

CALIFORNIA'S PROPOSITION 2 HAS EGG PRODUCERS SCRAMBLING: IS IT CONSTITUTIONAL?

I. INTRODUCTION

Animal agriculture is a leading industry in the United States.¹ This is particularly true for California where principal livestock products include cattle, poultry, milk, and other dairy commodities.² With the near disappearance of the traditional family farm and the emergence and abundance of factory farming, agricultural practices have transformed dramatically.³ The farmers our constitutional framers knew have virtually disappeared and have been replaced with large-scale industrial-farms with the goal of producing food products in mass quantities while generating maximum profits.⁴

It appears to some that the focus of farming has transformed from quality and sustenance to efficiency and profit.⁵ Consequently, consumers as a whole are becoming more cognizant and apprehensive with regard to the process through which they obtain the food products on their plates.⁶ Specifically, there has been mounting public awareness surrounding the treatment of the animals involved when current farm-animal-production methods are employed.⁷ There are also

¹ *Animal Products*, U.S. DEP'T. OF AGRIC. ECON. RESEARCH SERV.'s, <http://www.ers.usda.gov/topics/animal-products.aspx#Uj80K4asim4> (last updated July 10, 2013).

² LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 2 TREATMENT OF FARM ANIMALS. STATUTE 1 (June 30, 2008/10:40 AM), *available at* http://www.lao.ca.gov/ballot/2008/2_11_2008.pdf.

³ *See* CAROLYN DIMITRI ET AL., US DEP'T. OF AGRIC., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2, 12 (June 2005), *available at* <http://ageconsearch.umn.edu/bitstream/59390/2/eib3.pdf>.

⁴ *See id.*

⁵ *See* THE PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 5 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Industrial_Agriculture/PCIFAP_FINAL.pdf [hereinafter PUTTING MEAT ON THE TABLE].

⁶ *See* Amy Alesch et al., *Case Study California State Proposition 2: Standards for Confining Farm Animals* IOWA STATE UNIV. 2 (2008), *available at* <http://www.public.iastate.edu/~ethics/Prop2.pdf>.

⁷ *Id.*

concerns that factory farming has placed particular health risks upon society.⁸

States are increasingly introducing ballot initiatives and adopting regulations requiring improved animal welfare practices in food production methodology.⁹ Some states have gone a step further by passing statutes requiring all producers selling particular products in their state to meet the same animal welfare requirements.¹⁰ California's Proposition 2, which requires more spacious enclosures for particular animals, is one such statute.¹¹ The portion of Proposition 2 which has garnered the most attention and controversy is its housing requirements for hens utilized in egg production.¹² Approximately two years after Proposition 2 was passed, California Governor Arnold Schwarzenegger signed Assembly Bill 1437 into law which requires all eggs sold within the state of California to be produced by hens housed in compliance with Proposition 2.¹³ When states introduce any law that affects or burdens interstate commerce, the law may be unconstitutional due to the Dormant Commerce Clause.¹⁴

This Comment will show that California's Proposition 2 is constitutional because it is state legislation enacted for the purposes of improving the health of those who consume eggs and preventing animal cruelty to hens used in egg production, both permissible purposes under the Dormant Commerce Clause. Part II of this Comment will review transformations within the animal agriculture industry, discuss the emergence of industrial farming, and show how these developments altered egg production within the United States.

⁸ *Pollution from Giant Livestock Farms Threatens Public Health*, NATURAL RES. DEF. COUNCIL, <http://www.nrdc.org/water/pollution/nspills.asp> (last updated Feb. 21, 2013).

⁹ Anne Lieberman, *King Amendment to House Farm Bill Ignores Consumer Trends*, THE HILL (June 20, 2013 at 3:00 pm), <http://thehill.com/blogs/congress-blog/economy-a-budget/306637-king-amendment-to-house-farm-bill-ignores-consumer-trends#ixzz2Yx0ze5g3>.

¹⁰ *Id.*

¹¹ Will Coggin, *California's Prop. 2 Shouldn't Dictate Farming Practices to the Rest of the Country*, THE CTR. FOR CONSUMER FREEDOM (July 11, 2013), <http://www.consumerfreedom.com/2013/06/8886/>.

¹² See Steve Adler, *Good Eggs: California Farmers Focus on Safe, Affordable Food*, CAL. BOUNTIFUL (Mar./Apr. 2010), <http://www.californiabountiful.com/features/article.aspx?arID=684>.

¹³ ASSEMBLY BILL 1437 (2010), available at http://leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_bill_20100706_chaptered.html.

¹⁴ See *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

Part II will also address the health concerns regarding current and proposed egg-production practices. Further, Part II will highlight the growing public awareness of animal welfare as it relates to food production procedures and will introduce Proposition 2, including its language and purpose. Part III will analyze Proposition 2's inherent Dormant Commerce Clause issues due to the passage of Assembly Bill 1437. Part IV provides support for the contention that Proposition 2 is constitutional through application of the appropriate balancing test. Further, Part IV will illustrate that the legitimate state interests of improving health and safety of the public and expanding animal welfare are sufficient to withstand constitutional concerns. Part V will examine recently introduced legislative amendments relating to egg-production practices and their potential effects on Proposition 2. Part VI will discuss the future of the egg industry within California following the implementation of Proposition 2. Part VII will conclude that Proposition 2 is constitutional and will recommend federal legislation regulating egg production throughout the country.

II. FACTORY FARMING AND ITS HEALTH IMPLICATIONS

Farming practices in the United States have transformed dramatically in the last century.¹⁵ These changes have resulted in both positive and negative consequences.¹⁶ One positive aspect is that Americans spend approximately fifty percent less of their income on food than they did in the early 1900s.¹⁷ This is directly attributable to developments in the technology utilized in modern farming practices, including advances made in science and machinery.¹⁸ Although there are now fewer farms than in previous generations, these modern farms are much larger and produce a reduced variety of commodities.¹⁹ Such farms have become more specialized in order to maintain profitability.²⁰ These large-scale farms have been referred to as

¹⁵ See PUTTING MEAT ON THE TABLE, note 5 at 5.

¹⁶ *Id.*

¹⁷ *Background on Agricultural Practices and Food Technologies*, FOOD INSIGHT (Sept. 28, 2009),

http://www.foodinsight.org/Resources/Detail.aspx?topic=Background_on_Agricultural_Practices_and_Food_Technologies.

¹⁸ *Id.*

¹⁹ See CAROLYN DIMITRI ET AL., *supra* note 3.

²⁰ *See id.*

“factory farms” and commonly employ industrial farming techniques.²¹

Industrial animal farming practices include keeping large numbers of animals confined in close quarters.²² For example, cattle feedlots often contain thousands of cattle in one location and egg-laying businesses generally hold up to one million chickens or more in poultry houses.²³ These animals sometimes undergo excruciating mutilations and are bred in a manner to accelerate development resulting in the animals growing abnormally large and fast for the purpose of increasing milk, egg, and meat production for the agricultural industry.²⁴ These animals’ bodies cannot support this atypical growth, which often results in incapacitating and agonizing ailments and disfigurements.²⁵

Proposition 2 was drafted in response to growing concerns regarding the treatment and housing of animals confined in cramped cages.²⁶ Proposition 2 requires that calves raised for veal, egg-laying hens, and pregnant pigs be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs, and turn around freely.²⁷ Exceptions are made for, inter alia, transportation, rodeos, fairs, 4-H programs, lawful slaughter, research, and veterinary purposes.²⁸ A violation of this statute will result in misdemeanor penalties, including a fine not to exceed \$1,000 and/or imprisonment in jail for up to 180 days.²⁹ The stated purposes of Proposition 2 are to prevent animal cruelty, improve animal welfare, and provide healthier food to consumers, specifically to reduce Salmonella and Avian Flu.³⁰ Proposition 2 is scheduled to take effect on January 1, 2015.³¹ With the

²¹ *Industrial Livestock Production*, GRACE COMM’NS FOUND., <http://www.sustainabletable.org/859/industrial-livestock-production#animalprod> (last visited Sept. 23, 2013).

²² *Id.*

²³ *Id.*

²⁴ *Factory Farming*, FARM SANCTUARY, <http://www.farmsanctuary.org/learn/factory-farming/> (last visited Sept. 23, 2013).

²⁵ *Id.*

²⁶ Brandon R. McFadden, *Three Essays Examining the Effects of Information on Consumer Response to Contemporary Agricultural Production* 61 (2014) (unpublished Ph.D. dissertation, Oklahoma State University) (on file with author).

²⁷ CAL. HEALTH & SAFETY CODE § 25990 (West 2014).

²⁸ CAL. HEALTH & SAFETY CODE § 25992 (West 2014).

²⁹ CAL. HEALTH & SAFETY CODE § 25993 (West 2014).

³⁰ See generally Alesch et al., *supra* note 6 (providing background information regarding Proposition 2).

³¹ CAL. HEALTH & SAFETY CODE § 25990 (West 2014).

addition of Assembly Bill 1437, all whole eggs sold in California as of January 1, 2015, must come from hens who are housed in accordance with Proposition 2, regardless of what state the eggs are produced in.³²

A. Factory Farms

In order to gain an understanding of how the subject of industrial farming materialized as a public concern, it is essential to review the development of these farming practices. Farming in the United States has progressively become consolidated and industrialized causing the appearance of agriculture to quickly and radically transform.³³ Full-time farmers are disappearing from the landscape of the United States.³⁴ Since the 1970s, the number of farms in America has dropped by over ten percent; the majority of the farms lost were midsize family farms.³⁵

The bulk of the national production of food and fiber in the United States flows from a somewhat small number of large operations.³⁶ A report published by National Agricultural Statistics Service in 2007 revealed that “large and very large family farms produced over sixty-three percent of the value of all products sold (though they accounted for less than nine percent of all family farms).”³⁷ Also in 2007, small family farms (sales under \$250,000) represented eighty-eight percent of the total number of farms; however, they accounted for merely sixteen percent of agricultural production.³⁸ Many small family farm operators struggle to contend with larger competitors who have

³² ASSEMBLY BILL, *supra* note 13.

³³ *What exactly is a family farm? How does it differ from a factory farm?* FARM AID (Apr. 2010), <http://www.farmaid.org/site/apps/nlnet/content2.aspx?c=qll5lhNVJsE&b=2723877&ct=8214687>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Family & Small Farms Family Farms Overview*, U.S. DEP’T. OF AGRIC. NAT’L INST. OF FOOD AND AGRIC. (last updated June 16, 2010) http://www.nifa.usda.gov/nea/ag_systems/in_focus/familyfarm_if_overview.html.

³⁷ *Id.*

³⁸ See ROBERT A. HOPPE & DAVID E. BANKER, U.S. DEP’T. OF AGRIC. ECON. RESEARCH SERV., *STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT* iv (July 2010), *available at* http://www.ers.usda.gov/media/184479/eib66_1_.pdf. Economic Research Service/USDA.

superior financial resources.³⁹ Fewer, larger farms are progressively dominating agricultural sectors leaving family farmers feeling pressured “to get big or get out.”⁴⁰

Factory farms dominate food production within the United States by engaging in practices developed to maximize profits, and they have often been described as abusive and possibly detrimental to the environment, animal welfare, and even human health.⁴¹ Over ninety-nine percent of farm animals in the United States are raised on factory farms.⁴² Many factory farms pack animals into such constrictive spaces that the animals can hardly move.⁴³ Many of these animals have no access to the outdoors, spending their entire lifespan on warehouse floors or contained in enclosures such as cages or pens.⁴⁴ Without the space required to engage in instinctive behaviors, these confined animals suffer severe physical and psychological anguish.⁴⁵

B. Conditions Present in Modern Egg Production

The emergence of industrial farming has had a substantial impact on the methods utilized by egg producers throughout the United States.⁴⁶ California is among the top five states in annual egg production.⁴⁷ In 2012, a total of 340 million hens, referred to as “layers,” were used to produce 92.8 billion eggs.⁴⁸ This averages 274 eggs per hen,

³⁹ Dana Teppert, *Farm Bill 2013: Small Farmers Can't Make Money From Farming Anymore*, POLICYMIC (June 19, 2013), <http://www.policymic.com/articles/49323/farm-bill-2013-small-farmers-can-t-make-money-from-farming-anymore>.

⁴⁰ *What exactly is a family farm?*, *supra* note 33.

⁴¹ *Factory Farming*, *supra* note 24.

⁴² *Factory Farming*, FARM FORWARD <http://www.farmforward.com/farming-forward/factory-farming> (last visited Nov. 23, 2013).

⁴³ *What is a Factory Farm*, ASPCA, <http://www.asPCA.org/fight-cruelty/farm-animal-cruelty/what-factory-farm> (last visited Oct. 27, 2013).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See UNITED EGG PRODUCERS, AMERICAN EGG FARMING AND HOW WE PRODUCE AN ABUNDANCE OF AFFORDABLE, SAFE FOOD AND HOW ANIMAL ACTIVISTS MAY LIMIT OUR ABILITY TO FEED OUR NATION AND WORLD 1*, *available at* http://www.unitedegg.org/information/pdf/American_Egg_Farming.pdf (last visited Oct. 27, 2013).

⁴⁷ U.S. DEP'T. OF AGRIC., NATIONAL AGRICULTURAL STATISTICS SERVICE AGRICULTURAL STATISTICS BOARD 6 (June 21, 2013) *available at* <http://usda01.library.cornell.edu/usda/current/ChickEgg/ChickEgg-02-27-2013.pdf>.

⁴⁸ *Id.*

annually.⁴⁹ In contrast, during a typical life of a hen in natural conditions, it will lay between twenty to thirty eggs per year.⁵⁰

In order to meet the challenges of the changing market and satisfy the demands of the American public, egg producers implemented the modern battery cage system.⁵¹ Battery cages were first introduced in the 1930's to increase the amount of hens capable of being housed by a particular farming operation, to intensify egg production, and to reduce the spread of infectious disease among these hens.⁵² A typical battery cage allows a hen the space roughly equivalent to a standard sheet of letter-sized paper.⁵³ When battery cages were initially introduced, the cages were more spacious than their modern equivalents and normally housed one hen per cage.⁵⁴ Modernly, however, several hens are housed together in cages much smaller than their predecessors.⁵⁵ It is estimated that ninety-five percent of the egg-laying hens in the United States are housed in this manner.⁵⁶

The conditions utilized in order to obtain maximum output by layers are often appalling to the average person.⁵⁷ As many as eleven hens can be housed in one very small cage, measuring approximately eighteen by twenty inches.⁵⁸ These hens are often de-beaked in order

⁴⁹ *Id.*

⁵⁰ *Hens Raised for Eggs*, FOOD EMPOWERMENT PROJECT, <http://www.foodispower.org/hens-raised-for-eggs/> (last visited Oct. 27, 2013).

⁵¹ UNITED EGG PRODUCERS, *supra* note 46 at 2.

⁵² SANDRA HIGGINS, EDEN FARM ANIMAL SANCTUARY, ENRICHED CAGES AND EMBODIED PRISONS 3, *available at* <http://www.edenfarmanimalsanctuary.com/wp-content/uploads/2013/05/Enriched-Cages-and-Embodied-Prisons.pdf> (last visited Jan. 11, 2014); James Andrews, *European Union Bans Battery Cages for Egg-Laying Hens*, FOOD SAFETY NEWS (Jan. 19, 2012), <http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/#.Uj9awoasim4>.

⁵³ *Cage-Free vs. Battery-Cage Eggs*, HUMANE SOC'Y OF THE U.S. (Sept. 1, 2009), http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html.

⁵⁴ Andrews, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ Bruce Friedrich, *The Cruellest of All Factory Farm Products: Eggs From Caged Hens*, HUFF POST (Jan. 14, 2013), http://www.huffingtonpost.com/bruce-friedrich/eggs-from-caged-hens_b_2458525.html.

⁵⁷ *See Cage-Free vs. Battery-Cage Eggs*, *supra* note 53.

⁵⁸ Doris Lin, *What is a Battery Cage?*, ABOUT.COM, animalrights.about.com/od/animalsusedforfood/g/What-Is-A-Battery-Cage.htm (last visited Jan. 05, 2014).

to prevent them from pecking at each other.⁵⁹ Such confined conditions also prevent hens from partaking in many of their natural behaviors, such as nesting, pecking, dustbathing, stretching their wings, and walking.⁶⁰ In addition to these troubling conditions, modern factory farming also poses serious threats to both human and animal health.

C. Health Concerns

There are concerns that factory farming has placed particular health risks upon society: overuse of antibiotics; spread of infectious disease and foodborne pathogens; air, land, and water pollution; introduction of growth hormones; and much more.⁶¹ Studies focusing on various egg production methods and different conditions imposed on hens have yielded contradictory results.⁶² Some studies show housing hens in battery cages can lead to health issues for the caged hens and in turn can pose serious health risks to egg consumers.⁶³ Meanwhile other studies have claimed battery cage conditions are more desirable and safer for egg consumers.⁶⁴ Both sides of the argument have provided statistical assertions that their favored egg production practices have

⁵⁹ SARA SHIELDS & IAN J.H. DUNCAN, HUMANESOC'Y OF THE U.S. A COMPARISON OF THE WELFARE OF HENS IN BATTERY CAGES AND ALTERNATIVE SYSTEMS 5, available at <http://www.humanesociety.org/assets/pdfs/farm/hsus-a-comparison-of-the-welfare-of-hens-in-battery-cages-and-alternative-systems.pdf> (last visited Oct. 27, 2013).

⁶⁰ *Id.* at 1, 3 (explaining that dustbathing is a behavior hens participate in to keep their feathers and skin in healthy state. Provided access to dry material, such as wood shavings or dirt, hens typically dustbathe “once every other day.” While dustbathing, dust is rubbed through the feathers before the free particles are shaken off.).

⁶¹ *Pollution from Giant Livestock Farms*, *supra* note 8

⁶² *Welfare of Laying Hens in Conventional Cages and Alternative Systems: First Step Towards a Quantitative Comparison*, THE POULTRY SITE (Nov. 19, 2013), <http://www.thepoultrysite.com/articles/3003/welfare-of-laying-hens-in-conventional-cages-and-alternative-systems-first-steps-towards-a-quantitative-comparison>.

⁶³ *No Battery Cages: Our Campaign*, HUMANESOC'Y INT'L, http://www.hsi.org/world/canada/work/intensive-confinement/facts/no_battery_eggs.html (last visited Jan. 13, 2014).

⁶⁴ Sam Robinson, *Caged or Cage-Free? Debate continues on Safest Method to House Laying Hens*, FOOD SAFETY NEWS (2003), <http://www.foodsafetynews.com/2013/08/debate-continues-on-the-safest-method-to-house-hens/#.Uj9tW4asim4>.

diminished or eliminated health risks posed to consumers including Salmonella, pollution, and Avian Flu.⁶⁵

Eggs are among the most common sources of Salmonella outbreaks.⁶⁶ In the United States, there are nearly 42,000 reported cases of Salmonella each year.⁶⁷ Young children, the elderly, and the immune compromised are the most likely to experience severe infections of Salmonella.⁶⁸ Annually, approximately 400 people die from acute Salmonella infections.⁶⁹ Hens in battery cages are under high stress, which inhibits their natural immune response.⁷⁰ The stress hormones produced have been determined to increase the growth rate of Salmonella in these hens.⁷¹ Several studies have reported significantly higher levels of Salmonella infection in eggs from hens subjected to battery cage conditions.⁷² Other studies have shown that operations which cram hens into cages have twenty-five times higher rates of Salmonella contamination as compared to cage-free farms.⁷³

The other side of the Salmonella argument insists that modern housing systems provide optimal egg sanitation by creating a barrier separating fecal material from eggs and chickens and that this separation dramatically reduces the risk of Salmonella contamination.⁷⁴ Proponents of battery cages assert that this decreased risk of contamination leads to a reduction in human cases of Salmonella.⁷⁵ In the past ten years, California consumers have not had a human outbreak of Salmonella associated with eggs produced in

⁶⁵ *Id.*; *infra* Part II.C.

⁶⁶ *Salmonellosis – Topic Overview*, WEBMD, <http://www.webmd.com/food-recipes/food-poisoning/tc/salmonellosis-topic-overview> (last visited Jan. 11, 2014).

⁶⁷ *What is Salmonellosis?*, CTR. FOR DISEASE CONTROL AND PREVENTION (last updated Apr. 4, 2012), <http://www.cdc.gov/features/salmonella/general/>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Food Safety Benefits of Cage-Free Eggs*, PENN STATE DINING'S EGGS, available at http://www.cagefreepennstate.org/FoodSafety_EggProduction.pdf (last visited Sept. 22, 2013).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ PRODUCTIVITY COMM'N, BATTERY EGGS SALE AND PRODUCTION IN THE ACT 100 (1998), available at <http://ageconsearch.umn.edu/bitstream/31920/1/r98ba01.pdf>.

⁷⁵ See *Food Safety Programs*, Egg Safety Ctr., <http://www.eggsafety.org/producers/food-safety-programs> (last visited Sept. 23, 2013).

California.⁷⁶ They claim that the food safety management practices of California egg producers are among the most successful in the United States and directly credit them with decreasing Salmonella prevalence at the consumer level.⁷⁷

In addition to the concern regarding the spread of Salmonella through consumption of eggs, factory farm facilities can contribute to air and water pollution and the spread of disease, posing harm to the facilities' employees as well as neighbors and individuals living a distance from the facilities.⁷⁸ Employees and neighbors of these facilities have increased incidences of respiratory problems, including asthma.⁷⁹ Employees can also function as a bridging population, resulting in the transmission of animal-borne diseases to a larger population.⁸⁰

Further, studies have determined that serious human illness can be caused by the consumption of water which has been contaminated through contact with chicken excrement.⁸¹ Inappropriate management of massive quantities of waste may result in contamination of adjacent waters, infecting such waters with hazardous concentrations of toxins, bacteria, fungi, and viruses.⁸² Additionally, groundwater contamination can spread through underground aquifers, resulting in damaging affects to supplies of drinking water located far from the contamination source.⁸³

⁷⁶ *California's Egg Quality Assurance Program Enables Consumers to Buy With Confidence*, PR NEWSWIRE, www.prnewswire.com/news-releases/californias-egg-quality-assurance-program-enables-consumers-to-buy-with-confidence-101369004.html (last visited Sept. 23, 2013).

⁷⁷ *Food Safety Programs*, *supra* note 76 .

⁷⁸ PUTTING MEAT ON THE TABLE, note 5 at 11-19.

⁷⁹ *Id* at 16-17.

⁸⁰ *Id* at 13, 69.

⁸¹ *Legal Petition Filed to Stop San Diego Area Egg Farm from Releasing Tainted Water*, HUMANE SOC'Y OF THE U.S. (Oct 8, 2008), <http://yubanet.com/california/Legal-Petition-Filed-to-Stop-San-Diego-Area-Egg-Farm-from-Releasing-Tainted-Water.php#.UtL4OPRDuSo>.

⁸² ROLF U. HALDEN & KELLOGG SCHWAB, THE PEW COMM'N ON INDUS. FARM ANIMAL PROD., ENVIRONMENTAL IMPACT OF INDUSTRIAL FARM ANIMAL PRODUCTION 13, available at http://www.ncifap.org/_images/212-4_EnvImpact_tc_Final.pdf (last visited Oct. 27, 2013).

⁸³ PUTTING MEAT ON THE TABLE, note 5 at 11.

The emissions from these facilities can also have a negative impact on their neighbors and those living a distance from the facility.⁸⁴ The effects can pose a particularly increased risk of asthma and other respiratory illnesses in children, the elderly, and those with compromised respiratory systems or chronic conditions that limit their mobility.⁸⁵

In conflict with these findings, a study conducted in Taiwan indicated that free-range eggs contained five times the level of pollutants present in caged eggs.⁸⁶ This study hypothesized that these pollutants are present in the plants, soil, worms, and insects which the hens have access to while roaming free in the outdoors.⁸⁷ Notwithstanding this study, cramped conditions can lead to other health concerns.

Some research has shown that in high-density egg-producing factory farms, hens have more contact with one another, since they live in confined conditions and sometimes live in their own excrement.⁸⁸ These unsanitary conditions can lead to the spread of Avian Flu strains when the virus is expelled through the hens' feces and subsequently inhaled or ingested by other hens confined in the same shed.⁸⁹

In contrast, United Egg Producers assert that hens living outdoors have increased exposure to wild birds carrying disease.⁹⁰ The organization indicates that in Europe and Asia, hens living outdoors have been among the first to become infected with Avian Flu and conclude that this puts human health, as well as hen health, at risk without justifiably increasing hen welfare.⁹¹ With myriad studies reporting varying results regarding the safety concerns of free-range egg production versus battery cage egg production, closer examination

⁸⁴ ENVIRONMENTAL IMPACT OF INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 83.

⁸⁵ PUTTING MEAT ON THE TABLE, note 5 at 17.

⁸⁶ Niall Firth, *Free-Range Eggs 'Contain Five Times as Much Pollution as Those From Caged Birds'*, MAIL ONLINE (June 17, 2010), <http://www.dailymail.co.uk/sciencetech/article-1287301>.

⁸⁷ *Id.*

⁸⁸ Karen Davis, *The Plight of the Poultry*, THE ANIMAL'S AGENDA (July/Aug. 1996), <http://www.upc-online.org/su96primer.html>.

⁸⁹ See SHIELDS & DUNCAN, *supra* note 59 at 6.

⁹⁰ *The Egg Industry and Animal Welfare*, UNITED EGG PRODUCERS 5 (2005), available at

http://www.unitedegg.org/information/pdf/Egg_Industry__Animal_Welfare_Brochure.pdf.

⁹¹ *See id* at 9.

is required to determine the intent of California voters in passing Proposition 2.

D. The Conditions That Led to California Taking Action

The initial motivation leading to the introduction of Proposition 2 was not the reduction of the negative health implications associated with current egg production strategies but rather the treatment of these animals.⁹² Most anti-cruelty statutes at the state level forbid the intentional abuse of farm animals; however, most such statutes exclude ordinary agricultural practices for farm animals that may be considered inhumane or abusive.⁹³ Other laws specifically related to farm animals generally focus on the humane transportation and slaughter of these animals.⁹⁴

In 2008, several particularly offensive videos were released revealing the deplorable conditions, abuse, and cruelty farm animals were being subjected to in California.⁹⁵ These videos exposed rampant animal abuse and mistreatment of farm animals in large farming operations,⁹⁶ leaving the American public with ruffled feathers.⁹⁷ Gemperle Enterprises, an egg supplier for many chain stores, and Norco Ranch, California's leading egg producer, were among the offenders caught on video abusing hens.⁹⁸ Also in 2008, the Humane Society of the United States ("HSUS") released a video depicting the egregious abuse of downed cattle at the Hallmark/Westland Meat

⁹² See Carol Ness, *California's Prop. 2 Spurs Big-Buck Battle Over Farm-Animal Treatment*, GRIST (Oct. 8, 2008), <http://grist.org/article/cluck-and-cover/>.

⁹³ *Farmed Animals and the Law*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/resources/advocating-for-animals/farmed-animals-and-the-law/> (last visited Jan. 12, 2014).

⁹⁴ *Id.*

⁹⁵ See Howard Blume, *Group Alleges Cruelty to Hens*, LOS ANGELES TIMES (Oct. 14, 2008), <http://articles.latimes.com/2008/oct/14/local/me-chickens14>.

⁹⁶ See *Rampant Animal Cruelty at California Slaughter Plant Undercover investigation Finds Abuses at Major Beef Supplier to America's School Lunch Program*, THE HUMANE SOC'Y OF THE U.S. (Jan. 30, 2008), http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html.

⁹⁷ See Michelle Monk, *Factory Farming*, WHAT AN OPEN MIND CAN LEARN (Jan. 16, 2013), <http://somethingthatdescribesmeandmyarticles.blogspot.com/2013/01/factory-farming.html>.

⁹⁸ *Id.*

Packing Company.⁹⁹ This business is the second-largest beef provider to USDA's Commodity Procurement Branch, distributing beef to disadvantaged families, the aged, and the National School Lunch Program.¹⁰⁰

With the release of videos exposing such appalling abuse, public awareness about farm animal production methods grew, with specific apprehension regarding how these practices affect the treatment of the animals.¹⁰¹ Concerns have been expressed about the housing of certain animals in confined spaces, such as cages or other restrictive enclosures.¹⁰² Currently consumers delineate issues relating to safety, quality, and ethical matters among their top concerns with regard to the particular food products they consume.¹⁰³

With emotions running high, the foundation was laid for the new approach toward animal welfare undertaken in November of 2008, when California voters approved Proposition 2 by a sixty-three to thirty-seven percent margin.¹⁰⁴ Approximately two years later, Governor Schwarzenegger signed Assembly Bill 1437 which, in essence, requires businesses selling whole eggs within California to comply with the specifications set forth in Proposition 2.¹⁰⁵ When a state passes and institutes legislation that creates requirements or restrictions resulting in an encumbrance on commerce between states, issues arise regarding the constitutionality of the regulation.¹⁰⁶ Regulations that place a constraint on interstate commerce are said to

⁹⁹ See *Rampant Animal Cruelty*, *supra* note 97.

¹⁰⁰ *Id.*

¹⁰¹ *Ag-Gag: Factory Farms and Anti-Surveillance Bills*, STOP FACTORY FARMS, <http://www.stopfactoryfarms.org/ag-gag-factory-farms-and-anti-surveillance-bills/> (last visited Jan. 12, 2014).

¹⁰² PUTTING MEAT ON THE TABLE, note 5 at 31.

¹⁰³ *U.S. Congress and American Consumers Dethrone Another "King"*, I EAT GRASS (June 22, 2013), <http://ieatgrass.com/2013/06/u-s-congress-and-american-consumers-dethrone-another-king/>.

¹⁰⁴ *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 BLOG (Nov. 5, 2008, 6:15 pm), <http://fresheasybuzz.blogspot.com/2008/11/california-voters-pass-ballot-measure.html>.

¹⁰⁵ Kevin Walker, *California Bill Prohibits Sale of Eggs From Caged Poultry*, FARM WORLD (Aug. 4, 2010), <http://www.farmworldonline.com/news/ArchiveArticle.asp?newsid=10699>.

¹⁰⁶ *Id.*

be unconstitutional because the United States Constitution firmly places the power to regulate commerce with Congress.¹⁰⁷

III. COMMERCE CLAUSE AND DORMANT COMMERCE CLAUSE ISSUES

A. The Commerce Clause

The Commerce Clause, contained in the United States Constitution, provides Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”¹⁰⁸ The Commerce Clause is intended to foster the creation of a national economy and protect the national economy from unjustifiable interference by the states.¹⁰⁹ On its face, the Commerce Clause is an affirmative grant of legislative power authorizing Congress to regulate commerce.¹¹⁰ However, it has been established that in addition to the Commerce Clause granting Congress the power to regulate commerce amongst the states, it limits the authority of the states to regulate interstate commerce and to enact legislation that has a discriminatory affect against interstate commerce.¹¹¹ This negative implication is referred to as the Dormant Commerce Clause.¹¹²

B. Dormant Commerce Clause

The purpose of the Dormant Commerce Clause is to prevent individual states from passing legislation that unreasonably burdens the stream of interstate commerce.¹¹³ To determine if a law violates the Dormant Commerce Clause it must first be determined if the law “discriminates on its face against interstate commerce,” meaning whether there is “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹¹⁴ A law will be held invalid if it discriminates “against an article of commerce by reason of its origin or destination out of State” unless it

¹⁰⁷ *Will HSUS's Egg Agenda Scramble the U.S. Constitution?* HUMANEWATCH.ORG (July 27, 2010), http://www.humanewatch.org/scramble_the_constitution/.

¹⁰⁸ U.S. CONST., art. I, § 8, cl. 3.

¹⁰⁹ *See* *United States v. Lopez*, 514 U.S. 549, 574 (1995).

¹¹⁰ *Id.*

¹¹¹ *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

¹¹² *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008).

¹¹³ *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

¹¹⁴ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

can survive strict or rigorous scrutiny.¹¹⁵ A statute that treats “all private companies exactly the same” does not discriminate against interstate commerce.¹¹⁶

The United States Supreme Court explained that “once a state law is shown to discriminate against interstate commerce ‘either on its face or in practical effect,’ the burden falls on the state to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served equally well by available nondiscriminatory means.”¹¹⁷ The discrimination must be demonstrably justified by a legitimate factor unconnected to economic protectionism.¹¹⁸ The Dormant Commerce Clause strictly prohibits economic protectionism: regulatory measures intended to benefit economic interests within the state by “burdening out-of-state competitors.”¹¹⁹ Regulations or statutes enacted for economic protectionism are virtually per se invalid.¹²⁰

The Court distinguishes between state statutes that affirmatively discriminate against interstate transactions and those that burden such transactions only incidentally.¹²¹ While statutes in the first group are subject to more demanding scrutiny, the statutes in the second group violate the Commerce Clause only if the burdens they impose on interstate trade are excessive with relation to the local benefits.¹²² If a regulation is not facially discriminatory and pursues local interests, the regulation will be upheld if it is determined that the associated burdens on interstate commerce do not outweigh the local benefits.¹²³

IV. IS PROPOSITION 2 CONSTITUTIONALLY VALID, OR IS IT VOID DUE TO THE DORMANT COMMERCE CLAUSE? WHICH TEST APPLIES?

Proposition 2 does not discriminate against interstate commerce. First, it is not facially discriminatory as there is nothing within the

¹¹⁵ *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994).

¹¹⁶ *United Haulers Ass'n, Inc.*, 550 U.S. at 342.

¹¹⁷ *Maine*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

¹¹⁸ *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).

¹¹⁹ *Id.* at 273.

¹²⁰ *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹²¹ *Maine*, 477 U.S. at 138.

¹²² *Hughes*, 441 U.S. at, 331, 335.

¹²³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

language of the statute that favors California.¹²⁴ Second, it is not discriminatory in impact. Proposition 2 is intended to be applied evenhandedly to all egg producers, whether located within California or not, providing the producer intends to sell their products within the state of California.¹²⁵ Therefore, it is entirely irrelevant what state an egg producer conducts its business in; if the company wants to sell their eggs in California it must comply with the regulations set forth in Proposition 2.¹²⁶

Further, Proposition 2 is not an example of economic protectionism. California businesses receive no economic advantage over out-of-state producers; the law prohibits the sale of eggs from egg-laying hens confined in restrictive cages, regardless of the origin of the eggs.¹²⁷ Accordingly, eggs from other states and countries are treated no differently than eggs from California.¹²⁸

Although Proposition 2 is neither discriminatory nor an example of economic protectionism it must further a valid state interest, and where there is a legitimate local objective, the inquiry turns to degree.¹²⁹ The magnitude of the burden that will be accepted is contingent on the character of the local interest implicated, and whether the interest could be furthered in a manner having less of an effect on interstate activities.¹³⁰ Thus, to determine the constitutional validity of Proposition 2, a balancing test must be applied weighing the burdens on interstate commerce against the local benefits, taking into consideration the burdens placed on out-of-state egg producers against the state interest for the California public.¹³¹

¹²⁴ CAL. HEALTH & SAFETY CODE § 25996 (West 2014) (“[A] shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg 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.”).

¹²⁵ *Will HSUS's Egg Agenda Scramble the U.S. Constitution?*, *supra* note 108.

¹²⁶ CAL. HEALTH & SAFETY CODE § 25996 (West 2014).

¹²⁷ *Id.*

¹²⁸ *Id.*; Coggin, *supra* note 11.

¹²⁹ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹³⁰ *Id.*

¹³¹ *See Id.*

V. DORMANT COMMERCE CLAUSE BALANCING TEST

A. Valid State Interests Involved

It is useful to look toward the courts for guidance to determine what a valid state interest may include in order to decide if California has a valid state interest in enacting Proposition 2. The stated purposes of Proposition 2 are to improve animal welfare and provide healthier food for human consumption.¹³² The United States Supreme Court has long recognized that “states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.”¹³³ Police powers have been generally extended to regulations promoting morals, domestic order, health, and safety including the “protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.”¹³⁴ The Court has stated that it is an inherent function of state government to enact laws that codify and enforce moral values to protect the “local moral fabric.”¹³⁵

1. Health and Safety

When deciding *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court determined that a Smoke Abatement Act to promote the health and welfare of the city’s inhabitants by reducing air pollution was valid.¹³⁶ The Court held that a “state regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand” where no impermissible burden is shown.¹³⁷ Similarly, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court found a statute banning the sale of milk in plastic nonreturnable containers to be constitutional.¹³⁸ The Court determined the local benefits of conserving energy and easing solid waste disposal

¹³² See CAL. HEALTH & SAFETY CODE § 25995 (West 2014).

¹³³ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹³⁴ *Hannibal v. Husen*, 95 U.S. 465, 470-71 (1877) (quoting *Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 149 (1854)).

¹³⁵ *Roth v. United States*, 354 U.S. 476, 504 (1957).

¹³⁶ *Huron Portland Cement Co. v. Detroit, Mich.*, 362 U.S. 440, 448 (1960).

¹³⁷ *Id.* at 448.

¹³⁸ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 474 (1981).

were ample to support the statute under the Commerce Clause.¹³⁹ However, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court concluded that better packaging requirements for cantaloupe in order to maintain the favorable reputation of Arizona growers was not a compelling state interest.¹⁴⁰ These cases demonstrate that environmental health concerns are sufficient to qualify as valid state interests as long as the purpose is not for the sole economic benefit of the state.

One stated purpose of Proposition 2 is to improve health and food safety.¹⁴¹ In analyzing the data on either side of the issue, one must ask: which came first, current egg-production practices or the emergence of Salmonella? Both sides of the debate insist that the health and safety of consumers is best protected by their preferred egg-production procedures.¹⁴² So many studies with such conflicting results leave one feeling scrambled.

Laying hens may suffer from reproductive diseases, parasites, and infectious diseases whether living in cages or cage-free systems; however, the nature and magnitude of disease risk may be affected by the hens' housing environment.¹⁴³ Systematic studies regarding disease incidence are rare.¹⁴⁴ Accurately measuring the exact degree of diseases depending on cage system is difficult.

The stated purposes of Proposition 2, to improve health and food safety, appear legitimate as they relate to California's police powers and are similar to those stated in *Huron* and *Clover Leaf*. The public interest in *Pike* is much different because it did not relate to a state's police power and therefore was not found compelling enough to overcome the burdens imposed to interstate commerce.¹⁴⁵ As demonstrated by this line of case law, the state interest of improved health and food safety should be sufficient, even without the added interest in preventing animal cruelty.

¹³⁹ *Id.* at 473.

¹⁴⁰ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-146 (1970).

¹⁴¹ CAL. HEALTH & SAFETY CODE § 25995 (West 2014).

¹⁴² See generally *Official Voter Information Guide: Standards for Confining Farm Animals. Initiative Statute*, CAL. GEN. ELECTION (Nov. 4, 2008), <http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> (providing a summary of arguments in support of and against Proposition 2).

¹⁴³ SHIELDS & DUNCAN, *supra* note 59 at 6.

¹⁴⁴ *Id.*

¹⁴⁵ See *Pike*, 397 U.S. at 145.

2. Animal Welfare

Improving animal welfare and preventing animal cruelty are other stated purposes of Proposition 2.¹⁴⁶ *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013), a recent decision by the Ninth Circuit held that California has a legitimate interest in preventing cruelty to animals within its state.¹⁴⁷ The court acknowledged that animal cruelty prohibition “has a long history in American law, starting with the early settlement of the Colonies.”¹⁴⁸ According to the decision, the state pursued its interest in preventing animal cruelty inherent to foie gras production “both by outlawing the actual practice of force-feeding birds for the purpose of enlarging their livers and the sale of such products” within California.¹⁴⁹

Some proponents of Proposition 2 claim that lack of movement due to current caging practices results in osteoporosis in hens as well as bone breakage.¹⁵⁰ Due to the confinement utilized in modern cage systems and the consequential restricted movement, these hens can suffer from liver damage and metabolic disorders in addition to osteoporosis.¹⁵¹ Confined conditions also prevent hens from partaking in many of their natural behaviors, such as their primary behavior of nesting, stretching their wings, and standing upright.¹⁵²

A Congressional Research Report compared hen welfare in different housing conditions and found that mortality is lower in enriched cage systems than in conventional battery cages; however, mortality can be significant in non-cage systems.¹⁵³ Free-range housing significantly

¹⁴⁶ See CAL. HEALTH & SAFETY CODE § 25995 (West 2014).

¹⁴⁷ *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013) (See *United States v. Stevens*, 559 U.S. 460 (2010)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ David Lulka, *To Turn: California's Proposition 2 and the Ethics of Animal Mobility in Agriculture*, 2:1 HUMANIMALIA 39 (2010), available at <http://www.depauw.edu/humanimalia/issue03/pdfs/lulka%20pdf.pdf>.

¹⁵¹ *An HSUS Report: The Welfare of Intensively Confined Animals in Battery Cages, Gestation Crates, and Veal Crates*, HUMANE SOC'Y OF THE U.S. 2 (July 2012), available at <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-intensively-confined-animals.pdf>.

¹⁵² *Table Egg Production and Hen Welfare: The UEP-HSUS Agreement and H.R. 3798*, CONG. RESEARCH SERV. 1, 15 (May 14, 2012), available at <http://www.fas.org/sgp/crs/misc/R42534.pdf>.

¹⁵³ *Id.* at 17.

increases natural behavioral opportunities for hens but ultimately makes the management of diseases and parasites more challenging and increases cannibalism and other predatory behaviors.¹⁵⁴

Opponents to Proposition 2 have pointed to existing state laws that already protect animals by requiring humane treatment.¹⁵⁵ Some researchers have noted that most of the negative implications can be greatly reduced or avoided through responsible management by producers who value the welfare of their hens.¹⁵⁶

However, use of this type of argument in determining whether a state interest is valid was rejected in *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir. 2007), where a state law prohibiting the processing, sale, or transfer of horsemeat for human consumption was upheld.¹⁵⁷ The state's interests included preserving horses, preventing theft of horses, and preventing horsemeat consumption.¹⁵⁸ The district court stated that horses could continue to be slaughtered for nonhuman consumption, could continue to be consumed provided the meat was not purchased, and horse theft was already codified by another statute.¹⁵⁹ However, the Fifth Circuit stated that the particular statute "does not need to perfectly *fulfill* the identified state interests, it just needs to advance them better than the alternatives."¹⁶⁰

One of the stated purposes of Proposition 2, prevention of animal cruelty, has already been deemed legitimate by the court in *Harris*.¹⁶¹ Animal welfare experts have stated, "Where the science is incomplete, we must rely on common sense, good judgment, and a solid foundation of ethics, and provide the best possible environment for animals, erring on the side of the animals' perceived or actual best interest."¹⁶² When there is question as to the benefits of a state statute that effects interstate commerce, it is not necessary that the state

¹⁵⁴ *Id.* at 17.

¹⁵⁵ Ching Lee, *Opponents Ramp up Campaign to Defeat Prop 2*, AGALERT (Oct. 15, 2008), <http://www.agalert.com/story/?id=1155>; PROPOSITION 2, 82 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf>.

¹⁵⁶ SHIELDS & DUNCAN, *supra* note 59 at 10, 12.

¹⁵⁷ *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 329 (5th Cir. 2007).

¹⁵⁸ *Id.* at 336.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013).

¹⁶² SHIELDS & DUNCAN, *supra* note 59 at 13.

interests be wholly realized by the statute, but it need only further them better than the alternatives.¹⁶³

B. Burden to Out-of-State Producers

After assessing the state interests involved, the burden to out-of-state producers must be assessed. The United States Supreme Court outlined the Dormant Commerce Clause analysis in *Pike* stating, “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁶⁴ The burden to out-of-state producers in *Pike* included the need to build an expensive warehouse to package cantaloupes within Arizona before shipping them out of state, which was determined to be excessive.¹⁶⁵ The Court found that this burden on interstate commerce could be tolerated if a more compelling state interest was involved as opposed to merely enhancing the reputation of producers within its borders.¹⁶⁶ The Fifth Circuit in *Curry*, elaborated on this concept stating, “the incidental burdens to which *Pike* refers are the burdens on interstate commerce that exceed the burdens on intrastate commerce.”¹⁶⁷

Milk repackaging burdens to out-of-state businesses in *Clover Leaf* were seen as slight as compared with the substantial state interest of reducing solid waste disposal issues.¹⁶⁸ The Court held that a “nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry.”¹⁶⁹ Such a regulation violates the Commerce Clause only if the encumbrances on interstate commerce obviously outweigh the state’s valid interests.¹⁷⁰ The Smoke Abatement Act in *Huron* was considered legitimate as it did not impermissibly burden commerce.¹⁷¹

¹⁶³ *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336 (5th Cir. 2007).

¹⁶⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁶⁵ *Id.* at 145.

¹⁶⁶ *Id.* at 144.

¹⁶⁷ *Empacadora de Carnes de Fresnillo*, 476 F.3d at 336.

¹⁶⁸ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981).

¹⁶⁹ *Id.* at 474.

¹⁷⁰ *Id.*

¹⁷¹ *Huron Portland Cement Co. v. Detroit, Mich.*, 362 U.S. 440, 448 (1960).

The burden in *Huron* was that all vessel owners who operated ships within Detroit that did not meet the city's ordinance had to incur costs to improve the emissions of their vessels.¹⁷² This was not found to be an impermissible burden on commerce when taking into consideration the city's legitimate state interest.¹⁷³

In *Harris*, the court found the five million-dollar figure in loss of sales overestimated the burden to producers and failed to raise a serious question that the burden clearly exceeded the local benefits.¹⁷⁴ If producers desired to continue to sell their *foie gras* products within the state of California, they needed to obtain the product by refraining from force feeding a portion of their ducks.¹⁷⁵ Thus, there was not an excessive burden, and although the *foie gras* producers would have to alter their production practices, the Commerce Clause did not guarantee preferred production methods.¹⁷⁶

As indicated by the cases above, the importance of the state interest involved is weighed against the burden to out-of-state producers. As the state interests are valid the burden would have to be excessive to invalidate Proposition 2.¹⁷⁷ The burden for out-of-state producers resulting from Proposition 2 includes the costs involved in confining hens in larger cages.¹⁷⁸ The best data from a range of sources report that the production costs for non-cage systems are at least twenty percent more than those for battery cage systems.¹⁷⁹ The bases of these added costs range across main categories including: increased feed costs because non-caged hens consume more feed and produce less eggs, increased incidence of laying hen mortality, increased housing costs because there are less hens per flock and less eggs over the life of each hen, and increased labor costs in gathering eggs.¹⁸⁰

These studies compare current battery cage practices with cage-free practices. A better comparison would be to analyze the difference in

¹⁷² *Id.* at 441, 448.

¹⁷³ *Id.* at 448.

¹⁷⁴ *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013).

¹⁷⁵ *See id.* at 950.

¹⁷⁶ *See id.* at 952.

¹⁷⁷ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970).

¹⁷⁸ *See Will HSUS's Egg Agenda Scramble the U.S. Constitution?*, *supra* note 108.

¹⁷⁹ DANIEL SUMNER ET AL., UNIV. OF CAL. AGRIC. ISSUES CTR., ECONOMIC EFFECTS OF PROPOSED RESTRICTIONS ON EGG-LAYING HEN HOUSING IN CALIFORNIA ii (Jul. 2008), *available at* <http://aic.ucdavis.edu/publications/eggs/egginitiative.pdf>.

¹⁸⁰ *Id.*

costs of battery cages to cages similar to the specifications required in Proposition 2 such as colony cages or enriched cages. However, it is very difficult to locate statistics regarding the comparison in costs of the two. The costs involved in confining hens in larger cages complying with the specifications outlined in Proposition 2 would perhaps be less than the costs involved in the cage-free approach.

Costs difference estimations between battery cages and colony cages are just under twelve and a half percent.¹⁸¹ This does not appear to be excessive; although, it is difficult to compare this cost to the above cases where the burden was determined to be insignificant as compared to the benefits, because no percentages in financial implications were provided in the above cases. However, applying *Harris*, egg producers still have the option of housing a portion of their hens in a manner consistent with the requirements of Proposition 2 in order to sell those particular eggs in California, despite the fact that it is not their preferred production method.¹⁸² In turn, out-of-state producers could transfer the resultant extra costs of production into an increased price for those eggs sold within California. This practice would minimize the burden to out of state producers.

C. Is There a Less Burdensome Alternative?

When a law burdens interstate commerce yet serves a legitimate local purpose, the availability of a less burdensome alternative is relevant to the inquiry.¹⁸³ In *Harris*, however, the court noted, “to invalidate a statute based on the availability of less burdensome alternatives, the statute would have to impose a significant burden on interstate commerce, which is not the case here.”¹⁸⁴

Opponents of Proposition 2 have not offered less burdensome alternatives.¹⁸⁵ *Humanimalia: A Journal of Human/Animal Interface Studies* stated, “[t]he general avoidance of other options is less an indication of a lack of alternatives than a general adherence to, and

¹⁸¹ HOY CARMAN, UNIV. OF CAL. DAVIS, ECONOMIC ASPECTS OF ALTERNATIVE CALIFORNIA EGG PRODUCTION SYSTEMS 2 (Aug. 30, 2012), available at www.cdfa.ca.gov/ahfss/pdfs/legislation/Dr_Hoy_Carman.pdf.

¹⁸² *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013).

¹⁸³ *U & I Sanitation v. Columbus*, 205 F.3d 1063, 1070 (8th Cir. 2000).

¹⁸⁴ *Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 952 (quoting *Nat'l Ass'n of Optometrists*, 682 F.3d at 1157 (2012)).

¹⁸⁵ *Proposition 2 and the Ethics of Animal Mobility in Agriculture*, *supra* note 155.

perhaps preference for, the status quo. To be more convincing, opponents need to delve more deeply into several alternative management regimes rather than articulating polar opposites.”¹⁸⁶

As a possible less burdensome alternative, California could institute some type of testing that could test eggs as they enter California to determine if the eggs contain or possibly have been exposed to Salmonella or Avian Flu. In 2009, the Federal Drug Administration enacted a rule requiring large egg producers to conduct Salmonella testing on a portion of their eggs.¹⁸⁷ There do not appear to be any current testing measures required for eggs to determine if they are infected with Avian Flu.¹⁸⁸ However, whatever testing may be employed it would not sufficiently address the concerns regarding animal welfare which is considered a legitimate state interest.¹⁸⁹ When addressing the concerns of allowing hens to fully extend their limbs and turn around, it does not seem that another less burdensome alternative exists other than larger cages or cage free methods. Without a less burdensome alternative available, the balancing test would rely solely on the state interests as compared to the burdens placed on out-of-state producers and here the valid state interests would prevail over the burdens to interstate commerce.¹⁹⁰

VI. PROPOSED LEGISLATION: THE PROTECTION OF INTERSTATE COMMERCE ACT – THE KING AMENDMENT

In direct response to the Dormant Commerce Clause issues inherent in Proposition 2, an Amendment to the 2013 Farm Bill was hatched by Representative Steve King, a Republican from Iowa, the largest egg-producing state in the United States.¹⁹¹ The Farm Bill of 2013, in one version, included the Protection of Interstate Commerce Act (“PICA”),

¹⁸⁶ *Id.*

¹⁸⁷ *Purdue Lab Ready for Egg Salmonella Testing*, THE POULTRY SITE (Jun. 30, 2009), <http://www.thepoultrysite.com/poultrynews/20253/purdue-lab-ready-for-egg-salmonella-testing>.

¹⁸⁸ *See Testing for Avian Influenza A (H5N1)*, CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, <http://www.cdph.ca.gov/programs/vrdl/Pages/TestingforAvianInfluenza.aspx> (last visited Jan. 13, 2014) (stating that testing is recommended).

¹⁸⁹ *See Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 952.

¹⁹⁰ *See Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 67 (1st Cir. 2001) *on reh'g en banc*, 312 F.3d 24 (1st Cir. 2002).

¹⁹¹ Coggin, *supra* note 11; U.S. DEP'T. OF AGRIC., *supra* note 47 at 6 (reporting Iowa as the largest egg-producing state).

coined the “King Amendment,” after its author.¹⁹² The King Amendment was intended to prevent out-of-state producers from being required to meet the regulations of the state in which they are selling their products.¹⁹³ Although this Amendment was omitted from the version of the Farm Bill passed by the Senate, the House of Representatives initially passed the Farm Bill with this Amendment included; however, the compromise Farm Bill of 2014 recently passed by the House does not include the Amendment and is anticipated to effortlessly pass in the Senate.¹⁹⁴

The possible effects of the King Amendment were clear; California and the other nine states with analogous laws would not be able to enforce its own standards as a condition for agricultural trade within its state.¹⁹⁵ Humane Society advocates said that the King Amendment, “undermines the longstanding Constitutional rights of states to protect the health, safety, and welfare of their citizens and local businesses.”¹⁹⁶ The King Amendment language “creates a blanket federal preemption of state and local standards for agriculture production but fails to offer any alternative.”¹⁹⁷ If passed, the amendment could have overturned AB 1437.¹⁹⁸

The ramifications of the King Amendment would have been significant. The King Amendment would strip existing state laws to protect animals and undermine states’ ability to pass laws regarding any agricultural product, including animals.¹⁹⁹ Due to the broad nature of the federal definition of agricultural products, this amendment could

¹⁹² James McWilliams, *The Congressional King of Industrial Agriculture*, PAC STANDARD (Aug. 7, 2013), <http://www.psmag.com/business-economics/the-congressional-king-of-industrial-agriculture-64164/>; Coggin, *supra* note 11.

¹⁹³ See *U.S. Congress and American Consumers Dethrone Another “King”*, *supra* note 104.

¹⁹⁴ *The Congressional King of Industrial Agriculture*, *supra* note 193; Richard Simon & Michael Memoli, *Farm Bill Compromise Protects California’s Egg Law*, LOS ANGELES TIMES (Jan. 27, 2014), <http://www.latimes.com/nation/la-na-farm-bill-california-20140128,0,7017006.story#axzz2sJbLFM9t>.

¹⁹⁵ *King Amendment Ignores Consumer Trends*, *supra* note 9.

¹⁹⁶ Kathy Will, *Humane Society Opposes Farm Bill*, FOOD POISONING BULLETIN (June 23, 2013), <http://foodpoisoningbulletin.com/2013/humane-society-opposes-farm-bill/>.

¹⁹⁷ *Id.*

¹⁹⁸ Jerry Hagstrom, *Why is the Farm Bill Finally Ripe for Passage?*, NATIONAL JOURNAL (Feb. 2, 2014), <http://www.nationaljournal.com/outside-influences/why-is-the-farm-bill-finally-ripe-for-passage-20140202>.

¹⁹⁹ See *The Congressional King of Industrial Agriculture*, *supra* note 193.

have jeopardized state laws and regulations concerning numerous animal welfare issues, including not only farm animal welfare, but also issues ranging from puppy mills to horse slaughter.²⁰⁰ The amendment could have had even wider-reaching effects, not only on factory farms but regulations concerning environmental protection as well as food and worker safety.²⁰¹

Congressman Steve King stated,

The Constitution of the United States reserves the regulation of interstate commerce to the Congress, not the states. The Protect Interstate Commerce Act (PICA) prohibits states from entering into trade protectionism by forcing cost prohibitive production methods on farmers in other states. PICA covers all agriculture products listed in section 206 of the Agriculture Marketing Act of 1946. By 2015, California will allow only eggs to be sold from hens housed in cages specified by California. The impact of their large market would compel producers in other states to invest billions to meet the California standard of ‘means of production.’²⁰²

However, Senator King is wrong when he asserts that states may not regulate interstate commerce.²⁰³

Another recent attempt to pass federal legislation in order to address the treatment of egg-laying hens was rejected.²⁰⁴ Senator Dianne Feinstein proposed the Egg Products Inspection Act Amendments in April 2013, which were designed to set a national standard and ensure

²⁰⁰ Derrick Cain, *Humane Society Continues to Urge Lawmakers to Drop King Amendment from Farm Bill*, AGRI PULSE (Aug. 14, 2013), <http://www.agripulse.com/Humane-Society-continues-to-urge-lawmakers-to-drop-King-amendment-from-farm-bill-08142013.asp>.

²⁰¹ *Id.*

²⁰² Steve King, *2 King Amendments Included in Farm Bill* (May 15, 2013), <http://votesmart.org/public-statement/789502/kings-two-amendments-included-in-farm-bill#.UtRKrPRDsa8>. (The term “agricultural products” in section 206 of the Agriculture Marketing Act of 1946 includes: “agricultural, horticultural, viticultural, and dairy products, livestock and poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured.”) 207 AGRICULTURE MARKETING ACT OF 1946 (Jun. 8, 2012), *available at* www.ag.senate.gov/download/agricultural-marketing-act-of-1946.

²⁰³ *See supra* Part III.B.

²⁰⁴ Letter from Diane Feinstein, U.S. Senator for Cal., to Sarah McNabb (Sept. 16, 2013) (on file with author).

that hens are treated humanely.²⁰⁵ This legislation was entirely consistent with California's Proposition 2 providing all egg producers with a level playing field of regulations.²⁰⁶ On September 16, 2013, in response to an inquiry regarding this comment, Dianne Feinstein wrote a letter stating, "consideration of this legislation was blocked in both the House and Senate."²⁰⁷

VII. THE FUTURE OF THE CALIFORNIA EGG INDUSTRY

A. What if Legislation Like the King Amendment Passes?

Prior to the passing of Proposition 2 and the signing of AB 1437, a study conducted by the University of California Agriculture Issues Center anticipated that Proposition 2 would result in the elimination of California egg production within a few years due to the increased costs involved for California egg producers preventing them from being able to compete with imported eggs.²⁰⁸ An economic study on the potential impact of Proposition 2 conducted by Promar International estimated that egg production costs would be approximately twenty-seven percent higher and would ultimately result in the elimination of most California egg production.²⁰⁹

By passing the King Amendment, AB 1437 would have become invalid and other states would not have had to comply with the requirements of Proposition 2 in order to sell eggs within California's

²⁰⁵ Egg Bill, WEI13179 S.L.C., 113TH CONGRESS, 1ST SESSION, *available at* http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=dfed0b34-971e-43f1-987d-22481f4439ae

²⁰⁶ *Id.* (The legislation would have outlawed the practice of starving chickens to increase egg-production, required conventional battery cages to be replaced with new housing systems that nearly double the space for each egg-laying hen. It would also have required, after a phase-in period, all egg-laying hens be provided with "environmental enrichments" such as nesting boxes and scratching areas, required labeling on all egg cartons to inform consumers of the method used to produce the eggs, including "eggs from caged hens," "eggs from hens in enriched cages," "eggs from cage-free hens" and "eggs from free-range hens;" and would have prohibited the transport and sale of eggs not meeting these requirements).

²⁰⁷ Letter from Diane Feinstein to Sarah McNabb, *supra* note 205.

²⁰⁸ SUMNER, *supra* note 179 at iv.

²⁰⁹ PROMAR, IMPACTS OF BANNING CAGE EGG PRODUCTION IN THE UNITED STATES A REPORT PREPARED FOR UNITED EGG PRODUCERS 17, 28 (Aug. 2009), *available at* http://www.unitedegg.org/information/pdf/Promar_Study.pdf.

borders.²¹⁰ Therefore, without an increase in egg costs to both California egg producers and out-of-state egg producers, California egg producers would not have been able to compete.²¹¹ California egg producers would have suffered the increased costs associated with adherence to the requirements of Proposition 2, while out-of-state producers would not.²¹² Therefore, California would have had to make changes to Proposition 2 in order for its egg industry to survive.²¹³

Further, California is a substantial net importer of eggs produced in other states, producing about six percent of the national total of table eggs and consuming about twelve percent.²¹⁴ Based on population share, California does not produce enough eggs to feed itself.²¹⁵ California certainly relies on importing eggs from other states in order to provide a sufficient resource of eggs to its citizens.²¹⁶ If other states chose not to sell their products within California to avoid having to adhere to the requirements of Proposition 2 and AB 1437, California egg producers would have had to increase egg production or Californians would have had to adjust egg consumption based on the supply available.²¹⁷

²¹⁰ Leighton Woodhouse, *Steve Kings Farm Bill Amendment Hurts Animals – and California Farmers*, THE HILL (Sept. 5, 2013), <http://thehill.com/blogs/congress-blog/economy-a-budget/320449-steve-kings-farm-bill-amendment-hurts-animals-and-california-farmers>.

²¹¹ *See id.*

²¹² *See* Pamela Kan-Rice, *UC Studies Potential Economic Impact of Prop.2*, UNIV. OF CAL. (July 22, 2008), <http://www.universityofcalifornia.edu/news/article/18264>.

²¹³ *See id.*

²¹⁴ *See* Kan-Rice, *supra* note 213.

²¹⁵ *See id.*

²¹⁶ *See id.*

²¹⁷ *See id.*

VIII. RECOMMENDATION AND CONCLUSION

Because Proposition 2 is intended to effectuate a legitimate public purpose and its burdens placed on out-of-state producers are incidental, it is not unconstitutional. The King Amendment was introduced in order to eliminate the effects of Proposition 2 on out-of-state egg producers.²¹⁸ However, if the King Amendment had been successfully integrated into the final 2014 Farm Bill enacted by the legislature, the California egg industry would be in grave danger.²¹⁹ As discussed above, this may have ultimately resulted in the dismantling of the California egg industry altogether.²²⁰ This would have had far reaching ramifications as well because it would have placed other statutes and regulations in danger, even those that are long-standing and popular.

To address the issues of health concerns and animal welfare relating to egg-production, federal regulation targeting egg-production practices throughout the United States should be enacted. The regulation should prescribe minimum requirements for the confinement of egg-producing hens and allow states to enact stricter guidelines. This federal legislation could be similar to the Egg Product Inspection Act Amendment. However, a regulation enacted to improve conditions for egg-laying hens, which would prevent states from being able to implement stricter standards, such as banning cages altogether, would be highly inadvisable.²²¹

Farm animal treatment is a concern to most consumers in this nation. Particularly, in recent years, citizens have become increasingly alarmed by the current practices of egg production.²²² The legislature should take notice that the public is concerned about the treatment of these animals as well as the conditions to which they are subjected.

²¹⁸ See 2 King Amendments Included in Farm Bill, *supra* note 203.

²¹⁹ See Kan-Rice, *supra* note 213.

²²⁰ *Id.*

²²¹ *Combating the Egg Industry's Attempt to Keep Hens in Cages Forever*, STOP THE ROTTEN EGG BILL, http://stoptherottenegeggbill.org/site/c.8qKNJWMwFbLUG/b.7867921/k.C798/About_Us.htm (last visited Mar. 15, 2014).

²²² See J.C. Swanson et al., *Integration: Valuing Stakeholder Input in Setting Priorities for Socially Sustainable Egg Production*, POULTRY SCIENCE 2117 (2011), available at <https://www.msu.edu/~orourk51/860-Phil/Handouts/Readings/SwansonEtAl-Integration-ValuingStakeholderInput-PoultryScience-2011.pdf>.

Research has shown American consumers are prepared to pay increased prices in order to ensure and promote improved and more humane conditions for these animals.²²³ It would be a tremendous setback if legislation similar to the King Amendment were passed preventing pioneering states like California from enacting innovative laws to ensure safer food of better quality while promoting more humane treatment of farm animals.

SARAH MCNABB²²⁴

²²³ *U.S. Congress and American Consumers Dethrone Another “King”*, *supra* note 104.

²²⁴ J.D. Candidate, San Joaquin College of Law, 2015. Sarah would like to thank her family and friends for their endless support, particularly her father, Eldon McNabb, whose assistance was essential during the editing process. She would also like to express her deep gratitude to Professor Jeffrey Purvis who provided invaluable expertise and guidance. She would like to especially thank her law school partner, Jarrett Rogers, for his enduring encouragement and inspiration without which this comment would not have been possible. Sarah would also like to express her appreciation to those who have taken the time to read this comment