PROTECTING REGULATORY EXPRESSIONS OF FOOD POPULISM THROUGH INTERSTATE COOPERATION

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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]

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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:

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

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THE POLITICS OF FOOD SAFETY (2010) [hereinafter NESTLE, SAFE FOOD]; Cohen, *supra* 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 & Samual 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 feeing; 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]

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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

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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

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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 production[25] 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

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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

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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

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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

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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

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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

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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-

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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.

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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* PROMAR INT'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

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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

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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

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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

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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

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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

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146. *Id.*

147. Ass'n des Éleveurs de Canards et d'Oies du Quebec 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

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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

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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 Dumicus, *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

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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-

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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-toe-up-farm-bill.

173. JAMES T. O'REILY, 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

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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

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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

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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 Poinski, *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

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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.californiachoices.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

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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,

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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

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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-

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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-

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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]

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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, DEP'T 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

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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. DEP'T 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]

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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

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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

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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-festering 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

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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

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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

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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

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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-

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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 NCUSSL'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.

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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,

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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

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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

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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"

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

360. BROUN 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.

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369. Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175 (1985); BROUN 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. BROUN 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]

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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.

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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 ECOLOGY 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,

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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]

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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. DEP'T 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.

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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

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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).

subsequently incorporated the compact into the 1996 farm bill, granting its consent limited to a three year time term.[417]

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

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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 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.

alternative to a new regional compact.[428] The existence of the MILC program might therefore illustrate the enduring benefits to state 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 CO_2 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

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428. *Id.* at 2, 11.

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).

administering the agreement.[435] That organization is now RRGI, Inc., 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

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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, 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.

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 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.

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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.

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 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

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

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).

consumers.[455] These forces cut against the expense of moving away from intensive confinement, undermining a historically forceful argument for maintaining the status quo.

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

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

maximize state resources.[465] As applied here, a compact could provide 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]

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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).

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).

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] 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

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

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.

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.

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.

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

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. BROUN 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).

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 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

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

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 ECOLOGY 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).

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]

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]

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

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 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.

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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.

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.

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 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

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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).

production and consumption. Now is the time, then, to address both the normative and practical implications of what we eat and why.