

2022

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Recommended Citation

Victor, S. (2023). The Cost of Compassion: Why State Ballot Initiatives Complicate Farm Animal Welfare and Overlook the True Problems in Modern Agriculture. *Journal of Food Law & Policy*, 18(2). Retrieved from <https://scholarworks.uark.edu/jflp/vol18/iss2/5>

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—Journal of—
FOOD & LAW
—POLICY—

Volume Eighteen

Number Two

2022

THE COST OF COMPASSION: WHY STATE BALLOT INITIATIVES
COMPLICATE FARM ANIMAL WELFARE AND OVERLOOK THE
TRUE PROBLEMS IN MODERN AGRICULTURE

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I. Introduction

Farm animal welfare is a concern for many Americans, both among those who value a higher standard of care for the animals' own sake, and those concerned with food safety.¹ Industrial agriculture has become the dominant form of animal production to satiate a daunting demand for meat, eggs, and dairy products.² Industrial animal-raising facilities, also known as concentrated animal feeding operations ("CAFOs"), prioritize volume and efficiency and are a key factor in keeping consumer prices low.³ CAFOs are highly specialized and excel at production by minimizing inputs, maximizing confined animals, and externalizing environmental costs.⁴ This production method comes at the cost of natural conditions, and animal welfare organizations routinely target CAFOs, depicting these operations as horrendous and inhumane.⁵ Despite these concerns, federal law provides practically no protections for farm animals.⁶ State laws grant greater safeguards, but protections vary greatly between jurisdictions.⁷ As both federal and state governments are subject to the congressional gridlock that

¹ See Marta Alonso et al., *Consumers' Concerns and Perceptions of Farm Animal Welfare*, MDPI ANIMALS, FEB. 27, 2020 at 1, 2, 4.

² See David N. Cassuto & Sarah Saville, *Hot, Crowded, and Legal: A Look at Industrial Agriculture in the United States and Brazil*, 18 ANIMAL L. 185, 188, 190 (2012).

³ See, R. Jason Richards & Erica Richards, *Cheap Meat: How Factory Farming is Harming Our Health, The Environment, and the Economy*, 4 KY. J. EQUINE AGRIC. & NAT. RES. L. 31, 32-33 (2012).

⁴ See *id.*

⁵ See *Factory Farming in America: The True Cost of Animal Agribusiness for Rural Communities, Public Health, Families, Farmers, the Environment, and Animals*, HUM. SOC'Y U.S., <https://www.humanesociety.org/sites/default/files/docs/factory-farming-in-america-true-cost.pdf> (last visited Oct. 2, 2022).

⁶ See, e.g., 7 U.S.C. § 2132 (While most farm animals are exempt from the limited federal protections, laying hens are particularly vulnerable to exploitation, as they face the smallest conditions, the largest production volume, and the lowest regulations, with federal law considering chickens to be "fowl," and not "animals").

⁷ See, e.g., *Farm Animal Confinement Bans by State*, ASPCA, <https://www.aspc.org/improving-laws-animals/public-policy/farm-animal-confinement-bans> (last visited Oct. 2, 2022).

has stymied various legislation over the last decade, passing new welfare laws can be a herculean effort.⁸

Animal advocacy groups have responded to these legislative difficulties by increasingly focusing their efforts on individual state ballot initiatives, banking on the direct will of the people to advance welfare laws.⁹ This strategy has been effective, notably with the success of California's Proposition 2 and Proposition 12, and Massachusetts's Question 3, all of which mandate larger space and better enrichment for laying hens ("layers") and sows.¹⁰ The meat and egg industries have painted these measures as an anathema to the American food system, a subversion of American democracy, and an attack against affordable food.¹¹ Advocates applaud a step towards greater welfare protections, believing industrial animal production itself a crime against basic animal rights.¹² Still others believe recent ballot initiatives addressing animal welfare do not make a sufficient difference.¹³

All sides of the ballot initiative debate have failed to adequately acknowledge the impacts on independent farmers who are beholden to large-scale integrators¹⁴ via production contracts, a

⁸ See, e.g., *A Divided Country*, THE ECONOMIST, Jul 1, 2017 at 11.

⁹ See Joshua J. Dyck, *New Directions for Empirical Studies of Direct Democracy*, 19 CHAP. L. REV. 109 (2016) (state ballot initiatives have grown across a multitude of issues in American politics, including for farm animal welfare).

¹⁰ See *Massachusetts Minimum Size Requirements for Farm Animals Containment, Question 3 (2016)*, BALLOTPEDIA [https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment,_Question_3_\(2016\)](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment,_Question_3_(2016)) (last visited Oct. 2, 2022); see INFORMATION GUIDE FOR 2008, GENERAL ELECTION (UC Hastings Coll. of L. 2008); see *Animal Care Program*, CAL. DEP'T OF FOOD AND AGRIC., <https://www.cdffa.ca.gov/ahfss/Prop12.html> (last visited Oct. 4, 2022) (As chickens and pigs have been the primary targets of recent ballot initiatives, and because poultry and pork industries are the most affected by production contracts, this paper will focus on these areas of farm animal agriculture, and not address the beef or dairy industries).

¹¹ See, e.g., Jen Sorenson, *This Is Why California's Proposition 12 is so Unfair to Pork Producers Nationwide*, L.A. TIMES, Aug. 12, 2021.

¹² See, Ashley Chang, *This is What Prop 12 Means for Animals*, THE HUMANE LEAGUE (October 13, 2021), <https://thehumaneleague.org/article/prop-12>.

¹³ See Tracy Reiman, *Why PETA Can't Support Proposition 12*, PETA, <https://prime.peta.org/news/why-peta-cant-support-proposition-12> (last visited Oct. 4, 2022).

¹⁴ For the purposes of this writing, the term "integrator" will mean any individual or corporation that contracts with a grower or farmer under a contract arrangement wherein the farmer raises and cares for livestock or poultry in accordance with the terms of the integrating corporation's contract. Other sources may refer to these players as "contractors," or "processors."

staple under the industrial farming model.¹⁵ State ballot initiatives are an avenue to bypass traditional gridlocked politics to achieve welfare improvements, but this approach will not solve the economic disaster of the industrial system; the regulations required by the new state laws will ultimately not force large integrators to change their business models, but will force many independent farmers to comply with new infrastructure changes.¹⁶ While it is easy to demonize all animal producers as part of an uncaring monolith, reality reveals an economic system that preys upon independent farmers as much as, though in different ways, the animals themselves.¹⁷

As the production contract model has already marginalized the ability of independent farmers to be profitable, new animal welfare laws requiring large-scale change may deter or eliminate independent producers and have the paradoxical impact of further consolidating the farm animal market in the current monopsonies decried by advocates. To break the hold of industrial agriculture equitably, animal welfare progress cannot come at the expense of independent producers if lasting reform is to occur.

Additionally, animal advocates should tread carefully in using ballot initiatives to advance welfare laws. As in traditional politics, there is a risk that the pendulum will swing in the either direction towards laws limiting farm animal welfare—indeed, there have already been successful efforts to limit the ability to pass farm animal welfare through voter initiatives.¹⁸ While flawed, our representative democracy provides a safeguard against unrealistic or unworkable laws; by overly relying on voters to direct lawmaking without the check of legislators, unforeseen complications or misinterpretations are inevitable. Increasing farm animal welfare remains a worthy endeavor, but it is only one piece of a broken agricultural puzzle. Reforming the production contract system should also be an aim of welfare advocates so that both humans and animals can be liberated from a brutal model that rewards a select few. All players need to have a seat at the table to create a better agricultural system, and no advancements can be made at the cost of either animals or farmers.

¹⁵ See James M. MacDonald & Christopher Burns, *Marketing and Production Contracts Are Widely Used in U.S. Agriculture*, U.S. DEP'T OF AGRIC., (July 1, 2019), <https://www.ers.usda.gov/amber-waves/2019/july/marketing-and-production-contracts-are-widely-used-in-us-agriculture/>.

¹⁶ See *infra* Part IX.

¹⁷ See Neil Hamilton, *Broiler Contracting in the United States – A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43 (2002).

¹⁸ See *infra* Part VIII.

II. A Challenging System for Independent Farmers

The production contract model is relatively new.¹⁹ While farmers traditionally raised animals from birth to slaughter, this method is subject to price fluctuations borne entirely by the farmer.²⁰ Production contracts evolved as agriculture shifted at the turn of the 20th century.²¹ In the early 1900s, nearly half of U.S. labor worked in agriculture, and farm production was diverse, supplying various commodities.²² Efficient railways and refrigerated cars expanded market options, and while market prices could fluctuate, options were plentiful.²³

As the century continued, U.S. agriculture changed. Farm labor decreased, farm size increased, and farm production specialized into one or two outputs.²⁴ Simultaneously, integrators began to dominate the purchasing market.²⁵ Over the 1980s a trend of deregulation by the Reagan Administration, along with decisions by the Supreme Court, allowed conglomerates to effectively turn the agricultural market into a set of monopsonies.²⁶ By 1990, a few select companies controlled the market.²⁷

In recent years, trade wars, climate change, and lower commodity prices related to globalization have all combined to weaken the financial viability of farming.²⁸ More than 100,000 farms disappeared between 2011 and 2018.²⁹ Consolidation means that small farms account for only 25% of U.S. food production, down

¹⁹ See Dean Zimmerli, *Something Old, Something New: Relying on the Traditional Agricultural Cooperative to Help Farmers Solve the Power Imbalance in Modern Meatpacker Production Contracts*, 24 SAN JOAQUIN AGRIC. L. REV. 59, 60 (2015).

²⁰ See Shi-Ling Hsu, *Scale Economies, Scale Externalities: Hog Farming and the Changing American Agricultural Industry*, 94 OR. L. REV. 23, 33-34 (2015).

²¹ See Zimmerli, *supra* note 19, at 61.

²² Carolyn Dimitri, et al., *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S. DEP'T. OF AGRIC., June 2005.

²³ See Zimmerli, *supra* note 19 at 62.

²⁴ See *id.* (Whereas half of the labor force was connected to agriculture in 1900, by 1970 only four percent of labor consisted of agricultural workers).

²⁵ *Id.* at 63.

²⁶ See, e.g., *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986) (in which the Supreme Court held that a showing of loss or damage due to decreased competition did not constitute an antitrust injury under the Clayton Anti-Trust Act); see Clayton Act, ch. 323, § 7, 38 Stat. 730, (1914) (current version at 15 U.S.C. § 18).

²⁷ See Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY, Nov. 9, 2012.

²⁸ See Alana Semuels, *'They're Trying to Wipe Us Off the Map.'* *Small American Farmers are Nearing Extinction*. TIME, Nov. 27, 2019.

²⁹ *Id.* ("12,000 of those between 2017 and 2018 alone.").

from 50% under two decades ago.³⁰ From 1987 to 2012, the number of farms with over 2,000 acres doubled, while farms with less than 1,000 acres dropped 44%.³¹ Livestock concentration does not follow an exact correlation with crop land, but animal living space has nevertheless condensed dramatically since the mid-1980s.³²

Yet while animal production has exploded, farmers have not realized more profits; in the 1970s, a farmer raising hogs received 40-60 cents for every consumer dollar spent on pig products – today, that share is down to 19 cents.³³ As a result of consolidation, the major monopsonies pushed producers into vertical integration, a system in which the buying companies³⁴ own the animals, supply the feed, and control the slaughter and ultimate sale through production contracts.³⁵ In essence farming has shifted so that a farmer is not paid for her animals, but for her labor tending to a corporate product.³⁶

There are benefits to this system, the most prominent being price guarantees from the integrator laid out in the contract.³⁷ The relatively stable prices are attractive so farmers can better predict their expenses and earnings.³⁸ Broiler producers quickly converted from selling on the open market (95% of producers in 1950) to selling on contract (90% of producers in 1958).³⁹ Hog industries

³⁰ *Id.*

³¹ James M. MacDonald & Robert Hope, *U.S. Cropland is Consolidating into Larger Farms*, AMBER WAVES, Dec. 19, 2017. (“Large Crop farms (with 2,000 acres or more) accounted for 36 percent of U.S. cropland in 2012, compared to 15 percent in 1987”).

³² See James M. MacDonald, *Consolidation in U.S. Agriculture Continues*, AMBER WAVES, Feb. 3, 2020. (In 1987, the midpoint of a broiler flock was 300,000 animals; by 2017, it had more than doubled, at 744,000 birds. Layers jumped from 117,839 to 1,200,000 birds, while the midpoint of a team of hogs increased stupendously in the same time period, from 1,200 animals to 51,300).

³³ *Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, THE WHITE HOUSE (Jan. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>.

³⁴ See Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV 1051, 1064 (1995) (Mega-conglomerates such as Smithfield, JBS, Perdue, Tyson, and Cal-Maine Foods).

³⁵ See *id.* at 1055.

³⁶ See generally, OH FREEDOM AFTER A WHILE (Steven John Ross et al. 1999) (While modern farming overall remains a predominantly White occupation, the practice of using workers for labor rather than their product or directly employing them is reminiscent of the eviction crisis in the mid-west during the 1930s that predominantly affected Black sharecroppers, and reflects a troubling trend of dehumanizing the agricultural workforce.).

³⁷ See Hamilton, *supra* note 34, at 1099.

³⁸ See *id.*

³⁹ Khan, *supra* note 27.

joined the contract model as well.⁴⁰ The efficiency of integration does result in lower, stable prices for consumers, and less variation in the ultimate product; however, independent farmers feel the result of the intense consolidation without gaining all of the benefits.⁴¹

Production contracts are slanted heavily in favor of the drafting integrators, and though they do provide price stability, there is less ability for farmers to force competition in sales.⁴² By obscuring the market through confidential, exclusive contacts, integrators keep individual farmers in the dark as to the true market value of their animals.⁴³ The animals themselves become a cog in this machine – the larger the chicken and the less feed used, the more money a farmer will be paid.⁴⁴ Integrators, however, create a zero-sum market; the total payout to all farmers contracting with an integrator remains static, and farmers compete to grab a larger percentage by maximizing their production.⁴⁵ Such a system is wonderful for efficiency, but does not incentivize farmers to prioritize animal welfare.⁴⁶

Complicating the difficulties for farmers is the high cost of infrastructure required to raise animals. Top chicken producers can gross nearly \$250,000 annually.⁴⁷ Not everyone, however, can be a top producer, and that gross does not account for construction loans, tools, repairs, and labor necessary to raise chickens, which can cost nearly a million dollars.⁴⁸ An average broiler farmer has between three and four poultry houses, each costing approximately \$140,000, with an estimated \$500,000 required to replace all the houses on a farm.⁴⁹ Farmers also cannot independently decide on the design of these structures; they must follow specifications detailed by the contracting company.⁵⁰

Farmers who get into the chicken business without understanding the expense or terms of the contracts may not have a recourse to get out, as loans often involve the farmer's land or house

⁴⁰ *Id.*

⁴¹ See Zimmerli, *supra* note 19, at 59-60, 66.

⁴² See *id.* at 59-60, 64-65.

⁴³ See *id.* at 69-70.

⁴⁴ See Dan Charles, *The System Supplying America's Chickens Pits Farmer Vs. Far*, NPR NEWS (Feb. 20, 2014).

⁴⁵ See *id.*

⁴⁶ See Zimmerli, *supra* note 19, at 66.

⁴⁷ Charles, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ Hamilton, *supra* note 17, at 65.

⁵⁰ See *id.* at 73.

as collateral.⁵¹ Those who stand up to integrators face considerable risk. Sixty-day growing contracts can be terminated unexpectedly, and integrators can punish farmers indirectly by only sending sickly chicks, poor feed, or by simply undercounting the chickens' weight when determining the payout.⁵²

Integrating companies are able to do this because the contracts reserve the right to determine the number and frequency of birds delivered to the producers, and also allow delay in removing the birds.⁵³ A contract may include over forty separate substantive legal clauses concerning obligations and payment schedules, as well as referencing additional documents that may bind a farmer regarding complaint and arbitrations of disputes.⁵⁴ The duties of the integrator are straightforward and limited (in the example of broilers, to assign and deliver the chicks, and to compensate the farmer for them), whereas the duties of the farmer are far more explicit and demanding.⁵⁵ Even farmers who keep their heads down are at the mercy of the controlling company that determines compensation and can unilaterally change the methods for calculating payment, regardless of what the contract said when it was signed.⁵⁶ Direct or indirect retaliation from integrators is common, and exacerbating the situation, the top earners in the industry, not the consumers, benefit from pitting producers against each other.⁵⁷

The pork industry faces the same issues. Per capita pork consumption has increased 86% since 1961, with some estimates predicting an additional increase in consumption by more than 50% by 2050.⁵⁸ This increase is sustained because of the supply shift inherent to CAFOs, wherein producers are able to generate more pork products at relatively stable prices by using fewer inputs.⁵⁹ Simultaneously, the top four hog-processing companies have increased their control over the market from 33% in 1976 to 66% in

⁵¹ See Khan, *supra* note 27.

⁵² *Id.*

⁵³ Hamilton, *supra* note 17, at 51-52.

⁵⁴ *Id.* at 47-48.

⁵⁵ See *id.* at 48-49.

⁵⁶ *Id.* at 50 (Under the auspices of health and safety, typical production contracts prohibit a farmer from keeping birds from more than one company simultaneously. Thus, even if a farmer is in a region not dominated by a monopsony, she will still be under the yoke of a single integrator).

⁵⁷ See Zimmerli, *supra* note 19, at 60.

⁵⁸ Kelly Zering, *Hog Farming: Past, Present, and Future: An Economist's View*, 34 J. LAND USE & ENV'T L. 313, 315 (2019).

⁵⁹ *Id.* at 316 (the word "sustained" may be an ironic word choice, since the CAFO system is not sustainable, largely because it is able to externalize many of its market inputs and non-market outputs, such as water and waste).

2021, while earning record gross profits.⁶⁰ Independent hog farmers have dwindled, though not to the same extent as in the chicken industry.⁶¹

The majority of hogs are produced in CAFOs.⁶² A little over 60% of this production is done through production contracts, up from approximately 35% in the mid-1990s.⁶³ Hog production contracts are typically structured differently than those for poultry; whereas a poultry contracts are paid on a per bird basis and influenced by ranking among other farmers, hog contracts are designed around the space of the facility regardless of whether the barn is full with pigs, with potential premiums for efficient feed but also a more standardized payment plan than chicken farmers are afforded.⁶⁴ Hog contracts also tend to be longer term, rather than year to year or flock to flock.⁶⁵ Generally U.S. pig farmers are in a slightly more favorable situation than chicken farmers, but independent farmers of both animals remain at risk of being squeezed as the market continues to consolidate, and production contracts steadily become the norm.

III. Playing Politics with Pork and Poultry

Just as legal protections for farm animals are lacking, farmers have little legal recourse against exploitative policies.

⁶⁰ Brian Deese, et al., *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, THE WHITE HOUSE (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/>.

⁶¹ Some rare exceptions, such as Niman Ranch, offer the independent farmers with whom it contracts a guaranteed premium over market price, as well as a floor price. This is, however, the exception rather than the rule, and Niman Ranch itself, a pork, beef, and lamb supplier, was purchased by poultry giant Perdue Farms in 2015, demonstrating that even seemingly independent and innovative contractors often fall under the same corporate umbrella. See Marilyn Noble, *When a Big Ag Conglomerate Buys an Iconic Niche Meat Company, Who Has to Change?*, THE COUNTER (Apr. 1, 2019, 8:13 AM), <https://thecounter.org/niman-ranch-perdue-farms-livestock-meat-animal-husbandry/> (Noble does note in this article that Perdue has committed to improved animal welfare conditions, better environmental stewardship, and has provided more stability for independent farmers contracting with Niman Ranch, all of which notes that the agricultural industry is complex and complicated, but that consolidation still places tremendous power and influence in the hands of a select few).

⁶² Michelle B Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig*, 37 VT. L. REV. 1079,1083 (2013).

⁶³ James M. MacDonald & Christopher Burns, *Marketing and Production Contracts are Widely Used in U.S. Agriculture*, AMBER WAVES, July 1, 2019.

⁶⁴ Nowlin, *supra* note 62.

⁶⁵ *Id.*

Although the Packers and Stockyards Act of 1921⁶⁶ ostensibly protects farmers from unfair competition and trade practices, its enforcement via USDA's Grain Inspection, Packers and Stockyards Administration ("GIPSA") is questionable.⁶⁷ The Biden Administration has acknowledged the inequities in the agricultural market, and noted how a select few corporations control well over half the market in poultry and pork.⁶⁸ USDA recently began work on new proposed rules to support enforcement of the Packers and Stockyards Act,⁶⁹ including better enforcement against unfair and deceptive practices and reforming the poultry grower tournament style rules.⁷⁰ In early 2022, President Biden announced that \$1B of the American Rescue Plan would be dedicated to curb consolidation and encourage competition in the livestock industry.⁷¹

In the past, however, industry interests have tended to prevail. When the Obama Administration introduced GIPSA regulations that would have prohibited retaliation for challenging production contracts, Congress pushed back with a rider on USDA's

⁶⁶ Packers and Stockyard Act of 1921, 85 Pub. L. No. 909, 72 Stat. 1749 (though this act has been amended or superseded with subsequent legislation several times, most recently on December 27, 2020).

⁶⁷ For example, agricultural co-operatives are exempt from many of the regulations that would otherwise apply from anti-trust laws because of the Capper-Volstead Act (P.L. 67-146.). While the intention of this act was to protect the rights of independent farmers, in modern agriculture the difference between co-operatives and mega corporations is negligible. See Dan Kaufman, *Is it Time to Break Up Big Ag?*, THE NEW YORKER, August 17, 2021.

⁶⁸ See THE WHITE HOUSE, *supra* note 33.

⁶⁹ In February 2022, USDA also released an anonymous complaint/tip website to report violations of the Packers and Stockyard Act. *Farmer Fairness*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/farmerfairness> (Last visited Oct. 13, 2022).

⁷⁰ Press Release, U.S. DEP'T OF AGRIC., USDA to begin Work to Strengthen Enforcement of the Packers and Stockyards Act (June 11, 2021), <https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act>; The Justice Department has recently joined USDA in announcing its commitment to ensure fair competition in agriculture, but these efforts are still in preliminary stages. See Press Release, U.S. DEP'T OF JUST. OFF. OF PUB. AFF., Justice Department and Agriculture Department Issue Shared Principles and Commitments to Protect Against Unfair and Anticompetitive Practices (Jan. 3, 2022), <https://www.justice.gov/opa/pr/justice-department-and-agriculture-department-issue-shared-principles-and-commitments-protect>.

⁷¹ Critics, however, argue that such investment is not large enough to shake up a system already rigged against small- and mid-level processors, and will instead distract from the real issue, which is scrutinizing the practice of the "Big Four," something that this administration and past ones have not achieved in practice. Jessica Fu, *Can \$1 Billion Really Fix a Meat Industry Dominated by Just Four Companies?* THE COUNTER (Jan. 5, 2022), <https://thecounter.org/big-four-meatpackers-antitrust-consolidation/>.

funding, effectively blocking the new regulations.⁷² Antitrust laws meant to protect against supermarket and food processing facility consolidation have largely gone unenforced.⁷³ And while returning Secretary of Agriculture Tom Vilsack has vociferously supported changes to the agriculture market, he has also been accused of allowing GIPSA to ignore enforcement of its own actions, and has been vilified as a supporter of industrial-scale farming.⁷⁴ Overall, anticompetitive behavior has not been effectively policed.⁷⁵ Although the current administration is addressing the inequities of the industrial agriculture system,⁷⁶ and bills have been introduced to limit consolidation,⁷⁷ real change is still pending.

IV. Who Ensures Farm Animal Welfare?

While farmers struggle under the production contract system, consumers increasingly demand better farm animal welfare standards.⁷⁸ The ambiguity between which animals are food versus which are friends differs between societies,⁷⁹ but the majority of Americans agree that even if farm animals are destined for dinner, they are entitled to higher care than the law generally provides.⁸⁰

⁷² *See id.*

⁷³ *See* Semuels, *supra* note 28.

⁷⁴ *See* Dan Kaufman, *supra* note 67.

⁷⁵ A federal grand jury recently returned an indictment against broiler chicken producer executives on counts of price fixing and rigging bids for broilers from 2012 – 2017. While it is perhaps refreshing to see legal action against unlawful collusion, such lawsuits do little to alleviate the economic struggles of farmers and consumers who suffered under price fixing schemes. *See* Press Release, U.S. DEP'T OF JUST. OFF. OF PUB. AFF., Senior Executives at Major Chicken Producers Indicted on Antitrust Charges (June 3, 2020) <https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges>.

⁷⁶ President Biden at least has acknowledged the difficulties of farmers, even if solutions are still forthcoming: “Consolidation in the agricultural industry is making it too hard for independent family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries. . . and concentrated market power in the channels for selling agricultural products.” Exec. Order No. 14036, 86 Fed. Reg. 36,987, (July 9, 2021).

⁷⁷ The bill did not receive a single vote and was effectively dead on arrival. *See, e.g.*, Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2018, H.R. 6800, 115th Cong. (2018).

⁷⁸ *New Research Finds Vast Majority of Americans Concerned about Farm Animal Welfare, Confused by Food Labels and Willing to Pay More for Better Treatment*, ASPCA (July 7, 2016), <https://www.aspc.org/about-us/press-releases/new-research-finds-vast-majority-americans-concerned-about-farm-animal>.

⁷⁹ Caitlin Dewey, *Congress Doesn't Want You to Eat Your Dog or Cat*, WASH. POST, Apr. 24, 2018.

⁸⁰ A 2018 poll indicated that 67% of consumers are concerned about farm animal welfare, consistent across genders, races, and geographic location. *ASPCA Surveys*, ASPCA, <https://www.aspc.org/shopwithyourheart/business-and-farmer-resources/aspc-surveys> (last visited Sept. 28, 2022); *See, e.g.*, Fan Wenjiao, et al.,

Consumer opinions about food are significant; egg consumption alone represents \$14.2 billion annually in consumer spending.⁸¹ Pushed to identify whom is responsible for ensuring animal welfare, and most consumers hold distributors accountable, but with farmers a close second.⁸²

Many people, however, do not understand America's food system.⁸³ While certain farmers may want to respond to public demand, the economic limitations of their contracts make implementing costly infrastructure improvements difficult, and belies the public's perception of what an independent farm can do.⁸⁴ Complicating the decision to invest in animal welfare is the ambiguity around whether consumers are willing to pay for it; some consumers will pay more for products with enhanced animal welfare,⁸⁵ and even support the idea of the federal government

TBARS Predictive Models of Pork Sausages Stored at Different Temperatures, 96 MEAT SCI. 442, 443 (Jan. 2014) (69% of consumers stating animal welfare is somewhat, very, or extremely important); *Foster Farms First Major Poultry Producer in the West to Earn Humane Certification from American Humane Association™; Meets Increasing Consumer Demand for Humanely Raised Foods*, PR NEWSWIRE (Mar. 11, 2013), <https://www.prnewswire.com/news-releases/foster-farms-first-major-poultry-producer-in-the-west-to-earn-humane-certification-from-american-humane-association--meets-increasing-consumer-demand-for-humanely-raised-foods-197011261.html> (74% of consumers agree that they would like large producers to raise animals humanely).

⁸¹ Yan Heng, et al., *Consumer Attitudes Toward Farm-Animal Welfare: The Case of Laying Hens*, 38 J. OF AGRIC. & RES. ECON. 418, 419 (2013).

⁸² See World Animal Protection, *New Research Shows Major Global Supermarket Chains at Risk of Losing Customers over Poor Pig Welfare*, PR NEWSWIRE (Apr. 17, 2018), <https://www.prnewswire.com/news-releases/new-research-shows-major-global-supermarket-chains-at-risk-of-losing-customers-over-poor-pig-welfare-300631690.html> (89% of US consumers held supermarkets responsible for providing ethically raised products); *id.* (In one study, participants were asked to allocate 100 points across four groups (food companies, farmers, grocery stores, and restaurants), assigning points based on which group is responsible for providing information and transparency. Averaging the responses, respondents overwhelmingly attributed responsibility for animal well-being to food companies (49%), with farmers second (30%). In the same study, 47% rated humane treatment of farm animals as a high-level concern. On a rating of 0-10, 47% gave humane treatment a rating between 8-10. Comparatively, 62% gave food safety a similar rating).

⁸³ See Ronald Holden, *Do Not Underestimate the Ignorance of The American Eater*, FORBES (Jun. 15, 2017), <https://www.forbes.com/sites/ronaldholden/2017/06/15/do-not-underestimate-the-ignorance-of-the-american-eater/?sh=692274c37645>.

⁸⁴ World Animal Protection, *supra* note 82. (When asked if family farms would put their interests over consumer interests, 22% disagreed, and only 28% strongly agreed. Comparatively, when asked the same question about commercial farms, only 6% disagreed, and 50% strongly agreed. It is unclear from the study, however, if definitions were provided, or if participants relied on their own perceptions of "family farm" versus "commercial farms").

⁸⁵ See Heng, *supra* note 81.

requiring the level of farm animal care to be displayed on labels,⁸⁶ while many already find welfare claims on labels to be overly confusing.⁸⁷ In sum, while consumers may favor improved animal welfare, they are confused about how to get it, from whom to demand it, and whether it is worth the cost.

As the debate over animal welfare continues, some in the private sector have made a commitment to higher welfare standards in response to consumer demands.⁸⁸ Cargill, Smithfield, and Hormel have all made promises to phase out gestation crates and convert to group pens, and to make the same requirements of their contracted producers.⁸⁹ But producers have argued that more space for their pigs, combined with infrastructure costs, will impact their ability to be profitable, which means more cost eventually passed onto consumers.⁹⁰

The push for better welfare standards from the private sector would be moot if there were stronger federal and state laws, but there are not. The Animal Welfare Act, the primary federal legislation aimed at animal protection, is extremely limited; it exempts farm animals from regulation and does not define chickens as “animals.”⁹¹ Specific attention is given to the transportation of farm animals under the “28 Hour Law,” but adherence to and enforcement of this

⁸⁶ See F. BAILEY NORWOOD & JAYSON L. LUSK, *COMPASSION BY THE POUND: THE ECONOMICS OF FARM ANIMAL WELFARE* 341-43 (Oxford Univ. Press 2011).

⁸⁷ Jane Black, *How One Company is Trying to Make 'Pasture-Raised' the New Egg Standard*, WASH. POST (Apr. 7, 2015) https://www.washingtonpost.com/lifestyle/food/how-one-company-is-trying-to-make-pasture-raised-the-new-egg-standard/2015/04/06/5428bf22-d275-11e4-a62f-ee745911a4ff_story.html (Less than half of consumers can identify the difference between “cage free” and “free range”); see Alice Mitchell, *Over 60 Per Cent of Consumers Find Chicken Labels Confusing*, THE POULTRY SITE, (Mar. 16, 2016) <https://www.thepoultrysite.com/news/2016/03/over-60-per-cent-of-consumers-find-chicken-labels-confusing> (Between two-thirds to three-fourths of consumers are regularly confused by labels, believing them to be misleading or meaningless); see also *US Chicken Consumption: Presentation to Chicken Marketing Summit*, NAT'L CHICKEN COUNS. (Jul. 18, 2017), https://www.nationalchickencouncil.org/wp-content/uploads/2017/07/US3002925_NCC_Consumption_Presentation_Final_170713.pdf; see Press Release, NEWSWIRE, *USDA Natural Label Called Meaningless and Misleading to Consumers* (Jan. 11, 2007) (cited in *Consumer Perceptions of Farm Animal Welfare*, ANIMAL WELFARE INST. https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf (last visited Oct. 15, 2022)).

⁸⁸ See Mike Hughlett, *Consumer pressure leads Cargill to give pigs more room*, STAR TRIBUNE (June 8, 2014) <https://www.startribune.com/consumer-pressure-leads-cargill-to-give-pigs-more-room/262257761/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 7 U.S.C. § 2132(g).

law is practically non-existent.⁹² Once animals arrive at a slaughter facility, their deaths are regulated by the Humane Slaughter Act, but again, this law does not apply to chickens.⁹³

Some state laws provide better protection, but these laws vary, and none fully ensure welfare.⁹⁴ All states have animal anti-cruelty statutes, but the animals included under these laws may not include farm animals.⁹⁵ Even if farm animals are protected, practices that are deemed “routine,” “customary,” or “normal animal husbandry practices” are exempt from regulation.⁹⁶ Attempts to change laws through bills have met opposition from industry and a lack of political salience, similar to attempts at the federal level to protect farmers from large integrators.⁹⁷ With legislatures unable or unwilling to advance animal welfare, advocates have turned to petitioning the people directly for change, banking that the growing prioritization of animal welfare will translate into long-lacking housing and treatment reforms.

V. State Ballot Initiatives in Massachusetts and California

Facing similar legislative obstacles at both the federal and state levels, advocate groups have embraced state ballot initiatives to work around capitol gridlock.⁹⁸ A ballot initiative is unique in that it bypasses the normal process of introducing a bill, working through subcommittees, and having to negotiate votes through both houses.⁹⁹ Rather, a ballot initiative puts the matter directly to the people of the

⁹² 49 U.S. CODE § 80502 (The 28 Hour Law was passed in 1871, originally intended for rail transportation, and did not even apply to truck transportation until 2006. The law provides that transported animals must be allowed five hours of rest for every twenty-eight hours of transportation, but there are numerous loopholes. Most significantly, there are no checkpoints or record requirements to verify if the law is being followed, and no agency (USDA, DOT, DOJ) has the means or incentive to enforce these requirements).

⁹³ See 7 U.S.C. § 1902.

⁹⁴ See *States' Animal Cruelty Statutes*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/state-compilations/animal-cruelty> (last visited Sept. 29, 2022).

⁹⁵ See *id.*

⁹⁶ *Legal Prots. for Animals on Farms*, ANIMAL WELFARE INST., <https://awionline.org/content/farm-animal-legal-protections> (last visited September 22, 2022).

⁹⁷ See, e.g., Assemb. B. 732, 2003-2004 Reg. Sess. (Cal. 2004); Assemb. B. 594, 2007-2008 Reg. Sess. (Cal. 2007) (which attempted to address confinement crates and similar issues reflected in Prop 2).

⁹⁸ See Dyck, *supra* note 9.

⁹⁹ Marvin Krislov & Daniel M. Katz, *Taking State Consts. Seriously*, 17 CORNELL J.L. PUB. POL'Y 295, 303 (2008).

state, and can be passed through a simple voter majority.¹⁰⁰ Advocates have used this path increasingly since 1990.¹⁰¹ Of the twenty-four states that permit ballot initiatives, only California and Arizona require voter approval for legislators to significantly change or repeal citizen-initiated state statutes, and only California prohibits the legislature from making any changes without a citizen vote.¹⁰² As such, California is a unique setting in which to evaluate the effectiveness of ballot initiatives.

Before turning to California, however, Massachusetts's recent lawmaking should be considered. Though it has not received as much press as the laws in the Golden State,¹⁰³ the Bay State has seen similar farm animal welfare initiatives pass via ballot initiative.¹⁰⁴ In 2016, Massachusetts became the second state, alongside California, to use a ballot question to ban the sale of eggs raised in a "cruel manner," known as Question 3.¹⁰⁵ The debate surrounding Question 3 focused on its potential price impact.¹⁰⁶

¹⁰⁰ *Id.* at 316.

¹⁰¹ *Ballot Measure/Initiative/Referendum Hist. – Animal Prot. Issues*, HUMANE Soc'Y U.S., <https://www.humanesociety.org/sites/default/files/docs/ballot-initiatives-chart.pdf> (last visited September 26, 2022).

¹⁰² *Legislative Alteration*, BALLOTPEDIA, https://ballotpedia.org/Legislative_alteration (last visited September 26, 2022).

¹⁰³ *See California Summary*, BRITANNICA, [https://www.britannica.com/summary/California-state#:~:text=Population%3A%20\(2020\)%2039%2C538%2C223,400%20km%20east%20to%20west](https://www.britannica.com/summary/California-state#:~:text=Population%3A%20(2020)%2039%2C538%2C223,400%20km%20east%20to%20west) (last visited September 26, 2022) (California represents approximately 12% of the U.S. total population, and has the largest economy of any state, which would account for its larger role in the national conversation).

¹⁰⁴ *Laws Governing the Initiative Process in Massachusetts*, BALLOTPEDIA, https://ballotpedia.org/Laws_governing_the_initiative_process_in_Massachusetts (last visited September 26, 2022) (Massachusetts uses an indirect initiative process, which requires a certain number of signatures to place a measure on the ballot. The legislature, however, can first consider adopting a similar law. If the legislature does not do so, then the measure goes to the ballot. The implementation of the ballot language, however, can be altered slightly before passage of the ultimate law. This distinction is important, as it gives Massachusetts more flexibility when it comes to implementing the will of the voters).

¹⁰⁵ *Massachusetts Minimum Size Requirements for Farm Animals Containment, Question 3 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment_Question_3_\(2016\)](https://ballotpedia.org/Massachusetts_Minimum_Size_Requirements_for_Farm_Animal_Containment_Question_3_(2016)) (last visited Oct. 15, 2022) (a "cruel manner" is defined as "(i) a breeding pig in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs or turning around freely; or (ii) an egg laying-hen in an enclosure other than a cage-free housing system' or a housing system that doesn't meet the standards established by the law").

¹⁰⁶ *Lauren Dezenski, Both Sides of Question 3 Agree Egg Prices Will Increase*, POLITICO (Sept. 20, 2016, 6:09 PM), <https://www.politico.com/states/massachusetts/story/2016/09/both-sides-of-question-3-agree-egg-prices-will-increase-105644>.

Advocates touted the measure's increased animal welfare and a positive impact on food safety, while critics decried the potential increased prices for Massachusetts residents, particularly low-income residents.¹⁰⁷ The summary of the initiative explained to voters that the law would "prohibit any farm owner or operator from knowingly confining any breeding pig, calf raised for veal, or egg-laying hen in a way that prevents the animal from lying down, standing up, fully extending its limbs, or turning around freely."¹⁰⁸ Question 3 prohibits the selling of any animal product derived from animals raised in violation of these standards, with exceptions for transportation, veterinarian treatment, 4-H programs, slaughter, and certain other reasons.¹⁰⁹ The measure passed by a large margin, 77.6% in favor versus 22.4% against.¹¹⁰ The law is slated to take effect in August 2022, though with certain delays and modifications.¹¹¹

Within the last thirteen years, however, national attention has focused on California's state ballot initiatives, specifically regarding Proposition 2 and Proposition 12. California is an epicenter for animal welfare because of its distinct ballot initiative process and its farm animal production.¹¹² Over 40 million animals are raised commercially in California.¹¹³ It is regularly a top ten producer of chicken, eggs, cattle, calves, and milk, with over 25.5 million acres devoted to farming and ranching, and a corresponding annual economy from these products near \$340 billion.¹¹⁴ Being such an economic goliath, changes to animal production in California have the potential to send ripples across American agriculture, and as such both Proposition 2 and Proposition 12 received significant opposition from industry leaders and continued legal challenges after their adoption.

Proposition 2 was developed by HSUS, and was approved by voters in 2008,¹¹⁵ with a phase-in period allowing producers to

¹⁰⁷ *Id.*

¹⁰⁸ *Massachusetts Minimum Size Requirements for Farm Animals Containment, Question 3 (2016)*, *supra* note 105.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See infra* Part VI.

¹¹² *See Legislative Alteration*, *supra* note 102.

¹¹³ *Protect California's Animal Agriculture: Producer's Role in Foreign Animal Disease Prevention*, CAL. DEP'T OF FOOD & AGRIC. (May 2016), https://www.cdffa.ca.gov/ahfs/Animal_Health/pdfs/Protect_CA_Animal_Ag.pdf.

¹¹⁴ *Id.*

¹¹⁵ California's initiatives bookend Question 3, creating a unique timeline in which advocates and opponents in both states drew from each other's experiences. *California Proposition 2, Farm Animal Confinement Initiative (2008)*,

transition to new housing systems by 2015.¹¹⁶ The measure amended the space requirements for pregnant pigs, veal calves, and layers.¹¹⁷ The measure did not provide specific dimensions for prohibited confinement, but was based on the different animals' behaviors, ambiguity that would eventually lead to better definitions in Proposition 12.¹¹⁸ The official California voter guide for 2008 explained the initiative as requiring "calves raised for veal, egg-laying hens and pregnant pigs be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs, and turn around freely" with exceptions for "transportation, rodeos, fairs, 4-H programs, lawful slaughter, research and veterinary purposes."¹¹⁹ The voter guide estimated a potential of several million dollars lost annually in farm tax revenue.¹²⁰ Specifically, the fiscal analysis stated, "Compared to current practice most commonly used by California farmers in affected industries, this measure would require more space and/or alternative methods. . . As a result, this measure would increase production costs for some of these farmers."¹²¹ The guide noted that "higher production costs cause some famers to exit the business, or otherwise reduce overall production and profitability."¹²²

After several legal challenges, advocates returned to the California ballot in 2018 with Proposition 12.¹²³ The measure passed with 62.66% of the vote.¹²⁴ Proposition 12 differed from Proposition 2 in several ways: Rather than restricting animal movement based on

BALLOTPEDIA,

[https://ballotpedia.org/California_Proposition_2,_Farm_Animal_Confinement_Initiative_\(2008\)](https://ballotpedia.org/California_Proposition_2,_Farm_Animal_Confinement_Initiative_(2008)) (last visited Oct. 15, 2022).

¹¹⁶ *Proposition 2: Treatment of Farm Animals*, LEGIS. ANALYST'S OFF. (July 17, 2008), https://lao.ca.gov/ballot/2008/2_11_2008.aspx.

¹¹⁷ Prevention of Cruelty to Farm Animals Act, CAL. HEALTH & SAFETY CODE § 25990(b) (Deering 2022) (amended 2018).

¹¹⁸ *Id.* § 25991(c) (e).

¹¹⁹ UC Hastings Coll. of L., *supra* note 10.

¹²⁰ *Id.* at 17.

¹²¹ *Id.*

¹²² *Id.*

¹²³ A full accounting of the Constitutional challenges levied against Proposition 2 would be too exhaustive for the scope of this paper, though some of the same theories raised against Proposition 2 were revived in the attacks against Proposition 12, and are discussed herein. Additionally, several excellent articles have already covered the legal battles surrounding these initiatives. *See, e.g.*, Sean M. Murphy, *The Chicken or the Egg: A Look at Regulating Egg-Laying Hens Through Statewide Ballot Initiatives*, 22 DRAKE J. AGRIC. L. 319, 322 (2017).

¹²⁴ Kelsey Piper, *California and Florida Both Pass Animal Welfare Laws by a Landslide*, VOX (Nov 7, 2018, 2:38 PM), <https://www.vox.com/future-perfect/2018/11/7/18071246/midterms-amendment-13-proposition-12-california-florida-animal-welfare>.

species' behaviors, it specified the number of square feet required for veal calves, breeding pigs, and layers;¹²⁵ additionally, Proposition 12 banned the sale in California of veal, uncooked pork, and shelled and liquid eggs (Proposition 2 only covered shelled eggs) raised in conditions that violate these space requirements.¹²⁶ Certain aspects of the law took effect in 2020, with the rest of the confinement bans, particularly concerning hog confinement, starting on January 1, 2022.¹²⁷

Not only does this measure affect animals raised in California, but it also prevents integrators from other states from selling to California's 39 million residents, who account for approximately 12% of the nation's egg consumption, and 14% of pork consumption.¹²⁸ Proposition 12 therefore has the potential to affect nearly 40 million layers annually,¹²⁹ and could theoretically force a pig confinement revolution across the nation.¹³⁰ Animal welfare advocates have rightfully claimed the measures as a significant win for farm animals that have long suffered without strong state or federal protections, and have noted that these victories reflect the effectiveness of ballot initiatives. Yet elections have consequences, and the successes of Proposition 2 and Proposition 12 have been met with industry challenges and backlash, particularly from the pork industry.

VI. The Bacon Backlash

At the advent of 2022, much of the debate around Proposition 12 shifted to pork products.¹³¹ While the egg market may be larger, pork has a considerable footprint in the food market.¹³²

¹²⁵ Emma Therrien, *2018 State Legislative Review*, 25 ANIMAL L. 447, 457 (2019).

¹²⁶ Prevention of Cruelty to Farm Animals Act § 25990(b).

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ The combined effect of these measures and additional state laws has been a reduction of battery cage use by 26% from 2007 to 2021. *See* Samara Mendez, *US Egg Production Data Set*, THE HUMANE LEAGUE at 5 (Aug. 12, 2019), <https://thehumaneleague.org/article/E008R01-us-egg-production-data>.

¹³⁰ *See* Kenny Torrella, *The Fight over Cage-Free Eggs and Bacon in California, Explained*, VOX (Aug. 10, 2021, 8:10 AM), <https://www.vox.com/future-perfect/22576044/prop-12-california-eggs-pork-bacon-veal-animal-welfare-law-gestation-crates-battery-cages>.

¹³¹ *See, e.g.*, Michael Hiltzik, *Pork Producers Are in Full Squeal Over California's Farm Animal Rules. You Should Tune Them Out*, L.A. TIMES (Feb. 23, 2022, 6:00 AM), <https://www.latimes.com/business/story/2022-02-23/pork-producers-are-in-full-squeal-over-californias-farm-animal-rules-tune-them-out>.

¹³² *The Pork Industry*, NATIONAL PORK PRODUCERS COUN., <https://nppc.org/the-pork-industry/> (last visited Oct. 15) (estimating \$28.02 billion of gross output in the pork industry; NASS, POULTRY – PRODUCTION AND VALUE, 2020 SUMMARY 5

Bacon and other products derived from pigs are romanticized in restaurant and food advertising to an almost absurd degree, placing bacon on a pedestal in the public consciousness.¹³³ It thus comes as no surprise that pork advocates have joined the egg industry in decrying legislation aimed at increasing the size of confinement areas, particularly Proposition 12.¹³⁴ The remaining requirements under Proposition 12 took effect on January 1, 2022.¹³⁵ The National Pork Producers Council (NPPC) immediately voiced concern over anticipated devastating effects of the law, including pork shortages and skyrocketing bacon prices.¹³⁶ NPPC assistant vice president Michael Formica declared that only 4-5% of U.S. pork production is currently compliant with Proposition 12 requirements.¹³⁷

The concern that Proposition 12 will shorten national pork supplies has echoed around the country.¹³⁸ Consumers worry that market prices will balloon at a time when prices are already high due to U.S. inflation in 2021-2022.¹³⁹ While advocates on either side overstate or downplay the potential economic impact of California's law, the true cost likely lies somewhere in the middle, and may cost consumers a few dollars more per year for similar purchases.¹⁴⁰ Other

(USDA 2021) (estimating the total value of chicken sales to be approximately \$35.5 billion).

¹³³ See Maria Godoy, *Does Bacon Really Make Everything Better? Here's The Math*, THE SALT, (Oct. 25, 2013, 10:59 AM), <https://www.npr.org/sections/thesalt/2013/10/25/240556687/does-bacon-really-make-everything-better-here-s-the-math>.

¹³⁴ Hiltzik, *supra* note 131.

¹³⁵ Prevention of Cruelty to Farm Animals Act § 25990(e).

¹³⁶ Jenna Hoffman, *Prop 12: A Different Kind of California Wildfire*, FARM J., (Jan. 3, 2022) <https://www.agweb.com/news/policy/politics/prop-12-different-kind-california-wildfire> (The NPPC argues that Californians were misled by the language of Proposition 12, and that if they understood the potential effects to market prices, they would not have voted for it, though this reasoning does not comport with the voter's guide that did cover potential economic effects).

¹³⁷ *Id.*

¹³⁸ Hiltzik, *supra* note 131, at 17.

¹³⁹ Jackie Davalos et al., *Instacart's CEO Is 'Worried' About Inflation of Food Prices*, BLOOMBERG (Mar. 17, 2022, 4:14 PM), <https://www.bloomberg.com/news/articles/2022-03-16/instacart-ceo-is-worried-about-inflation-of-food-prices?leadSource=verify%20wall>.

¹⁴⁰ Richard Sexton & Daniel Sumner, *California's animal welfare law caused hysteria on both sides — here are the real impacts*, THE HILL (Aug. 20, 2021, 3:00 PM), <https://thehill.com/opinion/energy-environment/568762-californias-animal-welfare-law-caused-hysteria-on-both-sides-here> (“Our economic study finds that the price of the fresh pork products covered under Proposition 12 (about 60 percent of the pork on a hog) will rise by about 8 percent in California. Prices of cooked pork products or pork mixed with other ingredients are not covered by the law and will be largely unaffected. Economic losses from higher prices and lower consumption are about \$8 [per year] per Californian”); see also Natasha Daly, *California voted to improve pig welfare. The pork industry is facing a reckoning*,

estimates show Proposition 12-compliant pork products will rise on average \$0.21/lb., with uncooked cuts of pork in California rising 7.7%, or about \$0.25/lb.¹⁴¹ While those are still significant increases, particularly for working class families, inflation unrelated to Proposition 12 increased the price of bacon 21% between November 2020 and November 2021.¹⁴² While rising costs may price out certain buyers, at least temporarily, such increases are not unprecedented, and may be within the range of what consumers are willing to pay for enhanced welfare standards.¹⁴³

Other concerns relate to what compliance with Proposition 12 actually looks like. Thus far the trend for pig farmers has been to adjust to group pens, creating a larger space with several animals, rather than increase the size of preexisting individual pens.¹⁴⁴ Some simply use existing stalls and reduce the number of animals housed.¹⁴⁵ Group pens have their own welfare concerns. Sows can be aggressive, and their natural tendencies in group confinement areas could lead to more fighting, and actually decrease the welfare and safety of the sows.¹⁴⁶ Other pork advocates have questioned the risk of food-borne illness, arguing that the interaction between sows in larger pens will increase the risk of spreading infectious diseases.¹⁴⁷ Industry has raised other economic questions, such as how and at what cost processing operations will keep pork destined for

NAT'L GEOGRAPHIC (Aug. 13, 2021), <https://www.nationalgeographic.com/animals/article/california-voted-to-improve-pig-welfare-the-pork-industry-is-facing-a-reckoning> (stating “[b]ut the California Department of Food and Agriculture estimates that the price for pork and veal per Californian will go up by only \$10 per year.”).

¹⁴¹ Sexton & Sumner, *supra* note 140, at 18.

¹⁴² Taylor DesOrmeau, *Gas, Used Cars, Pork Chops: Household items push inflation to highest levels since 1982*, MLIVE.COM (Dec. 28, 2021, 10:54 AM), <https://www.mlive.com/public-interest/2021/12/gas-used-cars-pork-chops-household-items-push-inflation-to-highest-levels-since-1982.html>.

¹⁴³ See generally *infra* Section IV.

¹⁴⁴ Sexton & Sumner, *supra* note 140.

¹⁴⁵ *Id.* (Prop 12 will require 24 square feet per breeding sow, but. . . since the law applies to mother sows, not to the hogs actually grown for meat, less than 1 percent of America’s hogs are impacted. . . about 30 percent of breeding sows are already housed in group pens which generally have about 20 square feet each — not enough to meet the 24-foot requirement. These farms will remove a few sows per group pen in order to comply with Prop 12 rule.).

¹⁴⁶ Hoffman, *supra* note 136, at 18; see also Farm Journal, *DC Signal to Noise: The Price of Prop 12*, YOUTUBE (Mar. 2, 2022), <https://www.youtube.com/watch?v=jdRtnJDS6zw&list=PLvTM5d7T516mUXIEh8XF7pMFRMARFwwjB&index=27>.

¹⁴⁷ See Jim Wiesemeyer, *California Proposition 12 Took Effect Jan. 1, But Supreme Court Action Ahead*, PORK BUS. (Jan. 2, 2022), <https://www.porkbusiness.com/news/ag-policy/california-proposition-12-took-effect-jan-1-supreme-court-action-ahead>.

California separate from pork for the national market, as well as compliance with labeling and packaging.¹⁴⁸

While these queries remain pending, others continue to question if these measures are worth the cost.¹⁴⁹ If Proposition 12 will indeed force compliance with pork producers nationwide, the costs to infrastructure improvement will be significant, and will likely be passed on to consumers.¹⁵⁰ Even if industry can segregate pigs destined for California, the state is still looking at a \$320M economic loss for what is to some a minimal animal welfare improvement.¹⁵¹ PETA notably did not support Proposition 12, believing that it did not go far enough to end animal suffering.¹⁵² There are inherent limitations to allowing natural animal behavior in a system that still considers the creatures to be commodities, and the balance between safety in the name of animal welfare versus safety for the sake of efficiency is difficult to find.

Perhaps the most legally pressing concern voiced by the NPPC is that the California Department of Food and Agriculture (CDFA) has yet to promulgate regulations defining the scope of the products and transactions covered by the law, including certification schemes, recordkeeping and documentation, and registration requirements.¹⁵³ Producers are concerned that even if they are able and willing to make infrastructure investments, they lack direction on what the regulations will require.¹⁵⁴ Massachusetts is facing a similar quagmire. In late 2021, Massachusetts Gov. Charlie Baker signed Question 3 into law.¹⁵⁵ At the same time, however, the governor signed S-2603, which delayed the implementation of Question 3 until August 15, 2022.¹⁵⁶ Lawmakers claimed that the delay was necessary to avoid an egg and pork shortage and a spike in prices for both, while animal advocates such as the Humane

¹⁴⁸ *See id.*

¹⁴⁹ *See generally* Reiman, *supra* note 13, at 2.

¹⁵⁰ Torella, *supra* note 130, at 17.

¹⁵¹ Hoffman, *supra* note 136, at 18.

¹⁵² Reiman, *supra* note 13, at 2.

¹⁵³ Wiesemeyer, *supra* note 147, at 19.

¹⁵⁴ *See generally* Daly, *supra* note 140, at 18.

¹⁵⁵ *Massachusetts Delays Effective Date of Question 3*, NAT'L PORK PRODUCERS COUNS. (Dec. 22, 2022), <https://nppc.org/massachusetts-delays-effective-date-of-question-3/>.

¹⁵⁶ *Id.* (Additionally, the state's Department of Agricultural Resources is compelled to consult with the state's attorney general to write rules and regulations for the law by mid-2022).

Farming Association argued that the law violates the will of the voters and bows to business interests.¹⁵⁷

The change in the law highlights the challenges and difference of voter initiatives. Unlike in California, the Massachusetts legislature can adapt the text of Question 3 to accommodate what some see as a logistical issue.¹⁵⁸ This begs the question, to what extent can the legislature adjust the law? At what point does altering a law to ease transition, or to reflect changes in best scientific practices, represent an unlawful change to the will of the people, or a practical application of their intent?¹⁵⁹

VII. Challenging the Commerce Clause

Outside of the questions regarding regulations and economic impact, the largest question surrounding the welfare initiatives is whether they unconstitutionally violated the Commerce Clause.¹⁶⁰ Several detractors of Proposition 12 claim that the law violates the Dormant Commerce Clause because it disrupts interstate trade by forcing out-of-state producers to change their operations – in essence, that California law is unconstitutionally controlling industry in other states.¹⁶¹ Protectionist measures, such as laws that attempt to help in-state business at the expense of interstate commerce, are

¹⁵⁷ Chris Lisinski, *Mass. Legislature passes animal welfare law changes, set to ease egg supply fears*, GBH (Dec. 20, 2021), <https://www.wgbh.org/news/politics/2021/12/20/mass-legislature-passes-animal-welfare-law-changes-set-to-ease-egg-supply-fears>.

¹⁵⁸ *Laws Governing the Initiative Process in Massachusetts*, BALLOTPEDIA, https://ballotpedia.org/Laws_governing_the_initiative_process_in_Massachusetts (last visited Oct. 16, 2022).

¹⁵⁹ Consider that voters approved a measure requiring chickens and pigs to be allowed to freely turn around and have certain enrichments. In the original ballot question, this meant 1.5 square feet of “usable floor space” per hen. Advocates from both sides of the debate, however, believe that industry practices have changed in recent years. Several egg producers now use confinement measures for hens that have an aviary system, which allows more vertical space, but reduces floor space to one square foot. Would such a system still be within the intent of the law? Depending on the state and statute, some flexibility in lawmaking may be advantageous. *See*, Sarah J. Morath, *Private Governance and Animal Welfare*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 21, 24, 31 (2018).

¹⁶⁰As the rulings to the challenges to all three measures are somewhat similar, for brevity the focus will be on challenges to Proposition 12, as it is more timely.

¹⁶¹ The Dormant Commerce Clause does not actually appear in the text of the Constitution but has long been inferred from the Commerce Clause. Simply stated, while the Commerce Clause positively grants Congress the power to regulate commerce, the Dormant Commerce Clause negatively restricts states from passing laws that grant protection or advantage to in-state producers, and from laws that discriminate or unlawfully burden interstate or international commerce. *See*, e.g. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); U.S. CONST. art. 1, § 8, cl. 1.

generally prohibited by the Dormant Commerce Clause.¹⁶² Conversely, states are permitted to pass laws that promote health and safety of its citizens under its police powers that only incidentally impact interstate commerce.¹⁶³ Generally, states will permit a law that “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental ... unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁶⁴

It is against this backdrop that the Ninth Circuit denied industry’s challenge against Proposition 12. In *Nat’l Pork Producers Council v. Ross*,¹⁶⁵ the NPPC and American Farm Bureau Federation argued that because California does not produce nearly as much pork as it consumes, the impact of this law falls unfairly on out of state producers trying to sell in California.¹⁶⁶ The Ninth Circuit held that although Proposition 12 would have an impact on a national industry, such impact did not render California’s law impermissibly extraterritorial.¹⁶⁷ Most critically, the court held that the cost increases to the market and customers were not a substantial burden to interstate commerce, and thus are not impermissible under the Dormant Commerce Clause:¹⁶⁸

Even if producers will need to adopt a more costly method of production to comply with Proposition 12, such increased costs do not constitute a substantial burden on interstate commerce. . . Nor do higher costs to consumers

¹⁶² *Id.*

¹⁶³ Jessica Berch, *If You Don't Have a Cow (or Chicken or Pig), You Can't Call It Meat: Weaponizing the Dormant Commerce Clause to Strike Down Anti-Animal-Welfare Legislation*. 21 UTAH L. REV. 73, 79 (2021).

¹⁶⁴ Pike, 397 U.S. at 142; Berch, *supra* note 163 at 82. (Laws that neutrally apply to a state purpose, such as health, are reviewed under a rational-basis scrutiny, whereas anti-protectionist laws must be reviewed under strict scrutiny. “Because of the interconnected web of commerce, many state laws - maybe most or even all - affect interstate markets in some manner, and so in assessing whether strict scrutiny or lenient balancing applies, courts consider both the effect of the law (whether the law discriminates against out-of-state business in favor of in-state interests) and its purpose (the reasons prompting the enacting state to pass the law)”).

¹⁶⁵ *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1025-1026, (9th Cir. 2021).

¹⁶⁶ Allysia Finley, *California Is Making Bacon More Expensive*, THE WALL ST. J., Dec. 30, 2021. (Californians consume approximately 13% of nationwide pork production, while California itself only produces 0.1% of U.S. pork products.); CAL. DEP’T OF FOOD & AGRIC., *California Agricultural Statistics Review 2019-2020* (Sept. 21, 2022) (California’s hog and pig production is valued near \$30,000,000 annually. Comparatively, the value of its cattle production, which is its largest agricultural product, is almost 100 times larger).

¹⁶⁷ *Nat’l Pork Producers Council*, 6 F.4th at 1031-1032, (2021).

¹⁶⁸ *Id.*

qualify as a substantial burden on interstate commerce. . . Even though the Council has plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the pork production industry nationwide, it has not stated a violation of the dormant Commerce Clause under our existing precedent.¹⁶⁹

In late March 2022, the Supreme Court granted the petition of certiorari to review the Ninth Circuit’s decision.¹⁷⁰

VIII. Ballot Initiatives and the Democratic Process

As farm animal welfare advocates have increased their use of ballot initiatives in recent years, their industry opponents have been just as savvy navigating the legal landscape.¹⁷¹ As organizations like HSUS declare victory at the polls in California and Massachusetts, more traditionally conservative states have pushed to restrict the ability of national NGOs to effect agricultural change using the same tactics that produced Proposition 12.¹⁷² States have wrestled with restrictions on ballot initiatives, though the types of restrictions and reasonings vary depending on the state or reviewing circuit court. Though ballot restrictions are not exclusive to debates over farm animal welfare, the probability of such reactions in this realm loom, and could increase to counter animal welfare successes.

Returning to the Bay State, Massachusetts restricts ballot initiatives in several arenas deemed too critical to be influenced by public referendum, with the majority of these restrictions applying to certain crucial government functions.¹⁷³ Massachusetts’s ability to

¹⁶⁹ *Id.* at 1033-34.

¹⁷⁰ David G. Savage, *Supreme Court agrees to hear pork producers’ challenge to California animal anti-cruelty law*, L.A. TIMES, March 28, 2022.

¹⁷¹ See, e.g., *Initiative & Referendum Inst. v. Walker*, 450 F. 3d 1082, at 1085 (10th Cir., 2006).

¹⁷² *Id.*; Idaho recently attempted to restrict the ability to bring ballot initiatives under Senate Bill 1110, which would have required signatures from 6% of voters in all thirty-five legislative districts to bring a matter to the ballot; the bill was ultimately struck down as unconstitutional by the Idaho Supreme Court, but clearly states are reacting. See, Clark Corbin, *Idaho Supreme Court Says New Ballot Initiative Law Violates State Constitution*, IDAHO CAP. SUN, Aug. 23, 2021.

¹⁷³ MASS. CONST. art. 48 pt. 1 (“Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative. . . and the popular referendum.”); However, Sec. 2 prohibits referendums from matters related to religion, judicial appointments and removals, judicial decisions, specific appropriation of state money, and further prohibits referendum petition that is “inconsistent” with several basic rights, such as freedom of speech, freedom of

restrict types of ballot initiatives was challenged in *Wirzburger v. Galvin*, wherein a citizen group pushed to amend the state constitution via ballot initiative to allow public funds to be used for private, religiously affiliated schools.¹⁷⁴ Article 48 of the Massachusetts Constitution prevented such an initiative under the Anti-Aid and Religious Exclusions; the amendment was denied in the district court, and an appeal followed, wherein the First Circuit ultimately upheld the Anti-Aid and Religious Exclusions under the 14th Amendment.¹⁷⁵

Addressing the concept of ballot initiatives broadly, the First Circuit held that “the primary goal of state initiative procedures is to create an avenue of direct democracy whereby citizens can participate in the generation of legislation—that is, the act of creating law,” and that restricting certain matters from the initiative process does not unjustly target particular speech.¹⁷⁶ The circuit court elaborated, stating there is “no constitutional principle that prevents a state from determining that sensitive measures that relate to religion, religious practices, or religious institutions should not be made or initiated by the public initiative process but rather only via the legislature.”¹⁷⁷ Applying the First Circuit’s reasoning to the use of ballot initiatives in agriculture, *Wirzburger* serves as precedent that a state can keep certain issues deemed too “sensitive” off of the ballot.¹⁷⁸

Other circuit courts have permitted states to remove or limit certain topics from being the subject of ballot initiatives. In *Initiative & Referendum Inst. v. Walker*, Utah amended its constitution to prevent wildlife advocates from pushing through initiatives that limited the right to hunt certain animals.¹⁷⁹ Ballot initiatives had been increasingly used by environmental groups in the 1990s, particularly in western states to ban hunting of certain animals, and wildlife advocates looked to use the ballot again to bypass an unfriendly Utah

elections, freedom of the press, the right to peaceable assembly, unreasonable searches, and due process in property taking. MASS. CONST. amend. art. 48 pt. 2, § 2.

¹⁷⁴ *Wirzburger v. Galvin*, 412 F.3d 271, at 274 (1st Cir. 2005).

¹⁷⁵ *Id.* at 285 (finding that the exclusions did not discriminate on the basis of religious belief or status, and found that the exclusions were narrowly drawn to further a significant state interest (ensuring the Establishment Clause)).

¹⁷⁶ *Id.* at 277.

¹⁷⁷ *Id.* at 284.

¹⁷⁸ Although it should be noted that here the court was reviewing a “fundamental right” in religion, whereas animal welfare and farming, while both crucial, likely will not ever rise to the level of “fundamental rights.” *See id.*

¹⁷⁹ *See, e.g., Initiative & Referendum Inst. v. Walker*, 450 F. 3d 1082, at 1085 (10th Cir., 2006).

legislature to further more regulations.¹⁸⁰ Before any such measure could be presented on a ballot, hunting and fishing advocates were able to pass their own initiative, Proposition 5, which amended the Utah Constitution to require a two-thirds majority for any future ballot initiatives involving the taking of wildlife.¹⁸¹ The measure passed with 58% of the vote, ironically a lower majority than what the amendment requires for the actions it limits, under the justification that it protected Utah from “East Coast interest groups.”¹⁸²

Following this amendment, wildlife advocates sued, claiming that the new amendment imposed a “chilling effect” on its First Amendment right to free speech.¹⁸³ Ultimately the 10th Circuit rejected the First Amendment argument, holding that while requesting signatures on an initiative petition involves “core political speech,” and is thus subject to “exacting scrutiny,” the First Amendment only protects political speech incident to an initiative campaign, not the right to make a law itself via a ballot initiative.¹⁸⁴ The Tenth Circuit held that a heightened requirement to pass certain ballot initiatives does not silence or restrict the speech itself, and was only a regulation of the legislative process.¹⁸⁵

¹⁸⁰ J. Michael Connelly, *Loading the Dice in Direct Democracy: The Constitutionality of Content – and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 129 (2008).

¹⁸¹ *Id.*; See UTAH CONST. art. VI, §1(2)(a) (While the Utah Constitution provides that ballot measures may be passed simply by a majority vote, Proposition 5 added the following language: “Notwithstanding Subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.”).

¹⁸² One hunting advocate lamented that “radical groups, once they get an issue on the ballot, use emotional TV spots, such as showing an animal caught in a foot trap, to take management of wildlife away from professional state wildlife officials who use science in their work,” illustrating the frustration either side of a debate feels when opposing groups are able to push through disagreeable laws. Connelly, *supra* note 180.

¹⁸³ Walker, 450 F.3d at 1086.

¹⁸⁴ *Id.* at 1099.

¹⁸⁵ The Tenth Circuit had previously ruled that abortion rights could be removed as a ballot initiative question without violating the First Amendment. See *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996) (“Removing [the proposal] from the ballot. . . has not prevented [the voter] from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. . . moreover, she cites no law, and we find none, establishing a right to have a particular proposition on the ballot.”); It is unclear how the court reasoned that a pre-submission content review might be unconstitutional, but did not find an amendment requiring a supermajority to pass laws regarding a specific issue to be content-based pre-screening. See generally Walker, 450 F.3d 1082.

The Tenth Circuit also drew upon a similar ruling involving a First Amendment challenge to the Barr Amendment, a federal law barring voters in the District of Columbia from passing a ballot initiative to legalize or reduce penalties associated with the possession of marijuana.¹⁸⁶ The D.C. Circuit found that the Barr Amendment did not infringe upon the First Amendment as it did not prohibit “speech necessary to the proper functioning” of legislation, but simply removed a subject from being discussed in that process.¹⁸⁷ The concern with the Tenth Circuit’s reasoning is that it effectively created a viewpoint-based regulation, potentially affecting freedom of speech to debate certain topics in the political sphere; “In this sense, a viewpoint-based regulation of a ballot initiative can decrease one group’s total quantity of available core political speech relative to a group on the opposite side of an issue.”¹⁸⁸ Judge Lucero, writing the dissent in *Walker*, stated, “Given that election campaigns are necessarily conducted through the medium of speech, it is no more than foolhardy formalism to say that election laws that rig the outcome of elections do not infringe on speech rights.”¹⁸⁹

Nationally the circuit courts are split regarding how to assess ballot restrictions in relations to the First Amendment, an issue that the U.S. Supreme Court has recently noted, but not yet addressed.¹⁹⁰ Yet based on the Supreme Court’s brief acknowledgement of the divide, it seems that ballot restrictions will be permitted to stand, at least for the present. As such, animal welfare advocates would do well to note the *Walker* decision, and bear in mind that ballot initiatives and restrictions can easily swing against them.

Indeed, ballot initiatives are not restricted to interest groups attempting to work around an unfavorable legislature. In 2016, the

¹⁸⁶ *Marijuana Policy Project v. United States*, 304 F.3d 82, 87 (D.C. Cir. 2002).

¹⁸⁷ *Id.* at 87.

¹⁸⁸ Connelly, *supra* note 180, at 155.

¹⁸⁹ *Walker*, 450 F.3d at 1112 (Lucero, J., dissenting).

¹⁹⁰ See *Little v. Reclaim Idaho*, 140 S.Ct. 2616, 2616 (mem.) (2020) (“Yet the Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here. According to the Sixth and Ninth Circuits, the First Amendment requires scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person’s ability to place an initiative on the ballot. See *Thompson v. DeWine*, 959 F.3d 804, 808 (C.A.6 2020) (*per curiam*); *Angle v. Miller*, 673 F.3d 1122, 1133 (C.A.9 2012). Other Circuits, by contrast, have held that regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation. See, e.g., *Jones v. Markiewicz-Qualkinbush*, 892 F.3d 935, 938 (C.A.7 2018); *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1099-1100 (C.A. 10 2006) (en banc); *Dobrovlny v. Moore*, 126 F.3d 1111, 1113 (C.A.8 1997).”)

Oklahoma legislature itself placed Question 777 on the ballot.¹⁹¹ The design of the proposed law was to require courts to find a compelling state interest to justify any law that regulated farming and agriculture passed after the end of 2014.¹⁹² Supporters of the ballot believed that farmers needed the measure to protect themselves against laws that would harm the industry, while opponents countered that Question 777 would prevent the government from passing laws to protect small farmers and prevent against animal cruelty.¹⁹³ Ultimately, the measure was defeated, 60%-40%,¹⁹⁴ but that it reached the ballot in the first place further demonstrates the mercurial nature of relying on ballot initiatives for animal welfare reform.

IX. The Forgotten Farmers

Back in 2008, both industry and animal welfare advocates debated the merits of Proposition 2.¹⁹⁵ HSUS characterized the measure as preventing animal cruelty, promoting food safety, protecting the environment, and perhaps confusingly, supporting family farmers.¹⁹⁶ HSUS described family farmers as supporting Proposition 2 because “they believe food quality and safety are enhanced by better farming practices. Increasingly, they’re supplying mainstream retailers like Safeway and Burger King. Factory farms cut corners and drive family farmers out of business when they put profits ahead of animal welfare and our health.”¹⁹⁷ Arguments against Proposition 2 also centered on food safety, highlighting the risk of disease for birds with unnecessary outdoor access, economic loss to California, and the potential of increase

¹⁹¹ *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_\(2016\)](https://ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_(2016)) (last visited Oct. 16, 2022).

¹⁹² The intended effect was to restrict laws attempting to regulate the farming industry, and would have made future challenges to animal management practices difficult. *Id.*

¹⁹³ *Id.* (Article II of the Oklahoman constitution would have been amended to read: “To protect agriculture as a vital sector of Oklahoma’s economy, which provides food, energy, health benefits, and security and is the foundation and stabilizing force of Oklahoma’s economy, the right so citizens and lawful residents of Oklahoma to engage in farming and ranching practices shall be forever guaranteed in this state. The Legislature shall pass no law which abridges the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices without a compelling state interest.”).

¹⁹⁴ *Id.*

¹⁹⁵ UC Hastings Coll. of L., *supra* note 10.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

prices for consumers if producers were forced to incorporate infrastructure change.¹⁹⁸

As the developer of the measure, it is understandable that HSUS would characterize Proposition 2 as a victory for independent farmers as well as animal welfare. Its argument, however, is reductionist and ignores the complexity of modern contract farming. While there are certainly independent producers that sell their own eggs, most are beholden to the production contracts that pit farmers against each other.¹⁹⁹ To portray the difficulties in animal welfare as a fight between “family farmers” and “factory farms” creates a false dichotomy. The truth of the matter, as is often the case, lies somewhere between the two sides, and is contingent on our priorities.

Advocates of the industrial model and cheap food are correct in concluding that any requirements to infrastructure overhaul will have an economic impact.²⁰⁰ If our priority is affordable, readily available eggs and bacon, then initiatives like Proposition 2 do pose a threat to cheap food.²⁰¹ On the other hand, humans directed chicken into domestication and mass production not for the birds’ benefit, but so they might be commodities.²⁰² If we prioritize welfare, then it is common sense to increase the size of cages, provide animals with enrichment, allow them to exhibit natural behaviors and have access to the outdoors, and at least attempt to decrease their suffering before they are slaughtered or age out from a lifetime of laying.²⁰³ Sows, similarly, have an unenviable life of insemination, confinement, birth, and repetition.²⁰⁴

Of course, if the goal is to produce as many animals for market as possible, concentrated confinement make economic sense; the more room you provide for your animals, the less of them you

¹⁹⁸ *Id.*

¹⁹⁹ *See*, Hamilton, *supra* note 17, at 84.

²⁰⁰ *See*, Heng, *supra* note 81 (Higher efficiency involves management practices that protect hens, such as cutting beaks and isolating the birds from outdoor predators and disease. These measures, however, are largely viewed as cruel and brutal by the public, regardless of how effective they are).

²⁰¹ *Id.*

²⁰² *See*, Greger Larson & Dorian Q. Fuller, *The Evolution of Animal Domestication*, 45 ANN. REV. OF ECOLOGY, EVOLUTION, & SYSTEMATICS, 2014 at 115.

²⁰³ Yet allowing hens unfettered outdoor access has been linked to higher amounts of environmental damage, such as more air and water pollution, and increased feed requirements, as opposed to battery-raised hens. While environmental and welfare concerns are often linked in consumers’ minds, this may be an area of conflict between those two priorities. *See*, Heng, *supra* note 81.

²⁰⁴ Gaveric Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 L. & CONTEMP. PROBS. 325 (2007).

can have, and the higher the risk of damage or death happening to the pigs or piglets.²⁰⁵ Herein lies the tension. While incremental increases to confinement spaces and added enrichments make animal advocates feel better, believing that something is better than nothing, they are still operating within a massive capitalist machine that legally considers these animals commodities whose ultimate value is related to how much food they can produce for consumption. While consumers show interest in animals that are treated better, the majority still want affordable, convenient food, and that balance is difficult to maintain.²⁰⁶

Independent farmers are problematically caught between both sides of this debate. Farming is a precarious enterprise even under optimal conditions (and conditions are seldom optimal).²⁰⁷ Our modern farming system requires substantial infrastructure investments and externalized costs, and most farmers are deeply in debt and rely on a secondary source of income,²⁰⁸ making the economic incentives to maximize profits not only desirable, but necessary. Changing the confinement requirements for layers and sows requires greater investments, and there is a divide between the cost of overhaul, the amount of pigs and chickens that can be raised with new space requirements, and what integrators are willing to pay.²⁰⁹ One Iowan farmer estimates that to come into compliance with Proposition 12, he would need to invest \$3M, and the changes would reduce his space to hold 250 pigs, down from 300.²¹⁰ To make up the difference, he would need an extra \$20 per pig, a price that processors are not offering.²¹¹ How do we balance animal welfare against farmers' livelihoods? Where do we draw the line between reforming a broken system that millions of people rely on, and rejecting it holistically because it cannot, by its nature, protect the welfare of the animals it is designed to kill? What is the cost of compassion?

²⁰⁵ See, Wiesemeyer, *supra* note 147.

²⁰⁶ See, ASPCA, *supra* note 80.

²⁰⁷ See generally, Khan, *supra* note 27.

²⁰⁸ *Most farmers receive off-farm income, but small-scale operators depend on it*, U.S. DEP'T OF AGRIC. (Dec. 1, 2021), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58426>.

²⁰⁹ Scott McFetridge, *Bacon may disappear in California as pig rules take effect*, ASSOCIATED PRESS, (July 31, 2021), <https://www.legalbluebook.com/bluebook/v21/rules/18-the-internet-electronic-media-and-other-nonprint-resources/18-2-the-internet#b-320154>.

²¹⁰ *Id.*

²¹¹ *Id.*

CAFOs are better equipped to absorb these costs, whereas an independent farmer may find adapting cost prohibitive.²¹² Welfare measures, however, apply equally to all farmers, with no exceptions based on size or income. In the poultry industry, integrators control the purchase of birds and eggs, and affect the ultimate sale.²¹³ As discussed, the trend over the last forty years has been a dramatic decrease in farmers and farmland while animal production has skyrocketed. Additional welfare requirements may prove to be another nail in the coffin of independent farming, as the California voter guides warned. Ironically, while this achieves the heightened welfare that federal law has so long denied farm animals, it may be at the cost of independent farmers, which will further centralize the industry into megacorporations and CAFOs, a trend that has led to the lack of animal welfare that these measures are trying to provide.²¹⁴

X. The Road Goes Ever On

To believe we are trapped in an unsustainable agricultural system is overly pessimistic and likely false. American agriculture has seen several revolutions in the past century,²¹⁵ and to assume it will not change again is shortsighted. Still, we find ourselves today in a system that is environmentally unsustainable and problematic. Shortcuts have been taken in the name of abundance, and while affordable food is fantastic, it cannot fly in the face of our future. American animal production in the 21st century is controlled by a powerful few companies, and farming has changed from a marriage with the land into yet another industrial arm of the capitalist machine. Farmer have become cogs, their actions dictated by contracts designed to keep them competing with each other for small capital increases, most of them not making enough to survive on farming alone.

Adding to the complications of this exploitative system is that the commodities being traded are living animals who deserve, at the bare minimum, certain welfare guarantees. Farm animal

²¹² See, Hamilton, *supra* note 34.

²¹³ See, *supra* Part II.

²¹⁴ Wiesemeyer, *supra* note 147 (Per American Farm Bureau Federation President Zippy Duvall, “small family farms well beyond California’s borders will be hit hardest as they are forced to make expensive and unnecessary changes to their operations. This will lead to more consolidation in the pork industry and higher prices at the grocery store, meaning every family in America will ultimately pay the price for Prop 12.”).

²¹⁵ See, e.g., Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261 (1995).

advocates fight for small, but significant, increases in the welfare of the creatures fueling this enterprise. With federal and state laws mostly heeding to industry that would rather not endure laws that slow down efficiency, advocates have turned to ballot initiatives, asking voters to directly push for welfare reform in specific states, particularly in California and Massachusetts. While Propositions 2, 12, and Question 3 have been landmark results, their success has brought considerable scrutiny, and may paradoxically pave the way for ballot initiatives that shut down welfare reform, or call into question the constitutionality of the entire system. Lost in all of this are the farmers who are stuck in a production contract system that has only gotten worse in the last few decades.

While welfare advocates should not retreat from ballot initiatives, these measures need to consider the difficulties facing farmers. Historically progress is never equally realized if all stakeholders do not have a seat at the table, and the economic reality of independent farmers needs to be addressed, lest the solution becomes more difficult than the problem it attempts to solve. Animal welfare advocates need to continue to do what often seems monumental in modern politics and reach across the aisle. In this instance, that means recognizing potential allies in independent farmers who may well want to ensure farm animal welfare and return to better stewardship relationship between animals and nature, but who are unable to see a path to do so. While some welfare advocates may bristle at the compromise of not realizing a world without animal exploitation, such conversations are crucial; our modern farming system is not going to be tossed aside at once, lest we throw out the hog with the hogwash. The achievable goal of both advocates and independent farmers is the dissolution of the conglomerated industrial system that has evolved throughout the 20th century. The recent overtures from the Biden Administration are encouraging and necessary, hopefully harbingers of real change in American agriculture. Rather than watching the pin-pong of issues being raised in various ballot initiatives throughout the states, advocates and farmers should focus on overhauling the economic hold industry has placed on the nation. Through that avenue, we can find a road down which both animals and farmers can thrive.