



**TAKE BACK  
THE COURT**

# The Supreme Court Has Undermined Iowa's Small Farms and Rural Communities

**by Patty Judge**

Patty Judge was Iowa Lt. Governor and Iowa Secretary of Agriculture and serves currently as Co-Chair of Focus On Rural America

**and Aaron Belkin**

Director, Take Back the Court

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# Executive Summary

- ▶ Throughout the United States, and particularly in the Midwest, small farms and rural communities have been devastated over the past generation. In Iowa, for example, farm earnings per job decreased 53 percent since 2012, and thousands of farm jobs have been replaced by wage jobs.
- ▶ Farmers are well aware that technological advances, corporate consolidation, and government policy have led to the collapse of their farms and their communities. There has been less attention, however, to the role that federal courts, including the Supreme Court, have played in rural America's demise.
- ▶ In this study, we argue that the decline of small farms and rural communities has been, to a large degree, a result of Supreme Court and lower federal court decisions that favor corporate interests over those of small farmers.
- ▶ Courts have effectively dismantled the most significant protections that Congress enacted to protect small farmers. With the demise of those protections, corporations have seized monopoly control over agricultural markets and used market power to ruin small farms.
- ▶ In 1921, for example, Congress passed the Packers and Stockyards Act (PSA) to protect small farms and rural communities by promoting competition in agricultural industries and preventing unfair and deceptive trade practices. For half a century, the PSA worked well as long as federal courts allowed it to operate as Congress intended.
- ▶ Beginning in the 1970s and continuing until now, however, the Supreme Court and lower federal courts effectively drove small farmers out of business by subverting the PSA and allowing large corporations to achieve monopoly control, and by failing to protect small farmers from unfair trade practices and unfair contracts.
- ▶ During the 2020 presidential campaign, candidates have proposed rural revitalization plans to deconsolidate agricultural markets and strengthen small farms and local communities.
- ▶ The Supreme Court, however, is likely to strike down rural revitalization plans on the basis of implausible constitutional and legal doctrines, consistent with its record of voting in the direction favored by GOP donors and by large corporations.

# Rural decline and corporate consolidation

Throughout much of the 20<sup>th</sup> century Dexter, Iowa was a thriving community of independent family farms.<sup>1</sup> Over the past generation, farms have become larger, with fewer and fewer people living and working in the countryside. Dexter's family farms used to operate independently, but old farmhouses have been abandoned or even bulldozed by large farming operations that bought up land.

As agribusiness displaced small farms throughout the state, rural communities suffered devastating consequences. Two-thirds of Iowa's counties have experienced population decline since 2010,<sup>2</sup> corresponding to the loss of 2,533 farms in just five years.<sup>3</sup> Farm earnings per job have decreased 53 percent since 2012.<sup>4</sup> At the same time, thousands of farm jobs have been replaced by wage jobs in meatpacking and processing, an industry in which wages have fallen between 24 and 44 percent since 1982.<sup>5</sup> A 2003 study found that Iowa counties with larger farms saw lower overall economic growth and slower per capita income growth. In the last quarter of 2018, Iowa farmers carried more agricultural debt than farmers in any other state in the nation.<sup>6</sup>

Nor is Iowa unique within the U.S., as large corporations have driven family farms out of business in many states. The U.S. Department of Agriculture (USDA) has reported that nation-wide, the percent of cropland owned by farms with more than two thousand acres has more than doubled since 1987.<sup>7</sup> As of 2015, farms with more than \$1 million in revenue produce 51 percent of the value of agricultural production in the U.S., a dramatic increase from 31 percent in 1999.<sup>8</sup> The largest 1 percent of farms alone accounted for 35 percent of all agricultural sales in 2017.<sup>9</sup>

Throughout the U.S., the disappearance of family farms has been associated with the loss of jobs, retail shops, and even schools, because larger farms tend not to reinvest profits locally, unlike the small farms they replace.<sup>10</sup> As a result, agricultural consolidation has had a disastrous

## But how little the big packers feared the courts of the Nation.

Report of the Federal Trade Commission on the Meat Packing Industry, 1919.

impact on rural communities. While the total income of U.S. farms in 2017 exceeded \$400 billion, the average income for a farm has decreased since 2012 to only \$43,053.<sup>11</sup>

Farmers are well aware that technological advances, agricultural consolidation, and government policy have led to the collapse of their farms and their communities.<sup>12</sup> As technological improvements increased the need for capital investments in farming, agribusiness industries expanded, and a handful of corporations consolidated control over a large share of agricultural markets. In turn, the rise of vertical integration replaced local purchasers, and corporations used their market power to dictate lower prices to small farmers.<sup>13</sup> Many farmers even became employees or independent contractors on their own land, and supply and distribution chains of agricultural products—from farm to store—were consolidated under the control of a single corporation, with no markets in between. At the same time, policy has benefited large corporations whenever Washington subsidized large-scale production of agriculture.<sup>14</sup> While these factors are widely understood, there has been less attention to the role that federal courts, including the Supreme Court, have played in rural America's demise. In this study, we make the argument that the decline of small farms and rural communities has been, to a large degree, a result of Supreme Court and lower federal court decisions that favored corporate interests over those of small farmers. Courts have effectively dismantled the most significant protections that Congress enacted to protect small farmers. And with the evisceration of those protections, large corporations have seized monopoly control over agricultural markets and then used their market power to ruin small farms.

In 1921, for example, Congress passed the Packers and Stockyards Act (PSA), an antitrust law designed to protect small farms and rural communities by promoting competition in agricultural industries and preventing unfair and deceptive trade practices.<sup>15</sup> Congress passed the PSA in direct response to a disturbing level of consolidation in the meat packing industry, and the law worked well for half a century. Beginning in the 1970s and continuing to this day, however, the Supreme Court and lower federal courts have weakened its enforcement by siding with corporate interests over local farmers. Predictably, corporate consolidation followed the weakening of the law.

We show in this study that courts have not only upheld anticompetitive integration in the meatpacking industry, but have also dismantled the protections afforded to small farmers by the PSA. Three factors, in particular, warrant consideration. First, the PSA was intended to prohibit a monopoly in the meatpacking industry, but courts have held that corporate consolidation is not a violation of the PSA. Second, the clear language of the Act's broad prohibitions has been reinterpreted by courts to apply only to clearly egregious cases, thus allowing systemic yet subtle anticompetitive behavior to flourish. Finally, courts have failed to properly apply the PSA to contracts between small farmers and large corporations, even when contractual terms expressly violate the Act. Many small farmers have challenged the dismantling of the PSA, but the Supreme Court has, without exception, denied them a hearing, thus ignoring the ways that lower federal courts have reshaped the law to favor agribusiness at the expense of local farms. The decisions of the Supreme Court and lower federal courts have resulted in the consolidation of agricultural industries, leaving small farms and rural communities unprotected from hardship.

Unfortunately, however, the Supreme Court is unlikely to allow the next administration to repair the damage it has helped produce in rural America, in that the Court will probably strike down any rural revitalization plans proposed by presidential candidates. Consistent with its 73-0 record of voting in the direction favored by GOP donors in split-decision cases since 2005, and with its tradition of rulings favoring large corporate interests over those of small farmers, the Supreme Court is unlikely to allow for the revitalization of rural communities or small farms.

# History of the Packers and Stockyards Act of 1921

The PSA was enacted to protect consumers as well as local farmers from large agricultural corporations that engaged in anticompetitive practices. In general, technological advancements in an industry can exacerbate the consolidation of market power in the hands of a small number of corporations that can afford to invest in new, more efficient means of production. In the early 20<sup>th</sup> century, new technologies increased the efficiency of production and distribution in many industries, and large corporations expanded their share of markets in turn. In agricultural industries, a handful of agricultural firms and trusts expanded rapidly and quickly consolidated monopoly control.<sup>16</sup> In the livestock industry, five large corporations (the "Big Five") controlled 70 percent of all livestock by 1916.<sup>17</sup> At the same time, railroads expanded agricultural markets and allowed food to be shipped over long distances, providing another incentive for the commercialization of farming.<sup>18</sup>

The Federal Trade Commission (FTC) was tasked with investigating economic consolidation in the meatpacking industry, and its 1919 report stated that the Big Five corporations not only owned between 61 and 86 percent of the meat industry, but also controlled most of the distribution facilities for the market.<sup>19</sup> This "menace," the FTC concluded, was a "conspiracy for the purpose of regulating purchases of livestock and controlling the price of meat."<sup>20</sup> Highlighting a range of anticompetitive practices, including manipulating markets, restricting the supply of livestock, controlling prices,

and securing special privileges from distributors, the FTC concluded that the Big Five had engaged in a conspiracy to “crush effective competition.”<sup>21</sup> According to the FTC, “the Big Five have entrenched themselves in what may be called strategic positions of control of food distribution.”<sup>22</sup> The corporations controlled “all the facilities through which livestock is sold to themselves” and 93 percent of the railroad cars used to distribute meat, and secretly purchased their competitors in a “giant merger” that monopolized “almost completely the entire meat industry.”<sup>23</sup> The firms clearly bought and merged with competitors to create monopolies, however, and the FTC concluded that the Sherman Antitrust Act of 1890 was insufficient for preventing corporate consolidation.<sup>24</sup>

In response to the FTC report, Congress passed the PSA in 1921. Although the Big Five were, at the time, negotiating a settlement with the Department of Justice that would break up their monopolies and restrict their ability to engage in unfair trade practices, Congress sought to create a powerful antitrust regulatory regime.<sup>25</sup> Motivated by the FTC’s conclusion that the corporations profited not from efficiency or from their own production but rather from their monopolistic control over the market,<sup>26</sup> Congress created broad prohibitions that expanded the federal government’s power to prevent anticompetitive practices. The PSA provides regulatory tools for prohibiting anti-competitive practices such as horizontal integration (expansion within the same business line, for example, when a meatpacker acquires other meatpacking companies) and vertical integration (acquisition of firms engaged in different stages of production or distribution, for example, when a meatpacker acquires a livestock producer).<sup>27</sup> The Act broadly prohibits any “unfair, unjustly discriminatory, or deceptive practice” for the purpose of preventing monopolies in the meatpacking industry.<sup>28</sup> Congress intended the law to be flexible enough to regulate new business practices that might emerge, so the Act vests the Secretary of Agriculture with broad authority and discretion to define, identify, and enforce prohibitions against any type of unfair practice.<sup>29</sup> As well, Congress authorized the USDA to investigate violations of the Act, to order cessation of unlawful actions, and to assess civil penalties up to \$10,000 per violation.<sup>30</sup> Finally, the Act established criminal penalties for violating USDA orders.

In the decades following the PSA’s enactment, the Supreme Court as well as lower federal courts allowed the Act to function as Congress intended by upholding the USDA’s broad authority to define unfair trade practices as changing market conditions required. The Supreme Court upheld the law’s constitutionality in 1922, finding that Congress has the authority to enact broad commercial regulations under the Commerce Clause.<sup>31</sup> In addition to upholding the PSA’s constitutionality, the Supreme Court issued decisions that confirmed the PSA’s grant of discretion to the USDA to define unfair trade practices. In 1929, the Court upheld a USDA order that the American Livestock Association end its boycott of an agricultural cooperative, agreeing with the USDA that the boycott was intended to drive the cooperative out of business.<sup>32</sup> In 1938, the Supreme Court upheld the USDA’s “extraordinary powers” to set rates that market agencies could charge at stockyards and limited judicial review to the question of whether the agency had properly followed the mandated procedure.<sup>33</sup> Throughout the 1930s and 1940s, lower courts cited the Supreme Court’s ruling that the PSA does not have to designate an act as unfair for the USDA to regulate it.<sup>34</sup> Furthermore, federal courts followed the Supreme Court’s example and broadly upheld the USDA’s discretion in prohibiting evolving trade practices, including agreements between purchasers to keep prices low<sup>35</sup> as well as predatory pricing intended to shut out competitors.<sup>36</sup>

The PSA created a new system of regulations that limited the rights of private businesses, and the system worked as long as courts allowed it to function as Congress intended. In the decades following the PSA’s enactment, consolidation in the meat packing industry declined and the livestock industry deconsolidated as well, as large meatpacking firms grew at a slower rate than their smaller competitors.<sup>37</sup> Deconsolidation continued throughout the middle of the 20<sup>th</sup> century,<sup>38</sup> and by 1976 the top four meatpacking firms owned just 26 percent of the beef market.<sup>39</sup> As long as courts continued to allow the USDA to regulate agricultural markets as Congress intended, anticompetitive practices were checked, and small farmers and the communities they lived in were able to prosper.

## Federal courts have allowed large corporations to consolidate near-monopoly control over agricultural markets

After a half century of allowing PSA to function as intended, the Supreme Court as well as lower federal courts shifted gears in the 1970s and 1980s and issued a series of pro-business rulings that significantly weakened the law. The courts effectively drove small farmers out of business by subverting the PSA so as to allow large corporations to achieve monopoly control over agricultural markets. In turn, monopoly control has enabled large corporate buyers to dictate prices they pay to small farmers for livestock and crops. In 1986, the Supreme Court upheld the merger of the second- and third-largest meatpackers in the nation in *Cargill, Inc. v. Montfort of Colorado, Inc.*, and that ruling paved the way for other corporate consolidations that devastated small farms.<sup>40</sup>

At the time of the lawsuit, Cargill was the fifth-largest meatpacking company in the nation. Cargill challenged a proposed merger between two larger rivals on the grounds that the merged company would be able to use its market power to artificially lower prices to drive out competition.<sup>41</sup> The Supreme Court declined to address the effect that the merger would have on small farmers, however, and focused instead on the impact on competing meatpacking firms.<sup>42</sup> The Court held that the proposed merger did not “constitute a threat of antitrust injury,” because “antitrust laws do not protect small businesses from the loss of profits due to continued competition.”<sup>43</sup>

The Supreme Court’s pro-business framing in *Cargill* opened the door for additional mergers in the meatpacking industry, and just two years after the decision, the

“As long as courts continued to allow the USDA to regulate agricultural markets as Congress intended, anticompetitive practices were checked, and small farmers and the communities they lived in were able to prosper.”

market share of the four largest firms was 67 percent, an increase of 12 percent.<sup>44</sup> In the aftermath of the *Cargill* decision, the Department of Justice was much less likely to bring similar cases to court, so the industry dramatically merged in response. A study analyzing the effects of these mergers found that the largest firms together “paid significantly lower prices for fed cattle” than their competitors.<sup>45</sup> Two years after the Supreme Court reasoned that loss of profit due to decreased competition in a market did not constitute an antitrust injury, the CEO of a large meatpacking corporation told the *New York Times* that consolidation was not bad for the industry because “if we could control cattle prices, the feeders wouldn’t be making as much money as they are now and the money would be going into our pockets instead.”<sup>46</sup>

Lower federal courts, like the Supreme Court, have tilted the playing field in favor of agribusiness and against small farmers by upholding corporate justifications for consolidation when federal agencies attempt to block mergers. In 1976, the Ninth Circuit held that a meatpacking corporation's acquisition of a livestock purchasing company did not violate the PSA.<sup>47</sup> The USDA regulation under consideration banned corporations from owning both a livestock packer and dealer. To uphold the regulation, the court would have had to conclude that such a practice was the type of unfair activity prohibited by the PSA.<sup>48</sup> The court overturned the FDA regulation, however, by ruling that the Act only prohibited joint ownership of a packer and dealer if the USDA could establish that "the conduct in question is likely to produce" a monopoly.<sup>49</sup> Further limiting the USDA's discretion, the court defined an unfair trade practice likely to produce a monopoly as one that would result in the actual elimination of a buyer from the market.<sup>50</sup> The Ninth Circuit's opinion was cited by district courts in the early 2000s, as judges continued to uphold corporate justifications for anticompetitive practices.

In 2004, a district court in Alabama held that captive supply transactions (a type of vertical integration in which livestock are pledged to a specific meatpacker prior to slaughter) are justified as a legitimate business interest, and are not prohibited by the PSA.<sup>51</sup> Overturning a jury award for over one billion dollars in damages to the plaintiff cattle farmers, the court ruled that the evidence was not sufficient to prove that a large meatpacking corporation's use of captive supplies caused prices to decrease.<sup>52</sup> The use of captive supplies, the court reasoned, was justified by the meatpacker's need for an efficient and reliable supply of cattle, and by the fact that competing meatpacking corporations also engaged in captive supply transactions.<sup>53</sup> As a result of the court's decision, cattle farmers effectively were forced to enter into agreements to sell cattle at lower prices than would have been offered in a competitive market. Although captive supply transactions clearly decrease competition, the court held that the practice was not a violation of the PSA, reasoning tautologically that the Act only prohibited captive supply if it was an "unfair practice," and that since it was not illegal, it did not violate the Act.<sup>54</sup>

In a similar case in Virginia, a district court held that a pork packing corporation's acquisition of hog producers was not a violation of the PSA because the integration was motivated by efficiency rather than a desire to manipulate the market.<sup>55</sup> The court acknowledged that the

"largest pork packer in the world" "caused some financial hardship" to hog farmers by not purchasing hogs on a competitive market, but held that an anticompetitive effect was not a violation of the PSA.<sup>56</sup> Finding no evidence that the corporation intended to manipulate the hog market, the court construed the Act to prevent only collusion between competitors, regardless of collusion's impact.<sup>57</sup>

Federal courts have been sympathetic to corporations' arguments about efficiency and other business needs, but such arguments are inconsistent with economic data. Courts have reasoned that the integration of agricultural markets is justified by meatpackers' legitimate interest in having access to a steady supply of cattle, for example. But data from the 1980s, prior to the rise of captive supply transactions in the beef industry, show that meatpacking companies were able to maintain a reliable supply of cattle.<sup>58</sup> Federal courts have ignored the underlying purpose of unfair practices, to control the market in order to force suppliers to accept lower prices, and have failed to assess whether justifications offered by corporations are legitimate rather than mere pretext. Though the PSA and other antitrust statutes create broad prohibitions on unfair trade practices, the consolidation of agricultural markets has gone largely unchallenged by federal agencies, as Federal Courts have sided with corporate interests while ignoring the impact that mergers of the largest agricultural corporations have had on small farmers.

Federal agencies are authorized to investigate and block corporate mergers to prevent anti-competitive monopolies in the agricultural sector, but the Supreme Court and lower federal courts have upheld mergers that the agency sought to block.<sup>59</sup> Over the past generation, courts have interpreted the PSA to the benefit of large corporations by allowing horizontal and vertical integration of the agriculture industry, by limiting the extent to which the USDA can define anticompetitive practices as unfair under the Act, and by failing to extend the protections of the PSA to contracts between small farmers and large agricultural corporations. Federal courts' framing of antitrust regulations from the perspective of a merger's effect on competitors clearly misses the anticompetitive effects of market consolidation on small farmers.

Predictably, pro-business rulings have allowed large agricultural firms to merge, and the growth and consolidation of large corporations has, in turn, corresponded with a loss of power and profit for small farmers.<sup>60</sup> Recent studies show that four companies control 83 percent of

the beef industry, 66 percent of the pork industry, and 55 percent of the poultry industry.<sup>61</sup> Consolidation has allowed corporations to remove competition in livestock markets, forcing farmers to accept declining prices. And, consumer prices have increased at the same time that prices paid to farmers have declined. In 2009, the consumer price of pork had risen by 2.1 cents per pound, while the price paid to farmers declined by 14.27 cents per pound.<sup>62</sup> Similarly, the cost of retail beef increased by one dollar between 2012 and 2018, but the price paid to beef cattle farmers decreased by 5 percent.<sup>63</sup> The average net return per head of cattle fell from 36 dollars between 1981 and 1994, to just 14 dollars between 1995 and 2008.<sup>64</sup> Thus, efficiencies in the agricultural sector that followed from corporate consolidation have failed to benefit consumers or small farmers, as excess profits have gone into the pockets of large agricultural firms, even as the courts continue to accept efficiency-based justifications for unfair trade practices.

## Federal courts failed to protect small farmers from unfair trade practices

Though the PSA authorizes the Secretary of Agriculture to enact rules and regulations necessary to enforce the Act, courts consider these regulations to be advisory, so the USDA must be able to prove that the facts of a specific case show that a practice is a violation of the PSA.<sup>65</sup> Moreover, the Judicial Review Act of 1950 grants authority to federal courts to enjoin, set aside, or determine the validity of USDA enforcement orders under the PSA if they find that the USDA acted contrary to law or without enough evidence.<sup>66</sup> Because courts have discretion to review and reverse enforcement decisions of the USDA, the flexibility of the statute is restricted by judicial rather than agency interpretation of the Act.

Recent decisions by federal courts have supplanted the actual language of the Act with a judicial preference for corporate interests. The PSA clearly states that “it shall be unlawful for any packer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device.”<sup>67</sup> However, federal courts have limited the flexibility and discretion that Congress intended to extend to the USDA in identifying and defining what unfair practices are in a given case. Prior to the 1970s, federal courts tended to uphold the USDA’s conclusions that a packing corporation was engaging in unfair practices.<sup>68</sup> However, as of 2010, eight Circuit Courts have interpreted a limit to the discretion that the Act grants to the agency by adding a requirement that the USDA must prove that the unfair practice either injures or is likely to injure competition.<sup>69</sup>

In 1961, the Seventh Circuit upheld the common assumption that the language of the PSA granted authority to the USDA to identify an unfair practice, which required no proof that the practice would lead to a competitive injury.<sup>70</sup> Just seven years later, in 1968, the Seventh Circuit changed its interpretation of the Act and held that that a trade practice could not violate the PSA “absent some predatory intent or some likelihood of competitive injury.”<sup>71</sup> The second-largest meat packing firm in the country had offered consumers a coupon to lower the cost of its packaged bacon, and the USDA challenged the practice on the grounds that the coupon resulted in the meat being sold for less than the market unit price.<sup>72</sup> The USDA’s investigation showed that the company increased its sales while the coupon was offered, and that competitors lost sales during the same period.<sup>73</sup> Rather than deferring to the USDA’s findings and enforcement authority under the PSA, the Seventh Circuit held that the USDA did not provide enough evidence that the coupon program was likely to result in a competitive injury.<sup>74</sup>

To support this novel interpretation of the PSA, the Seventh Circuit cited only “case law and legislative history,” but failed to point to any case in which a circuit court had required the USDA to prove the likelihood of a competitive injury in order to deem a trade practice unfair under the PSA.<sup>75</sup> Rather, the court relied on its novel interpretation of the language of the Act, reasoning that words such as “unfair” were so broad as to require judicial scrutiny of the agency’s interpretation.<sup>76</sup> The Circuit cited its opinion in *Swift & Co. v. Wallace*, which “contemplated” that in a hypothetical case, proof of intent or competitive injury could establish a violation of the Act.<sup>77</sup> However, the *Swift* opinion expressly did not require such proof.<sup>78</sup> The Circuit



cited no Supreme Court decision that would support its interpretation of the Act. Rather, it relied on the reasoning that because its prior opinions hypothesized that proof of competitive injury *could* constitute a *per se* violation of the Act, the USDA *must* demonstrate such evidence in order to establish that a trade practice was unfair. It is quite possible that the Court thought that the USDA had been too harsh on what seemed like a harmless coupon special. However, the Court's unprecedented ruling was not limited to this specific case. Instead, the Court increased the scope of judicial power generally to limit the USDA's discretion in enforcing the PSA.

Once the Seventh Circuit expanded the scope of judicial review of the USDA's actions under the Act, other circuits adopted its approach. To date, eight circuit courts have reinterpreted the PSA to require proof of competitive injury, contrary to the plain language of the Act.<sup>79</sup> This approach limits the type of trade practices that the USDA can define as unfair to egregious examples of deceptive and unjust actions, such as participating in a conspiracy to coerce an auction house to change its terms to be more favorable,<sup>80</sup> or intentional deception to hide a clear conflict of interest.<sup>81</sup>

The Supreme Court's lack of consideration of the power imbalance between large corporations and small farmers has influenced lower federal courts that were asked to uphold PSA protections.

Despite limiting an unfair act under the PSA to one that is likely to result in a competitive injury, courts have failed to adopt the hypothetical *per se* rule that was supposed to justify this interpretation.<sup>82</sup> Instead, courts have chipped away at the Act's protections of small farmers by ruling that the existence of a competitive injury does not necessarily establish a violation of the PSA. The Sixth Circuit held in 2010 that anticompetitive effects on a single farmer were not sufficient evidence to establish an unfair practice.<sup>83</sup> Instead, the trade practices must be shown to have an adverse effect on overall competition in the industry.<sup>84</sup> This substitution of court discretion for clear statutory language and congressional intent has had the effect of limiting the types of trade practices that the USDA can prohibit.

A dissenting opinion in the Fifth Circuit case that adopted the competitive injury requirement highlights the judicial overreach that has limited the Act's intentionally broad grant of discretion to the USDA.<sup>85</sup> In that case, chicken farmers alleged that a packing corporation used a ranking system to determine the price it would pay each farmer. The corporation, however, had a much more favorable arrangement with at least one other farmer, who consistently received higher payments.<sup>86</sup> The farmers alleged that they were not provided with the opportunity to deal under the more favorable terms, which was a violation of the PSA's prohibition against unjust discrimination, and which afforded the special farmer an unfair advantage.<sup>87</sup> The dissent argues that a court must interpret a statute first by its plain text, which in the case of the PSA contradicts the "violence wrought on the statute by the majority's interpretation."<sup>88</sup>

The Seventh Circuit relied on a hypothetical posed in a prior opinion to expand the scope of judicial oversight of the PSA, and courts have engaged in "speculation" by requiring that the USDA provide evidence that an unfair practice will result in a competitive injury.<sup>89</sup> This interpretation arguably deviates from congressional intent as well as the text of the PSA, and benefits large corporations by summarily excluding competitive harms that small farmers experience in a highly consolidated market from the Act's prohibitions. While this expansion of judicial power has not been upheld by the Supreme Court, it has also not been scrutinized by the higher court. Since 1980, the Supreme Court has declined to hear appeals in at least five cases that raised the competitive injury question.<sup>90</sup>

# Federal courts have failed to protect small farmers from unfair contracts

One significant result of the consolidation of agricultural industries has been that small farmers seeking to sell their products have had little choice when entering into contracts with large corporations, because vertical and horizontal integration has created a distorted market in which corporations have many livestock farmers to choose to buy from, while small farmers have few options for selling their livestock.<sup>91</sup> This imbalance of power effectively forces small farmers to agree to unfair contractual terms when selling to large agricultural corporations.<sup>92</sup> The PSA makes “any unfair, unjustly discriminatory, or deceptive practice or device” unlawful,<sup>93</sup> and Congress arguably intended its flexible terms to allow the USDA to adjust enforcement to changing market practices, including the proliferation of unfair contracts.<sup>94</sup> Federal courts have limited the effectiveness of the PSA, however, by holding that it was not intended to limit the freedom to contract.<sup>95</sup> Additionally, the Supreme Court’s lack of consideration of the power imbalance between large corporations and small farmers has influenced lower federal courts that were asked to uphold PSA protections when small farmers entered into coercive contracts with packing corporations in uncompetitive markets. Lower federal courts have upheld arguably unfair contractual terms, reasoning that farmers are free to contract away their rights under the Act.<sup>96</sup>

In 1974, the Supreme Court ruled in *Mahon v. Stowers* against a cattle farmer who had not been paid for cattle sold to a meat packing company that then went bankrupt.<sup>97</sup> The Court held that the PSA was intended to prevent anti-competitive practices, not to “guarantee to such persons who sell cattle...a special favored position.”<sup>98</sup> Though the case did not deal directly with the type of production contract widely in use today, the ruling influenced lower federal courts by framing Congress’s

intent in passing the PSA as the neutral promotion of fair trade practices rather than the protection of small farmers in particular.

The Supreme Court’s 1974 *Mahon* ruling has had a significant impact on lower courts. In *IBP, Inc. v. Glickman*, for example, the USDA filed a complaint against IBP, a large meat packing company, alleging that its contract to buy cattle from a group of Kansas feed-lot owners violated the PSA.<sup>99</sup> The contract provided IBP with a right of first refusal, meaning it did not have to out-bid other offers to buy cattle from the Kansas farmers.<sup>100</sup> Citing *Mahon*, the Eighth Circuit held that the Act did not “require an entirely equal playing field,” and reversed the USDA’s prior decision to prohibit the contract.<sup>101</sup> Similarly, in *Jackson v. Swift Eckrich*, a federal court sided against turkey farmers who alleged that their contract with a poultry processing corporation was unfair.<sup>102</sup> The farmers alleged that the corporation failed to provide them with contractual options, essentially alleging that terms were coerced rather than negotiated.<sup>103</sup> The jury agreed with the farmers, awarding over \$300,000 in damages for violations of the PSA, but, citing *Mahon*, both the district court and the Eighth Circuit found that the evidence of an unfair trade practice was insufficient as a matter of law.<sup>104</sup> The court stated that contractual terms should not be disturbed by the PSA, because the Act’s purpose was “not to so upset the traditional principals of contract.”<sup>105</sup>

Parties are only truly free to enter into contracts when they have leverage to negotiate in competitive markets, which the PSA was enacted to protect and promote. Federal courts, however, have failed to recognize that the heavily consolidated meatpacking industry is not a level playing field, and that small farmers have been forced to enter into unfair contracts with large corporations that exploit them. Such contracts arguably violate the PSA’s prohibition against unfair trade practices, but federal courts have sided with corporate interests repeatedly by creating an exception to the Act under the theory that farmers are free to enter into contracts. That federal courts imagine that regulating anti-competitive practices would not require an assessment of the power imbalance between large corporations and small farmers arguably reveals a willingness to overlook Congressional intent as well as the plain text of a law so as to promote the interests of large corporations.

# The Supreme Court likely would strike down or sharply curtail rural revitalization plans

Despite the damage that federal jurisprudence favoring agribusiness has done to rural America, the Supreme Court is unlikely to allow the next administration to repair the harms it helped produce, as the Court probably will strike down or sharply curtail key components of rural revitalization plans proposed by the various presidential candidates. Consistent with its record of voting in the direction favored by GOP donors in split-decision cases during John Roberts's tenure as Chief Justice, and echoing its hostility to anti-trust law and its tradition of ruling in favor of large corporate interests at the expense of small farmers, the Supreme Court is unlikely to allow for the revitalization of rural communities or small towns.

Several presidential candidates have proposed rural revitalization plans, all of which rightly focus on the monopoly control of large agribusiness corporations over agricultural markets. Joe Biden and Kamala Harris, for example, propose strengthening the enforcement of existing antitrust laws.<sup>106</sup> Pete Buttigieg proposes to modify existing antitrust enforcement by expanding the threshold for merger reporting requirements.<sup>107</sup> Amy Klobuchar advocates legislating a new legal standard that would shift the burden to corporations seeking to merge by requiring them to show that their proposed integration would not reduce competition.<sup>108</sup> Bernie Sanders and Elizabeth Warren propose to reverse mergers of agricultural corporations, break up highly consolidated industries including meatpacking, and impose a moratorium on future mergers of large agricultural companies.<sup>109</sup>

While the candidates' proposals include many thoughtful provisions, and while rural revitalization is badly needed, none of the plans is likely to survive judicial review,

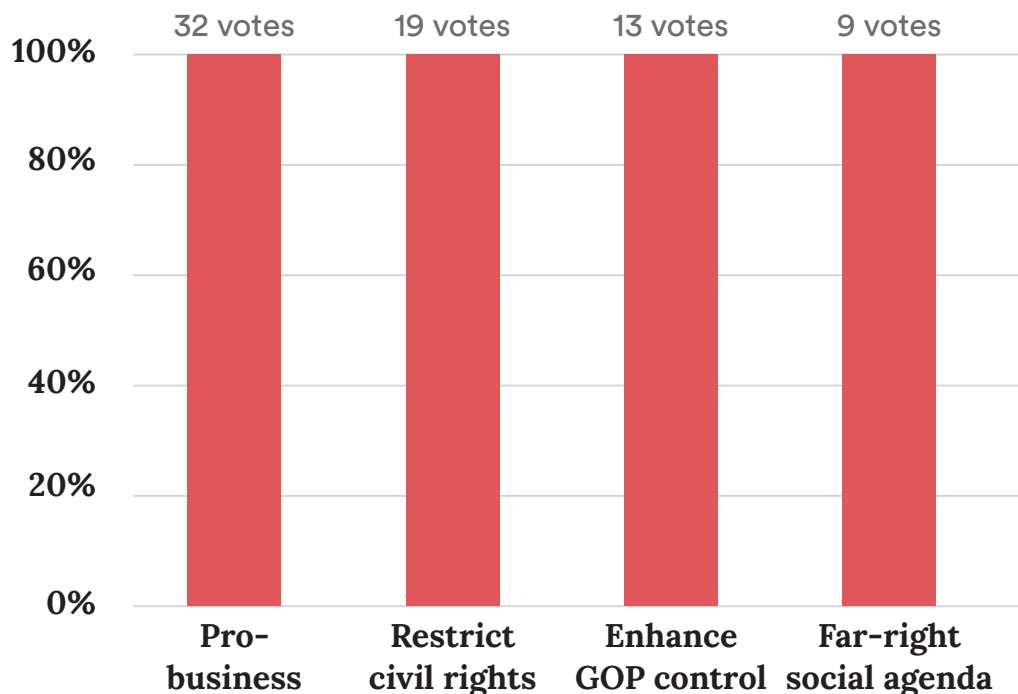
because all rely on federal courts—including the Supreme Court—to allow federal agencies to enforce deconsolidation. Unfortunately, however, there are at least four reasons to expect the Supreme Court to decline to permit rural revitalization plans to operate as intended.

First, all proposed rural revitalization plans would compromise the interests of large agribusiness corporations that contribute heavily to the Republican party and to Republican candidates running for office, and the Roberts Court always votes in the direction favored by GOP donors in split-decision cases. Since 2005, when John Roberts became Chief Justice, the Supreme Court has issued 73 split-decision rulings in which GOP donors had a clear interest, and the Court voted in the direction favored by GOP donors 73 times, for a record of 73-0.<sup>110</sup> While only a small minority of the 73 rulings involved agriculture, 32 of the cases advanced the interests of corporations. Agribusiness is a major GOP donor that contributes far more to Republican and conservative candidates and organizations than to Democrats and liberals, and the industry would have a clear interest in the outcome of any cases involving rural revitalization.<sup>111</sup> For that reason alone, the Court is expected to be hostile to rural revitalization.

Second, the Roberts Court usually rules in favor of large corporations in antitrust cases, having done so in 14 out of 19 antitrust cases (74%) in which it took a position between 2005 and 2019.<sup>112</sup> Leaders of the “antitrust bar” have described the Court as “radically. . . pro-business,” and “favoring business over consumers.”<sup>113</sup> Following a 2018 ruling in favor of American Express, for example, media headlines stated that the conservative majority “Devastate[d]”<sup>114</sup> and “Just Quietly Gutted” antitrust law.<sup>115</sup> Professor Tim Wu, who specializes in antitrust law, said that the Supreme Court weakened antitrust enforcement by siding with American Express “in an absurd way.”<sup>116</sup> More generally, a review of approximately 2,000 Supreme Court decisions between 1946 and 2011 found the Roberts Court to be the most pro-business court since World War II.<sup>117</sup>

Third, while the Roberts Court almost always ruled in favor of large corporations prior to former Justice Kennedy's retirement, Justice Kavanaugh is likely to be even more inclined to rule in their favor. The authors of a 2014 review of the Roberts Court reported that in 14 antitrust cases, Justice Kennedy was the only justice in the majority in every case, “reflecting his crucial swing-vote status.”<sup>118</sup> Justice Kennedy usually ruled in favor of large cor-

## PERCENT OF SPLIT-DECISION VOTES BENEFITING GOP DONORS (2005-2018)



porations, but Justice Kavanaugh is even more likely to do so, as he exhibited clear pro-corporate preferences in lower-court antitrust decisions. In a merger case involving two large health insurance companies, Justice Kavanaugh wrote a dissent that accepted the corporations' justification of "efficiency" for the proposed merger, despite the finding that ostensible efficiencies were available to customers without the merger.<sup>119</sup> The American Antitrust Institute cited this opinion as one of several that informed its decision to oppose Kavanaugh's nomination to the Supreme Court, stating that he held "anti-enforcement views of the antitrust laws."<sup>120</sup> Kavanaugh's antitrust views have been described as "outside the mainstream," and demonstrating "hostility to antitrust plaintiffs" and "expert federal agencies."<sup>121</sup>

Fourth, rural revitalization plans depend on government agencies for enforcement, which requires courts to acquiesce. The conservative majority's consistent siding with corporate interests in merger and other antitrust rulings, however, as well as its suspicion of federal agency authority in general, provide a glimpse of the legal reasoning

that the Court likely would invoke to uphold anticompetitive practices in the agricultural industry as legitimate business practices. Plans to deconsolidate agricultural markets via "trust-busting," for example, would be subject to the same judicial review processes as existing antitrust laws, as would agency efforts to undo mergers under the Clayton Act.<sup>122</sup> Programs that strengthen agency antitrust enforcement or oversight of mergers likely would be limited by the jurisprudence discussed in this paper as well.<sup>123</sup> Senator Warren proposes to strengthen Department of Justice guidelines concerning vertical integration cases, and to bolster USDA's enforcement of the PSA by "clarifying that they do not have to prove harm across the entire sector to bring a claim."<sup>124</sup> Agency guidelines only effect agency practices, however, and courts will continue to have ample opportunity to dilute them. And, while Senator Warren's proposal to remove the competitive injury requirement from the Supreme Court's interpretation of the PSA would allow the USDA to enforce the Act broadly, a revised agency regulation would not affect the Court's interpretation of the Act.<sup>125</sup>

# Conclusion: Federal courts have undermined small farms and rural communities

Farmers are well aware that technological advances, corporate consolidation, and government policy have led to the collapse of small farms and their communities. There has been less attention, however, to the role that federal courts, including the Supreme Court, have played in rural America's demise. As we demonstrate in this paper, federal courts have played a significant role in the decline of rural America. In particular, the Supreme Court and lower federal courts have repeatedly sided with corporate interests over rural communities by dismantling legislation intended to promote competition in agricultural industries and prevent unfair and deceptive trade practices.

The Packers and Stockyards Act was enacted in 1921 as a direct response to a concerning level of consolidation in the meat packing industry, and the Act worked well for half a century when federal courts allowed it to operate as Congress intended. In passing the Act, Congress recognized that when a few large corporations control agricultural markets, they can unfairly manipulate supply and demand so as to harm small farmers. The PSA broadly prohibits unfair trade practices in the meatpacking industry by authorizing the USDA to define unfair practices and to enforce the Act's protections. But, starting in the 1970s and 1980s, the Supreme Court and lower federal courts effectively dismantled the PSA, thus allowing agricultural industries to become monopolized via horizontal and vertical integration. Agricultural markets are now more consolidated than they were when the Packers and Stockyards Act was enacted.<sup>126</sup>

Federal courts have also extended their discretion to review the USDA's enforcement of the PSA and have inserted requirements beyond the plain meaning of the statute. These requirements, in turn, have made it difficult for USDA to protect small farmers from anticompetitive markets that resulted from consolidation. Small farmers have few companies competing to buy their crops and livestock, so they are forced to enter into unfair contracts negotiated under a coercive power imbalance with wealthy and powerful corporations. In 1994, 60% of hogs were sold in competitive markets in which prices could be negotiated, but by 2016, just 2% of hogs were sold to meatpacking companies in competitive markets, and the rest were contracted for as captive supply, a practice that harms small farmers by driving down prices.<sup>127</sup>

The rulings of the Supreme Court and lower federal courts with respect to the PSA have created a regulatory regime that has allowed market consolidation, which in turn has led to anticompetitive conditions that fall outside the courts' modern definitions of unfair practices. As a result, farmers have no way to protect themselves against coercive contracts. While legislative solutions could strengthen and better define the scope of the USDA's enforcement powers or break up agricultural monopolies, federal courts have demonstrated on a repeated basis that they will accept unpersuasive corporate justifications and arguments about freedom of contract to rationalize limiting protections to small farmers. Ultimately, the Supreme Court and lower federal courts have sided with the very industries that Congress intended the PSA to curtail and have revealed their pro-big-business inclinations.

Unfortunately, however, the Supreme Court is unlikely to allow the next administration to repair the damage it has helped produce in rural America, in that the Court will probably strike down rural revitalization plans proposed by presidential candidates. Consistent with its 73-0 record of voting in the direction favored by GOP donors in split-decision cases since 2005, and with its tradition of rulings favoring large corporate interests in antitrust cases, the Supreme Court is unlikely to allow for the revitalization of local communities or small farms. Structural reform of the Court may be the only option for preventing the judiciary from wreaking additional havoc in rural America.

# APPENDIX

## Supreme Court Antitrust Rulings

### During Chief Justice Roberts's Tenure

Case	Docket	Outcome
Illinois Tool Works Inc. v. Independent Ink, Inc.	04-1329	for big business
Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.	04-597	no position
Texaco Inc. v. Dagher	04-814	for big business
Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.	04-905	for big business
Bell Atlantic Corp. v. Twombly	05-1126	for big business
Credit Suisse Securities (USA) LLC v. Billing	05-1157	for big business
Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.	05-381	for big business
Leegin Creative Leather Products, Inc. v. PSKS, Inc.	06-480	for big business
Pacific Bell Telephone Co. v. Linkline Communications, Inc.	07-512	for big business
Stolt-Nielsen S.A. v. AnimalFeeds International Corp.	08-1198	for big business
Mac's Shell Service, Inc. v. Shell Oil Products Co. LLC	08-372	for big business
American Needle, Inc. v. National Football League	08-661	against big business
F.T.C. v. Phoebe Putney Health System, Inc.	11-1160	against big business
Comcast Corp. v. Behrend	11-864	for big business
American Exp. Co. v. Italian Colors Restaurant	12-133	for big business
F.T.C. v. Actavis, Inc.	12-416	against big business
Gelboim v. Bank of America Corp.	13-1174	no position
Oneok, Inc. v. Learjet, Inc.	13-271	no position
North Carolina State Bd. of Dental Examiners v. F.T.C.	13-354	against big business
Sandoz Inc. v. Amgen Inc.	15-1195	no position
Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.	16-1220	no position
Ohio v. American Express Co.	16-1454	for big business
Henry Schein, Inc. v. Archer and White Sales, Inc.	17-1272	for big business
Apple Inc. v. Pepper	17-204	against big business

## ENDNOTES

- We thank Laurel Petrulionis for outstanding research assistance.
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- See *supra* note 4 at 20.
- See *supra* note 4, and Donelle Eller, “More Iowa Farmers Face Trouble Securing Financing as Planting Season Ends,” *Des Moines Register*, Apr. 12, 2019, <https://www.desmoinesregister.com/story/money/agriculture/2019/04/12/iowa-farmers-unable-to-get-operating-loans-agriculture-economy-downturn-struggles-tariffs-prices-ag/2339163002/>.
- James M. MacDonald, et. al., *Three Decades of Consolidation in American Agriculture*, United States Department of Agriculture, (2018), [https://www.ers.usda.gov/webdocs/publications/88057/eib189\\_summary.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/88057/eib189_summary.pdf?v=0).
- *Id.*
- United States Department of Agriculture, *Farm Economics, Census of Agriculture*, (2017), [https://www.nass.usda.gov/Publications/Highlights/2019/2017Census\\_Farm\\_Economics.pdf](https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_Farm_Economics.pdf).
- See Brother David Andrews & Timothy J. Kautza, *Impact of Industrial Farm Animal Production on Rural Communities*, Pew Commission on Industrial Farm Animal Production, 35, [http://www.pcifapia.org/\\_images/212-8\\_PCIFAP\\_RuralCom\\_Finalc.pdf](http://www.pcifapia.org/_images/212-8_PCIFAP_RuralCom_Finalc.pdf).
- See *supra* note 12.
- See Poll: Farmers Overwhelmingly Oppose Bayer Monsanto Merger, Friends of the Earth, March 8, 2018, <https://foe.org/news/poll-farmers-overwhelmingly-oppose-bayer-monsanto-merger/>
- See *supra* note 1.
- See Devan A. McGranahan, et al., “A Historical Primer on the US Farm Bill: Supply Management and Conservation Policy,” *J. Soil and Water Conservation*, (2013), [https://chooseyourfuture.cps.edu/wp-content/uploads/2015/08/A\\_historical\\_primer\\_on\\_the\\_US\\_farm\\_bill\\_Supply\\_ma-1.pdf](https://chooseyourfuture.cps.edu/wp-content/uploads/2015/08/A_historical_primer_on_the_US_farm_bill_Supply_ma-1.pdf).
- 7 U.S.C. §§ 181–229.
- See Jon Lauck, “American Agriculture and the Problem of Monopoly,” 70(2) *Agricultural History* 196, 199–200, (1996).
- Summary and Part I, Report of the Federal Trade Commission on the Meat Packing Industry, 33 (1919).
- See *supra* note 22 at 199.
- See *supra* note 23 at 31.
- 20. *Id.* at 32.
- 21. *Id.* at 32–33.
- 22. *Id.* at 38.
- 23. *Id.* at 40 and 47–48. The Big Five conducted this merger while being investigated by the Department of Justice.
- 24. *Id.* at 46–47.
- 25. 10 Neil E. Harl, *Agricultural Law* § 71.02-03 (1993). The consent decree that resulted from the DOJ enforcement remained as an additional prohibition on the companies, until it was vacated in 1981. *Id.*
- 26. See *supra* note 23 at 76.
- 27. 7 U.S.C. §§ 181–229.
- 28. *Id.*
- 29. See *supra* note 31 at §§ 71.05, 07.
- 30. *Id.* at § 71.18
- 31. See *Stafford v. Wallace*, 258 U.S. 495 (1922). The court continued to uphold the constitutionality of the law in suits during the 1930s. See *Tagg Bros. & Moorehead v. United States*, 280 U.S. 420 (1930).
- 32. See *U.S. v. American Livestock Com’n. Co.*, 279 U.S. 435 (1929).
- 33. See *Morgan v. U.S.*, 304 U.S. 1, 15 (1938).
- 34. See, e.g., *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961).
- 35. See *Swift & Co. v. United States*, 317 F.2d 53, 55 (7th Cir. 1963).
- 36. See, e.g., *U.S. v. Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932).
- 37. See Terrance P. Stewart, “Trade and Cattle: How the System is Failing an Industry in Crisis,” 9 *Minn. J. Global Trade* 449, 509 (2000) and Richard J. Arnould, “Changing Patterns of Concentration in American Meat Packing, 1880–1963,” 45 *Business History Review* 18, 25 (Spring 1971).
- 38. *Id.* at 25-26.
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- 40. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104 (1986).
- 41. *Id.* at 107–08.
- 42. See Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 *N.D. L. Rev.* 449, 478 (1999).
- 43. 479 U.S. 104 at 116.
- 44. Clement E. Ward, *Economics of Competition in the U.S. Livestock Industry*, 7 (Jan. 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2011/09/09/AGW-15639-a.pdf>.
- 45. *Id.* at 13.
- 46. See *supra* note 45.
- 47. *Central Coast Meats, Inc. v. U.S. Dept. of Agriculture*, 541 F.2d 1325, (9th Cir. 1976).
- 48. *Id.* at 1326–27.
- 49. *Id.*

50. *Id.* The dissenting opinion pointed out that the PSA was intended to be more rigorous than the statutes authorizing the FTC to broadly define unfair trade practices, and argued that the USDA was right to protect smaller producers from “economic harm at the hands of middlemen.” *Id.* at 1328, (J. Goodwin dissenting).
51. *Pickett v. Tyson Fresh Meats, Inc.*, 315 F.Supp.2d 1172, 1175--76 (M.D. Ala. 2004), *aff'd* 420 F.3d 1272 (11th Cir. 2005).
52. *Id.* at 1176. After the jury verdict awarded damages against it for over one billion dollars, the packing corporation was bought by Tyson, who released a statement that the damages “wouldn’t hurt the company’s operations,” because the merged company would see an annual 24 billion in sales. See William E. Rosales, *Dethroning Economic Kings* 2004 Wis. L. Rev. 1497, 1530.
53. 315 F.Supp.2d 1172 at 1176.
54. *Id.* at 1177.
55. *Griffin v. Smithfield Food, Inc.*, 183 F.Supp.2d 824, (E.D. Va., 2002).
56. *Id.* at 826–28.
57. *Id.*
58. David A. Domina & C. Robert Taylor, “The Debilitating Effects of Concentration Markets Affecting Agriculture,” 15 *Drake J. Agric. L.* 61, 95–96 (2010).
59. Jerry Heykoop, *Merger and Antitrust Issues in Agriculture: Statutes and Agencies*, Congressional Research Service Report, Jan. 29, 2003, [https://www.everycrsreport.com/files/20030129\\_RS205622\\_3bd43b6d81dfedf44af187000cce40a5c8fab115.pdf](https://www.everycrsreport.com/files/20030129_RS205622_3bd43b6d81dfedf44af187000cce40a5c8fab115.pdf).
60. See Shi-Ling Hsu, *Scale Economies, Scale Externalities: Hog Farming and the Changing American Agricultural Industry*, 94 *Or. L. Rev.* 23, 62–64 (2015).
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63. Bill Bullard, “Spread Between Cattle, Retail Beef is Highest in History,” *Tri-State Livestock News*, Jan. 22, 2019, <https://www.tsln.com/news/bullard-spread-between-cattle-and-retail-beef-prices-highest-in-history/>,
64. See *supra* note 64.
65. 10 Neil E. Harl, *Agricultural Law* § 71.17 (1993).
66. *Id.* at § 71.18.
67. 7 U.S.C. § 202(a-b). The lack of any language requiring a competitive injury for a practice to be unlawful is made even more apparent by the inclusion of a competitive injury requirement for sales between entities to be unlawful. See *id.* at § 202(c-d).
68. Christopher M. Bass, “More than a Mirror: The Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement,” 12 *Drake J. Agric. L.* 423, note 42 (2007).
69. *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277–79, (6th Cir. 2010). Prior to 2009, the 5th Circuit had held that the plain meaning of the law did not require competitive injury; but the Court has since adopted the majority opinion. See *Wheeler v. Pilgrim Pride Corp.*, 591 F.3d 355 (5th Cir. 2009).
70. See *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (“The language in section 202(a) of the Act does not specify that a ‘competitive injury’ . . . be proved in order to show a violation.”).
71. See *Armour & Co. v. U.S.*, 402 F.2d 712, 717 (7th Cir. 1968).
72. *Id.* at 714–15.
73. *Id.*
74. *Id.* at 717–23.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Swift & Co. v. Wallace*, 105 F.2d 848, 862 (7th Cir. 1939) (holding that discriminatory practice that resulted in competitive injury “could be said” to violate the PSA as a matter of law, but that “no such case is presented here”).
79. See *supra* note 75.
80. See *De Jong Packing Co. v. U.S. Dept. of Agriculture*, 618 F.2d 1329, (9th Cir. 1980).
81. See *Syverson v. U.S. Dept. of Agriculture*, 601 F.3d 793 (8th Cir. 2010).
82. See *supra* note 85.
83. *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 279 (6th Cir. 2010).
84. *Id.*
85. See *Wheeler v. Pilgrim Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (J. Garza dissenting)
86. *Id.* at 372–73.
87. *Id.*
88. *Id.* at 373–76.
89. *Id.*
90. See, e.g., *De Jong Packing Co. v. U.S.*, 449 U.S. 1061, (1980); *London v. Fieldale Farms Corp.*, 546 U.S. 1034 (2005); *Pickett v. Tyson Fresh Meats*, 547 U.S. 1040 (2006); *Terry v. Tyson Farms Inc.*, 562 U.S. 1200 (2011); *Agerton v. Pilgrim’s Pride Corp.*, 571 U.S. 1203 (2014).
91. See Doug O’Brian, “Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture,” 9 *Drake J. Agric. L.* 33–34 (2004).
92. See Edward P. Lord, “Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts,” 33 *Wake Forest L. Rev.* 1125 (1998).
93. 7 U.S.C. §§ 181–229.
94. See *supra* note 31 at § 71.07



95. See *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999).
96. See, e.g., *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1307 (11th Cir. 2005) (holding that a contract that results in the underweighing of chickens does not violate the PSA, which requires that “poultry growers be paid based on the actual weight of the live poultry.”)
97. *Mahon v. Stowers*, 416 U.S. 100, (1974).
98. *Id.* at 107–08.
99. See 187 F.3d 974 at 975.
100. *Id.*
101. *Id.* at 977.
102. *Jackson v. Swift Eckrich*, 53 F.3d 1452 (8th Cir. 1995).
103. *Id.* at 1454–55.
104. *Id.* at 1455.
105. *Id.* at 1458.
106. See Farm Economy, Politico, Nov. 13, 2019, <https://www.politico.com/2020-election/candidates-views-on-the-issues/agriculture/farm-economy/>. Vice President Biden says he will “bolster enforcement” of the Packers and Stockyards act, while Senator Harris says she will “appoint antitrust regulators” who will strictly scrutinize future mergers in agriculture.
107. *Id.* Mayor Buttigieg also calls for the investigation of mergers, but only in the seed and chemical industries, and says he will increase the budget for investigating antitrust mergers.
108. *Id.*
109. *Id.*
110. See Sheldon Whitehouse, A Right-Wing Rout: What the “Roberts Five” Decisions Tell Us About the Integrity of Today’s Supreme Court, American Constitution Society Issue Brief, Apr., 2019.
111. See Spencer Chase, “Ag Campaign Spending Heavily Favors Republican Candidates,” *AgriPulse*, April 19, 2017; Center for Responsive Politics, *Agribusiness*, <https://www.opensecrets.org/industries/indus.php?Ind=A> accessed November 19, 2019.
112. See the Appendix for case details.
113. Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. R. 871, 872 (2011).
114. Tim Wu, “The Supreme Court Devastates Antitrust Law,” *The New York Times*, June 26, 2018. <https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html>.
115. Lina Kahn, “The Supreme Court Just Quietly Guttled Antitrust Law,” *Vox*, July 3, 2018. <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>. American Express contracts with merchants, but charges a higher fee than other credit cards. The Court upheld contractual provisions that forbid merchants from telling customers about the fees, even though the prohibition results in higher prices for consumers and merchants. The trial court found these provisions to be anticompetitive, but the Supreme Court ruled in favor of American Express.
116. See *supra* note 133.
117. See Lee Epstein, William M. Landes & Richard A. Posner, “How Business Fares in the Supreme Court,” *Minnesota Law Review*, 97 (2013).
118. Joanne C. Lewers & Robert A. Skitol, “The Developing Antitrust Legacy of the Roberts Court,” 28 *Antitrust* 7, 10 (Summer 2014). <https://www.antitrustinstitute.org/wp-content/uploads/2014/10/Lewers-and-Skitol-The-Developing-Legacy-of-the-Roberts-Court.pdf>. Lewers and Skitol argue that the Roberts Court’s antitrust record is not decidedly pro-business. Their analysis addresses almost unanimous decisions in 8 of 14 antitrust cases, but 5 of those 8 were decisions in favor of business, and of the three that the Court found for plaintiffs, one was on a procedural issue unrelated to antitrust law, and the other two were unusual situations that arguably did not compromise business interests. Additionally, their analysis focuses on 2005–2014, and the composition of the Court has changed significantly since that time.
119. See AAI Opposes Nomination of Judge Kavanaugh to the Supreme Court: Analysis Shows Hostility to Antitrust Plaintiffs and Leniency to Big Business, American Antitrust Institute, 3, July 17, 2018. <https://www.antitrustinstitute.org/wp-content/uploads/2018/09/Analysis-of-Judge-Kavanaughs-Antitrust-Record1.pdf>.
120. *Id.* at 5.
121. *Id.* at 1.
122. Both Senator Sanders and Senator Warren describe their agricultural plans as “trust-busting.” See *Revitalizing Rural America*, Bernie Sanders, <https://berniesanders.com/issues/revitalizing-rural-america/>; and *Leveling the Playing Field for America’s Farmers*, Elizabeth Warren, Mar. 27, 2019. §17, 15 U.S.C. §18. <https://medium.com/@teamwarren/leveling-the-playing-field-for-americas-family-farmers-823d1994f067>.
123. Note by the United States, *The Standard of Review by Courts in Competition Cases*, OECD, 2, June 4, 2019. [https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/standard\\_of\\_review\\_us-oecd.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/standard_of_review_us-oecd.pdf).
124. See *A New Farm Economy*, Elizabeth Warren, Aug. 7, 2019. <https://elizabethwarren.com/plans/new-farm-economy>.
125. As this paper discussed previously, courts base their review of USDA action under the PSA on the actual statute, and so changing the competitive injury requirement would require a legislative amendment to the Act, which Senator Warren’s plan does not include. *Id.*
126. See “Challenging Concentration of Control in the American Meat Industry,” 117 *Harv. L. Rev.* 2643, 2657 (2004).
127. Zoe Willingham & Andy Green, *A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America*, Center for American Progress, 42, May 7, 2019, <https://www.americanprogress.org/issues/economy/reports/2019/05/07/469385/fair-deal-farmers/>.

## PATTY JUDGE

Patty Judge was first elected to the Iowa Senate in 1992 and re-elected in 1996. During the six years in the senate, she served as assistant majority and minority leader, ranking member of the Agriculture Committee, member of the Appropriations Committee, Ways and Means Committee, Health and Human Services Committee, Natural Resources Committee and Economic Development Committee. She was also the chair of the Regulation and Administration Appropriations Subcommittee.

In 1998 Patty Judge became the first woman in Iowa to be elected Secretary of Agriculture. Re-elected in 2002, she served two terms in that post. Her knowledge and experience of production agriculture allowed her to work with leaders to increase market opportunities for Iowa's agricultural products. Patty's extensive travel to several countries in Europe, Asia, Central America and Mexico promoting those products was instrumental in opening new markets for Iowa's producers. She has led trade missions on behalf of corn growers, soybean growers and livestock producers alike. Patty has also worked with international companies with Iowa-based production on expansions for their facilities and product distribution.

Throughout her term as Iowa's Secretary of Agriculture, Patty worked tirelessly promoting renewable fuels – ethanol and biodiesel in particular. Under her leadership, renewable energy grew to become an integral part of Iowa's economy.

As Iowa Secretary of Agriculture, Patty was appointed to the Food and Agricultural Security Sector Committee in the newly formed Department of Homeland Security and served as the permanent chair of the Ag Security Committee of the National Association of Secretaries of Departments of Agriculture.

Patty Judge was elected Lieutenant Governor of Iowa in 2006, serving in that position for four years. During her term in office she served as the Governor's Homeland Security Advisor (HSA). As HSA, she was instrumental in coordinating critical response operations during the historic floods of 2008 and nine other presidentially declared disasters. Following the floods of 2008, Patty served as first director of the Rebuild Iowa Office as it worked to rebuild homes and businesses on the way to recovery in flood-affected communities. Under her leadership, efforts from the state, local governments and federal assistance was coordinated to maximize the assistance made available to Iowans who suffered devastating losses.

In addition to her Homeland Security efforts, Lt. Governor Judge also led numerous taskforces and worked daily with legislators to craft state budgets and pass legislation.

As a former Registered Nurse, Patty has many years of experience in the health care field, including Public Health. A lifelong resident of Iowa, Patty and her family have owned a cow/calf farm in Monroe County for over 40 years. In addition to the farming operation, Patty has owned and operated her own small business, selling and appraising real estate. During the farm crisis of the 1980s, she worked as a mediator with hundreds of farm families and creditors across the state to find solutions to financial troubles. Patty and her husband John have three sons and five grandchildren, all of whom still call Iowa home.

Recent awards include induction into the Iowa Women's Hall of Fame, the Monroe County Cattlemen's Hall of Fame and receiving the Iowa Farm Bureau Distinguished Service Award.

## AARON BELKIN

Aaron Belkin is a scholar, author, activist and dancer. He has written and edited more than twenty-five scholarly articles, chapters and books, the most recent of which is a study of contradictions in American warrior masculinity. The book, titled *Bring Me Men*, was first published by Columbia University Press in 2012 and then picked up by Oxford University Press in 2013.

Since 1999, Belkin has served as founding director of the Palm Center, which the *Advocate* named as one of the most effective LGBT rights organizations in the nation. He designed and implemented much of the public education campaign that eroded popular support for military anti-gay and anti-transgender discrimination, and when "don't ask, don't tell" was repealed, the president of the Evelyn and Walter Haas Jr. Fund observed that, "this day never would have arrived (or it would have been a much longer wait) without the persistent, grinding work of the Michael Palm Center." Harvard Law Professor Janet Halley said of Belkin that, "Probably no single person deserves more credit for the repeal of 'don't ask, don't tell.'"

During a November, 2016 White House ceremony, Deputy Assistant Secretary of Defense Anthony Kurta credited the Palm Center as one of the organizations most responsible for helping the military lift its ban on transgender personnel. As Palm's director, Belkin crafted a novel strategic model for using social science research to shape public opinion, a model that he describes in his 2011 e-book, *How We Won*. Arianna Huffington describes that book as a "best practices guide for civil rights fights going forward" and adds that, "if you care about changing America, read *How We Won*." Belkin has provided pro-bono strategic advice, based on his model, to numerous foundations and non-profit organizations.

His awards include the Freedom Award from Beth Chayim Chadashim, the oldest LGBT synagogue in the world, and the Monette-Horwitz Award from the estate of National Book Award Winner Paul Monette. In 2011, he was a Grand Marshal in San Francisco's LGBT Pride Parade.

Belkin serves as professor of political science at San Francisco State University, where he teaches a lecture course on delusion and paranoia in American politics. Prior to his arrival at State, he was an associate professor of political science at University of California, Santa Barbara and an associate professor of psychology at City University of New York. He earned his B.A. in international relations at Brown University in 1988 and his Ph.D in political science at the University of California, Berkeley in 1998.



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