

10-1-2021

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Repository Citation

S. Byron Frazelle, *Alternative Solutions for Government Intervention in Climate Crisis Markets: Price Gouging and the Pandemic Egg Market Case Study*, 46 Wm. & Mary Env'tl. L. & Pol'y Rev. 283 (2021), <https://scholarship.law.wm.edu/wmelpr/vol46/iss1/8>

ALTERNATIVE SOLUTIONS FOR GOVERNMENT INTERVENTION IN CLIMATE CRISIS MARKETS: PRICE GOUGING AND THE PANDEMIC EGG MARKET CASE STUDY

S. BYRON FRAZELLE*

*The cost of a thing is the amount of what I will call life which is required to be exchanged for it, immediately or in the long run.*¹

*The incredible, edible egg.*²

INTRODUCTION

Fires in California,³ hurricanes along the Gulf,⁴ a worldwide pandemic—it is evident that the year 2020 was defined by great crises, most of which were direct results of or exacerbated by climate change.⁵

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¹ HENRY DAVID THOREAU, *WALDEN* 31 (T. Y. Crowell ed., 1899) (1854).

² *The Incredible Edible Egg*, Marketing Slogan, AMERICAN EGG BOARD (1978), <https://www.youtube.com/watch?v=wfU2n17O1jE?t=27> [<https://perma.cc/B8VM-EUQE>].

³ Dani Anguiano, *California's Wildfire Hell: How 2020 Became the State's Worst Ever Fire Season*, *THE GUARDIAN* (Dec. 30, 2020, 4:00 PM), <https://www.theguardian.com/us-news/2020/dec/30/california-wildfires-north-complex-record> [<https://perma.cc/9RV6-P8R5>].

⁴ NOAA, *Record-Breaking Atlantic Hurricane Season Draws to an End* (June 10, 2021), <https://www.noaa.gov/media-release/record-breaking-atlantic-hurricane-season-draws-to-end> [<https://perma.cc/BPU8-JZNH>].

⁵ *Coronavirus, Climate Change, and the Environment: A Conversation on COVID-19 with Dr. Aaron Bernstein, Director of Harvard Chan C-CHANGE*, CTR. FOR CLIMATE HEALTH, & THE GLOB. ENV'T, HARVARD T. H. CHAN SCHOOL OF PUB. HEALTH, <https://www.hsph.harvard.edu/c-change/subtopics/coronavirus-and-climate-change/#:~:text=Many> [<https://perma.cc/ANV7-C3JS>] (last visited Nov. 3, 2021); Jeff Berardelli, *How Climate Change Is Making Hurricanes More Dangerous*, *YALE CLIMATE CONNECTIONS* (July 8, 2019),

The effects of these crises on broader American society, in particular that of the COVID-19 pandemic, are just beginning to be realized.⁶ Nearly every aspect of American life has been impacted by the pandemic and by the corresponding responses of state and federal governments.⁷

Rapid price increases are a common thread linking environmental catastrophes of various causes.⁸ Environmental catastrophes, like hurricanes, droughts, and pandemics, all can create scarcity, causing prices to rise.⁹ Depending on the magnitude, these price increases may be characterized as “price gouging.”¹⁰ Price gouging as a practice, and crisis price increases more broadly, can take many forms, have varying causes, and are not infrequently the subject of litigation and academic controversy.¹¹

The 2020 pandemic-induced price increases were unique in their sheer breadth: commodities from thermometers to toilet paper experienced nationwide price shocks,¹² due to increased demand,¹³ challenges

<https://yaleclimateconnections.org/2019/07/how-climate-change-is-making-hurricanes-more-dangerous/> [https://perma.cc/FVQ2-WZXD]; Ellen Gray, *Satellite Data Record Shows Climate Change's Impact on Fires*, NASA'S EARTH SCI. NEWS TEAM (Sept. 10, 2019), <https://climate.nasa.gov/news/2912/satellite-data-record-shows-climate-changes-impact-on-fires/#:~:text=Hot%20and%20dry.,speed%20at%20which%20it%20spreads> [https://perma.cc/VT52-BEL7].

⁶ See Maria Nicola et al., *The Socio-Economic Implications of the Coronavirus Pandemic (COVID-19): A Review*, 78 INT'L J. SURGERY 185, 185 (2020); *Impact of COVID-19 on People's Livelihoods, Their Health and Our Food System, Joint Statement by ILO, FAO, IFAD and WHO*, WORLD HEALTH ORG. (Oct. 13, 2020) [hereinafter WORLD HEALTH ORG], <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems> [https://perma.cc/2EUV-75FN].

⁷ WORLD HEALTH ORG., *supra* note 6; see Paul Blake & Divyanshi Wadhwa, *2020 Year in Review: The Impact of COVID-19 in 12 Charts*, WORLD BANK BLOGS (Dec. 14, 2020), <https://blogs.worldbank.org/voices/2020-year-review-impact-covid-19-12-charts> [https://perma.cc/4GTU-Z4KL].

⁸ Jarrett Greenstein, *The Perfect Storm: Price Gouging and Disaster*, THE CURRENT (Dec. 22, 2020), <https://thecurrentmsu.com/2020/12/22/the-perfect-storm-price-gouging-and-disaster/> [https://perma.cc/DYG9-M2SX].

⁹ See David Rothkopf & Claire Casey, *Impacts of Climate Change, Resource Scarcity and Foreign Policy*, WORLD WILDLIFE MAG. (2014), <https://www.worldwildlife.org/magazine/issues/winter-2014/articles/impacts-of-climate-change-resource-scarcity-and-foreign-policy> [https://perma.cc/2LGF-63FM].

¹⁰ See, e.g., FLA. STAT. § 501.160 (2020).

¹¹ Greenstein, *supra* note 8.

¹² See, e.g., Reese Dunklin & Justin Pritchard, *\$10 Toilet Paper? Coronavirus Gouging Complaints Surge in US*, PBA (Mar. 19, 2020, 1:22 PM), <https://www.pbs.org/newshour/economy/10-toilet-paper-coronavirus-gouging-complaints-surge-in-u-s> [https://perma.cc/K22Q-39XB].

¹³ See, e.g., *id.*

to supply chains,¹⁴ or both.¹⁵ The strain that the pandemic placed on the food supply was particularly unprecedented.¹⁶ Animal protein markets experienced never-before-seen challenges to their supply chains, while simultaneously dealing with skyrocketing demand.¹⁷ Of these commodities, the egg market experienced the most dramatic shift in price, with a consumer price index increase of 16.1% in April.¹⁸ The next highest increase was 4.3%, for the commodity category of meat, poultry, and fish.¹⁹

These commodity prices eventually leveled out, and by July even egg prices had returned to relative stability.²⁰ Even so, four state attorneys general brought actions against egg suppliers for price gouging through the spring and summer of 2020.²¹ In addition, calls for federal price gouging legislation have been renewed along bipartisan lines, despite overwhelming

¹⁴ See, e.g., Sara Silver, *From the Filings: Supply Chain Lessons from the Pandemic*, J. ACCOUNTANCY (Feb. 18, 2021), <https://www.journalofaccountancy.com/news/2021/feb/supply-chain-lessons-from-coronavirus-pandemic.html> [<https://perma.cc/TZH4-TDJN>].

¹⁵ See, e.g., Emily Feng & Amy Cheng, *COVID-19 Has Caused a Shortage of Face Masks. But They're Surprisingly Hard to Make*, NPR (Mar. 16, 2020, 2:23 PM), <https://www.npr.org/sections/goatsandsoda/2020/03/16/814929294/covid-19-has-caused-a-shortage-of-face-masks-but-theyre-surprisingly-hard-to-mak> [<https://perma.cc/GWR5-TD3W>].

¹⁶ Robert Johansson, *Another Look at Availability and Prices of Food Amid the COVID-19 Pandemic*, U.S. DEP'T OF AGRIC. (July 29, 2021), <https://www.usda.gov/media/blog/2020/05/28/another-look-availability-and-prices-food-amid-covid-19-pandemic> [<https://perma.cc/3R23-U39A>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Minnesota v. Forsman Farms, Inc.*, No. 62-CV-20-2829, at 1–2 (Minn. Dist. Ct. June 5, 2020), available at <https://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1628048049> [<https://perma.cc/43M6-79GH>]; *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Mar. 10, 2021); *Texas v. Cal-Maine Foods, Inc.*, No. 2020254 27-7, BLOOMBERG (Tex. Dist. Ct. Feb. 2, 2021); *West Virginia v. Dutt & Wagner, Inc.*, No. 20-C-68 (W. Va. Dist. Ct. July 14, 2020). The Minnesota court website does not have the documents readily accessible, however, the assurance of discontinuance in the Minnesota case is available online. Assurance of Discontinuance, In the Matter of Forsman Farms, Inc., Case No. 62-CV-20-2829 (Minn. Dist. Ct. June 5, 2020), https://chamberlitigation.org/sites/default/files/ForsmanFarms_AssuranceOfDiscontinuance%5B1%5D.pdf [<https://perma.cc/E8Y6-GA8C>]. West Virginia also does not provide dockets online, however, a copy of the West Virginia petition is available in the docket for the New York case. Exhibit 23, *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Aug. 11, 2020). As of November 2020, discovery in the West Virginia case is ongoing. Patrick Morrissey, *Report to the Governor, Senate President and House of Delegates Speaker*, OFF. ATTY GEN. 33 (Nov. 1, 2020), <https://ago.wv.gov/publicresources/Documents/2020GR.PDF> [<https://perma.cc/V5ZQ-D7HX>].

distaste among neoclassical economists for the kind of price ceilings these laws create.²²

Traditional economic critiques, however, have largely ignored the broader ethical, political, and moral concerns of politicians and voters that keep restrictions on price gouging popular.²³ These concerns ensure that anti-price gouging laws are an indefinite fixture in American law.²⁴ Litigation under anti-price gouging laws, however, is not the only option that federal and state governments have to prevent or mitigate crisis price increases.²⁵

This Note uses the egg market as a case study to present four policy alternatives that state and federal governments may consider in addressing crisis price increases, rather than resorting to anti-price gouging litigation. Part I narrows the scope of discussion and defines price gouging, a term that can be emotionally charged.²⁶ Part II tells the story of the 2020 egg market, which is both an intrinsically valuable case study and a useful model to frame policy alternatives.²⁷ Part III examines the theoretical underpinnings of price gouging to develop a dichotomous framework with which to evaluate policy alternatives.²⁸ Part IV presents and analyzes the four policy alternatives using this framework.²⁹ The goal of this Note is to describe and analyze alternatives to litigation that will better resolve the concerns that anti-price gouging laws attempt to address.

I. PRICE GOUGING DEFINITION AND SCOPE

“Price gouging” has the potential to be a loaded term, with an amorphous definition.³⁰ In a sterile way, price gouging may be defined as

²² See Price Gouging Prevention Act, S. 3853, 113th Cong. (2020) (introduced by Democratic Senator Elizabeth Warren); Ending Price-Gouging During Emergencies Act, S. 3574, 113th Cong. (2020) (introduced by Republican Senator Thom Tillis). The neoclassical economic critique of anti-price gouging laws is described *infra* Part III.

²³ See, e.g., Adrienne Hill, *Economists Don't Think Price Gouging Is a Problem. But What About Our Social Values?*, MARKETPLACE (Sept. 1, 2017), <https://www.marketplace.org/2017/09/01/why-economists-don-t-think-price-gouging-problem/> [https://perma.cc/4S5V-BWMM].

²⁴ See *id.*; see also Heather Morton, *Price Gouging State Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 17, 2021), <https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx#:~:text=Thirty%2Dsix%20states%2C%20Guam%2C,or%20deceptive%20trade%20practices%20law> [https://perma.cc/JA9T-8GDT].

²⁵ See *infra* Part IV.

²⁶ See *infra* Part I.

²⁷ See *infra* Part II.

²⁸ See *infra* Part III.

²⁹ See *infra* Part IV.

³⁰ See Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 349 (2008).

the practice of raising prices of necessary commodities during crisis scenarios in a way that is not commensurate with an increase in cost.³¹

While there is currently no federal anti-price gouging law, the federal government has used price controls before to prevent hoarding of consumer goods during certain crises.³² One such law is the Defense Production Act (“DPA”), passed in 1950 in response to the Korean War.³³ At least one price gouging lawsuit during the pandemic arose out of the price control provisions in the DPA.³⁴

The Georgia lawsuit notwithstanding, most price gouging litigation takes place under state statutes.³⁵ A majority of states have laws or regulations banning price gouging, though the scope of commodity categories covered varies.³⁶ Massachusetts, for example, only bans price gouging in the context of petroleum products, and does so through regulation.³⁷ A more typical statute bans price gouging for a wide array of products that are “necessary” during an emergency, including food, lumber, ice, and petroleum.³⁸

Legal standards also vary as to the amount at which a price increase becomes illegal.³⁹ Many states impose a “hard quantitative threshold” that has to be reached in order to create seller liability.⁴⁰ For example, during a declared emergency in California, sellers may not be able to raise prices higher than ten percent of the precrisis level.⁴¹ Other states impose a more flexible standard, banning price increases that are “unconscionable.”⁴²

³¹ *Id.* at 347, 349.

³² *See, e.g.*, Defense Production Act, 50 U.S.C. §§ 4512–4513.

³³ Defense Production Act, 50 U.S.C. § 4512; *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, CONG. RSCH. SERV. (Mar. 2, 2020).

³⁴ *See* Judgment, *U.S. v. Ayimadu*, No. 1:20-CR-275-JSA, BLOOMBERG (N.D. Ga. Sept. 3, 2020).

³⁵ *See, e.g.*, *Fraser et al. v. Cal-Maine*, No. 3:20-cv-02733, BLOOMBERG (N.D. Cal. Sept. 20, 2020); cases cited *supra* note 21.

³⁶ For a comprehensive list of anti-price gouging statutes by state, see Morton, *supra* note 24.

³⁷ 940 MASS. CODE REGS. § 3.18 (2020).

³⁸ *See, e.g.*, FLA. STAT. § 501.160 (2020).

³⁹ *See* Morton, *supra* note 24.

⁴⁰ Christopher Buccafusco, Daniel Hemel & Eric Talley, *Price Gouging in a Pandemic*, U. CHI. COASE-SANDOR INST. L. & ECON. RSCH. PAPER NO. 921, CARDOZO LEGAL STUD. RSCH. PAPER NO. 626, 1, 14 (2021).

⁴¹ *Id.*; CAL. PENAL CODE § 396 (2020).

⁴² Buccafusco, Hemel & Talley, *supra* note 40, at 14; *see, e.g.*, MICH. COMP. LAWS § 445.903 (2021).

Food commodities are typically reached by anti-price gouging laws either explicitly, by statutory prohibitions on price gouging as applied directly to food, or generally by statutory prohibitions on price gouging for broadly termed “necess[ities].”⁴³ Litigation over price gouging in the pandemic egg market, at the time of writing, took place in Texas, Minnesota, New York, and West Virginia.⁴⁴ Minnesota, New York, and Texas all apply flexible “unconscionable” standards, while West Virginia applies a cap of ten percent.⁴⁵ Texas bans price gouging of “fuel, food, medicine, lodging, building materials, construction tools, or [other] necessit[ies]” during an emergency.⁴⁶ The Minnesota Executive Order applies to “essential consumer goods.”⁴⁷ West Virginia lists many different types of goods, “food items” and “essential consumer goods” among them.⁴⁸ New York applies anti-price gouging laws to “goods and services vital and necessary for health.”⁴⁹

It is easy to overstate these differences. Each prohibition has the same intended effect, which is the creation of a price control during crisis scenarios.⁵⁰ The theoretical implications of these price controls will be discussed in Part III.⁵¹ Here, the definition and effect serve as background for addressing the specific context to which these definitions are applied—the United States egg market.

⁴³ Compare, e.g., TEX. BUS. & COM. CODE ANN. § 17.46(b)(27) (2021) with N.Y. GEN. BUS. LAW § 396-r (2020).

⁴⁴ See generally *Minnesota v. Forsman Farms, Inc.*, No. 62-CV-20-2829 (Minn. Dist. Ct. June 5, 2020), available at <https://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1628048049> [<https://perma.cc/U6QS-RZAY>]; *People v. Hillandale Farms, Corp. et al.*, No. 4516 50/2020, BLOOMBERG (N.Y. Sup. Ct. Mar. 10, 2021); *Texas v. Cal-Maine Foods, Inc.*, No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Feb. 2, 2021); *West Virginia v. Dutt & Wagner, Inc.*, No. 20-C-68 (W. Va. Dist. Ct. July 14, 2020).

⁴⁵ Minn. Exec. Order No. 20-10 (Mar. 20, 2020); N.Y. GEN. BUS. LAW § 396-r (2020); TEX. BUS. & COM. CODE ANN. § 17.44 (2021) (noting the subchapter is to be applied to protect consumers from “unconscionable actions”); TEX. BUS. & COM. CODE ANN. § 17.46(b)(27) (2021) (banning price gouging using the still-flexible language of “excessive or exorbitant”); W. VA. CODE ANN. § 46A-6J-1 (2020).

⁴⁶ TEX. BUS. & COM. CODE ANN. § 17.46(b)(27) (2021).

⁴⁷ Minn. Exec. Order No. 20-10 (Mar. 20, 2020).

⁴⁸ W. VA. CODE ANN. § 46A-6J-1 (2020).

⁴⁹ N.Y. GEN. BUS. LAW § 396-r (2020).

⁵⁰ See W. David Montgomery, Robert A. Baron & Mary K. Weisskopf, *Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply Interruptions*, 3 J. COMP. L. & ECON. 357, 374 (2007).

⁵¹ See *infra* Part III.

II. THE EGG MARKET CASE STUDY

A. *Evaluating Price Gouging and the Price Control Mechanism Through the Egg Market*

Policy alternatives to anti-price gouging laws will necessarily be context specific, even as the underlying mechanisms of supply and demand, the effect of price controls, and associated economic theories are broadly applicable.⁵² Supply chains are not the same across commodity categories or even necessarily across types of crises; neither is demand for a given commodity.⁵³ The policy alternatives described in Part IV will be useful guides for government action in supply chains and consumer markets across commodity categories, even if tailoring is required to fit the nuances of the specific crisis, commodity market, or supply chain.⁵⁴

There are several reasons why the egg market is a particularly useful case study to examine pandemic price gouging. The first is the availability of information on both supply and demand for eggs in the United States, as well as the availability of historic price and pandemic price information.⁵⁵ Additionally, multiple state and federal regulatory controls are in place for the egg market, which leaves open multilevel policy alternatives.⁵⁶ These alternatives will be readily applicable to

⁵² The same underlying mechanisms of supply and demand apply across different commodity categories. See ENCYCLOPEDIA BRITANNICA, SUPPLY AND DEMAND (Encyclopedia Britannica eds. 2019), <https://www.britannica.com/summary/supply-and-demand> [<https://perma.cc/982Q-56FK>].

⁵³ This is true even among food commodities, which faced different kinds of supply challenges during the pandemic. See Hallie Casey, *COVID-19 and the US Food Supply Chain: What Happened?*, SUSTAINABLE FOOD CTR. (Aug. 12, 2020), <https://sustainablefoodcenter.org/latest/blog/covid-19-and-the-us-food-supply-chain-what-happened> [<https://perma.cc/3Q2D-Y5NA>]. Different supply and demand considerations exist for goods like medicines, for example, in different kinds of disasters. See Michael A. Jhung et al., *Chronic Diseases and Disasters: Medication Demands of Hurricane Katrina Evacuees*, 33-3 AM. J. PREVENTATIVE MED. 207, 209 (2007).

⁵⁴ See *infra* Part IV.

⁵⁵ See Mario Ibarburu, *U.S. Egg Cost of Production and Prices*, EGG INDUS. CTR. 3–4 (May 6, 2020); Mario Ibarburu, Richard Gates & Lesa Vold, *EIC preliminary estimation of the impact of COVID-19 on egg prices and producers' revenue*, EGG INDUS. CTR. 3–5 (May 6, 2020).

⁵⁶ Generally, the USDA and FDA share regulatory oversight over eggs. Gretchen Goetz, *Who Inspects What? A Food Safety Scramble*, FOOD SAFETY NEWS (Dec. 16, 2010), <https://www.foodsafetynews.com/2010/12/who-inspects-what-a-food-safety-scramble/> [<https://perma.cc/WP5T-3BBR>]. However, states can exert their own regulatory oversight over the industry. Massachusetts, for example, passed animal protection legislation that may

other food commodity markets, which have similarly multifaceted regulatory structures.⁵⁷

It is also intrinsically valuable to evaluate the availability of food during a crisis, particularly in light of rising food insecurity in the United States during the pandemic.⁵⁸ Eggs are a low-cost protein, both an important part of a healthy diet and a product that is generally accessible across income groups because of their typically low price.⁵⁹ Eggs are also an important protein alternative to meat.⁶⁰ In sum, eggs are just the type of necessity that many anti-price gouging laws seek to protect.⁶¹ In looking forward to future crises, questions surrounding the protection of the food supply and availability of products like eggs will be paramount to ensure health and safety for Americans in short- and long-term crises.⁶²

B. Demand Shock

Though there is some evidence that COVID-19 had reached the United States as early as December 2019,⁶³ awareness of the situation

affect egg supplies independent of the pandemic. Jon Chesto, *Egg Industry Warns of Shortage in Mass. Without Legislative Action*, THE BOSTON GLOBE (Mar. 6, 2021, 12:17 AM), <https://www.bostonglobe.com/2021/03/06/business/egg-industry-warns-shortage-mass-without-legislative-action/> [<https://perma.cc/24PB-W7CJ>]. See also *Egg Laws by State*, NAT'L EGG REGUL. OFF.'S, <http://nerous.org/state-laws-regulations/egg-laws-by-state/> [<https://perma.cc/LR4R-DB7U>].

⁵⁷ See Goetz, *supra* note 56 (documenting federal food inspection authorities across different food commodities).

⁵⁸ Bridget Balch, *54 Million People in America Face Food Insecurity During the Pandemic. It Could Have Dire Consequences for Their Health*, ASS'N OF AM. MED. COLLS. (Oct. 15, 2020), <https://www.aamc.org/news-insights/54-million-people-america-face-food-insecurity-during-pandemic-it-could-have-dire-consequences-their> [<https://perma.cc/R6HM-4JGC>]. See also *The Impact of the Coronavirus on Food Insecurity in 2020 & 2021*, FEEDING AMERICA (2021), https://www.feedingamerica.org/sites/default/files/2021-03/National%20Projections%20Brief_3.9.2021_0.pdf [<https://perma.cc/576M-7RJJ>].

⁵⁹ See Stacey Vanek Smith & Cardiff Garcia, *Egg Prices: States Cry Foul*, NPR: THE INDICATOR FROM PLANET MONEY (Aug. 24, 2020, 5:16 PM), <https://www.npr.org/2020/08/24/905566618/egg-prices-states-cry-foul> [<https://perma.cc/5B2N-534H>].

⁶⁰ Ellie Krieger, *Cutting Down on Meat? Be Careful What You Replace It with*, WASH. POST (May 26, 2015), https://www.washingtonpost.com/lifestyle/wellness/cutting-down-on-meat-be-careful-what-you-replace-it-with/2015/05/26/94e77a0e-03b1-11e5-a428-c984eb077d4e_story.html [<https://perma.cc/F2CB-FNNA>].

⁶¹ See, e.g., N.Y. GEN. BUS. LAW § 396-r (2020); Petition at 1–2, *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Mar. 10, 2021).

⁶² See Chris J. Macias, *Is the Food Supply Strong Enough to Weather the COVID-19 Pandemic*, UC DAVIS (June 25, 2020), <https://www.ucdavis.edu/food/news/is-food-supply-strong-enough-to-weather-covid-19-pandemic/> [<https://perma.cc/26GT-LU8W>].

⁶³ Joann G. Elmore et al., *Excess Patient Visits for Cough and Pulmonary Disease at a*

and lockdown measures did not begin until March 2020.⁶⁴ At this point, demand for essential food items started to rapidly increase.⁶⁵ Almost all food commodity categories experienced price increases, with the egg market experiencing the highest change in the retail price index.⁶⁶ Consumer panic-buying, coupled with decreased restaurant traffic, led to large increases in demand across food product categories.⁶⁷

At its peak, the warehouse prices of Midwest large white eggs eclipsed recent historic levels, nearing 270 cents per dozen.⁶⁸ The Urner Barry benchmark for a dozen conventional eggs in California increased from \$1.55 to \$3.66 by late March.⁶⁹ Wholesale customers in New York reported paying four to five times their normal price per carton.⁷⁰ By late April, however, as demand cooled, prices returned to approximately pre-crisis levels.⁷¹ In contrast, the liquid egg market, which consists of eggs liquified and used primarily by the restaurant industry, experienced an all-time low in prices.⁷² The price for liquid egg bottomed out at almost half of the previous historic low.⁷³

Large US Health System in the Months Prior to the COVID-19 Pandemic: Time-Series Analysis, 22 J. MED. INTERNET RSCH. 1, 8 (2020).

⁶⁴ AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AM. J. MANAGED CARE (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> [<https://perma.cc/YB4Z-4XS5>].

⁶⁵ Robert Johansson, *Will COVID-19 Threaten Availability and Affordability of Our Food?*, U.S. DEPT. OF AGRIC. (July 29, 2021), <https://www.usda.gov/media/blog/2020/04/16/will-covid-19-threaten-availability-and-affordability-our-food> [<https://perma.cc/526M-CRBM>].

⁶⁶ Johansson, *supra* note 16.

⁶⁷ *Id.*

⁶⁸ *Egg Markets Overview*, U.S. DEPT. OF AGRIC. (Sept. 24, 2021), <https://www.ams.usda.gov/sites/default/files/media/Egg%20Markets%20Overview.pdf> [<https://perma.cc/GP4L-5KFG>].

⁶⁹ Samantha Masunaga, *Why Are Eggs So Expensive? Blame Coronavirus Demand*, L.A. TIMES (Apr. 8, 2020, 4:43 PM), <https://www.latimes.com/business/story/2020-04-08/egg-prices-rising-coronavirus> [<https://perma.cc/FQV3-SQR9>].

⁷⁰ Press Release, Off. N.Y. Att’y Gen., Attorney General James Sues One of the Nation’s Largest Egg Producers for Price Gouging During the Coronavirus Pandemic (Aug. 11, 2020) [hereinafter Off. N.Y. Att’y Gen.], <https://ag.ny.gov/press-release/2020/attorney-general-james-sues-one-nations-largest-egg-producers-price-gouging> [<https://perma.cc/V2KT-NSAY>]. This translated to retail prices as well; a retail customer in New York reported paying \$5.49 for a dozen eggs at his usual store. *Id.*

⁷¹ Ibarburu, Gates & Vold, *supra* note 55, at 3 (“As the demand moderated, prices went down at almost the same rate that they rose. During the last week of April, [shell eggs] reached a price level similar to the one before the crisis.”).

⁷² *Id.* at 4.

⁷³ The historic low was 14.4 cents per pound in 2017, while prices reached 8 cents per pound in April 2020. *Id.*

The markets for both liquid egg and shell eggs reflect the larger trends in the United States during the first months of the COVID-19 pandemic.⁷⁴ Decreased restaurant traffic led directly to a large decrease in the amount of liquid egg demanded by the restaurant industry.⁷⁵ Meanwhile, the shutdown also meant more people would be cooking at home, leading to increased demand for shell eggs.⁷⁶

The egg market price increases largely seem driven by demand, but this is not immediately evident. Supply chain disruptions were not unheard of, particularly in other animal protein markets due to outbreaks of COVID-19 in processing plants.⁷⁷ These were prevalent particularly in labor-intensive industries that relied on farm workers.⁷⁸ Outbreaks of COVID-19 in processing plants disrupted supply while consumer demand was independently rising as well.⁷⁹

It does not seem, however, that the egg industry experienced a similar shock to its supply chains.⁸⁰ In contrast to areas like pork production, egg processing usually occurs at the same production facility.⁸¹ Egg handling and processing is primarily automated, at least when compared to labor-intensive industries like pork production.⁸² Disruptions due to labor shortages were not as common. Additionally, cost of production for eggs, primarily a function of feed costs, were at or below normal levels through April 2020.⁸³

C. *Attempts at Directly Addressing Egg Market Price Increases*

Despite the fact that the period of high prices was relatively short-lived, two noteworthy attempts at market controls specific to the egg

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.*; Vanek Smith & Garcia, *supra* note 59.

⁷⁷ Casey, *supra* note 53.

⁷⁸ Thomas Reardon & Johan Swinnen, *COVID-19 and Resilience Innovations in Food Supply Chains*, INT'L FOOD POL'Y RSCH. INST. (July 6, 2020), <https://www.ifpri.org/blog/covid-19-and-resilience-innovations-food-supply-chains> [<https://perma.cc/85WZ-DKCJ>] (“Pandemic-related disruptions in supply chains are concentrated in their labor-intensive segments.”).

⁷⁹ *See* Casey, *supra* note 53. Demand for all food commodities rose—particularly animal proteins. Johansson, *supra* note 16.

⁸⁰ *Egg Processing*, U.S. POULTRY & EGG ASS'N, <https://ffa.app.box.com/v/uspoultryandegg> [<https://perma.cc/VLS5-H4GM>].

⁸¹ *Id.*

⁸² *Compare id.* (“Egg handling and processing is performed with automated equipment”) with Casey, *supra* note 53 (“On any given day, up to a thousand employees are in one of these [pork processing] facilities, processing meat for grocery and restaurant sales.”).

⁸³ Ibarburu, Gates & Vold, *supra* note 55, at 5.

market were put into place.⁸⁴ These were a modification to the Egg Safety Rule and other rules promulgated by the Food & Drug Administration (“FDA”),⁸⁵ and the price gouging litigation brought by state attorneys general.⁸⁶

1. FDA Modification to Egg Safety Rule

The dual issue of decreased demand in the market for liquid egg and skyrocketing demand for shell eggs theoretically presented a clear supply-side solution.⁸⁷ Though the Department of Agriculture (“USDA”) is responsible for grading eggs and most other regulatory measures for food commodity production, the FDA is responsible for the safety and labeling of shell eggs.⁸⁸ The FDA exercises its authority through promulgating regulations, particularly 21 C.F.R. 118, also known as the Egg Safety Rule.⁸⁹

In order to address the scarcity issues caused by increased demand, the FDA promulgated a temporary change to the Egg Safety Rule in early April.⁹⁰ This change allowed producers that sent eggs exclusively to processing facilities for “egg products,” e.g., liquid egg, to sell their eggs as table eggs.⁹¹ This new policy relaxed some of the safety conditions egg producers must meet before selling their eggs as table eggs.⁹² Additionally, in response to decreased restaurant traffic, the FDA promulgated a guidance allowing restaurants to resell their eggs without labels.⁹³

Demand for table eggs, however, had leveled off by late April, shortly after the rule took effect.⁹⁴ This limited the time frame for the

⁸⁴ Ron Sterk, *Eggs on Rollercoaster Due to COVID-19*, FOOD BUS. NEWS (Apr. 22, 2020), <https://www.foodbusinessnews.net/articles/15875-eggs-on-rollercoaster-due-to-covid-19> [<https://perma.cc/DZ55-P3EW>].

⁸⁵ Production, Storage, and Transportation of Shell Eggs, 21 C.F.R. §§ 118.1–118.12 (2009).

⁸⁶ *See, e.g.*, *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Mar. 10, 2021).

⁸⁷ *See* Ibarburu, Gates & Vold, *supra* note 55, at 2.

⁸⁸ *See* Goetz, *supra* note 56.

⁸⁹ Production, Storage, and Transportation of Shell Eggs, 21 C.F.R. §§ 118.1–118.12 (2021).

⁹⁰ U.S. FOOD & DRUG ADMIN., FDA-2020-D-1139-0006, TEMPORARY POLICY REGARDING PACKAGING AND LABELING OF SHELL EGGS SOLD BY RETAIL FOOD ESTABLISHMENTS DURING THE COVID-19 PUBLIC HEALTH EMERGENCY (2020) [hereinafter TEMPORARY POLICY REGARDING PACKAGING AND LABELING], <https://www.fda.gov/media/136732/download> [<https://perma.cc/G8FF-YCZ9>].

⁹¹ *Id.*

⁹² *Id.*

⁹³ TEMPORARY POLICY REGARDING PACKAGING AND LABELING, *supra* note 90.

⁹⁴ *See* Ibarburu, Gates & Vold, *supra* note 55, at 3.

efficacy of the policy.⁹⁵ Due to the nature of egg facilities, most liquid egg producers could not quickly change production, and did not have the necessary infrastructure to sell their eggs as shell eggs.⁹⁶ Similarly, egg producers that typically shipped large flats of eggs to restaurants had issues converting their equipment to the smaller flats necessary for in-store shipments.⁹⁷ Some liquid egg producers also found that, even if they could get their eggs to market, many retailers would not accept them.⁹⁸

Though the rule change may have had some marginal effect on diverting eggs into the higher-demand channels, it was not an overwhelming success.⁹⁹ This demonstrates that the egg supply chain was inelastic in the short term.

2. Price Gouging Litigation

Pursuant to their anti-price gouging state statutes or executive orders, four state attorneys general brought actions against egg producers: Texas, West Virginia, Minnesota, and New York.¹⁰⁰ At the time of writing, only the Texas and the Minnesota actions have been fully adjudicated,¹⁰¹ and in opposite directions.¹⁰²

a. Texas

Recall that the Texas price gouging statute applies a flexible “exorbitant or excessive” standard to pricing of necessities broadly and to

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *See generally* Minnesota v. Forsman Farms, Inc., No. 62-CV-20-2829 (Minn. Dist. Ct. June 5, 2020), available at <https://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1628048049> [<https://perma.cc/U6QS-RZAY>]; People v. Hillandale Farms, Corp. et al., No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Mar. 10, 2021); Texas v. Cal-Maine Foods, Inc., No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Feb. 2, 2021); West Virginia v. Dutt & Wagner, Inc., No. 20-C-68 (W. Va. Dist. Ct. July 14, 2020).

¹⁰¹ As of March 10, 2021, the New York litigation has been in adjournment since September 2020. *See* People v. Hillandale Farms, Corp. et al., No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Mar. 10, 2021). The West Virginia litigation is currently in the discovery phase. *See* Morrisey, *supra* note 21, at 33. West Virginia also filed an additional lawsuit against a different egg distributor in August 2020, which also appears to be ongoing. *See id.*; Brendan Tierney, *Second Lawsuit Filed for Egg Price Gouging*, WHSV (Aug. 11, 2020, 1:45 PM), <https://www.wHSV.com/2020/08/11/second-lawsuit-filed-for-egg-price-gouging/> [<https://perma.cc/E4X2-72VX>].

¹⁰² Minnesota v. Forsman Farms, No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Apr. 23, 2020).

several specific categories of commodities, including food.¹⁰³ The State of Texas brought the action against Cal-Maine Foods, the largest egg wholesaler in the United States, alleging price increases of up to 300%.¹⁰⁴ Cal-Maine bases its pricing off of the spot market.¹⁰⁵ According to Texas, this did not constitute forces outside of Cal-Maine’s control, and Cal-Maine charged high prices to take advantage of the market.¹⁰⁶ Because of this, Cal-Maine was “on track to make windfall profits.”¹⁰⁷

In response, Cal-Maine raised a number of defenses.¹⁰⁸ Their motion to dismiss was granted, and the case was dismissed with prejudice.¹⁰⁹ The trial court, however, gave no reasoning in its under-100-word order.¹¹⁰ The state filed an appeal, but the reasons for dismissal are as of yet unclear.¹¹¹

b. Minnesota

In contrast, the Minnesota lawsuit was not against a large national company, but a relatively small regional producer.¹¹² The Minnesota attorney general brought the action pursuant to Emergency Executive Order 20-10, which prohibits the sale of “essential consumer goods” for a price that is “unconscionably excessive.”¹¹³ Forsman Farms, like Cal-Maine, tied their prices to a third-party market index.¹¹⁴ This led to a 150% increase in egg prices.¹¹⁵ The case settled, with interesting provisions.¹¹⁶

¹⁰³ TEX. BUS. & COM. CODE ANN. § 17.46(b)(27).

¹⁰⁴ Petition at 9–10, *Texas v. Cal-Maine Foods, Inc.*, No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Apr. 23, 2021).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 11–12.

¹⁰⁷ *Id.*

¹⁰⁸ See Defendants’ Motion to Dismiss at 3, *Texas v. Cal-Maine Foods, Inc.*, No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. June 26, 2021).

¹⁰⁹ Order at 1, *Texas v. Cal-Maine Foods, Inc.*, No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Aug. 13, 2021).

¹¹⁰ *Id.*

¹¹¹ Notice of Appeal, *Texas v. Cal-Maine Foods, Inc.*, No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Sept. 11, 2021).

¹¹² Forsman Farms, the defendant, only acquired around \$24 million in revenue in 2019. Forsman Farms, Inc., KONA EQUITY, <https://www.konaequity.com/company/forsman-farms-inc-4019014863/#> [<https://perma.cc/ZM5K-PLCD>]; see FORSMAN FARMS, <http://www.forsmanfarms.com/> [<https://perma.cc/4GQE-R9L3>].

¹¹³ Minn. Exec. Order No. 20-10 (Mar. 20, 2020).

¹¹⁴ Press Release, Off. Minn. Att’y Gen., Attorney General Ellison Reaches Price-Gouging Settlement on Egg Prices (Apr. 28, 2020) [hereinafter Off. Minn. Att’y Gen.], https://www.ag.state.mn.us/Office/Communications/2020/04/28_ForsmanFarms.asp [<https://perma.cc/2KY7-SBX5>].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Despite the executive order creating an “unconscionable” standard for price gouging, the injunctive relief provides for a 20% pre-pandemic cap in egg price increases for Forsman Farms, subject to a stayed civil penalty of \$75,000.¹¹⁷ This is the kind of true price ceiling price gouging statutes seek to adopt, and is similar to percentage caps in other statutes.¹¹⁸

III. PRICE GOUGING THEORY AND A FRAMEWORK FOR WEIGHING ALTERNATIVES

Why did the events of 2020, in the egg market as well as in other hard-hit commodity markets, spur so much action and call for anti-price gouging measures? Many economists have long critiqued anti-price gouging laws as “stand[ing] in the way of . . . competitive markets.”¹¹⁹ These critiques, however, have been “about as popular as criticizing Jesus for being a lousy carpenter.”¹²⁰ The many jurisdictions that have passed price gouging legislation,¹²¹ the multiple bipartisan proposals for federal anti-price gouging laws,¹²² and continued enforcement actions by state attorneys general¹²³ demonstrate that neoclassical economists are losing the price gouging debate.

¹¹⁷ Assurance of Discontinuance at 7, *Minnesota Attorney General’s Office v. Forsman Farms, Inc.*, Case No. 62-CV-20-2829 (Minn. Dist. Ct. Apr. 27, 2020), available at https://chamberlitigation.org/sites/default/files/ForsmanFarms_AssuranceOfDiscontinuance%5B1%5D.pdf [<https://perma.cc/R7WA-LHDR>].

¹¹⁸ See, e.g., CAL. PENAL CODE § 396 (2021).

¹¹⁹ Hill, *supra* note 23.

¹²⁰ Dwight R. Lee, *The Two Moralities of Outlawing Price Gouging*, CATO INST.: REGUL. 28, 29 (2014).

¹²¹ Thirty-six states, plus Guam, Puerto Rico, the Virgin Islands, and the District of Columbia all have some form of price gouging prohibition in place, either through legislation or regulation. Morton, *supra* note 24. Minnesota and Maryland do not have anti-price gouging statutes but have prohibited the practice during the pandemic by executive order. Buccafusco, Hemel & Talley, *supra* note 40, at 13; Minn. Exec. Order No. 20-10 (Mar. 20, 2020), at 1; Md. Exec. Order No. 20-03-23-03 (Mar. 23, 2020), at 1.

¹²² Price Gouging Prevention Act, S. 3853, 116th Cong. (2020); Ending Price-Gouging During Emergencies Act, S. 3574, 116th Cong. (2020); Price Gouging Prevention Act, H.R. 6450, 116th Cong. (2020).

¹²³ This includes the recent enforcement actions in the egg market, *supra* Section II.C.2, however, price gouging actions by state attorneys general have been brought often. See, e.g., Samantha Oller, *Retailers Face Gouging Lawsuits Post-Hurricane*, CSP (Sept. 19, 2017), <https://www.cspdailynews.com/fuels/retailers-face-gouging-lawsuits-post-hurricane> [<https://perma.cc/2PAH-R6KH>] (litigation over oil prices in the wake of Hurricane Harvey); Paul Muschick, *Phillipsburg Area Hotel Settles Price Gouging Cases*, THE MORNING CALL (Nov. 6, 2013), <https://www.mcall.com/news/local/mc-xpm-2013-11-06-mc-hurricane-sandy-price-gouging-watchdog-20131106-story.html> [<https://perma.cc/LC42-EWWQ>] (describing litigation over price gouging hotel rooms during Hurricane Sandy).

It is standard practice for price gouging papers to include sections discussing the theoretical underpinnings of price gouging, and this Section, in part, does the same.¹²⁴ However, the primary goal of this Section is to develop a dichotomous framework with which to weigh the distributional effects of alternative policies. As Professor Snyder notes, alternative policy proposals must be weighed against each other in the price gouging context.¹²⁵ This framework will assist in a more robust analysis of policy alternatives than presentation alone. The framework analyzes price gouging alternatives through *efficiency* and *equity*, metrics that capture two distinct critiques of anti-price gouging laws.

A. *Neoclassical Microeconomic Theory and the Efficiency Metric*

Many economists' contempt¹²⁶ for anti-price gouging laws is rooted in neoclassical microeconomic theory.¹²⁷ In a disaster scenario, demand for certain goods increases,¹²⁸ typically including "essentials," like food necessities, and "non-essentials," like generators and gasoline.¹²⁹ When demand increases and supply stays the same, price increases.¹³⁰ Disasters may also disrupt supply chains, decreasing supply and also causing prices to increase.¹³¹

Neoclassical economics holds that these kinds of price increases lead to efficient allocation of resources: those that are willing to pay the higher price will be the ones most in need of the commodity, while those without high need will not want to pay the higher price.¹³² The high price also

¹²⁴ See, e.g., Caitlin E. Ball, Note, *Sticker Shock at the Pump: An Evaluation of the Massachusetts Petroleum Price-Gouging Regulation*, 44 SUFFOLK U. L. REV. 907, 910 (2011); Emily Bae, Note, *Are Anti-Gouging Legislations Effective Against Sellers During Disasters?*, 4 ENTREPRENEURIAL BUS. L. J. 79, 82 (2009).

¹²⁵ Jeremy Snyder, *What's the Matter with Price Gouging?*, 19 BUS. ETHICS Q. 275, 284 (2009).

¹²⁶ Professor Munger candidly expressed bafflement at the public's response to exorbitant pricing of ice in the wake of a hurricane. Michael Munger, *They Clapped: Can Price-Gouging Laws Prohibit Scarcity?*, THE LIBR. OF ECON. & LIBERTY (Jan. 8, 2007), <https://www.econlib.org/library/Columns/y2007/Mungergouging.html> [<https://perma.cc/9GYJ-NA34>].

¹²⁷ Buccafusco, Hemel & Talley, *supra* note 40, at 5.

¹²⁸ Snyder, *supra* note 125, at 275.

¹²⁹ See *id.* at 291 n.12.

¹³⁰ This is a basic feature of supply and demand. For a graphical visualization of the demand curve, see Bae, *supra* note 124, at 86 fig. 1.1; ENCYCLOPEDIA BRITANNICA, *supra* note 52.

¹³¹ See Bae, *supra* note 124, at 79–80; Silver, *supra* note 14.

¹³² See Zwolinski, *supra* note 30, at 352 (“[W]illingness to pay the higher price is a reflection of this increased need.”).

induces producers to produce more of the product in demand, or to move more of their product to the market experiencing the price increase.¹³³

A price control, like one created by anti-price gouging laws, leads to inefficient allocation of resources.¹³⁴ Price controls lead to long lines and further exhaustion of already scarce supplies, leading to shortages.¹³⁵ Sellers, faced with the cost of selling at a lower price than the market can hold, may turn to or create a black market for the product, in order to charge the efficient market price.¹³⁶ Anti-price gouging laws are thus disruptive of the price mechanism and antithetical to the market forces of supply and demand, according to the neoclassical economic critique.¹³⁷

To capture this critique, the first metric in the framework is *efficiency*. Alternatives to price gouging may be examined as to whether and to what extent they leave basic market forces in place to generate efficient outcomes.¹³⁸ Policies that are more efficient than anti-price gouging laws will allow the price mechanism to function with relatively less impediment and limit the effects to underlying supply and demand.¹³⁹ The benefits of a relatively efficient policy are near-term supply increases, allocation of resources to those with greater demand for those resources, and the prevention of black market formation.¹⁴⁰

B. *Fairness Concerns and the Equity Metric*

For many people, there is still a gut reaction against price gouging.¹⁴¹ A good deal of behavioral economics literature has centered around the perceptions of fairness that underlie this “gut feeling” which,¹⁴² as a

¹³³ See Munger, *supra* note 126 (“The only way to ensure *low* prices, and large supply, to buyers is to allow sellers to charge *high* prices, the highest they can get”) (emphasis in original). For more information on the price mechanism, see generally F. A. Hayek, *The Use of Knowledge in Society*, 35-4 THE AMERICAN ECON. REV. 519 (1945).

¹³⁴ See Montgomery, Baron & Weisskopf, *supra* note 50, at 379.

¹³⁵ See *id.* at 380, 387.

¹³⁶ See Michael Brewer, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101, 1128 (2007) (“The most obvious way market actors might avoid price controls is to create black markets in the goods they need.”).

¹³⁷ See *id.* at 1126.

¹³⁸ See *id.* (“[A] market with a floating price indicative of true supply and demand should result in increased goods delivered from outside the region, as well as increased goods as a consequence of speculative storage by local suppliers.”).

¹³⁹ *Id.*

¹⁴⁰ *Id.*; Zwolinski, *supra* note 30, at 352.

¹⁴¹ Matt Zwolinski, *Dialogue on Price Gouging: Price Gouging, Non-Worseness, and Distributive Justice*, 19 BUS. ETHICS Q. 295, 295 (2009).

¹⁴² Price gouging has a long history as a topic of study for behavioral economists. See, e.g.,

popular sentiment, generates anti-price gouging laws and litigation.¹⁴³ To state the matter simply, consumers do not perceive crisis price increases as “fair,” and this perception leads to anti-gouging legislation to address the fairness concerns.¹⁴⁴ The recent work by Buccafusco, Hemel, and Talley suggests that these fairness concerns are context-specific and dependent on relative price increases.¹⁴⁵

There are, of course, several different positivist arguments for anti-price gouging laws,¹⁴⁶ but the messaging from attorneys general around their price gouging litigation implies that distributional concerns are at the heart of their argument.¹⁴⁷ Because of this messaging, and the general salience of distributional concerns in 2020,¹⁴⁸ the focus here will be on the distributional issues.

Disaster price increases, in the short term, can put certain products out of reach of poorer communities.¹⁴⁹ Until a new post-disaster equilibrium is reached, the high prices remain, which may be prohibitive for individuals without significant buying power.¹⁵⁰ The neoclassical approach assumes buying power is an adequate signal for need in a disaster scenario; this may not be true for low- or fixed-income individuals.¹⁵¹

Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 738–40 (1986); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1512–13 (1998); Buccafusco, Hemel & Talley, *supra* note 40, at 63–64.

¹⁴³ See Buccafusco, Hemel & Talley, *supra* note 40, at 10 (“[A] legislature might enact a price gouging law simply because a critical fraction of the population shares a distaste for the incidence of price gouging.”).

¹⁴⁴ See *id.* at 3 (“Much of the concern over price gouging appears to be rooted in a perception that certain types of price hikes during an emergency are simply ‘unfair.’”).

¹⁴⁵ *Id.* at 64.

¹⁴⁶ See *id.* at 7–8; Snyder, *supra* note 125, at 279.

¹⁴⁷ See, e.g., Off. N.Y. Att’y Gen., *supra* note 70 (“Hillandale made an estimated \$4 million from unlawfully increasing the price of these eggs, which were often sold in grocery stores located in low-income communities.”); Off. Minn. Att’y Gen., *supra* note 114 (“It’s harder than ever for Minnesotans to afford their lives during this pandemic.”).

¹⁴⁸ See, e.g., Andie Corban & Kai Ryssdal, *What the Current Protests Have To Do With Economic Inequality*, MARKETPLACE (June 2, 2020), <https://www.marketplace.org/2020/06/02/what-the-current-protests-have-to-do-with-economic-inequality/> [<https://perma.cc/B6WZ-XD4Y>].

¹⁴⁹ Snyder, *supra* note 125, at 281.

¹⁵⁰ See *id.*

¹⁵¹ See John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L. J. 1603, 1652–53 (2013); Buccafusco, Hemel & Talley, *supra* note 40, at 7 (“[P]eople who are poor and/or facing liquidity constraints may simply be unable to pay their true hedonic valuations.”).

In this way, the short-term rationing scheme of price increases favors the wealthy over the poor.¹⁵²

As Buccafusco, Hemel, and Talley note, however, the distributional argument in favor of price gouging laws is “largely a negative argument *against* markets, rather than a positive argument *for* any particular alternatives.”¹⁵³ In addition, price controls have their own distributional shortcomings.¹⁵⁴ Price controls, of the kind that anti-gouging prohibitions create, lead to allocation based on a first come, first served basis, which is, at best, an imperfect solution.¹⁵⁵ Even when framed as equitable, price controls and anti-price gouging laws do not ensure equal distribution but only equal *opportunity* to access the commodity.¹⁵⁶ The long lines predicted by the neoclassical model create their own barrier to equitable distribution, which may be particularly pronounced for older or disabled consumers who cannot wait in long lines, or low-wage workers who cannot take time to do so.¹⁵⁷

To account for the distributional concerns present in both price-controlled markets and free markets, the second metric in the framework is *equity*. Do the policy alternatives address distribution in low-income communities? In this context, a product being cost-prohibitive may not necessarily be completely “unaffordable” in the common understanding of the word, but it would suffice to be prohibitive if it contributes to changes in buying decisions of low-income individuals.¹⁵⁸ By addressing distributional concerns, a more equitable policy would also likely correlate with increased popularity among the public.¹⁵⁹

¹⁵² Snyder, *supra* note 125, at 282.

¹⁵³ Buccafusco, Hemel & Talley, *supra* note 40, at 8.

¹⁵⁴ See Snyder, *supra* note 125, at 284.

¹⁵⁵ *Id.*

¹⁵⁶ Zwolinski, *supra* note 141, at 298.

¹⁵⁷ See Snyder, *supra* note 125, at 284; Buccafusco, Hemel & Talley, *supra* note 40, at 8.

¹⁵⁸ See Elaine Waxman, *The Costs and Impacts of Rising Food Prices Among Low-Income Households*, 8 J. FOOD L. & POL'Y 213, 214 (“An examination of families’ desperate struggle to afford basic needs and to weather shifts in their purchasing power suggests that both the public and policymakers have hastily overlooked the impact food prices have on low-income families.”); see also *id.* at 215 (“As families struggle to make ends meet, there may be a significant incentive to substitute cheaper, energy-dense calories in lieu of more expensive, nutrient-rich foods, which represents another ‘hidden’ cost of food acquisition for low-income households.”).

¹⁵⁹ Press releases from popularly elected officials highlighting the distributional effects of price gouging, and their attempts to resolve them, seem to suggest this would be the case. See, e.g., Off. N.Y. Att’y Gen., *supra* note 70.

IV. POLICY ALTERNATIVES TO ANTI-PRICE GOUGING LAWS

Even though “[a]ll our distributive options are imperfect,”¹⁶⁰ weighing distributive policies against each other will assist federal and state policy makers in deciding how to address crisis price increases in the most effective ways. Using the framework developed above, four policy options are analyzed here with the goal of correcting efficiency and distributive shortcomings of anti-price gouging laws. These are: (A) a policy not to litigate; (B) supply-side regulatory changes; (C) quantity limits (binding rationing); and (D) food subsidies (non-binding rationing).¹⁶¹ The analyses below are by no means exhaustive reviews of the implications of these policies, but serve merely to introduce them as alternatives to price gouging litigation and briefly describe how they may advance efficiency and equity goals using the framework developed above.¹⁶²

A. *Policy Not to Litigate*

A policy not to litigate price gouging claims leaves the price mechanism wholly in place.¹⁶³ This is the preferred policy of neoclassical economists arguing for efficient allocation.¹⁶⁴ While the basic implications of this policy are discussed above,¹⁶⁵ it is important to highlight the effects in light of the efficiency-equity framework.

Whether consciously or not, most states chose this policy by not litigating claims against egg producers.¹⁶⁶ California, for example, brought price gouging claims against producers of masks, but not egg producers.¹⁶⁷

¹⁶⁰ Zwolinski, *supra* note 30, at 362.

¹⁶¹ This is a non-exhaustive list. Notable omissions are auctioning, Buccafusco, Hemel & Talley, *supra* note 40, at 20, and income subsidies. Auctioning is seller-specific, not generally a government policy. *See id.* Income subsidies are an interesting policy alternative, but as this Note focuses on one commodity market, income subsidies, which are generally not specific to single commodity markets, have been omitted. *See Brewer, supra* note 136, at 1132–33 (describing food voucher programs as a potential intervention during crisis price increases).

¹⁶² *Supra* Part III.

¹⁶³ *See Brewer, supra* note 136, at 1102.

¹⁶⁴ *See id.*; Montgomery, Baron & Weisskopf, *supra* note 50, at 376.

¹⁶⁵ *Supra* Section III.A.

¹⁶⁶ The four states described in Part II are the only states to bring egg market price gouging litigation. *See supra* Section II.C.2.

¹⁶⁷ *See* Press Release, Off. Att’y Gen. Cal., Attorney General Becerra: Charges Filed Against Los Angeles County Pharmacist for Price Gouging on Masks (June 18, 2020) [hereinafter Off. Att’y Gen. Cal.], <https://oag.ca.gov/news/press-releases/attorney-general-becerra-charges-filed-against-los-angeles-county-pharmacist> [<https://perma.cc/YQ4Z-REE6>].

This is not for lack of evidence—a private price gouging action was brought for high egg prices in California during the pandemic.¹⁶⁸

Allowing egg prices to rise without any intervention likely reflected the demand surges of early Spring.¹⁶⁹ True demand for food commodities, including eggs, rose with the increased need to cook at home.¹⁷⁰ Further, the producers in the egg market litigation did not necessarily make the choice to increase prices, as contract prices were all tied to a third-party market index.¹⁷¹ While price gouging *can* be a conscious choice to inflate prices, and is often described as such, that does not appear to be what happened in the egg market.¹⁷² Even if the price index is a “feedback loop” between large producers and the market,¹⁷³ smaller producers likely do not exert control over this process.¹⁷⁴ Applying the concept more broadly, it is irrelevant if price increases are deliberate, as price gouging liability is generated whether or not it was a conscious choice.¹⁷⁵ If price did truly reflect demand in the pandemic egg market, then the price increases

¹⁶⁸ See Complaint at 2, *Fraser et al. v. Cal-Maine*, No. 3:20-cv-02733, BLOOMBERG (N.D. Cal. Apr. 20, 2020). California, along with some other states, creates private rights of action to enforce price gouging claims. See *id.* at 8; CAL. PENAL CODE § 396 (2020); see, e.g., N.C. GEN. STAT. § 75-16 (2020); N.C. GEN. STAT. § 75-38 (2020).

¹⁶⁹ See Ibarburu, Gates & Vold, *supra* note 55, at 3.

¹⁷⁰ *Id.*

¹⁷¹ See Petition at 11, *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Aug. 11, 2021); Off. Minn. Att’y Gen., *supra* note 114; Petition at 13, *Texas v. Cal-Maine Foods, Inc.*, Docket No. 202025427-7, BLOOMBERG (Tex. Dist. Ct. Feb. 2, 2021); Exhibit 23 at 8, *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Aug. 11, 2021) (West Virginia petition).

¹⁷² See Ibarburu, Gates & Vold, *supra* note 55, at 3.

¹⁷³ Petition at 11, *People v. Hillandale Farms, Corp. et al.*, No. 451650/2020, BLOOMBERG (N.Y. Sup. Ct. Aug. 11, 2021).

¹⁷⁴ The New York petition states that the “feedback loop” works by egg retailers feeding their egg price assessments to Urner Barry, which repeats that information back in the form of the price index, which Cal-Maine uses to set prices. *Id.* Without commenting on the merits of that claim, note that in 2018, Forsman Farms generated \$25.54 million in revenue, compared with Cal-Maine, which generated \$1.5 billion in the same year. Whether or not Cal-Maine engages in the feedback type of behavior, it is unlikely that smaller producers, like Forsman Farms, have the same power. See *Forsman Farms, Inc. Company Profile*, DUNN & BRADSTREET, https://www.dnb.com/business-directory/company-profiles.forsman_farms_inc.7e0eb739af89c39ebce9057ab4eed554.html [https://perma.cc/84NR-2B27] (last visited Nov. 3, 2021); *Cal-Maine Foods, Inc. Company Profile*, DUNN & BRADSTREET, https://www.dnb.com/business-directory/company-profiles.cal-maine_foods_inc.b0d785c414805f10267c3f057a47f7c7.html [https://perma.cc/4CX2-HR5S] (last visited Nov. 3, 2021).

¹⁷⁵ See, e.g., Minn. Exec. Order No. 20-10; CAL. PENAL CODE § 396 (2020).

should have led to efficient allocation: those who truly demanded eggs would buy them at the higher price; black markets would not arise.¹⁷⁶

However, with rising unemployment and food insecurity during 2020,¹⁷⁷ consumer demand may not have fully captured those for whom the ability to pay constrained their purchasing choices.¹⁷⁸ There is also evidence of hoarding behavior by consumers, also not reflective of consumers' true demand.¹⁷⁹ Finally, the egg supply was inelastic in the short term. Egg producers could not immediately make more eggs to meet demand, so the price-induced, near-term supply increases were generally not seen.¹⁸⁰ These factors demonstrate that the pricing mechanism, acting by itself, may not meet distributive or equitable goals.

B. *Supply-Side Regulatory Changes*

The supply-side changes the FDA pursued in April 2020, may be the intervention that best balances efficiency and equity.¹⁸¹ Changes to the egg safety rule, as well as permitting restaurants to sell surplus eggs, were policies designed to meet the increased demand in the shell egg market.¹⁸² One could also imagine similar changes to state regulatory structures, though none appeared to take effect in 2020.¹⁸³ No price controls are involved in these policies, and the price mechanism is thus able to move and be responsive to market forces.¹⁸⁴ This is characteristic of a highly efficient policy.¹⁸⁵

Simultaneously, supply-side changes were government intervention designed to decrease egg prices and meet the demand for eggs across

¹⁷⁶ *Supra* Section IV.A.

¹⁷⁷ See *supra* text accompanying note 58; Gene Falk et al., *Unemployment Rates During the COVID-19 Pandemic: In Brief*, CONG. RSCH. SERV. (Aug. 20, 2021), <https://fas.org/sgp/crs/misc/R46554.pdf> [<https://perma.cc/54ZK-5ALV>]; Balch, *supra* note 58.

¹⁷⁸ See Bronsteen, Buccafusco & Masur, *supra* note 151, at 1652–53.

¹⁷⁹ See Ronald Stiff, Keith Johnson & Khairy Ahmed Tourk, *Scarcity and Hoarding: Economic and Social Explanations and Market Implications*, 2 NA—ADVANCES IN CONSUMER RSCH. 203, 203 (1975).

¹⁸⁰ Ibarburu, Gates & Vold, *supra* note 55.

¹⁸¹ See TEMPORARY POLICY REGARDING PACKAGING AND LABELING, *supra* note 90; U.S. FOOD & DRUG ADMIN., FDA-2020-D-1139, TEMPORARY POLICY REGARDING ENFORCEMENT OF 21 CFR PART 118 DURING THE COVID-19 PUBLIC HEALTH EMERGENCY (2020).

¹⁸² See TEMPORARY POLICY REGARDING PACKAGING AND LABELING, *supra* note 90.

¹⁸³ For example, if the Massachusetts law had gone into effect in 2020, it could have been relaxed to permit more supply. See Chesto, *supra* note 56.

¹⁸⁴ See generally Zwolinski, *supra* note 30.

¹⁸⁵ See *id.*

income groups.¹⁸⁶ This would have the benefit of addressing distributional concerns by lowering prices in the near-term and increasing the availability of eggs.¹⁸⁷ This is beneficial for governments that want to be perceived as addressing constituent concerns to high prices.¹⁸⁸

The change to the egg safety rule, however, was perceived as a failure.¹⁸⁹ Producers could not easily pivot production; when they did, their eggs were sometimes not accepted.¹⁹⁰ Relaxing safety measures has its own costs, and retailers may not accept the products for either real or perceived quality concerns.¹⁹¹ The egg supply chain was also relatively resilient, especially compared with labor-intensive industries, and as the initial shock of the pandemic wore off, panic buying, as well as overall demand, fell to normal levels.¹⁹² The short-term inelasticity of the egg market meant that supply was not increased in time, prices remained high for the intervening period, and the equity concerns were not addressed until the market adjusted.¹⁹³

C. *Quantity Limits and Binding Rationing*

Quantity limits place a constraining limit on consumer demand.¹⁹⁴ Rather than buy two, five, or ten cartons of eggs, consumers are constrained by an external force setting a limit on consumption, say, to one carton of eggs.¹⁹⁵ This may also be referred to as “binding rationing.”¹⁹⁶ Many governments throughout history have utilized quantity limits during crises, particularly during times of war.¹⁹⁷

¹⁸⁶ See TEMPORARY POLICY REGARDING PACKAGING AND LABELING, *supra* note 90; U.S. FOOD & DRUG ADMIN., *supra* note 181.

¹⁸⁷ When supply increases to meet demand, it has a stabilizing effect on price. See ENCYCLOPAEDIA BRITANNICA, *supra* note 52.

¹⁸⁸ See, e.g., Off. Att’y Gen. Cal., *supra* note 167; Off. N.Y. Att’y Gen., *supra* note 70.

¹⁸⁹ See Ibarburu, Gates & Vold, *supra* note 55, at 2–3.

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² See *id.* at 3; Johansson, *supra* note 16.

¹⁹³ See Ibarburu, Gates & Vold, *supra* note 55, at 5.

¹⁹⁴ Buccafusco, Hemel & Talley, *supra* note 40, at 8.

¹⁹⁵ See *id.*

¹⁹⁶ X. M. Gao, Eric J. Wailes & Gail L. Cramer, *Partial Rationing and Chinese Urban Household Food Demand Analysis*, 22 J. COMPAR. ECON. 43, 46–47 (1996) (“When rationing is strictly binding, consumers’ compensated income increases as a result of rationing, and the consumption of nonrationed goods exceeds the optimal level.”) This is contradistinguished from non-binding rationing. See discussion *infra* Section IV.D.

¹⁹⁷ See, e.g., Thomas E. Fairchild, *The Legal Mechanism of Rationing*, 28 MARQ. L. REV.

Private retailers began placing quantity limits without government direction early on in the pandemic.¹⁹⁸ As early as the first weeks of March 2020, stores began placing limits on purchases of sanitation products, and later began placing limits on food items as well.¹⁹⁹ Later in the year, as cases of COVID-19 began to rise again in November, some stores returned to this policy to discourage hoarding behavior of essential goods.²⁰⁰ Walmart even placed quantity limits on online purchases of eggs.²⁰¹

There were no state or federal quantity limits on food items, however, government intervention commonly places quantity limits on certain items, like prescription drugs.²⁰² Additionally, the federal government has created quantity limits on food purchases in times of crisis, notably during World War II.²⁰³ What if federal and state governments had acted to place quantity limits on consumer goods instead of private retailers?

From an efficiency standpoint, quantity limits typically lead to a general loss of welfare.²⁰⁴ When a consumer has the demand for two cartons of eggs, but can only purchase one by an external constraint, that

11, 15 (1944) (describing food rationing in the United States during World War II); Adrian R. Fleissig & Gerald Whitney, *A Revealed Preference Test of Rationing*, 113 ECON. LETTERS 234, 235 (2010) (describing the rationing system in the United Kingdom during World War II).

¹⁹⁸ See, e.g., Jen Skerritt & Deena Shanker, *Food Rationing Confronts Shoppers Once Spoiled for Choice*, BLOOMBERG (Apr. 22, 2020, 10:49 AM), <https://www.bloomberg.com/news/articles/2020-04-21/food-rationing-is-new-reality-for-buyers-once-spoiled-for-choice> [https://perma.cc/4RMF-KJ9W].

¹⁹⁹ See, e.g., Jaewon Kang & Saabira Chaudhuri, *Supermarkets Ration Supplies as Coronavirus Fear Empties Shelves*, WALL ST. J. (Mar. 10, 2020, 11:41 AM), <https://www.wsj.com/articles/supermarkets-ration-staples-as-coronavirus-fears-leave-shelves-empty-11583853451> [https://perma.cc/U36Z-UPLU]; Skerritt & Shanker, *supra* note 198.

²⁰⁰ See, e.g., Dawson White, *Retailers are putting purchase limits on these items as coronavirus pandemic surges*, THE KANSAS CITY STAR (Nov. 22, 2020, 10:52 AM), <https://www.kansascity.com/news/nation-world/national/article247354324.html> [https://perma.cc/4Y28-ATMP].

²⁰¹ See *id.*

²⁰² Wayne Turner & Abigail Coursolle, *Ensuring People Have Access to Prescription Drugs During the COVID-19 Pandemic*, NAT'L HEALTH L. PROGRAM (Mar. 18, 2020), <https://healthlaw.org/ensuring-people-have-access-to-prescription-drugs-during-the-covid-19-pandemic/> [https://perma.cc/XT3T-WJJA]. Interestingly, Turner and Coursolle report that Ohio, which places quantity limits on all prescription drugs, took steps to relax those limits to allow consumers to purchase enough medication to have on hand during quarantine. *Id.*

²⁰³ See Fairchild, *supra* note 197, at 11.

²⁰⁴ EMMA HUTCHINSON, PRINCIPLES OF MICROECONOMICS § 4.6, <https://pressbooks.bccampus.ca/uvicecon103/chapter/4-7-quantity-controls/> [https://perma.cc/2Z4L-62VG] (last visited Nov. 3, 2021).

consumer is worse off.²⁰⁵ The constraining of demand also creates opportunities for black markets to meet consumers' actual demand.²⁰⁶ Binding rationing thus leads to inefficient outcomes.

Binding rationing has the goal of ensuring that there is enough supply for all consumers, in theory leading to equitable distribution.²⁰⁷ However, quantity limits alone are not targeted to low-income individuals, and result in the same distribution issues as price controls, primarily distributing goods on a first come first served basis.²⁰⁸ Black markets also interfere with equitable distribution goals; if sophisticated consumers can access the black market, no overall supply is saved.²⁰⁹ Quantity limits, then, are not generally efficient or equitable.

D. *Food Subsidies and Non-Binding Rationing*

Instead of placing maximum limits on consumer choice, governments may instead attempt to meet distributional goals by providing minimum supplies to targeted consumer groups. This may take the form of food subsidies, where governments purchase food commodities themselves and provide them to consumers at a lower cost.²¹⁰ This may be done with or without quantity limits;²¹¹ here the focus is on the subsidies themselves. Consumers would be free to buy as many eggs as they desire on the free market, but the government distributional program acts as a subsidized market, primarily for the benefit of low-income consumers

²⁰⁵ *See id.*

²⁰⁶ Brewer, *supra* note 136, at 1132.

²⁰⁷ *See id.*

²⁰⁸ Quantity limit policies do not distinguish between consumers, generally. *See, e.g., Answering Your Questions, WALMART* (June 15, 2020), <https://corporate.walmart.com/answering-your-questions> [<https://perma.cc/J29W-RSMM>] (describing a quantity limit policy on eggs).

²⁰⁹ *See* Brewer, *supra* note 136, at 1132 (“The higher prices on the black market will cause the seller to divert goods away from the legitimate market.”). Note also that low-income individuals are the least likely to compete in the black market. *Id.* at 1130.

²¹⁰ Many countries have put such a system in place, both throughout history and contemporaneously. *See, e.g.,* Fleissig & Whitney, *supra* note 197, at 235–36 (1940s United Kingdom); Lung-Fei Lee & Mark M. Pitt, *Microeconomic Models of Rationing, Imperfect Markets, and Non-Negativity Constraints*, 36 J. ECONOMETRICS 89, 91 (1987) (various developing countries in the 1980s); *Targeted Public Distribution System, GOV'T MAHARASHTRA*, <http://mahafood.gov.in/website/english/PDS.aspx> [<https://perma.cc/YNW6-TU7J>] (last visited Nov. 3, 2021) [hereinafter GOV'T MAHARASHTRA] (contemporary India).

²¹¹ *See, e.g.,* Fleissig & Whitney, *supra* note 197, at 234–36 (with quantity limits); GOV'T MAHARASHTRA, *supra* note 210 (without quantity limits).

when free market prices rise.²¹² For example, while the free market price of eggs continues to rise, low-income consumers would still be able to purchase them at a lower, perhaps precrisis cost.²¹³ This may also be termed “non-binding” rationing.²¹⁴

The government operates such a program at an obvious economic loss.²¹⁵ However, the United States already operates a kind of decentralized food distribution program in The Emergency Food Assistance Program (“TEFAP”).²¹⁶ In this program, the USDA purchases food commodities on the free market and distributes them to state agencies, which in turn distribute the commodities to food banks.²¹⁷ States have their own eligibility requirements for TEFAP, but can create additional flexibilities to apply the program more broadly, though they do so at their discretion.²¹⁸ Both of the early coronavirus relief packages provided additional funding for TEFAP.²¹⁹ The most recent relief bill also allocated additional funding to the USDA for the purchase and distribution of food to “individuals in need.”²²⁰

TEFAP is not a rationing program, but it is not difficult to imagine it as a part of a more robust non-binding rationing scheme.²²¹ A more formalized organizational structure, as opposed to the current decentralized structure with varying requirements, may be beneficial for low-income communities, particularly in times of crisis when food prices increase.²²² A systematic review of food bank literature in 2016 found that food banks tend to provide inadequate amounts of food.²²³ Limited government funding in previous years has also created strain on the food banking

²¹² See Gao, Wailes & Cramer, *supra* note 196, at 55 (describing a like system operating in China during the 1980s and early 1990s).

²¹³ See *id.*

²¹⁴ See *id.* at 46.

²¹⁵ See *id.*

²¹⁶ See KARA C. BILLINGS, R45408, THE EMERGENCY FOOD ASSISTANCE PROGRAM (TEFAP): BACKGROUND AND FUNDING, CONG. RSCH. SERV. 1–2 (2020).

²¹⁷ *Id.*

²¹⁸ See TEFAP COVID-19 Q&A’s, FOOD & NUTRITION SERV., <https://www.fns.usda.gov/tefap/covid-19-qas> [<https://perma.cc/9GWN-FRMX>] (last visited Nov. 3, 2021).

²¹⁹ Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178, 179 (2020); CARES Act, Pub. L. No. 116-136, 134 Stat. 281, 508 (2020); COVID-19 and TEFAP, HOUSE AGRIC. COMM., <https://agriculture.house.gov/covid19/covidtefap.htm> [<https://perma.cc/VH85-KZN4>] (last visited Nov. 3, 2021).

²²⁰ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1001 (2021).

²²¹ See generally BILLINGS, *supra* note 216.

²²² See Waxman, *supra* note 158, at 220.

²²³ Chantelle Bazerghi, Fiona H. McKay & Matthew Dunn, *The Role of Food Banks in Addressing Food Insecurity: A Systematic Review*, 41 J. CMTY. HEALTH 732, 739 (2016).

system, which is further strained by food price increases.²²⁴ If the federal government took a more active role in the food distribution system by providing commodities like eggs, this might help meet the needs of low-income communities that are reliant on food banks, both in emergencies and regular market conditions.²²⁵

This kind of non-binding rationing scheme splits the commodity market in two: an open market, responsive to price, and the government subsidized market.²²⁶ This has the potential to lead to inefficient outcomes, particularly in the long term, as governmental bureaucracy is not well-equipped to respond to consumer preferences.²²⁷ However, the bifurcated market ensures that higher income individuals have access to the free market to exert their choice, while lower income individuals have continued access to subsidized essentials.²²⁸ Of the four policy alternatives described, this scheme is the most directly targeted to low-income communities, and could help governments meet equitable goals, particularly during crisis price increases of the sort observed during the pandemic.²²⁹

CONCLUSION

In February of 2021, a catastrophic and atypical snowstorm hit Texas.²³⁰ It did not take long to set up hotlines to report price gouging, and soon the State was receiving reports of exorbitant prices on food and housing.²³¹ By March, the Texas Attorney General filed at least one price gouging lawsuit against a San Antonio hotel.²³² In a year that has seen a major environmental crisis in its first two months, and where worldwide

²²⁴ Waxman, *supra* note 158, at 220.

²²⁵ *See id.*

²²⁶ *See* Gao, Wailes & Cramer, *supra* note 196, at 55.

²²⁷ *See id.* at 46.

²²⁸ *See id.*

²²⁹ *See* Waxman, *supra* note 158, at 220.

²³⁰ Christina Maxouris, *Here's How a Week of Frigid Weather and Catastrophe Unfolded in Texas*, CNN (Feb. 21, 2021, 4:32 PM), <https://www.cnn.com/2021/02/21/weather/texas-winter-storm-timeline/index.html> [<https://perma.cc/K3B8-ND2D>].

²³¹ Tom Batchelor, *Texas Price Gouging Reported for Hotels, Food and Water amid Storm Chaos*, NEWSWEEK (Feb. 19, 2021, 10:50 AM), <https://www.newsweek.com/texas-price-gouging-hotel-food-water-storm-chaos-1570557> [<https://perma.cc/77KJ-VEK9>].

²³² *Texas AG sues Bexar County hotel on allegations of price gouging during winter storm*, KENS 5 (Mar. 18, 2021, 4:54 PM), <https://www.kens5.com/article/weather/texas-ag-sues-san-antonio-hotel-price-gouging-during-winter-storm/273-c56513b0-f7c3-4e75-83ba-c21f8a3e63f5> [<https://perma.cc/WT2N-2YL7>].

hunger and food insecurity are predicted to get worse,²³³ questions of accessibility to essential goods will continue to be paramount.

Lessons learned from the 2020 egg market may help governments answer these questions. The United States egg market experienced a large crisis price increase in 2020.²³⁴ Federal and state governments took steps to address this price increase, but the results of the action were either not successful, inconclusive, or questionable in the first place.²³⁵

Allowing prices to increase unfettered may give rise to equity and distributional concerns,²³⁶ but price controls themselves have shortcomings in both efficiency and equity.²³⁷ Policies not to litigate price gouging claims, supply-side changes, quantity limits, and food subsidies all have benefits and drawbacks, but these may balance the dual, sometimes competing, goals of efficiency and equity better than price gouging litigation.²³⁸ Looking forward to future crises, balancing efficiency and equity will be important to ensure that the policies used to combat crisis price increases are effective at achieving their goals and managing essential supplies during environmental crises.²³⁹

²³³ Siobhán O'Grady, *The coronavirus intensified a hunger crisis last year, but 2021 could be worse*, WASH. POST (Jan. 6, 2021, 6:00 AM), <https://www.washingtonpost.com/world/2021/01/06/coronavirus-starvation-poverty-inequality-hunger-un/> [<https://perma.cc/7VUP-3LF4>].

²³⁴ Ibarburu, Gates & Vold, *supra* note 55, at 3.

²³⁵ *See supra* Section II.C.

²³⁶ *See supra* Section IV.A.

²³⁷ *See supra* Section III.B.

²³⁸ *See supra* Part IV.

²³⁹ *See supra* Part III.