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PROTECTING REGULATORY EXPRESSIONS OF FOOD POPULISM THROUGH INTERSTATE COOPERATION

Kathryn Bowen

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PROTECTING REGULATORY EXPRESSIONS OF
FOOD POPULISM THROUGH INTERSTATE
COOPERATION

KATHRYN BOWEN*

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Consumers and retailers are increasingly interested in purchasing local, sustainable, and humanely raised foods. Advocacy groups are spearheading that trend. Their efforts have gained traction at the state-level, with a broad-based, food conscious constituency directly fomenting policy change. And yet, adversely affected food producers typically succeed in nullifying state reforms by securing from Congress preemptive national standards.

That dynamic is likely to manifest again in the area of farmed animal treatment. In November 2016, Massachusetts approved the furthest reaching prohibition on the use of “intensive confinement” systems for farmed animals, and the sale of any food products thereby derived. Additional states are moving towards the Massachusetts model, and industry is poised to repeat its preemption play.

This Article argues that states should protect regulatory expressions of “food populism,” including anti-confinement standards. It sets forth a new theory of food populism, founded on a dual-pronged normative principle of enhancing deliberative democratic engagement and minimizing the negative byproducts of industrial food production. It calls upon sympathetic state actors to establish a regional advisory agreement on farmed animal welfare. It contends that this instantiation of food populism can influence federal policy and avoid deregulatory preemption.

The case for interstate cooperation addresses three gaps in the literature. First, it confronts who decides, and who should decide, what we eat from the perspective of vertical and horizontal interest group bargaining. Second, it compares the ability of discrete interstate cooperative mechanisms to deliver on a food populist agenda. Third, it suggests institutional design principles for, and benefits to, a topical

regional consortium. This provides a guide for future policy and advocacy.

INTRODUCTION

Current political dynamics have increased populism's popularity as a moniker for change.¹ The term's resurgence lies partly in its malleability. Over the past century, populist movements have occupied both sides of the partisan divide. Populism's delinking from party affiliation relies on a key antagonistic relationship—"the people" versus "the elites."² While some populist leaders have paired that concept with more destructive threads of identity-politics, so doing perverts populism's ideological core: that government policy should benefit the public.³

This distributive question manifests in a host of regulatory contexts. Of late, it burgeons amidst growing demands for local, sustainable, and humanely produced food. Those calls emanate from a coalition of activists, consumers, and small farmers, and increasingly shape state and local policies. While legal scholars have yet to deploy the term "food populism,"⁴ I use it to describe popular demands for just, sustainable, and welfare-enhancing food and agriculture outcomes.⁵

1. Sylvia Stead, *Overuse of Term Populism Can be Misleading*, THE GLOBE & MAIL (May 26, 2017), <https://www.theglobeandmail.com/community/inside-the-globe/public-editor-overuse-of-term-populism-can-be-misleading/article35123889/>.

2. Cas Mudde, *The Populist Zeitgeist*, 39 GOV'T & OPPOSITION 541, 543 (2004).

3. Stead, *supra* note 1.

4. Journalists have used the phrase disparately. *See, e.g.*, Chase Purdy, *Food Politics Have Sparked Another Kind of Populism, and it's Resulting in Real Reform*, QUARTZ (Feb. 6, 2017), <https://qz.com/903289/food-politics-have-sparked-another-kind-of-populism-and-its-resulting-in-real-reform/>. A handful of law reviews reference populist demands for food reform. *See* Amy J. Cohen, *The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small*, 78 L. & CONTEMP. PROBS. 101, 106, 118 (2015) (observing that demands for food sovereignty evoke early populist arguments); Pamela A. Vesilind, *Emerging Constitutional Threats to Food Labeling Reform*, 17 NEXUS 59, 78 (2012) (noting that a "populist" movement has called for "healthier, safer food"). Guadalupe Luna has urged a "new agrarian populism" premised on rural insurgency and greater inclusion of farmers of color. *See, e.g.*, Guadalupe T. Luna, *Chicanas, Chicanos and "Food Glorious Food"*, 28 CHICANA/O-LATINA/O L. REV. 43, 53 (2009).

5. This conception of "food populism" puts into conversation work on alternative food systems, interest group competition, and risk regulation. *See generally* MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* (2003) [hereinafter NESTLE, *FOOD POLITICS*]; MARION NESTLE, *SAFE FOOD: THE POLITICS OF FOOD SAFETY* (2010) [hereinafter NESTLE, *SAFE FOOD*]; Cohen, *supra*

In recent years, alternative food activists have scored several significant victories at the state level. These successes include laws requiring on-package labeling of foods containing genetically modified organisms (GMOs), reducing the use of antibiotics in farmed animals, and stricter controls on certain chemicals in pesticides. Some characterize these mandates as reactive food alarmism, others defend them as critical to public health and safety. Interest groups typically take the lead in the normative back-and-forth. When it comes to legislative bargaining at the federal level, successful lobbying by large food and agriculture firms often results in the passage of standards favorable to industry, including statutes that prohibit states from enacting more demanding rules.⁶

This dynamic is likely to manifest again on the issue of farmed animal confinement. Industrial animal agriculture (IAA)⁷ operations typically use “intensive” or “extreme” confinement systems to house pregnant pigs, veal calves, and egg-laying hens. Eleven states have banned the use of these systems.⁸ In November 2016, Massachusetts voters approved a ballot initiative proposing the broadest of these

note 4, at 101; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Margaret Sova McCabe, *Foodshed Foundations: Law's Role in Shaping Our Food System's Future*, 22 FORDHAM ENV'T L. REV. 563 (2011); Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069 (2012).

6. This dynamic manifests across issue areas. See JOSEPH F. ZIMMERMAN, REGULATING THE BUSINESS OF INSURANCE IN A FEDERAL SYSTEM 28–30 (2010); J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1533–34 (2007); E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 329 (1985); Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 200, 214 (1997).

7. IAA is also referred to as “industrial farm animal production,” “industrial animal production,” or “factory farming.” John Rossi & Samuel Garner, *Industrial Farm Animal Production: A Comprehensive Moral Critique*, 27 J. AGRIC. ENVIRON. & ENVTL. ETHICS 479, 480 (2014). There is no precise definition of IAA, nor does it have a single defining feature. *Id.* at 484. Rather, IAA “is characterized by corporate ownership and/or control; economic consolidation and vertical integration; the extreme confinement of large numbers of animals; the use of ‘technological sanders’ such as growth-promoting antibiotics; the use and long-distance transport of remotely-grown concentrated feedstuffs, instead of forage- or pasture-based feeding; and tight control over the breeding, feeding and living conditions of animals so as to achieve the greatest production at the lowest cost in the shortest amount of time.” *Id.* at 480 (internal citations omitted).

8. *Farm Animal Confinement Bans by State*, AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.asPCA.org/animal-protection/public-policy/farm-animal-confinement-bans> (last visited July 26, 2017).

regulations to date.⁹ The Massachusetts measure prohibits both the in-state use of extreme confinement systems and the in-state sale of any pork, veal, or egg products thereby derived.¹⁰ Given the threat of costly regulation, newly-disciplined IAA producers are likely to seek and secure from Congress a “double win”—an absolutely preemptive federal statute that waters down the substantive stringency of existing state laws.¹¹

This Article contends that states have a role to play in protecting and enhancing regulatory expressions of food populism, including prohibitions on the use of intensive confinement systems. I posit that states can fulfill that role most effectively by negotiating cooperative arrangements. This argument works a threefold contribution to the literature. First, only a handful of scholars have addressed inter-systemic decision-making in the food law context.¹² While providing key insight at the intersection of federalism and food politics, these discussions elide preemption’s regulatory frequency, and its intersection with state-level efforts to achieve sustainable food outcomes. Second, this literature sidelines how and why food interest groups drive preemption, and the attendant normative implications of industry’s repeated preemption play. Third, food law scholars have yet to comparatively engage with discrete cooperative mechanisms through which states can instantiate systems for sustainable food governance. Elaborating how states as political actors can harness different modes of cooperation charts areas for action and opportunity.¹³

9. MASS. GEN. LAWS ANN. ch. 129 app. § 1-1 to 1-5 (West 2016) (effective January 1, 2022).

10. *Id.*; see *infra* Part I.

11. DeShazo & Freeman, *supra* note 6, at 1506.

12. See McCabe, *supra* note 5, at 574–81; Diana R.H. Winters, *The Benefits of Regulatory Friction in Shaping Policy*, 71 FOOD & DRUG L.J. 228, 229 (2016); Elizabeth Hallinan & Jeffrey D. Pierce, *Learning from Patchwork Environmental Regulation: What Animal Advocates Might Learn from the Varied History of the Clean Air Act*, in WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? 3, 3–26 (Randall S. Abate ed., 2015); Emilie Aguirre, *Contagion Without Relief: Democratic Experimentalism and Regulating the Use of Antibiotics in Food-Producing Animals*, 64 UCLA L. REV. 550, 555–56 (2017).

13. In so doing, I draw heavily on principles set forth in the regulatory federalism literature. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1543 (1994); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 61 (2014); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 30 (2007); Jessica Bulman-Pozen, *From Sovereignty and Process to*

I proceed in three parts. In Part I, I contextualize industry's use of intensive confinement, and set forth the government's regulatory response. Interstate inconsistency characterizes the status quo, reflecting a decade-long, iterative push-and-pull between interest groups. Catalyzed primarily by the Humane Society of the United States (HSUS), states have gradually adopted anti-confinement regulations. These regulations have evolved over time from cost-internalizing disciplines on in-state producers to primarily cost-externalizing measures burdening out-of-state entities. Examining HSUS's ability to stimulate state action, I predict that cost-externalizing regulations will become more common.¹⁴

In Part II, I argue that regulated firms will respond to this period of subnational cost-externalization by defensively seeking preemptive federal legislation that imposes a weak national standard. That response requires an ideological about-face from IAA interests, as these groups have historically opposed any federal intervention into livestock treatment. This analysis applies a cross-disciplinary approach to analyze IAA firm behavior.

Part III proposes a new strategy: that states create an advisory agreement on farmed animal confinement to enhance regulatory expressions of food populism. I first set forth the normative case for this agenda. I then present ways that states can alter federal policy through cooperation, and examine three mechanisms (uniform and model laws, interstate associations, and interstate agreements) that states might use to achieve the benefits of collective action. I argue that a regional advisory agreement can enhance the bargaining power of food populists at the federal level, and short-circuit deregulatory preemption dynamics. I then engage with possible legal challenges to, and structural criticisms of, the proposed agreement. I conclude with areas for future study.

I. HORIZONTAL EVOLUTION AND DIFFUSION OF FARMED ANIMAL CONFINEMENT STANDARDS: INTEREST GROUP DYNAMICS AND THE REGULATORY RESPONSE

This Part describes industry's reliance on intensive confinement and situates the efforts of animal welfare advocates to eliminate these

Administration and Politics: The Afterlife of American Federalism, 123 YALE L.J. 1920, 1955 (2014).

14. Food law scholars anticipated that this type of rule would be rare, despite California's contemporaneous product and production standard. See Hallinan & Pierce, *supra* note 12, at 21–23; see also CAL. HEALTH & SAFETY CODE §§ 25990–91, 25996 (West 2014-2015) (setting forth California's statutory scheme).

systems. IAA firms' anti-interventionist approach to government regulation, including on farmed animal treatment, contributes to federal inaction on the issue. This has led public interest groups, namely the Humane Society, to concentrate their efforts at the state level. HSUS's subnational successes, and the remaining regulatory gaps, provide critical insights into the likely trajectory of the anti-confinement regime and areas for future cooperation.

A. *The Persistence of Intensive Confinement*

Three intensive confinement systems are typically subject to scrutiny: "battery cages" for egg-laying hens, "gestation crates" for breeding sows, and "veal crates" for veal calves.¹⁵ Battery cages, so-named after the process of stacking cages on top of one another, typically house at least eight hens per cage level.¹⁶ A cage level, in turn, measures approximately twenty by nineteen inches.¹⁷ A hen receives a space the size of a single sheet of paper.¹⁸ Gestation crates individually house pregnant pigs during breeding, and are not much larger than the animal itself.¹⁹ Veal crates are similarly structured, but purposed primarily for male dairy calves.²⁰ In general, these systems severely limit the animal's mobility by preventing it from standing up, lying down, or spreading its limbs.²¹ In addition to restricting certain movements, intensive confinement systems prohibit the animal from expressing other natural behaviors.²² This

15. David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 217–18 (Cass R. Sunstein & Martha Craven Nussbaum eds., 2004).

16. *Id.*

17. *Id.*

18. *An HSUS Report: Welfare Issues with Furnished Cages for Egg-Laying Hens*, HUMANE SOC'Y U.S., http://www.humanesociety.org/assets/pdfs/farm/welfare_issues_furnished_cages.pdf (last visited July 26, 2017).

19. HUMANE SOC'Y U.S., AN HSUS REPORT: WELFARE ISSUES WITH GESTATION CRATES FOR PREGNANT SOWS 1 (Feb. 2013), <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Gestation-Crates-for-Pregnant-Sows.pdf>.

20. HUMANE SOC'Y U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE VEAL INDUSTRY 1 (July 2012), <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-animals-in-the-veal-industry.pdf>; Tamara Scully, *Raising Veal: Alternatives to Conventional Models*, FARMING MAG. (Aug. 1, 2014), <https://www.farmingmagazine.com/dairy/raising-veal/>.

21. PEW CHARITABLE TRS. & JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 85 (2008), <http://www.pewtrusts.org/~media/legacy/uploadedfiles/peg/publications/report/pcifapfinalpdf.pdf> [hereinafter PEW CHARITABLE TRUSTS].

22. *Id.*

can result in physical discomfort, mental stress, injury, chronic disease, and death.²³

Intensive confinement remains the dominant method for housing laying hens and hogs. Battery cages accommodate approximately 95% of hens used to produce eggs for consumption.²⁴ As of May 2017, organic and cage-free egg production²⁵ comprised just 13.2% of the egg-laying flock.²⁶ A 2012 study on pork production indicates that operations of 1,000 or more hogs house over 80% of their sows in gestation crates.²⁷ Veal represents an exception, as group housing systems now predominate production.²⁸ Some contend that this shift is the product of pressure by animal welfare groups after sustained industry resistance.²⁹

Ultimately, economics—not welfare—explains the persistence of extreme confinement systems among industrial pork and egg producers.³⁰ These systems are designed to maximize profits by reducing the costs of production, while maintaining certain standards for taste, texture, and efficiency.³¹ When IAA firms discuss alternative housing, they usually cite transition costs as prohibitive.³² Industry's

23. Rossi & Garner, *supra* note 7, at 493.

24. HUMANE SOC'Y U.S., *supra* note 18.

25. "Organic" is a labeling term that refers to products produced under the authority of the Organic Food Production Act. 17 U.S.C. § 6501 (2016); *Organic Production/Organic Food: Information Access Tools*, NAT'L AGRIC. LIBRARY, U.S. DEP'T AGRIC. (Apr. 2016), <https://www.nal.usda.gov/afsic/organic-productionorganic-food-information-access-tools>. With respect to egg production, "organic" means that the laying hen is uncaged, free to walk around, and has outdoor access. *How to Decipher Egg Carton Labels*, HUMANE SOC'Y U.S., http://www.humanesociety.org/issues/confinement_farm/facts/guide_egg_labels.html (last visited July 26, 2017). "Cage-free" egg production does not involve the use of cages, and the animal is free to walk around. *Id.* A "cage-free" hen, however, lacks outdoor access. *Id.*

26. *About the U.S. Egg Industry*, AM. EGG BOARD (June 7, 2017), <http://www.aeb.org/farmers-and-marketers/industry-overview>.

27. *Survey Shows Few Sows in Open Housing*, NAT'L HOG FARMER (June 7, 2012), <http://www.nationalhogfarmer.com/animal-well-being/survey-shows-few-sows-open-housing>.

28. *Animal Care & Housing*, AM. VEAL ASS'N (2016), <http://www.americanveal.com/animal-care-housing/>.

29. Sara Shields, Paul Shapiro, & Andrew N. Rowan, *A Decade of Progress Toward Ending the Intensive Confinement of Farm Animals in the United States*, 7 ANIMALS 1, 2–3 (2017).

30. Wolfson & Sullivan, *supra* note 15, at 225 (observing that economies of scale and inter-corporate competition severely constrain producers who prefer alternative housing methods).

31. PEW CHARITABLE TRUSTS, *supra* note 21, at 33.

32. See, e.g., *For the Week Ending November 11, 2016*, NAT'L PORK PRODUCERS COUNCIL (Nov. 11, 2016), <http://nppc.org/for-the-week-ending-november-11-2016/>. Given the current production model of IAA, a transition to alternative housing systems

preoccupation with price, and its reliance on intensive confinement, is intrinsically linked to the contemporary model of IAA. That model is characterized by “vertical integration,” in which a single meat packing company, or “integrator,” controls nearly all phases of the agricultural supply chain.³³ While contract “growers” do the actual farming, these individuals have almost no control over their operations.³⁴ Growers do not own the animals, raise the feed crops, or decide what and when the animals are fed.³⁵ Increasing vertical integration has paired with growing corporate concentration and higher density animal production.³⁶

In response to public pressure, several large retailers and food service suppliers have pledged to reduce extreme confinement.³⁷ While a significant step forward, these commitments are unlikely to compel industry-wide change.³⁸ For instance, McDonald’s shift to cage-free eggs—hailed as transformative—will improve conditions for just eight million of the three-hundred million-plus laying hens in the U.S.³⁹ And despite large retailer interest in alternative housing methods, IAA operators may be unwilling or unable to keep pace with demand.⁴⁰ Even if ultimately successful, buyers will take time to shift

would, at least initially, increase production costs for most firms. These costs would reduce over time, however, and certain alternative systems, like hoop barns, can be applied to beef, pork, dairy, and poultry farming at a relatively low cost. PEW CHARITABLE TRUSTS, *supra* note 21, at 33, 55.

33. PEW CHARITABLE TRUSTS, *supra* note 21, at 5–6 (observing that “the swine and poultry industries are the most vertically integrated, with a small number of companies overseeing most of the chicken meat and egg production in the United States”); Rossi & Garner, *supra* note 7, at 484. In this regard, vertically integrated IAA is distinct from farming methods classified as “sustainable,” “pasture-based,” or “organic.” *Id.* These alternative production methods can overlap, and have been collectively characterized as “non-industrial animal agriculture.” *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 6.

37. *Id.* at 35–37.

38. *See id.* at 38 (opining that voluntary inaction is inadequate due to loopholes and economic incentives, thus necessitating government regulation).

39. Beth Kowitt, *Inside McDonald’s Bold Decision to Go Cage Free*, FORBES (Aug. 18, 2016), <http://fortune.com/mcdonalds-cage-free>; Stephanie Strom, *McDonald’s Plans a Shift to Eggs from Only Cage-Free Hens*, N.Y. TIMES (Sept. 9, 2015), <https://www.nytimes.com/2015/09/10/business/mcdonalds-to-use-eggs-from-only-cage-free-hens.html>; Caroline Macdonald, *Study: Consumers Think Cage-Free Eggs Come from ‘Happier’ Birds, Boosting Quality*, FOOD DIVE (May 18, 2017), <http://www.fooddive.com/news/study-consumers-think-cage-free-eggs-come-from-happier-birds-boosting-q/443023/>; Vanessa Wong, *Egg Makers Are Freaked Out by the Cage-Free Future*, CNBC (Mar. 22, 2017), <http://www.cnbc.com/2017/03/22/egg-makers-are-freaked-out-by-the-cage-free-future.html>.

40. Macdonald, *supra* note 39 (citing countervailing economic conditions).

their supply networks. Considering pledges made to date, only ten percent of eggs currently sold in the U.S. are cage-free.⁴¹

Similar doubts overshadow the progressive potential of producer pledges. IAA firms have refused to honor these commitments due to cost considerations.⁴² In one especially notorious retraction, Smithfield Foods—the largest global pork producer and processor—walked back a 2009 promise to phase out gestation crates.⁴³ That shift came just two years after the company's initial announcement. Even where IAA producers follow through on voluntary pledges, these assurances often contain loopholes that allow for intensive confinement's continued use. For instance, producer pledges typically bind only in-house operations.⁴⁴ As a result, agreements often omit contract-growers who are responsible for the vast majority of hog and egg production. When Smithfield later renewed its promise to convert gestation crates to group housing, its commitment applied exclusively to "company-owned farms."⁴⁵ In addition, group housing pledges usually dictate treatment for just one stage of the animal's life.⁴⁶ For other periods, extreme confinement systems remain in play.

B. The Development of Anti-Confinement Regulations

As a result of intensive confinement's persistence, animal welfare advocates have pursued government regulation. HSUS in particular has focused on ending intensive farm animal confinement as part of its organizational objective to reduce animal cruelty.⁴⁷ Despite failing to achieve federal reform, the organization has driven the enactment

41. *Id.*

42. See Pamela A. Vesilind, *NAFTA's Trojan Horse & the Demise of the Mexican Hog Industry*, 43 U. MIAMI INTER-AM. L. REV. 143, 159 n.112 (2011) ("[T]he [hog] industry's stance on adopting more humane animal welfare practices has, for the most part, been limited to public relations opportunities."); Rick Berman, *Berman: A Tale of Two Industries*, FARM JOURNAL'S PORK (Aug. 22, 2013), <http://www.porknetwork.com/berman-tale-two-industries> (describing ways to circumvent pledges).

43. Vesilind, *supra* note 42.

44. According to some estimates, independent contractors raise nearly 80% of hogs produced domestically. Berman, *supra* note 42.

45. *Smithfield Foods Nears 2017 Goal for Conversion to Group Housing Systems for Pregnant Sows*, SMITHFIELD FOODS (Jan. 4, 2017), <http://www.smithfieldfoods.com/newsroom/press-releases-and-news/smithfield-foods-nears-2017-goal-for-conversion-to-group-housing-systems-for-pregnant-sows>; see Rossi & Garner, *supra* note 7, at 493 n.5 (critiquing Smithfield's past pledges).

46. See Shields et al., *supra* note 29, at 14 (listing producer pledges by company, date, application to contractors, and time spent by animals in individual crates during and following breeding).

47. *Id.* at 1.

of anti-confinement measures in eleven states.⁴⁸ These regulations broadly take two forms. The first disciplines production (“production regulations”) by limiting in-state *use* of intensive confinement systems.⁴⁹ The second model governs products (“product regulations”) by inhibiting the in-state *sale* of certain foods by out-of-state producers.⁵⁰ The majority of existing anti-confinement regulations discipline production.⁵¹ The Massachusetts measure approved in November 2016 will thus impose new costs on previously unregulated IAA entities.⁵²

1. Federal Inaction on Farmed Animal Welfare

Federal law remains silent on the on-farm treatment of animals intended for human consumption.⁵³ While several statutes could apply to farmed animals, none do. The Animal Welfare Act, which otherwise represents the seminal statute regulating animal cruelty, exempts farmed animals.⁵⁴ The Humane Slaughter Act excludes poultry, and does not govern methods for on-farm treatment, just slaughter.⁵⁵ The Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), and the Eggs Products Inspection Act (EPIA) respectively regulate the inspection, processing, and packaging of meat, poultry, and egg-based goods.⁵⁶ Those statutes do not govern treatment of live animals. While federal lawmakers have

48. *See id.*

49. *See* Hallinan & Pierce, *supra* note 12, at 4.

50. *See id.*

51. California’s statutory scheme represents an exception, but even that product regulation extends only to battery cages. *See* CAL. HEALTH & SAFETY CODE §§ 25990–91, 25996.

52. *See* MASS. GEN. LAWS ANN. ch. 129 app. § 1-1 to 1-5 (effective January 1, 2022).

53. Wolfson & Sullivan, *supra* note 15, at 207–08; Valerie J. Watnick, *The Business and Ethics of Laying Hens: California’s Groundbreaking Law Goes into Effect on Animal Confinement*, 43 B.C. ENVTL. AFF. L. REV. 45, 54–55 (2016); Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 150 (2009).

54. Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2012). The Act applies exclusively to animals used for research, exhibition, and as pets. Wolfson & Sullivan, *supra* note 15, at 207.

55. Humane Slaughter Act, 7 U.S.C. § 1901 (2012); *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009) (exempting poultry).

56. *See generally* Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (2012); Poultry Products Inspection Act, 21 U.S.C. §§ 451–472 (2012); Eggs Products Inspection Act, 21 U.S.C. §§ 1031–1056 (2012).

at times introduced legislation that would improve living conditions for farmed animals, those efforts have failed.⁵⁷

2. Subnational Regulatory Dynamism

Contrasting the dearth of analogous federal standards, eleven states have enacted product or production regulations limiting extreme confinement.⁵⁸ Five states have done so legislatively, five by ballot initiative, and one via an administrative body.⁵⁹ The rate of policy uptake is noteworthy. I begin with Florida, as voters there approved the first production regulation in 2002.⁶⁰ Eight states followed suit, adopting comparable provisions between 2006 and 2012.⁶¹ While these regulations initially applied to just one type of intensive confinement, later iterations applied to two types, then three.⁶² The most recent measure in Massachusetts is the broadest to date.⁶³

a. HSUS as a Catalyst for Policy Change

HSUS's pursuit of state reform stems partly from early unsuccessful attempts to pass federal legislation. In 1989, H.R. 84, the Veal Calf Protection Act, proposed a minimum size requirement for veal crates.⁶⁴ The legislation's backers intended for the statute to provide calves with more space as compared to the then-industry standard.⁶⁵ The American Veal Association (AVA) opposed the bill, as did cattle producers and the dairy industry.⁶⁶ These groups argued, in

57. Watnick, *supra* note 53, at 54–56.

58. AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, *supra* note 8.

59. *Id.* I consider California to have approved its production standard by ballot initiative, though the state's legislature later amended the statute to apply the in-state production standard to out-of-state egg producers. CAL. HEALTH AND SAFETY CODE §§ 25990-25991, 25996 (West 2014).

60. See Shields et al., *supra* note 29, at 3.

61. *Id.* at 5, 7–11.

62. See *infra* Part I(B)(2)(a).

63. See MASS. GEN. LAWS ANN. ch. 129 app. § 1-1 to 1-5 (West 2016) (effective January 1, 2022).

64. Veal Calf Protection Act, H.R. 84, 101st Cong. (1989); Shields et al., *supra* note 29, at 2. The bill contained additional feed guidelines to prevent anemia in veal calves. See H.R. 84.

65. *Id.*

66. *Veal Calf Protection Act: Joint Hearing Before the Subcomm. on Livestock, Dairy, and Poultry and the Subcomm. on Dep't Operations, Research, and Foreign Agric. of the H. Comm. on Agric.*, 101st Cong. 103–20, 126–28 (1989), <https://catalog.hathitrust.org/Record/007403971>.

short, that federal legislation would undermine their economic competitiveness and sanction unwanted federal regulation.⁶⁷ The bill failed to make it out of committee.⁶⁸

Attributing this failure to the industry's legislative sway, HSUS directed its advocacy efforts to state-based ballot campaigns.⁶⁹ Citizen-led initiatives played to HSUS's substantive strengths. Appealing directly to voters allowed HSUS to trade more effectively on public sympathy for animals.⁷⁰ HSUS, joined by other animal welfare organizations, followed a "path of least resistance," initially targeting non-agricultural states with few regulated entities.⁷¹ Scoring early victories would place pressure on IAA producers and their political allies, building momentum for more challenging campaigns.

HSUS's first success came in 2002, when Florida voters approved a ballot measure prohibiting the confinement of pregnant pigs in gestation crates.⁷² HSUS waged its initial anti-confinement campaign in Florida, as it fit the organization's broader strategic approach.⁷³ To begin, the state contained just two pork producers potentially subject to the regulation.⁷⁴ Florida, moreover, is outside the cohort of traditional agricultural states that adopt a more "utilitarian" view of animals.⁷⁵ The state also possesses a large urban population.⁷⁶ HSUS anticipated that urban voters would be more receptive to the theme of

67. *Id.* at 107 (statement of Bill Bassett, National Milk Producers Federation and the Florida Dairy Farmers Association), 109 (statement of Len Landwehr, Veal Farmer, American Farm Bureau Federation), 113 (statement of Jack Fleishman, American Meat Institute).

68. Shields et al., *supra* note 29, at 3.

69. *Id.*

70. *Id.*; see also Elliot et al., *supra* note 6, at 329 (explaining the comparative advantage enjoyed by environmental organizations at the subnational level).

71. Zack Colman, *The Fight for Cage-Free Eggs*, THE ATLANTIC (Apr. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/04/a-referendum-on-animal-rights/478482/>; Kristen Hinman, *How Colorado Cooled the Controversy Between the Humane Society and Big Agriculture*, WESTWORD (Apr. 15, 2010), <http://www.westword.com/news/how-colorado-cooled-the-controversy-between-the-humane-society-and-big-agriculture-5107797>.

72. See FLA. CONST. art. X, §21.

73. Shields et al., *supra* note 29, at 3.

74. *Id.* at 5.

75. See Maggie Jones, *The Barnyard Strategist*, N.Y. TIMES MAGAZINE (Oct. 26, 2008), <http://www.nytimes.com/2008/10/26/magazine/26animal-t.html>.

76. *Id.*

anti-animal cruelty.⁷⁷ The ballot measure passed with 55% of the vote.⁷⁸

HSUS's next site, Arizona, posed a greater challenge. To HSUS's advantage, the state lacked a large veal sector. The state also possessed a favorable track record of citizen-approved animal welfare reforms.⁷⁹ Complicating matters, however, was HSUS's intent to broaden its proposed initiative to regulate both veal and gestation crates. So expanding the measure increased the risk of opposition.⁸⁰ HSUS sought to strike a bipartisan tone to ameliorate that risk, emphasizing "compassion" as a universal value.⁸¹ HSUS succeeded: the Arizona measure passed with 62% of the vote.⁸²

Following the Arizona victory, HSUS prepared to launch a ballot campaign in Colorado.⁸³ After HSUS filed paperwork for the initiative, the state's then-Governor, Bill Ritter, reached out to HSUS's President and CEO, Wayne Pacelle.⁸⁴ Ritter suggested that HSUS and state industry groups avoid a costly battle by negotiating a compromise.⁸⁵ Relevant stakeholders found common ground, facilitating approval of a gestation and veal crate ban.⁸⁶ This represented HSUS's second statutory success, as the Oregon legislature had approved a gestation crate ban the year before.⁸⁷

Building on this momentum, HSUS began preparing for its first campaign in a major agricultural state: California. The campaign would prove contentious. California was then a top-ten egg producer.⁸⁸ While this presented a political risk, HSUS took the California campaign as an opportunity to improve the quality of more animal lives. For the first time, the proposed regulation extended a production ban to the use of battery cages.⁸⁹ As a result, the Prevention of Farm Animal Cruelty Act, or "Proposition 2," prohibited anyone in the state from confining a veal calf, gestating sow, or egg-

77. *Id.*

78. *Id.*

79. Shields et al., *supra* note 29, at 5.

80. *Id.*

81. *Id.*

82. *Id.*; see ARIZ. REV. STAT. ANN. § 13-2910.07 (West 2012).

83. Jones, *supra* note 75.

84. *Id.*

85. *Id.*

86. *Id.*; COLO. REV. STAT. ANN. § 35-50.5-102 (West 2008).

87. Shields et al., *supra* note 29, at 7; see OR. REV. STAT. §600.150 (West 2008).

88. JOEL GREENE & TADLOCK COWAN, CONG. RESEARCH SERV., R42534, TABLE EGG PRODUCTION AND HEN WELFARE: AGREEMENT AND LEGISLATIVE PROPOSALS 6 (2014).

89. *Id.* at 8.

laying hen in a way that prevented the animal from lying down, standing up, extending its limbs, or turning around freely.⁹⁰

Not surprisingly, the egg industry strongly resisted Proposition 2. The United Egg Producers (UEP), a trade association representing 90% of egg producers, led the effort.⁹¹ UEP focused on the measure's putative economic risks, arguing that consumers would face higher egg prices as producers switched to more expensive housing systems.⁹² UEP also rebutted HSUS's claims that intensive confinement systems harmed animals and the environment.⁹³ Because large veal and pork producers are virtually absent from California, the livestock industry did not contribute significantly to opposition efforts.⁹⁴ In November 2008, Proposition 2 passed with 63% of the vote.⁹⁵

Two years later, the California legislature approved AB 1437.⁹⁶ That bill amended Proposition 2 to prohibit the in-state sale of eggs derived from hens raised in violation of the state's existing treatment standard.⁹⁷ The amended statutory scheme represented the first contemporaneous anti-confinement product and production regulation.⁹⁸ Lawmakers framed the application of Proposition 2's treatment standard to out-of-state egg producers as "level[ing] the playing field" for in-state producers.⁹⁹ This comparative economic framing likely contributed to the bill's approval, as did voters' demonstrated support for Proposition 2.

90. Lovvorn & Perry, *supra* note 53; CAL. HEALTH & SAFETY CODE §§ 25990-91 (West 2015).

91. Lewis Bollard, *Sunny Side Up Legislation*, THE HILL (June 5, 2013), <http://thehill.com/blogs/congress-blog/healthcare/303425-sunny-side-up-legislation>.

92. See, e.g., Aurelio Rojas, *Feathers Fly Over Hens in Cages: More Space for Animals Sought, But Egg Price Jump Predicted*, SACRAMENTO BEE (Aug. 2008). UEP commissioned its own reports on the economic implications of Proposition 2. See generally PROMARINT'L, *Impacts of Banning Cage Egg Production in the United States* (Aug. 2009), http://www.unitedegg.org/information/pdf/promar_study.pdf.

93. *Id.* at 2-3.

94. Wayne Pacelle, *A Resounding Yes! On Prop 2*, A Humane Nation Wayne Pacelle's Blog (Sept. 17, 2008), <http://blog.humanesociety.org/wayne/2008/09/prop-2-support.html>.

95. Lucindo Valero & Will Rhee, *When Fox and Hound Legislate the Hen House: A Nixon-in-China Moment for National Egg-Laying Standards?*, 65 ME. L. REV. 651, 662 (2013).

96. See generally CAL. HEALTH AND SAFETY CODE §§ 25990-25991 (West 2014).

97. *Id.*

98. *Id.*

99. A.B. 1437, Assemb. Comm. on Agric., *Shelled Eggs: Compliance with Animal Care Standards 2* (Cal. 2009), http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_cfa_20090428_155254_asm_comm.html.

Proposition 2's passage strengthened HSUS's anti-confinement mandate. The organization proceeded to champion several initiatives elsewhere. In 2009, Maine's legislature passed a statute banning the in-state use of veal and gestation crates.¹⁰⁰ That same year, Michigan, a top veal and egg-producing state, adopted a production regulation that banned the use of all three intensive confinement systems.¹⁰¹ Michigan lawmakers drafted that bill following private stakeholder discussions.¹⁰² HSUS's next negotiated compromise came in 2010, when HSUS reached an agreement with industry groups in Ohio to phase out veal and gestation crates.¹⁰³ These groups also agreed to a moratorium on the construction of new battery cages.¹⁰⁴ Three years later, Rhode Island banned the use of gestation and veal crates.¹⁰⁵ The Rhode Island legislation passed the state's House unanimously.¹⁰⁶

In 2015, HSUS prepared its broadest anti-confinement measure for a Massachusetts campaign.¹⁰⁷ That initiative became known as "Question 3," after its number on the ballot.¹⁰⁸ While modeled on Proposition 2, Question 3 went a step further than California's statutory scheme by prohibiting both the in-state use of all three intensive confinement systems, and the in-state sale of any whole egg, pork, or veal products thereby derived.¹⁰⁹ California's product

100. ME. REV. STAT. tit. 7, § 4020 (West 2009).

101. MICH. COMP. LAWS, § 287.746(2)(a)(b) (West 2009); GREENE & COWAN, *supra* note 88, at 16.

102. GREENE & COWAN, *supra* note 88, at 23.

103. Shields et al., *supra* note 29, at 10.

104. *Id.* at 10–11.

105. See R.I. GEN. LAWS ANN. § 4-1.1-3 (West 2014).

106. Jennifer Bogdan, *A Chicken Kerfuffle: Humane Society Clucks Over Blocked Bill Requiring More Cage Space*, THE PROVIDENCE JOURNAL (July 2, 2015), <http://www.providencejournal.com/article/20150702/NEWS/150709788>; *Rhode Island Enacts Legislation to Prohibit Extreme Confinement Crates for Pigs and Calves and the Routine Docking of Cows' Tails*, THE HUMANE SOC'Y (June 21, 2012), http://www.humanesociety.org/news/press_releases/2012/06/rhode_island_gestation_crates_ban_062112.html?referrer=https://www.google.com/.

107. See Colman, *supra* note 71; Christian Wade, *Proposed Ban on Caged Foods Could Hike Prices*, NEWBURY PORT NEWS (Aug. 13, 2015), http://www.newburyportnews.com/news/local_news/proposed-ban-on-caged-foods-could-hike-prices/article_4372e106-8090-5442-aae4-e8b5f59f1f7c.html.

108. SEC'Y OF THE COMMONWEALTH OF MASS., MASS. INFO. FOR VOTERS 2016 BALLOT QUESTIONS 8–11 (Nov. 2016), http://www.sec.state.ma.us/ele/elepdf/IFV_2016.pdf. The measure is formally entitled "Prevention of Farm Animal Cruelty Act." *Id.* at 9.

109. See *id.*; MASS. GEN. LAWS ANN. ch. 129 app. § 1-1 to 1-5 (effective January 1, 2022).

regulation, in contrast, applied only to out-of-state egg producers, not to out-of-state producers of pork or veal.¹¹⁰

Prior to the November 2016 election, over one hundred local farmers, including certified organic and free-range growers, pledged their support for Question 3.¹¹¹ Additional endorsements came from large food retailers and service companies, like Chipotle and Bon Appetit Management, which had committed to stop buying certain intensively confined animal products.¹¹² A host of public interest groups, including animal welfare, environmental, public health, workers' rights, and religious organizations, advocated the measure. Individuals in the state's political establishment also signed on, including Massachusetts Governor Charlie Baker, thirty-five state legislators, one U.S. senator, five U.S. House members, and the state's Attorney General.¹¹³

To challenge the measure, IAA interests formed a coalition entitled "Citizens Against Food Tax Injustice."¹¹⁴ The group warned that Question 3 would cause prices to increase for common household goods, affecting consumers.¹¹⁵ Were these price increases to materialize, they would stem from Question 3's purported impact on out-of-state producers: just one farm in Massachusetts intensively

110. See generally CAL. HEALTH AND SAFETY CODE §§ 25990-25991 (West 2014).

111. CITIZENS FOR FARM ANIMALS, *Endorsements*, <http://citizensforfarmanimals.com/endorsements> (last visited July 26, 2017).

112. *Id.*; see BON APPETIT MGMT., *Switching Our Shell Eggs to Come from Hens Not Confined to Battery Cages*, <http://www.bamco.com/timeline/cage-free-eggs/> (last visited July 26, 2017) (committing to cage-free eggs); CHIPOTLE, *Conventional Pork vs. Chipotle's Pork*, <https://www.chipotle.com/pork-terms> (last visited July 26, 2017) (indicating that sourced pork is raised "outdoors and/or in deeply bedded barns").

113. See CITIZENS FOR FARM ANIMALS *supra* note 111; CISA, *Animal Confinement Question Passes*, (Nov. 9, 2016) <https://www.buylocalfood.org/animal-confinement-question-passes/>.

114. See CISA, *supra* note 113; David Scharfenberg, *Two Sides to Debate Cage-Free-Egg Ballot Issue: Second in Series on Referendums*, BOSTON GLOBE (Sept. 2016), http://edition.pagesuite.com/popovers/article_popover.aspx?guid=d5f4aa0d-eba6-49cb-97e7-f6622479ddb8; Colin A. Young, *Question 3 Wins in Landslide, Allowing Better Conditions for Farm Animals*, SENTINEL & ENTERPRISE NEWS (Nov. 9, 2016) http://www.sentinelandenterprise.com/news/ci_30553789/question-3-wins-landslide-allowing-better-conditions-farm#ixzz4oGT4yF8F (describing the coalition as comprising "the Massachusetts Farm Bureau, National Association of Egg Farmers, National Pork Producers Council, New England Brown Egg Council, Northeast Agribusiness and Feed Alliance, Protect the Harvest and 'anti-poverty advocates'").

115. See Young, *supra* note 114.

confined animals.¹¹⁶ Despite opposition from IAA interests, 78% of the state's voters approved the measure.¹¹⁷

b. Contextualizing Regulatory Gaps

Several factors contributed to HSUS's state-level success. Those factors included the organization's deliberate choice of where and when to campaign, its broad-based, non-partisan message, and the presence of significant voting blocs of receptive residents. In addition to ideologically aligned public interest organizations, HSUS generally relied on small organic farmers and retailers with sustainability commitments.

But gaps remain with respect to production regulations. Except for Ohio, all top pork-producing states continue to allow the use of gestation crates.¹¹⁸ These states, located primarily in the West and Great Plains, have traditionally been impervious to HSUS's ballot campaigns and legislative efforts. Many of these jurisdictions lack ballot initiative processes.¹¹⁹ IAA entities favoring intensive confinement are usually influential in these states, reducing the likelihood of legislative reform.¹²⁰ USDA data highlights the pork

116. Carolyn Heneghan, *Could a Massachusetts Ballot Initiative Start a Cage-Free Revolution?*, FOOD DIVE (Nov. 8, 2016), <http://www.fooddive.com/news/could-a-massachusetts-ballot-initiative-start-a-cage-free-revolution/429940/>. Despite the virtual absence of in-state producers using intensive confinement, the initiative's production regulation is crucial to fending off dormant Commerce Clause challenges. See *infra* Part III.

117. SEC. OF THE COMMONWEALTH OF MASS., MASSACHUSETTS ELECTION STATISTICS (2017), http://electionstats.state.ma.us/ballot_questions/view/2741/.

118. At the time of Ohio's negotiated compromise, the state ranked second in egg production, ninth in hog production, and was believed to have a large veal production sector. Shields et al., *supra* note 29, at 10–11.

119. Katie Smithson et al., *Predicting State-Wide Votes on Ballot Initiatives to Ban Battery Cages and Gestation Crates*, 46 J. OF AGRIC. AND APPLIED ECON. 107, 122–23 (2014); see Shields, *supra* note 29, at 11 (explaining that HSUS sought a federal ban on intensive confinement in part because “a ballot initiative is only an option in around half of U.S. states”); Jones, *supra* note 75 (observing that “[s]tate ballot measures were never the Humane Society's first choice” because HSUS preferred federal or state legislative action).

120. Jones, *supra* note 75. One leading manifestation of IAA producers' legislative influence is the successful imposition of livestock care standards boards. Whitney R. Morgan, *Proposition Animal Welfare: Enabling an Irrational Public or Empowering Consumers to Align Advertising Depictions with Reality?*, 26 U. FLA. J.L. & PUB. POL'Y 297, 322–24 (2015). Those boards can be structured to favor IAA interests. *Id.* State lawmakers in Ohio approved one such board in response to HSUS's proposed anti-confinement initiative there. *Id.*; Shields et al., *supra* note 29, at 10–11. Other agricultural states have implemented a range of protections for IAA firms, including

industry's relative regulatory insularity.¹²¹ That insularity stems from early state efforts to reduce public policy barriers to corporate entry and growth.¹²²

Question 3 thus represents a regulatory game-changer. By requiring out-of-state entities to comply with Massachusetts's new in-state standard, Question 3 threatens the pork industry's predominant business model. Compounding IAA firms' vulnerability is the likelihood that other states will adopt measures resembling Question 3. Just four months after Question 3's passage, Rhode Island lawmakers introduced legislation virtually identical to Question 3.¹²³ HSUS pushed hard for the measure.¹²⁴ The bill passed overwhelmingly in the Rhode Island House of Representatives.¹²⁵ As with Massachusetts, Rhode Island has just one farm that would need to phase out its use of extreme confinement if the state's anti-confinement measure succeeded.¹²⁶

In addition to Rhode Island, HSUS is moving in other states to capitalize on its Massachusetts victory.¹²⁷ In August 2017, HSUS

"right to farm" amendments and "ag-gag" laws. See Morgan, *supra* note 120 at 330–32; Carrie A. Scrufari, *A Watershed Moment Revealing What's at Stake: How Ag-Gag Statutes Could Impair Data Collection and Citizen Participation in Agency Rulemaking*, 65 UCLA L. REV. DISC. (2017) (observing ag-gag laws in eight states that "criminalize whistleblowing on farms").

121. For instance, compare Ohio and Iowa. In 2015, Ohio was the nation's ninth-largest pork producer, generating just over one billion hogs, as measured in pounds. See NAT'L AGRIC. STATISTICS SERV., USDA, *Meat Animals Production, Disposition, and Income: 2015 Summary* 17 (2016), <http://usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-28-2016.pdf>. The year's top producer, Iowa, generated around 12.5 billion hogs, almost eleven billion more pounds than Ohio. *Id.*; USDA, *2012 Census Highlights* (Mar. 2015), https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Hog_and_Pig_Farming.

122. Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 180–81 (2002).

123. See H. 6023, Gen. Assemb., Jan. Reg. Sess. (R.I. 2017), <http://webserver.rilin.state.ri.us/BillText/BillText17/HouseText17/H6023.pdf>; R.I. GEN. ASSEMB., H. COMM. ON ENVIRO. AND NAT. RES., NOTICE OF MEETING (June 6, 2017), <http://status.rilin.state.ri.us/documents/agenda-12863.pdf>.

124. Jacqueline Tempera, *House Again Gives Approval of Bigger Hen Cages*, THE PROVIDENCE JOURNAL (June 16, 2017); Tim Faulkner, *Drama in Quest to Rid Rhode Island of Battery Cages*, ECO NEWS (June 20, 2017).

125. See Tempera, *supra* note 124.

126. Tim Faulkner, *Single Farm Stands in Way of Ban on R.I. Battery Cages*, ECORI NEWS (Apr. 15, 2017), <https://www.ecori.org/government/2017/4/13/one-farm-stands-in-way-of-ban-on-battery-cages>.

127. Tempera, *supra* note 124; Zack Stanton, *33 Things This Election Will Decide that Have Nothing to Do with Trump or Clinton*, POLITICO (Oct. 29, 2016),

introduced a new California ballot initiative similar to Question 3—but again, broader. That initiative, titled the Prevention to Farm Animals Cruelty Act, calls for all eggs sold or produced in the state to be “cage-free.”¹²⁸ Like Question 3, the measure also prevents the in-state sale or use of intensive confinement for pork or veal.¹²⁹ HSUS must still generate the requisite signatures to place the initiative on the November 2018 ballot. If HSUS succeeds, the measure’s prospects for passage are fair. California voters have empirically supported strict animal welfare standards.¹³⁰ The absence of sizable pork or veal producers also buoys the measure’s prospects.¹³¹

Regression analysis shows that HSUS could enjoy success beyond the coasts.¹³² Using data collected following Proposition 2’s passage, researchers at Oklahoma State University predicted that over fifty percent of voters in twenty-two states would approve a similarly-styled initiative.¹³³ Several of these states, including Massachusetts, have since implemented broad anti-confinement measures. And while some of these states lack ballot initiative processes, widespread popular support could encourage legislative action.

Also increasing the possibility of interstate modeling is courts’ shelving of legal challenges to existing anti-confinement product regulations. In January 2017, the Ninth Circuit dismissed *Missouri v. Harris*, the lead case against California’s amended anti-confinement statute.¹³⁴ In *Missouri*, six states challenged the state’s product regulation under the Commerce Clause and Supremacy Clause.¹³⁵ While the court dismissed the complaint for lack of standing, it observed that California’s regulation on the sale of intensively confined egg products was not economically discriminatory.¹³⁶ Rather, the court noted that the California law treated “both intrastate and

<http://www.politico.com/magazine/story/2016/10/election-2016-ballot-initiatives-downticket-votes-measures-214400>.

128. Tara Duggan, *New Ballot Initiative Could Increase California Farm Animal Welfare Standards*, SF CHRONICLE (Aug. 29, 2017), <http://www.sfchronicle.com/food/article/New-ballot-initiative-could-increase-California-12159349.php>. The proposed text of the initiative, including definitions, is available at https://oag.ca.gov/system/files/initiatives/pdfs/170026%20%28Animal%20Cruelty%29_0.pdf.

129. *Id.*

130. *Id.*

131. Shields et al., *supra* note 29, at 5.

132. Smithson et al., *supra* note 119, at 117.

133. *Id.* at 108, 117, 120.

134. *Mo. ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017).

135. *Id.* at 650.

136. The state plaintiffs argued that they possessed *parens patriae* standing on behalf of their citizens, including egg producers. *Id.* at 655.

interstate products alike.”¹³⁷ Though non-dispositive with respect to a future merits challenge, the court’s reasoning cuts against a finding of invalidity under the dormant Commerce Clause.¹³⁸ In May 2017, the Supreme Court denied the states’ petition for a writ of certiorari.¹³⁹

Additional cases complicate dormant Commerce Clause challenges to anti-confinement product regulations. In stating that the California egg statute did not discriminate, the Ninth Circuit in *Missouri* relied partly on the court’s prior holding in *Association des Eleveurs de Canards et d’Oies du Quebec v. Harris* (Canards I).¹⁴⁰ In that case, the Ninth Circuit upheld California’s ban on the sale and production of force-fed foie gras under the Commerce Clause.¹⁴¹ Applying a two-tiered approach, the court first asked whether California’s ban directly regulated or discriminated against interstate commerce, or had the effect of favoring in-state economic interests over out-of-state groups.¹⁴² The court found no discriminatory purpose or effect because California’s law applied equally to “*the sale of both intrastate and interstate products that are the result of force feeding a bird.*”¹⁴³ The court then asked whether California had a legitimate interest in the regulation, and whether the law’s commercial burden clearly exceeded the local benefits.¹⁴⁴ The court found that California’s interest in preventing animal cruelty was legitimate.¹⁴⁵ In addition, the Ninth Circuit concluded that the regulation’s burden was minimal

137. *Id.*

138. Dormant Commerce Clause doctrine emanates from Congress’s authority to regulate under the Commerce Clause. U.S. CONST. art. I § 8, cl. 3. That doctrine is “driven by concern about economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273–74 (1988); accord *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008).

139. *Mo. ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017).

140. *Harris*, 847 F.3d at 655 (citing *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris* (Canards I), 729 F.3d 937, 948 (9th Cir. 2013)).

141. *Canards I*, 729 F.3d at 948–53; see CAL. HEALTH & SAFETY CODE § 25982 (West 2012) (prohibiting the in-state sale of a product that “is the result of force feeding a bird”); see Kathryn Bowen, Note, *The Poultry Products Inspection Act and California’s Foie Gras Ban: An Analysis of the Canards Decision and Its Implications for California’s Animal Agriculture Industry*, 104 CAL. L. REV. 1009, 1018 (2016) (discussing reasoning and related cases).

142. *Canards I*, 729 F.3d at 948–53.

143. *Id.* at 948.

144. *Id.* at 951–53.

145. *Id.* at 953 (citing *United States v. Stevens*, 559 U.S. 460, 496 (2010)).

because the state still allowed the continued production and sale of non-force-fed foie gras.¹⁴⁶

The Ninth Circuit recently affirmed the validity of California's force-fed foie gras ban under the Supremacy Clause.¹⁴⁷ In a renewed challenge, the *Canards I* plaintiffs amended their initial complaint to include a preemption argument (*Canards II*).¹⁴⁸ In short, the plaintiffs contended that California's ban on force-fed foie gras contravened a PPIA provision prohibiting states from imposing "ingredient requirements" that are "in addition to" or "different than" those under the federal act.¹⁴⁹ The district court ruled in the plaintiffs' favor, reasoning that the California statute improperly created a new ingredient requirement.¹⁵⁰ The state appealed, and won.¹⁵¹

Upholding California's ban, the Ninth Circuit found that the PPIA neither expressly nor impliedly preempted the state law.¹⁵² The court noted that the plaintiffs' interpretation of the PPIA would require it to "radically expand the ordinary meaning of 'ingredient'" to include treatment of animals "*while alive*."¹⁵³ The court opined that the plaintiffs' statutory reading overreached by proscribing states from broadly regulating "animal husbandry practices."¹⁵⁴ In so doing, the court analogized feeding techniques—an on-farm practice—to raising an animal "cage-free."¹⁵⁵ By deeming permissible state regulations on these types of practices, the Ninth Circuit cut against the likelihood of successful preemption challenges to future anti-confinement measures.

II. THE LIKELIHOOD OF DEFENSIVE PREEMPTION IN VIEW OF ANTI-CONFINEMENT PRODUCT REGULATIONS

This Part posits that IAA firms will react to costly state product regulations by seeking preemptive federal legislation. In so predicting, I draw on principles developed by regulatory federalism

146. *Id.*

147. *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra* (Canards II), 870 F.3d 1140, 1153 (9th Cir. 2017).

148. *Id.*

149. *Id.* at 1143; 21 U.S.C. § 467(e).

150. *Canards II*, 870 F.3d at 1145 (citing 79 F. Supp. 3d at 1144–48 (C.D. Cal. 2015)).

151. *Id.* at 1153.

152. *Id.*

153. *Id.* at 1149.

154. *Id.*

155. *Id.*

and environmental law scholars, and the empirical behavior of IAA firms. I provide a recent case study of defensive preemption in the context of state GMO labeling mandates. That study sheds light on the normative and practical implications of industry's repeated preemption play.

A. Adversely Affected Producers Will Seek Federal Protection

Defensive preemption theory illuminates when and why firms lobby for regulations that they would otherwise prefer to avoid.¹⁵⁶ Under this account of interest group behavior, there exists a "sweet spot" at which states produce sufficient uncertainty, inconsistency, and potentially costly regulatory content that industry shifts its generally anti-interventionist stance to support federal standards.¹⁵⁷ Regulations are especially likely to generate industry-driven calls for preemption if applied to products destined for national markets.¹⁵⁸ Nationally distributed goods are typically expensive to differentiate. In addition to timing, defensive preemption also helps forecast regulatory form. If stringent state regulation appears inevitable, industry groups usually lobby for a "double win"—i.e. total preemption of state laws by a weaker national standard.¹⁵⁹ These principles build on studies of corrosive capture and deregulatory preemption.¹⁶⁰

Defensive preemption theory naturally applies to the confinement context given the extent of state regulatory activity. And yet, the existing patchwork of state confinement regulations, albeit strict, has thus far failed to generate cohesive industry calls for federal intervention. The absence of a preemptive push is likely due to the historic insularity of industrial pork producers.¹⁶¹ Given, however, the

156. Deshazo & Freeman, *supra* note 6, at 1536–37.

157. *Id.*

158. *Id.* at 1506–07.

159. *Id.* at 1506.

160. See DANIEL CARPENTER & DAVID MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 16–19, 452 (2014). "Corrosive capture occurs if organized firms render regulation less robust than intended in legislation or than what the public interest would recommend. By less robust we mean the regulation is, in its formulation, application, or enforcement, rendered less stringent or less costly for regulated firms" *Id.* Traditional public choice accounts may also contribute to discussions about the regulatory behavior of IAA entities. Public choice predicts that concentrated, homogenous groups with an interest in regulatory rent-seeking typically prevail over dispersed, heterogeneous interests in securing their preferred policy outcomes. See Stewart, *supra* note 6.

161. See *supra* Part I.

prospect of costly new product regulations, IAA firms are likely to seek and secure a double win.

1. IAA Entities' Distaste for State Product Regulations

IAA firms behave like other corporate interests: they prioritize sales and stockholder satisfaction, and seek to maximize flexibility, reduce compliance costs, and minimize losses.¹⁶² Not surprisingly then, these entities have demonstrated their dislike of potentially costly state product regulations. The National Pork Producers Council (NPPC), a trade association representing pork producers, lobbied against Question 3.¹⁶³ NPPC has also come out strongly against HSUS's California initiative intended for 2018.¹⁶⁴ More broadly, NPPC and its beef industry counterpart, the National Cattlemen's Beef Association (NCBA), purport to represent farmers of all sizes.¹⁶⁵ In practice, these groups' policy positions align with the interests of integrators, not contract-growers.

At least publicly, NPPC and NCBA provide two rationales for opposing state product regulations. First, these groups contend that state disciplines will force a costly, industry-wide transition to alternative housing systems. Second, they warn that government intervention into care and treatment standards will spill over into more intrusive federal interference. One illustration is NPPC and

162. Deshazo & Freeman, *supra* note 6, at 1539–40; NESTLE, SAFE FOOD, *supra* note 5, at xiii, 15, 91. Nestle observes that food industry groups generally represent government intervention as “unnecessary, undesirable, and incompatible with government institutions (unless it protects and promotes their products).” NESTLE, FOOD POLITICS, *supra* note 5, at 359.

163. See A.B. 1437, Assemb. Comm. on Agric., *supra* note 99 and accompanying text; Gintautas Dumcius, *Question 3 on Farm Animal Confinement Draws Opponents, Including Retailers, Who Say it Will Spur Higher Food Prices*, MASSLIVE (Sept. 28, 2016), http://www.masslive.com/politics/index.ssf/2016/09/question_3_on_farm_animal_conf.html.

164. Patrick McGreevy, *Live in California and Buy Eggs? If Voters Approve this in 2018, They'll Need to be From Cage-Free Hens*, LA TIMES (Aug. 28, 2017) (“NPPC opposed all forms of regulation without representation and this fits the bill Livestock production practices should be left to those who are most informed about animal care—farmers—and not animal rights activists”). For why the farmer/environmentalist binary is destructive, see Margot J. Pollans, *Farming and Eating*, 13 J. FOOD L. & POL’Y 99 (2017).

165. See *About Us*, NAT’L PORK PRODUCERS COUNCIL, <http://nppc.org/about-us/> (last visited Nov. 8, 2017); *Association History*, NAT’L CATTLEMEN’S BEEF ASS’N, <http://www.beefusa.org/associationhistory.aspx> (last visited Nov. 8, 2017).

NCBA's support for the Protect Interstate Commerce Act (PICA).¹⁶⁶ Introduced in 2013 by Representative Steven King of Iowa, PICA would have preempted *any* state product regulations on agricultural goods.¹⁶⁷ This included California's anti-confinement product standard. Publicly supporting PICA, the NCBA's president opined: "We simply cannot have one state—any state—setting the standard for production practices in another."¹⁶⁸ PICA's preemptive breadth was sweeping. If enacted, the measure would have nullified a host of state food and environmental regulations, ranging from rules governing horse slaughter to children's nutritional requirements.¹⁶⁹ Public interest organizations successfully portrayed PICA as a federal overreach, and lawmakers omitted PICA from that year's farm bill.¹⁷⁰

With new subnational movement on anti-confinement, NPPC has embraced recent proposals for federal preemptive legislation. In July 2017, NPPC's chief executive officer testified in favor of a statute that would broadly bar states from taxing or regulating any out-of-state business.¹⁷¹ Considering that this bill is even more sweeping than

166. NAT'L HOG FARMER, *NPPC: Vote No on the Egg Bill Amendment* (June 17, 2013), <http://www.nationalhogfarmer.com/animal-well-being/nppc-vote-no-egg-bill-amendment>; NPPC, *For the Week Ending June 21, 2013* (June 21, 2013), <http://nppc.org/for-the-week-ending-june-21-2013/>; see Lauren Bernadett, *Proposed King Amendment Threatens Broad Spectrum of Food Issues*, FOOD SAFETY NEWS (Nov. 19, 2013), <http://www.foodsafetynews.com/2013/11/proposed-king-amendment-threatens-broad-spectrum-of-food-issues/#.WOQEMek2zcs> (explaining IAA firms' financial interest in PICA).

167. Bernadett, *supra* note 166; Rep. Steve King, *The Protect Interstate Commerce Act Protects Producers*, NCBA 3 (June 13, 2013), <http://www.beefusa.org/CMDocs/BeefUSA/Media/Beltway%20Beef/BeltwayBeef061313.pdf>. Title VII of the U.S. Code defines "agricultural product" broadly, to include dairy, livestock, poultry, plants, and "any and all products raised or produced on farms and any processed or manufactured product thereof." 7 U.S.C. § 1626.

168. Scott George, *NCBA Op-Ed: Protect Interstate Commerce, Protect Animal Ag*, BEEFMASTER BREEDERS UNITED (Dec. 5, 2013), <http://beefmasters.org/blog/2013/guest-blog-epas-regulatory-overreach>.

169. Bernadett, *supra* note 166; Chris Green, *King Amendment Officially Rejected!*, ANIMAL LEGAL DEF. FUND (Jan. 27, 2014), <http://aldf.org/blog/king-amendment-officially-rejected/>.

170. Green, *supra* note 169.

171. Gerry Tuoti, *Federal Bill Could Affect Massachusetts Farm Animal Law*, FALMOUTH BULLETIN (Aug. 4, 2017); Oscar Rousseau, *US Pork Council Backs Anti-State Regulation Act*, GLOB. MEAT NEWS (July 27, 2017); see "No Regulation Without Representation" and the Growing Problem of States Regulating Beyond Their Borders: Hearing on H.R. 2887 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 115th Cong. (2017) (statement of Neil Dierks, CEO, National Pork Producers Council), <https://judiciary.house.gov/wp-content/uploads/2017/07/Dierks-Testimony-1.pdf>.

PICA, it will likely face an uphill battle.¹⁷² And yet, food industry groups have succeeded before in displacing state product standards. For instance, these groups pressured Congress to amend federal food labeling and inspection statutes, including the Food, Drug & Control Act, to preempt additional or different state laws.¹⁷³

2. Livestock Producers' Legislative Pull

The livestock industry consistently achieves federal legislative outcomes favorable to its interests.¹⁷⁴ HSUS's failed Memorandum of Understanding (MOU) with UEP provides a seminal example.

The pre-Question 3 anti-confinement regime was inconsistent, stringent, and—from the perspective of egg producers—costly. By 2011, HSUS had achieved battery cage bans in three large egg-

172. Philip Brasher, *Dogs, Cats, Horses, Too: Animal Welfare Debates Could Tie up Farm Bill*, AGRIPULSE (Aug. 30, 2017), <https://www.agri-pulse.com/articles/9746-dogs-cats-horses-too-animal-welfare-debates-could-tie-up-farm-bill>.

173. JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW 127–29 (2006) (tracing the development of the Food, Drug & Control Act (FDCA), and attributing its preemptory amendments to “major food-industry pressure for a shield against inconsistent label requirements”). Lawmakers modeled the FMIA, PPIA, and EPIA after the FDCA. See Bowen, *supra* note 141, at 1023–26. These statutes were similarly amended to preempt additional and different state packaging, labeling, and ingredient requirements. *Id.*

174. A well-documented example is the livestock industry's influence on USDA's development of Hazard Analysis and Critical Control Point regulation (HACCP). Mariano-Florentino Cuéllar, *Coalitions, Autonomy, and Regulatory Bargains in Public Health Law*, in PREVENTING REGULATORY CAPTURE, *supra* note 160, at 326, 336–62; Dion Casey, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, KAN. J.L. & PUB. POL'Y, 142, 150–56 (1998). HACCP is a science-based approach for reducing pathogens at meat-processing facilities. *Id.* Some contend that industry capture contributed to HACCP's delay and ultimate watering down, which came also at the expense of public health and safety. *Id.* at 149–56. More recently, some attribute the rollback of the Obama Administration's “GIPSA” rules to sustained pressure from the livestock industry. The GIPSA rules created protections for contract-growers against anti-competitive practices in the poultry industry. Siena Chrisman, *Long Delayed Rules to Protect Small Farmers Might be Too Little Too Late*, CIVIL EATS (Jan. 11, 2017), <http://civileats.com/2017/01/11/obama-finally-issued-rules-to-protect-small-farmers-are-they-too-little-too-late/>; FARM FUTURES, *GIPSA Rules Delayed Again* (Apr. 11, 2017), <http://www.farmfutures.com/regulatory/gipsa-rule-delayed-again>; see NAT'L HOG FARMER, *Groups Want GIPSA Rules Delay to Become Withdrawal* (Apr. 14, 2017), <http://www.nationalhogfarmer.com/business/groups-want-gipsa-rules-delay-become-withdrawal> (providing NPPC and NCBA's public statements on the regulations). Livestock industry lobbying may also have contributed to rollback of new regulations to reduce pollution under the Clean Water Act. Bryce Oates, *Waters of the U.S. Rollback Signals Livestock Industry's Bullish Approach Under Trump*, CIVIL EATS (Mar. 1, 2017), <http://civileats.com/2017/03/01/wotus-rollback-rollback-signals-livestock-industrys-bullish-approach-under-trump/>.

producing states: California, Michigan, and Ohio.¹⁷⁵ As a result, several sizable industrial egg operators faced an expensive transition to alternative housing systems. AB 1437's passage in 2011 compounded the industry's financial risk by applying Proposition 2's standard to out-of-state entities selling in California. If another state adopted a similar provision, it would have further compounded the economic uncertainty facing the industry.¹⁷⁶

Citing the regulatory patchwork, UEP reached out to HSUS in June 2011.¹⁷⁷ UEP sought comprehensive federal legislation that would standardize welfare requirements for egg-laying hens.¹⁷⁸ The two groups subsequently signed a MOU pledging to seek congressional amendments to the EPIA within one year.¹⁷⁹ The MOU proposed both anti-confinement and hen treatment standards, representing the first federal direction on on-farm animal care.¹⁸⁰ Notably, the proposed legislation was generous to anti-confinement interests. In short, the amendments would have banned battery cages, imposed minimum space requirements for enriched housing systems, required more informative on-package labeling, prohibited certain other inhumane practices (e.g. forced molting), and barred the sale of egg products that violated these standards.¹⁸¹

The groups' MOU expressly provided that the proposed legislation would preempt conflicting state laws if enacted.¹⁸² Preemption of state regulations was a sticking point for UEP, which, by that time, had expressed an interest in regulatory uniformity irrespective of stringency.¹⁸³ Considering UEP's historical opposition to state

175. See GREENE & COWAN, *supra* note 88, at 6; *supra* Part I.

176. For instance, the majority of eggs consumed by Massachusetts residents are produced by out-of-state entities. See Michael Sol Warren, *How Would State Regulate Eggs if Question 3 Passes?*, SOUTH COAST TODAY (Nov. 4, 2016), <http://www.southcoasttoday.com/news/20161104/how-would-state-regulate-eggs-if-question-3-passes>.

177. Watnick, *supra* note 53, at 56; see Valero & Rhee, *supra* note 95, at 652–53, 667; see also *Egg Products Inspection Act Amendments of 2012, Hearing on S. 3239, Impact on Egg Producers Before the S. Comm. on Agric., Nutrition and Forestry*, 112th Cong. (July 26, 2012) (statement of David Lathem, Chairman, United Egg Producers) [hereinafter Lathem Statement].

178. *Id.* at 56–57.

179. Valero & Rhee, *supra* note 95, at 653.

180. UEP & HSUS, *Historic Agreement Hatched to Set National Standard for Nation's Egg Industry* (July 7, 2011), http://www.unitedegg.org/homeNews/UEP_Press_Release_7-7-11.pdf.

181. *Id.*

182. Valero & Rhee, *supra* note 95, at 666–67.

183. See Hills, *supra* note 13, at 30 (observing that “[t]his independent interest in regulatory uniformity gives pro-preemption groups an interest in making pacts with

confinement initiatives, egg producers likely would have preferred no regulation whatsoever. But by 2011, egg producers appeared to view national legislation as the only solution to the industry's mounting costs.¹⁸⁴ For its part, HSUS agreed to forgo its pursuit of entirely cage-free egg production, and to suspend its ongoing state-based battery cage campaigns.¹⁸⁵ As compared to incremental state reform, HSUS preferred a federal standard that would result in quality of life improvements for more hens.¹⁸⁶

Notwithstanding UEP's support, NCBA and NPPC adamantly opposed the amendments. These groups contended that the legislation would create a "slippery slope" by legitimating federal intervention into their respective sectors.¹⁸⁷ UEP attempted to pacify the livestock industry, partly by reiterating that the proposed EPIA amendments were limited to laying hens.¹⁸⁸ David Lathem, UEP's then-chairman, observed: "If other livestock sectors do not want a legislative settlement with HSUS, it isn't going to happen."¹⁸⁹ Lathem also stressed that federal laws had long distinguished between eggs and other farmed animal products.¹⁹⁰ Despite these efforts, the livestock industry lobbied Congress to omit the measure from that year's farm bill.¹⁹¹ NCBA and NPPC succeeded.¹⁹² Following this defeat, HSUS

anti-preemption groups—unions, environmentalists, consumer advocates—to bring preemptive legislation to the floor even when the proposed federal standard is tough").

184. Lathem Statement, *supra* note 177.

185. See GREENE & COWAN, *supra* note 88, at 9.

186. Shields et al., *supra* note 29, at 11; see Deshazo & Freeman, *supra* note 6, at 1537–38 (offering a similar explanation for why state regulation fails to satisfy environmentalists).

187. NCBA, *NCBA Statement on United Egg Producers-Humane Society of the United States Agreement*, <http://www.beefusa.org/newsreleases1.aspx?newsid=366> (last visited, July 27, 2017); NPPC, *Statement of National Pork Producers Council* (July 7, 2011), <http://nppc.org/statement-of-national-pork-producers-council/> (stating that the proposed amendments would set a "dangerous precedent" by "inject[ing] the federal government into the marketplace with no measureable benefit to public or animal health and welfare").

188. Lathem Statement, *supra* note 177.

189. *Id.*

190. *Id.*

191. Shields et al., *supra* note 29, at 11; see also Bollard, *supra* note 91; Jacqui Fatka, *UEP Abandons the Humane Society Egg Deal*, FARM FUTURES (Feb. 20, 2014), <http://www.farmfutures.com/blogs-uep-abandons-hsus-egg-deal-8186>; Jeannine Otto, *The Humane Society/UEP Language Not in Senate Farm Bill*, INDIANA AGRINEWS (May 2013).

192. *Id.*

and UEP declined to renew their MOU.¹⁹³ HSUS then resumed its state-based battery cage campaigns.

B. A Case Study of Defensive Preemption: State GMO Labeling Mandates

The livestock industry's demonstrated distaste for state product rules suggests that existing anti-confinement policies may be short-lived. The federal government's current anti-regulatory bent heightens the prospects for defensive preemption. IAA entities are stepping up their lobbying efforts in response to the Trump Administration's successful efforts to roll-back or delay administrative rules, including those governing food, agriculture, and the environment.¹⁹⁴ Now-uncertain standards include those governing nutrition labeling of menu items, organic animal welfare standards, and anti-competitive practices in the poultry industry—to name but a few.¹⁹⁵

Recently nullified state GMO labeling mandates shed light on how industry's preemption play might intersect with current deregulatory dynamics.¹⁹⁶ The parallels between confinement and GMO governance are replete. In both instances, the federal government was silent. Interstitial state policymaking produced stringent product

193. Dudley Hoskins, *United Egg Producers Decline to Renew MOU with the Humane Society*, NAT'L ASS'N OF STATE DEPTS. OF AGRIC. (Feb. 19, 2014), <http://www.nasda.org/News/24781.aspx>.

194. See *supra* text accompanying note 174 discussing GIPSA; Jeff Wells, *Food Industry Appeals to a Receptive Trump Administration for Regulation Delays*, FOOD DIVE (Apr. 28, 2017), <http://www.fooddive.com/news/grocery--food-industry-appeals-to-a-receptive-trump-administration-for-regulation-de/441507/>; Lynne Curry, *Why the Organic Industry is Suing the USDA Over Animal Welfare*, CIVIL EATS (Sept. 18, 2017).

195. Curry, *supra* note 194. For a discussion of the Trump Administration's various anti-regulatory efforts, see Diana R.H. Winters, *Food Law at the Outset of the Trump Administration*, 65 UCLA L. REV. DISC. 28 (2017); Megan Poiniski, *Is the Trump Administration a Disaster or an Opportunity for Food Policy*, FOOD DIVE (Apr. 2017), <http://www.fooddive.com/news/is-the-trump-administration-a-disaster-or-an-opportunity-for-food-policy/440299/>.

196. Based on the trajectory of state GMO labeling standards, some journalists hypothesized that Question 3 would also be preempted by industry-driven federal legislation. See Emily Monaco, *Are Widespread Cage-Free Eggs a Real Victory for Hens and Consumers?*, ORGANIC AUTHORITY (Oct. 3, 2016), <http://www.organicauthority.com/are-widespread-cage-free-eggs-a-real-victory/>; Jill Kaufman, *Farm Animal Welfare, Before and After Massachusetts Question 3*, NEW ENGLAND PUBLIC RADIO (Nov. 2016), <http://nepr.net/news/2016/11/04/farm-animal-welfare-massachusetts-question-3/>.

regulation. And, not surprisingly, agriculture companies reacted adversely. Many view the story's end—the imposition of a weak federal standard that undercut state regulations—as a “double win” for industry. From the perspective of sustainable food activists, GMOs and intensive confinement share normative links.¹⁹⁷ The similarities between these issues include systemic concerns about economic consolidation, corporate control over policy outcomes, and a lack of public transparency and accountability.¹⁹⁸

In July 2016, Congress enacted the first federal GMO labeling statute. That law nullified contrary state labeling regulations and imposed a purportedly industry-friendly standard. Prior to enacting that statute, the federal government had long been silent on GMO labeling.¹⁹⁹ National inaction, attributed by some to corporate lobbying, led concerned groups to concentrate their efforts at the state level.²⁰⁰ In particular, Vermont was receptive to the early pro-labeling push. In 1994, the state's legislature approved a measure requiring labeling of rBGH, a genetically engineered protein used to boost milk production in cows.²⁰¹ Several years later, GMO labeling advocates tabled a similar ballot measure in California.²⁰² Companies with an economic interest in GMOs—including processed food manufacturers and biotechnology firms—lobbied strongly against the California initiative.²⁰³ The measure failed by less than 3% of the vote.²⁰⁴

Encouraged by early demonstrations of support, anti-GMO activists expanded their efforts. In 2013, the Maine and Connecticut legislatures each approved mandates requiring on-package labeling of food containing GMOs.²⁰⁵ But neither statute had any immediate legal effect. Both laws contained “triggering provisions” requiring a

197. See Tai, *supra* note 5, at 1073–74, 1079–80.

198. *Id.*

199. CAL. ENVIRO. LAW & POLICY CTR., UNIV. OF CAL., DAVIS CALIFORNIA'S PROPOSITION 37: A LEGAL & POLICY ANALYSIS 5 (Oct. 2012), https://law.ucdavis.edu/centers/environmental/files/CELPC_Prop37report.pdf.

200. *Id.* at 5–6.

201. Observers attribute Vermont's early lead on GMO labeling to the state's strong local dairy industry. See Jenny Hopkinson, *How Vermont Beat Big Food*, POLITICO (Mar. 17, 2016), <http://www.politico.com/agenda/story/2016/03/vermont-gmo-labeling-law-national-standard-000067>; NESTLE, SAFE FOOD, *supra* note 5, at 198–204.

202. Hopkinson, *supra* note 201.

203. *Id.*

204. CAL. CHOICES, PROPOSITION 37, <https://www.californiachoice.org/proposition-37> (last visited, July 27, 2017).

205. Hopkinson, *supra* note 201; ME. REV. STAT. ANN. tit. 22, § 2591 (2014); CONN. GEN. STAT. ANN. § 21a-92c (West 2015).

certain number of other states to first enact their own parallel standards.²⁰⁶ Breaking the stalemate, Vermont lawmakers approved a mandatory GMO labeling statute in May 2014.²⁰⁷ Vermont's law required on-package labeling of all food products produced entirely or partially with genetic engineering and sold in the state.²⁰⁸ Vermont's statute did not contain a triggering provision.²⁰⁹

From the outset, large food and agriculture firms opposed Vermont's mandate.²¹⁰ Agribusiness companies argued that Vermont's law would contribute to a prohibitively expensive patchwork of state labeling requirements.²¹¹ Industry emphasized GMO's lack of proven health and safety risks.²¹² These groups warned that Vermont would encourage other states to adopt idiosyncratic and arbitrary regulations. Industry also contended that Vermont, by implementing its own mandate, would set a *de facto* labeling standard for the entire country.²¹³ That Vermont represented a small fraction of the national market amplified industry's alarm. Some companies threatened to pull their products entirely from Vermont's market.²¹⁴ Other companies actually did.²¹⁵

Even still, Vermont persisted. While industry groups brought legal challenges to enjoin the mandate, those efforts proved unsuccessful.²¹⁶ Regulated firms then began lobbying Congress for a preemptive national standard. This required an ideological about-face from biotechnology companies. Like IAA firms, these groups had

206. Connecticut's law required states with populations of more than 20 million to pass similar laws, and Maine's law requires five other Northeastern states to pass similar laws. CONN. GEN. STAT. ANN. § 21a-92c.

207. See Hopkinson, *supra* note 201.

208. VT. STAT. ANN. tit. 9, § 3043 (West 2016).

209. *Id.*

210. Hopkinson, *supra* note 201; see also GROCERY MFR. ASS'N, *Vermont GMO Labeling Bill Critically Flawed and Bad for Consumers* (Apr. 23, 2014), <http://www.gmaonline.org/news-events/newsroom/vermont-gmo-labeling-bill-critically-flawed-and-bad-for-consumers/> (warning that Vermont's bill "sets the nation on a costly and misguided path towards a 50-state patchwork of GMO labeling policies that will do nothing to advance the safety of consumers").

211. Hopkinson, *supra* note 201.

212. *Id.*

213. See GROCERY MFR. ASS'N, *Vermont GMO Labeling Bill Critically Flawed and Bad for Consumers* (Apr. 23, 2014), <http://www.gmaonline.org/news-events/newsroom/vermont-gmo-labeling-bill-critically-flawed-and-bad-for-consumers/>

214. Adam Chandler, *How National Food Companies are Responding to Vermont's GMO Law*, THE ATLANTIC (July 8, 2016), <https://www.theatlantic.com/business/archive/2016/07/vermont-gmo-food-companies/490553/>.

215. *Id.*

216. *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 648 (D. Vt. 2015) (declining to issue a temporary injunction in a challenge brought by industry groups).

historically opposed federal regulation.²¹⁷ Industry's first attempt at a bill included an entirely voluntary certification scheme.²¹⁸ That legislation passed the House before failing in the Senate.²¹⁹ The bill was redrafted, and hailed as a "compromise."²²⁰ Congress approved that legislation in July 2016, just weeks after Vermont's law took effect.²²¹ The law immediately preempted state GMO labeling requirements that were "not identical" to the national standard. The statute gave USDA two years to promulgate a federal disclosure regime.²²²

Critics attacked the federal standard as a product of disproportionate industry influence. With respect to process, Republican Representative Mitch McConnell, the Senate Majority Leader, fast-tracked the legislation by preventing hearings, debate, or mark up and amendment.²²³ The Act's text was placed in a hollowed-out bill intended to "reauthorize and amend the National Sea Grant College Program Act."²²⁴ This arguably limited public scrutiny of the federal standard.

As far as substance, the federal standard purportedly contains several pro-industry provisions absent from Vermont's law.²²⁵ Chief among these discrepancies is the federal law's lack of a textual, *on-package* labeling requirement. Rather, the federal standard allows food manufacturers to choose from four different labeling options,

217. See NESTLE, SAFE FOOD, *supra* note 5, at 223.

218. Hopkinson, *supra* note 201.

219. *Id.*

220. 7 U.S.C.A. § 1639b (West 2016). The federal statute is formally entitled the National Bioengineered Food Disclosure Standard. *Id.* For criticisms of the purported "compromise," see Dan Charles, *Congress Just Passed a GMO Labeling Bill. Nobody's Super Happy About It* (July 14, 2016), NAT'L PUB. RADIO, <http://www.npr.org/sections/thesalt/2016/07/14/486060866/congress-just-passed-a-gmo-labeling-bill-nobodys-super-happy-about-it>; Elaine Watson, *Federal GMO Labeling Bill Hailed as 'True Compromise,' But Critics Say it's Woefully Inadequate*, FOOD NAVIGATOR-USA (June 23, 2016), <http://www.foodnavigator-usa.com/Regulation/Federal-GMO-labeling-bill-hailed-as-true-compromise>.

221. 7 U.S.C.A. § 1639b.

222. *Id.* Just days after the bill took effect, USDA mailed each state governor a letter to inform him or her about the federal law's preemptive provision. See AGRIC. MKTG. SERV., USDA (Aug. 1, 2016), <https://www.ams.usda.gov/sites/default/files/media/GMOExemptionLettersto50Governors.pdf>.

223. Chris Morran, *Senate Approves Bill to Outlaw Vermont GMO Labels, Replace Them with Barcodes*, CONSUMERIST (Sept. 29, 2016), <https://consumerist.com/2016/07/08/senate-approves-bill-to-outlaw-vermont-gmo-labels-replace-them-with-barcodes/>.

224. *Id.*

225. See *supra* note 210 and accompanying text.

including a “QR code.”²²⁶ A QR code can be scanned with a smart phone, and takes the consumer to a website with product information.²²⁷ Consumer rights and anti-GMO groups argue that few, if any, shoppers will invest the time required to scan each item they intend to purchase.²²⁸ Those consumers that do will purportedly be subject to product advertising once rerouted to the company’s website. This arguably benefits companies by providing additional marketing opportunities.²²⁹

The federal law contains other elements ostensibly favorable to industry. The statute’s definition of a “bioengineered food” exempts refined products derived from GMOs, including ingredients found in many processed food products.²³⁰ A wide swath of foods may consequently escape any labeling requirement whatsoever. Observers have noted that the statute is otherwise vague, perhaps allowing industry to favorably fill-in details at the back-end.²³¹

III. PROTECTING REGULATORY EXPRESSIONS OF FOOD POPULISM THROUGH INTERSTATE COOPERATION ON FARMED ANIMAL WELFARE

The current federal predilection towards deregulation, and the repetition of industry’s preemption play, raise an under-theorized inquiry: what are the bargaining benefits to greater involvement by

226. These options include textual on-package labeling, symbolic on-package labeling, listing a number for consumers to call for the product’s ingredients, or a “QR code.” 7 U.S.C. § 1639 (West 2017).

227. See Greg Trotter, *Will Food Shoppers Really Seek out GMO Information Using QR Codes?*, CHI. TRIB. (July 12, 2016), <http://www.chicagotribune.com/business/ct-gmo-labeling-qr-codes-0713-biz-20160712-story.html>.

228. *Id.*; Carolyn Heneghan, *Are QR Codes a Labeling Problem or Solution?*, FOOD DIVE (Aug. 11, 2011), <http://www.fooddive.com/news/are-qr-codes-a-labeling-problem-or-solution/423714/>. While the law directs the Secretary to study the efficacy of QR codes prior to issuing final rules, it also requires “consultation with food retailers and manufacturers” if the Secretary find that QR codes are ineffective. 7 U.S.C.A. § 1639b(c) (West 2017).

229. See NESTLE, *FOOD POLITICS*, *supra* note 5, at 146 (observing that food companies are more willing to accept government regulations that potentially expand sales).

230. The statute defines a bioengineered food product as one that “contains genetic material.” 7 U.S.C.A. § 1639(1).

231. *Supra* note 186; see Cueller, *supra* note 144, at 330–31 (explaining that vague legislative drafting in the food policy context provides industry with “multiple bites at the policymaking apple”). For instance, the statute leaves it to the Secretary of Agriculture to determine the amount of bioengineered substance that must be present in a food to trigger the law’s labeling mandate. 7 U.S.C.A. § 1639b(a).

state officials—arguably the owners of regulatory content—in relation to interest group negotiations?²³² Little, if any, work has been done to address that question in the food law literature, due perhaps to concerns about corporate capture also at the state level. This section interrogates these conventional assumptions by assessing what states can do to protect and enhance regulatory expressions of food populism.

A. *The Normative Case for Food Populism*

Food populism rests on a rich tradition of “distinct, yet overlapping” alternative food movements.²³³ These coalitions comprise advocates of organic, local, and slow food, who share a desire for a “more socially and environmentally just food system.”²³⁴ Food populism is distinct, however, in that it highlights a redistributive political economy element only implicit in some of these alliances. That normative core is founded upon a dual-pronged principle, which respectively seeks greater democratic control over food structures, and to minimize the negative consequences of modern industrial food production.

“[D]emands for economic democracy have had a renaissance in food—but not in law.”²³⁵ Historicizing the rise of agricultural industrialization, Amy Cohen observes that “agrarians and other ‘decentralist intellectuals’” have long critiqued the aggregation of economic and political power in the hands of twentieth century corporate elites.²³⁶ Cohen notes that modern food progressives are tapping into a contemporary discontent with political and economic dispossession.²³⁷ Attention to the democratic implications of large-scale industrialization is critical to re-ceding some degree of decision-

232. See Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 261–62 (2014) (noting that compacts and other forms of interstate cooperation merit greater attention as potential solutions to collective action problems).

233. See Tai, *supra* note 5, at 1074–80 (classifying food “mini-movements”).

234. *Id.* at 1073.

235. Cohen, *supra* note 4, at 103. Cohen suggests that the institutional focus of “progressive ‘decentralized’ legal academics” often “diverges markedly from the practices and aspirations of contemporary food activists.” *Id.* at 119. Food populism seeks to bridge that political and economic divide.

236. *Id.* at 109. For another recent account of American populism’s roots in agrarianism, see JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* 18–28 (2016).

237. Cohen, *supra* note 4, at 109.

making autonomy to consumers and small food producers.²³⁸ At the heart of this agenda is a concern with disproportionate corporate influence over government decisions on food and agriculture. Recent qualitative accounts suggest that legislative capture by integrators trades off with policies that enhance public welfare.²³⁹ Deregulatory preemption raises distributive concerns about the role of government in providing public accountability and transparency on food issues.

While issues of capture predate the Trump presidency, the administration's deregulatory efforts have brought debates over corporate control into the mainstream, including in the food and agriculture realm. As with other areas of the administrative state, food policy has been subject to executive actions by the Trump Administration that are designed to scale back corresponding efforts by the Obama Administration.²⁴⁰ To advance that agenda, "deregulation teams" have been formed in both USDA and the Environmental Protection Agency (EPA).²⁴¹ Many believe that these efforts will work to the financial benefit of large food and agriculture companies.²⁴² It is not surprising, then, that these entities are pursuing their policy priorities with renewed vigor.

In addition to pushing back against concerns over corporate capture, food populism roots in a second, albeit related, value: reducing negative consequences attendant to industrialized food and agriculture production. Volumes have been written on the socio-

238. *Id.*; see Lindsay F. Wiley, *Deregulation, Distrust, and Democracy: State and Local Action to Ensure Equitable Access to Healthy, Sustainably Produced Food*, 41 AM. J.L. & MED. 284, 302 (2015) (observing that "foundational legal issues like preemption" can offer avenues for cooperation between food, environmental, and public health advocates).

239. See *supra* notes 133, 144 and accompanying text.

240. One of President Trump's first executive actions mandated an across-the-board cap on new regulations and agency spending. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017); WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *Presidential Executive Order on Reducing Regulation and Controlling Regulatory Cost* (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>. Another required agencies to designate a "regulatory reform officer" tasked with identifying rules for elimination or modification, see Joseph J. Whitworth, *Executive order threatens protections that safeguard food*, FOOD NAVIGATOR-USA (Feb. 28, 2017), <http://www.foodnavigator-usa.com/Regulation/EWG-Executive-order-will-put-food-safety-in-peril>.

241. Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html?mcubz=3&_r=0.

242. See Wells, *supra* note 194.

economic harms of consolidation, automation, and concentration in the food sector. I therefore provide but an overview of some of IAA's harmful effects, grouping illustrative examples into the areas of public health and disease, employment (including wage, labor and safety concerns), rural communities, environment and natural resources, and animal cruelty.

Public health considerations have emerged as a leading cause for concern in debates over IAA. This attention is driven by the livestock industry's prolific use of antibiotics in animals.²⁴³ Animal agriculture consumes about eighty percent of antibiotics sold in the United States, with high-density livestock operations responsible for the bulk of this trend.²⁴⁴ Antibiotics are administered to promote animal growth, and to reduce the risk of disease that results from customary farming practices, including intensive confinement.²⁴⁵ At current volumes, industry's use of antibiotics contributes to the evolution and spread of antibiotic resistant bacteria.²⁴⁶ The emergence of antibiotic resistant bacteria in turn reduces the efficacy of antibiotics in humans.²⁴⁷ The Center for Disease Control estimates that antibiotic resistant infections cause at least 23,000 deaths and two million illnesses per year.²⁴⁸ In addition to antibiotic resistance, other public health considerations attendant to IAA include animal-to-human disease transmission, food-borne illnesses, and diffuse harm to workers at IAA facilities and nearby communities.²⁴⁹

243. Scientists, to be sure, distinguish between responsible use, and overuse, of antibiotics in animal agriculture. See Hao et al., *Benefits and Risks of Antimicrobial Use in Food-Producing Animals*, 5 FRONT MICROBIOL 1, 6–7 (June 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4054498/pdf/fmicb-05-00288.pdf>; JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, INDUSTRIAL FOOD ANIMAL PRODUCTION IN AMERICA: EXAMINING THE IMPACT OF THE PEW COMMISSION'S PRIORITY RECOMMENDATIONS 2–12 (2013), http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/_pdf/research/clf_reports/CLF-PEW-for%20Web.pdf [hereinafter "IFAP IN AMERICA"].

244. PEW CHARITABLE TRUSTS, *supra* note 21, at 15–16.

245. The FDA has attempted to estimate the economic value of subtherapeutic antibiotic use via enhancements in "feed efficiency" or "rate of gain." FOOD AND DRUG ADMIN., REPORT TO THE COMMISSIONER OF THE FOOD AND DRUG ADMINISTRATION BY THE FDA: TASK FORCE IN THE USE OF ANTIBIOTICS IN ANIMAL FEEDS 3, 8–9 (1972).

246. IFAP IN AMERICA, *supra* note 243, at 2. Resistance is transferred in a number of ways including by being recycled back into food, migrating directly from animal production sites, or through contact with animals. *Id.* at 2–6.

247. *Id.*

248. CTRS. FOR DISEASE CONTROL AND PREVENTION, DEPT OF HEALTH AND HUMAN SERVS., ANTIBIOTIC RESISTANCE THREATS IN THE UNITED STATES 11–13 (Apr. 2013), <http://www.cdc.gov/drugresistance/pdf/ar-threats-2013-508.pdf>.

249. PEW CHARITABLE TRUSTS, *supra* note 21, at 12–13. For a more recent report on the public health implications of contaminated meat and poultry, see PEW

Indeed, those groups proximate to sites of production often face the most debilitating aspects of IAA. Several features of IAA, including high animal density, accelerated processing, and automation, create dangerous working conditions.²⁵⁰ These conditions result in high rates of accidental injury, and chronic physical stress disorders.²⁵¹ Occupational hazards are compounded by other public health harms, including cognitions of acute and prolonged respiratory illness.²⁵² IAA engenders problematic labor issues like low wages, lack of unionization, and the absence of health benefits.²⁵³ Exploitative conditions are part and parcel of industry's reliance on immigrant communities.²⁵⁴ This dependence has itself been the subject of criminal investigation.²⁵⁵

IAA operations also trade off with the economic, physical, mental, and social well-being of surrounding communities.²⁵⁶ The integrator-grower contract model reduces financial capital in agricultural areas, as compared to regions that retain more locally owned farms.²⁵⁷ Communities proximate to IAA operations suffer from relatively greater cognitions of depression and posttraumatic stress disorder.²⁵⁸ IAA sites reduce quality of life for surrounding residents, and can create destructive social rifts when individuals express their

CHARITABLE TRUSTS, FOOD SAFETY FROM FARM TO FORK (June 17, 2017), <http://www.pewtrusts.org/~media/assets/2017/07/food-safety-from-farm-to-fork-final.pdf>.

250. PEW CHARITABLE TRUSTS, *supra* note 21, at 16–18.

251. *Id.*

252. *Id.*

253. *Id.* at 43; David Barboza, *Meatpackers' Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES (Dec. 21, 2001), <http://www.nytimes.com/2001/12/21/us/meatpackers-profits-hinge-on-pool-of-immigrant-labor.html>.

254. PEW CHARITABLE TRUSTS, *supra* note 21, at 43; Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, THE NEW YORKER (May 2017).

255. See U.S. DEPT OF JUSTICE, *INS Investigation of Tyson Foods, Inc. Leads to 36 Count Indictment for Conspiracy to Smuggle Illegal Aliens for Corporate Profit* (Dec. 19, 2001), http://www.usdoj.gov/opa/pr/2001/December/01_crm_654.htm (announcing that an indictment was filed against Tyson Foods managers and executives for conspiracy to smuggle undocumented immigrants into the U.S.). Tyson employees have brought similar civil lawsuits. See, e.g., *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842, 844 (E.D. Tenn. 2008).

256. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 ENVIRON. HEALTH PERSPECT. 317–18 (Feb. 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817697/pdf/ehp0115-000317.pdf>; PEW CHARITABLE TRUSTS, *supra* note 21, at 41–42.

257. PEW CHARITABLE TRUSTS, *supra* note 21, at 41.

258. Donham et al., *supra* note 256, at 317–18 (associating these cognitions with quality of life and socioeconomic harms).

opposition to integrators.²⁵⁹ IAA facilities are disproportionately located in low-income areas, or those populated primarily by people of color.²⁶⁰ Manifestations of environmental injustice have been an increasing focus of both activists and academics.²⁶¹

The environmental implications of industrial meat production are similarly alarming. Consolidation and concentration of feeding operations creates unique obstacles for disposing of animal waste. IAA facilities typically store manure in large lagoons, adversely impacting water quality via runoff and erosion, direct discharges, spills, and leaching.²⁶² Manure lagoons also emit gasses (ammonia and hydrogen sulfide), particulate matter, volatile organic compounds, microorganisms, and odor—all of which degrade air quality.²⁶³ In addition, IAA operations release carbon dioxide and methane, contributing to climate change.²⁶⁴ Subsequent reductions in air, water, and soil quality generate their own set of negative public health and environmental consequences.²⁶⁵

This Article's focus, intensive confinement, provides but one of the animal cruelty issues associated with IAA. Other customary and problematic animal treatment practices can include castrations, debeaking, tail docking, and dietary restrictions, in addition to welfare issues involved in transport and slaughter.²⁶⁶ Some also find troubling the sheer number of farm animals killed for food each year in the U.S.—in 2015, about nine billion.²⁶⁷

259. *Id.* at 318.

260. *Id.*

261. *Id.*

262. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) 2–4 (2010); PEW CHARITABLE TRUSTS, *supra* note 21, at 29 (observing that just one hog IAA operation “produces manure in an amount equivalent to the sewage flow of an entire American town”).

263. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL32947, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: EPA'S AIR COMPLIANCE AGREEMENT 1–2 (Aug. 2014).

264. *Id.*; ENVTL. PROT. AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2015, 5-1 (2017), <https://www.epa.gov/sites/production/files/2016-04/documents/us-ghg-inventory-2016-chapter-5-agriculture.pdf>; PEW CHARITABLE TRUSTS, *supra* note 21, at 27–28.

265. C.M. Williams, *CAFOs: Issues and Development of New Waste Treatment Technology*, 10 PENN ST. ENVTL. L. REV. 217, 218–33 (2002); PEW CHARITABLE TRUSTS, *supra* note 21, at 17–19 (providing epidemiological findings regarding the public health impacts on nearby residents).

266. David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 133–34 (1996); PEW CHARITABLE TRUSTS, *supra* note 21, at 34–35.

267. HUMANE SOC'Y OF THE UNITED STATES, FARM ANIMAL STATISTICS: SLAUGHTER TOTALS (1950–2016),

There are, of course, putative benefits to IAA. These stem primarily from IAA's capacity to produce more meat cheaply, thereby enhancing profitability and lowering costs for consumers.²⁶⁸ And yet, peer-reviewed studies cast doubt on these efficiency rationales.²⁶⁹ Scientific findings demonstrate that productivity gains are only possible via externalized environmental costs and government subsidies for corn and soybeans.²⁷⁰ Productivity enhancements are, moreover, likely to level off as energy prices increase and agricultural conditions worsen due to climate change.²⁷¹ As far as profit-based benefits of IAA, wealth accrues primarily to corporate integrators—not individual farmers or rural communities.²⁷² This again invokes concerns about market control and income inequality. Consumer-based benefits presume that eating meat is intrinsically valuable, an issue that scientists, economists, and ethicists debate.²⁷³ These defenses of IAA, more broadly, take an all-or-nothing approach to reform. Many of IAA's harms are actually issues of size and scale, which can be incrementally reduced to prevent harmful price increases.²⁷⁴

Somewhat apart from these economic efficiency rationales, IAA advocates claim that the industrial model better protects public health, the environment, and animals. But many of these defenses presuppose IAA's single-tactic approach to problem solving.²⁷⁵ Take, for instance, the argument that industry's current use of antibiotics is critical to prevent disease transmission. Disease cognitions might be reduced were animals not intensively confined and fed a poor diet. Other IAA defenses, including that IAA improves food safety, implicitly assume government regulations are followed and properly enforced. Existing manifestations of harm, like the rate of food-borne

http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html?referrer=https://www.google.com/ (last updated June 25, 2015) [hereinafter "HSUS"].

268. Rossi & Garner, *supra* note 7, at 496–500.

269. See PEW CHARITABLE TRUSTS, *supra* note 21, at 6, 47 (surveying empirical literature).

270. *Id.* The Pew Report defines externalities as “costs or benefits resulting from a decision or activity that is not reflected in the transaction cost (price).” *Id.* at 47. Corn and soybeans are the chief ingredients in farm animal feed. *Id.*

271. *Id.* at 7, 51–55.

272. *Id.* at 41.

273. Rossi & Garner, *supra* note 7, at 498. High levels of meat consumption in the U.S., for instance, have been associated with negative public health consequences and greater spending on government-subsidized public health programs. *Id.* at 510.

274. *Id.* at 494–96; Cohen, *supra* note 4, at 103, 109; PEW CHARITABLE TRUSTS, *supra* note 21, at 35.

275. PEW CHARITABLE TRUSTS, *supra* note 21, at 54–55.

illness, belie that confidence.²⁷⁶ With respect to animal welfare, IAA advocates rely on a myopic view that excludes evidence about natural behaviors and mental well-being.²⁷⁷ Rather, industry's welfare assessments focus on gross physical factors, like growth and weight gain.²⁷⁸

Some might criticize the notion of food populism based on its purely reactive iteration, i.e. food hysteria or alarmism.²⁷⁹ Kuran and Sunstein reference a similar "pollutant of the month syndrome," whereby "expressed concerns about a particular substance fuel growing anxieties, which then generate an irresistible demand for regulation."²⁸⁰ This uninformed demand can lead to poor government decision-making.

Widespread panic over Alar provides a seminal example. Alar is a pesticide sprayed on apples that contains one percent of a particular carcinogen.²⁸¹ Alar's manufacturer undertook an initial study of the pesticide's effects in 1986. Preliminary findings issued in 1989 suggested a correlation between tumor incidence in animals and exposure to Alar.²⁸² According to several accounts, the Natural Resources Defense Council (NRDC) then vastly extrapolated the risks to children posed by Alar.²⁸³ Several media outlets publicized NRDC's allegations, which led to a public outcry.²⁸⁴ By the time the EPA found Alar's health risks negligible, the domestic apple industry had been devastated.²⁸⁵ Alar's manufacturer voluntarily pulled the product from retail sale. EPA later agreed to revise its regulations to more easily ban chemicals "suspected of being carcinogenic."²⁸⁶

For some, the Alar scare represents the social and economic costs to "bad science."²⁸⁷ Others, including NRDC, hail the EPA's

276. *Id.* at 11–16, 37–38.

277. *Id.* at 35.

278. *Id.* at 35, 87; see Rossi & Garner, *supra* note 7, at 499 (providing additional responses).

279. This argument is based on Kuran and Sunstein's work on "availability cascades." *Supra* note 5, at 685. The authors define availability cascades as processes "through which expressed perceptions trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse." *Id.*

280. *Id.* at 698.

281. *Id.*

282. *Id.*

283. *Id.* at 698–99.

284. *Id.* at 699.

285. *Id.*

286. *Id.* at 700.

287. See generally *supra* notes 282–83.

subsequent move towards a precautionary approach as an outstanding victory.²⁸⁸ Despite this divergence, these camps probably agree that the state can add value to public policy by providing holistic technical expertise.²⁸⁹ This comports with food populism's dual-pronged principle, which responds to popular desires for sustainable food while paying greater attention to potential risks associated with industrial food production.²⁹⁰

Encouraging state officials to take greater ownership over sustainable food and agriculture policies thus represents an important step in fulfilling a deliberative democratic approach. In other words, an approach that balances popular values with scientific principles. A state-based strategy facilitates contestation and debate over regulatory expressions of food populism, which can otherwise be easily dismissed as the work of "fringe radicals" and "fanatics."²⁹¹ The negative stigma attached to these labels, in turn, further delays solutions to long-festered harms.²⁹²

While HSUS was instrumental in initially catalyzing policy change, a lack of direct state engagement creates roadblocks where citizen-led initiatives are unavailable.²⁹³ The absence of political support from elected lawmakers also poses a problem if the ultimate goal is to enact a welfare-enhancing national standard. Indeed, both activists and outside observers agree that stringent federal regulation is ideal for redressing IAA's potential harms, including those associated with animal cruelty.²⁹⁴ Recognizing that sympathetic state

288. Melissa Denchak, *All About Alar*, NAT RESOURCES DEFENSE COUNCIL (Mar. 14, 2016), <https://www.nrdc.org/stories/all-about-alar>.

289. Kuran & Sunstein, *supra* note 5, at 738. As Kuran and Sunstein emphasize, the correct approach is not to "ignore the 'popular will.'" *Id.* Rather, it is to take "the 'popular will' seriously, both by attending to reflective judgments of value and by staying attuned to mechanisms that govern the construction of any 'popular will.'" *Id.*

290. Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS., 117, 132–33 (2007). Some, including Sunstein, have accordingly called for disclosure regimes that would provide greater public transparency and accountability of IAA production methods by way of economic indicators, purchasing trends, and consumer surveys that confirm the public's preference for sustainable and humanely raised products. *See id.*; *Millennials' Willingness to Pay for Premium Ingredients is Helping to Redefine the Food Industry*, MARKET WIRED (Feb. 21, 2017), <http://www.marketwired.com/press-release/-2197287.htm>.

291. Hinman, *supra* note 71. Journalistic accounts are replete with similar references. *Supra* note 64.

292. Kuran & Sunstein, *supra* note 5, at 714 (relating risk regulation to interest group competition and capture theory).

293. *See supra* Part I.

294. *See supra* text accompanying note 104. This has been HSUS's express goal, though legislative lobbying by IAA entities has largely taken national legislation off

officials, with entrepreneurial incentives of their own, can serve a value-adding role thus provides a fruitful new area for theorization.

B. Interstate Action and Defensive Preemption

Federalism scholars have taken stock of the mutually constitutive nature of inter-systemic decision-making, in which federal and state officials regulate in view of their overlapping authorities.²⁹⁵ State action can impact federal policy in at least three ways: through broad-based uniformity, planned dissent, and coordinated lobbying.

First, states can voluntarily cooperate to enhance uniformity and thereby address the negative economic externalities of inconsistency. Successful harmonization, in turn, signals to federal policymakers that intervention is unnecessary or even counter-productive.²⁹⁶ The converse is also true: the failure or absence of proposed harmonization can inspire calls for federal action.²⁹⁷ The primary question then becomes whether the extent of state uniformity is sufficient or could be sufficient to stymie concerns about interstate inconsistency. A secondary question is whether reducing inconsistency, but maintaining stringency, would placate corporate entities, like IAA firms, who could pursue a “double win.”²⁹⁸

Second, state cooperation can make more effective specific displays of aberrant regulatory behavior by states; that is, when states take an unorthodox approach to regulation. As Heather Gerken explains, dissident states offer up a “real life instantiation” of alternative governance in departing from the majoritarian policy approach.²⁹⁹ Dissenters thereby “provide important reassurance and guidance to federal legislators who are considering whether to change gears.”³⁰⁰ Aberrant states also agenda-set for national lawmakers by

the table. *Id.* See also PEW CHARITABLE TRUSTS, *supra* note 21, at 83 (recommending that the federal government “develop performance-based (not resource based) animal welfare standards” that include specifically enumerated minimum requirements for animal treatment).

295. See, e.g., Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 17–24 (2011).

296. Nim Razook, *Uniform Private Laws*, *National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS. L.J. 41, 46–48, 63–68 (2000).

297. *Id.*; Hills, *supra* note 13, at 19–21.

298. See *supra* Part II. For instance, the UEP-HSUS MOU suggests that IAA producers may be willing to concede on substance, thereby allowing stricter regulation, in order to generate uniformity. *Id.*

299. Gerken, *supra* note 13, at 1748.

300. Jessica Bulman-Polzen & Heather L. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1294 (2009).

raising otherwise sidelined substantive and normative considerations.³⁰¹ To be sure, states adopting anti-confinement regulations are already dissenting in isolation.³⁰² But by organizing their opposition, states may improve substantive outcomes and add value to their collective action project.³⁰³ This, in turn, can signal that federal intervention is undesirable.³⁰⁴ Preemption dynamics thus also intersect with how well states address an underlying problem.

Third, state lobbying efforts are strengthened by coordination.³⁰⁵ States act as do other interest groups, by attempting to influence lawmakers considering novel statutes.³⁰⁶ Geographically and politically significant states, like California and New York, have empirically succeeded in defending their regulatory regimes vis-à-vis corporate interests.³⁰⁷ But smaller states may be unwilling or unable to go it alone against powerful interest groups. To that end, coordinated action can add strength and coherence to state views.³⁰⁸

Uniformity, planned dissent, and coordinated lobbying can shift federal interest group dynamics. When it comes to policy outcomes, the result can take several forms. For instance, state collective action might ensure that a national preemptive standard is as rigorous as then-existing state rules.³⁰⁹ Alternatively, state action can influence

301. *Id.* at 1297; Bulman-Pozen & Gerken, *supra* note 13, at 1945–46; Gerken, *supra* note 13, at 1762.

302. *Infra* Part III(D).

303. See Ryan, *supra* note 295, at 79 (observing in the climate change context, “the negative leverage of federal preemption is often balanced by the positive leverage of state capacity”). To the extent then that states can demonstrate superior implementation, enforcement, and innovation, they gain leverage in bargaining. *Id.* at 125–33.

304. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 185 (1996) (asking whether organizationally-induced horizontal uniformity may be preferable to “spontaneous uniformity that is generated by . . . a simple game of follow the leader”).

305. Kramer, *supra* note 13, at 1552–53.

306. *Id.* For a recent example in the health care context, see Alexander Burns, *How Governors from Both Parties Plotted to Derail the Senate Health Bill*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/us/politics/affordable-care-act-governors.html>.

307. Huq, *supra* note 232, at 260–65, 292–93.

308. Kramer, *supra* note 13, at 1553.

309. Scholars have observed these dynamics at work in the case of climate change regulation. See Ryan, *supra* note 295, at 68, 124–25 (explaining how and why federal cap-and-trade proposals incorporate the content of regional cooperative efforts); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1107–09 (2009) (describing how iterative federal schemes have granted certain groups of

the extent of preemption, whereby the federal statute sets a floor that states are allowed to exceed.³¹⁰ Decisions over funding, compliance with federal targets, and enforcement provide other areas in which states can assert regulatory control.³¹¹ Extremely strong state coordination might also dissuade corporate entities from pursuing a federal standard in the first instance.³¹²

C. Collective Action Mechanisms from the Food Populist Perspective

Certain mechanisms for horizontal cooperation may be better than others in achieving the goals of food populists. This subsection accordingly assesses the merits of three vehicles for cooperation on farmed animal welfare: uniform laws and model acts, informal cooperation through interstate associations, and state-to-state agreements.³¹³

1. Uniform Laws and Model Acts

The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafts uniform laws, and recommends their enactment to state legislatures.³¹⁴ Uniform laws are intended to standardize broad subject areas.³¹⁵ NCCUSL accordingly vets proposed laws for areas where harmonization is both practicable and desirable.³¹⁶ Once drafted, member states vote to promulgate a proposed law.³¹⁷ If a requisite number of members approve the law, the Conference encourages state legislatures to adopt the law as written.³¹⁸ NCCUSL also drafts model acts intended for areas in

states "special regulatory power" in the areas of mobile source emissions and regional ozone regulation).

310. See Carlson, *supra* note 309, at 1109.

311. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 981–82 (2014).

312. See *infra* Part III.

313. Because much of food law is statutory, I do not discuss the American Law Institute's attempts to unify state common-law by issuing sets of subject matter rules. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995) (describing these efforts).

314. *Id.*

315. Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2258 (2015).

316. Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 90 (1993).

317. *Id.*

318. Razook, *supra* note 296, at 68.

which uniformity is not essential, desirable, or achievable.³¹⁹ Rather, model acts illustrate how state legislatures might address particular areas of policy concern.³²⁰

Because uniform laws are designed to harmonize policies across states, the Conference promotes its activities as an alternative to federal preemption.³²¹ There is some empirical evidence of the Conference's success with respect to anti-preemption signaling, especially as it relates to the Uniform Commercial Code (UCC).³²² That said, NCCUSL's record is mixed outside the area of commercial law.³²³ Most uniform laws are implemented in a non-uniform fashion.³²⁴

NCCUSL's pursuit of consistency carries additional risks. The desire for uniformity can engender policy conservatism, as policy areas are selected on the basis of expected uptake.³²⁵ The drive for uniform adoption may also contribute to "anticipated capture," where proposed laws are designed to appease interest groups to prevent these groups from subsequently blocking proposed laws in state legislatures.³²⁶ For similar reasons, NCCUSL provides corporate stakeholders with a direct role in the process of drafting uniform laws.³²⁷ Anticipated and actual capture often come at the expense of regulatory stringency and innovation.³²⁸

If anti-confinement measures were proposed in a uniform laws-like process, these drawbacks would probably manifest. High-

319. *Id.* at 69.

320. Ribstein & Kobayashi, *supra* note 304, at 152. The Uniform Marriage and Divorce Act provides but one example, and sets forth no-fault divorce and methods of asset distribution. *Id.*

321. Razook, *supra* note 296, at 63–68; see Patchel, *supra* note 290, at 141–42, 148–54 (observing that "the existence of a comprehensive state law dealing with a subject matter area is also likely to delay any federal enactment in the area"); Schwartz & Scott, *supra* note 313, at 602.

322. *Id.* But some caveat this conclusion, noting the lack of evidence supporting a causal connection between the enactment of uniform laws and congressional decision-making over whether to intervene into a particular area. Ribstein & Kobayashi, *supra* note 263, at 175 n.120; Razook, *supra* note 296, at 73 n.151.

323. Schwartz & Scott, *supra* note 313, at 643–45.

324. *Id.*

325. *Id.* at 597, 636–37 (observing that when NCCUSL does produce clear, bright-line rules, it is typically because those rules favor dominant interest groups).

326. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 578–80 (1998); Patchel, *supra* note 321, at 87, 121–26.

327. Schwartz & Scott, *supra* note 313, at 643–45.

328. See Patchel, *supra* note 321, at 98–101 (discussing UCC Article 9's exclusion of consumer protections as illustrative of compromise with industry); but see Stein, *supra* note 315, at 2270 (providing a positive account of NCUSL's efforts).

producing IAA states have an economic incentive to protect in-state integrators.³²⁹ If past behavior is any indication, these states would resist ending the use of intensive confinement. IAA interests would almost certainly become directly involved in the drafting process, contributing to the prospect of industry-driven rules. That NCCUSL addresses comprehensive policy areas, as opposed to one-off standards, creates additional pitfalls. For instance, IAA entities could statutorily sanction other arguably undesirable farming practices.³³⁰ From the food populist perspective, the uniform laws process leaves much to be desired.

It is worth caveating these capture concerns. If, in theory, IAA firms were interested in uniformity irrespective of stringency, there would be less risk of watered down regulatory content.³³¹ For instance, the UEP-HSUS MOU suggests that egg producers were willing to accept stricter disciplines to generate greater certainty. But industrial pork and beef producers have not signaled similarly. Despite the gradual adoption of inconsistent production regulations, these producers have largely remained on the sidelines. And yet, IAA producers have publicly opposed state product standards, suggesting that regulatory content represents their foremost concern. In sum, these groups do not appear to value regulatory harmonization as an end in itself.

While NCCUSL model laws offer an alternative to uniform acts, it is unlikely that a model law would add value over the status quo. Policy diffusion via HSUS has already generated broad subject matter uniformity across eleven states. State actors are therefore aware that they can enact aberrant anti-confinement standards in isolation. Model laws are neither intended, nor likely, to harmonize interstate discrepancies that do exist. In terms of achieving collective action, then, model laws are a less than ideal approach.

329. This is partly a byproduct of the industry's geographic consolidation. Abdalla, *supra* note 122, at 178–82; *see also* CRAIG GUNDERSON ET AL., ECON. RESEARCH SERV., USDA, A CONSIDERATION OF THE DEVOLUTION OF FEDERAL AGRICULTURAL POLICY 6–8 (2004) (discussing how agricultural production impacts states' policy positions).

330. Wolfson, *supra* note 266, at 148–49.

331. *See supra* text accompanying note 161.

2. Interstate Associations

States informally cooperate through ad hoc arrangements between departments and agency heads.³³² Officials maintain contacts with their counterparts in other jurisdictions, and often form regional or national organizations.³³³ When these organizations adopt an advocacy role, they can constitute “interstate interest groups” or be part of an “intergovernmental lobby.”³³⁴ These groups sometimes draft and promote model laws and guidelines.³³⁵

Interstate associations typically exert influence on federal lawmakers through routinized administrative interactions or informal communications.³³⁶ By providing a forum for coordination and viewpoint aggregation, these groups subsidize the costs of activism.³³⁷ This can reduce the prospect of preemption in areas where states wish to maintain policymaking control.³³⁸ When an interstate lobby represents a large number of states, the organization can typically trade on the “states’ rights” idiom more effectively.³³⁹ This too helps to guard against federal regulatory incursions.³⁴⁰

With respect to food policy, the National Association of State Departments of Agriculture (NASDA) provides an institutional analogue. NASDA’s mission is to enhance agriculture by “forging partnerships and creating consensus” between states, stakeholders,

332. Beyond interstate associations, informal cooperation can include a wide set of state behaviors. JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION 166–67, 204, 213 (2002).

333. *Id.* at 3, 166–69.

334. The National Association of Attorneys General provides one example. *Id.*; see Kramer, *supra* note 13, at 1552–53 (describing the inter-governmental lobby as including the Council of State Governments and the National Governors Association); Seifter, *supra* note 311, at 961–70 (offering an overview and a taxonomy). Under Seifter’s conception of “state interest groups,” each group “(1) exists to advance state governmental interests; (2) speaks with one voice; (3) represents a variable selection of state (and sometimes non-state) actors; and (4) is relatively opaque to the public.” *Id.*

335. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 332, at 166–69.

336. Seifter, *supra* note 311, at 961–70.

337. See *id.* at 985–91, 995 (explaining the comparative value of state interest groups over individual states in advocacy efforts).

338. *Id.*

339. See Huq, *supra* note 232, at 287 (“[A] network effect might be observed when a heterogeneous array of lobbying groups repeatedly invokes states’ interests using a federalism label, thus strengthening the appeal of federalism values by erasing their partisan valance and increasing their strength as focal points.”); Ryan, *supra* note 295, at 95–100 (discussing “federalism values” as bargaining currency).

340. *Id.*

and the federal government.³⁴¹ As currently structured, NASDA's primary role is to liaise with federal policymakers on behalf of its members, which comprise state departments of agriculture. NASDA members vote at the organization's meetings to adopt unified national policy positions on issues like animal health, nutrition, conservation, and food regulation.³⁴² NASDA then communicates these aggregate concerns in negotiations with federal lawmakers.³⁴³

Despite the theoretical benefits of interstate associations, there may be reasons to doubt NASDA's role in promoting an anti-confinement regime.³⁴⁴ Like NCCUSL, NASDA's objective of delivering a consensus message can result in a lowest-common-denominator approach.³⁴⁵ The tendency towards policy majoritarianism cuts against the epistemic benefits of subnational experimentation, and tends to favor the interests of large corporations.³⁴⁶

NASDA's public positions illustrate that vetting policy through that organization risks a watering down of regulatory content. With respect to animal welfare, NASDA "opposes activities or policies seeking to establish production or welfare standards outside of sound veterinary science and science-based best management practices."³⁴⁷ State legislators have included similar language in proposals to create livestock care standards boards.³⁴⁸ These boards are administrative entities often backed by IAA firms because they can be structured to favor the interests of integrators.³⁴⁹ In addition, NASDA has empirically aligned with industry to oppose aberrant state policies, including, for instance, GMO labeling mandates. NASDA not only lobbied Congress for the compromise legislation that preempted Vermont's law, but also supported industry's early call for an entirely

341. NASDA POLICY PRIORITIES, NAT'L ASS'N OF STATE DEPTS. OF AGRIC. (NASDA) (2017), https://www.agri-pulse.com/ext/resources/Farm-Bill-Summit-Resources/NASDA-Brochure_01232017.pdf.

342. See NASDA, *Policy Statements* (updated Sept. 19, 2017), http://s3.amazonaws.com/nasda2/media/Reports/NASDAPolicyStatements_09192017.pdf?mtime=20171128155734.

343. NASDA, ADVANCING AGRICULTURE IN THE STATES: AN OVERVIEW OF THE NASDA ORGANIZATION AND OUR MEMBERS 2, 8 (Sept. 21, 2017), http://s3.amazonaws.com/nasda2/media/Pages/NASDAOverview_09212017.pdf?mtime=20171025135640.

344. NASDA comports with Seifter's definition of a state interest group. See Seifter, *supra* note 311, at 961–70.

345. See Schwartz & Scott, *supra* note 313, at 596–97.

346. *Id.*

347. NASDA POLICY STATEMENTS, *supra* note 342, at 9.

348. See *supra* note 105 and accompanying text.

349. *Id.*

voluntary federal labeling scheme.³⁵⁰ In areas like school lunches and environmental conservation, NASDA tends to adopt an anti-regulatory approach.³⁵¹

3. State-to-State Agreements

Formal interstate agreements entail *ex ante* negotiations between state representatives.³⁵² Once state negotiators reach a consensus, officials in participating states propose reciprocal implementing statutes for legislative or administrative approval.³⁵³ These agreements are classically referred to as interstate compacts, and can represent a powerful subnational instrument for harmonizing policies across states.³⁵⁴

The U.S. Constitution provides two sources of legal authority for compacting. The first is structural. Having entered into the federal system with “their sovereignty intact,” states possess a residual authority to make policy in particular spheres.³⁵⁵ This “primary sovereignty” warrants federal comity when states exercise concurrent authority with the national government.³⁵⁶ The second source of compacting power arises from Article I, Section 10 of the U.S. Constitution. That clause provides: “No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign power. . . .”³⁵⁷

Despite Article I, Section 10’s plain text, the U.S. Supreme Court has not required congressional consent for all interstate compacts or agreements.³⁵⁸ Rather, the Court has adopted a “functional view” of compact interpretation, limiting the Clause’s scope to those compacts “directed to the formation of any combination tending to the increase

350. NASDA, *Coalition Letter to the Senate in Support of a National, Voluntary Labeling Framework for Bioengineered Foods* (Mar. 15, 2016), <http://www.nasda.org/Policy/filings/Letters/40009/41526.aspx>; NASDA, *Coalition Letter Urging Leader McConnell, Minority Leader Reid to Pass GMO Labeling Compromise* (June 28, 2016), <http://www.nasda.org/Policy/filings/Letters/40009/43747.aspx>.

351. NASDA POLICY STATEMENTS, *supra* note 342, at 49, 59.

352. CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER’S GUIDE* 18 (2006).

353. *Id.* at 18.

354. *Id.* at 2, 17–19. Compact scholars have noted difficulties with taxonomy. *See id.* at 12 (“Because of the broad nature of the compact instrument, it is difficult to categorize neatly or with great specificity the types of compacts now in effect.”).

355. *Alden v. Maine*, 527 U.S. 706, 713–14 (1999).

356. *Id.* at 714.

357. U.S. CONST. art. 1, § 10.

358. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 454 (1978).

of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”³⁵⁹ As a result, the Clause only applies to those compacts that tend to increase the political power of the states at the expense of federal authority.³⁶⁰

The Clause’s consent requirement operates in two principle circumstances.³⁶¹ First, consent is “absolutely required when the substance of the compact would alter the balance of power between the states and federal government.”³⁶² For instance, boundary compacts necessitate consent, as the alteration of state territory implicates federal interests and the extent of state sovereignty.³⁶³ If left unchecked, states could rework their boundaries to create alliances that threaten the federal government’s power.³⁶⁴ Second, consent “may be required” where the compact’s subject matter intrudes on an area over which Congress has “specific legislative authority.”³⁶⁵ For instance, compacts seeking to create regional price support programs likely encroach upon Congress’s ability to regulate interstate commerce.³⁶⁶ In practice, however, little is known about compacts violating the Clause.³⁶⁷ The U.S. Supreme Court has yet to invalidate a compact lacking Congress’s consent under that provision.³⁶⁸

In addition to the political power test for validity, the Court has also articulated “classic indicia” to discern the existence of a “compact”

359. *Id.* at 469; *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

360. BROWN ET AL., *supra* note 352, at 48–49.

361. *Id.* at 48.

362. *Id.* at 49.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. As Anne Joseph O’Connell discusses in her study of “boundary organizations,” the absence of clear legal rules governing interstate compacts can create uncertainty over the applicable constitutional and statutory provisions and the availability of corresponding defenses. See Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 896–911, 916–17 (2014) (providing as one example the Supreme Court’s refusal to apply sovereign immunity doctrine to a compact agency).

368. See William Funk, *Constitutional Implications of Regional CO₂ Cap-And-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. ENVTL. L. & POL’Y 353, 355 n.8, 361 (2009) (opining that “the Compact Clause, like the Non-Delegation Doctrine, has become a restriction in theory, but in practice the restriction rarely applies”).

for the purposes of the Clause.³⁶⁹ These indicia include the presence of a joint organization or body for a regulatory purpose, statutes conditioned on action by other states, and provisions preventing unilateral modification or repeal of the agreement.³⁷⁰ If an agreement lacks these classic compact features, the Clause's consent requirement is unlikely to apply.

Due perhaps to the absence of clear constitutional strictures, contemporary interstate compacts take many forms. Compacts can be bilateral, regional, or national in scope, and administered either by an endogenous interstate entity (a board or commission), or by existing agencies and departments in member states.³⁷¹ Scholars have broadly classified compacts as either boundary, regulatory, or advisory depending on the compact's purpose and the administering entity's level of delegated authority.³⁷² "Regulatory" or "administrative" compacts allocate autonomous policymaking authority to their administering agent.³⁷³ This, in turn, obligates member states to cede some degree of sovereignty. In contrast, purely "advisory" compacts do not entail the delegation of direct enforcement or policymaking power.³⁷⁴ Rather, these compacts often create an administering agency to identify regional or national issues of shared interest, provide technical support to member states, produce studies and reports, and develop recommendations towards a particular problem.³⁷⁵

In discussing the merits of compacting, it helps to disaggregate regulatory and advisory compacts. On the one hand, regulatory compacts provide states with robust tools for harmonizing policy.

369. *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985); BROWN ET AL., *supra* note 352, at 35 (observing that some interstate compacts will not fall "within the ambit of the Compact Clause").

370. *Ne. Bancorp, Inc.*, 472 U.S. at 175.

371. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 54–55. As of 2003, 175 compacts were in force. Ann O'M. Bowman & Neal D. Woods, *Strength in Numbers: Why States Join Interstate Compacts*, STATE POLITICS AND POLICY QUARTERLY, 347, 349–50 (2007). Thirty-three of these were national, i.e. any state could participate. *Id.* On average, each state belonged to 15.1 national compacts. The fewest number of states participating in an effective national compact was two, and the most was fifty. *Id.*

372. BROWN ET AL., *supra* note 352, at 12–15. Boundary compacts are designed to resolve jurisdictional and territorial disputes and are therefore outside of this Article's scope.

373. *Id.*

374. *See id.* (providing examples). The Multistate Tax Commission is one illustration. *Id.* Broun observes that advisory compacts more closely resemble administrative agreements, as opposed to compacts as traditionally conceived. *Id.*

375. *Id.*

Regulatory compacts are binding on future legislators, and their provisions are enforceable by and against member states.³⁷⁶ This prevents states from unilaterally nullifying, revoking, or amending the compact unless specific reservation is made.³⁷⁷ There is evidence that regulatory compacts can “defensively” forestall federal preemption by generating interstate uniformity in particular issue-areas.³⁷⁸

But this unifying power also engenders obstacles. Regulatory compacts are likely to constitute “compacts” under the Compact Clause.³⁷⁹ These compacts may therefore require congressional consent if they encroach upon Congress’s legislative authority.³⁸⁰ In addition, states may be reticent to cede decision-making authority to an autonomous interstate entity.³⁸¹ Reaching initial consensus over an agreement’s terms, and later obtaining legislative approval of implementing statutes, poses a formidable obstacle.³⁸² Compacts that require broad-based uniformity may fail due to insufficient member state participation. Those regulatory compacts that do secure significant quantitative uptake, not surprisingly, tend to benefit influential interest groups.³⁸³

376. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 204–05; Christi Davis & Douglas Branson, *Interstate Compacts in Commerce and Industry: A Proposal for “Common Markets Among States,”* 23 VT. L. REV. 133, 134–37 (1998); see BROUN ET AL., *supra* note 352, at 18–22 (explaining that it is the reallocation of governing authority that creates consideration, and thereby provides regulatory compacts with protection under the Contract Clause of the U.S. Constitution).

377. Davis & Branson, *supra* note 376, at 137.

378. Neal D. Woods & Ann O’M. Bowman, *Blurring Borders: The Effect of Federal Activism on Interstate Cooperation*, 39 AM. POLITICS RESEARCH, 859, 864 (2011); see ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 206–09 (reviewing studies).

379. *Supra* notes 326–28 and accompanying text.

380. *Id.*

381. BROUN ET AL., *supra* note 352, at 28–29.

382. *Id.*

383. See O’Connell, *supra* note 367 at 890 (observing that compacts can be prone to interest group influence). For instance, the Interstate Insurance Product Regulation Compact (IIPRC) is praised for harmonizing and improving asset-based insurance products, with the purported benefit of maintaining state regulatory control over the business of insurance. See ZIMMERMAN, REGULATING THE BUSINESS OF INSURANCE, *supra* note 6, at 94–96. The National Association of Insurance Commissioners (NAIC), a national organization of state insurance commissioners, drafted and championed the IIPRC’s adoption. Some scholars attribute industry’s acquiescence to the IIPRC largely to the systemic benefits it derives from the lack of federal intervention, including inroads with NAIC. Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 669 (1999).

Advisory compacts, on the other hand, do not require member states to cede sovereignty, and are therefore structurally unlikely to trade off with federal authority.³⁸⁴ Furthermore, advisory compacts may lack “classic” compact indicia when, for instance, they allow states to freely withdraw.³⁸⁵ Most advisory agreements consequently fall outside the ambit of the Compact Clause, which obviates the need for consent.³⁸⁶ This feature provides a boon in areas like anti-confinement where interest groups are likely to lobby against congressional approval.

Like other collective action mechanisms, advisory compacts have downsides. Perhaps foremost among these disadvantages is the technically non-binding nature of most advisory compacts. As a result, participants must generate the political will to negotiate, implement, and enforce an advisory agreement.³⁸⁷ Provided, however, that incentives for cooperation manifest, advisory compacts offer a range of other institutional advantages. For instance, advisory agreements can provide a locus for horizontal communication, advocacy, and knowledge sharing. Advisory agreements can also subsidize the transactional and political costs of interstate lobbying and dissent, encouraging states to undertake risky policy interventions.³⁸⁸ When advisory compacts are regionally focused, participants can tailor the agreement to meet state and local needs. Advisory arrangements might therefore provide several benefits towards instantiating an alternative mode of sustainable food governance.

384. BROUN ET AL., *supra* note 352, at 14 (“By their very terms, advisory compacts cede no state sovereignty, nor delegate any governing power to a compact-created agency. As such, advisory compacts generally do not contribute to political combinations that would be detrimental to the supremacy of the federal government.”).

385. *Id.*; see *supra* notes 326–28 and accompanying text.

386. BROUN ET AL., *supra* note 352, at 14.

387. See Bruce R. Huber, *How Did RGGI Do It? Political Economy and Emissions Auctions*, 40 *ECOLOGICAL L.Q.* 59, 62 (2013) (recognizing this challenge in the context of regional advisory climate agreements).

388. See O’Connell, *supra* note 367 at 890 (noting that interstate compact agencies may be required to address collective action problems and improve efficiency); Kristen Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 *N.Y.U. ENVTL. L.J.* 54, 58–59, 68–70 (2005) (describing the potency of a “strength in numbers” approach that, in the climate change context, can be pursued through regional organizations); Huq, *supra* note 232, at 252, 261–62 (discussing horizontal norm entrepreneurship through collective action).

D. An Advisory Agreement on Farmed Animal Welfare: Institutional Design Principles, Benefits, And Potential Challenges

Analyzing discrete modes of horizontal cooperation provides several lessons for anti-confinement advocates. States' experience with uniform laws and intergovernmental lobbies suggests that a pursuit of broad-based regulatory uniformity can come at the expense of a politics of reform. Those stakeholders interested in protecting regulatory aberrations in food and agriculture might therefore look to other ways of solidifying local gains. One appropriate strategy could be to galvanize action across like-minded states to increase coalitional bargaining power.³⁸⁹ In this way, alternative food movements might capitalize on the benefits of collective action even if food populism remains contrarian from a policy perspective.

1. Institutional Design Principles

Anti-confinement measures are low-hanging fruit for an interstate consortium. By championing the passage of similar statutes in several states, HSUS has laid a foundation for cooperation. Whether legislatively enacted or citizen-approved, an existing product or production regulation suggests sufficient in-state support for an anti-confinement mandate. This creates opportunities for political entrepreneurship by state lawmakers, who can trade on the demonstrated popularity of alternative housing measures.³⁹⁰ For instance, polls in Rhode Island show that 68% of voters approve of an anti-confinement standard identical to that in Massachusetts.³⁹¹

Massachusetts, in this regard, represents a natural leader to pioneer an anti-confinement regime based on Question 3. So conceived, that regime might prohibit the in-state use of intensive confinement systems to house gestating sows, veal calves, and egg-laying hens, as well as the in-state sale of any products thereby derived. Massachusetts is already obliged to implement that standard—the furthest reaching to date—by 2022.³⁹² Charlie Baker,

389. McCabe, *supra* note 5, at 583. In proposing a vertical re-approach to food systems, McCabe notes the possibility of “regional foodshed compacts” that might “include representatives from state/local food policy councils, agriculture and food industry, and planning experts.” *Id.*

390. JAMES Q. WILSON, *THE POLITICS OF REGULATION* 370–71 (1980). Even where ballot measures are responsible for regulatory content, elected officials have been pushed to set forth their position. See Young, *supra* note 114 and accompanying text.

391. Faulkner, *supra* note 126.

392. *Supra* note 9.

the state's governor, has publicly endorsed the rule, which is popular with state voters and elected officials.³⁹³ Six of the state's congressional representatives back the initiative, providing federal allies who can assist in legislative bargaining.³⁹⁴ Massachusetts, moreover, houses a voting bloc dedicated to local and sustainable food products.³⁹⁵ The existence of that constituency bodes well for future reforms, and provides politicians with a popular mandate. Finally, Massachusetts has historically exercised leadership in cooperative arrangements with neighboring states, including on climate change.³⁹⁶

To that end, the Northeast provides an ideal locus for a regional anti-confinement agreement. As with Massachusetts, Rhode Island and Maine already prohibit the in-state use of gestation and veal crates.³⁹⁷ Intrastate purchasing patterns demonstrate a broader commitment to local, humanely raised, and sustainable foods.³⁹⁸ States in the region contain few firms potentially subject to new disciplines.³⁹⁹ Instead, the region's influential agricultural interests comprise small farmers that generally oppose confinement,⁴⁰⁰

393. See *supra* Part I.

394. Young, *supra* note 114; see WILSON, *supra* note 390, at 370 (observing the role of U.S. senators in actualizing the ambitions of policy entrepreneurs); Elliot et al., *supra* note 6, at 335 (detailing the influence of U.S. Senator Muskie in obtaining passage of the Clean Air Act of 1970).

395. See MASS. DEPT OF AGRIC. RESEARCH, A SNAPSHOT OF MASSACHUSETTS AGRICULTURE 12 (July 2015), <http://www.mass.gov/eea/docs/agr/facts/snapshot-of-ma-ag-presentation.pdf> (documenting increased consumer demand for locally produced foods).

396. See Huber, *supra* note 387, at 88 (detailing early aggressive efforts by Massachusetts to form the Regional Greenhouse Gas Initiative, a cooperative regional cap-and-trade program).

397. For statutes' respective texts, see *supra* notes 9, 100, 105.

398. Brian Donahue et al., *A New England Food Vision*, FOOD SOLUTIONS NEW ENGLAND 7, 91 (2014), http://www.foodsolutionsne.org/sites/default/files/LowResNEFV_0.pdf; see Margaret Sova McCabe & Joanne Burke, *The New England Food System in 2060: Envisioning Tomorrow's Policy Through Today's Assessments*, 65 ME. L. REV. 549, 553–58, 575–76 (2013) (“New England has the potential to be a region that develops its brand of sustainable agriculture that replaces industrial agriculture norms with more sustainable practices.”).

399. See Donahue et al., *supra* note 398, at 8 (noting that the problems associated with livestock feeding operations “are small in comparison to other regions of the country,” and attributing this to the predominance of small and medium-sized family farms).

400. McCabe & Burke, *supra* note 398, at 575–76; see Hinman, *supra* note 71 (observing that the interests of small farmers generally diverge from those of IAA entities).

compete on specialty crops and high quality dairy products,⁴⁰¹ and adopt organic or near-organic practices.⁴⁰² Investment and economic development benefits also typically accrue from the growth of regional food systems.⁴⁰³

In addition to favorable intrastate dynamics, a long-history of interstate cooperation, including on food policy, characterizes the Northeast. There are several now active “food system change agents” in the region.⁴⁰⁴ These include local food policy councils, sustainable agriculture working groups, and conservation-oriented organizations.⁴⁰⁵ Informal networks function with varying degrees of private stakeholder and state involvement.⁴⁰⁶ As a historical matter, New England states have engaged in compacting more frequently than their peers.⁴⁰⁷ These agreements span areas ranging from environmental protection to education to public health.⁴⁰⁸

Two recent regional consortia, the Northeastern Interstate Dairy Compact and the Regional Greenhouse Gas Initiative (RGGI), demonstrate how a geographically concentrated grouping can yield collective action benefits.⁴⁰⁹ I begin with the Northeastern Interstate Dairy Compact, as it provides a topical illustration of a regional regulatory compact that garnered Congress’s consent. The RGGI, albeit concerning climate change, is analytically useful because it shows how states can successfully structure a regional agreement that faces early political resistance from federal decision makers.

401. Donahue et al., *supra* note 398, at 6–8. While industrial dairy operators have historically opposed anti-confinement regulations, the veal industry’s voluntary transition to group housing has reduced industry resistance. *See* AM. VEAL ASS’N, *supra* note 28. In addition, the majority of Northeastern dairy farmers operate at a small-scale and distribute to local networks, cultivating a set of economic interests that diverge from those of IAA firms. *Id.*; *see supra* text accompanying notes 355–58.

402. McCabe & Burke, *supra* note 398, at 569–70.

403. *See generally* FED’L RESERVE BANK OF ST. LOUIS, HARVESTING OPPORTUNITY: THE POWER OF REGIONAL FOOD SYSTEM INVESTMENTS TO TRANSFORM COMMUNITIES (2017), https://www.stlouisfed.org/-/media/Files/PDFs/Community-Development/Harvesting-Opportunity/Harvesting_Opportunity.pdf?la=en.

404. McCabe & Burke, *supra* note 398 at 556–58; *see* FOOD SOLUTIONS NEW ENGLAND, *Regional Alignment*, <http://www.foodsolutionsne.org/six-states-one-region/regional-alignment> (listing regional food networks) (last visited July 28, 2017).

405. FOOD SOLUTIONS NEW ENGLAND, *Regional Alignment*.

406. *Id.*

407. VINCENT V. THURSBY, INTERSTATE COOPERATION, A STUDY OF THE INTERSTATE COMPACT 106 (1953); Richard C. Kearney & John J. Stucker, *Interstate Compacts and the Management of Low Level Radioactive Wastes*, 45 PUB. ADMIN. REV. 210, 213, 216–17 (1985).

408. THURSBY, INTERSTATE COOPERATION, at 97, 101, 106–14.

409. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 98.

a. Northeastern Interstate Dairy Compact

The Northeastern Interstate Dairy Compact sought to stabilize the fluid milk market for small New England dairy farmers by creating a commission with direct authority to set a minimum price for Class I milk.⁴¹⁰ Interstate efforts to develop the compact began in 1988, and culminated in 1993 when six of the region's governors signed a resolution formalizing the compact.⁴¹¹ The Vermont and Maine legislatures initially enacted reciprocal legislation to implement the agreement, with Connecticut, Massachusetts, New Hampshire, and Rhode Island following suit.⁴¹²

The compact's terms expressly required Congress's consent for the agreement to take effect.⁴¹³ Governors from participating states subsequently worked with federal lawmakers to generate congressional approval.⁴¹⁴ Vermont Senator Patrick Leahy introduced legislation to obtain congressional authorization in 1994, and Massachusetts Congressman John Olver introduced parallel legislation in the House.⁴¹⁵ In advocating the Senate bill, Leahy played on several themes, including the importance of stable commodity prices to small farmers, the rights of states to protect their residents, and the virtues of bipartisan state cooperation.⁴¹⁶ Congress subsequently incorporated the compact into the 1996 farm bill, granting its consent limited to a three year time term.⁴¹⁷

410. *Id.*, at 97–101; NORTHEAST DAIRY COMPACT COMM'N, *History of the Compact*, <http://www.dairycompact.org/history.htm> (last visited July 28, 2017).

411. NORTHEAST DAIRY COMPACT COMM'N, *History of the Compact*.

412. *Id.* Compact membership was open to states contiguous with any of the enumerated states, or states contiguous to then-participating states. *Id.*; see S.J. Res. 28, 104th Cong. (1st Sess. 1995) (setting forth the compact's provisions as later consented to by Congress); Northeast Interstate Dairy Compact, Pub. L. No. 104-107, § 147, 110 Stat. 919–21 (1996).

413. S.J. Res. 28, 104th Cong. at § 20; see BROUN ET AL., *supra* note 352, at 48–49 (explaining why consent would likely be required under the Compact Clause for a regional price support agreement).

414. NORTHEAST DAIRY COMPACT COMM'N, *supra* note 411.

415. *Id.*

416. *Id.* For instance, Leahy opined in testimony before the Senate: “The people of New England want to take more control over how prices are set. The New England States want to help farmers by giving them a fair return for their work, and consumers want to have some kind of voice in setting stable milk prices [the Compact] is an idea from the grassroots. It is rooted in our deepest tradition of federalism. It is a way for the New England States to solve the problem on their own by taking more control of our milk pricing.” Northeast Interstate Dairy Compact, 140 Cong. Rec. S. 14792, 14793 (Oct. 7, 1994) (statement of Sen. Patrick Leahy).

417. 7 U.S.C. § 7256. This followed two unsuccessful attempts at federalization in 1994 and 1995, respectively. See NORTHEAST DAIRY COMPACT COMM'N, *supra* note

Despite the states' success, obtaining legislative authorization was no easy task. The agreement faced intense opposition from large milk processors, dairy producing states in the Midwest, and consumer groups concerned with higher milk prices.⁴¹⁸ A coalition of environmental organizations, small farmers, and states' rights advocates lobbied on the agreement's behalf.⁴¹⁹ When the compact's initial three year-time period elapsed, these groups were central to the fight over an extension.⁴²⁰ Congress approved that extension in 1999, subject to another term-limitation.⁴²¹ When that term subsequently expired in October 2001, Congress failed to renew the compact.⁴²² Some attribute this failure to unrelated political dynamics.⁴²³

Even after Congress's consent expired, however, state lobbying on behalf of the compact yielded gains. The 2002 farm bill authorized a new federal dairy subsidy "akin" to the compact, dubbed the Milk Income Loss Contract (MILC) program.⁴²⁴ Federal lawmakers designed the program to aid small and medium-sized farmers irrespective of their location.⁴²⁵ Under the MILC program, eligible dairy farmers received a payment whenever the price of fluid milk fell below a certain threshold.⁴²⁶ Ineligible large milk producers, located primarily in the West, opposed the subsidy.⁴²⁷ Producer groups in the Northeast and Upper Midwest, however, supported the program as an alternative to a new regional compact.⁴²⁸ The existence of the MILC program might therefore illustrate the enduring benefits to state

411; Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 346 (1995) (commenting that "much of the Supreme Court's dormant commerce clause jurisprudence can be written in milk") (citations omitted)).

418. James Dao, *Congress Weighs Bill to Expand the Cartel Letting Northeast Dairy Farmers Set Prices*, N.Y. TIMES (May 2, 1999), <http://www.nytimes.com/1999/05/02/nyregion/congress-weighs-bill-expand-cartel-letting-northeast-dairy-farmers-set-prices.html?mcubz=2>.

419. *Id.*

420. *Id.*

421. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 100.

422. *Id.* at 101.

423. *Id.*

424. RALPH M. CHITE, CONG. RESEARCH SERV., RL33475, DAIRY POLICY ISSUES 2, 6 (June 2006).

425. *Id.* at 2; RALPH M. CHITE & DENNIS A. SHIELDS, CONG. RESEARCH SERV., RL34036, DAIRY POLICY AND THE 2008 FARM BILL 1-2 (Jan. 2009).

426. CHITE & SHIELDS, *supra* note 425 at 1.

427. *Id.* at 2-3.

428. *Id.* at 2, 11.

coordination that began with lobbying on behalf of a regional policy regime.

b. The Regional Greenhouse Gas Initiative (RGGI)

The RGGI is a cooperative effort by nine Northeast and Mid-Atlantic states to reduce CO₂ emissions from the region's power sector.⁴²⁹ Interstate discussions began as a response to federal inaction on climate change, and gained momentum when then-New York Governor George Pataki formally invited other governors from the region to participate in a cap-and-trade program.⁴³⁰ Nine governors agreed, and the signatory states formalized their agreement in a 2005 MOU.⁴³¹

Structurally, the RGGI can be characterized as a commission-led advisory compact.⁴³² The RGGI MOU sets forth a preliminary "Model Rule" that states are obliged to implement as a condition of participation.⁴³³ The Model Rule articulates the RGGI's cap-and-trade framework, and provides a template into which member states can plug specific implementing language.⁴³⁴ The RGGI MOU does not place conditions on withdrawal, and is enforced on a voluntary basis. RGGI participants also created a regional organization for administering the agreement.⁴³⁵ That organization is now RRGi, Inc.,

429. REG'L GREENHOUSE GAS INITIATIVE (RGGI): AN INITIATIVE OF THE NORTHEAST AND MID-ATLANTIC STATES OF THE U.S., <http://rggi.org/design/regulations> (last visited July 28, 2017). Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont are currently active members. *Id.*

430. Huber, *supra* note 387, at 83–85.

431. *Id.* at 84. Huber attributes the agreement's rapid implementation in part to a long-standing history of regional cooperation on emissions reductions initiatives. *Id.* at 63, 90.

432. See Funk, *supra* note 368, at 360–61 (summarizing commentary on this issue, and concluding that Congress's consent is not required given the RGGI's purely advisory nature); Robert K. Huffman & Jonathan M. Weisgall, *Climate Change and the States: Constitutional Issues Arising from State Climate Protection Leadership*, 8 SUSTAINABLE DEV. L. & POL'Y 6, 10–11 (2008) (contending that the RGGI likely does not fall within the scope of the clause because it lacks classic compact indicia).

433. RGGI, MEMORANDUM OF UNDERSTANDING, 6–7 (2005), https://www.rggi.org/docs/mou_final_12_20_05.pdf [hereinafter RGGI MOU].

434. RGGI, *Model Rule: Part XX CO2 Budget Trading Program*, https://www.rggi.org/docs/ProgramReview/FinalProgramReviewMaterials/Model_Rule_FINAL.pdf (last updated Dec. 23, 2013); RGGI, *Program Design*, <https://www.rggi.org/design> (last visited July 28, 2017).

435. RGGI MOU, *supra* note 433, at 7–8. RGGI, Inc., in turn, maintains contractual agreements with each member state to assist with program implementation and development. See, e.g., REGIONAL GREENHOUSE GAS INITIATIVE,

a 501(c)(3) non-profit corporation.⁴³⁶ RGGI Inc. serves as a “deliberative forum” for collective action, maintains a system for tracking emissions allowances, and provides technical assistance to member states.⁴³⁷

Notably, the RGGI works—both in terms of reducing emissions and providing proof of concept for state and federal climate programs.⁴³⁸ Controlling for other exogenous factors, a 2015 peer-reviewed study found that “emissions would be 24% higher in the region if the RGGI program were not in effect.”⁴³⁹ The RGGI’s environmental and economic achievements have led to follow-on efforts by other states.⁴⁴⁰ In addition, federal climate proposals have sought to incorporate the RGGI’s substantive provisions without diluting the program’s substantive stringency.⁴⁴¹ With respect to legal challenges under the Compact Clause, RGGI members have neither requested, nor been obligated to seek, Congress’s consent.⁴⁴²

2. Collective Action Benefits

These principles of institutional design, and their instantiations, demonstrate how regional interstate agreements can alter substantive outcomes at the state and federal levels. They show that there are benefits to starting small, even if a compact later broadens to include larger, more influential states (for instance, states like California and Michigan). There are several reasons to initially focus on the Northeast, including its embrace of anti-confinement regulations, advantageous interest group mix, and cooperative history. As a result of these dynamics, a regional focus can yield

INC., *Scope of Services in Support of Connecticut’s Implementation of the CO2 Budget Trading Program*, https://www.rggi.org/docs/RGGIinc/Docs/StateContracts/CT_Contract.pdf.

436. REGIONAL GREENHOUSE GAS INITIATIVE, INC., *supra* note 435 at 12.

437. *Id.* at 1–2.

438. See Editorial, *Proof that a Price on Carbon Works*, N.Y. TIMES, Jan. 19, 2016 at A16.

439. Brian C. Murray & Peter T. Maniloff, *Why Have Greenhouse Emissions in RGGI States Declined? An Economic Attribution to Economic, Energy Market, and Policy Factors*, 52 ENERGY ECON. 581, 585–88 (2015).

440. Anthony F. Earley, Jr. & Bob Perciasepe, *How States Can Best Promote Clean Power*, THE HILL (Sept. 10, 2015), <http://thehill.com/blogs/congress-blog/energy-environment/253124-how-states-can-best-promote-clean-power>.

441. Ryan, *supra* note 295, at 66–68. RGGI member states likewise acknowledge in their MOU the possibility of absorption into a “federal program that rewards states that are first movers[,]” and pledge to sign on to such a federal program should it approximate the standards of the RGGI. RGGI MOU, *supra* note 433, at 10.

442. Funk, *supra* note 368, at 355 n.8, 358.

collective action benefits through state-based planning and coordinated lobbying.

As with the RGGI's "strength in numbers" approach, joint efforts to enact aberrant anti-confinement standards can enhance both quantitative and qualitative state buy-in.⁴⁴³ In terms of quantitative buy-in, i.e. getting more states to implement anti-confinement standards, coordinated regulatory development can offer political cover and cultivate a forceful regional norm that induces conformity.⁴⁴⁴ New York and Massachusetts harnessed the latter by making early aggressive commitments to the RGGI, chiding other states to step up their efforts.⁴⁴⁵ In a similar vein, cooperation between Massachusetts, Maine, or Rhode Island could induce action by states in the region that have yet to act on anti-confinement, but that possess largely supportive intrastate political dynamics. An interstate agreement can itself engender opportunities for entrepreneurship, by offering state lawmakers a platform to exercise regional leadership while generating political capital with food conscious voters at home.⁴⁴⁶

Coordinating dissent is particularly important in creating a coalition to advocate aberrant food product standards. The reticence of states to enact these policies in isolation is due partly to the recurrent threat from industry that companies will pull their products from the regulating state. That threat is credible vis-à-vis small states, which represent a relatively marginal fraction of national distribution.⁴⁴⁷ The risk of supply reduction, moreover, plays on elected officials' in-built sensitivity to the political implications of price increases for consumers. Food companies' disproportionate economic leverage consequently provides one reason that states abstain from regulating products.

Alternatively, and as was the case with GMO labeling mandates, industry's pullout threat can lead some states to adopt statutory triggering provisions.⁴⁴⁸ Those provisions require a certain number of

443. See Engel, *supra* note 388, at 58.

444. *Id.* at 68–70.

445. Huber, *supra* note 387, at 88–89.

446. Kristen Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does it Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1026 (2006); see Huq, *supra* note 232, at 264–65 (noting that politicians can generate "heterogeneous political payoffs" "with significant voting blocs of environmentally conscientious constituents" by taking aggressive action on climate change).

447. See *supra* notes 210–15 and accompanying text.

448. See *supra* notes 216–17 and accompanying text.

contiguous states to act first.⁴⁴⁹ In the instance of GMO labeling, Connecticut and Maine's contingent statutes failed to generate sufficient follow-on support, and these laws never took effect.⁴⁵⁰ When Vermont acted on its own, industry was able to effectively portray the state as an outlier setting a "de facto" national standard. Had these states initially agreed to implement their standards simultaneously, industry might not have been able to advance its preemptive position so effectively.

Generating additional quantitative buy-in can produce other offensive gains for anti-confinement advocates. As with emissions reductions, increasing the number of regulating states draws in more population centers and areas of production.⁴⁵¹ While the number of animals in these states is likely to be minimal, even incremental reductions in animal suffering are valuable from a welfare perspective. As HSUS's campaign strategy demonstrates, greater quantitative buy-in can generate increased attention from the media, consumers, and other elected officials.⁴⁵² This, in turn, can broadcast to industry that certain destructive practices are "out-of-step" with popular values.⁴⁵³ With respect to industry, an agreement could send a stronger signal that demand will shrink for non-compliant animal products.

In addition, an interstate agreement can cultivate regional economies of scale.⁴⁵⁴ As more states agree to a common standard, demand for conforming meat and egg products will increase; robust demand, in turn, enhances supply, which reduces costs for consumers.⁴⁵⁵ These forces cut against the expense of moving away from intensive confinement, undermining a historically forceful argument for maintaining the status quo.

449. See *supra* Part II.

450. See *supra* notes 216–17 and accompanying text.

451. See *supra* notes 431, 470 and accompanying text.

452. Elliot et al. *supra* note 6, at 329–30 (observing this snowball pattern of policy development in relation to subnational vehicle emissions standards, where "victories in one state may promote the marshaling of the resources necessary for victory in another"). *Id.* at 329. In that instance, incremental successes prompted renewed interest and attention to air pollution from environmental organizations, the media, and voters. *Id.*

453. Jones, *supra* note 75, at 50.

454. Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 450–54 (2006); *supra* text accompanying note 32 (discussing transition costs to alternative housing systems); see Jones, *supra* note 75 (observing that Proposition 2's price effects depend on whether other states impose similar regulations).

455. PEW CHARITABLE TRUSTS, *supra* note 21, at 31.

An agreement would also enhance qualitative buy-in; in other words, the willingness of states to defend their collective regulatory aberration against defensive preemption. Because preliminary negotiation requires substantial upfront temporal and political investments, states have greater incentives to ensure adequate back-end implementation and enforcement.⁴⁵⁶ Interstate agreement can also generate powerful discursive currency, allowing states to portray regulatory aberrations in terms of federalism values.⁴⁵⁷ The “states’ rights” motif can shift attention away from industry’s otherwise compelling “regulatory patchwork” sound-bite.⁴⁵⁸ The “food federalism” bargaining chip pairs well with other successful anti-confinement themes, including compassion towards animals and protecting small farmers.⁴⁵⁹ Follow-on federalization of the dairy compact, first via Congress’s consent and later as a new federal payment, demonstrates that political payoffs can be enduring.⁴⁶⁰

Beyond coordinated lobbying, greater qualitative buy-in can demonstrate subnational leadership in areas of state concern. Leadership signaling encourages federal lawmakers to integrate state-driven regulatory content into national legislation.⁴⁶¹ For instance, federal climate bills proposed after the RGGI incorporate the agreement’s strict rules.⁴⁶² As Erin Ryan observes, this shows “sensitivity to the federalism implications of enacting federal legislation in a field dominated by state leadership”⁴⁶³ Regional coordination is especially important for small states that want to signal leadership on a particular issue. Due to their size, these states typically cannot set regulatory trends as effectively as “superstates” like California and Texas.⁴⁶⁴

A regional agreement might also deliver institutional benefits that cast deregulatory preemption as an undesirable policy approach. In general, advisory compacts tend to bridge jurisdictional gaps and maximize state resources.⁴⁶⁵ As applied here, a compact could provide

456. Hall, *supra* note 454, at 452.

457. Seifter, *supra* notes 311 and accompanying text.

458. *Supra* notes 177, 340, 388–90.

459. *Supra* notes 5, 71, 418.

460. *Supra* notes 384–86, 398.

461. Ryan, *supra* note 295, at 69.

462. *Id.* at 68.

463. *Id.* at 69.

464. Gerken & Holtzblatt, *supra* note 13, at 103.

465. See Betheny Gross & Paul T. Hill, *The State Role in K-12 Education: From Issuing Mandates to Experimentation*, 10 HARV. L. & POL’Y REV. 299, 323 (2016) (advocating a similar approach in education policy).

a locus for researching and recommending data-driven food populist reforms, thereby operationalizing contextual calls for democratic experimentalism.⁴⁶⁶ Democratic experimentalism is, in short, “a governance regime organized to promote innovation and learning.”⁴⁶⁷ Discussions could therefore begin with the issue of anti-confinement, which is relatively non-controversial among potential participants, and could then expand to address IAA’s more challenging trans-boundary externalities.⁴⁶⁸

These collective action benefits reduce the prospect that industry might achieve a “double win.”⁴⁶⁹ Should interest groups push for preemptive legislation, coordinated action by states can help maintain the current regime’s stringency.⁴⁷⁰ In practice, this would mean a national standard that phases out intensive confinement systems. That outcome might be ideal from HSUS’s perspective, as it would implement a uniform federal rule that improves the greatest number of animal lives.⁴⁷¹ The UEP-HSUS MOU and bargained-for state production regulations demonstrate that IAA entities might agree to a compromise statute if they perceive less-promising interest group dynamics. Cost-externalizing regulations like Question 3 increase this propensity by putting IAA firms on the defensive. In this circumstance, a regional compact would serve as a vehicle to make an eventual federal standard more rigorous.⁴⁷²

Anti-confinement dissidents might also secure a partially preemptive statutory scheme, in which federal animal welfare standards set a floor that states are then allowed to exceed.⁴⁷³

466. Aguirre, *supra* note 12, at 579–84 (proposing this approach to regulate the use of antibiotics in IAA). For a general explanation of democratic experimentalism, see Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U.L. REV. 287, 350–62 (2004); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (Mar. 1998).

467. Gross & Hill, *supra* note 465, at 300.

468. The recommendations offered by the Pew Commission, for instance, provide replete areas for action and further study. PEW CHARITABLE TRUSTS, *supra* note 21, at 61–95.

469. Deshazo & Freeman, *supra* note 6, at 1506.

470. *Id.* at 1506 n.16. Because states, via collective action, can enhance their position in interest group negotiations, bargaining’s subsequent outcome is more likely to reflect a substantive middle ground. *Id.* (noting also that “sometimes industry miscalculates and Congress passes a surprisingly stringent standard”).

471. See *supra* note 119 and accompanying text.

472. See O’Connell, *supra* note 367 at 871–74 (recognizing that administrative organs can shift from the administrative periphery to the center).

473. PEW CHARITABLE TRUSTS, *supra* note 21, 35–37, 83 (describing potential federal performance-based standards governing farmed animal treatment).

National air pollution regulations provide a reference point.⁴⁷⁴ At a minimum, states should seek federal performance-based requirements to enshrine best practices for animal feeding, housing, health, and behavior.⁴⁷⁵ Prohibiting intensive confinement might represent one regulatory floor. States could then surpass that standard by, for instance, mandating a minimum size requirement for cages. In so doing, states can stimulate a ratcheting up of both federal and state regulatory stringency.⁴⁷⁶

A third possibility—albeit unlikely—is that strong state engagement deters IAA interests from pursuing defensive preemption from the outset. That deterrent effect could result from industry's perception that a regulatory shift is inevitable due to strong retailer and state buy-in. Producers might consequently recognize that an early transition to alternative housing would best serve their interests. That dynamic manifested in Proposition 2's wake, when some egg producers voluntarily adopted entirely cage-free systems.⁴⁷⁷ If a welfare agreement were to generate commensurate attention, companies might cut their losses to avoid greater public scrutiny of IAA practices.

3. Legal Challenges and Structural Criticisms

I address two sources of potential resistance to a regional advisory compact: legal challenges and structural criticisms.

a. Legal challenges

A regional advisory agreement lacking congressional consent is likely to face litigation under the Compact Clause. A Compact Clause challenge turns on two primary questions: first, whether the agreement constitutes a compact within the scope of the Clause, and if so, whether the compact enhances the political power of the states to the detriment of federal authority.⁴⁷⁸ If the answer to both inquiries is yes, then the agreement is invalid.

474. Deferring to California's leadership on emissions-reductions, federal lawmakers carved a state-based exception to the Clean Air Act's otherwise complete preemption of state vehicle emissions-standards. Ryan, *supra* note 295, at 65–67.

475. See *supra* text accompanying note 447.

476. See Ryan, *supra* note 295, at 67 (describing this dynamic in the air pollution context).

477. Colman, *supra* note 71.

478. BROWN ET AL., *supra* note 352 at 14, 35.

The agreement proposed here should survive under both prongs. As with the RGGI, this consortium lacks certain "classic" compact indicia, e.g. the presence of an interstate body with autonomous regulatory authority, and the existence of limits on a state's ability to withdraw from the accord.⁴⁷⁹ Even if the Clause were to apply, the agreement's advisory nature makes it structurally unlikely to encroach on federal authority.⁴⁸⁰ The lack of an on-point federal statute means that there is little, if any, national authority to usurp. Further favoring a finding of legitimacy is that states can, and indeed already have, established analogous product and production regulations.⁴⁸¹

Even though congressional consent is probably unnecessary, consent may still be desirable. Congress can consent to a compact either *ex ante* or *ex post*, the latter being express or implied.⁴⁸² The primary benefit to consent is that it transforms the agreement's terms into federal law.⁴⁸³ This can insulate an agreement from a range of constitutional challenges.⁴⁸⁴ In addition, federalization via consent opens new paths for enhanced cooperation between federal and state administrators.⁴⁸⁵ Because state coordination can improve the bargaining position of anti-confinement advocates in federal interest group negotiations, seeking consent following the compact's formation could provide an efficient means of enacting a federal standard while reducing industry opposition.

In addition, an anti-confinement advisory agreement could alter a judicial Commerce Clause analysis in a way that favors corresponding policy reforms.⁴⁸⁶ Under the dormant Commerce Clause, an economic

479. Funk, *supra* note 368 at 359.

480. See *supra* note 401 and accompanying text.

481. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 474–75 (1978) (observing that a state's ability to impose the underlying regulation in isolation cuts against a finding of invalidity under the Compact Clause).

482. BROWN ET AL., *supra* note 352, at 18–19; *Cuyler v. Adams*, 449 U.S. 433, 438–42 (1981).

483. *Cuyler*, 449 U.S. at 440.

484. See *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); *De Veau v. Braisted*, 363 U.S. 144, 151–55 (1960) (denying a preemption claim on the basis of consent); *Organic Cow, LLC v. Ne. Dairy Compact Comm'n*, 46 F. Supp. 2d 298, 304 (D. Vt. 1999) (rejecting a Fifth Amendment due process challenge to the Northeastern Interstate Dairy Compact because of consent).

485. See Ryan, *supra* note 295, at 64–69 (discussing policy benefits to cooperative federalism).

486. Dormant Commerce Clause challenges can and have been brought against current anti-confinement regulations. See *supra* Part I.

regulation is invalid if it discriminates against another state.⁴⁸⁷ Courts have ruled that product and production regulations are non-discriminatory because they create identical treatment standards for both in and out-of-state producers.⁴⁸⁸ If a court finds that the law is not discriminatory, the law is valid unless its burden on interstate commerce “is clearly excessive in relation to the putative local benefits.”⁴⁸⁹ A regional consortium could reduce perceived commercial burdens, and augment local regulatory benefits.⁴⁹⁰ For instance, agreement advocates could portray the compact as lessening inter-jurisdictional liability risks and compliance costs for industry. They might also point to the creation of regulatory economies of scale with positive price implications for consumers in participating states.

Turning to preemption, challenges to an anti-confinement advisory agreement under the Supremacy Clause are unlikely to succeed considering the lack of federal legislation governing on-farm animal treatment.⁴⁹¹ The preemption inquiry focuses on whether Congress intended a federal statute to preempt state action.⁴⁹² It is therefore unlikely that a court would invoke the Supremacy Clause to displace the agreement proposed here. The Ninth Circuit’s recent decision in *Canards II*, which upheld California’s force-fed foie gras ban under that clause, reduces this prospect further.⁴⁹³

487. See *supra* notes 143 and accompanying text.

488. See *supra* notes 144–45.

489. *Davis*, 553 U.S. at 338–39 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

490. Though a federal court has yet to rule on the RGGI’s validity under the dormant Commerce Clause, similar arguments have been made in the environmental literature. Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy Governance and U.S. Carbon Emissions*, 43 *ECOLOGICAL L.Q.* 143, 181–83 (2016); Lauren Baron, Note, *How to Avoid Constitutional Challenges to State Based Climate Change Initiatives: A Case Study of Rocky Mountain Farmers Union v. Corey and New York State Programs*, 32 *PACE ENVTL. L. REV.* 564, 586 n.144, 593–95 (2015).

491. See *supra* Part I.

492. In general, the Supremacy Clause deprives states of their ability to act in a given area due to the existence of federal law. See JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 1 (2006). Preemption can be express—where the text of the federal law explicitly prohibits contrary state statutes—or implied, where the state law creates a conflict with a federal enactment (“conflict preemption”), federal law occupies the regulatory field (“field preemption”), or when the state law creates an obstacle to achievement of a federal objective (“obstacle preemption”). *Id.* at 14, 69. Irrespective of the type of preemption, courts’ foremost concern is Congress’s preemptive intent. *Id.* at 4; see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992).

493. See generally *Canards II*, 870 F.3d 1140.

b. Structural criticisms

The proposed agreement is subject to at least two possible structural critiques. First, that the compact might stimulate regional balkanization. Second, that IAA interests would intervene into the compact, watering down any agreed-upon rules.

i. Balkanization

Compacts might aggravate, rather than resolve, state-induced externalities by regionalizing them.⁴⁹⁴ The Northeastern Interstate Dairy Compact, for instance, provoked a political backlash from Midwestern states opposed to the compact's price-fixing scheme.⁴⁹⁵ A regional anti-confinement compact could risk a similar reaction. One result would be the rise of a coalition seeking additional protections for large livestock producers.

While high-producing states are likely to vocalize initial resistance, interstate friction is unlikely to proceed so destructively.⁴⁹⁶ Existing advisory agreements, like the RGGI, have not provoked coalitions by states resistant to their aims. Furthermore, both Congress and the federal judiciary provide vertical checks to prevent runaway cartelization.⁴⁹⁷ Congress, for instance, can effectively nullify a compact by preempting the agreement's subject matter, or by refusing to grant or extend its consent to an agreement. Congress might also federalize the compact, thereby providing resistant states with input at the national level.⁴⁹⁸ The courts, for their part, retain the doctrinal tools earlier discussed. A court can block a state-led power grab under the Compact Clause, or can invoke the dormant Commerce Clause to forestall horizontal economic discrimination.⁴⁹⁹

Interstate or inter-regional spillovers can also produce normative benefits when they implicate salient political or cultural concerns.⁵⁰⁰ These types of spillovers enhance democratic debate and engagement by disrupting federal policy ossification and by forcing horizontal

494. See, e.g., Razook, *supra* note 296, at 53.

495. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 97–101.

496. Gerken & Holtzblatt, *supra* note 13, at 61–62.

497. *Id.* at 108–11, 113–18.

498. *Id.* at 111–12.

499. *Id.* at 114–15.

500. *Id.* at 90–96. The authors offer California's emissions regulations as one example of a politically and economically salient spillover. *Id.* at 83. Political salience can track increasing economic cost because of interest group attention.

responsiveness.⁵⁰¹ Enhanced interstate engagement is needed in debates over food and agriculture, where geography largely predetermines states' policy positions. An anti-confinement advisory agreement could, at the very least, shake up the status quo by forcing states to more seriously confront arguments in favor of sustainable food production. That in turn might stimulate productive discussions regarding the trans-boundary costs of IAA, generating both interstate and intrastate change.

ii. Capture

There is an additional risk: that compromise necessary for an agreement waters down the regime's substantive stringency. This threat manifests both during the agreement's negotiation, and when member states attempt to pass reciprocal implementing statutes. Even still, situating the proposed agreement among politically and economically aligned states minimizes the possibility of anticipated or actual capture. The aforementioned political opportunities, both for entrepreneurship and cover, further reduce this prospect. To the extent that some states, like Vermont, have strong dairy sectors, these industries are composed primarily of small farmers that do not use intensive confinement systems.⁵⁰² It is also worth noting that, at least historically, advisory compact commissions tend to comprise mostly subject matter experts.⁵⁰³ States can, furthermore, initially constrict the agreement's potential membership to facilitate early consensus, allowing new members to join once ground rules are established.⁵⁰⁴ This cuts against the possibility that a state participates only to undermine the agreement's anti-confinement mandate. In sum, the design principles proposed here lessen the risks of capture.

CONCLUSION

The past decade has seen food populism succeed primarily at the state and local levels. These victories contribute to antagonistic inter-systemic directions on food and agriculture policy. Regulatory expressions of food populism empirically encounter political resistance on the national stage, particularly where policies threaten

501. *Id.*

502. See *supra* notes 432–35 and accompanying text.

503. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 323, at 70.

504. The Northeastern Interstate Dairy Compact adopted this approach. See NORTHEAST DAIRY COMPACT COMM'N, *supra* note 411.

the economic interests of influential industry groups. Large food and agriculture producers, in turn, often successfully lobby federal officials to advance their interests at the expense of sustainable food advocates. These dynamics are likely to ossify in the medium-term.⁵⁰⁵

In advancing the idea that a regional advisory agreement can yield contextual benefits, this Article accepts that certain state lawmakers need to advocate on behalf of collective action. I do, however, provide reasons why these incentives are especially strong at this moment. This Article also does not attempt to assess particular price or production effects of the proposed advisory agreement. Following Question 3's implementation, however, there may be sufficient information to discern the macroeconomic implications of comparable product and production regulations. That analysis would prove fruitful for re-examining questions of commercial burdens and state uptake.

This Article raises a host of questions for additional study: why, for instance, have states been either unable or unwilling to successfully push back against prior instances of defensive preemption on food issues? Might cooperation be more fruitful on other areas of the food populist agenda, like antibiotics or pesticides? Finally, it is worth considering whether states, as opposed to cities and municipalities, provide the best unit of analysis. Recent successes with local obesity prevention strategies, including soda taxes and menu-labeling, suggest that micro-political food populism may be more effective.⁵⁰⁶

As with early calls for enhanced environmental protections, subnational food dynamism demonstrates that quantifiably more people are expressing qualitative concerns with agricultural production and consumption. Now is the time, then, to address both the normative and practical implications of what we eat and why.

505. See *supra* note 206 and accompanying text.

506. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U.L. REV. 1219, 1236–38 (2014) (discussing from a public health perspective how cities have spurred national action on issues like trans-fats and sugar sweetened beverages).