



# Animal Law Podcast: Transcript for Episode 89, Interview with Michael Dorf

**Mariann:** Welcome to the Animal Law Podcast, Michael.

**Michael:** Thank you. I'm glad to be here.

**Mariann:** I'm really glad to have you here because you're going to make me understand this case, which everybody in the animal protection movement is concerned about this case, but most of us don't know enough about what it really means. And I think after the argument in the Supreme Court, that we know less about what *\*laughing\** it means than we thought we did before the argument. So that's adding some more complications.

And we usually start off with the facts, you know, the time-honored legal writing fashion, start with the facts. But you mentioned, and I think it's a really good idea, that you might like to start off with a little introduction, law professor style, to what the Dormant Commerce Clause is.

Maybe a little bit about what the Commerce Clause is, why it's important, why it's dormant, what that means, and what function it has been performing in the past.

**Michael:** Sure. So Article 1, Section 8 of the Constitution assigns various powers to Congress. One of the most important of which is the power to regulate interstate commerce.

That's an affirmative power of Congress. It backs various statutes, very important ones, like anti-discrimination law, labor standards, environmental law. All sorts of federal laws are passed pursuant to the Commerce Clause. The Dormant Commerce Clause is a term used to describe a principle that the Supreme Court has inferred from the affirmative grant of power to Congress.

And the idea, captured by the word dormant, which means sleeping, is that even when Congress doesn't pass a statute, some laws passed by states are invalid on the ground that they interfere too much with interstate commerce. As a classical matter, this is used to strike down protectionist legislation.

The basic idea is that the United States should be a kind of domestic free trade zone, except to the extent that Congress wants to pass laws that restrict trade. And so if New York, for example, said, "You can only purchase yo-yos manufactured in New York," and someone wanted to import a yo-yo from New Jersey, that would be a clear violation of the Dormant Commerce Clause, even though Congress hadn't passed a law regulating the interstate sale of yo-yos.

**Mariann:** I understand better already, so let's get to the other side. These aren't really the facts, they're more of the law that's involved here. And I imagine a lot of listeners have some familiarity with California's Prop 12, and the sales bans that it imposed and the history behind it, but some may not.

Can you just give us the basics that are relevant to this case? And let's focus on the issues about pigs, specifically, even though the proposition involved other animals as well, but this case only involves the pig.

**Michael:** So Prop 12 governs the sale of meat in the state of California, focusing on pigs.

If somebody wants to sell pork in California, it must come from pigs that were raised in compliance with the strictures of Prop 12. For our purposes, we can say that means simply that you can't use gestation crates for the birthing of piglets and for the raising of them. And the challenge here is that the vast majority of pork products sold in California, well over 99%, are actually raised outside of California in states like Iowa and other places in the Midwest.

And so the pork industry has said that what California is doing here is it's really regulating outside of California. It's regulating the production methods in other states and therefore that's a violation of the dormant commerce. California, of course, counters that, "No, no. We're just regulating the sale of products inside California."

So that's the basic setup and the basic conflict in the case.

**Mariann:** Yeah, and we should mention that the decision will also affect a similar sales ban in Massachusetts, which has just been put on hold until this case gets decided.

And you know, will also affect the way the animal protection movement has been, or at least the animal law side of the animal protection movement, has been putting a lot of its hopes and dreams into, for whatever that's worth.

And I should mention, just for those who are listening and who are persnickety about this, it doesn't cover all kinds of pig meat. You can have packaged kinds of pig meat and you should excuse the expression. But all sales of bacon and pork chops and all those things.

Just to set the scene a little bit more, who are the parties here and what happened in the lower court?

**Michael:** So the main plaintiff is the National Pork Producer's Council, which is an industry trade group, and the chief defendant is the Attorney General or the government of California backed by the Humane Society of the United States, HSUS, which intervened on behalf of California to defend California's regulation.

I'll give you a fun fact. The lawyer who argued for HSUS in the Supreme Court, a prominent appellate lawyer named Jeff Lampkin, used to dog sit for me when I lived in Washington DC!

**Mariann:** \*laughs\* Well, I'm sure that led to this high point of his career, I have not the slightest doubt. And also the Biden administration, to the shock of a lot of people, I think, in the animal protection movement, actually intervened on the side of the pork producers, didn't it?

**Michael:** They did intervene, you're right, because they got some time during the oral argument. So the Deputy Solicitor General was up there, arguing alongside of the pork producers. His argument wasn't quite as radical as that of the pork industry, but it was pretty clearly against prop 12.

**Mariann:** You were talking before about the yo-yo case, the famous yo-yo case, and New York can't simply say, "We're only gonna sell New York yo-yos in New York." That's just pure discrimination against another state. That's not really involved in this case. That's the most obvious violation of the Dormant Commerce Clause. That's not involved, so let's put that aside.

The other more nuanced kind of arguments that they brought, they brought one cause of action arguing that this is an extra-territorial regulation and one that this is in violation of the Pike Balancing Test. And I believe the government is

allegedly just going with Pike, though these arguments seem to blend together in my limited imagination.

But let's start with extra territoriality. Maybe they're just upset about this case, who knows? So can you just kind of elaborate on their argument that California is somehow governing what, say Iowa, a major pork producing state, must do? They're governing extra-territorially?

**Michael:** Right. The extra-territoriality limit is often described as part of the Commerce Clause, but actually it's broader than that.

So even if the state was regulating nothing to do with Commerce, the state has authority within its own borders. But New York, for example, couldn't try to set the legal age for consent to sexual relations in Alabama, or vice versa, right? It's just the idea that sovereigns, and states are quasi sovereign, have authority within their territory.

And so the first argument that the pork producers make is to say that this law, because it affects almost entirely out of state producers, is really similar to my hypothetical law of California trying to regulate something that has nothing to do with California.

The other idea, the Pike Balancing, is named for a case involving one of the parties named Pike, says that there are actually two ways a state can violate the Dormant Commerce Clause. One is our example of straight up discrimination against interstate commerce or protectionism, but even a law that is neutral with respect to interstate commerce, that is to say it regulates in-state as well as out-of-state, can violate the Dormant Commerce Clause if it imposes an undue burden on interstate commerce, where undue is a matter of balancing the external impediments to interstate commerce versus the in-state benefits. But it's very difficult to prevail by making an undue burden or Pike Balancing claim because the court has said that in order to win one of these Dormant Commerce Clause challenges under the Pike Balancing test, the plaintiff has to show that the external impediments to interstate commerce are clearly excessive relative to the in-state benefits.

It's not just enough that it slightly tips the balance. There's gotta be a very clear difference. One of the sort of nuances of the oral argument was that the challengers, both the pork producers and the Solicitor General's office, seem to be saying that extra-territoriality is not simply a freestanding limit on state regulation, but is also incorporated within the Pike Balancing test.

That's what I think you meant by it merging. And their idea was that where a state regulates the in-state sale of a product based on its method of production out of state, that's the sort of extra-territorial effect, that is a kind of per se undue burden.

I'm not sure what's gained by treating this dimension as part of, rather than separate from, the Pike Balancing test. But in any event, both ideas were in play, and it all really boiled down to this question of whether a state has a legitimate interest in how a product produced out of state is produced when it's sold within the state.

**Mariann:** Well, that's an excellent explanation of boiling it down to what the basic problem is.

Now, one of the questions obviously that arises is if the industry doesn't like what California is requiring, why can't the industry just not do any business with California? They're not required to sell their pork in California. There's no law requiring them to do so.

**Michael:** Sure, they make two arguments. One is simply that the California market is so big that it's not reasonable for them to be asked to forgo it. And, I don't know, I think that's neither here nor there. It's a big market but if California's legitimately regulating, well, too bad. So, I think that that's fair. They make a second argument, though, which I think is a little more interesting, and they say that they are such an efficient operation using every bit of the slaughtered pig, that by the time the products come to market, you can't really tell what comes from where, and therefore whether they've complied with Prop 12 or not. And so what they'll have to do if they want to sell in California at all, is they're going to have to raise all of their pork as though it's being sold for California.

I should say I think that this argument is in some considerable tension with their other argument, which is that California could sufficiently validate its interests by having a labeling requirement. Because if it's possible to label pork products as being produced in conformity with Prop 12, then it's possible to distinguish what is and isn't produced in conformity with Prop 12.

**Mariann:** A lot of factual issues are revolving around that question of whether it's really that hard for them to do. There were, I think, a number of questions, perhaps an oral argument, if I'm remembering, from them, "Aren't meats labeled for a million different things now?" And "that's very common." And

other industries seem to be doing it, and in fact, not even the entire pork industry is saying they can't do this.

There are players who are moving forward in this, kind of dividing up the market. But I guess that is their best argument because going back to their other one, which they did spend a good deal of time on in the arguments, like, "Oh, California's so big we can't lose it." I mean, the fact that you would lose money really isn't a constitutional argument. \*laughs\*

And are we going to have different rules for Rhode Island and California just because California's big? Do they have to comply with the Constitution in a different way?

**Michael:** Right, exactly. And they also concede that California could, consistent with the Constitution, completely ban the sale of pork in California. And then they would be losing the California market entirely as well.

**Mariann:** Yeah, that was a weird one. And I guess they just didn't see any way around conceding that. But they concede that they could do labeling and they concede that they could ban pork, "They just can't do the thing they did!"

**Michael:** Right. Which is in between, which is not as severe as a ban and somewhat more restrictive than labeling.

So it's a kind of a reverse Goldilocks solution. "You can't do the thing that's in between."

**Mariann:** Nicely put. So this doesn't seem that hard so far, but the argument clearly revealed that the justices were very concerned about a lot of things going on in this case. And one of the major focuses of the argument was the implications of the fact that this law is morality based.

There were some health and safety arguments that were argued, I think. But they weren't given much attention at the argument at all. I mean, states obviously are allowed to pass laws that have to do with morals. There's no question that California can pass this law for its own producers. So why is the morality motivation of this such a problem when it comes to the Dormant Commerce Clause?

**Michael:** Well, I think the worry, as it was expressed by the industry lawyer and also by some of the justices, is that if California can do this, then we can expect what the lawyer referred to as balkanization. So given the fact that there are red



states and blue states with different values and with different legislatures, if California says it's immoral to raise pigs in inhumane ways and then sell their products in California, what's to stop Texas from saying it's immoral for factory workers to not to be able to refuse to join a union.

So that only products that come from so-called open shop states, right to work states, can be sold in Texas. You know, there are other things about immigration and so forth. And so the basic idea, and I think it's not a trivial argument, that they were trying to get forward is that the whole purpose of the Commerce Clause and the Dormant Commerce Clause is to have a national market, absent some special reason why states want to regulate locally, and once you start allowing states to sort of export their morality, given the fact of polarization, you're going to have a very divided market.

**Mariann:** It's not a bad argument at all, or not an irrelevant argument at all. It does give me some hope that that's the reason that the Biden administration decided to intervene, and not just because they don't care at all about the humane treatment of pigs, though that may also be true.

Before we pass this moment, I'm just going to talk about other rationales that came up for why laws might be passed in various states. So Justice Roberts spoke of a compelling rationale of raising pigs in the cheapest way possible to provide poor people with affordable food. And I just wanted to mention it because we do know that the current Supreme Court is deeply concerned with the poor \*laughs\* but could that be another legitimate factor in deciding whether a law passes the Pike Balancing test?

**Michael:** So it's a bit rich for the industry to be making this argument, for any number of reasons.

Top of the list is that they're profit seeking, right? That they're not concerned about selling cheap pork so that people can spend less money on their food. But more importantly, because of course, as you and I know if people want cheaply produced food, then feeding grain and other food stuffs, corn, et cetera, to animals and then killing the animals is grossly inefficient, right? That is the calorie loss is something like, you get sort of 10 to one or worse. And that's to say nothing of the air and water pollution, which are negative externalities that all of us have to bear. If a state were really concerned about providing its citizens with affordable food choices, it would be doing everything possible to promote plant-based foods.

And of course, that's not even remotely what's going on here.

**Mariann:** No, definitely. I mean, I would love to have had somebody mention that argument to see the complete confusion on the part of the court, but I digress. The industry also talked about the problems that would be created if different states started setting different square footage standards.

Prop 12 sets specific square footage standards, it's a very small amount of space that a pregnant pig might have, but it's a lot bigger than a gestation crate. And you know, how confusing it would be in every state, and this term balkanization kept coming up. Like there would be just different standards all over the place.

But it does bring up the question of whether that problem is fixable, and I think we sometimes get lost with the fact that Congress can just fix all these problems if it wants to, right? I mean, the Dormant Commerce Clause is not a problem for Congress if things get too out of hand.

**Michael:** That's right. It's the *Dormant* Commerce Clause.

If Congress wakes up and decides that it wants to set a national standard, it certainly could do that. Congress has the power to preempt contrary state laws, whether or not they violate the Dormant Commerce Clause. I should say that although that is clearly a constitutional solution, I'm not so sure that we, in the sort of animal friendly movement, want Congress to take action because the farm state Senators and Representatives have an awful lot of power on Capitol Hill. And often what you see when you get national standards is that the national standards are substantially lower than what you would get from more progressive states. So yes, Congress could fix that, and that's why the this fear of inconsistent balkanization is unrealistic as a purely legal matter. But as a policy matter, I'm not sure it serves our interests.

**Mariann:** I totally agree with you. As a policy matter, it doesn't serve our interests, but it is again, a little rich to have the industry arguing that, "What would we do if all these states...", the industry could go to Congress and get pretty much whatever they wanted.

So for them to be complaining that inconsistent standards would be the reason this all doesn't work...

**Michael:** Can I also say one other thing, which is that different states having different minima does not mean you have inconsistent standards, right? You can comply with all of them by just complying with the maximum space requirements of any particular state, right?



So the state that sets the highest threshold is the state whose requirements you follow for everywhere. So this is different from a classic case that was before the court a number of years ago in which one state required that trucks have what they called curved mudguards and another state required that you have rectangular mudguards on them, these apparently have some safety purpose.

There was no good evidence that it mattered whether they were curved or rectangular, but these were literally inconsistent. So if you had an interstate trucking route that went through both states, your truckers would have to get out at the state border and change the mudguards, which would be ridiculous.

So those were literally inconsistent standards in the sense that on a single interstate trip, it's impossible to comply with both. At least without imposing this very high cost of changing the mudguards. Having different minima is not literally inconsistent in that same way.

**Mariann:** Yeah, no, that's a really good point and really important for us to remember.

We could go to the highest common denominator instead of, as the pork industry wants to do, let us go to the lowest common denominator. All right. Going back to this balkanization question and all these questions that came up, which made us think that the court has a lot on its mind here about what the Dormant Commerce Clause is doing and what it should be doing.

Can you give us some examples out of this area of legislation that might run into problems? You had mentioned union requirements and other people have mentioned some other things that had to do with animals such as cosmetic testing on animals. But do you see a wide array of types of things that might run into these very same problems? That states would decide they are banning the sale of certain products, and then we have all different standards in different states. What is the court worried about here?

**Michael:** Well, so before I get to those, let me just tell you a few of the examples that California identified of existing laws, that presumably the state thinks are legitimate, that would be struck down if California loses based on the theory that the industry is promoting.

So one is New York bans sales of goods produced by child labor. Indiana apparently bans the sale or transfer of fetal tissue derived from aborted fetuses as opposed to miscarriages. That's sort of down the slippery slope in that

direction. I suppose one of the big worries from the other side is that you would see things like, so the immigration one I mentioned, right?

You could imagine, certainly Florida, for example, saying that if you're going to sell goods in Florida, you have to certify that nobody who is undocumented worked to produce those goods, and that would be very onerous. I wrote a column before the oral argument in which I worried a little bit about states banning the importation of abortion pills.

I don't think that's directly implicated by the pork industry's theory of the case though, because there the question is not so much the method of production out of state, but the sort of very existence of the product. But the truth is that, I think the worry, probably on each side, is a bit overstated, right?

This is a pretty old republic we live in, in which states have had the opportunity for over two centuries to pass laws that govern the production of goods out of state. And we haven't seen a flood of that, mostly because there's really not a lot of political gain to be had from doing that sort of thing.

Because what it tends to do is, if these are products that people in your state want to buy, they're gonna be pissed off if you start making it very difficult for out of state producers to make them and sell them. To put it differently, consumers in a state have interests that roughly align with producers out of state. And so one of the concerns of the Dormant Commerce Clause is that states are trying to harm out of state entities to the benefit of people in the state, and you just don't see that very much, again because protectionism, even sort of naked protectionism in the form of discrimination, yeah, it harms the out-of-state producers relative to the in-state producers, but it also harms the in-state consumers who will have some political power of their own.

So I really think that the slippery slopes and parades of horrors are quite overstated and that's sort of the experience up until now.

**Mariann:** Yeah, I think that makes total sense. And it even occurred to me that, I hope I can express this...but even the way that *Roe v Wade* was for many years protecting Red State legislators from doing anything about abortion... having things the way they are, like having this interpretation of the Dormant Commerce Clause, keep them from being able to pass laws saying everything has to come from a non-union state or... They can say, "We wish we could do that, but we can't under the constitution. So, uh..."

**Michael:** Well, I don't think we want that. Right? That's where we would be if the pork producers win. Right? Uh, I think for California to win it has to be permissible to enact these laws.

It's just that there's not a lot of political angle.

**Mariann:** Yeah, and you don't have that protection that it's impermissible.

All right, so one thing worth noting, which I think might have given the court pause, is that the pork producers actually admitted that under their rationale free states could not have banned the sale of products produced by slaves.

Which I think is a pretty compelling...that really focuses what this is all about. But getting back to this case, in its argument, California attempts to draw a line between out-of-state effects that are directly related to the product and ones that are more distant. Like, say, wages paid to workers.

They're trying to draw that line. So they're saying, well, kind of that the product itself is tainted. The harm that was done in creating this product actually is so close to the product. And I don't think they even made the point, but it actually, it's the very body of the entity who was harmed by this. So it really is very, very close. So do you think that's a legitimate way to draw a distinction and really narrow the way the court could decide this particular case, having to do with harm to animals?

**Michael:** I think so. Although it would require some element of judgment and it's a standard, it's not a rule. That is to say what exactly is integral to the production of a product and what is sort of just in the background, calls for a line drawing exercise about which people could reasonably disagree, although there will be some cases that are so clearly on one side or the other. If I had been arguing the case, I might have drawn an analogy to labor law, which distinguishes between permissible primary boycotts and impermissible secondary and tertiary quaternary boycotts, right?

So that if a union objects to the wages or conditions at a particular plant or store, they can picket there. But you're not allowed to picket anybody who does business with those people, even though, of course, they are in some sense supporting the hostile to labor policies. The theory being that when you get sufficiently upstream from the real wrongdoer that you're targeting, you are going to eventually expand out to everybody.

And then every restaurant, every employer is going to have to take sides on issues that really have very little to do with their business and that that is quite harmful. So here, I think you could say that this is some sort of similar line. So if a state were to say you can't sell bicycles that were assembled in plants that received any of their power from companies that made any charitable deductions to this or that or whatever, that would be too far upstream. It doesn't eliminate the element of judgment, but it would cabin the rule in such a way that what's allowable doesn't threaten to swallow up the whole economy.

**Mariann:** As you point out, this is a hard line to draw, but does the court have to draw it or can they just decide that this is a legitimate limitation, and things that are directly like this are legitimate, and leave it up to further litigation to decide where exactly that line gets drawn? Isn't that what courts do all the time?

**Michael:** Sure. And of course they can do anything they want. There's no super Supreme Court to reverse them.

**Mariann:** And they definitely feel that they can do anything they want these days.

**Michael:** Right. I did have the sense though, from the oral argument, that they are not inclined to do that, that this is not one of those cases where they're going to say, "Well, this is all we need to say for this case. We'll develop this as we go." Given how much of the oral argument focused on real and hypothetical extensions of what would happen if either side were to win.

One, to my mind, fairly disappointing development in the oral argument was the position that the newest justice, Justice Ketanji Brown Jackson, seemed to be taking, which was that California's moral interest is fully satisfied by labeling requirements and therefore anything beyond that is impermissible.

I'm not sure where she gets that from. There, heretofore, has not been a least restrictive means requirement under the Dormant Commerce Clause and, as the lawyer for California and for HSUS said, states can enact bans based on morality. But it did strike me that she might be leaning towards saying this only justifies notice. The only justice who I counted as really completely sympathetic to California and the animal welfare interest in this case was Justice Sotomayor.

**Mariann:** Yeah, and I'd like to go through the question of how you read each of the justices, which of course doesn't necessarily coordinate with how we see many cases, it's not as obvious a line drawing.

But before, I have to tell you, my next question for you was about Justice Jackson and labeling. So I just like to go back to that for a second because I actually wanted to make a comment about it, because I think it's pretty widely accepted among...this is not a legal issue, or maybe it doesn't help anybody... that labeling just doesn't work. People who will vote to have a statewide standard will nevertheless, if they're in the grocery store and given the choice, not necessarily opt for crate free pork. They won't pay more for it. It may not make sense to vegans who are very into following their own rules, but people just feel like "it's not going to do any good if just I spend more money unless there's a rule that everybody has to spend more money." So it's not insensible. I guess you've already answered my question of whether you feel that labeling is an inadequate remedy and you clearly do.

**Michael:** Well, let me add one other thing, if I can. So I think it's true, one way to understand a voter's preference for a law that imposes higher costs, but simultaneously not bearing those costs voluntarily, is as a kind of Ulysses contract, right?

So his way of binding yourself in advance, in the way that Ulysses had his men bind him to the mast. Another way is, as you said, a kind of, "We're all in this together, so I'll make this sacrifice if others do because that's going to be aggregated." But there's a third kind of reason why you might vote for that, which is that you might just not trust the labels.

So the USDA has an organic label, that means something, but you have to know that. A lot of consumers might not know the difference between organic, which has particular requirements, and the label all natural, which is essentially meaningless, but appears on lots of foods that are available in grocery stores.

So I think it's quite rational, just as a matter of consumer protection, to want to have everything conform to the the state's uniform standard.

**Mariann:** Those are excellent points. There are a lot of reasons to believe that labeling wouldn't work. It also, I think you mentioned this before, it kind of belies their whole argument about how difficult it is to separate out gestation pork from non gestation pork and how this is impossible.

I mean, if they're gonna put labels on it, they're gonna have to separate it all out, right?

**Michael:** Right. Absolutely. Yes.

**Mariann:** All right. Let's talk about the individual justices. Because I had said we were gonna get to that next, and as everyone knows, this is not a case that is likely to play out on traditional party lines.

Justice Thomas and probably Justice Gorsuch are very likely votes for affirming because they basically don't believe the Dormant Commerce Clause exists. Am I right about that?

**Michael:** Yes.

**Mariann:** And on the other hand, Justice Jackson, as you pointed out, was one of the toughest questioners and seemed to question the arguments a lot, of the respondents.

And so we don't know a lot about her yet, but it was a little ominous. Any predictions about anyone else? I mean, do you think that Justice Sotomayor's concern for, or at least sympathy towards the issues, would indicate the way she's gonna go?

**Michael:** Yeah. She's not one who tends to sort of ask questions just to throw people off the scent or for fun.

I can usually tell how she's going to vote based on what she says during the oral argument. I will say the one justice who disappointed me the most, based on sort of what I thought coming in, and this may surprise some people, is Justice Alito, who seemed very hostile to California's regulatory interest.

And you might wonder, well, how could Justice Alito disappoint you, given that he wrote the Dobbs opinion, how could you have had any expectations? And the answer is that although yes, I thought his opinion in the abortion case was terrible. He was the one justice to dissent in United States against Stevens, which was a 2010 case in which the Supreme Court invalidated the so-called crush video law.

The federal law that forbade the distribution of materials made in violation of animal cruelty laws, depictions of animal cruelty, particular case involved videos of dog fighting. But the court struck down the statute and Justice Alito dissented basically on grounds that "Hey, states and the federal government have a perfectly legitimate interest and almost a compelling interest in protecting animals from cruelty."



So I thought that there was at least some chance that he would be sympathetic to the goals of the law and it's possible that he is, but that his sort of free-marketism has just sort of overwhelmed that.

**Mariann:** I frequently brought up that case in class and thought he was right on it. I thought he was right on it but I thought it also came out of a sympathetic point of view.

And actually, during this case, I did see some commentators on the animal side very pleased that The Court did not actively make fun of the idea of protecting pigs from harm. Which I guess we can consider a step forward in our movement, but I didn't feel they really seemed to sympathize with the goal at all.

I mean, with the possible exception of Justice Sotomayor, or sympathize with the idea that there is actually a real moral issue here. Do you think I'm being too dark?

**Michael:** No. I mean, I think Justice Kagan is in play. I saw her as being a little bit on the fence and asking hard questions of both sides.

One of the things that I thought was very smart of Mr. Lampkin, who was arguing for HSUS, again my former dog sitter, was that he called attention to the fact that for millennia moral and religious traditions have considered the treatment of animals in the production of food to be a sort of vital concern.

And so of course, that has most to do with Hindu traditions of vegetarianism, Jewish kashrut, and Muslim halal. And you know, Justice Kagan, when she was younger, went to an Orthodox synagogue. She knows a fair bit about Jewish kosher laws. So I could see in her potentially a sympathy toward having moral concerns about how one's food is produced, even if not necessarily being that concerned about the welfare of the pigs.

**Mariann:** Though I did hate her decision in a case that had to do with California's downer law, downed pig law. And I thought it was wrong, of course I do lean towards a bias myself, I'm not denying it. But I actually did think it was wrong, so I had kind of written her off. But I hope you're right.

This question is particularly for you, I think. But you know, I think a lot of our listeners found very disturbing the assertions on all sides, that pork from animals in a system where gestation crates are not used, can be actually, the word was used, humane. Not inhumane, but humane. Which, you know, in this

movement we tend to be kind of careful about our language around that. What are your thoughts about seeking these types of reforms? How do you do it without slipping it into endorsement of that kind of bullshit?

**Michael:** Yeah, so I think that, I mean, that's a hard question.

It's one that my late great wife Sherry Colb and I used to struggle with as we wrote. We had a chapter in our book on abortion and animal rights, on just this question. I think Sherry was more...it was firmer in her view that, not that you oppose such efforts, but that one should direct one's energy elsewhere.

I certainly don't oppose these efforts and when there's a fight, I don't wanna sit on the sidelines and allow the industry and people who just want to exploit animals to win. So I think that these laws can move public opinion and can be a kind of stepping stone. I don't know that they're the best stepping stone, but I do think that when vegans are supporting these measures as a kind of baby step on the road to something more.

We do want to be careful about how we portray them, but at the same time, that's tricky because then you're making temporary alliances with groups for whom this is the end goal and not merely a step along a much longer path. So I don't have a magic solution to that.

**Mariann:** No, none of us do. It's the ongoing quandary.

But I do notice that you almost always use terms akin to not inhumane, rather than humane. And I think whenever we can, we should certainly do that. So a lot of people are predicting remand here. If they remand it, what would the likely questions be for remand? I don't think you're particularly predicting remand.

**Michael:** No. Well, so remand would, I think, probably be read as a victory for the pork industry because the procedural posture of the case is that the complaint was dismissed, right? So what the pork industry would get on remand is an opportunity for discovery. I don't think they want discovery, frankly, because discovery would mostly be California getting discovery against the industry.

But in any event, an opportunity for discovery for summary judgment motions and then potentially for a trial. If that were to happen, one of the kinds of questions that would be raised on remand would be actually how difficult would it be for the industry to segregate the pigs raised for California from those raised

for other states? Especially given that they say they can comply with labeling laws. Another would be what is the status of the sort of health and safety rationale that did not get much play during the oral argument, but which California has not conceded away.

After all, more closely confined pigs are more likely to require antibiotics, which is more likely to produce antibiotic resistant strains of various foodborne and other illnesses. There is a non-trivial health and safety interest here. I don't think it's California's primary interest, but it's not trivial.

So that would be another concern would be to sort of look into the underlying evidence for the health and safety rationale. But overall, if they remand for further development, that would be against the interest of California.

**Mariann:** It would be against the interest of California, but is there an argument to be made that it would be an opportunity to just shine a lot of light on this industry? Which this industry definitely doesn't want. Like all of the things you mentioned and the possibility of getting discovery and bringing to light, "Well, what is a gestation crate and what does it do?" And is all to the good of the animals, I think.

**Michael:** Sure. Right. It is always possible to win by losing and to use the litigation as a publicity vehicle.

If I can change the subject for a second, I'm sure that you're having a separate episode on what I'll call the Smithfield 2, the DXE acquittals in Utah. Recently, I had a conversation with Wayne Hsiung about a year and a half, two years ago, in which he said that, you know, it would be great for the movement if he were sent to prison, because then he could be a real martyr for the movement. I thought, "Oh, that's an interesting point." But you know, he also made great hay out of actually being acquitted. And so, you know, it is possible that in the same case, you could either win by winning or win by losing, in which case you say, "Well, it's sort of win-win."

And so maybe that's my optimistic take on this case as well.

**Mariann:** Yeah, and actually we had Wayne on and another lawyer who was actually a defendant in that case who had pled out before the trial. I'm not sure I'll have them again, but...I mean, I don't think he was eager to go to prison and be a martyr.

I think he just faced the fact that that might happen and if it happened, some good could come of it. That win has done more for this movement than anything I can think of in a long time. This would not be the same because it wouldn't be an outright win, but the opportunity to bring attention to these issues is just so valuable. Sometimes by losing you're winning, you're right.

As I mentioned at the beginning, the National Pork Producers brought this lawsuit and we're only concerned here with the pork. And neither the egg industry nor the veal industry who were also involved in Prop 12 seemed to object to any of the requirements being put on them. Why do you think the pork industry is fighting?

Even there are segments of the pork industry that are saying, "No, we can do this. It's fine. We don't need to use gestation crates. We're moving away from them. It's fine." So why are they doing this?

**Michael:** I assume they're doing it because of the money. That is that there are at least some dominant players in the pork industry that think that this will be expensive to comply with.

Another possibility is it might be a little bit like the gun lobby, right? That it might be that they think, "Well, we could do this if we had to," but they're worried about what comes next and even more stringent standards down the road.

**Mariann:** They're so worried about people finding out about what they do.

That kind of goes counter to bringing a lawsuit. But all of these situations put them in a difficult position because I think that most people, even though this was not the line that was touted at the argument, most people looking at non gestation raised pork would still be completely and utterly shocked at the horrific level of cruelty that's involved.

So they have a long way to go before they're able to meet common expectations about what they're really doing to these pigs.

**Michael:** Who's the young man who made that movie Speciesism the movie? I'm trying to remember his name...I'm blank. Anyway, there's this great scene in which he goes to I think it's a free range chicken or turkey farm in which he's interviewing somebody. You know, this is like some high welfare standards thing, and the person running the place is touting how great it is. And so the interviewer, the movie maker says, "Because of all the room!" And he says,

“Yeah, because they have so much room here!” And then the camera zooms in and then of course they're packed in neck to neck so that they're not in crates, but they also don't have any room to move.

**Mariann:** Yeah, people have no idea what's going on out there. And I think that's a great way to bring attention to what's really going on, is to highlight the improvements, which are just so sad. But, you know, they're real, but they're so sad. A higher circle of hell, that's how I usually describe them.

Anything else that I should have asked you that I haven't?

**Michael:** Uh, no. I think we've covered just about everything that I wanted to talk about.

**Mariann:** When should we expect a decision?

**Michael:** Oh, well, you know, the standard answer is by the end of June, which is when the Supreme Court term wraps up.

But I actually think this one will come out sooner than that. If I had to bet, I would say February or March.

**Mariann:** Okay. Well I'll be interested to see what happens. This is one crazy case. Crazier than I thought before I listened to that argument.

**Michael:** I don't think I will use it as my primary example of the Dormant Commerce Clause when I try to teach my poor first year students about that subject.

**Mariann:** Though it's a good opportunity to tell them about gestation crates!

**Michael:** Right, right.

**Mariann:** Well, thanks so much for sharing all of this and I feel like I understand the case so much better now.

**Michael:** Well, thank you. I'm not sure I understand it, but at least I think I understand what I'm confused about! \*both laugh\*