

SOMETHING OLD, SOMETHING NEW: RELYING ON THE TRADITIONAL AGRICULTURAL COOPERATIVE TO HELP FARMERS SOLVE THE POWER IMBALANCE IN MODERN MEATPACKER PRODUCTION CONTRACTS

I. INTRODUCTION

Years of consolidation in the meatpacking industry seemed to culminate on May 29, 2013 when Smithfield Foods and Shuanghui International announced a merger in which Shuanghui, a Chinese Corporation, would acquire all of the stock of Smithfield Foods in a deal valued at 7.1 billion dollars.¹ The merger combined the world's largest pork producer, Smithfield Foods, with the largest pork producer in China.² The dramatic size of the resulting company highlights the consolidation rampant in the meatpacking industry, and also stands as an imposing monolith representing the power imbalance present between individual producer farms and the firms they must deal with.³

This consolidation has eroded normal market mechanisms and yields a relationship which is often heavily skewed in favor of the meatpacking firm. As firms have become more consolidated, the use

¹ *Pigs Will Fly*, THE ECONOMIST, June 1, 2013, <http://www.economist.com/news/business/21578687-chinese-buyer-america-biggest-pork-producer-pigs-will-fly> [hereinafter *Pigs Will Fly*]; Press Release, Smithfield, Shuanghui International and Smithfield Foods Agree to Strategic Combination Creating a Leading Global Pork Enterprise (May 29, 2013), available at <http://investors.smithfieldfoods.com/releasedetail.cfm?ReleaseID=767743>

² *Pigs Will Fly*, *supra* note 1.

³ See *Smithfield Buyout Raises Fair Competition Concerns*, NAT'L SUSTAINABLE AGRIC. COAL. (May 31, 2013), <http://sustainableagriculture.net/blog/smithfield-buyout/> (statement of Senator Chuck Grassley of Iowa) ("I share the concerns of many family farmers and independent producers that the agriculture industry has consolidated to the point where many smaller market participants do not have equal access to fair and competitive markets.").

of “production contracts” has increased.⁴ Farmers dealing with meatpackers through production contracts often receive lower prices for their livestock,⁵ accept large amounts of contract risk,⁶ and forego asserting valid contract rights out of fear of retaliation.⁷ Meanwhile, consumers do not necessarily experience corresponding benefits, and ultimately, the result is monopolistic accretion of wealth within the meatpacking firms. Though the problems facing farmers dealing with production contracts are relatively new, the legal mechanisms that could be utilized as a solution have existed for over a century. Farmers should take advantage of the traditional agricultural cooperative to either collectively bargain with meatpackers thereby reducing the power imbalance, or, alternatively, use cooperatives to own and manage independent meatpacking facilities.

The cooperative is a business form in which the people who use the cooperative are the ones who own, control, and benefit from the organization, making it unique among business forms.⁸ In the agricultural context, it generally means that the cooperative is owned by the farmers it serves.⁹ Through cooperatives, livestock farmers could bargain collectively by using the cooperative entity as a single voice speaking for all its members when negotiating contracts with meatpackers. Alternatively, cooperatives could invest in and manage meatpacking facilities of their own, cutting the meatpacker out of the equation entirely. Neither of these suggestions are novel: the cooperative has been employed both to market collectively for its members and to manage processing facilities for its members. The cooperative could easily be employed to a greater degree in the livestock industry to counteract the recent proliferation of production contracts and even the proverbial playing field between meatpackers and farmers.

⁴ See *infra* Part II.A.3 (describing the use of production contracts).

⁵ See *infra* notes 103–105 and accompanying text (explaining how the use of production contracts has led to depressed prices within the livestock industry).

⁶ See *infra* Part II.B.1 (listing various contract terms often included in production contracts).

⁷ See *infra* text accompanying note 74 (describing how a meatpacker might withhold payment wrongfully).

⁸ See JOHN R. DUNN, ET AL., U.S. DEP’T OF AGRIC., CIR 60, AGRICULTURAL COOPERATIVES IN THE 21ST CENTURY 1 (2002), available at <http://www.rurdev.usda.gov/rbs/pub/cir-60.pdf>.

⁹ See *id.*

Part II of this Article will lay out the background necessary for understanding the status quo in the meatpacking industry. The background will begin by explaining the history and current landscape of the meatpacking industry, including the operation and effects of production contracts. Finally, Part II will highlight solutions proposed by other commentators. Part III of this Article suggests that taking advantage of the cooperative form could be a viable method to solve some of the problems farmers face. Specifically, Part III argues that the cooperative form allows for greater leverage to obtain better prices, less risk, and overall more favorable contracts when dealing with meatpackers, or, alternatively, allows farms to avoid dealing with meatpackers altogether.

II. BACKGROUND

As much as any other industry, agriculture has radically transformed over the past century.¹⁰ And although agriculture is among the least regulated industries in the country,¹¹ the legal landscape in which farmers operate has also changed dramatically.¹²

A. Evolution of the Livestock Industry

1. Early History

Throughout the past century, farms have become increasingly efficient, large, and specialized. Around the turn of the 20th century, nearly half of the U.S. workforce was employed in agriculture, a necessary result of an incredibly labor intensive industry.¹³ Most farms produced a number of different commodities as their major outputs.¹⁴

¹⁰ See generally CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKLIN, U.S. DEP'T OF AGRIC., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY* (2005).

¹¹ See, e.g., Capper-Volstead Act, 7 U.S.C. §§ 291–292 (West 2014) (excepting agricultural cooperatives from antitrust laws); 29 U.S.C. § 152(3) (West 2014) (excluding “agricultural laborer” from the definition of employee in the National Labor Relations Act).

¹² See *id.* at §§ 4, 57; see generally 3 AM. JUR. 2D *AGRICULTURE* (West, Westlaw through Feb. 2015) (explaining American Jurisprudence has 58 sections dedicated to legal topics related to agriculture ranging from the regulation of migrant labor to liability for errant pesticide application).

¹³ See DIMITRI, *supra* note 10, at 2.

¹⁴ See *id.* (noting that, on average, each farm produced five different commodities).

Many farms raised several different types of livestock both for personal consumption and for use or sale.¹⁵ At this time, a common method of sale was to drive livestock to a nearby railroad line which would ship the livestock to central stockyards in Omaha or Chicago.¹⁶ Sales would occur in an auction format at a local sale barn or through a commission office at the stockyards.¹⁷ In either case, buyers and sellers hashed out, either through negotiation or bidding, a fair price for the animal.¹⁸

Following the advent of refrigerated trucks around the time of WWII, the major meatpackers centered near the stockyards in Chicago, Omaha, and Denver lost much of their market power. Government grading and the ability to quickly ship meat via refrigerated trucks caused a rapid deconcentration in the meatpacking industry.¹⁹ New meatpackers began operating around the country which gave farmers access to more buyers leading to an efficient market and real choice.²⁰

2. Growth, Concentration, and Vertical Integration

More recent years have seen concentration and growth in almost all areas of meat production. Compared to nearly half of the population in 1900, by 1970, only four percent of the workforce was made up of agricultural workers. By 2000 that number had fallen to just under two

¹⁵ See *Farming in the 1930s – Livestock*, LIVING HISTORY FARM, http://www.livinghistoryfarm.org/farminginthe30s/crops_13.html (last visited May 14, 2014) (noting that farmers raised horses to pull equipment and raised pigs, cows, and poultry that they might consume themselves or sell for money).

¹⁶ See *Farming in the 1920s – Moving Livestock to Market*, LIVING HISTORY FARM, http://www.livinghistoryfarm.org/farminginthe20s/money_05.htm (last visited May 14, 2014).

¹⁷ *Id.*; see also *Schmidt v. Old Union Stockyards Co.*, 364 P.2d 23, 24 (Wash. 1961) (describing the two general methods of selling livestock).

¹⁸ See *Schmidt*, 364 P.2d at 24 (describing the “private treaty” method of sale, as opposed to auction sales. In the private treaty sales, “commission men,” acting as agents for sellers, would negotiate a private sale of the livestock to a purchaser such as a slaughterhouse).

¹⁹ Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case For Change In Public Policy*, 2000 WIS. L. REV. 531, 534 (2000).

²⁰ See *id.*; *Farming in the 1940s – The Livestock Industry Grows*, LIVING HISTORY FARM, http://www.livinghistoryfarm.org/farminginthe40s/crops_08.html (last visited May 14, 2014).

percent.²¹ Farm size has grown dramatically, and farms have become increasingly specialized, typically only producing a single major output.²² The average cattle farm has 100 head;²³ the average pig farm has about 900 pigs;²⁴ and the average chicken farm raises over 325,000 birds each year.²⁵ But despite this growth in farm size, there are still thousands of active farms in the market: almost a million cattle farms, over 75,000 pig farms, and approximately 27,000 chicken farms.²⁶

While individual farms have grown some, the meatpackers have exploded in size. In the 1980s, mergers among meatpackers produced large firms that dominated particular regions and, in some cases, dominate the entire market.²⁷ The trend has continued unabated for years. The statistics are eye-opening: In 2007, the top four beef processors accounted for 83% of the market, up from 72% in 1990, and have a capacity to slaughter 94,000 head daily;²⁸ the top four pork processors control 66% of the market, up from just 37% as recently as 1987;²⁹ and the top four chicken processors control about 60% of the market, nearly doubling since 1986.³⁰ The result of this concentration is a limited market into which a farmer can sell livestock.³¹ Along with the growth in size, the firms have become increasingly efficient, providing consumers more meat at lower prices.³²

A more recent phenomenon is “vertical integration” within the meatpacking industry. “Vertical integration is the process whereby a

²¹ DIMITRI, *supra* note 10, at 2.

²² *Id.*

²³ See U.S. DEP’T OF AGRIC., 2007 CENSUS OF AGRICULTURE 19 (2009) [hereinafter *2007 Agriculture Census*] (calculated based on numbers reported in tbl. 12).

²⁴ See *id.* at 23 (calculated based on numbers reported in tbl. 23).

²⁵ See *id.* at 24 (calculated based on numbers reported in tbl. 27).

²⁶ *Id.* at 19–24.

²⁷ Carstensen, *supra* note 19, at 534 (noting that the concentration was a result of lax enforcement of antitrust laws).

²⁸ Mary Hendrickson & William Heffernan, *Concentration of Agricultural Markets*, in AGRICULTURAL LAW 9566 5, 5 (Doug Spanier ed., 2013) available at <http://www.foodcircles.missouri.edu/07contable.pdf>.

²⁹ *Id.*

³⁰ *Id.* at 6 (stating the top four turkey producers slaughter nearly four billion birds each year).

³¹ See Carstensen, *supra* note 19, at 534.

³² See generally DUNN, *supra* note 8, at 5–6 (explaining the changes in the food industry that have resulted in lower-priced food).

company owns each stage of production.”³³ In the livestock industry, this manifests as contracts between the meatpacker and the farmers under which the farmer will raise animals owned by the meatpacker using supplies and feed provided by the meatpacker.³⁴ This relationship now dominates the poultry industry, with over 90% of “broilers,” a type of chicken,³⁵ produced under contract.³⁶ Pork production is following a similar trend: between 1994 and 2000, the share of pigs produced under contract has risen from 6% to 24%.³⁷ The contracts delineating the terms under which a farmer raises livestock for a meatpacker are known as production contracts, which are the focus of this article.³⁸

3. Production Contracts

To solve a variety of problems ranging from price risk, quality concerns, and supply issues, meatpackers began using production contracts to source the live animals for processing.³⁹ Under a typical production contract, the meatpacker owns the animals and places them with the farmer.⁴⁰ The farmer provides the buildings and the labor necessary to raise the animals, while the meatpacker provides feed, veterinary services, and other supplies.⁴¹ At the end of the growing period, the animals are delivered back to the meatpacker and payment is made based off of some formula devised to assess the quality of the animals and cost-effectiveness of the farmer’s services.⁴²

³³ Glenn A. Hegar, Jr., *Adhesion Contracts, Debt, Low Returns and Frustration—Can America’s Independent Contract Farmer Overcome the Odds?*, 22 *HAMLIN L. REV.* 213, 214 (1998).

³⁴ *Id.*

³⁵ *Frigalment Importing Co., v. B.N.S. Int’l Sales Corp.*, 190 F.Supp. 116 (S.D.N.Y. 1960) (explaining the distinctions between the different types of chickens which are sold in the industry).

³⁶ Hegar, *supra* note 33, at 214.

³⁷ STEVE W. MARTINEZ, U.S. DEP’T OF AGRIC., AIB No. 747-05A, COMPARISON OF VERTICAL COORDINATION IN THE U.S. POULTRY, EGG, AND PORK INDUSTRIES 3 (2002), available at http://www.ers.usda.gov/media/306727/aib74705_1_.pdf.

³⁸ *See id.* at 2–3.

³⁹ *See* Edward P. Lord, Comment, *Fairness For Modern Farmers: Reconsidering the Need For Legislations Governing Production Contracts*, 33 *WAKE FOREST L. REV.* 1125, 1128 (1998).

⁴⁰ *Id.* at 1127 (describing the mechanics of the typical poultry production contract).

⁴¹ *Id.* at 1127–28.

⁴² Hegar, *supra* note 33, at 215 (listing the various metrics on which payment may be calculated including “feed conversion, rate of growth, and animal mortality rate”).

The relationship is governed by contracts written by the meatpackers which lay out the rights and responsibilities of each party.⁴³ The contracts address issues such as who is responsible for animals that die; when can a party terminate; what discretion does the meatpacker have; when are additional investments by the farmers required; how and when payments are made; whether there is an obligation to renew; and what are the dispute resolution procedures.⁴⁴ Invariably these questions are resolved in the best interest of the meatpacker.⁴⁵

Despite contract terms that are often weighed in favor of the meatpacker, production contracts provide a number of benefits for meatpackers, farmers, and consumers.⁴⁶ Production contracts allow meatpackers a great deal of quality-control over the animals coming into their facility. This is necessary given the specialized technology employed by meatpacking firms.⁴⁷ Strict control over the inputs into the facility (the live animals) allows for more efficient processing.⁴⁸ Because the contracts can extend beyond a single delivery, they can ensure a steady supply of animals.⁴⁹ Other costs facing meatpackers, including transaction costs and price risk, can be limited with the use of production contracts.⁵⁰ Meatpackers have harnessed production contracts to produce efficiency gains throughout the industry.⁵¹

⁴³ *Id.*

⁴⁴ See Neil D. Hamilton, *Broiler Contracting In the United States-A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43, 48–56 (2002); see also Hegar, *supra* note 33, at 215.

⁴⁵ See Hamilton, *supra* note 44, at 48–56.

⁴⁶ See Lord, *supra* note 39, at 1128–30 (noting the positive aspects of production contracts for farmers and meatpackers alike); see also MARTINEZ, *supra* note 37, at 2–3 (stating that the “transaction cost economics (TCE) paradigm” explains the prevalence of production contracts: the “transaction costs” associated with monitoring others are much lower when using production contracts).

⁴⁷ See MARTINEZ, *supra* note 37, at 3 (noting the specialized facilities developed around the end of World War II).

⁴⁸ See *id.* (explaining that by the mid-1980s this trend of matching inputs to specialized technology eliminated the practice of processing different types of poultry in a single plant. In the 1960s, it was common for processing plants to slaughter both turkeys and broilers in the same facility during slow seasons for one of the types of birds).

⁴⁹ See Lord, *supra* note 39, at 1128.

⁵⁰ *Id.* at 1128–29; see Brian L. Buhr, *Economics of Antitrust In an Era of Global Agri-Food Supply Chains: Litigate, Legislate and/or Facilitate?*, 15 DRAKE J. AGRIC. L. 33, 34 (2010) (explaining that the risks include the “risk of uncertainty, degree of product differentiability, perishability”); see also MARTINEZ, *supra* note 37, at 3 (explaining that production contracts also ensure that animals can be sourced from

At the same time, production contracts provide some benefits to individual farmers; chief among these is risk management.⁵² Farmers are offered a guaranteed price and a guaranteed buyer when they contract directly with a meatpacker.⁵³ Farmers also get access to technology and other innovations that they might not otherwise be able to take advantage of.⁵⁴ Finally, under many production contracts the meatpacker owns the animals and provides the feed and other inputs, so farmers do not have to tie up as much cash during the growing period.⁵⁵

Consumers also gain a number of advantages because of the use of production contracts. Because production contracts provide economic efficiencies, consumers generally experience lower prices at the grocery store.⁵⁶ Additionally, because meatpackers can strictly control the growing process through production contracts, they can ensure that the final product is, for example, completely organic.⁵⁷ Quality control

local farms, which is important in the poultry industry because chickens can lose weight if transported of long distances).

⁵¹ See Buhr, *supra* note 50, at 34 (noting that “[e]conomies of size and vertical integration lead to economic efficiencies”).

⁵² Lord, *supra* note 39, at 1129.

⁵³ See *id.* (noting that under production contracts, the meatpackers bear the risk that the price of the commodity will fall, but also pointing out that in time of low demand or low prices, the meatpackers are likely to terminate contracts or reduce flock size). See GENE E. MURRA, FUTURES MARKET – BASIC 1-3, available at http://www.agmanager.info/livestock/marketing/bulletins_2/todays_market/futmrkt.pdf (noting that some of these advantages can come through alternative marketing methods such as the use of options, forwards, and futures contracts).

⁵⁴ See Lord, *supra* note 39, at 1129 (explaining that farmers get access to technology that allows them to grow larger birds faster).

⁵⁵ See Hamilton, *supra* note 44, at 44-45 (explaining that under a “typical” production contract, the farmer receives birds, medicine, and professional supervision). *But see Hog Procurement Agreement*, in AGRICULTURAL LAW 9566 5, 113 (Doug Spanier ed, 2013) (providing terms by which the farmer agrees to sell the hogs to the meatpackers).

⁵⁶ See Kelsea Kenzy Sutton, Comment, *The Beef With Big Meat: Meatpacking and Antitrust in America's Heartland*, 58 S.D. L. Rev. 611, 619 (2013) (noting consolidation and vertical integration have the potential to push down prices for consumers).

⁵⁷ See, e.g., Hamilton, *supra* note 44, at 45 (explaining that the meatpacker provides feed and other inputs); see LINDA COFFEY & ANN H. BAIER, U.S. DEP'T AGRIC., GUIDE FOR ORGANIC LIVESTOCK PRODUCERS, 7, 99 (Nov. 2012) (explaining the requirements for meat products to be deemed “organic” include “continuous organic management from the last third of gestation or hatching” and that, for example, pigs must be feed an organic diet including organic grains and protein sources).

allows for easier “branding” which consumers can identify with.⁵⁸ Food safety can also be improved because animals are quickly moved from growing facilities to slaughter facilities.⁵⁹

Most commentators conclude that although production have some advantages, the costs imposed on farmers is too great.⁶⁰

B. Impact of Vertical Integration and Production Contracts in the Livestock Industry

The primary catalysts for the unfairness arising out of production contracts are the disparity in size between individual farms and meatpackers and the lack of choice for farmers.⁶¹ Even though farms have expanded significantly in size over the past century, the meatpackers have outpaced them in growth.⁶² Thus, most individual farmers remain too small to use their economic position in order to negotiate for fair terms or better prices.⁶³ Contract terms are presented on a take-it-or-leave-it basis and farmers must often choose to accept terms they find objectionable.⁶⁴ This is compounded by the fact that a farmer may only have one or two options of meatpackers to deal

⁵⁸ See MARTINEZ, *supra* note 37, at 4 (explaining that Smithfield foods has tied its “brand” to a specific genetic line of pigs); see also DUNN, *supra* note 8, at 5 (explaining how “[d]rumsticks and pork chops won’t be the same from week to week unless the chickens and hogs they come from are relatively alike.”).

⁵⁹ *Id.* at 3 (noting that poultry has a narrow window in which it must be sent to be slaughtered to avoid the growth of foodborne pathogens).

⁶⁰ See Amber S. Brady, Comment, *Post-Smithfield and Hazeltime: An Evaluation of the Capper-Volsted Act as an Alternative Means of Marketing Power for Producers*, 10 Drake J. Agric. L. 331, 341 (2005) (arguing that without changes to the current trend, independent farms will “soon be a piece of America’s history”); see generally Carstensen, *supra* note 19 (asserting that the level of concentration present in the current meatpacking industry is not needed to achieve an efficient market, and further asserting that the proliferation of production contracts has undesirable social and political costs); see Lord, *supra* note 39, at 1153–54 (concluding that although some legal mechanisms exist to help farmers, more protection is needed). *But see* Buhr, *supra* note 50, at 58–59 (stating that the economic data on the impact of concentration in the livestock industry is mixed but that farmers and meatpackers might both see a reduction in welfare if the use of production contracts was limited).

⁶¹ See generally Buhr, *supra* note 50 (discussing the lack of autonomy that farms have in negotiating production contracts); Hegar, *supra* note 33, at 215–16.

⁶² See *supra* text accompanying notes 27–30 (describing the current market share of the nation’s top meatpackers).

⁶³ See Carstensen, *supra* note 19, at 536 (noting that “[a]n individual farmer or rancher is not well situated to bargain effectively with a single large customer.”).

⁶⁴ See Hegar, *supra* note 33, at 215.

with.⁶⁵ Even where a farmer has multiple options of who to deal with, the choice is illusory because, as between meatpackers, the contract terms are relatively standardized.⁶⁶ A final factor limiting the bargaining position of farmers is the investments already incurred. Building a new barn to raise animals can cost well over \$100,000 and many farmers have several barns.⁶⁷ Mortgage loans are entered into in order to finance building new barns and farmers *need* steady cash flow or they risk losing their investment through a foreclosure sale.⁶⁸ Together, these factors leave farmers without much choice or influence when entering these contracts.

1. Contract Risk and Unfair Contract Terms

Production contracts are complex legal documents which set out the rights and obligations of the farmer and the meatpacker in relation to one another, and all too often, the terms are highly skewed in favor of the meatpacker.⁶⁹ Typically, much of the risk of loss is transferred via contract to the farmer. For example, for animals that die, the farmer, in addition to not getting paid for those animals, is responsible for disposing of the animals in accordance with applicable statutes.⁷⁰

The payment terms are often skewed in favor of the meatpacker: though typically based on a formula that accounts for factors such as final weight, feed use, and performance relative to other farmers, the meatpacker makes the calculation and has the final say.⁷¹ This leaves meatpackers with the opportunity to game the calculation in their

⁶⁵ *Id.* (noting that integrated meatpackers often “dominate an entire region”); see Hamilton, *supra* note 44, at 65 (reporting that a survey revealed that, among poultry farmers, twenty-eight percent of farmers had only one company to sell to and the average number of companies in an area was about 2.5); see MARTINEZ, *supra* note 37, at 3 (“[M]any contract growers had essentially no alternative trading partners.”).

⁶⁶ See Hamilton, *supra* note 44, at 83 (explaining the “broiler industry has developed a fairly standard approach toward dealing with growers.”). *Id.* at 65–66 (noting that this reality is reflected by the perceptions of the farmers themselves. About 70% of farmers have never changed the meatpacker that they deal with, and almost 50% of those farmers who have not changed indicate the reason they have not switched is because they believe the terms would be the same elsewhere).

⁶⁷ *Id.* at 65.

⁶⁸ Hegar, *supra* note 33, at 216.

⁶⁹ See generally Hamilton, *supra* note 44, at 47–56 (explaining terms that are typical in production contracts).

⁷⁰ *Id.* at 49.

⁷¹ *Id.* at 50.

favor.⁷² In addition, some contracts allow the price-calculation mechanism to be changed at any time, thereby undermining one of the positive benefits that production contracts provide for farmers: a predictable payment.⁷³ This structure presents a risk that a meatpacker would delay or withhold payment wrongfully leaving the farmer with whatever dispute resolution provision is set out in the contract.⁷⁴

The term of the contracts are often short with no guarantee of renewal, presenting significant risk for farmers who have heavily invested in facilities and equipment needed to raise the animals. Often, contracts have no set term, but merely are in force for the time it takes to raise a herd or flock to butchering weight, which, for poultry farmers, can be as little as seven weeks.⁷⁵ Though some contracts contain automatic renewal provisions, they remain terminable at will by the meatpacker.⁷⁶ Even in term contracts that continue for a year or longer, the meatpacker often retains discretion as to when and if it will provide more animals for the farmer to raise.⁷⁷ Because a farmer's profit is heavily dependent on the number of animals he or she raises each year, a meatpacker's decision not to provide additional or as many animals could be the difference between profit and loss for a year.⁷⁸ This risk is exaggerated in cases where a farmer has made large investments in the facilities needed to raise animals.⁷⁹

Most contracts also include provisions allowing the meatpacker to take over the operation of the farm or possession of the birds if the farmer does not meet performance requirements.⁸⁰ This takeover right typically will reference general company standards that may or may not be reduced to writing and incorporated as part of the contract.⁸¹

⁷² See Lord, *supra* note 39, at 1134 (noting the risk that a meatpacker might underreport the weight of animals or overreport the amount of feed provided to farmers).

⁷³ See Hamilton, *supra* note 44, at 51–52.

⁷⁴ See Hegar, *supra* note 33, at 216–17 (noting that non-payment and slow payment are major areas of concern for farmers dealing under production contracts).

⁷⁵ Hamilton, *supra* note 44, at 51.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 51–52.

⁷⁹ See Hegar, *supra* note 33, at 216 (noting that the full investment for a poultry operation can cost “well over \$250,000.”).

⁸⁰ See Hamilton, *supra* note 44, at 63.

⁸¹ *Id.*

Another contract term that exacerbates the lack of negotiating power is nondisclosure clauses often included in production contracts.⁸² These provisions may restrict farmers from sharing information about contract terms or pricing mechanisms with other growers.⁸³ This makes it difficult for farmers to assess the terms of their contract vis-à-vis other farmers.⁸⁴

A final common contract term requires that the farmer adopt new practices or invest in new technology at the request of the meatpacker. A contract term might require the farmer “to adopt new management practices and install new or additional equipment required by” the meatpacker,⁸⁵ or “comply with any...quality program established by [the meatpacker] . . . and changes to such program.”⁸⁶ These provisions essentially require an open-ended investment obligation on the part of the farmer which places them in a “catch-22:” take on the additional financial burden being requested by the meatpacker or risk breaching the contract and losing potential profit from current or future animals.⁸⁷ Because of the financial pressures arising from previous investments already made, farmers, more often than not, agree to implement the required changes.⁸⁸ Even a farmer who fulfills his obligation to make additional investments is not protected: a meatpacker typically has no obligation to renew or extend the contract even after the changes are made.⁸⁹

2. Low Prices and Minimization of the Open Market

⁸² See *id.*; see also Doug O’Brien, *Policy Approaches to Address Problems Associated With Consolidation and Vertical Integration In Agriculture*, 9 DRAKE J. AGRIC. L. 33, 41 (2004) (explaining the various laws relating to confidentiality provisions in agricultural production contracts).

⁸³ Hamilton, *supra* note 44, at 63.

⁸⁴ See *id.*

⁸⁵ Lord, *supra* note 39, at 1131.

⁸⁶ *Hog Procurement Agreement*, in AGRICULTURAL LAW 9566 5, 120 (Doug Spanier ed., 2013).

⁸⁷ See Lord, *supra* note 39, at 1131.

⁸⁸ See *id.* at 1132 (explaining that where a farmer has already incurred significant debt in order to begin or expand a livestock operation, the farmer will need the reliable income).

⁸⁹ See *id.* at 1131 (noting that the Minnesota legislature has acknowledged and addressed this problem with MINN. STAT. § 17.92 (2014), which is discussed more fully below. In short, it requires that if a meatpacker may not terminate a contract after requiring a large capital investment unless it provides notice and pays damages).

The rise of the production contract is tied directly to the fall of the open transactional market.⁹⁰ As this open market becomes more illiquid, it is more difficult for a farmer to approximate a fair price for his livestock. Moreover, prices under production contracts, although more certain, are typically lower.⁹¹

As explained above, the traditional method of selling livestock was in an auction format where competitive buyers would bid up the price, often called the “spot” market.⁹² Individual auction results were widely reported in newspapers and over the radio giving farmers a sense of the actual market price for their livestock.⁹³

Similarly, the futures markets provides a market mechanism that not only determines price, but also serves as a hedge against future price swings.⁹⁴ Futures contracts are standardized agreements to either sell or buy a commodity at some time in the future.⁹⁵ A farmer who anticipates that the market price for his animals may be lower around the time that they are grown enough to go to market might sell a futures contract obligating the farmer to sell those animals at a set price in the future.⁹⁶ With both the spot market and futures market, robust activity establishes true market prices for livestock.

The importance and function of the traditional transactional markets is diminished by the proliferation of the production contract. As more farmers and meatpackers move towards using production contracts, the number of participants in the transaction market shrinks, resulting in less efficient pricing mechanisms.⁹⁷ The transactional market becomes simply a place for farmers to get rid of excess supply and for meatpackers to meet unexpected demand.⁹⁸ When meatpackers contract for the majority of their supply of livestock, they are no

⁹⁰ See Carstensen, *supra* note 19, at 534.

⁹¹ PEW COMM’N ON INDUS. FARM ANIMAL PRODUCTION, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 42, available at http://www.ncifap.org/_images/PCIFAPFin.pdf [hereinafter *PEW COMM’N*].

⁹² See *supra* note 18 and accompanying text.

⁹³ See, e.g., *Feature Farm Programming*, LINDER FARM NETWORK, <http://www.linderfarmnetwork.com/images/E0241301/62703LinderFarmFeatureFarmProgram.pdf> (last visited April 27, 2015) (noting the Linder Farm Network, the self-dubbed “Voice of Minnesota Agriculture,” broadcasts market updates five times a day).

⁹⁴ MURRA, *supra* note 53, at 1.

⁹⁵ *Id.*

⁹⁶ See *id.* at 1–2.

⁹⁷ Carstensen, *supra* note 19, at 539.

⁹⁸ See *id.*

longer bidding competitively for the farmers' product.⁹⁹ Today, there is essentially no functioning transactional market for poultry,¹⁰⁰ and the pork market is moving in the same direction.¹⁰¹ This limitation of the transaction market is magnified by the confidentiality provisions often present in production contracts, which make it so that farmers cannot compare prices being received under the contracts.¹⁰²

The end result is that prices are depressed. While precise numbers are difficult to approximate given the number of factors at play, a recent guide relating to poultry production estimates that a farmer can expect, at most, \$10,000 per year, per barn after mortgage payments and other expenses are accounted for.¹⁰³ In the beef industry, which is significantly less integrated than the poultry and pork industries, one study estimated that meatpacker control over the market resulted in an average decrease in price of about \$69.00 per animal from what would otherwise be realized on the spot market.¹⁰⁴ Many commentators agree that heavy vertical integration has led to low profits for farmers who deal with these companies.¹⁰⁵

⁹⁹ *See id.*

¹⁰⁰ *See* Hegar, *supra* note 33, at n.11 (citing statistics indicating that vertically integrated companies control nearly ninety-nine percent of the poultry industry in the United States); *see also* Lydia Depillis, *The Chicken Market Is So Hot Right Now. Why Can't I Trade On It?*, *THE WASHINGTON POST WONKBLOG* (Jan. 10, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/10/the-chicken-market-is-so-hot-right-now-why-cant-i-trade-on-it/> (explaining that "there is no futures market for" chicken). *See id.* (noting that essentially the only market for poultry outside of production contracts is through farmers markets and other direct marketing relationships).

¹⁰¹ *See supra* note 37 and accompanying text.

¹⁰² *See* Hamilton, *supra* note 44, at 63; *see also* Marvin Hayenga, Ted Schroeder, & John Lawrence, *Churning Out the Links, Vertical Integration in the Beef and Pork Industries*, *CHOICES MAGAZINE* (Winter 2001–02) (noting that less than 30% of pigs are purchased on the cash market today). *See id.* (noting that the beef market, for the most part, has resisted integration with only about 25% of cattle coming from long term production contracts).

¹⁰³ DAN L. CUNNINGHAM, *THE UNIVERSITY OF GEORGIA COOPERATIVE EXTENSION, GUIDE FOR PROSPECTIVE CONTRACT BROILER PRODUCERS 2*, (October 2010) *available at*

http://www.caes.uga.edu/applications/publications/files/pdf/B%201167_5.PDF.

¹⁰⁴ PEW COMM'N, *supra* note 91, at 42; *id.* (noting that the price effect on the pork industry is "decidedly more dismal.").

¹⁰⁵ *See, e.g.*, Hegar, *supra* note 33, at 215 (citing a 1995 survey showing that a poultry producer had an average profit of just \$12,000); Carstensen, *supra* note 19, at 538 (noting as the transactional market becomes marginalized, farmers face lower prices in marketing their hogs); Lord, *supra* note 39, at 1129–30 (explaining that

C. Legal Mechanisms Applicable to Production Contract Farming

Lawmakers, both state and federal, have long recognized that farmers are often in a weak economic position and have responded by enacting various laws addressing those concerns, including laws relating to production contract farming.¹⁰⁶ Federal laws include the Packers and Stockyards Act, the Capper-Volsted Act, and the Agricultural Fair Practices Act.¹⁰⁷ State laws include regulations on certain contract provisions¹⁰⁸ and, in a few states, frameworks allowing joint marketing associations among farmers dealing with meatpackers.¹⁰⁹ In addition, several commentators have proposed solutions to the perceived power imbalances between farmers and meatpackers. Generally these laws and proposals can be grouped into three main categories: laws limiting monopolistic practices by meatpackers;¹¹⁰ laws directly regulating contract provisions or the use of production contracts in particular situations; and laws aimed at increasing bargaining power on the part of the farmers.

1. Laws Limiting Monopolistic Practices of Meatpackers

“[f]armers are often surprised and disappointed by their low earning” and that meatpackers may sometimes distort facts regarding earning potential); PEW COMM’N, *supra* note 91, at 42.

¹⁰⁶ See generally O’Brien, *supra* note 82 (noting that the various policy approaches taken by lawmakers in addressing the issue of consolidation and vertical integration in the agricultural industry. He groups the policies into three categories including changing the structure of the industry, regulating the behavior of the participants, and improving enforcement of existing laws).

¹⁰⁷ See *id.* at 38–39 (describing the Capper-Volsted Act and the Agricultural Fair Practices Act); *id.* at 43–44 (describing the Packers and Stockyards Act).

¹⁰⁸ See *id.* at 39–42 (listing several state law provisions which regulate various contract terms such as confidentiality clauses or impose risk disclosure obligations).

¹⁰⁹ See *infra* text accompanying notes 148–168.

¹¹⁰ See Sutton, *supra* note 56, at 628–29 (describing that meatpackers’ presence in the market as a monopoly or oligopoly is not correct or is only partially correct. “Monopoly” is a word used to describe the situation where a *seller* commands more than market price because of its dominance. When referring to a *buyer* who uses its market power to pay less than market price when purchasing goods, the correct term to describe that situation is “Monopsony.” However, because this author believes readers have a fine understanding of the qualities of a “monopoly” and can apply those concepts either to buyers or sellers, I will describe the economic situation as one of “monopoly” power only, even though it may be technically incorrect).

Recognizing that consolidation among firms can negatively affect the competitive system at the heart of the United States' economy, several laws and proposals have been made to limit that effect.¹¹¹ One such law enacted by Congress is the Packers and Stockyards Act ("PSA").¹¹² In addition, commentators have proposed various solutions that deal with reducing the power of meatpackers.¹¹³

In response to a 1919 investigation by the Federal Trade Commission ("FTC") which found concentration and unfair monopolistic activities by meatpacking companies, Congress passed PSA in order to combat these abuses.¹¹⁴ The FTC determined that the five largest packers used their market power to: "manipulate live-stock markets; [r]estrict . . . supplies of foods; [c]ontrol the prices of dressed meats and other foods; [and] [d]efraud both the producers of food and consumers."¹¹⁵

The PSA is a fairly comprehensive bill, but the meat of the proposal, so to speak, is the prohibition on certain unfair trade practices. Generally, under a PSA, a packer may not "engage in or use any unfair, unjustly discriminatory, or deceptive practice;" "make or give any undue or unreasonable preference or advantage;" buy with the purpose of apportioning supply; manipulate prices; or act with others to do those restricted activities.¹¹⁶ The most applicable provision out of these with respect to production contracts is the prohibition on unfair, unjustly discriminatory, and deceptive practices.¹¹⁷ However, the PSA is of limited application to many of the issues noted above absent evidence of particularly bad faith conduct. This is because the courts have interpreted the provision in accordance with the "Rule of Reason," which looks both at the intent of the action and the general effect of the action, weighing both the pro-competitive and anti-competitive effects of the law.¹¹⁸

¹¹¹ See generally Carstensen, *supra* note 19 (arguing strongly that applying anti-trust laws and the PSA more aggressively would not have a detrimental impact on consumers but would lead to positive outcomes for farmers).

¹¹² See Hegar, *supra* note 33, at 237.

¹¹³ See *infra* notes 122-126 and accompanying text.

¹¹⁴ Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 2003 ARK. L. NOTES 35, 36-37 (2003).

¹¹⁵ *Id.* at 37.

¹¹⁶ 7 U.S.C. § 192 (West 2014).

¹¹⁷ See O'Brien, *supra* note 82, at 43 (explaining the applicability of the unfair practice clause to production contracts).

¹¹⁸ See *id.*

As applied to most contract provisions, the PSA typically does not restrict them, despite claims that they are “unfair.” In addition to considering the Rule of Reason, courts also state that the PSA is not meant to limit freedom of contract.¹¹⁹ Courts have held that false weighing and deceptive advertising violate the PSA.¹²⁰ Other practices have passed scrutiny under the PSA such as using different contract terms between different farmers.¹²¹

Several commentators have suggested that limiting the meatpacking industry’s influence and size is the proper solution for the power imbalance common in production contract negotiations. For example, two commentators argue forcefully for more aggressive enforcement of antitrust laws. One suggests that “a tougher policy on mergers” should be adopted by regulators enforcing current antitrust laws such as the PSA and Sherman Antitrust Act.¹²² He suggests that mergers between meatpacking firms should be halted absent a “clear showing” that the merger is necessary to achieve a demonstrable gain in efficiency.¹²³ Another argues that regulators should consider additional anti-competitive factors when evaluating a merger in the meatpacking industry.¹²⁴ Rather than simply looking at consumer surplus, she suggests that both the effect on producers and the availability of *choice* should be considered.¹²⁵ This approach is not without its criticisms, as some warn that aggressive antitrust enforcement could result in losses in economic efficiency and higher prices overall.¹²⁶

2. Directly Regulating Production Contracts and the Relationship Between Meatpackers and Farmers

Several states have enacted laws directly regulating particular issues related to production contracts, with some states forbidding certain clauses from being included in such written agreements.¹²⁷ For

¹¹⁹ O’Brien, *supra* note 82, at 43.

¹²⁰ See Kelley, *supra* note 114, at 43–44.

¹²¹ See *id.*

¹²² Carstensen, *supra* note 19, at 543.

¹²³ *Id.*

¹²⁴ Sutton, *supra* note 56, at 627.

¹²⁵ See *id.* at 627–28.

¹²⁶ See Buhr, *supra* note 50, at 59 (noting that evidence is mixed as to the effect of monopolistic entities and integration. Evidence shows that lower prices paid to farmers is likely offset by lower costs to consumers and efficiencies gained through vertical integration).

¹²⁷ See, e.g., IOWA CODE ANN. § 202.3 (West 2014).

example, Iowa makes it a criminal and fraudulent act for a meatpacker to insert a confidentiality provision in a production contract.¹²⁸ Similarly, federal law prohibits confidentiality provisions that restrict farmers from talking to their lawyers, bankers, accountants, or family members about the terms of the contract.¹²⁹ Minnesota has responded to challenges facing farmers who are requested by meatpackers to make capital investments in order to continue doing business with the meatpackers.¹³⁰ Under Minnesota law, a meatpacker cannot terminate a contract after requiring a farmer to make an investment of \$100,000 or more unless the meatpacker gives 180 days advanced notice before termination *and* reimburses the farmer for certain damages.¹³¹ Minnesota imposes other requirements in production contracts including mandatory mediation provisions,¹³² a three day cancellation period after signing,¹³³ and a requirement that production contracts have cover pages detailing the risks and terms of the contract.¹³⁴

Other proposals include better definitions of what constitute “unfair” practices under the PSA as well as limiting the amount of animals that can be acquired through production contracts. Peter Carstensen generally argues that the Secretary of Agriculture should use rule making authority to develop clear standards of what constitutes an “unfair” practice for purposes of applying the PSA.¹³⁵ Other proposals have included limitations on the number of animals that could be acquired through production contracts, requiring that a certain percentage be purchased on the spot market.¹³⁶

3. Increasing Bargaining Power on the Part of Farmers

Some solutions are aimed generally at increasing the economic power of farmers when dealing with larger companies. Federal legislation includes AFPA as well the Capper-Volsted Act, which is discussed in subsection II.C.4 *infra*. AFPA gives farmers some protections if they choose to form an association with other farmers to

¹²⁸ *Id.* §§ 202.3, 202.5 (West 2014).

¹²⁹ 7 U.S.C.A. 229b(b) (West 2014).

¹³⁰ *See* MINN. STAT. ANN. § 17.92 (West 2014).

¹³¹ *Id.* at § 17.92 Subd. 1.

¹³² *Id.* at § 17.91 Subd. 1.

¹³³ *Id.* at § 17.941.

¹³⁴ *Id.* at § 17.942.

¹³⁵ *See* Carstenson, *supra* note 19, at 546.

¹³⁶ *See* O’Brien, *supra* note 82, at 44 (citing a 2003 bill proposed in the U.S. Senate).

bargain collectively with buyers of agricultural products.¹³⁷ Some states have further broadened the rights of farmers operating in associations with other farmers.¹³⁸

In 1968, Congress passed the AFPA in order to help protect the right of farmers to join associations of other farmers.¹³⁹ As with many protective agricultural laws, it was passed in the wake of evidence of larger companies using their market power to abuse farmers who sought to join associations.¹⁴⁰ The resulting law is aimed at prohibiting packers and other buyers of farm products from discriminating against farmers who joined associations.¹⁴¹ The law prohibits handlers—buyers of agricultural products for later resale¹⁴²—from: a) coercing any farmer into joining an association or refusing to deal with a farmer because that farmer is a member of an association; b) discriminating against any farmer on the basis of price or terms because of the farmer’s membership in an association; c) coercing or intimidating any farmer into quitting an association; d) bribing a farmer into refraining from being a member of an association; or e) making false statements about associations.¹⁴³

Commentators largely agree that AFPA has failed in its ostensible goal because of the “disclaimer” provision added to the bill shortly before it passed.¹⁴⁴ Section five of the bill states “[n]othing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer’s membership in or contract with an association of producers, nor

¹³⁷ See *infra* text accompanying notes 138–142.

¹³⁸ See *infra* text accompanying notes 148–168.

¹³⁹ Agricultural Fair Practices Act of 1967 §§ 2301–2306 (West 2014); O’Brien, *supra* note 82, at 39.

¹⁴⁰ See Donald A. Frederick, AGRICULTURAL BARGAINING LAW: POLICY IN FLUX, 43 Ark. L. Rev 679, 681 (1990) (describing acts by Arkansas poultry processors, Ohio tomato processors, and California companies which refused to buy commodities from farmers who sought to join association of other farmers).

¹⁴¹ See *id.* at 684–685 (describing the practices prohibited by the law).

¹⁴² 7 U.S.C. § 2302(3)(A) (West 2014).

¹⁴³ See *id.* § 2303.

¹⁴⁴ See Frederick, *supra* note 138, at 682 (noting that the disclaimer provision added in 1967 was a successful modification by processors and rendered the resulting bill “far less than what proponents had sought”); O’Brien, *supra* note 82, at 39 (“[t]his provision has largely gutted the law”); Hegar, *supra* note 33, at 240–41 (explaining that the modifications successfully added by the handlers “severely weakened growers’ rights.”).

require a handler to deal with an association of producers.”¹⁴⁵ By permitting a handler to refuse to deal with a producer “for any reason” other than association membership, it allows a handler to merely point to any other reason, even if that reason is perhaps a mere pretext.¹⁴⁶ Moreover, because the law does not require the handler to deal with an association at all, a handler might simply refuse to deal unless the sheer size of the association forced the handler to come to the bargaining table.¹⁴⁷

Several states have identified the key deficiencies with AFPA and have enacted bargaining laws giving farmers additional rights. Chief among these laws is the Michigan Agricultural Marketing and Bargaining Act, which has been fairly successful in Michigan and served as a model for other states.¹⁴⁸ These laws typically include provisions which prohibit certain unfair practices, give farmers the explicit right to form associations, outline accreditation requirements, and require parties to negotiate in good faith.¹⁴⁹

Duplicating many of the prohibited practices under AFPA, Michigan’s marketing association law outlines practices deemed “unfair.”¹⁵⁰ It prohibits handlers from “coercing” farmers into joining or restraining them from joining associations.¹⁵¹ Handlers are prohibited from discriminating against farmers on the basis of their membership in an association;¹⁵² giving loans or money to farmers on the basis of their membership in an association;¹⁵³ disseminating false information about an association or other handlers;¹⁵⁴ or refusing to bargain with an association with whom the handler had prior dealings.¹⁵⁵ Michigan’s law also protects farmers from the unfair business practices of the associations themselves. Thus, associations are prohibited from publishing false information about handlers or other associations or from coercing a handler into terminating existing

¹⁴⁵ 7 U.S.C. § 2304 (West 2014).

¹⁴⁶ See Hegar, *supra* note 33, at 241.

¹⁴⁷ *Id.* at 242.

¹⁴⁸ Agricultural Marketing and Bargaining Act, MICH. COMP. LAWS ANN. §§ 290.701–.726 (West 2014).

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* § 290.704.

¹⁵¹ *Id.* §§ 290.704(1)(a), (2)(d).

¹⁵² *Id.* § 290.704(1)(b).

¹⁵³ *Id.* § 290.704(1)(d).

¹⁵⁴ *Id.* § 290.704(1)(e).

¹⁵⁵ *Id.* § 290.704(1)(g).

contracts.¹⁵⁶ The law specifically requires contracts negotiated by the association not discriminate against any individual member of that association.¹⁵⁷

Arguably the most important part of Michigan's marketing association law is the good faith bargaining requirement, which begins with accreditation.¹⁵⁸ After filing for accreditation, a state official determines the size and scope of the accredited association.¹⁵⁹ Once a marketing association is accredited, farmers can then have the association bargain for terms on their behalf. In contrast to AFPA, the Michigan law requires that the association and the handler bargain with each other in good faith, which is defined as the "mutual obligation of a handler and an accredited association . . . to meet at reasonable times and confer and negotiate in good faith."¹⁶⁰ Interestingly, the Michigan law leaves a large gap in its coverage: the "agricultural commodities" covered by the law only includes fruit and vegetables, though other states' laws do apply to livestock.¹⁶¹

Associations recognized by AFPA and state marketing association laws can provide numerous benefits for farmers. Aside from merely negotiating for better terms or prices, marketing associations can provide "price discovery" among commodities with a low-functioning or non-existent spot market.¹⁶² They can act as a trade association by "sponsoring industry-wide promotional activities, participating in State and Federal lobbying efforts, and collecting industry-wide market data."¹⁶³ They can also provide cost-sharing for services, such as legal assistance, that may otherwise be cost-prohibitive for farmers to use alone.¹⁶⁴ Finally, associations may provide universal benefits in enforcing contract reliability by ensuring opportunistic behavior does not occur by either party.¹⁶⁵ Despite these potential benefits for

¹⁵⁶ *Id.* § 290.704(2).

¹⁵⁷ *Id.* § 290.704(2)(a).

¹⁵⁸ *Id.* § 290.702(b).

¹⁵⁹ *Id.* § 290.706(2).

¹⁶⁰ *See* MICH. COMP. LAWS. ANN. § 290.713(1)

¹⁶¹ *See id.* § 290.702(f) (defining agricultural commodity as "all perishable fruits and vegetables"). Not all state marketing laws are so narrow: Minnesota's law, which is modeled after the Michigan law, has no similar limitation. *See* MINN. STAT. ANN. § 17.693 Subd. 5.

¹⁶² Brent Hueth & Philippe Marcoul, *An Essay On Cooperative Bargaining in U.S. Agricultural Markets*, 1 (10) J. AGRIC. & FOOD INDUS. ORG. Article 10, 8–11 (2003).

¹⁶³ *Id.* at 6.

¹⁶⁴ *Id.* at 6–7.

¹⁶⁵ *See id.* at 10.

producers, the actual utilization by farmers has remained relatively minimal. Bargaining laws exist in about a dozen states but, as of 2002, only about forty marketing organizations existed.¹⁶⁶

4. Agricultural Cooperatives and the Capper-Volsted Act

Farmers have long embraced the concept of banding together to form cooperative businesses which operate for the benefit of all members.¹⁶⁷ The salient characteristics of the cooperative entity include that they are user-owned, user-controlled, and designed to benefit the users.¹⁶⁸ Save for the ownership features of a cooperative, the modern cooperative is a legal entity not unlike most other business entities and is governed primarily by state law.¹⁶⁹

There are four basic types of agricultural cooperatives: marketing (or bargaining), purchasing (or supply), production, and service.¹⁷⁰ In a marketing cooperative, the business markets farmers' commodities on behalf of farmers either through purchasing the goods from the farmer and reselling them, or performing bargaining and other services on the farmer's behalf.¹⁷¹ Some marketing cooperatives carry out additional functions, ranging from "first-stage processing such as ginning cotton or hulling nuts" to fully integrated production such as "processing products for the consumer or industrial markets."¹⁷² A supply cooperative purchases supplies farmers need in large quantities and sells those supplies to the farmer members, allowing the farmers to

¹⁶⁶ *Id.* at 2.

¹⁶⁷ See generally *Cooperatives in the U.S.*, U. WIS.-MADISON, <http://www.uwcc.wisc.edu/whatisacoop/History/> (last visited May 10, 2014) (describing the early history of Cooperatives in the United States including the proliferation at the beginning of the 20th century).

¹⁶⁸ DUNN, *supra* note 8, at 1.

¹⁶⁹ See, e.g., MINN. STAT. §§ 308B.001–.975 (explaining that the Minnesota Cooperative Association Act governs issues including powers of the entity, elections of directors, membership interests, contributions, mergers, and dissolution).

¹⁷⁰ Sharlene F. Roberts-Caudle, *Agricultural Cooperative Member Equity: You Don't Have to Die For It!*, 7 *San Joaquin Agric. L. Rev.* 1, 6 (1997); see also LIONEL WILLIAMSON, *FARMER AND CONSUMER COOPERATIVES STRUCTURE AND CLASSIFICATION 1–2* (1998), available at <http://www2.ca.uky.edu/agc/pubs/aec/aec44/aec44.pdf> (classifying agricultural cooperatives as marketing, supply, or service).

¹⁷¹ WILLIAMSON, *supra* note 168, at 2.

¹⁷² See MARC WARMAN & TRACEY L. KENNEDY, U.S. DEP'T OF AGRIC., *UNDERSTANDING COOPERATIVES: AGRICULTURAL MARKETING COOPERATIVES 1* (May 1998), available at <http://www.rurdev.usda.gov/rbs/pub/cir4515.pdf>.

take advantage of bulk pricing.¹⁷³ A remarkably successful and well known example of a cooperative that combines both marketing and supply functions is Land O'Lakes, Inc. Through its feed arm dominated by Purina Mills, Land O'Lakes operates as a supply cooperative providing feed for farmers' animals.¹⁷⁴ Land O'Lakes operates as a marketing cooperative for thousands of member dairy farmers by purchasing raw milk from farmers and processing it into dairy products sold in stores.¹⁷⁵

Not unlike the situation facing many livestock producers today, farmers of the early 20th century also faced challenges when dealing with larger, more powerful buyers. Congress recognized that “[f]armers were perceived to be in a particularly harsh economic position,” and were generally left with no choice in who to sell to.¹⁷⁶ Moreover, Congress believed that due to their poor economic bargaining position, many farmers were likely taken advantage of by larger processors.¹⁷⁷ Cooperatives were viewed as a remedy for this power imbalance.¹⁷⁸ There was concern, however, that antitrust laws would be applied to farmers acting together in a cooperative, rendering their organizations illegal.¹⁷⁹ The response to this concern was the CVA. Passed in 1922, the CVA specifically permitted farmers to act collectively:

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.¹⁸⁰

¹⁷³ See Roberts-Caudle, *supra* note 170, at 6 (describing how a cooperative of beekeepers operates as a supply cooperative).

¹⁷⁴ See *About*, LAND O LAKES' FEED, <http://www.landolakesfeed.com/About/default.aspx> (last visited May 11, 2014).

¹⁷⁵ See *Investors*, LAND O'LAKES, INC., <http://www.landolakesinc.com/investors/default.aspx> (last visited May 11, 2014) (describing Land O'Lakes as a farmer-owned cooperative and “leading marketer of a full line of dairy-based . . . products”).

¹⁷⁶ See *Nat'l Broiler Mktg. Ass'n v. U.S.*, 436 U.S. 816, 825 (1978).

¹⁷⁷ *Id.* at 825–26. See also Brady, *supra* note 60, at 343 (2005).

¹⁷⁸ Brady, *supra* note 175, at 343.

¹⁷⁹ See *id.* at 342.

¹⁸⁰ 7 U.S.C.A. § 291 (West 2014).

With this permission, farmers could act collectively without fear of violating antitrust laws. Cooperatives have flourished under the CVA.¹⁸¹

There are some limits on the organizational structure and management of cooperatives. Cooperatives must operate on a strict one-vote-per-member rule, must not pay dividends on stock in an amount exceeding eight percent per year, and the majority of the business must come from members.¹⁸² Moreover, the protection from antitrust prosecution is not absolute. A cooperative that acts in a predatory manner such that prices are “unduly enhanced,” or engages in activity that has no “legitimate object” for the cooperative other than to stifle competition, can still face penalties under antitrust laws.¹⁸³

Moreover, the Supreme Court has clarified that the cooperative membership must be made up entirely of “farmers” within the meaning of the CVA. In *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978), the United States brought an antitrust suit against an association of integrated poultry processors.¹⁸⁴ Some of the member processors were involved *only* in slaughtering chickens and did not own chickens or grow-out facilities.¹⁸⁵ The court held that such members were not “farmers” within the meaning of the CVA and thus the cooperative was not exempt from antitrust prosecution.¹⁸⁶

¹⁸¹ See *Our Company*, CHS,

https://www.chsinc.com/portal/server.pt/community/about_us/338 (last visited Mar. 25, 2013) (noting that CHS is a Fortune 100 company); *Welcome to Land O'Lakes, Inc.*, LAND O'LAKES, INC., <http://landolakesinc.com/company/default.aspx> (last visited Mar. 25, 2013) (stating that Land O'Lakes serves nearly 300,000 member-producers through its network of member-cooperatives and handles about 12 billion pounds of milk annually).

¹⁸² 7 U.S.C.A. § 291.

¹⁸³ See *id.* § 292; *Md. & Va. Milk Producers Ass'n v. U.S.*, 362 U.S. 458, 468 (1960) (finding that purchasing a competitor milk producer so that the cooperative had a monopoly in the Washington, D.C. area served no “legitimate object,” and thus exposed the cooperative to antitrust liability).

¹⁸⁴ *Nat'l Broiler Mktg. Ass'n v. U.S.*, 436 U.S. 816, 818 (1978).

¹⁸⁵ *Id.* at 822.

¹⁸⁶ *Id.* at 827–29. The majority leaves open the possibility that a cooperative under the CVA could include fully integrated processors who own the baby animals, contract for the animals to be raised by a farmer, and slaughter the animals in its own facility. Justice Brennan would have limited “farmer” to exclude those types of fully integrated processors under the reasoning that merely having title to the animals throughout their life does not qualify the firm as a “farmer” meant to be protected by

III. DISCUSSION AND PROPOSAL

Livestock farmers face a number of challenges in today's modern economy. The solution, however, is not dramatic regulation of the industry, but rather a renewed reliance on the traditional agricultural cooperative. Farmers could rely on cooperatives to bargain collectively as a group or to run and manage meatpacking facilities themselves. Bargaining collectively as a single economic unit would give farmers more leverage during negotiations. Alternatively, operating packing facilities themselves would likely result in farmer-friendly contracts as well as ensure that whatever profits accrued to the meatpacker would be distributed and shared by the farmers. Because the vertically integrated model could remain in place under either approach, many of the benefits provided by the use of production contracts would remain as well.

A. Cooperatives as Collective Bargaining Units for Farmers

One of the primary uses of agricultural cooperatives is as an entity to jointly market and sell agricultural commodities on behalf of the member farmers.¹⁸⁷ Groups of livestock producers banding together through a cooperative to negotiate with a meatpacker could likely result in a more equal bargaining position for farmers. With enough economic clout, cooperatives could extract concessions from meatpackers or at least a higher price to compensate for taking on additional contract risk. Finally a cooperative would be in a solid position to take advantage of AFPA and state marketing laws already in place.

1. Negotiating with Meatpackers as a Cooperative

As a starting point, commentators today, as well as legislators in the past, have recognized a serious power imbalance as a cause for the poor economic position farmers often face. Just as in 1922, when the CVA was passed, farmers raising livestock today under production

the CVA. *See id.* at 837–39 (Brenan, J., concurring) (noting that allowing integrated processors to be protected by CVA “would stand the Act on its head; the integrators who process the fully grown broilers could thereby combine to dictate the terms upon which they deal with the contract growers to the latter’s disadvantage.”).

¹⁸⁷ *See supra* text accompanying notes 171–175 (explaining the functions of agricultural cooperatives).

contracts are “in a particularly harsh economic position.”¹⁸⁸ The proper solution today is the same solution made available almost 100 years ago: band together as a cooperative to create an economic entity that can bargain effectively with buyers.

An individual livestock farmer today has very little bargaining power when dealing with a large meatpacker.¹⁸⁹ While a single meatpacker may be the only sensible output for all of a farmer’s livestock, the typical farmer only accounts for a small percentage of the meatpacker’s total inputs. The meatpacker cares little if a single farmer rejects a production contract and refuses to raise animals for the meatpacker because the lone farmer represents an insignificant portion of the meatpacker’s capacity. On the other hand, a farmer might have only one or two meatpackers in the area with whom to raise animals for. The farmer might have significant debts and other expenses such that a guaranteed payment stream through a production contract is necessary. Or, if the farmer raises poultry, there may be no alternative but to deal with meatpackers through production contracts because there is no functioning transactional market. Facing this reality, a lone farmer is often obligated to accept whatever terms the meatpacker presents him.

The cooperative business model, coupled with the protections afforded by the CVA, gives farmers an effective means to alter this power imbalance. The CVA specifically allows “persons engaged in the production of agricultural products” as farmers and ranchmen the ability to act collectively in “marketing” agricultural products.¹⁹⁰ Also, the CVW permits cooperatives to operate marketing agencies and “make the necessary contracts and agreements” to carry out their purpose.¹⁹¹ The CVA protections apply to today’s livestock farmers just as it applied to farmers in the early 20th century. Even in the case of a farmer who does not, under the terms of the production contract, own the animals he is raising, he is nonetheless engaged in the production of agricultural products, thus falling neatly within the coverage of the CVA.¹⁹² The cooperative’s primary role in such a

¹⁸⁸ Nat’l Broiler Mktg. Ass’n v. U.S., 436 U.S. 816, 825 (1978).

¹⁸⁹ See *supra* text accompanying notes 61–68 (describing how the disparity in size between individual farmers and meatpackers leaves farmers in a poor negotiating position).

¹⁹⁰ 7 U.S.C.A. § 291 (West 2014).

¹⁹¹ *Id.*

¹⁹² See *supra* notes 184–186 and accompanying text (noting that the Supreme Court’s analysis in Nat’l Broiler Mktg Ass’n seems to imply that the “growing out” of the

situation would be to act as a marketing agency on behalf of its members. By operating as a marketing agency, the cooperative would represent the collective group of member farmers as well as their livestock for sale.

Provided the cooperative represents a sufficient percentage of the livestock market within an area, it could serve as a sufficient counterweight to the sizeable meatpacker. Where fifteen or twenty percent or more of the supply that might go to a single packing plant is represented by a cooperative, the meatpacker would be much more reluctant to have that group of farmers reject their production contract compared to a single farmer rejecting a contract. As such, the meatpacker would be willing to come to the table ready to negotiate on contract terms and pricing. The cooperative could then negotiate a contract on behalf of its members. This type of collective bargaining falls exactly in line with the purpose of the CVA, the proponents of which wanted farmers to be able to act together when dealing with larger buyers.¹⁹³

There may be various approaches a cooperative could take when structuring such a deal. For example, a cooperative could negotiate a master agreement that contains the various terms and conditions apart from quantity, leaving individual farmers to contract according to their capacity. Alternatively, the cooperative could contract to sell directly to the meatpacker and then serve as the buyer from individual farmer members. This latter approach would help to shift much of the contract risk to the cooperative thereby spreading it among all of the members. For example, the risk of slow payment could be eliminated if the cooperative paid the farmers immediately upon delivery while the cooperative waited for payment from the meatpacker. At the same time, improperly delaying payment or manipulating the payment to the cooperative could carry a significantly greater risk for the meatpacker compared to withholding or delaying a payment to an individual farmer because the cooperative would have the means to litigate the matter and may well have enough at stake to make litigation worth it.

2. Taking Advantage of Rights under AFPA and State Marketing Laws

animals is probably the most important consideration in determining who is a “farmer” covered by the CVA).

¹⁹³ See *supra* text accompanying notes 169–181 (explaining the role of cooperatives and how the CVA operates to encourage those functions).

Farmers are given rights under AFPA and state marketing laws to take advantage of the cooperative form. Under AFPA, meatpackers are prohibited from discouraging the formation of cooperatives.¹⁹⁴ State marketing laws provide mechanisms which impose negotiation requirements for meatpackers who might otherwise not want to deal with a cooperative.¹⁹⁵

Meatpackers are prohibited under AFPA from doing many acts that discourage membership in an association such as discriminating with respect to price based on a farmer's membership, refusing to deal with a farmer because of their membership, intimidating farmers into not joining or into quitting, or bribing farmers.¹⁹⁶ The CVA uses the term "association" interchangeably with "cooperative," and similarly, "associations" under AFPA would include associations organized as cooperatives under state law.¹⁹⁷ Therefore, the protections of AFPA apply to livestock farmers seeking to form or join a cooperative.

Cooperatives could take advantage of state marketing association laws if meatpackers refused to freely negotiate with them regarding the terms of the contract. Some state marketing laws, such as those modeled after Michigan's Agricultural Marketing and Bargaining Act, extend that coverage to livestock producers.¹⁹⁸ Where the size of the cooperative alone does not induce a meatpacker to bargain with a cooperative, the cooperative could seek accreditation under a state marketing act and relying on the good faith bargaining requirement to bring the meatpacker to the table.

B. Cooperatives as Meatpackers

¹⁹⁴ See, e.g., 7 U.S.C. § 2303 (West 2014) (noting that under AFPA, handlers are prohibited from discriminating against farmers based on their membership in an association or intimidating farmers into quitting an association).

¹⁹⁵ See, e.g., MICH. COMP. LAWS ANN. § 290.713(1) (West 2014) (requiring handlers and associations to meet and negotiate in good faith).

¹⁹⁶ See 7 U.S.C. § 2303.

¹⁹⁷ See 7 U.S.C.A § 291 (West 2014) (noting that while the CVA, by its terms applies to "associations," both its legislative history and subsequent recognize that cooperatives were the target of the law). See *Nat'l Broiler Mktg Ass'n v. U.S.*, 436 U.S. 816, 824 (applying the CVA in the context of an association of poultry processors which were organized as a cooperative under Georgia law and noting that the "purpose of the [CVA], as revealed by the legislative history" was to exempt cooperatives from the operation of antitrust laws).

¹⁹⁸ See *supra* note 159 and accompanying text (noting how Michigan's bargaining law does not include coverage for livestock producers but Minnesota's does).

An alternative to bargaining with the meatpackers is to completely cut the meatpackers out of the equation by using a cooperative to operate meatpacking facilities. Cooperatives using this approach would be able to avoid the challenges of negotiating with a meatpacker entirely and, at the same time, generate profits for their members.

One function of a marketing cooperative is to handle and process agricultural products for resale to consumers.¹⁹⁹ The CVA applies to cooperatives that engage in “collectively processing, [and] preparing for market” agricultural products.²⁰⁰ Thus, it expressly permits a cooperative to purchase its members’ products and process them for resale. In the case of livestock farmer cooperatives, this would involve purchasing live animals from farmers and slaughtering and processing the animals for resale to consumers or other buyers.

Such activities were implicitly deemed acceptable in *National Broiler Marketing Association*.²⁰¹ The Supreme Court analyzed whether a group of poultry processors were able to claim the antitrust exemption of the CVA; ultimately the court decided that the fatal flaw in their CVA claim was the fact that a number of members did not raise any animals or own any grow out facilities.²⁰² The court was not, however, concerned that the members or the association engaged in meatpacking operations. There is no concern that a cooperation operating a meatpacking facility on behalf of its members would fall outside the protections of the CVA.²⁰³

Using a cooperative to operate a meatpacking facility would provide two distinct benefits for farmers. First, farmers raising livestock on behalf of their cooperative would not face an adversarial bargaining situation. Cooperatives are both operated under the members’ control as well as operated for the benefit of the members. Because of these unique organizational characteristics, cooperatives would have no incentive to impose unfair contract obligations on members.²⁰⁴ There is no reason to believe that a cooperative would seek to impose as aggressive of contract provisions when entering into what is

¹⁹⁹ See *supra* text accompany notes 171 (explaining the different types of cooperatives).

²⁰⁰ 7 U.S.C.A § 291.

²⁰¹ See *Nat’l Broiler Mktg Ass’n*, 436 U.S. at 827-829.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See *Nat’l Broiler Mktg Ass’n*, *supra* note 201 (explaining cooperatives would still have to ensure the entity is protected so that it can continue to operate going forward).

essentially a friendly transaction. Moreover, the profits currently being acquired by meatpackers could potentially be realized by the cooperative itself. When reselling the processed product to grocery stores or restaurants, the cooperative will generate revenue for the business. To the extent the venture is profitable, the cooperative's profits will generally be passed on to the farmer members under the principle that the benefits of the cooperative are passed to the members.

The model of processing agricultural goods as a cooperative is successful in other areas. For example, Land'O Lakes, Inc., a cooperative primarily of dairy farmers, processes raw milk into a variety of finished food items such as milk and butter.²⁰⁵ Land'O Lakes has grown into one of the largest and most recognizable food brands in the world.²⁰⁶ A meatpacking cooperative that was able to establish a brand presence could one day be able to experience success similar to that of Land'O Lakes.

C. Relying on Cooperatives Rather than Regulation

Lawmakers and commentators had proposed various solutions to the power imbalance facing livestock farmers with production contracts. These include enforcing antitrust laws more strictly against meatpackers or determining what must or cannot be included in a production contract.²⁰⁷ Unfortunately, these solutions impose unnecessary burdens on the entire industry, resulting in inefficiencies or cost shifting.

One solution proposed is prohibiting mergers among meatpackers except in limited situations.²⁰⁸ The aggressive antitrust approach could result in inefficiencies leading to higher prices for consumers. By prohibiting mergers, regulators would ensure that less profitable businesses would not be swallowed up by more profitable businesses for the sake of keeping a diversified market. The result is that less

²⁰⁵ See *Welcome to Land O'Lakes, Inc.*, LAND O'LAKES, <http://landolakesinc.com/company/default.aspx> (last visited Mar. 2, 2015).

²⁰⁶ See *The NCB Co-op 100 Reports Top Producing Cooperatives with Revenues of \$234.5 Billion*, NAT'L COOP. BANK, <http://www.ncb.coop/default.aspx?id=5352> (last visited Feb. 22, 2015) (listing Land O' Lakes as the second largest agricultural cooperative).

²⁰⁷ See *supra* text accompanying notes 123–126.

²⁰⁸ See Carstensen, *supra* note 19, at 543 (suggesting methods of enhancing antitrust enforcement against meatpackers).

efficient competitors would remain in the market leading to higher prices for consumers. Moreover, synergistic gains from eliminating redundant management and other fixed costs would remain as well; these costs represent savings that would not be passed on to the consumer post-merger.

The aggressive antitrust enforcement approach would do little to effect the industry that is already in place. In the first instance, it is not clear that consumers necessarily benefit from additional choice when the product is essentially a commodity. The history of the industry shows that consumers prefer the low price product so long as they are assured that it is at least of equal quality.²⁰⁹ Though some consumers might pay more for meat labeled organic or natural, the reality is that they represent only a small portion of the public.²¹⁰ Moreover, because the market is already dominated by large meatpackers, without breaking up firms into constituent companies *much* smaller than their current size, farmers would remain unable to bargain effectively with meatpackers. Thus not only would the aggressive antitrust enforcement solution likely cause efficiency losses, it would also be ineffective at improving farmers' economic position vis-à-vis the meatpackers.

Various laws have been enacted that directly regulate production contracts. Among these are Iowa's prohibition of confidentiality clauses and Minnesota's regulation on capital investment requirements.²¹¹ These provisions do manage to eliminate specific objectionable provisions, but do not necessarily result in an overall increase in welfare for farmers. To the extent meatpackers are able to shift other risks to farmers or decrease the price paid to compensate for the mandated contract provisions, farmers are no better off.

By putting farmers in a position that they can negotiate with meatpackers effectively, real bargaining can occur allowing each party to evaluate what contract provisions are desirable to retain. Though the contract provisions outlined in this article can be construed as unfair to

²⁰⁹ See *supra* text accompanying note 19 (explaining how government grading eroded the concentration of the meatpacking industry. Government grading provided a way for consumers to quickly evaluate the quality of the meat product they were buying).

²¹⁰ *Organic Market Overview*, USDA ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture/organic-market-overview.aspx> (last updated Apr. 7, 2014) (noting organic foods account for just over four percent of total U.S. food sales).

²¹¹ See *supra* text accompanying notes 130–131.

farmers, most provide a legitimate benefit to the meatpacker. For example, where the meatpacker has made significant investment in the animals and feed and stands to lose the entire investment if the farmer fails to care for the animals, the takeover provision provides a method to protect their investment in such an emergency.²¹² The confidentiality provision could be helpful for protecting trade secrets or other information that is valuable to the meatpacker.²¹³ Where a cooperative has enough negotiating leverage due to its size, it will be able to attempt to bargain for a higher price or for concessions on other terms if the meatpacker determines that, for example, a takeover right is necessary. By leaving these terms up to the parties, they can reach agreeable terms, rather than terms imposed by legislators.

D. Challenges for Cooperatives as a Solution to the Power Imbalance

The fact that livestock farmers, for the most part, have not taken advantage of cooperatives does raise some questions on the viability of this proposed solution. Despite these questions, cooperatives remain a viable tool going forward.

Perhaps the biggest reason livestock cooperatives have not been used as a solution yet is because the problem is a relatively recent one, at least outside the poultry markets. Serious consolidation within the entire meatpacking industry did not begin until the 1980s.²¹⁴ In 1994, only six percent of pigs were produced under production contracts—a number that quadrupled in just six years.²¹⁵ Also, even with the protections of AFPA in place, it is possible that meatpackers discouraged, overtly or covertly, the formation of cooperatives that might challenge their market position. Going forward, there needs to be a critical mass of farmers that take the initiative to form a cooperative to deal with a specific packing plant or meatpacker. Because such a startup would take a relatively large amount of effort, there would likely need to be some sort of specific impetus to get the project off the ground. Without such a triggering event, inaction will likely always be an easier course.

²¹² See *supra* text accompanying notes 80–81 (describing the takeover right written into many production contracts).

²¹³ See *supra* text accompanying notes 83–84 (noting confidentiality or nondisclosure terms are present in some production contracts).

²¹⁴ See *supra* text accompanying notes 27–30 (detailing the growth of meatpackers since the 1980s).

²¹⁵ See *supra* text accompanying note 37.

Even with these challenges, cooperatives of livestock farmers present a viable solution. Farmers are familiar with working through cooperatives because they are extremely prevalent within the agricultural industry.²¹⁶ Indeed, for established cooperatives with influence over a geographic area, it would likely be a relatively easy feat to start an arm of the cooperative that works exclusively on behalf of livestock farmers. Even where an established cooperative would not want to start a new operation, starting a new marketing cooperative to bargain on behalf of farmers would not be an impossible task. The capital required would be relatively small compared to the benefits it could provide members. Certainly as the use of production contracts becomes more prevalent in other sectors of the livestock industry, the use of cooperatives will become more attractive.

The formation of cooperatives is only as useful as the interested parties make it. Laws prohibiting certain practices or contract terms are only effective if farmers assert their rights and regulators police the industry. Laws limiting monopoly power are only effective where there is willingness to aggressively police mergers. Similarly, laws encouraging collective action on behalf of farmers are only useful where farmers take the initiative to band together. As the meatpacking industry continues to consolidate and production contracts become more and more common, the need for livestock cooperatives will only grow.

IV. CONCLUSION

The rapid changes in agriculture over the past half-century have left livestock farmers in a poor economic position. Particularly in vertically integrated livestock farming, farmers are often at the mercy of a much more powerful meatpacker when negotiating contracts, which often leads to little or no negotiation at all.²¹⁷ Farmers who have invested heavily in the equipment and facilities needed to operate their livestock farm must accept unfair contract terms or risk serious financial consequences. The result is an industry that saddles farmers with risks and allows wealth to accumulate in the meatpackers.

Numerous laws have been passed addressing this issue, and many commentators have advocated for their own solutions. However, the

²¹⁶ *About Co-ops*, NATIONAL COUNCIL OF FARMER COOPERATIVES, <http://www.ncfc.org/about-ncfc/about-co-ops> (last visited February 22, 2015).

²¹⁷ See *supra* text accompanying notes 61–64.

solution for this modern problem lies in the common cooperative form, which was expressly validated by the Capper-Volsted Act nearly 100 years ago.²¹⁸ By negotiating collectively through a cooperative, farmers would be able to improve their negotiating position so that they are not stuck dealing on a take-it-or-leave-it basis with meatpackers. Alternatively, farmers could operate meatpacking facilities of their own through cooperatives. Farmers utilizing this method would be able to see the profits from the meatpacking activity flow back to them. Through these solutions, a farmer's position in the modern food industry can improve.

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²¹⁸ See *supra* text accompanying notes 179–181.

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