

1-23-2024

Cracking Down on Egg Law: Legal Discrepancies Impacting Sales of Ungraded Eggs in Texas

Parker Benton

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Food and Drug Law Commons](#), [Health Law and Policy Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Parker Benton, *Cracking Down on Egg Law: Legal Discrepancies Impacting Sales of Ungraded Eggs in Texas*, 55 ST. MARY'S L.J. 279 (2024).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol55/iss1/6>

This Comment is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENT

CRACKING DOWN ON EGG LAW: LEGAL DISCREPANCIES IMPACTING SALES OF UNGRADED EGGS IN TEXAS

PARKER BENTON*

I.	Introduction.....	280
II.	Statutory and Regulatory Background.....	281
	A. Texas Agriculture Code	281
	B. Department of State Health Services Regulations.....	283
	C. Discrepancies Between Statutes and Agency Regulations.....	285
III.	Egg Grading and Licensing Process	286
	A. Egg Grading	286
	B. Licensing	290
IV.	Analysis of the Arguments	291
	A. Arguments Against Legislative Amendment.....	291
	B. Arguments in Favor of Amending the Texas Agriculture Code.....	300
V.	Proposal for Legislative Amendment	306
	A. Previous Attempts to Amend the Law.....	306
	B. Conclusion: Proposal for Amendment.....	307

*J.D. Candidate, 2024, St. Mary's University School of Law; B.A., 2017, Texas A&M University.

I. INTRODUCTION

Kim Alexander, a small farmer outside of Austin, Texas, operates a chicken farm consisting of about 1,500 hens that produce an average of sixty-five to seventy dozen eggs per day.¹ As a small farmer (3,000 hens or less),² Kim is legally permitted to sell his eggs directly to consumers at farmers markets without first obtaining a license from the Texas Department of Agriculture (TDA) or having his eggs graded by the agency.³ For years, local Austin restaurants and even some small retailers enjoyed the freedom to purchase those exact same eggs from Kim to serve to their customers as part of a strong farm-to-table movement within the Austin restaurant community.⁴ This came to a sudden halt in 2009, when local health inspectors informed restaurant owners they could no longer serve Alexander Family Farm eggs because they were ungraded.⁵

Under the Texas Agricultural Code (TAC), small farmers like Kim Alexander can sell ungraded eggs produced by their own flock.⁶ However, the Texas Department of State Health Services (DSHS) prohibits restaurants and food retailers from buying ungraded eggs,⁷ even though they can serve and sell eggs without a license.⁸ This regulatory prohibition effectively circumvents the TAC by preventing small farmers from selling their ungraded eggs wholesale.⁹

To Kim, and many small farmers throughout Texas, these regulations create a marketing barrier for small farmers, who lack the resources to satisfy the licensing and grading requirements in order to sell their eggs wholesale.¹⁰

1. Virginia B. Wood, *Crackdown: If Local Eggs Are Outlawed, Will Only Outlaws Have Eggs?*, AUSTIN CHRON. (Nov. 27, 2009), <https://www.austinchronicle.com/food/2009-11-27/921339/> [<https://perma.cc/ZN9L-KNWG>].

2. *Id.*; see Alexia Kulwiec, *Viability of Small to Mid-Sized Agriculture*, 26 DRAKE J. AGRIC. L. 85, 91 (2021) (describing how farmers with 3,000 hens or less may be exempt from federal egg regulations).

3. Wood, *supra* note 1.

4. *Id.*

5. *Id.*; see also 4 TEX. ADMIN. CODE § 15.1 (2023) (Tex. Dep't of Agric., Inspections) (defining "[u]ngraded" as "[a] classification of eggs which are marketed by a producer . . . and which have not been handled, graded, or packed by a licensee").

6. TEX. AGRIC. CODE ANN. § 132.002.

7. S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019).

8. AGRIC. § 132.021.

9. S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019).

10. *Improve Access to Locally Produced Eggs!*, FARM & RANCH FREEDOM ALL. (Apr. 1, 2021), <https://farmandranchfreedom.org/improve-access-to-local-eggs/> [<https://perma.cc/PLE8-6Y4Q>].

While the state has a strong interest in providing quality assurance for the health and safety of consumers, there is disagreement between the Texas small farming community and state regulators as to whether these regulations provide any legitimate food safety benefits to the public.¹¹

This Comment will first provide an analysis of the relevant statutory language in the TAC, as well as the DSHS regulations. Then, this Comment will discuss the TDA licensing and egg grading processes to assess the burden these requirements impose on Texas' small farming community. This Comment will then explore the arguments for and against amending the TAC to explicitly permit small chicken egg producers to sell their ungraded eggs to restaurants and retailers for the purposes of resale. Following a thorough analysis of the relevant statutes and regulations, how they operate in practice, and the arguments for and against amendment, this Comment will provide a workable resolution to the issue, protecting both the economy and the small farmers' American dream.

II. STATUTORY AND REGULATORY BACKGROUND

A. *Texas Agriculture Code*

The statutory language found within the TAC does not facially prohibit Texas restaurants and retailers from buying ungraded eggs from small chicken egg producers for the purpose of resale to the ultimate consumer.¹²

Chapter 132 of the TAC provides the relevant statutory provisions governing the sale, licensing, and grading requirements of eggs in Texas.¹³ At the outset of this chapter, the TAC immediately exempts from its subsequent provisions any “person selling only eggs that are produced by

see Wood, *supra* note 1 (“At this point, it looks as though [Kim Alexander’s] only remedies would be an unlikely directive from the City Council . . . to suspend enforcement of the graded egg regulations or legislation amending the state law to allow small egg producers to sell ungraded eggs for resale.”).

11. *See* Wood, *supra* note 1 (describing a small farmer’s plea to the Austin Sustainable Food Policy Board that “egg grading is an unnecessary expense and regulatory burden on small producers and offers consumers of locally produced eggs no food-safety protection at all”).

12. *See* AGRIC. § 132.002 (exempting producers selling eggs from their own flock, for which they do not claim a grade); *id.* § 132.021 (permitting restaurants and retailers to buy and sell eggs without first obtaining a license).

13. *See id.* §§ 132.001–.006, 132.008, 132.021–.022 (codifying egg licensing, grading requirements, and various exemptions from such requirements); *see also* 4 TEX. ADMIN. CODE § 15.2(a)–(b) (2023) (Tex. Dep’t of Agric., Who Must Obtain a License) (outlining four classes of persons who must obtain a license and exempt persons).

the person's own flock and for which the person does not claim a grade."¹⁴ This critical limitation arguably indicates the intent of the Texas legislature—to permit producers of chicken eggs to sell their eggs throughout the state without going through any grading or licensing process.¹⁵

In this chapter's subsequent provisions, the TAC clearly prohibits any person from buying or selling eggs in Texas “for the purpose of resale without first obtaining a license” from the TDA.¹⁶ However, there are certain categories of persons exempt from this prohibition.¹⁷ For example, restaurants “where all eggs purchased are served by the establishment,”¹⁸ and retailers “selling eggs to the ultimate consumer of the eggs.”¹⁹ Additionally, the TAC exempts entities purchasing eggs solely for the purpose of hatching those eggs,²⁰ as well as food manufacturers who purchase eggs solely for food manufacturing purposes from its licensing requirements.²¹

Assessing these relevant TAC provisions logically, the intent of the legislature appears unambiguous.²² According to the TAC, not only are producers of eggs statutorily permitted to sell their eggs without claiming a grade,²³ but restaurants and retailers are also permitted to purchase those eggs for the purpose of resale to the ultimate consumer.²⁴ Thus, the TAC appears to permit producers of chicken eggs to sell their ungraded eggs to restaurants and retailers for the purpose of resale when considering the code's use of the phrase “buy or sell” in its relevant prohibitions, from which restaurants and retailers are exempt.²⁵

This Comment will now seek to clarify the terms “licensing” and “grading” in the context of egg production and resale. “Grading” refers to

14. AGRIC. § 132.002.

15. *See* Tex. H.B. 1284, 86th Leg., R.S. (2019) (attempting to legislatively amend the TAC to explicitly permit producers of chicken eggs to sell their eggs to restaurants and retailers without claiming a grade or obtaining a license).

16. AGRIC. § 132.021(a).

17. *Id.* § 132.021(b).

18. *Id.* § 132.021(b)(2).

19. *Id.* § 132.021(b)(5).

20. *Id.* § 132.021(b)(1).

21. *Id.* § 132.021(b)(3).

22. *See id.* § 132.021(a), (b)(2), (b)(5) (exempting restaurants and retailers from egg license requirements for the purchase or sale of eggs).

23. *Id.* § 132.002.

24. *Id.* § 132.021(b)(2), (b)(5).

25. *Id.* § 132.021(a).

the process by which the TDA takes eggs from a producer's flock and checks them for weight and visible defects.²⁶ After this "grading" process has been executed, the TDA then grants the producer a "license" to place these eggs in the stream of commerce in Texas.²⁷ Critical to this analysis is the understanding that obtaining a license from the TDA is merely one step of the grading process.²⁸ Although Texas egg producers are statutorily permitted to sell their eggs without claiming a grade and the TAC does not explicitly prohibit restaurants and retailers from buying those eggs for the purposes of resale, there are external forces preventing these vendors from carrying out this freedom afforded by the statute.²⁹ The driving forces behind this prohibition are the regulations imposed by the DSHS.³⁰

B. Department of State Health Services Regulations

Although the TAC facially permits the sale of ungraded eggs for the purpose of resale, the regulations imposed by the "Department of State Health Services . . . prohibit restaurants and retailers from buying ungraded eggs, effectively circumventing the statute and preventing farmers from selling their eggs wholesale."³¹ According to DSHS regulations targeting "food establishments," all chicken eggs received by a food establishment must be graded and "may not exceed the restricted egg tolerances for U.S. Consumer Grade B."³² DSHS defines "food establishment" as "an operation that stores, prepares, packages, serves, or vends food directly to the consumer, or otherwise provides food for human consumption."³³ Within the ambit of this definition falls any "restaurant, retail food store . . . or catered feeding location . . . if the operation provides food directly to a consumer."³⁴

26. *Improve Access to Locally Produced Eggs!*, *supra* note 10; *see also* Wood, *supra* note 1 (describing the major evaluative components in the egg grading process, which consist of an egg's size, soundness, and quality).

27. *Improve Access to Locally Produced Eggs!*, *supra* note 10.

28. *See Egg Quality Program*, TEX. DEP'T OF AGRIC. (2022), <https://www.texasagriculture.gov/RegulatoryPrograms/EggQualityProgram.aspx> [<https://perma.cc/XDD8-FK5W>] (requiring an egg license for the sale of graded eggs).

29. *See* 25 TEX. ADMIN. CODE § 228.62(b) (2023) (Tex. Dep't of State Health Servs., Specifications for Receiving) (requiring food establishments to source only graded chicken eggs).

30. *Id.* § 228.62.

31. S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019).

32. 25 TEX. ADMIN. § 228.62(b).

33. *Id.* § 228.2(14)(A)(i) (Tex. Dep't of State Health Servs., Definitions).

34. *Id.*

While DSHS regulations evidently prohibit restaurants and retail food stores from purchasing ungraded eggs from unlicensed producers, the TDA has created exemptions to this licensing requirement.³⁵ The TDA exempts from its egg grading and licensing requirements any “retailer who sells eggs directly to consumers.”³⁶ Further, the TDA defines “retailer” as any person who sells eggs directly to consumers.³⁷ In summary, while food establishments may only source their eggs from licensed producers whose eggs have been properly graded, producers who sell their eggs directly to consumers, at farmers markets for example, may be exempt from this licensing requirement.³⁸

Although the TDA does allow for licensing and grading exemptions for certain categories of egg producers, these exempt producers are not free from regulation altogether.³⁹ Producers wishing to sell ungraded eggs must meet certain labeling requirements to put consumers on notice.⁴⁰ Cartons of ungraded eggs sold directly to consumers must be labeled with the producer’s name and address, and must also be labeled “ungraded.”⁴¹ Additionally, producers must store their ungraded eggs at an ambient temperature of forty-five degrees Fahrenheit.⁴² Furthermore, producers must transport their eggs under clean and sanitary conditions.⁴³ Critical to this analysis is the understanding that, even when selling ungraded eggs without a license from the TDA, there are still regulatory measures in place to put consumers on notice of what they are purchasing and provide some form of health and food safety protections.⁴⁴

35. 4 TEX. ADMIN. § 15.2(b) (Tex. Dep’t of Agric., Who Must Obtain a License).

36. *Id.* § 15.2(b)(6).

37. *Id.* § 15.1(14) (Tex. Dep’t of Agric., Definitions).

38. 25 TEX. ADMIN. § 228.62(b) (Tex. Dep’t of State Health Servs., Specifications for Receiving); 4 TEX. ADMIN. § 15.2(b)(1), (b)(6).

39. *See* 4 TEX. ADMIN. § 15.7 (Tex. Dep’t of Agric., Storage Requirements) (describing storage requirements); *id.* § 15.8 (Tex. Dep’t of Agric., Labeling Requirements) (outlining labeling requirements for all Texas chicken eggs).

40. *Id.* § 15.8.

41. *Id.* § 15.8(a)(2), (b)(2).

42. *Id.* § 15.7(a).

43. *Id.*

44. *See, e.g.,* TEX. AGRIC. CODE ANN. § 132.045 (outlining sanitation requirements for persons engaged in the sale of eggs).

C. *Discrepancies Between Statutes and Agency Regulations*

The preceding analysis of TAC statutory language and DSHS regulations makes clear that these governing entities are at odds with one another with respect to the sale of ungraded eggs.⁴⁵ While the TAC does not explicitly prohibit small chicken egg producers from selling ungraded eggs for the purpose of resale to the end consumer,⁴⁶ the regulatory language created by the DSHS prohibits restaurants and food retailers from purchasing those eggs.⁴⁷ This lack of consistency within the state's laws and regulations has created a decades-long conflict within the Texas small-farming industry despite recent legislative efforts seeking clarity.⁴⁸

Proponents of amending the TAC might argue that agency regulations should be consistent with codified state law.⁴⁹ Proponents may also emphasize the lack of statutory prohibition and repeated attempts to legislatively amend the code.⁵⁰ This cohort sees an explicit directive permitting the sale of ungraded eggs to restaurants and retailers as a clear indication of the legislature's true intent.⁵¹ Opponents of the amendment may argue that upholding the regulations currently in place viably serves the state's interest in protecting the health and safety of Texas egg consumers.⁵² Further, those same opponents argue that a complete lack of regulation over

45. Compare *id.* § 132.002 (exempting persons selling eggs from their own flocks when they do not claim a grade), with 25 TEX. ADMIN. § 228.62 (Tex. Dep't of State Health Servs., Specifications for Receiving) (requiring food establishments to source only graded eggs).

46. See AGRIC. § 132.002 ("This chapter does not apply to a person selling only eggs that are produced by the person's own flock and for which the person does not claim a grade."); see also AGRIC. § 132.001(1)–(2) (defining terms such as "Egg" and "Person").

47. See 25 TEX. ADMIN. § 228.62 (requiring food establishments to receive only eggs not exceeding Grade B).

48. See, e.g., S. Comm. on Health & Hum. Servs., Tex. S.B. 1805, 86th Leg., R.S. (2019) (attempting to amend the Agriculture Code to explicitly permit the sale of ungraded eggs to restaurants and retailers for the purpose of resale).

49. See S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (criticizing Department of State Health Services regulations for effectively circumventing the TAC); see also MD. CODE ANN., AGRIC. § 4-302 (West 2020) (referencing corresponding statute in its regulatory language).

50. See, e.g., S. Comm. on Health & Hum. Servs., Tex. S.B. 336, 87th Leg., R.S. (2021) (attempting to legislatively amend the Texas Agriculture Code to explicitly permit producers of chicken eggs to sell their eggs to restaurants and retailers without claiming a grade or obtaining a license).

51. See S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) ("According to advocates, grading is entirely a marketing issue . . . and provides no significant benefits from a health or food safety perspective.").

52. See generally *J.W. Nichols Co. v. White*, 325 S.W.2d 867 (Tex. App.—Austin 1959, no writ) (upholding the requirement that chicken eggs be graded based on size, weight, and quality as a constitutional exercise of the state's police powers).

the sale of ungraded eggs may create a slippery slope, leaving consumers vulnerable to low quality or even potentially dangerous food products.⁵³ It is clear there are problematic discrepancies between codified statutes and regulatory agency practices in the area of ungraded egg sales.⁵⁴

III. EGG GRADING AND LICENSING PROCESS

A. *Egg Grading*

This Section will specifically address the finer details of the egg grading process and licensing requirements of the TDA. Small egg producers are permitted to sell ungraded eggs directly to consumers without first obtaining a license.⁵⁵ However, in order for those producers to sell their eggs to restaurants and food retail outlets for the purpose of resale to consumers, they must have their eggs graded by the TDA and obtain a license from the department, according to DSHS and TDA regulations.⁵⁶

According to DSHS regulations, eggs sold to and purchased by food establishments for the purpose of resale “shall be received clean and sound and may not exceed the restricted egg tolerances for U.S. Consumer Grade B.”⁵⁷ The federal poultry quality standards and procedures discussed below were established during World War II, when American agriculture began to shift from small family farming to more large-scale factory farm practices.⁵⁸ According to the United States Department of Agriculture (USDA), an egg grader establishes the quality of an egg by assessing a variety of interior and exterior factors.⁵⁹

53. *See generally* Rubenstein & Son Produce, Inc. v. State, 272 S.W.2d 613 (Tex. App.—Dallas 1954, writ denied) (upholding the state’s prohibition against the sale of eggs deemed unfit for human consumption as a valid exercise of its police power).

54. *See* S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (explaining how provisions in the TAC conflict with DSHS Regulations); *see also* Ferch v. People, 74 P.2d 712, 714 (Colo. 1937) (addressing a lack of irreconcilable statutory conflict in upholding convictions against egg dealer selling eggs unfit for human consumption).

55. 4 TEX. ADMIN. CODE § 15.2(b)(1), (b)(6) (2023) (Tex. Dep’t of Agric., Who Must Obtain a License).

56. 25 TEX. ADMIN. § 228.62(b) (Tex. Dep’t of State Health Servs., Specifications for Receiving); 4 TEX. ADMIN. § 15.2(a)(1).

57. 25 TEX. ADMIN. § 228.62(b) (citing Voluntary Grading of Shell Eggs and United States Standards, Grades, and Weight Classes for Shell Eggs, 7 C.F.R. § 56 (2020); and then citing Inspection of Eggs and Egg Products, 9 C.F.R. § 590 (2020)).

58. Wood, *supra* note 1.

59. U.S. DEP’T OF AGRIC., EGG-GRADING MANUAL 17 (2000).

Exterior quality factors include shell shape, texture, soundness, and cleanliness.⁶⁰ The USDA employs two distinct classifications, in terms of an egg's shell shape: practically normal and abnormal.⁶¹ A normal egg is ovular in shape, where the larger end "tapers toward the smaller end."⁶² While an egg must closely resemble this usual shape to be considered practically normal, ridges and rough areas are permitted, so long as they "do not materially affect the shape and strength of the shell."⁶³ An abnormal shell shape is one that appears "unusual or decidedly misshapen or faulty in soundness or strength or . . . show[s] pronounced ridges or thin spots."⁶⁴

Soundness of the egg's shell is separated into three categories: sound, check, and leaker.⁶⁵ An egg qualifies as sound if its shell shows no cracks or breaks.⁶⁶ A checked egg is one that has a "crack in its shell[,] but its shell membranes are intact and its contents do not leak."⁶⁷ An egg is a leaker if the shell membrane is broken and the contents of the egg come out of the shell.⁶⁸

The USDA further classifies the exterior quality of an egg as either clean or dirty.⁶⁹ A clean shell is one "free from foreign material and from stains or discolorations that are readily visible."⁷⁰ An egg may still be considered clean if it shows "small specks, stains, or cage marks" as long as these features do not generally affect the clean look of the egg.⁷¹ An egg may be classified as dirty if the shell remains unbroken, but shows prominent stains or "foreign material adhering to the surface."⁷² The shell must be considered dirty if these stains cover "more than one-thirty-second of the shell surface if localized, or one-sixteenth of the shell surface if scattered."⁷³

60. *Id.* at 17–19.

61. *Id.* at 18–19.

62. *Id.* at 17.

63. *Id.* at 18–19 (classifying eggs with minor ridges and rough areas as AA or A quality).

64. *Id.* at 19 (describing abnormal shells as B quality).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; see also 7 C.F.R. § 57.1(f) (2020) (describing in greater detail the characteristics of a leaker).

69. U.S. DEPT OF AGRIC., *supra* note 59, at 19.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 19–20.

Interior quality factors include, but are not limited to, size and depth of the air cell within the egg,⁷⁴ condition of the yolk,⁷⁵ and existence of mold,⁷⁶ and germ defects.⁷⁷ The term “air cell” refers to the pocket of air within the egg’s shell, which results from the contraction of liquids as the egg cools and evaporation of water after the egg has been laid.⁷⁸ A smaller, shallower air cell within the shell indicates a higher interior quality.⁷⁹

The condition of the yolk may be determined by the extent of its blemishing and discoloration, as well as its size and shape.⁸⁰ Freshly-laid eggs usually exhibit a round and firm yolk.⁸¹ However, “[a]s the yolk ages, the strength of the yolk membrane weakens[,] allowing water to be absorbed from the [egg] white.”⁸² This process causes the yolk to grow in size and become flat.⁸³ An enlarged and flattened yolk indicates a lower interior quality.⁸⁴

The interior quality of the egg and its contents are determined by an authorized egg grader through a process known as “candling.”⁸⁵ During the candling process, the egg grader rotates the egg under a light, known as the candling aperture, which illuminates the egg and allows the grader to identify any problematic defects or germ development within the egg and evaluate the overall condition of the yolk.⁸⁶

The USDA employs three grades with respect to an egg’s quality: AA quality (highest), A quality, and B quality (lowest).⁸⁷ To meet the standard of AA quality, the egg’s shell must be “clean, unbroken, and

74. *Id.* at 20–22.

75. *Id.* at 22–24.

76. *Id.* at 25.

77. *Id.* at 24.

78. *Id.* at 20.

79. *See id.* at 21–22 (depicting air cells within various eggs, ranging from high to low interior quality).

80. *Id.* at 23 (contending yolk size and shape are only taken into consideration in the lowest quality eggs).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 24 (emphasizing the exact causes of yolk defects are unknown, except for defects due to germ development).

85. *Id.* at 31.

86. *Id.* at 31–33 (discussing how light reflection from the bottom of the candling light is used to detect stains and dirt on the shells).

87. *Id.* at 27.

practically normal” in shape.⁸⁸ The air cell within an AA quality egg may not have a depth exceeding one-eighth inch.⁸⁹ Additionally, the white of the egg must be clear and firm, and “[t]he yolk must be practically free from apparent defects.”⁹⁰

An A quality egg must have a shell that is “clean, unbroken, and practically normal.”⁹¹ However, the air cell within the egg may reach a depth of three-sixteenths inch and still maintain an A quality grade.⁹² Similar to that of AA quality, the white of an A quality egg must exhibit reasonable clarity and firmness, and the yolk must not have defects.⁹³

To meet the standard for Grade B quality classification, the egg’s shell must not show any cracks or breakage, but can exhibit slight abnormalities in shape and stained areas.⁹⁴ The egg can also have an air cell over three-sixteenths inch deep with unlimited movement.⁹⁵ Additionally, a B quality egg can have a darker yolk and show germ development, so long as there is no blood in the yolk.⁹⁶ Finally, the egg “may show other serious defects that do not render the egg inedible.”⁹⁷ The USDA has clarified that while “[s]tandards of quality apply to individual eggs[,] grades apply to lots of eggs such as dozens, 30-dozen cases, and carloads.”⁹⁸ For an entire lot of eggs to meet the United States Consumer Grade B standard, ninety percent of the eggs must be B quality or better.⁹⁹ It is also important to keep in mind that egg grading is a largely subjective process, which lends itself to errors and inconsistencies.¹⁰⁰

88. *Id.* (noting the air cell in an AA quality egg may show “unlimited movement, and may be free or bubbly.”).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (“Small blood spots or meat spots . . . may be present”).

97. *Id.*; see also 7 C.F.R. § 57.1(e) (2020) (defining “inedible eggs” as those containing various types of rot, mold, blood rings, and other defects).

98. U.S. DEPT OF AGRIC., *supra* note 59, at 16.

99. *Id.* at 29.

100. *Id.* at 16.

B. *Licensing*

Next, producers of chicken eggs seeking to sell to restaurants and retailers must obtain a license from the TDA.¹⁰¹ The TDA license distinguishes between three separate classifications of persons applying for licensure, which can be found within the TAC.¹⁰² A person applying for an egg license with the TDA may identify as either a processor, broker, or dealer-wholesaler.¹⁰³ The TAC defines a processor as any person who “operates a plant for the purpose of breaking eggs for freezing, drying, or commercial food manufacturing.”¹⁰⁴ The TAC defines a broker as a person who “never assumes ownership or possession of eggs[,] but acts as an agent . . . in the sale or transfer of eggs.”¹⁰⁵ Lastly, the TDA requires producers to apply for an egg license as a dealer-wholesaler, which the TAC defines as a person who “buys eggs from a producer . . . and sells or transfers the eggs to a dealer-wholesaler, processor, retailer, consumer, or other person.”¹⁰⁶ Contained within this classification is a person who “produces eggs from [their] own flock and disposes of the production on a fully graded basis.”¹⁰⁷

The TDA egg license further classifies dealers-wholesalers in twelve separate classes based on the producer’s estimated average weekly volume of egg production.¹⁰⁸ These output classifications range from one case (thirty dozen eggs weekly) for Class One producers¹⁰⁹ to ten thousand cases or more of weekly output for Class Twelve producers.¹¹⁰ The producer’s estimated average weekly output volume determines the annual rate they must pay to the TDA for maintaining a valid license.¹¹¹ Annual fees range from \$100 per year for Class One producers to \$2,700 per year for Class Twelve producers.¹¹² Although these numbers may seem insignificant, they impose a heavy burden on Texas’ small farmers because

101. *Improve Access to Locally Produced Eggs!*, *supra* note 10.

102. TEX. AGRIC. CODE § 132.022(b)–(d).

103. *See id.* (defining the “broker,” “dealer-wholesaler,” and “processor” categories).

104. *Id.* § 132.022(d).

105. *Id.* § 132.022(b).

106. *Id.* § 132.022(c)(1).

107. *Id.* § 132.022(c)(2).

108. 4 TEX. ADMIN. CODE § 15.4(a) (2023) (Tex. Dep’t of Agric., Fees).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

eggs have a fairly thin profit margin and the grading and licensing process is a costly, time-consuming endeavor.¹¹³

IV. ANALYSIS OF THE ARGUMENTS

This Comment will explore the arguments for and against amending the Texas Agriculture Code to explicitly permit chicken egg producers to sell ungraded eggs for the purpose of resale.

A. *Arguments Against Legislative Amendment*

This Section will address the arguments against permitting the sale of ungraded eggs to Texas restaurants and retailers. The side against amending the TAC mainly consists of the agencies that put the current regulations in place, such as the TDA and DSHS, as well as the large-scale producers, who benefit financially from the lack of competition in the restaurant and retail markets.¹¹⁴

From the regulatory agency perspective, the current licensing and grading requirements constitute a valid and reasonable exercise of the state's police power.¹¹⁵ Regulators such as the TDA and DSHS would likely look to the

113. See *id.* § 15.4(a)–(c) (outlining fee schedules for egg dealers, processors, and brokers); 4 TEX. ADMIN. § 15.5(a)–(c) (Tex. Dep't of Agric., Special Fees) (describing special fees for egg licensees); see also S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (describing how the costs of the egg grading process creates a barrier for small farmers).

114. See 4 TEX. ADMIN. § 15.4(a) (showing the fees remitted to the TDA for different classes of egg dealers); S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (explaining how the egg grading process forces many small farmers out of the restaurant and retail markets).

115. See *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1053 (7th Cir. 2018) (upholding Wisconsin's butter grading statutes as rationally related to the state's interest in better-informed consumers and consumer confidence in food quality); see also *Parrott & Co. v. Benson*, 194 P. 986, 987 (Wash. 1921) (“[T]he police power includes within its scope, not only the public health, public morals, and public safety, but also all regulations designed to promote public convenience, the general welfare, and general prosperity, and all great public needs”); Will Derwin, *California's Egg Law Should Survive A Dormant Commerce Clause Attack*, GEO. INT'L ENV'T L. REV. ONLINE 1 (Apr. 2, 2015), [\(https://1.next.westlaw.com/\(type in the search bar “Will Derwin”; then filter the results by “Content types”; then choose “Secondary Sources”; then click “apply”; then click on the article title in the results\)\) \(emphasizing states' legitimate interest in public health and broad authority to protect citizens\); 12B Tex. Jur. 3d Const. L. § 317 \(2022\) \(describing the state's authority to classify as part of its regulatory power\); *J.W. Nichols Co. v. White*, 325 S.W.2d 867, 873 \(Tex. App.—Austin 1959, no writ\) \(upholding the state's police power to protect the public against fraud\).](https://1.next.westlaw.com/(type%20in%20the%20search%20bar%20Will%20Derwin);then%20filter%20the%20results%20by%20Content%20types;then%20choose%20Secondary%20Sources;then%20click%20apply;then%20click%20on%20the%20article%20title%20in%20the%20results))

1959 Court of Civil Appeals of Texas case, *J. W. Nichols Company v. White*,¹¹⁶ to support their position for upholding the status quo.¹¹⁷

The *Nichols* opinion addressed the constitutionality of the since-repealed “Texas Egg Law” of 1957,¹¹⁸ which imposed a statutory requirement that eggs offered for sale to consumers or at wholesale be graded before entering the marketplace.¹¹⁹ The appellant in *Nichols* sought to challenge the constitutionality of the law in its entirety, on the grounds that it constituted an unreasonable regulation of his occupation, which lacked justification under the state’s police power.¹²⁰ Further, the appellant argued that the law at issue did not protect public health nor safety in any way.¹²¹ In upholding the constitutionality of the law, the *Nichols* court held a legislative act “must be reasonable in light of all the circumstances” to be justified as a valid exercise of the state’s police power.¹²² The court in *Nichols* reasoned that the statutory grading requirements at issue passed constitutional muster in their reasonable relation to protecting consumers of eggs.¹²³

Under *Nichols*, regulators would assert that the current regulatory provisions in place find validity in their reasonable relation to food safety and consumer protection.¹²⁴ However, although the *Nichols* court held that

116. *J.W. Nichols Co. v. White*, 325 S.W.2d 867 (Tex. App.—Austin 1959, no writ).

117. *See id.* at 874 (Tex. App.—Austin 1959, no writ) (holding the Texas Egg Law constitutes a valid exercise of the police power); *see also* 35A Am. Jur. 2d Food § 33 (2022) (establishing the validity of reasonable regulations meant to protect against poor quality eggs).

118. *Nichols*, 325 S.W.2d at 868.

119. *Id.* at 869 (citing Act of May 23, 1957, 55th Leg., R.S., ch. 133, 1957 Tex. Gen. Laws 288, 288–292 (repealed 1981)).

120. *Id.* at 871; *see* Bethany Gullman, *Unburdening the Farm: A Dormant Commerce Clause Challenge to Conflicting Standards in Agricultural Production*, 43 MITCHELL HAMLINE L. REV. 451, 454 (explaining police powers include enacting necessary regulations on matters detrimental to public health, morals, or safety).

121. *Nichols*, 325 S.W.2d at 873.

122. *See id.* at 874 (holding the Texas Egg Law constitutes a valid exercise of the police power); *see also* *Consumer-Farmer Milk Coop., Inc. v. Wickham*, 270 N.Y.S.2d 184, 186–87 (N.Y. App. Div. 1966) (confirming New York’s licensing requirement for milk dealers as compliant with the Dormant Commerce Clause due to the state’s interest in the welfare of milk producers and consumers).

123. *See Nichols*, 325 S.W.2d at 874 (upholding the Legislature’s power to protect consumers from fraud or deceit); *see also* 41 Tex. Jur. 3d Food § 1 (2022) (“Legislation concerning food does not violate due process so long as it does not operate in an unreasonable or oppressive manner.”).

124. *See Nichols*, 325 S.W.2d at 874 (upholding egg grading requirement as protecting consumers from fraudulent egg sales); *see also* *Rubenstein & Son Produce, Inc. v. State*, 272 S.W.2d 613, 620 (Tex. App.—Dallas 1954, writ denied) (establishing it is “within the police power of the State to regulate or prohibit the sale within its boundaries of food which is adulterated or unfit for human consumption”); 12B Tex. Jur. 3d Const. L. § 151 (2022) (explaining the elements for proper exercise of the state’s police power).

a statutory provision requiring all eggs be graded before entering the marketplace is constitutional, it should be noted the statute at issue in that case has since been repealed.¹²⁵ Also, while it was within the state legislature's power to impose statutory egg grading requirements,¹²⁶ the legislature arguably expressed a contrary intent in repealing the Texas Egg Law, even after it was held constitutional.¹²⁷

The Seventh Circuit also addressed the constitutionality of state food grading statutes in the 2018 case, *Minerva Dairy, Inc. v. Harsdorf*.¹²⁸ The plaintiff in *Minerva*, an Ohio-based butter producer, sought to challenge Wisconsin's statutory butter-grading requirement on due process, equal protection, and Dormant Commerce Clause grounds.¹²⁹ The Wisconsin butter-grading statute, similar to the DSHS egg regulations at issue in this Comment, required that all butter be graded by a licensed grader before it could be sold at retail.¹³⁰ The plaintiff, who had sold its butter at retail outlets in Wisconsin without undergoing the voluntary grading process, sought injunctive relief from enforcement of the butter-grading requirement and a declaration that the statute was unconstitutional.¹³¹

In upholding the constitutionality of the Wisconsin butter-grading statute, the Seventh Circuit ruled that the law was rationally related to the State of Wisconsin's interest in facilitating better-informed butter consumers as a means of consumer protection.¹³² The Seventh Circuit also held that the statute was rationally related to the state's promotion of commerce.¹³³ Even further, the plaintiff in *Minerva* attempted to assert that consumers might disagree with the subjective nature of the butter-grading process.¹³⁴ The Seventh Circuit rejected that argument, mainly because

125. Act of May 23, 1957, 55th Leg., R.S., ch. 133, 1957 Tex. Gen. Laws 288, 288–292 (repealed 1981).

126. See generally *State v. Houston*, 298 N.W. 358 (Minn. 1941) (upholding the validity of city ordinances governing the grading and labeling requirements for eggs bought and sold within the municipality).

127. Act of May 23, 1957, 55th Leg., R.S., ch. 133, 1957 Tex. Gen. Laws 288, 288–292 (repealed 1981).

128. *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018) (considering whether Wisconsin's butter-grading statute violated the United States Constitution).

129. *Id.* at 1050.

130. *Id.* at 1050–51 (citing WIS. STAT. § 97.176 (2018)).

131. *Id.* at 1052–53.

132. *Id.* at 1053–54 (“[I]t is reasonable to think that some consumers care about the quality of butter they purchase—for example, experienced bakers . . .”).

133. *Id.* at 1054.

134. *Id.* at 1055.

statutes subject to rational-basis level of scrutiny may be supported by rational speculation.¹³⁵

Those same regulators looking to the *Nichols* opinion on the state level to argue for maintaining the status quo could arguably also look to *Minerva* to support their position on a federal level.¹³⁶ Although *Minerva* addresses the constitutionality of butter-grading, as opposed to the grading of eggs, the same principles could be applied to the issue in this Comment.

The Ninth Circuit also addressed the constitutionality of similar food-related regulatory provisions in the 1998 opinion, *Shamrock Farms Co. v. Veneman*.¹³⁷ In *Shamrock*, the plaintiff, a raw milk producer, challenged the constitutionality of California's milk composition standards.¹³⁸ The State of California aimed these regulatory standards at informing the state's milk consumers of the "content of the milk they purchase and [protecting] against fraud and misrepresentation" by requiring that all milk sold within the state contain no less than a certain percentage of fat.¹³⁹

The plaintiff in *Shamrock* sought to challenge the milk regulations at issue on Commerce Clause and equal protection grounds.¹⁴⁰ As to the Commerce Clause challenge, the plaintiff argued that the milk regulations "prohibit the free flow of milk products across state lines."¹⁴¹ In response to this challenge, the Ninth Circuit emphasized that state "regulations violate the Commerce Clause if they are discriminatory in nature or impose undue burden on interstate commerce."¹⁴² In response to the plaintiff's Fourteenth Amendment challenge, the Ninth Circuit established that food regulations, such as the milk fat regulation at issue, were subject to rational

135. *Id.* at 1055 (citing *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 683 (7th Cir. 2017)).

136. *See generally Minerva*, 905 F.3d 1047, 1050 (7th Cir. 2018) (holding state butter-grading statute compliant with due process, equal protection, and Dormant Commerce Clause of the Constitution); *see also* Diana R. H. Winters, *The Benefits of Regulatory Friction in Shaping Policy*, 71 FOOD & DRUG L. J. 228, 239–240 (2016) (describing the benefits of placing legal authority in smaller governmental bodies).

137. *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998) (upholding the constitutionality of California's regulatory milk composition standards).

138. *Id.* at 1179.

139. *See id.* at 1178 (discussing the specific type of fat regulated in the state's milk and the exact minimum percentage of fat allowed by the regulations).

140. *See id.* ("Shamrock asserts that the California provisions effectively prohibit out-of-state milk producers from selling their products in that state and impose an undue burden on interstate commerce.").

141. *Id.* at 1179.

142. *Id.*

basis scrutiny.¹⁴³ In applying rational basis review, the Ninth Circuit held that California's milk laws were rationally related to the state's interests "in maintaining a stable and plentiful supply of wholesome milk."¹⁴⁴

Just as California's milk composition standards were found to be rationally related to the state's interest in maintaining supply, Texas regulators would likely argue that the current egg licensing and grading requirements serve the exact same interest.¹⁴⁵

Additionally, the *Nichols* and *Minerva* opinions do not directly relate to the current debate, which focuses on both DSHS and TDA agency regulations, as opposed to the constitutionality of state statutes.¹⁴⁶ While the current debate is largely focused on state agency regulations, as opposed to statutory provisions, state agencies, such as DSHS, have their own independent authority to create and enforce rules related to protecting the state's consumers.¹⁴⁷ Even further, DSHS and other state agencies may be required, under the Health and Safety Code, to exercise their powers in all matters relating to preventing disease and protecting the public health.¹⁴⁸ From the regulator's perspective, not only do agencies like DSHS and the TDA have full authority to make the rules currently in place, but these governing bodies have a duty to do so for the sake of public health and consumer safety.¹⁴⁹

143. *Id.* at 1183 (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981)).

144. *Id.*

145. *See J.W. Nichols Co. v. White*, 325 S.W.2d 867, 877 (Tex. App.—Austin 1959, no writ) ("The act, therefore, is no more a consumers law then it is a producers, a wholesalers, or a retailers law. In other words it is an act designed to keep every phase of the egg business free of inedible and mislabeled eggs." (quoting *Ex parte Casperson*, 159 P.2d 88, 91 (Cal. Dist. Ct. App. 1945))).

146. *See* 25 TEX. ADMIN. CODE § 228.62 (2023) (Tex. Dep't of State Health Servs., Specifications for Receiving) (outlining DSHS requirements for food establishments receiving only graded chicken eggs).

147. *See* *Ctr. for Food Safety v. Lakey*, No. 03-13-00094-CV, 2014 WL 711622, at *5 (Tex. App.—Austin Feb. 19, 2014, no pet.) (mem. op.) (reinforcing DSHS authority to investigate egg production facilities as a means of preventing communicable diseases); *see also* *Helle v. Hightower*, 735 S.W.2d 650, 654 (Tex. App.—Austin 1987, writ denied) ("[A] rule is valid if it is constitutional, within the granted power, and promulgated pursuant to proper procedure."); *People ex rel. Schoonover v. McLaughlin*, 278 Ill. App. 197, 204 (1934) (holding the judiciary lacks the power to oversee state agency prosecutions over Illinois Egg Law violations).

148. TEX. HEALTH & SAFETY CODE ANN. § 81.021 ("The executive commissioner and department shall exercise their powers in matters relating to protecting the public health to prevent the introduction of disease into the state.").

149. *See Ex parte Casperson*, 159 P.2d 88, 90 (Cal. Dist. Ct. App. 1945) (enforcing the principle where food sellers must be held legally accountable for the quality of their food); *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556, 562 (E.D. Va. 2016) (explaining

Although regulatory agencies have the authority, and perhaps even the duty, to make and enforce rules in the name of consumer safety, these agencies also have the same authority to deny enforcing regulations.¹⁵⁰ In 2017, the Ninth Circuit addressed the validity of federal agencies denying petitions to create certain egg carton labeling regulations in *Compassion Over Killing v. FDA*.¹⁵¹ The plaintiffs, consisting of various animal rights advocates and egg consumers,¹⁵² submitted rulemaking petitions to several federal agencies¹⁵³ pushing for certain labeling requirements on cartons of chicken eggs.¹⁵⁴ After each agency denied their petitions, the plaintiffs filed suit claiming the defendant agencies “had acted arbitrarily and capriciously.”¹⁵⁵

In its denial of the plaintiff's rulemaking petition, the FDA explained that the plaintiffs failed to provide sufficient evidence that the living conditions of egg-laying hens directly affects an egg's nutritional value or the likelihood of salmonella.¹⁵⁶ Additionally, when the plaintiffs argued that disclosure of hen living conditions is required to prevent misleading consumers, the FDA explained that it could simply “bring individual enforcement actions against any such misbranded food, as it has done in the past.”¹⁵⁷

In upholding the FDA's denial of rulemaking petitions, the Ninth Circuit established that agencies are entitled to great deference with respect to their decisions to prioritize other concerns.¹⁵⁸ Even further, the Ninth Circuit established the standard for assessing the validity of an agency denial: “an agency must, at a minimum, clearly indicate that it has considered the potential problem identified in the petition and provide a ‘reasonable

how various regulatory agencies, such as the USDA, American Humane Association, and Humane Farm Animal Care, Inc., all maintain their own standard for what constitutes “ethically sourced” eggs).

150. See generally *Compassion Over Killing v. FDA*, 849 F.3d 849 (9th Cir. 2017) (upholding denial from federal agencies of petitions to promulgate regulations requiring egg cartons to identify the conditions in which hens were kept when they laid eggs).

151. *Id.* at 852 (discussing federal agency discretion in denying regulation proposals).

152. *Id.*

153. See *id.* at 852–53 (listing the FDA, Federal Trade Commission, Agricultural Marketing Service, and the Food Safety Inspection Service as defendants).

154. *Id.* at 853 (“The petitions specifically proposed that each agency develop regulations that would require all egg cartons to bear the labels ‘Free-Range Eggs,’ ‘Cage-Free Eggs,’ or ‘Egg from Caged Hens,’ consistent with the living conditions of the hens.”).

155. *Id.* at 852.

156. *Id.* at 856.

157. *Id.* at 856–57.

158. *Id.* at 857 (first citing *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007); and then citing *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)).

explanation as to why it cannot or will not exercise its discretion' to initiate rulemaking."¹⁵⁹

An agency's authority to deny rulemaking should equally weigh with its authority to create and enforce rules.¹⁶⁰ Also, if a federal agency, such as the FDA, has the resources to address misbranded food products on a case-by-case basis on a national scale, regulators on the state level should consider whether they have the resources to handle similar cases in the same manner.¹⁶¹ This method is expressly preferred to employing blanket rulemaking with respect to licensing and grading.¹⁶²

From a consumer safety perspective, regulators might assert that, while consumers purchasing ungraded eggs directly from producers at farmers markets usually know exactly what they are buying and who they are buying their eggs from,¹⁶³ consumers at restaurants and local grocers might not have that same degree of notice with respect to what they are purchasing.¹⁶⁴ Accordingly, the DSHS regulations arguably serve the state's interest in protecting consumers that are not similarly situated to those buying ungraded eggs directly from producers at farmers markets.¹⁶⁵ Also, while current regulations do require that cartons of ungraded eggs sold directly to consumers be labeled accordingly and provide producer information,¹⁶⁶ there is not a current working method to put restaurant and retail consumers

159. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); and then citing *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1042–43 (9th Cir. 2015)).

160. *See id.* (upholding the FDA's broad discretion to handle misbranding of eggs on an individual basis, as opposed to creating industry-wide regulations).

161. *See id.* at 857 (explaining the proportionate relationship between an agency's regulations and its capacity to enforce them).

162. *See id.* (describing the FDA's position on how individual enforcement actions were a better use of limited resources than proposed rulemaking).

163. David J. Berg, *Food Choice is a Fundamental Liberty Right*, 9 J. FOOD L. & POL'Y 173, 177 (2013) ("[W]hen a buyer can see the seller and ask her about her products, the buyer regains trust in his food."); see Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 273 (2012) (describing the benefit of purchasers knowing farmers with respect to food safety where problems are easily traceable and will not be impacted by national outbreaks of contamination).

164. *See J.W. Nichols Co. v. White*, 325 S.W.2d 867, 875 (Tex. App.—Austin 1959, no writ) ("When the consumer does buy from a producer there is usually a personal relationship between the two that the Legislature apparently felt a sufficient guaranty against fraud and deception . . .").

165. *See generally id.* at 867 (upholding Texas Egg Law licensing and grading requirements); *Ex parte Casperson*, 159 P.2d 88, 91 (Cal. Dist. Ct. App. 1945) (establishing California's Egg Law as "an act designed to keep every phase of the egg business free of inedible and mislabeled eggs.").

166. *See* 4 TEX. ADMIN. CODE § 15.8 (2023) (Tex. Dep't of Agric., Labeling Requirements) (requiring cartons of ungraded eggs be labeled "ungraded" and include producer's address).

on that same level of notice.¹⁶⁷ The *Nichols* court also stressed the concern for consumer notice.¹⁶⁸ Although several areas of state law and regulations would clearly support that consumers purchasing eggs should be put on notice of what they are purchasing,¹⁶⁹ opposing legislative amendment to explicitly permit the sale of ungraded eggs to restaurants and retailers for the purpose of resale assumes that there is no way to solve this notice discrepancy among different types of egg consumers.¹⁷⁰

The emphasis on the prevention of fraud may be further expanded to other aspects of the egg trade, as exemplified in *Mueller v. Burchfield*,¹⁷¹ the 1949 Missouri state court opinion.¹⁷² The *Mueller* case centered around a plaintiff seeking damages “based entirely on the theory that defendants misrepresented the condition of the eggs and that plaintiffs were unable to sell them, on account of their condition.”¹⁷³ Here, the plaintiff purchasing eggs from the defendants, made his lack of experience known, and was forced to simply rely on the defendants’ representations that the eggs purchased were of grade A quality.¹⁷⁴

The *Mueller* court ruled in favor of the defendants, due largely to the fact that the plaintiff was not licensed to “engage in the business of buying,

167. See, e.g., *Parrott & Co. v. Benson*, 194 P. 986, 987 (Wash. 1921) (outlining Washington statute requiring food establishments to employ signage in their establishment to notify customers they are serving foreign imported eggs).

168. See *Nichols*, 325 S.W.2d at 874 (“We believe a form of deceit is practiced upon the consuming public when it purchases eggs which run believing it has purchased firm eggs which do not run. It is within the power of the Legislature to protect the public against fraud or deceit.” (citing *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S.W. 874 (1912))).

169. See TEX. AGRIC. CODE ANN. § 132.084 (defining criminal penalties for misleading advertising of eggs); see also TEX. HEALTH & SAFETY CODE ANN. § 433.005(a) (defining what constitutes misbranding for livestock and poultry products); *L & L Started Pullets, Inc. v. Gourdine*, 592 F. Supp. 367, 374–75 (S.D.N.Y. 1984) (upholding states’ interest in protecting citizens from fraud with respect to food products); 2 N.C. ADMIN. CODE 90.0102 (2022) (requiring bold and legible letters on cartons of ungraded eggs); N.M. STAT. ANN. § 25-6-7 (West 1978) (permitting the sale of ungraded eggs at retail if cartons are clearly marked “ungraded”); OR. ADMIN. R. 603-022-0535 (2018) (allowing the sale of ungraded eggs directly to consumers when producers meet certain labeling requirements).

170. See, e.g., *Parrott*, 194 P. at 987 (identifying Washington statute requiring restaurants and other food establishments serving foreign eggs place signage in their establishment notifying customers the establishment’s eggs are imported from foreign sources).

171. *Mueller v. Burchfield*, 218 S.W.2d 180 (Mo. Ct. App. 1949).

172. *Id.* at 183–84 (Vandeventer, P.J., concurring in the result) (considering whether defendants are liable for damages suffered by plaintiff after defendant allegedly misrepresented their quality of eggs).

173. *Id.* at 182 (majority opinion).

174. *Id.*

selling, dealing in, or trading in eggs” as required by statute.¹⁷⁵ Although the plaintiff relied on the defendants’ misrepresentations as to the quality of the eggs purchased, his lack of proper licensure rendered him unable to recover damages, as the contract in question was void, according to statute.¹⁷⁶ Under *Mueller*, regulators in support of the current licensing and grading requirements would argue such requirements are not only in place to protect consumers, but also to protect all persons engaged in the buying and selling of eggs.¹⁷⁷

The debate here also arguably stems from a mere difference in perspective.¹⁷⁸ As opposed to looking at the current DSHS and TDA regulations as overly burdensome on small farmers, regulators would attempt to uphold the current licensing and grading requirements as totally voluntary in nature.¹⁷⁹ The rationale here is that, by undergoing the process of obtaining a license from the TDA and allowing your eggs to be graded by the agency, you get the benefit of selling your eggs for the purpose of resale.¹⁸⁰ From the regulator’s perspective, permission to sell your eggs to restaurants and retailers exemplifies an incidental benefit of voluntarily going through the licensing and grading process, as opposed to an imposition of undue burden on our small farmers.¹⁸¹

175. *Id.* (quoting MO. REV. STAT. § 9908 (1939)).

176. *Id.* at 183.

177. *See id.* at 182–83 (“It is very evident that this provision in our statutes was enacted for the protection of the public.”); *see also* *California Chicks, Inc. v. Viebrock*, 62 Cal. Rptr. 269, 271 (Cal. Dist. Ct. App. 1967) (“[I]t is clear that the Legislature forbids carrying on a business without securing a license . . . any contract of the kind involved here is illegal.”); N.C. GEN. STAT. § 14-34.4 (1987) (classifying the sale of misbranded food as a Class C felony).

178. *Compare Improve Access to Locally Produced Eggs!*, *supra* note 10 (emphasizing burdens on small farmers resulting from current regulations), *with* *J.W. Nichols Co. v. White*, 325 S.W.2d 867, 874–75 (Tex. App.—Austin 1959, no writ) (upholding Texas Egg Law as rationally related to protecting egg consumers).

179. *See, e.g.,* *Kirk v. McCallister*, 259 P.2d 325, 327 (Okla. Crim. App. 1953) (explaining how specific provisions of Oklahoma Egg Law only apply to producers who voluntarily elect to fall under the law’s provisions).

180. *See id.* (“Those desiring the benefits of the act could be licensed by the payment of a small fee and could candle and grade their eggs in accordance with the rules and regulations of the Department of Agriculture, and so advertise their eggs.”).

181. *See id.* (“[I]t is apparent that the Legislature . . . did not wish to place an undue restraint or limitation upon their farmer constituents by making the terms of the act apply to them unless the egg producer expressly elected that it should do so.”).

B. *Arguments in Favor of Amending the Texas Agriculture Code*

This Section focuses on the arguments in favor of permitting restaurants and retailers to purchase ungraded eggs for the purpose of resale. Arguably, those in favor of amending the Agriculture Code are the state's small farmers, who are currently prohibited from selling their ungraded eggs to restaurants and retailers.¹⁸² According to this subset, the burdensome grading and licensing requirements imposed on small farmers provide no substantial food safety consumer health benefits.¹⁸³ Egg grading largely focuses on the size, weight, and exterior cleanliness of the egg, which does not have a direct effect on the safety or sanitization of the egg's contents.¹⁸⁴ Further supporting this argument is the fact that the grading process does not include testing for harmful bacteria or salmonella.¹⁸⁵ Although the state has a strong interest in protecting the health and safety of consumers, the absence of testing for harmful bacteria in the grading process does not directly serve the state's interest.¹⁸⁶ Since grading eggs consists of weighing and measuring the egg, visually assessing the egg's air cell, and the clarity of the egg white, grading does not appear to be as much of a food safety issue as much as it seems like a marketing issue, keeping small farmers who cannot afford to satisfy the licensing and grading requirements out of the restaurant and retail markets.¹⁸⁷

182. See generally *Improve Access to Locally Produced Eggs!*, *supra* note 10 (advocating for legislative change to support Texas small farmers); Wood, *supra* note 1 (exemplifying one small chicken egg producer prohibited from selling his ungraded eggs to restaurants and retailers).

183. See generally *A Bill to be Entitled-An Act Relating to Egg Grading*: Hearing on Tex. S.B. 1805 Before the S. Comm. on Health & Hum. Servs., 86th Leg., R.S. (Apr. 10, 2019) [hereinafter *Hearing on Tex. S.B. 1805*] (public testimony) (tape available from Senate Video/Audio Office), https://tclsenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=14201 [<https://perma.cc/KK2W-MFHF>] (hearing public testimony by egg producers and restaurateurs in support of S.B. 1805).

184. *Id.*

185. *Id.*

186. *Id.* (providing an in-depth discussion of the egg grading process in Texas).

187. *Id.* (arguing grading and licensing requirements only keep small producers who cannot afford costs out of the market); *A Bill To Be Entitled-An Act Relating to Egg Grading*: Hearing on Tex. H.B. 1284 Before the H. Comm. on Agric. & Livestock, 86th Leg., R.S. (Apr. 15, 2019) [hereinafter *Hearing on Tex. H.B. 1284*] (testimony of Farm & Ranch Freedom All.) (tape available from House Video/Audio Office), https://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=17113 [<https://perma.cc/SFW8-EEA3>] (testimony of Farm & Ranch Freedom All.) (hearing testimony from Farm & Ranch Freedom All. asserting grading and licensing requirements were created as a marketing tool); *but see* *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017) (examining the alleged

It is not only the state's small farmers that support the lifting of current licensing and grading requirements, but also the restaurants and retailers who wish to support local economies and bring farm-to-table products to their customers.¹⁸⁸ Most local restaurants and small grocers in Texas are strongly in favor of permitting the sale of ungraded eggs for the purpose of resale.¹⁸⁹ This subset can point to an incredibly high demand for quality, affordable ungraded eggs.¹⁹⁰ These eggs should be permitted to be sold to restaurants and local retailers in the same manner they are directly sold to consumers at farmers markets.¹⁹¹

Since small farmers are permitted to sell their ungraded eggs directly to consumers at farmers markets, those exact same eggs should be made available to local restaurants and grocers who want the opportunity to locally source their eggs.¹⁹² As ungraded eggs are already permitted to enter the stream of commerce through local farmers markets, it is difficult to see how allowing local restaurants and retailers to purchase those very same eggs would suddenly cause a threat to consumer health and safety.¹⁹³ The story would be quite different if there was an absolute prohibition against selling ungraded eggs altogether.¹⁹⁴ Furthermore, the law has already acknowledged that selling ungraded eggs to consumers is a perfectly safe and permissible enterprise.¹⁹⁵

impact of California's Shell Egg Law on small farmers, which remains insufficient to grant out-of-state farmers *parens patriae* standing).

188. See Hearing on Tex. S.B. 1805 (public testimony) (discussing why amending the Agriculture Code would support small farmers in Texas).

189. See *id.* (emphasizing the demand for locally sourced eggs among local restaurants and retailers).

190. See *id.* (emphasizing the demand for high-quality ungraded eggs among Texas consumers).

191. See *id.* (arguing restaurants and local grocers want to source their eggs locally); see also *Stowers v. Ohio Dep't of Agric.*, No. 10CAA009782, 2011 WL 2176512, at *10 (Ohio Ct. App. June 6, 2011) (upholding the Ohio Legislature's authority to protect "small farming and cottage food operations" without violating due process and equal protection).

192. See Hearing on Tex. S.B. 1805 (public testimony) (arguing ungraded eggs sold directly to consumers should also be made available to local restaurants).

193. See *id.* (arguing current prohibitions on ungraded egg sales to restaurants do not provide substantial food safety benefits); see also *Woodruff v. Clark Cnty. Farm Bureau Coop. Ass'n*, 286 N.E.2d 188, 194–95 (Ind. Ct. App. 1972) (upholding the existence of implied warranties of merchantability between buyers and sellers of chickens for the purpose of egg production).

194. See Rebecca Ditmar, *Selling Yard Eggs in Texas*, 2022 TEX. A&M AGRILIFE EXTENSION at 1 (Jan. 24, 2022), <https://agrilifelearn.tamu.edu/s/product/selling-yard-eggs-in-texas/01t4x000004OfNAAS> [<https://perma.cc/LD4P-53SZ>] (describing the conditions a producer must meet to sell ungraded eggs directly to consumers).

195. See 4 TEX. ADMIN. CODE § 15.2(b)(1) (2023) (Tex. Dep't of Agric., Who Must Obtain a License) (creating licensing exemptions for certain producers wishing to sell ungraded eggs).

Additionally, even if the legislature were to lift licensing and grading requirements, small chicken farmers would retain the incentive to operate diligently and sell quality eggs to local restaurants and retailers.¹⁹⁶ Not only are small farmers incentivized to sell high quality eggs to retain their customer base, but there could also be potential criminal sanctions for producers that sell eggs of inferior quality.¹⁹⁷

Critical to this analysis is the understanding that the current grading and licensing requirements do serve a purpose.¹⁹⁸ While the time and expense associated with the grading and licensing processes arguably imposes unnecessary marketing barriers on small chicken egg producers, these requirements make sense in the context of large-scale producers who wish to sell their eggs around the country.¹⁹⁹ Additionally, the understanding that this discussion focuses on the farm-to-table market, as opposed to large-scale nationwide distribution, is critical to the arguments supporting an amendment of the TAC.²⁰⁰

Although the phrase “farm-to-table” exhibits some inherent ambiguity, the phrase primarily refers to food sourced directly from the producer.²⁰¹ This concept is deeply rooted in our nation’s history,²⁰² and plays a pivotal role in our economy.²⁰³

196. See generally *United States v. Quality Egg, LLC*, 99 F. Supp. 3d 920 (N.D. Iowa 2015) (assessing the legal consequences for an egg producer that sold eggs contaminated with *Salmonella Enteritidis*).

197. See generally *id.* (upholding incarceration for individual egg dealers guilty of selling eggs containing *Salmonella enteritidis*).

198. Hearing on Tex. S.B. 1805 (public testimony) (explaining how the current licensing and grading requirements apply in the context of large-scale producers).

199. See *id.* (supporting licensing and grading requirements for producers shipping their eggs nationwide); see also *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1183 (9th Cir. 1998) (holding California’s milk compositional standards and regulations are immune from Commerce Clause challenges as they are essential to the state’s interest in providing citizens with wholesome milk). But see *Rubenstein & Son Produce, Inc. v. State*, 272 S.W.2d 613, 616–17 (Tex. App.—Dallas 1954, writ denied) (discussing whether the state has authority “to prohibit the movement of . . . eggs in interstate commerce”).

200. Hearing on Tex. H.B. 1284 (testimony of Farm & Ranch Freedom All.).

201. See *The Farm-To-Table Movement: A Complete Guide*, HITCHCOCK FARMS (Mar. 27, 2020), <https://www.hitchcockfarms.com/blog/farm-to-table-movement> [<https://perma.cc/B22L-RVCU>] (“The simplest definition of farm-to-table, is food that moves directly from fields to commercial or home kitchens.”).

202. See, e.g., *id.* (explaining how the farm-to-table movement took form in the early 1900’s “to reestablish direct distribution from grower to consumer”).

203. See *id.* (“Farm-to-table also plays a role in economic and community sustainability. It strengthens connections between growers, the foodservice industry and consumers.”); see also Ernesto

Central to farm-to-table food-sourcing methods is the notion that the freshness of the egg, not the grade, determines the egg's quality as a cooking ingredient.²⁰⁴ This notion indicates that the quality of the egg served largely depends on the food establishment's diligence in ensuring the freshness of their eggs.²⁰⁵ This is largely due to the fact that eggs have a permeable shell, from which oxygen flows in and out, denaturing the contents of the egg over time.²⁰⁶ With this in mind, there is an argument that permitting the sale of ungraded eggs to restaurants and retailers, supporting the farm-to-table and small farming markets, would allow for higher quality eggs to be served by food establishments. This is because those eggs do not go through as many levels of vendors or distributors before they actually reach the consumer.²⁰⁷ Permitting restaurants and retailers to purchase ungraded eggs directly from producers, similar to how consumers do every day at farmers markets, might function to cut down the number of middlemen that possess the egg between the time of initial production and ultimate consumption, thereby reducing the amount of time for oxygen to denature the contents of the egg before consumption.²⁰⁸

Considering that the TAC does not currently prohibit restaurants and retailers from purchasing ungraded eggs, small farmers, restaurants, and retailers would likely assert that statutory code and regulatory provisions

Hernandez-Lopez, *Sustainable Food and The Constitution*, 50 ARIZ. ST. L.J. 549, 550 (2018) (discussing the impact of sustainable food on different aspects of the agriculture industry).

204. Hearing on Tex. S.B. 1805 (public testimony).

205. See generally *Worthy v. Beautiful Rest., Inc.*, 556 S.E.2d 185 (Ga. Ct. App. 2018) (discussing restaurant liability for negligently serving spoiled eggs); see also *Hogue v. Logan's Roadhouse, Inc.*, 61 So.3d 1077, 1081 (Ala. Civ. App. 2010) (establishing the duty of restaurants to exercise extreme care in the selection and preparation of their food) (citing *Travis v. Louisville & N.R. Co.*, 62 So. 851, 854 (Ala. 1913)).

206. Hearing on Tex. S.B. 1805 (public testimony); see also *L & L Started Pullets, Inc. v. Gourdine*, 592 F. Supp. 367, 375 (S.D.N.Y. 1984) ("[V]ariations in egg weights can result from causes other than humidity conditions. Bad distribution practices, temperature levels in transporting vehicles, and consumer egg switching are examples of such causes."); Prevention of *Salmonella* Enteritidis in Shell Eggs During Production, 69 Fed. Reg. 56823 (proposed Sep. 22, 2004) (to be codified at 21 C.F.R. pt. 16) ("The likelihood of trans-shell penetration increases with the length of time that the eggs are in contact with contaminating materials.").

207. See e.g., *W. Am. Ins. Grp. v. Springfield Poultry, Inc.*, No. 2004CA00083, 2005 WL 1491460, at *1 (Ohio Ct. App. 2005) (noting six separate dealers and producers possessed the eggs before they reached the ultimate consumer).

208. See *Amos Bird Co. v. Thompson*, 274 F. 702, 705 (W.D. Wash. 1921) (explaining how eggs tend to deteriorate rapidly, causing the handling and transportation time to negatively impact the soundness of the egg before it reaches the end consumer).

should be consistent with one another in achieving a common purpose.²⁰⁹ Those attempting to highlight the disparity between statutes and administrative regulations might point to the Oklahoma Supreme Court opinion in *State ex rel. Bd. of Agric. v. Warren*,²¹⁰ to support their position.²¹¹ In *Warren*, the Oklahoma State Board of Agriculture brought an action against a local grocery store operator for violating Oklahoma's egg law by purchasing ungraded eggs to sell to other dealers.²¹² In ruling for the defendant, the *Warren* court held that the legislature establishes the policy and standards to be followed.²¹³ Additionally, the court held that an administrative body may enforce such policy by "making rules of a subordinate character within the prescribed limits to carry [it] out."²¹⁴ The *Warren* court determined that, while the purpose of the pertinent egg law was to protect the consumer from eggs of unknown quality, the Board of Agriculture exceeded its authority and disregarded policy in extending the law to ungraded eggs sold to other egg dealers.²¹⁵ Although the opinion does not bind Texas courts, it persuasively supports the principle that statutory provisions and administrative agency regulations should be interwoven, rather than conflicting with each other, as exemplified by the relationship between TAC and DSHS regulations.²¹⁶

While the regulators who create and enforce the current licensing and grading requirements and the large-scale producers who enjoy the resources to satisfy these requirements with ease would most likely lean heavily on case law supporting the constitutionality of the law in its current form, this Comment does not seek to argue that the regulations in place are

209. See *State ex rel. Bd. of Agric. v. Warren*, 331 P.2d 405, 408 (Okla. 1958) (citing *Bell v. United Farm Agency*, Okla., 296 P.2d 149 (Okla. 1956)) (supporting the construction of an act by an administrative board in a manner consistent with its overall objective).

210. *State ex rel. Bd. of Agric. v. Warren*, 331 P.2d 405 (Okla. 1958).

211. See *id.* at 409 (finding the Oklahoma Board of Agriculture ventured beyond the intent of the legislature in extending its grading requirements).

212. *Id.* at 406.

213. *Id.* at 408.

214. *Id.*

215. See *id.* ("[T]he plaintiff Board goes beyond that which is contemplated by the Act in extending the requirements of the Act to the eggs produced by his own flock where an Oklahoma producer also handled other eggs commercially, but did not sell to the consumer.").

216. See *e.g., id.* at 409 ("To effectuate the evident legislative purpose it does not require that the fundamental precept of our jurisprudence that a man is innocent until proven guilty must be overturned.").

unconstitutional.²¹⁷ This Comment aims to argue that these regulations, although constitutional, effectively corner a vital part of our economy out of the restaurant and retail markets.²¹⁸ The expense associated with these licensing and grading requirements imposes a burden on small farmers which prevents them from participating in the restaurant and retail markets.²¹⁹ This is a human argument as much as it is a legal one.²²⁰

Not only should the law operate in a way that supports our small farmers, but the law should also reasonably permit restaurants and retailers to locally source their eggs in the same manner that individual consumers are permitted to at farmers markets.²²¹ Also, our small farmers are more vital than ever, in the wake of shutdowns and complications caused by the COVID-19 pandemic.²²²

217. See generally *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018) (upholding the constitutionality of Wisconsin's butter-grading requirements for butter to be sold at retail); *J.W. Nichols Co. v. White*, 325 S.W.2d 867 (Tex. App.—Austin 1959, no writ) (establishing Texas Egg Law as a reasonable and valid exercise of the state's police power); *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998) (upholding the constitutionality of California's milk composition standards, attacked under Due Process and Commerce Clause challenges).

218. See *Improve Access to Locally Produced Eggs!*, *supra* note 10 (describing the current DSHS regulations at issue as purely a marketing barrier for small farmers); Hearing on Tex. H.B. 1284 (testimony of Farm & Ranch Freedom All.) (arguing for legislative amendment to support small farming industry); Hearing on Tex. S.B. 1805 (public testimony) (claiming high demand for locally sourced eggs among local restaurants and retailers); see also Lauren Manning, *A New Way To Roost: How Land Use Policies Can Facilitate the Changing Tide of Poultry Regulations*, 24 SAN JOAQUIN AGRIC. L. REV. 1, 1–2 (2014–15) (describing the growing demand for locally produced food).

219. See 25 TEX. ADMIN. CODE § 228.62 (2023) (Tex. Dep't of State Health Servs., Specifications for Receiving) (preventing restaurants and retailers from purchasing eggs that haven't been shown to comply with U.S. Consumer Grade B standards); S. Comm. on Health & Hum. Serv., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (explaining how eggs have a small profit margin and current regulations impose unjustifiable burdens on small farmers).

220. See Patricia E. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34 NO. 3 ZONING & PLANNING REP. (March 2011), at 1, 2 (2011) ("Economic, environmental, and philosophical issues have recently renewed the public's interest in . . . local sourcing.").

221. See Ditmar, *supra* note 194, at 1–2 (outlining the requirements to sell ungraded eggs at farmers markets); see also Alexia Kulwicz, *Viability of Small to Mid-Sized Agriculture*, 26 DRAKE J. AGRIC. L. 85, 97 (2021) ("In 2021, Wyoming again amended its Food Freedom Act, permitting the sales of ungraded eggs, and clarifying that homemade food, drinks and eggs may be produced and sold to the maximum extent permitted by federal law."); Berg, *supra* note 163, at 177 ("Locavores and other food movement participants do not want food from far away agribusinesses; they seek to buy their food locally and connect with the farmers who produced the food.").

222. Liz Crampton, *Coronavirus Has More Americans Turning Directly to Farms for Food*, POLITICO (Mar. 31, 2020), <https://politico.com/news/2020/03/31/coronavirus-demand-for-local-farms-157538> [<https://perma.cc/PM5J-CW95>] ("Local and regional agriculture and food markets stand to lose up to \$700 million in sales through May because of the shutdowns caused by the coronavirus . . .").

V. PROPOSAL FOR LEGISLATIVE AMENDMENT

This Comment will now seek to propose a legislative amendment to the TAC to explicitly permit Texas restaurants and retailers to purchase ungraded eggs for the purpose of resale to the ultimate consumer.

A. *Previous Attempts to Amend the Law*

In 2019, during the 86th Texas legislative session, members of the Texas House of Representatives filed House Bill 1284.²²³ This bill sought, similar to what this Comment proposes, to amend the TAC by explicitly permitting a producer selling eggs “for which the [producer] does not claim a grade” to sell those ungraded eggs “directly to a consumer or at wholesale if the eggs are clearly labeled as ‘ungraded.’”²²⁴

Even further, House Bill 1284 sought to statutorily override DSHS regulations by including that “[a] state agency or political subdivision may not prohibit a person . . . from purchasing, reselling, or using eggs.”²²⁵ This bill went to the House Agriculture & Livestock Committee, which left the bill pending at the end of the legislative session.²²⁶

The 86th Legislative Session saw Senate Bill 1805, the Senate’s companion bill to House Bill 1284.²²⁷ Senate Bill 1805 employed almost identical language to House Bill 1284, while adding to the labeling provisions the requirement that an “ungraded” label on a carton of eggs must also include the producer’s name and address.²²⁸ Further, the Senate Bill 1805 labeling provision required that the label be legible and printed “on the top panel of the carton.”²²⁹ Also, Senate Bill 1805 labeling provisions required that the carton “not display the name of a retailer or of a producer other than the producer whose flock produced the eggs.”²³⁰

223. Tex. H.B. 1284, 86th Leg., R.S. (2019).

224. *Id.*

225. *Id.*

226. *HB 1284 History*, TEX. LEG. ONLINE (2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB1284> [https://perma.cc/3B5S-WBMX].

227. Tex. S.B. 1805, 86th Leg., R.S. (2019).

228. *Id.*

229. *Id.*

230. *Id.*

Senate Bill 1805 went to the Senate Health & Human Services Committee, where citizens provided public testimony.²³¹ The Senate Health & Human Services Committee unanimously voted to pass Senate Bill 1805 and subsequently engrossed the bill.²³² The Committee then sent Senate Bill 1805 to the House Agriculture & Livestock Committee, where it died at the end of the session in similar fashion to House Bill 1284.²³³

In 2021, the 87th Texas Legislature again sought reform with Senate Bill 336.²³⁴ Employing the same exact language as Senate Bill 1805, Senate Bill 336 appears to be the last attempt at amending the Texas Agriculture Code to explicitly permit the sale of ungraded eggs for the purpose of resale, in addition to farmers market consumers. The proposed bill's lifespan within the Texas Legislature was lackluster, to say the least.²³⁵ The legislature sent the bill to the Texas Senate Health & Human Services Committee, where it has been since March of 2021.²³⁶

B. *Conclusion: Proposal for Amendment*

There are two recurring concerns with potential change to this field of law: food safety and consumer protection, primarily as they pertain to consumer notice.²³⁷

Opposing amendment of the TAC for the sake of food safety protection presupposes that the law in its current form, burdened by DSHS regulations, actually provides any substantial benefits in that regard.²³⁸ Additionally,

231. *SB 1805 History*, TEX. LEG. ONLINE (2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB1805> [https://perma.cc/RQ76-JS2T].

232. *Id.*

233. *Id.*

234. Tex. S.B. 336, 87th Leg., R.S. (2021).

235. *See SB 336 History*, TEX. LEG. ONLINE (2021), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB336> [https://perma.cc/AR5M-C6FM] (showing SB 336 never made it out of the Senate Health and Human Services Committee).

236. *Id.*

237. *See* TEX. AGRIC. CODE ANN. § 132.084 (establishing criminal sanctions for misleading advertising of eggs); *see generally* J.W. Nichols Co. v. White, 325 S.W.2d 867 (Tex. App.—Austin 1959, no writ) (holding Texas Egg Law to be a valid exercise of the state's police power as it relates to protecting the consuming public).

238. *See* Hearing on Tex. S.B. 1805 (public testimony) (explaining how the current egg licensing and grading process does not even test for harmful bacteria, such as salmonella); *see also* Nina W. Tarr, *Food Entrepreneurs and Food Safety Regulation*, 7 J. FOOD L. & POL'Y 35, 50–51 (2011) (comparing egg safety regulations in Europe to egg regulations in the United States); Sean M. Murphy, *The Chicken or The Egg: A Look at Regulating Egg-Laying Hens Through Statewide Ballot Initiatives*, 22 DRAKE J. AGRIC. L.

opposing legislative amendment due to concerns surrounding consumer notice presupposes that persons who consume eggs via purchase at a restaurant or local grocer cannot be made aware of where their eggs came from, becoming similarly situated to those who purchase ungraded eggs directly from producers.²³⁹ Perhaps there is a way to amend the law to adequately address these concerns, while simultaneously supporting the small farming economy.

With respect to consumer notice, judicial precedent from surrounding states suggests there are viable methods for notifying restaurant and retail patrons of an egg's ungraded status.²⁴⁰ One method that Texas lawmakers and regulatory agencies should consider involves requiring food establishments to post signage on their walls to notify customers the eggs served at that establishment are ungraded.²⁴¹ In the 1921 opinion, *Parrott & Co. v. Benson*,²⁴² the Supreme Court of Washington upheld this method of consumer notice.²⁴³ The Supreme Court of California, in its 1932 opinion, *In re Bear*,²⁴⁴ also supported the constitutionality of this method.²⁴⁵ Although both of these cases focused on imported foreign eggs,²⁴⁶ the Texas Legislature could utilize its police power to apply this method to ungraded eggs as well.²⁴⁷ While there is a strong argument that people purchasing

319, 339–340 (2017) (noting California and Massachusetts egg regulations provide no substantial food safety benefits).

239. See *Parrott & Co. v. Benson*, 194 P. 986, 987 (Wash. 1921) (referencing the Washington statute requiring restaurants and other food establishments who serve foreign eggs to place signage in their establishment notifying customers that the eggs are imported from foreign sources); see also 010.0003.4 WYO. CODE R. § 7 (West 2012) (permitting the sale of ungraded eggs upon meeting certain labeling requirements).

240. See *Parrott*, 194 P. at 987 (outlining Washington statute requiring food establishments to post signs to notify customers that the eggs served by the establishment are imported).

241. See generally *In re Bear*, 15 P.2d 489 (Cal. 1932) (discussing a California statute requiring “[r]estaurants, hotels, cafes, bakeries, and confectioneries using the imported [eggs] must keep a sign, with letters at least four inches high, in a conspicuous place reading: ‘Frozen eggs . . . imported from without the United States used here.’”).

242. *Parrott & Co. v. Benson*, 194 P. 986 (Wash. 1921).

243. See *id.* at 988 (reversing the lower court’s holding that the statutory notification requirement at issue was unconstitutional).

244. *In re Bear*, 15 P.2d 489 (Cal. 1932).

245. See *id.* at 491 (rejecting the argument that the consumer notice provisions at issue are too burdensome on food establishments).

246. See *Parrott*, 194 P. at 987 (describing the requirement that restaurants employ signs conveying that they use foreign eggs); *In re Bear*, 15 P.2d at 489 (upholding legislation requiring restaurants using imported eggs to post signage notifying customers of their foreign nature).

247. See, e.g., *J.W. Nichols Co. v. White*, 325 S.W.2d 867, 874 (Tex. App.—Austin 1959, no writ) (upholding the Texas Legislature’s power to protect consumers from fraud or deceit).

eggs directly from producers have a different level of awareness than those purchasing eggs from restaurants and retailers,²⁴⁸ this method would arguably make the latter more similarly situated to the former.²⁴⁹

While the state and its regulatory agencies have broad authority to make rules to protect the consuming public from harmful or contaminated food,²⁵⁰ many of those directly engaged in the business of buying and selling eggs would argue that the law in its current form does not serve that particular interest.²⁵¹ This is highlighted by the fact that the current grading process does not even include testing for harmful bacteria like salmonella.²⁵²

This Comment provided a thorough analysis of the governing statutory language and the relevant regulatory provisions to highlight a glaring discrepancy among these two sources of law.²⁵³ While the TAC does not explicitly prohibit the sale of ungraded eggs for the purpose of resale,²⁵⁴ DSHS and the TDA employ regulatory language to prohibit what the Agriculture Code permits.²⁵⁵ While these prohibitions aim to protect consumers from harmful eggs, many Texans question whether the licensing and grading requirements currently in place serve that purpose.²⁵⁶ The licensing and grading requirements, which do not even involve tests for harmful bacteria,²⁵⁷ impose substantial financial burdens on our state's small farmers and prevent them from engaging in the restaurant and retail market.²⁵⁸

By amending the TAC to explicitly permit the sale of ungraded eggs for the purpose of resale, the Texas Legislature could break down the marketing

248. See *id.* at 875 (explaining how those purchasing eggs directly from producers usually have a personal relationship with those producers).

249. See *Parrott*, 194 P. at 987–88 (upholding the placement of signage within a food establishment sufficient to put consumers on notice).

250. See Derwin, *supra* note 115 (explaining how states have broad authority to serve their interest in protecting citizens).

251. S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019).

252. Hearing on Tex. S.B. 1805 (public testimony by Rob Cunningham).

253. See S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (explaining how DSHS regulations effectively circumvent the Texas Agriculture Code).

254. See TEX. AGRIC. CODE ANN. § 132.002 (exempting producers selling eggs from their own flock, for which they do not claim a grade); *id.* § 132.021 (permitting restaurants and retailers to buy and sell eggs without first obtaining a license).

255. See S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019) (explaining how DSHS grading requirements conflict with the TAC).

256. See *Improve Access to Locally Produced Eggs!*, *supra* note 10 (arguing that the current licensing and grading requirements do not provide any food safety benefits).

257. Hearing on Tex. S.B. 1805 (public testimony).

258. S. Comm. on Health & Hum. Servs., Bill Analysis, Tex. S.B. 1805, 86th Leg., R.S. (2019).

barriers currently in place under the guise of food safety and consumer protection.²⁵⁹ Such an amendment would also allow consumers, restaurants, and retailers a greater degree of choice with respect to the purchase of eggs.²⁶⁰ While the law in its current form would most likely pass constitutional review, there is certainly an argument that the law should be improved to support small economy and the growing locavore movement.²⁶¹

259. *See id.* (describing the burdens imposed by DSHS regulations on the state's small farmers).

260. *See generally* Berg, *supra* note 163, at 216–17 (explaining food choice contributes to a person's sense of self-expression and identity).

261. *See* Hearing on Tex. S.B. 1805 (public testimony) (emphasizing the demand for locally sourced eggs among local restaurants and retailers).