

Are State GMO Labeling Laws Constitutional?

First Amendment

A law that seeks to restrict or compel commercial speech is only valid if it satisfies the 3-part test established in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*.¹ Under *Central Hudson*, a statute compelling commercial speech: (1) must involve a substantial government interest, (2) must directly advance that government interest, and (3) must be no more extensive than necessary.

Is there a substantial government interest in mandatory labeling of GM foods?

Proponents of GM labeling assert that consumers have a right to know whether their food contains GM components. However, in a suit contesting Vermont's rBST labeling statute, the Second Circuit held that "consumer concern is not, in itself, a substantial interest."² FDA's position that GM foods do not require special labeling also undercuts the argument that there is a substantial government interest.

Does GM food labeling directly advance the government interest in providing consumer info?

The exemptions allowed in the current state bills and ballot initiatives could be problematic. Examples include meat, poultry, and dairy products, and alcoholic beverages. Also, foods sold by restaurants are exempt. With broad exemptions, its not clear labeling initiatives achieve states' interest in informing consumers.

Are state GM labeling laws no more extensive than necessary?

Can advancing a state's interest in informing consumers about GM food content be achieved without a labeling law? Organic foods are available to consumers that desire to avoid GM food products. A case can be made that the National Organic Program satisfies this desire.

Dormant Commerce Clause

Article 1, section 8, clause 3 of the United States Constitution provides Congress the power to "regulate Commerce with foreign nations and among the several States." The U.S. Supreme Court has held that the "dormant Commerce Clause" prohibits the states from enforcing laws or regulations that "unduly burden or discriminate against interstate or foreign commerce."³

Discriminatory or burdensome statutes are only constitutionally valid if they serve a "legitimate local interest" that could not be served "as well without discriminating against interstate commerce."⁴ The most common exception is the "health and safety regulation" exception, which allows for burdens on interstate commerce if the state or local government enacted a statute intended to protect the health and safety of its citizens.⁵

¹ 447 U.S. 557 (1980).

² *International Dairy Foods Association v. Amestoy*, 92 F.3d 67, 73 n.1 (2d Cir. 1996).

³ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

⁴ *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

⁵ *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978).

Are state GM labeling laws facially discriminatory?

The proposed state GM labeling laws do not appear to discriminate against interstate commerce. They do not appear to favor in-state products over products originating from other states.

Does the burden imposed on interstate commerce outweigh the local benefits of GM food labeling?

In instances where state laws do not discriminate against out-of-state interests but still hamper interstate commerce, courts will weigh the national burdens against the local benefits.⁶ A court could easily find that the burden of state GM labeling laws on interstate commerce excessively outweighs the local benefits resulting from the statute. The law would require food distributors to develop separate packaging for states that require GM labeling. If state GM labeling laws are not uniform, a patchwork of various labeling requirements would result. The Founders envisioned a national marketplace when the Commerce Clause was included in the Constitution; state-specific labeling laws do not promote a national market free of restrictions.

Do state GM labeling laws satisfy the “health and safety regulation” exception?

State and local governments may enact laws that discriminate against or burden interstate commerce if these laws are enacted to promote health and safety regulation. Courts are reluctant to intrude on a state’s police power responsibilities.⁷ Legislative “findings” are critical in justifying a law’s necessity under the health and safety regulation exception. Proposed state labeling proposals appear geared towards satisfying the health and safety regulation exception.⁸ However, these findings contradict federal findings and may not be sufficient.

Federal Preemption

Under the Supremacy Clause (Art. VI, Clause 2), if the federal government enters the field of GM food labeling (mandating or prohibiting), state labeling laws will be invalidated. Given the recent U.S. Senate Farm Bill markup session, it is unlikely that we will see such legislation come to pass in the near future.

⁶ In *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 781-82 (1945), the Supreme Court overturned an Arizona statute that limited train lengths to 70 cars. While the statute was intended to prevent train accidents in Arizona, it required train operators to de-couple and shorten train lengths while passing through the state and then re-couple the trains upon exiting its borders. The Court reasoned that the statute burdened national commerce by restricting free travel. Furthermore, it reasoned that the statute provided minimal local safety benefits and may have had the effect of increasing the potential for train accidents due to a higher volume of trains needed to move cargo through the state.

⁷ In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the Court upheld a state law that banned plastic nonreturnable milk containers even though it permitted other forms of nonreturnable containers, such as cardboard milk boxes. The Court held that even though the law burdened out-of-state plastic producers, this burden did not outweigh the state’s interest in promoting conservation.

⁸ The “health and safety regulation” exception does have its limits. One example is *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353 (1950). In *Dean Milk*, the City of Madison, Wisconsin passed an ordinance requiring all milk sold within city limits to be pasteurized and bottled within a 5-mile radius of the city’s center square. The City of Madison argued that this was necessary to protect the health and well-being of its residents by ensuring sanitary milk-processing practices were observed. The Supreme Court held that Madison could take other actions to achieve its safety goals without locking non-local processors out of the market.