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Chewing the Welfare Cud: A Digested Analysis of a Consumer Versus Producer-Defined Standard of Welfare Practices in Animals Raised for Human Consumption

*Caitlin C. Robb

“To your breed, your fleece, your clan be true, baa-ram-ewe.”—Babe

Baa-ram-ewe are words that mark a pivotal turning point in the movie *Babe*; a children’s film about a one-of-a-kind sheep herding pig and his farm animal friends that prove their worth to an old sheep farmer.¹ During this pivotal turning point, the antagonist sheepdog turns into a hero when he secured this “baa-ram-ewe” passcode from a herd of reluctant sheep, then relays it to Babe.² Using that passcode, Babe guides six sheep through a difficult herding pattern and subsequently wins a national sheepdog competition with the highest score ever recorded.³ While this kind of feel-good movie involving animals is not unique, it represents a concept that stands consistently between humans and animals—an emotional connection from humans that animals can be more than a source of food.⁴

Since the eighteenth century, animal well-being remains a concern for American citizens.⁵ Yet, underlying this concern is the

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¹ See *BABE* (Universal Pictures 1995).

² See *id.*

³ See *id.*

⁴ See generally Jacqueline Tawse, *Consumer Attitudes Towards Farm Animals And Their Welfare: A Pig Production Case Study*, 3 *BIOSCIENCE HORIZONS* 156, 156-63 (2010) (explaining how consumer attitudes of animals can dictate how that consumer believes an animal should or should not be treated).

⁵ See generally Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part II*, 19 *ANIMAL L.* 347, 348-50 (2013).

thought that while humans should not be cruel to animals, animals are still private property subject to human ownership.⁶ Therefore, multi-faceted questions of what constitutes “animal welfare” find a place in modern American debate.

One such question becomes: should the producer or the consumer define welfare practice standards of animals raised for human consumption?⁷ This note provides an answer to this question by first analyzing the robust history of animal welfare in the United States, along with the domestic and international impact of the livestock industry on the U.S. economy in Parts I and II. Next, in Part III, the note connects that history to constitutional rights and how the Commerce Clause influences consumers’ relationships to food, even though there is no constitutional right to food, or right to know about food.⁸

To illustrate the concepts in the first three parts of the article, Part IV reviews the arguments concerning California’s Proposition 12 (“**Prop 12**”)—a recent ballot initiative limiting pork pen size currently under review by the United States Supreme Court.⁹ Part IV

⁶ See generally PEOPLE, PENGUINS, AND PLASTIC TREES 369-70 (Christine Pierce & Donald VanDeVeer eds., 2d ed.1995) (explaining generally how humans cannot be legal property, but anything “nonhuman” could be implicitly assumed as legal property to maximize human satisfaction).

⁷ For further information on the nuances between animals rights and animal welfare, see generally Michelle Miller, *Animal Welfare vs. Animal Rights: What’s the Difference?* AGDAILY (Sept. 13, 2022), <https://www.agdaily.com/insights/animal-welfare-vs-animal-rights-whats-the-difference/>.

⁸ See Benedict Sheehy & Ying Chen, *Let Them Eat Rights: Re-Framing the Food Insecurity Problem Using a Rights-Based Approach*, 43 MICH. J. INT’L. L. 631, 685 (2022).

⁹ Proposition 12 originated as a 2018 ballot initiative in California that established confinement standards for certain farm animals and therefore codified into California statute. See *California Finalizes Prop 12 Regulations*, THE NAT’L L. REV. (Sept. 8, 2022), https://www.natlawreview.com/article/california-finalizes-prop-12-regulations#google_vignette. At the time of this comment’s submission, the case remained ongoing in the U.S. Supreme Court with an opinion expected to be released in the summer of 2023. See Dan Flynn, *Prop 12 Put Off Until After SCOTUS Ruling*, FOOD SAFETY NEWS (Dec. 2, 2022), <https://www.foodsafetynews.com/2022/12/prop-12-put-off-until-after-scotus-ruling/>. The opinion was actually released on May 11, 2023 and a plurality opinion upheld the judgment of the Ninth Circuit Court of Appeals. See *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 143 S. Ct. 1142, 215 L. Ed. 2d 336 (2023). For a detailed breakdown of that plurality opinion, see Meera Gorjala, et. al., *Supreme Court Pulls Back Dormant Commerce Clause in National Pork Producers Council v. Ross*, ARENTFOX SCHIFF (May 25, 2023), <https://www.afslaw.com/perspectives/alerts/supreme-court-pulls-back-dormant-commerce-clause-national-pork-producers>.

parses whether such a ballot initiative adequately resolves the tension between producer-defined and consumer-defined standards. Using precedent, Part IV also examines the tendency of courts to favor producer interests over consumer interests. Part IV further examines when, if at all, morality expressed through animal welfare regulations become constitutional violations.

The note concludes by summarizing potential solutions found in current case law and the livestock industry generally. While a one-size-fits-all solution is not likely feasible due to the complexities of the livestock and poultry industry, a place for both consumer and producer definitions should be encouraged and welcomed in the current market. Consumers should have the opportunity to choose food that reflects their morals and values, as they do in other consumer product categories. However, ensuring this consumer choice must not infringe upon the interests of producers and the legally recognized concept of animals as private property. Ultimately, any animal welfare practices must still comply with the Commerce Clause. Courts, through the purpose of litigation to resolve disputes, must always remain a final accountability step in defining welfare standards that welcome both producer and consumer definitions.

I. Animal Welfare in the United States

A. *Development of Animal Welfare Laws*

The concept of animal welfare in the United States developed from a variety of social and economic movements in the 1800s.¹⁰ While nineteenth century state law enacted penalties for crimes against animals, the Puritan “Body of Liberties” could be considered the original set of animal anti-cruelty laws.¹¹ This set of laws was created by early European colonists in New England in the

¹⁰ Animal welfare is a global topic and many U.S. animal welfare trends can be originated from foreign actions. See Kelch, *supra* note 5, at 348-50. However, global development of animal welfare is beyond the scope of this article. See *generally id.* (explaining further the development of European trends that influenced the development of Animal Welfare in America).

¹¹ See Kelch, *supra* note 5, at 350. The Massachusetts Body of Liberties is known as the first legal code established in New England by European Colonists in 1641 and is often considered as the precursor to the Massachusetts Constitution. See *Massachusetts Body of Liberties*, STATE LIBR. OF MASS., <https://www.mass.gov/service-details/massachusetts-body-of-liberties> (last visited Oct. 22, 2023).

mid 1600s and formed a list of “liberties” that guided the court in carrying out public policy.¹² The “Body of Liberties” outlined treatment for animals “usually kept for man[’]s use,” including instructions to not exercise “[t]iranny or [c]rueltie,”¹³ and ensured specific care for sick animals.¹⁴ Some argue that this language is reflective of the general peaceful nature of Puritan culture, but it cannot be ignored that the direct language within this “Body of Liberties” regards animals kept for “man[’]s use,” indicating an underlying economic motivation.¹⁵

By the 1800s, individual states recognized that animals, due to their susceptibility in man’s care, required additional protections.¹⁶ For example, in 1821, Maine criminalized beating horses or cattle with monetary or jail-time penalties.¹⁷ Interestingly, domestic animals were outside the scope of this law and only “commercially valuable” animals received statutory protections.¹⁸ Additionally, the statute only criminalized the owner of that commercially valuable animal, which suggests a potential balance of interests between producer profits and animal welfare.¹⁹ In 1829, New York followed suit with a law that criminalized beating or killing “horses, oxen, sheep, or cattle,” regardless of ownership.²⁰ In 1846, Vermont joined by criminalizing certain cruel and malicious actions, but only for animals belonging to others.²¹ Once again, this Vermont law suggests an animal is property because of its economic viability and susceptibility to the whims of man’s care.

These early laws are not the only means by which animal welfare continued to develop in the United States. Both Henry

¹² See *Massachusetts Body of Liberties*, *supra* note 11.

¹³ Oxford Dictionary defines “tiranny” as “cruel, unreasonable, or arbitrary use of power or control, and “crueltie” as “callous indifference to or pleasure in causing pain and suffering.” OXFORD LANGUAGES, <https://www.google.com> (last visited Oct. 23, 2023).

¹⁴ See William Henry Whitmore, *Body of Liberties* § 92-93, in A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY 52-53 (1890).

¹⁵ Kelch, *supra* note 5, at 350-51.

¹⁶ See *id.* at 354-56.

¹⁷ See *id.* at 355-56.

¹⁸ See Kelch, *supra* note 5, at 355; see also David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1880’s*, 1993 DET. C.L. REV. 1, 32 (1993).

¹⁹ See generally Kelch, *supra* note 5, at 355.

²⁰ *Id.*

²¹ See *id.*

Bergh,²² the founder of the American Society for the Prevention of Cruelty to Animals (“ASPCA”), and Charles Darwin,²³ psychologist, are credited as animal advocates.²⁴ Charles Darwin, although not an American scientist, is credited with concepts that shape viewpoints that animals equate to man.²⁵ Darwin’s research on evolutionary biology suggests that animals have both cognitive and emotional capabilities, and should be studied for their human-like qualities, rather than their unparalleled differences from humans.²⁶ Bergh is considered the founding father of animal cruelty laws in the United States and created the ASPCA.²⁷ Bergh’s movement of reformed animal welfare laws—including the original New York law, which ultimately gave power to the ASPCA to enforce the statute—can be seen throughout the nineteenth century in states such as Pennsylvania, Illinois, New Hampshire, and New Jersey.²⁸

After the impact of Bergh’s actions around animal welfare, a Mississippi court released an opinion seen as the first case law to recognize that animals as private property with economic value still deserve care.²⁹ In *Stephens v. State*, a farmer attempted to chase some neighboring hogs off his land, but after a failed attempt, shot the hogs instead.³⁰ Judge James Arnold wrote in his opinion that while this particular action did not directly violate the statute, it was created “for the benefit of animals, as creatures capable of feeling and suffering . . . To disregard the rights and feelings of equals, is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless is mean and cowardly.”³¹ Much of the movement in the nineteenth century around the development of animal welfare laws

²² For details on the life of Henry Bergh, see SYNDEY H. COLEMAN, *HUMANE SOCIETY LEADERS IN AMERICA* 33-35 (1924).

²³ For details on the life of Charles Darwin, see Adrian J. Desmond, *Charles Darwin*, BRITANNICA, <https://www.britannica.com/biography/Charles-Darwin> (last visited Oct. 23, 2023).

²⁴ See Kelch, *supra* note 5, at 367-69.

²⁵ See *id.*

²⁶ See *id.*

²⁷ Favre, *supra* note 18, at 13. The ASPCA eventually morphed into an organization dedicated to the welfare of children in anti-abuse statutes, which was not uncommon in the early 1900s. See Kelch, *supra* note 5, at 355-56. This likely suggests a concept of caring for those who cannot care for themselves, as both children and animals find themselves at the mercy of adults who provide care, even if that care could be labeled as inferior by public standards.

²⁸ Favre, *supra* note 18, at 21.

²⁹ See generally *Stephens v. State*, 65 Miss. 329, 330-33, 3 So. 458, 458-59 (1888).

³⁰ See *id.*

³¹ *Id.*

started with the actions of Bergh and moved to the moral perception of animal interests in Judge Arnold's opinion.³² Over time, both federal and state regulation surrounding the treatment of animals dramatically increased.

B. Current State and Federal Regulations

The power to police animal welfare remains largely within state jurisdiction in the United States, as opposed to the power to police the products of animals which is often ceded to federal regulation.³³ Because the U.S. Constitution does not mention animals, some argue that the primary source of governance for animal welfare stands with the states.³⁴ However, certain phases of farm animal production find themselves on the list of federal regulations, including the Poultry Products Inspection Act,³⁵ the Animal Health and Disease Research Act,³⁶ Humane Slaughter Act,³⁷ the Twenty-Eight Hour Law,³⁸ and the Animal Welfare Act.³⁹ Notably, many of these acts regulate post-production techniques, rather than on-farm production. This could suggest an unwillingness of the federal government to substitute its knowledge for producer minds, bringing the animal under federal regulation only after it begins to enter commerce for eventual human consumption.

The language in the aforementioned statutes suggests a congressional recognition of both consumer and producer interests. For example, the Humane Slaughter Act was one of the first steps

³² Favre, *supra* note 18, at 30.

³³ *See generally* *Federal-State-Local Cooperation in Animal Welfare Enforcement*, THE U.S. DEP'T OF JUST. ARCHIVES (Aug. 15, 2016), <https://www.justice.gov/archives/opa/blog/federal-state-local-cooperation-animal-welfare-enforcement>.

³⁴ David Favre, *Overview of U.S. Animal Welfare Act*, ANIMAL LEGAL & HIST. CENTER (2002), <https://www.animallaw.info/article/overview-us-animal-welfare-act>.

³⁵ *See generally* 21 U.S.C. §§ 451-472 (explaining the regulation of processing and distribution of poultry products).

³⁶ *See* 7 U.S.C. §§ 3191-3202 (explaining the promulgations around the prevention of disease through improved health and productivity in livestock, poultry, aquatic animals, and other income-producing animals).

³⁷ *See* 7 U.S.C. §§ 1901-1907 (explaining the current laws and regulations around the humane handling and treatment of food animals at slaughter facilities).

³⁸ *See* 49 U.S.C. § 80502 (clarifying that by law, animals transported for longer than twenty-eight consecutive hours must be unloaded for five consecutive hours to receive access to food, water, and rest).

³⁹ *See generally* 7 U.S.C. §§ 2131-2160 (explaining the only federal law in place to regulate the treatment of animals in research or exhibition).

towards federal regulation of welfare in animals designed for human consumption.⁴⁰ During the hearings that contemplated the passage of this act, Congress stated that the “use of humane methods in the slaughter of livestock prevents needless suffering,” suggesting that Congress knew some suffering would occur, but that suffering does not need to come at producer-profit expense.⁴¹ The Poultry Products Inspection Act also highlighted Congress’s recognition of a need for state and federal governments to work together to best serve the interests of producers and consumers alike.⁴²

A large limitation in standard welfare practices for livestock and poultry is the omission of these animals from the Animal Welfare Act.⁴³ Enacted in 1966, this act is the sole federal law “that regulates the treatment of animals in research, teaching, testing, exhibition, transport, and by dealers.”⁴⁴ The U.S. Department of Agriculture (“USDA”) still recognizes that farm animals deserve protections equal to their domestic animal counterparts.⁴⁵ The USDA partners with several third-party organizations to create certification programs based on scientific research written by various industry professionals.⁴⁶ Producers elect to participate in the program, must comply with program guidelines, and are monitored by audits from industry professionals.⁴⁷ These programs align consumer concern about production techniques with higher knowledge from those who are more intricately involved with livestock production.⁴⁸

⁴⁰ See National Agricultural Library, *Humane Methods of Slaughter Act*, U.S. DEP’T OF AGRIC., [https://www.nal.usda.gov/animal-health-and-welfare/humane-methods-slaughter-act#:~:text=The%20Humane%20Methods%20of%20Slaughter,and%20Inspection%20Service%20\(FSIS\)](https://www.nal.usda.gov/animal-health-and-welfare/humane-methods-slaughter-act#:~:text=The%20Humane%20Methods%20of%20Slaughter,and%20Inspection%20Service%20(FSIS)) (last visited Oct. 26, 2023). The act passed on August 27, 1958 and is enforced by the Food and Safety Inspection Service. *Id.*

⁴¹ See 7 U.S.C. § 1901.

⁴² See 12 U.S.C. § 1037 (explaining generally prohibited behavior by egg-handlers handling eggs to be consumed by humans).

⁴³ See generally 7 U.S.C. § 2131.

⁴⁴ National Agricultural Library, *Animal Welfare Act*, U.S. DEP’T OF AGRIC., <https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-act> (last visited Oct. 26, 2023).

⁴⁵ National Agricultural Library, *Animal Welfare Audit and Certification Programs*, U.S. DEP’T OF AGRIC., <https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-audit-and-certification-programs> (last visited Oct. 26, 2023).

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

Since no federal regulation on animal welfare exists, states are free to regulate as they see fit.⁴⁹ Many states statutorily enact livestock care boards that create welfare standards.⁵⁰ For instance, several states including Louisiana,⁵¹ Indiana,⁵² Minnesota,⁵³ and North Dakota⁵⁴ created Boards of Animal Health that regulate the care of farm animals.⁵⁵ Ohio even created the Ohio Livestock Care Standards Board (“**OLCSB**”) via State Issue 2,⁵⁶ an amendment to the Ohio State Constitution in 2009.⁵⁷ The goal of the OLCSB is to “obtain public input and recommend guidelines for the Ohio Department of Agriculture.”⁵⁸ Ohioans can submit complaints regarding violations via an online form⁵⁹ available on the Ohio Department of Agriculture’s website.⁶⁰ New Jersey appears to have one of the longest histories of statutory protections around animal welfare practices.⁶¹ In 1996, the New Jersey legislature granted

⁴⁹ See Legal Information Institute, *Preemption*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/preemption> (last visited Oct. 26, 2023).

⁵⁰ See, e.g., *Enforcement of State Farm Animal Welfare Laws*, ANIMAL WELFARE INST. (Mar. 2020), <https://awionline.org/sites/default/files/uploads/documents/20StateEnforcementReport.pdf>.

⁵¹ See *Animal Health*, DEP’T OF AGRIC. & FORESTRY, <https://www.ldaf.state.la.us/animal-health/> (last visited Oct. 26, 2023).

⁵² See *About BOAH*, IND. STATE BD. OF ANIMAL HEALTH, <https://www.in.gov/boah/about-boah/> (last visited Oct. 26, 2023).

⁵³ See *Our Mission*, MINN. BD. OF ANIMAL HEALTH STATE, <https://www.bah.state.mn.us/our-mission/> (last visited Oct. 26, 2023).

⁵⁴ See *North Dakota State Board of Animal Health*, N.D. DEP’T OF AGRIC., <https://www.ndda.nd.gov/divisions/animal-health> (last visited Oct. 26, 2023).

⁵⁵ See *id.*

⁵⁶ For more details on Issue 2, see generally Peggy Kirk Hall, *Legal Questions and Answers about Issue 2, The Ohio Livestock Care Standards Board Ballot Issue*, THE OHIO STATE UNIV. EXTENSION, <https://farmoffice.osu.edu/sites/aglaw/files/site-library/Issue2FactSheet%20%281%29.pdf> (last visited Nov. 2, 2022).

⁵⁷ See *Livestock Care Standards*, OHIO DEP’T OF AGRIC., <https://agri.ohio.gov/divisions/animal-health/livestock-care-standards> (last visited Oct. 26, 2023).

⁵⁸ *Id.*

⁵⁹ See *Livestock Care Standards Complaint Form*, OHIO DEP’T OF AGRIC., https://agri.ohio.gov/wps/wcm/connect/gov/95e6fc9b-3ccc-494e-9d5f-e037afc112c1/5.18.2022Ohio+Livestock+Care+Standards+Complaint.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_K9I401S01H7F40QBNJU3S01F56-95e6fc9b-3ccc-494e-9d5f-e037afc112c1-o3tgRma (last visited Oct. 26, 2023).

⁶⁰ See *Livestock Care Standards*, *supra* note 57.

⁶¹ See *Enforcement of State Farm Animal Welfare Laws*, *supra* note 50.

authority to the New Jersey Department of Agriculture to promulgate regulations around standard welfare practices.⁶²

These various state actions continue to show the lack of uniformity and malleable concept of what exactly constitutes best welfare practices in animals raised for human consumption. Even further, lack of federal regulation suggests that even the federal government is unwilling to dictate how producers across the country should or should not raise their livestock.

II. Livestock and its Impact on the U.S. Economy

The livestock and poultry industries make up the largest segment of the U.S. agricultural sector.⁶³ The market value of livestock, poultry, and their byproducts increased steadily from 2007, sitting at a current value of slightly under \$200,000,000,000.⁶⁴ In 2017, the total number of U.S. farms used for animal production and aquaculture stood at 1,075,130 across a total of 478,673,553 acres.⁶⁵

In 2021, the U.S. meat and poultry industry processed: 9.3 million chickens (young or mature, heavy or light), 33.9 million head of cattle (heifers, steers, dairy cattle, bulls, and “other” cattle), 391,300 head of calves, 2.26 million head of sheep (sheep, yearlings, and lambs), and 129 million head of hogs (barrows and gilts).⁶⁶ From 1999 to 2020, average meat consumption totaled 252 pounds per person per year.⁶⁷ While averages hit a low between 2007 and 2013 of 235 pounds per person,⁶⁸ in 2020 the average reached a high of

⁶² *See id.*

⁶³ *See Animal Products*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV. (Apr. 27, 2022), <https://www.ers.usda.gov/topics/animal-products/>; *see also Cattle and Beef Sector at a Glance*, U.S. DEP’T OF AGRIC. ECON. RSCH. SERV. (Aug. 30, 2023), <https://www.ers.usda.gov/topics/animal-products/cattle-beef/sector-at-a-glance/>.

⁶⁴ *See* U.S. DEP’T OF AGRIC., AC-17-A-51, 2017 CENSUS OF AGRICULTURE 9 (2019).

⁶⁵ *See id.* at 59.

⁶⁶ U.S. DEP’T OF AGRIC., ISSN:0499-0544, LIVESTOCK SLAUGHTER SUMMARY REPORT 1 (Sept. 23, 2021); U.S. DEP’T OF AGRIC., ISSN:2159-7480, POULTRY SLAUGHTER 2021 SUMMARY 7 (Feb. 2022).

⁶⁷ *See* Gretchen Kuck & Gary Schnitkey, *An Overview of Meat Consumption in the U.S.*, FARMDOC DAILY, (May 12, 2021), <https://farmdocdaily.illinois.edu/2021/05/an-overview-of-meat-consumption-in-the-united-states.html>.

⁶⁸ The great recession of 2008 is often attributed to this decrease, as a drop in income can signal a decrease in meat consumption. *Id.*

264 pounds.⁶⁹ In 2023, the production amount of beef and red meat hit an all-time high, totaling over 7 billion pounds.⁷⁰

Animals also find themselves as part of human consumption beyond just food. Pharmaceutically, swine gelatin is used for capsule pills, recent medical advancements created human valve replacements from hogs, pancreata from cattle is used for insulin, and sheep intestines are found in surgical sutures.⁷¹ When it comes to everyday items, animal byproducts are found in cosmetics, collagen, footballs, clothing, upholstery, gelatin for food use, and even stearic acid (plastics).⁷² The Pork Checkoff is a congressionally created program intended to highlight the value of pork within the market generally.⁷³ The program coined the phrase “everything but the oink” to signify just how much monetary value a pig holds when it comes to human consumption; a value that goes well beyond just a juicy porkchop or crispy piece of breakfast bacon.⁷⁴

The statistics referenced previously create a consumer demand that falls upon producers in various states across the country to fill.⁷⁵ Several states rank high for top-producers of livestock: California holds the top-position for dairy cattle production, Texas for beef cattle production, and Iowa and North Carolina remain the

⁶⁹ *See id.*

⁷⁰ *See* U.S. DEP’T OF AGRIC., ISSN:0499-0544, LIVESTOCK SLAUGHTER SUMMARY REPORT 1 (Feb. 23, 2023).

⁷¹ *See generally About Pork Checkoff*, PORK CHECKOFF, <https://porkcheckoff.org/pork-branding/facts-statistics/everything-but-the-oink/>, (last visited Nov. 2, 2022); *see also Everything But the Baa By-Products From Sheep*, FARM CREDIT OF THE VIRGINIAS, (Jan. 17, 2023) <https://www.farmcreditofvirginias.com/blog/everything-baa-products-sheep>; Amanda Radke, *Cattle are critical for advancements in human medicine*, BEEF (Feb. 3, 2019), <https://www.beefmagazine.com/cattle-market-outlook/cattle-are-critical-for-advancements-in-human-medicine>; *Seven Everyday Items with Animal Byproducts*, KAN. FARM FOOD CONNECTION, <https://kansafarmfoodconnection.org/spotlights/seven-everyday-items-with-animal-byproducts>, (last visited Oct. 26, 2023).

⁷² *See Seven Everyday Items with Animal Byproducts*, *supra* note 71.

⁷³ *See generally About Pork Checkoff*, *supra* note 71.

⁷⁴ *See Everything But the Oink*, PORK CHECKOFF, <https://porkcheckoff.org/pork-branding/facts-statistics/everything-but-the-oink/> (last visited Oct. 26, 2023).

⁷⁵ For further information and break down on the overall livestock industry in the United States, including comparison of the 2017 USDA Ag Census Report to previous years, see the 2017 USDA Ag Census Report. *See generally* U.S. DEP’T OF AGRIC., *supra* note 64, at 7.

top producing states for sow production.⁷⁶ Moreover, livestock and poultry markets outside the borders of the United States hold an economically significant role. The current total export value for the livestock and poultry industry is over \$37 billion dollars, with Mexico being the largest export market sitting at a \$7.22 billion dollar value.⁷⁷ China, Japan, and South Korea hold the second, third, and fourth place values respectively as top export markets for the U.S. livestock and poultry market.⁷⁸ The predicted increase in both beef and pork global demand for 2023 signals a production requirement likely to be met by U.S. producers.⁷⁹ This prediction further highlights that while producers may be required via state legislation to adhere to welfare practices, the ultimate demand for economic gain from U.S. livestock comes from a demand that far overreaches what any state can attempt to govern.

III. The Constitutional Anchor

A. Unconstitutional Right to Food

While the purpose of the nation's Constitution is to establish governmental laws that guarantee certain basic rights for citizens, this archaic but symbolic manuscript required interpretation over the many years as to what is truly granted to American citizens within its documented four corners.⁸⁰ Thus, the United States Supreme Court, through various landmark cases, interpreted from the Constitution what are known as fundamental rights,⁸¹ or rights so significant in

⁷⁶ See *Cattle Inventory*, U.S. DEP'T OF AGRIC., https://app.usda-reports.penguinlabs.net/?crop=cattle_cows_beef&statistic=inventory_head&year=&year=2022 (last visited Oct. 26, 2023); see also *Hog Inventory*, U.S. DEP'T OF AGRIC., https://app.usda-reports.penguinlabs.net/?crop=hogs&statistic=inventory_head&year=&year=2021 (last visited Oct. 26, 2023).

⁷⁷ See *Dairy, Livestock, and Poultry Exports in 2022*, U.S. DEP'T OF AGRIC., <https://www.fas.usda.gov/commodities/dairy-livestock-and-poultry> (last visited Oct. 26, 2023).

⁷⁸ See *id.*

⁷⁹ See *Livestock and Poultry: World Markets and Trade*, U.S. DEP'T OF AGRIC. 2 (July 12, 2023), https://apps.fas.usda.gov/psdonline/circulars/livestock_poultry.pdf.

⁸⁰ See generally *Constitution*, HISTORY (Mar. 28, 2023), <https://www.history.com/topics/united-states-constitution/constitution#:~:text=The%20Constitution%20of%20the%20United,th e%20Constitution%20in%20Philadelphia>.

⁸¹ See Legal Info. Inst., *Fundamental Right*, CORNELL L. SCH., https://www.law.cornell.edu/wex/fundamental_right (last visited Oct. 26, 2023).

American history and tradition that they must be protected from government overreach.⁸² For example, the right to marriage⁸³ can be seen through opinions in both *Loving v. Virginia*⁸⁴ and *Obergefell v. Hodges*.⁸⁵ Other constitutionally granted rights include the right to vote,⁸⁶ contraception,⁸⁷ privacy,⁸⁸ and even the custody of one's own children.⁸⁹

Even with a robust history of constitutionally defined rights, the U.S. Supreme Court still has not defined a constitutional right to food through any clearly established case law.⁹⁰ Which begs the question: if the U.S. Constitution does not grant a right to food, should consumers even have a right to know how that food is produced? And without a constitutional right to food, does a consumer even have a right to choose a particular food? An argument likely exists that if either of these questions are answered affirmatively, consumer choice is likely compromised or even removed entirely.⁹¹

Relatedly, modern scholars argue that the next fundamental right should be the intersection of a concept known as the "right to know" with food in general.⁹² Overall, "right to know" is a concept that reflects a citizen's right to the utmost knowledge of public body actions that affect them, except when that obtained knowledge would

⁸² See *id.*

⁸³ See generally Legal Info. Inst., *Marriage*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/marriage> (last visited Oct. 26, 2023).

⁸⁴ See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that prohibitions on interracial marriage unconstitutionally violate the Equal Protection Clause).

⁸⁵ *Obergefell v. Hodges*, 574 U.S. 1118 (2015) (explaining that prohibitions on same-sex marriages also unconstitutionally violate the Equal Protection Clause).

⁸⁶ See generally *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

⁸⁷ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁸ See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1971); *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸⁹ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁹⁰ See Eve E. Garrow & Jack Day, *Strengthening the Human Right to Food*, 7 U.C. IRVINE L. REV. 275, 282-85 (2017).

⁹¹ See Taiwo A Oriola, *Consumer Dilemmas: The Right to Know, Safety, Ethics and Policy of Genetically Modified Food*, 2002 SING. J. LEG. STUD. 514, 567 (2002).

⁹² The right to know and its relevance to food is beyond the scope of this article. For more details on how the right to know intersects more intricately with food and food law, see Oriola, *supra* note 91 (explaining generally how the right to know plays a role in a consumer's right to choose or not choose genetically modified foods).

negate or threaten merits of withholding that public disclosure.⁹³ Applying this to the context of consumer food choice, this means consumers have a right to know intricate details around their consumed food, including if that food is genetically modified or utilized certain animal welfare production methods. Critics of the “right to know” doctrine argue it is unethical to keep consumers in the dark about certain food choices that a consumer deemed important, but counterarguments state that oftentimes factors beyond even a producer’s control limit a state of consumer utmost knowledge.⁹⁴

Recently, Maine became the first state to address this concept. In November 2021, voters approved—by a 60% majority—an amendment to the Maine Constitution granting a right for “all individuals . . . to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being.”⁹⁵ This direct language insinuates both a consumer’s right to food of their own choosing and a right to choose how that food should be produced. Even further, this right goes beyond general health and safety, highlighting a theory that the consumer is ultimately the person best suited to make decisions for themselves, rather than governmental agencies or regulatory bodies.

Some states codified a right to know for their citizens in various contexts, but not without limitations. New Hampshire specifically recognized this complexity in its legislative materials around its own codified right to know law, stating that compliance “may be difficult and occasionally provide headaches.”⁹⁶ Oregon attempted a ballot initiative in 2014 that would have codified a consumer’s right to know food production methods through mandated GMO-labeling, but a slim majority opposed such a mandate.⁹⁷

⁹³ See Fritz Synder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297, 298 (2005).

⁹⁴ See Oriola, *supra* note 91, at 570-74.

⁹⁵ H.P. 61, 130th Leg. 1st Reg. Sess. (Me. 2021); see also Tess Brennan, *Maine Becomes the First US State to Recognize the Right to Food in a Constitutional Amendment*, GVA (Jan. 19, 2022), <https://www.universal-rights.org/blog/maine-becomes-the-first-us-state-to-recognise-the-right-to-food-in-a-constitutional-amendment>.

⁹⁶ 13 NH Practice Series: Local Government Law § 658 (2023).

⁹⁷ See *2014 Oregon Ballot Measure Results*, POLITICO (Nov. 15, 2014, 1:37 AM), https://www.politico.com/2014-election/results/map/ballot-measures/oregon/#.Y4JL_-zMJb8.

These two pieces of legislation imply a consumer does have a right to know animal welfare production methods, but courts have still placed overall restrictions on that right to know.⁹⁸ Consumer interests might hold some legislative importance, but the general impression is that the interest must still succumb to external factors that likely prevent full disclosure to enhance consumer knowledge. The consumer is not without recourse, because their voices can be heard through both purchase power and voter power. Consumer votes have the deliberate ability to enact or represent change that can come from the state's legislature.

B. *The Commerce Clause*

Although other states are free to follow Maine's lead, they will still face pressure to comply with the Commerce Clause. Found in Article 1, Section 8 of the Constitution, the Commerce Clause gives sole power to Congress to regulate "commerce among the states."⁹⁹ Additionally, the Dormant Commerce Clause is the judicially created doctrine that even if Congress has not enacted a law, even if its powers lie "dormant," states cannot enact laws that unduly burden interstate commerce.¹⁰⁰ Like many protected constitutional rights, the U.S. Supreme Court handed down several cases that ensure that the federal authority these doctrines grant to Congress can still simultaneously restrict state authority.

While the Commerce Clause impacts a variety of industries, many cases specifically involve agricultural products. One of the

⁹⁸ See *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-117, 2014 U.S. Dist. LEXIS 195138 (D. Vt. Oct. 7, 2014) (denying additional right to know food interest groups their motion to intervene because their interests were already represented by existing plaintiffs challenging state right to know laws); see also *Brown v. Peckman* (In re Title), 3 P.3d 1210 (holding that the titles and summaries of state legislation regarding genetically-engineered food labeling were not misleading and therefore not impeding a consumer's right to know in regards to genetically-engineered food). Overall, the intricacies of right to know legislation in connection to food law is beyond the scope of this article. For more information on how this type of legislation works, see generally Synder, *supra* note 90.

⁹⁹ See U.S. CONST. art. 1, § 8, cl. 3; see also Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 290 (Dean Choper & Jesse H. Choper eds, 6th ed. 2019); Legal Information Institute, *Commerce Clause*, CORNELL L. SCH., https://www.law.cornell.edu/wex/commerce_clause (last updated July 2022). *Gibbons v. Ogden* is credited as one of the earliest cases to outline Commerce Clause parameters, holding that if activity within a state's borders has a role in larger interstate activities, it can be constitutionally regulated. See *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

¹⁰⁰ Legal Information Institute, *supra* note 99.

earliest examples is *Wickard v. Filburn*, when an Ohio wheat farmer violated federal regulations around allotment proportions because he held back additional acres of wheat for use on his farm.¹⁰¹ Filburn argued that because the wheat stayed on his farm, it never impacted interstate commerce and could not be regulated by the Commerce Clause.¹⁰² A unanimous court disagreed and found that even trivial acts, when aggregated, could substantially effect market pricing and availability,¹⁰³ which therein implicated interstate commerce.¹⁰⁴ This case ultimately signaled the start of a broader and more expanded power grant to Congress in regard to regulation of interstate commerce.¹⁰⁵

Wickard is not the only case where the U.S. Supreme Court promulgated guidelines that govern how the Commerce Clause should be interpreted. In 1970, the U.S. Supreme Court declared a rule in *Pike v. Bruce Church* known as the *Pike* Balancing Test.¹⁰⁶ This test takes the regulation at issue and weighs the burden on interstate commerce with the substantial local interest meant to be protected.¹⁰⁷ If the result is an off-balance burden between that local interest and interstate commerce, then the regulation must be struck down.¹⁰⁸

In 1977, shortly after *Pike*, Washington state brought suit against the North Carolina Department of Agriculture for in-state regulations that required all apples in North Carolina to be labeled with USDA grade-standards, standards lower than those in place in Washington.¹⁰⁹ Here, the U.S. Supreme Court ruled that even if a law appears facially neutral—meaning it does not explicitly affect interstate commerce—it cannot burden state markets from fairly competing in other state markets.¹¹⁰ Then in 1980, Minnesota enacted a prohibition on non-refillable or returnable plastic containers and Clover Leaf Creamery brought suit against the state

¹⁰¹ See *Wickard v. Filburn*, 317 U.S. 111, 133 (1942); see also *Wickard v. Filburn*, OYEZ, <https://www.oyez.org/cases/1940-1955/317us111> (last visited Oct. 27, 2023).

¹⁰² See *Wickard*, 317 U.S. at 119.

¹⁰³ See *id.* at 133.

¹⁰⁴ See *id.* at 125.

¹⁰⁵ See generally *Wickard*, 317 U.S. at 111.

¹⁰⁶ See generally *Pike v. Bruce Church*, 397 U.S. 137 (1970).

¹⁰⁷ See *id.* at 142-46.

¹⁰⁸ See *id.*

¹⁰⁹ See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 336-39 (1977).

¹¹⁰ See *id.* at 352.

in *Minnesota v. Clover Leaf Creamery Co.*¹¹¹ Here, the Supreme Court took a different position and held that because Minnesota's legislation held a rational relation to the purpose of resource conservation, while placing in- and out-of-state commerce on the same level, the law was not unconstitutional.¹¹²

IV. Balancing Constitutionality with Consumer Demand

A. California's Proposition 12

California recently found itself at the center of animal welfare controversy with the passing of Prop 12, a ballot initiative approved by 62% of California residents in 2018.¹¹³ The legislation required products from egg-laying hens, veal calves, and breeding pigs to be raised in a minimum square footage area that allowed for more freedom of movement, cage-free design (in the case of hens), and minimum floor space.¹¹⁴ The legislation outlined two deadlines, one in January 2020 that affected egg-laying hens and veal calves, and the second in January 2022 for breeding pigs and further regulations around egg-laying hens.¹¹⁵ In particular, the legislation stated that breeding pigs required at least 24 square feet of usable floorspace per pig.¹¹⁶ Further provisions within Prop 12 involve criminal and civil penalties, including jail-time, for non-compliant pork sold within the state.¹¹⁷ Prop 12 even goes so far as to permit

¹¹¹ See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1980).

¹¹² See *id.*

¹¹³ See Kenny Torella, *The Supreme Court is about to decide the fate of millions of pigs*, VOX (Oct. 9, 2022, 8:00 AM), <https://www.vox.com/future-perfect/2022/10/9/23393017/supreme-court-pork-pigs-prop-12-california-animal-welfare>.

¹¹⁴ See Jana Caracciolo, *What is Going on with Prop 12?*, NAT'L AGRIC. L. CTR. (Feb. 2022), <https://nationalaglawcenter.org/what-is-going-on-with-prop-12/>.

¹¹⁵ See *December 23, 2021 Update to Question 5*, CDFA|AHFSS (Mar. 5, 2021), https://s29.q4cdn.com/239956855/files/our_impact/animal/Grimmway-Farms_Press-Release.pdf.

¹¹⁶ See *id.*

¹¹⁷ See Brian Eyink et al., *Cal. issues proposed reguls. under the Farm Animal Confinement Initiative (Prop 12)*, JDSUPRA (June 10, 2021), <https://www.jdsupra.com/legalnews/california-issues-proposed-regulations-2964304/>.

on-site inspection audits by California officials to ensure proper compliance.¹¹⁸

California currently imports 99.87% of pork sold within its borders but consumes about 13% of the nation's total pork supply.¹¹⁹ As of December 1, 2021, California housed 82,000 hogs and Iowa housed 23,900,000 hogs.¹²⁰ Current industry averages for sow gestation crates provide approximately 14 square feet of space per sow (typically arranged 24 inches wide by 7 feet long),¹²¹ far below the 24 square foot minimum. This implies that out of state pork producers will have to reconfigure existing barns, build new construction entirely, or reduce herd size to legally sell pork products in California, which is estimated to cost upwards of \$300 million dollars.¹²²

In December 2019, National Pork Producers Council (“NPPC”) and the American Farm Bureau Federation (“AFBF”) filed suit in the Southern District of California against the California Department of Agriculture and the California Department of Public Health.¹²³ The claim alleged that Prop 12 violated the Dormant Commerce Clause in two ways: 1) Prop 12 has an extraterritorial effect, meaning its effects are seen primarily out of state, and 2) that it fails the *Pike* Balancing Test because it unduly burdens interstate commerce.¹²⁴ Essentially, the complaint stated that the ballot initiative made it harder for Prop 12 compliant pork to enter California because of its significant ripple effect on producers not based in the state.¹²⁵ The District Court disagreed and held that Prop 12 “does not regulate extraterritorially because it does not target

¹¹⁸ See Rob Smith, *NPPC v. Ross – Supreme Court to Consider Whether Cal. Can Reg. Food Prod. for Entire Nation*, NFIB (Oct. 3, 2022), <https://www.nfib.com/content/legal-blog/legal/nppc-v-ross-supreme-court-to-consider-whether-california-can-regulate-food-production-for-entire-nation/>.

¹¹⁹ See Torella, *supra* note 113; see also Peggy Kirk Hall, *California farm animal welfare law heads to the Supreme Court*, FARM OFFICE (Oct. 4, 2022), <https://farmoffice.osu.edu/blog-tags/commerce-clause>.

¹²⁰ See *Hog Inventory*, *supra* note 76.

¹²¹ See John McGlone, *Gestation Stall Design and Space: Care of Pregnant Sows in Individual Gestation Housing*, NAT'L PORK BD. 2 (2013), <https://porkcheckoff.org/wp-content/uploads/2021/05/Gestation-Stall-Design-and-Space.pdf>.

¹²² See Torella, *supra* note 113.

¹²³ See Caracciolo, *supra* note 114.

¹²⁴ See Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201, 1206-8 (S.D. Cal. 2020).

¹²⁵ See *id.*

solely interstate commerce and it regulates in-state and out-of-state conduct equally.”¹²⁶

NPPC and AFBF appealed to the Ninth Circuit, which upheld the District Court’s ruling, but added a threshold clarification and stated that if Prop 12 had out-of-state effects, those effects are not “impermissible” simply because it regulates pork sales only in California.¹²⁷ In other words, just because a statute regulates only in-state sales does not mean that the effects of that regulation are “impermissible” on the affected out-of-state markets. The Ninth Circuit said that Prop 12 “neither dictates the price of pork products nor ties the price of pork products sold in California to out-of-state prices.”¹²⁸ Even further, the Ninth Circuit said that increased costs to market participants and consumers do not constitute a significant burden on interstate commerce, and it is only in rare cases that a statute imposes a substantial burden via discrimination.¹²⁹ Because council for NPPC and AFBF did not allege discrimination, no substantial burden exists.¹³⁰ NPPC and AFBF appealed once again, and the U.S. Supreme Court granted certiorari and heard oral arguments on October 11, 2022.¹³¹

B. Proposition 12 Oral Arguments

During Oral Arguments to the U.S. Supreme Court, counsel for California and NPPC raised legal arguments implying that Prop 12 does more than set animal welfare standards, but exposes the overall consumer trend to make purchase choices based on animal welfare motivated morals.¹³² NPPC counsel argued that although California eluded to potential public health and welfare interest, the driving motivational factor came down to morality, which cannot stand as a legitimate public interest, especially weighted against its

¹²⁶ *Id.* at 1208.

¹²⁷ See *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1029 (9th Cir. 2021).

¹²⁸ *Id.* at 1028.

¹²⁹ See *id.* at 1032-34.

¹³⁰ See *id.*

¹³¹ See *Supreme Court of the United States October Term 2022*, SUPREME COURT, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2022.pdf (last amended Sept. 28, 2022).

¹³² See Transcript of Oral Argument at 59-60, 74, 91, 94, *National Pork Producers v. Ross*, 598 U.S. 356 (2023) (No. 21-468); see also *Consumer Perceptions of Farm Animal Welfare*, ANIMAL WELFARE INST., https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf (last visited Nov. 11, 2023).

burden on interstate commerce.¹³³ Counsel for California counter-argued that the voting process cannot track voter motivations, but if morality was the sole motivator, the law itself does not stronghold out-of-state producers to comply and should be upheld.¹³⁴

When presented with this specific argument from California counsel, the Justices produced a line of questioning that focused on a threshold definition around morality regulation.¹³⁵ For instance, Justice Amy Coney Barrett asked if the allowance of Prop 12 would potentially open the door to states banning products from companies that did not provide certain healthcare for its employees, or how a ruling in favor of Prop 12 may or may not strike down a multitude of existing state laws.¹³⁶ Even further, when Justice Neil Gorsuch questioned as to whether Prop 12 should be upheld if California consumers were willing to pay for the entire increase of production costs, NPPC counsel countered that if that were the case, then primary pork-producing states such as Iowa or North Carolina could say that they have a moral interest in providing affordable pork to consumers that do not want to pay that increased price.¹³⁷ Since states cannot argue morality as a basis for their legislation, neither of these moral interest arguments have plausible legal merit.¹³⁸

But these arguments beseech an analysis of human versus animal morality, and whether a state can cross the proverbial line of morality over existing precedent.¹³⁹ For example, the U.S. Supreme Court firmly held in *Lawrence v. Texas*¹⁴⁰ that states cannot regulate

¹³³ See *Lawrence*, 539 U.S. at 582.

¹³⁴ See Transcript of Oral Argument, *supra* note 132, at 94.

¹³⁵ See Emily Hoeven, *California pig law exposes a divided America*, CAL MATTERS (Oct. 12, 2022), <https://calmatters.org/newsletters/whatmatters/2022/10/california-pig-law-supreme-court/>.

¹³⁶ See Transcript of Oral Argument, *supra* note 132, at 86, 97.

¹³⁷ See *id.* at 33-34, 79, 131.

¹³⁸ See *generally Pike*, 397 U.S. at 142.

¹³⁹ The currently seated U.S. Supreme Court appears to be moving strongly away from areas traditionally granted in the realm of civil rights. See *generally* Shay Dvoretzky & Emily Kennedy, *Key Trends to Watch as the Supreme Court Reopens its Doors*, REUTERS (October 17, 2022, 10:19 AM CDT), <https://www.reuters.com/legal/litigation/key-trends-watch-supreme-court-reopens-its-doors-2022-10-17/>. Therefore, an expansion of civil rights granted to animals seems highly unlikely. This line of thought is also likely strengthened by the lack of animals mentioned in the Constitution, the common-law principle of animals of property, and the commercially-valuable undertone of animals throughout history.

¹⁴⁰ For further analysis of the overall implications arising from the holding in *Lawrence v. Texas*, see *generally* Nicole Hart, *The Progress and Pitfalls of*

morality.¹⁴¹ In this landmark case, the U.S. Supreme Court held that “moral disapproval” alone cannot sufficiently stand as a legitimate state interest to be upheld under rational review, especially if that moral disapproval unfairly disadvantaged a group of certain individuals.¹⁴² If a state, such as Texas, cannot force its moral views on its own citizens, can those citizens use the power of their vote to force their moral beliefs on other states? Prop 12 indicates that Californians seem to think so. But the majority of morality precedence comes from cases that regulated behaviors between humans,¹⁴³ not humans and animals. So, can animal welfare even find morality classification that arises to a legitimate state interest? This seems unlikely since animals are not mentioned in the Constitution and have a long-standing history of being seen as “commercially valuable” property.¹⁴⁴

Other Justices raised questions such as whether or not the burden should be on California to label non-compliant pork.¹⁴⁵ This creates additional means to achieve California’s claimed local interest of grocery store shelves with specific welfare standards as a purchase option, without an undue burden on interstate commerce.¹⁴⁶ This potentially raises the question of commercial free speech, preceded by the *Central Hudson* Test articulated by the U.S. Supreme Court in *Central Hudson Gas and Electric Corp. v. Public Service Comm’n*. This four-prong test sets regulations to determine just how far commercial speech can push the envelope before

Lawrence v. Texas, 52 Buffalo L. Rev. 1417 (2004) (examining further the expansions and limitations of the Supreme Court’s holding in *Lawrence v. Texas*); see also Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 Calif. L. Rev. 505 (2008) (explaining the shortcomings of the holding in *Lawrence v. Texas* on subsequent gay rights litigation).

¹⁴¹ See *Lawrence*, 539 U.S. at 582 (explaining that prohibitions on homosexual relations violated the Equal Protection Clause).

¹⁴² The court held that the anti-sodomy laws at issue were created solely for the purpose of criminalizing homosexual sodomy, and because that criminalized only homosexuals, it violated the Due Process rights afforded to all U.S. citizens. See *Lawrence*, 539 U.S. at 582-83.

¹⁴³ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1952) (holding that segregated schools based on race are unconstitutional); see also *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (holding that indigent defendants must be provided representation without charge); see also *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (holding that a state-wide ban on contraceptives violated marital right to privacy).

¹⁴⁴ See generally Kelch, *supra* note 5, at 355.

¹⁴⁵ See Oral Argument – Audio, *supra* note 132.

¹⁴⁶ See *id.*

violating the First Amendment.¹⁴⁷ If California became responsible for labeling pork as non-compliant once it crosses into the state, the landmark *Central Hudson* Test could shift the labeling burden to producers; an action that California would rather put on producers anyway.

C. *A Tale of Precedence*

However, Prop 12 is not the first instance in which a clear line between consumers and producers, or producer interest groups, stood firmly. In *Int'l Dairy Foods Ass'n. v. Amestoy*, the plaintiff, a third-party dairy interest group, sued the state of Vermont for statutory labeling of milk produced with bST.¹⁴⁸ Plaintiffs argued that because the Food and Drug Administration (“FDA”) did not require such labeling, the state labeling requirement violated the First Amendment under the *Central Hudson* Test. On appeal, the Second Circuit agreed with the plaintiffs, finding strong evidence in the fact that the FDA scientifically proved milk composition with and without bST could not be differentiated between consumers and scientists alike.¹⁴⁹ Vermont in turn could not prove a real harm to consumers that signaled a need for public interest protection and awareness.¹⁵⁰

Additionally, the Second Circuit held that the producer-plaintiffs in this case did not need to prove that their speech was commercial, because the labeling requirement alone justified First Amendment implication, as it “requires them to speak when they simply rather would not.”¹⁵¹ It could be argued that this holding indicated any labeling burden should fall on California once pork enters the state, rather than on the pork producer during production. So, if Iowa or North Carolina producers do not want to speak,

¹⁴⁷ See David Schultz, *Commercial Speech*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/900/commercial-speech> (last updated Sept. 19, 2023).

¹⁴⁸ See *Int'l Dairy Foods Ass'n. v. Amestoy*, 92 F.3d 67, 69 (1996). bST is an FDA-approved growth hormone for bovines that increases milk production in cows. *Bovine Somatotropin (bST)*, See U.S. FOOD AND DRUG ADMIN., <https://www.fda.gov/animal-veterinary/product-safety-information/bovine-somatotropin-bst> (last updated Apr. 11, 2023).

¹⁴⁹ See *Int'l Dairy Foods Ass'n.*, 92 F.3d at 73.

¹⁵⁰ See *id.*

¹⁵¹ *Id.* at 72.

California then has the requirement to speak because its consumer-voters requested as such.

Courts have held that disclosure through product labeling generally applies to mandates, not just those intended to prevent deceptive labeling.¹⁵² This holding applies to uncontroversial mandates and a company's obligation not to participate in misleading advertising.¹⁵³ Here, the subject of animal welfare is highly controversial, and it is likely that livestock welfare practices could not be defined "generally" to prevent deception, because the USDA has not federally regulated standard welfare practices.¹⁵⁴ Prop 12 is strictly a mandate by California alone and is not a means of misleading advertising, because no other state or federal mandate sets the withholding of animal welfare production methods as misleading.

The *Int'l Dairy Foods Ass'n* majority even went so far as to note that "were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods."¹⁵⁵ Comparing the court's opinion in *Int'l Dairy Foods Ass'n* with the facts presented in Prop 12, can California really prove that their interest in removing a product they feel is morally inferior is substantial enough to be legally upheld? And even further, if the court in *Int'l Dairy Foods Ass'n* says that consumer interest alone cannot be sufficient for disclosure, it seems likely that the mandated disclosure of animal welfare practices because of consumer interest is a prime example of required disclosures that open the no-end floodgates mentioned by the Second Circuit.

The dissent in *Int'l Dairy Foods Ass'n* recognized that the First Amendment favors the free flow of accurate and relevant information, and withholding a label on milk with bST did not encourage that concept.¹⁵⁶ This implies that consumers, like those in

¹⁵² See The Harvard Law Review Association, *Commercial Speech — Compelled Disclosures — D.C. Circuit Applies Less Stringent Test to Compelled Disclosures. — American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*), 128 HARV. L. REV. 1526, 1526 (2015).

¹⁵³ See *id.* at 1527.

¹⁵⁴ See *id.* However, the *en banc* review suggested that courts recognize the complexity and general controversy around this issue could vary greatly and on review, the divided court affirmed. *Id.*

¹⁵⁵ *Int'l Dairy Foods Ass'n*, 92 F.3d at 74.

¹⁵⁶ See *id.*

California, have a constitutional right to accurate and truthful information. It seems hard to reconcile this line of thought when Americans do *not* have a constitutional right to food but *do* have a First Amendment right to know what is in food because withholding such information bars free flow of truth.

Another case that adds a layer of complexity is the previously mentioned *Minnesota v. Clover Leaf Creamery Co.*¹⁵⁷ Clover Leaf claimed a violation of the Commerce Clause, but the U.S. Supreme Court in a 7-1 majority disagreed.¹⁵⁸ The court held that because the state legislature had a legitimate interest of resource conservation, a law can still be upheld, even if that interest creates an incidental shift in interstate commerce.¹⁵⁹ However, is there a point when resource conservation also crosses into morality? Taking a line from the Prop 12 playbook, if one state argues that in-state legislation to go green should still be upheld, if it affects out-of-states markets, could an affected state argue that it has an equal moral interest in providing affordable resource conservation methods for those that do not choose the high price of “green values?”

In contrast, the D.C. Court of Appeals suggested an overall consumer interest in the right to know production methods in *Am. Meat Inst. v. U.S. Dep’t of Agric.*¹⁶⁰ In this case, the court upheld country-of-origin labeling for beef, stating that health and market concerns were enough of a substantial interest to warrant the labeling, and that this information has a “historical pedigree that lifts it well above ‘idle curiosity.’”¹⁶¹ So even though the D.C. Court of Appeals indicated the world-wide geographical location within production methods warranted a consumer’s right to know, does this mean that welfare practices within U.S. borders also rise to a level above idle curiosity? And does it change the analysis if consumers are willing to pay the price for their idle curiosity, as Justice Gorsuch questioned?

All the above-mentioned cases indicate a trend that while a consumer may have the right to define standard welfare practices, this does not mean that regulatory bodies and producer definitions

¹⁵⁷ See *Minnesota*, 449 U.S. at 458.

¹⁵⁸ See *Minnesota v. Clover Leaf Creamery Co.*, OYEZ, <https://www.oyez.org/cases/1980/79-1171> (last visited Nov. 11, 2022).

¹⁵⁹ See *id.*

¹⁶⁰ See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 20 (2014).

¹⁶¹ See *id.* at 23.

fall out of the picture entirely. If a court can consider scientific proof from the FDA as sufficient evidence to warrant a withholding of on-farm production methods, then the result is reduced consumer input about those methods. So how does a consumer truly find a way to insert their morality-driven welfare preferences when making purchase decisions?

D. Ballot Initiative Effectiveness

Consumers can express their purchase power as voters when they vote in favor of a ballot initiative, but is that the most effective way to express that power without violating well-established and foundational constitutional principles? Because consumers are involved in ballot initiatives, the Commerce Clause is automatically triggered. California is not the only state that enacted ballot initiatives to express morality preference in animal welfare practices. For example, Massachusetts put on its ballot Question 3, a welfare statute that nearly mirrors Prop 12.¹⁶² Currently, the enactment of Question 3 is on hold until the U.S. Supreme Court holding in *Nat'l Pork Producers Council v. Ross* is released. Arizona¹⁶³ and Florida¹⁶⁴ also have similar statutes that found their standing through ballot initiatives.

But consumers have a “brand choice” in nearly every other consumer product category, so why is the right to how food is produced excluded? Consumers are free to walk into a retail store and choose Kraft or Hidden Valley ranch dressing, or Levi or Faded Glory jeans. When consumers choose any particular brand, they can make that choice based upon personal values that guided their purchase power.¹⁶⁵ A willing consumer can take their personal

¹⁶² See Chris Lisinski, *Mass. Legislature passes animal welfare law changes, set to ease egg supply fears*, GHB (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>; see also Brian Eyink et al., *Massachusetts Agrees to Stay Question 3 Pork Enforcement Pending Supreme Court Proposition 12 Decision*, JDSUPRA (Aug. 12, 2022), <https://www.jdsupra.com/legalnews/massachusetts-agrees-to-stay-question-3-9178329/>.

¹⁶³ See *Pork Production Practice Banned in Arizona*, THE PIG SITE (Nov. 9, 2006), <https://www.thepigsite.com/news/2006/11/pork-production-practice-banned-in-arizona-1>.

¹⁶⁴ See FLA. CONS. art X, § 21.

¹⁶⁵ See generally William F. Brown, *The Determination of Factors Influencing Brand Choice*, 14 J. OF MKTG. 699 (1949) (explaining generally the various factors that can influence consumer brand choice).

values, pay a premium price, and expect that premium price automatically means animal welfare practices are above and beyond the standard definition of humane.¹⁶⁶

However, a plethora of complicated factors that many consumers may not even consider sit on the horizon when it comes to the effectiveness of ballot initiatives. For example, California released research results from on-site visits by a veterinarian, Dr. Cox, that examined the capacity and ability of out-of-state producers to raise “Prop-12 compliant pork.”¹⁶⁷ Interestingly enough, there are no financial statistics included in the report, nor are there any statistics around the number of out-of-state producers that would need to become compliant.¹⁶⁸ An additional twist is that Dr. Cox visited a Smithfield processing plant, which announced in June 2022 that it is closing a Vernon, California plant due to the increased costs of conducting business in the state.¹⁶⁹ If a consumer expressed their animal welfare choice through a ballot initiative, a potential repercussion of that choice is businesses such as Smithfield leaving that state’s market to find more affordable markets in other states where consumers likely have not defined standard welfare practices.

If a consumer, through voter-power, dictates a preferred choice in animal welfare practices, producers are still burdened with tracing the animal back to those same consumer-preferred welfare practices. Vertical integration is currently at an all-time high in the livestock and poultry industry, yet nation-wide traceability remains low.¹⁷⁰ Factors such as input costs (especially in the 2022 economic

¹⁶⁶ See *Ctr. for Env't. Health v. Perdue*, No. 18-CV-01763-RS, 2018 U.S. Dist. LEXIS 229877, at *5 (N.D. Cal. 2018).

¹⁶⁷ See Elizabeth Cox, *Lessons About Proposition 12 from Recent Pork Producer Visits*, ANIMAL CARE PROGRAM 1 (July 2022), https://www.cdffa.ca.gov/AHFSS/pdfs/prop-12_pork_producer_visits.pdf.

¹⁶⁸ See *id.*

¹⁶⁹ See News Desk, *Smithfield plans to close California plant over costly red tape and regulations*, FOOD SAFETY NEWS (June 13, 2022), <https://www.foodsafetynews.com/2022/06/smithfield-plans-to-close-california-plant-over-costly-red-tape-and-regulations/>.

¹⁷⁰ See generally Harrison M. Pittman, *Market Concentration, Horizontal Consolidation, and Vertical Integration in the Hog and Cattle Industries: Taking Stock of the Road Ahead*, THE NAT'L AGRIC. LAW CTR. (Aug. 2005), <https://nationalaglawcenter.org/publication/download/pittman-market-concentration-horizontal-consolidation-and-vertical-integration-in-the-hog-and-cattle-industries-taking-stock-of-the-road-ahead-national-aglaw-center-publications-2005/> (explaining generally the trends in vertical integration in the livestock and poultry industry in recent decades); see also Ag. Law in the Field,

climate¹⁷¹), the off-set ratio of farm-share to market-share in a production dollar,¹⁷² and federal regulations, all play significant roles in determining whether the producer finds profit in their livestock operation. Analyzed with Prop 12, 99.87% of pork is produced outside of California. This means out-of-state producers have no choice but compliance if they want the California market, simply because a voter-consumer preferred certain animal welfare practices. If a producer cannot profit from raising their livestock, then that producer falls out of the market which could implicate market prices and consumer demand across the United States or the globe.

Even if a state had a genuine concern for the ballot initiative, just as the court in *Int'l Dairy Foods Ass'n* recognized from Vermont, that genuine concern could still be held inadequate.¹⁷³ Most ballot initiatives are likely to be deemed inadequate, unless they meet already existing standards proven through extensive research.¹⁷⁴ While that research could come from congressional findings or federal regulatory bodies, a Wisconsin Court of Appeals suggested that states already have qualified experts on hand that can attest to quality animal welfare practices as a genuine concern.¹⁷⁵ In that case, the court held that because the alleged state expert had university training, years of on-farm experience including a childhood upbringing on a farm, and held a humane officer license for three years, she rightfully qualified as an expert to testify against the defendant's inhumane treatment of farm animals.¹⁷⁶

The reality is that ballot initiatives hold less credibility because they were created by the general voting population rather than legislation. Courts are more likely to favor well thought-out legislative intent over consumer votes because "it is not the function

Beth Rumley (Animal Confinement Statutes), TEX. AGRILIFE EXTENSION (Nov. 11, 2021), <https://aglaw.libsyn.com/episode-118-beth-rumley-animal-confinement-statutes>.

¹⁷¹ See Samuel Fromartz, *USDA projects farm income to rise around 5% in 2022*, SUCCESSFUL FARMING (Sept. 2, 2022), <https://www.agriculture.com/news/business/usda-projects-farm-income-to-rise-around-5-in-2022>.

¹⁷² See *Farm share of U.S. food dollar rose one cent in 2020, largest increase in nearly a decade, as food-at-home spending increased*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (Mar. 21, 2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=103547>.

¹⁷³ See *Int'l Dairy Foods Ass'n.*, 92 F.3d at 73.

¹⁷⁴ See generally *id.* at 74.

¹⁷⁵ See *State v. Drew*, 2004 WI App, ¶5, 275 Wis. 2d 277, 683 N.W.2d 94.

¹⁷⁶ See *id.* at ¶4.

of the courts to substitute their evaluation of legislative facts for that of the legislature.”¹⁷⁷ So, if clearly laid-out legislative intent reasonably supports congressional motivation, potential litigators cannot state that Congress mistook that legislative intent or findings.¹⁷⁸ California voters did not have to conduct research to get Prop 12 on the ballot. As indicated in oral arguments, if morality is what prompted Prop 12 to become a ballot initiative, it cannot stand. Morality, unlike public safety, cannot be researched. If it could, courts would still likely not deem this a legitimate interest, due to existing precedent from cases such as *Lawrence v. Texas*.¹⁷⁹ While courts acknowledge the challenge of balancing state interest with interstate commerce, truly legitimate interests, such as conservation or environmental concerns, backed by legislative processes simply hold more weight.¹⁸⁰

V. Blending Consumer and Producer Definitions

A. *Maintaining the Police Power in the States*

Ultimately, the answer lies not in creating one set of standard definitions, but rather understanding that a place for both producer and consumer definitions exist. Consumer demand drives producer output, even outside of the livestock and poultry industry. For instance, the significant increase in household cleaning products and soap during the 2020 COVID pandemic drove consumer demand that companies like Lysol had to fill.¹⁸¹ But the uniqueness of the livestock and poultry industry makes nationwide standardization incredibly difficult.¹⁸²

Some may argue that uniform inclusion of livestock in the Animal Welfare Act may be the answer, but the sharp reality is that producers in Florida are subject to much different geographic conditions, including temperature and even available land space, than producers in Oregon. Even though this inclusion would create an easy

¹⁷⁷ See *Minnesota*, 449 U.S. at 470.

¹⁷⁸ See *id.* at 464.

¹⁷⁹ See *Lawrence*, 539 U.S. at 578.

¹⁸⁰ See *Minnesota*, 449 U.S. at 469

¹⁸¹ See *How Covid-19 has transformed consumer spending habits*, J.P. MORGAN (Nov. 23, 2020), <https://www.jpmorgan.com/insights/research/covid-spending-habits>.

¹⁸² See Jennifer Alyson, *Vertical Integration in the Beef Industry*, SMALL BUS. CHRON., <https://smallbusiness.chron.com/vertical-integration-beef-industry-14614.html>, (last visited Nov. 17, 2022).

preemption argument by which Prop 12 would clearly be struck down,¹⁸³ producers are limited by a plethora of factors that vary by region. This means welfare standards would likely end up being so malleable that courts would spend too much time interpreting whether a specific practice qualified as inhumane. As seen in cases such as *Int'l Dairy Foods Ass'n*, courts are not willing to substitute their judgment for the judgment of those more skilled in a particular area.¹⁸⁴

Given that the Constitution does not mention animals, the power to address animal cruelty has been left to the states. Any federal preemption arguments must have a particularly strong reason for intervention,¹⁸⁵ and the lack of animal inclusion in the Constitution only strengthens this argument.¹⁸⁶ For instance, Michigan enacted “Generally Accepted Agricultural and Management Practices” (“GAAMPS”) that became law as part of the Michigan Right to Farm Act that defines “Care of Farm Animal” practices.¹⁸⁷ Nebraska enacted the Livestock Animal Welfare Act with misdemeanor charges for “intentionally, knowingly, or recklessly abandoning or cruelly neglecting a livestock animal” and includes felony charges if the animal dies.¹⁸⁸

While federal uniformity may not be the answer, perhaps a cohesion between state legislation and USDA guidelines could be a viable solution. If state legislatures modeled livestock welfare practices from the general welfare certifications offered by the USDA, an indirect but noticeable effect is that states would appear to have similarities in their statutes, without the additional complications of federal implications. In *Int'l Dairy Foods Ass'n*, even though the court ruled against the state, Vermont took the time to come up with an economic impact statement to show the reasoning

¹⁸³ See Legal Information Institute, *supra* note 99.

¹⁸⁴ See *Int'l Dairy Foods Ass'n*, 92 F.3d at 74.

¹⁸⁵ See *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (2017).

¹⁸⁶ See Favre, *supra* note 18.

¹⁸⁷ *Generally Accepted Agricultural and Management Practices for the Care of Farm Animals*, MICH. DEP'T OF AGRIC. & RURAL DEV. (2022), <https://www.michigan.gov/mdard/-/media/Project/Websites/mdard/documents/environment/rtf/2022-GAAMPS/2022-Care-of-Farm-Animals-GAAMPS.pdf?rev=7032f74127e943848d0d358f529a05b9&hash=FFF9C23F99FA756667E8E500B653157E>.

¹⁸⁸ NEB. REV. STAT. § 54-903 (2010).

behind the milk labeling requirement.¹⁸⁹ If a state does take its time to come up with facts tied to a particular interest, the court usually will recognize and potentially honor that particular interest.¹⁹⁰ States should have the power to balance the interests of producers within their borders, while still being able to clearly define standard practices and align them with current USDA standards so that a path towards uniformity could be seen without federal regulation.

B. Bridging the Gap Between Producers and Consumers

Another viable solution is to create accessibility between consumers who wish to define welfare practices with producers who are willing to meet that consumer definition. Room in the market for an increased consumer request for welfare definitions should be permitted, but that request must be met with the ability for the producer to reasonably produce that request, while still making a practical profit.

First, producers should be encouraged to explore additional unique diversification markets within their own operations.¹⁹¹ For instance, a cattle producer in Illinois should have more available access to metropolitan markets, such as Chicago, where consumers are willing to pay a high price for a premium cut of grass-fed steak raised without hormones. Or a producer in Texas should have the opportunity to connect with an investor that is willing to overhead costs of livestock production so that consumers have more morals-motivated choices on grocery shelves but does not want to manage the day to day of that operation. Solutions such as these allow a producer to continue to determine their own best animal husbandry practices, while still tailoring to consumers who would like to add additional considerations of best livestock welfare practices.

Next, is the encouragement of “Community Supported Agriculture” or niche farming. This is the practice of consumers engaging directly with producers and, ultimately, the animal they

¹⁸⁹ See *Int'l Dairy Foods Ass'n*, 92 F.3d at 75.

¹⁹⁰ See generally *id.*

¹⁹¹ See Blair Fannin, *Niche market for ranch-raised beef on the rise*, SW. FARM PRESS (June 24, 2021), <https://www.farmprogress.com/livestock/niche-market-ranch-raised-beef-rise>; see also Heather Smith Thomas, *Do Your Homework When Aiming For A Niche Market*, AM. CATTLEMAN (Dec. 14, 2020, 10:14 A.M.), <https://www.americancattlemen.com/articles/do-your-homework-when-aiming-niche-market>.

will consume through a direct-to-consumer business model, rather than through a traditional livestock auction, feed yard, or corporate contract.¹⁹² Because consumers have an increased desire to connect their morality choices of animal welfare with their purchase power, they are willing to pay a higher price for beef, pork, or chicken directly to the producer. The producer will more efficiently capitalize profits because those consumers pay more than a contract through an auction, feed yard, or corporation. This solution balances the consumer-defined welfare expectations with producer-defined welfare practices, without violating the Commerce Clause. With more niche farming operations, California does not need Prop 12 because consumers have the purchase power to access morality exactly as they have defined it.

Although this solution could likely be met with hesitation and market complications, acts such as the Butcher Block Act,¹⁹³ if enacted, could help alleviate these concerns. The USDA recently awarded over \$220 million to expand both livestock and poultry processing plants for increased producer competition, which is an incredibly helpful step in the right direction for a more available market for producers to thrive.¹⁹⁴ If producers had more reasonable access to more local processors, they therein have the capacity to supply an increased demand from consumers who believe they should define welfare practices of any animal they consume. And while the unique independence of the cattle industry is likely most subjective to a successful integration of this direct-to-consumer business,¹⁹⁵ state animal interest organizations could help forge a path to others. For instance, state or national, pork or poultry organizations could structure subsidies through checkoff programs that incentivize producers to raise animals for niche farming. These subsidies could forge a path for an increased direct-to-consumer retail model where consumers can more readily access pork or chicken that fits within their morally defined welfare standards.

¹⁹² Fannin, *supra* note 191.

¹⁹³ See H.R. REP. NO. 117-4140, at 1 (2022).

¹⁹⁴ See FERNS AG. INSIDER, *USDA awards \$223 million to expand meat processing capacity*, SUCCESSFUL FARMING (Nov. 3, 2022), <https://www.agriculture.com/news/business/usda-awards-223-million-to-expand-meat-processing-capacity>.

¹⁹⁵ See Rick Purnell, *Integration*, BEEF MAG. (Mar. 1, 1998), https://www.beefmagazine.com/mag/beef_integration [https://web.archive.org/web/20150428090111/https://www.beefmagazine.com/mag/beef_integration].

C. *Certified Animal Welfare Programs*

History indicates that producers remain in the driver's seat when it comes to defined standards of care, beyond just animal welfare. However, the law in recent years moved to a recognition of an overall right held by consumers, which is precisely the kind of right Prop 12 attempted to codify. But Prop 12, for many reasons, is not a workable answer. What could very well be workable is an expanded National Animal Welfare Program, much like the National Organic Program.¹⁹⁶ In 2016, the Agricultural Marketing Service introduced an expansion to organic livestock and poultry production that included provisions around livestock health care practices and living conditions.¹⁹⁷ The proposed expansion opened for public comment in August of 2022 and closed its 60-day commentary period after an extension in November 2022.¹⁹⁸ A National Animal Welfare Program such as this could develop and enforce consistent national standards for heightened welfare practices in the United States, with the relationship between producers and consumers being mediated by existing successful practices currently implemented in the National Organic Program. This kind of solution gives the government the chance to help consumers find the products they want, without putting consumers and producers at constitutional odds in a battle between state police power.

Another option is to simply add more certification programs to the current USDA Welfare Program List that qualify as heightened or specific standards of welfare practices. These certification programs “set standards and guidelines for the humane care of various livestock species such as cattle, swine, sheep, and poultry.” While the USDA does partner with various animal industry association groups to promulgate welfare standards, currently “A Greener World” is one of the only interest groups rated by Consumer Reports as one of the highest standards of Animal Welfare.¹⁹⁹

¹⁹⁶ See *National Organic Program*, USDA: AGRIC. MKTG. SERV., <https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program> (last visited, Nov. 17, 2023).

¹⁹⁷ See *National Organic Program (NOP); Organic Livestock and Poultry Standards*, 87 Fed. Reg. 48562 (proposed on August 9, 2022) (codified at 7 C.F.R. pt. 205).

¹⁹⁸ See *id.*

¹⁹⁹ See *Certified Animal Welfare Approved by AGW, A GREENER WORLD*, <https://agreenerworld.org/certifications/animal-welfare-approved/> (last visited Nov. 17, 2023).

Because there is a place in the market for consumer-defined welfare standards, organizations with incredibly heightened welfare expectations could come up with their own certification programs in tandem with USDA experts. These programs would then be available for producers to partake in, if they so choose, with regular inspections to ensure those standards are met. This bypasses constitutional violations that could arise with ballot initiatives and still gives the consumer the choice to express their morality through purchasing meat only from operations under a certain program. This also balances the acknowledgement of experts in regulatory bodies found by the court in *Int'l Dairy Foods Ass'n* with standards from welfare interest groups. Ultimately, the onus then falls on these interest groups to highlight which products on shelves meet their standards and which do not. Moreover, certain farms can elect to participate in that market, rather than be forced to participate in the market for profitability because of an enacted ballot initiative.

D. The Eternal Power of Litigation

Because of competing tensions between consumer and producer defined welfare standards, the ultimate power of the court to litigate between disagreeing parties should not be tossed aside. Courts can serve two purposes: 1) determine the more knowledgeable party, and 2) provide accountability checks for promulgated regulations. Courts often demonstrate an aversion to substitute their judgement for those that know how to raise an animal according to best husbandry practices.²⁰⁰ Ultimately, courts recognize the superior knowledge of producers as the ultimate determinative source by which to best determine how to practice safe animal husbandry.²⁰¹ Additionally, courts hold accountability power to ensure any promulgated agency regulations are carried out accordingly.

A prime of example of the court's accountability power is the current litigation between Farm Sanctuary²⁰² and the USDA. In two separate lawsuits, Farm Sanctuary and the Animal Welfare Institute asserted violations of the Poultry Products Inspection Act

²⁰⁰ See *Seale v. Mckennon*, 336 P.2d 340, 346 (1959) (explaining that the Oregon Dep't of Agric. cannot do everything in its power to eradicate disease in cattle, and some management decisions should be left to the producers).

²⁰¹ See *id.* at 574.

²⁰² See *About Us*, FARM SANCTUARY, <https://www.farmsanctuary.org/about-us/> (last visited Oct. 25, 2023).

and the Humane Slaughter Act, alleging unusually cruel high-speed practices in poultry slaughterhouses and a lack of downed pig regulations in humane slaughter.²⁰³ Even though the federal government expressed congressional values through these two acts, Farm Sanctuary, as an animal welfare activist group with heightened morality agendas, expressed a desire to hold the USDA accountable to higher humane slaughter practices.²⁰⁴ From this litigation, various uncovered factors demonstrated that the USDA did in fact need to be held accountable to their own promulgated welfare rules.²⁰⁵ This case serves as a prime example of why litigation should not be discarded entirely, but rather serve as a needed step to ensure the continued success of regulations post-implementation.

Another instructive accountability case comes from *N.J. Soc’y for Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, where the court held that a regulatory department must first determine if routine husbandry practices are humane before promulgating any regulatory agency standards around those practices.²⁰⁶ The court’s holding was motivated largely in part by the statute’s lack of clear definitions and measurability around the term “knowledgeable individual.”²⁰⁷ The court balanced this holding with a recognition of producer interests because the law stemmed from New Jersey’s extensive research into the issue.²⁰⁸ The court stated in its opinion that the regulations promulgated by the state did not solely come from economic motives, like the petitioner animal welfare

²⁰³ See *Farm Sanctuary v. U.S. Dep’t of Agric.*, 545 F. Supp. 3d 50, 52-53 (W.D.N.Y. 2021); see also *Animal Welfare Inst. v. Vilsack*, No. 20-CV-6595 (CJS), 2021 U.S. Dist. Lexis 261189, at *2-6 (W.D.N.Y. Oct. 13, 2021).

²⁰⁴ See generally *Farm Sanctuary* 545 F. Supp. 3d.

²⁰⁵ For instance, the USDA did not prepare an Environmental Impact Statement for National Environmental Policy Act before issuing regulations, and that the Food Safety Inspection Service was “categorically excluded from having to perform a NEPA review.” *Farm Sanctuary*, 545 F. Supp. 3d at 55. It should be noted that the opening line of Judge Wolford’s opinion from the case filed in New York’s Western District said, “Plaintiffs are nonprofit organizations working to protect animals, people, and environments from industrial animal agriculture, and to ensure that laws intended to regulate industrial animal agriculture are properly implemented.” *Id.* at 52. Contrasted with the group’s self-description in the original submitted complaint, “industrial animal agriculture” is not used once through the entirety of the document. This suggests that although courts do, and should, have an ultimate power to litigate, judges may always have an opportunity to flex their personal opinions on whatever matter might be before them.

²⁰⁶ See *N.J. Soc’y for Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, 955 A.2d 886, 912 (2008).

²⁰⁷ *Id.*

²⁰⁸ See *id.* at 914-15.

interest group suggested.²⁰⁹ The “regulations reflect[ed] that the Department took seriously its mandate to identify humane practices, but did so in recognition of the need to balance those concerns with the interests of the farmer whose livelihood depends on such techniques and whose existence would be threatened were they to be banned.”²¹⁰ The court here demonstrated that a producer should have a very serious voice in defining animal welfare standards.²¹¹ *N.J. Soc’y for Prevention of Cruelty to Animals* acknowledged the rights of state agricultural regulatory agencies to emphasize producer-defined welfare practices, if they so choose.²¹²

While case law over time established that animals deserve quality care from humans, courts still routinely uphold early societal views that animals are “commercially valuable” property not subject to legal rights equal to humans.²¹³ For example in *Nonhuman Rights Project, Inc. v. Breheny*, a New York court found that Happy the Elephant was not a legal person and therefore not subject to illegal detention at the New York Zoo.²¹⁴ Additionally, in *Justice v. Vercher*, an Oregon court held that under common law, animals cannot sue on their own behalf because they are personal property, and therefore the plaintiff could not sue a former abusive owner on behalf of a rescued horse.²¹⁵ While these cases could be distinguished from those involving animals for human consumption, they represent fact patterns courts could use to litigate disputes as to whether or not animals have welfare rights that could be defined by consumers.

Lastly, courts can define who, if anyone, is most appropriately situated to care for any livestock entrusted to their care. For example, a Criminal Appeals Court in Tennessee settled a dispute around an animal cruelty statute that the defendant allegedly violated.²¹⁶ Not only did the Court hold that the animal cruelty statute

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² *Id.* at 415, 955 A.2d at 915.

²¹³ *See generally* Favre, *supra* note 18.

²¹⁴ *See Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 575 (N.Y. June 14, 2022). Even with the majority holding, two justices wrote fairly lengthy dissents claiming that Happy the Elephant should indeed have legal rights. *Id.* at 578.

²¹⁵ *See Justice v. Vercher*, 518 P.3d 131, 132 (2022).

²¹⁶ *See State v. Broyles*, No. E2019-01033-CCA-R3-CD, 2021 Tenn. Crim. App. LEXIS 234, at *2 (Tenn. Crim. App. May 27, 2021) (examining whether the defendant violated Tenn. Code Ann. § 39-14-202 when he unreasonably failed to

provided “fair notice” to individuals regarding an obligation to care for animals, it also held that the defendant’s employment as a horse trainer placed him in the best position to reasonably determine the basic care needs of animals subjected to his care. While the facts of this case involved an animal not intended for human consumption, the court here still demonstrated an unwillingness to substitute its knowledge for that of the animal caretaker.²¹⁷ This shows that if a producer should hold the superior position of defining animal welfare standards, the state has capacity to directly hold those producers to those standards, with criminal enforcement, based on a morality argument that animals deserve a greater status than just property for human gain.²¹⁸

The power of the court, although beastly, should not be ignored. Litigation can be timely, costly, and even frustrating. The eventual outcome of litigation is to seek answers by which other courts, and ultimately the public or even the relevant administrative agency, can easily interpret and abide by. Litigation should continue to be a method by which interest groups on both sides of the consumer and producer aisle resolve disputes. Ultimately, litigation can establish standards and rules that guide the minutia naturally found within the complexities between animal welfare practices and morality.

VI. Conclusion

While the discussion of animal welfare standards will likely continue long into the future, the ability to welcome varied definitions into the marketplace is justifiably reasonable. Both federal and state courts recognize that consumer and producer interest should be protected, each in their respective ways. Although ballot initiatives likely prove an ineffective means for consumers to define standard welfare practices due to triggered Commerce Clause issues, the consumer is not without a voice. And if the consumer has the means to speak based on morality preferences, producers are still

provide adequate access to pasture, confined horses without food and water, failed to feed appropriate ration diets to horses, and failed to seek veterinary or other expert advice when the horses' malnourishment became pronounced).

²¹⁷ *See id.* at *51-52.

²¹⁸ While an unreported criminal case does not create strong binding or persuasive legal precedent, the importance of this case as an example comes from the court’s recognition to hold an owner of an animal to a basic welfare standard that could be recognized simply through direct ownership of that animal.

the most apt to define welfare practices. This ensures that producer interests are not sacrificed or lessened because of those morally-driven consumer definitions. An amendable solution for all parties is likely not feasible, because the connection between humans and animals runs centuries deep. To bridge the welfare gap most effectively between consumers and producers, a place in the market for both definitions must be welcomed and encouraged. Because as Farmer Hoggett says to Babe after his astonishing and winning sheepdog pattern, “that’ll do pig. That’ll do.”