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The Big Cost of Small Farms

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Abstract

Americans love meat. We celebrate our independence with steaks on the grill, we enjoy our favorite pastime with hot dogs, and we give thanks with turkey. Our love of meat is so ingrained in our culture that, historically, small increases in meat prices have driven the populace to riot. Today, meat prices are rising. Simultaneously, the largest meat processors and packagers are seeing record profits. Consumers, in turn, are outraged. Their emotions are being fueled by politicians who blame rising profits on a pandemic of greed and collusion and then argue that rigid antitrust enforcement is the only solution.

This account, however, relies on several false premises. While antitrust is thought to provide consumers with more choice, lower prices, and better quality, that expectation is not true in every arena. In the context of food and agriculture generally, and meat specifically, antitrust enforcement is more likely to raise food prices, limit cheap food options for poor people, and exacerbate problems of hunger and poor nutrition. In reality, the group most likely to benefit from such enforcement is small farmers, as was intended. Antitrust, as applied to meat, is thus both regressive and protectionist, sacrificing food accessibility in favor of protecting small farms.

This Article, *The Big Cost of Small Farms*, addresses the origin of this antitrust narrative and explores its harmful outcomes, using a consumer-centered approach to make the normative argument that the politicization of food production has always been and continues to be dangerous, resulting in disparate harms to poor people. Only in dispensing with the

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overreliance on antitrust enforcement will the poorest among us retain the option to buy cheap meat, an American staple. In this way, this Article serves as a necessary corrective to the current antitrust movement, which sees corporate bigness—without more nuanced consideration—as a curse.

INTRODUCTION

> *Why, despite the triumph of the consumer welfare model in virtually every other facet of American economic thought, does producer welfare continue to dominate agricultural policy in the United States?*[1]
>
> – Jim Chen, The American Ideology (1995)

The concepts of welfare, utility, and well-being are foundational to the American conception of liberty. As a culture, we believe that people have a right to be both healthy and happy. "The fundamental conditions and resources for health are: peace, shelter, education, food, income, a stable eco-system, sustainable resources, social justice, and equity."[2] By enhancing these conditions and maximizing these resources, individuals are equipped to attain "complete physical, mental and social well-being."[3] Said differently, optimal welfare is impossible without some minimal level of resources, and chief among those is food.

Food is not only essential to basic well-being but also an absolute necessity for survival. All people need it to survive. Thus, according to the United Nations Office of the High Commissioner for Human Rights, food is also a legal right.[4] It must be available,[5] accessible, and adequate.[6] To be deemed

1. Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 815 (1995).

2. *See* WORLD HEALTH ORG., HEALTH PROMOTION: THE 1ST INTERNATIONAL CONFERENCE ON HEALTH PROMOTION, OTTAWA, 1986, https://www.who.int/teams/health-promotion/enhanced-wellbeing/first-global-conference [https://perma.cc/NR2C-2UNA].

3. *Id.*

4. *See* U.N. HUM. RTS., OFF. HIGH COMM'R HUM. RTS., THE RIGHTS TO ADEQUATE FOOD, FACT SHEET NO. 34, at 2 (2010), https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet34en.pdf [https://perma.cc/N5W4-EEGY] ("The right to food is an inclusive right. It is not simply a right to a minimum ration of calories, proteins, and other specific nutrients. It is a right to all nutritional elements that a person needs to live a healthy and active life, and to the means to access them.").

5. *See id.* ("[Food] from natural resources either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting or gathering [is available]."). Food is also available when it is sold in markets and shops. *Id.*

6. *See id.* at 3 ("Adequacy means that the food must satisfy *dietary* needs, taking into account the individual's age, living conditions, health, occupation, sex, etc.").

accessible, both economic and physical access[7] to food must be guaranteed. "Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicines or rent."[8]

Despite the significance of food to welfare and well-being and the legal right to food, today's consumers have been faced with eye-watering food price inflation. Between early 2020 and June 2024, American food prices rose approximately thirty percent,[9] representing at least a forty-year high in both the food index generally and the food-at-home index specifically.[10] Of all the food categories, meat, poultry, and protein have seen the largest price increases.[11] The prices for retail beef, including everything from burgers and steaks to steak tartare, for example, are at record highs—hovering around levels of about

7. *See id.* at 2–3 (explaining that physical accessibility, which is outside the scope of this Article, requires access by those who are "physically vulnerable, such as children, the sick, people with disabilities," and those who reside in remote areas, among others).

8. *Id.* at 2.

9. *See* Taryn Phaneuf, *Food Prices Rose 28% in 5 Years. Here's Why*, NERDWALLET (Sept. 11, 2024, 9:34 AM), https://www.nerdwallet.com/article/finance/food-prices-july-2024#:~:text=While%20inflation%20isn't%20rising,higher%20year%2Dover%2Dyear [https://perma.cc/4ZE9-VVHC].

10. *See* U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., CONSUMER PRICE INDEX, https://www.bls.gov/cpi/ [https://perma.cc/2YCY-A7TL] (stating that the Consumer Price Index measures the change in prices paid by consumers for goods and services); *see also* U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., TED: THE ECONOMICS DAILY (July 18, 2022), https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm [https://perma.cc/M5PQ-DXWK] (finding that, under the U.S. Bureau of Labor Statistics' Consumer Price Index (CPI), inflation reached a forty-year high of 9.1% in June 2022); U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LABOR, TED: THE ECONOMICS DAILY (Aug. 15, 2022), https://www.bls.gov/opub/ted/2022/consumer-price-index-unchanged-over-the-month-up-8-5-percent-over-the-year-in-july-2022.htm [https://perma.cc/42WT-BPPV] (stating that the food index increased 10.9% from July 2021 to July 2022, the largest 12-month increase since the period ending in May 1979, and that the food-at-home index (grocery store or supermarket food purchases) increased 13.1% over the same period, the largest 12-month increase since the period ending March 1979).

11. In 2020, beef and veal prices increased by 9.6%, pork prices by 6.3%, and poultry prices by 5.6%. *See* ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., FOOD PRICE OUTLOOK, https://www.ers.usda.gov/data-products/food-price-outlook/ [https://perma.cc/XY92-QC8U] (discussing price increases for the years 2020, 2021, and 2022). In 2021, the beef and veal category had the largest relative price increase (9.3%). *Id.* And egg prices increased more (32.2%) than any category tracked by the U.S. Department of Agriculture's (USDA) Economic Research Service in 2022. *Id.*

eight dollars per pound.[12] Agricultural economists expect this trend to continue well into the future.[13]

The people most impacted by rising grocery prices are those residing in low-income households[14] because their groceries are a more significant component of their household budget.[15] To save money, low-income people consciously avoid expensive grocery stores in favor of dollar stores or mass discount stores, such as Walmart and Target.[16] By shopping at familiar stores with low prices, the consumer ensures that he gets what he needs at a price he can afford.[17] Even so, low-income shoppers may entirely avoid the sections of the grocery store that carry fresh produce, dairy, and meat because those foods spoil faster.[18] These people are already at a precarious point where they cannot afford the foods they need to maintain their health. Yet, without the options afforded by dollar stores and mass discount stores, low-income consumers would be even worse off.

The Biden Administration prioritized curtailing corporate growth as a way to combat high meat prices instead of creating laws and policies that would more quickly lower prices for

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12. *See* Lee Ying Shan, *Beef Prices are at Record Highs — How Much Pricier Will Your Steak Get?*, CNBC (Oct. 24, 2023, 10:03 PM), https://www.cnbc.com/2023/10/25/beef-prices-are-at-record-highs-and-your-steak-is-becoming-pricier.html [https://perma.cc/62TM-G8UB] ("Retail beef prices are currently hovering around record levels of about $8 per pound, according to data from the United States Department of Agriculture (USDA).").

13. *See, e.g.*, *id.* (Wells Fargo's Chief Agricultural Economist Michael Swanson: "All consumers will be paying more for all beef products for several more years.").

14. *See* HARTMAN GRP., THE BUSINESS OF THRIFT: UNDERSTANDING LOW-INCOME AND VALUE-ORIENTED CONSUMERS 2 (2018), https://s3.us-west-2.amazonaws.com/storage.www.hartman-group.com/videos/bcmLEz2nWwM8YUcLL204qLKqZF85rByMEr3DrQGD.pdf [https://perma.cc/VL7V-FJRQ] (defining low-income household as one making at or below 400% of the poverty level). This definition of low-income would include most U.S. consumers, even those who might otherwise be considered middle class.

15. *See id.* at 9 (noting that 57% of low-income participants in The Business of Thrift study, compared with only 39% of middle- and high-income participants, said that if given an extra $100 a week, they would spend it on food); *see also* Krystle Morrison, *The Grocery Shopping Habits of Low-Income and Thrifty Consumers*, FOOD INDUS. EXEC. (July 9, 2019), https://foodindustryexecutive.com/2019/07/the-grocery-shopping-habits-of-low-income-and-thrifty-consumers/ [https://perma.cc/F2B4-R6TZ].

16. *See* HARTMAN GRP., *supra* note 14, at 12.

17. *See* Morrison, *supra* note 15 ("[Consumers] have a preference for familiar stores because they know they can get what they need at the right price.").

18. *See id.* ("Low-income consumers shop from fewer food and beverage categories, sometimes avoiding whole store sections because those items are outside their price point.").

consumers, especially low-income consumers.[19] According to President Biden, rapid inflation in the meat sector is solely attributable to decades of "rising concentration."[20] Lax antitrust implementation purportedly allowed for mergers and acquisitions to proceed that otherwise should not have been allowed.[21] Through those mergers and acquisitions, a few large companies came to dominate the market, squeezing out small businesses and entrepreneurs.[22] The lack of competition then allegedly allowed the companies to raise prices, which is now hurting consumers, producers, and the economy.[23] Thus, the answer to meat price inflation is increased competition among small farms. [24]

19. Press Release, U.S. Dep't of Agric., Biden-Harris Administration Announces Final Awards through Landmark Meat and Poultry Processing Investment (Sept. 19, 2024), https://www.usda.gov/about-usda/news/press-releases/2024/09/19/biden-harris-administration-announces-final-awards-through-landmark-meat-and-poultry-processing [https://perma.cc/LA95-QQGQ].

20. *See* Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2021), https://www.nytimes.com/2021/12/25/business/biden-inflation.html [https://perma.cc/U4EN-B79P] ("The turn to antitrust levers stems from Mr. Biden's belief that rising levels of corporate concentration in the U.S. economy have empowered a few large players in each industry to raise prices higher than a more competitive market would allow.").

21. *See id.* (discussing instances where lax antitrust implementation led to inappropriate mergers and acquisitions); *see also FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, THE WHITE HOUSE: BRIEFING ROOM STATEMENT AND RELEASES (Jan. 3, 2022), https://www.whitehouse.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/VKL4-KB9W] [hereinafter FACT SHEET] (discussing the Biden Administration's efforts to address concentration issues in the meat and poultry processing sector and highlighting the dominance of a few large companies in controlling significant portions of the market).

22. *See* FACT SHEET, *supra* note 21 ("Four large meat-packing companies control 85 percent of the beef market. In poultry, the top four processing firms control 54 percent of the market. And in pork, the top four processing firms control about 70 percent of the market. The meatpackers and processors buy from farmers and sell to retailers like grocery stores, making them a key bottleneck in the food supply chain.").

23. *See id.* ("When dominant middlemen control so much of the supply chain, they can increase their own profits at the expense of both farmers—who make less—and consumers—who pay more.").

24. The United States Department of Agriculture's Economic Research Service (ERS) put out a 32-page briefing *Exploring Alternative Farm Definitions* in 2009. According to the experts at ERS, small has several dimensions—size of the operation and number of acres, total production and sales, or perhaps household income levels. ERIK J. O'DONOGHUE, ROBERT A. HOPPE, DAVID E. BANKER & PENNI KORB, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., EXPLORING ALTERNATIVE FARM DEFINITIONS:

Many economists, by contrast, argue that food price problems have little to do with problems of antitrust enforcement[25] and that the Biden Administration's fixation on market concentration was simply an attempt to mask its own role in increasing the cost of food.[26] To them, the real problem is government overreach.[27] By this logic, food prices have increased because of increased consumer demand resulting from the fiscal stimulus, market disruptions resulting from simultaneous supply and demand shocks, and the government's various, pandemic-prompted market interventions.[28] "What is *not* a plausible explanation [of rising prices]," according to one

IMPLICATIONS FOR AGRICULTURAL STATISTICS AND PROGRAM ELGIBILITY 5–13 (2009). For purpose of this Article, small means "family farm," which the UN Food and Agriculture Organization defined in 2014 in its *Identifying the Family Farm* Report. *See generally* Elizabeth Garner & Ana Paula de la O Campos, *Identifying the "Family Farm": An Informal Discussion of the Concepts and Definitions* (Food & Agric. Org. of the United Nations Agric. Dev. Econ. Working Paper, Paper No. 14-10, 2014), https://openknowledge.fao.org/server/api/core/bitstreams/359cf3cd-e4fb-41b2-a3a6-238b5a77c4ca/content [https://perma.cc/3FRC-C2DB]. According to the Report, "Family farming (also Family Agriculture) is a means of organizing agricultural, forestry, fisheries, pastoral and aquaculture production which is managed and operated by a family and predominantly reliant on family labour, both women's and men's. The family and the farm are linked, coevolve and combine economic, environmental, reproductive, social and cultural functions."*Id.* at 17.

25. *See, e.g.*, Teaganne Finn, *Liberal Group Points to Meat Companies as Reason for Higher Grocery Store Prices*, NBC NEWS (Sept. 27, 2021, 12:50 PM), https://www.nbcnews.com/politics/politics-news/liberal-group-points-meat-companies-reason-higher-grocery-store-prices-n1280119 [https://perma.cc/H6FG-VYKJ] ("Republicans have increasingly pointed to consumer prices and inflation as evidence that Democratic economic policies, including pumping trillions of dollars of stimulus into the economy to offset pandemic problems."); *Beefing Up Competition: Examining America's Food Supply Chain: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 10–11 (2021), https://www.judiciary.senate.gov/imo/media/doc/Miller%20-%20Testimony.pdf [https://perma.cc/72QK-V6H7] (written testimony of Shane Miller, Grp. President, Tyson Fresh Meats) (blaming the increase in meat prices on unprecedented market conditions).

26. *See generally Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America's Food Supply: Hearing before the H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial, and Administrative Law*, 117th Cong. 17–24 (2022) [hereinafter Manne Testimony], https://www.congress.gov/117/meeting/house/114345/witnesses/HHRG-117-JU05-Wstate-ManneG-20220119.pdf [https://perma.cc/7P23-K77J (written testimony of Geoffrey A. Manne, Founder & President, Int'l Ctr. L. & Econ.) (discussing how antitrust enforcement is inflating prices).

27. *See id.* at 6–10 (discussing the "detrimental effects" of overreach).

28. *See id.* at 9, 18–20 (discussing how the COVID-19 pandemic impacted the economy).

economist, "is increased concentration and the exercise of market power in the food supply chain."[29]

These narratives share a common flaw—the use of producer-centered rhetoric that focuses the issue of increasing meat prices on Big Ag (and corporate profits) and big government while completely disregarding consumer welfare. The reality is that food is the most fungible part of a family's budget.[30] The cause of the food price increases—whether due to consolidation or government overreach—is secondary to the reality that all consumers are paying more for their groceries, especially meat, poultry, and eggs, and that price increases disproportionately impact the most vulnerable sectors of society.[31] The emphasis going forward should thus be on how best to prioritize consumer welfare by decreasing the impact that food prices have on American consumers.

This Article takes an innovative approach by considering the role of antitrust, not on the income side but on the consumption side, and how it might make goods and services less affordable and less accessible to those on the lower half of the income distribution. It concludes that the near-pathological focus on antitrust enforcement is problematic for several reasons. First, when it comes to food, antitrust enforcement typically inures to the benefit of small farmers (as was intended), not the consumer. Second, under the law, the focus should be on price stabilization and consumer welfare writ large, particularly regarding food, a natural and legal right, and especially during times of rapid inflation. Third, despite popular opinion to the contrary, antitrust enforcement is not the proper tool to create immediate, downward price adjustments.

29. *Id.* at 1.

30. *See* Justine S. Hastings & Jesse M. Shapiro, *Fungibility and Consumer Choice: Evidence from Commodity Price Shocks*, 128 Q.J. ECON. 1449, 1468 (2013), https://scholar.harvard.edu/files/shapiro/files/premiumgasoline.pdf [https://perma.cc/4ZYX-2T3P] (questioning the assumption of absolute fungibility, the article presents compelling evidence that households engage in nuanced decisionmaking when confronted with fluctuating prices across diverse spending categories, including the impact on food expenditures); *see also* Travis A. Smith, *The Effects of Benefit Timing and Income Fungibility on Food Purchasing Decisions Among Supplemental Nutritional Assistance Support Households*, 98 AM. J. AGRIC. & ECON. 564, 565 (2016) (finding that within a family's budget, food emerges as the most fungible component).

31. *See* ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., FOOD PRICES AND SPENDING, https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/ [https://perma.cc/2SGA-E27P] ("In 2022, households in the lowest income quintile spent an average of $5,090 on food (representing 31.2 percent of income), while households in the highest income quintile spent an average of $15,713 on food (representing 8.0 percent of income).").

Accordingly, this Article proceeds in three parts. Part I establishes the background of antitrust law by reviewing the history of American urbanization, technological innovation, and agrarian grievances and activism to demonstrate that the original purpose of antitrust law was primarily to protect American farmers through market-throttling legislation—not to increase competition, lower prices, or protect consumer welfare. Part II shows how politicians of today, typified by the Biden Administration, work to preserve and promulgate that original purpose by focusing almost exclusively on antitrust enforcement as the solution to contemporary food price increases. Finally, in light of the tension between what antitrust law has been used to do and what its (ostensible) modern objectives are, Part III asserts that some market concentration, at least in the context of meat, tends to benefit consumers and should be left as is.

I. A History of Antitrust Protectionism in Agriculture

Unsurprisingly, farmers generally respond well to antitrust messaging.[32] The public, in turn, responds well to pro-farmer messaging.[33] This is because the antitrust narratives repeated by today's politicians, and generally believed by the public, are themselves based on a romanticized notion of the small American family farm[34] resulting from decades of antitrust

32. *See* Teaganne Finn, *Farmers Flourish Under Biden, See Recovery from Trump-era Trade Wars*, NBC NEWS (Jan. 29, 2022, 4:30 AM), https://www.nbcnews.com/politics/white-house/farmers-flourish-under-biden-see-recovery-trump-era-trade-wars-n1288044 [https://perma.cc/4M8Q-9PB2] (quoting the president of the Montana Farmers Union, Walter Schweitzer, who said in January 2022, "I think the real optimism in agriculture is that we've got a president[, Biden,] that is willing to stand up to these corporate monopolies and tell them 'enough is enough.' You need to play fairly, you need to share your profits").

33. *See, e.g.*, Michael Pollan, *Naturally*, N.Y. TIMES MAG. (May 13, 2001), http://www.nytimes.com/2001/05/13/magazine/naturally.html [https://perma.cc/A6CP-6Y3B] (observing that romanticized agrarian images on food labels, including appeals to farm-raised meat, cage-free chicken and eggs, and images of happy cows on dairy products, convey positive messaging for consumers and that "'[o]rganic' on the label conjures a whole story, even if it is the consumer who fills in most of the details, supplying the hero (American Family Farmer), the villain (Agri-businessman) and the literary genre").

34. The mythos surrounding the small American family farm is long-lasting. Professor Victor Davis Hanson has traced the tradition back to Thomas Jefferson, who wrote of the *mesoi* (ancient Greece's middle-class, small farmers who helped to establish the country's democracy) as part of his vision for American citizenship.

campaigns begun by late nineteeth-century farmers.[35] A historical review of those efforts reveals why American antitrust policy is not, and never has been, about increasing competition, lowering prices, or strengthening the economy and why, from its very inception, antitrust has been employed by farmers to protect their own interests at the expense of consumers' welfare.[36] Of course, this has not stopped populists, past or present, from using economic downturns to push antitrust policies to score political points with rural communities and people disproportionately impacted by food price increases.[37]

VICTOR DAVIS HANSON, THE OTHER GREEKS: THE FAMILY FARM AND THE AGRARIAN ROOTS OF WESTERN CIVILIZATION 358 (1999).

> Agrarian republicanism sought to preserve a vision of national identity based on classical civic virtues such as simplicity, frugality, prudence, diligent and dignified labor, tranquility, and physical and spiritual wellbeing. Further, it strongly correlated the sanctity of the spirit of citizens and the community with practices of husbandry and cultivation. Labor on the land and farm was the great teacher of virtue.

ROSS SINGER, STEPHANIE HOUSTON GREY & JEFF MOTTER, ROOTED RESISTANCE: AGRARIAN MYTH IN MODERN AMERICA 19 (2020).

The early linkage of small farmers to good citizenship persists today as a large part of the American ideology. *See, e.g.*, *id.* ("This vision of small freehold farmers continues to inspire quintessentially American visions of citizenship for urban as well as rural persons; in American myth, citizens are property-owning, self-sufficient, and independent. The figure of Jefferson's citizen-farmer dominated nineteenth-century conceptions of rural life and continues to animate nostalgic notions of the struggles and joys of rural life as a basis for national identity.").

35. *See infra* Sections I.B and I.C.

36. *See infra* Sections I.B and I.C.

37. Higher prices and increased market dependency have been sought by farmers since they began experiencing debt as a result of lowered income during the post–World War I economic downturn. BRAD BAUERLY, THE AGRARIAN SEEDS OF EMPIRE: THE POLITICAL ECONOMY OF AGRICULTURE IN US STATE BUILDING 134 (David Fasenfest ed., 2016). Today's renewed calls for antitrust solutions to food price inflation problems are unsurprising because, when it comes to food or agriculture, populists routinely tout antitrust solutions during market downturns. Modern studies propose that food is a particularly attractive pressure point for populists, in part, because rural communities are more likely to be negatively impacted by rising food prices, which they often associate with capitalism and representative democracy. *See* Homi Kharas, *The Challenge of High and Rising Food Prices*, 18 BROWN J. WORLD AFFS. 97, 102–03 (2011). The annual income in rural areas is sizably lower than it is in more urban areas, a big appeal to politicians who recognize such a disparity as an opportunity to tantalize the large number of voters who continue to reside in those rural communities. *Id. See generally* DIRK STRIJKER, GERRIT

Accordingly, Section A of this Part reviews the eighteenth- and nineteenth-century urbanization of the United States and discusses how technological innovations and market concentration made it possible to feed a ballooning population increasingly removed from its food sources. Section B discusses how the grievances of American farmers of the time prompted nationwide social movements, became the basis of American antitrust policy, created powerful political lobbies, and forever linked small farmers to a politicized narrative about food prices. Section C briefly examines some pertinent political theory to explain why and how agrarian lobbies were so successful and how that historical success primed the political narratives we see today.

A. *Urbanization and Innovation in the Nineteenth Century*

Prior to the Civil War, the United States was primarily a rural nation, with most people living in either very small towns or on farms.[38] This remained the case until the latter part of the nineteenth century, when urban population growth began

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VOERMAN & IDA TERLUIN, RURAL PROTEST GROUPS AND POPULIST POLITICAL PARTIES (2015) (engaging in a comparative analysis of European rural populist movements); Saturnino M. Borras Jr., *Understanding and Subverting Contemporary Right-Wing Populism: Preliminary Notes from a Critical Agrarian Perspective* (ERPI 2018 Int'l Conf.), https://www.tni.org/files/article-downloads/erpi_cp_47_borras.pdf [https://perma.cc/XH7X-ZD58] (describing links between rural populism and food sovereignty movements); Saturnino M. Borras Jr., *Agrarian Social Movements: The Absurdly Difficult but not Impossible Agenda of Defeating Right-Wing Populism and Exploring a Socialist Future*, 20 J. AGRARIAN CHANGE 3 (2019), https://doi.org/10.1111/ joac.12311 [https://perma.cc/BK47-P374]; Ian Scooner, Marc Edelman, Saturnino M. Borras Jr., Ruth Hall & Wendy Wolford, *Emancipatory Rural Politics: Confronting Authoritarian Populism*, 45 J. PEASANT STUDS. 5, 7–8 (2017); Natalia Mamonova & Jaume Franquesa, *Populism, Neoliberalism And Agrarian Movements in Europe. Understanding Rural Support for Right-Wing Politics and Looking For Progressive Solutions*, 60 SOCIOLOGIA RURALIS 710, 710–13 (2019), https://doi.org/10.1111/ soru.12291 [https://perma.cc/5R5Z-CBA6]; *see also* Paul Collier, *The Politics of Hunger: How Illusion and Greed Fan the Food Crisis*, 87 FOREIGN AFFS. 67, 67–72 (2008).

38. *See* R. DOUGLAS HURT, AMERICAN AGRICULTURE: A BRIEF HISTORY 35 (Purdue Univ., rev. ed. 2002) (providing a brief history of American agriculture from the prehistoric period through the twentieth century); *see also The Rise of Industrial America, 1876 to 1900: Rural Life in the Late 19th Century*, LIBR. CONGRESS, [hereinafter City Life] https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/rural-life-in-late-19th-century/ [https://perma.cc/3QGG-H7SR] ("The United States began as a largely rural nation . . . .").

rapidly outpacing rural growth for the first time in history.[39] Only about 7% of the 9 million people in the United States lived in a town or city in 1820; by the 1860s, however, a quarter of the nation's 31 million citizens did.[40] Cities grew by about 15 million people between 1880 and 1890 alone.[41] Much of this growth was attributable to immigration, both from around the world and from the domestic countryside.[42] During this time, almost 40% of American towns experienced population loss as people flocked to urban centers.[43]

The period following the Reconstruction Era, spanning from 1870 to 1914, was variably known as the Second Industrial Revolution, the Technological Revolution, and the Gilded Age.[44] As the epithets imply, widespread industrialization and technological progress drove urbanization by employing the millions of people pouring into cities to make mass production of goods possible.[45] And those millions of people needed to be fed. The impact that the technological innovations of the era had on urbanization is difficult to overstate because, without them, the cities would never have been able to sustain their increased populations.[46] The food supply provided by a small, local, rural, agricultural population cannot proportionally increase to meet skyrocketing demands created by gigantic, dependent urban populations without certain requisite technological breakthroughs.[47] In other words, with technology, you can have a lot more people living in non-agricultural areas

39. *See* Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635, 647 (2011) ("By 1900, the United States had become a predominantly urban society . . . .").

40. *See* MAUREEN OGLE, IN MEAT WE TRUST: AN UNEXPECTED HISTORY OF CARNIVORE AMERICA 14 (2013) (discussing the growth of urban areas).

41. *See* City Life, *supra* note 38 (discussing the rapid growth of cities between 1800 and 1900).

42. *See* Smythe, *supra* note 39 (stating that "[m]any of the workers in [urban areas] were immigrants"); *see also* City Life, *supra* 38 ("[P]eople from rural America also migrated to the cities . . . .").

43. *See* City Life, *supra* note 38 ("Between 1880 and 1890, almost 40 percent of the townships in the United States lost population because of migration.").

44. *See* Smythe, *supra* note 39, at 638–39 (discussing the Second Industrial Revolution).

45. *Id.* at 639.

46. *See id.* at 635–36 (discussing how technological innovations supported urbanization); *see also* OGLE, *supra* note 40 ("By the late 1860s, the nearly 1 million inhabitants of Manhattan needed 1.1 million animals a year to satisfy their carnivorous appetites.").

47. *See* Smythe, *supra* note 39, at 635–36.

because the people living in agricultural areas can provide all the first group with food.[48] Without technological breakthroughs, however, the two areas would have to grow at approximately the same rate.

The invention of barbed wire was one such breakthrough.[49] Before barbed wire fences, livestock were often allowed to graze freely, but this meant that the crops of neighboring farms could be subject to foraging animals and that the number of people who could settle in an area was limited by the mere presence of unfenced properties nearby.[50] Even so, farmers had already moved far from the nation's most populated eastern areas by the early nineteenth century and had set up cattle grazing and feeding operations as far as the Ohio River.[51] But, due to urbanization-driven demand increases, farming operations expanded westward to the Mississippi and Missouri rivers, where the same cattle-corn-hog complex could thrive just like it did in Ohio,[52] and to the grassy plains west of the Missouri River.[53] By the 1870s, cattle were roaming from the Texas Gulf coast to modern Montana and Idaho, and every year drovers

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48. *See id.* at 646 ("[Technology] ma[de] the agricultural sector more productive."); *see also* OGLE, *supra* note 40 (discussing food and urban and rural communities).

49. *See, e.g.*, Emily Ray & Schamel Wynell, *Glidden's Patent Application for Barbed Wire*, 61 SOC. EDU. 52, 52–55 (1997), https://www.archives.gov/education/lessons/barbed-wire [https://perma.cc/B23H-3QQ3]. Michael Kelly patented the first wire fence in November 1868. *Id.* His fence, with just one strand of wire, however, was constantly broken when cattle pressed their weight on it. *Id.* To remedy this problem, Kelly twisted two wires together, forming a cable for barbs, developing the "thorny fence." *See id.* Not only were the fences now stronger but also the addition of barbs "taught cattle to keep their distance." *Id.*

50. *See* Ray & Wynell, *supra* note 49. While wooden fences could be used, lumber was in short supply on the prairies and often didn't exist even for houses. *Id.* It was extremely difficult to acquire and expensive when available. *Id.* Likewise, stone walls could be erected, but rocks were also scarce on the plains. *Id.*

51. *See* OGLE, *supra* note 40, at 15 (noting that the Ohio River valley was especially attractive to farmers because it was situated on the nation's primary waterway and the rich soil was well adapted for growing corn and raising cattle and hogs).

52. *See id.* ("Squeezed by urban growth and demand, farmers and livestock headed to what was then called 'the west' . . . .").

53. The Far West not only provided millions of acres of land for the taking but also was especially attractive for ranchers because the land had sustained somewhere between thirty and forty million bison for centuries. *See id.* at 16–17. The grasses that had developed on the plains to nourish one ruminant would presumably nourish another just as well. *See id.* Moreover, "[t]hanks to the Far West's relatively mild, dry climate, western bison 'wintered' on their own, without any special food or shelter; Americans assumed that cattle could do the same." *Id.* at 17. Accordingly, "[t]he Far West would preserve and sustain Carnivore Nation." *Id.*

moved thousands of animals destined for eastern markets through open, unfenced, or public land to get them to ports and rails.[54] These open rangelands were quickly fenced in after Joseph Glidden patented and began mass-producing a much-improved version of barbed wire in 1874.[55] The advent of barbed wire not only abruptly ended the Wild West era of unrestricted, open-range grazing but also helped make the large-scale production of meat possible by increasing how many people in a region could raise livestock and how many livestock those people could raise.[56]

Increased productivity potential was worthless, however, unless livestock production itself, which was occurring on increasingly distant farms, was also supported by an infrastructure that both facilitated the production and delivered the livestock to cities for consumption.[57] Livestock had to be raised, watered, and fed on farms; driven en masse to railyards or ports; and then shipped to city slaughterhouses, which finally processed the animals, disposed of all the waste generated, and distributed the meat to retailers to sell to consumers.[58] Americans spent millions of dollars and laid thousands of miles of railway developing the infrastructure needed to support moving such enormous quantities of raw goods, foodstuffs, and livestock all around the country and to eastern urban markets.[59] Trains delivered millions of animals to Kansas City, St. Louis, and Chicago stockyards, and farmers had to haggle with commission agents, brokers, and meatpackers to ensure their animals were shipped.[60] Much of the grass-fed stock would immediately be shipped to eastern cities for slaughter and sale.[61]

54. *Id.* at 20–21.

55. *See* Ray & Wynell, *supra* note 49; *see supra* note 49 and accompanying text.

56. Barbed wire had a significant impact on nomadic Native Americans, whose travel patterns were radically altered by being pushed out of lands they had always used. Ray & Wynell, *supra* note 49. They began to refer to barbed wire as “the Devil’s rope.” *Id.*

57. *See* OGLE, *supra* note 40, at 14–22 (addressing the move west and how a transportation infrastructure was necessary).

58. *Id.*

59. *See id.* at 15 (“Americans invested millions of dollars in a transportation infrastructure so they could move foodstuffs from west to east.”).

60. *See id.* at 21 (discussing stockyards in Kansas City, St. Louis, and Chicago).

61. *See id.* at 17 (explaining that some midwestern farmers also bought livestock to fatten up a little more on corn before reselling to provide fresh beef to those living in urban areas).

All the technological leaps involved in developing the steam locomotives and railway systems moving the goods were groundbreaking enough on their own, but refrigerated railroad cars were the final piece needed to create a unified system capable of keeping up with urban demand.[62] In 1877, Gustavus Swift successfully shipped slaughtered cattle via refrigerated cars, demonstrating that animals no longer had to be shipped live for slaughter at their destination city.[63] Refrigeration made it possible for a central location, most often Chicago,[64] to slaughter, store, and ship to anywhere in the country fresh, cheap meat at any time of the year.[65] But while these and other technological advancements were integral to the new industrial-scale food production system that fed the populations driving urbanization, not everyone involved in the system felt that they benefited from it.[66]

B. *Agrarian Grievances and Activism*

The refrigerator car ultimately triggered the decline of the range cattle industry from the mid-to-late 1880s.[67] To start, the innovation spurred an increased demand for beef along with a new demand for better grades of cattle and beef.[68] Because the refrigerator car lowered prices so significantly, consumers were now able to buy the best grades of beef for prices that they had

62. *See id.* at 26–27 (discussing refrigerated railcars).

63. *See* Donald J. Boudreaux & Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUSTRIAN ECON. 81, 89 (1993) (noting that Gustavus Swift was the first to use refrigerated railroad cars in a cost-effective manner).

64. *See generally* WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST 34 (rev. ed. 1992) (discussing the ecological and economic changes that made Chicago America's most dynamic city and the Great West its hinterland).

65. *Cf.* OGLE, *supra* note 40, at 49 ("A journalist who covered commodities markets for the *Boston Journal* reported in 1883 that three-fourths of the dressed beef sold in that city came directly from Chicago."). Meats that were shipped in refrigerated cars would come to be known as dressed meats. *Cf. id.* at 28 (claiming that Gustavus Swift is "typically credited (wrongly) with inventing the refrigerated railcar and (wrongly) with being the first to ship dressed beef"). And the dressed meat cars eventually precipitated a dressed beef war. *See id.* Over the next decade, Swift's refrigerated railcars would drive many slaughterhouses and stockyards out of business. *Id.* After having won the dressed beef war, Swift's name would adorn packages of beef and pork sold around the world. *Id.*

66. *See* Smythe, *supra* note 39, at 646–54 (describing the discontent of various groups).

67. MARY YEAGER, COMPETITION AND REGULATION: THE DEVELOPMENT OF OLIGOPOLY IN THE MEAT PACKING INDUSTRY 172 (1981).

68. *Id.*

previously paid for cheaper grades of range cattle beef.[69] At the outset, producers benefited under this new system, increasing production substantially to satiate consumer demand.[70] A boom period thus ensued in the early 1880s, and producers prospered.[71]

By 1885, the boom period had turned into a bust.[72] As a result of high profits, however, the West was inundated with people, money, and cattle,[73] which saturated the cattle market, caused decline in cattle valuation, and created an economic bubble in the cattle industry.[74] Moreover, because consumers were no longer interested in the lower quality grass-fed range beef (preferring the better quality beef from corn-fed cattle), the prices for range cattle beef fell even lower.[75] The cattle bubble, like all bubbles, eventually burst.[76] "From Iowa to Texas, livestock producers watched as prices plunged and their livelihoods disintegrated."[77] The resultant economic decline

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* OGLE, *supra* note 40, at 51 ("[H]yperbolic promises of easy wealth spurred a race to capture both beef and profits. Hundreds of English, Scottish, German, French, and American investors dived in, scooping up land and livestock. Cowtowns swarmed with men on the make. The editor of the *Laramie Boomerang* described that burg's cattle district as 'a young Wall Street' where buyers, sellers, and madmen talked of 'millions' as if they were 'nickels.'").

74. *See* YEAGER, *supra* note 67. The rapid influx of supply would naturally result in decreased profits. *See* Boudreaux & DiLorenzo, *supra* note 63, at 85.

> Measured in pounds of live weight, cattle supply during the 1880s increased by about 50 percent for the United States as a whole, while the price per hundredweight received by cattlemen in the United States fell from an average of $5.69 in 1880 to $3.86 in 1890—a 15 percent decrease.

Id.

75. YEAGER, *supra* note 67.

76. *See id.* There were a number of factors that contributed to this outcome. OGLE, *supra* note 40, at 52–53. To start, overgrazing and grass depletion meant that the plains could no longer sustain the cattle burden. *Id.* at 52. As a result of overgrazing, the five acres of land a steer needed in 1870 expanded to between fifty-to-ninety acres by 1880. *Id.* This problem was worsened by President Grover Cleveland in 1885 when, in order to clear land for Indian Territory (today's Oklahoma), he ordered the removal of more than 200,000 head of cattle. *See id.* Those cattle could either go west to a range that was already facing disaster or east to a slaughterhouse. *Id.* Finally, the winters of 1885–1886 and 1886–1887 were especially brutal. *Id.* at 53. The frigid temperatures and string of blizzards killed tens of thousands of cattle. *Id.*

77. *See* OGLE, *supra* note 40, at 53.

affected every major cattle-producing state[78] and exacerbated an already ongoing economic slump.[79] Bankers began to call loans.[80] Agricultural prices had already been continuously falling lower and lower before,[81] and suddenly the farmers who had been scraping by found themselves on the ragged edge of survival.[82] "[R]anchers and corporate cowboys alike stared foreclosure and bankruptcy in the face and sold their livestock for whatever price they could get. It was not much."[83]

Meanwhile, the Big Four firms—Swift, Armour, Hammond, and Morris—were dominating the meatpacking industry.[84] By 1888, a mere decade after Swift had perfected the refrigerator car, they had built out the extensive distribution and administrative networks necessary to effectively manage that novel supply chain.[85] The Big Four "reaped economies of scale and acquired a measure of control that gave them distinct and significant advantages over their smaller rivals."[86] Rapid vertical integration garnered the packers an ever-increasing share of the market.[87] In 1888, the Big Four "produc[ed] almost three-fourths of the beef for Chicago's consumption, two-thirds of the nation's supply of dressed beef, and were slaughtering almost one-half of the nation's total meat supply."[88] Further, because of the extreme barriers to entry (namely capital costs), few firms could compete.[89] And, "[b]ecause economies of scale caused a decrease in the optimal number of producers of any particular commodity, the economy *looked* as if it were becoming more 'monopolized.'"[90]

78. *See* Boudreaux & DiLorenzo, *supra* note 63, at 85 ("[The] decline in cattle values . . . affected all the major cattle-producing states.").

79. *See* OGLE, *supra* note 40, at 53.

80. *Id.*

81. *See* Boudreaux & DiLorenzo, *supra* note 63, at 85 (discussing the decrease in price for beef and beef products "from the mid 1880s to the end of the decade," with the price of beef tenderloins, for example, decreasing nearly thirty-eight percent between 1883 and 1889).

82. *See* OGLE, *supra* note 40, at 53 (discussing the effects of bankers calling loans on farmers).

83. *Id.*

84. *See* YEAGER, *supra* note 67, at 49, 77.

85. *See id.* at 77.

86. *See id.* at 76.

87. *See id.* at 63–65 (recounting how Armour, Morris, and Hammond adopted Swift's strategy of vertical integration).

88. *Id.* at 77.

89. *See id.*

90. *See* Boudreaux & DiLorenzo, *supra* note 63, at 88.

Given everything at stake and the differences in power, it is understandable why a small farmer's worst fear would be getting underpriced by larger, more efficient firms. Hostility toward the packers quickly arose, and "rumors of a 'beef trust' began to spread."[91] "Cattlemen blamed Armour, Morris, Swift, and Hammond for their troubles. The Big Four, they contended, were colluding in the purchase of cattle to depress the price."[92] Many agrarians blamed every problem they had on "monopoly," which in context actually referred to "larger and more efficient firms who were driving many small farmers and merchants out of their traditional lines of work and business."[93]

These feelings of hostility, however, as echoed by the federal government,[94] simply ignored the fact that concentration could result from a combination of market and technological forces, not necessarily collusion.[95] According to one scholar, during a hearing conducted by a committee appointed to investigate the meat packers, even some stockmen attributed lower prices to "natural" causes, including overproduction and overmarketing.[96] Nevertheless, the committee insisted that concentration and pooling[97] were the root of the problem.[98] This conflation changed the concept of monopolization into what it is today: a malaprop that can be used to negatively describe anything vaguely related to big farms, logistical supply chains, or industrialization.[99]

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91. *See* YEAGER, *supra* note 67, at 172–73.

92. *Id.* at 173.

93. Boudreaux & DiLorenzo, *supra* note 63, at 88 ("Agrarians and local merchants in Missouri (as elsewhere) correctly perceived that the larger producers were responsible for the downward pressures on the prices of their outputs . . . .").

94. For a discussion of the Vest Committee and its investigation of the packers, see YEAGER, *supra* note 67, at 172–78.

95. *Id.* at 174.

96. *Id.*

97. Railroad owners, seeking to avoid market collapse, experimented with various options, such as the "pool," which allowed owners to agree on freight rates and divide the available livestock among themselves. Farmers complained that such cooperation amounted to monopolistic collusion even though the various "pool" efforts were largely unsuccessful. *See* OGLE, *supra* note 40, at 23 (describing "pools" as a means of avoiding market collapse). Ogle blames the lack of success on the fact that the "railroad kings" were not inclined toward voluntary cooperation and mutual trust. *Id.*

98. YEAGER, *supra* note 67, at 174.

99. *See* Jon Lauck, *American Agriculture and the Problem of Monopoly*, 70 AGRIC. HIST. 196, 197–99 (1996) (discussing how the term monopolization has become a catch-all for expressing disapproval of various aspects of large-scale economic activities).

C. *Growth, Success, and Legacy of the Agrarian Lobby*

The many farmers who believed the evils of their day were caused by "monopolists" began organizing to curb the influence of any business that they felt threatened by.[100] These organizational efforts quickly evolved and came to be known as the "Granger Movement," one of the era's political juggernauts.[101] The Granger Movement, like the multitudes of smaller, localized lobbying groups comprising it, sought to use government regulation to protect its constituents' interests.[102] The most powerful farm lobbies were often those comprised of cattlemen and retail butchers, who resented all forms of "monopolistic" practices, such as "the centralized butchering and meat-packing firms that emerged in Chicago in the early 1880s as a result of the development of an economical refrigerated railroad car."[103] The Great Plains, where the movement was most dominant, and Missouri in particular, exemplify how combative the era's political dynamics were.[104]

Missouri farmers, like most of the nation's farmers,[105] believed that larger, more efficient farms were intentionally

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100. The National Grange of the Order of Patrons of Husbandry, a group founded in 1867 in New York to advocate on behalf of rural communities and to help farmers form buying and selling cooperatives, had 1.5 million members by 1875. For more on the Granger movement, see D. SVEN NORDIN, RICH HARVEST: A HISTORY OF THE GRANGE, 1867-1900, at 23–33 (1974). The National Farmers' Alliance and the Industrial Union (the Southern Farmers' Alliance) were both formed in Texas in 1875. SOLON JUSTUS BUCK, THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATION 1870–1880, at 302–04 (1913). The Texas-based Farmers' Alliance was particularly concerned with the crop-lien system, which was notorious for throwing farmers into poverty. *Id.* at 302. The Northwestern Farmers' Alliance was formed in Chicago in 1880. *Id.* at 305.

101. *See* NORDIN, *supra* note 100, at 13 (discussing the development of the Granger Movement).

102. *See* BUCK, *supra* note 100, at 311. Other protests also arose during this period. The Greenback Party, for example, advocated for the issuance of paper money, believing that depreciating currency would help all debtors meet their obligations. *Id.* at 308–09; *see also The Farmer's Plight*, DIGIT. HIST. (2021), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=2&psid=3126 [https://perma.cc/FS7R-WNGY] ("Early in the 1870s the Greenback Party agitated for the issue of paper money, not backed by gold or silver, with the idea that a depreciating currency would make it easier for debtors to meet their obligations.").

103. Boudreaux & DiLorenzo, *supra* note 63.

104. *See id.* at 88–89 (discussing anti-monopoly sentiment in Missouri).

105. Long before U.S. Senator John Sherman and the fifty-first Congress passed the Sherman Act in 1890, states were already trending in that direction. By 1890, at least twenty states had passed antitrust legislation. *Id.* at 82, 95. These states and

underpricing their products.[106] So, groups such as the Farmers' Alliance, Missouri's dominant agrarian lobbyist,[107] routinely employed fearmongering tactics to cloak an anti-consumer agenda in antitrust terminology and preached against the dangers they associated with "land concentrating in the hands of capitalists."[108] At its 1889 meeting, the Farmers' Alliance even pushed legislation to "suppress . . . all unhealthy rivalry."[109] And, in 1888, the Farmers' Alliance "asked" state legislature candidates to sign a pledge promising they would "work and vote for the [Farmers' Alliance's] demands irrespective of party caucus or action."[110] Those candidates unwilling to sign such a pledge often found themselves blackballed.[111] The Farmers' Alliance also directed farmers to "vote against [any candidate who refuses to sign] and [to] use [their] influence to elect those who sign, irrespective of party."[112] These efforts paid off, and by the spring of 1889, Missouri's General Assembly was dominated by pro-agrarian politicians who immediately passed antitrust legislation aimed

the associated dates of antitrust legislation passage are as follows: Maryland (1867); Tennessee (1870); Arkansas (1876); Texas (1876); Georgia (1877); Indiana (1889); Iowa (1889); Kansas (1889); Maine (1889); Michigan (1889); Missouri (1889); Montana (1889); Nebraska (1889); North Carolina (1889); North Dakota (1889); South Dakota (1889); Washington (1889); Kentucky (1890); Louisiana (1890); and Mississippi (1890). *Id.* at 95. An additional four states would adopt antitrust legislation by 1893; these are Alabama (1891); Illinois (1891); Minnesota (1891); and California (1893). *Id.*

106. *See id.* at 88 ("Agrarians and local merchants in Missouri (as elsewhere) correctly perceived that the larger producers were responsible for the downward pressures on the prices of their outputs . . . .").

107. *See id.* at 83 ("The 'Farmer's [sic] Alliance' was the most powerful political coalition in Missouri . . . .").

108. *Id.*

109. Frank M. Drew, *The Present Farmers' Movement*, 6 POL. SCI. Q. 282, 286 (1891). These sentiments were far from unusual. For instance, the National Butchers' Protective Association of the United States of America, another Missouri-based lobbying group formed in 1886, stated outright that its express goal was "to destroy the dressed meat industry, which was shipping meat from Chicago to eastern cities and selling it for less than the meat killed by local butchers." Boudreaux & DiLorenzo, *supra* note 63, at 90.

110. Boudreaux & DiLorenzo, *supra* note 63, at 83.

111. *Id.*

112. *See id.* Unsurprisingly, candidates who were unwilling to commit to such pledges often found themselves blackballed; of the 174 Missouri senators and representatives, 140 agreed to sign the pledge. *Id.* Moreover, all the congressmen-elects along with the winners of three statewide races that year signed the pledge. *Id.*

at shielding small-scale cattle ranchers and independent butchers from Chicago meat-packing firms.[113]

These sorts of developments were not unique to Missouri; as one might expect, antitrust continued to find easy favor with farmers and politicians alike.[114] Attempting to put an end to a decade's worth of national political, industrial, and agrarian unrest, U.S. Senator John Sherman and the fifty-first Congress passed the Sherman Anti-Trust Act of 1890.[115] By 1893, all the Great Plains states had passed antitrust legislation[116] except Colorado, which passed it in 1913.[117] This widespread adoption may seem unusually rapid, but in regions where agriculture is a primary economic contributor, supporting antitrust is the only logical option for politicians because voting blocs inevitably coalesce around economic issues.[118] Other early antitrust-adopting states were large cotton exporters (Mississippi, Alabama, Georgia, Louisiana, Arkansas, and Texas), large tobacco exporters (North Carolina, Maryland, and Kentucky), or areas otherwise economically dependent on agriculture

113. *See id.* at 92 (discussing how Missouri's farmers dominated the General Assembly).

114. Notably, many economists of the time did not favor the Sherman Act. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPS. 43, 44 (2000). They believed that it was, at best, a harmless political gesture that would not really limit the growth of firms in scale or in scope, or at worst, that it would impede industrial reorganization. *See id.*

115. *Sherman Anti-Trust Act* (1890), NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act [https://perma.cc/73H3-BRG2]. While the Interstate Commerce Act of 1887 did make some cartel behaviors illegal, the Sherman Act commenced the federal regulation of mergers and monopolies in earnest. *See* Gerard N. Magliocca, *Constitutional False Positives and The Populist Movement*, 81 NOTRE DAME L. REV. 821, 843 (2006); Wesley W. Wilson, *Introduction: The Interstate Commerce Act of 1887*, 43 REV. INDUS. ORG. 3, 4 (2013) (acknowledging that the Interstate Commerce Act of 1887 was passed in response to cartelization).

116. *See* Charles S. Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1094 fig.1 (2016) (recognizing that Montana, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, and Texas had antitrust legislation by 1890); *see also* David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J., 141, 146 n.22 (1990) (noting that Oklahoma and New Mexico each passed antitrust legislation by 1891).

117. Mark Lillie, *Antitrust Law in Colorado: Back on Track*, 60 DENV. L.J. 645, 645 (1983).

118. *See* Lukas F. Stoetzer & Steffen Zittlau, *Vote Choice and the Nonseparability of Economic and Social Issues*, 84 PUB. OP. Q. 158, 159 (recognizing that voters' decisions are based, in part, on economic issues). Part of the reason why the Missouri beef lobby was so successful at accomplishing its political goals during this time was because beef was Missouri's largest agricultural output. *See* Boudreaux & DiLorenzo, *supra* note 63, at 92.

(Tennessee, Maine, Montana, Washington, and California).[119] Fighting antitrust would have just agitated the farm lobbies and alienated the very voters to whom politicians sought to appeal.[120]

Indeed, the political embrace of antitrust was so great at one point that it culminated in a new (albeit short-lived) political party—the People's Party—in 1892.[121] The People's Party, also known as the Populist Party or the Populists, was dedicated to protecting the nation's agricultural sector (not the broader public), reigning in big business, and helping struggling farmers.[122] However, after unsuccessfully supporting Democratic candidate William Jennings Bryan in the 1896 presidential election, the influence of the People's Party quickly waned.[123] These agrarian People's Party populists would go on to be assimilated into the Democratic Party and the burgeoning

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119. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2335 (2013) (stating that Maine, North Carolina, Texas, Tennessee, Mississippi, and Kentucky enacted antitrust laws prior to the Sherman Anti-Trust Act); *see also* John C. Brinkerhoff Jr., Note, *Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope*, 34 YALE J. ON REGUL. 353, 354 (2017) (noting that Alabama criminalized anticompetitive practices in 1891); Julian O. Von Kalinowski & John J. Hanson, *The California Antitrust Laws: A Comparison With the Federal Antitrust Laws*, 6 UCLA L. REV. 533, 534–35 (1959) (noting that California passed antitrust legislation in 1907); Dameron, *supra* note 116 (recognizing that Montana, Washington, and Lousiana were early adopters of antitrust legislation); U.S. CENSUS BUREAU, REPORT ON THE COTTON PRODUCTION IN THE UNITED STATES: EMBRACING AGRICULTURAL AND PHYSICO-GEOGRAPHICAL DESCRIPTIONS OF THE SEVERAL COTTON STATES AND OF CALIFORNIA 17 tbl.2 (1884) https://www2.census.gov/library/publications/decennial/1880/vol-05-06-cotton/1880v5-01.pdf [https://perma.cc/R329-ZEWM] (citing Mississippi, Georgia, Texas, Alabama, Arkansas, and Louisiana as large cotton producers); U.S. CENSUS BUREAU, REPORT ON THE PRODUCTIONS OF AGRICULTURE AS RETURNED AT THE TENTH CENSUS 38 tbl.1 (1880) https://www2.census.gov/library/publications/decennial/1880/vol-03-agriculture/1880v3-03.pdf [https://perma.cc/D4HT-GHPM] (citing the estimated value of farm productions); *id.* at 888 (citing tobacco production by state).

120. Beyond the politician's self-interest, the power of the agrarian lobbyists, as previously shown, must have instilled some fear.

121. *See* BUCK, *supra* note 100, at 309 (discussing the origins of the People's Party).

122. *See id.* (discussing the People's Party and the connection with the Farmers' Alliance).

123. The People's Party did field candidates in both the 1904 and 1908 presidential elections, but by that time the party's influence had waned significantly. It disbanded in 1908. R. HAL WILLIAMS, REALIGNING AMERICA: MCKINLEY, BRYAN, & THE REMARKABLE ELECTION OF 1896, at 164 (2010) ("The People's party . . . continued to wither. The party was a tiny remnant of its earlier self, and its adherents found it harder and harder after 1896 to attract support . . . .").

Progressive Movement,[124] both of which adopted populist objectives of increasing antitrust legislation and enforcement, increasing federal regulation of private industry, and increasing support for the agricultural sector.[125] And unlike the People's Party, the coalescence of the Democratic Party, the Progressive Movement, and agrarian populism endured; understanding its significance, therefore, is essential to understanding contemporary political platforms and narratives regarding agriculture, food prices, and antitrust.[126]

II. Consolidation and Modern Protectionism

Although much has changed since the Gilded Age, the antitrust agenda was established in an era where farmers had all the political clout. We are now "stuck" with a body of law and practices that reflect those past wins,[127] even if the powerful

124. *See id.* at 124–28 (discussing the end of the Populist Party).

125. These regulatory-intensive objectives conveniently intersected with the labor movement's prioritization of labor reform, consumer protection, and civil rights. *See, e.g.*, LAWRENCE GOODWYN, THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA 313–19 (1978) (noting the political impact of the People's Party); ROBERT C. MCMATH, JR., AMERICAN POPULISM: A SOCIAL HISTORY 1877–1898 at 186–92 (1993) (discussing the Populist labor coalition).

126. *See* GOODWYN, *supra* note 125, at 27–28. The merger is especially important regarding two specific types of narratives. The first type is an access narrative. "Narratives of access define policy benefits as an expansion both of the number of individuals gaining access to goods and services, and of the quantity or price of goods to which they are gaining access." GUNNAR TRUMBULL, STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS 27 (2012). Small-farm populists could not make this argument because low prices were what they were trying to protect against, but their new political partner, the Progressive Movement, which championed labor reform, consumer protection, and equal opportunity (both social and economic), could and did use the access narrative to great effect during the Progressive and Civil Rights eras.

The second type is a protection narrative, which can be used to "define risks against which diffuse interests must be defended." *Id.* at 28. As a result of the merger, agrarians could argue that they were acting in their own and consumers' best interests just like Democrats and Progressives were because more competition, the ostensible objective of antitrust, generally results in lower prices. Obviously, it is paradoxical for agricultural lobbying groups to defend the interests of their small-farmer constituents by ensuring that they are not negatively impacted by low prices (which would benefit consumers) while simultaneously working to increase antitrust enforcement (which is supposed to increase competition and lower prices). Nevertheless, these narratives have come to define how Americans view the small farmer.

127. The impact remains, in part, due to how Path Dependence has benefited the agrarian lobby over time. Path Dependence Theory instructs that, when given the option, institutions will act in ways that are similar to what they have always done,

players today are different.[128] The basic meat industry supply chain is essentially unchanged from how it was a century ago; farmers still produce and sell livestock (namely cattle) to meatpackers and processors who, in turn, process the animals and sell the meat to retailers for public consumption.[129] The meat industry itself, however, has undergone dramatic, large-scale consolidation over the last half-century.[130] Large conglomerates have absorbed smaller meat processors[131] via

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even if better options exist. *See generally* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000) (explaining Path Dependence and evaluating history-based jurisprudence); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (identifying three types of path dependency and finding examples of each in the common law); Alain Marciano & Elias L. Khalil, *Optimization, Path Dependence and the Law: Can Judges Promote Efficiency?*, 32 INT'L REV. L. & ECON. 72 (2012) (critiquing path dependency claims about the inefficiency of judge-made law); Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998) (claiming that Path Dependence affects the development of informal social norms as much as the development of formal law); Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999) (discussing how Path Dependence sheds light on why the advanced economies vary in their ownership structures).

128. *See* Alan Barkema, Mark Drabenstott & Nancy Novack, *The New U.S. Meat Industry*, 86 FED. RSRV. BANK KAN. CITY ECON. REV. 33, 37 (2001) ("Two powerful economic forces are at the root of the meat industry's transformation to a more compact structure: food demand and technology. Consumer food demand is shifting toward food products that are easy to prepare while also promising safe eating, improved nutrition, and greater consistency. The food industry's efforts to fulfill consumers' changing food needs have shifted competitive balances among food companies, triggering broad efforts to maintain or gain a competitive edge by trimming costs. The result is a sweeping trend toward consolidation in food retailing, meat processing, and livestock production.").

129. Brian Deese, Sameera Fazili & Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, WHITE HOUSE: BRIEFING ROOM BLOG (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/ [https://perma.cc/W54X-2VT6] (explaining the meat industry process).

130. Consolidation in poultry processing plants began in the 1950s. Barkema, Drabenstott & Novack, *supra* note 128, at 34. However, the number of poultry plants has remained fairly consistent since the 1960s given the rise of poultry consumption. *Id.* at 34–35.

131. *See* CLAIRE KELLOWAY & SARAH MILLER, OPEN MKT. INST., FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM 10 (2021), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2ebebf7d510debfd53f3/1632251583273/200921_MonopolyFoodReport_endnote_v3.pdf [https://perma.cc/JLY2-DEKR] (explaining how "food manufacturers have merged to exert monopoly power").

horizontal integration,[132] and food retailers and farms have coalesced into ever-bigger businesses[133] via vertical integration.[134] Section A of this Part details how all this came to be.

Just as it was argued during the Granger Movement, the general fear today is that these integrated industry giants have grown so large that they can unilaterally decrease the prices they pay producers, increase the prices they charge consumers, and pocket the difference whenever they please. Politicians willingly perpetuate the narratives inherited from Gilded Age populists by portraying corporate concentration as a villain that must be brought to heel by rigid antitrust enforcement. Section B of this Part explores this narrative framing under the Biden Administration.

A. *Modern Market Concentration in the Meat Industry*

Contemporary concerns about meat industry concentration are largely a result of rapid horizontal consolidation in beef and pork production and processing,[135] and the consolidation is clear at a glance. Approximately 17,000 cattle ranchers have gone out of business each year since 1980.[136] The number of hog farms has decreased from nearly 500,000 to about 85,000 over the same period.[137] In 1980, there were around 600 slaughterhouses for cattle and more than 500 for pigs.[138] Today, only about 170 remain for cattle and 180 for pigs.[139] Horizontal consolidation raises traditional monopoly concerns, namely that by reducing competition, such business growth can only come at the expense of the consumers. In such instances, the corporations are thought to become perfect price makers.

132. A horizontal merger exists whenever competitor firms combine to form one company and is normally accompanied by the integration of firm facilities. W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 213 (5th ed. 2018); *see also* KELLOWAY & MILLER, *supra* note 131 (providing an example of a horizontal merger).

133. *See* Barkema, Drabenstott & Novack, *supra* note 128, at 34–44 (discussing how consolidation is changing the meat industry).

134. Unlike a horizontal merger, a vertical merger exists whenever two firms with either potential or actual buyer–seller relationships combine to form one company. VISCUSI ET AL., *supra* note 132.

135. Consolidation in poultry production and processing is also often mentioned. Barkema, Drabenstott & Novack, *supra* note 128, at 34–35.

136. KELLOWAY & MILLER, *supra* note 131, at 3.

137. Barkema, Drabenstott & Novack, *supra* note 128, at 36.

138. *Id.* at 35.

139. *Id.*

Vertical integration has contributed to industry concentration as well and raises concerns about a different type of anticompetitive behavior. Historically, meat was purchased via direct negotiation between a rancher and a meatpacker, but the modern meat industry has adopted the "supply chain" process, in which livestock producers join in "tightly orchestrated production, processing and marketing arrangements stretching from genetics to grocery."[140] In the case of vertical integration, unlike that of horizontal integration, small farmers are no longer direct competitors of Big Ag but are now forced to bargain against the large meatpacking and meat processing firms, making them price takers. The large farm corporations in this scenario are said to wield monopsony power over the small farmers and can easily lower the prices paid to the farmers.

Over time, the decrease in slaughterhouses and the widespread adoption of the new supply chain structure boosted the market shares of the industry's largest meat processors. For example, the four largest hog processors went from controlling 33% of the market in 1976 to controlling 66% today;[141] the four largest beef processors went from 25% of the market in 1977 to 82% today;[142] and the four largest poultry processors went from 35% of the market in 1986 to 54% today.[143] The meat processing and packing companies dominating the industry today are known as the "Big Four"—Tyson, Cargill, JBS, and National Beef Packing—and after a half-century of both horizontal and vertical integration, they control approximately 55%–85% of the market for beef, pork, and poultry today.[144]

140. *Id.* at 36. These supply chains are contractual relationships that allow the parties to bypass traditional commodity markets. *Id.* The poultry industry was the first to adopt the supply chain structure in the early 1980s, and today almost all the nation's boiler chickens are produced through supply chain agreements. *Id.* Hog production is likewise dominated by this supply chain arrangement. *Id.* A 2001 study conducted by researchers at the University of Missouri, the Doane's Agricultural Report, found that more than 80% of hogs sold to processors today are sold through such an agreement. *Id.* at 36–37. The cattle industry, however, has not yet seen the same level of vertical integration as the poultry and hog industries, but it appears to be trending in the same direction. Barkema, Drabenstott & Novack, *supra* note 128.

141. Deese, Fazili & Ramamurti, *supra* note 129.

142. *Id.*

143. *Id.*

144. Ellen Walsh-Rosmann & J.D. Scholten, *Regional Food Hubs: Adding Flexibility and Resiliency to the Food Supply System*, *in* REFORMING AM.'S FOOD RETAIL MKTS., 217, 226 (2022), https://som.yale.edu/sites/default/files/2023-05/grocery-compendium_may2023.pdf [https://perma.cc/5BJH-NSNC].

This positioning has put these four firms in an extremely lucrative position. According to White House reports, the Big Four's collective gross profits jumped 120% and their net income increased by 500% over the course of the pandemic.[145] JBS, for example, provided $2.3 billion in dividends and share buybacks in 2020, and Tyson raised dividends by 6% for the fiscal year 2021, spending more than $477 million on dividends in the nine-month period ending July 2021.[146] Tyson also repurchased $200 million of shares between September 2020 and July 2021.[147] Moreover, in early 2022, the Big Four announced $1 billion in new dividends and stock buybacks on top of the more than $3 billion they had paid to shareholders since the beginning of the pandemic.[148]

Simultaneously, small farmers and ranchers have begun to feel the same strains as their late nineteenth-century predecessors. A *New York Times* article from December 2021, for example, describes the "distress of American cattle ranchers," such as Steve Charter,[149] to convey how the "staggering winnings harvested by the conglomerates that dominate the meatpacking industry" (i.e., companies such as the Big Four) are really a result of conspiratorial exploitation.[150] According to the *New York Times*, ranchers' share of the $66 billion beef cattle industry has "gone missing."[151] Charter's ranch, for example, has not turned a profit in five years because the "dominance" of a few giant corporations "has allowed them to extinguish competition and

145. *See, e.g.*, Andrea Shalal, *Meat Packers' Profit Margins Jumped 300% During Pandemic – White House Economics Team*, 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/VKY6-DEQB].

146. Deese, Fazili & Ramamurti, *supra* note 129.

147. *Id.*

148. Brian Deese, Sameera Fazili, & Bharat Ramamurti, *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, WHITE HOUSE: BRIEFING ROOM BLOG (Dec. 10, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/ [https://perma.cc/LK3W-YZHC].

149. Charter is a third-generation cattle rancher who owns an 8,000-acre ranch in Montana and is "accustomed to working seven days a week, 365 days a year—in winter temperatures descending to minus 40, and in summer swelter reaching 110 degrees." Peter S. Goodman, *Record Beef Prices, but Ranchers Aren't Cashing In*, N.Y. TIMES (Dec. 27, 2021), https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html [https://perma.cc/9KRF-R6AX].

150. *Id.*

151. *Id.*

dictate prices," lowering prices paid to ranchers for their animals to the benefit of the packers.[152] Thus, Charter is forced to contemplate the unimaginable—selling off his herd and ending his family's farming legacy.[153]

There is more than one way to tell this story. On one hand, one might reasonably point out that Americans still seem to crave meat despite the rising costs.[154] According to the USDA, per capita meat consumption rose to a record 225.3 pounds in 2020 and 2021.[155] It should therefore come as no surprise that meat companies benefited substantially during the pandemic.[156] On the other hand, one might conclude that unchecked corporate greed due to years of rising market

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152. *Id.*

153. *Id.*

154.

> That sense of entitlement is a crucial element of the history of meat in America. Price hikes as small as a penny a pound have inspired Americans to riot, trash butcher shops, and launch national meat boycotts. We Americans want what we want, but we rarely ponder the actual price or the irrationality of our desires . . . . We want packages of precooked chicken and microwavable sausages—and family farms, too.

OGLE, *supra* note 40, at xiii.

155. Chuck Abbott, *Pushed by High Meat Prices, Food Inflation Rate Hits 7%*, SUCCESSFUL FARMING (Feb. 11, 2022), https://www.agriculture.com/news/business/pushed-by-high-meat-prices-food-inflation-rate-hits-7-percent [https://perma.cc/6SPK-9T5H].

156. One USDA study found that during the first nine months of the pandemic, spending on protein foods (including lean meats, poultry, and eggs; seafood; beans, peas, and lentils; and nuts, seeds, and soy products) grew from 11.9% to 13.4% of the total food-at-home budget, led primarily by spending on unprocessed red meats but also including spending on poultry, fish and seafood, and eggs. *See* Abigail Okrent & Eliana Zeballos, *COVID-19 Working Paper: Consumer Food Spending Changes During the COVID-19 Pandemic* 4 (USDA Econ. Rsch. Serv., Working Paper AP-110, 2022), https://www.ers.usda.gov/webdocs/publications/105533/ap-110.pdf?v=4600.7 [https://perma.cc/4F4J-JNDF]. The share of unprocessed red meats grew the most (15%), from 4.0% pre-pandemic to 4.6% during the pandemic. *Id.* at 20. That increase was led by single households with children (1.9%) and Hispanic households (1.1%). *Id.* Similarly, the share of chicken, fish and seafood, and eggs also experienced relatively high growth (12%), from 5% to 5.6%. *Id.* That increase was the highest among non-Hispanic Blacks (1.0%) and households with at least one person older than sixty-five (1.0%). *Id.* Notably, Asian households, households in the two highest income quartiles, and households with children shifted toward purchasing more processed red meats. *Id.* While most of the growth in the protein food category was driven by healthier protein foods, those three categories (chicken, fish and seafood, and eggs) shifted toward less healthy protein food options (i.e., processed red meats). *Id.*

concentration and a lack of meaningful competition is driving these exorbitant earnings because, in an ideal market with more competition, the big-name meat processors would have netted fewer profits when their prices increased unexpectedly. They would have had to maintain low prices to earn retailers' business. Of these two stories, our government overwhelmingly subscribes to the latter.

B. *Government Responses to Rising Meat Prices*

President Biden blamed concentration in the meat industry for increased food prices as soon as he was elected.[157] The Biden Administration routinely pointed to meat prices as a good example of "dominant corporations in uncompetitive markets taking advantage of their market power to raise prices while increasing their own profit margins."[158] Even when the Biden Administration acknowledged other factors such as increased consumer demand, it concluded that price increases were attributable to a bottleneck in the meat supply chain caused by a lack of competition among meat processors (i.e., the monopoly problem).[159] The Biden Administration relied heavily on these suppositions to deduce that "bold action" was required to "enforce the antitrust laws, boost competition in meat-processing, and push back on the pandemic profiteering that is hurting consumers, farmers, and ranchers across the country."[160]

Consistent with such a declaration, President Biden began mobilizing his executive resources. In late 2021, he directed the USDA to investigate large meatpackers.[161] The USDA also used $100 million of the American Rescue Plan's loan guarantee program to leverage approximately $1 billion in lending capital to help expand the capacity of small meat processors and distributors pursuant to President Biden's objectives.[162] By

157. According to the White House, "During the pandemic, wholesale prices for beef rose much faster than input prices for cattle. That means that the prices the processors pay to ranchers aren't increasing, but the prices collected by processors from retailers are going up." Deese, Fazili & Ramamurti, *supra* note 129.

158. Deese, Fazili & Ramamurti, *supra* note 148.

159. Deese, Fazili & Ramamurti, *supra* note 129.

160. *Id.*

161. *See* Exec. Order No. 14036, 3 C.F.R. 609 (2022).

162. Press Release, U.S. Dep't of Agric., USDA Launches Loan Guarantee Program to Create More Market Opportunities, Promote Competition and Strengthen America's Food Supply Chain (Dec. 9, 2021), https://www.usda.gov/media/press-releases/2021/12/09/usda-launches-loan-guarantee-program-create-

February 2023, the USDA had already awarded almost $59 billion in federal grants to independent processors in Idaho, Virginia, South Carolina, South Dakota, and Maryland.[163] All of this was in addition to the $500 million from the Meat and Poultry Processing Expansion Program, which is dedicated to helping new entrants break into the meatpacking industry to disrupt the largest meat processing companies.[164]

The Department of Justice (DOJ) "stepped up [its] efforts to ensure competition and counter anticompetitive practices across all sectors," and promised to "continue to vigorously enforce our antitrust laws."[165] As such, the DOJ's Antitrust Division coordinated with the USDA to launch a "one-stop shop[]to report complaints of potential violations of our competition laws, including the Sherman and the Clayton Acts[,] as well as the Packers and Stockyards Act."[166] Attorney General Merrick Garland argued that these efforts were necessary because "[t]oo many industries have become too consolidated over time. Too many companies have pursued corporate conduct and more aggressive mergers that have made all of us vulnerable. Against this background, our antitrust efforts cannot and will not slow down."[167] According to Scott Blubaugh, the President of the Oklahoma Farmers Union, rigorous monitoring and antitrust enforcement are justified because multinational meatpackers in particular "suck out all

more-market [https://perma.cc/SB6J-LREE]; *see also* American Rescue Plan Act of 2021, Pub. L. No. 177-2, § 1006, 135 Stat. 4, 13–14.

163. Adam Goldstein, *USDA Aims to Boost Independent Meat Packers with $59 Million in Grants*, MD. MATTERS (Feb. 22, 2023), https://www.marylandmatters.org/2023/02/22/usda-aims-to-boost-independent-meat-packers-with-59-million-in-grants/ [https://perma.cc/E8F6-QM2Y]; *see also* U.S. DEP'T OF AGRIC., USDA RURAL DEVELOPMENT MEAT AND POULTRY PROCESSING EXPANSION PROGRAM 1–2 (Feb. 21, 2023), https://www.rd.usda.gov/sites/default/files/Meat-and-Poultry-Expansion-Awards-02.21.2023.pdf [https://perma.cc/S459-9ABK].

164. Press Release, U.S. Dep't of Agric., USDA Announces $500 Million for Expanded Meat & Poultry Processing Capacity as a Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System (July 9, 2021), https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing [https://perma.cc/TPR2-R5PQ].

165. Merrick B. Garland, Attorney General, Remarks at the Roundtable on Promoting Competition and Reducing Prices in the Meatpacking Industry (Jan. 3, 2022) (transcript available at https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-roundtable-promoting-competition-and) [https://perma.cc/PEJ6-TKD6].

166. *Id.*

167. *Id.*

of the wealth of rural America and put it in their corporate coffers."[168]

Likewise, there has been no shortage of congressional efforts to limit concentration in the meat industry in recent years. Between 2019 and 2023, there were at least a dozen attempts at such legislation. In May 2019, Senators Cory Booker (D-NJ) and Jon Tester (D-MT) introduced a new bill, the Food and Agribusiness Merger Moratorium and Antitrust Review Act,[169] to immediately halt food- and agriculture-related acquisitions and mergers.[170] Senator Booker explained that "excessive levels of concentration and market power are devastating our independent family farmers and ranchers" who "are being forced to sell into ever more concentrated marketplaces that unfairly reduce the prices they receive for their crops and livestock, and unfairly increase the cost of inputs."[171] Senator Tester added, "This bill will help put family farmers back in control of their futures by improving access to a competitive marketplace. Rural America cannot afford to see multi-national corporations put family farms out of business."[172]

In the summer of 2021, Senator Tester introduced another bill, the Meat Packing Special Investigator Act,[173] which was cosponsored by Senators Chuck Grassley (R-IA) and Mike Rounds (R-SD).[174] Under the bill, a newly appointed special investigator within the USDA would coordinate with various other enforcement agencies, such as the DOJ, the Federal Trade Commission (FTC), and the Department of Homeland Security, to better enforce the Packers and Stockyards Act by investigating anticompetitive practices in the meat industry.[175]

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168. Scott Blubaugh, Remarks During a Virtual Meeting to Discuss Boosting Competition and Reducing Prices in the Meat Processing Industry (Jan. 3, 2022) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/03/remarks-by-president-biden-during-a-virtual-meeting-to-discuss-boosting-competition-and-reducing-prices-in-the-meat-processing-industry/ [https://perma.cc/LDH5-Y4SP]).

169. Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019, S. 1596, 116th Cong. (2019).

170. Press Release, Cory Booker, Booker, Tester Reintroduce Bill to Halt Ag Mergers Immediately, Indefinitely (May 22, 2019), https://www.booker.senate.gov/news/press/booker-tester-reintroduce-bill-to-halt-ag-mergers-immediately-indefinitely [https://perma.cc/YH4D-6CYR].

171. *Id.*

172. *Id.*

173. Meat Packing Special Investigator Act, S. 2036, 117th Cong. (2021).

174. *Id.* § 2.

175. *Id.*

The investigator would also enjoy specially created subpoena powers to collect evidence.[176]

In November 2021, Senators Tester and Grassley, alongside Senators Deb Fischer (R-NE) and Ron Wyden (D-OR), proposed the Cattle Price Discovery and Transparency Act[177] in an "effort to return fairness to the cattle marketplace dominated by four major meat packers."[178] The bill would require meatpackers to purchase a regional minimum of cattle from local ranchers, so ranchers are not left with cattle they cannot sell anywhere.[179] The bill would also give the USDA the power to create and maintain a public "contract library" of the contracts made between producers and meatpackers.[180]

In February 2022, Senator Elizabeth Warren (D-MA) and Representative Mondaire Jones (D-NY) authored a letter to the DOJ asking it to "scrutinize" whether a proposed $4.5 billion merger between Sanderson Farms and Wayne Farms, the country's third- and sixth-largest poultry processing companies, by Cargill and Continental Grain violated any

176. *Id.* § 211(c). But consider Senator Tommy Tuberville, an Alabama Republican, who argues that adding a special investigator to the USDA to focus on competition is just more government. Tuberville said, "On the bill, which creates the Office of Special Investigator for competition matters at USDA, I believe the (Agriculture) secretary currently, currently today, has the authority to address these issues, and adding another level of government is not the answer. We need less government, not more." Tom Lutey, *Beef Market Challenges Take Center Stage in Congressional Hearings*, BILLINGS GAZETTE (Apr. 26, 2022), https://billingsgazette.com/news/beef-market-challenges-take-center-stage-in-congressional-hearings/article_99e74066-6d8c-5c07-b090-d8d5bfbd47d7.html [https://perma.cc/NWK2-C4QL].

177. Cattle Price Discovery & Transparency Act of 2022, S. 4030, 117th Cong.

178. Press Release, Chuck Grassley, Grassley, Fischer, Tester, Wyden Announce Plan to Improve Fairness in Cattle Market (Nov. 9, 2021), https://www.grassley.senate.gov/news/news-releases/grassley-fischer-tester-wyden-announce-plan-to-improve-fairness-in-cattle-market [https://perma.cc/3YXR-52QD].

179. *See* Abby Vesoulis, *Meat Prices Are Going Up. Congress Is Trying to Do Something About It*, TIME (Feb. 23, 2022, 1:30 PM), https://time.com/6150004/meat-monopolies-congress [https://perma.cc/K53N-FTNR] ("Pork and poultry producers wouldn't benefit from this bill, however. It[']s not because there aren't problems in those sectors, but because 'chicken and pork' are 'too far gone,' says the GOP Senate aide, citing how vertically integrated these portions of the market are, where the large companies own and control multiple stages of production, from the hatcheries to the chicken feed mills to the slaughterhouses and marketing. 'They're too far consolidated,' says the aide. 'There's not really any turning back.'").

180. Cattle Price Discovery & Transparency Act of 2022, S. 4030, 117th Cong., sec. 6, § 223(a). The publicly available information would, among other things, include: "(A) the type of contract; (B) the duration of the contract; (C) a summary of the contract terms; (D) provisions in the contract that may affect the price of cattle covered by the contract . . . ; [and] (E) the total number of cattle covered by the contract." *Id.* § 223(b)(2).

antitrust laws.[181] According to the lawmakers, the "proposed mega merger raises significant antitrust concerns in an industry already marked by price fixing, labor violations, and intense consolidation."[182] Ultimately, the deal closed on July 22, 2022, following DOJ review.[183]

In February 2023, Senator Booker reintroduced a slate of bills "geared towards reforming the country's agriculture sector," including the Farm System Reform Act[184] (previously introduced in 2021 with Senators Warren and Bernie Sanders (I-VT)),[185] Industrial Agriculture Accountability Act,[186] Protecting America's Meatpacking Workers Act,[187] and Protect America's Children from Toxic Pesticides Act.[188] According to Senator Booker, our current food system is fragile, but, if enacted, these bills "would help mold our food system into one

181. Letter from Elizabeth Warren, Sen., & Mondaire Jones, Rep., to Jonathan Kanter, Assistant Att'y Gen. (Feb. 16, 2022), https://www.warren.senate.gov/imo/media/doc/2022.02.16%20Letter%20to%20DOJ%20re%20Sanderson-Wayne%20Merger.pdf [https://perma.cc/M548-ZFU3].

182. *Id.*

183. Christopher Doering & Chris Casey, *Cargill and Continental Grain Close $4.5B Purchase of Sanderson Farms*, FOOD DIVE (July 22, 2022), https://www.fooddive.com/news/cargill-and-continental-grain-complete-45b-sanderson-farms-purchase/627910/ [https://perma.cc/E39U-FCH8].

184. Farm System Reform Act of 2023, S. 271, 118th Cong.

185. Farm System Reform Act of 2021, S 2332, 117th Cong.; *see* Press Release, Elizabeth Warren, Warren Joins Booker in Reintroducing Bill to Reform Farm System With Support From Farm, Labor, Environment, Public Health, Faith Based and Animal Welfare Groups (July 13, 2021), https://www.warren.senate.gov/newsroom/press-releases/07/21/2021/warren-joins-booker-in-reintroducing-bill-to-reform-farm-system-with-support-from-farm-labor-environment-public-health-faith-based-and-animal-welfare-groups [https://perma.cc/DSY4-XX7H]. In August 2019, a fire broke out in the Tyson Foods beef packing plant in Holcomb, Kansas, which is the country's second-largest beef packing plant and was responsible for roughly 6% of the country's total beef slaughter at the time. Michael Nepveux, *Impacts of the Packing Plant Fire in Kansas*, AM. FARM BUREAU FED'N (Sept. 10, 2019), https://www.fb.org/market-intel/impacts-of-the-packing-plant-fire-in-kansas [https://perma.cc/KK8N-DNEU]. This triggered a rise of 10% in wholesale beef prices, harming restaurant chains, grocery stores, and individual consumers shopping in the meat aisle. *Id.* Further, farmers were stuck with animals that were supposed to be shipped off to meat processors. *Id.* Such disruption occurs every time a one-off emergency takes place.

186. Industrial Agriculture Accountability Act of 2023, S. 272, 118th Cong.

187. Protecting America's Meatpacking Workers Act of 2023, S. 270, 118th Cong.

188. Protect America's Children from Toxic Pesticides Act, S. 269, 118th Cong. (2023); *see also* Press Release, Cory Booker, Booker Introduces Package of Bills to Reform U.S. Food System (Feb. 2, 2023) [hereinafter Booker Bills], https://www.booker.senate.gov/news/press/booker-introduces-package-of-bills-to-reform-us-food-system [https://perma.cc/WQ2G-ZNUC].

that is more competitive, resilient, humane, and just for everyone."[189] Such efforts are necessary, in part, "because the status quo created by agribusiness special interests is putting all of us at risk."[190] The Farm System Reform Act in particular proposes a moratorium on the creation of new or expansion of large factory farms (also known as concentrated animal feeding operations),[191] the phase-out of the largest factory farms by 2040, a voluntary buyout for farmers who want to transition out of operating these farms, and a strengthening of the Packers and Stockyards Act to protect family farmers and ranchers by "crack[ing] down on the monopolistic practices of meatpackers and corporate integrators."[192]

Like President Biden and his appointees, many members of Congress, either explicitly or implicitly, intentionally or unintentionally, sought to align the interests of consumers with those of small farmers and convince the public that antitrust is the perfect vehicle to get each party exactly what it wants. Despite this portrayal, antitrust enforcement is not the panacea its proponents purport it to be. In fact, there are risks associated with rigid antitrust enforcement. One large and routinely undisclosed risk is an attendant increase in food prices. Given the current crisis in food accessibility, any risk of further increasing food prices for the average consumer should be deemed unacceptable and impermissible. Consequently, it is time to reassess the cost we must pay for vehemently protecting small farms.

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189. Booker Bills, *supra* note 188.

190. *Id.*

191. *Id.* The bill proposed the use of the Environmental Protection Agency's definition of large factory farms, or large concentrated animal feeding operations (CAFO). *Id.*; Farm System Reform Act of 2023, S. 271 § 101(3). The EPA definition provides that a large CAFO confines at least 1,000 cattle or cow–calf pairs; 700 mature dairy cattle; 1,000 veal calves; 2,500 swine (weighing over 55 pounds); 10,000 swine (weighing less than 55 pounds); 500 horses; 10,000 sheep or lambs; 55,000 turkeys; 30,000 laying hens or broilers (liquid manure handling systems); 125,000 chickens other than laying hens (other than a liquid manure handling systems); 82,000 laying hens (other than liquid manure handling systems); 30,000 ducks (other than liquid manure handling systems); or 5,000 ducks (liquid manure handling systems). *Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs*, ENV'T PROT. AGENCY, https://www3.epa.gov/npdes/pubs/sector_table.pdf [https://perma.cc/JZG7-ZVH3].

192. Booker Bills, *supra* note 188.

III. REASSESSING THE COST OF SMALL FARMS

The U.S. obsession with protecting farm profitability, as previously discussed, is an old one—grounded in the country's nascency.[193] But the reality is that antitrust law is not supposed to protect small farms merely for the sake of perpetuating inefficient businesses, and using antitrust to raise prices for consumers has always been antithetical to the purpose of antitrust law. Under the Consumer Welfare Standard, "conduct that makes consumers better off does not violate the antitrust laws[,] but behavior that impairs consumer welfare does."[194] There is strong evidence to suggest that some concentration in the meat industry, though harmful to small farmers, is in fact good for consumers. If that is the case, then in times of grave economic hardship, the public would benefit most from a rigid adherence to the Consumer Welfare Standard, as opposed to increased antitrust enforcement. This would presumptively lower food prices for all consumers, as is their natural and legal right.

The promise of antitrust law and policy as an economic theory should be, simply put, the creation of low prices and consumer surplus, which is particularly important for those consumers who require low prices to eat. Section A of this Part offers a brief primer on the Consumer Welfare Standard and contends that this rationale is, and should remain, the lodestar for antitrust enforcement. Section B of this Part provides the current evidence that concentration in the meat sector not only has failed to harm but also has actually lowered grocery costs, and it argues that if we are to truly commit to the Consumer Welfare Standard—over some more abstract allocative efficiency standard—then we must recognize that the average consumer benefits from lower grocery costs.[195] And the best way

193. *See supra* notes 34–35 and accompanying text.

194. *See The Consumer Welfare Standard In Antitrust Law: Outdated Or A Harbor In A Sea Of Doubt?: Hearing Before the S. Comm. on the Judiciary, Subcommittee On Antitrust, Competition Policy And Consumer Protection* 4 (2017) [hereinafter Wright Testimony], https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Wright%20Testimony.pdf [https://perma.cc/2DN8-2RS3] (statement of Joshua D. Wright) (discussing how antitrust laws protect and harm consumers).

195. One common counterargument is that people derive more benefit from high-quality food rather than merely from lower prices. While quality is undoubtedly important, this perspective may not fully consider the pressing needs of those who struggle with food insecurity. For many individuals, particularly those facing financial hardship, the immediate priority is often affordability to ensure basic sustenance or nutrient security. Therefore, while quality is a valid concern, the

to lower grocery costs may be to still the hand of government in the market for food.

A. *Adherence to the Consumer Welfare Standard*

While the origins of antitrust legislation are grounded in populist fear of big business, the justifications for antitrust enforcement have evolved over time. Conservative legal scholar Robert Bork began to develop his consumer welfare approach in the 1960s.[196] The consumer welfare model seeks to "make consumers better off, by condemning conduct that raises prices, reduces output, etc.—even if doing so means some less efficient competitors are driven from the market."[197] In other words, corporate consolidation is not harmful to consumers so long as the merger (or series of mergers) does not lead to individuals having to pay more for a product or service, and, if such conduct does cause prices to rise, it considers "whether any offsetting benefits accrue to consumers, such as better products . . . or more product variety."[198] The Consumer Welfare Standard is the only legal doctrine that places consumers at the foreground of the antitrust discussion.[199] In economic terms, the Consumer

primary focus should remain on ensuring that food remains accessible and affordable for all consumers.

196. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 26 (1966).

197. *See* Wright Testimony, *supra* note 194, at 8; *see also* Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 245–49 (2012).

198. VISCUSI ET AL., *supra* note 132, at 238.

199. The alternative is the Total Welfare Standard. Using the Total Welfare Standard, the government could look at economic well-being in the aggregate. *See* Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 336 (2010). The Total Welfare Standard will only condemn conduct that decreases the sum of the welfare of all buyers and producers, or consumers and sellers. *Id.* The Total Welfare Standard would thus consider the needs of small farmers in addition to those of consumers. *Id.*

Yet, an argument can be made that the Consumer Welfare Standard is the only meaningful way to maximize the Total Welfare Standard over time. This is likely the case because the Consumer Welfare Standard tends to increase innovation. If this holds true, then there can be no meaningful distinction between the government's efforts at either consumer welfare or total welfare. *But see* Richard M. Steuer, *The Horizons of Antitrust*, 91 ST. JOHN'S L. REV. 177, 194–95 (2017); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE, at 6 (Aug. 2015), https://www.wsgr.com/PDFSearch/jacobson-0815.pdf [https://perma.cc/9BM8-K82Y]; *see also* Calvin S. Goldman, Ilene Knable Gotts & Michael E. Piaskoski, *The Role of Efficiencies in Telecommunications Merger Review*, 56 FED. COMM. L.J. 87, 135 (2003); Bork, *supra* note 196, at 19.

Welfare Standard seeks to maximize consumer surplus—the difference between what the consumer is willing to pay and what they actually pay, either by lowering prices or increasing output (bringing more consumers into the market). It ignores what accrues to sellers.

Bork argued that Congress's intent in passing the Sherman Act, as evidenced by the Congressional Record,[200] was primarily consumer protection.[201] Bork considered prominent views, statutory texts, legislative history, and structural features of the law and drew inferences from the scope, nature, consistency, and ease of administration of the law, concluding that antitrust law is workable only if courts pursue this consumer welfare objective.[202] According to Bork, "The conventional indicia of legislative intent overwhelmingly support the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare."[203] And though confusing, some evidence exists to suggest that by "consumer welfare," Bork meant total welfare or economic efficiency more broadly.[204]

Bork's critics strongly disagree with his interpretation. Professor Robert Lande, for example, contends that "the congressional debates and committee reports show that the

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200. *But see* Hebert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 27–30 (1989) (discussing the significance of congressional concern).

201. *See* Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 359 https://www.jstor.org/stable/2123000 [https://perma.cc/9PH9-RYNP] (discussing Bork's views on congressional intent and the Sherman Antitrust Act).

202. Bork's conclusions, however, have long drawn critique. His critics argue that the Consumer Welfare Standard is completely inconsistent with the actual legislative history of the Sherman Act. Professor Herbert Hovenkamp famously said "Bork's analysis of the legislative history was strained, heavily governed by his own ideological agenda. . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew." *See* Hovenkamp, *supra* note 200, at 22. *But see e.g.*, Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 841 (2014) ("Criticisms of this kind are not without some merit, but they are overstated, at least insofar as they target *The Antitrust Paradox* and not just *Legislative Intent and the Policy of the Sherman Act*, published 12 years earlier. The earlier article was devoted to proving the legislative intent of the Sherman Act from legislative history. It is thus fair to criticize Bork for selectivity and anachronism when it comes to a legislative-history-based assessment of the purposes of the Sherman Act (although Bork did spell out his argument in considerable detail, concealing none of his analysis). But . . . Bork's argument about congressional purpose in *The Antitrust Paradox* was considerably richer.").

203. ROBERT H. BORK, THE ANTITRUST PARADOX 71 (1978).

204. *See* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19, S20 (2014).

antitrust laws primarily were enacted to prevent higher prices and wealth transfers from consumers to firms with market power."[205] In contrast to Bork, Lande further argues that "[i]f Congress primarily had cared about enhancing economic efficiency, it would have enacted 'protrust' laws, not 'antitrust' laws."[206] Likewise, Lina Khan, former chairperson of the FTC and then–Open Markets Institute Director of Legal Policy, has explained:

> Through enacting the antitrust laws—the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914—Congress sought to check [the] extreme concentration of private power. . . . Taken as a whole, the antitrust laws were intended to preserve open markets and enhance opportunity, prevent large firms from extracting wealth from producers and consumers, and safeguard against extreme concentrations of private power.[207]

Both Lande and Khan would agree that competition is the thing to be protected as an end in itself; we want to have lots of small firms in the market, including easy entry for small firms.

The two differing approaches to consumer welfare are notably doctrinaire and partisan. On one hand, the neoliberal approach—a more politically conservative point of view—argues, like Bork, for a hands-off approach to antitrust and consumer protection, one that emphasizes total welfare based on questions of efficiency. According to the neoliberal approach, both antitrust and consumer protection law should strive to protect competitive markets by focusing on discrete market failures.[208] In doing so, sellers will purportedly benefit from

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205. Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2360 (2013) (footnotes omitted).

206. *Id.*

207. Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, YALE L.J.F. 960, 965–66 (2018).

208. *See* Wright Testimony, *supra* note 194, at 18; Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 2023 UTAH L. REV. 849, 851 (suggesting that antitrust and consumer protection laws should work together to foster competitive markets and benefit consumers). *But see* Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44, 45 (1998) (suggesting that while antitrust violations stem from market failures in the general marketplace, consumer protection violations stem from market failures inside consumers' minds); Mark

high production, and consumers from low costs.[209] The problem with this approach, according to contemporary critics, is that "it approve[s] practices that lower consumer surplus but enlarge firm profits."[210]

The contemporary critics—a more politically liberal point of view—on the other hand, advocate for a neo-Brandeisian or "moral economy" approach.[211] The moral economists, such as Lande and Khan, argue that the government's primary goal should be "policing abuses of power and attempts at consolidating power."[212] Further, the FTC "should not just focus on the interests of end users of goods and services ('consumers' in the usual sense of the word) but also treatment of workers and other small players in the chain of production and distribution."[213] Professor Luke Herrine has gone so far as to propose a shift away from correcting for discrete market failure and "toward imposing substantive standards of fairness that balance the interests of different market participants according to a notion of the 'public interest.'"[214] In other words, "efficiencies should simply be disregarded," in effect "condemning some practices that lead to higher output and lower prices."[215]

Applying the neo-Brandeisian approach to agriculture would look something like this: If I want to be a farmer, I should be able to buy land and a tractor and grow tomatoes and get them on a shelf in the supermarket—even if that would actually reduce consumer welfare. These sentiments harken back to the populist sentiments of days gone by. Consequently, the moral economy approach is just another iteration of an inherently flawed antitrust framework that leaves poor people lacking in affordable food options.

Armstrong, *Interactions Between Competition and Consumer Policy*, 4 COMPETITION POL'Y INT'L 97, 143 (2008) ("[I]f consumers are overly protected in their market transactions, there is a danger of moral hazard and consumers may not develop the market skills to defend themselves against future exploitative conduct.").

209. *See* Wright Testimony, *supra* note 194, at 18.

210. Hebert Hovenkamp & Fional Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, PROMARKET (Apr. 10, 2023), https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model/ [https://perma.cc/XU7D-9ZSC].

211. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018); Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 183 (2021).

212. Herrine, *supra* note 208, at 852.

213. *Id.*

214. *Id.* at 853.

215. Hovenkamp & Morton, *supra* note 210.

Between these two positions, scholars such as Professor Herbert Hovenkamp propose that the proper use of "consumer welfare" as an antitrust prescription should concern "trading partners, including intermediate and final purchasers, and also sellers, including sellers of their labor," who "all benefit from high output, high quality, competitive prices, and unrestrained innovation."[216] According to Hovenkamp, "Higher output and lower prices are good indicators of competitive benefit, and there is little practical difference between the way courts talk about antitrust harm and the idea of 'consumer welfare.'"[217] This legal realism approach is arguably the right way to answer the question.

But the debate over the purpose of antitrust laws may be unnecessary. In the time since Bork's theory was first propounded, and in the absence of a congressional mandate on which values should be considered and how those values should be weighed against efficiency and consumer welfare, a true consumer welfare standard has developed in the courts. And until Congress says otherwise, this is law. Courts have long adjudged antitrust cases based on both changes in output and changes in price.[218] In the years preceding the Sherman Act, when courts were deciding antitrust cases based primarily on judicial precedent, they concerned themselves with cases that restrained trade by either "enhanc[ing] the price" or "limit[ing] the supply."[219] Later, courts would prioritize cases where production output was restricted[220] or limited[221]—acts that would obviously raise prices.[222] Contemporary courts still prioritize these goals.[223]

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216. *Id.*

217. *Id.*

218. *See* Herbert Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1069–70 (2024).

219. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 183 (1871).

220. *See* Nelson v. United States, 201 U.S. 92, 111 (1906); United States v. U.S. Steel Corp., 251 U.S. 417, 464–65 (1920).

221. *See* United States v. Standard Oil Co. of N.J., 173 F. 177, 193 (1909).

222. *Price Fixing*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing [http://perma.cc/XFU5-M88V].

223. *See, e.g.*, FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990) ("[C]onstriction of supply is the essence of 'price fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered." (quoting Super. Ct. Trial Laws. Ass'n v. FTC, 272 U.S. App. D.C. 226, at 280 (D.C. Cir. 1988))); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985)

In addition to the evidence provided by judicial analysis, courts routinely apply the term "consumer welfare" directly. In 1979's *Reiter v. Sonotone*,[224] the Supreme Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription,'"[225] officially moving the normative objective beyond the interventionist, populist, and Brandeisian conceptions of antitrust law—which merely focused on the constraint of large-scale business power—and making the Consumer Welfare Standard the law of the land. Not only has the case law quoted *Sonotone* outright dozens of times[226] but

(reasoning that whether a business practice is presumptively unreasonable depends on whether it tends to "restrict competition and decrease output" (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979))); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (reasoning that "proof of actual detrimental effects, such as reduction of output" is necessary to spark an inquiry into market power (quoting PHILLIP AREEDA, ANTITRUST LAW 429 (1986))); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (noting that "[h]orizontal price fixing and output limitation" are typically illegal per se (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979))); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 (1986) (acknowledging argument that "petitioners would cartelize the . . . market, restricting output and raising prices above the level that fair competition would produce"); Ohio v. Am. Express Co., 585 U.S. 529, 542 (2018) (noting that plaintiffs can demonstrate anticompetitive effect by showing "reduced output, increased prices, or decreased quality"); NCAA v. Alston, 594 U.S. 69, 88 (2021) (noting that most restraints challenged under the Sherman Act are subject to assessments of their "capacity to reduce output and increase price").

224. 442 U.S. 330 (1979).

225. *Id.* at 343.

226. *See, e.g.*, *NCAA*, 468 U.S. at 107; Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 367 (1982) (Powell, J., dissenting); Jacobs v. Tempur-Pedic Int'l, 626 F.3d 1327, 1339 (11th Cir. 2010); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1136 (9th Cir. 2004); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995); Brown v. Pro Football, Inc., 50 F.3d 1041, 1054 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996); Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990); USA Petroleum Co. v. Atl. Richfield Co., 859 F.2d 687, 703 (9th Cir. 1988) (Alarcon, J., dissenting), *rev'd*, 495 U.S. 328 (1990); Fishman v. Estate of Wirtz, 807 F.2d 520, 566 (7th Cir. 1986) (Easterbrook, J., dissenting in part); Westman Comm'n Co. v. Hobart Int'l, 796 F.2d 1216, 1220 (10th Cir. 1986); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 231 n.3 (D.C. Cir. 1986) (Wald, J., concurring); Regents of Univ. of Cal. v. Am. Broad. Cos., 747 F.2d 511, 521 (9th Cir. 1984); Marrese v. Interqual, Inc., 748 F.2d 373, 387 (7th Cir. 1984); Ind. Fed'n of Dentists v. FTC, 745 F.2d 1124, 1140 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986); *In re* Indus. Gas Antitrust Litig., 681 F.2d 514, 520 (7th Cir. 1982); Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 482 n.92 (S.D.N.Y. 2012); United States v. VandeBrake, 771 F. Supp. 2d 961, 1001 (N.D. Iowa 2011), *aff'd*, 679 F.3d 1030 (8th Cir. 2012); United States v. UPM-Kymmene Oyj, No. 03 C 2528, 2003 WL 21781902, at *12 (N.D. Ill. July 25, 2003); *In re* Terazosin Hydrochloride Antitrust Litig., 164 F. Supp. 2d 1340, 1348 (S.D. Fla.

also dozens of other cases acknowledge that the primary reason antitrust laws exist is to advance consumer welfare.[227] The Consumer Welfare Standard, as established by precedent and not academicians, is thus well-established as law.

To this point, the term "consumer welfare" has served merely as a powerful tool of rhetoric for politicians and academics. Yet, as a practical matter, courts have elected to apply a true consumer welfare standard, one that prioritizes the end-user consumer and her surplus. This is not only important but also the right approach because, while everyone else in the supply chain is making a business or livelihood decision, poor consumers require food to survive.[228] If antitrust enforcement is used to break up Big Ag, especially out of concerns for "fairness," there will almost certainly be an adverse effect on food prices. For, if you view Big Ag as a threat to small farmers, then you must also believe that Big Ag creates food prices that are too low and will inevitably force smaller, less efficient producers out of production.

Because increased antitrust enforcement would raise food prices, the application of antitrust solutions to agricultural production and price problems is inapposite. The literature tells us that consumer welfare is maximized when consumer surplus is maximized.[229] Low prices and high output are thus the crux of all antitrust policy.[230] Further, Engel's Law tells us that, "[t]he poorer is a family, the greater is the proportion of the total outgo which must be used for food . . . . The proportion of

2000), *rev'd sub nom.* Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003); Coast Cities Truck Sales v. Navistar Int'l Transp. Co., 912 F. Supp. 747, 761 (D.N.J. 1995); Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 874 F. Supp. 844, 861 (N.D. Ill. 1995), *vacated*, 95 F.3d 593 (7th Cir. 1996); Irvin Indus. v. Goodyear Aerospace Corp., 803 F. Supp. 951, 956 (S.D.N.Y. 1992); Kerasotes Mich. Theatres. v. Nat'l Amusements, 658 F. Supp. 1514, 1520 n.17 (E.D. Mich. 1987), *rev'd*, 854 F.2d 135 (6th Cir. 1988); Machovec v. Council for the Nat'l Reg. of Health Serv. Providers in Psych., 616 F. Supp. 258, 270 (E.D. Va. 1985).

227. *See, e.g.*, Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (noting the antitrust laws' "traditional concern for consumer welfare and price competition"); Herbert Hovenkamp, *Did the Supreme Court Fix "Brown Shoe"?*, PROMARKET (May 12, 2023), https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe [https://perma.cc/4AK4-QWV2].

228. *See* H.P. 61, 130th Leg., 1st Reg. Sess. (Me. 2021).

229. Fred Ashton, *Why the Consumer Welfare Standard is the Backbone of Antitrust Policy*, AM. ACTION F. (Oct. 26, 2022), https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy/ [https://perma.cc/5P6E-UFLN].

230. *See generally* M.A. Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27 (1949).

the outgo used for food, other things being equal, is the best measure of the material standard of living of a population."[231] Combined, the Consumer Welfare Standard and Engel's Law suggest that any increase in food prices is not only undesirable but also would amount to a regressive policy for consumers—one that unduly harms poor people. Finally, social welfare is maximized when consumer surplus is maximized.[232] Therefore, maximizing consumer surplus in the context of food is good for society overall.

Nevertheless, discussion in this area routinely revolves around the profits of various types of firms: Big Ag versus Small Ag. This is a distraction. Agriculture is the only area where monopoly-based antitrust debates do not center on the consumer and, instead, focus on the producer's surplus.[233] Producer-surplus is important if the concern is income equality, but that is a different problem requiring different solutions than that of maintaining low prices for consumer benefit. We should not conflate the two. It is important that the government not promote regressive policies simply because of a long-standing public choice practice.[234]

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231. Adam Hayes, *Engel's Law, Curve, and Coefficient Explained*, INVESTOPEDIA (2024), https://www.investopedia.com/terms/e/engels-law.asp [https://perma.cc/MCF8-BVNT].

232. *Welfare Economics Explained: Theory, Assumptions, and Criticism*, INVESTOPEDIA (June 26, 2024), https://www.investopedia.com/terms/w/welfare_economics.asp [https://perma.cc/PTQ3-927W].

233. As distinguished from those that concern monopsony. *See, e.g.*, Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1511–12 (2013) (looking at perceptions of monopsonies in agriculture).

234. The Public Choice Theory contends that organized interest groups obtain favorable regulatory outcomes at the expense of the less organized and less informed public. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 35 (1998); s*ee also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 1–2 (1965) (explaining collective action), Mark C. Niles, *Punctuated Equilibrium: A Model for Administrative Evolution*, 44 J. MARSHALL L. REV. 353, 364–66 (2011) (discussing the development of the Public Choice Theory). Often analogized to an economic supply-and-demand market model, this theory rests on the principle that interested actors, motivated by economic incentives, will exchange goods and services for their desired regulatory outcomes from elected officials. Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State Greed, Chaos, & Governance: Using Public Choice to Improve Public Law*, 96 MICH. L. REV. 1746, 1752–53 (1998). Powerful entities, therefore, dominate the mechanisms for policy production and use those mechanisms to serve their individual needs. While a desired regulatory outcome may benefit interest groups, it often causes "diffuse damage to the rest of the community," thus reflecting the inefficiency of the regulatory system. Croley, *supra*, at 39–40.

B. *Concentration is Good for Consumers*

The use of antitrust in the context of food is problematic, then, because it so clearly violates the Consumer Welfare Standard as prescribed by the courts. Some recent congressional proposals will increase food prices almost immediately.[235] In this sense, proponents of antitrust enforcement in the agriculture realm are purposefully trying to raise food prices for already hungry consumers to break up purported monopolies. Because increased antitrust enforcement would raise food prices, the application of antitrust solutions to agricultural production and price problems is inapposite.

1. Concentration Increases Output and Lowers Prices

Market concentration typically comes about in one of two ways. First, it can come about organically with the emergence of dominant firms.[236] These firms have likely developed commercially successful technologies, products, marketing strategies, or all of the above.[237] Second, market concentration can result from the consolidation of input, midstream, and downstream segments of the agricultural supply chain.[238] The United States has seen an increase in this sort of consolidation over the past few decades.[239] Often, firms will integrate both

Scholars have observed that this phenomenon ultimately transforms agencies into "friendly protector[s] of private interest rather than an aggressive agent of the public welfare." Niles, *supra*, at 368.

235. *See, e.g.*, Matthew Yglesias, *Elizabeth Warren's Plan to Make Farming Great Again, Explained*, VOX (March 28, 2019, 10:00 AM), https://www.vox.com/policy-and-politics/2019/3/28/18283868/elizabeth-warren-agriculture-farm-policy [https://perma.cc/5J9Q-YDAJ].

236. Atanu Saha, Havenner Arthur & Rauschenbach Sonya, *The Rise of Dominant Firms: The Role of Chance*, 2 OPEN ECON. 76, 90 (2019) ("[M]arket concentration can also occur as a benign, natural consequence of evolution of firms in a random environment.").

237. *See* Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 WIS. L. REV. 337, 344 (discussing market concentration).

238. *See id.* ("Market concentration . . . can also result from horizontal and vertical integration. Consolidation of the input, midstream, and downstream segments of agricultural supply chains has been particularly pronounced over the last two decades.").

239. *Id.*

horizontally and vertically in attempts to diversify geographically or to diversify their product offerings.[240]

The benefits of consolidation are varied.[241] Firms might benefit from new or needed distribution channels, the reduction of financial risk, or both.[242] Most often, in the context of food, however, firms are incentivized by the various economies. Merging will often help a firm to streamline operations, and increasing scale can reduce costs.[243] This is especially important in the livestock context where the scale has already expanded significantly. The production "locus" between 1987 and 2002 "increased by 60 percent in broiler, 100 percent in fed-cattle, 240 percent in dairy, and 2,000 percent in hog

240. *See* Evan Tarver, *Horizontal Integration vs. Vertical Integration: What's the Difference?*, INVESTOPEDIA (June 25, 2024), https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp [https://perma.cc/5JSX-SVZS] (explaining horizontal and vertical integration).

241. One of the benefits of consolidation is the increased ability to comply with food safety regulations and absorb the cost of that compliance. One cost of compliance is the development of, for example, Hazard Analysis and Critical Control Point (HACCP) plans. One study estimates that the cost of developing the HACCP plan for small establishments, which can perform the work either internally or with a consultant, is $13,540 or $17,770 respectively. Catherine L. Viator, Mary K. Muth, Jenna E. Brophy & Gary Noyes, *Costs of Food Safety Investments in the Meat and Poultry Slaughter Industries*, 82 J. FOOD SCI. 260, 263 (2017), https://doi.org/10.1111/1750-3841.13597 [https://perma.cc/PLY6-LB63]. The cost for a large establishment to use a consultant was estimated at $43,080. *Id.* There are also associated costs for new technology: food firms often invest in additional food safety technologies for fear of lost sales in the event of a recall, to support an important brand, and to meet customer specifications. MICHAEL OLLINGER, MARY K. MUTH, SHAWN A. KARNS & ZANETHIA CHOICE, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., FOOD SAFETY AUDITS, PLANT CHARACTERISTICS, AND FOOD SAFETY TECHNOLOGY USE IN MEAT AND POULTRY PLANTS 7–8 (2011). Because a large corporation is able to supply more goods, it has better profit margins to survive in this regulatory landscape and can thus afford to continue producing higher quantities more efficiently. *See* David Dorn, UBS CTR. FOR ECONS. IN SOC'Y, THE RISE OF SUPERSTAR FIRMS: MARKET CONCENTRATION AND LABOR'S FALLING SHARE OF GDP 2 (2021), https://www.ubscenter.uzh.ch/en/publications/policy_briefs/the-rise-of-superstar-firms.html [https://perma.cc/EPG6-ZNXP].

242. *See* DARREN HUDSON & CARY W. HERNDON, MERGERS, ACQUISITIONS, JOINT VENTURES, AND STRATEGIC ALLIANCES IN AGRICULTURAL COOPERATIVES, 22 tbl.9 (2000), https://ageconsearch.umn.edu/record/15799/ [https://perma.cc/9VK4-FZJL].

243. *See* JAMES M. MACDONALD & WILLIAM D. MCBRIDE, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., THE TRANSFORMATION OF U.S. LIVESTOCK AGRICULTURE: SCALE, EFFICIENCY, AND RISKS, iii (2009), https://www.ers.usda.gov/publications/pub-details?pubid=44294 [https://perma.cc/7PT9-YXN6].

production."[244] Consequently, a large, single firm can produce a range of products at lower cost relative to individual firms manufacturing single products or product lines (this is the scope of economies).

Moreover, if the cost curve is such that the change in marginal costs from increased production is small or negative, mergers, larger firms, or both could increase production and lower prices, thereby benefiting consumers. The same holds true of vertical integration, where the benefit is from economies of coordination. Complementarities between traits in the vertical context normally allow reduced transaction costs, and when food manufacturers back into processing, it helps them to ensure reliable supplies and maintain quality control, thereby benefiting consumers.[245]

Another way to think about the issue is to consider allocative efficiency versus productive efficiency. In the case of allocative efficiency, the market would produce goods or services, in this case meat, such that the last unit produced would be equal to the marginal cost of producing it. In other words, there would never be too much meat, too little meat, or any deadweight loss. Allocative efficiency is distinguishable from productive efficiency, which exists whenever the market produces goods and services at the lowest possible cost per unit. In practice, this means that the firm is using the best technology and the most efficient combination of inputs so that it can minimize its average total cost. Here, the market neither wastes resources nor incurs any unnecessary costs. Productive efficiency is more likely to exist whenever producers have achieved technical and operational efficiency.

In one recent study, economist Sharat Ganapati found that every ten percent increase in national market share of the four largest firms is correlated to a one percent increase in real output.[246] Moreover, industries with the most real productivity

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244. *Id.* Locus statistics represent the midpoint of the range of farm sizes (in terms of annual sales) at which one half of national production comes from larger farms and the other half from smaller. *Id.*

245. *See* Rachel Goodhue, Gordon Rausser, Suzanne Scotchmer & Leo Simon, *Biotechnology, Intellectual Property and Value Differentiation in Agriculture* 8–9 (Univ. of Cal. at Berkeley Dep't of Agric. & Res. Econ. & Pol'y Working Paper No. 902, 2002), http://escholarship.org/uc/item/9w85z5r6 [https://perma.cc/AY6W-DLWL]; Gregory D. Graff, Gordon C. Rausser & Arthur A. Small, *Agricultural Biotechnology's Complementary Intellectual Assets*, 85 REV. ECON. STAT. 349, 360–61 (2003).

246. Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AM. ECON. J. MICROECONOMICS 309, 310 (2021).

growth are also those with the largest increases in industry concentration. While output typically measures the quantity of goods or services produced in the country, real output is particularly important because it adjusts for inflation. An increase of output then, especially when adjusted to real terms, is good for consumers because it applies downward pressure on the prices for consumer goods. Part of the benefit of Big Ag is that it has driven improvements in both productivity and efficiency in ways that small firms could not have. Thus, we have seen long-term gains in the aggregate supply of food, especially meat.[247]

We are told that antitrust policy was designed to increase competitiveness. Yet, scholars have long recognized that mergers, more concentration, or both could lead to an increase in social welfare, especially in situations where high fixed costs are more concerning than market power.[248] In other words, there are times when the economies of scale are so large that any added deadweight loss from market power pales in comparison.[249] Thus, fewer firms are welfare-increasing because the profits are larger than the change in consumer surplus. Vertical economies of scope, coordination, and scale, together, suggest that integration is good for efficiency and, thus, total welfare. Quality control and the enhanced ability to get new products to market faster are secondary benefits of mergers, and should, therefore, also be considered in any antitrust analysis.

Importantly, Ganapati also found that higher prices are not linked to increased firm concentration.[250] In this way, an oligopoly resulting from the economy of scales, as we see in the food industry, might be viewed as a positive force because the companies lower their marginal costs while increasing their market shares. As a result, consumers benefit (in the short-to-

247. *But see* Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 525 (2023) (discussing how some areas have become food deserts with a loss of food supply).

248. *See generally* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968) (discussing potential upsides to social welfare from increased concentration).

249. Joseph Farrell & Carl Shapiro, *Scale Economies and Synergies in Horizontal Merger Analysis*, 68 ANTITRUST L.J. 685, 700 (2001) (hypothesizing that "no-synergies mergers can increase output and lower price" in certain circumstances). *But see* PHILIP H. HOWARD, CONCENTRATION AND POWER IN THE FOOD SYSTEM 8–9 (David Goodman & Michael K. Goodman eds., rev. ed. 2021) (discussing views opposed to those of Professors Joseph Farrell and Carl Shapiro).

250. Ganapati, *surpa* note 246, at 324.

medium run) from price reductions and real choice increases.[251] These findings accord with long-held beliefs from across the spectrum. Economist Harold Demsetz, for example, has argued, since at least the 1970s, that market structure is not outcome determinative, saying "it is presumptuous to conclude . . . that markets populated by fewer firms perform less well or offer competition that is less intense."[252]

2. Concentration Does Not Necessarily Increase Market Power

While the politicians have latched on to the purported villainy of meatpackers, there is no data to support the link between concentration and market power. In 1990, for example, the United States Government Accountability Office (GAO) studied concentration trends at the various levels of the food supply chain and found that

> [e]mpirical economic literature has not established that concentration in the processing segment of the beef, pork, or dairy sectors or in the retail sector overall has adversely affected commodity or food prices. . . . Most of [the thirty-three reviewed studies] found either no evidence of market power, or efficiency effects that were larger than the market power effects of concentration.[253]

If concentration in the food supply chain, especially in beef packing, does not lead to market power, but instead results from scale efficiencies, then there are none of the anticipated market-power effects (namely price increases for consumers), so antitrust is wholly unnecessary.[254]

251. *Id.*

252. HAROLD DEMSETZ, THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES 140–41 (1995); *see also* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 3 (1973) (showing early support for these same arguments).

253. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-746R, U.S. AGRICULTURE: RETAIL FOOD PRICES GREW FASTER THAN THE PRICES FARMERS RECEIVED FOR AGRICULTURAL COMMODITIES, BUT ECONOMIC RESEARCH HAS NOT ESTABLISHED THAT CONCENTRATION HAS AFFECTED THESE TRENDS 27–28 (2009), https://www.gao.gov/products/gao-09-746r [https://perma.cc/AD75-VXPN].

254. *Contra* Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. 1717, 1719–21 (2022) (describing the prevalence of food deserts in marginalized neighborhoods due to anticompetitive practices); *but see also* Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1289, 1295 (2021) (explaining how market concentration has harmed consumers of food in poorer

This appears to be the case even today. Although food prices are currently increasing, the rate of inflation is not appreciably different from overall consumer prices. Therefore, the data does not support the ongoing hyperfocus on profiteering in the food industry. According to the USDA's Economic Research Service's (ERS) Consumer Price Index, from 2016 to 2020, all foods rose 7.8%, which was the same as the "all items" category in the CPI.[255] Moreover, "[f]ood price increases were below the 11.9-percent rise in medical care costs and the 11.4-percent increase in housing costs."[256]

The ERS not only evinced unremarkable change in food price inflation but also acknowledged that increases in prices for foods consumed at home in 2020 were largely due to "shifts in consumption patterns and supply chain disruptions resulting from the coronavirus pandemic."[257]

"Food-at-home spending (food purchased from supermarkets, convenience stores, warehouse club stores, supercenters, and other retailers) increased . . . in 2020, while food-away-from-home spending (food purchased from restaurants, fast-food places, schools, and other away-from-home eating places) decreased . . . ."[258] "This resulted in food-at-home spending accounting for 51.9 percent of total food expenditures, the first year it has accounted for more than half of food spending since 2008, during the Great Recession."[259]

It is true that the meat industry, like many industries, has become increasingly concentrated over the last few decades.[260]

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neighborhoods). These articles, however, tend to focus on the provision of groceries rather than production. As such, they are notable but are well outside the scope of this Article, which argues first and foremost for permissive consolidation in the context of agriculture.

255. ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., FOOD PRICE INFLATION OVER 2016–2020 EQUAL TO ECONOMY-WIDE INFLATION, https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58350 [https://perma.cc/6PCP-ADN3].

256. *Id.*

257. *Id.*

258. ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., U.S. FOOD-AT-HOME SPENDING SURPASSES FOOD-AWAY-FROM-HOME SPENDING IN 2020, https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58364 [https://perma.cc/QKP2-5HKU].

259. *Id.*

260. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REV. FINANCE 697, 698 (2019); Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561–644 (2020); Lawrence J. White & Jasper Yang,

The theory that such concentration would lead to price hikes and output reductions, thereby decreasing consumer welfare, however, has not so far been supported.[261] Indeed, if consolidation in the market were really to blame for food prices, we would expect to have some evidence of increased prices due to market collusion by now. Yet, prices in constant dollars are not increasing,[262] so consumer surplus is not decreasing, so market concentration is not restricting trade. This is contrary to the stories that politicians are telling. It is also true that the meat-packing companies have generated record gross profits.[263] But this is irrelevant. The argument here is not that monopolists and oligopolists do not have any incentive to increase prices or decrease output; it is well-established that they do.[264] The key here is that they have done neither, and our policy should not be reacting as though they have.

3. Concentration May Benefit Some Small Farmers

Interestingly, there may even be some benefits to small farmers—the same farmers who allegedly require protecting. "[M]ost economic research confirms that the benefits to cattle producers due to economies of size in packing largely offset the costs associated with any market power exerted by packers. Research indicates that there is market power, but its effect has been small."[265] Additionally, "Research shows that small but significant negative price impacts of market power [are]

What Has Been Happening to Aggregate Concentration in the US Economy in the 21st Century?, 38 W. ECON. ASS'N INT'L 483, 483 (2017).

261. James M. MacDonald, *Concentration in U.S. Meatpacking Industry and How It Affects Competition and Cattle Prices*, U.S. DEP'T OF AGRIC. (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/7DYN-8FAQ].

262. *Id.*

263. Warren Fiske, *Fact-Check: Are Meat-Packing Companies Making Record Profits?*, AUSTIN AM.-STATESMAN (July 5, 2022), https://www.statesman.com/story/news/politics/politifact/2022/07/05/fact-check-meat-packing-companies-making-record-profits/7793150001/ [https://perma.cc/N5LV-SB8Z].

264. According to the 2010 DOJ merger guidelines, "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives." U.S. DEP'T OF JUST., HORIZONTAL MERGER GUIDELINES 2 (2010), https://www.justice.gov/usdoj-media/atr/media/810916/dl?inline [https://perma.cc/9PBZ-BWW3].

265. Bart L. Fischer, Joe L. Outlaw & David P. Anderson, *Introduction* to THE U.S. BEEF SUPPLY CHAIN: ISSUES AND CHALLENGES x (Bart L. Fischer, Joe L. Outlaw, David P. Anderson eds., 2021).

outweighed by several magnitudes in cost efficiencies that benefit producers and consumers."[266]

CONCLUSION

The last century's economic-monetary policies created the political narrative dichotomy we see perpetuated and exacerbated today in the food price discourse. One side (i.e., liberals) blames food and agribusiness monopolies, while the other side (i.e., conservatives) blames government overregulation and overreach.[267] The problem with these narratives, though, is that both might be true, but neither side properly prioritizes consumer–citizen welfare. As discussed, traditional attempts to restore competition to the agricultural marketplace inure primarily to the benefit of small farmers and ranchers (as was intended) at some undisclosed cost to consumers. While this approach is politically sound for election purposes, it is wholly unfair to those consumers who need or want low-priced food options.

Agriculture is an unusual market,[268] with different concerns about competition, the need to protect farms against occasional bad years, and a broader social utility in stable prices for basic commodities. In many ways, we really *do not* want these to be ordinarily competitive markets. The ultimate goal on the producer side should be agricultural firms and supply chains that are local, resilient, and sustainable. On the consumer side, the ultimate goal should be low prices that do not compromise the health or safety of the American food supply. In either case, however, antitrust is the wrong tool to get us there.

Identifying the precise tool to get us to those goals is outside the scope of this Article. Nevertheless, other viable proposals do exist.[269] An effective and efficient solution to the question of

266. Derrell S. Peel, *How We Got Here: A Historical Perspective on Cattle and Beef Markets*, FEEDLOT (Jan. 3, 2022), https://www.feedlotmagazine.com/news/industry_news/how-we-got-here-a-brief-history-of-cattle-and-beef-markets/article_1fe3c56c-6739-11ec-a5bb-2b72c548a8a4.html [https://perma.cc/F9QN-396B].

267. *See* Manne Testimony, *supra* note 26, at 6–8.

268. "The most plausible competitive or efficiency theory of any particular industry's structure and business practices is as likely to be idiosyncratic to that industry as the most plausible strategic theory with market power." Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power* 26 (John M. Olin Program in L. & Econ., Stan. L. Sch., Working Paper No. 328, 2006).

269. *Id.* at 2. Scholars have pointed out that if the primary goal is in fact consumer welfare, a simple focus on distributional effects would show that—as in

food price inflation is particularly important right now, when thirty-five percent of households below the federal poverty line are food insecure and questions of economic viability and American hunger continue to increase. All good policy options should be taken seriously, and the public deserves to know the winners and losers associated with each.

other instances of rapid inflation—contractionary monetary policies, production requirements, increased taxes, price controls, and improved supply chains would arguably be at least as effective as increased antitrust enforcement, without any of the attendant risks.