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# A Brief for the Pigs: The Case of *National Pork Producers Council v. Ross*



Pig in a gestation crate at an industrial farm in Poland. (Andrew Skowron/We Animals Media)

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At the Supreme Court, a cruel and ruthless industry seeks relief from undue 'burden.'

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unavoidable, or just part of the order of things. He drew the line at “egregious cruelty.” And the details of how pigs are treated on factory farms, he said, formed “a prima facie case” proving extreme abuse in need of public inquiry and legislative correction.

As it turns out, such details are at issue in a case now before the Supreme Court of the United States. The dispute, *National Pork Producers Council v. Ross*, centers on the use of gestation crates for female pigs. These are the iron, fit-to-size cages in which the creatures, about six million of them at any given moment in our country, are kept almost completely immobilized for all of their lives, unable to walk or even turn around.

This four-sided encasement, at 2 feet x 7 feet, or even slightly smaller, confines animals weighing between 400 and 500 pounds, and it’s one of those details about industrial farming that stay with you once you’ve heard about them. When the U.S. Court of Appeals for the Fourth Circuit Court heard a 2020 case involving a pig farm owned by a subsidiary of Smithfield Foods, Judge J. Harvie Wilkinson III remarked during oral argument on “the inhumanity to the animals and the fatality rate” at the farm, and later noted “the outrageous conditions,” the “almost suffocating closeness” of the pigs, the “animal suffering” — and wondered in his written opinion “How did it come to this?” He was referring to the same confinement methods to be examined in *National Pork Producers Council v. Ross*.

Acting on their own concerns, California voters in 2018 approved a ballot initiative to prohibit the sale of products derived from the offspring of a pig or other farmed animal “who was confined in a cruel manner.” This measure, Proposition 12, the Prevention of Cruelty to Farm Animals Act, earned 7.5 million “yes” votes, prevailing with a 63 percent majority, including majorities of both Republicans and Democrats. It has been unsuccessfully challenged in federal district and appellate courts, and the National Pork Producers Council (NPPC) and its co-petitioner, the American Farm Bureau Federation, sought review by the high court. Although Proposition 12 regulates only in-state sales of certain pork products (respondent Karen Ross is the regulator charged with applying the law, which applies as well to veal calves and laying hens), the NPPC contends that the “practical effect” is an unconstitutional interference in interstate markets and an undue “burden” on their businesses.

Sensing a chance to dispatch similar state laws not to their liking, many other trade groups have filed amicus briefs supporting the NPPC. And prepare yourself for this formidable array of parties gathered to warn the Supreme Court of all that is in the balance if we start allowing state voters to have their way and pigs to have their space: the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, the Retail Litigation Center, the National Cattlemen’s Beef Association, the North American Meat Institute, the Food Industry Association, the Restaurant Law Center, Pharmaceutical Research and Manufacturers of America, the American Association of Swine Veterinarians — and so on.

In total, some 30 major business interests have lined up to be heard in the case. Twenty-six states also signed on to an amicus brief asserting that Proposition 12 is an offense to legitimate business interests. And then there is

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crate. And if these 30 or so very influential groups, aided by the United States government and by attorneys general in 26 states, have all found it worth their time to spend a combined 110,000 words trying to convince the Supreme Court that gestation crates are proper and necessary and that Proposition 12 is therefore unjustified, then it is worth our time to see if they are right.

## The Control of Commerce

On the constitutional point, the NPPC argues that for California to regulate in-state sales of pork is to assert “control” and “extraterritorial regulation” over out-of-state producers and thereby violate the commerce clause, at least as interpreted by one school of constitutional thought. States have and often exercise the authority to restrict transactions through legislative judgments regarding morality, public health, or safety, keeping products they deem harmful out of the marketplace. But in this instance, says the NPPC, any public good that is served by the law is outweighed by the interest of its business concerns and of interstate commerce in general.

And moral objections to cruelty, the NPPC tells the Court, are in any event based on claims that are “illusory and invalid,” hardly sufficient grounds for the “extreme burdens” supposedly placed on pork producers. The “intensive confinement,” as it’s known, of female pigs in gestation crates, packed into “mass confinement” facilities, is the standard, “science-based” method. To abandon use of gestation crates, says the pork industry, would be costly and onerous. Who are Californians, with so little involvement of their own in pork production, to pass judgment on such practices, imposing their “philosophical preferences” on the people who, after all, should know the most about pigs?

To the nonlawyer, not conversant in every constitutional nuance, some of these “extraterritorial regulation” questions have the ring of physics problems, requiring extra concentration to establish causality. For example, if two states, acting as coequal sovereigns, have independently arrived at different policy decisions, and if each seeks to counter the unwelcome policy influence of the other, which side has set the controversy in motion? And which party has exerted “control”? The out-of-state actors who created the conditions of controversy? The in-state actors who reacted to those conditions? Or is neither one controlling events? An effect cannot occur before its cause, and Proposition 12 preceded the alleged burdens placed on the pork industry. But that measure addressed industry practices that long preceded Proposition 12, and without those practices there would be no such law. A cruel industry, 7.5 million Californians could reasonably argue, has merely encountered the effect of its own conduct.

Likewise, is regulating sales within California really the same as regulating conduct outside of California? And when our most populous state, by a commanding majority, elects to set a legal standard for all to meet, in-state and out-of-state, why should we call that an “intrusion” on the workings of an open market, instead of simply a market incentive, for change, to which alert businesses would know how to respond? Every state, in our federalist system, has perfectly constitutional laws and regulations that indirectly affect industries outside its boundaries. What’s the difference with Proposition 12? When a multibillion-dollar industry has so offended the moral standards of so many citizens that they take corrective action at the ballot box, why is that a violation of

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persisted in going down the same path, refusing to recognize an elementary distinction between a farmed animal and an imprisoned, tortured animal. Never displaying much concern about their own far-reaching impacts on commerce, public health, and animal welfare, the hog corporations built more and more confinement operations in Iowa, North Carolina, and other states where many citizens have expressed deep misgivings of their own about the crates and about intensive confinement in general. These companies brought pervasive changes to a farming landscape they now say must not be subject to reforms such as Proposition 12. Why? Because that would entail, as their brief complains, “pervasive changes.” We’re supposed to take it as a given that the spread of intensive-confinement systems is inevitable, unstoppable, like gravity or the sunrise. But this claim is contradicted by the fact of many successful and profitable alternative approaches, including the methods of farmers who opted against gestation crates without need of public intervention.

In all of this, pork producers have followed a business model whose foreseeable consequences included organized political opposition to grievous cruelty, among other ills. Now, with exaggerated claims about the effects of Proposition 12 on commerce, with a reading of the commerce clause lacking any textual basis, and with an invented right to sell morally tainted products where they are not welcome, the industry seeks to make its harsh and destructive system a national norm, a status quo locked tightly in place like the pigs themselves. And if accepted by the Court, this legal theory would have implications beyond animal welfare that would affect every state for the worse. Whatever else might be said about the commerce clause, it was surely not intended to stifle moral debates, nullify democratic judgments, deny states their lawmaking power, and protect reckless companies from troubles of their own making.

The NPPC’s objections to Proposition 12 are like those of dealers in carvings and trinkets who complain that their commercial rights have been violated because some states forbid the buying and selling of African elephant ivory while other states do not. They just can’t see anything more important than ivory and its proceeds, and are mystified when others make such a big deal about how the product was obtained, bewildered by this imposition of other people’s “philosophical preferences.” But free societies and market economies do not work as the pork producers and their lawyers envision. Human beings are not just blind consumers, any more than animals are merely the raw material and “production units” of any industry. People will react to the abusive methods and to other harms, seeking to avoid complicity and other ill effects. The concerned will band together, citizens will vote, rural communities and welfare groups will litigate, and states will choose their own way. Would we really want it otherwise — a morally passive population, as inert and static as the industry itself, disapproving of cruelty but leaving it for others to do something about it?

And among free societies, least of all does America work as the industry would wish. The protection of animals is a cause long carried forward by popular sentiment, from our nation’s earliest days, and before that championed by British reformers such as the great William Wilberforce. It has been one front in the progress of Western law to restrain abuses of power and to hold human beings accountable for arbitrary and vicious conduct. In America’s advance of humane and civilized legal standards, the states have often led the way — so that today, for example, malicious cruelty is a felony in every state. And other than those who profit from the abuse of animals, or are simply indifferent, who resents these state reforms? California’s majority is hardly alone in believing that we are

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It would be reasonable for the justices to ask themselves this question, too: If the use of gestation crates is proper and defensible animal husbandry, why has the NPPC lobbied to make it a crime to photograph that very practice?

Here they are, in this case, telling the Supreme Court that public concerns over cruelty are “invalid,” “flimsy,” “illusory.” But in other courts, the NPPC has for years advocated “ag-gag” laws, such as Iowa’s, to suppress documentary evidence of what goes on at hog factory farms.

This effort includes 19 of the 26 states that support the NPPC with their amicus brief. In each case, industry lobbyists have sought to criminalize the mere photographing or filming of pigs and other creatures in confinement, even by news agencies and investigative reporters. Why do they care about the free flow of commerce but not about the free flow of information? In one federal court after another, these “ag-gag” laws have been struck down on First Amendment grounds, and what does that say of the plaintiffs’ own respect for constitutional boundaries? Trustworthy industries do not pour their money, legal resources, and political influence into strategies of concealment. What is the NPPC so afraid the public will see?

In its brief, conceding Court precedent, the NPPC acknowledges that if the moral concerns of Californians were valid, so too would the claims of Proposition 12 as a legitimate exercise of state authority become more compelling. The greater the weight of the public interest in preventing cruelty, the easier to justify the supposed burden placed on commercial interests. Logically, then, one would assume that this test carries an obligation to provide the Court with complete and accurate information. The justices were entitled to an unfiltered account of hog farming and the use of gestation crates, on the order of what Judge Wilkinson had learned when he described the “appalling,” “deplorable,” and “outrageous” conditions of a North Carolina farm — “conditions,” he added, “that there is no reason to suppose were unique to that facility.”

As it is, reviewing the briefs, we’re presented with a sterile scene of orderly processes, enlightened methods, and always upright intentions. It’s a picture of blameless stewards of nature, harassed and misunderstood by faraway critics in California, as they go about the management of “healthy herds,” faithfully following the science, diligently at work on what the industry now calls “protein production” while, as we’re assured repeatedly, animal welfare is never far from their minds. They’re very, very concerned about it.

The amicus brief from the American Association of Swine Veterinarians, for example, is a discourse on “sound husbandry,” supported by the “settled scientific consensus.” In the modern industry, “farmers and veterinarians seek to manage their herds so that all the animals enjoy good health and productivity.” Gestation crates, for the swine veterinarians, are “individual stalls.” These “housing arrangements” have numerous “health benefits,” such as “protecting” pigs who might be “vulnerable to fighting, stress, and injuries.” “Putting perceptions aside,” the Court should give farmers “flexibility,” room to maneuver. “Because Proposition 12 would take away that flexibility, it places at risk the well-being of many animals.” Thus, “all in all, the American Association of Swine Veterinarians wishes to emphasize to the Court that there is no one-size-fits-all housing type that is best for all sows in all situations.”

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Invariably, too, the citations offered in support of these expert insights point to such scholarly sources as the National Pork Board, outside Des Moines, and contributors to *Professional Animal Scientist*. As if the justices won't figure out that these are all the same like-minded people quoting and affirming one another as objective, evenhanded authorities, in a monoculture of industry-endowed university animal-science departments, subsidized "meat-science" specialists, and consultants retained by the major pork companies.

Crucial to their mission, the veterinarians tell the Court, is "to promote the health and well-being of pigs." In weighing the credibility of this claim, consider the scientific and ethical choices they made in the spring of 2020. As a group, these are the same caregivers who solved the industry's pandemic problems by prescribing "mass depopulation," with techniques bearing their veterinary stamp of approval: Ventilation shutdown, while pouring in boiling-hot steam, to leave millions of pigs to slowly suffocate or die from heat stroke and cardiac arrest. Carbon monoxide and sodium nitrate, to poison the pigs. Electrocuting, gunshot, beatings with blows to the head. In every detail, these methods were specifically authorized by the swine veterinarians, along with the bulldozers and mass burial pits to make it all look as if nothing had ever happened. The scenes were documented on videotape — by the kind of reporters and investigators the industry wants to see silenced and treated as criminals.

It helps to remember that "science," in the world of modern pork production, isn't what we ordinarily mean by the word. Here, all reasoning begins with a set of reductionist assumptions that may not be challenged: the System. All talk of "husbandry," "herd management," and the rest comes in the context of predetermined conditions of radical deprivation. Everything follows an insular, self-reinforcing logic in which the effects of prior abuse become pretexts for further abuse. The challenges they describe to the Court, such as stress and aggression among the pigs — "vices," as the industry terms these — are said to be solved by intensive confinement in gestation crates, even though intensive confinement is the source of all those problems, as creatures with all the intelligence, emotional sensitivity, and social natures of dogs are forced to live in squalor and torment.

Iron crates scarcely larger than the pigs' bodies become "protection," a word you find again and again in briefs to the Court. We are actually expected to believe that, as the NPPC brief puts it, "sows in breeding stalls are calmer and healthier" than free-roaming ones, somehow preferring constriction to freedom, concrete to soil, heat lamps to sunlight, biting the bars of a cage to chewing on straw, and, in general, life as a meat machine to being treated as a living creature.

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Pigs in an Indiana farm in 2019. (Courtesy photo)

## The Gestation Crate

In the industry’s arguments to the Court, as in its public-relations literature, pretending to relieve the suffering it has caused only compounds the offense. And if confinement in gestation crates is “science” in action, then, up close, it looks like some experiment to test what happens when all human empathy is removed and there’s nothing left but self-entitlement.

In this branch of science, the only general law is that if a problem doesn’t affect meat production, it doesn’t matter, just ignore it, and hope the public will too. This is a law I’ve observed in operation, though any court in search of the facts could readily establish — from independent sources — that such scenes are pervasive, that the worst is the standard, and indeed that cruelty defines the entire enterprise.

As I related in my book *Dominion*, at the opening of the door to an industrial gestation facility, visitors are greeted by a bedlam of squealing and chain-rattling and guttural, roaring sounds — a shrieking panic. Encased, pigs in gestation crates are unable to do anything but sit and suffer and scream at each new appearance of a human. They have never seen one of our kind who wasn’t there to inflict harm or to ignore their terrible plight.

You can tell by these reactions which pigs have been there the longest. Some are still defiant, roaring and rattling violently at one’s approach, the chains tearing their mouths raw. Others look broken in every way, fawning

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And others are dead, a feature of the system that the swine veterinarians in their brief neglected to mention: In every industrial gestation facility there is a “cull pen” for the dead or dying, the weak who are slowing the system down or getting in the way, the ones who just couldn’t endure their “housing arrangements” anymore. The weak piglets, when they arrive, get similar treatment. These “starve-outs” and the like are bludgeoned or smashed against a wall, the approved, swine-veterinarian version of “euthanasia.”

As the daily casualties add up, the expired pigs get dragged off to a truck and then thrown into a “dead hole,” the closest thing any of them ever receive to the “individualized care” of the NPPC brief’s fictional world. Some of the bodies are rendered, to make an ingredient for the pigs’ scientifically formulated fare, along with growth hormones, laxatives, vaccines, and antibiotics. In this industry, the idea of feeding the ground-up remains of pigs to other pigs counts as a lightbulb moment of innovation. And why not feed the stuff even to the pigs’ own offspring? They do.

It’s another cost-saver. And if you’re wondering about the laxatives, there are reasons for that, too. In the absence of bodily movement to catalyze intestinal function, and because these stressed, imprisoned creatures have an acute sense of smell and don’t want to foul their own space, they get constipated. So, pinned down inside the crate, never going outdoors, never feeling sunshine or walking on grass, they lie on slatted floors covered in their own excrement and urine, until the day they are killed.

Straw bedding would be nice, for these nesting and foraging animals. But the all-controlling system can’t handle that — it would clog pipes and also cost extra money. And for the same reason, plus strict dietary formulas, straw for chewing is out of the question. Part of the original idea of intensive confinement was to absolutely minimize any burning of calories by simply eliminating any free movement, solving the “complex herd management” problem that animals are *animate* and like to walk around. All of which makes for another sight no visitor can easily forget: Hundreds of crazed pigs engaged in stereotypical “vacuum” chewing on nothing at all, and rooting with imaginary straw, and “nest building” with straw that isn’t there for the piglets they’ll never get to care for.

To extend their limbs and lie on their sides, a powerful inclination during months of confinement, they try to put their legs through the bars into neighboring crates. Fragile from an abnormally large weight that has been genetically engineered, and rarely standing or walking — and then only on concrete, to be driven or dragged off for some other ordeal — their legs get crushed or broken. Everywhere, you see sprained, fractured, and swollen limbs, never examined, never even noticed, because who cares as long as it doesn’t affect their productivity?

And just as the meat is advertised for its prized “consistency,” so are the scenes in every intensive-confinement facility predictable and unvarying: creatures covered in feces, dried blood, and open sores; signs of respiratory disease and urinary-tract infections; bruises, lesions on skin and toes, ulcers, cysts, “pus pockets,” bleeding eyes, and on and on. Pointing out these miseries to the company employee showing me around always brought one version or another of the same reply: “Oh, that’s normal.”

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You would think that for the females, at least, there might still be some residual scrap of human charity, some modicum of respect for them as living creatures, fellow creatures, *mothers*. But, no, there just isn't time. The whole system operates at its own maniacal pace and by standards unrelated to anything else we would recognize from normal life, any of the sympathies and restraints that guide human behavior in a civilized society. Indeed, switch the location and circumstances, replace the pigs with animals of equal physical, mental, and emotional capacities, and "normal" in gestation crates would be a felony offense. Because of industry lobbying, however, these animals, born for a tough enough fate as it is, have not a single federal cruelty law to protect them on the farm.

## The Industry

Though relentless in its ethical corner-cutting, the system is designed to be "intensive" only for the pigs, and "efficient" only for the owners and shareholders. While the pigs are immobilized between bars, the people running the companies are to be found, as I've also observed firsthand, in their spacious and sunny quarters, studying spreadsheets, inputs and outputs, ups and downs in commodity prices, and whatever. The daily supervision of mass-confinement farms is left to machines and to cheap, transitory, and usually immigrant laborers who know nothing about animal care and aren't expected to, and who — the real pluses in their employee profile — can be counted on to make no demands and keep quiet about what they see.

With this industry now stepping forward, in *NPPC v. Ross*, as an aggrieved, "burdened" victim and upholder of rights, we should recall its own social and civic record. That begins with the pork producers' notorious abuse of workers, called "associates" these days but always treated as the poor and easily exploited people they are. Then there is the unmatched attrition rate at factory farms and pork plants, in work rewarded with subsistence wages and PTSD. Nor can we overlook decades of predatory conduct toward independent farmers, whose good name the big companies continue to trade on with their bogus, bucolic brand names and with labels suggestive of small family farms.

A heavy-handedness toward poor communities and minority populations is likewise the industry's calling card. People in these neighborhoods don't want the sickening odors and diseases that confinement farms spread. They don't want the lake-sized lagoons of pathogen- and pharmaceutical-laden manure. Yet they keep getting these anyway, because they don't live in the right places or know the right people. As Judge Wilkinson pointed out in that North Carolina case, you don't find factory farms anywhere near McMansions or golf courses; they're always in the communities that can't fight back.

The cleverest feature of all in the system is its way of endlessly externalizing costs and problems onto others: taxpayers, environmental agencies, stakeholders in public health, their own contract farmers, and their own customers as diet-related diseases multiply. While using political connections to escape responsibility over the years, these corporations have lobbied for and received billions of dollars in public subsidies and other government support — never mind all that talk now about free-market rules, interferences in commerce, and "spillover" costs from Proposition 12. The connections can be stretched only so far, however, and when the

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This record makes you wonder why all of those groups that submitted amicus briefs in support of the pork industry could possibly have wanted to associate themselves with it. Apparently, it's enough for them that they feel beset by the same critics, burdened by the same public pressures and animal-welfare standards. So the Supreme Court should be wary, not only of false assurances about gestation crates but also of false characterizations of the citizens who campaigned for and won with Proposition 12.

The NPPC wants us to think of its industry as steeped in time-honored values, and of its foes as a fringe element of West Coast meddlers and the excessively scrupulous. Over the years, however, the sheer ruthlessness of confinement operations has gotten the attention of many people who are not to be lightly dismissed, Father Neuhaus being just one of them.

The author Mary Eberstadt has noticed the similarity “between the industrial trashing of animal life via factory farms, and the industrial trashing of human life” that we see elsewhere in a sometimes callous, throwaway culture: “To connect the dots between the preciousness of animal life and the preciousness of human life isn't to engage in moral equivalence. It's rather to observe that people have big enough hearts to cherish both.” Decades ago, as mass confinement began to spread, Malcolm Muggeridge likewise wondered: “How is it possible to look for God and sing his praises while insulting and degrading his creatures?”

In the early 1980s, standing in the very place where Saint Francis lived, Pope John Paul II said of him: “His solicitous care, not only towards men, but also towards animals, is a faithful echo of the love with which God in the beginning pronounced his ‘fiat’ which brought them into existence. We too are called to a similar attitude. . . . It is necessary and urgent that with the example of the little poor man of Assisi, one decides to abandon unadvisable forms of domination, the locking up of all creatures.” Pope Benedict XVI, too, cautioned against “the industrial use of animals” and “the degrading of living creatures to a commodity,” as his successor, Francis, has spoken about the “disordered use” of animals in factory farms, the “wretchedness that leads us to mistreat an animal,” and the truth that, where cruelly made products are on offer, “purchasing is always a moral — and not simply economic — act.”

This isn't just Christian wisdom, it is moral commonsense — what every person who has thought seriously about the problem knows to be true. Whatever our backgrounds, whatever our politics or other convictions, we all recognize cruelty to helpless creatures to be low and shameful; we know that decency and mercy are more than matters of preference. And yet how easy it can be to brush off animals and their travails: What does it really matter to us whether a pig has space enough to turn around, with so much else in life to worry about? Why get so indignant over so small a thing? The better question is how something so small, and thus so easily granted, could ever have been withheld in the first place, from farmed animals so utterly dependent on our goodwill and our sense of right and wrong. And what does it say of our society if we continue to accept such selfish, merciless conduct as the norm?

Californians, for their part, have said with Proposition 12: “We don't want to be that kind of society.” Let the pigs

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their very lives for us, receive in return our efforts to make their brief stay on earth less intolerable. For their sake and for ours.”

In that spirit, let the justices honor an act of compassion by a vote of the people. If there are boundaries of authority in need of defining, or national principles of commerce to be affirmed, there must be grievances more worthy of vindication. The petitioners in this case have nothing to teach anyone about law or limits. And the creatures themselves, if they could speak and have their day in court, could explain to this industry in detail just how heavy an extreme and undeserved burden can feel.

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