NOTE

EATING HIGH ON THE HUMANELY RAISED HOG: STATE BANS ON SELLING FOOD PRODUCED USING CRUEL ANIMAL FARMING METHODS DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE

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> *"[W]e have enslaved the rest of the animal creation, and have treated our distant cousins in fur and feathers so badly that beyond doubt, if they were able to formulate a religion, they would depict the Devil in human form."*[1]

INTRODUCTION

The United States slaughters over nine billion animals for food annually.[2] Thus, farmed animals[3] unsurprisingly "represent 98 percent of all animals . . . with whom humans [interact]."[4] Yet, farmed animals are among the least-protected animals in the United States. Almost all farmed animals in the United States are raised on factory farms,[5] which well-documented evidence has shown subject animals to deplorable conditions.[6] Despite 94% of Americans believing that farmed animals should be protected from abuse,[7] the principal federal

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1 WILLIAM RALPH INGE, OUTSPOKEN ESSAYS 166–67 (1922).

2 *See* U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., POULTRY SLAUGHTER: 2020 SUMMARY 5 (2021) (showing nearly 10 billion poultry animals slaughtered in 2020); U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., LIVESTOCK SLAUGHTER: 2020 SUMMARY 8 (2021) (showing nearly 200 million livestock animals slaughtered in 2020).

3 This Note defines "farmed animals" as animals raised for agricultural purposes, specifically for the meat, egg, and dairy industries. *See Farmed Animals*, ANIMAL LEGAL DEFENSE FUND, https://aldf.org/focus_area/farmed-animals/ [https://perma.cc/7V2V-6KRP] (last visited May 14, 2021).

4 David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 206 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005).

5 Per the U.S. Department of Agriculture ("USDA") 2017 Census of Agriculture, an estimated "70.4% of cows, 98.3% of pigs, 99.8% of turkeys, 98.2% of chickens raised for eggs, and over 99.9% of chickens raised for meat" are raised in factory farms. Jacy Reese Anthis, *US Factory Farming Estimates*, SENTIENCE INST., https://www.sentienceinstitute.org/us-factory-farming-estimates [https://perma.cc/7U8P-SYGC] (last updated Apr. 11, 2019) (synthesizing food farming data from the 2017 Census of Agriculture and defining "factory farms" using the U.S. Environmental Protection Agency's ("EPA's") definitions of concentrated animal feeding operations ("CAFOs")); *see also* U.S. ENV'T PROT. AGENCY, REGULATORY DEFINITIONS OF LARGE CAFOS, MEDIUM CAFO, AND SMALL CAFOS, https://www.epa.gov/sites/production/files/2015-08/documents/sector_table.pdf [https://perma.cc/5MQF-J42T] (designating particular intensive animal feed operations as "concentrated" based on large animal confinement numbers and high polluting risk).

6 *See* Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 931–39 (2018) (summarizing the industry standards for animal husbandry, which are "fundamentally inconsistent with basic animal welfare").

7 *ASPCA Research Shows Americans Overwhelmingly Support Investigations to Expose Animal Abuse on Industrial Farms*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS (Feb. 17, 2012), https://www.aspca.org/about-us/press-releases/aspca-research-shows-americans-overwhelmingly-support-investigations-expose [https://perma.cc/BT6C-LSC6].

animal welfare law, the Animal Welfare Act,[8] largely excludes farmed animals from its protections. Instead, federal law leaves farmed animal welfare to "the tender mercies of state governments and corporate bottom lines."[9]

Most states' laws minimally protect farmed animal welfare. However, a growing minority of states have enacted food-related sales bans that are designed to improve the lives of farmed animals nationwide. These sales bans are passed by states as a means to eliminate inhumane confinement of farmed animals. For example, California has enacted Proposition 12, which increased and specified minimum space requirements provided to egg-laying hens, veal calves, and breeding pigs.[10] Further, Proposition 12 banned the in-state sale of eggs, veal, and pork produced in violation of Proposition 12's confinement requirements.[11] In other words, farmers across the country who wish to sell eggs, veal, or pork in California will be required to comply with Proposition 12 by 2022, when the law's requirements are set to go into full effect.[12] Remodeling farms and production methods to comply with Proposition 12 is a hefty expense for industrial farmers,[13] who have traditionally given animals so little space that the animals are unable to lie down, turn around, or open their wings.[14]

With some sales bans already in effect,[15] and several others soon to go into effect,[16] animal agribusiness has waged

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8 7 U.S.C. §§ 2131–2159 (2018).

9 Bruce Friedrich, *Ritual Slaughter, Federal Preemption, and Protection for Poultry: What Legislative History Tells Us About USDA Enforcement of the Humane Slaughter Act*, 24 ANIMAL L. 137, 139 (2018).

10 CAL. HEALTH & SAFETY CODE § 25991 (West 2021).

11 CAL. HEALTH & SAFETY CODE § 25990 (West 2021).

12 *Id.* Although Proposition 12's regulations were supposed to go into full effect on January 1, 2022, a state judge stayed enforcement for pork retailers until 180 days after the California Department of Food and Agriculture finalizes regulations (which are currently delayed by more than two years). *Cal. Hisp. Chambers of Com. v. Ross*, No. 34-2021-80003765, slip op. at 2 (Cal. Super. Ct. Feb. 2, 2022). However, earlier phases of the law dealing with spacing for calves and egg-laying hens went into effect in 2020.

13 *See* Hanbin Lee, Richard J. Sexton & Daniel A. Sumner, *Voter-Approved Proposition to Raise California Pork Prices*, 24 AGRIC. & RES. ECON. UPDATE 5, 5 (2021) (estimating that compliance with Proposition 12 will increase uncooked-pork prices by 7.7%).

14 *See Farmed Animals*, *supra* note 3.

15 CAL. HEALTH & SAFETY CODE §§ 25990–25994, 25996 (West 2021).

16 *See, e.g.*, MASS. GEN. LAWS ch. 333, § 3 (2016) (banning sales of certain eggs, veal meat, and pork meat from animals confined in a cruel manner effective January 1, 2022); *id.* ch. 108, § 6 (2021) (extending the gestation crate ban phase-in to take effect August 15, 2022); COLO. REV. STAT. ANN. § 35-21-203 (West 2020) (banning sales of eggs from confined egg-laying hens effective January 1, 2023); MICH. COMP. LAWS § 287.746 (2021) (banning sales of eggs from confined egg-

war against these laws. Their weapon? The Dormant Commerce Clause. Opponents of the sales bans argue that the bans unconstitutionally regulate interstate commerce. This Note disagrees and posits that under the modern Dormant Commerce Clause test, state bans on selling food produced using cruel animal farming methods do not violate the Dormant Commerce Clause.

This Note proceeds in four parts. Part I explores federal and state laws that pertain to farmed animal welfare, highlighting their shortcomings. Part II describes state sales bans that have burgeoned as an enforcement tool for states to improve farmed animal welfare. Part III explains how animal agribusiness has weaponized the Dormant Commerce Clause to fight against sales bans, as illustrated by the recent attacks on California Proposition 12, and uncovers an emerging circuit split on whether the Dormant Commerce Clause prohibits states from regulating production methods, including the animal husbandry practices regulated under Proposition 12. Part IV argues that Proposition 12, and similar sales bans, pass constitutional muster under the modern interpretation of the Dormant Commerce Clause.

I
FARMED ANIMAL WELFARE UNDER FEDERAL AND STATE LAWS

A. Farmed Animal Welfare Under Federal Law

The United States has no federal law that meaningfully protects farmed animal welfare.[17] Federal law does not provide protection for farmed animals while they are raised on farms.[18] Two laws—the Twenty-Eight Hour Law and the Humane Slaughter Act ("HSA")—ostensibly provide some federal protection for farmed animals during transport and slaughter, respectively.[19] Yet, loopholes, exclusions, discounted penalties,

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laying hens effective December 31, 2024); OR. REV. STAT. §§ 632.835–632.850 (2019) (regulating sales of eggs from confined egg-laying hens effective January 1, 2024); WASH. REV. CODE §§ 69.25.065, 69.25.110 (2019) (banning sales of certain eggs effective January 1, 2024).

17 Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENV'T L. REV. 423, 441 ("Although federal law protects companion animals, animals used in experiments, and some wild animals, it affords virtually no protection to farm animals prior to slaughter.").

18 *See id.* at 441 n.127; *see also* Wolfson & Sullivan, *supra* note 4, at 207 (asserting that federal law is "essentially irrelevant" to farmed animals).

19 *See* 49 U.S.C. § 80502 (2018); 7 U.S.C. § 1901 (2018).

and lack of enforcement render these laws inconsequential in preventing animal suffering.

The Twenty-Eight Hour Law requires that after 28 hours of consecutive interstate travel, transporters must unload farmed animals in a "humane way" and provide them feed, water, and rest for at least five consecutive hours.[20] However, the statute provides four exceptions: (1) sheep may be confined for an additional eight consecutive hours if the 28-hour period ends at night; (2) animals may be confined for more than 28 consecutive hours because of an accident or other unavoidable situation; (3) animals may be confined for 36 consecutive hours upon written request by the transporter or the animals' owner; and (4) animals may be confined uninterruptedly if the animals are confined with food, water, space, and opportunity to rest.[21] The law also implicitly exempts all poultry from the law's coverage,[22] a colossal omission given that poultry accounts for more than 98% of farmed animals killed for food.[23] And despite the millions of farmed animals transported across state lines per year,[24] the government rarely enforces and provides virtually no guidance on the Twenty-Eight Hour Law.[25] Violating the law results in a $100 to $500 civil fine per shipment—as opposed to per animal—unlawfully confined.[26]

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20 49 U.S.C. § 80502(a)–(b).

21 49 U.S.C. § 80502(a)(2)–(3).

22 9 C.F.R. § 89.1 (2021). In the USDA's Statement of Policy Under the Twenty-Eight Hour Law, the list of species protected under the law includes only cattle, dairy calves, horses, mules, sheep, goats, lambs, kids, and swine. *Id.*

23 Friedrich, *supra* note 9, at 139. This number includes farmed fish. *Id.* at 139 n.13.

24 Michael Greger, *The Long Haul: Risks Associated with Livestock Transport*, 5 BIOSECURITY & BIOTERRORISM 301, 301 (2007).

25 Of the three government entities empowered to enforce the law—the Department of Justice ("DOJ"), the Department of Transportation ("DOT"), and the USDA—both the DOJ and the DOT failed to show that they have promulgated any regulations, guidance, or other related paperwork to help enforce the Twenty-Eight Hour Law. The USDA has only authored one document—a memo in 2003—that has provided guidance on the law since the USDA codified its "Statement of Policy under the Twenty-Eight Hour Law" into federal regulations in 1963. Over a nine-year period, the USDA has initiated investigations into six possible violations of the law, ultimately finding enough evidence to support three findings of conduct in violation of the law; but the USDA has never referred a case to the DOJ for prosecution. Michelle Pawliger, Animal Welfare Inst. Farm Animal Program, *Animals in Transport Languish as Twenty-Eight Hour Law Goes off the Rails*, 25 ANIMAL L. 1, 2–3 (2018).

26 49 U.S.C. § 80502(d); *see also* Erin Gilgen, Note, *Friends, Food or Fiber: Comparing the Legal Frameworks Protecting Farmed Animals in the United States and the Republic of Ireland*, 72 RUTGERS UNIV. L. REV. 867, 881 n.107 (2020) (stating that penalties under the Twenty-Eight Hour Law "seem to be per shipment of animals, not per individual").

The second federal law, the HSA, requires the humane treatment of certain farmed animals during the final moments of their lives, including that they must be "rendered insensible to pain" prior to being slaughtered.[27] However, like the Twenty-Eight Hour Law, the HSA excludes poultry from its protections.[28] The HSA also excludes religious slaughter, like *shechita* in Judaism, from its protections.[29] Notably, the HSA has lacked an enforcement mechanism since 1978, when Congress repealed a provision that prohibited the federal government from purchasing animal products produced in violation of the statute.[30]

B. Farmed Animal Welfare Under State Law

Federal law's silence has led states to determine the fate of farmed animal welfare.[31] However, farmed animals have not fared well on their Judgment Day before state legislatures.

Many states have codified state humane transport laws that resemble the Twenty-Eight Hour Law.[32] But like the Twenty-Eight Hour Law, these state laws usually contain exemptions that leave most farmed animals unprotected.[33] Similarly, about 20 states have codified state slaughter laws that resemble the HSA.[34] These state laws often yield the same

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27 7 U.S.C. §§ 1901–1902 (2018).

28 7 U.S.C. § 1902(a).

29 7 U.S.C. § 1906 (2018).

30 Cynthia F. Hodges, *Detailed Discussion of the Humane Methods of Slaughter Act*, ANIMAL LEGAL & HIST. CTR. (2010), https://www.animallaw.info/article/detailed-discussion-humane-methods-slaughter-act [https://perma.cc/B449-A4W9].

31 For a broad overview of the myriad of ways states regulate animal welfare, see the Animal Legal Defense Fund's annual report that ranks, categorizes, and explains how different U.S. states and territories protect, or do not protect, animal welfare. ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE ANIMAL PROTECTION LAWS RANKINGS REPORT 2021 (2022), https://aldf.org/wp-content/uploads/2022/01/2021-Animal-Protection-US-State-Laws-Rankings-Report-Animal-Legal-Defense-Fund.pdf [https://perma.cc/89BS-VSQ4].

32 *See* Kelly Levenda, *Science-Based Farmed Animal Welfare Laws for the U.S.*, 13 J. ANIMAL & NAT. RES. L. 93, 103–04 (2017) ("Many states have laws relating to the transport of farmed animals and require transport to be done in a humane manner.").

33 *See id.* But see CONN. GEN. STAT. § 53-249 (2020) and 4 R.I. GEN. LAWS § 4-1-7 (2020) for humane transport laws that include poultry in their protections.

34 *See* Rebecca F. Wisch, *Table of State Humane Slaughter Laws*, ANIMAL LEGAL & HIST. CTR. (2006), https://www.animallaw.info/article/table-state-humane-slaughter-laws [https://perma.cc/FF9H-4ACZ].

shortcomings found in the HSA, including several exemptions and low civil penalties.[35]

Further, the majority of states either explicitly or practically exempt much of the suffering experienced by farmed animals from state anti-cruelty laws.[36] Some states, like Iowa and Utah, exclude farmed animals from their statutory definition of "animal," explicitly leaving farmed animals entirely unprotected.[37] At least 37 states in practice exclude farmed animals from state anti-cruelty laws by exempting "customary" farming practices from legal scrutiny.[38] A farming practice is customary if "a majority, or perhaps even a significant minority, of the animal industry follows it."[39] Thus, even the most cruel farming practices can persist, so long as states' anti-cruelty laws have a customary farming exemption and the farmers continue to perform the cruel practice. Even when anti-cruelty laws do cover the treatment of farmed animals, the laws are often poorly drafted and devoid of detailed affirmative actions that farmers must take to implement more humane practices.[40] And, of course, enforcement of such laws has been minimal at best.[41]

Responding to an influx of undercover investigations that have exposed the rampant abuses that animals endure in factory farms,[42] several states have introduced "ag-gag" laws that prevent whistleblowers from documenting and reporting abu-

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35 *See id. But see* CAL. CODE REGS. tit. 3, § 1246 (2021) (expanding the state slaughter laws to include protections for poultry); FLA. STAT. § 828.26 (2020) (establishing an administrative fine of up to $10,000 for each violation of the law).

36 Wolfson & Sullivan, *supra* note 4, at 212.

37 David N. Cassuto & Cayleigh Eckhardt, *Don't Be Cruel (Anymore): A Look at the Animal Cruelty Regimes of the United States and Brazil with a Call for a New Animal Welfare Agency*, 43 B.C. ENV'T AFFS. L. REV. 1, 12 (2016).

38 *Id.*

39 Wolfson & Sullivan, *supra* note 4, at 213.

40 *Id.* at 209.

41 *See* DENA JONES, ERIN SUTHERLAND & ALLIE GRANGER, ANIMAL WELFARE INST., ENFORCEMENT OF STATE FARM ANIMAL WELFARE LAWS 2 (2020), https://awionline.org/sites/default/files/uploads/documents/20StateEnforcementReport.pdf [https://perma.cc/2WCU-UNDD] (reporting on the enforcement of state laws aimed to protect farmed animal welfare).

42 Kelsey Piper, *"Ag-Gag Laws" Hide the Cruelty of Factory Farms from the Public. Courts Are Striking Them Down.*, Vox, https://www.vox.com/future-perfect/2019/1/11/18176551/ag-gag-laws-factory-farms-explained [https://perma.cc/F86W-BXRA] (last updated Jan. 11, 2019). *See also* Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1337–39 (2015) (noting that Mercy for Animals publicized an undercover investigation video on ABC that showed the cruelty of a dairy farm in Idaho and attracted public attention).

sive animal husbandry practices in agricultural facilities.[43] Because factory farms generally operate out of the public eye, ag-gag laws threaten to eliminate one of the few ways that the public can learn the truth about animal treatment on factory farms.[44]

As a result of a recent string of court decisions rendering many ag-gag laws unconstitutional under the First Amendment,[45] animal agribusiness has tactically shifted to "Right to Farm" legislation to combat the increasing public scrutiny of factory farms. Right to Farm legislation attempts to buttress industrial farmers' alleged "right" to use their preferred farming practices by, for example, banning municipalities from enacting laws more stringent than those enacted by the state or federal government; barring the public from suing farms for causing nuisances or creating threats to the environment or public health; or ordering plaintiffs that lose a lawsuit to pay the legal fees of the defendant-animal agribusiness supporter.[46] More concerning are the recent attempts to pass Right to Farm laws as amendments to state constitutions, which would "elevate[ ] farming to the same untouchable status as other constitutional rights, including the right to religious freedom and the right to vote."[47] Every state has enacted some form of Right to Farm legislation.[48]

However, there is momentum by a minority of states to improve farmed animal welfare by eliminating the most extreme forms of animal confinement. As of 2021, 14 states have banned extreme forms of confinement for egg-laying hens,

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43 *See What Is Ag-Gag Legislation?*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.aspca.org/animal-protection/public-policy/what-ag-gag-legislation [https://perma.cc/4M5Q-AMXC] (last visited May 16, 2021) (noting that as of 2020, nearly 30 states have introduced ag-gag bills, six states currently have had ag-gag bills passed into law, and five states have had their ag-gag laws knocked down as unconstitutional); *see also* Marceau, *supra* note 42, at 1337–39 (noting that the agriculture industry in Idaho lobbied the state to pass an ag-gag bill to protect the industry from undercover investigation).

44 *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, https://aldf.org/issue/ag-gag/ [https://perma.cc/UW8W-F2EK] (last visited May 16, 2021).

45 *See* Piper, *supra* note 42.

46 *Oppose "Right to Farm" Legislation*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.aspca.org/animal-protection/public-policy/oppose-right-farm-legislation [https://perma.cc/7KKF-4F9Z] (last visited May 16, 2021).

47 *See id.*

48 *States' Right-to-Farm Statutes*, NAT'L AGRIC. L. CTR., https://nationalaglawcenter.org/state-compilations/right-to-farm/ [https://perma.cc/JK62-B6JA] (last visited May 16, 2021).

sows, and veal calves.[49] Anti-confinement laws, often created through ballot initiative, typically prohibit or limit the use of hen battery cages, gestation crates, and veal crates.[50] Relatedly, some laws have banned farmers from docking cattle tails, a practice used to enable closer confinement of the animals.[51]

While these anti-confinement laws show promise in improving animal welfare, a review of the anti-confinement laws in effect as of 2019 revealed that they were, by and large, unenforced.[52]

To enforce compliance with anti-confinement laws, a handful of states have passed sales bans—the subject of this Note. Sales bans prohibit the in-state sale of foods produced in violation of various anti-confinement laws.[53] Sales bans can quickly run up hefty bills for farmers—even for those based outside of regulated states—because farmers often need to restructure their farms into compliance with regulated states' laws if they wish to continue selling their products in those states.[54] As such, animal agribusiness has fiercely contested sales bans as unconstitutional limits on interstate commerce, dredging back up the ambiguities of the Dormant Commerce Clause, a doctrine that Justice Thomas has famously quipped

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49 These states include Arizona, California, Colorado, Florida, Kentucky, Maine, Massachusetts, Michigan, Nevada, Ohio, Oregon, Rhode Island, Utah, and Washington. *Farm Animal Confinement Bans by State*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.aspca.org/animal-protection/public-policy/farm-animal-confinement-bans [https://perma.cc/MF25-2TQ3] (last visited May 16, 2021).

50 *See* JONES, SUTHERLAND & GRANGER, *supra* note 41, at 1.

51 *See id.* Despite farmers' steadfast claim that tail docking is performed to improve cattle hygiene, scientific research has repeatedly shown that tail docketing does not improve animal hygiene, and instead, can worsen it. *See* Animal Welfare Division, *Literature Review on the Welfare Implications of Tail Docking of Cattle*, AM. VETERINARY MED. ASS'N (2014), https://www.avma.org/sites/default/files/resources/tail_docking_cattle_bgnd.pdf [https://perma.cc/B8UL-BMVS].

52 *See* JONES, SUTHERLAND & GRANGER, *supra* note 41, at 2.

53 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25996 (West 2021) (banning the sale in California of an egg "if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm"); 940 MASS. CODE REGS. 36.05 (2021) (banning the sale in Massachusetts of any egg, veal meat, and pork meat that was produced using cruel confinement methods); Assemb. B. 399, 2021 Leg., 81st Sess. (Nev. 2021) (banning the sale in Nevada of egg products produced using battery cages).

54 Jennifer Brown, *All Colorado Eggs Must Be Cage-Free by 2025 Under Law Passed to Head off Stricter Ballot Measure*, COLO. SUN (July 1, 2020), https://coloradosun.com/2020/07/01/colorado-cage-free-egg-law/ [https://perma.cc/9UM6-8DRE].

has "no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[55]

II
STATE BANS ON SELLING FOOD PRODUCED USING CRUEL ANIMAL FARMING METHODS

A closer look at state sales bans helps illuminate how animal agribusiness argues for their eradication under the Dormant Commerce Clause. Only eight states have enacted any sort of sales ban.[56] The sales bans can be grouped in two categories: sales bans of eggs from battery cages and sales bans of meat from gestation crates or veal crates.

A. Banning the Sale of Non-Cage-Free Eggs

For six years, California was the only state to ban the statewide sale of shell eggs that did not come from cage-free hens. In 2008, Californians passed an anti-confinement initiative, Proposition 2, that requires "calves raised for veal, egg-laying hens and pregnant pigs be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs, and turn around freely."[57] Californians overwhelmingly supported this measure, which passed by a margin of 63.5% to 36.5%.[58] The California legislature then enacted California Assembly Bill 1437 ("AB 1437"), which bans the in-state sale of shell eggs that are not produced in compliance with Proposition 2.[59] Accordingly, the California market closed in 2015 to all shell eggs not produced in compliance with Proposition 2.

However, these California laws have only taken effect after surviving several legal challenges. In 2015, the Ninth Circuit dismissed an egg producer's lawsuit that alleged Proposition 2 was unconstitutionally vague for not specifying minimal cage

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55 Camps Newfound/Owatonna, Inc, v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

56 *See Farm Animal Confinement Bans by State*, *supra* note 49. Arizona also banned the in-state sale of eggs from caged hens in April 2022. *See* Ariz. Admin. Code § 3-2-907 (2022).

57 DEBRA BOWEN, CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 16 (2008), https://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf [https://perma.cc/4TGK-SJM3] (Proposition 2).

58 DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), https://elections.cdn.sos.ca.gov/sov/2008-general/sov_complete.pdf [https://perma.cc/H7GV-6E5D] (votes for and against November 4, 2008, state ballot measures).

59 CAL. HEALTH & SAFETY CODE § 25996 (West 2021).

sizes for egg-laying hens.[60] In 2017, the Ninth Circuit dismissed for lack of standing a lawsuit brought by six states[61] that argued AB 1437 violated the Commerce Clause.[62] Thirteen states[63] then petitioned the Supreme Court to invoke its original jurisdiction to hear the case.[64] In 2019, the Supreme Court denied review[65] after asking for the United States' view on the matter. The United States concluded that the dispute was "better suited to a district court" and brought by "a party directly regulated by the California laws."[66]

Massachusetts,[67] Washington,[68] Oregon,[69] Michigan,[70] Colorado,[71] Nevada,[72] and Arizona[73] have also since enacted sales bans of eggs from battery cages, but these bans are seeing much less court time. This reduced litigation, however, is not because of some understanding that such bans are constitutional. Rather, many farms are already prepared to make the shift to cage-free eggs due to pressures outside of the political and judicial system.

These pressures come from consumer demands for cage-free eggs. As a result, large retailers, like Nestlé, Costco, Target, Wendy's, Safeway, Subway, Denny's, Panera Bread, Dunkin' Brands, TGI Fridays, Unilever, Kraft Heinz, Burger King, and McDonald's, have promised to transform their supply chains to stop using eggs from caged hens.[74] These promises do not seem to be wholly empty. As of 2020, "26% of eggs produced and marketed in the United States are already cage-

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60 Cramer v. Harris, 591 F. App'x 634, 635 (9th Cir. 2015).

61 The six states are Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Iowa.

62 Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 647 (9th Cir. 2017).

63 The thirteen states are Missouri, Nebraska, Oklahoma, Alabama, Iowa, Arkansas, Indiana, Louisiana, Nevada, North Dakota, Texas, Utah, and Wisconsin.

64 Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support at 1–2, Missouri v. California, 139 S. Ct. 859 (2019) (mem.) (No. 148, Original).

65 Missouri v. California, 139 S. Ct. 859 (2019) (mem.).

66 Brief for the United States as Amicus Curiae at 1, 7, 22, Missouri v. California, 139 S. Ct. 859 (2019) (mem.) (No. 148, Original).

67 MASS. GEN. LAWS ch. 333, § 3(A) (2016).

68 WASH. REV. CODE § 69.25.110 (2019).

69 OR. REV. STAT. § 632.850 (2019).

70 MICH. COMP. LAWS § 287.746(4) (2021).

71 COLO. REV. STAT. ANN. § 35-21-203(2)(a) (West 2020).

72 Assemb. B. 399, 2021 Leg., 81st Sess. (Nev. 2021)

73 ARIZ. ADMIN. CODE § 3-2-907 (2022).

74 Matthew Prescott, *Holding Food Companies Accountable*, HUMANE SOC'Y U.S. (May 27, 2020), https://www.humanesociety.org/news/holding-food-companies-accountable [https://perma.cc/Q7YC-637R].

free, which represents a remarkable growth, since six years ago, it was only 5%."[75] Looking at this growing demand, animal agribusiness has seemingly forfeited the courtroom battle and accepted that changing their egg production process is not a matter of "if," but "when."[76]

A look at the legislative history behind one of the most recent enactments of a state sales ban on battery-caged eggs shows an interesting maneuver by animal welfare advocates to speed up the "when." The Colorado legislature was not exactly excited to pass the Egg-laying Hen Confinement Standards Act[77] into law. But animal advocate World Animal Protection ("WAP") presented the Colorado legislature with an ultimatum: pass the sales ban as a legislative matter or WAP would introduce a ballot initiative with far more sweeping measures to protect animal welfare.[78] WAP threatened that the ballot initiative would not only require "egg producers to transition to cage-free by the end of 2021—three years sooner [than the previous deadline of 2025]," it would also ban the statewide sale of meat produced using gestation or veal crates.[79] The Colorado legislature then decided that passing the egg sales ban was "the best way to protect Colorado's livestock and agriculture industry."[80]

B. Banning the Sale of Non-Cage-Free Meat

Why was the Colorado legislature so worried about WAP's ballot initiative that it acceded to WAP's "disgusting," "mafia-style tactics"[81] to adopt the egg sales ban? Presumably, the state did not want its animal agribusiness to bear the costs of complying with a sales ban on meat produced using gestation

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75 *Colorado Becomes Eighth U.S. State to Ban Cages for Egg-Laying Hens*, SINERGIA ANIMAL INT'L, https://www.sinergiaanimalinternational.org/single-post/colorado-becomes-eighth-us-state-to-ban-cages-for-egg-laying-hens [https://perma.cc/A26F-DZ7D] (last visited May 16, 2021).

76 Brown, *supra* note 54.

77 COLO. REV. STAT. ANN. § 35-21-203 (West 2020).

78 Brown, *supra* note 54.

79 *Id.*

80 *Id.* ("Even the bill sponsor, Rep. Dylan Roberts, an Avon Democrat, made clear it wasn't his idea, saying he was trying to help come up with a 'Colorado solution' to the New York intrusion. He and others predicted the out-of-state group would have no trouble collecting the required signatures—about 124,000—to get such a measure on the ballot.").

81 *Id.* (internal quotations omitted) (describing words used during legislative debates on the sales ban).

or veal crates.[82] So what was once a hotly contested measure to improve hen welfare has since been repurposed by legislatures and animal agribusiness to protect industrial farming from a greater "evil": sales bans protecting pigs and calves from cruel confinement.[83]

Only two states have enacted a sales ban on meat from gestation or veal crates. Massachusetts was the first state to do so in 2016, passing a ballot initiative with more than 77% of the vote.[84] California followed suit two years later, passing a ballot initiative with nearly 63% of the vote.[85] Both laws will take full effect in 2022.[86]

Unlike egg-related sales bans that animal agribusiness has increasingly come to tolerate, meat-related sales bans are facing legal challenges that are similar to those once brought against the former. The Massachusetts sales ban has survived two legal challenges to date. The first challenge, a lawsuit brought by a farmer and an anti-poverty activist, argued that the ballot measure was unconstitutional because it included "multiple unrelated subjects"—food production versus food sales—and "concern[ed] three different animals"—hens, calves, and pigs.[87] The Massachusetts Supreme Judicial Court disagreed and upheld the ballot measure, stating that the measure's provisions work together for one common purpose: improving animal welfare by eliminating extreme confinement.[88] The second challenge, brought by thirteen states,[89]

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82 This was a telling move by the Colorado legislature that appears to promote the interests of animal agribusiness by disenfranchising the public from deciding the matter.

83 Brown, *supra* note 54 (explaining that the bans on the sale of veal and pigs in confinement were dropped in a compromise in favor of the measures for cage-free chickens in Colorado).

84 *Massachusetts Results*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/2016/results/massachusetts [https://perma.cc/5AZL-D5GC]; *see also* MASS. GEN. LAWS ch. 333, § 11 (2016).

85 ALEX PADILLA, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 6, 2018 GENERAL ELECTION 100 (2018), https://elections.cdn.sos.ca.gov/sov/2018-general/sov/2018-complete-sov.pdf [https://perma.cc/9PXD-6NDF]; *see also* CAL. HEALTH & SAFETY CODE § 25991(e)(2)–(3) (West 2021).

86 *See* MASS. GEN. LAWS ch. 333, § 11; CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2021).

87 Shira Schoenberg, *Mass. Supreme Judicial Court Upholds Farm Animal Ballot Question Banning 'Extreme Confinement'*, MASSLIVE, https://www.masslive.com/politics/2016/07/sjc_upholds_farm_animal_ballot.html [https://perma.cc/2LUJ-V865] (last updated Jan. 7, 2019).

88 Dunn v. Att'y Gen., 54 N.E.3d 1, 7 (Mass. 2016).

89 The thirteen states are Indiana, Alabama, Arkansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin. Motion for Leave to File Bill of Complaint, Bill of Complaint, and

petitioned the U.S. Supreme Court to invoke its original jurisdiction to find that Massachusetts's sales ban violates the Dormant Commerce Clause.[90] As in the California egg case, the Supreme Court denied review following the Solicitor General's advice that the case should first be litigated in federal district court.[91]

California has notably been the target of recent litigation over its meat-related sales bans. In 2018, California enacted the Prevention of Cruelty to Farm Animals Act, or Proposition 12.[92] Proposition 12, deemed the "most progressive animal welfare protections in the world,"[93] enhances the regulations first introduced in Proposition 2 by increasing and specifying the minimum space requirements provided to calves and breeding pigs.[94] The most radical addition found in Proposition 12, however, is its enforcement of these new size requirements.[95] Expanding the sales ban first modeled in AB 1437, Proposition 12 prevents the in-state sale of pork and veal produced in violation of the Act.[96] Thus, farmers across the country who sell eggs, veal, and pork in California will be required to comply with Proposition 12 by 2022.

Because Proposition 12 applies to all products sold in California—regardless of their production location—states across the country have felt the impact. For example, California ac-

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Brief in Support at 1, Indiana v. Massachusetts, 139 S. Ct. 859 (2019) (mem.) (No. 149, Original).

90 *Id.* at 12–14; *see also* Brief of Association des Éleveurs de Canards et d'Oies du Québec, HVFG LLC, and Hot's Restaurant Group, Inc. as Amici Curiae in Support of Plaintiffs at 2, *Indiana v. Massachusetts*, No. 22O149 (U.S. Feb. 2, 2018) (stating that the "plaintiff States' bill of complaint" raises a "dormant Commerce Clause issue").

91 Shira Schoenberg, *US Supreme Court: States Cannot Sue Massachusetts in High Court over Cage-Free Egg Law*, MASSLIVE (Jan. 8, 2019), https://www.masslive.com/news/2019/01/us-supreme-court-states-cannot-sue-massachusetts-in-high-court-over-cage-free-egg-law.html [https://perma.cc/45PT-7EM5].

92 Proposition 12 is now codified at CAL. HEALTH & SAFETY CODE§§ 25990–25993 (West 2021).

93 Gabrielle Canon, *'A Loud and Clear Message': California Passes Historic Farm Animal Protections*, THE GUARDIAN (Nov. 8, 2018), https://www.theguardian.com/us-news/2018/nov/08/california-animal-welfare-cage-free-eggs-prop-12-passes [https://perma.cc/2WG5-KYYD].

94 Proposition 12 also declares that hens must be completely cage free by 2022. CAL. HEALTH & SAFETY CODE § 25991.

95 *See* CAL. HEALTH & SAFETY CODE § 25993 ("Any person who violates the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment").

96 *Id.* § 25990.

counts for about 13% of the national market for pork consumption.[97] But California "has only about 1,500 commercial breeding sows and needs the offspring of about 673,000 sows to satisfy its residents' annual demand for pork meat . . . ."[98] Industrial meat producers, unhappy with their choice to either abandon the California market or spend hefty sums to restructure their farms into compliance, hope to avoid this dilemma by challenging Proposition 12 in court and striking down California's sales bans under the Dormant Commerce Clause.[99]

III
"CONSTITUTIONAL FOOD FIGHTS"[100] BETWEEN STATES: LITIGATING SALES BANS UNDER THE DORMANT COMMERCE CLAUSE AND THE EMERGING CIRCUIT SPLIT

Meat industry professionals have already filed two separate lawsuits, *North American Meat Institute v. Becerra*[101] ("*NAMI*") and *National Pork Producers Council v. Ross*[102] ("*NPPC*"), to attack the constitutionality of Proposition 12's sales bans under the Dormant Commerce Clause. These cases have offered new opportunities to litigate whether the Dormant Commerce Clause prohibits state laws that ban the sale of cruelly produced food. Although the Ninth Circuit in *NAMI* and *NPPC* answered in the negative, the sales ban litigation is headed to the nation's highest court, as the U.S. Supreme Court granted certiorari in *NPPC* in March 2022.

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97 John Antczak, *Pork Industry Sues over California Law on Animal Confinement*, ABC NEWS (Dec. 6, 2019), https://abcnews.go.com/Business/wireStory/pork-industry-sues-california-law-animal-confinement-67555889 [https://perma.cc/L6VJ-V722].

98 *Id.*

99 *See, e.g.*, N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1017 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020) ("The complaint [brought by the North American Meat Institute] alleges that Proposition 12 violates the Commerce Clause of the United States Constitution by: (1) discriminating against out of state producers, distributors, and sellers of pork and veal; (2) impermissibly regulating extraterritorial activities beyond California's borders; and (3) substantially burdening interstate commerce in a manner that exceeds any legitimate local benefits.").

100 The term is borrowed from 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, 391 (2017).

101 N. Am. Meat Inst. v. Becerra, 825 F. App'x 518 (9th Cir. 2020) (unpublished opinion), *cert. denied sub nom. N. Am. Meat Inst. v. Bonta*, 141 S. Ct. 2854 (2021).

102 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (U.S., Mar. 28, 2022).

In a footnote of the *NAMI* opinion, the district court acknowledged that a circuit split may have emerged.[103] While finding that Proposition 12 did not violate the Dormant Commerce Clause,[104] the district court noted that its decision might conflict with Seventh Circuit jurisprudence that suggests that the Dormant Commerce Clause prohibits state laws that in effect regulate out-of-state production methods.[105] With the Supreme Court granting certiorari in *NPPC*,[106] animal agribusiness has an upcoming opportunity to persuade the highest court to interpret the Dormant Commerce Clause in the same way as the Seventh Circuit. This circuit split hinges upon dueling understandings of the modern scope of the Dormant Commerce Clause.

A. The Commerce Clause

The Framers constructed the U.S. Constitution with a regard for "federalism favoring a degree of local autonomy."[107] As such, the Constitution designates certain powers to the federal government and reserves certain powers for states.[108] In general, the federal government has the powers enumerated in the Constitution, while states retain non-enumerated police powers, such as the power to establish and protect the welfare, safety, and health of state residents.[109] One of the federal government's enumerated powers is located in Article 1, Section 8, Clause 3, better known as the Commerce Clause. The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States."[110] Simply put, it grants Congress the power to regulate interstate commerce to promote the free flow of trade between the states and to shield against unfair "economic protectionism" by those states.[111]

B. The Dormant Commerce Clause

The Commerce Clause notably does not *require* Congress to actively legislate interstate commerce—Congress merely has

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103 *N. Am. Meat Inst.*, 420 F. Supp. 3d at 1032 n.11.
104 *Id.* at 1034.
105 *Id.* at 1032 n.11.
106 Petition for Writ of Certiorari, Nat'l Pork Producers Council v. Ross (2021) (No. 21–468).
107 Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008).
108 U.S. CONST. amend. X.
109 *See id.*; *Police Powers*, WEX, LEGAL INFO. INST., https://www.law.cornell.edu/wex/police_powers [https://perma.cc/EXT7-B4TD] (last visited Oct. 28, 2021).
110 U.S. CONST. art. I, § 8, cl. 3.
111 *Dep't of Revenue of Ky.*, 553 U.S. at 337–38.

the power to do so, if it so wishes.[112] To combat fears that states will pass laws "designed to benefit in-state economic interests by burdening out-of-state competitors" if Congress has not regulated the market, the so-called Dormant Commerce Clause was born.[113]

The Dormant Commerce Clause refers to the prohibition against states from enacting laws that discriminate against or excessively burden interstate commerce.[114] There is no constitutional provision explicitly expressing such prohibition.[115] Rather, the Supreme Court has inferred the Dormant Commerce Clause as a corollary from the text of the Commerce Clause.[116] The word "dormant" conveys that "even though Congress has not acted, its commerce power lies dormant."[117] Thus, the Dormant Commerce Clause provides that states may not usurp the power conferred to Congress by passing laws that regulate interstate commerce.[118]

C. The Modern Dormant Commerce Clause Test

The lengthy judicial history of the Dormant Commerce Clause shows unwieldy, confusing, and "baffling" results.[119] However, in 2018, the Supreme Court in *South Dakota v. Wayfair, Inc.* summarized the modern two-part Dormant Commerce Clause test:

> Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may

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112 *See* U.S. CONST. art. I, § 8, cl. 3 (explicitly enumerating that Congress "shall" have the power to legislate interstate commerce without requiring Congress to do so).

113 *Dep't of Revenue of Ky.*, 553 U.S. at 337–38 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).

114 Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464 (2019) (discussing the Court's holdings that the Commerce Clause prevents states from (1) discriminating against the citizens and products of other states and (2) passing facially neutral laws that place an impermissible burden on interstate commerce).

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

116 Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

117 James P. "Bud" Sheppard, *The Dormant Right to Plant-Based Food*, 39 MISS. COLL. L. REV. 309, 315 (2021).

118 Healy v. Beer Inst., 491 U.S. 324, 326 n.1 (1989).

119 Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 337 (2020) (quoting BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.04 (2d ed. 2013)). See generally James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Endgame—From* Southern Pacific *to* Tennessee Wine & Spirits*—1945 to 2019*, 40 PACE L. REV. 44 (2019), for a longer analysis on the history of the Dormant Commerce Clause.

> not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[120]

Under this two-part test, a regulation violates the Dormant Commerce Clause only if it (1) discriminates against interstate commerce or (2) unduly burdens interstate commerce.

1. *Part One: Discriminating Against Interstate Commerce*

Justice Kennedy once wrote that "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[121] While courts have debated exactly what constitutes a discriminatory law, this Note analyzes modern interpretations of the Dormant Commerce Clause, and attempts to frame the current jurisprudence in a digestible and concise way.

In simple terms, a law that discriminates against interstate commerce provides "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[122] A law can discriminate in three ways: facially, practically, or purposefully.[123]

First, the law can discriminate on its face. A law facially discriminates if the language of the statute imposes an explicit hardship on out-of-state commerce that it does not impose on its own commerce.[124] *Second*, the law can discriminate through its practical effects—for example, if the regulation's consequences are so disproportionate between state actors and out-of-state actors that the law appears to be closer to a delib-

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120 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018) (citations omitted).

121 C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994).

122 Or. Waste Sys., Inc. v. Dep't of Env't Quality of the State of Or., 511 U.S. 93, 99 (1994).

123 Jareb A. Gleckel & Sherry F. Colb, *The Meaning of Meat*, 26 ANIMAL L. 75, 91 (2020).

124 *See* Wyoming v. Oklahoma, 502 U.S. 437, 440, 445–56 (1992) (holding that a statute mandating all electrical plants in Wyoming to purchase at least 10% of their coal from Wyoming coal producers facially discriminated against coal producers in other states that were barred from receiving the same benefit).

erate attempt to regulate the origin of the commerce.[125] *Third*, the law can discriminate in its purpose when the legislature enacted the law in order to regulate the commerce of other states.[126] Courts can determine purpose using various tools, such as "'statements by lawmakers;' 'the sequence of events leading up to the statute's adoption;' the State's consistent pattern of discrimination; 'the statute's historical background;' and 'the statute's use of highly ineffective means' of promoting a legitimate state interest."[127]

If a court finds a law facially, practically, or purposefully discriminatory, the law will then face a "virtually *per se* rule of invalidity."[128] After the Supreme Court in *Pike v. Bruce Church, Inc.* added "virtually" to the prior "*per se* rule of invalidity" in 1970,[129] courts have used various methods to determine when the presumption of invalidity might be outweighed by a greater state interest.[130] Courts have generally recognized that under the "virtually *per se*" rule of invalidity, a discriminatory law is invalid unless the state has *no other means* by which to advance a legitimate state purpose.[131] Some courts perform a strict-scrutiny-like test to determine whether the discriminatory law is the least restrictive alternative to advance the legitimate state interest.[132] Other courts seem to forfeit any sort of balancing and simply find that discriminatory laws are always

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125 *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978) (finding that a New Jersey law that excluded out-of-state waste from its landfill practically (in addition to facially) discriminated against out-of-state actors because the ban closed off the New Jersey market to out-of-state commerce solely because of its place of origin).

126 *See* Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1065 (8th Cir. 2004) (stating that comments made by legislators and the governor about a law can help show a pattern of discrimination that reveals the true discriminatory purpose behind the law).

127 Gleckel & Colb, *supra* note 123, at 91 (quoting *Smithfield Foods*, 367 F.3d at 1065).

128 McGoldrick, *supra* note 119, at 86 (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018)).

129 Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).

130 *See, e.g.*, McGoldrick, *supra* note 119, at 87–106 (describing several cases in which the Court used the "virtually *per se* balancing" approach to determine whether state interest trumps the presumption of invalidity).

131 *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 492–93 (2005) ("The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.").

132 *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (explaining that in deciding whether a burden on interstate commerce is impermissible, the Court must inquire, *inter alia*, into whether "alternative means could promote [the state] purpose as well without discriminating against interstate commerce").

unconstitutional under the Dormant Commerce Clause.[133] Regardless of the approach, however, the outcome has almost always been the same—discriminatory laws are unconstitutional.[134]

2. *Part Two: Unduly Burdening Interstate Commerce*

If the law is not discriminatory, then courts will uphold the law as long as it does not unduly burden interstate commerce.[135] To perform this balance, courts look to whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[136] This is a fact-intensive inquiry.

Professor James McGoldrick has identified eight factors that the Supreme Court considers when balancing state interests against the burden on interstate commerce: (1) the "nature and extent of the burden"; (2) the "nature and extent" of the state and local interests; (3) whether the law is "politically self-correcting"; (4) the "danger of multiplicity of inconsistent local regulations"; (5) the need for "uniformity versus diversity"; (6) whether the impact is "direct or indirect"; (7) whether there is "any federal legislation indicating Congress' desire"; and (8) the availability of "reasonable alternatives to advanc[e] the legitimate state interest without undue harm."[137] If, after considering these factors, the court determines that the burdens on interstate commerce are not clearly excessive in light of the state's legitimate interest, then the law passes constitutional muster under the Dormant Commerce Clause.

D. The Extraterritoriality Doctrine

Early Dormant Commerce Clause jurisprudence sampled several different tests to determine when a state law impermissibly regulated interstate commerce. At first, courts struck down state laws that regulated "national," rather than "local," areas—those in which Congress had already enacted legisla-

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133 McGoldrick, *supra* note 119, at 86–87 (citing Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019) ("Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'") (quotations omitted and alterations adopted)).

134 McGoldrick, *supra* note 119, at 106.

135 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018).

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

137 McGoldrick, *supra* note 119, at 60–61 (citing S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945)).

tion or those that required a uniform regulatory system.[138] However, courts struggled to define the boundary between local and national interests,[139] causing courts to eschew this distinction for a different one—the "direct-indirect" distinction.[140] Under this model, courts prohibited state regulations that directly, rather than indirectly, impacted interstate commerce.[141] However, this distinction also proved to be arbitrary and ill-defined.[142]

In pursuit of a workable Dormant Commerce Clause framework, the Supreme Court in the 1930s and 1940s introduced the beginnings of the modern Dormant Commerce Clause test. The Supreme Court deployed a balancing test that weighed a state's interest in a law against the burden of the law on interstate commerce,[143] providing more deference to laws that regulated even-handedly than to those that discriminated against out-of-state actors or served a protectionist purpose.[144] However, in a series of cases from the 1980s, the Supreme Court seemingly added an additional prong to the Dormant Commerce Clause analysis: the extraterritoriality doctrine.[145]

In *Edgar v. MITE Corporation*, the Supreme Court invalidated an Illinois statute that required any company seeking to take over an Illinois corporation to register the tender offer with

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138 *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851) (finding that states cannot enact laws that are "in their nature national, or admit only of one uniform system, or plan of regulation . . . as to require exclusive legislation by Congress").

139 Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 410 (1998).

140 *See* Bourjois, Inc. v. Chapman, 301 U.S. 183, 187–88 (1937) (finding that a state law that required registration and payment of an inspection fee for all cosmetics sold in the state did not violate the Dormant Commerce Clause because it did not directly burden interstate commerce).

141 *Id.*

142 *See* Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (describing the direct-indirect test as "too mechanical, too uncertain in its application, and too remote from actualities, to be of value"); *see also* Breard v. City of Alexandria, 341 U.S. 622, 635 n.19 (1951) ("[Indirect] as a test has not continued as a useful manner for determining the validity of local regulation of matters affecting interstate commerce.").

143 *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 770–71 (1945) ("The matters for ultimate determination here are the nature and extent of the burden . . . and . . . the relative weights of the state and national interests involved . . . .").

144 *See* S. Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 189 (1938) ("[S]o long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.").

145 *See* Dawinder Sidhu, *Interstate Commerce x Due Process*, 106 IOWA L. REV. 1801, 1812 (2021).

a state official, who would review the offer for substantive fairness.[146] The majority invalidated the statute using a burden balancing test,[147] but the plurality would have invalidated the statute because it regulated extraterritorial, or "wholly out-of-state," conduct.[148] The plurality opinion in *Edgar* is the oft-cited origin of the extraterritoriality doctrine. Under the extraterritoriality doctrine, a state law violates the Dormant Commerce Clause if it either regulates wholly out-of-state commerce, or has that "practical effect."[149]

However, the extraterritoriality doctrine is heavily critiqued. As Chad DeVeaux writes:

> From its inception, the [Dormant Commerce Clause's] extraterritoriality doctrine has faced unrelenting academic attack. Critics charged that the doctrine is mere dicta, that it "is a relic of the old world with no useful role to play in the new," and that it "inhibits state experimentation with laws that attempt to solve their social and economic problems."[150]

A group of law professors outlined three core concerns regarding the soundness of the extraterritoriality doctrine: (1) the cases invoking the doctrine appear to be "examples of the traditional anti-protectionism, anti-discrimination, and balancing principles"; (2) the doctrine "lacks textual and structural support, and has questionable historical support"; and (3) "the doctrine seems incapable of precise definition or reasoned application" given "today's sophisticated borderless economy."[151]

Courts seem to recognize these critiques too. Despite some lower courts' continued, albeit inconsistent, adherence to the doctrine,[152] the Supreme Court has not invoked the doctrine in decades.[153] Other than *Edgar*, the Supreme Court has only substantially considered the doctrine in two other cases, both from the 1980s and both involving price regulation.[154] Justice

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146 Edgar v. Mite Corp., 457 U.S. 624, 645–46 (1982).

147 *Id.*

148 *Id.* at 642.

149 *Id.* at 642–43.

150 Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana-Legalization Experiment*, 58 B.C. L. REV. 953, 967 (2017) (citations omitted).

151 Brief of Legal Scholars as Amici Curiae in Support of Petitioners at 6, 9, 19, *Frosh v. Ass'n for Accessible Meds.*, No. 18-546 (U.S. Dec. 13, 2018) [hereinafter Brief of Legal Scholars].

152 *See id* at 20–21.

153 *See* Am. Bev. Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring).

154 *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Inst. Inc., 491 U.S. 324 (1989).

Gorsuch, prior to sitting on the Supreme Court, authored the decision in *Energy & Environment Legal Institute v. Epel*, which opined that the extraterritoriality doctrine may no longer be good law.[155] Rather, Justice Gorsuch suggested that cases applying the extraterritoriality doctrine are "no more than instantiations" of the anti-discrimination rule.[156]

This Note agrees with Justice Gorsuch's sentiment in *Epel*. The two Supreme Court cases that applied the extraterritoriality rule laid out in *Edgar* are better described as anti-discrimination cases. In *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, the Supreme Court struck down a New York regulation that required "distillers to affirm that they [would] make no sales anywhere in the United States at a price lower than the posted price in New York."[157] Similarly, in *Healy v. Beer Institute*, the Supreme Court struck down a Connecticut statute that required anyone shipping beer into Connecticut to post its prices and to not sell beer in any contiguous state for a price lower than the price in Connecticut.[158] In both cases the Supreme Court used the extraterritoriality doctrine to invalidate the laws because they had the effect of dictating the price of alcohol in other states.[159]

However, the price affirmation statutes in *Brown-Forman* and *Healy* were protectionist. In *Brown-Forman*, the Court criticized the New York law for its protectionist effect: "[w]hile a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess."[160] Similarly, the Court in *Healy* found that Connecticut enacted the price affirmation statute "[h]aving determined that the domestic retail price of beer was consistently higher than the price of beer in the three bordering States, and . . . as a result, Connecticut residents living in border areas frequently crossed state lines to purchase beer at lower prices . . . ."[161] Using the anti-discrimination test espoused in *Wayfair*, both laws would have been invalidated for either their protectionist effect or protectionist intent. And even if the statutes in *Brown-Forman* and

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155 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172–74 (10th Cir. 2015).

156 *Id.* at 1173.

157 476 U.S. at 579.

158 491 U.S. at 326–27.

159 Brown-Forman Distillers Corp., 476 U.S. at 583–84; Healy, 491 U.S. at 338.

160 Brown-Forman Distillers Corp., 476 U.S. at 580.

161 Healy, 491 U.S. at 326.

Healy were found to regulate "even-handedly," the burden balancing test gives courts the opportunity to find that a local interest in lowering prices for their residents does not justify the burden placed on interstate commerce by prohibiting companies from selling alcohol at lower prices in other states.

In 2003, the last time the Supreme Court referenced the extraterritoriality doctrine,[162] the Supreme Court found that the doctrine was "not applicable" to a statute because it was not a "price control or price affirmation statute[ ]."[163] Since then, lower courts have reached inconsistent decisions regarding when, if ever, the extraterritoriality doctrine applies,[164] and when a statute has the practical effect of regulating wholly out-of-state conduct.[165]

This Note argues that the extraterritoriality doctrine no longer belongs in a Dormant Commerce Clause analysis, given (1) the Supreme Court's clear direction in *Wayfair*—which made no mention to the extraterritoriality doctrine—about what "[m]odern precedents" have determined "mark the boundaries of a State's authority to regulate interstate commerce,"[166] and (2) the Supreme Court cases that invoked the doctrine are better analyzed under the anti-discrimination and burden balancing test described in *Wayfair*.

E. The Emerging Circuit Split

In *NPPC*, the National Pork Producers Council and the American Farm Bureau Federation (collectively, "NPPC") brought suit against California challenging the constitutionality of Proposition 12.[167] NPPC argued that Proposition 12 violates the Dormant Commerce Clause in banning the in-state sale of pork meat, regardless of its production location, from hogs born of sows confined in violation of Proposition 12's regulations.[168] However, "California's pork consumption makes up about 13 percent of the national market," while California only supplies a small fraction of the pork meat consumed in the

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162 Am. Bev. Ass'n v. Snyder, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring).

163 Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003).

164 *See* Brief of Legal Scholars, *supra* note *151*, at 6.

165 *See id.*at 20–21.

166 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018).

167 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir.), *cert. granted*, 142 S. Ct. 1413 (2022).

168 Nat'l Pork Producers Council v. Ross, 456 F. Supp. 3d 1201, 1204 (S.D. Cal. 2020), *aff'd*, 6 F.4th 1021 (9th Cir. 2021).

state.[169] NPPC alleged that Proposition 12's requirements "are inconsistent with industry practice and standards . . . . and impose costs on pork producers that will ultimately increase costs for American consumers."[170] Therefore, NPPC argued that Proposition 12 violates the Dormant Commerce Clause by (1) regulating extraterritorial conduct by "compelling out-of-state producers to change their operations to meet California standards" and (2) imposing substantial burdens on interstate commerce "without advancing any legitimate local interest because it significantly increases operation costs, but is not justified by any animal-welfare interest and has no connection to human health or foodborne illness."[171]

The Ninth Circuit held that NPPC failed to plausibly plead a Dormant Commerce Clause claim.[172] The Ninth Circuit found that the extraterritoriality principle invoked by NPPC likely only applies to "price control or price affirmation statutes," which Proposition 12 undisputedly is not.[173] The Ninth Circuit further found that Proposition 12 does not have impermissible extraterritorial effects even when applying he extraterritoriality principle.[174] The Ninth Circuit reasoned that a regulation only has impermissible extraterritorial effects if it directly regulates wholly out-of-state conduct.[175] In contrast, the Ninth Circuit stated, Proposition 12 only directly regulates the sale of pork products within California's borders, and that any "upstream" "indirect practical effect on how pork is produced and sold outside California" is not an impermissible extraterritorial effect.[176] The Ninth Circuit also held that Proposition 12 does not excessively burden interstate commerce because "laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce."[177]

In *NAMI*, a case similar to *NPPC*, the National Trade Association of Meat Packers and Processors ("NAMI") also brought suit against California challenging the constitutionality of Proposition 12 under the Dormant Commerce Clause[178] The com-

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169 *Id.* at 1205 (internal quotations and citations omitted).
170 *Id.* (internal quotations and citations omitted).
171 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025–26 (9th Cir.), *cert. granted*, 142 S. Ct. 1413 (2022). (internal quotations omitted).
172 *Id.* at 1025.
173 *Id.* at 1028.
174 *Id.* at 1030.
175 *Id.* at 1029
176 *Id.* at 1028–29 (internal quotations omitted).
177 *Id.* at 1032.
178 N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1019–20 (C.D. Cal. 2019), *cert. denied sub nom. N. Am. Meat Inst. v. Bonta*, 141 S. Ct. 2854 (2021).

plaint alleged that Proposition 12 violated the Dormant Commerce Clause by: "(1) discriminating against out of state producers, distributors, and sellers of pork and veal; (2) impermissibly regulating extraterritorial activities beyond California's borders; and (3) substantially burdening interstate commerce in a manner that exceeds any legitimate local benefits."[179]

The United States District Court for the Southern District of California, affirmed later by the Ninth Circuit, held that Proposition 12 did not violate the Dormant Commerce Clause.[180] The court first found that Proposition 12 did not have a discriminatory purpose or effect.[181] The court reasoned that the legislative history of Proposition 12 revealed substantial evidence that the bill's authors and committees were primarily concerned with animal welfare and consumer health.[182] Further, the court said that Proposition 12 applied evenly to in-state and out-of-state actors because the regulation's impact did not depend on *where* the meat was produced, but rather *how* it was produced.[183] The court reiterated that while the Dormant Commerce Clause prevents a state from stripping other states of their "competitive advantage," it does not guarantee states any unearned "preferred method of production."[184] The court then found that Proposition 12 did not directly regulate extraterritorial conduct, mostly because the extraterritoriality doctrine only applies to price-fixing cases.[185] Lastly, the court found that Proposition 12 survived the substantial burden test.[186] The court reasoned that the state's interest in protecting animal welfare and public health out-

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179 *Id.* at 1017.

180 *Id.* at 1034–35.

181 *Id.* at 1025–29.

182 *Id.* at 1024,1027.

183 *See id.* at 1026. The district court found NAMI's argument that regulators may implement Proposition 12 in a discriminatory manner likely without merit. *Id.* at 1029 n.9 ("For one thing, NAMI cites no case law for the proposition that a statute can have a discriminatory effect if a prior statute, imposing the same regulatory obligations, gives in-state entities more time to comply. Also . . . some out-of-state producers began to comply with the pre-existing requirements imposed on California producers by Proposition 2 well-before voters enacted Proposition 12 to apply those requirements to out-of-state producers that sell into the California market."). In any event, the district court did not reach that issue because that claim was premature given that California had yet to issue any regulations implementing Proposition 12. *Id.* at 1028.

184 *Id.* at 1027.

185 *Id.* at 1029–32.

186 *Id.* at 1032–34.

weighed any burdens because NAMI's only reasonable complaint was the cost of compliance.[187]

While *NPPC* and *NAMI* were successes for the animal welfare movement, the validity of the decisions has come into question, especially when compared to the law of other circuits. For example, in *Legato Vapors, LLC v. Cook*, the Seventh Circuit struck down a sales ban similar to that in *NPPC* and *NAMI*.[188] In *Legato*, the court struck down an Indiana law under the Dormant Commerce Clause that banned the in-state sale of vaping products that did not conform to Indiana's detailed list of production specifications.[189] In reaching this decision, the court only considered whether the sales ban regulated extraterritorial activities beyond Indiana's borders.[190] The court ultimately held that it did because the law impermissibly "regulate[d] the production facilities and processes of out-of-state manufacturers [that sold vaping products in Indiana] and thus wholly out-of-state commercial transactions."[191]

The *Legato* decision seemingly conflicts with what the Ninth Circuit affirmed in *NPPC* and *NAMI*. While the Ninth Circuit in *NPPC* and *NAMI* determined that the extraterritoriality doctrine likely only applies in price-control cases, the Seventh Circuit in *Legato* determined that the doctrine has no such limit.[192] Further, the court in *NPPC* and *NAMI* held in the alternative that Proposition 12 did not violate the extraterritoriality rule because Proposition 12 regulated "in-state conduct with allegedly significant out-of-state practical effects," which is distinct from "directly" regulating conduct "wholly outside" of the state.[193] The *Legato* court, on the other hand, determined that a state law regulating the production methods of products sold in its state does violate the extraterritoriality rule when out-of-state producers must change their production methods to sell their products in that state.

IV
RESOLVING THE SPLIT

This Note argues that the Ninth Circuit ultimately reached the correct outcome: the Dormant Commerce Clause does not

187 *See id.* at 1034.
188 Legato Vapors, LLC v. Cook, 847 F.3d 825, 837 (7th Cir. 2017).
189 *Id.* at 827, 832.
190 *Id.* at 830.
191 *Id.* at 837.
192 *Id.* at 831.
193 N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014, 1031 (C.D. Cal. 2019) (internal quotations omitted).

necessarily prohibit states from banning the in-state sales of products using disfavored production methods. However, unlike the approaches that the courts took in *NPPC*, *NAMI*, and *Legato*, which referenced elements of traditional Dormant Commerce Clause jurisprudence (extraterritoriality), this Note proposes that the correct way to analyze these claims is under the modern-day two-part test summarized in *Wayfair*.

Following the *Wayfair* approach, the extraterritoriality doctrine no longer governs. Thus, the split decisions in *NPPC*, *NAMI*, and *Legato* would be resolved. Instead, the sales bans should be analyzed in two steps. Using *NPPC* and *NAMI* for illustration, the first step in the modern Dormant Commerce Clause test is whether Proposition 12 is facially, purposefully, or practically discriminatory.

Because the text of Proposition 12 bans all sales of meat that do not comply with its standards, regardless of production origin, the law is facially neutral.[194] Similarly, the legislative history behind Proposition 12 indicates that the bill's authors and sponsors were largely concerned with animal welfare and public health[195]—proper police powers of the state.[196] Thus, Proposition 12 was not enacted with a discriminatory purpose. The last question that remains is whether Proposition 12 prac-

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194 *See* CAL. Health & Safety Code § 25990(b); *see also* ALEX PADILLA, CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 6, 2018: OFFICIAL VOTER INFORMATION GUIDE 69 (2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf [https://perma.cc/L4KQ-66CZ] (Proposition 12) ("This sales ban applies to products from animals raised in California or out-of-state.").

195 *See* ALEX PADILLA, CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 6, 2018: TEXT OF PROPOSED LAWS 87 (2018), https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop12 [https://perma.cc/MEV9-D3BQ] (Proposition 12) ("The purpose of this act is to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California."); *see also* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring) ("[W]here the lawmakers' purposes in enacting a statute are explicitly set forth . . . or are clearly discernible from the legislative history . . . this Court should not take . . . the extraordinary step of disregarding the actual purpose in favor of some 'imaginary basis or purpose.'") (internal citations omitted).

196 *See* Sligh v. Kirkwood, 237 U.S. 52, 59 (finding that a "valid exercise of the police power" extends to "regulations which promote the public health, morals, and safety"); Plumley v. Massachusetts, 155 U.S. 461, 470 (1894) ("Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats . . . .") (internal quotations and citations omitted); Slaughter-House Cases, 83 U.S. 36, 62 (1872) (stating that states' police power extends "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State") (internal quotations and citations omitted).

tically discriminates against out-of-state producers. Proposition 12 affects California producers and out-of-state producers equally—all producers who want to sell the regulated food in California must comply with the law. Proposition 12 only restricts the way that food sold in state is made, rather than where it is made.[197] Indeed, California legislative analysts recognized the impact Proposition 12 might have on in-state farmers, warning that "it could take several years for enough farmers in California . . . to change their housing systems to meet the measure's requirements" and that "this measure would increase costs for some California farmers who produce eggs, pork, and veal, some of them could choose to stop or reduce their production."[198] Even if out-of-state farmers produce a greater portion of the regulated food sold in California, the Supreme Court has declined to find discriminatory effect when in-state and out-of-state actors are equally burdened by the regulation, but the regulation ultimately impacts a larger number of out-of-state actors.[199] Thus, Proposition 12 does not practically discriminate against interstate commerce.

Because Proposition 12 is not discriminatory, the second part of the modern Dormant Commerce Clause test applies. Here, the eight enumerated factors identified by Professor McGoldrick should be weighed to determine whether Proposition 12's burden on interstate commerce substantially outweighs California's interest in the regulation.

First, the "nature and extent of the burden," as asserted by NPPC and NAMI, comes from the substantial costs on out-of-state producers to restructure their farms into compliance with Proposition 12.[200] Purportedly, "producers will have to expend millions in upfront capital costs and adopt a more labor-intensive method of production" to comply with Proposition 12, re-

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197 *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978) (recognizing that quarantine laws that "banned the importation of articles such as diseased livestock" "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, *whatever their origin*") (emphasis added).

198 PADILLA, *supra* note 194, at 69.

199 *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617, 619 (1981) (finding that a severance tax on coal, borne primarily by nonresidents because 90% of the coal was shipped to other states, posed "no real discrimination . . . the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers"); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125 (1978) (finding that even when the burden of a regulation "falls solely on interstate companies" does not necessarily mean "that the State is discriminating against interstate commerce").

200 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1033 (9th Cir.), *cert. granted*, 142 S. Ct. 1413 (2022).

sulting "in a 9.2 percent increase in production cost, which would be passed on to consumers, and producers that do not comply with Proposition 12 would lose business with packers that are supplying the California market."[201] While cost is a factor considered in determining the burden on interstate commerce,[202] the Supreme Court has held that increased cost alone does not impermissibly burden interstate commerce when the state interest includes health benefits, environmental benefits, or non-discriminatory revenue generation.[203] Further, the Supreme Court has held that interstate commerce is not impermissibly burdened just because some out-of-state companies withdraw from the regulated market.[204] Thus, without more, the cost to comply with Proposition 12 is not an intolerable burden.[205]

Second, the "nature and extent" of California's interest in Proposition 12 includes (1) protecting animals that are raised for food sold in California from cruel animal farming methods, and (2) protecting residents from the health dangers associated with the production methods regulated by Proposition 12.[206] A group of public health and consumer welfare organizations filed an amici curiae brief while *NAMI* was on petition for review by the Supreme Court, which outlined several health concerns that Proposition 12 addresses.[207] For example, Proposition 12 aims to prevent infectious and antibiotic-resistant diseases that are spread among densely packed animals and to California consumers if they eat, or come into contact with, contaminated animal products.[208] Proposition 12 also protects

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201 *Id.*

202 S. Pac. Co. v. Arizona, 325 U.S. 761, 771–73 (1945) (finding a "serious burden" on interstate commerce when a regulation reducing train length imposed an additional cost of $1 million per year on companies to comply with the law; impeded efficient operations and increased traffic; and obstructed "national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service").

203 United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345–47 (2007); *see also* Bibb v. Navajo Freight Lines, Inc. 359 U.S. 520, 525 (1959) ("If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law . . . .").

204 Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978).

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

206 Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir.), *cert. granted*, 142 S. Ct. 1413 (2022).

207 Brief of Health Care Without Harm, the National Council for Occupational Safety and Health, the Consumer Federation of America, and Food & Water Watch as Amici Curiae in Support of Respondents at 5–6, N. Am. Meat Inst. V. Bonta, No. 20-1215 (U.S. June 1, 2021) [hereinafter "Brief of Health Care Without Harm"].

208 *Id.*

California consumers from eating food produced from animals raised in "outrageous conditions" with such little space that the animals eat, sleep, and give birth in their own diarrhea and blood.[209] The Supreme Court has been the "most reluctant to invalidate" "regulations that touch upon safety," which are given "a strong presumption of validity."[210]

Although NPPC and NAMI deny that Proposition 12 would improve public health or animal welfare, the Supreme Court is "not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation."[211] Indeed, the Supreme Court has held that where the law's efficacy is "at least debatable," courts are not in the position to undermine the findings of the legislature.[212] Because the health and welfare policies driving Proposition 12 are supported by at least some evidence,[213] California has a strong state interest in Proposition 12 that should not be usurped by judicial decisionmaking.

Third, Proposition 12 is "politically self-correcting." A law is politically self-correcting when its burdens are felt within the state that enacted the law so that political processes would be more likely to curb any abuses of the law.[214] As recognized by the ballot initiative, Proposition 12 was likely to increase consumers prices in California and increase costs to California farmers.[215] Therefore, Californians are incentivized to use political processes to change the law if ultimately dissatisfied by its negative effects.

Fourth, Proposition 12 does not pose a significant danger of "multiplicity of inconsistent local regulations." Professor McGoldrick identified two cases where the Supreme Court struck down legislation that posed a danger if other states enacted similar but inconsistent regulations.[216] The first, *Southern Pacific Corporation v. Arizona*, involved an Arizona law that regu-

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209 *Id.* at 6.

210 Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (internal quotations and citations omitted).

211 CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 92 (1987) (internal quotations and citations omitted).

212 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (internal quotations and citations omitted).

213 *See* Brief of Health Care Without Harm, *supra* note 207, at 5–6.

214 *See* S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.").

215 PADILLA, *supra* note 194, at 69.

216 McGoldrick, *supra* note 119, at 67–69.

lated maximum train length.[217] The Court identified 164 bills limiting train length that had been introduced in state legislatures, although only three were eventually passed.[218] The Court reasoned that if states had passed all these bills, the "varied system of state regulation" would cause significant confusion and difficulty because train operators would have to alter their trains in nearly every state.[219] The second, *Bibb v. Navajo Freight Lines, Inc.*, involved an Illinois regulation that required mudguards on trucks and trailers to be curved, rather than straight.[220] The Court identified a competing law in Arkansas, which prohibited curved mudguards.[221] The Court found that the Illinois regulation impermissibly burdened interstate commerce by disrupting a "vital" process called "interlining," which allows trucking carriers to transfer shipments by switching the trucks' trailers in lieu of unloading and reloading the cargo.[222] If trucks had to switch mudflaps between states, or unload and reload cargo to prevent non-compliant trailer mudflaps from entering certain states, there would be significant shipping delays, which would spoil perishable goods, prevent rush deliveries, and pose a significant danger to transporting dangerous goods, like explosives.[223]

However, unlike in *Southern Pacific* and *Bibb*, neither NPPC nor NAMI points to specific legislation that would directly conflict with Proposition 12 or pose a significant risk of unfeasibly varied regulation.[224] Further, *Southern Pacific* and *Bibb* dealt with regulations that transportation companies had little ability to avoid if they participated in interstate travel. In *Southern Pacific*, for example, the Court found that trains moving between California and Texas, passing through Arizona and New Mexico to do so, effectively had to conform to Arizona's law because it was "not feasible" to reassemble a train in the New Mexico rail yard near the Arizona border.[225] By contrast, Proposition 12 only requires farmers to provide the requisite space requirements for California-bound products. Neither NPPC nor

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217 S. Pac. Co. v. Arizona, 325 U.S. 761, 763 (1945).
218 *Id.* at 773 n.3.
219 *Id.* at 774.
220 Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 521–22 (1959).
221 *Id.* at 523.
222 *Id.* at 527–28.
223 *Id.*
224 Although NPPC identified an Ohio regulation that allows sow farmers to do what Proposition 12 restricts, the regulation did not restrict farmers from doing what Proposition 12 requires. *See* Petition for Writ of Certiorari, *supra* note 106, at 4.
225 S. Pac. Co. v. Arizona, 325 U.S. 761, 774–75 (1945).

NAMI "made any plausible allegation" that it would be "impossible" for farmers to "segregate their operations and produce California-specific products that comply with Proposition 12."[226] Thus, farmers are able to comply with Proposition 12 without a significant danger of multiplicity of inconsistent local regulations.

Fifth, the animal husbandry practices that Proposition 12 regulates do not require a "uniform system of regulation." A state law might be struck down if it regulates "activities that are inherently national or require a uniform system of regulation."[227] The Supreme Court has found a need for uniform regulations in primarily transportation cases,[228] when state laws posed burdens so severe that they, for example, "substantial[ly] obstruct[ed] . . . national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service."[229] A state law might also be struck down if the law "goes beyond" the proclaimed state interest and "attempts to impose particular standards [nationwide] as to [the] structure, design, equipment and operation" of an industry, which should only be established by Congress through a uniform rule.[230]

Proposition 12, as explained further below, does not run afoul of any national policies regarding treatment of pigs, calves, or hens during food production. Further, Proposition 12 does not "go beyond" its putative state interest in protecting consumer health and animal welfare in attempt to create a national standard for animal farming. Instead, Proposition 12 only requires that the regulated food sold in California comes from animals housed in spaces that meet Proposition 12's guidelines. A farm can segment its facilities based on the housing requirements in California and those of other states if it wishes to sell its products in California and in other less, or more, restrictive states. Thus, Proposition 12 does not infringe on an inherently national system or policy, nor does it create a nationwide regulation that can only be created by a uniform rule by Congress.

Sixth, Proposition 12 has an "indirect," rather than "direct," impact on interstate commerce. An impact on interstate

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226 Brief in Opposition at 18, Nat'l Pork Producers Council v. Ross, No. 210468 (U.S. Dec. 8, 2021).

227 Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012).

228 *See* Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 n.12 (1997).

229 S. Pac. Co., 325 U.S. at 773.

230 *Id.* at 781 (internal quotations and citations omitted).

commerce is "indirect when the state attempts to address a local problem but in so doing incidentally . . . impacts interstate commerce."[231] A direct impact on interstate commerce is presumed more harmful than an indirect one because it is a deliberate attempt by a state to control transactions occurring in other states.[232] Proposition 12 is properly viewed as a regulation that indirectly impacts interstate commerce because it addresses a local problem—protecting California consumers' health and moral desire to only eat food from humanely raised animals. Proposition 12 makes no deliberate attempt to control food transactions between other states, and thus, does not directly impact interstate commerce.

Seventh, federal legislation shows Congress's intent for states to regulate public health and animal welfare. As the Supreme Court notes, "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce."[233] The Animal Welfare Act explicitly allows states to promulgate standards on the "humane handling, care, treatment, and transportation of animals" in addition to what is provided in the Act.[234] The U.S. Department of Justice has stated that "[s]tates and local governments have had a long history of regulating animal cruelty," while recognizing that "harm to animals also harms communities."[235] The U.S. Department of Agriculture similarly recognizes that states have the ability to develop and promote food safety regulations, including those regarding meat,[236] poultry,[237] and eggs[238] sold through interstate commerce. Therefore, Proposition 12 aligns with Congressional intent for states to develop and enforce public health and animal welfare regulations.

Eighth, there are no "reasonable alternatives" to Proposition 12 that can "advanc[e] the legitimate state interest without

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231 McGoldrick, *supra* note 119, at 73.
232 *Id.* at 76.
233 S. Pac. Co., 325 U.S. at 769.
234 7 U.S.C. § 2143(a)(8) (2018).
235 John C. Cruden & Karol Mason, U.S. OFF. OF JUST. PROGRAMS, *Federal-State-Local Cooperation in Animal Welfare Enforcement*, U.S. DEP'T OF JUST. (Aug. 15, 2016), https://www.justice.gov/archives/opa/blog/federal-state-local-cooperation-animal-welfare-enforcement [https://perma.cc/BL2Y-E8CF].
236 21 U.S.C. § 661.
237 *Id.* § 454.
238 *Id.* § 454.

undue harm." A state law is more likely to be struck down if "reasonable . . . alternatives, adequate to conserve legitimate local interests, are available."[239] As Proposition 12 narrowly provides, the only way to prevent food produced in an unhealthy and inhumane way from entering the California market is to ban its sale. Neither NPPC nor NAMI identify a less burdensome way for California to accomplish this goal, likely because no other regulation would satisfy Californians' desire to rid their state of such food.

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While the farming industry argues that Proposition 12 will cost farmers millions of dollars to restructure their facilities, out-of-state producers can choose not to sell their products in California, or they can segment their operations only for the food headed to California. Even if the cost on producers is great, part two of the Dormant Commerce Clause test is a balance. With seven of the eight factors weighing in Proposition 12's favor, the burden on interstate commerce does not substantially outweigh California's interest in the regulation. Therefore, Proposition 12 does not violate the Dormant Commerce Clause.

CONCLUSION

Although animal agribusiness remains committed to fighting against Proposition 12 and similar meat-related sales bans, this Note argues that these regulations pass constitutional muster under the modern Dormant Commerce Clause test. But even if the law will not provide a remedy for animal welfare, changing consumer habits might. If the Supreme Court decides in *NPPC* that Proposition 12 violates the Dormant Commerce Clause, a look back at the egg sales bans suggests that pressures from shifting public opinion will force the industry into compliance anyways. Therefore, farmers might consider expending their resources on developing cage- and crate-free farms, rather than expensive courtroom battles. This investment is worth making—according to market research, 78% of consumers supported improving the lives on farmed animals, even if it increases the cost of meat.[240]

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239 Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

240 Andrew J. Enns, *Broiler Chicken Welfare Survey*, NRG RSCH. GRP. (July 5, 2017), https://file-cdn.mercyforanimals.org/mfa/files/MFA_2017_Survey_US.pdf [https://perma.cc/VG6A-XWA4].