

Why a United States Supreme Court Case About Pig Farming Matters So Much

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The United States Supreme Court is currently considering a case that could have major implications for animal welfare, public health, the environment, and the balance between state and federal power. The case is called [National Pork Producers Council v. Ross](#), and the Court heard oral arguments on October 11, 2022. The case concerns whether a state has the right to ban the sale of products made in ways that harm animals and public health. On one hand, it seems plausible that states should be able to regulate activity within their own borders. On the other hand, it seems plausible that states should *not* be able to regulate activity in other states. What happens if a state appears to be doing both at the same time?

The background is that in 2018, about 62 percent of California voters passed [Proposition 12](#), a ballot initiative that sets minimum space requirements for egg-laying hens, breeding pigs, and calves raised for veal, and that bans the sale of eggs, uncooked pork, and uncooked veal made in ways that violate these minimum space requirements. While all these bans are noteworthy, the legal challenge focuses on the ban involving uncooked pork products. Specifically, Proposition 12 requires that pork producers give breeding pigs at least 24 square feet of floor space – enough for them to perform basic actions like turning around. And some pork producers claim that this change would be bad for the industry.

Pork producers in the United States keep about [six million female breeding pigs](#) in intensive confinement each year. This is what life is like for a typical female breeding pig: When she reaches sexual maturity, pork producers [artificially inseminate](#) her and keep her in a gestation crate that prevents her from turning around during her pregnancy. When she gives birth, they move her to a farrowing crate that similarly confines her during the weaning process. Finally, when this process is complete, pork producers separate her from her piglets and repeat the process. A typical female breeding pig goes through this process about four times, until she becomes less productive and is sent to slaughter.

Does Proposition 12 Violate the Dormant Commerce Clause?

Proposition 12 bans the sale of uncooked pork products made in this way on animal welfare grounds and public health grounds. The animal welfare case against intensive confinement is clear: Pigs are intelligent, sensitive, social animals who require much more than what the average farmed pig receives in order to live well.

We can disagree about whether we should farm pigs at all, but we can at least agree that we should provide them with good lives if we do. The public health case might be less clear, but is still compelling. Intensive confinement increases stress, which increases vulnerability to infectious diseases. This vulnerability to infectious diseases increases the risk of disease outbreaks for pigs and humans alike.

Importantly, Proposition 12 bans the sale of these products only within the state of California, but it applies equally to products made in-state and out-of-state. The wrinkle is that California is a large state that consumes much more pork than it produces. Specifically, California produces less than 1% of the pork produced in the United States, and it consumes about 13% of the pork produced in the country. So, when California passes a law about what kind of pork can be sold in-state, the impacts of this law are felt elsewhere as well. In particular, out-of-state producers must now choose whether to comply with the law or, instead, stop selling uncooked pork within California, which is a major market for them.

Why is this effect of Proposition 12 a legal issue? The United States Constitution contains a Commerce Clause, which holds that Congress shall regulate interstate trade. Courts have inferred that the Constitution also contains a *Dormant Commerce Clause*, which essentially holds that *states* shall *not* regulate interstate trade. For instance, Courts have used the Dormant Commerce Clause to block protectionist state laws that discriminate against out-of-state producers in order to benefit in-state producers. The legal question is whether Proposition 12 is relevantly similar to other laws that Courts have found to violate the Dormant Commerce Clause, and, so, whether Courts should block Proposition 12, too.

[California argues](#) that Proposition 12 is *not* relevantly similar to these other laws. Proposition 12 applies equally to in-state and out-of-state producers, and the purpose of the law is not to benefit in-state producers (indeed, California has very few in-state producers to benefit!) but rather to avoid complicity in practices that harm animal welfare and public health. States have long regulated the sale of products within their borders for these kinds of reasons, and the Supreme Court has long affirmed that states have the legal right to do so, both to act in accordance with their values and to protect public health and safety. Proposition 12 is simply another such law, and the Supreme Court should affirm it as such.

However, the [National Pork Producers Council](#) (NPPC) argues that Proposition 12 *is* relevantly similar to these other laws. In their view, Proposition 12 would increase costs for pork producers and consumers nationwide. Many pork producers would need to either walk away from a major market or build expensive new housing systems for pigs and tracking systems for pork and pass these costs along to consumers. The NPPC also argues that these costs would outweigh the benefits of the law, since the benefits for animal welfare and public health are overstated, and in any case, satisfying a “philosophical” preference for improving animal welfare should not count as a benefit of the law in the first place.

Who Will the Conservative Supreme Court Side With?

A complication is that many of these disagreements are factual, not legal, yet the Supreme Court is supposed to decide the case on legal grounds, not factual grounds. In recent months, many experts have noted that the NPPC is wrong on the facts. Compliance with Proposition 12 is not nearly as bad for [producers and consumers](#) as the NPPC alleges. Moreover, intensive confinement *is* much worse for [animal welfare and public health](#) than the NPPC alleges. But for present purposes, the Supreme Court is supposed to accept the facts as alleged by the NPPC and decide the case on legal grounds. If the NPPC were to win, a lower Court would then need to assess the facts and issue another decision.

With respect to the legal issues, one might assume that the conservative Supreme Court would naturally side with the NPPC and against California. But in this case, matters are more complex. Many conservatives, including Justices Neil Gorsuch and Clarence Thomas, are skeptical of the Dormant Commerce Clause and reluctant to expand its scope. Moreover, while conservatives tend to side with businesses, they also tend to side with states. And animal welfare is a remarkably non-partisan issue in the United States, with a [supermajority](#) of Democrats and Republicans alike supporting laws like Proposition 12. As a result, this case is more nuanced from a conservative perspective than one might expect.

A further complication is that the potential implications of this case are vast. If the Supreme Court decides that states are able to ban the sale of products made in ways that violate their values, where will that lead us? What if progressive states ban the sale of products made by companies *without* unions, conservative states ban the sale of products made by companies *with* unions, and so on? Yet if the Supreme Court decides that states are *unable* to ban the sale of such products, where will *that* lead us? How can states do anything meaningful to address the many threats that humans, animals, and the environment now face if they lack the ability to even regulate what can be sold within their own borders?

While these concerns are all reasonable, the case for upholding Proposition 12 is ultimately more compelling than the case against. Even if the Supreme Court accepts that states lack the right to regulate interstate commerce, it should *not* interpret this idea so expansively that it blocks Proposition 12. Doing so would be wrong not only on the facts but also on the law, since it would constitute a massive and unprecedented infringement on state autonomy. The Supreme Court should preserve the right for states to pass this kind of law in the absence of conflicting federal law, while making it clear that Congress still has the power to regulate interstate commerce and to set national standards accordingly.

