

YOU'RE NOT THE BOSS OF ME: AN ANALYSIS OF GIPSA'S AUTHORITY TO REGULATE PRIVATE CONTRACTING IN THE BEEF INDUSTRY

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I. INTRODUCTION

The Packers and Stockyards Act of 1921 (PSA) has long provided fertile ground for litigation.¹ Some of the more contentious litigation surrounds Section 202(a) and (b) of the regulation implemented to enforce the PSA—which, generally speaking, makes it unlawful for packers to engage in any “unfair” or “dis-

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1. For a partial summary of PSA litigation within Circuit Courts, *see Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010), *cert. denied*, No. 10-542, 2011 U.S. LEXIS 1031 (2011).

criminary practice” or “give any undue or unreasonable preference or advantage” to any particular producer.² Per Congressional mandate, and perhaps to clarify multiple Circuit Court rulings, the USDA recently released proposed rules that are intended to clear up some of the ambiguities in Section 202(a) and (b) by providing specific examples of unfair or unjust behavior exhibited by packers.³ The proposed rules also provide sweeping regulation regarding the USDA’s ability to enforce Section 202.⁴ These proposed rules represent the first time that Section 202 of the PSA has undergone significant revisions since the Act’s implementation in 1921.⁵

As they currently stand, the proposed additions to Section 202 represent significant changes in how private contracts are made within the beef industry.⁶ It is therefore necessary to understand the economic, legislative, and constitutional impacts of the Grain Inspection, Packers, and Stockyards Administration’s (GIPSA’s) proposed rules if they are implemented as written. The focus of this discussion is three-fold:

- (1) Does GIPSA have Congressional authority to implement such sweeping rules?
- (2) Do the proposed rules violate the legislative intent of Section 202(a) and (b)?
- (3) Is the restriction of private contracting rights a violation of constitutional due process?

To understand the basis for these discussion points, a background on the PSA and subsequent litigation is provided, followed by an outline of the three discussion points with commentary, and a summary which includes policy and statutory recommendations for possible future PSA revision proposals.

2. Packers and Stockyards Act, 1921, ch. 64, § 202(a)–(b), 42 Stat. 159, 161 (1921) (codified as amended at 7 U.S.C. § 192(a)–(b) (2006)).

3. *See generally* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201) [hereinafter Regulations].

4. *See id.* at 35,352 (offering a textual example of what the codified rule will resemble).

5. *Compare* Packers and Stockyards Act, 1921, ch. 64, § 202(a)–(b), 42 Stat. 159, 161(1921), *with* 7 U.S.C. § 192(a)–(b) (2006).

6. Although § 202 covers regulation of the beef, swine, and poultry industries, the dominant operational structures within the beef industry set it apart from other livestock industries. Specifically, contracting within the beef industry is structured differently from the swine and poultry industry because of the longer birth to slaughter life cycle of beef. Therefore, this paper engages in a narrower focus of the beef industry by analyzing the impacts the proposed rules may have on private contracting within the beef industry. *See generally* Regulations, *supra* note 3.

II. MARKET CONSOLIDATION AND PSA BACKGROUND

A. Market Consolidation

Over the past two decades significant market consolidation has occurred within the beef industry, with the top four packinghouses increasing control of daily steer and heifer slaughter from fifty percent of the market in 1980 to eighty percent in 2007.⁷ Over an eight year period ending in 2008, however, the market shares of the top four beef packers have remained relatively stable—averaging eighty percent of the daily steer and heifer slaughter.⁸ Given the consolidation that has taken place and the combined market shares of the top four beef packers, there are relatively few packers that producers may choose from to process their livestock. As packer numbers have declined, producers have voiced concerns regarding greater market control exhibited by packers, limited access to slaughter facilities, and thus a potential for or actual reduction of competition.⁹ With limited access to slaughterhouses and reduced competition due to the oligopolistic nature of the now consolidated and concentrated competitors, it is argued packers indirectly or directly set lower market prices by purchasing from preferred suppliers.¹⁰ Others argue that packers are not purposefully operating in a collusive manor to drive beef prices down, but are merely consolidating operations to maximize market efficiencies by taking advantage of economies of scale that are gained through larger operations.¹¹ Whether the meat packing industry is intentionally operating with shared monopolistic intent or merely engaging in profit maximization behavior, the PSA is charged with “ensur[ing] fair competition and fair trade practices in the marketing of livestock, meat, and poultry.”¹²

7. GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., USDA, 2009 ANNUAL REPORT: PACKERS & STOCKYARDS PROGRAM 45 (2010), available at http://archive.gipsa.usda.gov/pubs/2009_psp_annual_report.pdf.

8. *Id.*

9. See generally David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61 (2010).

10. See *id.* at 93–94.

11. See Brian L. Buhr, *Economics of Antitrust in an Era of Global Agri-Food Supply Chains: Litigate, Legislate and/or Facilitate?*, 15 DRAKE J. AGRIC. L. 33, 34 (2010) (arguing that the meat processing industry maximizes profits through efficiency and “[t]he primary method to gain a competitive advantage is to adopt technologies or gain economies of size that lower costs.”).

12. Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, ARK. L. NOTES, 2003, at 35.

B. PSA History

The PSA was enacted in 1921 as a form of anti-trust legislation tailored to the meat processing industry and aimed at preventing restraints on trade by regulating predatory or discriminatory behavior within the meat industry.¹³ The Act was enacted after extensive investigations by Congress and the Federal Trade Commission (FTC) yielded strong evidence that consolidation of the meat packing industry resulted in intentional collusive behavior aimed at controlling meat prices through shared monopolistic behavior.¹⁴

The PSA grants authority to the Secretary of Agriculture to enforce and enact regulations under the statute.¹⁵ In turn, the Secretary of Agriculture delegates PSA enforcement authority to the Administrator of GIPSA.¹⁶ The PSA is founded on two basic principles: (1) The protection of producers, and (2) the protection of consumers.¹⁷ Producer interests are protected by ensuring packinghouses do not engage in unfair, discriminatory, or unjust buying practices—such as colluding with each other to set prices or ensuring accurate animal weights are taken.¹⁸ Consumer interests are protected by the PSA through agency oversight to prohibit collusive behavior among packinghouses to increase product prices or decrease product quality.¹⁹ Although most PSA litigation and legal analysis rarely focuses on the consumer protection aspect of the PSA, it is still an important function of the PSA.²⁰

13. *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 361 (5th Cir. 2009) (en banc) (holding that “[t]he legislative debate surrounding the PSA supports the conclusion that it was designed to combat restraints on trade, with everyone from the Secretary of Agriculture to members of Congress testifying to the need of this statute to promote healthy competition.”).

14. Summary of the FTC Report 31–32 (as reprinted in H.R. REP. NO. 66-1297, at 24 (1921)) (outlining that the collusive behavior between the “Big 5” meat packers was “not a casual agreement brought about by indirect and obscure methods, but a definite and positive conspiracy for the purpose of regulating purchases of livestock and controlling the price of meat . . .”).

15. Kelley, *supra* note 12, at 35.

16. *Id.* at 36.

17. *Id.*

18. *Id.*

19. Christopher M. Bass, *More Than A Mirror: The Packers and Stockyards Act, Anti-trust Laws, and the Injury to Competition Requirement*, 12 DRAKE J. AGRIC. L. 423, 431 (2007).

20. *See id.*

C. Litigation History of Section 202(a) and (b)

As mentioned, the PSA has long provided fertile ground for litigation—with the bulk of litigation focusing on Section 202(a) and (b).²¹ These sections of the PSA specify that it is unlawful for packers to:

(a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or (b) make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.²²

Given the ambiguity concerning these sections, much of the PSA litigation has focused on whether it is necessary for plaintiffs alleging a violation of section 202(a) or (b) of the PSA to show proof of overall market harm by the actions of producers—not just harm to an individual plaintiff or producer.²³ Plaintiffs and the USDA generally contend that proof of market harm is not required and they only must show that defendant packers' actions harmed individual plaintiffs or producers.²⁴ The majority of the United States Circuit Courts of Appeal have held that in order to prove a violation of Section 202(a) or (b), a plaintiff and/or the USDA must show proof of market harm or an adverse effect on competition.²⁵

1. Perspective One: Show Market Harm

The most recent opinions on this subject are *Wheeler v. Pilgrim's Pride Corp.* and *Terry v. Tyson Farms, Inc.*²⁶ *Wheeler* and *Terry* continue the trend of United States Circuit Courts of Appeal determining there is a need to show anti-competitive harm.²⁷ The appellate courts have based this finding on a variety of factors including: legislative intent, judicial history, (six circuits uniformly hold-

21. See *Stafford v. Wallace*, 258 U.S. 495, 528 (1922) (holding that Congress had the authority to implement the PSA and regulate interstate commerce of meat processing); see also *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010), *cert. denied*, No. 10-542, 2011 U.S. LEXIS 1031 (2011) (providing a history of PSA litigation and circuit decisions regarding PSA Section 202(a) and (b)).

22. 7 U.S.C. § 192(a)–(b) (2006).

23. See *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 357–58 (5th Cir. 2009) (en banc) (providing a general overview of litigation surrounding the ambiguity of Section 202(a) and (b) of the PSA).

24. See Regulations, *supra* note 3, at 35,340.

25. See *Terry*, 604 F.3d at 277–78 (providing a history of PSA litigation and circuit decisions regarding PSA Section 202(a) and (b)).

26. *Wheeler*, 591 F.3d 355 (en banc); *Terry*, 604 F.3d 272.

27. See *supra*, note 26.

ing that proof of market harm is an essential element for a PSA violation), and the theory that the PSA has historically been viewed as an anti-trust statute that shares common lineage and application with the Sherman Act and Federal Trade Commission Act.²⁸

Wheeler was a significant decision in recent PSA litigation.²⁹ Various poultry growers sued their processor/dealer for allegedly giving another grower more favorable contract terms than were offered to them—thus allegedly violating Section 202(a) and (b) of the PSA. After extensive analysis of the legislative intent behind the PSA, along with a thorough review of previous court rulings, the *Wheeler* court ruled “an anti-competitive effect is necessary for an actionable claim under the PSA.”³⁰ It wasn’t enough for a grower to assert that they alone were damaged by “unfair” or “discriminatory” actions of a processor, but growers also needed to offer proof that the processor’s actions negatively impacted the competitive nature of the market as a whole.³¹ This finding is analogous to general anti-trust theory, which requires a showing of harm to competition not just harm to a competitor—in order to prove an anti-trust violation.³² The Fifth Circuit in *Wheeler* went on to state that holding contrary to the decisions of the majority of courts requiring proof of market impact would go against the meaning of the statute.³³

Five months after the *Wheeler* opinion was released, the Sixth Circuit applied the same standard of proof required in *Wheeler* when it released its opinion in *Terry v. Tyson Farms, Inc.* In *Terry*, the court recognized the previous consistent rulings of seven of the circuit courts of appeals regarding the showing of market harm for an actionable offense under Section 202(a) and (b).³⁴ The Court noted that by engaging in independent and reasoned analysis, it was im-

28. See *supra*, note 26; see also John D. Shively & Jeffery S. Roberts, *Competition Under the Packer and Stockyards Act: What Now?*, 15 DRAKE J. AGRIC. L. 419, 431 (2010) (offering a thorough summary of the history of the PSA and its foundation in anti-trust rule and application).

29. See Shively, *supra* note 28, at 428 (providing an extensive analysis of the impacts of the *Wheeler* ruling on future PSA anti-trust litigation).

30. *Wheeler*, 591 F.3d at 362.

31. *Id.* at 362–63.

32. Shively & Roberts, *supra* note 28, at 430–31.

33. *Wheeler*, 591 F.3d at 363 (stating: [g]iven the clear anti-trust context in which the PSA was passed, the placement of Section 192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute).

34. *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 279 (6th Cir. 2010), *cert. denied*, No. 10-542, 2011 U.S. LEXIS 1031 (2011) (stating “the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction”).

portant to maintain “harmony among the Circuits on issues of law” and that “federal law . . . is supposed to be unitary,” thereby following the ruling of the other six circuits in requiring proof of competitive harm for an enforceable action under Section 202(a) and (b).³⁵ Given that certiorari was denied by the U.S. Supreme Court in January 2011, the *Terry* and *Wheeler* decisions continue to be controlling law.³⁶

2. *Perspective Two: Forget Market Harm*

The countervailing arguments against *Terry* and *Wheeler* are summarized in the *Wheeler* interlocutory appeal (*Wheeler I*) opinion—concerning the denial of summary judgment at trial—and *Wheeler*'s appellate level (*Wheeler II*) dissent.³⁷ Both the interlocutory appeal opinion and the dissent reasoned that proof of market harm was not necessary to show a violation of the PSA.³⁸ The court in *Wheeler I* and the dissent in *Wheeler II* relied, in part, on a strict textual reading of section 202, and the argument that the PSA's regulatory reach is broader than traditional anti-trust statutes.³⁹ Under a strict textual reading of the PSA, the *Wheeler II* dissent argued that Section 202(a) and (b) contains language that limits its application to only acts that have an adverse effect on competition.⁴⁰ The dissent went on to argue that the majority opinion “must refrain from reading additional terms, such as those that would require an adverse effect on competition, into . . . [S]ection[] [202(a) and (b)].”⁴¹

Continuing with their strict textual analysis, the *Wheeler II* dissent further argued that other sections of the PSA (such as Section 202(c)–(e)) contain language that specifically prohibits acts that restrain commerce.⁴² The *Wheeler II* dissent argued that if Congress had intended Section (a) and (b) to prohibit acts that had a market effect, they would have included that specific language within Section (a) and (b) much like they did in Section (c)–(e).⁴³

The *Wheeler II* dissent also argued that the PSA's regulatory reach is broader than traditional anti-trust regulation since the PSA was enacted in 1921 to quell the anticompetitive activities that traditional forms of anti-trust regula-

35. *Id.* at 278.

36. *Id.*

37. *See Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455 (5th Cir. 2008), *vacated*, 591 F.3d at 371 (2009); *Wheeler*, 591 F.3d at 371 (Garza, J., dissenting).

38. *Wheeler*, 536 F.3d at 459, *Wheeler*, 591 F.3d at 274 (Garza, J., dissenting).

39. *Wheeler*, 536 F.3d at 459, *Wheeler*, 591 F.3d at 274 (Garza, J., dissenting).

40. *Wheeler*, 591 F.3d at 374 (Garza, J., dissenting).

41. *Id.*

42. *Id.* at 374–75.

43. *Id.* at 375.

tion could not correct within the meat packing industry.⁴⁴ Therefore, because the PSA is broader than traditional forms of anti-trust regulation, proof of market harm is not a necessary element for a Section 202(a) or (b) PSA violation.⁴⁵ Many of the arguments made in the *Wheeler II* dissent correspond to the rationale the USDA has employed in enforcing and in revising the PSA.⁴⁶

In contradiction to the opinions delivered by the majority of federal circuit courts, the USDA has long held that “a violation of 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury,” and that not requiring this proof is “consistent with the language and structure of the [PSA], as well as its legislative history and purposes.”⁴⁷ In an attempt to reconcile USDA’s view with that of various circuit court opinions, and pursuant to a 2008 Congressional mandate outlined in Title XI of the 2008 Farm Bill, USDA-GIPSA released a set of proposed rules on June 22, 2010 that addressed the “proof” issue.⁴⁸ The proposed rules were released with the intent to further establish the USDA’s position that proof of market harm is not a necessary prerequisite to establish a proof of violation of the PSA.⁴⁹

D. GIPSA’s Proposed Rules

GIPSA contends its authority to propose broad contractual regulations in the PSA from both Congressional authorization through the 2008 Farm Bill and the PSA itself.⁵⁰ In the 2008 Farm Bill, Congress stipulated that the Secretary of Agriculture “establish criteria” to determine “whether an undue or unreasonable preference or advantage has occurred” in violation of the PSA.⁵¹ From these arguably general and ambiguous Congressional instructions, GIPSA inferred authority to outline specific examples of behavior that are deemed “unfair” or “discriminatory” under Section 202(a) and (b). GIPSA also outlined bans of specific contracting behavior within the beef industry—such as mandating processors

44. *Id.* at 382–83.

45. *Id.*

46. *Compare id.* at 371–85, with Regulations, *supra* note 3, at 35,340.

47. Regulations, *supra* note 3, at 35,340.

48. Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, 2120 (2008) (stipulating the Secretary of Agriculture “establish criteria that the Secretary will consider in determining-- (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act”).

49. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. at 35,340.

50. *See* Food, Conservation and Energy Act of 2008, 122 Stat. at 2120; *see also* Regulations, *supra* note 3, at 35,338 (stating that GIPSA is granted authority through 407 of the PSA to propose regulation that prohibits certain conduct because it is discriminatory).

51. Food, Conservation and Energy Act of 2008, 122 Stat. at 2120.

justify reasons for entering into purchasing contracts with certain parties and requiring that private purchasing contracts be published on GIPSA's website.⁵² If implemented, these rules will greatly impact how processors and producers in the beef industry make private contracts.⁵³

There are two main conflicting opinions regarding the proposed regulations. Many producers believe the proposed rules are necessary amendments to Section 202 and will lead to an increase in market transparency. They contend adopting the rules will lead to greater PSA enforcement, and thus benefit producers by allowing them to engage in transparent contracting with processors.⁵⁴ Many processors and other large producers have voiced concerns against the proposed rules, however, arguing the contractual constraints will further chip away at already minimal profit margins by increasing transactional costs through the requirement of contracting with multiple producers rather than one preferred supplier.⁵⁵ They contend the proposed rules risk harming consumers by raising prices—due to higher transaction costs in contracting—and decreasing product quality and consistency—due to uncertain sourcing due to new contract rules.⁵⁶

Regardless of which argument is correct, if implemented as written, the proposed rules will greatly affect how private contracts are made between producers and processors. These proposed rules also mark the first time since the enactment of the PSA that Section 202(a) and (b) have been significantly altered.⁵⁷ While it is important to understand the basic premise to both arguments, the remainder of this analysis focuses on GIPSA's authority to even propose such rules and whether the rules, as proposed, are constitutionally permissible.

52. For a full understanding of language used in the proposed rule *see* Regulations, *supra* note 3, at 35,344.

53. *See generally* Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1274–76 (11th Cir. 2005) (providing an overview of the current sales methods cattle and meat processors procure cattle for slaughter—specifically detailing cash market and marketing agreement sales).

54. *See* E-mail from Lynn A. Hayes, Program Director, Farmers' Legal Action Group, to Tess Butler, Grain Inspection and Packer and Stockyards Admin. (November 22, 2010), *available at* http://www.flaginc.org/topics/fedreg/comments/2010/20101122_GIPSA_WORC_CFFF.pdf.

55. *See* NAT'L CATTLEMAN'S ASSOC., SUMMARY OF NBCA COMMENTS ON PROPOSED GIPSA RULES (2010), *available at* <http://www.beefusa.org/uDocs/NBCA-Comments-Summary.pdf>.

56. *See* Buhr, *supra* note 11, at 34.

57. *Compare* Packers and Stockyards Act, 1921, ch. 64, § 202(a)–(b), 42 Stat. 159, 161(1921), *with* 7 U.S.C. § 192(a)–(b) (2006); *see also* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 361–62 (5th Cir. 2009) (detailing legislative history of Sections 202(a) and (b) have never been significantly altered since their enactment in 1921).

III. HOW MUCH AUTHORITY DOES GIPSA HAVE?

How much authority does GIPSA really have to propose restrictions on private contracting rights? As stated earlier, it is clear that GIPSA is granted authority to make changes to the PSA through both Congressional direction and through the authority that the PSA grants GIPSA. The exact scope (and limit) of GIPSA's regulatory authority has been strongly debated since the release of the proposed rules, however, especially by members of Congress.⁵⁸

GIPSA argues they were granted authority, in part, to propose additional regulations related to Section 202(a) and (b) through legislation within the 2008 Farm Bill.⁵⁹ The language within the Farm Bill reads: "The Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 . . . to establish criteria that the Secretary will consider in determining - (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act . . ." ⁶⁰ From this limited language, GIPSA reasoned it was necessary to propose limitations on specific conduct that GIPSA deemed to be unfair or discriminatory—specifically limiting how private contracts are negotiated within the beef industry.⁶¹

Placing limits on specific conduct, however—primarily contracting rights—is not "criteria" used to determine whether an unjust preference has occurred in violation of the PSA. Rather, GIPSA put the cart before the horse and instead of establishing criteria or a specific test to determine unjust behavior in violation of the PSA, GIPSA merely banned specific behavior within the beef industry through a liberal interpretation of their regulatory rights. Understandably, Congress took issue with GIPSA's interpretation of their regulatory authority.⁶²

In a July 2010 House subcommittee hearing—discussing the newly proposed rules—all but one Representative expressed concern regarding GIPSA's

58. See *Hearing to Review Livestock and Related Programs at USDA in Advance of the 2012 Farm Bill Before the Subcomm. on Livestock, Dairy, and Poultry of the H. Comm. on Agric.*, 111th Cong. (2010) [hereinafter *Hearing*].

59. See Regulation, *supra* note 3, at 35,338 (GIPSA also reasoned they were granted authority through the statutory language of the PSA: "These additional proposed regulations are promulgated under the authority of Section 407 of the [PSA], and complement those required by the Farm Bill to help ensure fair trade and competition in the livestock and poultry industries.").

60. Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, 2120 (2008).

61. See Regulations, *supra* note 4.

62. See generally *Hearing*, *supra* note 58. But see Letter from Senator Tom Harkin to Tom Vilsack, Secretary of Agric., available at http://johnson.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=76a7ec03-7013-4759-8f54-be576ea17294 (offering support with twenty other Senators for the proposed GIPSA PSA regulations).

authority to propose such stringent contracting regulation.⁶³ Representatives commented that, not only did the proposed rules extend beyond the directives of the Farm Bill,⁶⁴ but GIPSA lacked authority to usurp the congressional intent behind the PSA.⁶⁵

Representatives contended that prior to releasing the proposed rules, GIPSA did not engage in sufficient market research to offer proof that packing houses were intentionally colluding to affect market prices as a whole through their contracting methods.⁶⁶ Congress initially enacted the PSA in 1921, after substantial investigation by the Federal Trade Commission strongly suggested collusive behavior was intentionally occurring amongst the packinghouses.⁶⁷ This new PSA legislation was proposed with little such investigation. In a Congressional hearing, the Administrator of GIPSA documented that the only market research conducted by GIPSA before releasing the proposed rules were informal producer conversations the Secretary of Agriculture conducted during a nationwide tour.⁶⁸

During the same hearing, multiple Representatives noted that many aspects of the proposed rule had already been proposed by Congress and later rejected for good reason.⁶⁹ Some representatives inferred that by proposing such sweeping rules regulating meat sales that had been previously rejected by past Congressional debates—that GIPSA was bypassing congressional authority and creating their own regulation.⁷⁰ They therefore contend that because Congress did not impose such sweeping regulations regarding contracting in the private sector, neither should GIPSA.⁷¹

63. *Hearing, supra* note 58.

64. *See id.* at 27 (Chairman David Scott stating “the very language of the proposed rule goes far beyond the directives of the 2008 Farm Bill”).

65. *See id.* at 3 (Chairman David Scott stating “This proposed rule goes well beyond—well beyond—what Congress intended. It eliminates the required showing of competitive injury to determine violations of the Act.”).

66. *See id.*

67. Summary of the FTC Report, *supra* note 14, at 24 (outlining that the collusive behavior between the “Big 5” meat packers was “not a casual agreement brought about by indirect and obscure methods, but a definite and positive conspiracy for the purpose of regulating purchases of livestock and controlling the price of meat . . .”).

68. *Hearing, supra* note 58, at 7.

69. *Id.* at 2 (Chairman David Scott stating, “A number of these provisions had previously been rejected, their amendments on the floor, in the Senate process, and certainly in the farm bill. They were rejected strongly during the last farm bill deliberations. So the question is, why are they here? Is this an end run around Congress?”).

70. *Id.*

71. *Id.* at 2, 27.

GIPSA's authority to implement regulations also stems from the text of the PSA. Under the PSA, the USDA Secretary maintains "jurisdiction to deal with every 'unjust, unreasonable, or discriminatory regulation or practice' involved in the marketing of livestock."⁷² Although GIPSA has been granted authority handle unjust or discriminatory practices in procuring livestock for the meat-packing industry, Congress did not grant GIPSA authority—either through the 2008 Farm Bill, nor through PSA statutory language—to regulate specific contracting rights within the beef industry, in the hopes of preventing unfair or unjust behavior.

The Seventh Circuit has held that there was no Congressional intent in the PSA to give the Secretary unbridled discretion to regulate the meat packing industry.⁷³ This same Circuit also held that through "Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time anti-trust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged."⁷⁴ Because GIPSA was not delegated Congressional authority, GIPSA arguably over-extended its scope of authority in proposing contract restrictions through the PSA.

IV. DO THE PROPOSED RULES VIOLATE LEGISLATIVE INTENT OF SECTION 202(A) AND (B)?

In analyzing the PSA from an economic and anti-trust perspective, understanding the legislative intent behind Section 202(a) and (b) is paramount in analyzing whether the proposed rules extend beyond the intended scope of the PSA.⁷⁵ Some legal opinions have argued that discerning proper statutory intent should be analyzed under a strict textual analysis of the written statute.⁷⁶ Statutes

72. *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (interpreting 7 U.S.C. § 208(a)); *see also* Regulation, *supra* note 3, at 35,339 (arguing "[t]he [PSA] 'was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of Agriculture complete regulatory power over packers and all activities connected therewith'" (quoting Bruhn's Freezer Meats of Chi., Inc. v. USDA, 438 F.2d 1332, 1339 (8th Cir. 1971))).

73. *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) (holding that although section 202(a) of the PSA may be broader than traditional forms of anti-trust regulation such as the Sherman Act, "there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers.").

74. *Id.*

75. *See* *Stafford v. Wallace*, 258 U.S. 495, 513 (1922) (holding that "[i]t is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted.").

76. *See* *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 374 (5th Cir. 2009) (en banc) (Garza, J., dissenting) (arguing that "[p]roper statutory analysis begins with the plain text of the

do not merely appear, however; they are motivated by an underlying intent which spurs their creation. Therefore, analyzing statutory intent in a textual vacuum is arguably ineffective.⁷⁷ It is necessary to discern the legislative intent that motivated the creation of the PSA in order to distinguish whether GIPSA has violated the underlying intent of the PSA with the proposed rules.

This section will cover three segments, first exploring what the overall intent of the PSA was when it was enacted, focusing also on judicial interpretations of the PSA's intent. The next section will explore whether there is evidence of legislative intent within the PSA to regulate private contracting rights between producers and processors. Lastly, the note will discuss whether the proposed amendments to Section 202(a) and (b) violate the PSA's intent to protect not only producers, but also consumers.

A. Motivation and Intent of the PSA Circa 1921

The PSA was enacted in 1921 as an expansion of anti-trust law since existing anti-trust laws were ineffective in preventing monopolistic and collusive behavior in the meatpacking sector.⁷⁸ When Congress enacted the PSA in 1921, they relied, in part, on a 3000 page report presented by the Federal Trade Commission (FTC) that offered proof of intentional collusion and market altering activities by the "Big Five" packinghouses.⁷⁹ The FTC report stated that the market altering actions of the "Big Five" packinghouses were "not a casual agreement brought about by indirect and obscure methods," but were a "definite . . . conspiracy for the purpose of . . . controlling the price of meat."⁸⁰ Given the excessive market research offering almost certain proof of intentional collusive activities, Congress enacted the PSA in 1921 with the "primary purpose . . . to assure fair competition and fair trade practices in livestock marketing and the

statute," and that "[u]nder well-settled principles, courts must refrain from reading additional terms," into Section 202(a) and (b) of the PSA).

77. See *Wright v. Fed. Bureau of Prisons*, 451 F.3d 1231, 1234 (10th Cir. 2006) (quoting *Hain v. Mullen*, 436 F.3d 1168, 1176 (10th Cir. 2006)) (holding that proper statutory interpretation includes reading the words of the statute "in light of the purposes Congress sought to serve.").

78. See generally HARLAN HAYES & HENRY A. DIXON, *LIVESTOCK MARKETING AND MEATPACKING INDUSTRY—FAIR TRADE PRACTICES*, H.R. REP. NO. 85-1048 (1957), reprinted in 1958 U.S.C.A.N. 5212, 5213 [hereinafter H.R. REP. NO. 85-1048]; see also *Stafford*, 258 U.S. 495 (interpreting the scope of the PSA shortly after the act was enacted).

79. Along with the report, the FTC attached a letter to the President stating: "Answering directly your question as to whether or not there exist 'monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest,' we have found conclusive evidence that warrants an unqualified affirmative," FTC Report, *supra* note 14, at 23.

80. *Id.* at 24.

meatpacking industry,” while also ensuring that producers received the “true market value of their livestock,” and “protect[ing] consumers against unfair business practices in the marketing of meats.”⁸¹

Less than a year after the PSA was enacted, the Supreme Court ruled on the intent of the PSA in *Stafford v. Wallace*.⁸² The Court determined the congressional intent in enacting the PSA was to maintain healthy market competition within the meat packing industry and inferred that application of the PSA should be synonymous to other anti-trust statutes such as the Sherman Act.⁸³ The congressional intent analysis the Supreme Court employed in assessing the intent of the PSA has been the gold standard for subsequent courts—such as *Wheeler* and *Terry*—in assessing violations of the PSA.⁸⁴ The early legislative intent motivating the PSA enactment, backed with the early Supreme Court ruling in *Stafford*—which many courts have since utilized in assessing PSA violations—indicates that the PSA was clearly intended to be a form of anti-trust legislation intended to preserve market competition within the meatpacking industry.

B. Legislative Intent and Private Contracting Rights

Whether applying a strict contextual analysis of the PSA or dissecting the legislative history behind the PSA, Congress’ intent in enacting the PSA is an issue of consistent debate. Some argue that the intent of the PSA should only be ascertained through a pure textual analysis of the PSA.⁸⁵ Others argue that proper analysis regarding the regulatory reach of the PSA can only be obtained by analyzing the text in light of the legislative history that motivated the PSA.⁸⁶ When proposed regulation has the potential to significantly broaden the regulatory authority of the PSA to regulate private contract interactions within the beef industry, analyzing the intent of the PSA in a textual vacuum is inappropriate. Although there is legitimate debate between the two methods of statutory analysis, when assessing the regulatory boundaries of the PSA it is necessary to assess the PSA with a complete perspective of legislative history, textual analysis, and judicial analysis.

81. H.R. REP. NO. 85-1048, *supra* note 78, at 5213.

82. *See Stafford*, 258 U.S. 495, at 513.

83. *Id.* at 515–20 (1922) (arguing that “if Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust law . . . certainly it may provide regulation to prevent their formation.”).

84. *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 357–58 (5th Cir. 2009); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010), *cert. denied*, No. 10-542, 2011 U.S. Lexsee 1031 (2011).

85. *Wheeler*, 591 F.3d at 374.

86. *Id.* at 357–58.

As outlined in Section III.A. of this note, the initial intent of the PSA, delineated through legislative history and the *Stafford* ruling, was to promote fair market competition. Arguably, the proposed contract restricting amendments to Section 202(a) and (b) are in contrast to maintaining fair competitive markets given the amendments were proposed without sufficient proof that contracting is detrimental to competition and restricting contracting rights will not necessarily ensure fair market competition.

First, the PSA was enacted only after extensive proof—specifically a six volume report—was offered implying actual collusion and market effects of packinghouse actions, whereas the contracting amendments of the PSA were enacted with little such market research—suggesting that certain types of contracting agreements were actually having a detrimental effect on market competition within the beef industry.⁸⁷ Those in support of the proposed GIPSA amendments may argue that the purpose of the PSA is to terminate unfair trade practices in their embryonic stages before an actual harm is suffered.⁸⁸ Multiple circuits have held that in order for a trade practice to be deemed unfair or unjust, however, proof must be offered that the trade practices have an actual detrimental effect on competitive markets.⁸⁹ Because significant court rulings have required a showing of market harm, GIPSA cannot propose restrictive contracting amendments to the PSA if GIPSA has not offered proof that such contracting methods are indeed harmful to the competitive nature of the market.

Second, restricting private contracting practices under Section 202(a) and (b) will not necessarily assure fair market competition, nor will it assure that producers will receive a fair market price for their products. By mandating how contracts are created, the amendments will arguably increase transaction costs within the meat-processing sector while also decreasing product quality.

In 2007, GIPSA released a report analyzing the economic effects of alternative marketing arrangements (AMAs) within the beef industry, including use of marketing and forward contracts.⁹⁰ The GIPSA study analyzed data from 2002–2005 and found that “beef producers and processors . . . believed that some types of AMAs helped them manage their operations more efficiently, reduced

87. See FED. TRADE COMM’N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY (1919).

88. See *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336–37 (9th Cir. 1980).

89. See generally *Wheeler*, 591 F.3d at 358–60 (offering an overview of the judicial history of the PSA).

90. See GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., USDA, Cont. No. 53-32KW-4-028, LIVESTOCK MEAT MARKETING STUDY: VOLUME 1: EXECUTIVE SUMMARY AND OVERVIEW FINAL REPORT (2007), available at archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_1.pdf.

risk, and improved beef quality.⁹¹ Producers reasoned that AMAs—specifically use of contracts—allowed them to mitigate risk by decreasing transaction costs in negotiating bulk cattle sales, instead of selling cattle on a per head basis.⁹² Producers also stated that AMAs allowed them to “buy/sell higher quality cattle, improve supply management, and obtain better prices.”⁹³ Processors also reasoned that AMAs reduced operational risk by securing a stable supply of beef to process, thus allowing them to maximize efficiencies in livestock processing.⁹⁴ From a general economic perspective—and according to GIPSA—contract use in the beef industry is an important method of reducing risk, increasing efficiencies and ensuring product quality.⁹⁵

The purpose of the PSA is not to interfere with private contracting rights, but instead aims to promote market efficiency by preventing monopolistic behavior.⁹⁶ Arguably regulating how private contracts are made is a direct frustration to market efficiency by preventing processors from efficiently procuring a steady and uniform beef supply.⁹⁷ The 2007 GIPSA report stated that marketing contracts greatly reduced costs and increased quality in the beef supply while also stating that reducing the use of marketing contracts “would result in economic losses for beef consumers and the beef industry.”⁹⁸ According to the *Pickett* court, “[i]t was not Congress’ intent in enacting the PSA to interfere with a meat packer’s business practices where those practices did not interfere with competition.”⁹⁹ Because GIPSA has not offered proof that certain contracting strategies interfere with competition, the proposed rules arguably interfere with a meat packer’s business practices, rather than correcting anti-competitive behavior. Given statements made by the Eighth Circuit and anti-trust theory in general,

91. *Id.* at ES-3

92. *Id.* at ES-4.

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005) (holding that the main intent of the PSA is prevent monopolies that can harm market competition, but not at the expense of upsetting the freedom to contract); *see also Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922) (holding that the chief evil the PSA sought to correct was monopolies forming in the market that harm competition).

97. *See generally Pickett*, 420 F.3d 1272 (holding that marketing agreement contracts allow processors to efficiently procure a steady supply of meat and to maximize processing efficiency within processing plants).

98. GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., *supra* note 90, at ES-9 (also stating that “[t]he cost savings and quality improvements associated with the use of AMAs outweigh the effect of potential oligopsony market power that AMAs may provide packers).

99. *Pickett*, 420 F.3d at 1280.

there is ample proof that the PSA was not intended to protect producers from normal competition.¹⁰⁰

The PSA, like anti-trust legislation in general, was enacted to protect market competition—not to protect producers from market competition.¹⁰¹ The PSA was also designed to promote market efficiency, not frustrate it.¹⁰² Various Circuits have ruled in support of the notion that the PSA was not designed to protect market participants from competition. The *Jackson v. Swift Echrich, Inc.* court held that the PSA did not intend for a statutory entitlement that the same types of contracts be offered to all growers.¹⁰³ Similarly, the Eighth Circuit held, in *IBP, Inc. v. Glickman*, that the PSA was not intended to upset traditional notions of private contracting in order to provide a level playing field so that all could participate in the market.¹⁰⁴ Given that there is lacking evidentiary proof that certain contracting methods affect market participation as a whole, the proposed rules limiting private contracting rights are merely a protective measure for growers, rather than a preservation of competition.

C. PSA and Consumer Protection

The proposed rules seem to focus on mitigating the harm to producers that is incurred from market consolidation.¹⁰⁵ The intent of the PSA, however, is two-fold.¹⁰⁶ Not only is the PSA intended to protect producers from the harms of collusive activities, but the PSA is also intended to protect consumers from harmful monopolistic affects—namely, protection from paying inflated prices for beef.¹⁰⁷ If the intent of the PSA is two-fold, it is imperative to also analyze whether the proposed contracting restrictions will have a negative impact on consumers—therefore violating legislative intent of the PSA.

100. *See id.*

101. *See generally* Shively & Roberts, *supra* note 28, at 431 (stating “[t]he current case law holds the PSA to be an anti-trust statute, equates it with the Sherman and FTC Acts, and applies the full panoply of jurisprudence that has built up around those statutes to it.”).

102. *See, e.g.,* *Jackson v. Swift Echrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995).

103. *Id.* (holding that the PSA does not establish a statutory entitlement for poultry dealers to provide the same contract offered to one independent grower that was offered to a different independent grower).

104. *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999).

105. *See Regulation, supra* note 3.

106. Kelley, *supra* note 12, at 35.

107. *See* H.R. REP. NO. 85-1048, *supra* note 78, at 5213 (stating that the primary purpose of the PSA is to “safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats.”).

There is significant judicial and legislative history that supports the premise that the PSA is also intended to protect consumers. Shortly after the PSA was enacted, the Supreme Court in *Stafford*, argued that by enacting the PSA, Congress sought to avoid excessive charges imposed through monopolistic practices that would be passed down to the consumer.¹⁰⁸ The Court reasoned that if the unjust costs were “exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate.”¹⁰⁹ Congress has also stated that consumer protection was a fundamental intent of the PSA—stating that the objective of the PSA is to “protect consumers against unfair business practices in the marketing of meats.”¹¹⁰

Given the strong judicial and legislative history supporting consumer protection being an important intent of the PSA, it is argued that GIPSA is violating this legislative intent by proposing rules that could have a negative impact on consumers. Specifically, by regulating private contracting rights, the proposed rules will allegedly decrease product quality and increase prices paid by consumers.¹¹¹ In a 2007 report, GIPSA stated the importance of marketing contracts to both the meat producer and the meat consumer.¹¹² Respondents to the study stated that use of marketing contracts allowed processors to procure higher quality meat, while also reducing consumer costs.¹¹³

The 2007 report also stated that higher beef quality had a positive effect on beef demand—finding that lower prices for higher quality meat lead to an increase in consumer demand.¹¹⁴ This suggests that the presence of marketing contracts brings the beef market to a market equilibrium regarding beef supply and demand, which means consumers pay an optimum price for beef products. Regulating contracting in the beef sector would upset the present market equilibrium by increasing transaction costs in the marketing of beef while also decreasing the quality of meat and increasing the cost of meat.¹¹⁵ This does not benefit the consumer and violates the intent of the PSA, which is to protect consumers

108. *Stafford v. Wallace*, 258 U.S. 495, 515 (1922).

109. *Id.*

110. H.R. REP. NO. 85-1048 *supra* note 78, at 5213.

111. For a general overview of how marketing contracts provide market incentives for beef producers to grow higher quality cattle and allow processors to compensate producers for high quality cattle on a per head basis, thus securing a high quality uniform meat supply, *see Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1284–86 (11th Cir. 2005); *see also* GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., *supra* note 90, at ES-9.

112. GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., *supra* note 90, at ES-9.

113. *Id.*

114. *Id.*

115. *See Buhr, supra* note 11, at 43–45 (stating that the beef market is operating at market efficiency, in part due to contracting arrangements).

from paying exorbitantly high prices for meat.¹¹⁶ GIPSA is not preventing unproven monopolistic practices in introducing the proposed rules; rather, GIPSA is arbitrarily upsetting existing efficient market allocation without proof that they are actually correcting harmful market performance.¹¹⁷

Because the PSA was not intended to protect producers from the market competition and because the PSA was also intended to protect consumers from paying arbitrarily high prices, the introduction of regulation that mandates how private contracting occurs in the beef market is a direct violation of the initial intent of the PSA.

V. ARE THE PROPOSED RULES A VIOLATION OF CONSTITUTIONAL DUE PROCESS?

Beyond looking at GIPSA's administration authority of the PSA and the legislative intent underlying the PSA, if enacted, the proposed rules regarding contract regulation raise genuine questions of Constitutionality. While this is not the primary focus of this paper, it is important to note that there are also potential concerns regarding Constitutional due process. The proposed contracting amendments to the PSA constitute economic regulation because, if enacted, they will have a significant impact on how beef is marketed and sold.¹¹⁸ The Supreme Court has not invalidated economic legislation on the grounds of violating substantive due process since 1937—marking the departure from the “Lochner Era” of due process theory.¹¹⁹ The Supreme Court has a history of giving deference to the legislative intent behind economic regulation and the burden of proof rests on those alleging a violation of due process.¹²⁰ In a basic context, those arguing a

116. See H.R. REP. NO. 85-1048 *supra* note 73, at 5213.

117. See Buhr, *supra* note 11, at 34 (arguing that the beef market is maximizing efficiencies through profit maximization).

118. See INFORMA ECONOMICS INC., AN ESTIMATE OF THE ECONOMIC IMPACT OF GIPSA'S PROPOSED RULES 16 (2010), available at http://www.beefusa.org/uDocs/Gipsa-Report_2010-11-09.pdf (presenting analysis suggesting the market impact the proposed GIPSA contracting regulations would have on the beef industry if enacted); see also NAT'L CATTLEMAN'S ASSOC., *supra* note 55.

119. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 625–26 (3d ed. 2006); see also Johnathan Sullivan, *Eastern Enterprises v. Apfel: How Lochner Got it Right*, 60 OHIO ST. L.J. 1103, 1109 (1999) (stating that the “Lochner Era” marked an era where the Supreme Court increased judicial interference in legislation regarding economic matters, mainly because various laws restrained the freedom to contract. The end of the “Lochner Era” was marked by a series of rulings in 1937 where the Supreme Court refused to promote the theory of economic substantive due process, therefore assigning deference to legislatures in forming economic regulation).

120. CHEMERINSKY, *supra* note 119, at 625–26.

violation of economic due process must overcome the presumption that all economic regulation is Constitutional.¹²¹

However, would the Supreme Court offer the same deference to agency regulation as it does to federal legislation, especially when it is questionable whether Congress authorized an agency to make such legislation? Would the Supreme Court even entertain an argument of economic substantive due process with respect to the proposed GIPSA rules if they were enacted? Although the burden of proof is high for claims of due process violations, one case may offer some insight on whether the Supreme Court might entertain such arguments.

In *Eastern Enterprises v. Apfel*, a former coal company was ordered to pay medical benefits to coal miners per retroactive legislation, even though the company no longer owned a coal mining operation.¹²² The majority held that the legislation mandating benefit payments constituted an economic taking under the Takings Clause.¹²³ In a concurrence, however, Justice Kennedy argued that the law should be invalidated because it was a violation of substantive due process.¹²⁴ Kennedy went on to argue, “the remedy created by the coal act bears no legitimate relation to the interest which the government asserts in support of the statute,” thereby stating that in egregious situations, economic statutes are invalid on the grounds of violating due process.¹²⁵

Similarly, if the proposed GIPSA contract restrictions are made law, it could be argued that GIPSA’s remedy in restricting private contracting rights bears no legitimate relation to the interest of attempting to remedy unjust or unreasonable market preferences—especially when there is not quantitative proof of market harm from current contracting frameworks. It could further be argued that the remedy created by the proposed rules will—rather than increase market participation—decrease market efficiency through increased transaction costs.¹²⁶ Therefore, it is improper to justify imposing potential market altering effects of the proposed GIPSA rules in an attempt to amend practices that have not been proven to be unjust or market altering.

It is argued in this Note that judicial deference should not be afforded to agency regulation because: (1) Congress did not grant GIPSA authority to promulgate contract restrictive regulation with respect to private contracts and (2) agency regulation should not be afforded the same stringent critique as Congressional legislation. Although GIPSA regulation is subjected to a public comment

121. *Id.*

122. *E. Enter. V. Apfel*, 524 U.S. 498, 516–20 (1998).

123. *Id.* at 538.

124. *Id.* at 548–49 (Kennedy, J., concurring and dissenting in part).

125. *Id.* at 549.

126. *INFORMA ECONOMICS INC.*, *supra* note 118.

period—indeed GIPSA accepted comments on the proposed rules for five months—they are not required to incorporate public opinion into the comments. Unlike federal legislation, GIPSA regulation is not subjected to constituency critique because regulation authors are not elected by the public and are not motivated to satisfy public opinion.

Although this Note has proposed arguments for why the Court should not apply legislative deference to agency regulations, it is recognized the Court exhibits reluctance to reinstate Lochner Era protection of economic rights through substantive due process,¹²⁷ and it is remote that the Supreme Court would entertain the arguments presented above. It is also unlikely that Justice Kennedy would enforce his same opinion in *Eastern* against GIPSA because Kennedy also argued that one of the facts that made the legislation in *Eastern* so egregious was the fact that it was a retroactive statute.¹²⁸ Kennedy therefore argued that retroactive statutes should be afforded a higher level of scrutiny when analyzing a claim of due process violation.¹²⁹ Given that the proposed GIPSA contracting restrictions will not be retroactive, it is unlikely that Kennedy would apply the due process used in *Eastern*. Thus, if the rules are enacted with the contract restricting provisions, it is unlikely that the Supreme Court would entertain a claim that GIPSA has violated economic substantive due process.

VI. CONCLUSION

Market consolidation within the beef industry is a function of natural market performance within a capitalist market structure. There is insufficient proof that current beef procurement methods through contracting is detrimental to traditional notions of competitive markets. Furthermore, multiple courts have held that proof of market harm is *necessary* to establish a violation of the PSA. Economic and anti-trust theory along with legislative and judicial interpretation of the PSA all suggest that the PSA is a market preservation tool and not a market equalizer. This is substantial support that GIPSA lacks Congressional authority to enact regulation that restricts private contracting rights in the beef industry. Proposing such regulation also violates the legislative intent that motivated the initial enactment and current application of the PSA. So, without proof of intentional collusion or market harm within the beef industry, GIPSA has clearly overextended their regulatory authority by proposing rules that restrict private contracting rights within the beef industry.

127. CHEMERINSKY, *supra* note 119, at 625–26; *see also* Sullivan, *supra* note 119, at 1109.

128. *E. Enter.*, 524 U.S. at 548 (Kennedy, J., concurring and dissenting in part).

129. *Id.*

