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Dormant Commerce Clause Implications of Pennsylvania Dairy Regulations

Allison Q. Gerhart*

I. INTRODUCTION

“No Farms No Food.”¹ This slogan can be found on bumper stickers all over rural America, and the message is particularly relevant today for America’s dairy industry. Farmers are currently trapped in what economists call a “cost-price squeeze” in which revenues for dairy products are declining while the costs of feed and other inputs remain high.² World market events beginning in 2007 have created a perfect storm leaving farmers struggling to maintain their herds, their farms, and their families.

Dairy farm income has declined quickly and dramatically in the last two years. Exports grew and profits soared in 2007 primarily as a result of the relatively weak dollar and reduced production abroad.³ In 2009, these trends reversed, export potential declined, and the global recession placed additional downward pressure on both international and domestic sales.⁴ Feed costs increased in 2008, driven by increased corn and grain demand for ethanol production, high speculation in agricultural commodities markets, and substantial flooding in the corn-producing Midwestern states.⁵ Although market conditions have improved slightly in 2010, dairy farmers will face a protracted battle to recover from the severe shortfalls of 2008 and 2009, and they are looking to governments for help.⁶

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1. “No Farms No Food” is the registered trademark of American Farmland Trust. American Farmland Trust Homepage, <http://www.farmland.org/default.asp> (last visited Feb. 2, 2011).

2. DENNIS A. SHIELDS, CONG. RESEARCH SERV., R40205, DAIRY MARKET AND POLICY ISSUES 7-5700 (2009) [hereinafter SHIELDS, MARKET AND POLICY ISSUES].

3. *Id.*

4. *Id.*

5. *Id.*

6. Public Informational Hearing Before the S. Agriculture & Rural Affairs Comm., 2010 Leg., 194th Sess. (Pa. 2010) [hereinafter *2010 Hearing*] (statement of Richard Ebert, Vice President, Pennsylvania Farm Bureau).

Since passing the most recent federal farm bill in 2008, Congress has taken some measures to temporarily bolster farm revenues,⁷ but federal dairy policy is largely set until 2012.⁸ Therefore, legislatures in major dairy-producing states are attempting to provide additional relief for their domestic producers.⁹ Pennsylvania, which ranks fifth in national dairy production,¹⁰ is one such state.¹¹ However, any attempt by state legislatures to alter delicate dairy market conditions has traditionally been met with a legal challenge under the dormant Commerce Clause of the Constitution.¹² This comment will address the basis of this constitutional challenge and analyze various ways in which the Pennsylvania legislature may legally intervene on behalf of the state's dairy farmers.

The first section of this comment will provide an overview of dairy pricing mechanisms on federal, state, and non-governmental levels. The second section will analyze the current dormant Commerce Clause jurisprudence relating to dairy regulation, and the third section will apply this reasoning to three policy proposals under consideration in the Pennsylvania Senate. Although federal dairy policy greatly impacts Pennsylvania farmers, proposals for federal reform have received extensive analysis in recent academic literature and are beyond the scope of this comment.

II. BACKGROUND: MECHANICS OF DAIRY PRICING

Understanding the methods by which a state may intervene in the dairy industry requires a basic understanding of the interrelated layers of legislation that influence milk pricing. Three elements are critical:

7. In December 2009, the USDA announced two programs to aid financially distressed dairy farmers: (1) the Dairy Economic Loss Assistance Program to disperse one-time direct payments to producers based on annual production and (2) a program to expedite the purchase of processed dairy products by the Commodity Credit Corporation. See *USDA Announces Combined \$350 Million Financial Assistance for Dairy Producers*, AGRIC. L. BRIEF (Agricultural Law Resource and Reference Center, University Park, PA.), Jan. 2010, at 1.

8. DENNIS A. SHIELDS, CONG. RESEARCH SERV., R40903, DAIRY PRICING ISSUES 7-5700 (2009) [hereinafter SHIELDS, PRICING ISSUES].

9. See Tim Darragh, *Thirsty for More Milk Money, State Officials Take on Pricing Regulations to Try to Provide Better, Dependable Income to Dairy Farmers*, MORNING CALL (Allentown, PA), Jul. 12, 2010, available at 2010 WLNR 14009482.

10. Overview of Pennsylvania's Dairy Industry, <http://www.centerfordairyexcellence.org/index.php/pennsylvania-dairy-industry-overview.html> (last visited Feb. 2, 2011).

11. See, e.g., S. 1480, 2010 Leg., 194th Sess. (Pa. 2010).

12. Public Informational Hearing on the Transparency of Dairy Pricing Before the S. Agriculture & Rural Affairs Comm., 2009 Leg., 193rd Sess. (Pa. 2009) [hereinafter *2009 Hearing*] (statement of Ross H. Pifer, Director, The Agricultural Resource and Reference Center at the Dickinson School of Law of the Pennsylvania State University).

market forces, federal farm supports, and state-level regulations.¹³ To a large extent, market forces shape the response of the federal government, and state regulations operate to supplement federal supports.¹⁴ The three sections that follow will offer an overview of each element.

A. *Market Forces*

The market price of milk is determined by aggregate supply and demand for final dairy products such as cheese, cream, butter, and fluid milk.¹⁵ Conceptually, “milk” is not a homogeneous food but rather a collection of components used in different proportions to make these products.¹⁶ Demand for manufactured products will determine the necessary supply of milk components which will, in turn, affect the price processors will pay farmers for raw milk.¹⁷

Analyzing milk as a collection of components also helps to explain price swings.¹⁸ For example, an increase in the demand for cheese will restrict the supply of butterfat causing upward pressure on prices for other products which heavily utilize this component. Similarly, this increase would mean an increase in the supply of other components not extensively utilized in cheese production. These components would need to be utilized elsewhere in the manufacturing process, thereby influencing the market price of other products.¹⁹

Although an abstract examination of component supply and demand reveals a seemingly efficient market, two characteristics of milk production create problems for milk pricing: perishability and continuous production.²⁰ Unlike traditional manufacturers, farmers cannot simply produce less milk, nor can they store all of it indefinitely until market conditions improve.²¹ Excess milk production must be either manufactured into less-profitable, storable dairy products or discarded as waste.²²

13. See DON P. BLANEY & ALDEN C. MANCHESTER, U.S. DEP'T OF AGRIC ECONOMIC RESEARCH SERV., AIB-716, MILK PRICING IN THE UNITED STATES (2001).

14. See *id.*

15. Ed Jesse & Bob Cropp, *Basic Milk Pricing Concepts for Dairy Farmers*, UNIVERSITY OF WISCONSIN-EXTENSION, COOPERATIVE EXTENSION BULL. A3379 (2008), available at <http://learningstore.uwex.edu/assets/pdfs/A3379.pdf>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. SHIELDS, PRICING ISSUES, *supra* note 8.

21. *Id.*

22. *Id.*

To reduce market inefficiencies and increase bargaining leverage, farmers have traditionally banded together in cooperatives.²³ Cooperatives act to collect and market all of the milk produced by multiple farmers.²⁴ They then allocate portions of the total to specific processors, thereby assuring that the raw milk is utilized for the most profitable products and reducing the overall volume of waste.²⁵ These organizations continue to play a prominent role in dairy pricing,²⁶ but since 1933, the federal government has also intervened to stabilize the milk market.²⁷

B. Federal Farm Programs

Federal support for the dairy market operates through two primary mechanisms: the dairy product price support program (“DPPSP”) and federal milk marketing orders (“FMMOs”).²⁸ Two relatively new programs, the milk income loss contract (“MILC”) and the dairy export incentive program (“DEIP”), also operate to support farm milk prices in a more limited capacity.²⁹ Each of these programs is designed to remedy drastic price swings, severe gluts and shortages of certain milk components, and disproportionate bargaining power between milk producers and milk buyers.³⁰

The DPPSP operates only when prices for manufactured dairy products fall below specified levels.³¹ Under this program, the government will purchase unlimited supplies of butter, cheese, and nonfat dry milk at a fixed price.³² When market prices fall below this level, processors generally sell to the government creating, in practical effect, a price floor for these three products.³³ Because processing plants compete for milk components, the price floors for butter, cheese, and dry milk indirectly buttress prices for other manufactured milk products.³⁴ Additionally, upon purchase of the products, the government will place

23. BLANEY & MANCHESTER, *supra* note 13.

24. *Id.*

25. *Id.*

26. 2010 Hearing, *supra* note 6 (statement of Marvin Beshore, Counsel, Greater Northeast Milk Marketing Agency).

27. BLANEY & MANCHESTER, *supra* note 13.

28. SHIELDS, PRICING ISSUES, *supra* note 8.

29. SHIELDS, MARKET AND POLICY ISSUES, *supra* note 2.

30. *Id.*

31. SHIELDS, PRICING ISSUES, *supra* note 8.

32. *Id.*

33. SHIELDS, MARKET AND POLICY ISSUES, *supra* note 2.

34. Jesse & Cropp, *supra* note 15.

them in storage, thereby reducing the overall supply and placing additional upward pressure on prices.³⁵

The FMMOs operate separately from the DPPSP to mandate the minimum price that processors must pay farmers for their raw milk.³⁶ Raw milk is sorted into one of four classes depending upon its end use in manufactured products, and minimum prices for each class are calculated based on current wholesale dairy prices for that class of products.³⁷ Within each marketing area, proceeds are pooled and distributed to farmers at a weighted average price of all classes regardless of how an individual farmer's milk is utilized.³⁸

The MILC and DEIP are more limited in scope. Much like subsidy payments for agricultural products, the MILC pays farmers directly when farm milk prices fall below \$16.94 per hundredweight.³⁹ The program is usually inoperable because market prices are typically well above the minimum price; however, in December 2008, Congress reauthorized payments.⁴⁰ The DEIP also provides cash payments to farmers.⁴¹ These payments enable exporting producers to sell below the cost of production to ensure that dairy products produced in the United States remain competitive in international markets.⁴²

C. *Pennsylvania Dairy Legislation*

Recognizing that federal milk pricing does not adequately consider regional differences in milk production, many of the major dairy-producing states have created administrative boards to oversee and augment their local markets.⁴³ The Milk Marketing Board performs these functions in Pennsylvania.⁴⁴ Pursuant to the Milk Marketing Law,⁴⁵ the Board is responsible for ensuring a fair profit to producers,

35. See SHIELDS, MARKET AND POLICY ISSUES, *supra* note 2.

36. SHIELDS, PRICING ISSUES, *supra* note 8.

37. SHIELDS, MARKET AND POLICY ISSUES, *supra* note 2.

38. SHIELDS, PRICING ISSUES, *supra* note 8.

39. *Revised Milk Income Loss Contract Program Regulations Promulgated by USDA*, AGRIC. L. BRIEF (Agricultural Law Resource and Reference Center, University Park, P.A.), Jan. 2009, at 2.

40. *Id.*

41. *USDA Establishes Amount of Subsidies Available Through Dairy Export Incentive Program*, *supra* note 7.

42. *Id.*

43. MAURY COX, KENTUCKY DAIRY DEVELOPMENT COUNCIL, STATE MILK COMMISSIONS AND SUPPORTIVE DAIRY ORGANIZATIONS TO GROW THE DAIRY INDUSTRY, (2008), <http://kydairy.org/Documents/StateCommandSupportiveOrg.pdf>.

44. Pennsylvania Milk Marketing Board Introduction, http://www.mmb.state.pa.us/portal/server.pt/community/about_us/4742/introduction/480930 (last visited Feb. 2, 2011).

45. Milk Marketing Law, 31 PA. STAT. ANN. §§ 700j-101 to 700j-1204 (2010).

processors, and retailers and an adequate and affordable milk supply for consumers.⁴⁶

The Milk Marketing Board accomplishes its objectives by setting minimum retail and wholesale prices for milk sold in the Commonwealth.⁴⁷ The Board also sets the minimum price processors must pay producers for their raw milk based upon the costs incurred by Pennsylvania farmers.⁴⁸ The Board's mandated minimum price exceeds the federal order price, and the difference is called the over-order premium.⁴⁹

The issue for the state legislature is how to ensure that the over-order premium, ultimately paid by consumers at retail, reaches Pennsylvania's farmers. At present, all Class I fluid milk sold in the Commonwealth is subject to the state's minimum pricing scheme,⁵⁰ but processors need to return the over-order premium to farmers only if the milk was produced, processed, and sold in Pennsylvania.⁵¹ Therefore, the premium for any milk sold at retail in Pennsylvania that does not meet all three requirements becomes "stranded" with milk processors.⁵²

This stranding occurs in any of four ways.⁵³ First, milk that is produced in Pennsylvania may be shipped outside the Commonwealth for processing then returned to Pennsylvania for sale.⁵⁴ Second, milk that is produced and processed in Pennsylvania may be sold wholesale outside the state then imported back to the Commonwealth for retail sale.⁵⁵ Third, milk that is neither produced nor processed in Pennsylvania may be sold at retail in the state.⁵⁶ Fourth, milk that is produced and processed in Pennsylvania may be mixed with out-of-state milk and sold together at retail.⁵⁷ In this case, only a partial stranding occurs in proportion to the approximate amount of out-of-state milk included in the transaction.⁵⁸

46. Pennsylvania Milk Marketing Board Introduction, *supra* note 44.

47. 2009 Hearing, *supra* note 12 (statement of Richard Kriebel, Chairman, Pennsylvania Milk Marketing Board).

48. *Id.*

49. *Id.*

50. Milk Marketing Law § 700j-802.

51. 2010 Hearing, *supra* note 6 (statement of Russell C. Redding, Secretary, S. Agriculture & Rural Affairs Comm.).

52. *Id.*

53. 2010 Hearing, *supra* note 6 (statement of Marvin Beshore, Counsel, Greater Northeast Milk Marketing Agency).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. The Pennsylvania Milk Marketing Board changed its regulations on June 2, 2010 to require that the total over-order premium applied to milk processed with out-of-state milk be returned to Pennsylvania farmers. However, this decision has provoked a

The exact amount of stranded premiums is not entirely clear, but some estimates are available.⁵⁹ In 2009, consumers paid approximately \$60 million in over-order premiums, but about \$16 million did not reach the farmer.⁶⁰ However, because the over-order premium was increased for 2010, the amount of stranded premiums is expected to climb to \$26 million.⁶¹ In June of 2010, the Milk Marketing Board issued a decision to recalculate the payment formula and eliminate the forth method by which premiums may become stranded.⁶² The new formula is estimated to return between \$5 and \$7 million to farmers,⁶³ but it remains unclear when the change will take effect.⁶⁴

However small the regulatory changes may appear, even minor tweaks to the over-order premium translate to millions of dollars in financial consequences to dairy producers and processors, and both parties have become litigious.⁶⁵ Dairy producers sued the Milk Marketing Board over the Board's recent refusal to mandate the payment of an over-order premium for Pennsylvania-produced milk sold in New Jersey.⁶⁶ Processors, meanwhile, are currently suing the Milk Marketing Board for its decision to mandate the payment of the full over-order premium where Pennsylvania-produced milk has been mixed with milk produced outside the Commonwealth.⁶⁷

With inevitable challenges looming, the state faces two limits upon its actions.⁶⁸ First, the action must be economically sound.⁶⁹ Even though an action may appear to generate more revenue for dairy farmers, the state must make sure that payments are not so high that processors become unprofitable and are forced to buy raw milk from farmers in neighboring states.⁷⁰ Second, the action must be legally sound.⁷¹ For

constitutional challenge by the Pennsylvania Association of Milk Dealers, and the order has been temporarily stayed pending the outcome of the lawsuit. Matt Miller, *Judge Puts Pennsylvania Milk Pricing Law on Hold*, CENTRE DAILY TIMES (State College, PA), Sep. 21, 2010, available at 2010 WLNR 18702922.

59. 2010 Hearing, *supra* note 6 (statement of Daniel Brandt, Dairy Policy Action Coalition).

60. *Id.*

61. *Id.*

62. Miller, *supra* note 58.

63. 2010 Hearing, *supra* note 6 (statement of Daniel Brandt, Dairy Policy Action Coalition).

64. Miller, *supra* note 58.

65. See Darragh, *supra* note 9.

66. Dairylea Co-op. Inc. v. Pa. Milk Mktg. Bd., 3 A.3d 712 (Pa. Commw. Ct. 2010).

67. Darragh, *supra* note 9.

68. 2010 Hearing, *supra* note 6 (statement of Dave DeSantis, Chief of Accounting and Enforcement, Pennsylvania Milk Marketing Board).

69. *Id.*

70. See generally *Dairylea Co-op.*, 3 A.3d at 717.

dairy processors, the key to any legal challenge will be the dormant Commerce Clause of the Constitution which limits the extent to which state governments may intervene in support of domestic industries.⁷² The following sections will explain the analytical framework and discuss the legality of three current legislative proposals to amend Pennsylvania's Milk Marketing Law.

III. ANALYSIS: DORMANT COMMERCE CLAUSE RESTRAINTS UPON STATE ACTION

A. *Constitutional Analytical Framework*

The United States Constitution gives Congress the power to "regulate commerce among the several States."⁷³ Implicit in this clause is a negative or dormant requirement that no state may enact any law which unfairly favors in-state economic interests and unduly burdens interstate commerce.⁷⁴ In determining whether the state law violates the dormant Commerce Clause, a court must first determine whether the law is discriminatory or nondiscriminatory then apply the appropriate level of scrutiny.⁷⁵

Discriminatory laws are statutes that discriminate against interstate commerce on their face or in their purpose or practical effect.⁷⁶ Burdening out-of-state commerce need not be the law's primary purpose or effect in order to qualify as discriminatory,⁷⁷ and, conversely, the law will not necessarily avoid such qualification simply because it also burdens some in-state economic interests.⁷⁸ Discriminatory laws are presumptively invalid and will be subject to heightened scrutiny.⁷⁹ The party challenging the statute has the burden of proving the law's

71. *2010 Hearing*, *supra* note 6 (statement of Dave DeSantis, Chief of Accounting and Enforcement, Pennsylvania Milk Marketing Board).

72. *Id.* (statement of Earl Fink, Vice President, Pennsylvania Association of Milk Dealers).

73. U.S. CONST. art. I, § 8, cl. 3.

74. *See, e.g.*, *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* (*Cloverland II*), 462 F.3d 249, 260 (3d Cir. 2006); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994).

75. *See, e.g.*, *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* (*Cloverland I*), 298 F.3d 201, 210 (3d Cir. 2002); *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

76. *See, e.g.*, *Cloverland I*, 298 F.3d at 210; *Maine v. Taylor*, 477 U.S. at 138.

77. *Cloverland II*, 462 F.3d at 261 n.14 (quoting *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995)).

78. *Id.* at 262 (citing *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994)).

79. *See, e.g.*, *Cloverland I*, 298 F.3d at 210 (quoting *C & A Carbone*, 511 U.S. at 392).

discriminatory nature, but, once satisfied, the burden shifts to the state to prove (1) the statute serves a legitimate local purpose and (2) such purpose cannot be served by less discriminatory means.⁸⁰

If the challenging party is unable to prove that the statute is facially discriminatory or discriminatory in its purpose or effect, the law will be labeled “nondiscriminatory” and subject to the *Pike* balancing test.⁸¹ Under this test, the statute is presumptively valid and will be upheld unless “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”⁸² The balancing test is significantly less restrictive than heightened scrutiny,⁸³ and state laws are much more likely to be upheld under this standard.⁸⁴ Often, however, the line distinguishing discriminatory laws subject to heightened scrutiny from nondiscriminatory laws subject only to the *Pike* balancing test is “hazy.”⁸⁵

1. Distinguishing Between Discriminatory and Nondiscriminatory Laws

The most obvious way for a state to discriminate against interstate commerce is to do so explicitly.⁸⁶ Such laws are considered facially discriminatory because the plain text of the statute at issue distinguishes between in-state and out-of-state economic interests.⁸⁷ One common method by which states facially discriminate is to impose import or export restrictions upon articles in interstate commerce.⁸⁸ In *Philadelphia v. New Jersey*, the Supreme Court found a New Jersey law banning the importation of trash from neighboring states to be facially discriminatory.⁸⁹ Similarly, the Court found facial discrimination in an

80. See, e.g., *Maine v. Taylor*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

81. See, e.g., *Maine v. Taylor*, 477 U.S. at 138 (quoting *Hughes*, 441 U.S. at 336). See also *Cloverland II*, 462 F.3d at 261.

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

83. *Cloverland II*, 462 F.3d at 262.

84. 2009 Hearing, *supra* note 12 (statement of Ross H. Pifer, Director, The Agricultural Resource and Reference Center at the Pennsylvania State University, The Dickinson School of Law).

85. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* (*Cloverland I*), 298 F.3d 201, 211 (3d Cir. 2002) (quoting *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 400 n.18 (3d Cir. 1987)).

86. *Cf. W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (stating that the classic example of a discriminatory law is a protective tariff levied upon out-of-state goods).

87. *Cf. id.*

88. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

89. *Id.* at 628.

Oklahoma law banning the export of native minnow species⁹⁰ and a Maine law banning the importation of baitfish.⁹¹

The second common method by which states facially discriminate is to impose differing fees upon articles in interstate commerce depending upon their interstate character.⁹² In *Henneford v. Silas Mason Co.*, the state of Washington levied a tax upon chattels used in Washington but purchased in a neighboring state.⁹³ This "compensatory tax" was intended to nullify the effect of lower sales tax rates in neighboring states thereby aiding Washington retailers.⁹⁴ Although the Supreme Court upheld the law, the Court found that the tax was facially discriminatory.⁹⁵

Where a state law does not facially discriminate against interstate commerce, the law may still be labeled discriminatory where the purpose or practical effect of the law is to burden interstate commerce.⁹⁶ Particularly common among dairy statutes, a facially neutral law discriminates against interstate commerce when the law restricts or requires local processing.⁹⁷ In *Dean Milk Co. v. City of Madison, Wisconsin*, the Supreme Court found discrimination in a Madison ordinance that required all milk sold in town to be processed within five miles of the city limits.⁹⁸ The ordinance effectively prohibited the sale of milk from out-of-state milk processors as well as sufficiently distant in-state processors, but the effect upon the in-state processors did not change the law's discriminatory character.⁹⁹ In *H.P. Hood & Sons, Inc. v. Du Mond*, the Court struck down a discriminatory statute granting the agricultural commissioner the discretionary authority to deny milk processor licenses where the market was already adequately served.¹⁰⁰ In both cases, the effect of the local processing regulations was to limit the volume of milk in interstate commerce.¹⁰¹

A facially neutral law may also discriminate against interstate commerce by erecting artificial market entry barriers.¹⁰² In *Polar Ice Cream & Creamery Co. v. Andrews*, the Supreme Court invalidated a three-part regulatory scheme requiring the creamery to purchase its total

90. *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979).

91. *Maine v. Taylor*, 477 U.S. 131, 137-38 (1986).

92. *See, e.g., Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

93. *Id.* at 579-80.

94. *Id.* at 581.

95. *See id.* at 585 ("The taxpayers had 'failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact.'").

96. *See supra* Part III.A.

97. *See, e.g., Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

98. *Id.* at 354.

99. *Id.* at 354 n.4.

100. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

101. *See Dean Milk Co.*, 340 U.S. at 354; *H.P. Hood & Sons*, 336 U.S. at 530-31.

102. *See, e.g., Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964).

supply of fluid milk from in-state producers, accept all milk that the producers offered for sale, and pay a fixed price.¹⁰³ The scheme effectively barred the vast majority of out-of-state milk from the most lucrative segment of the market for the purpose of domestic economic protection.¹⁰⁴

The third instance in which a facially neutral law may be held discriminatory is when the legislation has the practical effect of regulating conduct or transactions beyond its borders.¹⁰⁵ In *Healy v. Beer Institute, Inc.*, the Supreme Court struck as discriminatory a Connecticut law that required beer distributors to set their prices each month and attest that their prices in surrounding states were not lower than their Connecticut prices.¹⁰⁶ Effectively, the law prevented beer distributors from reducing their prices in neighboring states after establishing their price in Connecticut, thereby projecting Connecticut's pricing legislation into neighboring states.¹⁰⁷ Furthermore, the court held that if similar legislation were enacted in other jurisdictions, the interaction of such legislation would produce a price gridlock in which prices could not be adjusted to account for local market variation.¹⁰⁸

The fourth common method by which a facially neutral law may discriminate in its purpose or effect is by benefiting an in-state interest at the expense of an out-of-state interest.¹⁰⁹ Perhaps the holding most important to the current dairy crisis in Pennsylvania is the Supreme Court's decision in *West Lynn Creamery, Inc. v. Healy*.¹¹⁰ Massachusetts enacted a facially neutral law that taxed all milk sold in the state whether it was produced by in-state or out-of-state dairy farmers.¹¹¹ However, the proceeds of the tax were distributed only to Massachusetts dairy farmers as subsidy payments for the purpose of protecting the state's dairy industry.¹¹²

The state attempted to argue that because both the subsidy payments and the tax are permissible state actions, the use of both measures in combination is similarly constitutional.¹¹³ The Court rejected this argument noting that while subsidies and taxes employed individually do

103. *Id.*

104. *Id.* at 377-78.

105. *See, e.g.*, *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989).

106. *Id.*

107. *Id.* at 337-38.

108. *Id.* at 339-40.

109. *See, e.g.*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

110. *See 2009 Hearing, supra* note 12 (statement of Ross H. Pifer, Director, The Agricultural Law Resource and Reference Center at the Pennsylvania State University, The Dickinson School of Law).

111. *W. Lynn Creamery*, 512 U.S. at 190-91.

112. *Id.*

113. *Id.* at 198.

not ordinarily burden interstate commerce, the measures in combination pose exactly the same threat as a protective tariff because the benefits accruing to the subsidized party come at the immediate expense of competing out-of-state entities.¹¹⁴ Furthermore, the market distorting effects of a subsidy and a tax used in conjunction are more severe than either component alone.¹¹⁵ By mollifying with a subsidy a party that would otherwise be harmed through the tax, the political process will become less effective at preventing legislative abuse.¹¹⁶

The final common method by which a facially neutral law may discriminate in its purpose or practical effect is through the elimination of a competitive advantage held by an out-of state entity as a result of its out-of state status.¹¹⁷ In *Baldwin v. G.A.F. Steelig, Inc.*, the Supreme Court struck down a New York statute that prevented the sale of out-of-state milk in New York if the price paid to producers was below the minimum price mandated by New York law.¹¹⁸ The statute operated to ban the sale of milk procured by dealers more cheaply from out-of-state sources, thereby eliminating a competitive advantage held by producers from neighboring states.¹¹⁹

Conversely, in *Cloverland II*, the Third Circuit Court of Appeals refused to find discriminatory a Pennsylvania law mandating the minimum wholesale price of milk sold in the Commonwealth.¹²⁰ The plaintiff, an out-of-state milk processor, argued that if it were not subject to the minimum price, it would be able to sell milk for about five cents less than the minimum price, thereby gaining a competitive advantage over in-state milk processors.¹²¹ The Court noted that proof of an ability to sell below the mandated minimum prices did not imply a cost advantage relative to in-state competitors.¹²² The plaintiff's raw milk costs were actually higher than many in-state milk processors, so they did not have a cost advantage that was eliminated by the minimum wholesale pricing.¹²³ However, if an out-of-state processor who is able to prove a cost advantage relative to in-state processors decides to

114. *See id.* at 199.

115. *Id.* at 199-200.

116. *Id.* at 200-01.

117. *See, e.g., Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd. (Cloverland II)*, 462 F.3d 249 (3d Cir. 2006).

118. *Baldwin v. G.A.F. Steelig, Inc.*, 294 U.S. 511, 519 (1935).

119. *Id.* at 527.

120. *Cloverland II*, 462 F.3d at 270.

121. *Id.* at 267.

122. *Id.*

123. *Id.* at 267-68.

challenge the law in the future, the law will eliminate that competitive advantage and will likely be reviewed under heightened scrutiny.¹²⁴

2. Heightened Scrutiny for Discriminatory Laws

As mentioned above, once the party challenging the statute proves that the law is discriminatory, the law is presumptively invalid.¹²⁵ The law will stand only if the statute serves a legitimate local purpose, and the purpose cannot be served by less discriminatory means.¹²⁶ Courts are generally more deferential to the states in recognizing a legitimate local purpose.¹²⁷ In *Maine v. Taylor*, the Supreme Court recognized that protection of the state's environmental resources is a legitimate local purpose.¹²⁸ Additionally, in *Dean Milk Co. v. Madison, Wisconsin*, the Court explicitly recognized that protection of the health and safety of state citizens is a legitimate local purpose.¹²⁹ However, courts will critically examine a state's purported goal.¹³⁰ Where health, safety, or environmental protection depends upon the economic welfare of a protected industry, courts will not uphold the discriminatory statute.¹³¹ Economic protection of in-state industries is almost never a legitimate local purpose.¹³²

The least discriminatory means prong of heightened scrutiny is frequently the most fatal for state legislatures.¹³³ In *Dean Milk Co. v. Madison, Wisconsin*, although health and safety protection was considered a legitimate local purpose, the ordinance preventing out-of-state milk from entering the city was not the least discriminatory means available.¹³⁴ The city could ensure the safety of the milk supply by expanding its inspection capabilities or relying on federal health inspectors.¹³⁵ Similarly, in *Philadelphia v. New Jersey*, protection of scarce environmental resources constituted a legitimate local purpose,

124. *Id.* at 272-73.

125. *See supra* Part III.A.

126. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

127. *Compare* *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978) (accepting that environmental protection is a legitimate local purpose) *and* *Dean Milk Co. v. Madison*, 340 U.S. 349, 353 (1951) (recognizing that health and safety protection is a legitimate local purpose) *with* *Maine v. Taylor*, 477 U.S. at 148 (stating that protection of economic interests is virtually never a legitimate local purpose).

128. *Maine v. Taylor*, 477 U.S. at 148.

129. *Dean Milk Co.*, 340 U.S. at 353.

130. *See Baldwin v. G.A.F. Steeling, Inc.*, 294 U.S. 511, 522-23 (1935).

131. *See id.*

132. *See, e.g.*, *Maine v. Taylor*, 477 U.S. at 148.

133. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

134. *Dean Milk Co.*, 340 U.S. at 354-55.

135. *Id.* at 354-56.

but the state had no basis to distinguish between in-state and out-of-state trash for this purpose.¹³⁶

Although there exists a strong presumption of invalidity for discriminatory laws, they are not always struck down by the courts.¹³⁷ In *Maine v. Taylor*, the Supreme Court recognized that Maine's total ban on baitfish imports was the only way the state could ensure the environmental safety of its native fisheries.¹³⁸ The fisheries were in danger of contamination from foreign parasites, and there was no way to reliably inspect incoming baitfish to exclude only the contaminated shipments.¹³⁹ As long as the government lacked reliable inspection capability, the law survived heightened scrutiny.¹⁴⁰

3. *Pike* Balancing for Nondiscriminatory Laws

If the challenging party is not able to prove that the state law is discriminatory, the law will be upheld unless the burdens upon interstate commerce outweigh the purported local benefit.¹⁴¹ Generally, though not always, the statute will be upheld under this standard.¹⁴² For example, in *Cloverland II*, the Third Circuit upheld the state-mandated minimum wholesale price for milk.¹⁴³ The court credited the Milk Marketing Board's witnesses who testified that the pricing scheme makes paying the over-order premium easier for handlers and allows small, independent producers to remain profitable, thereby fostering market diversity and consumer protection.¹⁴⁴ Any burdens the price scheme inflicts upon out-of-state competitors are outweighed by these benefits because price competition is not the only variable affecting the market share of milk processors.¹⁴⁵

Sometimes a lack of burden upon interstate commerce can be dispositive.¹⁴⁶ In *Grant's Dairy-Maine*, the plaintiff unsuccessfully challenged a Maine law that mandated the minimum prices in-state

136. *City of Philadelphia*, 437 U.S. at 626-27.

137. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986).

138. *Id.*

139. *Id.* at 141.

140. *Id.* at 147.

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

142. *See, e.g.*, *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd. (Cloverland II)*, 462 F.3d 249 (3d Cir. 2006). *But see, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

143. *Cloverland II*, 462 F.3d at 251.

144. *Id.* at 271.

145. *Id.* at 271 (referring to the District Court's finding that non-price factors such as quality, service, and the ability to bundle deliveries are important sources of competition in the Pennsylvania dairy market).

146. *See, e.g.*, *Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., Food, & Rural Res.*, 232 F.3d 8 (1st Cir. 2000).

processors must pay to in-state producers for raw milk.¹⁴⁷ The plaintiff argued that where the processor is subject to both federal and state minimum pricing, the distant processor is disadvantaged because only the state minimum price fails to account for transportation costs.¹⁴⁸ The Court considered this claim a “roundabout” burden not relevant to the dormant Commerce Clause analysis.¹⁴⁹ The law burdened in-state processors such as the plaintiff relative to other in-state processors who are located closer to out-of state markets, but this is a purely in-state effect to be addressed by the state legislature.¹⁵⁰ The law also burdened the plaintiffs relative to out-of-state processors who are not subject to Maine’s minimum prices, but, because the law in this situation did not benefit in-state interests, it did not run afoul of the dormant Commerce Clause.¹⁵¹

However, state laws do not always survive the *Pike* balancing test.¹⁵² In *Kassel v. Consolidated Freightways Corp.*, the Supreme Court struck down an Iowa law banning doublewide trucks from state roads.¹⁵³ Iowa argued that the ban was a safety measure, but the Court noted that there was no evidence that the law prevented any roadway accidents.¹⁵⁴ Moreover, the law substantially burdened interstate commerce because trucking companies would be forced to drive around Iowa or switch to a smaller vehicle at substantial additional cost.¹⁵⁵ Therefore, because the law was both highly burdensome and ineffective at achieving a local benefit, the statute failed the *Pike* balancing test and violated the dormant Commerce Clause.¹⁵⁶

B. Options for State Legislatures

On September 23, 2010, Senator Brubaker introduced Senate Bill 1480 proposing several changes to the Milk Marketing Law.¹⁵⁷ Although the bill was subsequently withdrawn to allow for further study in the legislature,¹⁵⁸ these proposals will likely shape the discussion for change

147. *Id.* at 11.

148. *Id.* at 21.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See, e.g.*, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

153. *Id.*

154. *Id.* at 673.

155. *Id.* at 674.

156. *Id.*

157. S. 1480, 2010 Leg., 194th Sess. (Pa. 2010).

158. Hearing on S. 1480 Before the S. Agriculture & Rural Affairs Comm., 2010 Leg., 194th Sess. (Pa. 2010) [hereinafter *S. 1480 Hearing*] (statement of Senator Mike Brubaker, Chairman, Sen. Agricultural & Rural Affairs Comm.).

next session. Three key provisions potentially raise constitutional concerns: (1) raising the minimum farm price to guarantee farmers a profit on their milk sales, (2) pooling the over-order premium to distribute pro-rata to all contributing farmers, and (3) defining the point-of-sale for raw milk to subject more milk to the over-order premium.¹⁵⁹ A constitutional analysis of each of these proposals follows below.

1. Raising the Minimum Farm Price

The current milk marketing law requires the Milk Marketing Board to guarantee a reasonable return to the dairy producer equal to the cost of production plus a reasonable profit.¹⁶⁰ However, the Board is currently permitted to set the producer price below the cost of production when the Board believes that the market for Pennsylvania-produced milk is threatened.¹⁶¹ Processors and retailers, however, are guaranteed profits of two and one half to three and one half percent regardless of market conditions.¹⁶² This proposal would seek to expand this profit guarantee to farmers.

If the law is challenged, a reviewing court must first determine whether or not the law is discriminatory.¹⁶³ Facially, the law does not discriminate because the minimum price applies to all buyers whether or not they are Pennsylvania businesses. Additionally, neither the purpose nor the effect of the law is discriminatory because the law does not manipulate the market in a way that makes Pennsylvania's dairy industry more competitive. Instead, by raising the cost of Pennsylvania-produced raw milk, the legislature runs a substantial risk that it will make the industry less competitive. If the legislature sets the price too high, Pennsylvania farmers will be unable to find buyers for their product. Therefore, the law will likely be labeled nondiscriminatory, and the *Pike* balancing test will apply.

Under the *Pike* balancing test, the law will be upheld if its local benefits outweigh the resulting burdens upon interstate commerce.¹⁶⁴ Here, a reviewing court will likely follow the reasoning in *Cloverland II* and recognize the local benefit to Pennsylvania consumers and producers that flows from securing an adequate supply of milk at reasonable prices.¹⁶⁵ Furthermore, the law appears to impose very little burden on

159. S. 1480.

160. Milk Marketing Law, 31 PA. STAT. ANN. § 700j-801 (2010).

161. *Id.*

162. *Id.*

163. *See supra* Part III.A.

164. *See supra* Part III.C.

165. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd. (Cloverland II)*, 462 F.3d 249, 271 (3d Cir. 2006).

interstate commerce. Although the increased price may make the purchase of Pennsylvania milk prohibitively expensive for some processors, these processors retain the right to procure milk from out-of-state sources. Therefore, if enacted, the proposal will likely survive a dormant Commerce Clause challenge, but it may be economically disadvantageous for Pennsylvania producers.

2. Pooling the Over-Order Premium

Under the current Milk Marketing Law, processors are solely responsible for paying the over-order premium to the dairy farmers or their co-ops; the premium never passes to the state for distribution.¹⁶⁶ As discussed above, where the milk is sold at retail in Pennsylvania but does not meet the three-part test of produced, processed, and sold in the state, the premium flows to processors but is not distributed to farmers.¹⁶⁷ By default, the processor is entitled to keep that premium even though it was intended for the dairy farmers.¹⁶⁸ Under this proposed change, processors would be required to pay the entire premium to a fund administered by the Milk Marketing Board.¹⁶⁹ The Board would then distribute the fund to both Pennsylvania farmers and out-of-state farmers in proportion to the amount of fluid milk each has contributed.¹⁷⁰

Logically, although not all of the proceeds will go to Pennsylvania farmers, the total receipts by Pennsylvania farmers should increase for two reasons. First, the premium applied to Pennsylvania-produced milk that has been transported out of the state before sale will be paid to in-state farmers. Second, market incentives to process out of state or comingle milk in order to capture the over-order premium will be reduced. However, the Milk Marketing Board should be vigilant to ensure that processors continue to receive a reasonable profit in order to incentivize both the purchase of milk from Pennsylvania farmers and low-cost retail sales. At present, the ability to capture the stranded over-order premium is figured into processors' business models, and the elimination of this revenue will adversely affect their profit.¹⁷¹ If the profit margin for processors shrinks too far, they will seek less expensive

166. *2010 Hearing, supra* note 6 (statement of Brook Duer, Chief Counsel, Pennsylvania Dept. of Agriculture).

167. *See supra* Part II.C.

168. *S. 1480 Hearing, supra* note 158 (statement of Senator Mike Brubaker, Chairman, Sen. Agricultural & Rural Affairs Comm.).

169. *S. 1480, 2010 Leg., 194th Sess. (Pa. 2010). See also 2010 Hearing, supra* note 6 (statement of Marvin Beshore, Counsel, Greater Northeast Milk Marketing Agency).

170. *S. 1480. See also 2010 Hearing, supra* note 6 (statement of Marvin Beshore, Counsel, Greater Northeast Milk Marketing Agency).

171. *2010 Hearing, supra* note 6 (statement of Chip English, Counsel, Pennsylvania Association of Milk Dealers).

out-of-state milk or more lucrative out-of-state retail markets which will, in turn, adversely affect Pennsylvania dairy farmers and consumers.

Assuming that dairy processors will attempt a constitutional challenge, the first analytical step is to decide whether the law is discriminatory.¹⁷² Facially, the law is clearly non-discriminatory; the law subjects both in-state and out-of-state milk to the tax and distributes the proceeds in equal proportions. The law avoids the tariff problem discussed in *West Lynn Creamery, Inc. v. Healy* because, under this proposal, both in-state entities and out-of-state entities subject to taxation will be able to receive subsidy payments.¹⁷³ Similarly, the purpose of the proposed law presents little problem. The Pennsylvania legislature, rather than attempting to protect the profits of Pennsylvania businesses, is attempting to protect the profitability of dairy farmers regardless of where the farmer is located. As stated by Senator Brubaker in his statement before the Senate Agriculture and Rural Affairs Committee, everyone appears to be making money in the milk business except the individual producers.¹⁷⁴ The goal behind this legislative change is a redistribution of profits from processor to farmer rather than an attempt to impinge on the profits of out-of-state entities.

The effects test in this context is slightly more complex. In *Cloverland II*, the Third Circuit expressly overruled the District Court's reasoning that any cost advantage accruing to an out-of-state firm as a result of state law was irrelevant to the dormant Commerce Clause analysis.¹⁷⁵ The same concern arises here because the current administration of the over-order premium confers a cost advantage on out-of-state processors by exempting them from payment of the over-order-premium.¹⁷⁶ By changing the administration of this payment and requiring all processors to pay the over-order premium to the Milk Marketing Board, the exemption for out-of-state processors is eliminated. Theoretically, this could eliminate the cost advantage of an out-of-state processor. Although a successful plaintiff will still be required to prove an actual competitive advantage relative to Pennsylvania processors, there may be a processor who can make such a showing and trigger heightened scrutiny.

172. See *supra* Part III.A.

173. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 198 (1994).

174. *S. 1480 Hearing*, *supra* note 158 (statement of Senator Mike Brubaker, Chairman, Sen. Agricultural & Rural Affairs Comm.).

175. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd. (Cloverland II)*, 462 F.3d 249, 265-67 (3d Cir. 2006).

176. See *supra* Part II.C. Stranding may occur when milk is produced in Pennsylvania, processed out of state, then sold at retail in Pennsylvania. Where such stranding occurs, the processor keeps the over-order premium thereby increasing their profitability and decreasing their costs relative to Pennsylvania processors.

However, a more narrow reading of *Cloverland II* is likely warranted. Taken to the logical conclusion above, the reasoning would preclude any state, having once conferred a cost advantage on a class of out-of-state entities, from ever changing or eliminating that law in the future. The more reasonable conclusion is that *Cloverland II* stands for the proposition that where a state law confers a cost advantage that remains intact, that cost advantage may be considered where the plaintiff seeks to challenge another aspect of the regulatory scheme. However, where the state itself chooses to change the law that once conferred the economic advantage, only the new law may be considered in evaluating the effects upon the economic advantage of out-of-state firms. Based on this reasoning, the regulatory proposal would place in-state and out-of-state processors on equal footing. It would not have the effect of incentivizing the procurement or processing of milk in Pennsylvania. Therefore, the law will likely be classified as non-discriminatory and subject to the *Pike* balancing test.

Regardless of whether heightened scrutiny or *Pike* balancing applies, however, a reviewing court is likely to recognize the state's legitimate interest in maintaining the integrity of the milk supply through the diversification of producers.¹⁷⁷ Under the *Pike* balancing test, any burdens the law places on interstate commerce would likely be considered merely incidental because, even if processors were forced to raise prices to recover their margins, price is not the only factor affecting market access.¹⁷⁸ However, under a heightened scrutiny analysis, the law will likely not be considered the least restrictive means to maintain the integrity of the milk supply. The state will always have the option to directly subsidize the industry even if subsidization is undesirable for financial reasons.¹⁷⁹

3. Defining the Point-of-Sale for Raw Milk

As discussed above, Pennsylvania law requires the payment of the over-order premium to farmers when the milk is produced, processed, and sold in the state.¹⁸⁰ For many milk processors, sales contracts with farmers and cooperatives mandate that title to the milk transfers to the processor at the processing plant rather than at the farm.¹⁸¹ This arrangement has two potential advantages for processors. First, the

177. *Cloverland II*, 462 F.3d at 271; *Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., Food, & Rural Res.*, 232 F.3d 8, 24 (1st Cir. 2000).

178. *Cloverland II*, 462 F.3d at 271-72.

179. *See W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 198 (1994).

180. *See supra* Part II.C.

181. *See generally Dean Foods Co. v. Brancel*, 187 F.3d 609, 617 (7th Cir. 1999).

farmer remains responsible for hauling costs and any potential loss or contamination that may occur in route to the plant.¹⁸² Second, if the plant is located outside of Pennsylvania, the “sale” does not occur in Pennsylvania, and the processor will not be required to pay the over-order premium to the farmer.¹⁸³ This legislative proposal seeks to change the second consequence by affirmatively defining the point-of-sale within the Commonwealth.¹⁸⁴

Assuming that milk processors will commence a dormant Commerce Clause challenge, the reviewing court must first determine whether the law is discriminatory or nondiscriminatory.¹⁸⁵ Facially, the law does not appear problematic because the point-of-sale applies to both in-state and out-of-state processors.

The purpose and practical effects of the law seem more problematic, however, because the Pennsylvania legislature is attempting to bring an otherwise out-of-state milk transaction within its regulatory scheme. In *Healey v. Beer Institute, Inc.*, the Supreme Court stated, “the critical inquiry is whether the practical effect of the legislation is to control conduct beyond the boundaries of the state.”¹⁸⁶ In determining the practical effects of the law, courts must consider not only the consequences of the statute at issue but also the consequences of similar legislation if it were enacted in other jurisdictions.¹⁸⁷

Under the Uniform Commercial Code (“UCC”) adopted in many states, the sale of goods occurs when title passes from the seller to the buyer.¹⁸⁸ If a buyer processing plant is located outside of Pennsylvania in a state adopting the UCC, that plant would be subject to contradictory regulation because state laws would mandate two conflicting points of sale. Furthermore, if this proposal is constitutional, a neighboring state could enact similar legislation mandating that the sale of milk occurs upon delivery to the plant. Again the risk of contradictory state regulation arises suggesting that the effect of the proposal is discriminatory. As a result, the law will likely be subject to heightened scrutiny.

182. *See generally id.* at 611.

183. *Cf. id.* (explaining that processors attempted to avoid a state regulation by contractually locating the sale outside the state).

184. It is unclear from the proposal whether the law would require title to transfer at the farm thereby changing which party is to assume the costs of hauling and the risk of loss.

185. *See supra* Part III.A.

186. *Healey v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

187. *Id.* at 336.

188. U.C.C. § 2-106(1) (2003). *See also Dean Foods Co.*, 187 F.3d at 617.

Applying heightened scrutiny, the law likely fails. Although bringing more milk within Pennsylvania's regulatory scheme furthers the legitimate local purpose of maintaining a secure milk supply, this proposal is clearly not the least restrictive means available to achieve this goal. The legislature could, instead, raise the over-order premium or abandon the over-order premium in favor of direct subsidization. However, even if a reviewing court found the law to be nondiscriminatory, the burden on interstate commerce that arises through inconsistent state regulations may still outweigh the slight benefit of including some additional milk within the regulatory scheme. Resolution of this question would likely depend on the volume of milk subject to the over-order premium and whether neighboring state legislation is in fact contradictory.

IV. CONCLUSION

Whether it is an increase in the demand for cheese abroad, a devastating flood in Iowa, or a change in federal marketing orders, a bewildering array of forces affect the dairy industry and the viability of local farming operations. State legislation is only one factor, but its impact is potentially very significant. Pennsylvania dairy farmers are petitioning for relief from the ruinous events of 2008 and 2009, and the recent hearings before the Senate Agriculture and Rural Affairs Committee suggest that legislative change is on the horizon. Specifically, the bill introduced by Senator Brubaker contains three proposals: (1) raising the minimum farm price for milk, (2) pooling the over-order premium for distribution to farmers regardless of their location, and (3) defining the point-of-sale for milk procurement transactions.¹⁸⁹

In evaluating the constitutionality of these proposals, the first inquiry is whether the law discriminates against interstate commerce. None of the proposals facially discriminate because they apply equally to both in-state and out-of-state transactions or entities. However, the effect of defining the point-of-sale for milk transactions is to bring within Pennsylvania's legislative scheme an otherwise out-of-state transaction. Because it is impermissible for a state to regulate beyond its borders, this proposal will likely be considered discriminatory by a reviewing court. However, because the other proposals do not alter the milk market to the benefit of Pennsylvania business interests, they will likely be found nondiscriminatory.

189. S. 1480, 2010 Leg., 194th Sess. (Pa. 2010).

Nondiscriminatory laws are frequently upheld under the *Pike* balancing test. The Third Circuit has previously recognized that the burdens of pricing laws are minimal compared to the benefits of maintaining an adequate and safe supply of milk through the diversification of producers.¹⁹⁰ Discriminatory laws, however, are rarely upheld. Even if a reviewing court will recognize the legitimate local purpose of securing the milk supply, the legislature can accomplish this goal by other nondiscriminatory means.

This comment is not meant to provide a normative judgment on whether any of these proposals are desirable, nor is it meant to suggest that any state action is necessary. These are issues for the legislature to address. However, given the recent interest in amending the Milk Marketing Law, lawmakers should critically examine the constitutionality of their proposals. Historically, dairy pricing has been extremely contentious, and further lawsuits are likely to follow.

190. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd. (Cloverland II)*, 462 F.3d 249, 271 (3d Cir. 2006).