

# BACON BUSINESS: AN INTERNATIONAL COMPARISON BETWEEN THE UNITED STATES AND EUROPEAN UNION IN LIGHT OF EVOLVING PIG CONFINEMENT STANDARDS

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“The raising of pigs is a perfectly lawful and respectable business. Doubtless it will remain so as long as the human palate craves the thin cut of juicy ham and the crisp slice of breakfast bacon.” – Clark v. Wambold 165 Wis. 70, 160 N.W. 1039 (1917).

## I. INTRODUCTION

The United States Supreme Court decided a case in 2023 which has since sparked interest in the fate of beloved bacon and inspired further conversation regarding the use of gestation crates and legislation for pig welfare.<sup>1</sup> This Note seeks to make a timely recommendation inspired by the recent United States Supreme Court decision in *National Pork Producers Council v. Ross*, regarding the operation of laws, regulations, and policies seeking to better the experience of pigs, consumers, and producers in the industry through an international comparison to the pig welfare laws in the European Union.<sup>2</sup>

Consumers, policymakers, and lawyers do not need expertise on pigs to be curious about the effects of the recently enacted pig welfare law, Proposition 12 (“Prop. 12”).<sup>3</sup> People may generally find interest in knowing the quality of their food sources and have a desire to participate in what they consider to be moral treatment of animals raised for consumption. Furthermore, pork production is an industry where human livelihood is affected; from the barn to the grocery store, there are many actors involved with ensuring a certain standard is met. Thus, decisions about how to regulate the raising of pigs should be considered with great care to account for all of the important workers involved. Producers are the fundamental starting point of a great slice of bacon, as well as the essential stewards of a pig’s life. Consumers are the end point; they desire a quality slice of bacon they can feel good about eating, not just because it tastes good, but because that animal was given a humane life, that their pork came

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1. *See generally* Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023); Proposition 12 (now codified in California’s Health & Safety Code §§ 25990-25994) also sets restrictions for laying hens and veal calves, which this Note does not discuss.

2. *See* Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023); *See infra* Part III.

3. CAL. HEALTH & SAFETY CODE §§ 25990-25994 [hereinafter Prop. 12]; Animal welfare generally may ideally be defined as freedom: (1) from hunger and thirst, (2) from discomfort, (3) from pain, injury and disease, (4) to express normal behavior, and (5) from fear and distress. Jessica Axberg, *Impact of EU-Regulation on Pigs’ Welfare During Transport*, 486 SWEDISH UNIV. AGRIC. SCI. 2, 3 (2014).

from a safe facility, is environmentally conscious, and sustainably priced.<sup>4</sup>

The United States should adopt a legal command at the federal level, overriding *National Pork Producers Council v. Ross*, which sets minimum standards for pig welfare, and would be regulated by the United States Department of Agriculture (“USDA”). A congressional delegation of authority to the USDA would unify and clarify guidance to an industry that is already being overseen by the USDA, making the United States’ legal methods more equitable and economical to consumers, and certain pigs, across the United States. Although California’s Prop. 12 has commendable intentions to protect pig welfare, the means seem to frustrate the ends. The European Union’s pig welfare law certainly is not perfect, but perhaps it is a better guide to United States’ regulations than the California-state law by avoiding state-to-state discrepancies and unequal application of the dormant Commerce Clause doctrine by United States’ courts. Any criminal and civil sanctions for animal cruelty should be backed with technical guidance and expertise to promote a better, more predictable outcome for producers, consumers, and pigs.

The recommendations for this Note may give the impression of an adversity to California’s fight for animal welfare, that is not the intention. By no means should living and feeling animals be subjected to cruel treatment, but the legislation and policies which protect pigs should foremost be taking into consideration the well-being of the people who work tirelessly for the husbandry of those pigs, and the people who will eventually take money out of their pockets for a high-quality source of protein.

Prop. 12 was born as a ballot initiative, it grew into a state statute, and then graduated to the federal judiciary where it was eventually held constitutionally valid by the United States Supreme Court. California was not the first state to fasten its ethical concerns with animal cruelty to a legal chariot. Florida was the original actor in spearheading restrictions on animal confinement standards in the United States via ballot initiative in 2002, which transpired to amending Article Ten of the Florida State Constitution, accordingly titled “Limiting cruel and inhumane confinement of pigs during pregnancy.”<sup>5</sup> Amending the Florida Constitution did not affect the pork production in, or distribution from, other states; Floridians’ democratic action resulted in only regulating conduct within the Sunshine State. Quite differently, California’s state law, Prop. 12 is constructively regulating out-of-state actors and thus needs to be addressed as a pressure on free trade. Before jumping ahead to the arguments, a foundation about Prop. 12 will be laid in Part II.

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4. See Dr. Susan Brewer, *Consumer Attitudes: What They Say and What They Do*, PORK INFO. GATEWAY (Apr. 9, 2010), <https://porkgateway.org/resource/consumer-attitudes-what-they-say-and-what-they-do/> [<https://perma.cc/QA3F-MJ39>].

5. *Do You Have Something to Add to ‘Pregnant Pigs’? Now’s Your Chance!*, USA TODAY (Aug. 25, 2017), <https://www.floridatoday.com/story/opinion/2017/08/25/do-you-have-something-add-pregnant-pigs-nows-your-chance-our-view/602026001/> [<https://perma.cc/VM83-M6L8>]; FLA. CONST. art. X, § 21.

## II. PIG WELFARE BACKGROUND

The similar economic structures of the European Union and United States make for a reliable comparison in analyzing pig welfare laws because of the impact that expanding stall space has on the pork market. The European Union is an economic and political association of 27 countries (also known as “member-states”), those countries enjoy free trade with one another, like the states of the United States. Most distinguishable, however, is that there exists a Constitution for the United States which intertangles them in a federalist union, whereas the countries of the European Union are bound by treaties and do not follow the same preemptive regime. A regulation in the European Union is similar to that of a federal administrative regulation in the United States. The secondary laws of the European Union (after the primary treaties) include directives, regulations, decisions, recommendations, and opinions.<sup>6</sup> Like a federal law in the United States would apply to all the states, the European Union Regulations are “binding in their entirety on all EU countries.”<sup>7</sup> Directives are more lenient than Regulations and they give the Member States guidance to achieve a binding end, but the means are left to the Member States. Therefore, the Member States can choose how they would like to go about achieving the goals that a certain directive sets out and then tell the European Commission about their plans to do so.<sup>8</sup>

Similar to the United States Supreme Court, The European Court of Justice has supremacy over European Union law, and individuals have the right to file suits related to compliance with the European Union’s fundamental treaties.<sup>9</sup> Regarding the legislative arm, the European Parliament and European Council work together “to adopt and amend legislative proposals and to decide on the EU budget,” and supervise the work of the European Commission much like how the bicameral Congress does for the United States.<sup>10</sup> The European Council holds “thousands of meetings among national officials, ministers, and heads of state and government . . . resulting in hundreds of pieces of legislation.”<sup>11</sup> The European Commission “is the EU’s politically independent executive arm” that is responsible for posing legislation and implementing the European Parliament and European Council’s decisions” like how the administrative agencies do in

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6. *Types of EU Law*, EUR. COMM’N, [https://commission.europa.eu/law/law-making-process/types-eu-law\\_en](https://commission.europa.eu/law/law-making-process/types-eu-law_en) [https://perma.cc/4Z9D-G9X2] (last visited Jan. 20, 2024).

7. *Id.*

8. *Id.*

9. Andrew Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 162 (Kalypso Nicolaidis & Robert Howse eds., 2001).

10. *Welcome to the European Parliament*, EUR. PARL., <https://www.europarl.europa.eu/about-parliament/en/home> [https://perma.cc/HVA4-DGY9] (last visited Dec. 30, 2023).

11. Moravcsik, *supra* note 9, at 162.

the United States under the executive branch.<sup>12</sup>

### *A. California's Prop. 12 Ballot Initiative*

California's Proposition 2 was the precursor to Prop. 12; by comparing and contrasting these two strikingly similar state animal welfare laws, reasonable predictions can be made on how Prop. 12 will affect the pork market and pork growers. In 2008, Californians used their state's ballot initiative process to amend the California Health and Safety Code by way of Proposition 2, which proposed requiring that veal calves, egg-laying hens, and pregnant pigs only be confined in a way that would allow them to "lie down, stand up, fully extend their limbs and turn around freely," with limited exceptions for "transportation, rodeos, fairs, 4-H programs, lawful slaughter, research and veterinary purposes."<sup>13</sup> Proposition 2 proposed that there should be "misdemeanor penalties, including a fine not to exceed \$1,000 and/or imprisonment in jail for up to 180 days."<sup>14</sup> Unlike Prop. 12., Proposition 2 attracted criticism mainly for its restrictions on laying hens as California is one of the United States' top egg-producing states.<sup>15</sup> But like Prop. 12, the opponents to Proposition 2, which consisted largely of egg producers and agricultural organizations, criticized the initiative for the expense that it would have on consumers and California egg farmers.<sup>16</sup>

Ten years after Proposition 2, Prop. 12 proposed "new minimum space requirements for confining veal calves, breeding pigs, and egg-laying hens."<sup>17</sup> Animal rights organizations labeled Prop. 12 on the ballot as anti-cruel and being a step in the right direction for pork consumers' health in California by preventing foodborne illness from pork products derived from animals confined

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12. *European Commission*, E.U., [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-commission\\_en](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/european-commission_en) [<https://perma.cc/Q965-JU3L>] (last visited Dec. 30, 2023).

13. Proposition 2, Standards for Confining Farm Animals, Initiative Statute, approved Nov. 4, 2008, Gen. Elec. (Cal. 2008) (effective Jan. 1, 2015) (ratified via referendum vote as Prop. 2 in the Nov. 4, 2008, election).

14. *Id.*

15. Kristine A. Tidgren, *Whatever Happened to that Egg Case?*, IOWA STATE UNIV. (Mar. 18, 2015), <https://www.calt.iastate.edu/blogpost/whatever-happened-egg-case> [<https://perma.cc/2BEC-US3D>].

16. Paige M. Tomaselli, *California's Proposition 2: Good for Chickens and Good for You*, CTR. FOR FOOD SAFETY (Jan. 8, 2015), <https://www.centerforfoodsafety.org/blog/3688/californias-proposition-2-good-for-chickens-and-good-for-you> [<https://perma.cc/S7FN-X3B8>]. As of 2014, Proposition 2 caused brokers supplying the California market to offer higher prices to egg producers in order to meet California's new egg rules. Dan Charles, *How California's New Rules Are Scrambling the Egg Industry*, NPR (Dec. 29, 2014), <https://www.npr.org/sections/thesalt/2014/12/29/373802858/how-californias-new-rules-are-scrambling-the-egg-industry> [<https://perma.cc/2VAR-L2H2>].

17. Prop. 2 (Cal. 2008); Proposition 12, Prevention of Cruelty to Farm Animals Act (Cal. 2018) (effective Jan. 1, 2022) (ratified via referendum vote as Prop. 12 in the Nov. 6, 2018, election).

in close spaces.<sup>18</sup> This campaigning was successful, and California voters passed Prop. 12 by a majority of almost sixty-three percent.<sup>19</sup> Now what was formerly Prop. 12, or the “Prevention of Cruelty to Farm Animals Act,” is codified in California’s Health and Safety Code.<sup>20</sup> The crucial differences between Proposition 2 and Prop. 12 is that Prop. 12 made it illegal for non-California producers to sell non-compliant pork within the state, and Proposition 2 largely affected California’s agricultural production whereas Prop. 12 affects almost exclusively out-of-state pork production.<sup>21</sup>

### *B. California’s State Law – Prop. 12*

The Prevention of Cruelty to Farm Animals Act (a.k.a. Prop. 12) says that a “farm owner or operator within the state shall not knowingly cause any covered animal to be confined in a cruel manner.”<sup>22</sup> The California Code of Regulations compliments this Act that:

Commencing January 1, 2024, any person engaged in business in the state as a pork producer, or any out-of-state pork producer that is keeping, maintaining, confining, and/or housing a breeding pig for purposes of producing whole pork meat, from the breeding pig or its immediate offspring, for human food for commercial sale in California, shall hold a valid certification issued pursuant to Article 5 of this Chapter as a certified operation.<sup>23</sup>

The specific requirements for California and non-California producers, distributors, and retailers is that they may not “knowingly engage in a commercial sale . . . of whole pork meat . . . if the whole pork meat is the product of a breeding pig, or the product of the immediate offspring of a breeding pig.”<sup>24</sup>

The exceptions to these confinement requirements for when a person does

18. Kitty Block & Sara Amundson, *Inside our campaign for Proposition 12, the strongest law for farm animals*, HSUS (Nov. 12, 2021), <https://www.humanesociety.org/blog/inside-our-campaign-proposition-12-strongest-law-farm-animals> [<https://perma.cc/VYU5-5T54>]; Valerie Baron, *YES on Prop 12: Improving Food Animal Welfare in CA & Beyond*, NATURAL RES. DEF. COUNCIL (Oct. 17, 2018), <https://www.nrdc.org/bio/valerie-baron/yes-prop-12-improving-food-animal-welfare-ca-beyond> [<https://perma.cc/X4L5-UYAH>].

19. *California Proposition 12, Farm Animal Confinement Initiative (2018)*, BALLOTOPEDIA, [https://ballotpedia.org/California\\_Proposition\\_12,\\_Farm\\_Animal\\_Confinement\\_Initiative\\_\(2018\)](https://ballotpedia.org/California_Proposition_12,_Farm_Animal_Confinement_Initiative_(2018)) [<https://perma.cc/2PL8-QWHX>] (last visited Jan. 29, 2024).

20. Throughout this Note, “Prop. 12” refers to California’s state law, not the ballot initiative, because the name “Prop. 12” stuck with this legislation after it was codified.

21. “California’s 13-percent share of the consumer pork market makes it economically infeasible for many pig farmers and pork producers to exit the California market.” Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1173 (2023) (Kavanaugh, J., concurring & dissenting).

22. CAL. HEALTH & SAFETY CODE § 25990(a) (2023).

23. CAL. CODE REGS. tit. 3, § 1322.1(b) (2022).

24. *Id.* at § 1322.1(a) (2022).

not need to comply are: (a) during medical research, (b) for veterinary purposes, (c) transportation, (d) rodeo exhibitions, state or county fair exhibitions, 4-H programs, and similar exhibitions, (e) during slaughter, as this is covered by federal statute, (f) during the five-day period prior to the breeding pig's expected date of giving birth, and when the pig nurses her piglets, and (g) during period for animal husbandry purposes which cannot exceed more than six hours in any one day, and no more than an entire day in a month.<sup>25</sup>

There are particular definitions to be laid out by the statute that direct its application: (1) "breeding pig," and (2) "whole pork meat." First, a "breeding pig" is "any female pig . . . kept for the purpose of commercial breeding who is six months or older or pregnant," meaning this definition includes gilts and sows, but excludes boars.<sup>26</sup> Second, "whole pork meat" specifically refers to:

Any uncooked cut of pork, including bacon, ham, chop, ribs, riblet, loin, shank, leg, roast, brisket, steak, sirloin, or cutlet, that is comprised entirely of pork meat, except for seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives. Whole pork meat does not include combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products, that are comprised of more than pork meat, seasoning, curing agents, coloring, flavoring, preservatives, and similar meat additives.<sup>27</sup>

The California Department of Food and Agriculture ("CDFA") is the state agency put in charge of the implementation and enforcement of Prop. 12. Since the Supreme Court's upholding of Prop. 12, the CDFA has been busy educating in-state and out-of-state producers, retailers, and distributors for what they need to do if they want to sell whole pork meat to California consumers.<sup>28</sup> Before Prop. 12, there were already stations set up on the California border to prevent certain agricultural products from crossing; these stations will now be able to check the transporters of whole pork meat to ensure that the products they carry contain a "PROP 12 Complaint" packing slip.<sup>29</sup> The CDFA can enforce the regulations on out-of-state actors without overextending its police powers or abrogating federal law by: (1) certifying third party agents to check non-California producers; (2) requiring shipping documentation, and (3) an audit trial as a means of recordkeeping to verify the non-California producer has not

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25. CAL. HEALTH & SAFETY CODE § 25992 (2023).

26. A gilt is a female pig that has not had an offspring, whereas a sow has offspring. *Id.* at § 25991(a).

27. *Id.* at § 25991.

28. *Animal Care Program*, CA DEP'T FOOD & AG., <https://www.cdfa.ca.gov/AHFSS/Animalcare/StakeholderResources/> [<https://perma.cc/2TF3-5XPN>] (last visited Feb. 9, 2024) (for education materials).

29. *See California Border Protection Stations (BPS)*, C.A. DEP'T FOOD & AG., [https://www.cdfa.ca.gov/plant/PE/ExteriorExclusion/borders\\_map.html](https://www.cdfa.ca.gov/plant/PE/ExteriorExclusion/borders_map.html) [<https://perma.cc/CC5Y-7NR3>] (last visited Feb. 8, 2024).

violated the statute.<sup>30</sup>

The CDFA lists its accredited certifying agents on its website.<sup>31</sup> Under the California statute, accredited agents cannot be just anyone, they must “have sufficient expertise in covered animal production and covered product distribution techniques to fully comply with and implement the terms and conditions of the certification program.”<sup>32</sup> Accredited agents are charged with inspecting and deciding whether to certify an out-of-California “breeding pig” operation as compliant to the California Health and Safety state law.<sup>33</sup> This provision allows California to regulate out-of-state actors through a third party.

Next, the California Code of Regulations Title 3, Division 2, Chapter 10, Article 3, Section 1322.4 lays out the requirements for the shipping documentation that must be included with “whole pork meat” to be distributed and sold in the state of California from out-of-state distributors and producers. Specifically, this section dictates that:

All documents of title and shipping manifests for shipments of whole pork meat entering the state or transported within the state for commercial sale in California shall include the statement ‘Pork CA Prop 12 Compliant’. The statement shall be clearly legible and plainly printed or stamped.<sup>34</sup>

Then, for a pig operation to maintain good standing certification, it “must maintain records concerning the production and distribution of covered animals and/or covered products.”<sup>35</sup> Those records must then be kept for two or more years.<sup>36</sup>

Lastly, there are also criminal and civil penalties attached to those found in violation of California’s amended Health and Safety Code’s Farm Animal Cruelty provisions. Chapter 13.8, Section 25993(b) reads:

Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment . . .<sup>37</sup>

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30. CAL. CODE REGS. tit. 3, § 1322 (2022).

31. *Accredited Certifying Agents*, C.A. DEP’T FOOD & AG., <https://www.cdfa.ca.gov/AHFSS/AnimalCare/AccreditedCertifyingAgents.html> [<https://perma.cc/6ZAW-K9XB>] (last visited Jan. 20, 2024).

32. CAL. CODE REGS. tit. 3, § 1326.10(a) (2022).

33. *Id.* at § 1326.10(a)(4).

34. *Id.*

35. *Id.* at § 1326.2(a).

36. *Id.* at § 1326.2(a)(3).

37. CAL. HEALTH & SAFETY CODE § 25993(b) (2023).

Although California does not violate its state police power, opposition to the statute argued that the Golden State was out of line and unlawfully making its way into discriminatory state protectionism under the doctrine of the dormant Commerce Clause. A more effective way to ensure state-to-state conformity with pig welfare standards would be a federal law that imitates the enforcement mechanism of the European Pig Directive (discussed further in Part II, Section D).

### *C. Prop. 12 Goes to Court*

After Californians voted in favor of Prop. 12, the National Pork Producer's Council and American Farm Bureau Federation took judicial action in federal court to have the state statute enjoined from officially becoming a part of California's code and declared unconstitutional. On behalf of their constituents, these two agricultural organizations saw Prop. 12 as an overextension of California's ability to influence the pork industry outside of its own borders, most poignantly because California produced a small fraction of pork while substantially consuming it, partially thanks to having the highest state population.<sup>38</sup> Ultimately in the spring of 2023, the Supreme Court voted against the agricultural organizations' arguments to find Prop. 12 unconstitutional, but not without some interesting discussion regarding the outcomes of allowing the law to stand.

Here we have a mix of conservative and liberal justices in a 5-4 majority for California, with five written opinions. The Supreme Court held that "there is no per se rule under dormant Commerce Clause forbidding enforcement of state laws that have practical effect of controlling commerce outside the State, when those laws do not purposely discriminate against out-of-state economic interests."<sup>39</sup> Additionally, the Supreme Court held that California's Prop. 12 was not subject to the *Pike* Balancing Test to determine the weight of legitimate state interests against burdens on interstate commerce.<sup>40</sup> Furthermore, there was no substantial burden imposed onto interstate commerce by Prop. 12; thus, it fails to show a violation against the dormant Commerce Clause.<sup>41</sup> This Note disagrees with the majority holdings and contends that there was in fact a substantial burden on interstate commerce which can be remedied by a federal law similar to that of the European Union's Pig Directive.

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38. Scott McFetridge, *California Bacon Law Takes Effect. Why Pork From Farms Using Cages Will Still be on Shelves*, OTTAWA CITY NEWS (Jun. 30, 2023), <https://ottawa.citynews.ca/2023/06/30/california-bacon-law-takes-effect-but-pork-from-farms-using-cages-will-still-be-on-shelves/> [<https://perma.cc/3B3K-5KWJ>] ("California . . . consumes roughly 13% of the nation's pork but produces almost none of it.").

39. *Nat'l Pork Producers Council*, 143 S. Ct. at 1143.

40. *Id.*

41. *Id.*

*D. The Supreme Court's Analysis & the Dormant Commerce Clause Doctrine*

The dormant Commerce Clause is a doctrine benched in the United States Congress's plenary commerce powers deriving from the Commerce Clause in Article 1, Section 8.<sup>42</sup> The Supreme Court has substantiated fundamental principles from dormant Commerce Clause jurisprudence to articulate the principles of this judge-made doctrine.

There is a two-part balancing test to analyzing dormant Commerce Clause issues: (1) whether the state's statute is economically discriminatory against out-of-state residents, and (2) if the statute is discriminatory under the first part, then whether the burden imposed on commerce is excessive. The dormant Commerce Clause is meant to prevent state protectionism to keep state economies from being inequitably powerful against one another.<sup>43</sup> However, the logical first part of a court's decision-making is determining if the statute is offensive on its face or as applied. Usually, a facial challenge will put the entire statute's validity at stake, and the as-applied challenge just more narrowly construes the state's statute through interpretation by the court. If the state statute is facially discriminatory, then it is typically struck down because only United States federal laws have the constitutional ability to tell more than one state what to do under Congress's interstate Commerce Power.<sup>44</sup>

In *National Pork Producers Council v. Ross*, California's statute was facially neutral because it was not clear at first blush that Prop. 12 discriminated against other states, since the statute applied to both in-state and out-of-state pork equally. In practice though, the agricultural organizations argued that Prop. 12 did in fact unequally discriminate against out-of-state pork because most of the pork in the United States is raised outside of the state of California. However, the Court's majority agreed with California because Prop. 12 "applie[d] only to sales inside California, moreover, producers outside California [were] free to confine animals however they choose for products sold outside the State."<sup>45</sup> Writing for the majority, Justice Gorsuch added that the Supreme Court "has long recognized that virtually all state laws create ripple effects beyond their borders," leaving unresolved the question of how substantial an effect has to be to be considered a wave instead of a ripple.<sup>46</sup>

California's Secretary of Agriculture stated that the restriction of certain animal products for the purpose of preventing their consumption and "complicity in a practice that the State has deemed cruel" is far from unusual.<sup>47</sup>

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42. U.S. CONST. art. 1, § 8, cl. 3.

43. *Nat'l Pork Producers Council*, 143 S. Ct. at 1144, 1153.

44. U.S. CONST. art. 1, § 8, cl. 3.

45. Brief in Opposition for Intervenor Respondents at 1, *Nat'l Pork Producers Council v. Ross*, 143 S. Ct., 1142 (2023). (No. 21-468).

46. This Note considers the question and concludes that Prop 12 is likened to a wave with a wake. *Nat'l Pork Producers Council*, 143 S. Ct. at 1144.

47. Brief for Respondents at 24, *Nat'l Pork Producers Council*, 143 S. Ct., 1142 (2023) (No. 21-468).

Moreover, that “Proposition 12 has local health-related justification,” that California voters adopted “Proposition 12 as a precautionary measure addressing any potential ‘threats to the health and safety of California consumers, and the ‘close confinement may . . . ‘lead to the increased risk of the spread of disease between hogs.’”<sup>48</sup> The Supreme Court thought these concerns were deemed “legitimate,” which this Note does not contest.

### *I. Notable Dissenting Points*

Justice Kavanaugh writes in his concurring and dissenting opinion that “the Framers in Philadelphia . . . adopted a new Constitution . . . [to] create a national economic market and overcome state restrictions on free trade – and thereby promote the general welfare.”<sup>49</sup> Markedly, in agreeing with the agricultural-organization petitioners, Justice Kavanaugh writes that:

Importantly for this case, the vast majority of pig farms are located in States other than California – such as Iowa, Minnesota, Illinois, Indiana, and North Carolina. And the vast majority of pork is likewise produced in States other than California. In 2018, California voters nonetheless passed a ballot initiative, Proposition 12, that not only regulates pig farming and pork production in California, but also in effect regulates pig farming and pork production throughout the United States.<sup>50</sup>

If states’ pig welfare statutes (which produce little pork themselves) are constructively controlling those states that do, the United States should be setting the standards so that states cannot “lay any Imposts or Duties on Imports or Exports.”<sup>51</sup> As of April 2024, the United States decision in *National Pork Producers Council v. Ross* served as the closest existing national decision on stall size restrictions for breeding pigs.

### *E. The Path to the European Union’s Pig Directive*

The European Union and United States’ regulations for pig welfare laws, and restrictions on stall sizes happened approximately during the same timeframe. The European Union has a more progressive approach to farm animal welfare than the United States, but the European Union has been met with some criticism for low rates of compliance to those laws.<sup>52</sup>

48. *Id.* at 22.

49. *Nat’l Pork Producers Council*, 143 S. Ct. at 1172–73 (Kavanaugh, J., concurring & dissenting).

50. *Id.* at 1173 (Kavanaugh, J., concurring & dissenting).

51. *See* U.S. CONST. art. 1, §. 10, cl. 2.1.

52. NEIL DULLAGHAN, DO COUNTRIES COMPLY WITH EU ANIMAL WELFARE LAWS?, RETHINK PRIORITIES 2 (2020), [https://rethinkpriorities.org/wp-content/uploads/2020/08/Do-Countries-Comply-Report\\_RethinkPriorities.pdf](https://rethinkpriorities.org/wp-content/uploads/2020/08/Do-Countries-Comply-Report_RethinkPriorities.pdf) [<https://perma.cc/5DN6-QZ5P>].

There was a “flurry of legislative activity in the 1990s,” but the European Union animal welfare laws’ genesis was really in 1974 concerning the slaughter of animals.<sup>53</sup> Legal action regarding breeding pigs did not occur until the mid-2000s when the European Union required that there be group housing for pregnant pigs.<sup>54</sup> Sweden was the first member state of the European Union to ban gestation stalls for sows, and was followed shortly by (then member state) the United Kingdom, and then in 2013 the European Union decided to fully ban gestation stalls.<sup>55</sup> In contrast, the United States where individual states, like California, have enacted their own gestation stall restrictions, but no bans.<sup>56</sup> Despite the European Union’s ban, its enforcement mechanisms lack torque, which the United States would need to take into considerations should it decide to pass national legislation on breeding pig gestation stall restrictions. Nevertheless, the European Union provides a model of what a United States federal act and regulations could utilize.

#### *F. European Union Pig Confinement Laws*

In 1976 the Council of Europe created the “European Convention for the protection of animals kept for farming purposes,” which laid out minimum standards for all the Member States to protect farm animals.<sup>57</sup> As a result of this Convention, in 2008 the European Commission passed the central Council Directive 2008/120/EC (the “Pig Directive”), which mandated the requirement that pregnant sows be kept in groups instead of individual stalls came into force in 2013.<sup>58</sup> The Pig Directive states that “a balance should be kept between the various aspects to be taken into consideration, as regarding welfare, including

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53. Nicholas K. Pedersen, *Detailed Discussion of European Animal Welfare Laws 2003 to Present: Explaining the Downturn*, ANIMAL L. & HIST. CENTER (2009), <https://www.animallaw.info/article/detailed-discussion-european-animal-welfare-laws-2003-present-explaining-downturn> [<https://perma.cc/5TBY-U4DU>]; Sophie Hild & Louis Schweitzer (eds.), *Animal Welfare: From Science to Law*, LA FONDATION DROIT ANIMAL 59 (2019), <https://www.fondation-droit-animal.org/documents/AnimalWelfare2019.v1.pdf> [<https://perma.cc/7PKD-K4GR>].

54. *Id.* at 61–62.

55. *Gestation Crates: A Growing Financial Risk*, FAIRR (Feb. 22, 2022), <https://www.fairr.org/policy/issue-briefings/gestation-crates> [<https://perma.cc/JE6R-DCB8>].

56. In 2016 Massachusetts, like California, passed restrictions on pork sales by ballot initiative – called Question 3 (“Q3”). “Notably, the legislation not only applied to animals raised within Massachusetts, but also to . . . pork . . . raised outside the state.” John G. Dillard, *Massachusetts Delays Enforcement of Question 3 Pork Restrictions*, OFW (Aug. 11, 2022), <https://ofwlaw.com/massachusetts-delays-enforcement-of-question-3-pork-restrictions/> [<https://perma.cc/ECW9-U39Q>].

57. European Convention for the Protection Of Animals Kept for Farming Purposes, Sept. 10, 1976, 1978 O.J. (L 323) (amended 1992).

58. *Food Safety; Pig Welfare*, EUR. COMM’N, [https://food.ec.europa.eu/animals/animal-welfare/animal-welfare-practice/animal-welfare-farm/pigs\\_en](https://food.ec.europa.eu/animals/animal-welfare/animal-welfare-practice/animal-welfare-farm/pigs_en) [<https://perma.cc/J4A4-M5CM>] (last visited Jan. 28, 2014).

health, economic and social considerations, and also environmental impact.”<sup>59</sup>

The European Union’s Pig Directive gives standards for floorspace based on the weight of the pigs, for example if a pig in weaning or rearing weighs more than 100 kilograms (220.5 pounds), then 1,00 m<sup>2</sup> “unobstructed floor area” should be available.<sup>60</sup>

The total unobstructed floor area available to each gilt after service and to each sow when gilts and/or sows are kept in groups must be at least 1,64 m<sup>2</sup> and 2,25 m<sup>2</sup> respectively. When these animals are kept in groups of fewer than six individuals the unobstructed floor area must be increased by 10%. When these animals are kept in groups of 40 or more individuals the unobstructed floor area may be decreased by 10%.<sup>61</sup>

The most similar provisions of the European Union’s Pig Directive to that of Prop. 12, are the requirements that Member States ensure flooring spaces for female breeding pigs be “equal to at least 0,95 m<sup>2</sup> per gilt and at least 1,3 m<sup>2</sup> per sow, must be of continuous solid floor of which a maximum of 15% is reserved for drainage openings.”<sup>62</sup> The European Union’s stipulations are very similar to California’s since 2,25 m<sup>2</sup> is approximately twenty-four feet squared.<sup>63</sup>

To enforce the Pig Directive, Member States ensure “that inspections are carried out under the responsibility of the competent authority in order to check that the provisions of this Directive are being complied with,” by taking a sample in their jurisdiction, and that every two years the Member States “shall inform the Commission of the results of the inspections.”<sup>64</sup> The USDA could conduct similar surveys in the United States by asking states to report on the compliance from certain areas, comparable to a tax audit.

The European Union’s pig welfare retained in the Pig Directive stems from the European Convention for the Protection of Animals Kept for Farming Purposes, which exists across all the Member States thanks to the European Union’s primary treaties.<sup>65</sup> The Pig Directive sets out minimum standards for the member states to abide by. They can either stick with the standards as recommended or make them stricter to restrict producers’ freedom over confinement of breeding pigs.

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59. Council Directive 2008/120, pmb1. ¶ 12, 2008 O.J. (L 47) 5 (EC) [hereinafter “Pig Directive”].

60. *Id.* at art. 3(1)(a).

61. *Id.* at art. 3(1)(b).

62. *Id.* at art. 3(2)(a).

63. METRIC CONVERSIONS, <https://www.metric-conversions.org/area/square-feet-to-square-meters.htm> [<https://perma.cc/3726-7YEW>] (last visited Sept. 21, 2024); CAL. CODE REGS. tit. 3, § 1322.1(a)(2) (2022).

64. Pig Directive 2008/120, art. 8, 2008 O.J. (L 47) 8 (EC).

65. *See* Council Directive 78/117, 1978 O.J. (L 323) 1 (EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1978:323:FULL> [<https://perma.cc/CJE2-NYCT>] (last visited Apr. 14, 2025).

### III. ARGUMENT FOR A NATIONAL PIG WELFARE LAW IN THE UNITED STATES

Producing pork is essential to a global consumer base that seeks a tasty, safe, economical, and ethical protein choice. A federal law that sets the baseline for animal confinement expectations but allows for states to be more restrictive of producers within that jurisdiction, while preempting any restrictions on interstate commerce, is a better approach to pig welfare in the United States. This federal law would partially replicate the Pig Directive by setting a uniform minimum threshold requirement for gestation crates and would prevent state laws like Prop. 12 from trendsetting for other states through state-specific ballot initiative processes. The USDA would be in a better position than the nine academic figureheads of the Supreme Court to determine the answer regarding the welfare of pigs, health of pork meat consumers, and the pork economy.

There are two overarching reasons ascertained from a comparative review of the Pig Directive that may be guiding principles for a federal law in the United States: (1) promoting free market through interstate commerce, which is better for long-term sustainability; and (2) balancing health, socio-economic, and environmental impacts into the law through scientific guidance. First, in the recitals, the Pig Directive acknowledges “[d]ifferences which may distort conditions of competition interfere with the smooth running of the organization of the common market in pigs and pig products.”<sup>66</sup> Second, the Pig Directive states that “[a] balance should be kept between the various aspects to be taken into consideration, as regarding welfare including health, economic and social considerations, and also environmental impact.”<sup>67</sup> Although California’s statute laudably seeks to regulate pig welfare in the United States, Prop. 12 is not an equitable law because of the practical applicability for the law over major pork-production states. The European Union provides a template for a national pig welfare law in the United States. The Pig Directive is a promising template for the United States to follow because of its uniformity and equitable treatment of each member state in the European Union. As opposed to the consequences for pigs and the pork industry resulting from the disparate application of the dormant Commerce Clause in *National Pork Producers v. Ross* by the United States Supreme Court.<sup>68</sup>

#### *A. The Global Pork Market & International Pig Welfare*

What the United States and European Union choose to do regarding the treatment of female breeding pigs in their respective jurisdictions affects more than just their own citizens, making the topic of regulating pig welfare by gestation crates internationally interesting on its own regarding global trade. Californians provide a perfect case study for this very sentiment. With the

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66. *Id.* at recital (6).

67. *Id.* at recital (12).

68. See *Nat’l Pork Producers Council*, 143 S. Ct. at 1142.

United States and European Union playing such an important role in the global pork market, it is pressing to look at how the more restrictive confinement stall standards in each of these locations is affecting all the involved parties. As the global population grows, it is ever more important to make the legal standards surrounding the supply chain of pork products economical, moral, and concerned with safety.<sup>69</sup> The needs of each involved actor should be weighed to make the system of breeding and raising pigs “manageable, economically viable, sustainable and socially acceptable.”<sup>70</sup>

In modern times, pork is either the most, or one of the most consumed meats in the world.<sup>71</sup> Both the United States and European Union are major exporters in the worldwide production of pork.<sup>72</sup> The business of producing pork products is economically important to the United States and European Union. In 2022, the United States produced eleven percent of the world’s total pork, at a value of over \$7.7 billion, making it the third largest producer of pork products.<sup>73</sup> The European Union beats the United States in pork production, taking the number two spot behind China for global production.<sup>74</sup> The European Union exports about 4.4 million tons per year.<sup>75</sup>

It has been accepted that animal welfare and international trade are inextricably linked.<sup>76</sup> For example, the European Union has restricted imports of animal furs from countries that use leg-hold traps international trade of furs

69. *Population*, U.N., <https://www.un.org/en/global-issues/population> [<https://perma.cc/9VTL-9AGS>] (last visited Feb. 3, 2024) (The United Nations predicts that the world population will reach 8.5 billion in 2030).

70. Emma M. Baxter et. al, *Transitioning from crates to free farrowing: A roadmap to navigate key decisions*, 9 *FRONTIERS VET. SCI.* 15 (Nov. 14, 2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9701704/pdf/fvets-09-998192.pdf> [<https://perma.cc/V6K5-EPW8>].

71. M. Shahbandeh, *Meat consumption worldwide 1990-2023*, STATISTA, <https://www.statista.com/statistics/274522/global-per-capita-consumption-of-meat/#statisticContainer> [<https://perma.cc/YRN5-5JHC>] (last visited Sept. 5, 2024); Michael E.R. Dugan et. al., *Pork as a Source of Omega-3 [n-3] Fatty Acids*, 4 *J. CLIN. MED.* 1999 (2015), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4693156/pdf/jcm-04-01956.pdf> [<https://perma.cc/QM3K-444R>].

72. Elżbieta Jadwiga Szymańska, *The Development of the Pork Market in the World in Terms of Globalization*, 16 *J. AGRIBUSINESS & RURAL DEV.* 843, 849 (2017).

73. *Facts & Statistics*, PORK CHECKOFF, <https://porkcheckoff.org/pork-branding/facts-statistics/> (last visited Feb. 2, 2024); *Global Pork Production in 2022 and 2023, by Country*, STATISTA, <https://www.statista.com/statistics/273232/net-pork-production-worldwide-by-country/> [<https://perma.cc/6AL7-Y76T>] (last visited Feb. 7, 2024).

74. *Global Pork Production in 2022 and 2023, by Country*, STATISTA, <https://www.statista.com/statistics/273232/net-pork-production-worldwide-by-country/> [<https://perma.cc/6AL7-Y76T>] (last visited Feb. 7, 2024).

75. *Pigmeat*, EUR. COMM’N, <https://agridata.ec.europa.eu/extensions/DataPortal/pigmeat.html> [<https://perma.cc/N9VS-49AJ>] (last visited Jan. 28, 2024); *Agriculture and Rural Development; Pork*, EUR. COMM’N, [https://agriculture.ec.europa.eu/farming/animal-products/pork\\_en](https://agriculture.ec.europa.eu/farming/animal-products/pork_en) [<https://perma.cc/GL7C-SLPP>] (last visited Jan. 28, 2024).

76. “Debates in the international community about the relationship between trade rules and non-economic values, including environmental and animal protection, have shaped understandings of how trade rules should be interpreted and applied.” Katie Sykes, *Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection*, 5(1) *TRANSNAT’L ENV’T L.*, 55, 72 (2016).

is affected by the animal welfare consideration from the European Union.<sup>77</sup> Similarly, banning gestation stalls has put additional weight onto the already burdened European pork market, causing the European Union to shift its focus away from global exports because it could no longer compete with other major exporters like Brazil and the United States.<sup>78</sup> Additionally, like Americans, Europeans are increasingly concerned with environmental and health issues revolving around pork production, which “are expected to limit the production growth” of the pork industry in the European Union.<sup>79</sup> In 2023, with the collision of the Pig Directive, disease, COVID-19 recovery, and market demands, pork producers in the European Union “fear an overhaul of EU livestock regulations . . . will cost billions and price EU pork out of export and domestic markets.”<sup>80</sup> It was estimated that “ending sow stalls swiftly by 2025 would cut pork production by nearly a quarter and raise prices by almost half.”<sup>81</sup> If the United States has a uniform policy for gestation crates, instead of a mixed policy across the states, this allows for predictable exportation and quality of United States pork products. The USDA, as a national agency, is the best choice to provide for the regulation of pig gestation crates as a means of promoting pig and consumer health and wellbeing.

### B. Science-Backed Decisions

Like the European Union’s reliance on the European Food Safety Authority (“EFSA”), the United States could use the USDA to provide an expert viewpoint that is substantiated in widely accepted research and technical guidance, and the USDA may then use a technical sub-agency for the ongoing regulation of pig and farm animal welfare.<sup>82</sup> The Pig Directive relies on veterinary expertise and assistance from the EFSA and states that based on the EFSA’s expert opinion, the Commission *shall* draw up a report that accounts for “the socioeconomic consequences, the sanitary consequences, the environmental effects and different climatic conditions.”<sup>83</sup> The EU Reference Centre for Animal Welfare

77. Council Regulation (EEC) 3254/91, 1991 O.J. (L 308) 1 (EU).

78. *Id.*

79. Christos Tzanidakis et al., *An Overview of the Current Trends in Precision Pig Farming Technologies*, 249 LIVESTOCK SCI., 104530 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S1871141321001384> [<https://perma.cc/ND9L-VF73>].

80. Gus Trompiz, *EU Pork on a Lean Streak as Higher Standards Drive up Costs*, REUTERS (June 12, 2023), <https://www.reuters.com/markets/commodities/eu-pork-lean-streak-higher-standards-drive-up-costs-2023-06-12/> [<https://perma.cc/9VZ6-G83Q>].

81. *Id.*

82. California has been criticized in other cases that implicate the agricultural industry for relying on science that is not widely accepted. See *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9<sup>th</sup> Cir. 2021); see also, Glenn G. Lammi, *Monsanto v. Hardeman*: Solicitor General’s Brief Unwittingly Makes Strong Case For Supreme Court Review, FORBES, (Jun. 1, 2022), <https://www.forbes.com/sites/wlf/2022/06/01/monsanto-v-hardeman-solicitor-generals-brief-unwittingly-makes-strong-case-for-supreme-court-review/> [<https://perma.cc/QH58-RAJ2>].

83. Pig Directive 2008/120, art. 7, 2008 O.J. (L 47) 8-9 (EC).

(“EURCAW”) has published factsheets to notify producers of indications that they need to intervene for the welfare of pigs, whereas California may set a state-specific requirement, but cannot further advise out-of-state producers in as meaningful of a way like the USDA could.<sup>84</sup>

With the already substantiated breadth of resources available to the USDA to regulate pig welfare through minimum stall requirements, this agency is suitable to implement a national law in the United States, similar to the Pig Directive of the European Union. The USDA is already the delegated authority over the welfare of pigs, and health of consumers by the Animal Welfare Act,<sup>85</sup> Twenty-Eight Hour Law,<sup>86</sup> Animal Health Protection Act,<sup>87</sup> Swine Health Protection Act,<sup>88</sup> Federal Meat Inspection Act,<sup>89</sup> and Humane Methods of Slaughter Act.<sup>90</sup> The USDA also has relevant sub-agencies: (a) the Food Safety and Inspection Service, (b) Agricultural Research Service, (c) Animal and Plant Health Inspection Service, (d) Economic Research Service, and (d) Foreign Agricultural Service.<sup>91</sup> The USDA can effectively use its vast resources to properly obtain data driven recommendations for a minimum space standard comparable to the Pig Directive which sets a minimum floorspace based on the weight of a pig, for a bare minimum of 0,15 square meters (approximately 10.8 square feet).<sup>92</sup>

Like the European authority, EFSA, the USDA would be in the best position to compile and weigh research and hear public opinion on how to set welfare standards for breeding pigs and the use of gestation stalls to promote their quality of life. In its ballot initiative, California listed the concerns for health that result from gestation crates. If this is a legitimate issue for consumer health, then it should be a nationwide health measure. Undeniably, concerns for health were valid for California consumers to have, but the scientific support is contested. The American Public Health Association filed an amicus curiae brief supporting these contentions for the health interests of Californians by making the statement that “intensive confinement of sows poses a profound danger to food safety and public health in California.”<sup>93</sup> However, if there are serious health concerns for consumers, there should be a national standard to guarantee consumer food safety which is already being regulated by the USDA’s sub-agencies. The size of an operation and health outcomes for pigs and people are

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84. Ruis Schubbert, *Group-housing and mixing of sows, Vulva lesions*, EURCAW PIGS (2020), <https://edepot.wur.nl/540108> [<https://perma.cc/MK6V-4TGL>] (last visited Apr. 25, 2025).

85. Although, the Animal Welfare Act exempts farmed animals. 7 U.S.C. 54 §§ 2131-2159.

86. 49 U.S.C. § 80502; 9 C.F.R. Part 89.

87. 7 U.S.C. §§ 8301-8317.

88. 7 U.S.C. 69 §§ 3801-3813.

89. 21 U.S.C. 12 §§ 601-695.

90. 7 U.S.C. § 1901; 9 C.F.R. Part 313.

91. *FDLP Resource Guides*, USDA, <https://libguides.fdlp.gov/us-department-of-agriculture/agencies-of-the-usda> [<https://perma.cc/8MEB-ZPG7>] (last visited Apr. 25, 2025).

92. See Pig Directive 2008/120, art. 3, 2008 O.J. (L 47) 6 (EC).

93. Brief for Respondents at 8, *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 46 (2022) (No. 21-468).

correlated as well as other factors.<sup>94</sup>

### *C. Cookin' with Grease – Pork Farm Consolidation*

The regulation of gestation crates has logical consequences that are better understood with some historical context on the tension between small and large farming operations. State statutes such as Prop. 12 may lead to more consolidation, which could be negative for pigs and producers in the long-term.<sup>95</sup> In the short time Prop. 12 has been valid, it has collided with the already happening pork farm consolidation, forcing the race to the bottom to be expedited, and increasing the difficulty for smaller farms to compete.<sup>96</sup>

Those concerned with consolidation will often also point to the industrialization of agriculture that comes about when farms consolidate and grow to a certain point to be scaled at a large commercial level.<sup>97</sup> The legal term for these large animal operations is “Confined Animal Feeding Operation” (“CAFO”). The United States Environmental Protection Agency (“EPA”) defines a “large CAFO,” specifically for swine, as one that has: (1) at least 2,500 swine each weighing fifty-five pounds or more, or (2) 10,000 swine each weighing less than fifty-five pounds.<sup>98</sup> The USDA reports that CAFOs have brought “concerns regarding facilities’ air and water quality, occupational health, and waste management.”<sup>99</sup> The growth of pig operations has led to consumer concern with the safety and morality of their pork, as reflected by the Prop.12 ballot initiative. This underlying concern with consolidation and industrialization of the farming industry has affected the thinking of American and European consumers about the quality and ethical sourcing of their food.<sup>100</sup>

94. See *infra*. Part II.C.

95. See Christina Nuñez, *What’s better for the world: local farms or large agribusiness?*, GLOB. CITIZEN (Feb. 16, 2015), <https://www.globalcitizen.org/en/content/whats-better-for-the-world-local-farms-or-large-ag/> [<https://perma.cc/RH3V-JY7Y>].

96. Dr. Barry K. Goodwin, *California’s Proposition 12 and its Impacts on the Pork Industry*, 1 (Oct. 5, 2023) <https://nppc.org/wp-content/uploads/2023/11/Goodwin-Prop-12-Final.pdf> [<https://perma.cc/JSE3-WK6A>].

97. See Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 175–91 (2002).

98. 40 C.F.R. § 122.23(b)(4)(iv), (v) (2017).

99. Mildred Haley, *Hogs & Pork – Sector at a Glance*, USDA ECON. RSCH. SERV. (Jan. 8, 2025), <https://www.ers.usda.gov/topics/animal-products/hogs-pork/sector-at-a-glance/> [<https://perma.cc/YL54-J6TP>].

100. However, recent research has suggested consumers prioritizing pig welfare over environmental impacts of large farming operations. *Pig welfare outweighs climate concerns for consumers*, SCIENCEDAILY (Oct. 25, 2023), <https://www.sciencedaily.com/releases/2023/10/231025110607.htm> [<https://perma.cc/KML4-323D>]; Steve Banker, *Do Consumers Care About Ethical Sourcing?*, FORBES (Oct. 5, 2021), <https://www.forbes.com/sites/stevebanker/2021/10/05/do-consumers-care-about-ethical-sourcing/?sh=95984985f503> [<https://perma.cc/357F-VEZ9>]; *Strong European Consumer Demand for Sustainable Food*, YARA (Feb. 28, 2023),

The Humane World for Animals uses the term “factory farms” to describe the consolidation, and explicitly uses this term in a negative context to point out the previously mentioned critiques of larger agricultural operations.<sup>101</sup>

In both the United States and European Union, the number of farms overall has decreased significantly, and the pig industry is concentrated in certain areas which lines up with the overall trending agricultural consolidation. In the United States, the number of pig farms dropped by more than seventy percent from the years 1992 to 2009, while the number of pigs remained the same.<sup>102</sup> The pork industry is apparently no exception to the trending consolidation and is highly concentrated in certain regions of both the United States and European Union. In 2013, United States pig farms with over 2,000 head of pigs account for eighty-seven percent of the national herd.<sup>103</sup> In 2023, Iowa has by far the most pig operations, with its contiguous neighbor Minnesota coming in second, then North Carolina, Illinois, Indiana, and Nebraska respectively.<sup>104</sup> Basically the entirety of the United States pork production happens in this central, southeastern region. In the European Union the pork industry is similarly concentrated, three countries make up half of the total pork production (Germany, Spain and France), and over seventy-five percent of pork production comes from eight member states.<sup>105</sup> International demands consistent with a growing world population have increased the need to produce for meat products which has resulted in intensification of operations.<sup>106</sup>

Despite the negative viewpoints of consolidation, there is also a perspective that “larger farms are in many ways conducive to better environmental outcomes and labor conditions than their mid-sized counterparts.”<sup>107</sup> Larger farms, like

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<https://www.yara.com/corporate-releases/strong-european-consumer-demand-for-sustainable-food/> [<https://perma.cc/3UKC-PR7B>].

101. See *Farmed Animal Welfare*, HUMANE WORLD FOR ANIMALS, <https://www.humaneworld.org/en/issue/farmed-animal-welfare> [<https://perma.cc/D5DT-BBXR>] (last visited Feb. 24, 2025).

102. William D. McBride and Nigel Key, *U.S. Hog Production From 1992 to 2009: Technology, Restructuring, and Productivity Growth*, USDA ECON. RSCH. SERV. (Oct. 23, 2013), <https://www.ers.usda.gov/publications/pub-details/?pubid=45151> [<https://perma.cc/CQE3-WXJ7>].

103. Lee Schulz, Catherine Hayes & Dermot Hayes, *United States Pork Production*, IOWA STATE UNIV. (2013), [https://www.card.iastate.edu/products/presentations/files/hayes\\_us\\_pork\\_production.pdf](https://www.card.iastate.edu/products/presentations/files/hayes_us_pork_production.pdf) [<https://perma.cc/7M3L-UV9U>].

104. *Top 10 U.S. states by inventory of hogs and pigs as of March 2023 (in 1,000s)\**, STATISTA, <https://www.statista.com/statistics/194371/top-10-us-states-by-number-of-hogs-and-pigs/> [<https://perma.cc/UEF8-27T9>] (last visited Feb. 8, 2024).

105. *Pigmeat, supra* note 75; *Animal welfare in EU's pork sector: What's wrong?*, BRUSSELS TIMES (Nov. 28, 2021), <https://www.brusselstimes.com/195429/animal-welfare-in-eus-pig-meat-sector-whats-wrong> [<https://perma.cc/RRP6-U9TC>].

106. MARY JANE ANGELO, JASON J. CZARNEZKI, & WILLIAM S. EUBANKS, *FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW* 66 (2013).

107. Caroline Grunewald & Alex Smith, *Big Farms, Bad Rap*, BREAK. INST. (Oct. 25, 2019), <https://thebreakthrough.org/issues/food-agriculture-environment/big-farms-bad-rap> [<https://perma.cc/RT92-FM3J>].

any big business, usually have more sophisticated management, economical balance, and accountability to their clientele which could stand to reason why they may sometimes be better than those smaller operations. Despite the overwhelmingly unfavorable views, agricultural industrialization may also be comprised of more efficient ways of raising animals by using calculated space requirements which are correlated with the animal's economic value. However, these benefits of larger operations are outweighed by negative implications for the environment, pig welfare, and human health.<sup>108</sup> More specifically, consolidation has been criticized for leading to unethical treatment of livestock, reducing farmer choice, suffocating healthy rural communities, inequitable effects on black and indigenous farmers, and degradation of the environment.<sup>109</sup>

### *1. Larger Farms Turning Smaller Farms into Bacon Bits*

Major adjustments to how pigs should be housed affects the viability of smaller operation in the United States. State statutes like the one debated in *National Pork Producers Council v. Ross* will likely result in the “exit of smaller hog operations” from the industry entirely, further contributing to consolidation of pig farms.<sup>110</sup> Since the United States is a free market, the market naturally adjusts to new state laws by bifurcating for a short time, in that adjustment period is when the bottom falls out and bigger pig farms live while the smaller ones die off.<sup>111</sup> Thus, the USDA should be the regulator for pig welfare reform, because of the negative implications that state statutes like Prop. 12 may have on smaller hog operations and contributing to agricultural consolidation. To substantiate a more equitable market for producers, and promote the best

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108. Industrialization can be defined as “the continued consolidation of farms and . . . vertical integration among input suppliers, lenders, agricultural producers, processors, and distributors of food and fiber products, domestically and globally.” Pete J. Barry, *Industrialization of U.S. Agriculture: Policy, Research, and Education Needs*, 24 AG. & ECON R. 128 (1995); ANGELO, CZARNEZKI, & EUBANKS, *supra* note 106.

109. Consolidation can be defined more narrowly than industrialization as: “shifts in production to larger farms and firms; in the context of mature, slow-growing industries, such shifts also imply fewer farms and firms.” James M. MacDonald, *Consolidation, Concentration, and Competition in the Food System*, 102 FEDERAL RESERVE BANK KANSAS CITY, 85, 88 (2017); See Hannah Andrew, *Addressing Consolidation in Agriculture*, VERMONT L., (Jul. 2022), <https://www.vermontlaw.edu/sites/default/files/2022-07/Addressing-Consolidation-in-Agriculture.pdf> [<https://perma.cc/V48P-D4EL>]; Siena Chrisman, *Bigger Is Not Better: The High Cost of Agribusiness Consolidation*, ACTIONAID USA, 27–32 (Sept. 2021), <https://www.actionaidusa.org/publications/bigger-is-not-better-the-high-cost-of-agribusiness-consolidation/> [<https://perma.cc/3AM8-4A44>]; See Leo Horrigan, Robert S. Lawrence, & Polly Walker, *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 110 NAT'L LIB MED, 445, 445–456 (2002); See *Bigger Farms, Bigger Problems: Farmland Consolidation is Harming US Rural Communities – and Better Policies Can Help*, UCS (Apr. 14, 2021), <https://www.ucsusa.org/resources/bigger-farms-bigger-problems> [<https://perma.cc/C6HX-58CV>].

110. Goodwin, *supra* note 96, at 1.

111. *Id.* at 34.

humane practices for breeding pigs, there should be a federal law in the United States as there is in the European Union. Transitioning from the industry-standard gestation crates to operations that allow more space for breeding pigs is a costly, time-consuming transition that pushes producers out to create more humane space for breeding pigs. In Europe, every country was required to comply with the minimum space requirements of the Pig Directive. However, in the United States the application of the dormant Commerce Clause in *National Pork Producers Council v. Ross* has created a “50-state patchwork of legislation for hog producers,” which will disparately affect smaller pig farms, and ultimately work against decreasing consolidation of the industry.<sup>112</sup> Globally, the demand for meat products is continuously growing while the number of pig farm companies is shrinking; this results in bigger companies becoming bigger and “less time spent by the farmer for animal condition assessment.”<sup>113</sup>

The Pig Directive came into full effect in 2013, in the summer of 2012 “[p]ig herds were reportedly shrinking . . . in all main pig producing countries.”<sup>114</sup> As of 2024, Producers in the United States face increased costs if they are needing to increase their stall spaces to meet the twenty-four square feet of space required by Prop. 12.<sup>115</sup> Producers who are not in California may find themselves needing to comply with the California requirements because the packing plant the producer sells to has decided to continue distributing to the California market.<sup>116</sup>

“While California is the largest pork-consuming state in the U.S., a growing amount of the nation’s pork is being sent overseas, lessening the impact of Prop 12 on many large producers,” thus leaving the smaller hog operations at the whim of market volatilities.<sup>117</sup>

#### *D. A Federal Act – USDA Authorization*

With the application of the dormant Commerce Clause in *National Pork Producer’s Council v. Ross*, California, a state that produces less than 1% of the nation’s pork, was able to set the standard for what the rest of the country should

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112. John McCracken & Ben Felder, *With California’s Prop 12 Now Law, Pork Producers Adapt While Lobbying Groups Continue to Fight*, INVESTIGATE MIDWEST (Mar. 6, 2024), <https://investigatamidwest.org/2024/03/06/with-californias-prop-12-now-law-pork-producers-adapt-while-lobbying-groups-continue-to-fight/> [https://perma.cc/7M7T-YEPS].

113. Tzanidakis et al., *supra* note 79, at 249.

114. DULLAGHAN, *supra* note 52, at 17.

115. Baxter et al., *supra* note 70.

116. “Some local hog farmers with compliant pens have found an opportunity to sell into a new competitive market, while those with non-compliant operations have balked at the new standards, claiming it would be too expensive to comply with or is against their principles.” McCracken & Felder, *supra* note 112.

117. *Id.*

be doing in terms of pork welfare.<sup>118</sup> It is inequitable for any one state to have such power over the economies of its sister states whose economies actually rely on pork production. The administrative process of notice-and-comment rulemaking is more democratic and equitable than an inconsistent state-by-state implementation of pig welfare laws because under notice-and-comment rulemaking citizens of every state have the opportunity to submit their concerns and suggestions before a final rule is published. The Agricultural Improvement Act (“Farm Bill”) comes up for reauthorization every five years, and has the potential to be a vehicle for a federal program on pig welfare.<sup>119</sup> Congress could put the USDA in charge of regulating pig welfare by passing legislation in the Farm Bill that delegates the USDA as the authority over pig welfare regulations.<sup>120</sup>

The Pig Directive has enforcement mechanisms, that despite the lesser-binding effect of a Directive, have resulted in gradual, successful transition to compliant gestation arrangements for breeding pigs.<sup>121</sup> The Pig Directive provides specific pig welfare goals for each country to implement within their national jurisdiction. Every five years the European Commission (“Commission”) makes a report and proposals to the leaders of each country, and the countries report their findings to the Commission.<sup>122</sup> As an attempt to gain compliance, the Commission will increase financial distributions to producers for good behavior, and for bad behavior will suggest penalties. The penalties cannot be set by the Commission through a directive, and so it is up to each of the member-states to enforce their set penalty for violating pig welfare laws.<sup>123</sup> Like the European Union the USDA may set “stick and carrot” enforcement provisions such as fines and greater farm assistance for compliance without imposing criminal sanctions as Prop. 12 does.

Finally, there has been effort to create a federal mandate in response to Prop. 12. A clear example is the introduction of the Ending Agricultural Trade Suppression Act (the “EATS” Act) to “restrict[] state and local governments from imposing certain standards or conditions on the preharvest production of agricultural products sold or offered for sale in interstate commerce.”<sup>124</sup> However, in the current political climate, the same issues plague the successful

118. CAL. PORK PRODUCERS ASS’N, *Commodity Fact Sheet: Pork*, <https://cdn.agclassroom.org/ca/resources/fact/pork.pdf> [<https://perma.cc/7P3S-SZZ6>] (last visited Apr. 25, 2025).

119. See generally *Farm Bill 101*, FARMAID (Mar. 22, 2023), <https://www.farmaid.org/issues/farm-policy/farm-bill-101/> [<https://perma.cc/E72F-59KX>].

120. It is important to note that the Chevron doctrine has been (debatably) overruled, thus taking power away from federal agencies in the context of judicial review. USDA rulemaking decisions are likely subject to more judicial interference.

121. *Update on EU compliance*, <https://web.archive.org/web/20120519235501/http://www.countdownto1-1-13.co.uk/compliance.asp> [<https://perma.cc/2D2F-EE2E>] (last visited Apr. 25, 2025).

122. DULLAGHAN, *supra* note 52, at 6; Pig Directive 2008/120, art. 8, 2008 O.J. (L 74) 8 (EC).

123. DULLAGHAN, *supra* note 52, at 10.

124. Ending Agricultural Trade Suppression Act, S. 2019, 118<sup>th</sup> Cong. (2023).

legislative agreement for an act such as the EATS act, as they do any other piece of federal legislation. Moreover, if there is to be a federal law which preempts states, the federal law should be more expansive than the EATS act and delegate the USDA to guide animal welfare standards across the United States. A federal act could lay out minimum space requirements and the USDA may effectively specify and provide guidance via federal administrative regulations so that there is a uniform and predictable law to better the outcomes for pigs and those who rely on the pork market.

#### IV. CONCLUSION

The United States should enact a federal law to preempt the majority decision of *National Pork Producers Council v. Ross*. In doing so, the United States may follow the rubric of the European Union's Pig Directive to (1) encourage free trade through interstate commerce, which is better for long-term sustainability; and (2) balance health, socio-economic, and environmental considerations into the law through the USDA's scientific guidance and regulations.

Giving federal, regulatory authority to the USDA for the confinement of breeding pigs is a step in the right direction to unify and clarify guidance to an industry that is already effectively regulated by the USDA. California's efforts to protect pig welfare have been noteworthy in taking initiative to increase the quality of life for pigs. However, a state-by-state approach is not the best method to achieve these ends, and rather a national law similar to the Pig Directive is a better approach for American legislation. Allowing the Supreme Court to apply the dormant Commerce Clause doctrine has resulted in economic consequences to the pork industry which is pushing out smaller operations that are ultimately better for effectuating consumer demands like environmental consciousness and sustainable pricing. Free trade is an economic principal desired by the United States and European Union, and has been mistakenly overlooked by the Supreme Court's decision. Thus, a federal law could follow the Pig Directive's lead and include recognition of "[d]ifferences which may distort conditions of competition interfere with the smooth running of the organization of the common market in pigs and pig products."<sup>125</sup>

Consolidation of the pork industry is a concern for the United States and European Union; it is a trend that threatens the best outcomes for consumers, producers, and pigs. A federal legislature and the USDA should consider consolidation into its decision making and be mindful of "[a] balance . . . between the various aspects to be taken into consideration, as regarding welfare including health, economic and social considerations, and also environmental impact."<sup>126</sup> Major pork operations allow for less producer face time with their animals, increased environmental issues, and the possibility of increased health

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125. Pig Directive 2008/120, recital (6), 2008 O.J. (L 74) 5 (EC).

126. *Id.* at recital (12).

risk to people. If a socio-economic and environmental balance is not considered alongside pig welfare, state laws such as Prop. 12 may not be marrying their desired means and ends.

A federal act is certainly possible and there have been efforts to create legislation that preempts Prop. 12, and any similar state statutes.<sup>127</sup> Interested parties may be wise to consider basing a federal act on the European Union's Pig Directive, and consider in their lawmaking: (1) the effect of pig welfare laws on global exports and national markets; (2) the concerns around further consolidation of the pork industry; (3) appointing the USDA as an agency which has scientific resources available to make technical regulations.

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127. *See* Ending Agricultural Trade Suppression Act, S. 2019, 118<sup>th</sup> Cong. (2023).

