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GOVERNMENT AND ITS RELATIONSHIP TO PRICE STANDARDS IN THE MILK INDUSTRY

By Richard C. Cadwallader*

Most lawyers, despite the flurry of milk control legislation and cases in recent years probably do not realize the economic importance of the "milk industry" to the general welfare of the country. It is the largest of all industries, surpassing the steel business, the coal industry, the motor car industry, and any other business that one may care to name. In addition to the thousands of persons interested in the processing, sale, and distribution of milk and its products, over five million out of our six million farm families are involved to some degree with milk.

With the coming of the depression, the milk industry found itself burdened with heavy surpluses, and unfair trade practices which brought about a breakdown in the incomes of those dependent on milk.

The resultant strikes and public seethings brought prompt legislative action by federal and state governments to place the milk industry under economic regulation. This was made easier by the fact that the milk industry had for many years been subject to sanitary regulation.

Five years have intervened since this gigantic experiment was initiated, and we are witnessing a general reluctance on the part of government to face reality and withdraw from this field of economic regulation, in which it has made a very poor showing. Politicians may delight in "pointing with pride" to their accomplishments, but such claims will not stand up under cold factual, legal and economic scrutiny.

What should the future bring? What is it likely to bring? The outcome will be of the greatest importance not only for the milk industry, but for all other businesses that operate under

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†Many persons active in both federal and state milk control administrations, in cooperative associations, in processing and distributing companies, on creamery journals, and in the legal and teaching professions have answered questions, furnished data and given helpful criticism; to all of these I wish to express my appreciation for their invaluable aid.

1This term is used to include milk producers, and fluid milk, ice cream, cheese, evaporated, condensed, dry milk, and butter processor-distributors. Cf. the composition of the Dairy Industry Committee, 1107 Barr Building, Washington, D. C.
private ownership and management. The whole problem deserves and is receiving the attention of some of our ablest economists and legal thinkers.

The purpose of this article will be to examine and evaluate these legal and economic problems in the light of the history of the milk industry, and to consider critically some tentative hypotheses.²

I. INTEGRATION AND GOVERNMENTAL REGULATION

A. Early Aspects.—In 1890³ the milk industry was poorly organized and existed mainly on a local basis. There were no processor-distributor organizations which were national in scope, and no powerful interstate farmers' cooperative marketing units. Nor did the constituent elements have well-knit lobbying organizations in Washington.

From a legal standpoint, the drive from that time down to 1916 was the effort to get inspection, testing, grading, laboratory standardization, pasteurization, and other regulatory health laws passed by the states, cities, and towns.⁴ In every state the police power was relied on to control milk supplies, by means of state legislation and local ordinances. True, some writers of the time were speaking of coordination, but they wanted it mainly because it would bring improved sanitation by making enforcement easier. Dr. M. J. Rosenau, Professor of Preventive Medicine at the Harvard Medical School, wrote a book in 1912 which is typical of the pre-war period.⁵ He pleaded for better sanitary control, and felt that combination and integration would help bring it about. He considered application of anti-trust legislation to the milk industry a mistake, and argued that concentration of the business of processing and distributing milk even to the extent of an absolute monopoly was a desirable thing, since it would make for easy enforcement of health laws, introduce better equipment and

²In considering the problem of governmental regulation, I have intentionally omitted any detailed analysis of the public health aspects, and have tried to deal mainly with the development of governmental control of prices.
³The year of the passage of the Sherman Anti-Trust Act is selected as a point of origin because the philosophy of price control by government received its greatest impetus at this time.
⁴Grading and Labeling of Milk and Cream, by Committee on Agriculture of the Boston Chamber of Commerce, August, 1918. For a digest of cases and materials on this public health supervision and control of milk and its products up through 1936, see: Tobey, The Legal Aspects of Milk Control (1936).
⁵Rosenau, The Milk Question (1912).
trained personnel, and allow economic use of surplus milk.\(^6\) We find him complaining:

"Competition is not the life of trade in the milk industry. Competition accounts for a certain amount and kind of 'life' in milk—namely, bacterial life. In other words, commercial competition hurts the quantity and quality of the milk supply. Cooperation is the watchword."\(^7\)

One of the notable early efforts to ascertain the economic effect of integration was the Rochester Milk Survey conducted by Dr. John R. Williams.\(^8\) He investigated the number of homes served by each milk route, miles traveled, and cost of distribution in Rochester, New York, and recommended a model system of unified fluid milk distribution, saying:

"The City of Rochester owns its water works, collects its own ashes, operates an incinerating plant for the sorting and disposal of garbage, and controls the collection of its garbage. All of these activities bear an important relation to the public health, but none the less does milk. Why, therefore, should not cities control their own milk supplies to the end that the people may have pure, wholesome milk at the minimum cost?"

With the start of the World War, the European nations soon found themselves unable to supply their armies and civilian populations with food by their own efforts. They discovered that evaporated milk and condensed milk, which had been produced on a small scale up until 1900,\(^9\) were ideal foodstuffs from the viewpoint of sustenance, ease of transportation, cost, and keeping qualities. With Switzerland, the only large producing country besides the United States, unable to increase her output materially, the belligerents (mainly the Allies) turned to the United States and Canada for a supply.

By 1914 there was a large degree of concentration in the production of canned milk, which had developed from control of patents, location of production units, control of marketing outlets, large capital necessary to start producing units and the like.\(^10\) At

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\(^6\)Rosenau, The Milk Question (1912).
\(^7\)Rosenau, The Milk Question (1912).
\(^9\)For an interesting sketch of the development of this phase of the milk industry see Baumgartner, The Condensed Milk and Milk Powder Industries, Bulletin of the Department of History and Political and Economic Science in Queens University, Kingston, Ontario, Canada. (1920.)
that time, three companies—Borden, Carnation, and Helvetia—produced 56.5 percent of the country's output, while in 1918 the same three companies with the addition of the Nestle's Food Company, produced 54.2 percent, and ten companies at that time produced 76.7 percent of the total canned milk manufactured in the United States, although there were 120 companies contributing to the total. During this same period the total exports of canned milk (evaporated and condensed) from the United States jumped from 22,831,904 pounds valued at $1,944,788 in 1914 to 852,181,414 pounds valued at $121,817,737 in 1919, an increase of 3,732 percent. The production of canned milk in the United States went from 660,006,000 pounds in 1914 to 1,798,082,000 pounds in 1919, an increase of 272 percent. Thus, it can be seen that though there was a tremendous increase in total production, it remained in the hands of the same companies practically, and to an even greater extent was the export trade in canned milk closely controlled.

This company had a remarkable growth. It was organized in New York as a subsidiary of Nestle and Anglo-Swiss Co., a Swiss company. In 1915 it began to buy canned milk, and in that year purchased 1,000,000 cases, in round numbers. By 1918 it had taken over the Hires Condensed Milk Company and its five subsidiary companies (whose plants were in Michigan, Vermont, and New York), the International Milk Products Co., (which operated four plants in New York state), and the John Wildi Evaporated Milk Company, a Delaware corporation which owned John Wildi Evaporated Milk Co., an Ohio Corporation, and stock in Delavan Condensed Milk Co., an Illinois Corporation. In 1918 the Nestle Food Co. through its subsidiaries produced milk in thirteen factories, and in addition controlled the output under one, two, and three year contracts of thirty-one other factories operated by ten companies. Altogether, this company was in a position in that year to produce and purchase under contract about 8,000,000 cases, or about one-fourth of the total production of the United States. See: pp. 58-62, Report of the Federal Trade Commission on Milk and Milk Products, 1914-1918, (1921).

This movement towards corporate centralization is further illustrated by the fact that on August 23, 1937, there were only thirty-seven (37) independent business units (organized into forty-eight (48) companies) engaged in manufacturing evaporated milk. List of Manufacturers of Evaporated Milk, issued by Evaporated Milk Association, August 23, 1937.

See table, List of Manufacturers of Evaporated Milk, issued by Evaporated Milk Association, August 23, 1937.

See: Contract of January 2, 1918, between Nestle & Anglo-Swiss Co. and The Borden Co., by which the former was allowed to sell condensed and evaporated milk in the United States and Canada, provided it gave the Borden Co. one-half of the total net profits earned by it on such business, and the latter was given a similar right in Europe on the same condition. Also see the two prior agreements which it modified. All are reprinted as Exhibit 7, in Appendix, pp. 145-168, of Federal Trade Commission Report on Milk 1914-1918, which suggested that they violated the federal anti-trust laws (Summary, p. 21).
This huge expansion of production of canned milk meant that more fluid milk had to be found, and since it was impossible to increase suddenly the milk output of our cow population to any large extent, the condenseries entered the market and offered prices that took large supplies from cheese, butter, and fluid milk processors. This factor, coupled with generally rising prices, sent the costs of milk and milk products sky-high as far as the consumer was concerned. But this did not appreciably benefit the producer, who was himself subject to greatly increased costs. Tremendous agitation developed, which soon became articulate under the leadership of newspapers and politicians. From the initiation of the war period forward we find investigations and surveys being launched by individuals, chambers of commerce, cities, states, and the federal government. They all em-

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17Report of the Mayor's Committee on Milk, City of New York, (1917); North, The Rochester Milk Survey, under the auspices of the Committee on Public Safety of the Common Council of the City of Rochester, New York (1919); Milk Market Situations in the Cities of San Francisco Bay, Univ. of California (1917).
phasized that milk was of the utmost importance to the public health and offered various schemes for reducing the prices to the public. Many of them enunciated the value of a "legalized monopoly and public control." Among other things, these groups and reports advanced the following ideas:

1. That the processing and distribution of fluid milk should be a regulated public utility service.\(^2\)

2. That the legislature should declare the milk business to be one affected with a public interest, and that state milk commissions should be created to regulate the milk distribution business by issuing licenses. Such commission to have power to fix prices, etc.\(^2\)

3. That municipalities should be authorized to acquire and operate milk distributing systems within their boundaries.\(^2\)

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\(^2\)Preliminary Statement of the Commissioners appointed by Governor Smith to report to him in the matter of the High Cost of Living, signed by Martin H. Glynn, late Governor of the State of New York and Dr. John H. Finley, Commissioner of Education; The Production, Distribution and Food Value of Milk—a report to Herbert C. Hoover, United States Food Administrator, by the Milk Committee, Clyde L. King, Chairman (1918); Report of the Fair Price Committee of the City of New York, Dr. Royal S. Copeland, Health Commissioner of New York City, Chairman, made to Governor Smith, Dec. 2, 1919, Leg. Doc. No. 39; North, The Rochester Milk Survey, under the auspices of the Committee on Public Safety of the Common Council of the City of Rochester, New York (1919).

However, some persons argued strongly that though amalgamation would be a good thing, it should be accomplished under private ownership subject to strict public regulation rather than by making it government-
4. That in nearly every city there are too many dealers and that there is a large duplication of routes, which makes for high cost of distribution, which can be reduced by abolishing competition and duplication through centralizing the distributing system into a single company. 

5. That the cost of production can be reduced by: (a) eliminating low producing cows; (b) collective hauling of milk; (c) collective buying of grain.

6. That dealers should be permitted without fear of the law to enter into common negotiations for the purchase of the necessary quantity required by them in their business.
7. That costs of milk production are reasonable and prices asked by producers are justified.  
8. That the dealer's cost of distribution is justified.  
9. That some solution must be found for the surplus milk problem.  
10. That producers' cooperatives should be organized and fostered and to some degree controlled by the state.  
11. That the milk problem of the time was caused by the drive by the public for increasingly sanitary milk, while not wishing to pay the increased cost necessary to allow the farmer to produce the higher grade fluid milk.  
12. That immediate and diligent attention should be given to violations of existing laws.  
13. That since many of the problems connected with the milk industry are interstate and national in character, they should receive the serious attention of the National Congress. Interstate regulation and control will assist materially in a final solution of all the problems involved.

One writer at the end of the War Period summed up the general viewpoint rather well when he wrote,  

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27Report of the Mayor's Committee on Milk, City of New York (1917).  
31MacNutt, The Modern Milk Problem—in Sanitation, Economics, and Agriculture, ch. ii, pp. 31-64.  
32Preliminary Statement of the Commissioners appointed by Governor Smith to report to him in the matter of the High Cost of Living, signed by Martin H. Glynn, late Governor of the state of New York, and Dr. John H. Finley, Commissioner of Education (1919); See letter of Health Commissioner Haven Emerson to Mayor John Purroy Mitchel on October 1, 1917; Report of the Mayor's Committee on Milk, City of New York (1917) p. 4.  
34Frederiksen, The Story of Milk (1919).
"In the large cities there has grown up an industry which largely monopolizes the milk supply and which until lately was powerful enough to dictate prices and conditions both for producers and consumers."35 After going on to indicate that he felt the middleman would be eliminated, he said, "It should not be forgotten, however, that while the much abused middlemen in times past have been able to dictate terms and prices and have often abused the privilege, they have at the same time used their influence and power to improve the milk supply. As the supply of oil and gasoline has been perfected and cheapened by the all-powerful Standard Oil Co. as a monopoly crushing all competition, so the 'Milk Trust' has improved the distribution of milk and has built up magnificent sanitary plants in which milk is handled, pasteurized, bottled, and distributed in a way that might not have been possible without the monopoly. It has served a good purpose, but has at the same time acquired such power that official control has become necessary for the protection of producer and consumer alike, and the time may be near when these two classes will combine and take the matter into their own hands so that the distribution may be done at actual cost."35

B. United States Food Administration.—During the period of the World War, the only effective instrument of government control was the United States Food Administration, which had a Milk Committee. However, price fixing in the milk and milk products industries was studiously avoided by the United States Food Administration.37 Margins and profits were required to be reasonable under the licenses issued, and in some cases maximum margins were specifically set.38 Control of exports of canned milk was exercised by the Food Administration through licenses by the War Trade Board.39

Milk, butter, cheese, and condensed, evaporated, and powdered milk were among the sixty-odd food commodities that were put under license control by proclamation of the president on October 8, 1917.40 Importers, manufacturers, storers, and distributors of

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38This was in connection with the cold storage price of butter at New York and Chicago, Federal Trade Commission Report on Milk, 1914-1918, p. 118.
40Messages from the president of the United States transmitting reports of the United States Food Administration for the year 1917, Exhibit E, p. 22.
milk and milk products were required to secure licenses from the United States Food Administrator on or before November 1, 1917. To operate without license or after the revocation of license subjected the offender to a fine of $5,000 or two years' imprisonment or both.\textsuperscript{41} However, retailers whose gross sales did not exceed $100,000 a year, although subject to the provisions of the food control act against hoarding, speculation, combination, and excessive profits, were, along with farmers and some others, excepted from the license control provided by the proclamation.\textsuperscript{42} They were reached through appeals to patriotism, local price-determining boards, and Rule 17 requiring them not to deal with persons violating the food control act.\textsuperscript{43}

To supplement and administer these licenses, many general and special rules and regulations were issued and enlarged or modified from time to time.\textsuperscript{44} These prohibited speculation, secret rebates, combination sales, and unfair practices and restricted re-sales within the same trade. They also provided that licensees should keep their property and records open to inspection by authorized representatives of the Food Administration and make such sworn reports concerning the conditions and management of their business as the Food Administration might require. Unreasonable prices were prohibited as to transactions in the United States, but margins of profit from export transactions were unregulated. Cold-storage warehouse charges were required not to be unreasonable or discriminatory. All cold-storage rates had to be filed with the United States Food Administration.\textsuperscript{45}

The three main objects of the general and special regulations issued in exercise of license control were:

A. To limit the prices charged by every licensee to a reasonable amount over expenses, and forbid the acquisition of speculative profits from a rising market.

B. To keep all food commodities moving in as direct a line and with as little delay as practicable to the consumer.

\textsuperscript{41}Sec. 5, Food and Fuel Control Act, August 10, 1917 (Pub. No. 41, 65th Congress).
\textsuperscript{42}Sec. 5, Food and Fuel Control Act, August 10, 1917 (Pub. No. 41, 65th Congress).
\textsuperscript{43}(1918) Annual Report of the United States Food Administration 62.
\textsuperscript{44}(1918) Annual Report of the United States Food Administration, Exhibit K, p. 59.
C. To limit as far as practicable contracts for future delivery and dealings in future contracts.\textsuperscript{46}

Voluntary agreements on the prices of market milk through the mediation of milk commissions appointed by the Food Administration were reached in 1917-1918 between the producers and processor-distributors in certain localities.\textsuperscript{47} The Food Administrator appointed such federal commissions with great reluctance, and only when requested by consumer or producer groups after a showing that otherwise great hardship would be worked on both groups.\textsuperscript{48} Prices generally were arrived at with great difficulty, and were usually of brief duration. Rapidly changing producers' costs, and heavy fluctuations in the demand for milk in various milk products industries were factors in the situation making for unstable prices.

The Food Administration was much more active in respect to controlling the prices of butter, cheese, and canned milk. Though it disclaimed the power to fix and enforce prices, it did issue numerous regulations attempting to control the maximum margins of wholesalers and jobbers, manufacturers, and commission merchants, and retailers of butter,\textsuperscript{49} cheese,\textsuperscript{50} and canned milk.\textsuperscript{51} Thus, though this attempted control of margins represented only a partial control of price to the consumer, since it did not control the price asked by the producer, it did have the price in a strait-jacket once it left the producer, if enforced.

C. Post-War Period.—With the close of the War, the Food Administration came to an end. Men continued to talk and write about the milk industry as a business affected with a public interest, and to plead for legalized monopoly.\textsuperscript{52} But it had little effect in the legislative halls, since the newspapers and public had turned their attention elsewhere. The main development toward integration came from new and improved technical processes, study of...
consumption, new machinery, milk tank cars, motorization, better accounting systems, keener advertising, better sanitation, and finer personnel. It saw the growth of small local companies into national ones, and brought the expansion of facilities and types of products handled by processor-distributors. It witnessed the rise of new milk producer cooperatives, and the growth and strengthening of old ones. Likewise the concept of collective bargaining as a method of fixing prices and quantity of milk handled developed from a theory to a practice. Government kept hands off of prices, and business boomed.

Considerable effort seems to have been devoted by cities, states, railroads, and processor-distributors, as well as by some producers' cooperatives, to the development of a bigger milkshed for metropolitan markets.

In the early days metropolitan milksheds were geographically small, and most of the large metropolitan markets were supplied by intrastate milksheds. But by 1919 numerous urban markets were supplied from milksheds extending over a number of states. And up until 1930 this tendency grew, with the help of refrigerated tank cars, homogenizers, and the demand for cheap milk. In fact, so much so that in 1933 more than half the amount of fluid milk consumed in New York City terminated on interstate rail movement at railroad terminals in New Jersey.

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53 Ross, Some Factors Affecting the Demand for Milk and Cream in the Metropolitan Area of New York, United States Dept. of Agriculture, Technical Bulletin No. 73, June, 1928.
54 Kelly and Clement, Market Milk, (1923).
55 Perhaps the raising of tariff walls had some effect on domestic prices. See: Milk and Cream—Report of the United States Tariff Commission to the President of the United States, with Appendix, Proclamation by the President (1929). Lininger, Dairy Products under the Agricultural Adjustment Act, (1934) 6.
59 Report of the Joint Legislative Committee to Investigate the Milk Industry, April 10, 1933, Legislative Doc. (1933) No. 114, Table 6, p. 36; Cassels, A Study of Milk Prices, Presented at the Department of Economics of Harvard University in partial fulfillment of the requirements for the degree of Doctor of Philosophy, March 30, 1934.
60 Report of the Joint Legislative Committee to Investigate the Milk Industry, April 10, 1933, Legislative Doc. (1933) No. 114, at p. 38.
D. Agricultural Adjustment Administration—Dairy Section.—
The price relationships from 1920 to 1934 encouraged expansion of the dairy industry, and this brought about increased herds, as illustrated by the fact that the number of cows and heifers two years old and over in the United States kept for milk increased from 22,330,000, on January 1, 1928, to 26,062,000 or over 13 per cent, on January 1, 1934.61

From 1931 to March and April, 1933, the combined effects of increased production and decreased demand sent dairy prices gradually lower.62 Thus, a definite buyer's market was created, and the producers clamored for legislation setting price minimums, with the hope that they would thus be protected from the consumers.

When the AAA was being considered by Congress in 1933, dairy products were at first omitted, but mainly through the efforts of the National Cooperative Milk Producers' Federation,63 they were included in the final draft of the act. A Dairy Section was set up to administer the act, and various divisions were created. The main effort at the start was toward solution of the market milk problem.

In general, the AAA did not deal with prices, but concerned itself with production. The theory of the government experts was that if a scarcity of the supply of commodities coming to the market could be produced, there would automatically be an increase in price, since demand would remain relatively constant, and hence the disproportion between the two would be lessened with an attendant restoration of equality of bargaining between buyers and sellers.

But in the case of milk and its products, the secretary of agriculture undertook a policy of outright price fixing. It was felt that such a policy did not contravene the due process clause of the fifth amendment because of the decision in the Nebbia Case.64

Fluid milk marketing agreements were arranged which set forth full schedules of prices to be paid producers for Class I,

61Black, The Dairy Industry and the A. A. A. (1933) 60.
Class II, and Class III milk—that is, milk consumed respectively in the forms of fluid milk, of cream, and of butter, cheese and other manufactured products. There was also a complete schedule of prices for contracting distributors' sales, including a wholesale price schedule, a price schedule to stores, and a retail price schedule.  

After the contracting producers and processor-distributors had proved the agreement, it was signed by the secretary of agriculture, and he issued licenses and set the day when the license and agreement should become effective. By the end of 1933, fluid milk marketing agreements and licenses were in effect in Chicago, Philadelphia, Detroit, Twin Cities, Baltimore, Knoxville, Evansville, Des Moines, New Orleans, Boston, Alameda County (Oakland), Los Angeles, St. Louis, San Diego and Richmond.

These agreements differed considerably as to their details, although practically all of them were attempted adaptations to the market structure prevailing in the individual markets. Some had a use plan of selling to dealers and a base-surplus plan of distributing proceeds to farmers. Others had cash-and-carry differentials or pooling systems for equalizing surpluses between processor-distributors.

By December, 1933, serious doubts had been raised as to the wisdom of many of the provisions of the agreements; one group in the AAA held four things to be essential: (1) recognition of farmers' cooperatives; (2) territorial limitations in whole milk sheds; (3) production control; (4) the same price to everybody (equalization). The other group believed that low minimum

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66The argument has been made that producers and distributors who sign such agreements thereby estop themselves from legally attacking their provisions. Wentworth, The Administration's Approach to the Fluid Milk Industry, Proceedings of the Twenty-seventh Annual Convention, General Sessions, International Association of Milk Dealers, Cleveland, Ohio (1934) p. 87.

67Black, The Dairy Industry and the A. A. A. (1933) 100.

68Lininger, Dairy Products Under the Agricultural Adjustment Act, (1934) 32. Copies of agreements, licenses and terminations can be found in Marketing Agreements, Licenses, and Codes of Fair Competition, U. S. Department of Agriculture, AAA, (1933-34).


70Lininger, Dairy Products Under the Agricultural Adjustment Act, (1934) 42-44.
GOVERNMENT AND THE MILK INDUSTRY

wholesale and retail price fixing might well be a part of the program of the AAA, but that above a low minimum resale price to protect against predatory price cutting, the free play of competitive forces (especially competing uses of milk) should determine the price the consumer paid for milk.71

In addition, serious difficulties of enforcement had arisen.72 By October 6, 1933, in the Chicago area alone, 112 persons and firms had been ordered to show cause why their licenses should not be suspended or revoked.73 Like conditions prevailed in other areas. Most of the violations had to do with resale prices. In spite of the fact that the supreme court of the district of Columbia had upheld the constitutionality of the AAA as respects milk licenses, in Economy Dairy Co. v. Wallace (Milton-Beek v. Wallace),74 neither the General Counsel of AAA nor the department of justice pushed court prosecutions.75

In December, 1933, there was a shakeup in the Dairy Section, and on January 8, 1934, a telegram was dispatched to all parties to existing agreements announcing a change of policy, saying in part:

"Concentration of future efforts will be upon establishment and maintenance of proper prices to producers, as each market warrants without attempting hereafter to establish or enforce complete schedules of distributors’ prices to consumers."76

On February 1, 1934, all existing agreements were terminated, though licenses were to remain in effect. By March 17, 1934, twelve new licenses had been approved. They provided for low minimum resale prices, though in no instance were resale prices fixed. Provision was made for milk to be sold to all distributors on a classified use basis, and proceeds were to be returned to producers at a pool price or blended, base-surplus price.77

The divergence of opinion continued in the Dairy Section and

71Lininger, Dairy Products Under the Agricultural Adjustment Act, (1934) 44.
72For an account of the part played by the Chicago gangster element in this enforcement war read, Mallon, From Beer to Milk, (1934) 1 Today 11:10.
73Black, The Dairy Industry and the A. A. A. (1933) 104.
75Wallace v. Dwyer, United States district court for Mass. (1934) unreported.
76Black, The Dairy Industry and the A. A. A. (1933) 117.
77Lininger, Dairy Products under the Agricultural Adjustment Act (1934) 77. For a sample license, see Appendix E, p. 479, Black, The Dairy Industry and the A. A. A. (1933).
The fundamental postulate of the Dairy Section was that there was only one milk market in the United States, and that it was of nationwide extent. They denied that there were many dissociated and localized centers which were unaffected by milk production and prices in the others. They argued that milk which could not find a consumer outlet in fluid form was sold to butter, cheese, evaporated milk plants, etc., and that, therefore, fluid milk prices in any given local market were within bounds controlled by the national price of manufactured milk products. Hence, it was impossible to attempt to control one (interstate) without controlling the other (intrastate), and that since this was true the Dairy Section had the right to issue licenses controlling both.

The Dairy Section, however, fared badly in the courts, and federal courts held milk licenses, in Baltimore, Boston, Des


29 The personnel of the Dairy Section was pungently criticized in The Impractical Experience of the AAA Dairy Dictatorship, compiled by the National Cooperative Dairy Defense Committee, (1934) 127 Pacific Rural Press 367.


31 Cassels, A Study of Fluid Milk Prices proves this to be economically true. Cf. Zapoleon, Farm Relief, Agricultural Prices and Tariffs, (1932) 40 J. Pol. Econ. 73 for a discussion of the interaction of prices between different sections of a federal sovereignty.

A similar analysis of Canadian activity is given in: Fraser, Result of Dominion and Provincial Attempts to Stabilize the Milk Industry, Proceedings of the Twenty-Seventh Annual Convention, International Association of Milk Dealers, Cleveland, Ohio (1934) 49.


33 United States v. Seven Oaks Dairy Co., (D. Mass. 1935) 10 Fed. Supp. 995. Court seems to suggest, although without so holding that due process under the fifth amendment may prohibit price fixing by the federal government even where the state would not be prohibited by the fourteenth amendment.
MOINES, Indianapolis, Los Angeles, Oklahoma City, Chicago, Tulsa and Louisville to be invalid, although the Chicago license was held good.31

Factually these decisions were divided into two types: (1) those in which milk was brought from a state where produced, across a state line, and sold in a different state from that of origin, (2) those in which milk produced within the state was purchased by processor-distributors to supply a market within that state, neither the production, milk, dealer, or transaction having any extrastate situs except as to its economic effect on interstate commerce.

The courts held that under the first situation Congress by virtue of the interstate commerce clause did not have the right to regulate the purchase price of milk at its point of production, since it did not constitute a regulation of transportation or interstate sales, but was a control of production with which the states alone had the right to deal.

As regards the second situation, the courts with the exception of United States v. Shissler92 held it to be typically a transaction of intrastate commerce, and one to which the federal price fixing power did not extend, regardless of its influence on interstate transactions.

As a result of these decisions, the Department of Justice proceeded with caution, and avoided taking any of the cases to the

88 Columbus Milk Producers Cooperative Ass'n v. Wallace (N. D. Ill. 1934) 8 Fed. Supp. 1014. In this case and in the Seven Oaks Case we have a situation in which had the state attempted to regulate the price to be paid, it would have been a regulation of interstate commerce and forbidden. When the federal government tried to do it, it was a regulation of production and forbidden. Edgewater Dairy Co. et al v. Wallace, (N.D. Ill. 1934) 7 Fed. Supp. 121, appeal dismissed in (C. C. A. 7th Cir. 1935) 75 F. (2d) 1022.
92 Note 90.
United States Supreme Court, especially in view of the *Schechter* decision, which many persons thought would affect the AAA.

The AAA refused to accept such a conclusion, and speedily set about devising amendments to meet the Supreme Court's pronouncements against undue delegation of powers and against extension of federal control under the commerce clause to include transactions only indirectly affecting interstate commerce.

The amendments were passed on August 24, 1935. "Orders" by the secretary of agriculture were substituted for licensing provisions of the original act, and a "reserve clause" was inserted, enabling the AAA to compel any distributor to accept an "order" favored by two-thirds of the producers. The practical effect of this was to allow producers and dealers to get together and bargain collectively. The only difference from the previous procedure was that dealers were allowed to bargain as a group without the theoretical threat of the Federal Anti-Trust Laws.

In *United States v. David Buttrick Co.*, Judge Brewster, relying on *United States v. Butler*, held that the entire AAA had been declared unconstitutional in the *Butler Case*, and, therefore, there was no statute under which the secretary of agriculture could issue "orders" regulating the marketing of milk.

As a result of this case, Order No. 4 in the Boston area was suspended and the Dairy Section became for a time primarily an academic body. Then partly as a result of Judge Brewster's cryptic opinion, and for other reasons, Congress amended and reenacted the provisions of the Agricultural Adjustment Act, relating to marketing agreements and orders. The purpose of the legislation was to separate clearly the marketing provisions of the AAA from the production-control program and to say as clearly as it was within the power of Congress to do so, that the marketing

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93See: (1934) New York, Attorney General's Report 319, where John J. Bennett, Jr., Attorney General, in an opinion held that the licensing power of the secretary of agriculture did not oust the state of New York from control over intrastate milk transactions, and that the state could enforce health regulations as to milk when as to those transactions involving interstate commerce.


97(1936) 297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914.


agreements and orders were not for the purpose of controlling the production of any agricultural commodity.

Before anything could be done under this, however, the First circuit court of appeals in *United States v. David Buttrick Co.* reversed the district court, and held that the United States district court had jurisdiction to decree compliance with Order 4, since marketing agreement and order provisions of the AAA as amended in 1935 were not intended to, and did not effect a regulation and control of agricultural production. The court said that as long as the AAA orders merely regulated the purchase, distribution and sale of milk in the current of interstate commerce, they were valid and would be enforced by the courts.

Thus, in the light of what the courts have decided to date, it is probably safe to say that the federal structure of the government will still act as a deterrent to any natural control of local production or intrastate marketing. In addition it would seem that the due process clause is still operative to the extent of preventing unreasonable, extraordinary and arbitrary fixing of prices of milk and its products.

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100(C. C. A., 1st Cir. 1937) 91 F. (2d) 66. Petition for writ of certiorari denied in (1937) 58 Sup. Ct. 140, 82 L. Ed. 103. Cf. the language in Edwards v. United States (C. C. A. 9th Cir. 1937) 91 F. (2d) 767, and United States v. Whittenberg, (S. D. Texas, 1938) 21 F. Supp. 713 in which under the same marketing provisions of the AAA, orders of the secretary of agriculture regulating the marketing of citrus fruit were upheld as being a valid exercise of Congress' power over agricultural products in the current of interstate commerce, as long as they only affected inter-state production and sale. Accord: United States v. Whiting Milk Co., (D. C. Mass. 1937) 21 F. Supp. 321.

101Order 4 was reinstated and hearings arranged. See: order of secretary of agriculture issued on June 25, 1937 (mimeographed). It is interesting to note that the effect of the order was avoided by the processor-distributors by arranging contracts with the producers whereby the former became the agents to make sales for the latter, title to the milk remaining in the producer.

102But if the federal government can control the production of steel, trailers, and clothes, why not the production of milk? Is there any reason for stressing the individual steps in the production and marketing of agricultural commodities and refusing to view it as a connected routine, while at the same time accepting the production and marketing of industrial commodities as an integrated process subject to control by the federal government because national in scope?

103For an excellent analysis and digest of all the federal cases on the dairy provisions of AAA see Tobey, Federal and State Control of Milk Prices, Int. Ass'n of Milk Dealers (1937). Abel, Commodity Price Control: A Comparative Study in Federal Constitutions, (Submitted to Professor Thomas Reed Powell in fulfillment of the requirements in the Constitutional Law Seminar, Harvard Law School, Cambridge, Mass., May, 1937) 31 et seq. has carefully considered all the cases dealing with determination of prices by government and has concluded that there is no due process limitation on reasonable price fixing.
The AAA was a further evidence of government paternalism towards agriculture which had earlier been evidenced by the Capper-Volstead Act and its predecessors. It was basically a system designed to further cooperative marketing—by government compulsions if necessary. Thus, it was a logical development of the old tendency to exclude certain agricultural groups from the operation of the Anti-Trust Laws. It was truly an anomalous situation in many respects—chiefly, since it witnessed an attempt by the government to benefit economically one group at the expense of various other groups—mainly consumers and middlemen.

The failures of the Dairy Section have been due to many causes. They lacked the proper personnel to start with, and tried to work too fast, with the result that they alienated public opinion as well as large sections of the industry. In addition, they soon learned that producers' cooperatives could not be depended on to support the general welfare, but were interested only in their narrow and selfish ends. Worse than all this, they lacked trained economists, accountants and lawyers of ability, steeped in the lore of the milk business and commanded by executives of large vision, with a knack for dealing with people. Nor was any comprehensive effort ever made to control prices based on analyzed knowledge of all the factors. Such things as market zones, feed costs, investment return, sanitary costs, product divides, transportation costs, marketing and processing costs, volume of supply and demand, etc., were either ignored or mostly guessed at. When we add to this the price harpooning of a large recalcitrant group of producer-distributors we can see that the Dairy Section was doomed to failure in any attempt to produce a nationally workable dairy program.

But, were none of these things true, the regulation of the prices of milk and milk products by the AAA is destined to be unsuccessful as long as they fail to control all production and marketing, and as long as the courts persist in their present views, the AAA will be unable to control intrastate production and marketing even

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105Cf. the recent ineffective protests of consumer groups in New York City as to the rising cost of milk. The Milk Dealer (July, 1937).
though it does "affect" national regulation. Hence, unless there is "national-state cooperation" by some method, or constitutional change, federal regulation will not be possible, aside from the question of its desirability and possibility of economic workability.

E. State Control. 110—From an early date, states had laws providing for public health control of milk and milk products, but it was not until 1933 with the advent of milk strikes 111 on a large scale that the first state law was passed providing for price control. 112 However, as early as 1910 the attorney general of New York had recommended such legislation to the legislature. 113

Thereafter, in rapid succession 24 states in all 114 passed milk control laws, while governors vetoed such laws in three states, 115 and in ten states 116 legislatures rejected them. On January 1, 1937, one survey indicated that twenty-one states had legislation. 117


For an earlier and somewhat more Holmesian approach see: King, Public Interest in Milk Distribution, supra, pp. 274-290. It is to be noted that lawyers have ignored the wealth of empirical materials that could be worked into briefs such as those collected in The Dairy Industry in the United States, 1932—Sept. 1934, compiled by Margaret Harrison, Librarian, Bureau of Agricultural Economics, U. S. Department of Agriculture.

111 New York, Philadelphia, St. Louis and Chicago were so affected as well as many other milksheds. Wilson, the Milk Strike, (1933) 76 New Republic 122 (New York situation); Lynch, Longest Milk Strike in History, (1933) 7 Coop. Mark. Jour. (1) : 8 (St. Louis situation); Holt, The Chicago Milk Strike, (Feb. 1934) 12 Rural Amer. (2) : 5; Harris, The Battle of the Milksheds, (Nov. 1933) 39 Current Hist. (2) : 191.


113 Illinois, Michigan, and Louisiana.

114 Arizona, Colorado, Georgia, Illinois, Iowa, Kansas, Michigan, Minnesota, Nebraska, and Tennessee.

115 Alabama, California, Connecticut, Delaware, Florida, Indiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Wisconsin, pp. 5-7, Analysis of State Milk Control Laws,
The laws in general provide for some administrative board, but the number of members on them varied considerably. They were pretty uniformly appointed by the governor and for varying terms. Remuneration provided varied from nothing to $8,000 a year. In many cases bonds were required. Producers, processor-distributors, consumers, and the state were usually represented on the boards.118

They had the power to supervise and regulate fluid milk, investigate, mediate, and arbitrate, right of entry, and could often designate marketing areas. As to prices, they could as a rule fix prices paid to producers and regulate wholesale and retail prices. In some cases they could fix a surplus price. License fees of a sliding scale nature were imposed variously on producers, producer-distributors, dealers or distributors, and processors, usually for the purpose of supporting the work of the administrative board. In a few states there were strict requirements as to keeping of records and accounting practices, while some required bonds from distributors for the protection of producers.119

These milk control laws soon found themselves in the courts.120

by Dorothy Campbell Culver; Bureau of Public Administration, University of California, Berkeley, Jan. 4, 1937 (Report to California Legislature). Cf. Brief Summary of Information Concerning State Milk Control Agencies, October 31, 1936, prepared by state of Connecticut Milk Administrator (mimeographed).

I have not gone into this state milk control legislation, since it is beyond the scope of this article to do more than sketch it. However, none of the compilations seem to be very accurate, since it is very difficult to ascertain the exact status of the legislation in various states due to legislative, administrative, and court changes. For example, the above survey shows Texas with an effective state control law in January, 1937. In fact, this law was held invalid in 1934. State v. Hall, (Tex. Civ. App. 1934) 76 S. W. (2d) 880, writ of error dismissed, and Mading's Drug Stores, Inc. v. Blanton, (Tex. Civ. App. 1934) 78 S. W. (2d) 1036, writ of error dismissed, both holding the Texas Milk Control Act, (Gen. and Sp. Laws, 43d Leg. 2d Called Sess. p. 56, Vernon's Ann. Civ. St. ch. 19, art. 165-1) unconstitutional. See: Report of the Committee to Investigate the Dairy Industry, House Journal, Texas Legislature, 44th Leg. 2d Called Sess. 616, 620.

The most complete digest and discussion of state milk control laws, cases and administrative set up is to be found in Series on State Milk Control Acts issued by the Dairy Section, AAA, of which thirteen papers had been issued on March 31, 1938. See also Comment (1937) 14 N. Y. U. L. Q. Rev. 375, n. 1, and Tobey, Legal Aspects of Milk Control, International Ass'n of Milk Dealers (1936).

118 Culver, Analysis of State Milk Control Laws, supra, pp. 5-8.
120 Tobey, Federal and State Control of Milk Prices, International Association of Milk Dealers (1937) and Miller, Legal Aspects of Milk Control Laws, Northeastern Dairy Conference, New York City (1937) (mimeo.) contain thoroughgoing discussions of the more important state decisions.

For a milkman-economist discussion of some of these cases see Corbett,
Nebbia v. New York was the first case involving the constitutionality of a state milk control law to reach the United States Supreme Court. The court upheld the right of the legislature of New York to pass such a law fixing milk prices, and held the test to be “whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.” The old basis of determination—“is it affected with a public interest?”—was abandoned. In the subsequent case of Highland Farm Dairy v. J. S. Agnew, the


Noncommittal Comments and Notes: (1934) 20 Va. L. Rev. 700; (1934) 8 Temp. L. Q. 426; (1934) 2 Geo. L. J. 604; (1934) 18 Marq. L. Rev. 198; (1934) 18 MINNESOTA LAW REVIEW 874; (1934) 20 A. B. A. J. 225.

Unfavorable: Note (1934) 4 Detroit L. Rev. 167.

For a cogent argument that the United States Supreme Court in upholding the constitutionality of the New York law did so on the basis of the fact that it was a temporary means of coping with a devastating emergency problem, see Report of the Joint Legislative Committee to Investigate the Milk Control Law, State of New York, Legislative Document (1937) No. 81, pp. 17-19.

Wynne, Analysis of Milk Control in New York State, (March, 1937) 20 The Dairy Dealer 6:62 gives a penetrating discussion of why the failure occurred.

The opinion of the district court, Highland Farms Dairy v. Agnew (E. D. Va. 1936) 16 F. Supp. 575 is well worth reading. Loss of this case failed to deter the Highland Farms Dairy from accepting orders to deliver milk in the Arlington-Alexandria area of Virginia at prices below those fixed by the state board. The company advises Virginia residents to send their orders by mail to the Washington office, whereupon deliveries are made in the usual manner at 11 cents per quart against the state price of 14 cents. Sales in Highland retail stores are at the higher price. Dairy Produce, August 16, 1937, p. 24, col. 2.
court through Mr. Justice Cardozo sustained the constitutionality of a similar law in Virginia.

Many state courts passed on the validity of such legislation, and most of them found their legislation constitutional. After the initial problem of whether a state legislature could fix the price of milk through a state control board had been determined, numerous other subsidiary questions under such laws occupied the attention of the courts. Chief among these was the question of allowable price differentials. The United States Supreme Court supported the designation of a minimum price to be paid producers, and upheld a provision of the New York Milk Control Act allowing a differential of one cent per quart in favor of dealers "not having a well advertised trade name," but refused to allow the benefit of such differential to be limited to distributors who entered the milk business before April 10, 1933. In another

126 The Maryland statute was held invalid as improperly delegating legislative power to an administrative board. Maryland Co-operative Milk Producers, Inc. v. Miller, (1936) 170 Md. 81, 182 Atl. 432, the court expressly reserving decision as to whether it violated any of the provisions of the Maryland constitution similar to the due process clause of the fourteenth amendment.
GOVERNMENT AND THE MILK INDUSTRY

case, *Baldwin v. Seelig*, the United States Supreme Court held invalid a refusal of the New York Milk Control Board to license a distributor who would not pay Vermont producers the price set by the board. This would seem to prevent any effective state control of milk imports, and makes resale price maintenance difficult.

After the decision of the *Nebbia Case* as to the limitations of the due process clause of the fourteenth amendment, the problem decided in the *Seelig Case* was bound to arise. By it the scope of state action in regulating milk prices was defined, and today a state cannot apply its milk price fixing laws to milk coming from or going to a place beyond its borders. In other words, it is just a reannouncement that a state cannot interfere with interstate commerce.

The total effect of the decision in the *Seelig Case* is to render nugatory any single state price control measures standing alone, since the prices of fluid milk and manufactured milk flowing in the channels of interstate commerce will be sufficient to upset the price control efforts of any one state.

Hence, if it is wise to persist in efforts at state regulation, some new technique must be found.

On the whole, state control schemes were not very successful in doing more than affording temporary stabilization. They were, as a rule, very much in local politics, and were manned by incompetent forces. As a rule, they were jealous of their prerogatives, and did not cooperate very well with other state boards or with the Dairy Section of the AAA.

**F. Present Conditions.—**The Congress of the United States, after an investigation into the milk industry in the District of Columbia, got excited about monopolistic conditions in the milk industry and about the relationship between milk producers' cooperatives and milk distributors, and in May, 1934 ordered the Federal Trade Commission to make an investigation into the sale and distribution of milk and other dairy products.

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132 *House Concurrent Resolution 32 (73rd Cong., 2d Sess.)* For a
In compliance with this, the Federal Trade Commission has investigated and reported on the Connecticut and Philadelphia milksheds, the Chicago sales area, the Boston, Baltimore, St. Louis, and Cincinnati milksheds, the Twin City sales area, and the New York milk sales area, and has transmitted a summary of their investigations to Congress. In connection with another Congressional direction they have made an implementing report.

These reports (which seem to be haphazard surface findings, rather than a thoroughgoing analysis) show that the dominating tendencies in the milk industry are toward centralization of processing and distributing in fewer hands, organization of milk producers into cooperative associations, and widening of collective bargaining between the two.

The integration of processor-distributing facilities has largely come about through acquisition of the principal independent distributors in large metropolitan centers by a few holding companies. The acquisition resulted either from purchase of stock control or assets, usually the former.

The largest of these national holding companies is National Dairy Products Corporation. It was organized in 1923, and has acquired either directly or indirectly the business of 358 individuals, firms, or corporations engaged in practically all branches

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recent brimstone charge of monopoly directed against the large milk process-distributors see Congressman Francis D. Culkin's talk at the Boonville (N.Y.) County Fair. (September 1, 1937) 84 American Creamery and Poultry Produce Review (11): 580 Col. 2.


Public Resolution No. 61, 74th Congress, 1st Session.

of the dairy industry.\textsuperscript{141} It is particularly interested in fluid milk, ice cream and cheese. The states in which its business is most heavily concentrated are: New York, Pennsylvania, Illinois, Ohio, Connecticut, Michigan, Wisconsin, and the District of Columbia. Among its subsidiaries handling fluid milk is the largest distributor in Philadelphia, Baltimore, Washington, Pittsburgh, and Cleveland.\textsuperscript{142}

At the end of 1932 the total assets of the company were $210,000,000, including goodwill valued at $22,400,000. In 1930 the total sales were $374,500,000. Net profits in 1932 were $12,500,000, or 6.0 per cent on the total capital. About one-third of its capital is in the form of capital stock and surplus. Bonded indebtedness accounts for 35 per cent of the total liabilities and net worth; preferred stock for 5.6 per cent. At the end of 1932 there were “in excess of 65,000” stockholders.\textsuperscript{143}

During 1934, subsidiaries of National Dairy Products Corporation purchased 3,727,942,292 pounds of fluid milk, equivalent to 11.2 per cent of all the wholesale milk sold by farmers in the United States. It purchased 19.1 per cent of all the milk sold on the market by all dairy farmers in the states of Vermont, New York, Connecticut, New Jersey, and Pennsylvania. It controls 39.3 per cent of the milk sold in Hartford, 30.5 per cent of the milk sold in New Haven, and 14.7 in the entire state of Connecticut. It sells approximately 55 per cent of the Baltimore supply.\textsuperscript{144}

Through its acquisition of the Hydrox Corporation, Breyer Ice Cream Co., General Ice Cream Co., and many smaller companies, it in 1934 manufactured and sold 37,550,988 gallons of ice cream, equal to 21.38 per cent of the total quantity of ice cream manufactured for sale in the United States.\textsuperscript{145} Control of Breakstone Bros., Inc., and of Kraft-Phenix Cheese Corporation gave it one-third of the cheese business in the United States.\textsuperscript{146}

\textsuperscript{141}Report of the Federal Trade Commission on the Sale and Distribution of Milk and Milk Products—New York Milk Sales Area, (1937) 77-114. A list of these companies is contained in Table 4, Appendix, pp. 125-138.
\textsuperscript{142}Report of the Joint Legislative Committee to Investigate the Milk Industry, Legislative Doc. (1933) No. 114, Albany, 1933, p. 178.
\textsuperscript{143}Report of the Joint Legislative Committee to Investigate the Milk Industry, Legislative Doc. (1933) No. 114, Albany, 1933, pp. 178-179.
During 1935, forty-eight executives of National Dairy Products Corporation and its subsidiaries received salaries of $15,000 or more per year. Their total salaries amounted to $1,229,974.37, at an average of $25,624.46 each. Seventeen received $25,000 or more each; three received more than $60,000 each; and the president of the corporation received $108,000.\textsuperscript{147}

The second largest milk and dairy products company in the United States is the Borden Company. The business had its beginning in 1857 when Gail Borden originated "condensed milk." The present company was organized and incorporated in 1899 under the name of Borden's Condensed Milk Co. The corporate name was changed to The Borden Co. on October 29, 1919. At the end of 1927 there were 35 subsidiaries, operating under the parent company.\textsuperscript{148} Beginning in 1928, the company initiated a policy of expansion through acquisition and consolidation of companies engaged in various branches of the dairy industry. During the five-year period 1928-1932, the Borden Co. acquired directly or indirectly through its subsidiaries 207 companies. The company was reorganized in January, 1936, and became an operating company by taking over the business of all excepting ten of its operating subsidiaries. The companies taken over in 1936 are now operating divisions of The Borden Company.\textsuperscript{149}

The capitalization of the company on December 31, 1932, was $158,793,000. This includes goodwill valued at $7,000,000. Sales in 1932 amounted to $212,349,000. Net income for 1932 was $7,524,000, or 4.7 per cent of the capitalization at the end of the year. Ownership of the stock at the end of 1932 was distributed among 36,000 stockholders.\textsuperscript{150}

Borden's does business in fluid milk, butter, cheese, ice cream, eggs, cream, condensed milk, evaporated milk, powdered milk, malted milk, casein products, caramels, mince meat, dried fruit juices, etc.\textsuperscript{151} During 1934 the Borden Company and its subsidiaries purchased 5,183,239,000 pounds of fluid milk and milk

\textsuperscript{150}Report of the Joint Legislative Committee to Investigate the Milk Industry, Legislative Doc. (1933) No. 114, Albany, 1933, p. 177.
\textsuperscript{151}Report of the Joint Legislative Committee to Investigate the Milk Industry, Legislative Doc. (1933) No. 114, Albany, 1933, p. 177.
equivalent in other dairy products, such as cream, butter, and cheese, equivalent to 6.8 per cent of the total commercial milk sold from farms in the United States. In June, 1934, they controlled 33.5 per cent of the milk business in Bridgeport and 7.9 per cent in Connecticut. In June, 1935, they sold 21 per cent of the total fluid milk in Chicago.\textsuperscript{152} Their business is mainly concentrated in Arizona, California, Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, West Virginia, Wisconsin, and in the Provinces of Ontario and Quebec in Canada. They distribute produce in every state of the union and in foreign countries.\textsuperscript{153}

Salaries received by thirty-five officials of The Borden Co. and its subsidiaries, who received salaries of $15,000 or over during 1935, amounted to $960,044, or an average of $27,430 each. Twenty-two of the thirty-five officers received $20,000 or more each, and the president received $95,000.\textsuperscript{154}

The third largest milk and milk products holding company in the United States is the United States Dairy Products Corporation. It was organized under the laws of Maryland on December 28, 1922. It had acquired 50 companies by 1935, and was operating in Delaware, Maryland, Pennsylvania, New York, New Jersey, Virginia, Florida, and Michigan. By 1935 it had filed a petition under 77-B of the Bankruptcy Law, and was being operated by trustees appointed by the United States district court at Baltimore.\textsuperscript{155}

The Federal Trade Commission has indicated that it is strongly opposed to the merger, consolidation, or bringing under one ownership or control of formerly competing enterprises, and has recommended to Congress that sections 7 and 11 of the Clayton Act be amended to achieve the desired results. They would amend it to prohibit the acquisition by one corporation or person of the stock or assets of any person or corporation engaged in


\textsuperscript{153}Report of the Joint Legislative Committee to Investigate the Milk Industry, Legislative Doc. (1933) No. 114, Albany, 1933, p. 177.


the same or similar lines of business (prevent vertical expansion).\footnote{156}

The Federal Trade Commission reports show the following milk producers' cooperatives to be outstanding in the areas covered:\footnote{157}

1. Philadelphia.
   a. \textit{Inter-State Milk Producers' Association}.\footnote{158} In 1935 it had approximately 22,000 producer-members drawn from the states of Pennsylvania, New Jersey, Delaware, Maryland, and West Virginia, who produce 80 per cent of the milk in that area.

2. Connecticut.
   a. \textit{Connecticut Milk Producers' Association}.\footnote{159} In 1935 it had a membership of about 2,760 farmers producing 50 per cent of all the milk in the state.

   a. \textit{Dairymen's League Cooperative Association, Inc.}\footnote{160} It had in 1935 about 37,500 active producer members. It processes milk in addition to marketing it. Approximately 50 per cent of the milk produced by members is handled through plants owned by the association. The balance is delivered to distributors.
   b. \textit{Sheffield Producers' Cooperative Association, Inc.}\footnote{161} In 1936 it had approximately 15,000 dairy farmers as members. It supplies milk only to Sheffield Farms Co., Inc., a subsidiary of National Dairy Products Corporation, distributing milk in the New York metropolitan area.

   a. \textit{New England Milk Producers' Association}.\footnote{162} During 1935

\footnote{156} The Agricultural Income Summary, supra, pp. 17-18.
\footnote{157} The Agricultural Income Summary shows that milk cooperatives have a total membership of 750,000 and handle one-third of the total cooperative marketing business in the United States.
GOVERNMENT AND THE MILK INDUSTRY

It had a membership of over 20,000, only 4,000 of whom are located in Massachusetts. It controls 70 per cent of the Boston milk supply.

5. BALTIMORE.
   a. Maryland Cooperative Milk Producers, Inc. In 1935 it had about 3,400 producer members, and controlled the bulk of the milk going into the Baltimore sales area.

6. CINCINNATI.
   a. The Cooperative Pure Milk Association. This is in effect a holding company which owns all of the common stock of French-Bauer, Inc., the Ritz-American Ice Cream Co., both located in Cincinnati, and of Kentucky Dairies, Inc., of Louisville, Ky. The members decreased from 3,300 in 1924 to 1,900 in 1935. This association is the largest distributor of milk in Cincinnati. In 1935 it shipped 59,897,467 pounds.
   c. The Milk Producers' Union, Inc. In February, 1936, it had about 1,600 members. In December, 1935, it shipped 3,269,201 pounds of milk.

7. ST. LOUIS.
   a. Sanitary Milk Producers, Inc. It acts as sales agent for approximately 12,900 members, and claims to control 70 per cent of the milk shipped to St. Louis.

8. CHICAGO.
   a. Pure Milk Association. On March 7, 1935, it had a membership of 16,983 dairy farmers in Wisconsin, Illinois, and

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Indiana. It has sales agreements with distributors who sell approximately 72 per cent of all fluid milk sold in Chicago.

9. MINNEAPOLIS AND ST. PAUL.

a. Twin City Milk Producers Association. It has over 8,000 milk producer members, and supplies about 85 per cent of the fluid milk requirements of Minneapolis and St. Paul. In 1935 the association itself processed 48.1 per cent of the milk handled into various products.

Although there was only slight evidence to support the fear of Congress that "there exists a close tie between certain leaders of milk producers' cooperatives and milk distributors," there was substantial evidence that cooperative organizations and large milk dealers through agreement had fixed the prices to be paid by consumers. The reports rather clearly indicate that if there is no government regulation, and if milk producers' cooperatives continue to be excluded from the operation of the state and federal anti-trust laws, the natural result will be increased prices to the consumer, which increase will to a considerable extent go to the producers. Of course there is some doubt how far economic conditions in the United States will allow them to take this.

One of the most interesting things about the reports is the evidence that the Milk Wagon Drivers' Union used threats and violence in an effort to help the large processor-distributors maintain the retail and wholesale price of milk in Chicago against the price cutting efforts of independent dealers.

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171 See Cassels, A Study of Fluid Milk Prices, Presented at the Department of Economics of Harvard University in partial fulfillment of the requirements for the degree of Doctor of Philosophy, March 30, 1934, chs. v, vii, viii, ix. Prof. Chaddock arrived at practically the same conclusion. He found that "monopoly price fixing by producers is very likely not to work out permanently for the benefit of producers themselves." Report of the Mayor's Committee on Milk, City of New York (1917) 71. A recent English study would seem to substantiate this view. Cohen, The History of Milk Prices (1936).
The commission took cognizance of the effect of court decisions holding the Agricultural Adjustment Act invalid, and of other court decisions so seriously limiting state control as to make it ineffective to meet the necessities. They recommended that since a large percentage of the transactions involved in the production and distribution of milk are intrastate, and since state control could be frustrated due to the inability of one state to forbid imports of milk from another, Congress should enact legislation empowering an appropriate federal authority to confer and advise with states in the preparation of interstate milk compacts. In this way, the commission felt that the sale of milk both in intrastate and in interstate commerce could perhaps be regulated in a way consistent with the constitution and agreeable to the signatory states.  

II. THE ANTI-TRUST LAWS IN ACTION

A. Cooperative Associations.  

When the Sherman Anti-Trust Law was passed in 1890, the cooperative marketing of dairy products was still in its infancy so far as the development of large-scale marketing associations was concerned. Associations of the size we have today were not contemplated, and the possibility that farmers' cooperative organizations would require any exemption from this law or similar state legislation was very remote at that time. Nor were there any effective lobbying or legislative agencies in Washington at that time. The rapid development of large-scale cooperative organizations following the enactment of the national and state anti-trust laws, however, soon raised questions concerning the effect of such laws on cooperatives. Interest of farming people in this question became heightened by the prosecution of several farmers' organizations under state anti-trust laws, in which their activities were held to run counter to common law principles, as well as to the provisions of the anti-trust statutes.

This action on the part of the courts led to agitation for legis-


174 For an excellent historical picture of the development of cooperative dairying, see Federal Trade Commission, Cooperative Marketing of Farm Products (1928) pp. 7-46; Report of the Joint Legislative Committee to Investigate the Milk Industry 98, Legislative Doc. (1933) No. 114, Albany, 1933.

lation affording farm organizations relief from the operation of these laws. In this fight for a change in the Sherman Law, the farmers and labor unions made common front. By 1914 there was an overwhelming demand that farmers' cooperative organizations and labor unions be excluded from the operation of that act by some specific amendment. They claimed that the Sherman Act had been intended primarily to prevent abuses of power by large industrial and mercantile corporations. As a result of considerable pressure, Congress in 1914 passed the Clayton Act, which amended the Sherman Act and which was supposedly intended by section 6 to exclude labor, agricultural, and horticultural organizations from the operation of the Sherman Act.175

The situation relative to the legal status of the cooperative associations was not entirely clarified by the enactment of this provision, since it contained the words "not having capital stock or conducted for profit." There were a large number of farmers' organizations having capital stock, which partook to a certain degree of the elements of a strictly commercial corporate organization. A feeling of uncertainty as to their exact status under the provisions of the Clayton Act led to efforts for additional legislation, which resulted in the enactment of the Capper-Volstead Act in 1922.176

This law allowed the organization of marketing associations with or without capital stock, provided that they conformed to one or both of the following requirements: (1) each member shall have only one vote; (2) association does not pay dividends on stock or membership capital in excess of 8 per cent. In addition, the group could not deal in the products of non-members to a greater extent than those of members.177

17538 Stat. at L. 731, sec. 6. "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

17642 Stat. at L. 388, 7 U. S. C. A. sec. 291, Mason's U. S. Code, tit. 7, sec. 291. It is interesting to note that this legislation resulted because a specific language change was desired as well as additional exemption and not because the courts construed sec. 6 of the Clayton Act as failing to exclude agricultural cooperative organizations from the operation of the Sherman Act. By contrast, it is rather bewildering to see what the courts did to sec. 6 when applied to labor unions.

177This weakened the cooperative movement's non-profit character,
Under the Capper-Volstead Act, the secretary of agriculture is given the supervision of cooperative organizations, and he has power to investigate, and to issue cease and desist orders and enforce them in the courts if he feels an association is monopolizing or restraining trade. However, the act apparently does not remove the jurisdiction of the department of justice in the enforcement of the Sherman and Clayton Acts, nor that of the Federal Trade Commission under the Federal Trade Commission and Clayton Acts, though it is very unlikely that either would act without first conferring with the department of agriculture.

The cooperative movement was given further aid by Congress when it passed the Cooperative Marketing Act of July 2, 1926. It provided for the creation of a division of cooperative marketing in the department of agriculture to disseminate information about cooperatives and to help them in various ways. It also allowed the cooperative associations themselves to interchange information.

On March 4, 1927, Congress passed a piece of legislation which encouraged the further expansion of the activities of cooperatives. It prevented the discrimination of boards of trade against farmers' cooperative associations becoming members of such boards, and provided remedies.

B. Administrative and Court Application—Beyond acting since it allowed them to deal in non-members' products and to pay unlimited dividends if they used the unit rule of voting.

It should be noted that when the labor groups finally got legislation through Congress successfully exempting labor unions from the operation of the Sherman Law, it contained no provisions for administrative control as strong as this. Neither the Norris-LaGuardia Act nor the Wagner Act provides for such a club over the organizations involved.

This Congressional wet nursing of agricultural cooperatives is further exemplified by the fact that they are excluded from the operation of the Federal Income Tax. Sec. 101(1) and sec. 101 (12), Revenue Act of 1936. Public—No. 740—74th Congress. Sec. 8 (c) (5) (F) of Agricultural Adjustment Act also gives them favored class treatment.

Though it seemed expedient in the above section to treat agricultural cooperatives generally in discussing the relationship between them and the anti-trust laws, it does not seem necessary or appropriate to consider court decisions relating to cooperatives under the federal anti-trust laws which fall outside of the milk industry field.

There have been numerous dissertations on the general field of court
as a threat in reserve if the milk industry behaves badly, the Federal Anti-Trust Laws have not had very much effect on the field. The department of justice evidently concluded that the difficulties of successful enforcement were too great, even though acknowledged monopolistic conditions existed from an economic viewpoint. One of these obstacles was described rather vividly by a writer discussing state anti-trust laws when he said:184

"The purpose of these laws is to restrain monopoly and prevent an interference with competition. To a great extent these statutes have not brought the relief hoped for. Manufacturers and middlemen have learned the great advantages that come from agreements or understandings which eliminate competition. "These understandings need not be in writing or formally made. They may be in the form of what is known as an understanding or a 'gentlemen's agreement.' It is practically impossible to frame a law, no matter how stringent, which will reach the so-called 'gentlemen's agreement.'"

Added to this problem of evidentiary proof were the additional factors of demand for integration by practical dairymen and technicians, court reversals, interstate vs. intrastate commerce, and a probable feeling on the part of courts and prosecutors as well as some sections of the public that it was not fair to exempt milk producers' cooperatives and not give wide leeway to processor-distributors. Coupled with this latter feeling was the practical thought that perhaps it would be impossible to comply with the spirit of acts exempting cooperatives unless processor-distributors who played ball with the cooperatives were also exempted.

However, attempts were made to enforce the federal anti-trust acts against parts of the milk industry, and some were successful. The most important of these cases was United States v. Whiting.185 Indictments were returned May 26, 1911, charging first, a conspiracy in restraint of trade in milk throughout New England, and second, a combination to restrain and monopolize trade in milk throughout New England. The defendants demurred to both indictments, and the cases were argued on demurrers together. The facts of the indictments stated that the several defendants who bought 86 per cent of the milk sold in specified

applications of federal and state anti-trust laws to agricultural cooperatives. Among them are: Nourse, The Legal Status of Agricultural Co-operation, chs. x, xi, xiv, xv, and xvi, and Federal Trade Commission, Cooperative Marketing of Farm Products, (1928) secs. 6, 7, and 8, pp. 336-342.


country districts in Maine, Vermont, New Hampshire, Connecticut, and Massachusetts for shipment to and sale in Boston and vicinity, and in Worcester, had conferred together and agreed upon uniform prices to be paid by them during each six months' period to the producers of milk so purchased. The indictment further stated that milk prices received by milk producers had been lowered as a result of the agreement. Judge Morton in his opinion sustained the demurrer to the first indictment charging conspiracy in restraint of trade, since it did not "allege facts warranting a finding by the jury that the restraint was unreasonable." The demurrer to the first count of the latter indictment charging a combination to restrain trade was overruled, since the count alleged facts from which a jury could have found undue, unreasonably extensive, and illegal combination in restraint of trade. The demurrer to the second count of the latter indictment charging monopoly was sustained because the facts showed only an agreement to eliminate competition as to price in buying between the defendants, and not an attempt to dominate or control the markets in which they sold their milk purchased pursuant to the agreement.

"Certain of the defendants entered pleas of nolo contendere and the case was continued as to them pending disposition of the case against the remaining defendants. On October 22, 1923 defendant Whiting paid a fine of $500 in lieu of costs, and the cases were filed as to the remaining defendants."\(^{186}\)

In *United States v. Elgin Board of Trade*,\(^ {187}\) a petition was filed December 14, 1912, in the federal court for the Northern District of Illinois, charging defendants with combining and conspiring in the interest of a number of large centralizing concerns to restrain interstate commerce in butter and butterfat, and arbitrarily fixing the price thereof to obtain throughout the United States. A decree granting the relief sought was entered without contest on April 27, 1914.\(^ {188}\) *United States v. Chicago Butter & Egg Board*\(^ {189}\) was a similar case, in which the Court held the government entitled to the relief sought, and a final decree to that effect was entered on October 12, 1914.

\(^{186}\)The Federal Antitrust Laws with Amendments (1931) 109.

\(^{187}\)The Federal Antitrust Laws with Amendments (1931) 120.

\(^{188}\)On November 3, 1917, the Elgin Board of Trade was requested to close for the period of the World War by the U. S. Food Administrator in order to eliminate the "possibility" of manipulation and speculative trading. Federal Trade Commission Report on Milk, 1914-1918, p. 117.

\(^{189}\)The Federal Antitrust Laws with Amendments (1931) 105.
In United States v. Jensen Creamery Co., an indictment was returned February 24, 1917, in the district court of Idaho against eight corporations and eleven individual defendants, charging them with combining and conspiring to restrain and monopolize interstate trade and commerce in creamery and dairy products in the northwestern states. In February, 1919, the Jensen Creamery Co., one of the corporate defendants, pleaded guilty and was fined $7,500. The trial of the remaining defendants resulted in a verdict of acquittal.

In United States v. Simpson, an indictment was returned April 2, 1917, in the supreme court of the District of Columbia, charging defendants with entering into an agreement as to the prices at which they would sell milk in the District of Columbia during the months of May to September, inclusive, 1916, and in pursuance of which uniform and increased prices were fixed and maintained. Nolle prosequi was entered on April 23, 1923.

A decision that is of particular interest today due to the vertical and horizontal expansion of processor-distributors in the milk industry is United States v. National Food Products Corporation. There a petition was filed in the United States district court for the Southern District of New York on February 13, 1926, to prevent and restrain violations of section 7 of the Clayton Act, through acquisitions of stock in competing chain store groceries and other companies engaged in the transportation of milk and other dairy products, ice cream, and similar frozen products. A consent decree was entered March 4, 1926, granting the relief sought.

As can be seen, the Anti-Trust Acts had little effect on the milk industry until they were suspended with the advent of the AAA. This was mainly due to the fact that the situation of the milk industry is not favorable to a natural or an engineered monopoly. And in fact, there have never been any fact monopolies in the milk industry, despite the tremendous centralization which has taken

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190The Federal Antitrust Laws with Amendments (1931) 138.
191The Federal Antitrust Laws with Amendments (1931) 139.
192The Federal Antitrust Laws with Amendments (1931) 195.
193Cf. Delaware, L. & W. Ry. Co. v. Kutter, (C.C.A. 2d Cir. 1906) 147 Fed. 51, 77 C. C. A. 315, where the defendant railroad company entered into a contract with plaintiff whereby the plaintiff was given the exclusive privilege of transporting milk into New York City over the defendant's lines "so far as it was permitted to do so by law." Held: Such contract was not a violation of the Sherman Anti-Trust Act. Writ of certiorari denied: D. L. & W. Ry. Co. v. Rutter, (1906) 203 U. S. 588, 27 Sup. Ct. Rep. 776, 51 L. Ed. 330. Should it make a difference that the control over transportation is exercised by means of stock control rather than by contract?
place with both the producers and with the processor-distributors. As long as a man can buy a cow and peddle his milk, there is not too much danger of monopoly even in our congested urban centers.

Therefore, the AAA has been rather anomalous, since it has forced the growth of monopolies for the artificial control of marketing and production, and has resented the little fellows going into business. This is contrary to the entire tradition of the American people, and the inevitable trend in the milk business seems to be back to a competitive system in which the government sits by as the watchdog.

III. PROPOSALS.

If affirmative state or federal control of milk prices and of marketing and production is desired, it can only come about through some technique which will allow the powers of both to be pooled.

The following are offered as possible starting points:

1. Interstate Compacts.\textsuperscript{194}—This remedy which has been advanced most recently by the Federal Trade Commission\textsuperscript{195} was suggested as early as 1934 by John J. Bennett, Jr.,\textsuperscript{196} Attorney General of New York. Still later the Harvard Law Review gave its cautious blessing to such a plan,\textsuperscript{197} and suggested the use of the formula advanced by Mr. Frankfurter and Mr. Landis in handling interstate compacts.\textsuperscript{198}

The New England Milk Shed Authority Plan\textsuperscript{199} was an attempt to give tangible form to these many suggestions. In further execution of this purpose, Representative Casey of Massachusetts introduced a bill into Congress,\textsuperscript{200} authorizing the New England States and New York to enter into an agreement whereby a fair and equitable milk marketing plan would be established and enforced by a joint authority of the states comprising the milkshed.

Later Senator Royal S. Copeland introduced a bill into Con-

\textsuperscript{194}Dimock and Benson, Can Interstate Compacts Succeed, (1937) have a good general discussion.
\textsuperscript{195}Note 173.
\textsuperscript{197}(1935) 48 Harv. L. Rev. 1437, 1438.
\textsuperscript{198}Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustment, (1925) 34 Yale L. J. 685.
\textsuperscript{200}House Joint Resolution 170, 75th Congress, 1st Session, January 28, 1937.
gress providing among other things for the establishment of a Bureau of Coordination of Milk and Milk Products Regulation in the Department of Agriculture. One of the duties of the Bureau would be to encourage, promote and negotiate the adoption of interstate compacts concerning the production, sale and distribution of milk and milk products.

Both of these bills were sent to committee, and there has been little recent evidence of activity to bring about the creation of any milk authority by interstate compact.

Most of the state officials are not overly sanguine about what may reasonably be accomplished by compacts. However, it would seem that they offer much more hope of successful control than does the present system.202

2. National-State Cooperation.203—By this method the federal and state bodies would issue a joint order and secure a joint agreement from the producers, which would be administered by a single administrator having joint powers of agency. It is a relatively unexplored field, but seems to have worked well in the Fort Wayne, Indiana marketing area, where it as yet has not been questioned.204 The Indiana Milk Control Board reports that it is "efficient and workable," and that they are contemplating additional concurrent orders in LaPorte County and Floyd County.205

If federal and state milk regulation continue in a command role, this type of coordination is going to become even more important

201Senate 2359, 75th Congress, 1st Session, May 6, 1937. See also the statement of explanation made by Senator Copeland in connection with the introduction of the bill.

202Abel, Commodity Price Control: A Comparative Study in Federal Constitutions, (Submitted to Professor Thomas Reed Powell in fulfillment of the requirements in the Constitutional Law Seminar, Harvard Law School, Cambridge, Mass., May, 1937) p. 96 after an exhaustive analysis of the efforts of the Australian and Canadian Federations to control commodity prices concludes that conjoint action is not effective. This same author reviews in detail all the Canadian, Australian and New Zealand cases on government control of milk prices.

203Corwin, (1937) 46 Yale L. J. 599. Also consult A Proposed Order to Govern Interstate Shipments of Milk for the New York-New Jersey Metropolitan Marketing Area; Governor's Committee on Interstate Milk Relations, in cooperation with the Secretary of Agriculture, for the consideration of Dairymen, October 4, 1935 (Tentative Draft); Milk Control Hearing called jointly by the New York, New Jersey and Pennsylvania Committee on Interstate Cooperation, Council of State Governments (Feb. 1, 1936, Mimeo.); Comment (April 28, 1934) 110 Pa. Farmer 239.

204Milk Regulation in New York, Comment (1937) 46 Yale L. J. 1359, 1367.

205According to a letter from Mr. Charles G. Dailey, Attorney, Milk Control Board of Indiana.
as an attempt at a solution of the constitutional and administrative problems.

3. Federal Delegation of Partial Sovereignty.\textsuperscript{206}—It is suggested that this might be achieved by having Congress adopt enactments which either:

(a) Provide that all milk shipped into a state shall upon arrival at its destination therein be subject to the "police laws" of the state to the same extent as if it had originated there; or

(b) Provide that any state may apply to milk of extra-state origin all laws constitutionally applicable to milk of local origin; or

(c) Provide that any state may exclude from the state all extra-state milk which is not produced under price standards applicable to milk of local origin; or

(d) Provide that a federal tax of so many cents per hundred pounds of milk or its equivalents shall be imposed on all milk or milk products transported in interstate commerce which are not bought from producers or sold to consumers according to the minimum price fixed by the state milk control agency of the state into which the milk is introduced for consumer utilization.\textsuperscript{207}

4. State Taxing Power.—What would the reaction of the courts be to a state statute which:

(a) Placed a tax of so many cents a quart on the retail sale

\textsuperscript{206}In the manner of the Ashurst-Summers Prison Goods Act held valid in Kentucky Whip & Collar Co. v. Illinois Central Railroad, (1936) 299 U. S. 334, 57 Sup. Ct. 277, 81 L. Ed. 270. In the recent case of United States v. Carolene Products Co., (April 25, 1938) (sustaining an Act prohibiting the shipment of filled milk in interstate commerce) Mr. Justice Stone as organ for the court said: "Hence Congress is free to exclude from interstate commerce articles whose use in the state for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, . . . or which contravene the policy of the state of their destination."

This would seem to lend strength to the view that a Congressional enactment, preceded by a factual study showing its economic and sanitary necessity, would stand if it prohibited the shipment in interstate commerce of milk or its products which were produced contrary to the laws of the state into which they were to be introduced.

\textsuperscript{207}These were all "inspired" by Professor Thomas Reed Powell's examination in constitutional law at the Harvard Law School, June, 1937. The writer is sure that "only God and Thomas Reed Powell know the answers."

H. R. 4746 by Representative Smith of Virginia, 75th Congress, 1st Session, February 15, 1937, is broad enough to lend itself to use in this manner, although the hearings (transcript only is available) indicate no such intention.

Sec. 258-M, 8, at p. 13, Rogers-Allen Law, New York, Laws 1934, for provision applying to New York state law to extrastate milk if such federal legislation is passed.
of all milk except such milk as has been purchased from producers at a price not less than the minimum fixed by the state milk control agency.\footnote{208}

5. Control by Government—Participation in Competition.—It has been suggested that a conjoint federal-state policy of price fixing (either maximum or minimum), whereby the state and the federal governments would enter the market and buy and sell when either the supply or the demand were off balance, is the soundest administrative and constitutional method of achieving continued stabilization.\footnote{209} Such a system would be executed by means of federal grants-in-aid to the states who executed their parts in the basic federal policy.

IV. SELF DETERMINATION.

Many persons within the milk industry feel that affirmative government (state or federal) control of milk prices is undesirable.

They believe that it is impossible to prevent general business declines with their accompanying sapping of urban purchasing power, or to abolish surplus production and high costs of distribution with or without governmental control. However, they do suggest that governmental legislation can strengthen the bargaining power of the dairy farmers, so that they will receive a fair share of the total returns. Thus, they can maintain a position which will always be proportionate in flux to that of transportation, labor, distribution and consumers.\footnote{210}

Such feelings gave rise to the Rogers-Allen Act\footnote{211} and to the

\footnote{208}This was likewise suggested by Professor Powell's examination.  
\footnote{209}Abel, Commodity Price Control: A Comparative Study in Federal Constitutions, (Submitted to Professor Thomas Reed Powell in fulfillment of the requirements in the Constitutional Law Seminar, Harvard Law School, Cambridge, Mass., May, 1937), chap. III, pp. 239-308; he reaches the conclusion that such a program would be perfectly constitutional.  
\footnote{211}No. 3240, In Assembly, State of New York, May 6, 1937. (Art. 21,
Kopplemann Bill\textsuperscript{212} which allow producers' associations or distributors to organize, respectively, overhead producers' bargaining agencies and distributors' bargaining agencies which can then by dealing with one another fix the producers' and/or resale price for milk. Provisions are included which would seem to serve as a protection to the consuming public's interest against monopolistic practices.\textsuperscript{213}

This legislation was engendered by the history of milk marketing and practical experience. In looking back, it is seen that the fundamental aim of government in its relationship to commodity prices is to bring about a balance of bargaining power between sellers and buyers. The federal and state anti-trust laws all were enacted with some such aim.

In the case of the milk industry, we see that the anti-trust laws never were effective in preventing gains by processor-distributors as buyers at the expense of producers as sellers. This was heightened by the tendency in the processing-distributing field constantly to integrate under banker management the small units into powerful organizations often nationwide in their scope.\textsuperscript{214} The results were that there was gross inequality of bar-

\textsuperscript{212}H. R. 8311, 75th Congress, 1st Sess., August 20, 1937. See the Extension of Remarks by the Hon. Herman P. Kopplemann on Dairy Producer Cooperatives, Congressional Record—Appendix (August 16, 1937) p. 12, 521 et seq.

\textsuperscript{213}On August 30, 1937 the United Milk Producers of Cleveland, Ohio organized an overhead bargaining agency with five producers' organizations as members. This was done without any special state legislation other than the usual state cooperative laws. It is a further indication of the tendency of the times. (Sept., 1937) 38 The Dairy Record (14) : 8, Col. 1.

\textsuperscript{214}Mr. Harvey P. Hood, 2nd points out all the reasons why mergers in particular communities should be encouraged. An Address on New England Milk and Government Control delivered before the Rotary Club of Boston, September 25, 1935. Published by H. P. Hood & Sons, (October, 1935).
gaining position, with the exception of the unusual period during and after the World War.\textsuperscript{216}

Producers early tried to remedy and strengthen their position as sellers by joining into cooperative marketing associations. This movement was aided by government enactments over a long period of years. But try as they would, it seemed that they could not catch up with the processor-distributors.

With the coming of the depression years, the leaders of producers were swept away by the general beclouded thinking of that era, and abandoning their old task, plugged and lobbied for formal federal and state fixing of prices for milk and milk products, and got it.\textsuperscript{216}

However, after a time the more intelligent leaders of milk producers came to see that any advantages to them were temporary (being a creature of price levels), and that instead of such governmental regulation strengthening their bargaining position, its long time effect would be seriously to weaken it.\textsuperscript{217}

Thus, we see that the probable future movement of government will be to strengthen the bargaining position of producers, while keeping hands off of prices and production, thereby facilitating effective and equitable bargaining between producers' units and processor-distributors' representatives.\textsuperscript{218}

It would seem that such a legislative program will not violate the spirit of the anti-trust legislation, since it provides for real competition under the watchful supervision of specified government officials, who are to see to it that nothing interferes with the

\textsuperscript{216}"What the dealers are doing to farmers is what some employers did to labor for many years. . . . the dairy farmer is not going back to that time when he was completely at the mercy of the man who purchased his milk." Senator George F. Rogers of the New York Legislature, 84 American Creamery and Poultry Produce Review, No. 17, Aug. 18, 1937, p. 525, col. 1.

\textsuperscript{217}See Wallace, New Frontiers (1934) 56, 67.

\textsuperscript{218}As indicating some such realization, see the speeches by Charles W. Holman, Secretary of the National Cooperative Milk Producers' Federation, and Dr. Edward Gaumnitz, Chief, Dairy Section, AAA, before the 13th Annual meeting of the American Institute of Cooperation, Iowa State College, June 26, 1937, (July, 1937) 26 The Milk Dealer, No. 10, p. 60.

\textsuperscript{218}The effectiveness of the Rogers-Allen Act in bringing about a strengthening of the bargaining power of the producer is illustrated by the increase in the price of milk granted to the Metropolitan Cooperative Milk Producers' Bargaining Agency, Inc., by the New York Metropolitan Milk Distributors' Bargaining Agency on August 25, 1937, 84 American Creamery and Poultry Produce Review, No. 18, August 25, 1937, p. 542, col. 2. Contrast the conclusions of Burns, Decline of Competition and Fetter, Masquerade of Monopoly.
operation of the natural economic factors\textsuperscript{219} adjusting supply and demand.

From a purely legal standpoint this would seem to be the most satisfactory, practical result, due to the constitutional difficulties in the way of effective fiat price fixing by either the state or federal governments.

V. Conclusions.

The issues involved between compulsory competition and controlled competition (regulated monopoly) are fundamental. The public has never had a clear cut opportunity to make its decision on this matter. For a people who pride themselves on their energetic democracy, and whose leaders vie with one another in loud affirmations of faith in its tenets, the situation is intolerable. Why continue this hodge-podge of evasion?

The basic problem before the members of the dairy industry today is self-control, not governmental control. Certainly all careful students of the history of milk control and regulations in the United States and in our fellow-democracies, New Zealand, England, Canada, Australia and France, must admit that the use of governmental coercion as it has been used is a poor institutional method to bring about that "agricultural, economic democracy" which all members of the milk industry desire at heart.\textsuperscript{220}

The idea that the farmer as a producer is an important cog in the industry is today everywhere admitted. Likewise, it is recognized that the producer should have a larger voice in determining and influencing those factors which by intricate by-play inevitably affect and fix milk prices.\textsuperscript{221} Thus, the big job is picking an institutional method which will most easily and satisfactorily

\begin{itemize}
\item\textsuperscript{219}Objections of the Milk Consumers' Protective League of New York City, the Progressive Women's Council, the Housewives Milk League, certain settlement workers and some borough consumers' organizations to price increases were ineffective, even though enforced by picketing, (July, 1937) 26 The Milk Dealer, No. 10, p. 84, col. 2.
\item That the danger of the consumer paying for the monopoly gains of the producer cooperatives and processor-distributors must be carefully guarded against is indicated by Bacon and Cassels, The Milk Supply of Paris, Rome and Berlin, (1937) 51 Quart. J. of Economics 630-631.
\item Tinley, Economic Considerations in Milk Marketing Control, delivered before the Third Annual Convention of the National Association of Milk Control Boards, Portland, Ore., August, 1937 (mimeographed. Distributed by the Oregon Milk Control Board, Terminal Sales Building, Portland, Oregon.)
\item See Whiting, President's Address, Proceedings of the Twenty-Seventh Annual Convention, General Sessions, International Association of Milk Dealers, Cleveland, Ohio (1934) p. 19.
\end{itemize}
achieve the admittedly desirable ends within the rigid limits of the Anti-Trust Laws.

The soundest, the most practical in point of experience, and the one riding the crest of the trend is one which allows the producer, who has an accurate knowledge of local market conditions, to exercise his influence and have his day by means of that institution, known as the milk producers' cooperative. In this way we will avoid both private and public collectivism, and will have achieved a method of obtaining the highest possible level of production with the lowest feasible level of prices.

After reviewing the experience of our state and national governments with coercive tactics, it is fair to state that such command attempts at a solution have failed, since they not only did not bring about an improvement in the general welfare of the producers, but in addition did not improve the condition of the milk industry as a whole. Nor is such an approach a democratic one, since it puts by far too great a strain on institutions fundamentally designed to serve different purposes. Laws and regulations unsupported by the active and effective public opinion of a continuing, substantial majority of those affected, will not long prove workable.

That is the situation in which compulsory governmental regulation of the milk industry will always find itself since it is too awkward and too bulky an institutional process to meet the "rough elements" found in the kaleidoscopic economic, human, social, weather, and political changes which always have been incident to the milk industry.

If Congress and our Legislatures must do something for the milk industry let them apply themselves to the development of sanitary regulations and yardsticks of quality. When they have done this, and have established a system for their effective enforcement, they will have stabilized the greatest disturbing factor in milk prices of our times.

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223A clear and concise idea of what a milk ordinance should contain, and what the duties of the officials should be thereunder is contained in Means of Improving the Quality of the Milk Supply, Parts I and II, Report of the Production Advisory Committee, International Association of Milk Dealers (1933).

The health laws should be such that any one may enter the milk industry who will abide by the established standards and pay his share of maintaining sanitation levels, regardless of his geographical position. Cf. Schultheiss, Fluid Milk Market Stabilization in Wisconsin, Wisconsin Milk Control Board (1937) 6-7.

At present, health ordinances are used at the behest of producer and/or
The one additional thing which will then be needed is some method of equalizing the returns of the bona fide producers. If producers' cooperatives are effective this difficulty will be solved.\textsuperscript{24}

distributor groups to limit production areas and thus fix prices. This is done to a greater or lesser degree in New York State, New England, Cleveland, Chicago, Philadelphia, Baltimore, Minneapolis, St. Paul, Milwaukee, etc. Spencer, Practice and Theory of Market Exclusion Within the United States, (1933) 15 Journal of Farm Economics; Catherwood, A Statistical Study of Milk Production for the New York Market, published by Cornell Univ. Agricultural Experiment Sta., Ithaca, N. Y., April, 1931 p. 8; Report of the Joint Legislative Committee to Investigate the Milk Industry, Legislative Doc. (1933) No. 114, Albany, 1933, p. 34; Milk for Millions, Consumers Guide, (U. S. Dept. of Agri., August 9, 1937). Rhode Island health officials went so far as to put coloring matter into out of state milk to prevent its sale and promote the sale of locally produced milk. This was ended by an injunction of the U. S. Dist. Court. (1937) 84 American Creamery and Poultry Produce Review, No. 17, p. 533, col. 2.


\textsuperscript{24}A classified price system is apparently an absolute necessity. Work of the Division of Milk Control, of the New York State Department of Agriculture and Markets for the year ending 1936, Circular 534 (1937) pp. 12-13. To support it, and yet insure that one class of producers doesn't fatten while another starves some type of pooling seems called for.


Judge Howard W. Mountz of Auburn, Indiana invalidated the equalization provisions of the Milk Marketing Agreement in the Ft. Wayne Area. 84 American Creamery and Poultry Produce Review, No. 18, August 25, 1937, p. 551, col. 2. In Lower Mainland Dairy Products Sales Adjustment Committee, [1933] A. C. 168, affirming (1932) 2 D. L. R. 277 the British Columbia Milk Control Statute, containing provision for an equalization fund, was held bad because it constituted an indirect tax which it was beyond the power of the province to impose.