

# PROPOSITION 12 AND A PATCHWORK PROBLEM: THE NEED FOR UNIFORMITY IN FARM ANIMAL HUSBANDRY LAWS

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## ABSTRACT

*Animal agriculture producers strive to provide a safe and sustainable supply of protein; therefore, state laws that burden agricultural interstate commerce and consequently threaten national food security, should be struck down as a violation of the Dormant Commerce Clause. The United States Supreme Court recently analyzed a farm animal husbandry statute, California's Proposition 12, in *National Pork Producers Council v. Ross*. Proposition 12—a ballot initiative that imposes stringent confinement regulations on the production of pork, eggs, and veal—incidentally affects interstate commerce because of its extraterritorial effects. However, despite the potential for a burdensome effect, the Supreme Court held that Proposition 12 did not violate the Dormant Commerce Clause.*

*This Comment discusses the Supreme Court's narrow application of the Dormant Commerce Clause and the need for Congress to step in with a legislative solution. Congress should utilize its Commerce Clause powers to pass a uniform standard for farm animal husbandry practices using existing welfare tools and materials, which have already been established by industry experts, to inform the chosen standards. Additionally, Congress should codify a preemption statute prohibiting states from passing legislation more restrictive than the standards set by Congress. The production and sale of agricultural products, which is already heavily regulated by the federal government, has been and will always be an interstate commerce issue. State legislatures are unable to regulate the national agricultural market without the effects reaching across state lines. Therefore, federal legislation will prevent a patchwork of state laws and promote uniformity in the market—*

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*increasing the assurance that producers can provide food security to the nation.*

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## I. INTRODUCTION

Imagine, your grocery bill doubles this month because available protein sources have drastically increased in price. Imagine, you can no longer afford to eat some of the most essential food items in your diet because your state has decided to pass a law imposing burdensome regulations on the production of meat. Imagine, the voters in your state are misinformed and influenced by misleading propaganda that is driving the passage of laws that are burdening the agricultural market. Imagine, you and your family already have limited options when it comes to food choices, and because of a law that fails to balance animal welfare with production efficiency, now you and your family cannot afford to eat. This is the reality of the way current state farm animal confinement laws are impacting the nation.<sup>1</sup> Misinformed and ineffective legislation regarding proper farm animal care is leading to increased costs for producers and consumers alike, and regulations at the state level are leading to inconsistency across the market.<sup>2</sup>

Animal agriculture producers work diligently to provide a healthy and sustainable meat supply to the nation while keeping the health and safety of animals a top priority.<sup>3</sup> In recent years, however, animal rights activists have raised their voices, attempting to undermine animal agriculture.<sup>4</sup> These groups have succeeded in their efforts by convincing state legislatures and voting bodies to pass laws containing stringent regulations on farm animal welfare.<sup>5</sup> Some of these laws and regulations not only impose guidelines on in-state producers but also impose regulations on out-of-state producers who wish to sell products in that state<sup>6</sup>—one of the most prominent examples being California’s Proposition 12.<sup>7</sup> Because the Supreme Court upheld Proposition 12 despite its potential for substantially burdening interstate commerce, Congress—in order to preempt states from passing a patchwork of similarly restrictive animal welfare regulations—should utilize its

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1. See *infra* Part 0 (providing background on the current state of farm animal confinement and its adverse effects).

2. See *infra* Sections II.A, II.B, II.C (describing the misinformed agenda of animal activists and how their advocacy has led to state laws that burden agricultural production and threaten food security).

3. See generally D.A. Hume et al., *The Future of Animal Production: Improving Productivity and Sustainability*, 149 J. AGRIC. SCI. 9, 13 (2011) (discussing the close relationship between sustainability and animal welfare).

4. See *Monitoring Activism*, ANIMAL AGRIC. ALL., <https://animalagalliance.org/initiatives/monitoring-activism/> (last visited Oct. 26, 2024).

5. See *infra* Sections II.B, II.C (discussing the connection between animal activism and state farm animal confinement laws).

6. See CAL. HEALTH & SAFETY CODE §§ 25990–91 (West 2015); COLO. REV. STAT. §§ 35-21-201-09 (2020); MASS. GEN. LAWS ch. 129 App., §§ 1-1–11 (2022); MICH. COMP. LAWS § 287.746 (2020); NEV. REV. STAT. § 583.211–51 (2022); WASH. REV. CODE § 69.25.107–10 (2019); OR. REV. STAT. § 632.835–50 (2023).69.25.107–10.

7. CAL. HEALTH & SAFETY CODE §§ 25990–91.

Commerce Clause powers to create a federal standard for farm animal husbandry practices.<sup>8</sup>

In the 2023 United States Supreme Court case, *National Pork Producers Council v. Ross*, the Court narrowly interpreted the Dormant Commerce Clause and held that California's Proposition 12 was constitutional despite its inevitably burdensome impact on interstate commerce.<sup>9</sup> The Court held that there is no "per se" rule that state laws with extraterritorial effects violate the Dormant Commerce Clause and refused to apply the *Pike* balancing test.<sup>10</sup> It reasoned the *Pike* balancing test could not be applied because the Petitioners failed to allege a substantial burden on interstate commerce,<sup>11</sup> and the benefits and burdens were incapable of judicial balancing.<sup>12</sup> However, the Court's reasoning was misguided. Based on the pleadings, it was plausible that California's Proposition 12 would have a drastic economic impact on producers and consumers alike—implicating a substantial burden on interstate commerce.<sup>13</sup> Additionally, the Court is often called upon to weigh economic burdens and noneconomic benefits and surely could have done so here.<sup>14</sup> If the Court had applied *Pike*, it likely would have found the burdens imposed by Proposition 12 largely outweigh the benefits.<sup>15</sup> Because of the Court's narrow tailoring of both the Dormant Commerce Clause and the *Pike* balancing test in *National Pork Producers*,<sup>16</sup> Congress needs to step in with a legislative solution.<sup>17</sup> As a market heavily implicated by interstate commerce concerns, the livestock production industry and the welfare of its animals, should be regulated at the national level.<sup>18</sup>

This Comment will propose a legislative solution to the problem created by the Court's decision in *National Pork Producers*.<sup>19</sup> Part II of this Comment provides background for the argument by analyzing the risks to food security under the current landscape of farm animal confinement laws

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8. Animal husbandry is a "branch of agriculture concerned with the production and care of domestic animals," such as pigs, cattle, and poultry. *Animal husbandry*, MERRIAM-WEBSTER <https://animalagalliance.org/initiatives/monitoring-activism/> (last visited Oct. 26, 2024).

9. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 391 (2023).

10. *See id.* at 390–91.

11. *See id.* at 379.

12. *See id.* at 381.

13. *See infra* Section 0 (discussing the plausibility of Petitioners' allegations).

14. *See infra* Section III.C.2 (illustrating the Court's ability to weigh economic burdens against noneconomic benefits).

15. *See infra* Section III.C.3 (explaining what the likely result would have been if the Court had applied the *Pike* balancing test).

16. *See Nat'l Pork Producers*, 598 U.S. at 391.

17. *See infra* Part IV (offering a legislative solution and an abundance of supportive reasoning).

18. *See infra* Section IV.B (discussing why Congress is well positioned to regulate farm animal husbandry).

19. *See infra* Section IV.A (proposing that Congress adopt a preemption statute and a uniform national standard for farm animal husbandry laws).

and how misinformation drives the adoption of these types of state statutes.<sup>20</sup> Part II also provides a brief overview of the Dormant Commerce Clause and the development of the *Pike* balancing test.<sup>21</sup> Part II ends with a short summary of the Supreme Court's most recent discussion of the Dormant Commerce Clause and *Pike* from *National Pork Producers*.<sup>22</sup>

This Comment argues that Congress should pass federal legislation to regulate farm animal husbandry practices and that, in drafting the language of the standards, it should consult the welfare auditing materials and tools that have already been established by industry experts.<sup>23</sup> Additionally, Congress should include a preemption statute in its legislation to prohibit states from passing any legislation more restrictive than the standards passed by Congress.<sup>24</sup> As context for why Congress needs to step in to regulate, this Comment will discuss how the Court misapplied the Dormant Commerce Clause when reviewing California's Proposition 12 in *National Pork Producers*.<sup>25</sup> Part III will discuss the arguments and conclusions made by the Court and provide support for an alternative holding.<sup>26</sup>

Finally, in Part IV, this Comment offers a multitude of reasons why federal legislation can and should solve the issues associated with the Supreme Court upholding a law like Proposition 12.<sup>27</sup> Part IV shows that Congress can use its Commerce Clause powers to regulate uniformly at a national level and can draw upon the materials developed by experts in animal production and welfare.<sup>28</sup> It discusses the regulatory power placed in administrative agencies and how adding animal welfare to their regulatory responsibility would be relatively seamless.<sup>29</sup> Lastly, Part IV addresses how federal regulation of farm animal husbandry practices will lighten the burdens on producers—which ultimately decreases the economic impact on consumers and prevents food insecurity across the nation.<sup>30</sup>

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20. See *infra* Sections II.A, II.B (providing background on food insecurity in the United States and the spread of misinformation by animal activists).

21. See *infra* Section II.D (providing a brief overview of the Dormant Commerce Clause and the *Pike* Balancing Test).

22. See *infra* Section II.E (discussing the arguments and conclusions from *National Pork Producers*).

23. See *infra* Section IV.A.1 (describing the animal welfare guidelines already established by knowledgeable experts).

24. See *infra* Section IV.A (proposing language for a preemption statute).

25. See *infra* Part III (explaining how the Court narrowly construed the Dormant Commerce Clause in *National Pork Producers*).

26. See *infra* Part III (arguing that the Court should have struck down Proposition 12 as a violation of the Dormant Commerce Clause because, among other reasons, it would fail the *Pike* balancing test).

27. See *infra* Part IV (providing reasons why federal legislation is a good solution).

28. See *infra* Section IV.A (describing the appropriate legislative solution).

29. See *infra* Section IV.A.2 (explaining that the addition of animal welfare to administrative agency responsibility would not be a complex task).

30. See *infra* Section IV.C (drawing connections between federal regulation of farm animal husbandry and the reduction of food insecurity issues).

## II. FOOD INSECURITY, FARM ANIMAL CONFINEMENT, AND CONSTITUTIONAL CONSIDERATIONS

There is an important connection between the confinement of farm animals and food security in the United States; confinement standards directly impact the price of food *production*, which directly impacts the price of food.<sup>31</sup> This causal chain is not so apparent to voters or even legislatures, but is especially nonobvious and unimportant to animal activists.<sup>32</sup> This has led state laws regarding farm animal confinement to reflect the misinformation spread by animal activists.<sup>33</sup> Some states have only imposed regulations on in-state production.<sup>34</sup> However, as if impacting production in their home state was not enough, some states' regulations prohibit the sale of any products not produced in a certain way, regardless of where they were produced.<sup>35</sup> The Supreme Court recently had the opportunity to address the question of whether laws such as these are unconstitutional under the Dormant Commerce Clause.<sup>36</sup> In *National Pork Producers Council v. Ross*, the Court upheld California's Proposition 12,<sup>37</sup> setting a precedent for narrow applications of the Dormant Commerce Clause and threatening the security of the nation's food supply.<sup>38</sup>

### *A. The Risks to Food Security Under the Current Farm Animal Confinement Landscape*

Every day, agricultural producers face the challenge of feeding the growing population.<sup>39</sup> Animal producers, specifically, are charged with providing a consistent supply of safe and affordable protein.<sup>40</sup> As the world population continues to grow, the industry must create and implement

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31. See *True Cost of Food: Measuring What Matters to Transform the U.S. Food System*, ROCKEFELLER FOUND. 1, 1 (July 2021), <https://www.rockefellerfoundation.org/wp-content/uploads/2021/07/True-Cost-of-Food-Full-Report-Final.pdf> (stating that food prices “include[] the cost of producing . . . the food we buy and eat”).

32. See Maureen Hanson, *How Animal Rights Activists Are Eating Away at Consumer Choice*, DAIRY HERD (July 17, 2023), <https://www.dairyherd.com/news/education/how-animal-rights-activists-are-eating-away-consumer-choice> (explaining that the Court upholding Proposition 12 will inevitably increase food prices and animal activists “applauded the news” of the decision).

33. See *infra* notes 57–63 and accompanying text (explaining that California's Proposition 12, which was written by an activist group, does not achieve the animal welfare objectives it proclaims to achieve).

34. See, e.g., COLO. REV. STAT. §§ 35-50.5-101–03 (2008) (lacking any language that imposes animal confinement regulations on out-of-state producers).

35. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25990–91 (West 2015).

36. See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 364 (2023).

37. See *infra* Section II.C (providing background and a detailed explanation of California's Proposition 12).

38. See *Nat'l Pork Producers*, 598 U.S. at 391.

39. Hume et al., *supra* note 3, at 9.

40. See *id.* at 10.

innovative practices that result in efficient production while also keeping prices as low as possible for consumers to prevent food security issues.<sup>41</sup>

Food insecurity exists when a person or people have a lack of access to a sustainable amount of safe and nutritious food for normal development and health.<sup>42</sup> One of the main causes of food insecurity is a person's lack of resources (money) to obtain food.<sup>43</sup> "In 2021, 32.1 percent of households with incomes below the Federal poverty line were food insecure."<sup>44</sup> Between 2021 and 2022, food prices in the United States increased by 11%—which suggests the price of food has only gone up since then.<sup>45</sup>

Food security is directly impacted by the factors of agricultural production.<sup>46</sup> Unpredictable supply chain disruptions—like having to rebuild or restructure an entire operation to conform to new regulations—can reduce producers' ability to provide a consistent and affordable food supply.<sup>47</sup> Achieving food security requires producers to manage their priorities and act accordingly.<sup>48</sup>

As the livestock industry adapts to change, animal welfare remains a top priority.<sup>49</sup> Contrary to what activists promote, meat producers recognize that a key principle of productivity is minimizing animal stress levels.<sup>50</sup> However, finding the balance between animal well-being and efficient production is a challenge producers are still navigating.<sup>51</sup> Under the current landscape, the attempts to regulate animal welfare are harming consumers—the burdens farm animal confinement statutes have placed on commerce are reflected in higher food prices.<sup>52</sup>

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41. Robert Capone et al., *Food System Sustainability and Food Security: Connecting the Dots*, 2 J. FOOD SEC'Y, 13, 19 (2014).

42. *Hunger and Food Insecurity*, FOOD & AGRIC. ORG. OF THE U.N., <https://www.fao.org/hunger/en/> (last visited Oct. 26, 2024).

43. *Id.*

44. *Food Security and Nutrition Assistance*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-security-and-nutrition-assistance/#:~:text=In%202021%2C%2032.1%20percent%20of,and%20very%20low%20food%20security> (last visited Oct. 26, 2024).

45. *Food Prices: Information on Trends, Factors, and Federal Roles*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 28, 2023), <https://www.gao.gov/products/gao-23-105846#:~:text=Publicly%20Released%3A%20Mar%2028%2C%202023,of%20their%20income%20on%20food>.

46. Bogdan Mârza et al., *Agricultural Insurances and Food Security. The New Climate Change Challenges*, 27 PROCEDIA ECON. & FIN., 594, 595 (2015).

47. See Marwa Ben Abdallah et al., *Exploring the Link Between Food Security and Food Price Dynamics: A Bibliometric Analysis*, II MDPI 1, 1-2 (Mar. 19, 2021), <https://www.mdpi.com/2077-0472/11/3/263>.

48. Capone, *supra* note 41, at 44.

49. Hume, *supra* note 3, at 11.

50. *Id.* at 13.

51. See *id.* (recognizing the need for compromise "between welfare aspirations and production demands").

52. See *infra* notes 357–358 and accompanying text (discussing the drastic food price increases that have occurred since the passage of Proposition 12).

*B. Misinformation about Animal Treatment Drives Activism*

There are countless organizations—the Humane Society of the United States, People for the Ethical Treatment of Animals (PETA), and Mercy for Animals, to name a few—whose goal is to shut down farms raising animals for food and advocate to eliminate animal products from the human diet.<sup>53</sup> To promote their agendas, activists are heavily involved in the media and gain traction by posting and producing animal rights “propaganda.”<sup>54</sup> These organizations are well-funded and well-organized and are often misleading the public about how livestock and poultry are raised.<sup>55</sup>

Activists heavily criticize the efficiency of animal agriculture due to a mischaracterization that *efficiency* has to mean abuse.<sup>56</sup> For example, activists consider California’s Proposition 12, drafted by the Humane Society of the United States, a victory for the animal activist community in preventing the cruel treatment of pigs.<sup>57</sup> However, in reality, the true impact of Proposition 12 is quite the opposite.<sup>58</sup> Proposition 12 specifically outlawed “gestation crates” for pregnant sows<sup>59</sup> because they are considered “cruel.”<sup>60</sup> However, these gestation crates are used as a way to *protect* the sows during their pregnancies.<sup>61</sup> The animals are very vulnerable during pregnancy and can be aggressive, so the “practice of separating the animals in crates keeps them from fighting and injuring each other.”<sup>62</sup> While these crates may seem abusive or inhumane, they are actually designed to protect the animals—which would fulfill the supposed mission of animal rights activists.<sup>63</sup>

Apart from public outreach, animal activist organizations also play an integral part in the lobbying efforts that lead to state laws regulating farm animal husbandry.<sup>64</sup> As recently as November of 2023, Maryland animal

53. *Monitoring Activism*, *supra* note 4.

54. *See Fake News*, PETA KILLS ANIMALS, <https://petakillsanimals.com/fake-news/> (last visited Oct. 26, 2024) (providing examples of “fake news” spread by animal rights activists).

55. *Monitoring Activism*, *supra* note 4.

56. Consumer Freedom, *HSUS Whistleblower Tells All*, YOUTUBE, at 04:29 (Apr. 21, 2015), <https://www.youtube.com/watch?v=pmXoYF36uAg> (stating that the Humane Society of the United States “mistakes efficiency for abuse”).

57. Press Release, The Humane Society of the United States, Victory: Supreme Court Upholds California Proposition 12 (May 11, 2023) [hereinafter *Humane Society Press Release*].

58. *Farrowing and Gestation Crates*, OSBORNE (Apr. 16, 2019), <https://osbornelivestockequipment.com/news/farrowing-gestation-crates/#:~:text=Gestation%20crates%20or%20individual%20stalls,fighting%20and%20injuring%20each%20other.>

59. “A sow is an adult female [pig] who has had a litter of pigs.” John E. Woodmansee, *Understanding Agriculture: Swine*, PURDUE UNIV. (July 8, 2022), <https://extension.purdue.edu/news/county/whitley/2022/07/understanding-agriculture-swine.html>.

60. *See* CAL. HEALTH & SAFETY CODE §§ 25990–91 (West 2015).

61. *Farrowing and Gestation Crates*, *supra* note 58.

62. *Id.*

63. *Id.*

64. *Legal Advocacy*, ANIMAL EQUAL., <https://animalequality.org/legal-advocacy/> (last visited Oct. 26, 2024) (detailing the lobbying efforts and “achievements” of the Animal Equality organization); *see also* Complaint for Declaratory and Injunctive Relief at ¶ 29, *Nat’l Pork Producers Council v. Ross*, 598

welfare activists were lobbying for a state law regulating the confinement of laying hens that would prohibit the sale of any non-cage-free eggs in the state.<sup>65</sup> Again, these activists are likely unaware they are lobbying for a system that is not necessarily more humane for laying hens.<sup>66</sup> The cage-free system has a much higher mortality rate, lower air quality, and a higher likelihood of injurious pecking and cannibalism within layer flocks.<sup>67</sup>

While activists claim to have good intentions, their lack of *informed* opinions and ideas is leading to laws that are not improving animal welfare and are leading to reduced production efficiency.<sup>68</sup> Most of the laws these activists would consider a success do little to improve the health and safety of the animals and consequently create a substantial burden on producers.<sup>69</sup> Simply put, misinformed laws are forcing producers to sacrifice efficiency for minimal to no improvement in animal welfare—which ultimately burdens consumers.<sup>70</sup>

### *C. California's Proposition 12 and the Patchwork of State Farm Animal Confinement Laws*

Currently, there are no federal standards for animal confinement in livestock production in the United States.<sup>71</sup> Because it has been left up to the states, the laws are unique across the various jurisdictions.<sup>72</sup> As industries that commonly reach across state lines, the livestock, meat, and poultry

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U.S. 356 (2023) (No. 21-468) (stating Proposition 12 was drafted by the Humane Society of the United States).

65. Erin Cox, *Buoyed by Recent Wins, Animal Rights Lobby in Md. Revisits Cage-Free Eggs*, THE WASH. POST (Nov. 24, 2023, 6:00 AM), <https://www.washingtonpost.com/dc-md-va/2023/11/24/maryland-cage-free-egg-law/>.

66. Joel Estevinho, *Welfare Implications of Cage-Free Egg Production*, POULTRY WORLD (June 12, 2021), <https://www.poultryworld.net/health-nutrition/welfare-implications-of-cage-free-egg-production/>.

67. *Id.*

68. *See supra* notes 57–63 and accompanying text (discussing the misinformed idea that outlawing gestation crates is a more humane production practice).

69. *See, e.g.*, Jennifer Shike, *Proposition 12 Is Not the Way We Want to Care for Animals, Hays Says*, PORK BUS. (Sept. 16, 2022), <https://www.porkbusiness.com/news/ag-policy/proposition-12-not-way-we-want-care-animals-hays-says> (“[Proposition 12] was done in the name of improving animal welfare, [but] will [actually] decrease the welfare, health, and the safety of those animals.”).

70. *See generally* Jenny Schlecht et al., *Pork Industry Sees Prop 12 Enforcement Hurting Pig Farmers, Consumers, and Animal Health*, AGWEEK (May 22, 2023, 5:29 AM) <https://www.agweek.com/news/policy/pork-industry-sees-prop-12-enforcement-hurting-pig-farmers-consumers-and-animal-health> (explaining that Proposition 12 does little to improve animal welfare but does have a negative effect on production efficiency).

71. David Favre, *Supreme Court Grapples with Animal Welfare in a Challenge to a California Law Requiring Pork to Be Humanely Raised*, PBS (Oct. 9, 2022, 9:02 AM), <https://www.pbs.org/newshour/politics/supreme-court-grapples-with-animal-welfare-in-a-challenge-to-a-california-law-requiring-pork-to-be-humanely-raised>.

72. Elizabeth R. Rumley, *States' Farm Animal Confinement Statutes*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/state-compilations/farm-animal-welfare/> (last updated May 1, 2021) (showing the various state laws regarding animal confinement).

production industries deserve a regulatory framework for animal welfare that promotes consistency and uniformity across the markets.<sup>73</sup>

There are two very opposite viewpoints engaged in this debate: (1) the producers who are attempting to feed millions of people using sustainable and affordable production methods, and (2) the animal rights activists who purport to care exclusively about the humane care and treatment of animals.<sup>74</sup> The challenge is striking the balance between the two viewpoints. So far, the attempts to find this balance—which have resulted in legislation being passed without voters or legislatures entirely considering what animal husbandry practices are supported by scientific evidence—have imposed significant burdens on food production.<sup>75</sup> When efficiency of production decreases, food prices rise.<sup>76</sup>

One of the most recent and prominent examples of a state law that prioritizes the activist agenda and threatens efficiency is California's Proposition 12.<sup>77</sup> Proposition 12 was a ballot initiative that imposed new confinement guidelines for breeding pigs, veal-production calves, and egg-laying hens.<sup>78</sup> The proposed objective of Proposition 12, also known as "The Prevention of Cruelty to Farm Animals Act," was to "prevent animal cruelty by phasing out extreme methods of farm animal confinement."<sup>79</sup> California also held the position that extreme methods of confinement would "threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California."<sup>80</sup>

Proposition 12 prohibits farm operators within the state from knowingly allowing any covered animals to be confined in a "cruel manner."<sup>81</sup> It also imposes compliance on out-of-state producers by prohibiting the sale of any uncooked pork products, uncooked veal products, shell eggs or liquid egg products that the business owner or operator is aware come from an animal

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73. See Miranda Groh, *The Confines of Federalism on Farmed Animal Welfare*, 29 ANIMAL L. 167, 188 (2023) (explaining that a federal standard for farm animal welfare is more practical due to the interconnected nature of the agriculture and food industries).

74. See generally Garrett M. Broad, *Animal Production, Ag-Gag Laws, and the Social Production of Ignorance: Exploring the Role of Storytelling*, 10 ENV'T COMM'N 43 (2016) (analyzing these two different viewpoints in a similar context).

75. See generally Schlecht et al., *supra* note 70 (discussing not only the burdensome economic effects of Proposition 12 but also the negative impact it could have the welfare of sows—impact the voters may not have considered or understood).

76. See *id.* (explaining that the expensive changes producers will have to make under Proposition 12 will cause the price of pork rise).

77. CAL. HEALTH & SAFETY CODE §§ 25990–91 (West 2015).

78. *Id.*

79. Cheri Shankar, *Request for Title and Summary for Proposed Initiative Statute*, ATT'Y GEN. OF CAL. (Aug. 29, 2017), [https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29\\_0.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29_0.pdf).

80. See *id.*

81. CAL. HEALTH & SAFETY CODE § 25990 (West 2015).

raised in a cruel manner.<sup>82</sup> The statute defines “confined in a cruel manner” as “confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.”<sup>83</sup>

Aside from Proposition 12, eighteen states have passed state legislation regulating farm animal confinement.<sup>84</sup> So far, a few states have given regulatory authority to a “board” or a group of specific individuals charged with establishing the standards for animal care and management in their state.<sup>85</sup> Other states have passed statutes or regulations that impose confinement guidelines on the producers in their state but do not impose guidelines on out-of-state producers through the prohibition of sales.<sup>86</sup> Lastly, some state regulations and statutes are very similar to California’s Proposition 12, imposing confinement guidelines on out-of-state producers by prohibiting the sale of meat in the state if it is not a product that was raised in compliance with the state’s statutes.<sup>87</sup> The Supreme Court’s recent holding in *National Pork Producers* will likely incentivize more states to adopt their own unique laws regarding farm animal production practices while being practically immune from constitutional violations.<sup>88</sup>

#### *D. The Dormant Commerce Clause Before National Pork Producers Council v. Ross*

The Constitution and specifically the Dormant Commerce Clause are heavily implicated by California’s Proposition 12 and thoroughly discussed in *National Pork Producers Council v. Ross*.<sup>89</sup> There is a long line of precedent regarding the Commerce Clause, the adjacent doctrine of the Dormant Commerce Clause, and the later-developed *Pike* balancing test, as these principles have been thoroughly discussed and developed by the courts.<sup>90</sup>

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82. *Id.* §25990–91

83. *Id.* § 25991(e)(1).

84. *See infra* notes 85–87 and accompanying text (discussing the different state laws regulating animal confinement).

85. *See* IND. CODE §15-17-3-23 (2011); LA STAT. ANN. §3:2093 (2020); OHIO CONST. art. XIV, § 1; UTAH CODE ANN. § 4-2-180 (2022); W. VA. CODE R. § 19-1C-1–6 (2021).

86. *See* ME. STAT. tit. 7, § 4020 (2009); ME. STAT. tit. 17, § 1039 (2014); FLA. CONST. art. 10, § 21; ARIZ. REV. STAT. §§ 13-2910.07 (2012); 302 KY. ADMIN REGS. 21:030 (2021); UTAH CODE ANN. § 4-4a-101–07 (2021); 4 R.I. GEN. LAWS § 4-1.1 (2013).

87. *See* COLO. REV. STAT. §§ 35-21-201–09 (2020); MASS. GEN. LAWS ch. 129 App., §§ 1-1–11 (2022); MICH. COMP. LAWS §287.746 (2020); NEV. REV. STAT. § 583.211–51 (2022); WASH. REV. CODE § 69.25.107–10 (2019); OR. REV. STAT. § 632.835–50 (2023).

88. *See Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 391 (2023).

89. *See generally Nat’l Pork Producers*, 598 U.S. 356 (discussing the Dormant Commerce Clause and the *Pike* balancing test in relation to California’s Proposition 12).

90. *See infra* Section II.D (providing a brief background on the various cases that have addressed the Commerce Clause, the Dormant Commerce Clause, and the *Pike* balancing test).

*1. A Brief Overview of the Dormant Commerce Clause*

The Commerce Clause grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>91</sup> Supreme Court precedent demonstrates three categories of activity that Congress can regulate under the Commerce Clause: (1) the channels of commerce, (2) the instrumentalities of commerce, and (3) activities that substantially affect interstate commerce.<sup>92</sup>

In the Constitution, the language of the Commerce Clause does not mention *state* commerce powers.<sup>93</sup> However, the Court has interpreted the Commerce Clause as granting Congress the *sole power* to regulate commerce; therefore, states are prohibited from passing laws that unduly restrict interstate commerce.<sup>94</sup> This interpretation, known as the Dormant Commerce Clause, controls “[t]his ‘negative’ aspect of the Commerce Clause, prevent[ing] the [s]tates from adopting protectionist measures and thus preserv[ing] a national market for goods and services.”<sup>95</sup>

One of the first cases to address the Dormant Commerce Clause after its establishment was *Cooley v. Board of Wardens*.<sup>96</sup> There, the Supreme Court held that while Congress’s power to regulate commerce included navigation, the state was not prohibited from passing a law regulating pilots *in the state*.<sup>97</sup> In that case, the law only implicated local, not national, concerns, and therefore, it was within the jurisdiction of the state to regulate.<sup>98</sup> The Court reasoned that the state law was valid because it did not *interfere* with Congress’ power to regulate commerce.<sup>99</sup> However, in later cases, state laws began to get struck down on the basis of their regulation of interstate commerce.<sup>100</sup> For example, in *Baldwin v. G.A.F. Seelig, Inc.*, the Court struck down the New York Milk Control Act, which established a price scale requiring out-of-state producers to sell milk products in the state at a certain price.<sup>101</sup> The Court reasoned that a state cannot put pressure on other states to conform to its standards in order to achieve an in-state purpose.<sup>102</sup> In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the

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91. U.S. CONST. art. I, § 8, cl. 3.

92. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (citing various Supreme Court cases).

93. *See* U.S. CONST. art. I, § 8, cl. 3 (lacking any mention of the commerce powers of the states).

94. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

95. *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L.Ed.2d 302 (1988)).

96. *See generally* *Cooley v. Bd. of Wardens of Port of Philadelphia*, 53 U.S. 299 (1851) (discussing the Dormant Commerce Clause and states’ ability to regulate navigation).

97. *Id.* at 318.

98. *Id.* at 319.

99. *See id.* at 321.

100. *See* *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935); *see* *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986).

101. *Baldwin*, 294 U.S. at 528.

102. *Id.* at 524.

Court, again, struck down a New York law that required liquor wholesalers to sell at a price no higher than the lowest price charged in any other state—reasoning that the state was directly regulating interstate commerce by requiring a wholesaler to gain regulatory approval in one state before participating in a transaction in another state.<sup>103</sup> While these New York laws were facially discriminatory, even laws that only have an incidental effect on commerce may be struck down when the local benefit does not *outweigh* the burden on interstate commerce.<sup>104</sup>

## 2. *The History and Development of the Pike Balancing Test*

As the Dormant Commerce Clause developed, the Supreme Court recognized that some state laws, while not facially discriminatory against out-of-staters, were still affecting interstate commerce.<sup>105</sup> Therefore, when a state law is regulating in- and out-of-staters equally to achieve a legitimate local interest and incidentally affects interstate commerce, the Supreme Court has held that the law will be upheld unless the burden imposed on interstate commerce “is clearly excessive” to the local benefit.<sup>106</sup> This “clearly excessive” standard is what is commonly known as the *Pike* balancing test.<sup>107</sup> The *Pike* balancing test is only applied to laws that are “directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”<sup>108</sup> One of the most recent analyses of the *Pike* balancing test appears in *National Pork Producers Council v. Ross*, which is discussed in Section II.E and Part III of this Comment.<sup>109</sup>

We first see the *Pike* balancing test in its namesake case, *Pike v. Bruce Church, Inc.*<sup>110</sup> There, Arizona passed the Arizona Fruit and Vegetable Standardization Act, which required that all cantaloupes grown and sold in Arizona must have been “packed in regular compact arrangement in closed standard containers approved by the supervisor.”<sup>111</sup> Implicated by this act was a cantaloupe operation that had operations in both Arizona and California, but only one processing facility, which was at its California location.<sup>112</sup> As an enforcement measure, the state issued an order prohibiting the cantaloupe operation from transporting uncrated cantaloupes to its

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103. *Brown-Forman*, 476 U.S. at 582.

104. *See Pike v. Bruce Church, Inc.* 397 U.S. 137, 141–42 (1970).

105. *See id.*

106. *Id.* at 142.

107. *See id.*

108. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

109. *See infra* Part III, Section II.E (analyzing the *Pike* balancing test as discussed in *National Pork Producers*).

110. *Pike*, 397 U.S. at 142.

111. *Id.* at 138.

112. *Id.*

California location for processing.<sup>113</sup> The state's primary purpose for passing the Act was to "promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging."<sup>114</sup> The Arizona cantaloupe operation was going to be forced to spend \$200,000 building a new packing plant in Arizona in order to comply with the law.<sup>115</sup> The Court reasoned that the state had a legitimate interest in passing the law, but it did not outweigh the burden on the Arizona cantaloupe company—building a new packing plant was expensive and unnecessary.<sup>116</sup> Therefore, applying the balancing test, the Court concluded that the burden on commerce was excessive in comparison to the local benefit.<sup>117</sup>

A decade after *Pike* was decided, the Minnesota legislature passed a law "banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons."<sup>118</sup> The state's purpose in enacting the statute was to encourage the use of returnable and reusable packaging for milk products.<sup>119</sup> Applying the *Pike* balancing test, the Court in *Minnesota v. Clover Leaf Creamery Co.* held the burden on interstate commerce was *not* clearly excessive in relation to the benefit to Minnesota.<sup>120</sup> The Court reasoned that because most dairies already packaged their products in different types of containers, it would be a minor inconvenience to conform to the new packaging requirements, and milk products would still be able "to move freely across the Minnesota border . . ."<sup>121</sup> Additionally, in response to the argument that the out-of-state plastics industry would be burdened by the statute's implications, the Court concluded that the burden was not clearly excessive in relation to the interest of reducing solid waste disposal issues in the state.<sup>122</sup>

Alternatively, in *Hunt v. Washington State Apple Advertising Commission*, the Court applied a version of the *Pike* balancing test and found that a North Carolina labeling statute was unconstitutional under the Dormant Commerce Clause.<sup>123</sup> There, the state passed a law requiring "all closed containers of apples sold, offered for sale, or shipped into the State" to meet certain labeling requirements.<sup>124</sup> When a Washington apple company brought suit, the Court was forced to weigh the burden the law had on the marketing

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113. *Id.* at 139.

114. *Id.* at 143.

115. *Id.* at 145.

116. *See id.* at 146.

117. *Id.*

118. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981).

119. *Id.* at 459.

120. *Id.* at 472.

121. *Id.*

122. *Id.* at 473.

123. 432 U.S. 333, 354 (1977).

124. *Id.* at 335.

and sale of apples against the benefit to North Carolina of protecting citizens from confusion and deception in the marketplace.<sup>125</sup> The Court found that the law did little to achieve the law's proposed objective, and because of that, the burden on commerce clearly outweighed the benefit to North Carolina.<sup>126</sup>

As exhibited in its many applications of the *Pike* balancing test, the Court is able to weigh local benefits against the burdens on interstate commerce to determine if a state law is unconstitutional.<sup>127</sup> In *Pike*, the Court weighed the state's interest in protecting and enhancing the reputation of cantaloupe growers in Arizona with the \$200,000 impact on the appellant company.<sup>128</sup> Additionally, in *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, the Court was tasked with weighing the *benefit* of a waste-flow-control ordinance that ensured the town-sponsored facility would be profitable with the *burden* of "depriving competitors, including out-of-state firms, of access to a local market . . . ."<sup>129</sup> The Court's precedent makes it clear that it is capable of weighing economic burdens against noneconomic benefits under the *Pike* balancing test.<sup>130</sup>

#### *E. National Pork Producers Council v. Ross and a Narrower Approach to the Dormant Commerce Clause*

The Supreme Court was recently tasked with analyzing another state law, California's Proposition 12, for its constitutionality under the scope of the Dormant Commerce Clause.<sup>131</sup> After California passed Proposition 12, the National Pork Producers Council and the American Farm Bureau Federation (Petitioners) filed suit pursuing a claim that Proposition 12 violated the Dormant Commerce Clause.<sup>132</sup> The Supreme Court took up the case at the motion to dismiss phase and ultimately held, in a five-four decision, that Petitioners did not state a plausible claim for relief under Federal Rule of Civil Procedure 12(b)(6).<sup>133</sup> The ultimate holding of the majority was that Proposition 12 did not violate the Dormant Commerce Clause.<sup>134</sup>

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125. *Id.* at 350–53.

126. *Id.* at 353–54.

127. *See Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970); *see C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994).

128. *Pike*, 397 U.S. at 143–44.

129. *C & A Carbone, Inc.*, 511 U.S. at 386 (holding that the flow-control ordinance violated the Commerce Clause).

130. *See Pike*, 397 U.S. at 142; *C & A Carbone, Inc.*, 511 U.S. at 391.

131. *See generally Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (holding Proposition 12 was not a violation of the Dormant Commerce Clause).

132. *Id.* at 365.

133. *Id.* at 391. Federal Rule of Civil Procedure 12(b)(6) is a motion to dismiss for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

134. *National Pork Producers*, 598 U.S. at 391.

In the case, Petitioners put forth two main theories of argument.<sup>135</sup> First, that Proposition 12 violated the extraterritorial doctrine set forth by Dormant Commerce Clause precedent.<sup>136</sup> Second, that if the Court were to apply the *Pike* balancing test, the economic burden on producers and consumers would clearly outweigh the benefits to Californians.<sup>137</sup> The Court ultimately rejected both arguments.<sup>138</sup> First, the Court insisted that, even when considering its precedent, there is no “per se” rule that laws with extraterritorial effects violate the Dormant Commerce Clause.<sup>139</sup> Next, the Court refused to apply the *Pike* balancing test because it determined that there was not enough of a burden on interstate commerce to justify an application of the test.<sup>140</sup>

As reflected in the complex court opinion, the Justices were very conflicted about how to decide the case.<sup>141</sup> The main conflict appeared in the Court’s analysis of whether to apply the *Pike* balancing test.<sup>142</sup> While all of the Justices agreed that the test should not be applied, they offered differing reasons, best presented by Justice Sotomayor and Justice Barrett’s concurring opinions.<sup>143</sup> Justice Sotomayor, joined by Justice Kagan, reasoned that the Petitioners failed to satisfy the “threshold requirement” of alleging a substantial burden on interstate commerce; therefore, the *Pike* balancing test could not be applied.<sup>144</sup> In contrast, Justice Barrett argued that the Petitioners had alleged a substantial burden, but that the benefits and burdens of the law were not capable of judicial balancing.<sup>145</sup> While the *Pike* balancing test remains intact, these opinions represent that the Court, moving forward, may be more hesitant to apply it.<sup>146</sup> While the future of the Dormant Commerce Clause remains unclear from the opinion, the Court’s decision ultimately allows California’s Proposition 12 to stand.<sup>147</sup>

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135. *Id.* at 377.

136. *Id.* at 371.

137. *Id.* at 377.

138. *Id.* at 391.

139. *Id.* at 375.

140. *Id.* at 377–78.

141. *See generally Nat’l Pork Producers*, 598 U.S. 356 (including five opinions: a majority opinion, two concurring opinions, and two opinions in which the justices concurred in part and dissented in part).

142. *Id.* at 377.

143. *Id.* at 393–94.

144. *Id.* at 393 (Sotomayor, J., concurring).

145. *Id.* at 394 (Barrett, J., concurring).

146. *See KATE R. BOWERS*, CONG. RSCH. SERV., LSB11031, SUPREME COURT NARROWS DORMANT COMMERCE CLAUSE AND UPHOLDS STATE ANIMAL WELFARE LAW, 1, 5 (2023).

147. *Id.*

III. HOW THE SUPREME COURT MISAPPLIED THE DORMANT COMMERCE CLAUSE IN *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

The Supreme Court has long interpreted state laws to determine if they impose a substantial burden on interstate commerce.<sup>148</sup> In the line of Dormant Commerce Clause cases, the Court has held that even when a law is facially neutral, it may still be considered a violation of the Dormant Commerce Clause if it is discriminatory in its effect.<sup>149</sup> In *National Pork Producers*, the Supreme Court misapplied the Dormant Commerce Clause and disregarded precedent when it upheld California's Proposition 12 because the law violates the Dormant Commerce Clause.<sup>150</sup>

Proposition 12 imposes in-state regulations on out-of-state producers by prohibiting the sale of any product not produced under California's guidelines.<sup>151</sup> Because the law requires compliance for California producers as well as out-of-state producers, the law is not discriminatory on its face or in its purpose.<sup>152</sup> However, once implemented, it will be discriminatory in its effect.<sup>153</sup> California, which consumes 13% of the nation's pork supply, imports more than 99% of its pork products from producers in other parts of the United States.<sup>154</sup> By imposing guidelines on the *sale* of pork in California, the state has incidentally applied its state regulations overwhelmingly onto out-of-state producers.<sup>155</sup>

Having conceded that Proposition 12 did not discriminate against out-of-staters on its face, the Petitioners in *National Pork Producers* pursued two other theories as to why this law still violated the Dormant Commerce Clause.<sup>156</sup> The first was an "almost *per se*" rule that state laws with extraterritorial effects violate the Dormant Commerce Clause.<sup>157</sup> The second

148. See *Gibbons v. Ogden*, 22 U.S. 1, 240 (1824) (establishing the Dormant Commerce Clause); *Baldwin v. G.A.F. Seeling, Inc.* 294 U.S. 511 (1935); *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977); *Healy v. Beer Institute, Inc.* 491 U.S. 324 (1989); *West Lynn Creamery, Inc. v. Healy* 512 U.S. 186 (1994); *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

149. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (finding the discriminatory effect of a state statute which banned the sale of milk in plastic containers, regardless of whether they were produced inside or outside of the state, was that producers would be inconvenienced by having to conform to the new packaging requirements).

150. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 391 (2023).

151. CAL. HEALTH & SAFETY CODE § 25990 (West 2015).

152. See *id.*

153. See *California's Proposition 12*, VALCO, <https://www.val-co.com/californias-proposition-12/> (last visited Oct. 26, 2024) ("[Proposition] 12 mostly applies to pork producers outside of California's borders.").

154. See *Commodity Fact Sheet, Pork*, CAL. PORK PRODUCERS ASS'N 1, 1 [https://cdn.saffire.com/files.ashx?t=fg&rid=CowPalace&f=PDF\\_pork\\_fact\\_sheet\\_pg\\_1.pdf](https://cdn.saffire.com/files.ashx?t=fg&rid=CowPalace&f=PDF_pork_fact_sheet_pg_1.pdf) ("Although California makes up less than 1% of the total US pork production, it accounts for 13% of the national pork consumption.").

155. See *id.*; see CAL. HEALTH & SAFETY CODE § 25990 (West 2015).

156. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371 (2023).

157. *Id.*

argument was that the Court should apply the balancing test from *Pike*.<sup>158</sup> The Court rejected both arguments in a narrow interpretation of the Dormant Commerce Clause.<sup>159</sup>

*A. Petitioners' Claims Clearly Presented a Plausible Claim for Relief*

*National Pork Producers* came to the Supreme Court at the motion to dismiss phase.<sup>160</sup> Because the Petitioners were facing a 12(b)(6) motion to dismiss for failure to state a claim, they only needed to plead facts that “plausibly” suggested a substantial burden on interstate commerce.<sup>161</sup> Petitioners alleged that Proposition 12 presented extraterritorial reach and massive market disruption within the pork industry.<sup>162</sup> The complaint included allegations that, at the time the case was filed, a “miniscule” portion of the sows in the United States were housed in a way that complied with Proposition 12.<sup>163</sup> Therefore, as also alleged, Proposition 12 would impose costly changes on all pork producers wishing to comply.<sup>164</sup> In *Pike v. Bruce Church, Inc.*, the Court struck down a state law that was trying to regulate the movement of produce across state borders because the law imposed unnecessary costs on a cantaloupe producer.<sup>165</sup> *National Pork Producers* is directly analogous to *Pike* because Proposition 12’s attempt to regulate the sale of meat products is imposing unnecessary costs on pork producers.<sup>166</sup>

Additionally, while the Court reasoned the complaint could not survive a motion to dismiss based on the alleged increase in compliance costs, the Petitioners’ complaint alleged more than just increased costs for producers.<sup>167</sup> A common theme throughout Petitioners’ complaint was how heavily this would disrupt the pork market, not only for producers but also for consumers.<sup>168</sup> The Petitioners’ complaint included statements asserting that the price increases Proposition 12 would impose on consumers would “mak[e] it more difficult for families on a budget to afford [an] important

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158. *Id.* at 377.

159. *Id.* at 391.

160. *Id.* at 397 (Roberts, C.J., concurring in part and dissenting in part).

161. *Id.* at 385; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

162. Complaint for Declaratory and Injunctive Relief at ¶ 33, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

163. *Id.* at ¶ 27.

164. *Id.* at ¶ 28.

165. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144–45 (1970).

166. *See id.*; *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023); *See generally* Schlecht et al., *supra* note 70 (reasoning that Proposition 12 was unnecessary because “pork producers already take great care of their animals”).

167. *Nat’l Pork Producers*, 598 U.S. at 397 (2023) (Roberts, C.J., concurring in part and dissenting in part).

168. *See generally* Complaint for Declaratory and Injunctive Relief at ¶28, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468) (providing context for the allegations of the Petitioners).

source of protein.”<sup>169</sup> Therefore, the Court was wrong to conclude that the burden was simply a speculative possibility.<sup>170</sup> It was plausible, and really inevitable, that the effects of California’s Proposition 12 could create a substantial burden on a national market.<sup>171</sup>

### *B. California’s Proposition 12 Will Have Extraterritorial Effects*

Petitioners first pursued the argument that Proposition 12 should be struck down because of its extraterritorial effects.<sup>172</sup> Under the extraterritorial principle, “a state statute may not control commerce occurring wholly outside the enacting state’s boundaries, even if the statute treats in-state and out-of-state interests evenhandedly.”<sup>173</sup> To support their “extraterritorial effects” position, the petitioners drew the Court’s attention to three cases: *Healy v. Beer Institute*,<sup>174</sup> *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>175</sup> and *Baldwin v. G.A.F. Seelig, Inc.*<sup>176</sup> Using these cases, the Petitioners were attempting to argue there is an “almost per se” rule that prohibits state laws that have the “practical effect of controlling commerce outside the state . . . .”<sup>177</sup>

The Court rejected the Petitioners’ position because it said the holdings of those cases advanced by Petitioners were narrow, fact-specific decisions and could not be applied in this context.<sup>178</sup> However, the cases, while distinguishable, are not so different as to warrant a rejection of the Supreme Court’s precedent. In *Healy*, *Brown-Forman*, and *Baldwin*, the state statutes at issue imposed *price restrictions* on producers and sellers outside of the respective states.<sup>179</sup> Here, Proposition 12 imposes *production restrictions* on out-of-state livestock producers.<sup>180</sup>

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169. *See id.*

170. *Nat’l Pork Producers*, 598 U.S. at 386.

171. *See generally* Complaint for Declaratory and Injunctive Relief at ¶ 28, *Nat’l Pork Producers*, 598 U.S. 356 (No. 21-468) (alleging multiple factual allegations that provide a plausible claim that Proposition 12 is unconstitutional).

172. *Nat’l Pork Producers*, 598 U.S. at 371.

173. Robin Feldman & Gideon Schor, *Constitutional Law: Lochner Revenant: The Dormant Commerce Clause & Extraterritoriality*, in *THE JUDGES’ BOOK* 21, 21 (Vol. 7, Art. 5, 2023).

174. *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (holding that a Connecticut statute, which controlled the prices at which out-of-state shippers could sell beer in other states, was a violation of the Dormant Commerce Clause).

175. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986) (holding that a New York statute, which imposed a price schedule on all distillers who sold products in the state, was unconstitutional under the Dormant Commerce Clause).

176. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) (holding that a New York statute, which established a minimum price for milk in the state, was unconstitutional).

177. *Nat’l Pork Producers*, 598 U.S. at 371.

178. *Id.* at 374.

179. *Healy*, 491 U.S. at 326; *Brown-Forman*, 476 U.S. at 575; *Baldwin*, 294 U.S. at 519.

180. CAL. HEALTH & SAFETY CODE § 25990 (West 2015).

Additionally, these cases present practical principles that can be followed in this context.<sup>181</sup> In *Brown-Forman*, the Court reasoned that a state could not project its legislation onto other states and stated that “forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulated interstate commerce.”<sup>182</sup> Also, in *Healy*, the Supreme Court stated that “the practical effect of a statute must be evaluated . . . by considering how the challenged statute may interact with the legitimate regulatory regimes of other [s]tates and what effect would arise if not one, but many or every, [s]tate adopted similar legislation.”<sup>183</sup> The Court, drawing on its precedent, should have recalled that the simple, yet “critical inquiry . . . is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.”<sup>184</sup>

Here, the practical effect of Proposition 12 is that it will inevitably control food production beyond the boundaries of California.<sup>185</sup> Like the reasoning stated in *Brown-Forman*, livestock producers in Iowa and North Carolina, for example, will have to seek regulatory approval before participating in any transactions in California.<sup>186</sup> Based on *Healy*, the Court needed to consider the practical effects not only on producers and consumers, but also on the agriculture industry as a whole.<sup>187</sup> Had it done so, the Court likely would have concluded that upholding Proposition 12 would set a dangerous precedent that states are allowed to regulate agricultural production in other states.<sup>188</sup>

Holding that Proposition 12 does not create a substantial burden on interstate commerce incentivizes other states to pass their own extraterritorial legislation, creating a continuance of all of the burdens alleged by Petitioners.<sup>189</sup> As seen in the already unique patchwork of state laws in place, there is no way to predict the specific characteristics of fifty farm animal confinement statutes.<sup>190</sup> With states having different priorities, it is very possible producers would have to adapt continuously to new and conflicting methods.<sup>191</sup> The burden on producers to stay in compliance with as many as fifty different production styles would be exponential.<sup>192</sup> Therefore, the

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181. See *Brown-Forman*, 476 U.S. at 582; see *Healy*, 491 U.S. at 336.

182. *Brown-Forman*, 476 U.S. at 582.

183. *Healy*, 491 U.S. at 336.

184. *Id.*

185. See CAL. HEALTH & SAFETY CODE § 25990.

186. See *id.*; see *Brown-Forman*, 476 U.S. at 582.

187. See *Healy*, 491 U.S. at 336.

188. See BOWERS, *supra* note 146, at 5.

189. ARTICLE: LEADING CASE: CONSTITUTIONAL LAW: *Dormant Commerce Clause Interstate Commerce State Law Extraterritoriality National Pork Producers Council v. Ross*, 137 HARV. L. REV. 330, 337–38 (Nov. 2023).

190. See *supra* notes 84–87 and accompanying text (overviewing the current state farm animal confinement statutes).

191. See Groh, *supra* note 73, at 188.

192. See *id.*

extraterritorial effects of Proposition 12 on the agriculture industry as a whole should have given the Court even more motivation to find that a violation of the Commerce Clause was plausible in this case.<sup>193</sup>

*C. California’s Proposition 12 Is a Classic State Law for Application of the Pike Balancing Test*

Because the Petitioners’ argument for a “per se” rule against extraterritorial effects failed, the Court, in turn, considered the Petitioners’ argument that the *Pike* balancing test should be applied.<sup>194</sup> The test that emerged in *Pike v. Bruce Church, Inc.* was that when a statute impacts interstate commerce to achieve a state’s legitimate public interest, it will be upheld unless the burden it imposes on commerce is “clearly excessive” in relation to that local benefit.<sup>195</sup> While the justices had differing views on the application of *Pike* in this case,<sup>196</sup> the Court ultimately ruled that it could not apply the *Pike* balancing test to Proposition 12.<sup>197</sup> The reasoning was two-fold: first, in its ruling that *Pike* requires a level of discrimination—a substantial burden on interstate commerce—which was not present in this case;<sup>198</sup> and second, that the Court could not apply the *Pike* balancing test because it would be impossible to weigh the economic burden on out-of-state producers against the benefits to Californians.<sup>199</sup>

*1. California’s Proposition 12 Imposes a Substantial Burden on Interstate Commerce*

To the first point—that there was no substantial burden on interstate commerce—the justices concluded that to apply the *Pike* balancing test, the Petitioners needed to allege that Proposition 12 imposed “purposeful discrimination” on out-of-state producers.<sup>200</sup> While it is true that the *Pike* balancing test can only be applied in certain contexts,<sup>201</sup> Supreme Court precedent has only required an incidental effect, not purposeful discrimination.<sup>202</sup>

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193. *Id.*

194. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 377 (2023).

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

196. The case included four concurring opinions, showing the justices’ differing views of the majority holding. *Nat’l Pork Producers*, 598 U.S. at 391–410.

197. *Nat’l Pork Producers*, 598 U.S. at 377, 381–82.

198. *Id.* at 377.

199. *Id.* at 381–82.

200. *Id.*

201. *See supra* note 108 and accompanying text (describing when the *Pike* balancing test can be applied).

202. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970); *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Historically, when a state's law is facially neutral but imposes burdens on other states, the Supreme Court has held the law unconstitutional because of its practical effects.<sup>203</sup> For example, in *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held that a North Carolina statute that imposed specific labeling guidelines on all apples sold or shipped into the state violated the Dormant Commerce Clause.<sup>204</sup> The Court found that the law had the practical effect of burdening the sale of apples from Washington state and causing Washington to lose competitive and economic advantages and therefore, created a substantial burden on interstate commerce.<sup>205</sup>

Here, pork producers will have to spend up to \$348 million reconstructing their operations to comply with Proposition 12 and overcoming the productivity lost due to this new law.<sup>206</sup> Like *Hunt*, not only is there a clear burden on the sale of pork, but the economic hardships producers are going to face could be detrimental to their operations.<sup>207</sup> Even still, a majority of the Court concluded that these challenges did not impose a substantial burden on interstate commerce.<sup>208</sup>

Rather, the Court pointed out that Petitioners conceded that while the “shift from one set of production methods to another [would promise] some costs,” producers would be able to pass along some of the cost increases to consumers.<sup>209</sup> This led the Court to reason that because the costs would ultimately be endured by the same consumers who voted to adopt the law, that effect did not count as a substantial burden.<sup>210</sup> What the Court should have considered was the allegation by Petitioners that after producers are forced to change their production practices, the costs will not only be imposed upon California but will also be endured throughout the entire country.<sup>211</sup> Thus, the pleadings supported a finding of a substantial burden on interstate commerce and a subsequent application of the *Pike* balancing test.<sup>212</sup>

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203. See, e.g., *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 354 (1977).

204. *Id.*

205. *Id.* at 351.

206. Complaint for Declaratory and Injunctive Relief at ¶ 342, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

207. See *id.*; *Hunt*, 432 U.S. at 351.

208. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 387 (2023).

209. *Id.* at 385–86.

210. *Id.* at 386.

211. Complaint for Declaratory and Injunctive Relief at ¶ 344–45, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

212. See Complaint for Declaratory and Injunctive Relief, *Nat'l Pork Producers*, 598 U.S. 356 (No. 21-468).

## 2. *The Court Is Capable of Weighing Economic Burdens and Noneconomic Benefits*

To the second point—that the Court could not apply the *Pike* balancing test because of the impossibility of weighing the economic burdens against the noneconomic benefits to California—the justices struggled with applying a balancing test in this context.<sup>213</sup> Justice Gorsuch stated that it is as if Petitioners had asked the Court to decide “whether a particular line is longer than a particular rock is heavy.”<sup>214</sup> Justice Gorsuch and Justice Barrett painted the *Pike* test as impossible to apply in this context because, as Justice Barrett put it, “California’s interest in eliminating allegedly inhumane products from its markets cannot be weighed on a scale opposite dollars.”<sup>215</sup>

However, as Chief Justice Roberts pointed out, the Court is often called upon to decide issues based on competing interests, and they often have “to weigh seemingly incommensurable values.”<sup>216</sup> In *Pike* itself, the Court had to weigh the economic burdens Arizona’s Fruit and Vegetable Standardization Act imposed on out-of-state producers against the local benefit of protecting the reputation of Arizona growers—a noneconomic local interest.<sup>217</sup> Similarly, here, the Court can, and should have, weighed the burdens and benefits.<sup>218</sup>

## 3. *California’s Proposition 12 Likely Fails the Pike Balancing Test, and Will Cause Additional Food Insecurity*

If the Supreme Court had applied the *Pike* balancing test, it likely would have found that the burden on interstate commerce heavily outweighed the benefit to the state of California.<sup>219</sup> Because the Court did not apply the test, the Respondent, California’s Secretary of Agriculture, did not provide detailed arguments regarding the benefits Proposition 12 brings to California.<sup>220</sup> However, the California Department of Agriculture advertised that the purpose of Proposition 12 was to “ensure animal agriculture producers [were] promoting and protecting the welfare and care of animals in agriculture and making sure California consumers [had] access to food that

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213. *Nat’l Pork Producers*, 598 U.S. at 380.

214. *Id.* at 381 (quoting *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment)).

215. *Id.* at 393 (Barrett, J., concurring).

216. *Id.* at 396 (2023) (Roberts, C.J., concurring in part and dissenting in part) (citing *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162, (1939); *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

217. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142–43 (1970).

218. *See id.*

219. *See generally id.* at 142 (providing context for the *Pike* balancing test)

220. *See generally Nat’l Pork Producers*, 598 U.S. at 356 (refusing to apply the *Pike* balancing test for a number of reasons).

[was] sourced from humanely and sustainably raised animals.”<sup>221</sup> The purported benefit discussed in the case was that the law served a moral benefit or a health interest for some residents of the state.<sup>222</sup>

However, Proposition 12 does not fulfill California’s proposed objective.<sup>223</sup> The pork production guidelines set forth in Proposition 12 do not create a more humane environment for the animals.<sup>224</sup> Additionally, the effects of the law will not create a more sustainable food supply.<sup>225</sup> In *Hunt v. Washington State Apple Advertising Commission*, the objective of Washington’s statute was to protect citizens from confusion in the marketplace.<sup>226</sup> Although, the Court, applying a version of the *Pike* balancing test, reasoned that while the state had a legitimate purpose, the law itself did “remarkably little” to further the state’s objective.<sup>227</sup> The Court struck down the law in *Hunt* because, with little to no benefits, the *burden* weighed heavier in the balancing test.<sup>228</sup> Here, Proposition 12 does not accomplish safety for the animals nor sustainability for the food supply.<sup>229</sup> Therefore, because the intended objective of Proposition 12 is not being accomplished, there is little to no benefit to California.<sup>230</sup>

In contrast, Petitioners set forth a number of allegations pointing to the substantial and detrimental burdens California’s Proposition 12 places on the pork industry.<sup>231</sup> Some of the allegations include the fact that almost the entire industry is not currently in compliance with Proposition 12 and would have to make massive production changes,<sup>232</sup> that producers will have to spend over \$300 million of additional capital to reconstruct their

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221. *CDFA Proposition 12 – Farm Animal Confinement*, QUALITY SYS. ENHANCEMENT, <https://enhancequality.com/cdfa-proposition-12-farm-animal-confinement/> (last visited Oct. 26, 2024).

222. *Nat’l Pork Producers*, 598 U.S. at 382.

223. *See* Shike, *supra* note 69.

224. *See id.*

225. *See* Todd Neeley, *Groups Call Out NPPC on Proposition 12*, PROGRESSIVE FARMER (Aug. 18, 2023 2:47 PM), <https://www.dtnpf.com/agriculture/web/ag/news/article/2023/08/18/animal-rights-groups-coalesce-bill> (“Proposition 12 is not-science based, will increase a farm’s environmental footprint[,] and . . . will increase prices and shrink supplies of an affordable and healthy protein for families inside and outside California.”).

226. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 353 (1977).

227. *Id.*

228. *See id.* at 353–54.

229. *See generally* *California’s Prop 12 Puts Food Security, and Animal Health at Risk*, WASH. POL’Y CTR., <https://www.nationalbeefwire.com/california-s-prop-12-puts-food-security-and-animal-health-at-risk> (last visited Oct. 24, 2024) (pointing out that Proposition 12 was designed to improve animal welfare, but instead produced new challenges for both the health of the animals and the affordability of the food supply).

230. *See Hunt*, 432 U.S. at 353 (reasoning that the state has to justify its objectives by showing there are local benefits being experienced by the state).

231. *See generally* Complaint for Declaratory and Injunctive Relief, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468) (setting forth numerous allegations as to Proposition 12’s burdensome effects).

232. *Id.* at ¶ 289.

operations,<sup>233</sup> and that the price of production will increase by 9.2%.<sup>234</sup> Lastly, because of higher production costs, pork products will become more expensive for consumers.<sup>235</sup> If the *Pike* balancing test had been applied, Petitioners' allegations would have transformed into a winning argument for the burden imposed on interstate commerce.<sup>236</sup>

There is a clear imbalance here, considering the laws' inability to achieve California's objective and the substantial burdens it is placing on the pork industry.<sup>237</sup> Had both parties been required to present arguments regarding the *Pike* balancing test, the Petitioners likely would have prevailed.<sup>238</sup> The clear negative impact Proposition 12 has on food prices and food security heavily outweighs any moral benefit there may have been to California.<sup>239</sup>

#### IV. WHY CONGRESS SHOULD STEP IN TO REGULATE THE NATIONAL MARKET IN THE WAKE OF *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

Because the Supreme Court upheld California's Proposition 12 despite its potential for substantially burdening interstate commerce, Congress should utilize its Commerce Clause powers to create a uniform standard for farm animal husbandry laws and preempt the states from passing a patchwork of more restrictive regulations.

##### A. Congress Should Use Its Commerce Clause Powers to Enact a Uniform Standard

Congress has long used its Commerce Clause powers to regulate agricultural production.<sup>240</sup> As products sold in commerce, farm animals are instrumentalities, and thus fit into a category of activities that Congress can regulate under the Commerce Clause.<sup>241</sup> Because the Supreme Court has narrowly interpreted the meaning of a substantial burden on interstate

233. *Id.* at ¶ 342.

234. *Id.* at ¶ 343.

235. *Id.* at ¶ 105.

236. *See generally* Complaint for Declaratory and Injunctive Relief, *Nat'l Pork Producers*, 598 U.S. 356 (No. 21-468) (listing the allegations set forth by Petitioners).

237. *See* Schlecht et al., *supra* note 70 (explaining that Proposition 12 imposes burdens on the industry and does not truly improve animal welfare).

238. *See generally* *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (showing that the parties were not required to present arguments for the *Pike* balancing test on the merits).

239. *See generally* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142-43 (1970) (providing context for the *Pike* balancing test).

240. *See* *Slaughter-House Cases*, 83 U.S. 36, 21 L. Ed. 394 (1872) (regulating meat slaughter); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (regulating wheat production); *Gonzales v. Raich*, 545 U.S. 1 (2005) (regulating production and distribution of marijuana).

241. *Groh*, *supra* note 73, at 181; *see also supra* note 92 and accompanying text (outlining the activities that can be regulated under the Commerce Clause).

commerce and ruled that state animal confinement regulations, such as California's Proposition 12, do not violate the Dormant Commerce Clause, Congress should take legislative action to federally regulate the broader matter of farm animal husbandry.<sup>242</sup> First, Congress should pass a preemption statute—preempting the states from passing any farm animal welfare law or regulation that is more restrictive than the standards set by Congress.<sup>243</sup> Then, Congress should enact legislation setting uniform standards for how producers are to raise and care for farm animals.

Congress should adopt the following proposed statutory provisions as a way to reserve, in itself, the sole power to regulate farm animal husbandry practices and to preempt the states from passing any more restrictive legislation:

Farm Animal Husbandry – Restriction on State and Local Laws and Regulations

A. Except as otherwise provided by law, Congress shall possess the sole power to determine and implement the law concerning the raising of and caring for farm animals.<sup>244</sup>

B. No state or local jurisdiction shall pass any law, statute, or regulation nor enforce any law, statute, or regulation concerning the raising of or caring for farm animals within its jurisdiction that is more restrictive than the regulations passed by Congress.<sup>245</sup>

While this Comment does not propose exact language for the animal husbandry standards, Congress should draw upon the welfare auditing tools and materials created by industry experts in creating its own confinement standards.<sup>246</sup>

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242. *Nat'l Pork Producers*, 598 U.S. at 391.

243. Congress has attempted to pass a legislative solution to Proposition 12, but has not been successful so far. *See, e.g.*, Ending Agricultural Trade Suppression Act, S. 2019, 118th Cong. (as referred to the Committee on Agriculture, Nutrition, and Forestry, June 15, 2023) (representing the most recent attempt at a Proposition 12 “fix”). The Ending Agricultural Trade Suppression (EATS) Act, also previously known as the King Amendment, has been introduced and considered various times by both chambers of Congress and was recently reintroduced in the Senate. *See id.* The EATS Act would prevent local or state governments from “interfering with the production and distribution of agricultural products” if the production occurs in another state. *Id.* There is strong opposition to enacting this legislation, Björn Ólafsson, *211 Members of Congress Now Oppose the EATS Act*, SENTIENT MEDIA (Oct. 15, 2023), <https://sentientmedia.org/eats-act-opposition/>, and the author does not intend to predict the outcome of the EATS act or any similar legislation. This Comment only suggests a solution to the narrower, more specific regulation of farm animal husbandry practices.

244. Elsewhere in the statute, Congress should define “farm animal” to include swine, cattle, and poultry.

245. *See generally* OKLA. STAT. tit. 2, § 2–4(c) (modeling the type of preemption and enabling statutes that should be implemented at the federal level).

246. *See, e.g.*, *Common Swine Industry Audit*, NAT'L PORK BD., 1, <https://www.porkcdn.com/sites/>

*1. Congress Should Utilize Existing Animal Welfare Tools Established by Industry Experts*

For the highest chance of success in regulating farm animal husbandry, Congress should use the ideas established in current animal welfare tools and guidelines to create its legislation.<sup>247</sup> Drafting a federal standard of care for farm animals could be a challenging task for Congress, considering the increasing difficulty it has had in encouraging both sides of the aisle to agree on certain issues.<sup>248</sup> However, opposing sides may be more enticed to work together with an understanding that these regulations will ultimately impact the larger issue of food security.<sup>249</sup> Additionally, the animal agriculture industry and consumer groups have already laid the groundwork—creating individualized auditing tools and educational materials that provide a standard way to measure and achieve adequate animal welfare practices on the farm.<sup>250</sup> These animal welfare materials—which have been set in place by experts in the field—are guides for livestock and poultry producers to be able to balance animal welfare and production efficiency.<sup>251</sup>

Animal welfare audits are the closest farm animal producers have come to finding a way to measure and enforce animal welfare.<sup>252</sup> Currently, any producer can voluntarily use a third party to conduct an audit of their operation; these audits provide an assessment of animal welfare practices on the farm.<sup>253</sup> While animal welfare compliance is not currently required by federal law, “[s]ome U.S. retailers require their suppliers to adhere to minimum animal welfare standards maintained by national producer organizations.”<sup>254</sup> In creating a federal standard, utilizing the comprehensive animal welfare materials already established by the livestock industry would

porkcheckoff/CSIA/2023+CSIA.pdf (last visited Oct. 26, 2024) (providing an example of an auditing tool used to assess animal welfare conditions on the farm).

247. See, e.g., *Animal Husbandry Guidelines for U.S. Egg-Laying Flocks*, UNITED EGG PRODUCERS 1 (2017), [https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines\\_17.pdf](https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines_17.pdf) (outlining the thoroughly researched animal husbandry guidelines for egg-laying chickens).

248. See Ashley E. Jochim & Bryan D. Jones, *Issue Politics in a Polarized Congress*, POL. RSCH. Q. 352, 352 (2012).

249. See *id.* at 353 (pointing out that laws regulating the food supply may bring opposing sides together).

250. See *infra* notes 259–281 and accompanying text (detailing the welfare guidelines and auditing tools set forth by the private sectors of the animal agriculture industry).

251. See *infra* notes 259–281 and accompanying text (emphasizing that animal welfare specialists and industry experts were very involved in the creation of the currently available materials regarding farm animal husbandry practices).

252. See generally Shawna Weimer et al., *Farm Animal Welfare: Audits and Certification Programs*, PURDUE EXTENSION 1 (Mar. 2018), <https://www.extension.purdue.edu/extmedia/AS/AS-639-w.pdf> (describing the history and usage of voluntary livestock and poultry welfare audits).

253. *What is a Third-Party Audit*, PEDERSON’S NAT’L FARMS, <https://pedersonsfarms.com/blogs/blog/what-is-a-third-party-audit> (last visited Jan. 5, 2024).

254. See Weimer et al., *supra* note 252, at 1–2 (listing organizations that provide animal welfare assessment guidelines, such as the National Cattleman’s Beef Association, the National Pork Board, and the United Egg Producers).

decrease the challenge lawmakers face in drafting their own language—providing a greater probability of successful legislation.<sup>255</sup>

Established in 2004, the Professional Animal Auditor Certification Organization (PAACO) is the leading organization in “animal welfare auditing, providing high-quality training and certification credentials for auditors and audits.”<sup>256</sup> PAACO’s personnel include highly trained animal welfare professionals with extensive expertise in the field.<sup>257</sup> Using the audit frameworks set by the variety of national trade organizations within the livestock and poultry industries, PAACO has a list of certified audits and auditors available to private companies.<sup>258</sup>

In the beef sector, the Checkoff-Funded Beef Quality Assurance (BQA) program publishes Cattle Care and Handling Guidelines.<sup>259</sup> The BQA program is a collaborative effort among experts in the beef industry, including veterinarians.<sup>260</sup> Its mission: “to guide producers towards continuous improvement using *science-based* production practices that assure cattle well-being, beef quality[,] and safety.”<sup>261</sup> The cattle care guidelines are promoted as an educational resource—informing proper animal care.<sup>262</sup> The National Cattlemen’s Beef Association publishes a comprehensive audit tool to help producers verify their feedyard is in compliance with the best industry practices, as outlined by the BQA program.<sup>263</sup> The audit “includes key standards of animal care that are directly related to animal health and welfare and contribute to a safe beef supply.”<sup>264</sup> The U.S. cattle industry prioritizes animal welfare while balancing the responsibility of providing a high-quality product to consumers.<sup>265</sup> The information contained in these publications and audit tools—as well as the

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255. See generally MARIA MOUSMOUTI, *THE MECHANICS OF EFFECTIVE LEGISLATION*, 12–15 (Edward Elgar Publ’g Ltd., 2019) (discussing how important the content of the legislation is in regard to its effectiveness).

256. *Ensuring Animal Welfare Auditor Training and Standards*, PROF. ANIMAL AUDITOR CERTIFICATION ORG., <https://animalauditor.org/> (last visited Oct. 26, 2024).

257. *Id.*

258. *Certified Audits*, PRO. ANIMAL AUDITOR CERTIFICATION ORG., <https://animalauditor.org/Audits> (last visited Oct. 26, 2024).

259. *Cattle Care & Handling Guidelines*, BEEF QUALITY ASSURANCE 1, 1–21 (2019), <https://www.bqa.org/Media/BQA/Docs/cattle-care-handling-guidelines-2019-revised.pdf> (last visited Oct. 26, 2024).

260. *National Manual*, BEEF QUALITY ASSURANCE 1, 3 (2019), [https://www.bqa.org/Media/BQA/Docs/bqa\\_manual\\_final.pdf](https://www.bqa.org/Media/BQA/Docs/bqa_manual_final.pdf) (last visited Oct. 26, 2024).

261. BEEF QUALITY ASSURANCE, <https://www.bqa.org/about-us/bqa-and-the-cattle-industry> (last visited Oct. 26, 2024) (emphasis added).

262. *Cattle Care & Handling Guidelines*, BEEF QUALITY ASSURANCE 1, 4 (2019) <https://www.bqa.org/Media/BQA/Docs/cattle-care-handling-guidelines-2019-revised.pdf> (last visited Oct. 26, 2024).

263. *Feedyard Audit*, NAT’L CATTLEMEN’S BEEF ASS’N, <https://www.ncba.org/producers/feedyard-audit> (last visited Oct. 26, 2024).

264. *U.S. Cattle Industry Feedyard Audit*, NAT’L CATTLEMEN’S BEEF ASS’N 1, 4, [https://www.ncba.org/Media/NCBAorg/Docs/full\\_feedyard-audit-2023.pdf](https://www.ncba.org/Media/NCBAorg/Docs/full_feedyard-audit-2023.pdf) (last visited Oct. 26, 2024).

265. *Id.* at 3.

expertise of those responsible for their contents—would be invaluable to Congress as it drafts farm animal husbandry standards.<sup>266</sup>

Additionally, the United States’ pork producers recognize their ethical responsibility to provide a safe food supply while also protecting and promoting animal well-being.<sup>267</sup> To fulfill their responsibility, producers are able to participate in third-party quality assurance audits.<sup>268</sup> These audits include a focus on animal well-being and contain an extensive list of auditing questions established by the National Pork Board’s Common Swine Industry Audit (CSIA) Task Force.<sup>269</sup> As developed by this group of “producers, veterinarians, animal scientists, packers, processors, and retail and foodservice representatives,” the audit’s objective is to provide a comprehensive assessment the welfare conditions of an operation.<sup>270</sup> While the CSIA does not establish a certain animal welfare “threshold,” it does provide extensive instructions on how to assess the state of animal welfare on the farm.<sup>271</sup> As Congress consults experts on what the national farm animal husbandry standards should be, the CSIA is an excellent tool for Congress to utilize—knowing the right questions to ask is half the battle.<sup>272</sup>

In the poultry industry—in partnership with PAACO, the National Chicken Council (NCC) has developed an audit checklist and welfare guidelines for broiler production.<sup>273</sup> One of the principles considered throughout the development process was that “[g]uidelines for welfare should balance scientific[] knowledge, practical application, and professional judgment with consideration of ethical and societal values.”<sup>274</sup> The intent of the guidelines is “to provide for optimum broiler welfare[,]” and they are frequently reviewed by animal welfare specialists and scientific advisors.<sup>275</sup> The NCC guidelines are yet another resource Congress can utilize as it drafts animal husbandry statutes, specifically for poultry.<sup>276</sup>

While not included in PAACO’s list of audits, the egg industry, on its own, has prioritized bird health and adjusted its practices accordingly for decades.<sup>277</sup> The United Egg Producers (UEP) is the leading organization in

266. *See id.*

267. *Common Swine Industry Audit*, NAT’L PORK BD. 1, 2, <https://www.porkcdn.com/sites/porkcheckoff/CSIA/2023+CSIA.pdf> (last visited Oct. 26, 2024).

268. *Id.*

269. *See id.* at 13–25 (detailing the multiple sections of animal well-being audit questions and objectives).

270. *Id.* at 2.

271. *See id.*

272. *See id.*

273. *National Chicken Council Broiler Welfare Guidelines and Audit Checklist*, NAT’L CHICKEN COUNCIL 1, 2 (Dec. 2022) [https://www.nationalchickencouncil.org/wp-content/uploads/2023/01/NCC-Broiler-Welfare-Guidelines\\_Final\\_Dec2022-1.pdf](https://www.nationalchickencouncil.org/wp-content/uploads/2023/01/NCC-Broiler-Welfare-Guidelines_Final_Dec2022-1.pdf).

274. *Id.*

275. *Id.* at 2–3.

276. *See id.*

277. *Animal Husbandry Guidelines for U.S. Egg-Laying Flocks*, UNITED EGG PRODUCERS 1, 3 (2017), [https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines\\_17.pdf](https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines_17.pdf).

welfare guidelines for both caged and cage-free egg production.<sup>278</sup> The UEP guidelines were developed by a Scientific Advisory Committee comprised of veterinarians, professors, and experts in hen welfare.<sup>279</sup> This committee forged the path for other animal agriculture sectors in the United States to establish welfare guidelines, using science as their primary guide.<sup>280</sup> The UEP guidelines, rooted in science and industry expertise, provide husbandry guidelines for both caged and cage-free egg production.<sup>281</sup> Compliance with UEP guidelines is not currently an industry requirement; however, “more than ninety percent of eggs produced in the U.S. come from farms that voluntarily” become UEP certified.<sup>282</sup> Congress should be enlightened by the overwhelming majority of egg producers that prioritize hen welfare, and because the UEP advisory committee conducts ongoing research for egg farm standards that will continuously improve the welfare certification program, Congress can use them as a resource throughout the legislative process.<sup>283</sup>

Congress often adopts private industry ideas when passing legislation.<sup>284</sup> Lobbyists and interest groups frequently interact with the legislature to present ideas about the goals and needs of the private groups they represent.<sup>285</sup> Some lobbyists even submit specific legislative language to a member of Congress with the hope of implementation.<sup>286</sup> Congress is no stranger to utilizing the ideas of subject-matter experts; thus, here, it should use the publications, educational materials, and auditing tools set forth by animal welfare experts to create its own uniform standard.<sup>287</sup> Beyond that, Congress should consult these industry experts as it drafts a uniform standard for farm animal husbandry practices. Because they are doing continuous research on how to improve animal well-being, farm animal welfare

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278. See *United Egg Producers Certified Animal Welfare Program*, UNITED EGG PRODUCERS, <https://uepcertified.com/> (last visited Oct. 26, 2024).

279. *Scientific Advisory Committee*, UNITED EGG PRODUCERS, <https://uepcertified.com/scientific-advisory-committee/> (last visited Oct. 26, 2024).

280. *Id.*

281. *Animal Husbandry Guidelines for U.S. Egg-Laying Flocks*, UNITED EGG PRODUCERS 1, 19–20 (2017), [https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines\\_17.pdf](https://uepcertified.com/wp-content/uploads/2021/08/Caged-UEP-Guidelines_17.pdf); *2024 Cage-Free Housing Animal Welfare Guidelines for U.S. Egg Laying Flocks*, UNITED EGG PRODUCERS 1, 21 (2023), [https://uepcertified.com/wp-content/uploads/2023/10/CF-UEP-Guidelines\\_2024.pdf](https://uepcertified.com/wp-content/uploads/2023/10/CF-UEP-Guidelines_2024.pdf).

282. *UEP Certified*, UNITED EGG PRODUCERS, <https://unitedegg.com/programs/uep-certified/> (last visited Oct. 26, 2024).

283. See *id.*

284. See generally *Lobbyists, Interest Groups, and Power*, LOBBYIT, <https://lobbyit.com/lobbyists-interest-groups-and-power/> (last visited Oct. 26, 2024) (providing background on the role lobbyists play in the legislature).

285. *Id.*

286. Elizabeth Brown, *Lobbying FAQ*, CTR. FOR PUB. INTEGRITY (Jan. 18, 2006), <https://publicintegrity.org/politics/lobby-watch/lobbying-faq/>.

287. See, e.g., *id.* (indicating that lobbyists have written pieces of legislation).

specialists will have the most accurate and up-to-date knowledge on the issues and are well equipped to advise Congress.<sup>288</sup>

The established and comprehensive welfare assessments the animal production industry already has shown that it has been working diligently to balance science, production, efficiency, and ethics for decades.<sup>289</sup> Therefore, Congress should use these animal-welfare tools in creating its own legislation. Utilizing the ideas and methods of the very industry that is to be regulated will increase the likelihood of successful and effective legislation.<sup>290</sup>

## 2. Administrative Agencies Have Adequate Regulatory Power for Enforcement

Administrative agencies, such as the United States Department of Agriculture (USDA), have been regulating food production at the national level for years and are well-equipped to add farm animal welfare to their list of priorities.<sup>291</sup> The USDA prioritizes nutrition and food security and strives to ensure that Americans have a consistent, affordable, and healthy food supply.<sup>292</sup> The department employs hundreds of thousands of highly qualified professionals who work to ensure not only a safe food supply but also the proper health and care of animals.<sup>293</sup> It employs veterinarians, attorneys, scientists, agricultural workers, governmental specialists, and subject-matter experts.<sup>294</sup> With the immense amount of knowledge and experience present in its personnel, the USDA is more than capable of regulating and enforcing federal farm animal husbandry standards.<sup>295</sup>

288. See, e.g., *UEP Certified*, UNITED EGG PRODUCERS, <https://unitedegg.com/programs/uep-certified/> (last visited Oct. 26, 2024) (“The advisory committee continues today and provides an ongoing review of new research and modern egg farm [welfare] standards . . .”).

289. See, e.g., *Hen Well-Being & Food Safety Timeline*, UNITED EGG PRODUCERS, <https://uepcertified.com/hen-well-being-food-safety-timeline-page/> (last visited Oct. 26, 2024); see also *supra* notes 265, 274 and accompanying text (highlighting industry dedication to balancing welfare and sustainability).

290. See generally Allison Hendricks, *Stakeholder Engagement in Government Organizations: Definitions, Barriers & Benefits*, SIMPLY STAKEHOLDERS, <https://simplystakeholders.com/government-stakeholder-engagement/#heading-2> (last visited Oct. 26, 2024) (advocating for greater stakeholder influence in the legislative process because it helps generate effective legislation).

291. See generally *Regulations and Directives*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/our-agency/about-usda/laws-and-regulations/regulations-and-directives> (last visited Oct. 26, 2024) (providing background about the areas of production the USDA has already been regulating).

292. *Food and Nutrition Security*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/nutrition-security> (last visited Oct. 26, 2024).

293. *Our Agency*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/our-agency> (last visited Oct. 26, 2024).

294. See generally, *USDA Organization Chart*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/sites/default/files/documents/usda-organization-chart.pdf> (depicting the various offices and departments within the USDA).

295. See *id.*

The best indication of the USDA's ability to regulate farm animal husbandry practices is in the fact that it has already been entrusted with the responsibility of regulating non-farm animal welfare under the Animal Welfare Act (AWA).<sup>296</sup> The AWA "addresses the humane treatment of animals intended for research, bred for commercial sale, exhibited to the public, or commercially transported."<sup>297</sup> While Congress maintains the primary legislative authority over the AWA, the Animal and Plant Health Inspection Service (APHIS) administers the act.<sup>298</sup> APHIS employs around 100 people to enforce this act, consisting of approximately 33 animal care inspectors and 66 veterinary medical officers.<sup>299</sup> APHIS carries out its responsibilities by creating, updating, and enforcing the regulations, registering entities subject to the AWA, conducting routine inspections of the registered and licensed entities, and investigating possible violations of the AWA.<sup>300</sup>

Additionally, another service within the USDA, the Food Safety and Inspection Service (FSIS), is responsible for enforcing the Humane Methods of Slaughter Act.<sup>301</sup> This Act "requires the humane treatment and handling of food animals at the slaughter plant."<sup>302</sup> FSIS employees perform daily inspections and oversee handling activities at facilities subject to federal inspection.<sup>303</sup> Before a meat product can be sold in the national market, FSIS must verify that the processor uses only humane methods when handling and slaughtering livestock.<sup>304</sup> As indicated by its already extensive involvement in the enforcement of animal welfare compliance in other areas, the USDA is well-equipped to be involved in enforcing farm animal husbandry standards, as they have already been handling a responsibility of this nature for years.<sup>305</sup>

It is important to note that the legislative solution proposed in this Comment does not give the USDA broad regulatory power.<sup>306</sup> Rather, Congress should draft and enact *specific* farm animal husbandry standards

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296. See ELENI G. BICKELL, CONG. RSCH. SERV., R47179, THE ANIMAL WELFARE ACT: BACKGROUND AND SELECTED ISSUES 1 (2023).

297. *Id.*

298. *Id.*

299. *Id.* at 8.

300. *Id.* at 1.

301. *Humane Handling*, FOOD SAFETY & INSPECTION SERV. U.S. DEP'T OF AGRIC., <https://www.fsis.usda.gov/inspection/compliance-guidance/humane-handling#:~:text=The%20United%20States%20Department%20of,Humane%20Methods%20of%20Slaughter%20Act> (last visited Oct. 26, 2024).

302. *Humane Methods of Slaughter Act*, NAT'L AGRIC. LIBR. U.S. DEP'T OF AGRIC., [https://www.nal.usda.gov/animal-health-and-welfare/humane-methods-slaughter-act#:~:text=The%20Humane%20Methods%20of%20Slaughter,and%20Inspection%20Service%20\(FSIS\)](https://www.nal.usda.gov/animal-health-and-welfare/humane-methods-slaughter-act#:~:text=The%20Humane%20Methods%20of%20Slaughter,and%20Inspection%20Service%20(FSIS)) (last visited Oct. 26, 2024).

303. *Humane Handling*, *supra* note 301.

304. *Id.*

305. See BICKELL, *supra* note 296, at 1 (Congress passed what later became known as the AWA in 1966).

306. See *supra* notes 242–45 and accompanying text (describing what a legislative solution should include—which does not include any substantive rulemaking authority for the USDA).

and limit the USDA's power to only enforcement of the standards enacted by the legislature.<sup>307</sup> Under the proposed legislative solution, the USDA will not be choosing the federal standard or regulations, the agency will only be enforcing the confinement requirements chosen by Congress.<sup>308</sup>

The USDA likely would not need to create a new agency for enforcement as there are many already in existence that could take on the task of enforcing farm animal husbandry standards—making the transition seamless.<sup>309</sup> For example, the USDA Agricultural Marketing Service (AMS) already provides auditing services for a variety of areas of the agricultural production industry.<sup>310</sup> When the Poultry Products Inspection Act (PPIA) was passed, some regulatory authority remained with USDA AMS because they had been overseeing the voluntary poultry inspection programs that were in effect before the PPIA was passed.<sup>311</sup> Here, auditing or inspection authority could easily remain within USDA AMS, FSIS, or APHIS as these agencies have been overseeing animal production for decades.<sup>312</sup>

### *B. Congress Is Well-Positioned to Regulate*

Congress is in a unique position to help ensure a uniform standard for a national supply chain.<sup>313</sup> Because of its ability to regulate the national market, Congress is well-suited to regulate farm animal husbandry and can lower the risks associated with a patchwork of state legislation.<sup>314</sup> While there are also risks affiliated with enacting national regulations, producers face fewer uncertainties under a federal standard.<sup>315</sup>

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307. *See supra* notes 242–45 and accompanying text (indicating that while this Comment will not propose a specific standard for animal husbandry, it should be Congress who establishes the standard of farm animal care required, not the USDA).

308. *See supra* notes 242–45 and accompanying text (proposing that Congress itself write and adopt legislation to codify a uniform standard for farm animal husbandry).

309. *See generally Agencies*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/our-agency/agencies> (last visited Oct. 26, 2024) (detailing the various agencies within USDA, including AMS, APHIS, and FSIS).

310. *Auditing and Accreditation*, AGRIC. MKTG. SERV. U.S. DEP'T OF AGRIC., <https://www.ams.usda.gov/services/auditing> (last visited Oct. 26, 2024).

311. COMMITTEE ON PUBLIC HEALTH RISK ASSESSMENT OF POULTRY INSPECTION PROGRAMS, FOOD AND NUTRITION BOARD, NATIONAL RESEARCH COUNCIL, *POULTRY INSPECTION: THE BASIS FOR A RISK-ASSESSMENT APPROACH*, 14 (Nat'l Acads. Press, 2d prtg 1987) [hereinafter *POULTRY INSPECTION*].

312. *See generally Our History*, FOOD SAFETY & INSPECTION SERV. U.S. DEP'T OF AGRIC., <https://www.fsis.usda.gov/about-fsis/history> (last visited Oct. 26, 2024) (providing a history of the USDA's involvement in food inspections).

313. *See supra* notes 91–92 and accompanying text (summarizing Congress's ability to regulate interstate commerce).

314. *See supra* notes 240–241 and accompanying text (overviewing how Congress can regulate farm animal husbandry practices under the Commerce Clause).

315. *See infra* Section IV.B.2 (explaining that producers face fewer risks under a national standard).

### 1. *The Agriculture Industry Has a Long History with Federal Oversight*

Agriculture has been regulated at the federal level for over 150 years.<sup>316</sup> Many producers are no stranger to a federal inspector being present in their facility on a daily basis.<sup>317</sup> For well over a century, commodity producers have been required to comply with federal laws and regulations surrounding the production of the nation's food supply.<sup>318</sup>

An example of a current law that has been effective in regulating agricultural production at the federal level is the Federal Meat Inspection Act of 1906 (FMIA), which still stands as one of the foundational laws of food safety in the United States.<sup>319</sup> This law was enacted “to address the unregulated and hazardous conditions in the meatpacking industry by establishing federal oversight and inspection of meat products intended for interstate commerce.”<sup>320</sup> Its mission is to “protect public health and maintain the integrity of the American meat supply.”<sup>321</sup> The USDA's FSIS is responsible for enforcing the FMIA.<sup>322</sup> This Act represents a time where Congress stepped in to regulate the national market and had long-lasting success.<sup>323</sup>

The FMIA was passed largely because of an uproar in opposition to the practices of the meat-packing industry.<sup>324</sup> Journalists were publishing articles in “muckraking magazines” detailing the unsanitary conditions of meatpacking houses and the manipulative practices of meatpacking companies.<sup>325</sup> Most famously, *The Jungle* by Upton Sinclair brought public attention to the terrible working conditions and appalling practices used in the meatpacking industry.<sup>326</sup> The unintended effect of the book was that people turned to focus more on the safety of the meat supply rather than the

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316. President Abraham Lincoln established the United States Department of Agriculture in 1862. *About the U.S. Department of Agriculture*, U.S. DEPT. OF AGRIC., <https://www.usda.gov/our-agency/about-usda#:~:text=On%20May%2015%201862%20President,economic%20development%20science%20natural%20resource> (last visited Oct. 26, 2024).

317. See, e.g., Food Safety and Inspection Service, *Summary of Federal Inspection Requirements for Meat Products*, U.S. DEP'T OF AGRIC. 1, 2 (2015), [https://www.fsis.usda.gov/sites/default/files/media\\_file/2021-02/Fed-Food-Inspect-Requirements.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2021-02/Fed-Food-Inspect-Requirements.pdf) (“Federal inspection personnel must be present at all times during livestock slaughter operations and for at least part of each shift during which there is further processing of meat products.”).

318. See, e.g., Kristen L. Rouse, *Meat Inspection Act of 1906*, BRITANNICA, <https://www.britannica.com/topic/Meat-Inspection-Act> (last updated June 23, 2023) (indicating that the Federal Meat Inspection Act was passed in 1906 and amended prior meat inspection laws).

319. *Federal Meat Inspection Act 1906*, LAWS, <https://federal.laws.com/meat-inspection-act> (last modified Sep. 25, 2023).

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. Rouse, *supra* note 318.

325. *Id.*

326. *Id.*

harm the employees were facing in packing plants.<sup>327</sup> While this result was not Sinclair's intent, the public adopted their own mission to see better oversight for food safety in meat packing plants.<sup>328</sup> In response to the public turmoil, Congress quickly passed the FMIA.<sup>329</sup>

Additionally, in 1957, the Poultry Products Inspection Act (PPIA) was passed in response to consumer demand for government inspection of poultry products.<sup>330</sup> Both FMIA and PPIA were enacted because consumers were demanding governmental intervention in industries where they thought federal oversight was needed to produce a clean and safe food supply.<sup>331</sup> In the animal welfare arena, animal activists spare no effort in pushing their agendas in the media and beyond to advocate for more stringent animal husbandry standards.<sup>332</sup> What makes these two groups different is the reality of what they were and are fighting for. While the motives of animal activists may seem similar to the demands that led to FMIA, PPIA, and a cleaner food supply, the reality is that, more often than not, the current activists are advocating for standards that are *not* happier or healthier for the animals.<sup>333</sup> Because activists will continue to go state by state advocating for unsupported and uninformed standards, now is the time for Congress to preempt the states from enacting burdensome statutes and to adopt a national standard.<sup>334</sup>

## *2. Because State Legislatures May Create a Problematic Patchwork of Regulations, Agricultural Producers Face Fewer Risks Under a Uniform National Standard*

Food production is and will always be an interstate commerce issue, as states rely heavily on other states for at least one aspect of their food

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327. Upton Sinclair's *The Jungle: Muckraking the Meat-Packing Industry*, TEACH DEMOCRACY, <https://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclair-the-jungle-muckraking-the-meat-packing-industry.html#:~:text=Sinclair's%20The%20Jungle%3A-,Muckraking%20the%20Meat%20Packing%20Industry,new%20federal%20food%20safety%20laws> (last visited Oct. 26, 2024).

328. *Id.*

329. Rouse, *supra* note 318.

330. POULTRY INSPECTION, *supra* note 311, at 12–14.

331. *See id.*; Rouse, *supra* note 318.

332. *The 4 Most Effective Animal Rights Activist Tactics*, MY LIFE DIVERSIONS PLANT-BASED LIFESTYLE, <https://mylifediversion.com/animal-rights-activists-tactics/#:~:text=Activists%20use%20various%20methods%20to,just%20world%20for%20all%20beings> (last visited Oct. 26, 2024).

333. *See Humane Society Press Release*, *supra* note 57 (stating that after months of unwavering dedication the Humane Society of the United States emerged “victorious” when the Supreme Court upheld Proposition 12); *supra* notes 59–63 and accompanying text (highlighting that the regulations proposed in Proposition 12 are not a better alternative).

334. *See supra* notes 64–67 and accompanying text (illustrating the ongoing and misinformed advocacy efforts of animal activists); *see also* Groh, *supra* note 73, at 187 (discussing why an activist organization would prefer state-by-state advocacy due to the ability to achieve success through ballot initiatives).

supply.<sup>335</sup> State legislatures do have the advantage of being more knowledgeable about production challenges unique to their state, and would likely be more equipped to handle regulating some of the issues that arise.<sup>336</sup> However, when a state government passes a law, it *only* focuses on the costs and benefits imposed on its state and generally do not consider the effects its policy decisions will have on other states—implicating one of the issues the Dormant Commerce Clause was intended to prevent.<sup>337</sup> While states can pass well-informed regulations, the window for regulating agricultural production without having an impact on interstate commerce is very narrow; therefore, Congress is the more appropriate legislature to regulate.<sup>338</sup>

To be sure, there are risks to the private sector when any type of federal standard is enacted.<sup>339</sup> There is fear associated with additional federal oversight because of its potential to impose significant burdens on producers.<sup>340</sup> Private companies are particularly threatened by regulations that are not based on adequate science or data.<sup>341</sup> However, if Congress draws upon the welfare materials already created by animal care experts, such as veterinarians, the risks are significantly reduced.<sup>342</sup> Additionally, producers face fewer risks under a *uniform* standard.<sup>343</sup> Raising farm animals is a very complex and often misunderstood practice, and an inconsistent patchwork of state regulations makes production even more complex—making efficiency even harder to achieve.<sup>344</sup>

It is worth noting that the animal welfare auditing itself would likely not be a concern for private companies as many of them have been participating

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335. See Janna Raudenbush, *Know Where Your Food Comes From with USDA Foods*, U.S. DEP'T OF AGRIC. (May 25, 2016), <https://www.usda.gov/media/blog/2016/05/25/know-where-your-food-comes-usda-foods>.

336. See generally *What are the Differences Between State Legislatures and Congress?*, PLURAL POL'Y (Oct. 31, 2023), <https://pluralpolicy.com/state-legislature-vs-congress/> (“[T]he narrower focus of state legislatures allows them to tackle more localized issues.”).

337. Jack Goldsmith & Alan Sykes, *The California Effect, Process-Based Regulations, and the Dormant Commerce Clause*, 6 (Harv. Pub. L., Working Paper No. 22-35, September 29, 2022), <https://ssrn.com/abstract=4233575>; see, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (demonstrating this phenomenon with an Illinois statute that made a very standard type of mudflap illegal without considering the type of burden it would impose on large trucks driving through the state).

338. See *supra* note 335 and accompanying text (pointing out that no state is completely agriculturally independent and therefore could not regulate all production of a product without impacting at least one other state).

339. See Daren Bakst, *Eliminating and Reducing Regulatory Obstacles in Agriculture*, THE HERITAGE FOUND. (June 28, 2016), <https://www.heritage.org/government-regulation/report/eliminating-and-reducing-regulatory-obstacles-agriculture#:~:text=In%20general%2C%20federal%20regulation%20is,costs%20and%20other%20significant%20burdens>.

340. *Id.*

341. *Id.*

342. See *supra* notes 259–281 and accompanying text (providing the various welfare guidelines that Congress can utilize in drafting farm animal husbandry statutes).

343. See Groh, *supra* note 73, at 188–89.

344. *California's Prop 12 Puts Food Security, and Animal Health at Risk*, NAT'L BEEF WIRE, <https://www.nationalbeefwire.com/california-s-prop-12-puts-food-security-and-animal-health-at-risk> (last visited Oct. 26, 2024).

in animal welfare audits for decades.<sup>345</sup> Some companies have participated in welfare audits for marketing purposes, others because it was the right thing to do, but mostly, they are intended to demonstrate to consumers that animal welfare is a standard part of production.<sup>346</sup> So, increased federal oversight, in general, is the more likely concern for producers—a concern which, while valid, can be overcome by the adoption of the ideas and recommendations within the audits producers are already using in evaluating production.<sup>347</sup> Additionally, if Congress codifies the specific standard and preempts the states from interfering, the power to change animal care requirements remains with Congress, meaning USDA agencies should not have any power to control this aspect of production beyond enforcing the statutory requirements.<sup>348</sup>

Unfortunately, a federal standard for farm animal husbandry would likely take away some of the competitive advantages associated with animal welfare auditing.<sup>349</sup> However, private agricultural companies have always had to comply with federal and state regulations in many aspects of production and have still found creative ways to differentiate their products.<sup>350</sup> The same would be true here. While there would be mandatory welfare compliance under federal law, there would be no restriction on private companies using more *enhanced* welfare practices to appeal to niche markets.<sup>351</sup>

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345. See *Animal Welfare Audit and Certification Programs*, U.S. DEP'T OF AGRIC., <https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-audit-and-certification-programs> (last visited Oct. 26, 2024).

346. See *id.* (“Due to the lack of federal legislation protecting farm animals, voluntary third-party welfare audits were started to provide assurances that animals are being raised according to [private industry] guidelines”).

347. See *supra* Section IV.A.1 and accompanying text (recommending the adoption of the expert-developed guidelines currently used by producers).

348. See *supra* notes 242–45 and accompanying text (proposing that it should be Congress who establishes the required standard for farm animal care, not the USDA).

349. See, e.g., Jennifer Shike, *Prop 12 Ruling: A Major Blow to Farmers and Consumers Who Will Pay the Price*, PORK BUS. (May 15, 2023), <https://www.porkbusiness.com/news/ag-policy/prop-12-ruling-major-blow-farmers-and-consumers-who-will-pay-price> (pointing out that producers will lose competitive advantages by being forced to comply with the welfare requirements of Proposition 12).

350. See generally *Adding Value to Agriculture: Branding and Certification*, UNIV. OF NEV. EXTENSION, <https://extension.unr.edu/publication.aspx?PubID=2370> (last visited Oct. 26, 2024) (using *branding* as an example of a marketing and differentiation strategy for agricultural producers).

351. See *supra* notes 242–246 and accompanying text (proposing federal legislation that places no restrictions on private companies using more enhanced animal welfare practices).

*C. Federal Animal Husbandry Laws Will Help Address the Larger Problem of Food Insecurity*

The agriculture industry and its efficiency play a vital role in the prevention of food insecurity.<sup>352</sup> “The ultimate beneficiaries of smooth and efficient supply chains are, of course, the 330 million Americans who all rely on retailers and restaurants for goods and services for their daily necessities.”<sup>353</sup> The price of food is a main part of the food security equation because not only do people need access to food, they need access to food they can afford.<sup>354</sup> Food prices have been steadily rising for a number of years due to inflation and pandemic-related supply-chain disruptions.<sup>355</sup> California’s Proposition 12 and the patchwork of similar state laws are just adding to the problem, “[putting] those most food insecure . . . at risk by making food [even] more expensive and out of reach.”<sup>356</sup>

Since California’s Proposition 12 was enacted, early indications of its effect on food prices have shown that the average price of pork ribs is 25% higher in California, and the price of pork loins in California rose by 43%.<sup>357</sup> As can be expected, the consumption of pork notably decreased in California, likely due to the fact that it can no longer be afforded.<sup>358</sup> While these statistics only reflect the price increase in California, state animal husbandry laws under this new landscape are likely to have far-reaching implications on food prices throughout the United States.<sup>359</sup> Interruptions of the supply chain not only affect in-state production but interfere with the market across the nation.<sup>360</sup>

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352. Karolina Pawlak & Malgorzata Kolodziejczak, *The Role of Agriculture in Ensuring Food Security in Developing Countries: Considerations in the Context of the Problem of Sustainable Food Production*, 12 *Sustainability*, 1, 2 (July 7, 2020).

353. Brief of the Retail Litigation Center, Inc. et al. at 14, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

354. Kay Summers, *Food Price Inflation is Endangering Global Food Security*, AM. UNIV. (Feb. 24, 2022), <https://www.american.edu/sis/news/20220224-food-price-inflation-is-endangering-global-food-security.cfm#:~:text=Food%20prices%20are%20part%20of,every%20person%20on%20the%20planet>.

355. Anna Helhoski, *The Cost of Groceries: Are Food Prices Going Up?*, NERDWALLET (Oct. 12, 2023, 9:22 AM), <https://www.nerdwallet.com/article/finance/price-of-food>.

356. *California’s Prop 12 Puts Food Security, and Animal Health at Risk*, WASH. POL’Y CTR., <https://www.nationalbeefwire.com/california-s-prop-12-puts-food-security-and-animal-health-at-risk> (last visited Oct. 26, 2024).

357. Hannah Hawkins, *Proposition 12 Preliminary Price Impacts*, S. AG TODAY (Sept. 19, 2023), <https://southernagtoday.org/2023/09/19/proposition-12-preliminary-price-impacts/>.

358. *Id.*

359. *See id.*

360. Groh, *supra* note 73, at 188.

*1. An Agricultural Producer's Goal Is to Provide a Sustainable Food Supply*

True sustainability in the food market is achieved when social responsibility, economic viability, and environmental stewardship are balanced.<sup>361</sup> Agricultural producers are the key to achieving sustainability, and they work diligently to do so.<sup>362</sup> Finding this balance is not an easy task, however, especially when productivity is interrupted by factors producers cannot control.<sup>363</sup>

In a market where different jurisdictions are passing laws requiring different production methods, producers will have limited options in how to respond.<sup>364</sup> Some producers will be forced to withdraw from certain markets altogether due to increased production costs and difficulty.<sup>365</sup> Others will begin producing based on the new regulations and stop producing what or how they were before, which eliminates a variety of products people would still purchase in some jurisdictions.<sup>366</sup> The final, yet unlikely, possibility is some producers will be able to afford to continue their old practices and adopt the new practices, serving all markets.<sup>367</sup> The reality of any of these choices, though, is that the supply and demand issues will inevitably increase the costs imposed on consumers.<sup>368</sup>

The *National Pork Producers* decision imposes new burdens on producers at an especially unfortunate time, where the cost of production is already near record highs.<sup>369</sup> A federal standard, drawing on guidance from industry experts, would drastically decrease these burdens and promote production efficiency.<sup>370</sup>

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361. *Pathway to a Successful Future: 2022 Executive Summary*, NAT'L BEEF QUALITY AUDIT 1, 5 (2022) [https://www.bqa.org/Media/BQA/Docs/143783\\_nbqa\\_executive-summary-2022\\_prf\\_low-res.pdf](https://www.bqa.org/Media/BQA/Docs/143783_nbqa_executive-summary-2022_prf_low-res.pdf).

362. *Private Sector Invests in the Success of Agriculture*, GAP INITIATIVE, <https://globalagriculturalproductivity.org/policy-goals-for-a-productive-sustainable-healthy-world/private-sector-engagement/> (last visited Oct. 26, 2024).

363. *Id.*

364. Jack Goldsmith & Alan Sykes, Goldsmith & Sykes, *supra* note 337, at 9–10.

365. *Id.* at 9.

366. *Id.* at 10.

367. *Id.* at 9.

368. *See id.* at 9–10.

369. Schlecht et al., *supra* note 70.

370. *See supra* Section IV.A.1 (recommending Congress consult the welfare tools and materials already in place).

2. *A Uniform Standard Prevents a Patchwork and Will Make Food More Affordable*

Market uniformity is essential to providing high-quality products at an affordable price.<sup>371</sup> Leaving farm animal husbandry requirements up to the states will cause a patchwork of regulations that force producers to adjust continuously.<sup>372</sup> If the regulations in California are different than those in Florida, New York, or Michigan, producers will either be forced to pull out of certain markets or will need practices that comply with each system.<sup>373</sup> Not to mention, the laws in fifty states may never align and will likely always be changing.<sup>374</sup> The burden on producers to comply will never be taken away.<sup>375</sup> Producers already face many challenges trying to provide a safe and sustainable food supply, and adding a layer of market uncertainty would increase the difficulty of providing food for America.<sup>376</sup>

The possibility that a producer would be forced to comply with ten, twenty, or up to fifty different standards is a logistical nightmare.<sup>377</sup> The constant restructuring, auditing, and recordkeeping would force producers to spend more money and would greatly lower efficiency—which again would be reflected in the price consumers are paying.<sup>378</sup> A producer might be able to adjust to one new regulation or standard, but it is the state-by-state approach that would become a complicated and unachievable way of production.<sup>379</sup> Enacting a uniform standard, which draws upon some of the animal husbandry materials already in place, would eliminate the economic and logistical burdens on producers and protect the integrity of the food supply.<sup>380</sup>

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371. See, e.g., *Beef Grading Shields*, AGRIC. MKTG. SERV. U.S. DEP'T OF AGRIC., <https://www.ams.usda.gov/grades-standards/beef/shields-and-marbling-pictures> (last visited Oct. 26, 2024) (explaining that beef grading is based on nationally uniform standards to promote uniformity and provide quality assurance, regardless of supplier).

372. See Groh, *supra* note 73, at 188–89 (explaining that adjusting to different state regulations can be difficult for some producers).

373. See *supra* notes 364–368 and accompanying text (detailing the limited options producers have in a patchwork situation).

374. See Groh, *supra* note 73, at 188–89 (pointing out that there is no guarantee that state laws will be similar).

375. See *id.* at 189.

376. *Private Sector Invests in the Success of Agriculture*, *supra* note 362.

377. See Groh, *supra* note 73, at 188–89.

378. See *id.* at 188 (stating that “states that pass farmed animal protection laws disrupt the operations and supply chains of the hugely important food and agriculture industries”).

379. See *id.* at 189.

380. See *supra* Section IV.A.1 (proposing Congress consult the welfare tools and materials already in place because the current auditing systems are helping farm animal producers achieve the balance between welfare and economic viability).

## V. CONCLUSION

With evidence that the Supreme Court is narrowly interpreting the Dormant Commerce Clause, and to avoid the patchwork of state legislation regarding farm animal welfare practices, Congress should step in with a legislative solution.<sup>381</sup> In order to promote uniformity in the market and food security in the United States, Congress should pass federal farm animal husbandry standards using the educational materials and audit tools written by industry experts to develop its uniform standard.<sup>382</sup> Additionally, Congress should pass a preemption statute that prohibits states from passing any legislation that is more restrictive than the standards passed by Congress.<sup>383</sup>

The agriculture industry, which is already heavily regulated by the federal government, has been and will always be an industry that depends upon and operates within interstate commerce.<sup>384</sup> The Dormant Commerce Clause will almost always be implicated under this landscape by the fact that states cannot regulate the national agricultural market without reaching across state lines.<sup>385</sup> Therefore, federal legislation is a solution that can achieve the balance of protecting animal welfare without sacrificing efficiency—minimizing the risks to food security in the United States.<sup>386</sup>

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381. *See supra* Part III (demonstrating the Court’s narrow interpretation of the Dormant Commerce Clause).

382. *See supra* Part IV (arguing for a federal standard for farm animal husbandry).

383. *See supra* Section IV.A (proposing a preemption statute for Congress to adopt).

384. *See supra* Part IV (explaining that Congress is well-suited to regulate farm animal husbandry because of its power to pass laws relating to commerce and its long history of overseeing agricultural production).

385. *See supra* note 335 and accompanying text (showing that the Commerce Clause will almost always be implicated when agriculture is being regulated).

386. *See supra* Section IV.C (discussing how federal legislation will help prevent or repair food insecurity).