# Toward An Agrarian Antitrust: A New Direction for Agricultural Law

by

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# TOWARD AN AGRARIAN ANTITRUST: A NEW DIRECTION FOR AGRICULTURAL LAW

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American antitrust law has undergone great change in the last two decades, reflecting a judicial embrace of the free market ideologies associated with the Chicago school of economics. Much of this change has proceeded on a neutral basis, without regard to the particular economic sector at issue. Such an approach fails to consider the uniquely agrarian origins of antitrust law and the wider social and statutory policies seeking to protect the economic interests of American farmers. Creating a uniquely agrarian antitrust law would more effectively address these concerns, advance the policies embraced by lawmakers, and bolster the bargaining power of American farmers.

Part I of this article explains the inability of the antitrust laws to address the economic concentration issue that has historically concerned farmers and reviews strategies to reverse this failure by examining recent case law. Part II strengthens the case for an agrarian antitrust by appealing to the wider statutory regime built to protect the economic interests of farmers. Part III outlines a general theory of agrarian antitrust that avoids many of the problems reviewed in Part I and addresses the legislative priorities reviewed in Part II. Part III, after reviewing the absence of agrarian considerations in merger cases, also applies the theory to merger analysis, where it is of particular importance.

## I. FARMERS AND THE PROBLEM OF ECONOMIC CONCENTRATION

### A. THE AGRARIAN BASIS OF ANTITRUST LAW

The emergence of the trusts, large corporations that dominated many sectors of the American economy, became a critical concern in post-Civil War politics, especially for advocates of the farmer.[1] In the most famous example, John D. Rockefeller's Standard Oil company by 1878 controlled ninety percent of the nation's oil production.[2] Similarly, in the agribusiness sector, the American Sugar Refining Company controlled eighty-five percent of the nation's sugar refining.[3] Perhaps the largest concern of farmers was the "Big Five," the group of

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1. DAVID A. HOROWITZ, BEYOND LEFT AND RIGHT: INSURGENCY & THE ESTABLISHMENT 6 (1997).

> Agrarian protest was rooted in the perception that monopolistic interests wielded illegitimate and unfair control over credit, transportation, distribution, and government policy. Farm agitation first surfaced in the 1870s when growers organized the Granger movement, a network of rural consumer cooperatives and mutual aid societies antagonistic to the railroads and middlemen.

*Id.*

2. PAGE SMITH, THE RISE OF INDUSTRIAL AMERICA: A PEOPLE'S HISTORY OF THE POST-RECONSTRUCTION ERA 129 (1984).
3. *Id.* at 130.

Chicago meatpacking companies which dominated the slaughter of the nation's cattle.[4]

In the words of capitalism's harshest critic, this "transformation of competition into monopoly [was] one of the most important—if not the most important—phenomena of modern capitalist economy."[5] Long before Lenin advanced his diagnosis and radical solution to the monopoly problem, Senator John Sherman (R-OH) understood the implications of the "power and grasp of these combinations," fearing, without legislative action to reduce economic concentration, the coming of the "socialist, the communist, and the nihilist."[6] As economic concentration increased and helped usher in totalitarianism in Nazi Germany and Soviet Russia, some American political leaders feared that similar economic concentration jeopardized democratic government within the United States.[7] Following in the tradition of Senator Sherman, who anticipated the dangers of economic concentration, Senator Estes Kefauver (D-TN) blamed business leaders for their shortsightedness and failure to appreciate the "inevitable" coming of fascism or socialist nationalization of the economy.[8]

Farmers have been a prominent voice in such criticism. Throughout the late nineteenth century, farmers feared the economic consequences of a powerful "tyranny of monopolies."[9] Farmers initiated demands for legislation that would reign in industrial concentration, an

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4. Robert M. Aduddell & Louis P. Cain, *Public Policy Toward "The Greatest Trust in the World,"* 55 BUS. HIST. REV. 217, 219 (1981).

5. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 7 (1987) (quoting Vladimir Lenin, a year prior to the Russian revolution).

6. 21 CONG. REC. 2460 (1890).

7. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 235-36 (1960).

> In the minds of the Congressmen [during the Celler-Kefauver debate], the growth of these large economic groups could lead only to increasing government control; freedom would corrode and the nation would drift into some form of totalitarianism. It was hardly a surprise, of course, to find a finger pointed at Adolf Hitler and Karl Marx, for they were no strangers to debates on antitrust legislation.

*Id.*; *see also* Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1078 (1979) (noting "American imposition of antitrust measures upon conquered Germany and Japan after World War II" stemming from a "desire to create alternative centers of power that could not readily be marshalled behind authoritarian regimes").

8. 96 CONG. REC. 16,452 (1950).

9. SMITH, *supra* note 2, at 431 (quoting farmers Eleanor Marx Aveling and her husband); *see also* Elizabeth Sanders, *Industrial Concentration, Sectional Competition, and Antitrust Politics in America, 1880-1980*, 1 STUD. AM. POL. DEV. 143 (1986).

> For most of the United States' industrial history, the antimonopoly impulse reflected the antagonism of the nonindustrial periphery toward the marauding rail, financial, and industrial corporations of the Northeast-Great Lakes manufacturing belt. Antitrust law of the populist and progressive eras represented the agrarian effort to restrain those predations and the regional maldistribution of wealth they entailed.

*Id.*

effort that produced the Interstate Commerce Commission to regulate the railroads and contributed to the consideration of more broadly-based monopoly legislation.[10] In response to the fears of what George Hoar (D-MS) called the "grave evil" of "vast fortunes in single hands," Congress in 1890 passed the Sherman Antitrust Act.[11] The legislation, according to historian Richard Hofstadter, was a "ceremonial concession to an overwhelming public demand for some kind of reassuring action against the trusts."[12] Such public demands were on display during the fall elections of 1890, causing Nebraskans, for the first time, to vote Democratic, sending to Congress a thirty-year-old lawyer from Lincoln, William Jennings Bryan, to fight the trusts.[13] Unhappy with both political parties' efforts to address the trust question, many farmers helped form the People's Party in 1892, adopting the famous Omaha Platform: "The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind."[14] In 1896, a fusionist effort united Democrats and Populists, both of whom nominated Bryan and adopted antimonopoly platforms; although he lost, Bryan won twenty-two states and captured nearly forty-nine percent of the vote.[15]

The monopoly problem remained a prominent issue in early twentieth century politics. President Theodore Roosevelt embraced the image of a trust-buster, initiating over forty antitrust suits between 1901 and 1909.[16] In 1911, the Supreme Court approved the divestiture of the Standard Oil and American Tobacco trusts and established a "rule of

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10. WINSTON W. GRANT ET AL., AGRICULTURAL EXPERIMENT STATION, UNIVERSITY OF MINNESOTA, FEDERAL ANTITRUST POLICY AND THE U.S. FOOD SYSTEM 5 (1985).

> The demands for federal antimonopoly legislation, initiated by the Granger Movement, were refueled and carried on by others when the focal point of populism became the trust—a development of Standard Oil Corp.—in 1882. By 1887, many great trusts had appeared on the scene including the Whiskey Trust, the Sugar Trust, the Lead Trust, the Cotton-Oil Trust, the Linseed Oil Trust, etc. It became obvious that the public wanted to destroy the power of the trust just as it had wanted to destroy monopolies and railroad pools before.

*Id.*; *see also* William D. Heffernan, *Agriculture and Monopoly Capital*, MONTHLY REV., July 1, 1998, at 46 (noting "[t]he whole history of the farmers' movement is largely about the unequal power balance between farmers and all the 'middlemen' they depended on for transportation, markets, and a host of inputs such as credit and farm equipment"); Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 244 (1992) (arguing that the "[b]eef trust played a more prominent role in the events leading to the enactment of the Sherman Act than has been recognized in the literature").

11. SMITH, *supra* note 2, at 132.
12. RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR 245 (1955).
13. SMITH, *supra* note 2, at 465.
14. SMITH, *supra* note 2, at 466.
15. HOROWITZ, *supra* note 1, at 9; SMITH, *supra* note 2, at 549.
16. HOROWITZ, *supra* note 1, at 14.

reason" analysis for future antitrust decisions.[17] The prominence of the monopoly question in the presidential election of 1912 prompted a range of widely-debated proposals.[18] When Woodrow Wilson won the election, he brought to Washington his "New Freedom" platform and a strengthening of federal antitrust legislation. This included the Federal Trade Commission Act of 1914, which established a new agency to help enforce the antitrust laws and impressed farmers with its large-scale investigations of the meatpacking industry.[19] The Clayton Act of the same year attempted to slow economic concentration by limiting corporate mergers and build farmer market power by exempting non-stock farmer cooperatives from the reach of the antitrust laws.[20] This dual approach of applying antitrust scrutiny to corporate activity while promoting the economic organization of farmers became a standard policy for addressing the concentration issue throughout the twentieth century.[21]

The accomplishments of this policy are in doubt. The antitrust laws have proved a poor method of limiting and reducing corporate concentration and power. The judicial embrace of efficiency and pro-competitive rationales for antitrust law in the last twenty years has further limited its effectiveness in this regard. The use of farmer cooperatives and other means to develop the market power of farmers has also fallen short of expectations, leaving many sectors of agricultural production highly disorganized. The resulting imbalance in bargaining power between concentrated buyers and disorganized sellers requires recognition in antitrust analysis.

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17. *See generally* United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

18. Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop., 413 F. Supp. 984, 988 (N.D. Cal. 1976) (describing 1912 as the "last time antitrust was an issue in a presidential campaign"); *see also* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 7-9 (1966).

19. G. Cullom Davis, *The Transformation of the Federal Trade Commission, 1914-1919*, MISS. VALLEY HIST. REV., Dec. 1962, at 441. "[The FTC's] first target was the meat-packing industry, where it undertook an extensive investigation of the five largest firms. In a lengthy report, issued late in 1919, it pointed out that the major meat packers were engaged in profiteering activities that constituted unlawful restraints of trade." *Id.*

20. Clayton Act, 15 U.S.C. § 17 (1994); *see also Northern Cal. Supermarkets*, 413 F. Supp. at 988.

> Congress, concerned about the minimal bargaining power of the individual farmer in the markets in which he buys and sells, and in order to encourage him to form agricultural organizations for mutual help, exempted such organizations from the application of the antitrust laws by enacting Section 6 [of the Clayton Act].

*Id.*

21. *See generally* Jon Lauck, *American Agriculture and the Problem of Monopoly*, 70 AGRIC. HIST. 196 (1996). The cooperative promotion policy is discussed in Part II.C. *infra*.

### B. FARMERS AND THE CONTINUING SUPPORT FOR ANTITRUST PROTECTION

Farmers continue to place great hopes in the antitrust laws. Throughout the 1990s, they have sought greater antitrust enforcement to alleviate the alleged abuses of large buyers of agricultural goods.[22] Farmers can draw on recent evidence of concentration, to make their case for antitrust relief. During Congressional testimony in January 1999, farmer advocates presented the results of a recent compilation of concentration data.[23] The study indicated, for example, that five firms conducted over eighty percent of beef packing and that six firms conducted seventy-five percent of pork packing, a much larger concentration rate than previous decades.[24] Similarly, the four largest grain buyers controlled nearly forty percent of elevator facilities.[25] Cargill was among the dominant firms in all three markets, indicating the multiple product markets occupied by many large food firms.[26]

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22. Thomas F. Stokes, *Testimony to Senate Agriculture Committee*, 106th Cong. 3 (Jan. 26, 1999), *available at* Organization for Competitive Markets (last visited Aug. 16, 1999) <http://competitive markets.com/testimony/ocmt4.htm> [hereinafter Stokes Testimony]; RESOLUTION CALLING UPON THE U.S. DEPT. OF JUSTICE AND THE ATTORNEYS GENERAL OF MINNESOTA, SOUTH DAKOTA, IOWA AND NEBRASKA TO INVESTIGATE COLLUSIVE PRACTICES IN THE MIDWESTERN FOOD PROCESSING INDUSTRIES, FOUR-STATE FARM PRICE CRISIS FORUM (Sioux City, Iowa), Jan. 30, 1999 (on file with author); HEARTLAND PRICE ACCORD, HEARTLAND FARM PRICE CRISIS FORUM (South St. Paul, Minn.), Apr. 18, 1999 (on file with author); ORGANIZATION FOR COMPETITIVE MARKETS, RESOLUTION ADOPTED AT ANNUAL MEETING, Aug. 21, 1999 (Omaha, Neb.) (calling on state attorneys general to stop agribusiness mergers); PRINCIPLES OF AGREEMENT, 1999 NATIONAL AGRICULTURAL SUMMIT, Apr. 27, 1999 (St. Louis, Mo.) (outlining the call of 29 farm groups for federal agencies to "monitor and investigate all mergers, ownership changes, interlocking directorates, joint ventures and strategic alliances in the agriculture industry to determine whether competitive markets for farmers and ranchers have been or will be compromised; and take necessary steps to prevent and/or reverse such mergers and ownership changes"); *Agriculture: In the Mill*, ECONOMIST, Mar. 20, 1999, at 64; *Angry Farmers Give U.S. Antitrust Chief an Earful*, CHI. TRIB., Apr. 19, 1999, at 3 (describing a rally of 1,000 farmers requesting greater antitrust efforts in agricultural markets); Bill Hord, *Harl: Consolidation Threatens Farmers*, Omaha World-Herald, Aug. 21, 1999, at 45 (explaining prominent agricultural economist Neil Harl's call for additional antitrust oversight for agricultural markets); Neal St. Anthony, *Hatch Opposes Cargill Grain Deal; Federal Help in Continental Purchase Asked*, STAR TRIB. (Minneapolis, Minn.), May 8, 1999, at D1 (explaining the Minnesota Attorney General's response to the antitrust concerns of farmers).

23. Ed Maixner, *Ag Sector Concentration Gets More Federal Attention*, FEEDSTUFFS, Jan. 25, 1999; William Heffernan, *Consolidation in the Food and Agriculture System, Report to the National Farmers Union* (visited Feb. 5, 1999) <http://www.nfu.org>; *see also* A TIME TO ACT: A REPORT OF THE USDA COMMISSION ON SMALL FARMS, JANUARY 1998, at 55-7, 66-7 (advocating federal action to address the growing concentration in agricultural markets).

24. Heffernan, *supra* note 23, at 17; Brian Williams, *Committee to Delve Into Monopoly on Slaughtering in U.S.*, COLUMBUS DISPATCH, Feb. 18, 1996, at 2H (explaining that in the early 1980s the top four packers only slaughtered 36% of all livestock).

25. Heffernan, *supra* note 23, at 18; *see also* Holman W. Jenkins, Jr., *Oh, Horrors! A Beverage-Can Oligopoly*, Wall Street J., Aug. 25, 1999, at A17 (arguing for reduced attention to the recent aluminum industry mergers given the existence of powerful buyers such as General Motors, Boeing, Coke, and Pepsi).

26. Heffernan, *supra* note 23, at 17-18.

Congressional concern with such concentration levels, highlighted by the pending merger of Cargill and the large trader Continental Grain—termed the "mother of all mergers" by one farm group[27]—has prompted calls for a moratorium on further mergers and acquisitions among large food firms.[28] More generally, Congressional leaders have called on the Department of Justice to "aggressively investigate concentration in agriculture."[29]

Some economic studies indicate a strong correlation between concentrated food firms and their profitability and market power.[30] Compounding such concerns are widening gaps between retail and farm prices. From 1984 to 1998, consumer food prices increased 3 percent, while the prices paid to farmers for the products plunged 36 percent.[31] The impact of the price disparity is reinforced by reports of record profits among agribusiness firms at the same time agricultural producers

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27. Leland Swenson, *Merger Mania Troublesome for Family Producers*, NATIONAL FARMERS UNION NEWS, Jan. 1999, at 2.

28. Senators Byron Dorgan (D-ND) and Chuck Hagel (R-NE) to President Clinton, Feb. 19, 1999 [hereinafter Dorgan & Hagel Letter] (on file with author); Neal Smith (D-IA, member of Congress from 1959- 1995) to Janet Reno, Nov. 24, 1998, *available at* Organization for Competitive Markets (last visited Aug. 16, 1999) <http://competitive markets.com/pressreleases/ocmpr8.htm> (outlining objections to the Cargill- Continental merger). *See* Heffernan, *supra* note 10, at 46 (noting that: "The whole history of the farmers' movement is largely about the unequal power balance between farmers and all the 'middlemen' they depended on for transportation, markets, and a host of inputs such as credit and farm equipment"). The Farmers Union has asked that Congress "establish a percentage of concentration that automatically triggers anti-trust action." Leland Swenson, *Testimony to the Senate Agriculture Committee*, 106th Cong. (Jan. 26, 1999); *see also* ORGANIZATION FOR COMPETITIVE MARKETS NEWSLETTER, Mar. 1999, at 1, *available at* Organization for Competitive Markets (last visited Aug. 16, 1999) <http://competitivemarkets.com/newsletters/OCM-N-01.htm> (noting that Senator Byron Dorgan (D-ND) has considered forming an "Antitrust Caucus" in the Senate to "promote a stricter antitrust agenda") (on file with author). *See generally* Greg Gordon, *Senators Rip Cargill's Grip on Market*, STAR TRIB. (Minneapolis, Minn.), Jan. 27, 1999, at D1.

29. Press Release, Senator Tom Daschle (D-SD), *Daschle Tells Senate Agriculture Committee That Growing Industry Concentration is Contributing to Farm Crisis; Presses Committee to Take Action to Halt Dramatic Loss of Producers*, Jan. 26, 1999 (last visited Jan. 27, 1999) <www.senate.gov/~daschle/releases>; *see also* Jill J. Barshay, *Cargill Faces USDA Charge; Company Call Hog-Price Complaint Technical, Plans to Appeal*, STAR TRIB. (Minneapolis, Minn.), Apr. 10, 1999, at D1 (reporting that the "Clinton administration has decided to make agricultural giants a political issue in 1999").

30. C. Robert Taylor, *Economic Concentration in Agribusiness, Testimony to the United States Senate Committee on Agriculture, Nutrition, and Forestry*, 106th Cong. 2 (Jan. 26, 1999), *available at* Organization for Competitive Markets (last visited Aug. 16, 1999) <http://competitivemarkets.com/testimony/ocmt3.htm> [hereinafter Taylor Testimony]; *see also* JEAN KINSEY, CONCENTRATION OF OWNERSHIP IN FOOD RETAILING: A REVIEW OF THE EVIDENCE ABOUT CONSUMER IMPACT 13 (The University of Minnesota Retail Food Industry Center Working Paper No. 98-04), *available at* <http://agecon.lib.umn.edu/mn/tr98-04.pdf> (last visited Aug. 16, 1999). The review concluded, however, that studies of the relationship between concentration and profitability produced "mixed evidence" and that "although research related to the question of monopoly power in the food industry has produced some intellectually interesting theories and measures of profitability, it has not richly informed consumers or public policy makers about the state of the industry as it operates today." KINSEY, *supra*, at 21-22.

31. Taylor Testimony, *supra* note 30, at 4 (concluding "There is considerable evidence that the economic power of global agribusiness giants has increased dramatically in the decade of the 1990s").

are suffering through a severe economic depression.[32] This contrast in economic health between vertically-related sectors indicates to many observers an excess of market power in the concentrated processing sector at the expense of farmers.[33] Unfortunately for farmers, the antitrust laws have never been able to address such concerns adequately, especially the disparity of bargaining power between individual farmers and large-scale corporate buyers.

### C. THE LIMITS OF ANTITRUST

#### 1. *"Mere Husks": The Economic Turn in Antitrust*

In the last two decades, courts have incorporated large amounts of economic theory into their antitrust decisions. Key among these theories have been those advanced by the "Chicago school" of economists, who emphasized the role of economic efficiency in legal analysis, including antitrust analysis. Along with the other works of the Chicago school, Robert Bork's famous book *The Antitrust Paradox* provided much of the ammunition for the economic turn, declaring unequivocally that "[t]he legislative history of the Sherman Act displays the clear and exclusive policy intention of promoting consumer welfare."[34] Such

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32. Dorgan & Hagel Letter, *supra* note 28 (stating "While thousands of farmers are being forced out of agriculture due to collapsed commodity prices, many of our nation's food processors are posting exceptional returns and record profits"); *see* Stokes Testimony, *supra* note 22, at 3 (noting that "IBP [Iowa Beef Producers] just turned in fourth quarter earnings that were four times that of the previous year; this is at a time when hogs are literally being given away") [hereinafter Stokes Testimony]. *See generally* Pam Belluck, *A New Kind of Farm Crisis Pummels the Northern Plains*, N.Y. TIMES, July 19, 1998, at A17. Belluck's article details the economic stress facing farmers:

> In the last two years, according to the North Dakota office of the Farm Service Agency, 2,511 wheat and cattle farmers have folded, and an additional 1,807 are expected to quit this year, leaving only about 26,700 farmers in this heavily agricultural state. Farm income has nose-dived 98 percent in the state to $15 million in 1997 from $764 million in 1996, the Department of Commerce said.

*Id.*

Senator Kent Conrad (D-ND), Verbatim Transcript of Senate Agriculture Committee Hearing, July 27, 1999, 1999 WL 555591, at 30 (explaining that North Dakota anticipates "losing 30 percent of [the] state's farmers in the next 12 to 24 months"); *see also* Bob von Sternberg, Rob Hotakainen, and Dane Smith, *A Grim Outlook For Farmers; Crisis May Force Out 6,500 in State This Year, Figures Show*, Star Trib., Sept. 2, 1999, at A1.

33. Stokes Testimony, *supra* note 22, at 2 (arguing that "aggregated power resulting from intense competition will be ruthlessly used by the powerful to the depredation of the less powerful" and that the "problem is that the ultimate value at retail is not distributed equitably among the contributing players. The pie is big enough, it is not being sliced reasonably"); *see* Saara Hyvonen, *Competitive Advantage, Bargaining Power, and Organizational Performance: The Case of Finnish Food Manufacturing Firms*, 11 AGRIBUSINESS 333, 335 (1995) (noting that in "the vertical chain, powerful firms can squeeze the profitability of downstream or upstream firms").

34. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (1978). It is worth noting that many Chicago scholars were once active supporters of using the antitrust laws forcefully to deconcentrate sectors of the economy. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L.

claims have motivated courts to search for market dynamics that promote consumer interests through economic efficiencies and lower prices.

In 1974, for example, the Supreme Court in *United States v. General Dynamics*[35] allowed a merger of large mining companies in spite of high concentration levels in the industry.[36] The court weighed "other pertinent factors," such as the large-scale changes in the coal market in previous decades and the use of long-term contracts between coal sellers and coal buyers.[37] It also noted that coal reserves were a better indicator of competitive potential than past coal production levels.[38] The court concluded that the acquired firm's reserve capacity was so small that the firm "was a far less significant factor in the coal market than the Government contended."[39] By considering factors beyond industrial concentration levels, the Supreme Court opened the door to broader economic analyses and theories in antitrust cases. In so doing, the Court failed to heed Derek Bok's earlier warning about "succumb[ing] to the economists who bid us enter the jungle of 'all relevant factors,' telling us very little of the flora and fauna that abound in its depths, but promising rather vaguely that they will do their best to lead us safely to our destination."[40]

The indeterminacy of economic theory undermines its usefulness as a guide to antitrust analysis. Economic analysis can produce multiple conclusions and offers very little concrete guidance to judicial rulemakers. In a pioneering article that contributed heavily to the early interpretations of section 7 of the Clayton Act, Bok highlighted the problem of relying on economic theory. Given the "aura of complicated uncertainty" surrounding the competitive effects of a merger, he believed that reliance on economic analysis would cause "confusion rather than enlightenment."[41] Thus, he believed that by attempting to incorporate economic "expertness we may only end in extravagance."[42]

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REV. 1105, 1134 (1989) (explaining that from the "1930s through the early 1950s, Chicago academicians such as Frank Knight, Henry Simons, Jacob Viner, and George Stigler developed economic arguments for expanded attacks on bigness").

35. 415 U.S. 486 (1974).

36. *See generally* United States v. General Dynamics Corp., 415 U.S. 486 (1974).

37. *General Dynamics,* 415 U.S. at 499-500 (explaining the declining demand for coal due to competition from oil and gas and the increasing use of long-term coal contracts which reduce the amount of coal available for purchase on the "spot" market); *see also* E. Thomas Sullivan, *The Economic Jurisprudence of The Burger Court's Antitrust Policy: The First Thirteen Years* 58 NOTRE DAME L. REV. 1, 40-41 (1982) (explaining that "the court in General Dynamics held that post-acquisition evidence of reserve capacity, rather than market share data, was the most relevant economic data in determining future competitive effect in the coal market," indicating a "greater receptivity to a wider range of competitive criteria leading to a more broadly-based analytical style").

38. *General Dynamics,* 415 U.S. at 502.

39. *Id.* at 503.

40. Bok, *supra* note 7, at 227.

41. Bok, *supra* note 7, at 349.

42. Bok, *supra* note 7, at 349.

Economic assumptions about the behavior of actors in particular contexts, as the Supreme Court more recently conceded, must be accepted "on faith."[43] The embrace of economics, according to the current chairman of the FTC, requires the incorporation of "large doses of hunch, faith, and intuition."[44]

Although couched in terms of scientific objectivity, Chicago economics involves value choices. Instead of supplying a rational approach that rises above personal or political preferences, Chicago economics involves its own kind of subjectivity. Economic analysis is built on numerous assumptions and depends upon the interpretation of confusing and contrived information.[45] For example, the assumption that people are "economically rational," an assumption crucial for Chicago economic theory, often falls short of expectations.[46] Similarly, firm managers, who are assumed to make profit-maximizing choices, may in fact choose, for a range of reasons, to make unprofitable decisions.[47] In the context of mergers, the goal of profit maximization may be subordinated to other motivations, such as an "ego trip for prestige and power-hungry managers."[48] Similarly, the assumption that potential

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43. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 479 (1992).

44. Robert Pitofsky, *The Political Content of Antitrust* 127 U. PA. L. REV. 1051, 1065 (1979). *See generally* John Cassidy, *The Decline of Economics*, NEW YORKER, Dec. 2, 1996, at 50-60 (recounting the poor performance record of many economic schools of thought and the increased mathematical theorizing which has undermined the practical usefulness of economics).

45. Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic 'Objectivity': Is There Any Role for Social and Political Values in Merger Policy?* 60 NOTRE DAME L. REV. 273, 295 (1985).

> The lack of perfect information regarding market conditions and consumer/supplier response, combined with a host of interpretations of that information, invariably requires that choices among various alternatives be made. As economic analysis becomes more sophisticated and the number of relevant economic factors continues to increase, the number of options confronting decision-makers will also multiply. As the ability to exercise such discretion increases, so does the vulnerability of the decision-making process to social and political bias. That merger policy tends to change with changes in administrations seems to support this conclusion.

*Id.*

46. *Id.* at 297.

47. *Id.* (noting that "a manager might decide not to enter a particular market for a variety of reasons, such as failure to recognize the opportunity, a fear that prices might later return to their original level, poor health, advanced age, or satisfaction with the status quo"); *see also* Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 294 (1992).

48. FREDERICK SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 563 (2d ed. 1980); *see* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 418 (4th ed. 1992) (noting that "some economists believe that in large, publicly held corporations managers are only weakly constrained, and do in fact choose maximands such as sales, or growth, or personal power that may bring them close to personal utility maximizing than profit maximizing would bring them"); Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1582, 1584 (1983) (noting that "economists and lawyers during the 1960s typically believed that the primary motives for mergers were concerns unrelated to efficiencies, such as corporate managers' empire building and firms' desires to increase their market power or gain tax advantages"); *see also* Willard F. Mueller, *Market Power and Its Control in the Food System*, 65 AM. J. AGRIC. ECON. 855, 860 (1983).

entrants will undermine collusive arrangements in a market was recently exposed in the Microsoft trial as an analytical factor that can cut both ways.[49]

The shifting economic doctrines underlying antitrust are the best indicators the economic indeterminacy problem. During the New Deal—after an episode in which government policy was actually to encourage price fixing—antitrust policymakers embraced the economic theories of Joan Robinson and Edward Chamberlain, which ultimately evolved into the "workable competition" policy of the 1950s.[50] Contrary to "discovering" economic theory in the last two decades, antitrust policymakers have simply "changed theories."[51] It could be said that the rise of the Chicago school is simply a return to the economic theories of the late nineteenth century,[52] highlighting the multiple economic theories that can be employed in antitrust cases. Economist Donald Dewey concludes that it is the

> height of arrogance for an economist, by remonstrance or innuendo, to chide Congressmen and judges for failing to accept immediately the truths that it took his trade the better part of a hundred years to learn. The judicial economics that

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> The discretionary power of conglomerate management can be used to satisfy their whims, fancy, and personal ambitions, as manifested by experience in many mergers and acquisitions. Much of this behavior can better be explained by sociologists and psychologists than by the economist. Occidental Petroleum's 1981 acquisition of Iowa Beef Processors, Inc., the country's largest meat packer, lacked any obvious efficiency gains from combining meat packing and petroleum extraction and distribution; its explanation is found in the minds and personal ambitions of Occidental's chairman and Iowa Beef's largest shareholder, long-time personal friends.

Mueller, *supra*, at 860. Mueller notes that the "chief beneficiaries of these mergers are the top executives, investment bankers, accounting firms, and law firms specializing in takeovers." Mueller, *supra*, at 860-61.

49. Massachusetts Institute of Technology economist Richard Schmalensee testified for Microsoft that the Linux operating system posed a threat to Windows. Prosecutors then quoted Bill Gates saying that "I've never had a customer mention Linux to me." Prosecutors then cited an academic article by Schmalensee arguing that "[t]here is a substantial difference between toehold entry and substantial entry that provides real pressure on established firms' profits." Schmalensee then testified, notwithstanding the earlier Linux comment, that no potential entrant met the test of substantial entrant. Joel Brinkley, *Microsoft Witness Attacked for Contradictory Opinions; Economist Is Said to Have Shifted Stance*, N.Y. TIMES, Jan. 15, 1999, at C5. *See generally* DONALD DEWEY, THE ANTITRUST EXPERIMENT IN AMERICA 43 (1990) (concluding that "much of what passes for economic analysis in antitrust cases, has come to be a kind of window dressing").

50. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 221-22 (1985) (noting how President Roosevelt, during the late 1930s, utilized "a different group of economists who were much more aggressive in their antitrust enforcement goals. Their work became the basis for the 'workable competition' theory that dominated antitrust policy in the 1950s").

51. *Id.* at 222-23.

52. *Id.* at 220 (explaining that during "roughly 1890-1930, American economists developed a set of theories that found consumer benefits in concentration and large firms probably to a greater extent than did any economic model until the rise of the Chicago school"). However, economists at the time thought antitrust was wise. DEWEY, *supra* note 49, at 25 (explaining that "[s]omewhere between 1900 and 1920, majority opinion among American economists swung behind antitrust. The acceptance was rapid and total").

Robert Bork treats with such scorn is, after all, the blue-ribbon opinion in economics of a generation back.[53]

With the embrace of economics, according to Frederick Rowe, the former chair of the American Bar Association's Antitrust Section, antitrust law "bound itself to a delusion."[54] For this, Rowe blames the New Dealers who embraced both the economics of the 1930s and other theories, prominent at the time, linking economic concentration to inefficiency and corporate sloth.[55] A core component of deconcentration efforts in the 1940s involved "antitrust law's assimilation of economics."[56] The economics changed over time, however. The coming of the Chicago school and its emphasis on economic efficiency produced different results in antitrust cases.[57] Economics, according to Rowe, fulfilled the "Faustian pact of the forties," and "the servant bec[ame] the master, first abetting, then usurping, antitrust law."[58] This usurpation has left the antitrust laws, in the words of Justice William Douglas, "mere husks of what they were intended to be."[59]

### 2. *Non-Economic Considerations*

The embrace of economics also precludes other policies embedded in the Sherman Act.[60] Contrary to the scholarship of Robert Bork and others, the legislative history of the Sherman Act does not support a singular pro-consumer agenda concerned with economic efficiency.[61]

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53. DEWEY, *supra* note 49, at 51.

54. Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1513 (1982).

55. *Id.* at 1520.

56. *Id.* at 1522. As Rowe write:

> Contemporary economic learning facilitated this grandiose antitrust design. Then in vogue among economic scholars, the Oligopoly Model linked anticompetitive behavior to the 'structure' of concentrated markets dominated by a few large producers. In theory, those few sellers instinctively collaborated to maintain the high prices and low output typical of class monopolies. Guided by oligopoly teachings, antitrust campaigns against economic concentration promised not only to improve competition, but also to preserve a pluralistic polity. A heady brew of ideology and learning, it inspired a missionary generation of economists and lawyers with a messianic vision that propelled antitrust for thirty years.

*Id.*

57. *Id.* at 1569 (calling this "vendomat jurisprudence: a model is plunked in, a legal result pops out").

58. *Id.*

59. WILLIAM O. DOUGLAS, THE COURT YEARS, 1935-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 162 (1980).

60. *See generally* Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263; Pitofsky, *supra* note 44, at 1051.

61. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 28 (1989) (noting, "There is no evidence of any organized consumer lobbying for the Sherman Act"); Rowe, *supra* note

Senator George (D-MS) thought the Sherman Act "ought to be directed" at the "organized force of wealth and money" which "crushed out" its smaller competitors.[62] Such sentiment existed in the face of the pro-consumer impacts of the trusts, such as consumer price reductions. Congressman Mason, referring to the Standard Oil trust, stated that "if the price of oil, for instance, were reduced to one cent a barrel it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprises."[63]

The legislation's namesake, Senator John Sherman, also did not emphasize pro-consumer and efficiency rationales. In his Senate speech on the issue, Sherman denounced the "kingly prerogative" of those men with "concentrated powers: [W]e will not endure a king over the production, transportation, and sale of any of the necessaries of life."[64]

Such sentiment belies Bork's interpretation of Sherman's singular focus on economic efficiency. Compounding doubts about Bork's interpretation are Sherman's tariff views, which were protectionist and anticompetitive.[65] Commentators at the time specifically linked the trust and tariff questions together, highlighting the anti-consumer consequences of allowing high tariffs to protect trusts.[66] Finally, the pro-consumer interpretation is weakened by evidence that prices of consumer products such as sugar and oil were falling when the Sherman Act was passed.[67]

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54, at 1559 (noting the minimal involvement of economics in the passage of the Sherman Act in 1890: "Nothing in antitrust's genesis foretold a fusion of law and economics, or the rise of economists as vicars of antitrust policy").

62. 21 CONG. REC. 3147 (1890).

63. 21 CONG. REC. 4100 (1890).

64. Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263, 267 (1992); *see also* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1278 (1988). During the Sherman Act debate, Senator Jones stated:

> Now, however, having been allowed to grow and fatten upon the public, [the monopolies'] success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.

Millon, *supra*, at 1278.

65. Hazlett, *supra* note 64, at 268 (quoting Sherman's view that tariffs would "protect, foster, and diversify American industry").

66. Hazlett, *supra* note 64, at 269. "Knowledge of the tariff's anticonsumer consequences was entirely common. The *New York Times*, for instance, made a near-crusade out of highlighting the pro-monopoly impact of protectionism, and in tying the trust question to the tariff." Hazlett, *supra* note 64, at 269.

67. Hovenkamp, *supra* note 61, at 29. According to Hovenkamp:

> Most of the contemporary evidence established without controversy that prices were indeed falling, a fact that contemporary economists readily confirmed. In fact, 'ruinous competition' was perceived to be a much bigger threat than high prices. So to posit that Congress' principal concern in enacting the Sherman Act was high consumer prices is to suggest that Congress was dealing with a problem that did not exist.

Hovenkamp, *supra* note 61, at 29.

Scholars have exposed the many weaknesses in Bork's analysis. For example, Robert Lande's exhaustive review of the subject shows that Bork overlooked a great deal of evidence indicating that Congress hoped to arrest the growing tendency to transfer wealth to the economically powerful.[68] Other scholars have gone much farther, arguing that the Sherman Act was a sociological statute which sought to preserve the individual entrepreneurship and small-town life which big business threatened.[69] The non-economic mission of the antitrust laws was especially evident during the debate over the Celler-Kefauver Amendments of 1950, which prohibited corporate mergers that might have substantially lessened competition. Arguing in the wake of a world war against Nazi Germany and Imperial Japan—regimes characterized by concentrated wealth and political authoritarianism—legislative leaders highlighted the importance of dispersed economic and political power to a functional democracy.[70] The dominance of non-economic concerns in the debate over the Amendment contrasted sharply with "the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency."[71]

Courts also have often recognized the non-economic considerations inherent in antitrust law.[72] In some of the earliest Sherman Act jurisprudence, the Supreme Court worried about "driving out of business the small dealers and worthy men whose lives have been spent therein."[73] Perhaps most famously, in the Alcoa case of the 1940s, Judge Learned Hand observed, "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass

68. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 105 (1982).

69. Millon, *supra* note 64, at 1219-28; Eleanor M. Fox, *Mergers 'R Us; Has Antitrust Gone the Way of the 5 & 10?*, WASH. POST, Mar. 30, 1997, at C1. *See generally* Kurt J. Meister, Note, *Time for a Change in the Antitrust Laws Affecting Horizontal Mergers*, 3 HARV. J. L. PUB. POL'Y 255, 267-69 (1980) (recognizing the protection of small business and the equal distribution of wealth as antitrust goals).

70. Bok, *supra* note 7, at 306. "There can be little doubt that the dangers resulting from further concentration weighed heavily in the minds of all who supported the amendment. Rightly or wrongly, it was repeatedly declared that increases in the market power possessed by large firms would jeopardize several of the nation's most fundamental ideals." Bok, *supra* note 7, at 306. Such ideas received scholarly support. Eugene Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 569 (1947) (noting the importance of achieving a "wider dispersal of power and opportunity, and a broader base for the class structure of our society, by a more competitive organization of industry and trade, in smaller and more independent units").

71. Bok, *supra* note 7, at 236.

72. National Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 829 (1978) (Brennan, J., concurring). "The Sherman Act was the first legislation to deal with the problems of participation of small economic units in an economy increasingly dominated by economic titans." *Id.*

73. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

of those engaged must accept the direction of a few,"[74] a consideration sure to be ignored in the recent aluminum industry consolidations. The Warren Court's interpretation of the Celler-Kefauver Amendments of 1950 also upheld the non-economic policy rationale of the statute. In *Brown Shoe Co. v. United States*,[75] the *Warren* Court noted the importance of Congressional goals such as economic "decentralization" and the "maintenance of fragmented industries and markets," despite the potential for higher costs and prices.[76]

Ignoring non-economic factors is an especially troublesome lapse when considering agriculture. What Andrew Jackson termed the "producing classes," with the farmer as archetype, have always held a privileged ideological position in the American republic, especially over those classes who work with paper and economic matters.[77] The importance of farming in American life has earned it the designation of "The American Ideology," the view that "life necessarily begins and properly ends on the farm."[78] A healthy agricultural sector has historically been linked with a functional American republic,[79] making it an important consideration in antitrust law.[80]

### 3. *The Oligopoly Problem*

Despite Congressional concern with what the Supreme Court called the "rising tide of economic concentration,"[81] the antitrust laws have been ineffective at reducing oligopolies—markets with so few firms that any of them can greatly affect the market conditions.[82] Oligopoly

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74. United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).

75. 370 U.S. 294 (1962).

76. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); *see also* Sullivan, *supra* note 37, at 37 (noting that "[t]he Court's seminal merger case is *Brown Shoe Co. v. United States*, where the Court fully embraced a Brandeisian multi-faceted analysis designed to further industry concentration, disperse economic power, and protect small business").

77. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 15 (1970).

78. Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 817 (1995) (criticizing the ideology).

79. *See generally* A. WHITNEY GRISWOLD, FARMING AND DEMOCRACY (1948).

80. Jane B. Baron & Jeffrey L. Dunhoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 451-462 (1996) (explaining the importance some critics have assigned to considering the impact on republican institutions, and other non-economic factors, when conducting an economic analysis of law).

81. *Brown Shoe*, 370 U.S. at 315.

82. GEORGE STIGLER, THE ORGANIZATION OF INDUSTRY 270 (1968). "The Sherman Act appears to have had only a very modest effect in reducing concentration." *Id.* Section one of the Sherman Act requires an explicit "agreement" and section two requires market power for single-firm monopolization. SULLIVAN & HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 736 (1994) (explaining that "[t]here is little separate case law on the offense of conspiracy to monopolize, because any imaginable multi-party 'conspiracy' to monopolize would also constitute a combination in restraint of trade under section 1, where the burden of proof is generally much lighter").

arrangements are common throughout the American economy, but a convincing anticompetitive rationale justifying legal action remains elusive. Economists have often recognized the extreme difficulty of predicting the behavior of firms in oligopoly settings.[83] While maintaining hope of finding some helpful theories, a leading industrial organization economist concedes that "virtually anything can happen."[84]

The theory of oligopolistic interdependence, prominent from the New Deal until the coming of the Chicago school, held that oligopolistic firms would price similarly to avoid triggering a price war.[85] Such tacit collusion would preclude gatherings in smoke-filled rooms required to fix prices and thus make Sherman Act enforcement, which requires actual "agreement," extremely difficult.[86] Interdependence theories, however, have been weakened by those who emphasize the frequency of differentials in market share and cost structure among firms, factors that can unravel tacit agreements.[87] Predicting the correct response to the pricing moves of other competitors in the market is also very complicated and undermines the effectiveness of tacit collusion.[88]

In spite of economic arguments about the difficulties of cooperation and the tendency to cheat among cartel members, collusion in oligopolistic settings can work.[89] In the most famous case, OPEC, oil-exporters are often able to reap monopoly profits by colluding.[90] Closer

83. SCHERER, *supra* note 48, at 151.

84. SCHERER, *supra* note 48, at 151; SULLIVAN & HOVENKAMP, *supra* note 82, at 876. "The problem of judicial remedy in cases of oligopoly pricing has been often analyzed and considered insoluble." SULLIVAN & HOVENKAMP, *supra* note 82, at 876. The collected evidence relating to collusion had an "unfortunate tendency to support virtually any conclusion." Peter Asch, *Collusive Oligopoly: An Antitrust Quandary*, 2 ANTITRUST L. & ECON. REV. 53, 65 (1969).

85. SCHERER, *supra* note 48, at 155.

86. SCHERER, *supra* note 48, at 156. Section 1 of the Sherman Act requires the finding of an agreement.

87. SCHERER, *supra* note 48, at 157, 160.

> [W]hen cost functions and/or market shares vary from firm to firm within an oligopolistic industry, conflicts arise that, unless resolved through formal collusive agreements, interfere with the maximization of collective monopoly profits. And if left unresolved, these conflicts may trigger myopic, aggressive behavior that drives the industry away from the joint-maximizing solution of its price-output problem.

SCHERER, *supra* note 48, at 157.

88. POSNER, *supra* note 48, at 298. "The firm must figure out not only how the competitor will react to a given price move but how the competitor will react to its reaction to competitor's reaction, and so on *ad infinitum*." POSNER, *supra* note 48, at 298.

89. SCHERER, *supra* note 48, at 169-70; Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1106 (1979) (reviewing 46 concentration/profit studies and finding that the "bulk of these studies yielded significant positive relationships between concentration and profits or price-cost margins"); *see also* Michael Freed et al., *The Detection and Punishment of Tacit Collusion*, 9 LOY. CONSUMER L. REP. 151, 154 (1997).

90. SCHERER, *supra* note 48, at 173; Walter Adams & James W. Brock, *The 'New Learning' and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1515, 1529-32 (1986) (recalling the failure of competition in the oil industry); Agis Salpukas, *Oil Producers Agree to Trim Output to Help Bolster Prices*, N.Y. TIMES, Mar. 13, 1999 (outlining a new OPEC plan to cut production by another 2 million barrels per

to farmers, the ready-to-eat (RTE) cereal market in the 1960s and 1970s seemed to maintain a system of price leadership that fostered collusive behavior.[91] Kelloggs led twelve of fifteen cereal price increases between 1965 and 1970.[92] General Mills followed the price increase nine times and Post followed ten times.[93] Courts have noted the continuation of price leadership in the industry in more recent years.[94] In another market important to farmers, lysine, Archer-Daniels-Midland (ADM) was found guilty of fixing prices during the 1990s in a three-year international conspiracy with four Asian companies.[95] When ADM and Ajinomoto executives met in the proverbial smoke filled room, competi-

day); *see also* Anthony DePalma, *Diamonds in the Cold; New Canadian Mine Seeks Its Place in a DeBeers World*, N.Y. TIMES, Apr. 13, 1999, at C1 (noting the diamond "cartel's tight grip on the market"). "For more than 65 years, DeBeers has had a near monopoly on the world's supply of rough diamonds, in some years handling upward of 80 percent of the uncut stones sold to dealers and polishers around the world." DePalma, *supra*, at C1.

91. SCHERER, *supra* note 48, at 182.

92. SCHERER, *supra* note 48, at 182.

93. SCHERER, *supra* note 48, at 182. Concerns about collusion in the RTE cereal industry in the 1970s prompted the consideration of shared monopoly theories at the FTC.

94. State v. Kraft Gen. Foods, 926 F. Supp. 321 (S.D.N.Y. 1995). In a case in which price coordination was found to be unlikely, a Federal District Court found continued price leadership "competitively neutral," refusing to find an "inference of impermissible coordination":

> Generally, Kellogg and General Mills are the first to announce changes in wholesale list prices. Post and other RTE cereal manufacturers often follow wholesale price increases by Kellogg and General Mills, but they do not do so all the time, or across the board. Nabisco and Ralston generally react to wholesale price increases at about the same time as Post. It is rational and profit-maximizing for a manufacturer the size of Post to 'follow' generally the price movements of the larger firms.

*Id.* at 342 (rejecting a challenge by the Attorney General of New York to the merger of Kraft and the cereal division of Nabisco). In order to argue that the acquisition of Nabisco would not undermine competition, the court concluded that Nabisco was a price "follower," never a price "maverick," failing to see the irony of using price following as an indication of competition. *Id.* at 342-43. The court's appointed expert expressed concerns about such activity, but since he did not believe disallowing the merger would increase competition—since Nabisco was a price follower—he concluded that a separate Nabisco would not change competition within the industry. *Id.* at 351. The court took this conclusion to support its finding that the merger did not hurt competition, failing to see the contradiction with the larger conclusion the court made about competition in the industry. *Id.* at 352; *see also* McIver v. General Mills, Inc., No. B097951, 1997 WL 314376, at *8 (Cal. App. 2d Dist. Jan. 6, 1997) (granting summary judgement against plaintiffs in pricing fixing claim against RTE cereal manufacturers after prohibiting discovery because it was "not likely" to produce usable information, notwithstanding the improbability of finding usable evidence of price-fixing without intensive discovery). The plaintiff's argument was largely based on the investigations of Congressman Sam Gejdenson(D-CT) and then-Congressman Charles Schumer (D-NY), who authored the report "Consumers in a Box: A Consumer Report on Cereal." *Id.* at *2. The defendants relied heavily on the analysis in *State v. Kraft General Foods*. *Id.*

95. Angela Wissman, *ADM Execs Nailed on Price-Fixing, May Do Time; Government Gets Watershed Convictions, But Company Still Dominates Lysine Market*, MERRILL'S ILL. LEGAL TIMES, Oct. 1998, at 1.

> Since the Justice Department's investigation into possible antitrust violations into the corn-based products of lysine, citric acid and high fructose corn syrup become public in 1995, ADM has been the subject of 65 private lawsuits and three foreign government investigations. ADM has been the subject of 31 private antitrust suits involving the sale of high fructose corn syrup, 21 suits involving lysine and 13 suits involving citric acid, according to ADM's March 1998 quarterly report.

*Id.*

tive Chicago assumptions did not prevail: "So the question is how do we share th[e] growth [in the lysine market]? What would you be willing to accept and what would we be willing to accept?"[96] An ADM executive further made clear his company's intention of punishing any firm that attempted to cut prices.[97]

Game theory, which attempts to predict the multiple strategic reactions of firms in various economic contexts, has also been applied to oligopoly settings, bringing a new sophistication to the economic analysis and providing another rationale for oligopolistic cooperation. The absence of formal agreement, a necessary element under section one of the Sherman Act, does not necessarily mean an absence of cooperation.[98] According to game theory, firms can deduce the appropriate, profit-maximizing conduct from the behavior of other firms in the market.[99] At the same time, game theory also indicates that oligopolistic firms can devolve into price wars.[100] The oligopoly riddle thus reinforces the indeterminacy problem already discussed, deprives policymakers of a coherent economic theory on which to base antitrust action, and leaves many markets concentrated, dashing Congressional hopes of addressing concentration levels.

#### 4. *The Oligopsony Problem*

Of particular concern to farmers is the concentrated power of the firms who buy their products. Excessive buyer power can lead to oligopsony, a market condition in which each of a limited number of buyers is strong enough to influence the market but not strong enough to ignore competitors' reaction to the exercise of such influence. Antitrust commentary, however, deals almost exclusively with the power of sellers and injuries to consumers.[101] Such an emphasis fails to consider

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96. *Id.*

97. Kurt Eichenwald, *Evidence Emerges on Inquiry Involving Archer Daniels*, N.Y. TIMES, July 10, 1998, at D3.

98. Peter Huber, *Competition, Conglomerates, and the Evolution of Cooperation*, 93 YALE L. J. 1147, 1157 (1984) (reviewing ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984)) (arguing that the "instability of cartels and the inevitability of competition within oligopolies and contract-rigging consortiums may be only myths").

99. *Id.* at 1160. "The absence of direct communication between firms does not foreclose cooperation. A capacity to observe the conduct of one's rivals is the only type of communication really needed. Cooperation is promoted, first and foremost, by meaningful patterns of behavior." *Id.*

100. *Id.* at 1168. "All commentators recognize that the performance of isolated oligopolies is indeterminate. In some instances, oligopolies work 'well' for the participating, cooperating firms; in many others, price or non-price competition develops and erodes profits." *Id.*

101. Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 298 (1991); James Murphy Dowd, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 B.U. L. REV. 1075, 1078-79 (1996). "Conventional wisdom denigrates the importance of oligopsonistic conduct. Courts have hesitated to apply the antitrust laws to instances

economic injuries to farmers, probably the strongest constituency behind the passage of the Sherman Act. Both buyers and sellers should qualify for protection under Learned Hand's expansive description of the wider justification of the Sherman Act: "[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[102] Even Holmes, no friend of the antitrust laws and their social purposes, recognized the negative effects of a wide power differential between all market actors, not solely sellers and consumers.[103] He understood the unfairness and the potential for exploitation when a disorganized economic sector faced a concentrated sector.[104] Holmes' concerns have been interpreted as a forerunner to the famous countervailing power theory advanced by John Kenneth Galbraith.[105]

Soon-to-be Supreme Court Justice Arthur Goldberg once highlighted the bargaining power inequality between sellers and buyers with reference to his field, labor, describing "the managers of big, powerful enterprises" facing down the "leaders of weak, divided and helpless unions."[106] The observation is also applicable to the relationship between powerful food processors and disorganized farmers, and the

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of oligopsonistic collusion in all but the most obvious and detrimental cases." *Id.*

102. United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).

103. Alfred S. Neely, *"A Humbug Based on Economic Ignorance and Incompetence"—Antitrust in the Eyes of Justice Holmes*, 1993 UTAH L. REV. 1, 2 (noting Holmes' comment that antitrust was "a humbug based on economic ignorance and incompetence") (quoting Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Apr. 23, 1910), *in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 132 (Mark D. Howe ed., 1941)).

104. Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896).

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way

*Id.*

105. Spencer Weber Waller, *The Modern Antitrust Relevance of Oliver Wendell Holmes*, 59 BROOK. L. REV. 1443, 1459-64 (1994). *See generally* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1954); Albert J. Ortega, Jr., Discussion of Bruce Marion, *Government Regulation of Competition in the Food Industry*, 61 AM. J. AGRIC. ECON. 191 (1979).

> Countervailing power is more equitable and reasonable than trying to force one group to remain 'competitive' when that group has to deal (either by purchasing from or selling to) with firms that have market power. Today, countervailing power is difficult to obtain. In my opinion, not only does antitrust legislation limit to ability to challenge entrenched monopoly power, but the entrenched power has the political influence to see that countervailing power is held down.

Ortega, *supra*, at 191.

106. Arthur Goldberg, *The Role of the Labor Union in an Age of Bigness*, 55 NW. U. L. REV. 54, 54-55 (1960). *See generally* Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 492 (1992) (noting that the labor laws were designed to "promot[e] greater equity in bargaining power between employers and employees").

Clayton Act recognized such a similarity by exempting both unions and farmer organizations from the antitrust laws.[107]

Power differentials have been recognized in non-agricultural contexts. In merger cases, for example, some defendants argue that the merger will produce efficiencies due to the increased market power of the combined firm, resulting in greater bargaining power with other market participants and thereby lowering costs.[108] Judge Posner has recognized that the potential success of horizontal collusion is undermined by the presence of powerful firms in vertical markets.[109] George Stigler, in one of the more famous attempts to make sense of the oligopoly problem, also noted the importance of seller organization to the potential success of buyer collusion.[110] Despite this recognition, however, merger decisions seldom consider the impact of greater horizontal concentration on suppliers, such as farmers selling into concentrated meatpacking or grain processing markets.[111]

Since oligopsony power involves reducing the prices paid to sellers, such as meatpackers colluding to keep cattle prices low,[112] it can be very elusive to antitrust investigators who look favorably upon markets in which prices are falling.[113] The reduction in prices creates a potential controversy over injury since plaintiffs must suffer a harm that the

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107. Robert F. Lanzillotti, The Superior Market Power of Food Processing and Agricultural Supply Firms—Its Relation to the Farm Problem, 42 J. FARM ECON. 1246 (1960) (noting the "aggravating infjuence of market power imbalances" for farmers and the means for addressing the imbalance: "[building] countervailing power through direct or indirect government action or special additional antitrust immunities for agriculture, and [working] to dissolve or lessen the market power of groups to whom the farmer sells or from whom he buys"); *see also* Clayton Act, 15 U.S.C. § 17 (1994).

108. Joseph F. Brodley, *Proof of Efficiencies in Mergers and Joint Ventures*, 64 ANTITRUST L.J. 575, 581 (1996).

109. POSNER, *supra* note 48, at 288.

> Finally, the structure of the buying side of the market is important. If there are many buyers of equal size, then cheating on the cartel will require many transactions and the chance of detection by the other members of the cartel will be great. But if there are few (major) buyers, a member of the cartel may be able to cheat just by luring one or two customers away from another member of the cartel.

POSNER, *supra* note 48, at 288.

110. STIGLER, *supra* note 83, at 39-63.

111. Cann, *supra* note 45, at 275-76. In the economic assessment of mergers,

> little concern is given to such non-horizontal effects as foreclosure of equal access to potential suppliers and customers, trends toward vertical integration, reciprocal buying, and entrenchment, all of which stem from either vertical or conglomerate mergers. The pursuit of efficiency is substantially encouraged, while the necessity of making any type of 'value judgement' is allegedly extinguished.

Cann, *supra* note 45, at 275-76.

112. Bruce Marion, *Interrelationships of Market Structure, Competitive Behavior, and Market/ Firm Performance: The State of Knowledge and Some Research Opportunities*, 2 AGRIBUSINESS 443, 449 (1986). "At least four studies have examined the relationship between packer buying concentration (or the number of buyers) and livestock prices. All found prices were negatively related to buyer concentration." *Id.*

113. Blair & Harrison, *supra* note 101, at 299.

antitrust laws were "intended to prevent."[114] It is not immediately obvious that lower prices to suppliers meets this requirement. Even a monopsonistic arrangement, in which the products of several sellers are sought by only one buyer, may remain competitive in the output market, further camouflaging collusive activities directed toward input sellers.[115] In spite of problems with proof, standing and detection, the exercise of market power by buyers, similar to that of sellers, carries economic costs in the form of reduced supplier output.[116]

Despite limited commentary, some courts have recognized potential abuses by powerful buyers. In the early 1940s, for example, sugar beet farmers in California filed suit against three sugar refiners for fixing the price they would pay for sugar beets.[117] Due to the perishability of sugar beets and refiner control over the supply of seeds, farmers were forced to sell to the refiners or quit farming.[118] By fixing the price to be paid to farmers, the "last vestige of local competition [was] removed and with it the only competitive opportunity for the grower to market his product."[119] The Supreme Court held that the Sherman Act applied to price-fixing among buyers, even though the injuries were sustained by "sellers, not customers or consumers,"[120] and the Court specifically noted that sellers are to be protected by the Sherman Act.[121] The Court also highlighted the market dominance of the refiners and noted the difficulties of entering the sugar refining business due to large capital

114. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); Blair & Harrison, *supra* note 101, at 337 (noting that such an argument "misinterprets Brunswick").

115. Blair & Harrison, *supra* note 101, at 322.

116. Blair & Harrison, *supra* note 101, at 316 (using the example of wheat growers to explain the economic cost of buyer collusion).

> But collusion creates expectations that have long-run significance. As their profits are reduced by collusion, the producers' incentives to plant durum wheat diminish and they will curtail supply in the future. Such reductions in supply entail adverse consequences for consumer welfare in the future. This analysis suggests that the National Macaroni decision, which reached its result by adhering to the bright-line test prohibiting price fixing, is sensible even under modern economic analysis. It implicitly recognizes that, even in cases where supply is fixed and reductions in quantity are not possible in the short run, monopsonistic collusion harms consumers by reducing the producers' profits, causing them to reduce supply in the future. Consequently, such restraints decrease consumer welfare in the long run and should be prohibited.

Blair & Harrison, *supra* note 101, at 316.

117. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 222 (1948).

118. *Id.* at 223.

119. *Id.* at 240.

120. *Id.* at 235.

121. *Id.* at 236. "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Id.*

requirements.[122] The Court took these facts seriously, stating that it refused to "ignore the facts of industrial life."[123]

In a similar case, the FTC sought a cease-and-desist order against manufacturers of spaghetti and macaroni who were fixing prices for durum wheat, semolina, and durum flour.[124] The suit named as defendant the National Macaroni Manufacturers Association, whose eighty-five members manufactured seventy percent of the nation's macaroni.[125] The manufacturers sought to avoid high supply prices by blending durum wheat with hard wheat when durum prices increased, a practice which cost wheat farmers significant profits.[126] To this end, the Association met in Minneapolis in 1961 and agreed to send an "expression of opinion" to wheat millers and members of the Association about the appropriate blend of durum and hard wheat to be used in macaroni manufacturing.[127] Using blended wheat allowed the Association to "ward off price competition for durum wheat in short supply by lowering total industry demand to the level of available supply."[128] The FTC concluded that by fixing the composition of their most important raw material, macaroni manufacturers substantially affected the price of durum wheat, a conclusion with which the Seventh Circuit Court of Appeals agreed.[129] The court thus recognized the power of monopsonistic buyers in the agribusiness sector to undermine farmers economically.

Similar arguments were at work in recent antitrust litigation in the meatpacking sector. Beginning in 1977 and extending throughout the 1980s, cattle sellers pressed a lawsuit claiming major meatpackers colluded to keep prices low.[130] Cattle producers argued that the major packers colluded by following the prices reported in the National Provisioner, a publication which listed some of the prices paid for cattle by buyers.[131] While the lawsuit was dismissed due to the absence of enough proof of agreement on the prices to be paid, the court recog-

122. *Id.* at 240; Dowd, *supra* note 101, at 1090 (elaborating on barriers to entry such as the costs of licensing, building distribution networks, economies of scale, and sunk costs).

123. *Mandeville Island Farms*, 334 U.S. at 244.

124. National Macaroni Mfrs. Ass'n v. Federal Trade Comm'n, 345 F.2d 421, 422 (7th Cir. 1965). Semolina originates from the middlings of durum wheat in granual form. *Id.* at 424. The highest quality macaroni is made from 100% semolina. *Id.* When durum is blended with other wheats, the quality of the macaroni is reduced. *Id.*

125. *Id.* at 423.

126. *Id.* at 424 (explaining that the Secretary of Agriculture, when asked by the Association to reduce durum wheat exports as a way of moderating wheat prices, refused due to the discriminatory impact on farmers).

127. *Id.* at 424-25. "Nearly all of the durum wheat ground in this country is ground by seven mills in the Minneapolis, Minnesota area. These mills are associate members of Association." *Id.*

128. *Id.* at 426.

129. *Id.*

130. *In re* Beef Industry Antitrust Litigation (BIAL), 907 F.2d 510, 511-12 (5th Cir. 1990).

131. *Id.* at 512.

nized that other uses of the National Provisioner indicated a great potential for colluding on cattle prices, a recognition that weakened the logic of the court's final holding.[132] The court, despite showing evidence of parallel pricing between the Iowa Beef Producers (IBP) and the National Provisioner, granted summary judgment to the plaintiffs, weakening the cases' precedential value.[133]

The case's precedential value is further limited by the plaintiffs' poor litigation strategy.[134] On the claim that meatpackers maintained oligopsony power in the market for cattle, for example, the plaintiffs only named IBP and Excel-Cargill as defendants, excluding the two other major packers and a large number of very small packers.[135] As a result, the Fifth Circuit could dismiss the claim by citing the theoretical possibility that oligopsonistic pricing on the part of IBP and Excel-Cargill would trigger higher offers from other packers and undermine the arrangement.[136] The confusing nature of the plaintiffs' case and the harshness of the court's grant of summary judgement create doubts about the merits of the decision, particularly in light of recent thinking about the potential for collusion in concentrated markets and the importance placed on understanding the nature of oligopsony.

During the summer of 1999 a federal court in South Dakota ruled on the constitutionality of a South Dakota price reporting law passed during the 1999 legislative session in response to concerns about price manipulations by large packers.[137] While not an antitrust ruling, the court did note the large amount of buying power possessed by packers. The court explained the absence of bargaining power on the part of farmers, who "are unable to set their prices but must rely on what buyers

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132. *Id.* at 513-14.

> The cattlemen point us to no comparison of pricing activity which demonstrates a three-way correlation between the prices quoted by the Yellow Sheet [National Provisioner], those paid to cattlemen by IBP, and those paid to cattlemen by Excel. Instead, they attempt to show that both packers used the Yellow Sheet price when selling beef to each other, for individual corporate bookkeeping purposes when making intracorporate transfers of beef from a packer's slaughtering division to its fabrication division, and for assessing the job performance of its cattle buyers. These pricing activities do not reflect the prices actually paid to cattlemen.

*Id.*

133. *Id.* at 514 (noting a study indicating a 97% correlation between IBP and National Provisioner prices between 1975 and 1978).

134. The plaintiffs claimed that IBP was both a monopsonist and an oligopsonist, causing the court to highlight the "contradictions in [the plaintiffs'] theory." *Id.* at 514-15; *see also* Dowd, *supra* note 101, at 1107.

135. *BIAL*, 907 F.2d at 516.

136. *Id.*

137. *See generally* American Meat Institute v. Barnett, No. 99-3017, 1999 WL 734962 (D.S.D. Aug. 31, 1999) (upholding the statute's price reporting provision; holding the statute's prohibition on discriminatory pricing to be a violation of the commerce clause).

will pay," and concluded that "[p]ackers have the market power in each livestock market to influence or determine prices paid to producers for livestock."[138] In the context of South Dakota farmers, the court noted the existence of an "oligopsony" among the state's three packers.[139]

Notwithstanding the outcome of the meatpacking case, some courts have continued to notice the problem of monopsony. In the early 1980s, the Ninth Circuit Court of Appeals condemned an agreement among pulp companies to depress the prices paid to loggers in Alaska.[140] The court noted that the pulp companies persisted in colluding from 1959-75, even in the face of a "chronic shortage of timber that persisted throughout that entire period."[141] Similar to the complaints of livestock producers in recent years, the pulp companies "created a network of 'captive' loggers heavily indebted to the defendants. With a drop of the executioner's sword, the defendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets."[142] The companies also used their control of timber supplies to stifle the entry of new pulp mills into the market,[143] casting doubt on theories that predict the collapse of oligopsonistic arrangements with entry, or the threat of entry, of new firms into the market.

In yet another case involving disorganized producers selling to large processors, California fishermen sued Star-Kist Foods, Ralston Purina and other buyers for colluding to limit the price of tuna.[144] The court dismissed the case, however, because it held the plaintiffs were not part of the class protected by the antitrust laws.[145] The proper class would have been the owners of the tuna boats, as they were the parties who actually sold the tuna for lower prices than they would have otherwise received.[146] The court did not link greater profits on the part of boat owners to greater economic compensation or security for the fishermen who worked on the boats,[147] declining to do so on the grounds that

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138. *Id.* at *2.

139. *Id.*

140. *See generally* Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983).

141. *Id.* at 1296-97 (explaining the degree of collusion by noting that out of 143 timber sales by the Forest Service between 1959 and 1975, the defendants only bid against each other three times).

142. *Id.* at 1298.

143. When a Japanese company opened a new mill, one of the pulp companies informed timber suppliers that anyone supplying timber to the mill would automatically be forced to repay all debts to the pulp mill. *Id.* at 1297. The new mill was forced to sell out to the defendants. *Id.* Five other mills were also forced to close. *Id.*

144. *See generally* Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987).

145. *Id.* at 541 (requiring that class members "prove that they were sellers in the raw tuna market").

146. *Id.* at 540-41.

147. The fishermen noted that their compensation was linked to the amount of fish caught on a voyage, specifically connecting their economic well-being to the selling conducted by the boat owners. *Id.* at 541.

it refused to recognize an "indirect" injury.[148] It is not clear why the boat owners, who were directly injured, did not sue themselves.

The results have been different in cases without the direct injury problem. For example, in a California case involving the merger of large rice milling facilities, the court recognized that California growers would face problems finding buyers other than the few large mills that dominated the market.[149] The court also noted that rice millers understood their monopsonistic position, knowing they were the "only good outlet for the California growers."[150] Large investments in rice growing operations limited the ability of growers to switch to other crops,[151] conferring a greater degree of bargaining power on millers. Entry into the milling market was also deemed to be unlikely due to the expense of building a mill and the difficulty of establishing a grower base from which to buy rice.[152] The resulting reduction in competition caused the court to find a violation of section 7 of the Clayton Act.[153]

The importance of the buyer-seller dynamic has also been recognized in the field of health care. The Clinton administration's proposed health care reforms, for example, were premised on the organization of health care buyers into alliances that could more effectively bargain with health care providers.[154] Nationwide, the nearly one million state employees have already effectively organized themselves to enhance their purchasing power.[155] In order to enhance the power of health care buyers, policymakers discussed a specific antitrust exemption for buyers wielding monopsony power.[156] The First Circuit Court of Appeals also considered the monopsony issue in health care when it rejected a claim by doctors that Blue Cross wielded too much buying power.[157] The decision highlighted one of the difficulties encountered in monopsony cases: judicial reluctance to take action where prices are low and reliance

148. *Id.* at 541-42.

149. United States v. Rice Growers Ass'n of Cal., No. Civ. 5-84-1066-EJG, 1986 WL 12562, at *4 (E.D. Cal. Jan. 31, 1986). "California rice growers normally would have no good alternative purchasers if the California mills were to lower their compensation for paddy ('unmilled') rice by a small but insignificant amount." *Id.*

150. *Id.* at *5.

151. *Id.* at *6.

152. *Id.* at *12. "New entry into the business of acquiring, milling and selling in California rice is not likely due to the length of time and capital expense of building a new mill." *Id.*

153. *Id.* at *11 (finding that the merger would have left three firms with 95% of the rice market).

154. Frances H. Miller, *Health Insurance Purchasing Alliances: Monopsony Threat or Procompetitive RX for Health Sector Ills?* 79 CORNELL L. REV. 1546, 1547 (1994).

155. *Id.* at 1554.

156. Kevin E. Grady, *The Role of Antitrust in a Reformed Health Care System*, 8 ANTITRUST 2, 3 (1993).

157. Kartell v. Blue Shield of Mass., 749 F.2d 922, 927-28 (1st Cir. 1984) (concluding that doctors could still "sell" to other health care buyers and that plaintiffs failed to establish any "predatory" pricing activities).

on Bork's scholarship on the consumer rationale of the Sherman Act.[158] Such decisions stymie a wider application of monopsony theory.

### D. RETHINKING THE RELATIONSHIP BETWEEN FARMERS AND ANTITRUST LAW

#### 1. *Power-Buyer Considerations*

Recent antitrust jurisprudence has given greater attention to the relative strength of firms in adjacent markets. The recognition of bargaining power disparities between buyers and sellers could signal greater attention to the problem of disorganized farmers selling into concentrated markets occupied by powerful firms, especially if specifically linked to monopsony theory.

Judicial recognition of bargaining power issues has come in the form of a defense to challenged mergers.[159] Courts have entertained the argument that the larger, more powerful firms resulting from mergers may be acceptable if the firms to which they sell also possess market power.[160] In *United States v. Country Lake Foods, Inc.*,[161] a case involving the merger of two firms in the fluid milk processing industry, the court recognized the ability of large food corporations who bought milk to check the power of milk processors.[162] The court noted the "extremely concentrated" nature of the food processing industry in the relevant market, where the top-three concentration ratio was over ninety percent.[163] The size of the food firms and the volume of their purchases allowed them to monitor milk prices, making them "very sophisticated buyers."[164] The court noted their ability to switch to other milk proces-

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158. *Id.* at 930-31.

159. Mary Lou Steptoe, *The New Merger Guidelines: Have They Changed the Rules of the Game?* 61 ANTITRUST L.J. 493, 493-94 (1993).

> Although the power-buyer defense may appear to be a judicial creation that has only just emerged within the last two years, it actually reflects an underlying trend in merger law, present since General Dynamics, toward a more searching examination of the economic conditions that affect a seller's ability to exercise market power.

*Id.*

160. United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990). In *Baker Hughes*, now-Justice Thomas endorsed the consideration of a "variety of factors" in merger cases, including buyer power, and rejected the "fixation" on singular factors such as market entry. *Id.; see also* FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (recognizing that the industrial dry corn industry was unlikely to be cartelized given the nature of their buyers, "a handful of large and sophisticated manufacturers of food products").

161. 754 F. Supp. 669 (D. Minn. 1990).

162. *See generally* United States v. Country Lake Foods, Inc., 754 F. Supp. 669 (D. Minn. 1990).

163. *Id.* at 674.

164. *Id.*

sors and to enter the processing market themselves.[165] The market entry of the large food processors would be aided by their capital resources, which would allow them to purchase an existing plant, and by their existing customer base.[166] The court therefore found the power-buyer defense the "most persuasive argument" advanced by the proponents of the merger.[167]

Commentators have also elaborated on the potential power of certain buyers. For example, buyers are particularly adept at checking the power of concentrated sellers when the price of the item in question is widely known.[168] In *Country Lake Foods*, the milk buyers could estimate the cost of processed milk based on the price paid for raw milk (since prices are publicly reported) and switch to a different seller if prices were deemed to be priced oligopolistically.[169] In addition to switching to a new seller, buyers could induce the market entry of additional sellers by extending long-term contracts or financing the start-up of new sellers.[170] Large buyers could support the merger of two smaller sellers who, when their assets are combined, could more effectively compete against larger sellers in the market.[171] Large buyers could also enter or threaten to enter the upstream market themselves.[172] This option is limited, however, by potential entry barriers in the upstream market and the sunk costs of starting a new firm.[173] Further, courts must insure that the power buyers are competitive, in order to prevent two oligopolistically-organized, vertically-related sectors from cooperating to share profits to the detriment of the ultimate consumer.[174]

Implicit in the recognition of the power-buyer defense is the assumption that powerful firms in a market can exploit small and disorganized firms in a vertically-adjacent market. In other words, the power-buyer argument provides a rationale for halting the growth of

165. *Id.*

166. *Id.* at 680.

167. *Id.* at 679; *see also* Luciano Venturini, *Countervailing Power and Antitrust Policy in the Food System*, paper presented at the Sixth Joint Conference on Food, Agriculture and the Environment, hosted by Center for International Food and Agricultural Policy, University of Minnesota, Aug./Sept. 1998, *available at* <http://agecon.lib.umn.edu/mn/c6vent01.pdf> (last visited Aug. 16, 1999) (elaborating on the power dynamics between food manufacturers and retailers, but ignoring supplier concerns).

168. Steptoe, *supra* note 159, at 496.

169. Steptoe, *supra* note 159, at 496.

170. Steptoe, *supra* note 159, at 501.

171. State v. Kraft Gen. Foods, 926 F. Supp. at 325, 351 (S.D.N.Y. 1995). Safeway and Kroger, major buyers of RTE cereals, supported the merger of Kraft, which owns Post, and the cereal division of Nabisco because "it makes Post a stronger competitor to Kellogg and General Mills," which sell 60% of RTE cereals. *Id.*

172. Steptoe, *supra* note 159, at 499-500.

173. Steptoe, *supra* note 159, at 500.

174. Herbert Hovenkamp, *Mergers and Buyers*, 77 VA. L. REV. 1369, 1382-83 (1991).

powerful agribusiness processors at the expense of the thousands of farmers who sell to them. In *United States v. United Tote, Inc.*,[175] the court rejected the power-buyer defense because it recognized the relative disorganization of the buyers of the product at issue, the totalisator, which manages betting at race tracks.[176] The court held that because so many buyers were present in the market and the buyers possessed different levels of sophistication, they could not constitute a legitimate check on the power of the sellers.[177]

Similarly, in the recent case *FTC v. Cardinal Health, Inc.*,[178] the D.C. Court of Appeals considered the potential power of firms who bought drugs from the four largest wholesale distributors of drugs in the nation.[179] While the court noted the power of certain buyers in the market, it also considered the numerous independent pharmacies that lacked the power to bargain effectively with the large wholesalers.[180] The existence of a large number of buyers and the presence of many small independents created a "fragmented" buying sector unable to counter the power of the wholesalers.[181]

In tandem with judicial recognition of the importance of monopsony power, the buyer-power defense creates a rationale for scrutinizing the power of buyers relative to sellers. Thousands of individual farmers, for example, are hard-pressed to muster the market power necessary to check the powerful food companies who buy their products. Farmer marketing is characteristically disorganized and "fragmented," similar to the accounts of the totalisator and wholesale drug buyers in *United Tote* and *Cardinal Health*. Since farm prices are publicly reported, buyers are also aware of any efforts to seek higher-than-market-prices and

175. 768 F. Supp. 1064 (D. Del. 1991).

176. United States v. United Tote, Inc., 768 F. Supp. 1064, 1065 (D. Del. 1991).

177. *Id.* at 1085.

> [T]he totalisator market does not consist of a few, very large consumers. In stark contrast, the totalisator market consists of over two hundred fifty-five pari-mutuel [the most common form of wagering on horses] facilities, only thirty-nine of which have average daily handles in excess of 1 million dollars. Even if the Court were to accept United Tote's argument that the owners of these large, sophisticated facilities would be able to protect themselves from any anti-competitive price increase, this would still leave at least one hundred nine facilities unprotected in the small market segment alone.

*Id.*

178. 12 F. Supp. 2d 34 (D.C. Cir. 1998).

179. *See generally* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.C. Cir. 1998).

180. *Id.* at 60 (noting that "[i]ncreasingly, the 27,000 independent pharmacies in the United States today are joining buying cooperatives which, in turn, are consolidating to try to develop greater buyer power," but concluding that "independent pharmacies have little leverage, as evidenced by the considerably higher upcharges they have to pay in comparison to the retail chains and institutional GPOs").

181. *Id.* at 61 (holding that the "existence of the independent pharmacies and the smaller hospitals makes the wholesale market considerably fragmented and remarkably similar to the market described in *United Tote*").

can immediately switch to a different seller, dramatically lessening the prospects for seller power. Consideration of the nature of farmer marketing in agribusiness merger cases would allow courts to predict more accurately the ability of agribusiness firms to behave oligopolistically. Moreover, courts would more faithfully carry out the intentions of lawmakers to promote the bargaining power of farmers.

The existence of bargaining power by some of the farmers in a market would not necessarily justify a merger in the adjacent food processing sector. In the context of meatpacking mergers, courts could consider the relative organizational power of sellers, taking into account the existence of sellers such as large feedlots and smaller, independent feeders. Commentators have noted that where some buyers are sophisticated and others are not—parallel to the situation of large feedlots and smaller feeders selling to the concentrated packer industry—the power-buyer defense should not be allowed.[182] Similarly, where many independent feeders exist alongside larger feedlots, courts should be skeptical of applying a seller-power defense given the potential to exploit smaller sellers. In *Cardinal Health*, for example, the court noted the potential to abuse independent pharmacies despite the existence of other large buyers.[183] In another context, the Supreme Court has recognized that the existence of some sophisticated purchasers in a market does not necessarily mean enhanced bargaining power for the unsophisticated, who may lack important information required to make proper market decisions.[184] Similar to the situation between feeders with different levels of market power and meatpackers, the Supreme Court explained, "[I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed."[185]

In markets where sellers are better organized, courts can lower the level of scrutiny applied to mergers. In a case involving Archer-Daniels-Midland's (ADM) long-term lease of two corn wet-milling plants from Nabisco, for example, a court refused to find that the merger violated section 7 of the Clayton Act and considered the organization of the

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182. Steptoe, *supra* note 159, at 502.

> Relatively few industries will sell solely to large customers. Far more common will be situations in which some buyers are large and some are small. In such cases the 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 the smaller buyers.

Steptoe, *supra* note 159, at 502.

183. *Cardinal Health*, 12 F. Supp. 2d at 59.

184. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 475 (1992).

185. *Id.*

firms who sold to ADM.[186] The plants in question manufactured high fructose corn syrup (HFCS), a substitute for the sugar used in food and beverage production.[187] Between 1978 and 1984, Coca Cola and Pepsi replaced all of the sugar in their soft drinks with HFCS.[188] Despite high concentration levels in the HFCS industry,[189] the court allowed the merger, citing the presence of "powerful buyers" in the beverage industry, which purchased seventy percent of HFCS.[190] The consolidation of firms that bought HFCS in the years preceding the case strengthened the court's argument.[191] Smaller, fragmented bottlers also began to form cooperative buying pools to counter the power of the HFCS manufacturers.[192] The "sophistication and bargaining power" of the buyers thus reduced the potential for anticompetitive behavior among HFCS producers.[193]

The bargaining power concerns embedded in the power-buyer defense have not been considered in the context of farmers. In the ADM case, for example, the court failed even to mention the impact of the merger on corn growers or to consider the potential for market power among corn sellers. Similarly, in *Cargill v. Monfort,*[194] the Supreme Court allowed the merger of major meatpackers without considering the impact on the farmers who sell to the merged firm. The court considered solely the impact of the merger on other firms in the industry. The recognition of the selling capabilities of farmers and the potential for monopolistic abuse as a consideration in agribusiness mergers could change the case law.

186. *See generally* United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991).

187. *Id.* at 1407; *see also Archer-Daniels-Midland,* 866 F.2d at 242 (finding sugar and HFCS to exist in separate product markets).

188. *Archer-Daniels-Midland,* 781 F. Supp. at 1408.

189. *Id.* at 1413 (the four largest HFCS firms, ADM, Staley, Cargill and CPC International, were responsible for 87% of the production in 1989).

190. *Id.* at 1416.

191. *Id.* (noting the large reductions in the number of soft drink bottlers, food corporations, dairies, and bakeries).

192. *Id.* at 1417.

193. *Id.* at 1422 (quoting FTC v. R.R. Donnelley & Sons Co., 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,852, 64,855, 1990 WL 193674 (D.C. Cir. 1990) and noting the relevance of power-buyer considerations in the Merger Guidelines). Using the same logic, the Ninth Circuit rejected a claim of monopsony power among movie theaters in Las Vegas, noting the power and sophistication of "giant film distributors like Columbia, Paramount and Twentieth Century-Fox," "humongous national corporations with considerable market power." United States v. Syufy Enterprises, 903 F.2d 659, 661, 663 (9th Cir. 1990). Unlike the case of farmers, however, the movie sellers did not complain about receiving lower prices. *Id.* at 669. The court also found entry into the Las Vegas market to be easy. *Id.* at 666-67.

194. 479 U.S. 104 (1986).

### 2. *Information Asymmetries*

Courts in recent years have also considered the importance of information disparities in markets. Rejecting the utopian assumption of "perfect information" prevalent in economic theory increases the possibility of a more sophisticated economic analysis, one that takes into consideration the limited information available to individual farmers relative to the buyers of their products. The leading case in this area is *Eastman Kodak Co. v. Image Technical Services*,[195] which "revolutionized antitrust jurisprudence." In *Kodak*, the Supreme Court expanded the notion of market power, an element critical to most antitrust violations, to include information. The controversy related to the information possessed by buyers of copy machines at the time of purchase.[196] The Supreme Court recognized that buyers' ignorance of the market for service and replacement parts for the copy machines distorted market choices.[197] The Court noted the difficulties of assessing information such as the relevant costs and the long-term requirements necessary for choosing a durable good such as a copy machine.[198] The Court also explained that once a decision to purchase a copy machine was made, consumers were often locked into their decision due to the high costs of switching to a new machine.[199]

The *Kodak* decision recognizes a fundamental economic point raised in the economics literature in the 1960s, when information studies still occupied "a slum dwelling in the town of economics."[200] As

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195. 504 U.S. 451 (1992); *see also* Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of Eastman Kodak Co. v. Image Technical Services and a Modest Proposal for Limiting Them*, 52 MD. L. REV. 336 (1993); Mark R. Patterson, *Product Definition, Product Information, and Market Power: Kodak in Perspective*, 73 N.C. L. REV. 185, 187 (1994) (arguing that *Kodak* "incorporated into antitrust law a body of economic teachings on product information that the Court had previously neglected").

196. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 473 (1992).

197. *Id.*

198. *Id.* at 473-74.

> In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of 'downtime,' and losses incurred from downtime. Much of this information is difficult—some of it impossible—to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition, the information is likely to be customer-specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of downtime.

*Id.*

199. *Id.* at 476.

200. STIGLER, *supra* note 82, at 171; Patterson, *supra* note 195, at 187.

George Stigler pointed out, market sellers do not simply accept the offer of the highest bidder.[201] Finding, or searching for, the highest bidder is a costly process, involving significant transaction costs.[202] Time is perhaps the largest expense,[203] especially for sellers of perishable products. When the prices paid for a commodity vary widely, indicating that some sellers did not find the highest bidders in the market, information problems are likely present.[204] That some sellers did not search for higher prices may mean that they concluded the cost of the search would outstrip any potential returns from higher prices.[205] One method of reducing the problem of poor information and the resulting "price dispersion" is the centralization of knowledge in one identifiable location,[206] a solution similar to the recent calls for the mandatory reporting of prices paid by meatpackers.[207]

Judicial recognition of the importance of information in markets adds an element of realism to often simplistic economic assumptions, but it is also difficult to translate into judicial rules. Some commentators found the *Kodak* decision "profoundly disturbing," expressing deep concerns about the potential jurisprudential and administrative chaos resulting from information considerations.[208] Most markets, after all, are beset with information shortages. To strive for anything approaching perfect information would thus involve significant costs.[209] *Kodak* provided few specifics about the nature of imperfect information, opening the door to a variety of cases involving elusive information issues and much greater judicial uncertainty.[210] The additional factual questions to be sorted out would involve significant legal expenses.[211]

Recognizing information problems is easier in some markets than in others. In the case of agricultural markets, for example, the problem may be prominent enough to avoid the parade of horribles presented by the critics of *Kodak*. Agricultural markets are defined by stark informa-

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201. STIGLER, *supra* note 82, at 171.
202. STIGLER, *supra* note 82, at 171.
203. STIGLER, *supra* note 82, at 175.
204. STIGLER, *supra* note 82, at 172.
205. STIGLER, *supra* note 82, at 175.
206. STIGLER, *supra* note 82, at 172, 176.
207. S. 19, 106th Cong. § 6 (1999) (requiring meatpackers to report prices paid for livestock); Steve Marbery, *Debate Over Price Discovery Enters Critical Round*, FEEDSTUFFS, June 1, 1998.
208. Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 4 (1994).
209. STIGLER, *supra* note 82, at 188. "Ignorance is like subzero weather: by a sufficient expenditure its effects upon people can be kept within tolerable or even comfortable bounds, but it would be wholly uneconomic entirely to eliminate all its effects." STIGLER, *supra* note 83, at 188.
210. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 655 (1979).
211. Arthur, *supra* note 208, at 61.

tion disparities, a context that involves obvious information problems and avoids the gray area between adequate information and inadequate information which complicates judicial line drawing. One study of Iowa hog farmers, for example, indicates that price searching is very limited[212] and that eighty-five percent of a farmer's hogs are sold to the same packer, indicating little price shopping.[213] Commentators have noted that "firms can exploit in numerous ways the bargaining power that the lack of comparison shoppers confers on them."[214]

The case for higher scrutiny for bargaining arrangements involving farmers is provided for in the *Kodak* analysis. As one commentator explained, "*Kodak* suggests that market power may be found wherever ignorant buyers can be exploited through individualized bargaining," a conclusion which could also apply to disorganized sellers.[215] While launching a new public relations campaign, Cargill's head of public affairs conceded the power of information in agricultural markets: "If you look at our oldest business, which is grain trading, whoever has been in that business has been reticent to talk about the details because a close hold on trading information could be critical to profits."[216]

The importance of information was also noted in the recent price reporting decision in South Dakota, in which a federal court acknowledged that "only packers have complete knowledge of livestock purchases and prices" and that "[o]nly a relatively small portion of livestock purchasing and pricing information is available to the public, including producers."[217]

### 3. *Post-Chicago Analysis*

The buyer-power defense to mergers and the recognition of information gaps in certain markets are part of a larger rethinking of antitrust analysis. The greater consideration of complexities in antitrust cases has become known as post-Chicago analysis. Herbert Hovenkamp is credited with the early criticism of Chicago theories that developed into

212. MARKET ACCESS, 1995 SURVEY RESULTS 3 (Iowa Pork Producers Ass'n, In Cooperation with Iowa State University) (on file with author). "Eighty-seven percent of the producers reported pricing their hogs the day of, or the day before, delivery." *Id.*

213. *Id.* at 4; *see also* Merle D. Faminow et al., *Errors in Slaughter Steer and Heifer Prices*, 12 AGRIBUSINESS 79, 79 (1996) (noting that the "exploitation of informational asymmetries can be one form of market power whereby agricultural processing industries can exploit farmers who sell to them").

214. Schwartz & Wilde, *supra* note 210, at 667.

215. Arthur, *supra* note 208, at 15.

216. Jill J. Barshay, '*Invisible Giant' Cargill Speaks Up in New Ads*, STAR TRIB. (Minneapolis, Minn.), Mar. 5, 1999, at D1.

217. American Meat Institute v. Barnett, No. 99-3017, 1999 WL 734962, at *2 (D.S.D. Aug. 31, 1999).

post-Chicago analysis.[218] In the midst of the Reagan administration's embrace of Chicago economics, Hovenkamp noted the serious limits to Chicago thinking. In addition to noting the problems "outside" the Chicago model, such as its flaunting of legislative history and its failure to consider policies not related to economic efficiency, Hovenkamp highlighted problems "inside" the Chicago model.[219] The latter include the questionable use of static methodologies that assume that external factors will not affect a particular economic condition and the failure to consider attempts by firms to minimize competition through strategic behavior.[220] The consideration of different economic models and factors in antitrust analysis reinforces the indeterminacy problem which afflicts economices, justifying the consideration of non-economic policy priorities.[221]

Perhaps the most important aspect of post-Chicago analysis is what one commentator describes as the "emergence of sophistication doctrine."[222] Instead of assuming economic rationality among all firms in a market, some recent antitrust cases consider the presence of sophisticated firms that possess "tactical expertise, knowledgeability, or intelligence."[223] The consideration of a firm's sophistication involves an "empirical, improvisational approach to corporate behavior" which allows courts to consider the relative bargaining power between large food processing firms and small, disorganized farmers.[224] In the case of agribusiness mergers, which often involve large, powerful firms, the sophisti-

218. Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. 1, 53 n.149 (1994) (noting that the term "post-Chicago" "apparently originated in Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985)"). *See generally* Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645 (1989); Martin Shubik, *Game Theory, Law, and the Concept of Competition*, 60 U. CIN. L. REV. 285 (1991); Michael O. Wise, *Antitrust's Newest "New Learning Returns the Law to Its Roots: Chaos and Adaptation as New Metaphors for Competition Policy*, 40 ANTITRUST BULL. 713, 723-24 (1995).

219. Hovenkamp, *supra* note 50, at 233-55.

220. Hovenkamp, *supra* note 50, at 261.

> The static market fallacy and the failure of orthodox Chicago School antitrust policy to take strategic behavior seriously are closely related weaknesses in the market efficiency model. Both errors result from the model's failure to appreciate time and change, and the havoc these factors play with the economist's idea of competitive equilibrium, which exists nowhere in the real world, or at least not for long.

Hovenkamp, *supra* note 50, at 261.

221. Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 225-26 (1995) (explaining how Chicagoans and post-Chicogoans have created a "stalemate in economic theory" which is "theoretically and empirically irresolvable" and calling for a recognition of the political views underlying each school).

222. Jacobs, *supra* note 218, at 8.

223. Jacobs, *supra* note 218, at 2.

224. Jacobs, *supra* note 218, at 3; *see also* United States v. Baker Hughes, Inc., 908 F.2d 981, 985-86 (D.C. Cir. 1990) (contrasting buyers with "sophistication" with those "who may possess imperfect information and limited bargaining power").

cation consideration could substantially alter the outcome of antitrust decisions, especially when combined with monopsony considerations.[225]

Post-Chicagoans also complicate antitrust analysis by considering insights from the field of game theory, which attempts to predict the multiple strategic reactions of firms in various economic contexts.[226] In contrast to Chicago economics, game theory suggests that firms can grow to be dominant by raising rivals' costs, effectively managing predatory pricing schemes and embracing certain advertising and investment strategies.[227] Game theory also takes into consideration asymmetric information among firms, the key insight of the *Kodak* case.[228] Holders of private information, such as large agribusiness firms with extensive information-gathering abilities, maintain bargaining power and thus enjoy greater economic gains.[229] Such insights are particularly valuable in legal analysis since, as one commentator noted, the "law abounds with instances in which small numbers of players who have private information adopt strategies to further their well-defined interests."[230]

Doubts about the wisdom of universal antitrust rules that apply in all economic contexts[231] allow room for greater analysis in individual antitrust cases. By considering the particulars of an antitrust case, post-Chicago analysis makes it possible to weigh the unique economic factors at work in agricultural markets.[232] The emerging buyer-power analysis, for example, can be reversed so that seller-power becomes a consid-

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225. David Barboza, *DuPont Buying Top Supplier of Farm Seed*, N.Y. TIMES, Mar. 16, 1999, at C4 (providing an appropriate example of high sophistication levels).

> DuPont Co., seeking to create an agricultural powerhouse to match its giant chemical business, said Monday that it would pay more than $7.7 billion in cash and stock to buy the remaining 80 percent of Pioneer Hi-Bred International, the world's largest producer of seed corn . . . . If the acquisition is approved by regulators, DuPont will take control of the last remaining giant seed company, making DuPont a formidable competitor to Monsanto Co., which has acquired more than $8 billion worth of large seed companies over the last two years, adding the heft of being the world's largest seed company to its strengths in herbicides and genetic research.

*Id.*

226. Hovenkamp, *supra* note 50, at 260-83; *see also* Chris Fawson et al., *Price Impacts of Concentration, Timing, and Product Characteristics in a Feeder Cattle Video Auction*, 12 AGRIBUSINESS 485, 485 (1996) (noting that a "significant amount of evidence exists that suggests cattle buyers behave strategically").

227. Jacobs, *supra* note 218, at 37-8.

228. Jacobs, *supra* note 221, at 242-43.

229. JOHN MCMILLAN, GAMES, STRATEGIES, AND MANAGERS 61 (1992).

230. Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1294 (1990).

231. Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63 ANTITRUST L.J. 669, 670 (1995). A post-Chicago analysis "faults Chicago results in specific particulars and raises doubts about the broader inferences associated with Chicago antitrust thinking. It is far less likely to yield definitive conclusions than is Chicago's use of more universal, less particularized and empirically informed antitrust models and norms." *Id.*

232. Marion, *supra* note 112, at 443-47 (arguing that the "theory of strategic groups seems to be much more consistent with reality than the superior efficiency [Chicago] explanation").

eration. In the absence of seller-power, a common characteristic in disaggregated agricultural markets, greater scrutiny can be applied to the existence of a concentrated processing sector. A component of such an analysis will be the information possessed by market actors. Instead of assuming that something approaching perfect information will be available to all actors, post-Chicago analysis can consider the vast disparity between the market information possessed by Farmer Brown and Cargill, with its international network of buyers and sellers.

## II. IN PARI MATERIA: THE WIDER STATUTORY BASIS FOR REFORMULATING ANTITRUST

The disorganization of farmers has undermined their economic position in society. Congress, state legislatures and the courts have often recognized the problem of disorganization and attempted to meliorate its effects. Such efforts and concerns, considered along with the purposes of the antitrust laws and their recent interpretations, provide a conclusive rationale for an agrarian antitrust which closely scrutinizes agricultural markets and considers the importance of farmer bargaining power.

After reviewing the elements of farmer disorganization, this section presents a number of statutes which clarify the purposes and intentions of the antitrust laws as they apply to agriculture. The current chairman of the Federal Trade Commission, Robert Pitofsky, understands the importance of considering the wider goals of the antitrust laws and of construing them comprehensively:

> Using subsequent legislative history to illuminate the intent of an earlier Congress seems particularly appropriate when we deal with 'a comprehensive charter of economic liberty,' . . . It also seems particularly appropriate because we deal with the 'antitrust laws'—an integrated network of statutes that supplements and amends earlier versions—designed in toto to govern marketplace competition.[233]

Pitofsky invokes the Supreme Court case *United States v. Hutcheson*,[234] which specifically interpreted the Sherman, Clayton and Norris-LaGuardia Acts as "interlacing statutes."[235]

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233. Pitofsky, *supra* note 44, at n.31.

234. 312 U.S. 219 (1941).

235. United States v. Hutcheson, 312 U.S. 219, 232 (1941); *see also* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1042-43 (2d Cir. 1980) (construing the Capper-Volstead Act in light of subsequent agricultural statutes).

The existence of agricultural statutes in pari materia, which "relate to the same thing" as the antitrust statutes, requires that both be considered as "one law" in judicial decision-making.[236] Failing to consider agricultural statutes eliminates critical factors to be considered in antitrust decisions and undermines the designs of legislators.[237] As a broad principle, weighing an array of factors, including closely related statutes, is recognized as an important component of balanced legislative interpretation.[238] If courts consider the wider statutory antitrust regime and the particular problem it was designed to address, judicial decisions can more properly reflect Congressional concern about economic concentration and its negative impact on the bargaining power of farmers.[239]

### A. FARMERS AND THE ORGANIZATIONAL DILEMMA

The large number of farmers, their geographical dispersion and their production of widely differing commodities has always left them economically disorganized.[240] Drafters of agricultural legislation have recognized the "difficulties that inhere in [a farmer's] business, that make cooperation and organization almost impossible."[241] Such disorganization, when matched against the concentrated economic power of the agricultural processing industry, has resulted in prices lower than would be paid to an economic sector with greater market power. Courts considering the problem have acknowledged both the economic

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236. United States v. Freeman, 44 U.S. (3 How.) 556, 564 (1845).

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in pari materia are to be taken together, as if they were one law.

*Id*; *see also* 73 AM. JUR.2D *Statutes* § 187 (1974 & Supp. 1998).

> [A]cts in pari materia, and all parts thereof, should be construed together and compared with each other. Because the object of the rule is to ascertain and carry into effect the legislative intent, it proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. Under this rule, each statute or section is construed in the light of, with reference to, or in connection with, other statutes or sections.

*Id.*

237. *Freeman*, 44 U.S. at 564 (explaining that "[t]he error" in the interpretation of a statute "arose from that act having been considered by itself, without any reference to other statutes relating to [similar concerns]").

238. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 356 (1990).

239. *Id.* at 358 (emphasizing the importance of the purposive inquiry: "What problem was Congress was trying to solve, and what general goals did it set forth in trying to solve it?").

240. HAROLD F. BREIMYER, INDIVIDUAL FREEDOM AND THE ECONOMIC ORGANIZATION OF AGRICULTURE 202 (1965) (explaining that "[i]n an economy of established power in the marketing system, the individual farmer stands devoid of power in his own behalf").

241. 61 CONG.REC. 1038 (1921) (statement of Sen. Reavis).

disorganization of farmers and Congressional efforts to alleviate its effects.[242]

A core organizational problem is determining the best interests of farmers. Over time, different groups have advanced numerous different proposals as panaceas to the plight of the farmer. The Populists, for example, were divided over the wisdom of the coinage of free silver, the employment of government power and self-organization through the promotion of cooperatives.[243] Any trappings of universal political programs quickly faded, however, as the movement waned.[244] In the 1920s, when farmers made their most effective foray to date into politics, their leaders were divided over the pursuit of export promotion policies, banking reforms and cooperative organization.[245] The problem of interest identification intensified in the postwar period with the explosion of

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242. Tigner v. Texas, 310 U.S. 141, 145 (1940).

> These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers . . . presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.

*Id.*

243. SMITH, *supra* note 2, at 550 (explaining the divisions between Populists in 1896 over the issues of free silver and greater government control of the economy); *see also* HOROWITZ, *supra* note 1, at 7.

> [A]grarian reformers seemed to embody a near-paralyzing ambiguity. On one hand, some Alliance activists hoped to use state power to curb monopoly and redistribute wealth across the social spectrum. On the other, deep-seated fears over the use of coercive government by wealthy plutocrats generated strong antistatist sentiments. Unable to resolve the dilemma, the People's party relied on the silver issue in 1892.

HOROWITZ, *supra* note 1, at 7.

244. HOFSTADTER, *supra* note 12, at 122-23.

> The Populists had appealed in a rather touching way to the principle of universality: they were working, they liked to think, for the interests of all toilers and certainly all farmers. In fact the diversity of interests among American farmers was such that even to them this could hardly apply; but the Populists' lip service to the idea was at least a tribute to their belief in the traditions of agrarian democracy. With the passing of Populism and with the frank twentieth century commercialization of American agriculture, the tone of farmers' movements was completely transformed. The keynote was no longer the universality of labor or of the farming interest, but the special crop, the special skill, the special problem, the particular region, and above all a particular stratum of the farming population.

HOFSTADTER, *supra* note 12, at 122-23.

245. *See generally* GILBERT FITE, GEORGE N. PEEK AND THE FIGHT FOR FARM PARITY (1954); HOROWITZ, *supra* note 1, at 49-51.

farm interest groups and the disaggregation of farmers into commodity-specific organizations such as the National Wheat Growers and the National Pork Producers Association.[246]

A fundamental dividing point for many farm advocates involves the invocation of state power. When the 1960s debate over federal legislation to promote farmer bargaining power reached a boiling point, one of the core issues which divided farm groups was the level of government involvement and control.[247] Perhaps the most prominent antagonism between farm groups on this issue is that between the Farmers Union and the Farm Bureau, reflecting a conflict over the wisdom of using government power to organize farmers.[248] The Farmers Union has typically embraced the federal agricultural programs as critical to farmer organization, whereas the Farm Bureau has criticized such efforts and promoted the self-organization of farmers.[249] Concerns over government control also prompted the writing of the "Iowa Plan" in the mid-1990s to end government controls on production, a proposal subsequently codified in the "freedom to farm" legislation of 1996.

In addition to interest identification, farmer organization is complicated by free riding. In the case of farmer cooperatives, for example, the economically rational course to follow would be to allow other farmers to organize cooperatively and then enjoy the benefit of any price increases they may effectuate.[250] If the cooperative effort fails, it costs the free rider nothing.[251] The possibility of free riding, its impact on the effectiveness of collective organization and the recognition of this situation by potential actors only exacerbates the problem of non-participation. The problem is further complicated in agricultural markets in which the production of individual farmers is small, making individual

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246. WILLIAM BROWNE, CULTIVATING CONGRESS: CONSTITUENTS, ISSUES, AND INTERESTS IN AGRICULTURAL POLICYMAKING 14-15 (1995); *see also* BREIMYER, *supra* note 240, at 189.

> It is becoming increasingly difficult to sense the opinion that exists within the farming community. This is true not only because there are several national farmers organizations and their positions differ, nor only because published resolutions may not reveal accurately what a group's membership believes. It is difficult to learn the common opinion of farmers because a common opinion scarcely exists. . . . [A]griculture is becoming more fragmented into special-interest groups, thus reducing unity of attitudes.

BREIMYER, *supra* note 240, at 189.

247. Jon Lauck, *The National Farmers Organization and Farmer Bargaining Power*, 24 MICH. HIST. REV. 89, 120-21 (1998).

248. BREIMYER, *supra* note 240, at 193-204.

249. BREIMYER, *supra* note 240, at 194-95.

250. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 126 (1965). "[I]f the individuals in any large group are interested in their own welfare, they will not voluntarily make any sacrifices to help their group attain its political (public or collective) objectives." *Id.*

251. *Id.* at 106. "As in any large, latent group, each individual in the class will find it to his advantage if all of the costs or sacrifices necessary to achieve the common goal are borne by others." *Id.*

cheaters difficult to detect.[252] The existence of free riders makes it counterproductive for some farmers to reduce production in order to increase price and bargaining power.[253] The tendency to be a free rider is exacerbated by the number of sellers who can be played off against one another by powerful buyers, reinforcing the monopsony problem.[254] Congressional recognition of these organizational problems, in tandem with concerns about the market power of buyers, has prompted legislation.

### B. THE PACKERS AND STOCKYARDS ACT

The same year that Congress passed the Sherman Act saw the collapse of the American Cattle Trust, an organization of farmers which attempted to build their bargaining power relative to meatpackers, highlighting the link between powerful meatpackers and poorly organized farmers.[255] In subsequent decades, persistent worries about the concentration problem and farmer bargaining power led to passage of the Clayton Act and the Federal Trade Commission Act in 1914. Agrarian concerns inhere in both statutes. The Clayton Act specifically limits the anticompetitive practices which contributed to the economic concentration that alarmed farmers, and it confers an antitrust exemption upon farmer efforts to organize themselves economically. The Federal Trade Commission Act created the Federal Trade Commission (FTC) with high expectations that some action would be taken against the "Big Five" meatpackers. The resulting FTC report on the meatpacking

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252. POSNER, *supra* note 48, at 286 (explaining how cheating can be profitable).

> If the expansion of the market's total output brought about by cheating is small, the fall in the cheater's profits resulting from the decline in the market price may be less than the increase in his profits from selling additional units . . . Notice that the trick succeeds because the cheater is small relative to the market; he can increase his own output substantially without increasing the market output substantially and thereby causing a steep fall in the market price and in the sales of his competitors. However, if other small firms follow the cheater's lead, the cumulative impact on the market price and one the sales of rivals, and hence on the profits of larger firms, will force them to cut their own prices defensively, and eventually the market price will be driven down to the competitive level.

POSNER, *supra* note 48, at 286.

253. OLSON, *supra* note 250, at 10 (noting the futility of a firm reducing output in industry with declining profits: "If a firm, foreseeing the fall in price resulting from the increase in industry output, were to restrict its own output, it would lose more than ever, for its price would fall quite as much in any case and it would have a smaller output as well").

254. Venturini, *supra* note 167, at 10 (explaining, in a different context, how "[l]arge buyers also may play one seller off against the others to elicit price concessions. A strong buyer, large enough so that the loss of his patronage is not a matter of indifference, is able to force concessions").

255. ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 329 (1977).

industry became the rationale for Congressional efforts to scrutinize closely the workings of the meatpacking industry.

Congressional action took the form of a comprehensive federal statute entitled the Packers and Stockyards Act [P&SA] of 1921, which prohibited meatpackers from engaging in or using any "unfair, unjustly discriminatory, or deceptive practice or device in commerce."[256] The purposes and provisions of the statute require consideration when enforcing the Sherman, Clayton and Federal Trade Commission Acts. P&SA passed after these wider statutes became law, and Congress specifically directed it toward a problem that seemed to persist despite the existence of previous legislation. The Congressional intent to promote the combined consideration and construction of the antitrust statutes is evidenced by the shared enforcement provisions of the P&SA.[257] Some courts have specifically held that the statute is designed to go beyond the broad language of the Sherman, Clayton, and Federal Trade Commission Acts, thereby recognizing the importance of construing the statutes together.[258] While refusing to purchase a farmer's livestock might be acceptable under the Sherman or Federal Trade Commission Acts, for example, it would not be acceptable under the broad protective purposes of the P&SA.[259] In making such decisions, courts have recognized the problem of monopsony that farmers face[260] and which Congress attempted to address in the P&SA.[261]

Furthermore, given its remedial nature, P&SA should be interpreted liberally to carry out its broad mandate and purposes.[262] When combined with the already broad language of the statute, enforcement agencies are given wide regulatory powers over the meatpacking indus-

256. Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-231 (1994 & Supp. 1997).

257. The PS&A even allowed for divided enforcement between the Secretary of Agriculture and the FTC. The FTC was to enforce the "retail sales" provision of the statute but the Secretary could assume responsibility if the FTC was not already proceeding with a similar investigation. 7 U.S.C. § 227 (1994). Per se illegality standards in the Clayton and FTC Acts carry over to P&SA. *In re* ITT Continental Baking Co., 44 Ag. Dec. 748 (1985).

258. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961).

259. Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968).

260. *Id.* at 250-52 (finding that buyers of lambs agreed not to pay over a certain price and that buyers agreed not to bid against one another for lambs; the firm which bought the lambs then sold them to another buyer which had agreed to not bid on the lambs).

261. *Id.* at 254. "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.* (citing Meat Packer Legislation hearings before the House Committee on Agriculture, 66th Cong., 2d Sess., pp. 22, 229, 250, 303, 1047, 2284 (1920)).

262. Glover Livestock Comm'n Co., Inc. v. Hardin, 454 F.2d 109, 111 (8th Cir. 1972) (describing the legislation as remedial and requiring liberal construction to carry out its purpose of "prevent[ing] economic harm to producers and consumers at the expense of middlemen") (citing Bruhn's Freezer Meats of Chicago v. United States Dep't of Agric., 438 F.2d 1332 (8th Cir. 1971)); *Bruhn's*, 438 F.2d at 1336 (citations omitted).

try,[263] especially as it relates to injuries inflicted upon farmers.[264] One contemporary commentator described the legislation as "extending farther than any previous law in the regulation of private business."[265] The transfer of such power indicates the heightened Congressional concern with meatpacker practices and the intent to intensely scrutinize potential antitrust violations within the industry.

The language of the P&SA makes clear that courts should give particularly close scrutiny to the marketing problems of farmers. Borrowing heavily from the language of other antitrust laws, and again confirming the interconnectedness of the antitrust legal regime, the legislation prohibits "*any* unfair"[266] practices or "*any* undue or unreasonable preference or advantage" to certain sellers.[267] The act also prohibits packer efforts to apportion supplies among them to avoid bidding against one another if apportionment "has the tendency or effect of restraining commerce or of creating a monopoly in commerce."[268] The statute also prohibits transferring articles[269] or engaging in business practices "for the purpose or with the effect of manipulating or controlling prices in commerce."[270] The number of practices that can have an "effect" on prices approaches infinity, indicating the intended sweep of the statute. Further, the "effect on price" provision of the statute does not involve the requirement that a practice have the "tendency or effect of restraining commerce or of creating a monopoly."[271] This absence indicates, *expressio unius*, that the only requirement for a violation of the provision is that a packer practice have an "effect" on price.

The broad language of the statute has been used to advocate the close regulation of vertical contracting between farmers and packers. One commentator has suggested that vertical contracting could reduce the number of buyers available to livestock sellers and therefore cause

263. *Bruhn's*, 438 F.2d at 1339. "The Act was framed in language designed to permit the fullest controls of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of Agriculture complete regulatory power over packers and all activities connected therewith." *Id.*

264. Stafford v. Wallace, 258 U.S. 495, 514-15 (1922) (holding that the "chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells").

265. Current Legislation, *The Packing Industry and the Packing Act*, 22 Colum. L. Rev. 68, 70 (1922) (quoting Senate Agricultural Comm., Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)).

266. Packers and Stockyards Act of 1921, 7 U.S.C. § 192(a) (1994).

267. *Id.* § 192(b).

268. *Id.* § 192(c).

269. *Id.* § 192(d).

270. *Id.* § 192(e).

271. *Id.* § 192(c).

economic injury.[272] The suggestion relies on previous court rulings that the broad mandate of the legislation obviates the need to prove an actual "competitive injury" or a "lessening of competition."[273] Some courts have found the plaintiff's burden is simply to show that a particular packer practice is "likely to reduce competition and prices paid to farmers."[274] Although such liberal standards have been narrowed in other cases, the statute can still be used in an attempt to prevent a reduction in the number of packers that may reduce competition for the farmer's product.[275] The possibility of such legal theories indicates the wide-ranging power of the P&SA and underscores the Congressional intent to take any antitrust concerns involving economic injuries to farmers very seriously.

### C. THE CAPPER-VOLSTEAD ACT

Among farmers in the late nineteenth century, a favored method of responding to the economic concentration of buyers was the marketing cooperative.[276] Formal government efforts to aid farmer cooperatives came with the passage of the Clayton Act in 1914.[277] In order to eliminate legal obstacles that might slow the growth of market power among farmers through cooperatives, the legislation specifically exempted non-stock agricultural cooperatives from the antitrust laws.[278] The inclusion of the farmer cooperative provision within an antitrust statute offers further evidence of the importance Congress placed on considering the economic disorganization of farmers when applying the antitrust laws. Doubts about the effectiveness of the Clayton Act exemption triggered legislative efforts to draft a stronger statute.[279] The result was the Capper-Volstead Act of 1922, which broadened the exemption from the antitrust laws beyond non-stock cooperatives.[280] To be protected from the antitrust laws, Capper-Volstead required that cooperatives allow

272. Douglas J. O'Brien, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 J. CORP. L. 651, 657 (1995).

273. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961).

274. Farrow v. United States Dep't of Agric., 760 F.2d 211, 214 (8th Cir. 1985).

275. O'Brien, *supra* note 272, at 663.

276. SMITH, *supra* note 2, at 431 (noting that "[i]n the mood of defiance the farmers generated a frenzy of cooperative activities: stores, marketing cooperatives, and even companies run on cooperative principles to manufacture farm equipment," but also pointing out that most of them failed).

277. Clayton Act of 1914, 15 U.S.C. §§ 12-27 (1994 & Supp. 1997).

278. *Id.* § 17.

279. Wendy Moser, *Selective Issues Facing Cooperatives: Can the Customer Continue to be the Company?* 31 S.D. L. REV. 394, 395 (1986) (explaining that Capper-Volstead was passed to "clarify the Clayton Act exemption provided to farmers").

280. Capper-Volstead Act of 1922, 7 U.S.C. §§ 291-292 (1994).

members only one vote, that annual dividends be limited and that non-member products could not exceed member products.[281]

With the passage of Capper-Volstead, Congress demonstrated its intention to treat farmer cooperatives differently from the typical corporate form and to give farmers the opportunity to build their bargaining power relative to corporate buyers.[282] By exempting farmer cooperatives from the antitrust laws, Congress sought to help "farmers to compete with large corporations."[283] According to some commentators, the legislation was specifically designed to "counterveil the monopsony power then held by the corporate purchasers."[284] The Supreme Court agreed that "individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities."[285] Without fear of antitrust prosecution, farmers were to unify into farmer cooperatives that could employ their bargaining power to negotiate with large food manufacturers for better prices for their products.[286]

The jurisprudence interpreting the Capper-Volstead Act recognizes the monopsony problem and farmer disorganization. The court in *Kin-*

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281. 7 U.S.C. § 291

282. Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1043 (2d Cir. 1980) (noting that "agricultural cooperatives were 'a favorite child of Congressional policy'") (quoting 5 TOULMIN, ANTITRUST LAWS § 6.1, at 334 (1950)); *see also* Millon, *supra* note 64, at 1281.

> The exemption of labor and agricultural combinations from the Sherman Act's proscriptions further demonstrates that a deep concern about social balance lay beneath statements of solicitude for those harmed by the trusts. Several senators advocated exemption on the ground that such combinations were necessary to counterbalance the economic power of massed capital.

Millon, *supra* note 64, at 1281; *see also* Michael D. Love, *Antitrust Law—Fairdale Farms, Inc. v. Yankee Milk, Inc.: —The Right of Agricultural Cooperatives to Possess Monopoly Power*, 7 J. CORP. L. 339, 341 (1982) (explaining Congressional hopes of helping "cooperatives to finance business operations of sufficient magnitude to compete with corporations"); Kathryn J. Sedo, *The Application of the Securities Law to Cooperatives: A Call for Equal Treatment for Non-agricultural Cooperatives*, 46 DRAKE L. REV. 259, 272 (1997) (noting the farmer cooperative exemption from the securities laws, indicating the Congressional view that cooperatives were favored organizations).

283. Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 284 F.2d 1, 8 (9th Cir. 1960).

284. David L. Baumer et al., *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemptions for Agriculture*, 31 VILL. L. REV. 183, 185 (1986). "Congressional passage of the agricultural antitrust exemption encouraged the formation of agricultural cooperatives intended to counterveil the monopsony power then held by the corporate purchasers." *Id.*

285. Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466 (1960).

286. Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 VA. L. REV. 341, 364 (1975) ("Capper-Volstead's authorization of collective processing and marketing was an attempt to counter the bargaining power of oligopsonist buyers, but the bargaining power gap is as wide today as it was fifty years ago"); James L. Guth, *Farmer Monopolies, Cooperatives, and the Intent of Congress: Origins of the Capper-Volstead Act*, 83 AGRIC. HIST., at 79 (1982) (noting the unsurprising hostility of processors to the Capper-Volstead Act: "The National Wholesale Grocers Association took the lead in mobilizing grain dealers, millers, and the food trade to inundate legislators with protests against this 'class legislation'").

*net Dairies, Inc. v. Dairymen, Inc.*,[287] for example, noted that "farmers needed congressional help" since they "had always been pricetakers, standing relatively helpless before those who would purchase their products."[288] In order to overcome the monopsony problem common to agricultural markets, Congress "deliberately set about to enable farmers to organize and band together in order to acquire and exercise marketing power."[289] If farmers can muster enough bargaining power, a "bilateral monopoly" between seller and buyer will result, conferring on farmers a fair price for their products.[290] The mirror image of promoting farmer bargaining power is close attention to economic activities that might increase the concentration among buyers and contribute to their collusive potential. Accordingly, the wider policy rationale of Capper-Volstead requires that courts apply strict scrutiny to mergers or other activities that enhance monopsonistic power of buyers and worsens the bargaining position of farmers.

### D. AGRICULTURAL FAIR PRACTICES ACT

Congressional concerns about maintaining a balanced bargaining arrangement between farmers and processors continued in more recent decades with passage of the Agricultural Fair Practices Act (AFPA) of 1967.[291] The statute was designed to prevent corporations from interfering in the formation of collective marketing organizations among farmers.[292] Congressional action stemmed from episodes in which food

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287. 512 F. Supp. 608 (M.D. Ga. 1981).

288. Kinnet Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608, 630 (M.D. Ga. 1981); Northern Cal. Supermarkets, Inc. v. Central Cal. Lettuce Producers Coop., 413 F. Supp. 984, 988 (N.D. Cal. 1976) (noting that "Congress perceived farmers as being at the mercy of sharp dealers in the sale of their produce and, therefore, made it possible for them to form cooperatives to help themselves").

289. *Kinnet Dairies*, 512 F. Supp. at 630. The court specifically mentions the promotion of "countervailing power" as a function of farmer cooperatives. *Id.* at 614.

290. National Broiler Mktg Ass'n v. United States, 436 U.S. 816, 842 (1978) (White, J., dissenting).

> The specific goal of permitting agricultural organizations was to combat, and even to supplant, purchasers' organizations facing the farmer. Economics teaches that the result in such circumstances is 'bilateral monopoly' with a potentially beneficial impact on the eventual consumer and a sharing of cartel profits between the organized suppliers and the organized buyers

*Id.* (citing, ironically, the core of the Chicago school: Stigler, Friedman, and Becker). The court also specifically mentions that chicken farmers exist in an "oligopsonistic" market. *Id.* at 844 (quoting Charles Gordon Brown, *U.S. v. Broiler Marketing Association: Will the Chicken Lickin' Stand?*, 56 N.C. L. REV. 29, 44 (1978)).

291. Agricultural Fair Practices Act (AFPA) of 1967, 7 U.S.C. §§ 2301-2306 (1994); *see also* Donald A. Frederick, *Agricultural Bargaining Law: Policy in Flux*, 43 ARK. L. REV. 679, 689 (1990) (noting that the legislation was "viewed as an important sanction of agricultural bargaining" and was a "congressional reaffirmation of the value of cooperative bargaining and marketing by agricultural producers").

292. 7 U.S.C. § 2303 (forbidding corporations from coercing, discriminating, or intimidating

processing corporations discriminated against cooperative bargaining associations by refusing to conduct business with them.[293] Courts have interpreted the "overriding purpose" of the resulting legislation to be the protection of farmers' rights to cooperatively organize.[294] Throughout the 1970s, Congress considered additional legislation to improve the bargaining power of farmers relative to that of the corporate food processing sector.[295] The AFPA's recognition of the disorganized nature of farmer marketing[296] and the potential for abusive practices on the part of agricultural processors adds further evidence of heightened Congressional concern with market power among buyers.

### E. BARGAINING POWER THROUGH VERTICAL EXCLUSION: CORPORATE FARMING STATUTES

If farmers were to become highly organized and exert market power over buyers, economic theory indicates that buyers would begin to integrate backward into farming.[297] Such moves are severely limited by various corporate farming statutes, however, indicating a policy in favor of building farmer bargaining power. Most of the statutes are state-based, but no federal legislation limits their existence.[298] To the contrary, a federal statute outlawing "corporate farming" was widely debated in the 1970s.[299] In the fall of 1998, South Dakota adopted a formal constitutional amendment forbidding the corporate ownership of farm land.[300] Fears about corporate control over agricultural and the

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members of farmer bargaining groups).

293. RANDALL TORGERSON, PRODUCER POWER AT THE BARGAINING TABLE: A CASE STUDY OF THE LEGISLATIVE LIFE OF S. 109, at 3-17 (1970).

294. Butz v. Lawson Milk Co., 386 F. Supp. 227, 235 (N.D. Ohio 1974). "[T]he overriding purpose of Congress in enacting the Agricultural and Fair Practices Act of 1967 was to protect the individual producer of milk in his right to band together with other producers or, in effect, to unionize." *Id.* *But see generally* Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg & Bargaining Bd., 467 U.S. 461 (1984) (using AFPA to preempt stronger state bargaining law which required producers to sell their products on association terms).

295. National Broiler Mktg Ass'n v. United States, 436 U.S. 816, 837 (1978) (Brennan, J., concurring) (noting the "persuasive evidence that Congress' concern for protecting contract growers vis-à-vis processors and handlers has not abated"). *See generally* Frederick, *supra* note 287, at 691-93; Oliver & Snyder, *Antitrust, Bargaining, and Cooperatives: ABC's of the National Agricultural Marketing and Bargaining Act of 1971*, 9 HARV. J. ON LEGIS. 498 (1972).

296. 7 U.S.C. § 2301.

297. Robert W. Pratt, *The "Sophisticated Buyer" Defense in Merger Litigation Gains Momentum*, 6 ANTITRUST 9, 12 (1992) (listing the ability to vertically integrate as an indicator of buyer power and sophistication).

298. Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 402 (1992) (noting the existence of corporate farming restrictions in Iowa, Kansas, Minnesota, Missouri, North Dakota, South Dakota, Wisconsin, Nebraska and Oklahoma).

299. *See generally* Senator James Abourezk, *Agriculture, Antitrust and Agribusiness: A Proposal for Federal Action*, 20 S.D. L. REV. 499 (1975) (outlining legislation which would prohibit corporate ownership of farm land); Jon K. Lauck, *The Corporate Farming Debate in the Post-World War II Midwest*, 18 GREAT PLAINS Q. 139, 148-49 (1998) (explaining the nature of the legislative debate).

300. S.D. CONST. art. XVII, § 21. "No corporation or syndicate may acquire, or otherwise obtain

"great inequality in bargaining power and information between the parties" have also triggered statutes governing production contracts between farmers and buyers.[301] Such statutes reinforce the high priority policymakers have placed on protecting the market position of farmers. The statutes also reinforce the importance policymakers place on non-economic considerations in antitrust.[302]

## III. REFORMING ANTITRUST

### A. THEORY OF AGRARIAN ANTITRUST

Antitrust cases involving agricultural markets require a unique set of considerations. Unlike other industries that may not have existed at the time of the passage of the Sherman Act, agriculture maintains a special status as an industry that heavily influenced passage of the original antitrust legislation. The Congressional response to agrarian concerns indicates that farmers were specifically considered as a group that suffered or could suffer antitrust injuries. Such a status partially explains the continued clamor in agricultural circles for antitrust action to address the economic woes of the farmer.

Antitrust law, particularly in recent decades, has failed to consider its agrarian grounding. The incorporation of Chicago economic theories into antitrust analysis has failed to take structure as a serious factor in decisionmaking. As a result, the non-economic considerations Congress advanced, such as decentralization, have been spurned, contributing to a persistence of concentration in many sectors of the economy. The monopsonistic relationship between some sellers and buyers, a structural consideration of particular import to farmers, has therefore not been widely recognized by the courts.

In the future, courts should weigh the agrarian origins of the antitrust laws and the importance of structural factors when deciding agrarian antitrust cases. In so doing, courts can elaborate on recent developments in antitrust law, mostly outside of the agricultural context, which question the usefulness of Chicago analysis. By applying the information analysis of *Kodak*, courts can take into account the power

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an interest whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming." *Id. See also generally* Dirk Johnson, *Growth of Factory-Like Hog Farms Divides Rural Areas of the Midwest*, N.Y. TIMES, June 24, 1998, at A12 (detailing growing concerns about concentrated hog production in South Dakota and efforts to limit its growth through referendum).

301. Neil Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051, 1054 (1995); Edward P. Lord, *Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts*, 33 WAKE FOREST L. REV. 1125, 1155 (1998) (advocating stronger legislation to "increase [farmers'] bargaining power").

302. Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-corporate Farming Statutes*, 59 UMKC L. REV. 679, 687-90 (1991) (emphasizing social considerations).

differential between farmers who lack information about market conditions and large processing firms who have more information than any other entity in the market.

The possession of information is also a component of "sophistication" analysis, which does not naively assume an equal footing for market actors, rather recognizing that mom and pop often exist within markets alongside a multi-billion dollar multinational firm. Such a firm possesses bargaining power over those who sell to it, explaining why some courts allow the merger of large sellers when a "power-buyer" is present in an adjacent market. It also explains why a few courts have considered the existence of monopsony power. The emergence of "post-Chicago" antitrust analysis allows for greater consideration of the particulars in antitrust cases, lending further legitimacy to the analysis of factors such as information availability and firm sophistication. Finally, courts can overcome a major oversight in past antitrust cases involving farmers: the failure to consider the range of agricultural statutes designed to supplement the antitrust laws and bolster the relative bargaining power of the individual farmer, historically disorganized and susceptible to monopsony power. In a variation on "Carolene group" protection, the antitrust statutes should be interpreted where possible to strengthen farmer bargaining power.[303]

### B. THE POVERTY OF MERGER ANALYSIS IN THE AGRICULTURAL CONTEXT

While an agrarian theory of antitrust has applications in all areas of antitrust law, it has particular relevance in merger analysis. The Sherman Act was motivated by a concern about mergers and their impact on levels of economic concentration.[304] Twenty-four years later, similar concerns motivated passage of the Clayton Act,[305] which embraced merger regulation as a method of stopping economic concentration in its "incipiency

303. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032 (1989) (noting a "special rule of statutory interpretation [which] is not stated as such in any of the [Supreme] Court's decisions but can be discerned from their overall pattern: Statutes affecting certain discrete and insular minorities 'Carolene groups'—shall be interpreted, where possible, for the benefit of those minorities") (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

304. PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 901, at 2 (1980). "[I]t was a series of mergers, virtually monopolizing several leading industries, that was primarily responsible for the passage of the Sherman Act." *Id.*; *see also* GRANT ET AL, *supra* note 10, at 16. "It was the rampant merger activities of the railroads and, later, the oil companies that prompted the original antitrust legislation at the turn of the century." GRANT ET AL., *supra* note 10, at 16.

305. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 124 (1986) (Stevens, J., dissenting) (concluding that the Clayton Act was passed "because Congress concluded that the Sherman Act's prohibition against mergers was not adequate").

before consummation."[306] Still concerned with concentration levels and the frequency of mergers that compounded concentration, Congress passed the Celler-Kefauver Antitrust Amendments in 1950, prohibiting corporate mergers the effect of which "*may* be to substantially lessen competition."[307] Congress again intended the merger provisions to serve as a "prophylactic measure"[308] which could "cope with monopolistic tendencies in their incipiency,"[309] choosing to focus on "probable harm [to competition] rather than actual harm."[310] The Congressional mood is even reflected in the title of the law, a self-proclaimed "Anti-merger Act."

In the 1960s, courts met Congressional hopes for a restrictive merger policy. In *United States v. Philadelphia National Bank*,[311] for example, a merger was found to be presumptively illegal if it caused a "significant increase in [market] concentration."[312] In *United States v. Von's Grocery*,[313] the Supreme Court disallowed a merger between firms that would have had a mere 7.5 percent post-merger market share.[314] In *Von's*, the Court sought to "prevent economic concentration in the American economy by keeping a large number of small competitors in business."[315] In subsequent years, after the adoption of the merger guidelines by the Department of Justice, merger cases continued to focus on structural considerations such as market share.[316]

Unlike the restrictive merger policies of an earlier generation of cases, however, the current inquiry does not end with the consideration of structural factors. Enforcement agencies now extend their analysis beyond concentration levels, weighing a "variety of economic factors" which could determine the anticompetitive effect of a merger.[317] Such

306. S. REP NO. 698, at 1 (1914).

307. *See* Celler-Kefauver Antitrust Amendment of 1950, 15 U.S.C. § 18 (1994 & Supp. 1997) (emphasis added).

308. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).

309. S. REP. No. 1775, 81st Cong., 2d Sess., at 4-5 (1950).

310. *Cargill*, 479 U.S. at 125 (Stevens, J., dissenting); *see also* Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 976 (1987) (noting that "[b]ecause we are able to do so little to prevent the anticompetitive operation of existing oligopolies, the policy of section 7 is prophylactic and designed to prevent oligopoly from arising or surviving").

311. 374 U.S. 321 (1963).

312. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

313. 384 U.S. 270 (1966).

314. *See generally* United States v. Von's Grocery Co., 384 U.S. 270 (1966).

315. *Id.* at 275. *See also generally* United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (blocking the merger of the 10th- and 18th-largest brewers).

316. Andrew Chin, *Antitrust By Chance: A Unified Theory of Horizontal Merger Doctrine*, 106 YALE L.J. 1165, 1170-72 (1997). The first merger guidelines were adopted in 1968. *Id.*

317. *Id.* at 1171. The merger guidelines of the Federal Trade Commission and the Department of Justice declare that "market share and concentration data provide only a starting point," adding the assessment of "other market factors that pertain to competitive effects, as well as entry, efficiencies and failure." Department of Justice and Federal Trade Commission Horizontal Merger Guidelines §

factors include the potential efficiencies generated by the newly-combined firm[318] and the ease of entry into the merged firm's market.[319] Enforcement agencies do not adopt unique considerations for agribusiness mergers.[320]

Despite greater sophistication in recent years, the economic analysis of mergers has never overcome the shortcomings outlined by Derek Bok in the earliest stages of commentary on section 7 of the Clayton Act. In 1960, Bok maintained that the "the problem of indeterminateness," discussed earlier, would undermine any attempts to assess the probable competitive consequences of a merger.[321] The commentary of two of the foremost scholars in the field of antitrust law indicates the subjectivity, randomness, and pure chance of economic analysis in the context of conglomerate mergers, with no apparent irony:

> Th[e indeterminacy] problem could be moderated by the use of presumptions. One could, for example, adopt the presumptions earlier set forth. Yet one might remain skeptical; presumptions will not simplify the matter if rebutting economic evidence is allowed. On the other hand, conclusive presumptions could cover far too much. That result might not be cause for great concern if such mergers never benefitted the economy, but they sometimes do.[322]

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2.0, *reprinted in* COLLABORATING AMONG COMPETITORS: ANTITRUST POLICY AND ECONOMICS 1004 app. (1991) [hereinafter Merger Guidelines].

318. Merger Guidelines § 4 *supra* note 318; *see also* Robert M. Vernail, *One Step Forward, One Step Back: How the Pass-On Requirement for Efficiencies in FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section*, 7 GEO. MASON L. REV. 133, 133-34 (1998). "Early enforcement agency Guidelines treated efficiency claims with great skepticism, but the recently revised Efficiencies Section in the current Horizontal Merger Guidelines clearly acknowledges the potential benefits of efficiencies." Vernail, *supra*, at 133-34.

319. Merger Guidelines § 3 *supra* note 318; *see also* Malcolm B. Coate, *Evaluating Mergers in Food Industries Under Procedures for Litigation or Regulation*, *in* STRATEGY AND POLICY IN THE FOOD SYSTEM: EMERGING ISSUES, PROCEEDINGS OF NE-165 CONFERENCE, JUNE 1996, at 111 (Food Marketing Policy Center, Department of Agricultural and Resource Economics, University of Connecticut & Department of Agricultural and Resource Economics, University of Massachusetts, Amherst), *available at* <http://agecon.lib. umn.edu/ne165/ne165968.pdf> (last visited Aug. 16, 1999) (explaining how food company mergers tend to focus on market definition, market entry, and efficiencies, making no allowance for supplier considerations).

320. When analyzing meatpacking mergers, an attorney for the Antitrust Division recounted the standard list of factors that would be considered, making no allowance for supplier considerations. Willie L. Hudgins, Merger Analysis in the Beef Packing Industry, Speech to the National Meat Association (February 1996) (on file with author).

321. Bok, *supra* note 7, at 228 (explaining that "economists, as well as lawyers, lack the knowledge to make predictions concerning the probable consequences of many of the mergers"); Vernail, *supra* note 318, at 141 (noting that the 1968 merger guidelines recognized "there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger").

322. Phillip Areeda & Donald Turner, *Conglomerate Mergers: Extended Interdependence and Effects on Interindustry Competition as Grounds for Condemnation*, 127 U. PA. L. REV. 1082, 1103 (1979).

More recent commentators have recognized this difficulty with particular reference to the efficiencies defense in merger cases.[323] Despite alleged advancements in economic theory[324] and the ubiquity of "efficiency" as a justification for business activities,[325] it is still extremely difficult to predict the existence of efficiencies in a merged firm. As FTC chairman Robert Pitofsky has noted, the efficiencies defense is "easy to assert and sometimes difficult to disprove."[326] One court has termed efficiency claims by defendants in merger cases "speculative self-serving assertions."[327] Doubts about the competitive consequences of mergers and efficiency claims and the problems of proof both present have even crept into the analysis of Chicago school stalwarts such as George Stigler, Richard Posner and Robert Bork.[328] The most reliable source of doubt about efficiency claims is the poor economic record of mergers.[329] The largest merger of the 1980s, for example, was recently

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323. Fisher & Lande, *supra* note 48, at 1596 (1983) (noting that "efficiencies still are enormously difficult to predict on a case-by-case basis and . . . balancing problems remain at least as difficult as the courts had anticipated earlier"). The merger guidelines adopted section 4 "Efficiencies" in 1997.

324. Fisher & Lande, *supra* note 48, at 1583, 1596 (explaining the efficiency argument as emerging from claims about better information/theory about their effect, especially the work of Oliver Williamson).

325. Louis B. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U. L. REV. 4, 17 (1960). Schwartz criticizes

> [the] hypnotized respect for the efficiency of corporate giants as the modern analogue of the deference paid in other days to the 'divine right' of kings, or the magical powers of wizards. In all ages humanity has attributed to the major temporal powers of its day a mythical sanction which, so-to-speak, legitimates it.

*Id.* The new term is "synergy."

326. Joseph Kattan, *Efficiencies and Merger Analysis*, 62 ANTITRUST L. J. 513, 514 (1994).

327. FTC v. Butterworth Health Corp., 946 F. Supp. 1285, 1301 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997).

328. Bok, *supra* note 7, at 258 n.133 (noting that even Stigler wanted to draw a line against mergers which create 20 percent market share or more); *see also* RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976) (concluding efficiencies measurement to be "an intractable subject for litigation"); Stephen Calkins, Panel Discussion, *Economic Concepts and Antitrust Analysis: A Critical Reexamination*, 56 ANTITRUST L.J. 91, 95 (1987) (explaining that "several scholars are starting to question the basic assumption that mergers generally enhance efficiency—the assumption that provides much of the popular and intellectual support for a liberal merger policy"); Kattan, *supra* note 326, at 520 (explaining that the evidentiary problems with efficiency analysis "led then-Professors Posner and Bork, the two most influential exponents of the Chicago School's efficiency-based antitrust analysis, to argue against recognizing any kind of efficiencies defense").

329. SULLIVAN & HOVENKAMP, *supra* note 82, at 824 (noting growing evidence that "firms who have experienced recent mergers actually perform more poorly than other firms in the same market"); Brodley, *supra* note 108, at 576 (noting a "recent review of economic studies [which] concluded that projections of merger efficiencies were 'surprisingly and consistently inadequate' and that, despite near-unanimous predictions of future profit, fully 60-80% of mergers were unsuccessful ex post"); Claudia H. Deutsch, *The Deal is Done. The Work Begins*, N.Y.TIMES, Apr. 11, 1999, at section 3, page 1 (explaining that "researchers routinely say that anywhere from one-half to three-quarters of mergers never provide the low costs, added market share or other benefits that management promised—or that they take much longer than expected to do so"); Peter Passell, *Do Mergers Really Yield Big Benefits?*, N.Y.TIMES, May 14, 1998, at D5 (reporting that the "most comprehensive study of conglomerate mergers . . . found that the profitability of acquired companies on average

reversed, earning a high rank in "the century's pantheon of financial ignominy."[330]

Debating the economic effects of mergers also crowds out the consideration of other policies undergirding the anti-merger provisions of the antitrust laws. In passing the Celler-Kefauver Amendment in 1950, Congressional action was premised on concerns about economic concentration and the tendency of mergers to further increase concentration.[331] Congress was concerned about the effects of concentration on personal freedoms, the disappearance of small businesses and the impact of concentrated economic power on democratic institutions,[332] and "efficiency was of small concern."[333] Thus, failing to consider non-economic concerns undermines the broader purposes and concerns of the statute.[334] The prominence of these considerations led courts in

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declined"); Peter Passell, *When Mega-Mergers Are Mega-Busts*, N.Y.TIMES, May 17, 1998, at 18 (Week in Review Section) (reporting that "most of the hard evidence from past mergers, along with the anecdotal evidence from the current wave, suggests that mergers do as much harm as good"). Passell notes that mergers "are too often the progeny of executive megalomania and deal makers's dreams of year-end bonuses." Passell, *supra* at 18; *see also* Francis Declerck, *Did LBOs Create Value in US Food Industries in the 1980s?*, 11 AGRIBUSINESS 523, 536 (1995) (concluding that leveraged buy-outs in the food industry during the 1980s produced companies that "could not service their debt and have tried to reduce their debt either by divesting, restructuring their debt, or returning to public ownership").

330. Bryan Burrough, *RJR Nabisco, an Epilogue*, N.Y. TIMES, Mar. 12, 1999, at A23 (explaining the spinoff of R.J. Reynolds tobacco from Nabisco); *see also A Disastrous Merger*, Editorial, N.Y.TIMES, Feb. 12, 1999, at A1 (explaining the failure of the BMW-Rover merger: "The lesson of BMW should remind them that mergers often do not work out as planned, and that savings are easier to anticipate than to realize"); Albert A. Foer, *Making Antitrust Tougher; Playing Monopoly*, NEW REPUBLIC, Apr. 12, 1999, at 16 (noting that in 1995, "when the Union Pacific and Southern Pacific Railroads wanted to merge, they projected huge efficiency gains. Within a year after the merger, however, the new railroad was plagued with logistical problems").

331. Bok, *supra* note 7, at 234-35.

332. Bok, *supra* note 7, at 236. The following is an explanation of the "sociological arguments" underlying the legislation:

> The ill effects of big business on initiative and individuality were forcefully described. There were arguments that concentration narrowed the opportunity to have one's own business, depressed local initiative and civic responsibility, and diminished the scope of entrepreneurship by forcing small businesses to become ever more subject to the dictates of large concerns.

Bok, *supra* note 7, at 236 (explaining the concern about democratic institutions).

333. Fisher & Lande, *supra* note 48, at 1592; *see also* Bok, *supra* note 7, at 318.

> There is little basis for concluding that the achievement of lower costs as such should give rise to favored treatment under section 7. The possibility of lower costs was brushed aside in the legislative deliberations and there is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations.

Bok, *supra* note 7, at 318.

334. Bok, *supra* note 7, at 247.

> Nevertheless, it seems abundantly clear that 'competition' meant far more to Congress than prices, costs, and product innovations. Hence, where economic doctrine is to be applied, it must be a doctrine which takes account of the broader range of interests which Congress had in mind if the statute is to be fairly interpreted.
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> ....
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> Section 7 was amended for the purpose of achieving and safeguarding the values expressed in the legislative history, and any rule which resolves uncertainties in a

the 1960s and 1970s to condemn mergers, despite possible efficiencies.[335] Judicial deference to Congressional concerns about mergers contributing to economic concentration was wise, especially in light of the inability to confirm or deny the presence of economic efficiencies.

A merger analysis that devolves into irresolvable economic theorizing and fails to weigh structural considerations undermines agrarian antitrust. Failing to consider concentration levels per se diminishes the importance of the overall bargaining context. The calculation of economic outcomes, which often involves solely a debate over the potential for price increases, and the consideration of efficiencies also indicates a decidedly pro-consumer bias in merger analysis, offering little or no opportunity to consider the negative impact of a merger on suppliers. A possible component of an efficiencies defense, for example, is that a merged firm will be able to maintain "bargaining advantages" over other economic actors.[336] Such an argument implicitly recognizes that those who sell to a large firm resulting from a merger will often be at a disadvantage, but it fails to consider the impact on suppliers as an autonomous factor in merger analysis.

A stricter merger policy in the past could have made a critical difference to the industrial structure of farm product buyers.[337] In the early part of the century, the food industry was defined by numerous small firms that started to grow larger and more powerful in the 1920s, partly through merger.[338] In the postwar period, concentration concerns

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> manner contrary to those desires threatens to give to section 7 a significance and an impact on the economy which differs from what was envisaged by the Congress.

Bok, *supra* note 7, at 305.

335. FTC v. Proctor & Gamble, 386 U.S. 568, 580 (1967) (finding that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but struck the balance in favor of protecting competition"); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (stating that "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization"); *see also* Fisher & Lande, *supra* note 48, at 1586 (noting that "[t]he Court therefore chose to resolve the [market power/efficiency] tradeoff problem by following the congressional directive to err on the side of strict enforcement of the antimerger laws"); Vernail, *supra* note 318, at 139 (explaining that the Supreme Court first considered the efficiencies issue in *Brown Shoe*).

336. Brodley, *supra* note 108, at 581.

337. Bruce W. Marion, *Government Regulation of Competition in the Food Industry*, 61 AM. J. AGRIC. ECON. 178, 180 (1979) (explaining that "[t]here is rather convincing evidence that the Celler-Kefauver Amendment has affected and can still significantly affect the structure of markets if it is vigorously enforced"). Marion also notes that most antitrust activity in the chain from farmer to consumer takes place in manufacturing and food retailing, with "little interest until recently in producer-first handler markets." *Id.* at 181; *see also* Willard F. Mueller, *Market Power and Its Control in the Food System*, 65 AM. J. AGRIC. ECON. 855, 858 (1983) (finding that "[g]iven the modern corporation's insatiable appetite for growth by merger, the absence of strict prohibitions on horizontal mergers would doubtless have led to much greater concentration in most food retailing and manufacturing markets").

338. A.C. Hoffman, *The Organization and Performance of the U.S. Food System in* THE ORGANIZATION AND PERFORMANCE OF THE U.S. FOOD SYSTEM, at xix-xxv (Bruce Marion ed., Lexington 1986).

became more pronounced as the number of food manufacturers dropped by over fifty percent from 1947 to 1972.[339] Then, in the mid-1960s, "an avalanche of mergers broke loose in the U.S. economy" referred to as "merger mania,"[340] and from 1971-1975 food-tobacco manufacturing firms made twenty-five percent of all large manufacturing acquisitions.[341] A.C. Hoffman, an early pioneer in the field of competition in the food industries, claimed that "[n]ever before in the history of capitalism [had] such great aggregations of economic power been created."[342] The abandonment of Warren-era merger policies by enforcement agencies and the courts, which "virtually [stopped] all but very small mergers by the leading ten food chains,"[343] contributed to the "record volume of food manufacturing acquisitions" in the 1980s.[344] One study concluded that two-thirds of the increase in

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339. Marion, *supra* note 337, at 181.

340. Russell C. Parker, *Antitrust Issues in the Food Industries*, 58 AM. J. AGRIC. ECON. 854, 856 (1976).

> The increase in aggregate concentration with the largest food manufacturers is strongly related to mergers. When food company mergers were examined in 1966, it was found that were it not for mergers the combined share of assets of the fifty largest food manufacturers would have declined between 1950 and 1965 . . . Since 1965 . . . mergers have eliminated a significant percentage of the remaining number of independent medium-sized and larger food manufacturers.

*Id.* Russell also notes that "FTC analysis [in 1966] of detailed product data for the twenty-five largest food manufacturers indicated that nearly 90 percent of the product areas entered by the companies were directly traceable to merger." *Id.* at 856. Russell concluded, "Merger enforcement policy probably has more impact on industry structure and performance than any other single area of enforcement." *Id.* at 858. Part of the problem with using merger policy to slow the growth of food companies is that so many food industry mergers were product extension mergers instead of horizontal mergers. *Id.* at 856. By the mid-1970s, however, the "principal conglomerate merger theories of deep pocket and cross-subsidization, reciprocity, and entrenchment of leading firms [had] fallen on hard times with respect to enforcement activity." *Id.* at 859.

341. Marion, *supra* note 337, at 181. During this period, profitability in food manufacturing was 13.2% of stockholder's equity, 11% higher than the rest of manufacturing. Marion, *supra* note 338, at 181-82. Marion worries about the market power of the food firms which emerged in the 1970s, noting that their "market power—which is more heavily based upon product differentiation and conglomerate-derived economic power than in previous periods—appears much less vulnerable to erosion." Marion, *supra* note 337, at 182.

342. Hoffman, *supra* note 338, at xix-xxv. Marion, *supra* note 338, at 181.

343. Willard Mueller & Thomas Paterson, *Policies to Promote Competition*, *in* THE ORGANIZATION AND PERFORMANCE OF THE U.S. FOOD SYSTEM 387 (Bruce Marion ed., Lexington 1986); *see also* Marion, *supra* note 337, at 180.

344. Marion, *supra* note 337, at 180 (explaining that "[s]ince the mid-70s, the antitrust agencies have relaxed their posture on food industry mergers. A recent surge in mergers by large grocery chains appears to be a direct response"); *see also* Sandra O. Archibald et al., *Trends in the U.S. Food-Processing Industry: Implications for Modeling and Policy Analysis in a Dynamic Interactive Environment*, 67 AM. J. AGRIC. ECON., 1149, 1153 (1985) (stating, "In recent years, the dominant form of mergers have been conglomerate and concentric facilitated in part by less stringent enforcement of antitrust laws"); *The New Food Giants; Merger Mania Is Shaking the Once-Cautious Industry*, BUSINESSWEEK, Sept. 24, 1984, at 133 (explaining how food processing companies in the 1980s "took advantage of the antitrust environment, more tolerant of big deals than it has been in decades, to increase their size and marketing clout"); Jon Lauck, *Competition in the Grain Belt Meatpacking Sector after World War II*, 57 ANNALS OF IOWA 135, 147-8, 151-52, 158 (1998) (detailing the raft of mergers which contributed to concentration in the meatpacking sector and noting that the "slowing of

concentration levels during the 1980s could be explained by mergers and acquisitions, many of which violated the Department of Justice's own merger guidelines.[345]

Throughout this period, very little attention was paid to farmer organization in merger analysis. In *Cargill v. Monfort*, a major 1980s Supreme Court case involving the merger of the second- and third-largest beef packers, the issue of supplier interests was not even considered.[346] The controversy stemmed from a lawsuit brought by Monfort against Cargill, the second-largest beef packer, which was attempting to acquire Spencer Beef, then the third-largest beef packer.[347] Monfort argued that the resulting firm would be able to price in a manner that economically undermined Monfort.[348] The case thus focused on the legitimacy of such an antitrust "injury."[349] The District Court and the Court of Appeals accepted Monfort's argument that Cargill would undercut Monfort's prices to retailers and outbid Monfort for cattle from suppliers, causing a "price-cost squeeze" which would injure Monfort.[350] The Supreme Court, however, cited case law requiring that the injury suffered by Monfort as a result of the merger actually derive from a violation of the antitrust laws, not simply the merger itself, and reversed the lower court holdings.[351] Such a holding is hardly

antitrust activities in the 1980s, together with the conglomeration of food processing, remains a concern for farmers given potential abuses of market power and the often disorganized nature of farmer marketing"). *See generally* William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939-1980*, 64 REV. ECON. AND STATS., 613, 613 (1982) (concluding that "[a]ntitrust policies emerge as the strongest single cause of rising competition" in his study of market structure from 1958 to 1980).

345. Bruce Marion & Donghwan Kim, *Concentration Change in Selected Food Manufacturing Industries: The Influence of Mergers vs. Internal Growth*, 7 AGRIBUSINESS 415, 427, 429 (1991); *see also* Adesoji Adelaja et al., *Predicting Mergers and Acquisitions in the Food Industry*, 15 AGRIBUSINESS 1, 1-3 (1999) (noting the continuation of significant merger activity in the food industry). Consumers are also affected by greater concentration. A recent study concluded that welfare losses due to oligopoly power totaled $15 billion in 1987. Sanjib Bhuyan & Rigoberto A. Lopez, *Oligopoly Power and Allocative Efficiency in US Food and Tobacco Industries*, 49 J. AGRIC. ECON. 434, 441 (1998).

346. *See generally* Cargill v. Monfort, 479 U.S. 104 (1986).

347. *Id.* at 106-07.

348. *Id.* at 107. Monfort advanced two theories of injury based on price. First, Cargill would lower prices to a point close to cost which would force Monfort to follow suit, causing Monfort to lose profits. Second, Cargill would price below cost by drawing on its greater resources until Monfort was driven from the market. *Id.* at 114, 117.

349. *Id.* at 108.

350. *Id.* Monfort alleged that the financial power of Cargill would allow it to carry out the plan long enough to drive smaller competitors from the market. *Id.* at 114.

351. *Id.* at 109 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)). Justice Stevens made a strong case for distinguishing between a section four claim for treble damages claim, which should require Brunswick-type injury, and a section seven claim for injunctive relief, which should only require a "threatened harm." *Id.* at 128 (Stevens, J., dissenting). Monfort's complaint was based on section 16 of the Clayton Act, which only required the showing of a "threatened loss or damage by a violation of the antitrust laws." Clayton Act, 15 U.S.C. § 26 (1994 & Supp. 1997). The majority did not reach the section 7 controversy since Monfort could not prove the required injury under section 16. *Cargill*, 479 U.S. at 122. The majority conflated the injury requirements under sections 4 and 16, holding that they both must involve an "injury of the type the antitrust laws were designed to prevent." *Id.* at 111. The majority holding relating to injury may also

remarkable. The remarkable aspect of the case is that suppliers of cattle to the newly-merged firm did not protest the merger. More recently, after a decade of agribusiness consolidation and farmer concerns about the concentration issue, an antitrust theory invoking agrarian concerns was not employed by farmers or any other parties involved in a merger of major cereal companies.[352] Suppliers should start protesting.

One possible approach would be to argue for a return to the *Philadelphia National Bank* (*PNB*) standard for mergers in the agribusiness sector. In *PNB*, the Supreme Court stopped the merger of the second- and third-largest banks in Philadelphia, holding that the combination of large firms in a market created an inferential violation of section 7.[353] Such a presumption, the court held, was particularly important in an economic sector where concentration was increasing.[354] A similar presumption in the case of agribusiness mergers would address the historic and contemporary concerns of farmers with the concentrated power of their buyers, a consideration particularly important after the growth of concentration in the last decade. A presumption would begin to compensate for overlooking the impact on suppliers in recent cases such as *Cargill v. Monfort*. Moreover, the presumption would tip the balance in favor of farmers in merger cases which are prone to inconclusive determinations about economic effects, more faithfully addressing Congressional concerns about economic concentration and the bargaining power of farmers.[355]

### C. APPLYING THE THEORY: THE CASE OF THE CARGILL-CONTINENTAL MERGER

In the midst of the concerns over concentration in agriculture, Cargill, Inc., the largest privately-owned company in the United States,

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frustrate an agrarian antitrust.

352. *See generally* State v. Kraft General Foods, 926 F. Supp. 321 (S.D.N.Y. 1995).

353. United States v. Philadelphia Nat'l Bank (PNB), 374 U.S. 321, 365 (1963). The court also noted the difficulty of reaching a decision given the "complex and elusive" nature of the economic data. *Id.* at 362.

354. *Id.* at 367.

> A fundamental purpose of amending [section] 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area.

*Id.* The court noted that the number of commercial banks in Philadelphia had declined from 108 in 1947 to 42 in 1963 and that the concentration level of the largest seven banks had grown from 6% to 9% during the same time period. *Id.* at 331.

355. *See generally* AREEDA & TURNER, *supra* note 304, at 977 (arguing that when confronting the oligopoly question in merger cases, "enforcement authorities will and should ultimately settle toward the more prohibitive side of the academic dispute, for the statute's prophylactic purpose means, I believe, that we should be cautious in accepting the view that even significant concentration within a market is not harmful").

announced plans to acquire the grain trading operations of Continental Grain Company, described as its "chief rival."[356] The purchase, which is estimated to cost as much as $1 billion, would give Cargill an additional six export terminals, twenty-seven river terminals and thirty-two country elevators, increasing its total to three hundred grain facilities in the United States.[357] As a result, Cargill would handle forty-two percent of corn exports, one-third of soybean exports and twenty percent of wheat exports.[358] The deal also increases Cargill's total storage capacity to 566 million bushels, ahead of Archer-Daniels-Midland's 464 million bushels.[359]

Many farmers and farm advocates have voiced concerns over the merger. Secretary of Agriculture Dan Glickman wrote to the Department of Justice and indicated his "significant antitrust concerns" with the deal.[360] Senator Charles Grassley (R-IA) has noted that "many farmers fear that further concentration in agribusiness will significantly diminish competition from companies that buy, store and trade their commodities."[361] Attorney General Mark Barnett of South Dakota and Attorney General Mike Hatch of Minnesota both opposed the merger. General Hatch argued that "antitrust law has not fulfilled its promise to prevent excessive market concentration."[362]

Cargill responded to the expressed concerns by arguing that the merger is beneficial. Cargill's President of North American grain operations argued that the merger "will allow us to better serve producers in terms of how we buy grain, how we load and transport grain and how we sell grain."[363] Another spokesperson argued that the merger will "allow us to take costs out of the system and provide better service at lower costs."[364] Focusing on consumer effects, the chairman of Cargill argues that the merger "will extend farmers' reach into new markets and

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356. George Anthan, *Cargill Merger: Will It Reduce Competition or Help Producers?* DES MOINES REGISTER, Nov. 15, 1998, at 1; Cheryl Strauss Einhorn, *Double Trouble? Cargill-Conti Grain Deal Worries Farmers*, BARRON'S, Nov. 16, 1998, at 14. "Until now, Continental was Cargill's fiercest competitor. By having one company owning both sets of storage facilities, farmers may receive less for their grain." Anthan, *supra*, at 1.

357. Anthan, *supra*, at 1. Another estimate values the deal at $300 million. Janelle Carter, *Senators Worry About Cargill Merger*, AP ONLINE, Nov. 14, 1998, *available in* 1998 WL 22418535.

358. Philip Brasher, *Cargill Merger Worries Ag Secretary*, APONLINE, Dec. 8, 1998, *available in* 1998 WL 23509170.

359. *Cargill Grain Deal Concerns Farmers Union; It Fears Merger Will Hurt Prices*, STAR TRIB. (Minneapolis, Minn.), Nov. 13, 1998, at D1.

360. Carter, *supra* note 357.

361. Carter, *supra* note 357.

362. Letter from Mike Hatch, Minnesota Attorney General, to Joel Klein (May 7, 1999) (on file with author); *see also* Letter from Mark Barnett, South Dakota Attorney General, to Joel Klein (May 11, 1999) (on file with author).

363. Anthan, *supra* note 356, at 1.

364. Carter, *supra* note 357.

improve service to a world of increasingly demanding consumers."[365] The chief executive of Continental espoused the benefits that the two companies combined assets would have for farmers and emphasized that "[w]hat's important for farmers is to have the most efficiency."[366] The invocation of consumer impacts and efficiency considerations shows that officials for Cargill and Continental have anticipated the inquiries that are common in current merger policy.

In July of 1999, the DOJ set forth its "Proposed Final Judgment" in the Cargill-Continental merger case.[367] The DOJ took note of certain "captive draw areas" where farmers were forced to sell almost exclusively to Cargill or Continental.[368] Corn and soybean farmers in North Dakota, South Dakota, Minnesota, Nebraska, and Iowa, for example, must rely on competition in the Pacific Northwest between Cargill's port facility in Seattle and Continental's port facility in Tacoma.[369] DOJ quite obviously stopped Cargill's acquisition of Continental's facilities in areas such as the Pacific Northwest where the acquisition would leave only one major grain buyer.[370] In short, DOJ prevented duopoly from devolving into monopoly. While recognizing a monopsonistic consequence of the merger and preventing complete monopsonization of some grain buying markets, the DOJ applied a very simplified and generic merger analysis. It failed to recognize the great potential for cooperation and collusion in heavily concentrated markets. It failed to recognize the unique bargaining power disparity between disorganized farmers and large-scale agribusiness firms. And it failed to respect a series of statutes passed by Congress and state legislatures concerned about the concentration problem in agricultural markets. DOJ's passivity has triggered pressure from farm groups and farm-state legislators for a challenge to the merger by state attorneys general.[371]

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365. Margaret Taus, *Cargill is Purchasing Rival's Grain Operations; The Deal, Which Faces Regulatory Approval, Adds to Farmers' Worries*, FORT WORTH STAR-TELEGRAM, Nov. 11, 1998, at 1.

366. Allen R. Myerson, *Cargill Set to Buy Main Unit of Continental Grain, Its Chief Rival*, WALL STREET J., Nov. 11, 1998, at C.

367. United States v. Cargill, Incorporated and Continental Grain Company, Civil No. 99 1875, Filed July 8, 1999 <http://www.usdoj.gov/atr/cases/f2500/2553.htm>. In accord with the Antitrust Penalties and Procedures Act, the DOJ will take comments for sixty days after publication of the Proposed Final Judgment in the Federal Register, which would allow comments until October 12th, 1999. Judge Gladys Kessler of the United States District Court for the District of Columbia will then weigh certain factors to determine whether or not the judgment is in the "public interest." *See* United States v. Microsoft, 56 F.3d 1448 (D.C.Cir.1995).

368. Competitive Impact Statement, United States v. Cargill, Incorporated and Continental Grain Company, July 23, 1999, Case Number 1:99CV01875, at 4, < http://www.usdoj.gov/atr/cases/f2500/2584.htm>.

369. *Id.*

370. *Id.* at 6-7.

371. States have the power to challenge the merger after federal enforcement officials have arranged a consent decree. California v. American Stores Company, 495 U.S. 271 (1990) (allowing

If state attorneys general advance an agrarian antitrust theory when challenging the Cargill-Continental merger they could scuttle the deal. The concentration factor would weigh heavily against the merger, given that Cargill and Continental occupy the top two positions in the export market, Cargill with twenty percent and Continental with fifteen percent. Plaintiffs could appeal to the Congressional intent to stave off concentration by preventing the merger of large firms. Blocking concentration trends in their incipiency would also avoid the puzzle of oligopoly. If firm sophistication were a factor in the analysis, Cargill would occupy the highest end of the spectrum, given its sheer size and its involvement in many different economic sectors.[372] In terms of information, Cargill commands an international network of agents in an industry known for extreme secrecy.[373] Further, the merger would give Cargill control of a large percentage of the Chicago Board of Trade's 79-million-bushel storage capacity for wheat, corn and soybeans, giving it great influence over an important source of price information for farm goods.[374]

The Cargill-Continental merger presents the opportunity to seek a new judicial merger policy that applies to agribusinesses. Plaintiffs could seek a ruling that such a merger among major agricultural firms that buy farm products is presumptively illegal, appealing to older cases such as *Philadelphia National Bank*. Doing so would give structure its appropriate weight as a consideration in antitrust cases. Instead of accepting a school of economic analysis that tends to find most corporate activity competitive and efficient, a court could recognize the serious limits on economic knowledge and prediction. It could weigh more heavily developing theories of monopsony and sophistication as rationales for finding large agribusiness mergers presumptively illegal, more faithfully honoring Congressional intentions to err on the side of

California to challenge the merger of the largest and fourth largest grocery store chains after the Federal Trade Commission had given its approval); *see also* ORGANIZATION FOR COMPETITIVE MARKETS, RESOLUTION ADOPTED AT ANNUAL METTING (Omaha, Neb.), Aug. 21, 1999 (on file with author); Organization for Competitive Markets to Roger Fones, Dep't of Justice, Sept. 22, 1999, *available at* <http://competitivemarkets.com>. Some attorneys general have expressed concerns about the judicial approval of the consent decree. *See* Jeremiah W. Nixon to Roger Fones, Sept. 16, 1999 (on file with author); Don Stenberg to Roger Fones, Sept. 7, 1999 (on file with author).

372. WAYNE G. BROEHL, CARGILL: GOING GLOBAL (1998); Ricardo Sookdeo, *Inside America's Biggest Private Company*, FORTUNE, July 13, 1992, at 83-90 (describing the many operations of Cargill); *see also* Liz Brissett, *Still the One: CEO Micek Fights Battles Around World to Keep Cargill on Top*, CORP. REP., May 1999, at 32 (noting that at the end of fiscal year 1998 Cargill reported $51 billion in revenue, total assets of $25.8 billion, and employed 80,600 people in 60 countries).

373. *See generally* DAN MORGAN, THE MERCHANTS OF GRAIN (1979).

374. Einhorn, *supra* note 356, at 14.

> Cargill will now have a lot of information about the grain markets. Some say this may allow it to influence the spread between cash and futures prices on the Chicago Board of Trade because it will know how much grain will be delivered, or is currently stored, at its CBOT sites each month.

Einhorn, *supra* note 356, at 14.

decentralization in merger cases. Furthermore, such a judicial policy would recognize the persistent Congressional imperative of promoting a more balanced bargaining relationship between farmers and the buyers of their products. Judicial acceptance of such an argument is more likely given that concentration concerns have historically been expressed in merger law.[375] Merger policy thus provides the most accessible outlet for addressing concerns about concentration in agricultural markets and, following Congressional concerns, addresses the problem before it worsens.

## IV. CONCLUSION

Farmers actively sought antimonopoly legislation in the late nineteenth century and have continued to support its application to the present day. Due to the recent judicial embrace of certain economic theories, however, the antitrust laws have failed to meet their expectations. More recent developments in the interpretation of the antitrust laws offer the opportunity to satisfy farmer expectations more completely. Greater judicial recognition of the limits of economic theory and the existence of power imbalances within markets, especially in light of legislative policies designed to promote the bargaining power of farmers, presents the opportunity to establish an agrarian-specific antitrust analysis.

375. SULLIVAN & HOVENKAMP, *supra* note 82, at 738 (concluding the "principal antitrust device for dealing with industrial concentration has been merger policy under section 7 of the Clayton Act").