SUSTAINABLE FOOD AND THE CONSTITUTION

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ABSTRACT

Sustainable food policies strive for environmental, healthy, economically just, and humane food production. Their success has ignited legal debates about the Constitution. This is not new. Iconic constitutional law cases examine sustainable food, such as meat in the Slaughter-House Cases *(1873), bread in* Lochner v. New York *(1905), and wheat in* Wickard v. Filburn *(1942). Currently, as eaters, cooks, growers, and policymakers seek sustainable food, food-and-Constitution debates continue. For recent examples, this Article analyzes disputes about pork, foie gras, shark fins, eggs, and ag-gag policies. It uses food studies approaches to identify what motivates food-and-Constitution jurisprudence. For advocates and courts, this illuminates what is at stake, when analyzing sustainable food sourcing, production means, and menu offerings.*

I. INTRODUCTION

Sustainable food has become a growing concern for farmers, ranchers, fishermen, merchants, restaurants, kitchens, and eaters. Environmental objectives, humane animal treatment, health benefits, and conditions for food and farm workers fuel sustainable food policies.[1] Sustainable eating's appeal

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1. Stephanie Tai describes sustainable food movements as encompassing social and environmental objectives. *See The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV.

to younger generations and influence on corporate food players indicate that this encompasses more than environmental issues. Large chain supermarkets and fast food restaurants emphasize that they offer organic, local, fair-trade, and humane food or ingredients free of gluten, transfats and genetically modified organisms ("GMOs"). This attracts foodies, millennials, vegetarians, and health conscious eaters. For the foreseeable future, sustainable eating will try to shape numerous aspects of food and agriculture.

Sustainable food projects can quickly become complex debates about constitutional law. A breed of policies focused on food industries has inspired lawsuits catching national attention, including policies on foie gras, shark fins, certain kinds of hen eggs and pork, and bans on recording farm or slaughter operations commonly referred to as "ag-gag." All of these have resulted in appellate level litigation about constitutional principles such as the Dormant Commerce Clause, preemption, and First Amendment freedom of expression. This litigation trend may only increase as states and localities pass "right to farm" legislation and measures to ban GMO seeds or to prohibit these bans. This Article classifies all of these efforts as sustainable food policies, even when their emphasis is on commercial sales, labor, or agriculture interests. The food and eating aspects of these initiatives drive popular and national attention, far beyond the purview of just lawyers and consumption industries.

This Article argues three points about sustainable food policies. First, they will increasingly become the subject of constitutional litigation when they impact engrained industrial interests. Second, historically constitutional law has addressed sustainable food issues. Third, food studies approaches illuminate what is at stake in these disputes. This Article's two-course goal is to begin identifying constitutional law's food past and to start envisioning its food future. Food studies insights are applied to this past and present. This illuminates what is at stake in recent regulations involving foie gras, shark fins, ag-gag, and certain kinds of eggs and pork. Looking at the Constitution's food history illustrates how law simmers, boils, or cool downs these tensions.

Part II of this Article describes how the food studies discipline approaches questions about sustainability. This includes inquiries about: food and

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1069, 1073 (2012). Laurie Ristino explains that at a minimum sustainable food objectives include environmental and economic concerns. *See Back to the New: Millennials and the Sustainable Food Movement*, 15 VT. J. ENVTL L. 1, 23 (2013). Jack Kloppenburg et. al. identify sustainable food movement as seeking ecological, local, economic, participatory, justice, cultural, socially conscious, and healthy objectives. *See Tasting Food, Tasting Sustainability: Defining the Attributes of an Alternative Food System with Competent, Ordinary People*, 59 HUM. ORG. 177, 182–84 (2000).

cultural identity, economic inequalities in production, and agricultural objectives of output maximization at the lowest cost. Part III applies these non-legal views to examine meat in the *Slaughter-House Cases* in 1873,[2] bread in *Lochner v. New York* in 1905,[3] and wheat in *Wickard v. Filburn* in 1942.[4] Food studies inquiries illuminates that a controversy about: the Fourteenth Amendment is also about meat and public health, Due Process and the Fourteenth Amendment is motivated by working conditions in baking; and Commerce Clause authority reflects a shift in governmental support to industrial agriculture. Part IV describes recent constitutional questions involving foie gras, shark fins, hen eggs, slaughters and "ag-gag" policies.[5] It suggests this small, and by no means exhaustive, list to begin prepping larger questions about what feeds constitutional food debates.

II. FOOD SUSTAINABILITY AS CULTURE, JUSTICE, AND AGRICULTURE

The *Routledge International Handbook of Food Studies* describes how different academic disciplines study, research, and teach food topics.[6] Produced as a multi-authored work compiling how social scientists, the humanities, food services, and activists approach questions about food, the *Handbook* includes contributions about food and cultural studies, food justice, and agriculture research. Fabio Parasecoli describes how food and cultural studies focus on "connections between lived bodies, imagined realities, and structures of power."[7] As a part of this, food has both material and symbolic significance. Power structures, like the food industry and advertising, shape experiences over recipes, eating traditions, kitchen techniques, and shopping in food markets. This approach suggests research to focus on how food is both materially and culturally important.

Next, eyeing health and environmental risks, Alison Hope Alkon explains that food justice research examines how "racial and economic inequalities

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2. 83 U.S. 36 (1872).
3. 198 U.S. 45 (1905).
4. 317 U.S. 111 (1942).
5. For a more detailed description of California's slaughter, foie gras, shark fin, and egg policies and how preemption and Commerce Clause doctrines impact them, see generally Ernesto Hernández-López, *Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs*, 7 U.C. IRVINE L. REV. 319 (2017).
6. ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES (Ken Albala ed., 2013).
7. Fabio Parsecoli, *Food, Cultural Studies, and Popular Culture*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES, *supra* note 6, at 274.

manifest in the production, distribution, and consumption of food."[8] She explains that communities and social movements shape and are shaped by these inequalities.[9] A food justice focus advances theoretical study and policy reform on food.

Lastly, Frederick Kirschenmann points to new avenues for agriculture and food research.[10] He emphasizes that for over half a century the food system has focused on the "singular goal" of "[m]aximum efficient production for short-term economic return."[11] From this, farms seek specialization and economies of scale. Kirschenmann explains that rising costs in energy, depleting water and biodiversity, and climate change now challenge long-term agricultural goals.[12] He predicts that sustainability concerns will shape future agriculture research. [13]

These three recommendations help analyze food and its material, cultural and formative influences; its motivation to remedy inequalities; and changing societal goals of food production. Applying these to historic constitutional law jurisprudence serves up food sustainability themes. Applied to recent food controversies, they show that Americans continue to look at constitutional law to settle food arguments.

III. MEAT, BAKERS, WHEAT, AND THE CONSTITUTION

Constitutional law is often taught and interpreted as the body of law that orders relationships between the federal government and states, the federal government's branches, and rights in federal law provided to individuals.[14] This Section makes the working-suggestion that many disputes developing this doctrine focus on food issues, by identifying sustainable food controversies in constitutional legal history.[15] This examines a small

8. Alison Hope Alkon, *Food Justice: An Overview*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES, *supra* note 6, at 295.

9. *Id.* at 296.

10. Frederick L. Kirschenmann, *Anticipating a New Agricultural Research Agenda for the Twenty-First Century*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF FOOD STUDIES, *supra* note 6, at 364.

11. *Id.*

12. *Id.* at 365–66.

13. *Id.* at 364.

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

15. Jim Chen has argued that constitutional law can be taught by focusing on cases involving liquor, beer, wine, and milk. *See The Potable Constitution*, 15 CONST. COMMENT. 1, 3 (1998). Geoffrey P. Miller describes the consumer and producer conflicts between butter and margarine,

sampling of constitutional law cases:[16] the *Slaughter-House Cases*, *Lochner*, and *Wickard*, well-known as two Fourteenth Amendment cases and a Commerce Clause case, respectively.

A. Butcher Rights, Public Health, and Beef Supply

Decided in 1873, as the Supreme Court's first interpretation of the Fourteenth Amendment, the *Slaughter-House Cases* also illustrate important issues about food and culture, justice, and sustainability.[17] The case is mostly known for the Court's doctrinal finding that Louisiana could grant a monopoly to all slaughtering in New Orleans, without any limitation posed by the Fourteenth Amendment. The cultural impact of the case arises in the material and symbolic significance placed by New Orleans butchers and residents on being free from state monopolies. The City's desire to freely slaughter animals articulated debates about individual rights in the Fourteenth Amendment. Similarly, food justice in the case regards the public health balancing between Louisiana's slaughtering regulations with the individual rights claimed by butchers. Food production issues are central to requiring sanitary abattoir complexes.

The *Slaughter-House Cases* arose from Louisiana legislation in 1869 requiring consolidation of New Orleans' many butchers and slaughterhouses into one facility, with one corporation acquiring a monopoly to operate a

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from 1870s to 1950s, as reflecting how food interests shaped federalism and separation of power doctrines. *See Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 86–87 (1989). Miller also presents the history of federal milk legislation and the milk industry as the genesis for the strict scrutiny standard of review. *See The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 406–09. Alison Peck shows how Tea Party activism in the Revolutionary Era and recent food consumer movements regarding obesity share common motivations. *See Revisiting the Original "Tea Party": The Historical Roots of Regulating Food Consumption in Americ*a, 80 UMKC L. REV. 1, 1 (2011). Mathilde Cohen compares how the United States and Indian constitutional law treat milk and cows used in dairy industries. *See The Comparative Constitutional Law of Cows and Milk—India and the United State*s, 7 INDIAN J. CONST. L. 1, 4 (2017).

16. Other cases focusing on food include: Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

17. Ronald M. Labbé and Jonathan Lurie describe the decision, the legal arguments confronted, the political and socio-economic contexts of Louisiana and butchering, and the lasting influence of the case. *See generally* LABBÉ & LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003). Michael A. Ross expands on the pragmatic nature of the case's holding and Reconstruction Louisiana politics. *See Justice Miller's Reconstruction: The* Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans*, *1861–1873*, 64 J.S. HIST. 649, 653 (1998).

complex across the Mississippi River.[18] New Orleans like many cities of the period tried to centralize slaughters into one location, due to concerns for health and sanitation.[19] An organization of butchers and slaughterhouses argued that the monopoly and denial to practice their trade violated the Fourteenth Amendment's Privilege and Immunities and due process protections.[20] The Supreme Court upheld Louisiana's slaughterhouse requirements but did so in addition to divorcing much of the Fourteenth Amendment's expected individual rights protections from application to state-level policies.[21]

Beyond these doctrinal aspects, this legal dispute clearly reflects food as economic livelihood and public health issues. In New Orleans, slaughterhouse centralization had been proposed since 1804, as its population grew and butchering was done near residential areas scattered in the dense city.[22] An 1867 report to the legislature described the unsafe state of affairs as "barrels filled with entrails, liver, blood, urine, dung, and other refuse, portions in an advanced stage of decomposition, are constantly being thrown into the river . . . poisoning the air with offensive smells and necessarily contaminating the water near the bank for miles."[23] No centralized location existed to slaughter, eliminate remains, or inspect processing. This led to cholera and yellow fever in the city. For nearly sixty years, reformers wanted butchers to be in one place, with adjacent stockyards and fertilizer and bone-boiling industries. These concentrations were instituted in Paris, France, in 1807 and, around the same time as Louisiana's proposal, in New York and throughout Europe.[24] Arguments against the health measure were motivated by the interests of butchers and resentment of residents and politicians aimed at the Republican Party, a racially diverse legislature, and outsider "carpetbaggers" investing in the centralized abattoir.[25] The case challenged the new Fourteenth Amendment soon into Reconstruction. Notions of race and the goal to exclude African Americans framed a much larger civil rights debate implicit in the *Slaughter-House Cases*. This was simultaneous to questions about slaughtering in New Orleans. Michael Ross adds that slaughterhouse centralization permitted butchers to enter the trade with less

18. Slaughter-House Cases, 83 U.S. 36, 59–60 (1872).
19. *Id.* at 59.
20. *See* LABBÉ & LURIE, *supra* note 17, at 60, 66–67.
21. *See id.* at 66.
22. *See id.* at 6.
23. *See id.* at 6–7.
24. *See id.* at 42 (quoting LA. H.R. SPEC. COMM., THE REMOVAL OF SLAUGHTERHOUSES, MINUTE BOOK (1867) (testimony of Dr. E.S. Lewis)).
25. *See id.* at 8–9.

capital, since they did not need to build their own facility, and African Americans and other new investors could start these businesses.[26]

Specific to New Orleans, enormous changes were expected for slaughterhouses.[27] Neighboring Texas was filled with cattle supply while the rest of the nation lacked beef.[28] There were abundant commercial interests to market this nationwide. The popularity of major cattle drives from Texas to Kansas or Missouri had not yet begun and railroad connections in Texas were years away.[29] New Orleans wanted to be the slaughter destination for these cattle.[30] A group of butchers, referred to as the "Gascons," controlled the slaughter trade in the city and were accused of protecting their informal monopoly.[31]

The *Slaughter-House Cases* reveal food sustainability themes implicit in the plight of butchers.[32] This reflects food's material and symbolic significance. The butchers and the greater part of the city interpreted abattoir centralization and the health measures as infringing on their constitutional rights.[33] Access to or the capacity to slaughter fueled a large community's opinion about a public health measure. Law's role in this, either in Louisiana's police powers or butchers' individual rights in the Fourteenth Amendment, framed the debate about food.[34] The public health arguments about the harms suffered by a city subject to infestation eventually won.[35] This was a food justice debate about public health. Lastly, as the national demand for beef supply increased, simultaneously regional production means, i.e. butcher and slaughter trade, underwent dramatic changes. This transpired as the nation recovered from the Civil War and was poised to enter late-nineteenth century modernization. The *Slaughter-House Cases* point to food's changing role in meat production.

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26. *See* Ross, *supra* note 17, at 656.

27. *See* LABBÉ & LURIE, *supra* note 17, at 77.

28. Mitchell Franklin, *The Foundations and Meaning of the* Slaughterhouse Cases, 18 TUL. L. REV. 1, 1–2 (1943).

29. *See* LABBÉ & LURIE, *supra* note 17, at 77–78.

30. *See id.* at 77; Franklin, *supra* note 28, at 3–4.

31. LABBÉ & LURIE, *supra* note 17, at 105 (quoting NEW ORLEANS TIMES, June 23, 1869, at 2).

32. *See* Slaughter-House Cases, 83 U.S. 36, 63–66 (1873).

33. *See* LABBÉ & LURIE, *supra* note 17, at 103–06, 112.

34. *Id.* at 112.

35. Wendy E. Parmet describes the *Slaughter-House Cases* as reflecting the doctrine of public health providing a basis for police powers. *See From* Slaughter-House *to* Lochner*: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 482–86 (1996).

B. Baker Rights, Competing Labor, and Modern Breadmaking.

Industrial changes in breadmaking resulted in the *Lochner* dispute in 1905, showing how constitutional law debates food's cultural significance, its place in justice struggles, and the impact of technology.[36] The dispute developed from concerns posed by increased modernization in bakeries, health protections for bakers, and competition between union and non-union and established and immigrant bakeries.[37] This case about state labor requirements for bakeshops illustrates bread's cultural significance as an item extremely valuable to migrants, changes in mechanized production, and the appeal of white bread. The quest to limit work hours and avoid lung disease for bakeshop workers stands out as *Lochner*'s aspect of food justice. Law's role in sustainable production appears in bakeshop workers seeking limited exposure to conditions that caused lung disease.

Seen in doctrinal terms, the Supreme Court struck down New York's workhour limit for bakeries because it violated the liberty of contract and due process protections in the Fourteenth Amendment.[38] The Court upheld many of the sanitary provisions of New York's Bakeshop Act from 1895, but ruled against the ten-hour workday limit despite public concern for work conditions leading to a respiratory illness called "consumption,"[39] a form of tuberculosis. The decision has been critiqued for applying the Fourteenth Amendment to invalidate state-level action and for protecting businesses and employers.[40]

The case illustrates industrial and social changes around breadmaking at the turn of the century.[41] Then, most bakery workers were compensated by the day, not by the hour.[42] The Bakeshop Act's hour limit tried to regulate exposure to bakery conditions, but did not try to eliminate them.[43] Bread bakeries, also called bakeshops, were divided into large commercial bakeries with unionized workers and smaller bakers with less than a handful of

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36. PAUL KENS, *LOCHNER V. NEW YORK*: ECONOMIC REGULATION ON TRIAL 6–10 (1998).
37. *Id.*
38. *See* Lochner v. New York, 198 U.S. 45, 53–54 (1905).
39. KENS, *supra* note 36, at 10.
40. For a description of this criticism, see David E. Bernstein, *Lochner*'s Legacy*'s Legacy*, 82 TEX. L. REV. 1, 3, 40–41 (2003).
41. *See* Matthew Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the* Lochner *Court*, 1 N.Y.U. J.L. & LIBERTY 476, 477–78 (2005); Lochner *v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. LEGAL HIST. 413, 416–18 (1994).
42. KENS, *supra* note 36, at 15.
43. *Id.*

workers usually in a cellar of an urban building.[44] These conditions in the industry were notoriously criticized with dark and damp rooms, lack of ventilation, and low ceilings, often in tenement buildings.[45] Workers had long work weeks. They sought limitations down to a seventy-two- or eighty-four-hour workweek.[46] Especially criticized were the bakeries where workers lived in or adjacent to the room with an oven and mixing areas.[47] Constant attention to dough making, baking, or ingredient mixing produced these labor demands.[48] Smaller bakeries were in residential areas, offering fresh bread to customers nearby.[49] They competed with larger bakeries distanced from residential areas and with homemade bread, which remained popular but required time and space for home cooks.[50] For bakeshops, the expense they could best control was labor, by demanding more hours.[51] Cheaper labor provided small bakeries an advantage. Large bakeries and unions wanted to eliminate this competition.[52]

The Bakeshop Act's concern for working conditions and bakery competition point to food justice and sustainability themes in food studies. Large commercial bakeries favored the limited workhour since they had far more employees.[53] It was argued that the smaller bakeries had an unfair advantage of just a few workers who would always be at the worksite. Any limit on worker hours was focused on small bakery employees.[54] The Act's effort to sanitize food production and limit exposure to baking elements point to sustainable impacts on food production. Most of the typical scholarly criticism of this decision and the "*Lochner* era" emphasizes this pro-business and anti-regulation aspect of the legal reasoning.[55]

This competitive aspect of breadmaking points to food's symbolic and material significance. Unions and larger bakeries favored the Bakeshop Act's

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44. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 23–25 (2011).

45. *See* KENS, *supra* note 36, at 8–9.

46. *See id.* at 13.

47. *See id.* at 57.

48. *Id.* at 12.

49. *Id.* at 6–8.

50. *See id.*

51. *See id.* at 8.

52. *See* BERNSTEIN, *supra* note 44, at 26–27.

53. *See id.* at 23–25 (explaining that large bakeries supported and benefitted from the legislation in *Lochner* because it would "drive out of business many old-fashioned bakeries that depended on flexible labor schedules").

54. *See id.* at 24–25.

55. David Bernstein offers a critique of this perspective describing liberty of contract and natural rights jurisprudence as informing the *Lochner* Court more so than the laissez-faire perspectives. *Id.* at 3–4.

work hour limit.[56] They tended to be staffed and owned by persons of German or Anglo descent.[57] The small bakeries, often in immigrant neighborhoods, were owned and favored by newer migrants who were Jewish, French, or Italian.[58] Their employees were not unionized and mostly Jewish, French or Italian. Maria Balinska explains that most Jewish bakers in New York were not unionized, especially after the Jewish bakers union in the Lower Eastside of New York failed in 1885 and 1893.[59] She explains that it was difficult for these bakers to unionize, since a system of patronage and home-country loyalty provided jobs and housing.[60] Dorothee Schneider adds that after 1890, German bakers, who had dominated bakeshops in New York, were decreasing in number as Eastern European Jewish and Italian bakers increased.[61] This trend continued. More recent migrant workers were not unionized, difficult to organize, and worked in worse conditions and for cheaper pay.[62] Only large commercial bakeries could compete with the smaller bakeshops.[63] By the 1890s, progressive reformers sought to improve these conditions,[64] with what became the Bakeshop Act.

Meanwhile, Americans were shifting their bread preference to more mechanized production. Aaron Bobrow-Strain notes bread production in bakeshops dramatically increased during the period that coincided with the dispute in *Lochner*.[65] He reports that in 1900, large bakeshops could make 15,000 loaves of bread a day. As of 1910, this number increased to 100,000, and by 1925, the 1 million loaves mark was passed. Furthermore, this means of production took over nationwide.[66] In 1890 home baked bread accounted for ninety percent of the country's bread production; by 1920 commercial

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56. *See id.* at 23; David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 299, 302, 307 (Michael C. Dorf ed., 2d ed. 2009).

57. BERNSTEIN, *supra* note 44, at 24.

58. *See* Bernstein, *supra* note 56, at 303.

59. *See* MARIA BALINSKA, THE BAGEL: THE SURPRISING HISTORY OF A MODEST BREAD 103, 106 (2008).

60. *See id.* at 101, 103.

61. *See* Dorothee Schneider, *The German Bakers of New York City: Between Ethnic Particularism and Working-Class Consciousness*, *in* THE POLITICS OF IMMIGRANT WORKERS: LABOR ACTIVISM AND MIGRATION IN THE WORLD ECONOMY SINCE 1830, at 55, 72 (Camille Guerin-Gonzales & Carl Strikwerda eds., rev. ed. 1998).

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* AARON BOBROW-STRAIN, WHITE BREAD: A SOCIAL HISTORY OF THE STORE-BROUGHT LOAF 31 (2012) (noting that "per capita bread consumption *increased*" during the "first decades of the twentieth century").

66. *See id.* at 20.

bakeries made ninety-four percent of this.[67] As the *Lochner* dispute developed, bakeries became more industrialized, with less workers, and Americans moved away from home baked bread.[68]

A legal and economic view of the *Lochner* dispute presents a conflict between regulators and small bakeshops and between union labor and non-union migrant labor. Bobrow-Strain's food history illuminates how bread production was changing dramatically by limiting human involvement and avoiding the labor conditions precipitating the Bakeshop Act.[69] This shift did not just imply socio-economic changes; the final product of bread was sold as more healthy, pure, and hygienic because it came from an automated bakery.[70] This long term trend would lead to preference for white versus brownish bread, production by machine, sterile appearing facilities, and wrapped bread.[71]

In sum, *Lochner* points to the food studies viewpoints of cultural and material imagination, food justice, and the push for sustainable food production. Breadmaking during this period implied cultural transformations in the rising appeal of machine-made white bread and in who worked in a bakeshop, whether as established or newer migrants. Concerns for food justice regarded the labor hours and exposure to consumption. While looking at sustainable food production, the case examined if state-level policies could protect workers and regulate the hours bakeshop owners could require of their workers. A complex dispute about police powers and economic regulation, *Lochner* simultaneously points to the cultural significance of bread and the plight of immigrant workers.

C. Farmers Fight Crop Controls and Agricultural Specialization

Wickard stands out as a case about federal authority regarding the Agricultural Adjustment Act of 1938, but its facts point to food issues involving specialized crop farming, global and national wheat markets, price controls during economic crises, and family farms.[72] Food's cultural significance in this case regards how smaller family farms were heavily impacted by federal regulations. In terms of food justice, *Wickard* gained widespread popular attention since many Americans were hungry due to the Great Depression. At the same time, federal regulations required farmers to

67. *Id.*
68. *Id.*
69. *See id.*
70. *Id.* at 25, 29.
71. *Id.* at 20.
72. Wickard v. Filburn, 317 U.S. 111, 114–16 (1942).

destroy crops and livestock. This was an anathema to many Americans. The case speaks to concerns for sustainable farming, since the federal government incentivized farmers grow crops that would provide the greatest yield. This specialization was better for the entire nation, despite the losses for individual farmers. In 1942, the *Wickard* Court found that the Constitution's Commerce Clause authorized federal agricultural regulations, penalizing a farmer for planting more than the federally-permitted wheat acreage.[73]

This Commerce Clause dispute developed from agricultural facts specific to one farm and how federal policy regulated its production issues, which could be assumed to be purely local. The Ohio Filburn farm did not specialize in wheat farming.[74] At its core, the debate examined if Roscoe Filburn's planting of wheat impacted interstate commerce.[75] On his farm, Filburn primarily raised dairy cattle and poultry and sold milk and eggs.[76] As was common then, he also grew some wheat to harvest, feed his livestock, save as seed, or grind for home consumption.[77] In the fall of 1940, Filburn planted over twenty acres of wheat, almost double what the Agriculture Adjustment Act permitted.[78] The legal dispute asked if these regulations fell within Congress's Commerce Clause authority. The Court found that Congress was within this authority, emphasizing the effects of Filburn growing wheat in excess of what was allowed, and whether the wheat was destined to be sold in interstate commerce.[79]

Passed as a key New Deal measure, the Agricultural Adjustment Act responded to falling wheat prices, caused by market disruptions since World War I when foreign wheat demand dried up and the Great Depression.[80] Before this Act was passed in 1938, the Farm Bankruptcy Act of 1934 and the prior Agricultural Adjustment Act of 1933 had been invalidated by courts.[81] The Act from 1938 that Filburn challenged was part of a reform agenda to stabilize crop prices, focusing on soil conservation, agricultural marketing, and quotas.[82] Central to the Act was the idea that acreage

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73. *Id.* at 127–28.

74. *See* Jim Chen, *The Story of* Wickard v. Filburn*: Agriculture, Aggregation, and Commerce*, *in* CONSTITUTIONAL LAW STORIES, *supra* note 56, at 69, 81.

75. *Id.* at 84–85.

76. *See id.*

77. *Id.* at 81.

78. *See id.*

79. Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

80. *See* Chen, *supra* note 74, at 74–75, 77–79.

81. *See id.* at 77–79.

82. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (codified at 7 U.S.C. §§ 1281–1401 (2012)).

restrictions would control the supply of federally subsidized crops. This remedied the problem of excessive wheat supply, which caused low prices.[83] In upholding the restrictions, the Court closely examined the economic justifications which looked at the challenges faced by a changing international wheat market.[84] It cited the heavy commerce and price impacts of countries that export and import wheat.

In legal terms, the Court noted how this farm growing wheat beyond the permitted amount actually impacted interstate commerce.[85] It reasoned that "homegrown wheat" had an influential impact on the prices attained by farmers who export wheat.[86] Doing this, the Court emphasized that aggregation or "substantial economic effect" of farming activity permitted the federal government to regulate production on one local farm.[87]

The impact of the decision was to motivate farms to specialize in one or a few agricultural crops. Filburn's farm grew wheat in addition to its focus on dairy and eggs.[88] The wheat grown, for which Filburn was fined, was intended to feed livestock.[89] It was not wheat to use for human consumption. Jim Chen describes the *Wickard* decision as "the final sinker into the pinewood coffin of the American family farm."[90] These kinds of farms used flexible practices like storing wheat, feeding livestock, and waiting to sell wheat on the open market. Chen explains that larger and specialized farmers became commonplace after *Wickard*, leading to economists developing the term of "agribusiness" describing the sum of production, distribution, and processing farm commodities.[91]

Wickard reflects food studies' insights into the imagined notion of the American family farm and food justice fights with New Deal goals of crop maximization. From a cultural viewpoint, the Filburn family had its choice of what to grow and sell denied by the federal government. The Court's interpretation of the Commerce Clause solidified this governmental practice.[92] Critics of the decision, claiming the effects reasoning was overreaching, point to the idea that the family merely wanted to grow wheat

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83. Chen, *supra* note 74, at 77–79.
84. *See Wickard*, 317 U.S. at 125.
85. *Id.* at 127–28.
86. *Id.* at 128.
87. *Id.* at 125.
88. *Id.* at 114.
89. *Id.*
90. *See* Chen, *supra* note 74, at 105.
91. *Id.* at 106.
92. *Wickard*, 317 U.S. at 128–29.

for use on its farm.[93] Federal power, seen in this light, challenged notions of agrarian autonomy. These farming gripes fit in nicely with general criticism of New Deal regulation.

Food justice themes stand out precisely from the federal government's role that the *Wickard* Court approved. The governmental choice to penalize agricultural production demonstrated how legal doctrine would be used to bolster governmental control and to limit private choices. Since then, federal policy regarding the Department of Agriculture, farming subsidies, price controls, and agricultural legislation has only grown.[94]

New Deal agricultural policies, such as the Agricultural Adjustment Act of 1938, were protested in unique justice terms centered on food. Ann Folino White explains how for many Americans the New Deal agricultural policy was immoral.[95] These policies were implemented during or soon after the Depression, when many did not have enough to eat or lacked the money to pay for food.[96] New Deal policies asked farmers, butchers, and other food sectors to destroy crops and food products, which included throwing away milk, killing pigs before slaughter, and penalizing wheat production.[97] White notes that protests extended widely with "just prices" sought for crop sales, worker labor, and consumer food.[98] Agricultural producers, consumers, and workers all defined "just" as the "minimal standard of well-being."[99] Filburn's Commerce Clause challenge actually expressed the popular farmer resistance to the idea of overproduction.[100] As the administration attempted to control prices and help farmers, hungry consumers saw New Deal policies as the cause of their food insecurity.[101]

Likewise, agricultural production objectives, to maximize output with specialization, gained legal authority with *Wickard*. The Filburn farm mostly sold milk and eggs.[102] Its additional wheat production provided flexibility. The farmer could grow wheat and decide to use it, sell it, or store it,

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93. Chen, *supra* note 74, at 102.

94. *See* Gary D. Libecap, *The Great Depression and the Regulating State: Federal Government Regulation of Agriculture, 1884–1970*, *in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 181, 182–83 (Michael D. Bordo et al. eds., 1998).

95. *See* ANN FOLINO WHITE, PLOWED UNDER: FOOD POLICY PROTESTS AND PERFORMANCE IN NEW DEAL AMERICA 1 (2015).

96. *See id.*

97. *See id.* at 1, 3–4.

98. *See id.* at 4.

99. *Id.*

100. *See id.* at 8.

101. *See id.*

102. Wickard v. Filburn, 317 U.S. 111, 114 (1942).

depending on their present needs and wheat prices.[103] The Agricultural Adjustment Act empowered the Department of Agriculture to decide how much wheat could be grown, by whom, and what would be the penalties.[104] These objectives sought to have Filburn not focus on wheat.

To conclude, the *Slaughter-House Cases*, *Lochner*, and *Wickard* present how sustainable food debates cook up constitutional controversies for butchers, bakeshop workers, and farmers. In a doctrinal sense, the *Slaughter-House Cases* regard the Fourteenth Amendment and individual rights; *Lochner* found that due process rights and liberty of contract in the Fourteenth Amendment protected bakeshop owners; and *Wickard* showed the apex of federal authority under the Commerce Clause providing legal support for agricultural reforms. These cases also point to sustainability issues regarding public health, worker protections, and macro-level agriculture policies. These legal food fights present changing cultural values about butchering and public health, white bread and immigrant labor, and family and industrial farms.

IV. CONTEMPORARY, SUSTAINABLE AND CONSTITUTIONAL QUESTIONS

A. Federal Meat Inspections Trump Downer Swine Protections

California's efforts to require humane animal slaughter provides this Article's first example of recent sustainable food policy and constitutional legality.[105] In *National Meat Association v. Harris*, the Supreme Court affirmed that the Federal Meat Inspection Act ("FMIA") displaces California's animal welfare measures.[106] The Court prioritized uniform national meat inspection regulations over state interests in humane swine slaughtering.[107] A debate over intricate statute distinctions, between California's criminal law and federal inspections, reflect this judicial balancing. A simple preemption case reflects a larger constitutional debate about sustainable food policies, regarding animals, their welfare, and state's rights. Here, federal legislative intentions included humane slaughter methods and explicit trumping of state policies.

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103. *Id.*

104. *Id.* at 115–16.

105. For more discussion on California's slaughter policies, preemption litigation, and constitutional jurisprudence on animal welfare policies, see generally Hernández-López, *supra* note 5.

106. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459 (2012).

107. *Id.*

On January 1, 2010 California banned slaughtering downer animals.[108] This applied to nonambulatory animals, called downers, who are "unable to stand and walk without assistance."[109] This prohibited buying, selling, or receiving them as well as processing or selling the meat or products of these animals.[110] It required that slaughterhouses take "immediate action to humanely euthanize" downers.[111]

Downers are a sustainable food concern, focused on the cruelty of their slaughter. They cannot move due to exhaustion or fractured bones.[112] Worried about downer cows inflicted with Bovine Spongiform Encephalopathy ("mad cow disease"),[113] California passed the downer slaughter ban for cattle, swine, sheep, and goats.[114] Federal regulations prohibit downer cattle slaughter,[115] but the California ban went further. Pork farmers and pork product sellers stood to lose a great deal from California's slaughter ban.

From a cruelty perspective, animal advocates argued that nonambulatory animals should not be killed for meat.[116] These swine are sick and it is inhumane to kill them. Removing downers from the slaughter line is viewed as an enormous economic loss, since downer pigs are fully matured at this point. Line removal eliminates most commercial options for which the animal had been raised for. Others argue that swine are raised in unhealthy and weak conditions to decrease production costs and increase profits. Docile pigs are easier to raise. When downers are taken to slaughterhouses, they are not an aberration, but actually the result of industrial objectives to keep animals docile and easily controlled in feed lots.[117]

In *National Meat Association*, the Supreme Court unanimously held that California's ban on downer slaughter was preempted by the FMIA.[118] It ruled against California and for the meatpackers finding FMIA Section 678

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108. *See* CAL. PENAL CODE § 599f (2018), *invalidated by* Nat'l Meat Ass'n v. Harris, 565 U.S. 452 (2012).

109. *Id.* § 599f(i).

110. *Id.* § 599f(a)–(b).

111. *Id.* § 599f(c).

112. 9 C.F.R. § 309.2(b) (2018).

113. *See* Pamela Vesilind, *Preempting Humanity: Why* National Meat Ass'n v. Harris *Answered the Wrong Question*, 65 ME. L. REV. 685, 690–91 (2013).

114. CAL. PENAL CODE § 599f(j) (2018).

115. *See* 9 C.F.R. § 309.3(e) (2018).

116. *See* Marya Torrez, *Health and Welfare Preempted: How* National Meat Association v. Harris *Undermines Federalism, Food Safety, and Animal Protectio*n, 10 J. FOOD L. & POL'Y 35, 61–63 (2014).

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

118. *See* Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 468 (2012) (citation omitted).

preempts state law.[119] The FMIA barred "additional or different" state regulations regarding the "premises, facilities and operations" mentioned in the FMIA.[120] With the goals of safe meat production and humane slaughtering, Congress passed the FMIA.[121] It was amended in 1958 with the Humane Methods of Slaughter Act.[122] This regulatory scheme was expansive and offered little room for conflict by additional or different state requirements.[123]

California's ban on slaughter of downer animals and its euthanasia requirement created a new regulatory scheme.[124] This scheme conflicted with Congress's requirements for downers and its expressed intent to displace state regulation in this area.[125] The FMIA viewed downer animals not always as unsafe and that they could be immobile at this point for many reasons. Post-death examinations of the animals allowed for inspectors to determine if there were human consumption health concerns.

The Supreme Court's holding in *National Meat Association* points to the conflict that exists between federal laws and state sustainable food polices focused on animal welfare. Here, a federal statute is seen as with wide-reaching coverage, in this case for humane slaughter and meat safety, with Congress's intention to expressly preempt state law. While on the losing side of the debate, a state attempts to craft sustainable protections for animals. *National Meat Association* illustrates that federal preemption doctrine can displace state law sustainability objectives to stop the slaughter of sick swine. In this case, expressed preemption ruled out the lower court's view that federal meat inspection statutes only apply to animals that will be killed for meat.[126] This ultimately prioritizes regulatory uniformity over the state's sustainability interests in stopping cruelty and wasteful slaughters.

National Meat Association demonstrates how state sustainable policies can lose to federal preemption. Seen in food culture terms, the debate over downer slaughter questions the morality of placing sick animals on slaughter lines and then eating them. California tried to ban this. Claims of inhumane slaughter spark justice debates, with farmers and ranchers emphasizing the economic cost of taking mature animals off the line. This consequently

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119. *Id.*
120. *Id.* at 456–60.
121. *Id.* at 455–56.
122. *Id.* at 456 (referring to the Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765 § 2, 72 Stat. 862 (codified as amended at 7 U.S.C. §§ 1901–1907 (2012))).
123. *See id.* at 458.
124. *See id.* at 459–60.
125. *See id.* at 460–61.
126. *See id.* at 459.

questions the objectives of animal farmers, who seek the lowest cost and highest output. When raising animals, this results in downers on the slaughter line.

B. Stopping Forced-Feeding Ducks Outweighs Interstate Commerce

Foie gras serves this Article's second recent example of a constitutional questioning of sustainable policies.[127] In 2004, California made foie gras effectively illegal in the state, by banning force-feeding of a bird to enlarge its liver and by prohibiting the sale of any product resulting from force-feeding. Foie gras is made by feeding a duck or goose to the point that its liver grows greatly, developing complex proteins affecting its flavor. In North America, foie gras producers raise ducks and not geese. Recently in the United States, foie gras has been the subject of many court debates, with animal rights groups arguing it is a diseased (adulterated) product or unlawfully sold when served off the menu.[128]

California's prohibition on foie gras comes from relatively simple changes to the California Health and Safety Code. The California legislature passed Sections 25981 and 25982, banning force-feeding birds and sales of products from this force-feeding, respectively.[129] Section 25982 adds that "a product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."[130] Section 25980 defines "force feeding" as a "process that causes the bird to consume more food" than it would "voluntarily," and includes but is not limited to "delivering feed through a tube or other device inserted into the bird's esophagus."[131]

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127. For more discussion on California's foie gras policies and constitutional debates about farm animal treatment policies, see generally Hernández-López, *supra* note 5.

128. *See* Animal Legal Def. Fund v. U.S. Dep't. of Agric., No. 2:12-CV-4028-ODW, 2013 WL 1191736, at *1 (C.D. Cal. Mar. 22, 2013), *rev'd*, 632 F. App'x 905 (9th Cir. 2015); Ill. Rest. Ass'n v. City of Chicago, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007), *vacating as moot* No. 06 C 7014, 2008 WL 8915042 (N.D. Ill. Aug. 7, 2008); Animal Legal Def. Fund v. LT Napa Partners LLC, 234 Cal. App. 4th 1270, 1275 (2015).

129. CAL. HEALTH & SAFETY CODE §§ 25981–25982 (2018).

130. *Id.* § 25982.

131. *Id.* § 25980(b).

Foie gras is an extremely controversial food item.[132] In 2013, the Ninth Circuit attempted an objective description of the feeding process.[133] It notes that ducks grow fully in eleven to thirteen weeks, developing in four feeding stages.[134] In the first three stages of growth, the ducks are fed pellets. In the first stage, for four weeks right after birth, the ducks eat pellets available to them in pans twenty-four hours a day.[135] In the second stage, for one or two month(s), the pellet varieties change but are still accessible all day and night.[136] In the third stage, for two weeks, ducks eat pellets "at only certain times during the day," with the farmer choosing eating times.[137] For the final and most controversial stage, called *gavage*, the ducks are "hand-fed by feeders who use 'a tube to deliver the feed to the crop sac at the base of the duck's esophagus.'"[138] *Gavage* lasts between ten and thirteen days. This last stage, a fraction of the duck's life, feeds the complex debates on animal cruelty and the consequent constitutional conflicts.

Foie gras critics see the animal as suffering from force-feeding and offer various ethical and physiological arguments.[139] They argue that the feeding with a tube inserted down the bird causes injuries to their throats and digestive organs. Furthermore, they claim that this force-feeding causes suffering to the bird, evident in their walking, breathing, standing, and effects on their joints, feet, and skin.

The *Association des Éleveurs I* dispute provided the first national legal attention to California's ban. The lawsuit was filed by the Association des Éleveurs (farmers from Canada), Hudson Valley Foie Gras (a farm and foie gras purveyor from New York), and Hot's Restaurant in Hermosa Beach, California.[140] The dispute reached finality on the Dormant Commerce claims in *Association des Éleveurs I*[141] and on preemption grounds regarding the Federal Poultry Products Inspections Act ("PPIA") in *Association des*

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132. *See* Michaela DeSoucey, *"Ducking" the Foie Gras Ban: Dinner and a Side of Politics in Chicago*, *in* POLITISCHE MAHLZEITEN: POLITICAL MEALS 81 (Regina F. Bendix & Michaela Fenske eds., 2014); Joshua I. Grant, *Hell to the Sound of Trumpets: Why Chicago's Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Laws*, 2 STAN. J. ANIMAL L. & POL'Y 52 (2009).

133. *See* Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris (*Ass'n des Éleveurs I)*, 729 F.3d 937, 942 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 398 (2014).

134. *Id.* at 942, 946.

135. *Id.* at 942.

136. *Id.*

137. *Id.*

138. *Id.*

139. These arguments are summarized in Grant, *supra* note 132, at 88–92.

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

141. *See id.* at 948.

Éleveurs II.[142] In 2014, the U.S. Supreme Court denied a writ of certiorari in *Association des Éleveurs I*, when the farmer sought review of the Ninth Circuit's decision to uphold the ban.[143] Nebraska and twelve other states filed an amicus curiae brief in the Supreme Court, arguing that California's ban violated the Dormant Commerce Clause.[144] The position of these states, along with significant agriculture industries, signaled that the food fight was not just over a specialty product, but instead was about larger issues of state-level regulations of farming.[145] Their fear is that state-level sustainability regulations for duck farming could serve as legal examples for regulations applied in a variety of other animal farming, ranching, and slaughtering industries.

On August 30, 2013, in *Association des Éleveurs I*, the Court of Appeals upheld California's ban.[146] The court held that Section 25982 barring foie gras sales in California was not a violation of the Dormant Commerce Clause. It issued three important findings.[147] First, it held that the ban does not discriminate against out-of-state producers.[148] The state bars how an item is made, but not where the item is made. Section 25982 was interpreted as focused on a production method. The court held that California regulated a process, used during *gavage*, and absent this, foie gras could still be sold in California.

Second, the court held that the ban did not directly regulate interstate commerce.[149] The prohibition is not aimed out-of-state because Californian and non-Californian farmers and purveyors are subject to the same rules.[150] It again noted that foie gras is not prohibited, but that the ban applied to sales resulting from force-feedings. The court rejected claims that California's ban violated the Dormant Commerce Clause because of its extra-territorial

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142. *See* Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra (*Ass'n des Éleveurs II)*, 870 F.3d 1140, 1143 (9th Cir. 2017).

143. Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris, 135 S. Ct. 398, 398 (2014) (mem.) (denying certiorari).

144. The states joining Nebraska in filing an amicus brief included: Alabama, Georgia, Iowa, Kansas, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, West Virginia, Wyoming. Brief of Amici Curiae States of Nebraska, et al. in Support of Petitioners at 11, Ass'n des Éleveurs de Canards et d'Oies du Québec, 135 S. Ct. 398 (No. 13-1313).

145. *See* Khushbu Shah, *Thirteen States Petition the Supreme Court to Evaluate the Constitutionality of CA's Foie Ban*, EATER (July 15, 2014, 7:40 AM), http://www.eater.com/2014/7/15/6186821/thirteen-states-petition-the-supreme-court-to-evaluate-the.

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

147. *Id.* at 948–52.

148. *Id.* at 948.

149. *Id.* at 948–49.

150. *Id.* at 949.

impact.[151] The Association des Éleveurs argued that California was regulating conduct outside of California. The farmers came from Canada and New York and did not want to be excluded from the large California market.[152] The court distinguished case law finding that regulating conduct outside the boundaries of a state is a Dormant Commerce Clause violation.[153]

Third, the court held that there was not a substantial burden on interstate commerce posed by barring sales of force-fed foie gras in California.[154] Examining these indirect effects, the court engaged in the most substantive commerce analysis and balances this with sustainable food interests in limiting animal cruelty. The economic burden the Association des Éleveurs raised was only from the more profitable method of force-feeding and not from other methods to make foie gras.[155] Comparing these economic burdens to California's local benefit, the court sided with California.[156] It noted that California had an interest in preventing animal cruelty.[157]

In *Association des Éleveurs II*, the duck farmers argued that the PPIA preempted California's ban on selling foie gras. In September of 2017, the Court of Appeals disagreed and upheld California's ban.[158] It overturned a district court finding from 2015 that the State's measure was expressly preempted by the "ingredient requirement" of the PPIA.[159] The Court of Appeals emphasized that this ingredient requirement regarded the physical component of poultry and California's ban on force-feeding did not interfere with this.[160] California barred how poultry were treated. The PPIA did something different with its preemption that focused on slaughtering, processing, and distribution of poultry products.[161] It added that California and other states do regulate poultry as well, discounting any arguments that federal law displaces the field or that it is impossible to meet California and federal requirements.[162]

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151. *Id.* at 950–51.

152. *Id.* at 942.

153. *Id.* at 950–51. The court explained that *Healy v. Beer Institute* and *Baldwin v. G.A.F. Seelig* only applied to extra-territorial price-fixing. *Id.* In those instances, states' policies attempted to set prices out-of-state. *Id.*

154. *Id.* at 951–52.

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

156. *Id.*

157. *Id.*

158. Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra (*Ass'n des Éleveurs II)*, 870 F.3d 1140, 1143 (9th Cir. 2017).

159. *Id.* at 1145.

160. *Id.* at 1147–48.

161. *Id.* at 1150.

162. *Id.* at 1152–53.

The court in *Association des Éleveurs II* explicitly discounts how the PPIA could interfere with California's sustainability objectives. It notes that there is a presumption against preemption especially when the state has legitimate interests. Here, California's interest in preventing animal cruelty necessitated "compelling evidence" of federal intention to displace.[163] It notes that "societal values" and "notions of acceptable food products" change and states and countries move accordingly to ban items.[164] The PPIA's preemption is not an obstacle to this.[165]

Foie gras legal challenges elucidate how sustainability values shape the debate. It is a cultural concern if force-feeding ducks and their purported suffering is tolerated or not by society. This quickly becomes a debate about cruel and indulgent eating. Public efforts like California's attempts seek a just result, so argued, by de-incentivizing *gavage*. Farmers and foie gras eaters see this as interfering with their eating choices. Foie gras can be made without *gavage* but probably not on the scale needed for commercial sales.[166] If *gavage* is banned, less people can eat and farm foie gras. Accordingly, the reasoning in *Association des Éleveurs I* and *II* that the process and not the item is made illegal is so significant. Food industries beyond foie gras worry about the next time that the means to make or grow food is effectively banned like this. *Gavage* is needed for commercial foie gras along similar lines as cattle are needed for beef, enclosed hens for eggs, and stationary cows for dairy.

C. States Interest in Shark Conservation Justifies Banning Shark Fin Possession

California's efforts to end eating shark fins points to a third recent constitutional debate.[167] For shark fin regulations, California has been successful in having courts side with its sustainable food objectives of conservation and anti-cruelty.[168] Courts have found no economic discrimination in a ban on selling or possessing shark fins, with Californians

163. *Id.* at 1146.

164. *Id.* at 1150 n.6.

165. *Id.*

166. *See* Juliet Glass, *Foie Gras Makers Struggle to Please Critics and Chefs*, N.Y. TIMES (Apr. 25, 2007), www.nytimes.com/2007/04/25/dining/25foie.html (noting difficulty in "getting a product that can be marketable as foie gras" without *gavage*).

167. For more discussion on shark fin policies, federal and state, and consequential constitutional arguments, see generally Hernández-López, *supra* note 5.

168. Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2448 (2016) (mem.).

and state businesses subject to the same rules as those out of state.[169] The shark fin ban illustrates how similar political goals, in federal and state policies, facilitate court approval.[170] Federal and state policies attempting to end, with criminal prosecution or fines, the eating, finning (cutting a shark's fin and discarding the animal carcass after), or trade in shark fins have been implemented since 1995.[171] These measures have the explicit objective of trying to stop fishing, selling, and eating shark fins outside California and in consumption markets outside the United States.[172] In 2011, California banned possession or selling shark fins.[173]

Shark fin soup has been eaten for centuries, as a celebratory dish served mostly at weddings and banquets, as a traditional luxurious item in Chinese cuisine.[174] As California proposed more stringent bans on shark fin than federal law, various community leaders and groups pointed to the bill as racist. The question becomes whether sharks are singled out to be saved by the ban or whether Chinese culture is targeted as the subject of the ban. Some voices from Asian, Asian American, and eater audiences supported the ban, siding with the conservation justifications. Chef Charlie Phan emphasized the challenges faced by eating sustainably caught seafood, despite its cultural history and significance.[175] The bill's sponsor, Chinese-American

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169. *Id.* at 1145–47.

170. For a legal analysis of shark fin bans, see Carrie A. Laliberte, Comment, *Cutting the Fins Off of Federal Shark Laws: A Cooperative Federalism Approach to Shark Finning Legislation*, 46 ARIZ. ST. L.J. 979, 996–1001 (2014) (arguing against federal regulation and for increased state-level regulation).

171. In 1995, California made it illegal to sell, deliver for commercial purposes, or possess any "shark fin or tail or part of a shark fin or tail" that had been "removed from the carcass." *See* Act of Aug. 3, 1995, ch. 371, § 1, 1995 Cal. Legis. Serv. (codified as amended at CAL. FISH & GAME CODE § 7704(c) (2018)). In 2000, Congress made it unlawful to remove the fins at sea, possess detached fins on a fishing vessel, transfer them to another vessel, and bring them onshore. *See* Pub. L. No. 106-557, § 3, 114 Stat. 2772 (codified as amended 16 U.S.C. § 1857(1)(P) (2012)).

172. *See* OFFICE OF LEGIS. COUNSEL, LEGISLATIVE COUNSEL'S DIGEST, Assemb. 376, 2011–12 Sess. (Cal. 2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_376_bill_20111007_chaptered.html; Shelly Clarke et al., *Social, Economic, and Regulatory Drivers of the Shark Fin Trade*, 22 MARINE RESOURCE ECON. 305, 316 (2007).

173. California Fish and Game Code § 2021(b) prohibits anyone from possessing, selling or offering to sell, trade, or distribute a shark fin. CAL. FISH & GAME CODE § 2021(b) (2018) (effective Jan. 1, 2012).

174. *See generally* Michael Fabinyi, *Historical, Cultural and Social Perspectives on Luxury Seafood Consumption in China*, 39 ENVTL. CONSERVATION 83 (2012).

175. *See* Patricia Leigh Brown, *Soup Without Fins? Some Californians Simmer*, N.Y. TIMES (Mar. 5, 2011), http://www.nytimes.com/2011/03/06/us/06fin.html?_r=0.

Assemblyman Paul Fong, pointed to the science of endangered sharks and the cruelty of consumption.[176]

Shark conservation motivates efforts to ban shark fin production. Many shark species have suffered from shrinking in populations from ninety to ninety-nine percent in recent decades.[177] Sharks are caught all over the world, with the high price of shark fin creating the incentive to catch them on the open seas.[178] Fins can be worth up to $181 per pound.[179] Fishermen catch the fish in waters worldwide and then transport the fin to Hong Kong or Guangdong, China, often by plane through California.[180] Without such a high price for shark fins, fishermen would prioritize other fish or boat space for something other than a shark fin or shark carcass.

California and conservationists present the global shark population as severely threatened by extinction. A major concern is that sharks are top-level predators in the ocean and if their populations are depleted then marine ecosystems will suffer greatly. Sharks are particularly vulnerable to extinction since they do not reproduce frequently, mature slowly, and have few pups when they do give birth.[181]

California has prevailed in legal disputes over how its shark fin law violates the Dormant Commerce Clause and is preempted by federal fish conservation statutes. The 2011 law was challenged by the Chinatown Neighborhood Association, and the Court of Appeals for the Ninth Circuit decided the case in September 2015.[182] It reasoned that the ban did not favor Californian interests and did not discriminate against out-of-state interests.[183] Both out-of-state sellers and buyers and California sellers and buyers were

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176. *See* Dana Goodyear, *No Sharks Were Harmed in the Making of This Shark Fin Soup*, NEW YORKER (Dec. 28, 2011), http://www.newyorker.com/culture/culture-desk/no-sharks-were-harmed-in-the-making-of-this-shark-fin-soup.

177. *See* John R. Platt, *Hong Kong Imported 10 Million Kilograms of Shark Fins Last Year*, SCI. AM.: EXTINCTION COUNTDOWN (July 18, 2012), https://blogs.scientificamerican.com/extinction-countdown/hong-kong-imported-10-million-kilograms-shark-fins/.

178. Twenty-six countries are the top shark-finning countries. *See* JOHANNE FISCHER ET AL., FOOD & AGRIC. ORG., REVIEW OF THE IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION FOR THE CONSERVATION AND MANAGEMENT OF SHARKS at iv, 63 (2012), http://www.fao.org/docrep/017/i3036e/i3036e.pdf.

179. *See Sharks! Attacked*, SHARK SAVERS, http://www.sharksavers.org/files/7913/4211/4391/usInfographic.pdf (last visited Feb. 22, 2018).

180. *See, e.g.*, *Hong Kong Welcomes California's Shark Fin Ban*, WWF-H.K. (Sept. 15, 2011) https://www.wwf.org.hk/en/news/?5420/Global-Shark-Conservation-News.

181. *See* Brown, *supra* note 175.

182. *See* Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2448 (2016) (mem.).

183. *See id.* at 1146–47.

subject to the prohibition.[184] The court also discounted any finding that the ban had any illegal effect outside California and was an "extraterritorial" violation.[185] Here, California merely bans this food item inside and outside the state, with no effort by California to set or change prices outside the state.[186]

In terms of burden placed on commerce by the ban, the court found that the benefit of the ban outweighed the commercial burden for the sellers and buyers, which is presented as insignificant.[187] Specifically, the benefit of the ban included shark conservation, preventing cruelty, and protecting wildlife and health.[188] California's choices as a state were seen as more significant than the economic effects of the ban. The court went so far as to indicate that shark fin regulation is not inherently national and, as such, California efforts do not step over or conflict with federal authority.[189] This court was heavily influenced by state choices regarding eating animals, specifically to conserve the shark population and stop their cruel killing. The court neatly deferred to California choices about ending this practice for sustainability and conservation justifications.

The shark fin case illustrates the easiest win for sustainable policies, since it regards an endangered animal and the policy in question builds on prior state, federal, and international efforts. The other issues of hens, ducks, and swine do not raise conservation issues. For shark fins, the cultural and justice issues were less contested since prior policies began cementing the public need to take action. In terms of seeking more sustainable production, California's 2011 law pinpoints where in the capture, unloading, and sales chain that regulations could target. California's ban on possession and sale aimed at this. Such a clear legislative intent made it easier for a court to weigh in favor of the state's sustainability interest in passing the law.

184. *See id.* at 1140.
185. *See id.* at 1146.
186. *Id.*
187. *See id.* at 1147.
188. *See id.*
189. *Id.*

D. *States Cannot Sue When Another State Bars Imports of Battery-Cage Eggs*

The fourth controversy between sustainable food polices and the Constitution involves the ban on battery-cage housing for egg-laying hens.[190] In 2008, California voters approved Proposition 2, the Prevention of Farm Cruelty Act.[191] The Act outlaws various farming measures such as gestation crates for swine, veal crates, and battery cages for egg-laying hens. [192] It generally sought that animals would be provided space to move and extend their limbs while raised on farms. Proposition 2 was a significant step in applying animal welfare standards to farms in California, with the battery-cage ban creating the greatest legal controversy. Two years later, the state passed AB 1437, prohibiting the sale of any out-of-state eggs in California that do not comply with the Proposition 2 housing requirements.[193] Immediately, this was argued to unfairly protect California's egg farmers and close off the national egg market to the state. From these two efforts, one approved directly by voters and one from the legislature, *Missouri v. Harris* (or "*California Egg Case*") ensued, when Missouri initiated the lawsuit on February 3, 2014.[194] In this suit, Missouri and five other egg-producing states argued that California's ban on battery cages violated the Dormant Commerce Clause and Supremacy Clause.[195]

California's regulation of hen housing focuses on the method employed, in this case, battery cages. The court of appeals only ruled on a procedural matter of the lawsuit, finding Missouri lacked standing.[196] In essence, the court argued that no economic injury is felt by the states that raise these claims.[197] Interestingly, with hen eggs, private actors have incrementally and

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190. For more discussion on California's battery cage policies, approved by popular referendum and by state legislation, and consequential litigation, see generally Hernández-López, *supra* note 5.

191. DEBRA BOWEN, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), http://elections.cdn.sos.ca.gov/sov/2008-general/sov_complete.pdf.

192. *Id.*

193. *See* AB-1437, 2009–2010 Leg., Reg. Sess. (Cal. 2010) (codified as amended at CAL. HEALTH & SAFETY CODE § 25995 (West 2010) (effective Jan. 1, 2011); CAL. HEALTH & SAFETY CODE § 25996 (West 2010) (amended 2013) (effective Jan. 1, 2014)). Its regulations are in California Department of Food and Agriculture Shell Egg Food Safety regulation 1350(d). CAL. FOOD & AGRIC. CODE § 1350(d)(1) (West 2013).

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

195. Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 650 (9th Cir. 2017).

196. *Id.* at 652.

197. *See id.* at 652–54.

increasingly supported the requirements in Proposition 2 and AB 1437.[198] Since California passed these two policies, egg producers and animal welfare advocates have worked together to support these bans, with each group withdrawing their support for additional state-level polices or additional lawsuits. Moreover, responding to consumer demand and regulations from California and other states, large chain restaurants and grocers have announced they will not sell, serve, or produce eggs from hens housed in battery cages.[199]

In general terms, hens for egg production can be housed in three manners: battery cages, enriched cages, and free range.[200] Battery cages house hens in small wire or metal enclosures indoors, usually providing about sixty-seven square inches per bird.[201] The argued advantage of these is that they provide automated feeding and watering, and separate hens from each other and their waste. Such spatial limitations offer the capacity to raise a larger amount of hens and produce eggs.[202] Ninety-five percent of egg farmers in the United States use these cages.[203] California has banned battery-cage housing in the state and prohibited the sale of eggs from hens housed this way.[204] The two other housing systems emphasize greater hen mobility, allowing them to stretch their limbs, move, and as such are argued to be less cruel than battery cages.[205] Enriched cages separate the hens from each other and from their feeding and waste.[206]

On November 17, 2016, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling that Missouri lacked standing.[207] The Court of Appeals only reversed the district court's dismissal of Missouri's complaint with prejudice.[208] It explained that Missouri could allege "post-

198. *See* Jimmy Sherfey, *What the Fast-Food Industry Shift to Cage-Free Eggs Really Means*, EATER (Feb. 17, 2016, 9:30 AM), http://www.eater.com/2016/2/17/11009252/what-are-cage-free-eggs.

199. *See id.*

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

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 2.

205. *Id.* at 20–21.

206. *See* Lindsey Youngman, Kristina O'Keefe & Casey Sullivan, *Welfare and Production Benefits of Laying Hens in Enriched vs. Conventional Caging Systems*, DEBATING SCI. (Apr. 29, 2014), https://blogs.umass.edu/natsci397a-eross/welfare-and-production-benefits-of-laying-hens-in-enriched-vs-conventional-caging-systems-2/.

207. Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 656 (9th Cir. 2017).

208. *Id.*

effective-date facts," since AB 1437 went into effect, that would support standing.[209] Essentially, the court heavily doubted Missouri was the proper party to bring this lawsuit, but it left the door open for facts, since the law became effective in 2014, to be raised in a complaint.

The dismissal of Missouri's complaint illustrates the complexities of how animal welfare norms can develop adjacent to the political and legal arenas. Missouri argued that it had parens patriae standing, representing a "quasi-sovereign interest."[210] The state argued that its interest was to protect its citizens' economic health and constitutional rights, as well as its own status in the federal system.[211] AB 1437's purpose was not to improve how hens were treated, but to protect California's own egg farms.[212] Missouri averred that closing off sales of battery cage eggs, which are the most popular nationwide, was inconsistent with federalist principles.[213] The cited harms and burdens only belong to those farmers who want to sell to California and not the residents of Missouri.[214]

Missouri brought the suit since egg famers (at least a large percentage of them) had decided to cooperate with battery-cage requirements and not challenge California.[215] The United Egg Producers ("UEP") and Humane Society of the United States ("HSUS") agreement from 2011 signaled this shift.[216] Contrary to the position of other farming groups, the UEP decided it was better to work to implement these animal cruelty standards. The National Cattlemen Beef Association and National Pork Producers heavily criticized the 2011 agreement.[217] The egg farmers undoubtedly found the lobbying and litigation challenges expensive, especially when such challenges are not successful. Public, consumer, and commercial sentiment supports these animal welfare efforts. For the UEP and those who sell and use eggs, it is better to control how and when the change to battery cages is made. This is

209. *Id.*

210. Missouri v. Harris, 58 F. Supp. 3d 1059, 1068 (E.D. Cal. 2014).

211. *Id.*

212. *Id.* at 1064.

213. *Id.* at 1069–70.

214. *Id.* at 1078.

215. *See* Sherfey, *supra* note 198.

216. THE HUMANE SOC'Y OF THE U.S., DETAILS OF THE ANIMAL WELFARE AGREEMENT BETWEEN THE HUMANE SOCIETY OF THE UNITED STATES AND THE UNITED EGG PRODUCERS, http://www.humanesociety.org/assets/pdfs/farm/battery_cage_agreement_fact.pdf.

217. *See* Dan Charles, *U.S. Pig and Cattle Producers Trying to Crush Egg Bill*, NPR (July 11, 2012, 11:45 AM), http://www.npr.org/sections/thesalt/2012/07/10/156551903/pig-and-cattle-producers-trying-to-crush-egg-bill; Ellyn Ferguson, *Standards for Hens Worry Other Livestock Groups*, ROLL CALL (May 3, 2013, 8:07 AM), http://www.rollcall.com/news/standards_for_hens_worry_other_livestock_groups-224516-1.html.

more desirable than being forced to make these changes by a court or another state legislature.

The *California Egg Case* offers the most complex sustainability issues, since California and the largest farmer group supported the ban on battery-cage eggs. A court has not yet reviewed the merits of how Proposition 2 and AB 1437 impact egg farmers. In cultural and justice terms, California following the lead of voters and foreign jurisdictions has succeeded in making sale of battery cage eggs illegal. This furthers its animal welfare objectives. Seen in production terms, seeking sustainable egg policies, the state capitalized on its market demand size and its clear voter will. Similarly, consumer preferences have pushed egg farmer associations and egg purveyors to phase out battery cage eggs. In this light, California's sustainable policies leverage these aspects to its sustainability advantage.

E. Public Access to Information Strikes Ag-Gag Policies

Eleven states have tried to prohibit the collection and distribution of information recorded on farms and abattoirs.[218] These policies called "Ag-gag" attempt to stop public dissemination of information about how farm animals are treated, animals are slaughtered, and agriculture and food facilities contaminate their surroundings.[219] Similar bills have been defeated in twenty other states.[220] Animal and environmental activists have succeeded in influencing public sentiment on food issues with footage about animal abuse, their physical condition, and factory settings of farms, feeding lots, and slaughterhouses.[221] These images speak to audiences who care, but this footage can usually only be attained undercover.[222] Seeking to change public positions on food industries, these recordings represent a contentious aspect of sustainable food movements. Policymakers, farms, and slaughterhouses argue that the recording is on private property and the result of employee-applicants lying about their intentions.[223]

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218. *See* CTR. FOR CONSTITUTIONAL RIGHTS & DEFENDING RIGHTS AND DISSENT, AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 10 (2017), https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf.

219. *Id.*

220. *See id.* at 3.

221. *Id.*

222. *See id.* at 4.

223. *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1191–92 (2018); Rita-Marie Cain Reid & Amber L. Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11. J. FOOD L. & POL'Y 31 (2015).

Ag-gag litigation offers the fifth example of how constitutional norms resolve sustainability debates. As of March 2018, courts have reached substantive decisions regarding Wyoming, [224] Utah,[225] and Idaho[226] ag-gag policies, with each measure found to be in conflict with First Amendment speech protections. Furthermore, a district court has ruled that a challenge to Iowa's ag-gag policy can proceed to trial.[227]

This year, the U.S. Court of Appeals for the Ninth Circuit found Idaho's ag-gag policy violates the First Amendment, specifically in its attempts to criminalize entry on farms and other facilities and to prohibit making a recording without express consent from the owner.[228] But, the court did side with Idaho regarding criminalizing employment by misrepresentation when there is the intent to cause injury to the farm or facility.[229] Last year, the U.S. Court of Appeals for the Tenth Circuit found that the Wyoming statute regulates speech protected by the First Amendment, "creation of speech," and it is not shielded from constitutional scrutiny merely because the behavior is on private property.[230] A district court issued similar reasoning for Utah's ag-gag policy, while discounting state policy justifications to control lying by farm employees and to bolster protections for workers and animals.[231] Utah is not appealing this loss.

Each of these substantive rulings point to ag-gag policies being too broad and insufficiently tailored to justify restricting speech. The policies have been justified by pointing to employee lying, private property protections extending to animals, trespassing by recorders, and terrorism by those who record. Importantly, the courts find that the recording serves a public purpose, since politicians and the citizenry are interested in these issues.[232] Broad criminalization of taping, working for farms or in facilities, or distribution of the information stifles speech. At the same time, criminal, tort, and employment law provide property protections for farms and slaughterhouses.

Ag-gag jurisprudence reflects the cultural, justice, and production aspects of sustainable food debates. Importantly, for these policies courts shift the focus away from producers, as farmers or slaughterhouses, and from activists

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224. W. Watersheds Projects v. Michael, 869 F.3d 1189 (10th Cir. 2017).

225. Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).

226. *Animal Legal Def. Fund*, 878 F.3d 1184.

227. *See* Animal Defense Fund et al. v. Reynolds et al., No. 17-cv-362, 2018 WL 1151000 (S.D. Iowa Feb. 27, 2018).

228. *Animal Legal Def. Fund*, 878 F.3d at 1203.

229. *Id.* at 1200.

230. W. Watersheds Projects v. Michael, 869 F.3d 1189, 1197 (10th Cir. 2017).

231. *See* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1202–05 (D. Utah 2017).

232. *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d at 1203–05; *W. Watersheds Projects*, 869 F.3d at 1195–96, 1197.

who record. They instead emphasize the information about food production that society gains from the recordings.

Looking at this, ag-gag cases point to sustainability concerns about food culture, justice, and production priorities. The Wyoming, Utah, and Idaho cases, so far, clearly illustrate that the content of the speech is influential for court findings. The policy concern is not how animals are treated and how food is made. The concern is for public access to information about these issues. Similarly, these cases point to a justice debate about this information. The public has access to this information.

This contrasts with supporting policies that protect farms and abattoirs from these recordings. States attempt to justify ag-gag policies since farmers, ranchers, and slaughterhouses enjoy legal protections for their property and animal husbandry measures. In the most recent Idaho case, Judge Bea's dissenting opinion asserts that Idaho's ag-gag policy is legal because it protects common law trespass actions and property rights to exclude.[233] Food and animal advocates argue that farms, ranches, and slaughter facilities shield their inhumane practices with norms in property law and husbandry traditions.[234] As Iowa seeks to defend its ag-gag policies at trial, the state argues that it only regulates conduct and not speech on these facilities.[235]

V. CONCLUSION

This Article has introduced the suggestion that debates about sustainable food in American society often take place as complex inquiries into constitutional law. With this, the Article has had two goals: to apply food studies approaches to iconic constitutional cases and to identify how contemporary food sustainability efforts spark constitutional debates.

For the first goal, food appears as the underappreciated inquiry in the *Slaughter-House Cases*, *Lochner*, and *Wickard*. This inquiry emerges when food studies approaches on justice, agriculture, and cultural studies are applied. The *Slaughter-House Cases* look like nineteenth-century controversies more about local public health regulations on meat production and less about the meaning of the citizenship privileges in the Fourteenth Amendment. *Lochner* paints how bakers and immigrant workers improved

233. *Animal Legal Def. Fund*, 878 F.3d at 1206.

234. For a description of why federal law is generally hands-off about animal farm treatment because of these property rights and husbandry justifications, see Hernández-López, *supra* note 5, at 325–26.

235. *See* Dan Flynn, *Activists' Case on Constitutionality of 'Ag-gag' Law Advances*, FOOD SAFETY NEWS (Mar. 1, 2018), http://www.foodsafetynews.com/2018/03/activists-case-on-constitutionality-of-ag-gag-law-advances/#.Wr01YWaZM0o.

their working conditions in the early twentieth century, in addition to highlighting due process and contract rights for businesses. *Wickard* illustrates how federal agricultural support shifted away from family farms, as well as commenting on the doctrinal apex of federal Commerce Clause powers. The overriding lessons from this food-studies-and-Constitution approach are that food cooks up constitutional controversies and that constitutional norms shape how Americans eat, produce, and make food.

For the second goal, constitutional law has informed how state downer slaughter bans are stricken, while it has upheld bans on interstate foie gras and battery-cage egg sales, bans on possession or sale of shark fin, and it has stricken down ag-gag policies in three states. As such, food sustainability and constitutional norms can be both mutually supportive and in conflict. The greater part of these legal inquiries rests on how state and federal policies intersect. This examines national regulatory uniformity, legislative intent, economic burdens, and protectionism for home-state industries.

For all of these, sustainable food policies question food and culture, justice, and production means. These policies are easier to legally uphold when political actors make their sustainable objectives clear. Such objectives supported California's foie gras and shark fin bans. The latter seen by many as cruel and the former regarded as cruel and impacting endangered animals. For battery-cage eggs, purveyors and farmers have taken the private effort to notice a cultural change, evident in sustainability, to modify their operations. Eaters, buyers, investors, and regulators favor battery-cage free eggs. Ag-gag litigation points to the biggest cultural shift, when courts deem information about food production as protected by the First Amendment. This contrasts with protections in property law and animal husbandry that traditionally shielded these industries. This shielding effectively supported environmental contamination or inhumane animal treatment.

Constitutional law is poised to become the subject of additional sustainable food debates, as states respond to the measures described here with right-to-farm laws[236] and localities seek to ban GMO seeds.[237] These debates will be framed by questions about interstate commercial impacts and clear sustainable objectives included in the legislative process. Like for the seven constitutional law cases described here, sustainable food policies are

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236. *See* Kira Lerner, *How Corporate Agribusiness Is Quietly Seizing the Heartland with 'Right To Farm' Laws*, THINK PROGRESS (Mar. 26, 2015), https://thinkprogress.org/how-corporate-agribusiness-is-quietly-seizing-the-heartland-with-right-to-farm-laws-de482b811217/.

237. *See* Kristina Johnson, *29 States Just Banned Laws About Seeds: Ag Giants Like Monsanto and DuPont Are Cheering*, MOTHER JONES (Aug. 21, 2017), http://www.motherjones.com/food/2017/08/29-states-just-banned-laws-about-seeds/.

more likely to succeed in court when their cultural relevance, justice impacts, and production priorities are identified by policymakers.