REGULATE COMMERCE, NOT CRUELTY: WILL THE DORMANT COMMERCE CLAUSE SHIELD STATES THAT WANT TO PROTECT PIGS?

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ABSTRACT

California's Proposition 12, or the Prevention of Cruelty to Farm Animals Act, passed in 2018 and prohibits the in-state sale of whole veal, pork meat, and shell and liquid eggs that are the products of animals who have been confined in a cruel manner.[1] The statute further defines "confined in a cruel manner" to include confining any animal in a manner that "prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely."[2] Confined calves must have a minimum of forty-three square feet of usable floorspace per calf, pigs must have at least twenty-four square feet, and hens must have 144 square inches of usable floorspace.[3] Despite widespread public support, Proposition 12 has faced multiple challenges from meat producers and factory farms. One such challenge eventually made its way to the United States Supreme Court, which upheld Proposition 12. While this decision denotes a small victory for sales bans under the Dormant Commerce Clause, it also leaves the future of bans purporting to protect animals open to more questions than answers. This Article addresses the increasing ability of states to regulate in unprecedented areas and several modern limitations on this authority. This Article also explores critical lessons from Dormant Commerce Clause precedent and its effect on the future of regulating animal cruelty through sales bans.

[1] Cal. Health & Safety Code Ann. § 25990(b).
[2] *Id.* § 25991(e).
[3] *Id.*

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I. INTRODUCTION

In the United States, farmed animals represent ninety-eight percent of animals that humans interact with each year,[4] yet farmed animals are historically underrepresented in animal welfare statutes. The law is quick to condemn the abuse of a companion animal but fails to consider the standards in which the country raises and slaughters 55 billion animals each year for food.[5] Most states' animal cruelty laws provide exemptions for livestock and accepted animal husbandry practices, leaving the overwhelming majority of the country's animals without legal protection.[6]

In recent years, several states have enacted varying types of sales bans which target some of the worst practices among factory farms. Unsurprisingly, these bans have faced legal challenges from large meat producers and farmers.[7] California's laws have been the subject of litigation, especially Proposition 12, which prohibits the sale of meat that is the product of an animal confined in a cruel manner and effectively establishes minimum size requirements for an animal's shelter and movement.[8] Confined spaces, like those used in the industry's standard gestational crates, prevent animals from even turning around in the space.[9] Pigs, one of the subjects of California's Proposition 12, often gnaw and bite iron bars in a desperate attempt to escape, and suffer immense trauma from their

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[4] *See* David Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 206 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004).

[5] Grace Hussain, *How Many Animals Are Killed for Food Every Day?,* SENTIENT MEDIA (Aug. 31, 2022), https://sentientmedia.org/how-many-animals-are-killed-for-food-every-day/#:~:text=All%20around%20the%20world%20animals,alone%2C%20according%20to%20the%20clock.

[6] *See* THE HUMANE SOCIETY OF THE UNITED STATES, https://www.humanesociety.org/resources/farm-animal-protection-faq.

[7] This Comment will analyze several examples in more detail: *See* Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021); Iowa Pork Producers Ass'n v. Bonta, Case No. 2:21-cv-09940-CAS (AFMx), 2022 WL 613736 (C.D. Cal. Feb. 28, 2022); N. Am. Meat Inst. v. Becerra, 420 F.Supp.3d 1014, 1023–25 (C.D. Cal. 2019).

[8] Cal. Health & Safety Code Ann. § 25990(b)(2); Confinement under Proposition 12 is cruel if it prevents the animal from "lying down, standing up, fully extending [its] limbs, or turning around freely." § 25991(e)(1).

[9] Glenn Greenwald, *The FBI's Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, THE INTERCEPT (Oct. 5, 2017), https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald/.

confinement.[10] The need for regulation to prevent cruelty to farmed animals is clear. While Proposition 12 received widespread support from California voters aware of this need, the industry brought its first round of legal challenges under the Dormant Commerce Clause.

This Comment will first discuss the evolution of Dormant Commerce Clause analyses as historically applied, including the increasing ability of states to regulate in unprecedented areas, and several modern limitations on this authority. Next, this Comment will explore a few prominent legal challenges to California's Proposition 12 and their foundation in the Dormant Commerce Clause. This Comment will analyze important lessons from the 2023 Supreme Court decision regarding Proposition 12, and how these lessons can serve other states that want to regulate animal cruelty in this way. Finally, a discussion ensues, concerning whether sales bans represent a successful avenue for mitigating animal cruelty in the light of ineffective existing regulations.

II. BACKGROUND

The Commerce Clause is found in Article 1, Section 8, Clause 3 of the U.S. Constitution. The clause expressly grants Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[11] Congress often cites the Commerce Clause to justify federal regulation that promotes the free flow of trade between states or shields against economic protectionism or discrimination by states.[12] In contrast, the Dormant Commerce Clause is not explicitly stated in the Constitution. The Dormant Commerce Clause limits the ability of states to regulate interstate commerce when regulations are discriminatory or protectionist in nature, even in the absence of a federal statute.[13] When states enact such laws, they effectively usurp the enumerated power of Congress to regulate interstate commerce. The Dormant Commerce Clause therefore restrains states from acting when those actions substantially affect a regulatory area that has been expressly left to Congress, therefore "trespass[ing] upon national interests."[14] The Dormant Commerce Clause is "dormant" because its limitations on state power apply "even without

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[10] *Id.*
[11] U.S. CONST. art I, § 8, cl. 3.
[12] *See* Department of Revenue of Ky. v. Davis, 553 U.S. 328, 363–65 (2008).
[13] *See* Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 248–52 (1829); Cooley v. Bd. of Wardens, 53 U.S. 299, 306–07 (1852); Southern Pac. Co. v. Arizona, 325 U.S. 761, 763 (1945).
[14] Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976).

congressional implementation,"[15] or when Congress is silent. The effect of this is that the implied doctrine is open to criticism, especially from textualists, who denounce the Clause as "unmoored from any constitutional text," or a purely judicial creation with "no basis in the text of the Constitution."[16] The lack of a clear standard or rationale may partially explain the evolution of the Clause, and why its application has been anything but consistent.

A. Emerging and Evolving Commerce Clause Analyses

Throughout the years, the Dormant Commerce Clause faced scrutiny under various tests, many of which are no longer applied by courts. These tests, which originally imposed high restrictions on states' ability to regulate, are now generally more deferential. The earliest cases reserved the most power to the federal government to regulate commerce occurring out-of-state. Now, states have increasing leniency to regulate, and the limits imposed by courts are less stringent than those created in the early nineteenth century.

i. Early Commerce Clause cases strictly limited states to regulate conduct only within its borders, but over time, exceptions evolved.

Early Commerce Clause decisions restricted the ability of states to regulate out-of-state commerce, and expressly limited this regulatory power to conduct occurring entirely within the regulating state's borders. One case that explores this principle is *Gibbons v. Ogden*,[17] which held that the power to regulate commerce "extend[ed] to every species of commercial intercourse between the United States and foreig[n] nations, and among the several States. It does not stop at the external boundary of a State . . . But it does not extend to a commerce which is completely internal."[18] The Court refused to recognize, however, any historical evidence of a concurrent power in the regulation of foreign and domestic trade granted to the states.[19] *Gibbons* therefore concluded that the states could not legislate on matters

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[15] Hunt v. Wash. Apple Advert. Comm'n, 432 U.S. 333, 350 (1977).
[16] *See* Camps Newfound v. Town of Harrison, 520 U.S. 564, 609 n.1 (1997) (Thomas, J., dissenting).
[17] 22 U.S. 1, 13 (1824).
[18] *Id.* at 3.
[19] *Id.* at 13.

affecting commerce, even in the absence of any exercise of their powers by Congress.[20] Additionally, the *Gibbons* Court defined commerce broadly, as "the exchange of one thing for another, the interchange of commodities" and "commercial intercourse" in its definition.[21] Congress therefore had a sweeping ability to regulate under the Commerce Clause.

Gibbons strictly limited the ability of the states to regulate commerce to only activity that occurs completely within the state. This test imposed broad restrictions on the ability of states to regulate, and generally assumed that Congress must pass any law which affects commerce in order to be valid. States, therefore, had little power to adopt laws which influence the stream of commerce. Unlike modern courts, the Court did not even deign to consider the extent of the regulation's impact on the conduct of out-of-state actors. This represents one of the ways in which courts have become increasingly deferential to the states' power to regulate since the emergence of the Dormant Commerce Clause analysis. As of 1824, states had no authority to substantially impede the free flow of commerce between states or to regulate aspects of commerce that desire national uniformity.[22]

ii. One such exception stands for the proposition that regulations rooted in the police power of the states may be permissible under the Constitution.

As Commerce Clause analyses evolved, courts provided some exceptions to the narrow holding that states could only regulate activity occurring within its borders and could do so only if Congress had not already spoken on the issue. The first case to address the "Dormant" Commerce Clause is *Willson v. Black-Bird Creek Marsh Co.*[23] The state of Delaware passed a law authorizing the erection of a dam that was challenged under the Commerce Clause as an infringement on the rights of the national government to regulate navigable or "highway" waters.[24] The Court denied the argument that such a law conflicts with the enumerated power of Congress to regulate commerce among the several states.[25] However, Congress had not yet enacted a law or act regulating this same

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[20] *Id.* at 14–15.
[21] *Id.* at 89.
[22] Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945).
[23] Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 248–52 (1829).
[24] *Id.* at 248.
[25] *Id.* at 252.

commerce at issue.[26] Had it done so, the conflicting state law would surely have been void.[27] The test set forth in *Willson* further determined that state regulation of commerce is acceptable if it is rooted in the state's police power. If, however, the law's purpose is solely to regulate commerce, it infringes on the exclusive and enumerated power of Congress to regulate commerce. Here, ferries, bridges, dams, and roads were part of the system of internal commerce and police of the states, so Delaware's law was not unconstitutional.[28] *Willson*, in the same vein as *Gibbons*, broadly defined the concurrent regulatory power of the states. This case upheld the idea that states cannot regulate in an area where Congress has already spoken but provided a limited exception which recognized the police power of individual states.[29]

B. Expansion of States' Regulatory Powers Led to New and Narrow Limitations

Cooley v. Board of Wardens,[30] which focused on the subject of the state law at issue rather than its purpose, loosened the standard that a state could not regulate an area in which Congress already acted.[31] Here, the Supreme Court held that a Pennsylvania law requiring all ships entering or exiting a Philadelphia port to hire a local pilot, and imposing fees on those who do not comply did not violate the Commerce Clause.[32] Certain subjects, the Court recognized, require uniformity and are therefore national in nature and necessarily regulated by the federal government.[33] Other subjects that are local in nature are not subject to this same limitation.[34] If the fee for noncompliance was a duty, import, or excise, it would fall under commerce regulated by Congress, and the unique state law would be invalid.[35] Since, however, the fee did not meet this definition, the subject of this law was local in nature.[36] Therefore, diversity was acceptable, and the state law was

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 251–52.
[29] *Id.*
[30] 53 U.S. 299, 306–07 (1852)
[31] *See id.*
[32] *Id.* at 306.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 307.
[36] *Id.* at 307.

upheld.[37] The Court recognized that while Congress maintained the ability to regulate the subject even if it had not yet taken action, the state also maintained the power to regulate.[38] This inherent power of the states was not limited simply because Congress had previously spoken on a given subject.[39]

In the early 1990s, courts continued to move away from the idea that states and Congress could not expressly regulate the same area. The standard that states could pass laws rooted in its police powers helped to create more lenient Commerce Clause tests which took into account both national and local interests. This leniency was a double-edged sword, however, because with it, new limitations emerged: the "material affects" limitation and the blanket prohibition of protectionist measures.[40]

i. "Material Affects" Limitation

In 1912, Arizona enacted the Train Limit Law, which prohibited any person or corporation from operating a train of more than fourteen passengers or seventy freight cars within the state of Arizona and imposed monetary penalties for violators.[41] The Court stated that reconciliation between conflicting state and national laws required a balance of state and national interests. Now, the states may regulate more activities so long as the state acts to preserve its own safety interests, and doing so does not materially restrict the free flow of commerce.[42]

The Court reiterated the earlier limits imposed by courts, including the restriction that the regulation cannot materially affect interstate commerce, and cannot interfere with matters in which uniformity is a national concern.[43] Here, a clear desire for uniformity in the main railroad lines throughout the United States existed, and the Arizona law was an obvious deviance from the national standards.[44] Therefore, the law was

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[37] *Id.* at 302.
[38] *Id.* at 319.
[39] *Id.*
[40] *See generally* Southern Pac. Co. v. Arizona, 325 U.S. 761, 763 (1945) (discussing the standard that state laws may not materially affect out-of-state commerce); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 676–77 (1981) (holding that state protectionist laws are unconstitutional).
[41] Arizona, 325 U.S. at 763.
[42] *Id.* at 768–70.
[43] *Id.* at 770.
[44] *Id.* at 771.

unconstitutional under the "national uniformity" limit on state regulation.[45] The Court did not stop there, however, for the law was also unconstitutional under the "material affects" limit.[46] The Court reasoned that, because approximately ninety-five percent of passenger traffic occurs interstate, and because the costs of compliance for carriers would amount to $1 million per year, the regulation amounted to an impermissible material effect on interstate commerce.[47] This case recognizes the holdings of both *Gibbons* and *Cooley* in its application and demonstrated the validity of both tests by 1945. Additionally, the "material affects" limitation on regulation, as this Comment will later explore, evolved into a standard applied by courts today.

ii. Prohibition of Protectionist Measures

Kassel v. Consolidated Freightways Corp.[48] stands for a different limit on the states' ability to regulate: a state may not enact protectionist laws. Here, an Iowa law barred the use of trucks longer than sixty feet on any of Iowa's interstate highways.[49] First, the state failed to demonstrate its purported safety interest because fifty-five-foot trucks were just as safe as sixty-five-foot trucks, so the state's interest in promoting public health and safety was insufficient to overcome the burden on interstate commerce.[50] The distinguishing feature of Iowa's regulation, however, which led the Court to iterate its holding on protectionist measures, was that the law was amended to include a "border cities exemption," which exempted Iowa trucks and those of important bordering cities from compliance.[51] This amendment emphasized the true purpose of the regulation: to discourage interstate truck traffic on its highways, which was impermissibly protectionist in nature under the Commerce Clause.[52] States may not enact regulation with the sole purpose of discriminating against out-of-state actors or limiting out-of-state activity, a principle that remains relevant throughout modern Commerce Clause analyses.

C. Dormant Commerce Clause Challenges to Animal Welfare Regulations

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[45] *Id.*
[46] *Id.* at 772.
[47] *Id.*
[48] 450 U.S. 662, 663–64 (1981).
[49] *Id.* at 662.
[50] *Id.* at 668.
[51] *Id.* at 676–77.
[52] *Id.* at 663–64.

This Section next addresses the application of evolving Dormant Commerce Clause principles to animal welfare regulations, specifically. California's Proposition 12 is not the first sales ban to be challenged under this Clause. While Dormant Commerce Clause analyses vary across the country, several cases establish a variety of routes of success for similar regulations. In particular, favorable decisions regarding extraterritoriality, discrimination, and the power of states to regulate based on their own morals or ethics will be useful in evaluating the constitutionality of future sales bans.

i. The Modern Dormant Commerce Clause

Perhaps the most cited Dormant Commerce Clause case among the recent slew of animal welfare cases is *South Dakota v. Wayfair, Inc.*[53] South Dakota passed a law requiring out-of-state sellers who sold more than $100,000 worth of goods in the state to collect and remix sales tax "as if the seller had a physical presence in the State."[54] Wayfair met the minimum requirements for the tax under the Act and filed suit against the state, claiming that the regulation was unconstitutional.[55] The Court discussed *Gibbons*, *Willson*, and *Cooley* as the groundwork for its Commerce Clause analysis, but also recognized a more modern test:

> First, state regulations may not discriminate against interstate commerce; and second, States may 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 regulate 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.[56]

Under the modern test, a regulatory law violates the Dormant Commerce Clause if it (1) discriminates against interstate commerce, or (2) unduly burdens interstate commerce.[57] In *Wayfair*, the law at issue was not discriminatory because in-state business entities were also subject to the

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[53] South Dakota v. Wayfair, Inc., 588 U.S. 162, 162–171 (2018).
[54] *Id.* at 162.
[55] *Id.*
[56] *Id.* at 173.
[57] *Id.*

tax.[58] The law also did not unduly burden interstate commerce because it imposed tax requirements only on companies with over $100,000 in sales within the state, therefore exempting small businesses from the costs of compliance, and did not apply retroactively.[59]

ii. Discrimination Against Interstate Commerce

Wayfair confirmed that state regulations may not discriminate against interstate commerce; state laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity."[60] Regulations may be invalid if they (a) are facially discriminatory, (b) are protectionist in nature, (c) disproportionately burden out-of-state interests, or (d) treat in-state and out-of-state commercial items differently.[61]As in *Kassel*, states may not enact regulation with the sole purpose of discriminating against out-of-state actors or limiting out-of-state activity.[62] Even when facial discrimination is an unintended side effect of legislation in pursuit of some other valid purpose, this discrimination renders the regulation unconstitutional.[63]

Even when the purpose is allegedly not discriminatory, if the practical result is, then the regulation is unconstitutional.[64] Even a permissible, nondiscriminatory purpose cannot be achieved by differentiating articles of commerce coming from out-of-state.[65] There must be "some reason, apart from their origin, to treat them differently."[66] In *Philadelphia v. New Jersey*, a law prohibiting the importation of waste collected outside the borders of New Jersey was held unconstitutional despite its purported purpose of protecting the state environment, public health, and economy.[67] Notably, the state conceded there was no basis to distinguish out-of-state waste and in-state waste.[68] The Court then found the regulation's ultimate effect was to "slow or freeze the flow of commerce

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[58] *Id.* at 187.
[59] *Id.* at 187.
[60] *Id.* .
[61] *See id.* at 173.
[62] *Kassel*, *supra* note 40, at 663–64. *See also* Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue and Fin., 505 U.S. 71, 79–81 (1992).
[63] *See* Kraft, *supra* note 62, at 81.
[64] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626—27 (1978).
[65] *Id.* at 627.
[66] *Id.*
[67] *Id.* at 618.
[68] *Id.* at 629.

for protectionist reasons" and constituted a clear attempt by New Jersey to isolate itself by erecting a barrier against interstate trade.[69]

Regulations like Proposition 12, despite their purported purposes of promoting animal welfare and public health, are not immune to claims of impermissible discrimination. California's Proposition 12 was challenged as a discriminatory regulation in *Iowa Pork Producers Ass'n v. Bonta*.[70] In its analysis, the district court cited *Wayfair*: state regulations that discriminate against interstate commerce are "generally struck down without further inquiry."[71] The court defined discrimination against out-of-state commerce as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[72] Proposition 12, then, is not facially discriminatory because it makes no distinction whatsoever between in-state and out-of-state pork producers.[73] It is insignificant that California companies were already in compliance with Proposition 12, while out-of-state producers had a period of six years to comply with the new law.[74]

The industry made a similar argument in *North American Meat Institute v. Becerra*,[75] asserting that Proposition 12 discriminated against out-of-state producers, distributors, and sellers of pork and veal.[76] The court was unconvinced, and noted that the purpose of the law was not to discriminate against out-of-state producers, but the regulation was rooted in studies of consumer health risks from food-borne bacteria in addition to the state's interest in promoting animal welfare.[77] The argument of per se constitutional invalidity also failed because the sales ban did not make distinctions based on the origin of the product and required all California producers to also meet the regulatory standards.[78]

Finally, *Nat'l Pork Producers Council v. Ross* provided additional guidance from the Supreme Court on challenges to animal welfare regulations.[79] Organizations representing pork producers sued California officials in 2019, seeking a declaratory judgment that Proposition 12's sales

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[69] *Id.* at 628.
[70] Iowa Pork Producers Ass'n v. Bonta, Case No. 2:21-cv-09940-CAS (AFMx), 2022 WL 613736 (C.D. Cal. Feb. 28, 2022).
[71] *Id.* at *11.
[72] *Id.*
[73] *Id.* at *12.
[74] *Id.* at *13.
[75] N. Am. Meat Inst. v. Becerra, 420 F.Supp.3d 1014, 1023–25 (C.D. Cal. 2019).
[76] *Id.* at 1023.
[77] *Id.* at 1024.
[78] *Id.* at 1025.
[79] *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

ban of whole pork meat from animals confined in a cruel manner violated the Dormant Commerce Clause.[80] Two years after the Ninth Circuit's decision, the Supreme Court affirmed the constitutionality of Proposition 12.[81] In particular, the Supreme Court in *Ross* recognized that some laws may discriminate on their face, while others' discriminatory purposes may be disclosed by only practical effects.[82] The ultimate goal, therefore, should be to determine whether the purpose of the law—either "actual" or "avowed"—is discriminatory.[83] Because the purpose of these sales bans is not to protect in-state industry, but to promote higher standards of treatment for farmed animals, these regulations are not explicitly or implicitly discriminatory. Indeed, the industry "nowhere suggest[ed] that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state businesses."[84]

The purpose behind the regulation proves significant for additional reasons. Also in *Ross*, the Supreme Court solidified the power of states to regulate based on its voters' unique idea of morality.[85] Here, the Court acknowledged that states may sometimes ban "in-state products they deem unethical or immoral without regard to where those products are made."[86] Proposition 12 fell squarely within this type of regulation; California voters affirmed a desire to mitigate the sale of products from animals raised and housed in a cruel manner. The health benefits of expanding confinement standards are also a legitimate concern which may encourage states to regulate in this area.[87] After this affirmation of regulation in accordance with a state's own unique moral and ethical standards, laws enacted for this purpose should face fewer challenges of discrimination or protectionism. This provided a sliver of hope for sales bans routed in animal welfare. Courts have determined that only clear, facial discrimination[88] can be decisive.

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[80] Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1025 (9th Cir. 2021)
[81] *Id.*
[82] *Id.* at 1158.
[83] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981).
[84] *Ross*, *supra* note 80, at 1158.
[85] *Id.* at 1160.
[86] *Id.*
[87] *See*, *e.g.*, *USDA Proposed Rule To Amend Organic Livestock and Poultry Production Requirements*, 87 Fed. Reg. 48565 (2022) (affording animals more space "may result in healthier livestock products for human consumption"). Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 382 (2023).
[88] *Ross*, *supra* note 79, at 377.

iii. Undue Burdens on Interstate Commerce

Wayfair also concluded that states may not impose undue burdens on interstate commerce. 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."[89] As held in *Kassel*, this is a fact-intensive inquiry. The State in *Kassel* could not factually support its assertion that its regulation was needed to mitigate public safety risks to the public.[90] The regulated party, however, had no issue providing evidence regarding the burden on interstate commerce.[91] A mere assertion of either benefit or burden was insufficient to persuade the court in its balancing test.

Meat producers and the industry have asserted similar claims of undue burdens on interstate commerce against animal welfare regulations. The court in *Becerra*[92] dismissed the argument that the regulation was unduly burdensome. Because there was no need for a uniform system of regulation, the mere fact that producers may be driven from the California market or forced to pay compliance costs did not establish an undue burden on those producers.[93] The original complaint in *Ross* argued that the legislation violated the Dormant Commerce Clause by imposing substantial burdens on interstate commerce without advancing any legitimate local interest because it significantly increased operation costs, but was not justified by any animal-welfare interest and "has no connection to human health or foodborne illness."[94]

The Ninth Circuit ultimately dismissed this argument, and noted that this claim is rarely successful.[95] Statutes impose such a significant burden only in rare cases, and notably when they are discriminatory.[96] The costs of compliance alone are not sufficient to establish a substantial burden on interstate commerce.[97] The Court in *Bonta* similarly concluded that increased costs to pork producers of compliance alone are insufficient to constitute a substantial burden on interstate commerce.[98]

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[89] *Id.*
[90] *Kassel*, *supra* note 40, at 670–74.
[91] *Id.*
[92] *Becerra*, *supra* note 75, at 1023–25.
[93] *Id.* at 1033.
[94] *Ross, supra* note 80, at 1025–26.
[95] *Id.* at 1032.
[96] *Id.*
[97] *Id.*
[98] *Bonta*, *supra* note 70, at *15.

Further, the Supreme Court has dismissed the argument that courts must prevent the enforcement of laws if its burdens are "clearly excessive in relation to the putative local benefits."[99] Again, the Court distinguished this proposal from clear, facial discrimination.[100] If the "losers" of the regulation are out-of-state actors while the "winners" are all in-state, the regulation is discriminatory, regardless of whether this principle is explicitly stated in the law or a purpose implied from its practical effects.[101] The existence of any discriminatory purpose was even conceded by pork producers here, who disavowed any claim that Proposition 12 discriminated on its face.[102] The Supreme Court rejected the pork industry's ambitious reading of *Pike* which would authorize judges to strike down state laws regulating the in-state sale of ordinary consumer goods "based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits.'"[103] Further, the opinion noted the difficulty in weighing the economic costs incurred by the pork industry and the noneconomic benefits—mitigation of animal cruelty and the health of California consumers—to the state.[104]

iv. Extraterritorial Effects

The extraterritoriality principle originated in *Edgar v. MITE Corporation*,[105] which established that a law was unconstitutional because it required any entity who wished to purchase an Illinois company to register the offer with the Secretary of State.[106] The Court reasoned that the Commerce Clause also precluded "the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[107] Because this was the precise effect of the Illinois act, the act was unconstitutional.[108] To rule otherwise would be to allow states to assert extraterritorial jurisdictions over people and property of "Sister States" and exceed the limits of the state's

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[99] *Ross*, *supra* note 79, at 377 (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).
[100] *Id.*
[101] *Id.*
[102] *Id.* at 379.
[103] *Id.* at 380.
[104] *Id.*
[105] 457 U.S. 624, 642–43 (1982).
[106] *Id.* at 624.
[107] *Id.* at 642–43.
[108] *Id.*

power.[109] Courts have also applied the extraterritoriality doctrine in cases like *U.S. Brewers Association, Inc. v. Healy*,[110] in which the Second Circuit struck down a Connecticut act preventing brewers from selling below a wholesale price set by the state to any wholesaler outside Connecticut.[111] The act intended to promote liquor and beer sales in Connecticut, as the prices were typically lower in neighboring states, so residents would drive outside state borders to purchase these products.[112] The Court recognized not only the protectionist motive of the act, but also its effect on wholly out-of-state conduct.[113] The act effectively attempted to control the prices set for sales occurring entirely outside the State of Connecticut and was therefore unconstitutional.[114]

Litigation surrounding animal welfare regulations has more clearly linked this "principle" to discrimination. In *Becerra*,[115] various meat packers argued that Proposition 12 impermissibly regulated extraterritorial activities beyond California's borders.[116] In response, the court further limited the application of the extraterritoriality doctrine to laws which dictate the price of only out-of-state products.[117] This application highlights the modern purpose of assessing extraterritorial effects: to discern whether a regulation is actually discriminatory.

In *Ross*, pork producers argued that Proposition 12 impermissibly regulated extraterritorial conduct by compelling out-of-state producers to change their operations to meet California standards.[118] The Ninth Circuit used a *Wayfair* analysis to dismiss the pork producer's claims.[119] The court considered California precedent which held that laws regulating conduct within the state, including the sale of products in the state, do not have impermissible extraterritorial effects.[120] If a state law regulates conduct that is wholly out of state, such regulation would be impermissibly

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[109] *Id.* at 643.
[110] 692 F.2d 275, 276 (2d Cir. 1982).
[111] *Id.* at 276.
[112] *Id.*
[113] *Id. See also* Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 582–83 (1986) (holding that a liquor sales regulation was unconstitutional because it controlled entirely out-of-state transactions and attempted to manipulate liquor prices in other states).
[114] *Id.* at 276–80.
[115] *Becerra*, *supra* note 75, at 1023–25.
[116] *Id.* at 1023.
[117] *Id.* at 1030.
[118] *Ross, supra* note 80, at 1025–26.
[119] *Id.* at 1029.
[120] *Id.*

extraterritorial, but the significant burden of a state's requirements outside of that territory do not impose impermissible extraterritorial effects.[121] There, the complex effects of compliance on out-of-state meat producers and farmers did not surmount to an impermissible extraterritorial effect.[122]

In its analysis of the same case, the Supreme Court revisited the arguments that Proposition 12 had the "practical effect of controlling commerce outside the state" and imposed substantial, impermissible costs on out-of-state producers wishing to sell pork in California.[123] The Court first rejected the idea that the extraterritoriality doctrine imposed an "almost *per se*" rule prohibiting state laws with the practical effect of controlling commerce outside the state.[124] The Court recognized that *most* regulations force some connection between states and have the "practical effect of controlling" extraterritorial behavior.[125] It then refused to extend this restriction to regulations like income taxes, libel laws, securities requirements, environmental laws, charitable registration requirements, health inspections, and tort laws, even though each of these affects the decisions of corporations and individuals across state borders.[126] Because not every question of extraterritoriality rises to the same level of protectionism prohibited by the Commerce Clause, the Court declined to adopt a *per se* rule whenever a state projects its power extraterritorially.[127] This rejection of a *per se* rule of discrimination whenever a regulation has extraterritorial effects will have implications beyond the *Ross* decision and for future Commerce Clause cases.

Ross, *Bonta*, and *Becerra* represent victories for animals and establish several accepted routes of success for similar regulations. The decisions regarding extraterritoriality, discrimination, and the power of states to regulate based on its own morals or ethics will be especially useful in evaluating the constitutionality of future sales bans. Generally, the courts' discussion of these doctrines should provide animal welfare advocates with the hope that sales bans will survive Dormant Commerce Clause challenges, therefore paving the way for more states to regulate factory farming and mitigate cruel industry practices. However, the discussion in *Ross* does not dismiss all potential legal challenges to future sales bans. Justice Kavanaugh separately invited arguments to these bans under the Import-Export Clause,

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[121] *Id.*
[122] *Id.*
[123] *Ross*, *supra* note 79, at 371.
[124] *Id.*
[125] *Id.* at 374.
[126] *Id.*
[127] *Id.* at 376.

the Privileges and Immunities Clause, and the Full Faith and Credit Clause.[128] Only time will tell whether the industry will assert these claims against future regulations.

III. ARGUMENT: THE FUTURE OF THE DORMANT COMMERCE CLAUSE AND ANIMAL WELFARE LAWS

A. Current Animal Welfare Laws Often Fall Short of Providing Protection

One of the reasons sales bans charged with preventing cruel factory farming practices may see an increase in popularity is that such bans provide a successful alternative to existing animal welfare laws. Statutory animal cruelty laws often fall short of providing meaningful protection to animals because the laws are easily contested by violators and leave too many gaps or exemptions. For example, accepted animal husbandry practices are exempted from the animal cruelty statues of most states.[129] This includes cruel practices like thumping, castration, force feeding, tail docking, dehorning, and much more.[130] Other broad exemptions from these statutes exist for research animals, hunting, and pest control.[131] Even federal regulation purporting to protect animals, namely the Animal Welfare Act, fall short of actually doing so, in part because the Act fails to cover livestock or research animals.[132] In Colorado specifically, neglect or cruelty offenses do not apply to "the treatment of pack or draft animals by negligently overdriving, overloading, or overworking them, or the treatment of livestock and other animals used in the farm or ranch production of food, fiber, or other agricultural products when the treatment is in accordance with accepted agricultural animal husbandry practices."[133] Therefore,

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[128] *Id.* at 404 (Kavanaugh, J., concurring in part and dissenting in part).
[129] Animal Legal Defense Fund, *2021 U.S. State Animal Protection Laws Rankings* (*insert date*), https://aldf.org/project/us-state-rankings/.
[130] Mercy for Animals, *12 Horrifying Factory Farming Practices That'll Keep You Up at Night* (Oct. 20, 2016), https://mercyforanimals.org/blog/12-horrifying-factory-farming-practices-thatll/.
[131] Rebecca L. Bucchieri, *Bridging the Gap: The Connection Between Violence Against Animals and Violence Against Humans*, 11 J. ANIMAL & NAT. RESOURCE L. 115, 120 (2015).
[132] 7 U.S.C. § 2132(g) (2022).
[133] Colo. Rev. Stat. § 18-9-202 (2)(a)(VII) (2022).

statutes which purport to prevent animal cruelty and torture fall short of doing so for millions of animals.

While both criminal and civil statutes criminalize acts of animal cruelty, abuse, abandonment, neglect, or hoarding,[134] these laws are difficult to enforce on many levels. First, most animal cruelty goes unreported.[135] Victims of animal abuse obviously cannot self-report, and there is less urgency to report cases involving an animal compared with a human body.[136] Cruelty to animals was added to the FBI's nationwide crime reporting and investigate system only in 2016.[137] Before this, no national registry existed for abusers.[138] Even now, only thirty percent of the country uses this system, so it provides at best a partial report of animal cruelty.[139] Another explanation is that legislators, prosecutors, and the courts have historically been reluctant to enforce these laws.[140] Prioritization of funding and manpower, differences in what constitutes animal cruelty, and lack of passion in generating legislative activity all provide possible explanations for this reluctance.[141] Additionally, many animal cruelty crimes that are frequently depicted and marketed can be easily concealed; prosecution of certain crimes may require evidence (animals) that is easily disposed of or hidden.[142]

Apart from the challenges previously discussed in this Comment, preemption provides another obstacle for animal advocates and is a common defense to violations of animal cruelty laws as well as sales bans. Meat producers generally use preemption to argue that compliance with animal welfare laws and laws governing agricultural food standards is impossible, or that "double-regulating" the same subject is unnecessary. Producers typically rely on federal laws that mandate the labeling, production, and packaging of poultry or other meat products to argue that they cannot comply with federal definitions or standards, as well as the additional sales ban they are contesting. Even the Animal Welfare Act has been cited as law

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[134] Janet A. McDonald, *Defending Those Who Cannot Speak: Civil and Criminal Prosecution of Animal Abuse*, FLA. B. J. at 30 (2014).
[135] *Animal Cruelty Facts and Stats*, THE HUMANE SOCIETY OF THE UNITED STATES, https://www.humanesociety.org/resources/animal-cruelty-facts-and-stats.
[136] *See Bucchieri*, *supra* note 131, at 128.
[137] *See Animal Cruelty Facts and Stats*, *supra* note 135.
[138] *Id.*
[139] *Id.*
[140] Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 16 (1998).
[141] *Id.*
[142] Alan S. Nemeth, *United States v. Stevens: The Heart of Protecting Animals*, MD. B. J., at 24, 29 (2010).

which preempts a state's attempts to further regulate the pet industry.[143] While this argument failed to succeed in this case, it demonstrates that there remains a conflict within areas with overlapping state and federal regulation.

B. Is the Dormant Commerce Clause an Effective Shield to Protect Animals?

If a state enacts a sales ban imposing some restriction on practices of factory farmers and meat producers, it seems inevitable that the regulation will face a Dormant Commerce Clause challenge. Notably, within the Ninth Circuit, various types of sales bans of animal products have been upheld, representing historic victories for animals. For example, the legislation at issue in *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta*[144] prohibited the in-state sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."[145] Various foie gras sellers argued the law violated the Dormant Commerce Clause because it both (1) regulated extraterritorial conduct and (2) unduly burdened interstate commerce.[146] The court dismissed the sellers' extraterritoriality challenge because the law prohibits only in-state sales of foie gras, and merely influencing the conduct of out-of-state sellers is not sufficient to amount to an impermissible regulation under the extraterritoriality principle.[147] Similarly, the court cited *Wayfair* when analyzing the burden on interstate commerce versus California's legitimate interest in public health and preventing animal cruelty: 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."[148] Significant, undue burdens occur primarily when regulations cause the "inconsistent regulation of activities that are inherently national or require a uniform system of regulation."[149] Because the sales ban is not discriminatory, and because the Ninth Circuit recognizes the legitimate state interest in mitigating animal cruelty, the ban is not unduly burdensome and does not violate the Dormant

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[143] *See* N.Y. Pet Welfare Assoc., Inc. v. N.Y.C., 850 F.3d 79 (2nd Cir. 2017).
[144] *See* Ass'n des Éleveurs de Canards et d'Oies du Québec v. Bonta, 33 F.4th 1107, 1113 (9th Cir. 2022).
[145] Cal. Health & Safety Code § 25982.
[146] *Bonta*, *supra* note 143, at 1113.
[147] *Id.* at 1117.
[148] *Id.* at 1119 (citing *Wayfair*, 588 U.S. 162 at 173).
[149] *Id.*

Commerce Clause under either of the proposed tests.[150] Not long after the win for animal welfare in *Ross*, the Supreme Court denied review of *Bonta*,[151] seemingly cementing this victory and protecting California's foie gras ban.

Across the United States, however, results are more varied than they appear within the Ninth Circuit. The Fifth and Seventh Circuits have confirmed the validity of sales bans of horse meat, for example.[152] Restrictions on how pet shops can acquire companion animals have survived Dormant Commerce Clause challenges in the Second Circuit.[153] In contrast, the Seventh Circuit has struck down sales bans similar to those initiated by Proposition 12, although unrelated to animal welfare laws. In *Legato Vapors, LLC v. Cook*,[154] the court held that a sales ban placing particular requirements on the labelling and manufacture of e-liquids and e-cigarettes was unconstitutional because it regulated the production facilities of out-of-state manufacturers that were wholly out-of-state commercial transactions.[155] A state law regulating the production methods of products sold in its state, the court reiterated, violates the extraterritoriality rule when out-of-state producers must change their production methods to sell their products in that state.[156] The Seventh Circuit's extraterritoriality doctrine, then, appears to be alive and well, especially when compared to the Ninth Circuit's limitation of this doctrine to price-fixing regulation.[157] This illustrates that Commerce Clause analyses still vary between jurisdictions and may lead to different results regarding the validity of sales bans in the name of animal welfare.

Although it is impossible to predict the scope of every regulation that states may pass in the future and difficult to predict which Commerce Clause analysis any given court may utilize, the Supreme Court's recent decision in *Ross* serves to provide some uniformity. Fortunately, this decision also sets sales bans based on animal welfare up for success. In order to be unconstitutional under the standards set by these courts, the regulation would need to clearly discriminate against out-of-state farmers or producers. Additionally, although the applications of the extraterritoriality

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[150] *Id.*
[151] Ass'n Des Éleveurs v. Bonta, No. 22-472, 2023 WL 3571483, at *1 (U.S. May 22, 2023).
[152] *See* Empacadora de Carnes de Fresnillo v. Curry, 476 F.3d 326, 329 (5th Cir. 2007).
[153] *See* N.Y. Pet Welfare Assoc, Inc. v. N.Y.C., 850 F.3d 79, 80 (2d Cir. 2017).
[154] 847 F.3d 825, 830 (7th Cir. 2017).
[155] *Id.* at 830.
[156] *Id.*
[157] *Id.*

doctrine are mixed, it cannot be said that sales bans regulate commerce that is wholly out-of-state when the producers within the state are equally affected by the regulation. And finally, Proposition 12 and similar sales bans clearly have a permissible purpose under the Dormant Commerce Clause. The mitigation of animal cruelty, as well as the protection of public health through regulating the consumption of animal products, are valid exercises of the states' police powers. The existence of similar language in the animal welfare laws of other states also suggests that these regulations are here to stay. In addition to California, Massachusetts, Florida, Arizona, Maine, Michigan, Oregon, and Rhode Island all have laws imposing standards for animal confinement.[158] Specifically, Massachusetts prohibits the sale of pork products from breeding pigs confined "in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs or turning around freely."[159]

C. Accepting Animals as Property?

One secret weapon of the Dormant Commerce Clause, which may lead to future legal success for sales bans, is that it upholds the status quo. Sales bans do not purport to create new, expansive rights for animals or to change the legal protections of farmed animals. Indeed, one of the original purposes of animal cruelty regulation is the protection of property.[160] An attempt to remove statutory exemptions for accepted animal husbandry practices, for example, would surely fail due to pressure from livestock owners. Perhaps, then, the best defenses to charges of animal cruelty are somewhat counterintuitive to those who wish to advocate for animals—accepting the legal status of animals as property and products.

In recent litigation, animal rights advocates have tried desperately to gain legal standing for animals. For example, over eighty hippos previously owned by Pablo Escobar were the first non-human creatures to be legally considered "interested persons" under Section 1782 in a Southern District

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[158] *Ross*, *supra* note 79, at 365; *see also* Ariz. Rev. Stat. Ann. § 13–2910.07(A) (2018); Me. Rev. Stat. Ann., Tit. 7, §§ 4020(1)-(2) (2018); Ore. Rev. Stat. §§ 600.150(1)-(2) (2021); R. I. Gen. Laws § 4–1.1–3 (Supp. 2022).

[159] Mass. Gen. Laws Ann. ch. 129 App., § 1-5.

[160] Janet A. McDonald, *Defending Those Who Cannot Speak: Civil and Criminal Prosecution of Animal Abuse*, 88 FLA. B. J. 30, 40 (2014) (citing Bruce A. Wagman, Sonia S. Waisman & Pamela D. Frasch, ANIMAL LAW: CASES AND MATERIALS 88 (4th ed. 2009).

of Ohio case.[161] The statute allows anyone who is an "interested person" in a foreign litigation to request permission from a federal court to take depositions in the United States in support of their case.[162] Similarly, the Animal Legal Defense Fund filed a lawsuit in Oregon on behalf of Justice, an eight-year-old horse who was abused by his caretaker. This lawsuit sought to recover the expenses of the horse's medical care, as well as compensation for pain and suffering, and would have been the first to establish that animals have a legal right to sue their abusers in court.[163] Here, the court recognized that animals are personal property under Oregon law and there is no statute that suggests that "an animal is a legal entity capable of bearing and exercising its own rights."[164] Obtaining legal standing for animals, therefore, seems more like a dream than a reality for now.

Of course, there is still resistance from animal rights activists against this norm of animals as property—even if not in the way we might expect. In October 2022, two activists facing burglary and theft charges for rescuing sick piglets from a factory farm were acquitted after disputing the actual value of the "stolen" piglets.[165] One veterinarian testified that the malnourished piglets would have required hundreds of dollars in medical attention to survive.[166] The piglets were starving and sick and therefore worthless to the company.[167] Notably, this case successfully used the status-quo notion of animals as mere property to its benefit. The Smithfield trial, along with the recent legal successes of sales bans against their Dormant Commerce Clause challenges, represents the idea that the future of animal welfare might not lie within creating stricter, more expansive laws against cruelty. Maybe the path toward creating a better future for animals lies within regulation of commerce. Sales bans are especially unique in that they finally offer some protections for farmed animals who are exempted from state and federal cruelty regulations. While the legal system does not seem close to granting sweeping rights to animals to be heard in court, there

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[161] 28 U.S.C. § 1782 (2022); *See* Animal Legal Defense Fund, *Animals Recognized as Legal Persons for the First Time in U.S. Court* (Oct. 20, 2021), https://aldf.org/article/animals-recognized-as-legal-persons-for-the-first-time-in-u-s-court/.

[162] *Id.*

[163] *See* Justice v. Vercher, 518 P.3d 131, 132 (Or. App. 2022).

[164] *Id.* at 138–39.

[165] Leto Sapunar and Jordan Miller, *Animal Rights Activists Found Not Guilty on All Charges After Two Piglets Were Taken From Circle Four Farms in Utah*, THE SALT LAKE TRIBUNE (Oct. 8, 2022), https://www.sltrib.com/news/2022/10/08/animal-rights-activists-charged/.

[166] *Id.*

[167] *Id.*

appears to be deference towards states that wish to mitigate cruelty by restricting the sale of animal products resulting from cruel practices.

IV. CONCLUSION

Thanks to the increasing ability of states to regulate in unprecedented areas under the Dormant Commerce Clause, sales bans enacted by states wanting to prevent animal cruelty seem to be set up for success. In particular, the Supreme Court's declaration that California's Proposition 12 is constitutional sets an important model for other states that want to protect animals. Because sales bans are not discriminatory, do not have adverse effects on out-of-state commerce, and are tailored to achieve permissible purposes of state regulation, they can be a useful and unique tool to mitigate animal suffering. The decisions regarding extraterritoriality, discrimination, and the power of states to regulate based on its own morals or ethics will be especially useful in evaluating the constitutionality of future sales bans. The appeal of sales bans is even more apparent when considering the ineffectiveness and narrow scope of existing animal welfare laws, as well as the challenges facing enforcement of these laws. Sales bans also protect farmed animals that are historically unrepresented, extending protection to millions more lives. While the idea of regulating commerce instead of cruelty may not be as initially appealing to animal welfare advocates, laws like Proposition 12 represent a new and effective way to make meaningful changes for animals.