Journal of Food Law & Policy

Volume 18 | Number 1 Article 6

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Journal of
FOOD & LAW
POLICY

Volume Eighteen Number One

Spring 2022

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A PUBLICATION OF THE UNIVERSITY OF ARKANSAS SCHOOL OF LAW

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I. Introduction

"A page of history is worth a volume of logic." [1]

~ U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. (1921) ~

Kansas City, Missouri – 1922. Just west of Kansas City, down in the river bottoms along the Missouri River, a hired hand throws a saddle across the back of an old sorrel gelding. He's done this a hundred times before, day in and day out, week after week, riding pens for the Kansas City Stockyards checking for sick or downed steers, checking feed and water, and sorting cattle. New steers come in daily from across the West and Midwest, most either trailed or trucked in, and most destined for markets back East in places like Chicago and New York. For a moment, the pen rider looks up at the colossal Livestock Exchange Building with its 475 offices, making it the largest livestock exchange building in the world, and one of the largest office buildings in Kansas City.[2] Cattle buyers and sellers are constantly moving in and out of the Livestock Exchange Building where huge blackboards hang on the wall showing the ever changing spot prices for cattle from across the country, and where the tellers exchange money and title to cattle like a well-oiled, free-market machine. The loud chugging and clanking of the steam engines and the rail cars pulling up to the loading docks perks up his horse's ears and snaps the hired hand back to reality. He waits for the cars to stop, then he drives a sorted pen of steers up the alley, pushes them up the ramps, loads them on the cars, turns his horse back and does it all over again.

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[1] N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

[2] LIVESTOCK EXCH. BLDG., https://livestockexchangebldg.com (last visited Mar. 10, 2022).

To put the Kansas City Stockyards in perspective, at its height in the early 1920's, over 2.6 million head of cattle came through the iconic stockyards each year,[3] making it the 2nd largest stockyards in America, second only to the Union Stockyards in Chicago.[4] (While the focus of the Kansas City Stockyards was beef cattle, there were over 2 million head of hogs[5] and thousands of sheep that were sold through the yards on a cash basis every year).[6] From its humble beginnings as a small set of cattle pens on 5 acres in 1870, the stockyards had grown to encompass 207 acres, with a handling capacity of 170,000 head of cattle at any given time, and employed over 20,000 people.[7] Because of the Stockyards, for roughly a century "[Kansas City] rivaled its big brother Chicago as a transportation hub, meat packer and agribusiness powerhouse but with its own Western flair."[8] This free-market inspired cattle industry transformed Kansas City from a backwater town in Jackson County, Missouri into a cattle mecca fueled cultural hub.[9]

However, by the early 1920's, the free market, or cash market, which had been used to dictate the fair market price for beef cattle in places like the Kansas City Stockyards, was being replaced by a corporatized, monopolized model. In 1920 this model, or monopoly, was controlled by five large meat packing companies, namely, Armour & Company, Cudahy Packing Company Morris & Company, Swift & Company, and Wilson & Company.[10] This monopoly, controlled by the "Big Five" with its captive markets, was suffocating the independent cattlemen and the rancher. The monopoly caught the attention of President Woodrow Wilson back in 1917 when he ordered the Federal Trade Commission (FTC) to

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[3] *See Story*, STOCKYARDS DIST., http://www.kcstockyardsdistrict.com/story (last visited Mar. 10, 2022).
[4] *See Kansas Citys Agriculture Roots Run Deep – Cowtown Turned Animal Health and Technology Center*, GALLAGHER, https://am.gallagher.com/en-US/Solutions/Case-Study-Listings/Kansas-Citys-Agriculture-Roots-Run-Deep---Cowtown-Turned-Animal-Health-and-Technology-Center (last visited Mar. 10, 2022).
[5] *See* Johnny D. Boggs, *Cattle, Cowboys, and Culture*, TRUE W. MAG. (Feb. 27, 2018), https://truewestmagazine.com/cattle-cowboys-and-culture.
[6] *See* Nancy Jorgensen, *Where Did All the Cattle Go?*, TODAY'S FARMER MAG. (June 12, 2013), https://todaysfarmermagazine.com/mag/728-where-did-all-the-cattle-go.
[7] *See id.*
[8] Boggs, *supra* note 6.
[9] *See id.*
[10] *See* Robert M. Aduddell & Lous P. Cain, *The Consent Decree in the Meatpacking Industry, 1920-1956*, 55 BUS. HIST. REV. 359, 359 (1981).

investigate the packing industry.[11] In 1919 the FTC released its report, finding that the Big 5 controlled roughly 70% of the market, and had "attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortune of their competitors in their hands."[12]

The situation would soon catch the attention of Congress and President Warren G. Harding (29th President of the United States from 1921-1923).[13] The year he took office, Congress would pass the Packers & Stockyards Act of 1921 (Public Law 67-51, 42 Stat. 159, 7 U.S.C. 181 et seq.) (Packers and Stockyards Act),[14] breaking up the meat packing monopoly and breathing new life into the suffocating beef cattle industry. Specifically, as stated by Congress, the purpose of the Packers & Stockyards Act was "to assure fair competition and fair trade practices, to safeguard farmers and ranchers...to protect consumers...and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices...."[15] This breakup of the meat packing monopoly in 1921 and the protections put in place through the Packers and Stockyards Act allowed the American cattle industry to flourish throughout the rest of the 20th Century.

Kansas City, Missouri – 2022. Fast forward 100 years. The hum and clanking of the cattle cars has been replaced with the hustle and bustle of a modern city. The iconic Kansas City Stockyards are long gone – closed back in 1991[16] and have long since been torn down. If it weren't for the old red brick Kansas City Livestock Exchange Building (the former headquarters for the Stockyards built

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[11] Roger A. McEowen, *DOJ to Investigate Meatpackers – What's It All About?*, AGRIC. L. & TAX'N BLOG (May 8, 2020), https://lawprofessors.typepad.com/agriculturallaw/2020/05/doj-to-investigate-meatpackers-whats-it-all-about.html.

[12] FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEATPACKING INDUSTRY PT. 1 (1919).

[13] *Warren G. Harding*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/warren-g-harding/ (last visited Mar. 10, 2022).

[14] *See* Packers and Stockyards Act of 1921, Pub. L. No. 67-50, 42 Stat. 159 (codified as amended at 7 U.S.C.A. §§ 181-229b).

[15] *Jurisdiction of Packers and Stockyard Acts: Hearing on H.R. 7743 and H.R. 8536 Before the H. Comm. on Agric.*, 85th Cong. 8 (1957); *see generally* Packers and Stockyard Act of 1921, Pub. L. No. 67-51, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181-229b).

[16] *See* Diane Euston, *Moove Over! It's Time to Embrace Kansas City's Cowtown Past*, MARTIN CITY TELEGRAPH (Apr. 16, 2018), https://martincitytelegraph.com/2018/04/16/moove-over-its-time-to-embrace-kansas-citys-cowtown-past/.

in 1908)[17] which still stands, one would have no idea that for over a hundred years the Stockyards had even been there, let alone been the keystone that made Kansas City one of the most famous "Cowtowns" of the era. However, echoes of the past still remain. The Stockyards lent themselves to making the Kansas City Strip steak a high demand cut of beef (although it was later rebranded the New York Strip by the famous Delmonico Brothers),[18] and helped create the barbeque culture, that to this day puts Kansas City on the map as one of the greatest barbeque cities in the country. In talking about putting Kansas City on the map, one can't forget the American Royal Agricultural Show (the predecessor to the American Royal) and the namesake for the Major League Baseball Team, the Kansas City Royals.[19] All have their roots and beginnings in the Kansas City Stockyards. Plus, it's no coincidence that the nations center of animal health and animal health technology is now firmly rooted in the Kansas City Animal Health Corridor, thanks in part to Kansas City's Cowtown past.[20] Today the West Bottoms where the Stockyards once reigned supreme is full of shopping and modern housing options in the aptly named Stockyards District.[21]

While the Stockyards themselves are gone, just like in the early 20th Century, a beef monopoly has once again found its way into the industry, and a way around the Packers and Stockyards Act of 1921 and is again suffocating the industry. While at the time of the act's passage in 1921 five companies controlled the market, today the market is even more consolidated in the "Big Four," as the four biggest meat packing companies in America are commonly known (Cargill, Tyson, JBS and National Beef/Marfrig), and are again arguably stifling the free-market. If Americans do not act quickly to address this extreme consolidation, then the free-market, independent cattle rancher will soon face the same fate as the Kansas City Stockyards, and soon, like the Stockyards, will simply be history and a distant memory. This is not only bad news for the American rancher, but is even worse news for the American consumer, as the

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[17] *See id.*

[18] *See Bone Appetit: The History Behind the KC Strip*, SULLIVAN'S STEAKHOUSE, https://www.sullivanssteakhouse.com/bone-appetit-the-history-behind-the-kc-strip/ (last visited Mar. 10, 2022).

[19] *See* Jared Diamond & Kevin Helliker, *Think the Kansas City Royals Are Named for Kings? That's a Bunch of Bull*, WALL ST. J., https://www.wsj.com/articles/did-you-know-the-kansas-city-royals-were-named-after-cows-not-kings-1413426602 (Oct. 16, 2014).

[20] *See generally About the Corridor*, KAN. CITY ANIMAL HEALTH CORRIDOR, https://kcanimalhealth.thinkkc.com/about (last visited Mar. 10, 2022); *see also* Gallagher *Kansas Citys Agriculture Roots Run Deep – Cowtown Turned Animal Health and Technology Center*, *supra* note 5.

[21] *See generally Story*, *supra* note 4.

consolidation creates food security and food safety issues, as highlighted by the recent events of 2020-2021 surrounding the COVID-19 pandemic.

To address this looming problem, this paper will highlight three things:

> Part I will show that like the monopoly created by the Big Five in the early 20th Century, the Big Four have again created a beef supply chain monopoly and that the monopoly is again harming beef producers.
>
> Part II will examine the federal legislation known as Mandatory Country of Origin Labeling (MCOOL), which until 2015 was one of the tools that independent beef producers used to overcome the monopolistic practices of the Big Four. While MCOOL was repealed some seven years ago, there are still efforts to revive it, and it could still be resurrected as part of a multi-pronged approach to fixing the broken beef industry.
>
> Part III will examine several other options for alleviating the burden beef producers currently face in the market and suggest several solutions to the consolidation problem aside from simply restoring MCOOL.

Perhaps by looking to the options presented in this paper, there is still a fighting chance that the independent American rancher and cattleman will not go by the wayside or become echoes of the past like the Kansas City Stockyards and the Cowtowns of yesteryear.

II. THE MONOPOLY

"The seasons still turn and the prairies still yearn
For those who were here long ago.
The Sioux have all gone and the bison moved on
And soon I will follow them home." [22]

A. CORPORATE CONTROL BY THE BIG FOUR AND COVID-19

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[22] CHRIS LEDOUX, *The Buffalo Grass*, on HORSEPOWER (Cap. Recs. Nashville 2003).

Hoxie, Kansas – 2022. On the high plains of Western Kansas, the sun peaks over the eastern horizon and sends a soft glow across the prairie. A weathered feedlot hand fires up the feed wagon and the diesel engine reluctantly comes to life in the cold air and chugs along. The steers out in the vast pens start to beller just a little as they anticipate breakfast. This particular feedlot is the Hoxie Feedyard, located just west of Hoxie, Kansas and has roughly 50,000 steers on feed at any given time. Scott Foote, the owner/manager has several yards of approximately the same size scattered across Western Kansas and Nebraska,[23] making Foote Livestock the 6th largest feedlot company in America.[24]

What makes this feedlot so unique is not the fact that Foote Livestock has close to a quarter million steers on feed at any given time between its several yards. No, what makes this particular feedlot company unique, is that it is owned by a private, small-town company. Unlike so many other major feedlots, it is not owned by one of the four multi-national companies known in the industry as "the Big Four" – Cargill, Tyson, JBS and National Beef/Marfrig. The Big Four control roughly 85% of the meat packing market, and that market share is growing at a surprisingly rapid rate.[25] What is particularly worrisome about that figure, is that in 1977 only 25% of the industry was concentrated in these conglomerates, and that number has risen to 85% in the 43 years since then.[26]

It may be beneficial before diving into a further analysis of the Big Four and the beef industry to gain a clear picture of the difference between a monopsony and a monopoly. In short, "a monopsony is a market condition in which there is only one buyer, the monopsonist…The difference between a monopoly and monopsony is primarily in the difference between the controlling entities. A single buyer dominates a monopsonized market while an

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[23] *See Our Story*, FOOTE CATTLE CO., https://footecattle.com/our-story/ (last visited Mar. 10, 2022).

[24] *Top 30 Cattle Feeders 2015*, R-CALF USA, https://r-calfusa.com/wp-content/uploads/2013/04/160125-Top-30-Cattle-Feeders.pdf (last visited Mar. 11, 2022).

[25] Brian Deese et al., *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, WHITE HOUSE BLOG (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/.

[26] *See* Telephone Interview by Mackenzie Johnston with Sheila Ellis, Rancher (Aug. 10, 2020), https://fair-cattle-markets.com/interviews/audio-sheila-ellis-discusses-why-labeling-us-beef-is-vital-for-consumers-producers/?fbclid=IwAR2-GGkDa2jo4hWzeo7mA6MogV8eLw8UxWc3oSOmCAYVYqr372fzST1108w.

individual seller controls a monopolized market."[27] Here, if the Big Four control 85% of the packing market, in truth they are a monopsony where they effectively serve as the only buyers for cattle ranchers and can effectively set the price for what ranchers are paid for their product. However, because the Big Four also serve as the sellers of processed beef to the retail markets, again controlling 85% of the sector, they are also a monopoly in their relationship with consumers. So, oddly enough, the Big Four are both a monopsony and a monopoly – a bottleneck of sorts for the entire beef industry. Because more people are likely familiar with the term "monopoly" as compared to the term "monopsony" the remainder of this paper will use the term monopoly when discussing the consolidation, however, be advised that in truth the Big Four are both a monopoly and a monopsony.

In addition to controlling the lion's share of the packing industry, through subsidiaries, the Big Four also control a large percentage of the biggest feedlots in America. For example, while Foote Livestock is the 6th largest feedlot company in America, the award for largest in America goes to Five Rivers Cattle Feeding, based in Greeley, Colorado, and owned by none other than JBS.[28] Five Rivers has a combined 11 feedlots with a capacity of close to a million head.[29] As another example, the third largest feedlot company is Cargill Cattle Feeders, LLC, a subsidiary of Cargill, Inc. based in Wichita, Kansas.[30] It appears the Big Four are not content with controlling the packing industry, but also seek to (and do) control a large swath of the cattle feeding sector as well.

The current problem in the beef cattle industry, specifically the multi-national corporate control of the industry, is best explained through a somewhat personal look at the industry through the eyes of someone in the beef cattle industry. This problem was recently explained by cattle rancher and R-CALF Board Member, Shad Sullivan in an interview with entrepreneur Patrick Bet-David on his network Valuetainment. Shad Sullivan was invited onto the show because in early summer of 2020 Mr. Sullivan uploaded an impromptu video on the social media platform YouTube discussing the food security, food safety and other negative impacts of the corporate takeover of the beef industry, all of which had been brought to light by COVID-19. Essentially, because of the consolidation in the beef packing industry, only four companies have

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[27] Julie Young, *Monopsony*, INVESTOPEDIA, https://www.investopedia.com/terms/m/monopsony.asp. (Nov. 21, 2020).
[28] *See Top 30 Cattle Feeders 2015, supra* note 25.
[29] *Id.*
[30] *Id.*

processing plants across the country. In addition to one major plant in Holcomb, Kansas being shut down because of a fire in the fall of 2019[31] because of the COVID-19 outbreak, processing plant "workers are afraid to go to work because of COVID, which has created a bottleneck or backlog of cattle waiting to be slaughtered."[32] But while there is a bottleneck of cattle waiting to be slaughtered, meanwhile, the United States has begun importing beef from countries like Namibia.[33]

Early on the interview, Patrick Bet-David asks, essentially, so as a consumer why do I care. Specifically, he asks:

> "PBD: How does that affect the average person…and how am I impacted by what's going on to you?
>
> SS: Well you're impacted by a supply issue, and a food safety issue. So what has happened down through the years is our federal government has allowed acquisitions and mergers of multi-national corporations to take over our food supply system. So in the beef industry for example, we have four companies that control 85% of the beef cattle supply chain. Ok, so there we are, putting all our eggs in one basket so to speak. So what happened is, the COVID come in, we get these sick people, and because our eggs are in one basket, we have the inability to process those animals to get them to the consumer. So the power that those companies have funnels down to the consumer, you're no longer able to get your product, number one. Number two, the safety, they're importing a lower quality beef into our supply and mixing it into our supply, which is increasing their profits, oppressing our profits, and gouging the consumer. So you don't know exactly what kind of product you're getting. It does come down to a food safety issue and a liberty issue."[34]

The conversation then turned to the Big Four specifically, and after establishing why the consumer should care about the

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[31] *See* Steve Kay, *The Smoldering Impact of Tyson's Holcomb Fire*, MEAT + POULTRY (Oct. 14, 2019), https://www.meatpoultry.com/articles/22036-the-smoldering-impact-of-tyson-holcomb-fire.
[32] *See* Valuetainment, *Cattle Rancher Warns About the Meat You're Buying*, YOUTUBE, at 5:05 (May 8, 2020), https://www.youtube.com/watch?v=m8ioFjN7viY.
[33] *Id.* at 4:21.
[34] *Id.* at 6:45.

consolidation in the industry, Patrick then asks exactly how this consolidation is hurting the producer.

> "PBD: How do they [the Big Four] bully you around as the small business owner? Because maybe they can afford to go through 6 months of bad times, where a lot of folks in your world cannot. So what role do they play making it difficult for you?
>
> SS: They have taken away all competition. So with the acquisitions and mergers over the last 25 or 30 years, they have gained more power and control, and that has eliminated the competition. So lets say 30 years ago there would have been 800 processors across the United States able to process and harvest this beef. Where now, there are only four main processors that harvest 85% of that chain. So what they have done is totally eliminated cash competition. What that does, is that has created their power to network down and take control of the industry that way."[35]

Addressing the corporate control and depressed beef prices, compared to other industries, Patrick then asks could you convince new people to come into the beef industry under these circumstances.

> "PBD: So you're standing there…could you easily sell others to consider getting into your industry today?
>
> SS: It's financially impossible. As an individual it's financially impossible…
>
> PBD: Why do you say that?
>
> SS: Because of the overhead, it costs too much to start up. It takes a lot of land, it takes a lot of overhead…The proverbial term in the beef cattle industry is, unless you marry it or inherit it, you aint gonna have it. And that's one of the problems that has taken place as a result of this, it's hard for families. Everybody's dream is to pass the family farm or ranch down, and that's totally impossible now. You can't do it…These young kids, it is impossible to get a start up. You can get some government help as a first time landowner or business owner, but the cost of the

[35] *Id.* at 10:00.

> land…and the cost of the inputs are increasing and gaining, so it's impossible without a lot of equity or cash in the bank to get a start. It's nearly impossible. And therefore across America we have seen thousands of youth not return to the family operation after high school or college.
>
> PBD: Because of this specific reason?
>
> SS: Correct."[36]

Not only are youth not returning to family farms and ranches because of the financial risk and inability to succeed, but addressing the loss of American ranchers, earlier in the interview, Patrick asked how many ranchers we have lost in the last 30 years. We went from roughly 1.2 or 1.3 million operators, to approximately 700,000.

> "PBD: How many of these 700,000 are going to be able to withstand the current challenges they're facing.
>
> SS: That's a good question…We could lose through this COVID situation, we could lose plus 1/3 of those this year.
>
> PBD: You could lose a third! So we could go from 700,000 to 450,000 in the next 6 or 7 months!
>
> SS: It is possible. Maybe more."[37]

This loss of America's ranchers because of the problems induced by the Big Four corporate control of the beef industry, is not a hypothetical issue. It is very real. In fact, during the interview, Shad Sullivan admits that he and his family have had serious conversations about having to sell out or at least sell off land just to get by. Patrick follows up on this part of the conversation by asking:

> "PBD: So you've actually considered that? You've actually had that conversation?
>
> SS: We are having it more and more every day. It's just a tough industry to be in, and if you're not profitable, well, it's not good business. Let's say we're spending $1,200 a head to make $900 a head, that's terrible business. We love the life, we love the

[36] *Id.* at 18:15.
[37] *Id.* at 20:20.

> legacy. But at some point you have to draw the line and say ok, are we going to be business people or are we going to lose everything we've put together over the last 60 years and go from there. I don't know. I think you have to be a business person, you have to be smart, and you have to be real.
>
> PBD: You know, they don't see legacy. They don't see family. They don't see tradition. They don't know the stories you have with your pops and the lessons you're going to hand down to your 4-year-old son. They just see profit margins. That's all they see.
>
> SS: That's right….You know, there are two factions in our industry, there's the independent producer, and then there's the globalists. And those two factions are fighting right now for what's best for our industry."[38]

This long set of quotes from the Shad Sullivan interview are extremely helpful when discussing the problems presented by the Big Four takeover of the beef industry. Instead of simply looking at numbers and figures, the personal insight of a man trying to keep a family operation up and running so he can hand that legacy down to his own children is gut checking. Mr. Sullivan makes some extremely good points, and does point out, there is a fight going on for the future of the beef industry…those who wish to pass on the western legacy and way of life vs. those who simply see profit margins and spreadsheets.

B. The DOJ Investigation And Current Political Efforts

The consolidation issue caught the attention of President Donald Trump in early 2020, and he ordered the Department of Justice (DOJ) to open an investigation into the packing industry. Specifically, the President ordered the DOJ to look into allegations that U.S. meat packers broke antitrust law because the prices paid to farmers and ranchers has declined even as meat prices rose. "I've asked the Justice Department to look into it. ... I've asked them to take a very serious look into it, because it shouldn't be happening that way and we want to protect our farmers," the president said at a White House event attended by Agriculture Secretary Sonny Perdue

[38] *See* Valuetainment, *Cattle Rancher Warns About the Meat You're Buying*, YOUTUBE, at 24:48 (May 8, 2020), https://www.youtube.com/watch?v=m8ioFjN7viY.

and Iowa Governor Kim Reynolds. "Are they dealing with each other? What's going on?" the president asked. [39]

In addition to the DOJ investigation, the U.S. Department of Agriculture also conducted an investigation into not only the Holcomb, KS fire, but also the COVID-19 effects and consolidation effects on the industry. The report, "The Boxed Beef & Fed Cattle Spread Investigation Report" was released on July 22, 2020.[40] Interestingly enough, "one of the earliest conclusions in the paper is this: 'Findings thus far do not preclude the possibility that individual entities or groups of entities violated the Packers and Stockyards Act during the aftermath of the Tyson Holcomb fire and the COVID-19 pandemic. The investigation into potential violations under the Packers and Stockyards Act is continuing.'"[41] In short, while no wrongdoing has been discovered …the investigations are ongoing, and violations have not been ruled out. As of Summer 2021, 27 U.S. Senators have renewed the call for the necessity of a DOJ investigation into the meat packing industry, specifically to examine anticompetitive behavior among meatpackers.[42]

The concern of anticompetitive behavior in the packing industry shared by these 27 Senators and former President Trump, is backed up by data. For example, as written by Professor Roger A. McEowen, Kansas Farm Bureau Professor of Agricultural Law & Tax, "according to USDA data, boxed beef prices have recently more than doubled while live cattle prices dropped approximately 20 percent over the same timeframe. The concern is that the meatpackers are engaged in price manipulation and other practices deemed unfair under federal law."[43] The concern is further shared by the Attorneys General of 16 different states, who in December 2021 addressed a letter to the new Secretary of Agriculture, Tom Vilsack,

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[39] Greg Henderson, *Trump Asks DOJ to Investigate Meat Packers*, AGWEB, (May 6, 2020), https://www.agweb.com/article/trump-asks-doj-investigate-meat-packers.

[40] AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., BOXED BEEF & FED CATTLE PRICE SPREAD INVESTIGATION REPORT (2022).

[41] *See* Alan Newport, *USDA Disasters Investigation Suggests Changes*, FARM PROGRESS: BEEF PRODUCER (July 24, 2020), https://www.farmprogress.com/regulatory/usda-disasters-investigation-suggests-changes?NL=FP-002&Issue=FP-002_20200806_FP-002_743&sfvc4enews=42&cl=article_1_b&utm_rid=CPG02000003370832&utm_campaign=51768&utm_medium=email&elq2=87ec91f6f79741fc92833667f1555f79.

[42] Letter from Michael Rounds et al., U.S. Senator, to Merrick Garland, Att'y Gen., U.S. Dep't of Just. (June 1, 2021), https://www.rounds.senate.gov/imo/media/doc/060121%20June%201%202021%20Rounds-Smith%20et%20al.%20to%20Attorney%20General%20Garland.pdf.

[43] McEowen, *supra* note 12.

urging the USDA to take action strengthening the PSA.[44] The letter states, in part, "the Packers and Stockyard Act originated in 1921 due to concerns about the concentration in meat processing markets and the effect this concentration had on producers…At that time, however, the five largest processors only controlled 70% of the market, indicating the concentration problems of today are worse than they were at the time of the passing of the PSA."[45]

President Joe Biden has taken efforts similar to his presidential predecessor, issuing Executive Order 14036, "Promoting Competition in the American Economy"[46] in July 2021. Among other things, the Executive Order directs the USDA to reexamine the Packers & Stockyards Act and issue new rulemaking addressing several key points in the statutory and regulatory law thereunder. These changes are examined throughout the remainder of this article, but suffice it to say, that the anti-trust focus of the USDA under the Biden Administration will have sweeping effects in the beef industry.

C. A Comparison To The Hog Industry

With this solid background in mind, to completely understand how the consolidation in the beef industry is harming the individual/independent cattle producer, it may be helpful to examine the beef industry's sister industry – the hog industry. Like the beef industry, the hog industry is becoming increasingly consolidated, and as recent events in 2020-2021 have shown, that consolidation is a recipe for disaster.

By way of introduction to this sub-analysis of the hog industry, in the iconic Western television miniseries "*Lonesome Dove*" there is a well-known line, still quoted to this day – "We Don't Rent Pigs!"[47] In light of current food safety events revolving around COVID-19 and packing house closures around the country, that classic line is quickly taking on new meaning in 2022.

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[44] *See* Keith Ellison et al., *Letter to USDA Secretary Vilsack and Senior Advisor Green* (Dec. 21, 2021). In addition to Attorney General Ellison, the letter was signed by the Attorneys General of the States of Wyoming, Iowa, California, Delaware, Hawaii, Idaho, Illinois, Maryland, Nevada, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota and Utah. Of note is that these states represent a diverse political spectrum with both "red" and "blue" states represented, indicating that the meat consolidation issue transcends traditional party lines.

[45] *Id.* at 2.

[46] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

[47] Hayden L. Ballard, '*We Don't Rent Pigs,'* FOOD SAFETY NEWS (May 14, 2020), https://www.foodsafetynews.com/2020/05/we-dont-rent-pigs/.

For anyone who hasn't seen it, in *Lonesome Dove* the two main characters (Gus McCrae and Captain Woodrow Call) are a couple of old, washed-up, Texas Rangers-turned-cattlemen, who start a cattle company and plan to trail a couple thousand head of cattle from Texas to the Montana Territory. Gus, the more eccentric of the two, makes a sign for their new cattle company, and to the sign adds the line "We Don't Rent Pigs!"[48] Captain Call, the more level-headed and serious one, is obviously not impressed by the sign and asks Gus why he had to put that stupid line on there. Gus responds:

> "Well, we don't rent pigs and I figure it's better to say it up front 'cause a man that does like to rent pigs is… he's hard to stop."[49]

While Gus never explains exactly what he meant by the second half of that statement, it doesn't take much imagination to envision why someone would want to rent a pig…to eat it. If you do rent a pig to a man who wants to eat it, you're getting the "short end of the stick" because you're probably not ever getting that pig back, "'cause a man who does like to rent pigs is…, well, hard to stop."[50] Essentially, this tongue-in-cheek line can be interpreted as saying we don't tolerate dishonest people who want to "rent" pigs.

As this is an article about consolidation in the beef cattle industry, at this point, the reader may very well be thinking "well that's a wonderful story about two fictional cowboys from a by-gone era, but what in the world does that have to do with current food safety issues?" To answer that question, again fast forward to current events. The Coronavirus (COVID-19) has swept the world, the booming economy of the United States has ground to a halt, various state and federal officials have issued controversial stay-at-home orders, mask and vaccine mandates, and across the country businesses have closed their doors. Meanwhile, America's meat producers (particularly it's cattle, hog and poultry farmers/ranchers) haven't stopped working, and production continues (because you can't exactly tell a steer or a hog to stop growing just because the world is under quarantine).

Unfortunately, many of the meat processing plants across the country closed, or closed temporarily, due to health concerns related to COVID-19. For example, over twenty meat processing plants across the country shut down over the span of two months during the spring of 2020 as thousands of packing house workers tested positive

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[48] *Id.*
[49] *Id.*
[50] *Id.*

for the virus.[51] These closures and reduction in workforce resulted in an overall reduction in production capacity of 30% - 40% at that time.[52]

This reduction in processing capacity is problematic for all meat producers, but particularly troublesome for pork producers. Because the pork processing industry has become so centralized in a handful of companies, those companies have standardized their processes and require a certain weight of hog for the machinery to operate efficiently. This creates a bottleneck of sorts, because pork producers can't simply wait for the COVID-19 epidemic to blow over and wait for the packing houses to come back online, because by then, the hogs they are currently raising will be too big and the packing house won't take them.[53] While small, local butcher shops could alleviate some of this bottleneck, because of the consolidation in the industry, small butcher shops are far and few between, and with plant closures, most small butchers are already booked 3 months out or more.[54] Producers could also sell directly to consumers, but few consumers know how to butcher their own pig, and as stated, small butchers are already booked, so that rules out the option of consumers purchasing direct from farmers and taking it to get slaughtered themselves.

What all this means for meat producers is that due to the COVID-19 virus, they simply have nowhere to go with their livestock. According to John Tyson, the Chairman of the Board of Tyson Foods, what this means is:

> "In addition to meat shortages, this is a serious food waste issue…Farmers across the nation simply will not have anywhere to sell their livestock to be

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[51] *Id.* (citing *Agriculture Sec. Perdue on Meat Workers Health Concern Amid Coronavirus Pandemic*, FOX NEWS (Apr. 30, 2020), https://video.foxnews.com/v/6153248260001?fbclid=IwAR0iu6gxCpAiQZx1HcQjhKFsUe-l0nj04dJu91p6eA6wurQHgrXiaY0FPYE#sp=show-clips.

[52] *Id.* (citing *Could Food Plant Closures Disrupt Food Supply Chains?*, FOX NEWS (Apr. 28, 2020), https://video.foxnews.com/v/6152541987001#sp=show-clips).

[53] Hayden L. Ballard, '*We Don't Rent Pigs,'* FOOD SAFETY NEWS (May 14, 2020), https://www.foodsafetynews.com/2020/05/we-dont-rent-pigs/ (citing Jenny Splitter, *Farmers Face Their Worst-Case Scenario: 'Depopulating' Chickens Euthanizing Pigs and Dumping Milk*, FORBES (Apr. 8, 2020), https://www.forbes.com/sites/jennysplitter/2020/04/28/farmers-face-their-worst-case-scenarios-depopulating-chickens-euthanizing-pigs-and-dumping-milk/?sh=32b158403003).

[54] *Id.*

> processed, when they could have fed the nation…the food supply chain is breaking."[55]

The situation got so bad in 2020 that it is estimated that around 160,000 hogs would be euthanized DAILY in the United States.[56] With these kinds of numbers of hogs being killed every day, but not being put into the food supply chain, it doesn't take much of an imagination to realize that very soon there won't be any ham, bacon or sausage in the supermarket.

The situation is just as bad for dairy farmers and poultry farmers, as producers have begun euthanizing millions of chickens[57] and dumping milk for the same reasons.[58] Cattle producers and feedlot owners have not been forced to begin euthanizing cattle…yet. However, as shown by one stocker operator in North Texas, Shad Sullivan, the beef cattle industry is not far behind. In April 2020, he received an official email from the United States Department of Agriculture and Animal and Plant Health Inspection Service, stating as follows:

> "State officials will be assisting to help identify potential alternative markets if a producer is unable to move animals and if necessary, advise and assist on **depopulation and disposal methods**" (emphasis added).[59]

Clearly the COVID-19 induced bottleneck in meat processing has put a huge strain on cattle producers, but has now created a food security issue for the nation. The control of the packing industry by the Big Four has simply exacerbated the problem, and COVID-19 has revealed the problem. As Shad Sullivan put it, "We are importing beef and we are destroying our harvests in

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[55] *Id.* (citing *Could Food Plant Closures Disrupt Food Supply Chains?*, FOX NEWS (Apr. 28, 2020), https://video.foxnews.com/v/6152541987001#sp=show-clips).
[56] *Id.* (citing Mike Dorning & Michael Hirtzer, *America's Mass Hog Cull Begins with Meat to Rot in Landfills*, BLOOMBERG (Apr. 28, 2020), https://www.bloomberg.com/news/articles/2020-04-28/closed-jbs-plant-will-be-used-to-euthanize-hogs-peterson-says).
[57] Shad Sullivan, *Starvation is Coming – Rancher Explains*, YOUTUBE (Apr. 28, 2020), https://www.youtube.com/watch?v=i9pCEnEqaz8.
[58] *See generally* Jenny Splitter, *Farmers Face Their Worst-Case Scenario: 'Depopulating' Chickens, Euthanizing Pigs And Dumping Milk*, FORBES (Apr. 28, 2020), https://www.forbes.com/sites/jennysplitter/2020/04/28/farmers-face-their-worst-case-scenarios-depopulating-chickens-euthanizing-pigs-and-dumping-milk/?fbclid=IwAR0ILYXF93yb5CvEqym9gv97QQv2dYOjsX10huChipmHgoWw_onS4I1EBt0#2dc39aa93003.
[59] Sullivan, *supra* note 58.

a time when people don't have jobs, and that's not the American way."[60]

In an effort to curb this problem, in 2020 President Trump invoked the 1950 Defense Production Act to order meat processing plants to stay open during this pandemic.[61] While some have criticized the move as endangering lives and creating other food safety issues, the move was much needed. Ultimately, while some criticized the President's actions as creating food safety issues (letting meat plants and meat workers be exposed to COVID-19) one must ask themselves, at what point does the risk of food safety outweigh the actual availability of food at all? At this point, the repercussions of all plants shutting down in this country would push recovery from months to years. This move by President Trump may be a band-aid that "stopped the bleeding," but it hasn't cured the underlying problem.

While the Coronavirus was clearly the identifiable catalyst to this pending meat shortage, the virus simply exacerbated an underlying condition that has been festering in this country for the past few decades – consolidation. In the United States, roughly ¾ of all pork is processed by four companies, JBS, Cargill, Tyson and Smithfield,[62] commonly known as "The Big Four" in the pork industry. Further, "there are more than 60,000 pork producers in the U.S., but roughly 60% of all hogs are processed in just 15 large pork-packing plants. These packing plants are designed to efficiently and affordably process animals for food consumption, and each one has a large workforce."[63] While today the Big Four of the pork industry have vertically integrated the process from piglet to slaughter, as noted in the Introduction herein, the pork industry used to be dominated by the cash market, as shown by the fact that over 2 million hogs used to be sold through the Kansas City Stockyards alone in the 1920's.

Not only does this level of market share make what's left of the hog cash market susceptible to undue influence, but as seen, this

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[60] *Id.* at 5:45.
[61] *Ballard, supra* note 48 (citing *Coronavirus: Trump Orders Meatpacking Plants to Stay Open*, BBC NEWS (Apr. 29, 2020), https://www.bbc.com/news/world-us-canada-52466502.)
[62] *Id. (*citing FOOD & WATER ET AL., THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED JBS-CARGILL PORK PACKING ACQUISITION 4 (2015).
[63] *Id.* (citing Jayson Lusk & Candace Croney, *The Road from Farm to Table*, PURDUE UNIV. COLL. OF AGRIC. (Apr. 28, 2020), https://ag.purdue.edu/stories/the-road-from-farm-to-table/?fbclid=IwAR0lORw686qjABwa2_dDM_O52QDkP6Okot3zZ8ILZYmU4bLMLO1_jzmrbGc).

consolidation has now contributed to a possible nationwide food shortage and food safety crisis. All it takes is for one of these companies to shutter its plants, and as seen by the nationwide euthanization of hogs, and other meat animals, instantly the farmers feel the devastating effects. Additionally, with the packing industry so consolidated, it has pushed small, local butchers out of business, and only a handful remain – further adding fuel to the fire.

So, if major consolidation and monopolization of the hog industry has contributed to a nationwide food shortage/safety crisis, then what can be done to help fix this problem immediately? While Part III of this paper will analyze some potential solutions in depth, there are several things that can be done at the federal level now to assist in rectifying the current hog situation.

(1) The Biden Administration could use the authority granted by the Packers & Stockyards Act and enforce its provisions as to break up the meat packing monopolies, just like was done when the act was first passed roughly 100 years ago. Doing so would make it easier for hog livestock auctions to be reopened and create a cash market for hogs again. This would reduce the complete reliance on the integrator contracts the Big Four currently utilize, and which have aided in the standardization of hog slaughter which has led to the current bottleneck in processing. These integrator contracts essentially make the pork farmers renters of the very pigs they raise, because oftentimes the company (one of The Big Four) retains ownership of the pig for its entire life, and the farmer simply cares for it. Essentially, the farmers "rent" the pigs.[64]

(2) Congress could create small-business exceptions to the myriad of rules and regulations imposed on large packers, and extend them to small local butchers, to make it easier for them to stay in business, and for more processors to enter the market.

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[64] *See* CHRISTOPHER LEONARD, THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA'S FOOD BUSINESS 84 (2014).

(3) Congress could loosen food safety regulations and make it easier for hog producers to sell directly to consumers.

While these changes will not alleviate the total problem here-and-now in 2020 (the damage has already been done to the hog supply chain), by implementing these changes, perhaps we could avoid a similar problem in the future with the cattle industry. Perhaps for that reason, the Coronavirus was a blessing in disguise as it revealed a major vulnerability in the nation's meat supply chain – namely consolidation in the meat processing market has created bottlenecks which as seen in 2020 – 2021 can lead to food shortages, euthanization of productive farm animals, and ultimately food insecurity. This attitude of "We Don't Rent Pigs" translates directly to the beef cattle industry. This is because, as the sister industry of the beef cattle industry, the hog and pork industry is a type, or shadow, or what is to come if the Big Four are able to completely consolidate and integrate the cattle industry, the same as was done with hogs.

In the coming days and months consumers may very well start turning to their local farmers hoping to buy meat. However, unless action is taken at the federal level as outlined above and in Part III of this paper, to ensure that the meat supply chain is de-centralized and more local processing encouraged, it may be difficult for every consumer to get enough meat to eat. BUT, if these changes are put in place, perhaps hog farmers can stop "renting" the pigs from The Big Four. Like was said at the beginning, the tongue-in-cheek line from Gus McCrae saying "We Don't Rent Pigs" can be interpreted as saying we don't tolerate dishonest people who want to "rent" pigs. Today, the Big Four literally rent pigs to the farmers who are beholden to the companies will, and while the farmer may not trust the system, there isn't much that can be done by the individual farmer. However, as said, if these problems are rectified, then the independent farmers and ranchers can again hold their heads high, and may have to start hanging a new sign out front – "We Don't Rent Pigs!...But We Do Sell 'Em."[65]

With this foundation established showing the increasing monopolization of the meat packing industry and the ways in which COVID-19 brought this issue to light, Part II will now examine one of the tools previously available to both pork and beef producers in their efforts to parry packer influence – country of origin labeling.

[65] Ballard, supra note 48.

III. MCOOL

"My old man's that old man,
Spent his life livin' off the land,
Dirty hands and a clean soul.
It breaks his heart, seein' foreign cars
Filled with fuel that isn't ours
And wearin' cotton we didn't grow."[66]

Mandatory Country-of-Origin Labeling (MCOOL) for beef is not a new issue in the United States. It has been a hotly contested policy for years and the American cattle industry remains sharply divided on the issue. On one side, the supporters of MCOOL include many independent cow-calf producers and organizations such as the Kansas Cattlemen's Association (KCA), and the Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (RCALF-USA). Supporters argue that U.S. consumers have a right to know where their beef comes from and that given a choice, they would purchase the domestic version. Particularly the cow-calf segment of the beef industry supports MCOOL by and large, since this would strengthen demand and prices for U.S. ranchers and producers. They also argue that it is unfair to exempt beef from the labeling requirements that U.S. importers of almost all other products already must meet, and additionally that major U.S. trading partners impose their own COOL requirements for imported meats.

On the other side, the opponents of MCOOL include the meat packing companies and organizations like the National Cattlemen's Beef Association (NCBA), the Kansas Livestock Association (KLA) and the American Meat Institute (AMI), as well as the governments of Canada and Mexico (as highlighted by World Trade Organization arbitration proceedings discussed more fully below). The opponents of MCOOL contend that there is little or no real evidence that consumers want such information and that industry compliance costs far outweigh any potential benefits to producers or consumers. They further argue that mandatory COOL for agricultural commodities is a form of protectionism that undermines U.S. efforts to reduce foreign barriers to trade in the global economy.

As extensive litigation and arbitration spanning the past two decades has shown, the two positions seem to be irreconcilable. This policy analysis suggests that as unlikely as it may seem, there is a

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[66] TOBY KEITH, *Made in America*, *on* CLANCY'S TAVERN, at 0:17–0:38 (Universal Music 2011).

path to a policy-based compromise, and that path runs through Kansas.

A. Mandatory Country-of-Origin Labeling in the United States

Since the 1930's, U.S. tariff law has required almost all imports to carry labels so that the "ultimate purchaser," usually the retail consumer, can determine their country of origin. However, many products, including many agricultural commodities, have long been excluded from the country of origin labeling requirement.[67] Supporters of MCOOL in the beef industry have long argued that it was unfair to exempt beef from the labeling requirements that U.S. importers of almost all other products already must meet, and additionally that U.S. consumers have a right to know where their beef comes from and that given a choice they would purchase the domestic version.[68] Congress first implemented MCOOL for beef in 2002, including it as a covered commodity in the 2002 farm bill.[69] The Act required retailers of a "covered commodity" to "inform consumers" as to the commodity's country of origin at the "final point of sale."[70] Implementation of the legislation was delayed, and then modified in the 2008 Farm Bill to ease some of the concerns raised with the original 2002 law.[71] The final rule to implement the COOL requirements for beef and all other commodities was issued by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) in early 2009.[72]

In 2009, Canada and Mexico challenged MCOOL before the World Trade Organization (WTO) dispute settlement panel, as unfairly discriminatory against Canadian and Mexican beef, and ultimately won in 2012.[73] To comply with the WTO Appellate Body's holding, the USDA promulgated a new MCOOL rule in May

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[67] *See* JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2 (2015).
[68] *Id.*
[69] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified 7 U.S.C.A. § 1638).
[70] *See* Cassidy L. Woodard, *From Cattle Drives to Labeling Legislation: The Implications of Mandatory Country of Origin Labeling on the Beef Industry*, 47 TEX. TECH L. REV. 399, 402 (2015).
[71] *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (codified 7 U.S.C.A. § 8701); JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2 (2015).
[72] JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2-3 (2015).
[73] Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R (June 29, 2012).

2013, which required more precise information - revealing the location of each production step.[74] The 2013 rule established the "Born, Raised, and Slaughtered" regime, by requiring the label on beef to "specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin destination."[75] Thus, for beef to be labeled a Product of the U.S.A., the animal would have to be born, raised, and slaughtered in the United States. Almost immediately opponents of MCOOL, led by the American Meat Institute (AMI), filed suit, claiming that the new rule requiring country of origin disclosures was a violation of the Constitution and their First Amendment rights, that it exceeded the scope of the initial 2008 Farm Bill, and was in violation of the Administrative Procedure Act.[76] Ultimately, the case was heard by the D.C. Court of Appeals who held in favor of MCOOL. The Appellate court found that the "Government's interests in making country-of-origin information available to consumers, including history of country-of-origin disclosures to enable consumers to choose American-made products, demonstrated consumer interest in extending country-of-origin labeling to food products, and individual health concerns and market impacts that could arise in event of food-borne illness outbreak, were sufficient to sustain United States Department of Agriculture (USDA) regulations mandating disclosure of country of origin information about meat products, despite meat industry trade association's contention that mandate violated its First Amendment right to freedom of speech."[77]

Although MCOOL was upheld by the U.S. judicial system, in 2015, Canada and Mexico again challenged the amended MCOOL rule, and again the WTO found in their favor, this time authorizing the two countries to respond with retaliatory tariffs against the United States.[78] Fearing retaliation, and without waiting for final WTO action, Congress repealed MCOOL in June 2015 with the passage of the *Country of Origin Labeling Amendments Act of 2015*.[79] Soon after, U.S. cattle prices began falling, causing U.S. ranchers to lose

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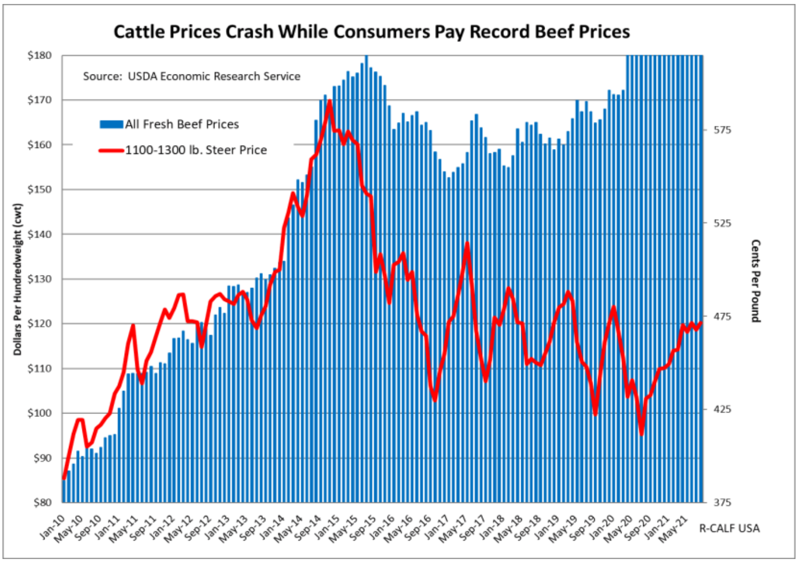
[74] Mandatory Country of Origin Labeling, 78 Fed. Reg. 31,367 (May 24, 2013) (codified at 7 C.F.R. pt. 60, 65).
[75] *Id.*
[76] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 968 F. Supp. 2d 38, 42-43 (D.D.C. 2013).
[77] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23–27 (D.C. Cir. 2014).
[78] JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2, 5 (2015).
[79] *Id.* at 49.

upwards of $500 for each animal sold.[80] Despite the rapid fall of cattle prices paid for Fed Cattle[81] following MCOOL's repeal, the price for beef paid by consumers continued to climb to record highs. Below is a graph produced by R-CALF USA, depicting this phenomenon.[82]

Figure 1.[83]



As can be seen in the chart above, fed "cattle prices (red line) historically followed consumer beef prices (blue columns) up and

[80]Letter from Bill Bullard, CEO, R-CALF United Stockgrowers of Am., to Donald Trump (Dec. 11, 2015), BILL BULLARD, LETTER TO DONALD TRUMP 1 (R-CALF, 2015), https://r-calfusa.com/wp-content/uploads/2013/05/151211-Letter-to-Donald-Trump.pdf.

[81] ANDREW P. GRIFFITH, UNIV. OF TENN. EXTENSION, CATTLE AND BEEF MARKET DEFINITIONS 4 (2019), https://extension.tennessee.edu/publications/Documents/W801.pdf Fed Cattle, sometimes referred to fat cattle or live cattle, are "steers and heifers that have been fed a nutrient-dense ration for the purpose of growing the animals, usually for 90-180 days in a feedlot or until they reach a desired slaughter weight and are ready for slaughter" typically between 1,100 and 1,300 pounds. *Id.*

[82] *Chart Shows Cattle Prices (Red Line) Historically Followed Consumer Beef Prices (Blue Columns) Up and Down Very Closely*, R-CALF UNITED STOCKGROWERS OF AM., https://www.r-calfusa.com/label-our-beef/chart-shows-cattle-prices-red-line-historically-followed-consumer-beef-prices-blue-columns-up-and-down-very-closely/https://www.r-calfusa.com/label-our-beef/chart-shows-cattle-prices-red-line-historically-followed-consumer-beef-prices-blue-columns-up-and-down-very-closely/ (last visited Mar. 11, 2022).

[83] *Id.*

down very closely."[84] However, note that the lines diverge sharply in mid-2015, which coincides with the repeal of MCOOL. According to the graph, ranchers are receiving the same prices for their cattle that they were receiving roughly 10 years ago back in 2011 and 2012 (although given the impacts of inflation and higher costs of inputs,[85] that same dollar-for-dollar value is arguably even less than it was 10 years ago). Meanwhile, according to the graph, as of 2021 packers are receiving record setting highs for the retail value of beef. In short, the difference between the blue line and the red line shows the profit margin going to the packers. While the rancher struggles to make a living, the packers are, quite literally, "making a killing."

Currently, while MCOOL is not in place for beef, various other agriculture products are still required to disclose their country of origin.[86] With MCOOL at the national level repealed, groups like R-CALF USA continue to fight to see it reinstated in one form or another[87] with varying levels of success. For example, in September 2021, "Senator John Thune (R-S.D.), for himself and for Senators Jon Tester (D-Mont.), Mike Rounds, (R-S.D.), and Cory Booker (D-N.J.) introduced the '*American Beef Labeling Act of 2021*,'"[88] Senate Bill 2716. The bill, if passed, "reinstates beef as among the numerous food commodities currently subject to the United States mandatory country-of-origin labeling (M-COOL) law that was originally passed by Congress in the 2002 Farm Bill."[89] The bill also directs the Office of the U.S. Trade Representative (USTR) and Department of Agriculture (UDA) to "develop a means of reinstating the requirements that complies with the rules of the World Trade Organization"[90] thus avoiding the pitfalls of the previous MCOOL law. In short, "Senate Bill 2716 undoes the repeal that Congress did in the Consolidated Appropriations Act of 2016 by simply reinserting the terms "beef" and "ground beef" back into the existing M-COOL

[84] *Id.*
[85] *Reduce Farm Input Costs: Farm Financing Options,* AG AM. LENDING (Dec. 2, 2021), https://agamerica.com/blog/reducing-farm-input-costs/.
[86] 7 U.S.C.A. § 1638(1)(A) (Westlaw through P.L. 117-80).
[87] *See* Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. Perdue, 718 Fed. Appx. 541, 542 (9th Cir. 2018) (arguing that a Federal Meat Inspection Act regulation cannot exempt imported beef and pork from complying with the statute's demand that meat be labeled with its country of origin through retail).
[88] *Country of Origin Labeling: MCOOL Bill Officially Introduced,* TRI-STATE LIVESTOCK NEWS (Sept. 24, 2021), https://www.tsln.com/news/country-of-origin-labeling-mcool-bill-officially-introduced.
[89] *Id.*
[90] American Beef Labeling Act, S. 2716, 117th Cong. § 2(c)(1) (2021).

law, and it requires M-COOL to be implemented no later than 1-year after the bill's enactment."[91]

In addition to seeking MCOOL reinstated at the federal level, some states have sought to implement state level COOL. For example, in 2019 Montana proposed a state level COOL system in response to testimony delivered in 2016 to the Montana House Ag Committee showing that under current federal laws, the "USDA allowed a loophole for beef and pork to be labeled 'Product of USA,' even if it is only processed or packaged here."[92] According to the testimony, a state level COOL was needed because "oftentimes, USA beef is mixed in with cheaper imported beef, misleading our consumers and defrauding our ranchers."[93] In recent years, Wyoming and South Dakota have also ran similar bills.[94]

B. Voluntary Country-of-Origin Labeling in the United States

Most recently, Voluntary Country of Origin Labeling (VCOOL) was first used when MCOOL was included the 2002 Farm Bill. The bill stated that the MCOOL labeling requirements would not become mandatory until 2004, and until then, labeling would be voluntary under the USDA guidelines promulgated for that purpose.[95]

While VCOOL was used only in the interim between the passage of MCOOL and its implementation, it was again proposed when Congress ultimately repealed MCOOL in June 2015. At the time of repeal, there was a compromise bill ran at roughly the same time entitled the *Voluntary Country of Origin Labeling (COOL) and Trade Enhancement Act of 2015* (S. 1844).[96] While the VCOOL bill

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[91] *Fact Sheet: Senate Bill 2716 (S.2716)*, R-CALF USA, 1 (2021), https://www.r-calfusa.com/wp-content/uploads/2021/09/210923-Fact-Sheet-S2716-final.pdf (last visited Mar. 11, 2022).

[92] Associated Press, *Montana Country-of-Origin Labeling Bills Stuck in Committees*, FARM J. PORK (Mar. 1, 2019), https://www.porkbusiness.com/news/ag-policy/montana-country-origin-labeling-bills-stuck-committees.

[93] *Id.*

[94] Dan Flynn, *Ranchers Look for Some Traction on Country-of-Origin Labeling*, FOOD SAFETY NEWS (Feb. 3, 2017), https://www.foodsafetynews.com/2017/02/ranchers-look-for-some-traction-on-country-of-origin-labeling/.

[95] J. VanSickle et al., Int'l Agric. Trade & Pol'y Ctr., *Country of Origin Labeling: A Legal and Economic Analysis*, PBTC 03-5 (May 2003). *See also* Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling, 67 Fed. Reg. 63,367, 63,368 (Oct. 11, 2002).

[96] Voluntary Country of Origin Labeling (COOL) and Trade Enhancement Act of 2015, S. 1844, 114th Cong.

also repealed MCOOL for beef, it simultaneously sought to amend the Agricultural Marketing Act,[97] requiring USDA to establish a label designation that enables meat processors to voluntarily use a U.S. label for beef that is exclusively born, raised, and slaughtered in the United States.[98] At the time, the National Farmers Union (NFU) called the compromise bill "the only real solution for food labeling," since the repeal of MCOOL would put to rest the complaint by Mexico and Canada, and yet put in its place a voluntary labeling system that could allow consumers to know the origin of their food.[99]

The NFU lauded VCOOL as a "win-win" for all the parties involved, including Mexico and Canada. In fact, during the 2012 WTO Appellate Body Report, Canada and Mexico both suggested voluntary labeling as a way to resolve the issue.[100] Canadian Minister of Agriculture Gerry Ritz stated in August 2014 that "when it's mandatory it creates that segregation and discriminatory price system…if you do a voluntary label, which we do in Canada under product of Canada, you don't have that trade sanctioned problem."[101]

The VCOOL system proposed would have been similar to other labeling programs overseen by the USDA. For example, the voluntary Certified Organic label program overseen by the Agricultural Marketing Service, allows for certain food products to carry the "USDA Organic" label if the production of that food followed certain steps as put forth by the USDA.[102] Thus, if a consumer wants to buy organic food, they can be assured that if the food carries the USDA Organic label, that it was produced following all the USDA Organic regulations.[103] The consumer can trust that the label represents a certain process that was followed to get that food to them, and be assured it's truly "organic." Although it is completely voluntary, the organic labeling program provides a system, where if consumers demand organic products, then producers can have a level playing field that allows them to put a premium on their products as the free-market dictates. Without the integrity the label provides,

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97 *Id.*

98 JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 25-26 (2015).

99 *Fact Sheet: Bipartisan Senate COOL Compromise: The Only Real Solution for Food Labeling,* NAT'L FARMERS UNION (July 27, 2015), ht-tps://1yd7z7koz052nb8r33cfxyw5-wpengine.netdna-ssl.com/wpcontent/uploads/2015/07/Senate-COOL-Compromise-Final.pdf.

100 *Id.*

101 *Id.*

102 *About Organic Labeling,* AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., https://www.ams.usda.gov/rules-regulations/organic/labeling (last visited Mar. 11, 2022).

103 *Id.*

anyone could simply state their product was "organic" and undercut the producers who followed the labeling regulations.

Because the 2015 VCOOL bill failed, there is currently no structure in place, like the organic labeling system, that would allow consumers to use the free market to demand beef produced in the USA.[104] Had the 2015 VCOOL bill passed, it would have done much to appease those worried about renewed sanctions from Canada and Mexico, while maintaining the integrity of the "Made in the USA" brand and providing a framework for producers to utilize their greatest asset, the "Product of the USA" label.

Returning to President Joe Biden's Executive Order 14036, "Promoting Competition in the American Economy,"[105] among other things, the Executive Order directs the USDA to issue new rulemaking addressing a VCOOL label. Specifically, the Executive Order directs the Secretary of Agriculture as follows:

> "…to ensure consumers have accurate, transparent labels that enable them to choose products made in the United States, consider initiating a rulemaking to define the conditions under which the labeling of meat products can bear voluntary statements indicating that the product is of United States origin, such as "Product of USA"…"[106]

As the status of the Biden Executive Order and the resulting rules and regulations are still pending, the effectiveness of this particular order remains to be seen. However, with the Secretary being directed to at least consider a USDA voluntary Product of USA label, the potential for a USDA sanctioned VCOOL system is high.

C. Economic Benefits of Beef Country-of-Origin Labeling

While MCOOL has been repealed, and the 2015 VCOOL proposal failed in Congress, there is no lack of support for COOL in the United States. For example, the support of COOL among agricultural producers is extremely high, with one study showing that 98% of U.S. agricultural producers favored labeling.[107] Support of COOL among consumers hasn't declined either and has in fact increased slightly over time. For example, in 2002 when COOL was first passed, a national survey found that 86% of consumer

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[104] Voluntary Country of Origin Labeling (COOL) and Trade Enhancement Act of 2015, S. 1844, 114th Cong.
[105] Exec. No. 14036, 86 Fed. Reg. 36,987, 36,993 (July 9, 2021).
[106] *Id.*
[107] VanSickle et al., Int'l Agric. Trade & Pol'y Ctr., *supra* note 96, at 12.

respondents favored country of origin labeling.[108] Compare that to a study conducted by the Consumer Federation of America in 2013, indicating that 90% of the Americans surveyed favored COOL on fresh meat.[109] This willingness of the consumer to "spend a little more in the store for a tag in the back that says USA,"[110] translates into an economic impact in excess of $3.5 billion for beef alone (as of 2002).[111]

On the other hand, opponents to COOL rely on studies like the one conducted by the Kansas State University Department of Economics, that suggest that even if there were increased market demand, that the costs of compliance introduced by COOL outweighed any evidence of increased demand. These particular results suggest an aggregate economic loss for the U.S. meat and livestock supply chain spanning from producers to consumers as a result of MCOOL implementation.[112] The study then went on to state that if VCOOL was economically beneficial, it would have occurred on its own, and where it hadn't, this supported the assertion of many COOL opponents, "where is the market failure?"[113] However, this study is in conflict with another study that proved that the implementation costs, in regard to record keeping specifically, were 90 to 95% lower than the USDA cost estimates, and translated into less than one-tenth of a cent per pound for the covered commodities.[114] Thus, whether the costs of implementation really do outweigh the benefits is still debatable, and deserves further analysis industry wide.

D. The Current State of MCOOL

In the battle of studies, surveys, and public opinion, both sides of the COOL debate remain heated and staunchly fixed in their respective positions. Even if the support of the cow-calf sector and the consumers was enough to get some sort of VCOOL passed, there's no real incentive on the part of the retailers and packers to participate. In short, opponents of COOL, such as the packing industry, oppose COOL because their studies affirm their position

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[108] *Id.*

[109] *Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat*, CONSUMER FED'N OF AM. (May 15, 2013), https://consumerfed.org/press_release/new-poll-shows-strong-support-for-usdas-approach-to-resolving-country-of-origin-labeling-dispute/.

[110] KEITH, *supra* note 67.

[111] VanSickle et al, Int'l Agric. Trade & Pol'y Ctr., *supra* note 96, at 3.

[112] GLYNN T. TONSOR ET AL., KAN. STATE UNIV., MANDATORY COUNTRY OF ORIGIN LABELING: CONSUMER DEMAND IMPACT 3-4 (2012).

[113] *Id.* at 5.

[114] VanSickle et al., Int'l Agric. Trade & Pol'y Ctr., *supra* note 96, at 3-4.

that the cost to implement it (including data collection and record keeping) outweighs any benefit to the packing industry, and they get "stuck with the bill" as it were. Supporters of COOL, such as many cow-calf producers, are in favor of it because it puts a premium price on American beef, thus driving up domestic cattle prices, yet they have almost no implementation costs as non-regulated entities.[115] Groups such as R-CALF have brought litigation attempting to reinstate MCOOL,[116] and have launched websites and initiatives to encourage Congress to bring it back and reinstate it.[117] On the other side of the issue, the National Cattlemen's Beef Association (NCBA) is much larger, and wields much greater political influence than does R-CALF. The NCBA is adamantly opposed to MCOOL[118] and so for the time being, MCOOL will face an uphill battle in making a resurgence.

With the two sides adamantly opposed, and with studies on both sides supporting their claim, it seems impossible to reach some sort of policy compromise. Accordingly, cattle producers need to begin thinking outside the box and begin looking at additional options to cure the market ills that ail them. This is the topic of Part III.

IV. BEYOND MCOOL

While the analysis in Part II has shown that there is a viable argument in favor of reinstating Mandatory Country of Origin Labeling for beef, the hard truth most producers now face is this – MCOOL is a steep uphill battle. It is still possible that MCOOL could be reinstated legislatively, and it is possible that some of the ongoing litigation revolving around MCOOL could bring a similar result. However, the chances of that are slim, and so is it possible? Yes. Is it likely? It seems that the metaphorical jury is still out on that question. So then the question becomes, if reinstating MCOOL is the best option, but unavailable to producers, what else can be done to bring back competitive cattle markets, raise cattle prices for producers, and lessen the control that the Big Four have on the beef industry as a whole? This section seeks to put forward several options

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[115] *Id* at 5, 13.

[116] *Court Finds Cattle Producers Harmed by Lack of Country-of-Origin-Labeling: Moves Issue Onto Administration's Plate*, R-CALF UNITED STOCKGROWERS OF AM., (June 5, 2018), https://www.r-calfusa.com/court-finds-cattle-producers-harmed-lack-country-origin-labeling-moves-issue-onto-administrations-plate/.

[117] *Label Our Beef*, R-CALF UNITED STOCKGROWERS OF AM.R-CALF USA, https://www.r-calfusa.com/label-our-beef/ (last visited Mar. 7, 2022).

[118] Julie Harker, *NCBA Says R-CALF Is Wrong on COOL*, BROWNFIELD (May 9, 2017), https://brownfieldagnews.com/news/ncba-says-r-calf-wrong-cool/.

that can be used, or at least put forth to be explored further as possible options.

A. U.S. CattleTrace, Inc. and the Path to Compromise

A possible solution to the MCOOL standoff comes in the form of a compromise involving a state level VCOOL system coupled with the Kansas CattleTrace Pilot Project (now U.S. CattleTrace, Inc.). In December 2017, members of the Kansas Livestock Association voted to amend their policy to support mandatory cattle disease traceability, in support of the Beef Industry Long-Range Plan put forth by the National Cattlemen's Beef Association.[119] Soon after, on June 30, 2018, Kansas Governor Jeff Colyer announced the creation of the Kansas CattleTrace Pilot Project, a public-private collaboration including the KLA, the Kansas Department of Agriculture (KDA), and others, aimed at animal disease traceability.[120]

The CattleTrace program uses Ultra-High Frequency (UHF) eartags on participating cattle, and automated tag readers located at partner livestock markets, feedyards and processors to gather the minimal data points necessary to determine: (1) that a particular animal was (2) at that place, (3) on that date, and (4) and that time. These four data points allow for a disease trace back in the event of an outbreak.[121] The project has been funded by private industry groups, the USDA, as well as the Kansas Department of Agriculture, which was allocated another $250,000 towards the project in the 2020 Kansas Senate budget bill.[122]

Support for the CattleTrace program has been generally positive, but in ways mirrors the same "camps" that support and oppose COOL. As of December 2018, all three major beef packing companies in Kansas were participating in CattleTrace as well as 14

[119] *See* Pat Melgares, *Keeping Kansas Beef on Track: CattleTrace Project Aims to Safeguard State's $17B Industry*, SEEK, Spring 2019, at 30, 30.
[120] *See Kansas Announces Cattle Trace Pilot Program for Disease Traceability*, KAN. DEP'T OF AGRIC., https://agriculture.ks.gov/news-events/news-releases/2018/07/02/kansas-announces-cattle-trace-pilot-program-for-disease-traceability#:~:text=Cattle%20Trace%20is%20a%20public,the%20nation%2C%E2%80%9D%20said%20Colyer (last visited Mar. 9, 2022).
[121] *See What Was the CattleTrace Pilot Project?*, U.S. CATTLE TRACE, https://www.uscattletrace.org/cattletracepilotproject (last visited Mar. 9, 2022).
[122] *See Legislative Action Includes CattleTrace Funding Enhancement*, KAN. LIVESTOCK ASS'N (Mar. 25, 2019), https://www.kla.org/news-center/news-releases/news/details/12915/legislative-action-includes-cattletrace-funding-enhancement.

feedyards and 7 livestock markets.[123] With a goal of enrolling 55,000 cattle over the next two years, there is a strong need for more cow-calf producers, so in the final year of the pilot project, the recruitment focus is on getting more cow-calf operators and backgrounders to get involved.[124]

Cow-calf producers have many concerns about participating in the program, and David Gregg, a World Perspectives consultant, has been working with Cattle Trace to try to address those concerns, as well as develop a system that can be replicated across the country. Cow-calf producers have raised concerns about management of data, data privacy, as well as the hefty initial cost of setting up a system and maintaining it. Cattlemen have also expressed concerns that traceability would not provide enough added value to offset the cost of participation in an identification system. (i.e., each eartag would cost between $1.00 and $2.75).[125] Then there's also the added liability that can arise from the ability of regulators and others to trace back meat products to the farm of origin.[126] With these concerns, many cow-calf producers just don't see any benefit of participating in CattleTrace, unless there was some other incentive that outweighs these concerns.

Dr. Justin Smith, the Kansas Animal Health Commissioner, has addressed the potential for the CattleTrace infrastructure to be used for other purposes to benefit the cow-calf producers in Kansas. In September 2018, Dr. Smith gave a presentation in Kansas City, Missouri on the CattleTrace program. There he emphasized the focus of CattleTrace is disease traceability, but went on to say:

> "...All the time [we] get the questions about what else can it do, what else can it do?
>
> "We hope the infrastructure is going to be there to do a huge amount of things for the industry, for each participant to grab a hold of that infrastructure and leverage it for their own purposes, but our focus is disease traceability and that's the direction we're

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[123] *See* Walt Davis, *KLA Members Get Update on Cattle Trace Development Efforts*, FARM PROGRESS (Dec. 5, 2018), https://www.farmprogress.com/livestock/kla-members-get-update-cattle-trace-development-efforts.

[124] *Id.; see also* John Maday, *Disease Traceability: Better Late than Never,* DROVERS (Sept. 6, 2018), https://www.drovers.com/news/disease-traceability-better-late-never-0.

[125] *See generally The Producer-Led Organization for Animal Disease Traceability*, U.S. CATTLE TRACE, www.cattletrace.org (last visited Mar. 9, 2022).

[126] VanSickle et al., Int'l Agric. Trade & Pol'y Ctr., *supra* note 96, at 4.

> going, and that's why we're only going to collect the four data points. But honestly, we hope that infrastructure's there that they can leverage for their own purposes and collect what they want to collect…
>
> We're trying to address the cow-calf concerns…the biggest questions we get out of cow-calf producers, which I think is a hugely valid question, is what's in it for me? Why do this?... I think that's a question that we've all struggled with, and we're working through that. I think that's where the opportunity of trying to demonstrate to them some of the ability to leverage that infrastructure for their purposes, for their economic purposes..."[127]

While Dr. Smith never mentions Country of Origin Labeling as a potential use of the CattleTrace infrastructure, he does state that, in addressing the cow-calf concern of "what's in it for me," he believes that one of the benefits to the cow-calf producers is their ability to "grab a hold" of the CattleTrace infrastructure and leverage it "for their economic purposes."[128] A Kansas VCOOL system could very well be that "economic purpose" and could provide the incentive necessary for the cow-calf producers to get on board with CattleTrace. By using the four data points already being collected for disease traceability, the infrastructure for a state-wide record keeping system necessary for COOL would already in place.

Implementing a Kansas VCOOL system utilizing the CattleTrace infrastructure, would simultaneously solve two problems – break the MCOOL standoff and increase cow-calf participation in CattleTrace. The opponents of COOL don't see its value, particularly where the implementation costs outweigh any benefits they receive. This same group also supports CattleTrace but are struggling to get cow-calf producers support for it. On the other side of the fence, the cow-calf producers aren't participating in CattleTrace because their implementation costs outweigh any benefits they would receive. Thus, when you boil it down, packers don't see the value of COOL, and cow-calf producers don't see the value of CattleTrace.

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[127] Justin Smith, *Cattle Trace – Livestock Traceability Initiatives and Projects*, YOUTUBE, (Oct. 16, 2018), https://www.youtube.com/watch?v=peftDhAYXFs, at 14:05-15:10 (presenting from the NIAA 2018 Strategy Forum on Livestock Traceability, September 25 - 26, 2018, Kansas City, MO, USA).
[128] *Id.* at 15:03.

Perhaps some *quid pro quo* could be provided by implementing a Kansas VCOOL system in conjunction with the CattleTrace project. In exchange for greater, voluntary participation in CattleTrace, the packing industry would support a VCOOL system in Kansas, utilizing the CattleTrace infrastructure for COOL data collection. It's true that the packing industry could then face VCOOL implementation costs, but the cow-calf producers would also face CattleTrace implementation costs. Still, all involved would get some sort of a "win." The consumers would now have a reputable labeling system overseen by the KDA, and be given the choice to purchase domestic beef, or not - a win for the consumer. The cow-calf producers would now be provided a way to put a premium on their product – a win for the cow-calf producers. The packing industry, and supporters of CattleTrace, would now also have the participation of the entire beef supply chain for disease traceability – a win for them. Lastly, so long as the COOL system was voluntary, it would avoid discriminating against beef from Canada or Mexico, and avoid running afoul of any WTO proceedings.

Some may challenge this proposal on the basis of the fact that as a voluntary system implemented by individual states, the program lacks the "teeth" or the sweeping effect of a federal law. The critics would likely say that to fix a nationwide problem requires federal law applicable, well, nationwide. While this argument has some merit, to put the vast potential of this policy proposal into perspective, perhaps it would be useful to briefly examine some numbers using a visual.

Below is a map of all of the states that, according to the U.S. CattleTrace program, are now States with U.S. CattleTrace Participation.

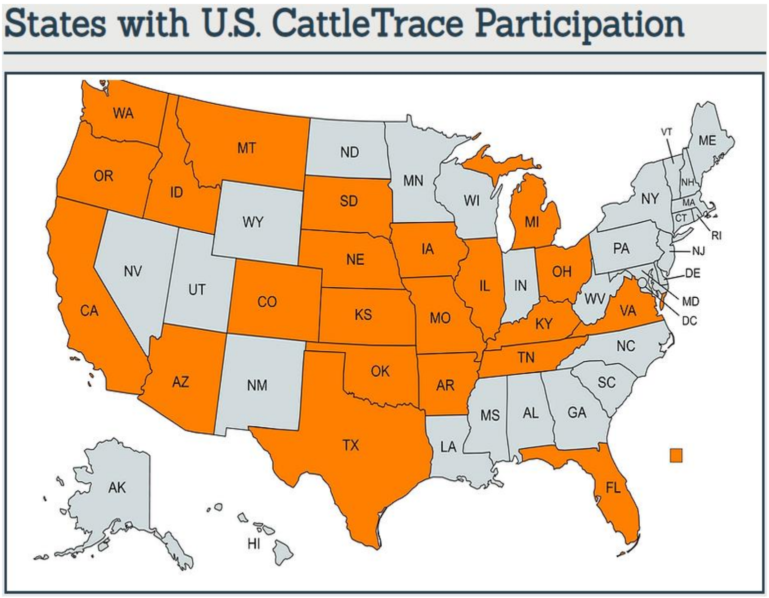

Figure 2. U.S. CattleTrace – Industry Partners[129]

By looking at the above map, it may not be immediately apparent that the CattleTrace partnership really covers that much of the beef industry, as many states are still not partners. This seemingly lends credence to the critics' argument mentioned above. However, looking at the Partner states individually, and looking at the number of cattle in each may help make this argument clear.

Below is a crude table created by the author. This table shows a list of all the CattleTrace Partner states (according to the above map), as well as the number of beef cattle in that state, a ranking of that states beef population (in parenthesis) as well the percentage of the total U.S. beef herd that is raised in that state. These numbers are retrieved from the beef informational website "Beef2Live".[130]

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[129] *See Industry Partners*, U.S. CATTLE TRACE, https://www.uscattletrace.org/our-partners (last visited Mar. 9, 2022).
[130] *See* Rob Cook, *Ranking of States with the Most Beef Cows*, BEEF2LIVE, (Mar. 10, 2022), https://beef2live.com/story-ranking-states-beef-cows-0-108181.

Table 1.[131]

State (Rank)	Total Cattle	Percentage of U.S. Total
Texas (1)	4,685,000	15.04%
Oklahoma (2)	2,189,000	7.03%
Missouri (3)	2,035,000	6.53%
Nebraska (4)	1,900,000	6.1%
South Dakota (5)	1,799,000	5.77%
Kansas (6)	1,477,000	4.74%
Montana (7)	1,419,000	4.55%
Kentucky (8)	983,000	3.15%
Florida (10)	929,000	2.98%
Arkansas (11)	925,000	2.97%
Tennessee (12)	900,000	2.89%
Iowa (13)	890,000	2.86%
California (16)	670,000	2.15%
Colorado (17)	659,000	2.12%
Virginia (18)	595,000	1.91%
Oregon (19)	525,000	1.68%
Idaho (22)	474,000	1.52%
Ohio (30)	302,000	0.97%
Washington (32)	221,000	0.71%
Arizona (34)	194,000	0.62%
Michigan (38)	100,000	0.32%
CattleTrace States	23,598,000	76.61%
United States	31,200,000	100%

As the above table makes clear, when all of the cattle in the CattleTrace Partner states are added together, they total 23,598,000 head of beef cattle. This number represents 76.61% of the total U.S. beef cattle herd. This is not an insignificant number. For those who say that a federal law is required to address this problem, because the CattleTrace Program isn't applicable nationwide, this graph shows

[131] *Id.*

that it indeed has nationwide potential. In fact, as shown, over three-quarters of the entire U.S. beef herd is currently in Partner states.

Perhaps, instead of attempting to reinstate federal legislation like MCOOL, by strategically using CattleTrace to the producer's advantage, over three-quarters of the U.S. beef herd could be included in this compromise - having major effects on the U.S. beef industry as a whole. Not only is this a possible path forward, but it is also producer driven and would avoid a federally mandated animal disease traceability system. This point is driven home by Joe Leathers (CattleTrace, Inc. Board Member and General Manager of the 6666 Ranch in Guthrie, Texas) when he said the following about the CattleTrace initiative as a whole:

> "We're working real hard to make sure that the producer is the one that's driving it…I want everyone to understand that the driver of this is from the producer up, not from the federal government down. I think that's a big difference in what's been happening before…I really feel like this is one of the rare opportunities where we in the cattle industry have an opportunity to not only have a seat at the table, which doesn't come very often, but we can be proactive instead of reactive."[132]

It's true that this compromise proposal is not the "end-all-be-all" solution, and likely raises more questions than it answers. However, this proposal is of a limited scope, and is not intended to answer every possible question raised. Instead, this analysis is simply meant to show that this policy proposal is an option that if explored further, is a workable solution to an issue that has faced the cattle and beef industries since MCOOL was first passed 20 years ago. In short, the American cattleman's greatest asset and marketing tool is the fact that American beef is renowned worldwide, and that standard deserves to be protected. However, the battle lines involving MCOOL have been drawn such that neither side seems to be willing to budge. A Kansas VCOOL system containing a born, raised and slaughtered regime, coupled with CattleTrace, provides a route to compromise. By implementing a state level voluntary country-of-origin labeling system in Kansas, the free market would be given a structure wherein consumers could demand domestic beef. It would also provide a way for domestic cattle producers to put a premium on their product, and simultaneously kick-start the CattleTrace

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[132] Ken Anderson, *Texas Cattleman Helps Lead Cattle Traceability Effort*, FOUR SIXES RANCH (Apr. 12, 2018), https://www.6666ranch.com/news/texas-cattleman-helps-lead-cattle-traceability-effort/.

animal disease traceability project by giving cow-calf producers an incentive to participate. If this policy was pursued, Kansas and CattleTrace could be a realistic model of compromise for the remaining CattleTrace Partner states to follow, or even be a model for a federal system (as the Biden Executive Order directs the creation of a USDA sanctioned VCOOL system).[133] Perhaps if this compromise is followed, beef producers can show that it still means something to be Made in America.

B. The Corporate Social Responsibility Argument

Another avenue worth exploring, and one that is commonly overlooked, is viewing the consolidation issue through the lens of Corporate Social Responsibility. First, before beginning an in-depth analysis, regarding the Big Four's beef packing practices through the lens of Corporate Social Responsibility (CSR), it's important to first define CSR and also determine which CSR definition is going to be used.

Companies worldwide are increasingly feeling the pressure to "behave socially responsible"[134] and adopt some sort of Corporate Social Responsibility to guide their efforts. The problem, thus far, has been that there is no universal definition of what constitutes "CSR." This is partially because the "modern era of CSR, or social responsibility…is most appropriately marked by the publication by Howard R. Bowen of his landmark book *Social Responsibilities of the Businessman* in 1953"[135] effectively beginning the CSR era at that time in the not so distant past. This initial CSR work came about because of Bowen's belief that seven hundred of the largest businesses in the United States "were vital centers of power and decision making and that the actions of these firms touched the lives of citizens in many ways."[136] Bowen's initial work was refined by a man by the name of Carroll, who broke down a businesses' social responsibility into four main responsibilities, stating: "Corporate social responsibility encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time."[137] These four responsibilities, economic, legal, ethical, and philanthropic were later visualized into

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[133] Exec. No. 14036, 86 Fed. Reg. 36,987, 36,993 (July 9, 2021).
[134] Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, CORP. SOC. RESP. & ENV'T. MGMT., Jan. 2008, at 1, 1.
[135] Archie B. Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, INT'L J. CORP. SOC. RESP., July 5, 2016, at 1, 1, https://jcsr.springeropen.com/track/pdf/10.1186/s40991-016-0004-6.pdf.
[136] *Id.*
[137] *Id.* at 2.

what has become known as "Carrolls' Pyramid of CSR."[138] Carroll's Pyramid broke these four responsibilities down into what is required by society, expected by society and what is desired by society. Starting at the bottom of the pyramid, Economic Responsibilities, the responsibility to be profitable, was required by society.[139] The next step up, Legal Responsibilities, the duty to obey laws & regulations, was also required by society.[140] Moving up the pyramid, Ethical Responsibilities, that of the duty to "do what is just and fair" and "avoid harm" was expected, but not required, by society.[141] At the top of the pyramid, Philanthropic Responsibilities, the duty to be a good corporate citizen, was simply desired by society.[142] While this pyramid seemed to place emphasis on certain responsibilities more than others, Carroll believed that all four should be considered simultaneously when determining whether an action was corporately socially responsible.

While Carroll's Pyramid of CSR did much to shed light on the issue, as the years progressed, no single definition of CSR emerged. In fact, recently one study found that 37 different definitions had been adopted by global companies.[143] For example, the Commission of the European Communities, in 2001, defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[144] Another group, Business for Social Responsibility, defined CSR as "achieving commercial success in ways that honour ethical values and respect people, communities and the natural environment."[145] While each of the 37 definitions was slightly different, each of the 37 sound somewhat similar, because as a whole, each took into account five main dimensions that were taken into account when drafting each individual definition. These dimensions are: (1) the Environmental Dimension, which takes into account the natural environment when making business decisions,[146] (2) the Social Dimension, which considers the relationship between business and

[138] *Id.* at 5 fig. 1.
[139] *Id.*
[140] *Id.*
[141] Archie B. Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, INT'L J. CORP. SOC. RESP., July 5, 2016, at 1, 5 fig. 1, https://jcsr.springeropen.com/track/pdf/10.1186/s40991-016-0004-6.pdf.
[142] *Id.*
[143] *See* Dahlsrud, *supra* note 135, at 3.
[144] *Id.* at 7 app.
[145] *Id.* at 8.
[146] *Id.* at 4.

society,[147] (3) the Economic Dimension, which looks at socio-economic or financial aspects, including describing CSR in terms of a business operation,[148] (4) the Stakeholder Dimension, which considers individual stakeholders and stakeholder groups,[149] and (5) the Voluntariness Dimension, which accounts for actions not prescribed by law.[150] So while none of the above 37 definitions of CSR could agree on a single definition of what exactly CSR is, each looked at these five dimensions, environmental, social, economic, stakeholders and voluntariness when crafting a CSR proposal that fit each unique circumstance.

With this understanding of not only the four responsibilities proposed by Carroll's Pyramid of CSR, but also the five dimensions used by modern companies, an in-depth review can now be undertaken regarding beef packing companies in the United States and whether they are arguably committing CSR abuses.

It's no secret that the United States beef packing industry has become extremely consolidated, as has been analysed thus far. In fact, "according to the U.S. Department of Agriculture, the top four beef processors hold 85 percent of the market share, controlling the beef market to the point that some farmers believe the companies' clout unfairly influences livestock prices."[151] These four companies, Tyson, Cargill, JBS and National Beef are often referred to as the "Big Four" as stated before.[152]

Through horizontal and vertical integration, the consolidation of the beef market in the hands of only a few major players, namely the Big Four, is only getting worse. For example, in 2019, National Beef (the fourth-largest of the Big 4) was acquired (almost wholly) by the Brazilian company Marfrig Global Foods

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[147] *Id.*
[148] *Id.*
[149] Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, CORP. SOC. RESP. & ENV'T. MGMT., Jan. 2008, at 1, 4.
[150] *Id.*
[151] Grant Gerlock, *Consolidation in the Livestock Industry May Get a Boost Since Proposed USDA Rule Won't' Take Effect*, HARVEST PUB. MEDIA (Nov. 3, 2017), https://www.harvestpublicmedia.org/post/consolidation-livestock-industry-may-get-boost-proposed-usda-rule-won-t-take-effect.
[152] Joe Fassler, *A New Lawsuit Accuses the "Big Four" Beef Packers of Conspiring to Fix Cattle Prices*, THE COUNTER (Apr. 23, 2019), https://thecounterBa.org/meatpacker-price-fixing-class-action-lawsuit-cattlemen-tyson-jbs-cargill-national-beef/.

SA.[153] This same year, the Marfrig owned National Beef acquired another beef packing company – Iowa Premium Beef, which is a regional packer focused on processing steers in the Upper Midwest.[154] While this deal didn't make waves or national headlines, it highlights the dangers that consolidation poses to the beef industry. Iowa Premium was one the last smaller, independent packers, situated in the Iowa-Minnesota region, which "is the only place left in the country where over half of all cattle are sold into the cash market"[155] meaning, livestock auctions, where the fair market price of the cattle is determined by competitive bidding. Today, because of consolidation (like the Iowa Premium buyout) nationwide "only 25 percent of cattle sell on the cash market. Instead, most cattle are sold through forward contracts or through 'formula pricing,' in which packers determine the value of cattle based on a non-negotiated pricing formula."[156] This number is concerning because, as stated by Robert Taylor, Professor of Agricultural Economics at Auburn University, "the thinner the cash market is, the more easily it's manipulated."[157] Referencing the Iowa Premium deal, Bill Bullard, CEO of the Ranchers-Cattlemen Action Legal Fund (R-CALF) had this to say – "The deal could hasten the death of competitive price setting for cattle…The cash market is the price discovery market for the entire cattle industry. If the cash market continues to thin…then it's essentially game over for cattle producers…with a lack of a competitive marketplace, the packers will dictate prices to producers."[158] In short, when there are only four main buyers of cattle, those four buyers can control the entire beef industry.

The CSR implications of this growing consolidation through acquisitions and mergers may not be apparent to some, but the actions taken by the Big 4 are arguably socially irresponsible. When the Big Four's monopoly is viewed through the lens of Carroll's Pyramid of CSR, it's clear that all four companies are meeting their first responsibility, the Economic Responsibility, or duty to be profitable. In fact, in late 2019, packers' profit margins rose to a

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[153] *Brazil's Marfrig Raises Stake in National Beef to 81.7%*, REUTERS, https://www.reuters.com/article/national-beef-ma-marfrig-gl-foods/brazils-marfrig-raises-stake-in-national-beef-to-81-7-idUSL2N27Y05P (Nov. 18, 2019).

[154] *See* Claire Kelloway, *Beef Packing Merger Threatens America's Last Competitive Cash Cattle Market*, FOOD & POWER (Apr. 11, 2019), http://www.foodandpower.net/2019/04/11/beef-packing-merger-threatens-americas-last-competitive-cash-cattle-market/ (2019).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

record $358 per head.[159] To put that in perspective, in 2018 alone, there were 33.7 million cattle slaughtered in the United States.[160] On the flip side, at the same time period that packers profit margins were $358 per head, "… cattle feeders saw their margins decline from an average of $24 per head profit to a $28 per head loss."[161] That swing is a direct result of the "cash fed cattle market at $5 per cwt. lower"[162] than usual.

While packers are "making a killing" in profits, the rest of the industry is suffering, and the cash market is down to a point that cattle producers are losing money. With this information in mind, looking at the rest of Carroll's Pyramid, the next rung is Legal Responsibilities, or the duty to obey laws & regulations, which is required by society. While the Big Four are arguably meeting this responsibility, on the surface, this meeting of this responsibility is questionable. For example, the Packer & Stockyards Act was passed in 1921 to, in part, prevent the monopolization of the cattle industry. The Packers & Stockyards Act contains various provisions defining what is "unfair practices" in an effort to prevent packers' abuses of the rest of the industry. However, as the law currently stands, for an individual cattle producer to be able to show that one of the Big Four has engaged in an unfair practice, they "have to prove harm for the entire. . . .industry rather than harm to themselves when seeking relief. . . .for abusive contract practices."[163] An interim rule was passed in 2016 called the Farmer Fair Practices Rule (FFPR), which eliminated this requirement, and required only that the producer show that the unfair practice harmed his individual operation, not the industry as a whole. The FFPR was withdrawn in 2017, much to the chagrin of independent cattlemen's groups, such as the United States

[159] Greg Henderson, *Profit Tracker: Packer Margins Went Up How Much?!*, DROVERS (Aug. 20, 2019), https://www.drovers.com/news/industry/profit-tracker-packer-margins-went-how-much.
[160] *Statistics and Information, STATISTICS AND INFORMATION*, ECON. RSCH. SERV, U.S. DEPT. OF AGRIC.Tbl.3a, https://www.ers.usda.gov/topics/animal-products/cattle-beef/statistics-information.aspx. (Sept. 28, 2021).
[161] Henderson, s*upra* note 160.
[162] *Id.*
[163] *See Action Alert: Farmer Fair Practices Rules in Jeopardy at USDA*, NAT'L FARMERS UNION, https://nfu.org/action-alert-farmer-fair-practices-rules-in-jeopardy-at-usda/ (last visited Mar. 16, 2022).

Cattlemen's Association.[164] The repeal was lobbied for by the National Cattlemen's Beef Association.[165]

This section of the PSA that the FFPR sought to address is the subject of President Biden's Executive Order 14036, "Promoting Competition in the American Economy," which directs the Secretary of Agriculture to:

> "…address the unfair treatment of farmers and improve conditions of competition in the markets for their products, consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments."[166]

In short, the proposed rule would be similar to the FFPR, in that a producer would no longer have to prove industry wide harm to receive some sort of relief under the PSA.[167]

Another example of questionable legal responsibilities includes two of the Big Four, JBS and National Beef/Marfrig, both of which are Brazilian based companies. Together with JBS, "Marfrig has a record of colluding with JBS to lower prices paid to Brazilian cattle producers and bribing public officials."[168] While similar practices have not been proven here in United States, the fact that JBS and Marfrig/National Beef has a history of such practices in their home country it should not surprise anyone that they are now being accused of that here in the States (more on that *infra*).

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[164] *See* Hagstrom Report, *USDA Withdraws GIPSA's Farmer Fair Practices Rules*, THE FENCE POST (Oct. 17, 2017), https://www.thefencepost.com/news/usda-withdraws-gipsas-farmer-fair-practices-rules/.

[165] *See USDA Moves Forward with Flawed GIPSA Rules*, NAT'L CATTLEMEN'S BEEF ASS'N (Oct. 14, 2016), https://www.ncba.org/newsreleases.aspx?NewsID=6030.

[166] Exec. Order 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

[167] *See* Daniel Litwin, *How Will Updates to the Packers and Stockyards Act Shape Agriculture's B2B Relationships?*, MARKETSCALE, (Aug. 12, 2021), https://marketscale.com/industries/food-and-beverage/how-will-updates-to-the-packers-and-stockyards-act-shape-agricultures-b2b-relationships/.

[168] Kelloway, *supra* note 155 (citing *Brazil Prosecutors Seek $774 mln in Fines over Alleged Loan Scheme*, REUTERS (Oct. 5, 2018), https://www.reuters.com/article/brazil-caixa-fraud/brazil-prosecutors-seek-774-mln-in-fines-over-alleged-loan-scheme-idUSL2N1WL13E).

Moving up the pyramid, Ethical Responsibilities, that of the duty to "do what is just and fair" and "avoid harm" were expected, but not required, by society. Here, there is nothing just or fair about dictating prices to cattle producers in a way that the Big Four are seeing record profits and forcing the rest of the industry into a losing game. At the top of the pyramid, Philanthropic Responsibilities, the duty to be a good corporate citizen, were simply desired by society. Here, the duty to be a good corporate citizen is lacking. Each of the Big Four have issued various CSR Reports outlining the good they do. From a philanthropic view, they do much for the good of society. However, behind the scenes they are crippling, or simply buying their competition. This is not meeting the duty to be a good corporate citizen. Carroll's pyramid seemed to place emphasis on certain responsibilities more than others, Carroll believed that all four responsibilities should be considered simultaneously when determining whether an action was corporately socially responsible. Here, when viewed in light of these four responsibilities as a whole, it appears that the Big Four, as a whole, are lacking.

When the actions of the Big Four are viewed through the lens of the five dimensions of CSR proposed by Dahlsrud, there also appears to be some holes in their conduct. The first dimension, the environmental dimension, is not really the focus of this paper and as such would require extensive research beyond the scope of this paper and will not be addressed. However, the second dimension, the social dimension, considers the relationship between business and society. Here, the alleged conduct of dictating prices, and price fixing, is putting America' cattlemen/cattlewomen out of business and killing the ranching way of life in America as we know it. While it may not be as drastic as the shuttering of the Stockyards in Kansas City or Omaha, it is killing a way of life. These actions likely are in conflict with the social dimension. Third, the economic dimension, as discussed above, is being met by these companies. The fourth dimension, the stakeholder dimension, will be discussed in the final section of this paper. Lastly, the fifth dimension, the voluntariness dimension is a tough one to meet, because as was stated above, CSR compliance is not regulated by State's, and is completely voluntary on the part of the company. As such, if companies, such as the Big Four, choose to violate various aspects of CSR, there isn't a whole lot of enforcement mechanisms available.

As stated above, CSR compliance is not regulated by States, and is completely voluntary on the part of the company. As such, if companies, such as the Big Four, choose to violate various aspects of CSR, there are not many enforcement mechanisms available. Industry groups can try to work with the Big Four to reach workable solutions, or overcome these CSR shortcomings, but at the end of the day, if the Big Four choose to continue down the path they are on, the voluntariness dimension says they can do as they please. This is where R-CALF USA again comes into play.

According to their website "R-CALF USA (Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America), is the largest producer-only membership-based organization that exclusively represents U.S. cattle and sheep producers on domestic and international trade and marketing issues. R-CALF USA, a national, non-profit organization, is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry."[169] In short, their slogan is "Fighting for the U.S. Independent Cattle Producer."[170]

As one of the leading groups fighting for the independent U.S. cattle producer, R-CALF has taken many steps thus far, including extensive litigation over the years. For example, in 2019, R-CALF filed a large class action lawsuit with a 121-page complaint, alleging that the Big Four conspired to depress cattle prices, and inflate their own margins. As such, "the suit alleges the nation's four largest beef packers violated U.S. antitrust laws, the Packers and Stockyards Act, and the Commodity Exchange Act by unlawfully depressing the prices paid to American ranchers."[171] While the outcome of this litigation remains to be seen, as shown, JBS and Marfrig have faced similar charges at home in Brazil, it may not be surprising if similar conduct is found here in the States.

In fact, while the R-CALF lawsuit continues, another lawsuit ended in February 2022, making essentially the same allegations. In the case of *Pacific Agri-Products, Inc. v. JBS USA Food Company Holdings, et al.*,[172] the Plaintiff Pacific Agri-Products, Inc. (a wholesale food distributor who purchases beef from the Big Four) brought suit in the U.S. District Court for the District of Minnesota alleging that "Tyson, Cargill, National, and JBS worked together, starting in 2015, to reduce the number of cattle slaughtered which

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[169] *About Us,* RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AM. (2022) https://www.r-calfusa.com/about-us/ (last visited Mar. 16 2022).
[170] *Id.*
[171] *R-CALF Files Lawsuit Against "Big Four" Beef Packers*, N. AG NETWORK (Apr. 24, 2019), https://www.northernag.net/r-calf-files-lawsuit-against-big-four-beef-packers/.
[172] Pacific Agri-Products, Inc. v. JBS USA Food Company Holdings et al, 0:19CV02720 (D. Minn., 2019) (Court Listener.).

created, 'artificial Beef supply restraints.'"[173] The case settled in early February 2022, wherein "JBS SA agreed to pay a sum of $52.5 million to settle litigation following accusations of conspiring to inflate prices and pocketbooks by limiting beef supply in the U.S. market."[174] In a Press Release dated February 2, 2022, Iowa's Senator Chuck Grassley had this to say regarding the settlement:

> "If there were any doubt about the shenanigans Big Packers play to line their pockets at the expense of consumers and independent producers, look no further than JBS' $52.5 million settlement in price-fixing litigation. The other members of the Big Four packers continue to face similar allegations. Although the settlement is a spit in the ocean compared to JBS' record profit throughout the pandemic, it validates what cattle producers have been telling me when they try to get a fair price in the marketplace. It's time to put an end to these price fixing schemes once and for all. Congress must pass the *Cattle Price Discovery and Transparency Act* to bring access and accountability to the meatpacking industry."[175]

In addition to litigation, R-CALF has taken other steps, such as advocating extensively for the implementation of the Farmer Fair Practices Rule discussed above.[176] Another example of their involvement is through organizing educational events, workshops and meetings across the nation, in conjunction with other advocacy groups, such as the recent "Rally to Stop the Stealin'" held in Omaha, Nebraska in October, 2019, held in conjunction with the Organization for Competitive Markets.[177] Such educational events

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[173] Jim Mundorf, *The Truth About Beef Price Fixing, the JBS $52.5 Million Settlement, and Justice*, LONESOME LANDS (Feb. 8, 2022), https://www.lonesomelands.com/new-blog/2022/2/6/the-truth-about-beef-price-fixing-and-why-jbs-525-million-settlement-is-not-justice.

[174] Jenna Hoffman, *JBS Settles Price Fixing Allegations for $52.5M, Industry Responds*, DROVERS (Feb. 2, 2022), https://www.drovers.com/news/industry/jbs-settles-price-fixing-allegations-525m-industry-responds.

[175] Press Release, Chuck Grassley, Senator, *Grassley: JBS Settlement Tells You Everything You Need to Know About Packers' Anticompetitive Tactics* (Feb. 2, 2022), https://www.grassley.senate.gov/news/news-releases/grassley-jbs-settlement-tells-you-everything-you-need-to-know-about-packers-anticompetitive-tactics.

[176] *See GIPSA Rules Will Help Reverse Cattle Industry Decline*, RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AM. (Dec. 14, 2016), https://www.r-calfusa.com/r-calf-usa-gipsa-rules-will-help-reverse-cattle-industry-decline/.

[177] *October 2, 2019; Rally to Stop the Stealin'!,* ORG. FOR COMPETITIVE MKTS., (Sept. 20, 2019), https://competitivemarkets.com/stopthestealin/.

are important, as fighting to influence the "court of public opinion" is oftentimes as important as fighting in the courts of law. This is because, as once wisely observed by Wilma Mankiller (the first female president of the Cherokee Nation), "public perception creates public policy."[178] With that in mind, the following are several recommendations on how this issue can be more effectively addressed in the future to influence better practice and change within the private beef packing sector.

First, because much of CSR is voluntary, most internal company change in regard to CSR comes as a result of the company feeling pressure to change from their consumers. R-CALF has done an excellent job at educating beef cattle producers, but so far, has somewhat overlooked the consumers. There are far more consumers in America, than there are beef cattle producers. If advertising, and educational events could be tailored in a way that draws consumers into them, then the consumers can use their collective weight through the power of their "purse" to slow any abusive practices in the packing industry.

The second step would be a nationwide push for the reimplementation of the Farmers Fair Practices Rule. Because the FFPR would benefit not just beef producers, but all livestock producers nationwide, a working group could be created consisting of representatives of all independent beef cattle producing organization, as well as those that represent independent sheep, pork, and poultry producers. By creating a working group consisting of all segments of the livestock industry, there would not be a lone voice in favour of the FFPR, but the collective power of the entire meat industry. Again, the Biden Administration has proposed rulemaking similar to the FFPR, and the success of said rulemaking remains to be seen.

The second step then translates into the third step, the creation of a "United States Multi-Stakeholder Initiative." This cross-sector initiative could include representatives from the beef industry, the cattle industry, as well as consumer groups, food safety groups, and free-market advocates. This multi-stakeholder initiative has the benefit of governance without government. In other words, if the federal government were not ultimately successful in reinstating the FFPR, or enforcing the Packers & Stockyards Act, then the initiative could create an independent system of market-based

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[178] Gary Herbert, *Utah Compact on Racial Equity, Diversity and Inclusion,* FACEBOOK (Dec. 15, 2020), https://www.facebook.com/GovGaryHerbert/videos/145876427011787/.

regulatory mechanisms including guidelines, certifications, auditing and labelling, to start. With representatives from this cross-sector group, these market-based regulatory instruments could be drafted in a way to take the Big Four and "hold their feet to the fire" as it were.

While these suggestions arising from the CSR analysis are like the VCOOL/CattleTrace Compromise in that they are not the "end-all-be-all" solutions, they are still worth mentioning. Up to this point in time, the entire argument surrounding overcoming the packers consolidation of the industry has revolved around MCOOL and breaking up the "Big Four." By shedding light on other options, like those proposed above involving CSR, perhaps the discussion can be changed to where producers and organizations begin looking at other options.

C. Other Solutions

As stated above, the point of introducing other options aside from simply renewing the fight for MCOOL is to get producers and industry experts thinking about how else to fix the problem. It's true that MCOOL is one of the best tools to fight back against consolidation, price fixing and price manipulation – however, since that option is only one options, what other options are available beyond what has been discussed?

In a recent interview with rancher Sheila Ellis, she was asked that very question, namely, "what are some solutions that could be implemented to fix these issues?"[179] She responded, "the PRIME Act being made into law, enforcement of anti-trust laws, and breaking up the packer monopolies would all be viable solutions."[180] Of Ms. Ellis' proposals, the first, instating the PRIME Act is one of the best options available at this point. The PRIME Act (Processing Revival and Intrastate Meat Exemption) was first introduced in 2015.[181] This options is one of the best because "currently, custom facilities across the country are exempt from state and federal inspection regulations to process meat for personal consumption…However, when a farmer wants to actually sell meat to any buyer — individual consumer, restaurant, hotel, or grocery store — the animal must be slaughtered and processed at a USDA-inspected or…state-inspected facilities to legally sell the meat."[182] By exempting these smaller processing facilities from strict, suffocating federal "red tape" would encourage

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[179] Johnston, *supra* note 27.
[180] *Id.*
[181] Jared Cates, *What is the PRIME Act?*, CAROLINA FARM STEWARDSHIP ASS'N https://www.carolinafarmstewards.org/what-is-the-prime-act/ (last visited Mar. 16, 2022).
[182] *Id.*

the development and building of more, local, processing plants. Thus, giving consumers more local options for their meat, and giving up-start beef processors a fighting chance against the Big Four.

Under the Biden Executive Order discussed prior, the USDA recently announced that it intends to invest $500M to support and incentivize "new competitive entrants into meat and poultry processing" and more than $150M to strengthen existing "small and very small" facilities.[183] This funding will do much to encourage the development and building of more, local, processing plants. Again, however, in addition to funding, the USDA should consider ways to decrease the "red tape" that these small processing facilities must cut through simply to get their product to the consumers. For example, Kaibab Processing is a small, family owned "custom-exempt meat processing facility" located in Fredonia, Arizona.[184] Kaibab Processing has a 4 out of 4 rating from the Arizona Department of Agriculture and "offer[s] custom slaughter and processing livestock."[185] As an Arizona inspected facility, the family has been able to bring this custom processing facility from an idea to a fully functioning plant in less than 2 years processing livestock and game in the State of Arizona. However, where Fredonia, Arizona is located on the Arizona/Utah border, and due to the unique geography, Kaibab Processing is very isolated from the rest of Arizona yet extremely proximate to Southern Utah (Fredonia is 195 miles from its county seat of Flagstaff, Arizona, yet only 7 miles from Kanab, Utah, the county seat of neighboring Kane County, Utah). Because of USDA regulations, Kaibab Processing is able to engage in only limited interstate commerce even though most of their potential clientele reside north of the Arizona/Utah border. Again, particularly in situations like those pertaining to Kaibab Processing, in addition to funding, the USDA should consider ways to decrease the "red tape" that these small processing facilities must cut through simply to get their product to the consumers.

The second solution brought up by Ms. Ellis is that of enforcing the anti-trust laws that are already on the books. This is another viable option, as there are various anti-trust laws already in

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[183] Ellison et al., *supra* note 45(citing Press Release, U.S. Dep't of Agric., USDA Announces $500 Million for Expanded Meat & Poultry Processing Capacity as Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System (July 9, 2021), https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing).

[184] *About Us*, KAIBAB PROCESSING, http://kaibabprocessing.com/?page_id=11 (last visited Mar. 16, 2022).

[185] *Id.*

effect that are simply not being enforced – such as the Packers and Stockyards Act. According to Professor Roger A. McEowen, "a good case can be made that the courts have not carried out the legislative intent of the PSA provision concerning price manipulation."[186] There are legal mechanisms already in place to prevent the type of activity engaged in by the Big Four, those mechanisms just need to be used and enforced. Here, a federal/state partnership may be extremely beneficial as highlighted in the letter signed by 16 Attorneys General in December 2021 and sent to Secretary of Agriculture, Tom Vilsack, urging the Secretary as follows:

> "USDA should consider using funds appropriated through the American Rescue Plan Act of 2021 to establish a grant that state antitrust enforcers could avail themselves of for the purpose of investigating and bringing actions in agricultural markets. State attorneys general have the potential to have significant impact on agriculture market concentration, but lack of resources is a perennial limitation on what states can do."[187]

While the State attorneys general share the enforcement authority to enforce and investigate antitrust violations, as noted the perennial lack of resources prevents States from playing an active role. However, if a fund were to be established from which States could draw from and aid the USDA in its efforts, perhaps the PSA could be enforced like it was originally intended.

The third solution raised by Ms. Ellis is that of breaking up the packing monopolies. Of the three options, this one is by far the hardest to accomplish. To break up the monopolies (as was done with the Big Five early in the 20th Century) would require some sort of proof of wrongdoing. As discussed earlier in this paper, there are ongoing investigations into the meat packing industry. So while as of now this option may not be viable, if the DOJ returns with findings that the Big Four have violated the Packers & Stockyards Act, perhaps this could be a reality.

The list of possible solutions is extensive, and this paper is not intended to address all of them, but other possible solutions include looking further into the following:

[186] McEowen, *supra* note 12, at 4.
[187] Ellison et. al., *supra* note 45.

1. Promoting local processing options through funding mechanisms rather than simply through the PRIME Act.
2. Enforcing the Packers & Stockyards Act through federal/state partnerships.
3. Reinstating the Farmer Fair Practices Rule.[188]
4. Break-up the Big Four monopoly as was suggested.
5. A Beef Contract Library (like the Swine Contract Library §222 P&S Act) to encourage greater transparency into the contracts entered into by the Big Four and facilitate price discovery.
6. Mandatory Cash Sales, as has been suggested by Senator Chuck Grassley (R-IA) in his recent bill,[189] dubbed the "50/14 Rule." In short, this "bipartisan bill will require that a minimum of 50 percent of a meat packer's weekly volume of beef slaughter be purchased on the open or spot market"[190] and require a packer to actually slaughter the beef within 14 days of the sale.[191]

While this list is not exclusive and would obviously require greater "flushing out" to determine how effective (or ineffective) each would be, the point is still this – producers need to begin looking at other options besides just MCOOL. As has been stated, if producers desire a level playing field that is not dominated by the Big Four, then MCOOL is a wonderful option. However, as shown, it's not truly viable at this point, as various groups oppose it, and under the current political climate, the odds of it passing Congress are not good. So in the meantime, there is a problem that needs addressing, and these suggestions are simply that, suggestions. Suggestions to spark conversation and get beef producers thinking about how best to save their industry from those who simply see profit margins and

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[188] *GIPSA Rules Will Help Reverse Cattle Industry Decline*, *supra* note 177.
[189] Alan Newport, *Senate Bill Would Require 50% Cash Cattle Sales*, BEEF MAG. (May 14, 2020), https://www.beefmagazine.com/legislative/senate-bill-would-require-50-cash-cattle-sales.
[190] Press Release, Chuck Grassley, Senator, *Grassley, Colleagues Introduce Bipartisan Bill to Increase Transparency in Cattle Market*, (Mar. 24, 2021), https://www.grassley.senate.gov/news/news-releases/grassley-colleagues-introduce-bipartisan-bill-to-increase-transparency-in-cattle-market.
[191] S. 949, 117th Cong. § 1(4)(A)(ii) (2021).

spreadsheets. To get producers thinking about how to preserve their industry and the western legacy for those to come.

V. CONCLUSION

"So when you see the cowboy, he's not ragged by his choice
He never meant to bow them legs or put that gravel in his voice.
He's just chasin' what he really loves and what's burnin' in his soul
And wishin' to God that he'd been born a hundred years ago,
Still singin' Strawberry Roan and Little Joe." [192]

Omaha. Dodge City. Abilene. Denver. Fort Worth. All five of these American cities have one thing in common. Like Kansas City, all five were founded as "Cowtowns." After the American Civil War ended in 1865, there was a shortage of beef in the ever industrializing northern states, and millions of head of cattle in the western plains of the country that needed to get to those markets.[193] Accordingly, the Chisolm Trail became a hotbed of cattle being trailed from Texas and Oklahoma to shipping yards in places like Kansas City or Dodge City, which was affectionately dubbed "Queen of the Cowtowns."[194] These Cowtowns were where the cattle coming off the trail were sold to cash bidders, and railed to packing houses back east. The success of these Cowtowns, and the competitive markets of the cash bidders for cattle, gave rise to some of the most iconic ranches and heroes of the day.

Those days are long gone. The giant shipping yards and stockyards of Kansas City and Denver are no more, but cattle ranching in the United States is still hanging on, along with the cowboy spirit that it embodies. In fact, as of 2017, there were 882,692 total cattle and calve operations in the United States[195] the vast majority of which (96%) are family-owned or individually operated.[196] However, this industry, and its way of life is being threatened of extinction alongside those early Cowtown stockyards

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[192] GARTH BROOKS, *The Cowboy Song*, *on* IN PIECES, (Liberty Records 1993).
[193] Litwin, *supra* note 168.
[194] *Cowtowns*, KANSAPEDIA, KAN. HIST. SOC'Y, https://www.kshs.org/kansapedia/cowtowns/15598 (Feb. 2013).

[195] NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRI., AC-17-A-51, 2017 CENSUS OF AGRICULTURE 19 tbl. 11 (2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0011_0012.pdf.
[196] *Industry Statistics*, NAT'L CATTLEMEN'S BEEF ASS'N, https://www.ncba.org/beefindustrystatistics.aspx, (last visited Mar. 10, 2022).

due to the ever-growing monopolistic power of the four, multi-national corporations known as the "Big Four."

Returning to the interview between Patrick Bet-David and Shad Sullivan, towards the end of the interview Patrick asked Shad the following question:

> "PBD: Do you have kids?
>
> SS: I do.
>
> PBD: Any plans of one day passing this down to your daughter and son?
>
> SS: Absolutely. That's the goal. That is every rancher's dream is to be able to pass down this business and the lifestyle. It's a tradition. It's something that we love. It brings a lot of hardship, but it brings a lot of love to the heart to. There's a lot of rewarding experiences in this life, and I shouldn't say it isn't about the money. Because we have to be able to feed the world at a profit, we can't do it at a loss. And in order to send that dream on down the road, we have to be successful. Because we do want to hand down that legacy, that's what it's all about…were proud to be multi-generational operators, but at this point, it aint looking like it…. at some point you have to have a win."[197]

That tradition, and love of a way of life that Mr. Sullivan talks about is on the verge of extinction. There truly is a battle between those who love that tradition and way of life and those who simply see profit and cold, hard numbers. The American rancher and cattleman needs a win, otherwise, the industry is looking at losing many of its producers in the coming years, according to Mr. Sullivan. While the Big Four continue their march towards consolidation, groups such as R-CALF USA are attempting to do something about it, and slow that march, or halt it. By looking to the options presented in this paper, and considering the U.S. CattleTrace/VCOOL compromise proposed herein, perhaps the American Rancher will not go the way of the Kansas City Stockyards and the Cowtowns of yesteryear.

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[197] Valuetainment, *supra* note 33, at 27:30 – 28:40.