

6-2017

# Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs

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### Recommended Citation

Ernesto A. Hernández-López, *Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs*, 7 U.C. IRVINE L. REV. 347 (2017).  
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# Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs

Ernesto Hernández-López\*

*Animal welfare policies focused on food production cook up significant constitutional controversies. Since 2008, California has tried to ban the sale of certain edible items made from animals. Eaters and farmers challenge these policies, citing economic discrimination and preemption by federal statutes, in violation of the Constitution’s Dormant Commerce and Supremacy Clauses, respectively. This food-and-animal jurisprudence includes pork products in *National Meat Association v. Harris* (2012); foie gras in *Association des Éleveurs de Canards et D’Oies du Québec v. Harris* (2013) and *Association des Éleveurs de Canards et D’Oies du Québec v. Becerra* (2017); shark fins in *Chinatown Neighborhood Association v. Harris* (2015); and eggs in *Missouri v. Harris* (2016). These cases regard California’s animal welfare policies to ban: pork products from “downer” swine, who are immobile; force-feeding ducks to make foie gras; shark fins used in soup in Chinese cuisine; and eggs from hens housed in battery cages. These policies raise legal questions beyond what is inhumane, forcing courts to decide if Californian food choices create barriers to interstate commerce or conflict with federal food statutes on meat, poultry, and marine conservation. This Article argues that state-level food policies improving animal treatment will face judicial inquiry, balancing preventing animal cruelty with federal concerns for economic discrimination, uniformity, and costs passed on to eaters and food producers. This Article identifies how California policies exemplify larger conflicts placing states and animal advocates against eaters and farmers. Constitutional law will serve as an important ingredient to settle these stewing conflicts.*

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## INTRODUCTION

What happens when California tries to improve how animals are treated in food production by banning the sale of foie gras, shark fin, and certain kinds of pork and eggs? Simmering constitutional debates begin to appear between state-level policies and federal legal doctrines. Disputes over the Constitution's Dormant Commerce Clause<sup>1</sup> and Supremacy Clause<sup>2</sup> fuel this fire between those who try to

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1. The Dormant Commerce Clause operates as a limitation on states enacting laws that impose substantial burdens on interstate commerce. *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). It is a judicial doctrine interpreting the Constitution's Commerce Clause in Article I, Section 8, cl. 3. U.S. CONST. art. I, § 8, cl. 3.

2. This Article describes how the preemption doctrine, interpreting the Supremacy Clause, Constitution Article VI, clause 2, is used to displace state regulation when federal law encompasses the subject field. U.S. CONST. art. VI, cl 2.

advance animal welfare<sup>3</sup> and those who defend eating choices under the “food freedom”<sup>4</sup> banner. Since 2008, California has attempted to limit animal cruelty in food industries with policies directed at slaughtering immobile swine called “downers;”<sup>5</sup> foie gras, liver from force-fed ducks;<sup>6</sup> shark fins;<sup>7</sup> and eggs from hens in large-scale housing called “battery cages.”<sup>8</sup> California has looked to state power to address animal suffering, argued to be intrinsic to eating and making these foodstuffs. In response, California has tried to ban the sale or possession of these edible items.

Four recent court cases involving California show how disputes about animals in food production simultaneously examine the Constitution and food. The disputes address downer slaughter in *National Meat Association v. Harris* (2012);<sup>9</sup> foie gras in *Association des Éleveurs de Canards et D’Oies du Québec v. Harris* (2013) (*Association des Éleveurs I*) and *Association des Éleveurs de Canards et D’Oies du Québec v. Becerra*

3. For descriptions of animal welfare, see Temple Grandin, *Animal Welfare and Society Concerns Finding the Missing Link*, 98 MEAT SCI. 461 (2014) (summarizing how animal welfare regimes are applied to different meat industries); Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63 (2011) (describing how animal cruelty laws are not applied to agriculture and the abuse and mistreatment animals experience).

4. For scholarly and policy literature on “food freedom” issues, see generally BAYLEN LINNEKIN & MICHAEL BACHMANN, THE ATTACK ON FOOD FREEDOM (2014), [http://ij.org/images/pdf\\_folder/economic\\_liberty/perspectives-food-freedom.pdf](http://ij.org/images/pdf_folder/economic_liberty/perspectives-food-freedom.pdf) [<https://perma.cc/4WZU-H96S>]; David J. Berg, *Food Choice Is a Fundamental Liberty Right*, 9 J. FOOD L. & POL’Y 173 (2013); Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 737 (2013); Samuel R. Wiseman, *The Dangerous Right to Food Choice*, 38 SEATTLE U.L. REV. 1299 (2015).

5. Effective in 2010, California Penal Code Section 599f attempted to prohibit the buying, selling, or receiving nonambulatory animals; processing, butchering or selling their meat; or holding these animals without humane euthanasia. CAL. PENAL CODE § 599f (West 2010), *invalidated by Nat’l Meat Ass’n v. Harris* (*Nat’l Meat Ass’n*), 132 S. Ct. 965 (2012).

6. Made operative in 2012, California Health and Safety Code Section 25981 prohibits force-feeding a bird for the purpose of “enlarging the bird’s liver.” CAL. HEALTH & SAFETY CODE § 25981 (2004) (effective Jan. 1, 2005). Section 25982 attempted to prohibit selling any product “in California if it is the result of force-feeding a bird for the purpose of enlarging [its liver].” CAL. HEALTH & SAFETY CODE § 25982 (2004) (effective Jan. 1, 2005).

7. Passed in 2011, California Fish and Game Code section 2021(b) prohibits anyone from possessing, selling or offering to sell, trade, or distribute a shark fin. CAL. FISH & GAME CODE § 2021(b) (West 2017).

8. In 2008, California voters voted for Proposition 2, which prohibits cruel confinement of farm animals inside California. CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION, OFFICIAL VOTER INFORMATION GUIDE 82 (Aug. 11, 2008). Effective on January 1, 2015 as the Prevention of Farm Animal Cruelty Act (codified as amended at CAL. HEALTH & SAFETY CODE §§ 25990–25994 (2008) (operative Jan. 1, 2015)), Proposition 2 bars housing egg-laying hens in cages that prevent them from standing, laying, turning, or extending their limbs fully. CAL. HEALTH & SAFETY CODE § 25990; *see also* Alys Masek & Eric. C Surette, 3 CAL. JUR. 3D *Animals* § 186 (2014). In 2010, the California legislature passed AB-1437, which requires out-of-state egg farmers to comply with the requirements of Proposition 2 when selling eggs in California. AB-1437, 2009–2010 Leg., Reg. Sess. (Cal. 2010) (codified as amended at CAL. HEALTH & SAFETY CODE § 25995 (2010) (effective Jan. 1, 2011); CAL. HEALTH & SAFETY CODE § 25996 (2010) (amended 2013) (effective Jan. 1, 2014). Its regulations are in California Department of Food and Agriculture Shell Egg Food Safety regulation 1350(d). CAL. CODE REGS. tit. 3, § 1350(d)(1) (2013).

9. *Nat’l Meat Ass’n*, 132 S. Ct. at 966 (finding federal meat inspection statutes preempted California downer slaughter ban and euthanasia requirements).

(2017) (*Association des Éleveurs II*);<sup>10</sup> shark fin in *Chinatown Neighborhood Association v. Harris* (2014);<sup>11</sup> and eggs in *Missouri v. Harris* (2016) (*California Egg Case*).<sup>12</sup> As sales bans affecting food industries outside California, it is nearly impossible for these policies not to impact interstate commerce. These effects lead to litigation and fuel constitutional inquiry about commerce to and from California. Moreover, these policies potentially conflict with federal meat and poultry inspections regimes.<sup>13</sup> As more eaters, voters, and legislators nationwide seek state-level animal welfare reforms aimed at food industries, the Constitution becomes the bold menu choice to settle debates between animal protection and food.<sup>14</sup>

This Article makes two arguments. First, it argues that state policies regulating food choices and animal treatment will face judicial inquiry balancing state concerns for animal welfare with federal concerns for economic discrimination, regulatory uniformity, and costs passed on to eaters and producers. Second, it claims that this litigation leads to larger federalism debates, implying political food fights over state measures and eventual federal rules on farm animal treatment. To illustrate this, this Article describes California's four examples of downer pig slaughter, foie gras, shark fins, and battery-cage eggs. They exemplify how California passes laws to limit animal cruelty on farms and in food industries. Humanitarian objectives motivated California to enact these measures. Legal arguments sourced in the Constitution inform opposition to these policies. Specifically, Dormant Commerce Clause claims argue that state policies on animals and food economically discriminate and are protectionist. This federal doctrine's general objective is to protect interstate commerce within the United States. Farmers, restaurants, fishermen, fish merchants, butchers, and meat processors have argued that banning food sales inside California violates this, whether directed at foie gras, shark fins, or eggs.<sup>15</sup> Next, Supremacy Clause arguments aver that federal laws displace these state

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10. *Ass'n des Éleveurs de Canards et D'Oies du Québec v. Harris* (*Ass'n des Éleveurs I*), 729 F.3d 937, 952 (9th Cir. 2013) (finding California's ban on foie gras sales did not violate the Dormant Commerce Clause), *cert. denied*, 135 S. Ct. 398 (2014); *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra* (*Ass'n des Éleveurs II*), 870 F.3d 1140 (9th Cir. 2017) (finding that the Poultry Products Inspection Act (PPIA) does not preempt California's foie gras sales ban), *rev'g* 79 F. Supp. 3d 1136 (C.D. Cal. 2015).

11. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015), *cert. denied*, No. 15-798, 2016 WL 2945289 (May 23, 2016) (finding California's ban on possessing or selling shark fins did not violate the Dormant Commerce Clause and was not preempted by federal fisheries conservation policies).

12. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (2016); *see also Missouri v. Harris*, 58 F. Supp. 3d 1059, 1063 (E.D. Cal. 2014) (finding Missouri and other state plaintiffs lacked standing to sue California for its sale ban on battery cage eggs).

13. *See infra* Part III.A (discussing the Federal Meat Inspection Act (FMIA) and downer slaughter ban) and Part III.B.ii (discussing the Poultry Products Inspection Act (PPIA) and foie gras sales ban).

14. *See* Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 L. & INEQ. 363, 376–78 (2005) (describing state efforts to regulate animal confinement, slaughter, tail docking, and force-feeding).

15. *See Chinatown Neighborhood Ass'n*, 794 F.3d at 1139–40; *Ass'n des Éleveurs I*, 729 F.3d at 942, 947.

policies as “preempted.” This preemption doctrine identifies when federal statutes trump state policies.<sup>16</sup> It is argued that federal meat and poultry inspections or marine conservation policies displace these Californian measures.<sup>17</sup> These four California controversies point to a legal debate, pitting “animal protection versus food choice” and “state bans versus federal protections for interstate commerce and preemption.”

California’s push to seek food equity, with improved animal welfare, sparks federalism contests. This Article refers to “food equity” as “the adverse effects” of “food production-related environmental contamination,” involving how animals are treated in fishing, slaughter, and farming.<sup>18</sup> These moral, humanitarian, and food debates are about what can be eaten or sold as food, but these policies engender debates about constitutional ordering between state and federal authority. As explained below, federal law is relatively “hands-off” for animal treatment on farms.<sup>19</sup> For this reason, animal advocates seek state-level reforms.<sup>20</sup> Federal law displaces state policies with doctrines based on the Constitution’s Dormant Commerce Clause and Supremacy Clause. Said simply, as states try to protect animals, these federal doctrines will be looked at to trump these policies.

Feeding off this backdrop, this Article provides a working constitutional law and policy menu, to make sense of how state concerns for animals shape a food equity debate. These contests are slow-cooked and deep in constitutional inquiry. California exemplifies a trend that will easily repeat itself in other states. Many states have passed or are posed to enact similar animal welfare measures, directed at food consumption and food production.<sup>21</sup> This will impact farms, ranches, fisheries, and

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16. Preemption inquiries also shape how food-labeling requirements are applied. See Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 399 (2013); Pamela A. Vesilind, *Emerging Constitutional Threats to Food Labeling Reform*, 17 NEXUS 59, 63–64 (2012).

17. See *Nat’l Meat Ass’n*, 132 S. Ct. at 968; *Chinatown Neighborhood Ass’n*, 794 F.3d at 1139; *Ass’n des Éleveurs II*, 870 F.3d at 1147.

18. This Article uses the examples of California’s four recent measures to predict that state-level animal welfare rules applied to food production will create constitutional law controversies, over the Dormant Commerce Clause, federal preemption, and state goals of animal protection. Animal welfare laws address the “food equity” concern of “protection from food production-related environmental contamination,” as defined by this Symposium. *UC Irvine School of Law: 2016 Food Equity Symposium*, U.C. IRVINE SCHOOL OF LAW, <http://www.law.uci.edu/events/food-equity/2016/> [https://perma.cc/43GU-XEX4] (last visited Nov. 9, 2016).

19. See *infra* note 29.

20. See Kreuziger, *supra* note 14, at 395–401.

21. For a description of state-level initiatives—voter and legislative—banning gestation crates, including Florida’s state constitution litigation and similar bans by Arizona, Oregon, Colorado, and California, see SONIA S. WAISMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 400–01 (5th ed. 2014). Other examples include an initiative petition in approved in Massachusetts in the November 2016 election. See Mass., An Act to Prevent Cruelty to Farm Animals, Bill H.3930 189th (2015–2016), <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter333> [https://perma.cc/K4DZ-9UWZ]; Andy Rosen, *SJC Approves Ballot Question on Cage-free Eggs*, THE BOSTON GLOBE (July 6, 2016), <https://www.bostonglobe.com/metro/2016/07/06/sjc-approves-ballot-question-cage-free-eggs/jYsOQkFPD1mOUdiksajavO/story.html>

slaughterhouses as well as food consumption in markets, restaurants, and kitchens. Federal law will fuel challenges from farmers, eaters, and food industries. At the risk of oversimplifying, the agricultural industry prefers federal law and animal advocates and conservationists favor state law.<sup>22</sup> Looming constitutional contests brew with a national market for food items made from animals and as states try to protect farm animals. With animal welfare laws states can change how food is made and what is eaten. Specifically, California has tried to improve animal treatment in food production with four distinct measures. It passed legislation prohibiting the slaughter of downer pigs, also called nonambulatory, which are immobile and potentially sick.<sup>23</sup> California has banned the sale of foie gras, or liver from force-fed ducks.<sup>24</sup> Next, it moved to end the market for shark fins, used in celebratory soups in Chinese cuisine, by banning the possession or sale of this item.<sup>25</sup> Lastly, California mandated that eggs, whether from in-state or out-of-state producers, only come from hens raised in cages permitting animal movement.<sup>26</sup> This effectively bans egg sales from the popular battery cages used in most egg farms throughout the United States. California argues that these policies help stop the inhumane treatment of pigs in meat production, ducks subjected to cruel force-feeding, wasteful and cruel killing of endangered sharks, and egg farming with inhumane hen housing. These policies were developed in California with rationalizations determining what can be sold as food in California. But, their impact is much wider. They try to influence food's consumption and production outside California with bans on in-state sales of items produced outside the state. As legal food fights develop, courts must decide if California's public food choices create barriers to interstate commerce or conflict with federal law on meat, poultry, or marine life.

This Article describes this constitutional food fight, questioning equity for animals in food production, and helps make sense of similar measures and expected reforms outside California. Part II describes why the subject of animals and food is ripe for constitutional inquiry, since federal law is relatively hands-off regulating welfare for farm animals. Part III describes California's recent animal-and-food jurisprudence, involving *National Meat Association* and an attempted state ban on the slaughter of nonambulatory animals; *Association des Éleveurs* regarding the state ban on selling foie gras; a state prohibition on possessing or selling shark fins in *Chinatown Neighborhood Association*; and the *California Egg Case*, which focused on a state ban on selling eggs from hens raised in battery cages.

The following Parts illustrate how courts have sided with state-level animal welfare interests for foie gras, shark fins, and eggs. They also show how courts have

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[<https://web.archive.org/web/20170122040945/https://www.bostonglobe.com/metro/2016/07/06/sjc-approves-ballot-question-cage-free-eggs/jYsOQkFPD1mOUdiksajavO/story.html>].

22. Colin Kreuziger argues that farm advocates should seek reform for animal welfare in state and local level legislation. Kreuziger, *supra* note 14, at 364.

23. CAL. PENAL CODE § 599f, *invalidated by Nat'l Meat Ass'n*, 132 S. Ct. 965.

24. CAL. HEALTH & SAFETY CODE § 25982 (West 2010).

25. CAL. FISH & GAME CODE § 2021(b) (West 2013).

26. CAL. HEALTH & SAFETY CODE §§ 25990–25996 (West 2010).

sided with food producers by prioritizing national regulatory uniformity for downer slaughter. From these four examples, Part II describes the controversial food item, California's policy, the legal decision, and how courts interpret animals and legal protection. Part III identifies two lessons from these food-and-animal welfare cases. One regards the political food fight created when states try to protect animals in food industries. The second regards a doctrinal jockeying over food-and-animal welfare between state authority and potential federal statutes. The Conclusion ends by predicting the Constitution's role in future animal welfare policies.

#### I. FEDERAL LAW "HANDS-OFF" FARM ANIMALS INVITES CONSTITUTIONAL INQUIRY

Constitutional law is often taught and interpreted as the body of law that orders relationships between the federal government and states, the federal government's branches, and rights in federal law provided to individuals.<sup>27</sup> This Part identifies constitutional arguments in recent efforts to protect state-level animal welfare and federal challenges to them based on the Dormant Commerce and preemption doctrines. Importantly, federal law is "hands-off" animal protection in farming. This provides the opening for agricultural and food industries to raise lawsuits based on these two doctrines. California's recent food fights suggest that food and animal protection will be resolved with constitutional law. Larger moral questions about food and animal cruelty will be debated with court examination into economic discrimination and who absorbs the costs of improved animal treatment (i.e. Dormant Commerce Clause inquiry) and regulatory uniformity (i.e. preemption inquiry). Since protections for animals in the food industry likely lead to economic costs on farmers and merchants, there are many reasons to challenge these policies. Animals are central to farming and many eating practices. An added complexity is that animals are often seen as unprotected by constitutional law and liberal legal doctrines, which are more focused on legal subjects, rights, and property.<sup>28</sup> In sum, federal inaction for animal welfare on farms and the general legal status of animals fuel current moral debates between animal protection and food freedom.

Farmers, the food industry, and eaters look to federal law to challenge animal welfare innovations passed at the state level. These reforms contrast federal power in two important ways. One is that federal law is relatively "hands-off" for animals in agriculture. Accordingly, states may break new ground with animal welfare reforms. David J. Wolfson and Mariann Sullivan describe animals as practically

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27. This definition summarizes Ernest Young's description of how American constitution law generally focuses on the form of the Constitution versus emphasizing what constitutional law does. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 412 (2007).

28. See generally LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL JURISPRUDENCE (Yokiro Otomo & Ed Mussawir eds., 2013) (describing how the notion of animal rights is shaped by how humans view animals' existence in relation to persons and consequentially their status as legal subjects); Mariann Sullivan, *Consistently Inconsistent: The Constitution and Animals*, 19 ANIMAL L. 213 (2013) (arguing that jurisprudence on animals is inconsistent, both protecting and supporting animal harm, because public sentiments regarding animals are similarly irreconcilable).

disappearing from federal law.<sup>29</sup> They are only protected in very specific and limited protections in the Animal Welfare Act (AWA), which is limited to animals in research and excludes animals on farms; the Humane Methods of Slaughter Act (HMSA), protecting farm animals only when slaughtered and excludes poultry; and the Twenty-Eight Hour Law, requiring animals be unloaded while transported for long trips and until recently exempting poultry and nontrain travel, e.g. trucks.<sup>30</sup> Animal rights and animal welfare advocates argue that this lack of federal attention supplements the cruelty animals suffer due to protections for husbandry customs and property rights enjoyed by farmers and ranchers.<sup>31</sup> Moreover, industrial agriculture interests contest any legislation, state or federal, addressing animal welfare in food production.<sup>32</sup> Agricultural associations launch lobbying and litigation challenges against animal protection.<sup>33</sup> Plainly, federal law is unlikely to take on the policy objectives California has with bans on downer slaughter, foie gras sales, shark fin possession and sales, and battery-cage eggs.

The second contrast regards how federal law fuels constitutional challenges against these state innovations. In these cases, plaintiffs cite impacts on interstate commerce or conflict with federal statutes. Dormant Commerce Clause claims have been argued by foie gras farmers from New York and Canada in *Association des Éleveurs*, fish merchants in *Chinatown Neighborhood Association*, and six states noting economic losses for their egg farmers in the *California Egg Case*.<sup>34</sup> Also, food industry litigants raise preemption claims. Federal law has been argued as displacing

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29. David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 206–09 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

30. Wolfson & Sullivan, *supra* note 29, at 206–09. The AWA has been enacted as sections 2131 to 2159 of Title 7 of the U.S. Code. *See* 7 U.S.C. §§ 2131–2159 (2012). The Twenty-Eight Hour Law has been enacted as section 80502 of Title 49 of the U.S. Code. *See* 49 U.S.C. § 80502 (2012). The HMSA enacted at sections 1901–1907 of Title 7 of the U.S. Code. *See* 7 U.S.C. §§ 1901–1907 (2012). For descriptions of how the AWA does not apply to farm animals, see 11 NEIL E. HARI, AGRICULTURAL LAW § 87.02, LEXIS (database updated 2017).

31. *See* Cass R. Sunstein, *Introduction: What are Animal Rights?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 3, 11 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (describing how when animals are viewed as property, their rights and status before the law is severely limited). *See generally* Pamela Vesilind, *Animal Husbandry Redux: Redefining “Accepted Agricultural Practices” for Locally Sourced Food*, 28 NAT. RESOURCES & ENV’T, Fall 2013, at 37 (describing how husbandry practices provide industrial agricultural ways to treat animals inhumanely).

32. For descriptions of how industrial agriculture benefits from excluding animals from welfare protection measures, see David N. Cassuto, *Meat Animals, Humane Standards and other Legal Fictions*, 10 L. CULTURE & HUMAN. 225 (2014); Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643 (2004). Tadlock Cowan writes that for federal animal protections in agriculture, Congress prefers voluntary versus regulatory measures. *See* TADLOCK COWAN, CONG. RES. SERV., RS21978, HUMANE TREATMENT OF FARM ANIMALS: OVERVIEW AND ISSUES (2011).

33. *Id.*

34. *Ass’n des Éleveurs I*, 729 F.3d at 947; *Chinatown Neighborhood Ass’n*, 794 F.3d 1136; *Missouri*, 58 F. Supp. 3d 1059.

California's downer policies the Federal Meat Inspection Act (FMIA),<sup>35</sup> foie gras sales ban by the Poultry Products Inspection Act (PPIA),<sup>36</sup> and shark fin ban by federal fish conservation programs.<sup>37</sup> Pork product sellers in *National Meat Association*, foie gras growers in *Association des Éleveurs II*, and fish merchants in *Chinatown Neighborhood Association* argued this, respectively.<sup>38</sup> Given federal inattention to animal cruelty on farms and the national impacts of sales bans on food items, the Dormant Commerce and preemption doctrines are the legal instruments used to try to roll back animal protections in food production and food sales.

Dormant Commerce claims derive from the Constitution's affirmative grant that the federal government has exclusive power "to regulate Commerce . . . among several States," called the Commerce Clause.<sup>39</sup> Sometimes referred to as the Negative Commerce, Dormant Commerce doctrine operates as a limitation on states enacting laws that impose substantial burdens on interstate commerce.<sup>40</sup> They are presented as "dormant" since Congress is argued to have the power to regulate this commerce but has not passed legislation to that effect. State policies impact this silence or inaction of the federal government. Importantly, the Dormant Commerce Clause seeks to protect the market and market participants, trying to guard the domestic free flow of goods and services across state borders in the United States. Mostly, this focuses on striking state laws that discriminate against out-of-state actors, favor in-state actors, or unduly burden interstate commerce.

Preemption doctrine is derived from the Constitution's Supremacy Clause, stating that "the Laws of the United States . . . shall be the supreme Law of the Land."<sup>41</sup> In its simplest incarnation, federal preemption inquiry can look at Congress's explicit intent to displace state legislation or to its explicit intent to save these state measures.<sup>42</sup> Many times though, this area of law is more complex, with states increasingly passing laws in subject areas where the federal government also regulates, and vice versa; the federal government has moved into fields that state authorities have occupied. Likewise, federal statutes may be passed without an explicit statement to displace state legislation.

There are three kinds of federal preemption: expressed, field, and conflict.<sup>43</sup> Expressed preemption looks at when Congress has explicitly stated it intends to

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35. *Nat'l Meat Ass'n*, 132 S. Ct. at 968. See generally Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (2012).

36. *Ass'n des Éleveurs II*, 870 F.3d at 1146–53.

37. *Chinatown Neighborhood Ass'n*, 794 F.3d at 1140.

38. *Nat'l Meat Ass'n*, 132 S. Ct. at 970; *Chinatown Neighborhood Ass'n*, 794 F.3d at 1140–41; *Ass'n des Éleveurs II*, 870 F.3d 1140.

39. See U.S. CONST. art. I, § 8, cl. 3.

40. See *Nat'l Ass'n of Optometrists & Opticians*, 682 F.3d at 1147.

41. U.S. CONST. art. VI, cl. 2.

42. See *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1986).

43. These categories were generally described in *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368–69 (1986). The Court has also explained that these

displace state law. Federal statutes will have an expressed preemption clause that a court examines. Often this inquiry focuses on whether the state measure is within the scope of the federal preemption clause. The next category, field preemption, is applied when there is no preemption clause in the federal statute. For this, courts look to whether federal regulation in the area is so pervasive that it is reasonable to infer that Congress did not leave room for state involvement. This inquiry often emphasizes the federal interest in the field of regulation. Also applicable when there is no preemption clause, conflict preemption examines if a party can comply with both federal and state requirements. When a party cannot comply with both, or when state compliance is an obstacle to federal objectives, a state law will be trumped by conflict preemption.

In sum, with these two doctrines, Dormant Commerce and preemption, eaters and food industries try to strike state animal welfare laws. Constitutional law enters the fray after voters, eaters, animal advocates, environmentalists, and state legislators move to curb alleged abuses in food production and food consumption.

## II. CALIFORNIA PROTECTS ANIMALS AND HEATS CONSTITUTIONAL INQUIRY

This Article next examines the Constitution's recent path in litigation about California's animal welfare policies since 2008. Jonathan Lovvorn and Nancy Perry, Vice-Presidents of the Humane Society of the United States (HSUS), referred to this year as a "watershed moment for animal law" when voters approved Proposition 2.<sup>44</sup> The Proposition was a turning point in the HSUS campaign for minimal humane standards for farm animals. Lovvorn and Perry explain how Proposition 2, also known as the Farm Animal Cruelty Act, coincided with cattle slaughter, beef recall scandals, and the looming enforcement of a ban on foie gras. Proposition 2 did not just lead to enacting a new set of animal cruelty rules for farms in the nation's most populous and economically powerful state with a leading agricultural sector. More importantly, it signaled a "seismic shift in public attitudes towards animals raised for food."<sup>45</sup> California is not so much a leader in these new public perceptions, but its actions reflect what many states have been doing with animal welfare regulations applied to farming.<sup>46</sup> Animal welfare is posed to increasingly regulate what Americans eat as and what is produced as food. Because

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categories are not rigid. *See* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

44. Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 150 (2009).

45. *See id.* at 150.

46. California is often seen as the vanguard in food developments, in terms of agriculture, eating trends, and state regulations. *See generally* Baylen J. Linnekin, *The "California Effect" & the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 CHAP. L. REV. 357 (2010); JOYCE GOLDSTEIN WITH DORE BROWN, *INSIDE THE CALIFORNIA FOOD REVOLUTION: THIRTY YEARS THAT CHANGED OUR CULINARY CONSCIOUSNESS* (2013).

these trends occur at the state level, they marinate as constitutional legal questions, potentially clashing with interstate commerce and federal law.

In short, California represents a new popularity and political viability for public rules focused on animals in food production. In policy terms, these safeguards for animals, derived out of concern for cruelty and animal conservation, include bans directed at four things: downer animals, foie gras, shark fins, and battery-cage eggs. These bans achieved two important things in California: they eliminated distinct methods of food production, and made it illegal to commercially sell products from these methods. This second point is directed at activities outside California. It reflects California's specific goals to eliminate the economic incentives to continue the four allegedly cruel practices. It is argued by some food producers that their illegality in California will help eliminate these practices nationwide.<sup>47</sup> These commercial impacts fuel Dormant Commerce and preemption doctrine disputes, with out-of-state food producers looking to the Constitution to contest California in court. Farming industries rely on decades of environmental and animal cruelty norms being hands-off federal law. The four legal fights described below set the table for how big agriculture will fight animal welfare rules in the future. With this backdrop, this Part describes the policies, constitutional litigation, and legal results of California banning A) downer slaughter; B) the practice of force-feeding ducks to create foie gras and the sale of foie gras; C) commerce in or possession of shark fins; and D) battery-cage housing for hens on egg farms.

#### *A. Downer Slaughter: Federal Inspections Displace California Swine Protections*

California's efforts to require humane animal slaughter provide this Article's first example of questioning animal welfare's constitutional legality. In *National Meat Association v. Harris*, the Supreme Court affirmed that the FMIA displaces California's animal welfare measures. This prioritizes uniform national meat inspection regulations over state interests in humane swine slaughtering. A complex debate over intricate statute distinctions, between California's criminal law and federal meat inspections, reflect this judicial balancing, ultimately siding against state-level animal welfare.

This Section presents this dissonance between California's efforts for improved animal welfare and existing federal authority. This illuminates why a simple preemption case, purportedly about a meat inspection statute and state-level conflict, reflects a larger constitutional debate about animals welfare, food, and states' rights. For this, the Section first describes the political and popular attention motivating a ban on downer slaughter and California's attempt to regulate this with criminal law. This provides a backdrop to then identify the larger and brewing constitutional controversy subtly appearing in the unanimous decision in *National Meat Association*.

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47. See Linnekin, *supra* note 46, at 363–67.

The context for *National Meat Association* began on January 1, 2010 when California's ban on slaughtering downer animals became effective with California Penal Code Section 599(f).<sup>48</sup> This section applied to nonambulatory animals, also called downers, who are "unable to stand and walk without assistance."<sup>49</sup> It prohibited buying, selling, or receiving a nonambulatory animal as well as processing or selling the meat or products of such animal.<sup>50</sup> Furthermore, it mandated that slaughterhouses take "immediate action to humanely euthanize" animals that have become nonambulatory after their arrival.<sup>51</sup> California's ban focused on the operation or process of a particular type of slaughter. These California regulations contrast federal measures. Federal law permits in certain instances meat can be sold from these slaughterers.<sup>52</sup> In short, California prohibits an action and federal law protects the potential sale of an item resulting from the action.

Pamela Vesilind describes downers as animals that have passed visual inspection by the U.S. Department of Agriculture Federal Food Safety Inspection Service (FSIS) upon initial arrival at a facility.<sup>53</sup> Downers are unable to move or are lame due to exhaustion or a fractured bone.<sup>54</sup> California passed this measure after the public controversy of the Hallmark/Westland slaughter facility in Chino, California.<sup>55</sup> Humane Society investigators released reports of downer cows at this facility unable to move along the slaughter line being rammed by forklifts, jabbed in the eye, shocked electrically, and sprayed with high-pressure water.<sup>56</sup> These actions were taken to ensure the cows were slaughtered. This avoided economic losses from line removal.

Adding to these cruelty concerns, downer cows may be inflicted with Bovine Spongiform Encephalopathy (BSE or "mad cow disease").<sup>57</sup> Eventually, these images led to public outcry and the largest meat recall in American history, since Hallmark/Westland was the second-largest supplier of meat to the National School Lunch Program.<sup>58</sup> While this controversy involved cattle, California's downer slaughter ban that was passed in 2009 applied to cattle, swine, sheep, and goats.<sup>59</sup> Federal regulations prohibit downer cattle slaughter,<sup>60</sup> but the California ban went

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48. See CAL. PENAL CODE § 599f (West 2010 & Supp. 2016), *invalidated by Nat'l Meat Ass'n*, 132 S. Ct. 965.

49. *Id.* § 599f(i).

50. *Id.* § 599f(a)–(b).

51. *Id.* § 599f(c).

52. See *Nat'l Meat Ass'n*, 132 S. Ct. at 969.

53. See Pamela Vesilind, *Preempting Humanity: Why National Meat Ass'n v. Harris Answered the Wrong Question*, 65 ME. L. REV. 685, 690 (2013).

54. See *id.*

55. See Lovvorn & Perry, *supra* note 44, at 156–58.

56. See *id.*

57. See Vesilind, *supra* note 53, at 690–91.

58. See Nancy Perry & Peter Brandt, *A Case Study on Cruelty to Farm Animals: Lessons Learned from the Hallmark Meat Packing Case*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 119 (2008).

59. CAL. PENAL CODE § 599f(j) (West 2010), *invalidated by Nat'l Meat Ass'n*, 132 S. Ct. 965.

60. See 9 C.F.R. § 309.3(e) (2016). For a description of how "young calves" have been exempted from this ban on cattle downer slaughter and other federal and state downer regulations, see Animal

further than just cows. Federal slaughter regulations, applied to cattle and swine, are contained in the meat inspection regime, enforced by FSIS.<sup>61</sup>

Pork farmers and pork product sellers stood to lose a great deal from California's downer slaughter ban.<sup>62</sup> Downer swine account for .05 to 1% of the pigs that make it to a pork processing plant.<sup>63</sup> From a cruelty perspective, animal advocates argued that nonambulatory animals should not be killed and processed into meat.<sup>64</sup> These swine are sick and it is inhumane to kill them. Federal law requires the humane slaughter of pigs and other animals, but enforcement of these measures is often seen as lacking.<sup>65</sup>

Concerns for mad cow disease motivate the California and existing federal slaughter bans on cattle. But for swine, health concerns are not so clear. Research shows that downer pigs result in pork meat of lower quality.<sup>66</sup> Removing downers from the slaughter line is viewed as an enormous economic loss, since downer pigs are fully matured at this point. Taking them off the line eliminates most commercial options for which the animal had been raised and cared for. From a critical perspective, others argue that swine are raised in unhealthy and weak conditions to decrease production costs and increase profits. Docile pigs are easier to care for and can be raised in larger numbers. When downers arrive at the slaughterhouse, they are not an aberration, but actually the result of industrial objectives to keep the animals weak and easy to raise in feed lots.<sup>67</sup>

In 2012's *National Meat Association*, the Supreme Court unanimously held that California's ban on downer slaughter was preempted by the FMIA.<sup>68</sup> Seen in preemption terms, the decision was a small but direct way for federal law to displace state-level policy regulating humane animal slaughter.<sup>69</sup> The Court interpreted the

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Welfare Inst., *Legal Protection for Nonambulatory (or "Downed") Animals* (2014), <https://awionline.org/sites/default/files/uploads/documents/fa-legalprotectionsfordownedanimals-12262013.pdf> [https://perma.cc/L5FZ-HX6W].

61. For a description of how FSIS enforces meat inspection and humane methods of slaughter, see GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS22819, *USDA MEAT INSPECTION AND HUMANE METHODS OF SLAUGHTER ACT* (2008).

62. Vesilind explains that downers are usually the result of objectives to maximize meat production. Vesilind, *supra* note 53, at 690.

63. See S.N. Carr et al., *A Survey of Pork Quality of Downer Pigs*, 16 J. MUSCLE FOODS 298 (2005).

64. See Lovvorn & Perry, *supra* note 44, at 156–58. See generally PERRY & BRANDT, *supra* note 130; Marya Torrez, *Health and Welfare Preempted: How National Meat Association v. Harris Undermines Federalism, Food Safety, and Animal Protection*, 10 J. FOOD L. & POL'Y 35, 61–63 (2014).

65. See Bruce Friedrich, Note, *When the Regulators Refuse to Regulate, Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L.J. 197, 204 (2015); Emma Burgess Roy, Note, *Cruelty on Your Plate: The Misadministration of the Humane Methods of Slaughter Act*, 3 MID-ATL. J. ON L. & PUB. POL'Y 104–06 (2015).

66. See generally Carr et al., *supra* note 63, at 301–03.

67. Cf. Andrea M. Repphun, *Pigs-In-A-Blanket: How Current Meat Inspection Regulations Wrap America in False Security*, 16 DRAKE J. AGRIC. L. 183, 201–02 (2011).

68. See *Nat'l Meat Ass'n*, 132 S. Ct. at 967.

69. For descriptions of scope of the FMIA and its preemption clause, see NEIL E. HARI, *supra* note 30, §§ 65.01–65.02.

FMIA broadly and clearly, with no dissent or competing interpretations by the justices. The *National Meat Association* court presents governmental authority as plainly delineated. This regards state-level authority and federal statutes enforced by the FSIS. This clarity dissipates when the holding is interpreted in light of animal welfare law's muted, if not negated, role in agriculture and food production. California's attempt to guarantee humane slaughter of swine ran into not only the FMIA, but the larger discord with federal law's "hands-off" approach to animals in agriculture.

In 2008, California passed measures banning nonambulatory animal slaughter.<sup>70</sup> It amended the California Penal Code, Section 599(f), to require two things: a prohibition on downer slaughter, and humane euthanasia of any downer animal on the slaughter line.<sup>71</sup> Specifically, this barred any selling, buying, receiving, processing, or butchering of a product from a downer animal.<sup>72</sup> Also, it required immediate removal of these animals from the slaughter line and required them to be euthanized.<sup>73</sup> The provision banned any holding on to a "nonambulatory animal without taking immediate action to humanely euthanize the animal."<sup>74</sup> Any infraction of these provisions could lead to a one-year jail sentence and \$20,000 fine.

Quickly, a group of meatpackers and processors filed suit against California to enjoin enforcement of these provisions.<sup>75</sup> Eventually, the Supreme Court ruled against California and for the meatpackers finding FMIA Section 678 preempts state law.<sup>76</sup> Specifically, it noted that the FMIA barred "additional or different" state regulations regarding the "premises, facilities, or operations" mentioned in the FMIA.<sup>77</sup> With the goals of safe meat production and humane slaughtering, Congress had passed the FMIA in 1906 in response to public outcry following various meatpacking controversies mentioned in the book *The Jungle*.<sup>78</sup> The FMIA had been amended in 1958 with the Humane Methods of Slaughter Act (HMSA).<sup>79</sup> This regulatory scheme was expansive and offered little room for conflict by additional or different state requirements.<sup>80</sup>

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70. *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1096 (9th Cir. 2010).

71. *See* CAL. PENAL CODE § 599f(a)–(c) (West 2010), *invalidated by Nat'l Meat Ass'n*, 132 S. Ct. 965.

72. *See* CAL. PENAL CODE §599f(a) (barring slaughterhouses and other food sellers from buying, selling, or receiving); CAL. PENAL CODE §599f(b) (barring slaughterhouses from processing, butchering or selling meat or productions of nonambulatory animals).

73. *See* CAL. PENAL CODE § 599f(c).

74. *Id.*

75. *Nat'l Meat Ass'n*, 132 S. Ct. at 970.

76. *Id.* at 975.

77. *Id.* at 970.

78. *Id.* at 968.

79. *Id.* (referring to HMSA, 72 Stat. 862, 7 U.S.C. §§ 1901–07).

80. *See id.* at 969.

California's ban on using downer animals and its euthanasia requirement created a new regulatory scheme.<sup>81</sup> This conflicted with Congress's mandated requirements for downer and its expressed intent to displace state regulation in this area.<sup>82</sup> The specific difference between California and federal requirements involved what could be done with the nonambulatory animal. The FMIA allows for downer animals to be classified as "U.S. Suspect," by the FSIS, and separated for a postmortem exam, but not taken off the line.<sup>83</sup> They are slaughtered and then their carcass is inspected by an FSIS inspector. If the inspector looks at the carcass and deems the downer unsafe, then, it will be classified as "U.S. Condemned."<sup>84</sup> This classification removes them from being processed or sold for consumption.

This is quite different than what California tried to do. California Penal Code Section 599(f) tried to mandate no use of the downer animal and its required euthanasia.<sup>85</sup> The Court described this as a new regulatory regime and in conflict with the FMIA.<sup>86</sup> The California position would bar any use of the animal, arguing it is unsafe and inhumane to slaughter them. The FMIA reflected a different position.<sup>87</sup> It looked at downer animals not always as unsafe and that for many reasons they could be immobile at this point. Post-death examinations allow for inspectors to determine if there is health concern for human consumption from the animal. Similarly, California argued that it was inhumane to slaughter or eat these animals. The FMIA allowed for a further step of inspection before condemning the animal.

The Supreme Court's view that the FMIA and the California provision conflicted in terms of "operations" differed greatly from how the lower court saw the issue.<sup>88</sup> The U.S. Court of Appeals for the Ninth Circuit found the FMIA inapplicable, focusing on what becomes destined to be slaughtered or not.<sup>89</sup> Authored by Judge Kozinski, the appellate opinion in *National Meat Association* saw no express preemption in the FMIA.<sup>90</sup> It viewed California's ban and euthanasia requirements as taking animals off the slaughter line. Since it removed what would be slaughtered and could be inspected, the FMIA was inapplicable. California's requirements were viewed as doing something before the FMIA applies. Animal welfare advocates have agreed with this lower courts approach, arguing that the FMIA provides a minimum level of regulation that states can add to.

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81. *See id.* at 970.

82. *Id.*

83. *See Nat'l Meat Ass'n*, 132 S. Ct. at 969; *see also* Vesilind, *supra* note 53, at 690–91 (describing the FSIS inspection process at a slaughter facility).

84. *Nat'l Meat Ass'n*, 132 S. Ct. at 968.

85. *Id.* at 970–71.

86. *Id.* at 970.

87. *Id.* at 971–72.

88. *See id.* at 972.

89. *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1099 (9th Cir., 2010).

90. *Id.* at 1096.

The Supreme Court's holding in *National Meat Association* points to the conflict that exists between federal laws and state efforts to improve animal welfare. Here, a federal statute is seen as having wide-reaching coverage. It regards humane slaughter and meat safety with Congress's intention to expressly preempt state law. While on the losing side of the debate, a state, California in this example, attempted to craft protections for animals.

In sum, California's efforts to prohibit nonambulatory slaughter lose out to federal law as a result of the Supremacy Clause. From an animal and food perspective, *National Meat Association* illustrates that federal preemption doctrine can displace the humanitarian objectives of state law to stop the slaughter of sick swine. In this case, expressed preemption ruled out the lower court's view that federal meat inspection statutes only apply to animals that will be killed for meat.<sup>91</sup> State criminal law was interpreted as in conflict with a federal regime focused on meat safety and humanitarian slaughter. For animal welfare advocates and states, the only way to overcome this federal bar would be to seek a legislative change at the federal level, limiting the FMIA's preemption clause's reach. With *National Meat Association's* ruling, pig farmers and the meat industry would be less vulnerable to the economic loss of a downer animal taken off the slaughter line, months after being raised, fed, housed, and transported. In animal welfare terms, the FMIA and the Supreme Court do not regard the bar on downer slaughter as an issue for state authority once an animal reaches the slaughterhouse. Conceivably, downer protections could be implemented before then. In terms of food production, *National Meat Association* shows how states cannot prohibit an operation or a process ultimately resulting in food that federal law authorizes and intentionally preempts. In short, when animal welfare conflicts with federal norms on meat inspection, state law must cede. This ultimately prioritizes regulatory uniformity over state interest in stopping cruelty directed at downers.

*B. Foie Gras: A Sales Ban Does Not Discriminate and Does Not  
Conflict with Federal Requirements*

Foie gras serves as this Article's second example of a constitutional questioning of California's animal welfare policies, with lawsuits challenging the law on Dormant Commerce Clause and then preemption grounds.<sup>92</sup> In terms of the Dormant Commerce clause, courts have found the California's sales ban on foie gras does not discriminate, since Californian and non-Californian purveyors are

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91. *See id.*

92. Soon after California passed its foie gras ban, legal scholarship began predicting if the ban was legal or not under dormant commerce clause grounds. *See generally* Alexandra R. Harrington, *Not All It's Quacked Up To Be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law*, 12 DRAKE J. AGRIC. L. 303, 318–19 (2007) (arguing that the attempts to ban foie gras contained in foie gras legislation constitute violations of the Dormant Commerce Clause, and the policy behind these bans does not fall within the zone of protected legislative activity), Erica Williams Morris, Note, *Foie Gras Ban in California*, 45 GOLDEN GATE U.L. REV. 5 (2014) (suggesting that plaintiff in *Ass'n des Eleveurs I*, 729 F.3d 947, could have succeeded with a Commerce Clause argument).

subject to the same bar. For this doctrine, courts have sided with California's efforts to protect animals from alleged cruel treatment in feeding.<sup>93</sup> The U.S. Court of Appeals for the Ninth Circuit has also sided with California finding no preemption in the PPIA.<sup>94</sup>

In 2004, California made foie gras effectively illegal in the state, by banning force-feeding of a bird to enlarge its liver and by prohibiting the sale of any product resulting from force-feeding. Foie gras is made by feeding a duck or goose to the point that its liver grows greatly, developing complex proteins affecting its flavor. Foie gras is a product steeped in centuries of history, described by food writers in ancient Egypt and valued as an expensive delicacy.<sup>95</sup> In North America, foie gras producers raise ducks and not geese. The Israeli Supreme Court has also prohibited foie gras production.<sup>96</sup> But these efforts have not prohibited the sale of foie gras. Recently in the United States, foie gras has been the subject of myriad debates in court, with animal rights groups arguing it is a diseased (adulterated) product<sup>97</sup> or unlawfully sold when served off the menu.<sup>98</sup> In 2006, Chicago banned the sale of foie gras, which the city council eventually repealed in 2008.<sup>99</sup> Interest groups trying to preserve foie gras, mostly farmers and restaurants, also argue that California's efforts violate due process standards since its prohibition has vague requirements.<sup>100</sup> California argues that it merely prohibits force-feeding, which is a process, and that foie gras as fattened liver can still be sold or possessed.<sup>101</sup> Legal contests over foie gras in California have an extended history. Hillary Dixler charts a decade of these disputes in the state, including animal cruelty, breach of contract, meat labeling, and

93. See *Ass'n des Éleveurs I*, 729 F.3d at 952.

94. See *Ass'n des Éleveurs II*, 870 F.3d at 1148.

95. See MARK CARO, *THE FOIE GRAS WARS: HOW A 5,000-YEAR-OLD DELICACY INSPIRED THE WORLD'S FIERCEST FOOD FIGHT* 23–33 (2009); MICHAEL GINOR ET AL., *FOIE GRAS: A PASSION* 2–3 (1999).

96. For description of the Israeli Supreme Court banning foie gras, see Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, *LAW & CONTEMP. PROBS.*, Winter 2007, at 139, 143–54.

97. See *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. 2:12-cv-4028-ODW(PJWx), 2013 WL 1191736, at \*1 (C.D. Cal. Mar. 22, 2013) (finding foie gras not adulterated per PPIA), *rev'd & remanded*, 632 F. App'x 905 (9th Cir. 2015); see also Stephen Wells, *The Only Thing Unadulterated About Foie Gras is the Cruelty*, *HUFFINGTON POST* (Nov. 5, 2015, 8:50 AM), [http://www.huffingtonpost.com/stephen-wells/only-thing-unadulterated-about-foie-gras-cruelty\\_b\\_8474728.html](http://www.huffingtonpost.com/stephen-wells/only-thing-unadulterated-about-foie-gras-cruelty_b_8474728.html) [<https://perma.cc/R5K5-RM38>].

98. See *Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1275 (2015).

99. See *Ill. Rest. Ass'n v. City of Chicago*, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007) (finding no economic discrimination and thus no dormant commerce clause violation). See generally Michaela DeSoucey, *"Ducking" the Foie Gras Ban: Dinner and a Side of Politics in Chicago*, in *POLITISCHE MAHLZEITEN: POLITICAL MEALS* 81 (Regina F. Bendix & Michaela Fenske eds., 2014), <http://ncsu.academia.edu/MichaelaDeSoucey> [<https://perma.cc/5KHV-9XX3>] (examining the chef and eater protests of the Chicago ban); Joshua I. Grant, *Hell to the Sound of Trumpets: Why Chicago's Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Laws*, 2 *STAN. J. ANIMAL L. & POL'Y* 52 (2009) (providing history of the product, description of Chicago's policy, and Dormant Commerce Clause analysis).

100. See *Ass'n des Éleveurs I*, 729 F.3d at 946–47.

101. *Id.* at 944.

consumer law claims, along with concurrent advocacy and reform efforts nationwide.<sup>102</sup>

This Article focuses on Dormant Commerce Clause and preemption arguments in foie gras litigation, since they reflect similar trends in other animal and food cases. Moreover, courts primarily focus on these issues about competing federal and state authority. Before examining these doctrinal debates, this Section first describes California's foie gras ban, then foie gras as a food item, and the arguments in support and against its prohibition. Finally, this Section presents the legal debate posed by the ban. Importantly, California's efforts to ban foie gras have been seen by courts as focused on the process of force-feeding and on the ingredient derived from ducks. Dormant Commerce Clause jurisprudence has found the ban legal since it only focuses on the activity of force-feeding and does not ban foie gras made without force-feeding.<sup>103</sup> Likewise, preemption jurisprudence has found federal poultry inspection requirements do not trump California's foie gras sales ban.<sup>104</sup>

California's prohibition on foie gras comes from relatively simple changes to the California Health and Safety Code. In 2004, the California legislature passed Sections 25981 and 25982, banning force-feeding birds and sales of products from this force-feeding, respectively.<sup>105</sup> Section 25981 merely states a "person may not force feed a bird for the purpose of enlarging the bird's liver beyond normal size."<sup>106</sup> Section 25982 adds that "a product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."<sup>107</sup> Section 25980 defines "force feeding" as a "process that causes the bird to consume more food" than it would "voluntarily," and includes but is not limited to "delivering feed through a tube or other device inserted into the bird's esophagus."<sup>108</sup> The definition of a bird includes but is not limited to a duck or goose.<sup>109</sup> A period of seven and a half years was allotted by the legislature between January 1, 2005, and July 1, 2012, when California's foie gras bans became operative.<sup>110</sup> The legislature did this to allow "agricultural practices that include raising and selling force fed birds" to be modified.<sup>111</sup>

These provisions effectively made standard foie gras consumption and production illegal in California. The only way to either produce or sell foie gras in the state would be if a bird was not force-fed. If birds voluntarily consumed enough

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102. Hillary Dixler, *The Decade-Long Foie Gras Fight, Explained*, EATER (Jan. 9, 2015), <http://www.eater.com/2015/1/9/7513743/foie-gras-ban-california-history-appeal-peta-aldf> [https://perma.cc/99JK-F1TL].

103. *See Ass'n des Éleveurs I*, 729 F.3d at 949–50.

104. *See Ass'n des Éleveurs II*, 870 F.3d at 1146.

105. CAL. HEALTH & SAFETY CODE § 25981 (West 2010); *id.* § 25982.

106. *Id.* § 25981.

107. *Id.* § 25982.

108. *Id.* § 25980(b).

109. *Id.* § 25980(a).

110. *Id.* §§ 25984(a)–(c).

111. *Id.* § 25984(c).

to enlarge their liver, that would be conceivably legal under California's new changes.<sup>112</sup> This policy was not a surprise when passed; it had been the concerted effort of animal rights groups in California, nationwide, and overseas. Moreover, the new policy provided substantial time, seven and half years, for farmers and sellers to adapt their businesses. When the changes were passed, there was one foie gras farmer in California. It became the subject of much litigation and legal attention, went out of business after the ban.<sup>113</sup> Foie gras farmers still heavily invest in successful operations in New York and Canada, making these California provisions legal concerns for out-of-state growers, in-state eaters and sellers, and interstate commerce.

Foie gras is an extremely controversial food item. In 2013, the Ninth Circuit attempted an objective description of the feeding process.<sup>114</sup> It notes that ducks grow fully in eleven to thirteen weeks, developing in four feeding stages.<sup>115</sup> In the first three stages of growth, the ducks are fed pellets. In the first stage, for four weeks right after birth, the ducks eat pellets available to them in pans twenty-four hours a day.<sup>116</sup> In the second stage, for one or two month(s), the pellet varieties change but are still accessible all day and night.<sup>117</sup> In the third stage, for two weeks, ducks eat pellets "at only certain times during the day," with the farmer choosing eating times.<sup>118</sup> For the final and most controversial stage, called *gavage*, the ducks are "hand-fed by feeders who use 'a tube to deliver the feed to the crop sac at the base of the duck's esophagus.'"<sup>119</sup> *Gavage* lasts between ten and thirteen days. This last stage, a fraction of the duck's life, feeds the complex debates on animal cruelty and the consequent conflicts on federal and state authority.

Foie gras defenders praise its rich and unique taste, gastronomic importance as a luxurious item emphasizing an animal's physical ability to prepare for seasons.<sup>120</sup>

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112. Gaining much food and news notoriety, a farm in Spain has succeeded in producing foie gras without force-feeding. See Dan Barber, *The Farmer Who Makes "Ethical" Foie Gras*, GUARDIAN (Jan. 18, 2015, 4:30 AM), <https://www.theguardian.com/world/2015/jan/18/the-farmer-who-makes-ethical-foie-gras> [<https://perma.cc/ZE6Y-G79X>].

113. Sonoma Foie Gras is owned by Guillermo Gonzalez. For his description of intimidation by animal rights advocates and unfulfilled promises by California to research cruelty-free foie gras production, see Ryan Maxey, *In the Words of a Foie Gras Farmer: An Interview with Guillermo Gonzalez of Sonoma Artisan Foie Gras*, SFGATE: INSIDE SCOOP SF (June 29, 2012, 11:37 AM), <http://insidescoopsf.sfgate.com/blog/2012/06/29/in-the-words-of-a-foie-gras-farmer-an-interview-with-guillermo-gonzalez-of-sonoma-artisan-foie-gras/> [<https://perma.cc/V9RV-TJ5S>]. For recent news about the farm's reemergence, see Jay Weston, *The Inside Story How Foie Gras Returned to California!*, HUFFINGTON POST (Apr. 24, 2015, 3:51 PM), [http://www.huffingtonpost.com/jay-weston/the-inside-story-how-foie\\_b\\_7126660.html](http://www.huffingtonpost.com/jay-weston/the-inside-story-how-foie_b_7126660.html) [<https://perma.cc/PV9M-K3J2>].

114. See *Ass'n des Éleveurs I*, 729 F.3d at 942.

115. *Id.* at 942, 946.

116. *Id.* at 942.

117. *Id.*

118. *Id.*

119. *Id.*

120. For a succinct defense of foie gras, see *Top 5 Facts About Foie Gras*, ARTISAN FARMERS ALLIANCE, <http://www.artisanfarmers.org/factsaboutfoiegras.html> [<https://perma.cc/S3AW-FAGD>] (last visited July 5, 2016).

It is a reminder of meat eating before refrigeration and chemical preservation. Since ducks and geese are not endangered, foie gras bans are argued to force-feed morality.<sup>121</sup> One of foie gras's most vocal defenders in the United States, Michael Ginor, founder of Hudson Valley Foie Gras, is a litigant in the most recent cases against California. Ginor explains in the book *Foie Gras: A Passion* that a goose or duck is different than a human and their anatomy is different, for example, geese and ducks are particular prepared for long migrations.<sup>122</sup> For this reason, the birds naturally enlarge their liver after gorging on food. Foie gras defenders also argue that the bird naturally has a different gag-reflex than humans, with its throats and digestive system allowing eating fish and other items whole.<sup>123</sup> For this reason, tubes used to force-feed are not cruel to the birds. Poultry researchers add that examinations of bird hormone levels show no stress from force-feeding and that since an enlarged liver is reversible the condition is not a disease.<sup>124</sup>

Foie gras critics see the animal as suffering from force-feeding and offer various ethical and physiological arguments against *gavage*.<sup>125</sup> They argue that the feeding with a tube inserted down the bird causes injuries to their throats and digestive organs. Furthermore, they claim that this force-feeding causes suffering to the bird, evident in their walking, breathing, standing, and effects on their joints, feet, and skin. Next, it is alleged that the birds develop a variety of diseases and injuries to their respiratory and digestive system.<sup>126</sup> This results in a high rate of mortality for birds subjected to *gavage*.

These culinary, farming practices, ethical, and animal welfare arguments feed debates on whether prohibitions on foie gras are legal. Larger concerns shape these attitudes as well, regarding governmental intervention in choosing what we may eat and the agriculture industry's suspicion of regulation, especially regarding animal welfare. With this context, in foie gras disputes, courts do not directly examine what is cruel or permitted in force-feeding birds. Instead, bans are viewed as potentially illegal because of their impact on state and federal authority.

1. *The Ban Does Not Discriminate Against Out-of-State Interests or Substantially Burden Interstate Commerce.*

*Association des Éleveurs I* provided the first national legal attention to California's ban. A lawsuit was filed by the Association des Éleveurs (a group of duck and geese farmers from Canada), Hudson Valley Foie Gras (a duck farm and

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121. See Jonathan Gold, *With Foie Gras Ban, Chefs Say State Is Force-Feeding Morality*, L.A. TIMES (June 27, 2012), <http://articles.latimes.com/2012/jun/27/food/la-fo-0628-foie-gras-20120628> [<https://perma.cc/K3SE-Q7BC>].

122. See GINOR ET AL., *supra* note 95, at 81.

123. See Gold, *supra* note 121; ARTISAN FARMERS ALLIANCE, *supra* note 120.

124. See Daniel Guéméné et al., *Force Feeding: An Examination of Available Scientific Evidence*, ARTISAN FARMERS ALLIANCE 5 (2006), [http://www.artisanfarmers.org/images/Foie\\_Gras\\_Study\\_by\\_Dr\\_Guemene.pdf](http://www.artisanfarmers.org/images/Foie_Gras_Study_by_Dr_Guemene.pdf) [<https://perma.cc/9CZF-4YNS>].

125. These arguments are summarized by Grant. See Grant, *supra* note 99, at 88–92.

126. *Id.*

foie gras purveyor from New York), and Hot's Restaurant in Hermosa Beach, California.<sup>127</sup> The dispute has reached finality on the Dormant Commerce claims (*Association des Éleveurs I*), with the U.S. Supreme Court denying a writ of certiorari from the Association des Éleveurs, which appealed the Court of Appeals for the Ninth Circuit upholding the ban.<sup>128</sup> In 2014, Nebraska and twelve other states filed an amicus curiae brief in the Supreme Court, arguing that California's ban violated the Dormant Commerce Clause.<sup>129</sup> The position of these states, along with significant agriculture industries, signaled that the food fight was not just over a specialty duck product, but instead was about larger issues of state-level regulations of farming.<sup>130</sup> Recently, the Court of Appeals for the Ninth Circuit upheld the ban on PPIA preemption grounds (*Association des Éleveurs II*).<sup>131</sup>

On August 30, 2013, in *Association des Éleveurs I*, the Court of Appeals upheld California's ban with no dissent filed by the panel.<sup>132</sup> The court held that Section 25982 barring foie gras sales in California was not a violation of the Dormant Commerce Clause. It reached three important findings, two focused on direct impacts on interstate commerce and the third examining indirect impacts.<sup>133</sup> First, it held that the ban does not discriminate against out-of-state producers. California prohibits how an item is made, with force-feeding in this case, but not where the item is made. For this analysis, Section 25982 was interpreted as focused on a production method. Regarding Dormant Commerce Clause analysis, the court held that California regulated a process, used during *gavage*, and absent this, foie gras could still be sold in California. The panel reasoned that the item of foie gras was not taken out of the stream of commerce, just that the act of *gavage* to make the item for sale in California was barred.

Second, the court held that the ban did not directly regulate interstate commerce.<sup>134</sup> The prohibition is not aimed at out-of-state producers since Californian and non-Californian farmers and purveyors are subject to the same rules.<sup>135</sup> It specifically noted that foie gras is not prohibited, but that the ban barred sales of items resulting from force-feedings. Foie gras can still be sold in California if it is not produced with force-feeding. Importantly, the court rejected the farmers'

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127. See *Ass'n des Éleveurs I*, 729 F.3d 937, cert. denied, 135 S. Ct. 398 (2014).

128. See *id.*

129. Thirteen states joined Nebraska in filing an amicus brief in support of Association des Éleveurs' writ of certiorari before the Supreme Court. They included: Alabama, Georgia, Iowa, Kansas, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, West Virginia, Wyoming. Brief of Amici Curiae States of Nebraska, et al. in Support of Petitioners, *Ass'n des Éleveurs I*, 729 F.3d 937.

130. See Khushbu Shah, *Thirteen States Petition the Supreme Court to Evaluate the Constitutionality of C.A.'s Foie Ban*, EATER (July 15, 2014, 7:40 AM), <http://www.eater.com/2014/7/15/6186821/thirteen-states-petition-the-supreme-court-to-evaluate-the> [https://perma.cc/B3L3-8AY9].

131. *Ass'n des Éleveurs II*, 870 F.3d 1140 (9th Cir. 2017), rev'g 79 F. Supp. 3d 1136 (C.D. Cal 2015).

132. *Ass'n des Éleveurs I*, 729 F.3d at 937.

133. *Id.* at 948, 951.

134. *Id.* at 948–49.

135. *Id.* at 948.

claims that California's ban violated the Dormant Commerce Clause because of its extra-territorial impact.<sup>136</sup> The Association des Éleveurs argued that California was regulating conduct outside of California. The farmers came from Canada and New York and did not want to be excluded from the large California market.<sup>137</sup> The court distinguished case law finding that regulating conduct outside the boundaries of a state is a Dormant Commerce Clause violation. It explained that *Healy v. Beer Institute* and *Baldwin v. G.A.F. Seelig* reasoning only apply to extra-territorial price-fixing.<sup>138</sup> In those instances, states' policies attempted to set prices out of state. Here California's ban on selling foie gras does not attempt to set prices. Lastly, the court found no effect of conflicting legislation with California's ban and other states having no such policy.<sup>139</sup> Here the concern would be that a producer could not comply with California's requirements and those of another jurisdiction. In this instance, these compliance conflicts did not exist for foie gras.<sup>140</sup>

Third, the court held that there was not a substantial burden on interstate commerce posed by barring sales of force-fed foie gras in California.<sup>141</sup> Examining these indirect effects, the court engaged in the most substantive commerce analysis and balances this with California's interests in limiting animal cruelty. Here, the test used is whether the burden on "interstate commerce is 'clearly excessive in relation to the putative local benefits,'" from *Pike v. Bruce Church*.<sup>142</sup> The court was not convinced that the foie gras market was inherently national or required uniform regulation. The Association des Éleveurs claimed it would lose over \$5 million in sales, but the court noted that this number included duck products that could still be sold in California that were not produced by force-feeding.<sup>143</sup> The economic burden the Association des Éleveurs raised was only from the more profitable method of force-feeding and not from other methods to make foie gras.

Comparing these economic burdens to California's local benefit, the court sided with California.<sup>144</sup> It noted that California had an interest in preventing animal cruelty.<sup>145</sup> It cited recent Supreme Court dicta on the history of animal cruelty law in the United States. The citation merely referenced a colonial era law, but did not refer to any animal cruelty law or farming regulations state or federal.<sup>146</sup> Importantly, California is pursuing this interest by banning force-feeding and sale inside California and importation to California. In sum, the court sided with supporting California's efforts to prevent animal cruelty in food production and not with

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136. *Id.* at 950–51.

137. *Id.*

138. *Id.* (first citing *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989); then citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

139. *Id.* at 951.

140. *Id.* at 948.

141. *Id.* at 951.

142. *Id.* (citing *Pike v. Bruce Church*, 397 U.S. 137 (1970)).

143. *Id.* at 952.

144. *Id.*

145. *Id.*

146. *Id.* (citing *United States v. Stevens*, 559 U.S. 460 (2010)).

avoiding commercial burdens for out-of-state purveyors who lose economically because of these policies.

2. *The Ban Does Not Interfere with Ingredient Requirements in Federal Poultry Inspections*

In *Association des Éleveurs II*, the duck farmers argued that the PPIA preempted California's ban on selling foie gras. In September of 2017, the Court of Appeals for the Ninth Circuit disagreed and upheld California's ban.<sup>147</sup> It overturned a district court finding from 2015 that the state's measure was expressly preempted by the "ingredient requirement" of the PPIA.<sup>148</sup> The court of appeals emphasized that this ingredient requirement regarded the physical component of poultry and California's ban on force-feeding did not interfere with this.<sup>149</sup> California regulated how poultry were treated. The PPIA did something different with its preemption that focused on slaughtering, processing, and distribution of poultry products.<sup>150</sup> It adds that California and other states do regulate poultry as well, refuting arguments that federal law displaces the field or that it is impossible to meet California and federal requirements.<sup>151</sup>

The court in *Association des Éleveurs II* explicitly discounted how the PPIA could interfere with California's objective to prevent animal cruelty. It noted that there is a presumption against preemption especially when the state has a legitimate interest. Here, California's interest in preventing animal cruelty necessitated "compelling evidence" of federal intention to displace.<sup>152</sup> As explained, the ingredient requirement of the PPIA did not reflect this federal intention. The court noted that "societal values" and "notions of acceptable food products" change and states and countries move accordingly to ban food items.<sup>153</sup> The PPIA's preemption is not an obstacle to this.<sup>154</sup>

The district court viewed things quite differently. In 2015, the court focused on foie gras as a product. It did not see fattened liver as the result of a process. Specifically, it found that the PPIA's ingredient requirements preempt Section 25982, California's sales ban.<sup>155</sup> This did not affect the ban on force-feeding in California. There is a long-term preemption debate involving the PPIA and state-level policies, regarding poultry eating and processing.<sup>156</sup> It noted that the Supreme

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147. *Ass'n des Éleveurs II*, 870 F.3d at 1153.

148. *Id.*

149. *Id.* at 1147–49.

150. *Id.* at 1150.

151. *Id.* at 1152–53.

152. *Id.* at 1146.

153. *Id.* at 1150 n.6.

154. *Id.* at 1150.

155. *See Ass'n des Éleveurs de Canards et D'oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1147 (2015) (referring to the Poultry Products Inspection Act (PPIA)) (codified at 21 U.S.C. §§ 451–470)).

156. For descriptions of preemption in the Poultry Products Inspection Act (PPIA), see NEIL E. HARI, *supra* note 30, §§ 66.01–66.02.

Court, in *National Meat Association*, found a nearly identical clause in the FMIA “swe[pt] broadly.”<sup>157</sup> The district court’s preemption finding focused on foie gras as an ingredient. California argued that it only regulates a process, which is fattening up bird livers.<sup>158</sup> The court of appeals agreed with California that only a process was banned.

In sum, of the four food item bans examined in this Article, foie gras presents the greatest doctrinal significance since appellate courts have sided with California’s animal welfare justifications twice with two distinct constitutional doctrines. For Dormant Commerce, California’s interest in preventing animal cruelty, banning foie gras sales, outweighs the economic burden suffered by duck farmers. In theory, *Association des Éleveurs I* suggests that if more of an economic impact was felt by these farmers, maybe if foie gras were not such a niche product, it would pose a Commerce Clause conflict. As is, the farmers and producers cannot overcome the *Pike* balancing test, between California’s interest in animal protection and economic burdens.<sup>159</sup> Similarly, if the foie gras ban did not apply to Californian farmers and sellers but did outside the state, it could be discriminatory and a violation of the Commerce Clause. From a preemption perspective, federal statutory inspection requirements do not displace California’s ban on foie gras sales. In *Association des Éleveurs II*, the PPIA ingredient requirements are interpreted as focusing on the physical components of poultry. This does not encompass a ban on the process of *gavage*. Moreover, the PPIA does not stand in conflict with state interests in preventing animal cruelty.

*C. Shark Fin: Banning Possession and Sale Is Legal,  
Evading Inquiry into Federal Conservation Policies*

California’s efforts to end eating shark fins points to a third constitutional debate between state and federal authority over food and animal protection.<sup>160</sup> Even though here, so far, courts have sided with the state’s animal welfare interests, these disputes reflect many of the legal arguments arising in foie gras, egg, and downer cases.<sup>161</sup> Dormant Commerce Clause and preemption doctrines shape how conflicts between food choices and animal welfare were resolved. For shark fin regulations, California has been successful in having courts side with its conservation and anticruelty objectives. Courts have found no economic discrimination in a ban on selling or possessing shark fins, with Californians and state businesses subject to the

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157. See *Ass’n des Éleveurs*, 79 F. Supp. 3d at 1144 (citing *Nat’l Meat Ass’n*, 132 S. Ct. at 970).

158. *Id.* at 1144–45.

159. See *supra* note 142.

160. For legal analysis of shark fin bans, see Carrie A. Laliberte, Comment, *Cutting the Fins Off of Federal Shark Laws: A Cooperative Federalism Approach to Shark Finning Legislation*, 46 ARIZ. ST. L.J. 979, 996–1001 (2014) (arguing against federal regulation and for increased state-level regulation); Elizabeth Neville, Note, *Shark Finning: A Ban to Change the Tide of Extinction*, 25 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 387 (2014) (describing state, federal, and international legal regulation of shark finning).

161. See *Chinatown Neighborhood Ass’n*, 794 F.3d at 1140–41.

same rules as those out of state.<sup>162</sup> Also, courts have found the ban not in conflict with federal efforts to conserve sharks with permitted shark fishing. The shark fin ban illustrates how similar political goals, in federal and state policies, facilitate the courts' legal approval.

Federal and state policies attempting to end, with criminal prosecution or fines, the eating, finning (cutting a shark's fin and discarding the animal carcass after), or trade in shark fins have been implemented since 1995.<sup>163</sup> Each subsequent measure increases the severity of fines or tries to further regulate activities while at sea, in the water, arriving on shore, and seeking a sale. These measures have the explicit objective of trying to stop fishing, selling, and eating shark fins outside California and in consumption markets outside the United States.<sup>164</sup> This Section describes shark fin consumption, policies aimed at ending this, and then constitutional law in debates raised in *Chinatown Neighborhood Association v. Harris*, specific to California's Shark Fin Law passed in 2011.<sup>165</sup> At first federal law banned the process of removing fins from sharks. Then California added to this by prohibiting the possession or sale of these fins, whether the fish was legally caught or not.<sup>166</sup> In terms of California law, the item of shark fin is illegal to possess or sell.<sup>167</sup>

Shark fin soup has been eaten for centuries, as a celebratory dish served mostly at weddings and banquets, as a traditional luxurious item in Southern Chinese cuisine.<sup>168</sup> Its recent controversy develops from concerns for shark conservation, finning's cruelty, and increased consumption by a rising class of moneyed eaters in China and other parts of Asia.<sup>169</sup> The dish's history dates back to the Ming Dynasty

162. *Id.* at 1145–47.

163. In 1995, California made it illegal to sell, deliver for commercial purposes, or possess any “shark fin or shark tail or portion” that had been “removed from the carcass.” *See id.* at 1140 (citing CAL. FISH & GAME CODE § 7704(c) (2016)). In 2000, Congress added finning bars to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), making it unlawful to remove the fins at sea, possess detached fins on a fishing vessel, transfer them to another vessel, and bring them onshore. *See id.* (citing 16 U.S.C. § 1857(1)(P) (2012)).

164. *See* Shelly Clarke et al., *Social, Economic, and Regulatory Drivers of the Shark Fin Trade*, 22 MARINE RESOURCE ECON. 305, 316, 320 (2007); Hampus Eriksson & Shelley Clarke, *Chinese Market Responses to Overexploitations of Sharks and Sea Cucumbers*, 184 BIOLOGICAL CONSERVATION 163, 170–71 (2015); Bonnie Tsui, *Opinion, Souring on Shark Fin Soup*, N.Y. TIMES: SUNDAY REVIEW (June 29, 2013), [http://www.nytimes.com/2013/06/30/opinion/sunday/souring-on-shark-fin-soup.html?\\_r=0](http://www.nytimes.com/2013/06/30/opinion/sunday/souring-on-shark-fin-soup.html?_r=0) [[https://web.archive.org/web/20170203162037/http://www.nytimes.com/2013/06/30/opinion/sunday/souring-on-shark-fin-soup.html?\\_r=0](https://web.archive.org/web/20170203162037/http://www.nytimes.com/2013/06/30/opinion/sunday/souring-on-shark-fin-soup.html?_r=0)] (describing how increases in moneyed classes and business cultures in Asia fuel shark fin demand and how consumption may decrease with changes in foodway culture and bans on finning and fin possession).

165. *See Chinatown Neighborhood Ass'n*, 794 F.3d at 1145–47.

166. *See id.* at 1140.

167. *See* CAL. FISH & GAME CODE § 7704(c) (West 2013 & Supp. 2016).

168. *See generally* Michael Fabinyi, *Historical, Cultural and Social Perspectives on Luxury Seafood Consumption in China*, 39 ENVTL. CONSERVATION 83 (2012); Gordon C.K. Cheung & Chak Yan Chang, *Cultural Identities of Chinese Business: Networks of the Shark-Fin Business in Hong Kong*, 17 ASIA PACIFIC BUS. REV. 343 (2011).

169. *See generally* Clarke et al., *supra* note 164; Fabinyi, *supra* note 168, at 87; Tsui, *supra* note 164.

(AD 1368–1644), when it was served in royal ceremonies as something expensive and exotic, since sharks were difficult to catch.<sup>170</sup> Shark fin, primarily because of its gelatinous fibers and not the actual skin or flesh, has been appreciated as something exclusive, reflecting high social status, and providing physical strength as a sort of tonic.<sup>171</sup> This appeal and uniqueness is why it is served at weddings and banquets, reflecting the host's generosity and affluence. Such elaborate meals are designed to create lasting memories for family of a wedding party or invited business relations.<sup>172</sup> From this continuing history, shark fin is deeply reflective of a long-held food culture of celebration and toasting to good fortune. With recent gains in spending power throughout China and Asia, shark fin has become an increasingly popular delicacy in the past few decades.<sup>173</sup>

When California's ban was discussed in the legislature and media, it was described as racist, targeting Chinese cuisine and culture. Patricia Leigh Brown described these sentiments as seeing the ban as “a sort of Chinese Exclusion Act in a bowl,” referring to the explicit and extensive cultural, political, and legal measures from the late nineteenth and early twentieth century United States.<sup>174</sup> The ban can easily be viewed as merely extending nativist tropes in the United States about food with regard to Asians and Asian Americans. In this light, shark fin soup appears as the cruel and undesirable food of a foreign culture, unwilling to accept environmental and moral reasons to ban its use. Robert Ji-Song Ku, Martin Manalansan, and Anita Mannur argue that for Asian Americans, food is a perpetual reminder of inequalities.<sup>175</sup> They argue that “most matters related to food” are loaded with racial meanings and racialization.<sup>176</sup> For them, Asian foodways are an important part of a “‘trope’ of the smelly and unwashed immigrant.”<sup>177</sup> These tropes stand out when Asian cuisine is painted as exotic, unclean, or cruel to the American public.

As California proposed more stringent bans on shark fin than federal law, various community leaders and groups pointed to the bill as racist. Leland Yee, then a California State Senator and mayoral candidate in San Francisco, described the

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170. See Clarke et al., *supra* note 164, at 307.

171. See Fabinyi, *supra* note 168, at 87; Clarke et al., *supra* note 164, at 307; Eriksson & Clarke, *supra* note 164, at 168.

172. See Fabinyi, *supra* note 168, at 88.

173. See *id.* at 87.

174. Patricia Leigh Brown, *Soup Without Fins? Some Californians Simmer*, N.Y. TIMES (Mar. 5, 2011), [http://www.nytimes.com/2011/03/06/us/06fin.html?\\_r=0](http://www.nytimes.com/2011/03/06/us/06fin.html?_r=0) [https://web.archive.org/web/20170122171250/http://www.nytimes.com/2011/03/06/us/06fin.html?\_r=0].

175. See Robert Ji-Song Ku et al., *An Alimentary Introduction*, in *EATING ASIAN AMERICA: A FOOD STUDIES READER* 1, 1 (Robert Ji-Song Ku et al. eds., 2013).

176. *Id.* Looking to Asian American identity and food, this adapts Michael Omi and Howard Winant's focus on racial formation. Omi and Winant define racial formation as “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 55 (2d ed. 1994).

177. See Robert Ji-Song Ku et al., *supra* note 175, at 3.

ban as an “attack on Asian culture.”<sup>178</sup> He emphasized that the ban targeted shark fins even if removed from a whole fish caught legally. Federal law banned finning and leaving the carcass aside. But California aimed to ban any possession or removal of shark fins, even if the shark was legally caught. Part of California’s objective was to stop the trade of fins brought from overseas to California,<sup>179</sup> to be served to eaters in California or on route to buyers in Asia. California wanted to stop both the trade in the item and serving the item in the state. The tradition of serving the soup at banquets, something admired and celebrated for centuries would be especially felt by older eaters, who did not agree with recent moral and environmental sentiments. Chef Jonathan Wu supported the ban, but noted that conservation justifications have not been extended to Caspian Sturgeon or Bluefin Tuna, which are also endangered but are far more popular in the United States.<sup>180</sup> The question becomes whether sharks are singled out to be saved by the ban or whether Chinese culture targeted as the subject of the ban.

Some voices from Asian, Asian American, and eater audiences supported the ban, siding with the conservation justifications. Chef Charlie Phan emphasized the challenges faced by eating sustainably caught seafood, despite its cultural history and significance.<sup>181</sup> The bill’s sponsor, Chinese-American Assemblyman Paul Fong, pointed to the science of endangered sharks and the cruelty of consumption.<sup>182</sup> He added that shark fin is not a “staple in the Chinese diet” and its consumption pointed more to wealth and privilege than eating on a regular basis.<sup>183</sup> Noting similar bans had been passed in Hawai’i and the Northern Mariana Islands, he described Chinese culture as not so “fragile that it would fall apart with one little delicacy that only . . . wealthy people can afford to eat.”<sup>184</sup>

Aside from cultural and cruelty concerns, shark conservation motivates efforts to ban shark fin production. Many shark species have suffered from shrinking in populations from ninety to ninety-nine percent in recent decades.<sup>185</sup> In 2011, 10.3

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178. See Jonathan Kauffman, *Is Banning Shark’s Fin Racist?*, SFWEEKLY: SFOODIE (Feb. 15, 2011, 6:04 PM), <http://www.sfweekly.com/foodie/2011/02/15/is-banning-sharks-fin-racist> [https://perma.cc/78JP-QLMQ].

179. See Maureen Cavanaugh et al., *Legislation to Ban Sale, Possession of Shark Fins in California*, KPBS (Feb. 22, 2011), <http://www.kpbs.org/news/2011/feb/22/legislation-ban-shark-fin-feeding-california/> [https://perma.cc/PQ2E-LJX9].

180. See Francis Lam, *Is It Racist to Ban Shark’s Fin Soup?*, SALON (Mar. 7, 2011, 7:01 AM), [http://www.salon.com/2011/03/07/sharks\\_fin\\_soup\\_ban/](http://www.salon.com/2011/03/07/sharks_fin_soup_ban/) [https://perma.cc/VN8K-P3VW].

181. See Brown, *supra* note 174.

182. See Dana Goodyear, *No Sharks Were Harmed in the Making of This Shark Fin Soup*, THE NEW YORKER (Dec. 28, 2011), <http://www.newyorker.com/culture/culture-desk/no-sharks-were-harmed-in-the-making-of-this-shark-fin-soup> [https://perma.cc/23Q6-GF2M].

183. Cavanaugh et al., *supra* note 179.

184. *Id.*

185. See John R. Platt, *Hong Kong Imported 10 Million Kilograms of Shark Fins Last Year*, SCI. AM.: EXTINCTION COUNTDOWN (July 18, 2012), <http://blogs.scientificamerican.com/extinction-countdown/hong-kong-imported-10-million-kilograms-shark-fins/> [https://perma.cc/KDB8-FMNY].

million kilograms of shark-fin products were imported into Hong Kong.<sup>186</sup> Sharks are caught all over the world, with the high price of shark fin creating the incentive to catch them on the open seas.<sup>187</sup> Fins can be worth up to \$181 per pound.<sup>188</sup> This can be 20 to 250 times the price for shark meat. Fishermen catch the fish in waters near South America, Europe, Africa, Asia, or the Middle East, and then transport the fin to Hong Kong or Guangdong, China, often by plane through California.<sup>189</sup> This high price creates an incentive for fishermen to catch the sharks while out to sea. Without such a high price for shark fins, fishermen would prioritize other fish or boat space for something other than a shark fin or shark carcass. Space and weight limitations deeply influence what fishermen catch, keep, throw overboard, and/or bring to shore.<sup>190</sup> If boats have to carry the shark carcass while out to sea, their catch is worth far less, since the entire fish occupies limited space and weight capacities on the boat. Often sharks are by-catch, retrieved when looking for more lucrative tuna or other fish.<sup>191</sup> In economic terms, it suits fishing boats to catch sharks, discard the carcass and only take the fins on their long journeys. This results in throwing away in the ocean the rest of the shark's body. The high price of shark fins fuels this motivation, with shark meat and other parts providing far less profit.

To justify California's law and other measures, California and conservationists present the global shark population as severely threatened by extinction. A major concern is that sharks are top-level predators in the ocean and if their populations are depleted then marine ecosystems will suffer greatly. The Shark Savers reports that: one third of all shark species are threatened with extinction; eighty percent of open-ocean shark species targeted in high sea fisheries are threatened or near threatened with extinction; and all of the shark species most prevalent in the shark fin trade are threatened or near threatened with extinction.<sup>192</sup> Sharks are particularly vulnerable to extinction since they do not reproduce frequently, mature slowly, and

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186. *See id.*

187. The Food and Agricultural Organization of the United Nations lists twenty-six countries as the top shark-finning countries, where eighty-four percent of the shark finning takes place. These include: Indonesia, India, Spain, Taiwan Province of China, Argentina, Mexico, the United States, Pakistan, Malaysia, Japan, France, Thailand, Brazil, Sri Lanka, New Zealand, Portugal, Nigeria, Iran, the United Kingdom, the Republic of Korea, Canada, Peru, Australia, Yemen, Senegal, and Venezuela. *See* JOHANNE FISCHER ET AL., FAO, REVIEW OF THE IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION FOR THE CONSERVATION AND MANAGEMENT OF SHARKS iv, 63 (2012), <http://www.fao.org/docrep/017/i3036e/i3036e.pdf> [<https://perma.cc/8J9K-CVVE>].

188. *See Sharks! Attacked*, SHARK SAVERS, <http://www.sharksavers.org/files/7913/4211/4391/usInfographic.pdf> [<https://web.archive.org/web/20170111011854/http://www.sharksavers.org/files/7913/4211/4391/usInfographic.pdf>] (last visited July 5, 2016).

189. *See* FISCHER ET AL., *supra* note 187, at 63.

190. *See* Clarke et al., *supra* note 164, at 316.

191. *Id.*

192. *See Shark Fin Soup Destroys Shark Populations*, SHARK SAVERS, <http://www.sharksavers.org/en/our-programs/i-m-finished-with-fins/learn-more/shark-fin-soup-destroys-shark-populations/> [<https://web.archive.org/web/20170122172256/http://www.sharksavers.org/en/our-programs/i-m-finished-with-fins/learn-more/shark-fin-soup-destroys-shark-populations/>] (last visited July 5, 2016).

have few pups when they do give birth.<sup>193</sup> Other fish species populations can more easily recover from depletion. National regulations of shark fins are among the most common tools to manage shark populations.<sup>194</sup> Other measures include by-catch and discard requirements, protecting species, allotting allowable catches, quotas, and reporting.<sup>195</sup>

The group WildAid has been one of the leaders of international campaigns to raise awareness so potential eaters move away from buying, serving, or eating shark fins. The campaign has included television and video board ads with celebrities like basketball player Yao Ming, soccer star David Beckham and actors Jian Wen and Maggie Q urging the public in China and Southeast Asia not to eat shark fins. In 2012, the Chinese government reported that it stopped serving shark fin at state banquets, as part of an effort to limit lavish public spending and encourage similar efforts amongst citizens.<sup>196</sup> These awareness campaigns along with bans on finning and on shark fin sales tackle the demand and supply sides of the trade. It has been predicted that without regulation or changes in consumer attitudes shark fins would continue to be sourced on the open seas.<sup>197</sup>

These campaigns have had results. Shark fin production has declined because of limits of the supply, changes in consumer preferences, and/or regulations on the trade. As of 2015, these reductions have been reported as: by approximately twenty percent since 2003,<sup>198</sup> and seventy percent reduction or elimination of eating shark fin soup by Hong Kong residents, and eighty-one percent of these cite environmental justifications.<sup>199</sup> In 2014, for Mainland China reported reductions include drops in shark trade by eighty-two percent in Guangzho, the center of the shark fin trade,<sup>200</sup> and significant declines by surveyed Beijing banquet restaurants.<sup>201</sup>

Policies trying to stop shark fin consumption have a long history. Efforts in California and federal law seeking to end eating shark fins predate California's 2011 law.<sup>202</sup> In 1995, the state passed a law focusing on activities on the water, i.e. shark

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193. *Id.*

194. *See* FISCHER ET AL., *supra* note 187, at iv.

195. *See id.*

196. Bettina Wassener, *China Says No More Shark Fin Soup at State Banquets*, N.Y. TIMES (July 3, 2012), <http://www.nytimes.com/2012/07/04/world/asia/china-says-no-more-shark-fin-soup-at-state-banquets.html> [<https://web.archive.org/web/20170122172328/http://www.nytimes.com/2012/07/04/world/asia/china-says-no-more-shark-fin-soup-at-state-banquets.html>].

197. *See* Clarke et al., *supra* note 164, at 320.

198. *See* Eriksson & Clarke, *supra* note 164, at 163–73.

199. *See* Imogen Zethoven, *Hong Kong Says No to Shark Fin Soup*, PEW CHARITABLE TRUSTS (May 7, 2015), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2015/05/07/hong-kong-says-no-to-shark-fin-soup> [<https://perma.cc/WFZ3-2WRY>].

200. *See* Jennifer Duggan, *Sales of Shark Fin in China Drop by Up to 70%*, THE GUARDIAN (Aug. 7, 2014), <http://www.theguardian.com/environment/chinas-choice/2014/aug/08/sales-of-shark-fin-china-drop-70> [<https://perma.cc/KN3W-M52Q>].

201. *See* Michael Fabinyi & Neng Liu, *Seafood Banquets in Beijing: Consumer Perspectives and Implications for Environmental Sustainability*, 12 CONSERVATION & SOC'Y 218 (2014).

202. *See Chinatown Neighborhood Ass'n*, 794 F.3d at 1140.

finning. It made it “unlawful to sell, purchase, deliver for a commercial purpose, or possess on a commercial fishing vessel . . . a shark fin or tail or part of a shark fin or tail that has been removed from the carcass.”<sup>203</sup> This made it illegal for fishermen to use the fin, tail, or part of the shark. This did not make it entirely illegal to fish a shark and then use its fin. Conceivably, a shark could be caught as permitted and from this the fin then removed. The 1995 ban only made it illegal to remove the fin and leave the carcass. Likewise, the ban was limited to catching the fish or actions on the water or with the carcass. This did not regulate commercial activity on land. It could be argued that merchants on land who possessed shark fins could avoid these 1995 measures.

Inspired by similar objectives, federal law passed similar measures in 2000. Congress prohibited shark finning. It amended the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by making it unlawful to remove fins from sharks at sea, possess detached fins aboard a boat, move fins from one boat to another, and to land the fin onshore.<sup>204</sup> These federal policies contained loopholes to the finning ban, involving total weight and vessel types.<sup>205</sup>

California has prevailed in legal disputes over how its shark fin law violates the Dormant Commerce Clause and is preempted by federal fish conservation statutes. The 2011 law was challenged by the Chinatown Neighborhood Association, and reached a decision by the Court of Appeals for the Ninth Circuit in September 2015.<sup>206</sup> Similar to foie gras, the court found that banning possession and sales of shark fins did not violate the Dormant Commerce Clause.<sup>207</sup> It reasoned that the ban did not favor Californian interests and did not discriminate against out-of-state interests.<sup>208</sup> Both out-of-state sellers and buyers and California sellers and buyers were subject to the prohibition. The court also discounted any finding that ban had any illegal effect outside California and was an “extraterritorial” violation.<sup>209</sup> It explained that “extraterritorial” effects violate the Dormant Commerce Clause only when states attempt to fix prices in other states.<sup>210</sup> Here, California merely bans this food item inside and outside the state, with no California effort to set or change prices outside the state.

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203. See CAL. FISH & GAME CODE § 7704(c) (West 2013 & Supp. 2016).

204. See 16 U.S.C. § 1857(1)(P) (2012); Shark Conservation Act of 2010, Pub. L. No. 111-348, § 103(a)(1), 124 Stat. 3668, 3670 (2011); Shark Finning Prohibition Act, Pub. L. No. 106-557, § 3, 114 Stat. 2772 (2000).

205. The finning prohibition did not apply to situations when the total weight of the shark fins was less than five percent of the total weight of the shark carcasses on the boat. See NAT'L MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, 2011 SHARK FINNING REPORT TO CONGRESS 2 (2011), [http://www.nmfs.noaa.gov/ia/species/sharks/2011\\_shark\\_finning\\_report.pdf](http://www.nmfs.noaa.gov/ia/species/sharks/2011_shark_finning_report.pdf) [https://perma.cc/48CP-4FRY]. Before changes by the Obama administration in 2008, the finning ban only applied to a “fishing vessel” and fins could not be seized on other kinds of boats such as a chartered vessel. *United States v. Approximately 64,796 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008).

206. See *Chinatown Neighborhood Ass'n*, 794 F.3d at 1136.

207. See *id.*

208. See *id.* at 1146–47.

209. See *id.* at 1146.

210. See *id.*

In terms of burden placed on commerce by the ban, the court found that the benefit of the ban outweighed the commercial burden for the sellers and buyers, which is presented as insignificant.<sup>211</sup> Specifically, the benefit of the ban included shark conservation, preventing cruelty, and protecting wildlife and health.<sup>212</sup> For the *Pike* test, California's choices as a state were seen as more significant than the economic effects of the ban. The court went so far as to indicate that shark fin regulation is not inherently national and, as such, California efforts do not step over or conflict with federal authority.<sup>213</sup>

This court was heavily influenced by state choices regarding eating animals, specifically to conserve shark and stop their cruel killing. Fishermen and shark fin eaters do not benefit from legal protections often extended to farmers' livestock. The court neatly deferred to California choices about ending this practice for moral reasons and for conservation justifications.

Potential conflicts between California's ban and federal fish conservation goals point to important preemption inquiries.<sup>214</sup> This did not ultimately convince the court to strike the law or to even permit the Chinatown Neighborhood Association to amend its complaint to include preemption claims. So, for now, Justice Reinhardt's dissenting opinion and briefs filed by the federal government suggest how animal conservation policies and shark fin bans may conceivably conflict.<sup>215</sup> The MSA contains specific objectives of how to conserve shark populations by allowing them to be legally caught.<sup>216</sup> Many shark species are overpopulated and threaten the ecosystem. California's ban prohibits this legal fishing, determined by the federal government as needed for conservation reasons.

The federal MSA does not have an express preemption provision.<sup>217</sup> This poses a different inquiry than developed for foie gras or slaughters. Questions about if this federal statute displaced the California ban had to examine if there was conflict between complying with both federal and state law. The MSA was enacted to create a federal-regional partnership to manage fisheries. With it, the federal government has "sovereign rights and exclusive fishery management over all fish,

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211. *See id.* at 1147.

212. *See id.*

213. *Id.*

214. For discussion of preemption, the MSA, and state regulations, see *Fisheries Ass'n, Inc. v. Chiles*, 979 F.2d 1504 (11th Cir. 1992); *Se. Fisheries Ass'n, Inc. v. Mosbacher*, 773 F. Supp. 435 (D.D.C. 1991); and Jay M. Zitter, Annotation, *Preemption of State and Local Regulations by Magnuson Fishery Conservation and Management Act (16 U.S.C.A. §§ 1801 to 1883)*, 31 A.L.R. Fed. 2d 337 (2008).

215. *See Chinatown Neighborhood Ass'n*, 794 F.3d at 1149 (Reinhardt, S. dissenting). In an appeal of a denial of Chinatown Neighborhood Association's motion for preliminary injunction, the Department of Justice submitted papers arguing that California's shark fin ban conflicted with the MSA. *See* Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal on the Supremacy Clause Claim, *Chinatown Neighborhood Ass'n v. Brown*, 539 F. App'x 761 (9th Cir. 2013) (No. 13-15188), 2013 WL 3914118, at \*17.

216. Magnuson-Stevens Fishery Conservation and Management Act (MSA) § 304, 16 U.S.C. §§ 1801-1891 (2012).

217. *See Chinatown Neighborhood Ass'n*, 794 F.3d at 1141 (finding "conflict preemption").

all Continental Shelf fishery resources, within the exclusive economic zone (“EEZ”),” extending 200 miles off the shore.<sup>218</sup> The court found that the Chinatown Neighborhood Association did not identify any actual conflict between the MSA and the California shark fin law.<sup>219</sup> Fishermen can comply with California’s ban and federal legal shark fishing to use sharks for oil, meat, and skin. The court adds that because both state-level and federal authorities implement the MSA, there is more cooperation than conflict between these two regimes.

Judge Reinhardt’s dissenting opinion suggests that the court should more closely examine conflict between the federal requirements of the EEZ and California’s ban and grant the Chinatown Neighborhood Association request to amend its complaint.<sup>220</sup> The Association had argued two points. First was that the EEZ contains specific quotas for shark fishing to optimize the MSA’s yield.<sup>221</sup> Second, it averred that California’s ban created an obstacle to achieving these quotas because it significantly decreased legal shark fishing.<sup>222</sup> Said simply, the federal government creates a quota system to specify the amount of a particular species that should be caught and California’s ban interferes with this. It was argued that an amended complaint could show how the number of sharks caught in the EEZ had fallen dramatically.

In sum, California’s ban on possessing or selling shark fins offers the best example of legal support of animal welfare, since the state’s efforts are consistent with and add to federal and international efforts to stop the eating of shark fins. Sharks are an endangered animal, a fact supporting the state-level ban. With antifinning measures in effect for over twenty years, it is not a surprise to fisherman and merchants that shark fins are regulated. California’s latest ban reflects a long-term trend, different than legal resistance faced by initial implementation of bans on downer slaughter, foie gras sales, and battery-cage eggs. This context makes it easier for a court to discard any economic discrimination, favoring California, posed by the ban. An additional Dormant Commerce Clause analysis not yet examined by courts regards how California’s ban impacts overseas shipments of shark fins. The recent ban effectively makes it illegal for air shipments of shark fin entering or leaving the state. Cargo planes carry this food item from all over the world and stop to make transfers at airports in Los Angeles or San Francisco. One day a court may review how this established pathway for shark fins inbound from Western Hemisphere, European, or African waters and outbound for Asian eater markets.

Similarly, arguments in support of overturning the ban illuminate a great deal about how animal welfare fits into legal debates about food equity. Concerns for where conservation is directed casts doubt on how fair the prohibition is. Sharks are an endangered animal, but by no means are they the only seafood whose over

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218. *See id.* at 1139.

219. *See id.* at 1142.

220. *See id.* at 1148.

221. *See id.* at 1149.

222. *See id.*

fishing threatens species' extinction. Many shark fin advocates see this ban as racist, reflecting historic American notions of Asians as foreign and their eating habits as undesired. For them, singling out this food item steeped in Chinese culture is discriminatory. Moreover, federal law attempts to conserve shark populations by permitting specific levels of fishing in the EEZ. Here California's ban makes it impossible to comply with both federal EEZ permissions and state law. Unlike meat and poultry inspection statutes, the MSA does not contain a preemption clause. Accordingly, it is not so clearly laid out that federal conservation goals conflict with California's conservation and humanitarian concerns. The lesson is that the cultural assumptions and conservation goals of shark fin bans are not clean cut.

*D. Eggs: Farming and Animal Groups Agree, Forcing States  
to Unsuccessfully Fight for Interstate Commerce*

The fourth controversy between California's animal protection efforts and the Constitution involves the ban on battery-cage housing for egg-laying hens. In 2008, California voters approved Proposition 2, the Prevention of Farm Cruelty Act, by a large margin with sixty-three percent of favorable votes.<sup>223</sup> The Act outlaws various housing methods for farm animals including battery cages for egg-laying hens.<sup>224</sup> It generally sought that animals be provided space to move and extend their limbs while raised on farms. Proposition 2 was a significant step in applying animal welfare standards to farms in California, with the battery-cage ban creating the greatest legal controversy. Two years later, the state passed AB 1437, prohibiting the sale of any out-of-state eggs in California that do not comply with the Proposition 2 housing requirements.<sup>225</sup> Immediately, this was argued to unfairly protect California's egg farmers and close off the national egg market to the state. From these two efforts, one approved directly by voters and one from the legislature, the *California Egg Case* ensued, when Missouri initiated the lawsuit on February 3, 2014.<sup>226</sup> In this suit, Missouri and five other egg-producing states argued that California's ban on battery cages violated the Dormant Commerce Clause and Supremacy Clause.

California's regulation focused on animal housing methods, in this case it was hens in battery cages. A district court and the court of appeals have only ruled on a procedural matter of the lawsuit, finding Missouri lacked standing.<sup>227</sup> In essence, these courts argued that no economic injury is felt by the states that raise these claims. These courts have asked for the state to point to any economic injury from

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223. DEBRA BOWEN, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), [http://elections.cdn.sos.ca.gov/sov/2008-general/sov\\_complete.pdf](http://elections.cdn.sos.ca.gov/sov/2008-general/sov_complete.pdf) [<https://perma.cc/CY5Y-HKY9>].

224. *Id.*

225. See AB-1437, 2009–2010 Leg., Reg. Sess.

226. See Jim Miller, *Judge Rejects Suit Against Egg Law by 6 Other States*, SAC. BEE, Oct. 3, 2014, at 4A.

227. *Missouri ex rel. Koster*, 847 F.3d at 652; *Missouri*, 58 F. Supp. 3d at 1079.

battery-cage prohibitions or for a private actor to bring these claims.<sup>228</sup> The Supreme Court has denied review of this case.<sup>229</sup>

Interestingly, with hen eggs, private actors have incrementally and increasingly supported the requirements in Proposition 2 and AB 1437.<sup>230</sup> Since California passed these two policies, egg producers and animal welfare advocates have worked together to support these bans, with each group withdrawing their support for additional state-level policies or additional lawsuits. Moreover, responding to consumer demand and regulations from California and other states, large chain restaurants and grocers have announced they will not sell, serve, or produce eggs from hens housed in battery cages.<sup>231</sup> These trends point to animal welfare norms developing outside the political and litigation arenas. This Section proceeds by describing the political efforts and technology behind Proposition 2, cooperation between the United Egg Producers (UEP) and HSUS and its legal impacts, the significance of the *California Egg Case* so far, and market support for animal welfare measures outside the courts and legislatures.

In general terms, hens for egg production can be housed in three manners: battery cages, enriched cages, and free range.<sup>232</sup> Battery cages house hens in small wire or metal enclosures indoors, usually providing about sixty-seven square inches per bird.<sup>233</sup> The argued advantage of cages is that they provide automated feeding and watering and separate hens from each other and their waste. Such spatial limitations offer the capacity to raise a larger amount of hens and produce eggs. Ninety-five percent of egg farmers in the United States use these cages.<sup>234</sup> California has banned battery-cage housing in the state and prohibited the sale of any eggs from hens housed this way.

The two other housing systems emphasize greater hen mobility, allowing them to stretch their limbs, move, and as such are argued to be less cruel than battery cages. Enriched cages separate the hens from each other and from their feeding and waste. Generally, these systems are a hybrid between automation of indoor housing

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228. See *Missouri ex rel. Koster*, 847 F.3d at 652–54; *Missouri*, 58 F. Supp. 3d at 1072.

229. See *Missouri v. Becerra*, 137 S. Ct. 2188 (2017).

230. Burger King, McDonalds, Walmart, Aramark, Sodexo, Trader Joes, Starbucks, Panera, Subway, Taco Bell and many others have announced places to stop using eggs from batter cages. For a description of recent food industry announcements, see Jimmy Sherfey, *What the Fast-Food Industry Shift to Cage-Free Eggs Really Means*, EATER (Feb. 17, 2016), <http://www.eater.com/2016/2/17/11009252/what-are-cage-free-eggs> [https://perma.cc/3XAH-56U4]; Gregory Barber, *Are Cage-Free Eggs All They're Cracked Up to Be?*, MOTHER JONES (Feb. 16, 2016), <http://www.motherjones.com/blue-marble/2016/02/corporations-are-going-cage-free-whats-next-hens> [https://perma.cc/J2MH-69M6]; Jennifer Chaussee, *The Insanely Complicated Logistics for Cage-Free Eggs for All*, WIRED (Jan. 25, 2016), <http://www.wired.com/2016/01/the-insanely-complicated-logistics-of-cage-free-eggs-for-all/> [https://perma.cc/AJU8-5HVM].

231. Jimmy Sherfey, *supra* note 230.

232. This summarizes descriptions in JOEL L. GREENE & TADLOCK COWAN, CONG. RESEARCH SERV., R42534, TABLE EGG PRODUCTION AND HEN WELFARE: AGREEMENT AND LEGISLATIVE PROPOSALS 7 (2014).

233. See *id.*

234. See *id.*

and hens roaming freely outdoors. They include classifications such as aviary, modified, colony, and furnished cages. The last system is free range, which allows the hens to have outdoor access. This is argued by many to be the least cruel and most natural for the hens, since the animal has the most movement and behavior options.<sup>235</sup> From a contrasting view point, free-range housing is criticized as exposing the hens to predators, limiting sanitary controls, and allowing hens to attack each other, which is their natural behavior.

In 2011, the traditionally opposing groups of the UEP and HSUS announced an agreement significantly impacting what legal measures would be pursued to further welfare for egg-laying hens.<sup>236</sup> The UEP represents that largest national organization of farmers who raise hens for eggs while the HSUS is the most influential animal advocacy organization, leading political, education, and litigation campaigns on a variety of animal welfare measures. Importantly, they have focused on animals in agriculture. Both sides decided that it was too expensive to continue seeking state-voter initiatives like Proposition 2 or to challenge or defend them in court.<sup>237</sup> Accordingly, their 2011 agreement included various provisions for a set period of time, but the most important were to not challenge existing state battery-cage bans, not pursue additional state initiatives to prohibit battery cages, and work towards and support federal hen-egg housing standards.<sup>238</sup> The immediate results of this agreement were threefold: no UEP farm would challenge California's measures; these specific measures were left as the last state-level battery-cage bans for the time being, and it signaled that animal advocates and agriculture were open to working together to change how animals were treated on farms, avoiding expensive litigation and lobbying of state-level measures.<sup>239</sup> For farmers it also allowed them to control how they would give in to hen-housing reform. They could avoid spending resources on policy lobbying and legal action.

On October 2, 2014, a district court dismissed the lawsuit brought by Missouri against California, alleging Commerce Clause and preemption violations from requirements that all eggs sold in California comply with animal care standards in Proposition 2. The court granted California's motion to dismiss because Missouri lacked standing.<sup>240</sup> On November 17, 2016, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling that Missouri lacked standing.<sup>241</sup> The court of appeals only reversed the district court's dismissal of Missouri's complaint with prejudice. It explained that Missouri could allege "post-effective-date facts," since AB 1437's went into effect, that would support standing.<sup>242</sup> Essentially, the court heavily doubted Missouri was the proper party to bring this lawsuit, but it left

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235. *See id.* at 21.

236. *See id.* at 9–10.

237. *See id.* at 10.

238. *See id.* at 9–10.

239. *See id.*

240. *Missouri*, 58 F. Supp. 3d at 1079.

241. *Missouri ex rel. Koster*, 847 F.3d at 656.

242. *Id.*

the door open for facts, since the law became effective in 2014, to be raised in a complaint.

The dismissal of Missouri's complaint illustrates the complexities of how animal welfare norms can develop adjacent to the political and legal arenas. Missouri argued that it had *parens patriae* standing, representing a "quasi-sovereign interest."<sup>243</sup> The state argued that its interest was to protect its citizens' economic health and constitutional rights as well as its own status in the federal system. AB 1437's purpose was not to improve how hens were treated, but to protect California's own egg farms. Missouri averred that closing off sales of battery-cage eggs, which are the most popular nationwide, was inconsistent with federalist principles. This made non-Californian egg farmers decide to forgo the California market, the largest in the nation, or to substantially increase their production costs. These decisions would result in major investments and losses for farmers relying on a national market in eggs, free from protectionist state measures. Furthermore, Missouri argued that battery cages were better for hens and that AB 1437 was enacted as a pretext to protect California's egg producers, but in reality it had limited public-health justifications.<sup>244</sup>

In its appeal, Missouri offered more complex arguments to distinguish the harm the state suffered versus the interests of private parties in the lawsuit. They were the following: harm to egg farmers in the state, harmful price fluctuations for eggs prices, and discrimination for non-Californian eggs.<sup>245</sup> The court rejected these and argued that egg farmers could seek their own court action;<sup>246</sup> changes in prices were too speculative, only felt by farmers and not consumers, and this commodity was not of "central economic significance;"<sup>247</sup> and that California's measure did not discriminate since the battery-cage policy impacted both in-state and out-of-state eggs.<sup>248</sup>

Both courts argued that any potential economic injury from California's measure would be to the farmers and not Missouri or its residents. The cited harms and burdens only belong to those farmers who want to sell to California and not the residents of Missouri.<sup>249</sup> For this reason, the state did not have standing in court.

Missouri brought the suit since egg farmers (at least a large percentage of them) had decided to cooperate with battery-cage requirements and not challenge California and/or opted for not selling eggs in California.<sup>250</sup> The UEP and HSUS agreement from 2011 signaled this shift. Contrary to the position of other farming groups, the UEP decided it was better to work to implement these animal cruelty policies. Farming associations historically oppose any animal cruelty measures in

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243. *Missouri*, 58 F. Supp. 3d at 1068.

244. *Id.* at 1065.

245. *Missouri ex rel. Koster*, 847 F.3d at 652–55.

246. *Id.* at 652.

247. *Id.* at 654–55.

248. *Id.* at 655.

249. *Missouri*, 58 F. Supp. 3d at 1078.

250. *See* Sherfey, *supra* note 230; Greene & Cowan, *supra* note 232, at 9–10.

food production. They typically regard the HSUS and other animal advocates as their opposition. The National Cattlemen Beef Association and National Pork Producers heavily criticized the 2011 agreement the UEP made with the HSUS.<sup>251</sup>

The egg farmers undoubtedly found the lobbying and litigation challenges as prohibitively expensive, especially when they are not successful. Public, consumer, and commercial sentiments support these animal welfare efforts in farming and food production. For the UEP and those who sell and use eggs, it is better to control how and when the change to battery cages is made. This is more desirable than being forced to make these changes by a court or another state legislature.

With its conclusion, the *California Egg Case* illustrates that a state may succeed in legally defending farm animal welfare measures aimed at a large-scale agricultural industry, such as hen eggs, when three conditions exist. First, there was industrial support for the measures. Egg producer associations had already decided to phase out battery cages on their own terms, versus being required to do so by potential state or federal regulations. Second, the industry had changed its position on the battery-cage phase outs. It stopped resisting an end to battery-cage use. The change reflected industry lessons learned from overseas experiences and from listening to consumer preferences. Third, economic discrimination could not be proven easily since in-state and out-of-state egg farmers faced the same regulation, barring sales for battery-cage eggs. In theory, this could easily change if an egg farmer would bring a lawsuit as a private actor suffering economic injury after AB 1437's became effective. It could be argued that Proposition 2 made California egg farmers susceptible to lower-cost eggs from outside California, not subject to the bans on battery cages. For this reason, AB 1437 was directed at protecting Californian egg farmers and an out-of-state producer would point to their consequent economic injury in court.

In sum, seen purely in terms of case law, California's animal welfare fights, over pork, foie gras, shark fins, and eggs, suggest that constitutional norms can both support and strike state policies. Dormant Commerce Clause violations are hard to prove, especially for small-market food items like foie gras and shark fins. If California farmers and food industries suffer the same harm as out-of-state interests, it will be difficult to find for out-of-state plaintiffs. In terms of preemption challenges, California's animal welfare fights point to the likely preclusion by federal law when laws like the FMIA can be read to displace state-level ingredient requirements or operation requirements. For these reasons California's efforts to prohibit downer slaughters was found to be illegal. Preemption clauses in several

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251. See Dan Charles, *U.S. Pig And Cattle Producers Trying To Crush Egg Bill*, NPR (July 11, 2012, 11:45 AM), <http://www.npr.org/sections/thesalt/2012/07/10/156551903/pig-and-cattle-producers-trying-to-crush-egg-bill> [https://web.archive.org/web/20170122194738/http://www.npr.org/sections/thesalt/2012/07/10/156551903/pig-and-cattle-producers-trying-to-crush-egg-bill]; Elynn Ferguson, *Standards for Hens Worry Other Livestock Groups*, ROLL CALL (May 3, 2013, 8:07 AM), [http://www.rollcall.com/news/standards\\_for\\_hens\\_worry\\_other\\_livestock\\_groups-224516-1.html](http://www.rollcall.com/news/standards_for_hens_worry_other_livestock_groups-224516-1.html) [https://perma.cc/W374-CG9P].

food statutes include ingredient and operations preemptions, along with similar displacement for marketing and facilities.

California's legal plight over a battery-cage ban points to the procedural complications of litigation, essentially halting any court inquiry over the merits of preemption and commerce arguments. Viewed solely in terms of case law, this dispute provides the least illumination. But, when the *California Egg Case* is examined regarding why the hen-egg industry supported new housing methods and why states were plaintiffs, the case reflects a significant context. This is that states can enact animal welfare measures and that federal law is hands-off protecting farm animals. State reforms and a lack of federal law shift the legal contest to one over economic harms. With this kind of legal context, between states protecting animals and food producers suffering economic injury, food contributes to how constitutional law is formed and applied, specifically regarding animals and states. This Article next describes how this context develops from two perspectives, as a political food fight and as doctrinal jockeying between states and federal law.

### III. FARM ANIMAL PROTECTION: POLITICAL FOOD FIGHTS AND SETTING A DOCTRINAL MENU

California's recent attempts to ban foie gras, shark fins, battery-cage hen eggs, and certain kinds of pork point to two trends: political food fights about what can be eaten and doctrinal contests between state and federal law. Both illustrate how food, derived from animals, shapes law. This Part first describes the political food fight over animal welfare using food studies concepts. California's recent animal welfare litigation illuminates political lessons supporting and challenging state-level reforms. Next, this Part describes a larger doctrinal contest between state and federal law to set the menu on how animals may be regulated on farms and in food production. California's experiences point to future legal battles, potentially impacting ranching, meat processing, slaughter, dairy, and egg, poultry, swine, and lamb farm industries.

#### *A. Political Food Fights with Animals as the Prime Subject*

California's attempts to ban food for animal welfare demonstrate political contests ending in legal resolution. These disputes are not just about the Dormant Commerce or Supremacy clauses of the Constitution, but instead involve public dialogue about what can be eaten or not. This Article suggests food studies concepts to examine legal contests over food. The *Routledge International Handbook of Food Studies*, edited by Ken Albala, describes how different academic disciplines study, research, and teach food topics.<sup>252</sup> Produced as a multiauthored work compiling

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252. These disciplines and approaches include food and: anthropology, sociology, communications, psychology, nutritional anthropology, nutrition, archaeology, journalism, cultural history, literature, philosophy, linguistics, theology, art, film, television, food studies programs, American studies, folklore, food museums, food law, feminism, culinary arts and food service management, cultural studies, food and race, food justice, animal rights, food security, school food,

how social scientists, the humanities, food services, and activists approach questions about food, the *Handbook* includes contributions about food and cultural studies, food justice, and agriculture research.

These three concepts illuminate how a legal dispute is really about food issues. Fabio Parasecoli describes how food and cultural studies focus on “connections between lived bodies, imagined realities, and structures of power.”<sup>253</sup> As a part of this, food has both material and symbolic significance. Power structures, like the food industry and advertising, shape experiences over recipes, eating traditions, and shopping in food markets. This suggests examining how food is both materially and culturally important. Next, eyeing health and environmental risks, Alison Hope Alkon explains that food justice research examines how “racial and economic inequalities manifest in the production, distribution, and consumption of food . . . .”<sup>254</sup> She explains that communities and social movements shape and are shaped by these inequalities. A food justice focus advances theoretical study and policy reform on food. Lastly, Frederick Kirschenmann points to new avenues for agriculture research.<sup>255</sup> He emphasizes that for over half a century the food system has focused on the “singular goal” of “[m]aximum efficient production for short-term economic return.”<sup>256</sup> From this, farms seek specialization and economies of scale. Kirschenmann explains that rising costs in energy, depleting water and biodiversity, and climate change now challenge long-term agricultural goals. He predicts that sustainability concerns will shape future agriculture research.<sup>257</sup>

Debates about animals and food (regarding pork, foie gras, shark fins, and eggs) coexist with the Dormant Commerce Clause and preemption disputes. Central to these are the cultural, justice, and sustainability dialogues intrinsic to developing animal welfare policies. *National Meat Association* covered if sick or weak swine could be slaughtered or their euthanasia mandated by California. *Association des Éleveurs I* and *II* regard debates about if *gavage* is harmful force-feeding or it extends the natural process of fattening for migration. *Chinatown Neighborhood Association* explored if shark fin possession or sale encouraged cruel killing of an endangered species. It also examined if fins could be sold from sharks without their finning or from sharks caught as part of federal conservation programs. The *California Egg Case* covered battery cages for cruelly housed hens and if they were unsafe to hens and possibly to public health. For all four political determinations, the California

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tourism, senses, agriculture, and ethics. ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES (Ken Albala ed., 2013).

253. Fabio Parasecoli, *Food, Cultural Studies, and Popular Culture*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES, *supra* note 252, at 274, 275.

254. Alison Hope Alkon, *Food Justice: An Overview*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES, *supra* note 252, at 295.

255. Frederick L. Kirschenmann, *Anticipating a New Agricultural Research Agenda for the Twenty-First Century*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES, *supra* note 252, at 364, 368–69.

256. *Id.* at 364.

257. *Id.*

legislature sided with animal welfare. Courts agreed with these except for in the example of downer swine.

These decisions also reflect food's material and symbolic significance; centrality in redressing inequalities; and role in sustainability. In cultural terms, these animal welfare measures determined what was inhumane slaughtering; painful duck feeding; wasteful and cruel fishing; and cruel hen housing. Concerns for animal welfare and their corresponding moral questions entered public discourse and succeeded in banning the production and/or sale of edible items, which is otherwise legal in most of the United States. Moreover, shark fin and foie gras eating are associated with luxury and opulent eating and traditional French and Chinese cuisine.

Similarly, these policies reflect food justice efforts. They were passed to limit the injustice of consuming slaughtered downers, livers from fattened ducks, fins from sharks, and eggs from hens in large-scale, small-cage complexes. The shark fin ban presents the most expansive justice concerns, since it made possession and sales illegal. It also came after bans on shark finning in California and federal law and in other jurisdictions. The foie gras policy banned its sale in addition to its production. Focusing on the commercial aspects, California attempted to eliminate the incentives to produce, sell, or serve shark fins and foie gras. The downer slaughter and battery-cage eggs policies are efforts to limit injustices argued to be the result of industrial farming of pigs and hens. These industries prefer allowing downer slaughter and using battery cages, in order to maximize efficiencies and limit production costs. Because they directly ban sales or possession or because they prohibit efficient farming methods, these animal welfare policies in all probability lead to some economic injury. This motivates farms, food processors, distributors, and restaurants to seek redress in court. When the courts ruled for California in *Association des Éleveurs I and II*, *Chinatown Neighborhood Association* and the *California Egg Case*, they determined that the costs of protecting ducks, sharks, and hens could be passed on to farmers and fishermen and fish merchants.

California's ban on foie gras, shark fin, and certain kinds of pork and eggs points to many of the changes in food production that Kirschenmann predicts. The state's ban on battery-cage eggs and attempted ban on downer slaughters emphasized different values in food production. Farming practices utilize battery cages and result in downers when their priority is lowest cost and highest output. California's policies, AB 1437 and Proposition 2 for eggs and California Penal Code Section 599(f) for downers, tried to shift this focus by emphasizing anticruelty values. For battery-cage eggs, California succeeded in court, with most egg farmers not challenging the policies. For downers, California lost in court, since the federal meat inspection regime also includes humane slaughter regulations and it expressly preempts state regulation for slaughter operations. *National Meat Association* illustrates how policies seeking more sustainable or humane food production can find federal regulations to be a roadblock. The *California Egg Case* demonstrates

how when farmers are supportive of these changes, legal challenges may motivate states to sue the state passing sustainable food policies.

The shark fin and foie gras bans point to how a state passes sustainable food measures that prioritize preventing animal cruelty. Here, what stands out is how California's regulations take aim at events outside the state as well. California won in court arguing that it was targeting to stop cruel *gavage* for ducks and to stop removing fins from sharks. For both food items, the state did more than the ban the item in California. It wanted to eliminate the incentive for fishermen, farmers, and purveyors outside California to sell in the state. For shark fin regulation, animal conservation objectives bolstered California's argument. Moreover, since the 2011 changes to the Fish and Game Code section 2021(b) added to federal and prior California measures, its objectives were more defined and easier to defend in court. California represents a large-demand market for food industries. For this reason California passed the 2011 shark fin ban. Given California's market size, the battery-cage egg sales ban threatened hen-egg farming nationwide. Egg farmers had to decide to change their operations to sell to California or not and forego this part of the domestic market. In sum, these four California sustainable policies point to the legal and economic complexities of such measures that impact more than the home state.

These four California food-and-animal food regulation efforts illustrate lessons that can guide lawmakers when developing future measures. First, in support of sales bans on food, California's experiments illuminate a great deal. Any sales ban on a food item promises to cut at commercial opportunities by making an existing market illegal. Food producers and sellers invest in raising and caring for animals, the resulting products, and the goodwill their businesses build on this. These economic effects and losses fuel challenges. One way to limit the legal effect of these is long implementation periods for the bans, allowing food producers to prepare for when state policies are eventually enforced. In this light, legislation on animal cruelty does not result in unexpected or immediate commercial harms. This supports state-level food regulation seeking improved animal treatment. The foie gras ban was not effective until seven and a half years after it was passed.<sup>258</sup> For battery-cage eggs, Proposition 2 did not ban these eggs inside California for over six years after it passed<sup>259</sup> and AB 1437 did the same for out-of-state imports for four years.<sup>260</sup> So far, courts have sided with California's reasoning in these Dormant Commerce inquiries.<sup>261</sup> Preemption inquiry does not necessarily examine economic losses to find a violation, but these harms do drive food producers to become lawsuit plaintiffs. The longer the period for food producers to prepare for a ban, the easier it may be to side with state animal measures in court.

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258. *See Ass'n des Éleveurs I*, 729 F.3d at 942.

259. *See Missouri*, 58 F. Supp. 3d at 1064.

260. *See id.* at 1064–65.

261. *See Ass'n des Éleveurs I*, 729 F.3d at 942; *Chinatown Neighborhood Ass'n*, 794 F.3d at 1139.

Another political context supporting bans is that conservation- and science-based justifications help courts to approve state policies, despite claims of economic burdens. California's 2011 ban on possessing or selling shark fins provides the best example of this.<sup>262</sup> The state's efforts were consistent with its previous regulations in 1995 and a federal ban on finning from 2000.<sup>263</sup> All of these policies are developed with justifications that sharks are endangered, this impacts the ecosystem, and fin consumption accelerates these problems. In *Chinatown Neighborhood Association*, the court weighed the state's interest in conserving sharks with economic harms claimed by fish merchants.<sup>264</sup> This governmental interest is not limited to saving the shark population, but also includes California's role in the international trade and shark fin consumption inside the state.

Legislatures benefit from devoting time and effort to having science findings in support of its requirements. Foie gras defenders argue that *gavage* does not harm the ducks, citing that the animal naturally increases its feeding and its neck permits for ingesting large items whole without a gag.<sup>265</sup> Animal advocates point to a series of physiological evidence to counter this.<sup>266</sup> California's legislature took the time to listen to all of the perspectives. For this reason, the court does not second-guess these political determinations. In *Association des Éleveurs I*, this scientific-support-and-methods analysis used by lawmakers helped the court side with California.<sup>267</sup> The political branches succeed in having their sales bans more likely to be found legal when these perspectives are taken into account in developing policies.

Second, political contexts do work against state food bans, potentially motivating courts to strike them as illegal. For instance, food bans passed solely with economic objectives will face legal scrutiny. The six states contesting California's battery-cage ban argued that AB 1437 only had an economic motivation.<sup>268</sup> They argued that California's efforts inside the state with Proposition 2 did not pose a Dormant Commerce Clause problem, but the legislature's later efforts banning domestic imports of battery-cage eggs were solely to protect California's egg producers. They claimed that egg farmers outside California can avoid the costly Proposition 2 requirements. AB 1437 was argued as having the intent to protect California's egg industry more so than to protect hens. These substantive claims have not been reviewed by a court, but they paint how similar measures will be seen by courts.

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262. See CAL. FISH & GAME CODE § 2021(b).

263. See discussion *supra* notes 165–76, 201–05, and accompanying text.

264. *Chinatown Neighborhood Ass'n*, 794 F.3d at 1147.

265. See *Top 5 Facts About Foie Gras*, ARTISAN FARMERS ALLIANCE, <http://www.artisanfarmers.org/factsaboutfoiegras.html> [<https://perma.cc/VZ8W-MJQT>] (last visited Nov. 13, 2016).

266. See HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE FOIE GRAS INDUSTRY (2012).

267. See *Ass'n des Éleveurs I*, 729 F.3d at 946.

268. See *Missouri*, 58 F. Supp. 3d at 1065.

Another example weakening a state's animal welfare justifications develops when the animals protected by the ban are not endangered. California argues that it is addressing animal cruelty with bans on *gavage* for ducks raised for foie gras and battery cages for egg hens. Here, California's ban cannot rely on conservation claims with ducks and hens, which as animals are not in such a precarious state as sharks. It can be presumed that with sufficient economic harms, a food producer can point to commercial burdens that are not counterbalanced by conservation justifications helping the state.

*B. A Doctrinal Menu for Farm Animal Welfare as State Innovation or Defensive Preemption*

A doctrinal menu in the form of federal regulation on farm animal treatment is the long-term contest looming behind California's animal-and-food disputes. For fourteen years, starting with the passing of the foie gras ban, food producers and animal welfare advocates have been in legal and policy combat in California, armed with long-term litigation, expensive public relations and lobbying, and muddled Dormant Commerce Clause and Supremacy Clause arguments. Litigation on niche products like foie gras and shark fin and common practices like downer slaughter and battery cages has captured national attention, usually under the lens of "food freedom" or ending animal cruelty or descriptions of defending American farms or stopping factory farm abuse. Consumers increasingly care about what they eat and how animals are treated on farms and in slaughterhouses. Restaurants, grocers, and food suppliers know this and increasingly change their sourcing, operations, sales, and marketing. For this reason, the largest hen-egg farm association preferred to modify their operations versus suing California over battery cages. But for many farming and ranching operations, animal welfare policies promise to decrease profits. Many farmers and ranchers, along with accompanying businesses, fear a cease in operations when production costs rise due to mandated animal treatment.

In court opinions, these contests appear as a repetitive federalism debate. This will persist because federal law is generally silent on animal treatment on farms and states have the political ability to regulate animals in food production. Food producers can look to Dormant Commerce and preemption challenges. But lawsuits are expensive and do not provide predictable results, especially with disruptions in multiple states. This Article argues that this will continue until food producers succeed in supporting federal farm animal regulation and Congress enacts it. This will operate as defensive preemption to innovation by states like California.

*1. Industrial Farms and the Threat of Multiple Animal Welfare Requirements*

Industrialized farms, or "Big Ag," benefit from federal law's inattention to animal treatment on farms. Industrialized farms are characterized by large-scale production of one item; technology-emphasizing maximum output, decreased production costs, and uniform output; and vertical integration with control of all

stages of production.<sup>269</sup> The lack of federal regulation of animals on farms limits production costs. Wolfson and Sullivan describe animal welfare as virtually disappearing from federal law, especially for farm animals, with their only protection when slaughtered or during transport for a small number of animals.<sup>270</sup> This exceptionalism goes beyond animals. Farms have been exempted from basic environmental regulations.<sup>271</sup> This includes how animals are housed in concentrated animal feeding operations (CAFO) or feed lots,<sup>272</sup> which industrial farms use.

Industrialized agriculture is increasingly concerned when California and other states enact measures to protect farm animals.<sup>273</sup> Animal welfare requirements can limit opportunities to set up shop in these states. But more significantly, state measures increase the costs of selling items like beef, pork, eggs, poultry or dairy products in these states. Barriers to interstate commerce arise when a state bans things like gestation crates, feed lots, downer slaughter, tail docking, or battery cages. The commercial impact is greater when a large-demand state like California passes these measures. In more political terms, the industry worries that as states pass more measures popular momentum for animal welfare increases and this motivates more state legislatures to enact animal-care policies.

Three factors suggest that state laws on farm animal treatment will have a national impact. First, recently states have become more active. In November 2016, Massachusetts through a voter referendum enacted the Act to Prevent Cruelty to Farm Animals. Voters approved this by a three-to-one margin with 77.7% in favor of the measure.<sup>274</sup> Supported by the HSUS and other animal advocates, the act prohibits the use of battery-cage housing for hens and gestation crates for veal and swine. Its enforcement begins in 2022. This signals that the HSUS and others advocates will seek voter support directly with state-level measures like referenda, voter initiatives, and proposals. This deviates from the HSUS and UEP agreement in 2011, which suspended these state-level efforts if farmers and advocates

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269. Susan A. Schneider, *Reconsidering the Industrialization of Agriculture*, 26 J. ENVTL. L. & LITIG. 19, 19 (2011).

270. Wolfson & Sullivan, *supra* note 29, at 206–09.

271. See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 262, 265 (2000).

272. See Margot Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 WAKE FOREST L. R. 399, 405–06 (2015).

273. For a description of state-level initiatives, voter and legislative, banning gestation crates including Florida's state constitution litigation and similar bans by Arizona, Oregon, Colorado, and California, see SONIA S. WAISMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 400–01 (5th ed. 2014). The American Society for the Prevention of Cruelty to Animals lists eleven state bans on gestation crates for pigs and for veal and battery cages for hen eggs, see Farm Animal Confinement Bans, available at <https://www.aspc.org/animal-protection/public-policy/farm-animal-confinement-bans> [<https://perma.cc/8LYT-YAPB>]. In 2016, Massachusetts voters approved an initiative banning battery cages, veal crates, and pig gestation crates and banning sales of products made with these means, see Mass., An Act to Prevent Cruelty to Farm Animals, *supra* note 21.

274. See MASS. GEN. LAWS ANN. ch. 129, § 1 (2017); Abby Elizabeth Conway, Mass. Voters Approve Question 3, Banning Certain Farm Animal Confinement Practices, POLITICKER (Nov. 8, 2016), <http://www.wbur.org/politicker/2016/11/08/question-three-animal-confinement-results> [<https://perma.cc/S6DD-NB3B>].

succeeded in federal welfare regulations for poultry farms. Also, California may possibly have another farm animal voter initiative in the November 2018 election.<sup>275</sup> If approved by state voters, this measure would ban veal and swine gestation crates.<sup>276</sup> Moreover, for eggs it would require cage-free hen housing, going a step further than what was in dispute in the *California Egg Case*. Titled the Prevention of Cruelty to Farm Animals Act, this proposal comes over a decade after California voters approved Proposition 2 by the widest margin of any direct measure in the state.

Second, these recent state measures seek to ban the sale of food items, promising to impact out-of-state farmers, ranchers, slaughterhouses, and merchants. Massachusetts's regulations are already posed to do this.<sup>277</sup> Like with California's existing shark fin, foie gras, and battery-cage egg policies, Massachusetts seeks to prevent animal cruelty outside the state by eliminating the economic incentives to sell in the state. The proposed California voter initiative would do the same for veal and pork gestation crates and for eggs from any caged hens. It is predicted that out-of-state pork producers stand to lose the most from this measure, since California does not have a large pork industry.<sup>278</sup> It is estimated that eighty-three to ninety percent of pork producers in the United States use gestation crates.<sup>279</sup> But already large food companies, including McDonalds, Subway, and Dennys, have pledged to in the future stop selling pork products from suppliers who use gestation crates.<sup>280</sup>

The Dormant Commerce Clause inquiries focused on discrimination, indirect effects, and economic burdens, described above, will shape predicted constitutional food fights. Pork, poultry, and veal farmers are undoubtedly contemplating lawsuits against Massachusetts. They will do the same for California if the proposal gets on the 2018 ballot and if voters approve it.

Third, pressure continues to mount for farms to change how they raise animals. The Pew Commission on the Industrial Farm Animal Production

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275. Initiative No. 17-0026, The Prevention of Cruelty to Farm Animals Act, (Aug. 29, 2017), [https://oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29\\_0.pdf](https://oag.ca.gov/system/files/initiatives/pdfs/17-0026%20%28Animal%20Cruelty%29_0.pdf) [https://perma.cc/ZK88-AYS4].

276. Cage-free eggs would be required by December 31, 2021, pork free from gestation crates by December 31, 2021, and veal not locked in crates by December 31, 2019. See *California Ballot Initiative Seeks to Prevent Animal Cruelty, Protect Food Safety in the Golden State*, THE HUMANE SOCIETY OF THE UNITED STATES (Aug. 29, 2017), [http://www.humanesociety.org/news/press\\_releases/2017/08/california-ballot-initiative-082917.html](http://www.humanesociety.org/news/press_releases/2017/08/california-ballot-initiative-082917.html) [https://perma.cc/R799-MCUJ].

277. Greg Henderson, *HSUS Seeks Calif. Cage-Free Status for Pork, Veal and Egg*, AG WEB: POWERED BY FARM JOURNAL (Sept. 2, 2017), <https://www.agweb.com/article/hsus-seeks-calif-cage-free-status-for-pork-veal-and-eggs-naa-greg-henderson/> [https://perma.cc/7EUB-X9GY].

278. See Tara Duggan, *New Ballot Initiative Could Increase California Farm Animal Welfare Standards*, S.F. CHRON. (Aug. 29, 2017), [www.sfchronicle.com/food/article/New-ballot-initiative-could-increase-California-12159349.php](http://www.sfchronicle.com/food/article/New-ballot-initiative-could-increase-California-12159349.php) [https://perma.cc/7MXN-LYJS].

279. Tara Duggan, *New Standards in Animal Welfare Raise New Issues*, S.F. CHRON. (Aug. 15, 2017), <http://www.sfchronicle.com/food/article/New-standards-in-animal-welfare-raise-new-issues-11818025.php> [https://perma.cc/FK9Q-GC6T].

280. See Duggan, *supra* note 279.

(PCIFAP) produced a comprehensive report in 2008 documenting this need and proposing reforms in the areas of public health, environmental risks, animal welfare, and rural America.<sup>281</sup> Titled *Putting Meat on the Table*, it identified how the rising demand for food, pressures to increase farm output while reducing costs, and concentration in agricultural production created the status quo of industrial farms, with farms appearing more like factories than rural, family-run endeavors.<sup>282</sup> Most Americans are unaware of this, living far from where food is produced.<sup>283</sup> It offered twenty-four recommendations, to respond to what is concluded was a system of that “is not sustainable and presents an unacceptable level of risk to public health and damage to the environment” and “unnecessary harm to animals.”<sup>284</sup> The report was commended for its comprehensive approach to identifying causes, economic challenges, a comprehensive set of recommendations, and risks to persons, animals and the environment.<sup>285</sup> It was expected as the public became more engaged the USDA, FDA, and Congress would begin work on the report’s suggestions.

Five years later, the Johns Hopkins University Center for a Livable Future (CLF) reported on the inaction and lack of progress in following *Putting Meat on the Table* publication. The CLF director, Robert S. Lawrence, MD, explained that there was an “appalling lack of progress” and a federal “failure to act” and “continued intransigence of the animal agriculture industry.”<sup>286</sup> Pew Commission Chair, John Carlin, added that with the public increasingly involved on these issues that policymakers are not listening to constituents.<sup>287</sup> PCIFAP’s executive director explained that “inaction was inexcusable” when the initial report was issued, but five years later “it is unconscionable.”<sup>288</sup>

CLF’s report *Industrial Food Animal Production in America* focused on six priority recommendations, regarding nontherapeutic use of antimicrobials, disease monitoring, regulations for industrial food animal production, intensive confinement, livestock market competition, and research in animal agriculture.<sup>289</sup>

281. See John Carlin, *Foreword* to PEW COMM’N ON INDUS. FARM ANIMAL PROD., PEW CHARITABLE TRS. & JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, *PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA*, at iv (Jeffrey T. Olson ed., 2008) [hereinafter *PUTTING MEAT ON THE TABLE*].

282. See *PUTTING MEAT ON THE TABLE*, *supra* note 281, at x–9.

283. See *id.* at 1, 3.

284. See Robert P. Martin, *Preface* to *PUTTING MEAT ON THE TABLE*, *supra* note 281, at viii–ix, 56–95.

285. See Rick Weiss, *Report Targets Costs of Factory Farming*, WASH. POST, Apr. 30, 2008, at A2; Elizabeth Williamson, *Farming Critics Fault Industry’s Influence*, WALL STREET J., Apr. 30, 2008, at A4.

286. Johns Hopkins Ctr. for a Livable Future, *Analysis of Pew Commission’s Impact on Industrial Farm Animal Production*, Johns Hopkins Bloomberg Sch. Pub. Health (Oct. 22, 2013), [https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/newsroom/News-Releases/2013/pew\\_2013.html](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/newsroom/News-Releases/2013/pew_2013.html) [https://perma.cc/8LJC-9FVH].

287. *Id.*

288. *Id.* (internal quotation marks omitted).

289. BRENT F. KIM ET AL., *INDUSTRIAL FOOD ANIMAL PRODUCTION IN AMERICA* xiii (Ctr. for a Livable Future 2013), [https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/\\_pdf/research/clf\\_reports/CLF-PEW-for%20Web.pdf](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-a-livable-future/_pdf/research/clf_reports/CLF-PEW-for%20Web.pdf) [https://perma.cc/F9HD-U8LJ].

Two of these, intensive animal confinement and regulations for industrial food animal production, reflect the political motivations behind California's recent measures, described in this Article. In 2008, the Pew Commission recommended eliminating all intensive confinement systems, given the interrelation between animal conditions and their welfare, food safety, and public health.<sup>290</sup> This included ending swine gestation crates, battery cages for hens, veal crates, force-feeding for foie gras, tail-docking for cattle, and forced molting of laying hens.<sup>291</sup> Understanding the economic costs involved, it proposed phase in periods and targeted assistance for farm conversions.<sup>292</sup> In describing limited successes in animal welfare reforms, *Industrial Food Animal Production in America* points to state-level efforts in five states, Colorado, California, Maine, Michigan, and Rhode Island, with bans on pig gestation crates, veal crates, tail-docking cattle, or battery-cage eggs, since the Pew commission study five years earlier.<sup>293</sup>

Moreover, *Industrial Food Animal Production in America* describes how already Congress negotiates between potential federal standards for farm animals and preserving the status quo of federal law hands-off position on farm animals.<sup>294</sup> A product of the UEP-HSUS agreement, Senator Dianne Feinstein, from California, proposed the Egg Products Inspection Act of 2013, that would ban battery cages nationwide over fifteen to eighteen years, require labeling of cage and cage-free hens, and bar states from exceeding the Act's floor-space mandates.<sup>295</sup> The Act was not approved by Congress and excluded from the farm bill. Agricultural organizations, such as the National Pork Producers Council, National Chicken Council and National Cattlemen's Beef Association opposed this egg measure. They feared it would open the door for federal livestock and chicken protections.<sup>296</sup>

As pressure mounts from consumers and Americans as voters and litigants, regulation and animal welfare stand out as the subjects of ongoing political food fights and the menu of doctrinal jockeying between states and federal authority. The interrelated causes and effects of animal farming noted in *Putting Meat on the Table* and *Industrial Food Animal Production in America* paint where California's food-and-Constitution litigation can easily replicate itself across the United States.

## 2. Limited Resolution in Dormant Commerce Clause Claims

Many state animal welfare measures are unlikely to be found to be inconsistent with the Dormant Commerce Clause when they apply inside and outside the state's borders and when legislatures take the time and effort to listen to scientific

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290. *Id.* at 26.

291. *Id.*

292. *Id.*

293. *Id.* at 28.

294. *See id.* at 26.

295. *Id.* (citing H.R. 3798, 113th Cong. (2012)).

296. *See* David Rogers, *Draft Bill Aids, Pork, Beef Lobbies*, POLITICO (May 9, 2013, 7:04 P.M.), <http://www.politico.com/story/2013/05/draft-farm-bill-aids-pork-beef-lobbies-091164> [<https://perma.cc/32Q7-F369>].

justifications and to identify their conservation or anticruelty objectives. For California, the shark fin and foie gras bans were not ruled to be in violation of the Dormant Commerce Clause.<sup>297</sup> This appears inconsistent with case law involving state-level food regulations. In those cases, the regulations were found to be Dormant Commerce Clause violations either as discriminatory or as extraterritorial regulation.<sup>298</sup> Dormant Commerce Clause inquiry focuses on whether a state attempts to protect its home industries with state-level policies at the expense of interstate commerce.<sup>299</sup> The doctrine's objective is to protect a federal market without barriers to trade between the states.

In these three Dormant Commerce Clause cases, it would be unlikely to find state animal welfare policies in violation. First, if a state policy on its face discriminates against out-of-state interests, then courts subject the policy to a strict scrutiny review and most likely find it to be in violation of the Dormant Commerce Clause.<sup>300</sup> This kind of policy would be unlikely for animal welfare and food regulation. In theory, California could try to ban beef from Texas or milk from Vermont only because they come from those states, but that is improbable. Most state-level regulations would point to scientific, health, economic, or animal welfare reasons to close off such domestic imports.

Such policies spark the second type of Dormant Commerce Clause analysis for "even-handed" or nondiscriminatory regulation. California's foie gras and shark fin bans were examined with this lens. The regulations impacted duck farmers, restaurants, and shark fin merchants and fishermen both inside and outside the state. Californian and non-Californian economic interests suffer from the same regulation. These even-handed regulations are only a violation of the Dormant Commerce Clause if the burden on commerce is excessive to the public interest. This is the *Pike* balancing test.<sup>301</sup> For foie gras and shark fin bans, California's interest was ending the cruelty felt by ducks and curtailing the depletion of shark populations and similarly avoiding the cruelty of catching sharks just for their fins. This is not outweighed by the burdens of duck farmers, merchants, or fishermen.<sup>302</sup> These burdens were seen as less given the implementation period, political goals of animal welfare as expressed by the legislature, and limited size of these industries.

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297. See *id.*; *Ass'n des Éleveurs I*, 729 F.3d 937.

298. See *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (finding state beer price affirmations violated the Dormant Commerce Clause); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (finding state milk price controls violated the Dormant Commerce Clause); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (finding state liquor price controls violated the Dormant Commerce Clause); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013) (finding requirements of state origin markings on beverage bottles to be a violation of Dormant Commerce Clause).

299. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 11.1 (5th ed. 2012).

300. *Ass'n des Éleveurs I*, 729 F.3d at 948 (describing a two-tier approach to Dormant Commerce Clause analysis for direct regulation or discrimination and for indirect effects and evenhanded regulation) (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 578–79).

301. *Pike*, 397 U.S. 137.

302. See *Chinatown Neighborhood Ass'n*, 794 F.3d at 1147; *Ass'n des Éleveurs I*, 729 F.3d at 952.

Third is Dormant Commerce Clause analysis focused on extraterritorial conduct. For shark fin and foie gras, the out-of-state effects of California's ban were judged in relation to their local benefit. This effectively uses the *Pike* test for extraterritorial analysis. Prior case law focused on the practical effects of state regulation aimed at conduct "wholly outside state borders," involving price controls for liquor or milk sold across state borders. This reasoning was not applied to foie gras or shark fin sale bans, since Californian and non-Californian actors suffered the same harm from the sales ban.<sup>303</sup> Past extraterritorial reasoning was read by courts as focused on price-fixing or bottle labels required for beverage sales, which were not an issue for these animal welfare policies.<sup>304</sup> Unless a state animal welfare policy only regulates activity outside the state and has the objective to fix prices or ban sales without state mandated labels, it is doubtful that a court would find the policy inconsistent with the Dormant Commerce Clause.

Noting these challenges for farmer plaintiffs with Dormant Commerce Clause claims, federal legislation has been proposed to make state welfare regulations for farm animals illegal. This has the support of farming groups and politicians in farming states.<sup>305</sup> Representative Steve King from Iowa proposed the Protect Interstate Commerce Act (PICA) recently.<sup>306</sup> It would prohibit state or local governments from "imposing a standard or condition" on producing or manufacturing agricultural products sold in interstate commerce if "the production or manufacture occurs in another state" and it "adds to standards or conditions" under federal law or in the state or locality where the product is produced or manufactured.<sup>307</sup> Representative James Sensenbrenner of Wisconsin also proposed the "No Regulation Without Representation Act of 2017"<sup>308</sup> Its prohibitions are more expansive. It allows states to tax or regulate "interstate commerce" only when the actor is "physically present in the state during the period in which the tax or is imposed."<sup>309</sup> Both measures aim to stop states passing regulations that would limit imports of domestic food and agricultural products.

Also called the "King Amendment," PICA directly responds to California's animal farm regulation.<sup>310</sup> It was proposed for the previous farm bill, 2014, and

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303. See *Chinatown Neighborhood Ass'n*, 794 F.3d at 1146; *Ass'n des Éleveurs I*, 729 F.3d at 952.

304. See *Chinatown Neighborhood Ass'n*, 794 F.3d at 1136; *Ass'n des Éleveurs I*, 729 F.3d 937; *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013).

305. The National Pork Producers Council has supported these measures. See Carolyn Lochhead, *California's Hen Law at Center of Farm Bill Fight*, S.F. GATE (Nov. 12, 2013), <http://www.sfgate.com/nation/article/California-s-hen-law-at-center-of-farm-bill-fight-4978974.php> [<https://perma.cc/JHS8-2ZN6>] (last updated Nov. 12, 2013). The National Cattleman's Beef Association also supported these measures. See Rep. Steve King, *The Protect Interstate Commerce Act Offers State Trade Solution*, NAT'L CATTLEMEN'S BEEF ASS'N (last visited Oct. 22, 2017), <https://www.beefusa.org/ourviewscolumns.aspx?NewsID=2620> [<https://perma.cc/5U5K-YQJV>].

306. H.R. 3599, 115th Cong. (2017).

307. *Id.* § 2(a).

308. No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. § 1 (2017).

309. *Id.* § 2(a).

310. INDUSTRIAL FOOD ANIMAL PRODUCTION IN AMERICA, *supra* note 289, at 26, 28.

included in the House version of the bill.<sup>311</sup> With the support of livestock and poultry groups, Representative King moved to include PICA in reaction to the UEP-HSUS agreement of 2011, which supported federal legislation on housing standards for hens. Such measures would eliminate the likelihood of disputes like the *California Egg Case* and the motivation for voter proposals in Massachusetts and California. PICA was included in the House Agriculture Committee and House versions of the bill, but the Senate House negotiations ultimately eliminated it from the final farm bill for 2014.<sup>312</sup>

PICA's inclusion threatened to derail this farm bill. It was heavily criticized because it limits the ability of states to regulate internal matters. The Los Angeles Times noted that it would invalidate food safety, labor, farm-raised fish, and pesticide regulations.<sup>313</sup> Another report added state regulations for animal antibiotics, GMO labels, farm animals, food additives, dog breeding, and much more.<sup>314</sup> Then, PICA was opposed by over 100 members of Congress and by over 100 organizations.<sup>315</sup>

Current proposals by Representative King and Representative Sensenbrenner promise to only attract as much opposition, perhaps more so with renewed public successes with voters in Massachusetts and planned for in California. Moreover, corporate food industries are moving away from whole-heartedly resisting animal welfare measures with consumers prioritizing ethical and sustainable farming.<sup>316</sup> PICA moves away from federal reform for farm animal treatment.<sup>317</sup> It goes beyond the federal hands-off farm animal policy that is traditional in American law. It tries to ban state action.

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311. Philip Brasher, *Dogs, Cats, Horses, Too: Animal Welfare Debates Could Tie Up Farm Bill*, AGRI-PULSE (Aug. 30, 2017), <https://www.agri-pulse.com/articles/9746-dogs-cats-horses-too-animal-welfare-debates-could-tie-up-farm-bill> [https://perma.cc/NG95-2CQU]; Lochhead, *supra* note 305.

312. Brasher, *supra* note 311.

313. See Times Editorial Board, Editorial, *Iowa Rep. Steve King Lays an Egg on the Farm Bill*, L.A. TIMES (Jan. 23, 2014), <http://www.latimes.com/opinion/editorials/la-cd-king-amendment-farm-bill-20140123-story.html> [https://perma.cc/9QHH-U3BL].

314. ANIMAL LAW COMMITTEE, N.Y.C. BAR ASS'N, THE "PROTECT INTERSTATE COMMERCE ACT" AMENDMENT (REP. KING): FEDERAL AGRICULTURE REFORM AND RISK MANAGEMENT ACT OF 2013 (Oct. 2013), <http://www2.nycbar.org/pdf/report/uploads/20072583-ProtectInterstateCommerceActAmendmenttoHR1947.pdf> [https://perma.cc/AG6R-FAZJ].

315. See *Compendium of Publicly Stated Opposition to Rep. Steve King's Farm Bill Amendment*, THE HUMANE SOC'Y OF THE UNITED STATES (Jan. 23, 2014), <http://www.humanesociety.org/assets/pdfs/legislation/king-amendment-opposition-master.pdf> [https://perma.cc/Q4XX-VUTW].

316. Anne Lieberman, *King Amendment to House Farm Bill Ignores Consumer Trend*, THE HILL: CONGRESS BLOG (June 20, 2013, 7:00 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/306637-king-amendment-to-house-farm-bill-ignores-consumer-trends> [https://perma.cc/W6J6-WZ4P].

317. See INDUSTRIAL FOOD ANIMAL PRODUCTION IN AMERICA, *supra* note 289, at 26, 28.

### 3. Industrial Farms One Day Will Seek Defensive Preemption

Eventual federal preemption, with statutory law on farm animal treatment, is more likely to provide lasting solutions to these state and food producer contests, more so than lawsuits examining variants of economic discrimination. At first glance, California's preemption jurisprudence appears like a muddle, measures have been found to be preempted by federal statutes<sup>318</sup> and not preempted by federal statutes.<sup>319</sup> Historically the FMIA and PPIA have been found as preempting<sup>320</sup> and not preempting state regulations.<sup>321</sup>

Ernest Young explains that preemption jurisprudence often looks arbitrary and inconsistent since diverse areas of law and policy are being reviewed.<sup>322</sup> He notes that what causes inconsistencies is that preemption analysis focuses on the reallocation of governmental authority.<sup>323</sup> For animal welfare, federal law is traditionally relatively hands-off, and states increasingly are taking on this policy area.<sup>324</sup> For now, proponents of preemption, food producers and the federal government, will paint statutes like the FMIA, PPIA and Egg Products Inspection Act as broad. The FMIA<sup>325</sup> and PPIA<sup>326</sup> include a great deal in their preemption clauses, including bars on states imposing “[m]arking[s], labeling, packaging, [and] ingredient[s]” requirements or requirements concerning “premises, facilities and operations” that are “in addition to, or different than” the federal requirements. For state animal welfare food policies to succeed they will have to be argued as independent of inspection and these many requirements. Courts have interpreted the PPIA as preempting<sup>327</sup> and not preempting<sup>328</sup> state food regulations. Similarly the FMIA has been found to preempt<sup>329</sup> and to not preempt<sup>330</sup> state food regulations.

This Article's prediction of eventual federal statutes on farm animal treatment builds on Randall Abate's edited book *What Can Animal Law Learn from*

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318. See *Nat'l Meat Ass'n*, 132 S. Ct. at 968.

319. See *Ass'n des Éleveurs II*, 870 F.3d at 1140; *Chinatown Neighborhood Ass'n*, 794 F.3d at 1141–42.

320. See *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 745 (9th Cir. 1994); *Armour & Co. v. Ball*, 468 F.2d 76, 83–85 (6th Cir. 1972).

321. See, e.g., *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975); *Swift & Co. v. Wickham*, 364 F.2d 241 (2d Cir. 1966).

322. See generally Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 (2012).

323. *Id.*

324. See discussion *supra* notes 29–53 and accompanying text.

325. 21 U.S.C. § 678 (2012).

326. 21 U.S.C. § 467e (2012).

327. See *National Broiler Council*, 44 F.3d 740.

328. See, e.g., *Physicians Comm. for Responsible Medicine v. Applebee's Int'l*, 224 Cal. App. 4th 166 (2014); *Physicians Comm. for Responsible Medicine v. McDonald's Corp.*, 187 Cal. App. 4th 554 (2010).

329. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Ball*, 468 F.2d 76.

330. See *Becker*, 530 F.2d 1295.

*Environmental Law*?<sup>331</sup> It sets a law and policy course for animal law's future summarized by the simple proposition that animal law is fifty years behind environmental law with states currently providing piecemeal and disjointed approaches. The history of the Clean Air Act of 1970 illustrates how the automobile and coal industries found it more desirable to support federal clean air regulation.<sup>332</sup> This was because one set of norms for all domestic operations, regulating manufacturing and marketing cars and mining or coal energy production, was easier to comply with, avoided costly litigation or lobbying contests state-by-state, and provided certainty in terms of costs of doing business. These industries, which stood to lose most from patchwork environmental regulations, preferred to have federal regulation of their operations versus regulations focused on an item. This is similar to industrial agriculture's support for federal regulation of an operation, as in *National Meat Association*, where compliance can be prepared for as a business and then proven. To the contrary would be regulation prohibiting an item, like foie gras or shark fins, where it becomes difficult for farmers, merchants, or fishermen to sell the product or proving their operations comply.

This future look at animal law paints federal statutes as evolving in six stages. Donald Elliott, Bruce Ackerman, and John Millian describe how environmental law became federal in the United States along separate stages as common law, political costs externalization, preemptive federalization, aspirational law, legal bureaucracy, and revision.<sup>333</sup> California's recent examples with foie gras, shark fins, and battery-cage eggs best resemble the second stage of political costs externalization. In this phase, the costs of animal welfare regulations are mostly felt outside of the state that passes regulations. The subjected industry is passive and disorganized in its response, while scientific justifications and proregulation interest groups increasingly become organized. As an increasing number of states pass specific measure barring certain animal farming methods or pass comprehensive farm animal treatment laws, this stage explains much of the status quo. Abate describes that most of this regulation is not passed in states with a large animal farming industry, so state constituents as buyers chose to absorb the costs by barring the sale of food items they disagree with.<sup>334</sup> California is the only agricultural state example, when the battery-cage ban required by Proposition 2 pitted state egg farmers against popular sentiment against battery-cage housing. Eventually, as seen in the *California Egg Case*, the battle was over where to market battery-cage eggs versus where they can be produced. As more states pass animal welfare measures while consumers, grocers, and restaurants increasing worry about animal treatment,

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331. WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW? (Randall S. Abate ed., 2015).

332. Elizabeth Hallinan & Jeffrey D. Pierce, *Learning From Patchwork Environmental Regulation: What Animal Advocates Might Learn From the Varied History of the Clean Air Act*, in WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?, *supra* note 331, at 3, 3–41.

333. E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985).

334. WHAT CAN ANIMAL LAW LEARN FROM ENVIRONMENTAL LAW?, *supra* note 331.

“defensive preemption” is contemplated.<sup>335</sup> J.R. DeShazo and Jody Freeman describe this type of preemption when industries and proregulation forces succeed in converging their interest in federal legislation.<sup>336</sup> Industries seek to avoid a patchwork of regulations and desire a ceiling to any federal bars. Proregulation forces try to avoid states having weaker regulations than others, inspiring industry to race to the bottom. For animal welfare, the proregulation forces would be animal advocates and conservationists and the industries would be farming and food producers. In sum, California’s four recent food-and-animal disputes point to an ongoing political food fight and a long-term contest to set a doctrinal menu between state innovation and federal law.

#### CONCLUSION

This Article has introduced the suggestion that food equity debates about food in American society often take place as complex inquiry into constitutional law. The Article’s goal has been to identify how evolving efforts to protect animals in food production spark sophisticated constitutional debates. Food-and-Constitution developments currently transpire, as animal welfare policies enliven societal discussions about food. Whether commenting on animal cruelty, species conservation, or industrial farming, questions about animal treatment fuel a series of changes in food consumption and production. Based on this, eaters demand and spend accordingly, policymakers seek legislative changes, and producers as farmers, merchants, restaurants, fishermen, and ranchers all are inspired to respond. State and local governments will increasingly seek policies to limit claims of animal cruelty on farms, ranches, fisheries, abattoirs, restaurants, and markets.

Concerning pork products, shark fins, foie gras, and eggs, California’s four recent animal welfare measures offer a current window into how food debates heat up constitutional controversies. California has tried to improve animal treatment by banning the sale and/or possession of these items. Seen solely as legal doctrine plates, *National Meat Association* is a federal preemption case, the *California Egg Case* is a Dormant Commerce Clause case, and *Chinatown Neighborhood Association* and *Association des Éleveurs I* and *II* cover both doctrines. But when these cases are seen as state attempts to regulate food sales and production with animal welfare norms, food’s powerful role in the Constitution and the Constitution’s influence in food debates begin to emerge. The Commerce Clause and Supremacy Clause are menu items deciding if states can or cannot protect animals. Routine preemption, commerce, and federal questions take on animal cruelty and food freedom significance. This pot of legal ingredients appears to simmer when it becomes obvious that California is just one of many states seeking these measures.

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335. Hallinan & Pierce, *supra* note 332, at 12.

336. J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499 (2007).

These four examples illustrate this Article's claim: that state policies regulating food choices and animal treatment will face judicial inquiry balancing state concerns for animal welfare with federal concerns for economic discrimination, regulatory uniformity, and costs passed on to eaters and producers. *National Meat Association* shows how federal uniformity in inspections for pork displaces state animal cruelty policies. This applies to the process of slaughtering pigs, despite humanitarian concerns for downers. Federal law won. *Association des Éleveurs II* illustrates how banning a process, *gavage*, helps California's foie gras sales ban. *Association des Éleveurs I* and *Chinatown Neighborhood Association* demonstrate how state policies overcome Dormant Commerce inquiry. These courts looked for economic discrimination and economic burdens passed on to fishermen and merchants and duck farmers and foie gras sellers. These policies survive since Californian and non-Californian actors are subject to the same sales ban. Similarly, the political objectives of conserving endangered sharks and stopping *gavage's* purported cruelty motivated the court to side with the state. The procedural holding of *California Egg Case* shows that any inquiry into preemption or interstate commerce requires harms from private actors. In three cases, state power to protect animals has won over federal norms.

Farming interests and animal advocates closely follow this progress planning their future in terms of litigation, lobbying, policy support, and business model changes. This leads to this Article's second claim that food-and-Constitution litigation feeds larger federalism debates. This evolves in two steps. First are political food fights over state animal welfare. Next there is setting the doctrinal menu for farm animal protection. This evolves as a contest between state-level innovation and defensive preemption.

In conclusion, this Article serves up an inquiry into how food constitutes an important part of constitutional law. Ideally, it motivates further examination into the eating, food production, and agricultural aspects of other cases in constitutional law. The Article looks to the future, when eaters, legislators, and food producers will increasingly have to confront questions about animal treatment. The current offering is a political food fight, while a battle looms to set the doctrinal menu to regulate animals in food production and food sales. California's animal welfare offerings involving pork products, shark fins, foie gras, and eggs confirm that the Constitution keeps these debates warm.