State GMO Restrictions and the Dormant Commerce Clause

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Legislation that would enact a temporary moratorium or restrictions on the sale of genetically modified organisms (GMOs) was recently introduced in some states.[1] Opponents of the legislation claimed state restrictions on GMOs violate the dormant commerce clause of the U.S. Constitution.[2] This article addresses those challenges and makes the argument that if done correctly, GMO restrictions should not violate the dormant commerce clause.

The U.S. Constitution requires that "The Congress shall have power . . . To regulate commerce…among the several states."[3] The negative or dormant aspect of this clause ". . . prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[4] Dormant commerce clause cases usually entail a two-step approach.[5] First, whether the statute is discriminatory or has an extraterritorial reach, in which case the law is usually declared invalid. Second, if the statute is not discriminatory or extraterritorial, then the statute must not impose burdens upon interstate commerce which outweigh the putative local benefits. If a statute survives these two tests, courts generally find it does not offend the dormant commerce clause.

The judicial review standard for the first prong is that "if the law in question overtly discriminates against interstate commerce, then [a court] will strike the law unless the state or locality can demonstrate 'under rigorous scrutiny that it has no other means to advance a legitimate local interest.'"[6] So long as state law restrictions on GMOs impose similar restrictions upon both out-of-state and in-state seed suppliers and do not favor in-state interests, courts should find that the laws do not overtly

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1 *See* H.B. 1338, 57th Leg. Sess. (N.D. 2001); H.B. 211, 57th Leg. Sess. (Mont. 2001); H.F. 807, 82nd Leg. Sess. (Minn. 2001).

2 Tom Rafferty, *Bill Approved for Study of GMO Wheat,* Minot Daily News (April 3, 2001); Carey Gillam, *Proposed Biotech Wheat Bans Falter in N.D., Montana*, Reuters News Service (March 30, 2001); Andrew Pollack, *Farmers Joining Efforts Against Bioengineered Crops*, New York Times (March 24, 2001).

3 U.S. Const. art. I, § 8, cl. 3.

4 *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988).

5 *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 578-79 (1986).

6 *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000) (quoting *C & A Carbone, Inc. v. Town of Clarkson*, 511 U.S. 383, 392 (1994)).

discriminate against out-of-state suppliers.[7] Even if state legislation restricting GMOs is found to discriminate against interstate commerce, it could survive a constitutional challenge if the local interests served by the legislation are of sufficient importance and there is no other means to accomplish them.[8] Courts could find legitimate local interests to include: (1) safeguarding farmers from environmental contamination and potential liability as result of genetic drift from GMO products,[9] and (2) protecting farmers and the state's grain handling industry from economic harms that may result from limited opportunities to market commodities that contain GMOs.[10] The lack of alternatives to advance local interests may be especially prevalent where companies are introducing GMO products to new commodities that may permanently alter the environment and the marketplace.[11] The combination of evenhanded restrictions against in-state and out-of-state seed suppliers and legitimate local interests should be enough to make carefully drafted GMO legislation withstand a discriminatory challenge.[12]

Next, state GMO restrictions must not control conduct of parties who are beyond a state's boundaries. "Under the Commerce Clause, a state regulation is per-se invalid when it has 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state."[13] If crafted correctly, legislation restricting GMOs that only applies to commodities grown and harvested in that particular state and that does not attempt to regulate seed sales in other states should satisfy this part of the constitutional test. If legislation is indifferent to sales occurring out-of-state, courts are likely to find that it will not have an unconstitutional extra-territorial reach.[14]

The Eighth Circuit Court of Appeals recently ruled that a Missouri law enacted to eliminate price discrimination in the purchase of Missouri livestock did not have an

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7 *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960) ("Evenhanded local regulation to effectuate a legitimate public interest is valid unless . . . unduly burdensome on . . . interstate commerce.")

8 *C & A Carbone,* 511 U.S. at 392.

9 For a general overview of GMO liability issues from the seed industry perspective see John P. Mandler and Kristin R. Eads, *Liability Exposure to Seed Companies from Adventitious GMO Pollination Due to Pollen Drift Resulting in Cross Pollination or Outcrossing*, Faegre & Benson LLP (Jan. 26, 2000) <http://www.faegre.com/downloads/gmo.doc> (last visited July 20, 2001).

10 United States General Accounting Office, *International Trade: Concerns Over Biotechnology Challenge U.S. Agricultural Exports,* GAO-01-727 (June 15, 2001).

11 Cropchoice News, *North Dakota Organic Farmers Worry About Biotech Contamination,* CropChoice.com (Feb. 6, 2001).

12 *See generally*, John E. Nowak and Ronald D. Rotunda, *Constitutional Law* ch. 8 (5th ed. 1995).

13 *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (citing *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).

14 *See Cotto Waxo Co.*, 46 F.3d at 794 (holding that Minnesota statute prohibiting in-state sale of petroleum-based sweeping compounds does not suffer from an unconstitutional extraterritorial reach).

extraterritorial reach. The court held in *Hampton Feedlot v. Nixon* that, unlike a South Dakota price discrimination statute that imposed requirements on out-of-state commerce, "[t]he Missouri statute, on the other hand, only regulates the sale of livestock sold in Missouri."[15] Citing *Cotto Waxo Co.* as an example, Judge Heaney wrote that "packers who do not wish to conduct business under the terms of [the Missouri price discrimination law] may purchase their livestock for slaughter from other states."[16] The Eighth Circuit held that the Missouri statute affects the flow of interstate commerce "but it does not burden interstate commerce."[17] Likewise, state GMO restrictions that impose requirements only on transactions done in that state would not have an extraterritorial reach; while they may affect the flow of interstate commerce, namely the sale of certain seeds in a state, under the *Hampton Feedlot* holding they should not be found to burden interstate commerce.

Even if a new law is determined not discriminatory or to have an extraterritorial reach, it would still be subject to scrutiny under the "balancing test" established by the Supreme Court in *Pike v. Bruce Church*.[18] "If each act '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.'"[19] Under the *Pike* balancing test, a challenging party would have to prove that an actual burden exists upon interstate commerce and that it outweighs any putative local benefits to state producers.[20] While seed suppliers would be restricted from selling GMO seed, they would presumably not be barred from selling non-GMO seed or participating in other types of commerce within the state. It is likely that the putative benefits put forward on behalf of proponents of the legislation would appear to render incidental, and not excessive, any burdens upon interstate commerce imposed by such legislation.[21] Local benefits could include farmers' ability to freely market commodities in foreign markets that ban, require labeling of, or limit GMO products;[22] making the general public aware when GMO products are present;[23] ensuring that organic and other identity

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15 *Hampton Feedlot v. Nixon*, 249 F.3d 814, 819 (8th Cir. 2001).

16 *Id*.

17 *Id*.

18 397 U.S. 137 (1970)

19 *United Waste Systems of Iowa, Inc. v. Wilson*, 189 F.3d 762, 767-68 (8th Cir. 1999) (quoting *Pike v. Bruce Church*, 397 U.S. at 142).

20 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

21 In *Hampton Feedlot*, the Eighth Circuit addressed the local benefits of the price discrimination law and concluded that "[t]he Missouri legislature has the authority to determine the course of its farming economy, and this measure is a constitutional means of doing so. We have no doubt that the state considered the potential harms and benefits to all stakeholders in creating its price discrimination law." 249 F.3d at 820.

22 North Dakota Wheat Commission, *N.D. Producer Talks Biotech Wheat with Customers in Japan* (May 1, 2001).

23 Though this local benefit may cause other constitutional problems. The Second Circuit held Vermont's recombinant bovine somatotrophin (rBST) labeling law violated the First Amendment where the intent of the label was to provide consumers information, but not

preserved commodities meet required certifications;[24] and ensuring that a state's commodities are free of any potential health and safety impacts.[25] In some federal circuits, only putative benefits, not actual benefits must be shown by a statute's proponents.[26] While a case-by-case analysis is necessary, a strong argument can be made that many local benefits could outweigh any actual burdens.

Courts would also analyze whether the goal of the state statute is motivated to protect *bona fide* safety or health concerns. Examples where courts have cited *bona fide* safety or health concerns in upholding product restrictions over commerce clause challenges include the banning of items that spread pestilence;[27] a statute banning the sale of retail milk in plastic, nonrefillable containers in order to conserve Minnesota resources;[28] and a municipal ban on phosphates for the purpose of preventing nuisance algae.[29]

Under the Supreme Court's holding in *Dean Milk Co. v. City of Madison*, even if a barrier to out-of-state goods is motivated by *bona fide* safety or health concerns it will be struck down on Commerce Clause grounds if reasonable non-discriminatory alternatives are available.[30] These alternatives must truly be "available" in the sense that the alternative already exists and a state would not be required to discover a new alternative.[31] In *Maine v. Taylor*, Maine imposed a total ban on the importation of live bait fish. The state supported its ban on health and safety grounds, principally arguing that its own population of wild fish would be placed at risk by certain parasites prevalent in out-of-state bait fish but not common to Maine's own wild fish. A fish importer attacked the statute on two grounds: (1) Maine was the only state to bar importation of all live bait fish; and (2) the state used sampling and inspection techniques in order to guard against a similar threat in the case of importation of other fresh water fish, rather than placing an outright ban on the fish, so there was no

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information on the public health or safety of rBST. *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996); *see also*, Note, *Fear of Frankenfoods: A Better Labeling Standard for Genetically Modified Foods*, 1 MN Intell. Prop. R. 101, 111 (2000).

24 *See, e.g., Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915) (State of Florida's police power includes declaring it a criminal offense to deliver for shipment in interstate commerce citrus fruits immature and unfit for consumption).

25 *See*, *e.g., Parker v. Brown*, 317 U.S. 341, 362-63 (1943) (State of California's raisin marketing order withstood Commerce Clause challenge "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.").

26 *See K-S Pharmacies v. American Home Products*, 962 F.2d 728, 731 (7th Cir. 1992); *Eastern Ky. Resources v. Fiscal Ct. of Magoffin*, 127 F.3d 532, 545 (6th Cir. 1997).

27 *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978).

28 *Clover Leaf Creamery Co.*, 449 U.S. at 473.

29 *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69, 79-80 (7th Cir. 1975), *cert*. *den*. 421 U.S. 978 (1975).

30 340 U.S. 349 (1951).

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

reason why it could not do the same for bait fish. The Supreme Court upheld Maine's ban.[32] The Supreme Court pointed out that procedures for testing and inspecting live bait fish did not currently exist, therefore the commingling of live bait fish with Maine's wild fish was a distinct possibility based on expert testimony.[33] Likewise, for a state's farmers, segregation methods for GMO crops may be developed in the future, but under the current grain handling system,[34] as shown by the StarLink™ corn example,[35] it is next to impossible to segregate GMO commodities from non-GMO commodities. Therefore, the least discriminatory and perhaps only method to ensure the health and safety of a state's crop is to enact restrictions.

Until a state statute is enacted that restricts GMOs and that statute is challenged on the basis that it violates the dormant commerce clause this article, like much that has been written about the legal implications of GMOs, is speculative at best. However, applicable federal case law does provide proponents of state GMO restrictions an argument that if legislation is done for legitimate local interests to protect the state's health and safety, a statute could withstand a dormant commerce clause challenge.

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32 *Taylor*, 477 U.S. at 152.

33 *Taylor*, 477 U.S. at 146.

34 *See*, *e.g.*, Dr. Neil Harl, *Genetically Modified Crops: Guidelines for Producers*, Iowa Grain Quality Initiative (October 2000) <http://www.exnet.iastate.edu/Pages/grain/gmo/gmo.html> (last visited July 20, 2001).

35 David Barboza, *Gene-Altered Corn Changes Dynamics of Grain Industry*, New York Times (Dec. 11, 2000).