

CAPPER-VOLSTEAD AND RAW MILK REGULATIONS: THE NEED TO REFORM AND PROTECT THE SMALL DAIRY FARMER

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We must preserve the qualities of industriousness . . . and loyalty to traditions which have proved a source of good throughout the centuries. —Pope Pius XII¹

INTRODUCTION

The United States Department of Agriculture takes the Census of Agriculture once every five years.² In 1934, 5.2 million dairy farms existed in America.³ As of 2022, just 24,470 dairy farms remain.⁴ Since 1934, dairy farms experienced a rapid disappearance.⁵ Despite the rapid disappearance of dairy farms, milk production continually increases.⁶ Currently, milk

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1. Pope Pius XII, *The Pope Speaks on Rural Life*, PAPAL ENCYCLICALS ONLINE (1946), <https://www.papalencyclicals.net/pius12/poprrural.htm> (on file with the Ave Maria Law Review).

2. *Census of Agriculture*, USDA (Oct. 8, 2025), <https://www.nass.usda.gov/AgCensus/> (on file with the Ave Maria Law Review).

3. Hannah Tremblay, *Dairy's Decline: The Harsh Reality for Farmers and What We Can Do About It*, FARM AID: BLOG (June 23, 2023), <https://www.farmaid.org/blog/dairys-decline-harsh-reality-for-farmers/> (on file with the Ave Maria Law Review).

4. U.S.D.A., 2022 CENSUS OF AGRICULTURE HIGHLIGHTS: DAIRY CATTLE AND MILK PRODUCTION 1 (2024), https://www.nass.usda.gov/Publications/Highlights/2024/Census22_HL_Dairy.pdf (on file with the Ave Maria Law Review).

5. Tremblay, *supra* note 3.

6. Jonathan Law, *Value of U.S. Milk Production Reaches \$59 Billion in 2022*, U.S.D.A. (Jan. 11, 2024), <https://www.ers.usda.gov/data-products/charts-of-note/chart-detail?chartId=108228> (on file with the Ave Maria Law Review); *see also Are Americans Moving on from Dairy?*, USA FACTS (Feb. 22, 2024), <https://usafacts.org/articles/are-americans-moving-on-from-dairy/> (on file with the Ave Maria Law Review) (noting that since 1975, milk production has almost doubled).

production is at an all-time high⁷ with 226 billion pounds produced in 2022.⁸ However, the average American dairy farmer only made a profit twice within the past two decades.⁹ Thus, countless dairy farmers are forced to sell their cows, bringing an end to their family's way of life and the source of income that has lasted them generations.¹⁰ Small dairy farmers continue to disappear at an alarming and rapid rate while milk production increases.¹¹ The mass disappearance of small dairy farmers is because of the "get big or get out" culture in the dairy industry.¹²

I. THE CURRENT STATE OF THE DAIRY INDUSTRY

The structure of the dairy industry plays a major role in the dairy crisis.¹³ The three stages of the dairy industry are: (1) farmers producing the unpasteurized (raw) milk; (2) handlers processing the milk; and (3) consumers purchasing the milk from the *processors*.¹⁴

7. *Id.*

8. *Milk Production, Disposition, and Income 2022 Summary*, U.S.D.A., 4–5 (Apr. 2023), https://www.ams.usda.gov/sites/default/files/media/FMMO_MIG_15A.pdf (on file with the Ave Maria Law Review).

9. Nina Lakhani, *US Dairy Policies Drive Small Farms to 'Get Big or Get Out' as Monopolies Get Rich*, THE GUARDIAN (Jan. 31, 2023), <https://www.theguardian.com/environment/2023/jan/31/us-dairy-policies-hurt-small-farms-monopolies-get-rich> (on file with the Ave Maria Law Review).

10. See Rick Barrett & Mark Hoffman, *'This Isn't the Way I Wanted It to End': Dairy Farm Shuts Down After 148 Years*, PULITZER CTR. (Mar. 8, 2021), <https://pulitzercenter.org/stories/isnt-way-i-wanted-it-end-dairy-farm-shuts-down-after-148-years> (on file with the Ave Maria Law Review) (noting that dairy farmers, the Adams family, could not afford their farm anymore and had to shut it down and sell its animals and equipment); see also Phil McCausland, *Best Advice to U.S. Dairy Farmers? 'Sell Out As Fast As You Can'*, NBC NEWS (June 30, 2018), <https://www.nbcnews.com/news/us-news/best-advice-u-s-dairy-farmers-sell-out-fast-you-n887941> (on file with the Ave Maria Law Review) (reporting that the Coombs family was also forced to shut down their family farm after 70 years because they lost their contract with Dean Foods); see also Abe Voelker, *How the Dairy Crisis Killed My Family's Farm*, CIVIL EATS (Mar. 14, 2019), <https://civileats.com/2019/03/14/how-the-dairy-crisis-killed-my-familys-farm/> (on file with the Ave Maria Law Review) (explaining that the Voelkers blame the shutdown of their farm on CAFO mega-dairies and low prices paid to farmers).

11. *The Dairy Crisis*, NFFC, <https://nffc.net/what-we-do/dairy-crisis/> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

12. *Id.*

13. Tremblay, *supra* note 3.

14. *From Farm to Table: How Milk Goes From the Cow to Your Glass*, U.S. DAIRY (July 20, 2022), <https://www.usdairy.com/getmedia/8a21c6dd-f233-4029-b707-0c7cb5240518/Infographic-FarmToTable-12-2022.pdf?ext=.pdf> (on file with the Ave Maria Law Review).

The first stage, farmers producing the raw milk, can differ in appearance depending on the size of the farm.¹⁵ Small dairy farms may range from 1–50 cows; midsize dairy farms have hundreds of cows; and mega-dairies have thousands of cows.¹⁶ Only approximately 2,000 dairy farms are mega-dairies, but over half of the milk produced in the U.S. comes from them.¹⁷ Small farmers who do not process the milk themselves will produce it, bottle it up to drink for themselves, and sell the rest to the handler to be processed.¹⁸

The middle stage includes handling the milk by pasteurizing it and processing it into pasteurized fluid milk or other pasteurized milk products like butter and cheese.¹⁹ This middleman processor has always been the most powerful role in the dairy industry because it is the most profitable.²⁰ The processors who obtain the raw milk from the farmers get to “process, brand, label, and collect the profits.”²¹ The processors have mass-consolidated the dairy industry, leaving power in the hands of a few, which has left devastating effects on the small farmers.²²

The powerful processors mass-consolidated the dairy industry through the strategic use of dairy cooperatives.²³ In general, agricultural cooperatives are “a collection of farmers jointly marketing their products in order to bargain for a better price than they could obtain individually.”²⁴ Dairy cooperatives can

15. James M. MacDonald, *Scale Economies Provide Advantages to Large Dairy Farms*, U.S.D.A. (Aug. 3, 2020), <https://www.ers.usda.gov/amber-waves/2020/august/scale-economies-provide-advantages-to-large-dairy-farms#:~:text=American%20dairy%20farms%20cover%20a,operations%20with%20several%20thousand%20cows> (on file with the Ave Maria Law Review).

16. *Id.*

17. *The Dairy Crisis*, *supra* note 11.

18. *Big Dairy Does Not Support Raw Milk*, GETRAWMILK.COM (July 12, 2024), <https://getrawmilk.com/content/industrial-dairy-groups-anti-raw-milk> (on file with the Ave Maria Law Review).

19. *Gateway to Dairy Production and Products*, FOOD & AGRIC. ORG. OF THE U.N., <https://www.fao.org/dairy-production-products/processing/milk-processing/en> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

20. See *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 825 (1978) (discussing how “[f]armers were perceived to be in a particularly harsh economic position [because they were] . . . caught in the hands of processors and distributors”).

21. *Welcome Dairy Farmers*, RAW MILK INST., <https://www.rawmilkinstitute.org/farmers> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

22. Tremblay, *supra* note 3.

23. Eduardo Castro, “*For the Mutual Benefit of Members Thereof*”: *Attacking Capper-Volstead Immunity and Challenging Dairy Cooperative Power*, 38 MINN. J. L. & INEQ. 145, 150–51 (2020).

24. John C. Monica, Jr., *Agricultural Antitrust Liability: What About the “Reasonable Farmer?”*, 22 DRAKE J. AGRIC. L. 1, 2 (2017).

achieve this by negotiating things like price, quality, and delivery.²⁵ Dairy cooperatives are farmer-owned, and they are supposed to “further the economic well-being” of their members.²⁶

Nevertheless, in 2022, only three dairy cooperatives—Dairy Farmers of America (DFA), Land O’Lakes, and California Dairies—sold 83% of all fluid milk production.²⁷ DFA, which first formed from a merger of four cooperatives, purchased the largest dairy processor, Dean Foods, in 2020.²⁸ Now, DFA is the largest dairy cooperative in the U.S., with “unprecedented power” as both a milk producer and processor.²⁹ DFA, alone, supplies approximately 29% of the nation’s milk³⁰ and brought in a revenue of \$24.5 billion in 2022.³¹ Due to this “unprecedented power,” small dairy farmers are left with little market power, are forced to join cooperatives like DFA, and are left with no choice but to accept low prices from the processor.³²

The power the processors currently enjoy in the dairy industry is a result of many interwoven factors. Many law review discussions focus solely on one factor,³³ but there have not been any changes so far. This Note argues that to fully understand the current crisis of the small farmer, it is important to understand how both the Capper-Volstead Act and raw milk regulations collectively increase the processor’s power by eliminating the small dairy farmers. This Note advocates for the reform of the current law that purports to protect the farmer but actually protects the processor, and it calls to redistribute the power from the processors to the farmers. Part II will provide a foundational background on the antitrust law that affects farmers and discuss

25. *Dairy Cooperatives: Potential Implications of Consolidation and Investments in Dairy Processing for Farmers*, GAO (Sept. 27, 2019), <https://www.gao.gov/products/gao-19-695r> (on file with the Ave Maria Law Review).

26. *About Cooperatives*, NMPF, <https://www.nmpf.org/about/about-nmpf/about-cooperatives/> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

27. Tremblay, *supra* note 3.

28. Dan Kaufman, *Is It Time to Break Up Big Ag?*, NEW YORKER (Aug. 17, 2021), <https://www.newyorker.com/news/dispatch/is-it-time-to-break-up-big-ag> (on file with the Ave Maria Law Review).

29. *Id.*

30. *Strategic Investments Continue to Strengthen the Cooperative*, DFA (Mar. 23, 2022), <https://dfamilk.com/newsroom/press-center/press-center-blog/march-2022/strategic-investments-continue-to-strengthen-the-c#~:text=In%202021%2C%20DFA%20directed%20the,production%20in%20the%20United%20States> (on file with the Ave Maria Law Review).

31. *DFA Reports 2022 Financial Results*, DFA (Mar. 22, 2023), <https://dfamilk.com/newsroom/press-center/press-center-blog/march-2023/dfa-reports-2022-financial-results> (on file with the Ave Maria Law Review).

32. Castro, *supra* note 23, at 151; *see also* Kaufman, *supra* note 28 (noting that a farmer once remarked that, “The only reason I’m with D.F.A. is there’s no other place to go.”).

33. Castro, *supra* note 23; *see also* Kaufman, *supra* note 28.

how Congress came to pass an exemption for agricultural cooperatives. Part III will analyze how the courts expanded the law, disregarding its original intent. Part IV will examine the need and proposal for equitable solutions.

II. BACKGROUND OF ANTITRUST LAW

The primary law that allows the processors to keep expanding their power over the small farmers is a federal statute called the Capper-Volstead Act.³⁴ In 1922, Congress enacted Capper-Volstead to allow farmers, not processors, to form cooperatives without violating antitrust law.³⁵ Because Capper-Volstead is supposed to be a limited exemption to antitrust law,³⁶ it is necessary to have a foundational understanding of very basic antitrust law with regard to agricultural cooperatives.³⁷

A. *Sherman Act – Sections 1 and 2*

In 1890, Congress passed the Sherman Antitrust Act³⁸ in response to the growing power of corporations and their unfair business practices that allowed them to push out competitors to become industry titans.³⁹ Section One of the Sherman Act outlawed anticompetitive practices⁴⁰ by making “[e]very contract, combination in the form of trust . . . or conspiracy, in restraint of trade or commerce . . . to be illegal.”⁴¹ Section Two of the Sherman Act outlawed monopolies⁴² by making “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or

34. See generally Castro, *supra* note 23.

35. See Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827–28 (1978) (holding that “[c]learly Congress did not intend to extend the benefits of the act to the processors”).

36. Donald A. Frederick, *Legal Rights of Producers to Collectively Negotiate*, 19 WM. MITCHELL L. REV. 433, 440–41 (1999).

37. Sarah K. Phillips, *The Future of Dairy Cooperatives in the Modern Marketplace: Redeveloping the Capper-Volstead Act*, 124 PENN. ST. [DICK.] L. REV. 175, 181 (2019) (on file with the Ave Maria Law Review).

38. Note, *Antitrust Action Against Milk Marketing Cooperatives Shaking up the Milk Industry*, 34 DRAKE L. REV. 493, 495 (1985) (on file with the Ave Maria Law Review).

39. Christopher Klein, *How Gilded Age Corruption Led to the Progressive Era*, HISTORY (July 10, 2025), <https://www.history.com/news/gilded-age-progressive-era-reforms> (on file with the Ave Maria Law Review).

40. Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 395, 395 (1999) (on file with the Ave Maria Law Review).

41. 15 U.S.C. § 1.

42. Harbur, *supra* note 40, at 395.

persons, to monopolize any part of the trade or commerce . . . guilty of a felony. . . .”⁴³

The Sherman Act was vague and left much room for judicial interpretation, so the courts developed the *Rule of Reason* and the *Rule of Per Se Illegality*.⁴⁴ The *Rule of Reason* “prohibits conduct which ‘unreasonably’ restrains trade or monopolizes commerce.”⁴⁵ The *Rule of Per Se Illegality* classifies inherently anticompetitive practices, like price-fixing or dividing markets, as illegal per se.⁴⁶

B. Clayton Act – Section 6

The Sherman Act became a source of uncertainty for agricultural cooperatives because farmers banding together to market their products and agree on prices would be a violation of antitrust law.⁴⁷ For example, price-fixing is *illegal per se* under Sherman.⁴⁸ However, price-fixing to obtain a better price for the farmer’s milk is a main objective of agricultural cooperatives,⁴⁹ which have long been embedded in American history.⁵⁰ Congress acknowledged the important role cooperatives played in America and reacted by passing the Clayton Act in 1914.⁵¹ Section Six of the Clayton Act became the first exemption for agricultural cooperatives and was “a clear expression by Congress that forming a cooperative is not a violation of the antitrust laws.”⁵² Section Six of the Clayton Act says:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations instituted for the purposes of mutual help, and not having capital stock or conducted for profit,

43. 15 U.S.C. § 2.

44. Frederick, *supra* note 36, at 437.

45. *Id.*

46. *Id.* at 438.

47. David L. Baumer, Robert T. Masson & Robin A. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 188 (1986).

48. Frederick, *supra* note 36, at 438.

49. *Fairdale Farms v. Yankee Milk*, 635 F.2d 1037, 1039 (2d Cir. 1980).

50. Stephen D. Hawke, *Antitrust Implications of Agricultural Cooperatives*, 73 KY. L. J. 1033, 1033 (1985).

51. David P. Claiborne, *The Perils of the Capper-Volstead Act and Its Judicial Treatment: Agricultural Cooperation and Integrated Farming Operations*, 38 WILLAMETTE L. REV. 263, 275 (2002).

52. Frederick, *supra* note 36, at 439.

or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.⁵³

Section Six proved to be “inadequate” because it only applied to nonstock organizations⁵⁴ and did not clarify what exactly cooperatives were allowed to do without violating the Sherman Act.⁵⁵ The law only vaguely states that cooperatives are allowed to “carry[] out the legitimate objects thereof. . . .”⁵⁶

C. Capper-Volstead Act

The inadequacy of Section Six of the Clayton Act resulted in even more uncertainty for cooperatives under antitrust law.⁵⁷ So in 1922, Congress resolved this uncertainty by passing the Capper-Volstead Act.⁵⁸ Capper-Volstead expanded the antitrust exemption to include cooperatives with capital stock, which would help farmers fight against the middlemen processors,⁵⁹ and attempted to establish what the “legitimate objects” of cooperatives entailed.⁶⁰ Capper-Volstead, the “Magna Carta of Agriculture,” became the foundational law that led to the current state of the dairy industry.⁶¹

This Note will focus on Section One of Capper-Volstead because Section Two, which gives the Secretary of Agriculture the power to take action if cooperatives unfairly restrain trade for their own profit,⁶² has never been invoked.⁶³

53. 15 U.S.C. § 17.

54. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 824 (1978).

55. Frederick, *supra* note 36, at 439.

56. 15 U.S.C. § 17.

57. DONALD A. FREDERICK, U.S.D.A., ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT, Coop. Info. Rep. 59, at 75-77, 84-87 (2002), <https://www.rd.usda.gov/files/CIR59.pdf> (on file with the Ave Maria Law Review).

58. Baumer, Masson & Masson, *supra* note 47, at 191.

59. *Id.* at 190-92 (explaining that corporations with stock would help the farmers counter the middlemen processors).

60. *Id.*

61. See Harbur, *supra* note 40, at 395-96 (explaining that the Capper-Volstead Act resulted in giving power to the middlemen processors).

62. Frederick, *supra* note 36, at 439.

63. Hawke, *supra* note 50, at 1043.

III. A FAILED ATTEMPT TO REGULATE THE MIDDLEMEN

A. *Capper-Volstead Act*

Section One of Capper-Volstead says:

Persons engaged in the production of agricultural products as farmers . . . [or] dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in . . . commerce, such products of persons so engaged. Such associations may have marketing agencies in common . . . and their members may make the necessary contracts . . . to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof.⁶⁴

Section One of Capper-Volstead attempted to define (1) *who* qualifies for this antitrust exemption; (2) *what* the permitted and prohibited actions of cooperatives are; and (3) how the cooperative must be “for the *mutual benefit*” of its members.⁶⁵

1. *Overinclusive Membership*

Capper-Volstead states that to qualify for the exemption, a member must be a “[p]erson[] engaged in the production of agricultural products.”⁶⁶ Under Capper-Volstead, only producer members are entitled to this exemption.⁶⁷ Non-producer members are not entitled to any Capper-Volstead immunity.⁶⁸ Furthermore, for an entire cooperative to qualify for Capper-Volstead immunity, every single member must individually qualify.⁶⁹ Therefore, for a cooperative to qualify for Capper-Volstead immunity, all of its members must be producers.⁷⁰

64. The Capper-Volstead Act, 7 U.S.C. § 291 (2025).

65. *Id.*

66. *Id.*

67. *See* Nat’l Broiler Mktg. Ass’n v. United States, 436 U.S. 816, 826-27 (1978) (holding that nonproducers such as processors are not protected by Capper-Volstead).

68. *See id.* (holding that nonproducers such as processors are not protected by Capper-Volstead).

69. *See id.* at 822 (citing *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 394 (1967)) (holding that Congress did not intend to protect organizations with nonmembers).

70. *See id.* (citing *Case-Swayne*, 389 U.S. at 394) (holding that Congress did not intend to protect organizations with nonmembers).

In *National Broiler v. U.S.*, the Supreme Court attempted to clarify what qualified as a “producer” under Capper-Volstead;⁷¹ however the Court left many questions about the scope of a producer unanswered. In *National Broiler*, the National Broiler Marketing Association (NBMA) cooperative was composed of approximately seventy-five different entities engaged in the production and marketing of broiler chickens.⁷² The producer stage of the broiler chickens included owning the hatchery or grow-out facilities.⁷³ However, nine members of NBMA were not engaged in any part of the production stage, but only in the processing stage.⁷⁴ These non-producer members purchased chickens for processing after they hatched and did not own any breeder flock, hatchery, or grow-out facility.⁷⁵ The Supreme Court held that these members did not qualify for Capper-Volstead protection because they were not farmers or producers of agricultural production, but they were solely processors.⁷⁶ The Court held that the entire NBMA could not “avoid liability under antitrust laws for its collective activity” because not all of its members were producers.⁷⁷

In *National Broiler*, a majority of the producer members were “integrated,” also taking part in the processing stage by operating a processing plant.⁷⁸ However, the Court was adamant that processors do not qualify for Capper-Volstead protection.⁷⁹ The Court explained that Congress’s motive stemmed from the idea that individual farmers are “comparatively helpless” compared to the processors because farmers “must bear the costs and risks of a fluctuating market.”⁸⁰ Additionally, the Court rejected NBMA’s argument that the processors also face a risk of the “fluctuating market,” emphasizing that the exemption specifically applied to individual farmers because of the disadvantage they are at in their inability to respond to those risks.⁸¹ The Capper-Volstead Act was meant to be “special-interest legislation” because

71. *Id.* at 827.

72. *Id.* at 820–21.

73. *Id.*

74. *Id.* at 822.

75. *Id.*

76. *Id.* at 828–29.

77. *Id.* at 822.

78. *Id.* at 821.

79. *Id.* at 827–29.

80. *Id.* at 826.

81. *Id.* at 826–27.

the Act's particular purpose was to aid the "individual farmer" not the "full spectrum of the agricultural sector."⁸²

Justice Brennan's concurrence provided further clarification that Capper-Volstead's intent was to permit individual farmers to "combine with [their] neighbors."⁸³ He argued that Congress clearly intended to *exclude processors* from Capper-Volstead protection because farmers were "individual economic units."⁸⁴ Despite the Court's acknowledgement of the true intention of Capper-Volstead, powerful processors like DFA continue to be entitled to Capper-Volstead protection because they are allowed to label themselves as agricultural cooperatives.⁸⁵ *National Broiler* has allowed these processors to become dairy cooperatives by simply engaging in vertical integration.⁸⁶ Vertical integration is when a cooperative is engaged in multiple stages of production.⁸⁷ The wealthy processors "remove the farmer and take over production" by engaging in the first stage of the dairy industry.⁸⁸

The precedent set in *National Broiler*, allowing members who engaged in both stages of processing and producing to qualify as producer members,⁸⁹ continues to cause significant harm to the small dairy farmer.⁹⁰ Justice Brennan's concurrence highlights the danger of the majority's decision to not address the development of vertical integration.⁹¹ Justice Brennan emphasized that this was never Congress's intention because vertical integration was not the norm in the farming industry at that time.⁹² When discussing the Congressional passage of the Capper-Volstead Act, Senator Thomas Walsh of Montana stated that the "entire purpose of the bill is to do away with the

82. *Id.* at 826.

83. *Id.* at 831 (emphasis added).

84. *Id.* at 830–31 (Brennan, J., concurring).

85. See generally Competitive Impact Statement, *U.S. v. Dairy Farmers of America*, (E.D. P.A., Nov. 3, 2000) No. 00-1663, 2000 WL 33200552 <https://www.justice.gov/sites/default/files/atr/legacy/2014/07/09/6376.pdf#:~:text=Moreover%2C%20because%20both%20DFA%20and%20Land%20O%27Lakes,or%20on%20behalf%20of%20agricultural%20production%20cooperatives> (on file with the Ave Maria Law Review).

86. Castro, *supra* note 23, at 151–52.

87. E.g., Joseph J. Hlavacek & Timothy E. Troll, *Antitrust Law: Agricorporate Membership in Cooperatives – Is the Capper-Volstead Exemption a Threat to Farmers?*, 17 WASHBURN L. J. 525, 535 (1978).

88. *Id.* at 536.

89. See *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 827 (1978) (holding that only the processors who did not actually own a breeder flock or hatchery were nonmembers who did not qualify for Capper-Volstead protection).

90. See Castro, *supra* note 23, at 151–52.

91. See *National Broiler Marketing Ass'n*, 436 U.S. at 829 (Brennan, J., concurring).

92. *Id.* at 830.

unnecessary middleman, and thus give to the producer the profits which would ordinarily accrue to him.”⁹³ Therefore, the current protections and economic advantages that the processors enjoy are directly adverse to Congress’s original intent of the Act.⁹⁴ At the time of passage, Congress’s understanding of a farmer that was entitled to Capper-Volstead protection was a small “economic farming unit[] which actually tilled the soil,”⁹⁵ not a cooperative-owned mega-dairy that more closely resembled a corporation, milking over 7,000 cows.⁹⁶

2. Any “Legitimate Object” Is Allowed

If dairy processors can obtain Capper-Volstead protection by vertically integrating themselves as producers, they should be subject to more narrow and impactful limitations. Under Capper-Volstead, a dairy cooperative’s actions are only subject to the *legitimate objects test*, taken from Section Six of the Clayton Act.⁹⁷ Under the *legitimate objects test*, cooperatives can “carry[] out the legitimate objects” of the organization.⁹⁸ Capper-Volstead states that “collectively processing, preparing for market, handling, and marketing” by “mak[ing] the necessary contracts” are legitimate objects.⁹⁹ As a result of the vague definition of legitimate objects, courts are forced to discern what specific actions are permitted or prohibited under the *legitimate objects test*.¹⁰⁰ The courts’ attempt to define the limits of collectively

93. 62 CONG. REC. 2273 (1992).

94. See *National Broiler Marketing Ass’n*, 436 U.S. at 826–27 (explaining that Capper-Volstead was passed specifically to protect individual farmers and keep out the middlemen).

95. *Id.* at 830 (Brennan, J., concurring); see also *Case-Swayne v. Sunkist Growers*, 389 U.S. 930, 391 (1967) (holding that Congress “intended that only actual producers of agriculture products be covered by the legislation.”).

96. See *Alta Dena Dairy Thrived Under the Leadership of the Stueves*, CHAMPION NEWSPAPERS (Apr. 27, 2024), https://www.championnewspapers.com/opinion_and_commentary/article_420e024e-0370-11ef-8d21-8fb5df2fbaf6.html#:~:text=As%20a%20matter%20of%20fact,site%20in%20the%20United%20States (on file with the Ave Maria Law Review). Alta Dena, the “largest dairy operation on one site in the United States,” has over 7,000 cows, and it is a farmer-owned brand owned by DFA. *Id.* See also *Our Story*, ALTA DENA, <https://altadenadairy.com/our-story/> (on file with the Ave Maria Law Review) (last visited Jan. 16, 2026) (“Alta Dena is a 100% farmer-owned brand of Dairy Farmers of America[.]”).

97. *United States v. Borden Co.*, 308 U.S. 188, 204 (1939).

98. 15 U.S.C. § 17.

99. *Md. & Va. Milk Producers Ass’n v. United States*, 362 U.S. 458, 466, 471 (1960) (citing Capper-Volstead Act, 7 U.S.C. § 291) (extending the *legitimate objects test* from Clayton Act to the Capper-Volstead Act).

100. See Hawke, *supra* note 50, at 1043 n.51. Capper-Volstead clarified that the legitimate objects of the Act were to allow farmers to process, market, and handle their products. *Id.* at 1043.

processing, marketing, and handling agricultural products led to this judicial expansion of permitted actions under the *legitimate objects test*.¹⁰¹

In *Maryland & Virginia Milk Producers v. U.S.*, the Supreme Court established that any “predatory practices” cannot be “legitimate objects” of cooperatives.¹⁰² In *Maryland & Virginia Milk Producers*, the government alleged the cooperative threatened and induced milk dealers to purchase milk from the cooperative; eliminated other cooperatives from supplying milk to the same dealers; tried to interfere with other cooperatives’ truck shipments; and boycotted a store to compel the owner to purchase milk from the conspiring cooperative.¹⁰³ The Court held that this cooperative, which supplied 86% of milk in the area, could not assert Capper-Volstead protection because their actions were considered predatory.¹⁰⁴ The cooperative’s “anticompetitive activities . . . [were] so far outside the ‘legitimate objects’ of a cooperative . . . they would constitute clear violations of . . . the Sherman Act.”¹⁰⁵

The cooperative’s anticompetitive practices named in *Maryland & Virginia Milk Producers* are undeniably predatory, but there is still a need for more definitive guidelines to determine if a cooperative’s act is predatory or a legitimate object. Determining if an act is a predatory or legitimate object is difficult because there is an obvious conflict between the Sherman Act and its exception, Capper-Volstead.¹⁰⁶ The Sherman Act holds that price-fixing is *illegal per se*, but *Maryland & Virginia Milk Producers* holds that cooperatives are exempt from this.¹⁰⁷ The Court highlights that price-fixing is one of the legitimate objects that a cooperative is explicitly allowed to do.¹⁰⁸ However, allowing cooperatives to fix prices “does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers.”¹⁰⁹ Thus,

101. *Id.* at 1049.

102. *See Md. & Va. Milk Producers*, 362 U.S. at 467–68. The Court holds that predatory practices are antitrust violations. *Id.* The Court also references the senate hearings during the passage of the Capper-Volstead Act and states that the Secretary of Agriculture would not have allowed predatory practices under the Sherman Act even if the defendants were protected by Capper-Volstead. *Id.*

103. *Id.* at 468.

104. *See id.* at 460, 467–68 (holding that Capper-Volstead did not authorize these predatory practices).

105. *Id.* at 468.

106. *Fairdale Farms v. Yankee Milk*, 635 F.2d 1037, 1040 (2d Cir. 1980).

107. *Md. & Va. Milk Producers*, 362 U.S. at 466–67; *see also Fairdale Farms*, 635 F.2d at 1041 (holding that price-fixing is part of marketing under Capper-Volstead).

108. *Md. & Va. Milk Producers*, 362 U.S. at 466–67.

109. *Id.*

cooperatives can engage in price-fixing, but they cannot do so in a predatory way.¹¹⁰

Similar to *Maryland & Virginia Milk Producers*, the holding in *U.S. v. Borden* did not provide much clarity on predatory versus legitimate objects. In *U.S. v. Borden*, the Court held that cooperatives with Capper-Volstead protection are not fully immune to Section 1 of the Sherman Act.¹¹¹ While producers have a right to form cooperatives to market, handle, or process their products, they still cannot “combin[e] or conspir[e]” to restrain trade with other people who are not protected by Capper-Volstead, like major distributors and city officials.¹¹² Thus, cooperatives can price-fix among each other,¹¹³ but not with any other group who is not protected under Capper-Volstead.¹¹⁴

The Supreme Court’s holdings in *Maryland & Virginia Milk Producers* and *Borden* are very narrow and do not provide sufficient guidelines about what is “predatory” or a “legitimate object” in today’s modern dairy industry. Throughout the years, DFA has faced many antitrust suits, but they continue to increase their control of the market by choosing to settle them, which further contributes to the expansive interpretation.¹¹⁵ The courts are not able to sufficiently clarify the limitations of Capper-Volstead because most of the cases between DFA and dairy farmers are settled by the profitable DFA.¹¹⁶

In 2010, in *Allen v. Dairy Farmers of America*, a group of dairy farmers filed a class-action suit against defendants including DFA and Dean Foods.¹¹⁷ Dean Foods did not have Capper-Volstead protection because they were not a cooperative; they were allegedly one of the biggest dairy processors.¹¹⁸ DFA ended up settling the case for \$50 million and subsequently acquired Dean Foods itself, further vertically integrating DFA in the processing stage.¹¹⁹ This

110. *Id.*

111. *United States v. Borden Co.*, 308 U.S. 188, 205 (1939).

112. *Id.* at 204–05.

113. *Id.*

114. *Id.* at 203.

115. See *Othart Dairy Farms v. Dairy Farmers of Am.*, 720 F. Supp. 3d 1087 (D.N.M. 2024); *Sitts v. Dairy Farmers of Am.*, 276 F. Supp. 3d 195 (D. Vt. 2017); *Allen v. Dairy Farmers of Am.*, 748 F. Supp. 2d 323 (D. Vt. 2010); see also *Settlement Agreement Reached in DFA Northeast Lawsuit*, AG PROUD (Sept. 30, 2020), <https://www.agproud.com/articles/36334-settlement-agreement-reached-in-dfa-northeast-lawsuit> (on file with the Ave Maria Law Review) (DFA reached settlement agreements in *Sitts* and *Allen*).

116. See generally *Othart*, 720 F. Supp. 3d at 1087; *Sitts*, 276 F. Supp. 3d 195; and *Allen*, 748 F. Supp. 2d 323. (These are all class-action suits against DFA that have settled).

117. See *Allen*, 748 F. Supp. 2d 323.

118. *Id.* at 331 (“Dean is alleged to be the largest milk bottler”).

119. Kaufman, *supra* note 28; see also Opinion & Order Granting Motion for Final Approval of December 2015 Proposed Settlement at 2, *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230 (D. Vt. June 7, 2016).

consolidation is in direct conflict with Congress's intent of the Act.¹²⁰ Congress intended Capper-Volstead to enable farmers to obtain a higher price for their products¹²¹ by collectively bargaining and marketing.¹²² Farmers already choose to sell their milk to DFA, accepting low prices because "there's no other place to go."¹²³ There should be explicit guidelines and more limitations on what is "predatory" because "even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act."¹²⁴

3. *For the Mutual Benefit of the Cooperative?*

Section One of Capper-Volstead specifically requires that cooperatives must be "operated for the mutual benefit of the members thereof."¹²⁵ The *mutual benefit* requirement of Capper-Volstead is not one that many courts have had the opportunity to specifically address because it is not often used as a main point in litigation.¹²⁶ Some scholars suggest that this language in Capper-Volstead should be used by plaintiffs to argue that defendants are not protected by Capper-Volstead.¹²⁷ Accordingly, in *Case-Swayne Co. v. Sunkist Growers*, the Supreme Court briefly addressed the mutual benefit requirement.¹²⁸ In *Case-Swayne*, the Court held that a cooperative that included some processor members did not have Capper-Volstead protection because "Congress did not intend to allow an organization with such *nonproducer* interests to avail itself of the Capper-Volstead exemption."¹²⁹ Thus, a cooperative is not for the mutual benefit of its cooperative members if it has "such nonproducer interests."¹³⁰

The purpose of the mutual benefit requirement was to guarantee that cooperatives were "truly organized and controlled by, and for, *producers*."¹³¹ Congress was motivated by its acknowledgement that cooperatives could be

120. See 62 CONG. REC. 2275 (1922) (statement of Sen. Norris) (asserting why the amendment to add processors into the category of those protected under Capper-Volstead is "wrong and is evil.").

121. *Id.*

122. Frederick, *supra* note 36, at 446 (citing to 7 U.S.C. § 291).

123. Kaufman, *supra* note 28.

124. *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 472 (1960).

125. The Capper-Volstead Act, 7 U.S.C. § 291 (2025).

126. Castro, *supra* note 23, at 147, 156.

127. *Id.* at 147.

128. *Case-Swayne v. Sunkist Growers*, 389 U.S. 384, 393–94 (1967).

129. *Id.* at 395–96 (emphasis added).

130. *Id.*

131. *Id.* at 394 (emphasis added).

“controlled by persons other than producers” or “could serve a purpose other than the mutual obtaining of a fair return to their members.”¹³² Today, processors like DFA can portray that they are established for the *mutual benefit* of their members by emphasizing ideas like a group of 10,000 farmers are a supposed family-owned and family-run business that works together to support all the other farmers.¹³³ In reality, many of its current members and previous members of the cooperative feel like the only choice they have is to join DFA, even though they are being taken advantage of.¹³⁴

B. Raw Milk Regulations

After analyzing the primary law that keeps the power in the hands of the processors, this Note also addresses the assisting secondary law that results in the same outcome.¹³⁵ The effects that raw milk regulations have on small farmers is important to address because the analysis provides a new perspective on the barriers both regulations cause for the small dairy farmer while benefitting the processor.¹³⁶

Currently, all *interstate* sales of raw milk for human consumption are banned by the federal government.¹³⁷ Thus, to sell milk across state lines, the milk must be pasteurized.¹³⁸ All *intrastate* sales of raw milk for human consumption are controlled by each state’s legislature.¹³⁹ However, even in states where some form of the sale of raw milk for human consumption is legal, the state governments place many restrictions on farmers that make it

132. *Id.*

133. *See Our Farmers*, DFA, <https://www.dfamilk.com/who-we-are/our-farmer-owners> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025). The DFA website constantly uses the word “family” or “family run” to portray that they are small family farms. *Id. See also Our Mark*, DFA, <https://www.dfamilk.com/who-we-are> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025) (using the word family to portray an image of small family farms instead of the corporation they really are).

134. Kaufman, *supra* note 28; *see also* Othart Dairy Farms v. Dairy Farmers of Am., 720 F. Supp. 3d 1087 (D.N.M. 2024); Sitts v. Dairy Farmers of Am., 276 F. Supp. 3d 195 (D. Vt. 2017); Allen v. Dairy Farmers of Am., 748 F. Supp. 2d 323 (D. Vt. 2010) (These are only a few of the most recent class action suits against DFA.).

135. *See* 21 CFR § 1240.61(a) (2025) (making it mandatory to pasteurize all milk that crosses state lines).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Food Safety and Raw Milk*, FDA (Mar. 5, 2024), <https://www.fda.gov/food/buy-store-serve-safe-food/food-safety-and-raw-milk> (on file with the Ave Maria Law Review).

very difficult to sell the raw milk.¹⁴⁰ For example, the government could restrict sales to solely direct on-farm sales;¹⁴¹ require farmers to hold multiple permits or licenses;¹⁴² or limit farmers as to the number of cows they are allowed to have that produce raw milk for human consumption.¹⁴³

These raw milk regulations that ban or hinder the sale of raw milk have the effect of forcing the farmer to sell his raw milk to a processor.¹⁴⁴ As a result of Capper-Volstead and the processors' growing power, small farmers who sell their raw milk to be pasteurized by processors do not make enough money to sustain their farms.¹⁴⁵ While prices vary depending on the location, dairy farmers may receive as little as \$1.32 per gallon for selling their raw milk to a processor.¹⁴⁶ This means they receive less than what it costs to produce that one gallon.¹⁴⁷ In contrast, farmers who sell raw milk for consumption directly to the customers make a greater profit because the middleman processor is completely eliminated.¹⁴⁸ Farmers who sell raw milk directly to customers may receive \$6.00 per gallon, or even more.¹⁴⁹

1. How Raw Milk Regulations Work with Capper-Volstead

In addition to Capper-Volstead and the impact it has on small farmers, raw milk regulations further the economic hardships felt by small dairy farmers.¹⁵⁰ By eliminating or restricting the option for small dairy farmers to sell directly to customers, processors can further take advantage and expand their power over the farmers.¹⁵¹

140. See *Raw Milk Laws by State*, A CAMPAIGN FOR REAL MILK, <https://www.realmilk.com/real-milk-legal-map/> (on file with the Ave Maria Law Review) (last updated Dec. 12, 2023) (showing how each state has its own complicated laws for intrastate sales of raw milk).

141. *Id.*

142. *Id.*

143. *Id.*

144. See 21 CFR § 1240.61(a) (2025) (making it mandatory to pasteurize all milk that crosses state lines).

145. See McCausland, *supra* note 10 (discussing the fall of the small farmer due to low profits).

146. *Id.*

147. *Id.*

148. *Raw Milk Bill Becomes Law in Colorado*, ROCKY MOUNTAIN FARMERS UNION, <https://rmfu.org/raw-milk-bill-becomes-law-in-colorado/> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

149. *The Economics of Raw Milk*, A CAMPAIGN FOR REAL MILK, <https://www.realmilk.com/the-economics-of-raw-milk/> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

150. See McCausland, *supra* note 10 (discussing the fall of the small farmer due to low profits).

151. See *Raw Milk Bill Becomes Law in Colorado*, *supra* note 148 (Farmers now have a new market to sell to because raw milk is now legal in Colorado).

Dept. of Agriculture v. Miller is a recent state court case,¹⁵² but it is a revealing court case because it demonstrated the economic struggles that a small dairy farmer may face due to raw milk regulations.¹⁵³ The Pennsylvania Department of Agriculture sued Amos Miller, an Amish farmer, for selling raw milk on his farm in Pennsylvania without a permit.¹⁵⁴ Miller argued that he did not obtain a permit for the sale of raw fluid milk because obtaining the permit would prohibit him from also selling raw butter, yogurt, and other milk products.¹⁵⁵ In *Miller*, the trial court originally enjoined him from selling raw milk at all.¹⁵⁶ The court then modified the injunction to prohibit Miller only from selling raw milk in the state of Pennsylvania under Section Two of the Milk Sanitation Law that prohibits sales “within this Commonwealth.”¹⁵⁷ The trial court refused to grant the Pennsylvania Department of Agriculture’s request for a preliminary injunction that barred *all* sales of raw milk.¹⁵⁸

In *Miller*, the appellate court affirmed the trial court’s decision to refuse to grant a preliminary injunction barring Miller from selling raw milk out-of-state.¹⁵⁹ In making their decision, the appellate court heavily emphasized the economic effect the Miller family would experience.¹⁶⁰ The appellate court emphasized that Miller and his family would lose their farm and go bankrupt if the preliminary injunction were to be granted.¹⁶¹ The court stated that the “loss of a family farm constitutes irreparable harm because ‘[i]t involves the loss of generations of family history, sweat-equity, and memories.’”¹⁶² The *Miller* decision demonstrates the possibility that courts may begin to understand the detrimental economic effect that raw milk regulations can have on a small family farmer.¹⁶³

152. See generally *Department of Agriculture v. Miller*, 329 A.3d 145, 154–55 (Pa. Commw. Ct. 2025) (demonstrating the extensive economic hardship imposed on small dairy farmers by state raw milk regulations).

153. *Id.*

154. *Id.* at 148.

155. *Id.* at 149.

156. *Id.* at 148.

157. *Id.*

158. *Id.* at 151–52.

159. *Id.*

160. *Id.* at 152.

161. *Id.*

162. *Id.* (citing *Watson v. Perdue*, 410 F. Supp. 3d 122, 131 (D.D.C. 2019)).

163. *Id.*

PROPOSED SOLUTIONS

A. The Ethical Need for Solutions

A reform in this area of the law is justified by both natural law and antitrust law principles. The Catholic Church has called for the government to pass laws that “improve the work of farmers in the poorest and most remote areas.”¹⁶⁴ Specifically, in the Compendium of the Social Doctrine of the Church, Pope John Paul II declared that the government should “intervene when particular monopolies create delays or obstacles” to the free economy¹⁶⁵ because people have a right to be free from monopolies and their detrimental effects.¹⁶⁶ When Congress passed Capper-Volstead, it also recognized the vital role that the American rural population plays in the success of any nation, particularly America.¹⁶⁷ America, a nation founded on the natural law,¹⁶⁸ will always depend on its rural population of farmers¹⁶⁹ for its source of food and economic wealth.¹⁷⁰ The Founding Fathers viewed agriculture as “the proper source of American wealth and happiness.”¹⁷¹

When speaking on rural life, Pope Pius XII also declared that farming was “very important to the social and economic prosperity of the whole people” because of the nature of the industry: the family farm.¹⁷² Farmers provide so much for Americans, so “[w]e must preserve the qualities of industriousness, simple and honest living, . . . love of country, and loyalty to traditions which

164. Cindy Wooden, *To feed the world, start with family farms, Pope says*, NATIONAL CATHOLIC REPORTER: EARTHBEAT (July 26, 2021), <https://www.ncronline.org/earthbeat/politics/feed-world-start-family-farms-pope-says> (on file with the Ave Maria Law Review) (discussing Pope Francis’s message to the United Nations on July 26, 2021, calling for the protection of small farmers).

165. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 351 (2004) [hereinafter *Compendium*].

166. *Id.* at ¶ 557.

167. See 59 Cong. Rec. 8025 (1920) (statement of Rep. Hersman) (“The greatness of any nation depends upon maintaining a contented and prosperous rural population.”).

168. See generally CARLI N. CONKLIN, *THE PURSUIT OF HAPPINESS IN THE FOUNDING ERA: AN INTELLECTUAL HISTORY* (2019) (explaining how America was founded on the natural law).

169. Justin Fritscher, *The Founding Farmers*, U.S.D.A. (Feb. 12, 2019), <https://www.farmers.gov/blog/founding-farmers> (on file with the Ave Maria Law Review).

170. See Steven Zahniser, *What is Agriculture’s Share of the Overall U.S. Economy?*, U.S.D.A. (Dec. 19, 2024), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy> (on file with the Ave Maria Law Review) (explaining how as of 2023, the agriculture-and-food-related industries make up about “\$1.537 trillion of the U.S. gross domestic product.”).

171. *The Founders, Farms and Facts*, THE LEHRMAN INST.: HISTORY-ESSAYS, <https://lehrmaninstitute.org/history/founders-farms-facts.html> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025).

172. Pope Pius XII, *supra* note 1.

have proved a source of good throughout centuries.”¹⁷³ This appeal to fairness for the small dairy farmers embodies the ideals of the natural law principle known as commutative justice.¹⁷⁴ Commutative justice emphasizes “fairness in agreements and exchanges between individuals.”¹⁷⁵ The parties in a business transaction must receive what they have a right to in the business transaction.¹⁷⁶ Thus, according to commutative justice, the dairy farmer who “gives up his property in the form of his energies, mental or physical, [should] be given other property in return to equate for the property yielded up by him.”¹⁷⁷ The dairy farmers, who labor physically and mentally to provide other Americans with milk and other milk products, should be paid a fair price to cover the cost of their expenses and make a profit so that they can continue to provide for themselves and their fellow Americans.¹⁷⁸

If farmers are so important to the Nation as a whole, then America has failed the small family farmers, who are now some of the most disadvantaged and economically vulnerable people in society.¹⁷⁹ According to the natural law, the purpose of the law is to promote the common good and to benefit society as a whole,¹⁸⁰ which is why there must be reform in this area of law. Now, small farmers are at an unethical disadvantage, especially in comparison to the processors.¹⁸¹ Thus, the current consolidated state of the dairy industry

173. *Id.* (speaking about why the rural life must be preserved).

174. See William R. White, *The Natural Law and Commutative Justice*, 2 THE CATH. L. 31, 34 (1956) (stating how commutative justice “regulates exchanges between individuals,” requiring them to be equal).

175. *Commutative Justice: A Deep Dive into Its Legal Significance*, USLEGAL, <https://legal-resources.uslegalforms.com/c/commutative-justice> (on file with the Ave Maria Law Review) (last visited Oct. 10, 2025).

176. *Id.*

177. White, *supra* note 174, at 39.

178. Lakhani, *supra* note 9.

179. See Daniel Munch, *2024 Farm Income Decline Confirmed in USDA Update*, AM. FARM BUREAU FED’N (Dec. 3, 2024), <https://www.fb.org/market-intel/2024-farm-income-decline-confirmed-in-usda-update> (on file with the Ave Maria Law Review) (discussing the economic struggles of the farmer); see also Rosalie Einsenreich & Carolyn Pollari, *Addressing Higher Risk of Suicide Among Farmers in Rural America*, NRHA, <https://www.ruralhealth.us/getmedia/98f1009e-5418-4c06-910c-cdbb965cdb2e/NRHA-Policy-Brief-Increases-in-Suicide-Rates-Among-Farmers-in-Rural-America.pdf> (on file with the Ave Maria Law Review) (last visited Mar. 27, 2025) (explaining that farmers are now much more prone to suicide due to the financial stress they are under).

180. See WAHEED HUSSAIN & MARGARET KOHN, *THE COMMON GOOD* 22 (Edward N. Zalta & Uri Nodelman eds., 2024).

181. Munch, *supra* note 179.

no longer reflects Congress's original legislative intent¹⁸² nor reflects Catholic Church teachings.¹⁸³

In addition to the natural law, further justification can even be found within antitrust law principles themselves. Judge Robert H. Bork—leading authority on antitrust law, federal appellate judge, and one of the first professors of law at Ave Maria School of Law—revolutionized the understanding of antitrust law.¹⁸⁴ Judge Bork argued that the only purpose of antitrust law was to protect consumer welfare.¹⁸⁵ “Antitrust is about the effects of business behavior on consumers.”¹⁸⁶ For Judge Bork, antitrust law should allow the consumers “to satisfy their wants as fully as technological constraints permit.”¹⁸⁷ This consumer-centered argument means that the only reason to preserve competition within the market is to benefit consumers with lower prices, higher quality products, and innovation.¹⁸⁸

Currently, within the dairy industry, consumer welfare is not satisfied to its fullest potential.¹⁸⁹ The dissatisfaction of consumers¹⁹⁰ stems from the consolidation of the dairy industry because the disappearance of small farms leaves room for the mega-dairies to take over the industry.¹⁹¹ In particular, Concentrated Animal Feeding Operations (CAFOs) produce a majority of the milk in the dairy industry.¹⁹² CAFOs, or factory farms, are facilities that keep thousands of animals in confined spaces, resulting in extremely unsanitary conditions.¹⁹³ CAFOs lead to unethical and unsanitary milk production

182. National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 826–27 (1978).

183. See Pope Pius XII, *supra* note 1.

184. Bernard Dobranski, *Law of Life: Article: Remembering Judge Bork*, 11 AVE MARIA L. REV. 207, 207 (2013).

185. ROBERT H. BORK, THE ANTITRUST PARADOX 51 (1978).

186. *Id.* at 90.

187. *Id.*

188. *Id.* at 56–62.

189. See Hans D. Schmalzried & L. Fleming Fallon, *Proposed Mega-Dairies and Quality of Life Concerns: Using Public Health Practices to Engage Neighbors*, 125 PUB. HEALTH REP. 754, 755 (2010) (explaining citizens' concerns with the public health impact of mega-dairies).

190. *Id.*

191. Debbie Weingarten, *'There Are Ghosts in the Land': How U.S. Mega-Dairies Are Killing Off Small Farms*, EHRP (June 1, 2021), <https://economichardship.org/2021/06/there-are-ghosts-in-the-land-how-us-mega-dairies-are-killing-off-small-farms/> (on file with the Ave Maria Law Review).

192. Ameyer, *Concerns About Industrialized Dairy Operations*, GREEN BUS. NETWORK AT GREEN AM. (Oct. 23, 2014), <https://www.greenamerica.org/blog/concerns-about-industrialized-dairy-operations> (on file with the Ave Maria Law Review).

193. Owen Walsh, *What is a CAFO (Concentrated Animal Feeding Operation)?*, THE HUMANE LEAGUE, <https://thehumaneleague.org/article/what-is-a-cafo> (on file with the Ave Maria Law Review) (last updated Mar. 21, 2025).

because of the thousands of animals confined in close quarters.¹⁹⁴ The goal of CAFOs is to “maximize . . . dairy . . . production while keeping costs as low as possible.”¹⁹⁵ Although costs are low for the consumers, consumer welfare is not being protected because they are not receiving a high-quality product.¹⁹⁶ Studies show that consumers prefer the milk they drink to come from cows that are grazing in green pastures, not confined in unhygienic close quarters.¹⁹⁷

In summary, small dairy farmers work extremely hard to provide for Americans, yet they barely turn a profit¹⁹⁸ and do not receive what they deserve. Therefore, they are the ones who need protection and support from the law. The law should not protect the processors over the farmers because it creates an unethical balance of power in the dairy industry, resulting in the mass disappearance of dairy farms.¹⁹⁹

B. Proposed Solutions

The goal of the solutions is to limit the processors and empower the small dairy farmers.

1. Capper-Volstead

Capper-Volstead, the 103-year-old statute, needs to be amended. First, there needs to be limits on those who can label themselves “producers” in order to qualify for Capper-Volstead membership and form a cooperative. In *National Broiler*, Justice Brennan’s concurrence suggests that when deciding if a vertically integrated processor can be considered a member, the law should take into account the following factors: (1) “the nature of the association’s activities;” (2) “the degree of integration of its members;” and (3) “the

194. *Id.*

195. Hannah McKay, *Mega Farms Called CAFOs Dominate Animal Agriculture Industry*, SENTIENT FOOD (Sept. 29, 2021), <https://web.archive.org/web/20240305105625/https://sentientmedia.org/cafo/> (on file with the Ave Maria Law Review).

196. Walsh, *supra* note 193.

197. Sarah Smith, *Two Types of Raw Milk*, RAW MILK INST. (Aug. 9, 2024), <https://www.rawmilk institute.org/updates/two-types-of-raw-milk#:~:text=Such%20milk%20is%20being%20produced,higher%20levels%20of%20milk%20production> (on file with the Ave Maria Law Review); see also Mark McAfee, *Factory Farms vs. Sustainable Local Farms During COVID-19*, RAW MILK INST. (May 1, 2020), <https://www.rawmilk institute.org/updates/factory-farms-vs-sustainable-local-farms-during-covid19> (on file with the Ave Maria Law Review) (explaining how consumer polls indicate customers do not want their milk coming from a CAFO).

198. Lakhani, *supra* note 9.

199. See *The Dairy Crisis*, *supra* note 11 (explaining that farm policies encourage the “get big or get out” mentality of the dairy industry).

functions historically performed by farmers in the industry.”²⁰⁰ In 1978, when *National Broiler* was decided, this might have been sufficient. As of 2025, the dairy industry is at its peak of consolidation, so this Note advocates for a complete return to Congress’s original intent. Capper-Volstead does not limit the size of the cooperatives.²⁰¹ The word “farmer” must be interpreted to mean what it did at the time of passage of Capper-Volstead.²⁰² Farmers who qualify for Capper-Volstead protection should be restricted only to allow natural persons who actually work on their farm, or “till[] the soil,”²⁰³ to band together with other small farmers. Furthermore, even if only small farmers may band together, there must be a maximum limit on the size of a single cooperative because Capper-Volstead does not limit the size of the cooperatives.²⁰⁴ A processor like DFA collects milk from over 10,000 farmers,²⁰⁵ so a cap on size is necessary to prevent creating the same problem. Even 10,000 small farmers should not be allowed to band together because other farmers who do not wish to be a part of their cooperative would be put at a disadvantage.

Second, more clarity is needed to determine if a practice is a legitimate object or a predatory practice. Although most of the antitrust litigation against DFA ends in a settlement,²⁰⁶ the court showed its openness to the idea that even anticompetitive behavior among Capper-Volstead-protected cooperatives has its limits.²⁰⁷ In a 2025 antitrust suit against DFA, *Othart Dairy Farms v. Dairy Farmers of America*, the district court denied DFA’s motion to dismiss and held that an agreement between cooperatives to depress the prices it pays to its members is not permitted under Capper-Volstead.²⁰⁸ The court acknowledged that Capper-Volstead permits agreements among dairy cooperatives; however, such anticompetitive practices are not a legitimate object because Capper-Volstead is supposed to “operate for the mutual benefit of its members, and actions outside of that objective are subject to antitrust law.”²⁰⁹

200. Nat’l Broiler Mktg. Ass’n v. United States, 436 U.S. 816, 836 (1976) (Brennan, J., concurring).

201. Fairdale Farms v. Yankee Milk, 635 F.2d 1037, 1040 (2d Cir. 1980).

202. Nat’l Broiler Mktg. Ass’n, 436 U.S. at 835 (Brennan, J., concurring).

203. *Id.* at 830.

204. *Fairdale*, 635 F.2d at 1040.

205. *DFA Reports 2022*, *supra* note 31.

206. See generally *Othart Dairy Farms v. Dairy Farmers of Am.*, 720 F. Supp. 3d 1087 (D.N.M. 2024); *Sitts v. Dairy Farmers of Am.*, 276 F. Supp. 3d 195 (D. Vt. 2017); *Allen v. Dairy Farmers of Am.*, 748 F. Supp. 2d 323 (D. Vt. 2010) (These are all class-action suits against DFA that have settled).

207. See *Othart Dairy Farms*, 720 F. Supp. 3d at 1106 (requiring operation for the mutual benefit).

208. *Id.* at 1106, 1110.

209. *Id.* at 1106.

Congress should amend the Capper-Volstead Act to reflect its original intent and conform to modern industry practices. Currently, the legitimate object test seems like an easy standard to pass. This Note advocates for a more defined test that cooperatives must pass, which still incorporates the cooperative's purpose to not be predatory, but also considers the cooperative's actual effect on its members. A cooperative's objective should only be considered legitimate if it actually mutually benefits its members. To satisfy the mutual benefit standard, the cooperative must demonstrate (1) an effort to consistently bargain for higher prices to return a profit to their farmer members and (2) a proportional distribution of those profits. This test is not satisfied if the profits are disproportionately going to a vertically integrated processor member of the cooperative because it is not mutually benefitting all of its other members.

2. Raw Milk Regulations

The current strict raw milk regulations should be abandoned, and the sale of raw milk should be legalized by federal and state law. To implement this solution safely, education, training, and testing standards must be put into practice.²¹⁰ The author of this Note is aware of the opposing arguments that raw milk is not safe to consume.²¹¹ However, with the growing sentiment in America to go back to raw milk,²¹² this option is a viable one.

While the Food and Drug Administration (FDA) purports that all raw milk is very dangerous because it can carry "harmful germs,"²¹³ the FDA also concedes that Americans are moving back to drinking raw because they believe it has health benefits or prefer unprocessed foods in general.²¹⁴ The FDA is fully correct that raw milk can be very dangerous.²¹⁵ Raw milk that is

210. See Sarah Smith, Mark McAfee & Anna Catharina Berge, *Managing Potential Pathogenic and Herd Health Risks in Raw Milk Herds*, RAW MILK INST. (Mar. 4, 2025), <https://www.rawmilk.institute.org/updates/herdhealth> (on file with the Ave Maria Law Review) (discussing sampling strategies to reduce the risk of pathogens and produce raw milk safely).

211. Sarah Smith, Mark McAfee & Anna Catharina Berge, *The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk*, U.S. FOOD & DRUG ADMIN. (Mar. 4, 2025), <https://www.fda.gov/food/buy-store-serve-safe-food/dangers-raw-milk-unpasteurized-milk-can-pose-serious-health-risk#:~:text=Raw%20milk%20can%20carry%20dangerous,products%20made%20from%20raw%20milk> (on file with the Ave Maria Law Review).

212. *Id.*

213. *Id.*

214. *Id.*

215. See RAW MILK INST., *supra* note 21 (explaining that raw milk produced in a CAFO that is intended to be pasteurized anyway is very dangerous to drink raw).

“intended for pasteurization,” originating from a mega-dairy like a CAFO is very unsafe to consume raw.²¹⁶ These conditions reflect the reasons that America first switched from drinking raw milk to drinking pasteurized milk.²¹⁷ Humans have safely consumed raw milk for at least 10,000 years²¹⁸ before the urbanization of America—when it became dangerous to do so due to dirty living conditions, insufficient refrigeration, and a lack of milk processing standards.²¹⁹

On the contrary, cows that produce milk intended for human consumption are not housed in these dangerous types of conditions.²²⁰ These cows are raised in conditions that are intended to keep both the cows and the raw milk sanitary and safe.²²¹ With proper precautions like training and testing, raw milk produced with the specific intent to drink raw can be extremely safe.²²² Today, many European countries allow the sale of raw milk and even dispense it through vending machines.²²³ The easy access to raw milk was in response to the people in these countries who prefer to consume raw milk for its nutritional benefits.²²⁴

To feasibly legalize the sale of raw milk, the Capper-Volstead reform must also be implemented to prevent cooperatives like DFA from doing the same thing with raw milk.

216. *Id.*

217. Russell W. Currier & John A. Widness, *A Brief History of Milk Hygiene and Its Impact on Infant Mortality from 1875 to 1925 and Implications for Today: A Review*, 81 J. OF FOOD PROTECT. 1713, 1713–14 (2008).

218. Mark McAfee & Sarah Smith, *Why Humans Drink (RAW) Milk*, RAW MILK INST. (Nov. 2, 2024), <https://www.rawmilkinstitute.org/updates/why-humans-drink-raw-milk> (on file with Ave Maria Law Review).

219. Currier & Widness, *supra* note 217, at 1713.

220. Smith, *supra* note 197.

221. A.C. Berge & T. Baars, *Raw Milk Producers with High Levels of Hygiene and Safety*, EPIDEMIOL INFECT 1, 1–2 (2020).

222. See RAW MILK INST., *supra* note 21.

223. Joseph Mercola, *Milk Vending Machines Flourish in Europe*, ORGANIC CONSUMERS ASS’N (Sept. 4, 2018), <https://organicconsumers.org/raw-milk-vending-machines-flourish-europe/#:~:text=Europe%20Makes%20Access%20to%20Raw%20Milk%20Easy&text=After%20paying%20for%20the%20milk,light%20then%20sanitizes%20the%20surface> (on file with the Ave Maria Law Review).

224. *Europe’s Raw Milk Vending Machines Come in for Market Scrutiny*, FOOD SAFETY NEWS (Mar. 20, 2017), <https://www.foodsafetynews.com/2017/03/europes-raw-milk-vending-machines-come-in-for-market-scrutiny/> (on file with the Ave Maria Law Review).

CONCLUSION

This Note provides a different perspective on the dairy industry's rapid decline by analyzing the effects of both the Capper-Volstead Act and raw milk regulations on the small dairy farmer. The combined impact of both laws supports the processor while tearing down the small farmer. The middlemen have especially taken advantage of the antitrust exemption, which has allowed them to grow to obtain unparalleled power within the industry. Capper-Volstead, legislation that was originally intended to protect the small farmer against the wealthy middlemen, is now being used by those middlemen to effectively eliminate the small farmer. The current application of this law directly conflicts with its original intent and transformed it into an unjust law. Raw milk regulations worsen this economic disparity by pushing farmers into the hands of processors even more. As a result, dairy farmers that have kept their farms for generations are forced to completely abandon their identities and livelihoods because they cannot earn a profit. This Note aims to encourage more support for the small dairy farmer by bringing attention to the issue, analyzing the legal basis, and providing solutions, in the hope that change will eventually come for the struggling small dairy farmers.