

THE CHICKEN AND THE EGG – ANIMAL WELFARE, FOOD SAFETY AND FEDERALISM

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INTRODUCTION

On January 1, 2015 two California laws took effect. Proposition 2 (hereinafter “Prop 2”) was a 2008 voter initiative that required cages for veal calves, pregnant sows, and egg-laying hens be large enough for the animals to lie down, stand up, fully extend their limbs and turn around freely.¹ California Assembly Bill 1437 (hereinafter “AB 1437”), enacted in the wake of the successful Prop 2 vote, bans the in-state sale of eggs for human consumption that are not produced under conditions required by Prop 2.² Accordingly, the California market is now closed to any egg seller, within or outside California, who does not house its egg-laying hens in cages that meet the standard adopted by California voters.

Before taking effect, these laws were challenged on multiple fronts and on various legal grounds. For example, Prop 2 survived a challenge that it was unconstitutionally vague when an egg producer complained that the law does not expressly mandate a cage size.³ This paper analyzes a challenge by officials in several egg-producing states (so far unsuccessful, but pending appeal) that AB 1437 violates the Commerce Power in the United States Constitution.⁴

Part I of the paper briefly explains the concerns about animal welfare and food safety in large-scale agricultural operations. These concerns were the backdrop for the successful Prop 2 vote in California. Part I also discusses the legislative history of AB 1437 for eggs. Part II of the paper analyzes the unusual step by state officials in egg-producing states (rather than egg producers themselves) to challenge the alleged undue burdens on interstate commerce caused by the California laws. Part III compares and contrasts the alleged burdens in AB 1437 with commerce power precedent cases to determine the strength of the constitutional challenge. Part IV explains the alleged federal preemption of California’s law by federal egg safety mandates.

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¹ CAL. HEALTH & SAFETY CODE §§ 25990-94 (effective Jan. 1, 2015).

² A.B. 1437, Reg. Sess. (Cal. 2010).

Commencing January 1, 2015, a shelled egg may not be sold or contracted for sale for human consumption in California if it is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in Chapter 13.8 (commencing with Section 25990).

³ *Cramer v. Harris*, No. 12-56861 (9th Cir. 2015)(unpublished opinion), available at <http://cdn.ca9.uscourts.gov/datastore/memoranda/2015/02/04/12-56861.pdf> . The court concluded that a reasonable person could comply with the law’s requirement based on objective criteria such as animal wingspans and turning radii. *Id.* at 3. Now that the law is in effect, the California Department of Agriculture has adopted regulations that quantify the Prop 2 mandates. 3 CCR § 1350 (d) (2015). For nine or more egg-laying hens, a cage must provide 116 square inches of floor space per bird. For one bird, the minimum floor space is 322 square inches. 3 CCR § 1350(d)(1) (2015). Birds must have access to food and water without restriction. 3 CCR § 1350(d)(2) (2015).

⁴ *Missouri v. Harris*, No: 2:14-CV-00341-KJM-KJN, 2014 WL 4961473, at *1 (E.D. Cal. Oct. 2, 2014) (found at <http://docs.burningbird.net/cases/eggs/document102.pdf>) (hereinafter Order).

The paper concludes with recommendations to protect states' rights to restrict the sale of food products that do not conform to the expectation of in-state consumers.

I. Animal Welfare, Food Safety and the California laws

As one commentator put it, “[p]erhaps the most devastating feature of the industrial system, in terms of food safety, is the concentrated animal feeding operation.”⁵ The close proximity of huge numbers of food animals can lead to disease in the livestock and food borne illnesses when pathogens in feces are transferred from hoofs and hides to food production machinery, water, workers and tools.⁶ Further, water run-off from these dense animal operations can contaminate nearby fresh produce fields with pathogens such as e-coli.⁷ In addition to the food safety concerns stemming from animals raised in tight confines are the issues of inhumane conditions for the animals.⁸ This modern industrialized farming environment is the context in which California voters overwhelmingly passed Prop 2 to improve conditions for a few confined animals.⁹

A. Prop 2 and its genesis

Californians for Humane Farms (CHF) was the non-profit ballot committee established to sponsor California's Prop. 2.¹⁰ CHF was formed and supported by the Humane Society of the United States (HSUS), Farm Sanctuary,¹¹ and others.¹² Earlier in 2008, HSUS had released a

⁵ Nathan M. Trexler, *Student Note: "Market" Regulation: Confronting Industrial Agriculture's Food Safety Failures*, 17 WIDENER L. REV. 311, 319 (2011). See also, CAFO: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES (Daniel Imhoff, ed. Watershed Media 2010).

⁶ THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 12 (Andrew Kimbrell ed., 2002); Michael Pollan, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 67 (2006).

⁷ A. Bryan Endres and Nicholas R. Johnson, *SYMPOSIUM: Integrating Stakeholder Roles in Food Production, Marketing, and Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 52-53 (2011). California's Central Valley yields one-third of all the produce grown in the United States. Mark Bittman, *Everyone Eats There*, N.Y.TIMES, Oct. 10, 2012 (Magazine), <http://www.nytimes.com/2012/10/14/magazine/californias-central-valley-land-of-a-billion-vegetables.html?pagewanted=all>.

⁸ “A growing and increasingly influential movement of philosophers, ethicists, law professors and activists are convinced that the great moral struggle of our time will be for the rights of animals.” Michael Pollan, *An Animal's Place*, N.Y.TIMES, Nov. 10, 2002, <http://www.nytimes.com/2002/11/10/magazine/an-animal-s-place.html>. For a detailed discussion about the food safety and animal welfare issues specifically associated with egg production in concentrated laying facilities, see Sarah McNabb, *Comment: California's Proposition 2 has Egg Producers Scrambling: Is it Constitutional?* 23 S.J. AGRIC. L. REV. 159, 165-69 (2013-14).

⁹ *California Voters Pass Ballot Measure to Eliminate Battery-Style Cages for Egg-Laying Hens By a 26% Margin; Small Cages to be Eliminated in 2015*, FRESH AND EASY BUZZ (Nov. 5, 2008, 6:15 pm), <http://freshneasybuzz.blogspot.com/2008/11/california-voters-pass-ballot-measure.html>. The blog explains that only egg production would significantly change as a result of Prop. 2, because few veal calves were being raised in California and most pig producers already had moved away from small crates for sows. *Id.*

¹⁰ *Californians for Humane Farms v. Schaefer*, 2008 WL 4449583, *1 (N.D.Cal. 2008), <https://www.animallaw.info/case/californians-humane-farms-v-schaefer>.

¹¹ Farm Sanctuary is a New York-based non-profit founded to “combat the abuses of factory farming and encourage a new awareness and understanding about farm animals.” Farm Sanctuary, *About Us*,

video of unsafe and inhumane conditions in a Chino, California beef production facility that prompted the largest beef recall in U.S. history.¹³ Also in 2008, Mercy for Animals released undercover videos of abuses by two large California egg producers.¹⁴ Accordingly, California voters and food consumers were primed for the Prop 2 initiative with recent, horrific images of animal abuse in concentrated farm animal operations.

The campaign mostly emphasized the inhumane treatment of the animals. For example, the official Legislative Analysis for the ballot initiative focused only on the treatment of farm animals and makes no mention of the food safety issues associated with concentrated confines.¹⁵ In addition to preventing cruelty to animals, however, the official Arguments from the supporters offered these justifications for passage: (1) improving health and food safety; (2) supporting family farmers; and (3) protecting air, water and safeguarding the environment.¹⁶ The food safety discussion referenced the recent Chino beef recall specifically.¹⁷ Regarding egg safety, research indicates a potential for increased salmonella in the digestive system of hens in stressful laying conditions.¹⁸ This laying environment allegedly increases the potential that the pathogen would be passed through those hens' eggs, posing an increase risk for salmonella exposure for consumers.¹⁹ The environmental protection argument focused on the groundwater runoff from

www.farmsanctuary.org/about-us/ (last visited Mar. 7, 2015).

¹² *Californians for Humane Farms v. Schafer*, 2008 U.S. Dist. LEXIS 74861, 1-2 (N.D. Ca. 2008). This successful injunction action blocked the national Egg Board from campaigning against Prop. 2 using “check off” funds collected from a mandatory assessment on all egg producers. *Id.* at 4-5. For more about the check off funds for agricultural marketing and education, see generally Rita Cain, *Uncle Sam Wants You – To Eat Beef?* 11 DRAKE J. AGRIC. L. 165 (2006).

¹³ See David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST, Feb. 18, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html>.

¹⁴ *Undercover Investigations: Exposing Animal Abuse*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited Mar. 4, 2015).

¹⁵ California General Election, Tuesday November 4, 2008, Official Voter Information Guide, *Prop 2 Analysis by the Legislative Analyst*, <http://www.voterguide.sos.ca.gov/past/2008/general/analysis/prop2-analysis.htm> (last visited Mar. 7, 2015).

¹⁶ California General Election, Tuesday November 4, 2008, Official Voter Information Guide, *Arguments in Favor of Prop 2*, <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> (last visited Mar. 7, 2015). Although this is the official voter guide, the page explains that arguments presented are the opinions of the authors, Wayne Pacelle, President, The Humane Society of the United States, Kate Hurley, D.V.M., M.P.V.M., Clinical Professor, School of Veterinary Medicine, University of California, Davis and Andrew Kimbrell, Executive Director, Center for Food Safety, not any state official or agency.

¹⁷ *Id.*

¹⁸ See e.g., K. M. Burkholder, K. L. Thompson, M. E. Einstein, T. J. Applegate and J. A. Patterson, *Influence of Stressors on Normal Intestinal Microbiota, Intestinal Morphology, and Susceptibility to Salmonella Enteritidis Colonization in Broilers*, 87 POULTRY SCIENCE 1734 (2008). This study did not evaluate cage size, but did find increased salmonella as a result of increased temperatures in the housing environment.

¹⁹ *Salmonella* “silently infects the ovaries of healthy-looking hens, contaminating the eggs inside the chicken before the shells are even formed.” Remy Melina, *How Does Salmonella Get in Eggs?* LIVESCIENCE, (Aug. 18, 2010), <http://www.livescience.com/10016-salmonella-eggs.html>. Cooking and storing eggs properly protects consumers from infection by eating a contaminated egg. *Playing it Safe with Eggs*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm077342.htm> (May 7, 2015).

factory farms that contaminate groundwater and soil.²⁰ Thus, the justifications for the initiative included multiple public interests, although the voter appeal focused on animal welfare.

The major argument against the initiative was a health safety claim that outdoor access for poultry could expose them to wild migratory birds that carry avian flu.²¹ The opponents also pointed out that no case of salmonella had been linked to a California-produced egg in more than a decade because “modern housing systems” (the battery cages that Prop 2 bans) keep hens from laying eggs in their own waste, which otherwise can expose the eggs to pathogens.²²

The rebuttal hardly addressed the inhumane treatment issue, except to say that the initiative was misleading when it fails to differentiate treatment from housing.²³ In other words, in any housing environment a person can inhumanely handle an animal. This rebuttal argument ignored the point, however, that many (including 63% of Prop 2 voters, apparently) consider the cramped housing itself to be inhumane.

Finally, one argument against passage emphasized economic harm to the egg farming community and to consumers from the increased cost of egg production if the industry were forced to change from concentrated confinement. The opponents estimated that the initiative would cost thousands of jobs and \$600 million in local and state economic activity because “California eggs will be MORE EXPENSIVE.”²⁴ After Prop 2 passed, this economic concern, in part, prompted California legislators to pass AB1437.

B. AB 1437

The Legislative Digest for AB 1437 explains that this California law, as prompted by Prop 2, specifies “farm animal treatment standards.”²⁵ Regardless of the prevailing animal welfare sentiment that motivated Prop 2, the stated justifications for AB 1437 are all about food safety, including the food safety implications of animal stress in close confines:

The Legislature finds and declares all of the following:

- (a) According to the Pew Commission on Industrial Farm Production, food animals that are treated well and provided with at least minimum accommodation of their natural

²⁰ *Id.*

²¹ California General Election, Tuesday November 4, 2008, Official Voter Information Guide, *Arguments Against Prop 2*, <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> (last visited Mar. 7, 2015). Again, these arguments are not espoused by any government agency or official, but by Craig Reed, DVM, Former Deputy Administrator, Food Safety and Inspection Service, United States Department of Agriculture (USDA), Tim E. Carpenter, Ph.D., Professor of Epidemiology Department of Medicine and Epidemiology, School of Veterinary Medicine, UC Davis and Patricia Blanchard, DVM, Ph.D., Branch Chief University of California Animal Health and Food Safety Laboratory System.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (emphasis in original).

²⁵ ASSEMBLY BILL 1437 (2010), available at http://leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_bill_20100706_chaptered.html.

behaviors and physical needs are healthier and safer for human consumption.

- (b) A key finding from the World Health Organization and Food and Agricultural Organization of the United Nations Salmonella Risk Assessment was that reducing flock prevalence results in a directly proportional reduction in human health risk.
- (c) Egg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines and the conditions increase the likelihood that consumers will be exposed to higher levels of food-borne pathogens.
- (d) Salmonella is the most commonly diagnosed food-borne illness in the United States.
- (e) It is the intent of the Legislature to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella.²⁶

Thus, AB 1437 appears to be a measure to protect the health of California egg consumers. Further, in his signing statement for the law, Governor Schwarzenegger cited the public's overwhelming approval of the humane treatment requirements in Prop 2.²⁷ In other words, AB 1437 also protects the will of California citizens about how egg-laying hens should be treated, as reflected by the super-majority vote for Prop 2. If a vendor of eggs does not conform to California voters' expectation of humane hen treatment, that vendor is not allowed access to the California market.

Despite these seemingly valid local health, safety and public policy interests, there is evidence that AB 1437 was also motivated by economic protectionism for California egg producers that would be under the constraints of Prop 2, unlike the vast majority of their out-of-state competitors.²⁸ In an analysis of the bill for the Assembly Committee on Appropriations, Analyst Julie Salley-Gray comments, "The intent of this legislation is to level the playing field so that in-state producers are not disadvantaged."²⁹ Although the analysis goes on to state that,

²⁶ *Id.*

²⁷ Susan Ferriss, *Capitol Alert, Schwarzenegger Signs Bill Requiring 'Humane' Out-of-State Eggs*, SACRAMENTO BEE (July 7, 2010), <http://blogs.sacbee.com/capitolalertlatest/2010/07/gov-signs-bill-requiring-human.html>.

²⁸ In 2008, Arizona and Oregon banned close confined housing for veal calves and Arizona for pregnant sows. Nevertheless, no state had a similar ban to Prop 2 for egg laying hens in 2008. Accordingly, 90% of eggs produced in the U.S. use battery cages for the hens to this day. Lorelei Laird, *California's Ban on Standard-Caged Birds Poses a Chicken-Egg Problem*, ABAJ. (June 1, 2014), http://www.abajournal.com/magazine/article/californias_ban_on_standard-caged_birds_poses_a_chicken-egg_problem.

²⁹ Assembly Committee on Appropriations, AB 1437 (May 13, 2009). According to one estimate, Prop 2 would raise the cost of egg production by \$.01 per egg. California General Election, Tuesday November 4, 2008, Official Voter Information Guide, *Rebuttal to Argument Against Proposition 2*,

“Californians have a history of establishing basic animal welfare standards for the products they consume,”³⁰ the ‘level playing field’ comment suggests economic protectionism. Similarly, in its analysis of the legal impact of the bill, California Department of Food and Agriculture recommended the law to “ensure a level playing field for California’s shell egg producers by requiring out of state producers to comply with the state’s animal care standards.”³¹

Thus, AB 1437 raises the question whether a state legislature is entitled to restrict access to the state market for out-of-state producers who do not otherwise establish basic animal welfare standards that the state citizenry expects. Or, does such a limitation on out-of-state access to the in-state market smack of unconstitutional discriminatory protectionism? The litigation by out-of-state officials in dominant egg-producing states sought to answer that question.

II. The States’ Litigation – *Parens Patriae*

In *Missouri v. Harris*, the states of Missouri, Iowa, Nebraska, Oklahoma, Alabama and Kentucky challenge AB1437 on behalf of egg producers and consumers in their states.³² Unlike the political campaign against Prop 2³³ and the legal challenge to it when it passed,³⁴ no egg producer or industry association raised a legal challenge to California’s AB1437.³⁵ The six states, through their governors or attorneys general, claim standing to sue as “*parens patriae* because [they have] quasi-sovereign interests in protecting [their] citizens’ economic health and constitutional rights as well as preserving [their] own rightful status within the federal system.”³⁶

<http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> (last visited Mar. 7, 2015). Again, the opinions in the rebuttal are not the views of any California official or agency, but the authors Ixchel Mosley, DVM, President, San Diego County Veterinary Medical Association, Nigel Walker, California Egg Farmer, Michael Jacobson, Ph.D., Executive Director, Center for Science in the Public Interest. In 2014, California produced 5 billion eggs. California Egg Industry Association, Commodity Facts Sheet, Eggs, 1 (2014), <http://www.cfaic.org/factsheets/pdf/Eggs.pdf>. Thus, the cost of Prop 2 compliance, if the penny-per-egg estimate is correct, comes to \$50 million annually – not exactly chicken feed!

³⁰ *Id.*

³¹ Huffman, California Dept. of Food & Agric. Enrolled Bill Report 1, (June 28, 2010) (found at https://charleslincoln3.files.wordpress.com/2014/02/missouri-v-harris-exhibit-l-22bill-to-prohibit-the-sale-of-eggs-for-human-consum-if-hen-was-caged22-2-14cv00341_docketentry_02-03-2014_2-12.pdf). The ‘level playing field’ reference is repeated at 3 and 8.

³² *Supra* note 4.

³³ *See supra* note 21.

³⁴ *See supra* note 3.

³⁵ *See* Pamela Visiland, *Did the Dismissal of Missouri v. Harris Have an Unintended Effect*, ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION ON AGRICULTURAL AND FOOD LAW (Oct. 7, 2014), <http://aglaw.blogspot.com/2014/10/did-dismissal-of-missouri-v-harris-have.html>.

Center for Food Safety, Consumers Union/Consumer Reports, Food & Water Watch, Food Animal Concerns Trust, Institute for Agriculture and Trade Policy, Public Justice and Healthy Food Action are all non-profit corporations or subsidiaries that joined in one amicus brief supporting dismissal in *Missouri v. Harris*. *Missouri v. Harris*, Proposed Amici Brief, No. 2:14-cv-00341-KJM-KJN I (June 10, 2014).

³⁶ *Missouri v. Harris*, First Amended Complaint No. 2:14-CV-00341-KJM-KJN 4-7 (Mar. 5 2014) (hereinafter First Amended Complaint). Iowa’s Governor, Terry E. Branstad, claims *parens patriae* “because Iowa has quasi-

This section will discuss these interests and how case precedents treat the rights of states to stand for them in court.

To maintain a *parens patriae* action, “the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.”³⁷ The states challenging AB1437 would be nominal parties if they were only challenging the law to protect the competitive interests of their in-state egg producers and the rights of those producers to access the California market unhindered. But *Snapp* held that states can maintain *parens patriae* actions when they assert injury to a “quasi-sovereign” interest, consisting of “a set of interests that the State has in the well-being of its populace.”³⁸ The states challenging AB1437 assert such quasi-sovereign interests in the price of eggs for all their consuming citizens. If egg producers everywhere are obliged to comply with California standards, the price of eggs will rise everywhere.³⁹

In *Snapp*, Puerto Rico challenged Virginia apple producers for their non-compliance with federal immigration laws, “by failing to provide employment for qualified Puerto Rican migrant farm-workers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers, and by improperly terminating employment of Puerto Rican workers.”⁴⁰ In *Snapp*, the Court accepted that Puerto Rico was concerned with unemployment rates and working conditions for its citizens. Accordingly, Puerto Rico was able to elevate the alleged discrimination by out-of-state private employers into a quasi-sovereign interest in the economy and welfare of Puerto Ricans. This was true even though there were only 787 Virginia jobs at stake in the complained-of action,⁴¹ arguably not enough to impact the Territory’s economy.

Presumably, the economic impact of the AB1437 compliance on the overall economies of the various egg-producing states in *Harris* is as significant, if not more, than 787 Virginia apple jobs were to Puerto Rico in *Snapp*. Nevertheless, quoting *Snapp*, the California federal district court was not convinced. First, the states’ economic interest in consumer egg prices was a double-edged sword. At the same time the states argued that AB1437 compliance would raise egg prices for all consumers, they also asserted that the price of eggs would plummet if their in-state producers forego California sales by not complying with the California cage mandates. In that latter case, the eggs that usually would supply California would flood the markets in the rest of the states, causing prices to drop.⁴² At best then, the states’ concerns for consumers in the wake of AB 1437 was speculative because prices could go up with compliance, but down from non-

sovereign interests in regulating agricultural activity within its own borders and preserving Iowa’s rightful status within the federal system, as the United States Constitution guarantees.” *Id.* at 8. *Parens Patriae* is translated “parent of the fatherland” or “parent of the country” hence the usage when a government official sues on behalf of his or her citizenry or governmental entity.

³⁷ *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

³⁸ *Id.* at 601-02.

³⁹ First Amended Complaint at 19-20, 23.

⁴⁰ *Snapp*, 458 U.S. at 598.

⁴¹ *Snapp*, 458 U.S. at 609.

⁴² First Amended Complaint at 20.

compliance.⁴³ Accordingly, the states had not asserted an injury in fact. “[P]laintiffs fail to set forth any allegations that support a finding they are bringing this action to protect their citizens’ economic health or the well-being of each state’s populace.”⁴⁴ In the case of plummeting egg prices, “[r]ather, the allegations throughout the first amended complaint specifically focus on the impact of AB 1437 on plaintiffs’ egg farmers.”⁴⁵

One argument from *Snapp*, that the states did not raise, could have bolstered their *parens patriae* claim. Justice Brennan’s concurring opinion in *Snapp* argued that states should have the prerogative to pursue diversity cases in district courts similar to private plaintiffs. In other words, any constraints on *parens patriae* claims should only apply to the Supreme Court’s **original jurisdiction** when the Court actually tries cases by one state against another.⁴⁶ The *Snapp* majority admitted that different considerations might apply between original actions and district court suits.⁴⁷ The plaintiff states could have asserted that such a distinction should apply in *Harris* and their complaints against AB 1437 should not differ from any private party who objected on Commerce Power grounds.

The states may have missed several other opportunities to bolster their case and distinguish their sovereign interests from those of egg producers affected by AB 1437. First, if the states purchase eggs themselves, such as through state hospitals or school lunch programs, the states would have a direct injury if AB 1437 curtailed the supply of eggs to the state. This was the basis for a successful challenge by Ohio and Pennsylvania against West Virginia over its law that required West Virginia producers of natural gas to meet all in-state demand before supplying interstate customers.⁴⁸ The Court noted that, “each state uses large amounts of the gas in [her] several institutions and schools—the greater part in the discharge of duties which are relatively imperative.”⁴⁹ West Virginia’s law directly impinged on the supply of gas to Pennsylvania and Ohio, giving rise to their Commerce Power claims. The Court explained that both Pennsylvania and Ohio could sue to protect a twofold interest—

one as a proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected.⁵⁰

Both interests were deemed substantial and both were threatened with serious injury.⁵¹

⁴³ Order at 15.

⁴⁴ *Id.* at 16, citing *Snapp*, 458 U.S. at 602.

⁴⁵ *Id.*

⁴⁶ *Snapp*, 458 U.S. 610 (Brennan concurring, joined by Justices Marshall, Blackmun, and Stevens).

⁴⁷ *Snapp*, 458 U.S. 603 n. 12.

⁴⁸ *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

⁴⁹ *Id.* at 592.

⁵⁰ *Id.* at 591.

⁵¹ *Id.*

Potentially, if the federal district court in California had comparable joint threats presented to it, the general economic harm to the consuming public might have seemed less speculative. If the states had alleged increase budgetary expenses for their state hospitals and schools to keep buying eggs, they would have been more on par with Pennsylvania and Ohio's protected interest. On the other hand, the loss of supply of one food source (eggs) in *Harris* might not rise to the level of seriousness threatened in *Pennsylvania v. West Virginia* where the natural gas was used for winter heating.

Alternatively, in states that tax food purchases,⁵² the impact of AB 1437 could have a direct effect on tax revenues if egg sales fell due to decreased supply and rising prices. This loss of sales tax revenue would be analogous to Wyoming's direct Commerce Power claim in *Wyoming v. Oklahoma*.⁵³ Wyoming claimed lost coal extraction taxes when Oklahoma required its coal-powered electric utilities to purchase at least 10% of its coal from in-state producers.⁵⁴ While the Oklahoma law directly curtailed out-of-state purchases, which AB 1437 does not, Wyoming's claim was not linked to its own lost sales of coal, but to the lost tax revenue from others' in-state purchases. Accordingly, any direct tax revenue losses from lost sales of in-state product based on application of the out-of-state law could be analogous.⁵⁵

Both these claims of direct harm to the states from loss of supply would have required the states to forgo their argument that new egg supplies, previously going to California, would flood the market and depress prices. It was that competing complaint of dwindling versus excessive supply that caused the district court to deem that the states' claims were speculative, not injuries in fact. Accordingly, the states might have been better to omit the argument that AB 1437 was going to result in a glut of supply and focus on the direct and indirect harms from loss of supply.

Finally, a recent federal district court decision in Minnesota suggests a different result in *Harris* may have been possible without any alternative presentation of the claims by the states. In *North Dakota v. Heydinger*,⁵⁶ Minnesota's Next Generation Energy Act (NGEA) established energy and environmental standards related to carbon dioxide emissions.⁵⁷ The law prohibited importation of power from outside the state that would contribute to power sector carbon dioxide

⁵² Alabama and Oklahoma apply their general sales tax to food, but Oklahoma provides a low income tax credit for the food sales tax. Federation of Tax Administrators, State Sales Tax Rates and Food and Drug Exemptions (Jan. 2015), <http://www.taxadmin.org/fta/rate/sales.pdf>. Missouri charges a lower tax rate on food. *Id.* Nebraska and Kentucky exempt food purchases from sales tax. *Id.* Iowa's food sales tax law exempts eggs and egg products and all food bought with food stamps. *Iowa Sales Tax on Food*, Iowa Dept. of Rev. <https://tax.iowa.gov/iowa-sales-tax-food> (last visited May 11, 2015).

⁵³ *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

⁵⁴ *Id.* at 443-45.

⁵⁵ California grocers, restaurants and other distributors of eggs are constrained from buying out-of-state eggs if they are non-compliant with AB 1437. These lost sales by commercial distributors usually would not result in a loss of state sales taxes in the originating state, however, because they would be exempt from sales tax, which typically is only charged at retail to the end user at the point of sale, not in the chain of distribution and not by the state of origin. *See generally, Sales Tax Exemptions Exist in Every State*, BUSINESS OWNER'S TOOLKIT (May 24, 2012), www.bizfilings.com/toolkit/sbg/tax-info/sales-taxes/some-transactions-exempt-from-sales-tax.aspx.

⁵⁶ *North Dakota v. Heydinger*, 2014 WL 1612331, at 3 (D. Minn. Apr. 18, 2014).

⁵⁷ Ch. 136, art. 5, § 3. Minn. Stat. § 216H.03, subd. 3(2007).

emissions contrary to NGEA.⁵⁸ Thus, like AB 1437 for egg sales into California, the in-state standard on emissions would dictate the terms of Minnesota contracts and delivery of power from out of state. Buyers could be exempt from the out-of-state purchase restrictions if they could show offsetting carbon dioxide reduction projects.⁵⁹ Plaintiffs included the State of North Dakota, along with the Industrial Commission of North Dakota, the Basin Electric Power Cooperative, the North American Coal Corporation, and others.⁶⁰

As in *Missouri v. Harris*, Defendants in *North Dakota v. Heydinger* argued that Plaintiffs did not have standing because they had not suffered an injury-in-fact. On the contrary, the court found that, “plaintiffs have standing to challenge the constitutionality of a law that has a direct negative effect on their borrowing power, financial strength, and fiscal planning.”⁶¹ Likewise, “an imminent loss of business resulting from a statute’s enforcement constitutes an injury-in-fact.”⁶² The court did not differentiate these harms between the various plaintiffs, which included private commercial parties along with the government entities. According to the court, only one plaintiff needs to establish standing, to satisfy subject matter jurisdiction.⁶³ It is not clear which *Heydinger* plaintiff had the necessary injury in fact according to the court, the private party or the state actors. What does seem clear, however, if just one egg producer had participated in the *Harris* case, its projected loss of business and financial strength by complying with AB 1437 could have justified standing and salvaged the case for all the state plaintiffs, at least according to the Minnesota court in *Heydinger*.

The court’s acceptance of North Dakota’s standing in *Heydinger* simply may have been a portend of its conclusion that the Minnesota law was unconstitutional under the Commerce Power.⁶⁴ If so, could that suggest that the *Harris* decision to dismiss the egg case on standing actually harkened to a conclusion that AB 1437 would pass constitutional scrutiny anyway? This crucial, substantive issue is discussed next.

III. The Commerce Power Analysis

Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States”⁶⁵ Though phrased as a grant of regulatory power to Congress, “[t]he Commerce Clause has long been understood to have a ‘negative’ aspect that denies the States the

⁵⁸ *Id.* at subd. 3 (2) (2007).

⁵⁹ *Id.* at subd. 4(a).

⁶⁰ 2014 WL 1612331 at 4.

⁶¹ *Id.* at *21 (quoting *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006)).

⁶² *Id.* Moreover, the court determined it was not necessary that any plaintiff have an actual contract in place to be empowered to sue. *Id.* at *22.

⁶³ *Id.* at * 23 n.8. Standing, or lack thereof, addresses the court’s subject matter jurisdiction. *Id.* at *20 n.6 (quoting *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003)).

⁶⁴ *Id.* at *32. The court concluded the Minnesota law violated the extra-territorial prescriptions of the Dormant Commerce Power because it could regulate generation and transmission of power wholly outside Minnesota since the nature of power transmission on a regional grid is “boundary-less.” *Id.* at *45.

⁶⁵ U.S. CONST. art. 1, § 8, cl. 3.

power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”⁶⁶ This Negative, or Dormant, Commerce Power is driven by concerns about “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”⁶⁷ Accordingly, the Commerce Clause has been interpreted to invalidate local laws that “impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”⁶⁸

The states challenging AB 1437 allege that its mandates impose just such protectionist burdens on out-of-state egg sellers. In order to protect California egg producers from the competitive disadvantage that would come from their Prop 2 compliance, AB 1437 ‘levels the playing field’ by requiring all eggs sold for human consumption in California to originate under conditions that comply with Prop 2.⁶⁹

To evaluate challenges under the Dormant Commerce Clause, a court first must determine whether “a state statute directly regulates or discriminates against interstate commerce.”⁷⁰ A discriminatory law, typically, is *per se* invalid if it provides “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁷¹ Such a law can only survive constitutional scrutiny if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”⁷² As will be explained next, AB 1437 is not vulnerable to such a complaint of discriminatory treatment.

A. Discrimination Against Interstate Commerce

Agricultural products have been at issue in some classic Dormant Commerce Power cases. For example, in *Dean Milk Co. v. City of Madison*, Madison, Wisconsin banned all sales of milk not produced within a five-mile radius of the city center.⁷³ The lower courts upheld the ordinance as a valid method to promote “convenient, economical, and efficient plant inspection,”⁷⁴ an appropriate goal of regulation, according to the Court.⁷⁵ Nevertheless, the U.S.

⁶⁶ *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994).

⁶⁷ *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

⁶⁸ *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994).

⁶⁹ First Amended Complaint 3.

⁷⁰ *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

⁷¹ *United Haulers Assn, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

⁷² *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of State of Or.*, 511 U.S. 93, 101 (1994)).

⁷³ 340 U.S. 349, 350 (1951).

⁷⁴ *Id.* at 352.

⁷⁵ *Id.* at 353.

Supreme Court struck down the law as discriminatory and protectionist of in-locale dairies over outsiders.⁷⁶ The city could insure safety and quality of milk without a ban, by charging producers the cost of sending Madison inspectors to their facilities, for instance, or by relying on the inspection by public health officials in the producers' jurisdictions.⁷⁷

By contrast, a complete ban on imported fish bait was upheld in *Maine v. Taylor*.⁷⁸ Maine had an interest in the health of its aquaculture economy.⁷⁹ In particular,

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. Further, 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.⁸⁰

In larger livestock, such as cattle and horses, this kind of foreign contamination is prevented with testing and temporary quarantines.⁸¹ But those measures were not possible or realistic with the baitfish because of their small size and large quantities. Inspection for parasites would destroy the product.⁸² Further, no scientifically acceptable standard for statistical sampling had been developed for baitfish, as was available for larger fish like salmon and trout.⁸³ A ban was the appropriate option to protect Maine's local interest in its native fish species and aquatic ecosystems.⁸⁴

Neither of these examples of direct discrimination of an out-of-state product corresponds to California's egg mandate. AB 1437 does not target interstate commerce for different treatment to create an advantage for in-state product or producers as in *Dean Milk*. AB 1437's mandates are imposed on all sales, and contracts for sale of eggs in California, for human consumption in California, regardless of whether the eggs are produced in state or out of state.⁸⁵ All buyers and

⁷⁶ *Id.* at 354.

⁷⁷ *Id.* at 355-56.

⁷⁸ 477 U.S. 131 (1986).

⁷⁹ *Id.* at 141.

⁸⁰ *Id.*

⁸¹ *See generally*, 9 C.F.R §71.1 -.22 (2015) regarding the interstate transportation of animals, including poultry.

⁸² 477 U.S. at 141.

⁸³ *Id.* at 142.

⁸⁴ "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Id.* at 148.

⁸⁵ *See supra* note 2. This focus in AB 1437 on in-state purchasers, their subsequent in-state sales and in-state consumption, overcomes any complaint that the law is extra-territorial in its reach, which could also violate the Dormant Commerce Power. *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989). An extra-territorial statute directly controls commerce occurring wholly outside the state. While AB 1437 requires egg producers everywhere to

distributors of eggs in California must insure their purchases and sales comply with the law's crate mandates if they want to sell eggs for human consumption in the state. Thus, the law applies to in-state purchasers and their subsequent in-state sales of eggs for in-state consumption. The law's implications for producers are identical whether the producer is in state or out-of-state. AB 1437 can overcome a complaint that it is *per se* invalid because it does not differentiate in its treatment based on place of origin for the product.

A recent Ninth Circuit decision regarding regulation of *foie gras* sales in California supports the conclusion that AB 1437 does not discriminate against interstate commerce.⁸⁶ The California law in question in *Canards* prohibits the sale of *foie gras* in California if it has been produced by force-feeding ducks or geese to enlarge their livers. Canadian and other producers claimed the law violated the Negative Commerce Clause by discriminating against their interstate production and sales.⁸⁷ The court disagreed because the law applied equally to all in-state sales regardless of where the *foie gras* was produced.⁸⁸

The challengers in *Canards* also alleged that California law violated the Negative Commerce Power because it was wholly extra-territorial in its reach and a direct regulation on out-of-state commerce.⁸⁹ They asserted that the direct regulation of extra-territorial conduct was apparent in the two-pronged construction of the statute at issue.⁹⁰ Section 25981 prohibits force-feeding birds in California to enlarge their livers for increased *foie gras* production.⁹¹ Additionally, section 25982 prohibits the sale of any force-fed product in the state.⁹² This statutory construct in *Canards* mirrors the interplay between the California Prop 2 voter initiative and AB 1437. Prop 2 prohibits the battery cage housing of egg laying hens in California (as well as close confines for veal calves and swine).⁹³ AB 1437 is the statutory follow up that prohibits all egg sales in the state that do not comply with Prop 2 mandates. The *Canards* challengers claimed the two-pronged approach of the *foie gras* statutory scheme proved that the § 25982 sales ban targeted interstate commerce. They argued that § 25982 was unnecessary to protect

comply or forego California sales, its direct control is only on purchases and sales of eggs in California. *See also*, Brown-Forman, *supra* note 70 at 582-84. One commentator contends that the extraterritorial doctrine is dead and unlikely to be revived any time soon. Brannon P. , *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 980(2013). In particular, "it is not impermissible extraterritorial legislation to require out-of-state sellers to comply with state law when vending their products in the regulating state." *Id.* at 990. This characterization exactly describes the scope of AB 1437. In *Heydinger*, *supra* note 56, the Minnesota court provided an extensive analysis that the extra-territoriality constraint on states under the Dormant Commerce Power is alive and well. 2014 WL 1612331 at 43-47.

⁸⁶ Assn des Eleveurs de Canards et D'oies du Quebec v. Harris, 729 F.3d 937 (9th Cir. 2013) *cert. denied* 135 S. Ct. 398 (2014) (hereinafter "*Canards*").

⁸⁷ *Id.* at 947-49. The *Canards* challengers also unsuccessfully claimed the *foie gras* statute was unconstitutionally vague. *Id.* at 946-47. This is another similarity to the unsuccessful Prop 2 challenges. *See supra* note 3.

⁸⁸ *Id.* at 948.

⁸⁹ *Id.* at 949.

⁹⁰ *Id.*

⁹¹ Cal Health & Saf Code § 25981 (2015).

⁹² *Id.* at § 25982.

⁹³ *See supra* notes 10 through 31 and accompanying text.

humane duck treatment in California because that was accomplished already in § 25981. Thus, § 25982 targets interstate producers.⁹⁴

The Ninth Circuit disagreed and said the challengers “misinterpret the interplay” between the two provisions.⁹⁵ The first provision (like Prop 2) regulates animal treatment behavior in the state. “But for § 25981, a California producer could force feed ducks in California, and then sell *foie gras* outside of California.”⁹⁶ Section 25981 (like Prop 2) prohibits that behavior. Accordingly, § 25981 (like Prop 2) “serves an entirely different purpose” than regulating sales of product made by the offending, in-humane methods.⁹⁷ Those sales are the scope of the second prong of the *foie gras* statutory scheme (and of AB 1437 for eggs). Accordingly, the Ninth Circuit said the sales ban in §25982 was not directed at out-of-state producers, only at in-state sales of offending product.⁹⁸ This same analysis should apply to a challenge to AB 1437.

The Dormant Commerce Power prohibits state laws that discriminate in their treatment or their effects.⁹⁹ The states challenging AB 1437 contend that it was motivated only by an illegitimate interest to protect California egg producers from the price competition they would face if out-of-state producers could continue to access the state market without meeting the stricter demands of Prop 2. In other words, the real effect of the statute is to strip out of state sellers of their competitive advantage to produce at a cheaper price, unfettered by the Prop 2 cage mandates. This contention is supported by references in AB 1437’s legislative history that the law was necessary to “level the playing field” for in state egg producers.¹⁰⁰

The “level playing field” argument sounds similar to the successful contention by Washington apple growers in *Hunt*.¹⁰¹ In that case, a North Carolina law required out of state growers to remove from their packaging any mention of grading standards that applied to the apples, other than the federal standards. Washington had its own grading system for apples, above and beyond the federal grades.¹⁰² The Washington growers argued the real effect of the North Carolina law was to deny their competitive advantage to market based on their state’s (allegedly) superior grading standards.

California cannot deny the unfortunate “level playing field” expression of an apparent protectionist motive in AB 1437’s legislative history.¹⁰³ But in *Hunt*, “[t]he first, and most

⁹⁴ 729 F. 3rd at 949.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 949.

⁹⁹ *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 350-51 (1977).

¹⁰⁰ *See supra* notes 29 through 31 and accompanying text.

¹⁰¹ *Supra* note 99.

¹⁰² 432 U.S. at 336.

¹⁰³ At least one commentator recommends differentiating between statutory purpose and legislators’ motives in constitutional cases. *See* Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1 (2007). “A statutory purpose - or objective - might be different than the motives of the legislators who enact the statute.” *Id.* “While the use of actual purpose may be more theoretically justifiable under any level

obvious [effect] is the statute's consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected."¹⁰⁴ Thus, unlike AB 1437, this unconstitutional regulation in *Hunt* was not one that "leveled" the playing field. As the Court noted, the North Carolina law created additional costs for Washington producers to strip indicia of the Washington grading before they could sell in North Carolina. North Carolina's sellers bore no such cost in that state where no state grading was in effect. In *Hunt*, the unconstitutional "disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute."¹⁰⁵ As such, the discriminatory effect in *Hunt* is not the result of the market being leveled, but because North Carolina added a burden on outsiders that its own growers did not share. This is not the level playing field California lawmakers described when they sought to make the local burdens of Prop 2 applicable to all egg sellers in California, regardless of place of origin of their eggs.

Nevertheless, *Hunt* goes on to describe the competitive advantage that North Carolina stripped of the Washington growers by not allowing them to market under the perceived superior grading system in Washington.¹⁰⁶ This could be analogous to the competitive price advantage AB 1437 strips from the out of state egg sellers when California imposes its cage mandates on them. Of course, this would be a somewhat perverse application of *Hunt*. North Carolina's prohibition on state apple grading denied the state apple market indicia of superior quality the Washington apples represented.¹⁰⁷ This is the opposite effect of AB 1437, which purports to improve the safety of eggs. As will be discussed below in Part IV, it is questionable whether states like Missouri can claim they are protecting a legitimate competitive advantage when that advantage derives from food being cheaper because it is potentially less safe.¹⁰⁸

If a statute regulates evenhandedly and focuses on in-state sales only, the Dormant Commerce Clause analysis next "examines whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."¹⁰⁹ The alleged burden from AB 1437 on the interstate egg market is discussed next.

of heightened scrutiny, reliance upon motive evidence to prove actual purpose enhances the danger that courts will engage in the pseudo-psychic art of inventing governmental purpose from a skimpy jumble of motive evidence." *Id.* at 5. Another explains that "[i]nvalidating laws on the basis of allegedly unconstitutional motives of legislators has a checkered history in constitutional law. Brannon, *Reconstructing the Dormant Commerce Doctrine*, 50 WM. & MARY L. REV. 417, 502 (2008). Justice Scalia has been a voice in steering the Court away from such analyses. It "is virtually impossible to determine the singular 'motive' of a collective legislative body, ... and this Court has a long tradition of refraining from such inquiries." *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring). In *Maine v. Taylor*, *supra* notes 78 through 84 and accompanying text, the Court eschewed the argument that a protectionist-sounding remark in the legislative history rendered otherwise legitimate justifications for the fish bait ban a sham and mere. 477 U.S. at 149.

¹⁰⁴ 432 U.S. at 351.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 351-52.

¹⁰⁷ *Id.*

¹⁰⁸ *See infra* notes 190 through 192 and accompanying text.

¹⁰⁹ *Brown-Forman*, *supra* note 70 at 579.

B. Burden on Interstate Commerce

Non-discriminatory state laws have been examined under a balancing test established in *Pike v. Bruce Church, Inc.*¹¹⁰ Under *Pike*, a state regulation is upheld unless the burden it imposes upon interstate commerce is “clearly excessive in relation to the putative local benefits.”¹¹¹

1. Are the Burdens on Commerce from AB 1437 Excessive?

First, when assessing a state law burdens on interstate commerce, it should be acknowledged that “several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations.”¹¹² Thus, it seems that the real potential burden on interstate commerce is from discriminatory state laws, which the foregoing analysis of AB 1437 reveals is not applicable here. Further, the very process of courts weighing economic interests of interstate participants against states’ public policies has come under scrutiny and criticism.¹¹³ For example, in *Kentucky v. Davis*, Justice Scalia has complained that *Pike*’s weighing of benefits versus burdens “is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines.”¹¹⁴ *Kentucky v. Davis* may be limited in its applicability to many Dormant Commerce Clause cases, including the challenge to AB 1437, because of a significant factual distinction. Kentucky exempted interest on its in-state municipal bonds from its state income tax, while taxing interest on other states’ and municipalities’ bonds. As a bond issuer, the Court focused its analysis on the state as a “market participant”¹¹⁵ in interstate commerce. “This ‘market-participant’ exception reflects a ‘basic distinction . . . between States as market participants and States as market regulators,’ [t]here [being] no indication of a constitutional plan

¹¹⁰ 397 U.S. 137 (1970).

¹¹¹ *Id.* at 142 (1970).

¹¹² *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12. (1997). The Court upheld Ohio’s differential tax treatment at issue in this case because the parties differently taxed were not similarly situated in the marketplace. *Id.* at 310. After concluding the law was not discriminatory, the analysis ended without any *Pike* balancing.

¹¹³ See generally David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1 (2007). Day concluded that it bodes ill for states to effectuate their policies when the discrimination test is expanded and the balancing test absorbed in it, because the discrimination test is stricter and harder to satisfy. *Id.* at 51.

¹¹⁴ *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 360 (2008). Justice Scalia has announced that he would only vote to enforce the negative Commerce Power, in deference to *stare decisis*, in two situations: (1) when a state law facially discriminates against interstate commerce, and (2) when a state law is indistinguishable from a type of law previously held unconstitutional by the U.S. Supreme Court. *Gen. Motors Corp. v. Tracy*, 519 U.S. at 312 (Scalia concurring) (citing [West Lynn Creamery, Inc. v. Healy](#), 512 U.S. 186, 210, 129 L. Ed. 2d 157, 114 S. Ct. 2205 (1994) (Scalia concurring) and [Intl Containers Int’l Corp. v. Huddleston](#), 507 U.S. 60, 78, 122 L. Ed. 2d 421, 113 S. Ct. 1095 (1993) (Scalia concurring in part and concurring in judgment)).

¹¹⁵ *Id.* at 339.

to limit the ability of the States themselves to operate freely in the free market."¹¹⁶ In other words, the differential tax treatment is inherent in the financial market for government-issued bonds, and is "a far cry from the private protectionism that has driven the development of the dormant Commerce Clause."¹¹⁷ Thus, the Court refused to remand the case for any further analysis under *Pike*. Despite this clear emphasis in *Kentucky v. Davis* on the state as market participant, one commentator contends that the case portends a broadening skepticism within the Supreme Court for the *Pike* balancing test.¹¹⁸

The Seventh Circuit also has refused to apply the *Pike* balancing test to a non-discriminatory law. The court categorized three levels of state or local laws that affect interstate commerce: those that explicitly discriminate (disparate treatment);¹¹⁹ those that appear neutral between the states but bear more heavily on out of state parties than local commerce (disparate impact);¹²⁰ and laws that affect interstate commerce but "do not give local firms any competitive advantage over those located elsewhere."¹²¹ For the third category, "the normal rational-basis standard is the governing rule. ...Unless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification."¹²² In other words, "*Pike* is not universally applicable."¹²³

National Paint is especially germane to the question whether *Pike* requires balancing to analyze AB 1437. An Illinois district court¹²⁴ applied *National Paint* to uphold a Chicago *foie gras* rule¹²⁵ identical to California's that was upheld in *Canards*.¹²⁶ As was noted above, these restrictions on the sale of *foie gras* unless it has been produced consistent with the local mandate are directly analogous to the AB 1437 restriction on sale of eggs that do not meet California's cage mandate. In upholding the Chicago law in the face of a Dormant Commerce Clause challenge, the Illinois district court found that the law was non-discriminatory in purpose and effect.¹²⁷ As such, applying *National Paint*, the court dismissed the challenge without further analysis under *Pike*'s balancing test.¹²⁸

¹¹⁶ *Id.* (quoting *Reeves, Inc. v. Stake* 447 U.S. 429, 436 (1980)).

¹¹⁷ *Id.* at 353.

¹¹⁸ Paul T. Stewart, *Pike Balancing: Vulnerabilities of State Greenhouse Gas Regulations and Possible Solutions*, 44 *ELR* 10874, 76-77 (2014).

¹¹⁹ For a discussion of AB 1437 as disparate treatment, *see supra* notes 73 through 98 and accompanying text.

¹²⁰ For a discussion of the disparate effects of AB 1437, *see supra* notes 100 through 109 and accompanying text.

¹²¹ *National Paint & Coatings Assn v. City of Chicago*, 45 F.3d 1124 (1995).

¹²² *Id.* at 1131-32.

¹²³ *Id.* at 1131. The Seventh Circuit characterized the Arizona in-state cantaloupe packing mandate in *Pike* to be one of disparate impact. *Id.* at 1131.

¹²⁴ *Illinois Restaurant Assoc. v. Chicago*, 492 F. Supp. 2d 891(N.D. Ill. 2007).

¹²⁵ CHICAGO, ILL. MUN. CODE § 7-39-002 (2006).

¹²⁶ *See supra* notes 86 through 98 and accompanying text.

¹²⁷ 492 F. Supp. 2d at 898.

¹²⁸ *Id.* at 901-02.

Notwithstanding the questionable continuing viability of the *Pike* balancing approach to Dormant Commerce Clause cases, AB 1437 should withstand a balancing analysis. There is no question that AB 1437 imposes additional costs on egg producers to comply if they want to sell eggs in California. Either chickens have to be removed from existing facilities to reach the larger mandated cage space per bird, thus lowering egg production and sales, or facilities have to be expanded to accommodate more cages. Expansion poses additional costs for location space (if available) and crate building. California voters were warned that passage of Prop 2 would raise the cost of eggs by .01 each.¹²⁹ In the first month after going into effect, that increase was actually 16 cents per egg.¹³⁰ This suggests that the egg producers are passing along their compliance costs to California consumers who are absorbing it in their prices they pay.¹³¹ In that case, arguably, AB 1437 represents no compliance costs on interstate producers, only on California consumers who are absorbing its costs in price increases.¹³² In fact, a recent National Egg Review from the U.S. Department of Agriculture (USDA) suggests a stable national egg market, with nothing aberrant about the California market either:

New York prices are 4 cents higher on larger sizes and Medium. Regional prices are 5 to 11 cents higher on Extra Large, up 2.5 to 11 cents on Large, 3 to 11 cents higher on Medium. California prices are 5 cents higher on Jumbo, Medium and Small, unchanged on the balance. The undertone is steady to higher in California, firm to sharply higher regionally. Offerings are generally light to moderate. Retail and food service demand is light to moderate, however fairly good to good in California as operators refill following the holiday weekend. Supplies are usually light to moderate in the Northeast and Southeast, light to moderate in Midwest, moderate in the South Central and California. Market activity is moderate to active in California, generally moderate elsewhere. Breaking stock supplies are light to about adequate to cover full-time to reduced breaking schedules. Light type fowl offerings are light to sufficient; demand is light to moderate.¹³³

¹²⁹ See *supra* note 29 and accompanying text.

¹³⁰ *California's Scrambled Eggs*, Opinion, WALL STREET JOURNAL (Jan. 25, 2015), <http://www.wsj.com/articles/californias-scrambled-eggs-142232494>.

¹³¹ The *Wall Street Journal* also explained that per capita consumption of eggs is the highest since 1983 as consumers look for alternative sources of protein in the face of soaring meat prices. *Id.* Accordingly, the consumer price burden in California for eggs cannot be attributed exclusively to decreased supply from fewer laying hens in the wake of AB 1437.

¹³² Potentially, egg prices could go up across the United States in response to nation-wide compliance with California's mandate. In *Canards*, *supra* notes 86 through 98 and accompanying text, the 9th Circuit addressed national impact of the California *foie gras* law as an indication that the law was directly regulating interstate commerce. If federal regulation or a need for national uniformity in production were required, then a state law, effectively, could establish itself as the exclusive national standard and ban all other production under any other method. This could be unconstitutional according to the court, but no such facts were alleged in the case. 729 F. 3rd at 950. Whether federal law requires uniform egg production is discussed in Part IV regarding preemption.

¹³³ Egg Market News Report, U.S. Dept. Agric. (May 11, 2015), <http://www.ams.usda.gov/mnreports/pybshellegg.pdf>.

As was discussed above, the *Harris* court found the states' price impact claims too speculative to support standing.¹³⁴ The fact that no egg producer participated in the challenge to AB 1437 in *Harris* casts a large shadow on the claim of undue industry burdens.

Finally, the analysis of burdens on interstate commerce seemingly would be incomplete without some discussion of California's role in the national economy. Is it an undue burden on interstate commerce just because California is big and can make its economic muscle felt through its public policies? The challenging states argued that their egg producers could not afford to forego the California market without undue hardship to those producers and, by extension, to their state consumers and economies.¹³⁵ Does that mean a state with a small population could pass and enforce its own version of AB 1437 without any constitutional complaint because the small state's laws would have little economic impact? If so, does that not deny a large state like California, with a big consuming population, its basic sovereignty to enforce its public policies the same as a state with a smaller population?¹³⁶ It is well understood that California exercises considerable heft in moving public policy debates.¹³⁷ That natural impact should not be elevated to the level of an unconstitutional burden on interstate commerce.

[Differences in state law are generally considered one of the U.S. government's strengths because they provide for greater political accountability, public participation, and experimentation.

¹³⁴ See *supra* notes 42 through 45 and accompanying text.

¹³⁵ *Id.*

¹³⁶ According to one commentator, "Article V of the Articles of Confederation embraced sovereign equality among the states in their votes in the central government Congress by mandating that 'each State shall have one vote ... in determining questions in the United States in Congress assembled.' Here, no matter the geographic size, population or economic wealth of each state, the principle of one state, one vote, was adopted in recognition that otherwise state sovereignty equality would be disturbed." James E. Hickey, Jr., *Localism, History and The Articles of Confederation: Some Observations about the beginning of U.S. Federalism*, 9 IUS GENTIUM 5, 18 (2003). This principle carried over into the U.S. Constitution in equal voting for the states in the U.S. Senate. Proportionate voting in the U.S. House provides power based on population density. U.S. CONST., Art. I, §§ 2-3. Any Commerce Power analysis that gave large states less power to enforce their interests would turn this traditional balance upside down.

¹³⁷ For example, regarding greenhouse gas emissions regulation, one commentator explained, "both state and federal actors saw California's actions as the best route to generating nationwide action on climate change because, in the short term, collective adoption by other states of California's standards could effectively create national policy... ." Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1102 (2014). See also, Anthony L. Moffa and Stephanie L. Safdi, *Freedom from the Costs of Trade: A Principled Argument Against Dormant Commerce Clause Scrutiny of Goods Movement Policies*, 21 N.Y.U. ENVTL. L.J. 344, 399 (2014); Jonathon Specht, *Raising Cane: Cuban Sugarcane Ethanol's Economic and Environmental Effects on the United States*, 36 ENVIRONS ENVTL. L. & POL'Y J. 171, 206 (2013) (asserting that California's enormous 55-member delegation to the U.S. House of Representatives has the ability to influence national policy). "Marijuana legalization in California has made its way into national policy debates through state initiatives and direct democracy campaigns." Brooke Mascagni, *The Politics of Exclusion in California's Marijuana Reform Movement*, 15 UDC-DCSL L. REV. 33, 36 (2011). On a darker side, one author claims the national policy of Japanese American internments during World War II actually was politically motivated by California. Jonathon Simon, *Commentary: Ending Mass Incarceration is a Moral Imperative*, 26 FED. SENT. R. 271 (2014).

Therefore, the geographical size, population, diversity, and regionalism of the United States reinforce state sovereignty...¹³⁸

The *Pike* balancing test presumes validity of a state law unless its burdens are clearly excessive relative to local benefits underlying the challenged law. As Justice Scalia's "apples versus tangerine"¹³⁹ quip reflects, this balancing test often requires measuring economic burdens -- such as direct costs of producing eggs with fewer chickens in larger crates -- against benefits that are more difficult to quantify, such as humane animal treatment and food safety. This discussion of the alleged burdens on interstate commerce concludes with a discussion of the legitimate interests California can prove to support AB 1437.

2. California's Interests Underlying AB 1437

California can articulate at least two legitimate interests that underlie AB 1437: animal welfare and food safety. Both these interests were espoused as justifications for Prop 2, although the animal welfare concern was prominent in the Prop 2 election campaign.¹⁴⁰ These interests were resoundingly voiced when a large majority of California voters passed Prop 2.

Arguably, AB 1437 simply reinforces the clear public policy established by Prop 2. If eggs could be produced out of state without regard to Prop 2's expectations, then distributed in the state, California consumers would continue to be exposed to the food safety concerns presented by eggs produced in close confines. Further, the Prop 2 vote established California as a market where consumers expect that their food will be produced under certain humane conditions for the livestock. Without AB 1437, the will of the Prop 2 voters regarding animal welfare and food safety could not be ensured in the California egg market.

Further, without legislation like AB 1437, Prop 2 could be rendered a complete nullity, potentially, if California egg producers moved all operations out of state to avoid its mandates. Then few or none of the eggs sold in California would be safe from the health concerns of close confines for laying hens. Both the animal welfare and food safety expectations of the voters would be thwarted. In California, a successful voter initiative can only be nullified by another voter initiative.¹⁴¹ In passing AB 1437, the California Assembly merely protected its citizens' interest in seeing that Prop 2's stated objectives became reality.¹⁴²

¹³⁸ Jaime Serenity Boutwell, *Note: A Case of Unconstitutional Immigration: The Importation of England's National Curriculum to the United States*, 34 VAND. J. TRANSNAT'L L. 333, 359-60 (2001).

¹³⁹ See *supra* note 114 and accompanying text.

¹⁴⁰ See Part IA.

¹⁴¹ CAL. CONST., ART. II, §10(c). This portion of the California Constitution does allow legislative amendment or repeal of a voter initiative without voter approval if the initiative statute provides for it. Currently, the statute makes no such provision for legislative repeal without voter approval.

¹⁴² It is not surprising that a state like Missouri might fail to appreciate the goal of the California Assembly to enforce the will of its voters. Missouri has no requirement that a voter proposition be protected from subsequent legislative usurpation. Thus, when Missouri voters voted to outlaw inhumane dog breeding operations ("puppy mills,") the Missouri legislature repealed most of the voter initiative protections in subsequent legislation. Kenn Bell, *Missouri State Senate Overturns Puppy Mill Law Favored By Voters*, DOGFILES (Mar. 10, 2011), <http://www.thedogfiles.com/2011/03/10/missouri-state-senate-overturns-puppy-mill-law-favored-by-voters/>. Such an action would be unconstitutional in California.

Eventually, Missouri's Governor, Jay Nixon, negotiated a compromise law with legislators and animal welfare groups. Chris Blank, *All Things Animal in Southern California and Beyond*, LA TIMES (Apr. 28, 2011), <http://latimesblogs.latimes.com/unleashed/2011/04/missouri-governor-signs-compromise-on-voter-approved-prop->

Opponents attack AB 1437 on the merits of the food safety concerns about eggs produced in close confines that underlie it and Prop 2.¹⁴³ “When, however, the state claims that its regulation is an exercise of its police power, the state still has the burden of showing the significant health and safety benefits of the regulation, in order to tip the scale in favor of the regulation.”¹⁴⁴ The Dormant Commerce Power “is not to be avoided by ‘simply invoking the convenient apologetics of the police power.’”¹⁴⁵ Prop 2 opponents disputed the food safety concern about the potential for increased salmonella in the digestive system of hens in stressful laying conditions, like industry-standard battery cages.¹⁴⁶ Prop 2 opponents also contended that chickens that are allowed to roam outside may be exposed to avian (bird) flu, which can be transmitted to humans, thus presenting a different food safety concern of hens not in battery cages.¹⁴⁷

The amici that opposed the states’ challenge in *Harris* devoted their entire brief to the science behind the claim that close confines for laying eggs increase salmonella risk.¹⁴⁸ It references the U.S. Centers for Disease Control,¹⁴⁹ the U.S. Food & Drug Administration (FDA)¹⁵⁰ and numerous researchers.¹⁵¹ It also cites the European Food Safety Authority, which has banned battery cages for hens.¹⁵² The FDA premises its egg safety regulations on the number

[b-puppy-mill-cruelty-prevention-act.html](#). Nevertheless, a 2014 report showed that over 22 of the Humane Society’s list of 101 worst dog breeding operations were in Missouri, the most in the United States. Neighboring states, Kansas and Nebraska, followed with thirteen and twelve, respectively. Chris Oberholtz, Missouri, Kansas Top National List of Worst Puppy Mills, KCTV5 NEWS (June 5, 2014), <http://www.kctv5.com/story/25440415/missouri-kansas-top-national-list-of-worst-puppy-mills>. The report also notes that scrutiny as a result of new laws had resulted in fifteen of the worst operations from the preceding list closing. It was not clear if all those were located in Missouri.

¹⁴³ First Amended Complaint 13-16.

¹⁴⁴ Donald P. Rothschild, *A Proposed "Tonic" with Florida Lime to Celebrate our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. MIAMI L. REV. 829, 842 (1984).

¹⁴⁵ *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 779-80 (1945) (quoting *Kansas City Southern R. Co. v. Kaw Valley District*, 233 U.S. 75, 79 (1914)).

¹⁴⁶

“Nearly all California farmers follow the California Department of Food and Agriculture’s California Egg Quality Assurance Program, assuring the highest standards for FOOD SAFETY and PUBLIC HEALTH. This program has resulted in the virtual elimination of food-borne illness, like *Salmonella*, in California eggs. In fact, according to the California Department of Food and Agriculture, no case of *Salmonella* has been traced to California egg production in nearly a decade.” *Supra* note 21.

See also First Amended Complaint 13-14.

¹⁴⁷ *See supra* note 21.

¹⁴⁸ *State of Missouri v. Harris*, Proposed Amici Curiae Brief of Center for Food Safety, et. al., Case No. 2:14-cv-00341-KJM-KJN (Aug. 22, 2014).

¹⁴⁹ *Id.* at 3, 5, 6.

¹⁵⁰ *Id.* at 4, 8.

¹⁵¹ *Id.* at 4, 5, 8, 9, 10, 11, 12.

¹⁵² *Id.* at 6, 9.

of hens at a farm.¹⁵³ This support reflects that legislators' objectives in passing AB 1437 go well beyond mere lip service to the state's police power regarding food safety. Although alternative arguments can always be espoused when science is new and emerging, as food safety understanding is,¹⁵⁴ the concern for salmonella exposure from hens laying in close confines has enough legitimate support to justify a state legislative response.

An additional, legitimate food safety issue posed by concentrated animal confines is the groundwater runoff concern. As was noted above, concentrated animal facilities produce large amounts of feces that carry pathogens like salmonella and e-coli.¹⁵⁵ These pathogens move from the feces to other food sources through water, such as ground water runoff, but also when contaminated water gets on equipment, tools, and workers shoes and hands.¹⁵⁶ This food safety concern goes beyond the potential that eggs may be contaminated. This concern, that is well-documented and understood in the produce industry, literally runs to California's abundant produce fields that can get polluted with contaminated water. Thus, while the Prop 2 campaign did not emphasize the issue of water pollution from concentrated animal facilities, it was a stated interest and is still a valid food safety concern.

Nevertheless, as a justification for AB 1437, the runoff concern is weak. While concentrated egg production facilities in California create runoff concerns for California produce fields, the same facilities in Iowa or Missouri do not threaten California produce fields. Accordingly, the only way that out-of-state concentrated egg production facilities threaten food safety from fecal contamination is that the eggshells would carry the fecal pathogens.¹⁵⁷ Since consumers don't eat eggshells, pathogens on shells can only contaminate food through cracks in the shells. "This used to be a common problem. However, stringent procedures for cleaning and inspecting eggs were implemented in the 1970s and have made illness from *Salmonella* caused by chicken feces on the outside of egg shells extremely rare."¹⁵⁸ Thus, the runoff water contamination concern from out-of-state concentrated poultry operations becomes a much more remote food safety concern to support AB 1437 mandates on egg producers who want to sell within California.

¹⁵³ 21 C.F.R. § 118.1 (2015). See Part IV for a discussion of these FDA regulations in conjunction with the challengers' federal preemption argument against AB 1437.

¹⁵⁴ One illustration of the relative newness of food safety law enforcement: until passage of the 2011 Food Safety Modernization Act, Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885, 3947 (2011) (codified in scattered sections of 21 U.S.C.), the FDA had very little authority to mandate farm safety activity. All its authority merely supported best industry practices and allowed it to respond to contamination after-the-fact. See Rita-Marie Cain Reid & Amber Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L & POL. 31, 51-53 (2015).

¹⁵⁵ See *supra* notes 5 through 7 and accompanying text.

¹⁵⁶ *Id.*

¹⁵⁷ Salmonella Serotype Enteritidis, Centers for Disease Control and Prevention (Nov. 23, 2010), http://www.cdc.gov/nczved/divisions/dfbmd/diseases/salmonella_enteritidis/.

¹⁵⁸ *Id.* This food safety concern has been addressed in federal regulations for washing eggshells and protecting against cross contamination when the eggs are produced in farms with more than 3000 laying hens. 21 C.F.R. § 118 (2015).

Even if the food safety interests underlying Prop 2 and AB 1437 were considered shaky by a court hearing a Dormant Commerce Power challenge, the animal welfare interest behind the laws should remain paramount. As noted above, Prop 2 advocates touted the animal welfare concern¹⁵⁹ and California voters overwhelmingly decided on this standard for animal treatment. Prop 2 opponents' only defense was that treatment and housing are separate issues.¹⁶⁰ Admittedly, inhumane treatment can occur in any housing environment. But, as noted above, that comeback ignores the concern that voters considered the cramped housing itself to be inhumane treatment.

Other states have reached a similar conclusion for other animal food sources.¹⁶¹ Likewise, Europe banned the battery cages for chickens in 2012, after a 12-year phase out.¹⁶² Accordingly, the policy is defensible on humane treatment grounds, even if it is not the U.S. industry norm. As Justice Brandeis once opined, the states are the laboratories where new social and legal norms are tested.¹⁶³ According to the Ninth Circuit, "[i]f successful, those experiments may often be adopted by other states without Balkanizing the national market or by the federal government without infringing on state power."¹⁶⁴ AB 1437 imposes one such new norm on any egg producer who wants access to the California market and its consumers and voters. California has a right to enforce its state policy on sales within its borders, of a product to be consumed within its borders. Presumably, this is a right the U.S. system of federalism protects, a right that is not usurped by the Dormant Commerce Clause.¹⁶⁵

As was noted above regarding discriminatory treatment and effects, the states challenging AB 1437 contend that it was motivated only by an illegitimate interest to protect California egg producers from the price competition they would face if out-of-state producers could continue to access the state market without meeting the stricter demands of Prop 2. This contention is supported by references in AB 1437's legislative history that the law was necessary to "level the

¹⁵⁹ See *supra* notes 8 through 15 and accompanying text.

¹⁶⁰ See *supra* note 23 and accompanying text.

¹⁶¹ See *supra* note 28 and accompanying text.

¹⁶² See James Andrews, *European Union Bans Battery Cages for Egg-Laying Hens*, FOODSAFETYNEWS (Jan. 19, 2012), <http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/#.VVnz9GZ8iLM>.

¹⁶³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁶⁴ *Rocky Mountain Farmers' Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013), *cert. denied* 134 S. Ct. 2884 (2014). In this case the appellate court concluded that California's Low Carbon Fuel regulations of ethanol did not discriminate against interstate commerce because they were based on carbon density, regardless of origin, even though that carbon density differed depending on place of origin. *Id.* at 1089-90. It remanded the case for the district court to evaluate the regulations' burdens on commerce under the *Pike* test, in light of California's legitimate interests in lowering greenhouse gas emissions. *Id.* at 1105. Thereafter, Plaintiffs amended their complaint and dropped the "*Pike* balancing" claim (as well as a preemption claim not discussed here). *Rocky Mt. Farmers Union v. Goldstene*, 2014 U.S. Dist. LEXIS 171812, *33 (E.D. Cal. Dec. 10, 2014).

¹⁶⁵ Moffa and Safdi, *supra* note 137. The authors discuss goods movement from the environmental concern of freight transport, air pollution and emissions control. *Id.* at 55-87. But they also discuss the states' rights to promote local food production, *id.* at 395-97, and specifically California's right to enforce the egg laws. *Id.* at n. 281.

playing field” for in state egg producers.¹⁶⁶ In the face of seemingly legitimate interests in food safety and animal welfare discussed above, the question for a court should be whether an interest in a level playing field is purely illegitimate and discriminatory, to override the defensible legitimate interests.

Arguably, the “level playing field” comments reflect more than protectionism for California egg producers against price competition from out of state. The California Assembly also has a valid interest in protecting its agriculture economy. Without AB 1437, California egg producers could circumvent Prop 2’s demands by moving production facilities out of state, only to ship the eggs back into the state for sale. Not only would this circumvent the food safety and animal welfare interests of the state, but also could result in increased prices for California egg consumers, not from Prop 2 compliance, which voters willingly and knowingly accepted. Instead, prices would rise simply from the increased cost of moving production out of state, only to have eggs that do not meet the voter’s expectations sold back into the state.

Further, this potential flight of California egg production facilities to neighboring states could disrupt the economies of those California locales where such facilities are located. According to California’s Department of Food and Agriculture,

without a level playing field with out of state producers, companies in California will no longer be able to operate in this state and will either go out of business or be forced to relocate to another state. This will result in significant loss of jobs and reduction of tax revenue in California.¹⁶⁷

Thus, the “level playing field” AB 1437 provides does not merely protect California egg producers from outside price competition. It also protects larger economic interests of the state to maintain this important sector, while enforcing the will of the voters. “Given the substantial national political and economic power of corporations that operate in this interstate space, regulations that support healthy local economies seem like a valid counterbalance.”¹⁶⁸

Of course, the Commerce Power is an express grant of power to federal legislators to protect interstate commerce through federal legislation. Arguably, the best protection against undue state burdens comes when Congress imposes its federal mandates for food safety. Those federal mandates for eggs and their preemptive impact, if any, on California’s AB 1437 are discussed next.

IV. Preemption

The plaintiffs in *Harris* argue that the federal Egg Products Inspection Act (EPIA)¹⁶⁹ preempts AB 1437.¹⁷⁰ For eggs moving in interstate commerce, this federal law expressly

¹⁶⁶ See *supra* notes 28 through 31 and accompanying text.

¹⁶⁷ CDFA Enrolled Bill Report for AB 1437 at 5.

¹⁶⁸ Moffa and Safdi, *supra* note 137 at 384. The authors cite Amazon.com as an example of the current strength of interstate commerce. *Id.* The online giant can outcompete local retailers by avoiding state sales tax collection, a loophole under the Commerce Power. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). See generally Rita M. Cain, “The Domestic and International Landscape for Internet Taxation,” 13 *Global Focus* 49 (2001).

¹⁶⁹ 21 U.S.C. §§ 1031-1056 (2015).

preempts state or local laws that “require the use of standards of quality, condition, weight, quantity, or grade which are in addition to or different from the official Federal standards.”¹⁷¹ Plaintiffs assert that AB 1437 regulates the quality and condition of eggs in conflict with the federal standards.¹⁷²

Plaintiffs acknowledge this preemption claim is in the alternative to their Dormant Commerce Clause allegations. If not, they would be trying to have it both ways on the food safety interest underlying AB 1437. On the one hand, they contend that the food safety justifications for AB1437 are a pretext to mask economic protectionism for California egg producers.¹⁷³ They argue that the food safety benefits of eliminating concentrated confinement cannot be proved.¹⁷⁴ On the other hand, they contend that federal law exclusively governs egg safety and wholesomeness.¹⁷⁵ Accordingly, because AB 1437 regulates egg *safety*, federal food safety law preempts it, so the argument goes.

Obviously, either AB1437 is a food safety law, and it potentially falls within the scope of federal safety law to be preempted by it. Or, AB 1437’s food safety justification is a pretext, and it does not represent any conflicting food safety standard to be preempted by federal law. Unlike their position that AB 1437 will result in both price increases and price declines,¹⁷⁶ the states preemption argument “In the Alternative” recognizes that they are arguing both sides of the safety issue. The district court did not address the preemption argument when it dismissed the case for lack of standing, but this analysis will critique its merits.

The EPIA governs both shell eggs and egg products.¹⁷⁷ The stated purpose of the law regarding shell eggs is to provide “restrictions upon the disposition of certain qualities of eggs, and uniformity of standards for eggs, and otherwise regulate the processing and distribution of eggs to prevent the movement or sale for human food, of eggs ... which are adulterated or misbranded or otherwise in violation of this chapter.”¹⁷⁸

Much of the EPIA focuses on inspection of plants where egg products are processed.¹⁷⁹ None of these provisions apply to shell egg production facilities that are the subject Prop 2 and AB 1437’s hen housing mandates. The federal Act also prohibits buying, selling, offering to sell

¹⁷⁰ First Amended Complaint 24.

¹⁷¹ 21 U.S.C. § 1053(b) (2015).

¹⁷² First Amended Complaint 24. The plaintiffs assert both express and implied preemption by the federal statute without explaining the different alleged bases for each.

¹⁷³ First Amended Complaint at 13-15.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 17-19.

¹⁷⁶ *See supra* notes 42 through 45 and accompanying text.

¹⁷⁷ 21 U.S.C. § 1033 (f) & (g) (2015).

¹⁷⁸ 21 U.S.C. § 1032 (2015).

¹⁷⁹ *See* 21 U.S.C. § 1034-36 (2015).

“restricted” eggs¹⁸⁰ and defines restricted eggs to include those that are dirty, inedible, leaking, smashed or broken.¹⁸¹ Further, the Act defines an egg as “adulterated” “if it has been prepared, packaged, or held under unsanitary conditions “whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.”¹⁸² Thereafter, all prohibitions on adulterated eggs are in the context of their use in egg products at processing plants, not in their sale as shell eggs.¹⁸³

It is difficult to find any standards for shell eggs in this federal law that touch on the same subject as AB 1437. AB 1437 imposes no specific quality or safety standards or mandates for eggs, as the federal law does and as California law previously had done before passage of the federal act.¹⁸⁴ AB 1437’s mandates are only about hens and their housing requirements.

Nevertheless, a review of the federal regulations implementing EPIA reveals that the FDA effectuates egg safety, in part, by mandating standards for *hens’ housing*. For example, one regulation to address salmonella prevention on farms requires protecting against cross contamination when equipment and people move among poultry houses, preventing stray poultry, wild birds, cats, and other animals from entering poultry houses and monitoring for flies and rodents.¹⁸⁵ Another rule calls for cleaning and disinfection when new hens are introduced to a laying house or when an egg from the flock tests positive for salmonella.¹⁸⁶ Clearly, the FDA believes its authority under EIPA for egg safety extends to hens’ housing, the very subject of AB 1437. This would appear to support the preemption argument that the scope of the federal law encompasses AB 1437’s mandates. As such the EIPA’s express preemption provision would prevent California from imposing cage mandates for egg safety that the federal law does not.

Unfortunately for the states in *Harris*, a greater scrutiny of the FDA regulations implementing EIPA completely undermines their preemption defense. First, the foregoing FDA salmonella prevention regulations for poultry housing impose only the MINIMUM obligations on farms,¹⁸⁷ suggesting state regulating bodies could go further in imposing consistent salmonella protections. More importantly, the entire FDA rule expressly preempts only those state salmonella prevention requirements that are “less stringent” than the FDA’s.¹⁸⁸

¹⁸⁰ 21 U.S.C. § 1037(a)(1) (2015).

¹⁸¹ 21 U.S.C. § 1033(g)(8) (2015).

¹⁸² 21 U.S.C. § 1033(a)(4) (2015).

¹⁸³ See e.g., 21 U.S.C. § 1034(a) & (c), 1036 (a) and 1037(a)(4) (2015).

¹⁸⁴ Gina Elaine Dronet, *Federal Preemption of State Food Standards: The Egg Products Inspection Act as a Case in Point*, 11 U.C. DAVIS L. REV. 511, 513-15 (1978). This early analysis of preemption under the EIPA explains that Congress was targeting classic grading of eggs by California, such as Grade A, AA and B, with their separate requirements for air cell size, yolk size and tolerances. *Id.* at n. 23.

¹⁸⁵ 21 C.F.R § 118.4(b)(2)-(4) & (c) (2015).

¹⁸⁶ *Id.*

¹⁸⁷ 21 C.F.R. § 118.4 (2015).

¹⁸⁸

Accordingly, even if the scope of EIPA and AB 1437 were considered the same, because they both seek to effectuate egg safety, the FDA has construed EIPA's preemption as a floor, not a ceiling, on what states may do in that safety aim. The FDA preemption language seemingly torpedoed the states' preemption claim.

Any court analyzing the states' preemption argument should give strong judicial deference to the regulating agency's statutory interpretation, if the express language of the statute is ambiguous.¹⁸⁹ Thus, the question remains whether the express preemption in EIPA is unambiguous or is it open to the FDA's interpretation that the law establishes a floor from which the states may regulate?

Other language in the EIPA beyond the preemption provision supports the agency's prerogative to allow the states latitude in spite of the statute's express preemption. Congress found that

Unwholesome, otherwise adulterated, or improperly labeled or packaged products can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged products, to the detriment of consumers and the public generally. It is hereby found that all egg products and the qualities of eggs which are regulated under this chapter are either in interstate or foreign commerce, or substantially affect such commerce, and that that regulation by the Secretary of Agriculture and the Secretary of Health and Human Services, ***and cooperation by the States and other jurisdictions, as contemplated by this chapter***, are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.¹⁹⁰

Clearly, Congress empowered the FDA (under the Secretary of Health and Human Services)¹⁹¹ to work with the states to effectuate the health and safety goals of the law, in the face of the substantial effects on interstate commerce caused by unwholesome eggs. As such, it seems that the preemption provision in EIPA is part of a cooperative dynamic between federal regulators

Preemption. No State or local governing entity shall establish, or continue in effect any law, rule, regulation, or other requirement regarding prevention of SE in shell eggs during production, storage, or transportation that is less stringent than those required by this part.
21 C.F.R. § 118.12(d) (2015).

¹⁸⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). When evaluating whether an agency's interpretation of a statute is valid, a court must first ask if the language of the statute is clear. If so, the agency must follow the clear and unambiguous commands of the legislature. If a court determines that the statutory language is silent or ambiguous, however, then the court determines whether the agency's interpretation "is based on a permissible construction of the statute." A reviewing court should not impose its own construction of a statute in place of a reasonable interpretation provided by the agency but grant the agency's interpretation deference. *Id.* at 842-43.

¹⁹⁰ 21 U.S.C. § 1031 (2015) (emphasis added).

¹⁹¹ John P. Swann, *FDA's Origins*, US FOOD & DRUG ADMINISTRATION, ABOUT FDA, <http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm124403.htm> (last updated June 23, 2014).

and the states to protect food safety, as opposed to a set of exclusive federal mandates imposed on the states from Washington, D.C.¹⁹²

Further, in this cooperative regulatory environment, Congress expressly acknowledged that the sale of unwholesome eggs is the real culprit in burdening interstate commerce, especially when producers that shirk on food safety sell at cheaper prices. Accordingly, if California's cage mandate can lower the salmonella risk, then AB 1437's allegedly improper goal of protecting California egg producers from lower-priced, out-of-state eggs (by "leveling the playing field"¹⁹³) would actually seem to support the interstate commerce goals of the EIPA, not contravene them. Thus, EIPA's express preemption provision is amenable to the FDA's decision to establish a floor from which the states could set further, consistent safety measures regarding salmonella prevention.

Finally, the FDA regulations discussed above also bolster California's food safety interest underlying AB 1437. Based on an express exemption in the EIPA,¹⁹⁴ the FDA limited its egg safety requirements to facilities that house greater than 3000 hens.¹⁹⁵ This federal focus on larger production environments supports California's overarching defense to Prop 2 and AB 1437: the greater number of hens in a facility presents increased food safety concerns.

V. Conclusion & Recommendations

One approach to food safety that would sidestep future Commerce Power complaints would be stricter federal laws dictating animal welfare and food safety mandates. For example, the Humane Society of the United States, the main backer of Prop 2, is working with egg producers throughout the United States to pass federal legislation that would extend requirements like Prop 2 to the entire U.S. egg industry.¹⁹⁶

At the same time, however, federal lawmakers need to reject all attempts at express federal preemption of state efforts like California's Prop 2. One such example, the Protection of Interstate Commerce Act (PICA), a proposed amendment to the 2014 omnibus farm bill, would have preempted all state agriculture laws that require tougher safety or animal treatment standards than ones set by federal law.¹⁹⁷ PICA's sponsor, Steve King, represents Iowa, the largest egg producing state in the U.S.¹⁹⁸ PICA was a direct response to California's Prop. 2 and

¹⁹² Moffa and Safdi, *supra* note 137, characterize this as "cooperative federalism" in the environmental protection arena, where environmental law "supports a strong role for the states and localities alongside the federal government as innovators and guardians of public health and the environment." *Id.* at 401.

¹⁹³ See *supra* notes 28 through 31 and accompanying text.

¹⁹⁴ 21 U.S.C. § 1044(a)(7) (2015).

¹⁹⁵ 21 C.F.R. § 118.1(a) (2015).

¹⁹⁶ See e.g., The Egg Products Inspection Act Amendments, S. 3239 sponsored by Sen. Dianne Feinstein, D-Calif., and H.R. 3798 sponsored by Reps. Kurt Schrader, D-Ore., Elton Gallegly, R-Calif., Sam Farr, D-Calif., and Jeff Denham, R-Calif. See also *Federal Court Upholds California Ballot Measure Preventing Extreme Confinement of Farm Animals in Crates and Cages*, THE HUMANE SOCIETY OF THE UNITED STATES, (Sept. 12, 2012), http://www.humanesociety.org/news/press_releases/2012/09/federal_court_upholds_Prop_2_09122012.html?credit=web_id457264229.

¹⁹⁷ H.R. 2642, 113th Cong. (2d Sess. 2013), available at <https://www.govtrack.us/congress/bills/113/hr2642/text>.

¹⁹⁸ See *Charts and Maps: Annual Egg Production by States*, NAT'L AGRIC. STATISTICS SERV. (Apr. 29, 2014), http://www.nass.usda.gov/Charts_and_Maps/Poultry/eggmap.asp.

reflected an unprecedented attempt to extend federal power into the states' traditional health and safety realms.¹⁹⁹ The National Conference of State Legislatures claimed PICA would have violated the Tenth Amendment because it would hinder states' abilities to protect against livestock disease and invasive pests and to ensure food safety.²⁰⁰ PICA did not survive in the final farm bill.²⁰¹ Congress should eschew such legislative attempts in the future.

Individual states can exercise leadership in pushing standards ahead of general industry practice, in ways that federal lawmakers cannot because of the many more numerous competing political interests that federal lawmakers must reconcile. As was noted above, California has a history of being one such leader.²⁰² Accordingly, any federal standards for animal welfare and food safety should establish floors, not ceilings, like the FDA has under the EIPA.²⁰³ This would be consistent with other federal consumer protection laws that permit stricter state standards.²⁰⁴

Further, strict state standards like Prop 2 always should be accompanied by restrictions in the local market like AB 1437. When the underlying standards are based on legitimate public interest in animal welfare and food safety, requirements that all producers must comply in order to access the state market are necessary to protect the espoused in-state interest. According to the analysis by the Ninth Circuit in upholding just such a statutory scheme for *foie gras* sold in California,²⁰⁵ enactments akin to AB 1437 should withstand constitutional scrutiny because they are non-discriminatory and are necessary to facilitate the public interest underlying the strict in-state standards. Enactments like California's *foie gras* laws and AB 1437 remove the incentive for in-state producers to relocate to neighboring states with less-stringent production requirements in order to access the state market from outside, without the in-state constraints. Such enactments also protect against unwholesome food moving into the state at cheaper prices,

¹⁹⁹ See Lydia O'Connor, *Legal Experts Slam Controversial Farm Bill Amendment In Letter To Congress*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2013/12/06/law-professors-farm-bill_n_4401489.html. See also Pamela Vesilind, *Preempting Humanity: Why Nat'l Meat Ass'n v. Harris Answered the Wrong Question*, 65 ME. L. REV. 685, 692-702 (2013).

²⁰⁰ Melanie Condon, *NCSL Stakes Out Farm Bill Position in Letter to House, Senate Conference Leaders*, NAT'L CONF. STATE OF LEGISLATURES (Nov. 22, 2013), <http://www.ncsl.org/blog/2013/11/22/ncsl-stakes-out-farm-bill-position-in-letter-to-house-senate-conference-leaders.aspx>.

²⁰¹ NCSL, *The Agricultural Act of 2014*, http://www.ncsl.org/documents/standcomm/scnri/2014_fullfarmbillanalysis.pdf (last visited May 15, 2015) (explaining, under "Preserving State Authority," that the King Amendment was not included in the 2014 farm bill).

²⁰² See *supra* note 137 accompanying text.

²⁰³ See *supra* notes 187 through 192 and accompanying text.

²⁰⁴ See *e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010). The preemption provisions are found at 12 U.S.C § 5551(a) & (b) (2015). An additional example of federal and state cooperation in this law requires federal regulators to initiate a rulemaking docket when a majority of the states requests a new rule or rule modification. 12 U.S.C. § 5551(c).

²⁰⁵ See *supra* notes 89 through 98 and accompanying text.

a concern Congress acknowledged in the EIPA. Numerous sources show that consumers are willing to pay more for food safety.²⁰⁶

As was noted above, states with large populations should not be constrained from enforcing their public interests against out-of-state producers simply because their economic clout is significant. Any such interpretation of the Commerce Power effectively denies those large states their sovereign right to exercise their local police powers. In light of that market power, both commercial and consumer food buyers in such states need to maintain pressure on the industry for higher food safety quality and humane standards, in particular by eliminating concentrated animal confinement.

²⁰⁶ See Nathan Gray, *Consumers Will Pay More for Local Foods: Study*, FOODNAVIGATOR.COM (Feb. 27, 2013), <http://www.foodnavigator.com/Science/Consumers-will-pay-more-for-local-foods-Study> (describing a University of Arkansas study that found local food, for which consumers were willing to pay, was associated with freshness and food safety). See also Emily Caldwell, *Study: Consumers Value Safer Food More than Current Analyses Suggest*, RESEARCH NEWS, THE OHIO STATE UNIVERSITY (Feb. 8, 2011), <http://researchnews.osu.edu/archive/saferfood.htm/> (explaining a research methodology that focused on the value of food safety to consumers, rather than earlier USDA cost/benefit analyses that focused on total eradication of food pathogens).