

INCENTIVIZING THE BEEF PACKING INDUSTRY TO INVEST IN COMPETITION THROUGH A TAX CREDIT FOR SMALL MEAT PACKERS

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ABSTRACT

Every year, nearly 17,000 cattle ranchers across the United States lose their businesses and livelihoods. One of the many reasons for this is the low prices meat packing plants—particularly the Big Four packing plants that control the industry—pay farmers and ranchers for their cattle. Cattle ranchers and producers are forced to accept these low prices because they are limited to few local meat packing plants with enough available capacity to take the cattle for processing. If producers had more local and regional options to choose from, packing plants would have to offer competitive prices to receive the rancher’s cattle supply. Small packing plants, which would increase competition, struggle to compete against big packers due to several challenges such as capital needed for infrastructure improvements.

Antitrust laws have not been used to enforce nor create fair competition within the meat processing industry, despite their purpose and intention. Previous court-ordered break-ups across industries reveal why breaking up the Big Four meat packers is not a viable solution. Grants are not enough to create continued growth and efficiency within the meat packing industry. Many throughout the cattle ranching industry are also opposed to increased regulations such as mandated cash trade proposed by the Cattle Price Discovery and Transparency Act. Texas legislators must take the necessary steps to incentivize and facilitate more competition throughout the meat packing industry without controlling or limiting the marketing options ranchers have.

This Article does four things. First, it examines previous attempts to preserve competition within the industry. The Packers and Stockyards Act of 1921 is one major piece of legislation that was meant to reduce market concentration within the meat packing industry. On the other hand, regulations such as the Hazard Analysis and Critical Control Points Systems rule have added to the costs of processing cattle and have hindered small meat packers with limited resources. Second, this Article explains how courts are unable to provide a proper solution. One issue with relying on the judicial system is that the court must find a violation of an antitrust law to act on any antitrust claim. Based on previous cases, it appears unlikely that the Supreme Court would find sufficient evidence of collusion or engagement in monopolistic practices. Another issue with relying on the judicial system is that breaking up a company that has found ways to thrive within a difficult industry could send the message to other companies that working hard to get to the top and finding your niche position may lead to dissolution of the entity. Third, reasons are provided explaining why other proposals are not long-term

solutions. Providing meat packers with limited grants can only help them compete for so long; eventually, they must become profitable on their own after grant money runs out. Mandating cash trade through the Cattle Price Discovery and Transparency Act is another insufficient solution. Such a mandate would limit a rancher's ability to sell his or her cattle in whatever ways they see fit.

Finally, a legislative solution is presented that would provide a property tax credit benefitting small meat packing plants in Texas that invest in the modernization and expansion of their facilities. These incentivized investments would increase the efficiency and capacity of beef processing plants, leading to increased competition and efficiency throughout the market as a whole. A market full of prospering small packers increases competition for the Big Four, which inevitably helps ranchers and producers who have devoted their lives and legacies to feeding America.

I. INTRODUCTION

Many cattle ranchers across the country are losing their livelihoods on a daily basis—nearly 17,000 annually since 1980.¹ Ranchers like Shad Sullivan of Olney, Texas have stopped paying for cable TV, limited family vacations and trips to the movies, and even considered ending their health insurance despite their severe medical conditions.² Those that are still in the industry, such as Montana rancher, Steve Charter, are “contemplating getting out” because they “are not getting [their] share of the consumer dollars.”³ Certain ranchers have even become so desperate and discouraged by the debt that the industry has caused them to incur that they have considered taking their lives.⁴ Others, sadly, have taken their lives.⁵

1. CLAIRE KELLOWAY & SARAH MILLER, OPEN MKTS INST., FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM 3 (2021), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/614a2ebeb7d510debfd53f3/1632251583273/200921_MonopolyFoodReport_endnote_v3.pdf [https://perma.cc/4UYA-64JH].

2. Mary Hennigan, *A Consolidated Meatpacking Market Leaves Ranchers Struggling*, THE COUNTER (July 27, 2021, 2:00 PM), <https://thecounter.org/consolidated-market-ranchers-meatpacking-covid-beef-usda/> [https://perma.cc/LJS9-68DD].

3. Peter S. Goodman, *Record Beef Prices, but Ranchers Aren't Cashing in*, THE N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html>.

4. *Id.*

5. Debbie Weingarten, *Why Are America's Farmers Killing Themselves?*, THE GUARDIAN (Dec. 11, 2018, 12:51 PM), <https://www.theguardian.com/us-news/2017/dec/06/why-are-americas-farmers-killing-themselves-in-record-numbers> [https://perma.cc/6U89-5ZKR].

As many studies have shown, the price difference between what consumers pay for beef at grocery stores and what cattle ranchers are paid per head continues to diverge; retail prices continue to rise for consumers while cattle prices decline for ranchers.⁶ This is in major part due to the concentration of the meat packing industry into the hands of four major packers; the concentration allows packers to reduce the prices they pay producers and ranchers who raise those animals.⁷ Meat packers serve as the middle-men between ranchers and consumers.⁸ Packers buy cattle that are ready for slaughter, process the cattle, and prepare those beef cuts for sale or consumption.⁹ With so few packing plants in an industry with such large numbers of fed cattle, ranchers are left to either sell their cattle at a discounted price at auction or contract with big buyers—often for much less money than they would normally receive in a competitive market.¹⁰ Bill Bullard, a former rancher and current head of the Ranchers-Cattlemen Action Legal Fund, described the cattle supply chain as “having consumers exploited on one end of the supply chain, [and] cattle producers exploited on the other,” while “meatpackers are making all-time record profits.”¹¹ “It always ends the same,” Senator Chuck Grassley of Iowa deplored, “[m]ore profits for the packers and independent producers going out of business.”¹²

As a result of the increasing price margin, there have been allegations of collusion within the beef packer industry.¹³ Since the original Packers and

6. See, e.g., Donnelle Eller, *‘We’re Fighting for a Way of Life’: Pandemic Causes Iowa Cattle Farmers to Lose Money While Consumers Pay More*, DES MOINES REG. (Nov. 15, 2020, 8:13 AM),

<https://www.desmoinesregister.com/story/money/business/2020/11/12/covid-19-exposes-dysfunction-cattle-industry-why-cattle-producers-losing-money-when-consumers-paying/6076820002/> [<https://perma.cc/6GT7-BXNV>] (exploring the spread between what prices rancher and packers are paid).

7. Terence P. Stewart et al., *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 MINN. J. INT’L L. 449, 510 (2000).

8. See generally *Packer*, U.S. DEP’T OF AGRIC. AGRIC. MKTG. SERV. (Feb. 27, 2024, 1:22 PM), <https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/regulated-entities/packer> [<https://perma.cc/Q6LH-S3AM>].

9. *Id.*

10. Abby Vesoulis, *Why This Bipartisan Group of Senators Has Beef With the ‘Big Meat’ Industry*, TIME (Apr. 28, 2022, 1:51 PM), <https://time.com/6171326/meat-beef-industry-congress/> [<https://perma.cc/E75C-59C3>].

11. Goodman, *supra* note 3.

12. Vesoulis, *supra* note 10.

13. See, e.g., *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939) (plaintiffs alleged illegal price discrimination and unreasonable preferences given via price discounts); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005) (plaintiffs alleged the packer

Stockyards Act of 1921¹⁴ was passed, the United States beef processing and packing industry has become even more concentrated; the industry has dropped from five major packers to four, and the market share of the “Big Four” has increased from 35% to around 85%.¹⁵

Recently, antitrust lawsuits have piled up against the Big Four packers in the United States: Cargill, Inc., Tyson Foods, Inc., JBS USA Food Company Holdings, and National Beef Packing Company (Marfrig).¹⁶ Lawsuits, such as *In re Cattle Antitrust Litigation*, allege that the Big Four have “conspired to fix and suppress the price of fed cattle in violation of federal and state antitrust laws.”¹⁷ Plaintiffs are either (1) institutions and organizations or (2) individuals and business plaintiffs who sold fed cattle to the defendants.¹⁸ The defendant Big Four packers purchase approximately 85% of the fed cattle in the United States,¹⁹ process the cattle into beef, and then sell those beef cuts.²⁰

To increase market efficiency and competition so that the monopolistic power of the Big Four packing plants is reduced, Texas legislators should propose and pass legislation that provides a property tax incentive for beef processing plants that slaughter less than 2,500 head of cattle per week. The property tax credit would apply to those small meat packers that invest in modernizing or expanding their facilities.²¹

artificially reduced the cash market prices for cattle); *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824 (E.D. Va. 2002) (plaintiffs alleged that the packer manipulated the cash market price for hogs and restrained commerce).

14. Packers and Stockyards Act, 7 U.S.C. §§ 181–229.

15. CHRISTOPHER R. KELLEY, NAT’L AGRIC. L. CTR., AN OVERVIEW OF THE PACKERS AND STOCKYARDS ACT 4–5 (2003), <https://nationalaglawcenter.org/publication/download/kelley-an-overview-of-the-packers-and-stockyards-act-national-aglaw-center-publications-2003/> [<https://perma.cc/9BVH-6C8A>]; Tom Polansek, *Explainer: How Four Big Companies Control the U.S. Beef Industry*, REUTERS (June 17, 2021, 12:12 PM), <https://www.reuters.com/business/how-four-big-companies-control-us-beef-industry-2021-06-17/> [<https://perma.cc/TH9S-YJHK>].

16. Polansek, *supra* note 15.

17. *See In re Cattle Antitrust Litig.*, No. 19-1222, 2020 WL 5884676, at *1 (D. Minn. Sept. 29, 2020).

18. *Id.* at *1–2.

19. Mary K. Hendrickson et al., *Power, Food and Agriculture: Implications for Farmers, Consumers and Communities* 13, 25 tbl. 5 (Nov. 1, 2017) (unpublished working paper) (on file with the Univ. of Mo. Coll. of Agric., Food & Nat. Res., Div. of Applied Soc. Scis.).

20. *In re Cattle Antitrust*, 2020 WL 5884676, at *1.

21. *See* discussion *infra* Section III.0 (providing legislation that limits the tax credit’s applicability to small meat packers).

This Article first discusses how the beef packing industry has developed and changed over time, what has previously been done to try to preserve competition within the beef packing market, and what should be done now to promote a fair, competitive marketplace for any sized meat packing plant. Part II provides a background of the meat packing industry, the federal legislation impacting the industry, and the previously failed attempts by courts to prevent monopolies from controlling different markets. Part III analyzes how legislation providing a tax credit for small Texas meat packers would be more beneficial than breaking up the Big Four, strictly giving out grants, or mandating the Big Four to participate in cash trade.

II. OVERVIEW OF THE MEAT PACKING INDUSTRY

The meat packing industry is significantly impacted by many different legal frameworks, regulations, and hurdles.²² In order to find solutions for the industry and create competition in a complex market, one must understand some of the major challenges the industry currently faces. Larger meat packers have the resources necessary to more easily address the challenges and requirements of the industry, including having enough employees on staff, having enough capacity to handle the number of cattle in the region, meeting testing and safety requirements, and having sophisticated equipment for quick, efficient processing.²³ Courts have attempted to deal with monopolies in many different industries.²⁴ As such, litigation has been no stranger to the meat packing industry; recent lawsuits alleged that the Big Four meat packers have violated antitrust laws for years.²⁵ Missouri has attempted to improve competition within the meat packing industry through state income tax credits.²⁶ While Texas does not collect a state income tax, Texas

22. See discussion *infra* Sections II.0, II.0, II.0 (explaining the challenges small meat packers face, what legal frameworks have addressed and aided market concentration within the meat packer industry, and how courts have ineffectively handled antitrust cases).

23. See generally JAMES M. MACDONALD ET AL., U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., CONSOLIDATION IN U.S. MEATPACKING (2000), https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=0 [<https://perma.cc/99QS-79CG>] (explaining the economies of scale of the meat packing industry).

24. See discussion *infra* Section II.C.0 (exploring results from breaking up corporations as a result of general antitrust claims).

25. See discussion *infra* Section II.C.2 (exploring results from antitrust litigation in the meat packing industry).

26. MO. REV. STAT. § 135.686 (2024).

has offered property tax incentives for other industries and could offer similar property tax incentives to small meat packers.²⁷

A. Challenges Small Meat Packers Face

Understanding the challenges and requirements that small meat packers face reveals the reasons behind the severe concentration in the meat packing industry. From the outside looking in, the cattle industry could seem extremely simple: raise the cattle and sell them to be processed into beef at the offered, and therefore “market,” price. This, however, is rarely the case. The Big Four can use their market power to shift cattle sales to market agreements; this creates a long-term contract between ranchers and packers.²⁸ In these market agreements, cattle prices are set and not negotiated as they otherwise would be in the cash trade market.²⁹ Over the last 15 years, cash trade of cattle has declined from 52% to just 20%.³⁰ Additionally, ranchers’ share of the consumer dollar has dropped from 64% in 1970 to the current 38%.³¹

The original Packers and Stockyards Act was passed in 1921 to help protect against monopolies in the packing industry, but since then the industry has become even more concentrated, and the exact issues leading to the legislation’s enactment have continued to occur.³² Before the 1980s, the beef packing industry consisted of many competing firms, but this market consolidated quickly during the 1980s and 1990s.³³ While antitrust lawsuits have been recently making their way through

27. See TEX. TAX CODE ANN. § 11.27 (West 2021); *Taxes in Texas*, TAX FOUND. (April 21, 2024, 11:23 PM), <https://taxfoundation.org/location/texas/#:~:text=Texas%20does%20not%20have%20an,tax%20rate%20of%208.20%20percent> [<https://perma.cc/QTT8-5R62>].

28. Vesoulis, *supra* note 10.

29. *Id.*

30. Mikkel Pates, *U.S. Senate Tackles the Issue of Packer Concentration and the Impact on Cattle Markets*, AGWEEK (Apr. 27, 2022, 9:55 AM), <https://www.agweek.com/news/policy/u-s-senate-tackles-the-issue-of-packer-concentration-and-the-impact-on-cattle-markets> [<https://perma.cc/S4EH-WRKS>].

31. Vesoulis, *supra* note 10.

32. KELLEY, *supra* note 15.

33. KENNETH H. MATHEWS, JR. ET AL., U.S. DEP’T OF AGRIC. ECON. RSCH. SERV., U.S. BEEF INDUSTRY: CATTLE CYCLES, PRICE SPREADS, AND PACKER CONCENTRATION 9–10 (1999), https://www.ers.usda.gov/webdocs/publications/47232/17825_tb1874_1_.pdf?v=6888 [<https://perma.cc/8FH4-5TZD>].

the court system,³⁴ judges must realize that their decisions could make or break the industry, and legislators are the ones who are equipped to deal with the issues plaguing the meat packing industry.³⁵

With four packing companies in control of about 85% of the multi-billion dollar meat processing industry, these packers are able to control the market price offered to producers for slaughter cattle.³⁶ The size of a beef packer generally “confers bargaining power even though it does not confer any meaningful productive efficiency.”³⁷ With such a concentrated packing plant market, the options for producer and rancher cattle buyers are often limited to a single packer that is dominant in the area, creating a monopsony.³⁸ It is a chain reaction: providing tax incentives to small packers will allow them to prosper and compete with the Big Four, which will inevitably help ranchers and producers who devote their lives to feeding America.³⁹

There are many barriers to enter the meat packing industry, but even established small and medium-sized packers face challenges when trying to compete against the Big Four packers.⁴⁰ These barriers and challenges include high upfront capital costs, creating a business development plan, the permitting and inspection processes, wastewater disposal requirements, payment for inspection overtime, and lack of businesses or distributors down chain to sell to.⁴¹ Judith McGeary, co-owner of a Central Texas family farm and executive director of the Farm and Ranch Freedom Alliance, explained that even with increased interest in local foods, small packers “don’t have the infrastructure to support it because

34. See generally *In re Cattle Antitrust Litig.*, No. 19-1222, 2020 WL 5884676, at *1 (D. Minn. Sept. 29, 2020) (2020 lawsuit alleging that meat-packer defendants violated antitrust laws).

35. See *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

36. Hendrickson et al., *supra* note 19, at 26.

37. Alexandra Spring, *Big Ag, Antitrust & Climate Change: The Environmental Impacts of Constrained Economic Choice*, 23 VT. J. ENV’T L. 266, 286 (2022) (quoting Peter Carstensen, *The Prospects and Limits of Antitrust and Competitive-Market Strategies*, in *FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE* 227, 235 (Thomas A. Lyson et al. eds., 2008)).

38. *Id.* at 273.

39. See *id.* at 267.

40. Michelle R. Worosz et al., *Barriers to Entry into the Specialty Red Meat Sector: The Role of Food Safety Regulation*, 23 J. RURAL SOC. SCIS. 170, 173 (2008).

41. See *id.* at 173, 179, 189.

nobody has helped us with that infrastructure, and in fact there's been active barriers to that infrastructure for decades.”⁴²

B. Legal Frameworks That Addressed and Aided Market Concentration

While there are many laws and regulations meat packers must abide by, the Packers and Stockyards Act of 1921 was a major piece of legislation passed to help ensure competition within the meat packing industry.⁴³ Regulations such as the Hazard Analysis and Critical Control Points Systems (HACCP), while entirely necessary, require packing plants to have additional equipment, employees, and systems in place for meat processing.⁴⁴

1. The Packers and Stockyards Act of 1921

At the time of the enactment of the Packers and Stockyards Act of 1921, Armour, Swift, Morrison, Wilson, and Cudahy were the Big Five meat packing plants.⁴⁵ In 1917, President Woodrow Wilson ordered the Federal Trade Commission to investigate the meatpacking industry.⁴⁶ The Federal Trade Commission concluded that the Big Five had not only “a monopolistic control over the American meat industry, but ha[d] secured control, similar in purpose if not yet in extent, over the principal substitutes for meat, such as eggs, cheese, and vegetable oil products, and [were] rapidly extending their power to cover fish and nearly every kind of foodstuff.”⁴⁷ The report went on to find that the “combination among the Big Five is not a casual agreement brought about by indirect and obscure methods, but a definite and positive conspiracy for the purpose of regulating purchases of livestock and controlling the price of meat.”⁴⁸ Not only did the Big Five control the price of meat, but they also “held extensive ownership in

42. Sarah Asch, *Pandemic Demand Strains Central Texas Meat Supply Chain*, AUSTIN AM.-STATESMAN (July 4, 2020, 11:38 AM), <https://www.statesman.com/story/news/local/2020/07/04/pandemic-demand-strains-central-texas-meat-supply-chain/42452195/> [<https://perma.cc/6P32-RJNE>].

43. KELLEY, *supra* note 15, at 1.

44. Worosz et al., *supra* note 40, at 182.

45. Rachel Gabel, *100 Years of the Packers and Stockyards Act: Modernization and Enforcement*, THE FENCE POST (Aug. 20, 2021), <https://www.thefencepost.com/news/100-years-of-the-packers-and-stockyards-act-modernization-and-enforcement/> [<https://perma.cc/4Q83-KSQE>].

46. *Id.*

47. *Id.*

48. *Id.*

stockyards, railcar lines, branch houses, and other facilities used in the distribution of perishable foods.”⁴⁹

According to the USDA, the intended purpose of the Packers and Stockyards Act was to prohibit:

“any unfair, unjustly discriminatory, or deceptive practice or device”; making or giving “any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect”; and engaging “in any course of business or do[ing] any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce.”⁵⁰

In other words, the purposes were to (1) protect the financial interests of producers by ensuring proper payment based on accurate weights of the animals and (2) to prohibit monopolistic practices within the packing industry by using fair business practices.⁵¹

2. Pathogen Reduction; Hazard Analysis and Critical Control Points Systems; Final Rule 9 C.F.R. Part 304

In addition to the challenges previously mentioned, the Food Safety Inspection Service’s (FSIS) “Pathogen Reduction; Hazard Analysis and Critical Control Points Systems; Final Rule” created multiple mandates regarding the sanitation of packing plants.⁵² The rule identifies points throughout the processing chain that pose hazards related to foodborne illness and requires corrective action.⁵³ The HACCP Final Rule was published in 1996 by the FSIS and caused a shift in FSIS inspections from a “command and control” system to an audit system.⁵⁴ Previously, the FSIS established standards and record keeping procedures, but facilities established their own sanitation operating procedures while inspectors just approved those procedures.⁵⁵ After the Final Rule, federal

49. *Id.*

50. *Id.*

51. KELLEY, *supra* note 15, at 2.

52. Worosz et al., *supra* note 40, at 182.

53. *Id.*

54. *Id.*

55. News Release, Jack Connolly, Reflecting on 25 Years of HACCP, U.S. Dept. of Agric. Food Safety and Inspection Serv. (Aug. 19, 2021), <https://www.fsis.usda.gov/news-events/news-press-releases/reflecting-25-years-haccp> [<https://perma.cc/Z8JS-EAQQ>].

personnel were in charge of inspecting facilities and activities to ensure compliance with food safety standards.⁵⁶

While entirely necessary, the Final Rule requires meat packers to establish four programs within their facilities.⁵⁷ Three of the four are pathogen reduction measures and the fourth requires plants to develop and implement HACCP programs.⁵⁸ The first mandate requires processors to establish sanitation standard operating plans that specify the methods that the facility will use to prevent contamination.⁵⁹ Second, packers must employ regular microbial testing for generic *E. coli* and *Salmonella*.⁶⁰ The third mandate sets performance standards that measure the effectiveness of the sanitation standard operating plans related to *Salmonella* testing.⁶¹ The final mandate requires plants to identify all points within their process that pose a potential contamination hazard and develop plans using scientific data to monitor these points.⁶² These requirements place such high cost-related burdens on meat packers that only very large packing plants can afford to comply with the regulation.⁶³

These mandates require additional equipment for microbial testing,⁶⁴ additional employees that are able to carry out the testing and ensure safety methods are in place,⁶⁵ recurring HACCP employee training,⁶⁶ and additional time for conducting tests and following sanitation operations.⁶⁷ A Regulatory Impact Analysis was completed to evaluate the costs and benefits associated with the mandatory HACCP-based regulatory program for packing plants.⁶⁸ The cost estimates for the impact analysis were “based on data for average wages, the cost

56. *Id.*

57. See ELIZABETH BOYLE, INTRODUCTION TO HACCP FOR MEAT AND POULTRY PROCESSORS, PORK INFO. GATEWAY 1 (2006), <https://porkgateway.org/wp-content/uploads/2015/07/introduction-to-haccp-for-meat-and-poultry-processors1.pdf> [<https://perma.cc/5E9K-HVER>].

58. *Id.*

59. Worosz et al., *supra* note 40, at 182.

60. *Id.*

61. *Id.*; Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38806, 38806 (July 25, 1996) (to be codified at 9 C.F.R. pts. 304, 308, 310, 320, 327, 381, 416, 417).

62. Worosz et al., *supra* note 40, at 183.

63. See Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. at 38811.

64. *Id.* at 38819.

65. *Id.* at 38969.

66. *Id.* at 38947.

67. *Id.* at 38835.

68. *Id.* at 38945.

of specific processing equipment or the cost of conducting specific laboratory analyses.”⁶⁹ The FSIS estimated that the mandates would cost the industry \$2.2 billion over the following 20 years.⁷⁰ Large meat packers are able to absorb costs related to regulations, such as the HACCP, more easily and can meet the requirements in a much shorter timeline than small local meat packers that have limited resources.⁷¹

C. Courts Ineffectively Handling Antitrust Cases Dealing with Market Concentration

Concentration is not just found within the meat packing industry.⁷² There have been many companies in a variety of industries that have faced the consequences of limited competition and eventually ended up in litigation.⁷³ Courts have handled these lawsuits in a variety of ways, and the meat packing industry has spent its fair share of time in the judicial system.⁷⁴ Monopolies found in other industries have been broken up by the courts, but this “solution” would not work for the modern-day beef packing industry.⁷⁵ United States Representative, Abigail Spandberger, admits that the Big Four antitrust violations are well-known, but “the structure to really go after them and just enforce the existing law just isn’t strong enough.”⁷⁶ Case law in both the meat packing industry and other industries reveals why the legislative branch, rather than the judicial branch, should be charged with restoring meat packer competition.

69. *Id.*

70. *Id.* at 38946.

71. *Id.* at 38975.

72. Matthew Stuart, *How AT&T Became Even Bigger After the Government Broke it Up*, BUS. INSIDER (Mar. 5, 2018), <https://www.businessinsider.com/att-breakup-1982-directv-bell-system-2018-02> [<https://perma.cc/BQM6-ZU6V>].

73. See Frederick Reese, *15 Companies the U.S. Government Tried to Break up as Monopolies*, MY SAN ANTONIO (Oct. 22, 2019), <https://www.mysanantonio.com/personal-finance/slideshow/15-companies-the-U-S-government-tried-to-break-197149.php> [<https://perma.cc/QV6M-6PLT>].

74. *Id.*

75. See discussion *infra* Section III.B.0 (explaining how breaking up the Big Four could harm the industry more than it would help).

76. Aruni Soni, *Congress Could Beef up Meatpacking Oversight This Fall. But Obstacles to Enforcement Remain*, MO. INDEP. (Aug. 9, 2022, 5:50 AM), <https://missouriindependent.com/2022/08/09/congress-could-beef-up-meatpacking-oversight-this-fall-but-obstacles-to-enforcement-remain/> [<https://perma.cc/44UF-6AL5>].

1. General Antitrust Cases

In one of the more successful court-ordered breakups, AT&T was dissolved into eight separate companies.⁷⁷ One year later, The Wall Street Journal wrote about the “painful and bewildering repercussions for nearly everyone” in the industry.⁷⁸ The Wall Street Journal found that “some benefits that divestiture’s advocates promised have yet to appear. Although long-distance telephone rates have fallen 5% to 6% under pressure of increased competition, that has failed to offset new rate increases obtained or likely to be granted for local telephone service.”⁷⁹ Economists for the Federal Communications Commission (FCC) argued that the Telecommunications Act of 1996 could have achieved the same results as the more complicated and expensive antitrust lawsuit.⁸⁰ The same results would have occurred had the FCC simply enacted regulation requiring the AT&T/Bell companies to modify their facilities so that all long distance carriers would have equal access to those facilities.⁸¹

In *Standard Oil Co. of New Jersey v. United States*, Standard Oil was forced to break up into 34 separate companies, but all were still owned by the same shareholders.⁸² As John McGee wrote, “Standard Oil did not use predatory price discrimination to drive out competing refiners, nor did its pricing have that effect.”⁸³ Despite the hope that breaking Standard Oil up would lead to lower petroleum product prices, prices were falling because of the discovery of new oil—and actually rose for a little while after Standard Oil was dissolved.⁸⁴ As oil producing regions were developed by competitors, Standard Oil’s market share had fallen from 82% to 64% in just 12 years—all before Standard Oil was

77. Stuart, *supra* note 72.

78. Janet Guyon & Jeanne Saddler, *The Disconnection: A Year After Breakup of AT&T, the Benefits Mostly Remain Elusive*, THE WALL ST. J. (Mar. 5, 2006, 4:19 PM), <https://www.wsj.com/articles/SB114159316873789794>.

79. *Id.*

80. Will Rinehart, *A History of Failure: Government-Imposed Corporate Breakups*, AM. ACTION F. (June 27, 2018), <https://www.americanactionforum.org/insight/a-history-of-failure-government-imposed-corporate-breakups/> [<https://perma.cc/Y2SV-9KTX>].

81. Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSPS. 3, 13 (2003).

82. See Reese, *supra* note 73; *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 30, 79 (1911).

83. John S. McGee, *Predatory Price Cutting: The Standard Oil (N. J.) Case*, 1 J.L. & ECON. 137, 168 (Oct. 1958).

84. Crandall & Winston, *supra* note 81, at 7.

dissolved.⁸⁵ By 1911, the petroleum industry was already more competitive and the Court decree itself caused little change to the industry that was not already underway from development.⁸⁶

In 1910, American Tobacco Company accounted for over 75% of sales of most tobacco-related products in the United States.⁸⁷ American gained this market share by acquiring Union Tobacco Company, Continental Tobacco Company, and others.⁸⁸ The Tobacco industry was court-ordered to restructure into three firms, creating an oligopoly.⁸⁹ For a while, prices remained stable but later rose due to increases in excise taxes.⁹⁰ Due to the absence of price competition, the three firms earned the same profit rates as the American Tobacco Company Trust had earned before.⁹¹ This constant profit rate before and after the “breakup,” combined with consistent prices, tends to show that the breakup had little positive impact.⁹² The failure of *United States v. American Tobacco Co.* is one example of how court-ordered breakups or dissolutions can easily turn monopolies into oligopolies, without any significant changes to the prices of the commodities.⁹³

United States v. Aluminum Co. of America is one example of the Supreme Court breaking up a company when the industry was not fit to support increased competition.⁹⁴ The Court ordered the Aluminum Company of America (Alcoa) to (1) terminate contracts with chemical firms from which it purchased supplies, (2) give up its interest in its Canadian subsidiary, and (3) not participate in collusive activities or discriminate against competitors.⁹⁵ The problem with this order was that the aluminum market at that time was not designed to support more than one supplier.⁹⁶ Even 18 years later, Alcoa represented 90% of the supply market for

85. *Id.* at 7–8.

86. *Id.* at 8.

87. *Id.*

88. *Id.*

89. *Id.* at 9.

90. *Id.*

91. *Id.*

92. *Id.*

93. Robert W. Crandall, *If It Ain't Broke, Don't Break It Up*, BROOKINGS (June 14, 2000), <https://www.brookings.edu/opinions/if-it-aint-broke-dont-break-it-up/> [<https://perma.cc/Q2GM-85ZK>]; see *United States v. American Tobacco Co.*, 22 U.S. 106 (1911).

94. Crandall & Winston, *supra* note 81, at 9; see *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

95. Crandall & Winston, *supra* note 81, at 9.

96. *Id.*

aluminum in the United States.⁹⁷ There was not sufficient competition until the government provided aluminum plants to two existing companies and assisted three others in entering the market.⁹⁸ Had the Court not interfered, it is likely that when demand for aluminum increased, like it did, more firms would have entered the market and competition would have resulted regardless of Court intervention.⁹⁹

The Supreme Court explicitly allowed for monopolistic activity and conduct in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.¹⁰⁰ These petitioners alleged that Verizon violated § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, by discriminating against competitors in the telephone services market.¹⁰¹ The Telecommunications Act of 1996 required Verizon to share its telephone network, as well as individual network elements, with competitors.¹⁰² Investigations by New York's Public Service Commission (PSC) and the FCC led to Verizon making a "voluntary contribution" of \$3 million to the United States Treasury under a consent decree with the FCC.¹⁰³ The PSC ordered Verizon to incur \$10 million worth of liability to competing carriers.¹⁰⁴ Verizon was also subject to new requirements and performance measurements with additional penalties if Verizon did not comply.¹⁰⁵ The PSC and FCC requirements and the consent decree were terminated the following year.¹⁰⁶

Following the termination of the consent decree and orders, Trinko, an AT&T customer, filed a class action alleging that Verizon discriminated against competitors by not filling rivals' customer orders for service with the intent that customers would not use competing carriers.¹⁰⁷ The complaint stated that Verizon "has filled orders of [competitive LEC] customers after filling those for its own local phone service, [and] has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers."¹⁰⁸

97. *Id.*

98. *Id.* at 10.

99. *Id.*

100. *See Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414–16 (2004).

101. *Id.* at 401.

102. *Id.*

103. *Id.* at 403–04.

104. *Id.* at 404.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

The Supreme Court found that the creation of duties under the Telecommunications Act did not automatically mean that the duties would be enforced through antitrust claims, but rather that claims satisfying antitrust standards would be preserved.¹⁰⁹ Justice Scalia went on to say that “mere possession of monopoly power, and the concomitant charging of monopoly prices, is . . . not unlawful; it is an important element of the free-market system.”¹¹⁰ For Verizon’s monopoly power to be considered unlawful, an element of anticompetitive conduct would have to be present.¹¹¹ In this case, the Court did not find Verizon’s refusal to assist in providing service to rivals to be an antitrust violation.¹¹² The opinion notes that “anticompetitive violations of § 251 may be . . . ‘beyond the practical ability of a judicial tribunal to control.’”¹¹³ The Court held that the complaint failed to state a claim under the Sherman Antitrust Act and found that the Sherman Antitrust Act “does not give judges the *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”¹¹⁴

2. Meat Packing Antitrust Cases

In other industries throughout the United States, courts have found anticompetitive conduct and have court-ordered those companies to dissolve; however, courts have been more reluctant to find such conduct within the meat packing industry.¹¹⁵ One of the earlier cases where a court failed to find anticompetitive conduct, notwithstanding the Secretary of Agriculture imposing a cease and desist order on the meat packer, is *Swift & Co. v. Wallace*.¹¹⁶ The United States Court of Appeals for the Seventh Circuit set aside the Secretary of Agriculture’s cease and desist order that required the packer to stop giving

109. *Id.* at 406.

110. *Id.* at 407.

111. *Id.*

112. *Id.* at 410.

113. *Id.* at 414 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)).

114. *Id.* at 415–16.

115. *See, e.g., Swift & Co. v. Wallace*, 105 F.2d 848, 856 (7th Cir. 1939) (finding that giving price and credit term preferences was not enough on its own—bad faith needed to be shown as well); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1286–88 (11th Cir. 2005) (vacating a jury’s judgment and granting judgment as a matter of law for the packer); *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 828 (E.D. Va. 2002) (finding that despite the anticompetitive effects of Smithfield Foods actions, because their purpose was efficiency, there was no antitrust violation).

116. *Swift & Co.*, 105 F.2d at 862.

“unreasonable preferences” in price and credit terms.¹¹⁷ The court held that the Secretary of Agriculture should have taken into consideration the “relevant factor[s] of competition.”¹¹⁸ The cease and desist order may have stood had the secretary shown evidence of bad faith on behalf of the packer instead of just unfair preferences.¹¹⁹

After *Swift & Co. v. Wallace*, the Eleventh Circuit decided *Pickett v. Tyson Fresh Meats, Inc.*, where plaintiffs alleged Tyson took advantage of its large market share and used marketing agreements to manipulate prices in the cash cattle market.¹²⁰ At the time, Tyson processed over 10 million cattle a year.¹²¹ Tyson decided to leave the cash market to pursue marketing agreements, and with their substantial share of the market now gone, prices collapsed.¹²² Marketing agreements use prices based on the cash market average from the previous week; this essentially eliminates negotiations between producers and the meat packing plants they sell to.¹²³

Tyson benefited from these low cash market prices because their marketing agreements were based on those, now lower, cash market averages.¹²⁴ These agreements allow packers to “capture” the product before it ever enters the cash market.¹²⁵ Through marketing agreements, meat packers have the power to adjust prices paid to producers based on the quality and yield of cattle after slaughter—giving packing plants the ability to control prices even more.¹²⁶ According to the plaintiffs, Tyson violated the Packers and Stockyards Act by obtaining lower cash market prices through exiting the cash market; Tyson’s response was that it had adequate “competitive justifications.”¹²⁷

The jury found that Tyson lacked a legitimate reason for its anticompetitive effect on the industry through use of marketing agreements and awarded plaintiffs

117. *Id.* at 857.

118. *Id.*

119. *Id.*

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

121. *Id.* at 1276.

122. Spring, *supra* note 37, at 275.

123. *Id.* at 274.

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

125. Elliott Dennis, *Captive Supply: Nature, Extent, and Market Trends*, UNIV. NEB.—LINCOLN, INST. OF AGRIC. AND NAT. RES. (June 10, 2019), <https://cap.unl.edu/livestock/captive-supply-nature-extent-and-market-trends> [<https://perma.cc/5U5S-GZRS>].

126. Spring, *supra* note 37, at 274.

127. *Pickett*, 420 F.3d at 1281.

\$1.28 billion for antitrust violations.¹²⁸ However, the district court vacated the judgment and granted Tyson judgment as a matter of law that was later affirmed by the Eleventh Circuit.¹²⁹ The Eleventh Circuit held that “[i]f a packer’s course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition.”¹³⁰ There was no explanation given as to how Tyson’s actions aided competition other than stating that Tyson was able to compete with other packers using the same tactics.¹³¹

In 2002, the court in *Griffin v. Smithfield Foods, Inc.*, continued the practice of letting packing plants off the hook based on market efficiency.¹³² The court allowed Smithfield Foods to continue obtaining hogs for slaughter through pre-contracted arrangements and direct ownership of hogs simply because it’s purpose was to compete more effectively within the meat packing industry.¹³³ The court found that the purpose of the Packers and Stockyards Act was “to promote efficiency, not frustrate it” and that Smithfield was simply promoting efficiency within its packing process, not manipulating the market.¹³⁴ *Griffin* paid no attention to the anti-competitive effects of Smithfield’s actions which the Packers and Stockyards Act speaks directly to when proscribing conduct that has “the purpose or . . . effect of manipulating or controlling prices.”¹³⁵

A more recent antitrust suit filed against large meat packers is *In re Cattle Antitrust Litigation*.¹³⁶ Plaintiffs of this mass tort, consisting of plaintiffs from three other lawsuits filed in 2019, alleged that the Big Four abused their market power by conspiring to limit the supply of and fixing the prices of beef and cattle sold in the industry.¹³⁷ One of the main allegations set forth was that the Big Four conspired to artificially constrain the supply of beef entering the domestic supply

128. *Id.* at 1277–78.

129. *Id.* at 1278, 1288.

130. *Id.* at 1280.

131. *See id.*

132. *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 828 (E.D. Va. 2002).

133. *Id.*

134. *Id.*

135. 7 U.S.C. § 192(e); *see Griffin*, 183 F. Supp. at 828.

136. *In re Cattle Antitrust Litig.*, No. 19-1222, 2020 WL 5884676, at *1 (D. Minn. Sept. 29, 2020).

137. *See Class Action Compliant at 25–28, Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. Tyson Foods, Inc.*, No. 0:19-cv-01222 (D. Minn. May 7, 2019) (alleging that the Big Four conspired to decrease cattle prices while increasing their own margins); Case Management Order No. 1, *In re Cattle Antitrust Litig.*, No. 19-1222, 2020 WL 5884676 (D. Minn. Sept. 29, 2020).

chain.¹³⁸ One of the issues that the plaintiffs pointed out was that while independent packers were increasing their average slaughter, the Big Four's average slaughter decreased as they chose to import cattle instead of purchasing low-priced domestic cattle.¹³⁹ The plaintiffs alleged the defendants' conduct of reducing supply purchases and output in hopes of increased profits could only be the result of collusion.¹⁴⁰ The suit was dismissed due to a Fed. R. Civ. P. 12(b)(6) motion to dismiss on September 29, 2020.¹⁴¹

D. Examples of Other Tax Incentives That Could Be Implemented in Texas' Meat Packing Industry

Like the meat packing industry, other industries have faced similar challenges related to expensive set up and maintenance costs. For instance, Texas offers a property tax exemption for landowners who have wind or solar devices installed on their property.¹⁴² One way to overcome some capital-related challenges is through the provision of tax credits.¹⁴³ Tax credits allow a taxpayer to deduct money from the total amount of taxes they owe.¹⁴⁴ A tax credit is more beneficial to a taxpayer because it reduces the taxes owed dollar for dollar rather than reducing the amount of taxable income—a tax incentive known as a tax deduction.¹⁴⁵ For example, if the taxpayer was in a 25% tax bracket, a tax deduction of \$1.00 would save the taxpayer \$0.25, while a tax credit would reduce the tax liability by the full \$1.00. Two recently enacted tax credit incentives are the Solar and Wind-Powered Energy Devices exemption¹⁴⁶ and the Meat Processing Facility Investment Tax Credit Act.¹⁴⁷

138. *In re Cattle Antitrust*, 2020 WL 5884676, at *1.

139. *Id.* at *2.

140. *Id.* at *3.

141. *In re Cattle Antitrust*, 2020 WL 5884676, at *4, 8.

142. TEX. TAX CODE ANN. § 11.27 (West 2021).

143. See discussion *infra* Section III.A (providing model legislation regarding a tax credit for small meat packers).

144. Troy Segal, *Tax Credit: What It Is, How It Works, What Qualifies, 3 Types*, INVESTOPEDIA (Mar. 17, 2024), <https://www.investopedia.com/terms/t/taxcredit.asp> [<https://perma.cc/GGS7-G8SB>].

145. *Id.*

146. See generally TEX. TAX CODE ANN. § 11.27.

147. See generally MO. REV. STAT. § 135.686 (2024).

1. Texas Property Tax Code Section 11.27: Solar and Wind-Powered Energy Devices

Texas currently provides a tax incentive for the improvement of property using solar and wind-powered energy devices.¹⁴⁸ Texas Property Tax Code Section 11.27 allows for an appraised value of property exemption on property taxes that results from the installation of a solar or wind powered energy device.¹⁴⁹ To claim an exemption for the entire installation cost of energy devices, the taxpayer must submit the required forms to the county appraiser.¹⁵⁰ “Pursuant to Tax Code Section 11.45, after considering this application and all relevant information, the chief appraiser may request additional information,” which must be provided “within 30 days of the request or the exemption may be denied.”¹⁵¹ For example, if a landowner’s property was valued and taxed at \$200,000 and a \$20,000 solar or wind system was installed, increasing the property value, the landowner would only be taxed on the value of the property before the installation of the system—only \$200,000.¹⁵²

2. Missouri Meat Processing Facility Investment Tax Credit Act

One tax credit provided to those in the meat packing industry is Missouri’s Meat Processing Facility Investment Tax Credit Act.¹⁵³ This tax credit was passed “to stimulate investment in the meat processing industry,” and incentivize meat packers to modernize and expand their facilities.¹⁵⁴ Meat packers who “construct, improve, or acquire buildings, facilities, or equipment used exclusively for meat processing” are eligible to receive an income tax credit.¹⁵⁵ Effective January 3, 2023, Missouri’s Meat Processing Facility Investment Tax Credit Act was

148. *Id.*

149. *Texas Solar Property Tax Exemption*, SQUARE DEAL: LOWER YOUR PROP. TAX! (Feb. 10, 2022), <https://blog.squaredeal.tax/texas-solar-property-tax-exemption/> [<https://perma.cc/9BXD-X3P9>].

150. *Id.*

151. *Id.*

152. *Id.*

153. *See generally* MO. REV. STAT. § 135.686 (2024).

154. *Meat Processing Facility Investment Tax Credit Program*, MO. DEP’T OF AGRIC. (Feb. 27, 2024, 10:50 AM), <https://agriculture.mo.gov/abd/financial/meatprocessingfacility.php> [<https://perma.cc/6LLM-GGYX>].

155. *Id.*

renewed for another six years ending December 31, 2028.¹⁵⁶ The new version of the tax credit limits the tax credit to owners of small meat packing facilities with less than 500 employees.¹⁵⁷ This narrow focus emphasizes the need to increase the number of small and regional meat packing facilities.

III. TEXAS SHOULD IMPLEMENT A TAX CREDIT FOR SMALL MEAT PACKERS

The leading agricultural commodity in Texas is cattle.¹⁵⁸ This commodity, however, has been significantly hindered by “dominant middlemen” that nearly have complete control of the meat packing industry.¹⁵⁹ Ranchers across the state have lost their livelihoods due to the inability to turn a profit¹⁶⁰—and something must be done. Many ranchers insist that the lack of scale-appropriate meat processors is their biggest barrier to the consumer beef market.¹⁶¹ Representatives for the White House noted that:

When dominant middlemen control so much of the supply chain, they can increase their own profits at the expense of both farmers—who make less—and consumers—who pay more. Most farmers now have little or no choice of buyer for their product and little leverage to negotiate, causing their share of every dollar spent on food to decline. Fifty years ago, ranchers got over 60

156. Garrett Hawkins, *Agriculture is a Wise Investment for Missouri's Future*, MO. FARM BUREAU (Oct. 6, 2022), https://mofb.org/agriculture-is-a-wise-investment-for-missouris-future/?utm_source=rss&utm_medium=rss&utm_campaign=agriculture-is-a-wise-investment-for-missouris-future [https://perma.cc/93TL-HHQM].

157. Rudi Keller, *Rural Incentives in Missouri Tax Cut Proposal Target Biofuels, Small Producers for Help*, MO. INDEP. (Sept. 13, 2022, 7:00 AM), <https://missouriindependent.com/2022/09/13/rural-incentives-in-missouri-tax-cut-proposal-target-biofuels-small-producers-for-help/> [https://perma.cc/M8CR-D5G8].

158. *New Bills Would Help Increase Beef Processing, Availability*, TEX. FARM BUREAU: TEX. AGRIC. DAILY (July 8, 2020) [hereinafter *Beef Processing Bill*], <https://texasfarmbureau.org/new-bills-would-help-increase-beef-processing-availability/> [https://perma.cc/FK5V-WUHJ].

159. *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) [hereinafter *Supply Chain Fact Sheet*], <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/TQV6-RNST].

160. Hennigan, *supra* note 2.

161. Jodi Helmer, *Covid-19 is Highlighting an Old Problem: The Lack of Meat Processing Plants*, FOODPRINT: THE LATEST (July 20, 2020), <https://foodprint.org/blog/meat-processing-plants/> [https://perma.cc/WSK2-8LF2].

cents of every dollar a consumer spent on beef, compared to about 39 cents today.¹⁶²

Currently, meat packing plants in Texas have some tax incentives available to them, but property taxes can still be a major hindrance—especially when the property tax increases as new or additional equipment is added to the facility.¹⁶³ To increase market efficiency and competition, and reduce the monopolistic power of the Big Four, Texas legislators should propose legislation that provides tax incentives for processing plants that slaughter less than 2,500 head of cattle per week.

Some of the largest barriers for small packers include the inability to gather enough capital to pay for updated equipment, inspections, inspection overtime, and meeting waste water disposal requirements; each of these requires significant funding.¹⁶⁴ Under the current system, small meat packing plants will generally require a plant manager who has experience processing beef and running a business, clerical personnel, and two or three production employees which could grow to seven or eight if the plant is successful.¹⁶⁵ Additional costs packers must incur are pre-occupational capital expenses.¹⁶⁶ These expenses include the “design[ing] of the facility, blueprints, consulting, utility prepayments, soil tests and environment impact.”¹⁶⁷ These expenses “will equal about 20% of the overall plant, property and equipment, or PPE fees, so for a small plant it would require \$300,000 in pre-occupational capital.”¹⁶⁸

Reducing the amount of taxes packers must pay to update their facilities would allow these entities to put that money elsewhere.¹⁶⁹ Small packers could

162. *Supply Chain Fact Sheet*, *supra* note 159.

163. Glenn Hegar, *Agricultural and Timber Exemptions*, COMPROLLER.TEX.GOV (Mar. 21, 2024, 9:32 AM), <https://comptroller.texas.gov/taxes/ag-timber/> [<https://perma.cc/L9JZ-2KSH>].

164. See Worosz et al., *supra* note 40, at 173; Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. at 38948.

165. Lacey Newlin, *So You Want to Build a Slaughter Plant?*, HIGH PLAINS J. (June 12, 2020), <https://hpj.com/2020/06/12/so-you-want-to-build-a-slaughter-plant/> [<https://perma.cc/SJJ7-SLCP>].

166. *Id.*

167. *Id.*

168. *Id.*

169. See, e.g., Amanda Albee, *The U.S. Is Offering Meat Processors \$1 Billion in Grants. Will It Actually Help?*, TEXAS MONTHLY (May 11, 2022), <https://www.texasmonthly.com/food/will-federal-meat-processor-grants-help/> [<https://perma.cc/Z6QW-XX22>] (explaining what small meat processors in Texas could do with access to extra funds).

reallocate these funds and focus on overcoming some of the other barriers they face, such as increasing capacity by creating butchering apprenticeship programs and hiring more employees.¹⁷⁰ With the ability for small cattle processors to reduce barriers comes the ability for them to be more competitive.¹⁷¹ When ranchers have finished raising their cattle to the target weight, they either sell their cattle to a packing plant for processing into beef cuts or to a feed lot for the cattle to gain additional weight until slaughter-ready.¹⁷² More competition within the beef packing industry gives producers more viable options when shipping cattle for slaughter.¹⁷³

Ranchers and producers could make more money per head selling to a local packer that has received the tax credit. Packers could use the property tax savings to hire more employees and increase rail-cooler and processing floor space; yet another way to increase capacity.¹⁷⁴ If local packers have the ability to take in more cattle, ranchers and farmers do not have to worry about the high costs of transportation to plants that are further away.¹⁷⁵ The incentive to modernize would lead packers to acquire new technology that could help reduce production costs.¹⁷⁶ Local packers are able to receive price premiums from consumers who prefer high-quality beef or to spend their money on local products.¹⁷⁷ Small meat processors can easily increase the available market share because “[p]eople want to know where their food comes from,” and small regional meat packers give consumers

170. *See id.*

171. *See generally id.* (finding that even if the barriers were removed, competing against the Big Four would be still difficult).

172. Goodman, *supra* note 3.

173. Chad Smith, *Federal, State Governments Offer Support for Smaller Meat Packers*, MIDWEST MESSENGER LIVESTOCK ROUNDUP (Oct. 7, 2021), https://www.agupdate.com/livestockroundup/livestock/beef/federal-state-governments-offer-support-for-smaller-meat-packers/article_5c3b3c8e-25e4-11ec-a28a-2726fd1105c4.html [<https://perma.cc/2C9K-XHT6>] (“[M]ore processing capacity would help the producers be able to get some cattle out of the feedlots and provide some more competition for their cattle . . .”).

174. *See* Albee, *supra* note 169.

175. Harwood D. Schaffer & Daryll E. Ray, *Concentration in the Meat Packing Industry Has Advantages and Distinct Disadvantages*, AGRIC. POL’Y ANALYSIS CTR.: POL’Y PENNING (2020), <https://www.agpolicy.org/weekcol/2020/1024.html> [<https://perma.cc/HUU4-YSEE>].

176. *See* Emily Green, *Unpacking the Meat Industry*, ECON FOCUS, Fourth Quarter 2020, at 4, 5, https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2020/q4/feature1.pdf [<https://perma.cc/K86F-XDB8>].

177. *Id.* at 9.

the opportunity to know just that.¹⁷⁸ According to the 2018 National Survey of Grocery Shoppers, 59% of consumers choose their grocery store partly for the available selection of local products while 57% choose a market based on ties to the community.¹⁷⁹ Lower production costs combined with premium prices would allow profits to trickle down to the rancher for their local, high-quality cattle.¹⁸⁰

A. Creating a Tax Credit: The Small Meat Processing Modernization and Expansion Incentive

While the Big Four would like consumers to believe otherwise, ranchers only choose large-scale cattle production because they are not able to find reliable markets for smaller quantities of livestock.¹⁸¹ This is due to limited options within the slaughter market for cattle producers, which typically leaves them with the single option of a dominant packer and creates the monopsonies seen today.¹⁸²

Texas legislators should propose legislation combining Missouri's Meat Processing Facility Investment Tax Credit¹⁸³ with Texas Tax Code Section 11.27.¹⁸⁴ A market full of small and medium-sized packers tailored to local or regional needs "necessitates dispersed economic power and the producer autonomy of a competitive market."¹⁸⁵ This property tax incentive would lead to investment, increasing the efficiency and capacity of the beef processing plants themselves, and therefore increasing competition and efficiency throughout the market.¹⁸⁶ Missouri House Representative Brad Pollitt noted that the Meat Processing Facility Investment Tax Credit was a good investment for the state since "agriculture tax credits bring back 2-1 at the very least for every dollar the

178. Greg Henderson, *Capacity Constraints*, FARM J.: DROVERS (May 6, 2021), <https://www.drovers.com/news/industry/capacity-constraints> [<https://perma.cc/9GEZ-YRA5>].

179. Green, *supra* note 176, at 9.

180. See Patrick Thomas, *Cattle Ranchers Take Aim at Meatpackers' Dominance*, THE WALL ST. J. (Mar. 21, 2022, 11:09 AM), <https://www.wsj.com/articles/cattle-ranchers-meatpackers-beef-price-inflation-11647874135>.

181. Hendrickson et al., *supra* note 19.

182. Spring, *supra* note 37, at 273 (quoting Peter Carstensen, *The Prospects and Limits of Antitrust and Competitive-Market Strategies*, in FOOD AND THE MID-LEVEL FARM: RENEWING AN AGRICULTURE OF THE MIDDLE 227, 233 (Thomas A. Lyson et al. eds., 2008)); see discussion *supra* Section II.0 (discussing some of the major challenges faced by small meat packers).

183. See generally MO. REV. STAT. § 135.686 (2024).

184. See generally TEX. TAX CODE ANN. § 11.27 (West 2021).

185. Spring, *supra* note 37, at 279.

186. See *Meat Processing Facility Investment Tax Credit Program*, *supra* note 154.

state invests.”¹⁸⁷ Moreover, the Meat Processing Facility Investment Tax Credit Act has brought jobs and investment opportunities to rural Missouri, which a similar act could do if implemented in Texas.¹⁸⁸ The Texas version, with slight variation in numbering and other nuisances, could read as follows:¹⁸⁹

1. This section shall be known and may be cited as the “Small Meat Processing [Modernization and Expansion Incentive] Tax Credit Act”.

2. As used in this section, the following terms mean:

. . . .

(1) “Meat processing facility”, any commercial plant . . . at which [2,500 or less cattle] are slaughtered [per week] or at which meat or meat products are processed for sale commercially and for human consumption;

(2) “Meat processing modernization or expansion”, constructing, improving, or acquiring buildings or facilities, or acquiring equipment for meat processing including the following, if used [and placed in service] exclusively for meat processing:

(a) Building construction including livestock handling, product intake, storage, and warehouse facilities;

(b) Building additions;

(c) Upgrades to utilities including water, electric[ity], heat, refrigeration, freezing, and waste facilities;

(d) Livestock intake and storage equipment;

(e) Processing and manufacturing equipment including cutting equipment, mixers, grinders, sausage stuffers, meat smokers, curing equipment, cooking equipment, pipes, motors, pumps, and valves;

(f) Packaging and handling equipment including sealing, bagging, boxing, labeling, conveying, and product movement equipment;

(g) Warehouse equipment including storage and curing racks;

(h) Waste treatment and waste management equipment including tanks, blowers, separators, dryers, digesters, and equipment that uses waste to produce energy, fuel, or industrial products;

187. James Turner, *Missouri House Passes Omnibus Ag Bill with Tax Credit Extensions*, THE MO. TIMES (Jan. 31, 2022), <https://themissouritimes.com/missouri-house-passes-omnibus-ag-bill-with-tax-credit-extensions/> [<https://perma.cc/TQL9-MDHZ>].

188. See Hawkins, *supra* note 156.

189. The following is the author’s proposed statutory language extrapolated from both Missouri and Texas statutes which are cited accordingly.

- (i) Computer software and hardware used for managing the claimant’s meat processing operation including software and hardware related to logistics, inventory management, production plant controls, and temperature monitoring controls; and
- (j) Construction or expansion of retail facilities or the purchase or upgrade of retail equipment for the commercial sale of meat products if the retail facility is located at the same location as the meat processing facility;
- (3) “Tax credit”, a credit against the [appraised value of real property] tax[es] otherwise due under [Chapter 11 of the Texas Tax Code]
- (4) “Used exclusively”, used to the exclusion of all other uses”¹⁹⁰
3. The comptroller, with the assistance of the Texas [Department of Agriculture], or its successor, shall develop guidelines to assist local officials in the administration of this section.¹⁹¹
4. [A person] shall be [entitled to] a tax credit for [the amount of appraised value of real property owned by the person that arises from] meat processing modernization or expansion related to the [person’s] meat processing facility. The tax credit amount shall be equal to [the increase in the appraised value of the meat processing facility that arises from the] modernization or expansion.¹⁹²
5. No tax credit claimed under this section shall be refundable. The tax credit shall be claimed in the tax year in which the meat processing modernization or expansion expenses were paid, but any amount of credit that the taxpayer is prohibited by this section from claiming in a tax year may be carried forward . . . four subsequent tax years.
6. To claim the tax credit allowed under this section, the taxpayer shall submit to the [county appraiser] an application for the tax credit on a form provided by the [Comptroller and Texas Department of Agriculture] The application shall be filed with the [country appraiser] at the end of each calendar year in which a meat processing modernization or expansion project was completed and for which a tax credit is claimed under this section. The application shall include any certified documentation, proof of meat processing modernization or expansion, and any other information required by the [county appraiser]. All required information obtained by the [county appraiser] shall be confidential and not disclosed except by court order, subpoena, or as otherwise provided by law. If the . . . meat processing modernization or expansion meet[s] all criteria required by this section and

190. MO. REV. STAT. § 135.686 (2024).

191. TEX. TAX CODE ANN. § 11.27 (West 2021).

192. MO. REV. STAT. § 135.686.

approval is granted by the [county appraiser], the [county appraiser] shall issue a tax credit certificate in the appropriate amount. Tax credit certificates issued under this section may be assigned, transferred, sold, or otherwise conveyed, and the new owner of the tax credit certificate shall have the same rights in the tax credit as the original taxpayer. If a tax credit certificate is assigned, transferred, sold, or otherwise conveyed, a notarized endorsement shall be filed with the [county assessor] specifying the name and address of the new owner of the tax credit certificate and the value of the tax credit.

7. Any information provided under this section shall be confidential information, to be shared with no one except state and federal animal health officials, except as provided in subsection [6] of this section.

8. The [Texas Comptroller and Texas Department of Agriculture] shall promulgate rules establishing a process for verifying that a facility's modernization or expansion for which tax credits were allowed under this section has in fact expanded the facility's production within three years of the issuance of the tax credit and if not, the [Texas Comptroller and Texas Department of Agriculture] shall promulgate through rulemaking a process by which the taxpayer shall repay the . . . amount equal to that of the tax credit allowed.

9. The [Texas Comptroller and Texas Department of Agriculture] shall, at least annually, submit a report to the [Texas Legislature] reviewing the costs and benefits of the program established under this section.¹⁹³

While based almost entirely on Missouri's Meat Processing Facility Investment Tax Credit Act, The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act does not replicate the Missouri statute exactly because Texas property taxes are some of the highest in the country.¹⁹⁴ Missouri's tax credit is applied towards the corporation's state income tax for the tax year in which the expansion or modernization took place.¹⁹⁵ Since Texas property taxes are so high, the credit would be more beneficial to meat packers if applied towards property taxes based on the meat packing facility's value.¹⁹⁶

193. *Id.*

194. Lana Dolyna, *Texas Property Taxes Compared to Other States + FAQs*, TAX SHARK (Sept. 2022), <https://taxsharkinc.com/texas-property-tax-compared/> [<https://perma.cc/9LVA-K53A>].

195. MO. REV. STAT. § 135.686(4).

196. *See, e.g.*, PRODUCER OWNED BEEF, FAST FACTS (2022), <https://producerownedbeef.com/wp-content/uploads/2022/09/Final-POB-Fact-Sheet-FAQ-8.29.22.pdf> [<https://perma.cc/XEX4-MWCC>] (noting that the city of Amarillo and the Highland Park School District drew new packing plant to Amarillo partially by providing a 100% abatement for 10 years on nearly \$650 million of estimated improvement costs).

Another reason The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act is not an exact copy of Missouri's Meat Processing Facility Investment Tax Credit Act is because the state departments in charge of implementing the acts are different in the two states.¹⁹⁷ The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act places the Texas Department of Agriculture and the Texas Comptroller in charge of overseeing the Act since they are the state departments responsible for governing taxation¹⁹⁸ and agriculture businesses and operations.¹⁹⁹

Monetary incentives for meat packing plants seem to be a common idea amongst those trying to improve the meat packing industry.²⁰⁰ On July 29, 2021, the Feed America by Incentivizing Rural Meat Packing Act (the FAIR Meat Packing Act) was introduced to the Senate.²⁰¹ The FAIR Meat Packing Act would essentially allow for an investment tax credit of 25%.²⁰² Another program legislators have proposed is the Requiring Assistance to Meat Processors for Upgrading Plants Act (the RAMP UP Act) that would provide grants to processors wanting to upgrade their facilities and become closer to qualifying for USDA inspection.²⁰³ Once a packing plant is USDA inspected, it may sell products across state lines, leading to more consumers and more money for the packer and rancher.²⁰⁴ The Center for Rural Affairs also found that investments in small packing plants would likely “bring [these] plants up to federal inspection standards and increase [their] capacity through building expansions, equipment upgrades[,] and technical training.”²⁰⁵

If a bill such as The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act was passed, the efficiency of outdated facilities would

197. MO. REV. STAT. § 135.686(2) (defining the “authority” as the Agricultural and Small Business Development Authority under MO. REV. STAT. § 348).

198. See Glenn Hegar, *Taxes*, COMPTROLLER.TEXAS.GOV (Mar. 1, 2024, 2:33 PM), <https://comptroller.texas.gov/taxes/> [<https://perma.cc/R3EH-4FPY>].

199. See *What Does the Texas Department of Agriculture (TDA) Do?*, TEX. DEP'T OF AGRIC. COMM'R SID MILLER (Mar. 1, 2024, 2:46 PM), <https://www.texasagriculture.gov/About/What-does-TDA-do> [<https://perma.cc/J5XA-CUKG>].

200. See e.g., Feed America by Incentivizing Rural Meat Packing Act, S. 2558, 117th Cong. (2021); MO. REV. STAT. § 135.686.

201. S. 2558.

202. *Id.*

203. Requiring Assistance to Meat Processors for Upgrading Plants Act, H.R. 7490, 116th Cong. § 298 (2020); *Beef Processing Bill*, *supra* note 158.

204. *Beef Processing Bill*, *supra* note 158.

205. Smith, *supra* note 173.

likely increase as they did in Missouri.²⁰⁶ Production technology is a major influencer in any industry, and entities that can afford to have more sophisticated technology and facilities are better able to influence the competitive nature of the industry.²⁰⁷ Small Texas processors have stated that they would put additional capital towards increasing rail-cooler space, expanding the floor space of processing areas, and hiring more employees.²⁰⁸ This additional capacity would help meet demand on both the producer and consumer sides of packing plants.²⁰⁹

Ultimately, Texas should enact legislation mimicking Missouri's Meat Processing Facility Investment Tax Credit Act to "allow family farms to compete with corporate farms on a level playing field."²¹⁰ Jill Wood, executive director of the Missouri Agricultural and Small Business Development Authority at the Department of Agriculture, correctly stated that the tax credit "goes to meat processors for expansion of their processing facility so that benefits farmers by more capacity to process meat, [and meat processors are] going to make more money if they're able to process more meat quickly."²¹¹ For Texas, this would mean more money in the pockets of both ranchers and small meat packers.

B. The Court System, Grants, and Mandated Cash Trade Are Insufficient Solutions

First, while lawsuits and court proceedings may be the instinctive solution for what many consider to be a matter of antitrust violations, the courts have yet to create any increase in competition and have instead dismissed lawsuit after lawsuit.²¹² Second, there have been a considerable number of grants provided to

206. See Mike Cullinan, *New Tax Credits Aim to Boost Meat Processors*, SPRINGFIELD BUS. J. (July 15, 2019, 1:57 PM), <https://sbj.net/stories/new-tax-credits-aim-to-boost-meat-processors,64635> [<https://perma.cc/ZZQ8-UW6Q>].

207. See Albee, *supra* note 169.

208. *Id.*

209. *Beef Processing Bill*, *supra* note 158.

210. Keller, *supra* note 157.

211. Hannah Falcon, *Mid-Missouri Meat Processor Benefits from Tax Credits That Lawmakers are Debating in Jefferson City*, ABC 17 NEWS (Sept. 16, 2022, 7:23 PM), <https://abc17news.com/politics/missouri-politics/2022/09/16/mid-missouri-meat-processor-benefits-from-tax-credits-that-lawmakers-are-debating-in-jefferson-city/> [<https://perma.cc/JGT4-MJTC>].

212. See, e.g., *In re Cattle Antitrust Litig.*, No. CV 19-1222, 2020 WL 5884676, at *8 (D. Minn. Sept. 29, 2020) (granting the defendants' joint motion to dismiss the case); *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 830 (E.D. Va. 2002) (dismissing suit for the plaintiffs' failure to provide evidence establishing a violation of the Packers and Stockyards Act).

small meat packers.²¹³ But when these grants run out of money, the packer must find a way to make a profit, despite the high risk of failure.²¹⁴ A third proposed solution is the Cattle Price Discovery and Transparency Act, but industry leaders have stated the mandates proposed would not be beneficial.²¹⁵

1. The Judicial System Is Not Equipped to Be, Nor Willing to Be, the Solution

Enacting legislation is a much better response to concentration seen in the meat packing industry than relying on the courts to act as “central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.”²¹⁶ Pushing for a legal framework that enables increased competition is a much more sustainable option than court-ordering the Big Four to break up. Courts have ordered businesses to break up in the past such as Standard Oil, Microsoft, and others, and only in some situations has it been the true cause of the anticipated results.²¹⁷ Breaking up companies that have found ways to thrive within difficult industries would likely send the message to other companies that working hard and engaging in fair competition could lead to dissolution of the entity if it becomes too good at what it does.²¹⁸ Breaking up the Big Four would not be effective in addressing market concentration. Due to their success, the Big Four have the resources and the ability to continually innovate and allow the packing industry as a whole to advance.²¹⁹

First, the issue with trying to break up the Big Four via the judicial system is that the courts can only order the dissolution of a company if there is evidence

213. *Supply Chain Fact Sheet*, *supra* note 159.

214. Albee, *supra* note 169 (“Eventually those grants run out, and the firms benefiting from them will have to compete, just like always.”).

215. *Cattle Industry Opposition to Government Mandate Amplified Through Senate Hearing*, NAT’L CATTLEMEN’S BEEF ASS’N (Apr. 26, 2022) [hereinafter *Cattle Industry Opposition*], <https://www.ncba.org/ncba-news/news-releases/news/details/30125/cattle-industry-opposition-to-government-mandate-amplified-through-senate-hearing/> [<https://perma.cc/PW69-P67P>].

216. *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

217. Crandall, *supra* note 93.

218. George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295, 322–23 (2001).

219. See *Economics 101: What is a Monopoly*, MASTERCLASS (Oct. 12, 2022), <https://www.masterclass.com/articles/economics-101-what-is-a-monopoly/> [<https://perma.cc/P7AS-89GN>] (“A monopoly . . . is more likely to . . . invest[] in research and development. This can lead to new products and manufacturing efficiencies that may benefit consumers down the line.”).

showing violation of an antitrust law.²²⁰ Breaking up the Big Four cannot even be considered an option until the courts find evidence of antitrust activity.²²¹ Based on previous lawsuits, it appears that the Supreme Court is unlikely to find sufficient evidence of the Big Four colluding or engaging in monopolistic practices.²²² Summary judgment motions keep kicking antitrust suits out of court because of a lack of evidence showing collusion or anticompetitive behavior on behalf of the Big Four.²²³ The Court noted in one matter that “[t]he opportunity to charge monopoly prices . . . is what attracts ‘business acumen’ in the first place . . . [and] induces risk taking that produces innovation and economic growth.”²²⁴ The Court went on to state that because this production of innovation is so valuable, monopoly power will be found to be lawful unless there is sufficient evidence of anticompetitive conduct.²²⁵

Time after time, lawsuits alleging violation of the Sherman Act or the Packers and Stockyards Act have been dismissed on a 12(b)(6) motion for “failure to state a claim upon which relief can be granted.”²²⁶ According to The National Agricultural Law Center, the Packers and Stockyards Act prohibits meat packers from “engaging in or using ‘any unfair, unjustly discriminatory, or deceptive practice or device’; [and] making or giving ‘any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage.’”²²⁷ Further unlawful practices include engaging “in any course of business or do[ing] any act for the purpose or with the effect of manipulating or

220. *The Sherman Act*, THEODORE ROOSEVELT CTR. AT DICK. ST. UNIV., (Mar. 1, 2024, 2:39 PM), <https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Capitalism-and-Labor/The-Sherman-Act.aspx/> [<https://perma.cc/SEL4-WTSM>].

221. *Id.*

222. *See, e.g., In re Cattle Antitrust Litig.*, No. CV 19-1222, 2020 WL 5884676, at *8 (D. Minn. Sept. 29, 2020); *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 830 (E.D. Va. 2002).

223. *See, e.g., In re Cattle Antitrust*, 2020 WL 5884676, at *8 (granting the defendants’ joint motion to dismiss the case); *Griffin*, 183 F. Supp. 2d at 830 (dismissing suit for the plaintiffs’ failure to provide evidence establishing a violation of the Packers and Stockyards Act).

224. *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

225. *Id.*

226. *See, e.g., id.* at 416; FED. R. CIV. P. 12(b)(6).

227. *The Packers and Stockyards Act: An Overview*, THE NAT’L AGRIC. L. CTR., (Mar. 1, 2024, 2:38 PM), <https://nationalaglawcenter.org/overview/packers-and-stockyards/> [<https://perma.cc/564E-RVR3>].

controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce.”²²⁸

In *Pickett v. Tyson Fresh Meats*, the Eleventh Circuit stated that the Packers and Stockyards Act was supposedly designed to promote efficiency, but later admitted that it was designed to “prevent unfair practices, price fixing and manipulation, and monopolization.”²²⁹ By holding that the Packers and Stockyards Act is meant to promote efficiency, the Eleventh Circuit accepted Tyson’s explanation that it purposely manipulated prices for the sake of efficiency.²³⁰ This intentional manipulation of prices was still not found to be a violation of the Packers and Stockyards Act because it was done in the name of “efficiency,” despite being a blatant violation of antitrust laws.²³¹ As the Eleventh Circuit in *Pickett* demonstrated, the efficiency justification allows for price manipulation and anticompetitive conduct, while encouraging courts to condone otherwise illegal behavior.²³² Because concentrated market structures promote anticompetitive types of conduct, the efficiency justification frustrates the very purpose of antitrust law.²³³ Looking at *Pickett*, it seems hard to believe that courts will ever find anyone to have violated the Packers and Stockyards Act.²³⁴

Even if courts found that the Big Four were violating an antitrust law, there are major economic concerns that would need to be considered.²³⁵ Economic treatises have admitted that the impact monopolies have on innovation likely exceed the impact of static or fixed pricing.²³⁶ In *Standard Oil Co. of New Jersey v. United States*, the Supreme Court recognized that:

[t]he evils which led to the public outcry against monopolies and to the final denial of the power to make them [include] . . . [t]he danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.²³⁷

228. *Id.*

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

230. *Id.* at 1283–84.

231. *See id.*

232. 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/9SWX-UNGK>].

233. *See id.*

234. *See generally Pickett*, 420 F.3d 1272.

235. *See generally* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 584 (Elisa Adams et al., eds., 13th ed. 1989).

236. *Id.*

237. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 52 (1911).

While monopoly power itself is unlawful, companies that achieve monopoly status typically get there because they establish a framework that allows them to serve the industry in a unique way.²³⁸ The Supreme Court stated that an underlying purpose of antitrust law is to incentivize investment in companies, so requiring companies to share their competitive advantages with others in the industry does not promote this underlying purpose.²³⁹

2. Grants Alone Are Not a Sufficient Solution

If legislators simply make a one-time decision to grant a fixed amount of funds to packing plants, these plants still have to find a way to survive in the industry after that money runs out.²⁴⁰ By providing a recurring incentive for improvements of packing facilities, entities with an established position in the industry who know what they are doing will be able to focus more on continuous innovation.²⁴¹ While grants can be awarded to help new packers get on their feet and small established packers improve, it is not feasible to financially help them forever; at some point, they have to be able to survive on their own.²⁴² This is exactly what the Big Four have done and why they have made it where they are.²⁴³

According to Cliff Lamb, the director of Texas A&M AgriLife Research, when a grant runs out and a small plant is no longer profitable, the plant is likely to either be purchased by a bigger packing plant—which would only grow the larger entities—or it will be shuttered.²⁴⁴ Providing tax incentives to established packing plants reduces the chance of investing grant money in a new packing plant at risk of failing.²⁴⁵

238. *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

239. *Id.* at 407–08.

240. Albee, *supra* note 169 (“Eventually those grants run out, and the firms benefiting from them will have to compete, just like always.”).

241. See generally Julia Kagan, *Business Tax Credits: Meaning, How They Work, Example*, INVESTOPEDIA (Dec. 19, 2023), <https://www.investopedia.com/terms/b/business-tax-credits.asp> [<https://perma.cc/NPT4-9SVV>] (discussing the benefits of business tax credits including promoting continuing expansion and efficiency).

242. Albee, *supra* note 169.

243. *Packer & Processor*, U.S. ROUNDTABLE FOR SUSTAINABLE BEEF (Feb. 27, 2024, 1:21 PM), <https://www.beefsustainability.us/the-framework/packer-processor> [<https://perma.cc/DK8M-SM79>] (finding that the Big Four “dominate the packing market due to the efficiency of scale” they have been able to achieve).

244. Albee, *supra* note 169.

245. *What Are the Risks from Investing in Early Stage Companies?*, MANHATTAN ST. CAP. (Mar. 1, 2024, 2:46 PM), <https://www.manhattanstreetcapital.com/faq/for-investors/what-are->

3. Mandated Cash Trade Is Not a Complete Solution

There has been a significant push for Congress to pass the Cattle Price Discovery and Transparency Act.²⁴⁶ Supporters of this include Iowa Senator, Chuck Grassley,²⁴⁷ the American Farm Bureau Federation,²⁴⁸ and the United States Cattlemen's Association.²⁴⁹ While the Cattle Price Discovery and Transparency Act may do some good, price reporting and transparency alone is not enough to help producers who are stuck selling their cattle to the same packing plants offering the same low prices.²⁵⁰ Theoretically, mandatory price reporting could help ranchers to an extent if properly executed.²⁵¹ Ethan Lane, the Vice President of Government Affairs of the National Cattlemen's Beef Association (NCBA), stated that the "NCBA strongly supports fairness and transparency in the market, but Congress is wasting time with legislative proposals in search of a problem while ignoring real issues impacting cattle producers."²⁵²

Industry leaders have found one major issue with the proposed Cattle Price Discovery and Transparency Act: price transparency is not the only mandate being proposed—mandated negotiated cash trading is also required.²⁵³ Mandating negotiated cash trade limits ranchers' ability to use alternative marketing agreements which could benefit ranchers when used appropriately by meat

risks-investing-early-stage-companies [<https://perma.cc/3RH5-2V9U>] ("Investments in startups are speculative, and these companies often fail." Mature businesses, on the other hand have "a track record of revenue and income" that are attractive).

246. See Cattle Price Discovery and Transparency Act of 2022, S.4030, 117th Cong. (2022).

247. ShayLe Stewart, *Call the Market*, PROGRESSIVE FARMER (Apr. 27, 2022, 12:49 PM), <https://www.dtnpf.com/agriculture/web/ag/news/article/2022/04/27/cattle-price-discovery-transparency> [<https://perma.cc/4Y6W-JE69>].

248. Mike Tomko, *Farm Bureau Seeks Revision to Cattle Transparency Act*, AM. FARM BUREAU FED'N (Jan. 21, 2022), <https://www.fb.org/newsroom/farm-bureau-seeks-revision-to-cattle-transparency-act> [<https://perma.cc/3E3U-ZGWS>].

249. ShayLe Stewart, *supra* note 247.

250. *The Beef with Big Cattle*, CHUCK GRASSLEY (Mar. 22, 2024, 12:35 PM), <https://www.grassley.senate.gov/cattle-market-transparency> [<https://perma.cc/9E48-Z753>].

251. Terence Stewart et al., *supra* note 7, at 586.

252. *House Passes Meat Packing Special Investigator Act in Broader Legislation*, N. AG NETWORK (June 16, 2022), <https://northernag.net/house-passes-meat-packing-special-investigator-act-in-broader-legislation/> [<https://perma.cc/RYP3-VYAP>].

253. *Federal Mandates Hurt the Cattle Industry*, TEX. FARM BUREAU (Mar. 22, 2024, 11:21 AM), <https://texasfarmbureau.org/advocacy/cattle-markets/> [<https://perma.cc/JL9P-AFDJ>].

packers.²⁵⁴ Alternative marketing agreements typically provide ranchers with the ability to receive a premium above market value for higher quality cattle.²⁵⁵ If packers are forced to instead engage in negotiated cash trade, ranchers lose the option to negotiate an alternative marketing agreement and therefore are unable to benefit from these quality-based premiums.²⁵⁶

Many are opposed to the proposed mandates on cattle sales including the Kansas Livestock Association and the NCBA.²⁵⁷ The Cattle Price Discovery and Transparency Act would require packing plants to purchase a definite percentage of their supply through cash bids, which would in turn reduce the ability for cattle ranchers and producers to sell their cattle how they see fit.²⁵⁸ Shawn Tiffany of the Kansas Livestock Association testified that the Cattle Price Discovery and Transparency Act mandates could actually reduce the number of marketing opportunities ranchers and producers have.²⁵⁹ This is exactly what ranchers like Mark Gardiner, owner of the Gardiner Angus Ranch in Ashland, Kansas, are concerned about.²⁶⁰ Gardiner told the Senate Ag Committee that with all of the potential solutions out there, legislators need to remember one thing: “[p]lease do not create regulations and legislation that have the unintended consequence of harming value-based marketing, [as] . . . [d]oing so would undo many years of progress for producers such as my family and those of our customers.”²⁶¹

Reports have demonstrated that mandating cash trade between producers and packers could cost ranchers up to \$249 million annually with about 90% of the costs coming from producers in Texas, Kansas, Oklahoma, and New Mexico.²⁶² Texas ranchers and producers specifically, who are already in major debt, could end up losing an additional \$126 million annually.²⁶³ This loss would result from ranchers losing the ability to receive premiums for higher quality cattle through alternative marketing agreement formulas as discussed above.²⁶⁴

254. CATTLE MARKET WORKING GROUP, AM. FARM BUREAU FED’N 12 (2020), https://www.fb.org/files/AFBF_Cattle_Market_Working_Group_Final_Report.pdf [<https://perma.cc/X4DR-73ZE>].

255. *Id.*

256. *Id.*

257. *Cattle Industry Opposition*, *supra* note 215.

258. *Federal Mandates Hurt the Cattle Industry*, *supra* note 253.

259. *Cattle Industry Opposition*, *supra* note 215.

260. Smith, *supra* note 173.

261. *Id.*

262. *Federal Mandates Hurt the Cattle Industry*, *supra* note 253.

263. *Id.*

264. CATTLE MARKET WORKING GROUP, *supra* note 254, at 12.

The cattle industry as a whole is fairly opposed to additional regulations and hoops for ranchers, producers, packers, and others in the industry to jump through.²⁶⁵ The Cattle Market Working Group, consisting of representatives from 10 states, including Texas, reported that:

[a]dditional regulation may not solve the problems as intended and could potentially result in negative consequences. A key point to remember when discussing the optimal level of negotiated transactions is that PRICE DISCOVERY is not the same as PRICE DETERMINATION. While enhanced price discovery is a good thing, it does not necessarily mean it will result in higher prices (as many proponents of minimum thresholds contend). Mandatory minimum negotiated trade could potentially inhibit a producer's ability to enter AMAs, which are typically a premium paid above market value.²⁶⁶

C. Chain Reaction Effect on Producers and Consumers

The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act would improve some of the hindrances packers face, but there would still be many other challenges for small meat packers.²⁶⁷ Even if all the barriers to entry were removed, and small processors had an increase in available funds, there would still be “an uphill battle to compete with the Big Four.”²⁶⁸

Increasing the number of small packers, and the capacity of existing small packers, would help enlarge the country's beef industry and, most importantly, balance profitability throughout the beef supply chain.²⁶⁹ More specifically, helping small packers become more efficient and increase capacity would have a direct effect on cattle ranchers and producers across Texas.²⁷⁰ Dustin Aherin, a RaboBank analyst, discovered that “[i]f such expansion can be achieved through in-plant technology improvement and new, consumer demand-driven small . . . plants, profitability will be more evenly distributed throughout the beef and cattle supply chain.”²⁷¹ Such improvements and expansions are exactly what The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act would

265. *Federal Mandates Hurt the Cattle Industry*, *supra* note 253.

266. CATTLE MARKET WORKING GROUP, *supra* note 254, at 12.

267. *See* Albee, *supra* note 169.

268. *Id.*

269. Henderson, *supra* note 178.

270. *See* Smith, *supra* note 173.

271. Henderson, *supra* note 178.

promote across Texas by requiring investments to be in packing plants that slaughter less than 2,500 head of cattle per week to qualify for the tax credit.²⁷²

The average 1,370 pound steer has a value of \$1,630, but that \$1,630 “must be divided between the slaughterhouse, feed lot and the rancher, who typically bears the largest expense of raising the animal for more than a year.”²⁷³ Increasing “processing capacity would help the producers be able to get some cattle out of the feedlots and provide some more competition for their cattle.”²⁷⁴ Bill Bullard, Chief Executive Officer of the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA), believes that ranchers have already lost 75% of their marketing outlets and despite beef demand and exports being extremely high, producers struggle to market their cattle.²⁷⁵

Leading the nation in number of farms and ranches, Texas has 230,662 farms and ranches, with one in every seven working Texans having an agriculture-related job.²⁷⁶ In 2022, the Texas cattle industry was valued at \$15.5 billion—over three times as much as the second largest commodity, poultry and eggs, at \$5 billion.²⁷⁷ The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act would just be a starting place, but the legislature must start addressing the issues that threaten one of the biggest industries in Texas.

IV. CONCLUSION

The importance of sustainable competition within the meat packing industry is paramount for cattle ranchers and farmers in Texas. Providing small packers with The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act, or a similar act, gives these packers the ability and incentive to expand, update, and streamline their facilities.²⁷⁸ With these updates comes increased capacity for the packing plants and more options for ranchers looking to sell their

272. See discussion *supra* Section III.A (discussing the specifics of The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act).

273. Scott McFetridge, *Unhappy with Prices, Ranchers Look to Build Own Meat Plants*, ASSOC. PRESS NEWS (Oct. 16, 2021), <https://apnews.com/article/ranchers-look-to-build-their-own-meat-plants-d95ef3d2aee8e80aa5aca6d06ffa50a4> [<https://perma.cc/U6JZ-RB3D>].

274. Smith, *supra* note 173.

275. Wendy Griffith, *‘Extremely Serious’: Ranchers Say Meat Packer Monopoly Threatens Their Way of Life and US Food Security*, CHRISTIAN BROAD. NETWORK (Aug. 04, 2022), <https://www1.cbn.com/cbnnews/us/2022/august/cattle-ranchers-say-meat-packer-monopoly-is-threatening-their-way-of-life> [<https://perma.cc/YGR2-MP88>].

276. *Texas Ag Stats*, TEX. DEP’T OF AGRIC. COMM’R SID MILLER (Mar. 1, 2024, 2:35 PM), <https://www.texasagriculture.gov/About/Texas-Ag-Stats> [<https://perma.cc/J3MA-HFEW>].

277. *Id.*

278. *Beef Processing Bill*, *supra* note 158.

cattle.²⁷⁹ Packing plants will be forced to offer competitive prices to ranchers to receive the rancher's cattle or the rancher could choose to sell to another packer.

Texas legislators should pass The Small Meat Processing Modernization and Expansion Incentive Tax Credit Act. This would provide a property tax credit for small packing plants processing less than 2,500 head of cattle per week.²⁸⁰ Giving regional packing plants the opportunity to thrive and compete in the industry provides ranchers and producers with more viable options when selling their cattle. More options means more competition, which leads to fair prices for ranchers, beef distributors, and consumers. In the words of Les Shaw, a fourth-generation cattle rancher, there needs to be change “so there is a future for this business and our kids in the next generation, so this heritage doesn't disappear.”²⁸¹

279. Smith, *supra* note 173 (stating that “more processing capacity would help the producers be able to get some cattle out of the feedlots and provide some more competition for their cattle”).

280. See discussion *supra* Section III.0 (providing model legislation for a tax credit for small meat packers processing 2,500 head of cattle or less per week).

281. Griffith, *supra* note 275.