

The Smell of Money? An Iowa-Focused Impact Analysis of *National Pork Producers Council v. Ross*

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ABSTRACT: Federalism is the foundation of the American governmental system with the dormant Commerce Clause serving as a barrier against states reaching beyond their borders. The dormant Commerce Clause was tested in the U.S. Supreme Court case, National Pork Producers Council v. Ross over California’s Proposition 12, an animal health and welfare ballot measure that regulates the sale of livestock into the California marketplace. Proposition 12 survived its challenge before the U.S. Supreme Court because the Court found that pork chops are not regulated under the dormant Commerce Clause. This decision immensely impacts Iowa’s economy as Iowa is the number one pork producer in the nation, and most of its production is not in compliance with Proposition 12. Exploring the economic, environmental, and human health impacts of factory farming, and the cost of compliance with Proposition 12, this Note suggests that the consolidation of the agricultural industry has harmed, rather than helped, Iowans. This Note argues that Proposition 12 presents a unique opportunity for the Iowa Legislature to wean itself off factory farming and reestablish its roots as a state committed to small family farms.

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“People in cities may forget the soil for as long as a hundred years, but Mother Nature’s memory is long and she will not let them forget indefinitely.” —Henry A. Wallace¹

INTRODUCTION

As one gazes upon scenic views of gentle hills and rolling plains, with the nation’s heartland stretching as far as the eye can see, one thing remains consistent: the odor. Those unfamiliar with our great state may wonder, what is this odor? Iowans typically respond (usually with a hint of humor) that it is the smell of money.² It is the smell of manure.

Where does this manure come from? Animal Feeding Operations (“AFO”). The Environmental Protection Agency (“EPA”) defines an AFO as “a lot or facility where animals are kept confined and fed or maintained for [forty-five] or more days per year, and crops, vegetation, or forage growth are not sustained

1. 142 CONG. REC. S9644-47 (daily ed. Aug. 2, 1996) (statement of Sen. Harkin) (asking for Senator John C. Culver’s speech about Henry A. Wallace to be in the record).

2. As Justice Cady remarked in *Worth County Friends of Agriculture v. Worth County*, “Iowa is largely defined by its proud and rich agricultural economy.” *Worth Cnty. Friends of Agric. v. Worth County*, 688 N.W.2d 257, 259 (Iowa 2004).

over a normal growing period.”³ Iowa has more than twelve thousand AFOs with more than fifteen million Animal Units (“AU”).⁴ Over the last several decades, the headcount of AFOs has risen immensely, leading to a significant increase in Concentrated Animal Feeding Operations (“CAFO”).⁵ CAFOs are a type of intensive AFO “that contain at least a certain number of animals, or have a number of animals that fall within a range and have waste materials that come into contact with the water supply.”⁶ CAFOs constitute a sizable percentage of AFOs—totaling around fifteen percent.⁷

The rise of CAFOs has led to significant concern about their impact on the environment, human health, and animal health and welfare. Federal regulation of animal welfare is “minimal” and occurs mostly at the state level.⁸ States across the nation, from Arizona⁹ to Maine¹⁰ have passed laws that regulate the extreme confinement of livestock.¹¹ California joined this growing trend when its voters passed Proposition 12 via a ballot measure in 2018.¹² Proposition 12 established new requirements for egg-laying hens, breeding

3. CARRIE HRIBAR, NAT’L ASS’N OF LOC. BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 1 (Mark Schultz ed., 2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [<https://perma.cc/6QNV-8E6Y>].

4. IOWA DEP’T NAT. RES., BASIC AFO DATA (WITH ANIMAL UNITS), <https://programs.iowadnr.gov/animalfeedingoperations/PrintableReport.aspx?ReportType=BasicAFOData> [<https://perma.cc/BPN9-CAR9>] (click on “Reports”; then select “Basic AFO Data”; then click “Print/Export”). Animal Units are a conversion from the number of head to animal units to calculate the maximum number of animals an individual may confine at one time. For example, swine over fifty-five pounds has an equivalency factor of 0.4; therefore, five thousand swine over fifty-five pounds is two thousand animal units. ANIMALS TO IOWA DEP’T OF NAT. RES., ANIMAL TO ANIMAL UNITS CONVERSION, <https://www.iowadnr.gov/Portals/idnr/uploads/forms/5420020.pdf> [<https://perma.cc/JZ6U-4ZDQ>].

5. U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 9 (2008), <https://www.gao.gov/assets/gao-08-944.pdf> [<https://perma.cc/F3A8-DNH9>] (“CAFOs are a subset of animal feeding operations and generally operate on a larger scale.”).

6. HRIBAR, *supra* note 3, at 1.

7. Elizabeth Overcash, *Detailed Discussion of Concentrated Animal Feeding Operations: Concerns and Current Legislation Affecting Animal Welfare*, ANIMAL LEGAL & HIST. CTR. (2011), <https://www.animallaw.info/article/detailed-discussion-concentrated-animal-feeding-operations> [<https://perma.cc/GQR9-BPYY>].

8. Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. REV. 391, 396 (2013) (explaining that federal “laws impose few practical requirements on the treatment of agricultural animals”).

9. ARIZ. REV. STAT. ANN. § 13-2910.07(D) (2024) (prohibiting gestation crates and veal crates).

10. ME. STAT. tit. 7, § 4020 (2024) (prohibiting gestation crates and veal crates).

11. Colorado, Florida, Kentucky, Massachusetts, Michigan, Nevada, New Jersey, Ohio, Oregon, Rhode Island, Utah, and Washington have also passed legislation. See *Farm Animal Confinement Bans by State*, ASPCA, <https://www.aspc.org/improving-laws-animals/public-policy/farm-animal-confinement-bans> [<https://perma.cc/64GE-VQF7>].

12. *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)) [<https://perma.cc/M8KS-2TNN>].

pigs, and calves raised for veal.¹³ The catch? All livestock sold *into* California must comply with Proposition 12's requirements.¹⁴ Representing thirteen percent of the nation's pork market, California exerts significant force on the national pork industry.¹⁵ However, the "vast majority of farmers nationwide do not comply with Proposition 12,"¹⁶ which gives rise to potential dormant Commerce Clause concerns.¹⁷

This Note argues that Proposition 12 gives Iowa a unique opportunity to reduce its reliance on *industrial* agriculture. Given the size of the California market, most pork producers are faced with a difficult decision about whether to comply with Proposition 12; thus, the Iowa Legislature needs to take immediate action to address the impacts of *National Pork Producers Council v. Ross*. Part I examines the relationship between industrial agriculture and the dormant Commerce Clause, culminating in an analysis of *National Pork Producers Council*. Part II outlines the impact of industrial agriculture by examining the cost of compliance with Proposition 12 and looking at the economic, health, and environmental harms of industrial agriculture. Finally, Part III proposes two synchronous solutions to address the impact of Proposition 12: The Iowa Legislature should introduce a moratorium on CAFOs and pass legislation supporting smaller family farms.

I. THE INTERSECTION BETWEEN INDUSTRIAL AGRICULTURE AND THE DORMANT COMMERCE CLAUSE

Proposition 12 was not the first time industrial agriculture and the dormant Commerce Clause have come into conflict. In 1998, South Dakota voters passed a ballot initiative referred to as Amendment E.¹⁸ Amendment E prohibited corporations from owning farmland or engaging in farming or livestock production.¹⁹ Amendment E was soon the center of litigation.²⁰ The Eighth Circuit found that Amendment E was discriminatory because it targeted out-of-state interests.²¹ A law may discriminate against out-of-state interests if the state

13. CAL. HEALTH & SAFETY CODE § 25991 (e) (West 2010 & Supp. 2024).

14. *Prop 12 Establishes New Standards for Confinement of Specified Farm Animals; Bans Sale of Noncomplying Products. Initiative Statute.*, CAL. SEC'Y ST., <https://vigarchive.sos.ca.gov/2018/general/propositions/12/analysis.htm> [<https://perma.cc/72CS-GN5V>].

15. See Brief for Petitioners at 3, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

16. *Id.* at 45.

17. See Sullivan, *supra* note 8, at 400 (highlighting the potential dormant Commerce Clause challenges that might arise with state regulation).

18. *1998 Amendment E*, S.D. SEC'Y ST., https://sdsos.gov/elections-voting/election-resource/s/election-history/1998/1998_amendment_e.aspx [<https://perma.cc/EH2L-34K2>].

19. *Id.*

20. *S.D. Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020, 1050 (D.S.D. 2002) (holding that Amendment E violates the dormant Commerce Clause).

21. *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596 (8th Cir. 2003) ("[T]he intent behind Amendment E was to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests.").

demonstrates that there were no nondiscriminatory alternatives.²² South Dakota linked industrial farming with environmental issues and poverty; however, South Dakota did not evaluate any other alternatives aside from Amendment E.²³ Thus, the Eighth Circuit struck down Amendment E as a violation of the dormant Commerce Clause.²⁴ Twenty years later, Proposition 12 brought industrial agriculture and the dormant Commerce Clause back into conflict—except this time before the Supreme Court.

First, this Part will explore the development of industrial agriculture in the United States and its role in Iowa.²⁵ Second, this Part will examine the history of the dormant Commerce Clause and its development into three distinct prongs. Finally, this Part will discuss *National Pork Producers Council v. Ross*, outlining the Court’s decision within the broader context of its impact on the dormant Commerce Clause and on industrial agriculture.

A. THE DEVELOPMENT OF INDUSTRIAL AGRICULTURE

The national pork industry is a cash cow worth twenty-six billion dollars each year.²⁶ A significant exporter of pork, the United States “is responsible for nearly a third of global pork exports.”²⁷ In 2019, Iowa’s hog inventory was 24.8 million, which accounted for 32.1% of the U.S. total inventory.²⁸ On average, over the last twenty years, Iowa’s hog inventory has accounted for 28.7% of the U.S. total inventory, consistently growing over the last several decades.²⁹ Iowa has not relinquished its control as the leader of U.S. pork production since the 1880s.³⁰ Iowa’s inventory is 2.5 times larger than that of Minnesota, the second-largest in the United States.³¹ This Section will look at the history of industrial agriculture, starting with examining the history in the United States and then looking specifically at the state of Iowa.

22. *Id.* at 597.

23. *Id.*

24. *Id.* at 598.

25. When necessary, this Note will address the poultry and the beef industries, but it will mostly focus on the pork industry as it was the center of the litigation in *National Pork Producers Council v. Ross*. A comprehensive analysis of the other industries is beyond the scope of this Note.

26. Brief for Petitioners, *supra* note 15, at 9.

27. Margaret Carrel, Sean G. Young & Eric Tate, *Pigs in Space: Determining the Environmental Justice Landscape of Swine Concentrated Animal Feeding Operations (CAFOs) in Iowa*, 13 INT’L J. ENV’T RSCH. & PUB. HEALTH, Aug. 2016, at 1, 1.

28. DECISION INNOVATION SOLS., 2020 IOWA PORK INDUSTRY REPORT 9 (2020), https://www.iowapork.org/files/images/Documents/Full_Iowa-Pork-Industry-Report.pdf [<https://perma.cc/27RM-WHN6>].

29. *Id.* at 8.

30. Mark Honeyman & Mike Duffy, *Iowa’s Changing Swine Industry*, in IOWA STATE UNIVERSITY ANIMAL INDUSTRY REPORT 2006 (2006), <https://www.iastatedigitalpress.com/air/article/id/6648> [<https://perma.cc/VQP8-5BAS>].

31. Ji-Young Son & Michelle L. Bell, *Exposure to Animal Feeding Operations Including Concentrated Animal Feeding Operations (CAFOs) and Environmental Justice in Iowa, USA*, ENV’T RSCH.: HEALTH 2 (Nov. 1, 2022), <https://iopscience.iop.org/article/10.1088/2752-5309/ac9329/pdf> [<https://perma.cc/8AGH-6PB3>].

1. A Brief History of Industrial Agriculture in the United States

The agricultural industry has an essential role in the United States. Agriculture and food-related industries account for over five percent of the U.S. gross domestic product (“GDP”), and the industries contribute over \$1.5 trillion to the GDP in 2023.³² Surprisingly, less than two percent of the U.S. labor force works in the agriculture sector.³³ A century ago, the agricultural industry constituted forty-one percent of the labor force.³⁴ There has been a slow consolidation of the industry, which has resulted in the decline of family farms and the number of jobs.³⁵ At sixty-nine percent of the overall inventory, it is apparent that large farms are the driving force of the pork industry.³⁶

The void left by the family farm has been filled by CAFOs. CAFOs are a relatively recent phenomenon. Before World War II, livestock grazed in pastures.³⁷ This tradition of pastoral farming changed slowly following World War II, and CAFOs began to “proliferate” in the 1970s.³⁸ In part, Secretary of Agriculture Earl Butz drove this trend.³⁹ Simply put, Secretary Butz told small farms to “get big or get out.”⁴⁰ This sentiment supported Secretary Butz’s belief that “[b]igger farms were more productive . . . so [Butz] pushed farmers to consolidate.”⁴¹ Butz ruthlessly told farmers to “‘adapt or die’ . . . and to regard themselves not as farmers but as ‘agribusinessmen.’”⁴²

It is incredibly convenient for producers, farmers, and processors to be in the same place. Through the rise of CAFOs and other large operations, the agricultural industry has significantly consolidated the journey from the farms to the processors. The only alternative small producers have to getting

32. *Ag and Food Sectors and the Economy*, ECON. RSCH. SERV. (Apr. 19, 2024), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy> [https://perma.cc/6PWY-TDSZ].

33. CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKLIN, ECON. RSCH. SERV., ECON. INFO. BULL. NO. 3, *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2* (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_1.pdf [https://perma.cc/C6KT-Z9MK].

34. *Id.*

35. CHRISTINE E. WHITT, NOAH MILLER & RYAN OLVER, ECON. RSCH. SERV., ECON. INFO. BULL. NO. 247, *AMERICA’S FARMS AND RANCHES AT A GLANCE: 2022 EDITION*, at 5 (2022), <https://www.ers.usda.gov/webdocs/publications/105388/eib-247.pdf?v=8844.7> [https://perma.cc/PYJ9-CDK B] (finding that small family farms constitute eighteen percent of production).

36. *Study Finds Iowa Pork Industry Continues to Fuel State Economy*, NAT’L HOG FARMER (Sept. 2, 2020), <https://www.nationalhogfarmer.com/pork-market-news/study-finds-iowa-pork-industry-continues-to-fuel-state-economy> [https://perma.cc/VX6W-4AD5].

37. Overcash, *supra* note 7.

38. See N. William Hines, *CAFOs and U.S. Law*, 107 IOWA L. REV. ONLINE 19, 38 (2022); see also Daniel L. Moeller, Note, *Superfund, Pesticide Regulation, and Spray Drift: Rethinking the Federal Pesticide Regulatory Framework to Provide Alternative Remedies for Pesticide Damage*, 104 IOWA L. REV. 1523, 1532 (2019) (describing the “significant” transition from small family farms to massive operations).

39. Secretary Butz served under Presidents Richard Nixon and Gerald Ford. See MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 51–52 (2006).

40. *Id.* at 52.

41. *Id.*

42. *Id.*

bigger is to sign production contracts with integrators.⁴³ This relationship is best summarized:

In the typical contract scenario, the integrator retains ownership over hogs and feed, but outsources to the farmer the tasks of growing them and managing the waste, requiring the farmer to provide the intensive labor and infrastructure necessary to do so. The farmer thus cedes control of his own land and livestock to the integrators, which dictate every aspect of how he does his work—what (and how much) he feeds the hogs, as well as how he houses them, cleans them, and medicates them. The result is that the integrator owns all the elements of the supply chain that appreciate in value (live hogs, processed pork), and the farmer is responsible for the elements that depreciate in value (housing, manure, equipment).⁴⁴

The production contracts system (in its current form) is incredibly harmful to small farmers because they lack the significant bargaining power of large operations.⁴⁵

Although the number of CAFOs rapidly increased in the 1970s, the foundation for their rise began nearly four decades earlier. Since the 1930s, U.S. farm policy has been primarily centered around the Farm Bill.⁴⁶ The Farm Bill provides significant support for “staple commodities” like corn.⁴⁷ As demonstrated by the relevant statistics around federal subsidies, although “about one-third of U.S. farmers have participated in Federal farm programs, these programs have historically been structurally biased toward benefiting the largest farms.”⁴⁸ This favoritism towards large producers is intentional because farm payments are “calculated on the basis of volume of production . . . enabling [large producers] to further capitalize and expand their operations.”⁴⁹ This relationship has grown stronger in recent decades, with “indirect grain subsidies to CAFOs between 1997 and 2005 amount[ing] to almost \$35 billion, or nearly \$4 billion per year.”⁵⁰

As federal involvement grew with the increase of federal subsidies, so did farm size. It became much cheaper for producers to feed their swine a grain-based diet rather than graze on pastures. Additionally, crops such as corn and

43. Brief for Small & Indep. Farming Bus. et al. as Amici Curiae Supporting Respondents at 8–10, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

44. *Id.* at 10–11.

45. *See id.* at 11.

46. *See* CONG. RSCH. SERV., IF12047, FARM BILL PRIMER: WHAT IS THE FARM BILL? 1 (2024) (“The farm bill is an omnibus, multiyear law that governs an array of agricultural and food programs.”).

47. *See id.*

48. HAROLD L. VOLKMER ET AL., NAT'L COMM'N ON SMALL FARMS, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 18 (1998), <https://static.ewg.org/reports/2021/BlackFarmerDiscriminationTimeline/1998-NCSF-Report.pdf> [<https://perma.cc/LSJ8-VMWL>].

49. *Id.*

50. UNION OF CONCERNED SCIENTISTS, THE HIDDEN COST OF CAFOs 3 (2008), https://www.ucsus.org/sites/default/files/2019-10/cafo_issue-briefing-low-res.pdf [<https://perma.cc/PgT2-X8W8>].

soy thrive in the climate of the Upper Midwest.⁵¹ These decisions have resulted in a race to the bottom for large producers because “locating swine production in Iowa and other Midwestern states reduces the transport costs of these feedstuffs.”⁵² In any given year, Iowa hogs will eat twenty-two percent of Iowa’s corn and twenty-three percent of Iowa’s soybeans.⁵³ The “urbanization” of animals into CAFOs would have never occurred without the subsidized corn.⁵⁴ As evidenced, CAFOs enjoy a privileged position in the United States because of the relationship between federal policy and large producers.

Farm subsidies have remained consistently high even when there are significant profits for farms.⁵⁵ Despite the agricultural landscape shifting dramatically toward CAFOs since the 1970s, U.S. farm policy has not adjusted. The agricultural lobby is one of the most powerful lobbies in the nation and dedicates significant resources to shaping the rulemaking process for relevant agencies. In 2022 alone, agriculture interests spent over 165 million dollars in federal lobbying.⁵⁶ Notably, even the Biden Administration advocated on behalf of the agricultural industry in *National Pork Producers Council*.⁵⁷

CAFOs’ privileged position extends beyond federal subsidies. For example, the federal regulatory scheme of environmental law is lax regarding CAFO regulation. The Clean Air Act (“CAA”) does not regulate greenhouse emissions from CAFOs.⁵⁸ The Clean Water Act (“CWA”) does not regulate CAFOs except for the largest ones, and even then, the law dictates that a party must show that the CAFO’s waste has entered the waters of the United States before requiring a permit.⁵⁹ The EPA has failed to act, even when it has the power to issue regulations. Unfortunately, “CAFOs are mostly unregulated because weak rules often allow them to fall under the agriculture stormwater exemption of

51. Carrel et al., *supra* note 27, at 2; see POLLAN, *supra* note 39, at 18 (“The great edifice of variety and choice that is an American supermarket turns out to rest on . . . a tiny group of plants that is dominated by a single species: *Zea mays*, the giant tropical grass most Americans know as corn.”).

52. Carrel et al., *supra* note 27, at 2.

53. 2020 *Iowa Pork Industry Facts*, IOWA PORK PRODUCERS ASS’N, <https://www.iowapork.org/newsroom/facts-about-iowa-pork-production> [<https://perma.cc/E2SH-BY7L>].

54. POLLAN, *supra* note 39, at 66–67.

55. Sarah Cohen, Dan Morgan & Laura Stanton, *Farm Subsidies over Time*, WASH. POST (July 2, 2006), <https://www.washingtonpost.com/wp-dyn/content/graphic/2006/07/02/GR2006070200024.html> [<https://perma.cc/A854-6RE7>].

56. Madison McVan, *GRAPHIC: Agribusiness Spent a Record-Breaking \$165 Million on Federal Lobbying Last Year*, INVESTIGATE MIDWEST (Feb. 16, 2023), <https://investigatemidwest.org/2023/02/16/graphic-agribusiness-spent-a-record-breaking-165-million-on-federal-lobbying-last-year> [<https://perma.cc/8JFR-E39S>].

57. Brief for the United States as Amici Curiae Supporting Petitioners at 19, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468) (arguing that “California has no cognizable interest in the welfare of animals located in other States”).

58. Randall S. Abate, *Anthropocene Accountability Litigation: Confronting Common Enemies to Promote a Just Transition*, 46 COLUM. J. ENV’T L. 225, 229 (2021).

59. 40 C.F.R. § 122.23 (2023) (defining a large CAFO as having “[two thousand five hundred] swine each weighing [fifty-five] pounds or more” or “[ten thousand] swine each weighing less than [fifty-five] pounds”).

the [CWA].”⁶⁰ Furthermore, the EPA denied citizen petitions that sought to increase the strength of CAFO regulations at the federal level.⁶¹

2. The Role of Industrial Agriculture in Iowa

If the agriculture industry has an essential role in the United States, it is indispensable to the state of Iowa. Agriculture accounts for over nine percent of Iowa’s GDP,⁶² and “[a]pproximately ninety percent of the land within its borders is devoted to agriculture.”⁶³ As such, the nationwide trends surrounding farms have been even more pronounced in Iowa. Iowa has approximately four thousand CAFOs, the most of any state.⁶⁴ Of the 288 CAFOs added across the nation from 2021 to 2022, 252 were in Iowa.⁶⁵

The pork industry contributes significantly to Iowa’s GDP, accounting for “\$40.8 billion in output and more than 147,000 jobs . . . and generat[ing] \$893 million in state and local taxes and \$1.3 billion in federal taxes.”⁶⁶ Interwoven with Iowa’s economy, “one in nearly [ten] working Iowans has a job tied to the pork industry.”⁶⁷ The Bureau of Labor Statistics found that Iowa has the highest concentration of processing jobs of any state.⁶⁸ Large processing facilities like Seaboard-Triumph Foods’ Sioux City pork processing plant or Prestage Foods’ Eagle Grove processing “plant will process about [ten thousand] hogs daily.”⁶⁹ The consolidation of farming has led to the whims of the largest producers and processors determining policy.

60. Michael Schmidt, *A Tale of Two Petitions: EPA Proposes Meetings Instead of Federal Changes to CAFO Rules*, IOWA ENV’T COUNCIL (Aug. 25, 2023), <https://www.iaenvironment.org/blog/iowa-environmental-voice/epa-opts-for-meetings-rather-than-changes-to-cafo-rules> [<https://perma.cc/LMP7-3PLZ>].

61. *Id.*

62. Son & Bell, *supra* note 31, at 2.

63. Worth Cnty. Friends of Agric. v. Worth County, 688 N.W.2d 257, 259 (Iowa 2004).

64. Madison McVan, *Large CAFOs Are Known Polluters. Here’s Why EPA Permits Only Cover One-Third*, IOWA CAP. DISPATCH (Nov. 21, 2022, 12:50 PM), <https://iowacapitaldispatch.com/2022/11/21/large-cafos-are-known-polluters-heres-why-epa-permits-only-cover-one-third> [<https://perma.cc/ME5M-36DS>].

65. Madison McVan, *GRAPHIC: Majority of New CAFOs Were Built in Iowa Last Year*, INVESTIGATE MIDW. (June 8, 2023), <https://investigatemidwest.org/2023/06/08/graphic-majority-of-new-cafos-were-built-in-iowa-last-year> [<https://perma.cc/7863-3X8N>].

66. Brief for Iowa Pork Producers Assoc. et al. as Amici Curiae in Support of Petitioners’ Request for Certiorari at 20, Nat’l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468) (citing DECISION INNOVATION SOLS., *supra* note 28, at 7).

67. 2020 *Iowa Pork Industry Facts*, *supra* note 53.

68. *High Concentrations of Slaughterers and Meat Packers in Iowa, South Dakota, and Nebraska in 2019*, U.S. BUREAU LAB. STAT. (June 26, 2020), <https://www.bls.gov/opub/ted/2020/high-concentrations-of-slaughterers-and-meat-packers-in-iowa-south-dakota-and-nebraska-in-2019.htm> [<https://perma.cc/DFC8-D368>].

69. Donnelle Eller, *Iowa Could Support 45,700 Livestock Confinements, but Should It?*, DES MOINES REG. (Mar. 12, 2018, 9:11 AM), <https://www.desmoinesregister.com/story/money/agriculture/2018/03/08/iowa-can-support-47-500-cafos-but-should/371440002> [<https://perma.cc/7RXX-SXZU>].

In 1997, Iowa had 96,705 farms.⁷⁰ In the most recent Census of Agriculture, which occurred in 2022, there were 86,911 farms, showing a clear reduction in total farm count.⁷¹ Despite the industry accounting for nearly ten percent of Iowa's jobs, the number of pork-related jobs has shrunk because of the industry's consolidation. This trend toward consolidation is especially true for the pork industry because "[t]he number of operations of [200 to 499 head] declined from 4,664 in 1997 to 372 in 2017. . . . The number of hog operations with 5,000 or more head rose to 1,131 in 2017 from 308 in 1997."⁷² The most common size of hog farms in Iowa are farms with 2,000 to 4,999 head, but the majority of Iowa's hog inventory is located on farms with 5,000 or more pigs.⁷³ This shift toward large farms has culminated in nearly a ninety percent reduction in the number of Iowa's hog farms from 1982 to 2017.⁷⁴ Unfortunately, small farms with 1,000 to 1,999 head constitute only thirteen percent of Iowa's pig farms.⁷⁵

Iowa's policy toward CAFOs is even more favorable than federal policy. The agriculture lobby is the most powerful entity in Iowa. Notably, the Iowa Farm Bureau ("IFB"), a not-for-profit entity advocating on behalf of farmers, is incredibly involved in political races, fundraising heavily for candidates who will champion the interests of the agricultural industry.⁷⁶ In 2021, the IFB had ninety-seven million dollars in annual revenue, which is nearly double the annual revenue of the American Farm Bureau Federation ("AFBF").⁷⁷

70. NAT'L AGRIC. STATS. SERV., U.S. DEP'T OF AGRIC., 2017 CENSUS OF AGRICULTURE STATE PROFILE: IOWA 1 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resource/s/County_Profiles/Iowa/cp99019.pdf [<https://perma.cc/5685-HRXM>].

71. NAT'L AGRIC. STATS. SERV., U.S. DEP'T OF AGRIC., 2022 CENSUS OF AGRICULTURE - STATE DATA 259 (2022), https://www.nass.usda.gov/Publications/AgCensus/2022/Full_Report/Volume_1,_Chapter_2_US_State_Level/stg9_2_001_001.pdf [<https://perma.cc/5GXR-XUKC>].

72. DECISION INNOVATION SOLS., *supra* note 28, at 21.

73. *Study Finds Iowa Pork Industry Continues to Fuel State Economy*, *supra* note 36 (explaining that at thirty-two percent of farms are 2,000 to 4,999 head and twenty percent of farms are over 5,000 head).

74. FOOD & WATER WATCH, THE ECONOMIC COST OF FOOD MONOPOLIES: THE HOG BOSSES 1 (2022), https://www.foodandwaterwatch.org/wp-content/uploads/2022/05/RPT2_2205_IowaHogs-WEB4.pdf [<https://perma.cc/PY8R-XSH3>].

75. *Study Finds Iowa Pork Industry Continues to Fuel State Economy*, *supra* note 36.

76. Pat Rynard, *Memo Details Iowa Farm Bureau's Plan to Buy Sec of Ag Race*, IOWA STARTING LINE (Oct. 23, 2018), <https://iowastartingline.com/2018/10/23/memo-details-iowa-farm-bureaus-plan-to-buy-sec-of-ag-race> [<https://perma.cc/3VPJ-ZFC8>] (containing a copy of the full memo which states that "[t]he Iowa Secretary of Ag campaign is being run on very small campaign budget. We have reasonable expectation that an outside investment from Iowans for Agriculture in this campaign can affect the outcome of the election"); Erin Jordan, *Farm Bureau Flourishes as Water Quality Flags*, GAZETTE (Aug. 16, 2022, 2:23 PM), <https://www.thegazette.com/agriculture/farm-bureau-flourishes-as-water-quality-flags> (on file with the *Iowa Law Review*) (finding that in financial disclosures, Republican "recipients outnumbered Democrats nearly [five] to [one] and overall got [fifteen] times as much money").

77. Claire Kelloway, *The Iowa Farmer Group Backed by an Insurance Company*, FOOD & POWER (Oct. 14, 2021), <https://www.foodandpower.net/latest/iowa-farm-bureau-10-21> [<https://perma.cc/4FUS-7TFK>].

Furthermore, the IFB holds over \$1.4 billion in assets.⁷⁸ Interestingly, eighty-one percent of IFB's revenue is derived from investment income.⁷⁹ Powered by its extensive war chest, the IFB has firmly entrenched itself in local communities and exerts significant control and influence throughout its extensive network,⁸⁰ with one hundred Farm Bureau outposts in the State.⁸¹ There is at least one outpost in every county in Iowa.⁸²

The IFAB's influence has led to Iowa's "weak state laws and regulations governing the approval, siting, operation, and monitoring of CAFOs."⁸³ The regulatory framework is highly "friendly to large agribusiness."⁸⁴ The State has codified significant protections for CAFOs through various statutes.⁸⁵ For instance, the State has prohibited counties from being more stringent than the state unless the counties received state approval,⁸⁶ and the state laws cannot be more stringent than the federal laws.⁸⁷ Additionally, Iowa has tried multiple times to pass "Ag-Gag" laws that limit reporting on CAFO conditions.⁸⁸ Finally,

78. Kate Cox & Claire Brown, *US Academics Feel the Invisible Hand of Politicians and Big Agriculture*, GUARDIAN (Jan. 31, 2019, 12:40 PM), <https://www.theguardian.com/environment/2019/jan/31/us-academics-feel-the-invisible-hand-of-politicians-and-big-agriculture> [<https://perma.cc/G6Z6-Z6V4>].

79. Kelloway, *supra* note 77.

80. See generally Austin Frerick, *Iowa Farm Bureau Is a Suburban Insurance Company Pretending To Be the Voice of Farmers*, DES MOINES REG. (June 22, 2018, 9:10 AM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2018/06/22/iowa-farm-bureau-insurance-company-voice-farmers/714274002> [<https://perma.cc/MRL7-2UYV>] (describing the significant influence the IFB has over state policy).

81. Jordan, *supra* note 76.

82. *Id.*

83. Hines, *supra* note 38, at 39.

84. Carrel et al., *supra* note 27, at 2.

85. IOWA CODE § 459.103(1) (2024) (codifying state control over animal feeding operations at the expense of local control); *id.* § 459.311(2) (codifying state rules shall not be more "stringent" than the federal requirements).

86. *Id.* § 459.103(1); *id.* § 331.301 ("A county may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents.").

87. *Id.* § 459.311(2).

88. William Morris, *Judge Strikes Down 4th Iowa 'Ag-Gag' Law in Ongoing Conflict over Free Speech vs. Trespassing*, DES MOINES REG. (Sept. 28, 2022, 10:23 AM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2022/09/27/4th-iowa-ag-gag-law-struck-down-free-speech-trespassing/8123958001> [<https://perma.cc/E2UV-2K25>]. The Eight Circuit upheld the Ag-Gag laws in two separate decisions filed on January 8, 2024. See *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1065, 1067 (8th Cir. 2024) (upholding the validity of IOWA CODE § 717A.3B); *Animal Legal Def. Fund v. Reynolds*, 89 F.4th 1071, 1074-75 (8th Cir. 2024) (upholding the validity of IOWA CODE § 727.8A); see also Norman A. Dupont & Alec Goos, *Ag-Gag Laws Meet the First Amendment: Two Recent Eighth Circuit Cases*, AM. BAR ASS'N (May 3, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2024-may-june/ag-gag-laws-meet-the-first-amendment (on file with the *Iowa Law Review*).

Iowa has passed legislation that limits the damages plaintiffs may win in actions against AFOs, codifying Senate File 447 into law in 2017.⁸⁹

Furthermore, Iowa's insistence on protecting agriculture has found support from the Iowa Supreme Court.⁹⁰ Numerous Iowa Supreme Court decisions have reaffirmed the state legislature's substantial control, taking it away from local counties.⁹¹

Still, the "most effective tool that citizens of Iowa have to combat the expansion of CAFOs is their local Board of Supervisors' authority to approve or deny construction permits."⁹² The Iowa Department of Natural Resources ("IDNR") utilizes a program called the "master matrix" to administer its CAFO regulations.⁹³ The master matrix is an opt-in program on a county basis that allows for "higher standards than required by law. A confinement feeding operation required to use the master matrix will likely have increased separation distances to objects and a more conservative manure management plan."⁹⁴ The master matrix is a point-based system that is only required for confinement feeding operations that require a construction permit.⁹⁵ As part of the master matrix, producers only need to hit 440 points, a low threshold of fifty percent of the overall score to receive approval for the construction.⁹⁶ Because "[t]he master matrix shall be structured to ensure that it feasibly provides for a satisfactory rating,"⁹⁷ the system has become extremely controversial.⁹⁸

89. See IOWA CODE § 657.11 ("The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production.").

90. See Halle B. Kissel, Note, *Extending Protections for CAFOs Is the Wrong Move for Iowa Courts and the Legislature to Make*, 109 IOWA L. REV. 2267, 2271-78 (2024).

91. E.g., *Goodell v. Humboldt County*, 575 N.W.2d 486, 492 (Iowa 1998) (holding that the Iowa Legislature has complete authority over local government regarding CAFO operations); *Worth Cnty. Friends of Agric. v. Worth County*, 688 N.W.2d 257, 265 (Iowa 2004) (holding that a county ordinance that regulated confinement structures to be preempted by state law); *Merrill v. Valley View Swine, LLC*, 941 N.W.2d 10, 18 (Iowa 2020) (holding that a property owner's nuisance claim was frivolous); *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 86 (Iowa 2022) (holding that "[p]rotecting and promoting livestock production is a legitimate state interest").

92. Emily A. Kolbe, Note, "Won't You Be My Neighbor?" *Living with Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, 440 (2013).

93. See IOWA CODE § 459.305.

94. ENV'T SERVS. DIV., IOWA DEP'T OF NAT. RES., DETAILS OF SCORING THE MASTER MATRIX 1 (2012), <https://www.iowadnr.gov/Portals/idnr/uploads/afo/afo-files/details-scoring-matrix.pdf> [<https://perma.cc/TW5A-8VDZ>].

95. ENV'T SERVS. DIV., IOWA DEP'T OF NAT. RES., CONSTRUCTION PERMIT APPLICATIONS AND THE MASTER MATRIX 1-2 (2022), <https://www.iowadnr.gov/Portals/idnr/uploads/afo/afo-files/matrix-supervisors.pdf> [<https://perma.cc/8P5E-BT42>].

96. *AFO Construction Permits*, IOWA DEP'T NAT. RES., <https://www.iowadnr.gov/Environment/Protection/Animal-Feeding-Operations/AFO-Construction-Permits> [<https://perma.cc/z2NK-RRPT>].

97. IOWA CODE § 459.305.

98. See Hines, *supra* note 38, at 40 (explaining that there are loopholes around the ownership requirement); see also Ryan Bruen, Note, *It's Time to Take a Second Look at Iowa's Master Matrix*, 23 DRAKE J. AGRIC. L. 459, 462 (2018) (describing the master matrix program as "lenient").

Counties are required to opt into the master matrix and renew their membership each year.⁹⁹ If a county fails to renew its membership, that county may no longer use the master matrix.¹⁰⁰ Thus, that county is no longer permitted to have more stringent standards for CAFOs if they fail to renew their membership in the master matrix.¹⁰¹

Furthermore, there is very little local control despite the master matrix program operating at the county level. Though counties may deny the construction of a new CAFO, the IDNR has the ultimate approval authority.¹⁰² The regulated “CAFO owner is the party responsible for filling out the matrix and the regulatory board merely approves or rejects the plan. Presently, the IDNR is not equipped to inspect these plans carefully.”¹⁰³ Although IDNR has authority in theory, it lacks the capacity and resources to review each plan carefully.¹⁰⁴ Even where there are laws—federal or state—that regulate CAFOs, IDNR has lacked the resources to regulate CAFOs properly.¹⁰⁵ It is difficult for interested third parties to identify CAFOs in their communities because IDNR’s website “does not . . . have the date of construction or implementation for many (most) of the swine CAFO records.”¹⁰⁶ Throughout this entire process, producers attempt to place their thumb on the scale and are willing to lobby IDNR to revoke an individual county’s ability to review new projects.¹⁰⁷ The industry is unwilling to regulate itself, and the local entities lack the authority to prevent the building of CAFOs.

B. THE HISTORY OF THE DORMANT COMMERCE CLAUSE

Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁰⁸ The Supreme Court traditionally “interpreted the Commerce Clause as an implicit restraint on state authority.”¹⁰⁹ The Commerce Clause has also “been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate

99. *AFO Construction Permits*, *supra* note 96.

100. *Id.*

101. *See id.*

102. Kolbe, *supra* note 92, at 441 n.195.

103. *Id.* at 441 (footnote omitted).

104. *Id.*

105. Kris Lancaster, *Agreement Reached to Improve Iowa’s Concentrated Animal Feeding Operations Permit and Compliance Program*, EPA (Sept. 11, 2013), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/59ac0a79754c7cfd85257be3006do324.html [<https://perma.cc/2NUJ-TPMP>] (explaining that as part of the agreement between the EPA and IDNR that IDNR had to “[c]hange several provisions of Iowa’s CAFO rules” because the EPA had found numerous CWA violations).

106. Carrel et al., *supra* note 27, at 14.

107. Eller, *supra* note 69 (describing Iowa Select’s attempt to lobby IDNR to “revoke Humboldt County’s ability to review projects”).

108. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

109. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

against or burden the interstate flow of articles of commerce.”¹¹⁰ This “negative” aspect is known as the dormant Commerce Clause, which “bars the states from interfering with interstate commerce, even where Congress’s power to legislate is unexercised (or ‘dormant’).”¹¹¹ The dormant Commerce Clause ensures that states coexist harmoniously and power the economy of the nation.¹¹² In short, the dormant Commerce Clause is meant to prevent a race to the bottom between the states, serving as an impediment against discriminatory measures against interstate commerce. The modern-day dormant Commerce Clause has three branches: the antidiscrimination principle, the *Pike* Balancing Test, and the extraterritoriality doctrine.¹¹³ This Section will look at the three branches separately, first looking at the antidiscrimination principle, then the extraterritoriality doctrine, and, finally, *Pike* balancing.

1. The Antidiscrimination Principle

The first branch, central to most dormant Commerce Clause cases, is the antidiscrimination principle. This principle ensures that there is no “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹¹⁴ The antidiscrimination principle has its origins in *City of Philadelphia v. New Jersey*, where the Supreme Court held that a New Jersey law that prohibited the importation of solid and liquid waste violated the dormant Commerce Clause.¹¹⁵ Though New Jersey had the right to protect its citizens’ “pocketbooks as well as their environment,” state laws cannot discriminate against commerce coming from outside the state.¹¹⁶ States cannot purposefully distinguish between local and interstate commerce.¹¹⁷

There is a narrow exception to the antidiscrimination principle. The Supreme Court has found that “if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to ‘advanc[e] a legitimate local purpose.’”¹¹⁸

110. *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 98 (1994).

111. Robin Feldman & Gideon Schor, *Lochner Revenant: The Dormant Commerce Clause & Extraterritoriality*, 16 N.Y.U. J.L. & LIBERTY 209, 218 (2022).

112. *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 548 (2015) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

113. Feldman & Schor, *supra* note 111, at 226–27 (explaining that there are three branches of dormant Commerce Clause cases: the antidiscrimination principle, the *Pike* Balancing Test, and extraterritoriality). The petitioners in *National Pork Producers Council v. Ross* do not allege any discrimination. Therefore, a detailed discussion surrounding the discrimination branch is beyond the scope of this Note. This discussion will be limited to its relevance to the potential solutions that the Iowa Legislature might utilize to navigate the impact of *National Pork Producers Council*.

114. *Or. Waste Sys., Inc.*, 511 U.S. at 99.

115. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 625–28 (1978).

116. *Id.* at 626.

117. Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POLY 31, 40 (1998).

118. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 518 (2019) (quoting *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008)).

A “legitimate local purpose” is decidedly difficult to discern;¹¹⁹ however, the Court has been abundantly clear that this does not include discriminating against out-of-state economic interests.¹²⁰ The Court recognized that regulating the health and safety of its citizens¹²¹ or the environment¹²² are legitimate local purposes. A discriminatory state law may be held constitutional if this “legitimate local purpose” cannot be achieved by “reasonable nondiscriminatory alternatives.”¹²³ For example, in *Maine v. Taylor*, the Court upheld a Maine prohibition on the importation of live baitfish.¹²⁴ Here, the Court determined that “Maine’s fisheries are unique and unusually fragile.”¹²⁵ The Court held that a state must have properly explored all viable alternatives before implementing the discriminatory law to advance a legitimate local purpose.¹²⁶ States should not pass laws that “discriminate” against other states, but are permitted to do so if they have determined that there are no alternatives and it advances a local purpose.

2. The Extraterritoriality Doctrine

Under the extraterritoriality doctrine, “a state may not project its laws beyond its borders”¹²⁷ and “may not attach restrictions to exports or imports in order to control commerce in other States.”¹²⁸ Described as “the least understood of the Court’s three strands of dormant [C]ommerce [C]ause jurisprudence,”¹²⁹ this doctrine is controversial because there is not a bright-line rule that limits the doctrine.¹³⁰ Since there is not a standard for courts to

119. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 150–52 (1986) (holding that a Maine statute prohibiting the importation of live baitfish from other states was constitutional because non-native species can ruin an ecosystem and it is not possible to rid invasive species of the parasite without killing the fish); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 352–54 (1977) (holding that a North Carolina statute that required apples shipped into the state in closed containers to display “USDA grade” or nothing at all was unconstitutional because it prohibited the inclusion of higher standards on the container); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354–57 (1951) (holding that the City of Madison’s ordinance that made it unlawful to sell milk unless it had been pasteurized by an approved pasteurization plant within five miles of Madison was unconstitutional because the city could have required testing for *any* milk that entered Madison).

120. *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 364 (2023) (“Assuredly, under this Court’s dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests.”).

121. See *Dean Milk Co.*, 340 U.S. at 353.

122. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

123. *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 94 (1994).

124. *Taylor*, 477 U.S. at 151–52.

125. *Id.* at 151.

126. See *id.* at 150–51.

127. Tyler L. Shearer, Note, *Locating Extraterritoriality: Association for Accessible Medicines and the Reach of State Power*, 100 B.U. L. REV. 1501, 1550 (2020).

128. *C & A Carbone, Inc. v. Town of Clarkson*, 511 U.S. 383, 393 (1994) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935)).

129. *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015).

130. See Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1144–45 (2024).

use, the possibilities of state overreach are endless. Thus, there seems to be an increase in state attempts to project their concepts of morality onto other states, and states are becoming increasingly antagonistic toward one another.¹³¹ At its core, the extraterritoriality doctrine establishes that the effects of a state's law cannot control commerce that occurs outside the state¹³² and ensures that the "sovereignty of each State" is protected.¹³³

The extraterritoriality doctrine originated in *Cooley v. Board of Wardens*, where the Court considered the constitutionality of a Pennsylvania law requiring all ships that traveled through the Port of Philadelphia to hire a local pilot.¹³⁴ The Court held the law was constitutional because national concerns should be left to Congress, and local concerns should be left to the states.¹³⁵ Here, this requirement was of local concern and should be regulated by Pennsylvania.¹³⁶

The modern understanding of the doctrine originates in *Baldwin v. G.A.F. Seelig, Inc.*, where the Supreme Court found a New York law that attempted to protect the dairy industry to be unconstitutional.¹³⁷ The law required retailers to pay milk producers before selling their goods in the state.¹³⁸ Here, the locality (New York) was attempting to regulate a national concern. Following *Baldwin v. G.A.F. Seelig, Inc.*, scholars have identified two rationales for the extraterritoriality doctrine: "(1) protection of the sovereignty of the states and (2) protection of interstate commerce from protectionist impulses."¹³⁹ While there is a concern to prevent a race to the bottom, states should have some authority over the commerce that occurs within their borders.

Although *Baldwin* is the modern origin of the extraterritoriality doctrine, *Brown-Forman Distillers Corp. v. New York State Liquor Authority* illustrates that some kind of regulation is permissible. In this case, the Supreme Court considered if New York's price affirmation law violated the Commerce Clause because it required that sellers of alcohol affirm their prices with the New York State Liquor Authority before lowering their prices in other states.¹⁴⁰ There, the central inquiry was "whether New York's affirmation law regulates commerce

131. See Douglas A. Kysar, *State Public Morality Regulation and the Dormant Commerce Clause*, 19 DUKE J. CONST. L. & PUB. POL'Y 109, 111–12 (2024); see also *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 407 (Kavanaugh, J., concurring in part and dissenting in part) (discussing whether state laws could regulate the sale of goods made by workers who were paid less than twenty dollars per hour).

132. See *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989).

133. Cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) ("[T]he Framers also intended that the States retain many essential attributes of sovereignty.")

134. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 311 (1851); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 981 (2013) (describing that extraterritoriality originates in *Cooley v. Board of Wardens*).

135. *Cooley*, 53 U.S. at 319–20.

136. *Id.* at 320.

137. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519, 528 (1935).

138. *Id.* at 519.

139. Shearer, *supra* note 127, at 1512.

140. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575–76 (1986).

in other States.”¹⁴¹ The Court held that action that regulates commerce *in other* states is not permissible; however, state action that regulates commerce *between* states is acceptable.¹⁴² Finally, the Court in *Healy v. Beer Institute* articulates what question is at the core of extraterritoriality cases:

First, the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State” Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.¹⁴³

The fundamental understanding of the extraterritoriality doctrine is “that no single State could [enact a policy that applies to the entire nation], or even impose its own policy choice on neighboring States.”¹⁴⁴ Nonetheless, the challenging party has the burden to show that there is an “impermissible extraterritorial effect.”¹⁴⁵ The extraterritoriality doctrine is decidedly complicated and has been difficult to decipher for courts.

3. The *Pike* Balancing Test

The *Pike* Balancing Test is a balancing test determining whether a state law that burdens interstate commerce is “clearly excessive in relation to the putative local benefits.”¹⁴⁶ Though the *Pike* Balancing Test famously articulates the principles weighed by courts, it was not the origin.¹⁴⁷ An earlier iteration of the balancing test appeared in *Southern Pacific Co. v. Arizona*,¹⁴⁸ where the Court considered the constitutionality of the Arizona Train Limit Law of 1912, which

141. *Id.* at 580.

142. *Id.* at 579–80, 585; *see also* Shearer, *supra* note 127, at 1515 (explaining the holding of *Brown-Forman Distillers Corp.* further).

143. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citations omitted).

144. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

145. *Feldman & Schor*, *supra* note 111, at 254–55.

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

147. *See* James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Endgame—from Southern Pacific to Tennessee Wine & Spirits—1945 to 2019*, 40 PACE L. REV. 44, 52–53 (2020) (stating that *Southern Pacific Co.* is the beginning of the balancing test); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1094 (1986) (articulating that *Southern Pacific Co.* is a “new balancing approach”).

148. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945).

limited the sizes of trains.¹⁴⁹ This early iteration of the *Pike* Balancing Test required that the regulation is “local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight.”¹⁵⁰ Here, the Court ultimately held that the Arizona regulation was far too burdensome because the economic impact “passes beyond what is plainly essential for safety.”¹⁵¹

In 1929, the Arizona Legislature passed the Arizona Fruit and Vegetable Standardization Act, which required Arizona growers to pack cantaloupes for sale in standardized closed containers.¹⁵² Several decades later, *Pike v. Bruce Church, Inc.*, brought the Arizona Fruit and Vegetable Standardization Act before the Supreme Court. There, the Supreme Court famously articulated the so-called *Pike* Balancing Test: “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.”¹⁵³ In applying the *Pike* Balancing Test, courts are supposed to weigh the burden against commerce against the supposed benefits of the law. Though *Pike* established the balancing test, it did not apply it; in fact, Justice Stewart virtually ignored the test.¹⁵⁴ As such, it was the case law that followed *Pike* that established the test’s parameters.

The case law following *Pike* has led to “murky” results because the precedent established by *Pike* gives no clear criteria as to what constitutes a “burden” and what constitutes a “benefit.”¹⁵⁵ Justice Souter, in writing for the majority in *General Motors Corp. v. Tracy*, stated that “the Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them.”¹⁵⁶ The *Pike* Balancing Test is incredibly subjective, and courts do not enjoy being in the position to make judgment calls about benefits versus burdens; those considerations are best left to Congress or state legislatures.

C. AN ANALYSIS OF NATIONAL PORK PRODUCERS COUNCIL V. ROSS

Proposition 12 (also known as the Prevention of Cruelty to Farm Animals Act)¹⁵⁷ imposes square-footage requirements for commercial farms: egg-laying

149. *Id.* at 763.

150. *Id.* at 767.

151. *Id.* at 781–82.

152. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 138 (1970).

153. *Id.* at 142.

154. *See id.* at 143; Regan, *supra* note 147, at 1213.

155. James D. Fox, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 176–77 (2003) (explaining that *Pike* analysis does not have a distinct set of rules that lead to consistent results).

156. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997).

157. ELECTIONS DIV., CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY NOVEMBER 6, 2018: TEXT OF PROPOSED LAWS 87, <https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#pr op12> [<https://perma.cc/FZV8-LS8E>].

hens require cage-free housing; breeding pigs require twenty-four square feet of floor space; and calves raised for veal require forty-three square feet of floor space.¹⁵⁸ Proposition 12 passed with more than sixty-two percent of the vote in 2018.¹⁵⁹ In 2019, the Petitioners, the National Pork Producers Council (“NPPC”) and the AFBF challenged Proposition 12 on the grounds that it violated the dormant Commerce Clause.¹⁶⁰ This Section will first look at the factual background of the case. This Section will then examine the Petitioners’ extraterritoriality doctrine argument and the Petitioners’ *Pike* Balancing Test argument. Finally, this Section will investigate the Court’s reasoning in response to the Petitioners’ arguments.

1. The Factual Background of the Case

Proposition 12 was a California ballot measure that sought to “prevent animal cruelty by phasing out extreme methods of farm animal confinement.”¹⁶¹ Proposition 12 was a continuation of efforts by animal welfare advocates who launched a successful campaign to pass Proposition 2 in 2008.¹⁶² Proposition 2 required that egg-laying hens, breeding pigs, and calves raised for veal have minimum space requirements and prohibits “[their confinement in a] manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs.”¹⁶³ Proposition 12 expanded upon the requirements in Proposition 2, and Proposition 12 continued the prohibition on confining an animal in a cruel way and added specific space requirements.¹⁶⁴ Following Proposition 12’s passage in 2018,¹⁶⁵ the NPPC and the AFBF quickly challenged its constitutionality.¹⁶⁶ The U.S. District Court for the Southern District of California dismissed their challenge for failure to state a claim.¹⁶⁷ The Ninth Circuit affirmed that dismissal.¹⁶⁸ The Petitioners subsequently submitted a petition for a writ of certiorari to the Supreme Court, which was granted on March 28, 2022.¹⁶⁹

158. *Prop 12 Establishes New Standards for Confinement of Specified Farm Animals; Bans Sale of Noncomplying Products. Initiative Statute.*, *supra* note 14.

159. *California Proposition 12, Farm Animal Confinement Initiative (2018)*, *supra* note 12.

160. *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1204 (S.D. Cal. 2020).

161. ELECTIONS DIV., *supra* note 157, at 87.

162. See KELLEY MCGILL, ANN LINDER & KELSEY EBERLY, BROOKS MCCORMICK JR. ANIMAL L. & POL’Y PROGRAM, HARVARD L. SCH., LEGISLATIVE ANALYSIS OF S.2019 / H.R.4417: THE “ENDING AGRICULTURAL TRADE SUPPRESSION ACT” 9–10 (Chris Green ed., 2023), <https://animal.law.harvard.edu/wp-content/uploads/Harvard-ALPP-EATS-Act-Report.pdf> [<https://perma.cc/2ZFL-WPK6>].

163. CAL. HEALTH & SAFETY CODE § 25991 (q) (West 2010 & Supp. 2024); *Proposition 2: Treatment of Animals. Statute.*, LEGIS. ANALYST’S OFF. (July 17, 2008), https://lao.ca.gov/ballot/2008/2_11_2008.aspx [<https://perma.cc/U8ZP-C5PH>].

164. CAL. HEALTH & SAFETY CODE § 25991 (e).

165. *California Proposition 12, Farm Animal Confinement Initiative (2018)*, *supra* note 12.

166. *Nat’l Pork Producers Council v. Ross*, 456 F. Supp. 3d 1201, 1204 (S.D. Cal. 2020).

167. *Id.* at 1210.

168. *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1033–34 (9th Cir. 2021).

169. *Petition for a Writ of Certiorari at 1, Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

2. The Petitioners' Arguments

A consistent theme throughout the industry's argument was that other states may pass more stringent laws because of the success of Proposition 12.¹⁷⁰ The Petitioners, the NPPC and AFBF, did not allege discrimination in this case, thus not requiring the Court to analyze the antidiscrimination principle, because the burden was the same on in-state producers as well as those from outside the state.¹⁷¹ Consequently, the case did not address whether regulating animal welfare occurring outside of a state's territory was a legitimate state interest.¹⁷² After disregarding any antidiscrimination arguments, the Petitioners attempted to salvage their claim that Proposition 12 violated the dormant Commerce Clause through the extraterritoriality doctrine¹⁷³ and the *Pike* Balancing Test.¹⁷⁴

i. *The Petitioners' Extraterritoriality Doctrine Argument*

Petitioners claimed that there is an “almost *per se*” rule that prohibits the enforcement of the law if the “practical effect” of the law controls out-of-state retailers and there is minimal impact on in-state retailers.¹⁷⁵ Here, “[m]ore than ninety-nine percent of pork consumed in California [was] produced outside of that state,”¹⁷⁶ and California's inventory was only ninety-nine thousand hogs in 2020.¹⁷⁷ Thus, the Petitioners argued that the extraterritoriality principle applied because it regulated commerce that was completely outside California's borders.¹⁷⁸ The Petitioners argued that “sow farmers cannot say with certainty that no meat from any of their pigs will be sold in California, after those pigs pass through nursery and finishing farms, a packer-slaughter plant, then distributors, before their meat reaches consumers.”¹⁷⁹ The Petitioners relied primarily on three cases to support their argument that the “almost *per se*” rule applied to their extraterritoriality argument: *Healy v. Beer Institute*, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, and *Baldwin v. G.A.F. Seelig Inc.*¹⁸⁰

170. Brief for Iowa Pork Producers Assoc. et al. as Amici Curiae in Support of Petitioners' Request for Certiorari, *supra* note 66, at 17 (“If California is able to impose its regulatory requirements [of 24 square feet] on farmers in other states (and countries), then other states may do the same.”).

171. *Nat'l Pork Producers Council*, 598 U.S. at 371. Instead, the Petitioners “disavow[ed] any discrimination-based claim.” *Id.* (emphasis added).

172. Kysar, *supra* note 131, at 130.

173. See *Nat'l Pork Producers Council*, 598 U.S. at 371–76.

174. See *id.* at 377–91.

175. *Id.* at 371.

176. Brief for Petitioners, *supra* note 15, at 21.

177. Brief for Iowa Pork Producers Assoc. et al. as Amici Curiae in Support of Petitioners' Request for Certiorari, *supra* note 66, at 11.

178. Brief for Petitioners, *supra* note 15, at 21.

179. *Id.* at 3–4.

180. *Id.* at 19 (stating the “almost *per se*” rule); *id.* at 21 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) & citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986)); *id.* at 33 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)); see also *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371 (2023) (referencing the Petitioners' argument and the three cases).

These three cases supported the Petitioners' claims because the "practical effect" of the laws at issue in these cases controlled conduct beyond the state borders.¹⁸¹

ii. *The Petitioners' Pike Balancing Argument*

The Petitioners relied on the *Pike* Balancing Test as well, claiming that the burdens of Proposition 12 rested solely on out-of-state producers.¹⁸² Here, the pork farmers outside of California did not have any control over where their pork would eventually be sold; therefore, the pork farmers would be required to comply with Proposition 12 for fear of their products being sold in California.¹⁸³ The Petitioners alleged that the benefits, decreasing the risk of foodborne illness and animal cruelty,¹⁸⁴ were not enough to overcome the substantial economic burden placed upon the pork farmers.¹⁸⁵ In fact, the Petitioners claimed, the benefits were "invalid or non-existent."¹⁸⁶ To comply, the Petitioners argued, farmers would either have to reduce headcount or build new facilities, all of which would come at a significant cost to the farmers and consumers.¹⁸⁷

3. The Court's Holding

The Supreme Court issued a 5-4 decision that dismissed both of the Petitioners' arguments as misconstruing dormant Commerce Clause precedent.¹⁸⁸ Justice Gorsuch wrote the majority with respect to Parts I, II, III, IV-A, and V.¹⁸⁹ Parts IV-B, IV-C, and IV-D, also written by Justice Gorsuch, were only supported by a plurality of justices.¹⁹⁰ This Section will examine Justice Gorsuch's analysis of the extraterritoriality doctrine, *Pike* balancing, and their relationship to California's Proposition 12.

i. *Extraterritoriality Doctrine*

Justice Gorsuch first turned to the extraterritoriality doctrine argument, and when analyzing the doctrine, the Court found that nothing in *Healy*, *Brown-Forman Distillers Corp.*, or *Baldwin* suggested that an "almost *per se*" rule exists.¹⁹¹ *Healy*, *Brown-Forman Distillers Corp.*, and *Baldwin* were concerned with

181. Brief for Petitioners, *supra* note 15, at 21 (quoting *Healy*, 491 U.S. at 336).

182. *Id.* at 44.

183. *Id.* at 45-46.

184. *Id.* at 7.

185. *Id.* at 47 (describing the benefits as "invalid or non-existent").

186. *Id.*

187. *Id.* at 46.

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

189. *Id.* at 363.

190. *Id.* This Note is only going to address Justice Gorsuch's majority and plurality opinions. The concurrences and dissents are beyond the scope of this Note.

191. *Id.* at 373-74.

economic protectionism and plainly discriminated against out-of-state entities.¹⁹² The Supreme Court found that the Petitioners cited the precedent incorrectly and that the national marketplace causes the “practical effect” of impacting extraterritorial behavior.¹⁹³ States have passed laws that impact commerce outside their borders.¹⁹⁴ There are already many laws that “have the ‘practical effect of controlling’” other state activities; for example, many environmental laws determine where manufacturers are going to set up their businesses, or state income taxes decide if a company or individual will move jurisdictions.¹⁹⁵ The “almost *per se*” rule that the Petitioners argue for would be disastrous for state sovereignty and undermine traditional state powers;¹⁹⁶ it is a broad expansion of dormant Commerce Clause powers and would result in “endless litigation.”¹⁹⁷

The laws that would violate the extraterritoriality doctrine are those that solely regulate out-of-state transactions.¹⁹⁸ Here, that was not the case because, as the majority addresses in a footnote, the Petitioners conceded that Proposition 12 only regulates products that are sold *within* California; Proposition 12 only applies if the products are sold within California.¹⁹⁹ Pork producers, while they would like to sell in California, are not required to do so. Therefore, the pork producers could avoid the practical effects of Proposition 12 if they did not sell *into* California. The majority found that Proposition 12 regulates commerce between the states (despite California maintaining a small amount of pork inventory) rather than controlling the commerce of other states.²⁰⁰

ii. *Pike Balancing*

Justice Gorsuch did not give any weight to the Petitioners’ *Pike* argument, criticizing it for two reasons. First, the Court found that the “[P]etitioners overstate[d] the extent to which *Pike* and its progeny depart from the antidiscrimination rule [T]he *Pike* line serves as an important reminder that a law’s practical effects may also disclose the presence of a discriminatory purpose.”²⁰¹ Thus, *Pike* and the relevant case law illustrate hidden discrimination that might not be apparent immediately.²⁰² While the Court permits analysis

192. *Id.*

193. *Id.* at 374.

194. *Id.* at 375.

195. *Id.* at 374.

196. *See id.* at 375.

197. *See id.*

198. *See id.* at 375–76; *see also* Kysar, *supra* note 131, at 121 (“Extraterritorial reach invalidates a state statute when the statute *requires* people or businesses to conduct their out-of-state commerce in a certain way.” (quoting *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995))).

199. *Nat’l Pork Producers Council*, 598 U.S. at 376–77 n.1.

200. *Id.* at 376.

201. *Id.* at 377, 382.

202. *See id.* at 378.

of nondiscriminatory laws within the context of *Pike*,²⁰³ the Petitioner's arguments did not fit within the *Pike* framework.²⁰⁴

Second, the plurality determined that striking down Proposition 12 under the *Pike* Balancing Test would broadly expand the power of the *Pike* Balancing Test.²⁰⁵ The Court wrote that an expanded *Pike* Balancing Test would be “authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law’s ‘costs’ and ‘benefits.’”²⁰⁶ The plurality felt that courts should not be in the position to make a cost-benefit analysis because there is “[n]o neutral legal rule” to guide a court’s decision when comparing the noneconomic benefits to the economic benefits.²⁰⁷ Justice Gorsuch determined that complicated choices about benefits and burdens are best left to the legislature and to voters.²⁰⁸

Justice Gorsuch contemplated that “it is hard not to wonder whether petitioners have ventured here only because winning a majority of a handful of judges may seem easier than marshaling a majority of elected representatives across the street.”²⁰⁹ The pork producers are free to lobby the California State Legislature or even Congress to neutralize the supposed threat that Proposition 12 poses to the pork industry.²¹⁰ Justice Gorsuch criticized the notion that California’s democratically elected law is worth less because California is a large market and because it will cost money for the pork producers to increase their square footage requirements.²¹¹

II. PROTECTING INDUSTRIAL AGRICULTURE IS THE WRONG MOVE

Given the Supreme Court’s decision, agricultural states like Iowa are at a significant crossroads—either continue with industrial agriculture and incur significant costs or carve a different path and support the small family farm. Industrial agriculture’s appeal is efficiency and sizable production, but Proposition 12 minimizes the traditional advantages of industrial agriculture. If large producers want access to California’s lucrative market, they will have to comply with Proposition 12’s requirements. There will be costs to large producers, including many producers in Iowa. Consequently, this Part will first explore the costs of Proposition 12, what it means for pork producers, and what it means for consumers in California and across the nation. Then, this Part will outline industrial agriculture’s economic, environmental, and health impacts.

203. *Id.* at 379 (citing *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008)).

204. *Id.* at 379–80.

205. *Id.* at 380 (plurality opinion).

206. *Id.*

207. *Id.* at 381.

208. *Id.* at 382.

209. *Id.* at 383.

210. *See id.* at 382.

211. *Id.* at 382–83.

A. THE COST OF COMPLIANCE WITH PROPOSITION 12

With “[m]ore than [ninety-nine percent] of the pork consumed in California” produced out of state, the harm to California’s economy is insignificant.²¹² California’s nonpartisan Legislative Analyst’s Office estimates that there will be a decrease in state income tax revenues by about several million dollars from the agricultural industry.²¹³ Industrial agriculture claims that the cost of Proposition 12 will be passed to producers; however, most of the costs will be borne by California consumers.²¹⁴ The cost to “consumers outside California will be marginal.”²¹⁵ Still, studies on the cost to California consumers “indicate[d] that the incremental cost for bringing compliant pork . . . [was] \$0.23 per pound in 2018 prices.”²¹⁶ The California Department of Food and Agriculture estimated that Proposition 12-compliant pork will cost consumers eight dollars more *annually*.²¹⁷ Instead, the Brief for the Agriculture and Resource Economics Professors estimated that there will be a “0.2% decline in the price of retail pork outside California.”²¹⁸ Thus, the cost for the pork producers and consumers is minimal.

Instead, the out-of-state pork producers will bear the costs. The costs to large producers will be more significant, whereas small pork producers likely already comply with the square footage requirements.²¹⁹ Proposition 12 will burden small producers at a much lower rate because small producers “are less likely to use extreme confinement in the first place.”²²⁰ The primary benefit of extreme confinement is a large amount of production in a limited amount of space. Even if small producers must upgrade their square footage, “[s]mall farms have less capital invested compared to larger farms and large packers.”²²¹ Meaning, small farms will be able to adapt more quickly than large farms.

The exact numbers vary, but the costs for large producers have the potential to be immense. For example, the North Carolina Chamber Legal Institute estimated that it would cost at least \$2.5 million per farm to ensure

212. Brief for Petitioners, *supra* note 15, at 21.

213. *Proposition 12: Establishes New Standards for Confinement of Certain Farm Animals; Bans Sale of Certain Non-Complying Products. Initiative Statute.*, LEGIS. ANALYST’S OFF. 4–5 (Nov. 6, 2018), <https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018> [<https://perma.cc/XH4L-7BZA>].

214. Brief for Agric. & Resource Econ. Professors as Amici Curiae Supporting Neither Party at 6, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

215. *Id.*

216. *Id.* at 18.

217. CAL. DEP’T OF FOOD & AGRIC., TITLE 3. FOOD AND AGRICULTURE: PROPOSED REGULATIONS—ANIMAL CONFINEMENT 22 (2021), https://www.cdfa.ca.gov/ahfss/pdfs/regulations/AnimalConfinement1stNoticePropReg_05252021.pdf [<https://perma.cc/N2EG-NLSW>].

218. Brief for Agric. & Resource Econ. Professors as Amici Curiae Supporting Neither Party, *supra* note 214, at 23.

219. CAL. DEP’T OF FOOD & AGRIC., *supra* note 217, at 19.

220. Brief for Econ. Rsch. Orgs. as Amici Curiae Supporting Respondents at 26, *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

221. *Id.* at 27.

that farms comply with Proposition 12.²²² Jen Sorenson, the president of the National Pork Producers Council, claimed that Proposition 12 will “result in a loss of 2.5 percent of national pork harvest capacity.”²²³

Barry Goodwin, an economist at North Carolina State University, estimated that “construction costs for a new 5,200-sow operation that meets the California requirements would be \$15.6 million, while retrofitting an existing barn would cost an average of \$10 per pig, or \$770 million for the 77 million sows on U.S. pig farms.”²²⁴ Applying these numbers to the 24.8 million hogs in Iowa, it would cost nearly \$250 million to comply. Economists fear that these costs could concentrate the hog farming industry even further as smaller farms will not be able to retrofit their facilities to come into compliance with Proposition 12.²²⁵ Economists at the University of California, Davis, determined that the “facility costs per sow [will] rise by about [twenty percent] to achieve an increase in space per sow from [twenty] to [twenty-four] square feet.”²²⁶

Additionally, the pork producers claim that certification, labeling, and reporting requirements will also constitute significant costs. The California Department of Food and Agriculture determined that small producers would pay around one hundred to two hundred dollars for certification, whereas large producers would pay around two thousand to four thousand dollars.²²⁷ The report also determined that labeling costs were “nominal” and that reporting costs would be around five thousand dollars.²²⁸ All these costs occur at the farm level.

There will be additional costs to the integrators and processors. Although the sentiment around pork producers has been one of alarm, the processors have already begun to factor in these costs. For example, Hormel Foods, a large Minnesota food processing company, has stated “that [the company] faces no risk of material losses from compliance with Proposition 12 While these measures will add complexity to our supply chain . . . we will continue to meet the needs of our consumers.”²²⁹ A group of agriculture and resource

222. Brief for N.C. Chamber Legal Inst. et al. as Amici Curiae Supporting Petitioners at 12, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

223. Letter from Jen Sorenson, President, Nat'l Pork Producers Council, to Thomas J. Vilsack, Sec'y, U.S. Dep't of Agric. (May 27, 2021), <https://nppc.org/wp-content/uploads/2021/05/NPPC-Letter-to-Sec.-Vilsack-on-Prop.-12-Background-Study.pdf> [<https://web.archive.org/web/20210806170338/https://nppc.org/wp-content/uploads/2021/05/NPPC-Letter-to-Sec.-Vilsack-on-Prop.-12-Background-Study.pdf>].

224. Gary Baise, *California's New Pig Rule Will Wreak Havoc with Pork Producers*, FARM PROGRESS (Jan. 3, 2022), <https://www.farmprogress.com/commentary/california-s-new-pig-rule-will-wreak-havoc-with-pork-producers> [<https://perma.cc/RTN6-434F>].

225. *Id.*

226. HANBIN LEE, RICHARD J. SEXTON & DANIEL A. SUMNER, GIANNINI FOUND. OF AGRIC. ECON., UNIV. OF CAL., VOTER-APPROVED PROPOSITION TO RAISE CALIFORNIA PORK PRICES 6 (2021), https://s.giannini.ucop.edu/uploads/pub/2021/08/17/v24n6_2.pdf [<https://perma.cc/YA3F-X5D2>].

227. CAL. DEP'T OF FOOD & AGRIC., *supra* note 217, at 17.

228. *Id.* at 17-18.

229. *Hormel Foods Company Information About California Proposition 12*, HORMEL FOODS (May 11, 2023), <https://www.hormelfoods.com/newsroom/news/hormel-foods-company-information-about-california-proposition-12> [<https://perma.cc/G6BT-X7MZ>].

economics professors estimated in their amicus curiae brief that “these additional costs will be about \$15 per compliant hog slaughtered, or \$.0933 per pound, assuming 160.8 pounds of meat per processed hog.”²³⁰

B. CAFOS HAVE NOT RESULTED IN PROSPERITY

Farming has a long and storied history in Iowa, but it was not the factory farm that drove the engine of the Iowa economy.²³¹ Rural communities thrived because of the family farm. As industrial agriculture has developed in Iowa, family farms have suffered. When accounting for the other externalities, industrial agriculture has not been as beneficial as its proponents like to proclaim. Population loss has afflicted rural counties across the nation—but those dependent on agriculture saw the most significant decline.²³² The subsidies for industrial agriculture have not led to prosperity in rural communities.²³³ Industrial agriculture has been a gross departure from our state’s storied history in feeding the nation and the world. This Section will characterize the cost of industrial agriculture more accurately to rural communities.

1. Economic Impact

A common misconception is that CAFOs are excellent at producing large amounts of food at a low cost. However, a study by the U.S. Department of Agriculture found that size does not always increase efficiency.²³⁴ In fact, studies have determined that “there is evidence of diseconomies of scale as farm size increases.”²³⁵ Nearly “[forty percent] of medium-sized animal feeding operations are about as cost-effective as the average large hog CAFO.”²³⁶ Thus, bigger does not always mean better. Even where there is increased production, it has not resulted in decreased prices for consumers. Starting in 1960 and even until the 1990s, “[e]xports of meat products remained consistently below

230. Brief for Agric. & Resource Econ. Professors as Amici Curiae Supporting Neither Party, *supra* note 218, at 17.

231. *Early Agriculture*, IOWA PBS, <https://www.iowapbs.org/iowapathways/mypath/2737/early-agriculture> [<https://perma.cc/4LGW-7DR7>].

232. John Cromartie, *Rural Areas Show Overall Population Decline and Shifting Regional Patterns of Population Change*, ECON. RSCH. SERV. (Sept. 5, 2017), <https://www.ers.usda.gov/amber-waves/2017/september/rural-areas-show-overall-population-decline-and-shifting-regional-patterns-of-population-change> [<https://perma.cc/K68X-NJRZ>].

233. See Yuheng Li, Hans Westlund & Yansui Liu, *Why Some Rural Areas Decline While Some Others Not: An Overview of Rural Evolution in the World*, 68 J. RURAL STUD. 135, 142 (2019) (explaining that their research found that “heavy subsidization of agriculture . . . only contributes to rural development to a very small extent”).

234. VOLKMER ET AL., *supra* note 48, at 15.

235. Willis L. Peterson, *Are Large Farms More Efficient?*, AGECON SEARCH STAFF PAPER SERIES, Jan. 1997, at 1, 13.

236. DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOS UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS 2 (2008), <https://www.ucsus.org/sites/default/files/2019-10/cafos-uncovered-executive-summary.pdf> [<https://perma.cc/WC6K-JZZ2>].

[five percent] of total production.”²³⁷ This trend dramatically changed starting in the 1990s, and by the 2010s, more than twenty percent of pork production left the United States.²³⁸ Increased exports, while good for the producers, is not good for the average consumer and has led to increased prices.²³⁹

Furthermore, the average hog farmer today earns less per hog than thirty years ago. As production of hogs increased, the price of hogs decreased.²⁴⁰ This development occurred because of significant production and a trend toward concentration.²⁴¹ Research has found that “[t]oday’s farmers earn [two dollars] less per pound of hog produced compared to 1982, while the retail price fell only [one dollar]; slaughterhouses, processors[,] and retailers are capturing the other [one dollar].”²⁴²

Small farmers and producers typically negotiate with one integrator because “integrators often have a regional monopoly, so in many rural communities, a hog farmer only has one integrator he can contract with.”²⁴³ These monopolies result in one integrator who controls significant market power and does not allow for other supply chains to thrive.²⁴⁴

These changes have led to dire circumstances in America’s rural communities because “as farm size and absentee ownership increases, social conditions in the local community deteriorate.”²⁴⁵ With the decline of small farms, “the economic basis of America’s rural communities decline, and rural towns are lost.”²⁴⁶ Midwestern towns are susceptible to the consolidation of farm ownership.²⁴⁷ Proponents of industrial agriculture claim that large facilities will bring jobs to the local community; “[h]owever, the economic reality is that CAFOs employ far fewer people per dollar invested or unit of production than do the independent family farms they inevitably displace.”²⁴⁸ For example, when industrial agriculture became widespread in Missouri, the state “lost more than [ninety percent] of [the] independent hog producers.”²⁴⁹ Unfortunately, an increased concentration of agriculture leads to “depressed median family

237. John Ikerd, *Economic Realities of CAFOs*, U. MO. (May 2020), <https://ikerdj.mufaculty.umsystem.edu/presentation-papers/factory-farms-cafos/economic-realities-of-cafos> [<https://perma.cc/XZH4-K7WA>].

238. *Id.*

239. *Id.*

240. See FOOD & WATER WATCH, ECONOMIC COST OF FOOD MONOPOLIES: THE HOG BOSSES 1 (2022), https://www.foodandwaterwatch.org/wp-content/uploads/2022/05/RPT2_2205_IowaHogs-WEB4.pdf [<https://perma.cc/NPS3-YJDK>].

241. *Id.*

242. *Id.*

243. Brief for Small & Indep. Farming Bus. et al. as Amici Curiae Supporting Respondents, *supra* note 43, at 11.

244. *Id.* at 12.

245. Dean MacCannell, *Agribusiness and the Small Community*, TECH. PUB. POL’Y & CHANGING STRUCTURE AM. AGRIC., May 1986, at 1, 7.

246. VOLKMER ET AL., *supra* note 48, at 15.

247. MacCannell, *supra* note 245, at 6.

248. Ikerd, *supra* note 237.

249. *Id.*

incomes, high levels of poverty, low education levels, [and] social and economic inequality between ethnic groups.”²⁵⁰

In many situations, “[e]ven as ownership remains local and labor remains in the family unit, decreasing the number of farms in the region erodes the support base for the communities.”²⁵¹ Research at the University of Missouri has found that the increased tax base from the large operations is outweighed by the infrastructure costs that arise from the traffic affiliated with these operations.²⁵² Property values decrease twenty percent to forty percent based on how far they are from operations.²⁵³ Communities that had a broader base of economic wealth were disproportionately impacted by this change in ownership. The U.S. Department of Agriculture (“USDA”) determined:

Small farms contribute more than farm production to our society. Small farms embody a diversity of ownership, cropping systems, landscapes, biological organization, culture, and traditions. Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits. Decentralized land ownership produces more equitable economic opportunity for people in rural communities, and offers self-employment and business management opportunities.²⁵⁴

While proponents of industrial agriculture point to its efficiency and overall production, industrial agriculture has harmed rather than helped people in rural communities.

2. Environmental Impact

Beyond the economic consequences, numerous adverse environmental outcomes result from industrial agriculture. As the largest industry in the state, it should be no surprise that the largest portion of Iowa’s greenhouse gas (“GHG”) emissions are from agriculture, constituting twenty-nine percent of the state’s GHG emissions.²⁵⁵ Totaling 36.03 million metric tons carbon dioxide equivalents (“MMtCO_{2e}”) in 2021, the agriculture industry’s GHG emissions are expected to double by 2040 if no changes are made.²⁵⁶ The impacts of

250. MacCannell, *supra* note 245, at 7.

251. *Id.* at 6.

252. Ikerd, *supra* note 237.

253. James Merchant & David Osterberg, *Iowans Want Action to Limit Concentrated Animal Feeding Operations and Their Harmful Effects*, DES MOINES REG. (Feb. 18, 2020, 4:46 PM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/02/18/cafos-animal-feeding-hogs-harms-iowa-have-worsened-moratorium/4794608002> (on file with the *Iowa Law Review*).

254. VOLKMER ET AL., *supra* note 48, at 13.

255. IOWA DEP’T OF NAT. RES., 2021 IOWA STATEWIDE GREENHOUSE GAS EMISSIONS INVENTORY REPORT 7 (2022), <https://www.iowadnr.gov/Portals/idnr/uploads/air/ghgemissions/2021%20GHG%20REPORT.pdf> [<https://perma.cc/MHJ4-7YR2>].

256. *Id.* at 16 (projecting emissions from agriculture to hit 65.74 MMtCO_{2e} by 2040).

GHG emissions on climate change are well-documented,²⁵⁷ and industrial agriculture has had an outsized impact on this trend. These changes result in more severe disasters like floods and drought—all of which impact farming communities at a substantial rate,²⁵⁸ which will in turn impact “[c]rop productivity . . . due to variations in integral abiotic factors such as temperature, solar radiation, precipitation, and CO₂.”²⁵⁹

On a more localized scale, the environmental impacts of industrial agriculture have significantly harmed the natural landscape and water quality. From an ecological perspective, “Iowa is now considered to be one of the most altered states in the nation.”²⁶⁰ Iowa’s wetlands used to cover several million acres, but more than ninety percent were drained to support agriculture.²⁶¹ Iowa has also lost its millions of acres of prairies due to agriculture.²⁶² This loss of prairie has been catastrophic for the fertile topsoil, which used to be, on average, over a foot thick, but is now “only six to eight inches thick on average.”²⁶³ This topsoil loss has been the result of significant erosion and tilling from farming.²⁶⁴ Despite its notoriety, Iowa’s topsoil would not be as productive without the added fertilizers and manure.²⁶⁵ The consistent farming does not allow the soil to replenish the nutrients that produce such excellent yields.

Furthermore, “[t]he presence of clustering of swine production and manure spills within watersheds, and in particular watersheds that serve major cities in Iowa, such as Des Moines and Sioux City . . . indicate that populations downstream from swine CAFOs are at risk of exposure to externalities from high densities of swine upstream.”²⁶⁶ Iowa’s terrain, in particular, is susceptible to water quality problems because of the karst terrain located throughout the

257. See generally *Causes and Effects of Climate Change*, UNITED NATIONS, <https://www.un.org/en/climatechange/science/causes-effects-climate-change> [<https://perma.cc/36MK-CVQ5>] (“As greenhouse gas emissions blanket the Earth, they trap the sun’s heat. . . . The world is now warming faster than at any point in recorded history. Warmer temperatures over time are changing weather patterns and disrupting the usual balance of nature.”).

258. See *Greenhouse Gases*, EPA, <https://www.epa.gov/report-environment/greenhouse-gases> [<https://perma.cc/JJ5B-BWJ7>].

259. Kashif Abbas et al., *A Review of the Global Climate Change Impacts, Adaptation, and Sustainable Mitigation Measures*, 29 ENV’T SCI. & POLLUTION RSCH. 42539, 42544 (2022).

260. VINCE EVELSIZER & JOANNA L. JOHNSON, IOWA DEP’T OF NAT. RES., WETLAND ACTION PLAN FOR IOWA: IOWA GEOLOGICAL AND WATER SURVEY SPECIAL REPORT NO. 4, at 5 (2010), <https://www.ihr.uiowa.edu/igs/publications/uploads/SR-04.pdf> [<https://perma.cc/8TZX-6Z4V>].

261. *Id.* at 4–5.

262. See KATHLEEN WOIDA, *The Root of Our Problems: Iowa’s Degraded Soils, in TENDING IOWA’S LANDS: PATHWAYS TO A SUSTAINABLE FUTURE* 23, 25 (Cornelia F. Mutel ed., 2022).

263. *Id.*

264. *Id.*

265. *Id.*

266. Carrel et al., *supra* note 27, at 14.

state.²⁶⁷ Karst terrain is vulnerable to permeation because of its solubility.²⁶⁸ Even beyond the particularly vulnerable karst regions of Iowa, water quality around the state has plummeted since the rise of industrial agriculture.

There is a relationship between animal feeding operations and groundwater nitrate concentrations.²⁶⁹ IDNR found that only fifteen water segments out of the 1,382 water segments studied met Iowa water quality standards for their intended use.²⁷⁰ Researchers at Iowa State University identified that an increased number of farming operations causes “an increased risk for deterioration of water quality.”²⁷¹ A report from the Iowa Environmental Council found that Iowans will pay “\$333 million over the next five years to remove nitrates from drinking water. Rural Iowans can pay as much as \$1,200 per person per year for nitrate treatment.”²⁷²

CAFO waste “greatly exceed[s] the minimal levels that have been shown to promote noxious algal blooms” and prevents aquatic habitats from thriving.²⁷³ The harm to water quality is also detrimental to aquatic life because manure kills fish and spreads “bacteria, viruses[,] and noxious fumes.”²⁷⁴ It appears that “[a]lthough the acute impacts are often clearly visible—dead fish floating on the water surface, or algal over-growth and rotting biomass—the chronic, insidious, long-term impacts of commonly accepted practices of CAFO waste management on receiving aquatic ecosystems are also significant.”²⁷⁵ The relationship between degraded water quality and human health is extensive, all of which are more pronounced by CAFOs.

267. *Iowa's Karst Topography*, IOWA GEOLOGICAL SURV. U. IOWA COLL. ENG'G, <https://iowageo logicalsurvey.uiowa.edu/iowa-geology/popular-interest/iowas-karst-topography> [<https://perma .cc/PQ7U-VAVC>]. Karst terrain is “created by dissolving bedrock that may contain sinkholes, sinking streams, caves, springs, and other features.” Letter from Allamakee Cnty. Protectors – Educ. Campaign et al., to Kelli Book, Staff Att’y, Iowa Dep’t of Nat. Res. 21 (June 15, 2023), <https://www.iaenvironment.org/webres/File/Joint%20Comments%20on%202023%20CAFO %20rules.pdf> [<https://perma.cc/6FNM-7B84>].

268. Letter from Allamakee Cnty. Protectors – Educ. Campaign et al., *supra* note 267, at 21.

269. Keith W. Zirkle et al., *Assessing the Relationship Between Groundwater Nitrate and Animal Feeding Operations in Iowa (USA)*, 566–67 *SCI. TOTAL ENV’T* 1062, 1063 (2016).

270. Press Release, Iowa Dep’t of Nat. Res., DNR Releases Latest Draft of 303d Impaired Waters List (Feb. 21, 2022), <https://www.iowadnr.gov/About-DNR/DNR-News-Releases/ArticleID/3914/DNR-releases-latest-draft-of-303d-impaired-waters-list> [<https://perma.cc/4V2D-UBZ6>].

271. IOWA STATE UNIV. & THE UNIV. OF IOWA STUDY GRP., *IOWA CONCENTRATED ANIMAL FEEDING OPERATIONS AIR QUALITY STUDY: FINAL REPORT 10* (2022), https://ehsrc.public-health.uiowa.edu/wp-content/uploads/2019/08/CAFO_final2-14.pdf [<https://perma.cc/8RFN-GARN>].

272. IOWA ENV’T COUNCIL, *THE COSTS OF CAFOS: IMPACTS ON YOUR WALLET AND YOUR HEALTH 2* (2023), https://www.iaenvironment.org/webres/File/The%20Costs%20of%20CAFOS%20-%20White%20Paper%2011_10_23.pdf [<https://perma.cc/X5RR-RQUX>] (footnote omitted).

273. JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 *ENV’T HEALTH PERSPS.* 308, 308–09 (2007).

274. Carrel et al., *supra* note 27, at 13.

275. Burkholder et al., *supra* note 273, at 309.

3. Human Health Impact

Industrial agriculture has significant impacts on human health and welfare. Extensive research and literature have found that there is “direct impact on human health and welfare for communities that contain large industrial farms. . . . [H]uman health can suffer because of contaminated air and degraded water quality, or from diseases spread from farms.”²⁷⁶ Health departments are not involved in the regulation of industrial agriculture.²⁷⁷ State environmental agencies regulate industrial agriculture.²⁷⁸ Logistically, this makes sense; however, the role of environmental agencies is not to regulate human health, but to regulate environmental health. While environmental health and human health overlap and environmental laws like the CAA emerged from concerns about air pollution and smog,²⁷⁹ sometimes the priorities clash. Consequently, the costs to human health are often not quantified when considering environmental regulation. The costs to human health—monetary and physical—must be prioritized when considering the impacts of industrial agriculture.

While environmental agencies are increasingly concerned with the intersection of human health and environmental justice,²⁸⁰ the role of environmental agencies is to protect the environment, not necessarily focus on human health. Increasing the focus on environmental justice will bridge the gap between human health and environmental health.²⁸¹ For example, a study in North Carolina found that CAFOs “are located disproportionately in communities with [a] higher percentage of minorities and in low-income communities.”²⁸² Yet in Iowa, “traditional [equal justice] populations of non-whites and poor residents are not associated with high swine density . . . as they are in other parts of the U.S.”²⁸³ It remains important for Iowa to consider environmental justice when enacting state policy. Environmental justice ensures that state policy is equitable and does not continue to perpetuate the historical wrongs of previous policies.

²⁷⁶. HRIBAR, *supra* note 3, at 3.

²⁷⁷. Jillian P. Fry, Linnea I. Laestadius, Clare Grechis, Keeve E. Nachman & Roni A. Neff, *Investigating the Role of State and Local Health Departments in Addressing Public Health Concerns Related to Industrial Food Animal Production Sites*, PLOS ONE, Jan. 2013, at 1, 5–6.

²⁷⁸. Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV'T HEALTH PERSPS. A182, A187 (2013).

²⁷⁹. *Clean Air Act Requirements and History*, EPA (Aug. 6, 2024), <https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history> [<https://perma.cc/2BHD-QTQD>] (explaining that the CAA’s primary purpose is to “protect [human] health and welfare” and that the Act was passed in response to serious smog plaguing U.S. cities).

²⁸⁰. *See generally Climate Change and Human Health*, EPA (June 4, 2024), <https://www.epa.gov/climateimpacts/climate-change-and-human-health> [<https://perma.cc/LD3G-3XTK>] (explaining the link between environmental degradation and its impact on human health).

²⁸¹. *Environmental Justice*, EPA (Sept. 6, 2023), <https://www.epa.gov/environmentaljustice> [<https://perma.cc/HED6-8CDU>] (describing that environmental justice occurs when everyone has the “same degree of protection from environmental and health hazards”).

²⁸². Son & Bell, *supra* note 31, at 8.

²⁸³. Carrel et al., *supra* note 27, at 15.

Industrial agriculture has resulted in significant respiratory issues for those living near CAFOs. A study of Iowa school-aged children living near CAFOs found that students suffered from asthma at a much higher rate than the rest of the state.²⁸⁴ The students living near CAFOs suffered at a rate of over nineteen percent compared to the control group and the rest of the state, which was around seven percent.²⁸⁵ These issues are not limited to school-aged children; it also has been discovered that adults are impacted by “measures of odor, endotoxin, hydrogen sulfide, and PM₁₀,” which are produced by CAFOs.²⁸⁶ There were a variety of symptoms associated with these particulate matters: “increased respiratory difficulty, sore throat, chest tightness, nausea, and eye irritation.”²⁸⁷

Beyond various respiratory conditions, residing near CAFOs can result in other ailments. Living in proximity to CAFOs may severely increase the risk of acute gastrointestinal disease.²⁸⁸ Iowans have also reported post-traumatic stress disorder (“PTSD”) cognitions when living near CAFOs.²⁸⁹ For example, “hydrogen sulfide and semivolatle particles were linked to reports of feeling stressed, annoyed, nervous, and anxious.”²⁹⁰

Furthermore, CAFOs can be the origin of diseases that affect animals but spread to humans. “Congress has explicitly acknowledged, in the Animal Health Protection Act (“AHPA”), that infectious diseases in livestock pose a threat to the ‘health and welfare of the people of the United States’”²⁹¹ For example, the swine flu epidemic in the early 2000s is believed to have originated in a CAFO.²⁹² This trend of diseases originating from CAFOs is likely to accelerate in the future if CAFOs continue to grow. Researcher James E. Hollenbeck has found that “[w]ith so many swine and poultry CAFOs in close proximity, the acceleration of the ‘mixing’ and assortment of influenza viruses is

284. Sigurdur T. Sigurdarson & Joel N. Kline, *School Proximity to Concentrated Animal Feeding Operations and Prevalence of Asthma in Students*, 129 CHEST 1486, 1489 (2006).

285. *Id.*

286. Nicole, *supra* note 278, at A187.

287. *Id.* (citing Leah Schinasi et al., *Air Pollution, Lung Function, and Physical Symptoms in Communities Near Concentrated Swine Feeding Operations*, 22 EPIDEMIOLOGY 208, 211 (2011)).

288. *Study Links N.C. Hog Feeding Operations to Acute Gastrointestinal Illness*, UNC GILLINGS SCH. PUB. HEALTH (Nov. 23, 2022), <https://sph.unc.edu/sph-news/study-links-n-c-hog-feeding-operations-to-acute-gastrointestinal-illness> [<https://perma.cc/V5MJ-Q7KR>].

289. Kelley J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 ENV'T HEALTH PERSPS., 317, 318 (2007) (“PTSD cognitions were consistent with interviewees’ multiple concerns about the decline in the quality of life and socioeconomic vitality . . . with declining traditional farm production.”).

290. Nicole, *supra* note 278, at A187 (citing Rachel Avery Horton, Steve Wing, Stephen W. Marshall & Kimberly A. Brownley, *Malodor as a Trigger of Stress and Negative Mood in Neighbors of Industrial Hog Operations*, 99 AM. J. PUB. HEALTH. S610, S610 (2009)).

291. Helena Masiello, Note, *CAFO’s Are a Public Health Crisis: The Creation of COVID-19*, 76 U. MIA. L. REV. 900, 903 (2022) (quoting 7 U.S.C § 8308(a) (2018)).

292. Anastasia S. Stathopoulos, Note, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 407, 429–30 (2010).

unfathomable.”²⁹³ In the aftermath of the COVID-19 pandemic, people should be especially careful of zoonotic diseases.

These various problems can result in excessive medical bills, which are especially harmful for those who cannot afford them. As discussed above, the economic toll of industrial agriculture is quite high.²⁹⁴ These economic costs are also found in human health effects. For example, Iowa’s medical costs related to nitrate in drinking water range from \$6.25 million to \$37.5 million annually.²⁹⁵ The indirect losses Iowans suffer from the adverse health effects are even more significant. Iowans suffer \$35 million to \$167.5 million annually “from preterm births, economic losses from disability, and life-years lost due to premature death.”²⁹⁶ While the price of hogs is an important part of the picture, it is incomplete. Numerous externalities that impact the communities around CAFOs are not factored into hog prices. Consequently, a more accurate assessment is one that accounts for the economic, environmental, and human health impacts.

III. PROPOSITION 12 PRESENTS A UNIQUE OPPORTUNITY FOR IOWA

Given the extensive costs facing Iowa farm producers noncompliant with Proposition 12, the minimal cost for consumers that comes from Proposition 12, and the other adverse effects of industrial agriculture, Iowa can reinvent itself. Agriculture has, and should remain, an integral part of the state’s economy. Small farmers throughout the twentieth century drove the economy of Iowa.²⁹⁷ Despite this long-standing practice, the industry has only consolidated, and consolidation has not resulted in benefits for everyone. As such, the new policy must address this trend.

The movement at the federal level has been disappointing as federal legislators are more interested in repealing Proposition 12 rather than planning for its impacts. Representative Ashley Hinson for Iowa’s Second District introduced federal legislation entitled the Ending Agricultural Trade Suppression (“EATS”) Act.²⁹⁸ The EATS Act would prohibit states from passing laws that would infringe on out-of-state producers like Proposition 12.²⁹⁹ Broadly expanding the traditional jurisdiction of the dormant Commerce Clause, the EATS Act would be disastrous as over one thousand state laws could be overturned because there are not many federal standards; the language of the

293. James E. Hollenbeck, *Interaction of the Role of Concentrated Animal Feeding Operations (CAFOs) in Emerging Infectious Diseases (EIDS)*, 38 INFECTION GENETICS & EVOLUTION 44, 45 (2016).

294. See *supra* Section II.B.1.

295. Letter from Allamakee Cnty. Protectors – Educ. Campaign et al., *supra* note 267, at 8.

296. *Id.*

297. See *supra* note 231 and accompanying text.

298. Ending Agricultural Trade Suppression Act, H.R. 4417, 118th Cong. (2023). This bill has been effectively reintroduced by Representative Hinson who proposed the Exposing Agricultural Trade Suppression Act in 2021, also colloquially known as the EATS Act. See also Exposing Agricultural Trade Suppression Act, H.R. 4999, 117th Cong. (2021) (preventing the regulation of agriculture trade by states).

299. H.R. 4417.

Act is decidedly broad and has severe potential to “backfire.”³⁰⁰ In Iowa alone, at least thirty-four laws could be impacted by the EATS Act.³⁰¹ An analysis of the plain text of the EATS Act suggests that “[a]lthough some producers might initially financially benefit from enactment of the EATS Act, the potential for market disruption and uncertainty is extremely high.”³⁰²

Federal policy reform might occur, but forming a coalition to pass such measures could be challenging. Rather, state-level policy should drive this path forward. As the leader in pork production, Iowa can and should be a leader in transforming the landscape of agriculture in a post-Proposition 12 nation. As a result, this Note argues that the moratorium on CAFOs should be joined by legislation that aggressively encourages smaller family farms to counteract the industry’s further consolidation. This Part will advocate for a moratorium on CAFOs, looking to North Carolina as an example and identifying potential pitfalls to avoid in Iowa. Then, this Part will identify the best legislation Iowa could pass to encourage small-family farm growth.

A. ADVOCATING FOR A MORATORIUM ON CAFOs

North Carolina’s pork industry exploded toward the end of the twentieth century.³⁰³ North Carolina State University economist Tomislav Vukina identified that “[t]he primary engine of this dramatic growth was the swine industry’s transition to a market structure defined by production contracts between integrators/processors and independent farmers. These contractual relationships bind farmers (growers) to specific husbandry practices in exchange for monetary compensation that is insulated from market price volatility.”³⁰⁴ Yet, this extreme growth did not come without a cost, and North Carolina instituted a moratorium on new and expanded swine farms in 1997.³⁰⁵ This “moratorium was made permanent in 2007 for farms that use anaerobic waste lagoons [for] their primary waste treatment.”³⁰⁶

300. Conner Hendricks, *‘Unintended Consequences’ Harvard Law School Says EATS Act Could Backfire on Iowa Farmers*, KCRG.COM (July 26, 2023, 6:23 PM), <https://www.kcrg.com/2023/07/26/unintended-consequences-harvard-law-school-says-eats-act-could-backfire-iowa-farmers> [https://perma.cc/A9DS-XNKJ].

301. MCGILL ET AL., *supra* note 162, at 65–66.

302. *Id.* at 4.

303. Tomislav Vukina, *The 1997 Moratorium on Construction or Expansion of Swine Farms: A Tale of Unintended Consequences*, N.C. ST. ECONOMIST, Mar.–Apr. 2023, 1, 1, https://cals.ncsu.edu/agricultural-and-resource-economics/wp-content/uploads/sites/46/2023/12/Economist_MarchApril2023final.pdf [https://perma.cc/MPF2-C28S].

304. *Id.*

305. *Program Summary: Facts About North Carolina’s Animal Feeding Operations Program*, N.C. DEP’T ENV’T QUALITY, <https://www.deq.nc.gov/about/divisions/water-resources/water-quality-permitting/animal-feeding-operations/program-summary> [https://perma.cc/4NFH-SCXg].

306. *Id.* For an abbreviated explanation about anaerobic lagoons:

Anaerobic lagoons are large man-made ponds, typically ranging between [one to two] acres in size, and up to [twenty] feet deep. They are used widely for treatment of agricultural wastewater resulting from meat production, as well as treatment of other

The moratorium has been highly effective because “the number, location, and size of swine farms in North Carolina have remained unchanged since 1997.”³⁰⁷ Still, even when there are incentives to upgrade their facilities, farmers have refused to do so. One such example of an incentive is that there is “substantial cost-shar[ing] for operators to upgrade their lagoons and implement [environmentally superior technologies].”³⁰⁸ Despite this encouragement, there have only been eleven applicants and eight participants in the program.³⁰⁹

There is significant demand from the Iowa electorate for a moratorium on CAFOs. Sixty-three percent of Iowans believe that the state should pass a moratorium on CAFOs,³¹⁰ which has resulted in increased activity from individual state representatives. State Representative Art Staed has introduced CAFO moratorium legislation.³¹¹ Over the past several years, Representative Art Staed has reintroduced the bill, and the number of cosponsors has increased.³¹² However, the bill is considered “dead on arrival” and does not have much support because—even though the Iowa electorate wants a moratorium—lawmakers have significant relationships with industrial agriculture.³¹³ The moratorium is considered the state lawmakers’ most radical proposal.³¹⁴ Supporters of CAFOs “claim that CAFOs are an economic necessity” to preserve the affordability of

industrial wastewater streams, and as a primary treatment step in municipal wastewater treatment. Wastewater is typically piped into the bottom of the lagoon, where it settles out to form an upper liquid layer, and a semi-solid sludge layer. The liquid layer prevents oxygen from reaching the sludge layer, allowing a process of anaerobic digestion to break down the organic materials in the wastewater. On average, this process can take as little as a few weeks, or up to six months to bring BOD/COD levels to the target range. Anaerobic bacteria favor certain environmental conditions, such as warm water temperatures ([eighty-five to ninety-five degrees Fahrenheit]) and a near-neutral pH, therefore, maintaining optimal conditions will enhance the rate of anaerobic microorganism activity, resulting in a shorter wastewater detention time. The rate of anaerobic respiration can also be limited by a number of factors, including fluctuations in BOD/COD concentration, and presence of substances such as sodium, potassium, calcium, and magnesium.

What Is Anaerobic Wastewater Treatment and How Does it Work?, SAMCO, <https://samcotech.com/an-aerobic-wastewater-treatment-how-it-works> [<https://perma.cc/4KW6-CHLG>].

307. Vukina, *supra* note 303, at 2.

308. Nicole, *supra* note 278, at A188.

309. *Id.*

310. GREENBERG QUINLAN ROSNER, JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, NATIONAL SURVEY ON CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) 41 (2019), <https://clf.jhsph.edu/sites/default/files/2019-12/CAFO-moratorium-survey-results.pdf> [<https://perma.cc/28FA-7YZB>].

311. H. File 2305, 89th Gen. Assemb., Reg. Sess. (Iowa 2022).

312. Art Staed, *Opinion: Iowans Deserve a Clean Environment—that Means No More Factory Farms*, DES MOINES REG. (Feb. 8, 2022, 5:15 AM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2022/02/08/factory-farm-moratorium-iowa-we-deserve-clean-environment/6694612001> [<https://perma.cc/3WNB-WSMC>].

313. James Q. Lynch, *Iowa CAFO Bill Unlikely to Move Forward*, IOWA FARMER TODAY (Feb. 17, 2021), https://agupdate.com/iowafarmertoday/news/state-and-regional/iowa-cafo-bill-unlikely-to-move-forward/article_692f48aa-708f-11eb-a5a3-c3f10e614318.html [<https://perma.cc/ST8W-FGPX>].

314. *Id.*

meat, milk, cheese, and eggs for American consumers.³¹⁵ Furthermore, Iowa's economy is interlinked with factory farming; thus, changing the factory farming status quo would be detrimental to the agricultural industry and Iowa's economy.

B. ENCOURAGING SMALLER FAMILY FARMS

A moratorium alone will not resolve the problems facing rural communities. Thus, Iowa should be cautious in passing a moratorium on CAFOs. Tomislav Vukina has found that a moratorium on CAFOs has led to further consolidation of the industry in North Carolina.³¹⁶ This is the opposite of what Iowa should hope to achieve. Vukina argues that “[b]y establishing a firm cap on industry expansion through a production quota system, the moratorium effectively created a barrier to entry into swine production.”³¹⁷ Unsurprisingly, “[f]arm size and wealth are positively related.”³¹⁸ As such, a moratorium would have to be accompanied by other legislation. In fact, legislation that actively encourages smaller farms can prevent what happened in North Carolina from occurring in Iowa.

A ban is likely to fail, as evidenced by Eighth Circuit case law.³¹⁹ Though the antidiscrimination principle is not utilized by the Petitioners in *National Pork Producers Council*, the antidiscrimination principle is incredibly revealing of the types of challenges that the Iowa Legislature will face in passing legislation that supports and encourages smaller family farms. There are two notable cases in the Eighth Circuit where the appellate court struck down amendments prohibiting corporations from farming: *South Dakota Farm Bureau, Inc. v. Hazeltine*³²⁰ and *Jones v. Gale*.³²¹ In both instances, the Eighth Circuit criticized the states for their lack of research into less discriminatory alternatives.³²² If Iowa were to explore less discriminatory alternatives, a ban

315. Ikerd, *supra* note 237.

316. Vukina, *supra* note 303, at 4 (describing that the concentration in North Carolina was “more pronounced” than the national industry).

317. *Id.* at 2.

318. ASHOK K. MISHRA, HISHAM S. EL-OSTA, MITCHELL J. MOREHART, JAMES D. JOHNSON & JEFFREY W. HOPKINS, U.S. DEP’T OF AGRIC., REP. NO. 812, INCOME, WEALTH, AND THE ECONOMIC WELL-BEING OF FARM HOUSEHOLDS 22 (2002).

319. See *infra* notes 321–23 and accompanying text.

320. *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 587 (8th Cir. 2003). The Eighth Circuit in *South Dakota Farm Bureau, Inc. v. Hazeltine* criticized the South Dakota Legislature for not evaluating alternative solutions and trying to find a less discriminatory mechanism to achieve their goals of protecting family farms, stating the report “contains no evidence that suggests, evaluates, or critiques alternative solutions.” *Id.* at 597. In fact, the Eighth Circuit suggests several alternatives citing a report entitled: *A Time to Act: A Report of the USDA National Commission on Small Farms*. *Id.* (explaining that “the State could implement an initiative to optimize the labor and resources of small farm operators. . . . [T]he State could create an oversight process to regulate contracts between corporations and syndicates and South Dakota farmers” (citation omitted)). Thus, the Eighth Circuit seemed to suggest that this amendment could have been permissible. See *id.*

321. *Jones v. Gale*, 470 F.3d 1261, 1271 (8th Cir. 2006). The Eighth Circuit struck down an amendment to the Nebraska Constitution that prohibited farming or ranching by corporations except for family farms. *Id.* Like the court in *Hazeltine*, the Eighth Circuit in *Gale* criticized Nebraska for not exploring alternatives to the prohibition of the corporations farming. See *id.* at 1270–71.

322. *Id.* at 1270; *Hazeltine*, 340 F.3d at 597.

is more likely to survive; however, the case law surrounding a ban is not promising. Despite these setbacks prohibiting corporate farming, the Eighth Circuit has long held that promoting family farms is a legitimate state interest.³²³ Thus, Iowa could utilize this nexus to anchor any legislation accused of violating the dormant Commerce Clause. If Iowa explores its options and determines that there are no less discriminatory alternatives (if the state is accused of such behavior), then it is likely that any legislation will be held as constitutional under the dormant Commerce Clause.

Thus, the legislation should focus on the relationship between corporations and farmers. First, Iowa should pass a statute that regulates the contract process between corporations and independent farmers. It is apparent that “[p]roduction under contract can infringe upon the competitiveness of the open cash market, particularly in regional and local markets where contract usage is high.”³²⁴ Thankfully, Iowa regulates the contract process already by making confidentiality provisions illegal.³²⁵ The Iowa Legislature should continue to level the playing field by furthering transparency. This change could occur by requiring the disclosure of basic provisions to the Iowa Department of Agriculture & Land Stewardship.³²⁶ Iowa should then adopt language like Proposition 12, requiring that any livestock or commodity sold, slaughtered, or processed in Iowa is subject to these rules. Relying on *National Pork Producers Council* and Eighth Circuit precedent, it is likely that such legislation would survive any challenges after doing significant research because promoting small family farms is a legitimate state interest.³²⁷

Second, the state subsidies should be tailored toward small farms rather than large ones. Subsidies that encourage the formation of cooperatives would produce numerous benefits. First, creating cooperatives would allow farmers to compete more directly with industrial operations.³²⁸ Being a part of a cooperative “provide[s] a potential means for farmers to capture a greater share of the value of their product.”³²⁹ Additionally, federal law protects farming cooperatives.³³⁰ Utilizing the federal framework as a baseline, Iowa can emphasize

323. See *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (“We agree with the district court that [promoting family farm operations] represents a legitimate state interest . . .”).

324. VOLKMER ET AL., *supra* note 48, at 56.

325. IOWA CODE § 202A.4 (2024).

326. Cf. *How Corporate Control Squeezes Out Small Farms*, PEW (July 18, 2012), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2012/07/18/how-corporate-control-squeezes-out-small-farms> [<https://perma.cc/R5GH-F458>] (explaining that disclosure of basic contract provisions to the USDA could level out the playing field federally).

327. See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 388 (2023) (describing that even though it impacts out-of-state producers, California has a legitimate state interest); *Jones v. Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006); *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, 597 (8th Cir. 2003).

328. VOLKMER ET AL., *supra* note 48, at 58.

329. *Id.*

330. 7 U.S.C. § 291 (“Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged.”).

the value that cooperatives bring to rural communities. The cooperatives will “keep[] more dollars in their local and regional economies instead of exporting raw commodities (and dollars) away from rural communities.”³³¹

CAFOs are not the only path forward. In fact, sustainable pork agriculture that is not reliant on industrialized factory farms has a history in Iowa. Niman Ranch, a subsidiary of Perdue Farms, is a network of 740 farmers who engage in sustainable and humane agricultural practices.³³² Niman Ranch expanded to pork production when it “met farmer Paul Willis of Thornton, Iowa.”³³³ Paul Willis has operated the Willis Free Range Pig Farm since 1975.³³⁴ Companies like Niman Ranch can produce at the same scale as other large-scale operations. Niman Ranch is the supplier of Chipotle, demonstrating its capability to produce pork at the scale of large producers.³³⁵ Further investment into sustainable agriculture would demonstrate that there are viable alternatives to factory farming.

Furthermore, the state can provide support by offering programs that help small farmers navigate the regulatory framework.³³⁶ Small farmers often lack the resources to engage in these endeavors.³³⁷ By providing state support through financial, legal, or even marketing research, smaller farmers will be able to be more competitive when they are beginning operations—their most vulnerable stage.³³⁸ Utilizing its universities, the Iowa Legislature could call upon the University of Iowa and Iowa State University to facilitate these programs. The University of Iowa College of Law could create a free agricultural legal clinic that could assist small, independent farmers. A legal clinic geared toward small farmers would ensure the advocacy they deserve. The Iowa Legislature could also look to the Agriculture Law Center at the Drake University Law School to provide more coverage to the state. On the other hand, Iowa State University could provide technical expertise, and the University of Iowa could provide low-cost legal advice. Iowa State University already provides free information about the basics of cooperatives online.³³⁹ The State can support this endeavor by dedicating more public funds to cooperative research at Iowa State University. Universities could and should play a pivotal role in this transition toward more sustainable agriculture. The Iowa Legislature has numerous tools at its disposal to support small farms and revitalize rural communities.

331. VOLKMER ET AL., *supra* note 48, at 58.

332. *About Niman Ranch*, NIMAN RANCH, <https://www.nimanranch.com/about-niman-ranch> [<https://perma.cc/K45V-6PgB>].

333. *Id.*

334. Brief for Perdue Premium Meat Co., Inc. as Amici Curiae Supporting Respondents at 1, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023) (No. 21-468).

335. *See Treated with Respect*, CHIPOTLE, <https://realfoodprint.chipotle.com/human-nature/treated-with-respect> [<https://perma.cc/9QU7-EYX9>].

336. VOLKMER ET AL., *supra* note 48, at 71.

337. *Id.*

338. *Id.*

339. *Cooperatives*, IOWA ST. U.: EXTENSION & OUTREACH, <https://www.extension.iastate.edu/agdm/cooperatives.html> [<https://perma.cc/R2HU-JJPG>].

CONCLUSION

The *National Pork Producers Council* decision provides the Iowa Legislature an opportunity to stop and smell the manure. Iowa's marriage to industrial agriculture has resulted in significant economic, human health, and environmental harm. Although industrial agriculture has provided prosperity for a select few, it has not improved conditions for many Iowans. The quality of life for rural Iowans has declined while the number of CAFOs has risen. Rather than doubling down on CAFOs, Iowa should reinvent itself and pivot to a more sustainable future that will benefit Iowans. Sustainable farms can produce pork and other livestock at a large scale. Iowa should implement a moratorium on CAFOs and support small farmers who have been the lifeblood of our rural communities. This decision ensures a much more sustainable path forward and ensures that Iowa will navigate the Proposition 12 market appropriately.