REGULATING CUTTHROAT BUSINESS*

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The production of meat is almost entirely controlled by a small group of multinational agribusinesses. These "packers" own everything from animal genetics to feed to wholesaling to slaughtering to butchering—leaving only the raising of the animals to nominally independent farmers, who are, in turn, controlled through one-sided contracts. Packers use this power both to push down costs and make raising and slaughtering animals more specialized and efficient and to extract more money from farmers, workers, retailers, consumers, and state and local governments. They also wield their resources to avoid accountability for the costs they impose on others and to shape the research and press coverage on their industry.

Taking on the power of meatpackers and its impacts on working conditions, prices, animals, rural communities, and the environment would require a comprehensive set of reforms. But a surprisingly large amount would be possible by revitalizing enforcement of a century-old statute that has largely lain dormant during the transformation of meat production. Congress passed the Packers and Stockyards Act of 1921 ("PSA") in (belated) response to the first wave of integration and consolidation in meatpacking. By the 1950s, the PSA had become part of a quasi-sectoral regulatory regime. This Article narrates how that regime came to be and how it collapsed. It then synthesizes the criticisms of concentrated agribusiness that have resulted and explains several means by which the PSA (the rump of the old regime)—and its prohibition on "unfair" and "unjustly discriminatory" practices—could be used to redistribute power in the short term and begin to build toward a more comprehensive re-regulation.

** Assistant Professor of Law, Alabama Law. This project grew out of research and consulting I was hired to do for the USDA's Packers and Stockyards division on the history of the PSA and its relationship to the history of the FTC Act. It represents my own views and not necessarily those of the USDA. For conversation and comments, I thank Peter Carstensen, Mary Hendrickson, Sandeep Vaheesan, Eamon Coburn, Aaron Johnson, William Boyd, and participants in the NPU Workshop.

INTRODUCTION

Throw a pebble and you hit an investigation revealing meatpacking corporations abusing their power. Two teams of journalists in 2023 and 2022 found extensive use of child labor in slaughterhouses, along with a high incidence of serious injuries and deaths.[1] In 2019, Human Rights Watch documented some of the highest on-job injury and death rates in any industry in the United States.[2] In 2020, another team of journalists revealed that packers drafted the Trump Administration's legislative order that required plants to stay open during COVID, a policy which killed hundreds of workers and untold numbers of their family and friends and caused multiple plants to shut down, a drop in supply, mass culling of livestock, and dramatic increases in price.[3] That same year, the Securities and Exchange Commission charged the owners of JBS—a Brazilian corporation that is now the largest meatpacking company in the world—with "bribery to finance their expansion into the US markets and then continuing to engage in bribery" once having acquired several US companies.[4] In 2024, two scholars documented how the industry was "involved

1. Laura Strickler, Julia Ainsley & Didi Martinez, *A Minor Who Died in a Poultry Plant Accident Got the Job with the Identity of a 32-Year-Old, Company Confirms*, NBC NEWS (Dec. 18, 2023), https://www.nbcnews.com/news/us-news/slaughterhouse-children-documentary-rcna129405 [https://perma.cc/NBK5-9NNS]; News Release, U.S. Dep't of Lab., *More than 100 Children Illegally Employed in Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays $1.5M in Penalties* (Feb. 17, 2023), https://www.dol.gov/newsroom/releases/whd/whd20230217-1 [https://perma.cc/X8HL-3AQ6].

2. *"When We're Dead and Buried, Our Bones Will Keep Hurting*," HUM. RTS. WATCH (Sept. 4, 2019), https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat [https://perma.cc/44CA-6XTY].

3. AUSTIN FRERICK, BARONS: MONEY, POWER, AND THE CORRUPTION OF AMERICA'S FOOD INDUSTRY 130 (2024); Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sept. 14, 2020), https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open [https://perma.cc/MQA5-A6LL]; Andrea Shalal, *Meat Packers' Profit Margins Jumped 300% During Pandemic*, REUTERS (Dec. 10, 2021), https://www.reuters.com/business/meat-packers-profit-margins-jumped-300-during-pandemic-white-house-economics-2021-12-10/ [https://perma.cc/D9M6-7M7W (staff-uploaded archive)].

4. Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Brazilian Meat Producers with FCPA Violations* (Oct. 14, 2020), https://www.sec.gov/news/press-release/2020-254 [https://perma.cc/DDJ5-5BFU (staff-uploaded archive)]; FRERICK, *supra* note 3, at 122.

in multiple multi-million dollar efforts with universities" to produce research that obfuscates the truth about its environmental impact.[5] Throughout this time, packers in the beef, pork, poultry, and turkey industries have been settling price-fixing lawsuit after price-fixing lawsuit, and more are pending.[6] And so on.

Industrial meatpacking has long been a dangerous and exploitative proposition, but its risks were once cabined by a patchwork, quasi-sectoral regime. Big packers were once bound by automotive industry-style pattern bargaining agreements that gave workers a voice on pay and conditions.[7] The Occupational Safety and Health Administration ("OSHA") was once decently staffed and funded.[8] A longstanding antitrust consent order once restricted packers' ability to integrate horizontally and forced them to periodically account for their conduct to the Department of Justice ("DOJ") and a skeptical judge.[9] Agricultural subsidies were once conditional on price and volume controls that made consolidation less efficient.[10] Stricter structural presumptions in antitrust once prevented downstream grocers and wholesalers from consolidating and putting pressure on agricultural suppliers to consolidate to achieve countervailing power.[11]

Today, the meatpacking industry is almost fully vertically integrated within each sector, increasingly horizontally integrated across sectors, and increasingly concentrated across both dimensions.[12] Packing firms control everything from animal genetics to feed to wholesale purchases and sales to slaughter to butchering—leaving only the raising of the animals to nominally independent farmers.[13] As of 2019, the four-firm concentration ratio in the beef industry was 85%; in pork, 67%; and in chicken (which is the most rapidly

5. Viveca Morris & Jennifer Jacquet, *The Animal Agriculture Industry, US Universities, and the Obstruction of Climate Understanding and Policy*, 177 CLIMATIC CHANGE 41, 41 (2024).

6. *See infra* notes 231–35 and accompanying text.

7. Daniel Calamuci, *Return to the Jungle: The Rise and Fall of Meatpacking Work*, 17 NEW LAB. F. 66, 70 (2008).

8. The underfunding of OSHA is discussed in *When We're Dead and Buried*, *supra* note 2.

9. *See* United States v. Swift & Co., Eq. No. 37623 (D.C. 1920) (consent decree), *available at* https://www.justice.gov/atr/page/file/1442361/download [https://perma.cc/4Z2V-G29Y]; United States v. Swift & Co., 1981 WL 2171, at *1 (N.D. Ill. Nov. 23, 1981) (lifting this consent order).

10. FRERICK, *supra* note 3, at 40–42.

11. *See id.* at 42–45, 137–70.

12. *See infra* Part II.

13. *Id.*

growing sector), 53%.[14] And these numbers vastly understate the power packers can exert over farmers, since these are highly localized markets. For example, hog growers in the Southeast and the Texas panhandle each have only one company to sell to, and 54% of chicken growers had just one or two to sell to.[15] Meanwhile, the biggest packers in each sector are often also the biggest in others. Cargill, Tyson, and JBS constitute three of the biggest four packers in the three biggest sectors: pork, beef, and poultry.[16] As for countervailing power at plants, unionization is near nil and turnover rates near 100%.[17]

Packers use this power, and not just to push down costs and make growing and slaughtering animals more specialized and efficient (though they have done that), nor just to bargain for more favorable deals from farmers, workers, retailers, and consumers (they have done that, too).[18] They use it to exert pressure on state and local governments to look away from their pollution of waterways and their disruption of local communities.[19] They use it to lobby and bribe elected officials to increase subsidies and remove conditions.[20] They use it to control how the public thinks about their industry—from funding favorable research to prosecuting animal rights advocates who document cruelty to

14. JAMES MACDONALD, XIAO DONG & KEITH O. FUGLIE, U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 256, CONCENTRATION AND COMPETITION IN U.S. AGRIBUSINESS 25 (2023), https://ers.usda.gov/sites/default/files/_laserfiche/publications/106795/EIB-256.pdf?v=97553 [https://perma.cc/T6JS-3A8N] [hereinafter MACDONALD ET AL., CONCENTRATION AND COMPETITION].

15. *Id.* at 29.

16. James M. MacDonald, *Concentration in U.S. Meatpacking Industry and How It Affects Competition and Cattle Prices*, USDA ECON. RSCH. SERV. (Jan. 25, 2024), https://www.ers.usda.gov/amber-waves/2024/january/concentration-in-u-s-meatpacking-industry-and-how-it-affects-competition-and-cattle-prices [https://perma.cc/9P6T-EUE8] [hereinafter MacDonald, *Concentration in U.S.*].

17. WILLIAM G. WHITTAKER, CONG. RSCH. SERV., RL33002, LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW, 34–38 (2006).

18. *See infra* Part III.

19. FRERICK, *supra* note 3, at 19–27. This discussion is actually of hog *farmers*, but, as will be discussed, some packers own farms and consolidation of farms can be seen at least in part as a downstream effect of consolidation of packers.

20. *Id.* at 172–76; Philip H. Howard, *Corporate Concentration in Global Meat Processing: The Role of Feed and Finance Subsidies*, *in* GLOBAL MEAT 31, 33 (Bill Winders & Elizabeth Ransom eds., 2019) [hereinafter Howard, *Corporate Concentration*].

livestock.[21] They use it to intimidate workers, avoid regulators, and move legal doctrine in their favor.[22]

A growing number of scholars, advocates, journalists, and bureaucrats (mostly outside the legal academy) have come to see this concentration of power as a serious problem.[23] Taking on the power of meatpackers and its impacts on working conditions, prices, animals, rural communities, and the environment would require a comprehensive set of reforms. But a surprisingly large amount would be possible by revitalizing enforcement of a century-old statute that has largely lain dormant during the transformation of meat production.[24]

Congress passed the Packers and Stockyards Act of 1921[25] in response to the first wave of integration and consolidation in meatpacking.[26] Its ambition was to give the United States Department of Agriculture ("USDA") the authority "to exercise . . . the fullest control of the packers and stockyards which the Constitution permits."[27] Its method was to regulate stockyards—the

21. *See* Morris & Jacquet, *supra* note 5, at 41; Caitlin A. Ceryes & Christopher D. Heaney, *"Ag-Gag" Laws: Evolution, Resurgence, and Public Health Implications*, 28 NEW SOLS. 664, 665 (2019).

22. FRERICK, *supra* note 3, at 47–48; Ariel Ron, *The Iron Farm Bill*, PHENOMENAL WORLD (May 2, 2024), https://www.phenomenalworld.org/analysis/the-iron-farm-bill/ [https://perma.cc/2EHV-KSQM].

23. *See generally* FRERICK, *supra* note 3 (arguing that the consolidation of American agriculture has economically damaged rural America); Binyamin Appelbaum, *Building a Better Meatpacking Industry*, N.Y. TIMES (Jan. 15, 2022), https://www.nytimes.com/2022/01/15/opinion/meat-meatpacking-industry.html [https://perma.cc/XE2Q-ZM5W (staff-uploaded, dark archive)]; MARY K. HENDRICKSON, PHILIP H. HOWARD, EMILY M. MILLER & DOUGLAS H. CONSTANCE, THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS (2020), https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf [https://perma.cc/8LVD-S2D9]; CAIUS Z. WILLINGHAM & ANDY GREEN, CTR. FOR AM. PROG., A FAIR DEAL FOR FARMERS: RAISING EARNINGS AND REBALANCING POWER IN RURAL AMERICA 2–3 (2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2021/08/Fair-Deal-for-Farmers1.pdf [https://perma.cc/P9SF-GG83]; INT'L PANEL OF EXPERTS ON SUSTAINABLE FOOD SYS., TOO BIG TO FEED 7 (2017), https://www.ipes-food.org/_img/upload/files/Concentration_FullReport.pdf [https://perma.cc/L78N-6Z6S] [hereinafter IPES Report]; MICHAEL POLLAN, THE OMNIVORE'S DILEMMA 1–3 (2006); *see also LPE of Meat*, LPEBlog, https://lpeproject.org/symposia/lpe-of-meat/ [https://perma.cc/3D7K-9XFN].

24. This proposal may seem in tension with proposals to totally restructure the regulatory architecture for agriculture and food production, to which I am generally sympathetic. *See* Gabriel N. Rosenberg & Jan Dutkiewicz, *Abolish the Department of Agriculture*, NEW REPUBLIC (Dec. 27, 2021), https://newrepublic.com/article/164874/abolish-department-agriculture [https://perma.cc/PB2G-TZ8W]. I do not think it is: before we get to that larger restructuring, we can use the tools we have. If these tools do anything to undermine the dominance of major agribusiness firms over the political process, they may facilitate a deeper reform.

25. Pub. L. No. 67-51, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181–229).

26. *See infra* Section I.A.2.

27. H.R. Rep. No. 67-324, at 3 (1921).

enormous pens to which farmers' agents brought their livestock to auction to packers—as public exchanges (like those for stocks and commodities) and to impose more rigorous conduct standards on packers than those required by generally applicable antitrust law, including the Federal Trade Commission Act[28] ("FTC Act"). Since stockyards have mostly closed down in the intervening century, the portion of the statute regulating packers is most relevant today.

The PSA prohibits four broad types of packer conduct. The first is any violation or near violation of otherwise applicable antitrust laws: "restraining commerce" (whether or not those restraints involve an agreement) and "creating a monopoly" (even if not actually monopolizing).[29] The second is "manipulating or controlling prices," whether or not their conduct involves antitrust harm (and without any explicit standard for intent, as in the commodities and securities context).[30] The third is "unjust[] discriminat[ion]" and "undue . . . preferences," standards drawn from the public utility regulation and the Clayton Act that aim at both invidious status hierarchies and incumbents reproducing their advantage through sweetheart deals.[31] The fourth is "unfair . . . or deceptive practices," a standard which covers all violations of the letter or spirit of antitrust laws, as well as abuses of power that undermine public policies concerning honesty, farmer autonomy, and rational land use, among other matters.[32]

These standards were underdeveloped and understudied,[33] but they began to be tested during the Biden Administration's revivification of competition

28. *See infra* Section I.A.2.

29. 7 U.S.C. § 192(c), (d).

30. *Id.* § 192(e).

31. *Id.* § 192(a), (b).

32. *Id.* § 192(a); *see also infra* Section IV.B.

33. *But see* John D. Shively & Jeffrey S. Roberts, *Competition Under the Packers and Stockyards Act: What Now?*, 15 DRAKE J. AGRIC. L. 419, 420–22 (2010) (discussing the standards under the Packers and Stockyards Act); Geoffrey A. Manne & Joshua D. Wright, *A First Principles Approach to Antitrust Enforcement in the Agricultural Industry*, 5 CPI ANTITRUST CHRON. 1, 2–3 (2010) (discussing antitrust laws in the agricultural context); William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 WISC. L. REV. 1497, 1499–1500 (discussing § 192's origin and application); Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 93–94 (2003) (discussing the legislative history of the Packers and Stockyards Act); Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 488–491 (1999) [hereinafter Lauck, *Toward an Agrarian Antitrust*] (providing an overview of the Packers and Stockyards Act).

policy.[34] In particular, the third and fourth standards—the prohibition on "unjust discrimination" and on "unfair or deceptive practices"—were the vehicles for rulemakings on discrimination against protected classes, retaliation against organizing by farmers, and disclosure rules.[35]

This Article situates these regulatory efforts in doctrine and history and explores how they might be extended into a broader effort at rebalancing power in the meatpacking industry (should a future administration again become interested in achieving that end). It explores four mutually compatible avenues for reform via conduct regulation. The first would involve a general effort to deconcentrate the packing industry and increase competition *between* packers by targeting collusion, exclusionary conduct, and concentrated market power in each market in which they participate. The second would target vertical restraints to rebalance power between packers and farmers, creating a floor on pay and treatment, empowering farmers by facilitating both exit and voice, and perhaps dampening the role of incentive payments to promote equality of treatment between farmers. A third avenue would go beyond existing progress and seek to raise the standard for treatment of packhouse workers by supplementing work laws to channel competition away from cutting costs on labor and toward attracting workers with better pay and conditions. And a fourth would begin to promote a more decentralized and redundant ecosystem of farms and packers in the name of dispersing power and promoting resilience.[36]

Some progress on some of these avenues has already been made, though only some. This Article aims to spur further research on an industry that has received little attention among legal scholars.[37] Only a few relatively short law

34. *See* Sandeep Vaheesan, *Seeds of an Antitrust Revival*, DEMOCRACY J. (Sept. 4, 2019), https://democracyjournal.org/magazine/72/seeds-of-an-antitrust-revival [https://perma.cc/66CA-FKBD].

35. *See* discussion *infra* Sections IV.A, IV.B.

36. *See infra* Part V.

37. In a recently published article, Tammi Etheridge expresses skepticism about antitrust enforcement in the meatpacking industry. Tammi Etheridge, *The Big Cost of Small Farms*, 77 FLA. L. REV. 465, 465–66 (2025). Etheridge argues that rising meat prices are unrelated to industry concentration, which she attributes to more efficient techniques, and that decentralizing power and/or promoting competition (which are treated identically) would reduce efficiency and raise consumer prices. *Id.* at 508. Following Chicago School principles, she prioritizes consumer welfare and dismisses antitrust enforcement—apparently of any variety—as misguided. *Id.* at 506–07.

I became aware of Etheridge's article too late in the editorial process to include a detailed response, but I find her argument unpersuasive for three reasons: First, Etheridge bases her claim that

review articles (or sections of longer articles) on the structure of the meatpacking industry have been published in recent years, with only scattered articles before that.[38] Recent years have seen several books published on the subject,[39] mostly by journalists and other non-academics, but much work remains to be done.

Less directly, the Article contributes to several current debates. It draws on recent literature on monopsony, fissuring, and labor market power, as well as broader discussions about the role of antitrust and surrounding doctrines in the wake of "Neo-Brandeisian" scholarship.[40] It also adds to recent work on regulated industries, in particular by highlighting an instance in which regulation overlaps with antitrust-type regulation rather than presenting mutually incompatible ways of structuring market governance.[41] It adds nuance to recent work on the history of the concept of "unfair practices" and "unfair methods of competition" in the FTC and beyond.[42] It is in conversation with a number of recent pieces that have been rethinking our contemporary relationship to the Progressive and New Deal Eras and the regulations they left

concentration is due entirely to efficiencies on the congressional testimony of antitrust skeptic Geoffrey Manne and a couple of Austrian economics articles. *Id.* at 471–72. And her article addresses none of the contradictory evidence presented below. Second, she treats the cheapness and plenitude of animal protein as the sole desiderata of a system of meat production, with no attention to the effects of the system on those who work in it, on those who live near it, on the environment (and future generations), or on the animals themselves. There is no attention to balancing or tradeoffs whatsoever. *Id.* at 503, 506. Third, she entirely fails to engage with the PSA or surrounding legal regimes.

38. *See* sources cited *supra* note 33; *see also* Erika Douglas, *Antitrust Abandonment*, 42 YALE J. REG. 1, 44–55 (2025); Peter C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 IOWA L. REV. 1175, 1198–1210 (1989) [hereinafter Carstensen, *Impact of Antitrust*]; Harold Breimyer, *Future Organization and Control of U.S. Agricultural Production and Marketing*, 46 J. FARM ECON. 930 (1964).

39. *E.g.*, FRERICK, *supra* note 3; CHRISTOPHER LEONARD, THE MEAT RACKET (2014).

40. *E.g.*, Hiba Hafiz, *Labor's Antitrust Paradox*, 86 U. CHI. L. REV. 381 (2019); Eric A. Posner, Suresh Naidu & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2021).

41. *See generally* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WHELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY (2022) [hereinafter RICKS ET AL., NETWORKS] (synthesizing the law of networks, platforms, and utilities and discussing ways it intersects with antitrust law).

42. *E.g.*, Eamon Coburn, Note, *Supply-Chain Wage Theft as Unfair Method of Competition*, 134 YALE L.J. 615, 621–25 (2025); Samuel Evan Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 110–16 (2023); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 363–74 (2020); Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 438–39 (2021) [hereinafter Herrine, *Folklore*]; Luke Herrine, *Unfairness, Reconstructed*, 42 YALE J. REGUL. 95, 97–102 (2025) [hereinafter Herrine, *Unfairness, Reconstructed*].

behind.[43] And it strives to build on the work of the few scholars who have explored the role of law in decimating rural America—and its potential for undoing some of that harm.[44] Even more generally, it aims to be a form of law and political economy.[45]

The Article proceeds as follows. Part I explains how quasi-sectoral regulation of the meatpacking industry came to be and how it fell apart. Part II summarizes the current structure of the meatpacking industry and synthesizes its advantages and disadvantages. Part III explains the original intent of the PSA, how it fell into disuse, and how it came to be reactivated in recent years. Part IV interprets the central operative provision of relevance to modern efforts at meatpacking regulation. Part V explains the four avenues for reform that this interpretation might make possible.

I. THE RISE AND FALL OF QUASI-SECTORAL REGULATION OF MEATPACKING

Large, vertically integrated meatpacking corporations have controlled the process of raising, killing, and dismembering animals and the distribution of the resulting meat since the 1870s. Reform-minded legislators have been concerned about the power of these firms for nearly as long. In fits and starts between 1890 and 1935, Congress constructed the rudiments of a quasi-sectoral approach to regulating them. By 1940, nearly the entire meat production chain was subject to administrative supervision. The major meatpacking corporations had their dealings with farmers and wholesalers supervised by the USDA (at least nominally), had their dealings with each other and with potential corporate partners supervised by a district court monitoring a consent order and a DOJ that was largely anti-merger, had their dealings with employees subject to National Labor Relations Board-monitored, sector-wide collective bargaining agreements, and had conditions on the slaughterhouse floors monitored by USDA health and OSHA safety inspectors. I call this approach "quasi-sectoral" because it involved various sector-specific price, quality, entry/exit, wage/hour,

43. *E.g.*, WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 1–24 (2022); LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE 'NEW COMPETITION,' 1890–1940, at 1–23 (2018).

44. *E.g.*, Ann M. Eisenberg, *Economic Regulation and Rural America*, 98 WASH. U. L. REV. 737, 739–49 (2021).

45. *See generally* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020) (describing a legal analysis framework that considers the relationship between politics and the economy while also acknowledging the inherently political nature of the economy).

and other regulation, but without that regulation being the subject of a single coherent scheme monitored by a single administrative body. It also did not cover the entire sector, leaving wholesale and retail sales subject only to general-purpose antitrust and consumer protection laws and leaving working conditions on farms largely to the mercy and caprice of farmers.

This regime coincided with—and seemed to have played at least a partial causal role in producing—a meatpacking system that was relatively stable and fair to workers and farmers without driving up prices or sacrificing innovation. But it was premised on the continued dominance of the original "Big Five" beef- and pork-packing corporations and the centrality of stockyards and railroads to the marketing of animals. When this dominance was challenged, the regime fell apart. Insurgents in the beef and (new) chicken industries developed business models premised on underpaid, nonunionized workers and built on huge horizontal factories in rural areas with access to the national highway system. They maneuvered around stockyards and pattern bargaining agreements, were not covered by the consent agreement, and evaded much of the postwar regulatory architecture to outcompete and eventually acquire the firms most directly governed by it. By the end of the 1970s, the consent agreement had been terminated as a dead letter, the USDA's stockyard monitoring system was mostly irrelevant, and collective bargaining had been almost totally defeated.

Then, starting in the 1980s, the DOJ gave up on robust antitrust enforcement, and the industry reconsolidated into the modern agribusiness model. It did so at the same time as upstream (feed) and downstream (retail) industries also consolidated, with some forward and backward integration. Today, the meatpacking industry remains dominated by massive corporations that directly own the facilities that slaughter and dismember livestock, but these corporations are even larger and more consolidated and concentrated than they were before the first wave of reform. New regulations have not been forthcoming, leaving only (deeply underfunded) OSHA and USDA inspectors to supervise activity inside the plants and the chronically underenforced PSA to monitor power imbalances in the distribution chain. A weak and uneven approach to general-purpose antitrust laws has failed to fill any gaps.

A. *Industrialization, Consolidation, Regulation: 1875–1945*

1. The Industrialization of Meatpacking

Before Gustavus Swift moved to Chicago, the killing of animals and the packaging and shipping of their meat was a series of "nonintegrated and nonspecialized activities" performed by a smattering of merchants throughout the country.[46] These activities were highly seasonal—relying on cold weather to perform at least some preservative functions.[47] Butchering and packing of fresh meat usually took place in cities—after animals had been transported alive, either by "drovers," who kept them fed by walking them over grasslands, or by riverboats or railcars, on which they lost weight or died.[48] Butchering and packing of preserved meat usually took place in the country, after which the meat could be shipped in wooden barrels or sealed jars.[49]

Swift's deployment of a fleet of refrigerated railcars and warehouses made it possible to consolidate most of these activities in a single location.[50] Previous innovations had made the slaughter and dismemberment of animals partially mechanized—creating a "disassembly line" that began to put a hierarchized division of labor in place of a workshop full of skilled butchers.[51] Deskilling labor made it possible to push down wages and to dictate the pace and safety of the workplace without having to consult with workers.[52] Packers made every effort to maintain this control, creating a workplace hierarchy divided by skill, filling the more mechanized roles with immigrant workers who spoke different languages from each other, and recruiting Black workers as strike breakers in an explicit effort to promote racial animus.[53] Packers had also previously jointly invested in "stockyards": vast hives of feeding pens located near the terminus

46. MARY YEAGER, COMPETITION AND REGULATION: THE DEVELOPMENT OF OLIGOPOLY IN THE MEAT PACKING INDUSTRY 18 n.1 (1981); JIMMY M. SKAGGS, PRIME CUT: LIVESTOCK RAISING AND MEATPACKING IN THE UNITED STATES, 1607–1983, at 11–49 (1986).

47. YEAGER, *supra* note 46, at 1; RICK HALPERN, DOWN ON THE KILLING FLOOR: BLACK AND WHITE WORKERS IN CHICAGO'S PACKINGHOUSES, 1904–54, at 8–9 (1997).

48. YEAGER, *supra* note 46, at 4–9; SKAGGS, *supra* note 46, at 20–22, 53–55.

49. YEAGER, *supra* note 46, at 2–4.

50. *Id.* at 58–63; ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 301 (1977) (providing an account of meatpacking that seems to be based entirely on Mary Yeager's, his graduate student). Railroads refused to provide refrigerator cars, because doing so might have strengthened packers' bargaining power unacceptably. Andrew Hammond had experimented with refrigerator cars before Swift, but his experiment failed. Swift figured out the organizational difficulties. YEAGER, *supra* note 46, at 58–63.

51. HALPERN, *supra* note 47, at 8, 12, 16–21; SKAGGS, *supra* note 46, at 43.

52. HALPERN, *supra* note 47, at 16–21.

53. *Id.* at 26–38.

of railroads at which animals could be stored and fed while awaiting slaughter.[54] With the help of refrigerated railcars, the packers could now purchase fully fed livestock at these stockyards, slaughter it, and ship it across the country with significantly reduced risk of spoilage.[55]

Because packers controlled the transportation, storage, and marketing infrastructure in addition to having consolidated the meat production process into networks of factories, they set the terms of dealing. By the 1890s, meatpacking had been stabilized by a "Big Six" and then a "Big Five" and then a "Big Four" oligopoly.[56] Swift, Armour, Morris, Cudahy, Schwarzchild & Sulzberger—which soon became Wilson—and Hammond were all multi-million dollar, family-owned firms with thousands of employees, massive packing plants in some or all of the big meatpacking cities, and tens or hundreds of branch offices peppered around the country.[57] Meat had become a continuous mass production industry characteristic of the Second Industrial Revolution, with high overhead costs and large facilities in need of large labor forces to operate. These facilities operated most profitably under conditions of constant high-volume production to avoid the costs of idle capacity. The Big Five collectively owned tens of thousands of refrigerator cars—over ninety percent of those in existence—as well as over seventy percent of all livestock.[58] They jointly owned all of the major stockyards and controlled ninety-five percent of exports.[59]

The biggest stockyard and the biggest packing facilities were in Chicago, the main railroad entrepot between the plains and the east coast. All of the Big Five were headquartered there, where they slaughtered eighty-two percent of the cattle that entered.[60] That proximity made it convenient to coordinate. representatives from each of the firms met every Tuesday afternoon in a suite of rooms they jointly rented, with Swift & Co's attorney Henry Veeder

54. YEAGER, *supra* note 46, at 14; SKAGGS, *supra* note 46, at 45–46.

55. Mary Yeager Kujovich, *The Refrigerator Car and the Growth of the American Dressed Beef Industry*, 44 BUS. HIST. REV. 460, 460–61, 467–68 (1970).

56. CHANDLER, *supra* note 50, at 391; SKAGGS, *supra* note 46, at 100; Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 249–50 (1992).

57. CHANDLER, *supra* note 50, at 392–93; Kujovich, *supra* note 55, at 467–68.

58. CHANDLER, *supra* note 50, at 397; FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY 40 (1919) [hereinafter FTC, REPORT ON MEAT-PACKING]; HALPERN, *supra* note 47, at 16.

59. HALPERN, *supra* note 47, at 16; SKAGGS, *supra* note 46, at 104–05.

60. YEAGER, *supra* note 46, at 66; Libecap, *supra* note 56, at 249; FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 31.

presiding.[61] At these meetings, the "Veeder Pool" shared information, set safety standards, fixed prices and volume, resolved territorial disputes, and otherwise stabilized conditions to prevent ruinous competition and to maintain their collective advantage.[62] They also organized lobbying efforts. Allocation of volume was generally proportional to market share in local markets. Allocation of decision-making authority generally tracked national market share, which meant Armour and Swift had outsize say. One major accomplishment of the Veeder Pool was to set off rate wars between railroads, driving shipping costs down and allowing its members to capture more of the market.[63]

Another major accomplishment was to exert control over farmers and dominate smaller packers. This control produced the political backlash that led to regulation. Although farmers benefited from the reliable source of relatively stable demand and the outsourcing of transportation to others that came with industrial consolidation, these changes also created pressure to invest in bigger farms, the debt overhang from which made them especially vulnerable to fluctuations in demand or in price. They also faced reduced bargaining power and concomitant price squeezes, both due to the size of the new packing firms and their coordinated efforts to govern the market.[64]

2. The Regulation of Meatpacking

As an agrarian-led Populist movement took shape and gained legislative power, farmers and their allies sought to create legal mechanisms to rebalance power between packers and farmers (as they did for railroads, banks, grain elevators, and so on).[65] They initially "had no clear idea of the specific methods that were best suited to curtailing 'trusts'"—some advocated breakups of all big firms regardless of efficiency, others advocated nationalization, and others mixed and matched.[66] In the crucible of congressional compromise, a motley of methods emerged.

61. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 46.

62. YEAGER, *supra* note 46, at 117–20; CHANDLER, *supra* note 50, at 400; FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 46–47.

63. YEAGER, *supra* note 46, at 122–25.

64. *See* Lauck, *Toward an Agrarian Antitrust, supra* note 33, at 450–53 (discussing market conditions affecting farmers during the emergence of American antitrust law).

65. ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917, at 173 (1999); CHARLES POSTEL, THE POPULIST VISION 146–50 (2007); Lauck, *Toward an Agrarian Antitrust, supra* note 33, at 450–53.

66. SANDERS, *supra* note 65, at 269.

A first wave of reform efforts focused on breakups and quality regulation. In 1890, as it was considering the bill that ultimately became the Sherman Act, Congress put together a committee—the "Vest Committee"—which researched and published a report on price-fixing and market division that eventually led to the Veeder Pool.[67] So important was meatpacker power to the Populist movement that at one point the bill that became the Sherman Act included a provision "strongly backed by the agrarians to specifically ban anticompetitive acts by railroads and meatpacking firms."[68] The Vest Committee report also discussed disease outbreaks in the beef and pork trades.

In 1891, Congress passed the Federal Meat Inspection Act[69] under pressure from this coalition in addition to pressure from foreign governments who alleged that US beef and pork was diseased mostly as a pretext to justify protectionist import restrictions.[70] That law "required that the Secretary of Agriculture inspect and certify all cattle to be exported or to be slaughtered for either interstate or export trade" and created a discretionary inspection regime for hogs and sheep.[71]

Initial attempts to use the Sherman Act to redistribute power had limited impact. In 1902, the DOJ filed suit, alleging:

> combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different [s]tates, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads, to the exclusion of competitors.[72]

67. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 46; Libecap, *supra* note 56, at 254–55; YEAGER, *supra* note 46, at 172–78. According to Yeager, "the committee's report reflected the facts about the pools much less accurately than it reflected traditional attitudes about monopolistic competition and the value of individual enterprise in the marketplace." YEAGER, *supra* note 46, at 172–78.

68. SANDERS, *supra* note 65, at 271.

69. Federal Meat Inspection Act of 1906, Pub. L. 59-382, 34 Stat. 669 (codified as amended at 21 U.S.C. §§ 601–95).

70. Libecap, *supra* note 56, at 250–55.

71. Libecap, *supra* note 56, at 255.

72. Swift & Co. v. United States, 196 U.S. 375, 394 (1905).

The DOJ eventually won an injunction preventing much of that coordination.[73] Yet, the Big Five responded as many cartels did when broken apart at the turn of the century: they merged.[74] The resulting National Packing Co. (a holding company) functioned almost identically to the Veeder Pools—with most of the same personnel meeting in the same place for the same purposes.[75] When faced with a new Sherman Act suit, the Big Three agreed to dissolve the National Packing Co. and sought new ways to coordinate.[76]

In fact, the Big Five expanded their power by expanding their control over more aspects of the supply chain. They found ways to use "meat by-products"—that is, other parts of an animal—and also to assert their oligopolistic control over refrigerated transportation to capture revenue from growing lines of business. Notably, they expanded their shipping operations, becoming crucial the supply chain of and canned goods.[77] They also "expand[ed] into a variety of other food products . . . [mostly through] acquisition," with the apparent goal of "dominat[ing] the distribution of close substitutes for meat so that they could control price changes among substitutes."[78] And they even began to acquire control over retail operations, "both by direct ownership of specialized meat markets and by various contractual devices intended to create exclusive dealing arrangements."[79]

These actions—in the context of broader political economic shifts that pushed down prices for farmers without lowering prices for consumers—produced a broader constituency for reform, which reconstituted with the resurgence of agrarian power in the 1910s.[80] Now, not only were farmers and

73. *Id.* at 400–02.

74. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 46–48; YEAGER, *supra* note 46, at 145–55; CHANDLER, *supra* note 50, at 400–01. Or, at least, the Big Three did. The financing fell through for the first deal that would have included all of the Big Five because of the financial downturn of 1903. YEAGER, *supra* note 46, at 143–45.

75. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 48; YEAGER, *supra* note 46, at 145–55.

76. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 48; CHANDLER, *supra* note 50, at 401; SKAGGS, *supra* note 46, at 103–05; Carstensen, *Impact of Antitrust*, *supra* note 38, at 1201.

77. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 36; LEWIS HANEY, SOUTHERN WHOLESALE GROCERS ASS'N BUREAU OF RESEARCH AND PUBLICITY, THE CASE AGAINST THE MEAT PACKERS AS SEEN BY THE WHOLESALE GROCERS OF THE SOUTH 1 (1919).

78. Carstensen, *Impact of Antitrust*, *supra* note 38, at 1201.

79. *Id.*

80. *See* SANDERS, *supra* note 65, at 173 ("Particularly during the Taft and Wilson administrations, concentrated in the period between the 1909 revolt against House Speaker Joseph Cannon and late 1916, Congress came to be dominated by a reform coalition whose most numerous members were agrarian Democrats."). On price trends, see Libecap, *supra* note 56, at 248 (prices for farmers); ROBERT

smaller packers concerned, but so were grocers, wholesalers, and at least some non-livestock farmers.[81] Consumers did not come to packers' defense—indeed many joined the Progressive cause that would succeed Populism.[82]

The macroeconomic situation after World War I made all of this worse.[83] The cost of living went up, and farmers' incomes dropped as their debt loads increased. Conditions for farmers would only worsen throughout the 1920s.[84] The consumers and farmers who were feeling these pressures had outsized congressional representation and were a key part of President Wilson's winning coalition. In 1917, the president tasked the three-year-old FTC with investigating the meat industry for "manipulations, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law or the public interests" and with recommending "proper remedies, legislative or administrative."[85] This investigation was one of a series from the FTC into agricultural costs and prices undertaken around that time.[86]

The FTC report found that Henry Veeder's weekly meetings to coordinate the industry had survived the breakup of National Packing Co. and every other previous attempt to prevent their occurrence. In this new Veeder Pool, packers allegedly divided "purchases of the cattle, sheep, and hogs sent to

J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 63–81 (2016) (discussing the evolution in prices and demand from consumers).

81. *See generally* HANEY, *supra* note 77 (explaining the impact of the large meat packers on wholesale grocery businesses).

82. *E.g.*, *Meat Packer: Hearings Before the Comm. on Agric.*, 67th Cong. 54–63 (May 2, 1921) [hereinafter *Hearings on Agriculture*] (statement of Florence Kelley, Gen. Sec'y, Nat'l Consumers' League, in favor of regulating meatpacking). Though the Beef Trust had initially increased the supply of meat and pushed its unit cost down, the cost of meat (and the overall cost of living) began to rise in the first two decades of the twentieth century. Meat consumption declined, gradually being replaced with canned and processed food. Alice Béja, *The Political Uses of Food Protests: Analyzing the 1910 Meat Boycott*, 57 J. AM. STUD. 178, 178–80 (2023); GORDON, *supra* note 80, at 63–81. This trend accelerated after Upton Sinclair's famous exposé which—in addition to spurring stricter inspection rules—immediately halved meat consumption. "Even in the late 1920s, meat packers were still struggling to boost meat sales back to their pre-1906 heyday." GORDON, *supra* note 80, at 82; UPTON SINCLAIR, THE JUNGLE (1906).

83. In sum, agricultural output prices collapsed due to expansions of supply from Europe and the Global South, and the Gold Standard kept input prices and interest rates high, squeezing farmers on both ends. SKAGGS, *supra* note 46, at 130–65; Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 335–36 (1983); MONICA PRASAD, THE LAND OF TOO MUCH 85–87 (2012); JONATHAN LEVY, AGES OF AMERICAN CAPITALISM 370 (2021).

84. SKAGGS, *supra* note 46 at 130–65.

85. Letter from President Woodrow Wilson to Hon. William J. Harris, Chairman, Fed. Trade Comm'n (Feb. 7, 1917), *in* FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 50, 50–52.

86. Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 195–98 (2010) [hereinafter Winerman & Kovacic, *Outpost Years*].

market according to certain fixed percentages . . . [that] changed only when conditions were greatly altered . . . ."[87] This practice of market division allowed packers to maintain stable uniform prices for buying livestock and selling dressed meat, to restrict supply, and prevent new entrants.[88] It also made it easier to defraud farmers (via "short-weighing," for example) and consumers (via adulteration, for example). And it was supported by various other techniques to prevent competition and accountability.[89] These included multiple efforts to break unions and to sabotage the very investigation the Commission was reporting on.[90]

The Commission recommended nationalizing nearly all transportation, storage, and marketing infrastructure for meat and managing it under common carrier principles.[91] Although these recommendations about nationalization were not followed[92]—and some of the staff who produced the report were

87. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 24.

88. *Id.* at 49, 68–70.

89. As the Supreme Court summarized:

> The complaints of the shippers of live stock against the charges and practices, working to their prejudice in the conduct of the stockyards, the commission men and the dealers, were: First, suppression of competition in purchases through agreement by which one packer would buy a car load or train load of cattle and turn over half of it to the only other packer buying in the local market. Second, 'wiring on.' A shipper would send a car load or train load of stock to one stockyard. Finding the market unsatisfactory, he would ship them further east. The packers' agents were promptly advised at the second stockyards and, controlling the price there, they made it the same as at the first stockyards, though the shipper had paid the freight, and had to stand the 'shrink' of the cattle from the journey. Third, the charges in the stockyards for hay and other facilities were excessive. Fourth, the duplication of commissions through the collusion of the commission men and the dealers, by which commission men would sell at a lower price to dealers than to outside buyers, and drive the latter to buying from dealers through commission men, forcing two commissions. Fifth, the monopoly conferred by the stockyards owner on a company in which packers were largely interested, of buying at a fixed price of $5 a head all dead cattle for rendering purposes, when they were worth more. Sixth, the frequency with which commission men reported to shippers that live stock had been crippled and had to be sold in that condition at a lower price, arousing suspicion as to the fact and if it was a fact, as to the cause of the crippling.

Stafford v. Wallace, 258 U.S. 495, 502–03 (1922).

90. William B. Colver, *The Federal Trade Commission and the Meat-Packing Industry*, 82 ANNALS AM. ACAD. POL. & SOC. SCI. 170, 172 (1919).

91. FTC, REPORT ON MEAT-PACKING, *supra* note 58, at 77–78.

92. Congress initially considered the Commission's nationalization proposal, but it abandoned that idea after the consent decree was signed. *See* H.R. 13324, 65th Cong., 3d Sess. (Dec. 10, 1918); G.O. Virtue, *Legislation for the Farmers: Packers and Grain Exchanges*, 37 Q.J. ECON. 687, 688–89 (1923).

pushed out of the agency after a campaign of redbaiting[93]—the Commission's investigation was deeply influential on the second wave of reforms, which would shape the industry for decades.

These reforms had two major components. In the first, the DOJ used the Commission's findings as the basis for its antitrust action against the Big Five that almost immediately led to a settlement. The resulting consent decree required the five firms to divest ownership in stockyards, stop doing business in "side lines" (such as using their refrigerated rail cars to ship canned goods), divest their interests in forward-integrated railroads and retail stores, and submit to ongoing monitoring to maintain these separations.[94] Although there is no record of the DOJ's logic in arriving at this particular mix of terms, the intent to "limit[] the majors to being meat packers and meat wholesalers" is clear enough.[95] As the Supreme Court put it when it affirmed a challenge to the decree in 1932, the meatpackers

> abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subject to extraordinary restraints. There was fear that even when so acting they would still be ready to crush their feebler rivals in sale of groceries and kindred products by forms of competition too ruthless and oppressive to be accepted as fair and just.[96]

The reasoning here is ambiguous as to whether the point was to prevent big meatpackers' lower cost production and distribution techniques from becoming too large a source of leverage (i.e., that "efficiency" could only go so far in justifying size) or whether the point was to prevent packers from using exclusionary conduct to avoid competition from potentially more efficient entrants.[97] The reasoning offered by the Supreme Court seems to suggest that, at the least, productive efficiency did not matter as much as it came to after the Chicago School gained prominence (indeed, the *Swift* decision was critiqued by Bork and Posner). Nevertheless, examining the matter in 1989, Peter Carstensen found that "[t]he best economic data for the period suggests that

93. *See* Linda J. Bradley & Barbara D. Merino, *Stuart Chase: A Radical CPA and the Meat Packing Investigation, 1917–1918*, 23 BUS. & ECON. HIST. 190, 190–91 (1994).

94. *Current Legislation: The Packing Industry and the Packers Act*, 22 COLUM. L. REV. 68, 69 (1922).

95. Carstensen, *Impact of Antitrust*, *supra* note 38, at 1202–03.

96. United States v. Swift & Co., 286 U.S. 106, 119 (1932).

97. *See* Carstensen, *Impact of Antitrust*, *supra* note 38, at 1203.

the major packers were no more efficient than their rivals and frequently less so."[98]

In any case, the consent decree remained in effect for sixty-one years.[99] It was actively enforced despite multiple motions to vacate or modify it and multiple agreed-to modifications.[100] The decree mostly prevented the Big Five from integrating forward—into retail or certain lines of meat processing or shipping—and kept stockyards outside their control. In doing so, it likely prevented these incumbents from stifling or adjusting to the efforts of insurgent competitors who, as we will see, would soon get about the task of transforming the industry.

The second component of reform came from Congress through the PSA. The PSA created an administrative sub-agency to monitor competitive conditions in meatpacking specifically and to prevent packers and stockyards from abusing their power more generally. To accomplish this task, the PSA gave authority to the Secretary of Agriculture to initiate administrative hearings appealable to a federal court of appeals, to write regulations, to undertake investigations, to inspect books and records, and to engage in rate regulation of stockyards.[101]

Substantively, the PSA treated "packers" and "stockyards" separately. Stockyards were given the public utility treatment, borrowing language and concepts from the Interstate Commerce Act[102] ("ICA"), as well as state common carrier regulations.[103] Indeed, the stockyard half of the PSA seems to be the first federal law to apply these concepts to an organized exchange, predating the

98. *Id.*

99. United States v. Swift & Co., 1981 WL 2171, at *1 (N.D. Ill. Nov. 23, 1981).

100. United States v. Swift & Co., 1980 WL 1797 (N.D. Ill. Jan. 25, 1980) (modifying); United States v. Swift & Co., 1975 WL 864 (N.D. Ill. Jan. 17, 1975) (modifying); United States v. Swift & Co., 1971 WL 575 (N.D. Ill. Dec. 20, 1971) (modifying); United States v. Armour & Co., 402 U.S. 673 (1971) (interpreting the order as originally written); United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd* 367 U.S. 909 (1961) (declining to vacate or modify); United States v. Swift & Co., 286 U.S. 106, 120 (1932) (declining to vacate or modify); Swift & Co. v. United States, 276 U.S. 311 (1928) (declining to vacate or modify).

101. Packers and Stockyards Act, Pub. L. 67-51, 42 Stat. 159, 161–64, 169 (1921) (codified as amended at 7 U.S.C. §§ 181–231).

102. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

103. It is worth noting that the ICA was also enacted after a previous proposal to nationalize core transportation routes (to create a public option) was rejected. *Compare* REPORT OF THE SELECT COMMITTEE ON TRANSPORTATION-ROUTES TO THE SEABOARD, S. REP. NO. 307, 43d Cong, at 140–41, 155–61 (1874), *with* REPORT OF THE SENATE SELECT COMMITTEE ON INTERSTATE COMMERCE, S. REP. NO. 46, 49th Cong., at 53 (1886).

Futures Trading Act[104] (which became the Grain Futures Act,[105] which became the Commodity Exchange Act[106]) by a year. Per the PSA, stockyard operators had to register with the USDA and regularly file records of all rates and charges, which the agency could (and can) challenge for being unjust or unreasonable.[107] They were required to provide all of their services on "reasonable and nondiscriminatory" terms and not refuse to provide services for "unreasonable or unjustly discriminatory" bases.[108] They had to run their stockyards in a "reasonable and nondiscriminatory manner," including by monitoring and regulating the behavior of marketing agents selling livestock on behalf of farmers.[109] For good measure, both stockyards and marketing agents were prohibited from "engag[ing] in or us[ing] any unfair, unjustly discriminatory, or deceptive practice or device" in any of their activities.[110]

For their part, packers were not quite treated as public utilities—crucially, they do not have to file rates[111]—but they were subjected to heightened monitoring[112] and regulatory scrutiny that cobbled together principles from previous antitrust and common carrier laws and builds on top of them. Call this "dominant player" regulation. We will discuss its details below when we turn to potential applications in the present.

Together, the consent decree and the PSA joined the meat inspection apparatus to form a makeshift but stable regulatory regime that covered much of the meat supply chain. As we saw above, multiple efforts from the meatpackers to remove the consent order were dismissed, as was a constitutional challenge to the PSA.[113] Coming from the other side, a 1948 Justice Department

104. Future Trading Act, Pub. L. No. 67-66, 42 Stat. 187 (1921), *invalidated by* Hill v. Wallace, 259 U.S. 453, 459 (1922).

105. Grain Futures Act, Pub. L. No. 67-331, 42 Stat. 998 (1922) (codified as amended 7 U.S.C. §§ 1–17).

106. Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–27).

107. 7 U.S.C §§ 205, 206.

108. *Id.* § 205.

109. *Id.* §§ 203, 205, 207.

110. *Id.* § 213.

111. This issue came up multiple times in Congressional debates, and each time the main drafters of the legislation were definitive on this point. *Hearings on Agriculture*, *supra* note 82, at 25 (statement of Rep. Anderson); 61 CONG. REC. 1801 (May 26, 1921) (statement of Rep. Haugen); 61 CONG. REC. 1879 (May 27, 1921) (statements of Reps. McLaughlin & Sanders); 61 CONG. REC. 2388 (June 10, 1921) (statement of Sen. Kenyon); 61 CONG. REC. 2611 (June 15, 1921) (statement of Sen. Caraway).

112. 7 U.S.C. § 221 (requiring the keeping of books and records and the disclosure of all transactions "in the manner and form prescribed or approved by the Secretary").

113. *Supra* note 100 and accompanying text; Stafford v. Wallace, 258 U.S. 495, 497 (1922).

lawsuit that would have dissolved the Big Five and restructured the entire industry fizzled when the "slow proceedings" of a special master "allowed for a change in national administration and an ultimate voluntary dismissal."[114] The meatpacking industry remained dominated by the Big Five and its expansive rail-based refrigerated distribution network, but now—at least in theory—these firms had been tamed. A series of regulations, albeit spread across multiple regulatory agencies, restricted the dominant packers' ability to enter other markets while regulating the quality and the labeling of all packers' products and the terms on which they could bargain with suppliers and distributors and compete with each other.

Labor regulation arrived during the New Deal. Labor organizations had played little role in the Populist and Progressive reform projects, yet labor organizing was active and often militant at meatpacking plants.[115]

Packers had brutally defeated multiple unionization campaigns over the decades, often using racist divide-and-conquer tactics and buying off skilled butchers who believed that unskilled workers were unorganizable.[116] Unions became more directly involved with electoral politics and played a major role in the New Deal coalition. Buoyed by the National Labor Relations Act[117] ("NLRA") (and before that, the National Industrial Recovery Act and wartime support from the government), the interracial and multi-ethnic industrial-union strategy of the Congress of Industrial Organizations finally pushed meatpacking executives to the bargaining table.[118] The first major contract was signed in 1940, and by 1946, a cross-industry strike forced President Truman to

114. Carstensen, *Impact of Antitrust*, *supra* note 38, at 1205. It is worth noting that the packers were briefly subject to direct price controls. During World War II, the Office of Price Administration (OPA) successfully kept the price of beef down without reducing supply. It was enormously popular for having done so, and Congress initially proposed maintaining price caps during the postwar recovery (if not beyond). Meatpackers rebelled—cutting supply to erode public support while lobbying and advertising heavily. They won. Meat prices immediately shot up. *See* MEG JACOBS, POCKETBOOK POLITICS 222–31 (2005); Meg Jacobs, *"How About Some Meat?" The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946*, 84 J. AM. HIST. 910, 932 (1997).

115. *See generally* SANDERS, *supra* note 65, at 30–100; *See* HALPERN, *supra* note 47, at 44–129.

116. Halpern, *supra* note 47 at 44–129.

117. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–66)

118. *Id.* at 134 ("[T]he National Labor Relations Board held its first representation election in the stockyards. In early November 1937, workers . . . voted overwhelmingly to have the CIO serve as their bargaining agent . . . . The company recognized but adamantly refused to bargain with the newly certified union . . . . [T]he plant's workers swung into action [and after a strategic work stoppage,] [t]he superintendent capitulated and ushered the union committee into his office for a meeting."); WHITTAKER, *supra* note 17, at 12–18.

intervene.[119] The result was a sector-wide pattern bargaining structure governed by NLRB-supervised bargaining and arbitration that lasted until the latter half of the 1970s. By the early 1960s, "95% of hourly workers in beef and pork multi-plant packers outside the south" were members of one of two unions, and those two unions signed a treaty in 1968, making them functionally similar to one big union (though not without internal rivalry).[120] Working conditions and wages improved dramatically—meatpacking went from an industry full of contingent positions and a racialized hierarchy of tasks to a system of stable middle-class jobs "comparable to auto and steel production" in a relatively integrated workplace governed by seniority.[121]

Taken together, these piecewise efforts at regulation created a quasi-sectoral regime. Packers' purchases largely took place on public exchanges. Their treatment of farmers was subject to industry-specific regulation and supervision. Their treatment of rivals and merger activity was monitored by a district judge. Their treatment of workers was subject to nearly industry-wide collective bargaining agreements. Their treatment of animals was overseen by health and safety auditors. This monitoring was not all performed by a single agency nor was it under the aegis of a single coherent statutory scheme, but it covered nearly every industry practice. And it was embedded in a series of complementary regimes—such as the New Deal agricultural bill and (at least in the initial postwar years) aggressive sector-wide antitrust sweeps—that aimed to promote stable input and output prices for farmers, stable supply, and moderate prices for consumers.[122]

Assessing the effects of this complex and evolving regime goes well beyond our scope here (and would be worthy of much further study), but a few things can be said with confidence. As already noted, wages and working

119. Jeffrey Keefe & Mathias Bolton, *When Chickens Devoured Cows: Union Rebuilding in the Meat and Poultry Industry, in* COLLECTIVE BARGAINING UNDER DURESS CASE STUDIES OF MAJOR U.S. INDUSTRIES 161, 171 (Howard R. Stanger, Ann C. Frost & Paul F. Clark eds., 2013).

120. *Id.* (on union density); WHITTAKER, *supra* note 17, at 18–20 (on union alliance). In the 1960s, only a small amount of meat production outside of chicken (which was itself a relatively small industry) took place in the South. *See* Charles Craypo, *Meatpacking: Industry Restructuring and Union Decline*, *in* CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 65, 67 (Paula B. Voos ed., 1994).

121. Calamuci, *supra* note 7, at 70.

122. *See* ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., REPORT NO. 530, AGRICULTURAL FOOD-POLICY REVIEW: COMMODITY PROGRAM PERSPECTIVES, 3 (1985), https://ers.usda.gov/sites/default/files/_laserfiche/publications/40556/50974_aer530.pdf?v=97275 [https://perma.cc/WGV7-NSKW]; Basel Musharbash, "*Kings over the Necessities of Life": Monopolization and the Elimination of Competition in America's Agriculture System*, FARM ACTION 17–29 (Sept. 2024).

conditions for those who toiled in the packing plants were dramatically improved by federal recognition of sector-wide pattern bargaining agreements.[123] Incumbent packers were also disempowered: they controlled a significantly smaller share of the industry (four-firm concentration ratios were twenty-six percent for cattle and thirty-three percent for hogs by 1963), and they were prevented from expanding their influence into surrounding industries.[124] Yet, as we will discuss below, it is not entirely clear that industry deconcentration can be attributed to any of these reforms (rather than the entry of new packers, taking advantage of the opportunity created by the national highway system). Although prices do seem to have remained relatively stable and markups relatively low during the postwar period, more analysis would be necessary to parse out the relative impact of the multiple different reforms (antitrust enforcement versus the Farm Bill price control scheme, say) and the relative standing of the United States internationally during this period (with no other country approaching its scale of meatpacking) in producing this effect.[125]

B. *Insurgency, Reorganization, Reconsolidation, 1950–2010*

Whatever the effectiveness of this regime, it did not last long. Among its many shortcomings and inconsistencies, perhaps its fatal flaw was its ambivalent attitude toward competition.

By the 1950s, meatpacking market concentration had finally gone down as the intensity of competition increased. This increased competition lasted until the 1980s, just about when the consent decree was lifted. Some commentators who decry the hyperconcentration of today's food markets have treated this surge of competition as a victory for regulation and a virtue of the regime. But it is not at all clear how much of the increased competitiveness can be traced to either the consent decree or the PSA. In fact, the most important new entrants into meatpacking in this period—the poultry industry and the so-called "New Breed" packers—succeeded by maneuvering *around* the midcentury regulatory regime. These companies built enormous facilities outside of the big shipping cities, relying on trucks rather than trains, de-skilled high-turnover low-wage

123. *Supra* notes 7 & 121 and accompanying text.

124. Musharbash, *supra* note 122, at 95.

125. *Cattle: Marketing Year Average Prices Received 1909–2011*, U.S. DEP'T OF AGRIC. NAT'L AGRIC. STAT. SERV. WASHINGTON FIELD OFFICE (2011), https://www.nass.usda.gov/Statistics_by_State/Washington/Publications/Historic_Data/livestock/cattlmya.pdf [https://perma.cc/BUJ9-ZGR4].

employees rather than unionized workforces, and long-term contracts and quasi-franchising arrangements rather than stockyard bidding. It is true that the companies benefited from the restrictions placed on the Big Five, but they also benefited from the same flexibility to maneuver around labor laws, transportation regulation, and the USDA's lack of creativity in using the PSA to prevent these evasions. And their success—along with the consolidation of surrounding industries like retailers—eventually undermined the regimes that governed the Big Five, creating the conditions for de-unionization, de-regulation, and ultimately reconsolidation.

The insurgency that challenged quasi-sectoral regulation had two fronts: beef and chicken. The remainder of this section recounts each of these insurgencies in turn. It then explains how, after competition hollowed out regulation, anemic antitrust enforcement enabled the industry to reconsolidate into its modern form.

1. Beef Insurgency

In 1960, two former Swift & Co. employees took a $300,000 loan from the Small Business Association to form Iowa Beef Packers (IBP).[126] Their strategy was to open packing plants in rural areas and buy directly from farmers, rather than through marketing agents at stockyards. Because of the federal meat inspection regime, these new packers did not have to "develop [their] own reputation for quality," which "lowered a significant entry cost."[127] Making use of cheap real estate in rural areas, their plants were horizontal rather than vertical and full of state-of-the-art technology, speeding up the process of slaughtering and dismembering.[128] This technology also further deskilled the disassembly line and lowered the number of workers required to produce a given amount of meat, further undermining worker power.[129]

126. Michael J. Broadway, *From City to Countryside: Recent Changes in the Structure and Location of the Meat- and Fish-Processing Industries*, *in* ANY WAY YOU CUT IT 17, 18 (Donald D. Stull, Michael J. Broadway & David Griffith eds., 1995) [hereinafter Broadway, *From City to Countryside*]; Steve Bjerklie, *On the Horns of a Dilemma: The US Meat and Poultry Industry*, *in* Any Way You Cut It, *supra*, at 41, 53; LEONARD, *supra* note 39, at 169–71. The company later changed its name to "Iowa Beef *Processors*." LEONARD, *supra* note 39, at 169 (emphasis added).

127. Carstensen, *Impact of Antitrust*, *supra* note 38, at 1205.

128. *See id.*

129. WHITTAKER, *supra* note 17, at 28.

Indeed, IBP's locational and technological decisions were in part motivated by an effort to undermine workers' bargaining position.[130] IBP broke unions and recruited workers from marginalized and transient populations, just as the original Big Five had done in their earlier efforts to resist unionization.[131] Workers at IBP were paid roughly *half* the wages of workers in similar roles at the incumbent plants.[132] And "IBP and other growing giants gobbled up unionized plants and reopened them without a union—and with considerably lower wages."[133]

To maneuver around existing distribution systems (and their regulation), IBP shipped its cuts of beef in refrigerated trucks rather than trains, making use of the recently constructed interstate highway system.[134] As IBP expanded, it integrated forward into butchery, cutting cattle into vacuum-sealed portions, so-called "boxed beef," that it sold to grocery stores that fired and/or de-skilled their in-house butchers. Independent butchers closed up shop.[135]

Other "independent" (or "New Breed") packers soon imitated IBP's strategy.[136] Feeling the pressure, the Big Four began to close their newly out-of-date multi-story plants in big cities "and to build new, single-story beef slaughtering plants to compete with the independents on the high plains."[137] They initially maintained their master agreements with unions, making it difficult to compete on cost with the independents. Declining demand for beef in the 1970s created a smaller stream of income for the increasing number of firms to compete over, putting pressure on profitability.[138] Despite the reduced

130. WHITTAKER, *supra* note 17, at 27–28. This general strategy of closing tall, unionized factories in cities and opening wide (often) nonunionized factories in rural areas was not unique to meatpacking in this time period. *See* STEVEN CONN, THE LIES OF THE LAND 117–28 (2023).

131. WHITTAKER, *supra* note 17, at 34–40; Charles Craypo, *Strike and Relocation in Meatpacking*, *in* GRAND DESIGNS: THE IMPACT OF CORPORATE STRATEGIES ON WORKERS, UNIONS, AND COMMUNITIES 185, 201 (Charles Craypo & Bruce Nissen eds., 1993); *see also* Carrie Freshour, *Cheap Meat and Cheap Work in the US Poultry Industry: Race, Gender, and Immigration in Corporate Strategies to Shape Labor*, *in* GLOBAL MEAT, *supra* note 20, at 121, 125–27.

132. Broadway, *From City to Countryside*, *supra* note 126, at 19.

133. FRERICK, *supra* note 3, at 126.

134. Carstensen, *Impact of Antitrust*, *supra* note 38, at 1205; LEONARD, *supra* note 39, at 169–72.

135. LEONARD, *supra* note 39, at 170–72.

136. *See* Craypo, *supra* note 131, at 187–88; LEONARD, *supra* note 39, at 169–76; FRERICK, *supra* note 3, at 125–28.

137. Stephen Wayne Hiemstra, Labor Relations, Technological and Structural Change in U.S. Beef Packing and Retailing 74 (Oct. 8, 1985) (Ph.D. dissertation, Michigan State University) (on file with Michigan State University Libraries).

138. Keefe & Bolton, *supra* note 119, at 9; Jon K. Lauck, *Competition in the Grain Belt Meatpacking Sector After World War II*, 57 ANNALS IOWA 135, 141–43 (1998) [hereinafter Lauck, *Competition*].

size of the market, four-firm concentration ratio hovered around thirty percent during this period, down from over fifty percent in the 1950s.[139] Increased market power on the input end (grain growers and feedlots) and the output end (retail and chain restaurants) created a vice that further squeezed profits.[140] All of this put pressure on incumbents to cut costs to match the insurgents.

2. Chicken Insurgency

The other insurgency came from chicken. Between 1930 and 1990, chicken meat went from a "seasonal delicacy" to the best-selling animal flesh in the US (and second-best worldwide).[141] When the PSA was passed, chicken raised for its meat ("broilers," in industry parlance) was a byproduct of raising chicken for their eggs.[142] Broilers were considered "women's work," not worthy of full compensation nor considered worthy of inclusion in the PSA.[143] But a series of government investments and technological innovations quickly pushed broilers to the cutting edge of agribusiness. The discovery of Vitamin D in 1926 made it possible to raise chickens without exposure to sunlight.[144] The Roosevelt Administration's National Poultry Improvement Plan eliminated and managed enough poultry diseases to make large-scale confinement possible.[145] Large indoor facilities for raising chickens were installed in the Delmarva (Delaware, Maryland, Virginia) region, and they pushed forward the frontiers of animal and agricultural science.[146] This investment was further stimulated by the federal government buying up the entire Delmarva output to feed troops in

139. Lauck, *Competition*, *supra* note 138, at 146–47.

140. *Id.* at 137–40.

141. William Boyd & Michael Watts, *Agro-Industrial Just-in-Time: The Chicken Industry and Postwar American Capitalism*, *in* GLOBALISING FOOD: AGRARIAN QUESTIONS AND GLOBAL RESTRUCTURING 192, 192–97 (David Goodman & Michael J. Watts eds., 1997); Howard, *Corporate Concentration*, *supra* note 20, at 7.

142. Freshour, *supra* note 131, at 124.

143. Congress added poultry production to the PSA during the New Deal. An Act to Amend the Packers and Stockyards Act, ch. 532, 49 Stat. 648 (1935) (codified as amended in scattered sections of 7 U.S.C.).

144. *See* Boyd & Watts, *supra* note 141, at 143.

145. *See id.* at 198.

146. Douglas H. Constance, *The Southern Model of Broiler Production and its Global Implications*, 30 CULTURE & AGRIC. 17, 18 (2008) [hereinafter Constance, *Southern Model*]; *see* William Boyd, *Making Meat: Science, Technology, and American Poultry Production*, 42 TECH. & CULTURE 631, 636 (2001).

World War II.[147] By the end of the 1930s, the Delmarva facilities were collectively raising and killing 300,000 chickens a day.[148]

With the major chicken suppliers shipping their goods overseas and with wartime price controls not applying to chicken, a huge opportunity arose for anybody with land, experience with agriculture, and a head for investment. It turned out that, at exactly the same time, southern planters were facing a collapse in cotton prices and looking for opportunities.[149] An Agricultural Adjustment Administration program that paid planters to let cotton land lay fallow pushed many tenant farmers out of work, creating a fresh supply of desperate labor.[150] Led by the Georgia Cotton Producers Association, Southern planters—especially in northern Georgia, Alabama, and Arkansas—got into the broiler business.[151] These "growers" were able to build highly sophisticated indoor poultry facilities due to the work of the New Deal's Rural Electrification program.[152] And their early investments were effectively guaranteed to pay off when, in 1944, the "War Food Administration reserved all the chicken produced from seven counties in North Georgia."[153]

Over the course of the 1950s, growers became increasingly dependent on "integrators" (originally grain and feed companies) who sold chicks and feed on credit and bought and slaughtered grown chickens at the end.[154] Meanwhile, innovations in selective breeding, hormone treatments, antibiotic usage, and technology for raising and feeding chickens (much of which developed at land-grant universities) made poultry production significantly more efficient—producing several times more pounds of chicken per farm, per hour of labor, per pound of feed.[155] The amount of time it took to raise a chicken to full size was cut in half.[156]

147. Constance, *Southern Model*, *supra* note 146, at 18; Boyd & Watts, *supra* note 141, at 198.

148. Constance, *Southern Model*, *supra* note 146, at 18; Douglas H. Constance, Francisco Martinez-Gomez, Gilberto Aboites-Manrique & Alessandro Bonanno, *The Problem with Poultry Production and Processing*, *in* THE ETHICS AND ECONOMICS OF AGRIFOOD COMPETITION 155, 157 (H.S. James, Jr. ed., 2013).

149. Freshour, *supra* note 131, at 124–25; Boyd & Watts, *supra* note 141, at 198–99.

150. Freshour, *supra* note 131, at 124.

151. *See id.*; Boyd & Watts, *supra* note 141, at 201.

152. Boyd & Watts, *supra* note 141, at 197–98.

153. Freshour, *supra* note 131, at 125.

154. Constance, *Southern Model*, *supra* note 146, at 19; Boyd & Watts, *supra* note 140, at 199–200.

155. Constance, *Southern Model*, *supra* note 146, at 20; Boyd & Watts, *supra* note 141, at 198–99; DONN ALVIN REIMUND, J. ROD MARTIN & CHARLES V. MOORE, U.S. DEP'T OF AGRIC., BULL. NO. 1648, STRUCTURAL CHANGE IN AGRICULTURE: THE EXPERIENCE FOR BROILERS, FED CATTLE, AND PROCESSING VEGETABLES 7 (1981).

156. Broadway, *From City to Countryside*, *supra* note 126, at 19.

Yet the broiler business, especially as it became more capital intensive, was prone to boom-and-bust cycles that left growers vulnerable to bankruptcy.[157] This volatility also drove feed companies out of the market, leaving it open for new specialized chicken slaughterers like Tyson, Perdue, and Holly Farms to become the new integrators.[158] They managed volatility through vertical integration and vertical constraints. Rather than selling chicks and feed, they rented chicks out and required them to be raised under highly specific conditions specified via yearly contracts.[159]

By the 1960s, the broiler industry had developed a distinctive structure. A few highly capitalized integrators each owned a network of industrialized feed-producing, egg-laying, and chicken-slaughtering plants. These plants were all located in rural areas, predominantly in the South.[160] Executives and managers were highly compensated, in line with other Fortune 500 companies. Workers who dealt with poultry directly (such as egg sorters and workers on the "disassembly line") were paid near minimum wage for monotonous and dangerous work.[161] Union presence was always minimal, and turnover was consistently high. To keep it that way, integrators have intentionally ensured that the workforce is drawn mostly from contingent and marginalized labor forces—originally white women and children not needed in the fields; then Black former sharecroppers; then, starting in the 1980s, predominantly Latino immigrants, often undocumented; and, when those immigrants began to organize, Black women with few other job opportunities.[162] Children have also consistently been part of this workforce.[163]

Even as chicken integrators expanded their vertical integration, they consistently left the actual raising of chickens to nominally independent farmers. For decades, each slaughtering plant was surrounded by a thirty-mile radius of growers that entered into year-long contracts with the integrator that controlled the nearby plant. Growers seeking these contracts for the first time had to take out loans—often from integrators themselves—to build multiple enormous, million-dollar, high-technology indoor growing complexes capable

157. Boyd & Watts, *supra* note 141, at 201, 210.

158. *Id.*

159. *See id.* at 200.

160. *Id.* at 203.

161. *See* David Griffith, Michael J. Broadway & Donald D. Stull, *Introduction: Making Meat*, *in* ANY WAY YOU CUT, *supra* note 126, at 3, 4.

162. Freshour, *supra* note 131, at 125–34; WHITTAKER, *supra* note 17, at 32–34; Boyd & Watts, *supra* note 141, at 213.

163. FRERICK, *supra* note 3, at 132.

of containing hundreds of thousands of chickens each. The contracts were structured as renewable sharecropping arrangements: growers obtained all of their chicks and feed from the same integrator on loan and returned the grown chickens to the same integrators. They were paid according to private formulas that were meant to incentivize maximization of meat output per feed input.

The chicken industry developed largely outside the regulatory strictures that constrained the beef and pork industries. Indeed, when the USDA attempted to stop integrators' efforts to undermine the creation of a cooperative of poultry growers as "unjustly discriminatory" under the PSA, it successfully argued that inartful drafting in the statute made it such that the PSA (as of 1969) did not apply to them.[164]

Without these strictures, chicken began to seriously compete with beef and pork in the 1970s. By the end of that decade, chicken "was less than a third the price of beef and less than half the price of pork."[165] Demand for chicken increased dramatically, surpassing that for beef in 1990.[166] Chicken became most threatening to beef and pork once integrators integrated forward into meat processing—developing "nuggets"—and convinced fast food companies to include these new products on their menus.[167] "In 1980, McDonald's sold no chicken; by 2012, McDonald's sold more chicken than beef."[168]

Chicken began to cut into the profits of the beef and pork industries that were the only real games in town half a century earlier.

> As the boundaries of product substitution shifted, the highly unionized workforce in red meat [including beef and pork] with union wages and benefits began to compete with the low-wage, nonunion labor in the broiler industry based in the rural Black Belt South that earned half their wages but had higher productivity growth.[169]

Reclaiming market share—or, more realistically, preventing an even more rapid decline in market share—required not just marketing campaigns like "Pork. The Other White Meat." and "Beef. It's What's for Dinner." (paid for through special federal taxes collected by packers called "checkoff fees") but also imitating the business practices of the chicken industry to cut costs and increase

164. LEONARD, *supra* note 39, at 84–85.
165. *Id.* at 92.
166. Boyd & Watts, *supra* note 141, at 192.
167. *See* STEVE STRIFFLER, CHICKEN 19–31 (2005); *see also* LEONARD, *supra* note 39, at 93–102.
168. Keefe & Bolton, *supra* note 119, at 13.
169. *Id.* at 14.

efficiency.[170] Indeed, it is not uncommon to hear the transformation of the beef and pork industry that followed referred to as "chickenization."[171]

3. Reorganization and Reconsolidation

In addition to these insurgents, incumbent packers were hemmed in by the growing power of upstream feed companies—with their highly profitable, IP-protected grains and legumes—and downstream chain retailers.[172] Besieged on multiple fronts and without an effective regulatory shield, incumbent packers could not maintain their business model. Conglomerates sped up the process by acquiring incumbent packers (for a time, Greyhound owned Armour), shutting down many of their plants, breaking their unions, and expanding the high-tech rural plants with fewer workers, lower wages, and little to no union representation (and a growing amount of workplace injuries).[173] Several of the more profitable firms and plants were purchased by agricultural oligopolists Cargill and ConAgra.[174] Meanwhile, Tyson brought its business model to pork from its base in chicken and IBP did the same from its base in beef.[175] Incumbent pork packers—many of which were the same companies as the incumbent beef packers—did not have to learn the same lesson twice.[176] Plants were closed, unions were busted, packing was sped up, workers were laid

170. Jane L. Levere, *The Pork Industry's 'Other White Meat' Campaign Is Taken in New Directions*, N.Y. TIMES (Mar. 4, 2005), https://www.nytimes.com/2005/03/04/business/media/the-pork-industrys-other-white-meat-campaign-is-taken-in-new.html [https://perma.cc/UZL7-UC26 (staff-uploaded, dark archive)]; Amanda Radke, *Beef Checkoff Revamps "Beef. It's What's For Dinner." Campaign*, BEEF (Oct. 9, 2017), https://www.beefmagazine.com/farm-business-management/beef-checkoff-revamps-beef-it-s-what-s-for-dinner-campaign [https://perma.cc/LAY5-UXEA (staff-uploaded archive)]; LEONARD, *supra* note 39, at 149–83; Keefe & Bolton, *supra* note 119, at 15–17.

171. LEONARD, *supra* note 39, at 145.

172. MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 7–24, 36–44; Musharbash, *supra* note 122, at 45–46; *see also* FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES: THE GROCERY CARTELS 8 (2021), https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS-V2FINAL.pdf [https://perma.cc/RP8T-QZ77]. Peter Carstensen points out that, in 1975, a class of farmers "persuaded a trial court that a number of supermarkets were coordinating their buying from packers in a way that resulted in artificial lowering of supply prices," but that this decision "ultimately resulted in little liability or reform." Carstensen, *Impact of Antitrust*, *supra* note 38, at 1206.

173. MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 9–10; Hiemstra, *supra* note 137, at 76–78.

174. Lauck, *Competition*, *supra* note 138, at 151–52.

175. LEONARD, *supra* note 39, at 149.

176. NICK KARLSON & VERNON EIDMAN, STRUCTURAL CHANGES IN MEAT PACKING AND PROCESSING: THE PORK SECTOR 25 (1991).

off and wages cut, and pig farms were industrialized.[177] Stockyards thinned out, largely replaced by relational contracting.[178]

This restructuring of industry generated a scramble for control and stabilization just as the consent decree was lifted. The timing was not good for re-regulation since bipartisan enthusiasm for "deregulations" was then *au courant*.[179] Also *au courant* was a bipartisan enthusiasm for throttling back antitrust enforcement.[180] So, a merger wave followed, largely unopposed.[181]

Over the course of the 1980s, "the number of cattle-feeding operations in the largest 13 cattle states dropped by 40 percent."[182] By 1995, the four largest packers—Tyson, Cargill, Swift (now JBS-Swift), and National Beef—purchased 81% of cattle.[183] "Since 1980, an average of nearly 17,000 cattle ranchers have gone out of business every year."[184] In pork, the wave came a bit later: the four-firm concentration ratio in packing went from 30% in 1980 to 50 percent in 1995 to 70% in 2010.[185] Farms also became increasingly concentrated: "the number of hog operations declined from 240,000 to 70,000" between 1992 and 2004 even as output increased.[186] The major firms also consolidated their control across industries. After expanding from chicken to pork through internal growth in the 1980s, Tyson became a major player in the beef market when it

177. Keefe & Bolton, *supra* note 119, at 10; *see* LEONARD, *supra* note 39, at 190–94.

178. LEONARD, *supra* note 39, at 173.

179. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1393–97 (1998). *See generally* Appelbaum, *supra* note 24 (discussing Biden's plans to reduce beef prices through regulatory intervention).

180. *See generally* George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1 (discussing the influence of Robert Bork's *Antitrust Paradox* on the Supreme Court antitrust opinions).

181. Carstensen, *Impact of Antitrust*, *supra* note 38, at 1207.

182. CLAIRE KELLOWAY & SARAH MILLER, FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM 3 (2019).

183. MacDonald, *Concentration in U.S.*, *supra* note 16; KENNETH H. MATHEWS, JR., WILLIAM F. HAHN, KENNETH NELSON. LAWRENCE A. DUEWER & RONALD A. GUSTAFSON, U.S. DEP'T OF AGRIC., TECH. BULL. NO. 1874, U.S. BEEF INDUSTRY: CATTLE CYCLES, PRICE SPREADS, AND PACKER CONCENTRATION 35 (2019), https://ers.usda.gov/sites/default/files/_laserfiche/publications/47232/17825_tb1874_1_.pdf?v=85993 [https://perma.cc/FM97-J7BZ] .

184. KELLOWAY & MILLER, *supra* note 182, at 3.

185. MacDonald, *Concentration in U.S.*, *supra* note 16.

186. MARCY LOWE & GARY GEREFFI, A VALUE CHAIN ANALYSIS OF THE U.S. PORK INDUSTRY 10 (2008), https://www.globalvaluechains.org/wp-content/uploads/CGGC_PorkIndustry Report_10-3-08.pdf [https://perma.cc/9PJ2-4WMY]; LEONARD, *supra* note 39, at 196–97.

acquired IBP—then the largest hog and cattle packer—in 2001.[187] Cargill, which started in grain, acquired major beef, pork, and poultry divisions. JBS, a Brazilian corporation supported by sweetheart loans from the Brazilian government, has become the world's largest meatpacking company in part by rolling up Swift & Co., Smithfield's cattle division, Pilgrim's Pride (which had previously rolled up ConAgra's chicken division and Gold Kist), and Cargill's pork division.[188]

II. EVALUATING TODAY'S MEATPACKING INDUSTRY

The United States meatpacking industry merger-and-acquisitioned its way into its modern form over the course of the 1990s. Today, the agribusiness model of meatpacking is dominated by massive multinational, vertically integrated firms committed to cost cutting throughout the supply chain and generating profitability through the marketing of value-added products (frozen meals, chicken nuggets, etc.). These firms are embedded in an agribusiness ecosystem—the industries that provide their inputs and the firms that buy their outputs are also dominated by massive multinational, vertically integrated firms.[189] Major packers are unencumbered by collective bargaining agreements or robust regulation. They are disciplined primarily by their efforts to capture market share from each other—efforts that have become less vigorous as their control and cooperation have consolidated.

There are some important benefits to the modern agribusiness model, but its impact on the lives of workers, farmers, nearby communities, animals, and the environment cries out for reform. This part identifies the basic structure of modern meatpacking—and its variation by major animal/protein type—and explains its most significant impacts, good and bad.

187. Jim Jenkins, *Tyson's Acquisition of IBP Completed*, SIOUX CITY J. (Sept. 29, 2001), https://siouxcityjournal.com/news/local/tysons-acquisition-of-ibp-completed/article_5754f433-92e1-57c4-895e-16a85dda66fb.html [https://perma.cc/R58K-XHYR]; MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 28.

188. KELLOWAY & MILLER, *supra* note 182, at 4; Howard, *Corporate Concentration*, *supra* note 20, at 31, 35. JBS's proposed acquisition of National Beef Packing in 2008 was dropped after the DOJ threatened to sue. Howard, *Corporate Concentration, supra* note 20, at 50.

189. Since my focus is on regulation of US companies, I am not discussing the development of meatpacking industries in other countries or the trade and other rules that shape the balance of global competition. For information on the global development of the meat market, see Howard, *Corporate Concentration*, *supra* note 20 (discussing the role that feed and financial subsides had on the global concentration of meat producers).

A. *Agribusiness Theme and Variation*

In the agribusiness model, nearly every part of production—from feed to breeding to slaughter and processing to transportation and wholesaling—is coordinated by a small group of vertically integrated corporations that sell their output largely to a small group of vertically integrated retailers (like Costco, Walmart, Amazon, Kroger) and wholesalers to food service companies (like Sysco, US Foods, Aramark). These firms locate their plants in rural areas and take advantage of racialized, gendered, and nativist divides to recruit a low-wage, high-turnover workforce to risk serious injury on high-speed disassembly lines.[190] They outsource raising animals to networks of farmers, with whom they deal mostly according to renewable year- or season-long adhesive contracts that price according to incentive-driven formulas. The prevalence of these contracts varies by industry.[191] Stockyards are mostly vestigial, playing a role only in some limited parts of the beef industry.[192]

Each market is heavily concentrated. As of 2019, the four-firm concentration ratio for chicken slaughter was 53%, for pig slaughter 67%, and for cow slaughter 85%.[193] Since "the procurement of livestock occurs in local or regional markets because the animals cannot [profitably] be moved far for slaughter," focusing on nationwide concentration ratios understates the local market concentration that most directly affects farmers.[194] In many regions, that concentration approaches literal monopoly.[195] Meanwhile, many of the big firms in one industry are the same as in the others, if not members of the same corporate "family." Cargill, Tyson, and JBS constitute three of the "Big Four" in pork, beef, and poultry.[196]

Farms have, in turn, become much larger-scale and more capital-intensive ventures. In poultry, animals are now raised in as confined a space as possible

190. Sherley Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 658–59 (2022).

191. CONTRACTING IN AGRICULTURE: MAKING THE RIGHT DECISION, NAT'L SUSTAINABLE FARMERS COAL. 2, 8 (2016), https://sustainableagriculture.net/wp-content/uploads/2017/03/2016-Drake-FSA-NSAC-Production-Contracts-Guide.pdf [https://perma.cc/TTY5-7PLA].

192. *See* MICHAEL K. ADJEMIAN, B. WADE BRORSEN, WILLIAM HAHN, TINA L. SAITONE & RICHARD J. SEXTON, U.S. DEP'T OF AGRIC., ECON. INFO. BULL. NO. 148, THINNING MARKETS IN U.S. AGRICULTURE 2 (2016).

193. MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 25–26. Lower consolidation in poultry can be attributed to a more rapidly growing market.

194. *Id.* at 28.

195. *Id.* at 29.

196. Many of their nearest competitors have engaged in similar conglomeration. *Cf. id.* at 28 (describing how several large firms, including Tyson Foods, JBS, and Perdue Foods, operate in multiple meat processing businesses).

and fed proprietary mixes of (subsidized) corn and soy along with hormones and antibiotics, all according to strict schedules to maximize meat production at lowest cost possible.[197] Pigs mostly follow that model as well—preventing mothers from ever meeting their offspring.[198] Cows have a bit more space (unless they produce milk). Generally, with larger animals with longer lifecycles, the stages of life have been split up into specialized farms: some responsible for infancy, most for the major growth years, and some for final fattening.[199]

Although there has been substantial convergence, market structure varies by animal. As mentioned above, in the broiler industry, integrators in all parts of the country use contracts to control almost every aspect of growers' operations.[200] Although setting up a growing operation costs millions of dollars—a cost which can only be recouped after at least a decade of operation—these contracts are almost exclusively for only one growing season. Under these contracts, growers agree to receive the chicks that the integrator chooses, while the integrator remains owner of the chicks. Growers must use the feed provided by the integrator and their facilities, and processes must follow the specifications determined by the integrator. They must allow the integrators' employees—including veterinarians, consultants, and researchers—to enter their property and follow their instructions.[201]

When the chickens have grown to their full size, growers return them to integrators in exchange for prices determined by a "tournament system." In this system, integrators entirely dictate pricing terms, mandating a formula that pays a higher per-pound price for broilers that use less feed. In addition to this "base price," farmers are rewarded a bonus or docked a penalty based on how well they minimized feed costs *relative to* other growers that the integrator deems comparable (usually by geographic proximity).[202] This system is supposed to reward growers who make the most efficient use of the feed integrators give them (a similar effect as might be produced if farmers were

197. *See* Raj Patel & Jim Goodman, *The Long New Deal*, 47 J. PEASANT STUD. 431, 444–46 (2020).

198. LEONARD, *supra* note 39, at 154–55.

199. MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 27.

200. *See, e.g.*, LEONARD, *supra* note 39, at 272–75. The most important exceptions involve cooperatives and small farmer-owned operations.

201. *See id.* at 192–93 (describing one farmer's experience with the Tyson employees).

202. *See id.* at 116–22; *see also* Press Release, Open Markets, Open Markets Urges USDA to Ban Unfair Tournament Payment Schemes (Sept. 27, 2022), https://www.openmarketsinstitute.org/publications/open-markets-urges-usda-to-ban-unfair-tournament-payment-schemes-in-the-poultry-industry [https://perma.cc/VVX2-7JWP].

billed for feed), using an incentive system to discipline farmers into running their farms in a manner that will allow integrators to maximize revenue. The "tournament" aspect of the system is meant to filter out noise, preventing farmers' pay from varying with circumstances that similarly situated farmers are experiencing, such as heat waves or demand fluctuations.[203]

In the beef industry, farmers are more independent, and, because of the different specializations of different farms, the market structure is more complex. Unlike with chickens, farmers own the cattle they raise and can keep cattle at a sellable weight for a relatively long time, allowing them to hold out for better deals. In some portions of the market—fed calves and culled cattle, for example—farmers continue to sell their cattle at stockyards where they receive multiple bids. In the (shrinking) "cash market," farmers continue to negotiate rates and other aspects of a transaction. Even in the large and growing part of the market that looks most like the quasi-franchising arrangements in poultry, farmers are somewhat more independent. Under these Alternative Marketing Arrangements ("AMAs"), farmers commit much or all of their cattle to a given buyer, priced according to a standardized "grid" that provides for different per-pound prices depending on various factors (marbling, for example).[204] AMAs generally do not specify detailed conditions for how to run a ranch, and, at least in some regions, farmers can choose between competing buyers.[205]

The pork industry is somewhere in between. Some packers—including, for instance, Tyson—insist on poultry-like sharecropping arrangements. Others offer something more like AMAs.

203. LEONARD, *supra* note 39, at 120–22.

204 *Beef Grading Shields*, U.S. DEP'T OF AGRIC.: AGRIC. MKTG. SERV., https://www.ams.usda.gov/grades-standards/beef/shields-and-marbling-pictures [https://perma.cc/9V7V-U3KS] (explaining, in brief, the beef grading system and compiling infographics for further research).

205. *See* Christopher C. Pudenz & Lee L. Schulz, *Multi-Plant Coordination in the U.S. Beef Packing Industry*, 106 AM. J. AGRIC. ECON. 382, 386–89 (2024) (describing the basic structure of the beef industry and recent changes); C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?*, 19–20 (April 27, 2022) (unpublished manuscript) (on file with the North Carolina Law Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4094924 [https://perma.cc/LK5M-HN4V].

B. *Evaluating the Agribusiness Model*

1. The Efficiencies of Agribusiness

The most optimistic interpretation of the restructuring of the meatpacking industry is that it involved the market working as it should: forcing producers to maximize output. After all, meat is more readily and cheaply available to more people than ever before.[206] On this account, packers disrupted the industry through ruthless cost cutting, making production more efficient and putting pressure on others to do the same. This cost cutting came in the form of technological innovations that increased the yield of meat produced by a given amount of feed (which itself came to be more efficiently produced through innovations in GMOs and farming techniques in that concentrated upstream industry); organizational innovations that sped up the disassembly process, shortened the supply chain, and pushed down labor costs; and transportation innovations that took advantage of the flexibility of the federal highway system and then trucking deregulation.[207] In the intensely competitive market of midcentury, margins were tight and these output-maximizing innovations were the best way to survive.[208] Margins later widened as competition shifted toward innovating "value-added products" like chicken nuggets and frozen dinners, but, the argument might go, these products increased value for consumers as well.[209]

Margins also increased as competition moved from retooling and relocating production processes to racing to acquire control of the new infrastructure. The most optimistic interpretation of this process was that consolidation was driven primarily by the scale economies inherent to slaughtering animals in larger plants.[210] Larger plants initially had diseconomies

206. Global per capita meat consumption has doubled since 1961 and continues to rise each year; world population has more than doubled. Bill Winders & Elizabeth Ransom, *Introduction to the Global Meat Industry: Expanding Production, Consumption, and Trade*, *in* GLOBAL MEAT, *supra* note 20, at 1, 5. Meat production has thus nearly sextupled. *Id.*

207. Boyd & Watts, *supra* note 141, at 193–94; LEONARD, *supra* note 39, at 152–55; MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 39.

208. Bjerklie, *supra* note 126, at 42.

209. STRIFFLER, *supra* note 167, at 21–23; LEONARD, *supra* note 39, at 95–111.

210. *See* JAMES M. MACDONALD, MICHAEL E. OLLINGER, KENNETH E. NELSON & CHARLES R. HANDY, U.S. DEP'T OF AGRIC., AGRIC. ECON. REP. NO. 785, CONSOLIDATION IN U.S. MEATPACKING 17 (2000), https://www.ers.usda.gov/publications/pub-details?pubid=41120 [https://perma.cc/CS6D-V7X9]; WILLIAM HAHN, U.S. DEP'T OF AGRIC., LDP-M-118-01, BEEF AND PORK VALUES AND PRICE SPREADS EXPLAINED 10, 12 (2004),

of scale due to increased labor costs, but when "[p]ackers sharply reduced wages at large cattle and hog plants—likely in anticipation of future immigrant labor" they "removed [that] cost disadvantage."[211] These larger plants necessitated "large and steady flows of livestock," which made it more cost effective to enter captive supply contracts with farmers before a growing season rather than bid for animals ex post.[212] Quasi-franchising arrangements (in poultry and pork), AMAs (in beef and pork), and other vertical restraints lowered transaction costs and stabilized investment while also giving consolidated firms the ability to conduct "supply management"—thus ensuring certain amounts meat of a certain quality and ensuring that the shape of animals best fits the tools on the disassembly line.[213]

2. Late Breaking Markups and Collusion

Even those who have this general view about the purpose of market regulation—that it ought to promote output—and accept this general story about the successes of hands-off regulation have become more skeptical of the meatpacking's consolidation in recent years.[214] The major reason is that, around 2015, markups (to retailers) and markdowns (to farmers) began to increase in all major meatpacking industries, and evidence of tacit and explicit collusion between packers has accumulated.[215]

The below figures chart the increased spread between farmer and wholesale prices (that is, the difference between the price paid and the price

https://ers.usda.gov/sites/default/files/_laserfiche/publications/41108/18011_aer785_1_.pdf?v=46352 [https://perma.cc/GZ95-5J7K];
https://ers.usda.gov/sites/default/files/_laserfiche/outlooks/37369/49585_ldpm11801.pdf?v=54843 [https://perma.cc/EF6F-KPGR]; THE U.S. BEEF SUPPLY CHAIN: ISSUES AND CHALLENGES 154 (Bart L. Fischer, Joe L. Outlaw & David P. Anderson eds., June 2021), https://afpc.tamu.edu/research/publications/710/cattle.pdf [https://perma.cc/33PJ-P4WN]; MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 26.

211. MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 26.

212. *Id.* at 27; *see* Kyle W. Steigert, Azzeddine Azzam & B. Wade Brorsen, *Markdown Pricing and Cattle Supply in the Beef Packing Industry*, 75 AM. J. AGRIC. ECON. 549, 557 (1993) (finding pricing behavior consistent with a need to manage problems of unanticipated undersupply).

213. *See* MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 27; Taylor, *supra* note 205, at 7.

214. *See* MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 1.

215. *Id.* at 32. For earlier data on markups, see Sang V. Nguyen & Michael Ollinger, *Mergers and Acquisitions and Productivity in the U.S. Meat Products Industries: Evidence from the Micro Data*, 88 AM. J. AGRIC. ECON. 606 (2006).

received by packers) in the beef and pork industries,[216] using data collected, calculated, and compiled by the Economic Research Service ("ERS") at the USDA.[217] For both the beef and the pork industries, three graphs are presented. The first graph of each set includes spread data for the entire period for which the ERS provides such data: 1970 to 2025.[218] The second graph includes the same data only for the 1970 to 2014 period.[219] The third includes the same data only for the 2010 to 2025 period.[220]

As economists at the USDA point out in a 2023 study, the spread in the beef industry doubled on average between 2015 and 2021.[221] The graphs illustrate that the spread continued to increase until 2022, after which it declined (perhaps in response to antitrust litigation, discussed below). It has not yet fallen back to 2015 levels. An earlier increase in the beef spread can also be seen beginning at the end of the (merger wave of the) 1990s. Overall, beef spreads were between $50 and $65 per hundredweight in 2024–2025,[222] up from between $16 and $23 per hundredweight in 1997–1998 (which was similar to prices in preceding years going back to the 1970s).

216. Data for the broiler industry is harder to come by. The USDA's data on broiler spreads creates a "composite" measure that focuses only on the spread between wholesalers and retailers, which is not our main focus here. I am unaware of data on the farmer-wholesaler spread.

217. William Hahn, *Meat Price Spreads*, U.S. DEP'T OF AGRIC. (Jan. 8, 2025), https://www.ers.usda.gov/data-products/meat-price-spreads/documentation [https://perma.cc/6256-3Q9X] (providing basic information on meat price spread data and how it is gathered and calculated); *see also* TED C. SCHROEDER, GLYNN T. TONSOR, LEE L. SCHULZ, BRADLEY J. JOHNSON & CHRISTOPHER SOMMERS, USDA ERS MEAT PRICE SPREAD DATA PRODUCT REVIEW 9 (2019), https://ers.usda.gov/sites/default/files/_laserfiche/publications/100843/CCR-71.pdf?v=68006 [https://perma.cc/EVK5-9GXR].

218. *Infra* Figure 1 (beef); *infra* Figure 4 (pork).

219. *Infra* Figure 2 (beef); *infra* Figure 5 (pork).

220. *Infra* Figure 3 (beef); *infra* Figure 6 (pork).

221. MACDONALD ET AL., CONCENTRATION AND COMPETITION, *supra* note 14, at 34.

222. Choice Beef Values and Spreads and the All-Fresh Retail Value, rows 30–41, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (June 11, 2025), https://www.ers.usda.gov/data-products/meat-price-spreads [https://perma.cc/A5DW-BJYW (staff-uploaded archive)].

Figure 1. Beef Farm-Wholesale Price Spread, 1970–2025[223]

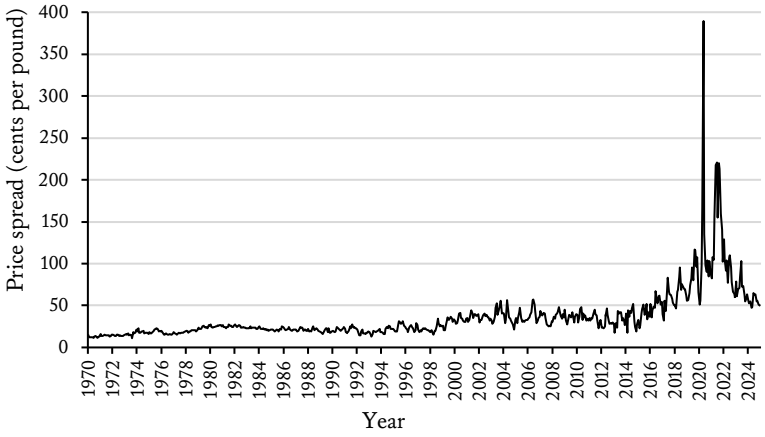
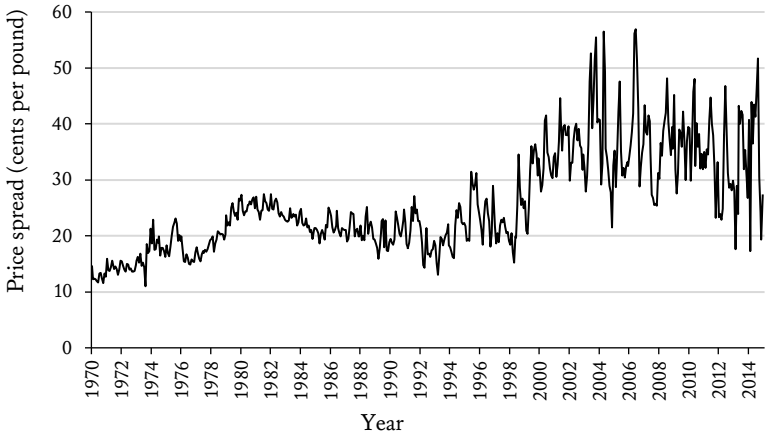


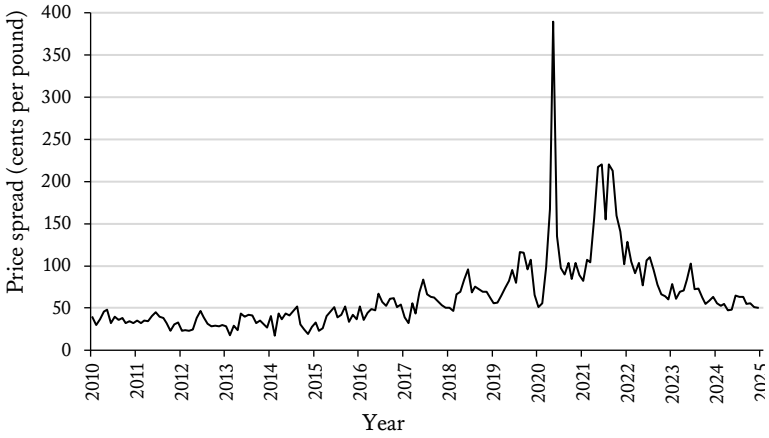
Figure 2. Beef Farm-Wholesale Price Spread, 1970–2015[224]



223 Historic Monthly Price Spread Data for Beef, Pork, Broilers: Beef, rows 6–665, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (Feb. 27, 2025), https://www.ers.usda.gov/data-products/meat-price-spreads [https://perma.cc/S7AF-MZ9A (staff-uploaded archive)].

224 *Id.* at rows 6–545.

Figure 3. Beef Farm-Wholesale Price Spread, 2010–2025[225]



A similar two-step increase in spread can be seen in pork at roughly the same times.[226] There is a clear and enduring increase in spreads at the end of the 1990s and then a more dramatic surge starting around 2015. The post-2015 spike has peaked and begun to decline, but 2025 spreads remain well above those that prevailed before 2015.[227] As with beef, it remains to be seen how enduring this post-2015 increase will be.

225. *Id.* at rows 486–65.

226. Historic Monthly Price Spread Data for Beef, Pork, Broilers: Pork, rows 6–545, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (Feb. 27, 2025), https://www.ers.usda.gov/data-products/meat-price-spreads [https://perma.cc/398E-5L8K (staff-uploaded archive)].

227. Pork Values and Spreads, rows 42–46, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (June 11, 2025), https://www.ers.usda.gov/data-products/meat-price-spreads [https://perma.cc/9LGQ-EGGH (staff-uploaded archive)].

Figure 4. Pork Farm-Wholesale Price Spread, 1970–2025[228]

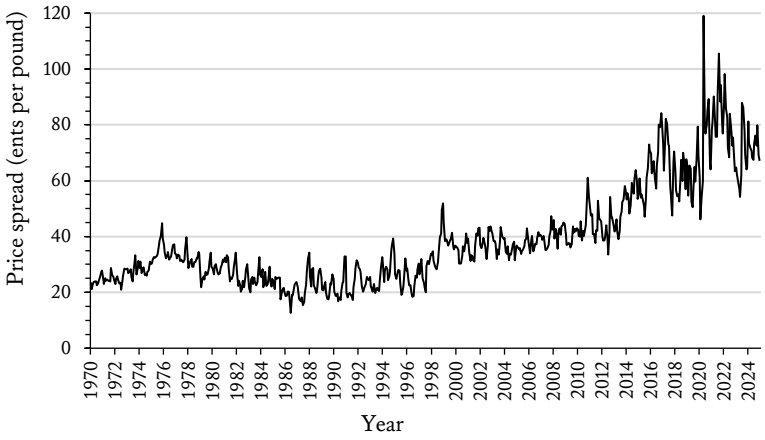
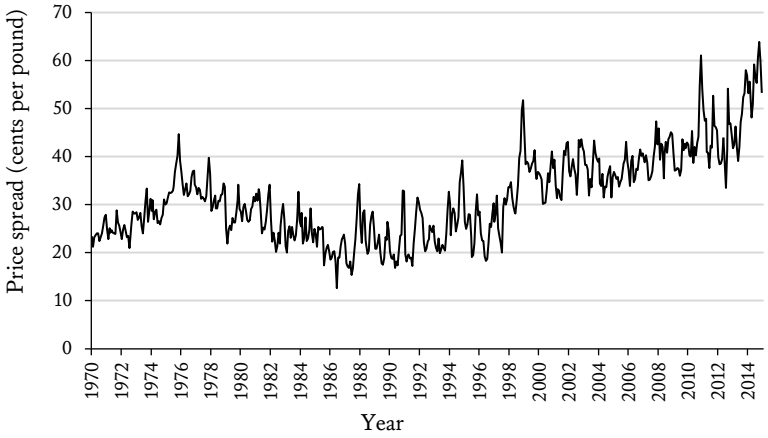
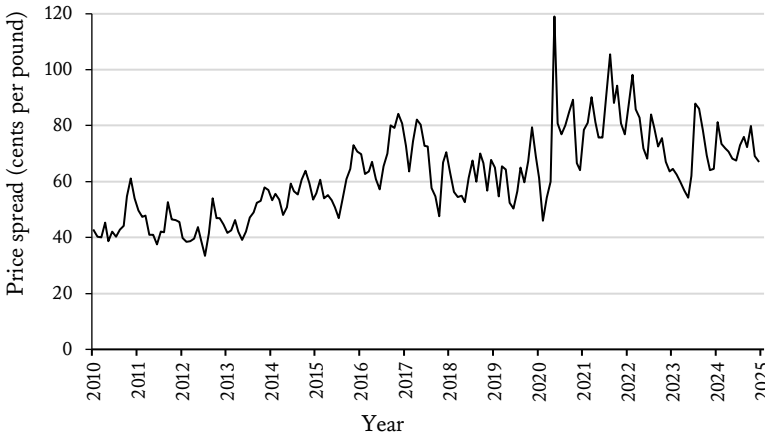


Figure 5. Pork Farm-Wholesale Price Spread, 1970–2015[229]



228. Historic Monthly Price Spread Data for Beef, Pork, Broilers: Pork, *supra* note 226.
229. *Id.* at rows 6–545.

Figure 6. Pork Farm-Wholesale Price Spread, 2010–2025[230]



Overall, one can see spreads increasing in two stages—first in the 1990s and then after 2015. Though more research would be welcome, there is reason to believe that these increases in spreads reflect the increased ability of concentrated firms to collude and exclude.

One piece of evidence to that effect is that collusion among meatpackers in all three industries under examination here has been the subject of a series of successful recent lawsuits. In 2019, several class actions were filed against Cargill, JBS, Tyson, and National Beef—the current "Big Four" in beef packing—based on their efforts to increase margins starting in 2015. In particular, plaintiffs alleged that the Big Four colluded to "jointly manage fed cattle slaughter volumes; jointly manage cash cattle purchases and enforce anticompetitive procurement practices; import foreign cattle after it became uneconomical to do so; and close and idle plants" in order to "suppress[] the price of fed cattle . . . and . . . increase . . . the price of [slaughtered] beef," increasing their revenues at the expense of both farmers and consumers.[231] The suits were consolidated into a multi-district litigation ("MDL") in the District of Minnesota, and the judge denied the packers' motion to dismiss all Sherman Act and PSA claims in 2021.[232] The same judge denied a motion to dismiss a similar claim, though covering a period beginning in 2009, in a MDL against

230. *Id.* at rows 486–665.

231. *In re* Cattle Antitrust Litig., Civil No. 19-1222, 2021 WL 7757881, at *2 (D. Minn. Sept. 14, 2021).

232. *Id.* at *18–19.

seven of the eight biggest pork packers.[233] A similar MDL against the major broiler integrators survived a motion to dismiss in the Northern District of Illinois in 2017.[234] That litigation concerned the integrators' alleged efforts to coordinate price and production levels through private communications and public use of a platform called Agri-Stats that allowed for detailed reporting of actual and anticipated production levels. All of these lawsuits—and another involving turkey integrators—resulted in nine-figure settlements.[235]

Each of these alleged price-fixing schemes has also been the subject of USDA and DOJ investigations, some of which have resulted in civil and criminal enforcement actions.[236] Additionally, the DOJ has brought a civil case against certain poultry growers for conspiracy to suppress workers' pay at processing plants and to deceive poultry growers about how their payment will be calculated.[237] And a class action against beef packers for conspiring to

233. *In re* Pork Antitrust Litig., 495 F. Supp.3d 753, 764–65 (D. Minn. 2020). Claims against one packer—Indiana Packers—were dismissed for lack of evidence. *Id.* at 770 ("The Court concludes that these allegations, when viewed as a whole, are sufficient to plausibly plead parallel conduct against all Defendants, except Indiana Packers.").

234. *In re* Broiler Antitrust Litig., 290 F. Supp.3d 772, 779 (N.D. Ill. 2017).

235. Mike Scarcella, *Chicken Price-Fixing Litigation Yields $57.4 Million in Fees for Plaintiffs' Firms*, REUTERS (Oct. 10, 2022), https://www.reuters.com/legal/litigation/chicken-price-fixing-litigation-yields-574-mln-fees-plaintiffs-firms-2022-10-10/ [https://perma.cc/A3NR-THTR (staff-uploaded archive)] (Parties "settled civil price-fixing claims for $181 million"); Mike Scarcella, *Pork Consumers' $75 Million Price-Fixing Accord with Smithfield Approved*, REUTERS (Apr. 12, 2023), https://www.reuters.com/legal/pork-consumers-75-million-price-fixing-accord-with-smithfield-approved-2023-04-12/ [https://perma.cc/9MJS-T6MJ (staff-uploaded archive)]; Jonathan Stempel, *JBS Reaches "Icebreaker" Settlement of Beef Price-Fixing Claims*, REUTERS (Feb. 2, 2022), https://www.reuters.com/legal/litigation/jbs-reaches-icebreaker-settlement-beef-price-fixing-claims-2022-02-02/ [https://perma.cc/V8Z5-N4BZ (staff-uploaded archive)]; Mike Scarcella, *JBS to Pay $25 million in Latest Beef Price-Fixing Settlement in US Court*, REUTERS (Apr. 17, 2023), https://www.reuters.com/legal/litigation/jbs-pay-25-mln-latest-beef-price-fixing-settlement-us-court-2023-04-17/ [https://perma.cc/595S-8B8H (staff-uploaded archive)].

236. Leah Douglas, *US DOJ Files Meat Industry Antitrust Case Against Agri Stats*, REUTERS (Sept. 28, 2023), https://www.reuters.com/legal/us-doj-brings-meat-industry-antitrust-case-against-data-company-agri-stats-2023-09-28/ [https://perma.cc/3XSG-HJHG (staff-uploaded archive)]; Plea Agreement, United States v. Pilgrim's Pride Corp., No. 20-cr-00330-RM (D. Colo. 2001), ECF No. 58; Bob Van Voris, *Third Time's the Charm in Chicken Price Fixing Trial, DOJ Says*, BLOOMBERG (Apr. 14, 2022), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X1C4OJ2O000000?bna_news_filter=antitrust [https://perma.cc/BM3K-DY5H (staff-uploaded, dark archive)]; U.S.D.A. AGRIC MKTG. SERV., BOXED FEED & FED CATTLE PRICE SPREAD INVESTIGATION REPORT 2 (2020), https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf [https://perma.cc/86G2-NZGG].

237. Press Release, U.S. Dep't of Just., Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and

suppress workers' wages survived a motion to dismiss, causing a couple defendants to settle.[238]

Taken together, these lawsuits and the data on which they rely point to widespread collusion among meatpackers to reduce the output of meat in order to increase both their markup and their markdown. For those who analyze market competition in terms of its ability to maximize "output" or to force producers to price as close to marginal cost as possible, this collusion is problematic insofar as it allows packers to collect "rents" (in other words, more money than they would make relative to the "competitive" outcome). For those who focus only on *consumer* welfare, only the mark*ups* are problematic—mark*downs* might be seen as potentially beneficial ways of lowering input costs, so long as the cost savings are passed along. A more dynamic problem with collusion for somebody focused on output is that it interferes with the sort of competition that has forced meatpackers to find ways to increase output and cut costs for decades. It is a classic collusion problem of the sort that is supposedly the "supreme evil of antitrust."[239]

3. Questioning Efficiency Arguments

As dissenters have pointed out all along, there are reasons to doubt whether the waves of consolidation starting in 1980—and the vertical restraints they brought with them—were entirely a matter of efficiency enhancement.[240]

Address Deceptive Abuses Against Poultry Growers (July 25, 2022), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy [https://perma.cc/9U24-8DZN].

238. Brown v. JBS USA Food Co., No. 22-cv-02946-PAB-STV, 2023 WL 6292717, at *17 (D. Colo. Sept. 27, 2023); Jacqui Fatka, *JBS Pays $52.5M to Partially Settle Beef Antitrust Litigation*, FARM PROGRESS (Feb. 2, 2022), https://www.farmprogress.com/farm-operations/jbs-pays-52-5m-to-partially-settle-beef-antitrust-litigation [https://perma.cc/WAN8-W2ZC (staff-uploaded archive)]; Jacqui Fatka, *JBS pays $52.5M to partially settle beef antitrust litigation*, FARM PROGRESS (Jan. 2, 2022), https://www.farmprogress.com/farm-operations/jbs-pays-52-5m-to-partially-settle-beef-antitrust-litigation [https://perma.cc/WAN8-W2ZC (staff-uploaded archive)] (detailing JBS' partial settlement, which was subject to court approval); Todd Neeley, *National Beef Settles Wage-Fixing Case*, PROGRESSIVE FARMER (July 30, 2024), https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2024/07/30/national-beef-packing-company-wage [https://perma.cc/43BK-F2JR].

239. Verizon Comms., Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); *see also* Vivek Ghosal & D. Daniel Sokol, *The Rise and (Potential) Fall of U.S. Cartel Enforcement*, 2020 U. ILL. L. REV. 471, 472 (2020).

240. *See* Taylor, *supra* note 205, at 7–8; Peter Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531, 532–33 (2000) [hereinafter Carstensen, *Concentration and the Destruction of Competition*]; David Barboza, *Five Questions for Neil E. Harl: Converging Forces Afflict Farms*, N.Y. TIMES (Apr. 29, 2001),

One major issue with the efficiency interpretation is that it conflates economies of scale and scope. Even supposing that larger plants achieve economies of scale and reduce processing costs, it does not follow that the consolidation of multiple plants under single ownership produces economies of scope.[241] Examining the matter in 2000, Professor Carstensen demonstrated that even the largest plants each only accounted for four percent of the market in beef and three percent of the market in pork.[242] Thus, economies of scale at the plant level cannot in the least explain increased consolidation of ownership, either in an empirical or normative sense. We would need additional evidence of economies of scope that come with locating multiple plants in the same firm or family of firms. According to a recent study, there is no such evidence.[243] In fact, what evidence there is indicates that multi-plant ownership allows for strategic behavior that increases price spreads.[244] It remains an open question, then, whether consolidation can be justified on "efficiency grounds."[245]

There is also reason to doubt whether the cost reductions that have accompanied larger plants (whether those introduced during the post-1980 consolidations or in the pre-1980 restructurings and relocations) can all—or even mostly—be attributed to economies of scale or other efficiency enhancements. One major reason is that pushing down labor costs is not necessarily an efficiency enhancement. If, as noted above, the large-plant economies of scale after 1980 could not be realized without making work conditions so dangerous, unpleasant, and badly remunerated that near-100% turnover is treated as a cost of doing business, those economies of scale are not

https://www.nytimes.com/2001/04/29/business/five-questions-for-neil-e-harl-converging-forces-afflict-farms.html [https://perma.cc/YKJ9-GDPJ (staff-uploaded, dark archive)]; Xiaowei Cai, Kyle W. Stiegert & Stephen R. Koontz, *Oligopsony Fed Cattle Pricing: Did Mandatory Market Reporting Increase Meatpacker Market Power?*, 33 APPLIED ECON. PERSPS. & POL'Y 606, 607–08 (2011).

241. *See* Carstensen, *Concentration and the Destruction of Competition*, *supra* note 240, at 536–37.

242. *Id.* at 537. This data provides reason to doubt the story as it pertains to consolidations that occurred before 2000. As long as there have not been truly transformational increases in economies of scale at the plant level in the meantime (and I am not aware of evidence to this effect), the basic argument applies to consolidations since 2000 as well.

243. Francisco Garrido, Minji Kim, Nathan Miller & Matthew Weinberg, Buyer Power in the Beef Packing Industry: An Update on Research in Progress 2 (Apr. 13, 2022) (unpublished manuscript) (on file with the North Carolina Law Review).

244. Pudenz & Schulz, *supra* note 205, at 382.

245. It is worth noting that the value of coordination among multiple plants can also be realized without consolidating ownership over those plants. A regulatory body or industry association might facilitate coordination, as might a cartel or a joint venture agreement. Recognizing the value of coordination does not mean favoring consolidation into a single firm. *See* Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 581–83 (2023).

(entirely) indicative of increased input-output efficiency but rather (at least partially) increased exploitation. Cutting wages and speeding up lines may lower production costs, but it does not do so by increasing the amount of output produced by a given amount of input. (In contrast, changing chicken genetics and improving the feed mix to increase the meat yield per animal *does* increase output per input, even if it might produce harms to the animals or the environment.) Rather, it increases the unpriced cost to workers and their communities: exhaustion, injury, financial stress, inequality, drug addiction.

A third source of doubt pertains to the various forms of captured supply contracts that purportedly complement the economies of scale (and, perhaps, scope) by ensuring quantity and quality and lower transaction costs. With respect to the quality, Professor Taylor has pointed out that there are several institutions in place to maintain it, and there is no evidence that captured supply contracts play the central—or even a very large role—as compared with other institutions.[246] For instance, packers ensure quality in the cash market by pricing according to a "grid" that specifies premiums and discounts for different aspects of a cow. Packers "own records show that cattle . . . obtained in the cash market are typically of *higher* quality than cattle obtained" via captured supply contracts.[247] With respect to transaction costs, Professor Taylor notes that the only available evidence in beef markets finds savings of seven-thousandths of a cent per pound of beef at retail.[248] As for maintaining quantity and lowering investment risk, Professor Carstensen has noted that captured supply contracts are far from the only means of achieving such an end.[249] It could be achieved by revitalizing "large, well-supplied transactional market[s]" like the old stockyards or by adding other features to the grid pricing system.[250] Grading and quality control could also be handled through standardization and third-party evaluation—much like meat inspection has been for over a century.[251]

Similarly, in the poultry industry, the "tournament system" that sets per-pound prices based on a proprietary metric of relative efficiency does not

246. Taylor, *supra* note 205, at 8.

247. *Id*; *see also id.* at 20 ("Moreover, packer buyers are skilled in recognizing quality 'on the hoof' and packers collect post-slaughter quality data on such acquisitions."). *See also* Peter C. Carstensen, *Dr. Pangloss as an Agricultural Economist: The Analytical Failures of The U.S. Beef Supply Chain: Issues and Challenges* 5 (Wis. L. Sch. L. Stud. Research Paper Series No. 1741, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049230 [https://perma.cc/KW8C-H2Q5] [hereinafter Carstensen, *Dr. Pangloss*].

248. Taylor, *supra* note 205, at 20.

249. Carstensen, *Concentration and the Destruction of Competition*, *supra* note 240, at 536.

250. *Id.*

251. *Id.*

actually promote efficient use of feed. The exact pricing formula has long been hidden from growers and is complex enough that it is not likely to be clear to most farmers exactly what is being rewarded.[252] Moreover, the major factor in producing different outcomes is the different quality of chicks, feed, and other inputs, all of which are in the control of *integrators* and not *growers*.[253] Integrators do not even provide growers information about variability in input quality and its relevance to outcomes such that they can compare their chance of success with different integrators. To a substantial degree, then, growers seem to be rewarded or penalized for factors outside their control. It is unclear how doing so encourages more efficient production, except, perhaps, as a form of semi-random operant conditioning.[254] Worse, integrators have allegedly manipulated the system to penalize growers for failing to make risky investments or for speaking out against integrators' practices.[255]

4. Domination of Workers and Farmers

Whether efficiency-enhancing or not, consolidation and collusion among meatpackers has increased their power over packhouse workers and farmers. This power has been used to shift incomes *away* from and costs *onto* each of these groups, as well as to distribute these incomes and costs unevenly within the groups. Even if consolidation comes with benefits to consumers or executives, these costs imposed on workers and farmers and their families and communities have to be balanced against them. Additionally, the very shift of power must itself be reckoned with insofar as it interferes with the freedom of farmers and workers, makes the food production system less democratic, and contributes to a general shift in power upward.

As has been mentioned at several points, harms or "costs" to workers have included dangerous and grueling work conditions, exposure to disease, child

252. LEONARD, *supra* note 39, at 121; Open Mkts. Inst., Comment Letter on Proposed Rule Regarding Poultry Growing Tournament Systems: Fairness and Related Concerns (Sept. 29, 2022), https://www.regulations.gov/comment/AMS-FTPP-22-0046-0158 [https://perma.cc/J2QE-X63H].

253. Open Mkts. Inst., *supra* note 252; LEONARD, *supra* note 39, at 131–32.

254. *See generally* Wylene Rholetter, *Operant conditioning*, EBSCO (2022), https://www.ebsco.com/research-starters/social-sciences-and-humanities/operant-conditioning [https://perma.cc/37Z2-R2V6] ("Operant conditioning is a behavioral learning theory . . . [that] posits that behaviors are shaped and learned through the consequences they produce, which can be either reinforcing or punishing.").

255. LEONARD, *supra* note 39, at 123–38; Terry v. Tyson Farms, Inc., 604 F.3d 272, 275 (6th Cir. 2010); Wheeler v. Pilgrim's Pride Corp., 536 F.3d 455, 456–57 (5th Cir. 2008), *rev'd en banc*, 591 F.3d 355 (5th Cir. 2009).

labor, authoritarian governance, and inadequate wages.[256] Imposing these harms while undermining workers' bargaining power—collectively and individually—undercuts their ability to seek compensation for their difficulties or to otherwise have a say in how to organize and innovate meatpacking. Without such power, workers also have less of a say in how to manage the impacts of labor-saving technologies. The COVID crisis made these costs especially clear when packing plants, deemed "essential" and prohibited from closing, became superspreaders for workers and their families, most of whom were underinsured.[257] The packers lobbied for this special treatment—and then managers opened betting pools on which workers would get sick.[258] Only when plants had to shut down for lack of workers did firms mandate vaccines and masks.[259]

For farmers, the impacts of restructuring have been more mixed. Under upstream pressure to become more consolidated, capital-intensive, and productively efficient, some farmers have become quite successful. Yet even successful farmers have become more dependent on a small group of enormous agricultural firms in order to get their livestock to market. And, in some industries, these farmers must compete with farms owned by packer insiders, such as the Perdue family, which often self-preference.[260] In many parts of the country, farmers have no choice over with whom they deal, and most have a choice between two or at most three packers. Moreover, packers make it difficult to switch to other packers by requiring expensive, place-specific investments that cannot be recouped in the short term and locking in contracts for entire herds (or flocks) while imposing opaque contract terms that make comparison between packers difficult. These and similar lock-in efforts can be

256. *See* Cruz, *supra* note 190, at 665–73.

257. *Id.*; HENDRICKSON ET AL., THE FOOD SYSTEM, *supra* note 23, at 12; Dalton Whitehead & Yuan H. Brad Kim, *The Impact of COVID 19 on the Meat Supply Chain in the USA: A Review*, 42 FOOD SCI. ANIMAL RESOURCES 762, 766 (2022).

258. Cruz, *supra* note 190, at 665–73; Eric Schlosser, *The Essentials: How We're Killing the People Who Feed Us*, ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/ [https://perma.cc/9KX9-F6J4 (staff-uploaded, dark archive)]; Vanessa Romo, *Tyson Managers Suspended After Allegedly Betting if Workers Would Contract COVID*, NPR (Nov. 19, 2020), https://www.npr.org/2020/11/19/936905707/tyson-managers-suspended-after-allegedly-betting-if-workers-would-contract-covid [https://perma.cc/AV2V-N86J].

259. Lauren Hirsch & Michael Corkery, *How Tyson Foods Got 60,500 Workers to Get the Coronavirus Vaccine Quickly*, N.Y. TIMES (Nov. 4, 2021), https://www.nytimes.com/2021/11/04/business/tyson-vaccine-mandate.html [https://perma.cc/YNK6-SGRV (staff-uploaded, dark archive)].

260. *Cf.* United States v. Perdue Farms, Inc., 680 F.2d 277, 285 (2d Cir. 1982) (discussing how farms owned by the family members of the family that owns a vertically integrated packer were given preferential treatment by the integrator).

mutually beneficial to farmers and packers by, among other things, reducing the costs of shopping around and guaranteeing supply and demand at the time of investment (stabilizing incomes, making it easier to incur high overhead costs). But they also undermine a key source of farmer bargaining power: the threat of switching to a competitor.

What's more, they reinforce a dynamic in which only big farms willing to adapt to the needs of the high-throughput packers can survive, let alone thrive. That means less farmer autonomy and fewer independently owned farms and farm jobs. It also means that running a small farm—let alone a small farm that uses practices that do not conform to the demands of the big packers—has become increasingly difficult. This impact lands especially hard on Black farmers, who have been subject to multiple overlapping forms of discrimination that have caused enormous land loss over the course of the twentieth century.[261]

As livestock farms have become more subject to the say-so of packers while remaining formally separate entities, they have become more like "fissured workplaces."[262] As Professor Weil has argued, the basic structure of a leading firm outsourcing the risk and effort of running of the day-to-day operations of a substantial part of its business to formally independent small proprietors while using contracts to control how they run their business has become increasingly common across industries.[263] Fissured structures allow leading firms to have "control without responsibility" for labor regulations, employee benefits, and liability for harm to workers and consumers.[264] Meanwhile, they put pressure on the smaller firms to cut costs on labor, including by underpaying, overworking, and increasing health and safety risks.

Fissured structures greatly increase the rate of labor and employment law violations.[265] Under these structures, the risk of legal liability for cost-cutting

261. Dania V. Francis, Darrick Hamilton, Thomas W. Mitchell, Nathan A. Rosenberg & Bryce Wilson Stucki, *Black Land Loss: 1920–1997*, 112 AEA PAPERS & PROC. 38, 38 (2022).

262. DAVID WEIL, THE FISSURED WORKPLACE (2014). In fact, Weil does briefly mention agriculture and meatpacking in his text, though he does not analyze the industry in any detail. *Id.* at 96–97, 259–60.

263. *Id.*; *see also* Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960-1980*, 22 ENTER. & SOC'Y 156, 156–57 (2021); Marshall Steinbaum, *Antitrust, The Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 45–46 (2019); Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 233–34 (2017).

264. WEIL, *supra* note 262, at 8–13, 77–98.

265. *Id.* at 77–98; Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 J.L. & POL. ECON. 397, 402 (2021) [hereinafter Callaci, *What Do*

efforts shifts to small proprietors who are less able to bear it than highly capitalized multinational agribusinesses. Small proprietors must also bear the risk of the investment in the local aspect of the business itself—which, in the meatpacking industry, is the substantial risk of not making back one's investment on the expensive facilities for the low-margin business of raising livestock *en masse*. In other words, franchising and other fissuring arrangements use contracts to perform a similar function as packers' intrafirm labor policies: pushing down compensation and increasing intensity of work. They have the additional feature of offloading risk from the firm better able to bear it to small farmers. A meta-analysis "on the relationship between agricultural structure and community well-being . . . found detrimental effects of industrialized farming on [nearby] communities in 82% of them."[266]

Among the different meat industries, the relationship between poultry integrators and growers comes closest to the classic cases of fissured work explored by Professor Weil and others. Its widely used "tournament" pricing system in particular has come under much recent scrutiny. Above, we questioned some of the purported efficiency justifications for this system.[267] Here we note that, even if the broiler-payment system does have some impact on grower efficiency, it combines with other contract terms to push overall payment to growers down, incentivizing growers to treat *their* workers worse. As with the worse working conditions discussed above, this increases inequality and has various harmful impacts on surrounding communities. What is more, variable payments push the risks of the markets' vicissitudes onto nondiversified, highly leveraged, and relatively capital-light growers, who are less able to absorb them than big integrators.[268] The pricing system, along with other vertical restraints and a highly concentrated market, makes it difficult for growers to switch between integrators—or to even find an integrator with meaningfully different terms—which undermines their bargaining power.[269] When integrators use their pricing system or other aspects of contracting to

Franchisees Do?]; Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213, 213 (2018).

266. Mary K. Hendrickson, *Resilience in a Concentrated and Consolidated Food System*, 5 J. ENV'T STUD. & SCI. 418, 420 (2015) [hereinafter Hendrickson, *Resilience*].

267. *See supra* text accompanying notes 253–55.

268. *See* Boyd & Watts, *supra* note 141, at 211 ("[B]ecause grower investments in fixed capital represent more than half the total investment in fixed capital in the industry, the contractual arrangement has provided a way of de facto freeing up capital for the integrators.")

269. *See* C. Robert Taylor, Alfa Eminent Scholar of Agric. at Auburn Univ., Comments at the DOJ/FTC Workshop on Merger Enforcement: The Many Faces of Power in the Food System (Feb. 17, 2004).

retaliate against growers who attempt to organize to build collective power, it undermines that avenue for change as well.[270]

Feeders (and ranchers)[271] are relatively more independent in the beef industry, but AMAs have still enabled packers to shift bargaining in their favor. For one thing, the pricing formula on AMAs is indexed to cash prices over a given period of time even as the increased usage of AMAs thins out the markets in which those cash prices are negotiated.[272] Thinned markets are relatively easy to manipulate, especially in a highly concentrated industry, allowing packers to push prices down. "Empirical studies going back two decades have clearly established a significant negative relationship between weekly captive supply deliveries [via AMAs] and the residual cash market" on which the pricing is indexed.[273] Further, packers have been known to enter sweetheart deals with certain feeders, which, in addition to distorting competition, reduces the role of negotiation in setting cash prices.[274] This, in turn, further manipulates formula prices for non-sweetheart feeders.[275] Finally, AMAs play a role in "tying up a key input," thus reinforcing the highly concentrated ownership structure by increasing the cost of entry for packers who might operate differently.[276]

As mentioned, the structure of the pork industry combines elements of the poultry and beef industries.[277]

5. Broader Social and Environmental Costs of Agribusiness

A third set of concerns go even more directly to the core of the modern efficiency-focused meatpacking business model and, indeed, the "Big Ag" ecosystem that sustains it. These are concerns about the macro-level health, social, and ecological stakes of growing food in massive monoculture farms controlled by even larger multinational corporations.

High meat consumption facilitated by cheap plentiful meat—especially in the highly processed forms that are most profitable to packers—has been

270. *See id.*

271. Feeders, which "finish" cows by bulking them up to slaughter weight, are the cow farmers that usually sell cattle to packers (and are most likely to be covered under the PSA). In the modern context, ranchers raise cows to (usually) sell to feeders. Thanks to Peter Carstensen for helping me with terminology.

272. *See* Taylor, *supra* note 205, at 21, 25–26, 28–29.

273. *Id.* at 26.

274. *Id.* at 27–28, 29–30.

275. *Id.*

276. Carstensen, *Dr. Pangloss*, *supra* note 247, at 10.

277. *Supra* Section II.A.

associated with a number of health problems, including (in order of strength of evidence) increased risk of mortality, colorectal cancer, heart disease, obesity, and dementia.[278] We have already reviewed the increased risk to workers and farmers of the highly concentrated, high-volume, output-maximizing model of meat production.[279] Additionally, monocultural crop and meat production reduces biodiversity, which creates risk of zoonotic and food-borne diseases and of antibiotic resistance due to the widespread prophylactic usage necessary to prevent outbreaks in crowded farms.[280] The genetic selection processes—especially for chickens—and the intense confinement in which animals are held also produces enormous amounts of animal suffering, which is worsened by intentional cruelty perpetrated by market-pressured farmers.[281]

As Professor Hendrickson has argued, organizing agriculture in a consolidated and monocultural fashion also creates a brittleness in responding to systemic threats.[282] Striving for efficiency in production by creating specialized animal genetics and specialized production systems that require high volumes to operate makes a production system highly vulnerable to any threat that disrupts the usual workings of the system.[283] During COVID, for example, close quarters and the need for constant operation turned packing plants into superspreaders, infecting tens of thousands of employees (and their families) and forcing multiple plants to shut down.[284] These shutdowns in turn reduced

278. H. Charles J. Godfray, Paul Aveyard, Tara Garnett, Jim W. Hall, Timothy J. Key, Jamie Lorimer, Ray T. Pierrehumbert, Peter Scarborough, Marco Springmann & Susan A. Jebb, *Meat Consumption, Health, and the Environment*, 361 SCIENCE 243 (2018); Evelyne Battaglia Richi, Beatrice Baumer, Beatrice Conrad, Roger Darioli & Alexandra Schmid, *Health Risks Associated with Meat Consumption: A Review of Epidemiological Studies*, 85 INT. J. VITAMIN NUTRITION RSCH. 70 (2015).

279. *See supra* Section II.B.4.

280. IPES Report, *supra* note 23, at 65–68; Qiuzhi Chang, Weike Wang, Gili Regev-Yochay, Marc Lipsitch & William P. Hanage, *Antibiotics in Agriculture and the Risk to Human Health: How Worried Should We Be?*, 8 EVOLUTIONARY APPLICATION 240, 244–45 (2015).

281. *See* K.M. Hartcher & H.K. Lum, *Genetic Selection of Broilers and Welfare Consequences: A Review*, 76 WORLD'S POULTRY SCI. J. 154, 154 (2019); FRERICK, *supra* note 3, at 87–88; Kenny Torrella, *A New Investigation Exposes the Stomach-Churning Practice that Goes into Making Your Bacon*, VOX (Aug. 14, 2023, 2:20 PM), https://www.vox.com/future-perfect/23817808/pig-farm-investigation-feedback-immunity-feces-intestines [https://perma.cc/9PBT-BA5B (dark archive)]; Jonathan Anomaly, *What's Wrong with Factory Farming?*, 8 PUB. HEALTH ETHICS 246 (2015).

282. Hendrickson, *Resilience*, *supra* note 266, at 418.

283. On the general idea that resilience in a supply chain can be an underpriced "externality" see Doni Bloomfield & Jeff Gordon, *The Law and Economics of Resilience*, 103 WASH. U. L. REV. (forthcoming 2026). Bloomfield and Gordon's (implicit) model does not capture all of the relevant aspects of the sort of disruption envisioned here (in addition to being implausibly static in its form and welfare analysis), but here is not the place to quibble.

284. HENDRICKSON, ET AL., THE FOOD SYSTEM, *supra* note 23, at 11–13.

the supply of meat, pushing up the price to consumers, and the demand for livestock, forcing farmers to "cull" thousands of animals and take losses.[285] The shift in consumer demand for *types* of meat caused by closing of restaurants, bars, and other public eating places also created further bottlenecks, adding to the need to cull.[286] This waste and its human and animal cost were worsened by the highly concentrated nature of the industry. If the slaughter occurred at smaller regional facilities, infection at any given facility would cause a smaller disruption to the whole system.[287] And COVID is no one-off. Similar dynamics have been at play in previous disruptions caused by salmonella in eggs, *dicamba* in soybeans (which are used for feed), a fire at a major Tyson plant, and a cyber-attack on JBS.[288] Climate change will surely add onto these disruptions.

In addition to being *affected* by climate change, increased global consumption of meat is a major *contributor* to it. That increase has been enabled by the combination of increased global incomes and our focus here: cheaper mass production of animal protein.[289] In fact, due to feeding practices that produce less methane in excrement, industrial-scale farming reduces the per-animal emissions produced.[290] However, it also increases the total animals produced, which in turn increases emissions.[291] Generally, "[m]eat is considered as the food product with the greatest environmental impact throughout the food chain [with] the greatest impacts aris[ing] from livestock farms."[292]

Finally, consolidated control over the meat industry means consolidated power over its priorities, including the technology used, the innovations pursued, which animals it raises with what genetic qualities, how it designs farms and the slaughtering process, who gets to see and have a voice as to how

285. Dalton Whitehead & Yuan H. Brad Kim, *The Impact of COVID 19 on the Meat Supply Chain in the USA: A Review*, 42 FOOD SCI. ANIMAL RES. 762 (2022).

286. *Id.*

287. *Id.*; *see* Hendrickson, *Resilience*, *supra* note 266, at 428; *see also* HENDRICKSON ET AL., THE FOOD SYSTEM, *supra* note 23, at 12.

288. *Id.*; MICHAEL KADES, PROTECTING LIVESTOCK PRODUCERS AND CHICKEN GROWERS: RECOMMENDATIONS FOR REINVIGORATING ENFORCEMENT OF THE PACKERS AND STOCKYARDS ACT 28 (Wash. Ctr. Equitable Growth 2022), https://equitablegrowth.org/wp-content/uploads/2022/05/050522-packers-stockyards-report.pdf [https://perma.cc/N7TA-W2VH].

289. *See* Fredrik Hedenus, Stefan Wirsenius & Daniel J.A. Johansson, *The Importance of Reduced Meat and Dairy Consumption for Meeting Stringent Climate Change Targets*, 124 CLIMACTIC CHANGE 79, 79 (2014).

290. *See* Riva C. H. Denny, *Contributions to Global Climate Change: A Cross-National Analysis of Greenhouse Gas Emissions from Meat Production*, *in* GLOBAL MEAT, *supra* note 20, 145, 146–53.

291. *Id.*

292. Ilijia Djekic & Igor Tomasevic, *Environmental Impacts of Meat Chain—Current Status and Future Perspectives*, 54 TRENDS IN FOOD SCI. & TECH. 94, 94 (2016).

animals should be treated, and the political processes through which others deliberate on whether and how to regulate their decisions.[293] It has even meant consolidated control over what knowledge is produced about meat and what discussions policymakers have—with packers funding research favorable to their power and suppressing research skeptical of it.[294] Indeed, meatpackers have engaged in outright bribery of officials, at the local and federal level.[295] As Professor Hendrickson puts it, "decision-making about food has migrated from a more public arena into an arena of private decision making that largely involves those within the dominant firms, including their management teams, boards of directors and shareholders."[296] That is a problem in itself from the perspective of a principled committed to democratic (or republican) control over our social system, and it is an indirect problem for effective governance insofar as it facilitates a monoculture of thought and institutional imagination. Such a monoculture might be especially problematic as climate change's unpredictable effects heighten the potential for crisis and the need for parallel experiments in response.[297]

III. BRINGING THE PSA BACK IN

A policy response commensurate to the scale and scope of the problems with today's agribusiness model of animal husbandry and slaughter would be far-reaching and multi-modal. It would require careful analysis not just of the structure of the meat industry but also of surrounding industries like grain and groceries. It would require a comprehensive rethinking of our system of agricultural subsidies and of rural land allocation, a comparison of different policy levers to encourage environmental stewardship, a debate on different ways of weighing the importance of animal welfare, and so on. This is a bigger task than can be undertaken here.

The narrower effort of this and the following section is to explore what can be done by using one remnant of the previous effort at comprehensive regulation of meatpacking: the Packers and Stockyards Act. As originally envisioned, the PSA would have been central to the regulatory apparatus of the

293. IPES Report, *supra* note 23 at 48–75.

294. *See* Morris & Jacquet, *supra* note 5, at 41.

295. FRERICK, *supra* note 3, at 117–19.

296. Hendrickson, *Resilience*, *supra* note 266, at 419.

297. For the sake of keeping the discussion manageable, I leave aside a discussion of animal welfare and the mass industrial production of meat. *See generally* JONATHAN SAFRAN FOER, EATING ANIMALS (2009).

meatpacking industry. It authorized the USDA to supervise and price regulate the organized markets in which nearly all livestock sales took place, while also being able to set and enforce standards for meatpackers' commercial conduct within and beyond these markets. In practice, however, the PSA played mostly a supporting role to other regulatory regimes and was not used to disrupt industry restructuring and reconsolidation. But the PSA remains good law and its provisions contain potential for imposing standards of conduct that would spread power downward. Experiments in that direction during the Biden Administration showed some promise.

To establish the relevance of the PSA, this part explores how the Act was understood by the Congress that enacted it and then how it was enforced (and, mostly, not enforced) by the USDA over the years.

A. *The Original Design of the PSA*

As discussed above, the PSA was Congress's response to the FTC's 1919 report on the meatpacking industry.[298] It was passed after extensive hearings and debate, which took place at the same time that the DOJ was preparing, bringing, and settling its case with the Big Five packers.[299] The consent decree was finalized while debate and drafting were still ongoing, and legislators did take into account the decree's central effort to split up packers from stockyards.[300] Still, as several of the law's advocates emphasized, the PSA was meant to stand on its own—to be enforced in conversation with the DOJ as necessary, but without needing the consent decree to be effective.[301]

298. *See supra* Section I.A.

299. 61 CONG. REC. 1800 (May 26, 1921) (statement of Rep. Haugen) (describing the lengthy hearings).

300. *See, e.g.*, 61 CONG. REC. 1808–11 (May 26, 1921).

301. *See* 61 CONG. REC. 1809 (May 26, 1921) (statement of Rep. Tincher) ("I believe the stockyards should be regulated by law and it never did appear to me to make any difference as to who owned them."); *id.* at 1811 (statement of Rep. Kincheloe) ("It was the intention of the committee in drawing this bill as reported not to touch that decree one way or the other."); 61 CONG. REC. 1866 (May 27, 1921) (statement of Rep. Voigt) (supporting the bill: "I do not believe that it is right that we should pass a bill here and put the supervision over the packers in the hands of the Secretary of Agriculture, and then also in part regulate them by a decree of court."); 61 CONG. REC. 2656–57 (June 16, 1921) (statement of Sen. Smoot) (opposing the bill, pointing out that the then-current draft of the law governed packer ownership over stockyards and was more comprehensive than the consent decree); 61 CONG. REC. 2702 (June 17, 1921) (statement of Sen. La Follette) (putting a letter into the record from leading farm groups insisting that the legislation should have the backstop of the Sherman Act and the consent decree at least "until its operation has been successfully tried out"). From the other side, Attorney General Palmer testified in front of Congress that legislation was not necessary after

The PSA is best seen as part of a series of efforts at reforming the marketing system—and especially the agricultural marketing system—pushed forward by agrarian populists and their allies in the Progressive Era.[302] During the Wilson Administration, these reforms included both the FTC and Clayton Acts as well as "the Warehouse, Grain Standards, and Cotton Futures Acts of 1914–16 and railroad and shipping legislation of 1910–16."[303] Congress continued its efforts during the Harding Administration despite the new president's avowed conservatism,[304] passing the Capper-Volstead Act,[305] which exempted agricultural cooperatives from antitrust laws regarding horizontal coordination while empowering the USDA to ensure that those cooperatives did not become monopolists[306] and the Grain Futures Act[307] (after the Futures Trading Act was struck down) to regularize and stabilize the process of grain trading.[308] As Professor Sanders has convincingly argued, many of these reforms followed a pattern: Agrarian populists pushed for some combination of nationalization, break-ups, and detailed conduct rules meant to disperse power. These proposals produced a backlash mostly from the owners of the large firms that would have been regulated. After extensive debate and lobbying, Congress would arrive at a compromise effort that was often spearheaded by technocratic urban reformers and that (often) took the form of a commission in charge of enforcing a set of broad, undefined prohibitions.[309]

The PSA represented the commission compromise stage of meatpacking reform. As Representative Anderson put it in the final hearings before debate commenced, the central purpose of the PSA was to "to set up an agency between producer and packer, and between packer and consumer, that will give confidence to the producer and to the consumer, and tend to induce the belief

the consent decree. 61 CONG. REC. 1807 (May 26, 1921) (statement of Rep. Tincher) (describing this testimony).

302. *See generally* SANDERS, *supra* note 65 (explaining that the PSA followed the ICA and the Sherman Antitrust Act, bolstering effective enforcement and legislative support; additional legislation followed the PSA with increased agrarian support).

303. *Id.* at 298.

304. Harding's commitment to less aggressive regulation and reform was discussed multiple times during the debates over the PSA. *E.g.*, 61 CONG. REC. 2652 (discussing the Republican platform and its implications); 61 CONG. REC. 1804 (discussing the relevant of Harding's campaign commitments). On Harding's campaign and policies generally, see EUGENE P. TRANI & DAVID L. WILSON, THE PRESIDENCY OF WARREN G. HARDING (1977).

305. Capper-Volstead Act, ch. 57, § 1, 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. § 291).

306. Pub. L. 67-146, 42 Stat. 388 (1922) (codified at 7 U.S.C. § 291).

307. *Id.*

308. The Grain Futures Act, ch. 369, 42 Stat. 998 (1922).

309. *See* SANDERS, *supra* note 65, at 387–408.

that somebody is going to see to it that a square deal is given to everybody concerned."[310] Those who favored the law thought that the Sherman, Clayton, and FTC Acts had proven insufficient to check the power of packers and that the consent decree was not enough on its own.[311] With nationalization receiving insufficient traction and cooperativism fizzling, they sought to, in the words of the House Report, "extend[] farther than any previous law in the regulation of private business, in time of peace, except possibly the Interstate Commerce Act."[312] Many of those who opposed the PSA did so on precisely the ground that they thought it went too far—some even invoked the specter of Bolshevism.[313]

The core aspect of the "square deal" the PSA promoted was to reduce the "spread" between producers and consumers—that is, to increase farmers' prices and decrease consumers' prices while reducing packers' incomes.[314] It remained ambiguous whether this spread was to be minimized even if doing so came at the expense of efficiency (a specter that was raised by opponents, including the packers themselves), although some legislators were clear that efficiency could not justify domination.[315] In any case, this effort at rebalancing income was to be done by directly regulating prices at stockyards while promoting more vigorous competition between packers and developing rules that would prevent

310. *Hearings on Agriculture*, *supra* note 82, at 24; *see also* H.R. REP. NO. 67-77, at 2 (1921) ("[The bill] has been worked out . . . [to] safeguard the interest of the public and all elements of the industry from the producer to the consumer without destroying any unit of it").

311. 61 CONG. REC. 1877 (May 27, 1921) (statement of Rep. McLaughlin) (discussing the committee's decision that "constructive legislation [was] . . . necessary" because of failures of previous regulation); *id.* at 1887 (statement of Rep. Anderson) (calling previous prohibitions "absolutely inadequate").

312. H.R. REP. NO. 67-77, at 2 (1921); *see also* 61 CONG. REC. 1804 (May 26, 1921) (statement of Rep. Tincher); 61 CONG. REC. 1887 (May 27, 1921) (statement of Rep. Anderson); 61 CONG. REC. 2616 (June 15, 1921) (statement of Sen. Kendrick); *id.* at 2621–23 (debate over relevance of business affected with public interest).

313. *See* 61 CONG. REC. 1860 (May 27, 1921) (statement of Rep. Jones); 61 CONG. REC., 1872 (May 27, 1921) (statement of Rep. Parker); 61 CONG. REC. 1925 (May 31, 1921 (statement of Rep. Sanders); 61 CONG. REC. 2381 (June 10, 1921) (statement of Sen. Stanfield); 61 CONG. REC. 2600 (June 15, 1921) (statement of Sen. Fernald); 61 CONG. REC. 2620 (June 15, 1921) (statement of Sen. Brandegee); 61 CONG. REC. 2651 (June 16, 1921) (statement of Sen. McCormick).

314. *See* 61 CONG. REC. 1809 (May 26, 1921) (statement of Rep. Tincher) 61 CONG. REC. 1868–69, 1879–82 (debate concerning whether packers are making excess profits at others' expense); 61 CONG. REC. 2627 (June 15, 1921) (statement of Sen. Capper); 61 CONG. REC. 2702–03 (June 17, 1921) (statement of Sen. La Follette); *Hearings on Agriculture*, *supra* note 82, at 24–29 (discussing profits, spreads, and price regulation).

315. *E.g.*, 61 CONG. REC. 1862 (May 27, 1921) (statements of Rep. Jones) (comparing efficiency in business to the efficiency of a "dictator" in government).

them from manipulating markets in ways that took advantage of others—especially farmers.[316] But Congress's concern was not just how to distribute flows of money and credit. Supporters of the bill also discussed the importance of equalizing bargaining power more generally, promoting cooperation, and preventing unfair sources of exclusion and advantage while promoting a less oligarchic food system.[317]

This goal was aimed at by creating a commission with both adjudicatory and regulatory authority: the Secretary of Agriculture could (and can) initiate administrative hearings—appealable to a federal court of appeals—write regulations, undertake investigations, inspect books and records, and engage in rate regulation of stockyards.[318] The substantive ambit of the PSA is defined by modifications of the broad prohibitory language that had been used in the Sherman and Clayton Acts, the FTC Act, and the ICA.[319]

As discussed above, stockyards are treated as regulated exchanges—with public utility-style rate regulation and antidiscrimination rules at play—packers

316. 61 CONG. REC. 1800 (May 26, 1921) (statement of Rep. Haugen introducing the bill) ("[T]o encourage, protect, and build up worthy and legitimate enterprises and activities in connection with the great packing industry . . . [to] safeguard the interests of the public and all elements of the packing industry from the producer to the consumer without destroying any unit in it."); 61 CONG. REC. 1868 (May 27, 1921) (statement of Rep. Voigt) (discussing benefits to produce and consumer and genuine competition and conducting business "in a lawful and proper way"); H.R. REP. NO. 67-77, at 2 (1921) ("The bill also amply protects the interest of cooperative associations.").

317. *E.g.* 61 CONG. REC. 2614 (June 15, 1921) (Sen. Kendrick) ("The fundamental objection to packer ownership or domination . . . is that it places the buyer of livestock in a position of power of which, if he were so disposed, he could take undue advantage, to the detriment of the seller."); 61 CONG. REC. 2649 (June 16, 1921) (statement of Sen. McCormick) ("There are many Senators, like myself, who long have believed that legislation of this character was necessary . . . because we believed that it was contrary to public policy that a great industry which in one way or another affected a majority of our fellow citizens should be dominated by a few persons, natural or corporate, without control.")

318. Pub. L. 67-51, secs. 203, 204, 310, 311, 401, 407, 42 Stat. 159, 161–65, 169 (1921) (codified as amended in scattered sections of 7 U.S.C.).

319. *See supra* note 311 and accompanying text. Legislators were so explicit about this borrowing that, at several points during the debate, there was discussion about whether anything new was being prohibited or whether these prohibitions were being given new strength by being housed in a special commission with increased supervisory, regulatory, and enforcement authority. *See, e.g.*, 61 CONG. REC. 2611 (June 15, 1921) (statement of Sen. Caraway) (stating that the bill merely gives administrative authority to govern prohibitions already on the books); 61 CONG. REC. 2619 (June 15, 1921) (statement of Sen. Kendrick) (same); 61 CONG. REC. 2654 (June 16, 1921) (statement of Sen. Kenyon) (acknowledging one or two additions but mostly extending existing prohibitions); 61 CONG. REC. 2661 (June 16, 1921) (discussion as to whether this is true, with Senator Cummins providing reasons it is not).

are treated as dominant players subject to heightened antitrust-style and looser common carrier-style rules.[320]

In the antitrust-like category, the PSA makes it unlawful for packers to take any action "for the purpose or with the effect of . . . restraining commerce,"[321] even if (as would be required under the Sherman Act) there is no agreement among competitors,[322] and the PSA prohibits any course of commercial conduct "for the purpose or with the effect of . . . creating a monopoly."[323] It also specifically prohibits market division ("apportioning the supply" between some set of packers) with the "tendency or effect" of restraining commerce or creating a monopoly,[324] as well as any arrangements or unilateral actions with the purpose or effect of "manipulating or controlling prices" (whether or not doing furthers monopolization or restraint of trade).[325]

This last prohibition—on price manipulation—also resembles prohibitions on price manipulation in financial markets, especially on regulated exchanges, although it does not contain the same level of intent usually required in modern versions of these laws.[326]

320. *Supra* notes 102–09 and accompanying text.

321. 7 U.S.C. § 192(d). *Compare id.* (declaring unlawful nearly any commercial action—"sell[ing] or otherwise transfer[ring] to or for any other person, or buy[ing] or otherwise receiv[ing] from or for any other person, any article" so long as it is done with the purpose or effect of restraining trade), *with* 15 U.S.C. § 1 (declaring unlawful "every contract, combination . . . or conspiracy" only if done in restraint of trade).

322. *See* Herbert Hovenkamp, Does the Packers and Stockyards Act Require Antitrust Harm? 4 (Jan. 10, 2011), available at https://scholarship.law.upenn.edu/faculty_scholarship/1862/ [https://perma.cc/7DGK-9W78 (staff-uploaded archive)]; KADES, *supra* note 288, at 76–77.

323. 7 U.S.C. § 192(d). *Compare id. with* 15 U.S.C. § 2 (imposing criminal liability on those "who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize").

324. 7 U.S.C. § 192(c). This is now effectively a redundancy, since market division had been ruled unlawful under Sherman Act precedent since before the PSA, *see* United States v. Addyston Pipe & Steel Co., 85 F. 271, 302 (6th Cir. 1898), and has since been deemed illegal per se. United States v. Topco Assocs., Inc., 405 U.S. 596, 612 (1972); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 50 (1990) (per curiam). *But see* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 225–27 (D.C. Cir. 1986) (casting doubt on *Topco*).

325. 7 U.S.C. § 192(e).

326. *Cf.* 15 U.S.C. § 78i (prohibiting manipulation of securities prices); Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation, 76 Fed. Reg. 41398 (July 14, 2011) (codified at 17 C.F.R. pt. 180) (regulation implementing prohibition of manipulation of commodities prices and discussing the history). Price manipulation causes of action are frequently brought alongside antitrust causes of action in seeking liability for the same underlying conduct. *Cf.* Harry v. Total Gas & Power N. Am., Inc., 889 F.3d 104 (2d Cir. 2018) (action by investors against a major oil and gas company alleging coordinated price manipulation on both Commodities Exchange Act and Sherman Act grounds).

The PSA also applies public utility- or regulated exchange-type principles by making it unlawful for packers to "make or give any undue or unreasonable preference or advantage [or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage] to any particular person or locality in any respect."[327] This clause is almost identical to section 3 of the ICA.[328] Similar language can also be found in other common carrier and public utility laws, both before and after the PSA's initial enactment.[329]

Finally, the PSA makes it unlawful for packers to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device."[330] This phrase seems to have been intended to modify and extend the FTC's authority as of 1919, in particular to focus on vertical power.[331] At that time, the FTC's authority was defined under section 5 of the FTC Act in terms of "unfair methods of competition."[332] That phrase was meant to give the FTC authority to go beyond the limits of the Sherman Act—and, indeed, the Clayton Act—to set norms that would channel business conduct away from methods of competition that could lead to monopolization, restraints of trade, or other

327. 7 U.S.C. § 192(b).

328. Interstate Commerce Act, Pub. L. No. 49-104, § 3, 24 Stat. 379 (1936).

329. *See* RICKS ET AL., NETWORKS, *supra* note 41, at 26 (2022) (discussing "equal access rules" as a core part of the "toolkit" such laws employ); Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law of Common Carriers*, 73 DUKE L.J. 1037, 1051–53, 55–56 (2024) (discussing equal access rules at common law and the emergence of price nondiscrimination in nineteenth-century common law).

330. 7 U.S.C. § 192(a).

331. I know of no smoking gun in which Congress directly states that it is borrowing from the FTC Act, but, in my view, the circumstantial evidence is very strong and, to my knowledge, nobody has contested the point. The most enlightening moment on this point I am aware of in the pre-enactment legislative history occurs when the final House bill was first introduced, in which Representative Luce says he "cannot read the page without considering it to be a mere elaboration of the attempt to prevent unfair competition in commerce" and Representative Anderson disagrees on the grounds that unfair competition "only includes acts which constitute the rights of the competitor." 61 CONG. REC. 1805 (May 26, 1921). But the legislative debate also contains multiple other mentions of "unfair competition" and "unfair methods of competition" as relevant to consideration of the meaning of the PSA. *E.g.*, 61 CONG. REC. 1801 (May 26, 1921) (statement of Rep. Haugen); 61 CONG. REC. 2584–86 (June 15, 1921) (debate about certain actions taken by the FTC and the meaning of "unfair methods of competition"). And the legislative debate was strongly influenced by the FTC's report and testimony, with Congress briefly considering giving the relevant authorities to the FTC. *See* 61 CONG. REC. 2697–2708 (June 17, 1921) (discussing Sen. Sterling's proposed amendment to that effect—the amendment lost by 2 votes (31 in favor, 33 against, 31 not voting)).

332. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 4 (2003).

dominant or exclusionary conduct.[333] The Congress that enacted the original FTC Act frequently spoke of preventing monopolies and restraints of trade in their "incipiency" and of imposing commonsense standards of morality. In 1920, the FTC had not yet had much opportunity to test the scope of "unfair methods of competition"—once the United States entered the Great War, it had mostly been tasked with investigating the causes of high prices in various industries (including meatpacking!) rather than bringing enforcement actions.[334] Nevertheless, Congress was committed to creating an even broader authority than the unfair methods standard, or, by implication, than the Sherman or Clayton Acts.[335]

The phrase "unfair practice" was initially put forward by the Commission itself during 1919 House hearings on the "high cost of living as affected by trusts and monopolies."[336] The context was not meatpacking. Rather, the Commission was (in retrospect, wrongly) concerned that the phrase "unfair method of competition" might be interpreted to apply only to conduct that harmed competitors in the same market—thus preventing the Commission from policing conduct like stock watering, board interlocks, or vertical relationships between firms at different levels of the supply chain.[337] It sought to add "unfair practice" to section 5 in order to make clear the Commission's authority over such exercises of *vertical* power.

Congress did not take up the suggestion (though, as we will discuss, a later Congress eventually gave the FTC authority over "unfair or deceptive acts or practices" to encourage its consumer protection practice). But it is surely not a

333. *See* Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 441–42 (1920) (Brandeis, J., dissenting) ("The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general practice, that the apprehended effect of an unfair method in suppressing competition by destroying rivals could be averted."); Sears, Roebuck & Co. v. Fed. Trade Comm'n, 258 F. 307, 311 (7th Cir. 1919) ("The commissioners, representing the government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases.").

334. Winerman & Kovacic, *Outpost Years*, *supr*a note 86, 156 (2010) ("Though [the FTC's] staff quadrupled (only to halve again after the war), it served largely as a cost-finding agency for other agencies.").

335. NEIL E. HARL & ROBERT P. ACHENBACH, AGRICULTURAL LAW § 71.01 & nn.3–7 (1988).

336. *High Cost of Living as Affected by Trust and Monopolies: Hearings Before the H. Comm. on the Judiciary*, 66th Cong. 25–26 (1919) [hereinafter *High Cost Hearings*] (statement of Rep. Murdock); *see* Winerman & Kovacic, *Outpost Years*, *supra* note 86, at 177 n.129 (pointing to these hearings).

337. *High Cost Hearings*, *supra* note 336, at 25–26 (statement of Rep. Murdock).

coincidence that the phrase "unfair . . . practice" appears in every iteration of the PSA being considered by the same Congress at the same time.[338]

B. *Enforcement and Nonenforcement of the PSA*

The grandest ambitions of the PSA were never realized. Enforcement was uneven and eroded over time. Only in the past two decades has its potential scope been revisited.

In the first few years after the Act was passed, the new Packers and Stockyards Division of the USDA set up a robust market supervision program at stockyards and brought many actions against packers for antitrust-like offenses (like boycotts) and abuses of power (like intentional delays in payment).[339] Thereafter, enforcement of the stockyards half of the act seems to have remained relatively robust until stockyards become vestigial. Enforcement of the packers half seems to have been uneven.[340]

338. S. 5305, 65th Cong. (1919); S. 2202, 66th Cong. (1919); S. 3944, 66th Cong. (2020).

339. *See* S. REP. NO. 85-704, at 9–10 (1957) (discussing early enforcement of both parts); Farmers' Livestock Comm'n v. United States, 54 F.2d 375, 376 (E.D. Ill. 1931) (reviewing an enforcement against a boycott); United States v. Am. Livestock Comm'n Co., 279 U.S. 435, 436 (1929) (same); Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 431–32 (1930) (reviewing an enforcement against price-fixing).

340. In a recent piece, Erika Douglas argues that, after only a few years of vigor, the USDA effectively "abandoned" the PSA, at least with respect to the antitrust-like authorities therein. Erika Douglas, *Antitrust Abandonment*, 42 YALE J. REGUL. 1, 44–55 (2025). I think that is an overstatement for a few reasons. First, Douglas focuses only on reported cases litigated in federal court for the period between 1922 and 2017. *Id.* at 49–50. As she acknowledges, that makes for a record "less complete than for other agencies," since it tells us very little about cases that settled or that went unreported, let alone administrative and informal enforcement. *Id.* The incompleteness is not Douglas's fault: there does not seem to be much information available about administrative proceedings under the PSA before 2017 (although I have a bit of data that I will make use of below). Second, because her focus is on administrative antitrust enforcement, Douglas only looks at reported cases that involve subsections 202(c) through (g) of the PSA—i.e. those that most closely track the language of the Sherman and Clayton Acts. *Id.* at 45. But it turns out that the great majority of the reported cases dealing with the PSA—including those that involve antitrust-like allegations—involve 202(a). Douglas characterizes 202(a) and (b) as providing the USDA with "consumer protection-like powers." *Id.* at 46. That is accurate in the sense that "unfair or deceptive" is used in modern consumer protection statutes, but, as we have just discussed, it is not accurate insofar as it implies that those provisions are primarily focused on protecting consumers. And, as we will discuss below, the term "unfair or deceptive" appeared in the PSA *before* it was used in the modern consumer protective sense (eventually Congress separated out consumer protection authority in meatpacking and gave it to the FTC). Others involved the stockyard half of the PSA, which is beyond Douglas's scope but was the USDA's priority during the first few decades of enforcement. Third, enforcement of the PSA did not remain at a uniformly low level but—as best I can tell—seems to have fluctuated over time and in response to political pressures.

The bread-and-butter of packers-half enforcement has always been actions for nonpayment or delayed payment. During years of regulatory retrenchment, those actions have been the *only* enforcement of the PSA.[341] But there have also been spurts of more ambitious regulatory energy. One such period was the 1960s, when the former Minnesota Democratic-Farmer-Labor Party founder Orville Freeman was secretary of agriculture.[342] During that decade, the USDA brought cases (winning some and losing some) for predatory price cutting, unilateral refusal to deal, market division, price discrimination, and failure to maintain sufficient financial cushion to meet orders.[343] Many of these cases were against big players. After a period of only nonpayment cases under Earl Butz (who often openly denigrated the value of small farms, decentralized power, competition, price stability, buffer stocks, and, indeed, regulation more generally),[344] a brief spurt of more ambitious cases was brought under Robert Bergland.[345]

But by the late 1970s, these were rearguard actions. Stockyards had become much less important (and nobody took any action to attempt to redirect commerce onto them), rendering half of the PSA outdated. Surrounding antitrust doctrine began to favor bigness in the name of productive efficiency under the influence of the Chicago School, and the USDA followed along.[346] By the 1990s, the USDA had largely given up on trying to rebalance power in

341. S. REP. NO. 85-704, *supra* note 339, at 3–4 (discussing the focus on nonpayment in the early years of PSA enforcement); KADES, *supra* note 288, at 11 (discussing this focus in the 1990s and early 2000s).

342. David Stout, *Orville Freeman, 84, Dies; 60's Agriculture Secretary*, N.Y. TIMES (Feb. 22, 2003), https://www.nytimes.com/2003/02/22/us/orville-freeman-84-dies-60-s-agriculture-secretary.html [https://perma.cc/4SG7-Y488 (staff-uploaded, dark archive)].

343. Wilson & Co. v. Benson, 286 F.2d 891, 896 (7th Cir. 1961) (finding that selling below cost amounted to predatory pricing and unlawful price discrimination); Swift & Co. v. United States, 308 F.2d 849, 854 (7th Cir. 1962) (finding that an agreement to share the purchase of hogs of a given quality from a given region was unlawful); Bowman v. U.S. Dep't of Agric., 363 F.2d 81, 86 (5th Cir. 1966); Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968) (finding that failing to maintain financial solvency while continuing to make orders was unlawful); Armour & Co. v. United States, 402 F.2d 712, 727 (7th Cir. 1968) (overturning a USDA finding that a regionally focused coupon amounted to unlawful price discrimination).

344. FRERICK, *supra* note 3, at 38–39.

345. De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329, 1331 (9th Cir. 1980) (alleging coerced change in terms of sale by group of packers); United States v. Perdue Farms., Inc., 680 F.2d 277, 279–80 (2d Cir. 1982) (alleging self-dealing by major poultry packer).

346. *See* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST 129, 129–53 (2022) (discussing the influence of the Chicago School on the development of American antitrust policy); Priest, *supra* note 180, at S1 (discussing the influence of Robert Bork's *Antitrust Paradox* on Supreme Court antitrust opinions).

the meatpacking industry. The lion's share of PSA cases again involved failures to make prompt payment and new regulations were nowhere to be found.[347]

In fits and starts, that has begun to change. Enabled by a 1976 amendment to the PSA that provided a private right of action,[348] farmers began to bring class actions challenging core business practices.[349] In 1996, a group of cattle feeders brought the first class action in PSA history, originally against IBP, which merged with Tyson five years later during the litigation's pendency.[350] Further class actions followed quickly, mostly involving poultry growers.[351] Most of these cases were successful in courts of first instance—some winning major judgments at jury trials—only to be reversed by appellate courts inventing new legal theories that will be critiqued below.[352]

Meanwhile, farmers' organizations took their cause to Congress. The 2002 Farm Bill would have created more explicit standards in a bid to revive antitrust enforcement.[353] Although that bill died during committee markup, some of its proposals were revived in the 2008 Farm Bill, which, among other things, "provide[d] poultry growers and swine producers the right to cancel contracts," and "the option to decline arbitration," and required the USDA to issue a rule on the meaning of "undue or unreasonable preference or advantage."[354] Packers lobbied hard to prevent a strong rule from being passed, mobilizing majorities in Congress to pass budgetary riders for the rest of the Obama Administration that withheld funds from the USDA for nearly every aspect of the rule with any bite.[355] Regulatory activity ceased during the first Trump Administration.

Beyond the agricultural world, interest in strengthening antitrust statutes began to gain momentum. When President Biden took office, he appointed leading figures in the emerging antimonopolist movement to key positions in

347. U.S. GEN. ACCT. OFF., GAO/RCED-92-26, PACKERS AND STOCKYARDS ADMINISTRATION: OVERSIGHT OF LIVESTOCK MARKET COMPETITIVENESS NEEDS TO BE ENHANCED 4–5 (1991).

348 An Act to Amend the Packers and Stockyards Act of 1921, Pub. L. No. 94-410, § 6, 90 Stat. 1249, 1250 (1976) (codified as amended at 7 U.S.C. § 209).

349. JOEL L. GREENE, CONG. RSCH. SERV., R41673, USDA'S "GIPSA RULE" ON LIVESTOCK AND POULTRY MARKETING PRACTICES 5 (2016).

350. *Id.*

351. *Id.* at 6.

352. *Infra* Section IV.C.2.

353. Steve Marbery, *Competition Clause Proposed in U.S. Farm Policy Debate*, FEEDSTUFFS (June 4, 2001), https://www.iatp.org/news/competition-clause-proposed-in-us-farm-policy-debate [https://perma.cc/3W9T-CF54].

354. GREENE, *supra* note 349, at 7–8.

355. *Id.* at 28–34.

his Administration.[356] Under their influence, President Biden issued an "Executive Order on Promoting Competition in the American Economy" that, among other things, instructed the USDA to "consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences."[357]

IV. INTERPRETING THE PSA

Since stockyards are no longer the central locus of livestock sales, the packers' half of the PSA is most relevant today. The central substantive provision of the packers' half of the PSA is section 202.[358] As discussed above, section 202 has several types of prohibitions.[359] Subsections (c), (d), and (e) give the USDA the capacity to develop an expanded notion of restraints of trade and monopolization—one that can be guided by court-created common law (and will be reviewed by courts) but that need not remain within its confines.[360] Subsection (e) also prohibits any arrangements or unilateral actions with the purpose or effect of "manipulating or controlling prices," whether or not they restrain trade or contribute to a monopolization scheme.[361] Subsection (b) creates a common carrier-like obligation not to engage in unjustified favoritism

356. *See* Sandeep Vaheesan, *Seeds of an Antitrust Revival*, DEMOCRACY J. (Spring 2024), https://democracyjournal.org/magazine/72/seeds-of-an-antitrust-revival/ [https://perma.cc/M4QV-QV2X].

357. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36992 (July 14, 2021); *see also* THE WHITE HOUSE, FACT SHEET: THE BIDEN-HARRIS ACTION PLAN FOR A FAIRER, MORE COMPETITIVE, AND MORE RESILIENT MEAT AND POULTRY SUPPLY CHAIN (2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/ [https://perma.cc/745T-UBKU]; Letter from Senators Josh Hawley & Tammy Baldwin to Chairman Simons, Comm'r Phillips, Comm'r Chopra, Comm'r Slaughter & Comm'r Wilson (Apr. 29, 2020), https://www.hawley.senate.gov/wp-content/uploads/files/2020-04/FTC-Letter-Meatpacking-6b-Study.pdf [https://perma.cc/8JFT-XV2E] (calling for an antitrust investigation of the meatpacking industry).

358. 7 U.S.C. § 192.

359. *Infra* Part III.

360. 7 U.S.C. § 192(c), (d), (e).

361. *Id.* § 192(e).

or discrimination.[362] And subsection (a) prohibits any "unfair, unjustly discriminatory, or deceptive practice or device."[363]

This final subsection seems to encompass all of the other prohibitions in section 202 while going beyond them. Indeed, nearly every case under section 202 that has been appealed into the federal courts has involved the application of section 202(a).[364] This subsection focuses on the meaning of this subsection, drawing on case law from the FTC and the ICC in addition to the USDA. The basic claim will be that the prohibition on "deceptive" conduct gives the USDA authority to police dishonesty whether or not there is evidence that such dishonesty had an effect on competitive conditions or prices. The prohibition on "unfair" conduct gives the USDA authority to determine which actions reinforce packers' power (and/or undermine the power of trading partners, especially farmers) without sufficient justification. And the prohibition on "unjustly discriminatory" conduct gives the USDA authority to rebalance power between farmers by preventing packers from disfavoring certain farmers without sufficient justification.

A. *Unfair or Deceptive Practices*

1. Borrowing from the FTC

As mentioned above, the phrase "unfair or deceptive practices" was first suggested by the FTC as a way of expanding its authority over "unfair methods of competition." Thus, the FTC's 2022 policy statement on the meaning of "unfair methods of competition," which carefully synthesizes over a century of case law, provides a good starting place for analysis.[365] In that statement, the

362. *Id.* § 192(b); *see* Interstate Commerce Act, ch. 104, § 3(1), 24 Stat. 379 (1887) (repealed) (making it unlawful for common carriers to "make or give any undue or unreasonable preference or advantage . . . or subject any particular person . . . to any undue or unreasonable prejudice or disadvantage."). The "undue preference" language of the ICA was eventually used by the ICC to prohibit racial discrimination in interstate travel. Mitchell v. United States, 313 U.S. 80, 93–95 (1941); *see also* Keys v. Carolina Coach Co., 64 M.C.C. 769, 772 (U.S. Interstate Com. Comm'n Nov. 7, 1955) (administrative ruling affirming and applying this principle to bus service); Hall v. DeCuir, 95 U.S. 485, 488–89 (1878) (finding discrimination in interstate commerce an "undue burden" under the Commerce Clause); Morgan v. Virginia, 328 U.S. 373, 380–81 (1946) (same).

363. 7 U.S.C. § 192(a).

364. These cases are discussed in Section IV.A.2 below.

365. FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 8–16 (2022) [hereinafter 2022 POLICY STATEMENT], https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf

FTC identifies "two key criteria to consider" in determining whether a method of competition is unfair.[366] The first criterion is whether conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature" (notice that "deceptive" is included in this first prong as a particularly well-defined subcategory of "unfair"—that is in accord with longstanding practice).[367] The second is whether the "conduct . . . tend[s] to negatively affect competitive conditions."[368] These criteria are to be "weighed according to a sliding scale."[369] On the one hand, where there is clear exploitation, deception, abuse, or similar overbearing uses of economic power, "less may be necessary to show a tendency to negatively affect competitive conditions."[370] On the other, conduct that does not facially involve an abuse of power may be an unfair method of competition if "more information about the nature of the commercial setting," such as the "size, power, and purpose of the respondent" or the "current and potential future effects of the conduct," indicates that the conduct will undermine the competitive process.[371]

This frame of analysis has been criticized, including by a dissenting Commissioner as a mere "list of adjectives" that does not set clear standards.[372] The criticism is misguided. The list of adjectives comes from a Second Circuit case and draws on adjectives commonly used by previous courts in reviewing allegations of "unfair methods of competition."[373] And the most commonly proposed alternative of applying the "rule of reason" from Sherman Act cases relies on an even vaguer adjective.[374] Nevertheless, it is less than clear how *some*

[https://perma.cc/F8UY-BHS5]. I have my disagreements with several aspects of the policy statement, but it does an excellent job summarizing case law and it is, in any case, the current policy of the administrative agency charged with enforcing the relevant authority.

366. *Id.* at 9.

367. *Id*; *see* Herrine, *Unfairness, Reconstructed*, *supra* note 42, at 103 (discussing the "deception" as a subcategory of "unfair").

368. 2022 POLICY STATEMENT, *supra* note 365, at 9.

369. *Id.*

370. *Id.*

371. *Id.*

372. CHRISTINE S. WILSON, COMM'R, FED. TRADE COMM'N, DISSENTING STATEMENT REGARDING THE "POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT," at 6 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf [https://perma.cc/YXV7-9UKT].

373. E.I. DuPont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 140 (2d Cir. 1984); Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 4 UTAH L. REV. 849, 872 n.127 (2023) [hereinafter Herrine, *At the Nexus of Antitrust*].

374. *Id.*

of the adjectives in the first criterion are meant to map onto the analysis suggested by the second criterion. How is one to determine whether conduct is "collusive," for instance, without asking whether the conduct "tends to negatively affect competitive conditions"?

In earlier work, I have suggested that we can more or less ignore the "collusive" aspect of the first criterion and conceptualize it as focused on abuses of power asymmetries regardless of exclusionary effects while conceptualizing the second prong as turning attention to whether conduct is harmful in part through exclusion.[375]

a. The First Criterion

The first criterion, insofar as it focuses on abuses of power asymmetries independently of their exclusionary effects, also thereby identifies unfair *practices*. Indeed, section 5 of the FTC Act was amended to add a prohibition on "unfair or deceptive acts or practices" to endorse the FTC's practice of prohibiting business conduct that harmed vulnerable parties even if the competitive impact of that conduct was unclear.[376] It aims to prevent firms from using their various forms of power to undermine the socially recognized interests of systematically less powerful market participants.

The modern test the FTC applies to determine whether a given type of conduct is an unfair practice is whether it (1) causes injury to protected parties (consumers, in the FTC's case); (2) that injury is outweighed by countervailing benefits to those parties or to competition; and (3) the injury was not reasonably avoidable by the protected parties.[377] As I have argued elsewhere, this test is best understood as counteracting power asymmetries of various sorts—in information, wealth, outside options—by focusing the FTC on socially recognized interests that vulnerable parties are unable to further under existing market conditions.[378] That requires *channeling* competition to advantage "high

375. Herrine, *At the Nexus of Antitrust*, *supra* note 373, at 881–85.

376. *See* Herrine, *Folklore*, *supra* note 42 at 462–66; Herrine, *At the Nexus of Antitrust*, *supra* note 373, at 881–85.

377. 15 U.S.C. § 45(n).

378. Herrine, *Unfairness, Reconstructed*, *supra* note 42, at 166–72. Unlike some consumer protection advocates and scholars, I do not think the Substantial Injury test is inherently less protective of consumers than the "Cigarette Rule" that preceded it and that still governs in many states. Thus, I do not embrace Michael Stumo and Douglas O'Brien's suggestion that the USDA adopt the Cigarette Rule. Stumo & O'Brien, *supra* note 33, at 111–12. Although further elaboration would require much more space, my basic reasoning is that the narrowness of the Substantial Injury test is not due to its

road firms" that further the relevant interests rather than trying to make markets more "competitive" per se.

A similar logic can be applied to "unfair practices" in section 202. After all, the authorities are not merely homonymous: the FTC, which proposed the amendment to its own authority, pointed to the PSA as precedent (and recall: it had requested such an authority for itself as early as 1919).[379]

The main difference between the two authorities is that the FTC is to use its version primarily to police the power dynamic between firms and vulnerable consumers,[380] while the USDA supervises the dynamic between meatpacker-buyers and vulnerable farmer-sellers. One important difference between these two dynamics regards the socially recognized interests served by consumers versus farmers. The former are primarily considered in terms of *their own* interests (though with consideration of how those relate to others'), whereas the latter are primarily considered in terms of how they serve others' interests in meat consumption that comports with distinct social goals (public health, environmental stewardship, preserving democratic institutions). Thus, an unfairness standard for farmers does not need to be as concerned with overriding vulnerable parties' preferences as it should be with which types of impacts on others a given market structure incentivizes (although this difference should not be overstated—protecting farmer autonomy is part of the goal of the PSA). Another important difference is that, whereas consumers can generally be presumed to be inexpert generalists with little time to examine contracts or examine market structure, farmers are well-versed in the meat business. That is not to say that farmers are equally sophisticated in business dealings as the multinational conglomerates that own meatpacking facilities but

content but to its application by enforcers under the influence of what I have called the Consumer Sovereignty Framework. Since I think that this framework can be rejected without rejecting the Substantial Injury Test and I do not see evidence that the Cigarette Rule guides analysis any better, I see no reason to reject that test. I also think that test is not very helpful and does not take the difficulties of paternalism seriously enough.

379. CHARLES WESLEY DUNN, WHEELER-LEA ACT: A STATEMENT OF ITS LEGISLATIVE RECORD 411, 418 (1938) (testimony of Ewin Davis, Chair, Fed. Trade Comm'n).

380. The original Unfair or Deceptive Acts or Practices ("UDAP") authority was not restricted to consumers by its terms, though the debate surrounding it entirely focused on consumer markets. A 1994 Amendment required proof of "substantial injury *to consumers*." The term "consumer" is not defined, however. Recent years have seen the FTC expand its application of UDAP to workers and small businesses when their relation to business partners is like that of a consumer. Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 29—30 (2024); Herrine, *Unfairness, Reconstructed*, *supra* note 42, at 127.

that they can be counted on to read contracts and shop around more than consumers in many markets.

b. The Second Criterion

What does it mean for conduct to "negatively affect competitive conditions"?[381] The 2022 policy statement focuses on a wide variety of potential harms, including "raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition."[382] It also makes clear that such harms need not have actually taken place, since the point is to "focus[] on incipient threats."[383] What is required is that the conduct is of the sort that "has a tendency to generate" such harms, whether on its own or as part of an overall scheme.[384] This way of thinking about competitive harm is consistent with the "competitive process" account that sees antitrust as pursuing multiple goals—anti-domination, freedom of choice, republican self-governance, efficiency, output—by creating norms that disperse power and reinforce rivalry. It is entirely consistent with the caselaw reviewing FTC actions, though it is a departure from decades of FTC practice under the influence of the consumer welfare framework. Those who argue in favor of this approach have been concerned that the 2022 policy statement's way of conceptualizing harm is too squishy to provide clear guidance or to be evaluated against any metric. They generally argue it is better to apply a "rule of reason" analysis that analyzes each form of conduct by analyzing its likely effect on price and output (sometimes only on the price to consumers, and sometimes allowing for consideration of price to others).[385] My own view is that the competitive process view is more consistent with the text and purpose of the FTC Act, the caselaw implementing

381. 2022 POLICY STATEMENT, *supra* note 365, at 9.

382. *Id.* at 9–10.

383. *Id.* at 9. This notion is well established in case law and legislative history. *See* Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Ac*t, 70 GEO. L.J. 225, 283 (1981).

384. *Id.* at 10.

385. FED. TRADE COMM'N, Statement of Enforcement Principles Regarding "Unfair Methods Of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/9XWZ-N99E].

it, and sound public policy, but, in part because judges trained on the consumer welfare model might see things differently, we can leave the question open.[386]

2. As Applied to Caselaw

This two-factor framework makes good sense of the section 202(a) caselaw and enforcement record—at least prior to the 2005 turn to "competitive injury" in several Circuit Courts, which we will discuss below. A number of cases and regulations focus on preventing abuses of power without any analysis of competitive impact. Many of these cases target packers' actions that interfere with disinterested functioning of market infrastructure: setting standards for weights and measures,[387] preventing delays in payments or feet-dragging in performing on other contractual obligations,[388] and ensuring buyers keep adequate cash on hand and don't operate while insolvent.[389] They have also aimed to prevent deceptive and dishonest practices, including false reports of market conditions, misrepresentations about contract conditions, manipulation of weights, obscuring conflicted relationships with marketing agents, and failing to disclose key aspects of a deal.[390] When the relationship between packers and

386. Herrine, *At the Nexus of Antitrust*, *supra* note 373, at 865–73; Averitt, *supra* note 383, at 227; William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act,* 76 ANTITRUST L.J. 929, 942 (2010); Rudolph J. R. Peritz, *Unfair Methods of Competition Under FTC § 5: Beyond the Sherman Act and an Ex Post Model of Enforcement*, 56 ANTITRUST BULL. 823, 865–67 (2011).

387. 9 C.F.R. §§ 201.82, 201.73.

388. On failing to pay, see R & D Invs., Inc., 35 Agric. Dec. 493, 493 (U.S.D.A. A.L.J. 1976); Mid-West Veal Distribs., 43 Agric. Dec. 1124, 1124–25 (U.S.D.A. Jud. Officer 1984); Ozark County Cattle Co., 49 Agric. Dec. 336, 336 (U.S.D.A. Jud. Officer 1990). On delaying payment, see Beef Neb., Inc., 44 Agric. Dec. 2786, 2786 (U.S.D.A. Jud. Officer 1985); *Mid-West Veal Distribs.*, 43 Agric. Dec. 1124, 1124–25 (U.S.D.A. Jud. Officer 1984); Farmers & Ranchers Livestock Auction, Inc., 45 Agric. Dec. 234, 234 (U.S.D.A. Jud. Officer 1986). On check-kiting, see Blackfoot Livestock Comm'n Co. v. U.S. Dep't of Agric., 810 F.2d 916, 916–17 (9th Cir. 1987). On failing to honor validly drawn drafts, see Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co., 498 F.2d 925, 928 (10th Cir. 1974).

389. Ozark County Cattle Co., 49 Agric. Dec. 336, 336 (U.S.D.A. Jud. Officer 1990); Britton Bros., 49 Agric. Dec. 423, 424–25 (U.S.D.A. Jud. Off. 1990); Powell, 41 Agric. Dec. 1354, 1354 (U.S.D.A. Jud. Officer 1982). In *Mahon v. Stowers*, 416 U.S. 100, 111–14 (1974), the Supreme Court overruled the USDA on this issue, but Congress responded by overruling the court and enacting a separate provision requiring sellers to maintain a trust for the benefit of unpaid cash sellers. *See* 7 U.S.C. § 196(b). Failure to maintain such a trust would be a violation under this separate provision, of course, but one can also interpret Congress's action as siding with the USDA's original interpretation (expressing support for the public policy behind that declaration of an "unfair practice").

390. On false market reports, see 9 C.F.R. §§ 201.53, .100 (2025). On contract disclosures in poultry, see 9 C.F.R. § 201.200. On bait-and-switch sales, see HARL & ACHENBACH, *supra* note 335,

farmers is especially lopsided, as in the poultry industry, subsection 202(a) has been used to set even more minute standards for the process of contract negotiation, required disclosures, and so on (even before the recent spate of regulatory initiatives).[391] These types of enforcement actions and regulations have been deferentially reviewed by courts for substantiality of evidence and consistency with the purpose of preventing vulnerable farmers from being taken advantage of.[392] As the Seventh Circuit put it in an influential case, "Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission."[393]

Heightened farmer vulnerability is also present when market participants serve two different roles—such as a packer also functioning as a dealer or an agent also functioning as a wholesale buyer—and subsection 202(a) has been used to prohibit or to manage these conflicts of interest.[394] Such conflicts of interest move us up the sliding scale: they involve conduct that is less clearly abusive but more clearly affects the grounds on which firms compete. Subsection 202(a) has also long been used to enforce against unambiguously anticompetitive conduct such as collusion between packers or other buyers to push prices down (including by manipulating the bidding process) or to prevent entry by other buyers.[395] Unilateral practices that take advantage of market

§ 71.08[4]. On obscuring conflicts of interest, see *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 804 (9th Cir. 1984). On weights, see *Excel Corp. v. U.S. Dep't of Agric*, 397 F.3d 1285, 1285 (10th Cir. 2005).

391. 9 C.F.R. § 201.100.

392. Capitol Packing Co. v. United States, 350 F.2d 67, 76 (10th Cir. 1965); Bowman v. U.S. Dep't of Agric., 363 F.2d 81, 84 (5th Cir. 1966); Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agric., 438 F.2d 1332, 1336 (8th Cir. 1971); *Hays*, 498 F.2d at 925 (10th Cir. 1974); United States v. Perdue Farms., Inc., 680 F.2d 277, 280 (2d Cir. 1982) (separating "unfair practices" from "anticompetitive" practices); Gerace v. Utica Veal Co., 580 F. Supp. 1465, 1469 (N.D.N.Y. 1984).

393. Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968).

394. 9 C.F.R. §§ 201.56, 201.61 (2024) (commission selling); 9 C.F.R. § 201.67 (2024) (ownership of finance selling agencies). On commercial bribery, see HARL ET AL., *supra* note 335, § 71.08[1]. On discounts to corporate insiders, see *id.* § 71.08[4]. On commingling funds with marketing agencies, see United States v. Donahue Bros., 59 F.2d 1019, 1022–23 (8th Cir. 1932). On self-dealing and inadequate record keeping by agents selling on consignment, see Bosma v. U.S. Dep't of Agric., 754 F.2d 804, 806 (9th Cir. 1984). On overcharging when acting as both dealer and market agent, see Ferguson v. U.S. Dep't of Agric., 911 F.2d 1273, 1274 (8th Cir. 1990). *But see* Cent. Coast Meats, Inc. v. U.S. Dep't of Agric., 541 F.2d 1325, 1327 (9th Cir. 1976) (determining, over a well-reasoned dissent, that USDA could not categorically prohibit packer-dealer cross-ownership because of a separate provision that managed such a circumstance, which was held to imply its permissibility).

395. United States v. Am. Livestock Comm'n Co., 279 U.S. 435, 437–38 (1929) (commercial boycotts); Farmers' Livestock Comm'n v. United States, 54 F.2d 375, 379 (E.D. Ill. 1931) (same); 9 C.F.R. § 201.70 (2024) (bid rigging).

power or aim to increase it in an illegitimate way (such as bribery, predatory pricing, and unilateral refusals to deal by dominant firms) have also been condemned—whether or not they would violate other antitrust statutes.[396] In analyzing these cases, courts consistently applied the principle that the PSA aims to prevent market concentration before it locks in, so the USDA need only establish a *likelihood* of some type of competitive harm without having to prove actual increases in prices or similar injury.[397] And in a 1968 case, the Seventh Circuit adopted a sliding-scale analysis akin to—though not identical to—that put forward by the FTC in 2022:

> Normally the twin solvents for determining when the boundaries of fair competition have been exceeded are the existence of predatory intent and the likelihood of injury to competition. The clearer the danger of the latter, as when competitors conspire to eliminate the uncertainties of price competition, the less important is proof of the former. Conversely, the likelihood of injury arising from conduct adopted with predatory purpose is so great as to require little or no showing that such injury has already taken place.[398]

B. *Unjustly Discriminatory Practices*

Several enforcement actions have also aimed to prevent buyer power from being used to price discriminate—and in particular, to limit volume discounts.[399] The legitimacy of these enforcement actions has generally been analyzed in terms of whether they are oriented toward protecting competitive conditions generally, but they also implicate a distinct commitment to nondiscrimination contained in the prohibition on "unjust discrimination" in

396. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961) (predatory pricing); Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968) (refusal to deal); United States v. Perdue Farms., Inc., 680 F.2d 277, 279 (2d Cir. 1982) (same). *But see* IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999) (finding that a right of first refusal was not unlawful because of lack of evidence of likely anticompetitive effect); HARL & ACHENBACH, *supra* note 335, § 71.08[1] (bribery).

397. *Cent. Coast Meats*, 541 F.2d at 1328 (Goodwin, J., dissenting); Farrow v. U.S. Dep't of Agric., 760 F.2d 211, 214 (8th Cir. 1985); De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329, 1335 (9th Cir. 1980); Parchman v. U.S. Dep't of Agric., 852 F.2d 858, 864 (6th Cir. 1988); *Wilson & Co.*, 286 F.2d at 895–96; Swift & Co. v. Wallace, 105 F.2d 848, 856 (7th Cir. 1939); *IBP, Inc.*, 187 F.3d at 977.

398. *Armour & Co.*, 402 F.2d at 717.

399. HARL & ACHENBACH, *supra* note 335, § 71.08[4]; *Armour & Co.*, 402 F.2d at 717 (overruling USDA finding of unlawful price discrimination); *Wallace*, 105 F.2d at 857 (same); *Wilson & Co.*, 286 F.2d at 896 (7th Cir. 1961) (upholding USDA finding of unlawful price discrimination); Trunz Pork Stores v. Wallace, 70 F.2d 688, 691 (2d Cir. 1934) (same).

subsection 202(a) and on "undue preferences" in 202(b).[400] In the Clayton Act, the Robinson-Patman Act,[401] and in sectoral regulatory schemes statutes such as the ICA, such prohibitions aim to prevent the use of buyer power as a competitive method (specifically, competing on relationships with buyers rather than on merit) and to prevent disempowered parties from being treated worse without good reason.[402] Perhaps the most difficult and contested aspect of policing discrimination is determining which differences between sellers are legitimate grounds for differential treatment.

A relatively well-settled principle is that discrimination based on race or other protected class is unlawful—having been an established violation of the ICA's prohibition on "undue preferences" since 1941.[403] On the other hand, whether dominant buyers can charge lower prices to higher volume sellers due to economies of scale and whether they can price discriminate in order to keep up with competitors has long been a subject of controversy.[404] The (much criticized) Robinson-Patman Act attempted to address the former question by

400. *Armour & Co.*, 402 F.2d at 720 ("[T]he object of the anti-trust law is to encourage competition. Lawful price differentiation is a legitimate means for achieving the result. It becomes illegal only when it is tainted by the purpose of unreasonably restraining trade or commerce or attempting to destroy competition or a competitor, thus substantially lessening competition, or when it is so unreasonable as to be condemned as a means of competition. The price reduction here has none of these stigmata." (quoting Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp 796, 807 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1966))).

401. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13).

402. On the policing of discrimination via antitrust laws, see generally Brian Callaci, Daniel A. Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 TEMPLE L. REV. 185 (2025); Samuel Evan Milner, *The Clayton Act Cipher: Text as an Antitrust Strategy*, 77 FLA. L. REV. 279 (2025); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015); PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE (2017). On the role of antidiscrimination in ICC law, see Louisville & Nash. R.R. v. United States, 282 U.S. 740, 749 (1931) ("The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at.").

403. Mitchell v. United States, 313 U.S. 80, 93–95 (1941). *Mitchell* ruled on the question of racial discrimination but did so on the principle that "denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." *Id.* at 95. In other words, it used the Fourteenth Amendment as evidence of a well-established public policy against particular grounds for differential treatment. *See id.* Extending this principle would seem to make "unjustly discriminatory" any form of discrimination that is prohibited by well-established public policy.

404. Senator Cummins, who played a major role in the passage of the FTCA and was generally supportive of the PSA, introduced an amendment to eliminate the prohibition on "unjust discrimination" on the ground that packers were not utilities and that the obligation was thus insufficiently clear. 61 CONG. REC. 2672 (June 16, 1921). He also seems to have believed that "unfair practice" might cover Clayton Act violations (of the sort that were ultimately covered by Robinson-Patman). *Id.* His proposal was narrowly voted down, 35–33. *Id.* at 2675.

prohibiting price differences for the same products not grounded in cost differences.[405] Before the Act fell into such disfavor, reviewing USDA enforcement actions approved of Robinson-Patman-type theories.[406]

The ICA had a similar policy, although as its work progressed, Congress encouraged it to correct for inequalities produced by previous price differences and discount competitive justifications for price differentials.[407] In a 1939 PSA case, the Seventh Circuit relied on early ICC practice in finding that the USDA had to consider whether even non-cost-based price discrimination was justified by the need to meet competitors' prices.[408] It is not clear that this holding would stand if it were revisited. It came before the major ICC case that qualified earlier case law on the matter and it relied on reasoning that does not comport with modern regulatory practice.[409] There are, in other words, many open questions about how to think about the scope of the anti-discrimination provisions in the PSA. But some notion of anti-favoritism is clearly included.

405. Callaci et al., *supra* note 402, at 185–86.

406. Trunz Pork Stores v. Wallace, 70 F.2d 688, 690 (2d Cir. 1934) (the A&P received volume discounts on meat through a scheme that involved a broker rebating fees). *Trunz* was even cited in several FTC cases applying Robinson-Patman. *See* Biddle Purchasing Co. v. Fed. Trade Comm'n, 96 F.2d 687, 692 (2d Cir. 1938); Oliver Bros. v. Fed. Trade Comm'n 102 F.2d 763, 771 (4th Cir. 1939); United States v. N.Y. Great Atl. & Pac. Tea Co., 173 F.2d 79, 82 n.1 (7th Cir. 1949).

407. The major case that adopted a version of the latter principle was New York v. United States, 331 U.S. 284, 296 (1947). It deferred to the ICA's determination (with pressure from Congress) that higher volume and more efficient northern railroads should charge higher rates to give southern businesses a competitive advantage to compensate for the path-dependent industrialization of the United States that was in part enabled by earlier cheap railroad rates in the North. *Id.* at 304–05. This reasoning was controversial—not even backed by longstanding supporter of the ICC Felix Frankfurter, who thought the evidence too sparse. *Id.* at 352 (Frankfurter, J., dissenting).

408. Swift & Co. v. Wallace, 105 F.2d 848, 854–56 (1939).

409. The relevant ICC case was *New York*, 331 U.S. at 353–53 (Frankfurter, J., dissenting). One major flaw in the reasoning is the Court's conclusion that even if the USDA had an enforcement strategy that aimed to *change* competitive conditions by going after multiple competitors who discriminated, it still had to allow parties to discriminate to meet status quo competitive conditions. *Wallace*, 105 F.2d at 863. Why? Because if the USDA were to undertake such a regulatory program, it would have to have "power at least as comprehensive as the power of the Interstate Commerce Commission in its field, and such as can be exercised effectively only by treating the packing industry as a public utility. We find no evidence in the Packers and Stockyards Act of an intention by Congress to confer such a power upon the Secretary of Agriculture." *Id.* There are several flaws with this reasoning, but dispositive is that the capacity to undertake a comprehensive enforcement effort to change business practices that concededly have no justification aside from "other businesses are doing it" is not the same thing as public-utility-style regulation. Such a capacity is contained in any regulatory agency with the ability to regulate firm conduct and to prevent races to the bottom—anything from product quality to anti-deception to environmental regulation presupposes the ability to set standards for multiple players in an industry, whether through enforcement sweeps or quasi-legislative regulation.

C. *Is "Competitive Injury" Required?*

Before we move on to applications, we have to deal with a barrier to applying the above analysis. A recent spate of circuit court decisions involving private rights of action under the PSA find (or come close to finding) that there can only be a violation of subsection 202(a) (or subsection 202(e)) if there is evidence of "competitive injury." Although "competitive injury" is never defined, the reasoning in some of these decisions suggests something like harm to consumers in the form of lower prices and/or evidence of increased markups. This interpretation would undermine many prophylactic antitrust-like uses of subsection 202(a) that do not require such evidence as well as any uses of subsection 202(a) that rely on theories of harm based on public policies other than (which is not to say inconsistent with) competitive markets—policies like honesty, anti-discrimination, and facilitating farmers' cooperation. Indeed, some of the conduct that these cases reject as not "injurious to competition"—retaliation, price manipulation using lock-in contracts, shifting risk onto growers by requiring major capital investments without compensation—is exactly the sort that will be the target of proposals for using subsection 202(a) in the next part.

As all experts who have commented on them have agreed, these cases are wrongly decided and poorly reasoned. They are inconsistent with the text, history, purpose, and previous case law interpreting the PSA. This section tours the main reasons why.[410]

1. Reviewing the "Competitive Injury" Cases

The judicial mischief began in 2005, when the Eleventh Circuit overturned two jury verdicts in favor of farmers.[411] Each case was brought under the private right of action provision of the PSA—the USDA was not a party.[412] One interpreted the meaning of "unfair practice" under subsection 202(a), the other price manipulation under 202(e). The court ruled that it could not find a

410. Toward the end of the Biden Administration, the USDA proposed a rule that would have clarified that competitive injury is not required in 202(a) or (b) cases. *See* Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886 (June 28, 2024). It is not clear increasingly anti-administrative courts would have allowed the USDA's interpretations to win the day. Nor is it clear that the rule would have survived the change in administration. In any case, it was withdrawn just before the transition. *See* Fair and Competitive Livestock and Poultry Markets, 90 Fed. Reg. 4679 (Jan. 16, 2025).

411. London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir. 2005); Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1279–80 (11th Cir. 2005).

412. *See* 7 U.S.C. § 209 (creating a private right of action).

violation of either clause unless the plaintiffs proved "adverse effects to competition."[413] The panels offered two rationales: (1) previous cases applying subsection 202(a) allegedly "held that only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA"[414] and (2) the PSA was enacted to deal with the market power of meatpackers, so it must be understood as primarily a statute to promote competition.[415] Little reasoning or evidence was offered for either proposition—legislative history was gestured at, mostly by quoting from earlier cases, and previous cases were cited rather than discussed. No first-order statutory interpretation was offered.

Two years later, the Tenth Circuit panel offered a more detailed discussion in reversing a grant of summary judgment against a class of poultry growers challenging various aspects of the tournament system under subsection 202(a).[416] The majority concluded, over a concurrence and dissent, that plaintiffs had to show "likelihood of competitive injury"—which, "though the test . . . is less stringent than under some of the anti-trust laws," does not necessarily require *actual* injury—in order to establish an "unfair practice."[417] It reasoned that, even though subsection 202(a) contains no language about restraining commerce or creating monopolies like that found in 202(c), (d), or (e), when read in light of the statutory purpose "to assure fair competition and fair trade practices . . . and to safeguard farmers . . . against receiving less than the true market value of their livestock," it makes little sense to allow for a violation that does not involve at least a likelihood of competitive injury.[418] Quoting from an earlier Ninth Circuit case, it posited that the PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation."[419] To conclude otherwise "would make a federal

413. *London*, 410 F.3d at 1302–03; *Pickett*, 420 F.3d at 1280.

414. *London*, 410 F.3d at 1303; *Pickett*, 420 F.3d at 1279.

415. *London*, 410 F.3d at 1302–03; *Pickett*, 420 F.3d at 1280. The panel in *London* discussed the phrase "assure fair competition and *fair trade practices*" apparently without appreciating that the latter part is distinct from the former and usually involves per se prohibitions without inquiry into competitive impact. 410 F.3d at 1302.

416. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1225–30 (10th Cir. 2007).

417. *Id.* at 1228. Notably, the plaintiffs survived a motion for summary judgment on remand when the District Court applied the modified standard. *See* Been v. O.K. Indus., Inc., No. CIV-02-285-RAW, 2008 WL 11389456 (E.D. Okla. Feb. 22, 2008). Thanks to Peter Carstensen for pointing this out.

418. *Been*, 495 F.3d 1217 at 1228.

419. *Id.* (quoting De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329, 1335 n.7 (9th Cir. 1980).

case out of every breach of contract."[420] The majority then pointed out that previous case law, including in the Tenth Circuit, "suggested that a showing of competitive injury can be determinative" even if it never concluded that it *must* be determinative.[421] What about an earlier Tenth Circuit case that actually did find a violation of subsection 202(a) without even mentioning competition? Well, that case, which involved a bait-and-switch, involved *deceptive* and not *unfair* conduct.[422]

Another two years later, in 2009, the Fifth Circuit joined in.[423] The case involved an allegation that a poultry integrator's providing special terms to growers owned by family members of the integrator violated the unfair and unjustly discriminatory clauses of 202(a) and the undue preference clause of 202(b).[424] The district court denied summary judgment for the integrator and a panel affirmed, but the en banc court reversed, 9 to 7. The majority decision rejected a textualist reading that distinguished subsections 202(a) and (b) from the remaining subsections that explicitly referred to restraints of trade and monopolization.[425] It reasoned that "the clear antitrust context in which the PSA was passed, the placement of [these subsections] among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent" all pointed in the direction of requiring "likelihood of an anticompetitive effect" in order to establish a violation.[426] Regarding "antitrust context," it pointed to the fact that the PSA was passed to supplement a long series of efforts at using antitrust laws to rein in the power of the packers and to statements in the legislative history that referred to the need to promote competition.[427] Regarding precedent, it reviewed multiple Circuit Court cases showing that anticompetitive impact *can* be determinative and treated the Eleventh and Tenth Circuit cases that seemed to require that it *must* be determinative as merely an extension thereof.[428] It then reasoned that Congress's repeated failure to amend the PSA in light of these allegedly clear cases amounted to congressional acquiescence.[429]

420. *Id.* at 1229.

421. *Id*.

422. *Id.* at 1230 (discussing Peterman v. U.S. Dep't of Agric., 770 F.2d 888 (10th Cir. 1985).

423. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 363 (5th Cir. 2009) (en banc).

424. Wheeler v. Pilgrim's Pride Corp., 536 F.3d 455, 456 (5th Cir. 2008), *rev'd en banc*, 591 F.3d at 363.

425. *Wheeler*, 591 F.3d at 362–63.

426. *Id.* at 363.

427. *Id.* at 360–62.

428. *Id.* at 357–60.

429. *Id.* at 361–62.

A four-judge concurrence written by Chief Judge Jones argued that the "legal terms . . . were well defined at the time" and broadly understood to only cognize anti-competitive harms.[430] In particular, she pointed to the ICA and the FTC Act, noting that the PSA "is more than just similar to the language of these predecessors; it follows their contours precisely."[431] With respect to the FTC Act, she argued that the 1920 *Gratz* decision did not invite a "free-ranging inquiry into the equities of business practices" unless "injury to competition would be an element of the inquiry."[432] *Gratz* said that the prohibition on "unfair method[s] of competition" prohibited practices "opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[433] Chief Judge Jones offered no reasoning as to how to make sense of "deception, bad faith, fraud, or oppression" if not appealing to the equities of business practices. As for the ICA, she discusses a series of cases that required the Interstate Commerce Commission to account for railroads' need to match competitors' prices when determining whether a practice or a rate was "unjustly discriminatory" or amounted to an "undue or unreasonable preference."[434]

Finally, the Sixth Circuit joined this growing chorus in a case involving alleged retaliation against a poultry grower seeking to organize his fellow growers.[435] In doing so, it relied on its sense that other circuits "unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b)."[436] Ruling otherwise would thus create a conflict, which would be undesirable given that "the rationale employed by [its] sister circuits is well-reasoned and grounded on sound principles of statutory construction. Moreover, under the fundamental principle of stare decisis, [the court] deem[ed] the construction of this nearly 90-year-old statute to be a matter of settled law."[437]

430. *Id.* at 365 (Jones, J., concurring).

431. *Id.* at 366.

432. *Id.* at 367.

433. Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 427 (1920))

434. *Wheeler*, 591 F.3d at 367–69.

435. Terry v. Tyson Farms, Inc., 604 F.3d 272 (6th Cir. 2010) (en banc), *cert. denied* 562 U.S. 1200 (2011).

436. *Id.* at 276.

437. *Id.* at 278–79.

2. Critiquing the "Competitive Injury" Cases

a. *Misreading the Text*

The most obvious problem with these decisions is that they are not supported by the text. Neither 202(a) nor 202(b) contains any reference to competition, nor are the words "unfair," "deceptive," or "unjustly discriminatory" always or only used in contexts pertaining to competition. It is for this reason that some courts imposing a competitive injury requirement quickly pivot to purpose and history.[438] And whereas subsections (d) and (e) all contain explicit references to "restraining commerce" and "creating a monopoly," neither (a), (b), nor (c) do.[439] "*Expressio unius est exclusio alterius*."[440]

That would seem to be a simple enough analysis, and it has convinced several judges and all expert commenters.[441] The two arguments offered against it are unavailing. One is that if "unfair" isn't interpreted to mean anticompetitive harm, then anything goes: suddenly "simple breach of contract" or whatever else become matters for the USDA.[442] It becomes an "inkblot."[443] But that does not follow in the least. The choice is not between the goals of antitrust or standardless anarchy. Other relevant goals include promoting honest dealing, counteracting information asymmetries, preventing invidious and arbitrary discrimination, and reinforcing policies that promote fair wages. As for "simple breach of contract" in particular, USDA regulation does use the PSA to require packers to remedy contract breaches in a reasonable period of time,[444] and various states with their own unfair practices statutes have held that breaches of contract can be unfair practices in the consumer protection context.[445] Nobody has suggested that these regulations should be overturned.

438. London v. Fieldale Farms Corp., 410 F.3d 1295, 1302–03 (11th Cir. 2005); Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1279–80; Been v. O.K. Indus., Inc., 495 F.3d 1217, 1228 (10th Cir. 2007).

439. Packers and Stockyards Act of 1921, ch. 64, 42 Stat. 159, 161 (codified at 7 U.S.C. § 192). Additionally, the reference to "manipulating or controlling prices" in (d) and (e) is treated separately from restraining commerce or creating a monopoly, which would seem to suggest that cognize harms that would not be restraints of commerce or monopolizing. *See id.*

440. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993).

441. *See* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 374–75 (Garza, J., dissenting); *Been*, 495 F.3d at 1241 (Hartz, J., concurring in part and dissenting in part); M&M Poultry, Inc. v. Pilgrim's Pride Corp., No. 2:15-cv-32, 2015 WL 13841400, at *8–9 (N.D. W. Va. Oct. 26, 2015); Hovenkamp, *supra* note 322, at 5–8; KADES, *supra* note 288, at 38; Stumo & O'Brien, *supra* note 33, at 103.

442. *London*, 410 F.3d at 1304; *Been*, 495 F.3d at 1229.

443. *Wheeler*, 531 F.3d at 367 (Jones, C.J., concurring).

444. 9 C.F.R. § 201.217 (2025).

445. *E.g.*, Lester v. Resort Camplands Int'l, Inc., 605 A.2d 550, 557 (Conn. App. Ct. 1992).

The other argument is that subsections (a) and (b) are best read as "catch-alls" while subsections (c) through (e) ban specific conduct. But, as Judge Garza's dissent in *Wheeler* points out, subsection (e) itself serves that catch-all purpose by prohibiting "*any* act for the purpose or with the effect of manipulating or controlling prices or restraining commerce."[446] To read subsections (a) or (b) as requiring the same conditions would render them meaningless.

b. *Misinterpreting Legislative History and Context*

The injury-to-competition decisions make similar mistakes about the relevance of legislative history and of the FTC Act and the ICA.

With respect to legislative history, there is no doubt that *one of* Congress's goals in passing the PSA was to promote business rivalry (output maximization is a more tenuous proposition), but that is not the same as competition being the *only* goal. As the *Wheeler* dissent points out, this is evident from a phrase from a 1958 House Report on amendments to the PSA relied upon in multiple opinions: "[t]he primary purpose of [the PSA] is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry."[447] The fact that after *fair competition*, *fair trade* practices are mentioned is "evidence of a second purpose that does not involve competitive harm."[448] Nor are on-the-record statements from the actual legislative history of 1921 so univocal about the main purpose of the statute. To illustrate, let us focus just on one representative—Sydney Anderson from Minnesota's First District—during one set of hearings in May 1921 before the Committee on Agriculture. At one time, Representative Anderson said that the purpose of the bill was to "prohibit the particular conditions under which monopoly is built up, and to prevent a monopoly in the first place and to induce healthy competition."[449] At another time, he suggested that the purpose was to "deal with [packers] with some sense of supervision, such as we have exercised in the case of railroads and other public utilities."[450] At yet another time, he said the purpose was to "set up an agency between producer and packer, and between packer and consumer, that will give confidence to the producer and to the consumer, and tend to induce the belief

446. *Wheeler*, 531 F.3d at 375 (Garza, J., dissenting).

447. *Id.* at 378 (discussing H.R. Rep. No. 85-1048 at 1–2 (1957)).

448. *Id.*

449. *Meat Packer: Hearings on H.R. 14, H.R. 232, H.R. 5034, and H.R. 5692 Before the Comm. on Agric.*, 67th Cong. 26 (1921) (statement of Rep. Sydney Anderson).

450. *Id.* at 24.

that somebody is going to see to it that a square deal is given to everybody concerned."[451] These are not incompatible or contradictory, but they are not the same. And they are certainly not exclusively focused on competition per se.

Expanding the lens to account for "the PSA's antitrust ancestry"[452] beyond the particulars of legislative history does not help matters. For one thing, part of that antitrust ancestry is the FTC. And, as discussed above, the idea of the FTC was to go beyond the confines of the Sherman and Clayton Acts, both in the sense that it aimed to channel competition in a way that would prevent anticompetitive conduct from arising and in the sense that it aimed to channel competition in a manner consistent with public policies concerning honesty and fair treatment, rather than allowing those who violated those policies to drag down the standards of the market.[453] The basic idea that the prohibition on "unfair methods of competition" cognized *both* conduct that violated the letter and spirit of the antitrust laws *and* conduct that was harmful for other reasons was affirmed in the very first Supreme Court case to review the FTC's actions, which came out the year before the PSA. The *Gratz* majority described unfair methods of competition disjunctively in terms of acts "opposed to good morals because characterized by deception, bad faith, fraud, or oppression, *or* as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[454] And some version of this disjunctive description has long been repeated by courts, up to and including the most recent Supreme Court statement that the term "encompass[es] not only practices that violate the Sherman Act and other antitrust laws," but also "conduct which . . . is close to a violation [of those laws] or is contrary to their spirit" and even "practices that the Commission determines are against public policy for other reasons."[455] Indeed, this fact was evident to at least the *Been* majority insofar as it pertained

451. *Id.*

452. London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir. 2005).

453. *See supra* Section III.A.

454. Fed. Trade Comm'n v. Gratz, 253 U.S. 421, 427 (1920) (emphasis added).

455. Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (citing Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 689–95 (1948); Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972)); E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 136–37 (2d Cir. 1984). Contra Chief Judge Jones's concurrence in Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 367 n.3 (5th Cir. 2009) (Jones, J., concurring), this interpretation of "unfair methods of competition" does not depend on the fact that Congress later added a prohibition of "unfair or deceptive acts or practices" in order to clarify that the FTC also had authority over consumer protection. The interpretation arose before that amendment and has lasted even after that amendment created a distinct consumer protection authority. Indeed, as discussed above, the amendment seems to have been at least partially inspired by the PSA.

to *deceptive* practices—no reason is offered why it should not extend to the other parts of subsection 202(a).[456]

For another thing, the PSA is not just part of a legacy of antitrust legislation; it is also part of a legacy of public utility regulation (such as the ICA), of public market regulation (for example, the Grain Futures Act), and of shifting power to farmers (as through the Capper-Volstead Act). It is selective reasoning to focus only on the PSA's relationship to antitrust statutes and their (purported) policy goals while ignoring the policies of these statutes.

c. *Misrepresenting Prior Caselaw*

Finally, it is simply false to say that there has been a consistent century of case law holding that there can be no violation of subsection 202(a) without evidence of competitive injury. In *Wilson & Co. v. Benson*,[457] the Seventh Circuit explicitly rejected such a requirement: "the language in subsection 202(a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language."[458] And in *Spencer Livestock Commission Co.*, the Ninth Circuit said that the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics."[459]

None of the cases that have been cited as examples of the "injury to competition" requirement predating 2005 actually stands for that proposition.[460] What they stand for is that one *can* establish a violation of section 202(a) by proving actual or potential competitive injury, not that one *must* do so. In two of the cited cases—*Farrow* in the Eighth Circuit and *De Jong* in the Ninth Circuit—the USDA was not even restricted in any way. Instead, its orders were affirmed on the ground that the USDA's theory that competition

456. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1230 (10th Cir. 2007).

457. 286 F.2d 891 (7th Cir. 1961).

458. *Id.* at 895.

459. Spencer Livestock Comm'n v. U.S. Dep't of Agric., 841 F.2d 1451, 1455 (9th Cir. 1988); *see also* Capitol Packing Co. v. United States, 350 F.2d 67, 76 (10th Cir. 1965) ("The words, 'unfair, unjustly discriminatory, or deceptive practice or device,' as used in § 312(a) of the Act are not defined, and their meaning must be determined by the facts of each case within the purposes of the Packers and Stockyards Act.").

460. *Cf. Been*, 495 F.3d at 1228 (discussing various cases from other circuits that have some injury to competition requirement); London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir. 2005) (citing various circuit and district court cases that impose an injury to competition requirement).

had been harmed was sound and an appropriate use of subsection 202(a).[461] The thrust of both of those cases was that, *if* the USDA was aiming to improve competitive conditions, it could do so by targeting *potential* injuries to competition without having to prove actual injuries. On the other hand, the Seventh Circuit's decision in *Armour & Co.*, (discussed extensively in the Fifth and Tenth Circuit opinions on the issue) did find that no proof of injury to competition meant no proof that subsection 202(a) or (b) had been violated.[462] But that was because the USDA articulated its theory of *that case* in terms of unfair competition. The agency did not claim that the coupon program in question involved deception or market manipulation or mistreatment of farmers or any other theory of harm, so the Seventh Circuit was not presented with the question of whether those theories could survive.[463] The court even affirmed that "[s]ection 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission," and it treated "deceptive" practices as a separate issue.[464]

Meanwhile, circuit courts before 2005 have consistently approved of theories of harm under subsection 202(a) that did not involve analysis of competitive conditions. Before 2005, such cases have involved repeatedly failing to honor (validly drawn) drafts by a marketing agent,[465] self-dealing and

461. Farrow v. U.S. Dep't of Agric., 760 F.2d 211, 214 (8th Cir. 1985); De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329, 1333 (9th Cir. 1980). In a footnote, the *De Jong* majority notes that the policy of the antitrust laws should guide its analysis, even if the PSA might prohibit more acts than previous antitrust laws. *Id.* at 1335 n.7. I read this statement as applying to the sort of practice alleged in that case, since the Court had no reason to address practices that might be alleged under different theories of harm.

462. Armour & Co. v. United States, 402 F.2d 712, 727 (7th Cir. 1968).

463. *Id.* at 717 ("[A] coupon program *of this nature* does not violate Section 202(a), absent some predatory intent or some likelihood of competitive injury") (emphasis added); *see also* IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999) (applying similar reasoning to an allegation that a right of first refusal harmed competition).

464. *Armour & Co.*, 402 F.2d at 722. This case came down after the Wheeler-Lea amendments, but it is not clear whether the Court meant only to reference "unfair methods" or also "unfair practices." Other cases that have been cited as precedent—*Parchman* and *Pacific Trading*—are even further afield. In *Parchman*, the Sixth Circuit was dealing with the manipulation of weighing on "fair competition." Parchman v. U.S. Dep't of Agric., 852 F.2d 858, 864 (6th Cir. 1988). All it had to say about the subject of "injury to competition" is a quote from *Farrow* that actual injury does not have to be shown when competitive injury is alleged. *Id.* at 864 (quoting *Farrow*, 760 F.2d at 215). *Pacific Trading* involved private litigation between two parties for breach of contract that resulted in a dismissal for failure to state a claim because "the Packers and Stockyards Act does not create any private cause of action for civil damages." Pac. Trading Co. v. Wilson & Co., 547 F.2d 367, 369 (7th Cir. 1976).

465. Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co., 498 F.2d 925, 927–28 (10th Cir. 1974).

inadequate record keeping by agents selling on consignment,[466] check kiting,[467] overcharging when acting as both dealer and market agent,[468] and changing the formula used to price certain weights without adequate notification.[469] Indeed, a 1995 Eighth Circuit case explicitly drew the distinction between actions that were "deceptive or injurious to competition" and those that were "unfair, unjust or unreasonable."[470]

Indeed, even since the wave of "competitive injury" cases, the doctrine remains uncertain. The Northern District of West Virginia has now twice rejected the injury to competition requirement—once in 2015 and once in 2019.[471] To quote Judge Bailey in those cases, "[A]lthough typically causing much destruction and chaos before receding, tidal waves inevitably return to the sea, allowing rebirth, and eventually the tides will turn."[472]

V. APPLYING THE PSA TO MODERN MEATPACKING

With these interpretive issues established, we can now explore some ways that section 202(a) might be used to begin to restructure the meatpacking industry to distribute power (and income) downward. We will explore, in broad outline, four mutually compatible avenues for reform. The first would involve a general effort to deconcentrate the packing industry and increase competition *between* packers: targeting collusion, exclusionary conduct, and concentrated market power in each market in which they participate. This effort began under the Biden Administration, largely pursued by the DOJ in litigation that combined Sherman Act and PSA causes of action. The second would target vertical restraints to rebalance power between packers and farmers, creating a floor on pay and treatment, empowering farmers by facilitating both exit and voice, and perhaps dampening the role of incentive payments to promote equality of treatment between farmers. Some progress in this direction was also made during the Biden Administration, although only some, largely in the poultry industry, and much of that may well be rolled back. A third avenue

466. Bosma v. U.S. Dep't of Agric., 754 F.2d 804, 806–07 (9th Cir. 1984).

467. Blackfoot Livestock Comm'n Co. v. U.S. Dep't of Agric., 810 F.2d 916, 920 (9th Cir. 1987).

468. Ferguson v. U.S. Dep't of Agric., 911 F.2d 1273, 1274 (8th Cir. 1990).

469. Excel Corp. v. U.S. Dep't of Agric., 397 F.3d 1285, 1288–89 (10th Cir. 2005).

470. Jackson v. Swift-Eckrich, Inc., 53 F.3d 1452, 1458 (8th Cir. 1995). *See* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 381–82 (Garza, J., dissenting) (discussing the relevance of this passage).

471. M&M Poultry, Inc. v. Pilgrim's Pride Corp., No. 2:15-cv-32, 2015 WL 13841400, at *12 (N.D. W. Va. Oct. 26, 2015); Triple R Ranch, LLC v. Pilgrim's Pride Corp., 456 F.Supp.3d 775, 778(N.D. W. Va. 2019).

472. *M&M Poultry*, 2015 WL 13841400, at *10.

would go beyond existing progress and seek to raise the standard for treatment of packhouse workers by supplementing work law to channel competition away from cutting costs on labor and toward attracting workers with better pay and conditions. And a fourth would be the most ambitious: promoting a more decentralized and redundant ecosystem of farms and packers in the name of dispersing power and promoting resilience.

A. *Increasing Competition Between Packers*

The first avenue—a general effort to increase competition between packers—would build off of existing lawsuits alleging price-fixing among packers. As discussed above, both private parties and the DOJ have brought Sherman Act restraint of trade claims against packers for price-fixing in beef, pork, and poultry.[473] The private lawsuits have focused on harms to farmers and consumers from alleged collusion to restrict the supply of beef to drive down prices to farmers and drive up prices to consumers. DOJ lawsuits have made similar allegations, and one has also alleged collusion to drive down wages of packhouse workers. With the exception of one claim of deception regarding nondisclosure of terms in the poultry growing context, none of these lawsuits have made use of the PSA.

These lawsuits have so far mostly resulted in monetary settlements of insufficient magnitude to have a significant deterrence effect and they took many years of litigation and expert testimony to accomplish. It seems likely that packers would be tempted to engage in similar conduct in the future. The PSA could help prevent them from doing so by creating prohibitions and/or presumptions against various forms of unilateral conduct that is likely to have collusive and/or exclusionary effects in the enduringly concentrated market for meatpacking. As Michael Kades has argued, because section 202 does not require proof of agreement in order to establish a restraint of commerce,[474] it can be used to target joint and parallel conduct by packers that restricts farmers' options.[475] For example, an extended period of lockstep price changes or a consistent pattern of non-bidding or of alternating bidding in a given region could give rise to a presumption of liability, shifting the burden onto packers to

473. *Supra* Section IV.B.

474. As discussed above, this is true even of the provisions of section 202 that deal explicitly with "restraints of commerce," but it is also true of the prohibition on "unfair methods of competition" over which the FTC has authority and which is incorporated into subsection 202(a)'s prohibition on "unfair practices." *See* Swift & Co. v. United States, 393 F.2d 247, 254–55 (7th Cir. 1968).

475. KADES, *supra* note 288, at 77.

prove they were not colluding. Unilateral conduct such as a failure to bid for livestock within a given radius from a plant or refusal to consider an offer or counteroffer could also be treated as presumptively or conclusively unlawful in the name of undermining collusive schemes, even if doing so would sometimes be overinclusive. Rules about which information can be submitted to and shared by an industry price reporter could also restrict the possibilities for price coordination.[476]

From the other direction, the PSA could be used to prevent the consolidation and abuse of unilateral market power without the high thresholds of current Sherman Act monopolization jurisprudence and/or to establish structural presumptions at lower thresholds than current Clayton Act jurisprudence. As Kades also argues, a relatively straightforward way to do so would be to lower the threshold of market power required to establish that a course of conduct qualifies as monopolizing under the PSA.[477] Doing so would be consistent with Professor Carstensen's argument that buyer power—such as that which packers exercise in their purchase of livestock—can be exercised with smaller market shares than seller power.[478]

Additionally or alternatively, the USDA could develop a more localized analysis of market power in recognition that nearly all livestock is sold to

476. These reforms are framed in the conventional rhetoric of antitrust, focused on the evil of price-fixing in itself. It may seem strange that I would argue in this way, since I have argued with Nathan Tankus that some form of price (and other) coordination is inevitable in order to manage the uncertainties of marketing, and horizontal price-fixing is not necessarily the worst such form. Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 72 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022). However, the coordination to be targeted here would involve horizontal price-fixing and other forms of coordination among highly concentrated dominant players—thus, it involves market stabilization on highly unequal and undemocratic terms. Going after the most explicit of such collusion would likely not eliminate all coordination among major packers, although they would make it more difficult to collusively structure the terms of dealing in such a lopsided way. *See generally* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 U.C.L.A. L. REV. 378 (2020) [hereinafter Paul, *Antitrust as Allocator*] (arguing that antitrust and surrounding laws should be focused on managing coordination to disperse power). A more serious effort to disrupt current forms of market stabilization among major packers could be expected to create market instability that would need to be resolved through some form of coordination. Thus, a long-term agenda aimed at redistributing power in the meatpacking industry would have to consciously consider how to build structures for coordination that are more broadly beneficial, perhaps by rebuilding publicly supervised markets, directly regulating price setting, creating sectoral bargaining boards, or similar efforts.

477. KADES, *supra* note 288, at 79–81.

478. PETER CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER 38 (2017).

packers within tens or at most hundreds of miles.[479] After performing the overall analysis necessary to establish such a rule or presumption, the USDA would not need to re-argue market definition in each new PSA case. Alternatively, the USDA could rely less on indirect statistical evidence of market power based on market share and more on direct evidence of power, such as significant risk shifting or persistent scarcity of bids in a cash or contract market.[480] Kades points out that doing so would pair well with an approach that categorically prohibits certain types of conduct, such as lopsided contract terms or lock-in agreements that make switching difficult (which is discussed more below).[481]

More structural remedies might also be worth considering. For instance, pointing to evidence that economies of scope are limited in beef markets and that multi-plant ownership substantially increases packer bargaining power,[482] Francisco Garrido, Minji Kim, Nathan Miller, and Matthew Weinberg have suggested that banning multi-plant ownership (and, one imagines, divesting monopolistic firms of their assets) should be considered.[483] Less dramatically, implementing a presumption that multiple plant ownership creates market power and thus would give rise to a monopolization claim in the presence of a merger or other exclusionary conduct would shift the burden of proof and allow development of more evidence as to economies of scope, which would help facilitate a more finely tuned regulation over time.[484] Such an intervention would separate out the issue of power in local markets from power in a nationwide market (which is itself separate from the issue of power across different meat markets). However, without coordinated antitrust enforcement in surrounding industries, it might also shift more power to already powerful wholesale buyers of meat such as Walmart, Costco, and McDonald's.[485]

479. *See supra* note 194 and accompanying text. More research would be needed to determine the relevant distance, of course.

480. KADES, *supra* note 288, at 82.

481. *Id.* at 84–85.

482. *See* Carstensen, *Dr. Pangloss*, *supra* note 247, at 12–13.

483. Garrido et al., *supra* note 243, at 2; *see also* KADES, *supra* note 288, at 84 (discussing this suggestion). On divestiture, see Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 106 CORNELL L. REV. 1955 (2020).

484. One important question here is whether the USDA has the authority to administer divestitures on its own. I leave that for future work.

485. Walmart and Costco have already begun to integrate backward into meatpacking. *See* David Baskin & Bruce Heckman, *Walmart Announces New Case-Ready Beef Facility in Olathe Kansas*, WALMART (June 13, 2023), https://corporate.walmart.com/news/2023/06/13/walmart-announces-new-case-ready-beef-facility-in-olathe-kansas [https://perma.cc/JH5K-NKWB]; Mary Meisenzahl, *See*

B. *Shifting Power to Farmers*

Although disrupting packer collusion—and especially dispersing ownership over plants—might shift some power to farmers, the USDA could also take more direct actions to rebalance power. One set of actions would involve adding more sector-wide standards for conduct independent of the relative size of the packer or the structure of the transaction. During the Biden Administration, the USDA began reform efforts of this sort. It used its deception authority to mandate disclosures to poultry growers[486] and to prohibit misleading statements and omissions pertaining the contracting process generally,[487] and used its unjust discrimination authority to explicitly prohibit discrimination based on established protected classes and entity form. It also used such authority to prohibit retaliation for asserting rights or organizing with other farmers.[488] In writing these regulations, the USDA relied primarily on public policies other than business rivalry or lowering consumer prices—for example, honesty, distributional fairness, anti-subordination, the integrity of legal processes, and countervailing power. But it has also articulated unfair methods of competition theories—arguing that if, for instance, packers that obscure their terms can outcompete those that do not, allowing such deception to continue puts pressure on honest packers to adopt dishonest tactics.[489]

Another set of actions would counteract the disempowering effects of increasingly prevalent lock-in contracts. As discussed above, such contracts, even if they lower transaction costs and stabilize supply (a questionable proposition, at least as a general matter), have the effect of limiting farmers' exit options.[490] Like other forms of "workplace fissuring," they function as a form of regulatory arbitrage that removes much of farmers' independence, including the ability to switch packers, without providing them employment or

Inside Costco's Controversial Nebraska Chicken Plant That Produces Millions of $4.99 Rotisserie Chickens Each Year, BUS. INSIDER (June 18, 2022), https://www.businessinsider.com/costco-rotisserie-chicken-plant-nebraska-photos-2022-6?op=1 [https://perma.cc/55MD-72BS]. Thanks to Peter Carstensen for pointing this out to me.

486. Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210 (Nov. 28, 2023).

487. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092, 16199 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201).

488. *Id.* at 16198–99.

489. *Id.* at 16128 (citing Fed. Trade Comm'n v. Winsted Hosiery Co., 258 U.S. 483 (1922), a classic FTC unfair methods case that prohibited unfair treatment of consumers on such a theory). I should here remind the reader that I advised the USDA while it was drafting some of these regulations, so the use of these types of theories is likely not coincidental.

490. *See supra* Section II.B.

labor protections.[491] In doing so, packers can integrate farmers' labor and output into their production processes without integrating farms' capital investments and risk of labor and environmental liability onto their balance sheets.[492]

Several scholars have argued that workplace fissuring can be counteracted in part by prohibiting vertical restraints such as covenants not to compete, most-favored-nation clauses,[493] product tying, and resale price maintenance that reduce the independence of small players and make it more difficult for them to switch away from dominant firms.[494] The logic is that such restraints, especially if they are combined with other entry barriers, undermine the bargaining power of small players by restricting their alternatives while also making it more difficult for new entrants to challenge the dominant player by offering better terms.[495] Eliminating the restraints thus empowers small players in part by shifting the locus of bargaining to terms more likely to favor them and in part by increasing the possibility of new entry, thereby creating more outside options.[496] While many vertical restraints were *per se* unlawful or strongly disfavored in the Postwar period, after the Chicago School revolution, they have been subject to deferential "rule of reason" analysis.[497] During the Biden Administration, the FTC began to use its section 5 authority to create bans or presumptions that go further than court-created law—most notably in its proposed regulation to ban noncompetes outright.[498] The USDA could use its subsection 202(a) authority in a similar way.

Which restraints might it scrutinize? One answer can be found in a recent DOJ settlement with Koch Foods: exit fees that poultry growers must pay if

491. *See* Claire Kelloway, *Lawsuit Alleges Chicken Farmer Misclassification*, AM. PROSPECT (Apr. 19, 2022), https://prospect.org/labor/lawsuit-alleges-chicken-farmer-misclassification/ [https://perma.cc/45JJ-H6AN].

492. On this general strategy of judgment proofing via the outsourcing of liability-sensitive areas of production or marketing, see Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 20–23 (1999). Thanks to Eamon Coburn for drawing this connection.

493. These are clauses in which Firm A requires Firm B to promise to deal with Firm A on terms at least as good as those on which Firm B deals with other firms.

494. Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONLINE 27, 51–57 (2023); Marshall Steinbaum & Christopher Peterson, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623, 625 (2023).

495. Callaci, *What Do Franchisees Do?*, *supra* note 265, at 403.

496. *Id.* at 47–50.

497. *Id.* at 42–45; Paul, *Antitrust as Allocator*, *supra* note 476, at 413 n.125.

498. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023); *see also* Callaci & Vaheesan, *supra* note 494, at 50–54 (discussing other options for the FTC).

they switch to a rival.[499] Such fees function as noncompetes and were alleged to be unfair practices under subsection 202(a). Another possibility would be rights of first refusal in cattle bidding, which might have similar lock-in effects as most-favored-nation clauses and can be argued to violate the norm against undue preferences. The USDA lost on similar theories in a 1999 Eighth Circuit case, but that ruling was fact-specific and limited to one circuit.[500] It might be worth reconsideration now that market power in beef markets has increased, evidence of that market power has improved, and theories of the harm of vertical restraints have developed.[501]

Other examples of restraints could be adduced. But more comprehensive approaches at rebalancing power by resetting the terms of dealing are also worthy of consideration. These would involve directly regulating terms of contracts and/or making it easier for farmers to bargain collectively. Indeed, to the extent that supply contracts do have the benefit of stabilizing investment and reducing transaction costs, the USDA's resources might be better spent making the substance and process of such transactions fairer rather than attempting to split them into pieces. Doing so would also build on the above discussed regulations of deception, discrimination, and unfair treatment in all livestock sales (whether via captive contract or not). As with those regulations, the idea would be to channel competition *away from* passing off costs to farmers at the expense of established public policies like living wages, safe working conditions, and environmental stewardship and *toward* finding ways to balance productive efficiencies with farmer dignity and autonomy.

One proposal in this direction has been to prohibit the "tournament system" in poultry growing and instead regulate the price-setting process. Before he was appointed to the USDA, Andy Green suggested fixing prices to growers at a "fair share . . . of the relevant wholesale or retail prices, or at a minimum, on a fixed dollar amount on the day the contract is signed."[502] He also suggested that "farmer fair share boards" could be facilitated by funding or

499. Proposed Final Judgment and Competitive Impact Statement, 88 Fed. Reg. 85311, 85312–13 (Dec. 7, 2023).

500. IBP, Inc. v. Glickman, 187 F.3d 974, 977–78 (8th Cir. 1999).

501. *See* Garrido et al, *supra* note 243, at 1, 11; Pudenz & Schulz, *supra* note 205, at 390.

502. WILLINGHAM & GREEN, *supra* note 23, at 26. Note that Green is currently in charge of writing regulations for the tournament system as Senior Advisor for Fair and Competitive Markets at the USDA. *See* Press Release, U.S. Dep't of Agric., USDA Announces Dr. Dewayne Goldmon as Senior Advisor, Racial Equity, and Andy Green as Senior Advisor, Fair and Competitive Markets (Mar. 1, 2021) (on file with the North Carolina Law Review).

perhaps by mandated sectoral bargaining.[503] He did not get around to implementing either option, but a future USDA still could.

The Open Market Institute has suggested setting a floor on base pay and allowing incentive-based payments only if those payments meet certain requirements to ensure they actually reward factors within farmers' control and are supervised by the USDA *or* if they are bargained for by a collective of farmers.[504] Setting baselines on pay and reducing the effect of incentive payments would reduce inequality in payments and might dampen the impact of cyclicality—implementing principles that have long been at play in the regulation of wages.[505] It would also limit packers' ability to shift risk onto farmers and to push them to self-exploit and exploit their employees. Whether it takes a more or less minimal approach to regulating price, the USDA could also set more standards for safety and hours at farms (standards which could also have safe-haven clauses for collectively negotiated agreements). And it could mandate that packers share the cost of any capital investments they require in their contracts, perhaps by mandating a clause that splits costs or a minimum contract length that would help guarantee farmers' incomes.[506]

Such efforts would, of course, increase the costs and risks of contracting out the growing of chicken. Raising that cost would, in turn, increase the relative benefit to integrators simply setting up their own chicken farming operations or buying out existing farmers, which would render most chicken farmers employees rather than independent businesses.[507] That seems to me a desirable outcome. It would ensure that farmers (and their employees) have guaranteed baseline incomes and benefits and allocate risk to the party better able to bear it—in terms of both diversification and ability to pay. Many chicken farmers agree—as indicated, for instance, by a class action some of them filed arguing that they should be classified as employees for the purpose of minimum wage and benefits considerations under existing law.[508] Other farmers may see things differently. Ideally regulatory deliberation would tease out these

503. *Id.* at 26.

504. Open Mkts. Inst., *supra* note 252, at 17–19.

505. *See* Coburn, *supra* note 42, at 660.

506. Using the unfair discrimination authority, the USDA could also categorically prohibit self-preferencing and might consider regulating volume discounts on Robinson-Patman-type theories.

507. This basic tradeoff between the relative costs of owning or buying is, of course, at the heart of Oliver Williamson's work. *See generally* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985).

508. *See* Kelloway, *supra* 491.

objections and determine how best to address them. And these farmers could, of course, refuse a buyout.

The poultry market is a proving ground, since it is so thoroughly dominated by adhesive contracts.[509] But similar principles might guide regulation of formula contracts in beef and pork markets, *mutatis mutandis*. Several authors have pointed to the need for rules that prevent beef packers from using prices on thin cash markets to set prices for their AMAs, and perhaps collective bargaining over the grid would also be called for.[510] Perhaps the USDA could use its authority to channel cash sales onto existing virtual auction platforms and regulate those platforms as new stockyards.

C. *Shifting Power to Workers*

A third avenue—one not yet explored by others, as far as I know—would make use of the PSA to rebalance power between packers and their employees. Of course, the relationship between packers and their employees is officially governed by various areas of work law—NLRA,[511] FLSA,[512] OSHA,[513] workers' compensation laws,[514] and so on. But these regimes have various limitations that have allowed packers to evade their bite.[515] The PSA could fill some of these gaps if the USDA simply declared that violations of relevant workplace laws—

509. And the USDA has been considering a rule on tournaments for a while now. *See* Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201).

510. *E.g.*, Taylor, *supra* note 205, at 25–27; Carstensen, *Dr. Pangloss*, *supra* note 247, at 5–7.

511. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–66).

512. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19).

513. Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–78).

514. These are state-run schemes, with the exception of the scheme for federal employees. *Cf.* Workers' *Compensation Laws: 50-State Survey*, JUSTIA (last updated Nov. 2022), https://www.justia.com/workers-compensation/workers-compensation-laws-50-state-survey/ [https://perma.cc/XCC2-VUVV].

515. For example, as Sherley Cruz has demonstrated, severe and enduring underfunding of OSHA has led to underreporting, underdetection, and underenforcement of workplace safety problems in the meatpacking industry and beyond, including during the COVID-19 pandemic. This underenforcement gives workers little reason to rely on OSHA to protect their interests, which further dampens any possibility of enforcement or even public shaming. Faced with these failures of employment law, workers and their allies have attempted to channel their claims through creative causes of action that rely on indirect harms to consumers, including public nuisance and FTC deceptive practices claims. Cruz, *supra* note 190, at 673–80.

from OSHA to FLSA—are also violations of subsection 202(a).[516] It could do so on the logic that these laws declare public policies for the appropriate treatment of workers, and gaining a competitive advantage by flouting them creates an unfair competitive disadvantage for law-abiding businesses.[517]

There is precedent for using unfair competition law in this way. California's unfair competition law "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable."[518] And, as Eamon Coburn has recently highlighted, preventing unfair competition was an explicit motivation for Progressive- and New Deal-era worker protection laws, most notably the FLSA.[519] The FLSA itself declares that "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers . . . burden[] commerce and the free flow of goods in commerce [and] constitute[] an unfair method of competition in commerce."[520] Before the FTC was given a separate "unfair or deceptive acts or practices authority," it sued companies for deceiving or exploiting consumers on the logic that doing so unfairly took market share from honest companies.[521] At least one commissioner has expressed support for updating this theory for workers.[522] Indeed, as mentioned above, the USDA itself recently appealed to such a theory in its inclusive competition rulemaking, citing one of these cases.[523]

516. *See* Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. CHI. L. REV. 469, 492–94 (2023).

517. Of course, violating labor law also imposes an unjustifiable injury on workers themselves, but it is less than clear that the PSA includes packhouse workers in its scope of protected classes.

518. Cel-Tech Comms., Inc. v. L.A. Cell. Tel. Co., 20 Cal.4th 163, 180 (1999) (cleaned up); *see also* Samuel Evan Milner, *From Rancid to Reasonable: Unfair Methods of Competition Under State Little FTC Acts*, 73 AM. U. L. REV. 857 (2024).

519. Coburn, *supra* note 43, at 653.

520. 29 U.S.C. § 202(a); *see also* Citicorp. Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987) ("While improving working conditions was undoubtedly *one* of Congress' concerns, it was certainly not the *only* aim of the FLSA. In addition to the goal [of establishing decent wages], the Act's declaration of policy . . . reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions.").

521. *E.g.*, Fed. Trade Comm'n v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934); Fed. Trade Comm'n v. Winsted Hosiery Co., 258 U.S. 483 (1922); *see* Herrine, *Folklore*, *supra* note 42, at 462–72 (2021).

522. Alvaro M. Bedoya & Max M. Miller, "*Overawed*": *Worker Misclassification as a Potential Unfair Method of Competition*, 43 YALE L. & POL'Y REV. 333, 347, 351 (2024).

523. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 89 Fed. Reg. 16092, 16128 (Mar. 6, 2024) (to be codified at 9 C.F.R. pt. 201). Additionally, UDAP has been put to work protecting workers in various contexts. *See* Jonathan Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1, 9 (2024).

Using the PSA in this way would create another "cop on the beat," and it might also give packers and other industry players an incentive to snitch on each other to gain their own competitive advantage (similarly to how the Lanham Act makes it possible for competing firms to sue each other for false advertising).[524] It would, at the least, throw a wrench in the gears of exploitation, perhaps giving workers a bit of leverage in waging their own fights for improved conditions.

The PSA could also be used to expand the ambit of existing workplace protections. For instance, Eamon Coburn has argued that lead firms in an industry that gain cost advantages by contracting with suppliers that engage in wage theft should be held to have engaged in unfair methods of competition under the FTC Act.[525] This theory would expand the reach of the FLSA, applying its rules against wage theft to firms that benefit from it without directly employing workers, as is necessary to give rise to liability under the FLSA.[526] To the extent meatpackers engage in such "supply chain wage theft" (for instance by using temp firms to staff plants or even by encouraging sub-minimum wage work on supplier farms), the PSA could use this theory to prohibit it.

D. *Democratizing the Food System*

The final avenue would take us even closer toward a restructuring of the industry. The PSA is not really designed for this task, but it could be used to remove some of the current obstacles to farmers and allies who are trying to create such a system and to facilitate some of the experimentation and power building necessary to build a movement to bring about other reforms. As a start, some of the above proposals to rebalance power between packers and farmers would likely make smaller, less industrialized farms more feasible and could facilitate more organizing among farmers to develop shared projects, including at the legislative level. Since fear of retribution is apparently common among farmers, the new prohibition on retaliation, if effectively enforced, could itself be an important catalyst.

Yet packers still largely have control over the conditions in which animals are raised, and they strongly favor industrial monoculture. To create more space for more integrated and sustainable farms with less cruelty—which are certainly

524. 15 U.S.C. § 1125(a)(1)(B); Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1307 (2011).

525. Coburn, *supra* note 42, at 688–92.

526. *Id.*

less efficient, at least in terms of maximizing output of meat with a given set of inputs—the USDA might invoke its authority over unjust discrimination or unfair practices to make it easier for smaller, less specialized farms to have access to slaughtering facilities and distribution networks. This path might be taken according to a similar logic suggested by Professor Crane in his work on the role of antitrust in facilitating the regulation of tobacco.[527] Crane points out that using antitrust policies to tip the scales against businesses that produce harmful output makes antitrust consistent with broader public policy goals.[528]

One obstacle I have heard reported anecdotally in conversation with farmer advocates is that farmers who want to raise animals in a more sustainable pluricultural setting—in which some crops feed animals and some manure feeds crops and so on—tend to raise animals of breeds, shapes, and sizes that are not optimized for the massive semi-automated packhouses run by the major agribusinesses (who often also control the genetics of the animals that are raised to fit their tools). Additionally, slaughtering animals of different shapes and sizes might require more training of workers, which might increase their bargaining power. And, even in aggregate, the small-scale farms engaged in permaculture are not guaranteed to supply the volume that makes modern abattoirs run at their most profitable capacity. A USDA committed to promoting more sustainable and democratic agricultural models (as the PSA nominally is!) might develop a rule that requires big packers to open up their facilities to these non-cost-effective farmers at least during certain times (once a month?) or else to contribute to a fund that allows these farmers to build out facilities that work for the sorts of animals they raise. It might do so on the logic that designing slaughtering facilities that only work for large monocultural farms that meet packers' specifications is a form of unjust discrimination and/or undue preference.

To the extent it promotes a form of farming that incorporates animal waste into fertilization and safe disposal rather than open pollution, this type of rule would also require packers to bear some of the costs they impose on others in the form of polluted air and water.[529]

527. Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321 (2005).

528. *Id.* at 356–73.

529. *See* Lee Miller, *Environmental Justice Is Climate Justice Is Justice for Animals*, LPE PROJECT: BLOG (Dec. 2, 2020), https://lpeproject.org/blog/environmental-justice-is-climate-justice-is-justice-for-animals/ [https://perma.cc/2BVV-VG9W].

CONCLUSION

This basic thesis of this Article is simple: meatpacking agribusinesses have too much power and the Packers and Stockyards Act provides some underappreciated tools for beginning to take some of it away. To make this point, it has explored the history of the industry, the policy arguments for and against the current industry structure, the meaning and purpose of the PSA (both overall and in several specifics), and some specific reforms that the PSA might be used to enact.

I need not have covered such broad territory to make a relatively narrow point, but I did so in the hope that synthesizing existing literature and advancing a series of historiographical and legal-interpretive theses would help seed future work in the area. Whether my proposals advance or not, my hope is that the conversation will.