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Unburdening the Farm: A Dormant Commerce Clause Challenge to Conflicting Standards in Agricultural Production

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**UNBURDENING THE FARM: A DORMANT COMMERCE
CLAUSE CHALLENGE TO CONFLICTING STANDARDS
IN AGRICULTURAL PRODUCTION**

Bethany Gullman[†]

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I. INTRODUCTION

Under the guise of a health and safety rationale, a recent trend has seen individual states regulating aspects of agricultural production in a way that applies equally to products produced in state and out of state. These regulations, such as labelling laws and animal welfare restrictions, apply to products sold in the state enacting the regulation. But the regulations also have a much broader impact on the industry that extends beyond the borders of that state.

The dormant Commerce Clause doctrine has long prohibited regulation that burdens interstate commerce. The history of dormant Commerce Clause litigation includes challenges to regulations regarding safety features on highway vehicles, species of fish, and produce packaging.¹ In considering these regulations, courts weigh the incidental burden on interstate commerce against the local benefit.

Both litigation, which ultimately uses the burden against benefit balancing test, and congressional action can resolve questions about the constitutionality of agricultural regulations under the Commerce Clause. Various state regulations prescribing laying hen cage sizes have provided some of the more recent opportunities for courts to conduct the balancing test; in one case, the Ninth Circuit dismissed a challenge to a California cage size law in November 2016.² In contrast, a Vermont “genetically modified organism” (“GMO”) labelling law was challenged through litigation,³ but Congress reached a nationwide solution.⁴ This national solution preempted Vermont’s state law and reduced the burden on manufacturers by creating a uniform national standard.⁵ Because of

1. See *infra* Section II.A.3.

2. Missouri *ex rel.* Koster v. Harris, 847 F.3d 646, 656 (9th Cir. 2017), *amending and superseding* 842 F.3d 658 (2016) (considering a challenge to CAL. CODE REGS. tit. 3, § 1350(d)(1) and Assembly Bill 1437).

3. See *infra* Section II.B.2.a.

4. See *infra* Section II.B.2.b.

5. See National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016) (to be codified at 7 U.S.C. § 1639b) (preempting state

the difficulty and expense of litigating each instance individually, resolving the constitutionality of agricultural regulations through congressional action is superior to litigating state actions. Therefore, Congress should enact legislation prohibiting states from regulating agricultural production in a way that puts an excessive burden on interstate commerce; this could be accomplished either through a specific federal law for cage sizes that would preempt state laws or a more general federal law about state regulation of products in interstate commerce.

II. BACKGROUND

A. *The Dormant Commerce Clause Doctrine*

1. *The Commerce Clause*

In a dual federalist system of government like the United States', the federal government and state governments each have designated powers.⁶ Sometimes, federal and state areas of legislative power overlap.⁷ Such is the case with Congress's interstate commerce power, which has been broadly construed and often conflicts with traditional state authority.⁸

In general, Congress has only the powers enumerated in the U.S. Constitution, while the states retain non-enumerated powers that the states had prior to the Constitution's existence.⁹ For

food labeling standards that are not identical to the federal standard); VT. CODE R. § 121 (2016) (regulating food labeling for genetically engineered foods); *GE Food*, VT. ATT'Y GEN.'S OFF., <http://ago.vermont.gov/hot-topics/ge-food-litigation.php> (last visited Dec. 26, 2016) (discussing litigation challenging VT. CODE R. § 121 (West, Westlaw through Jan. 13, 2017)).

6. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126, 144 (2010). "The powers 'delegated to the United States by the Constitution' include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause." *Id.* (citation omitted). On the other hand, per the Tenth Amendment, "[t]he powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* (quoting U.S. CONST. amend. X).

7. *See, e.g.*, *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (considering whether the building of a dam on a marsh creek is within the State's power over property, or whether the action conflicts with the federal power to regulate interstate waterways under the Commerce Clause).

8. *Id.*

9. *See, e.g.*, U.S. CONST. amend. X.

example, Article I, Section 8 of the United States Constitution gives Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes,”¹⁰ while states retain traditional, non-enumerated police powers.¹¹ The states’ traditional police powers include legislation on matters “detrimental to public health or morals, or the public safety generally. The power of the States to pass quarantine and inspection laws has never been questioned, and it includes that of prescribing the necessary regulations, as well as the subjects to which they may be applied.”¹²

2. *The Supremacy Clause*

If the federal government and the state government both regulate in the same area and the laws conflict, the federal law prevails.¹³ Thus, under the Supremacy Clause, if Congress regulates in an area where it is authorized to do so by the Constitution, that act of regulation is said to preempt state and local regulation.¹⁴ Local regulations can also implicate the Supremacy Clause when they “would pass muster under the Due Process Clause, . . . [but] run afoul of the policy of free trade reflected in the Commerce Clause.”¹⁵

3. *The Dormant Commerce Clause*

If Congress has not acted to exclude the states, states may regulate using their police power even if Congress has the power to regulate in the same area,¹⁶ unless doing so would violate the

10. *Id.* art. I, § 8.

11. *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 467 (1877) (“Whilst the power to regulate commerce is granted to Congress, that of establishing interior police regulations belongs to the States.”).

12. *Id.* at 468 (citations omitted) (quoting *Thorpe v. Rutland & Burlington Ry.*, 27 Vt. 140 (1854)).

13. *See* U.S. CONST. art. VI, cl. 2.

14. *Gibbons v. Ogden*, 22 U.S. 1, 41 (1824) (“Each party possessing the power, may of course use it. Each being sovereign as to the power, may use it in any form, and in relation to any subject; and to guard against a conflict in practice, the law of Congress is made supreme.”).

15. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (citations omitted).

16. *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (“If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows . . . we should feel not

dormant Commerce Clause.¹⁷ The dormant Commerce Clause is not an *actual* clause in the Constitution but has been inferred from the Commerce Clause and developed in case law.¹⁸ As stated in *Willson v. Black-Bird Creek Marsh Co.*, the dormant Commerce Clause may be violated where a state regulation is “repugnant to [Congress’s] power to regulate commerce in its dormant state.”¹⁹ In other words, even where Congress has not acted, if Congress could regulate an area of commerce, a state regulation in that area may be invalid even though there is no direct conflict with federal law.²⁰ Where state and local laws put an undue burden on interstate commerce, they violate the dormant Commerce Clause.²¹

The Supreme Court identifies two types of state statutes that improperly regulate interstate commerce: (1) “statutes that burden interstate transactions only incidentally,” and (2) statutes that “affirmatively discriminate” against interstate transactions.²² To determine whether state statutes affecting interstate commerce are valid, the general rule is: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²³

A state regulation with the clear intent on the face of the statute to discriminate against out-of-state interests “invokes the strictest

much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act.”).

17. *Id.* (“The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”).

18. *See id.*

19. *Id.* (alteration in original).

20. *See id.*

21. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

22. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

23. *Pike*, 397 U.S. at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)) (“The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court’s decisions. Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action . . . or unduly burdensome on . . . interstate commerce . . .”).

scrutiny of any purported legitimate local purpose.”²⁴ Where the state regulation does not have a stated discriminatory purpose, but it uses discriminatory means, it will be subject to strict scrutiny review.²⁵

The Court has often invalidated regulations that do not technically discriminate against out-of-state interests but nevertheless unduly burden interstate commerce. For example, in *Pike v. Bruce Church, Inc.*, an Arizona state law placed an undue burden on interstate commerce by requiring cantaloupes grown in Arizona to be processed in Arizona in order to be labeled as Arizona cantaloupes.²⁶ The company challenging the law grew cantaloupes in Arizona but had a cantaloupe packaging plant across the border in California.²⁷ The company would have needed to spend at least \$200,000 to comply with the act by building a second packaging plant in Arizona.²⁸ This state law placed an undue burden on interstate commerce.²⁹ The interest in labeling premium cantaloupes grown in Arizona was a legitimate local purpose, but forcing the packing company to build a second packaging plant had Commerce Clause implications that outweighed the local benefit.³⁰

Also invalidating a regulation, but on the basis that there essentially was no valid local purpose, the Court in *Raymond Motor Transportation, Inc. v. Rice* invalidated a Wisconsin statute³¹ that prohibited trucks longer than fifty-five feet from being operated on state highways without a permit.³² The challenged regulations “[made] no more than the most speculative contribution to highway safety.”³³ The Court took notice of the “great number of exceptions” to the rule, “especially those that discriminate[d] in favor of local

24. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

25. *Taylor*, 477 U.S. at 139; see *City of Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978) (“The crucial inquiry here must be directed to determining whether [the regulation] is basically an economic protectionist measure, and thus virtually per se invalid, or a law directed at legitimate local concerns that has only incidental effects on interstate commerce.”).

26. *Pike*, 397 U.S. at 146.

27. *Id.* at 139.

28. *Id.* at 140.

29. *Id.* at 146.

30. *Id.*

31. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978).

32. *Id.* at 432.

33. *Id.* at 429.

industry.”³⁴ The exceptions undermined the assumption that “the State’s own political processes [would] act as a check on local regulations that unduly burden interstate commerce.”³⁵

In *Bibb v. Navajo Freight Lines, Inc.*, another case implicating the balancing test, an Illinois law required trucks and trailers on the state’s highways to be equipped with a unique type of curved mudguard that was not common in the industry.³⁶ The state argued that the mudguard promoted safety by protecting motorists driving behind the trucks from being hit with mud or debris.³⁷ The Court observed that a unique law could have a local benefit significant enough to outweigh the burden on interstate commerce:

[a] State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device—out of line with the requirements of other States—may be so compelling that the innovating State need not be the one to give way.³⁸

But the Court determined that the claimed benefit of this new technology when balanced against the clear burden on commerce was “far too inconclusive to make this mudguard meet that test.”³⁹

Maine v. Taylor is one of the rare cases in which the legitimate local purpose for a statute was found to outweigh the statute’s burden on interstate commerce.⁴⁰ In that case, the state of Maine prohibited importing live baitfish.⁴¹ The purpose of the regulation was to protect Maine’s fish population from harmful non-native, invasive species.⁴² Standardized techniques for inspection of baitfish

34. *Id.*

35. *Id.* at 447.

36. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529–30 (1959).

37. *See id.* at 521 n.1.

38. *Id.* at 529–30.

39. *Id.* at 530.

40. *See Maine v. Taylor*, 477 U.S. 131, 131 (1986).

41. *See id.* at 132.

42. *See id.* at 140–41 (“First, Maine’s population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine’s aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.” (citations omitted)).

did not exist at the time.⁴³ The Court applied strict scrutiny and found in favor of the statute⁴⁴ because the evidence in that case amply “support[ed] the District Court’s findings that Maine’s ban on the importation of live baitfish serv[ed] legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives.”⁴⁵

B. Recent Agricultural Litigation Regulating Interstate Commerce

One of the more recent areas of regulation to potentially run afoul of the dormant Commerce Clause is regulation of agricultural production and processing. States may find these regulations subject to challenge as they impose burdens across the United States. Litigation over laying hen cage sizes, which have been the subject of different requirements in different states, has demonstrated the problem with these individual state regulations. In contrast, uniform national regulation can be less burdensome than (often conflicting) individual state regulations. Although no federal solution has been made in the egg laying industry, the GMO labelling law passed by Congress in 2016 provides an example of how a national regulation can provide the solution to patchwork regulation.

1. Regulations of Cage Sizes for Egg-Laying Hens

At least two jurisdictions have enacted regulation of hen cage sizes for hens laying eggs to be sold in that jurisdiction, each with differing requirements.⁴⁶ This creates a salmagundi of standards for egg producers, who often sell eggs across the United States, to sort through. A California law was enacted and survived a challenge that went to the Ninth Circuit; the case was dismissed primarily on standing grounds.⁴⁷ A Massachusetts law, one of the broadest regulations of its type, that regulates hen cage sizes under an animal cruelty rationale, has yet to face a challenge in court.⁴⁸ These regulations demonstrate the inherent problems with local regulations that infringe on interstate commerce.

43. *See id.* at 146.

44. *Id.* at 151–52.

45. *Id.* at 151.

46. *See infra* Section II.B.1.a, b.

47. *See infra* Section II.B.1.a.

48. *See infra* Section II.B.1.b.

a. California's Proposition 2

A recent California ballot initiative provides a stellar example of legislation challenged as too restrictive on agricultural commerce.⁴⁹ In 2008, California voters approved a ballot initiative called Proposition 2 that, starting January 1, 2015, made it illegal in California to “tether or confine any covered animal [including egg-laying hens], on a farm, for all or the majority of any day, in a manner that prevents such animal from (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely.”⁵⁰ Compliance requires a minimum of 116 square inches of floor space per bird.⁵¹

In March 2014, after California passed Proposition 2 and drafted laws in accordance with the proposition, the states of Missouri, Iowa, Nebraska, Oklahoma, Kentucky, and Alabama brought suit against the new California laws, specifically the provisions governing the sale of “shell eggs.”⁵² Among other things, the regulation requires producers to enclose hens that lay eggs ultimately sold in California in cages that meet certain size requirements.⁵³ The states alleged that the new laws, Assembly Bill 1437 (“AB 1437”) and Proposition 2, which became CDFA Shell Egg Food Safety regulation 1350(d), collectively referred to as the “Shell Egg Laws,” placed an unconstitutional burden on interstate commerce.⁵⁴ CDFA Shell Egg Food Safety regulation 1350(d), enacted in 2013 and effective in 2015, applies to California egg producers. Subsequently, AB 1437 was specifically enacted to protect California egg producers required to comply with Proposition 2 from competition with out-of-state egg producers.⁵⁵ The law subject to dormant Commerce Clause challenge, therefore, is AB 1437,

49. CAL. CODE REGS. tit. 3, § 1350 (West, Westlaw through Jan. 13, 2017) [hereinafter CDFA Shell Egg Food Safety regulation 1350(d)]; Brief for Appellants at 2, Missouri *ex rel. Koster v. Harris*, 842 F.3d 658 (9th Cir. 2016) (No. 14-17111) [hereinafter Appellants' Brief].

50. Appellant's Brief at 6.

51. *See id.* at 14 (citing CAL. CODE REGS. tit. 3, § 1350(d)(1) (West, Westlaw through Jan. 13, 2017)).

52. *Id.* at 3.

53. CAL. CODE REGS. tit. 3, § 1350(d) (“Commencing January 1, 2015, no egg handler or producer may sell or contract to sell a shelled egg for human consumption in California if it is the product of an egg-laying hen that was confined in an enclosure that fails to comply with [certain] standards.”).

54. Appellant's Brief at 15.

55. *See id.* at 12:22.

because it is the one that applies the cage size requirements to eggs sold in California produced by hens outside of California.

The challenge was dismissed for the state plaintiffs lack of standing to sue on behalf of their residents.⁵⁶ The court found that the suit was really on behalf of a few producers who might be affected by the California regulation,⁵⁷ which is not sufficient to confer standing to the state.⁵⁸ The court did not reach the merits of the case.⁵⁹

On appeal to the Ninth Circuit, the Appellant States challenged the rulings on standing, ripeness, and whether the district court's dismissal of the complaint without leave to amend was an abuse of discretion.⁶⁰ The Ninth Circuit affirmed the judgment of the district court.⁶¹ The Ninth Circuit held that the parties challenging the law lacked standing; the egg producers themselves, not the states, should bring suit if they want to challenge the California law.⁶²

b. Massachusetts Farm Animal Cruelty Act

On November 8, 2016, Massachusetts passed the Massachusetts Farm Animal Cruelty Act, one of the country's broadest regulations regarding the sale of eggs and meat from confined animals.⁶³ Its stated purpose is to "prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on the Commonwealth of Massachusetts[.]" arguably a health and safety rationale.⁶⁴ The regulation makes it unlawful for a farm owner "within the Commonwealth of Massachusetts to knowingly cause any covered animal to be confined in a cruel manner."⁶⁵ This law

56. *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1075 (E.D. Cal. 2014), *aff'd and remanded sub nom. Missouri ex rel. Koster v. Harris*, 842 F.3d 658 (9th Cir. 2016), *withdrawn from bound volume, and aff'd and remanded*, 847 F.3d 646 (9th Cir. 2017).

57. *Id.* at 1072–73.

58. *Id.* at 1073.

59. *See id.*

60. *See* Appellants' Brief, *supra* note 49, at 2.

61. *See Harris*, 847 F.3d at 650.

62. *Id.* at 664.

63. *See* MASS. GEN. LAWS. ANN. ch. 129 app. at § 1-1 (West, Westlaw Current through Chapter 20 of the 2017 1st Annual Session).

64. *See id.*

65. *Id.* § 1-2.

prohibits cruel confinement of not only egg-laying hens but also breeding pigs and calves raised for veal.⁶⁶

The statute defines “confined in a cruel manner” as that which “prevent[s] a covered animal from lying down, standing up, fully extending the animal’s limbs, or turning around freely.”⁶⁷ The regulation also prevents business owners from knowingly selling pork, veal, or eggs from animals unlawfully confined, even if the source is outside of Massachusetts.⁶⁸ Under the statute, a laying hen must have at least 1.5 square feet of usable floor space to be considered able to fully extend its limbs.⁶⁹ The rules and regulations implementing the Act must be in place by January 1, 2020, and the Act will take effect two years later on January 1, 2022.⁷⁰ This regulation illustrates the continuing patchwork of laws producers will face when attempting to comply with cage size and other restrictions in producing eggs. There is no indication that the Act has been challenged yet in litigation; however, litigation on dormant Commerce Clause grounds may be forthcoming if a national federal solution is not reached.

2. *Vermont GMO Labelling Law*

Litigation in multiple states to challenge varying standards does not need to be the outcome of the hen cage size dispute. Instead, a uniform federal law could be passed to set a national standard, as occurred in a recent dispute regarding a GMO labeling statute in Vermont. The state of Vermont enacted Act 120, which took effect on July 1, 2016.⁷¹ Act 120 required retailers to label food produced with genetic engineering as either entirely or partially produced from genetic engineering.⁷²

a. *Dormant Commerce Clause Litigation*

In response to the Vermont GMO law, several associations brought a federal court challenge for declaratory and injunctive

66. *Id.* § 1-5(D).

67. *Id.* § 1-5(E).

68. *See id.* § 1-3.

69. *Id.* § 1-5(J).

70. *See id.* §§ 1-10, 1-11.

71. VT. STAT. ANN. tit. 9, §§ 3041–3048 (West, Westlaw through 2016 Reg. Sess. and 2016 Special Sess.).

72. *Id.* § 3043.

relief.⁷³ The Complaint alleged several claims, including First Amendment free speech violations,⁷⁴ violations of the Due Process Clause,⁷⁵ violations of the Commerce Clause,⁷⁶ and violations of the Supremacy Clause.⁷⁷

In its Commerce Clause claim, the associations alleged that Act 120 required manufacturers to label their products in specific ways and placed advertising restrictions on products in Vermont.⁷⁸ The Complaint further alleged that:

The vast majority of Plaintiffs' members are manufacturers located outside the State of Vermont. There are no major food manufacturers based in Vermont, and Vermont's restaurant and dairy industries, as well as its organic industry, are all exempted from the Act's requirements. Consequently, the cost of implementing the regulation falls largely, if not entirely, on out-of-state companies.⁷⁹

The Complaint described the burden as follows:

Plaintiffs' members sell food in interstate commerce through nationwide and regional distribution chains. In order to comply with the Act, they would need to establish Vermont-specific distribution channels where those channels do not currently exist. However, there is no commercially reasonable way to do so, and it may be impossible to establish such a system before the Act's effective date. Therefore, to avoid liability under Act 120, manufacturers who do not or cannot establish Vermont-specific distribution would have to revise their labeling on a regional or even nationwide basis, no matter where in the country their products may ultimately be sold.⁸⁰

After the district court judge denied an injunction, the associations appealed the denial to the Second Circuit.⁸¹ However, after Public Law 114-216, the federal GMO labelling law, was

73. Complaint for Declaratory & Injunctive Relief at 1, *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015) (No. 5:14-CV-117), 2014 WL 2965321.

74. *Id.* at 13, 17.

75. *Id.* at 18.

76. *Id.* at 20.

77. *Id.* at 21.

78. *Id.* at 18.

79. *Id.* at 18.

80. *Id.* at 18–19.

81. See Scott K.G. Kozak, *Vermont GMO Battle Continues in Second Circuit*, NAT'L L. REV. (Oct. 9, 2015), <http://www.natlawreview.com/article/vermont-gmo-battle-continues-second-circuit>.

enacted,⁸² Vermont's Attorney General announced that Vermont would no longer enforce Act 120,⁸³ presumably because it was preempted by the federal law. The parties then reached an agreement to dismiss the case, which was essentially mooted by the state's announcement that it would not enforce Act 120.⁸⁴

b. Enacted Federal Regulation: Public Law 114-216

Ultimately, the GMO labelling issue was not resolved through litigation: Congress reached a federal legislative solution to the problem caused by the Vermont GMO law. Public Law No. 114-216 requires the FDA to establish a national mandatory bioengineered food disclosure standard.⁸⁵ The law prevents individual states from regulating GMO food labeling.⁸⁶ Instead, food may bear a disclosure that the food is bioengineered only in accordance with regulations promulgated by the Secretary of Agriculture, in accordance with the law.⁸⁷ This federal law was a compromise, but the industry ultimately supported it because it nullified the Vermont law.⁸⁸ Now, rather than causing the packaging industry to deal with a patchwork of inconsistent laws, complying with the single uniform federal law will be less of a burden on industry actors.

III. CONGRESSIONAL ACTION IS NEEDED TO AVOID INCREASED LITIGATION

A. Constitutionality of Regulation of Cage Sizes for Egg-Laying Hens

On the issue of laying hen cage sizes, a federal legislative solution has not been reached, and the line between state police power and the dormant Commerce Clause continues to be litigated.

82. National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016); *see also infra* Section II.B.2.b.

83. *See* Robert Audette, *Parties in Vermont GMO Labeling Lawsuit Agree to Dismissal*, VTDIGGER (Sept. 2, 2016, 11:34 AM), <https://vtdigger.org/2016/09/02/parties-vermont-gmo-labeling-lawsuit-agree-dismissal/>.

84. *Id.*

85. 130 Stat. 834.

86. *Id.* § 295(b).

87. *Id.* § 293(b)(2)(D).

88. *See* Dan Charles, *Congress Just Passed a GMO Labeling Bill. Nobody's Super Happy About It*, NAT'L PUB. RADIO (July 14, 2016, 5:34 PM), <http://www.npr.org/sections/thesalt/2016/07/14/486060866/congress-just-passed-a-gmo-labeling-bill-nobodys-super-happy-about-it>.

The regulations in California and Massachusetts likely violate the dormant Commerce Clause by regulating conduct outside their borders. The California regulations likely have a discriminatory purpose and would be invalidated on strict scrutiny review. Even if the purpose was not found to be discriminatory and the law was determined to have only incidental effects on interstate commerce, the burden of each law in California and Massachusetts outweighs the minor value of the legitimate local purpose.

1. *State Regulation with a Discriminatory Means*

Where a state regulation does not have a stated discriminatory purpose but uses discriminatory means, it will be subject to strict scrutiny review.⁸⁹ The California regulations should be evaluated under the discriminatory means test, and strict scrutiny should be applied. As the Appellants in *Missouri v. Harris* pointed out, the California regulations are problematic because they are actually two different regulations.⁹⁰ Proposition 2, now codified, applies to in-state producers.⁹¹ AB 1437 applies to out-of-state producers.⁹² The rationale of Proposition 2 is at least arguably related to health and safety⁹³ because some evidence suggests that requiring hens to live in cages larger than the traditional sixty-seven square-inch “battery cages” can reduce exposure to disease pathogens, such as salmonella.⁹⁴

89. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (quoting *Lacoste v. Louisiana Dep’t of Conservation*, 263 U.S. 545, 550 (1924)) (“[W]hen considering the purpose of a challenged statute, this Court is not bound by ‘[t]he name, description or characterization given it by the legislature or the courts of the State,’ but will determine for itself the practical impact of the law.”). This is true even though the Ninth Circuit found the law was not discriminatory for purposes of *parens patriae* standing. *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655 (9th Cir. 2017) (quoting *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013)) (“The Shell Egg Laws do not distinguish among eggs based on their state of origin. A statute that treats ‘both intrastate and interstate products’ alike ‘is not discriminatory.’”).

90. See Appellants’ Brief, *supra* note 49, at 13–14 (discussing Phase I and II).

91. See CAL. HEALTH & SAFETY CODE § 25990 (West, Westlaw through 2016 Reg. Sess.); CAL. CODE REGS. tit. 3, § 1350(d) (West, Westlaw through Jan. 13, 2017).

92. See CAL. HEALTH & SAFETY § 25996.

93. Sarah McNabb, *California’s Proposition 2 Has Egg Producers Scrambling: Is It Constitutional?*, 23 SAN JOAQUIN AGRIC. L. REV. 159, 176 (2014).

94. See Calvin Massey, *The California Egg Law and the Dormant Commerce Clause*, THE FAC. LOUNGE (Mar. 13, 2014, 2:51 PM), <http://www.thefacultyounge.org/2014/03/the-california-egg-law-and-the-dormant-commerce-clause.html>.

The rationale of AB 1437, however, is economic protectionism. After Proposition 2 was passed, there was concern that California's over three hundred million dollar egg industry would be at a competitive disadvantage to out-of-state egg producers.⁹⁵ If California could no longer use the small "battery" cages but was required to use larger "colony" cages (or to go cage-free), the cost of production would increase for California producers, and they would have to raise the cost of eggs as sold to consumers, while out-of-state egg producers could keep their prices lower. In his signing statement, Governor Schwarzenegger stated, "By ensuring that all eggs sold in California meet the requirements of Proposition 2, this bill is good *for both California egg producers and animal welfare.*"⁹⁶ Not only do the two statutes have different rationales, but they may have different applicable standards.⁹⁷ It is not clear whether AB 1437 incorporates the same colony cage standards of Proposition 2 or requires out-of-state producers to go entirely cage-free.⁹⁸ California is using discriminatory means to protect in-state interests, and a court evaluating the constitutionality of AB 1437 should apply strict scrutiny.

In applying strict scrutiny review, the Supreme Court has stated that "[t]he crucial inquiry here must be directed to determining whether [the regulation] is basically an economic protectionist measure, and thus virtually *per se* invalid, or a law directed at legitimate local concerns that has only incidental effects on interstate commerce."⁹⁹ AB 1437 was passed after Proposition 2. It was passed in response to public concern that the massive California egg industry might be wiped out by out-of-state competition after Proposition 2 went into effect.¹⁰⁰ It is evident that at least one

95. Wyatt Buchanan, *Law Extends State's Egg Mandates to Imports*, SFGATE, July 7, 2010, <http://www.sfgate.com/bayarea/article/Law-extends-state-s-egg-mandates-to-imports-3182388.php>.

96. Susan Ferriss, *Schwarzenegger Signs Bill Requiring "Humane" Out-of-State Eggs*, THE SACRAMENTO BEE (July 7, 2010) (emphasis added), https://charleslincoln3.files.wordpress.com/2014/02/missouri-v-harris-exhibit-n-22schwarzenegger-signs-bill-requiring-22humane22-out-of-state-eggs22-2-14cv00341_docketentry_02-03-2014_2-14.pdf.

97. Appellants' Brief, *supra* note 49, at 14.

98. *See id.* at ER46–ER47.

99. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

100. Buchanan, *supra* note 95.

motivation behind the enactment of AB 1437 is economic protectionism.¹⁰¹ Thus, it should be invalid.¹⁰²

While the Ninth Circuit dismissed the case on standing grounds, if the case were brought by the proper plaintiffs, it should not be dismissed. There is not a legitimate local purpose that outweighs the burden on interstate commerce. The California cage-hen case is distinguishable from *Maine v. Taylor*, in which the Court found that Maine's prohibition on the importation of live baitfish was valid, because protecting its fish population from harmful non-native species was a legitimate local concern.¹⁰³ Here, protecting laying hens from a marginally higher risk of salmonella is not a legitimate local concern (or at least it is a concern that does not weigh heavily), and there are other ways of reducing the risk of salmonella than requiring out-of-state producers to house hens in larger cages.

2. *Even-Handed Regulation with Incidental Effects on State Commerce*

Even if considered even-handed regulations with incidental effects on interstate commerce and therefore evaluated under the lower standard of review, both the California regulations and the Massachusetts regulation should be invalidated because they place an undue burden on interstate commerce.¹⁰⁴

a. *California's AB 1437*

No matter how AB 1437 is applied, it will place an undue burden on egg producers by making production significantly more expensive. Some estimates show that if applied coextensively with Proposition 2, the cost of producing eggs could rise at least twelve percent.¹⁰⁵ If producers are required to implement cage-free production, the production costs could increase by more than thirty-

101. See, e.g., Ferriss, *supra* note 96.

102. See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (finding "conservation" to be an illegitimate local state interest "when equally effective nondiscriminatory conservation measures are available").

103. *Maine v. Taylor*, 477 U.S. 131, 131 (1986).

104. See *Pike*, 397 U.S. at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

105. Appellants' Brief, *supra* note 49, at 14.

four percent.¹⁰⁶ When these serious burdens are weighed against the marginal benefit of reducing the possibility of salmonella, this regulation violates the dormant Commerce Clause.

In *Pike v. Bruce Church, Inc.*, the Arizona state law requiring Arizona cantaloupes to be processed in Arizona so that they could be labeled as Arizona cantaloupes placed an undue burden on interstate commerce because the company would have needed to build a second packaging plant when there was already one built across the border in a neighboring state.¹⁰⁷ Similarly, here, producers will need to build different, additional, or duplicative cages in order to comply with the California regulations. This is unduly burdensome.

b. Massachusetts' Prevention of Farm Animal Cruelty Act

The Massachusetts law violates the dormant Commerce Clause for the same reasons. Moreover, the Massachusetts law demonstrates the difficulty egg producers will face not only with attempting to comply with one law but with a patchwork of burdensome laws. They will have to build different cages to comply with different state and local laws.¹⁰⁸ They will also need to segregate which eggs go to which states to comply with those laws. This represents an undue burden on interstate commerce, and the laws should be struck down as inconsistent with the dormant Commerce Clause.

B. Congress Should Pass a Uniform Federal Law Nullifying State Laws

Congress should offer a solution that prohibits states from enacting laws setting specific cage sizes for out-of-state producers. This will create fairness among egg producers and avoid the expense and burden of attempting to comply with a patchwork of state laws with different requirements for cage sizes. The GMO labeling bill compromise was reached because Congress determined that a uniform federal law would avoid placing an undue burden on industry in needing to comply with various labeling requirements, including those of Vermont.¹⁰⁹ The same is true in the context of the

106. *Id.*

107. *Pike*, 397 U.S. at 142.

108. *See, e.g.*, 2016 Mass. Acts 333, §§ 5(E), 5(J) (West, Westlaw through Nov. 8, 2016) (requiring that a laying hen must have at least 1.5 square feet of usable floor space to be considered able to fully extend its limbs).

109. *See generally* Charles, *supra* note 88.

laying-hen cage-size controversy. The recent Ninth Circuit affirmance demonstrates that industry will continue to bear the burden of enforcing the dormant Commerce Clause if Congress does not act.¹¹⁰

Iowa Representative Steve King previously attempted to prohibit states from making such regulations by introducing the so-called King Amendment in the Agricultural Act of 2014.¹¹¹ The amendment was not included in the final version of the bill.¹¹² Critics of the amendment were concerned that it would have the unintended consequence of invalidating a number of constitutional state health and safety laws.¹¹³ Proponents of the amendment were concerned about the negating the effects of the California law on egg producers in Iowa and other states.¹¹⁴

The proposed King Amendment stated, “[c]onsistent with Article I, section 8, clause 3 of the Constitution of the United States, the government of a State or locality therein shall not impose a standard or condition on the production or manufacture of any agricultural product sold or offered for sale in interstate commerce” under certain circumstances.¹¹⁵ The circumstances included were:

- (1) such production or manufacture occurs in another State; and
- (2) the standard or condition is in addition to the standards and conditions applicable to such production or manufacture pursuant to—
 - (A) Federal law; and
 - (B) the laws of the State and locality in which such production or manufacture occurs.¹¹⁶

This proposed language is consistent with the dormant Commerce Clause.¹¹⁷ It would reduce the burden placed on egg producers, some of whom may otherwise be required to comply with both the California and Massachusetts laws, and possibly others.¹¹⁸

110. See *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017).

111. See H.R. 687, 113th Cong. (2013).

112. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

113. See *Iowa Rep. Steve King Lays an Egg on the Farm Bill*, L.A. TIMES, Jan. 23, 2014, <http://www.latimes.com/opinion/editorials/la-ed-king-amendment-farm-bill-20140123-story.html>.

114. See *id.*

115. H.R. 687.

116. *Id.*

117. See generally *supra* Section II.A.

118. Compare 2016 Mass. Acts 333, § 5(E) (West, Westlaw through Nov. 8, 2016)

The King Amendment is just one example of a national legislative solution to the current problem. A revised version of the King Amendment could be passed with a clarification to address some of the concerns about unintended preemption of state health and safety laws. Alternatively, as with the GMO labelling law, Congress could pass a law setting a uniform cage size for laying hens. In any case, a uniform federal standard would be the most efficient solution to avoid unnecessary litigation and the burden of compliance with multiple conflicting state standards.

IV. CONCLUSION

With an increasing interest in animal welfare and food traceability from the American public, it is likely that dormant Commerce Clause litigation in the agricultural production industry will only intensify. While only two states currently have regulations regarding cage sizes for laying hens that cross state lines, the industry is already feeling the burden of increased and conflicting standards for production. As additional states consider or pass legislation, it will only make it more imperative that a national consensus is reached on this issue. Because of the difficulty and expense of litigating each instance individually, Congress should act. Congress should either use the recent GMO labelling law as inspiration to resolve these issues by setting a national standard or enact legislation consistent with the dormant Commerce Clause prohibiting states from regulating agricultural production in a way that puts an excessive burden on interstate commerce.

(requiring that a laying hen must have at least 1.5 square feet, or 216 square inches, of usable floor space to be considered able to fully extend its limbs), *with* CAL. CODE REGS. tit. 3, § 1350(d)(1) (West, Westlaw through Jan. 13, 2017) (requiring 116 inches of floor space per bird).

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