# Can One State Dictate Agricultural Practices in Other States?

*Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law*
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## Overview

For several years now, some states (particularly California) have been testing the boundaries of the constitutional limits on economic regulation. The issue could have troubling implications for agriculture. These states have enacted laws setting requirements that out-of-state producers of agricultural goods must meet before those goods can be sold in the state establishing the requirements.

Clearly, a state can regulate economic activity within its borders, and can also establish the rules for goods that are sold and services that are provided within its jurisdiction. However, when do those rules and regulations cross the constitutional line from being within a state's authority to impermissibly regulating another state's economic activity and national interests?

A state's ability to regulate the economic activity of another state – it's the topic of today's post.

## What Is the "Dormant Commerce Clause"?

Article I, section 8, clause 3 of the United States Constitution (the "Commerce Clause") grants Congress the power to "regulate commerce" among the states. Although the Constitution does not specifically limit a state's power to regulate commerce, the United States Supreme Court has long interpreted the clause as an "implicit restraint on state authority, even in the absence of a conflicting federal statute." *Gibbons v. Ogden, 22 U.S. 1 (1824)* The basic precept was that when the Constitution was ratified the country was a single economic union, and the states surrendered their sovereign power to impose tariffs and restrain interstate trade. *See, e.g., THE FEDERALIST No. 7, 39–41 (Hamilton).* Instead, it is the Congress that can impose economic regulation (consistent with constitutional limits) on interstate commerce. Thus, under the "Dormant Commerce Clause" a state cannot enact any rules or regulations that affirmatively discriminate against the economic production of goods in another state without a legitimate local justification for doing so.

Clearly, a law that expressly mandates different treatment of in-state and out-of-state competing economic interests is unconstitutional on its face if that treatment favors in-state interests and burdens out-of-state interests. But, when a law is facially neutral, courts determine whether a Dormant Commerce Clause violation exists on the basis of whether the law imposes burdens on in terstate commerce that are "clearly excessive in relation to the putative local benefits." *See, e.g., Minnesota v. Barber, 136 U.S. 313 (1890); Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 504 U.S. 353 (1992).*

## Recent Cases Involving Agriculture

**Eggs.** In 2014, a California federal court dismissed for lack of standing a challenge brought by major egg producing states to a California law (AB1437) dictating methods of production for all eggs sold in California. *Missouri, et al. v. Harris, 58 F. Supp. 3d 1059 (E.D. Cal. 2014).* The legislation bans the sale of shell eggs within California by producers or handlers if the eggs are the product of an egg-laying hen that was confined in an enclosure that fails to comply with certain animal care standards.

The lawsuit claimed that the law (which amended the state's Health and Safety Code) and its implementing regulations, violated the Commerce Clause of the United States Constitution and was preempted by the Federal Egg Products Inspection Act. *21 U.S.C. §1031 et seq.* Effective January 1, 2015, the law criminalized the sale of eggs for human consumption in California if the eggs were the product of egg-laying hens confined in a manner not in compliance with the law *no matter where they were produced.* A violation of the law constitutes a misdemeanor and is punishable with a fine of not more than $1,000 or imprisonment in the county jail for not more than 180 days or both. *Cal. Health & Safety Code §25997.*

The implementing regulations require enclosures containing nine or more egg-laying hens to provide a minimum of 116 square inches of floor space per bird. *3 C.C.R. 1350.* Enclosures containing eight or fewer birds are also regulated. *Id.* Purportedly, the law was enacted 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." The plaintiffs, however, alleged that the California legislature's real intent was to "level the playing field" for California producers faced with a costly California regulatory regime. It was not enacted, the plaintiffs claimed, with the primary concern of protecting the health of California citizens.

The trial court dismissed the case for lack of standing. The court asserted that the plaintiffs were claiming injury-in-fact to all of the citizens in their respective states, and reasoned that the increased cost of egg production in the non-California states challenging the law did not affect the general citizenry of those states. Instead, the court determined that the California legislation would only impact egg producers that failed to conform their farming procedures to comply with the California rules. Thus, according to the court, the plaintiffs did not bring the case on behalf of "a substantial segment of their populations." While the court accepted as true the claim that the California legislation would impose a substantial cost on the plaintiff-states, that cost wouldn't be borne on the citizenry of the states as a whole, but rather just the subset of egg farmers that wished to continue selling eggs in California.

The court also dismissed as without merit and speculative the plaintiffs' argument that any resulting increase in the cost of eggs would injure all egg consumers. The plaintiffs also alleged that they were disadvantaged compared to other states that were not impacted by the California legislation. The court also dismissed this allegation as a basis for standing because the plaintiff states would not have to completely withdraw from egg production but would only incur "price fluctuations."

The court also determined that the threat of prosecution by California was merely speculative and was not imminent. The court noted that the plaintiffs didn't "articulate any concrete plan by their egg farmers to violate California's shell egg laws." Merely preferring to continue to market eggs to California, the court said, was not a specific harm. Unfortunately, the trial court failed to cite any cases to support its position on the standing issue where a state threatened to impose or did impose criminal penalties on conduct occurring in other states.

The trial court's opinion was affirmed on appeal. *Missouri v. Harris, 842 F.3d 658 (9th Cir. 2016).* The U.S. Supreme Court declined to hear the case. *Missouri v. Becerra, 198 L. Ed. 2d 255 (2017).*

**Beyond eggs.** In the fall 2018 election, California voters passed Proposition 12 ("The Farm Animal Confinement Initiative") that establishes minimum requirements on farmers to provide more space for egg-laying hens, breeding pigs, and caves raised for veal. Specifically, the law requires that covered animals be housed in confinement systems that comply with specific standards for freedom of movement, cage-free design and minimum floor space. The law identifies covered animals to include veal calves, breeding pigs and egg-laying hens. The implementing regulations prohibit a farm owner or operator from knowingly causing any covered animal to be confined in a cruel manner, as specified, and prohibits a business owner or operator from knowingly engaging in the sale within the state of shell eggs, liquid eggs, whole pork meat or whole veal meat, as defined, from animals housed in a cruel manner.

In addition to general requirements that prohibit animals from being confined in a manner that prevents lying down, standing up, fully extending limbs or turning around freely, the measure added detailed confinement space standards for farms subject to the law.

Under Proposition 12, effective January 1, 2022, all pork producers selling in the California market must raise sows in conditions where the sow has 24 square feet per sow. The law also applies to meat processors – whole cuts of veal and pork must be from animals that were housed in accordance with the space requirements of Proposition 12.

The National Animal Meat Institute (NAMI) challenged Proposition 12 as an unconstitutional violation of the Dormant Commerce Clause by imposing substantial burdens on interstate commerce "that clearly outweigh any valid state interest." The trial court rejected the challenge, finding that the plaintiff failed to establish that the law discriminated against out-of-state commerce for the purpose of economic protectionism. *National Animal Meat Institute v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019)*. On appeal, the appellate court affirmed. *National Animal Meat Institute v. Becerra, 825 Fed. Appx. 518 (9th Cir. 2020).* The appellate court determined that the trial court did not abuse its discretion in finding that the plaintiff was not likely to succeed on the merits of its Dormant Commerce Clause claim. The appellate court also stated that the plaintiff acknowledged that Proposition 12 was not facially discriminatory, and had failed to produce sufficient evidence that California had a protectionist intent in enacting the law. The appellate court noted the trial court's finding that the law was not a price control or price affirmation statute. Similarly, the appellate court held that the trial court did not abuse its discretion in holding that Proposition 12 did not substantially burden interstate commerce because it did not impact an industry that is inherently national or requires a uniform system of regulation. The appellate court noted that the law merely precluded the sale of meat products produced by a specific method rather than burdening producers based on their geographic location.

A separate legal action has been filed in a different California court against Proposition 12 and it continues.

**Conclusion**

Frankly, it's difficult to *not* see the protectionist intent behind the California laws. Even assuming explicit protectionist intent is not present, in the litigation challenging the California laws, substantial data was produced showing the economic harm to out-of-state egg and pork producers wishing to sell their products in the California market.

Of course, if the California requirements applied only to California egg and pork producers, out-of-state producers would be at an economic advantage. If the point of the laws is health-based, it would seem that requiring egg and pork products to meet federal quality standards should be sufficient for eggs and pork to be sold in California. Allowing one state to regulate certain sectors of another state's agricultural production is the reason economic regulation among the states was reserved for the Congress in the first place. If the courts don't get this issue correct, problems abound for agriculture – regulating out-of-state agricultural activities won't stop with eggs and pork.