

BIG AG, ANTITRUST & CLIMATE CHANGE: THE ENVIRONMENTAL IMPACTS OF CONSTRAINED ECONOMIC CHOICE

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INTRODUCTION

Much of the blame for agriculture’s greenhouse gas emissions is placed at the feet of beef cattle and those who raise them.¹ However, cattle can be managed in such a way to sequester greenhouse gases and build soil; such

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1. Tom Levitt, *What’s the Beef with Cows and the Climate Crisis?*, THE GUARDIAN (Oct. 27, 2021), <https://www.theguardian.com/environment/2021/oct/27/whats-the-beef-with-cows-and-the-climate-crisis>.

regenerative farming can mitigate climate change while protecting biodiversity.² The real problem lies in the predominant production methods, and the agribusinesses that promote their use. With concentrated economic power, agribusinesses can steer the methods of production.³ This paper contends that because these businesses do not incur the costs of environmental degradation, they are incentivized to promote environmentally destructive practices. Further, the widespread adoption of regenerative agriculture is impeded by concentrated market structures. The threshold issue underlying greenhouse gas emissions in the beef industry is therefore the unmitigated concentration of market power. Antitrust law offers the solution.

The premise of antitrust enforcement is that competitive markets with dispersed economic power benefit both market participants and consumers. To counter market concentration, antitrust law defines and prohibits unlawful mergers and business practices “to protect the process of competition.”⁴ A century ago, the Packers and Stockyards Act emerged as a solution to the meatpacker’s monopolistic control over livestock markets.⁵ Today, renewed enforcement of the same law can prevent buyers from applying inordinate pressure on producers and enable more competitive livestock markets.

This paper argues that dispersed economic power is essential for the competitive viability of regenerative beef production. Section I explores the potential to mitigate climate change through adaptive livestock management in a range of ecosystems, from Vermont to Zimbabwe. Section II examines the current structure of the United States beef market and argues that the associated constrained economic choice both exacerbates climate change by precipitating environmental harms and decreases adaptive capacity by inhibiting alternative supply chains. Section III evaluates the existing legal framework, looking to the Packers and Stockyards Act of 1921, the evolution of competition policy, the modern judicial interpretation of antitrust

2. Jean-Louis Peyraud & Michael MacLeod, *Study on Future of EU Livestock: How to Contribute to a Sustainable Agricultural Sector?*, 1, 18 (2020) (European Commission); Jason E. Rowntree et al., *Potential Mitigation of Midwest Grass-Finished Beef Production Emissions with Soil Carbon Sequestration in the United States of America*, *FUTURE FOOD: J. ON FOOD, AGRIC. & SOC’Y* 31, 36 (2016), https://www.researchgate.net/publication/311921284_Potential_mitigation_of_midwest_grass-finished_beef_production_emissions_with_soil_carbon_sequestration_in_the_United_States_of_America.pdf.

3. Tina L. Saitone & Richard J. Sexton, *Concentration and Consolidation in the U.S. Food Supply Chain: The Latest Evidence and Implications for Consumers, Farmers, and Policymakers Special Issue 2017 Federal Reserve*, *BANK KAN. CITY: ECON. REV.* 25, 38 (2017), https://www.kansascityfed.org/documents/764/Concentration_and_Consolidation_in_the_U.S._Food_Supply_Chain_The_Latest_Evidence_and_.pdf.

4. *The Antitrust Laws*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Apr. 15, 2022).

5. 7 USC § 181 (1921).

violations, and the challenge of reform in the face of concentrated political power. Section IV looks to the changing landscape of antitrust and introduces a first step in agriculture's antitrust reform: Vesting enforcement authority in an agency insulated from industry interests.

I. REGENERATIVE AGRICULTURE AS A CLIMATE CHANGE SOLUTION

Regenerative agriculture is a “holistic land management practice that leverages the power of photosynthesis in plants to close the carbon cycle, and build soil health, crop resilience and nutrient density.”⁶ The holistic management approach can be applied to a variety of agriculture sectors, including livestock. Beef production, often cited for its major contribution to climate change,⁷ can have positive environmental impacts when practiced regeneratively.⁸ A 2020 European Commission study found “a reduction of animal production will not necessarily lead to more sustainable agri-food chains.”⁹ The study found that ruminants, in particular, “can have a positive impact on biodiversity and soil carbon via the maintenance of permanent grassland and hedges and optimized use of manure.”¹⁰ The European Commission study adds to a growing understanding of the nuanced relationship between agriculture and ecosystems.

A 2011 study through Texas A&M University evaluated the impacts of four land management techniques on Texas tall grass prairie.¹¹ The study looked at adaptive management using multi-paddock grazing, light continuous grazing, heavy continuous grazing, and management without grazing.¹² Continuous grazing allows livestock to electively graze a single enclosed paddock and is the most common grazing management technique in beef production.¹³ Under adaptive management, livestock are moved throughout multiple paddocks to allow land to rest between grazing periods.

6. Regenerative Agric. Initiative & The Carbon Underground, *What is Regenerative Agriculture?* REGENERATION INT'L, (Feb. 21, 2022), <https://regenerationinternational.org/wp-content/uploads/2017/02/Regen-Ag-Definition-2.23.17-1.pdf>.

7. David Vetter, *Got Beef? Here's What Hamburger is Doing to The Climate*, FORBES (Oct. 5, 2020), <https://www.forbes.com/sites/davidvetter/2020/10/05/got-beef-heres-what-your-hamburger-is-doing-to-the-climate/?sh=39cd55515206.html>.

8. ALLAN SAVORY WITH JODY BUTTERFIELD, *HOLISTIC MANAGEMENT: A COMMONSENSE REVOLUTION TO RESTORE OUR ENVIRONMENT* 233 (Islandpress, 3rd ed. 2016) [hereinafter ALLAN SAVORY WITH JODY BUTTERFIELD].

9. Peyraud & MacLeod, *supra* note 2, at 69.

10. Peyraud & MacLeod, *supra* note 2, at 18; Ruminants are herbivorous, hoofed mammals, including cattle and goats, with a complex 3- or 4-chambered stomachs. *Ruminant*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ruminant> (last visited Mar. 9, 2022).

11. W.R. Teague et al., *Grazing Management Impacts on Vegetation, Soil Biota and Soil Chemical, Physical and Hydrological Properties in Tall Grass Prairie*, 141 *AGRIC., ECOSYSTEMS & ENV'T* 310, 310 (2011).

12. *Id.*

13. *Id.* at 311.

The study found that continuous grazing (whether heavy or light) quickly degrades ecosystem health because livestock repeatedly target certain areas of a paddock.¹⁴ On the other hand, multi-paddock grazing allows ranchers to replicate wild ungulate behavior,¹⁵ respond to biological indicators, and manage grazing for desired results.¹⁶ Compared to all other techniques, adaptive multi-paddock management where “knowledge of . . . biological responses [wa]s incorporated into timely management decisions”¹⁷ had higher soil carbon, plant biomass, and water- and nutrient-holding capacity.¹⁸ Multi-paddock management led to greater ecosystem health than all other livestock management techniques, and even outperformed plots with no livestock.¹⁹

The fungal/bacterial ratio was also highest under adaptive multi-paddock management.²⁰ Fungal/bacterial ratios play a significant role in ecosystem health and carbon sequestration.²¹ Natural carbon storage occurs as photosynthesis fixes atmospheric carbon dioxide (CO₂) into plant biomass; removing CO₂ from the air.²² Plants have a symbiotic relationship with mycorrhizal fungi: In exchange for nutrient delivery, the plant roots provide energy in the form of carbon to the mycorrhizae.²³ This process creates soil with high soil organic matter and soil organic carbon. Some CO₂ is lost back to the atmosphere as microbes break down plants.²⁴ However, in a well-balanced system, carbon storage exceeds CO₂ losses, and soil organic carbon steadily grows.²⁵

The 2011 study demonstrates ruminant’s ancient role in this process. Just as plants coevolved with mycorrhizal fungi, plants coevolved with ruminants.²⁶ The grazing mammals contribute to soil health in several ways, including by encouraging carbon storage.²⁷ As they graze and selectively defoliate plants, the plants shed root mass to conserve energy.²⁸ The discarded root mass provides a feast of carbon-enriched compounds for

14. *Id.*

15. *Ungulate*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/ungulate> (last visited Mar. 9, 2022).

16. W.R. Teague et al., *supra* note 11, at 312.

17. *Id.* at 317.

18. *Id.* at 310.

19. *Id.*

20. *Id.*

21. Todd A. Ontl & Lisa A. Schulte, *Soil Carbon Storage*, NATURE (2012), <https://www.nature.com/scitable/knowledge/library/soil-carbon-storage-84223790/>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. ALLAN SAVORY WITH JODY BUTTERFIELD, *supra* note 8, at 228.

27. *Id.* at 241.

28. *Id.*

bacteria and mycorrhizal fungi, increasing carbon storage and improving soil structure.²⁹ While carbon storage is complex and difficult to measure,³⁰ increased carbon storage decreases overall atmospheric carbon dioxide—one leading cause of climate change.³¹ Further, soil health and improved soil structure have a variety of benefits aside from carbon storage. For example, proper soil structure improves water retention and decreases erosion.³² Soil loss on some farms “exceeds the rate of soil formation by >2 orders of magnitude.”³³ The Intergovernmental Panel on Climate Change points to land degradation as “one of the biggest and most urgent challenges for humanity.”³⁴

The symbiotic relationship between ruminants and soil is demonstrated in even the most brittle ecosystems.³⁵ Allan Savory, a Zimbabwean ecologist, has dedicated his career to “kick starting land recovery” with grazing ruminants.³⁶ In one experiment, Savory regenerated land that had been bare for over 30 years by managing his herd to replicate the behavior of native grazers.³⁷ Over the course of a week, Savory moved his herd of 500 cattle onto the barren area at night and allowed the herd to graze elsewhere during the day.³⁸ The heavy ungulates broke up the solidified dirt with their hooves and infused the struggling soil with fertilizer (urine and dung).³⁹ After one week, grass started growing again.⁴⁰ Wild animals returned to the area to graze, and two years later, the land was densely covered with grass.⁴¹

Around the same time on the other side of the world, Gabe Brown was operating a 5,000-acre ranch in Bismarck, North Dakota.⁴² North Dakota’s

29. *Id.*

30. *See, e.g.*, COLE D. GROSS & ROBERT B. HARRISON, QUANTIFYING AND COMPARING SOIL CARBON STOCKS: UNDERESTIMATION WITH THE CORE SAMPLING METHOD, 82 SOIL SCI. SOC’Y AMERICA J. 949 (2018).

31. *FAQ: Carbon Dioxide and Climate Change*, UC SAN DIEGO SCRIPPS INST. OCEANOGRAPHY, <https://scripps.ucsd.edu/research/climate-change-resources/carbon-dioxide-and-climate-change> (last visited Apr. 15, 2022).

32. ALEXANDRA BOT & JOSÉ BENITES, THE IMPORTANCE OF SOIL ORGANIC MATTER, CHAPTER ONE 2 (2005), <https://www.fao.org/3/a0100e/a0100e04.htm#bm04>.

33. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: CLIMATE CHANGE AND LAND, CHAPTER 4: LAND DEGRADATION 347, https://www.ipcc.ch/site/assets/uploads/sites/4/2019/11/07_Chapter-4.pdf.

34. *Id.* at 348.

35. *Brittle and Nonbrittle Environments*, MANAGING WHOLES, <https://managingwholes.com/-ecosystem-brittleness.htm/> (last visited Feb. 21, 2022) (explaining Brittle ecosystems, a brittle ecosystem is one with a prolonged dry season, as opposed to year-round moisture).

36. ALLAN SAVORY WITH JODY BUTTERFIELD, *supra* note 8, at 233.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Gabe Brown, *Sustainable Farming and Ranching in a Hotter, Drier Climate*, YOUTUBE at 08:00, 51:49 (Nov. 29, 2017), https://www.youtube.com/watch?v=O394wQ_vb3s.

climate differs drastically from Zimbabwe's, but is similarly brittle with a long dry season.⁴³ Brown's operation started as a monoculture,⁴⁴ but after observing the fragility of his farm, his priority became growing and maintaining healthy soil.⁴⁵ Brown insists the most effective way to maintain soil health is to mimic nature—with high species diversity and adaptive livestock management.⁴⁶ Soil infiltration is one indicator of soil health; quick infiltration of rainwater indicates a stable structure and high organic matter.⁴⁷ When Gabe Brown began his operation in 1991, his soil could infiltrate half an inch of rainfall per hour.⁴⁸ After a decade of regenerative management, Brown's soil infiltrates one inch of rainfall in nine seconds.⁴⁹

In Vershire, Vermont, Niko Horster of Shire Beef is experimenting with raising cattle and building soil health simultaneously. The Northeastern United States is a non-brittle environment with relatively consistent rainfall. Horster says there are “plenty of theories about how soil carbon building works in non-brittle environments, but we don't have a lot of data yet.”⁵⁰ Thus far, most carbon sequestration research has focused on the top four to six inches of soil. This may not reflect optimal carbon storage in non-brittle ecosystems like Vermont.⁵¹ The increased rainfall and biological activity associated with non-brittle environments mean that carbon cycles are accelerated.⁵² Thus, more permanent carbon storage may occur deeper in soil as compared to brittle environments with lower biological activity.⁵³ In collaboration with Dartmouth College, Shire Beef and two other Vermont farms received a Conservation Innovation Grant to research carbon storage in the Northeast.⁵⁴ The researchers theorize that managing livestock with

43. *Climate Risk Profile: Zimbabwe*, WORLD BANK GROUP, i, at 3, https://climateknowledgeportal.worldbank.org/sites/default/files/2021-05/14956-WB_Zimbabwe%20Country%20Profile-WEB%20%281%29.pdf (last visited Mar. 10, 2022) (North Dakota's mean monthly temperatures range from about 12°F in January to 70°F in July, while Zimbabwe's mean monthly temperatures range from about 60°F in July to 76°F in December).

44. William C. Wetzel et al., *Variability in Plant Nutrients Reduces Insect Herbivore Performance*, 539 NATURE 425 (2016); Monoculture is the practice of cultivating a single crop or organism on agricultural land. *Monoculture*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/monoculture> (last visited Apr. 19, 2022).

45. Brown, *supra* note 42, at 20:10.

46. *Id.* at 53:44.

47. U.S. DEP'T AGRIC., NAT. RES. CONSERVATION SERV., SOIL QUALITY INDICATORS:INFILTRATION, (1998) https://web.extension.illinois.edu/soil/sq_info/sq_intro.pdf.

48. Brown, *supra* note 42, at 07:21.

49. *Id.* at 07:40.

50. Interview with Nikko Horster, in South Royalton, Vt. (Sept. 7, 2020) (on file with author).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Researching Strategies for Improving Vermont's Soil Health Through Perennial Grazing Crop Development Project*, DARTMOUTH COLL. https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010522 (last visited Apr. 19, 2022).

deep-rooted perennial wheat grass may be more appropriate for carbon storage in Vermont, where rainfall inundates the top four to six inches of soil.⁵⁵ The research reflects an effort to tailor land management to different ecological conditions.

The key to holistic regenerative management is the ability to tailor practices to different biological and climatic indicators. A 2016 study of carbon sequestration through beef production concluded that “well-managed grazing and grass-finishing systems in environmentally appropriate settings can positively contribute to reducing the carbon footprint of beef cattle, while lowering overall atmospheric CO₂ concentrations.”⁵⁶ The results of the study are staggering—the careful management of livestock can lower CO₂ in the atmosphere. The study reinforces the importance of environmentally appropriate management. What works in Zimbabwe might not work in the Northeastern United States. As Allan Savory notes, solutions must overcome the notion that, “all environments respond in the same manner to the same influences.”⁵⁷

The ability to make ecosystem-specific management decisions requires decision-making autonomy, which inevitably requires dispersed economic power. In a market structure where power is concentrated in a few buyers, producers have no choice but to implement the practices favored by buyers. Certain livestock contracts, particularly prevalent in the hog and poultry industries, further decrease autonomy by allowing the downstream buyer to explicitly dictate the means of production.⁵⁸ These “resource-providing contracts introduce substantial buyer decision-making into the farm production process, thereby reducing farmer autonomy.”⁵⁹ The contracts employed in the beef industry do not explicitly dictate the means of production; agribusinesses instead dominate the market by controlling an inordinate percentage of processing facilities.⁶⁰ This processing bottleneck allows firms to exercise significant influence over producers.⁶¹ Antitrust law, which aims to protect fair competition in the marketplace, is primed to address the unprecedented concentration of economic power in the hands of a few multinational companies. Existing antitrust law must be enforced to

15, 2022) (scroll down to “2019 Vermont State Conservation Innovation Grants” to find the link to Dartmouth College’s abstract).

55. *Id.*

56. Rowntree et al., *supra* note 2, at 36.

57. ALLAN SAVORY WITH JODY BUTTERFIELD, *supra* note 8, at 34.

58. Saitone & Sexton, *supra* note 3, at 25, 38.

59. *Id.*

60. Mary K. Hendrickson et al., *Power, Food and Agriculture: Implication for Farmers, Consumers and Communities*, 1, 25 (University of Missouri, Working Paper, 2017), <https://philhowardnet.files.wordpress.com/2017/11/hendrickson-howard-constance-2017-final-working-paper-nov-1.pdf>.

61. *Id.* at 25.

disperse economic power, which ultimately will support alternative modes of production.

II. ANTITRUST REFORM AS A THRESHOLD ISSUE

Livestock agriculture sectors in the United States, including beef, witnessed rapid concentration over the last 50 years. In 1975, four firms slaughtered 28% of steers and heifers in the beef market.⁶² Based on 2016 data, four firms (Tyson, JBS, Cargill, and National Beef) now control 85% of steer and heifer slaughter.⁶³ The concentrated slaughter market limits buyer options for beef producers, often to a single regionally dominant firm, creating a monopsony.⁶⁴ As this paper argues, the resulting bottleneck constrains economic choice, which in turn exacerbates climate change and decreases the adaptive capacity of our national food system.

A. Agricultural Monopsony Exacerbates Climate Change

Agricultural markets dominated by a few powerful buyers predispose behavior that exacerbates climate change. Without competitors, a dominant firm can steer production.⁶⁵ If the dominant firm does not bear the environmental costs of production, the firm is able to extract “concessions from the farmer who has no one (outside of the farm ecology or farmworkers) to extract concessions from.”⁶⁶

The beef industry demonstrates this dynamic. Pre-1980, the meatpacking market was relatively decentralized.⁶⁷ Throughout the 1980s and 1990s, the buyer side of the beef market consolidated rapidly.⁶⁸ As the market concentrated, buyers started to gain decision-making power as the increasing

62. Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, ARK. L. NOTES, 35, 37 (2003).

63. Hendrickson et al., *supra* note 60, at 25.

64. PETER CARSTENSEN, THE PROSPECTS AND LIMITS OF ANTITRUST AND COMPETITIVE-MARKET STRATEGIES, FOOD AND THE MID-LEVEL FARM 227, 233 (Thomas A. Lyson et al. eds., 2008). A monopsony, also known as a buyer’s monopoly, is a market with only one buyer, or with a single buyer that dominates the market. See, e.g., *What is a Monopsony? Definition and Meaning*, MKT. BUS. NEWS, <https://marketbusinessnews.com/financial-glossary/monopsony-definition-meaning/> (last visited Feb. 23, 2022).

65. See e.g. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1286 (11th Cir. 2005) (Tyson uses market dominance to promote the production of high-yielding, not high-quality, cattle).

66. Hendrickson et al., *supra* note 60, at 30.

67. KENNETH H. MATHEWS, JR. ET AL., U.S. BEEF INDUSTRY: CATTLE CYCLES, PRICE SPREADS, AND PACKER CONCENTRATION i, 9 (Apr. 1999).

68. *Id.* at 10 (“The 1980s brought the term ‘merger mania’ to the beefpacking industry . . .”); see also JOEL L. GREENE, CONG. RSCH. SERV., R41673, USDA’S “GIPSA RULE” ON LIVESTOCK AND POULTRY MARKETING PRICES 3 (2016). (quoting “from 1986 to 2008, the fourth-firm share of slaughter increased from 55% to 79% cattle”).

use of marketing agreements began to replace the cash market.⁶⁹ These agreements were originally pioneered by cattle producers, who sought a more efficient alternative to the hassle of negotiation.⁷⁰ Also called captive supply agreements, marketing agreements allow the meatpacker to “capture” the product before it enters the cash market.⁷¹ Marketing agreements set the price on the previous week’s cash market average, replacing negotiation between buyer and seller.⁷² Many agreements allow the meatpacker to adjust the price post-slaughter, depending on quality and yield.⁷³ Marketing agreements, therefore, introduce substantial buyer power, enabling meatpackers to incentivize certain product qualities over others.⁷⁴ However, with high regional concentration and three major firms (Tyson, JBS, and Cargill) controlling 75% of the market,⁷⁵ the majority of producers have only one buyer option. The “incentive” is more akin to a direct command.

In *Pickett v. Tyson Fresh Meats*,⁷⁶ the Eleventh Circuit described this convenient feature of captive supply agreements as allowing Tyson to incentivize an increase in “the overall quality and yield of [the] cattle.”⁷⁷ The court seemed to suggest that Tyson would incentivize higher quality cattle through captive supply agreements. The “quality” Tyson prefers, however, may be counterintuitive. Tyson is one of the world’s largest meatpackers, securing a dominant position after its 2001 acquisition of IBP, another meatpacking company.⁷⁸ The multinational corporation is a volume dealer, processing 10 million cattle a year at the time of the *Pickett* lawsuit.⁷⁹ Tyson’s priority is to provide large volumes of cheap meat to its primary customer: supermarket chains.⁸⁰ To this end, Tyson prefers high-yield cattle of lesser quality.⁸¹ Thus, Tyson structures its marketing agreements to “encourage producers to raise high-yielding cattle, not high-quality cattle.”⁸²

69. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1275-76 (11th Cir. 2005).

70. *Id.* at 1275.

71. Elliott Dennis, *Captive Supply: Nature, Extent, and Market Trends*, UNIV. NEB.-LINCOLN, AGRIC. ECONS. EXTENSION: FARM & RANCH MGMT. (June 10, 2019), <https://farm.unl.edu/captive-supply-nature-extent-and-market-trends.pdf>; *see also* Saitone & Sexton, *supra* note 3, at 38.

72. *Pickett*, 420 F.3d at 1276.

73. *Id.* at 1276.

74. *Id.* at 1285.

75. Hendrickson et al., *supra* note 60, at 25.

76. *Pickett*, 420 F.3d at 1276.

77. *Id.* at 1285.

78. Hendrickson et al., *supra* note 60, at 25–26.

79. *Pickett*, 420 F.3d at 1276.

80. *Id.* at 1285.

81. *Id.* at 1286.

82. *Id.*

The most efficient method of producing large volumes of high-yield, low-quality beef is to move the animal from pasture to feedlot.⁸³

Tyson's dominance over the market does not stop at captive supply agreements. Farmers who opt out of marketing agreements and sell cattle on the cash market are not immune to Tyson's pressure. In *Pickett*, plaintiffs alleged Tyson used marketing agreements, coupled with its large market share, to manipulate prices on the cash market.⁸⁴ Due to Tyson's dominant position in the industry, the firm's withdrawal from the cash market "substantially decreased price pressure," causing prices to fall.⁸⁵ Tyson's marketing agreements benefit from low cash market prices because the marketing agreement prices are based on cash market averages.⁸⁶ Plaintiffs claimed that Tyson sought this outcome in violation of the Packers and Stockyards Act of 1921.⁸⁷ Tyson did not deny the behavior, but rather claimed it had adequate "competitive justifications."⁸⁸

The court ultimately ruled in favor of Tyson, and in doing so, glossed over the evident unequal market power in the beef industry. Through firm dominance and marketing agreements, Tyson can exert substantial influence over producers.⁸⁹ Even if farmers opt out of marketing agreements, they are forced to accept low prices on the cash market due to Tyson's influence on the market.⁹⁰ Depressed prices encourage farmers to cut costs and increase output to maintain profitability, incentivizing more efficient production.⁹¹ Switching to intensive agricultural operations and large feedlots becomes even more appealing as prices drop. In other words, unequal market power allows buyers to extract "concessions from the farmer, who has no one (outside of farm ecology or farmworkers) to extract concessions from."⁹²

As Tyson rose to dominance in the beef sector and captive supply agreements became prolific, the use of large and intensive feedlots also steadily increased in the 1980s and 1990s.⁹³ By 2011, 88% of fed cattle were

83. See, e.g., Jennifer M. Latzke, *Research Shows Amylase-enhanced Corn Hybrids Offer Cattle Feeding Efficiencies*, FARMPROGRESS (Nov. 3, 2021), <https://www.farmprogress.com/beef/feeding-high-octane-corn-can-put-feedlots-winners-circle>.

84. *Pickett*, 420 F.3d at 1277.

85. *Id.* at 1277.

86. *Id.*

87. *Id.*

88. *Id.* at 1278.

89. *Id.* at 1285.

90. *Id.* at 1277.

91. Dennis, *supra* note 71 ("Meatpacking is a margin business so per head operating costs drives profitability").

92. Hendrickson et al., *supra* note 60, at 30.

93. It is important to note that while the number of total feedlots has decreased since the 1980s, the overall capacity of feedlots has increased, as smaller feedlots (farmer-feeders) decline and the largest feedlots become more prolific. See, e.g., Bill Bullard, *Under Siege: The U.S. Live Cattle Industry*, 58 S.D. L. REV. 560, 564 (2013).

marketed by feedlots with capacity of over 1,000 cattle.⁹⁴ Within that category, 32% of all fed cattle came from feedlots holding 50,000 or more cattle.⁹⁵ As the high-capacity feedlots increase, the smallest category of feedlots (those with less than 1,000 head of cattle) are in rapid decline because even “small” feedlots cannot keep up with the demand of meatpackers.⁹⁶

As opposed to adaptive grazing management systems, feedlots prioritize economic efficiency without regard to ecosystem health or building soil organic carbon. Livestock confined to feedlots, also called animal feeding operations (AFOs), do not graze or forage, and live instead on exposed soil or inside buildings.⁹⁷ Exposed soil contributes significantly to atmospheric CO₂.⁹⁸ Feed for AFO-confined livestock must be grown elsewhere, and incurs the additional environmental costs of production and transportation.⁹⁹ Feed production accounts for about 45% of emissions from livestock agriculture.¹⁰⁰ On the other hand, high-quality forage in grazing systems have no transportation costs and contains higher levels of easily fermentable carbohydrates, leading to higher digestibility and lower methane outputs from cattle.¹⁰¹ The digestion process of ruminants, *enteric fermentation*, accounts for 39% of emissions from livestock,¹⁰² but can be significantly reduced through a diet of high-quality forage.¹⁰³ Further, manure storage accounts for 10% of livestock emissions.¹⁰⁴ Animal waste deposited on healthy pastures acts as a fertilizer and emits little or no methane.¹⁰⁵ On the other hand, cattle feedlots emit significant levels of methane, as well as

94. *Id.* at 564.

95. *Id.*

96. *Id.*

97. 40 C.F.R. § 122.23(b)(1) (2021) (An “animal feeding operation. . . means a lot or facility. . . where the following conditions are met: (i) Animals. . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.”).

98. Judith D. Schwartz, *Soil as Carbon Storehouse: New Weapon in Climate Fight?*, YALE ENV'T 360 (Mar. 4, 2014), https://e360.yale.edu/features/soil_as_carbon_storehouse_new_weapon_in_climate_fight (“when soil is exposed, it oxidizes, essentially burning the soil carbon”).

99. GLEAM 2.0-Assessment of Greenhouse Gas Emissions and Mitigation Potential, FOOD & AGRIC. ORG. UN, <http://www.fao.org/gleam/results/en/#c300947> (last visited Apr. 16, 2022).

100. Giampiero Grossi et al., *Livestock and Climate Change: Impact of Livestock on Climate Change and Mitigation Strategies*, 9 ANIMAL FRONTIERS 69, 71 (2019).

101. Md Najmul Haque, *Dietary Manipulation: a Sustainable Way to Mitigate Methane Emissions from Ruminants*, J. ANIMAL SCI. & TECH. (2018) at 3.

102. Grossi et al., *supra* note 100, at 69.

103. Haque, *supra* note 101, at 8.

104. Grossi et al., *supra* note 100, at 69.

105. *Id.* at 70.

nitrous oxide and ammonia.¹⁰⁶ Many confined animal feeding operations (CAFOs)¹⁰⁷ store waste in open “manure lagoons.”¹⁰⁸ Over the course of a year, manure lagoons on the largest hog CAFOs hold more than one and half times the amount of waste as the city of Philadelphia produces annually.¹⁰⁹ The waste from these facilities contains excessive nutrients, microbial pathogens, and pharmaceuticals—burdening neighboring communities and ecosystems.¹¹⁰

The environmental costs of these production methods are not incurred by the agribusinesses that encourage their use. For instance, the Clean Water Act (CWA) directs the Environmental Protection Agency (EPA) to regulate water quality impacts from CAFOs, explicitly listing CAFOs as *point sources* of pollution.¹¹¹ However, the industry has successfully evaded regulation since the CWA’s enactment in the 1970s, because applying to the CWA permitting system has thus far been voluntary for CAFO operators.¹¹² Instead, the public incurs the environmental costs of the widespread use of CAFOs.¹¹³ Unequal market power leads to farming techniques that benefit agribusinesses but impose environmental costs on the public and contribute significantly to climate change.

B. Agricultural Monopsony Decreases Adaptive Capacity

While the monopsony market structure encourages practices that exacerbate climate change, it also decreases the food system’s capacity to adapt. Market concentration has led to a bottleneck of food processing and distribution across sectors, meaning that entire supply chains rely on

106. Mei Bai et al., *A Snapshot of Greenhouse Gas Emissions from a Cattle Feedlot*, 44-6 J. ENV’T QUALITY 1974, at 1974-78 (Oct. 9, 2015).

107. 40 C.F.R. § 122.23(b)(2) (2021) (defining a CAFO as an AFO of certain size, as determined by the head count of specific livestock).

108. U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 1 (2008).

109. *Id.* at 5.

110. JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENVIRONMENTAL HEALTH PERSPECTIVES 308, 308-310 (2007).

111. 40 C.F.R. §122.23 (2021) (naming CAFOs as a point source of pollution subject to permitting requirements).

112. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960-01, 3008 (Jan. 12, 2021) (“[S]ince the inception of the NPDES permitting program in the 1970s, a relatively small number of larger CAFOs has actually sought permits.”); *Waterkeeper All. Inc., v. EPA*, 399 F.3d 486, 506 n.22 (2d Cir. 2005) (noting that “. . . Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process.”).

113. Doug Gurian-Sherman, *CAFOs Uncovered The Untold Costs of Confined Animal Feeding Operations*, UNION CONCERNED SCIENTISTS, (Apr. 2008), <https://www.ucsusa.org/sites/default/files/2019-10/cafos-uncovered-full-report.pdf>.

relatively few facilities.¹¹⁴ An unexpected interruption of one facility can lead to widespread supply chain disruption.¹¹⁵ The COVID-19 pandemic exemplified how the contemporary structure buckles under stress.¹¹⁶ With unexpected lockdowns, the so-called efficient system fell apart; without alternative channels of distribution, millions of gallons of milk were dumped, food rotted in fields, and livestock were euthanized.¹¹⁷ Meanwhile, food insecurity skyrocketed.¹¹⁸

Extreme weather events also strain supply chains. In the aftermath of Hurricane Katrina, disruptions of food supply chains led to panic and looting.¹¹⁹ A 2019 FEMA Supply Chain Resilience Guide exposed a large part of the problem: often “80 percent of key goods and services serving a densely populated area . . . depend on seven or fewer distribution centers.”¹²⁰ Bottlenecks of processing and distribution make the system increasingly fragile. The progression of climate change will impose increasing strain on supply chains, as the risk of a 1-in-100-year weather event gets progressively closer to a 1-in-30-year event.¹²¹

In the livestock sector, the processing bottleneck also constrains the viability of alternative systems. Currently, livestock farmers must go up against the “symbiotic vertical relationship between retail oligopoly¹²² and slaughterhouse oligopoly” to get products to the consumer.¹²³ As mentioned above, these oligopolies demand large volumes of cheaply produced meat,¹²⁴ and small and mid-sized regenerative farmers cannot compete with the industrial scale. In many instances, farmers elect large-scale production only because markets for smaller quantities of livestock are not available.¹²⁵ Regenerative agriculture and other alternatives to intensive livestock

114. CLAIRE KELLOWAY ET AL., BUILDING FOOD SYSTEMS RESILIENCY THROUGH DIFFERENT BUSINESS SCALES AND FORMS, OPEN MKTS. INST., 5 (2021), https://static1.squarespace.com/static/5e449c8e3ef68d752f3e70dc/t/60df0e09cc8302417c732010/1625230859521/USDA_SupplyChainsComment_LR_CK_JF.pdf.

115. *Id.* at 1.

116. Jennifer Clapp, *Spoiled Milk, Rotten Vegetables and a Very Broken Food System*, N.Y. TIMES, (May 8, 2020), <https://www.nytimes.com/2020/05/08/opinion/coronavirus-global-food-supply.html>.

117. *Id.*

118. DIANE WHITMORE SCHANZENBACH, FOOD RESEARCH & ACTION CENTER, NOT ENOUGH TO EAT: COVID-19 DEEPENS AMERICA’S HUNGER CRISIS (Sept. 2020), https://frac.org/wp-content/uploads/Not-Enough-to-Eat_Hunger-and-COVID.pdf.

119. Sid Mahanta, *A Year After Sandy, Food and Fuel Supplies are as Vulnerable as Ever*, REUTERS (Oct. 28, 2013), <https://www.reuters.com/article/idUS417782027820131028>.

120. U.S. DEP’T OF HOMELAND SEC., SUPPLY CHAIN RESILIENCE GUIDE 10 (April 2019), <https://www.fema.gov/sites/default/files/2020-07/supply-chain-resilience-guide.pdf>.

121. Tim Benton & Rob Bailey, *Extreme Weather and Food Shocks*, N.Y. TIMES (Sept. 8, 2015), <https://www.nytimes.com/2015/09/09/opinion/extreme-weather-and-food-shocks.html>.

122. *Oligopoly*, BLACK’S LAW DICTIONARY, Westlaw (11th ed. 2019).

123. Peter Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Policy*, 2000 WIS. L. REV. 531, 535 (2000).

124. CARSTENSEN, *supra* note 64, at 1286.

125. Hendrickson et al., *supra* note 60, at 6.

production depend on the availability of regional processing and distribution networks at a variety of scales.¹²⁶

Many regenerative livestock farmers cite the lack of scale-appropriate processing and distribution as their greatest barriers to the market.¹²⁷ Niko Horster of Vershire, Vermont, points to distribution cartels¹²⁸ as one of the most important challenges for farmers moving forward. “Cartels,” says Horster, “must be replaced by a local aggregation distribution scheme that farmers own.”¹²⁹ In a panel hosted by the Organic Consumer Association, the commonality between a poultry producer from Indiana, a Minnesotan bison producer, and an Iowan beef producer was the shared need for more scale-appropriate processing facilities.¹³⁰

Many advocate for the decentralization and diversification of food processing and distribution.¹³¹ Processing bottlenecks, advocates claim, should be replaced with a network of “small and midsize [facilities] that better fit the topography and climatic zones.”¹³² Roma’s Butchery in South Royalton, Vermont, is a hallmark example of a business tailored to the needs of a region. Roma’s opened in October of 2020 to accommodate the specific needs of livestock farmers in the area.¹³³ Liz Roma, owner and operator of Roma’s Butchery, opened the shop after years of struggling to maintain good land stewardship and profitability while also fitting into Vermont’s network of slaughterhouses.¹³⁴ The shop buys animals from local farmers, coordinates transportation for slaughter at local facilities, and then breaks down whole animals into cuts at the butcher shop.¹³⁵ Roma’s Butchery provides reliability for both farmers and processors, while delivering high-quality meat to consumers.¹³⁶

A network of small and midsize facilities tailored to local needs necessitates dispersed economic power and the producer autonomy of a competitive market. Instead, the decline of antitrust enforcement has resulted

126. Lauren Gwin & Arion Thiboumery, *Local Meat Processing: Business Strategies and Policy Angles*, 37 VT. L. REV. 987, 988(2013).

127. Jodi Helmer, *Covid-19 is Highlighting an Old Problem: The Lack of Meat Processing Plants*, FOODPRINT (July 13, 2020), <https://foodprint.org/blog/meat-processing-plants/> (last updated July 20, 2020).

128. A cartel is a group of independent entities that collude to reduce competition or fix prices. Cartel, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cartel> (last visited Feb. 21, 2022).

129. Interview with Nikko Horster, in South Royalton, Vt. (Sept. 18, 2020) (on file with author).

130. Organic Consumer Association, *Boycott Big Meat Panel*, YOUTUBE, <https://www.youtube.com/watch?v=JVWMewR83Kw>.

131. KENNETH A. DALHBERG, PURSUING LONG-TERM FOOD AND AGRICULTURAL SECURITY IN THE US, FOOD AND THE MID-LEVEL FARM 20 (Thomas A. Lyson et al. eds., 2008).

132. *Id.* at 21.

133. Liz Roma, Personal Interview (Sept. 10, 2021) (on file with author).

134. *Id.*

135. *Id.*

136. *Id.*

in unprecedented concentration in livestock industries.¹³⁷ While a competitive market will not guarantee the widespread adoption of regenerative agriculture, this paper contends that it is a necessary condition of its economic viability. The modern concentration of market power in a few firms is a relatively new, and by no means immutable, trait of the United States agricultural system.¹³⁸ Reforming antitrust enforcement is therefore the threshold issue for tackling climate change mitigation and adaptation in the agriculture sector.

III. THE LEGAL FRAMEWORK THAT ALLOWED MARKET CONCENTRATION

A broad agricultural antitrust law has been on the books since the 1920s.¹³⁹ After the law's initial success and an era of deconcentration, antitrust standards in the agricultural sector have been largely unenforced.¹⁴⁰ This is due in large part to the laissez-faire approach that has dominated both competition and food policy since the 1970s.¹⁴¹ The effects of contemporary competition policy are evident in court decisions like *Pickett*.¹⁴² The effects of concentrated political power that accompanies concentrated economic power are evident in the Obama Administration's failed attempt to reform antitrust in agriculture.¹⁴³

A. The Packers and Stockyards Act

The state of the meatpacking industry at the turn of the last century was sordid.¹⁴⁴ Transparency was low and a handful of firms controlled two production necessities: slaughterhouses and railroads.¹⁴⁵ Then in 1906, the Federal Meat Inspection Act (FMIA) established federal grading of meat, which leveled the playing field for new entrants to the market.¹⁴⁶ The Federal Trade Commission Act of 1914 established the Federal Trade Commission (FTC), whose first major target was the meatpacking industry.¹⁴⁷ The FTC's 1919 report found that five meatpacking companies had acquired a dominant market position and that "the producer of livestock [was] at the mercy of

137. MATHEWS ET AL., *supra* note 67, at 10.

138. KELLOWAY ET AL., *supra* note 114, at 20.

139. 7 U.S.C. § 181 (1921).

140. Carstensen, *supra* note 123, at 534.

141. *Id.* at 536-537.

142. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1272 (11th Cir. 2005).

143. CHRISTOPHER LEONARD, *THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA'S FOOD BUSINESS* 286 (2014).

144. Carstensen, *supra* note 123, at 534.

145. *Id.*

146. *Id.*

147. Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 453 (1999).

these five companies.”¹⁴⁸ The report established that the companies’ profitability and rise to power was owed less to their efficiency and more to their monopolistic control over distribution.¹⁴⁹

In 1921, the Packers and Stockyards Act (PSA) introduced strong protections against anticompetitive behavior.¹⁵⁰ Under the PSA, it is unlawful to “use any unfair, unjustly discriminatory, or deceptive practice or device,” or to “[e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce”¹⁵¹ The liberal text of the Act stands out among antitrust legislation, granting broader authority than the Sherman Act, Clayton Act, or Federal Trade Commission Act.¹⁵²

In the mid-1930s, the invention of refrigerated trucks meant that slaughterhouses no longer needed to be located on rail lines, encouraging further market entry.¹⁵³ The combination of this invention with the FMIA and PSA led to the “rapid deconcentration of meat packing” in the 1940s and 1950s.¹⁵⁴ This trend paralleled peak antitrust enforcement with the liberal Warren Court adopting strict rules on mergers and unfair competitive practices.¹⁵⁵

B. Coinciding Trends of Laissez-faire Food and Competition Policy

The cornerstone of American food policy is omnibus legislation that provides federal support to agriculture and nutrition assistance programs, known as the “farm bill.”¹⁵⁶ The first farm bill was enacted in 1933 in response to the twin disasters of the Great Depression and the Dust Bowl.¹⁵⁷ For the first few decades, the farm bill attempted to control production to stabilize prices. Policies included maximum acreage allotments and paying

148. Kelley, *supra* note 63, at 37 (quoting FTC, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT PACKING INDUSTRY 392 (1919)).

149. *Id.*

150. 7 U.S.C. § 181 (1921).

151. 7 U.S.C. § 192(a), (e) (1935).

152. Kelley, *supra* note 62, at 35-36.

153. Carstensen, *supra* note 123, at 534.

154. *Id.*

155. *See, e.g.,* Klor’s, Inc., v. Broadway-Hale Stores, Inc., et al., 359 U.S. 207 (1959); Brown Shoe Co. v. U.S., 370 U.S. 294 (1962); U.S. v. Phila. Nat’l Bank et al., 374 U.S. 321, 324 (1963); U.S. v. Sealy Inc., 388 U.S. 350 (1967).

156. RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., RS22131, WHAT IS THE FARM BILL? (2019).

157. Jonathan Coppess, *A Return to the Crossroad: Farming, Nutrient Loss, and Conservation*, 39 U.ARK. LITTLE ROCK L. REV. 351, 366 (2017).

farmers to take land out of production.¹⁵⁸ However, the 1970s marked a tectonic shift in federal food policy; the 1973 Farm Bill resoundingly encouraged production, rather than attempting to control it.¹⁵⁹

In 1971, President Nixon appointed Earl Butz as Secretary of Agriculture.¹⁶⁰ In 1972, the United States entered an unprecedented deal with the Soviet Union, where drought conditions had led to a shortage of wheat and feed grains.¹⁶¹ The United States agreed to lend the Soviet Union up to \$750 million to buy surplus United States grain in what resulted in the largest grain sale in United States history.¹⁶² Partially in response to the consequent export demand, the 1973 Farm Bill encouraged increased production through direct payments to farmers and deprioritized market intervention tactics aimed at controlling supply.¹⁶³ With the rise of the globalized economy and decline of the Soviet Union, “corporate size was equated with national economic survival.”¹⁶⁴ The Secretary of Agriculture’s message to the American farmer: “Get big or get out.”¹⁶⁵ Farmers across the nation responded—taking out loans to increase acreage and production.¹⁶⁶ Consequently, ownership of farms steadily concentrated into fewer hands.¹⁶⁷ Meanwhile, the laissez-faire approach to food policy coincided with a larger economic trend. Political support for “dispersed economic power as a social goal” was steadily declining, and the 1970s would usher in a new era of competition policy.¹⁶⁸

Antitrust suits were formerly evaluated on overall market structure, and the Warren Court intervened on mergers “whose effect ‘may be substantially to lessen competition, or to tend to create a monopoly . . . in any line of commerce in any section of the country.’”¹⁶⁹ The Chicago School’s approach urged courts to instead adopt an economic analysis into antitrust evaluations—specifically, to focus on consumer welfare through allocative efficiency.¹⁷⁰ Economist Aaron Director operationalized this approach, and

158. Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES MAG. (Apr. 9, 2004) <https://www.choicesmagazine.org/2004-4/policy/2004-4-09.htm>; See generally *Wickard v. Filburn*, 317 U.S. 111 (1942).

159. Jonathan Coppess, *A Brief Review of the Consequential Seventies*, FARMDOC DAILY (May 30, 2019), <https://farmdocdaily.illinois.edu/2019/05/a-brief-review-of-the-consequential-seventies.html>.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. CARSTENSEN, *supra* note 64, at 237.

165. Alana Semuels, *‘They’re Trying to Wipe us Off the Map.’ Small American Farmers are Nearing Extinction*, TIMES (Nov. 27, 2019), <https://time.com/5736789/small-american-farmers-debt-crisis-extinction/>.

166. Coppess, *supra* note 157, at 386.

167. Carstensen, *supra* note 123, at 534.

168. CARSTENSEN, *supra* note 64, at 237.

169. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 324 (1962) (quoting Section 7 of the Clayton Act).

170. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 719–720 (2017).

Judges Robert Bork and Richard Posner developed it further.¹⁷¹ Central to Chicago School's competition policy is the idea that unilateral economic behavior typically considered anticompetitive is actually motivated by a desire for efficiency, not monopolization.¹⁷² Higher efficiency would pass lower prices on to the consumer, and the market would correct against monopolization.¹⁷³ Therefore, courts should not intervene in seemingly anticompetitive unilateral action, so long as the action is in pursuit of efficiency.¹⁷⁴ By relying on the consumer welfare standard and the efficiency justification, the approach narrowed judicial intervention.¹⁷⁵

Non-interventionist competition policy took root in the courts in the late 1970s, and a focus on efficiency began to replace the focus on overall competition. In *Reiter v. Sonotone Corp.*, the Supreme Court adopted the efficiency-based consumer welfare standard, citing Robert Bork's suggestion that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"¹⁷⁶ The adoption of this standard, as Barak Orbach points out, "was done with no discussion and was erroneous."¹⁷⁷ Legislative history reveals instead that Congress enacted the Sherman Act to prevent significant concentration of power for fear of a "king" of production.¹⁷⁸

President Reagan's pro-monopoly agenda aligned well with the Chicago School's approach. In 1981, Reagan appointed "Chicago-oriented scholar" Bill Baxter to the Antitrust Division of the Justice Department.¹⁷⁹ The Department "veered away from interventionist stances"¹⁸⁰ and narrowed the scope of antitrust laws in adoption of efficiency considerations.¹⁸¹

In 1980, four meatpacking companies controlled 32% of the market.¹⁸² Throughout the '80s, companies like Tyson Foods rose to dominance with

171. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

172. *Id.* at 927.

173. *Id.* at 929.

174. *Id.* at 928.

175. Khan, *supra* note 170, at 719-720.

176. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

177. Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151, 2152 (2013); *see also* Lauck, *supra* note 147, at 460 (rejecting the notion that the Sherman Act supports a "singular pro-consumer agenda concerned with economic efficiency"); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 29 (1989) ("to posit that Congress' principal concern in enacting the Sherman Act was high consumer prices is to suggest that Congress was dealing with a problem that did not exist").

178. Carstensen, *supra* note 123, at 531.

179. John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 634 (2005) (describing Baxter as a "Chicago-oriented scholar").

180. Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 UNIV. CHI. L. REV., 1911, 1912 (2009).

181. Linda Khan, *Obama's Game of Chicken*, WASH. MONTHLY (Nov. 9, 2012), <https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/>.

182. *Id.*

“aggressive mergers and acquisitions” of competing firms.¹⁸³ In 1986, *Cargill v. Monfort* established the non-interventionist standard in the agricultural sector.¹⁸⁴ The Court’s holding limited a “competitor’s ability to challenge mergers” and led to rapid consolidation.¹⁸⁵ By 1990, four meatpacking companies controlled 72% of the market.¹⁸⁶ By the early 2000s, the meatpacking industry was more concentrated than it had been at the turn of the last century.¹⁸⁷

C. Practical Effects of the Efficiency Justification

In *Pickett v. Tyson Fresh Meats* mentioned above, the jury found that Tyson’s use of captive supply marketing agreements had an anticompetitive effect on the market for which Tyson lacked a legitimate justification.¹⁸⁸ The jury awarded \$1.28 billion in damages for the PSA violations.¹⁸⁹ However, the injured plaintiffs never reaped the reward.¹⁹⁰ The District Court for the Middle District of Alabama vacated the judgment, granting Tyson judgment as a matter of law.¹⁹¹ Judgment as a matter of law is granted only when a plaintiff “presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action.”¹⁹² The Eleventh Circuit affirmed the ruling, agreeing that no reasonable jury could have found a violation of the PSA.¹⁹³ Judge Carnes of the Eleventh Circuit held that “[i]f a packer’s course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition.”¹⁹⁴ The court did not explain how Tyson’s behavior aids competition, other than to say that marketing agreements allow Tyson itself to remain competitive with other meatpackers who employ similarly manipulative practices.¹⁹⁵ Instead, the court equated competition to efficiency and continued the analysis from there. Because Tyson supplied several efficiency justifications for intentionally manipulating prices, the court found that Tyson did not adversely affect competition or violate the PSA.¹⁹⁶ In its analysis, the Eleventh Circuit followed in the Supreme Court’s

183. Hendrickson et al., *supra* note 60, at 25.

184. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986).

185. Khan, *supra* note 181.

186. *Id.*

187. Kelley, *supra* note 62, at 37.

188. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1277 (11th Cir. 2005).

189. *Id.* at 1278.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1280.

194. *Id.*

195. *Id.*

196. *Id.* at 1286.

direction from *Reiter* and erroneously claimed that the PSA was designed to promote efficiency.¹⁹⁷ The PSA was enacted in 1921, whereas the efficiency justification was not adopted until the late 1970s. The Act was not designed to promote efficiency but, as the court admitted later in the opinion, to “prevent unfair practices, price fixing and manipulation, and monopolization.”¹⁹⁸ As demonstrated by *Pickett*’s vacated judgment, the efficiency justification leaves the PSA toothless and injured plaintiffs with no relief.¹⁹⁹

Before the Chicago School’s approach, courts enforced antitrust laws to preserve competitive market structures.²⁰⁰ This included rulings that some scholars consider to be economically indefensible, which served as “low-hanging fruit” for the Chicago School to promote an alternative policy.²⁰¹ The Chicago School’s approach introduced economics into antitrust analysis, promising the use of “economics to analyze business conduct in an effort to maximize social welfare.”²⁰² However, several core assumptions of the theory have proven faulty. One of the most perilous of the Chicago School’s assumptions is that the market will correct against monopolization.²⁰³ The core members of the Chicago School assumed cartels were naturally unstable, that there were few barriers to market entry, and that monopolization would attract disruptive entry.²⁰⁴ Further, proponents of Chicago School’s theories view vertical integration and contracting as “unmitigated goods,” and the only consequence of mergers to be reduced costs.²⁰⁵ Based on these assumptions, the efficiency justification and decreased regulatory oversight are appropriate.

However, meat industry concentration data from the 1980s to the present prove that the market does not correct against monopolization.²⁰⁶ Without adequate antitrust enforcement, cartels have become prolific. The presence of cartels has established significant barriers to entry, many of which escape the Chicago School’s narrow definition.²⁰⁷ Further, mergers and vertical integration do not necessarily lead to greater efficiency and lower consumer

197. *Id.* at 1283.

198. *Id.* at 1287.

199. See also Griffin et al. v. Smithfield Foods, Inc., 183 F. Supp.2d 824, 830 (E.D. Va. 2002); London v. Fieldale Farms Corp., 410 F.3d 1295, 1305 (11th Cir. 2005) (holding that the defendant’s use of poultry contracts did not violate the Packers and Stockyards Act).

200. Khan, *supra* note 170, at 718.

201. Herbert Hovenkamp, *The Looming Crisis In Antitrust Economics*, B. U. L. Rev. 493-4 (2021).

202. Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1848 (2020).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1852 (“The economic literature has come down solidly against the key early assumption of the Chicago thinkers that markets will self-correct.”).

207. *Id.* at 1861 (comparing the Chicago School and Harvard School definitions of entry barriers).

prices.²⁰⁸ Often “size confers bargaining power even though it does not confer any meaningful productive efficiency.”²⁰⁹ Leonard Weiss found that concentration *raises* prices without significantly raising profits in a 1989 comparison of concentration and price across sectors.²¹⁰ By many estimates, the price gap between what consumers pay for beef and what cattle producers earn is widening dramatically as prices go up for consumers and down for producers.²¹¹ Consumer welfare, even when simplified to lower prices, is not enhanced by industry concentration.²¹² As demonstrated by *Pickett*, the efficiency justification does not impede price manipulation or exploitative conduct, but instead encourages courts to excuse otherwise illegal behavior. Because “concentrated market structures promote anticompetitive forms of conduct,” the efficiency justification frustrates the very purpose of antitrust law.²¹³

The persistence of the Chicago School’s approach, despite its faulty logical footing, can be attributed to the notion that where size confers bargaining power, it also confers political power. As firms like Tyson Foods rose to dominance in their respective sectors, a coherent political message rose as well—conservative institutions, funded by firms that profit from decreased regulation, have gone to great lengths to maintain the non-interventionist status quo.²¹⁴ On the other hand, adequate antitrust enforcement provides diffuse benefits to market participants, consumers, and as demonstrated in the case of agriculture, the environment, through maintaining competitive markets with dispersed economic power. As is often the case with diffuse public goods, there is “no equivalent financial incentive to fund interventionist policy.”²¹⁵ In this sense market concentration is self-reinforcing, as dominant firms have the means and motive for locking in ideologies that serve their interests. The Chicago School’s non-interventionist policy has become an “economically outdated but nevertheless powerful tool of regulatory capture.”²¹⁶ The implications of concentrated political power in a few agribusinesses are evident in the Obama Administration’s failed attempt to enforce the PSA.²¹⁷

208. *Id.*

209. CARSTENSEN, *supra* note 64, at 235.

210. Carstensen, *supra* note 123, at 536 (citing Leonard W. Weiss, CONCENTRATION AND PRICE (1989)).

211. See, e.g., Donnelle Eller, ‘We’re Fighting for a Way of Life’: Pandemic Causes Iowa Cattle Farmers to Lose Money While Consumers Pay More, DES MOINES REG. (Nov. 12, 2020), <https://www.desmoinesregister.com/story/money/business/2020/11/12/covid-19-exposes-dysfunction-cattle-industry-why-cattle-producers-losing-money-when-consumers-paying/6076820002/>.

212. Khan, *supra* note 170, at 739.

213. *Id.* at 718.

214. Hovenkamp & Scott Morton, *supra* note 202, at 1851.

215. *Id.* at 1852.

216. *Id.* at 1844.

217. LEONARD, *supra* note 143, at 286.

D. Reform in the Face of Unprecedented Political Power

The early years of the Obama Administration held great potential for agriculture's antitrust reform. Even before President Obama was inaugurated, the 2008 Farm Bill directed the Secretary of Agriculture to "promulgate specified regulations" under the PSA.²¹⁸ Then-Senator Barack Obama's campaign appealed to rural American voters on a platform of agricultural reform and secured substantial support from farmers and ranchers across the country.²¹⁹ One pillar of the campaign was the promise to finally implement the PSA.²²⁰ In 2010, the Department of Justice (DOJ) and the United States Department of Agriculture (USDA) co-hosted workshops across the country to involve farmers in the regulatory process.²²¹ Despite facing retaliatory action from their agribusiness contractors, many farmers attended the workshops and "farmer after farmer [told] the same story, basically pleading for help."²²² The same year, the Grain Inspection, Packers and Stockyards Administration (GIPSA) proposed regulations under the PSA to clarify ambiguous terms and prohibit retaliatory action against farmers.²²³ The proposed regulations were collectively known as the GIPSA rules.

The rules garnered bipartisan support from members of Congress, but meat industry interests were quick to push back.²²⁴ Between the nation's largest meat companies and allied trade groups like the National Cattleman's Beef Association and American Meat Institute, the meat industry has "one of the better-funded, better-coordinated lobbying machines in Washington."²²⁵ The trade groups and corporations together spent \$7.79 million lobbying in 2010.²²⁶ In one effort, the National Cattleman's Beef Association pressed members of Congress to oppose the rules, claiming they would cost the

218. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008).

219. *Real Leadership For Rural America*, OBAMA BIDEN CAMPAIGN, <https://sustainableagriculture.net/wp-content/uploads/2015/04/RuralPlanFactSheet-1.pdf> (last visited Feb. 23, 2022) [hereinafter OBAMA BIDEN Fact Sheet]; Howard Berkes, *Poll: McCain Lost Key Rural Support in Early October*, NAT'L PUB. RADIO (Oct. 23, 2008) <https://www.npr.org/templates/story/story.php?storyId=96008609>.

220. OBAMA BIDEN Fact Sheet, *supra* note 219.

221. *Public Workshops: Agriculture and Antitrust Enforcement Issues In Our 21st Century Economy*, DEP'T JUST., <https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10> (last updated June 29, 2020).

222. Khan, *supra* note 181.

223. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338 (proposed June 22, 2010).

224. Khan, *supra* note 181.

225. LEONARD, *supra* note 143, at 286.

226. *Id.* at 286.

United States economy \$14 billion and put 104,000 Americans out of work.²²⁷

Despite the momentum from the DOJ workshops, industry claimed victory in 2011. That year, House Appropriations Committee funding contained an appropriations rider. The “GIPSA rider” prohibited the USDA from defining competitive injury or likelihood of harm, and from finding (a) unjustified breach of contract, (b) retaliatory action, or (c) attempts to limit a producer’s rights without justification, as “unfair, unjustly discriminatory or deceptive.”²²⁸ The rider stopped reform dead in its tracks. It was included in appropriations bills for the next four years.²²⁹ The rider was not included in 2016, and on December 20 of that year, the outgoing Obama Administration proposed two amendments to the PSA and published a final interim rule.²³⁰ In September 2017, newly appointed Secretary of Agriculture Sonny Perdue “realigned” the USDA, moving Packers and Stockyards enforcement into the Agricultural Marketing Service (AMS).²³¹ The following month, the Trump Administration’s USDA withdrew the interim rule and announced it would take no further action on the two proposed rules.²³²

The Organization for Competitive Markets (OCM) sued the USDA in 2018, claiming their failure to comply with the 2008 Congressional directive “constitutes unlawful withholding of agency action” under the Administrative Procedure Act (APA).²³³ Despite the directive and deadline from Congress, the Eighth Circuit in *OCM v. USDA* held that the USDA did not violate the APA in failing to promulgate PSA regulations.²³⁴ The court pointed to the appropriations rider as “powerful if not conclusive evidence” that the USDA’s failure to promulgate regulations was not “agency action unlawfully withheld or unreasonably delayed.”²³⁵ However, following the trajectory of the DOJ workshops, initial bipartisan political support, and industry pressure, the appropriations rider is stronger evidence of agribusiness’s influence over agency decision-making.

227. Cindy Zimmerman, *New Study Shows GIPSA Rule Would Cost Jobs*, AGWIRED (Oct. 21, 2020), <https://agwired.com/2010/10/21/new-study-shows-gipsa-rule-would-cost-jobs/>.

228. AMERICAN FARM BUREAU FEDERATION [FB], GIPSA RULE – PACKERS AND STOCKYARDS ACT (Feb. 2019), <https://www.fb.org/files/GIPSA2019.pdf>.

229. *Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 461 (8th Cir. 2018).

230. Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 244 (Dec. 20, 2016) (interim final rule; request for comments).

231. *Secretary Perdue Announces USDA Improvements for Customer Service & Efficiency*, USDA (Sept. 7, 2017), <https://www.usda.gov/media/press-releases/2017/09/07/secretary-perdue-announces-usda-improvements-customer-service>.

232. *Org. for Competitive Mkts.*, 912 F.3d at 458.

233. *Id.* at 458.

234. *Id.* at 463.

235. *Id.*

In January of 2020, the AMS proposed new criteria to determine violations of the PSA.²³⁶ These criteria direct the Secretary of Agriculture to find undue or unreasonable preferences only where the action cannot be justified: (a) on the basis of a cost savings; (b) on the basis of meeting a competitor's prices; (c) on the basis of meeting other terms offered by a competitor; or (d) as a reasonable business decision that would be customary in the industry.²³⁷ According to OCM, the new criteria “do almost nothing to protect producers from harm,” and “clearly reveal Sonny Perdue’s unwillingness to address meatpacker abuses.”²³⁸ This is unsurprising, given AMS’s reputation for close ties to industry.²³⁹

The GIPSA rider and the enforcement policy under AMS are evidence of a federal agency preferring industry giants over independent farmers. This preference is a corollary of agency capture, which results from the unimpeded concentration of economic power.²⁴⁰ And yet, in *OCM v. USDA*, the court pointed to the GIPSA rider as a justification for lack of enforcement of the PSA.²⁴¹ So, with paradoxical logic, the court pointed to a symptom of the very harm the PSA was enacted to address to excuse lack of enforcement of the PSA.

IV. SOLUTIONS

The Biden Administration has committed to tackling climate change and promoting fair competition in the economy.²⁴² In the agricultural sector, these are synergistic goals. To tackle climate change in livestock agriculture, the Administration must first address market concentration. The last time livestock markets were relatively competitive, two major factors precipitated the era: lower barriers to entry (through the federal grading of meat and invention of refrigerated trucks) and antitrust legislation tailored to agriculture (the Packers and Stockyards Act).²⁴³ Replicating this trend, a dual approach should encourage market entry for regenerative agriculture and enforce antitrust law to ensure a competitive market.

236. Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 1771 (proposed Jan. 13, 2020) (to be codified at 9 C.F.R. pt. 201).

237. Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 1771 (proposed Jan. 13, 2020) (to be codified at 9 C.F.R. pt. 201).

238. Organization for Competitive Markets, *Captured: How Agribusiness Controls Regulatory Agencies and Harms Producers and Consumers* (Aug. 24, 2020), https://competitivemarkets.com/wp-content/uploads/2020/08/Regulatory-Capture-Paper_Final.pdf.

239. *Id.*

240. Hovenkamp & Scott Morton, *supra* note 202, at 1844.

241. *Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 463 (8th Cir. 2018).

242. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

243. Kelley, *supra* note 62, at 35.

A. Promoting Regenerative Agriculture

To promote regenerative agriculture, the social and environmental costs of intensive animal feeding operations should be internalized, while simultaneously, the viability of regenerative livestock operations should be bolstered.

In 2019, Caius Willingham of the Center for American Progress, and Andy Green, now serving as the Department of Agriculture Senior Advisor for Fair and Competitive Markets, put forth several policy recommendations in their report: *A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America*.²⁴⁴ One recommendation to balance the scales for farmers is to pass legislation that would ensure “processors are held jointly responsible for violations of public policy,” including environmental harms.²⁴⁵ Internalizing the environmental costs of CAFOs requires a multifaceted approach. The National Sustainable Agriculture Coalition (NSAC) recommends promulgating new National Pollutant Discharge Elimination System (NPDES) guidelines, disallowing CAFOs to self-certify—and largely avoid—regulation by the Clean Water Act.²⁴⁶ Not only do CAFOs skirt environmental regulations, in many instances, they also receive federal funding through conservation programs.²⁴⁷ The Environmental Quality Incentives Program (EQIP) is a voluntary conservation incentive program that encourages farmers to employ conservation measures on working lands.²⁴⁸ The 2002 Farm Bill opened the program to CAFOs for waste management,²⁴⁹ and 50% of EQIP funding is now allocated to livestock operations.²⁵⁰ Several states strongly prioritize CAFOs over other livestock operations, funneling public conservation money to these polluting entities.²⁵¹ In some cases, CAFOs would “not be economically feasible without [EQIP] subsidization.”²⁵² Loopholes that

244. Caius Z. Willingham & Andy Green, *A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America*, CTR. FOR AM. PROGRESS (May 7, 2019), <https://www.americanprogress.org/article/fair-deal-farmers/>.

245. *Id.*

246. NATIONAL SUSTAINABLE AGRICULTURE COALITION, PRESIDENTIAL TRANSITION BRIEFING PAPERS: FOOD & AGRICULTURE PRIORITIES FOR ADMINISTRATIVE ACTION 32 (2020), <https://sustainableagriculture.net/wp-content/uploads/2020/12/NSAC-Final-Transition-Team-Document-2020.pdf>.

247. *Id.*

248. *Env't Quality Incentives Program*, U.S. DEP. AGRIC. NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/> (last visited Apr. 16, 2022).

249. Gurian-Sherman, *supra* note 113, at 3.

250. *Action 10: Eliminating Waste-Management Subsidies CAFOs Receive Under EQIP*, JOHN HOPKINS CENTER FOR LIVABLE FUTURE (June 2020), <https://clf.jhsph.edu/sites/default/files/2020-06/apha-cafo-10.pdf>.

251. Gurian-Sherman, *supra* note 113, at 3.

252. *Id.*

allow CAFOs to benefit from federal conservation programs like EQIP should be closed.

As CAFOs begin to reflect their true cost, Congress should pass legislation that supports alternative forms of livestock agriculture. The Agricultural Resilience Act, introduced to the House in April 2021, would support regenerative farmers to achieve net-zero emissions from agriculture no later than 2040.²⁵³ Among other measures, the bill sets an ambitious goal of establishing “advanced grazing management, including management-intensive rotational grazing, on at least 50 percent of all grazing lands by not later than 2030 and 100 percent of all grazing land by not later than 2040.”²⁵⁴

Regenerative livestock agriculture should also be supported through the promotion of scale-appropriate processing facilities. In July 2021, the USDA announced it would invest \$500 million to expand “meat & poultry processing capacity as part of efforts to increase competition, level the playing field for family farmers and ranchers, and build a better food system.”²⁵⁵ Further, the Strengthening Local Processing Act, introduced to the Senate in February 2021, would support small and very small meat and poultry processing facilities through the establishment of grants and scale-appropriate Hazard Analysis and Critical Control Points (HACCP) guidance, among other measures.²⁵⁶ The Family Farm Action Alliance further advocates investing in regenerative practices through the Farm Credit Service (FCS), by requiring a “10% set aside of FCS profits to be re-lent to promote environmentally sustainable agriculture.”²⁵⁷ However, all efforts to bolster regenerative agriculture must coincide with antitrust reform.

B. Reforming Antitrust in Agriculture

Antitrust under the Chicago School approach has been ineffective at preventing industry concentration.²⁵⁸ Antitrust enforcement across sectors should abandon the efficiency justification of the consumer welfare standard,

253. H.R. 2803, 117th Cong. (1st Sess. 2021).

254. *Id.*

255. *USDA Announces \$500 Million for Expanded Meat & Poultry Processing Capacity as Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better System*, USDA (July 9, 2021), <https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing>.

256. S. 370, 117th Cong. (2021).

257. FAMILY FARM ACTION ALLIANCE, *USHERING IN A BETTER FUTURE FOR FARM AND AGRICULTURE: POLICY RECOMMENDATIONS TO THE 117TH CONGRESS* (2020), https://farmaction.us/wp-content/uploads/2021/01/Ushering-in-a-Better-Future_Policy-Recommendations_FINAL.pdf.

258. Leah Nysten, *Biden Launches Assault on Monopolies*, POLITICO (July 8, 2021), <https://www.politico.com/news/2021/07/08/biden-assault-monopolies-498876>.

and instead, prioritize maintaining fair competition and decentralized market structures.²⁵⁹

The Biden Administration has signaled a focus on fair competition with Executive Order 14036: Promoting Competition in the American Economy,²⁶⁰ and with several notable appointments. Lina Khan, who was appointed the Chair of the Federal Trade Commission in July, is a leading proponent of antitrust reform. Khan's breakthrough article, *Amazon's Antitrust Paradox*, argued that the consumer welfare standard is "unequipped to capture the architecture of market power in the modern economy."²⁶¹ Jonathan Kanter, a "leading advocate . . . [of] strong and meaningful antitrust enforcement and competition policy" now serves as the Assistant Attorney General for the Justice Department's Antitrust Division.²⁶² Tim Wu, Special Assistant to the President for Technology and Competition Policy, similarly advocates for the phasing out of the consumer welfare standard in favor of a *protection of competition* standard.²⁶³ Rohit Chopra, previously a commissioner at the FTC, now leads the Consumer Financial Protection Bureau (CFPB).²⁶⁴ In his time at the FTC, Commissioner Chopra has been an "outspoken consumer advocate,"²⁶⁵ pushing the FTC to employ all statutory authority to penalize unfair and deceptive practices.²⁶⁶

In the agriculture sector, antitrust reform has garnered some attention, but climate change initiatives have taken a different route. The Growing Climate Solutions Act (GCSA), for instance, would direct the USDA to facilitate farmer participation in private carbon offset markets.²⁶⁷ These markets have received overwhelming support from agriculture industry leaders, who see the markets as an additional revenue stream.²⁶⁸ However,

259. Carstensen, *supra* note 123, at 534.

260. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

261. Khan, *supra* note 170, at 710.

262. *President Biden Announces Assistant Attorney General for Antitrust*, WHITE HOUSE (July 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/20/president-biden-announces-jonathan-kanter-for-assistant-attorney-general-for-antitrust/>.

263. Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, COMPETITION POL'Y INT'L COL. PUB. L. RSCH PAPER NO. 14-608 (2018).

264. Martha C. White, *Biden's CFPB Nominee Rohit Chopra Brings 'Substantive' Regulatory Expertise*, NBC NEWS (Mar. 2, 2021), <https://www.nbcnews.com/business/business-news/biden-s-cfpb-nominee-rohit-chopra-brings-substantive-regulatory-expertise-n1259257>.

265. Theresa Y. Kananen & Edward A. Marshall, *A New Sheriff in Town: Former FTC Commissioner Rohit Chopra Chosen to Lead CFPB*, ARNALL, GOLDEN, GREGORY, LLP (Jan. 20, 2021), https://www.agg.com/news-insights/publications/a-new-sheriff-in-town-former-ftc-commissioner-rohit-chopra-chosen-to-lead-cfpb/?CID=mvbrief_mac.

266. Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. 71, 98-99 (2021).

267. S. 1251, 117th Cong. (2021).

268. *Growing Climate Solutions Act Supporters*, US SENATE COMM. AGRIC., NUTRITION, & FORESTRY, <https://www.agriculture.senate.gov/imo/media/doc/GCSA%20Supporters.pdf> (showing supporters such as the National Cattlemen's Beef Association, North American Meat Institute, and Tyson) (last visited Apr. 16, 2022).

the markets as currently designed do little to promote holistic regenerative agriculture and may even accelerate market concentration.²⁶⁹ Rather than support a carbon credit trading scheme, federal agriculture policy should focus on restoring competition.

Ostensibly, agriculture should be the most competitive industry in our economy. The PSA grants broad authority to the Secretary of Agriculture, granting “‘jurisdiction to deal with *every* unjust, unreasonable, or discriminatory regulation or practice’ involved in the marketing of livestock.”²⁷⁰ Partially due to decades of regulatory capture, the sector is instead dominated by a handful of firms.

In June of 2021, the USDA announced its intent to propose three rulemakings designed to promote enforcement of the PSA.²⁷¹ First, the USDA will propose a rule to clarify unfair and deceptive practices, undue preferences, and unjust prejudices.²⁷² A second proposed rule will address poultry grower tournament systems.²⁷³ Finally, the third proposed rule will “clarify that parties do not need to demonstrate harm to competition in order to bring an action under section 202(a) and 202(b)” of the PSA.²⁷⁴

The goals of the proposed rules closely resemble the 2010 GIPSA rules, and if they are finalized, would likely go a long way towards enforcing the PSA. However, the rules will face similar political peril as the 2010 GIPSA rules. Therefore, along with the promulgation of these rules, enforcement authority should be granted in an agency appropriately insulated from industry interests.

As mentioned above, former Secretary Sonny Perdue moved Packers and Stockyards enforcement to the Agricultural Marketing Service, an agency historically compromised by industry influence.²⁷⁵ Groups like the Organization for Competitive Markets advocate for moving that authority.²⁷⁶ The Biden Administration should vest PSA enforcement authority in a relatively impartial, independent agency.

Center for American Progress’s *A Fair Deal for Farmers* recommended creating an Independent Farmers Protection Bureau.²⁷⁷ The proposed Bureau would replicate the CFPB and be housed within the USDA. The Bureau’s

269. Claire Kelloway, *Private Carbon Programs Funnel Farm Data to Gig Ag.*, FOOD & POWER (Sept. 30, 2021), <https://www.foodandpower.net/latest/regen-connect-carbon-markets-big-data-9-21.pdf>.

270. Kelley, *supra* note 62, at 35.

271. U.S. DEP’T OF AGRIC., PRESS RELEASE NO. 0130.21, USDA TO BEGIN WORK TO STRENGTHEN ENFORCEMENT OF THE PACKERS AND STOCKYARDS ACT, <https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act.pdf>.

272. *Id.*

273. *Id.*

274. *Id.*

275. Organization for Competitive Markets, *supra* note 238.

276. *Id.*

277. Willingham & Green, *supra* note 244.

duties would be congruent with the DOJ and FTC, not preemptive. The Bureau would monitor agricultural markets,²⁷⁸ work to internalize environmental and social harms,²⁷⁹ and facilitate farmer organization.²⁸⁰ However, if the USDA houses the Bureau, there is a significant risk of agency capture.

The CFPB is an independent agency created after the 2008 financial crisis to protect consumers from predatory lending.²⁸¹ The CFPB has supervisory, enforcement, and rulemaking authority, to ensure “markets for consumer financial services and products are fair, transparent, and competitive.”²⁸² The CFPB is funded directly from the Federal Reserve, avoiding Congressional appropriation.²⁸³

Rather than create a new bureau within the USDA, Congress should vest the Packers and Stockyards Act’s enforcement authority directly in the existing CFPB. The CFPB’s central mission of ensuring fair, transparent, and competitive markets aligns well with the goal of protecting independent farmers.²⁸⁴ The newly expanded Consumer and Independent Farmer Protection Bureau (CIFPB) could protect independent farmers with direct funding from the Federal Reserve, avoiding future appropriations issues like the Obama-era GIPSA rider. The CIFPB’s enabling legislation must specify strict qualifications for independent farmers so that the protections are not co-opted to protect large firms posing as independent farmers.²⁸⁵ The enabling legislation should explicitly reject the Chicago School’s antitrust approach.²⁸⁶ With broader jurisdiction, the CIFPB could protect consumers

278. *Id.* (IFPB would oversee and certify spot markets, require processors to file pricing formulas for public availability, and investigate and ban exploitative contracts).

279. *Id.* (by “ensuring that processors are held jointly responsible for violations of public policy—such as environmental pollution, workplace safety, health and food safety standards”).

280. *Id.* (through organizing for collective bargaining, and establishing a Farmer Fair Share Boards, a complaint hotline, and regional offices in every major agricultural center).

281. Zixta Q Martinez, *Consumers Count: Five Years Standing Up for You*, CONSUMER FIN. PROT. BUREAU (Jul. 21, 2016), <https://www.consumerfinance.gov/about-us/blog/consumers-count-five-years-standing-you/>.

282. CHERYL R. COOPER & DAVID H. CARPENTER, CONG. RSCH. SERV., IF10031, INTRODUCTION TO FINANCIAL SERVICES: THE CONSUMER FINANCIAL PROTECTION BUREAU (2021).

283. The Trump Administration made several attempts to subject CFPB funding to Congressional review. In 2019, David Perdue (cousin of Sonny Perdue) introduced a bill to the Senate that would subject CFPB to the appropriations process. S.453, 116th Cong. (1st Sess. 2019).

284. *About Us*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/> (last visited Apr. 16, 2022).

285. Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. REV. 462, 462–64 (2013).

286. See Khan, *supra* note 181 (describing the effect the Chicago School antitrust approach has on small-scale farmers); Hovenkamp & Scott Morton, *supra* note 202, at 1848.

from predatory lending and exploitative markets, and protect independent farmers from similar harms.²⁸⁷

CONCLUSION

Competitive agricultural markets are a necessary condition of regenerative agriculture's economic viability. Regenerative agriculture requires adaptive management—incorporating knowledge of biological processes into decision-making. Buyer-side monopolies prevent adaptive livestock management, instead encouraging the use of animal feeding operations. Dispersed economic power would allow livestock farmers to adapt to biological and climatic pressures rather than employ a one-size-fits-all model to different ecosystems. Therefore, addressing concentration is a threshold issue to climate change mitigation and adaptation in agriculture. The road ahead will not be easy—power, once gained, is reluctantly surrendered. Nevertheless, the threats of ecosystem degradation and climate change require that we cross this threshold.

287. See, e.g., *Welcome to DATCP*, WIS. DEP'T AGRIC., TRADE, & CONSUMER PROT., <https://datcp.wi.gov/Pages/Homepage.aspx> (describing the DATCP's mission to “partner with all the citizens of Wisconsin to grow the economy by promoting quality food, healthy plants and animals, sound use of land and water resources, and fair marketplace.”).