THE CONFINES OF FEDERALISM ON FARMED ANIMAL WELFARE

By
Miranda Groh*

ABSTRACT

Although farmed animal advocates have achieved some protection for animals through state and local laws, Congress's constitutional authority to preempt state law and regulate interstate commerce poses a significant threat to those achievements. Additionally, the practical constraints of the United States' interconnected food system suggest that national, uniform standards are more desirable than a state-by-state, piecemeal approach to animal welfare. Despite the potential benefits of a state-by-state approach and some obstacles faced at the federal level, this Article argues that long-lasting legal protections for farmed animals should ultimately come from Congress, and that animal advocates should concentrate their efforts there. This is especially true pending the Supreme Court's decision in National Pork Producers Council v. Ross*, where the Court will rule on the validity of California's Proposition 12, which bans in-state sales of certain products made from animals who were cruelly confined.*[1]

Section I of this Article describes the shortcomings of the current sparse federal legislation for farmed animal welfare and concludes that farmed animals need additional welfare protections. Section II considers the United States' federalist system as it applies to farmed animal welfare: Congress has the power to legislate interstate commerce and preempt state law, while the states retain the authority to prohibit conduct within their borders, so long as they do not burden interstate commerce. In particular, the Dormant Commerce Clause of the U.S. Constitution and the Supreme Court's jurisprudence under that clause dictate the boundaries of permissible state regulation, and in Ross*, the Court will issue an opinion that will determine the continued validity of animal advocates' current, localized approach. Section III argues that durable protection for farmed animals will ultimately need to come from Congress, and that advocates should redirect their efforts to the federal level to ensure the best standards are promulgated there. In conclusion, while there are strategic reasons for advancing state and local legislation to protect farmed animals, the welfare of those animals is ultimately subject to congressional action, and additional efforts are needed at the federal level to establish lasting welfare protections.*

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* J.D. Candidate, 2023, Lewis & Clark Law School.

1 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (2022) (No. 21-468).

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I. Introduction: Farmed Animals Need Welfare Protections

Scant legal protections exist to protect the 9 billion land animals who are bred and slaughtered for food in the United States every year.[2] Inadequate and nonexistent laws allow producers to confine animals in inhumane conditions and inflict extreme pain on livestock and poultry—mainly cattle, pigs, and chickens.[3] Dairy cattle experience near-constant confinement without access to pasture, and suffer painful udder infections as their reproductive systems are exploited to produce the most milk possible.[4] Calves raised for veal are often kept in small individual confinements and denied the freedom to express their

[2] Animal Welfare Inst., Legal Protections for Animals on Farms 1 (2022).

[3] *See id.* ("Throughout a majority of their short lives, farm animals are closely confined and deprived of the chance to exhibit natural behaviors. Common practices on factory farms include confining pregnant pigs to crates so small they cannot turn around, confining hens to cramped, barren cages, castrating male pigs without anesthesia, and killing sick and injured animals with blunt force.").

[4] *See Welfare Issues for Dairy Cows*, Compassion in World Farming, https://perma.cc/PP7W-3PCY (accessed Feb. 23, 2023) ("In the US, many dairy cows are given growth hormones to increase their milk yield. This can increase welfare problems including lameness and mastitis.").

natural behaviors.[5] Similarly, most pregnant sows spend the majority of their lives in gestation and farrowing crates so narrow they cannot turn around or lie down comfortably.[6] Many pigs are raised in severe confinement for meat and become so stressed they engage in tail-biting; many farmers use tooth-clipping and tail-docking to prevent these behaviors.[7] Male pigs also endure castration without pain relief to prevent something called "boar taint," which allegedly causes an unsavory odor and taste in pork.[8] Meanwhile, chickens raised for meat spend most of their short lives in filthy, overcrowded sheds with ammonia-polluted air and no natural light.[9] Egg-laying hens are bred to produce unnatural amounts of eggs, kept in battery cages so small they cannot extend their wings, and deprived of outdoor access and enriched environments.[10] Cattle, pigs, and chickens also experience stressful conditions during transport, when they are packed for long hours onto crowded trucks with no food or water, and often suffer injuries from worker brutality during loading and unloading.[11]

Preventing these kinds of suffering is a worthy goal for several reasons. First and foremost, animals are their own beings whose experiences deserve consideration. Additionally, prohibiting animal cruelty serves humans in at least three ways: first, preventing individuals from committing animal cruelty may also prevent them from committing violence against humans;[12] second, humane treatment reduces the likelihood of disease in animal food products;[13] and third, humane treatment can yield economic benefits for food producers in the form of

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[5] *See About Calves Reared for Veal*, COMPASSION IN WORLD FARMING, https://perma.cc/U8GZ-SCPE (accessed Feb. 23, 2023) (describing how "most veal calves in the US experience poor welfare due to rearing, feeding, and housing techniques" that allow little opportunity for social interaction or exercise, such as narrow veal crates that "cause tremendous suffering for calves").

[6] *See Welfare Issues for Pigs*, COMPASSION IN WORLD FARMING, https://perma.cc/AEG3-RPV7 (accessed Feb. 24, 2023) (stating a pregnant commercial sow may be confined to "a metal crate or cage, usually with a bare, slatted floor, which is so narrow that the sow cannot turn around and can only stand up and lie down with difficulty" for the 16 week gestation period, then re-inseminated two weeks after giving birth—a continuous cycle that "will last about three years before she is sold for slaughter").

[7] *Id.*

[8] *Id.*

[9] *Welfare Issues for Broiler Chickens*, COMPASSION IN WORLD FARMING, https://perma.cc/578K-W74X (accessed Feb. 21, 2023).

[10] *Welfare Issues for Egg Laying Hens*, COMPASSION IN WORLD FARMING, https://perma.cc/DW79-UE3G (accessed Feb. 21, 2023).

[11] *During Transport*, ANIMAL WELFARE INST., https://perma.cc/4T4T-FTHJ (accessed Feb. 21, 2023).

[12] *See, e.g.*, Cynthia Hodges, *The Link: Cruelty to Animals and Violence Towards People*, MICH. STATE UNIV. COLL. L. (2008), https://perma.cc/RM4Y-G6LM (accessed Apr. 15, 2023) ("Research indicates that people who commit acts of cruelty to animals often do not stop there—many of them later turn on humans.").

[13] *See, e.g.*, *Relationship between Animal Handling, Meat Quality, and Food Safety*, ANIMAL WELFARE INST. (July 2020), https://perma.cc/HA8Z-RYT4 (accessed Feb. 9, 2023) ("According to the USDA, stressful conditions have a significant deleterious effect on food safety through different mechanisms affecting the susceptibility of farm animals

competitive advantages, productivity gains, and higher product quality.[14] With these goals in mind, animal welfare advocates strive to reduce farmed animals' suffering by establishing minimum legal standards for how animals are treated.[15]

Because laws at both the state and federal levels remain insufficient to protect farmed animals, there is much work to be done.[16] Some federal laws provide minimum standards for farmed animal welfare during slaughter and transportation, but those standards are insufficient to prevent significant suffering throughout the rest of the animals' lives.[17] In fact, no federal law governs farmed animal welfare while the animals are being raised.[18]

The few existing legal protections for farmed animals originate from, and end with, the Humane Methods of Slaughter Act (HMSA) and the Twenty-Eight Hour Law.[19] The HMSA requires cattle, swine, and "other livestock" to be slaughtered humanely, in part to alleviate "needless suffering."[20] The statute details humane slaughter methods, including a single blow that ensures the animals are unable to feel pain.[21] The HMSA by its terms does not apply to poultry, but the USDA issued a notice in 2005 to remind poultry processors that birds, too, must be handled consistent with "good commercial practices,

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to infections and the presence and shedding of pathogens [though] more research is needed.").

14 *See, e.g.*, Jill N. Fernandes et al., *Costs and Benefits of Improving Farm Animal Welfare*, 11 AGRIC. 1, 6–7 (2021) (describing economic benefits to animal operations that implement higher animal welfare standards).

15 *See, e.g.*, *Advocating for Stronger Laws*, ASPCA, https://perma.cc/MF4Z-25T7 (accessed Feb. 27, 2023) ("We're helping to pass bans on some of the worst factory farming practices, fighting for greater transparency in agriculture, and working to strengthen existing laws so they keep farm animals safe from suffering."); Amy Mosel, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, MICH. STATE UNIV. COLL. L. (2001), https://perma.cc/8R4U-ZZHD (accessed Feb. 27, 2023) ("Therefore, Congress should pass legislation that protects farm animals by requiring farmers to meet minimum humane living condition requirements.").

16 *See* ANIMAL WELFARE INST., *supra* note 2, at 1 ("No single federal law expressly governs the treatment of animals used for food while on farms in the United States.").

17 *See id.* (explaining that "these animals do not have legal protections until they are transported off the farm," and that the HMSA excludes poultry).

18 *See id.* (noting that "all federal efforts to change the legal status quo for farm animals have failed").

19 Humane Methods of Slaughter Act of 1978, 7 U.S.C. § 1901 (2021); Twenty-Eight Hour Law of 1873, 49 U.S.C § 80502 (2021).

20 7 U.S.C. §§ 1901, 1902(a). The HMSA originally applied only to slaughterhouses selling meat to the federal government, *see* Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 456 (2012), and was amended through the Federal Meat Inspection Act to apply to all slaughterhouses. *See* 21 U.S.C. § 610(b) (making it unlawful for any "person, firm, or corporation" to "slaughter or handle in connection with slaughter" cattle, swine, and livestock in violation of the HMSA).

21 7 U.S.C. § 1902(a) (requiring that "[a]ll animals [be] rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut").

which means they should be treated humanely."[22] However, the USDA never issued formal regulations requiring the humane slaughter of poultry,[23] and courts have deferred to the USDA's interpretation of the HMSA.[24] Accordingly, no law requires the humane slaughter of chickens—which make up around ninety percent of land animals—killed for food in the United States.[25]

The Twenty-Eight Hour Law provides limited protection for animals moved in interstate commerce.[26] Farmed animals are often transported from farms to slaughterhouses in crowded trucks without food, water, or bedding, and they experience stress from severe weather conditions and abuse during loading and unloading.[27] The Twenty-Eight Hour Law requires that most animals, including farmed animals, be unloaded from trucks at least every twenty-eight hours for rest, food, and water.[28] Unfortunately, enforcement of the law is spotty at best,[29] and the statute does not protect animals while they are in concentrated animal feeding operations (CAFOs) or in slaughterhouses.

Because the only federal laws that protect farmed animals are the HMSA and Twenty-Eight Hour Law, animals remain unprotected by federal law during virtually any moment not spent on a truck or at a slaughter facility. Animals suffer the most in the crowded confinements where they spend most of their lives, but federal law does not provide for any minimum space requirements or cleanliness standards for those enclosures.[30] Similarly, federal law does not require that farmed animals be provided with access to the outdoors, food, or water.[31] Accordingly, federal law leaves many farmed animals vulner-

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[22] Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624, 56624 (Sept. 28, 2005).

[23] DENA JONES, THE WELFARE OF BIRDS AT SLAUGHTER IN THE UNITED STATES 1 (3d ed. 2020).

[24] *See, e.g.*, Levine v. Johanns, 2006 WL 8441742, at *14–15 (N.D. Cal. Sept. 6, 2006) (holding that the USDA is not obligated to interpret the phrase "other livestock" to include poultry), *rev'd on other grounds*, Levine v. Vilsack, 587 F.3d 986 (9th Cir. 2009); Animal Welfare Inst. v. Vilsack, 2022 WL 16553395, at *1 (W.D.N.Y. Oct. 31, 2022) (noting without comment that the USDA "ha[s] determined that the term 'livestock' in the HMSA does not include poultry").

[25] *Everything You Need to Know About Animal Slaughter*, THE HUMANE LEAGUE (June 14, 2021), https://perma.cc/3RB3-RTRZ (accessed Dec. 27, 2022).

[26] 49 U.S.C. § 80502.

[27] *During Transport*, *supra* note 11.

[28] 49 U.S.C. §§ 80502(a), (b).

[29] ANIMAL WELFARE INST., A REVIEW: THE TWENTY-EIGHT HOUR LAW AND ITS ENFORCEMENT 5–8 (2020).

[30] *See* ANIMAL WELFARE INST., *supra* note 2, at 1 (noting that animals raised for food "do not have legal protections until they are transported off the farm").

[31] *See id.*

able to the cost-cutting tendencies and inhumane practices of food producers for virtually the entire duration of their lives.[32]

Though every state has laws prohibiting animal cruelty, those laws tend to apply primarily to companion animals, and often explicitly exclude farmed animals and common husbandry practices from their purview.[33] Accordingly, some states have passed laws to prohibit some of the cruelest animal-raising practices within their borders, such as tail docking, gestation crates, veal crates, and battery cages.[34] In the last twenty years, at least fourteen states passed legislation banning severe methods of confinement for pigs, chickens, or veal calves, and several of those states also banned the sale of products made from animals who were confined in violation of state law.[35] One such law is California's Proposition 12, the law at issue in *National Pork Producers Council v. Ross*,[36] which establishes minimum space requirements for veal calves, breeding pigs, and egg-laying hens, and bans the sale of certain products from those animals if they are not raised in accordance with the law.[37] Though industry players have unsuccessfully challenged similar laws,[38] Proposition 12 and the *Ross* case are unique because they captured the Supreme Court's attention and a spot on its docket.

Regardless of the Court's decision in *Ross*, a glimpse at the legal landscape of farmed animal protection reveals a patchwork of state and federal laws that only protect some animals, some of the time. Meanwhile, millions of animals in states that do not enact legal protections for them will remain vulnerable to food producers' inhumane practices and cost-cutting tendencies until more stringent federal standards are in place.

II. Federalism Defines the Limits of Farmed Animal Welfare Legislation

Because the federalist government structure of the United States defines the interplay of federal and state laws, animal advocates should be aware of that structure and make efforts to work within its boundaries. Federalism has been defined as:

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[32] *See Why Are Factory Farmed Products So Cheap?*, ASPCA (June 21, 2018), https://perma.cc/R3TJ-PTMB (accessed Feb. 20, 2023) (explaining how factory farms cut cost by utilizing inhumane practices).

[33] *Id.* at 2 ("In 37 states, common or recognized animal husbandry practices—such as tail docking and castration without anesthesia—are exempt from the definition of cruelty, unless the act is specifically prohibited.").

[34] ANIMAL WELFARE INST., *supra* note 2, at 11–13.

[35] *Id.* at 12–13.

[36] *Ross*, 6 F.4th at 1025.

[37] *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTPEDIA (2018), https://perma.cc/WPA3-A5CQ (accessed Feb. 20, 2023).

[38] DANIELLE J. UFER, STATE POLICIES FOR FARM ANIMAL WELFARE IN PRODUCTION PRACTICES OF U.S. LIVESTOCK AND POULTRY INDUSTRIES: AN OVERVIEW iv (2022) (finding that "[l]egal challenges and legislative efforts in response to State animal welfare policies have been largely unsuccessful").

> [A] model of governance that has two separate and independent layers of government: (1) a national government that, at least in theory, has limited authority as spelled out in a [f]ederal constitution; and (2) separate state and local governments for each of the sovereign states, each of which has more general powers as limited by each state's constitution. . . . Fundamentally, federalism is a question of how power, resources, and responsibility should be divided between the federal and state governments.[39]

A federalist government structure aims to balance local sovereignty with a nation's need to centralize certain matters to maintain a strong union.[40] It does so through a "territorial separation of powers" that is now an essential element of the United States' democracy.[41] Separation of powers between federal and state governments protects local rights by discouraging the concentration of power and allowing local issues to be resolved at the local level.[42] However, some local issues impact the nation as a whole, often when a state's interests are different from those of the rest of the nation. For example, states that are home to major industry players may be less likely to regulate that industry to make the state more appealing to the companies that provide it with needed jobs and tax revenue.[43]

The U.S. Constitution prescribes Congress's and the states' authority in the federalist structure by delegating legislative powers over interstate commerce to Congress,[44] mandating that federal law on those matters binds states when Congress wants it to,[45] and leaving police powers over intrastate criminal affairs to the states.[46] This Section explores the extent to which federal and state powers may be used to protect farmed animals and concludes that federal and local governments share concurrent jurisdiction over farmed animal welfare.

Two clauses of the U.S. Constitution establish the federal government's ability to dictate farmed animal welfare standards. First, the Supremacy Clause provides for federal supremacy, which allows federal law to preempt state law according to Congress's will.[47] Second, the Commerce Clause gives Congress authority over interstate commerce,[48] allowing it to regulate farmed animal welfare through a commercial lens. As for the states, they can exercise their traditional police

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[39] CHRISTOPHER B. POWER ET AL., 36 E. MIN. L. FOUND. § 6.02 (June 21–23, 2015).

[40] *See* RALPH C. CHANDLER ET AL., CONSTITUTIONAL L. DESKBOOK § 1:10 (describing "the classical problem of federalism" as "the proper balance between local sovereignty and the requirements of centralization").

[41] *Id.*

[42] *Id.*; *Federalism*, BILL OF RTS. INST., https://perma.cc/SG3C-4KUU (accessed Mar. 8, 2023).

[43] *See, e.g.*, Keith Boeckelman, *Deregulation*, CTR. FOR STUDY OF FEDERALISM (2017), https://encyclopedia.federalism.org/index.php/Deregulation (accessed Mar. 8, 2023).

[44] *Infra*, Section II.B.

[45] *Infra*, Section II.A.

[46] *Infra*, Section II.C.1.

[47] *Infra*, Section II.A.1.

[48] *ArtI.S8.C3.1 Overview of Commerce Clause*, CONST. ANNOTATED, https://perma.cc/4NE8-XYZ3 (accessed Feb. 27, 2023).

powers to criminalize immoral behavior like animal cruelty, and those laws are effective unless found unconstitutional or preempted.[49] As discussed here, however, the conditions under which a state law is preempted or invalidated under the Dormant Commerce Clause are still being defined.

A. When Congress Wants it to, Federal Law Reigns Supreme

The essence of federal supremacy is the federal government's ability to supersede conflicting state law. This area of law can be complicated as applied, and is dominated by Supreme Court case law creating and defining the preemption doctrine.[50] The Court's jurisprudence made federal preemption of state law a ubiquitous concept in the United States, and today, preemption is "almost certainly the most frequently used doctrine of constitutional law."[51] The preemption doctrine provides that, so long as Congress expresses an intent to override state law, federal law displaces state or local laws that conflict or interfere with the federal law's objectives.[52] As applied to farmed animal welfare, the preemption doctrine means that any time Congress decides to create national standards for farmed animal operations, those standards will supplant state laws.

1. Preemption, Generally

The Supremacy Clause of the U.S. Constitution is the foundation for the preemption doctrine; it provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[53]

As applied, the Supremacy Clause means that "any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield[,]" as long as the federal law is constitutional.[54] Thus, state or local laws that conflict with federal law, when challenged, are "without effect."[55] Not only federal statutes, but also "agency regulation[s] with the force of law" may preempt state requirements.[56]

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[49] Ilya Shapiro, *State Police Power and the Constitution*, CATO INST. (Sept. 15, 2020), https://perma.cc/58S5-E5EU (accessed Feb. 28, 2023).

[50] *See generally* JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2019) (detailing various Supreme Court cases where the Court interpreted and further explained how to apply the preemption doctrine).

[51] *Id.* at 1 (quoting Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994)) (internal quotation marks omitted).

[52] *Id.* at 2.

[53] U.S. CONST. art. VI, cl. 2.

[54] 16 AM. JUR. 2D *Constitutional Law* § 229 (2023).

[55] Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992).

[56] Wyeth v. Levine, 555 U.S. 555, 576 (2009).

Preemption challenges to state laws ask whether Congress intended to displace the state law in question; "[t]he purpose of Congress is the ultimate touchstone."[57] Congress's intent may be explicit in the statute's language or implicit in its structure and purpose, so preemption may be express or implied.[58] A federal statute may implicitly preempt state law in three situations: (1) when Congress regulates a field that is dominated by federal interests ("field preemption"); (2) when a state law conflicts with a federal law such that compliance with both is impossible ("impossibility preemption"); and (3) when a state law stands as an obstacle to Congress's purposes and objectives ("obstacle preemption").[59]

Further, the Supreme Court has applied—albeit inconsistently—a "presumption against preemption," so that federal law only preempts state law when Congress makes that fact clear.[60] Indeed, Congress does not always wish to preempt state law, and sometimes allows states to impose more stringent requirements than those created at the federal level.[61] When it so desires, though, Congress can unquestionably supersede state laws that obstruct lawful federal objectives.

2. Preemption as Applied to Farmed Animal Welfare

As applied to farmed animal welfare, the preemption doctrine would allow any federal law that creates national standards for the confinement, transport, slaughter, or processing of livestock and poultry to supersede state or local laws on those topics.[62] Four federal statutes apply to animal agriculture operations today: the Twenty-Eight Hour Law; the Poultry Products Inspection Act (PPIA); and the HMSA, as implemented by the Federal Meat Inspection Act (FMIA). These statutes do not grant extensive protections to farmed animals, but they illustrate (1) the power of federal preemption once Congress regulates farmed animals and the foods they produce; and (2) that both of those topics fit comfortably within congressional authority.

The Twenty-Eight Hour Law prohibits transport carriers from confining animals in vehicles for more than twenty-eight hours with-

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[57] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (quoting Allis–Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985)).

[58] *Cipollone*, 505 U.S. at 516.

[59] SYKES & VANATKO, *supra* note 50, at 2.

[60] *Id.* at 3–4 (citing Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[61] For example, under the Clean Air Act, states may adopt and enforce their own standards regarding emissions of air pollutants so long as they are not "less stringent" than federal standards. Clean Air Act of 1970, 42 U.S.C. § 7416 (2021) (stating that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce [ ] any standard or limitation respecting emissions of air pollutants . . . [but] such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than [federal standards].").

[62] *See* Caleb Nelson & Kermit Roosevelt, *The Supremacy Clause*, NAT'L CONST. CTR., https://perma.cc/3FDN-5GKY (accessed Feb. 24, 2023) (noting that "[a]s long as the directives that Congress enacts are indeed authorized by the Constitution, they take priority over both the ordinary laws and the constitution of each individual state").

out unloading them for food, water, and rest.[63] That law contains no preemption clause,[64] so at first glance, there is no established federal supremacy on the topic of interstate transport of farmed animals. However, as discussed below, any state attempts to regulate interstate transport should fail under the Dormant Commerce Clause, making the Twenty-Eight Hour Law and any future amendments to it the authority on farmed animal transport across state lines.[65]

In contrast, the FMIA and PPIA contain nearly identical express preemption clauses that preclude state regulation of the issues addressed by those statutes.[66] The FMIA and PPIA apply to federally inspected livestock and poultry slaughter and processing facilities,[67] and require that all poultry and livestock slaughtered for commercial sale be slaughtered and processed according to USDA regulations.[68] Both the FMIA and PPIA explicitly prohibit requirements of slaughter and processing facilities that "are in addition to or different than those made under" those acts.[69] The statutes also prohibit states from imposing additional "[m]arking, labeling, packaging, or ingredient requirements."[70] In effect, the FMIA and PPIA preclude states from imposing any requirements for livestock and poultry slaughterhouses and processing plants.

The Supreme Court's unanimous opinion in *National Meat Association v. Harris*[71] demonstrates the ability of these preemption clauses to nullify state farmed animal legislation. *Harris* involved a California

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63 49 U.S.C. § 80502(a)(1).

64 *See* 49 U.S.C. § 80502.

65 *See infra*, Section II.C.2.

66 Federal Meat Inspection Act, 21 U.S.C. § 661(a)(1) (2022); Poultry Products Inspection Act, 21 U.S.C. § 454(a)(1) (2022).

67 *See* 21 U.S.C. § 678 (referring to "premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter"); 21 U.S.C. § 608 (requiring "inspection of all slaughtering, meat canning, salting, packing, rendering, or similar establishments in which amenable species are slaughtered and the meat and meat food products thereof are prepared for commerce"); 21 U.S.C. § 453(p) (defining "official establishment" as "any establishment . . . at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this [Act].").

68 *See* 21 U.S.C. § 458(a)(1) (making it illegal to "slaughter any poultry or process any poultry products which are capable of use as human food . . . except as in compliance with the requirements of this chapter"); 21 U.S.C. § 610(a) (making it illegal to "slaughter [cattle, sheep, swine, goats, horses, mules, or other equines] or prepare any such articles which are capable of use as human food . . . except in compliance with the requirements of this chapter").

69 *See* 21 U.S.C. § 467(e) (referring to "requirements . . . with respect to the premises, facilities and operation of any official establishment which are in addition to, or different than those made under this chapter may not be imposed. . ."); 21 U.S.C. § 678 (referring to "requirements . . . with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed. . .").

70 21 U.S.C. § 467e; 21 U.S.C. § 678.

71 *Harris*, 565 U.S. at 454.

law that made it unlawful for slaughterhouses to "buy, sell, or receive a nonambulatory animal," "process, butcher, or sell meat or products of nonambulatory animals," or "hold a nonambulatory animal without taking immediate action to humanely euthanize the animal."[72] The National Meat Association, a trade association representing meatpackers and processors, challenged California's law as being preempted by the FMIA.[73] The district court granted the Association's request for a preliminary injunction, but the Ninth Circuit upheld the California law because it regulated only "the kind of animal that may be slaughtered," not the act of slaughter.[74] To uphold the law, the Ninth Circuit relied on two similar cases: *Empacadora de Carnes de Fresnillo v. Curry* and *Cavel International v. Madigan*.[75] In those cases, the Fifth and Seventh Circuits upheld state laws prohibiting the slaughter of horses against preemption challenges under the FMIA.[76] The courts reasoned that the FMIA's preemption clause "in no way limits states in their ability to regulate what types of meat may be sold for human consumption in the first place."[77]

The Supreme Court unanimously reversed the Ninth Circuit, struck down the California law, and held that "[t]he FMIA's preemption clause sweeps widely" to preclude any state regulation that "reaches into [a] slaughterhouse's facilities and affects its daily activities."[78] The Court was careful to "express no view on [*Empacadora de Carnes* and *Madigan*]," but the Court did distinguish the bans on horse slaughter from the challenged California law.[79] Unlike the horse slaughter bans, under which "no horses [would] be delivered to, inspected at, or handled by a slaughterhouse," under the California law, swine slaughterhouses would still encounter nonambulatory pigs, largely because many pigs become disabled in transit to the slaughterhouse.[80] The California law was ultimately held invalid because it affected slaughterhouses by requiring them to take a particular action.[81]

A few years later, the Ninth Circuit considered a preemption challenge under the PPIA in *Association des Eleveurs de Canards et d'Oies du Quebec v. Becerra*.[82] That case involved a California law that pro-

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[72] *Id.* at 458–59 (citing CAL. PENAL CODE ANN. § 599f(a)–(c)).

[73] *Id.* at 459.

[74] *Id.*

[75] Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1098 (9th Cir. 2010) (citing Empacadora de Carnes de Fresnillo v. Curry, 476 F.3d 326 (5th Cir. 2007) and Cavel Int'l v. Madigan, 500 F.3d 551 (7th Cir. 2007)).

[76] *Id.* at 1098.

[77] *Empacadora de Carnes*, 476 F.3d at 333. *See also Cavel*, 500 F.3d at 554 ("But if [horse meat] is not produced, there is nothing, so far as horse meat is concerned, for the [FMIA] to work upon.").

[78] *Harris*, 565 U.S. at 459, 467.

[79] *Id.* at 467.

[80] *Id.*

[81] *Id.*

[82] Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra, 870 F.3d 1140 (9th Cir. 2017).

hibited the sale of a product known as foie gras, which is made by force-feeding ducks or geese.[83] Plaintiffs, out-of-state foie gras producers, alleged that the PPIA's prohibition on additional "ingredient requirements" expressly preempted the California law.[84] The producers argued that the law imposed an ingredient requirement because it allowed foie gras to be made only from birds who were not force-fed.[85] The Ninth Circuit disagreed, found no preemption on those grounds, and held that the PPIA's reference to ingredient requirements speaks to physical components of poultry products, not the treatment of the animals.[86] Because the California law regulated "how animals are treated long before they reach the slaughterhouse gates," the PPIA did not preempt the state's prohibition on foie gras sales.[87] "The same logic applies to the difference between regular chicken and cage-free chicken," said the court; "[c]age-free is no more an ingredient than force-fed."[88]

Together, *Harris* and *Eleveurs* demonstrate both the power and the limits of federal preemption under the FMIA and PPIA. The Supreme Court's opinion in *Harris* signals that livestock slaughter operations are federal domain under the FMIA.[89] Given the similarities in the FMIA's and PPIA's preemption clauses, the Court's holding should apply to poultry slaughter facilities as well, such that states may not create additional regulations for either livestock or poultry slaughter and processing plants. However, given the Court's acknowledgment of the horse slaughter prohibitions in *Cavel* and *Empacadora de Carnes*, states may prohibit certain species from being sent to slaughter without violating the FMIA or PPIA.[90]

The Ninth Circuit's reasoning in *Eleveurs* does not detract from the power of the *Harris* decision, but it illuminates the outer limits of the FMIA and PPIA—or at least, the Ninth Circuit's understanding of those limits.[91] Under *Eleveurs*, states may prohibit inhumane animal-raising techniques without fear of preemption by the FMIA or PPIA's prohibition on additional ingredient requirements.[92]

Since those cases are the leading authorities on federal preemption of farmed animal welfare laws, the states have some space to legislate without being preempted, at least for now. For example, California's Proposition 12, prohibiting the cruel confinement of calves,

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[83] *Id.* at 1143 (citing CAL. HEALTH & SAFETY CODE §§ 25980–25984).

[84] *Id.* at 1143, 1146.

[85] *Id.* at 1146.

[86] *Id.* at 1148.

[87] *Id.*

[88] *Id.* at 1149 (internal quotation marks omitted).

[89] *Harris*, 565 U.S. at 455–56, 459–60.

[90] The Court's discussion of the horse slaughter cases is technically dicta and not legally binding, but the writing is on the walls for anyone who tries to challenge similar provisions. *Brown*, 599 F.3d at 1098 (citing *Empacadora de Carnes de Fresnillo*, 476 F.3d at 333 and *Cavel Int'l*, 500 F.3d at 554).

[91] *Becerra*, 870 F.3d at 1151–52.

[92] *Id*. at 1148, 1153.

pigs, and hens,[93] does not face any serious threat of federal preemption under the current federal framework. The PPIA and FMIA govern slaughterhouses,[94] not CAFOs, where animals are kept for most of their lives. Like in *Eleveurs*, it would be equally difficult to paint cage sizes as an "ingredient requirement" under either federal statute.[95] However, as the Supreme Court recognized in *Harris*, when Congress forbids state legislation on animal agriculture operations, state laws that affect those operations will easily fail.[96]

This means that if and when Congress chooses to address farmed animal welfare, including the conditions of the animals' confinement, those federal standards can completely override any conflicting state laws. Further, as discussed in the next Section, even when a state law is not preempted by federal law, as with Proposition 12, the law remains vulnerable to invalidation under the Dormant Commerce Clause.

B. The Commerce Clause Allows Congress to Legislate Farmed Animal Welfare

Despite the potency of the Supremacy Clause, the federal government is one of enumerated powers, which means that Congress may only exercise authority that is expressly delegated to it by the Constitution.[97] Congress's most frequently invoked power is its power under the Commerce Clause,[98] which gives Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States."[99]

Supreme Court case law extends Congress's commerce power to three categories of activity: the channels of commerce, the instrumentalities of commerce, and "activities that substantially affect interstate commerce."[100] The channels of interstate commerce include the

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[93] *Proposition 12 – Farm Animal Confinement Initiative*, CAL. DEP'T OF EDUC. (Oct. 2022), https://perma.cc/NX2L-4JJR (accessed Feb. 23, 2023).

[94] Food Safety and Inspection Service, *Slaughter Inspection 101*, U.S. DEP'T OF AGRIC., https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/slaughter-inspection-101 (accessed Feb. 23, 2023).

[95] *See Becerra*, 870 F.3d at 1147 (explaining that "Congress made clear that the PPIA's 'ingredient requirements' address the physical components of poultry products, not the way the animals are raised").

[96] *See Harris*, 565 U.S. 452, 459–60 (explaining that "[t]he FMIA's preemption clause sweeps widely. . . The clause prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations").

[97] Randy E. Barnett & Heather Gerken, *Article I, Sec. 8: Federalism and the Overall Scope of Federal Power*, CONST. CTR., https://perma.cc/C9DL-PZVK (accessed Feb. 24, 2023).

[98] *Commerce Among the Several States*, CONST. ANNOTATED, https://perma.cc/8HUD-TLHA (accessed Feb. 24, 2023); *Commerce Clause*, CORNELL L. SCH., https://perma.cc/WV29-QXT3 (accessed Mar. 5, 2023).

[99] U.S. CONST., Art. I, § 8, cl. 3.

[100] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citing other Supreme Court cases).

throughways of interstate transport,[101] and the instrumentalities of commerce include both the persons and things in interstate commerce.[102] Lastly, Congress may also regulate any activity that has a "substantial economic effect on interstate commerce."[103] This catch-all category extends federal authority to private, in-state activities traditionally regulated under state police powers, such as drug use,[104] backyard gardens,[105] and labor relations.[106] In those cases, Congress's ability to regulate activities that, in the aggregate, substantially affect interstate commerce, overrides the states' authority to police conduct within their borders.[107]

One subset of laws escapes the catch-all category: criminal laws that do not regulate economic activity fall outside of Congress's commerce power.[108] In *United States v. Lopez*, the Supreme Court rejected the United States' argument that gun possession in school zones had substantial effects on interstate commerce, and invalidated the federal Gun-Free School Zones Act.[109] Similarly, in *United States v. Morrison*, the Court found that gender-motivated crimes had no substantial effect on interstate commerce, because those crimes are "not, in any sense of the phrase, economic activity."[110] In contrast, Congress *may* regulate drug use, something traditionally policed by the states, because "there is an established, and lucrative, interstate market" and, thus, an economic justification for Congress's commerce power.[111]

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101 *See* Caminetti v. United States, 242 U.S. 470, 482–84, 486, 490–92 (1917) (upholding the federal White Slave Traffic Act that prohibited transportation "for immoral purposes of women and girls").

102 *See Lopez*, 514 U.S. at 558 ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.").

103 *Id.* at 556 (citing Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

104 Gonzales v. Raich, 545 U.S. 1, 29, 32–33 (2005) (upholding the federal Controlled Substances Act that prohibited cannabis use, despite California law that permitted home consumption for medical purposes).

105 *Wickard*, 317 U.S. at 113–16, 118–19, 124, 127–29 (upholding the federal Agricultural Adjustment Act, which prohibited wheat farmer from growing wheat for personal use in excess of federal quotas, because "[h]ome-grown wheat . . . competes with wheat in commerce").

106 United States v. Darby, 312 U.S. 100, 105, 109, 113–14, 121, 123–25 (1941) (upholding federal Fair Labor Standards Act that mandated minimum wage and maximum hour requirements, because intrastate labor has significant effects on interstate commerce).

107 *Lopez*, 514 U.S. at 555–57; *Gonzales*, 545 U.S. at 29, 32–33; *Wickard*, 317 U.S. at 114, 119, 125, 133; *Darby*, 312 U.S. at 100, 105, 109, 113–14, 121, 123–25.

108 *See Lopez*, 514 U.S. at 551, 559, 561, 567 (striking down federal Gun-Free School Zones Act, which made it a federal offense to knowingly possess a firearm in a school zone, because it "was not economic activity that substantially affected interstate commerce"); United States v. Morrison, 529 U.S. 598, 598–99 (2000) (citing *Lopez* and striking down a portion of the Violence Against Women Act).

109 *Lopez*, 514 U.S. at 563–64, 567.

110 *Morrison*, 529 U.S. at 609–13.

111 *Gonzales*, 545 U.S. at 27.

Here, farmed animal welfare undoubtedly constitutes commercial activity that Congress may regulate when it so chooses. That fact appears settled as it pertains to humane slaughter and interstate transport, as neither the Twenty-Eight Hour Law, the FMIA, or the PPIA have faced any significant Commerce Clause challenges. This makes sense: farmed animals are instrumentalities, or "things" sold in interstate commerce,[112] so Congress has the authority to regulate the conditions under which they may be sold.[113]

Further, the standards of care farmed animals receive have substantial economic effects on interstate commerce. Meat production is clearly commercial in nature: the United States' "meat and poultry industry accounts for $1.02 trillion in economic output," which is greater than five percent of the country's gross domestic product (GDP).[114] The ways farmers treat animals in their care significantly impact food safety, product pricing, economic yield per animal, and, thus, the overall stability of the colossal market for animal food products. First, "animal welfare and food safety are intrinsically linked . . . sick animals produce sick food," so providing animals with proper care prevents diseased food products from entering commerce.[115] Second, consumers are willing to pay higher prices for animal products derived from animals who were treated humanely, which affects the market for these products.[116] Finally, there are additional economic incentives for humanely handling farmed animals: improvements to animal welfare result in higher quality meat products and higher economic yields for farmers.[117] And even if none of this were true, farmed animal welfare standards have economic impacts because the standards imposed determine the costs of turning animals into food products.[118] These combined commercial effects of farmed animal welfare yield the conclusion that Congress may regulate farmed animal welfare under its commerce power because raising animals for food constitutes substantial economic activity.

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112 Research for this Article found no cases explicitly declaring animals as instrumentalities, but as they are used today, animals are "things" that are bought and sold in interstate commerce. *See* DAVID A GEBHART, INTERSTATE COMMERCE OF ANIMALS 1 (2019) (describing how the sale of animals constitutes interstate commerce).

113 *See Gonzales*, 545 U.S. at 20 (noting that *Wickard* involved a commercial farm, which constitutes "quintessential economic activity").

114 *The United States Meat Industry at a Glance*, N. AMER. MEAT INST., https://perma.cc/2PXA-QWZ8 (accessed Feb. 27, 2023).

115 *Animal Factories and Animal Welfare*, CTR. FOOD SAFETY, https://perma.cc/FGX3-73B8 (accessed Feb. 27, 2023). *See also* Alicia Kelso, *Consumers are Willing to Pay a Premium for Animal Welfare Certifications*, GROCERY DIVE (July 17, 2018), https://perma.cc/3GZN-UMGZ (accessed Mar. 9, 2023) (stating 67% of consumers would purchase certified humane products even if they were priced higher).

116 *Consumer Perceptions of Farm Animal Welfare*, ANIMAL WELFARE INST., https://perma.cc/TRV8-VDBT (accessed Feb. 27, 2023).

117 Keith E. Belk et al., *The Relationship Between Good Handling / Stunning and Meat Quality in Beef, Pork, and Lamb*, COLO. STATE UNIV. (Feb. 21, 2002), https://perma.cc/HF79-M834 (accessed Feb. 27, 2023).

118 Fernandes et al., *supra* note 14, at 4.

C. The States' Police Powers Enable Them to Regulate Animal Welfare, so Long as the Regulations do not Burden Interstate Commerce

1. State Police Powers

Where federal commerce powers end, state police powers begin. The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[119] This amendment was first read to grant the states their police powers in 1837, when the Supreme Court noted that, at the time the Constitution was ratified, the states did not intend to grant Congress "the regulation of internal police;" otherwise, "the [T]enth [A]mendment becomes a dead letter."[120] There, the Court upheld a state law that required ship captains to file reports documenting their passengers because "the act [was] not a regulation of commerce, but of police; . . . it was passed in the exercise of a power which rightfully belonged to the states."[121] By the Tenth Amendment's language, this makes sense: the Constitution delegates to Congress a broad array of powers, including the power to tax, declare war, and of course, regulate interstate commerce, but nowhere does the Constitution grant Congress the ability to make criminal laws.[122] Accordingly, states retain the authority to police conduct that occurs entirely within their borders, so long as it is not preempted by federal law.[123]

The Supreme Court stated many years ago that a state's police powers encompass all "laws in relation to persons and property within its borders as may promote the public health, the public morals, and the general prosperity and safety of its inhabitants."[124] States have long exercised those powers through laws prohibiting animal cruelty.[125] The states have an interest in prohibiting cruelty to farmed animals because it is offensive to public morals, increases the likeli-

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119 U.S. CONST. amend. X.

120 Mayor, Aldermen and Commonalty of City of New York v. Miln, 36 U.S. 102, 181–97 (1837).

121 *Id.* at 103, 130.

122 U.S. CONST. Art. I, § 8. That section does grant Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," but research for this Article found no applications of that clause to regulate internal criminal conduct.

123 Gibbons v. Ogden, 22 U.S. 1, 204, 208, 209–10 (1824).

124 W. Union Tel. Co. v. James, 162 U.S. 650, 653 (1896).

125 *See* United States v. Stevens, 559 U.S. 460, 469 (2010) (finding that "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies"); Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (noting that protecting animals, like safeguarding citizens' health and safety, is a legitimate state interest).

hood of adulterated meat,[126] and is correlated with other violent activity.[127] But, as noted previously, many state anti-cruelty laws explicitly exempt farmed animals and common industry practices from their protection.[128] Animal advocates have achieved some prosecutions for egregious cruelty to farmed animals under state laws, but the exceptions in those laws make prosecutions for abuse to farmed animals infrequent.[129]

2. The Dormant Commerce Clause as a Limit on State Police Power

The 'Dormant' Commerce Clause (DCC) doctrine arose from the Supreme Court's inference that the Commerce Clause's delegation of commercial power to Congress implicitly limits state and local legislatures from interfering with the flow of goods in interstate commerce.[130] The DCC acts as a constitutional limit on the states' otherwise broad-ranging police powers.[131]

Under Supreme Court jurisprudence, the DCC prohibits three main types of state legislation. First, it prohibits *discriminatory* "state or municipal laws whose object is local economic protectionism," because those rules "would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[132] Second, the DCC prohibits *extraterritorial* laws that extend "to commerce that takes place wholly outside of the [s]tate's borders."[133] Finally, the DCC prohibits *burdensome* state laws that obstruct interstate commerce in excess of the "putative local benefits."[134] The three cases that follow provide the background principles needed to consider DCC challenges to farmed animal protection laws.

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126 Belk et al., *supra* note 117; Julia Jeanty & Grace Adcox, *Voters Demand Farm Animal Protections From Both Politicians and Companies*, DATA FOR PROGRESS (Aug. 3, 2022), https://perma.cc/VB7F-3Y6Z (accessed Mar. 3, 2023).

127 *The Link Between Cruelty to Animals and Violence Toward Humans*, ANIMAL LEGAL DEF. FUND, https://perma.cc/K5LU-QHA5 (accessed Feb. 25, 2023).

128 *See* discussion *supra* Section I.

129 *See* Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 77–78, 80–83 (May 2011) ("Historically, factory farms have not been the subject of cruelty prosecutions or other legal enforcement for their mistreatment of animals. However, over the course of approximately the last decade, significant strides have been made whereby advocates have been successful in bringing forth evidence of animal abuse and neglect on factory farms that has resulted in legal enforcement.").

130 Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829). *See also* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) ("Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate inter-state and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.").

131 *S.-Cent Timber Dev., Inc.*, 467 U.S. at 87.

132 C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

133 Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982).

134 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

In *Wyoming v. Oklahoma*, the Supreme Court struck down a discriminatory Oklahoma law that required in-state, coal-fired electric generators to burn coal that contained at least ten percent Oklahoma-mined coal.[135] Because the state law discriminated against interstate commerce by expressly reserving a portion of the state's market to in-state coal, the law violated the DCC.[136] The Court found it particularly relevant that, prior to the statute's passage, Wyoming provided "virtually 100% of the coal purchased by Oklahoma utilities," and that following the act's effective date, in-state coal sales increased and caused corresponding decreases in purchases of Wyoming coal.[137]

In *Healy v. Beer Institute*, the Court invalidated a Connecticut law for violating the extraterritoriality principle by requiring out-of-state beer shippers to affirm that their product prices in Connecticut were consistent with the prices in neighboring states.[138] The Court found that the law had an "extraterritorial effect" because it prevented out-of-state "brewers from undertaking competitive pricing in [another state] based on prevailing market conditions."[139]

Finally, in *Bibb v. Navajo Freight Lines*, the Court struck down an Illinois law that placed an "unconstitutional burden on interstate commerce" by requiring trucks passing through the state to use a different type of mudflap than the one allowed in forty-five other states.[140] Although the law was a legitimate exercise of the state's police power, requiring trucks to install new mudflaps to pass through Illinois was too heavy a burden to justify the safety regulation.[141]

Together, *Wyoming*, *Healy*, and *Bibb* demonstrate the types of state laws that unconstitutionally interfere with interstate commerce. Under the reasoning in those cases, state laws violate the DCC when they favor in-state production; regulate market conditions in other states, such as price; or impose burdensome regulations on interstate commerce.[142]

Some scholars have argued that the DCC is dead or dying.[143] It is true that DCC challenges fail more than they succeed today, and that the Court has become more permissive of state legislation that does

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135 Wyoming v. Oklahoma, 502 U.S. 437, 438 (1992).

136 *Id.* at 455.

137 *Id.*

138 Healy v. Beer Inst., Inc., 491 U.S. 324, 337–38 (1989).

139 *Id.* at 338.

140 Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959).

141 *Id.* at 529–30.

142 *Wyoming*, 502 U.S. at 455; *Healy*, 491 U.S. at 336–38; *Bibb*, 359 U.S. at 529–30.

143 *See, e.g.*, Daniel Francis, *The Decline of the Dormant Commerce Clause* 94 DENVER L. REV. 255, 277 (Jan. 2017) (noting the "remarkable decline" of the Supreme Court's scrutiny when analyzing DCC cases); Amy M. Petragnani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1249 (1994) (arguing that "the Court has . . . begun to realize the fallacy of the dormant Commerce Clause," such that the doctrine is on its "last leg").

not obviously discriminate against interstate commerce.[144] However, in 2018 four members of the Supreme Court would have applied the doctrine to strike down a South Dakota law that regulated interstate commerce.[145] So the clause is clearly not dead, though maybe frailer than it once was. Of course, with the Court's consideration of a DCC challenge to California's Proposition 12 in *Ross*, it remains to be seen whether the Court's decision will be the nail in the coffin for either the state law or for the DCC.

3. Courts Have Consistently Upheld State Animal Welfare Legislation Against DCC Challenges (So Far)

Regardless of the Court's decision in *Ross*, the outcome will further illuminate the confines of the federalist system and the DCC on farmed animal welfare. The Court agreed to hear the pork industry's challenge to California's Proposition 12, which provides minimum space requirements for veal calves, egg-laying hens, and pregnant sows, and bans the in-state sale of products made from animals confined in less space than the state's law requires.[146]

Naturally, animal advocates and industry players are anxious to see how the Court will respond, as it has never considered a DCC challenge to state animal protection legislation, and the validity of many state laws hangs on that decision. Other courts, however, have heard similar challenges, and their analyses provide context for the types of arguments considered by the Court as it answers the question: how much protection can state law afford to farmed animals?

Proposition 12 does not outright ban the sale of certain products; it bans the sale of products that were *made in a certain way*.[147] The Ninth Circuit encountered a similar law to Proposition 12 in *Eleveurs*. That court upheld California's law prohibiting the sale of products made by force-feeding birds and rejected the challengers' argument that the law violated the extraterritoriality principle by compelling out-of-state farmers to comply with California's standards.[148] Because the law applied equally to in-state and out-of-state entities, it did not

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[144] *See, e.g.*, Francis, *supra* note 143, at 272, 278, 280, 288 (discussing how DCC is losing practicability and changes in state application).

[145] South Dakota v. Wayfair, Inc., 138 S.Ct. 2080, 2100–03 (2018) (Roberts, J. dissenting). Justice Breyer, Justice Sotomayor, and Justice Kagan joined the Chief Justice's dissenting opinion, which would have left intact precedent under which the state law violated the DCC. Meanwhile, Justice Thomas and Justice Gorsuch wrote concurring opinions in which they separately called into question the validity of the DCC.

[146] *See* Nat'l Am. Meat Inst. v. Becerra, 420 F.Supp.3d 1014, 1019 (C.D. Cal. 2019) (discussing pork within the California Proposition 12 frame); DENA JONES ET AL., ENFORCEMENT OF STATE FARM ANIMAL WELFARE LAWS 2 (2020); *Proposition 12 – Farm Animal Confinement Initiative*, *supra* note 93 (discussing space requirements for livestock per state).

[147] *See Proposition 12 – Farm Animal Confinement Initiative*, *supra* note 93 (explaining that Proposition 12 bans the sale of animal products from animals housed cruelly).

[148] *Ass'n Des Eleveurs*, 729 F.3d at 937, 941–42, 949.

violate the DCC; the law did not impermissibly burden interstate commerce, it merely precluded "a more profitable method of operation."[149]

The Ninth Circuit followed that same logic when it upheld Proposition 12, though its reasoning was questionable.[150] Proposition 12 was allowed to stand because its requirements "merely impose a higher cost on production, rather than affect interstate commerce."[151] The court did recognize that the law "as a practical matter, may result in the imposition of complex compliance requirements on out-of-state farmers," but held that that fact did not mean the law violated the extraterritoriality principle.[152] But it is hard to see how a law that imposes such costly and complex requirements on out-of-state producers does not affect interstate commerce; as discussed previously, farmed animal welfare very much affects commerce, and food producers have been outspoken about the law's burdensome effects on their operations.[153]

To summarize this Section, farmed animal welfare may be regulated by both the federal and state governments—at least until the Supreme Court's *Ross* decision. On one hand, humane treatment is a commercial issue of national importance and thus subject to federal regulation. Farmers and retailers across the country certainly make or lose money depending on how animals are treated in their facilities. On the other hand, humane treatment of animals is a policing issue that has been subject to state legislation for a long time. DCC challenges to animal protection legislation have been unsuccessful so far, but none of those laws was as impactful (or as burdensome, depending on who is arguing) as Proposition 12. Given this backdrop, the Court's *Ross* analysis will provide much-needed clarity on whether states may continue to regulate in this way, or whether farmed animal welfare is a substantial commercial issue that requires uniform federal regulation.

III. Farmed Animal Welfare Protections are Needed at the Federal Level

Although federal and state governments share the ability to regulate farmed animal welfare, a federal standard is necessary to secure long-lasting protections for farmed animals. So far, advocates have found some success at the state level: during the last two decades, more than two dozen states have passed farmed animal protection

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149 *Id*. at 952.

150 *Ross*, 6 F.4th at 1029–31.

151 *Id.* at 1026, 1029.

152 *Id.* at 1029.

153 *See* Jennifer Shike, *California's Proposition 12 Would Cost U.S. Pork Industry Billions*, PORK BUS. (Oct. 22, 2020), https://perma.cc/83Y7-4BSF (accessed Feb. 28, 2023) ("Complying with Proposition 12 will cost individual hog producers millions and will likely result in significant and irrevocable ramifications. . . .According to a University of Minnesota study, the conversion of sow barns to group pens alone would cost between $1.87 billion and $3.24 billion.").

laws.[154] Those protections include bans on gestation crates, veal crates, and battery cages; bans on painful husbandry procedures like tail docking; and general animal care standards.[155] These laws, if enforced,[156] ensure millions of animals experience better living conditions than they would otherwise. Plus, it makes practical sense why organizations like the Humane Society of the United States (HSUS) would opt for a state-by-state crusade.[157] At least twenty-six states permit ballot initiatives by residents who wish to include action items on state ballots for enactment by popular vote,[158] circumventing state legislatures and enabling several of the farmed animal protection laws in those states.[159] This process is unique to the states and localities; there is no similar ballot measure available at the federal level in the United States.

Farmed animals will benefit most if Congress establishes higher welfare standards and leaves room for state legislation to impose more stringent standards for in-state conduct. This would effectively create mandatory minimum standards as a federal floor, while still allowing states their traditional power to regulate intrastate conduct without interfering with the federal regulatory scheme.

There are practical and political reasons why farmed animal welfare standards are needed at the federal level, regardless of advocates' wins at the state level. First, as a practical matter, the interconnected nature of the nation's food system, paired with the potential for fifty different farmed animal welfare standards, suggests that a uniform standard would be more feasible. Further, political and constitutional challenges to state farmed animal welfare laws indicate federal laws are more durable, and that once federal laws are in place, they may supplant the standards created by the states. Though pursuing federal legislation is, in many ways, a more challenging process than pursuing state legislation, the challenges posed at the federal level are weakening with time, thanks in part to the work done at the state level. As states often pave the way for progressive change at the federal level,[160]

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154 JONES ET AL., *supra* note 146, at 1.

155 *Id.* at 1–2.

156 *See id.* at 8 (discussing the severe lack of enforcement for most of the state farmed animal welfare laws).

157 The HSUS has been the most successful, but by no means the only, organization advancing welfare protections for farmed animals at the state level. *See* Sara Shields et al., *A Decade of Progress Toward Ending the Intensive Confinement of Farm Animals in the United States*, 7 ANIMALS 1, 3, 6–8, 15 (2017) (observing the modern history of the animal welfare movement and discussing the organizations involved in several major developments).

158 *States with Initiative or Referendum*, BALLOTPEDIA, https://perma.cc/QQG9-6UPE (accessed Feb. 28, 2023).

159 ANIMAL WELFARE INST., *supra* note 2, at 11–13.

160 *See, e.g.*, Sam Ricketts et al., *States Are Laying a Road Map for Climate Leadership*, CTR. AMER. PROGRESS (Apr. 30, 2020), https://perma.cc/43K6-E3G2 (accessed Feb. 21, 2023) (describing how state and local governments are leading the charge on clean energy).

long-lasting change for farmed animals will more likely be secured that way, too.

A. Uniform Federal Standards are More Practical Than a State-by-State Approach

Federal standards for farmed animal welfare are preferable because that approach is more practical given the interconnected nature of the country's food system and the need for uniform regulations across fifty states. As the Supreme Court has noted, centralized regulation of interstate commerce is important to guarantee "a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods."[161] States that pass farmed animal protection laws disrupt the operations and supply chains of the hugely important food and agriculture industries.[162] Food is often not purchased where it is grown or raised,[163] which creates complicated dynamics when consumers of one state seek to enforce certain standards for animals raised in another state. Proposition 12 is a good example of this. Most of the meat consumed in California is not raised or slaughtered there,[164] but consumers want to ensure the products offered at their supermarkets do not come from animals who are cruelly confined.[165]

Opponents to laws like Proposition 12 fear the idea of what could be fifty different state approaches to farmed animal welfare.[166] Some

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161 Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 803 (1976).

162 *See* UFER, *supra* note 38, at 9 ("[Researchers] estimated a 3- to 4-cent increase, or approximately 8.7 percent in the per pound cost of producing finished hogs in a gestation stall-free system compared with a gestation stall system [as required by Proposition 12]. Since relatively little pork production outside of the banning States was converted to compliant housing, the prohibition on noncompliant pork sales would reduce the supply of pork imported into California from out of State. [Researchers] estimate retail pork prices in California will increase 7.7 percent, reducing demand by 6.3 percent and resulting in an annual loss of $320 million in economic benefits for consumers.").

163 *See* Janna Raudenbush, *Know Where Your Food Comes From with USDA Foods*, U.S. DEP'T OF AGRIC. (July 13, 2022), https://perma.cc/XC4C-KTYM (accessed Feb. 20, 2023) ("A number of items available through USDA Foods are sourced solely from one state. For example, 100 percent of the strawberries purchased by USDA Foods in FY2014 came from the state of California.").

164 Dan Flynn, *California Bets Its Egg and Pork Markets Will Attract the Compliant*, FOOD SAFETY NEWS (Jan. 1, 2022), https://perma.cc/LEA8-X3VG (accessed Feb. 20, 2023).

165 *See* Kelso, *supra* note 115 (highlighting that 77% of consumers are concerned about animal welfare as it applies to food).

166 *See, e.g.*, Brief of Indiana and 25 Other States as Amici Curiae Supporting Petitioners at 32, *Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 212 L. Ed. 2d 402, 142 S. Ct. 1413 (2022) (No. 21-468) ("Among many other horizontal federalism problems, in this situation the risk of inconsistent regulation by different States is substantial. California may have its own view of what constitutes proper treatment of livestock sold as food to its consumers, but other States may have other ideas, and differing standards will ultimately conflict with one another.") (internal citation and quotation marks omitted).

producers can adjust their operations to comply with Proposition 12, but they may be unable to do the same to comply with the various standards potentially developed by other states.[167] For example, what if a smaller state like Oregon passed a law banning the sale of eggs from hens who were not pasture-raised? Some suppliers might conform, or they might not, causing Oregon to face an egg shortage. These kinds of shortages could reduce the importance consumers place on animal welfare and thus thwart the enacted protections. So far, the terms of state farmed animal welfare laws have been similar, though some differences in the laws could create practical barriers for producers that serve multiple states.[168] Additionally, there is no guarantee that state provisions will continue to be similar, especially if Proposition 12 is allowed to stand; states may become even more eager to enact stricter protections if they know the laws will sustain a DCC challenge after *Ross*. Finally, state laws may disrupt international trade, too: the United States annually imports more than $2 billion in pork products alone, originating primarily from the European Union and Canada.[169] Canadian pork producers recently joined forces with other international producers, including parties in Mexico, to argue that the "entwined nature" of the international pork industry makes it "nearly impossible to trace a particular pork product back through the supply chain to the original breeder sow."[170]

In sum, though some meat, egg, and dairy producers can comply with the existing modifications in state law, a state-by-state approach may become impractical if every state is allowed to create its own standards based on its residents' unique preferences.

B. Federal Standards are Preferable for Political and Constitutional Reasons

Federal farmed animal welfare standards, once established, will also be more durable and well developed than state legislation. First, federal standards, though subject to their own constitutional challenges, will be immune to preemption and DCC challenges, which are serious threats to state legislation.[171] As discussed previously,[172] fed-

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167 *See* Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) (arguing that the "multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes").

168 ANIMAL WELFARE INST., *supra* note 2, at 11–13 (listing variations in state laws).

169 UFER, *supra* note 38, at 20.

170 Treena Hein, *Ruling on Controversial Proposition 12 Expected Soon*, PIG PROGRESS (Jan. 18, 2023), https://perma.cc/8UV3-QMR2 (accessed Mar. 5, 2023).

171 *See SCOTUS Case Reversal Rates (2007-Present)*, BALLOTPEDIA, https://perma.cc/VZ4A-F6S8 (accessed Mar. 5, 2023) (stating that though the DCC has not been used to strike down farmed animal welfare laws, the Supreme Court's grant of certiorari paired with its near-80% reversal rate (94% in the Ninth Circuit in 2020) reaches the bar for a "serious threat").

172 *Supra*, Section II.A.1.

eral law may supersede state law as long as Congress appropriately exercises its lawmaking power and indicates its preemptive intent.[173] If the Court finds in *Ross* that California's Proposition 12 substantially burdens interstate commerce, many of California's and other states' accomplishments for farmed animals will be suddenly suspended in unconstitutionality.

Second, state authority is insufficient to regulate some of the worst parts of animals' lives, including slaughter[174] and interstate transport.[175] State regulation of interstate transport, particularly regulation that causes a "disruption of travel and shipping due to a lack of uniformity in state laws,"[176] is almost always unconstitutional.[177] State attempts to require certain transport enclosures would likely constitute a disruption of travel or another burden on the flow of interstate commerce and be struck down as unconstitutional. On the other hand, Congress may create requirements for how animals are handled during transport, as it did with the Twenty-Eight Hour Law.

Third, federal farmed animal welfare standards will benefit from agency expertise and the opportunity to hear from all interested parties through the federal comment process.[178] Raising animals for food is a complicated practice occupied by ethical, economic, and scientific questions that are better answered by the nation's best scientists and animal activists, who are more likely to be engaged in a nationwide discussion. It is important for animal advocates not to be too distracted by their state crusades to represent their cause at the federal level. In August 2021, in response to state farmed animal welfare laws, senators from big hog-producing states proposed the federal Exposing Agricultural Trade Suppression Act (EATS Act), which would "prevent

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[173] *See* 13 Cal. Jur. 3d Constitutional Law § 94 ("Indeed, generally speaking, under the 10th Amendment, a power granted to Congress trumps a competing claim based on a state's police powers.").

[174] *See supra*, Section II.A.2 (discussing how the FMIA and PPIA preempt slaughter regulations).

[175] *See supra*, Section II.C.2 (discussing how the DCC prohibits state legislation of interstate transport).

[176] Pac. Nw. Venison Producers v. Smitch, 20 F.3d 1008, 1015 (9th Cir. 1994).

[177] Research for this Article found no cases where a state regulated an aspect of interstate transportation without violating the DCC. *See, e.g.*, S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 783–84 (1945) (striking down an Arizona law prohibiting operation of trains with more than fourteen passenger or seventy freight cars); *Bibb*, 359 U.S. at 520 (striking down an Illinois statute requiring mudguards on trucks on state highways); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 430 (1978) (striking down a Wisconsin law prohibiting trucks longer than fifty-five feet); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 678–79 (1981) (striking down an Iowa law prohibiting sixty-five foot, double trailer trucks); Mich. Pub. Utilities Comm'n v. Duke, 266 U.S. 570, 574, 578 (1924) (striking down a Michigan law classifying an interstate goods transporter as a "common carrier" and subjecting it to regulation).

[178] *See* Scott A. Smith & Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 WM. MITCHELL L. REV. 391, 416 (2000) ("Expert federal agencies, intimately familiar with the products and industries they regulate, are arguably far better suited [than state courts and juries] . . . to ascertain the degree of federal uniformity necessary to assure safety, efficacy, *and* availability at a reasonable cost.").

[s]tates from interfering with the production and distribution of agricultural products in interstate commerce."[179] Some commentators have also predicted that, if Proposition 12 is upheld, "within five years livestock producers will be proposing national legislation setting uniform welfare standards for farm animals" to streamline their compliance requirements.[180]

Thus, regardless of the states' authority to regulate farmed animal welfare, because the topic also falls within Congress's enumerated power to regulate interstate commerce, Congress has the ability to supersede any state law on point. Here, this means that while states and localities *can* pass laws to protect farmed animal welfare, those attempts can ultimately be circumscribed by Congress or invalidated by the Supreme Court and are vulnerable until Congress establishes federal standards. When Congress does decide to create such standards, that conversation will involve some of the top scientists and animal advocates in the country, making for better standards overall.

C. The Challenges to Pursuing Federal Legislation are Weakening With Time

Passing state legislation is generally easier than obtaining change at the federal level, but federal standards are becoming more feasible with time. The lack of a federal ballot measure process, Congress's majoritarian nature, and industry's wealth of resources pose challenges to farm animal advocates at the federal level that are not present to the same extent at the state level.[181] Given that "animal welfare lobbying groups are small in number and have far less funding to pursue legislative change than industry lobbying groups . . . the attitude of the general public is of vital importance in determining how to pursue reform."[182] Public opinion poses a challenge at the federal level, where animal advocates cannot necessarily rely on the majority vote like they can in states like California. At the national level, the "lack of consensus, especially around the welfare of farm animals and the historic special place of agriculture in government policy, [creates] significant barriers . . . to achieving reasonable oversight of livestock production in . . . the U.S."[183]

However, "American consumers are increasingly aware of, and concerned about, how animals raised for food are treated."[184] This awareness is demonstrated by the moves of mega-retailers like Mc-

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179 UFER, *supra* note 38, at 8.

180 David Favre, *Supreme Court Grapples with Animal Welfare in a Challenge to a California Law Requiring Pork to be Humanely Raised*, THE CONVERSATION (Oct. 4, 2022, 8:25 AM), https://perma.cc/98Q4-DZZG (accessed Feb. 20, 2023).

181 Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 MINN. J. L. & INEQ. 363, 385–86 (2005).

182 *Id.* at 381.

183 Terry L. Whiting, *Policing Farm Animal Welfare in Federated Nations: The Problem of Dual Federalism in Canada and the USA*, 3 ANIMALS 1086, 1112 (2013).

184 *Consumer Perceptions of Farm Animal Welfare*, *supra* note 116, at 1.

Donald's, Burger King, Wendy's, Compass Group (the world's largest food service company), Walmart, Denny's, Kraft Foods, Campbell Soup, and Hyatt hotels, which have pledged to purchase from suppliers using cage-free or crate-free housing systems.[185] Although Congress's infamous gridlock nature will undoubtedly frustrate animal advocates at the federal level, now more than ever before, those advocates have the public's support, as evidenced by the passage of the state legislation they will aim to immortalize at the federal level.

IV. Conclusion

In conclusion, the United States' federalist model, as implemented by the Constitution, seriously affects farmed animal welfare and animal advocates' ability to create welfare standards. Federal preemption and commerce powers mean that Congress can impose commercial regulation and supersede state law on that topic. The states reserve their traditional authority to proscribe animal cruelty, but the interconnected and gargantuan nature of today's animal agriculture industry makes animal protection laws more challenging to maintain on a state-by-state basis, and thus, more suited to uniform regulations at the federal level. This Article has attempted to shed light on the confines of federalism on farmed animal welfare, but ultimately, the Supreme Court will further define those boundaries this year in *Ross*.

[185] Shields et al., *supra* note 157, at 12–14, 18.