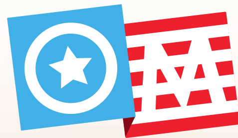
SEPTEMBER 2020

Redeeming the Democratic Promise of Agricultural Cooperatives

AN OPEN MARKETS INSTITUTE REPORT



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Executive Summary

Farmers have long been vulnerable to predation by monopolistic corporations. In the Populist and Progressive eras, farmers responded to these threats by strongly advocating for anti-monopoly laws to contain the power of railroads, granaries, and meatpacker cartels. But they also turned to another critical tool for building power: cooperatives.

Many scholars, advocates, farmers, and policymakers are interested in cooperatives both as a way for smaller economic actors to build power against concentrated business, and as a democratic alternative to investor-owned firms, whose business model emphasizes maximizing short-term returns to shareholders.

But the agricultural economy serves as a case study for how cooperatives, when competing in highly consolidated markets without sufficient oversight, can begin to grow distant and unaccountable to their members. Cooperative monopolies have come to dominate regional markets, squeeze farmers, and exploit legal privileges granted specifically to protect the interests of farmers and ranchers. Among these legal privileges are certain antitrust exemptions that were originally created to allow farmers to economically coordinate legally within cooperatives. This raises the question: How can we ensure that small farmers can join together in cooperatives to build power against monopolies, without allowing cooperatives to become abusive monopolies? Answering this question is not only critical for farmers, but for all workers and independent businesses that could benefit from the cooperative form.

This report charts the history of agricultural producer cooperatives in the United States and their relations to antitrust law and agricultural consolidation. It documents the ways cooperatives have supported small and medium-sized family farms, as well as the ways that co-ops have exploited them. It argues that a combination of renewed antitrust enforcement and reformed cooperative governance can ensure that cooperatives are truly democratic and serve their members' interests.

These reforms include:

- Requiring greater transparency and reporting in cooperative management
- Mandating one-member, one-vote systems in cooperatives' elections
- Revoke the antitrust protections and tax benefits of cooperatives that do not benefit their members
- Promoting federated cooperative structures
- Ensuring cooperative decision-making processes have no bias against smaller members
- Increasing public investment in research, technical support, and financing for cooperatives
- Limiting horizontal mergers between cooperatives, if the mergers would create harmful levels of power among either buyers or sellers
- Limiting vertical integration in large cooperatives that have monopsony pricing power over farmers
- Ensuring that mergers, joint ventures, and partnerships between cooperatives and investor-owned corporations are demonstrably in the interest of co-op members

I. Introduction

The global coronavirus pandemic has revealed America's fragile food supply chains. As public health precautions closed restaurants and schools, farmers and distributors failed to quickly redirect foods destined for these institutions to grocery stores or food banks. Without a place to sell their output, farmers tilled crops back into the ground and dumped millions of gallons of milk, even as grocery stores faced shortages and as an unprecedented number of newly unemployed Americans waited hours in food pantry lines.[1]

This simultaneous waste and want resulted, in part, from decades of pro-corporate policies that put financiers' interests above all other outcomes. The drive for short-term profit maximization pushed businesses along the food chain to neglect infrastructure investments, cut safety measures or emergency stockpiles, and get big or get out. "If you pull out one little thing in that specialized, centralized, consolidated chain, then everything crashes," said Mary Hendrickson, a rural sociology professor and expert in food system resiliency at the University of Missouri.[2] This is exactly what we saw in the wake of COVID-19.

These trends strained the food system long before the pandemic. The median income derived from farming has been negative since 2013, and farm bankruptcies hit an eight-year high last year.[3] A growing chorus of farmers, advocates, and policymakers blame monopolists for squeezing farmers along the food chain. Because of corporate consolidation, fewer and fewer giant agribusinesses and supermarket chains compete for farmers' goods, which pushes down prices for farmers' crops, milk, and livestock. At the same time, corporate consolidation also means that farmers must pay monopoly prices for the supplies they need, from seeds to tractors.[4]

In the Populist and Progressive eras, roughly from around the 1880s to the 1920s, farmers responded to exploitation and predation by monopolistic corporations by pushing hard for anti-monopoly laws to contain the power of railroads, granaries, and meatpacker cartels. But they also turned to another critical tool for building power: cooperatives.[5]

Cooperatives allowed many small farmers to come together to counterbalance monopoly power and gain better terms of trade. The co-op movement worked in tandem with antitrust enforcement and public policies that constrained surplus agricultural production, to tame corporate

dominance and boost farm income. Cooperatives also presented a democratic alternative to investor-owned firms, whose business model emphasizes the maximization of shareholder wealth ahead of the interests of producers, consumers, and the public.[6]

In a reflection of these goals, some cooperatives outperformed investor-owned firms in responding to the coronavirus crisis by centering the interests of workers, farmers, and consumers. The only cooperatively owned food distributor in the U.S., Co-op Partners Warehouse, told *Civil Eats* that "we found we were able to get product where other distributors, which carried items from the same farms, could not," due to their long-term commitments to fair dealing and relationship building with their suppliers.[7] Similarly, consumer-owned co-op grocers exhibited faster decision-making in response to COVID-19 than centralized, hierarchical, corporate entities. Many also avoided shortages by sourcing from a broader range of suppliers. The average co-op grocery store sources from 300 vendors, while a large conventional store will only source from 30, according to *Civil Eats*.[8]

At the same time, some cooperatives faced coronavirus catastrophes. The nation's largest dairy cooperative, Dairy Farmers of America, instructed its members to dump their milk, after losing major buyers due to COVID-19, a financial burden that it will spread across its members.[9] Other dairy co-ops, such as Organic Valley and the Northwest Dairy Association, did not have to resort to these measures.[10] Even though DFA directly owns or partners with a large network of processing plants, the co-op had no excess capacity in its processing network to shift milk destined for schools and restaurants to retail channels. In fact, milk supplies exceeded milk processing capacity well before COVID-19.[11] So how did some co-ops fail in the same ways as stripped-down, efficiency-driven corporate supply chains, while others maintained diversity and resiliency?

As anti-monopoly policies have been thrown in reverse, many cooperatives have grown to resemble giant, investor-owned corporations. Beginning in the 1980s, federal regulators significantly weakened their antitrust enforcement, leading to unprecedented levels of corporate concentration in food production, processing, and retailing.[12] In reaction to this trend, farmer co-ops have merged into ever-larger enterprises and grown distant from and too often unaccountable to members. In some key instances, traditional farmer co-ops have exploited loopholes and lax antitrust enforcement to become giant, vertically integrated corporate monopolies that prey upon their members—the farmers whose interests they are supposed to advance.

This paper explores whether and how a combination of increased antitrust enforcement and reform of the laws governing farmer co-ops can rebalance agricultural markets in ways that serve the public interest. In general, it finds that the answer is yes, particularly if these reforms are combined with the restoration of policies to manage the surplus supply of agricultural commodities.[13] But the solution depends on keeping market power dispersed among many competing players, including cooperatives. It also requires stronger guidelines and public support to restore healthy, democratic governance within co-ops.

The principles at issue have larger applications. While this paper primarily focuses on agricultural marketing cooperatives, today it is not just farmers but also growing numbers of independent producers, contract workers, and smaller-scale business owners who need to cooperate with one another, as the markets they buy from and sell to become increasingly monopolized.[14] The struggles of family farmers to work cooperatively in the face of giant agribusinesses parallel the struggles of Uber drivers and third-party venders on Amazon to organize and bargain collectively. Legislators, regulators, policymakers, advocates, and especially those who produce goods and services will find new relevance in understanding how anti-monopoly laws have historically intersected with cooperative enterprise to lessen structural inequalities and serve other beneficial public purposes.[15]

II. Cooperatives in the Early Anti-Monopoly Movement

A strong anti-monopoly movement emerged in the 1880s primarily in response to the growth of agribusiness and railroad monopolies.[16] Organizations such as the Grange and the Farmers Alliance pressed for the breakup or tight regulation of giant "trusts" and for prohibitions on collusion among large, investor-owned corporations in setting wages, prices, and other terms of trade. Equally important to the agenda of this anti-monopoly movement were calls for increased coordination and cooperation among small-scale producers such as farmers and workers, both as a countervailing force against the market power of concentrated capital and as an alternative to financier-run and -dominated corporations.[17] The Farmers Alliance and Knights of Labor, among others, promoted a long-term vision in which co-ops replaced corporations and democratized the economy.[18]

One of the earliest and most dramatic examples of this reform agenda was the founding of cooperatives to break the hold that investor-owned grain elevators had over Midwestern farmers. By banding together to build and operate their own elevators, farmers managed to increase the price they received for their grain by an estimated 6% to 12%.[19]

Cooperatives also sprang up among dairy farmers, who were also particularly vulnerable to concentrated downstream agribusinesses. High transportation costs and economies of scale meant that dairy processing plants tended to enjoy local monopolies, giving the proprietary firms that owned such plants a great deal of pricing power vis a vis farmers who sold them products.[20] Farmers responded by coming together to market their milk collectively to privately owned dairy plants, or, in some cases, farmers collectively purchased and operated their own dairy plants.

Meanwhile, cooperatives such as the California Fruit Growers Exchange and the California Associated Raisin Company were formed to boost the market power of farmers by combining the production of hundreds or even thousands of farmers into a single business owned and controlled by farmers.[21] Cooperatives also played a strong role as social movement builders; for example, local Grange halls provided opportunities for farmers to meet and build a sense of community across America's sparsely populated regions.[22]

Much to their dismay, the antitrust legislation that Populist and Progressive reformers helped enact began to hinder this burgeoning co-op movement and, by extension, the very people whom antitrust was supposed to protect. When Congress passed the first federal antitrust law, the Sherman Antitrust Act of 1890, reformers hoped that its broad prohibitions on "restraint of trade" and on any and all attempts to "monopolize" markets would be used to bring criminal and civil cases against giant trusts such as Standard Oil.[23] The act's framers viewed combinations among capitalists and their corporations as fundamentally different from coordination among farmers and workers.[24] In practice, however, the act was more often deployed against labor unions and farmers' co-ops than corporate goliaths.[25] In 1895, for example, Chicago-area milk distributors successfully sued a local dairy co-op by arguing that the co-op's insistence on an exclusive contract was an illegal restraint of trade under state antitrust law.[26]

This case exemplified how the courts could reinterpret the expansive language of the antitrust laws ("restraint of trade") to interfere with the right of small producers to coordinate with one another in setting output, prices, and terms of market entry. Hoping to bring greater clarity to antitrust law, Congress passed the Clayton Antitrust Act in 1914, which specifically exempted cooperatives from antitrust action so long as they did not sell stock and remained nonprofits.[27] Congress also began passing annual appropriations riders that prevented the government from bringing antitrust actions against cooperatives for negotiating fair prices for farmers.[28]

Yet the legal status of cooperatives remained murky. When exactly did cooperation among farmers in controlling production quotas, prices, and distribution channels turn into illegal collusion? How could co-ops raise the capital they needed to compete with investor-owned agribusinesses, if they could not sell stock? What about co-ops that didn't just seek higher prices for farmers but also engaged in food processing and distribution, whether through direct ownership or alliances with downstream businesses? What exactly was the difference between such a co-op and a cartel?

During the late 1910s and early 1920s, the courts were generally skeptical of the idea that cooperatives should operate free of antitrust enforcement.[29] But state legislatures, with strong backing from rural constituents, passed legislation supporting the ability of cooperatives to engage in setting prices and other types of coordination.[30] Meanwhile, at the national level, the cooperative movement enjoyed strong support not just among many Democratic and Republican Progressives, but also among conservative proponents of free enterprise.[31]

Congress offered legal clarity and strengthened the power of co-ops in 1922. In that year, a Republican Congress and president passed and signed the Capper-Volstead Act. This law provides farmers and ranchers broad protections to legally coordinate within cooperatives, regardless of whether they issue stock.

The authors of Capper-Volstead debated how best to allow farmer coordination while preventing the growth of new agricultural monopolies.[32] The act empowers the secretary of agriculture to issue a cease and desist order if and when the government determines that a co-op has "unduly enhanced" the price of an agricultural product.[33] But the law does not define what "unduly enhanced" means, and no secretary of agriculture has ever used this power.[34] Furthermore, lawmakers were primarily concerned with cooperatives building monopoly power over large buyers, and did not take steps to address cooperatives' potential buyer power over members, because it was presumed that cooperatives, by their very nature, existed to serve member owners.

Today, it is still not clear whether mergers between cooperatives are exempt from antitrust review, especially where buyer power over members is concerned.[35] At a minimum, Supreme Court decisions have held that co-ops are subject to the Sherman Act's ban on monopolization or attempts to monopolize and that co-ops cannot join forces with non-cooperative entities to engage in restraint of trade.[36] However, there's leeway for non-farming entities to become co-op members and pursue similar ends.

Capper-Volstead contains no clear definition of which individuals or entities are allowed to organize cooperatives as "farmers, planters, ranchmen, dairymen, nut or fruit growers," though there's evidence that legislators did not intend for the law to cover food processors.[37] The law is also vague about the rights of members and control over cooperative operations, only stating that cooperatives should be "operated for the mutual benefit of members," and adopt at least one of two principles: Either no members are "allowed more than one vote," or the co-op can "not pay dividends on stock or membership capital in excess of 8 per centum per annum."[38]

States have varying laws to regulate cooperatives. Similar to corporations, cooperatives are legal business entities chartered under state law. Some states have laws specifically governing agricultural cooperatives, and California even distinguishes among four types of agriculture cooperatives, whereas other states make no distinctions between co-op types and forms. All cooperatives must adopt and ratify legally enforceable bylaws, but only

some states enumerate co-op members' rights and obligations or other requirements for co-op bylaws.[39] All cooperatives also must elect a board of directors, but only some states define specific board responsibilities. Oversight and transparency also vary. For instance, Wisconsin's Department of Agriculture, Trade, and Consumer Protection has the authority to investigate the management of a cooperative and force disclosure of relevant management practices to members.[40]

Over the years, these federal regulatory ambiguities and state-level variations made room for large co-ops to adopt less accountable decision-making structures and to develop internal conflicts of interest among different members and different parts of their businesses. At the same time, Capper-Volstead freed farmers to build cooperatives into viable players in the agricultural economy, eventually becoming critical agents in New Deal farm and rural development policy. This history of how co-ops have or have not served farmers provides direction for reforming cooperatives today, as addressed in Part VII.

III. Cooperatives in the New Deal Era

Congress passed Capper-Volstead at a time when most American farmers were suffering. As European countries and their farm sectors recovered from World War I, American food exports fell sharply. Meanwhile, the emergence of giant national brands such as Kellogg's, Birdseye, and Borden—and of giant grocery chains such as A&P—further eroded the market power of farmers, as a few, highly concentrated buyers turned farmers into price takers.[41] At the same time, as John Deere and International Harvester tractors replaced horses and mules, and as chemical fertilizers, hybrid seed, and other new technologies came into use, farmers faced rising costs for inputs, while increasing yields drove down farm-gate prices.[42] All these factors led to a deep depression across rural America, even as urban America prospered during the Roaring '20s.[43]

With the coming of the Great Depression, the plight of America's farmers only got worse. President Herbert Hoover attempted to stem the growing farm crisis by bolstering the resources and powers of cooperatives. He signed the Agricultural Marketing Act of 1929 to create a $500 million revolving federal loan program, administered by a newly formed Farm Board, which cooperatives could use to buy up surplus commodities and withhold them from the market until prices rebounded. Hoover saw support of cooperatives as strongly in the self-help tradition. In his mind, and in those of many other like-minded conservatives of the era, cooperatives helped foster the free enterprise system by allowing farmers to match the growing market power of larger agribusinesses.[44]

But as the Great Depression deepened, this approach alone proved inadequate to the task.[45] Even when subsidized by federal loans, cooperatives were not able to fix the problem of overproduction because they ultimately lacked the ability to control output. Faced with this reality, President Franklin Delano Roosevelt during his first 100 days in office pushed through an Agricultural Adjustment Act (AAA) that created a federal supply management program to support crop prices. This program included the establishment of agricultural marketing agreements and orders. Each of these directives covered a single commodity, usually for a specific region, and set specific production quotas to prevent oversupply, taking the burden to move markets off cooperatives.

Conservative cooperative organizations steeped in the self-help tradition, such as the National Cooperative Council (NCC), initially rejected the government interventions of the first AAA and viewed the bureaucracy it required as a competitor to cooperatives.[46] But the NCC came to support subsequent versions of the AAA, which included expanded cooperative credit programs and permitted cooperative leaders to join elected farmer committees tasked with administering AAA marketing agreements and orders.[47] In this way, cooperatives became vehicles for administering supply management programs. The 1937 Farm Security Administration (FSA) further promoted the development of cooperatives.[48]

These developments brought renewed strength to the cooperative movement during the following decades. Membership in agricultural cooperatives grew from 3.1 million to 3.4 million during the 1930s and then doubled to 7.1 million by 1950.[49] In combination with other policies, the growth of co-ops contributed to a substantial increase in farmer incomes relative to the rest of the population. In 1934, the per person disposable income of people living on farms was 39% of the per person disposable income of all Americans. By the beginning of the 1970s, that ratio had increased to 100%.[50]

Cooperatives were particularly instrumental for Black farmers, who otherwise did not equally receive the benefits of—or worse, were displaced by—New Deal farm policy.[51] In addition to FSA-supported cooperatives, which may have contributed to some moderate gains in Black Southern farmland ownership between 1940 and 1945, Black farmers sought to build power and circumvent discrimination by forming cooperatives during the civil rights movement (more below).[52]

Co-ops and Social Justice: The Federation of Southern Cooperatives

Co-ops are supposed to deliver quantifiable economic benefits to their members by acting as collective bargaining agents for farmers. The Federation of Southern Cooperatives (FSC) represents a powerful example of how cooperatives can also advance social justice. The FSC has been working since 1967 to empower poor, mostly African American farmers in the South, who have historically faced extremely unfavorable market conditions, influenced by the failure of Reconstruction to put freed slaves on an equal footing with white people in the South, and by decades of Jim Crow discrimination, which led to the social and economic marginalization of African Americans in the South.

The FSC reached its zenith in the mid-1970s, serving 10,000 farmers who controlled more than 1 million acres of farmland; its membership included more than 30 agricultural cooperatives and another 50 nonagricultural co-ops and credit unions across the South.[82] One longtime FSC leader, John Zippert, estimated that the federation and its member cooperatives have provided $400 million in benefits to farmers, including $85 million from cooperative marketing and $100 million worth of land that stayed in farmers' hands.[83] The FSC has provided essential technical assistance to member cooperatives, including helping them set up joint marketing schemes to secure better prices, conservation education programs, management training, and bulk purchase programs for farm supplies such as seeds, fertilizer, oil, and farm equipment.[84] Such efforts have required outside philanthropic and government funding, because of the limited resources of the farmers that the FSC serves. This speaks to the need to broaden cooperative development to focus more explicitly on social justice and to provide cooperatives with more public financing to do so.

IV. Consolidating Co-ops

During recent decades, the total agricultural business done by cooperatives has continued to increase. However, dramatic consolidation among co-ops has paralleled this growth, particularly since the 1970s. Even as co-ops did more and more business, there were fewer and fewer of them. Due primarily to mergers and buyouts, their number dropped from 6,445 in 1979 to only 2,186 in 2014, a decline of 66%.[53] In the process, many larger cooperatives began to resemble the agribusiness firms that they were initially designed to combat, growing more distant from members and their interests, and leaving farmers with fewer buyers and less bargaining power once again.

This increasing concentration among co-ops occurred as the industries that co-ops deal with—including food processing, retailing, seed, and pesticide manufacturing, among others—were consolidating into much larger, investor-owned enterprises. Thirty agricultural chemical companies making insecticides, herbicides, and fungicides in the 1970s had merged by 2001 into only six. Concurrently, chemical companies bought up seed companies that had genetically engineered new plant forms that optimized the use of specific herbicides.[54]

These parallel processes of consolidation among co-ops and investor-owned firms occurred in the wake of a sea change in antitrust policy that started in late 1970s and accelerated during and after the Reagan administration. In this new paradigm, federal regulators and the courts issued new merger guidelines and reinterpreted antitrust laws in ways that made preventing mergers or breaking up monopolies very difficult.[55] To appreciate the magnitude of the change in antitrust enforcement, consider that in the 1960s the Supreme Court ruled illegal a merger between two regional supermarket chains with a combined 7.5% market share in the Los Angeles metropolitan area.[56] By contrast, the courts and federal regulators waved through 385 grocery mergers between 1996 and 1999 alone.[57] The national market share of the top four grocery chains grew from 17% in 1994 to 40.3% in 2016.[58]

Courts and regulators have also for the most part stood by as many traditional farmer co-ops have grown into massive, integrated monopolies and oligopolies whose interests are not clearly and consistently aligned with that of their member farmers. Perhaps the most notorious example is Dairy Farmers of America. DFA was formed in 1998 as the result of a merger

among four large dairy co-ops. At the time, as DFA's official corporate history explains, co-ops had to get bigger in order to compete: "As milk processors and grocers grew larger and more national in scope, it was clear that the regional structure of the traditional cooperative couldn't keep up."[59]

DFA would soon become far more than just a combination of traditional marketing co-ops. It soon integrated vertically into all aspects of dairy production. Not only did it come to control 46 manufacturing plants making everything from Dairy Pure milk to specialty coffee drinks, but DFA also struck deals to become the sole milk supplier for dominant milk processor Dean Foods in several regions.[60] In these places, farmers had to either join DFA or sell through DFA controlled marketing agencies if they wanted to sell to Dean.[61] Meanwhile, DFA's dominion expanded through its marketing arm, Dairy Marketing Services, into milk testing and trucking from farm to market.[62] Before long, DFA Chairman Gary Harman was flying around the country in DFA's corporate jet while collecting $31.6 million during his seven-year tenure with the cooperative.[63]

But the individual member farmers who nominally owned the co-op did not do so well. As DFA expanded into downstream businesses such as processing and distributing milk and milk products, the interests of DFA's managers and its member farmers diverged. DFA's managers wanted to maximize the surplus revenue flowing to the enterprise—and, by extension, their own salaries and perks—by paying the lowest amount possible for the milk they bought for the food processing plants they controlled. In contrast, DFA's members wanted the organization to maximize the prices farmers got paid for their milk. The members might have prevailed, had they been better organized and informed, but they were spread throughout the country and in most instances were working longer and longer hours to save their failing dairy farms as milk prices decreased. Ben Burkett, a produce and grain farmer and state coordinator for the Mississippi Association of Cooperatives, perfectly captures this dynamic between co-op members and management:

> *All farmers—regardless of what they raise—should be paid a fair price. A good cooperative will help their farmer members get fair prices, but many have become vertically integrated and act just like corporations, forgetting who supports them and for whom they're supposed to provide services.*[64]

In the case of DFA, many farmer members felt they had no other recourse for fair compensation but to bring lawsuits against their own co-op. In 2014, DFA paid $40 million to a group of Northeastern dairy farmers who alleged in their lawsuit that DFA had conspired with Dean Foods to lower milk prices in the Northeast. In a similar case in the Southeast, DFA agreed to pay $140 million

to settle charges of conspiring with Dean Foods to eliminate competition from other milk buyers and reduce the farm-gate milk price. There are many instances of DFA coercing farmers to join DFA after the co-op bought up milk plants or supply contracts formerly held by different co-ops.[65]

V. Successful Cooperative Models

During this same period, however, many farmer cooperatives have continued to serve the interests of the members. Often, though not always, they are smaller and/or focused on niche products. But even some dominant national brands still operate in the best interests of their farmer members. These models reveal some of the attributes that can help cooperatives act democratically at different sizes.

Westby Cooperative Creamery, for example, is a traditional small-scale co-op that still works for both its member farmers and the local community. Founded more than 100 years ago, Westby processes milk from more than 100 member farms in southwestern Wisconsin, selling it to conventional and organic milk bottlers while also processing and marketing its own brands of cheese, cottage cheese, sour cream, and butter.[66] The co-op generates $50 million for the local economy and is not beholden to a larger co-op or corporation.[67] Westby is an important example of a co-op that has succeeded and served its organizational mission. This relatively small co-op demonstrates how vertical integration and product differentiation can produce value for member farmers. According to Pete Kondrup, general manager of the Westby Cooperative Creamery, "the pay price of Westby is right up at the top—lots of niche products. Westby doesn't do any fluid milk bottling."[68]

Fifteen miles from Westby, in the Kickapoo Valley of southwestern Wisconsin, is another, much larger co-op that that has become either the largest or second-largest organic dairy firm in the country. Organic Valley is an example of a New Generation Co-op. This term refers to co-ops that are more market oriented and focused on specialty or value-added goods, using market trends to inform production rather than trying to market what members already produce.[69] This could include developing niche markets that are less competitive than generic commodity markets, where price becomes the sole arbiter of competition. By being vigilant about the way its farmer members treat their dairy cows, and by developing its own third-party certification for organic, grass-fed milk that goes above and beyond the USDA's requirements, Organic Valley uses its niche marketing as a powerful tool to elevate the economic status of its farmer members, who currently receive twice the conventional price for their milk. The cooperative also docks farmers who produce milk beyond an allocated quota, creating an incentive to avoid overproduction (more below).

Co-ops and Self-Organized Supply Management: National Dairy Producers Organization

Farmers have long been interested in using cooperatives as a vehicle to influence the prices they receive by controlling how much they produce. In the past, the government has also relied on co-ops to implement federal supply management programs. In today's era of persistently low crop prices, oversupply, and dismantled federal supply management, farmers are once again turning to co-ops as vehicles for managing supply. So-called New Generation Co-ops focus on producing for the market rather than just marketing what farmers produce, and part of that calculus includes matching production to profitable demand, in the same way that any corporation can.[85]

There is a lack of legal consensus on co-ops' ability to restrict supply under Capper-Volstead and on the original intent of the law.[86] Case law supports the ability of co-ops to fix prices, though there's disagreement on whether this extends to limiting production. Others debate whether coordinating supply fits under permissible co-op marketing activities.[87] Meanwhile, federal enforcers including the Federal Trade Commission, the Justice Department, and the USDA have challenged co-ops' ability to restrict members' production.

But examples exist of successful cooperative-led supply management today. Ocean Spray, for instance, receives permission from the USDA to destroy as much of a quarter of its crop some years, in order to maintain prices.[88] Organic Valley, a New Generation Co-op, also has used a quota system: in 2017 any milk produced in excess of a farm's quota was docked $20 per hundred weight.[89] At least one farmer group, the National Dairy Producers Organization, is interested in pushing the boundaries of cooperative-led supply management even further, to empower co-op members across several different co-ops to implement supply management principles.[90] The NDPO represents a large variety of farms, from a 2,000-head dairy in New Mexico to small producers in the Northeast with fewer than 100 cows. But members agree on the need to work within their co-ops to universally bring down the supply of milk to address the persistent issues of overproduction and low prices that are driving farmers out of business. Coordination among co-ops could raise legal challenges, but some NDPO members assert these actions are within Capper-Volstead's protections for cooperatives to take actions that benefit members.

Rod Meier, a former Organic Valley farmer member from Minnesota, explained how this co-op combines cooperative values with organic niche marketing:

> *Organic Valley is out there to try to get farmers the best price they can. Others are trying to get as cheap as possible. Organic Valley as a co-op is probably responsible for getting the price we've got. I was in there writing bylaws for 15 years—got pride in that organic definitely saved a lot of farms. I might have been one of them.*[70]

Important insight into what makes some co-ops beneficial to farmers comes also from the example of Sunkist Growers Inc. Its origins go back to 1893, when a network of grower-controlled packing houses organized into a cooperative that branded and marketed California citrus on the East Coast.[71] Today, Sunkist has about 6,000 members in California and Arizona who grow oranges, grapefruit, and lemons on 300,000 acres spread throughout the two states. Most of its growth has been from within the membership of its growing region, unlike DFA, which has grown mostly through mergers with other co-ops.

Still, Sunkist does not have a spotless history and has sometimes acted contrary to the broader public interest. In the 1990s, for example, the federal government sued Sunkist for violating federal sales quotas on citrus then in effect to prevent oversupply and price wars among farmers.[72] Over the years, it has also faced charges of abusive and monopolistic behavior by other independent packers and other players in the citrus industry.[73] Unlike DFA, though, Sunkist has never been accused of undermining the interests of its own member farmers.

This is most likely due to its more decentralized and democratic governance structure. Rather than being centrally controlled, as DFA is, Sunkist evolved as a federation of locally controlled grower cooperatives and privately owned packing houses that operate through what are called district exchanges. The district exchanges delegate a great deal of authority to the larger organization, but if they are unhappy with the parent organization's performance, they can take back this authority to run marketing campaigns and sell fresh and processed citrus on behalf of the exchanges and their members.[74] Cooperatively owned packing houses can also decide to leave Sunkist entirely and strike out on their own, and member growers can similarly decide to sell to independent marketing firms under Sunkist's membership policy. Even though this has led to declines in the cooperative's market share, it also means that the co-op faces competition for its members' business, which puts a check on any incentives that the co-op's management might have to make deals at the members' expense.

Sunkist's comparatively limited role in downstream food processing probably also plays a role in keeping the interests of the co-op's management aligned with those of its member growers. Sunkist has been fairly proactive in licensing its name for hundreds of orange-flavored products around the world, even making forays into managing international shipments of Australian oranges to customers in Japan when the supply of California oranges is running low. But its comparative lack of vertical integration means that it doesn't have an institutional interest in reducing the price of citrus fruits produced by its members and in lowering the cost of inputs. This speaks to a concern expressed by Pete Hardin, publisher of The Milkweed, a muckraking dairy newspaper, regarding vertical integration: "At a certain point, the interests of management cease to be maximizing the value of the raw product; instead, it becomes maximizing the value of the plant operations."[75]

These cases highlight a few key qualities of healthy, pro-member cooperatives, such as high degrees of local control from smaller scale or federated structures, support to compete on qualities other than price—such as third-party sustainability claims—and upholding competition for farmers' business. While some of these qualities are intrinsic to internal cooperative decisions and structure, many can be supported by stronger policies to regulate cooperative governance and structure, as well as regulating the larger agricultural markets in which cooperatives compete.

VI. Policy Reforms to Reinvigorate Agricultural Co-ops

The cooperative business model is founded on the principles of democratic governance, but it is clear that many co-ops have fallen short of this traditional principle, especially in the face of increasingly monopolized competition and supply chains throughout the economy.[76] Addressing market consolidation will help co-ops compete on a more level playing field, but policymakers also need to take steps to ensure that cooperatives maintain healthy democratic functions in service of their members, if they are to maintain the tax and legal privileges of the cooperative form.

Increased transparency and improved decision-making processes within co-ops would help hold cooperative management accountable. Antitrust laws also need to allow farmers to build countervailing power within cooperatives, while also ensuring that cooperatives do not use their market power to abuse farmers. Finally, cooperative members need tools and resources to become more effective and meaningful participants in their co-ops, to empower change from within where possible.

The following policy proposals aim to enact these principles of cooperative reform:

- **Deconsolidate agribusiness**

  Federal and state antitrust regulators should deploy bright-line rules to block mergers or undo past mergers that allowed companies to exceed a certain market share (in many sectors, the line should be 20%). They should also set overall caps on market share. Agribusinesses that exceed a fixed market share should be ordered to divest assets or lines of business to fall under the threshold, subject to a business justification defense that growth was achieved through fair means of competition.[77] Cooperatives will have an easier time bargaining on behalf of their farmer members—and likewise will have less incentive to get bigger—as their supply chain adversaries are cut down to size.

- **Adopt bright-line rules to limit the horizontal mergers of cooperatives**

  Antitrust regulators should develop maximum thresholds for co-op market concentration in different types of agriculture products, balancing the potential benefits of economies of scale in specific markets against the potential harms caused by the power concentrated in a monopsonist buyer or a monopoly seller. If a proposed merger between cooperatives would create one cooperative with more than a 5% share of the national raw milk market, for example, that merger should be blocked.

  This will accomplish several objectives. More co-ops and more competition among them will make farmers less beholden to any one dominant player. Reducing the scale of cooperatives and increasing their number will also make direct, democratic farmer involvement in cooperative governance more feasible.

- **Adopt bright-line rules to limit the combination of horizontal and vertical integration of co-ops**

  Vertical integration in cooperatives is not harmful per se, but it can hurt farmers' interests when combined with significant horizontal integration, leaving farmers with few options for marketing their raw products. Vertically integrated co-ops with regional monopsony power are more able to exert downward price pressure on their member suppliers than vertically integrated co-ops operating in more competitive environments. If a cooperative controls more than 30% of a regional market for a given crop, then it should be prohibited from owning food processing plants that process its members' raw products, under bright-line prosecutorial guidelines. The USDA should also be required to conduct a market analysis on a biannual basis to inform the threshold above which co-ops may have monopsony pricing power and thus cannot be vertically integrated, adjusting thresholds to meet structures of different crop markets as necessary. If co-ops grow to exceed the determined threshold, then they should be required to divest themselves of specified processing plants, to increase competition among buyers for farmers' production.

- **Revoke the cooperative privileges of abusive businesses**

  While the Capper-Volstead Act loosely defines cooperatives, it does make plain that cooperatives should be "operated for the mutual benefit of members." If a cooperative is found to harm its members or work against their best interests, that enterprise should lose the antitrust protections and tax benefits granted to legitimate cooperatives. The USDA should publish a policy statement and file amicus briefs that affirm the "mutual benefit of members" requirement of Capper-Volstead and that articulate what constitutes "mutual benefit" to cooperative members.

- **Foster greater participation and responsiveness by promoting federated structures**

  In instances when cooperatives require some degree of national scale, cooperatives should adopt a federated structure, or a cooperative of regional cooperatives, to ensure high degrees of regional control. This will foster greater participation in governance by rank-and-file members while also avoiding the conflict of interest that sometimes exists among farmers in different regions. The USDA should promote federated co-op structures and train co-ops to maximize democratic participation.

- **Address size biases within co-ops**

  Substantial size difference between the largest and smallest members of a co-op can create power imbalances and marginalize the voices and needs of smaller members. To ensure healthy democratic functions, co-ops need either to limit the size differential between members or to adopt policies that avoid size bias. Either the largest member cannot be 10 times larger than the average member of that co-op in the preceding year, or co-ops need to undergo annual review to ensure that their decision-making processes do not have any scale biases. This could mean limiting patronage refunds (the co-op equivalent of returns on equity) or setting fees and charges proportional to member sales. All co-ops should also have a one-member, one-vote structure. Membership should also be limited to bona fide farmers and ranchers directly involved in food production. Supreme Court Justice William J. Brennan, in his concurrence in National Broiler Marketing Association, recognized that large corporations and agribusinesses could use the cooperative form to evade antitrust laws if the law were not limited to certain producer classes.[78]

- **Reform and strengthen co-op governance**

  Governance of cooperatives is a sorely neglected area of federal and state case and statutory law. We need to build new legal infrastructure that outlines what constitutes good governance for agricultural cooperatives, provides appropriate incentives for managers to follow rules, and establishes vigilant oversight and enforcement of these governance rules, to ensure that managers are carrying out their mission and prioritizing members. Specific elements of this new oversight structure should include a one-member, one-vote requirement and regular board elections (every two to four years) staggered to ensure that there is always some overlap from one year to the next in board composition, in order to preserve institutional memory. It should also include good governance practices to increase member participation, ensuring that major cooperative decisions cannot proceed without at least 50% of voters participating.

- **Facilitate greater transparency and accountability in co-op management**

  As management becomes more complex and professionalized in larger cooperatives, there is greater distance between management and members. Management may become less accountable to members, but also to other stakeholders such as employees, other suppliers, and the broader community, as profitability and business growth take precedence over other goals. To counter this tendency, co-ops with sales of more than $100 million should be required to make their annual reports publicly available and be subject to the same reporting requirements that the Securities and Exchange Commission places on publicly held corporations. This includes disclosing executive compensation. They must also provide clear explanations for any deductions taken out of producers' payments in the producers' receipts of payment.

  The USDA should establish a task force to interview members, board members, and management from co-ops of all sizes, to create standard information disclosure requirements for quarterly and annual reports to members. Capper-Volstead is premised on the assumption that co-ops exist to benefit their members, yet many cooperatives today make decisions that run counter to members' interests. Co-op managers must be held to account when it comes to advancing members' interests and following co-op rules. Civil and criminal penalties against managers should be established for malfeasance.

- **Ensure that mergers, joint ventures, and partnerships between cooperatives and investor-owned corporations are demonstrably in the interests of co-op members**

  All co-op mergers must be positively affirmed to be in the interests of farmer members; that is, strong evidence must be provided to the Justice Department, Federal Trade Commission, and the USDA that the merger or joint venture will enhance prices and/or increase farmer ownership interest in the long run through increased efficiencies, greater market access, or additional added value. The USDA's Cooperative Programs should develop an algorithm, formula, or scorecard to create a composite measure of the economic value that farmers receive from their co-op memberships, accounting for both return on member investment in the co-op and prices received for commodities marketed through the co-op. Similarly, co-op managers must present and make available to members an analysis of how a proposed joint venture, investment, merger, or other major change would affect producer pay and profits, before members vote on any such step. Co-op members must be able to vote on all potential mergers, joint ventures, or partnerships on a one-member, one-vote basis with a minimum voting participation of 40% of all members.

- **Rebuild USDA's cooperative program**

  At its peak in the late 1960s, the USDA program dedicated to supporting cooperatives, then called the Farmer Cooperative Service, had slightly more than 100 employees. Today, federal cooperative support is housed within the Rural Business-Cooperative Service, an agency under USDA's broader Rural Development agency. According to the U.S. Office of Personnel Management, the Rural Business-Cooperative Service had fewer than 100 employees in 2018 and covered a far wider span of work than just cooperatives, such as rural business grant-making and renewable energy.[79] In early 2020, the Rural Business-Cooperative Service directory listed only five staff members dedicated to cooperative education and research, and a 2018 letter from the agriculture secretary proposed transfers that would further shrink the branch.[80] Among other things, this division produced a bi-monthly magazine on cooperatives that the USDA abruptly canceled in 2018. While the Cooperative Marketing Act requires the USDA to support co-ops, the program does not have a line-item budget, allowing for such dramatic attrition. Cooperative supports at the USDA need to be restored to an independent division, as they

were up until 1994, with significantly more resources to support critical cooperative research, education, and technical assistance. These resources are especially important to help smaller co-ops and their members develop strong managerial and governance structures, and to develop new co-ops.

- **Establish public investment in cooperatives**

  Cooperatives have long struggled to finance their operations, relying on startup contributions from members, the farm credit system, and limited private lending. At times, this can leave cooperatives reliant on larger members for financing, which contributes to power imbalances within the co-op. Restrictive financing can also push co-ops to look more and more like corporations. Co-ops may take on a class of non-patron "investor" members or even investor board members to raise outside capital, skewing ownership and decision-making away from the interests of co-op participants to capital owners seeking returns.[81] Taking a lesson from the history of rural electrification and the paired success of electric co-ops and the National Rural Electric Cooperative Finance Corporation, Congress should appropriate more public financing opportunities to provide capital for the creation of new co-ops and help established co-ops looking to expand or stay afloat in economic crisis.

Acknowledgements

For their research, feedback, and contributions to this paper, the Open Markets Institute would like to thank Claire Kelloway, our senior researcher; Sandeep Vaheesan, our legal director; Zachary Burley, our legal fellow; Sanjukta Paul, visiting assistant professor of law at the University of Minnesota; Bobbi Wilson, policy and special projects coordinator for the Wisconsin Farmers Union; Sarah Lloyd, food systems scientist in the University of Wisconsin Center for Integrated Agricultural Systems; National Dairy Producers Organization Chairman Mike Eby and other members of the organization; and Nathan Schneider, assistant professor of media studies at the University of Colorado.

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