

# ADHESION CONTRACTS: FRIEND OR FOE TO SMALL FARM OWNERS?

## I. INTRODUCTION

In 1994, small farm owners from Alabama took on agribusiness giants such as ConAgra, the nation's tenth largest poultry processor and diverse agribusiness, by rallying and lobbying their local lawmakers to pass the Alabama Agriculture Fair Practices Act (Act).<sup>1</sup> The farmers wanted the Act to pass because it would give small farm owners the ability to negotiate collectively instead of being forced to accept the large companies' contract demands on an all-or-nothing basis, thus giving the farmers more contracting rights.<sup>2</sup> At the time, many of these small farm owners paid regular dues to the Alabama Poultry and Egg Association (APEA), a nonprofit organization in the consumer services industry that claims to serve "both companies and individuals that make up Alabama's poultry industry".<sup>3</sup> In turn, the APEA lobbied against the Act that the farmers fought for by taking the side of Conagra, Tyson Foods, Wayne Farms, Perdue, and other corporate agricultural giants.<sup>4</sup> Together, they sent the message that if the bill passed, big agricultural corporations would leave the state.<sup>5</sup> Together with the APEA, the large poultry companies spent \$90,000 to defeat the bill, and the bill failed.<sup>6</sup> The next year, after facing a suit by poultry farmers claiming to be mistreated, ConAgra presented new contracts that made arbitration the only means of dispute resolution.<sup>7</sup> As a result, the option for those farmers to form a class action vanquished, and the ability for them to bring suit was weakened.<sup>8</sup>

As agricultural technology becomes more sophisticated, fewer large companies control the technology that farmers need, whether it be genetically

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<sup>1</sup> Sam Gazdziak, *The 2018 Top 100 Mean and Poultry Processors*, THE NATIONAL PROVISIONER (2018), available at <https://www.provisioneronline.com/2018-top-100-meat-and-poultry-processors> (last visited February 12, 2019); see also Dan Fesperman and Kate Shatzkin, *Taking a Stand, Losing the Farm*, BALTIMORE SUN (June 27, 2011, 10:35 AM), available at <http://www.baltimoresun.com/business/bal-pecking-order-day2a-story.html>.

<sup>2</sup> Fesperman & Shatzkin, *supra* note 1.

<sup>3</sup> *Id.*; APEA, [HTTP://WWW.ALABAMAPOULTRY.ORG](http://www.alabamapoultry.org) (last visited March 1, 2019); *National Contract Poultry Growers Association*, BLOOMBERG (March 1, 2019), available at <https://www.bloomberg.com/profiles/companies/1639894D:US-national-contract-poultry-growers-association>.

<sup>4</sup> See sources cited *supra* note 3.

<sup>5</sup> See sources cited *supra* note 3.

<sup>6</sup> Fesperman & Shatzkin, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

modified seeds, pesticides, or rearing techniques.<sup>9</sup> As a result, large corporations are able to set the terms of the agreements and have increased their influence over the regulatory agencies that are supposed to ensure fair practices in the agricultural (“ag”) industry.<sup>10</sup>

This Comment will consider the problems that arise when small farm owners sign contracts with large ag corporations. Part II of this Comment will provide a thorough background on how larger agriculture companies have gained the lion’s share of the ag industry.<sup>11</sup> Part III of this Comment will examine the contracts that small farm owners are agreeing to within the framework of due process, public policy, and contract law, specifically adhesion contracts, arbitration clauses, and unconscionability claims. Part IV of this Comment will review mutual assent issues, modern Contract Clause interpretation, and the representation that small farm owners have available. Part V of this Comment will discuss the possible remedies that could protect small farm owners from disadvantageous adhesion contracts.

## II. BACKGROUND

The landscape of the agricultural industry has increasingly changed over the years, including a shift in power from many small farm owners to few large corporations.<sup>12</sup> In America, the number of farms has decreased by more than one million in the last half-century.<sup>13</sup> With this change, contractual liability has shifted to the small farm owner.<sup>14</sup>

Today close to eighty percent of all corn, seventy percent of soybean, and sixty percent of all seeds are provided by a handful of companies, namely Monsanto, DuPont, Syngenta, and Dow.<sup>15</sup> In the poultry industry Purdue,

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<sup>9</sup> Ken Roseboro, *GE Seed Monopoly: Fewer Choices, Higher Prices, Sound Consumer*, PCC NAT. MARKETS (Sept. 2013), available at [http://www.pccnaturalmarkets.com/sc/1309/ge\\_seed\\_monopoly.html](http://www.pccnaturalmarkets.com/sc/1309/ge_seed_monopoly.html).[http://www.pccnaturalmarkets.com/sc/1309/ge\\_seed\\_monopoly.html](http://www.pccnaturalmarkets.com/sc/1309/ge_seed_monopoly.html) (last visited February 12, 2019).

<sup>10</sup> *Id.*; Sabrina Wilson, *Induced Nuisance: Holding Patent Owners Liable for Gmo Cross-Contamination*, 64 EMORY L.J. 169, 171 (2014); Ian T. Shearn, *Whose Side Is the American Farm Bureau On?*, THE NATION (July 16, 2012), available at <https://www.thenation.com/article/whose-side-american-farm-bureau>.

<sup>11</sup> Dorothy Du, Note, *Rethinking Risks: Should Socioeconomic and Ethical Considerations Be Incorporated into the Regulation of Genetically Modified Crops?*, 26 HARV. J.L. & TECH. 375, 387 (2012).

<sup>12</sup> Shearn, *supra* note 10; Dorothy Du, *supra* note 11.

<sup>13</sup> HEATHER CABLE, THE PEW CHARITABLE TRS., HOW CORPORATE CONTROL SQUEEZES OUT SMALL FARMS (The Pew Charitable Trs. ed., July 18, 2012), available at <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2012/07/18/how-corporate-control-squeezes-out-small-farms>.

<sup>14</sup> See Neil D. Hamilton, *Forced Feeding: New Legal Issues in the Biotechnology Policy Debate*, 17 WASH. U.J.L. & POL'Y 37, 48 (2005).

<sup>15</sup> Roseboro, *supra* note 9.

Tyson, Pilgrim's, and Sanderson Farms together control over fifty percent of the market.<sup>16</sup> In 2015 the Chief Executive Officers of John Deere, Dupont, and Monsanto made more money than over 2,000 small farm owners combined.<sup>17</sup> With the rise of bigger agricultural corporations, smaller farmers are seeing the cost of doing business rise, and the ability to protect their property through the courts decline as they sign standard-form adhesion contracts.<sup>18</sup> Adhesion contracts are contracts presented on a take-it-or-leave-it basis, meaning that the consumer must accept all contractual terms as they are presented in order to do business with the company.<sup>19</sup> Often, however, the consumer does not have a meaningful choice when deciding to contract or not, as many markets are controlled by a handful of small businesses that present essentially identical terms.<sup>20</sup>

In 2010, the United States Department of Agriculture (USDA), together with the United States Department of Justice (DOJ), conducted a workshop that examined the impact large poultry companies had on small farm owners.<sup>21</sup> Retired U.S. Fish and Wildlife Service officer, Mike Weaver, was one of only a few farmers who attended the workshop.<sup>22</sup> He bemoaned the practices of the poultry industry giants and claimed that the other contract farmers were too afraid of retaliation to attend the workshop.<sup>23</sup> He later alleged that he was retaliated against by big poultry businesses for speaking out and subsequently received inferior feed and chickens.<sup>24</sup> The policy director for the Campaign for Contract Agriculture Reform stated that the poultry contracts in question caused farmers to become deeply indebted.<sup>25</sup> The small farm owners' debt accrues as a cost of doing business with these companies because the farmers bear the cost burden of housing and raising the chickens that do not belong to

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<sup>16</sup> Leah Douglas, *Big Food Versus Big Chicken Lawsuits Allege Processors Conspired to Fix Bird Prices*, NPR (February 6, 2018, 6:38 PM), available at <https://www.npr.org/sections/thesalt/2018/02/06/583806552/big-food-versus-big-chicken-lawsuits-allege-processors-conspired-to-fix-bird-pri>.

<sup>17</sup> Donnelle Eller, *Cartoonist Says His Work Got Him Axed*, DES MOINES REGISTER (May 3, 2016, 2:52 PM), available at <https://www.desmoinesregister.com/story/money/2016/05/02/cartoonist-says-his-work-got-him-axed/83841760/>.

<sup>18</sup> Roseboro, *supra* note 9; Dorothy Du, *supra* note 11; See Sierra David Sterkin, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 34 GOLDEN GATE U. L. REV. 285, 287 (2004) (“[A]dhesion contracts represent the will of only the drafting party.”).

<sup>19</sup> See sources cited *supra* note 18.

<sup>20</sup> See sources cited *supra* note 18.

<sup>21</sup> See Nathaniel Haas, *John Oliver vs. Chicken*, POLITICO (July 1, 2015, 5:25 PM), available at <https://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

them, but to the large poultry companies.<sup>26</sup> Weaver claims that the small farm owners enter into these contracts believing the large companies' promises that they will be profitable, instead they end up struggling by becoming deeply indebted or losing their farms altogether.<sup>27</sup>

The Chicken Council represents the poultry companies that produce over ninety percent of the poultry consumed in the United States.<sup>28</sup> The council publicly refuted the claims of mistreatment in the poultry industry with a University of Delaware study that indicated seventy percent of poultry farmers were pleased with their dealings with the chicken companies.<sup>29</sup>

Subsequent to the 2010 workshop, 40,000 contract poultry farmers, 900,000 cattle ranchers, and 70,000 hog farmers alleged that the USDA does not always act in the best interest of small farm owners.<sup>30</sup> Represented by the Organization for Competitive Markets (OCM), ranchers and farmers attempted to sue the USDA claiming that it failed to adequately represent them.<sup>31</sup> In the petition for review the OCM claimed:

[I]n these respects and others, the Withdrawals [of the Farmer Fair Practices Rule] are arbitrary, capricious, and contrary to the PSA in violation of 5 U.S.C. § 706(2), and by withdrawing the Farmer Fair Practices Rules without replacing them, the USDA has unlawfully withheld agency action under the 2008 Farm Bill in violation of 5 U.S.C. § 706(1).<sup>32</sup>

The Grain Inspection, Packers and Stockyards Administration (hereinafter, GIPSA) was created in 1994.<sup>33</sup> As part of the USDA, GIPSA was the result of joining the Federal Grain Inspection Service and the Packers and Stockyards Administration.<sup>34</sup> Under the USDA, GIPSA was meant to promote fair and competitive practices within the agricultural industry.<sup>35</sup> Barbara Patterson, a representative of the National Farmers Union, supported farmers in their claim.<sup>36</sup> She pointed out that the purpose of the 1921 Packers and Stockyard Act was originally created to offer small farm owners "protection from

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<sup>26</sup> *Id.*

<sup>27</sup> See Hass, *supra* note 21.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Nancy Matsumoto, *The USDA Rolled Back Protections For Small Farmers. Now The Farmers Are Suing*, NATIONAL PUBLIC RADIO (2017), available at <https://www.npr.org/sections/thesalt/2017/12/14/570889309/the-usda-rolled-back-protections-for-small-farmers-now-theyre-suing> (last visited Jan 8, 2019).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *History and Mission Statement*, USDA (May 3, 2016), available at <https://www.gipsa.usda.gov/about/mission.aspx> (last visited Jan 24, 2019).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

predatory, retaliatory, and nontransparent practices” of larger companies, but the courts have allowed the original intent of the act to erode over time.<sup>37</sup> While these particular GIPSA challenges are centered particularly on poultry and livestock markets, they give a glimpse into how the USDA may leave small farm owners unprotected.<sup>38</sup>

### III. LEGAL AUTHORITY

#### *A. Contract Clause Limitations on States’ Abilities to Govern Contract Law*

The Contract Clause was not a great source of contention during the drafting of the U.S. Constitution, nor is it one of the most well-known fixtures of the Constitution today.<sup>39</sup> The Clause’s importance, however, is underscored in the Federalist Papers by James Madison’s detailed description of the clause’s purpose.<sup>40</sup> He wrote that the Contract Clause was intended to create expectations of security in private property dealings, “Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights.”<sup>41</sup>

Sticking to a strict interpretation of the Clause’s words, renowned U.S. Supreme Court Chief Justice Marshall proclaimed that to let the legislature impair contracts would be to “break in upon the ordinary intercourse of society and destroy all confidence between man and man.”<sup>42</sup>

Created with the intent to protect the property rights of private parties, the Contract Clause was frequently used to challenge legislation through the courts for the first eighty years of the United States’ existence.<sup>43</sup> However, after New Deal ideals took hold of the nation, the Supreme Court started to take a less rigid approach to analyzing Contract Clause cases.<sup>44</sup> Over time, the Court’s test shifted from one that primarily analyzed individual expectations, to a test that balances individual rights with what best protects the public good.<sup>45</sup> To determine if the legislation can withstand the Contract Clause, the Court now considers the legislators’ prerogative rather than the mindset of the individual parties to the contract.<sup>46</sup>

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<sup>37</sup> Matsumoto, *supra* note 30.

<sup>38</sup> *Id.*

<sup>39</sup> See Robert A. Graham, *The Constitution, the Legislature, and Unfair Surprise: Toward A Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV. 398, 398–412 (1993).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 404.

<sup>43</sup> *Id.* at 398.

<sup>44</sup> *Id.* at 398.

<sup>45</sup> Graham, *supra*, note 39.

<sup>46</sup> *Id.*

This shift was notably highlighted when United States Supreme Court Chief Justice Hughes announced that the Court's analysis rests on the "growing appreciation of public needs and the necessity of finding ground for a rational compromise between individual rights and public welfare".<sup>47</sup> This balancing test between individual and public rights can be seen in modern contract cases.<sup>48</sup>

### *B. Early American Jurisprudence View of Property Rights*

In 1829, United States Supreme Court Justice Joseph Story explained property rights from a constitutional framework:

The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred...the people ought not to be presumed to part with rights so vital to their security and wellbeing, without very strong and direct expressions of such an intention.<sup>49</sup>

The framers of the constitution added many provisions in the Constitution that were intended to protect property rights.<sup>50</sup> Among several congressional limits was the Contract Clause, which barred states from passing laws "impairing the obligation of Contracts."<sup>51</sup>

Early U.S. Supreme Court justices held the view that property and contractual rights were integral to a free market economy and, because due process protected an individual's right to property, it inherently protected an individual's liberty to contract.<sup>52</sup> Early state laws reflected the notion that contractual freedom is protected under the Constitution as well.<sup>53</sup> Contracts are the underpinning of our economy and when used properly they can protect business and property interests; when used as tools of oppression, they work against an individual's right to life, liberty, and property.<sup>54</sup>

Supreme Court Justice Antonin Scalia stated that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined, procedures tailored to the type of dispute."<sup>55</sup> High litigation costs are one of several reasons arbitration agreements are present in adhesion

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829).

<sup>50</sup> *Severance v. Patterson*, 370 S.W.3d 705, 709 (5<sup>th</sup> Cir. 2012).

<sup>51</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>52</sup> LII / LEGAL INFO. INS., DUE PROCESS OF LAW (Lii/Legal Info. Ins. ed.), available at <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/due-process-of-law> (last visited Feb 8, 2019).

<sup>53</sup> *Allgeyer v. State of La.*, 165 U.S. 578, 584–93 (1897).

<sup>54</sup> See *Wilkinson*, 27 U.S. at 657.

<sup>55</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45, 131 S. Ct. 1740, 1749, 179 L. Ed. 2d 742 (2011).

contracts used by businesses in an effort to reduce expenses.<sup>56</sup> This litigation alternative does not always save small farm owners money, however.<sup>57</sup> Instead of being able to go to small claims court where costs are usually around a hundred dollars per case, arbitration costs are usually more than a thousand dollars per day.<sup>58</sup> Arbitration clauses frequently appear in standard form agreements.<sup>59</sup> By its nature, arbitration is a private process that is not regulated or monitored by the court processes that would otherwise handle disputes.<sup>60</sup> As standard form arbitration clauses have been on the rise, so have claims of unconscionability and violation of public policy.<sup>61</sup> Arbitration clauses account for the “lion’s share” of the rise of unconscionability claims; choice of law, choice of forum, as well as class action waivers have been increasingly challenged.<sup>62</sup> States such as California once considered class waiver requirements unconscionable, but the Supreme Court later ruled that state doctrines that held arbitration clauses unconscionable were preempted by the Federal Arbitration Act.<sup>63</sup>

The Federal Arbitration Act states that arbitration agreements are “valid, irrevocable, and enforceable”.<sup>64</sup> However, arbitration agreements can be challenged at the federal level when they are unfair or deceptive because the Federal Trade Commission prohibits such practices.<sup>65</sup> Similarly, every state in the nation has “consumer protection acts” of their own to serve the same purpose.<sup>66</sup> The Federal Trade Commission is authorized to bring an action against companies or individuals when claims of misrepresentation, unconscionability, or economic duress are successfully brought against them.<sup>67</sup> At the state level, consumer protection acts usually authorize state attorneys general to obtain relief for consumers against deceptive business

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<sup>56</sup> CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH* 541 (West Acad. Publ’g, 2<sup>nd</sup> ed. 2013).

<sup>57</sup> Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1240 (2001).

<sup>58</sup> *Id.*

<sup>59</sup> Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 621-25 (2009).

<sup>60</sup> *See City Coll., Inc. v. Moore Sorrento*, (2010 Okla. Civ. App. 127, 128-31).

<sup>61</sup> Knapp, *supra* note 59.

<sup>62</sup> *Id.*

<sup>63</sup> *AT&T Mobility*, 563 U.S. 333 at 333.

<sup>64</sup> Federal Arbitration Act § 3 U.S.C. § 392 (1947).

<sup>65</sup> *See generally Id.*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 3353–54, 87 L. Ed. 2d 444 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 (1985)).

<sup>66</sup> Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little Ftc Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 373–74 (1990).

<sup>67</sup> *Id.* at 382–85.

practices.<sup>68</sup> This can be done by means of injunctive relief or declaratory judgments.<sup>69</sup> An injunction is an equitable remedy, which means the purpose is to provide relief from irreparable harm.<sup>70</sup> Harm is deemed irreparable when it, it cannot readily, adequately, and completely be remedied by financial compensation.<sup>71</sup> A declaratory judgment declares the rights of the parties but has no executory process and does not demand performance from a defendant.<sup>72</sup>

The disproportionate bargaining power between large agribusiness companies and small farm owners leads to adhesion contracts that may contain terms that significantly disadvantage small farm owners.<sup>73</sup> Once signed, however, there is little these farmers can do to regain the rights they relinquished at the time of contract.<sup>74</sup>

The Organic Seed Growers and Trade Association is a group of farmers, seed businesses, and related organizations. They brought an action seeking a declaratory judgment that they were not infringing Monsanto's patents.<sup>75</sup> The members of the association argued that because of the terms in Monsanto's contract that hold farmers responsible for genetic drift, many farmers refrain from farming in a manner they would prefer to.<sup>76</sup> In response, Monsanto did not make a covenant not to sue as the farmers had hoped, but instead published a statement expressing "its commitment not to take legal action against growers whose crops might inadvertently contain traces of Monsanto biotech genes."<sup>77</sup>

Vernon Bowman, an Indiana farmer sued Monsanto in 2013.<sup>78</sup> He argued that the patent exhaustion doctrine allowed him to replant seeds and sell the

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<sup>68</sup> Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. KAN. L. REV. 209 (2016).

<sup>69</sup> Karns, *supra* note 66.

<sup>70</sup> See *State Comm'n on Human Relations v. Talbot Cty. Det. Ctr.*, 370 Md. 115, 140, 803 A.2d 527, 542 (2002).

<sup>71</sup> *Id.*

<sup>72</sup> *Lemoine v. Baton Rouge Physical Therapy, L.L.P.*, 2013-0404 (La. App. 1 Cir. Dec. 27, 2013).

<sup>73</sup> David R. Moeller and Michael Sligh, *Rural The Farmers' Checklist to GMO Contracts*, U.S. DEPARTMENT OF JUSTICE (November 2014). (featured on the US Justice Department to help farmers become aware of what they are getting themselves into when contracting with companies like Monsanto).

<sup>74</sup> *Id.*

<sup>75</sup> *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 718 F.3d 1350, 1352–54 (Fed. Cir. 2013).

<sup>76</sup> *Id.* Genetic drift occurs when pollen from genetically modified pollen is moved into neighboring fields by wind, insects, and animals.

<sup>77</sup> *Id.*

<sup>78</sup> *Bowman v. Monsanto Co.*, 569 U.S. 278, 133 S. Ct. 1761, 185 L. Ed. 2d 931 (2013).



product of those seeds beyond one season.<sup>79</sup> The Supreme Court held that the doctrine did not permit the farmer to reproduce the seeds through planting and harvesting without the patent holder's permission and found in favor of Monsanto.<sup>80</sup> Monsanto was also successful in its cases against other small farm owners for patent infringement.<sup>81</sup> The David and Goliath dynamic between small farm owners and companies like Monsanto has not gone unnoticed by those in the industry.<sup>82</sup> As the President of the Texas Organic Cotton Marketing Cooperative once proclaimed, "You're not going to beat Monsanto in court...you're not going to beat them in the political arena."<sup>83</sup> This dynamic between farmers and companies like Monsanto presents the need for organizations, private or governmental, to serve as a watchdog against potential contractual abuses.<sup>84</sup>

### *C. Contract Law*

Contracts are based on promises and contract law is based on the premise that people should be held to the agreements that they make.<sup>85</sup> The law recognizes that by communicating a commitment to one another, people are assenting to obligations.<sup>86</sup> However, a promise alone is not enough to bind someone to an obligation.<sup>87</sup> To be considered a contract there must be a bargained-for exchange that mutually induces the assent of the parties.<sup>88</sup> This bargaining process includes a "benefit to the promisor" known as consideration.<sup>89</sup> Parties may seek relief from contract enforcement based on a lack of predictability and clarity that existed at the time they signed the contract and a court may deem a contract invalid due to misrepresentation, mistake, duress, undue influence, unconscionability, or a violation of public policy at the time of formation.<sup>90</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Saved Seed and Farmer Lawsuits*, MONSANTO, (April 11, 2017), available at <https://monsanto.com/company/media/statements/lawsuits-against-farmers/>.

<sup>82</sup> See Eva Hershaw, *Seeds of Discontent: A Texas Organic Cotton Farmer Takes On Monsanto*, TEX. OBSERVER (Feb. 7, 2013, 3:59 pm), available at <http://www.texasobserver.org/seeds-of-discontent/>; See Wilson, *supra* note 10, at 171; see Shearn, *supra* note 10.

<sup>83</sup> Hershaw, *supra* note 82.

<sup>84</sup> *Id.*

<sup>85</sup> CAL. CIV. CODE § 1549 (West 1872).

<sup>86</sup> See *Money Store Investment Corp. v. Southern Cal. Bank* 98 CA4th 722, 728, 120 CR2d 58 (2002).

<sup>87</sup> See *Blaylock v. Toledo, P. & W. R. Co.*, 43 Ill. App. 3d 35, 36–38, 356 N.E.2d 639, 640–42 (1976).

<sup>88</sup> See *id.* at 36–38.

<sup>89</sup> See *Nuszen v. Burton*, 494 S.W.3d 799, 803–06 (Tex. App. 2016).

<sup>90</sup> CAL. CIV. CODE § 1565-1568 (West 1872).

Common law has no concrete rules about what constitutes an adhesion contract, and courts use several criteria when deciding if a contract is adhesive or not.<sup>91</sup> Courts often look to see whether the contract is a standardized form, that is more general than particular, and whether the contract is presented on a “take it or leave it basis”.<sup>92</sup> Adhesion contracts are often long, and the legal terms are often unintelligible to a layperson.<sup>93</sup>

#### *D. Unconscionability*

One theoretical option farmers have when finding themselves disadvantaged by the terms of adhesion contracts is to claim that the contract is unenforceable due to unconscionability.<sup>94</sup> The contractual concept of unconscionability originated in the 18th century English courts.<sup>95</sup> The defense of unconscionability does not police the behavior that occurs during the performance of the contract but relates to the terms that were agreed upon during a contract’s formation.<sup>96</sup> There are two types of unconscionability, procedural and substantive.<sup>97</sup>

Procedural unconscionability can be argued when there is a gross inequality of bargaining power due to the absence of meaningful choice or when there is an unfair surprise that the party would not have been expected to anticipate.<sup>98</sup> When arguing an imbalanced bargaining position, adhesion contracts themselves can be used to support that claim.<sup>99</sup>

Substantive unconscionability can be argued when there is an overall imbalance that relates to the oppressive nature of the contract.<sup>100</sup> When examining the alleged imbalanced and oppressive nature of a contract, courts look to see if the contract in question contains terms that deprive one party of the benefit of the agreement, or if the terms deny one party an adequate remedy in the event that the other breaches.<sup>101</sup> These types of contracts are substantially

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<sup>91</sup> Andrew Tutt, *On the Invalidity of Terms in Contracts of Adhesion*, 30 YALE J.439, 440–441 (2013).

<sup>92</sup> *Id.* at 441–42.

<sup>93</sup> See Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1062–63 (2005).

<sup>94</sup> *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 224–234 (Tex. 2014) (farmers argued arbitration provisions were unconscionable; the Supreme Court of Texas agreed that the waiver in question was invalid because it transgressed public policy).

<sup>95</sup> *See Hume v. United States*, 132 U.S 406 (1889).

<sup>96</sup> *Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th 677, 689–94, 99 Cal. Rptr. 2d 809, 818–21 (2000).

<sup>97</sup> *See Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1249–51, 367 P.3d 6, 14–16 (2016).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1159 (Fla. 2014).

<sup>101</sup> *Id.*

disadvantageous to one party and extremely unequal terms will usually be evident.<sup>102</sup>

When determining whether an unconscionability defense is viable, the court considers both procedural and substantive unconscionability.<sup>103</sup> The court looks to see if unintelligible legal language was used and whether or not the person could understand the terms based on their education level and literacy.<sup>104</sup> The court may also look at the particular trade or industry involved to determine unconscionability.<sup>105</sup>

Claims that a contract is unenforceable on the basis that it is unconscionable are most likely to be successful when they arise between individual consumers—such claims by businesses are rarely successful.<sup>106</sup> If a court finds a contract or contract clause unconscionable, the court may deem a clause void, or void the entire contract.<sup>107</sup>

### *E. Seed Contracts*

While most large agriculture corporations have smaller farmers sign adhesion contracts, the most notorious of them all is, arguably, Monsanto.<sup>108</sup> This comment will take a close look at Monsanto's technology/stewardship agreement because as much as ninety percent of seed genetics are controlled by Monsanto and not all agricultural companies have had the terms of their agreements exposed as publicly.<sup>109</sup> The agreement is a contract that Monsanto requires farmers to sign in an effort to discourage misuse of their technology, and provides insight into what small farm owners are up against.<sup>110</sup>

Farmers wishing to do business with Monsanto must sign a technology/stewardship agreement.<sup>111</sup> Farmers are required to abide by those terms, such as being liable for potential cross-contamination or for keeping

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<sup>102</sup> See *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 246 P.3d 961 (Idaho 2010).

<sup>103</sup> See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 96–106, 6 P.3d 669, 678–85 (2000).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; See *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1249–51, 367 P.3d 6, 14–16 (2016); *Toker v. Westerman*, 113 N.J. Super. 452, 454, 274 A.2d 78, 80 (Dist. Ct. 1970).

<sup>106</sup> *Kunz*, *supra* note 59 at 523.

<sup>107</sup> See *Gatton v. T-Mobile USA, Inc.*, 152 Cal. App. 4th 571, 584–88, 61 Cal. Rptr. 3d 344, 354–58 (2007).

<sup>108</sup> Christopher Leonard, *Monsanto Uses Patent Law*, NATION, (Last Visited Dec 8, 2018), available at [https://www.cleveland.com/nation/index.ssf/2009/12/monsanto\\_uses\\_patent\\_law\\_to\\_co.html](https://www.cleveland.com/nation/index.ssf/2009/12/monsanto_uses_patent_law_to_co.html).

<sup>109</sup> *Id.*; MONSANTO, *supra* note 81.

<sup>110</sup> MONSANTO, *supra* note 81.

<sup>111</sup> *Id.*

leftover seeds.<sup>112</sup> There are over 325,000 farmers who contract with Monsanto to purchase their products every year.<sup>113</sup>

Farmers have no opportunity or rights to negotiate the terms of the technology agreement which they are required to sign in order to purchase the product.<sup>114</sup> The contract also warns farmers that they accept all of the provided terms not only by signing the contract, but in some cases merely by opening the bag of seeds.<sup>115</sup> Usually, the binding arbitration clause requires arbitration to be resolved in St. Louis, the same city Monsanto's headquarters are located.<sup>116</sup> The laws of Missouri will apply to farmers who go to court against Monsanto instead of the laws of the state in which the farmer lives or where the farming occurred.<sup>117</sup> Their choices are to agree to the arbitration clause, or not receive the seeds.<sup>118</sup> Because virtually all large seed companies have similar arbitration agreement requirements, farmers are left with a lack of meaningful choice in regard to growing particular crops.<sup>119</sup> Farmers have many variables to contend with when trying to produce a successful yield.<sup>120</sup> Genetically modified crops, grown from seeds such as Monsanto's, are more resistant to insects, weeds, and weather conditions.<sup>121</sup> Farmers that use do not utilize this biotechnology are forced to spend more money on tillage, water, and pesticide use.<sup>122</sup>

The terms of Monsanto's contracts usually provide that Monsanto will collect damages and attorneys' fees and costs if they find the farmers have violated the agreement.<sup>123</sup> An example of a violation would be if a farmer was found to have saved leftover Monsanto seed from a previous crop cycle because farmers agree to "not to supply any Seed containing patented Monsanto Technologies to any other person or entity for planting, and not to save any crop produced from Seed for planting and not to supply Seed produced from Seed to anyone for planting."<sup>124</sup> Often, however, the provided contracts do not provide for the farmers to recover their attorneys' fees and related costs even if they are not found to be in violation.<sup>125</sup> In addition, most

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<sup>112</sup> Moeller & Sligh, *supra* note 73.

<sup>113</sup> MONSANTO, *supra* note 81.

<sup>114</sup> Moeller & Sligh, *supra* note 73.

<sup>115</sup> *Id.*

<sup>116</sup> MONSANTO, *supra* note 81.

<sup>117</sup> *Id.*

<sup>118</sup> Moeller & Sligh, *supra* note 73.

<sup>119</sup> See David Sterkin, *Challenging Adhesion Contracts in California: A Consumer's Guide*, 34 GOLDEN GATE U. L. REV. 285, 287 (2004).

<sup>120</sup> *Why Do We Use GMOs*, PURDUE UNIVERSITY, <https://ag.purdue.edu/GMOs/Pages/WhyGMOs.aspx>. (last visited March 24, 2019).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Moeller & Sligh, *supra* note 73.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

contracts provide that if the seeds do not perform as promised, the farmer is only entitled to Monsanto's choice of replacement of the seed or reimbursement for those particular seeds, leaving farmers with no avenue to seek damages.<sup>126</sup>

The Federal Privacy Act ("FPA") outlines an individual's "right to be protected against unwarranted invasion of their privacy resulting from the collection, maintenance, use, and disclosure of their personal information."<sup>142</sup> The FPA would ordinarily protect government records of a farmer's crop from being released to other entities.<sup>127</sup> However, when farmers sign these agreements, they waive all of their rights under the FPA.<sup>128</sup> From the time they start contracting, the farmers must waive their privacy rights and allow Monsanto access to their fields to inspect crops.<sup>129</sup> The farmers must allow Monsanto full access to their records containing data about their crops, such as yield information.<sup>130</sup> Farmers must also surrender any requested invoices for all seed and chemical transactions.<sup>131</sup> In doing so, companies such as Monsanto are allowed to view the records, copy the records, and keep the records.<sup>132</sup> Monsanto then retains this right to review a farmer's documents and crops even after the crops the farmer is growing no longer use Monsanto seeds.<sup>133</sup>

In addition to seed contracts, a large number of farmers are entering into poultry production contracts that contain disadvantageous terms as well.<sup>134</sup>

### *F. Poultry Production Contracts*

Over a century ago, most chicken farmers independently owned, raised, and sold their own poultry.<sup>135</sup> Beginning in the 1940s, various phases of poultry production started to be streamlined by poultry producers.<sup>136</sup> These poultry

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<sup>126</sup> *Id.*

<sup>142</sup> The Privacy Act and the Freedom of Information Act, Social Security [hereinafter, "Privacy Act"], *available at* <https://www.ssa.gov/agency/privacyact.html>. (last visited Feb. 25, 2019).

<sup>127</sup> Moeller & Sligh, *supra* note 73.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Privacy Act, *supra* note 142.

<sup>133</sup> Moeller & Sligh, *supra* note 73.

<sup>134</sup> *See Vertical Integration*, THE NAT'L CHICKEN COUNCIL, *available at* <https://www.nationalchickencouncil.org/industry-issues/vertical-integration/> (last visited March 29, 2019).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

producers are also known as “integrators.”<sup>137</sup> According to estimates, integrators now produce over ninety percent of the poultry sold in the United States.<sup>138</sup> Today, these poultry producers own the poultry and control almost every aspect of their production, while the farmer’s role is to take care of the poultry for a limited time.<sup>139</sup> The rules for taking care of the poultry are directed by terms found in production contracts.<sup>140</sup> A production contract can be defined as:

[A] legally binding agreement of a fixed term, entered before production begins, under which a producer either agrees to sell or deliver all of a specifically designated crop raised on identified acres in a manner set in the agreement to the contractor and is paid according to a price or payment method, and at a time, determined in advance, or agrees to feed and care for livestock or poultry owned by the contractor until such time as the animals are removed, in exchange for a payment based on a formula using the performance of the animals.<sup>141</sup>

The rules for raising the poultry under these contracts are strict and the cost is high.<sup>142</sup> The cost of poultry-raising equipment can be hundreds of thousands of dollars, and the farmer must pay for it before the poultry producers will let them sign the contract, which places a large burden and risk on small farm owners.<sup>143</sup> Under the terms of their production contracts with the integrators, farmers are subject to pricing based on ranking systems by the integrators that aren’t always explained to the farmers.<sup>144</sup>

In theory, production contracts offer a reliable way for farmers to limit their risks because the contracts can guarantee payment for the raised poultry.<sup>145</sup> Integrators also benefit from this arrangement by reducing their financial risk because they gain control over the market and do not have to invest their own funds as capital.<sup>146</sup> However, when market conditions are not favorable, “integrators are more likely to terminate contracts with farmers than decrease production by reducing the density of flocks grown on all contract farms.”<sup>147</sup> While the amount of poultry being raised has increased over three hundred

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See NAT’L CHICKEN COUNCIL, *supra* note 134.

<sup>141</sup> See Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051, 1057-58 (1995); See Edward P. Lord, *Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts*, 33 WAKE FOREST L. REV. 1125, 1125-53 (1998).

<sup>142</sup> Haas, *supra* note 21.

<sup>143</sup> *Id.*

<sup>144</sup> See Randi Ilyse Roth, *Contract Farming Breeds Big Problems for Growers*, FARMERS’ LEGAL ACTION GRP. (1992), at 15.

<sup>145</sup> See Lord, *supra* note 141.

<sup>146</sup> *Id.*

<sup>147</sup> Lord, *supra* note 141.

percent over the last century the number of farms has simultaneously decreased.<sup>148</sup> Production contracts usually end up with poultry farmers earning low incomes, despite presentations by the integrators that professed optimistic outcomes for the farmers.<sup>149</sup>

#### IV. LEGAL ANALYSIS

##### *A. Mutual Assent within Adhesion Contracts*

The common law principles regarding the sanctity of contracts developed under the assumption that a contract was the result of two parties enjoying a meeting of minds, also known as mutual assent.<sup>150</sup> In such an instance, the resulting contract is the product of the parties bargaining for the terms they each desired.<sup>151</sup> Because the bargain was struck after a negotiation between the parties, the requirement of mutual assent could be understandably presumed.<sup>152</sup> However, the standard-form adhesion contracts that small farm owners are presented with today do not afford both parties the freedom to bargain over contractual terms.<sup>153</sup> Despite the fact that adhesion contracts are not the product of a bargain in the same way conventional contracts are, traditional contract law is usually still applied.<sup>154</sup> With standard form adhesion contracts, the traditional notion of a contractual amalgamation of dickered terms is often overlooked.<sup>155</sup> The necessary element of mutual assent can still be satisfied with a showing of an offer of the terms combined with subsequent acceptance of the terms.<sup>156</sup> For example, the farmers who sign the technology/stewardship agreement with Monsanto usually do not have an opportunity to bargain with Monsanto regarding the terms of the agreement; they must accept the terms as presented to them.<sup>157</sup> Courts have acknowledged that contracts have changed to meet the needs of society, but have failed to change how the validity of such contracts are analyzed accordingly.<sup>158</sup>

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<sup>148</sup> See Robert V. Bishop & Lee A. Christensen, *America's Poultry Industry*, NAT'L FOOD REV., (Jan. 1, 1989); Lord, *supra* note 141.

<sup>149</sup> Lord, *supra* note 141; see Roth, *supra* note 144, at 14.

<sup>150</sup> Justin P. Green, *The Consumer-Redistributive Stance: A Perspective on Restoring Balance to Transactions Involving Consumer Standard-Form Contracts*, 46 AKRON L. REV. 551, 561 (2013).

<sup>151</sup> See Green, *supra* note 150.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Green, *supra* note 150, at 562.

<sup>155</sup> Green, *supra* note 150, at 561.

<sup>156</sup> *Id.*

<sup>157</sup> Moeller & Sligh, *supra* note 73.

<sup>158</sup> Green, *supra* note 150, at 565.

This is not to say that adhesion contracts using standardized forms are used solely for nefarious purposes.<sup>159</sup> The obvious advantages of these contracts are efficiency and productivity.<sup>160</sup> Similar to how integrators allow for a simplified method to mass produce poultry, adhesion contracts allow large companies to proficiently produce mass contracts without being encumbered by the impractical process of having to print and negotiate each one individually.<sup>161</sup> This saves significant amounts of time and money and is often necessary in our modern society of mass production and consumption.<sup>162</sup>

Despite these advantages, adhesion contracts can pose a threat to the property rights of individuals with less resources.<sup>163</sup> Those with less resources often lack an equity of information.<sup>164</sup> Larger companies have the resources, such as in-house legal counsel, to draft and interpret complicated contracts, while small farm owners may not have access to the same wealth of knowledge.<sup>165</sup> This David and Goliath scenario means that larger companies can capitalize on this inequality by drafting contracts containing one-sided terms; there are few legal consequences to dissuade them from doing so.<sup>166</sup>

Likewise, the binding arbitration clauses found in agricultural adhesion contracts can make it harder for a small farm owners to protect their property rights, but arbitration clauses in themselves are not without merit.<sup>167</sup> Arbitration can be an ideal method for parties to resolve disputes arising from commercial transactions because the process is speedy and relatively inexpensive.<sup>168</sup> Similar to the purpose of standard form contracts, arbitration clauses are employed to streamline proceedings and expedite the process of resolution.<sup>169</sup>

While arbitration agreements and the standardized formatting of adhesion contracts certainly have particular benefits, sometimes these benefits come at a cost to the less powerful party.<sup>170</sup> In the realm of agriculture, the less powerful party is often the small farm owner.<sup>171</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Green, *supra* note 150, at 554.

<sup>162</sup> Green, *supra* note 150, at 556.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348, 131 S. Ct. 1740, 1751, 179 L. Ed. 2d 742 (2011) (“[I]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Haas, *supra* note 21.



### *B. Modern Contract Clause Interpretation*

In deciding whether a state's legislation is in violation of the Contracts Clause, the first issue the court must decide is whether the state law acts as a "substantial impairment of a contractual relationship".<sup>172</sup> To decide this the Supreme Court analyzes "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights".<sup>173</sup> This rule, set forth in *Sveen v. Melin*, 138 S. Ct. 1815, 201 L. Ed. 2d 180 (2018), leaves room for states to enact laws governing existing contracts when there is a legitimate public interest in doing so.<sup>174</sup> The Court ruled that when a state enacted a law that affected life insurance beneficiaries, it did not violate the Contracts Clause.<sup>175</sup> The Court held that while revoking a beneficiary designation is a significant change to the original contract, the state law does not "substantially impair pre-existing contractual arrangements."<sup>176</sup>

The Court accepted the argument that the very point of an insurance policy is to benefit the named beneficiary- a beneficiary that would be directly affected by the statute in question.<sup>177</sup> However, because the Court viewed the statute as a reflection of the policyholder's intent, it said the statute supported the "contractual scheme", therefore no contractual scheme was impaired.<sup>178</sup> The Court supported the state's right to enact this law by pointing out that an "insured's failure to change the beneficiary after a divorce is more likely the result of neglect than choice."<sup>179</sup> Similarly, it could be argued that a farmer's failure to enjoy favorable terms at the time of contract is more likely a result of power imbalance than choice.<sup>180</sup> While legislation that requires fairer contractual terms for small farm owners would affect the primary parties of the contract, such legislation could be said to further the contractual scheme of protecting property rights in business dealings.<sup>181</sup>

### *C. Small Farm Owner Representation*

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<sup>172</sup> See Graham, *supra* note 39, at 398–412.

<sup>173</sup> See *Sveen v. Melin*, 138 S. Ct. 1815, 201 L. Ed. 2d 180 (2018).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See *Sveen v. Melin*, 138 S. Ct. 1815, 201 L. Ed. 2d 180 (2018).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

Regarding the USDA, Iowan Senator Chuck Grassley stated, “[T]hey’re just pandering to big corporations...they aren’t interested in the family farmer.”<sup>182</sup> Senator Grassley went on to proclaim that the “A” in USDA is supposed to stand for Agriculture, not big Agribusiness.<sup>183</sup>

The federal government does, however, help small farm owners involved in contract farming by providing much needed financing.<sup>184</sup> The government has guaranteed certain loans made to farmers up to ninety percent of their value.<sup>185</sup> While these guarantees help farmers garner the funds for their production contract ventures, in the long run they may hurt farmers because they can cause integrators to offer less favorable terms in their contracts and federal lenders sometimes provide credit even when the farmer's ability to repay seems objectively uncertain.<sup>186</sup>

The American Farm Bureau Federation (“AFBF”) is a nongovernmental organization that claims to represent the interests of farmers and has become a close second to Monsanto in lobbying expenditures for agriculture-related issues, spending nearly six million dollars in 2011.<sup>187</sup> The AFBF generally takes the position that GMO technologies are in line with those interests.<sup>188</sup> They report that “roughly ninety percent of corn, cotton, and soybeans grown in the US have been improved by biotechnology” and they praise biotechnology companies for improving soil, air, and water quality while also reducing costs of production.<sup>189</sup>

At the same time, the AFBF has recognized that there is a high level of misunderstanding among its members regarding data deals in contracts, including stewardship/technology agreements.<sup>190</sup> According to an AFBF Survey, fifty-nine percent of respondents were confused as to whether current agreements or contracts they were involved in allowed technological or service providers access to their data.<sup>191</sup> The AFBF President claims to have focused the Federation’s efforts on data privacy.<sup>192</sup> The AFBF is a founding member

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<sup>182</sup> David Pitt, *Grassley: USDA ‘Just Pandering to Big Corporations-They Aren’t Interested in the Family Farmer’*, DES MOINES REGISTER (Oct. 18, 2017), available at <https://www.desmoinesregister.com/story/money/agriculture/2017/10/18/grassley-usda-just-pandering-big-corporations-they-arent-interested-family-farmer/776120001/>.

<sup>183</sup> *Id.*

<sup>184</sup> Lord, *supra* note 141.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> FARM BUREAU SURVEY: FARMERS WANT TO CONTROL THEIR OWN DATA, AMERICAN FARM BUREAU FEDERATION (May 10, 2016) [hereinafter “AFBF”], available at <https://www.fb.org/newsroom/farm-bureau-survey-farmers-want-to-control-their-own-data>.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

of the Ag Data Coalition which aims to aid farmers better manage their information. AFBF also created a tool called the Ag Data Transparency Evaluators to help farmers by explaining the complicated terms of data contracts.<sup>193</sup>

While the AFBF boasts of a roster of over six million members, there are only approximately two million farms in America.<sup>194</sup> This fact led critics to express concern that the AFBF makes a significant amount of money from its insurance affiliates, some of whom are reported to have pushed these enrollment members up by signing people up at the same time they are purchasing different forms of insurance.<sup>195</sup> Some of these affiliates are stockholders of large agribusinesses like Syngenta, DuPont, and Dow.<sup>196</sup> Critics allege that these facts present a potential conflict of interest regarding who exactly the AFBF represents.<sup>197</sup> If nothing else, organizations like the AFBF serve as source of farming related information for small farm owners; if the information is not biased towards the large agricultural corporations, it could help farmers make well informed contractual decisions.<sup>198</sup>

## V. RECOMMENDATIONS

Currently, farmers have limited remedies when it comes to challenging adhesion contracts.<sup>199</sup> Small farm owners can find themselves legally bound when conducting business with large agricultural companies.<sup>200</sup> While one may make the argument that some of the aforementioned contracts are unconscionable, the judicial rescission of unconscionability is generally only recognized in cases between individuals, not businesses.<sup>201</sup> If the court would not restrict businesses from pursuing unconscionability as defense to formation, it could, under certain circumstances, discourage large agriculture businesses from taking advantage of small farm owners.<sup>202</sup>

### *A. Legislative Action*

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<sup>193</sup> *Id.*

<sup>194</sup> *See* Shearn, *supra* note 10.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See* AFBF, *supra* note 187.

<sup>199</sup> Lord, *supra* note 145.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

Another remedy to challenging unfair contract adhesion in farming that has been considered is legislative action.<sup>203</sup> Legislative action is the lawmaking process by which the legislative body prepares and enacts laws.<sup>204</sup> This process involves creating, proposing, amending, and voting on laws.<sup>205</sup> In 2017, a bill was introduced in Oregon Legislative Assembly that sought to allow causes of action against patent holders such as Monsanto for genetically engineered organisms present on land without permission of the owner or lawful occupant.<sup>206</sup> This bill would have afforded farmers the opportunity to successfully sue patent holders such as Monsanto, instead of other farmers, when genetic drift of patented genetically modified crops occurred.<sup>207</sup> It also would have allowed courts to award prevailing smaller farmers with attorney costs, something technology/stewardship agreements often do not allow.<sup>208</sup> This is an example of proposed legislation that could protect smaller farmers from the larger agricultural companies they contract with.<sup>209</sup> With congressional support, similar legislation could be useful in protecting small farm owners from one-sided arbitration clauses present in adhesion contracts.<sup>210</sup>

Advancing legislation to provide the contractual protection farmers need is a difficult task.<sup>211</sup> Some farmers actively encourage protective legislation, but others worry that too much legislation will hurt their businesses even more by encouraging integrators to seek out regions where contractual laws are more relaxed.<sup>212</sup> Legislators should use caution when drafting these prohibitions to prevent integrators from being discouraged from dealing with local smaller farmers altogether.<sup>213</sup> In an effort to prevent bad faith trade practices, some states have enacted statutes that would prohibit contract termination in the absence of economic justification or would guarantee farmers' right to organize.<sup>214</sup> Regarding integrators in the poultry industry however, many bills that are proposed with the purported intention of increasing farmer protections never actually become law.<sup>215</sup> To be successful, legislators should seek to

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<sup>203</sup> H.B. 2739, 2017 Sess. Cong. (Or. 2017) (Would have allowed causes of action against patent holder, rather than the farmer, for genetically engineered organism present on land without permission of owner or lawful occupant).

<sup>204</sup> *Legislation*, CORNELL LAW SCHOOL, available at <https://www.law.cornell.edu/wex/legislation>. (last visited March 27, 2019).

<sup>205</sup> *Id.*

<sup>206</sup> H.B. 2739

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See Generally Id.*

<sup>211</sup> Lord, *supra* note 145.

<sup>212</sup> *Id.* at 1154.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1152–53.

<sup>215</sup> *Id.* at 1153.

enact laws that protect farmers while not placing an undue hardship on the poultry producers that the farmers work with.<sup>216</sup> It could be best to adopt legislation on a federal level to avoid poultry producers from running to the states with the laxest laws, leaving the farmers in the other states out of business.<sup>217</sup>

### *B. The Australian Approach*

In 2016, the Australian government not only recognized that small business owners such as farmers were facing the same contractual problems as the small farm owners in the United States, but they created a new law to “protect farmers and small businesses” from unfair contracts.<sup>218</sup> They did so by extending the Treasury Legislation Amendment Act Contract Term Protections in the Australian Consumer Law to small business contracts.<sup>219</sup> These protections allow a court broad discretion to declare adhesion contract terms unfair.<sup>220</sup> If the contract contains terms the court deems unfair, the entire contract can be considered void.<sup>221</sup> Prior to implementing the new law, the Australian Government looked at studies conducted regarding small businesses across industries.<sup>222</sup> They found that sixty percent of survey respondents that were presented with adhesion contracts reported that they face terms they felt were unfair; the parliament noted that this likely meant that a large portion of businesses were being affected by unfair contract terms that were enforced against them.<sup>223</sup> Almost half of the respondents in this situation indicated that the enforcement of such terms caused them harm or loss generally ranging from \$1,200 to \$20,000.<sup>224</sup> The reports indicated that these losses were the most common mentioned effect of the unfair contract terms, but loss of business opportunities and damage to reputation were also mentioned by respondents.<sup>225</sup> Only a small percentage of respondents

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<sup>216</sup> *Id.* at 1154.

<sup>217</sup> *Id.*

<sup>218</sup> *New Law on Unfair Contract Terms to Provide Protections for Farmers and Agriculture Businesses*, AUSTRALIAN CONSUMER AND COMPETITION COMMISSION, (July 19, 2016) [hereinafter “ACCC”], available at <https://www.accc.gov.au/media-release/new-law-on-unfair-contract-terms-to-provide-protections-for-farmers-and-agriculture-businesses>.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> BASED ON THE AUSTRALIAN GOVERNMENT THE TREASURY DATA, available at [https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-021\\_Extending\\_UCTs\\_RIS.pdf](https://static.treasury.gov.au/uploads/sites/1/2017/06/C2015-021_Extending_UCTs_RIS.pdf).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

complained of these terms through formal channels due to the lack of legislative protections at the time.<sup>226</sup>

The Australian Competition and Consumer Commission (hereinafter, “ACCC”) commissioner stated that in “agriculture supply chains” unbalanced bargaining power is common; the objective of the ACCC is to inform farmers that, when signing contracts with much larger companies, they have legal protections that can help them avoid unfair dealings.<sup>227</sup> He elaborated, stating that often when larger businesses present small farm owners with a standard form contract the farmers are left with no alternative but to accept the terms they are presented with.<sup>228</sup> The objective of the new legal protections is to give courts the opportunity to strike unfair contract terms.<sup>229</sup>

Since the law’s implementation, the ACCC has investigated contract terms provided by larger agricultural companies.<sup>230</sup> One such company is Fonterra, which provides 40 percent of the world’s whole milk industry.<sup>231</sup> After engaging with the ACCC, Fonterra agreed to make changes regarding the contractual relationships they maintained with farmers.<sup>232</sup>

The United States could use Australia as an example of increasing economic liberty by protecting farmers from unfair contractual practices.<sup>233</sup>

## VI. CONCLUSION

Technological advancements have changed not only farming techniques, but the role of farmers themselves have changed drastically as well.<sup>234</sup> In recent decades, there has been mounting tension between small farm owners and more powerful agricultural companies.<sup>235</sup> Now more than fifty percent of the agricultural market is controlled by a handful of agricultural giants.<sup>236</sup> As the larger companies have gained prominence, small farm owners have had to trade their liberties as a cost of doing business.<sup>237</sup> While the founders of the United States and early Supreme Court Justices made it clear that the protection of property rights was a vital characteristic of the nation, the protection of those rights have become concentrated over the years among the

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<sup>226</sup> *Id.*

<sup>227</sup> *See* ACCC, *supra* note 218.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Roseboro, *supra* note 9.

<sup>235</sup> Fesperman & Shatzkin, *supra* note 1.

<sup>236</sup> Roseboro, *supra* note 9.

<sup>236</sup> Douglas, *supra* note 16.

<sup>237</sup> Roseboro, *supra* note 9.

parties with the most money and power in the industry.<sup>238</sup> While there are organizations in the industry that purport to safeguard smaller farmers against being misused, the effectiveness of these organizations is sometimes dubious.<sup>239</sup> State legislatures have attempted to address these issues but have not had high rates of success.<sup>240</sup> The Contracts Clause of the Constitution puts limitations on the right of the states to create laws that impair the obligation of contracts, but *Sveen v. Melin* may have left the door open for legislation that could ensure fair contractual terms for small farm owners without violating the Constitution in the process.<sup>241</sup> When considering what contractual legislation would be helpful to the less powerful in the agricultural industry, legislators could look to Australia as a model.<sup>242</sup> With the current laws, small farm owners often find themselves signing contracts with no power to negotiate the terms if they want to stay in business because there is no reasonable alternative.<sup>243</sup> The overall effect is that they are stripped of their power and beholden to the interests of corporate giants, which leaves many farmers heavily in debt or other negative consequences.<sup>244</sup> The United States legislature has been slow and ineffective in their response to these circumstances, but the right legislation could bring a balance to the agriculture industry and safeguard against abuse of bargaining power.<sup>245</sup>

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<sup>238</sup> *Wilkinson*, 27 L. Ed. at 657.

<sup>239</sup> Haas, *supra* note 21.

<sup>240</sup> See Lord, *supra* note 141.

<sup>241</sup> *Sveen*, 138 S. Ct. at 180.

<sup>242</sup> *Id.*

<sup>243</sup> See Roseboro, *supra* note 9.

<sup>244</sup> Lord, *supra* note 141.

<sup>245</sup> *Id.*

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