

TOO BIG TO FAIL: HOW CONSOLIDATION IN THE AGRICULTURAL INDUSTRY HAS CREATED UNINTENDED CONSEQUENCES THAT THREATEN FARMERS, CONSUMERS, AND OUR NATIONAL SECURITY

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ABSTRACT

Consolidation within the agricultural sector has increasingly posed issues for producers, consumers, and national security. Although many articles discuss the harms posed by consolidation in individual sub-sectors of the industry (ex: right to repair, consolidation of input manufacturers, etc.), this article seeks to provide an analysis of how these harms are interconnected and thus, require a holistic solution. In addition to congressional action, addressing consolidation in the agricultural sector will require intra-agency antitrust enforcement, increased public sector investment in research and development, and the development of more tools to promote market transparency for producers and consumers alike. Ultimately, this article seeks to advocate for agricultural producers by making the case for how consolidation has negative impacts that reach far wider than the family farm: immediate action is necessary to protect the industry that feeds, fuels, and clothes the world.

I. INTRODUCTION

What do a John Deere combine and an Apple iPhone have in common? An obvious similarity is that both companies strive to develop technology to provide essential services that make their users' lives easier.¹ Additionally, both John Deere and Apple are Fortune 100 companies² with solid brand recognition. The

1. See Bianca Flowers & Joseph White, *Deere Tapping into Apple-Like Tech Model to Drive Revenue*, REUTERS (May 27, 2022, 3:14 PM), <https://www.reuters.com/business/autos-transportation/deere-tapping-into-apple-like-tech-model-drive-revenue-2022-05-26/> [https://perma.cc/HT9J-RLHZ].

2. Will Kenton, *Fortune 100 Definition, Requirements, and Top Companies*, INVESTOPEDIA (Sept. 6, 2022), <https://www.investopedia.com/terms/f/fortune-100.asp> [https://perma.cc/9S68-D4GN].

phrase “Nothing Runs Like a Deere”³ and the half-eaten apple icon⁴ are easily recognizable to consumers. Digging a little deeper, however, John Deere and Apple are both large, multi-national corporations that are operating in increasingly consolidated industries.⁵ Furthermore, both companies have recently come under fire for limiting consumers’ or third parties’ ability to repair their products if they are not working properly.⁶

The rise of tangible and intangible technology has created a gray area for how the law protects investments in intellectual property while also balancing consumers’ or producers’ rights in what are essentially captive markets. In addition to these legal and policy implications, industry consolidation results in consumers and producers bearing the economic cost.⁷ The agricultural industry is no exception.⁸

3. *The Legacy of John Deere’s Tagline: Nothing Runs Like a Deere*, MACHINEFINDER BLOG (June 8, 2023, 11:18 PM), <https://blog.machinefinder.com/26391/john-deere-tagline#:~:text=show%20you%20why%E2%80%A6,Nothing%20Runs%20Like%20a%20Deere.%E2%80%9D,silly%20to%20represent%20the%20company> [https://perma.cc/8PVH-WS8L].

4. See generally Holden Frith, *Unraveling the Tale Behind the Apple Logo*, CNN (Oct. 7, 2011, 3:07 PM), <https://www.cnn.com/2011/10/06/opinion/apple-logo/index.html> [https://perma.cc/C9PU-UUD8].

5. See Martin Placek, *Revenue of the World’s Largest Farm Machinery Manufacturers 2021*, Comment to *Selected Farm Machinery Manufacturers Worldwide in FY 2021, Based On Revenue*, STATISTA (Apr. 12, 2022), <https://www.statista.com/statistics/461428/revenue-of-major-farm-machinery-manufacturers-worldwide/> [https://perma.cc/P62J-KRWC]; Jonathan Ponciano, *The World’s Largest Tech Companies in 2022: Apple Still Dominates as Brutal Market Selloff Wipes Trillions in Market Value*, FORBES (May 12, 2022, 6:15 AM), <https://www.forbes.com/sites/jonathanponciano/2022/05/12/the-worlds-largest-technology-companies-in-2022-apple-still-dominates-as-brutal-market-selloff-wipes-trillions-in-market-value/?sh=218d4a0b3448> [https://perma.cc/Y3R4-PP48]; Daniel Foelber, *Is Deere the Apple of Agriculture?*, THE MOTLEY FOOL (May 26, 2022, 6:47 AM), <https://www.fool.com/investing/2022/05/26/is-deere-the-apple-of-agriculture/> [https://perma.cc/392V-H3ML].

6. See Nathan Proctor, *Deere in the Headlights as 21 States Consider Right to Repair*, ARIZONA PIRG (Mar. 1, 2021), <https://pirg.org/arizona/articles/deere-in-the-headlights-as-21-states-consider-right-to-repair/> [https://perma.cc/H6SE-ZZZ7]; Dain Evans, *Apple’s New Fix-it Policy is a Drop in the Bucket for ‘Right to Repair’*, CNBC (Dec. 30, 2021, 12:01 PM), <https://www.cnbc.com/2021/12/30/apples-new-fix-it-policy-is-not-the-end-for-right-to-repair.html> [https://perma.cc/CWF8-5K8M].

7. Hannah Andrew, ADDRESSING CONSOLIDATION IN AGRICULTURE 4 (Vt. L. Sch. Ctr. for Agric. & Food Sys. ed., 2022), <https://www.vermontlaw.edu/sites/default/files/2022-07/Addressing-Consolidation-in-Agriculture.pdf> [https://perma.cc/8MMN-BM69].

8. *Id.*

In recent years, concern has grown over the rise of “Big Ag,” a phrase often used to describe the increasingly concentrated oligopoly of large agribusinesses that dominate the food supply chain.⁹ Names like John Deere, Cargill and Tyson have become the Targets and Walmarts of the agricultural space. From seed companies to equipment manufacturers to commodity processors, consolidation across the agricultural supply chain has created unintended consequences posing grave economic, legal, and national security implications. Failure to address this consolidation negatively impacts the livelihoods of farmers and ranchers,¹⁰ concentrates the food supply,¹¹ creates higher costs for consumers,¹² and makes the agricultural sector more vulnerable to attack.¹³ Although many of the ideal solutions to address the harms of consolidation in the agricultural sector are no longer available,¹⁴ there are other actions that can and must be taken to mitigate the ill-effects that stem from industry consolidation. These options include amending antitrust legislation to rely on Congressional regulatory power instead of judicial enforcement, providing new companies with financial support for research and development, demanding more cooperation across government agencies to better police Big Ag, and promoting tools that provide transparency to producers and consumers to alleviate some effects of the current power imbalance in the marketplace.¹⁵

This article is divided into five parts. Part II presents a general overview of antitrust litigation and legislation.¹⁶ Part III examines the legal, economic, and legislative background for consolidation in the agricultural sector.¹⁷ Part IV is divided into several subsections. Part IV.A explores the general apathy toward the

9. Cynthia Kurtz, *Big Agriculture*, ALLSIDES (June 8, 2023, 7:47 PM), <https://www.allsides.com/translator/big-agriculture> [<https://perma.cc/8J2L-DT5W>] (Big Ag is synonymous with agribusiness companies that have grown or merged into massive, multi-national corporations).

10. See discussion *infra* Part III.A.

11. See discussion *infra* Part III.A.

12. See discussion *infra* Part III.B.

13. See discussion *infra* Part VI.C.

14. See Bill Baer, *Improving Antitrust Law in America*, BROOKINGS (June 8, 2023, 6:43 PM), <https://www.brookings.edu/testimonies/improving-antitrust-law-in-america/> [<https://perma.cc/GM25-M4FC>] (Concern for misinterpreting or over-enforcing antitrust laws have led courts to limit the effectiveness of current antitrust legislation. Furthermore, Congress has not addressed courts' unwillingness to adequately apply antitrust legislation nor has Congress employed more resources to combat monopolistic practices).

15. See discussion *infra* Part IV.D.

16. See discussion *infra* Part II.

17. See discussion *infra* Part III.

challenges the agricultural sector faces as a result of consolidation.¹⁸ Part IV.B discusses how agribusinesses have become above the law by analyzing how consolidation in the industry has created multiple touchpoints from a legal perspective.¹⁹ Part IV.C makes the case for why consolidation in the sector has created a risk to our food supply and presents a threat to national security.²⁰ Finally, Part IV.D includes a detailed plan for addressing the problem through interagency cooperation, strengthening of antitrust legislation, bolstering antitrust enforcement mechanisms, and increased public sector investment.²¹ This article concludes with a concise summary of the issues by reiterating the importance of the topic and the need for real change to ensure protections for producers and consumers alike.²²

II. HISTORY OF ANTITRUST ENFORCEMENT IN THE UNITED STATES

In the late nineteenth century, major industries were beginning to form trusts that destroyed competition and concentrated market power.²³ At that time, trusts were created through a board of trustees comprised of executives in the same industry.²⁴ Company shareholders received trust certificates while the board of trustees would be tasked with determining dividends.²⁵ Due to the fact that representatives of competing companies in the same industry were all members of a board of trustees, the trust could essentially operate as a monopoly.²⁶

A. Passage of Landmark Legislation

In response to this rapid industrialization, limited regulation, and the rise of tycoons controlling critical sectors of the economy, Congress recognized a need to

18. See discussion *infra* Part IV.A.

19. These legal touchpoints include violations of environmental, labor, and contract laws, among others. See discussion *infra* IV.B.

20. See discussion *infra* IV.C.

21. See discussion *infra* IV.D.

22. See discussion *infra* Part V.

23. *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES (Mar. 15, 2022), <https://www.archives.gov/milestone-documents/sherman-anti-trust-act#:~:text=Approved%20July%202%2C%201890%2C%20The,U.S.%20Congress%20to%20prohibit%20trusts> [https://perma.cc/WP69-K3VT] (Attorney Samuel Dodd of Standard Oil first had the idea of a trust).

24. *Id.*

25. *Id.*

26. *Id.*

constrain big business.²⁷ The Sherman Antitrust Act (the Sherman Act), passed in 1890, criminalized any business practice that restricted commerce through monopolistic conspiracies, contracts, or other market-constraining behavior.²⁸ The language of the Sherman Act states, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²⁹ Additionally, “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”³⁰ The Sherman Act provided federal authorities the ability to initiate proceedings against businesses deemed to be a trust in order to break them up in an effort known as “trust busting.”³¹

In theory, the legislation creates a strong disincentive to commit anti-competitive business practices; those convicted of monopolizing trade under the act are subject to a fine not to exceed \$100,000,000 for a corporation or \$1,000,000 for an individual and/or a term of imprisonment not to exceed ten years.³² However, the law’s practical application has proven challenging because of vague language and loosely defined terms in the legislation including “monopoly,” “trust,” and “conspiracy.”³³

This ambiguous language led to the Supreme Court largely dismantling the power behind the Sherman Act in *United States v. Standard Oil Co.*³⁴ Although the Court held that Standard Oil had engaged in practices that restrained trade in violation of the Sherman Act, the Court endorsed a “rule of reason” standard to evaluate whether businesses were monopolies.³⁵ Under this standard, a business that restrained trade was not in violation of the Sherman Act so long as the restraint was “reasonable.”³⁶

27. Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 450 (1999), <https://commons.und.edu/cgi/viewcontent.cgi?article=1586&context=ndlr> [<https://perma.cc/Q6J5-AJWT>].

28. 15 U.S.C. §§ 1–38 (1890).

29. 15 U.S.C. § 1 (1890).

30. 15 U.S.C. § 2 (1890).

31. *Sherman Anti-Trust Act (1890)*, *supra* note 23.

32. 15 U.S.C. § 2 (1890).

33. *Sherman Anti-Trust Act (1890)*, *supra* note 23.

34. *See* *Standard Oil Co. v. New Jersey*, 221 U.S. 1, 61–62 (1911).

35. *Id.* at 62.

36. *Id.* at 63–64.

Over time, courts also adopted the rule of reason standard to conclude that a business's size did not necessarily determine its ability to restrain trade.³⁷ With limited opportunity for the federal government to deter behavior that restrained trade but did not do so “unreasonably,” consolidation remained incredibly popular in the business world with 9,877 companies consolidating into 628 trusts *after* the passage of the Sherman Act.³⁸ The agricultural industry was no exception with an average of 301 firms disappearing annually from 1895 to 1904.³⁹

Following several court decisions that weakened the Sherman Act, Congress passed legislation to create the Federal Trade Commission (FTC).⁴⁰ The FTC was created to prevent persons, corporations, and partnerships—with the exception of banks, savings, loan institutions, federal credit unions, or other financial institutions—from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”⁴¹ Following its creation, if the FTC believes anti-competitive behavior has occurred, it can initiate legal proceedings against “any such person, partnership, or corporation [that] has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce.”⁴²

To further bolster antitrust enforcement power, Congress passed the Clayton Act in 1914.⁴³ The Clayton Act was designed to address shortcomings of antitrust enforcement under the Sherman Act by prohibiting mergers or acquisitions that “may be substantially to lessen competition, or to tend to create a monopoly.”⁴⁴

37. Lee Loevinger, Assistant Att’y Gen. in charge of the Antitrust Div., U.S. Dep’t of Just., Address at the American Bar Association Section of Antitrust Law: The Rule of Reason in Antitrust Law (Aug. 7, 1961), <https://www.justice.gov/atr/speech/file/1237731/download> [<https://perma.cc/4XGM-6S3X>].

38. Terrell McSweeney, Comm’r, Fed. Trade Comm’n, Keynote Remarks at the Am. Bar Ass’n Clayton Act 100th Anniversary Symposium: The Clayton and FTC Acts: 100 Years of Looking Ahead (Dec. 4, 2014), https://www.ftc.gov/system/files/documents/public_statements/603341/mcsweeney_-_aba_clayton_act_100th_keynote_12-04-14.pdf [<https://perma.cc/7J5W-6WGQ>].

39. Ralph L. Nelson, *MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895–1956*, 37 (Princeton Univ. Press 1959).

40. See 15 U.S.C. § 41–58 (1914).

41. 15 U.S.C. § 45(a)(2) (1914).

42. 15 U.S.C. § 45(b) (1914).

43. See Daniel Baracskay, *Federal Trade Commission, THE FIRST AMEND.* ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/812/federal-trade-commission> [<https://perma.cc/KA9G-GTX6>] (These weaknesses included, among other things, unfavorable court decisions and limited support from Congress); 15 U.S.C. §§ 12–27 (1914).

44. 15 U.S.C. § 18 (1914).

Under the Clayton Act, civil penalties can be assessed to companies that engage in monopolistic behavior such as price discrimination, mergers and acquisitions that reduce competition, and businesses that allow board members to serve for two competing companies.⁴⁵ Additionally, parties alleging injury can sue corporations or individuals that violate the Clayton Act for compensation equaling up to three times the damages the plaintiff suffers.⁴⁶

Currently, the Department of Justice (DOJ) and FTC enforce the Sherman and Clayton Acts.⁴⁷ Both the Sherman and Clayton Acts have been used in high-profile cases to protect consumers from wrongful behavior—including breaking up American Tobacco⁴⁸ and AT&T,⁴⁹ limiting cinema companies from engaging in price fixing activities,⁵⁰ and limiting Microsoft's ability to form exclusionary contracts with internet providers.⁵¹ More recently, the DOJ and Congress have looked to take on the technology sector as companies like Google, Meta, Amazon, and Apple dominate their respective markets.⁵² However, as a whole, antitrust enforcement is challenging for a number of reasons.

45. *Clayton Antitrust Act*, CORP. FIN. INST. (Jan. 15, 2023), <https://corporatefinanceinstitute.com/resources/knowledge/finance/clayton-antitrust-act/> [<https://perma.cc/JT6W-V3WM>].

46. *Id.*

47. *The Enforcers*, FED. TRADE COMM'N (June 9, 2023, 6:32 AM), <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> [<https://perma.cc/46E3-UNWN>].

48. *See generally* *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (holding that American Tobacco had engaged in illegal restraint of trade which required dissolution of the company under the Sherman Antitrust Act).

49. *See generally* *United States v. Am. Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983) (AT&T had to submit a consent decree that seriously divested its interests in the telecommunications industry).

50. *See generally* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (holding motion picture distribution practices including block booking, circuit dealing, resale price maintenance, and granting exclusive film licenses for specific geographic areas were violative of antitrust laws).

51. *See generally* *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (holding that exclusionary contracts with Internet access providers violated the Sherman Act).

52. Chris Alcantara et al., *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), <https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/> [<https://perma.cc/L3MG-4NFD>].

B. Institutional Protection of Consolidation

Around the 1970s, two trains of antitrust thought called the Chicago School and Harvard School became prominent in American antitrust jurisprudence.⁵³ Under the Chicago and Harvard Schools, American antitrust enforcement created inefficient markets that diminished consumer welfare.⁵⁴ Under this consumer welfare standard, “conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act.”⁵⁵ Conservative ideological thought under the Reagan administration prompted a push to support big businesses and this *laissez faire* view of antitrust enforcement.⁵⁶ Additionally, the Reagan administration limited its enforcement of antitrust actions and wrote amicus briefs supporting big business while appointing like-minded judges to the federal judiciary.⁵⁷

The fight for domination of the United States court system has included hundreds of millions of dollars to lobby for judges who will rule that marketplace competition hurts consumers.⁵⁸ Furthermore, big business has funded corporations and special interest groups that have filed numerous amicus briefs and even gone so far as to sponsor conferences and courses on antitrust law that judges across the country attend.⁵⁹ With so much of the United States’ antitrust policy relying on judicial interpretations from lifetime appointments of pro-business judges and special interest groups continually interfering in the judicial process, it has become increasingly difficult to engage in meaningful antitrust enforcement.⁶⁰ Increasing partisanship in both Congress and among political appointees to critical institutions

53. Filippo Lancieri et al., *THE POLITICAL ECONOMY OF THE DECLINE OF ANTITRUST ENFORCEMENT IN THE UNITED STATES* 1, 2 (2022), https://bfi.uchicago.edu/wp-content/uploads/2022/08/BFI_WP_2022-104.pdf [<https://perma.cc/R7L9-3VS2>].

54. *Id.* at 2–3.

55. Christine S. Wilson, Comm’r, Fed. Trade Comm’n, Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019). The consumer welfare standard served as a compliment to the “rule of reason” standard the Supreme Court solidified in *Standard Oil Co.*, 221 U.S. at 62. The rule of reason was a judge-made interpretation of the Sherman Antitrust Act which contended that Congress’ wording of the Act was meant to be interpreted as only those big business acts which would be considered “unreasonable.”

56. Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARVARD BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [<https://perma.cc/KWV3-2JG8>].

57. *Id.*

58. See Lancieri, *supra* note 53, at 67–70.

59. *Id.* at 70–71.

60. *Id.* at 73.

such as the FTC and DOJ have also made it such that a transition in political party results in a change of how antitrust measures are enforced.⁶¹

Despite the last several decades seeing a decline in enthusiasm for pursuing antitrust violations, there has been a revival in recent years for increased enforcement.⁶² Notably, the Biden Administration has aggressively attempted to crack down on big business by securing Lina Khan's nomination as chairwoman of the FTC.⁶³ Additionally, "Big Tech"⁶⁴ has become embattled as politicians across the spectrum have sought to limit these companies' influence.⁶⁵ However, while there has been support for increased antitrust enforcement from both Democrats and Republicans, there is still not a unified strategy for preventing

61. See Theodore Voorhees, Jr., *The Political Hand in American Antitrust—Invisible, Inspirations, or Imaginary?*, 79 ANTITRUST L. J. 557, 559 (2014), https://www.cov.com/-/media/files/corporate/publications/2014/06/voorhees_alj_79-2_final_ant209.pdf [<https://perma.cc/6PL6-XZAZ>] (antitrust issues have increasingly become campaign issues); *The Federal Trade Commission Goes Rogue*, SENATE REPUBLICAN POL'Y COMM. (June 9, 2022), <https://www.rpc.senate.gov/policy-papers/the-federal-trade-commission-goes-rogue> [<https://perma.cc/4UHU-VRLI>] (opposing political parties have even gone so far as to attack its opponent for its antitrust enforcement strategy).

62. Jesse Hirsch, *In 2021, Antitrust Could Dominate the Court of Public Opinion*, CTR. FOR INT'L GOVERNANCE INNOVATION (Dec. 31, 2020), <https://www.cigionline.org/articles/2021-antitrust-could-dominate-court-public-opinion/> [<https://perma.cc/YMW3-7M4U>].

63. *Khan Confirmation to FTC Foreshadows More Aggressive Antitrust Agenda*, NAT'L L. REV. (June 18, 2021), <https://www.natlawreview.com/article/khan-confirmation-to-ftc-foreshadows-more-aggressive-antitrust-agenda> [<https://perma.cc/T4AT-X543>] (Khan has been a champion of increased antitrust enforcement throughout her professional career, specifically targeting Amazon in an article she wrote while at Yale).

64. *Big Tech/Social Media Regulation*, TEX. L., TARLTON L. LIBR. (Sept. 30, 2022, 2:01 PM), <https://tarlton.law.utexas.edu/big-tech-regulation> [<https://perma.cc/VV86-XLM5>] (like "Big Ag," "Big Tech" refers to an oligopoly of major firms that use their market power to shape technology offerings, media and information dissemination, e-commerce, and society at large).

65. Lauren Feiner, *'Big Tech Never Loses a Legislative Fight – and They Just Did' as Package of New Bills Passes*, CNBC (Oct. 6, 2022, 2:04 PM), <https://www.cnbc.com/2022/10/06/tech-critics-see-hope-for-new-antitrust-laws-after-win-in-the-house.html> [<https://perma.cc/UUG2-VBQS>].

harmful market consolidations.⁶⁶ Moreover, both motivations for and methods on how to increase scrutiny of big business differs wildly across party lines.⁶⁷

III. HISTORY OF CONSOLIDATION IN THE AGRICULTURAL INDUSTRY

Agriculture has existed in some form for thousands of years.⁶⁸ At the beginning of the twentieth century, farming was primarily planned around survival and not as a business designed to make money.⁶⁹ People would grow enough food to sustain themselves and sell what little surplus remained.⁷⁰ Increased agricultural production had its perks: people who were once subsistence farmers were free to move to cities, take jobs in manufacturing, and help spur the United States' economy to new heights.⁷¹ Fewer farmers were able to produce more of the food, fuel, and fiber, needed to feed and clothe not only those in the United States, but others around the world.⁷² Naturally, as farming became a profitable business venture, related businesses adapted to meet farmers' growing needs.⁷³

A. Regulatory Measures Addressing Agricultural Consolidation

Although farming transformed from a lifestyle into a viable career path toward the mid-1900s, small, family-owned farming operations were still the

66. See *Biden Administration Steps up Antitrust Enforcement*, AM. BAR ASS'N (June 8, 2023, 6:42 PM), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/11/antitrust-enforcement/> [<https://perma.cc/4HNU-JEWW>].

67. Steve Kovach, *Democrats and Republicans Disagree on How to Curb Big Tech's Power — Here's Where They Differ*, CNBC (Oct. 7, 2020, 12:50 PM), <https://www.cnbc.com/2020/10/07/democrats-and-republicans-disagree-on-how-to-regulate-big-tech.html> [<https://perma.cc/WKG8-ESCZ>].

68. See Brian Roberts et al., *PEOPLE, LAND AND TIME, AN HISTORICAL INTRODUCTION TO THE RELATIONS BETWEEN LANDSCAPE, CULTURE, AND ENVIRONMENT* 16 (1st ed. 1998), https://www.researchgate.net/publication/271841247_The_origins_and_spread_of_agriculture [<https://perma.cc/V9QP-38FR>].

69. See David Satterthwaite et al., *Urbanization and Its Implications for Food and Farming*, 365 *PHIL. TRANSACTIONS ROYAL SOC'Y* 2809, 2817 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2935117/> [<https://perma.cc/H9Z8-FJAA>].

70. *Id.*

71. See Raymon Huston & R. Adam Dastrup, *PEOPLE, PLACES, AND CULTURES* (2020), <https://open.library.okstate.edu/culturalgeography/> [<https://perma.cc/3RXC-UDC6>].

72. See Eric Njuki, *A Look at Agricultural Productivity Growth in the United States, 1948-2017*, U.S. DEP'T AGRIC. (Mar. 5, 2020), <https://www.usda.gov/media/blog/2020/03/05/look-agricultural-productivity-growth-united-states-1948-2017> [<https://perma.cc/4PWQ-B2C4>].

73. David Hodes, *Agribusiness Sector Continues Strong Growth*, *BUS. EXPANSION J.* (May 17, 2019), <http://bxjmag.com/agribusiness-sector-continues-strong-growth/> [<https://perma.cc/UFP2-7Y33>].

predominant way crops and livestock were produced in the United States.⁷⁴ This time period epitomized the romantic version of farming often displayed in pop culture: farms were generally highly diversified, grew multiple crops, and raised various species of livestock; products were sold locally; and farming was less focused on inputs and more on labor-intensive production.⁷⁵ Over the last 50 years, technological and agrological advancements have allowed farmers to produce more than ever before.⁷⁶ These advancements have come in the form of new seed varieties bred in a field or created in a lab, specialization to focus on fewer products, larger machinery equipped with GPS software, more reliable storage facilities to limit waste, and better land management practices, to name a few.⁷⁷

Industries relevant to farming have also evolved. Agribusiness firms have existed for decades to provide essential services to farmers across the entirety of the supply chain.⁷⁸ Farmers and consumers have come to rely on the services these companies provide to support “every activity within the whole realm of the food and fiber system . . . [t]hat could be production, financial aspects, marketing, merchandising, or distribution.”⁷⁹ Just like in other sectors of the economy, large corporations have slowly bought out independent and family-owned businesses supplying farm inputs to farmers.⁸⁰ These companies are perceived to exert too much control over markets, disadvantage producers and consumers, and prioritize profit over the public’s general welfare.⁸¹

74. *Farming and Farm Income*, U.S. DEP’T AGRIC. (Mar. 14, 2023), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/#:~:text=The%20number%20of%20U.S.%20farms,and%20increased%20nonfarm%20employment%20opportunities> [https://perma.cc/88DA-BL85].

75. Carolyn Dimitri et al., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY* 9 (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf [https://perma.cc/YHB8-4R7A].

76. Michael Boehlje & Michael Langemeier, *Importance of New Technologies for Crop Farming*, UNIV. ILL. FARMDAILY (Mar. 5, 2021), <https://farmdocdaily.illinois.edu/2021/03/importance-of-new-technologies-for-crop-farming.html> [https://perma.cc/C6D9-MQ23].

77. *Id.*

78. *What is Agribusiness?*, NORTHEASTERN JUNIOR COLL. (Sept. 28, 2021), <https://www.njc.edu/news/092821/what-agribusiness> [https://perma.cc/PPR7-7EBA].

79. *Id.*

80. Jennifer Clapp, *A RESEARCH AGENDA FOR FOOD SYSTEMS* 46 (Colin Sage, ed., 2022).

81. *Id.*

1. Key Legislation

Throughout the 1900s, growth of agribusiness led to increased regulation.⁸² Policymakers realized that like all business models, increased profits created the potential for bad actors.⁸³ Additionally, as the United States' food supply became concentrated in fewer hands, there was a need to safeguard the system through regulation.⁸⁴ Two key pieces of legislation concerning agricultural regulation that still exist today are the Capper Volstead Act passed in 1922⁸⁵ and the Packers and Stockyards Act passed in 1921.⁸⁶

The Capper Volstead Act exempted farmers from certain provisions of the Sherman Act by allowing the formation of cooperatives to market agricultural products and bargain for higher prices.⁸⁷ The USDA determines limitations to what practices are allowed under the Capper Volstead Act—the DOJ then enforced those limits.⁸⁸ The Packers and Stockyards Act was designed to protect farmers and ranchers as well as consumers from unfair trade practices in the livestock and poultry sectors by regulating unfair and monopolistic business practices.⁸⁹

2. Antitrust Enforcement in Practice in the Agricultural Industry

Agricultural producers have seen mixed results in pursuing action against companies exhibiting uncompetitive business practices.⁹⁰ In *Pickett v. Tyson Fresh Meats, Inc.*, the Eleventh Circuit upheld a ruling that Tyson did not violate antitrust laws by using marketing agreements to purchase cattle for processing.⁹¹ According to the court, the plaintiffs failed to present adequate evidence to suggest that Tyson

82. THE GEORGE WASHINGTON UNIV. REGUL. STUDIES CTR. & UNITED STATES DEPT. OF AGRIC., *THE RELATIONSHIP BETWEEN REGULATORY FORM & PRODUCTIVITY: AN EMPIRICAL APPLICATION TO AGRICULTURE* 122-154 (2018), <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/USDA/GW%20Reg%20Studies%20-%20USDA%20Full%20Report.pdf> [<https://perma.cc/BMA2-MK8M>].

83. See Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 *DRAKE J. AGRIC. L.* 34, 34-35 (2004), <https://aglawjournal.wp.drake.edu/wp-content/uploads/sites/66/2016/09/agVol09No1-Obrien.pdf> [<https://perma.cc/2HK5-2RAE>].

84. *Id.*

85. 7 U.S.C. ch. 9 (1922).

86. 7 U.S.C. §§ 181-229 (1921).

87. 7 U.S.C.A. §§ 291-92.

88. *Id.*

89. 7 U.S.C. §§ 181-229.

90. See *infra* notes 91-100.

91. See *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1287 (11th Cir. 2005).

was using the marketing agreements for anticompetitive purposes.⁹² Utilizing a freedom of contract mentality, the court held that “[i]f a packer’s course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition.”⁹³ Similarly, a federal court held in *Griffin v. Smithfield Foods, Inc.* that Smithfield’s use of vertical integration in its pork sector did not unfairly depress cash prices for hogs.⁹⁴

However, in a win for farmers, the DOJ’s pursuit to end John Deere’s purchase of Monsanto’s precision planting technology eventually ended with the companies terminating the acquisition.⁹⁵ Multiple class action lawsuits have also been filed recently across the agricultural sector alleging antitrust violations in farm equipment,⁹⁶ seed and fertilizer,⁹⁷ and against livestock processors.⁹⁸ Consumers and policymakers alike have experienced or witnessed the impacts of anticompetitive behavior and taken notice.⁹⁹

92. *Id.*

93. *Id.* at 1280. (through this ruling, the court failed to recognize the gross imbalance of power between farmers and the multibillion-dollar international corporations); Robert Pitofsky, *The Political Content of Antitrust*, 127 UNIV. PA. L. REV. 1051, 1053–57 (1979), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4867&context=penn_law_revie_w [<https://perma.cc/WCC6-WLCT>] (antitrust laws were designed to restrain concentrated economic power while enhancing individual freedom).

94. *See Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) (vertical integration is the process of owning multiple stages of production in a supply chain).

95. *Deere Abandons Proposed Acquisition of Precision Planting from Monsanto*, Press Release by U.S. DEP’T JUST. (May 1, 2017), <https://www.justice.gov/opa/pr/deere-abandons-proposed-acquisition-precision-planting-monsanto#:~:text=Decision%20to%20Terminate%20Deal%20Preserves,Precision%20Planting%20LLC%20from%20Monsanto> [<https://perma.cc/AZX8-C896>] (John Deere and Monsanto withdrew from the agreement out of concerns that the DOJ would not approve the sale).

96. Carlton Fields & Scott Abeles, “*Right to Repair*” *Class Actions Against John Deere Obtain a Centralized Forum*, JD SUPRA (July 11, 2022), <https://www.jdsupra.com/legalnews/right-to-repair-class-actions-against-6013092/> [<https://perma.cc/AZ2E-7CW7>].

97. *See generally* *Bailey v. Bayer CropScience LP*, No. 3:21-cv-00512-NJR (S.D. Ill. 2021) (alleging Bayer, Corteva, BASF, and Syngenta colluded to prevent electronic sales platforms from disrupting their market dominance and supply chains).

98. *See generally* *Complaint, Sysco Corp. v. Cargill*, No. 4:22-cv-02049 (S.D. Tex. June 24, 2022) (alleging beef processors reduced supplies while fixing beef prices).

99. Aaron Perzanowski, *Consumer Perceptions of the Right to Repair*, 96 IND. L.J. 361, 364–65 (2021), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11398&context=ilj> [<https://perma.cc/MVD5-DJSN>].

Bills supporting farmers' right to repair their own equipment have been introduced in state legislatures across the country.¹⁰⁰ Additionally, politicians at the federal level have introduced bills to protect agricultural producers ranging from right to repair¹⁰¹ to price transparency in livestock markets.¹⁰² The increased visibility and public sentiment behind this movement has galvanized support for stronger reforms to limit Big Ag's market power, ultimately culminating in President Biden signing Executive Order 14036, "Promoting Competition in the American Economy," as a means to provide more resources for the DOJ and FTC to pursue antitrust violations, particularly across the agricultural supply chain.¹⁰³

B. Economic Forces Supporting Consolidation Within the Industry

As an industry, agriculture is unique. Given the heavy focus on commodities, agriculture represents one of very few economic sectors that display nearly perfect competition; many farmers grow a crop that is essentially homogenous and as such, farmers have become price takers on the market.¹⁰⁴ Essentially, a farmer is not able to distinguish their products: a bushel of their corn is, in general, no different than a bushel of corn from another farmer.¹⁰⁵ This inability to distinguish their products as well as the small amount of product that an individual farmer produces relative to total production requires farmers to accept whatever price is offered to them by the market.¹⁰⁶ Additionally, a farmer must purchase raw inputs and use them to "create" a finished product that serves as the base of the supply chain for any number of end goods.¹⁰⁷ Because of this dynamic, farmers are caught between a

100. *Id.* at 365.

101. Fair Repair Act, H.R. 4006, 117th Cong. (2021).

102. Cattle Price Discovery and Transparency Act of 2021, H.R. 5992, 117th Cong. (2021).

103. *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> [<https://perma.cc/78YX-MUAK>].

104. *Characteristics of Competition*, N.D. STATE UNIV. (June 7, 2023, 6:35 PM), <https://www.ag.ndsu.edu/aglawandmanagement/agmgmt/coursematerials/competition#:~:text=Production%20agriculture%20is%20often%20cited%20as%20an%20example%20of%20perfect%20competition> [<https://perma.cc/NMG5-NXUN>].

105. *Price Taker*, CFI (Dec. 12, 2022), <https://corporatefinanceinstitute.com/resources/economics/price-taker/> [<https://perma.cc/TW2D-ATDA>].

106. *Id.*

107. *Frontier Technology Issues: Frontier Technologies for Smallholder Farmers: Addressing Information Asymmetries and Deficiencies*, UNITED NATIONS DEP'T ECON. & SOC. AFFS. (Nov. 17, 2021), <https://www.un.org/development/desa/dpad/publication/frontier->

rock and a hard place; they are consumers for agricultural inputs such as seed, equipment, and fertilizer, but also exposed to the market risk of paying for inputs prior to realizing any profit from the sale of crops.¹⁰⁸ They then turn around and are forced to sell their products to many of the same large firms that sold the farmers their inputs.¹⁰⁹

1. *The Rise of Big Ag*

As margins for farmers have gotten tighter, the least profitable farms have been forced to exit the market.¹¹⁰ Remaining farms have been forced to fight for access to the land, equipment, and other assets left behind by those who could not survive the ever-increasing consolidation.¹¹¹ The number of farms in the United States has fallen from a peak of 6.8 million in 1935 to 2.0 million at the end of 2022.¹¹² Furthermore, nearly half of agricultural production in the United States comes from farms that the USDA classifies as “large-scale.”¹¹³

Technological developments have largely been credited for fewer farms producing greater agricultural output.¹¹⁴ This demand for innovative production technology created market opportunity for agribusiness firms providing inputs to

technology-issues-frontier-technologies-for-smallholder-farmers-addressing-information-asymmetries-and-deficiencies/ [https://perma.cc/UX6C-M3FE].

108. *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, *supra* note 103.

109. Hiba Hafiz & Nathan Miller, *Competitive Edge: Big Ag’s Monopsony Problem: How Market Dominance Harms U.S. Workers and Consumers*, WASHINGTON CTR. EQUITABLE GROWTH (Feb. 18, 2021), <https://equitablegrowth.org/competitive-edge-big-ags-monopsony-problem-how-market-dominance-harms-u-s-workers-and-consumers/> [https://perma.cc/MT7B-RVPL].

110. See Alena 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/8CWA-BYFC].

111. *See id.*

112. *See* Kassel, *supra* note 74.

113. *Id.*

114. James M. MacDonald et al., *THREE DECADES OF CONSOLIDATION IN U.S. AGRICULTURE* 40 (Mar. 2018), <https://www.ers.usda.gov/webdocs/publications/88057/eib-189.pdf?v=5765.6> [https://perma.cc/KB9D-6EU4].

farmers.¹¹⁵ These firms include familiar names such as Bayer,¹¹⁶ John Deere,¹¹⁷ ADM,¹¹⁸ and others. Since 1970, private firms have quadrupled their investment in research and development while public sector investment has steadily declined since the early 2000s.¹¹⁹ Thus, farmers—and indirectly, the public—have relied heavily on efficiencies in agricultural technology advancement created by private entities. However, this reliance has come at a high cost. Limited market competition is a symptom of consolidation and it has occurred at all levels of food production from input sales—including seeds, chemicals, and fertilizers—to individual farming operations to grain trading and meat processing operations to retail and distribution; there is no segment of the agricultural sector consolidation has not touched.¹²⁰ Higher prices, distorted production, consumption decision-making, lower production efficiency, reduced incentive to invest in innovation, and increased levels of income inequality are all symptoms of reduced competition among agribusinesses.¹²¹

The capital-intensive nature of agricultural innovation has worsened consolidation by Big Ag. From 1977 to 2012, the four largest firms for farm machinery increased their market share from 46 to 61 percent.¹²² Fertilizer manufacturers controlling roughly one-third of the market increased their share to as high as 88 percent while pesticide manufacturers increased their share from 55

115. Torsten Kurth et al., *Reviving Agricultural Innovation in Seeds and Crop Protection*, BOSTON CONSULTING GRP. (Feb. 24, 2020), <https://www.bcg.com/publications/2020/reviving-agricultural-innovation-seeds-crop-protection> [<https://perma.cc/JF3T-CA75>].

116. *8 Largest Agricultural Companies in the World*, THE AGROTECH DAILY (Aug. 22, 2022) <https://theagrotechdaily.com/8-largest-agricultural-companies-in-the-world/#:~:text=The%20company%20is%20also%20one,billion%20with%20around%20103%2C824%20employees> [<https://perma.cc/W7C3-5BXV>].

117. *Id.*

118. *Id.*

119. *Agricultural Research Spending from the Private Sector has Increased While Spending from the Public Sector Fell*, U.S. DEP'T AGRIC. (July 9, 2019), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=93420> [<https://perma.cc/5RUK-V6GR>].

120. Mary K. Hendrickson et al., *The Food System: Concentration and Its Impacts*, FAM. FARM ACTION ALL. (May 6, 2021), https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf [<https://perma.cc/5EJQ-WNMU>].

121. James M. MacDonald, *Consolidation, Concentration, and Competition in the Food System*, FED. RSRV. BANK KANSAS CITY: ECONOMIC REVIEW, 85, 93 (2017) <https://www.kansascityfed.org/documents/765/2017-Consolidation,%20Concentration,%20and%20Competition%20in%20the%20Food%20System.pdf> [<https://perma.cc/A8W2-FRX4>].

122. *Id.* at 94.

to 57 percent.¹²³ Seed sales in the United States are dominated by just four companies.¹²⁴ Similarly, four firms control 55 to 85 percent of meat processing.¹²⁵

Agricultural firms have taken aggressive action to protect their investments, leading to a steady increase in firm consolidation since the late 1970s.¹²⁶ High market concentration can create a system where input sellers are exercising monopoly power over agricultural producers while agribusinesses buying agricultural products from producers can exert monopsony power.¹²⁷ For example, John Deere—the largest seller of farm equipment in the United States—employs strict end-user license agreements that a farmer agrees to by simply turning on their machinery.¹²⁸ Despite purchasing the equipment, farmers agree to a lifetime lease and forfeit the right for themselves or third-party repair shops to make repairs or modifications to the equipment under the terms of the agreement.¹²⁹ This commitment can prove costly for farmers when equipment needs repaired.¹³⁰

2. Deadweight Loss, Record Profit

Lost time and profits from slow machinery repairs is far from the only systemic impact felt by farmers in an increasingly consolidated industry. “Parity” is a term frequently used to gauge the economic health of farmers and is essentially a ratio between prices received by farmers for commodities relative to the ratio of

123. *Id.*

124. Pamela Smith, *It Starts With Seed*, PROGRESSIVE FARMER (Sept. 17, 2021, 5:00AM), <https://www.dtnpf.com/agriculture/web/ag/crops/article/2021/09/17/seed-company-leadership-profiles#:~:text=They%20are%20often%20called%20%22The,seeds%20in%20the%20United%20States> [https://perma.cc/V659-GK4Z].

125. Brian Deese et al., *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, THE WHITE HOUSE (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/> [https://perma.cc/ZQ3W-G2CM].

126. See MacDonald, *supra* note 121.

127. *Id.* (monopsony power exists when a buyer faces little to no competition from other buyers for a good or service).

128. S. Kyle Montello, *The Right to Repair and the Corporate Stranglehold over the Consumer: Profits over People*, 22 TUL. J. TECH. & INTELL. PROP. 165, 170–71 (2020).

129. See generally John Deere, LICENSE AGREEMENT FOR JOHN DEERE EMBEDDED SOFTWARE (2016), https://www.deere.com/assets/pdfs/common/privacy-and-data/docs/agreement_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf [https://perma.cc/TY8B-XTES].

130. See Montello, *supra* note 128, at 170–72.

the cost paid for production and then indexed to a base year.¹³¹ A parity of 100 means the price received by farmers is reflective of inflation and the cost of production.¹³² Since its peak of 120 in the 1920s, parity has declined to 31 in 2020—meaning that commodity prices received by farmers have drastically fallen out of sync with production costs and inflation.¹³³ This discrepancy exists despite the fact that the price for all food in the United States—consumed both inside and outside the home—has increased 20 percent over the last 10 years.¹³⁴

In addition to negatively impacting producers, agricultural consolidation also leads to indirect price increases for consumers.¹³⁵ Interdependency among different business units in the food supply chain creates a ripple effect of production and logistical challenges that can drive up food costs.¹³⁶ This effect was seen in 2019 when a fire at a beef processing facility in Kansas led to a huge spike in beef prices across the country.¹³⁷ However, the disruptions this fire caused were negligible compared to the COVID-19 pandemic when 40 percent of plants were forced to shut down to contain the spread of the virus, creating huge supply disruptions that left grocery store shelves empty and meat prices at record highs.¹³⁸

131. U.S. DEP'T AGRIC., NAT'L AGRIC. STAT. SERV., *PARITY PRICES, PARITY RATIO, AND FEED PRICE RATIOS 4-13* (2010), https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Prices/Chapter%20Four%20Parity%20and%20Feed%20Price%20Ratios%20v10.pdf [<https://perma.cc/2WTH-R34Y>].

132. *Id.*

133. *See id.*; *Prices Paid and Received: Parity Ratio by Year, US*, U.S. DEP'T AGRIC. NAT'L AGRIC. STAT. SERV. (June 8, 2023, 11:47 PM), https://www.nass.usda.gov/Charts_and_Maps/Agricultural_Prices/parity.php [<https://perma.cc/S5BE-FMX9>].

134. Matthew MacLachlan & Megan Sweitzer, *Annual Percent Changes in Selected Consumer Price Indexes, 1974 Through 2022*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (June 7, 2023, 11:02 PM), <https://www.ers.usda.gov/data-products/food-price-outlook/> [<https://perma.cc/GN5T-ZYZT>].

135. *See* Andrew, *supra* note 7, at 4.

136. *Id.*

137. Michael Nepveux, *Impacts of the Packing Plant Fire in Kansas*, Am. FARM BUREAU FED'N (Sept. 10, 2019), <https://www.fb.org/market-intel/impacts-of-the-packing-plant-fire-in-kansas> [<https://perma.cc/AW5M-RXDK>]. The United States Department of Agriculture investigated the issue and called into question whether the fire had impacted the beef supply chain as much as claimed or if Tyson Foods had used the incident as an excuse to raise prices. Dennis Rudat, *USDA Price-Spread Investigation Reports Slaughter Increased Following 2019 Tyson Plant Fire*, MICH. FARM NEWS (July 23, 2020), <https://www.michiganfarmnews.com/usda-price-spread-investigation-reports-slaughter-increased-following-2019-tyson-plant-fire> [<https://perma.cc/UKY5-KK4G>].

138. U.S. DEP'T AGRIC. AGRIC. MKTG. SERV., *BOXED BEEF & FED CATTLE PRICE SPREAD INVESTIGATION REPORT* (July 22, 2020),

While farmers and consumers both felt the squeeze of increasing costs, agribusiness companies have continued to reap record profit.¹³⁹ Cargill, a diversified agribusiness and one of the largest privately held companies in the world, posted a nearly \$5 billion profit in 2021.¹⁴⁰ Similarly, John Deere posted nearly \$6 billion in profits in 2021, a 69 percent increase from its previous record set in 2013.¹⁴¹ Meat packers Tyson and JBS increased 2021 net income by 47 percent and 345 percent, respectively.¹⁴² These companies were able to set new revenue records during a global pandemic despite paying executives record salaries and spending hundreds of millions on stock buybacks where sales volumes even sometimes declined amid record inflation.¹⁴³

IV. ANALYSIS

Although calls to toughen antitrust enforcement in the agricultural industry have grown louder in recent years, efforts have largely been siloed to a group's particular interest.¹⁴⁴ There are numerous arguments supporting an overhaul of antitrust enforcement systems, including the inability to efficiently repair expensive farm equipment,¹⁴⁵ meatpacking firms integrating livestock

<https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf> [https://perma.cc/2WNR-YYZW].

139. Errol Schweizer, *How Profit Inflation Made Your Groceries So Damn Expensive*, FORBES (Sep. 12, 2022, 2:08 AM), <https://www.forbes.com/sites/errolschweizer/2022/09/12/how-profit-inflation-made-your-groceries-so-damn-expensive/?sh=5a53b3142eb9> [https://perma.cc/NG6L-VLKG].

140. *Id.*

141. Tyler Jett, *John Deere to Sell Machine-Servicing Software to Farmers Amid Right to Repair Complaints*, DES MOINES REG. (Mar. 24, 2022, 1:18 PM), <https://www.desmoinesregister.com/story/money/business/2022/03/22/john-deere-tractors-farmers-access-software-after-right-repair-complaints/7126749001/> [https://perma.cc/AV9H-HP9C].

142. See Schweizer, *supra* note 139.

143. *While Working Families Struggled to Put Food on the Table in 2021, the Biggest Food Companies Saw Increased Profits, Shareholder Handouts, and Executive Compensation*, ACCOUNTABLE.US (Mar. 23, 2022), <https://accountable.us/wp-content/uploads/2022/07/2022-03-23-Food-CPI-Pandemic-Profiteers-Report-FINAL.pdf> [https://perma.cc/3JF6-Y9ZU].

144. See, e.g., *supra* notes 101–02 and accompanying text.

145. See Mike Serra, *Looking Under the Hood on the Right to Repair*, MICH. BAR J., (May 2022) <https://www.michbar.org/journal/Details/Looking-under-the-hood-on-the-right-to-repair?ArticleID=4428> [https://perma.cc/QV2W-SGSC].

operations,¹⁴⁶ and limited options for purchasing inputs such as seed or fertilizer.¹⁴⁷ Each of these examples are valid on their own; however, the impacts of agricultural consolidation are much larger than any singular concern. At a granular level, there is a strong argument that Big Ag should face enhanced legal scrutiny. When viewed from 50,000 feet, it is obvious: limited competition in the agricultural sector creates economic loss for both farmers and consumers, gives a free pass to large agribusinesses to engage in behavior that potentially violates other laws, and poses grave concerns for national security and the safety of the United States' food supply.¹⁴⁸

A. Why No One Cares

So why have agribusiness companies continued to consolidate and exert ever-increasing market power right under the nose of the DOJ, FTC, and Congress without aggressive steps being employed to mitigate the problem? Numerous factors contribute to the general apathy that has befallen the agricultural industry; although farmers are responsible for feeding, fueling, and clothing the United States and much of the world, only 1.4% of the population is employed in direct, on-farm production agriculture.¹⁴⁹ Additionally, a recent study revealed that 41

146. See *FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, THE WHITE HOUSE (Jan. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/> [https://perma.cc/29NY-G7TD] (several large firms dominate meatpacking for beef, pork, and poultry).

147. See Rebecca Bratspies, *Owning All the Seeds: Consolidation and Control in Agbiotech*, 47 ENVTL. L. 583, 585–601 (2017) (four companies control virtually the entire market for agricultural inputs such as fertilizer and seed).

148. See Claire Kelloway & Sarah Miller, *FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM* 12–14, (Open Mkts. Inst. ed. 2019), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea9fa6c2c1e9c460038ec5b/1588198002769/190322_MonopolyFoodReport-v7.pdf [https://perma.cc/GBF4-B6W9].

149. *Ag and Food Sectors and the Economy*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (June 7, 2023, 6:22 PM), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> [https://perma.cc/XGS7-45HJ]. A 2022 study found that food and agriculture accounted for approximately 20 percent of the United States' economic activity. *What is the Food and Agriculture Sector's Impact in Your Community?*, FEEDING THE ECON. (2023), <https://feedingtheeconomy.com/> [https://perma.cc/ZK3J-JYAK].

percent of Americans never or rarely seek information about where their food comes from.¹⁵⁰

American farmers and consumers are increasingly disconnected from each other; this creates a void benefitting the agribusiness companies serving as middlemen.¹⁵¹ In addition to exploiting passivity among both farmers and consumers, Big Ag spent approximately twice as much as any other industry on lobbying when adjusted for industry size from 2003 to 2020.¹⁵² In 2022 alone, agribusiness companies spent nearly \$166 million on lobbying efforts.¹⁵³ Notably, some legislators directly benefit from consolidation within the sector. For instance, former U.S. Congresswoman Vicky Hartzler of Missouri, a member of the House Agriculture Committee, and her husband own a farm equipment company that earned between \$1 million and \$5 million according to her 2020 House of Representatives Financial Disclosure Form.¹⁵⁴

Despite ongoing concern over consolidation for the past several decades, there is a lack of political will to address antitrust violations in the agricultural sector. For example, although the two largest equipment manufacturing associations broke a promise to release service information by January 2021, there has been virtually no recourse.¹⁵⁵ Additionally, despite many states introducing

150. Holly Whetstone, *New Food Literacy and Engagement Poll Reveals Public Disconnect on Food and Climate Change, Rising Interest in Meat Alternatives*, MICH. STATE UNIV. (Apr. 20, 2021), <https://www.canr.msu.edu/news/new-food-literacy-and-engagement-poll-reveals-public-disconnect-on-food-and-climate-change-rising-interest-in-meat-alternatives> [https://perma.cc/7GDE-TVFB].

151. *See id.*

152. Vincent H. Smith & Benjamin J. Goren, *FARM-SECTOR SPENDING ON FEDERAL CAMPAIGN CONTRIBUTIONS AND LOBBYING EXPENDITURES: EVIDENCE FROM 2003 TO 2020* 1 (Am. Enter. Inst. ed., 2021), <https://www.aei.org/wp-content/uploads/2021/12/Farm-sector-spending-on-federal-campaign-contributions-and-lobbying-expenditures.pdf?x91208> [https://perma.cc/62DU-KH4Z].

153. Erin Duffin, *Total Lobbying Expenses in the United States in 2022, by Sector*, STATISTA (Apr. 5, 2023), <https://www.statista.com/statistics/257368/total-lobbying-expenses-in-the-us-by-sector/#:~:text=In%202021%2C%20about%20150.88%20million,sector%20in%20the%20United%20States> [https://perma.cc/99BS-LCS2].

154. LEGISLATIVE RES. CTR., *FINANCIAL DISCLOSURE REPORT 3 (2021)*, https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2020/10041198.pdf [https://perma.cc/XM9V-APGE].

155. *AEM, EDA Announce Statement of Principles on 'Right to Repair'*, ASSOC. EQUIP. MFRS. (Feb. 1, 2018), <https://www.aem.org/news/aem-eda-announce-statement-of-principles-on-right-to-repair> [https://perma.cc/5NRG-AK3L]; Grey Morgan, *Farmers Will Soon Have the Right to Repair their Tractors*, CIV. EATS (July 13, 2021),

right-to-repair legislation, extensive lobbying efforts have prevented these bills from passing.¹⁵⁶ The attempts for federal legislation have fared no better. The right to repair bill introduced in the United States Senate only has two co-sponsors and has seen little movement within the chamber.¹⁵⁷ Despite the entire country needing food to live, there is surprisingly little desire to address the consequences of consolidation within the sector on farmers or the general population.

Another issue of concern is the lack of understanding regarding the massive amount of tax dollars used to fund federal subsidy programs for farmers and nutrition programs for individuals struggling with food security.¹⁵⁸ The Agriculture Improvement Act of 2018 (Farm Bill) is expected to cost \$428 billion from 2019 to 2023.¹⁵⁹ The bulk of the bill's spending is for use on nutrition programs, including the Supplemental Nutrition Assistance Program (SNAP) with other outlays dedicated to federally subsidized crop insurance and commodity support programs to close the income gap for farmers when crop prices and farm revenue declines.¹⁶⁰

Despite agribusiness companies remaining flush with funds, the federal government continues to write checks to struggling farmers and hungry citizens with little oversight over potential causes that have contributed to the need for assistance in the first place.¹⁶¹ In fact, additional assistance programs offered in 2020 during the COVID-19 pandemic contributed to subsidies accounting for 39

<https://civileats.com/2021/07/13/farmers-just-got-a-new-right-to-repair-their-tractors/> [<https://perma.cc/WG9A-6TNK>].

156. Elaine S. Povich, *Farmers File Federal Complaint Over Right to Repair Equipment*, YAHOO SPORTS (Mar. 3, 2022, 11:59 PM), <https://sports.yahoo.com/farmers-file-federal-complaint-over-045900609.html> [<https://perma.cc/N53Y-G9RE>].

157. Fair Repair Act, S. 3830, 117th Cong. (2022).

158. Dan Charles, *Farmers Got Billions From Taxpayers in 2019, and Hardly Anyone Objected*, NAT'L PUB. RADIO (Dec. 31, 2019, 4:13 PM), <https://www.npr.org/sections/thesalt/2019/12/31/790261705/farmers-got-billions-from-taxpayers-in-2019-and-hardly-anyone-objected> [<https://perma.cc/2LVW-RTAT>].

159. *Farm Bill Spending*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (Feb. 7, 2023), <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-bill-spending/> [<https://perma.cc/J3W8-ZZ4F>].

160. *Id.*

161. Vincent Smith & Joseph Glauber, *Congress Must End Blank Check to Use on Government Farm Subsidies*, THE HILL (July 23, 2020, 3:00 PM), <https://thehill.com/opinion/energy-environment/508725-congress-must-end-blank-check-to-use-on-government-farm-subsidies/> [<https://perma.cc/N76V-5YEX>].

percent of farm income for the year.¹⁶² It defies logic that companies are still able to continue to exert monopoly and monopsony power over the food supply at the American taxpayer's expense and in direct violation of laws that were designed to prevent such behavior.

B. When Did Big Ag Become Above the Law?

Given the economic harm that consolidation in the agricultural sector has both directly and indirectly caused, it begs the question of how Big Ag not only successfully avoids major antitrust enforcement, but also skirts other state and federal laws in the process. Many public complaints regarding the agricultural industry stem from issues originating with large agribusiness firms: from "ag-gag" legislation designed to prohibit whistleblowing at livestock facilities and exempting commodity groups from public records requests,¹⁶³ to climate change and other environmental harms, Big Ag is the primary source of the public's complaints.¹⁶⁴ As mentioned above, agribusiness firms have utilized deft lobbying machines to mitigate fall-out from negative press.¹⁶⁵ However, increasing consolidation has shone a light on large agribusiness firms violating the law, an issue that can longer be ignored.

1. Impacts to the Environment and Human Health

America's few agribusiness firms are so large that these corporations can exert powerful legal influence in their communities.¹⁶⁶ For the past several decades, Big Ag has engaged in shady practices that have polluted the nation's

162. Chuck Abbott, *Record-High Ag Subsidies to Supply 39% of Farm Income*, SUCCESSFUL FARMING (Dec. 3, 2020), <https://www.agriculture.com/news/business/record-high-ag-subsidies-to-supply-39-of-farm-income> [<https://perma.cc/47TK-W3EF>].

163. Nancy Fink Huehnergarth, *Big Agriculture Bullies and Lobbies to Keep Americans in the Dark*, FORBES (May 5, 2016, 11:05 AM), <https://www.forbes.com/sites/nancyhuehnergarth/2016/05/05/big-ag-bullies-and-lobbies-to-keep-americans-in-the-dark/?sh=7b526759502c> [<https://perma.cc/AYM5-EHUL>].

164. Matthew R. Sanderson & Stan Cox, *Big Agriculture Is Leading to Ecological Collapse*, FOREIGN POL'Y (May 17, 2021, 3:02 PM), <https://foreignpolicy.com/2021/05/17/big-industrialized-agriculture-climate-change-earth-systems-ecological-collapse-policy/> [<https://perma.cc/U6S6-WNNQ>].

165. See Smith & Goren, *supra* note 152; see also Duffin, *supra* note 153.

166. See Huehnergarth, *supra* note 163.

air¹⁶⁷ and water¹⁶⁸ and in the process, causing cancer through exposure to toxic chemicals.¹⁶⁹ Furthermore, consolidation in the agricultural industry has concentrated wealth, power, and resources into the hands of a few, select companies.¹⁷⁰

This power concentration has enabled Big Ag to simply pay a fine in exchange for continuing practices that, despite being detrimental to human health and the environment, generate large profits.¹⁷¹ For companies that make billions of dollars a year, this does little to disincentivize bad behavior. An example of how grossly disproportionate these companies' fines are relative to their revenue stream can easily be examined: over the last 10 years (2013–2022), Tyson Foods turned over \$414 billion in revenue.¹⁷² Contrast that with the \$294 million in total fines Tyson has paid since 2000.¹⁷³ Despite Tyson's fine records spanning over twice

167. Marcia Brown, *In Restricting Repair, John Deere May Be Violating the Clean Air Act, Advocates Allege*, POLITICO (July 22, 2022, 9:30 AM), <https://www.politico.com/news/2022/07/22/john-deere-clean-air-act-00047078#:~:text=Agriculture-.In%20restricting%20repair%2C%20John%20Deere%20may%20be%20violating%20the%20Clean,other%20than%20via%20authorized%20dealerships> [https://perma.cc/N9CS-68PD].

168. Jef Feeley, *Bayer's \$648 Million U.S. Water Pollution Settlement Moves Ahead*, BNN BLOOMBERG (Mar. 15, 2022), <https://www.bnnbloomberg.ca/bayer-s-648-million-u-s-water-pollution-settlement-moves-ahead-1.1738040> [https://perma.cc/4PSV-YL52].

169. Brendan Pierson, *Bayer on Winning Streak in Roundup Litigation After Huge Initial Losses*, REUTERS (Sept. 2, 2022, 6:38 PM), <https://www.reuters.com/legal/litigation/bayer-winning-streak-roundup-litigation-after-huge-initial-losses-2022-09-02/> [https://perma.cc/U5L6-58Q6].

170. See Hendrickson, *supra* note 120.

171. See *Clean Air Act: Agriculture-Related Enforcement Cases*, U.S. ENV'T PROT. AGENCY (June 8, 2023, 7:40 PM), <https://archive.epa.gov/agriculture/ag-center-archive/web/html/lcaaenf.html> [https://perma.cc/PG44-XCK3]; Audrey McAvoy, *Critics Blast EPA for Lowering Syngenta Pesticide Fine*, SEATTLE TIMES (Feb. 15, 2018, 4:24 PM), <https://www.seattletimes.com/business/critics-blast-epa-for-lowering-syngenta-pesticide-fine/> [https://perma.cc/59BD-TE6P]; *Cargill Clean Air Enforcement Settlement*, U.S. ENV'T PROT. AGENCY (Oct. 31, 2022), <https://www.epa.gov/enforcement/cargill-clean-air-enforcement-settlement> [https://perma.cc/3BPY-Y3S5].

172. *Tyson Foods Revenue 2010–2023*, MACROTRENDS (June 9, 2023, 6:39 AM), <https://www.macrotrends.net/stocks/charts/TSN/tyson-foods/revenue> [https://perma.cc/JHF9-7ASE].

173. *Violation Tracker Current Parent Company Summary Tyson*, GOOD JOBS FIRST (June 9, 2023, 7:23 AM), https://violationtracker.goodjobsfirst.org/?parent=tyson-foods&order=pen_year&sort=&page=3 [https://perma.cc/WQ35-YTUP] (the fines mentioned against Tyson are a collection of employment, environment, competition, safety, and financial related offenses).

the period of revenue, the fines assessed to Tyson for routinely breaking the law is less than four-hundredths of a percent of its revenue for the last decade.¹⁷⁴ From a business perspective, the message is clear: it pays to break the law.

It is natural to wonder how these companies increased their revenue stream by employing these harmful practices. The answer is more nuanced than it may seem. At the surface level, and as the example above illustrates, these companies have found paying a fine is cheaper than compliance with the law.¹⁷⁵ Pollution mitigation is costly. Although statistics for pollution abatement costs in the United States are scarce, a 2014 study found that manufacturers in the United States spent \$24.6 billion on waste disposal, treatment of wastewater and air pollution, and abating greenhouse gas emissions.¹⁷⁶ Breaking down those costs, the study found that the food industry alone accounted for 28 percent of the total cost for wastewater treatment.¹⁷⁷

Because the cost to mitigate pollution is an obvious expense that large agribusiness seeks to avoid, these businesses indirectly impact the environment by encouraging farmers to use detrimental practices and products that increase agricultural output. Agribusiness firms in both the crop and livestock sectors utilize production contracts that occasionally mandate the use of certain inputs or production methods to dictate how crops are grown or how livestock are reared.¹⁷⁸ Consolidation plays even more heavily into this conversation given the very few options available to farmers to market their products.¹⁷⁹ Farmers either have to conform to the practices agribusinesses demand or risk not having a marketing channel to sell their crops or livestock.¹⁸⁰

Additionally, these firms have largely refused to pay for their environmental impact by encouraging farmers not to adopt more sustainable production practices,

174. *Id.* From 2000 through 2022, Tyson was assessed 299 fines.

175. See Tri Vi Dang et al., *The Role of Financial Constraints in Firm Investment Under Pollution Abatement Regulation*, 76 J. CORP. FIN. (2022), <https://www.sciencedirect.com/science/article/pii/S0929119922000955> [<https://perma.cc/W68K-P39Z>].

176. Andy Szal, *Study: U.S. Manufacturers Paid More for Pollution Control*, MANUFACTURING.NET (Mar. 11, 2015), <https://www.manufacturing.net/home/news/13238394/study-us-manufacturers-paid-more-for-pollution-control> [<https://perma.cc/JJX9-UV3C>].

177. *Id.*

178. Caius Z. Willingham & Andy Green, *A Fair Deal for Farmers*, CTR. AM. PROGRESS (May 7, 2019), <https://www.americanprogress.org/article/fair-deal-farmers/> [<https://perma.cc/H3PK-6XHP>].

179. *Id.*

180. *Id.*

thus putting the burden on taxpayer-funded initiatives.¹⁸¹ Just as pollution abatement is an expensive endeavor, sustainable farming practices also carry a hefty price tag. Regenerative agriculture, or the adoption of agricultural practices designed to restore soil back to its natural state, typically leads to significantly lower yields due to less input use.¹⁸² Despite agribusinesses reaping billions of dollars a year in profit, farmers largely bear the cost of adopting more sustainable farming practices,¹⁸³ or taxpayers foot the bill.¹⁸⁴ This reality exists despite the fact that agribusiness firms in both the crop and livestock sectors have known for years that their business practices directly or indirectly promoted environmental degradation.¹⁸⁵ Furthermore, these same companies have engaged in dark money

181. See Michael Happ, *Payments for Pollution: How Federal Conservation Programs Can Better Benefit Farmers and the Environment*, INST. FOR AGRIC. & TRADE POL'Y (Apr. 14, 2022), <https://www.iatp.org/documents/payments-pollution-how-federal-conservation-programs-can-better-benefit-farmers-and> [<https://perma.cc/9W9Q-W3K4>].

182. Claire E. LaCanne & Jonathan G. Lundgren, *Regenerative Agriculture: Merging Farming and Natural Resource Conservation Profitably*, PEERJ (2018) <https://peerj.com/articles/4428/> [<https://perma.cc/CF92-8PNZ>] (a study of regenerative cropping methods for corn production found a 29 percent reduction in grain production).

183. Chuck Abbott, *More Farmers Plant Cover Crops for Higher Yields and Soil Health*, SUCCESSFUL FARMING (Oct. 5, 2022), <https://www.agriculture.com/news/business/more-farmers-plant-cover-crops-for-higher-yields-and-soil-health> [<https://perma.cc/5VKN-K7ZG>].

184. See *The Conservation Reserve Program (CRP) is Regionally Concentrated*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (Jan. 6, 2023), [https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58266#:~:text=USDA's%20Conservation%20Reserve%20Program%20\(CRP,of%20spending%20at%20that%20time\)](https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58266#:~:text=USDA's%20Conservation%20Reserve%20Program%20(CRP,of%20spending%20at%20that%20time)) [<https://perma.cc/JY2G-QHCY>] (the conservation reserve program has an annual budget of \$1.8 billion and is the USDA's largest conservation program by spending); See also *USDA to Invest \$1 Billion in Climate Smart Commodities, Expanding Markets, Strengthening Rural America*, U.S. DEP'T AGRIC. (June 8, 2021), <https://www.usda.gov/media/press-releases/2022/02/07/usda-invest-1-billion-climate-smart-commodities-expanding-markets> [<https://perma.cc/LZU3-WXN2>].

185. See Bill Tomson, *US Farmers Count on Environmental Practices to Get Edge in Foreign Markets*, AGRI-PULSE (Dec. 8, 2020, 11:45 AM), <https://www.agri-pulse.com/articles/14958-us-farmers-count-on-enviro-practices-to-get-edge-in-foreign-markets> [<https://perma.cc/6HPJ-FEQQ>] (Bunge and ADM, two of four companies that control 75 percent of global grain trade, have knowingly purchased grain from South American farming operations that have contributed to deforestation of the Amazonian rainforest); See also Tom Levitt, *Three Food Companies with a Climate Footprint Bigger Than the Netherlands*, THE GUARDIAN (Dec. 7, 2015, 12:30 AM), <https://www.theguardian.com/sustainable-business/2015/dec/07/food-climate-footprint-cargill-tyson-yara-netherlands> [<https://perma.cc/88TG-M5JT>].

campaigns to kill lawsuits that attempt to hold them accountable for their business practices.¹⁸⁶

While agribusiness companies exert a stranglehold on the supply side, regulatory mechanisms designed to keep companies in check have failed to work effectively.¹⁸⁷ Although the EPA is tasked with regulating pesticide use in the United States, the EPA still allows dozens of pesticides that are banned in other countries with high agricultural production.¹⁸⁸ The Federal Insecticide, Fungicide, and Rodenticide Act—the legislation controlling pesticide use in the United States—makes removing harmful chemicals from the market significantly more difficult than the process for a chemical to receive approval.¹⁸⁹

Consolidation of agricultural firms again plays a role in this harm because lax regulatory enforcement has led to a significant decline in the number of new active ingredients introduced into the market for herbicides, insecticides, fungicides, and other chemicals.¹⁹⁰ For the oligopoly of firms producing agricultural chemicals, there is virtually no competition for market share, nor is there any incentive to create newer, safer products because the regulatory system does not demand it.¹⁹¹ Furthermore, where legislation falls short of addressing these issues, the court system has been unpredictable in their rulings for cases concerning Big Ag.¹⁹²

186. *Berkeley Talks Transcript: Art Cullen on Journalism and Politics in the Corn Belt*, BERKELEY NEWS (Apr. 24, 2020), <https://news.berkeley.edu/2020/04/24/berkeley-talks-transcript-art-cullen/> [<https://perma.cc/2BAB-Y49T>].

187. *See 8 Largest Agricultural Companies in the World*, *supra* note 116. *See also* Nathan Donley, *How the EPA's Lax Regulation of Dangerous Pesticides is Hurting Public Health and the US Economy*, BROOKINGS (Sept. 29, 2022), <https://www.brookings.edu/research/how-the-epas-lax-regulation-of-dangerous-pesticides-is-hurting-public-health-and-the-us-economy/> [<https://perma.cc/YRV4-T43Z>].

188. *Id.*

189. *Id.*

190. *Evolution of the Crop Protection Industry Since 1960*, PHILLIPS MCDUGALL (Nov., 2018), <https://croplife.org/wp-content/uploads/2018/11/Phillips-McDougall-Evolution-of-the-Crop-Protection-Industry-since-1960-FINAL.pdf> [<https://perma.cc/E3NQ-LUXK>].

191. James M. MacDonald, *Mergers and Competition in Seed and Agricultural Chemical Markets*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (Apr. 3, 2017), <https://www.ers.usda.gov/amber-waves/2017/april/mergers-and-competition-in-seed-and-agricultural-chemical-markets> [<https://perma.cc/8BU4-H5DK>].

192. *See* Pierson, *supra* note 169; *Bd. of Water Works Trs. of Des Moines v. Sac Cnty. Bd. of Supervisors*, 890 N.W.2d 50 (Iowa 2017); Tom Hals, *U.S. Appeals Court Upholds \$25 Mln Roundup Verdict in Blow to Bayer*, REUTERS (May 14, 2021, 11:06 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/us-appeals-court-upholds-verdict-that-bayers-roundup-caused-cancer-2021-05-14/> [<https://perma.cc/QJ2F-5HHY>].

Although lawsuits and consent decrees concerning environmental harm have been brought against agribusiness companies,¹⁹³ the deep pockets of the industry continue to pay off or kill any resistance to initiatives that stand in the way of revenue.¹⁹⁴ Meanwhile, farmers who are beholden to agribusinesses for their livelihoods continue to contribute to pollution merely to survive.¹⁹⁵ 60 percent of river pollution, 30 percent of lake pollution, and 15 percent of pollution in estuaries and on the coast can be attributed to agriculture.¹⁹⁶

Additionally, agricultural emissions are the largest contributor to fine-particulate air pollution as fumes from fertilizers and livestock waste combine with other substances in the air to form particulate matter.¹⁹⁷ Agricultural air pollution contributes to 17,900 deaths¹⁹⁸ and costs the country \$820 billion annually in healthcare expenditures.¹⁹⁹ Yet despite these enormous social and economic costs, agribusinesses continue to operate with impunity with their only

193. See *Bd. of Water Works Trs. of Des Moines v. Sac Cnty. Bd. of Supervisors*, 890 N.W.2d 50; *Archer Daniels Midland Company (ADM) Clean Air Act Settlement*, U.S. ENV'T PROT. AGENCY (Dec. 28, 2022), <https://www.epa.gov/enforcement/archer-daniels-midland-company-adm-clean-air-act-settlement> [<https://perma.cc/WTG3-6FBU>]; *EPA Reaches Agreement with Cargill*, U.S. ENV'T PROT. AGENCY (Sept. 1, 2005), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/cc9346adfa0656c5852570bc0073fb2f.html [<https://perma.cc/QK7M-6BKJ>].

194. See Art Cullen, *They're Playing a Game at Our Expense*, STORM LAKE TIMES PILOT (July 20, 2016), <https://www.stormlake.com/articles/theyre-playing-a-game-at-our-expense/> [<https://perma.cc/A8S7-CRSV>]; See also Art Cullen, *The Wrong Choice for Iowa State*, THE GAZETTE (Oct. 18, 2017, 12:33 PM), <https://www.thegazette.com/guest-columnists/the-wrong-choice-for-iowa-state/> [<https://perma.cc/6XCW-E85L>] (Art Cullen won a Pulitzer Prize for his work uncovering dark money efforts by Koch, Monsanto, and others to kill lawsuits and initiatives not favorable to their interests).

195. See Abbott, *supra* note 183.

196. Andrew Moxey, AGRICULTURE AND WATER QUALITY: MONETARY COSTS AND BENEFITS ACROSS OECD COUNTRIES 26 (2012), <https://www.oecd.org/greengrowth/sustainable-agriculture/49841343.pdf> [<https://perma.cc/LSX3-N4FH>].

197. Susanne E. Bauer et al., *Significant Atmospheric Aerosol Pollution Caused by World Food Cultivation*, 43 GEOPHYSICAL RSCH. LETTER 5394, 5399 (2016), <https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1002/2016GL068354> [<https://perma.cc/9SDJ-TDJF>].

198. Nina G. G. Domingo et al., AIR QUALITY-RELATED HEALTH DAMAGES OF FOOD 1 (Paul Behrens ed., 2021), https://www.researchgate.net/publication/351467626_Air_quality-related_health_damages_of_food [<https://perma.cc/NH42-85KB>].

199. Matthew Lavietes, *Air Pollution Costs Each American \$2,500 a Year in Healthcare - Study*, THOMSON REUTERS FOUND. NEWS (May 20, 2021, 5:12 PM), <https://www.reuters.com/business/legal/air-pollution-costs-each-american-2500-year-healthcare-study-2021-05-21/> [<https://perma.cc/DZF4-5396>].

consideration being for their bottom line. Conversely, consolidation of these firms has reduced autonomy for farmers, limited their operations to market their products, tied them to unfavorable production contracts, and reduced their income.²⁰⁰

2. *The Jungle: A New Era*

In 1906, Upton Sinclair's novel, *The Jungle*, exposed labor and health violations in the Chicago Stockyards.²⁰¹ Because of Sinclair's work, the Pure Food and Drug Act was passed to address public outcry stemming from unsanitary conditions in the United States' manufacturing plants.²⁰² Over a century later, new legislation is needed to address the egregious labor violations Big Ag commits and the consolidated market structure that enabled it to commit these violations unabated for decades. Lack of competition in the industry affords the top agribusiness companies the ability to suppress or even fix wages, impose atrocious working conditions, and exploit immigrant and minority communities.²⁰³

For context, it is important to note the structure of the livestock industry in the United States. In the chicken market, the largest four firms dominate half of the market share for chicken processing.²⁰⁴ Furthermore, 90 percent of the chickens raised in the United States are subject to production contracts that dictate what type of birds are raised, what they are fed, and what price a farmer will receive when the birds mature.²⁰⁵ Despite meat-packing companies turning record profit on the backs of these specific production contracts, three-quarters of poultry farmers live below the poverty line.²⁰⁶

200. See Hendrickson, *supra* note 120.

201. Kate Lohnes, *The Jungle: Novel by Sinclair*, BRITANNICA (May 27, 2023), <https://www.britannica.com/topic/The-Jungle-novel-by-Sinclair> [<https://perma.cc/99VU-C256>].

202. *The Pure Food and Drug Act*, HISTORY, ART & ARCHIVES U.S. HOUSE REPRESENTATIVES (June 19, 2023, 7:40 PM), <https://history.house.gov/Historical-Highlights/1901-1950/Pure-Food-and-Drug-Act/> [<https://perma.cc/W93M-92QE>].

203. Colleen Slevin, *Lawsuit Accuses Largest US Meat Producers of Wage Fixing*, ABC NEWS (Nov. 16, 2022, 6:21 PM), <https://abcnews.go.com/US/wireStory/lawsuit-accuses-largest-us-meat-producers-wage-fixing-93434861> [<https://perma.cc/GV9F-W9UW>]; Jenna Thompson, *Meatpacking Workers, Advocates Describe 'Dehumanizing' Conditions in Nebraska Plants*, LINCOLN J. STAR (May 23, 2023), https://journalstar.com/news/local/meatpacking-workers-advocates-describe-dehumanizing-conditions-in-nebraska-plants/article_1287b495-df27-5423-914f-f7dda9a5caad.html [<https://perma.cc/WU29-328J>].

204. See Kelloway & Miller, *supra* note 148.

205. *Id.*

206. *Id.*

In the beef industry, rapid consolidation over the last several decades has left ranchers with only one or two buyers in their market.²⁰⁷ Additionally, even though consumer retail prices for beef continue to rise, the price ranchers receive for their cattle continues to decline.²⁰⁸ The top four beef packing companies control 85 percent of the national market.²⁰⁹ Similarly, the market for hogs has suffered from declining competition.²¹⁰ Currently, the top four meat processors control two-thirds of hog market share and 80 percent of hogs were raised under production contracts or directly owned by these companies through vertically integrated business models.²¹¹

Given the overwhelming market power a handful of companies possess, it should come as no surprise that these firms engage in exploitative labor practices because it is good for business and because they can. There is perhaps no better recent example of this behavior than the conditions meat processing workers faced during the COVID-19 pandemic.²¹² Within the first year of the pandemic, nearly 54,000 workers had tested positive for the virus and 270 had died.²¹³ This tragedy occurred in large part because the companies refused to implement safety precautions or allow for a more adequate leave policy to prevent sick individuals from being forced to come to work or risk losing their job.²¹⁴

During the pandemic, the Occupational Safety and Health Administration (OSHA), was tasked with enforcing labor standards on these companies; however, they were derelict in their duty to uphold the law.²¹⁵ A United States House of Representatives committee investigated the failures of OSHA and found their response to be “wholly insufficient.”²¹⁶ In fact, OSHA only issued eight citations

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. See Hafiz & Miller, *supra* note 109.

212. Rachel Treisman, *Meatpacking Companies, OSHA Face Investigation Over Coronavirus in Plants*, NAT'L PUB. RADIO (Feb. 1, 2021, 3:05 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/02/01/962877199/meatpacking-companies-osha-face-investigation-over-coronavirus-in-plants> [<https://perma.cc/VYH9-28C3>].

213. *Id.*

214. *Id.*

215. *How the Meatpacking Industry Failed the Workers Who Feed America, Hearing Before the H. Select Subcomm. on the Coronavirus Crisis of the Comm. on Oversight and Reform*, 117th Congress 5 (2021).

216. *Id.*

totaling less than \$80,000 in fines.²¹⁷ When divided by the number of deaths, each human life lost only cost these companies less than \$293. Unfortunately, the behavior these companies exhibited during the pandemic is one of many examples of callous disregard for workers' safety.²¹⁸

Aside from placing workers' health and safety at risk, limited competition among agribusiness firms allows them to illegally fix wages²¹⁹ or to pay employees lower than market wages.²²⁰ Despite wage fixing being illegal under the Sherman Act, no agribusiness has ever faced a criminal prosecution for allegations of illegally setting employees' pay.²²¹ Instead, the companies are allowed to buy their way out of breaking the law by paying fines that do little to deter the illegal behavior.²²²

Since 2000, Tyson, Cargill, and JBS, three of the largest meat processors in the United States, were fined a combined total of 551 times for roughly \$151 million even though over that same period, those companies collectively turned

217. *Id.*

218. *Amputation at Tyson Foods Exposes Chemical, Fall, Fire Hazards at Texas Plant: Agency Fines Company \$263K for 15 Serious, 2 Repeated Workplace Safety Violations*, U.S. DEP'T LABOR (Aug. 16, 2016), <https://www.osha.gov/news/newsreleases/region6/08162016> [<https://perma.cc/4ZYZ-XWGD>] (Tyson Foods was fined \$263,000 for 17 workplace safety violations: exposure to high levels of carbon dioxide, amputation of an employee's finger after it became stuck in a conveyor belt, and slip and fall hazards); *Cargill Plant Explosion Injures 2 in Kansas, Investigation Underway*, USA TODAY (Oct. 17, 2019, 2:41 PM), <https://www.usatoday.com/story/news/2019/10/17/cargill-plant-explosion-dodge-city-kansas-facility-2-injured/4008969002/> [<https://perma.cc/XVK8-J55A>] (two employees were injured during an explosion at a meat processing plant).

219. *See Jien v. Perdue Farms, Inc.*, 1:19-CV-2521-SAG, 2022 WL 2818950 (D. Md. 2022). In *Jien*, the plaintiffs successfully brought a class action lawsuit against 20 poultry producers and their subsidiaries and parents for illegally fixing and depressing wages.

220. *See Dan Papsun, Cargill, Sanderson, Wayne to Pay \$85 Million in DOJ Settlement* (2), BLOOMBERG L. (July 25, 2022, 1:08 PM), <https://news.bloomberglaw.com/antitrust/cargill-wayne-farms-sued-by-doj-for-sharing-wage-benefits-data> [<https://perma.cc/85ZF-A7DD>]; *see also* Catherine Thorbecke, *John Deere Workers Approve New Deal After Monthlong Strike*, ABC NEWS (Nov. 17, 2021, 8:24 PM), <https://abcnews.go.com/Business/john-deere-reaches-3rd-tentative-deal-workers-strike/story?id=81177902> [<https://perma.cc/UCY3-XGAB>].

221. Michelle R. Peirce et al., *Wage-Fixing Suit Signals Shift in Government's Prosecution of Antitrust Actions*, HINCKLEY ALLEN (Oct. 28, 2022), <https://www.hinckleyallen.com/publications/wage-fixing-suit-signals-shift-in-governments-prosecution-of-antitrust-actions/> [<https://perma.cc/45DP-C2F2>] (the first ever criminal prosecution of wage-fixing came against a Texas physical therapist in *United States v. Jindal*).

222. *See generally Violation Tracker Current Parent Company Summary Tyson*, *supra* note 173.

trillions of dollars in profit.²²³ These companies—particularly meat processing facilities—are often located in rural communities where the companies’ position as one of the only employers gives them even more power to exploit their workers.²²⁴ This reality is particularly troubling given the ethnic makeup of the workforce. Among slaughterhouse and meat processing workers, nearly two-thirds of the workers are people of color and much of the workforce does not have United States citizenship.²²⁵ Concerns over legal status and limited English-speaking skills among workers creates an even more pronounced power imbalance that the few agribusinesses in the market can exploit.²²⁶

3. Right to Repair Should Not be a Debate

Farmers across the country have expressed growing frustration over the power imbalance with John Deere, and multiple lawsuits have been filed in state and federal courts demanding the right to repair equipment purchased from the company.²²⁷ State and federal governments have also taken notice of farmers’ concerns over the right to repair issue. Currently, 32 states have introduced right to repair legislation and a right to repair bill has been introduced in the United States Senate.²²⁸ Even the executive branch has joined the fray as President Joe Biden recently signed an executive order promoting right to repair.²²⁹

223. *Violation Tracker Current Parent Company Summary Cargill*, GOOD JOBS FIRST (June 9, 2023, 7:24 AM), <https://violationtracker.goodjobsfirst.org/parent/cargill> [<https://perma.cc/S6KB-CPE3>]; *Violation Tracker Current Parent Company Summary Tyson*, GOOD JOBS First, (June 9, 2023, 7:25 AM), <https://violationtracker.goodjobsfirst.org/parent/Tyson-foods> [<https://perma.cc/3PV3-ZXZD>]; *Violation Tracker Current Parent Company Summary JBS*, GOOD JOBS First, (June 9, 2023, 7:26 AM), <https://violationtracker.goodjobsfirst.org/parent/jbs> [<https://perma.cc/8LTS-CLPU>] (figure is derived from adding the total violations for the three companies for primary offense types labelled “employment discrimination,” “workplace safety or health violation,” “wage and hour violation,” and “labor relations violation”).

224. See Kelloway & Miller, *supra* note 148, at 5.

225. Angela Stuesse & Nathan T. Dollar, *Who are America’s Meat and Poultry Workers?*, ECON. POL’Y INST. (Sept. 24, 2020, 10:00 AM), <https://www.epi.org/blog/meat-and-poultry-worker-demographics/> [<https://perma.cc/47SP-U2LU>].

226. See Hendrickson, *supra* note 120.

227. Chris Clayton, *AFBF Strikes Deal on Right to Repair*, PROGRESSIVE FARMER (Jan. 8, 2023, 1:12 PM), <https://www.dtnpf.com/agriculture/web/ag/equipment/article/2023/01/08/farm-bureau-signs-mou-john-deere> [<https://perma.cc/QZ8R-5G6N>].

228. *Id.*

229. See *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, *supra* note 103; see generally Fair Repair Act, S. 3830, 117th Cong. (2022).

However, the lawsuits John Deere is currently facing have the potential to do more harm than good. Federal antitrust legislation is vaguely worded, meaning there is a high likelihood that courts could rule in favor of John Deere and set precedent benefitting Big Ag for decades to come.²³⁰ John Deere has deep pockets, vast legal resources, and an unlikely ally in Big Tech, who has similarly opposed the right to repair movement.²³¹ Additionally, until a comprehensive right to repair bill is codified at the federal level, farmers and consumers will continue to suffer economic losses and politicians will continue to pay mere lip service to the problem.

John Deere's captive hold on the market for its machines allows the company to inflate prices for repairs that can take an unreasonable amount of time to complete.²³² The long wait times farmers face directly results from consolidation within John Deere itself.²³³ John Deere's business model has long been recognized for encouraging its independent dealerships to get larger or to sell out.²³⁴ As a result, only 1,544 dealership locations remained in 2021 compared to 3,400 in 1996.²³⁵

In response to intense pressure from the public and state and federal governments, John Deere reached an agreement in principle on January 8, 2023²³⁶ with the American Farm Bureau Federation to allow farmers and independent repair facilities to perform some repairs on John Deere machinery.²³⁷ The Memorandum of Understanding "will ensure that Farmers and Independent Repair

230. See Alison Jones & William E. Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65(2) ANTITRUST BULL. 227, 232 (2020).

231. Mark Bergen, *Microsoft and Apple Wage War on Gadget Right-to-Repair Laws*, BLOOMBERG (May 20, 2021, 5:00 AM), <https://www.bloomberg.com/news/articles/2021-05-20/microsoft-and-apple-wage-war-on-gadget-right-to-repair-laws>.

232. Louise Matsakis & Olivia Solon, *Senate Introduces Bill to Allow Farmers to Fix Their Own Equipment*, NBC NEWS (Feb. 1, 2022, 6:30 AM), <https://www.nbcnews.com/tech/new-senate-bill-farm-equipment-right-to-repair-rcna13961> [<https://perma.cc/3U6R-YSBG>].

233. Todd Neeley, *Deere Right-to-Repair Lawsuits Grow*, PROGRESSIVE FARMER (Mar. 3, 2022, 7:33 AM), <https://www.dtnpf.com/agriculture/web/ag/equipment/article/2022/03/02/john-deere-faces-growing-list-right> [<https://perma.cc/5QWM-T45C>].

234. See *id.*

235. *Id.*

236. *Memorandum of Understanding*, AM. FARM BUREAU FED'N & JOHN DEERE (June 5, 2023, 9:58 PM), https://www.fb.org/files/AFBF_John_Deere_MOU.pdf [<https://perma.cc/FEB7-EKTD>].

237. *Id.*

Facilities will be able to access and obtain, per subscription or sale, Manufacturer’s Tools, Specialty Tools, Software, and Documentation . . .” needed to “timely control the lawful operation and upkeep of Agricultural Equipment.”²³⁸ However, there are many skeptics in the industry who believe the agreement is merely an attempt to stall or prevent the passage of right to repair legislation.²³⁹ These concerns appear particularly valid considering the agreement does not include a formal enforcement mechanism.²⁴⁰

4. The Double-Edged Sword of Contracts in the Agricultural Industry

As discussed previously, the agricultural industry heavily relies on contracting for the purchase of inputs as well as sales of crops and livestock.²⁴¹ Because agribusiness firms know that farmers and ranchers are dependent on the opportunity to do business with those firms, the companies are more easily able to impose one-sided contract provisions.²⁴² Additionally, because the market is so consolidated, companies can leverage the threat of not renewing a contract to prevent the farmer from any form of objection to the contract.²⁴³

At the heart of agribusinesses’ decision to contract is their ability to transfer risk from the company to the farmer through capital requirements, environmental responsibilities, and pricing confidentiality.²⁴⁴ The large and skilled legal teams of agribusiness firms that draft production contracts are certainly at an advantage.²⁴⁵

238. *Id.*

239. Joe Hernandez, *John Deere Vows to Open Up its Tractor Tech, But Right-to-Repair Backers Have Doubts*, NAT’L PUB. RADIO (Jan. 10, 2023, 5:00 AM), <https://www.npr.org/2023/01/10/1147934682/john-deere-right-to-repair-farmers-tractors> [<https://perma.cc/H8YH-6TLE>].

240. *Id.*

241. See discussion *supra* Part III.B.

242. See Complaint, *Garner v. JBS Live Pork, LLC*, No. 4:22-cv-04032 (W.D. Ark. Apr. 5, 2022) (a hog farmer sued JBS for breach of contract for failing to comply with the terms it set forth in a production agreement); see also DRAKE UNIV., FARM SERV. AGENCY & NAT’L SUSTAINABLE AGRIC. COAL., *CONTRACTING IN AGRICULTURE: MAKING THE RIGHT DECISION 5* (June 8, 2023, 5:30 PM), <https://sustainableagriculture.net/wp-content/uploads/2017/03/2016-Drake-FSA-NSAC-Production-Contracts-Guide.pdf> [<https://perma.cc/6X9K-8KYE>].

243. See Hafiz & Miller, *supra* note 109.

244. DRAKE UNIV., FARM SERV. AGENCY & NAT’L SUSTAINABLE AGRIC. COAL., *supra* note 242, at 2–3.

245. Lina Khan, *Obama’s Game of Chicken*, WASH. MONTHLY (Nov. 9, 2012), <https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/> [<https://perma.cc/7Y27-KF6F>].

When dealing with individual farmers with little bargaining power, the more concentrated the market is, the more this advantage for Big Ag grows.²⁴⁶

In the livestock sector, farmers are oftentimes expected to submit to provisions that leave them with all of the burden of a contract without any of the benefit. For example, a company might require a farmer to submit to certain provisions that they build and maintain all facilities at their own expense, pay for all maintenance/insurance/utilities/other bills, provide all labor to monitor and manage the livestock herd, and meet all of a company's specifications for the animal.²⁴⁷ Companies do this by implementing contractual language to reserve "the unilateral right to amend, revise, or eliminate any standard, requirement or policy identified in this Agreement."²⁴⁸

Contracts relating to seed agreements²⁴⁹ or technology for machinery are no better.²⁵⁰ Contracts of this nature are arguably unconscionable and should not be enforced, and yet, they are the standard.²⁵¹ The certainty afforded to agribusiness firms through contracting leaves farmers vulnerable if they are locked into a contract and a market shock occurs—a logistical disruption, weather event, or consumer perception—that would necessitate a change in the contract terms where the farmer could not renegotiate and thus, fail to perform under the terms of the contract.²⁵²

Even when presented with immense market power in a consolidated industry, agribusiness firms have decided that they still want more. There have been several instances of the major agribusiness conglomerates facing complaints for fraudulent behavior, false advertising, or misrepresentation of company financials, products, and processes.²⁵³ Given their market power both buying and

246. *Id.*

247. Complaint, Garner v. JBS Live Pork, LLC, 4:22-cv-04032.

248. *Id.*

249. *Farming*, FAIR CONTRS. (June 8, 2023, 9:46 PM), <https://faircontracts.org/issues/farming-d76/> [<https://perma.cc/33UM-KH6W>].

250. *See generally Agreements*, JOHN DEERE (June 7, 2023, 6:31 PM), <https://www.deere.com/en/privacy-and-data/agreements/index.html> [<https://perma.cc/7D69-3BPX>].

251. *See Willingham & Green, supra* note 178.

252. Pat Mooney, *Too Big to Feed: Exploring the Impacts of Mega-mergers, CONSOLIDATION & CONCENTRATION OF POWER IN THE AGRI-FOOD SECTOR 52* (Chantal Clément & Nick Jacobs eds., 2017), https://www.ipes-food.org/_img/upload/files/Concentration_FullReport.pdf [<https://perma.cc/8HDD-B7ZQ>].

253. *Armstrong v. Deere & Co.*, 116CV00844TWMPMB, 2017 WL 4168485 (S.D. Ind. Sept. 20, 2017) (an Indiana farmer sued John Deere for fraud and misrepresentation over a

selling in the agricultural supply chain, agribusinesses generally have access to more complete information than either farmers or consumers.²⁵⁴ As such, Big Ag benefits from market consolidation by having the opportunity to exploit knowledge gaps to increase profits. The Agricultural Fair Practices Act of 1967 was designed to prevent companies from retaliating against, discriminating, or coercing farmers buying inputs.²⁵⁵ Unfortunately, the statute has not been properly enforced and efforts to amend the statute to broaden farmers' bargaining power have also failed.²⁵⁶

There is no doubt that farmers and consumers have benefitted from some of the efficiencies that streamlined contracting and rapidly advancing technology provides.²⁵⁷ However, an imbalance of power in these agreements might be the least of farmers' concerns. Although Congress, consumer advocacy groups, and

piece of farm equipment); Mark Weinraub, *Lawsuit Alleges ADM Manipulated Cash Ethanol Market to Profit From Derivatives*, REUTERS (Sept. 5, 2019, 12:18 PM), <https://www.reuters.com/article/us-archer-daniels-ethanol-lawsuit/lawsuit-alleges-adm-manipulated-cash-ethanol-market-to-profit-from-derivatives-idUSKCN1VQ2B3> [<https://perma.cc/W3JB-L6WW>]; *Monsanto Paying \$80 Million Penalty for Accounting Violations*, U.S. SEC. & EXCH. COMM'N (Feb. 9, 2016), <https://www.sec.gov/news/press-release/2016-25> [<https://perma.cc/P7N6-LJ9P>] (agri-input provider Monsanto was fined for misrepresenting company earnings for its flagship herbicide product); see Jenny Splitter, *Tyson Foods Accused of False Advertising in New Federal Trade Commission Complaint*, FORBES (July 31, 2020, 7:20 AM), <https://www.forbes.com/sites/jennysplitter/2020/07/31/tyson-foods-ftc-complaint/?sh=60d0432930ff> [<https://perma.cc/9J62-FBQK>] (agribusiness firm Tyson Foods faced an FTC complaint for falsely claiming it works with independent family and farms and that it has created a safe work environment for its employees).

254. Michelle Miller, *Big Data, Information Asymmetry, and Food Supply Chain Management for Resilience*, 11 J. OF AGRIC., FOOD SYS., & CMTY. DEV. 171, 173 (2021), <https://www.foodsystemsjournal.org/index.php/fsj/article/view/1040/1011> [<https://perma.cc/5ETD-NMGH>].

255. See generally 7 U.S.C. § 56 (1967).

256. Michael Boehlje et al., PURDUE AGRICULTURAL ECONOMICS REPORT: THE PRODUCER PROTECTION ACT—WILL IT PROTECT PRODUCERS? 2 (2001), <https://ag.purdue.edu/commercialag/home/paer-article/the-producer-protection-act-will-it-protect-producers/> [<https://perma.cc/L2JA-4BXV>]. Sixteen attorney generals have proposed revisions to the Producer Protection Act. Requested changes included requiring easy to understand contracts that contain a notice of risk, allowing producers a three-day cancellation window, allowing producers to have priority in debt collection in certain situations, preventing companies from arbitrary or spiteful cancellation of producer contracts, and prohibiting companies from basing a farmer's pay-out on their performance relative to other farmers.

257. Shauna Rumbaugh, *Ag Technology Benefits Consumers and Producers*, HIGH PLAINS J. (Feb. 13, 2015), https://www.hpj.com/ag_news/ag-technology-benefits-consumers-and-producers/article_4c4b1825-397d-5c20-8ab1-8fc7ec8df32e.html [<https://perma.cc/5U82-WB3K>].

the public have increased their scrutiny of Big Tech firms, Big Ag's questionable data privacy practices have gone largely unnoticed.²⁵⁸ Data privacy issues as a whole are woefully under-investigated with the FTC bringing less than 25 privacy and data security cases annually.²⁵⁹ Through farmers increasing their adoption of technology, agribusiness companies have harvested massive amounts of data across a range of topics: agronomy, weather, production, land, livestock, and machine use, to name a few.²⁶⁰ To utilize the technology that is necessary to stay competitive, farmers sign onto vague contracts that provide little protection of personal data.²⁶¹ This poses significant threats to farmers' data privacy.²⁶² Among them is concern that lack of data safety is merely one of many threats consolidation in the agricultural industry presents to national security.²⁶³

C. *The Nation's Food Supply is at Risk*

With a global population expected to hit nearly 10 billion by 2050, the need for a safe and reliable food supply cannot be understated.²⁶⁴ Much concern has been placed on the potential national security threat foreign investment poses in domestic agriculture.²⁶⁵ However, there has been significantly less attention paid to the threat agricultural consolidation presents to national security. Decreased competition for agricultural inputs and services creates an opportunity for bad

258. Annie Guest, *Are Big Ag Tech Companies Harvesting Farmers' Confidential Data?*, ABC NEWS AUSTRALIA (Feb. 18, 2022, 3:59 PM), <https://www.abc.net.au/news/2022-02-19/agriculture-data-protection/100840436> [<https://perma.cc/E5M3-K39W>].

259. Jody L. Ferris, *Data Privacy and Protection in the Agriculture Industry: Is Federal Regulation Necessary?*, 18 MINN. J. L. SCI. & TECH. 309, 325 (2017), <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1422&context=mjlst> [<https://perma.cc/N6N6-TUKM>].

260. Jennifer Zwagerman, *Agriculture & Data Privacy: I Want a Hipaa(Potamus) for Christmas . . . Maybe*, 8 TEXAS A&M L. REV. 685, 689 (2021), <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1227&context=lawreview> [<https://perma.cc/L273-9HNN>].

261. Mark Ryan, *Agricultural Big Data Analytics and the Ethics of Power*, 33 J. AGRIC. & ENV'T ETHICS 49, 60–61 (2020), <https://d-nb.info/1211150445/34> [<https://perma.cc/Y9DD-ULH2>].

262. See Zwagerman, *supra* note 260.

263. See discussion *supra* Part IV.C.

264. Neil Ruiz et al., *Coming of Age*, INT'L MONETARY FUND (Mar. 2020), <https://www.imf.org/en/Publications/fandd/issues/2020/03/infographic-global-population-trends-picture> [<https://perma.cc/WY4K-8NBJ>].

265. *Congressional Considerations on Restricting Foreign Investments in U.S. Agriculture*, NAT'L AGRIC. L. CTR. (June 8, 2023, 7:42 PM), <https://nationalaglawcenter.org/congressional-considerations-on-restricting-foreign-investments-in-u-s-agriculture/> [<https://perma.cc/RZP7-EV9F>].

actors to engage in cyber warfare and bioterrorism.²⁶⁶ Additionally, Big Ag continues to greatly contribute to climate change, a phenomenon the United States Secretary of Defense has deemed an “existential threat.”²⁶⁷ Farmers and consumers facing injustice at the hands of multibillion-dollar agribusiness companies is a travesty; the threats consolidation in the agricultural industry pose to national security are terrifying and must be addressed.

1. The Rise in Ransomware

High profile ransomware attacks that have targeted large and small businesses alike have become more prevalent in the news cycle.²⁶⁸ However, in the instances when agribusiness firms have been targeted, the full ramifications of such an attack are rarely expressed. For instance, JBS, a company controlling a quarter of beef packing in the United States, paid \$11 million in a ransomware attack in 2021.²⁶⁹ Operations at slaughterhouses were paused for only a day, but the attack still had the potential to “disrupt food supply chains and further inflate already high food prices.”²⁷⁰

Similarly, a good faith audit of two of the largest agricultural equipment manufacturers found that hackers had the potential to remotely control machines, obtain highly sensitive data including names, addresses, and login information for

266. See *Agroterrorism: The Threat to America's Breadbasket*, S. Hrg. 491 Before the S. Comm. on Gov't Affs., 108th Cong. (2003), <https://www.govinfo.gov/content/pkg/CHRG-108shrg91045/html/CHRG-108shrg91045.htm> [<https://perma.cc/UAS8-QFP4>].

267. David Vergun, *Defense Secretary Calls Climate Change an Existential Threat*, U.S. DEP'T DEF. (Apr. 22, 2021), <https://www.defense.gov/News/News-Stories/Article/Article/2582051/defense-secretary-calls-climate-change-an-existential-threat/> [<https://perma.cc/N2TB-KQLM>].

268. Isabella Volmert, *Dallas Central Appraisal District Attacked by Ransomware, Agency Says*, DALL. MORNING NEWS (Nov. 11, 2022, 3:08 PM), <https://www.dallasnews.com/news/crime/2022/11/11/dallas-central-appraisal-district-attacked-by-ransomware-agency-says/> [<https://perma.cc/CN29-AR4L>]; Kevin Collier, *Ransomware Attacks on Hospitals Take Toll on Patients*, NBC NEWS (Nov. 9, 2022, 5:08 PM), <https://www.nbcnews.com/tech/security/ransomware-attacks-hospitals-take-toll-patients-rcna54090> [<https://perma.cc/B5KU-K5MQ>]; see Sean Lyngaas, *Microsoft Blames Russian Military-linked Hackers for Ransomware Attacks in Poland and Ukraine*, CNN (Nov. 14, 2022, 11:03 AM), <https://www.cnn.com/2022/11/10/politics/microsoft-russian-linked-hackers-poland-ukraine/index.html> [<https://perma.cc/VPR4-J7DJ>].

269. *Meatpacker JBS Says It Paid Equivalent of \$11 Mln in Ransomware Attack*, REUTERS (June 10, 2021, 7:18 PM), <https://www.reuters.com/technology/jbs-paid-11-mln-response-ransomware-attack-2021-06-09/> [perma.cc/8B7K-LKTF].

270. *Id.*

other systems, and even disrupt the companies' employment software.²⁷¹ Although government agencies tasked with protecting national security²⁷² and the companies themselves²⁷³ have recognized the threat cyberwarfare poses to the food supply, minimal effort has been made to address the underlying issue: consolidation in the industry. Companies have still been allowed to merge into giant conglomerates with tax-payer money funding measures to lessen these businesses' vulnerabilities.²⁷⁴

2. *The Threat to Monoculture Cropping Systems and Concentrated Livestock Facilities*

Cyber-attacks have the potential to disrupt fragile supply chains.²⁷⁵ However, consolidation in the agricultural industry presents a far more sinister threat: concentrated livestock facilities and decreasing diversity in cropping systems would allow even a small-scale bioterrorist attack to have dire consequences. In the event of a biological attack on the food supply in the United States, containment measures would require quarantines or a freeze of commodity shipments that would create severe supply chain bottlenecks.²⁷⁶ Farmers and processors would have to cull infected livestock or destroy compromised crops, further exacerbating supply shortages and driving up prices for consumers.²⁷⁷ Economic costs would be huge; producers would need to be compensated for their losses and lost trade

271. Radhamely De Leon, *Hacker Says He Found a 'Tractorload of Vulnerabilities' at John Deere*, VICE MEDIA GRP. (Aug. 13, 2021, 1:00 PM), <https://www.vice.com/en/article/z3xkdy/hackers-uncover-weaknesses-in-agriculture-giants-systems> [https://perma.cc/CJ5F-53T3].

272. FED. BUREAU INVESTIGATION CYBER DIV., RANSOMWARE ATTACKS ON AGRICULTURAL COOPERATIVES POTENTIALLY TIMED TO CRITICAL SEASONS 2 (2022), <https://www.ic3.gov/Media/News/2022/220420-2.pdf> [https://perma.cc/YG9Y-XARK].

273. Jacob Bunge, *Food Giant ADM Bolsters Its Defense Against Hacks, CEO Says*, WALL ST. J. (June 24, 2021, 2:32 PM), <https://www.wsj.com/articles/agriculture-giant-adm-is-shoring-up-cyber-defenses-ceo-says-11624555232> [https://perma.cc/AX9J-7T7S].

274. *USDA to Invest More Than \$4 Billion to Strengthen Food System*, U.S. DEP'T AGRIC. (Jun. 8, 2021), <https://www.usda.gov/media/press-releases/2021/06/08/usda-invest-more-4-billion-strengthen-food-system> [https://perma.cc/LZU3-WXN2].

275. *NIST Updates Cybersecurity Guidance for Supply Chain Risk Management*, U.S. DEP'T COM. NAT'L INST. STANDARDS & TECH. (May 5, 2022), <https://www.nist.gov/news-events/news/2022/05/nist-updates-cybersecurity-guidance-supply-chain-risk-management> [https://perma.cc/F2SB-DJ2P].

276. Dean Olson, *Agroterrorism: Threats to America's Economy and Food Supply*, FED. BUREAU INVESTIGATION L. ENF'T BULL. (Feb. 1, 2012), <https://leb.fbi.gov/articles/featured-articles/agroterrorism-threats-to-americas-economy-and-food-supply> [https://perma.cc/8FK2-X5Y2].

277. *Id.*

opportunities would occur due to embargoes from other countries seeking to limit their exposure to contaminants.²⁷⁸ Large-scale attacks or market disruptions would have the potential to create a destabilizing effect on social order and institutional trust.²⁷⁹

A 2019 report from the United Nations found only nine plant species account for two-thirds of total crop production.²⁸⁰ In the United States, two companies control 75 percent of corn seed sales, 65 percent of soybean seed sales, and over 50 percent of the market for chemicals such as herbicides and pesticides.²⁸¹ This concentrated market power has left cropping systems vulnerable as thousands of seed varieties have been lost.²⁸² Monocropping select seed varieties has created additional problems including a wide range of plants that are now resistant to commonly used herbicides.²⁸³ Consolidated meat processors, and the control they exert over the market, have led to declining genetic diversity in livestock with 200 breeds going extinct and 30 percent of global livestock breeds becoming endangered over the last 20 years.²⁸⁴

In a twist of irony, climate change will serve as one of the greatest risks to the global food supply moving forward. The USDA's Economic Research Service has noted that climate change will lead to a decline in food production "in U.S. regions experiencing increased frequency and duration of drought. Shifting precipitation patterns, when associated with high temperatures, will intensify wildfires that reduce forage on rangelands, accelerate the depletion of water supplies for irrigation, and expand the distribution and incidence of pests and

278. *Id.*

279. *Id.*

280. COMM'N GENETIC RES. FOR FOOD & AGRIC., FOOD & AGRIC. ORG. UNITED NATIONS, THE STATE OF THE WORLD'S BIODIVERSITY FOR FOOD AND AGRICULTURE 114 (2019), <https://www.fao.org/3/CA3129EN/CA3129EN.pdf> [<https://perma.cc/K535-ANSQ>].

281. See Bratspies, *supra* note 147, at 591.

282. Allyson Martin, *Seed Savers v. Monsanto: Farmers Need a Victory for Wilting Biodiversity*, 24 DEPAUL J. ART, TECH., & INTELL. PROP. L. 95, 113–118 (2013), <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1023&context=jatip> [<https://perma.cc/EW7X-EN3J>].

283. See Hendrickson, *supra* note 120, at 16.

284. Min Zhang et al., GLOBAL GENOMIC DIVERSITY AND CONSERVATION PRIORITIES FOR DOMESTIC ANIMALS ARE ASSOCIATED WITH THE ECONOMIES OF THEIR REGIONS OF ORIGIN 1 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6076285/pdf/41598_2018_Article_30061.pdf [<https://perma.cc/53KW-YMKJ>].

diseases for crops and livestock.”²⁸⁵ A 2016 study found that because of the low biodiversity of cropping systems in the United States, a repeat of conditions from the 1930s dust bowl, would destroy 40 percent of the domestic corn and soy crops and 30 percent of the wheat crop—three of the world’s staple food crops.²⁸⁶

A study by the National Aeronautics and Space Administration (NASA) also concluded that by 2030, higher greenhouse gas emissions could lead to a 24 percent decline in corn yields and a 17 percent decline in wheat yields.²⁸⁷ Biodiversity²⁸⁸ and more sustainable farming practices²⁸⁹ have been identified as two key measures to address climate change. However, while the rest of the world seeks to stave off the worst effects of climate change on the food supply, agricultural giants in the United States are continuing to make billions every year by employing business as usual tactics which only continue to accelerate climate change.²⁹⁰ This attitude creates a potential threat for national security—as former Secretary of Agriculture Sonny Perdue noted, “[f]ood security is a key component of national security, because hunger and peace do not long coexist.”²⁹¹

285. *Climate Change*, U.S. DEP’T AGRIC. ECON. RSCH. SERV. (June 10, 2022), <https://www.ers.usda.gov/topics/natural-resources-environment/climate-change/> [<https://perma.cc/AVW9-XFS5>].

286. Olivier De Schutter & Emile Frison, *Modern Agriculture Cultivates Climate Change - We Must Nurture Biodiversity*, THE GUARDIAN (Jan. 9, 2017, 2:00 PM), <https://www.theguardian.com/global-development/2017/jan/09/modern-agriculture-cultivates-climate-change-nurture-biodiversity-olivier-de-schutter-emile-frison> [<https://perma.cc/3LPJ-BGGV>].

287. Ellen Gray, *Global Climate Change Impact on Crops Expected Within 10 Years, NASA Study Finds*, NAT’L AERONAUTICS & SPACE ADMIN. (Nov. 2, 2021), <https://climate.nasa.gov/news/3124/global-climate-change-impact-on-crops-expected-within-10-years-nasa-study-finds/> [<https://perma.cc/C7HM-C447>].

288. *Biodiversity - Our Strongest Natural Defense Against Climate Change*, UNITED NATIONS CLIMATE ACTION (June 8, 2023, 6:45 PM), <https://www.un.org/en/climatechange/science/climate-issues/biodiversity> [<https://perma.cc/4TFB-CXDU>].

289. Erik Stokstad, *Can Farmers Fight Climate Change? New U.S. Law Gives Them Billions to Try*, SCIENCE (Aug. 16, 2022, 5:30 PM), <https://www.science.org/content/article/can-farmers-fight-climate-change-new-u-s-law-gives-them-billions-try> [<https://perma.cc/2W4E-Q6TK>].

290. Shefali Sharma, *Emissions Impossible Europe: How Europe’s Big Meat and Dairy are Heating Up the Planet*, INST. FOR AGRIC. & TRADE POL’Y (Dec. 13, 2021), <https://www.iatp.org/emissions-impossible-europe> [<https://perma.cc/6PBC-JY7P>] (a recent study shows JBS, Tyson, Cargill, Dairy Farmers of America, and Fonterra combined emit more greenhouse gases than ExxonMobil, Shell, or BP).

291. *Sonny Perdue Sworn in as 31st U.S. Secretary of Agriculture*, U.S. DEP’T AGRIC. (Apr. 25, 2017), <https://www.usda.gov/media/press-releases/2017/04/25/sonny-perdue-sworn>

D. Proposed Solutions: The Time is Now

If the criticism of Big Ag's behavior in this article seems repetitive, it is. For decades, farmers and consumers have seen the writing on the wall for what continued industry consolidation would mean for competitive markets while the regulatory, judicial, and legislative mechanisms designed to prevent these business practices sat idly by. From the extensive harms discussed in this analysis, it should be apparent that there is no silver bullet to solve the increasingly precarious situation facing the agricultural industry. However, it is abundantly clear that federal enforcement of antitrust legislation is lackluster, farmers are suffering, and consumers are subsidizing the profits of multibillion-dollar companies. Have these companies grown too big to be regulated, and if not, where does the work begin to re-introduce competition back into the sector? Although it is highly unlikely that government action could be implemented to reduce the size and influence of giant, agribusiness firms, there are opportunities for increased regulation, interagency collaboration, and incentives for new competitors to join the marketplace that would lessen the market power of these oligopolies.

1. Making Antitrust Laws Court-Proof

Although there is no denying that the federal Judiciary has made decisions that have hamstrung the DOJ and FTC's ability to implement effective and widespread antitrust prosecution, Congress' inability to pass legislation to overcome judicial precedent should be closely scrutinized. It is no secret that much of the Judiciary's original criticisms of antitrust legislation centered on how vague the language of the Sherman and Clayton Acts was.²⁹² Despite having broad powers to regulate commerce under the Commerce Clause, Congress has done little to remedy its mistakes in early attempts to combat anticompetitive business practices.

As the economy becomes more complex and globalized, laws written at the turn of the 20th century are simply not capable of addressing the current business environment. It is obvious that antitrust legislation should be modified such that the judiciary cannot inject flawed principles like consumer welfare or the rule of reason into the marketplace. Aside from the fact that the same entities seeking to support market consolidation have bought and paid for much of the economic

31st-us-secretary-agriculture#:~:text=Food%20security%20is%20a%20key,comes%20directly%20from%20the%20land [https://perma.cc/9BW3-FJ8Q].

292. See generally *Standard Oil Co. v. New Jersey*, 221 U.S. 1 (1911).

analysis surrounding the consumer welfare standard,²⁹³ the arguments in favor of virtually limitless consolidation are illogical. To an extent, economies of scale allow larger firms to operate more efficiently, thereby contributing to lower costs and pushing the bounds of innovation.²⁹⁴ However, there is a tipping point at which the market has become so consolidated, the remaining firms can exploit what is essentially a captive market. When a market is no longer competitive, firms can set higher than market-equilibrium prices and lower than market-equilibrium wages, offer a lower quality product or service, and be slow to innovate.²⁹⁵ As a result, consumers are harmed as are any other firms in the supply chain who are subject to the dominant firm's monopsony or monopoly power. As mentioned previously, firms with large market share can also unintentionally exert an influence in markets and situations that cause supply chain bottlenecks, shortages, etc.²⁹⁶

Common sense would say that by definition, market consolidation is an unreasonable restraint on trade because it restrains choice. Federal antitrust legislation should be amended to reflect the reality of allowing mergers or acquisitions that concentrate too much market power in a single firm instead of a theoretical approach in which all participants are considered rational actors. Additionally, while regulation should not be overly burdensome or punitive for businesses, there is an argument to be made that mega-firms should be forced to divest some of their holdings after reaching a certain market share threshold to keep industries competitive.

293. Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers> [<https://perma.cc/J2N8-2SFA>].

294. U.S. GOV'T, ECONOMIC REPORT OF THE PRESIDENT 201 (2020), <https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020.pdf> [<https://perma.cc/77MG-C2LG>].

295. Martin Gaynor, E.J. Barone University Professor of Economics and Public Policy, Statement before the U.S. House of Representatives Committee on the Judiciary & Subcommittee on Antitrust, Commercial, and Administrative Law: Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets (Mar. 7, 2019), <https://www.congress.gov/116/meeting/house/109024/witnesses/HHRG-116-JU05-Bio-GaynorM-20190307.pdf> [<https://perma.cc/EV66-26X3>].

296. See Hendrickson, *supra* note 120; Lohnes, *supra* note 201; *The Pure Food and Drug Act*, *supra* note 202.

2. *The Need for New (and Improved) Regulatory Measures*

Regulatory agencies and Congress addressing ineffective merger policing in the agricultural space will require extensive work. From 2005 to 2014, regulators reviewed only 3 percent of mergers and acquisitions in the United States.²⁹⁷ Part of the reasoning for the low levels of scrutiny are due to an increasingly pro-business mentality that took root during the Reagan administration.²⁹⁸ Even if the DOJ and FTC were in the mood to employ more stringent consolidation review, these entities simply do not have the reach necessary to adequately defend against the modern business model of “get big or get out.”²⁹⁹

However, it must be noted that for more aggressive antitrust enforcement to be effective, Congress must also be willing to put in the work. The Biden administration requested significantly more funding for the FTC and DOJ to fight antitrust violations in the 2023 federal budget.³⁰⁰ Despite increased concern of consolidation, there are 350 fewer antitrust staffers at the DOJ than in 1979.³⁰¹ Thus, Congress should allocate more funding to the DOJ and FTC to create enhanced investigatory units tasked with prosecuting anticompetitive behavior.

Aside from amending antitrust legislation, Congress can address the effects of consolidation in the agricultural industry through other pieces of legislation. For instance, stability should be created for antitrust enforcement regimes such that they are not subject to the whims of the political climate. If antitrust divisions are independent, their focus can remain on the task at hand: preventing harmful market consolidation instead of appeasing politicians. Additionally, Congress should prioritize funding for smaller scale enterprises—such as the traditional family farm—and those that employ more sustainable farming practices. Other reforms

297. Mooney, *supra* note 252, at 80.

298. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377, 379 (2003) (quoting Milton Handler, *Introduction*, 35 ANTITRUST BULL. 13, 21 (1990), “With the advent of the Reagan administration, a 180-degree change in merger enforcement policy occurred. . . The pendulum swung from one extreme to another. . .”).

299. Roger Johnson, *We Must Reject the ‘Go Big or Go Home’ Mentality of Modern Agriculture*, THE HILL (Oct. 8, 2019, 4:30 PM), <https://thehill.com/opinion/finance/464856-we-must-reject-the-go-big-or-go-home-mentality-of-modern-agriculture/> [<https://perma.cc/8PAA-ZATT>]. During the Nixon administration, the Secretary of Agriculture, Earl Butz, told farmers to “[g]et big or get out.”

300. Anna Edgerton & Leah Nylen, *Biden’s Antitrust Chiefs Seek Funds for Strong Enforcement*, BLOOMBERG (Sept. 21, 2022, 3:14 PM), <https://www.bloomberg.com/news/articles/2022-09-20/biden-s-antitrust-chiefs-seek-funds-for-ambitious-enforcement?leadSource=uverify%20wall> [<https://perma.cc/82PU-423R>].

301. *Id.*

include overhauling farm subsidy payments by subsidizing commodity support programs under the Farm Bill through a tax on agribusinesses instead of American taxpayers.

3. *The Buck Stops Here*

In addition to the questionable ethics surrounding Congress' regulation of companies its members have financial ties to, members of our federal legislature have found it easier to merely complain and place blame for a problem they have the power to address. Multiple members of Congress in both parties have written letters to the executive branch and its agencies to express frustration with the lack of meaningful antitrust enforcement.³⁰² However, this frustration has thus far not been enough to motivate Congress to pass legislation or provide resources and/or authority to another entity to fix the problem of increasing consolidation. Meanwhile, bills aimed at mitigating the worst effects of consolidation have yet to even make it to the floor of either chamber.³⁰³

Although Congress does shoulder blame in the lackluster approach to limit anticompetitive business practices, part of the problem lies in the siloed efforts of entities attempting to reign in Big Ag. The USDA, DOJ, and FTC may have broad authority to address concerns over industry consolidation, but other agencies have a more limited ability to address the impacts of such large companies operating in the marketplace. An intra-agency committee comprised of the DOJ, USDA, EPA, OSHA, Food and Drug Administration (FDA), the Department of Commerce (DOC), and elements of the national security community should be developed to take a more holistic approach to addressing the harms decreasing competition in the agricultural sector have created. At a minimum, an agency should be created within the USDA solely to address anticompetitive behavior.³⁰⁴ If necessary, special powers afforded to matters of national security could be utilized as a

302. C.J. Petersen, *'Get Big or Get Out': An American Horror Story*, CARROLL TIMES HERALD (Jan. 3, 2022), https://www.carrollspaper.com/opinion/get-big-or-get-out-an-american-horror-story/article_2f757d1c-6cb2-11ec-ad7a-77885336a76e.html [<https://perma.cc/G4TE-BKV3>].

303. *See generally* Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2022, H.R. 7827, 117th Cong. (2022); Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2022, S. 4245, 117th Cong. (2022).

304. *See USDA Seeks Public Comment to Identify Anti-competitive Market Structures and Practices in Fertilizer, Seed and Agricultural Inputs, and Retail Market*, U.S. DEP'T AGRIC. (June 9, 2023, 6:40 AM), <https://www.ams.usda.gov/about-ams/fair-competitive/rfi> [<https://perma.cc/TDE5-YSD8>] (The USDA is acutely aware of the problem market consolidation poses. As a result, the Department has launched a public comment period on how to address anti-competitive behavior across various sub-sectors of the industry.).

stopgap measure. The situation is rocketing towards a point of no return; given the importance of a safe and stable food supply, the urgent need to limit Big Ag's continued influence cannot be overstated.

The agricultural industry is reliant on agribusiness firms to be the driving force behind innovation in the sector. As a result, Big Ag can leverage this reliance to exert even more influence on what is becoming an increasingly captive market. Under the current system, producers and consumers are both dependent on agribusinesses: without innovation from these companies, producers are not as efficient, thereby consumers pay higher prices.³⁰⁵ However, private firms do not have to be the only source for advancement in the sector.

Studies have consistently shown that public investment in agricultural research yield rates of return between 40 and 60 percent.³⁰⁶ Despite this incredible rate of return, public investment in agricultural research have declined.³⁰⁷ The private sector has filled this hole in funding, largely in the form of technology that can be patented or otherwise protected.³⁰⁸ Increasing public sector funding would help reduce the sector's reliance on agribusiness companies while also creating a more level playing field for access to technology. As previously mentioned, American taxpayers already foot a large bill when it comes to supporting the agricultural sector.³⁰⁹ The return on investment should at least accrue to American citizens in the form of lower prices and more diversified offerings in the marketplace instead of as profits for an agribusiness firm.

A specific area of investment that would greatly reduce the power of Big Ag would be in the form of data and information sharing. Data collection in the sector

305. See Julian M. Alston & Philip G. Pardey, *INNOVATION, GROWTH AND STRUCTURAL CHANGE IN AMERICAN AGRICULTURE* 22 (2020), <https://www.nber.org/papers/w27206> [<https://perma.cc/2XVP-Z399>].

306. Keith O. Fuglie & Paul W. Heisey, *ECONOMIC RETURNS TO PUBLIC AGRICULTURAL RESEARCH* 7 (2007), https://www.ers.usda.gov/webdocs/publications/42826/11496_eb10_1_.pdf?v=5085.8 [<https://perma.cc/F362-3C62>].

307. Matthew Clancy et al., *U.S. Agricultural R&D in an Era of Falling Public Funding*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Nov. 10, 2016), <https://www.ers.usda.gov/amber-waves/2016/november/us-agricultural-r-d-in-an-era-of-falling-public-funding/> [<https://perma.cc/SG4F-2ZZW>].

308. Kelly P. Nelson & Keith Fuglie, *Investment in U.S. Public Agricultural Research and Development Has Fallen by a Third Over Past Two Decades, Lags Major Trade Competitors*, U.S. DEP'T AGRIC. ECON. RSCH. SERV. (June 6, 2022), <https://www.ers.usda.gov/amber-waves/2022/june/investment-in-u-s-public-agricultural-research-and-development-has-fallen-by-a-third-over-past-two-decades-lags-major-trade-competitors/> [<https://perma.cc/M2CH-BQVD>].

309. See Andrew, *supra* note 7.

is vast and provides valuable insights across the entire supply chain.³¹⁰ Agribusiness firms recognize the value of this data and have worked hard to harvest it.³¹¹ Unsurprisingly, Big Ag has failed to specify how they are using this data, and as a result, there is a lack of trust with farmers sharing their information.³¹² Furthermore, despite the high value of this data to agribusiness companies, they generally do not pay farmers to use it and enforce intellectual property rights on keeping the data and its uses secret.³¹³

Public investment in data applications would allow farmers to better utilize their own farm data which would have positive implications for issues ranging from productivity to sustainability. Furthermore, public sector investment into data applications that increase transparency for pricing and contracting would enable farmers to be better informed when entering into agreements with agribusiness firms—whether those agreements concern the input purchases on the front end or commodity sales on the back end. Big Ag has recognized the threat that data transparency poses to its bottom line and is currently facing a lawsuit over its efforts to squash third-party data applications.³¹⁴ Although it is difficult to undo the consolidation that has already taken place in the industry, increased public funding dedicated to data transparency would diminish the power imbalance mergers have created and help level the playing field between farmers and agribusinesses.

There is no rewinding the clock to entirely eliminate the consolidation that has happened in the agricultural industry or the many negative consequences that have befallen producers, consumers, or the environment as a result. However,

310. Jeff Bradshaw, *The Growing Need for Data in Agriculture*, FORBES (July 12, 2022, 6:30 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/07/12/the-growing-need-for-data-in-agriculture/?sh=7596eff21811> [<https://perma.cc/QWW4-4G6Y>].

311. Scott Carpenter, *Access to Big Data Turns Farm Machine Makers into Tech Firms*, FORBES (Dec. 31, 2020, 10:56 PM), <https://www.forbes.com/sites/scottcarpenter/2021/12/31/access-to-big-data-turns-farm-machine-makers-into-tech-firms/?sh=2d348ff97e47> [<https://perma.cc/J2LM-F8JS>].

312. See generally Emma Jakku et al., “If They Don’t Tell Us What They Do with It, Why Would We Trust Them?” *Trust, Transparency and Benefit-sharing in Smart Farming*, 90–91 NJAS WAGENINGEN J. LIFE SCIS. 1, 7 (2019), <https://www.sciencedirect.com/science/article/pii/S1573521418301842> [<https://perma.cc/7B3Z-6R66>].

313. Ziwen Yu et al., *Who Owns and Controls Farming Data?*, UNIV. OF FLA. INST. FOOD & AGRIC. SCIS. (Oct. 20, 2021), <https://edis.ifas.ufl.edu/publication/AE564> [<https://perma.cc/L4GJ-SN4Q>].

314. Rebecca Boone, *Farmers File Antitrust Lawsuit Against Big Ag Companies*, ASSOCIATED PRESS (Apr. 6, 2021), <https://apnews.com/article/lawsuits-boise-prices-us-news-idaho-373735ff107149f69bd8c9d261839c00> [<https://perma.cc/94TL-4KXN>].

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hindsight is 20/20. Decisive action must be taken to mitigate and begin to reverse the worst effects of market concentration in the agricultural sector. There are a variety of tools available to address this issue, and all that is needed now is the political will to quit prioritizing profits of multi-national companies over anyone or anything else.

V. CONCLUSION

When antitrust laws were drafted, agriculture was highly decentralized and was not considered at risk for consolidation. However, the last several decades have made it abundantly clear that not only is market concentration possible, but it is occurring with disastrous consequences. Agribusiness companies cannot be treated as too big to regulate. Currently, they operate under the belief that they are above the law and that they can leverage their resources (including time, wealth, and legal teams) to pay fines, settle lawsuits, and lobby for positions advantageous to them at agricultural producers' and the public's expense. Truth be told, this belief is not misplaced.

Across the spectrum, no sector of agribusinesses is innocent: farm equipment/implement dealers, input providers for chemicals and seed, and meat processors all have abused their market power to extort profit. They operate with impunity because the entities tasked with regulating them and enforcing the laws have failed to do their jobs. How much of this could have been avoided if governmental agencies had aggressively enforced antitrust laws? That will likely never be known. However, if one thing is clear, there must be a coherent, forward-thinking strategy implemented sooner rather than later to address the problem of consolidation in the agricultural sector.

As suggested in this article, there are a variety of tools available to not only mitigate the effects of market consolidation but begin to reverse those effects that are most harmful. Antitrust regulators must aggressively pursue Big Ag with support needed from Congress and other governmental agencies. Furthermore, companies' influence must be diminished through a combination of restructuring taxpayer-funded programs and promoting public and smaller, third-party companies to welcome competition in the marketplace. It is passed time to break up Big Ag and foster a marketplace that works for everyone and not just powerful companies. Failure to pursue these solutions will continue to push our national and global food supply to the brink. Those in a position to restore the market balance between producers/consumers and Big Ag should do so as if their lives depend on it. At the end of the day, everyone has to eat and those in charge of regulating agribusiness firms need to start acting like it.