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## If You Don't Have a Cow (or Chicken or Pig), You Can't Call It Meat: Weaponizing the Dormant Commerce Clause to Strike Down Anti-Animal- Welfare Legislation

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IF YOU DON'T HAVE A COW (OR CHICKEN OR PIG), YOU CAN'T  
CALL IT MEAT: WEAPONIZING THE DORMANT COMMERCE  
CLAUSE TO STRIKE DOWN ANTI-ANIMAL-WELFARE LEGISLATION

Jessica Berch\*

*Abstract*

*Industrial meat producers and proponents of plant-based diets are locked in legislative and litigation battles. On the legislative battlefield, meat producers are attempting to prohibit vegetarian and vegan food manufacturers from calling their products “meat,” “burgers,” “pork,” or other similar “meaty” descriptions. At the same time, animal-welfare advocates are urging states to pass laws to better the lives of animals in various ways, such as requiring meat producers to provide farm animals more space or other enhanced conditions. On the litigation side, both the meat producers and the plant-based companies are attempting to deploy the Dormant Commerce Clause (“DCC”) to strike down the laws inimical to their industries; but each side also ardently argues that the DCC permits the laws that benefit its industry. This Article describes the legislative battle and provides a theoretical framework for understanding how the litigation battle should be resolved under the DCC.*

I. INTRODUCTION

This Article charts the simultaneous rise of two different sets of laws that affect the animal-protection movement. First, some states are passing laws that enhance the lives of farm animals by requiring that meat and dairy producers give their animals more space to stand, stretch, and turn around. Second, some states are enacting labeling laws that prohibit words like “meat,” “burger,” or “pork” in connection with plant-based or cell-based alternative food.<sup>1</sup> These two types of laws are connected by more than their contemporaneous passage in different states and oppositional stances to animal welfare; both are susceptible to challenges under the Dormant Commerce Clause (“DCC”) because both affect out-of-state industries.<sup>2</sup> Plant-based food producers, who often align with the animal-welfare movement, must take care in invoking the DCC because protecting the animal-welfare laws as comports with

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<sup>1</sup> States are also passing laws prohibiting “dairy”-type terms for plant-based “milk” products. The same issues discussed in this Article regarding meat-labeling laws apply to these milk-labeling laws.

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 3.

the DCC may unwittingly protect the meat-labeling laws from challenge; conversely, attacking the meat-labeling laws as violative of the DCC may unintentionally attack the animal-protection laws.<sup>3</sup> This Article provides an analytical framework based on the DCC that supports striking down meat-labeling laws while affirming animal-protection laws that require meat and dairy producers to provide their farm animals with more space.

Although both plant-based food producers and meat and dairy farmers rely in part on the DCC to strike down laws inimical to their industries, the DCC is so dormant that some scholars have called it moribund or even entirely “dead.”<sup>4</sup> But the slumbering DCC does have the potential to awaken, particularly because litigators are relentlessly poking the doctrine, hoping to prod it into doing their bidding, such as striking down animal-protection laws, meat-labeling laws, or both.<sup>5</sup> This Article charts a path that wakes the sleeping DCC giant vis-à-vis the meat-language laws but leaves it slumbering when invoked against animal-protection laws. This analytical framework does not require changing any extant caselaw or policy, either when defending lawsuits challenging animal-protection laws or when pursuing lawsuits challenging meat-terminology legislation. But it requires a more nuanced understanding and application of both the DCC framework that courts have created and the reasons motivating the state laws challenged under the DCC.

This Article comes at a pivotal time for the animal protection movement. A “wave of groundbreaking animal welfare legislation” is sweeping the country.<sup>6</sup> States have banned or are on the verge of banning veal crates, gestation crates, eggs from caged hens, animal-tested cosmetics, fur for clothing, foie gras from force-fed

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<sup>3</sup> The double-edged nature of the DCC has not been unnoticed. See Baylen Linnekin, *Vegetarians and Meat Eaters Are Trying to Stifle Interstate Commerce*, REASON (May 12, 2018, 8:30 AM), <https://reason.com/2018/05/12/vegetarians-and-meat-eaters-are-trying-t/> [<https://perma.cc/9BN3-F3ES>] (discussing California’s cage-free egg requirement and Missouri’s meat-labeling statute).

<sup>4</sup> Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979–80 (2013) (describing the extraterritoriality doctrine as “dead, and unlikely to be revived by the current [Supreme] Court”).

<sup>5</sup> See, e.g., *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131 (W.D. Mo. 2019) (suit against Missouri’s meat-labeling law); *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014), *aff’d* *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017) (suit against California’s cage-free egg requirement); *cf.* *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (suit against California’s law limiting carbon emissions).

<sup>6</sup> See, e.g., Natasha Daly, *States Across U.S. Are Taking Bold Steps Toward Protecting Animals*, NAT’L GEOGRAPHIC (July 10, 2019), <https://www.nationalgeographic.com/animals/2019/07/first-time-animal-welfare-laws-in-us-states/> [<https://perma.cc/7XPE-NQ5H>] (highlighting recent laws relating to animal welfare).

ducks or geese, sales of dogs from puppy mills, cat declawing, sales of shark fins, and displaying or exploiting exotic animals in circuses.<sup>7</sup> In response, some meat and dairy producers have begun abandoning raising livestock in favor of growing plants.<sup>8</sup>

Other industrial meat producers have dug in their heels, unleashing serious backlash against these animal-protection laws in the media, in legislative chambers, and in courtrooms across the country.<sup>9</sup> Of particular importance to this Article, lawsuits have been filed challenging animal-welfare legislation on a variety of grounds, including the DCC.<sup>10</sup> In addition, some state legislatures have passed laws protecting the farm-animal industry at the expense of plant-based companies. For example, Missouri became the first state to bar food manufacturers from calling any product “meat” unless it is “derived from harvested production livestock or poultry.”<sup>11</sup> This type of law may prohibit the well-known brand Beyond Meat™ from using its trade-name because the product “is not derived from harvested production livestock or poultry.”<sup>12</sup> As of mid-2020, a dozen states have passed laws banning the use of meat-type words for plant-based or cell-cultured products, another nine states have such

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<sup>7</sup> See *id.*; Ernesto Hernández-López, *Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs*, 7 UC IRVINE L. REV. 347, 349 (2017) (“Since 2008, California has attempted to limit animal cruelty in food industries with policies directed at slaughtering immobile swine called ‘downers;’ foie gras, liver from force-fed ducks; shark fins; and eggs from hens in large-scale housing called ‘battery cages.’”) (footnotes omitted).

<sup>8</sup> See Tom Levitt, *Why Some Farmers Are Ditching Livestock and Growing Plants Instead*, HUFFPOST (Apr. 20, 2020, 5:45 AM), [https://www.huffpost.com/entry/why-farmers-ditching-livestock-growing-plants\\_n\\_5e9620b8c5b6a4470cb77646](https://www.huffpost.com/entry/why-farmers-ditching-livestock-growing-plants_n_5e9620b8c5b6a4470cb77646) [<https://perma.cc/DXX3-3JL2>] (discussing a push by animal activists to help farms transition to more “environmentally-friendly [sic] types of agriculture”).

<sup>9</sup> These three lines of attack are interrelated. Attacks in the media might stir legislatures to enact contrary laws and prompt lawyers to challenge the extant animal-welfare laws. See Jen Fifield, *Farmers Push Back Against Animal Welfare Laws*, THE PEW CHARITABLE TRUSTS (Nov. 29, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2016/11/29/farmers-push-back-against-animal-welfare-laws> [<https://perma.cc/YAK3-SAR9>]; *N. Am. Meat Inst. v. Becerra*, No. 2:19-CV-08569, 2020 WL 919153 (C.D. Cal. Feb. 24, 2020).

<sup>10</sup> Although this Article focuses on the DCC challenges to animal-welfare and anti-animal-welfare laws, various other challenges may be mustered. For example, the meat-labeling laws may be susceptible to First Amendment challenges involving commercial speech, vagueness, and overbreadth. See *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552 (E.D. Ark. 2019). Other potential challenges to animal-welfare laws include preemption. See *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1065–66 (E.D. Cal. 2014), *aff’d and remanded sub nom. Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017).

<sup>11</sup> MO. ANN. STAT. § 265.494(7) (West 2018). Violators are subject to one year in prison and a \$2,000 fine. See MO. ANN. STAT. § 265.496 (West 2018); see also MO. ANN. STAT. §§ 558.002(1)(2), 558.011(1)(6) (West 2018) (providing that those convicted of class A misdemeanors are subject to up to one year imprisonment and a \$2,000 fine).

<sup>12</sup> MO. ANN. STAT. § 265.494(7) (West 2018).

laws pending in their legislatures, and nine states have considered, but declined to pass, such laws.<sup>13</sup> This simultaneous rise of animal-protection legislation and anti-

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<sup>13</sup> As of the end of April 2020, the following states have enacted laws banning the use of meat-type words for plant-based and/or cell-based products: Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, and Wyoming. See Elaine Watson, *Plant-Based and Cell-Cultured ‘Meat’ Labeling Under Attack in 25 States*, FOODNAVIGATOR-USA (May 29, 2019), <https://www.foodnavigator-usa.com/Article/2019/05/29/Plant-based-and-cell-cultured-meat-labeling-under-attack-in-25-states#> [<https://perma.cc/R47A-5YGP>]; see also ALA. CODE § 2-17-10(d) (West 2019); ARK. CODE ANN. § 2-1-305(6) (West 2019); KY. REV. STAT. ANN. § 217.035(15) (West 2019); LA. STAT. ANN. § 3:4744(B)(4) (effective Oct. 1, 2020); MISS. CODE ANN. § 75-35-15(4) (West 2019); MO. ANN. STAT. § 265.494(7) (West 2018); MONT. CODE ANN. § 50-31-203(14) (West 2019); N.D. CENT. CODE ANN. § 4.1-31-05.1 (West 2019); OKLA. STAT. ANN. tit. 63, § 317(7) (West 2019); S.C. CODE ANN. § 47-17-510 (2019); S.D. CODIFIED LAWS § 39-4-26 (2019); WYO. STAT. ANN. § 35-7-111(a)(xiii) (West 2020). Oklahoma’s law contains a carveout for plant-based meat: “product packaging for plant-based items shall not be considered to be in violation of the provisions of this paragraph so long as the packaging displays that the product is derived from plant-based sources.” OKLA. STAT. ANN. tit. 63, § 317(7) (West 2019). In Mississippi, the legislature chose to rewrite its meat-labeling law rather than litigate a First Amendment challenge. Tim Cushing, *After Being Sued, Mississippi Rewrites Its Unconstitutional Ban on the Use of Meat Words by Vegan Food Producers*, TECHDIRT.COM (Sept. 13, 2019, 12:01 PM), <https://www.techdirt.com/articles/20190910/09384142957/after-being-sued-mississippi-rewrites-unconstitutional-ban-use-meat-words-vegan-food-producers.shtml> [<https://perma.cc/738J-RK4E>]; see also *supra* note 10 (regarding other challenges that may be brought against these laws). The following states legislatures are currently considering meat-labeling laws: Colorado (although a similar law was defeated in 2019), Georgia, Illinois, Iowa, Kansas, Maryland, Michigan, Vermont, and Washington. See H.B. 20-1117, 72nd Gen. Assemb., Reg. Sess. (Colo. 2020), <https://leg.colorado.gov/bills/hb20-1117> [<https://perma.cc/P3YU-6JS9>]; S.B. 211, 2019–2020 Gen. Assemb., Reg. Sess. (Ga. 2019), <http://www.legis.ga.gov/Legislation/en-US/display/20192020/SB/211> [<https://perma.cc/QM43-9FML>]; H.B. 2556, 101st Gen. Assemb., Reg. Sess. (Ill. 2019), <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2556&GAID=15&DocTypeID=HB&LegId=118663&SessionID=108&GA=101> [<https://perma.cc/PK52-BBST>]; S.F. 404, 88th Gen. Assemb., 2019 Reg. Sess. (Iowa 2019), <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%20404> [<https://perma.cc/6R7C-X22Y>]; H.B. 2437, 2019–2020 Leg., Reg. Sess. (Kan. 2020), [http://www.kslegislature.org/li/b2019\\_20/measures/hb2437/](http://www.kslegislature.org/li/b2019_20/measures/hb2437/) [<https://perma.cc/C596-WEQN>]; S.B. 188, 2020 Gen. Assemb., Reg. Sess. (Md. 2020), <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0188?ys=2020RS> [<https://perma.cc/RA8S-P4NF>]; H.B. 4947, 2019–2020 Leg., Reg. Sess. (Mich. 2019), <http://www.legislature.mi.gov/documents/2019-2020/billintroduced/House/pdf/2019-HIB-4947.pdf> [<https://perma.cc/P6UE-3ZM9>]; H. 233, 2019–2020 Gen. Assemb., Reg. Sess. (Vt. 2019), <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/H-0233/H-0233%20As%20Introduced.pdf> [<https://perma.cc/EQ52-6BVN>]; H.B. 1519, 66th Leg., 2019 Reg. Sess. (Wash. 2019), <https://app.leg.wa.gov/billsummary?BillNumber=1519&Year=2019&Initiative=false> [<https://perma.cc/ER3Y-KCSN>]. The following state legislatures have considered, but declined to pass, meat-labeling laws for plant-based or cell-based products: Arizona, Hawaii, Indiana, Nebraska, New

animal legislation may put plant-based food producers, who are often aligned with the animal-welfare movement, in a bind: protecting the former as not violative of the DCC may unwittingly protect the latter and attacking the latter as violative of the DCC may unintentionally undermine the former.

This concurrent rise of animal-protection legislation and meat-labeling laws strains our understanding of the DCC. Do both types of law survive a lenient DCC analysis because the state laws do have in-state benefits and effects? Do both fail a stringent DCC analysis because both entail burdensome out-of-state effects? Identifying the framework that resolves the constitutionality of these two sets of laws requires a more nuanced analysis of the DCC's contours.

Federal courts have inferred the DCC as a “negative corollary” from Article I's Commerce Clause.<sup>14</sup> That is, the Commerce Clause grants Congress the authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>15</sup> Although the Commerce Clause does not directly address states' rights to pass laws affecting interstate commerce, the Supreme Court has determined that the Clause implicitly prohibits states from enacting legislation that substantially interferes with interstate commerce.<sup>16</sup> State laws that affect interstate commerce are subject to being struck down as unconstitutional,<sup>17</sup> even though the

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Mexico, Tennessee, Texas, Virginia, and Wisconsin. *See* H.B. 2604, 54th Leg., 1st Reg. Sess. (Ariz. 2019), <https://www.azleg.gov/legtext/54leg/1R/bills/HB2604P.pdf> [<https://perma.cc/9RJC-MUYV>]; S.B. 1425, 30th Leg., 2019 Sess. (Haw. 2019), [https://www.capitol.hawaii.gov/session2019/bills/SB1425\\_.htm](https://www.capitol.hawaii.gov/session2019/bills/SB1425_.htm) [<https://perma.cc/5RMU-KH5J>]; H.B. 1414, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019), <http://iga.in.gov/static-documents/2/e/c/5/2ec50d50/HB1414.01.INTR.pdf> [<https://perma.cc/2QMY-HTYT>]; L.B. 594, 106th Leg., 1st Sess. (Neb. 2019), <https://nebraskalegislature.gov/FloorDocs/106/PDF/Intro/LB594.pdf> [<https://perma.cc/DD2V-BQY5>]; HB 222, 54th Leg., 1st Sess. (N.M. 2019), <https://www.nmlegis.gov/Sessions/19%20Regular/bills/house/HB0222.pdf> [<https://perma.cc/JAD9-J6TU>]; S.B. 0003, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019), <http://www.capitol.tn.gov/Bills/111/Bill/SB0003.pdf> [<https://perma.cc/XF2K-ECDY>]; H.B. 3799, 86th Leg., Reg. Sess. (Tex. 2019), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB03799I.pdf#navpanes=0> [<https://perma.cc/RSY7-76JZ>]; H.B. 2274, 2019 Gen. Assemb., Reg. Sess. (Va. 2019), <https://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+HB2274+pdf> [<https://perma.cc/YBQ4-9H6B>]; S.B. 464, 2019–2020 Leg., Sess. (Wis. 2019), <https://docs.legis.wisconsin.gov/2019/proposals/sb464> [<https://perma.cc/W3AU-8ZUP>]. Virginia's proposed law would have contained a carveout for products labeled as “imitation” meat.

<sup>14</sup> *E.g.*, *Mason & Dixon Lines, Inc. v. Steudle*, 761 F. Supp. 2d 611, 626 (E.D. Mich. 2011), *aff'd*, 683 F.3d 289 (6th Cir. 2012).

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>16</sup> *S.–Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (“Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”).

<sup>17</sup> *See id.*

DCC acts primarily as a sword against state laws protecting in-state businesses or activities at the expense of out-of-state businesses or activities.<sup>18</sup>

State laws protecting animal welfare may be attacked as violating the DCC because they have out-of-state effects. For example, suppose California passes a law requiring egg-laying hens to be provided enclosures meeting minimum space requirements. In that case, the law may “interfere” with the interstate egg market because some—even most—eggs sold in California are produced in other states not complying with California’s minimum hen cage size standards.<sup>19</sup> Challenging animal welfare laws as violative of the DCC is not an idle threat, as evidenced by the DCC-based lawsuits filed against animal-protection laws.<sup>20</sup> Under the analysis described in this Article, these laws can—and should—survive a DCC challenge.

Similarly, laws that seek to protect the meat and dairy industries by restricting other companies’ labeling may be challenged under the DCC as having out-of-state effects. For example, the Missouri law banning the use of the word “meat” to describe plant-based and cell-cultured meat substitutes may “interfere” with the interstate advertising and sale of these alternative products. In this context as well, the possibility of a DCC challenge is not merely hypothetical; vegetarian and vegan food producers have sued, arguing that prohibiting them from describing their products using meat-based terms hinders their interstate businesses.<sup>21</sup> Under this Article’s proposed analytical framework, these laws can—and should—fall to a DCC challenge.

Why should the animal-protection laws pass muster while the meat-language laws fail? Both laws affect out-of-state businesses and interfere with the free flow of interstate commerce, thus triggering DCC scrutiny. Both laws also purport to provide at least some local benefits. The animal-protection laws survive, and the meat laws fail, because of their purposes.<sup>22</sup> The DCC primarily attempts to quell protectionist measures—laws passed with the express or implied goal of helping in-state business at the expense of out-of-state business or interstate commerce.<sup>23</sup> But the

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<sup>18</sup> See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330–31 (1996).

<sup>19</sup> Hernández-López, *supra* note 7, at 350 (“As sales bans affecting food industries outside California, it is nearly impossible for these policies not to impact interstate commerce.”).

<sup>20</sup> See, e.g., *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1062 (E.D. Cal. 2014), *aff’d and remanded sub nom. Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017) (detailing a commerce clause and supremacy clause challenge to a California law requiring all eggs sold in California to come from an enclosure that complies with the law’s standards).

<sup>21</sup> See *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1134–35 (W.D. Mo. 2019).

<sup>22</sup> Purpose can be the stated purpose, or the purpose inferred from the legislation. See *Huffman v. W. Nuclear, Inc.*, 486 U.S. 663, 671–72 (1988). In this latter context, purpose requires a court to consider what problem the legislature was trying to solve when it passed the law at issue. E.g., Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1186 (2011) (describing Justice Breyer’s form of purposivism as “refer[ring] to the ‘purposes’ the legislature has in enacting the statute”).

<sup>23</sup> See *infra* Part II.A.

DCC does not generally override traditional state police powers,<sup>24</sup> which allow a state to pass laws to enhance the health, safety, and welfare of its citizenry, as long as those laws only incidentally burden interstate commerce.<sup>25</sup> Thus, laws passed with a protectionist purpose should fail, and laws passed for traditional health, safety, or welfare reasons should survive.

While many animal-welfare laws have traditional health, safety, and welfare purposes,<sup>26</sup> legislatures that have passed meat-language laws have been vocal in describing the purpose of such legislation as protecting meat industries against competition from plant-based businesses.<sup>27</sup> If these goals remain—protecting the health and safety of citizens for the animal-welfare laws and protecting the meat industry from competition for the meat-language laws—then the DCC should leave untouched the former but strike down the latter.

This Article charts the course for sustaining animal-welfare laws under a state's police power while striking down meat-language laws as protectionist measures, and it does so in four principal parts.<sup>28</sup> In Part II, this Article analyzes the DCC, its applicable caselaw and policies, and explicates how the DCC leaves intact traditional state police powers. Part III more fully describes exemplar legislation from California and Missouri that typify these legal battles. Part III also discusses the current

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<sup>24</sup> *E.g.*, *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 467 (1877) (“Whilst the power to regulate commerce is granted to Congress, that of establishing interior police regulations belongs to the States.”); *see also* *Am. Trucking Ass’n, Inc. v. Michigan Pub. Serv. Comm’n*, 545 U.S. 429, 434 (2005) (noting that the law at issue was within the state’s police powers and therefore not violative of the DCC). For more information on police powers, *see infra* Part II.B.

<sup>25</sup> *Husen*, 95 U.S. at 468.

<sup>26</sup> *See* *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1065 (E.D. Cal. 2014) (“The stated purpose of [California’s statute mandating more space for egg-laying hens] is to protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress that may result in increased exposure to disease pathogens including salmonella.”) (internal quotation marks and citation omitted).

<sup>27</sup> Kate Gibson, *Missouri First U.S. State to Ban Word “Meat” on Anything But Animal Flesh*, CBS NEWS (Aug. 28, 2018, 5:03 PM), <https://www.cbsnews.com/news/missouri-first-state-to-ban-word-meat-on-anything-but-animal-flesh/> [<https://perma.cc/2K3N-JSDS>] (noting the purpose of the law is to “protect ranchers”).

<sup>28</sup> This Article does not explore other grounds for challenging the meat-labeling laws, such as the First Amendment, despite the fact that such challenges seem fruitful. *See supra* note 10 for additional discussion of these other challenges. For example, in December 2019, Judge Kristine Baker of the Eastern District of Arkansas granted a preliminary injunction to prevent Arkansas from enforcing its meat-labeling law because of First Amendment concerns. *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552 (E.D. Ark. 2019); Beth Mole, *Judge Serves Up Sizzling Rebuke of Arkansas’ Anti-Veggie-Meat Labeling Law*, ARS TECHNICA (Dec. 12, 2019, 3:51 PM), <https://arstechnica.com/science/2019/12/judge-serves-up-sizzling-rebuke-of-arkansas-anti-veggie-meat-labeling-law/> [<https://perma.cc/2NC4-K9HF>].

litigation on these matters. Part IV considers other scholarship in the area of animal-welfare legislation, which roughly breaks down into two camps. In Part IV.A, this Article recounts scholarship that would uphold animal-welfare laws as not violating the DCC, but does so in language that would likely uphold laws like Missouri's meat-language statute. In Part IV.B, this Article addresses scholarship that would strike down animal-welfare laws as violating the DCC, but does so in language that would also strike down laws like Missouri's meat-language statute. In other words, the other scholarship on these matters generally sets up all-or-nothing analytical frameworks in which the two types of laws either both survive, or both fail. Finally, Part V of this Article posits an analytical framework for litigating and deciding these DCC cases in a way that distinguishes the health and safety purposes of the animal-welfare legislation from the protectionist reasons underlying the meat-language laws.

## II. THE REFEREES OF THE LEGISLATIVE AND LITIGATION BATTLES: DCC AND POLICE POWERS

### A. *The DCC*<sup>29</sup>

Implicit in the Constitution's affirmative Commerce Clause is a negative corollary barring states from enacting legislation that substantially burdens the free flow of commerce;<sup>30</sup> this negative gloss has become known as the DCC.<sup>31</sup> Thus, the DCC seeks to "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."<sup>32</sup>

Litigation seeking to invalidate state laws based on the DCC meets different levels of scrutiny depending on the type of DCC challenge asserted. Courts have determined the DCC serves three functions:<sup>33</sup> (1) an "anti-protectionist function," (2) a "sovereign-capacity function," and (3) an "anti-obstructionist function."<sup>34</sup>

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<sup>29</sup> This section is based on my earlier work and research into the DCC. See Jessica Berch, *Weed Wars: Winning the Fight Against Marijuana Spillover from Neighboring States*, 19 NEV. L.J. 1 (2018) [hereinafter *Weed Wars*]; Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover Flowing from Their Legalizing Neighbors*, 58 B.C. L. REV. 863 (2017) [hereinafter *Reefer Madness*].

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 3.; *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

<sup>31</sup> *E.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

<sup>32</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979).

<sup>33</sup> See *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (noting the three different DCC varieties).

<sup>34</sup> See Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1005–06 (2011)

These different DCC functions bring different standards of review, from the restrictive strict scrutiny standard to a lenient rational-basis type standard.

The anti-protectionist framework is reserved for laws that benefit in-state businesses at the expense of out-of-state businesses.<sup>35</sup> These laws are subject to the “strictest scrutiny,” and courts routinely strike them down as violating the DCC.<sup>36</sup> After all, such laws entail the very economic Balkanization that the DCC proscribes.

The DCC’s second function, the sovereign-capacity function, prevents a state from projecting its legislation into sister states.<sup>37</sup> The DCC “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State . . . .”<sup>38</sup> These laws receive strict scrutiny because out-of-state businesses bear the brunt of the negative effects.<sup>39</sup>

In analyzing the third category, the anti-obstructionist function of the DCC, courts will uphold a state statute that “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>40</sup> These laws, being neutral and evenhanded, do not trigger fears of protectionism and therefore are subjected to something akin to rational-basis scrutiny.

The first two of these frameworks—anti-protectionist and sovereign-capacity—require the application of strict scrutiny. Perhaps because they receive the same level of scrutiny, some scholars have recognized that these two strands of the DCC may be collapsed into one.<sup>41</sup> Thus, rather than focusing on three strands of the DCC,

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(creating the nomenclature adopted in this Article). This Article provides a brief outline of these three different DCC challenges. For those interested in a more detailed discussion of these three functions, see *Weed Wars*, *supra* note 29, at 30–37.

<sup>35</sup> See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 345 (1996) (stating that the DCC “require[s] ‘justifications for discriminatory restrictions on commerce [to] pass the strictest scrutiny’”) (citation omitted) (second alteration in original).

<sup>36</sup> *Id.*

<sup>37</sup> See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

<sup>38</sup> *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citation omitted); see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) (“Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.”); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987) (recognizing that where the “law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law”) (citation omitted); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986) (citing *Healy* as invalidating a statute because it “regulate[d] conduct occurring wholly outside the state”) (alteration in original); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality) (invalidating a Illinois statute for its “sweeping extraterritorial effect”).

<sup>39</sup> See *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

<sup>40</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>41</sup> Bethany Gullman, *Unburdening the Farm: A Dormant Commerce Clause Challenge to Conflicting Standards in Agricultural Production*, 43 MITCHELL HAMLINE L. REV. 451,

it is permissible to focus on two. *First*, laws that discriminate against interstate commerce and advance local interests over out-of-state interests are subject to strict scrutiny and are almost always invalidated.<sup>42</sup> *Second*, laws that apply evenly to both in-state and out-of-state commerce receive more lenient scrutiny and are more likely to survive a challenge.<sup>43</sup>

Because of the interconnected web of commerce, many state laws—maybe most or even all—affect interstate markets in some manner,<sup>44</sup> and so in assessing whether strict scrutiny or lenient balancing applies, courts consider both the effect of the law (whether the law discriminates against out-of-state business in favor of in-state interests) and its purpose (the reasons prompting the enacting state to pass the law).<sup>45</sup> Courts determine the disparate effect by evaluating whether the law

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455 (2017) (“The Supreme Court identifies two types of state statutes that improperly regulate interstate commerce: (1) ‘statutes that burden interstate transactions only incidentally,’ and (2) statutes that ‘affirmatively discriminate’ against interstate transactions.”) (citations omitted); see also Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California’s Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENVTL. L. REV. 423, 427 (2015) (“Ordinarily, to determine if a state law violates the dormant Commerce Clause, a court must decide whether the law discriminates against out-of-state commerce. Discriminatory laws are presumptively unconstitutional and can be upheld only if justified by a valid factor unrelated to economic protectionism. Nondiscriminatory laws are unconstitutional if the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”) (internal quotation marks and citations omitted).

<sup>42</sup> Gullman, *supra* note 41; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

<sup>43</sup> Joshua I. Grant, *Hell to the Sound of Trumpets: Why Chicago’s Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Laws*, 2 STAN. J. ANIMAL L. & POL’Y 52, 72 (2009) (“Cases under the dormant Commerce Clause are analyzed under a two-tiered approach. Under the first tier, a court must determine whether a law on its face or in effect discriminates against interstate commerce. . . . [Discriminatory] statu[t]es are subject to strict scrutiny and will be struck down unless a state ‘can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.’ However, if a law does not discriminate in favor of local interests but instead regulates neutrally and has only incidental effects on interstate commerce, then a case is analyzed under the second tier of case law.”); *Pike*, 397 U.S. at 142; see *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008) (writing that “[s]tate laws frequently survive this *Pike* scrutiny”).

<sup>44</sup> It is difficult to imagine a law that does not affect interstate commerce or out-of-state interests. *Cf. Wickard v. Filburn*, 317 U.S. 111, 127 (1942) (holding that an individual growing wheat for home use affects the interstate market for wheat); see also Schmitt, *supra* note 41, at 424 (“[B]ecause of the interconnected nature of the modern economy, most state regulations have some extraterritorial effects.”).

<sup>45</sup> See, e.g., *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461 (2019) (noting that a law that has out-of-state effects may nonetheless be sustained if it is “narrowly tailored” to advance a “legitimate local purpose”) (quotation marks and citations omitted).

applies evenhandedly to in-state and out-of-state markets.<sup>46</sup> Courts determine the purpose of the law by assessing—through usual statutory interpretation methods—the stated purpose of any drafters or proponents of the law and by considering the problem the law was meant to solve.<sup>47</sup> A law motivated by a purpose to aid in-state activities at the expense of out-of-state ones triggers the application of strict scrutiny; a law motivated by traditional police powers—to enhance the health, safety, or welfare of in-state citizenry<sup>48</sup>—triggers the application of the balancing test. In other words, both “protectionist” and “police powers” laws may affect interstate commerce and may even advance in-state interests at the expense of out-of-state interests; that is, they both may have disparate effects. The principal difference in whether the law survives DCC analysis lies in the legislature’s (stated or unstated) motivation for passing the law; that is, the purpose of the law.<sup>49</sup>

### B. Police Powers

Police powers allow a state to regulate the health, safety, and general welfare of its citizenry.<sup>50</sup> Courts generally uphold laws that advance these purposes as long as they are reasonable, passed in good faith, and do not violate the Constitution, including the DCC.<sup>51</sup>

Many police-powers-based laws affect other states, either directly or incidentally.<sup>52</sup> That is the nature of the interconnected economy of the United States. But the DCC accommodates this interconnectivity and tolerates traditional police

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<sup>46</sup> See, e.g., Jonathan W. Garlough, *Weighing in on the Wine Wars: What the European Union Can Teach Us About the Direct Shipment Controversy*, 46 WM. & MARY L. REV. 1533, 1541 (2005) (“The second way a state law can violate the dormant Commerce Clause is by clearly discriminating against interstate commerce, either facially or through the law’s practical effect.”). Most laws should be written neutrally so as to avoid any obvious disparate purposes or effects.

<sup>47</sup> See Tushnet, *supra* note 22, at 1186 (regarding statutory purpose).

<sup>48</sup> See *infra* Part II.B.

<sup>49</sup> It may happen that a legislature’s intent does not align with the law’s effect. More study of this phenomenon and its permutations is needed. As an initial reaction, this author believes that a law motivated by a protectionist legislative purpose, but which does not achieve that protectionist end, should receive strict scrutiny analysis; a law motivated by a non-protectionist legislative purpose, but that does turn out to have a protectionist effect, should perhaps also receive strict scrutiny analysis. In other words, a legislature should fairly certainly be held accountable for its “evil” mindset in the first permutation; and a legislature should perhaps be held accountable for any “evil” effect of a law it passes in the second.

<sup>50</sup> 16A C.J.S. CONSTITUTIONAL LAW § 707 (2020) (“It is the right and duty of a state possessing the police power to pass such laws as may be necessary for the preservation of public health.”).

<sup>51</sup> *Id.* § 717.

<sup>52</sup> *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring) (“The modern reality is that the States frequently regulate activities that occur entirely within one State but that have effects in many.”).

power laws by subjecting them to the lenient balancing test that laws frequently survive.<sup>53</sup> As the Supreme Court has stated, “the States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.”<sup>54</sup> Thus, the key is finding a way to distinguish legitimate local concern from illegitimate local protectionism.

*C. The Line Between Valid Police Powers and Invalid Protectionism*

There is no clear line to demark laws furthering valid police powers and those advancing unconstitutional protectionism.<sup>55</sup> The Supreme Court has candidly stated that “defining the appropriate scope for state regulation is often a matter of delicate adjustment.”<sup>56</sup> At the core of this inquiry is whether the state has “place[d] itself in a position of economic isolation”<sup>57</sup> based on the “practical operation” of the state law.<sup>58</sup>

This question of statutory meaning, purpose, and effect plagues numerous areas of the law, and there are too many divergent views on how to interpret statutes to recount here properly.<sup>59</sup> At least in the context of potentially protectionist laws, the Supreme Court has directed courts to consider the “practical operation” of the law. Generally, a law does what its writers intended it to do.<sup>60</sup> Thus, the reason a law is passed is pertinent in deciphering whether the law is protectionist. In addition, given the Supreme Court’s pronouncement that “practical operation” matters, how the law actually operates in practice, including its effects, must be considered in ascertaining whether or not the law is principally protectionist.

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<sup>53</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (describing that the “nature of the local interest” matters in assessing whether a law survives a DCC challenge).

<sup>54</sup> *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (citation omitted).

<sup>55</sup> See Schmitt, *supra* note 41, at 428 (“The Supreme Court, however, has never clearly explained how the dormant Commerce Clause’s ban on extraterritorial legislation applies when a state directly regulates only in-state conduct, but such regulation has out-of-state effects.”).

<sup>56</sup> *BT Inv. Managers*, 447 U.S. at 36 (internal quotation marks and citation omitted).

<sup>57</sup> *Id.* (quotation marks and citation omitted).

<sup>58</sup> *Id.* at 37.

<sup>59</sup> Some famous texts regarding statutory interpretation include the following: ANTONIN SCALIA & BRYAN A. GARNER, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994).

<sup>60</sup> *Cf. Deweese v. Nat’l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 246 (3d Cir. 2009) (reviewing congressional findings and statutory language to determine practical effect of a statute).

### III. TWO COMBATANTS IN THE LEGISLATIVE AND LITIGATION BATTLES: CALIFORNIA'S CAGE-FREE EGG STATUTE AND MISSOURI'S MEAT-LABELING STATUTE

#### A. California's Cage-Free Egg Statute

California leads the nation's animal-welfare movement.<sup>61</sup> For example, California laws ban the sale of cosmetics that have been tested on animals;<sup>62</sup> require pet stores to adopt dogs, cats, and rabbits that come from shelters or nonprofits;<sup>63</sup> and prohibit the use of fur for new clothing and accessories,<sup>64</sup> among others.

California has also attempted to reduce the cruelty inflicted on animals raised for food.<sup>65</sup> In 2018, California voters overwhelmingly supported Proposition 12 to adopt "the most progressive animal welfare protections in the world."<sup>66</sup> Proposition 12 amplified earlier measures passed in 2008's Proposition 2.<sup>67</sup> Under Proposition 12, effective January 1, 2020, producers who wish to sell veal in California must provide veal calves with at least 43 square feet of floor space; hens, chickens, turkeys, ducks, geese, and guinea fowl must have at least 1 square foot.<sup>68</sup> By 2022, the law will protect breeding pigs, banning the sale of pork from pigs that are provided less than 24 square feet of space.<sup>69</sup> Also, by 2022, all eggs sold in California must

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<sup>61</sup> The Animal Legal Defense Fund ranks U.S. states by the strength of their animal-protection laws. In 2019, the most recent year for which rankings are available, California earned a "top tier" designation and ranked eighth. *2019 U.S. State Animal Protection Laws Rankings: The Best and Worst States for Animal Protection Laws*, ANIMAL LEGAL DEFENSE FUND, <https://aldf.org/project/us-state-rankings/> [<https://perma.cc/2M97-JKPB>] [hereinafter *ALDF Rankings*]; Hernández-López, *supra* note 7, at 349 ("Since 2008, California has attempted to limit animal cruelty in food industries . . ."); Daly, *supra* note 6 (listing California's animal-protection legislation); see also Lynn E. Dwyer & Dennis D. Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act*, 35 NAT. RESOURCES J. 735, 742 (1995) ("California has always appeared to be a leader in its commitment to environmental protection.").

<sup>62</sup> CAL. CIV. CODE § 1834.9.5 (West 2019). The ban went into effect January 1, 2020.

<sup>63</sup> CAL. HEALTH & SAFETY CODE § 122354.5(a) (West 2019). The law became operative January 1, 2019. *Id.* § 122354.5(I).

<sup>64</sup> CAL. FISH & GAME CODE § 2023 (West 2019). The ban goes into effect January 1, 2023.

<sup>65</sup> Hernández-López, *supra* note 7, at 349 (describing how the California legislature has attempted to address animal suffering).

<sup>66</sup> Gabrielle Canon, 'A Loud and Clear Message': California Passes Historic Farm Animal Protections, THE GUARDIAN (Nov. 8, 2018, 7:00 EST), <https://www.theguardian.com/us-news/2018/nov/08/california-animal-welfare-cage-free-eggs-prop-12-passes> [<https://perma.cc/PG87-W73R>]. The law is codified at CAL. HEALTH & SAFETY CODE §§ 25990–94 (West 2019).

<sup>67</sup> Canon, *supra* note 66.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

come from “cage-free” hens as defined by the United Egg Producers’ guidelines.<sup>70</sup> Penalties include civil fines of \$2,500 per violation and \$6,000 per intentional violation.<sup>71</sup>

In 2014, the State of Missouri, among other states, sued various California officials seeking injunctive and declaratory relief and alleging Proposition 2 was unconstitutional and preempted.<sup>72</sup> The states brought the suit in their capacity as *parens patriae*, asserting an interest in their in-state businesses’ financial health and success, which they posited would be harmed if Proposition 2 went into effect.<sup>73</sup> The complaint alleged the California law effectively required out-of-state egg producers “to comply with behavior-based enclosure standards identical to those in [Proposition] 2 if they want to continue selling their eggs in California.”<sup>74</sup> This left the out-of-state producers with a dilemma: they could either “incur massive capital improvement costs to build larger habitats for some or all of their egg-laying hens,” or they could “walk away from the largest egg market in the country.”<sup>75</sup> The complaint thus set forth a claim under the DCC because the California law allegedly affected out-of-state businesses and impinged on interstate commerce. The courts never reached the merits of the complaint because the district court dismissed the case for lack of standing,<sup>76</sup> and the Ninth Circuit affirmed on that ground.<sup>77</sup>

If this case had progressed to the merits, would Missouri have succeeded in having the court strike down California’s law as violative of the DCC?<sup>78</sup> Although several scholars agree that California’s laws should be upheld,<sup>79</sup> this consensus is

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<sup>70</sup> *Id.*

<sup>71</sup> CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2019) (noting injunctions and civil penalties).

<sup>72</sup> *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014). The preemption argument relies on the Federal Egg Products Inspection Act, 21 U.S.C. § 1031, because one of its stated purposes “is to protect human health in connection with the consumption of shell eggs.” *Id.* at 1065 (quotation marks and citation omitted). This Article does not address preemption concerns.

<sup>73</sup> *Id.* at 1068.

<sup>74</sup> *Id.* at 1063.

<sup>75</sup> *Id.* at 1063–64.

<sup>76</sup> *Id.* at 1072–75 (dismissing the case for lack of standing because the states had not alleged a cognizable injury; although the egg producers might suffer harm, which would make them appropriate plaintiffs, the states failed to allege how individuals within the state—other than the egg producers—would be harmed).

<sup>77</sup> *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 650 (9th Cir. 2017).

<sup>78</sup> Some of the language used by the Ninth Circuit in affirming the district court’s dismissal of the Missouri lawsuit on the basis of standing suggests that the judges would have sustained the cage-free egg law on the merits. For example, the Ninth Circuit stated that California erected “no trade barriers” and that the cage-free egg laws were “not discriminatory.” *Id.* at 655.

<sup>79</sup> See, e.g., Rita-Marie Cain Reid, *The Chicken and the Egg—Animal Welfare, Food Safety and Federalism*, 71 FOOD & DRUG L.J. 1, 11 (2016) (concluding that California state legislation relating to egg production is likely constitutional); Grant, *supra* note 43, at 103–

not unanimous,<sup>80</sup> and much of the reasoning supporting the constitutionality of animal-welfare laws centers on a case-by-case assessment, leaving the resolution somewhat unsettled.<sup>81</sup> This Article proposes that California's law is a proper exercise of the police power and, because the law's anti-obstructionist purpose is to protect its citizens' health, safety, or welfare, it should withstand rational basis scrutiny under the DCC.

### B. Missouri's Meat-Labeling Statute

Missouri ranks thirty-fifth for its animal-protection laws.<sup>82</sup> In 2018, as California was busy introducing various animal-welfare measures, Missouri passed its own law inimical to the interests of the animal-protection movement.<sup>83</sup> Missouri's legislature banned the use of the word meat to describe any product that does not come from "harvested production livestock or poultry."<sup>84</sup> Violating the statute is a Class A misdemeanor.<sup>85</sup>

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04 (2009) (arguing why California's ban on foie gras is likely to survive a constitutional challenge); Louis Cholden-Brown, *Missouri and Indiana Lay an Egg: Why the Latest Attempt at Invalidating State Factory Farm Regulations Must Fail*, 22 CHAP. L. REV. 161, 179–83 (2019) (positing that neither the California nor Massachusetts egg production laws are invalid under the Supreme Court's modern DCC doctrine).

<sup>80</sup> See Gullman, *supra* note 41, at 464–69 (arguing that these laws fail the DCC analysis and advocating that Congress pass legislation to preempt local experimentation).

<sup>81</sup> See, e.g., Hernández-López, *supra* note 7 (describing the potential challenges to animal-protection-based food laws, noting the importance of constitutional law in these matters, and describing the case-by-case balancing that must transpire).

<sup>82</sup> *ALDF Rankings*, *supra* note 61 (ranking Missouri #35 out of 50).

<sup>83</sup> Missouri is not alone in passing a state industry protection law like this, but it is useful to focus on one such law for the purpose of this Article. For a full list of U.S. states that have passed, are considering passing, or have defeated such laws, see *supra* note 13. Nor is the United States alone in considering and adopting these laws. In early 2019, the European Parliament's agriculture committee approved banning plant-based foods from being named like their meat counterparts. See Maria Chiorando, *EU Ban on 'Meaty' Names Would Be 'Unlawful,' Claims Vegan Charity*, PLANTBASEDNEWS.ORG (Apr. 23, 2019), <https://www.plantbasednews.org/post/eu-ban-on-meaty-names-unlawful-claims-vegan-charity> [<https://perma.cc/NR47-4MM5>]. When such a proposal passed in France, supporters touted the law would serve to protect France's agricultural products. See Katy Askew, *France Bans Use of Meaty Names for Veggie Food*, FOODNAVIGATOR.COM (Apr. 23, 2018), <https://www.foodnavigator.com/Article/2018/04/23/France-bans-use-of-meaty-names-for-veggie-food> [<https://perma.cc/A2PQ-6RVA>] (quoting French MP Jean-Baptiste Moreau using protectionist language in support of these meat-labeling laws).

<sup>84</sup> MO. REV. STAT. § 265.494(7) (West 2018); *id.* § 262.492 (defining "meat" and regulating meat advertising to ban plant-based meats from using the "meat" label, and also prohibiting "clean meat"—cell-based meat—from using that label even though that meat comes from livestock and poultry cells because clean meats do not come from carcasses).

<sup>85</sup> *Id.* § 265.496 (West 2020).

Tofurky, a company that makes vegan meat alternatives, joined with other plaintiffs to sue the State of Missouri, seeking to enjoin the meat-labeling law.<sup>86</sup> One theory of the law's invalidity is that its protectionist purpose renders it violative of the DCC. Count II of the complaint alleges Missouri's law seeks to "put Plaintiff Tofurky at a disadvantage in Missouri in order to protect local economic interests from interstate competition."<sup>87</sup> The complaint also alleges the law was passed "at the behest of in-state livestock and poultry producers who do not wish to compete against Plaintiff Tofurky and other plant-based meat producers' products."<sup>88</sup> This case remains pending.<sup>89</sup> This Article proposes that Missouri's law has an improper protectionist purpose and fails under the anti-protectionist function of the DCC.<sup>90</sup>

#### IV. PREVIOUS PREDICTIONS OF THE DCC BATTLES: EITHER TWO WINNERS OR TWO LOSERS

Both California's cage-free egg legislation and Missouri's ban on the use of the word meat for plant-based alternatives have been challenged as violating the DCC.<sup>91</sup> The California-Missouri animal-protection-versus-meat-industry battle shares another ironic twist that bears mention: it was *Missouri* that sued *California* over its cage-free egg measures.<sup>92</sup> Thus, Missouri does not want California's legislation to intrude on Missouri's business, but Missouri wants its legislation to control out-of-state businesses, including California's.

Other articles have addressed state laws that incidentally burden activities in other states,<sup>93</sup> and some articles have even addressed animal-welfare laws that

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<sup>86</sup> Complaint, *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131 (W.D. Mo. 2019) (No. 2:18-cv-04173).

<sup>87</sup> *Id.* at ¶ 109.

<sup>88</sup> *Id.* at ¶ 111.

<sup>89</sup> *Turtle Island Foods v. Richardson*, 425 F. Supp. 3d 1131, 1141 (M.D. Mo. 2019) (order denying preliminary injunction) (denying the plaintiffs' request for a preliminary injunction, at least in part because the plaintiffs' labeling already includes "qualifiers" that clarify that the products are plant-based rather than animal-derived), *appeal docketed*, No. 19-3154 (8th Cir. Oct. 4, 2019).

<sup>90</sup> *See infra* Part IV.A.

<sup>91</sup> *See supra* Part II.A–B.

<sup>92</sup> *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014). In fact, in the *Missouri v. Harris* litigation, the State of Missouri vigorously argued against the California statute with these words: "[W]e are talking about a statute that effectively blocks, at the California border, eggs from out of state that don't comply with California's own notions of proper animal husbandry." *Id.* at 1069. After Missouri's meat-labeling statute, we could swap out "California" for "Missouri" and "eggs" for "plant-based meat": "We are talking about a statute that effectively blocks, at the Missouri border, plant-based meat from out of state that do[es]n't comply with Missouri's own notions of proper [advertising or naming standards]."

<sup>93</sup> *E.g.*, Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 636–38 (2007); DeVeaux, *supra* note 34, at 1006; *Weed Wars*, *supra* note 29, 31–32; *Reefer Madness*, *supra* note 29, at 889–91.

incidentally burden other states.<sup>94</sup> In particular, the scholarship addressing animal-welfare laws falls roughly into two camps. On the one hand, some scholars find that animal-welfare laws survive the pliant DCC restriction, but these scholars tend to use language that strongly suggests Missouri's meat-labeling legislation should also survive. On the other hand, some scholars believe animal-welfare laws fail the DCC, using a test that would almost certainly strike down Missouri's meat-language law. This part of the Article reviews the solutions posited by others; then, in Part V, this Article sets forth a theoretical and analytical framework for resolving these disputes to ensure animal-protection laws survive the DCC challenge, while meat-language laws fail the challenge.

### A. *Two Winners*

One outcome of the dual DCC challenge—one against animal-welfare laws and one against meat-labeling laws—is that both sorts of laws survive scrutiny. This, in fact, is a likely result if lawyers, courts, and scholars emphasize the low-level balancing test that applies to anti-obstructionist laws under the DCC. Recall that these laws survive as long as the out-of-state harm does not clearly outweigh the in-state benefits.

For example, Professor Jeffrey Schmitt proposed that California's animal-welfare legislation does not run afoul of the DCC because these laws meet the balancing test.<sup>95</sup> He explains that “in-state conduct violates the extraterritoriality principle only when the regulation: (1) lacks a corresponding in-state interest; and (2) *inescapably* has the practical effect of regulating conduct beyond the state's borders.”<sup>96</sup> Under such a test, a court would uphold California's cage-free egg requirement because “[a]lthough California's legislation regulates the out-of-state production of . . . eggs bound for the California market,” California maintains “an interest in making sure that its citizens do not participate in animal cruelty . . . .”<sup>97</sup> Moreover, out-of-state producers can choose to comply with California's laws and change their production methods, or they may choose not to sell in California, “meaning that such effects are not ‘inescapable.’”<sup>98</sup> Nor does California's law require producers “to change their operations with respect to products sold in other states.”<sup>99</sup> Professor Schmitt concludes that the California legislation passes constitutional muster because “California's legislation simply does not, indeed cannot, interfere with another state's power to enact or enforce its own legislation on these subjects.”<sup>100</sup>

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<sup>94</sup> Schmitt, *supra* note 41, at 441–47; Hernández-López, *supra* note 7, 366–69; Gullman, *supra* note 41, at 458–63.

<sup>95</sup> See Schmitt, *supra* note 41, at 447–48.

<sup>96</sup> *Id.* at 425 (emphasis in original); see also *id.* at 429, 449 (providing similar formulations of the proposed test).

<sup>97</sup> *Id.* at 425.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 426.

Professor Schmitt's approach focuses on the availability of options to the out-of-state business affected. In his view, the opportunity to choose to do business by changing business practices, or not to do business in a particular state and therefore keeping business practices the same, lessens or even obviates the existence of an immediate burden on the out-of-state business. When the small (or nonexistent) out-of-state burden is compared to the in-state benefits, the latter clearly outweighs the former. The court should uphold California's animal-welfare legislation.

Nevertheless, this framework provides a roadmap for upholding Missouri's meat-labeling law. After all, Missouri has an interest in the production of meat in Missouri. Moreover, Missouri's law would not force plant-based meat producers to change the packaging of their products sold in states other than Missouri. And if the producers would like to sell in Missouri, they can do so simply by changing their packaging (either just for Missouri or nationwide). Alternatively, these producers may keep their packaging as-is while forgoing the Missouri market. Finally, Missouri's law does not, and cannot, interfere with another state's power to enact or enforce its own legislation on these matters; those other states can prohibit or require their own labeling. Missouri's law comfortably fits in the "wide latitude" given to states in regulating in-state conduct.<sup>101</sup> In fact, using reasoning like this, several circuit courts have upheld other types of labeling laws,<sup>102</sup> which further suggests that this sort of analysis would validate Missouri's law.

In sum, the application of Professor Schmitt's analysis from the animal-protection realm would support the affirmation of Missouri's meat-labeling law.<sup>103</sup>

### B. *Two Losers*

Under a different analysis, neither of the laws highlighted in this Article would survive DCC scrutiny. This result occurs if courts focus their attention on the out-of-state effects of the legislation. Both California's animal-welfare laws and Missouri's meat-labeling law unquestionably have effects outside the borders of the states in which they were enacted, thus harming out-of-state interests.

Professor Bethany Gullman, for example, explains that California's animal-welfare legislation is both protectionist and that it lacks sufficient in-state interests to counterbalance the harmful out-of-state effects:

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<sup>101</sup> *Id.* at 427.

<sup>102</sup> *See, e.g.,* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 644–50 (6th Cir. 2010) (finding Ohio law banning dairy producers from certain misleading labeling about hormones survived *Pike* test); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108–13 (2d Cir. 2001) (reversing award of preliminary injunction barring enforcement of a Vermont law requiring labeling of products containing mercury).

<sup>103</sup> *Cf. Grant, supra* note 43, at 71 ("A state's regulation of a food product is therefore likely to be upheld on state constitutional grounds as a valid exercise of a state's power to protect the public health, safety, morals, or welfare.").

The regulations in California . . . likely violate the [DCC] by regulating conduct outside [California's] borders. The California regulations likely have a discriminatory purpose and would be invalidated on strict scrutiny review. Even if the purpose was not found to be discriminatory and the law was determined to have only incidental effects on interstate commerce, the burden of each law in California . . . outweighs the minor value of the legitimate local purpose.<sup>104</sup>

This analysis predicts that animal-welfare legislation will be analyzed under the anti-protectionist prong of the DCC, subjected to strict scrutiny, and struck down. As a second line of attack, Professor Gullman posits that even if courts analyze animal-welfare legislation under the lenient anti-obstructionist framework of the DCC, the “minor value” of the in-state benefits cannot outweigh the heavy burden on interstate commerce.

Professor Gullman's analysis would also likely compel a court to invalidate Missouri's meat ban. As explored more in Part V, *infra*, Missouri's legislature has an interest in protecting its meat industry,<sup>105</sup> which should trigger the anti-protectionist framework's strict scrutiny. Laws rarely survive this strict scrutiny, and there is nothing suggesting that meat-labeling laws are so important that they should. Professor Gullman, however, continues her analysis of California's animal-welfare laws, stating that even if California's laws are not discriminatory and only incidentally burden interstate commerce, “the burden of the law in California . . . outweighs [its] minor value . . . .”<sup>106</sup> If that is true of the animal-protection laws, then similarly, even if Missouri's meat-labeling law were not discriminatory and only incidentally affected interstate commerce, the legislation would probably fail the balancing test. Missouri would have to identify a local, non-protectionist purpose of the law. The most likely non-protectionist purpose is requiring clear labels to stave off consumer confusion as to which products are animal-based and which are plant-based. But this purpose has weight only if consumers are indeed confused, and there has been no evidence of consumer confusion. On the contrary, plant-based products are already prominently labeled as such.<sup>107</sup> Thus, whatever marginal confusion is allayed by the meat-labeling law is more than offset by the burdens imposed on out-of-state businesses needing to change their labeling practices or forgo the Missouri market.

In sum, this sort of analysis would likely invalidate both California's animal-welfare laws and Missouri's meat-language ban.<sup>108</sup>

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<sup>104</sup> Gullman, *supra* note 41, at 464.

<sup>105</sup> Gibson, *supra* note 27 (explaining that the law's purpose is to “protect ranchers”).

<sup>106</sup> Gullman, *supra* note 41, at 464.

<sup>107</sup> See Preliminary Injunction Order cited *infra* note 131, at 24 (rejecting consumer confusion in meat-labeling case).

<sup>108</sup> This analysis would likely invalidate many other laws as well, including the labeling laws mentioned *supra* note 102.

*C. Concluding Remarks for the Dual Winner/Dual Loser Framework*

Neither Professor Schmitt nor Professor Gullman analyzed the meat-labeling laws; nor could they as their articles predate Missouri's law, which was the first on the subject. But the analytical frameworks they use suggest outcomes for the Missouri-type laws as well.

Professor Schmitt focuses on an out-of-state business's choice on whether to comply with an in-state law. The same reasoning that he uses to support animal-welfare laws would also allow meat-labeling laws to pass muster. A better focus—one perhaps not needed in 2015 in a world without meat-labeling laws—considers the purpose of the laws and not simply their effects on choice. Professor Gullman's analysis properly considers legislative purpose, but as explored below in Part V, improperly ascribes a primarily protectionist purpose to California's animal-welfare legislation. If purpose is to be the touchstone of the DCC analysis, we must take care in properly identifying the reasons motivating the enactment of state legislation.

V. PROPER OUTCOME OF THE DCC BATTLES: ONE LAW SURVIVES  
AND ONE LAW SUCCUMBS

Under the frameworks addressed in Part IV, *supra*, the courts would likely find either that both statutes survive or that both should be struck down. This Part builds a template for separating the constitutional animal-protection statutes from the unconstitutional meat-labeling ones.

*A. Health and Safety Laws Survive, but Protectionist Laws Fall*

Stating that both California's animal-welfare legislation and Missouri's meat statute have out-of-state effects, interfere with interstate commerce and business transactions, and are thus suspect under the DCC, does not resolve the constitutionality question. If "out-of-state effects" were the sole test, then both laws must fail. Nor is it sufficient to say that a state law's offer of choice to an out-of-state business will salvage the law. Forgoing market participation may, for practical and economic reasons, be no choice at all. And often a law in one state prompts laws in other states, so these businesses may have to adapt to a patchwork of different state laws or forgo participation in multiple markets.

The key to separating the winners from the losers is putting the laws in their proper analytical frameworks of the DCC. Animal-welfare legislation should be challenged as violating the anti-obstructionist portion of the DCC, and the meat-labeling statutes should be challenged as violating the anti-protectionist function of the DCC. These two different strands of the DCC entail different levels of review, and because the anti-obstructionist lens is a rational-basis-balancing-type framework, the animal-protection laws should survive. On the other hand, the anti-protectionist function of the DCC subjects laws to strict scrutiny, and so the meat-labeling laws should fail.

Animal-welfare laws have “long been recognized as part of the historic police power[s] of the States.”<sup>109</sup> State legislatures passing animal-protection laws explicitly rely on police powers language about regulating health, safety, and welfare. For example, in 2010, when California’s legislature banned the sale of out-of-state eggs that did not meet certain welfare standards that already applied to in-state producers,<sup>110</sup> the legislature explained that the purpose of the law was to “protect California consumers from the deleterious health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease pathogens including salmonella.”<sup>111</sup> Thus, the members of the legislature explicitly relied on human health justifications for their statute.

Those findings relate specifically to the salmonella risk from caged hens, but even more generally, current industrial animal farming methods may “present[] an unacceptable level of risk to public health and damage to the environment.”<sup>112</sup> Intensive confinement for farm animals should be eliminated “given the interrelation between animal conditions and their welfare, food safety, and public health.”<sup>113</sup> Laws like California’s cage-free egg requirement that require more space, sunlight, and natural behavior for animals thus fit snugly within the state’s police powers because mistreatment of farm animals, poor animal health, and environmental degradation directly and negatively affect human health and wellbeing.

Therefore, even though these animal-welfare laws affect out-of-state businesses, which must choose whether to comply with the different standards or forgo the market, these laws also have a significant in-state purpose that is not solely or primarily related to protecting in-state industry.<sup>114</sup> These laws should pass muster under the relatively relaxed balancing test of the anti-obstructionist prong of the

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<sup>109</sup> *DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994); *see also* *Planned Parenthood of Ind. & Ky. v. Comm’r of Ind. State Dep’t of Health*, No. 17-3163, 2018 WL 3655854, at \*5 (7th Cir. June 25, 2018) (Easterbrook, J., dissenting) (“[A]nimal welfare affects human welfare. Many people feel disgust, humiliation, or shame when animals or their remains are poorly treated.”); 3B C.J.S. ANIMALS § 198 (2020) (writing that statutory provisions prohibiting cruelty to animals “are sustainable as a valid exercise of the police power”); *see also* *Daly*, *supra* note 6 (noting that the Director of Legislative Affairs at the Animal Legal Defense Fund considers state animal protection laws to constitute a reflection of “Americans’ growing concern for the wellbeing of animals”).

<sup>110</sup> A.B. 1437, 2009–2010 Leg., Reg. Sess. (Cal. 2010). Moreover, the requirements imposed on out-of-state producers were already imposed on in-state producers—thus providing no competitive advantage to in-state business interests except in the sense that the new law levels the playing field. *Id.*

<sup>111</sup> CAL. HEALTH & SAFETY CODE § 25995(e) (West 2018).

<sup>112</sup> *Hernández-López*, *supra* note 7, at 392 (citing Robert P. Martin, *Preface* to PEW COMM’N ON INDUS. FARM ANIMAL PROD., *Putting Meat on the Table: Industrial Farm Production in America*, at vii–ix, 56–59 (Jeffrey T. Olson ed., 2008)).

<sup>113</sup> *Id.* at 393.

<sup>114</sup> Indeed, as noted *supra* note 110, these laws also apply to in-state egg producers.

DCC because the in-state human health benefits are not clearly and substantially outweighed by the interference with out-of-state businesses.

On the other hand, with respect to Missouri's labeling law for meat-alternative products, proponents and legislators primarily and often explicitly relied on the purpose of protecting Missouri's meat industry from competition.<sup>115</sup> The meat industry fears losing market share to companies that make plant-based meat alternatives and is actively pushing state legislatures to enact labeling laws in order to protect the meat and dairy farms.<sup>116</sup> In support of Missouri's meat-labeling law, Mike Deering, the Executive Vice President of the Missouri Cattleman's Association, said, "[t]his is about protecting the integrity of products that farm and ranch families throughout

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<sup>115</sup> See Jessica Fu, *Missouri Lawmakers Pass Bill to Prevent Plant-based Meat Companies from Using the Word "Meat,"* THE COUNTER (May 1, 2018, 4:49 PM), <https://newfoodeconomy.org/missouri-house-bill-meat-labeling-restrictions-hcb-16/> [<https://perma.cc/GW39-8NM4>]; see also Gibson, *supra* note 27 (noting that the law's purpose is to "protect ranchers"); AP Wire, *Judge Declines to Block Missouri Fake-Meat Law, Appeal Claims Censorship*, FOX4 (Oct. 5, 2019 3:28 PM), <https://fox4kc.com/2019/10/05/judge-declines-to-block-missouri-fake-meat-law-appeal-claims-censorship/> [<https://perma.cc/J7MX-UBZK>] (quoting an attorney for the plaintiffs in the suit against Missouri's meat-labeling law as saying that "Missouri passed this law to protect established agriculture interests from competitive pressures, not to protect consumers"); Hailey Konnath, *Tofurky, ACLU Slam Ark. Law Banning "Veggie Burger" Labels*, LAW 360 (July 22, 2019, 10:37 PM), <https://www.law360.com/articles/1180855> [<https://perma.cc/C88L-R2Y2>] (quoting Tofurky's CEO about Arkansas's meat-labeling law as saying that "[w]hat's really going on here is that the state of Arkansas is seeking to limit access to healthier, more sustainable food choices for its constituents, and it is doing so to benefit the animal agriculture industry").

<sup>116</sup> Meat eaters are eating more and more plant-based foods. See Michelle Neff, *6 Percent of Americans Now Identify as Vegan—Why This Is a Huge Deal for the Planet*, ONE GREEN PLANET (2017), <https://www.onegreenplanet.org/news/six-percent-of-americans-identify-as-vegan/> [<https://perma.cc/MU3N-8DVV>] ("For the past few decades, meat consumption in the U.S. has seen a steady decline. According to recent studies, 30 percent of Americans are not only leaving meat off their plates but also seeking out plant-based meat alternatives."); Rich Haridy, *The Burger Battle: The Lawsuits Challenging Restrictions on Plant-based Meat Labels*, NEW ATLAS (July 25, 2019), <https://newatlas.com/plant-based-meat-food-label-law-battle/60748/> [<https://perma.cc/3CKG-7WYP>] ("A striking 95 percent of these plant-based burgers are reportedly being consumed by meat-eaters, and while beef burger consumption has not dropped over the last 12 months, growth has been flat. Consumers are undeniably open to trying meat alternatives, especially when those alternatives increasingly resemble traditional meat products."). These trends have led industrial meat farmers to promote laws like Missouri's ban on the use of the word "meat" to describe plant-based foods. See Nathaniel Popper, *You Call That Meat? Not So Fast, Cattle Ranchers Say*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/technology/meat-veggie-burgers-lab-produced.html> [<https://perma.cc/R9WQ-9GAS>] ("In recent weeks, beef and farming industry groups have persuaded legislators in more than a dozen states to introduce laws that would make it illegal to use the word meat to describe burgers and sausages that are created from plant-based ingredients or are grown in labs.").

the country work hard to raise each and every day.”<sup>117</sup> House Representative Jeff Knight, a former livestock auctioneer, made the protectionist point even more clearly: “We wanted to protect our farmers from misleading advertising that could negatively impact Missouri farmers . . . .”<sup>118</sup> Thus, Missouri’s law relies on explicitly protectionist rhetoric.<sup>119</sup>

Opponents of Missouri’s law have also pointed out the protectionist purpose of these laws: they “don’t seem to be directed at solving a problem in the marketplace[, but rather seem to be] about fighting off competition”,<sup>120</sup> “Missouri passed this law to protect established agriculture interests from competitive pressures, not to protect consumers.”<sup>121</sup>

So, Missouri’s meat-labeling ban interferes with interstate markets in plant-based goods—which currently label their products as “meat[s],” “burgers,” or other such descriptions<sup>122</sup>—and these producers will need to change their labels or cease

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<sup>117</sup> Gibson, *supra* note 27.

<sup>118</sup> Fu, *supra* note 115. Note that this claim is phrased in terms of protecting the meat industry and also protecting consumers; however, the consumers are “protected” as a way to protect the industry. There is no evidence that consumers are confused by plant-based meats. See Preliminary Injunction Order cited *infra* note 131, at 24.

<sup>119</sup> Unfortunately, “Missouri does not preserve legislative history.” *Nixon v. Shrink Miss. Gov’t PAC*, 528 U.S. 377, 393 (2000). In that case, lawyers relied on a senator’s affidavit regarding the law’s purpose, and the district court noted contemporaneous newspaper reports. *Id.* With respect to the meat-labeling laws, advocates must likewise be creative and discern intent through other evidence, such as individual legislators’ statements of why they are voting for a particular bill and newspaper reports relaying such statements.

Legislators in other states that have considered meat-labeling laws also tend to rely on protectionism. For example, in Arizona, Representative David Cook supported a similar ban on certain meat and dairy words because it would protect the cattle industry. Howard Fischer, *Lawmakers Ban Sale of ‘Almond Milk’ as Well as ‘Meatless ‘Meat,’* CASA GRANDE DISPATCH (Feb. 28, 2019), [https://www.pinalcentral.com/casa\\_grande\\_dispatch/area\\_news/lawmakers-ban-sale-of-almond-milk-as-well-as-meatless/article\\_560a4b40-aefc-527d-8439-237ce5d7d910.html](https://www.pinalcentral.com/casa_grande_dispatch/area_news/lawmakers-ban-sale-of-almond-milk-as-well-as-meatless/article_560a4b40-aefc-527d-8439-237ce5d7d910.html) [<https://perma.cc/T4SP-KM86>]; see H.B. 2604, 64th Leg., 1st Reg. Sess. (Ariz. 2019), <https://www.azleg.gov/legtext/54leg/1R/bills/HB2604P.pdf> [<https://perma.cc/9RJC-MUYV>].

<sup>120</sup> Popper, *supra* note 116 (quoting Sarah Sorscher of the Center for Science in the Public Interest); see also Haridy, *supra* note 116 (quoting a source as saying, “[o]ur labels are not trying to trick consumers into buying our vegan foods,” and “[w]e aim to clearly communicate what our foods are made from for those actively seeking vegan foods and others considering incorporating them into their diet. [The meat-labeling laws are] not about clearing up consumer confusion, [but] about stifling competition and putting plant-based companies at a disadvantage in the marketplace.”).

<sup>121</sup> AP Wire, *supra* note 115.

<sup>122</sup> *Cf.* Watson, *supra* note 13. For example, Beyond Meat and Impossible Burger use meat-based terminology. See BEYOND MEAT, <https://www.beyondmeat.com/products/the-beyond-burger/> [<https://perma.cc/KTK5-5B67>] (last visited July 19, 2020); *Meet Impossible Burger*, IMPOSSIBLE FOODS, <https://impossiblefoods.com/burger/> [<https://perma.cc/T8CZ-YQQW>] (last visited July 20, 2020). Tofurky calls its products sausage, ham, and deli meat,

selling their products in states like Missouri to protect themselves from legal challenges. Additionally, Missouri's meat-labeling ban serves a disfavored protectionist purpose. This combination of out-of-state harm coupled with a protectionist purpose should place these laws in the anti-protectionist category for purposes of DCC analysis and subject them to strict scrutiny. Laws rarely survive this rigorous analysis, and Missouri's law should be no exception.<sup>123</sup>

Thus, these two sorts of state laws—both potentially problematic under the DCC because they impose burdens on interstate commerce—fall under two different analyses courts have used in applying the DCC. On the one hand, although California's cage-free egg requirements interfere with an interstate market in eggs, the California legislation has a permissible purpose of protecting the health of California residents.<sup>124</sup> The in-state and non-protectionist benefits keep these laws out of the anti-protectionist category of the DCC and allow the lenient balancing test to apply, so these laws should survive judicial scrutiny. On the other hand, Missouri's meat-labeling ban for plant-based foods interferes with an interstate market in those alternative products, and the Missouri legislature acted with the impermissible purpose of protecting in-state meat producers from out-of-state competition. The purpose that motivated this law suggests it should be analyzed under the anti-protectionist prong of the DCC and subjected to the highest form of scrutiny. Missouri's law will fail strict scrutiny. There are other, better-tailored means of ensuring consumers purchase animal-based products, rather than plant-based ones, if those are the products the consumers wish to buy. For example, plant-based products should be prominently labeled as such. Moreover, there are other means of helping in-state ranchers if that is desired—perhaps tax breaks or other subsidies should be considered. As Missouri's law is written, however, it should not survive a DCC challenge.

In short, as these laws stand currently, under appropriate DCC analyses, Missouri's meat-labeling law fails and California's animal-welfare laws survive.<sup>125</sup>

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among others. *See generally* TOFURKY, <https://tofurky.com/> [<https://perma.cc/2T3X-GX5L>] (last visited July 19, 2020). These companies also prominently label their foods as vegan or plant-based. But under many Missouri-type laws, the other, plant-based descriptors are irrelevant as long as the labels also include meat terminology.

<sup>123</sup> *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”).

<sup>124</sup> *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1065 (E.D. Cal. 2014) (noting that the purpose is “to protect California consumers from the deleterious, health, safety, and welfare effects”).

<sup>125</sup> When state legislatures pass meat-labeling (or similar) laws in the future, they may disguise the true purpose of these laws, refusing to acknowledge that the laws primarily protect ranchers or other in-state businesses, but instead couching the laws as protecting their citizens from confusing or misleading labeling, or protecting citizens' health from the deleterious effects of pea protein or high-sodium plant-based alternatives. As labeling proponents and state legislatures become more sophisticated, the litigation strategy noted here will also have to become more sophisticated. But for now, legislatures are passing meat-labeling laws

There is a winner and a loser in these battles between industrial meat farmers and producers of plant-based alternatives.

*B. A Roadmap for Future Battles: Protecting Animal-Welfare Laws from DCC Challenges*

Protecting animal welfare through legislation begins with lawmakers, particularly state legislators, as they must pass legislation in ways that will help the laws survive DCC challenges. Because most animal-welfare laws affect out-of-state businesses, legislators must pass these laws for health, safety, or welfare purposes. State legislators can aid in that regard by making explicit findings.<sup>126</sup> General safety-type statements may not be sufficient; protectionist language favoring in-state business over out-of-state business should surely be avoided. Instead, state legislatures should specify the particular animal cruelty they are eschewing and the attendant health, safety, and environmental concerns they are promoting for the consuming public.<sup>127</sup> In particular, articulating specific health concerns rooted in fear of contamination, salmonella, hormones, antibiotics, or other pathogens would provide a better chance that the law will be subjected to the anti-obstructionist balancing standard rather than the anti-protectionist strict scrutiny standard and hence will be upheld. Environmental concerns regarding the degradation of the local environment, particularly if coupled with human health concerns, should also suffice to trigger the balancing test's lower standard.

Lawyers may also help structure legal arguments and marshal evidence to help animal-welfare laws survive legal challenges—or fend off such challenges altogether. When challenging a meat-labeling law as violative of the DCC, lawyers must advise the court that the law is protectionist legislation subject to the strict standard of review applicable to those sorts of DCC challenges. When seeking to uphold an animal-welfare law against a DCC challenge, lawyers must be sure to show why

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with express protectionist purposes, contrary to the proscriptions of the DCC. *Cf.* *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2593–95 (2019) (Breyer, J., concurring in part and dissenting in part) (arguing that the citizenship question on the census is impermissible because the reason provided by the Commerce Secretary was not credible, but leaving open the possibility that the question could be added if supported by a better reason).

<sup>126</sup> See Grant, *supra* note 43, at 101 (“If a legislature decides to pass a foie gras law based on animal cruelty concerns . . . it should clearly state its reasons for doing so and make specific conclusions about the cruelty involved . . . and its effect on the local government or population. The more specific and extensive a legislature’s findings are, the more hesitant a court will be to overturn the political will of another co-equal branch of the government.”).

<sup>127</sup> See Reid, *supra* note 79, at 20 (quoting Donald P. Rothschild, *A Proposed “Tonic” with Florida Lime to Celebrate Our New Federalism: How to Deal with the “Headache” of Preemption*, 38 U. MIAMI L. REV. 829, 842 (1984)) (“When, however, the state claims that its regulation is an exercise of its police power, the state still has the burden of showing the significant health and safety benefits of the regulation, in order to tip the scale in favor of the regulation.”).

these laws are not merely about helping out home-state businesses, but instead ameliorate health, safety, or welfare concerns. Keeping these two sorts of laws in their respective spheres will clarify why animal-welfare laws should survive a DCC challenge while meat-labeling laws should not survive.

Finally, continued investigation into the treatment of animals and how animal welfare affects human health will help support legislative and legal efforts. Some cheese products portray their cows as frolicking happily in idyllic green meadows; some meat producers show organic chickens roaming freely in lush outdoor fields with no cages or fences. These labels suggest that happy animals produce nutritious products that feed healthy humans. The reality of some factory farming practices is markedly different and, as recent reports show, “presents an unacceptable level of risk to public health and damage to the environment.”<sup>128</sup> As more evidence comes to light about the conditions in which farm animals are kept and the health of those animals, more states may choose to pass laws like California’s cage-size requirements. And as more states do so, their legislatures should explicitly rely on their police powers in enacting these laws.

These three factors—the investigations into factory farming, the legislative findings, and the lawyering process—should work together to ensure that animal-welfare laws continue to be enacted and, if challenged, ultimately upheld.

Notably, the objection may be raised that this analytical framework will help the meat industry succeed in passing more restrictive labeling requirements or other laws impeding competition from plant-based alternative products. After all, legislatures passing a meat-labeling law could assert health, safety, and consumer protection motivations, rather than the protectionist purposes relied on to this point.<sup>129</sup> It is true the industrial meat lobby may become more sophisticated, but it is still less likely to benefit from this framework than the animal-welfare industry for at least two reasons. *First*, the industry now has a record of relying on protectionism to support its laws; it should be difficult for courts to ignore this historical evidence.<sup>130</sup> *Second*, there seem to be two potential health or welfare justifications that support a meat-labeling law: (1) consumer confusion about what products come from an animal carcass and what products do not, and (2) plant-based meats may be high in sodium, soy, or other ingredients that may be unhealthy in large doses. But neither reason actually supports a Missouri-type meat-labeling law. There is no documented

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<sup>128</sup> Hernández-López, *supra* note 7, at 392 (internal quotation marks and citation omitted).

<sup>129</sup> Of course, as the stated purpose of the laws changes, the litigation response must change as well. *See* *Dep’t of Commerce v. New York*, 139 S. Ct. 2251, 2593–95 (2019) (Breyer, J., concurring in part and dissenting in part).

<sup>130</sup> *See generally* *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 677, 679 (2005) (disallowing a Ten Commandments display); *Van Orden v. Perry*, 545 U.S. 677 (2005) (allowing a Ten Commandments display). The difference in result may be attributed, at least in part, to the forty-year history of the display in *Van Orden*. 545 U.S. at 678. History matters, and although the meat-labeling laws are fairly new, they have been passed using the language of protectionism. This history should be hard for legislatures to erase or for courts to ignore.

consumer confusion of what is animal-derived meat and what is plant-derived meat; nor is there any evidence that consumers misunderstand any existing labeling on this point.<sup>131</sup> Plant-based meats prominently say “vegan,” “vegetarian,” or “plant-based” because purchasers desire and seek out—and often pay extra for—those attributes. Moreover, many grocery stores place plant-based meats in a section separate from the animal meats. The potential health value of products, whether meat or non-meat, may require labeling, but that is a separate concern from whether consumers are confused by the use of meat-related terms on a label. For example, product labels regularly warn of soy, egg, gluten, or other ingredients that may create health or

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<sup>131</sup> In granting a preliminary injunction to Tofurky against enforcement of a similar Arkansas meat labeling law, Judge Baker wrote as follows: “The State appears to believe that the simple use of the word ‘burger,’ ‘ham,’ or ‘sausage’ leaves the typical consumer confused, but such a position requires the assumption that a reasonable consumer will disregard all other words found on the label.” Preliminary Injunction Order, at 24, *Turtle Island Foods v. Soman*, No. 4:19-cv-00514-KGB (E.D. Ark.). The judge noted that the State’s “assumption is unwarranted” because “[t]he labels in the record evidence include ample terminology to indicate the vegan or vegetarian nature of the products.” *Id.* The judge also reviewed the seven Tofurky labels in the record and concluded that each label, although using “meat” terms like “burger” or “chorizo,” was not misleading because of other qualifiers and descriptors on the packaging:

The “Veggie Burger” label has the word “veggie” modifying the word “burger” and includes the words “all vegan” in the middle of the package. Further, the “Veggie Burger” label features the words “white quinoa” next to a picture of the burger. The “Deli Slices” label also includes the words “all vegan” in the middle of the label, features the words “plant-based” next to a picture of the product, and describes the product as “smoked ham *style*.” The “Chorizo Style Sausage” label includes the words “all vegan” and states that the product was “made with pasture raised plants.” The “Slow Roasted Chick’n” label has the words “all vegan” right next to the product’s name and describes the product as “plant-based” in the bottom left corner. The “Original Sausage Kielbasa” label includes the words “all vegan” next to the word “sausage” and identifies the product as “Polish-style wheat gluten and tofu sausages.” The “Hot Dogs” label has the words “all vegan” next to the word “dogs” and “plant-based” under the word “dogs.” The “Vegetarian Ham Roast” has the word “vegetarian” modifying the words “ham roast[.]” Each of these labels also features the letter “V” in a circle on the front of the packaging, a common indicator that a food product is vegan or vegetarian. Finally, each of these labels features the company name “Tofurky,” which clearly contains the word “tofu” in a play on the word “turkey.”

*Id.* at 23–24 (citations omitted). In granting the preliminary injunction in Tofurky’s favor, the court concluded, “the Court finds that Tofurky is likely to prevail in demonstrating that Act 501 does not advance the stated governmental interest of protecting consumers from being misled or confused . . .” *Id.* at 27–28.

allergen concerns.<sup>132</sup> But it is true that as this area becomes more evolved and those involved in the legislative process become more sophisticated, the framework used to attack or support these laws will necessarily need to change. Law is not static.

## VI. CONCLUSION

In the end, Congress may wish to exercise its authority and set national standards for animal welfare and product labeling. Congress, of course, may pass laws that interfere with interstate commerce. For Congress, “the commerce clause is not dormant” but is express, enabling Congress to enact nationwide legislation on these issues.<sup>133</sup>

But until Congress does so, state legislatures will fill the void and regulate in this field. Some may follow California’s path and enact animal-welfare legislation; others may follow Missouri’s path and pass laws to protect the meat industry. Both types of laws then may be challenged as violating the DCC. Under the analysis proposed in this Article, California-type animal-protection laws should survive these challenges, while Missouri-type meat-labeling laws should fail.

The analytical framework is now clear: the DCC can be awakened from its slumber when laws like Missouri’s are passed for protectionist reasons, while the DCC may remain somnolent when laws like California’s are passed for welfare reasons.

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<sup>132</sup> This sort of labeling law, too, may be subject to a DCC challenge because the out-of-state producers of these products will need to change their labels to conform to unique state laws. But these laws seem less problematic for a few reasons. First, they do not target plant-based food in order to protect in-state industry; all food high in sodium, including in-state and meat-based foods, would need such labels. Second, because fifty different labeling laws across the country would be burdensome, this seems like an area ripe for Congress to intervene and set a national standard.

<sup>133</sup> 2 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 53 (David S. Tanenhaus ed., 2008).