beautifully. . . . It seems to us that the only sensible thing for Uncle Sam to do now is to

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<sup>50</sup>"Sun-Maid's Position on Prorate," n.d. but September 29, 1937, TMs [photocopy], SMCA; Fresno Bee, September 29, 1937; Leslie to Growers, October 29, 1937, SMCA.

give more money to Sun-Maid. Another million dollars would just about clean up the deal and safely maintain the \$60 price."<sup>51</sup> In fact, Sun-Maid required \$2,500,000 to re-open the annual pool. The cooperative had badly underestimated both the size of the 1937 crop--250,000 tons, an increase of 68,000 tons over 1936--and the growers' desperation for stable prices.<sup>52</sup>

Sun-Maid's inability to carry the industry through the 1937 harvest with its own stabilization program revealed just how far cooperation in practice had departed from the theory of benevolent monopoly. Given its shrunken membership rolls and its dependance on federal loans for crop advances, the cooperative's capacity to take delivery of raisins was limited to less than half of the state's actual production. Sun-Maid's own records do not reveal just how many tons of raisins it took in that year, but the miscalculated crop estimate undoubtedly caused Sun-Maid 's attempt to substitute cooperation for proration to fail.<sup>53</sup>

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<sup>51</sup>Kieffer, "Sun Maid Stops Raisin Buying; Growers Are Surprised," PRP, 134 (December 18, 1937): 670; "Raisin Contracts Deferred," Sun-Maid press release, December 6, 1937, SMCA. Leslie told the growers that Sun-Maid suspended purchasing only at the insistence of the Central Bank for Cooperatives. Leslie to Growers, December 31, 1937, SMCA.

<sup>52</sup>Watson, "An Analysis of Raisin Marketing Controls," 29. The 1937 crop figure is from Kieffer, "California's 1937 Farm Income Review," PRP, 135 (January 15, 1938): 63.

<sup>53</sup>"Sun-Maid Stops Raisin Buying," PRP, 134 (December 18, 1937): 670; Kieffer, "Inside Story of Raisin Situation," PRP, 135 (January 29, 1938): 134.

Damage control efforts began immediately. In January, 1938, a new Program Committee went directly to the Commodity Credit Corporation and obtained authorization for a loan of up to \$2,500,000 to buy the remaining unsold raisins at \$55 per ton. The Committee eventually purchased 25,000 tons and sold them to the government for food relief programs. While this move dealt effectively with part of the 1937 annual carryover, it would take more than money to restore popular confidence in the prorate law. What was needed, a contemporary economist argued, was a chance for the law to work:

[T]he machinery of proration, while set up, had not actually functioned. . . . Because the Program Committee secured help for the industry from federal sources, rather than by actual proration, growers began to confuse prorate marketing of raisins with government aid [and] . . . tending to make them expect the 'government,' by spending federal funds, to do what the growers had failed to do by use of the prorate.<sup>54</sup>

The significance of the events of 1937 was two-fold: Sun-Maid could not stabilize the raisin industry on its own, and future proration programs would rely on federal financial support.

The Prorate Commission adopted a prorate program for the 1938 raisin crop that financed crop advances with federal funds. In July, a meeting of representatives of the Program Committee, the AAA, the Commodity Credit Corporation

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<sup>54</sup>Watson, "An Analysis of Raisin Marketing Controls," 31-32.

(CCC), and the Reconstruction Finance Corporation (RFC) produced an agreement on a loan to finance a surplus pool. In return for \$9 million in CCC loans, the Program Committee would keep 20 percent of the 1937 carryover and 1938 crop off the market. Sun-Maid endorsed the program because it established a guaranteed price floor that would prevent other packers from undercutting the crop advance price. In addition, the CCC asked Sun-Maid to handle disbursements of the loan proceeds to growers.<sup>55</sup>

Once again, a huge surplus upset the careful plans laid by industry and government. The 1938 crop came in at a record 290,000 tons, and this fact became apparent too late in the harvest for the Program Committee to do anything about it.<sup>56</sup> And, once again, the industry faced the critical problem of how to dispose of a huge surplus. The Program Committee attempted to sell substandard raisins for brandy and for stockfeed, but growers protested. They argued that plenty of raisins had already been set aside for brandy, and that \$7 per ton was an inadequate price for raisins diverted to stockfeed. As the Prorate Zone Agent, Lowell Miller, made his report to the growers in a series of

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<sup>55</sup>Watson, "An Analysis of Raisin Marketing Controls," 33-36; Leslie to Growers, July 22, 1938, September 30, 1938, October 28, 1938, August 25, 1939, SMCA; Kieffer, "Government Loans More Raisin Money Through New Agency," PRP, 135 (February 26, 1938): 254.

<sup>56</sup>Kieffer, "1938 Raisin Advance To Be \$50 Per Ton," PRP, 136 (July 16, 1938): 62.

meetings during the spring of 1939, he discovered that the growers were in open revolt on the issue of surplus disposal and that their discontent extended to the Program Committee's handling of the prorate in general. Thanks to the federal loan guarantees, growers had actually been able to sell more raisins at higher prices in 1938-1939 than they had the previous season. This despite the fact that the 1938 crop produced a surplus of 145,000 to 150,000 tons. The growers, however, were unmollified by the higher prices and criticized the Committee's disposal of the surplus, convinced it had been directed by the "dominating influence of Sun-Maid on the Program Committee." To quiet grower discontent, the Prorate Commission ordered new elections for Committee nominees and temporarily stopped the sale of surplus raisins for stockfeed.<sup>57</sup>

Opponents of the prorate law funnelled the growers' criticism of the Program Committee into a general condemnation of proration. As one contemporary scholar wrote:

There seems little doubt but that opponents of the prorate used the stockfeed sales as a means of promoting discontent among the growers. . . . Opposition to the sale of raisins as stockfeed came not only from the growers who wanted to do away with the prorate entirely, but from others who have never clearly seen the necessity of surplus removal if the balance of the crop is to be

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<sup>57</sup>Leslie to Growers, February 29, 1939, SMCA; Watson, "An Analysis of Marketing Controls," 40-44; Kieffer, "Reassuring Raisin Prorate Report," PRP, 137 (April 1, 1939): 318.

profitably sold.<sup>58</sup>

Many in the agricultural sector were both dissatisfied with the way proration worked and discontented with its underlying purpose. In the 1939 session of the California Legislature, twelve bills were introduced amending the Prorate Act and two more repealing it. These bills accurately represented what producers of different prorated commodities believed was wrong with the law: it did not permit growers to withdraw from the programs, proration did not work very well for semi-and non-perishable crops, and the Commission had no time to oversee the local program committees or the programs they instituted. For raisin growers, the second and third complaints were especially pertinent, and they expressly blamed the Commission and the Committees for failing to respond to their desire to augment their income as much as possible by selling surplus raisins through normal marketing channels.<sup>59</sup>

The legislature was willing to recognize the adminis-

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<sup>58</sup>Watson, "An Analysis of Raisin Marketing Controls," 45-46.

<sup>59</sup>"You May Lose the Prorate Law," PRP, 136 (October 28, 1938): 412; "Selfishness and Politics Can Kill the Prorate," PRP, 136 (December 3, 1938): 532; Kieffer, "This Prorate Law--What is It?" PRP, 136 (July 16, 1938): 46; C.B. Hutchinson, "The California Agricultural Prorate Act," PRP, 137 (January 7, 1939): 6; "The Prorate Bills," PRP, 137 (February 25, 1939): 192. The Committee resumed selling raisins for stockfeed in June, after demonstrating to the growers that the raisins would not re-enter normal trade. Kieffer, "Raisin Grower Sentiment Favors Selling Surplus for Stockfeed," PRP, 137 (June 3, 1939): 510.



trative lapses in the law but refused to jettison entirely the concept of mandatory participation. The California Supreme Court upheld the state's authority under the police power to regulate agricultural surpluses with proration, in the case of Agricultural Prorate Commission v. Superior Court (1936).<sup>60</sup> And the fact that growers were well represented on the program committees helped to counteract opposition in the legislature.<sup>61</sup>

The policy of proration was safely embedded in the state's public policy, but opponents managed to find a convenient scapegoat in the Prorate Commission. In extensive amendments to the statute, the legislature abolished the Prorate Commission and established in its place an Agricultural Prorate Advisory Commission consisting of six growers, a representative of consumer interests, and a representative of the processing industry. This change gave growers two more voices and deprived packers, processors, and cooperatives of their representatives. But the Advisory Commission, unlike its predecessor, had nothing to do with implementation of the law. Instead, the State Director of Agriculture, William B. Parker, was given plenary authority to enforce the act, including the power to appoint

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<sup>60</sup>Supra n. 28.

<sup>61</sup>"The Prorate Problem and the Alternative," PRP, 137 (April 1, 1939): 500; R.W. Gray, "Experiences and Lessons of Proration," PRP, 137 (April 15, 1939): 351; Watson, "An Analysis of Raisin Marketing Controls," 47.

program committees from slates of nominees drawn up by the growers. The functions of program committees remained the same; they would develop the specifications for prorates and submit them to the Director for approval.<sup>62</sup>

The legislature also spelled out the kinds of marketing methods that prorate programs could employ to minimize surpluses. Particularly important from the standpoint of the raisin industry was the provision for stabilization pools, from which crops could be sold back into regular trade channels when the program committee determined that such sales would not adversely affect the market. Surplus pools, provided for in the 1935 amendments, took crops off the regular market entirely; this restriction had led to the controversy over diversion of raisins to stockfeed. Now the program committees could use both methods: the stabilization pools, which enhanced prices by reducing the crop available for sale and which then could be sold to take advantage of those higher prices; and the surplus pools, which would not compete with free tonnage or stabilization pool crops but which could be sold for non-human consumption.<sup>63</sup> The changes helped to alleviate the political tension between the Commission and the growers and provided

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<sup>62</sup>Statutes of California, 1939, ch. 894, §§3, 6, 10, 16, pp. 2488-90, 2491-92, 2493, 2495-96.

<sup>63</sup>Statutes of California, 1939, ch. 894, §§16, 19.1, pp. 2495-96, 2497-98; Watson, "An Analysis of Raisin Marketing Controls," 47. The changes took effect on September 19, 1939.

more specific methods of proration.<sup>64</sup>

The amendments did not, however, cure the divisions in the raisin industry as the 1939 harvest neared. Some growers favored placing most, if not all, of the crop in the control of the Program Committee, minimizing the tonnage available to packers and placing as much as 48 percent of the crop into a surplus pool. Others, alarmed at the possibility of losing money on almost half of what they produced, suggested placing 20 to 25 percent into the surplus pool. Still another group hired a law firm to challenge the prorate law in court. Thus, when the Program Committee announced a prorate on August 14, the industry was far from prepared to support it. At a mass meeting held on August 16 in Fresno, growers signed a petition asking Secretary Wallace not to provide the Program Committee with any federal loans. As a contemporary writer remarked, "This seems to have been the first in what was to develop into a show of conflicting messages to federal officials in regard to the 1939 program for the raisin industry."<sup>65</sup>

The "conflicting messages" soon became "chaos." Members of the Program Committee met with CCC and AAA offi-

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<sup>64</sup>"California Could Have a Good Year," PRP, 137 (June 3, 1939): 500.

<sup>65</sup>Leslie to Growers, August 25, 1939, SMCA; Kieffer, "Plans for 1939 Raisin Control," PRP, 138 (July 29, 1939): 79; "Raisin and Grape Affairs Become Tangled," PRP, 138 (August 26, 1939): 142-43; Watson, "An Analysis of Raisin Marketing Controls," 47-50.

cials in Washington in early September to apply for federal loans for the 1939 crop. A discernable movement to throw over all "artificial" controls and permit "natural events [to] attend to the price" arose while the Program Committee was in Washington. Opponents of proration flooded Washington with telegrams during the negotiations, called scores of mass meetings, and took to the radio to present their views. The unrest in the industry undermined the Program Committee's credibility with the federal lending agencies, and on September 14 State Director of Agriculture Parker wired the members in Washington to break off negotiations and return home to work out a new program. The final blow came when the federal government decided not to make any funds available for the 1939 crop. Without federal funds, the Program Committee was forced to cancel the prorate program on September 27.<sup>66</sup>

Sun-Maid officials were not dismayed by the cancellation. Nor were they distressed at the loss of CCC crop loans, because Sun-Maid's own fortunes were no longer closely linked to proration. In 1938 and again in 1939, the cooperative obtained its own loans from the Farm Credit Administration. In addition, with the full support of the

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<sup>66</sup>Kieffer, "California's 1939 Farm Income Review," PRP, 139 (January 27, 1940): 30; "Raisin Program is Like Football," PRP, 136 (September 9, 1938): 174; "Raisin Chaos Robs Growers of Price Boosts," PRP, 138 (September 23, 1939): 206; Watson, "Analysis of Raisin Marketing Controls," 48-56; Leslie to Growers, September 30, 1939, SMCA.

federal government, Sun-Maid had helped to administer the marketing of and proceeds from the CCC loan pool, thereby preserving its disbursement relationship with growers who delivered to the cooperative.<sup>67</sup>

Proration had proven to be disorganized, difficult to administer, and critically dependent on grower support-- similar to the historical experience of cooperation in the raisin industry and to the history of Sun-Maid itself. The cooperative's role in the market had changed from primary facilitator of collective action to commercially competitive packer; however, with special access to federal assistance, its success no longer depended on extensive market control. Sun-Maid was able to come to terms with the extensive intervention of government in the field of marketing once the industry's experience with proration showed that there was still plenty of room for a cooperative.<sup>68</sup> Proration had not succeeded in keeping surpluses off the market, primarily because the state did not authorize direct control of production and the federal AMAA was not permitted to, under the

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<sup>67</sup>Leslie to Growers, July 28, 1939, August 25, 1939, September 30, 1939, SMCA; Watson, "Analysis of Raisin Marketing Controls," 58.

<sup>68</sup>Tariff Commission, Grapes, Raisins, and Wines, 143. The Tariff Commission report warned the raisin industry not to rely on higher tariffs for protection against low domestic prices, saying that "relief must come temporarily from strict marketing control or expanded cooperative selling efforts, and more permanently from production control." Kieffer, "Raisin Problems Remain Difficult," PRP, 138 (December 16, 1939): 394.

ruling in U.S. v. Butler.<sup>69</sup> Accordingly, regulation of raisin marketing took place at the state level, with federal assistance. This state-federal cooperation in the regulation of agricultural commodities raised novel constitutional problems in the ensuing years.

#### Constitutional Fallout

In the spring of 1940, faced with mounds of unsold raisins, the industry continued its roller-coaster relationship with government market controls. Prices were dangerously below 1939 levels and another large crop was on the vines. The growers met in Fresno to call for some kind of marketing control; as usual, consensus proved elusive: "The recent raisin community grower meetings held to decide what to do about a marketing control program this season indicated a continuation of the perpetual ideological disagreements which have created for this industry such a daffy mental climate during its last few seasons."<sup>70</sup> The cheapest and quickest route to centralized marketing was to amend the old prorate program in time for the fall harvest.<sup>71</sup>

By June, a growers' committee had produced a rough

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<sup>69</sup>Supra n. 15.

<sup>70</sup>Kieffer, "Government Raisin Purchase Assured," PRP, 139 (March 9, 1940): 190.

<sup>71</sup>Leslie to Growers, January 31, 1940, February 23, 1940, March 29, 1940, April 26, 1940, May 31, 1940, SMCA; "Raisin and Grape Plans Pushed," PRP, 139 (April 20, 1940): 326.

outline of a 1940 program that would "supervise control of the crop from the moment it leaves the vineyard." Sun-Maid would operate district receiving stations, where inspection and grading operations would be conducted. The program established a 20 percent surplus pool and a 50 percent stabilization pool. The remainder--a mere 30 percent of the crop, as compared to 80 percent under the 1938 prorate--would be freely marketable. Growers could market no raisins until they delivered to the two pools; the Program Committee would issue certificates as proof of compliance. The federal government made \$8 million available in crop loans, contingent "upon the express condition that the program . . . be made effective and maintained in operation."<sup>72</sup> The growers voted on the program in late July and at the end of August Director Parker officially announced its implementation. The program had the support of Sun-Maid, as Leslie informed the membership: "In view of world conditions and their effect upon the export market we believe that the program is as good as could reasonably have been expected, and urge its whole-hearted support."<sup>73</sup>

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<sup>72</sup>Growers would receive \$27.50 per ton on Thompson and Sultana and \$25.00 per ton on Muscats delivered to the surplus pool; for stabilization pool raisins, growers would receive \$55.00 per ton on all varieties. Brief for Appellants, Parker v. Brown, Case No. 1040, U.S. Supreme Court, October Term 1941, 4-5, 15.

<sup>73</sup>Kieffer, "FSCC [Federal Surplus Commodity Commission] Raisin Buying Lifts Field Price," PRP, 139 (June 1, 1940); Leslie to Growers, August 30, 1940, September 27, 1940, SMCA.

The uncharacteristic dispatch with which the industry settled on such an extensive control program caught Porter L. Brown unaware. Brown had been a raisin grower all his life; in 1939, he established a small packing facility on his farm in Fresno County. He participated in the 1938 program, handling less than one percent of the industry's total crop. It was a usual practice for packers of that size to start selling the crop the preceding spring. In early 1940, Brown contracted to sell 762.5 tons of raisins. Two hundred tons would come from his own vineyards; he had an additional 100 tons on hand. The rest he planned to buy on the open market. When the program went into effect on September 7, Brown had not yet purchased all the raisins he needed. In fact, he had gambled that there would be no prorate for the 1940 crop, that growers would glut the market, and that he could fill his orders at rock-bottom prices. While there were plenty of raisins available to packers after the institution of the prorate, they cost \$55 per ton, \$10 more than the springtime price. Brown's delay in purchasing the raisins he needed cost him an additional \$5,625. The prorate held prices firm during the fall, and on December 28, he filed suit in the U.S. District Court at Los Angeles to enjoin its operation.<sup>74</sup>

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<sup>74</sup>Brief for Appellants, 16-19; Complaint, Brown v. Parker, U.S. District Court, Southern District of California, Case No. 78, filed December 28, 1940, in Transcript of Record, Parker v. Brown, No. 1040, October Term, 1941, 1.



Brown attacked the proration program on the grounds that it unconstitutionally interfered with interstate commerce. The strength of this argument lay in the fact that California had a natural monopoly on U.S. raisin production. Consequently, any marketing control program would affect interstate commerce. What the federal court had to decide was whether this effect was permissible under the Constitution.

Brown argued that the combined surplus and stabilization pools would withhold 70 percent of the raisins produced in the Zone from interstate commerce. Given that 95 percent of the raisins produced in California eventually entered interstate commerce, Brown's attorneys reasoned, this amounted to an unconstitutional interference with interstate trade. The federal court properly had jurisdiction in the case since Brown claimed a loss from being unable to fill his spring contracts far in excess of the federal statutory requirement of \$3,000. Brown made other attacks on the prorate law but these had nothing to do with his constitutional claim.<sup>75</sup>

The state responded that Brown's arguments were without

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<sup>75</sup>These other arguments stated that the program would continue in effect for years to come if not enjoined, causing excessive losses to growers; that the program imposed arbitrary and excessive penalties for non-compliance; and that the zone had never been willing or able to pay growers on delivery and so the prorate had never legally gone into effect! "Plaintiff's Amended Complaint," in Transcript of Record, Parker v. Brown, No. 1040, October Term, 1941, 1-5.

merit. Not only did the prorate program not burden interstate commerce but in fact proration benefitted interstate movement of raisins by ensuring the availability of an ample supply of standard quality raisins to the nation. In addition, the state's answer referred to the substantial assistance that state marketing programs had received from the federal government in the form of cooperation with federal agencies, complementary statutes, and loans to assist in disposal of surpluses. Such assistance conferred legal authority to regulate beyond the state's borders. In short, California Attorney General Earl Warren argued, "the Federal Government has recognized the benefit and help to interstate commerce of the said proration program for raisins."<sup>76</sup>

The District Court disagreed and issued the injunction --the first legal decision to go against proration in eight years and sixteen commodity prorates.<sup>77</sup> The court found that the Prorate Act did not protect health and safety interests, as the state was required to do in exercising its police powers. Further, the court agreed with Brown that the "production of raisins is complete when the grapes dry and cured into raisins." The process of production took place entirely within the confines of the growers' fields, and the court concluded that the prorate program had nothing

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<sup>76</sup>"Answer to First Amended Complaint," February 25, 1941, in Transcript of Record, Parker v. Brown, 6-13.

<sup>77</sup>Brown v. Parker, 39 F.Supp. 895 (1941).

to do with production and so interfered with interstate commerce:

It seems clear to us that the program is frankly and simply a means of controlling the supply of raisins into interstate trade channels to meet the market demands. As to this purpose it is not in our province to comment. We think the State has attempted to accomplish this result by a process which impinges upon a grant of power to the Federal Government.<sup>78</sup>

The state immediately filed its notice of appeal to the Supreme Court.<sup>79</sup>

As both sides submitted briefs on the commerce clause issue in the spring of 1942, the Raisin Proration Zone was making final disbursements of the proceeds from the 1940 crop pools. Every ton of raisins had been sold at prices above the minimum established under the prorate. During the litigation, the Program Committee made preparations to apply for a marketing agreement under AMAA or a government purchase program, in case the district court struck down the prorate act. The success of the 1940 program had "persuaded the [federal] government to put a \$72 [per ton] floor under the 1941 crop." With this guarantee, and with the government's subsequent decision to purchase all surplus raisins for Lend-Lease assistance, the industry decided that no prorate was needed for 1941. The Program Committee closed

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<sup>78</sup>Id. at 900, 901.

<sup>79</sup>Transcript of Record, 63-69.

its Fresno office for good in April, 1942.<sup>80</sup>

When the state's appeal came before the Supreme Court in 1941, the justices concluded that the question of proration's constitutionality involved more than commerce clause issues and ordered reargument for the 1942 term. The justices asked both sides to present arguments on the applicability of the Sherman Anti-Trust Act, the Agricultural Marketing Agreement Act of 1937, the Agricultural Adjustment Act of 1938, the Clayton Anti-Trust Act, and the Capper-Volstead Act of 1922.<sup>81</sup> These statutes and the constitutional provision raised issues pertaining to the federal-state relationship in economic regulation: Was the state program preempted by federal legislation that established the same regulations? Was the prorate law, by setting up a state-run monopoly, invalid under the federal anti-trust laws? Did proration have any legal relationship to the exemption from anti-trust prosecution provided to cooperatives under federal law? The Court's request for reargument on these questions indicated an awareness of the broader legal context of agricultural regulation and a desire to test more thoroughly the legality of state-sanctioned and

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<sup>80</sup>Leslie to Growers, April 25, 1941, May 29, 1941, June 27, 1941, July 25, 1941, SMCA; Kieffer, "1940 Raisin Pool Payments Completed," PRP, 143 (April 4, 1942): 254.

<sup>81</sup>Sherman Act, 26 U.S. Stats. at Large 209 (July 2, 1890); AMAA, 50 U.S. Stats. at Large 246 (1937); AAA, 52 U.S. Stats. at Large 31 (February 16, 1938); Clayton Act, 38 U.S. Stats. at Large 730 (October 15, 1914); Capper-Volstead Act, 42 U.S. Stats. at Large 388 (February 18, 1922).

state-operated monopoly.

Brown's attorneys stuck closely to the argument that had proved so persuasive in the lower federal court. In their brief, they contended that production of raisins was completely confined to grower operations, that proration dealt exclusively with marketing, and that because almost all of California's raisins were ultimately sold outside the state, proration unconstitutionally interfered with interstate commerce. It was simple to extend this reasoning to other constitutional and statutory questions. Forcing all growers to participate rendered proration invalid under the Sherman Act, Brown argued, because the law banned any combination that controlled local production and directly burdened interstate commerce. Under the AMAA, the U.S. Secretary of Agriculture had the duty to "issue orders respecting the handling of agricultural products (including fruits and raisins" in interstate commerce." Brown argued that Congress intended to give the Secretary power to set national agricultural policy and that the state proration law did not reinforce this policy. Rather, the two statutes were mutually exclusive: "The federal and state acts are wholly inconsistent because each act assumes control of the entire traffic in raisins. They cannot operate together. The superior federal statute must prevail, and the state act

must give way."<sup>82</sup> Brown pointed to the compulsory nature of the state program as proof that proration resulted in a taking of property without compensation. Lastly, Brown dismissed the argument that the prorated program constituted a cooperative entitled to immunity under the Capper-Volstead Act of 1922. Capper-Volstead referred to voluntary agreements among producers, not to "state control of manipulated organizations where membership may be or is compulsory."<sup>83</sup>

Attorney General Warren read the AMAA and the Prorate Act as complementary in purpose and operation:

The federal and state acts, while differing in some particulars, adopt the same economic policy of orderly regulated movement of the commodity, elimination of 'gluts' with their consequent 'famines,' and protection of the farmer in securing a living return for his crop and relief from disastrously depressed prices resulting from the unrestricted 'dumping' of a crop upon a surfeited market.

The congruence of federal and state agricultural regulation was further demonstrated by the financial relationship between the federal government and the state proration program. Coordination between the two levels of government long anteceded the implementation of the 1940 program; prorate officials well understood the dependence of the state program on federal crop loans. Of course, the state's brief

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<sup>82</sup>Supplemental Brief of Appellees, Parker v. Brown, No. 46, October Term 1942, 18-47.

<sup>83</sup>Supplemental Brief of Appellee, 53-55.

noted in passing, the federal government could simply have established a program for raisins under AMAA. But Secretary Wallace had chosen not to. And there was little reason to believe that he would change his mind, simply because what the state and the federal lending agencies had achieved in an industry rife with dissension was probably just as good--if not better--than what the USDA could have achieved under AMAA. There was no question of state conflict with federal policy in light of the fact that the Secretary of Agriculture, the president of the CCC, and President Roosevelt had all approved the loan agreements, as required under the statute: "It is sufficient to say that the State's 1940-1941 State Marketing Plan for Raisins was not only approved but was in fact actually prepared and dictated by the Federal officials."<sup>84</sup>

The state gave predictable answers to Brown's commerce clause arguments. Warren's brief contended that production was not complete upon drying of the raisins but that processing and packing were essential stages in the process to prepare the raisins for human consumption. Thus the proration program dealt with market functions that arose before the crop entered interstate commerce. The state's aim was to cure intrastate problems related to seasonal surplus, when prices paid by packers fell below growers' cost of production. Its regulations had no impact on movement in

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<sup>84</sup>Supplemental Brief for Appellants, 4-5, 31.

interstate commerce or retail prices. Proration regulated only transactions between growers and packers--exchanges that took place entirely within the boundaries of the state --and left the raisins alone after that:

The record here fails to show any unusual incident in the interstate transaction in the finished raisin production during the time the State program was in effect. There is absolutely nothing in the record upon the movement or prices of the finished raisin product in interstate commerce. The record does show affirmatively that there was no interference with the interstate supply.<sup>85</sup>

It was precisely because interstate commerce was not affected by proration that federal officials did not invoke their authority under federal law to preempt the state program. Only if they had done so would a constitutional conflict arise.

The heart of the state's argument lay in its analysis of the applicability of federal anti-trust laws to the state marketing program. There the distinction between private cooperation, sanction by the state and protected from prosecutions under the anti-trust laws, and state-run marketing programs was carefully laid out. No state's exercise of its police powers had ever been struck under Sherman, an interpretation supported by both legislative history and precedent. The prorate program was established under California's police power in furtherance of a legitimate policy to

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<sup>85</sup>Supplemental Brief of Appellants, 15-22.



protect the public interest in agriculture; thus, under the authority of Nebbia v. New York (1934)<sup>86</sup>, the state could fix agricultural prices through a compulsory monopoly without running aground on the reef of Sherman. Like a privately organized cooperative, the state program was designed as a self-help, non-profit, non-capitalized organization:

Certainly it requires a considerable stretch of the imagination to believe that Congress deliberately intended to permit private parties to operate agricultural nonprofit organizations exempt from the provisions of the anti-trust laws and at the same time to deny a State the right to do the same in the exercise of its governmental powers.<sup>87</sup>

Unlike a cooperative, however, a state in the exercise of its sovereign authority was not subject to the restrictions on monopoly and combination in restraint of trade. The state's appeal to a constitutional presumption in favor of the rationality of state legislative acts was faintly reminiscent of the justification for endowing cooperatives with extraordinary legal privilege, as Congress had done in Capper-Volstead: "It is not to be presumed that the State will so arbitrarily and unreasonably administer its laws, and such a problem can be met when and if it arises."<sup>88</sup>

The Supreme Court ruled unanimously that the California

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<sup>86</sup>291 U.S. 502 (1934).

<sup>87</sup>Supplemental Brief of State, Parker v. Brown, U.S. Supreme Court, No. 46, October Term 1942, 61.

<sup>88</sup>Supplemental Brief of Appellant, 35-65.

proration program was constitutional on all grounds.<sup>89</sup> Writing for the Court, Chief Justice Stone exonerated the state from Brown's accusation that proration erected an illegal combination among private persons. In enacting the Prorate Act, the state exercised its sovereign powers, outside the scope of the federal anti-trust laws.<sup>90</sup> Stone also adopted the state's argument on the relationship between the AMAA and the state Prorate Act:

The conditions imposed by the Secretary of Agriculture in the [CCC] loan agreement with the State of California, and the collaboration of federal officials in the drafting of the program, must be taken as an expression of opinion by the Department of Agriculture that the state program thus aided by the loan is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts.<sup>91</sup>

Applying the test of determining where interstate commerce begins and ends, the Court broke no new ground but simply ruled that the state's regulation was constitutional under the commerce clause because it "control[led] the disposition, including the sale and repurchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for

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<sup>89</sup>Parker v. Brown, 317 U.S. 341 (1943).

<sup>90</sup>Id. at 350.

<sup>91</sup>Id. at 358.

shipment in interstate commerce."<sup>92</sup> The Court upheld proration because it presented no conflict with federal agricultural policy.

Chief Justice Stone confined his ruling to the anti-trust, statutory, and commerce clause issues. The analogy between cooperation and proration played no part in the Court's decision, apparently because the policy arguments proved sufficiently persuasive. One legal scholar has termed Parker "a decision rooted in a particular legislative context."<sup>93</sup> In fact, the decision recognized that cooperation affected--and was affected by--the scope and purpose of proration. The state's method of stabilizing the raisin industry borrowed heavily from cooperation's model of market control. With the addition of compulsory participation, proration improved on the model to the extent that the state could subdue an unruly band of growers, packers, and cooperative officials--all of whom had had a hand in Sun-Maid's inability to maintain control over the market.

In Parker v. Brown, the Court had to interpret a complex regulatory relationship between the federal government and the state of California. States may permissibly "substitute public regulation for private competition," but such regulations would be examined for their effects on

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<sup>92</sup>Parker v. Brown, 317 U.S. 341, at 358, 361.

<sup>93</sup>Lawrence A. Sullivan, Handbook of the Law of Anti-trust (St. Paul, MN: West Publishing Co., 1977), 734.

federal policy, legislation, and constitutional powers.<sup>94</sup> The case also carried subtle implications for the cooperative movement. Proration and the manner in which it was authenticated by the Supreme Court disclosed the transformation in Sun-Maid's economic status. The raisin industry, to be sure, was one of the most difficult to organize. Growers often did not agree on the specifications of proration programs; some even disputed the necessity for governmental intervention of any kind. But cooperatives could not control entire industries by themselves; government financial and administrative assistance was necessary. Sun-Maid's particular difficulties during the 1920s and 1930s attest to the costs involved in running the kind of monopoly contemplated by the law of cooperative marketing. Paradoxically, the state faced enormous difficulties in overcoming the growers' suspicion of governmental intrusion into the market. Attempts at collective action in the raisin industry had left a mixed legacy by the time Parker was finally decided.

The case, then, does not so much break up the cooperative ideal as recognize that a transformation had already taken place in the competitive position of cooperatives, particularly, their right to control marketing. Sun Maid's bungled attempt to bypass proration in 1937 demonstrated that the cooperative was not capable of conducting a monop-

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<sup>94</sup>Ibid.

oly due to its financial dependence on federal crop loans. Subsequently, Sun-Maid supported proration because a state marketing program, whatever its drawbacks, at least removed the debate surrounding the industry's economic problems to the realm of public policy and legislative, democratic accountability. For Sun-Maid, proration made it possible to compete in the market, retain some of the still-useful privileges of being a cooperative, and avoid some of the pitfalls of cut-throat competition.

The terms of the co-existence of cooperatives and government marketing programs were forged earlier and more easily in other commodities. In the cases of the lemon and walnut industries, the cooperatives retained extensive control over most of their growers; they used proration and federal marketing orders to maintain their control and to solve their free-rider problems. Those industries show that the partnership between cooperation and public oversight, as established during the 1920s, could be extended when deep economic crisis warranted. Proration did not meet nearly as much resistance where there was a strong cooperative; there the partnerships between the public and private spheres, between the state and the federal government, were strengthened by a foundation of industry confidence in cooperative action.

The raisin industry's experience with proration also showed that a private cooperative presented little threat to

free competition. By 1938, Sun-Maid was incapable of either controlling competition or impeding the state program. Once its officers realized the limitations of their organization, they helped to facilitate administration of the prorate programs. The Prorate Act and the decision in Parker, however, did not disturb the legal privileges with which public policy endowed cooperatives for the benefit of their members and the public. They simply provided new ways for cooperatives to take advantage of those privileges.



22. J.M. Leslie, Sun-Maid President, c. 1940. Leslie began his affiliation with Sun-Maid during the 1920s as an Advisory Council member and later Vice-President under Merritt. He became president in 1930 and served until 1948, surpassing his two predecessors in longevity. Courtesy Sun-Maid Raisin Growers, Corporate Archives.

## CONCLUSION

By the end of World War II, the special place reserved for agriculture in American society had crystallized in public law. Promoters of cooperative marketing in general and of the California style of cooperation in particular asserted that cooperation directly served the public interest. Persuaded that cooperatives fulfilled their economic promise, Congress and the state legislatures conferred on them an impressive array of legal privileges. This study considered anti-trust exemption as the most significant of these privileges; cooperatives were also the beneficiaries of special income tax exemptions, and promotional assistance in the form of loans, market information, and administrative expertise.<sup>1</sup>

The act of endowing cooperatives with the privilege of anti-trust exemption did more than grant farmers the right to combine and control the markets for their products. It also marked a pathway from the era of substantive due process through the toppling of formalist roadblocks to the plenary regulatory power that triumphed during the New Deal. The case of Connolly v. Union Sewer Pipe Company, decided in

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<sup>1</sup>For an extended discussion and analysis of these laws, see the symposium in Law and Contemporary Problems, 13 (1948).



1902,<sup>2</sup> stood as the most formidable obstacle to state favoritism toward agriculture. The Supreme Court held in Connolly that states could not discriminate between farmers and non-farmers for the purpose of regulating exchange in the marketplace. Only the lone voice of Justice Joseph McKenna was heard in dissent. In a short but impassioned opinion, McKenna argued the case for treating farmers differently from other entrepreneurs:

The statute was the expression of the purpose of the State to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons, or corporations. . . . But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? . . . The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. . . . In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts?<sup>3</sup>

McKenna differed with the majority not so much because he sympathized with farmers, but because he believed the state was within its authority to make reasonable discriminations based on "economic problems" into which the judiciary had no business inquiring.<sup>4</sup>

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<sup>2</sup>184 U.S. 540 (1902).

<sup>3</sup>Id. at 571.

<sup>4</sup>Id.

By the time the issue had passed through the prism of economic and constitutional crisis, both the judiciary's conception of the proper role of government in economic regulation and the relationship between cooperation and monopoly had changed. The Supreme Court finally--and unanimously--overruled Connolly in 1940, adopting McKenna's argument that a legislative differentiation between farmers and non-farmers for purposes of anti-trust policy was constitutionally proper. The case of Tigner v. Texas<sup>5</sup> presented facts almost identical to those in Connolly. A state anti-trust statute imposed criminal penalties on persons conspiring to restrain trade but exempted "agricultural products or live stock in the hands of the producer or raiser." A beer manufacturer, prosecuted under the statute, challenged the entire law under the authority of Connolly.<sup>6</sup> Justice Felix Frankfurter, like Justice McKenna, found that the state's purpose in enacting the statute--"curbing industrial and commercial combinations"--rested on the belief that farmers and ranchers "presented no threat to the community." In other words, Frankfurter found reasonable grounds for the legislature's decision to classify farmers and ranchers separately from industry and commerce.<sup>7</sup>

The constitutional justification for this reasoning lay

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<sup>5</sup>310 U.S. 141 (1940).

<sup>6</sup>Id. at 144.

<sup>7</sup>Id. at 145.

in the legislative declarations of policy in both federal laws promoting cooperation and the state cooperative marketing acts. "Since Connolly's case was decided, nearly forty years ago," Justice Frankfurter wrote, "an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy."<sup>8</sup> And what were those differences? None other than those captured in Aaron Sapiro's production theory of agriculture--his idea that the atomistic nature of agricultural production mandated governmental recognition of agriculture's special marketing problems.<sup>9</sup> The concept had become so thoroughly imbued in public policy that Frankfurter asserted its relevance without bothering to cite authorities:

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process.<sup>10</sup>

These real economic differences, Frankfurter held, justified

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<sup>8</sup>Id. at 145-46.

<sup>9</sup>Chapter 7 discusses Sapiro's production theory and its influence on state legislation during the 1920s.

<sup>10</sup>Id. at 146-47.

special treatment for cooperatives, eclipsed the equal protection scruples of the Connolly majority, and settled the issue of whether legislatures could frame public policy on the basis of those differences: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling."<sup>11</sup>

The legal basis for differentiating agriculture from other forms of commerce, and for using cooperatives as the vehicle by which to execute that policy, was thus well established by mid-century. Even the National Association of Manufacturers, hardly a natural ally of agriculture, proclaimed in 1946 that cooperatives were "a legitimate form

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<sup>11</sup>Id. at 147. There were limits to the state's indulgence of agricultural monopoly. The Capper-Volstead Act did not permit cooperatives to combine with other persons or firms, only other cooperatives; and the enforcement provisions in Section 2 theoretically checked cooperatives' effect on price. Those provisions were upheld and enforced against a cooperative combining with a third party (not a cooperative) in U.S. v. Borden, 308 U.S. 188 (1939). But few other anti-trust provisions could be successfully invoked against farmers. The Clayton Act was construed in the farmers' favor in 1943, when a federal district judge held, "When Congress said that cooperatives were not to be punished even if they became monopolistic it would be ill-considered for me to hold to the contrary." U.S. v. Dairy Cooperative Association, 49 F.Supp. 475 (D.C.D.Ore. 1943).

of private enterprise."<sup>12</sup> But as the law was changing to accommodate cooperative enterprise, at the same time cooperation itself had altered in form and meaning. The transformation from equity to efficiency wrought by California raisin growers and exported to the rest of the nation by Sapiro's cooperative marketing acts diminished the economic distinctiveness of cooperation. The more cooperatives became special in the eyes of the law, the more they became like regular business corporations in form and function.

Economists were most distressed at the paradox between law and cooperative morphology. University of California agricultural economist Henry E. Erdman noted in 1949 that considerable ambiguity had arisen as to proper cooperative form: "It is true that the economists' concept of a 'business firm' as a 'profit maximizing unit' does not fit cooperatives without qualification, but the 'economic concept of a "pure" cooperative' is likewise not acceptable."<sup>13</sup> Cooperatives were not unadulterated private corporations, but neither did they retain clear identification with the Rochdale principles.

In part, the roots of this ambiguity lay in the fertile soil of California agriculture, where economic profit was an

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<sup>12</sup>National Association of Manufacturers, NAM and Cooperatives (New York: NAM, 1947), 7, quoted in A. Ladru Jensen, "Integrating Economic and Legal Thought on Cooperatives," Journal of Farm Economics, 31 (1949): 907.

<sup>13</sup>Henry E. Erdman, "Discussion--Thought on Cooperatives," Journal of Farm Economics, 31 (1949): 916.

overt goal of cooperating farmers. As early as 1911, California economists pointed out that the fruit industry cooperatives were scarcely different from the commercial packing and marketing firms they aimed to replace. Ira Cross went so far as to label cooperation a "failure" in California, due in his view to the absence of the traditional mutual help spirit among growers, the prominence of economic individualism, and the predominance of profit-oriented concerns within the cooperatives that did persevere: "The California Fruit Growers' Association," he said, "exists solely because it can earn greater profits for its members than can be obtained by any other marketing arrangement. It is difficult to see wherein this point of view differs from that which characterizes the stockholders of the ordinary business corporation."<sup>14</sup> The same charge, of course, was routinely leveled against the CARC and Sun-Maid through the 1920s.

By 1925, observers openly debunked the idea that coop-

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<sup>14</sup>Ira Cross, "Cooperation in California," American Economic Review, 1 (1911): 543, 544. Cross's criticism ignored the reality faced by would-be cooperating growers; lacking means of independently financing their organizations, they had to depend on outside interests like the local banks, whose support meant more to the success of cooperation in California than the internal structure of the cooperatives. Financing was absolutely essential to acquire market control and the capital investments needed for processing, packing, marketing functions; thus, in organizing marketing cooperatives, growers made pragmatic choices for which the Rochdale principles offered little guidance. John W. Lloyd, Cooperative and Other Methods of Marketing California Horticultural Products, University of Illinois Studies in Social Science, 8:1 (1919): 77, 82.

eration was anything other than "our old friend Private Ownership dressed up in a new suit of clothes." But Hugh J. Hughes, writing in The Outlook, sought not to bury cooperation but to praise it; he wished to celebrate its progress by exposing the Rochdale tradition as a myth that had no application in modern agricultural commerce. "[Cooperation] has been represented as the Sir Galahad of business, able to conquer because its heart was pure. . . . It's about time that we get over this childish vision of cooperation as a dragon slayer, and talk about it in terms of twentieth-century business."<sup>15</sup> So, then, what kind of business was cooperation? Simply another, albeit different, form of enterprise:

[C]o-operation has the same field of action, the same limits, the same chances of success and failure, as private business. Co-operation is merely another form of private business, and the only mystery about its place and purpose is that unusual powers and results have so long been attributed to anything carrying the name 'co-operative.'<sup>16</sup>

The agricultural economist Edwin G. Nourse shared Hughes' analysis but not his conclusions. He, too, pleaded for a newer, more informed consideration of cooperation. Rather than seeing it as the "mystic formula destined to usher in the economic millennium," or as the "creator of monopoly and

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<sup>15</sup>Hugh J. Hughes, "What Co-operation Can Do," The Outlook, 141 (September 16, 1925): 92.

<sup>16</sup>Hughes, "What Co-operation Can Do," 96.

the breeder of a harmful class-consciousness," Nourse urged Americans to confine their hopes for cooperation to more modest goals: "maintain[ing] present standards of living and productive efficiency and seek[ing] a plan of organization suited to modern conditions of minute division of labor, extreme geographical specialization of production, and world-wide exchange."<sup>17</sup> Said more directly, the participatory democracy of Rochdale cooperation could not succeed in a technologically advanced economy characterized by large-scale forms of business, commerce, and finance. The best that one could reasonably expect, Nourse cautioned, was that cooperation "should prove . . . an abiding safeguard against undue exploitation or inefficiency."<sup>18</sup>

These economists' concerns were generally well-founded. Despite statutory attempts to define true cooperative practice--by limiting non-member business, requiring that all members be actual farmers, specifying an eight percent maximum for dividends, and the one-person, one-vote standard--cooperatives' resemblance to regular corporations tended to increase as the century progressed. Indeed, economists today commonly assert that cooperatives, like regular corporations, are private, proprietary, investor-

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<sup>17</sup>Edwin G. Nourse, "The Economic Philosophy of Cooperation," American Economic Review, 12:4 (December, 1922): 590-91.

<sup>18</sup>Nourse, "The Economic Philosophy of Co-operation," 593.



owned firms seeking to benefit owners through profit-making operations. What distinguishes cooperatives from regular corporations is the way in which profits are distributed. Regular corporations disburse profits to shareholders depending on the amount of their invested capital. Cooperatives, however, impose special qualifications on their members--usually derived from occupation--and only these members receive patronage dividends according to their contribution to the business of the cooperative.<sup>19</sup> Thus, what makes cooperatives cooperative is patronage dividends. And this element was not incorporated into the Capper-Volstead Act or the state cooperative marketing acts but left to the discretion of farmers to adopt or not as they chose.

And, after the passage of these laws, arguments over cooperative form became academic. Politicians ceased debating the relative merits of limits on non-member business, capital stock, and non-profit status, satisfied that as long as the Capper-Volstead and state law requirements were met cooperatives would pose little threat to the anti-trust policy. While this conclusion assured farmers of the right to cooperate without fear of Justice Department "harassment," economists and lawyers associated with agriculture raised questions of how this privilege would be used, who

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<sup>19</sup>For a current analysis of cooperative morphology, see David G. Barton, "Principles," in David Cobia, ed., Cooperatives in Agriculture (Englewood Cliffs, NJ: Prentice Hall, 1989), 3-7.

would avail themselves of it, and whether those invoking the privilege would abide by the implicit guarantee that cooperatives would serve rather than undermine the public interest.<sup>20</sup>

Still others contended that the dilution of the original vision of cooperation--its reliance on voluntarism, its aspiration to equality, its promise to blunt the hard edges of industrialism for the working class and small owners--in favor of an emphasis on corporatist market control was a capitulation to the new industrial order. The historian James Malin argued in 1943 that the cooperative movement represented the "principal exception" to farmers' general unwillingness to adopt agriculture "more effectively to the accelerated economic and social change." But even after seventy-five years' experimentation, he concluded, "this type of agricultural organization was still, at best, a doubtful undertaking." Malin's skeptical assessment of the movement rested on the bold insight that governmental promotion and financing of cooperatives ultimately resulted in government control of both marketing and production during the New Deal. The autonomy of farmers, which cooperatives were supposed to preserve, was ceded away under the New Deal farm program, which he termed "a most precarious and uncer-

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<sup>20</sup>Mathew O. Tobriner, "How Shall Cooperatives Be Organized?" Journal of Farm Economics, 6 (1924): 367-77; O.B. Jesness, "Relation of Cooperative Marketing to the Adjustment of Agricultural Production," Journal of Farm Economics, 7 (1925): 176-90.

tain basis for planning for the future."<sup>21</sup>

Indeed, ever since the New Deal displaced both the commodity marketing and voluntary production control principles, the cooperative movement has been scrambling to redefine both its economic function and its philosophical vision. It is a problem that reduces to a question that has dogged the movement ever since its inception in the U.S.: do cooperatives monopolize to the point where they unreasonably restrain trade? According to some legal and economic scholars, they do not, because no Secretary of Agriculture has ever made a finding of "unduly enhanced" prices under Section 2 of Capper-Volstead.<sup>22</sup> But as the California raisin growers demonstrated, the lack of an official finding does not guarantee that cooperatives have never exerted undue influence on price. The scholarly insistence that cooperatives pose no real danger to competitive balance in the market rests on a set of somewhat contradictory beliefs. Farmers contend, and some scholars agree, that it is desira-

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<sup>21</sup>James C. Malin, "Mobility and History: Reflections on the Agricultural Policies of the United States in Relation to a Mechanized World," Agricultural History, 17 (1943): 178, 186.

<sup>22</sup>Harold F. Breimyer, "The Capper-Volstead Act: A Historical and Philosophical Assessment," in Agricultural Cooperatives and the Public Interest: Proceedings of a North Central Regional Research Committee 117 Sponsored Workshop Held in St. Louis, Missouri, 6-8 June 1977, North Central Project 117, Monograph 4 (Madison: Research Division, College of Agricultural and Life Sciences, University of Wisconsin, 1978), 6; Richard B. Heflebower, Cooperatives and Mutuals in the Market System (Madison: University of Wisconsin Press, 1980), 37.

ble to retain the essence of voluntary associationalism in which decision-making is local and autonomous. At the same time, cooperatives must be set apart from regular business corporations in ways recognized and promoted by law. Yet, because cooperatives must operate in the same "competitive world" as "other enterprise units," they must be endowed with the attributes of regular business corporations.<sup>23</sup>

The California raisin growers, more than any other agricultural industry, conflated these three goals. Their organization served as the model for legal recognition of the cooperative movement. Their combination of the associationalism of traditional cooperation, the special legal privileges necessary for agricultural combination, and the competitive tools of the industrial corporation was both imaginative and unprecedented. Certainly theirs was an impressive, and at times violent, method of coping with the economic and social changes besetting agriculture in the twentieth century. Their attempt to have the best of all worlds--voluntarism, corporatism, and the privileged legal status to make the design work--rested on cooperation's ideological appeal and the assumptions underlying "modern America's organizational revolution."<sup>24</sup>

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<sup>23</sup>Breimyer, "The Capper-Volstead Act," 7-8.

<sup>24</sup>Louis Galambos, Competition and Cooperation: The Emergence of a National Trade Association (Baltimore: The Johns Hopkins University Press, 1966), 295.

The drawbacks of agricultural cooperation were many. Its economic effectiveness was and still is disputed.<sup>25</sup> But the ways in which law, ideology, and action came together through cooperation reorganized American agriculture during the twentieth century, gave it its peculiar mix of private and public values, and provided a symbol as compelling as the family farm for an increasingly urban American to understand its enduringly powerful rural element.

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<sup>25</sup>See, for example, E. Dale Odom, "Associated Milk Producers Incorporated: Testing the Limits of Capper-Volstead," Agricultural History, 59 (1985): 40-55.

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