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## Old MacDonald had a Trust: How Market Consolidation in the Agricultural Industry, Spurred on by a Lack of Antitrust Law Enforcement, is Destroying Small Agricultural Producers

Cody McCracken

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OLD MACDONALD HAD A TRUST: HOW  
MARKET CONSOLIDATION IN THE  
AGRICULTURAL INDUSTRY, SPURRED  
ON BY A LACK OF ANTITRUST LAW  
ENFORCEMENT, IS DESTROYING SMALL  
AGRICULTURAL PRODUCERS

CODY MCCRACKEN\*

*Farming is a profession of hope.*

—Brian Brett<sup>+</sup>

ABSTRACT

*The U.S. agricultural industry is controlled by a handful of large corporations. Unprecedented levels of market consolidation has created a power disparity, where controlling corporations alone shape markets, often to the disadvantage of small agricultural producers. A primary, and often overlooked, cause of this consolidation-driven bargaining disadvantage, and its resulting harm, can be found in the lacking enforcement of the nation's antitrust laws.*

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\* JD Candidate, 2022, William & Mary Law School. BS in Political Science, 2018, Montana State University–Billings. I would like to dedicate this Note to my mom, dad, and sister for their endless love and support. I would like to thank Mark Harshman, for the *Black's Law Dictionary* that propagated the high-level vocabulary contained in this Note, as well as Max, Ian, and Sophia for serving as a focus group for the ideas contained within. I would also like to acknowledge all of the amazing educators I have been fortunate enough to learn from in my life. To Alden McCracken, Rodney Stam, and all the bygone dirt farmers and stockmen, here's to you, and the idea that we can once again create a nation where the people who feed the world never have to worry about feeding their own families. In loving memory of Virginia McCracken, the world's greatest grandmother.

<sup>+</sup> BRIAN BRETT, *TRAUMA FARM: A REBEL HISTORY OF RURAL LIFE* 8 (2009).

*Faulty metrics and lax legal interpretations employed by regulatory agencies have permitted large corporations to grab control of nearly every sector of the industry. From the seeds farmers plant to the markets they sell their goods into; the American food chain is one of the most consolidated areas of the entire economy. This unfettered concentration has been disastrous for small producers, increasing their costs and suppressing their profits, all while consumer costs continue to rise. Overall, this Note will present that a lack of enforcement of antitrust laws is a leading contributor to increased market consolidation of the agricultural industry, wreaking havoc on small producers, consumers, rural communities, and as a result, the whole nation.*

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## INTRODUCTION

Wander out to the vast rural expanses that comprise a majority of the nation's geography,<sup>1</sup> down any country road, and you will bear witness to the monuments unintentionally erected to mark the degradation of a way of life.<sup>2</sup> A way of life that powered the birth and expansion of a nation and at one time was the economic, cultural, and societal heart of the country.<sup>3</sup> Across almost any farm or ranch, there lay remnants of agricultural producers past.<sup>4</sup> A handful of abandoned homesteads, deteriorating homes and barns, dotting each property.<sup>5</sup> To most, these crumbling structures are no more than a quaint sign of how folks lived way back when.<sup>6</sup> Yet with a closer look, these homesteads turn into a flashing warning sign, signaling the decades-long deterioration of rural America.<sup>7</sup> Say for example that a farm in eastern Montana has four former homesteads across the entire property. This indicates that at one time four separate families made a living off the same land just one family makes their living on today.<sup>8</sup> A casual observer may justifiably assume that producers today make four times the profits and live four times better than producers did decades ago. Yet there lies the issue: land that could at one time raise and

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<sup>1</sup> See *New Census Data Show Differences Between Urban and Rural Populations*, U.S. CENSUS BUREAU (Dec. 8, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-210.html> [<https://perma.cc/8WNW-B3CJ>].

<sup>2</sup> See Patricia Leigh Brown, *Ghost Houses Reflect Fading of Farm Life*, N.Y. TIMES (Apr. 2, 1992), <https://www.nytimes.com/1992/04/02/us/ghost-houses-reflect-fading-of-farm-life.html> [<https://perma.cc/8V83-DQGP>]; Kristin Scharkey, *Desert Homesteads Abandoned, Not Forgotten*, DESERT SUN (Oct. 28, 2016), <https://kristinscharkey.com/blog/2016/10/28/high-desert-homesteads-are-abandoned-but-not-forgotten> [<https://perma.cc/K5NQ-93HA>].

<sup>3</sup> See WILLARD WESLEY COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* 7–9 (1993).

<sup>4</sup> See Brown, *supra* note 2; Scharkey, *supra* note 2.

<sup>5</sup> See Brown, *supra* note 2; Scharkey, *supra* note 2.

<sup>6</sup> See Brown, *supra* note 2; Scharkey, *supra* note 2.

<sup>7</sup> See Eduardo Porter, *The Hard Truths of Trying to 'Save' the Rural Economy*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/interactive/2018/12/14/opinion/rural-america-trump-decline.html> [<https://perma.cc/4XUV-XRD7>].

<sup>8</sup> According to USDA data, the total number of farms in the United States has been on a continued decline from its peak of 6.8 million farms in 1935, to just over 2 million farms in 2019. *The Number of U.S. Farms Continues to Decline Slowly*, USDA (May 10, 2021), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58268> [<https://perma.cc/L58W-HAKN>].

support four or more families now can barely support one.<sup>9</sup> Family farmers and ranchers today are barely scraping by despite operating more land, producing more food, and doing so in a more efficient and effective manner than the producers that operated the same land before them.<sup>10</sup>

Agriculture has long been at the heart of this once primarily agrarian nation.<sup>11</sup> Still today, despite growing urbanization,<sup>12</sup> agriculture is a central industry.<sup>13</sup> With over 2 million farms and ranches,<sup>14</sup> operating nearly 900 million acres of land,<sup>15</sup> agriculture's impact extends far beyond the barnyard.<sup>16</sup> Agriculture and related industries contribute over 22 million jobs in the United States, \$1 trillion to gross domestic product (GDP)—a 5.4% share—and the output of America's farms and ranches contributed \$132.8 billion to the economy.<sup>17</sup> For small and large communities alike, the success or failure of local producers dictates the success of local businesses, industries, and schools, which dictates the survival of all towns and in the long run, the survival of the nation's economy.<sup>18</sup>

Despite agriculture's critical role, those who comprise the majority of agricultural production—small family producers—are in economically dire straits.<sup>19</sup> While today's producers raise more

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<sup>9</sup> Alana Semuels, "They're Trying to Wipe Us Off the Map." *Small American Farmers Are Nearing Extinction*, TIME (Nov. 27, 2019, 1:16 PM), <https://time.com/5736789/small-american-farmers-debt-crisis-extinction/> [<https://perma.cc/VA39-4MQS>].

<sup>10</sup> See *id.*; Evaggelos Vallianatos, *America: Becoming a Land Without Farmers*, INDEP. SCI. NEWS (Sept. 1, 2012), <https://www.independentsciencenews.org/environment/america-becoming-a-land-without-farmers/> [<https://perma.cc/RSJ2-MUZH>].

<sup>11</sup> See *Ag and Food Sectors and the Economy*, USDA (Dec. 16, 2020) [hereinafter *Ag and Food Sectors*], <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> [<https://perma.cc/CT2L-8WZL>]; see also COCHRANE, *supra* note 3, at 3–4, 7–9.

<sup>12</sup> U.S. DEP'T OF COM., UNITED STATES SUMMARY: 2010 POPULATION AND HOUSING UNIT COUNTS 537 (Sept. 2012).

<sup>13</sup> See *Ag and Food Sectors*, *supra* note 11.

<sup>14</sup> USDA, FARMS AND LAND IN FARMS: 2020 SUMMARY 4 (Feb. 2021) [hereinafter FARMS AND LAND IN FARMS].

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *Ag and Food Sectors*, *supra* note 11.

<sup>18</sup> See *id.*

<sup>19</sup> Around ninety percent of U.S. farms are small family operations. David Domina & Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. 62, 62–63 (2010); James McDonald

produce more efficiently than ever,<sup>20</sup> they have seen profit margins degrade, all while consumers pay more for produce and large agricultural corporations make record profits.<sup>21</sup> While the decline of rural America and small producers may lend itself to several issues (trade wars, climate change, technological advances, globalization, etc.), there stands one that is the most immense and imminent threat to small producers, their consumers, and the communities they live in.<sup>22</sup> This predominate threat is the pervasive market consolidation currently controlling nearly all sectors of the agricultural industry.<sup>23</sup>

Building for decades, unfettered consolidation has resulted in the U.S. agricultural economy being controlled by a handful of large international corporations.<sup>24</sup> From seed to storefront, every facet of the market is dominated by a few corporations with concentration in many sectors reaching levels unmatched by any point in history.<sup>25</sup>

This concentration puts market power in the hands of the big and the few, allowing them to control terms squarely in line with their interests.<sup>26</sup> This has resulted in increased costs and decreased income for producers, which, mixed with rising retail costs,<sup>27</sup> prevents producers from receiving an appropriate and necessary fraction of the retail food dollar.<sup>28</sup> In the 1950s, when a consumer purchased an agricultural product from the grocery store, about forty-one cents of every dollar spent went to the producer that grew it.<sup>29</sup> That share remained consistent into the

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& Robert Hoppe, *Large Family Farms Continue to Dominate U.S. Agricultural Production*, USDA (Mar. 6, 2017), <https://www.ers.usda.gov/amber-waves/2017/march/large-family-farms-continue-to-dominate-us-agricultural-production/> [<https://perma.cc/LSH9-T3UK>].

<sup>20</sup> See Semuels, *supra* note 9; Vallianatos, *supra* note 10.

<sup>21</sup> Claire Kelloway, *How to Close the Democrats' Rural Gap*, WASH. MONTHLY (Mar. 2019), <https://washingtonmonthly.com/magazine/january-february-march-2019/how-to-close-the-democrats-rural-gap/> [<https://perma.cc/27WR-QKG5>].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see Domina & Taylor, *supra* note 19, at 62, 74.

<sup>24</sup> See Domina & Taylor, *supra* note 19, at 62–63.

<sup>25</sup> See *id.*; Rebecca Bratspies, *Owning All the Seeds: Consolidation and Control in Agbiotech*, 47 ENV'T L. 583, 584–85 (2017).

<sup>26</sup> See Domina & Taylor, *supra* note 19, at 75.

<sup>27</sup> See *id.* at 62, 74.

<sup>28</sup> See *id.* at 64–65.

<sup>29</sup> See *id.* at 64.

1980s.<sup>30</sup> Yet today, producers receive less than fifteen cents on every dollar, even while raising the goods amounts to eighty percent of overall production costs, and consumer prices for goods continue to rise.<sup>31</sup> Where is the money going? Directly into the coffers of the companies that control agricultural markets.<sup>32</sup> This decrease in profit share mirrors the dramatic rise of consolidation.<sup>33</sup> Over the past few decades, as nearly every sector has seen rapid and widespread consolidation growth, these same sectors have increasingly produced adverse results for small producers.<sup>34</sup> This has put producers in a vice, squeezing them from both the input and output sides of their operations.<sup>35</sup> Every phase of an agriculture operation is made less profitable by consolidation.<sup>36</sup> This is true for nearly all producers, no matter what they raise.<sup>37</sup> While consolidation exists in many industries,<sup>38</sup> no other is being squeezed to such a degree as agriculture.<sup>39</sup> As a result, small

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<sup>30</sup> See Kelloway, *supra* note 21.

<sup>31</sup> Hannah Kass, *Breaking Up Big Ag Requires Reasonable Antitrust Enforcement*, REGUL. REV. (Dec. 26, 2019), <https://www.theregreview.org/2019/12/26/kass-breaking-up-big-ag-antitrust-enforcement/> [<https://perma.cc/7UNU-ZYGN>]; see Domina & Taylor, *supra* note 19, at 65.

<sup>32</sup> See Kelloway, *supra* note 21.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 455 (1999); Domina & Taylor, *supra* note 19, at 62.

<sup>36</sup> See Domina & Taylor, *supra* note 19, at 62, 74.

<sup>37</sup> See *id.* at 74; Dean Zimmerli, *Something Old, Something New: Relying on The Traditional Agricultural Cooperative to Help Farmers Solve the Power Imbalance in Modern Meatpacker Production Contracts*, 24 S.J. AGRIC. L. REV. 59, 74 (2015).

<sup>38</sup> While consolidation in technology sectors has recently drawn widespread ire, everything from eyeglasses to freight shipping has concerning degrees of consolidation. See David Tsui et al., *Regulators Lean in to U.S. Big Tech Firms*, S&P (Aug. 25, 2020), <https://www.spglobal.com/ratings/en/research/articles/200825-regulators-lean-in-to-u-s-big-tech-firms-11624217> [<https://perma.cc/N5X2-QXX4>]; David Lazarus, *How Badly are we Being Ripped off on Eyewear? Former Industry Execs Tell All*, L.A. TIMES (May 5, 2019, 5:00 AM), <https://www.latimes.com/business/lazarus/la-fi-lazarus-glasses-lenscrafters-luxottica-monopoly-20190305-story.html> [<https://perma.cc/7CUV-U2XQ>]; Jim Blaze, *Railroad Mega-mergers: To Be Feared, or a Path to Business Growth?*, RY. AGE (June 9, 2020), <https://www.railwayage.com/freight/class-i/railroad-mega-mergers-to-be-feared-or-a-path-to-business-growth/> [<https://perma.cc/2QFP-5BZG>].

<sup>39</sup> See Lauck, *supra* note 35, at 455; Domina & Taylor, *supra* note 19, at 64.

producers are worse off today than almost any point in American history and are left begging for a cure to the consolidation dominating their livelihoods.<sup>40</sup>

While there does exist a legislative foundation to combat consolidation and its anticompetitive effects—the Sherman Antitrust Act, Packers and Stockyard Act, and others—the mere existence of these laws has done little to dissuade this new wave of consolidation.<sup>41</sup> It is not a lack of legislation that is to fault.<sup>42</sup> This unperturbed consolidation, while bolstered by several factors, is brought on largely by a continual lack of enforcement of this nation’s antitrust laws on the part of the government agencies entrusted with their enforcement.<sup>43</sup>

While statutory gaps and changing judicial interpretations are often the focus of consolidation analysis, this Note will instead analyze how a lack of antitrust enforcement, through the implementation of lax agency interpretations and inaccurate metrics, has also helped pave the way for increased consolidation in all sectors of the industry.<sup>44</sup> This has been disastrous for small producers, leading to increased costs,<sup>45</sup> decreased profits, increased bankruptcies, and other severely detrimental effects.<sup>46</sup> Simultaneously this has failed to benefit consumers as retail produce costs continuously rise.<sup>47</sup> Overall, consumers are paying more while producers are making less, creating a pool of profits going entirely to the large corporations that have concentrated market power.<sup>48</sup>

Part I of this Note will supply necessary background information, presenting the nation’s legislative regime that governs modern market interactions.<sup>49</sup> Part II presents the increased consolidation permeating all areas of the industry.<sup>50</sup> Part III will introduce the principal argument of how, despite the existence of the laws presented in Part I, they are not being effectively enforced

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<sup>40</sup> See Kelloway, *supra* note 21.

<sup>41</sup> See Lauck, *supra* note 35, at 452–55.

<sup>42</sup> See *id.* at 455.

<sup>43</sup> See Kelloway, *supra* note 21.

<sup>44</sup> See Domina & Taylor, *supra* note 19, at 62.

<sup>45</sup> See *id.* at 64–65, 74.

<sup>46</sup> See Kelloway, *supra* note 21.

<sup>47</sup> See Domina & Taylor, *supra* note 19, at 65, 74; Kelloway, *supra* note 21.

<sup>48</sup> See Domina & Taylor, *supra* note 19, at 62–65; Kelloway, *supra* note 21.

<sup>49</sup> See *infra* Part I.

<sup>50</sup> See *infra* Part II.

which is a leading cause of consolidation.<sup>51</sup> This Part will also present possible solutions, and associated critiques.<sup>52</sup> Part IV will then show how the resulting consolidation has had a devastating impact on small producers, consumers, and their communities.<sup>53</sup> Finally, the Conclusion will reiterate these points and once again warn that without increased antitrust law enforcement, there will be no reduction in consolidation in the industry, extending its damaging effects on small producers, consumers, rural communities, and the nation as a whole.<sup>54</sup>

### I. BACKGROUND

Trusts, massive corporations that control large swaths of an industry, have held a dominant presence in the American economy for a majority of the nation's existence.<sup>55</sup> Agricultural producers in particular have been battling trusts since their prominent emergence in the post-Civil War American economy.<sup>56</sup> As the nation grew and industrialized at a blistering pace, tycoons such as Rockefeller, Carnegie, and Morgan, took advantage of the changing and unregulated world by grabbing complete control of critical sectors of the new economy.<sup>57</sup> These "robber barons" strong armed their way into controlling the nation's railroads, oil refineries, manufacturing plants, and more.<sup>58</sup> No industry was saved from this wave of monopolistic practices, chief among them agriculture.<sup>59</sup> In the late nineteenth century, the American Sugar Refining Company controlled eighty-five percent of the nation's sugar refining, while a group of Chicago meatpacking companies, known as the "Big Five," had a stranglehold on cattle markets.<sup>60</sup> These are only a few examples of the consolidation that controlled the industry in the late nineteenth and early twentieth century.<sup>61</sup>

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<sup>51</sup> See *infra* Part III.

<sup>52</sup> See *infra* Part III.

<sup>53</sup> See *infra* Part IV.

<sup>54</sup> See *infra* Conclusion.

<sup>55</sup> Lauck, *supra* note 35, at 450–51.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 450.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 450–51.

<sup>60</sup> *Id.* at 450–54.

<sup>61</sup> *Id.*

In response to this market dominance and similar corporate takeovers of economies around the world, a global movement grew for economic reform.<sup>62</sup> In Europe, this led to social and economic upheavals; in some cases, culminating in complete economic regime changes such as the Bolshevik revolution in modern day Russia.<sup>63</sup>

In the United States, this took shape in the Progressive Movement, whose economic message revolved around increased regulation and oversight of the large corporations dominating the economy, including overhauls of antitrust laws.<sup>64</sup> Small farmers and ranchers were some of the most vocal advocates in this movement, pushing for legislation to remedy growing concentration present throughout their industry.<sup>65</sup> This push eventually resulted in landmark pieces of legislation geared towards evening the playing field and protecting consumers.<sup>66</sup> Most prominent of which was the Sherman Antitrust Act of 1890.<sup>67</sup> This monumental piece of legislation broadly prohibited many of the anticompetitive practices that plagued the economy at the time such as anticompetitive agreements, price-fixing, and other unilateral conduct that monopolized markets.<sup>68</sup> The Act authorized the Department of Justice (DOJ) to bring criminal or civil action against violators.<sup>69</sup>

However, one act alone could not cure the ills afflicting the consolidated economy and antitrust remained a centerpiece of the Progressive Movement into the twentieth century.<sup>70</sup> In 1912, this brought a strengthening of antitrust laws, including the Federal Trade Commission Act.<sup>71</sup> This established the Federal Trade Commission (FTC) to help enforce antitrust laws, and the new agency

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<sup>62</sup> See *id.* at 451.

<sup>63</sup> See *id.*

<sup>64</sup> See Lauck, *supra* note 35, at 451–53; Laurie Ristino, *Back to the New: Millennials and the Sustainable Food Movement*, 15 VT. J. ENV'T L. 1, 5–6 (2013).

<sup>65</sup> See Lauck, *supra* note 35, at 453–55.

<sup>66</sup> *Id.* at 452–55.

<sup>67</sup> See *id.* at 452.

<sup>68</sup> See *id.* at 451–52; 15 U.S.C. §§ 1–7; see, e.g., *Richter Concrete Corp. v. Hilltop Basic Res., Inc.*, 547 F. Supp. 893, 917 (S.D. Ohio 1981). The purpose of the Act was not to protect competitors from harm from legitimately successful businesses, but to preserve a competitive marketplace to protect consumers from abuse. KATALIN JUDIT CSERES, *COMPETITION LAW AND CONSUMER PROTECTION* 291–93 (2005).

<sup>69</sup> 15 U.S.C. §§ 1–7.

<sup>70</sup> See Lauck, *supra* note 35, at 452.

<sup>71</sup> See *id.*

immediately undertook large-scale investigations of consolidated agricultural sectors.<sup>72</sup> Enacted the same year, the Clayton Act attempted to further curb concentration by limiting corporate mergers and increasing farmer bargaining power by exempting agricultural co-operatives from certain regulations.<sup>73</sup> Clayton additionally authorized private parties injured by prohibited anticompetitive conduct to bring suits for remedies such as treble damages.<sup>74</sup>

Another critical piece of legislation that specifically targeted consolidation in the meatpacking sector is the Packers and Stockyards Act (PSA).<sup>75</sup> Congress passed the PSA in response to a 1919 FTC investigation which found concentration and unfair monopolistic activities by the “Big Five” meatpacking companies.<sup>76</sup> The PSA further prohibited meat packers from engaging in the use of unfair, anticompetitive, or deceptive practices.<sup>77</sup> The language of the PSA makes clear that courts should give particularly close scrutiny to the marketing problems of agricultural producers.<sup>78</sup>

Despite this seemingly strong statutory footwork from which consolidation and its effects can be combatted, these efforts would not fully deliver the reforms producers had hoped.<sup>79</sup> While doing a great service at reducing consolidation and creating relatively fair markets for much of the 20th century, by the end of the century changing interpretations and enforcement practices would allow trusts to reemerge and retake control of agricultural markets.<sup>80</sup> Producers dedicated decades of resources and political capital

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<sup>72</sup> See *id.* at 452–53.

<sup>73</sup> See Lauck, *supra* note 35, at 452–53; Zimmerli, *supra* note 37, at 87.

<sup>74</sup> 15 U.S.C. § 15. Treble damages allow the plaintiff to pursue three times as much money in damages as the violation cost them. *Id.* While private parties are an often efficient body to bring antitrust claims, they are constrained to private remedies and cannot effectively regulate markets on their own. See Lauck, *supra* note 35, at 453–56. Active government regulation is necessary and is the focus of this Note.

<sup>75</sup> See Zimmerli, *supra* note 37, at 74–75.

<sup>76</sup> See *id.*

<sup>77</sup> 7 U.S.C.A. § 192(a), (g) (West 2005); see Lauck, *supra* note 35, at 489; Domina & Taylor, *supra* note 19, at 79–80. High levels of concentration are not per se violations of the PSA. Yet, high concentration levels indicate a high level of market power in a few firms and establishes that monitoring for anti-competitive behavior is warranted. See Lauck, *supra* note 35, at 489.

<sup>78</sup> See Lauck, *supra* note 35, at 489–90. Courts have generally done so, if given the chance. *Id.*

<sup>79</sup> See *id.* at 454–56.

<sup>80</sup> See *id.* at 455; Domina & Taylor, *supra* note 19, at 62.

pushing for increased regulation of trusts, understanding the risks consolidation meant for their pocketbooks, communities, and way of life.<sup>81</sup> Despite the legislative actions their perpetual push accomplished, many of the ills producers suffered in the late nineteenth and early twentieth century are once again being felt by those of the 21st century, if not in greater levels.<sup>82</sup> Foremost among these is the market consolidation, once triumphed upon, that has once again grown to retake control of American agriculture.<sup>83</sup>

Today, market consolidation dominates nearly every sector of the agribusiness industry at levels parallel to, and in some sectors exceeding, those of the late nineteenth and early twentieth century, when the progressive antitrust movement and the resulting legislation laid out above first came to form.<sup>84</sup>

## II. MODERN MARKET CONSOLIDATION

Agricultural production itself is one of the *least concentrated* areas of the entire economy.<sup>85</sup> Tens of thousands of farmers and ranchers operate mostly their own land with their own equipment to grow their own produce, which eventually finds its way into the homes and businesses of consumers around the world.<sup>86</sup> However, the market's producers rely on to grow and sell their goods are, in contrast, some of the most concentrated.<sup>87</sup> This puts producers in a bind as the inputs necessary for production must be obtained from oligopolistic suppliers, while their raw commodities must be sold in highly concentrated supply chains.<sup>88</sup> From the moment a producer purchases seeds and rides out on their tractor to plant them into the soil, to when they sell their produce to the grain bins,

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<sup>81</sup> See Lauck, *supra* note 35, at 450–53.

<sup>82</sup> See Domina & Taylor, *supra* note 19, at 62–64.

<sup>83</sup> See Lauck, *supra* note 35, at 454–55; Domina & Taylor, *supra* note 19, at 62–64.

<sup>84</sup> See Lauck, *supra* note 35, at 450–55; Domina & Taylor, *supra* note 19, at 62.

<sup>85</sup> 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, 348–49 (2014).

<sup>86</sup> FARMS AND LAND IN FARM, *supra* note 14, at 4; *Ag and Food Sectors*, *supra* note 11.

<sup>87</sup> See Domina & Taylor, *supra* note 19, at 62–63.

<sup>88</sup> Moss & Taylor, *supra* note 85, at 348–49; see Domina & Taylor, *supra* note 19, at 74.

stockyards, or other sale points; every product needed for each step of this process is dominated by a few massive firms.<sup>89</sup> This consolidation has not just reemerged over the past few decades, it has increasingly reached record highs.<sup>90</sup>

### *A. Input Side Consolidation*

Starting with concentration in the input markets where producers purchase the materials necessary to grow their produce.<sup>91</sup> Seeds, fertilizers, pesticides, farm equipment, and nearly every sector is plagued by consolidations.<sup>92</sup>

#### *1. Seeds, Fertilizers, Pesticides*

The levels of global concentration are highest in crop seeds, fertilizers, and pesticides.<sup>93</sup>

Until fairly recently, seeds were considered a common resource with thousands of small companies operating in the sector.<sup>94</sup> To reduce costs, farmers commonly employed practices such as saving seeds from past harvests to reuse in future plantings.<sup>95</sup> However, a few key legal changes marked the end of this era and set the stage for consolidation.<sup>96</sup> In 1980, the Supreme Court began allowing patenting of genetically engineered organisms.<sup>97</sup> A few years later, the U.S. Patent and Trademark Office extended intellectual property rights to plant varieties, giving patent holders the ability to curtail practices like saving seeds.<sup>98</sup> These developments unleashed a flood of new genetically engineered patented

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<sup>89</sup> See Moss & Taylor, *supra* note 85, at 348–49; Domina & Taylor, *supra* note 19, at 74.

<sup>90</sup> See Moss & Taylor, *supra* note 85, at 348–49; Domina & Taylor, *supra* note 19, at 62–63.

<sup>91</sup> See Moss & Taylor, *supra* note 85, at 341–42.

<sup>92</sup> See *id.*; Bratspies, *supra* note 25, at 584.

<sup>93</sup> See Moss & Taylor, *supra* note 85, at 341–42.

<sup>94</sup> Bratspies, *supra* note 25, at 589.

<sup>95</sup> See *id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Diamond v. Chakrabarty*, 447 U.S. 303, 310–11 (1980); see Bratspies, *supra* note 25, at 589–91.

<sup>98</sup> See Bratspies, *supra* note 25, at 589–90.

seeds.<sup>99</sup> Within a decade, fifty-two percent of corn, seventy-nine percent of cotton, and eighty-seven percent of soybean acreage in the United States was planted with patented seeds.<sup>100</sup> This allowed the handful of large corporations that held these patents to use this power to grab control of the sector, which along with a lack of antitrust enforcement quickly drove small suppliers out of business and led to increased consolidation.<sup>101</sup>

Seed markets today are now some of the least competitive.<sup>102</sup> In 1994, the top four seed companies controlled twenty-one percent of the global market.<sup>103</sup> By 2013, the top three controlled fifty-five percent.<sup>104</sup> Today, four firms own eighty-four percent of total market share.<sup>105</sup> In the United States, the share of seed sales controlled by these firms are ninety-one percent for cotton,<sup>106</sup> eighty-five percent for corn,<sup>107</sup> and seventy-six percent for soybeans.<sup>108</sup>

Since these same companies also control the markets for fertilizers and pesticides, similar concentration is present.<sup>109</sup> Between 1994 and 2009, four-firm concentration for agricultural chemicals increased by eighty-seven percent, from twenty-eight percent to fifty-three percent.<sup>110</sup> The markets for potash and phosphate fertilizers are tight oligopolies, with three firms accounting for the bulk of North American output.<sup>111</sup> The top four producers of nitrogen fertilizer controlled thirty-four percent of the market in 1977, but by 2015 their share had increased to more than sixty-seven percent.<sup>112</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 589.

<sup>101</sup> *See id.* at 584, 590–92.

<sup>102</sup> *Id.* at 588.

<sup>103</sup> KEITH O. FUGLIE ET AL., U.S. DEPT' OF AGRIC., ECONOMIC RESEARCH REPORT NO. 130: RESEARCH INVESTMENTS AND MARKET STRUCTURE IN THE FOOD PROCESSING, AGRICULTURAL INPUT, AND BIOFUEL INDUSTRIES WORLDWIDE 14 (2011).

<sup>104</sup> Kelloway, *supra* note 21; *see* Bratspies, *supra* note 25, at 584.

<sup>105</sup> *See* Kelloway, *supra* note 21; Kass, *supra* note 31.

<sup>106</sup> *See* Bratspies, *supra* note 25, at 587–88.

<sup>107</sup> Kass, *supra* note 31.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Moss & Taylor, *supra* note 85, at 341–42.

<sup>111</sup> *Id.*

<sup>112</sup> *See* Bratspies, *supra* note 25, at 587–88.

## 2. Farm Implements

Raising produce requires not only seeds, but also the large and technologically advanced equipment needed to plant, control, and harvest the produce.<sup>113</sup>

Today two companies, John Deere and CNH Industrial, hold the lion's share of manufacturing and sales of agricultural equipment.<sup>114</sup> In the mid-1900s, Deere's market share stood at 14.5%.<sup>115</sup> Today, Deere holds fifty-three percent of large farm tractors, followed by CNH at thirty-five percent.<sup>116</sup> Deere's lead is even more commanding in the combine segment, controlling sixty percent of the market, followed by CNH at thirty percent.<sup>117</sup>

While stark, one must consider an argument often used to justify this sector-specific consolidation. As the number of farms decreased and farmers were forced to operate more land, that decreased the number of implements sold.<sup>118</sup> Less farmers, less equipment, forcing smaller implement dealers out of business while the large must get larger to survive.<sup>119</sup> Nevertheless, this does not fully rationalize the need for so little competition.<sup>120</sup> Also, as seen later, consolidation in the implement sector is causing massive damage, despite controlling companies finding a more sympathetic rationale to justify their dominance.<sup>121</sup>

Overall, before a producer gets anywhere near realizing an income, they are already squeezed by a handful of corporations who

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<sup>113</sup> See Jennifer Reibel, *Manufacturer Consolidation Reshaping the Farm Equipment Marketplace*, FARM EQUIP. (Aug. 2, 2018), <https://www.farm-equipment.com/articles/15962-manufacturer-consolidation-reshaping-the-farm-equipment-marketplace> [https://perma.cc/U2S3-7MH3].

<sup>114</sup> Candice Y. Riviere et al., *Competition Concerns and Proposed Remedies for Agriculture Labor, Seeds, Farm Equipment, and Meat and Dairy Processor Consolidation* (Yale U. Thurman Arnold Project), Feb. 2021, at 20.

<sup>115</sup> Reibel, *supra* note 113.

<sup>116</sup> Thomas J. Horton & Dylan Kirchmeier, *John Deere's Attempted Monopolization of Equipment Repair, and the Digital Agricultural Data Market—Who Will Stand Up for American Farmers?* (2020 CPI Antitrust Chron.), Jan. 2020, at 2.

<sup>117</sup> *Id.*

<sup>118</sup> See Reibel, *supra* note 113.

<sup>119</sup> *Id.* This argument cannot be applied to other sectors, because while there may be fewer overall producers, they are still producing as much, if not more, goods than ever and require the same supply of input goods to do so.

<sup>120</sup> See *infra* Part IV.

<sup>121</sup> See Riviere et al., *supra* note 114, at 20; *infra* Part IV.

control how they purchase their seeds, equipment, and nearly every other sector of the input stage.<sup>122</sup>

### *B. Output Side Consolidation*

Consolidation examples are just as egregious on the output side.<sup>123</sup> When a producer sells their produce, they will again face a gauntlet of consolidated buyers shaping prices adverse for producers.<sup>124</sup>

#### *1. Livestock*

Some of the most shocking examples of consolidation come in the purchasing and processing of livestock produced by American ranchers (cattle, pigs, poultry, etc.).<sup>125</sup>

As discussed earlier, the dominance of the “Big Five” Chicago meat packers, who controlled roughly eighty percent of the cattle meatpacking industry in the early 1900s, was a driving force behind the push for aggressive antitrust laws and enforcement.<sup>126</sup> Following the passage of the PSA and other legislation, consolidation in the industry was alleviated for much of the remaining century.<sup>127</sup> In the 1970s, when consolidation was at its lowest,<sup>128</sup> the four largest meat packers slaughtered only about twenty-five percent of cattle.<sup>129</sup> Yet, over the intervening decades consolidation once again swept the industry and today four companies control eighty-five percent of the market.<sup>130</sup> The “Big Five” meat packers

<sup>122</sup> See Lauck, *supra* note 35, at 455; Domina & Taylor, *supra* note 19, at 64.

<sup>123</sup> See Domina & Taylor, *supra* note 19, at 62, 79–80.

<sup>124</sup> See *id.*

<sup>125</sup> See Zimmerli, *supra* note 37, at 63–64.

<sup>126</sup> See Lauck, *supra* note 35, at 455.

<sup>127</sup> See *Homegrown Stories: Gilles Stockton—Exposing Corporate Power in the Cattle Industry*, FARM AID (Jan. 15, 2020) [hereinafter *Homegrown Stories: Gilles Stockton*], <https://www.farmaid.org/blog/homegrown-stories-gilles-stockton-exposing-corporate-power-cattle-industry/> [https://perma.cc/FX2Z-R2YX]; Zimmerli, *supra* note 37, at 61–63. In 1921, resulting from the PSA, a consent-decree was implemented, requiring the large controlling packers to divest themselves of their market centers, stockyards, and monopoly of transportation. See *Homegrown Stories: Gilles Stockton*, *supra* note 127.

<sup>128</sup> See *Homegrown Stories: Gilles Stockton*, *supra* note 127.

<sup>129</sup> See Kelloway, *supra* note 21.

<sup>130</sup> See *id.*

of the early 1900s have now been supplanted by the big four, who control an even larger share of the industry.<sup>131</sup>

This dominance is present in all livestock industries.<sup>132</sup> The top four pork processors process eighty percent of the nation's hogs and control sixty-six percent of the market, up from thirty-seven percent in 1987.<sup>133</sup> In poultry, over sixty percent of the market is controlled by only four corporations, nearly doubling their market share since the 1970s.<sup>134</sup> These industries are also home to high levels of vertical integration, further expanding market control.<sup>135</sup> From cows to chickens, livestock processing is home to some of the most consolidated markets in the entire economy, and with it comes some of the most detrimental effects.<sup>136</sup>

## 2. Crop Processing

In the processing of grains, soybeans, and other crops, consolidation—while not as drastic as in livestock—is dominant and increasing.<sup>137</sup> In the milling of wheat flour, three firms account for over fifty percent of the market.<sup>138</sup> In soybeans, four companies process about eighty-five percent of the market, up from sixty-one percent thirty years ago.<sup>139</sup> For corn milling, the nation's most produced crop,<sup>140</sup> eighty percent of sales were attributed to the four largest firms.<sup>141</sup>

These consolidation metrics and their rates of increase are jarring.<sup>142</sup> Nearly every sector with which a producer interacts is

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<sup>131</sup> See Zimmerli, *supra* note 37, at 63.

<sup>132</sup> See *id.* at 62.

<sup>133</sup> See CLAIRE KELLOWAY & SARAH MILLER, OPEN MKTS. INST., FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM 4 (2019).

<sup>134</sup> Zimmerli, *supra* note 37, at 63–64.

<sup>135</sup> “Vertical integration” is the process whereby a company owns and controls nearly every stage of production. See *id.*

<sup>136</sup> See *id.* at 61–64.

<sup>137</sup> See Moss & Taylor, *supra* note 85, at 343.

<sup>138</sup> *Id.*

<sup>139</sup> See Kelloway, *supra* note 21.

<sup>140</sup> Tom Capehart & Susan Proper, *Corn is America's Largest Crop in 2019*, USDA (Aug. 01, 2019).

<sup>141</sup> Matthew Elliott, *Grain Merchant and Processor Consolidation, Concentration, and Competition*, SDSU EXTENSION (Dec. 19, 2018).

<sup>142</sup> See Domina & Taylor, *supra* note 19, at 64–65.

dominated by a few corporations.<sup>143</sup> However, these statistics do not tell the half of it. Several other factors must be considered to get the full picture of modern-day consolidation in the agricultural industry.<sup>144</sup>

### *C. Additional Factors*

These high levels of consolidation, while shocking, are exacerbated by a litany of factors, such as location.<sup>145</sup> Just because there is more than one provider or processor operating in the entire nation, does not mean every producer has access to more than one.<sup>146</sup> At the local level, producers may be limited to a single option for their input and output needs, giving already dominant businesses complete monopolies and leaving producers nowhere to go if treated unfairly.<sup>147</sup> This is worsened by the fact that many rural areas still lack access to reliable broadband internet access, cutting them off from global markets that could partially alleviate the burden of the more highly concentrated markets in their immediate areas.<sup>148</sup>

Equally troubling is the growing concentration in the retail segment, with eight firms controlling about fifty percent of the market.<sup>149</sup> Again, in regional markets, this concentration can often be even higher.<sup>150</sup> Growing concentration in the midstream and downstream segments of the supply chain exacerbates a lack of competition and bargaining power and its damaging effects.<sup>151</sup>

It is evident that consolidation in nearly every sector of agriculture is at levels unmatched from a historical perspective.<sup>152</sup> The controlling trusts of the early 1900s, whose market dominance spurred the creation of antitrust laws, have been supplanted by even more consolidated groups of companies that control a greater

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<sup>143</sup> See Moss & Taylor, *supra* note 85, at 343; Domina & Taylor, *supra* note 19, at 62–64.

<sup>144</sup> See Moss & Taylor, *supra* note 85, at 352.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*; Domina & Taylor, *supra* note 19, at 66–68.

<sup>147</sup> See Moss & Taylor, *supra* note 85, at 352–53; Kelloway, *supra* note 21.

<sup>148</sup> See Moss & Taylor, *supra* note 85, at 352–53; Kelloway, *supra* note 21.

<sup>149</sup> See Moss & Taylor, *supra* note 85, at 344.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See Domina & Taylor, *supra* note 19, at 62–64.

share of the markets than their Gilded Age predecessors.<sup>153</sup> The consolidation that has a stranglehold on the industry today does not merely match consolidation witnessed over a century ago but greatly eclipses it.<sup>154</sup>

This creates real concerns about the effects these mergers have on producers and consumers.<sup>155</sup> Among these concerns are the possibility of price increases and loss of choice, both for producers and consumers, leading to decreased profits for producers, which may have widespread effects on the nation.<sup>156</sup> As shown in Part IV, these concerns are very much being realized.<sup>157</sup>

What has led to this dramatic market domination? Part III will lay out the principal argument that, despite the statutory foundation for antitrust regulation, a lack of enforcement of these laws has allowed a handful of corporations to swallow up entire sectors of the industry.<sup>158</sup> Without remedy, the consolidation presented in this Part may grow even larger.<sup>159</sup>

### III. CAUSE OF CONSOLIDATION & SOLUTIONS

In witness of the legislative accomplishments the antitrust movement delivered,<sup>160</sup> it begs the question how the current level of consolidation has occurred.<sup>161</sup> How, even after the enactment of many laws focused on combating anticompetitive conduct, can market consolidation have worsened to the historical high where it stands today?<sup>162</sup> For decades these laws successfully alleviated consolidation in not just agriculture, but in most industries.<sup>163</sup> Overwhelming evidence indicates that this sudden failure to stop the unmitigated growth of consolidation can lend itself primarily to a change in policy—specifically, changes in implementation,

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<sup>153</sup> See Lauck, *supra* note 35, at 452–53.

<sup>154</sup> See Domina & Taylor, *supra* note 19, at 62–64.

<sup>155</sup> *Id.* at 64–65.

<sup>156</sup> See Bratspies, *supra* note 25, at 599.

<sup>157</sup> See *infra* Part IV.

<sup>158</sup> See *supra* Part I; Lauck, *supra* note 35, at 497–98.

<sup>159</sup> See Domina & Taylor, *supra* note 19, at 64.

<sup>160</sup> *Supra* Part I.

<sup>161</sup> *Supra* Part II.

<sup>162</sup> See Kelloway, *supra* note 21.

<sup>163</sup> See Lauck, *supra* note 35, at 497–98.

interpretation, and a drastic lack of enforcement of the nation's antitrust laws.<sup>164</sup>

Changes in judicial interpretations are often derided, and rightfully so, as a leading cause of lacking enforcement.<sup>165</sup> However, judicial interpretations are not alone in blame. Over the past few decades, the federal government has pulled the antitrust cops off the beat.<sup>166</sup> Regulators have permitted massive agribusinesses to merge and consolidate markets unchecked, despite the fact that laws were created explicitly to combat their anticompetitive behavior.<sup>167</sup> This often non-existent enforcement by federal agencies has exacerbated disparity in market power, allowing abusive treatment of producers to flourish and corporations to transform food systems.<sup>168</sup> How this has been permitted to continue comes down to how agencies such as the FTC and the DOJ have employed lax metrics and interpretations of antitrust statutes.<sup>169</sup>

In line with judicial changes, institutional interpretations of antitrust laws have become narrowly focused not on competition but on economic efficiency.<sup>170</sup> Mergers and various forms of exclusionary conduct are generally evaluated in the context of static effects on consumer surplus or total economic surplus.<sup>171</sup> The focus is therefore on anticompetitive output restrictions and supra-competitive prices as well as any cost-lowering effects of, or consumer benefits from, mergers or certain business practices.<sup>172</sup> Little else is typically considered.<sup>173</sup> This efficiency-focused analysis has been used by corporations and regulators to justify many of the mergers that have led to increased consolidation.<sup>174</sup>

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<sup>164</sup> See Kelloway, *supra* note 21.

<sup>165</sup> See Lauck, *supra* note 35, at 450.

<sup>166</sup> FOOD & WATER WATCH, WHY ANTITRUST LAWS MATTER FOR AGRICULTURE AND FOOD 1 (Mar. 2010); see *Homegrown Stories: Gilles Stockton*, *supra* note 127.

<sup>167</sup> See Moss & Taylor, *supra* note 85, at 358–59.

<sup>168</sup> See Kelloway, *supra* note 21; Kass, *supra* note 31; Moss & Taylor, *supra* note 85, at 339.

<sup>169</sup> See Kelloway, *supra* note 21; Moss & Taylor, *supra* note 85, at 358–59.

<sup>170</sup> See Moss & Taylor, *supra* note 85, at 358–59; Bratspies, *supra* note 25, at 608; Domina & Taylor, *supra* note 19, at 65–67.

<sup>171</sup> Moss & Taylor, *supra* note 85, at 358.

<sup>172</sup> *Id.* at 358–59.

<sup>173</sup> *Id.* at 359.

<sup>174</sup> See Bratspies, *supra* note 25, at 585–86.

This narrow focus on price and output may be adequate in the context of some industries.<sup>175</sup> But in agriculture, these analytics are insufficient and neglect to consider the abuses to which small producers are currently subjected.<sup>176</sup> These calculations also fail to include critical policy objectives such as produce quality, health and safety, stability of food chains, and environmental sustainability.<sup>177</sup> Consolidation has a detrimental impact on all these efforts, yet modern calculations fail to even consider them.<sup>178</sup> For example, supply chain fragility is a greater threat in sectors with high consolidation.<sup>179</sup> Supply chains featuring few competitors and high entry barriers are excessively exposed to the risk of disruption and collapse following any type of exogenous shock.<sup>180</sup> This was showcased in 2020 when, in the midst of the COVID-19 pandemic, a series of meatpacking facilities across the nation became infected, forcing them to cease operations.<sup>181</sup> While this hit a relatively small number of facilities,<sup>182</sup> due to massive consolidation in the sector,<sup>183</sup> a containable outbreak evolved into a major threat

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<sup>175</sup> Moss & Taylor, *supra* note 85, at 359.

<sup>176</sup> *Id.*

<sup>177</sup> See Bratspies, *supra* note 25, at 607–09; Moss & Taylor, *supra* note 85, at 359.

<sup>178</sup> See Moss & Taylor, *supra* note 85, at 357–59.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (“Shocks can range from input-market disruptions, to political events, weather, and quality control problems.”).

<sup>181</sup> See Michael Grabell & Bernice Yeung, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, PROPUBLICA (Aug. 20, 2020, 5:00 AM), <https://www.propublica.org/article/meatpacking-companies-dismissed-years-of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19> [https://perma.cc/N3QR-5QVS]; see also Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sep. 14, 2020, 2:43 PM), <https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open> [https://perma.cc/HF3K-BN8T].

<sup>182</sup> More than 100 meat processing plants have had COVID-19 outbreaks. Jacey Fortin, *After Meat Workers Die of Covid-19, Families Fight for Compensation*, N.Y. TIMES (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/business/coronavirus-meatpacking-plants-compensation.html> [https://perma.cc/X2WM-X27A]. There are over 7,000 meat and poultry processing plants in the United States, however a handful do a majority of the processing. See *The United States Meat Industry at a Glance*, NAMI, <https://www.meatinstitute.org/index.php?ht=d/sp/i/47465/pid/47465> [https://perma.cc/WRP9-NNPE].

<sup>183</sup> See Zimmerli, *supra* note 37, at 62–63. In the cattle industry, a little more than fifty plants are responsible for as much as ninety-eight percent of

to the entire American food chain.<sup>184</sup> When a single meatpacking plant in Sioux Falls, South Dakota processes five percent of all pork, a single closure causes widespread disruption.<sup>185</sup> This sent the livestock industry spiraling; spiking retail meat prices,<sup>186</sup> putting plant workers in the middle of pandemic hotspots,<sup>187</sup> and leaving ranchers stuck with no place to sell their livestock, forcing some to euthanize animals.<sup>188</sup> Further, even while meat prices spiked for consumers, prices for producers dropped.<sup>189</sup> While this

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slaughtering and processing in the United States. Michael Corkery & David Yaffe-Bellany, *The Food Chain's Weakest Link: Slaughterhouses*, N.Y. TIMES (Apr. 18, 2020). Bad hygiene practices and crowded working places also led these facilities to be particularly hard hit by viruses. See Polly Mosendz et al., *U.S. Meat Plants Are Deadly as Ever, With No Incentive to Change*, BLOOMBERG (June 18, 2020), <https://www.bloomberg.com/news/features/2020-06-18/how-meat-plants-were-allowed-to-become-coronavirus-hot-spots> [<https://perma.cc/BA8E-A2ZQ>].

<sup>184</sup> See Grabell & Yeung, *supra* note 181.

<sup>185</sup> Michael Pollan, *The Efficiency Curse*, WASH. POST (Feb. 5, 2021), <https://www.washingtonpost.com/outlook/2021/02/05/pandemic-food-resilience/> [<https://perma.cc/8PLE-UXHN>].

<sup>186</sup> John Waggoner, *Why the Coronavirus Outbreak Has Sent Food Prices Soaring*, AARP (July 24, 2020), <https://www.aarp.org/money/budgeting-saving/info-2020/food-prices-coronavirus-outbreak.html> [<https://perma.cc/AM3Y-TQKV>]; Kate Taylor, *Meat Costs are Soaring During the Pandemic, Skyrocketing in Grocery Stores and on Restaurant Menus*, BUS. INSIDER (June 9, 2020, 1:42 PM), <https://markets.businessinsider.com/news/stocks/meat-prices-rise-in-grocery-stores-and-restaurants-2020-6> [<https://perma.cc/8PLE-8RF9>].

<sup>187</sup> Over 50,000 meat plant workers have been infected by the COVID-19 virus, killing over 200. Kimberly Kindy, *More Than 200 Meat Plant Workers in the U.S. Have Died of Covid-19. Federal Regulators Just Issued Two Modest Fines*, WASH. POST (Sept. 13, 2020), [https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f\\_story.html](https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html) [<https://perma.cc/7A45-FC7V>]; Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD & ENV'T REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> [<https://perma.cc/3D5Q-N5LH>].

<sup>188</sup> See Jade Scipioni, *Fourth Generation Cattle Rancher: 'It's Just Become a Survival Game'*, CNBC (May 15, 2020, 10:12 AM), <https://www.cnbc.com/2020/05/15/fourth-generation-cattle-rancher-its-just-become-a-survival-game.html> [<https://perma.cc/UP7E-D46G>]. A few decades ago, if this same event were to occur, ranchers could take their livestock to the thousands of local meat plants that existed at the time. See, e.g., Zimmerli, *supra* note 37, at 62. However corporate control drove many of those small packers out of business. *Id.* at 62–63.

<sup>189</sup> Cattle prices dropped thirty percent to forty percent since the start of COVID-19 shutdowns in March 2020 to May 2020. Dan Nosowitz, *Why Are Beef Prices and Demand Up, But Cattle Prices Down?*, MOD. FARMER (Apr. 9, 2020),

was a clear threat to the American food system, modern interpretations do not incorporate the potential for such an event into their calculations.<sup>190</sup>

Further, the specific metrics employed by regulators fail to incorporate factors unique to agriculture.<sup>191</sup> A primary example is a major U.S. Government Accountability Office (GAO) report which regulating agencies have heavily adopted into their analyses.<sup>192</sup> This report greatly understates consolidation in agriculture by not considering important factors, such as the perishability of certain commodities that geographically restricts where they can feasibly be transported or sold.<sup>193</sup> The GAO overlooked the fact that perishability in captive draw areas means that producers in some regions have only one or two buyers, creating no real competition in their areas.<sup>194</sup> As stated earlier, due to many factors, concentration may be worse in some regions.<sup>195</sup> If the GAO would have considered this, it would have more than doubled the consolidation statistics upon which industry regulators rely.<sup>196</sup>

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<https://modernfarmer.com/2020/04/why-are-beef-prices-and-demand-up-but-cattle-prices-down/> [<https://perma.cc/EQA8-4T4E>]. In the same time span, the National Grocers Association found sales were up ninety-one percent and ground beef sales alone were up \$180 million from the same time in 2019. *Id.* This has caused some to suspect price-fixing. *Id.*; *Pandemic Results in Record Farm-to-Retail Price Spreads in Beef and Pork*, FARM BUREAU (Sept. 4, 2020), <https://www.fb.org/market-intel/pandemic-results-in-record-farm-to-retail-price-spreads-in-beef-and-pork> [<https://perma.cc/D3H5-FLCH>].

<sup>190</sup> See Bratspies, *supra* note 25, at 587–88. Antitrust analysis has focused primarily on attaining efficiency, which entails the relentless reduction of redundancy. *See id.* at 585. This has direct implications for consolidation in agricultural supply chains. *See id.* at 591. In determining whether a merger is likely to substantially lessen competition, antitrust enforcers may not consider its effect on exacerbating the fragility of a supply chain by eliminating the number and diversity of suppliers. Moss & Taylor, *supra* note 85, at 359; *see* Bratspies, *supra* note 25, at 587–89.

<sup>191</sup> *See* Moss & Taylor, *supra* note 85, at 338.

<sup>192</sup> *See* Domina & Taylor, *supra* note 19, at 65–66.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 65–67.

<sup>195</sup> *See* Moss & Taylor, *supra* note 85, at 352.

<sup>196</sup> *See id.* The GAO reported a Herfindahl-Hirschman Index (HHI) value of over 2,000. Domina & Taylor, *supra* note 19, at 65. However, this is in the broad sellers' market. *Id.* If the GAO had considered perishability, HHI on the buyer side of the market would have exceeded 5,000, greatly altering the analysis for regulators. *Id.* at 66.

The motives behind these lax interpretations and misaligned metrics cannot be fully known.<sup>197</sup> However, the complex impact of market power in agriculture is revealed in a number of ways, including noncompetitive prices, price discrimination, control of market entry, and control of innovation.<sup>198</sup> The economic power in agriculture has also translated to the use of intimidation, capture of regulatory agencies, and often successful attempts to influence legislation regulating agricultural trusts.<sup>199</sup> Large agribusinesses and agribusiness organizations wield considerable political power.<sup>200</sup> This influence has been used to change the rules of the game and obtain legislation and regulations that favor the big and powerful over smaller independent producers and consumers.<sup>201</sup> This further increases their profits, leading to more political capital, promulgating a cycle of influence that silences the concerns of average producers and consumers.<sup>202</sup>

While the cause and true motive behind this laissez faire approach is not clear, it is apparent it has allowed large corporations to grow and grab mightier shares of the industry with little push back from the regulators tasked with preventing such consolidation and harm.<sup>203</sup> Thankfully, there are a number of potential solutions that have been presented to retool interpretations and get regulators back to regulating and reducing the rampant consolidation completely controlling, and in many ways harming, the industry.<sup>204</sup>

#### A. Solutions

The clearest solution is for regulatory agencies to use their interpretation and execution discretion to take a more aggressive approach in fighting consolidation in agriculture.<sup>205</sup> Some suggest mergers should be halted absent a “clear showing” that the

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<sup>197</sup> See Moss & Taylor, *supra* note 85, at 356.

<sup>198</sup> See *id.* at 359; Bratspies, *supra* note 25, at 604–06.

<sup>199</sup> See Moss & Taylor, *supra* note 85, at 359.

<sup>200</sup> *Id.*

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *id.* at 356–59.

<sup>204</sup> See *id.* at 365–66.

<sup>205</sup> See Zimmerli, *supra* note 37, at 74–76.

merger is necessary to achieve a demonstrable gain in efficiency.<sup>206</sup> Others suggest regulators must consider additional anticompetitive factors when evaluating mergers in the industry, such as effects on producers, rather than simply looking at the artificial “efficiency” standards highlighted earlier.<sup>207</sup> While varied, these suggestions are all meaningful encapsulations of what must be adjusted in order to combat consolidation.<sup>208</sup> Overall, along with increased focus on agricultural trusts, regulators must employ analytical changes such as implementing more applicable metrics and considering the unique aspects of producing agricultural goods.<sup>209</sup>

A good place to start is to look at the analytics regulators employ to observe and understand consolidation.<sup>210</sup> As stated earlier, the measures upon which enforcement agencies rely fail to consider important metrics to truly present the concentration producers face, such as how concentration is often worse on local levels.<sup>211</sup> Statistics must be developed for these captive draw areas, reflecting time and distance constraints for marketing commodities, as well as the litany of other analytics unique to agriculture expressed above.<sup>212</sup> Employing arcane calculations of concentration causes regulators to lose sight of what should be the guiding question: whether a handful of corporations should be allowed to control global markets, often to the detriment of a majority of producers and consumers.<sup>213</sup>

A fundamental review of metrics used to study concentration, particularly in agricultural markets, is necessary.<sup>214</sup> Yet,

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<sup>206</sup> *See id.* at 75.

<sup>207</sup> *See id.*; Moss & Taylor, *supra* note 85, at 358–59; Bratspies, *supra* note 25, at 587–88, 608.

<sup>208</sup> *See* Domina & Taylor, *supra* note 19, at 74.

<sup>209</sup> *See id.*

<sup>210</sup> *See id.* at 65–68.

<sup>211</sup> *See id.* at 65.

<sup>212</sup> *Id.*

<sup>213</sup> Bratspies, *supra* note 25, at 587–88.

<sup>214</sup> Domina & Taylor, *supra* note 19, at 66. University of Wisconsin Antitrust Law Professor Peter Carstensen has called for new metrics to assess buyer power:

Enforcers need to develop a deeper understanding of the unique characteristics of the buying side of the marketplace. This calls for appropriate metrics. A mindless transposition of seller side criteria for market shares or competitive effects can result in a deeply flawed analysis of the buyer power implications of mergers.

*Id.* at 66–67.

evolved analytics is just one solution to the failing interpretations instituted by regulators.<sup>215</sup> Governmental agencies must also recognize complex and unique characteristics of each individual sector and resist employing one size fit all approaches.<sup>216</sup> For example, the way market power manifests in the poultry sector is considerably different than in the beef sector.<sup>217</sup> Therefore, a single metric or approach to competition analysis will be inadequate and fail many producers.<sup>218</sup>

Additionally, as mentioned earlier, the fragility of food chains, as showcased by separate meatpacking facility shutdowns caused by COVID and cyber-attacks, is a prevalent threat, yet for the most part is not considered by regulators.<sup>219</sup> Regulators must consider food chain stability, environmental effects, and other critical factors consolidation adversely impacts.<sup>220</sup> Also inherent in agriculture is a disparity in negotiating power from the very beginning, even without consolidation.<sup>221</sup> Farmers and ranchers have excess capacity and little ability to control or reduce capacity in the aggregate.<sup>222</sup> A rancher cannot let his ranch go ungrazed, and a farmer cannot ignore the need to farm their land for too long.<sup>223</sup> Yet, a food processor can allow plants to sit or run slowly in order to manipulate the cost of produce.<sup>224</sup> When processors have significantly more capacity to manipulate the flow of product than producers, they hold almost complete market power.<sup>225</sup>

Antitrust enforcement over the past few decades has failed to effectively consider these substantial structural imbalances as well as the exploitative and exclusionary conduct present in input and output markets producers face because of it.<sup>226</sup>

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<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at 71–73.

<sup>217</sup> *See id.*

<sup>218</sup> *See id.* at 67–68.

<sup>219</sup> Moss & Taylor, *supra* note 85, at 359; *see* Bratspies, *supra* note 25, at 587–89; *supra* notes 172–81 and accompanying text.

<sup>220</sup> Moss & Taylor, *supra* note 85, at 359.

<sup>221</sup> *See* Domina & Taylor, *supra* note 19, at 69.

<sup>222</sup> *Id.* at 67–68.

<sup>223</sup> *See id.* at 66–67.

<sup>224</sup> *See id.*

<sup>225</sup> *Id.* at 64.

<sup>226</sup> *Id.*

Beyond these analytical approaches, there is evidence that simply taking a more aggressive approach in investigating matters may partially remedy issues stemming from consolidation, such as depreciated prices for producers selling into consolidated sectors.<sup>227</sup> One study tested this by informing large cattle buyers they were under investigation for collaborating to depreciate prices.<sup>228</sup> Using a repeated cross-section of prices across procurement auctions that were and were not subjected to the “investigation,” the study found that prices in targeted auctions: “(i) significantly increased as soon as targets were made aware they were under investigation; (ii) remained higher as long as the investigation was open; and (iii) systematically declined to the same low pre-knowledge state after the closure of the investigation without prosecution.”<sup>229</sup> While this shows how investigations can entice parties to act fairly, it also proves that without a legitimate threat of prosecution, violative parties will revert back to their bad practices as soon as possible.<sup>230</sup>

Another interesting factor that is beginning to play out is how a changing executive branch may alter interpretation and execution of antitrust laws.<sup>231</sup> On January 20, 2021, Democrat Joe Biden was inaugurated President of the United States, replacing Republican President Donald Trump.<sup>232</sup> Biden’s policy proposals include strengthening enforcement of antitrust laws in order to allow producers “access to fair markets where they can compete and get fair prices for their products.”<sup>233</sup> Biden has also nominated a number of advocates of strong antitrust enforcement to prominent positions within the White House and regulatory agencies.<sup>234</sup> When the question of antitrust enforcement hinges

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<sup>227</sup> Kalyn Coatney & Jesse Tack, *The Impacts of an Antitrust Investigation: A Case Study in Agriculture*, 44 R. INDUS. ORG. 423, 436–40 (2014).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See *The Biden-Harris Plan to Build Back Better In Rural America*, JOE BIDEN [hereinafter *The Biden-Harris Plan*], <https://joebiden.com/rural-plan/> [<https://perma.cc/LZX4-TZNR>].

<sup>232</sup> Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/20/us/politics/biden-president.html> [<https://perma.cc/62JT-39UH>].

<sup>233</sup> *The Biden-Harris Plan*, *supra* note 231.

<sup>234</sup> Leah Nylen, *Biden Picks 2 Antitrust Crusaders. But His Biggest Choices Come Next*, POLITICO (Mar. 9, 2021, 7:47 PM), <https://www.politico.com/news>

on interpretations of law, simply changing who is doing the interpreting may be all that is needed to right the ship.<sup>235</sup> However, that raises the clear issue of what happens next time political seas change.<sup>236</sup> In order to ensure long-term relief from cartel abuse, concrete administrative changes to interpretation and implementation must be applied.<sup>237</sup>

While the path to stronger enforcement may take multiple routes, the overarching principle is straight forward: to ensure fair competition in the agricultural marketplace, it is imperative that federal regulators provide proper enforcement of antitrust laws.<sup>238</sup> Also clear is that the current approach employed by regulators does not fulfill the promise of the legislation they are entrusted with enforcing, as evidenced by the widespread consolidation presented in Part II.<sup>239</sup>

However, there is not a universal consensus that increased enforcement will remedy consolidation and there exists a fair share of critiques that must be confronted.<sup>240</sup>

### *B. Critiques*

The principal argument against increased antitrust law enforcement is that it would harm consumers by decreasing economic efficiency and increasing prices.<sup>241</sup> The argument goes that

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/2021/03/09/biden-antitrust-tech-ftc-474875 [https://perma.cc/BC85-2U6Y]; Margaret Harding McGill, *Strong Arm on Tech*, AXIOS (May 1, 2021), https://www.axios.com/biden-big-tech-critics-nominations-caee5dde-b1e9-4452-bf97-b67122f8e7f4.html [https://perma.cc/NS34-BHD2].

<sup>235</sup> Alan Rappeport & Michael Corkery, *Biden's Choice of Vilsack for U.S.D.A. Raises Fears for Small Farmers*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2020/12/21/us/politics/vilsack-usda-small-farmers.html [https://perma.cc/HPD3-5BN7]. However, Biden's nominee for Secretary of Agriculture, Tom Vilsack, previously served as USDA secretary under President Barack Obama, an administration that was not able to implement the long-term changes necessary to grant relief from consolidation, creating concern in some agricultural advocacy groups. *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See Zimmerli, *supra* note 37, at 75; Moss & Taylor, *supra* note 85, at 358–59; Bratspies, *supra* note 25, at 608.

<sup>239</sup> See *supra* Part II; Kass, *supra* note 31.

<sup>240</sup> See Zimmerli, *supra* note 37, at 75.

<sup>241</sup> See Moss & Taylor, *supra* note 85, at 358–59; Coatney & Tack, *supra* note 227, at 439; Bratspies, *supra* note 25, at 585–86.

by allowing one company to control an entire sector, they can more effectively bargain and create low prices and efficient markets.<sup>242</sup> Basically, consolidation is actually good for the whole.<sup>243</sup> However, this thinking is seriously flawed and outflanked by the damaging impact consolidation causes producers and consumers.<sup>244</sup> As presented later, even while producers receive less for their goods, consumers are paying more than ever.<sup>245</sup> The anti-consumer effects promoters of this defense warn of are already occurring under their control, and it is hard to see how the scene could become any more unfavorable for consumers.<sup>246</sup> The current inefficient state of play is one of depreciating prices for producers, while simultaneously rising prices for consumers, only benefitting those claiming the current system is the most effective.<sup>247</sup>

These same companies also erroneously claim that consolidation serves the public by promoting food security and environmental sustainability.<sup>248</sup> These claims similarly lack merit.<sup>249</sup> In reality, industrial agriculture stands as a cause of these problems, not a solution.<sup>250</sup> There is significant evidence that the industrial-scale monoculture these companies represent drives climate change rather than combats it and exists as an obstacle to food security rather than as an ally.<sup>251</sup> For example, the United Nations (UN) Conference on Trade and Development expressed concern that “concentration in agricultural biotechnology is giving the largest corporations unprecedented power vis-à-vis growers and other stakeholders” with “far-reaching implications for food security.”<sup>252</sup>

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<sup>242</sup> See Moss & Taylor, *supra* note 85, at 358–59; see also Bratspies, *supra* note 25, at 585–86.

<sup>243</sup> See Moss & Taylor, *supra* note 85, at 359–60.

<sup>244</sup> See *id.*

<sup>245</sup> Kelloway, *supra* note 21; see also *supra* Part IV.

<sup>246</sup> See Kelloway, *supra* note 21.

<sup>247</sup> See *id.*

<sup>248</sup> See Bratspies, *supra* note 25, at 585–86. For example, Bayer CEO Werner Bauman characterized his company’s proposed merger with Monsanto as “the kind of revolutionary approach to agriculture that will be necessary to sustainably feed the world.” *Id.* at 585. Similar sentiments are echoed throughout the industry. See *id.* at 585–86.

<sup>249</sup> See *id.*

<sup>250</sup> *Id.* at 586.

<sup>251</sup> *Id.*

<sup>252</sup> Bratspies, *supra* note 25, at 586; U.N. Conf. on Trade & Dev., *Tracking the Trend Towards Market Concentration: The Case of the Agricultural Input Industry*, Apr. 20, 2006, at iv, 1, <https://grain.org/en/article/2197-unctad-study-tracking>

The UN has also warned that advancements in technology and environmental sustainability corporations claim to have made have “had very limited impact so far.”<sup>253</sup> In the case of pesticides for example, some of the very products companies tout as solutions are, in reality, undermining environmental efforts.<sup>254</sup> Also, as presented, consolidation greatly weakens food chains.<sup>255</sup> While corporations push a narrative that they are securing food systems and fighting climate change by controlling whole markets, in reality they are driving the continuation of these global threats.<sup>256</sup>

Overall, while critiques offered by the corporations controlling agricultural markets may make basic sense, they are undermined by reality.<sup>257</sup> The evidence is clear: the current system of regulatory oversight has allowed a handful of massive international corporations to control entire industries.<sup>258</sup> As seen in the next Section, this is having a detrimental impact on producers, consumers, rural America, and the entire economy.<sup>259</sup>

### C. Other Solutions

In this analysis of how to combat consolidation plaguing agriculture, it is helpful to briefly touch on additional potential solutions.<sup>260</sup> These additional proposals can be grouped into two categories: statutory changes to strengthen trust regulation and increasing bargaining power of producers through “free-market” solutions such as strengthening co-operatives.<sup>261</sup>

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-the-trend-towards-market-concentration-the-case-of-the-agricultural-input-in-dustry [https://perma.cc/959H-8JR3].

<sup>253</sup> See Bratspies, *supra* note 25, at 586; HUGH TURAL ET AL., FOOD AND AGRIC. ORG. OF THE U.N., CLIMATE CHANGE, WATER, AND FOOD SECURITY xxiii (2011).

<sup>254</sup> See Bratspies, *supra* note 25, at 586. The UN’s Special Rapporteur on the Right to Food cautioned that the model of agriculture these companies represent “is highly problematic, not only because of damage inflicted by pesticides, but also their effects on climate change, loss of biodiversity and inability to ensure food sovereignty.” *Id.*

<sup>255</sup> Such as when COVID-19 shut down meat packers, which, due to few alternatives, threatened the entire food chain. See *supra* notes 172–81 and accompanying text.

<sup>256</sup> See Bratspies, *supra* note 25, at 586.

<sup>257</sup> See *id.* at 585–87.

<sup>258</sup> See Domina & Taylor, *supra* note 19, at 64.

<sup>259</sup> See *infra* Part IV.

<sup>260</sup> See *infra* Section III.C.1.

<sup>261</sup> See Zimmerli, *supra* note 37, at 73–74.

### 1. *Statutory Action*

To strengthen the foundation regulators use to patrol markets and reduce room for faulty interpretations, it would be helpful for Congress to pass amendments to current antitrust laws or new laws altogether to specifically target the issues plaguing agriculture.<sup>262</sup> The current antitrust statutes are for the most part short pieces of legislation.<sup>263</sup> This brevity leaves room for interpretations that can shift to reflect anticompetitive views.<sup>264</sup> More defined and clear statutory prescription could fill these gaps.<sup>265</sup>

One such proposal includes reinstating the Agricultural Adjustment Act,<sup>266</sup> a law that contained important policy for agrarian viability such as parity pricing, and price supports that cover producers' costs of production in setting commodity prices.<sup>267</sup> Reinstating this for agricultural goods would ensure consolidated agribusinesses are not able to fix prices below certain costs of production.<sup>268</sup>

Additional proposals include passing legislation requiring regulatory agencies to take antitrust enforcement action in any sector where the four biggest firms control more than fifty percent of market,<sup>269</sup> as well as passing amendments to the PSA making it easier for producers to file unfair practices claims and protections for reporters from retaliation.<sup>270</sup> Furthermore, regulating the use of production contracts and the ability of corporations to

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<sup>262</sup> See Kass, *supra* note 31.

<sup>263</sup> Section 1 of the Sherman Act, for example, is less than 100 words. 15 U.S.C. §§ 1–38.

<sup>264</sup> Andrea Agathoklis Murino & Brian N. Desmarais, Practice Note, *Antitrust Law Fundamentals*, 2021 LEXIS, available at <https://plus.lexis.com/api/permalink/10e049ad-08dc-4aaa-80f9-fd6a3ed20875/?context=1530671>.

<sup>265</sup> *Id.*

<sup>266</sup> See Kass, *supra* note 31. The policy lapsed in 1973 and has never returned as part of federal agricultural law. *Id.*

<sup>267</sup> See *id.*

<sup>268</sup> See *id.*

<sup>269</sup> See Kelloway, *supra* note 21. As has been presented, this would cover many crucial agricultural industries. *Id.*

<sup>270</sup> *Id.* In 2010, a number of small chicken producers who reported abuses to the USDA during public forums were retaliated against by the large chicken processing corporations they contracted with. Nathaniel Haas, *John Oliver vs. chicken*, POLITICO (June 1, 2015, 5:24 PM), <https://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510> [<https://perma.cc/C9PU-TT9L>].

leverage patent power to shore up market control would go a long way toward fixing specific faults that both drive and result from consolidation.<sup>271</sup> There is also recently introduced legislation which would increase funding to regulatory agencies, giving them greater capacity to take on some of the largest companies the world has ever known.<sup>272</sup>

These statutory changes could create a stronger toolbelt from which regulators could more aggressively approach antitrust enforcement.<sup>273</sup> While helpful, it would still be necessary to bring about the same changes of interpretations and analysis argued for throughout this Note.<sup>274</sup> Without that, any new legislation could similarly be interpreted to allow large corporations to consolidate the market.<sup>275</sup>

## 2. Reform Agricultural Co-ops

A more “free market” solution may be to empower and encourage agricultural co-operatives (“co-ops”), comprised of small producers, in order to shift bargaining power in their favor.<sup>276</sup> By forming co-ops, producers may be able to bargain more effectively with monopolistic companies.<sup>277</sup> The PSA and other antitrust

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<sup>271</sup> Riviere et al., *supra* note 114, at 18–19.

<sup>272</sup> Bill Baer, *How Senator Klobuchar’s Proposals Will Move the Antitrust Debate Forward*, BROOKINGS (Feb. 8, 2021), <https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward/> [<https://perma.cc/LK9E-S6RY>].

<sup>273</sup> See Riviere et al., *supra* note 114, at 24. Enacting these changes may also require a change in the composition of the legislative branch. Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN ST. L. REV. 1, 3 (Oct. 22, 2019). These policy proposals find bipartisan support amongst the electorate. *Id.* Yet, for the most part, Democratic politicians are leading the charge in Congress. *Id.* Democratic party leaders proposed “A Better Deal” document in 2017 that called for “cracking down on corporate monopolies.” *Id.* However, there are even some Republicans joining the choir, especially amongst the populist wing of the party. *Id.*; Kelloway, *supra* note 21.

<sup>274</sup> See Baer, *supra* note 272.

<sup>275</sup> *Id.*

<sup>276</sup> See Zimmerli, *supra* note 37, at 83.

<sup>277</sup> See *id.* at 80. However, over time some co-ops have become so big that they themselves have become abusive monopolies. See Kelloway, *supra* note 21. In the dairy industry, large co-ops such as the Dairy Farmers of America and Land O’Lakes swallowed up rivals, made deals with large firms, and earned record profits, all while their members suffered from record low prices and go

legislation exempt co-ops from certain trust restrictions on coordination and price setting in order to incentivize their formation and empower them to coordinate effectively.<sup>278</sup> In contrast to the dominant model of investor-owned business and its core ideal of shareholder wealth maximization that exacerbates destructive effects seen in the industry, co-ops can mitigate these effects by focusing on advancing the interests of small producers, consumers, workers, and overall a much wider swath of the citizenry.<sup>279</sup>

While this may be an ideal solution, in the current climate it appears impractical.<sup>280</sup> Co-ops are hard to form and organize.<sup>281</sup> More importantly though, the corporations currently controlling the industry are so big and the market is so concentrated that it may prove fruitless even if a very large co-op force could be formed.<sup>282</sup> In order for co-ops to gain a foothold, they need greater enforcement to reduce current levels of consolidation.<sup>283</sup> Once accomplished, strong and effective co-ops may be an ideal solution to ensure producers maintain a consistently strong bargaining position.<sup>284</sup>

Each of these potential solutions has merit, however they also have major flaws and still rely on support of regulatory agencies to fulfill their duties and enforce antitrust laws.<sup>285</sup> To fully ensure competition in the agricultural marketplace, it is imperative that regulators provide proper enforcement.<sup>286</sup> A lack of enforcement has resulted in increased consolidation and corporate agribusinesses holding a disproportionate share of market power in nearly every sector.<sup>287</sup> This has caused inexplicable harm to small

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out of business by the thousands. *Id.* To fix this, Congress could pass laws ensuring the governance of co-ops remains in the hands of members, and that no co-op becomes so big that it monopolizes local markets. *Id.*

<sup>278</sup> See Vaheesan & Schneider, *supra* note 273, at 1–2; Moss & Taylor, *supra* note 85, at 360.

<sup>279</sup> See Vaheesan & Schneider, *supra* note 273, at 1–2; Moss & Taylor, *supra* note 85, at 360; Zimmerli, *supra* note 37, at 83.

<sup>280</sup> See Vaheesan & Schneider, *supra* note 273, at 21.

<sup>281</sup> See *id.*

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

<sup>284</sup> See *id.*

<sup>285</sup> See Zimmerli, *supra* note 37, at 83.

<sup>286</sup> See Kass, *supra* note 31.

<sup>287</sup> See *supra* Part II; Kass, *supra* note 31.

producers while delivering little to no benefit to consumers.<sup>288</sup> Part IV of this Note will explore that damage and fully present how consolidation in the agricultural industry is harming producers, consumers, both rural and urban communities, and as a result, the entire economy.<sup>289</sup>

#### IV. IMPACT ON SMALL PRODUCERS

America's farmers and ranchers are familiar with hardships and the need to overcome them.<sup>290</sup> Inclement weather, trade deals, equipment failures, and many other problems routinely complicate agricultural production.<sup>291</sup> Yet, trade deals come and go, good and bad, same with the weather.<sup>292</sup> A drought may be followed by the perfect rain quantities or by a flood.<sup>293</sup> There is a certain amount of luck and uncertainty surrounding a producer's way of life, an accepted cost of business.<sup>294</sup>

However, one constant force which has impeded producers' ability to maintain consistent profits and preserve their way of life more than any other is the rampant market consolidation presented throughout this Note.<sup>295</sup> Part II presented the startling consolidation that has grabbed control of nearly every sector of the agricultural industry.<sup>296</sup>

Just as startling as this consolidation and the lack of enforcement that caused it is its devastating impact.<sup>297</sup> This Part will present that impact on producers, as well as on consumers and rural economies as a whole.<sup>298</sup> First, a look at the impact on small producers.

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<sup>288</sup> See Domina & Taylor, *supra* note 19, at 74.

<sup>289</sup> *Infra* Part IV.

<sup>290</sup> See Kelloway, *supra* note 21.

<sup>291</sup> See Semuels, *supra* note 9.

<sup>292</sup> See Kelloway, *supra* note 21.

<sup>293</sup> See Len Calderone, *Effects of Extreme Weather on Farming*, AGRITECH TOMORROW (Dec. 26, 2018, 5:32 AM), <https://www.agritechtomorrow.com/article/2018/06/top-article-for-2018-effects-of-extreme-weather-on-farming/10806> [<https://perma.cc/83RT-GLQH>].

<sup>294</sup> See Kelloway, *supra* note 21.

<sup>295</sup> See Domina & Taylor, *supra* note 19, at 72.

<sup>296</sup> *Supra* Part II.

<sup>297</sup> See Domina & Taylor, *supra* note 19, at 62.

<sup>298</sup> *Supra* Part IV.

### A. *Impact on Producers*

High concentration does not just impact a few aspects of a producer's operation; due to the universal nature of consolidation, the damage is equally universal.<sup>299</sup> Initial costs, sale prices, and everything in between, no aspect of a farmer or rancher's operation is left undamaged.<sup>300</sup>

Perhaps where this harm is most clearly seen is in increasing costs, paired with stagnant prices producers sell their goods for.<sup>301</sup> When competition is non-existent, leaving producers little choice on where to buy and sell, this naturally leads to prices damaging for their bottom lines.<sup>302</sup>

#### 1. *Input Costs*

Before a producer gets anywhere near receiving a paycheck, they must first pay startup expenses.<sup>303</sup> Seeds, fertilizers, and equipment are normally far from cheap investments.<sup>304</sup> Yet today, producers are seeing their input costs rise even higher.<sup>305</sup> When the giants controlling input markets face little pressure to compete, increases in concentration of input sectors results in shocking increases in input costs.<sup>306</sup> Many of these cost rises perfectly mirror the rise in consolidation.<sup>307</sup> Overall, American producers are paying over three times more for inputs today than they did in the 1990s,<sup>308</sup> a result of higher costs for nearly everything they need to grow their goods.<sup>309</sup>

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<sup>299</sup> See Kelloway, *supra* note 21; Bratspies, *supra* note 25, at 589–90; Domina & Taylor, *supra* note 19, at 84–86.

<sup>300</sup> Kelloway, *supra* note 21.

<sup>301</sup> Bratspies, *supra* note 25, at 599–600.

<sup>302</sup> Kelloway, *supra* note 21.

<sup>303</sup> See MARY AHEARN & DORIS NEWTON, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., ECONOMIC INFORMATION BULLETIN NO. 53: BEGINNING FARMERS AND RANCHERS 19 (2009).

<sup>304</sup> See *id.*

<sup>305</sup> See Bratspies, *supra* note 25, at 599–600.

<sup>306</sup> See *id.*

<sup>307</sup> See Bratspies, *supra* note 25, at 599–602; Domina & Taylor, *supra* note 19, at 62; *supra* Part II.

<sup>308</sup> See Kelloway, *supra* note 21.

<sup>309</sup> See *id.*

Starting with seeds, no matter what crop a farmer is setting out to grow, they will face prices past generations could not have imagined.<sup>310</sup> For example, farmers planting soybeans or corn in 2015 paid over 300% more for those seeds than they paid only two decades earlier.<sup>311</sup> For cotton seeds, farmers witnessed a 500% increase over the same period.<sup>312</sup> In recent years seed prices have increased around thirty percent annually, significantly higher than the rate of inflation.<sup>313</sup> These increases mean that purchasing seeds costs farmers over sixteen percent of their crop's ultimate sale price, twice the historic norm of four percent to eight percent.<sup>314</sup>

It is a similar story for fertilizers and pesticides, whose prices roughly tripled from 1990 to today, with the steepest increases coming after 2007.<sup>315</sup> The fertilizer market is dominated by several international companies and in 2013 the American Anti-trust Institute argued that price swings in these markets were due almost entirely to oligopolistic behavior.<sup>316</sup>

This damage has mostly been as a result of decreased choice due to increased consolidation.<sup>317</sup> Aside from directly eliminating competitors and local options, controlling corporations have implemented two other tactics to greatly limit choice and increase costs.<sup>318</sup> First, large amounts of research and development on the part of these corporations has focused on creating "platforms" of seeds and chemicals which, with the purchase of one product, contractually locks a producer into the entire platform of products.<sup>319</sup>

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<sup>310</sup> See Bratspies, *supra* note 25, at 599–601.

<sup>311</sup> See *id.* at 589–90; Kelloway, *supra* note 21.

<sup>312</sup> Philip H. Howard, *How Corporations Control our Seeds*, in BITE BACK: PEOPLE TAKING ON CORPORATE FOOD AND WINNING 15 (2020).

<sup>313</sup> Bratspies, *supra* note 25, at 600; Henry Bryant et al., *Effects of Proposed Mergers and Acquisitions Among Biotechnology Firms on Seed Prices*, 1, 27 (Tex. A&M U. Agric. Food & Pol'y Ctr., Working Paper No. 16-2, 2016).

<sup>314</sup> Bratspies, *supra* note 25, at 599.

<sup>315</sup> See Kelloway, *supra* note 21.

<sup>316</sup> *Id.*

<sup>317</sup> See Bratspies, *supra* note 25, at 601–04.

<sup>318</sup> See *id.* at 603.

<sup>319</sup> *Id.* Some critics further argue these platforms are engineered for the purpose of creating exclusive packages of traits, seeds, and agrichemicals that are less likely to interoperate with rival products. *Id.* at 604. This bundling practice may constitute illegal tying under § 2 of the Sherman Act and § 3 of the Clayton Act, however regulators have failed to investigate the practice. Riviere et al., *supra* note 114, at 6.

Companies also deploy a second tactic of using patent rights to obtain market dominance.<sup>320</sup> Under this system farmers do not purchase seeds outright, but are instead offered the opportunity to license seeds for a single growing season.<sup>321</sup> Among the license conditions are clauses barring seed saving and limiting warranties.<sup>322</sup> Further, as discussed in Part II, changes in patent law allowed corporations to flood the market with costly genetically engineered seeds.<sup>323</sup> While these seeds produce higher yields, that has not translated into benefits for producers.<sup>324</sup> These tactics have been highly profitable for the companies deploying them, but those profits come at the expense of greatly reduced choice.<sup>325</sup> This squeezes out competitors and creates enormous barriers to entry for new companies,<sup>326</sup> resulting in weaker restraints on price increases.<sup>327</sup> Meanwhile, in markets without significant consolidation, where smaller local companies retain market power, farmers have more options and lower costs.<sup>328</sup>

The equipment sector is also witnessing similar effects.<sup>329</sup> Tractors, combines, and other pieces of equipment are extraordinarily expensive investments, with newer models often costing more than a house.<sup>330</sup> While some of this rise can be attributed to technological advances,<sup>331</sup> an overall lack of competition is chiefly

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<sup>320</sup> See Bratspies, *supra* note 25, at 604–05.

<sup>321</sup> *Id.*

<sup>322</sup> See *id.*

<sup>323</sup> *Id.* at 603–05; see *supra* notes 91–94 and accompanying text.

<sup>324</sup> Frederico Ciliberto et al., *Valuing Product Innovation: Genetically Engineered Varieties in US Corn and Soybeans*, National Institute of Food and Agriculture, U.S. Dep't of Agric. Working Paper, Paper No. 17-WP 576, 2017), <https://www.card.iastate.edu/products/publications/pdf/17wp576.pdf> [<https://perma.cc/89RK-84MW>].

<sup>325</sup> See Kelloway, *supra* note 21.

<sup>326</sup> See Lauck, *supra* note 35, at 455; Domina & Taylor, *supra* note 19, at 64.

<sup>327</sup> See Lauck, *supra* note 35, at 455; Domina & Taylor, *supra* note 19, at 64.

<sup>328</sup> Bratspies, *supra* note 25, at 601.

<sup>329</sup> See Riviere et al., *supra* note 114, at 7–8.

<sup>330</sup> See Kim Schmidt, *What's Driving Consolidation Among Farm Equipment Dealers?*, FARM EQUIP. (Aug. 29, 2018), <https://www.farm-equipment.com/articles/15963-whats-driving-consolidation-among-farm-equipment-dealers> [<https://perma.cc/SKR5-WX95>].

<sup>331</sup> See Caleb Jacobs, *Farmers Are Buying Up Old Tractors Because New Ones Are Pointlessly Complicated and Expensive*, DRIVE (Jan. 9, 2020), <https://www.thedrive.com/news/31761/enormous-costs-of-new-tractors-drive-demand-of-40-year-old-equipment-to-all-time-highs> [<https://perma.cc/4SY2-JW2W>].

responsible.<sup>332</sup> With only two corporations controlling a major share of the industry, mirroring consolidation in other sectors, similarly raises the costs of implements.<sup>333</sup> Beyond initial cost, one of the most damaging effects is how manufacturers build equipment so producers are unable to repair them, forcing them to spend significant amounts of money having company dealers do necessary repairs.<sup>334</sup> As manufacturers pack more technology into today's tractors, they have also made it nearly impossible to repair that equipment by locking computer systems behind firewalls only dealers can unlock, using proprietary tools in assembly, and limiting the resale of spare parts.<sup>335</sup> This has forced some producers to go as far as paying top dollar for older equipment.<sup>336</sup> Overall, consolidation has led to higher costs, while causing equipment owners to be beholden to those same corporations for maintenance, which are also much more costly than under prior circumstances.<sup>337</sup>

All in all, with only a handful of massive corporations controlling nearly every sector of input markets, costs for products producers need to grow their goods have risen drastically.<sup>338</sup> Concentration has turned farmers from equal negotiating parties, into price takers with no ability to negotiate.<sup>339</sup> This has led producers to pay over three times more on inputs today than they did in the 1990s.<sup>340</sup>

One could make the argument that, while input costs may be up, advances in science and technology leading to higher yields and larger markets would similarly translate to increased sale prices and income.<sup>341</sup> However, reality shows the opposite.<sup>342</sup> The

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<sup>332</sup> See Schmidt, *supra* note 330.

<sup>333</sup> See Kelloway, *supra* note 21.

<sup>334</sup> See Jacobs, *supra* note 331. Transporting the equipment to a corporate dealer can cost thousands of dollars alone. See *id.*

<sup>335</sup> *Id.* This has spawned a movement for a specific legislative solution, commonly referred to as "right-to-repair," intended to allow consumers the ability to repair and modify their own implements. *Id.*

<sup>336</sup> See *id.* Rationale being that, although it may break down sooner, at least they will be able to fix that equipment on their own for much less than it would cost to maintain new equipment. See *id.*

<sup>337</sup> See Kelloway, *supra* note 21; Jacobs, *supra* note 331.

<sup>338</sup> See Domina & Taylor, *supra* note 19, at 62; Bratspies, *supra* note 25, at 587.

<sup>339</sup> See Domina & Taylor, *supra* note 19, at 71.

<sup>340</sup> See Kelloway, *supra* note 21.

<sup>341</sup> See Domina & Taylor, *supra* note 19, at 80.

<sup>342</sup> See *id.* at 63.

prices producers sell their goods for have stagnated, and in some cases decreased, over the past few decades.<sup>343</sup>

## 2. Sale Prices

As shown throughout this Note, the most alarming statistic evidencing the harms of consolidation is the dollar share producers receive from the purchase of their produce.<sup>344</sup> Today producers receive less than 15 cents of every dollar a consumer spends on their goods, a dramatic drop from where that number stood forty years ago, about forty cents per dollar.<sup>345</sup> After accounting for input costs, that drops to around eight cents in profit.<sup>346</sup> The hefty remainder is held by the controlling agribusinesses and retailers.<sup>347</sup> Even as monopolization means farmers pay more in inputs, it also means they receive less for their goods due to equal, if not worse, consolidation existent on the output side.<sup>348</sup> Elevators where a farmer sells their grain, meat packers where ranchers sell their cattle, and other points of sale are in the hands of a small and shrinking number of corporations.<sup>349</sup>

While the costs producers pay for seeds have gone up, the prices farmers receive for their crops have not kept pace, with the cost of seeds more than doubling relative to the price of harvested crops.<sup>350</sup> In 1973, the sale price for corn was \$3.30 a bushel;<sup>351</sup> today's average price is around \$3.10 a bushel.<sup>352</sup> In the same period, wheat prices have gone from around \$4.00 a bushel to only about \$6.00 a bushel in some regions.<sup>353</sup> At the nadir of the great

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<sup>343</sup> See *id.*

<sup>344</sup> Kass, *supra* note 31.

<sup>345</sup> See Domina & Taylor, *supra* note 19, at 64–65; Kelloway, *supra* note 21.

<sup>346</sup> *Fast Facts About Agriculture & Food*, FARM BUREAU, <https://www.fb.org/newsroom/fast-facts> [<https://perma.cc/VG6W-4A65>] (last visited on Jan. 4, 2022).

<sup>347</sup> See Kelloway, *supra* note 21.

<sup>348</sup> See Domina & Taylor, *supra* note 19, at 71.

<sup>349</sup> See Kelloway, *supra* note 21.

<sup>350</sup> See Bratspies, *supra* note 25, at 599–600.

<sup>351</sup> See Kelloway, *supra* note 21.

<sup>352</sup> Gary Schnitkey et al., *Expected Harvest Prices for Corn in 2020*, ILL. UNIV. DEPT. AGRIC. CONSUMER ECON. (June 16, 2020), <https://farmdocdaily.illinois.edu/2020/06/expected-harvest-prices-for-corn-in-2020.html> [<https://perma.cc/WZ4T-YZAG>].

<sup>353</sup> *Grain Markets*, N. AG NETWORK, <https://www.northernag.net/grain-markets/> [<https://perma.cc/GYR5-W82D>].

depression, wheat prices fell to around \$0.49 a bushel.<sup>354</sup> Adjusted for inflation that is about \$9.00 in today's money,<sup>355</sup> higher than even the best prices today.<sup>356</sup> In 1973, soybean prices topped \$11.00; today, they often sink below \$10.00.<sup>357</sup> The examples go on and on.<sup>358</sup> Nearly every crop is seeing the same trajectory in prices, as consolidation and input costs rise, and sales prices drop or stagnate.<sup>359</sup>

The scene is not much rosier for livestock.<sup>360</sup> In 2016, mega pork processor Smithfield bragged that its record profits were due to fourteen-year lows in prices paid to ranchers along with higher consumer prices for those same products.<sup>361</sup> At the same time, the Contract Poultry Growers Association claimed that its chicken farmers have not seen a base pay increase for the past twenty years.<sup>362</sup> In beef, which is less integrated than poultry or pork, one study estimated that meat packer control resulted in an average decrease in price of around \$69.00 per animal from what would be realized in more open markets.<sup>363</sup> Even when retail meat prices spiked during the COVID-19 pandemic, prices remained stagnant for producers with live cattle futures hitting eighteen-year lows.<sup>364</sup> In dairy, the prices farmers receive for their produce has dropped over forty percent since only 2014.<sup>365</sup>

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<sup>354</sup> U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, 122–23 (1960).

<sup>355</sup> *CPI Inflation Calculator*, BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/cpicalc.pl> [<https://perma.cc/7GR8-NXGL>].

<sup>356</sup> *U.S. Average Wheat Prices*, KAN. STATE UNIV. DEP'T AGRIC. ECON. (Sept. 10, 2021), <https://www.agmanager.info/grain-marketing/grain-supply-and-demand-wasde/us-average-wheat-price> [<https://perma.cc/QZ42-S7YW>].

<sup>357</sup> *Soybean Prices: 45 Year Historical Chart*, MACROTRENDS, <https://www.macrotrends.net/2531/soybean-prices-historical-chart-data#:~:text=The%20current%20price%20of%20soybeans,2020%20is%20%2410.7375%20per%20bushel> [<https://perma.cc/CZX5-GJL6>].

<sup>358</sup> See Bratspies, *supra* note 25, at 590–91.

<sup>359</sup> See *id.*

<sup>360</sup> See Zimmerli, *supra* note 37, at 60.

<sup>361</sup> Kelloway, *supra* note 21.

<sup>362</sup> *Id.*

<sup>363</sup> See Zimmerli, *supra* note 37, at 72.

<sup>364</sup> Roxana Hegeman, *11 attorneys general seek probe into meatpacking industry for price-fixing*, AP (May 6, 2020), <https://wset.com/news/nation-world/11-attorneys-general-seek-probe-into-meatpacking-industry-for-price-fixing> [<https://perma.cc/4MRS-HQW3>]; see Grabell & Yeung, *supra* note 181.

<sup>365</sup> Riviere et al., *supra* note 114, at 10.

Heavy concentration has led to depressed profits for livestock producers, just as in the crop industry.<sup>366</sup>

All told, key commodity prices have plummeted by about fifty percent since 2012 and producers today are receiving sale prices more on par with those of the 1970s than what should be expected of today.<sup>367</sup> This begs the question: how does it work to live and farm paying 2021 costs, while receiving 1970s prices?<sup>368</sup> It does not work.<sup>369</sup> This disparity in input and output prices is depreciating incomes and accelerating debt.<sup>370</sup>

### 3. Profits & Debt

Increased costs and depreciated prices are not an anomaly of this moment in time; they have been building for years, and that adds up for producers.<sup>371</sup> Year after year of higher costs and decreased income shrinks profits, putting more and more producers in the red.<sup>372</sup> The last five years have seen the sharpest decline in farm incomes since the Great Depression.<sup>373</sup> More than half of all farm households lost more money than they made every year since 2013.<sup>374</sup> This unsustainable system is driving producers into debt and towards bankruptcy.<sup>375</sup> Many observers are predicting the industry is on the verge of a debt crisis more dangerous than the 1980s farm crisis.<sup>376</sup> The numbers seem to be proving this prediction true; since 2007, farm and ranch debt has jumped by

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<sup>366</sup> See Zimmerli, *supra* note 37, at 72.

<sup>367</sup> Katie Wedell et al., *Midwest Farmers Face a Crisis. Hundreds Are Dying by Suicide*, USA TODAY (Mar. 9, 2020, 6:00 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/03/09/climate-tariffs-debt-and-isolation-drive-some-farmers-suicide/4955865002/> [<https://perma.cc/6SSS-EDSU>]; see Kelloway, *supra* note 21.

<sup>368</sup> See Kelloway, *supra* note 21.

<sup>369</sup> See Semuels, *supra* note 9.

<sup>370</sup> See *id.*

<sup>371</sup> See *id.*

<sup>372</sup> *Id.*

<sup>373</sup> *US Farm Income Tumbles, But Rising Corn Prices Will Ease the Pain*, GRO INTEL. (July 8, 2019), <https://gro-intelligence.com/insights/articles/us-farm-income-sees-steep-drop-but-rising-corn-prices-will-ease-the-pain> [<https://perma.cc/7G77-Y6FL>].

<sup>374</sup> Semuels, *supra* note 9.

<sup>375</sup> See *id.*

<sup>376</sup> See Kelloway, *supra* note 21.

a third, levels last seen during that 1980s crisis.<sup>377</sup> With farm debt at an all-time high of \$416 billion, farm loan delinquencies are rising as well.<sup>378</sup> The downturn is particularly devastating for grain, dairy, and other operations that rely on large annual operating loans.<sup>379</sup> After four to five years of losing money, these farms have exhausted their credit lines.<sup>380</sup> Farmers' debt-to-income ratios are at the highest levels in three decades.<sup>381</sup> Since 1980, around 17,000 cattle ranchers have gone out of business while nearly seventy percent of hog farms and seventy-five percent of peanut farms have met the same fate.<sup>382</sup> In 2020, the United States lost a total of 4,400 agricultural operations,<sup>383</sup> with Wisconsin alone losing over 1,100 dairy farms over the past two years.<sup>384</sup> Small producers are going out of business and their operations are being consolidated, forcing neighbors to buy out neighbors in hopes of expanding and improving profits.<sup>385</sup> Even though farms have expanded in size significantly over the past century, controlling corporations have outpaced them,<sup>386</sup> leaving most producers still too small to negotiate for fair terms or prices.<sup>387</sup> This is occurring while producers are more efficient than ever; operating more land, producing more goods, and supplying food to more people, all while receiving less in their paychecks and being driven into bankruptcy.<sup>388</sup>

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<sup>377</sup> Wedell et al., *supra* note 367.

<sup>378</sup> Semuels, *supra* note 9.

<sup>379</sup> *See id.*

<sup>380</sup> Kelloway, *supra* note 21.

<sup>381</sup> *Id.*

<sup>382</sup> Riviere et al., *supra* note 114, at 9.

<sup>383</sup> FARMS AND LAND IN FARMS, *supra* note 14.

<sup>384</sup> Kelloway, *supra* note 21.

<sup>385</sup> *See* Chris McGreal, *How America's Food Giants Swallowed the Family Farms*, GUARDIAN (Mar. 9, 2019, 11:30 AM), <https://www.theguardian.com/environment/2019/mar/09/american-food-giants-swallow-the-family-farms-iowa> [<https://perma.cc/6RZX-D6F9>]. This continuing shrink in the number of producers poses another threat to rural America, less people. *Id.* To preserve rural America as well as market balance, policymakers must also fight farmland consolidation and allow small-scale farms to remain small. JON TESTER, GROUNDED 121 (1st ed. 2020).

<sup>386</sup> *See* Zimmerli, *supra* note 37, at 63–64.

<sup>387</sup> *See id.*

<sup>388</sup> *Id.*

Perhaps the most frightening result of this economic toil is its impact on the physical well-being of individual producers.<sup>389</sup> Under immense pressure to preserve a struggling way of life their families have known for generations, producers are feeling pushed to their limits.<sup>390</sup> Farming and ranching are not like other jobs where if you lose it you go home and find another. For many producers, the land they produce their goods on has been in their families for generations, and the thought of losing that sacred inheritance is too much for many to bear.<sup>391</sup> This pressure is buttressed by a severe lack of access to mental healthcare in most rural areas.<sup>392</sup> According to a study by the Centers for Disease Control and Prevention, farmers are among the most likely of any occupation to die by suicide,<sup>393</sup> with producer suicide rates increasing by forty percent in less than two decades.<sup>394</sup> One dairy co-op recently even sent its members a list of suicide hotlines along with their paltry dairy checks.<sup>395</sup>

These heartbreaking numbers are perhaps the most jarring results of the degradation of the agricultural way of life.<sup>396</sup> However, not only is consolidation slowly destroying small agricultural operations,<sup>397</sup> it is also harming consumers.<sup>398</sup>

### *B. Impact on Consumers*

Monopolization in agriculture has become so extreme that even as it drives down prices for producers, it drives up prices for consumers.<sup>399</sup> The spread between prices paid to farmers and prices paid by consumers increases as concentration grows in

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<sup>389</sup> See Wedell et al., *supra* note 367.

<sup>390</sup> See *id.*

<sup>391</sup> See *id.*

<sup>392</sup> See *Mental Health and Rural America: Challenges and Opportunities*, NAT'L INST. MENTAL HEALTH (May 30, 2018), <https://www.nimh.nih.gov/news/media/2018/mental-health-and-rural-america-challenges-and-opportunities> [<https://perma.cc/SKC9-6RD4>]. Nowhere else in the nation is the need for quality mental health care more pressing, yet the access is more lacking. See *id.*

<sup>393</sup> Wedell et al., *supra* note 367.

<sup>394</sup> *Id.*

<sup>395</sup> See Kelloway, *supra* note 21.

<sup>396</sup> See *id.*

<sup>397</sup> See Zimmerli, *supra* note 37, at 63–64.

<sup>398</sup> See Domina & Taylor, *supra* note 19, at 74, 88.

<sup>399</sup> See *id.*

both food processing and retail, even after adjusting for increased processing of food.<sup>400</sup> Increased concentration in the chain of buyers, processors, and retailers has undoubtedly contributed to increased cost of food even if some processors and retailers claim they are not making significant profits.<sup>401</sup> This suggests increased concentration not only results in higher prices, but also produces economic inefficiency.

For example, chicken and turkey retail prices grew steadily over the last decade, by nineteen and forty-seven percent, respectively, from 2007 to 2013, well beyond the inflation rate.<sup>402</sup> The same is seen for nearly every agricultural product, with a loaf of bread sometimes costing consumers nearly as much as a producer receives for an entire bushel of grain, enough grain to create over seventy loafs.<sup>403</sup>

This massive drop in producer profits, mixed with the increase in consumer costs, has resulted in the large agricultural corporations that control the industry to be allowed to rake in profits like never before.<sup>404</sup>

### *C. Impact on Corporations*

There may be only one group benefiting from the current layout of the agricultural industry: the corporations that hold vast amounts of market share in nearly every sector.<sup>405</sup> A growing share of every dollar spent on produce is going straight into the coffers of the powerful few,<sup>406</sup> with many of these corporations reporting record profits, even while producers and consumers struggle.<sup>407</sup>

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<sup>400</sup> See Kelloway, *supra* note 21. “Efficiencies, if any, are not reflected in lower food costs.” Domina & Taylor, *supra* note 19, at 74.

<sup>401</sup> Domina & Taylor, *supra* note 19, at 74.

<sup>402</sup> Kelloway, *supra* note 21.

<sup>403</sup> Mark Wech, *What’s the Value of Wheat in a Loaf of Bread?*, ABILENE REP. (Mar. 19, 2017); see Kelloway, *supra* note 21. See generally *Wheat Facts*, NAT’L ASS’N WHEAT GROWERS, <https://www.wheatworld.org/wheat-101/wheat-facts/> [<https://perma.cc/YN9R-MQ8A>] (last visited Jan. 4, 2022).

<sup>404</sup> See Domina & Taylor, *supra* note 19, at 88.

<sup>405</sup> See Kelloway, *supra* note 21.

<sup>406</sup> See McGreal, *supra* note 385.

<sup>407</sup> See Domina & Taylor, *supra* note 19, at 88.

Seed and pesticide giant Corteva forecasts a major increase in profits for 2021, with over \$2.5 billion in profits.<sup>408</sup> John Deere broke their annual profits record only nine months into 2021.<sup>409</sup> Before acquisition by Bayer and recent legal trouble, Monsanto touted record seed sales and profits in 2017.<sup>410</sup> Smithfield, Dairy Farmers of America, and many more are also seeing record profits.<sup>411</sup> The examples are plenty.<sup>412</sup> The only group doing well, and they are doing very well, are the giant corporations that have wrestled control of the industry, with lack of regulation an accessory to this power grab.<sup>413</sup>

These corporations are experiencing a boom while producers go broke and consumers are forced to pay more to put food on the table.<sup>414</sup> This consolidation of power and wealth is also weakening the communities many producers call home.<sup>415</sup>

#### *D. Impact on Rural Communities*

For many rural communities, agriculture is the lifeblood of their economies and cultures, with one in five rural counties depending on agriculture as their primary source of income.<sup>416</sup>

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<sup>408</sup> Jacob Bunge, *Corteva, Under Activist Pressure, Forecasts Big Rise in Profits*, WALL ST. J. (Feb. 3, 2021, 5:59 PM), <https://www.wsj.com/articles/corteva-under-activist-pressure-forecasts-big-rise-in-profits-11612393167> [<https://perma.cc/BBT3-R9JC>].

<sup>409</sup> Donnelle Eller, *Deere says last 9 months of earnings already have beat full-year profits record set in 2013*, DES MOINES REGISTER (Aug. 20, 2020, 2:26 PM), <https://www.desmoinesregister.com/story/money/agriculture/2021/08/20/deere-annual-profits-record-broken-three-months-left-go/8209000002/> [<https://perma.cc/B3JQ-FUV5>].

<sup>410</sup> See Kelloway, *supra* note 21.

<sup>411</sup> See *id.*; Claire Kelloway, *Milking Profits: The Dairy Monopolies That Are Hurting Farmers*, WASH. MONTHLY (Sept. 14, 2020), <https://washingtonmonthly.com/2020/09/14/milking-profits-the-dairy-monopolies-that-are-hurting-farmers/> [<https://perma.cc/5NCM-UVM7>].

<sup>412</sup> See, e.g., Javier Blas & Michael Hirtzer, *Cargill Heads to Record Profits on Booming Agriculture Market*, BUS. TIMES (May 25, 2021), <https://www.businesstimes.com.sg/energy-commodities/cargill-heads-to-record-profits-on-booming-agricultural-markets> [<https://perma.cc/4556-CSMG>].

<sup>413</sup> See Kelloway, *supra* note 21.

<sup>414</sup> See McGreal, *supra* note 385.

<sup>415</sup> See Semuels, *supra* note 9; McGreal, *supra* note 385.

<sup>416</sup> Claire Kelloway & Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, OPEN MKTS. INST. (Mar. 27, 2019), <https://>

Therefore, as farm incomes decline, so does the economic health of whole regions.<sup>417</sup> First, local equipment and supply dealers are forced to close.<sup>418</sup> Then, with the decline in economic activity and eventual loss of population, so do local restaurants, banks, schools, and hospitals.<sup>419</sup> Most people in rural America are not farmers, but in traditionally age-dependent regions, even non-farmers' livelihoods depend, directly or indirectly, on farm income.<sup>420</sup>

Take for example the town of Turner, Montana.<sup>421</sup> In the first half of the twentieth century, it was a growing agricultural hub served by its own railroad spur.<sup>422</sup> There were two banks, three automobile and farm machinery dealers, hotels, department stores, a doctor, a pharmacy, and more.<sup>423</sup> Yet today, Turner is a town of only about sixty residents, a co-op grocery store, a post office, and a small school building holding classes for its grade school students.<sup>424</sup> There are many Turners in rural America, towns that were once places of economic growth and opportunity that have now dropped in population and wealth.<sup>425</sup> This is not to say that a rise in agricultural consolidation was the sole cause of the degradation of small towns like these, yet it was a leading cause of the agricultural decline that contributed mightily to their deterioration.<sup>426</sup>

Rural communities are also disproportionately oppressed by consolidation in other industries, including healthcare, finance, and transportation.<sup>427</sup> If we are to begin the restoration of rural America to the societal and economic role it once held, regulators

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[www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system](http://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system) [<https://perma.cc/G4PC-77Q2>].

<sup>417</sup> See Semuels, *supra* note 9; McGreal, *supra* note 385.

<sup>418</sup> See Semuels, *supra* note 9; McGreal, *supra* note 385.

<sup>419</sup> See Semuels, *supra* note 9; McGreal, *supra* note 385.

<sup>420</sup> See Semuels, *supra* note 9; McGreal, *supra* note 385.

<sup>421</sup> BIG FLAT HIST. GRP., WHISPERING WIND: A HISTORY OF THE BIG FLAT 588–600 (2012).

<sup>422</sup> *Id.* at 600.

<sup>423</sup> *Id.* at 588–99.

<sup>424</sup> *Id.*

<sup>425</sup> See Semuels, *supra* note 9. Another example, once among the nation's richest counties, Nebraska's "cattle country" now includes five of the top twelve poorest counties in the entire nation. Domina & Taylor, *supra* note 19, at 75.

<sup>426</sup> See Kelloway, *supra* note 21.

<sup>427</sup> See *id.*

must employ aggressive enforcement of the nation's antitrust statutory regime in all industries, yet most importantly in agriculture.<sup>428</sup>

### *E. Other Impacts*

Beyond what has been presented, there are additional impacts stemming from consolidation that are important to mention.<sup>429</sup> Due to the market power and influence a few corporations have acquired, other agricultural policies have also shifted singularly towards what is best for these corporations.<sup>430</sup> One example is how trade deals have been formed with little consideration for small producers.<sup>431</sup> Deals such as the North American Free Trade Agreement (NAFTA), or its modern counterpart the United States-Mexico-Canada Agreement (USMCA), have been “nothing but an unmitigated disaster” according to some producers.<sup>432</sup> Flooding American markets with foreign beef, for example, damaged cattle markets,<sup>433</sup> while providing consumers with subpar beef and no way of knowing where that beef originated.<sup>434</sup>

Increased consolidation has also been detrimental to the fight against climate change.<sup>435</sup> As farmers' margins are cut, the only way some can stay afloat is by making it up in volume.<sup>436</sup> This accounts for the emergence of confined animal feeding operations (CAFOs), which consists of many animals crammed together in

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<sup>428</sup> *See id.*

<sup>429</sup> *See Homegrown Stories: Gilles Stockton, supra note 127.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*; see Kristina Johnson & Samuel Fromartz, *NAFTA's 'Broken Promises': These Farmers Say They Got the Raw End of Trade Deal*, NPR (Aug. 7, 2017, 7:00 AM), <https://www.npr.org/sections/thesalt/2017/08/07/541671747/nafta-s-broken-promises-these-farmers-say-they-got-the-raw-end-of-trade-deal> [<https://perma.cc/V6UG-95HQ>].

<sup>432</sup> *Homegrown Stories: Gilles Stockton, supra note 127.*

<sup>433</sup> Johnson & Fromartz, *supra note 431*. 2020 was a record year for beef imports. Mike Dandrea, *Record Year of Cattle Imports in 2020*, KX NEWS (Feb. 17, 2021, 5:19 PM), <https://www.kxnet.com/news/agriculture/record-year-of-cattle-imports-in-2020/> [<https://perma.cc/23VX-D6L7>].

<sup>434</sup> Dandrea, *supra note 433*. One policy that helped consumers in that regard was Country of Origin Labeling (COOL), which mandated foreign raised meat to be marked with the nation it was raised in. COOL was repealed in 2015. *See Homegrown Stories: Gilles Stockton, supra note 127.*

<sup>435</sup> *See Kelloway, supra note 21.*

<sup>436</sup> *Id.*

inhumane conditions.<sup>437</sup> These are not only harmful to animals, but pose threats to human health as some use nontherapeutic antibiotics on animals crowded into confined spaces, producing antibiotic-resistant bacteria.<sup>438</sup> They further cause pollution from large manure lagoons, detracting from quality of life across expanding sections of rural America.<sup>439</sup> These “factory farms” also give agriculture a bad name, starring in anti-meat consumption propaganda, when in reality they are the major minority when in livestock raising.<sup>440</sup> This affects all consumers alike, rural and urban.<sup>441</sup>

Many of the people who pick food and cut meat are also marginalized when giants control the industry.<sup>442</sup> Overworked and under paid,<sup>443</sup> farm workers are routinely exposed to harmful chemicals and unsafe work conditions, wreaking havoc on their health and a critical part of the food chain.<sup>444</sup>

In the livestock sector, market control has also manifested in the increased prevalence of “production contracts” between meat

<sup>437</sup> *See id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *See id.*

<sup>441</sup> *Id.*

<sup>442</sup> Jeff Daniels, *From Strawberries to Apples, A Wave of Agriculture Robotics May Ease the Farm Labor Crunch*, CNBC (Mar. 8, 2018, 4:22 PM), <https://www.cnbc.com/2018/03/08/wave-of-agriculture-robotics-holds-potential-to-ease-farm-labor-crunch.html> [<https://perma.cc/8AE9-TF6K>]. These workers are often some of the most vulnerable people in the system, with higher rates of language barriers and immigration status further limiting ability to fight for better working conditions or pay. *See id.*

<sup>443</sup> Tracie McMillan, *As Common as Dirt*, AM. PROSPECT (Sept. 11, 2012), <https://prospect.org/economy/common-dirt-d2/> [<https://perma.cc/R7VB-BFJD>]. Lack of competition also naturally leads to lower wages with less options for workers to bargain for higher wages. *See* Dan Charles, *Farmworkers Say the Government Is Trying to Cut Their Wages*, NPR (Nov. 11, 2020, 4:00 PM), <https://www.npr.org/2020/11/11/929064527/farm-workers-say-the-government-is-trying-to-cut-their-wages> [<https://perma.cc/6Q2N-ATZD>]. *See generally* Suresh Naidu *et al.*, *More And More Companies Have Monopoly Power Over Workers' Wages. That's Killing the Economy*, VOX (Apr. 6, 2018, 9:50 AM), <https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality> [<https://perma.cc/PL6F-XJHM>].

<sup>444</sup> *See* Tom Philpott, *Drifting Pesticides Keep Making California Farm Workers Sick*, MOTHER JONES (Dec. 21, 2017), <https://www.motherjones.com/food/2017/12/drifting-pesticides-keep-making-california-farm-workers-sick/> [<https://perma.cc/6BAG-S7QS>].

packers and farmers.<sup>445</sup> Under these agreements, producers raise animals owned by meat packers with their equipment and labor, using supplies provided by the meat packer, then animals are returned to the packer for sale.<sup>446</sup> The contracts delineating the terms of these agreements are written by the meat packers and often skew in their favor, containing restrictive terms which force producers to follow costly and burdensome mandates, only to see a relatively small share of the profits.<sup>447</sup> These deals take all bargaining power that remained in the hands of producers away, letting corporations run the show to an even greater extent.<sup>448</sup> This relationship currently dominates the poultry industry, with over ninety percent of chickens produced under contract.<sup>449</sup> Pork production is following a similar trend, with the share of pigs produced under contract rising from six percent to twenty-four percent between 1994 to 2000.<sup>450</sup> Cattle ranchers fear that this practice could take over their industry as well, and production contracts are seeing increased usage in some crop production.<sup>451</sup> In industries that have such dense consolidation, producers are left with

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<sup>445</sup> See Zimmerli, *supra* note 37, at 64–65.

<sup>446</sup> *Id.* at 64.

<sup>447</sup> See *id.* at 67–69; *Abusive Poultry Contracts Require Government Action*, FOOD & WATER WATCH (Feb. 2015). Having to purchase expensive equipment, follow strict standards harmful to animals, and putting all grading and pricing control in the hands of the meat packers are common terms. See *Production Contracts—An Overview*, NAT'L AGRIC. L. CTR. [hereinafter *Production Contracts*], <https://nationalaglawcenter.org/research-by-topic/production-contracts/> [<https://perma.cc/FT55-WYXB>] (last visited Jan. 4, 2022); David Andrews & Timothy J. Kautza, *Impact of Industrial Farm Animal Production on Rural Communities*, PEW. However, it can be argued that there are some benefits such as reduced risk and uncertainty. See *Production Contracts, supra*. Yet, most commentators conclude that although there exist some advantages, the costs imposed on producers is too great. Zimmerli, *supra* note 37, at 67.

<sup>448</sup> See Zimmerli, *supra* note 37, at 64–65.

<sup>449</sup> *Id.* at 64.

<sup>450</sup> *Id.*

<sup>451</sup> See *Homegrown Stories: Gilles Stockton, supra* note 127; James Macdonald & Christopher Burns, *Marketing and Production Contracts Are Widely Used in U.S. Agriculture*, USDA (July 1, 2019), <https://www.ers.usda.gov/amber-waves/2019/july/marketing-and-production-contracts-are-widely-used-in-us-agriculture/> [<https://perma.cc/HB4C-WWJH>].

little choice but to sign onto these predator agreements, worsening consolidation and its effects.<sup>452</sup>

The poor state of agriculture is also proving to be a drain on the federal government's budget.<sup>453</sup> Over the past few years there has been a marked rise in stimulus payouts to agricultural producers.<sup>454</sup> While this fills the gap for some, it is often only enough to get by for another year.<sup>455</sup> In a time when the federal deficit is continually rising, it may be more effective to restore markets by enforcing antitrust laws, rather than continuing to pay producers billions each year while controlling corporations rake in record profits.<sup>456</sup>

Finally, even the national security of sovereign nations is jeopardized by such high concentration in critical markets.<sup>457</sup> This is most clearly evidenced by the 2021 foreign origin cyber-attack that forced the temporary shutdown of major meatpacking company, JBS.<sup>458</sup> While only a single company was impacted by the ransomware attack, when that single company is responsible for twenty percent of the nation's meatpacking market, a temporary halt leads to widespread damage.<sup>459</sup> While a brief disruption, due

<sup>452</sup> See Zimmerli, *supra* note 37, at 67–68.

<sup>453</sup> Ryan McCrimmon, *Here's Your Check: Trump's Massive Payouts to Farmers Will Be Hard to Pull Back*, POLITICO (July 14, 2020, 4:30 AM), <https://www.politico.com/news/2020/07/14/donald-trump-coronavirus-farmer-bailouts-359932> [<https://perma.cc/LW2H-QP3N>]. Producers received a record \$46 million in direct federal payouts in 2020. Dan Charles, *Farmers Got a Government Bailout In 2020, Even Those Who Didn't Need It*, NPR (Dec. 30, 2020, 5:04 AM), <https://www.npr.org/2020/12/30/949329557/farmers-got-a-government-bailout-in-2020-even-those-who-didnt-need-it> [<https://perma.cc/A8RU-DQRQ>].

<sup>454</sup> See McCrimmon, *supra* note 453.

<sup>455</sup> See Charles, *supra* note 453.

<sup>456</sup> See Lauck, *supra* note 35, at 453–56. Indications also show that large agricultural operations received a disproportionate share of federal aid, with the top one percent receiving one-fourth of aid. Mike Dorning, *In Trump Farm Bailout, Top 1% Reaped Nearly One-Fourth of Aid*, BLOOMBERG (Feb. 24, 2021, 12:27 PM), <https://www.bloomberg.com/news/articles/2021-02-24/largest-farms-share-of-subsidies-grew-under-trump-bailouts> [<https://perma.cc/UNN5-YW5X>].

<sup>457</sup> See Fabian Batista et al., *All of JBS's U.S. Beef Plants Were Forced Shut by Cyberattack*, BLOOMBERG (June 1, 2021, 6:48 PM), <https://www.bloomberg.com/news/articles/2021-05-31/meat-is-latest-cyber-victim-as-hackers-hit-top-supplier-jbs> [<https://perma.cc/N9SU-3U3S>].

<sup>458</sup> *Id.*

<sup>459</sup> Tom Lutey, *JBS Ransomware Attack a Gut Check for Montana Ranchers*, BILLINGS GAZETTE (June 4, 2021), <https://billingsgazette.com/news/state-and>

to the drastic lack of supply chain flexibility consolidation causes, this attack immediately led to a dip in prices for producers, and a spike in costs for customers.<sup>460</sup> Not only does consolidation hurt many individual parties, it also has an immediate threat to the security of critical food supplies and increases the fragility of national defense.<sup>461</sup>

It has hopefully been made clear throughout this Section that agricultural producers are in a bad spot, paying more for the supplies they need, receiving less for the goods they sell, reducing profits and leading to increased bankruptcies, and in the most devastating of cases, suicide.<sup>462</sup> At the same time, consumers are seeing little benefit, paying more for goods while their markets are increasingly flooded with produce made in either environmentally damaging ways or in foreign nations.<sup>463</sup> Meanwhile, the corporations that have wrestled complete control of nearly every sector of the industry are experiencing record gains, fueling their continued takeover.<sup>464</sup> In the end, this is not only damaging the people who grow agricultural goods, but the people who buy those goods, the communities where they live, and the health, well-being, and security of the entire nation.<sup>465</sup>

## CONCLUSION

U.S. States Senator Jon Tester, the only working farmer in the Senate,<sup>466</sup> once stated “industrial agriculture takes the people out of the equation.”<sup>467</sup> This Note has certainly proven that point.

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-regional/jbs-ransomware-attack-a-gut-check-for-montana-ranchers/article\_f285654f-ec4b-523c-abd3-c54c14703549.html [https://perma.cc/YA6V-AQJR].

<sup>460</sup> Jacob Bunge & Jesse Newman, *Ransomware Attack Roiled Meat Giant JBS, Then Spilled Over to Farmers and Restaurants*, WALL ST. J. (June 11, 2021, 10:28 AM), <https://www.wsj.com/articles/ransomware-attack-roiled-meat-giant-jbs-then-spilled-over-to-farmers-and-restaurants-11623403800> [https://perma.cc/GB46-MGSY].

<sup>461</sup> See Lutey, *supra* note 459.

<sup>462</sup> See Kelloway, *supra* note 21.

<sup>463</sup> See *id.*; see also Bratspies, *supra* note 25, at 589–90.

<sup>464</sup> See Kelloway, *supra* note 21; Domina & Taylor, *supra* note 19, at 84.

<sup>465</sup> See Kelloway, *supra* note 21; Domina & Taylor, *supra* note 19, at 62, 84.

<sup>466</sup> *Agriculture*, U.S. SENATOR FOR MONT. JON TESTER, <https://www.testersenate.gov/?p=issue&id=67> [https://perma.cc/WDA8-TQ6Z] (last visited Jan. 4, 2022).

<sup>467</sup> TESTER, *supra* note 385, at 122. Senator Tester recently introduced legislation focused on combatting consolidation in the meatpacking industry by

Producers, consumers, farm workers, and people of urban and rural communities alike have fallen victim to the current lopsided, corporate-controlled American agricultural system, all for the betterment of the massive agribusinesses controlling the industry.<sup>468</sup> As presented in this Note, the consolidation these corporate giants have been permitted to create is the most immediate threat to family agriculture and the people and communities that rely on it.<sup>469</sup> The preeminent cause of this consolidation is the lack of enforcement of the nation's antitrust laws, powered by lax interpretations and metrics implemented by federal regulators, paving the way for large corporations to swallow up markets unchallenged.<sup>470</sup> In order to alleviate growing concentration and its deadly effects, there must be a recommitment to aggressive interpretations and enforcement of antitrust laws by regulatory agencies.<sup>471</sup> If not accomplished, the current state of agriculture, where the big get bigger and everyone else gets poorer, will continue, directly harming producers, consumers, and the entire American food system and economy.<sup>472</sup>

America's farmers and ranchers have long served this nation by producing world class food that sustains and enriches each of our lives; it is far past time that this nation support their efforts by ensuring that the people who feed the world can once again afford to feed their own families.

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creating an office of special investigators to look into competition within the packers and stockyard division of the USDA. Brandon Warren, *Tester Announces New Bill Aimed at Meatpackers*, KTVQ (June 13, 2021, 11:26 AM), <https://www.ktvq.com/news/local-news/tester-announces-new-bill-aimed-at-meatpackers> [<https://perma.cc/2Y EZ-G3NG>].

<sup>468</sup> See Kelloway, *supra* note 21.

<sup>469</sup> See *id.*

<sup>470</sup> See Warren, *supra* note 467.

<sup>471</sup> See Kelloway, *supra* note 21.

<sup>472</sup> *Id.*