

PREEMPTING HUMANITY: WHY *NATIONAL MEAT ASS'N V. HARRIS* ANSWERED THE WRONG QUESTION

Pamela Vesilind

INTRODUCTION

- I. BACKGROUND: FEDERAL MEAT INSPECTION, SLAUGHTER STANDARDS, AND *NATIONAL MEAT ASS'N V. HARRIS*
 - II. THE TRADITIONAL FEDERALIST DIVISION OF ANIMAL WELFARE LAW
 - A. *Domesticated Animals*
 - B. *Wildlife Animals*
 - C. *Animals in Research and Entertainment*
 - D. *Agricultural Animals*
 - III. THE COMMERCE CLAUSE AND PREEMPTION LIMITS ON ANIMAL WELFARE STANDARDS
 - A. *Maximum Livestock Slaughter and Handling Standards Cannot Protect Channels of Interstate Commerce from "Immoral or Injurious Abuses"*
 - B. *Mandatory Upper Limits on HMSA Animal Welfare Standards Fail the "Substantial Effect on Interstate Commerce" Test*
 1. *Only Minimum Humane Slaughter Standards are Essential to the Federal Meat Inspection Act's Goals*
 2. *Maximum Limits on Standards for Managing Non-Ambulatory Livestock Are Not Reasonably Certain to Substantially Affect Interstate Commerce*
 - C. *The Welfare of Animals in Agriculture is a State Interest*
- CONCLUSION

PREEMPTING HUMANITY: WHY *NATIONAL MEAT ASS'N V. HARRIS* ANSWERED THE WRONG QUESTION

Pamela Vesilind*

INTRODUCTION

The 2011-12 Supreme Court term was notable for high-profile cases about state undocumented immigrant law,¹ GPS-enabled police searches,² chronic liars claiming military honors,³ and the constitutionality of the Affordable Health Care Act.⁴ As such, it is unsurprising that the decision in *National Meat Ass'n v. Harris*,⁵ notable for its unanimity and matter-of-fact concision, received relatively little attention from the media or the academy.⁶ Nevertheless, *National Meat* is a bellwether federalism opinion, the significance of which has been widely overlooked.

At first blush, the legal question in *National Meat* appeared to be relatively unremarkable: whether the USDA's slaughterhouse and packing plant regulations under the Federal Meat Inspection Act (FMIA, or "Meat Inspection Act")⁷ preempted new California standards for handling disabled livestock—standards higher than those required by the USDA.⁸ A logical extrapolation of the Court's reasoning for striking down California's regulations suggests an alarmingly remarkable and novel premise: that the federal government has absolute supremacy in regulating welfare standards for animals in agriculture. This unfortunate consequence might have been avoided, had *National Meat* not asked the wrong question.

The challenged state regulations were amendments to California's criminal animal cruelty law, enacted after The Humane Society of the United States (HSUS) published video taken during an undercover investigation at a Hallmark/Westland Meat Packing Company plant in Chino, California. The video documented multiple incidents of former dairy cows, too sick or injured to stand or walk to the slaughter chute, being shocked with electric prods, shoved along the ground with

* J.D., LL.M., Adjunct Professor, Univ. of Arkansas School of Law and Vermont Law School. I would like to thank Managing Editor Benjamin Birney and his team at the Maine Law Review for their indispensable editorial assistance. I would also like to thank Symposium Editor Charles Boyle and the 2013 Food Law Colloquium team for coordinating an exceptional event. All mistakes and errors, of course, are my own.

1. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

2. *United States v. Jones*, 132 S. Ct. 945 (2012).

3. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

4. *Nat'l Fed'n of Ind. Business v. Sebelius*, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

5. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012).

6. Cf. David N. Cassuto, *Meat Animals, Humane Standards & Other Legal Fictions*, L., CULTURE & HUMAN., at 2 (July 17, 2012), available at <http://ssrn.com/abstract=2111455> (analyzing Justice Kagan's rhetoric).

7. 21 U.S.C.A. §§ 601-95 (West 1999 & Supp. 2012).

8. Cal. Pen. Code § 599f was introduced in February 2008 and signed by the Governor of California on July 22, 2008. 2008 Cal. Legis. Serv. Ch. 194 (A.B. 2098) (West).

forklift prongs, or dragged behind a tractor.⁹ Reacting to this widely-viewed video, the USDA temporarily closed the plant for investigations and urged Hallmark to initiate the largest meat recall in U.S. history.¹⁰ The California legislature acted to address food safety concerns, prohibiting California-based slaughterhouses and related business partners from dealing in non-ambulatory animals¹¹ and banning the use of non-ambulatory animals for human food.¹² This Essay focuses on the other provisions of § 599f, the subsections drafted to regulate how the animals were treated while they were still alive.¹³

Ten days before these measures became effective, the National Meat Association (NMA), a trade organization representing the cattle and hog industries, sought injunctive and declaratory relief in federal court.¹⁴ NMA won in district court¹⁵ but lost on appeal in the Ninth Circuit Court of Appeals.¹⁶ In November 2011, the Supreme Court took up the question of whether the Federal Meat Inspection Act's preemption language applied, expressly or impliedly, to invalidate the California regulations. The Court's unanimous answer: Yes; the FMIA preemption clause invalidated all aspects of the new state regulations because they created "addition[al]" obligations in slaughterhouse "operations."¹⁷ Further, these operations were solely defined under the FMIA, in service of its "dual goals of safe

9. Nancy Perry & Peter Brandt, *A Case Study on Cruelty to Farm Animals: Lessons Learned from the Hallmark Meat Packing Case*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 119 (2008), <http://www.michiganlawreview.org/assets/fi/106/perrybrandt.pdf>.

10. USDA FOOD SAFETY & INSPECTION SERV., Recall Release No. FSIS-RC-005-2008, *California Firm Recalls Beef Products Derived from Non-Ambulatory Cattle Without the Benefit of Proper Inspection* (Feb. 17, 2008), http://www.fsis.usda.gov/pdf/recall_005-2008_release.pdf.

11. CAL. PENAL CODE §§ 599f(a), (f)-(g) (West, Westlaw current with all 2012 Reg. Sess. laws, Gov.Reorg.Plan No. 2 of 2011-2012, and all propositions on 2012 ballots).

12. *Id.* § 599f(b).

13. These sections read:

- (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.
- (d) No stockyard, auction, market agency, or dealer shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal or to provide immediate veterinary treatment.
- (e) While in transit or on the premises of a stockyard, auction, market agency, dealer, or slaughterhouse, a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time, but shall be moved with a sling or on a stoneboat or other sled-like or wheeled conveyance.

Id. §§ 599f(c)-(e).

14. *Nat'l Meat Ass'n v. Brown*, 2009 WL 426213, at *1 (E.D. Cal., Feb. 19, 2009) (No. CV-F-08-1963 LJO DLB). Whereas the Hallmark video depicted the abuses of non-ambulatory cattle, National Meat Association sued on behalf of the swine industry, a clever choice that deflected attention from the images of abused cattle. Complaint for Declaratory & Injunctive Relief Against All Defendants by National Meat Ass'n., *Nat'l Meat Ass'n v. Brown*, No. CV-F-08-1963 LJO DLB (E.D. Cal., Dec. 23, 2008).

15. *Nat'l Meat*, 2009 WL 426213, at *10.

16. *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1098-99 (9th Cir. 2010); *vacated sub nom.* *Nat'l Meat Ass'n v. Harris*, 680 F.3d 1193 (9th Cir. 2012).

17. 21 U.S.C.A. § 678 (West 1999 & Supp. 2012) (preempting state regulations "in addition to" or "different than" USDA regulations regarding slaughterhouse "premises, facilities, and operations"); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012).

meat and humane slaughter.”¹⁸

This Essay argues that California missed an opportunity to preserve the subsections of § 599f that raised its humane care guidelines for disabled livestock. Rather than seeking a restrained reading of the FMIA’s preemption language, California should have challenged Congress’s Commerce Clause authority to establish upper limits on farmed animal welfare regulations, to the *de facto* preemption of more protective state regulations.¹⁹ The proper inquiry was whether §§ 599f(c)-(e) unreasonably frustrated interstate commerce under the “dormant” Commerce Clause doctrine.²⁰ Under this doctrine, USDA regulations promulgated under the FMIA and the Humane Methods of Slaughter Act (HMSA or “Humane Slaughter Act”) might not invalidate reasonable state protections for farmed animals.

To clarify, this Essay does not challenge Congress’s authority to set *minimum* standards for humane treatment of livestock at slaughterhouse facilities. Without these minimum standards, slaughter plants would have less incentive to take the precautions Congress has deemed necessary for minimizing risks of meat contamination and line worker injury, and for preventing a state-based race to the deregulation basement. Nor does this Essay promote a case-by-case, as-applied analysis of when FMIA guidelines regulating humane slaughter and the management of livestock in connection with slaughter should preempt state or local regulation. That approach, which the Supreme Court has rejected in recent Commerce Clause jurisprudence, would require courts to “excise individual applications of a concededly valid statutory scheme.”²¹ Finally, this Essay does not ask whether the federal government *should* legislate in the field of animal cruelty, only whether it is constitutionally authorized to expressly preempt similar state efforts to raise ethical standards for the care of farmed animals. It is a question worth asking, considering the current flux of Commerce Clause and preemption jurisprudence²² and the documented frequency of farmed animal abuse.²³

Part I of this Essay explains how the Humane Slaughter Act’s standards for humane livestock slaughter and the handling of non-ambulatory livestock came to be referenced by the Meat Inspection Act, and how the Supreme Court interpreted these guidelines in *National Meat Ass’n v. Harris*. Part II discusses how legislative authority for animal welfare is typically allocated between state and federal governments. Congress’s Commerce Clause power to impose upper limits on

18. *Nat’l Meat Ass’n*, 132 S. Ct. at 967.

19. The state might have stipulated to the preemption of §§ 599f(a)-(b), (f)-(g), sections that spoke directly to the handling of animals for food safety concerns. *Nat’l Meat Ass’n*, 132 S. Ct. at 970.

20. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

21. *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (“Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.” (quoting *Perez v. United States*, 505 U.S. 144, 154 (1992) (emphasis omitted))).

22. Pamela Vesilind, *Emerging Constitutional Threats to Food Labeling Reform*, 17 NEXUS: CHAP. J. L. & POL’Y 59, 68-73 (2012).

23. Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse & Neglect: Law & Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63, 64-69 (May 2011).

animal welfare standards for slaughter conditions and the treatment of non-ambulatory livestock is examined in Part III. The Essay concludes that *National Meat Ass'n v. Harris* asked and answered the wrong question. Rather than analyzing the FMIA's preemption language, the Court should have scrutinized California's livestock welfare regulations for their effects on interstate commerce.²⁴

I. BACKGROUND: FEDERAL MEAT INSPECTION, SLAUGHTER STANDARDS,
AND *NATIONAL MEAT ASS'N V. HARRIS*

Although the preemption language at issue in *National Meat* is part of the Meat Inspection Act, the USDA regulations regarding livestock management at slaughter are promulgated under another federal law, the Humane Slaughter Act.²⁵ Justice Kagan's recitation of applicable law in the *National Meat* opinion implies that the two statutes are essentially merged. This is an over-simplification, contradicted by the two statutes' markedly different legislative histories.

The FMIA is a broad food safety statute conceived in 1906, in the wake of Upton Sinclair's *The Jungle*. The Meat Inspection Act's purpose is to reassure consumers that their meat and meat products will be "wholesome, not adulterated, and properly marked, labeled, and packaged."²⁶ It further seeks to protect the marketplace, especially producers and processors that comply with the standards.²⁷ Under this broad directive, the USDA is charged with regulating most aspects of meat production and distribution in commerce. Prohibited acts include "misbranding" or "adulterating" meat that is "capable of use as human food," and engaging in commercial transactions of such misbranded or adulterated products.²⁸

On the other hand, the Humane Slaughter Act is fundamentally an animal welfare law.²⁹ Enacted in 1958 after three years of heated congressional debate,³⁰ its mandate is straightforward: that livestock slaughter, "and the handling of livestock in connection with slaughter[,] . . . be carried out only by humane methods."³¹ Livestock covered under the act³² must be unconscious "before being shackled, hoisted, thrown, cast, or cut."³³ During its first two decades, the HMSA contained no enforcement provisions, and it applied only to slaughterhouses

24. See generally *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (balancing "the nature of the local interest involved" with the state law's "impact on interstate activities"). The scope of this Essay does not permit a thorough analysis under the "dormant" Commerce Clause doctrine.

25. 7 U.S.C. §§ 1901-1907 (2006).

26. 21 U.S.C.A. § 602 (West 199 & Supp. 2012).

27. *Id.*

28. *Id.* § 610.

29. Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 184-88 (Winter, 2007).

30. Act of August 27, 1958, 72 Stat. 862, (codified at 7 U.S.C. §§ 1901-1906 (2006)).

31. 7 U.S.C. § 1901.

32. *Id.* § 1902(a) (limiting coverage to "cattle, calves, horses, mules, sheep, swine, and other livestock"). The USDA does not extend HMSA protection to poultry, which represent about 95% of the animals slaughtered annually in federally-inspected slaughterhouses. *Id.* § 1902(a); Treatment of Live Poultry Before Slaughter, 70 Fed.Reg. 56,624, 56,624 (Sept. 28, 2005).

33. 7 U.S.C. § 1902(a) (defining "humane" to mean that the animal be "rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective"). The law also has an expansive exemption for "slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith." *Id.* § 1902(b).

wishing to sell to the federal government.

In 1978, the FMIA was amended to require that all federally-inspected slaughterhouses comply with HMSA guidelines.³⁴ By this time, FMIA standards also applied to meat processing plants engaged in intrastate-only commerce,³⁵ giving the USDA's Food Safety Inspection Service (FSIS) broad inspection scope. In applying FMIA enforcement mechanisms to the humane slaughter guidelines, the amendment imposed on FSIS inspectors the additional duty of monitoring compliance with humane slaughter guidelines.

The HMSA regulations relevant to *National Meat* are those that address "non-ambulatory" livestock.³⁶ These animals, colloquially dubbed "downers," have passed FSIS's visual inspection upon their arrival at the slaughter facility, but for one reason or another, they have become lame or unable to walk down the narrow chute to the slaughter box. Usually, this is due to exhaustion, or a fractured or broken leg. This is not an uncommon occurrence in a system optimized for meat production, not animal health. The cows in the Hallmark/Westland video, spent dairy cows already in poor condition, were particularly susceptible to becoming non-ambulatory.

The inability to walk or stand may also be the effect of neurological disorder such as Bovine Spongiform Encephalopathy (BSE or "mad cow disease").³⁷ Therefore, the USDA requires that these animals be removed from the slaughter queue and sequestered until they can be viewed, ante-mortem, by the FSIS veterinary inspector.³⁸ This inspector has the sole authority to determine whether the animal should be kept out of the human food supply. If the inspector believes the lameness was caused by injury or exhaustion, they label the animal "suspect," send him or her to slaughter, and later visually inspect the carcass for signs of a

34. 7 U.S.C. §§ 1901-1907; 21 U.S.C.A. § 620(a) (West 1999 & Supp. 2012) (prohibiting the importation of meat or meat products derived from livestock not slaughtered or handled in accordance with the HMSA); *id.* § 603 ("examination of animals prior to slaughter; use of human methods"); *id.* § 610 ("Prohibited acts include methods of slaughter or handling not in accordance with the HMSA . . .").

35. *Id.* § 661(a)(1). The law gives states the option to implement their own inspection programs, so long as they are "at least equal" to federal inspection standards. *Id.*

36. USDA regulations define non-ambulatory (or disabled) livestock as "livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic condition." 9 C.F.R. § 309.2(b) (2012).

37. In 2003, a downed cow was identified as the first U.S. case of mad cow disease, renewing concerns about the safety of our meat supply. See GEOFFREY S. BECKER, CONG. RESEARCH SERV., EBGR64, "MAD COW" DISEASE (BSE) I (2004), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/IB0082.pdf>. Four cases of BSE have been identified in the United States, most recently in April 2012. Press Release, USDA, Statement, Release No. 0132.12, *Statement by USDA Chief Veterinary Officer John Clifford Regarding a Detection of Bovine Spongiform Encephalopathy (BSE) in the United States*, (Apr. 24, 2012) available at <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/04/0132.xml&contentidonly=true>. By 2008, "at least 13 of the 16 identified BSE cases in North America" were discovered in non-ambulatory cattle. *Downers, Human Health Hazards, & USDA Policy*, HUMANE SOC'Y U.S., (Apr. 30, 2008), <http://www.humanesociety.org/assets/pdfs/farm/downers-health-concerns-usda-policy-4-23-08.pdf>.

38. Non-Ambulatory Disabled Veal Calves and Other Non-Ambulatory Disabled Livestock, 76 Fed. Reg. 6572, 6573 (Feb. 7, 2011) (noting that the "case-by-case disposition determination for cattle that became non-ambulatory disabled after passing anti-mortem inspection . . . may have created an incentive for establishments to inhumanely force non-ambulatory disabled cattle to rise").

pathogenic illness.³⁹

The requirement to sequester and locate an FSIS inspector for additional inspection makes downer livestock tremendously inconvenient and potentially expensive to meat processing companies like Hallmark/Westland. It also incentivizes workers to “go to extraordinary lengths (often with the complicity and encouragement of management) to get the animals on to their feet and staggering toward the killing floor.”⁴⁰ The 2008 Hallmark/Westland video revealed that the company had been disregarding federal requirements to submit non-ambulatory livestock to ante-mortem screenings. This discovery was particularly disturbing because Westland Meat Company was the second largest beef supplier for government programs supporting senior citizens, needy families, and the National School Lunch Program.⁴¹

Although some of the practices used on the downer cattle at Hallmark/Westland were illegal under USDA HMSA guidelines, others were not. California’s § 599f(c)-(e) attempted to correct this by raising the federal standards for managing lame or sick animals.⁴² For example, federal regulations allow disabled livestock to be subjected to electric prodding,⁴³ and they may be pulled or dragged on the ground with “forklift or bobcat-type vehicles” so long as they have been “stunned.”⁴⁴ By contrast, California’s regulations prohibited electric prodding as well as all methods for dragging or pushing non-ambulatory animals.⁴⁵ The only allowable means for transporting disabled livestock were those employing “sled-like or wheeled conveyance[s].”⁴⁶ Moreover, rather than sequestering the animal for eventual visual assessment by an FSIS inspector, § 599f required slaughter plants to “tak[e] immediate action to humanely euthanize” or furnish the animal “immediate veterinary care.”⁴⁷

Because these state animal welfare standards required more of slaughterhouse operators than federal standards required, NMA argued that the state standards were preempted by the FMIA. FMIA preempts all state regulations “with respect to premises, facilities and operations” subject to FSIS inspection⁴⁸ if they are “in addition to, or different than” FMIA requirements. For NMA’s challenge to prevail, this preemption authority must include the power to limit a state’s ability to regulate how its citizens treat agricultural animals. Restated, the federal

39. 9 C.F.R. § 310 (2012). Animals exhibiting difficulty in standing or walking are considered “high risk” in that they could be suffering from a central nervous system disorder associated with BSE. USDA, AUDIT REPORT: ANIMAL AND PLANT HEALTH INSP. SERV. & FOOD SAFETY INSP. SERV. BOVINE SPONGIFORM ENCEPHALOPATHY (BSE) SURVEILLANCE PROGRAM—PHASE I, at i (Aug. 18, 2004), available at <http://www.usda.gov/oig/webdocs/50601-9-final.pdf>.

40. Cassuto, *supra* note 6, at 2; Perry & Brandt, *supra* note 9, at 119.

41. Perry & Brandt, *supra* note 9, at 119.

42. Nat’l Meat Ass’n v. Brown, 599 F.3d 1093, 1101 (9th Cir. 2010), *rev’d sub nom.* Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965 (2012).

43. FOOD SAFETY & INSPECTION SERV., HUMANE HANDLING OF DEAD LIVESTOCK, FSIS DIRECTIVE 6900.1(V)(E) (1992).

44. 9 C.F.R. § 313.2(d)(2) (2012).

45. CAL. PENAL CODE § 599f(e) (Westlaw current with all 2012 Reg.Sess. laws, Gov.Reorg.Plan No. 2 of 2011-2012, and all propositions on 2012 ballots.).

46. *Id.*

47. CAL. PENAL CODE § 599f(d).

48. 21 U.S.C. § 678 (2006).

government's message to state legislatures would be: "Your citizens must treat injured or sick livestock animals *this humanely*, but you may not require them to behave more humanely."

National Meat was a case of first impression for challenging the federal humane slaughter provisions vis-à-vis more expansive state provisions. Indeed, until *National Meat*, no federal animal welfare law had been infused with the power to set the upper limit for animal welfare standards, irrespective of a state's purpose for enacting even modestly more restrictive guidelines. As discussed in the next section, this concept is at odds with federalism principles that have historically recognized state authority to establish morality-based laws like animal cruelty statutes.

II. THE TRADITIONAL FEDERALIST DIVISION OF ANIMAL WELFARE LAW

Animal welfare laws, or laws that regulate human interactions with non-human animals, reflect our values and interests. Although most animals are still legally regarded as the personal property of their human owners,⁴⁹ the scope and force of animal welfare law has evolved considerably in the last decade.⁵⁰ Nearly all animal welfare law originates at the state level. The relatively few federal civil and criminal laws are, more often than not, expressions of federal authority to regulate interstate commerce.⁵¹ Significantly, federal regulations that overlap with state police powers often set minimum standards to which state and local regulations may append.⁵² As discussed below, federal lawmakers have traditionally refrained from dictating standards for handling farmed animals, leaving states to legislate in this area.

A. Domesticated Animals

With the exception of animals listed under the federal Endangered Species

49. Elizabeth L. DeCoux, *Pretenders to the Throne: A First Amendment Analysis of the Property Status of Animals*, 18 FORDHAM ENVTL. L. REV. 185, 188-90 (2007).

50. Elizabeth Ann Overcash, *Unwarranted Discrepancies in the Advancement of Animal Law: The Growing Disparity in Protection Between Companion Animals & Agricultural Animals*, 90 N.C. L. REV. 837, 850-51, 853 (March, 2012); 2012 U.S. Animal Protections Laws Rankings, ANIMAL LEGAL DEF. FUND 4 (Dec. 2012), <http://aldf.org/custom/rankings/ALDF2012USRankingsReport.pdf> [hereinafter *ALDF Rankings*] (observing that "over the past five years, more than three quarters of all states and territories experienced a significant improvement in their animal protection laws").

51. See, i.e., Gavin R. Villareal, *One Leg to Stand On: The Treaty Power & Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEXAS L. REV. 1125, 1134 (Apr. 1998) (discussing expansive interpretations of Commerce Clause authority to affirm the constitutionality of various federal wildlife conservation statutes); *Haviland v. Butz*, 543 F.2d 169, 175 (D.C. Cir. 1976) (affirming defendant's conviction under the Animal Welfare Act, 7 U.S.C. § 2136 (1970), as a constitutional exercise of commerce power); c.f. *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (affirming the constitutionality of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 (1976), under the Property Clause); *State of Missouri v. Holland*, 252 U.S. 416, 435 (1920) (recognizing Congress's treaty power to enact the Migratory Bird Treaty Act, today codified at 16 U.S.C. §§ 703-711).

52. See *United States v. Darby*, 312 U.S. 100, 114 (1941) ("It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.").

Act, domesticated animals—our pets—are the animals most protected from harm by humans. At a minimum, state animal cruelty statutes prohibit the intentional or malicious infliction of “unnecessary” physical pain or suffering.⁵³ All states except North Dakota and South Dakota have felony animal cruelty provisions,⁵⁴ and most states set minimum standards of care for animals in human possession, beginning with a basic duty to furnish food, water, medical care, and exercise.⁵⁵

Beyond these baselines, state and local animal welfare laws vary considerably, by the requisite *actus reus* or *mens rea*, or by degree of penalty. A state may criminalize emotional torture, or physical injury due to recklessness or negligence.⁵⁶ Although every state bans animal fighting, the penalty for attending or participating in these events often reflects regional culture.⁵⁷ Finally, some states, including California, include some protections for wildlife and agricultural animals in their animal cruelty laws.⁵⁸

There is no uniform code to which state animal cruelty laws adhere. In 2010’s *United States v. Stevens*, the Supreme Court noted this lack of uniformity as a central consideration in finding that a federal “crush video law” was overbroad.⁵⁹ Interpreting the federal ban as written, the Court envisioned scenarios wherein a video of someone hunting deer in the District of Columbia, where hunting is illegal, could be considered contraband in Virginia, where hunting is legal.⁶⁰

B. Wildlife Animals

When it comes to wildlife preservation, state legislation and federal legislation operate in tandem. Except on federal lands, state agencies manage wildlife animals as natural resources,⁶¹ regulating human interactions with these animals. A state’s general animal cruelty act may also apply to wildlife animals, but only for activities outside the fish and wildlife agency’s regulatory scope. To illustrate, someone with a valid state hunting license may shoot deer during hunting season. He may not, however, intentionally run over the deer with his snowmobile, because this behavior is well outside the scope of traditional hunting practices. In this case, he

53. Joyce Tischler, *A Brief History of Animal Law, Part II (1985-2011)*, 5 STAN. J. ANIMAL L. & POL’Y 27, 57-59 (2012) (tracking the development of modern animal cruelty law).

54. *ALDF Rankings*, *supra* note 50, at 3.

55. *Animal Neglect Facts*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/article.php?id=1299> (last visited Feb. 14, 2013).

56. *State Animal Cruelty Chart*, HUMANE SOC’Y U.S. (June 1, 2012), http://www.humanesociety.org/assets/pdfs/abuse/state_animal_cruelty_laws_13.pdf.

57. *Ranking of State Dogfighting Laws* HUMANE SOC’Y U.S. (Jan. 2013), http://www.humanesociety.org/assets/pdfs/animal_fighting/dogfighting_statelaws.pdf.

58. Overcash, *supra* note 50, at 860-61.

59. *United States v. Stevens*, 130 S. Ct. 1577, 1589 (2010) (noting the variances among state hunting statutes, particularly those involving “canned hunting”); *see also* *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2734 (2011) (“States have long had laws against committing [animal cruelty].” (emphasis omitted)).

60. *Stevens*, 130 S. Ct. at 1580-81. The Court also warned of scenarios wherein no animal is *actually* treated cruelly, although the law might prohibit that behavior, such as intentionally but humanely killing an animal listed under the ESA. *Id.* at 1588.

61. Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 431 (2007).

may be charged under the state animal cruelty law.⁶²

Federal wildlife conservation laws are authorized by several enumerated powers, including the Commerce Clause, the Treaty Power, and the Property Power.⁶³ Among these laws are the Endangered Species Act,⁶⁴ the Migratory Bird Treaty Act,⁶⁵ the Bald Eagle Protection Act,⁶⁶ the Lacey Act,⁶⁷ and the Marine Mammal Protection Act.⁶⁸ These powers have recognized limits, as the Supreme Court demonstrated in nullifying an application of the Migratory Bird Treaty Act to bring non-navigable waters under the Clean Water Act's purview.⁶⁹ Importantly, none of these laws expressly preempt a state's authority to grant greater protections for wildlife animals on state or private lands.⁷⁰

C. *Animals in Research and Entertainment*

The treatment of animals in the course of research, education, and entertainment is regulated at both the state and federal levels. The primary federal statute, the Animal Welfare Act (AWA),⁷¹ directs the USDA to set minimum standards for the "handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors" in interstate commerce.⁷² Notably, these standards serve as baselines, and the AWA expressly recognizes state authority to augment its minimum standards and definitions,⁷³ including its very limited definition of "animal."⁷⁴ Courts have interpreted this savings clause liberally, allowing states to prohibit or restrict activities that are permissible under AWA regulations.⁷⁵

62. *State v. Kuenzi*, 796 N.W. 2d 222, 304-06 (Wisc. Ap. Ct. 2011) (holding defendants chargeable for criminal animal cruelty because using snowmobiles to ram and run over deer was not contemplated under applicable hunting and fishing statutes).

63. *See Villareal, supra* note 51, (collecting cases that explain the source of Congressional authority for wildlife management on federal lands).

64. 16 U.S.C.A. §§ 1531-44 (2010).

65. 16 U.S.C. §§ 703-711 (2006).

66. 16 U.S.C. §§ 668-668d (2006).

67. 16 U.S.C.A. §§ 3371-3378 (West 2010 & Supp. 2012).

68. 16 U.S.C.A. §§ 1361-1423h (West 2010 & Supp. 2012).

69. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171 (2001) (Stevens, J., dissenting).

70. Federal law may preempt state wildlife management laws on federal lands, however. *See*, Julie Lerman & Sanford P. Rabinowitz, *Preemption of State Wildlife Law in Alaska: Where, When, & Why*, 24 ALASKA L. REV. 145, 150-51 (Dec. 2007).

71. 7 U.S.C.A. §§ 2131-2159 (West 2010 & Supp. 2012).

72. *Id.* § 2143(a)(1).

73. *Id.* § 2143(a)(8) (allowing state and local governments to "promulgat[e] standards in addition to those standards promulgated by the Secretary").

74. *Id.* § 2132(g) (omitting coverage for birds, rats, and mice used for research and all "farm animals").

75. *Dehart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) ("[I]t is clear that the Animal Welfare Act does not evince an intent to preempt state or local regulation of animal or public welfare."); *Zimmerman v. Wolff*, 622 F.Supp.2d 240, 247-48 (E.D. Pa. 2008) (finding the AWA did not preempt a state animal licensing scheme or animal cruelty law); *American Canine Found. v. Sun*, No. C-06-4713 MMC, 2007 WL 4208358, at *5 (N.D. Cal., Nov. 27, 2007) (dismissing claim that local licensing ordinance was preempted by the AWA).

D. Agricultural Animals

Without a doubt, the vast majority of animal suffering in the United States occurs in large-scale confinement facilities, and animal welfare law has failed to keep pace with industrial food production practices.⁷⁶ This is particularly so at the federal level, despite the fact that most of our animal-based food is raised in federally-regulated facilities and sold interstate. Other than the 1958 Humane Methods of Slaughter Act discussed herein, the only federal agricultural animal welfare law is the “Twenty-Eight Hour Law.” This law, enacted in 1877, limits the length of time livestock may travel interstate without breaks for food, water, and rest.⁷⁷ Until recently, the anachronistic limitations applied only to train travel; the USDA’s regulatory definition of “vehicle” did not include trucks traveling by highway until 2006.⁷⁸ The handling of farmed animals during all other stages of life are entirely unaddressed by federal law.⁷⁹

Animal advocates have called for broad federal legislation to set minimum welfare standards for animals raised in “factories.” As Congress and the USDA have been unwilling or unable to adopt meaningful welfare guidelines, the ethical case for treating agricultural animals more humanely has been taken up at the state level.⁸⁰ A growing number of legislatures have instituted sunset provisions for the most inhumane industrial confinement practices, such as hog gestation crates, laying hen battery cages, and veal calf crates.⁸¹ More often than not, these policy shifts are instigated at the grass roots level, with ballot initiatives. Californians approved Proposition 2, the 2008 Prevention of Farm Cruelty Act, by an

76 Jonathan R. Lovvorn, *California Proposition 2: A Watershed Moment for Animal Law*, 15 *Animal L.* 149, 162 (2009).

77. Livestock Transportation Act, Pub. L. No. 59-340, 34 Stat. 607 (1906) (codified as amended at 49 U.S.C. § 80502 (2006)).

78. 60 Fed. Reg. 48,362, 48,365 (Sept. 19, 1995) (“The Twenty-Eight Hour Law does not apply to transport by truck.”); 9 C.F.R. §§ 89.1-89.5 (2006) (implementing the Twenty-Eight Hour Law through USDA regulations).

79. Perry & Brandt, *supra* note 9, at 119 (finding it ironic that “the greatest protection afforded to [livestock] animals usually comes on the day of their slaughter”).

80. Overcash, *supra* note 50, at 860-61. Some state animal cruelty statutes exempt farmed animals altogether. Others limit the *actus reus* to practices outside the scope of traditional animal treatment, a variable standard that reflects what each state defines as “accepted agricultural practice,” as the *Stevens* Court noted. *United States v. Stevens*, 130 S. Ct. 1577, 1589 (noting that in 2009 “California . . . banned cutting or ‘docking’ the tails of dairy cattle, which other States permit” (citing 2009 Cal. Legis. Serv. Ch. 344 (S.B. 135) and comparing Fla. Stat. § 828.23(5) (2007) (excluding poultry from humane slaughter requirements) with Cal. Food & Agric. Code Ann. § 19501(b) (including some poultry)). See also Jeff Welty, *supra* note 29 (documenting state welfare laws applying to slaughter).

81. For example, nine states prohibit or are currently phasing out the use of gestation crates: Rhode Island, R. I. St. § 4-1.1-3 (amended Ch. 12-S 2191A) (2012); Ohio, Oh. Admin. Code, § 901.12:8 (2011); Michigan, M.C.L.A. § 287.746 (2009); Maine, 7 M.R.S.A. § 4020 (2009); California, Cal. Health & Safety Code, §§ 25990-25994 (2008); Colorado, C.R.S.A. § 35-50.5 (2008); Oregon, ORS § 600.150 (2007); Arizona, A.R.S. § 13-2910.07 (2006); and Florida, Fla. Const. art. X, § 21 (2002). As of this writing, New Jersey is likely to become the tenth state to ban gestation crates for hogs. *New Jersey Becomes Tenth State to Ban Sow Stalls*, PIG SITE (Mar. 29, 2013), <http://www.thepigsite.com/swinenews/32752/new-jersey-becomes-10th-state-to-ban-sow-stalls>.

unprecedented margin.⁸² As the standard-bearers in all other areas of animal welfare law, states are best positioned to protect the basic needs of animals they raise for food.

III. THE COMMERCE CLAUSE AND PREEMPTION LIMITS ON ANIMAL WELFARE STANDARDS

Congress's Article I, Section 8 authority "[t]o regulate Commerce with foreign Nations, and among the several States"⁸³ remains the most debated and changeable of the enumerated powers.⁸⁴ In fact, the clause has not always been used to test congressional authority; in the 1800s it was invoked to prevent states from enacting commerce-related legislation that discriminated against other states.⁸⁵ The most notorious shift in Commerce Clause jurisprudence occurred in 1937, when the clause was interpreted to support broad New Deal legislation, beginning with the National Labor Relations Act.⁸⁶ The doctrine reached its high watermark in the 1960s, when it was used to affirm the constitutionality of federal Civil Rights laws.⁸⁷

Thirty years later, in *United States v. Lopez*,⁸⁸ four Associate Justices joined Chief Justice Rehnquist to introduce a refashioned, narrower doctrine for evaluating congressional acts. Since then, Commerce Clause challenges have yielded a number of thorny, contentious opinions.⁸⁹ The *Lopez* rubric offers three ways in which Congress may exercise its authority. First, it may regulate channels of interstate commerce.⁹⁰ Second, it may regulate or protect instrumentalities or persons traveling in interstate commerce.⁹¹ The third option is to regulate

82. Jonathan R. Lovvorn, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 167-68 (2009); State of Cal., *Proposition 2*, CAL. GEN. ELECTION, <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop2-title-sum.htm> (last visited Apr. 7, 2013).

83. U.S. CONST. art. 1, § 8, cl. 3.

84. *Gonzales v. Raich*, 545 U.S. 1, 15-16 (2005) ("[O]ur understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."); *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819) ("[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.")

85. *United States v. Lopez*, 514 U.S. 549, 553-54; *see also, e.g.*, *Harvey v. Huffman*, 39 F. 646, 647 (D. Ind. 1889) (determining whether an Indiana livestock inspection act should be enforceable against the defendant); *Swift v. Suthphim*, 39 F. 630, 631 (N.D. Ill. 1889) (evaluating Minnesota pre-slaughter inspection regulations for their effect on out-of-state commerce participants).

86. *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-38 (1937).

87. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). *But see Lopez*, 514 U.S. at 560 (describing *Wickard v. Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

88. *Lopez*, 514 U.S. at 561 (1995) (striking down the Gun-Free School Zones Act because it criminalized activities having "nothing to do with 'commerce' or any sort of economic enterprise").

89. *See, e.g., NFIB*, 132 S. Ct. 2566, 2609 (2012) (splitting 5-4 on the Commerce Clause question); *Rapanos v. United States*, 547 U.S. 715, 718 (2006) (same); *Raich*, 545 U.S. at 4 (2005) (answering the Commerce Clause question by a majority of six Justices, with only five Justices agreeing on the reasoning); *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 161 (2001) (resolving the Commerce Clause question 5-4).

90. *Raich*, 545 U.S. at 16; *Lopez*, 514 U.S. at 558; *Heart of Atlanta*, 379 U.S. at 256.

91. *Raich*, 545 U.S. at 16-17; *Lopez*, 514 U.S. at 558. Broad federal authority under the Endangered Species Act allows the government to prohibit "takings" of listed species and habitat, even if purely

economic activities that, individually or in the aggregate, “substantially affect interstate commerce.”⁹²

None of these three categories, as interpreted by *Lopez* and its progeny, can be used to enact federal animal welfare standards that preempt, absolutely, state or local regulations that raise the federal standards. The two potentially applicable categories are discussed below, beginning with federal authority to prevent “immoral or injurious abuses” of channels of interstate commerce, and then moving to the regulation of economic activities having a substantial effect on interstate commerce.

A. Maximum Livestock Slaughter and Handling Standards Cannot Protect Channels of Interstate Commerce from “Immoral or Injurious Abuses”

The most straightforward application of the “channels of interstate commerce” category is the regulation of avenues of transportation between states, such as highways, rivers, or railways.⁹³ A more nuanced application of this category authorizes regulations designed to prevent interstate commerce from being harmed or burdened by “immoral or injurious uses.”⁹⁴ This regulatory authority may apply to activities of a “purely local character” so long as interstate commerce registers “the pinch” of that detrimental activity.⁹⁵ An example of this authority is the Endangered Species Act’s prohibition on all incidences of “taking” or destroying the habitat of listed species. This is a permissible use of Commerce Clause authority to “prevent injurious local practices that in turn have a substantial harmful effect on interstate commerce either by discouraging such commerce or by inciting a race to the bottom.”⁹⁶

For similar reasons, Congress enacted the precursor to the FMIA, the Meat Inspection Act of 1906.⁹⁷ The Act answered President Roosevelt’s call to address widespread corruption and safety threats⁹⁸ that were unchecked by weak federal influence on the intrastate and interstate meat trades.⁹⁹ Indeed, multiple sections of the FMIA are valid expressions of this type of Commerce Clause authority. The Statement of Purpose affirms Congress’s intent to protect the market from injuries caused by unfair and illegal competitive practices, such as offering “unwholesome,

intrastate, because it is “necessary to enable the government to control the transport of the endangered species in interstate commerce.” *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (cert. denied, 118 S. Ct. 2340 (1998)).

92. *United States v. Morrison*, 529 U.S. 598, 610 (2000); see also *Raich*, 545 U.S. at 17 (allowing regulations of isolated local or intrastate activities so long as their aggregate effect on interstate commerce is substantial); *Perez v. United States*, 402 U.S. 146, 150 (1971).

93. 49 U.S.C. § 80502 (2006).

94. *Heart of Atlanta*, 379 U.S. at 256 (citing *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”)).

95. *Id.* at 258.

96. *Nat’l Ass’n of Home Builders*, 130 F.3d at 1048-49 (finding that the Endangered Species Act’s Section 9 taking provision constitutionally regulated channels of interstate commerce in two respects).

97. Act of June 30, 1906, ch. 3913, 34 Stat. 669.

98. *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965, 968 (2012).

99. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1225-26 (1986).

adulterated, mislabeled, or deceptively packaged articles . . . at lower prices.”¹⁰⁰ The prohibition on misbranding or adulterating meat and meat products sold for human consumption is meant to stem injurious abuses to these markets.

For instance, the federal laws upheld in *Heart of Atlanta Motel v. United States* and *Katzenbach v. McClung* were civil rights laws enacted to deter immoral behavior by business owners who might otherwise exploit or mistreat minority participants in interstate commerce. Although one business owner’s racially-motivated refusal of service to a black customer is a purely local event, if the would-be customer decides to opt out of the market rather than suffer this indignity, commerce is negatively impacted by this moral abuse. Another illustration of this regulatory power is the federal minimum wage mandate analyzed in *United States v. Darby*.¹⁰¹ The established minimum hourly wage prevents “states with higher regulatory standards from being disadvantaged vis-à-vis states with lower regulatory standards” and limits states that might otherwise compromise the welfare of their citizens to attract new businesses.¹⁰²

Federal animal welfare standards that criminalize abusive acts and compel humane treatment likewise prevent “moral abuse” of interstate commerce. Under *Darby*’s logic, federal minimum animal welfare standards for humane slaughter or for handling sick or disabled livestock are acceptable methods of protecting interstate commerce from moral abuses incurred by unregulated market participants. As such, the HMSA’s requirement that livestock animals be stunned unconscious before being shackled and hoisted for slaughter, and its guidelines for handling non-ambulatory livestock, are supportable.

The critical distinction between this example of valid authority and the preemption authority championed by NMA and asserted by the USDA in *National Meat* is that *Darby*’s moral abuse test applies to a federal *minimum* wage, not maximum wage. A federal *maximum* wage standard, one that would limit state legislative authority to mandate higher state wage requirements, would no longer serve the purpose of protecting channels of commerce from injurious uses. It would also be illogical. Therefore, the *Darby* category of Commerce Clause authority cannot support using a federal maximum animal welfare standard to preempt more rigorous state standards.

*B. Mandatory Upper Limits on HMSA Animal Welfare Standards
Fail the “Substantial Effect on Interstate Commerce” Test*

The Commerce Clause empowers Congress to regulate individual activities of citizens, if these activities affect interstate commerce and the absence of such regulation would seriously compromise the enforcement of broad federal legislation. Although this doctrine has sanctioned federal limits on individual

100. Act of Mar. 4, 1907, ch. 2907, title I, § 2, in Pub. L. No. 90-201, § 2, 81 Stat. 587 (1967) (codified at 21 U.S.C. § 602 (2006)).

101. *United States v. Darby*, 312 U.S. 100, 115 (1941). Arguably, HMSA’s humane slaughter guidelines also protect the market from injurious or moral abuses in that the minimum standards create safer conditions for line workers. See *infra*, section III(A)(2).

102. *Nat’l Ass’n of Home Builders*, 130 F.3d at 1048 (applying *Darby* to the Endangered Species Act).

wheat production¹⁰³ and permitted federal criminal charges on individuals possessing or growing medical marijuana plants,¹⁰⁴ it cannot be used to sanction the *de facto* preemption power of HMSA guidelines over broader state animal cruelty laws.

Under the “substantial effect” rubric, Congress needs only a rational belief that the conduct being regulated has a substantial effect on interstate commerce.¹⁰⁵ To illustrate, the federal regulations challenged in *Wickard v. Filburn* and *Gonzales v. Raich* addressed activities that were already being performed by individuals. Farmers were growing wheat for their livestock, and consumers of legal and illegal marijuana were growing their own plants. Left unregulated, these activities impacted interstate commercial markets. Congress was aware of the cumulative effects of these activities, and it sought to temper the effects and encourage commercial transactions by regulating the individual acts. Limiting a wheat farmer’s production forced that farmer to purchase additional wheat for his livestock. Prohibiting a medical marijuana patient from using home-grown sources supported legal commercial transactions from licensed dispensaries and discouraged illegal production and consumption.

For upper limits on animal welfare standards to be constitutional under the “substantial effect” test, Congress must be able to demonstrate a reasonable certainty that merely permitting states to expand animal welfare protections to farmed animals will negatively impact interstate commerce. Preemptively prohibiting these state laws prevents any reasonable assessment from occurring. Because California’s § 599f was the first state law challenged for imposing welfare standards beyond HMSA guidelines, any substantial effects the animal welfare regulations may have had on commerce were speculative.¹⁰⁶ Had *National Meat* challenged the constitutionality of *de facto* preemption of California’s humane handling guidelines, the federal government would have been required to demonstrate why Congress was reasonably certain the federal limits were necessary to curb their adverse effects on interstate commerce.

As the Supreme Court meticulously explained in *Raich*, federal authority over an individual activity may be permissible if the regulation is “an essential part” of a broad “regulatory scheme [that] could be undercut” if the activity went unregulated.¹⁰⁷ The federal Controlled Substances Act (CSA)¹⁰⁸ discussed in *Raich* was a “comprehensive regime to combat the international and interstate traffic in illicit drugs,”¹⁰⁹ and the challenged section of the law banned the possession and

103. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

104. *Gonzales v. Raich*, 545 U.S. 1, 17 (citing *United States v. Perez*, 402 U.S. 146, 151 (1971); *Wickard*, 317 U.S. at 128-29).

105. *Raich*, 545 U.S. at 17-19 (“When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.” (quoting *Perez*, 402 U.S. at 154)).

106. The only exception is unrelated to this topic. *Jones v. Butz*, 374 F. Supp. 1284, 1291, 1293 (S.D.N.Y. 1974) (upholding the HMSA’s ritual-slaughter exemption against an Establishment Clause challenge).

107. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (describing the Gun-Free School Zone Act as a “criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise”).

108. 21 U.S.C.A. §§ 801-971 (West 1999 & Supp. 2012).

109. *Raich*, 545 U.S. at 12.

production of medical marijuana. The Court accepted the Government's argument that *not* prohibiting intrastate possession and production would compromise the CSA's effectiveness.¹¹⁰ Under the same rationale, federal limits on individual wheat production were upheld in *Wickard*. The stability of the wheat market was critical to the success of the Agricultural Adjustment Act of 1938 (AAA).¹¹¹

Like the CSA and the AAA, the FMIA is a broad legislative scheme. Nearly every section of the Meat Inspection Act concerns *post*-slaughter stages in meat production, including inspecting, processing, packaging, labeling, storing, transporting, marketing, and selling meat and meat products.¹¹² The only sections concerning the treatment of live animals are related to Humane Slaughter Act regulations. These regulations fall into two categories: those related to slaughter, and those related to managing the animal at the slaughter and processing plant, prior to slaughter.

*1. Only Minimum Humane Slaughter Standards are Essential
to the Federal Meat Inspection Act's Goals*

Taking these categories in turn, the humane slaughter guidelines require that cattle and hogs be rendered unconscious before being hoisted off the ground for slaughter. This may prevent tremendous suffering by the animal, but it also has significant food safety and employee safety benefits.¹¹³ The HMSA's declaration of policy observes that humane slaughter "results in safer and better working conditions" for slaughterhouse workers; "brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce."¹¹⁴

Thus, the federal minimum standards are essential to meeting the FMIA's food safety goals. If a state wishes to raise its standards for "humane" slaughter conditions, it is unlikely that more stringent guidelines would reverse the benefits achieved by the federal standards. Instead, they may further protect line workers from injuries caused by inadequately-stunned animals. Or, they may decrease the chances of pathogenic feces contamination. Indeed, preventing states from raising these standards could be antithetical to FMIA's food safety goals.

110. *Id.* at 30.

111. *Wickard v. Filburn*, 317 U.S. 111, 115 (1942) (allowing the government to limit individual wheat yields to "avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce").

112. See Andrea M. Repphun, *Pigs-in-a-Blanket: How Current Meat Inspection Regulations Wrap America in False Security*, 16 DRAKE J. AGRIC. L. 183, 192-94 (2011) (analyzing enforcement provisions of the HMSA).

113. This conclusion is supported by the Court's opinion in *United States v. Stevens*, which observed that not all federal regulations dictating "the proper treatment of animals" are crafted out of concern for animal well-being. *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010) ("Livestock regulations are often designed to protect the health of human beings.").

114. 7 U.S.C. § 1901 (2006).

2. *Maximum Limits on Standards for Managing Non-Ambulatory Livestock Are Not Reasonably Certain to Substantially Affect Interstate Commerce*

National Meat Ass'n dealt with the second category of HMSA regulations, those relating to the management of livestock prior to slaughter. These regulations fall into two sub-categories: food safety regulations and animal welfare regulations. As explained in Section I, the requirement to sequester non-ambulatory livestock and subject them to FSIS inspection is intended to prevent diseased animals from entering the human food supply. This regulation is reasonably necessary to serve the FMIA's food safety goals. By contrast, the regulation defining allowable methods for transporting a non-ambulatory cow to the sequester pen is an animal welfare guideline, not a food safety guideline.

California's § 599f included both food safety and animal welfare regulations. Although the Supreme Court struck § 599f in its entirety, the subsections directly preventing the use of non-ambulatory livestock in the human food supply¹¹⁵ were severable from the subsections imposing more humane guidelines for handling and transporting non-ambulatory cows and pigs. If, in defending § 599f, California had distinguished these two types of regulations, it might have preserved the animal welfare subsections from preemption. By not severing the two types of regulations, California inadvertently bolstered the Court's adoption of a novel theory about the FMIA. Justice Kagan's opinion described the FMIA as having "dual goals of food safety and animal welfare."¹¹⁶ This characterization defies a plain reading of the FMIA's text and the legislative histories of the FMIA and HMSA.

The Humane Slaughter Act's congressional record and regulatory history also contradict this attribution. In the fifty years since its enactment, the HMSA's vague statutory parameters for humane slaughter have remained unchanged.¹¹⁷ In the last decade, numerous bills mandating more humane treatment of downed livestock have failed to garner adequate political support.¹¹⁸ Congress has merely authorized, but has not required, the USDA to criminally or civilly enforce HMSA standards,¹¹⁹ leaving the FSIS with limited enforcement options. Even when its

115. One might argue that subsections § 599f(a)-(b) and (f)-(g) indirectly serve animal welfare concerns by discouraging commercial trade in non-ambulatory livestock. However, these provisions only prevent the carcasses from non-ambulatory livestock from entering the human food supply. Section 599f still allowed packing plants to trade in carcasses from non-ambulatory livestock for other purposes, such as rendering.

116. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 968 (2012).

117. 7 U.S.C. § 1904(b) (2006). Jeff Welty argues that in 1958, the overriding reasons for enacting the HMSA was to prevent animals from experiencing unnecessary pain and suffering at the time of slaughter. On the other hand, the congressmen who revisited the act in 1978 to align HMSA standards with the Meat Inspection Act goals, were primarily focused on food safety standards and appeasing the livestock processors and packers. Welty, *supra* note 29, at 186 n.68.

118. Downed Animal and Food Safety Protection Act, H.R. 3704, 112th Cong. (2011); Downed Animal and Food Safety Protection Act of 2010, S. 4007, H.R. 4356, 111th Cong.; Downed Animal Enforcement Act of 2008, S. 2770, 110th Cong.; Downed Animal and Food Safety Protection Act of 2007, S. 394, 110th Cong.; Downed Animal and Food Safety Protection Act, H.R. 661, 110th Cong. (2007); Downed Animal Protection Act, S. 1779, H.R. 3931, 109th Cong. (2005); Downed Animal Protection Act, S. 1298, H.R. 2519, 108th Cong. (2003); Downed Animal Protection Act, S. 267, H.R. 1421, 107th Cong. (2001).

119. See Perry & Brandt, *supra* note 9, at 120-21 (claiming that prior to the introduction of S. 2770 the USDA's enforcement of its humane slaughter guidelines was merely an "appearance of enforcement

investigators identify cases of egregious abuse, the FSIS may only cite the plant and require it to submit “a plan for corrective action,” or temporarily close the plant for investigation.¹²⁰

The USDA’s meager rulemaking and enforcement records also contradict *National Meat’s* notion of the FMIA as an animal welfare law. Although inadequate enforcement has been cited as a primary concern, and surveyed USDA FSIS inspectors cite sparse regulatory guidelines and a lack of agency guidance as their primary enforcement challenges, Congress has never separately funded livestock management and slaughter inspections¹²¹ and the USDA has been slow to promulgate new rules and enforcing existing standards.¹²² This gap in federal oversight underscores the importance of state law, whether it is an animal cruelty law that applies to non-traditional agricultural practices, or it is a law specifically drafted to protect farmed animals. Barring state governments from legislating in this area means animal abusers will never be criminally accountable for acts like those depicted in the Hallmark/Westland video.¹²³

C. *The Welfare of Animals in Agriculture is a State Interest*

As explained, most animal welfare legislation originates at the state level, as a function of state police authority. Importantly, this legislative authority does not require endowment by the U.S. Constitution.¹²⁴ Where Congress lacks enumerated authority to legislate, a state is free to act, so long as the legislation does not offend constitutionally-protected rights¹²⁵ and it is founded on a rational basis.¹²⁶ As a

rather than any meaningful consequence”); 7 U.S.C. § 1907 (2006); Farm Security & Rural Investment Act of 2002, 116 Stat. 134 § 10815.

120. Perry & Brandt, *supra* note 9, at 120.

121. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-487T, HUMANE METHODS OF SLAUGHTER ACT: WEAKNESSES IN USDA ENFORCEMENT 1-5 (2010), *available at* <http://www.gao.gov/assets/130/124119.pdf> (recalling the as-yet unfulfilled FSIS commitment to “establish additional clear, specific, and consistent criteria” for enforcement).

122. *Id.* at 6-7 (citing the *FSIS Strategic Plan FY 2008 through FY 2013* as illustrative of the agency’s failure to “clearly articulate or list goals related to HMSA enforcement”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-247, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES 6 (2004), *available at* <http://www.gao.gov/new.items/d04247.pdf> (offering recommendations to improve enforcement). As Jeff Welty observed, whereas the Code of Federal Regulations contains around six pages of HMSA rules, “the overall number of pages devoted to the meat and poultry inspection program approaches 350. Seventeen pages are devoted to post-mortem meat inspection alone.” Welty, *supra* note 29, at 188.

123. *Id.* at 121-22 (“[T]he USDA’s complete lack of authority to target individual offenders for their cruel acts can and should be supplemented by state law prosecutions. To facilitate this, most states will need legislation extending cruelty laws to farm animals; California’s laws allowing for prosecution of the Hallmark employees are the exception rather than the rule.”).

124. *NFIB*, 132 S. Ct. 2566, 2578 (2012); *United States v. Morrison*, 529 U.S. 598, 618-19 (2000).

125. *NFIB*, 132 S. Ct. at 2578; *see also Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 533-40 (1993) (overturning a local ordinance because it impermissibly targeted a religious practice protected by the First Amendment); *Lawrence v. Texas*, 539 U.S. 558, 565-79 (2003) (invalidating on federal constitutional grounds a Texas criminal statute condemning homosexual conduct). If violence towards animals is not violence “directed at the instrumentalities, channels, or goods involved in interstate commerce,” then its regulation “has always been the province of the States.” *Morrison*, 529 U.S. at 618.

result, federally-mandated limits on state livestock welfare laws infringe on the “liberties that [citizens] derive from the diffusion of sovereign power.”¹²⁷

In 2007, the Seventh Circuit affirmed this state authority when it upheld an Illinois ban on the slaughter of horses for human consumption because “[s]tates have a legitimate interest in prolonging the lives of animals that their population happens to like.”¹²⁸ The plaintiff in that case, an equine slaughterhouse, argued that the ban was preempted by the FMIA.¹²⁹ Writing for the court, Judge Richard Posner submitted that Congress’s authority to regulate horse slaughter under the Meat Inspection Act does not *require* states to permit the slaughter of horses.¹³⁰

Extrapolating on this notion, Congress’s authority to regulate all aspects of selling meat and meat products in interstate and intrastate commerce should not inevitably preclude states from adopting regulations protecting animals used in the production of this food. The desire for animals to be treated humanely in the production of food is an issue “touch[ing] on citizens’ daily lives” that is best “administered by smaller governments closer to the governed.”¹³¹ *National Meat* stood for the proposition that Congress could require Californians to accept, participate in, contribute to, and endorse what they consider inhumane and unethical activities.

CONCLUSION

The first episode of *Portlandia*, a satirical comedy sketch television show, features two socially-conscious meat-eaters who are reluctant to order the chicken entrée until they can be convinced that the chicken had led a happy life. Without batting an eye, their waitress produces the heritage chicken’s photograph and

126 Although scholars differ, the Supreme Court has not ruled definitively that federal or state governments have a compelling interest in ensuring the humane treatment of animals. *See, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1600, n.6 (2010) (Alito, J., dissenting) (insisting that the government may have a compelling interest and pointing to precedent that “evidence of a national consensus” can stand as “proof that a particular government interest is compelling” (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Roberts v. United States Jaycees*, 468 U.S. 609, 624-25 (1984))); Brief for a Group of American Law Professors as Amicus Curiae in Support of Neither Party at 9-10, *Stevens*, 130 S. Ct. 1577 (2009) (No. 08-769); Meredith L. Shafer, Note, *Perplexing Precedent: United States v. Stevens Confounds A Century of Supreme Court Conventionalism and Redefines the Limits of “Entertainment,”* 19 *VILL. SPORTS & ENT. L.J.* 281, 322 (2012) (reading from *Church of the Lukumi* the Court’s “implied . . . acceptance of a compelling governmental interest in preventing the suffering or mistreatment of animals”). In fact, the *Stevens* Court actively avoided this question when it affirmed the Third Circuit under a different analysis. *Stevens*, 130 S. Ct. at 1592 (striking down the crush video law because it was impermissibly overbroad); *United States v. Stevens*, 533 F.3d 218, 232-35 (3d Cir. 2008) (deciding that the federal government has no compelling interest in protecting animals from extreme cruelty). The Justices do not agree as to the analysis applied in *Stevens*. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2747 (2011) (Alito, J., concurring in the judgment but disputing the claim that the federal law in *Stevens* was subjected to strict scrutiny analysis). It bears mentioning that *Stevens* mentions “strict scrutiny” only once, in discussing the Third Circuit’s analysis. *Stevens*, 130 S. Ct. at 1584.

127. *NFIB*, 132 S. Ct. at 2578 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

128. *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007).

129. *Id.* at 553.

130. *Id.* at 554 (“The government taxes income from gambling that violates state law; that doesn’t mean the state must permit the gambling to continue.”).

131. *NFIB*, 132 S. Ct. at 2578.

“papers,” announcing: “Here is the chicken you will be enjoying tonight. . . . His name was Colin.”¹³² The spirit of this satire rings increasingly authentic among American consumers fortunate enough to be selective about their food. Although Californians have led this trend, the swelling political will has garnered the attentions of a growing list of state legislatures.¹³³

National Meat is a significant barrier to this movement. In a recent critique of *National Meat*, Professor David Cassuto warned of the “powerful legal implications” of conflating the terms “animal” and “meat” in food and agricultural law.¹³⁴ By merging concepts of “food safety” with “animal welfare,” the Court laid the foundation for Congress to reserve exclusive legislative authority over an entire branch of animal welfare law. Taking the opinion to its logical conclusion, Congress and the USDA theoretically possess almost limitless power to preempt competing state farmed animal welfare legislation.

Although Congress has historically refrained from addressing the conditions of animals in industrial agriculture, the mounting conflict between meat and poultry corporations and the organizations representing animal welfare, food safety, and consumer protection concerns will eventually force congressional action. Unless Congress’s preemption power over state animal welfare law is challenged, the federal government will retain an unchecked authority to suppress legislative expressions of our moral and ethical values, by defining and enforcing artificial limits to our humanity.

132. *Portlandia: Farm* (IFC broadcast Jan. 21, 2011) available at <http://www.youtube.com/watch?v=l2LBICPEK6w>.

133. See, e.g., THE HUMANE SOC’Y OF THE U.S., STATES GESTATION CRATE LAWS (last updated Jan. 2, 2013), available at http://www.humanesociety.org/assets/pdfs/legislation/gestation_crate_laws.pdf (listing Florida, Arizona, Oregon, Colorado, California, Maine, Michigan, Ohio, and Rhode Island as states to have banned the use of gestation crates); *supra* note 81 (documenting state legislatures that have eliminated some inhumane industrial confinement practices).

134. Cassuto, *supra* note 6, at 1-2 (warning of the “powerful legal implications” of conflating “animals” with “meat”).