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The Legal Fight Over California's Ban on Cruel Animal Cages Will Have National Repercussions

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When the Supreme Court sits in October, having taken a break after its current bout of country-shaking decisions, it will decide whether Californians have the democratic right to decide how the animals they eat are treated. In 2018, the Golden State's voters overwhelmingly supported Proposition 12, a ballot initiative that requires that many animal-derived products, like pork and eggs, sold in California come from animals raised on farms that give them more space to move. Specifically, it required giving pregnant pigs 24 square feet of space, thereby freeing them from gestation stalls in which they cannot turn around or even lie down comfortably. In the wake of the decision, the meat industry in California turned to scaremongering about price increases and bacon shortages, and challenged Prop 12 in court. It lost.

But now the highest court has agreed to hear the case, and a who's who of American business has lined up behind the pig industry. Amicus briefs for the case have been filed by U.S. and Canadian meat industry groups, manufacturing and pharmaceutical associations, and free market evangelists like the Cato Institute and the U.S. Chamber of Commerce. The crux of all these groups' arguments is that Proposition 12's animal welfare standards will impose an unfair economic burden on pig producers in other states that sell to California. Unexpectedly, the latest group to throw its weight behind the hog barons is the Biden administration's Department of Justice. But while this case, *National Pork Producers Council & American Farm Bureau Federation v. Ross*, is ostensibly about interstate commerce, it also raises a deeper question: whether values democratically expressed by a state's voters can serve as legal basis for regulating harmful industries' effects within that state.

At any given moment in the United States, just over six million female pigs are kept on factory farms as the so-called breeding herd for the country's pork. The average sow's short life in this system consists of being artificially inseminated, locked in a seven-by-two-foot gestation crate for the 114 days of her pregnancy, locked into an equally constraining farrowing crate while her piglets suckle, and then artificially inseminated again as soon as possible, until her captors deem her no longer fit for pregnancy and send her to slaughter. While states including Florida and Arizona have banned these cages through ballot initiatives, California is not specifically banning crates within state lines. Instead, it is requiring that animal-derived products sold in California, whether they're produced there or in other states, come from production systems that use less intensive confinement.

The issue is that California's almost 40 million citizens consume 15 percent of the country's pork, but the state's farms produce less than 1 percent of the country's pigs. So much of California's pork will come from out-of-state producers who aren't using humane production methods. The legal question is whether California is illegally extending its jurisdiction beyond its boundaries, despite the fact that it's only regulating in-state sales.

The Commerce Clause of the U.S. Constitution states that Congress shall regulate interstate trade. Courts have extrapolated from that a concept known as the "dormant commerce clause," which holds that states cannot enact what amount to protectionist measures against other states. The National Pork Producers Council, or NPPC, the trade association representing pork consumers, argued that Proposition 12 violates this dormant Commerce Clause when it challenged the regulation in the Ninth Circuit Court of Appeals in 2020. Its case was dismissed, and the court held that Proposition 12 applies to in-state and out-of-state producers equally and, crucially, that while higher animal welfare standards "may burden pork producers and result in a less efficient mode of operation, there is no burden on interstate commerce merely because it is less profitable than a preferred method of operation." In other words: Just because regulations might increase the cost of doing business in a particular state, that doesn't make them illegitimate.

The NPCC and its supporters aren't just hoping that the Supreme Court reverses this decision. They are making a more pernicious claim, as well: that democratically expressed values are not a viable basis for regulating production practices in other states. NPPC argues that, aside from claims about human health, Proposition 12 rests "only on philosophical preferences" that should not outweigh the costs borne by producers. Likewise, the DOJ amicus brief questions the legitimacy of "enforcing Californians' judgments about appropriate animal husbandry throughout the Nation."

Both of these entities are suggesting that ethical judgments, even when expressed democratically at the ballot box, are an insufficient basis for regulation. It means that states lack the right to refuse to be complicit in practices that their voters take to be massively and unnecessarily harmful or unjust if a judgment comes down to ethics or philosophical preferences about justice.

In this particular case, the irony is that regulation is necessary not only for ethical reasons but also for economic reasons. Improving standards in food production is necessary for humans, animals, and the environment. After all, factory farming consumes vast amounts of land and water and produces vast amounts of waste, pollution, disease, and greenhouse gas emissions. As a result, it contributes to global health and environmental crises that imperil us all, including our markets. So even if we assumed for the sake of argument that commerce takes priority over all, we still would have reason to allow our legal and political institutions to regulate it. Commerce with fewer harmful externalities is, after all, good for commerce in the long run.

But the underlying legal issue raised in this case extends well beyond this law. At stake are not only pork products intended for sale in California but also any kind of product intended for sale in any U.S. state. States would theoretically lose the right to ban the sale of products that harm not only animals but also children, workers, global health, or the environment if those regulations are seen as coming down to merely ethical or philosophical preferences.

The U.S., at least in theory, is founded on the idea of striking a delicate balance in power both within and between the state and federal levels of government. But states should at least be able to set minimal ethical standards that apply equally to in-state and out-of-state companies. The Ninth Circuit saw that.

There's a danger here that the Supreme Court—which hasn't exactly covered itself in glory recently—falls into an increasingly common strain of thinking about injustice. The logic runs thus: When some people claim that a particular practice is harmful or unjust, others reply that many other practices are similarly harmful and unjust. Therefore, if we acknowledge the harm and injustice here, then we might need to acknowledge it everywhere—and if we acknowledge it everywhere, then we might need to rethink basic features of our social, political, and economic order, such as factory farming. If animals deserve considerably better treatment, then large swathes of our economy and individual practices would need to change dramatically. So our legal and political authorities put their heads in the sand.

This is the wrong call. In suggesting that justice anywhere is a threat to commerce everywhere and that commerce clearly takes priority over justice, the NPPC and its supporters are making multiple errors in reasoning and essentially conceding that the U.S. is a fundamentally and permanently unjust enterprise. And once we make that concession, it becomes a self-fulfilling prophecy—a race to the bottom. If we believe that the U.S. has the capacity to improve, we need to allow our institutions to do that work. Yes, this process can introduce complications and inconsistencies in the short term. But the only way out is through, and in any case, we should prefer to be inconsistently good than consistently bad.

It will take a long time for humanity to understand what justice requires, both within and across species. Striking a balance between state and federal powers in the U.S. will continue to be a delicate process as well. In the meantime, we can at least use tools like ballot initiatives to address particularly egregious harms and injustices, and we can also use tools like informational, financial, and regulatory policies to phase out cruelty and enhance humane, healthful, and sustainable alternatives as a general matter. But if each step on the path toward justice is blocked, then we fail not only animals but also ourselves and the institutions, economies, and ecologies on which our shared future depends.