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Concentration Concerns in the American Livestock Sector: Another Look at the Packers and Stockyards Act

by

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In the early years of the twentieth century, the American meatpacking industry was often criticized for engaging in anticompetitive behavior. As one early report of the United States Senate concluded, “[i]t has been demonstrated beyond question that the history of the development of this industry has been the history of one effort after another to set up monopoly.”² Such concerns prompted Congress to adopt the Packers and Stockyards Act in 1921. Livestock sellers who interact with the packing sector have again expressed concerns in recent years about their vulnerability to anticompetitive injuries. The growth of vertical contracting between individual livestock producers and large packers has also heightened concerns about anticompetitive injury on the part of livestock sellers.

A recent civil action brought under the auspices of the Packers and Stockyards Act (P&SA) highlights the importance of these concerns and the need for a more comprehensive understanding of the P&SA. In February 2004, a federal jury in Alabama found the meatpacking company Tyson-IBP guilty of depressing the price of cattle and recommended damages to a class of farmers in the amount of \$1.28 billion.³ The civil lawsuit, first filed in 1996, “was the first class-action litigation ever heard under a corner of antitrust law known as the Packers and Stockyards Act of 1921, which was designed to protect farmers from the market power of that era’s meat giants.”⁴ The jury foreman said the decision was based upon the “spirit of the law – the Packers and Stockyards Act,” which justifies another look at its origins.⁵

Section I of this article outlines the general changes in the hog and cattle markets that have prompted concerns about competition. Section II outlines some concerns regarding the effectiveness of the Packers and Stockyards Administration as an enforcement agency. Section III addresses concerns about the more general antitrust statutes, which were designed to address anticompetitive behavior in the economy more broadly. Section IV sets forth the general history surrounding passage of the P&SA.

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² Federal Live Stock Commissioner, Senate Report No. 39, 67th Congress, 1st Session, at 7 (May 9, 1921). See also Food Investigation, Report of the Federal Trade Commission on the Meatpacking Industry (hereinafter FTC Report), Part 2, Evidence of Combination Among the Packers (1918), at 11 (concluding that there “has been practically no time since 1885 when the packers were not combined in some way”).

³ Elizabeth Becker, *Alabama Jury Awards Ranchers \$1.28 Billion From Tyson*, N.Y. TIMES, Feb. 18, 2004.

⁴ Scott Kilman, *Alabama Federal Jury Finds Tyson Guilty of Depressing Cattle Prices*, WALL STREET JOURNAL, Feb. 18, 2004.

⁵ *Id.* On the date this article was submitted for publication the case was on appeal to the 11th Circuit Court of Appeals after the trial court judge overturned the verdict because he found some Plaintiff actions justified.

I. The Restructuring of the Livestock Sector

Within the last twenty years, the nature of American livestock markets has changed dramatically. In the 1950s and 1960s, political leaders, antitrust enforcement agencies, and the courts viewed concentrated markets with great skepticism. As a result, mergers between packers were limited and the degree of concentration in the packing sector did not grow to alarming levels. The livestock farmers who sold to the packers were also able, to some extent, to organize their marketing through pooling and collective bargaining, partially mitigating the market power of packers and diminishing the packers' ability to behave anticompetitively. According to some critics, when antitrust enforcers failed to address the problem of packer mergers in the 1980s and farmers' efforts to collectively organize their selling diminished, the nature of the livestock system changed dramatically. Instead of farmers who were relatively equal in size and somewhat organized selling to a relatively unconcentrated packing sector, small farmers and large farmers who had adopted large-scale industrial production methods sold in an unorganized fashion to a packing sector that had become heavily concentrated due to packer mergers. The new packers catered to the largest industrial livestock producers, triggering concerns over packer price discrimination between large and small livestock producers. The growing use of livestock production and marketing contracts between packers and farmers, which allowed packers to arrange "captive supplies" of livestock, generated concerns over price manipulation of the shrinking open, or spot, market often used by smaller livestock producers. The prevalence of production and marketing contracts also triggered fairness concerns among some commentators, who were alarmed at the disparity in bargaining power between the new mega-packers and individual farmers and what they viewed as the restrictive nature of the contracts and the deterioration of the independent, entrepreneurial status of farmers.

A. Production and Slaughter of Hogs and Cattle

In 1988, farmers raising less than a thousand head of hogs per year produced 32 percent of the hogs sold.⁶ By 1997, these farmers produced only 5 percent of nation's hogs.⁷ In Iowa, from 1992-1997, 90 percent of the farmers who quit raising hogs were in this category.⁸ Overall, from 1980 to 2000, the number of Iowa farmers raising hogs dropped 81 percent.⁹ The loss of these hog producers is not reducing the overall level of hog production. Instead, the productive capacity of smaller producers is being replaced by larger producers. The number of hogs marketed by farmers who sell fewer than one thousand hogs per year declined by 70 percent from 1994 to 1997.¹⁰ But the producers who market between 50 and 500 thousand hogs per year increased production by 79 percent in the same period.¹¹ Producers who market over 500 thousand hogs per year increased production 144 percent.¹² From 1988 to 1997, the proportion of hogs produced on farms raising 5,000

⁶ John Lawrence, Glenn Grimes, and Marvin Hayenga, *Production and Marketing Characteristics of U.S. Pork Producers, 1997-1998*, National Pork Producers Council (December 1998), at 3 (hereinafter "NPPC").

⁷ NPPC, at 3.

⁸ *Id.*

⁹ Jan Horgen, *Hog Summit Message: Bigger Is Not Better*, THE GLOBE GAZETTE, (Apr. 7, 2002).

¹⁰ NPPC, at 2.

¹¹ *Id.* See also Steve W. Martinez, *Vertical Coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products*, Economic Research Service, USDA, Agricultural Economic Report No. 777 (April 1999), at 11 (noting that the "[i]ndustrialization of the pork industry has been especially apparent since the 1990s, which heralded the arrival of the 'mega producers' (operations with inventories of at least 2,000 head)"). "The percentage of the U.S. swine production raised by the mega producers nearly doubled from 28.8 percent in 1992 to 55 percent in 1997. Since 1990, total pork production has increased by an annual average of 1.8 percent per year. In the 1980s, the annual average increase in pork production was 0.5 percent." *Id.*

¹² NPPC, at 2.

or more hogs per year increased from 28 percent to 63 percent.¹³ The impact on the number of small hog farms was dramatic. From 1989 to 1999, the number of farms producing hogs declined from 300,000 to 98,000.¹⁴ In 2000, 110 hog operations owned about 45 percent of the hog inventory.¹⁵ The remaining 55 percent was owned by 77,150 smaller farms.¹⁶

The concentration of hog production was preceded by the concentration of hog slaughtering. In 1986, 19 slaughter plants could process 1.5 million hogs annually and accounted for 50 percent of annual hog slaughter.¹⁷ In 1997, 29 plants could process 1.5 million hogs annually and accounted for 84 percent of annual hog slaughter.¹⁸ Overall, the four largest pork-packing firms have increased their share of the total hogs slaughtered from 34 percent in 1980 to 40 percent in 1990 to 56 percent in 1999.¹⁹ The level of concentration would have increased much further if Smithfield Foods, the nation's largest hog processor, had finalized its recent effort to purchase IBP, Inc., the nation's second largest hog processor.²⁰ The merged entity alone would have processed nearly 40 percent of nation's pork.²¹ Prior to the deal, Smithfield already owned 6.6 percent of IBP.²² IBP was ultimately acquired by Tyson Foods, Inc., despite Tyson's attempt to scuttle the deal when alleged accounting irregularities were exposed.²³ When ruling that Tyson would have to complete the merger, a federal court noted Tyson's acquisition and business strategy:

The IBP-Tyson Merger Agreement resulted from a vigorous auction process that pitted Tyson against the nation's number one pork producer, Smithfield Foods. To say that Tyson was eager to win the auction is to slight its ardent desire to possess IBP. During the bidding process, Tyson was anxious to ensure that it would acquire IBP, and to make sure Smithfield did not. By succeeding, Tyson hoped to create the world's preeminent meat products company—a company that would dominate the meat cases of supermarkets in the United States and eventually throughout the globe.²⁴

¹³ *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices*, Report to Congressional Committees, United States General Accounting Office, September 2000, at 32.

¹⁴ *Id.*

¹⁵ LMPR Review Team, *Livestock Mandatory Price Reporting System: Report to the Secretary of Agriculture*, July 2, 2001 (hereinafter "LMPR Review"), at 3.

¹⁶ *Id.*

¹⁷ Martinez, *supra* note 11, at 10.

¹⁸ *Id.*

¹⁹ *Assessment of the Cattle and Hog Industries, Calendar Year 2000*, United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration, April 2001, at 5 (hereinafter "GIPSA 2000 Assessment"), 5, 22.

²⁰ David Barboza, *Smithfield Offers \$2.7 Billion for IBP; Deal Would Combine Giant Hog Producer and Huge Meatpacker*, N.Y. TIMES, Nov. 11, 2000, at C2 (noting that the offer was the "latest play by Smithfield Foods, which over the last few years has moved aggressively to acquire hog production and processing operations across the country").

²¹ *Id.* "In the last year, Smithfield has been criticized for creating a vertically integrated company that owns both hog farms and slaughterhouses, a system that some small farmers fear could lead to manipulation in the market for hogs." *Id.*

²² *Id.*

²³ Greg Winter, *After Rocky Courtship, Tyson and IBP Will Merge*, N.Y. TIMES, June 28, 2001.

²⁴ *IBP, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001).

The analysts who believed that Smithfield intended to acquire Farmland Industries, another large packer, were recently proven correct, giving Smithfield 30 percent of the pork processing market.²⁵ Smithfield has also discussed acquiring the beef unit of ConAgra Foods, Inc., the third largest beef packer.²⁶ In 2001, Smithfield also acquired Moyer Packing Company, Packerland Holdings Inc., and American Foods Group, Inc.²⁷

Similar trends are detectable in the cattle sector. In 1962, two-thirds of slaughter cattle came from feedlots that fed fewer than 1,000 head per year and most of the remainder came from feedlots that sold between 1,000 and 1,600 head of cattle.²⁸ In 1973, feedlots that fattened at least 32,000 head of cattle provided 20 percent of the cattle packers slaughtered.²⁹ By 1997, roughly 200 feedlots provided more than half of the 28-29 million cattle slaughtered by packers in a single year.³⁰ Since larger feedlots displaced the production of smaller feedlots, the number of cattle feedlots declined from 190,000 in 1987 to 111,000 in 1997.³¹ In 2000, about 116 feedlots accounted for about 40 percent of feedlot cattle marketed.³² The remaining 60 percent were supplied by 97,091 feedlots.³³

High concentration ratios in the beef packing sector in the early part of the century in part prompted passage of the Packers and Stockyards Act. In subsequent years, strict enforcement of the merger laws, technological changes in the sector, and the failure of older firms significantly lowered concentration levels.³⁴ In 1972, the largest four firms slaughtered 25 percent of cattle.³⁵ This percentage grew to 36 percent in 1980, 72 percent in 1990, and 81 percent in 1999.³⁶ Large packing plants that slaughter over half a million cattle a year have increased their market share from 16 percent in 1977 to 80 percent in 1998.³⁷ The level of concentration in the cattle slaughter market exceeds the degree of concentration in the hog slaughter market. "The level of concentration is even higher now than when the Packers and Stockyards Act became law 82 years ago."³⁸

²⁵ Greg Winter, *IBP, Inc. Sues Tyson Foods for Cancelling Sale*, N.Y. TIMES, Mar. 31, 2001; David Barboza, *Smithfield Bid Tops Cargill's for Pork Unit of Farm Co-op*, N.Y. TIMES, Oct. 14, 2003.

²⁶ *ConAgra Seeks Buyer for Beef Unit-Source*, REUTERS, Sept. 1, 2001.

²⁷ Rod Smith, *Smithfield to become number-four beef company with American acquisition*, FEEDSTUFFS, Nov. 5, 2001. "The acquisition includes American Foods' processed pork facility in Mitchell, S.D. Dakota Pork Industries makes ham, bacon and other products and has sales of \$75 million. Smithfield's John Morrell unit will take over this plant. Smithfield acquired American Foods' closed pork processing plant in Huron, S.D., in 1997. Smithfield never re-opened the plant." *Smithfield Acquires American Foods Group*, CATTLE BUYERS WEEKLY, Nov. 5, 2001.

²⁸ LAUCK, THE PROBLEM OF MONOPOLY, *supra* note 1 at 44.

²⁹ *Id.*

³⁰ *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices*, Report to Congressional Committees, United States General Accounting Office, September 2000, at 33 (hereinafter "GAO Report").

³¹ *Id.*

³² LMPR Review, at 3.

³³ *Id.*

³⁴ LAUCK, THE PROBLEM OF MONOPOLY, *supra* note 1 at 50-56.

³⁵ *Id.* at 50.

³⁶ GIPSA 2000 Assessment, at 8.

³⁷ GAO Report, at 33.

³⁸ Scot Kilman, *Alabama Federal Jury Finds Tyson is Guilty of Depressing Cattle Prices*, WALL STREET JOURNAL, Feb. 18, 2004.

B. Vertical Coordination and “Captive Supply”

The degree of vertical coordination through contracting has increased in both the hog and cattle industries. In both 1970 and 1980, less than 2 percent of hogs were sold to packers under contract.³⁹ As late as 1993, only 11 percent of hogs were sold to packers under contract.⁴⁰ By 1997, however, 57 percent of hogs were sold to packers under some pre-arranged agreement.⁴¹ Seventy-five percent of hog producers who sell over 50 thousand hogs use production contracts.⁴² Seventy-five percent of these producers use formula contracts, in which the price is “based on an observable market.”⁴³ Almost 92 percent of the hogs marketed by those who produce over 500 thousand head per year use marketing contracts.⁴⁴ Overall, 75 percent of all hogs currently sold to packers are sold using marketing contracts.⁴⁵ In addition to contracting with farmers, packers are also able to vertically integrate and produce their own hogs. According to one estimate, 25 percent of all hogs are produced by the packers themselves, eliminating any need for packers to offer bids to farmers for that part of the market.⁴⁶

The use of vertical contracts has caused concerns among some farmers. According to one study, “[p]roducers report that the primary advantage of marketing contracts is increase in prices received.”⁴⁷ Increased prices, it can be assumed, provide farmers with the income necessary to stay on the farm. Such an assumption is bolstered by the second listed advantage, ranked slightly below the first: “allow to be in hog business.”⁴⁸ Such advantages can be read as a matter of survival. Without a marketing contract, farmers fear their farm will not be economically sustainable and they will be forced to leave farming altogether. In addition, farmers face pressure from creditors to sign marketing contracts.

Despite the lure of higher prices, only 22 percent of non-contract farmers were “interested” in a contract in the future.⁴⁹ Those without a contract believed that the “performance of the marketing system deteriorated in many respects—reduced number of buyers, reduced market access, more expansion, and lower open market prices.”⁵⁰ Some analysts note that independent hog producers will

³⁹ Martinez, *supra* note 11, at 10.

⁴⁰ NPPC, at 8.

⁴¹ *Id.*.

⁴² *Id.*

⁴³ *Id.* at 9 (citing, as examples, the Iowa Southern Minnesota market or the Western Corn Belt Lean Value).

⁴⁴ *Id.* (table 13).

⁴⁵ GIPSA 2000 Assessment, at 5.

⁴⁶ *Id.*.

⁴⁷ NPPC, at 9.

⁴⁸ *Id.* at 10. On a scale of 1 to 6, “increased price” scored a 3.98 and “allow to be in hog business” scored a 3.20. *Id.*

⁴⁹ *Id.* at 9. “Producers interested in a marketing contract were asked to rate the importance of potential contract features. The most important by far was the ability to receive higher prices if they occur, followed by improved prices without risk protection. Minimum price features were considered somewhat important, but price risk avoidance was not high on the priority list for these producers. This is consistent with the dominant contracting methods already used in the industry, as formula pricing has the least risk protection of all the contract types in use.” *Id.*

⁵⁰ *Id.* at 10.

resist further involvement in integrated production systems.⁵¹ Such economic “irrationality,” as economists would say, can be explained by farmer preferences for economic independence and traditional small-scale production techniques.⁵²

The use of vertical contracts has diminished open market pricing. Traditionally, hogs were sold in the “spot market” or open-market transactions that took place at a terminal, auction, or packing plant.⁵³ During the 1990s, however, it became much more common for hogs to be sold through pre-arranged contracts. The consequence is an increasingly “thin” spot market, or one in which fewer and fewer hogs are handled. Similar trends are at work in the cattle sector. In 1950, 75 percent of cattle were purchased by packers at terminal stockyards.⁵⁴ By 1984, packers purchased almost 80 percent of cattle directly from feedlots.⁵⁵ In 1997, almost 20 percent of cattle were sold by producers using forward contracts signed more than two weeks prior to slaughter.⁵⁶ Similar to hog production, the number of cattle purchased on the spot market is declining.⁵⁷

These trends have exposed problems in the livestock pricing system. The Agricultural Marketing Act of 1946 established the Voluntary Market News Program to disseminate livestock pricing information to market participants.⁵⁸ This system, while not without problems, could function while a large proportion of livestock was sold through auctions and terminal markets.⁵⁹ When the structure of livestock markets began to change, however, the voluntary reporting system began to fail. With the increased use of private vertical contracts between livestock producers and packers and the growth of packer-produced livestock, the traditional price reporting collapsed. One study concluded that “[w]ith the growing importance of alternative marketing arrangements and the decline of trading in traditional cash markets, a gap emerged in publicly available market information under the voluntary program for cattle, swine, and sheep. The lack of market data made it difficult for livestock producers, particularly those who utilize cash markets or wish to consider alternative marketing arrangements, to determine the actual purchase prices and other terms of trade for livestock.”⁶⁰ Cash, or spot market prices, were increasingly based on a shrinking number of prices reported, leaving a “thin” spot market vulnerable to wild price swings and to prices which were not based on representative market prices.⁶¹

⁵¹ Martinez, *supra* note 11, at 11 (stating that “[u]nlike the broiler industry, the pork industry has a large core of independent hog producers selling on the open market. These producers will likely resist further moves toward contracting and integration in the hog industry, *despite the competitive pressures placed on them to find a market for their hogs.*”) (italics added).

⁵² *Id.*

⁵³ Steve W. Martinez, *Vertical Coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products*, Economic Research Service, USDA, Agricultural Economic Report No. 777 (Apr. 1999), at 10.

⁵⁴ LAUCK, THE PROBLEM OF MONOPOLY, *supra* note 1, at 44.

⁵⁵ *Id.*

⁵⁶ GAO Report, at 33.

⁵⁷ GIPSA 2000 Assessment, at 5. “Packers are purchasing larger numbers of fed cattle through non-spot marketing methods. More fed cattle also are being purchased on the basis of their individual quality merits, rather than purchasing all animals in a lot at a single price. ‘Spot market’ refers to transactions in which the animals are ready for delivery and the price is determined at the time the agreement is entered.” *Id.*

⁵⁸ LMPR Review, at 3.

⁵⁹ At least two lawsuits started in the 1970s were based on the manipulation of livestock price reporting mechanisms.

⁶⁰ LMPR Review, at 4.

⁶¹ GIPSA 2000 Assessment, at 7. “Increased use of various production and marketing contracts has reduced the number of livestock sold through spot markets. When only a relatively small volume of trading activity occurs in a particular market, it is said to be a ‘thin market.’ Producers have expressed concern about potential

In response to these pricing problems, Congress adopted the Livestock Mandatory Reporting Act of 1999.⁶² The legislation aimed to remedy the problems in the old reporting system and provide accurate livestock pricing information to market participants by mandating that packers report prices.⁶³ The legislation included vertical contracts within mandatory reporting requirements. The Agricultural Marketing Service of the USDA issued a proposed rule implementing the mandatory reporting law in March 17, 2000, but technical problems delayed implementation of the new reporting system until April 2, 2001.⁶⁴ On that date, packers were required to report pricing information, and the AMS made the information available.⁶⁵

According to a recent report, the system suffers significant problems.⁶⁶ A review team's "major finding [was] that testing conducted by AMS was not adequate to ensure that the LMPR system was accurately calculating reported data."⁶⁷ For example, most prices reported by packers are not verified. In June of 2001, only 19 of 119 reporting entities had been audited to verify that price reports were accurate.⁶⁸ Inaccurate information has already been linked to farmer financial losses. Due to the misreporting of boxed beef prices, the prices paid to farmers for Choice beef was \$2.85 per cwt lower than it should have been from April 3 to May 11.⁶⁹ According to one econometric study, the "[l]osses of sales revenue of cattle producers are estimated to range from \$15 to \$25 million."⁷⁰ Confidentiality provisions also limit pricing information. Due to a requirement that at least three firms, none of which sold sixty-percent of the livestock, be present in a market before reporting is required, the "release of a significant quantity of information" is being prevented.⁷¹

II. Criticism of the Packers and Stockyards Administration

In the face of significant change in livestock markets and the growth of concerns associated with economic concentration, the Packers and Stockyards Administration, according to some critics, has been quite docile. In 1997, the U.S. Department of Agriculture's Office of Inspector General concluded that the P&SA lacked the capacity to effectively investigate anticompetitive practices in livestock markets and recommended extensive improvements in its administrative operations.⁷² A recent report of the Government Accounting Office concluded that P&SA's investigations were conducted "primarily by economists" who did not work with attorneys who

harm resulting from thin cattle and hog markets. Thinly traded markets would be a concern under the P&S Act to the extent that thin markets may make unlawful price manipulation or other anti-competitive behavior easier." *Id.*

⁶² 7 U.S.C. §§ 1635-1636h.

⁶³ *See id.* Prior to passage of the federal law, South Dakota, Iowa, Minnesota, Nebraska, and Missouri had passed state-based price reporting laws.

⁶⁴ LMPR Review, at 8-9.

⁶⁵ *Id.* at 9.

⁶⁶ "On May 18, 2001, Secretary of Agriculture Ann Veneman, appointed a LMPR [Livestock Mandatory Price Reporting] Review Team to evaluate measures in place to ensure integrity of information reported under LMPR and to assess the economic impact the misreported data may have had on livestock producers. *Id.* at i.

⁶⁷ *Id.* at ii.

⁶⁸ *Id.*

⁶⁹ *Id.* at iii.

⁷⁰ *Id.*

⁷¹ *Id.* at ii. This is known as the 3/60 rule.

⁷² GAO Report, at 4-5.

would be able to identify practices that violated competition laws.⁷³ Many investigations may have been compromised due to the absence of the necessary training and expertise.⁷⁴ From 1998 to 2000, years of large-scale concentration in agricultural markets, the P&SA actually cut the number of attorneys available for investigative work from eight to five.⁷⁵ The economists who were involved were not trained in investigative work, and investigations were not developed to examine how a firm's actions may have violated the law.⁷⁶ In 1999, in the midst of large-scale structural change within the livestock sector, only 13.2 percent of the P&SA's work dealt with competition problems.⁷⁷

Not surprisingly, given the weak administrative capacity and disorganized investigative process, P&SA's investigations were less than impressive. For example, in 1997 the agency began investigating complaints that packers had divided buying territories among them to avoid bidding against one another.⁷⁸ In 1998, the investigation was suspended while the agency was being restructured and an economist was being added to the investigation.⁷⁹ In 2000, the investigation still had not been restarted.⁸⁰ Also in 1997, the agency began investigating the competitive problems in an auction market.⁸¹ When the investigation was closed that same year, the P&SA field staff still believed additional research was necessary.⁸² In 2000, the investigation still had not been restarted.⁸³

III. The Failures of the Antitrust Regime

Farmers and ranchers continue to place great faith in the antitrust laws.⁸⁴ Legal theories have been advanced that argue that antitrust laws are grounded in agrarian agitation over buyer concentration and therefore require policymakers and courts to closely scrutinize any possible antitrust violations in agricultural markets.⁸⁵ Despite the hopes of many in the agricultural community and despite the advancement of agrarian antitrust theories, the antitrust laws have not addressed the problem of buyer concentration and anticompetitive behavior in agricultural markets. In response, several senators and congressmen have advanced legislative proposals to limit mergers in the

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 13. "In its February 1997 report, USDA's OIG [Office of Inspector General] highlighted the importance of having attorneys participate in GIPSA's investigations of complex anticompetitive activities. The OIG reported that only 4 of 84 investigations of anticompetitive practices from 1994 through 1996 had been referred to OGC for review because (1) the investigations had been conducted by staff without appropriate backgrounds or training, (2) attorneys from OGC were not involved in the investigations, and (3) there was a climate of noncooperation between various branches of GIPSA that were then responsible for the investigations." *Id.*

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See generally LAUCK, THE PROBLEM OF MONOPOLY, *supra* note 1.

⁸⁵ Jon Lauck, Toward an Agrarian Antitrust: A New Direction for Agricultural Law; Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531 (2000) (noting several concerns with concentrated agricultural markets).

agricultural sector and regulate anticompetitive practices.⁸⁶ Others called for the inclusion of a “competition title” to address the problem of buyer concentration in the new farm bill.⁸⁷ During the fall of 2001, over 40 farm organizations called for inclusion of a competition title in the 2002 farm bill.⁸⁸ In response to the advancement of agrarian antitrust theories and the legislative proposals they have supported and generated, the Antitrust Section of the American Bar Association has issued a report recommending that Congress not adopt any new antitrust measures to address competition concerns in agricultural markets.⁸⁹

The recent debate about the use of the antitrust laws should serve as a reminder that the framers of the P&SA contemplated a statute that reached beyond the antitrust laws. Congress endorsed the stringent provisions of the P&SA in part because it fully recognized the difficulties of addressing the problems within the sector with the existing antitrust laws. As a result, they adopted language in the Act that went significantly beyond the prohibitions contained in the antitrust laws. As one commentator noted, since the Interstate Commerce Act, the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act “were not adequate to deal with the problems of the livestock and meat industries, Congress enacted the Packers and Stockyards Act in 1921. The legislative history of the Act shows that it was intended to be broader in scope and to go further in the prohibition of undesirable trade practices than the foregoing statutes.”⁹⁰ When the Supreme Court first interpreted the statute, it recognized the Congressional intention to go beyond the existing antitrust laws with additional “remedial legislation” to address the persistent problems in the packing sector.⁹¹ Another court later noted that the Packers and Stockyards Act was designed to be “broader and more far reaching than the Sherman Act.”⁹² It is with this context in mind that the P&SA should be analyzed.

IV. The Packers and Stockyards Act

Growing concerns about concentration in agriculture, concerns about the enforcement efforts at the Packers & Stockyards Administration, and doubts about the effectiveness of antitrust enforcement all contributed to the filing of a private P&SA suit in the case of *Pickett v. IBP*. With the re-emergence of the P&SA as an option for legal redress, its background and context deserve additional attention.

⁸⁶ Agriculture Competition Enhancement Act of 2001, H.R. 1526, 107th Congress, 1st Session, introduced by Congressman Thune (R, SD).

⁸⁷ S. 1628, 107th Congress, 1st Session, introduced by Senator Harkin (D, IA); Robert Pore, *Move Under Way to Add Competition Title to Farm Bill*, HURON DAILY PLAINSMAN, Oct. 22, 2001 (noting the support of 24 Senators for a competition title). See also *OCM Says Farm Bill Should Serve All Farmers/Consumers Through Competition*, press release from Organization of Competitive Markets, September 21, 2001 (noting that “Seventy-four organizations including farm, rural, faith, environmental, sustainable agriculture and consumer groups have requested both the House and the Senate include a Competition Title”); Steve Marberry, *Competition Clause Proposed in U.S. Farm Policy Debate*, FEEDSTUFFS, June 4, 2001.

⁸⁸ Communication to Senator Tom Harkin, Chairman of Senate Agriculture Committee, November 7, 2001. Many agricultural trade associations, including those of the packers and other processors, opposed the legislation. Jim Wiesemyer, “*Competition*” *Farm Bill Title Has Competition*, INSIDE WASHINGTON TODAY, Nov. 6, 2001.

⁸⁹ Section of Antitrust Law, American Bar Association, Comments Relating to Proposed Agribusiness Legislation Pending Before the 106th Congress (hereinafter ABA Report).

⁹⁰ Campbell Treatise, at 186.

⁹¹ *Stafford v. Wallace*, 258 U.S. 495, 521 (1922).

⁹² *Swift & Co. v. U.S.*, 393 F.2d 247 (7th Cir. 1968).

A. Anticompetitive Problems in the Packing Sector

After the Civil War, American farmers and public policymakers became concerned about increasing levels of concentration among the agricultural processing firms to which farmers sold their products. Farmers and policymakers were particularly alarmed at the increasingly concentrated nature of the packing sector and its propensity to engage in anticompetitive and collusive activities. In 1885, for example, the major meatpackers formed the “Allerton Pool” in order to fix cattle prices and to divide business territory among them. A U.S. Senate Committee investigated such practices on the part of the packers and issued a report that played a prominent role in the adoption of the Sherman Antitrust Act in 1890. Unfortunately, as the Federal Trade Commission later noted, the “agitation which followed the publication of the committee’s report and the almost simultaneous enactment of the Sherman Antitrust Law did not end the [packers’] efforts at combination.”⁹³

From 1893 to 1896 and from 1897 to 1902, the major meatpackers again maintained a cooperative pooling arrangement that they used to fix the price of beef and allocate selling territories. The Department of Justice finally took action and sought an injunction against such packer activities. In 1905, in an opinion by Justice Holmes, the Supreme Court upheld the lower court injunction prohibiting packers from conspiring to avoid competition in the purchase of farmers’ livestock. The Department of Justice had concluded that in

order to restrain competition among themselves as to the purchase of livestock, defendants have engaged in, and intend to continue, the combination for requiring and do and will require their respective purchasing agents at the stockyards mentioned [Chicago, Omaha, St. Joseph, Kansas City, East St. Louis and St. Paul], where defendants buy their livestock (the same being stock produced and owned principally in other states and shipped to the yards for sale), to refrain from bidding against each other ‘except perfunctorily and without good faith,’ and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.⁹⁴

After the court enjoined their anticompetitive pooling plan, the packers sought to escape competition by merging their enterprises. Only ten days after a court injunction prohibiting their anticompetitive activities was issued, the major meatpackers signed a contract to merge their operations. As the Federal Trade Commission concluded, “[a]rrangements were made to merge all five of the large meatpacking companies into a single corporation.”⁹⁵ The financing for the merger fell through after the panic of 1903, but the major packers still formed a new corporation to acquire all of the assets of their major competitors.

Due to the anticompetitive behavior exhibited by the packing sector, in 1917 President Woodrow Wilson ordered the newly-formed Federal Trade Commission to conduct a large-scale study of the sector. The following year, the Federal Trade Commission released a massive study of the meatpacking industry, uncovering numerous, large-scale anticompetitive schemes.⁹⁶ The FTC responded to President Wilson’s request: “Answering directly your question as to whether or not there exists ‘monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of

⁹³ FTC Report, Part 2, Evidence of Combination Among Packers (1918), at 13.

⁹⁴ *Swift and Company v. United States*, 196 U.S. 375, 391 (1905).

⁹⁵ FTC Report, Part 2, Evidence of Combination Among the Packers (1918), at 21.

⁹⁶ FTC Report, Summary and Part 1, at 28 (noting that the FTC reviewed “detailed evidence, including hundreds of documents taken from the files of the packing companies, about 9,000 pages of sworn testimony, and many thousand pages of field reports of agents of the Commission [which it] carefully analyzed and digested”).

harmony with the law in the public interests' we have found conclusive evidence that warrants an unqualified affirmative."⁹⁷ With respect to farmers, the FTC noted that the "producer of livestock is at the mercy of these five companies because they control the market and the marketing facilities."⁹⁸ The FTC sent the results of its research and several staffers to the Antitrust Division of the Department of Justice to participate in an antitrust suit against the packers.⁹⁹ Instead of lengthy litigation, the packers decided to sign a far-reaching consent decree with the Department of Justice. Among other things, the decree prohibited the packers from owning the stockyards that they had used for many years to manipulate livestock prices.

B. Congress Responds with the P&SA

Alarmed at the findings of the Federal Trade Commission, Congress began to hold hearings on the anticompetitive activities of the packers that later justified the adoption of new legislation.¹⁰⁰ When discussing the possibility of federal legislation, Congressman Sydney Anderson, a Republican of Minnesota, concluded that in "back of it there is a long history of combination, of agreements to apportion markets, to apportion supply, a long history of litigation resulting in the making of restraining orders, enjoining members of the big five and others from engaging in combinations and in oppressive practices with respect to competition, which I am sorry to say have more or less characterized the action of the big five in the packing business."¹⁰¹

The history of anticompetitive behavior in the meatpacking sector prompted the adoption of a comprehensive federal statute to address the problem. As Congressman Gilbert Haugen, a Republican of Iowa and Chairman of the House Committee on Agriculture, noted:

The legislation proposed in [the Packers and Stockyards] bill is not a new proposition. For more than a quarter of a century the subject of packers and packer legislation has been given much thought and consideration. . . . Many believe that the spread in the price between the producer and the consumer is much wider than it should be; that the packers are in a large degree responsible for the wide spread; that there is something wrong with the meatpacking industry; and, for these and various other reasons, the packers should be brought under government regulation and supervision"¹⁰²

Congressman J.N. Tincher, a Republican of Kansas, agreed with Haugen that the Packers and Stockyards Act "goes farther than we have ever gone in reference to regulating private business, except in the Interstate Commerce Act."¹⁰³ The House report that accompanied the Packers and Stockyards Act noted that "it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the Interstate Commerce

⁹⁷ *Id.* at 23.

⁹⁸ *Id.* at 24.

⁹⁹ SUSAN WAGNER, *THE FEDERAL TRADE COMMISSION* (1971), at 76-77.

¹⁰⁰ Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in *AGRICULTURAL LAW* (John H. Davidson, ed) 186-87 (1981) (hereinafter Campbell treatise) (concluding that the "impetus for the enactment of the Packers and Stockyards Act was provided by an investigation and report of the Federal Trade Commission (FTC) on conditions in the livestock and meat industries").

¹⁰¹ Hearings before the Committee on Agriculture, House of Representatives, 67th Congress, 1st Session (May 1921), at 12.

¹⁰² 61 Congressional Record 1799-1800 (May 26, 1921). "The Committee on Agriculture of the House held 40 days of hearings last Congress and one week of hearings this Congress on meatpacking legislation, covered in more than 3,500 pages of printed testimony." *Id.*

¹⁰³ 61 Congressional Record 1804 (May 26, 1921).

Act.”¹⁰⁴ As one commentator concluded, the Packers and Stockyards Act “constitutes one of the early major entries of the federal government into the regulation of private industry and is antedated in this respect only by the establishment of the Interstate Commerce Commission in 1887 and of the Federal Trade Commission in 1914.”¹⁰⁵

Congress was concerned enough about the absence of bargaining power on the part of farmers, the abuses of market power on the part of the packing sector, and the proclivity of the sector to adopt anticompetitive practices that it concluded that additional legislation was needed that would extend further than the existing antitrust laws. The Senate report concluded that with a “multitude of producers on the one hand and a very limited number of packers and distributors on the other,” the packing industry lent itself “readily to monopoly,” making “special legislation” the only way to safeguard the public interest.¹⁰⁶

C. The P&SA and Livestock Price Manipulation

Concerns about preserving open, public markets for livestock dominated the debate about the need for new legislation. During the legislative hearings prior to adoption of the Packers and Stockyards Act, Senator George Norris, a Republican of Nebraska, asked the prevailing question: “[Stockyards] are supposed to be a *public marketplace* where competition would be unrestrained – yet if that marketplace was owned by the man who was going to do the buying, would you not fear that he might interfere with the price that the seller might get?”¹⁰⁷ When endorsing federal legislation, farmers echoed the concerns of Senator Norris and criticized the concentrated nature of the packing sector that was conducive to anticompetitive behavior and that disrupted the normal workings of an open market economy: “We endorse as essential the policy of divorcing the packers from control of the stockyards, which should be *public market forces*, treated as public utilities, and open, under equal and reasonable conditions, to all.”¹⁰⁸

Because there were so few packers, and because they controlled the buying arena, they could manipulate and control the price they paid for livestock. When proposing a remedy to the problem of packer market manipulation, the Federal Trade Commission emphasized that farmers needed to be “assured of a fair market, reasonable charges, open bidding, full and helpful market information, the limitation of violent fluctuations in price, and the elimination of unnatural market influences.”¹⁰⁹ In so doing, the Federal Trade Commission, some would argue, anticipated recent litigation such as *Pickett v. IBP* that involves allegations of packer manipulation of open market pricing through the management of captive supplies that reduce open market transactions, contribute to spot market volatility, and foster price discrimination.

¹⁰⁴ Interstate and Foreign Commerce and Livestock, Livestock Products, etc., House Report No. 77, 67th Congress, 1st Session (May 18, 1921), at 2.

¹⁰⁵ Thomas J. Flavin, *The Packers and Stockyards Act, 1921*, 26 GEO. WASH. L. REV. 161 (Jan. 1958).

¹⁰⁶ Federal Live Stock Commissioner, Senate Report No. 39, 67th Congress, 1st Session, at 6 (May 9, 1921).

¹⁰⁷ Government Control of Meatpacking Industry, Hearing before the Subcommittee on Agriculture and Forestry, United States Senate, 65th Congress, 2nd Session, on Senate Resolution 221 in Favor of Government Control in the Operation of Packing Houses and Packing Plants During the Continuance of the War (September 18, 1918), at 73 (italics added).

¹⁰⁸ Meatpacker Legislation, Hearings before the Committee on Agriculture, House of Representatives, 66th Congress, 2nd Session (March 1, 1920), Part 5, at 272-73 (quoting letter from the Market Committee of the American National Livestock Association to Senator Asle J. Gronna, Chairman, Committee on Agriculture and Forestry, U.S. Senate, August 23, 1919) (italics added).

¹⁰⁹ FTC Report, Summary and Part 1, at 78. The Senate report concluded that the Packers and Stockyards Act would “meet the demands of all the great farm organizations.” Federal Live Stock Commissioner, Senate Report No. 39, 67th Congress, 1st Session, at 7 (May 9, 1921).

When Congress adopted the Packers and Stockyards Act while emphasizing the importance of promoting open, competitive markets, it recognized the problem of large packers manipulating the price livestock as a major issue. The FTC report that led to passage of the Packers and Stockyards Act listed packer “monopolization of markets and their *manipulations* and controls” as “grave . . . problems.”¹¹⁰ With specific reference to the problem of farmers selling livestock, the FTC concluded that the “stockyards are the markets so controlled and manipulated by the packers that they may buy advantageously the livestock from which their salable products are converted.”¹¹¹ The FTC also concluded that farmers “see in the violent fluctuations of the market – and our investigation confirms their suspicions – manipulations by the big packers in order to secure their raw material cheaply.”¹¹² The greatest “evil” the packers perpetrated, according to the FTC, was the manipulation of livestock prices: “*Foremost of packer practices in evil results is the manipulation of the livestock markets, manifested primarily in violent and unreasonable fluctuations in livestock prices from day to day. This constitutes the greatest grievance of the livestock producers against packer control of the markets.*” How seriously these market fluctuations are regarded by livestock producers is expressed in the statement of E.L. Burke, Vice President of the American National Livestock Association:

The fact is that beef production in the corn belt has become the most hazardous and uncertain legitimate business that a man can engage in. Outside of gambling on the board of trade or the New York Stock Exchange, I know of nothing to compare with it. Probably the worst thing the feeder has to contend with is these violent fluctuations.¹¹³

Given the focus of the advocates of the Packers and Stockyards Act, the statute becomes relevant to recent claims about the manipulation of prices caused by the existence of captive supplies. In this regard, the thinning of public markets due to the rise of direct buying and the consequent reduction of public market prices was contemplated in the legislative hearings that preceded passage of the Packers and Stockyards Act. Senator Norris, a prime advocate of the legislation, questioned W.B. Tagg, the President of the National Livestock Exchange:

Senator Norris: You think that stock would sell for a less price out in the country than it would at the stockyards?

Mr. Tagg: Yes, sir.

Senator Norris: Well, then, if there were any packers left to buy at the stockyards, they would pay a bigger price there than the packer would pay that went out in the country?

Mr. Tagg: Not necessarily, Senator Norris. The fewer buyers you had at the markets the lower the markets naturally would be.

Senator Norris: Yes.

Mr. Tagg: The less competition there would be, and the packer who is buying in the country would naturally base his prices on the lowered price at the market.¹¹⁴

¹¹⁰ *Id.* at 26 (italics added).

¹¹¹ *Id.* at 81 (italics added).

¹¹² *Id.* at 71.

¹¹³ *Id.* at 69-70 (italics added).

¹¹⁴ Government Control of the Meatpacking Industry, Hearings Before the Senate Committee on Agriculture and Forestry, 66th Congress, 1st Session, on S. 5305, Wednesday, January 22, 1919, at 214.

D. Market Manipulation in Practice

Packer concentration in agricultural markets caused concerns about the packers' ability to affect livestock prices. In the early part of the century, for example, packers could avoid competing for the purchase of farmers' livestock by allocating the total purchase of livestock among them. By pre-arranging the amount of livestock to be purchased, the packers would be assured that they received the number of livestock they needed for their packing plants and would also be assured that they would not have to competitively bid against other packers for that livestock. Such behavior took place in major stockyard facilities where most major packers had a presence. With the erosion of terminal markets in recent years and the increased practice of direct packer buying, it is likely that the major packers' presence in many livestock selling markets is seriously diminished. In fact, some commentators have noted that regional livestock markets are much more concentrated than national statistics would indicate. Such conditions make collusive and anticompetitive arrangements much easier to manage. Two buyers of cattle for two of the larger meatpackers, for example, were recently indicted by the Department of Justice for rigging bids for livestock in Nebraska. According to the indictment, the "combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendant and two co-conspirators to rig a bid for the purchase of cattle being sold by Alex Pester." The buyer, who worked for Cargill, discussed his prospective bid with other cattle buyers, agreed upon a bid to be submitted to the farmer, designated which co-conspirator would be the winning bidder, and had the designated co-conspirator purchase the cattle from the farmer.¹¹⁵ In the late 1970s, an ex-packer gave a deposition in which he admitted that packers in the state of Washington had rigged bids and allocated business to Safeway for over 20 years, indicating that such conspiracies can be long-term.¹¹⁶

Another example of the possible dangers associated with concentration in the meatpacking sector can be found in a case decided by the Seventh Circuit Court of Appeals. In *Swift & Company v. Freeman*, the court noted the problems faced by farmers selling lambs in Colorado.¹¹⁷ Because of their limited number, meatpackers were able to collude and therefore pay lower prices to farmers. Swift and American Stores agreed not to bid against Harry Heath & Son, who bought the fat lambs sold by farmers in the Western Slope lamb marketing area.¹¹⁸ Swift and American Stores then bought the fat lambs from Harry Heath & Son and avoided the need to bid and therefore avoided paying higher prices to farmers.¹¹⁹ Such collusion and coordination is possible in markets involving a limited number of buyers.

E. Collusion and Strategic Behavior

In its lengthy report, which became the basic rationale for the passage of the Packers and Stockyards Act, the Federal Trade Commission concerned itself with the collusive practices of the packers. The Federal Trade Commission noted that farmers were "at the mercy of these five [packing] companies because they controlled the market and the marketing facilities" and noted "their monopolization of markets and their manipulations and controls" of the market.¹²⁰ The packers

¹¹⁵ United States v. Casey Wilmot, Criminal No.: 8:97CR213 (D. Neb. 1997). The defendants plead guilty.

¹¹⁶ Gerald A. Connell to Files, July 13, 1977, DOJ Memorandum, FOIA Documents (in author's possession).

¹¹⁷ 393 F.2d 247 (7th Cir. 1968) (finding a violation of the Packers and Stockyards Act). "The lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed." *Id.* at 254.

¹¹⁸ *Id.* at 251.

¹¹⁹ *Id.* at 254 (concluding that "producers' prices for fat lambs were depressed, and that producers' sales of fat lambs to Harry Heath & Son were without competition from competitors").

¹²⁰ FTC Report, Summary and Part 1, at 24, 26.

manipulated the market by dividing the total amount of livestock to be sold at a stockyards among them. Each packer would then be assured of the livestock supply he or she needed without having to competitively bid for the farmers' livestock. The packers "admitt[ed] that they were buying beef, sheep and hogs in all the stockyard centers in the United States on a percentage basis at that time [preceding 1912] and that they have continued to buy on almost identically the same percentage basis from that date to this."¹²¹ When it was discovered that an outside packer was disrupting the established division of livestock purchases at the Omaha stockyards, for example, the packer was quickly condemned by the established buyers in that market for "destroying the balance of power" and quickly abandoned the practice, thereby allowing the established packers to avoid competitive bidding for farmers' livestock.¹²² The large meatpackers would also wait until the very small independent packers had bought their livestock for the day before they decided to "come out" and bid, thereby avoiding any potential competition with the small packers. After the small packers had made their purchases, "then the big five representatives come out, and there is nobody to compete with, and the balance is to be taken on the proportions they have been maintaining all these years."¹²³

Even without a formal agreement to divide livestock purchases among them, the concentrated nature of the packing sector would make collusion possible. One observer noted at the time that "it seems to me that when a couple of buyers are going down to the yards, say, an Armour man and a Swift man, and one of them says: 'Well, Bill, I think we can take off a quarter today,' and the other fellow says, 'It looks like a pretty good run in, I guess we can,' that is the sort of thing that is unavoidable. If that does not happen, it is a very surprising thing to me, because men being what they are and business being what it is, it is bound to happen."¹²⁴ The observer concluded that "I think it is entirely unnecessary on their part to enter into any compact about prices. They probably understand each other perfectly well. They are working alongside of each other day after day throughout the whole year, and the slightest hint among themselves is sufficient."¹²⁵

Packers followed the logic of oligopolistic interdependence. They could share the collective profits earned by the packing sector if arrangements were made to avoid bidding against one another and if they recognized their mutual dependence on collusive behavior:

A local manager will also have difficulty in increasing his share of the market. He may know that by slaughtering more animals he can bring down his unit cost, but the only way to obtain his supply is by outbidding competitors. In order to keep their own costs down and their labor force at work, these in turn will raise their bids, for no manager wants to report to the head office that he has lost his place in the market or to lay off

¹²¹ Government Control of the Meatpacking Industry, Hearings before the Committee on Agriculture and Forestry, United States Senate, 65th Congress, 3rd Session, on S.5305, a Bill to Stimulate the Production, Sale and Distribution of Livestock and Livestock Products, and For Other Purposes (January 13, 1919), at 13 (quoting Francis J. Heney).

¹²² *Id.* at 14.

¹²³ *Id.* at 15 (quoting Heney).

¹²⁴ Meatpacker Legislation, Hearings before the Committee on Agriculture, House of Representatives, 66th Congress, 2nd Session (March 1, 1920), Part 5, at 301 (quoting Charles M. O'Donel, of Bell Ranch, New Mexico). See also FTC Report, Summary and Part 1, at 50 (explaining the mechanics of packer collusion). "Throughout the entire market day each big packer knows exactly what the others are doing in all the markets, and at the end of the day, the end of the week, the end of the month, and the end of the year, the purchases of all are checked up, so that if any of the five has bought more or less than his share, or has bought 'out of line,' the other may administer the proper measure of correction. If, for example, a packer buys less than his share over any considerable period, he is liable to have his percentage reduced, while if, on the other hand, any packer tries to 'hog the market,' he is liable to have the others retaliate by 'putting the market up on him.'" *Id.*

¹²⁵ *Id.*

workers for lack of raw material. The net result will be higher prices to all and no gain to any packer. *This means simply that no packer wants to start a price war.* What a packing-industry economist wrote as far back as 1923, in defense of the constant percentages, still holds true: “In the case of Swift & Company it is an individual, common-sense policy, arrived at independently, not to invite retaliation and trade wars by using over-aggressive tactics. The company has deliberately tried to avoid cut throat competition wherever it was legally possible to do so.”¹²⁶

F. Price Discrimination

When the buying sector is highly concentrated and the selling sector includes some large sellers and many small sellers, the large buyers will tend to favor the large sellers. In such a market structure, smaller sellers could be disfavored and the possible victims of discriminatory pricing. Recent antitrust decisions have recognized this problem. Some courts have allowed the merger of large sellers in a concentrated market when the buyers are large and sophisticated and therefore less likely to be the victims of the sellers’ market power.¹²⁷ But courts have rejected this argument when the buyers are disorganized and possess different levels of market strength.¹²⁸ In so doing, courts recognized that peripheral firms could be the victims of discriminatory treatment by powerful sellers, regardless of the power of certain large buyers.¹²⁹

In the context of information disparities between large and small firms that are prevalent in some markets, the United States Supreme Court noted that “if a company is able to *price discriminate* between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.”¹³⁰ One commentator agrees, noting that “large buyers may be able to protect themselves from supracompetitive pricing while the small buyers cannot. If the seller is able to *price discriminate* between these two classes of customers, it will be able to raise the prices that it charges to the smaller buyers.”¹³¹ Other commentators believe that such an arrangement will foster cooperative and collusive behavior by the large sellers and large buyers,¹³² such as large feeders and large packers. The pervasive problem of price discrimination was in full evidence during the writing of the FTC Report on the meatpacking sector and during the passage of the Packers and Stockyards Act. The discriminatory pricing of railroads, which had angered farmers in the past,¹³³ was exploited

¹²⁶ SIMON N. WHITNEY, *ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES* 81 (1958) (italics added).

¹²⁷ *United States v. Country Lake Foods, Inc.*, 754 F.Supp. 669 (D. Minn. 1990). Although many cases address the organization and sophistication of the buying sector, the same analysis applies to the structure of selling sector, which is important to the present analysis. See *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990).

¹²⁸ *United States v. United Tote, Inc.*, 768 F.Supp. 1064 (D. Del. 1991); *FTC v. Cardinal Health, Inc.*, 12 F.Supp. 2d 34 (D.C. Cir. 1998).

¹²⁹ *Id.*

¹³⁰ *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 475 (1992) (italics added).

¹³¹ Mary Lou Steptoe, *The New Merger Guidelines: Have They Changed the Rules of the Game?* 61 *ANTITRUST L. J.* 493, 502 (1993) (italics added).

¹³² See Herbert Hovenkamp, *Mergers and Buyers*, 77 *VA. L. REV.* 1369 (1991).

¹³³ RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.*, 115 (1998) (explaining how the “proliferation of rebates hastened the shift toward an integrated national economy, top-heavy with giant companies enjoying preferential freight rates”). “Almost 20 years passed before reformers succeeded in introducing public regulation that forced an end to the railroad *favoritism that so incensed farmers* and other small shippers across America.” *Id.* at 117 (italics added).

to the full extent by the packers,¹³⁴ in part explaining explicit prohibition on price discrimination included in the Packers and Stockyards Act.

Price discrimination by packers has prompted policymakers in some states to adopt legislation specifically outlawing packer price discrimination. When construing the price discrimination statute adopted in South Dakota, a federal court noted that farmers “must rely on what buyers will pay” and noted the “increasing and sometimes alarming concentration occurring in the agricultural industry,” that there are “very few buyers for livestock today and producers face an ‘oligopsony,’” and that “packers have the market power in each livestock market to influence or determine prices paid to producers for livestock.”¹³⁵ The court also noted that “in any buyer-seller arrangement, packers seek to pay as low prices as possible. More competitive markets would result in higher prices to producers.”¹³⁶ The federal court, construing a Missouri statute adopted to prohibit packer price discrimination, also noted the problem of price discrimination on the part of packers.¹³⁷

In the 1960s, after some large feedlots emerged, internal USDA documents reported that these feeders could receive a price premium for their sales.¹³⁸ Some evidence indicates that the National Farmers Organization, which organized large blocks of livestock for sale in the 1960s and 1970s, also received price premiums for their pooled livestock sales.¹³⁹ This practice has continued in recent years. In 1996, cattle producers organized the cooperative U.S. Premium Beef and purchased a share in National Beef Packing Company to slaughter their cattle.¹⁴⁰ In 2000, cattle producers organized Consolidated Beef Producers to market 2.1 million cattle.¹⁴¹

G. Predation

The authors of the Packers and Stockyards Act recognized that concentration and coordination allowed dominant meatpackers to exclude and punish potential rivals. During Congressional hearings after the release of the FTC report and prior to the adoption of the Packers and Stockyards Act, witnesses described a classic case of predatory pricing. When a potential rival was threatening market entry, the major packers would take turns pricing below cost so that the new rival could not establish a customer base and earn profits. When the rival was snuffed out, the major packers would again raise prices to profitable levels and recoup the losses suffered during predation.¹⁴²

¹³⁴ Government Control of the Meatpacking Industry, Hearings before the Committee on Agriculture and Forestry, United States Senate, 65th Congress, 3rd Session, on S.5305, a Bill to Stimulate the Production, Sale and Distribution of Livestock and Livestock Products, and For Other Purposes (January 13, 1919), at 10. “It is admitted – shown by the evidence and conceded by the packers – that for many years they did have the benefits of rebates, and it was during that period, of course, when they were forging ahead and becoming the larger packers they were getting these rebates and using these refrigerator cars.” *Id.*

¹³⁵ American Meat Institute and John Morrell & Company v. Barnett, 64 F.Supp.2d 906 (D. S.D. 1999).

¹³⁶ *Id.*

¹³⁷ Hampton Feedlot, Inc. et al v. Nixon (D. Mo. 2000) (citation unavailable).

¹³⁸ LAUCK, THE PROBLEM OF MONOPOLY, *supra* note 1, at 44.

¹³⁹ *Id.* at 92-94.

¹⁴⁰ GIPSA 2000 Assessment, at 11.

¹⁴¹ *Id.*

¹⁴² Government Control of the Meatpacking Industry, Hearings before the Committee on Agriculture and Forestry, United States Senate, 65th Congress, 3rd Session, on S.5305, a bill to stimulate the production, sale and distribution of livestock and livestock products, and for other purposes (1919) (January 13, 1919), at 10.

The FTC investigation uncovered correspondence in the files of Wilson and Company that outlined a packer conspiracy to eliminate the upstart packer Hormel in Austin, Minnesota. The predation strategy was to raise a rival's costs. According to the plan, hog buyers for Wilson

were instructed to go and buy all around Hormel and as close to him as possible, and even to buy at a loss, and ship straight to Chicago over the railroad on the other side of Hormel, the object being to force Hormel to go farther away from home to buy his hogs and to incur the freight cost on his hogs which the big packer incurs in Chicago. . . . After surrounding him and doing this, then they approached him on the proposition of buying him out, and I found the correspondence to that effect.¹⁴³

When reviewing the packer consent decree in 1932, Justice Cardozo also noted the problem of predation:

[The large packers'] low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals. . . . [S]ize carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. . . . Thus in the race of competition they will be able by their own admission to lay a handicap on rivals overweighted at the start. The opportunity will be theirs to renew the war of extermination that they waged in years gone by.¹⁴⁴

Noting how the packers had "abused their powers so grossly and persistently" in the past, Cardozo feared ending the consent decree would allow the packers to return to "ruthless and oppressive" tactics to "crush their feebler rivals."¹⁴⁵

If farmers attempted to avoid the price manipulations and market power of the large packers by establishing a farmer-owned packing plant, the packers would make sure that the plant was unprofitable and that farmers would be forced to sell to the large packers. The predatory strategy employed in this case was selling below cost:

If a cooperative establishment or any independent establishment looks as if it might eventually amount to something substantial, Armour, Swift, Cudahy, Morris, and Wilson will take turns at selling meats below cost in the vicinity of the customers of this concern – one will sell below cost one week and another will sell below cost another week and another one below cost another week, and so on – they take turns at it. In that way they make it a losing proposition for even the raisers of beef, hogs or sheep to do their own slaughtering through cooperative arrangement. They make less money, so that the producer gets less for his animals than he could get by selling to the packers direct, and naturally they have kept down the tendency toward cooperation and have destroyed those who did get into it or else kept them from becoming of any importance by size. Senator Norris: And when they put them out of business they put the price up? Mr. Heney: Oh, yes; invariably.¹⁴⁶

¹⁴³ Government Control of the Meatpacking Industry, Hearings before the Committee on Agriculture and Forestry, United States Senate, 65th Congress, 3rd Session, on S.5305, a bill to stimulate the production, sale and distribution of livestock and livestock products, and for other purposes (1919) (January 15, 1919), at 64-65.

¹⁴⁴ United States v. Swift, 286 U.S. 106, 116, 118 (1932).

¹⁴⁵ *Id.* at 119.

¹⁴⁶ Government Control of the Meatpacking Industry, Hearings before the Committee on Agriculture and Forestry, United States Senate, 65th Congress, 3rd Session, on S.5305, a bill to stimulate the production, sale

In a contemporary example, one study concluded that Archer-Daniels-Midland and Cargill attempted to deter a farmer-organized cooperative from building a plant and entering the fructose market. After entering the market, some critics argued, the price of fructose dropped dramatically and the cooperative was allegedly forced to allow Cargill to take over operations of the plant.¹⁴⁷

The market power that accompanies high levels of concentration allows large firms to punish firms and farmers who deviate from the established order. The FTC reported, for example, that the large packers conspired to “punish” a railroad by diverting livestock shipments from it when the railroad refused to comply with packer demands.¹⁴⁸ If packers could punish powerful economic actors like the railroads, they could also intimidate farmers who were dependent on the packer for his livelihood. During Congressional hearings before passage of the Packers and Stockyards Act, the President of the American Cattle Loan Company noted the problem: “Before going further I want to mention the fact that in this business it is embarrassing for the shipper of cattle to market to criticize the methods of those who buy his product. Many of the patrons of the market are afraid they will be discriminated against, and they have hesitated to present their grievances. This is one of the features that has made it difficult to get before the principals the actual defaults and mistakes that are made.”¹⁴⁹ In later decades, Department of Justice investigations into price manipulations in the packing sector were similarly stalled by witnesses who feared being “blackballed.”¹⁵⁰

The concentrated power of the packers could give them a “whip hand” over the sellers of livestock.¹⁵¹ Although an economist might predict that farmers could avoid collusive and abusive buying practices by searching for another market in which to sell their livestock, the transportation costs often precluded such an option. Even if a farmer attempted such a move, packers were strategically positioned to undermine such an attempt: “When a cattleman, dissatisfied with the prices offered at the stockyards to which he has shipped, decides to try another, a telegram is sent forward over the packers’ private wire notifying the buyers that the destination that the cattle are being shipped and giving the price offered at the first market. As a result the cattleman finds that at the second market he is offered the same or a lower price, and stands to lose at least the freight and shrinkage as *punishment* for trying to beat the system.”¹⁵²

and distribution of livestock and livestock products, and for other purposes (1919) (January 13, 1919), at 10 (quoting the exchange between Senator Norris and FTC investigator Heney).

¹⁴⁷ JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND 320-21 (2000).

¹⁴⁸ Government Control of the Meatpacking Industry, Hearings before the Committee on Agriculture and Forestry, United States Senate, 65th Congress, 3rd Session, on S.5305, a bill to stimulate the production, sale and distribution of livestock and livestock products, and for other purposes (1919) (January 13, 1919), at 11-12. “The business of the big five packers grew to be so tremendous in volume of shipping that they acquired a dominating influence over railroads; by diverting shipments from a particular railroad they could lessen its earning power to such an extent as to change its profits into losses, and there was one instance in the United States where they did punish a railroad, and my recollection is that they are still doing it.” *Id.*

¹⁴⁹ Meatpacker Legislation, Hearings before the Committee on Agriculture, House of Representatives, 66th Congress, 2nd Session, Thursday, February 26, 1920, Part 3, at 204 (quoting Mr. D. de Ricqlès, President of the American Cattle Loan Company).

¹⁵⁰ Steven C. Douse to Files, August 28, 1980, DOJ Memorandum, FOIA Documents. “[redact] said that to get information from someone, we would have to catch them when they have just been hurt. He said wholesalers right now would complain, but two weeks from now they might not. They have to be angry at the system in order to be willing to give information. Industry sources have to be careful of being blackballed. If the wrong people found out, they might not be able to buy meat. [redact] claimed that brokers who talked to Jonathan Kwitney were ostracized and now no one talks to them.” *Id.*

¹⁵¹ FTC Report, Summary and Part 1, at 40.

¹⁵² *Id.* at 71 (*italics added*).

The legal process can also be employed strategically. In order to deter deviant behavior, large firms can use their wealth to employ high-dollar legal counsel and the threat of legal action as a form of deterrence. When farmers were attempting to organize raisin marketing about the time of the passage of the Packers and Stockyards Act, for example, the “Big Five” raisin packers dismissed the threat because “[their] attorneys [were] far and away superior to the [farmers’] attorneys.”¹⁵³ When some cattlemen were considering an antitrust suit against IBP in the 1970s, IBP officials announced that they had “instructed [their] attorneys to explore filing a countersuit for the malicious abuse of process.”¹⁵⁴ When an IBP informant came forward in the 1970s with certain internal company documents, he was quickly embroiled in a long legal controversy instigated by IBP. Given the potential for retaliation and the possibility of large legal expenses, in addition to the risks of suing one of the few remaining firms that might purchase your livestock, the incentive to avoid a dispute with a large packer is significant.¹⁵⁵ The American Bar Association’s Antitrust Section has also noted that farmer dependence on the buyer acts as a deterrent to proper enforcement of the antitrust laws.¹⁵⁶

V. The Historical Context

The overall context of the adoption of the Packers and Stockyards Act is critical given that, as one commentator has noted, the “language of the statute ‘must take meaning from its historical setting.’”¹⁵⁷ The commentator takes his cue from the case *Wilson and Company v. Benson*, in which the court concluded the importance of understanding the historical context in which the Packers and Stockyards Act was adopted and noted that the Act was to be more strict than the antitrust laws adopted previously.¹⁵⁸

Legislation addressing the competitive problems in the meatpacking sector was in the vanguard of progressive reform in the early twentieth century. As the sector of the economy with the highest total value of economic output, the anticompetitive problems and the widely-discussed public health problems made the activities of the packers a major public issue.¹⁵⁹ The FTC, which was created shortly after Woodrow Wilson’s victory in the presidential election of 1912 (in which the

¹⁵³ VICTORIA SAKER WOESTE, *THE FARMERS’ BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA, 1865-1945*, 148 (1998).

¹⁵⁴ *Cattlemen File Price-Fixing Suit Against 4 Packers*, WALL STREET JOURNAL, Aug. 13, 1976, at 20.

¹⁵⁵ See James R. Baker, Administrator, GIPSA, testimony before the Senate Agriculture, Nutrition, and Forestry Committee, February 1, 2000 <http://www.senate.gov/~agriculture/bak0021.htm> (noting a complaint filed against a packer for retaliating against a farmer who was critical of the packer). “USDA filed a formal complaint against Farmland National Beef Packing Company, alleging that the company violated the P&S Act by changing its business practices by failing to make bids or purchase cattle at Callicrate Cattle Company Feedyard, St. Francis, Kansas, after an article critical of Farmland written by Callicrate Feedyard’s sales manager was published in a livestock journal.” *Id.*

¹⁵⁶ Section of Antitrust Law, American Bar Association, *Comments Relating to Proposed Agribusiness Legislation Pending before the 106th Congress*, at 13. “Sellers generally are reluctant to sue a large customer because the challenge is almost certain to end the relationship. In this instance, the courts may not provide an effective remedy for monopsony. This would explain, in part, the relatively small number private cases challenging monopsony.” *Id.*

¹⁵⁷ Campbell Treatise, at 186 (quotation omitted).

¹⁵⁸ 286 F.2d 891, 895 (7th Cir. 1961).

¹⁵⁹ Current Legislation, 22 COLUM. L. REV. 68 (1922). “Looked at from the view of the number and significance of the people that it affects, it stands second to none. The packers stand between the thousands of cattle raisers and retail meat dealers, who together bulk large in the middle class of the nation . . . Their power is absolute in their sphere – they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands.” *Id.*

monopoly problem was the most widely discussed political issue), almost immediately set to work studying the competitive problems in the packing sector. Anticompetitive practices in the sector were so widely reported and questions about market failure so pervasive that Congress deviated from its tradition of avoiding government intervention in the marketplace and adopted a stringent and wide-ranging regulatory statute. The statute was even adopted and signed into law after President Warren Harding (R) came to occupy the presidency (after campaigning on a limited government platform in the presidential campaign of 1920), demonstrating the widespread and bipartisan views of policymakers about the anticompetitive and counterproductive tendencies of the packing sector. While the forces arrayed against social and economic reform in the 1920s were powerful, they were not powerful enough to stop those reformers concerned about the functionality of agricultural markets.¹⁶⁰ The organization of the Congressional “farm bloc” made passage of the Packers and Stockyards Act and other agricultural legislation possible.¹⁶¹

During the years surrounding passage of the Packers and Stockyards Act, Congress developed an understanding of the potential for large buyers to exploit individual farmers. A year after adoption of the Packers and Stockyards Act, Congress adopted the Capper-Volstead Act, which allowed farmers to collectively pool their products for sale to the concentrated processing sector. In so doing, Congress recognized the difficulties that farmers encountered when attempting to organize their production for collective sale and the potential for large-scale agricultural processors to abuse their market power when dealing with individual farmers. When describing the Packers and Stockyards Act, one contemporary commentator noted the disorganization of farmers and the absence of bargaining power that they possessed: “Ranch man and city butcher must deal through the packer in a market no longer freely competitive. Today the cattleman must either ‘take it or leave it’ at the prices fixed by the ‘big five’ . . . Retaliatory combination is not practicable, for cattle raisers are small and of necessity widely scattered.”¹⁶²

The House Report accompanying the Packers and Stockyards Act confirms that the statute was adopted with the expectation that farmers would be allowed to collectively and cooperatively market their products in order to improve their bargaining position as contemplated by the Capper-Volstead Act: “The bill also amply protects the interest of cooperative associations in that it provides specifically for cooperation in the marketing of their products through such organizations in the stockyards by permitting them to return to their members on a patronage basis their excess earnings on livestock handled, subject to regulation by the secretary.”¹⁶³ Congressman Tincher noted that the combination of the Packers and Stockyards Act and the farmer Cooperative legislation combined to make “a program of which any man representing an agricultural section of this country and having the cause of his constituents at heart can well be proud.”¹⁶⁴ Congress was under no illusion, however,

¹⁶⁰ WILLIAM E. LEUCHTENBERG, *THE PERILS OF PROSPERITY, 1914-1932* 100 (1958) (noting that the “Republican Old Guard, which had little trouble in spiking labor and social reform efforts, found the farm interests a much more formidable foe”).

¹⁶¹ *Id.* at 101-2 (“In May, 1921, a group of western and southern senators led by William Kenyon of Iowa and Arthur Capper of Kansas met in the offices of the Farm Bureau Federation to organize the ‘farm bloc,’ which was to unite farm-district congressmen behind agricultural legislation. With members in both parties and in both houses of Congress, the farm bloc in the next two years drove through the Packers and Stockyards Act of 1921, which subjected rates of commission merchants and stockyards to public control and aimed at preserving competition among packers; the Grain Futures Act of 1921, which gave the Secretary of Agriculture control over grain exchanges; the Capper-Volstead Act of 1922, which exempted farm co-operatives from the antitrust laws; and the Agricultural Credits Act of the 1923, which created twelve Intermediate Credit Banks to make loans to groups of farmers.”).

¹⁶² Current Legislation, 22 *COL. L. REV.* 68 (1922).

¹⁶³ House Report No. 77, at 2-3.

¹⁶⁴ 61 Congressional Record 1809 (May 26, 1921).

that the organization of farmers into an effective selling block would be easy or even likely and understood that farmers could easily be left in a chronically inferior bargaining position. At the time of passage, for example, Congressman Tincher fully recognized the difficulties faced by cattle producers who would attempt to collectively organize their marketing and noted that he knew of no farmers' organization attempting to so organize.¹⁶⁵ The difficulties of farmer organization efforts underscored the need for comprehensive legislation curtailing the abuse of market power on the part of packers.

Even the judiciary, which had been so hostile to government intervention in the marketplace in the past that it had even struck down laws regulating child labor, recognized the legitimacy of public action with regard to the packing sector. Chief Justice Taft, who had been the Republican incumbent in the monopoly-dominated Presidential race of 1912, found the Packers and Stockyards Act constitutional and concluded that the "chief evil feared is the monopoly of the packers, enabling them to unduly and arbitrarily to lower prices to the shipper who sells."¹⁶⁶ The former President was not alone. Numerous legal scholars were rethinking the legal doctrines that had frustrated attempts to promote economic reforms and address the concentrated power of economic sectors such as meatpacking.¹⁶⁷ In particular, scholars grew increasingly skeptical of the objective, neutral descriptions of market transactions and noted the coercive power of concentrated capital within the economy.¹⁶⁸ Much of this criticism was directed toward traditional economic analyses of agricultural markets.¹⁶⁹ In addition to the recognition of the power disparities in agricultural markets, legal thinkers and political reformers noted their presence in the relationship between workers and corporations.¹⁷⁰

The Congressional sponsors of the Packers and Stockyards Act were attuned to changes in economic thought during the early years of the twentieth century. Prior to passage of the legislation, lawmakers and other federal agencies conducted numerous investigations and compiled an impressive record of packer activities that was often in keeping with the prominent schools of economics in early twentieth century America. Many economists of the day who were concerned with the study of how firms interact in markets, what today is known as industrial organization economics, conducted empirical studies of markets in order to make conclusions about how firms behave.¹⁷¹ Many of these economists studied in Germany and were therefore heavily influenced by German economics, which was largely based on the "case-study approach" to economics.¹⁷² The devotees of

¹⁶⁵ 61 Congressional Record 1916 (May 31, 1921).

¹⁶⁶ *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922).

¹⁶⁷ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 33-34 (1992) (noting the "creation of giant corporations capable of exercising enormously disproportionate market power"). "Monopolization proved a catalyst for Progressive critiques of the traditional assumption of relatively equal bargaining power that had formed the foundation of legitimacy for the freedom of contract doctrine within Classical Legal Thought." *Id.*

¹⁶⁸ See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 29-70* (1998).

¹⁶⁹ Catherine McNicol Stock, *The Countryside in the Age of the Modern State: Political Histories of Rural America* (Cornell Univ. Press 2001).

¹⁷⁰ *Id.* at 47. "[T]he description of the employment relationship as a locus of coercion was a progressive commonplace in legal, economic, and political circles. . . . Progressives repeatedly defended . . . prounion and proworker legislation as necessary to counterbalance the force of concentrated capital." *Id.* Both farmers and workers were exempted by the Clayton Act of 1914 in order to promote their bargaining power.

¹⁷¹ Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 109-18 (1989).

¹⁷² *Id.* at 110 ("As if to slap theory in the face, in the 1870s and 1880s many American students who would become the prominent economists of the next generation selected German rather than English universities for their graduate education. Among these students were F.W. Taussig, Frank Fetter, John Bates Clark, Richard T. Ely, Simon Patten, and Edwin R.A. Seligman. Although the founders of the American Economic Association

the historical-empirical school were arrayed against the theoreticians of neo-classical economics, who believed the generic abstractions of theory were more useful and applicable than the limited observations case studies could produce.¹⁷³ The historical-empirical school remained “suspicious of theory, which it believed could easily be manipulated for political ends. It was hostile toward simplification, opposed to universalism, highly committed to the use of statistical evidence, and much more tolerant of ad hoc government intervention in the market.”¹⁷⁴ Despite disputes over its uses, the “American mavens of political economy – liberal and conservative alike – quickly popularized this view of the German historical school in the 1880s and 1890s” and the historical-empirical approach “dominated industrial organization theory for several decades. . . . The United States Bureau of Corporations used the historical model to analyze business firms such as American Tobacco and United States Steel. The Federal Trade Commission, which succeeded the Bureau of Corporations in 1914, also produced a series of historical case studies.”¹⁷⁵ The competitive problems in agricultural markets were an important part of this methodological trend—the Bureau of Corporations conducted studies of beef and machinery markets and the FTC conducted studies of flour milling and meatpacking.¹⁷⁶ Given the prominent place of the FTC meatpacking investigations during the debate over the Packers and Stockyards Act, lawmakers clearly intended that the historical-empirical school of economics be used when analyzing agricultural markets and making public policy.¹⁷⁷ Subsequent economic studies produced in the 1920s justified policymakers’ concerns with the competitive problems in concentrated markets.¹⁷⁸ In short, the political, legal, and economic thought of the age underscores the ambitiousness and uniqueness of the Packers and Stockyards Act, an important consideration when interpreting the meaning of the statute.

(AEA), formed in 1885, were careful to qualify their enthusiasm for the German historical methodology, part of the AEA’s agenda was to include more case-study analysis in American economics. The AEA’s constitution provided that the Association should promote ‘economic research, especially the historical and statistical study of the actual conditions of industrial life.’ The Association’s publications over the first three decades of its history are filled with cases of particular markets and firms.”).

¹⁷³ *Id.* at 111-12. The neoclassical theorists “not only reduced the relevant [economic] propositions to a very small number but also excluded any postulates that were not ‘economic’ in a narrow sense. Under the neoclassical system, morals, psychology, and sociology played little or no role in explaining the behavior of the economic individual or firm. The historical approach, on the other hand, was far more holistic – more inclined to account for every phenomenon, even if no rational ‘economic’ explanation was available.” *Id.* at 115.

¹⁷⁴ *Id.* at 112. The historical-empirical school also became closely identified with “institutionalists” like Thorstein Veblen and John R. Commons. *Id.*

¹⁷⁵ *Id.* at 112-14.

¹⁷⁶ *Id.* at 114, n. 41, 42.

¹⁷⁷ *Id.* at 108 (noting that the “early writers on industrial organization were largely concerned with policy problems”).

¹⁷⁸ *Id.* at 117. “A second generation of studies appeared in the 1920s. The economists in the second group were less confident that large firms would produce lower prices and much more concerned about the threat of monopoly pricing.” *Id.*

VI. Conclusion

The preservation of public markets and the prevention of any possible manipulation of livestock prices by large packers was a primary purpose of the Packers and Stockyards Act. The legislation was specifically designed to prevent the market abuses and manipulations which the Big Five packers had engaged in for decades. With the re-consolidation of the packing sector in recent years and a large civil judgment based upon the P&SA, the statute and its history are as relevant as ever.