

Missouri v. Harris: California's Eggs-traterritorial Reach

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As U.S consumers become increasingly conscious of the origins and quality of the food they eat, states are enacting legislation to address animal welfare and food safety concerns. Given the broad scope of the industry, food safety laws in one jurisdiction often impact producers and consumers in another. Consequently, these laws raise important legal questions about the extent to which a state may regulate food production when such regulation impacts commercial activity outside its borders. More specifically, food safety laws implicate the so-called "dormant" Commerce Clause, which implicitly prohibits states from regulating interstate commerce. Lawsuits seeking to enjoin these statutes will ultimately shape the boundaries within which states and local governments may regulate food production extraterritorially.

As a case in point, a California law regulating the production and sale of eggs recently gave rise to a federal lawsuit. At issue in *Missouri v. Harris*[1] is a 2010 California statute[2] which prohibits the sale in the state of shelled eggs for human consumption, if they are produced by hens confined in a manner such that they are unable to lie down, stand up, fully extend their limbs and turn around freely.[3] The statute requires a minimum of 116 square inches of space per bird, which is nearly twice the current industry standard of 67 square inches.[4] In effect, the law requires all egg producers nationwide, regardless of where they are located, to comply with California's animal care standards as a condition of selling eggs in the Golden State.

In an effort to enjoin enforcement of the law, six of the largest egg producing states – Missouri, Alabama, Iowa, Kentucky, Nebraska and Oklahoma – brought suit in federal district court on Commerce Clause grounds.[5] The plaintiffs contend that the statute is unduly burdensome because it would force out-of-state farmers to "forgo California's markets altogether or accept significantly increased production costs just to comply with California law."[6] The plaintiffs sued under the theory of *Parens Patrie*, which permits a state to invoke federal jurisdiction if it can assert an injury to a "quasi-sovereign interest," meaning an injury to a "sufficiently substantial segment of its population."[7]

The federal district court in California's Eastern District did not reach the merits. It found that the plaintiffs lacked standing because they failed to show how a large segment of their state populations would be injured by the California statute, noting that the law would only apply to egg producers in their states, not all citizens.[8] Moreover, the court was unpersuaded by the plaintiffs' claim that the law would increase the cost of eggs, thereby harming consumers in their states. The court reasoned that a potential increase in egg prices was too speculative to establish a showing of injury sufficient for standing under *Parens Patrie*.[9] Accordingly, the court dismissed the case without leave to amend.[10] The plaintiffs appealed, the results of which are still pending. [11]

Meanwhile, the law went into effect on January 1, 2015.

This article will evaluate the merits of the Commerce Clause challenge to California's egg law and discuss the implications of the law, if upheld.

The Commerce Clause grants Congress the authority "[t]o regulate commerce... among the several states."[12] This express grant of authority to Congress has been interpreted as an implicit prohibition on the states' ability to regulate interstate commerce, even when Congress has not acted.[13] This implied limitation is known as the "dormant" aspect of the Commerce Clause. As a general rule, state and local laws are unconstitutional if they place an undue burden on interstate commerce.

The conventional approach to analyzing Commerce Clause claims is two-fold. First, a court must determine if the state or local law discriminates against out-of-state actors, either on its face or in purpose or effect. All laws having a discriminatory commercial effect are *per se* invalid, and will only be upheld if necessary to achieve an important purpose that cannot be served by alternative nondiscriminatory means.

Second, if the state law is not discriminatory, a court must conduct a balancing test, articulated by the Supreme Court in *Pike v. Bruce Church, Inc*.[14] Under the *Pike* test, a nondiscriminatory law will be upheld if its burden on interstate commerce is outweighed by the benefits of the law.

The California egg law is facially neutral because it makes no distinction based on the origin of the eggs. However, a facially neutral law can be invalidated if its purpose or effect is to discriminate against out-of-state interests. The stated purpose of the law is 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."[15] The complaining states disagree, alleging that the law was enacted as a protectionist measure to "level the playing field" for California farmers, who would be competitively disadvantaged if out of state egg producers were not subject to the same restrictions.[16] However, a review of the legislative history does not support this contention.[17] As such, it does not appear that the law was enacted with discriminatory purpose.

There are two principles developed through the case law that determine if a law has a discriminatory effect. A law

Continued on page 37

Federal Cont'd from page 21

will be deemed to have a discriminatory effect if it imposes a burden on out-of-state interests that in-state interests will not bear,[18] or the state law excludes virtually all out-of-state actors from a market.[19] A review of the relevant case law suggests that California's egg statute does not so burden or exclude out-of-state actors, and therefore the law does not have a discriminatory effect.

Accordingly, the constitutionality of the law will ultimately hinge on the *Pike* test.

Under *Pike*, the Court considers whether the objectives of the law can be achieved through reasonable and less restrictive alternatives, [20] and the extent to which the statute in question has "extraterritorial effects." [21] Based on these factors, challengers may argue that California's egg law does not survive the *Pike* test.

The stated purpose of the egg law is to promote consumer health and safety. Opponents of the law will argue that this interest can be achieved through less burdensome means, such as California's adoption of a robust labeling scheme or public service campaign to educate consumers.

Out of state producers also assert that the extraterritorial effects of the law make it unconstitutional. California, the most populous state in the country, imports one-third of its egg supply and can purchase as much of 30 percent of the eggs produced in a single state.[22] Because California represents such a substantial portion of the market, the state can significantly impact standards for egg production on a national scale. The ability of a single state to create *de facto* national production standards in an industry as important and far-reaching as food production may be challenged as wholly inconsistent with the purposes of the Commerce Clause. Enforcement of the law would seem to require California to become actively involved in monitoring egg production nationwide. To detractors, such a result would fly in the face of federalist principles, as the authority to regulate commerce among the states lies primarily with Congress. Moreover, they assert, if the law is upheld it would create a dangerous precedent, because it would establish legal footing for California and other states to enact conflicting legislation.

The need for uniform food safety standards is important to provide clarity and stability to producers and consumers alike. However, efforts to enact federal legislation that would preempt California's legislation have stalled.[23]

Notwithstanding the arguable invalidity of the law under the traditional Commerce Clause analysis, the law seems likely to survive. The Ninth Circuit has upheld similar animal welfare statutes.[24] In addition, over the last two decades, the Supreme Court's interpretation of the dormant Commerce Clause has shifted.[25] Under *Pike*, the justices retain substantial discretion. The Court has deviated from traditional dormant Commerce Clause analysis, as evidenced by its increasing willingness to carve out new exceptions to the general prohibition on state regulation.[26] As such, it appears that the Court would not block such a law.

In any event, for now the Commerce Clause has not deprived the egg-laying chickens in the Golden State—and their hard-working kin in other states that export eggs to California—of the right to 116 square inches of personal space.

Notes

1. Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 840950 (E.D.Cal. Feb. 3, 2014).
2. AB 1437, Gen. Assemb. (Cal. 2010) (Codified in Cal. Health & Safety Code §§25995-97).
3. Cal. Health & Safety Code §25990.
4. Cal. Code Regs. 3 tit. 3 § 1350, providing in part that "[a]n enclosure containing nine (9) or more egg-laying hens shall provide a minimum of 116 square inches of floor space per bird."
5. Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 840950 (E.D. Cal. Feb. 3, 2014).
6. Amended Complaint at 2, Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 1245038 (E.D. Cal. Mar. 3, 2014).
7. Missouri v. Harris, 2014 U.S. Dist. LEXIS 141337 at 25-28 (E.D. Cal. Oct. 1, 2014)
8. *Id.* at 28-38.
9. *Id.*
10. *Id.* at 48.
11. Notice of Appeal, Missouri v. Harris, No. 2:14-CV-00341 (E.D. Cal. Oct. 24, 2014).
12. U.S. Const. Art. 1, § 8
13. James L. Buchwalter, *Construction and Application of Dormant Commerce Clause,* 41 A.L.R. Fed. 2d 1 (2009) ("Although the Commerce Clause is a power-allocating provision giving Congress preemptive authority over the regulation of interstate commerce, it is also a substantive restriction on permissible state regulation of interstate commerce.").
14. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
15. Cal. Health & Safety Code § 25995.
16. Amended Complaint at 3, Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 1245038 (E.D. Cal. Mar. 3, 2014).
17. In an effort to show discriminatory intent, plaintiffs rely primarily on reports by state *administrative agencies* that were issued *after* the law had already been passed by the state legislature. *See* Maine v. Taylor, 477 U.S. 131, 149-50 (1986) (finding that comments made by a state administrative agency after the statute's enactment constituted weak evidence of legislative intent).
18. *See* Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333 (1977); West Lynn Creamery v. Healy, 512 U.S. 186 (1994) (invalidating laws that imposed burden only on out-of-state competitors).
19. *See e.g.* C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994); Brimmer v. Rebman, 138 U.S. 78 (1891); Deans Milk Co. v. Madison, 340 U.S. 349 (1951).
20. *Pike*, 397 U.S. at 142; *See e.g.* Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 473 (1981) (upholding state law banning plastic milk containers because there was no less restrictive alternative).
21. See e.g. Healy v. Beer Institute, 491 U.S. 324, 336-37 (1989) ([T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."
22. *See* Amended Complaint at 10, Missouri v. Harris, No. 2:14-CV-00341, 2014 WL 1245038 (E.D. Cal. Mar. 3, 2014);
23. Dan Wheat, *Push for national chicken cage standards stalls*, Capital Press http://www.capitalpress.com/Nation_World/Nation/20150102/push-for-national-

Federal Cont'd from page 38

chicken-cage-standards-stalls (last updated Jan. 5, 2015, 2:39 PM).
24. *See e.g.* Ass'n des Éleveurs de Canards v. Harris, 729 F.3d 937, 2013 U.S. App. LEXIS 18154, 2013 WL 4615131 (9th Cir. 2013) (affirming the denial of an injunction to prevent the enforcement of a California statute that forbids the sale of products resulting from force fed birds in the state, finding no Commerce Clause violation).
25. *See generally*, Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. (2013); http://digitalcommons.law.lsu.edu/lalrev/vol73/iss4/5.
26. Denning, *supra*, note XXV. ML

Listserv Cont'd from page 29

threatened with physical harm.
I receive 1.2 million e-mails every day and have time to answer four of them.
I answer lots of questions from people in my doorway who wonder if I have a minute and then leave an hour later.
I counsel and console.
I reprimand and admonish.
I advise (and get ignored).
I advise again (and get ignored again).
I try to convince co-workers that I truly don't remember anything about divorce law.
I hand out a lot of phone numbers for lawyers that do divorces.
I get ignored some more.
I pick my battles and refuse to be ignored when it really matters.
I protect my client's representatives to the extent they are watching out for its best interests.
I protect my faceless client like a fat kid covers the last piece of cake.

Okay. But Why?

sigh If I could definitively answer that question, I could save all of us a lot of money in the therapist's office and at the liquor store. I suppose, if I'm completely honest with myself, I like being part of something as critically important as local government. We're never going to be wealthy lawyers by the world's standards and most of us are never going to be legendary legal gods, two things that, I sheepishly confess, bothered me the first few years of my municipal career. I guess it's true, though, that with age comes wisdom and I have left those concerns further and further behind me as I've become more and more aware of the direct impact local government has on the quality of life for the people around me. (It also could be that with age comes laziness and I just don't feel like expending the energy to worry anymore. You'll have that.)

I have to say, though, that my "why" recently has become clearer. When I began writing this article, things were rolling along as usual: too much to do and not enough time to do it, but it all was general, garden-variety municipal work. And then, in a moment, life changed and work stopped and attention shifted to matters larger and more intense than I could have ever imagined.

The details of my Moment aren't important because, for each of us, there has been or will be a Moment that defines our "why." A Moment may be the result of a natural disaster ravaging your city or a school shooting or a bad decision or a political scandal or one of the billion other things completely outside of the individual, direct control of a city attorney. Trust me: the genesis doesn't matter when you define your "why." Nothing matters as you realize that your presence as legal counsel for your city right then, in that Moment, matters more than anything else you've done in your career and instinctively you know that it will greatly matter in all of the hours and days and weeks and months to follow. Your presence, your help, your mind, your experience will make a difference for this client and its people and you suddenly realize why you do this. It's because protecting this faceless client is as much a part of who you are as the color of your eyes and you know that this is why you were put on this spinning terrarium – to protect and serve and defend in this Moment and in all the little "m" moments to follow.

You were put here to pick up these pieces and help your city put itself back together. You are here to handle the Moment, counsel shaken employees who are suddenly willing to listen, and send them back to the comfort of their daily work with the confidence and knowledge that they've got it now.

You do it because that's who you are. It's who you were made to be.

And after everyone else has moved past the Moment, you will continue to deal with it and its consequences and its mind-numbing minutiae that nobody else will ever see. But you see it, you live it, you breathe it, you lose sleep because of it ... because you're still there, camped out in the Moment long after it's over.

That's just what you do.

In fact, you've been in the damn Moment armpit deep from the time it happened and you know you'll stay in it until the file is finally closed and stored away. You'll do that for the employees and the electeds and the department heads so they can return to the important work they do for your client and for its citizens. You'll handle the Moment and still manage the zillion other issues that won't stop coming just because you've had your Moment. You'll keep going because your city and its operation under the unique laws that govern its ultimate success or failure is in your hands. You'll stay in that Moment for as long as it takes because municipal law found you and you couldn't let it go and now it's who you are. It's what you proudly do even if it seems nobody understands what it is or why you do it.

Hear me, though: I understand. I know what it is you do and I get why you do it.

And I'm floating on this timber with you. ML

Second Look Cont'd from page 23

support the LGO's position – giving little weight to such evidence even if they heard it. By contrast, any opinion adverse to the LGO from the LGO's own expert employee would be pure gold for the opponent. Designating all your expert employees as consulting experts in an attempt to insulate their opinions from discovery will probably not work even if done in good faith because the limits on discovery about consulting experts usually applies only to consultants specially retained for the litigation, not to general employees. *See* Notes of Advisory Committee on Rules—1970 Amendment, Fed. R. Civ. P. 26 (discussing Rule 26(b)(4)(B) [now 26(b)(4)(D)]).[4] Time and resources permitting, the LGO's lawyer could question each such employee and obtain an affidavit neutralizing the employee's usefulness as a hostile expert witness if the affidavit were truthful. Otherwise, my best suggestion would be to encourage LGO's to hire and train their expert employees carefully so that they hold in common the significant opinions relating to the subject of their work. In some instances the most effective deterrent to such tactics will be that the adverse party will be equally or more vulnerable to this approach as the LGO.

Conclusion. An LGO has a strong likelihood of success in helping an employee who does not want to testify as