

THE CHICKEN OR THE EGG: A LOOK AT REGULATING EGG-LAYING HENS THROUGH STATEWIDE BALLOT INITIATIVES

Sean M. Murphy[†]

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ABSTRACT

Sensing a shift in consumer sentiment towards animal welfare, animal rights activists have successfully spearheaded statewide ballot initiative campaigns to require a minimum cage size for the housing of egg-laying hens. Although well

[†] J.D., Antonin Scalia Law School at George Mason University, 2017; B.A., Political Science, University of Rhode Island, 2010. Thank you to my wife, Alison, for her support before, during, and after publication of this Article. Thank you to the staff of the *Drake Journal of Agricultural Law* for their hard work in preparing this Article for publication.

intended, these ballot campaigns have negative unintended consequences both legally and economically. Opponents of these ballot initiatives argue they violate the Commerce Clause of the United States Constitution by regulating commerce, or they violate the single subject rule often found in state constitutions—claims that while plausible, are unlikely to be agreed with by a court. By circumventing the standard legislative process, voters and legislators are deprived of an opportunity for a structured public hearing and may be more susceptible to misinformation. As a policy matter, these regulations are often unsound and strain farmer resources, disproportionately impact low-income families, and fail to benefit both animals and farmworkers. This Article will examine the issues described above and present consumer-friendly alternatives that can be implemented in contrast to strict farm regulations approved by statewide ballot initiatives.

I. INTRODUCTION

Eggs are great. You can scramble them, fry them, boil them (hard or soft), use them in baking, make pasta with them, dye them for Easter, and many other things. In fact, the average American was expected to consume roughly 275 eggs during 2017.¹ To keep up with demand, farmers employ a wide range of methods to produce eggs from hens, ranging from factory eggs to cage-free eggs, and even organic eggs.² Naturally, the prices of eggs differ by the method of production.³ This price disparity allows consumers to purchase eggs that fit their budgets. Unfortunately, states such as California and Massachusetts have recently passed ballot initiatives mandating any egg sold in the state come from hens housed in cages that meet a bare minimum size requirement.⁴

This Article will show these types of regulations, while constitutional, are bad policy because they increase the price of eggs, affecting those who can least afford the price increase. Further, there are no demonstrable health benefits of any particular way of raising eggs. Additionally, this Article will discuss why ballot initiatives are a poor tool for making substantive policy and will suggest alternative paths to regulate the housing of egg-laying hens.

Section II of this Article will provide background and context of both the

1. *About the U.S. Egg Industry*, AM. EGG BD., <https://perma.cc/LSX4-DKEQ> (archived Oct. 24, 2017).

2. Jeffrey Kluger, *Organic Eggs: More Expensive, but No Healthier*, TIME (July 8, 2010), <https://perma.cc/A6TU-XG72>.

3. *See id.*

4. Karin Brulliard, *Massachusetts Voters Say No to Tight Quarters for Hens, Pigs, and Calves*, WASH. POST (Nov. 9, 2016), <https://perma.cc/ZC97-7FN2>; Dan Charles, *How California's New Rules are Scrambling the Egg Industry*, NPR: THE SALT (Dec. 29, 2014, 6:07 PM), <https://perma.cc/835J-SB55>.

California ballot initiative, Proposition 2, and the Massachusetts ballot initiative, Question 3. Because some opponents of these laws argue they are an unconstitutional violation of the Interstate Commerce Clause of the United States Constitution, Section III will examine the constitutional implications of these laws. In Section IV, this Article will explore the ramifications of these types of regulations. Namely, the impact on prices, the health of both chickens and farmworkers, and the flawed method of passing substantive policy through ballot initiatives. Lastly, Section V will suggest changes to federal laws and regulations as both an alternative to the ballot initiatives and a way to mitigate their harmful results.

II. BACKGROUND

In order to understand the impact of these ballot initiatives and the legal and political issues they raise, it is important to get a firm understanding of how they were implemented into law. This section will give an overview of the events leading to the approval of both the California and Massachusetts egg initiatives.

A. California Law: Proposition 2

California voters are no strangers to ballot initiatives. In 2016, voters were asked to weigh in on seventeen different propositions, ranging from school bonds to the legalization of marijuana.⁵ In 2008, voters were asked to decide twelve ballot propositions dealing with abortion for minors, same-sex marriage, and the initiative at issue in this Article, confinement of farm animals.⁶

In October 2007, Californians for Humane Farms—a coalition comprised of the Humane Society of the United States, Farm Sanctuary, other animal protection groups, family farmers, veterinarians and public health professionals—began collecting signatures for a ballot initiative to improve the conditions of farm animals.⁷ To qualify for the November ballot, 433,971 valid signatures were required, which the group far eclipsed by gathering 790,486.⁸ The California Secretary of State certified the signatures on April 9, 2008, allowing the question to be voted on in the November 2008 general election.⁹ As Proposition 2, the initiative would require “calves raised for veal, egg-laying hens and pregnant pigs be confined only in ways

5. John Myers, *What You Need to Know About the 17 Propositions on November's Statewide Ballot*, L.A. TIMES (July 3, 2016, 12:05 AM), <https://perma.cc/259A-3B39>.

6. *California—Election Results 2008*, N.Y. TIMES (Dec. 9, 2008), <https://perma.cc/2T4S-LUDZ>.

7. *Nearly 800,000 Signatures Turned in to Qualify Anti-Cruelty Measure for November Ballot*, HUMANE SOC'Y U.S. (Feb. 28, 2008), <https://perma.cc/J88LL-WC4F>.

8. *Id.*

9. *Anti-Cruelty Measure Certified for California's November Ballot*, CALIFORNIANS FOR HUMANE FOOD (Apr. 10, 2008, 10:00 AM), <https://perma.cc/XV34-QH3Q>.

that allow these animals to lie down, stand up, fully extend their limbs and turn around freely.”¹⁰ On November 4, 2008, the initiative passed by a margin of 63.5% to 36.5%.¹¹

One wrinkle in this plan, however, was the law only applied to hens in California. Therefore, eggs transported in from other states would not need to comply with the new cage requirement, and in-state egg producers would be put at a significant disadvantage.¹² To remedy this oversight, the California legislature passed a law requiring any egg sold in the state to comply with the requirements set out in Proposition 2.¹³

Despite Proposition 2 passing with a super majority, the law has faced legal challenges from both inside and outside the state of California. In 2012, William Cramer, a California egg farmer, filed a lawsuit against Proposition 2’s cage size requirements, arguing it is “unconstitutionally vague under the Fourteenth Amendment’s due-process clause because it lacks details about the exact cage size required to avoid criminal prosecution.”¹⁴ Cramer argued because the Proposition lacks “fair notice of unlawful criminal conduct” and “enforcement of the statute will be arbitrary and inconsistent” due to prosecutorial discretion, Proposition 2 violates the Due Process guarantees.¹⁵ In addition, Cramer challenged Proposition 2 under the Commerce Clause of the United States Constitution, stating it violates the Clause because the restriction on interstate commerce is “excessive in relation to the putative local benefits.”¹⁶

Judge John F. Walter did not agree with Cramer, and granted a motion to

10. CAL. SEC’Y OF STATE, 2008 CALIFORNIA GENERAL ELECTION VOTER GUIDE – PROPOSITION 2, at 1 (2008) [hereinafter CAL. SEC’Y OF STATE, 2008 VOTER GUIDE], <https://web.archive.org/web/20081016023112/http://www.voterguide.sos.ca.gov/title-sum/pdf/prop2-title-summary.pdf>.

11. See generally CAL. SEC’Y OF STATE, VOTES FOR AND AGAINST NOVEMBER 4, 2008, STATE BALLOT MEASURES (2008), http://elections.cdn.sos.ca.gov/sov/2008-general/7_votes_for_against.pdf.

12. Wyatt Buchanan, *Law Extends State’s Egg Mandates to Imports*, S.F. GATE (July 7, 2010, 4:00 AM), <https://perma.cc/F46N-DMYC>.

13. Lindsay Barnett, *Gov. Schwarzenegger Signs Bill to Require Out-of-State Egg Producers to Comply with Proposition 2 Space Requirements for Egg-Laying Hens*, L.A. TIMES: L.A. UNLEASHED (July 8, 2010, 4:46 PM), <https://perma.cc/VM7T-Z7YB>.

14. Amanda Bronstad, *Challenges Mount to California Measure Protecting Hens*, NAT’L L.J., Jan. 2015, at 1.

15. First Amended Complaint for Declaratory and Injunctive Relief at 8-9, *Cramer v. Brown*, No. CV-12-03130-JFW-JEM (C.D. Cal. July 5, 2012).

16. *Id.*

dismiss his claims.¹⁷ Judge Walter found the Proposition was not vague and, in fact, established a clear test for law enforcement officials, additionally commenting the “test does not require the law enforcement officer to have the investigative acumen of Columbo to determine if an egg farmer is in violation of the statute.”¹⁸ Cramer’s Commerce Clause argument did not fare any better, with Judge Walter stating the “factual allegations are wholly insufficient to raise his claim above the speculative level.”¹⁹

Mr. Cramer appealed to the Ninth Circuit Court of Appeals, which decided the case without a hearing.²⁰ In a three paragraph unpublished opinion, the Ninth Circuit affirmed the lower court’s motion to dismiss, without mentioning the Commerce Clause issue.²¹

Mr. Cramer’s lawsuit was not the only legal challenge Proposition 2 faced, as six egg-producing states impacted by the proposed law subsequently filed suit, challenging the law as a violation of the Commerce Clause.²² In February 2014, the state of Missouri filed a lawsuit arguing California’s requirement that out-of-state egg producers follow the restrictions on cage size violates the Commerce Clause.²³ Within one month, five other states—Nebraska, Alabama, Oklahoma, Kentucky, and Iowa—joined the lawsuit.²⁴

In October 2014, Judge Kimberly Mueller dismissed the lawsuit, finding the states lacked standing to bring the challenge.²⁵ Because Article III of the United States Constitution limits the judicial branch to cases or controversies, the standing doctrine limits the power of the courts to hear certain cases.²⁶ Standing requires courts to determine “whether the litigant is entitled to have the court decide the

17. Order Granting Defendant-Intervenor the Humane Society of the United States’ Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim at 8, *Cramer v. Brown*, No. CV-12-03130-JFW-JEM (C.D. Cal. Sept. 12, 2012).

18. *Id.* at 6.

19. *Id.* at 7.

20. *See generally* *Cramer v. Harris*, 591 F. App’x 634 (9th Cir. 2015).

21. *See generally id.*

22. *Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 WL 1245038, at *1 (E.D. Cal. Mar. 5, 2014); Matthew Patane & Donnelle Eller, *California Egg Law May Lead to Ag War Between States*, DES MOINES REG. (Oct. 6, 2014, 2:41 PM), <https://perma.cc/ZWE7-6HBW>.

23. Reid Wilson, *Missouri Sues California Over Chicken Regulations*, WASH. POST (Feb. 4, 2014), <https://perma.cc/MX4E-EJTE>.

24. *Ag States Join Missouri’s Challenge of Egg Law*, FARM NEWS (Mar. 16, 2014), <https://perma.cc/R945-THYD>.

25. *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1063 (E.D. Cal. 2014), *aff’d*, 847 F.3d 646 (9th Cir. 2017).

26. *See Allen v. Wright*, 468 U.S. 737, 750-51 (1984).

merits of the dispute or of particular issues.”²⁷ To meet this requirement, a plaintiff must “allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”²⁸ Additionally, the six egg-producing states had filed the lawsuit and asserted standing under the doctrine of *parens patriae*.²⁹ This doctrine allows states to bring a suit on behalf of its citizens when the state “allege[s] injury to a sufficiently substantial segment of its population,’ ‘articulate[s] an interest apart from the interests of particular private parties’ and ‘express[es] a quasi-sovereign interest.’”³⁰ Judge Mueller found the states did not establish a quasi-sovereign interest because their argument alleged injury to the state’s egg farmers, not the citizens as a whole.³¹ On appeal, the Ninth Circuit affirmed Judge Mueller’s decision.³²

With California’s law surviving two legal disputes, one from within the state, and one from outside the state, the law would go into effect in 2015 as planned. It is important to note the two lawsuits did not settle the constitutionality question definitively. The Cramer lawsuit did not discuss anything about the Commerce Clause on appeal, and the Missouri lawsuit never evaluated the merits. When an out-of-state egg farmer files suit it will be interesting to see how the court handles the matter.

B. Massachusetts Law: Question 3

On November 4, 2016, Massachusetts voters were faced with a ballot question almost identical to California’s Proposition 2 eight years earlier. Massachusetts’s Question 3 would prohibit “any confinement of pigs, calves, and hens that prevents them from lying down, standing up, fully extending their limbs, or turning around freely.”³³

Before voters could decide the fate of Question 3, it had to appear on the ballot. Massachusetts uses a unique initiative proposal system where initiatives are first sent to the state legislature, the Massachusetts General Court, to decide on

27. Warth v. Seldin, 422 U.S. 490, 498 (1975).

28. Allen, 468 U.S. at 751 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

29. Harris, 58 F. Supp. 3d at 1064.

30. Table Bluff Reservation v. Philip Morris, Inc., 256 F.3d 879, 885 (9th Cir. 2001) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982)).

31. Harris, 58 F. Supp. 3d at 1074-75.

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

33. SEC’Y OF THE COMMONWEALTH, MASSACHUSETTS INFORMATION FOR VOTERS, 2016 BALLOT QUESTIONS 8 (2016) [hereinafter MASSACHUSETTS INFORMATION FOR VOTERS], https://www.sec.state.ma.us/ele/elepdf/IFV-_2016.pdf.

adoption.³⁴ In order to be presented to the legislature, the issue must be submitted to the Attorney General, who determines whether the measure meets constitutional requirements.³⁵ If approved, advocates must gather 64,750 voter signatures.³⁶ Once the requisite number of signatures is reached, the initiative is sent to the Massachusetts General Court, where they may approve, disapprove, propose a substitute, or take no action.³⁷ Unless the general court enacts the initiative by the first Wednesday in May, advocates are required to obtain an additional 10,792 signatures to secure a position on the ballot.³⁸

In December 2015, the Massachusetts Secretary of State certified the proponents of Question 3 had submitted 95,817 signatures and forwarded the petition to the legislature.³⁹ When the legislature failed to take action on the measure, advocates submitted an additional 40,000 signatures, which were certified by the Secretary of State, placing the issue on the ballot for the 2016 election and giving the voters in Massachusetts the final decision.⁴⁰ On election day, voters overwhelmingly supported the measure, approving it by a margin of 77.7% to 22.3%.⁴¹

While the initiative passed by an astounding margin, it wasn't without legal disputes. In April 2016, opponents of the ballot initiative filed a lawsuit, arguing, "the question violates the constitutional requirement that initiatives contain only subjects 'which are related or which are mutually dependent.'"⁴² In their view, the ballot question asked two questions, "whether certain farming practices should be banned in Massachusetts, and whether certain types of products should be banned from being sold in the state."⁴³ The Massachusetts Supreme Judicial Court heard arguments in June and upheld the question in a unanimous opinion one month

34. *Initiatives & Other Types of Ballot Questions*, MASS.GOV. (2017), <https://perma.cc/3NKW-NC9V>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Colin A. Young, *Major Signature Hurdle Cleared by Seven Ballot Question Campaigns*, MILLBURY-SUTTON CHRON. (Dec. 24, 2015), <https://perma.cc/R4SM-P74D>.

40. Shira Schoenberg, *4 Statewide Questions Make Massachusetts Ballot*, MASSLIVE (July 6, 2016, 7:35 PM), <https://perma.cc/X8LY-CW2K>; Shira Schoenberg, *Questions on Marijuana, Education, Farm Animals Likely to Make November Ballot*, MASSLIVE (June 22, 2016, 4:45 PM), <https://perma.cc/YL4G-KKZX>.

41. *Massachusetts Results*, N.Y. TIMES (Nov. 8, 2016, 11:22 AM), <https://perma.cc/5V9E-MR76>.

42. Joshua Miller, *Opponents Call Cage-Free Egg Ballot Question Rotten*, BOS. GLOBE (Apr. 28, 2016), <https://perma.cc/8YFW-HZK9> [hereinafter Miller, *Opponents*].

43. *Id.*

later.⁴⁴ The supreme judicial court found “the farm provision and the sales provision share a common purpose of preventing farm animals from being caged in overly cramped conditions,” and held the initiative contained subjects that are related or are mutually dependent.⁴⁵

With the law not taking effect until 2022, it is extremely likely there will be more legal challenges in the coming years.⁴⁶ Like the California law, opposition from outside the state may try to roll back Question 3. However, if the California litigation provides any guidance, the opposition cannot come from the states directly.

While both California’s Proposition 2 and Massachusetts’s Question 3 passed by large margins and were placed on the ballot by gathering signatures of concerned voters, they still faced challenges along the way. In California, six egg-producing states unsuccessfully sued to get the law ruled unconstitutional; however, their case was never heard on the merits. In Massachusetts, a challenge attempting to prevent the initiative from being placed on the ballot was unsuccessful, with the Massachusetts Supreme Judicial Court finding the supporters of the initiative had complied with all the requirements. With both initiatives surviving judicial scrutiny, they are the law of the land in their respective states.

III. CONSTITUTIONALITY

Throughout history, controversies over food have yielded some of the most important cases in defining and expounding the United States Constitution. For example, *United States v. Carolene Product Co.*, a case regarding the Filled Milk Act of 1923, produced “the most famous footnote in constitutional law.”⁴⁷ The “most far reaching example of Commerce Clause authority over intrastate activity” came from *Wickard v. Filburn*, which involved a farmer’s wheat.⁴⁸ More recently, the Court examined the boundaries of the Fifth Amendment’s Takings Clause through a case involving raisins.⁴⁹

44. Shira Schoenberg, *Mass. Supreme Judicial Court Upholds Farm Animal Ballot Question Banning ‘Extreme Confinement,’* MASSLIVE (July 6, 2016, 1:17 PM), <https://perma.cc/KA9E-WF4K>; see Miller, *Opponents*, *supra* note 42.

45. *Dunn v. Attorney Gen.*, 54 N.E.3d 1, 7 (Mass. 2016).

46. Miller, *Opponents*, *supra* note 42.

47. *United States v. Carolene Products Co.*, 304 U.S. 144, 145 (1938); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165 (2004).

48. *United States v. Lopez*, 514 U.S. 549, 560 (1995). See generally *Wickard v. Filburn*, 317 U.S. 111 (1942).

49. *Home v. Dep’t of Agric.*, 135 S. Ct. 2419, 2419 (2015).

Some opponents of the laws mandating cage size for out-of-state egg-laying hens argue they are an unconstitutional violation of the Commerce Clause of the United States Constitution.⁵⁰ To combat the California egg law, six egg-producing states filed a federal lawsuit to prevent the law from taking effect.⁵¹ In Massachusetts, a group worried about the rising costs of eggs filed a lawsuit challenging the placement of the initiative on the ballot under the Massachusetts constitution.⁵² While these challenges were thrown out, some without deciding on the merits, their arguments deserved to be examined.

A. Commerce Clause

Article I, Section Eight, Clause Three of the United States Constitution gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁵³ Thus, the Clause creates three separate powers over commerce that have come to be recognized as three distinct clauses: the Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause.⁵⁴ As each Clause regulates a different type of activity, they have developed their own lines of jurisprudence.⁵⁵ Because this Article focuses on the relationship between the several states and commerce, a look at the Interstate Commerce Clause and its counterpart—the Dormant Commerce Clause—is necessary.⁵⁶

1. Interstate Commerce

Article I, Section Eight of the United States Constitution enumerates eighteen powers given to the legislative branch of our federal government.⁵⁷ The third Clause gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” while Clause eighteen vests Congress with the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or

50. Patane & Eller, *supra* note 22.

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

52. Miller, *Opponents*, *supra* note 42.

53. U.S. CONST. art. I, § 8, cl. 3.

54. Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1150 (2013).

55. *Id.*

56. *See* Jennifer L. Larsen, Note, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 845 (2004) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). The Dormant Commerce Clause is a negative implication of powers given to Congress. Because Congress has power to regulate interstate commerce, the Dormant Commerce Clause “directly limits the power of the States to discriminate against interstate commerce.”

57. U.S. CONST. art I, § 8.

Officer thereof.”⁵⁸ These Clauses, known as the Commerce Clause and the Necessary and Proper Clause, lay the foundation for Congress’s ability to regulate interstate commerce. Today, this ability includes the power to regulate (1) the use of the channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities substantially relating to interstate commerce.⁵⁹ Put succinctly, “Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce.”⁶⁰

In 1995, the Supreme Court began scaling back this power in *United States v. Lopez*.⁶¹ In *Lopez*, the Court struck down a federal statute imposing criminal penalties on any individual who knowingly possessed a firearm in a school zone.⁶² The Court found Congress exceeded its authority under the Commerce Clause because the law was a criminal statute, and did not relate to commerce or economic enterprise “however broadly one might define those terms”; therefore, it could not be viewed as substantially affecting interstate commerce, even in the aggregate.⁶³ In addition, the Court was concerned the statute did not contain any jurisdictional element, which would ensure the firearm possession in question had some form of nexus with interstate commerce.⁶⁴

Five years after *Lopez*, in *United States v. Morrison*, the Court further limited Congress’s ability to regulate interstate commerce through the Commerce Clause.⁶⁵ At question in *Morrison* was a provision of the Violence Against Woman Act, which provided a federal remedy to victims of gender-motivated violence.⁶⁶ The Court struck down the provision finding “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”⁶⁷ Despite Congress’s finding that violence against women substantially affects interstate commerce in the aggregate, the Court was not persuaded, and found the causal chain from violent crime to effects on interstate commerce was too weak.⁶⁸

While Congress still has broad power to regulate commerce, *Morrison* and *Lopez* limited this power. These decisions illustrate Congress cannot attempt to

58. *Id.* cl. 3, 18.

59. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

60. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

61. *See Lopez*, 514 U.S. at 549.

62. *Id.* at 551.

63. *Id.* at 561.

64. *Id.*

65. *See generally Morrison*, 529 U.S. at 598.

66. *Id.* at 601-02.

67. *Id.* at 613.

68. *Id.* at 615.

regulate non-economic activity, such as crime, even if there is an aggregate impact on interstate commerce.⁶⁹

2. *Dormant Commerce Clause*

Because Congress is empowered to regulate commerce between the states, it logically follows that states cannot regulate interstate commerce. This doctrine, known as the Dormant Commerce Clause, prohibits states from imposing a tax or regulation “that discriminates against or unduly burdens interstate commerce.”⁷⁰ This issue is especially important to the litigation over California’s and Massachusetts’s egg initiatives, as producers in other states would be subject to the regulation if they intend to ship eggs into the respective states.

In determining whether states have overstepped their ability to regulate commerce, the Supreme Court has distinguished between state statutes that affirmatively discriminate against interstate commerce and those that only burden interstate commerce incidentally.⁷¹ In making these determinations, discrimination simply means the statute favors in-state economic interests over its out-of-state counterparts.⁷² Statutes that on their face discriminate against interstate commerce are “virtually per se illegal” and receive “the strictest scrutiny,” even if the state is pursuing a legitimate local interest.⁷³ Statutes that are facially neutral, yet have a discriminatory purpose, or are facially neutral, but still have a discriminatory effect, will receive this heightened scrutiny as well.⁷⁴

The review of state regulations that only incidentally burden interstate commerce is more deferential. In *Pike v. Bruce Church, Inc.*, the Supreme Court articulated the applicable standard as follows: “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.”⁷⁵ Thus, if a statute is not facially discriminatory, the court must weigh the burden to interstate

69. *See id.* at 628; *Lopez*, 514 U.S. at 561.

70. *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

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

72. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 100 (1994).

73. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

74. David S. Day, *The “Mature” Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 2 (2007).

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

commerce against the local benefits.⁷⁶ This is known as the “*Pike* balancing test.”⁷⁷

In order for state statutes regulating interstate commerce to survive a Dormant Commerce Clause challenge, they must serve a legitimate local interest and be non-discriminatory. Should a statute survive the initial step, its local benefits are weighed against its burden on interstate commerce. If the benefits outweigh the burden, the statute will stand.

B. Single Subject Rule

The Commerce Clause is not the only constitutional obstacle Proposition 2 and Question 3 have faced. Many states have what is known as the “single subject rule,” a constitutional provision that requires laws and ballot initiatives to cover only one question or issue.⁷⁸ This unique area of state constitutional law can apply to state legislatures, ballot initiatives, or both, but has no federal counterpart.⁷⁹ Both the California and Massachusetts constitutions contain such a provision that applies to ballot initiatives.⁸⁰ While those that challenged California’s Proposition 2 did not raise a single subject challenge, the only legal challenge to Massachusetts’s Question 3 was a single subject rule violation.⁸¹

1. Massachusetts

The Massachusetts constitution requires a proposed ballot initiative to contain subjects “which are related or which are mutually dependent.”⁸² For example, in 2006, the Massachusetts Supreme Judicial Court struck down a proposed ballot initiative that sought to ban gambling on dog racing and broaden criminal penalties for dog abuse.⁸³ The court found that combining a controversial topic (banning wagers on dog racing) with the noncontroversial topic (placing tougher penalties on

76. See *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 49-50 (2d Cir. 2007) (“Under *Pike*, a non-discriminatory regulation will be upheld if the burden it places on interstate commerce is outweighed by its local public benefits.”).

77. *Town of Southold*, 477 F.3d at 49-50 (emphasis added).

78. *Single Subject Rule*, NAT’L CONF. ST. LEGISLATURES, <https://perma.cc/4XSG-VFE9> (last updated May 8, 2009).

79. See *id.*; see also Brannon P. Denning & Brooks R. Smith, *The Truth-in-Legislation Amendment: An Idea Whose Time Has Come*, 78 TENN. L. REV. 831, 831 (2011).

80. See CAL. CONST. art II, § 8(d); MASS. CONST. amend. art. XLVIII, pt. 2, § 3; see also Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579, 584, 601 (2004).

81. Joshua Miller, *SJC Hears Challenges to Pot, Egg Questions*, BOS. GLOBE (June 8, 2016), <https://perma.cc/U2HE-28L3>.

82. MASS. CONST. amend. art. XLVIII, pt. 2, § 3.

83. *Carney v. Attorney Gen.*, 850 N.E.2d 521, 524 (Mass. 2006).

dog abuse) the proposed initiative violated the relatedness provision of the state constitution.⁸⁴

In contrast, in 2014, the Massachusetts Supreme Judicial Court upheld a proposed initiative that sought to ban casinos, slot gambling, and wagering on dog races.⁸⁵ Here, the court found the initiative conformed to the related subject requirement of the state constitution because “all the provisions in the petition before us can reasonably be understood to be antigaming provisions.”⁸⁶ The court stated they had not construed the related subject requirement narrowly, but required the subjects in an initiative share a “common purpose.”⁸⁷

While this may not be a rigorous test, arguing that Massachusetts’s Question 3 violated this single subject provision did offer one avenue to challenging the validity of the initiative.

2. California

The California constitution states any “initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”⁸⁸ In 1999, the California Supreme Court struck down a proposed ballot initiative that changed the way the state reapportions congressional and state legislative districts and revised methods of compensation of state elected officials.⁸⁹ The court found initiatives do not violate the single subject rule as long as all parts are “reasonably germane” to each other, and “to the general purpose or object of the initiative.”⁹⁰ Additionally, the court noted they have upheld initiatives ““which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose.””⁹¹ Because the court found the two measures—reapportionment and salaries of public officials—did not share a common theme or purpose, it struck down the proposed initiative.⁹²

C. Analysis

California’s Proposition 2 and Massachusetts’s Question 3 are strikingly similar and thus raise the same questions about their constitutionality. The largest

84. *Id.* at 524-25.

85. *Abdow v. Attorney Gen.*, 11 N.E.3d 574, 577 (Mass. 2014).

86. *Id.* at 592.

87. *Id.* at 590 (quoting *Mazzone v. Attorney Gen.*, 736 N.E.2d 358, 370 (Mass. 2000)).

88. CAL. CONST. art II, §8(d).

89. *Senate of Cal. v. Jones*, 988 P.2d 1089, 1091 (Cal. 1999).

90. *Id.* at 1098 (quoting *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1320 (Cal. 1991)).

91. *Jones*, 988 P.2d at 1099 (quoting *Eu*, 816 P.2d at 1321).

92. *Id.* at 1105.

challenge is whether these laws violate the Commerce Clause by discriminating against interstate commerce. Also of relevance is whether the initiatives violated their respective state requirement of a single subject per ballot initiative. While the Massachusetts Supreme Judicial Court heard arguments about the single subject rule, it did not discuss the effect on interstate commerce.⁹³ In California, the two lawsuits filed over Proposition 2 were thrown out before reaching the merits. One was dismissed on a 12(b)(6) motion to dismiss, while the other was rejected for lack of standing.⁹⁴ This section will apply the *Pike* test as described above and examine the applicability of the single subject rule to each of the initiatives.

1. Commerce Clause Challenge

The Dormant Commerce Clause prohibits states from imposing a tax or regulation that “discriminates against or unduly burdens interstate commerce.”⁹⁵ Statutes that discriminate receive strict scrutiny and are virtually per se violations.⁹⁶ On the other hand, if a statute is not facially discriminatory, the court must weigh the burden to interstate commerce against the local public benefits.⁹⁷ Thus, in order to determine if Proposition 2 and Question 3 violate the Dormant Commerce Clause, we must first determine if they discriminate against out-of-state economic actors. If not, the benefits must still outweigh the burdens for the initiatives to be upheld.

Both initiatives regulate the proper cage size for egg-laying hens and apply to any egg being sold in the respective state.⁹⁸ Thus, the argument is because out-of-state farmers would have to comply with the law, it places an impermissible burden on interstate commerce. It is hard to say these initiatives are discriminatory. The Supreme Court has found statutes to be discriminatory when they favor in-state economic interests over their out-of-state competitors.⁹⁹ One example is an Oregon law that charged different fees for the disposal of garbage based on which

93. See generally *Dunn v. Attorney Gen.*, 54 N.E.3d 1, 1 (Mass. 2016).

94. Order Granting Defendant-Intervenor the Humane Society of the United States’ Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim, *Cramer v. Brown*, No CV 12-03130-JFW-JEM 8 (C.D. Cal. Sept. 12, 2012). See generally *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017).

95. *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

96. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

97. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 49-50 (2d Cir. 2007).

98. Dan Flynn, *Egg-Producing States File Appeal Over California’s Proposition 2*, FOOD SAFETY NEWS (Mar. 9, 2015), <https://perma.cc/Z4B5-9RLC>; Steve LeBlanc, *Voters to Weigh Cost of Restrictive Cages for Farm Animals*, BOSTON.COM (Sept. 24, 2016), <https://perma.cc/PRR4-PHL>.

99. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 100 (1994).

state produced the garbage.¹⁰⁰ Because Oregon charged a higher fee for garbage generated in a different state, the Court found the scheme favored disposal of waste generated in-state and was therefore a facially discriminatory statute.¹⁰¹

Unlike the statute in Oregon, the egg initiatives treat producers of eggs the same.¹⁰² The initiatives do not seek to favor their state's economic interest at the expense of another. Therefore, the initiatives do not appear to be facially discriminatory. Even if the initiatives are not facially discriminatory, they are subject to heightened scrutiny if they are discriminatory in effect or purpose.¹⁰³ It is unlikely a court would find a discriminatory effect or purpose, because the egg producers are treated the same whether they are located inside the state in question or in a neighboring jurisdiction.

With the initiatives failing to be discriminatory, the reviewing court would not apply strict scrutiny, but rather weigh any legitimate local interest against the burden on interstate commerce.¹⁰⁴ First, the court must determine whether there is a legitimate local interest.¹⁰⁵ Proponents of the initiatives argue they have legitimate interest in preventing animal abuse and protecting public health.¹⁰⁶ It is hard to argue against this position, as the Supreme Court has found these to be legitimate interests. For instance, in *Hughes v. Oklahoma*, the Court struck down an Oklahoma statute that prohibited the transportation of minnows outside the state if they had been caught there.¹⁰⁷ The Court, however, did conclude the state had a legitimate interest in the protection of wild animals stating, "[w]e consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens."¹⁰⁸ Applying this to egg-laying hens, it appears proponents of Proposition 2 and Question 3 have strong arguments that the welfare of farm animals and protection of public health both fall within the criteria of a legitimate state interest.

Finding a legitimate interest is only the first part of the *Pike* balancing test,

100. *Id.* at 95-96.

101. *Id.* at 99.

102. CAL. SEC'Y OF STATE, 2008 VOTER GUIDE, *supra* note 10.

103. Day, *supra* note 74, at 2.

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

105. *Id.*

106. Brief for Animal Legal Defense Fund, et al. as Amici Curiae Supporting Defendants' Motion to Dismiss, *Missouri ex rel. Koster v. Harris* (No. 2:14-cv-00341-KJM-KJN), 2014 WL 3726696, at *3 (E.D. Cal. July 2, 2014).

107. *See Hughes v. Oklahoma*, 441 U.S. 322, 323-25 (1979).

108. *Id.* at 337.

as the interest must be weighed against the burden it places on interstate commerce.¹⁰⁹ Opponents of the propositions, namely the six states that filed suit against California, did not dispute the power of the state to ban certain cages for hens inside the state border, but argued the state had no legitimate interest in animal welfare beyond its borders.¹¹⁰ This argument misses the point. The initiatives are not mandating farms in other states to use certain cages for their hens, but are banning certain eggs from entering their state. Farmers in other states do not have to comply with the initiative's cage requirements if they do not wish to do so. However, if farmers were to ship their eggs into California and Massachusetts, they would have to comply with the standard set forth by those states. Balancing the interest of the state (protecting animal welfare and public health) with the burden (precluding farmers from outside of California and Massachusetts from shipping eggs into those states unless they comply with the cage laws) seems to tip the scales in favor of the initiatives.

The Ninth Circuit has held a statute will not violate the Dormant Commerce Clause because it merely "affects in some way the flow of commerce between the States."¹¹¹ In this scenario, the Dormant Commerce Clause challenge will likely fail because the initiatives are not discriminatory on their face, nor do they have a discriminatory purpose or effect. In addition, the burdens they place on interstate commerce are incidental and outweighed by a legitimate state interest.

2. Single Subject Rule Challenge

With a Dormant Commerce Clause challenge to Proposition 2 and Question 3 likely to fail, opponents still have a constitutional challenge by looking to the state constitutions and the single subject rule. These state constitution rules mandate any proposed initiative cover only one topic and that the contents of the initiative share a common purpose.¹¹² The Supreme Judicial Court of Massachusetts already heard, and denied, a challenge to Question 3; however, opponents of Proposition 2 in California have not attempted to defeat the initiative in this way.

In *Dunn v. Attorney General*, a Massachusetts farmer sought to prevent

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

110. Plaintiffs' Response to Amicus Curiae Briefs in Support of the Defendants' and Defendant-Intervenors' Pending Motions to Dismiss/for Judgment on the Pleadings, *Missouri ex rel. Koster v. Harris* (No. 2:14-cv-00341-KJM-KJN), 2014 WL 3726770, at *2 (E.D. Cal. July 15, 2014).

111. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948-49 (9th Cir. 2013) (quoting *Nat'l Ass'n of Optometrists v. Harris*, 682 F.3d 1144, 1148 (2012)).

112. See CAL. CONST. art II, § 8(d); MASS. CONST. amend. art. XLVIII, pt. II, § 3; see also, Rachael Downey et al., *supra* note 80, at 584-86, 601-02 (examining different state constitution single subject rules).

Question 3 from being placed on the ballot, arguing the initiative violated the Massachusetts requirement that initiatives contain subjects “which are related or which are mutually dependent.”¹¹³ The farmer argued the initiative dealt with two separate issues: first, whether Massachusetts should ban certain methods of confinement for farm animals; second, whether the state should ban the sale of food from which the animals were confined in such a manner.¹¹⁴ The farmer also argued that because the prohibition of certain confinement applied to egg-laying hens, calves raised for veal, and breeding pigs, the initiative dealt with three unrelated subjects.¹¹⁵ The supreme judicial court was not persuaded by the argument noting they “have not construed this requirement narrowly” and the single subject rule will be upheld when “one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane.”¹¹⁶ Here the court found “a common purpose of preventing farm animals from being caged in overly cramped conditions,” and noted “the two provisions also complement each other in the means of accomplishing this common purpose.”¹¹⁷

Application of California’s single subject rule is very similar to Massachusetts’s rule in that California courts have not construed it narrowly and upheld initiatives when the subjects share a common purpose.¹¹⁸ In *Amador Valley Joint Union High School District v. State Board of Equalization*, the California Supreme Court upheld an initiative that sought to (1) impose a limit on the property tax rate; (2) place a restriction on the assessed value of real estate; (3) limit the changes in state taxes; and (4) place a restriction on local taxes.¹¹⁹ Despite the varying nature of the taxes, the California Supreme Court upheld the initiative, finding “each of them is reasonably interrelated and interdependent, forming an interlocking ‘package’ deemed necessary by the initiative’s framers to assure effective real property tax relief.”¹²⁰

Unfortunately for opponents of Proposition 2, it is unlikely a California court will find it in violation of the single subject rule, for many of the same reasons the

113. MASS. CONST. amend. art. XLVIII, pt. II, § 3; *Dunn v. Attorney Gen.*, 54 N.E.3d 1, 3 (Mass. 2016); Meagan McGinnes, *Here’s What’s Happening With Massachusetts Cage-Free Egg Ballot Question*, BOSTON.COM (June 7, 2016), <https://perma.cc/8UMW-RGFC>.

114. *Dunn*, 54 N.E.3d at 3.

115. *Id.* at 7.

116. *Id.* at 6 (quoting *Abdow v. Attorney Gen.*, 11 N.E.3d 574, 590 (Mass. 2014)).

117. *Id.* at 7.

118. *See Senate of Cal. v. Jones*, 988 P.2d 1089, 1099 (Cal. 1999).

119. *Amador Valley Joint Union High Sch. Dist. v. Bd. of Equalization*, 583 P.2d 1281, 1284 (Cal. 1978).

120. *Id.* at 1290-91.

Massachusetts Supreme Judicial Court laid out.¹²¹ As *Amador Valley* demonstrates, California courts have a broad reading of the single subject rule.¹²² Proposition 2 could reasonably be read as having a common theme of farm animal protection, and it would be unlikely a court will be willing to strike it down. Similar to *Amador Valley*, the restriction on the use of certain cages, combined with the prohibition on the sales of food products that used certain cages, form an “interlocking package,” as implementation of one of the prohibitions without the other would undermine the regulatory scheme.¹²³ Because it can be said Proposition 2 has a common theme, and its provisions are reasonably related, it will be upheld in the face of a single subject rule challenge.¹²⁴

Proposition 2 and Question 3 raise very important constitutional questions. The first question is whether these initiatives violate the Commerce Clause of the Constitution. The second is whether they violate the single subject rule of the California and Massachusetts constitutions. While challenges like these can be plausibly argued, it is unlikely either of them will succeed. The initiatives do not facially discriminate against interstate commerce, leaving it to the more deferential *Pike* balancing test.¹²⁵ When applying the balancing test, it is hard to say any incidental burden on interstate commerce outweighs the legitimate state interest of protecting animal welfare and public health, thus allowing the initiative to survive. A single subject challenge is a bit harder to argue given both states interpret the requirements broadly.¹²⁶ Under a single subject challenge, the initiative will be upheld as long as the provisions share a common purpose.¹²⁷ The provisions in Proposition 2 and Question 3 share the common purpose of regulating the condition of farm animal confinement. Despite two parts to the law—a prohibition on certain confinement methods and a prohibition on the sale of food products from animals confined in certain ways—the initiatives will easily withstand judicial review.

IV. POLICY IMPLICATIONS

While Proposition 2 and Question 3 will pass constitutional muster, this does not mean they are sound policy options. This section will demonstrate these initiatives represent poor public policy because they have no demonstrable health benefits and raise the price of eggs—impacting those that can least afford the price

121. *Abdow*, 11 N.E.3d at 590.

122. *Amador Valley*, 583 P.2d at 1290-91.

123. *Id.*

124. *See id.*

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

126. *See Senate of Cal. v. Jones*, 988 P.2d 1089, 1099 (Cal. 1999); *Dunn v. Attorney Gen.*, 54 N.E.3d 1, 6 (Mass. 2016).

127. *See Jones*, 988 P.2d at 1099; *Dunn*, 54 N.E.3d at 6.

increase. This section will also explore why the use of initiatives are a poor policy-making tool.

A. Price Increase

Initiatives such as Proposition 2 and Question 3 will inevitably lead to a price increase on eggs.¹²⁸ A price increase on eggs, like many other price increases, will impact poor families the hardest, depriving them of the ability to obtain a cheap, reliable source of necessary nutrition.¹²⁹ While the ballot initiatives were aimed at improving the welfare of egg-laying hens, it may have also reduced the welfare of low-income humans. For that reason, the initiatives promote bad policy.

Both those who favor these ballot initiatives and those who oppose them agree on one thing: the price of eggs will increase as a result of the initiatives.¹³⁰ They do disagree on just how much the increase will be, with supporters claiming it will be merely \$0.01 per dozen and opponents saying it could be anywhere from \$0.12 to \$1.00 per dozen.¹³¹ California's Proposition 2 offers some insight into what the actual price increase could look like. In June 2015, California's egg production had fallen by 20% from the previous year.¹³² The decline "coincide[d] with the implementation in January of new rules increasing the amount of space layers must be allowed in henhouses."¹³³ Combined with a drought in California and the outbreak of the bird flu, the price of eggs rose 71% and was \$0.40 higher than the national average.¹³⁴ At the same time, the President of the National Association of Egg Farmers noted California egg prices were \$1.93 to \$2.26 higher than the national average and could reach as high as \$5.00 per dozen.¹³⁵

The impact on egg prices is not purely anecdotal. Studies on California's Proposition 2 suggest California's egg prices are increasing, as compared to the rest of the nation. A study published in the *Journal of Agricultural and Resource*

128. Lauren Dezenski, *Both Sides of Question 3 Agree Egg Prices Will Increase*, POLITICO (Sept. 20, 2016, 6:09 PM), <https://perma.cc/8VWY-BHV4> [hereinafter Dezenski, *Both Sides of Question 3*].

129. William A. Masters & Jennifer Hashley, *Keeping Eggs Affordable: The Case Against Massachusetts Ballot Question 3*, WBUR (Oct. 19, 2016), <https://perma.cc/DX3T-9KQT>; Joshua Miller, *Question 3 is Approved in Massachusetts*, BOS. GLOBE (Nov. 8, 2016), <https://perma.cc/GD67-ASV9> [hereinafter Miller, *Question 3*].

130. Dezenski, *Both Sides of Question 3*, *supra* note 128.

131. *Id.*; Miller, *Question 3*, *supra* note 129.

132. Russ Parsons, *Why Eggs Have Gotten More Expensive in California*, L.A. TIMES (June 18, 2015, 8:00 AM), <https://perma.cc/TGM3-4E2T>.

133. *Id.*

134. *Id.*

135. *Id.*

Economics concluded California's ban on cages would cause a price increase of anywhere from 33% to 70%, or \$0.48 to \$1.08 per dozen eggs.¹³⁶ Another study, conducted by Promar International found similar numbers, concluding passage of Proposition 2 would increase egg prices by 76%, or roughly \$0.33 per dozen.¹³⁷ Additionally, a study performed by the Coalition for Sustainable Egg Supply indicated there would be a 23% increase in operation costs going from conventional cages to cage-free alternatives.¹³⁸ With an increase in operating costs, it is likely the egg producers will pass some of those costs on to consumers, resulting in higher prices.

The fact that ballot initiatives will raise prices does not necessarily make them bad policy, but rather it is due to the fact the poorest in our nation will be affected the most.¹³⁹ During the fight over Massachusetts's Question 3, one of the leading opponents was an anti-poverty activist.¹⁴⁰ Her argument was that the cost increase on eggs will effectively create "a regressive tax with an outsize impact on poor families."¹⁴¹ Due to their low price and good nutrition, eggs are often a staple in low-income households.¹⁴² However, government food assistance does not increase when healthier food items become more expensive. Thus, the price increase in eggs will either force these families to buy less of this healthy nutritious food, or buy more of a cheaper less nutritious food.¹⁴³ This places the family in an unfortunate situation that ultimately makes the ballot initiative's burdens outweigh its benefits.

The ballot initiatives will clearly raise egg prices. However, it is the poorest among our communities that will be hit the hardest with this price increase. Our food policy should not punish those less fortunate by increasing the price of a cheap nutritious food item—simply because certain people want their eggs to be free-range or cage-free. The Massachusetts and California ballot initiatives do just that. By forcing a price increase on those that can least afford it, the ballot initiatives lead to a bad policy decision.¹⁴⁴

136. Trey Malone & Jayson L. Lusk, *Putting the Chicken Before the Egg Price: An Ex Post Analysis of California's Battery Cage Ban*, 41 J. AGRIC. RES. ECON. 518, 520 (2016).

137. PROMAR INT'L, ECONOMIC IMPACT ON CALIFORNIA OF THE TREATMENT OF FARM ANIMALS ACT 7 (2008), http://digital.library.ucla.edu/websites/2008_993_089/sites/default/files/Economic%20Impact%20Study%20May%202008.pdf.

138. COAL. FOR SUSTAINABLE EGG SUPPLY, FINAL RESEARCH RESULTS REPORT 23.

139. Masters & Hashley, *supra* note 129.

140. Dezenski, *supra* note 128.

141. Miller, *Question 3*, *supra* note 129.

142. See Masters & Hashley, *supra* note 129.

143. See *id.*

144. See *id.*

B. No Demonstrable Health Benefits

A second reason ballot initiatives such as Proposition 2 and Question 3 represent bad policy is because they have no demonstrable health benefits. The “Yes on 3” campaign prominently promoted the ballot question will improve safety in animals and humans stating, “cage facilities have higher rates of salmonella than cage-free farms.”¹⁴⁵ While this fact is disputed, Question 3 arguably doesn’t even ban the use of cages in egg production because the law only requires hens be kept in enclosures that do not prevent them from “lying down, standing up, fully extending its limbs, or turning around freely.”¹⁴⁶ Further, there is evidence that eggs from cage-free hens are more susceptible to salmonella than their caged counterparts.¹⁴⁷

Supporters of Massachusetts’s Question 3 argue it will improve the health and safety for humans and hens.¹⁴⁸ Supporters point to a poultry industry publication that claims “salmonella thrives in cage housing” as proof that caged hens are more likely to produce salmonella.¹⁴⁹ However, the actual article demonstrates the effects of caging are far from conclusive.¹⁵⁰ The article states that studies on the effect of housing have “variable results going from a reduced risk of [s]almonella contamination in cage systems, to no influence of the housing system, to an increased risk.”¹⁵¹ This is hardly a ringing endorsement. In reality, using cages for hens may actually help improve against salmonella infections. When a hen lays an egg in a caged system, the egg slides down a sloping floor, keeping the egg separate from the hen.¹⁵² By keeping the egg separated from the chicken and the chicken’s droppings, the egg is able to avoid contamination.¹⁵³ In contrast, eggs in a cage-free environment come into contact with other chickens and the chickens’ droppings, increasing the opportunity for contamination.¹⁵⁴ Illustrating the difficulty in determining whether housing dramatically impacts the development of salmonella,

145. Stephanie Harris, *Question 3 Safeguards Animals and Humans*, SENTINEL & ENTERPRISE (last updated Nov. 7, 2016, 7:20 AM), <https://perma.cc/WC2C-99U5>.

146. MASSACHUSETTS INFORMATION FOR VOTERS, *supra* note 33, at 8.

147. *Salmonella Thrives in Cage Housing*, POULTRY WORLD (June 14, 2010), <https://perma.cc/5XH9-D8XT> [hereinafter *Salmonella*].

148. *Health and Food Safety*, CITIZENS FOR FARM ANIMALS, <https://perma.cc/XC4M-L5ET> (archived Oct. 26, 2017).

149. *Id.*

150. *Id.*

151. *Salmonella*, *supra* note 147.

152. Patricia Curtis & Jacqueline Kochak, *Making the Case for Caging: Improvements in Egg Safety and Animal Welfare*, FOOD SAFETY MAG., Aug.-Sept. 2012, <https://perma.cc/96RR-NKGW>.

153. *Id.*

154. *Id.*

a study published in 2011 in *Poultry Science* determined there is “no general consensus demonstrating the superiority of one housing situation over another regarding food safety and egg quality” and that “housing decisions need to be based on sound scientific data and this information currently does not exist.”¹⁵⁵ With no consensus on how housing affects salmonella levels, supporters of the initiative do not have a sound argument to support their claim of health and safety.

Apart from the salmonella level in eggs, cage-free housing options are worse for the health of chickens and human farmers in several different ways. A 2015 study by the Coalition for Sustainable Egg Supply found that while there was a positive impact on hen behavior in cage-free housing, there were negative impacts on mortality, cannibalism, and keel bone damage.¹⁵⁶ Likewise, there is a negative impact on worker health and safety when hens are housed in cage-free settings.¹⁵⁷ The same study found a negative impact on worker particulate matter and endotoxin exposure, lung health, and ergonomics.¹⁵⁸ The study found there was a positive impact on worker access; however, the “task of gathering floor eggs in [cage-free housing] required workers to adopt extreme body positions for extended periods and exposed them to multiple respiratory and ergonomic hazards since they had to crawl and lie on the floor.”¹⁵⁹

To support Proposition 2 or Question 3 on grounds that it protects the health and safety of hens and humans is to ignore the facts. There is no conclusive evidence that cage-free housing reduces the chance of eggs being infected with salmonella. Worker health drastically decreases, and while the hens may be out of cages, hens have higher mortality rates, cannibalism, and bone damage than compared to the caged housing. Although there may be some benefits to having cage-free hens, it comes with different health risks and is no safer than their caged counterparts. Because there are no demonstrable health benefits, ballot initiatives such as Proposition 2 and Question 3 once again represent poor policy.

C. Ballot Initiatives as Lawmaking Tools

Despite the appeal of direct democracy, ballot initiatives like Proposition 2 and Question 3 are poor tools in making substantive law. Misinformation over the measure could make the electorate uninformed as to the impact of the law, which is made worse by the avoidance of the normal legislative process. Additionally,

155. Symposium, *The Impact of Different Housing Systems on Egg Safety and Quality*, POULTRY SCI. 1, 9-10 (2011).

156. COAL. FOR SUSTAINABLE EGG SUPPLY, *supra* note 138, at 29.

157. *Id.* at 21.

158. *Id.*

159. *Id.* at 20.

ballot measures can be bankrolled by out-of-state special interests, adding to concerns regarding money in politics.

Some believe ballot initiatives create a well-informed electorate by raising a “lively public debate, which in turn increases voters’ awareness of substantive issues.”¹⁶⁰ This would be true if the debate were based upon the merits of the issue; however, misinformation over the ballot initiative could lead to an uninformed electorate, unaware of the substantive issues. A real-world example illustrating voter misinformation occurred in Colorado during 2008.¹⁶¹ In that election, voters were asked to vote on Amendment 46, the “Colorado Civil Rights Initiative.”¹⁶² While framed as a civil rights issue, the initiative would effectively end affirmative action programs in Colorado.¹⁶³ A study performed after the vote concluded one of the primary factors influencing the outcome of the vote was voter confusion about the intent, meaning, and consequence of the initiative.¹⁶⁴ One of the most cited arguments in the media coverage against the initiative stated it was “deceptive on multiple levels.”¹⁶⁵ The study found, although the initiative was defeated 50% to 49%, had the initiative been clearly worded on its effects, voters would have defeated it by a margin of 66% to 34%.¹⁶⁶

As Colorado’s Amendment 46 demonstrates, clarity of the issue is important. Massachusetts’s Question 3 read as follows: “This proposed law would prohibit any farm owner or operator from knowingly confining any breeding pig, calf raised for veal, or egg-laying hen in a way that prevents the animal from lying down, standing up, fully extending its limbs, or turning around freely.”¹⁶⁷ While that is the accurate description of the law, supporters sought to label it as banning “extreme” methods of confinement, even writing into the proposed law the purpose is to “pre-

160. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS* 27 (1989).

161. MICHELE S. MOSES ET AL., *INVESTIGATING THE DEFEAT OF COLORADO’S AMENDMENT 46: AN ANALYSIS OF THE TRENDS AND PRINCIPLE FACTORS INFLUENCING VOTER BEHAVIORS I* (2010), <http://www.civilrights.org/publications/colorado-46/2010-11-12-defeat-of-amendment46-report-final.pdf>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 2.

166. *Id.* at 1.

167. Gintautas Dumcuis, *Here’s What Your Massachusetts 2016 Presidential Ballot Looks Like*, MASSLIVE (Oct. 27, 2016, 1:52 PM), <https://perma.cc/K7D2-UGGZ>.

vent animal cruelty by phasing out extreme methods of farm animal confinement.”¹⁶⁸ This ignores the fact that keeping hens in small cages is a common practice, one that approximately 95% of factory farms use.¹⁶⁹ The president of the National Association of Egg Farmers went as far as saying supporters of Question 3 were “intentionally trying to misinform” the electorate.¹⁷⁰

With misinformation prevalent in the initiative process, the problem of an uninformed electorate is exacerbated by the fact the initiative does not go through the normal legislative process. During the debate over California’s Proposition 2, at least one newspaper’s editorial board argued on behalf of going through the legislative process.¹⁷¹ *The Reporter* noted that by going through the legislative process “ranchers and animal advocates can be brought in to create a law that will suit both of their interests.”¹⁷² The editorial board called the initial legislative process cumbersome and unwieldy while also pointing out that by going through the legislative process “when, as inevitably happens, [the] law creates an unintended consequence, the Legislature will be able to make the necessary adjustments.”¹⁷³ The same reasoning can be applied in Massachusetts, where the ballot initiative process allows proposed laws to be placed directly on the ballot with no hearings or findings required.¹⁷⁴ In contrast, bills in the state’s legislature are sent to specialized committees that hold public hearings and allow people to testify on the matter.¹⁷⁵ This would give state legislators the opportunity to hear both sides of the argument and craft a well-thought-out piece of legislation, as opposed to letting a possibly misinformed general population vote directly on a vague measure.

The third problem with allowing policy decisions to be made through ballot measure is caused by the influence of special interest money. One argument in favor of ballot initiatives is, due to legislators receiving money from special interest, they enact legislation to help that interest rather than the general public.¹⁷⁶ This argument does not carry weight because special interest groups can fund ballot

168. MASSACHUSETTS INFORMATION FOR VOTERS, *supra* note 33, at 9.

169. Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 152 (2009).

170. Ken Klippen, *Animal Welfare Question Misleading*, GREENFIELD RECORDER (Sept. 7, 2016), <https://perma.cc/X9KA-9UQ6>.

171. Editorial, *Prop. 2—Not for Voters: Let Legislature Make Law*, REPORTER (Oct. 20, 2008), <https://perma.cc/P7SL-YNJ5>.

172. *Id.*

173. *Id.*

174. *Initiatives & Other Types of Ballot Questions*, *supra* note 34.

175. *The Legislative Process*, MASS. B. ASS’N, <https://perma.cc/4TDA-8ATR> (archived Oct. 26, 2017).

176. SCHMIDT, *supra* note 160, at 30-31.

initiatives as well. In 1981, the Supreme Court in *Citizens Against Rent Control v. City of Berkeley* found state-imposed contribution limits to ballot initiative committees were an unconstitutional restriction of donors' First Amendment rights.¹⁷⁷ This means individuals and organizations can contribute unlimited funds to support ballot measures. In Massachusetts, the Humane Society contributed \$1,000,000 to support Question 3.¹⁷⁸ The managing director of a New York investment firm gave \$250,000 to the cause as well.¹⁷⁹ This considerable amount of out-of-state money flowing into Massachusetts for Question 3 should be alarming, and the contribution casts doubt on the integrity of the initiative process.

Ballot initiatives may be a way for people to have a direct say in what laws should be passed, but initiatives are a poor tool for enacting substantive policy decisions. First, there is often misinformation among the voting public about what the initiative will do and how it will impact their lives. Second, by bypassing the traditional legislative process, the public is robbed of its chance for a public hearing and testimony from both sides. When a legislature hears the arguments from supporters and opponents, they are better able to craft a law that will appeal to both. Lastly, with the large amount of money being spent by out-of-state special interest groups, the integrity of the initiative process may be seen as tainted.

V. PROPOSED ALTERNATIVES

There are several alternatives to ballot measures that can enact laws regarding the welfare of hens or encourage consumers to pick eggs raised in a more humane way. First, Congress could pass a law mandating certain cage sizes or preempt state laws regarding cage sizes. Second, egg labeling requirements can be modified to make the condition the hens are kept in more obvious. The second approach would allow consumers to make the changes necessary through the free market, which is a change already underway.

A. Federal Law

The United States Constitution grants Congress all federal legislative power.¹⁸⁰ The Constitution also declares all laws made in pursuant to its purpose "shall be the supreme Law of the Land."¹⁸¹ This doctrine is known as the Supremacy

177. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-300 (1981).

178. Lauren Dezenski, *Question 3 Opponents Lack Financial Backing in Fight over Farm Animal Confinement*, POLITICO (Sept. 19, 2016, 5:34 AM), <https://perma.cc/E2ZT-XCYP>.

179. *Charter School Campaign Draws 19 Million From Backers, Critics*, WCVB (Sept. 10, 2016, 7:29 AM), <https://perma.cc/23GG-YVYF?type=image>.

180. U.S. CONST. art I, §1.

181. U.S. CONST. art VI, cl. 2.

Clause, and it allows Congress to preempt state laws by statute.¹⁸² One solution to prevent certain states from seizing too much power over the egg industry is to pass federal legislation prohibiting states from regulating farm animal cage size.

Congress can pass legislation prohibiting states from passing certain laws. In 2016, Congress passed legislation prohibiting states from regulating genetically modified food and barring states from regulating certain toxic substances.¹⁸³ Using the Supremacy Clause, Congress can make a nationwide uniform law on cage sizes. In response to California's Proposition 2, Congressman Kurt Schrader (D-OR), introduced bipartisan legislation, H.R. 3789, which would "establish a national standard on cage sizes and enriched housing for egg laying hens."¹⁸⁴ The legislation came about as the results of a compromise reached between the United Egg Producers and the Humane Society of the United States, and it would require the phase-out of the conventional small cages in favor of "enriched" cages. Enriched cages allow for more room and "environmental enrichments, such as perches, nesting boxes, and scratching areas, that will allow hens to express natural behaviors."¹⁸⁵ In addition, the legislation would overhaul the egg carton labeling scheme to "inform consumers of the method used to produce the eggs."¹⁸⁶ Unfortunately, the legislation never received a hearing in the House of Representatives, and no other action was taken on the bill. Legislation identical to H.R. 3789 was introduced in the Senate, and this bill, S. 3239, did receive a committee hearing.¹⁸⁷ While this bill did not receive a vote, the fact it received a hearing is a step in the right direction, as it allowed stakeholders to educate Congress on the importance of the issue. Representative Schrader and Senator Dianne Feinstein (D-CA) reintroduced the legislation in the following session of Congress, however no hearings were held.¹⁸⁸

182. ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44066, PREEMPTION IN PROPOSED AMENDMENTS TO THE TOXIC SUBSTANCES CONTROL ACT (TSCA): SIDE-BY-SIDE ANALYSIS OF S. 697 AND H.R. 2576, at 1 (2015).

183. Norma Volkmer, *Congress Passes GMO Labeling Bill*, CURRENT ST. (Council of State Gov'ts), July-Aug. 2017, <https://perma.cc/E7T6-SPU8>; Puneet Kollipara, *United States Adopts Major Chemical Safety Overhaul*, SCI. MAG. (June 8, 2016, 10:30 AM), <https://perma.cc/Z4JK-AKAD>.

184. Press Release, Congressman Kurt Schrader, Congressman Schrader Introduces Bill to Improve Housing for Egg-Laying Hens and Provide Stable Future for Egg Farmers (Jan. 23, 2012), <https://perma.cc/8VG8-YR7Z>.

185. *Id.*

186. *Id.*

187. See generally *Egg Products Inspection Act Amendments of 2012: Impact on Egg Producers: Hearing on S. 3239 Before the S. Comm. On Agric. Nutrition, & Forestry*, 112th Cong. (2012).

188. H.R. 1731, 113th Cong. (2013); S. 820, 113th Cong. (2013).

The proposed legislation strikes a nice balance between the industry and animal rights advocates, and illustrates the benefits of having legislation go through the legislative process, as opposed to the ballot initiative process. As one alternative to state-by-state ballot measures or laws, Congress should pass federal legislation mandating one national standard of cage sizes for egg-laying hens.

B. Better Labeling

In the grocery store, consumers encounter various types of eggs, including free-range, cage-free, pastured, pasteurized, farm fresh, and all natural. But what do each of these labels actually mean? Egg labels can often be misleading.¹⁸⁹ This section will explore what egg carton labels truly mean and argue that through better labeling, consumers will be able to make better decisions about the types of eggs they want.

Labels are only useful if they convey the correct information to the consumer. When an individual thinks of cage-free eggs, it is likely they think of hens “happily wandering around a big red barn, pecking at corn kernels on a hay-covered floor.”¹⁹⁰ While the hens do live outside of cages, they often live in warehouses and only receive artificial light.¹⁹¹ Free-range invokes images of hens “playfully strolling and tumbling down green hills, home on the range” when in reality it is the same as cage-free, with the additions of “a few small doors that lead to a screened-in porch with cement, dirt or a modicum of grass.”¹⁹² Farm fresh has no meaning, and natural means the product contains no artificial ingredients or it was only minimally processed, something that applied to almost all shelled eggs.¹⁹³ With so many different, often vague labels, they are unlikely to convey the treatment of the hens in a satisfactory manner.

One alternative is to move away from flowery terms and implement labeling standards based on the housing situation of the hens. In 2006, animal rights groups filed a petition with the Food and Drug Administration to label egg cartons with

189. See Donna M. Byrne, *Eggs, Egg Cartons, and Consumer Preferences*, 26 REGENT U. L. REV. 397, 418 (2014) (“For many people, eggs are eggs, but if consumers believe the eggs come from hens like those pictured in story books and on egg cartons, then consumers are being misled.”).

190. Anders Kelto, *Farm Fresh? Natural? Eggs Not Always What They’re Cracked Up to Be*, NPR: THE SALT (Dec. 23, 2014, 10:56 AM), <https://perma.cc/CJ49-RHDC>.

191. Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 TEMP. J. SCI. TECH. & ENVTL. L. 51, 69 (2011).

192. Kelto, *supra* note 190.

193. Sarah Cranston, *So Sue Me: How Consumer Fraud, Antitrust Litigation, and Other Kinds of Litigation Can Effect Change in The Treatment of Egg-Laying Hens Where Legislation Fails*, 9 RUTGERS J.L. & PUB. POL’Y 72, 83 (2012).

the production method used to avoid misleading consumers.¹⁹⁴ Their suggested method of labeling involved three different terms: (1) “free-range eggs”; (2) “cage-free eggs”; and (3) “eggs from caged hens.”¹⁹⁵ These labels are a good start and are similar to the label provisions found in the proposed federal legislation. Under H.R. 3798, eggs would be labeled using four different types of terms, including: (1) “eggs from free-range hens”; (2) “eggs from cage-free hens”; (3) “eggs from enriched cages”; and (4) “eggs from caged hens.”¹⁹⁶ This type of labeling system would allow consumers to know where their eggs came from and would resolve any misleading language such as “natural” or “farm fresh.”

Using clearer labeling would allow consumers in the free market to determine what types of eggs they wish to buy. This argument won the praise of the editorial board of *The Recorder*, a local Massachusetts newspaper. The editorial board urged a “no” vote on Question 3, and instead, urged voters to “vote with their pocketbooks, creating a growing demand not only for cage-free eggs but also for humanely produced meat and animal products of all kinds.”¹⁹⁷ This type of demand shift is already underway as consumer desires have forced large companies, such as McDonalds and Wal-Mart, to commit to only using suppliers that raise cage-free eggs.¹⁹⁸ This increase in demand has led the Department of Agriculture to predict the egg industry “will have to convert over half its egg production to cage-free systems by 2025.”¹⁹⁹ Better labeling will allow consumers to make their own informed choices on how they want their eggs produced. By allowing the market to work out supply and demand, farmers and consumers will be better able to adapt over time.

Viable alternatives to ballot initiatives such as Proposition 2 and Question 3 exist and would be beneficial to the egg market as a whole. If Congress were to pass federal legislation, they could preempt state laws and have one uniform national standard, as opposed to a patchwork of state law. Passing legislation through Congress also comes with the benefits of committee hearings and witness testimony. Better labeling on egg cartons are also an alternative to these ballot initiatives. Clearer labeling would allow consumers and the free market to determine the demand for cage-free eggs and allow them to adapt over time.

194. Rodriguez, *supra* note 191, at 76-77.

195. *Id.*

196. H.R. 3798, 112th Cong. §2 (2012).

197. Editorial, *Vote ‘No’ on Question 3*, RECORDER (Nov. 2, 2016), <https://perma.cc/5RFN-ZVKE>.

198. Jen Fifield, *Farmers Push Back Against Animal Welfare Laws*, LA CROSSE TRIB. (Dec. 3, 2016), <https://perma.cc/JL58-WD74>.

199. *Id.*

VI. CONCLUSION

Ballot initiatives such as Proposition 2 and Question 3 were billed as laws to improve the health and welfare of egg-laying hens, farmworkers, and consumers of eggs. Having fought through litigation, these statutes have survived judicial scrutiny and their constitutionality cannot be disputed. Because they do not facially discriminate on interstate commerce, their burdens and benefits are weighed, with the benefits prevailing. Although constitutional, these initiatives do not represent good policy because they increase the price of eggs, impacting those who can least afford them. Furthermore, the initiative's purported health benefits are inconclusive at best and at worst would result in more danger to humans and hens. In addition, ballot initiatives are a poor tool for creating substantive policy. The ballot campaigns are filled with misinformation, and by avoiding the traditional legislative process, they do not provide benefits such as committee hearings and testimony from stakeholders. To remedy these unsatisfactory ballot initiatives, the federal government should pass a law preempting state regulation and create a national standard. In the alternative, clearer labeling on egg cartons will provide consumers in the free market a better understanding of how their eggs are produced and enable them to make independent choices.