

AMERICA NEEDS FARMERS AND FARMERS NEED BETTER ANTITRUST LAW



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J.D. Scholten is running for Iowa's 4th Congressional District, an area of the country defined by its rolling fields of corn and soybean. On the trail, you may find him wearing a campaign shirt that reads: "America Needs Farmers; Farmers Need Antitrust." The first part of the slogan is certainly familiar to Iowans as legendary Hawkeye football coach Hayden Fry coined it during the last farm crisis. It also inspired lines of black and gold "ANF" clothing, as well as stickers and hitch covers that occupy the back of Iowa vehicles. The second part of the slogan, however, reflects the growing role that antitrust is playing in American politics. How has competition law become a central campaign issue in this predominantly rural and agricultural part of the country? It could have something to do with the fact that agriculture and antitrust have been intertwined since before the passage of the Sherman Antitrust Act in 1890 and that Scholten is campaigning in a state responsible for the world's first antitrust statute.

Following the Civil War, farmers across the western frontier of the United States suffered through droughts, declining incomes, and the predatory practices of monopolistic railroads, lenders, and grain elevators. In response to these troubles, farmers organized in the second half of the 19th century, calling for regulation of industries and demanding that their legislatures address the problem of monopoly power in agricultural markets. Known as the "Granger Movement," these farmers took aim at limiting the market power of corporate middlemen in the agricultural supply chain who took economic rents from farmers' productivity. Political newspapers, like St. Paul, Minnesota's aptly-named "Anti-Monopolist," sprung up to advance the political goals of the Grangers. These efforts led to the passage of laws regulating the prices and practices of railroads and grain elevators, but it also inspired states to begin passing statutes protecting and promoting competition.

On April 16, 1888, the Iowa legislature became the first government in the world to pass a general antitrust statute. Titled *An Act for the Punishment of Pools, Trusts, and Conspiracies*, the act outlawed agreements to fix the price or reduce output of commodities.² Other midwestern states soon followed Iowa's lead.³ While legislative action at the state level was foreshadowing the coming embrace of competition regulation, it was understood that state laws could only nibble at this monopoly-sized problem. As a Spirit Lake, Iowa newspaper reflected after the passage of the Iowa act: "So far as domestic trusts are concerned the Iowa act seems well calculated to prevent and punish the evil. The most rapacious trusts, however, are inside the field of inter-state commerce, and are fortified by ultra-protectionism, so that congress [sic] only can deal with them."⁴ Two years after the Iowa act, Congress passed the Sherman Act, which would

² Act of Apr. 16, 1888, ch. 84, 1888 Iowa Acts 124.

³ See Charles S. Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 Yale L.J. 1072, 1082 (2016).

⁴ *The Law Passed by the Iowa Legislature Forbidding Trusts, Pools, Etc.*, The Spirit Lake Beacon, Apr. 20, 1888, http://dickinson.advantage-preservation.com/viewer/?k=%22anti%20trust%22&i=f&d=01011870-12311889&m=between&ord=k1&fn=sprit_lake_beacon_usa_iowa_spirit_lake_18880420_english_1&df=1&dt=3#zoom=page-width, (last visited Dec. 6, 2019) (Reprint of an article from the Chi. Trib., Apr. 12, 1888, 4).

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become the backbone of antitrust law in the United States and provide inspiration for competition statutes around the world.⁵ Global competition law, therefore, owes much to America's farmers and their fight to address monopoly power.

So, how have American farmers fared under the antitrust laws they helped create? The answer, quite simply, is not well at all. One measure of the health of the farm economy is to look to farmers' share of the retail food dollar. Alongside the enactment and enforcement of state and federal antitrust laws through the first part of the 20th century, farmers' share of the food retail dollar remained relatively stable, floating around 40 cents for much of the century.⁶ However, since the late 1970s there has been a steady decline in the farmers' share of the food dollar. As of 2017, farmers earn about 14 cents of every retail dollar spent on food.⁷

Several factors have contributed to the decline of the farmers' share of the retail food dollar including a notable consumer demand shift to time-saving processed foods, but probably no factor has been as important as the weakening of antitrust enforcement in America. This has permitted extreme concentration in agricultural markets to emerge on both the input and output side of the American farm. This concentration had the foreseeable effect of minimizing farmers' earnings while enriching the oligopolies on either side of the farm.

Recent mergers on the input side involved Dow and Dupont, Bayer and Monsanto, and ChemChina and Syngenta, which followed a string of earlier mergers eliminating strong competitors such as DeKalb and Pioneer. This recent string of mergers had the shocking impact of reducing the "Big Six," as they were once known (and resulting from an earlier generation of mergers), to just four (Bayer, Corteva (formerly DowDupont), Syngenta, and BASF). Based on available 2015 data, two companies, Bayer and Corteva, now effectively control over 77 percent of the corn seed market, and 66 percent of the soybean seed market.⁸ For comparison, as recently as 1997, the top seven seed companies competed for only a 68 percent share of all seed markets.⁹ Similar concentration trends can be seen in the fertilizer industry as the 2017 merger of Potash Corp and Agrium, Inc. created Nutrien Ltd., the "world's largest producer of crop inputs," further consolidating an already concentrated fertilizer market.

On the production side, the situation is looking similarly dire. Just four companies, Archer Daniels Midland, Bunge, Cargill, and Dreyfus, control approximately 90 percent of the global grain trade.¹⁰ Only four companies control 79 percent of beef, 65 percent of the pork, and 57 percent of the chicken processing markets in the United States.¹¹ Approximately half of all chicken producers are located in regions with only one or two processing plants.¹² Just two companies, Dean Foods and Dairy Farmers of America, control almost 60 percent of the milk supply in the United States and in some states, their control can exceed 80 percent.¹³ As a sign of how weak antitrust law in the United States has become, agricultural firms are pushing the boundaries of what constitutes a legal merger. In 2018, Archer Daniel Midland engaged in talks to acquire Bunge (which later failed) and recent reports indicate that Dairy Farmers of America has entered negotiations to purchase Dean Foods after it filed for bankruptcy. The concentrated markets and moves toward further consolidation represent a clear trend toward monopoly in agriculture, a trend that is certain to have devastating consequences for farmers.

As these production-side markets become more concentrated, the possibility of both tacit and active price collusion also increases. Peter Carstensen, antitrust professor emeritus at the University of Wisconsin School of Law, spoke about the potential Dairy Farmers of America purchase of Dean Foods and noted that the buyout "could give it monopoly-like power over the milk market. . . What you're going to see is increased

⁵ While Iowa was first to pass a modern general antitrust statute, competition-related common law and statutes date back more than a millennium.

⁶ *Agribusiness during the 1950s and 60s*, <https://livinghistoryfarm.org/farminginthe50s/making-money/agribusiness/> (last visited Dec. 6, 2019), citing Bruce L. Gardner, *American Agriculture in the Twentieth Century*, Harvard University Press (2002).

⁷ USDA Economic Research Service, *Food Dollar Application* (Aug. 20, 2019), <https://data.ers.usda.gov/reports.aspx?ID=17885>, (last visited Dec. 6, 2019)

⁸ Sonja Begemann, *Farm Journal: Mergers and Market Shifts*, Verdant Partners (July 2016), <https://www.verdantpartners.com/mergers-and-market-shifts/>. (last visited Dec. 6, 2019)

⁹ USDA Economic Research Service, *Seed Industry Structure is Characterized by Growth and Consolidation*, The Seed Industry in U.S. Agriculture, AIB-786 27, https://www.ers.usda.gov/webdocs/publications/42517/13605_aib786g_1_.pdf. (last visited Dec. 6, 2019).

¹⁰ Adam Putz, *The ABCDs and M&A: Putting 90% of the global grain supply in fewer hands*, Pitchbook (Feb. 21, 2018), <https://pitchbook.com/news/articles/the-abcds-and-ma-putting-90-of-the-global-food-supply-in-fewer-hands>. (last visited Dec. 6, 2019).

¹¹ Jonathan Tepper & Denise Hearn, *The Myth of Capitalism*, 31 (2018); Luis Suarez-Villa, *Corporate Power, Oligopolies, and the Crisis of the State* 63 (2015).

¹² *Chicken*, Food & Power, <http://www.foodandpower.net/chicken/> (last visited Dec. 6, 2019). U.S. Small Business Administration, *Evaluation of SBA 7(A) Loans Made to Poultry Farmers 2* <https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13.pdf> (last visited Dec. 6, 2019).

¹³ *Dairy*, Food & Power, <http://www.foodandpower.net/dairy/> (last visited Dec. 6, 2019).

risk of tacit collusion on the consumer side, raising the price of milk for consumers.”¹⁴ In recent years, private lawsuits have been filed against the beef, pork, chicken, and dairy processors alleging price and output manipulation, the clearest harms articulated by the antitrust laws. In 2012 and 2013, Dean Foods and DFA settled allegations that they colluded together to fix prices paid to farmers, conduct that ironically, becomes legal should the two be allowed to merge. With the potential for collusion and durable market power in agricultural markets, farmers earn less for their products than they would in a competitive market. But consumers may not benefit either as market power allows the same processors to pocket the cost savings achieved from squeezing farmers while keeping the prices high for consumers.

This concentration and potential cooperation among competitors has a profound impact on farmers’ bottom lines. Between 2006 and 2017, average seed prices increased over 250 percent, from \$45 per acre in 2006 to \$115 per acre in 2017. Pesticides saw a 220 percent increase going from \$33 per acre in 2000 to \$73 per acre in 2017.¹⁵ Fertilizer has experienced similar increases. In 2000, a ton of anhydrous ammonia averaged \$227.¹⁶ This past summer, if you wanted to buy a ton of anhydrous ammonia in Iowa, it cost you, on average, \$630 per ton, a 270 percent increase over the year 2000.¹⁷ Meanwhile, farmers have seen declining prices paid for their production. Since 2012, wheat, corn, and soybean prices have been on a steady decline.¹⁸ The stranglehold of a few companies over the processing of livestock forces producers out of competitive cash markets and into forward contracts favorable to processors. Virtually all broiler chickens are now produced on a contract basis.¹⁹ Beef and pork are quickly descending to the same state. This move toward contract farming jeopardizes the economic well-being of America’s livestock producers by eliminating competitive markets for their products and increasing the power of processors over producers.

Rising input costs and falling output prices has meant that farmers’ profits have decreased or been eliminated entirely, creating hardships and bankruptcy. Dairy producers spend on average \$1.92 to produce a gallon of milk, but they receive just \$1.32 when they sell it to processors.²⁰ This is economically unsustainable, and it forces hundreds of dairy farms to close each year. In 1970, there were 650,000 dairy farms in the United States, fueling a middle class and sustaining rural communities across the country. Today just 40,219 remain.²¹ The trend is consistent across the agricultural industry. Delinquencies are up on farm loans, to their highest point in 9 years.²² And, for the first time since before the Louisiana Purchase, the total number of farms in the United States will drop below 2 million.²³ The decimation of the small family farm not only impacts the economic well-being of those individuals, it also weakens the rural communities that depend on them, and in turn, threatens the economic fabric upon which the American Republic depends.

In December of 2018, I was honored to speak on a panel at the American Antitrust Institute’s Food and Agriculture Competition Roundtable in Madison, Wisconsin. The event was well attended by scholars and practitioners, but it was also attended by a fair number of farmers,

14 Colleen Kottke, *Is Sale to DFA Best Solution in Dean Foods Financial Woes?* Wisconsin State Farmer, (Nov. 20, 2019), <https://www.wisfarmer.com/story/news/2019/11/19/sale-dfa-best-move-solving-dean-foods-financial-woes/4228744002/> (last visited Dec. 6, 2019).

15 Gary Schnitkey, *Historic Fertilizer, Seed, and Chemical Costs with 2019 Projections*, Farmdoc Daily, (June 5, 2018), <https://farmdocdaily.illinois.edu/2018/06/historic-fertilizer-seed-and-chemical-costs.html> (last visited Dec. 6, 2019).

16 USDA Economic Research Service, *Fertilizer Use and Price*, Table 7: Average U.S. Farm Prices of Selected Fertilizers. <https://www.ers.usda.gov/data-products/fertilizer-use-and-price.aspx> (last visited Dec. 6, 2019).

17 *USDA - AMS: Iowa Production Cost Report (Bi-Weekly)*, Futures and Commodity Market News, (June 4, 2019), http://tfchart.com/news/futures/USDA__AMS__Iowa_Production_Cost_Report__Bi_Weekly__2019_06_04__usda3197xw85d.html (last visited Dec. 6, 2019).

18 *Wheat Prices – 40 Year Historical Chart*, Macrotrends, <https://www.macrotrends.net/2534/wheat-prices-historical-chart-data>; (last visited Dec. 6, 2019); *Corn Prices – 59 Year Historical Chart*, Macrotrends <https://www.macrotrends.net/2532/corn-prices-historical-chart-data> (last visited Dec. 6, 2019); *Soybean Prices – 45 Year Historical Chart*, Macrotrends <https://www.macrotrends.net/2531/soybean-prices-historical-chart-data> (last visited Dec. 6, 2019); Jesse Newman & Patrick McGroarty, “The Next American Farm Bust Is Upon Us.” *The Wall Street Journal*, 8 Feb. 2017, www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488 (last visited Dec. 6, 2019).

19 *Broiler Chicken Industry Key Facts 2019*, National Chicken Council, <https://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/> (last visited Dec. 6, 2019).

20 Phil McCausland, *Best Advice for a U.S. Dairy Farmer? ‘Sell out as Fast as You Can’*, NBC News (June 29, 2018), <https://www.nbcnews.com/news/us-news/best-advice-u-s-dairy-farmers-sell-out-fast-you-n887941?ref=marketbulletin> (last visited Dec. 6, 2019).

21 *Id.*

22 Roxana Hegeman, *Farm Loan Delinquencies Reach Highest Point in 9 Years As Prices Slump*, Des Moines Register (Feb. 28, 2019), <https://www.desmoinesregister.com/story/money/agriculture/2019/02/28/farm-loan-delinquencies-highest-point-nine-years-donald-trump-tariffs-low-grain-prices-corn-soybeans/3017895002/> (last visited Dec. 6, 2019).

23 Jesse Newman & Patrick McGroarty, *The Next American Farm Bust Is Upon Us*, Wall St. J. (Feb. 8, 2017), <https://www.wsj.com/articles/the-next-american-farm-bust-is-upon-us-1486572488>. (last visited Dec. 6, 2019).

many of whom were from the dairy industry. While the viewpoints of panelists were diverse, the sentiments of the farmers were not. They were irritated that the government has thus far failed to enforce antitrust law against agriculture's corporate giants. They also held the general opinion that higher prices in the grocery line should be an acceptable tradeoff to ensure that farmers could thrive. This belief, of course, caused some practitioners who were trained on price-based "consumer welfare" antitrust to bristle.

These farmers' sentiments, however, should not have been surprising as it dates back to the founding of our modern antitrust statutes. When farmers across the Midwest organized and lobbied for the passage of the first antitrust laws, they were not doing it because they were concerned about the prices paid by their neighbors at the local general store. They primarily were concerned about their economic liberty and well-being. They wanted fair markets, not ones distorted by durable market power. The radical shift of antitrust to a consumer welfare framework in the 1970s and 80s lost sight of the origin movement of antitrust. It ignored the fact that individuals in our society are not just consumers seeking the lowest prices. They are also employees, business owners, and hard-working folks expecting to receive fair compensation for their productivity. Many Americans across the country are connected to agriculture. Some are farmers, others love them, and still others make up the communities that support and depend on them. And all Americans, one way or another, rely on farmers to put food on our tables. As these farmers continue to get squeezed by the power wielded by a few large agricultural corporations, these same Americans begin to understand the fight of the Grangers from over a century ago. Antitrust has always been a movement-based area of law, and a new movement is emerging and demanding reform.

While some may be taking note of this new antitrust movement, U.S. Department of Agriculture Secretary Sonny Perdue demonstrated that he is oblivious to the shifting American attitudes toward antitrust. At a meeting with dairy farmers in Wisconsin in October, Secretary Perdue said, "It's very difficult on an economy of scale with the capital needs and all the environmental regulations and everything else today to survive milking 40, 50, or 60 or even 100 cows ... In America, the big get bigger and the small go out."²⁴ Needless to say, Secretary Perdue's comments were not well received by the struggling dairy farmers in the room. Speaking with reporters after the meeting, Darin Von Ruden, president of the Wisconsin Farmers Union and a small dairy farmer himself, asked, "Do we want one corporation owning all the food in our country?"²⁵ His question is prescient, because while the obvious answer is "no," antitrust policy in the United States has certainly put the country on a trajectory toward that outcome. With each wave of mergers in every industry, there are armies of highly-paid attorneys, economists, and consultants willing to argue that fewer market participants is a good thing for consumers. It is foreseeable that without an adjustment to antitrust policy and the legal framework, further consolidation and concentration will continue.

To keep antitrust from becoming obsolete in the United States, antitrust practitioners would be wise to start listening to the farmers. Seek out their stories of corporate abuses of power in these agricultural markets and recognize how corporate concentration has weakened and even eliminated their livelihoods. Farmers are the economic group most responsible for the creation of our modern antitrust laws, but ironically, they have suffered the most under the yoke of concentrated corporate power. They were a force in creating the original statutes, and they now can be a force in helping to reform this essential area of law. As practitioners, academics, or anyone who cares about competition policy, we should recognize that if antitrust is failing the farmers, it is simply failing. Let us rethink our understanding of the law and embrace reforms to help restore competitive markets to America's agriculture industries.

24 *Trump Agriculture Secretary Says During Wisconsin Visit That Family-Run Dairy Farms May Not Survive*, MarketWatch (Oct. 3, 2019, 4:37 PM), <https://www.marketwatch.com/story/trump-agriculture-secretary-says-during-wisconsin-visit-that-family-run-dairy-farms-may-not-survive-2019-10-03>. (last visited Dec. 6, 2019).

25 *Id.*

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