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Robert M. Califf

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ABSTRACT

The regulation of food, drugs, and controlled substances in this country is exceedingly complex. Local, state, and federal regulation coexist, and common law remedies supplement positive law. Strata of regulation are necessary because patterns of production and consumption vary by region and demographic, while federal regulation provides regulatory uniformity across the United States. As localities struggle to sustain autonomy in response to local preference while working within a centralized system, and federal agencies struggle to maintain regulatory uniformity to foster a national marketplace, we see interaction and friction between regulatory spheres. While this friction usually becomes apparent through a lens of adversity, it is also a space of foment for policy change and democratic engagement. In this Paper I explore this productive space by looking at several recent instances of action by states in food, dietary supplements, and controlled substances regulation that highlight this friction. An analysis of these actions and the challenges to them provides an opportunity to view the interaction between different levels of regulatory authority and to discuss implications of the judicial review of these enactments. We see complex and shifting alliances working to change policy, and we see benefits in the push and pull caused by these actions.

INTRODUCTION

The regulation of food, drugs, and controlled substances in this country is exceedingly complex. Local, state, and federal regulation coexist, and common law remedies supplement positive law. Strata of regulation are necessary because patterns of production and consumption vary by region and demographic, while federal regulation provides regulatory uniformity across the United States. We see these layers strengthen each other at times by filling gaps, but also weaken each other at times through conflict and inefficiency.

The multiplicity of regulatory authority reflects the complexity of the subject and the elusiveness of certainty. These products affect the body, health, and perceptions of health. Take food, for example. People have intensely personal relationships with and beliefs about the food they eat, and the plethora of expert opinions regarding

* Associate Professor, Indiana University Robert H. McKinney School of Law. I benefitted from comments and input by Bruce Friedrich, Sam Halabi, Joseph A. Page, Patricia J. Zettler, and participants at the Food and Drug Law Journal’s Symposium: Constitutional Challenges to FDA Law and Regulation. Judy Rein at the Food and Drug Law Institute was a great help.
nutrition and health can be leveraged to support almost any position.\(^1\) And while the regulatory system is in place to insure the safety of the food supply, the notion of what safe means and how that state can be achieved is contested.\(^2\)

As localities struggle to sustain autonomy in response to local preference while working within a centralized system, and federal agencies struggle to maintain regulatory uniformity to foster a national marketplace, we see interaction and friction between regulatory spheres. This friction can be vertical—between the various levels of government, whether local, state, or federal—or horizontal—between the acting authority and other localities or states with conflicting interests. And while this friction usually becomes apparent through a lens of adversity, it is also a space of foment for policy change and democratic engagement.

In this Paper I explore this productive space by looking at several recent instances of action by states in food, dietary supplements, and controlled substances regulation that highlight this friction. The examples I use\(^3\) include legislative action—the passage of several humane treatment of animal laws in California (two now invalid) and laws mandating the labeling of food products that contain genetically engineered ingredients—and concerted Attorney General action to remove allegedly fraudulently labeled dietary supplements from the shelves of large retailers.\(^4\) In addition, the movement toward the decriminalization and regulation of marijuana in several states brings the interaction between regulatory authorities into sharp relief, and the scholarly commentary about this movement has much to say to other state action in the field of food and drug policy.

All of these actions involve attempts by state and local government to fill gaps left by federal legislation, or to address what is seen as misguided federal policy. Most of these actions have been challenged in court, and the suits against them allege that the state has overreached its lawful authority. The alleged overreaching falls into two categories: The state has infringed on (1) the federal government’s authority or (2) another state’s authority or domain. Plaintiffs allege the action is preempted if arguing the former, and that there is a Commerce Clause violation if the latter.


\(^3\) Although I have chosen several actions to discuss here, there are others that tell similar stories. For example, I have previously looked at the interaction of state consumer protection laws with federal regulation in the context of food labeling. See Diana R. H. Winters, The Magical Thinking of Food Labeling: The NLEA as a Failed Statute, 89 TUL. L. REV. 815, 826 (2015); Winters, Inappropriate Referral: The Use of Primary Jurisdiction in Food-Labeling Litigation, 41 AM. J. L. & MED. 240 (2015). California also very recently passed a law strictly regulating animal antibiotics, which may have national implications. See Lydia Zuraw, California Governor Signs Bill Regulating Animal Antibiotics, Food Safety News, Oct. 10, 2015, available at http://www.foodsafetynews.com/2015/10/california-governor-signs-groundbreaking-bill-regulating-animal-antibiotics/#.ViVcZBCrS9Y.

Here I look at these actions and the challenges to them, but not with an eye to assessing the probable, or best, outcome of the suits. Instead, an analysis of these actions and the challenges to them provides an opportunity to view the interaction between different levels of regulatory authority and to discuss implications of the judicial review of these enactments. We see complex and shifting alliances working to change policy, and we see benefits in the push and pull caused by these actions. These benefits include the dialogue and potential compromise that comes from disagreement, the engagement of the citizenry, and the possibility that local action can spark national policymaking.

In Part I, I describe recent state action in the fields of food regulation and marijuana decriminalization, and the ensuing challenges. In Part II, I discuss the types of friction that these actions have caused, between the states and the federal government and between the states themselves. And in Part III, I suggest that we should not view this friction as harmful to the relevant regulatory schemes, for two reasons. First, much of the action taken by states has been done as part of a national conversation on the issue and in conjunction with other states. We do not see isolated actors acting alone. This action by coalition forces a rethinking of the notion that state action is infringing on another entity’s authority, which we see articulated in the challenges to the action. And second, I use the work of Heather Gerken on the potential benefits of the spillover of state action and the friction this spillover causes to argue that the friction ensuing from state action can be beneficial to food system and controlled substances regulation, and to our democratic scheme.

I. SOME EXAMPLES OF RECENT STATE REGULATORY ACTION: FOOD REGULATION, DIETARY SUPPLEMENTS, AND THE DECRIMINALIZATION OF MARIJUANA

Although there is a vast federal regulatory apparatus that administers the nation’s food supply, the regulation of food systems has traditionally been a matter of local regulation, and local institutions maintain a vibrant regulatory authority over most aspects of food production, distribution, and sale. Over the past decade, California passed several laws on the humane treatment of animals, Vermont passed a law mandating the labeling of genetically engineered ingredients, and the Attorneys General of several states have attempted to increase oversight of the dietary supplements industry. Not within the food regulatory space, but also within the last decade, several states have legalized marijuana for medical or general use. All of these actions were taken against the background of federal regulation that functions to ensure product uniformity for a national marketplace and to foster state

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5 The system is “a continual source of consternation and befuddlement” to observers. Heinzerling, Lisa, Divide and Confound: The Strange Allocation of U.S. Regulatory Authority Over Food (October 8, 2014). Food and Drug Regulation in an Era of Globalized Markets, Elsevier, 2015. Available at SSRN: http://ssrn.com/abstract=2507346 (“The division of regulatory responsibility for food across multiple federal agencies in the U.S. is, among aficionados of food law, a continual source of consternation and befuddlement. Some fifteen different federal agencies, from six different Cabinet-level institutions, share authority over the safety and transparency of our food supply, together administering thirty-five different federal laws.”).

coordination. Challenges to these actions assert that they harm federal and other states’ interests, and do damage to the regulatory scheme.

A. Food Regulation

A suite of laws affecting food production based on animal welfare concerns took effect in California over the last five years or so, and several states passed laws mandating the labeling of genetically engineered ingredients in food.

1. California Humane Treatment Laws

Courts have found the first two laws discussed here to be expressly preempted by federal legislation, though one is on appeal. In 2004, California prohibited the sale of products that are “the result of force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size,” which is the process traditionally used to produce foie gras, a “a delicacy that gourmets consider heaven and animal rights groups call hell.” The law became effective on July 1, 2012, and several producers of foie gras products and a restaurant group that served foie gras immediately sued California, alleging that federal law preempted the statute.

The Poultry Products and Inspection Act (PPIA), administered by the United States Department of Agriculture (USDA), “regulates the distribution and sale of poultry and poultry products.” The PPIA has an express preemption clause. States may not enact: “[m]arking, labeling, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under [the PPIA].” In January 2015, a federal district court found that because the California law “imposes an ingredient requirement in addition to or the federal laws and regulations,” it was expressly preempted by the PPIA. The case is currently on appeal.

The district court decision on the foie gras ban echoes a previous tussle that California had with the federal government regarding the humane treatment of animals, where the state also lost. In 2009, the California legislature strengthened an existing law to prohibit slaughterhouses from buying or selling animals that could not walk or processing or selling meat from such animals. The law also required

7 Cal. Health & Safety Code § 25982. The statute defines “force feeding” as “a process that causes the bird to consume more food than a typical bird of the same species would consume voluntarily.” § 25980(b).
10 National Broiler Council v. Voss, 44 F.3d 740, 742 (9th Cir. 1994).
12 Association des Éleveurs de Canards Et D’Oies Du Québec, 2015 WL 191375, at *7. Defendants argued that the California law regulated a process rather than an ingredient, and that the process took place before the bird entered an official establishment, which triggered the preemption provision, but the court disagreed. Id. Plaintiffs did not challenge a separate provision of the California code that actually banned force feeding, but only § 25982, which prohibited the sale of products that are produced through force feeding. Id. at *1.
slaughterhouses to immediately humanely euthanize any nonambulatory animals on their premises. Slaughterhouses, however, are also regulated by the USDA under the Federal Meat Inspection Act (FMIA), and in 2012, the Supreme Court found the California law to be expressly preempted by this statute.

The FMIA, which “regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals,” contains an express preemption clause similar to that in the PPIA, which prohibits state “[r]equirements within the scope of this [Act] with respect to premises, facilities and operations of any establishment at which inspection is provided under [this Act], which are in addition to, or different than those made under this [Act].” The Court explained that because slaughterhouses could treat pigs that were nonambulatory one way under federal law, but were required to treat them differently under the California law, “in essence, California’s statute substitutes a new regulatory scheme for the one [USDA] uses.”

A third California humane treatment initiative—a ban on the in-state sale of eggs laid by hens kept in battery cages—also faces an implied preemption challenge, although justiciability barriers may prevent its adjudication. In 2008, California voters passed Proposition 2, which requires that egg-laying hens (among other animals) “be confined only in ways that allow these animals to lie down, stand up, fully extend their limbs and turn around freely.” The major supporters of this proposition included the Humane Society of the United States, Farm Sanctuary, an anti-animal cruelty organization, the Center for Science in the Public Interest, the California Democratic Party, and the Center for Food Safety. The passage of Proposition 2 reflected a growing awareness of and distaste for the use of battery cages for egg-laying hens.

In 2010, the California legislature passed AB 1437 which amended the California Health and Safety Code to prohibit the sale of an egg in the state “if it is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with those animal care standards [of Proposition 2].” This provision “level[ed] the playing field,” by holding out-of-state producers to the same standards as in-state

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17 Id.
19 National Meat Assoc., 132 S. Ct. at 970. The Court disagreed with the argument that California’s law did not regulate slaughterhouses per se, but instead “exclude[d] a class of animals from the slaughtering process.” Id. at 973. The FMIA includes reference to humane slaughter, 21 U.S.C. §§ 603(b), 610(b), which the PPIA does not, which may be significant in terms of whether federal law is found to preempt state law. Thanks to Bruce Friedrich of The Good Food Institute for pointing this out.
22 See infra, at 245-247.
producers. The new laws (Proposition 2 and AB 1437, hereinafter the “Egg Laws”) took effect on January 1, 2015.

In early 2014, six states sued California alleging that the Egg Laws violate the Commerce Clause and are preempted by the Egg Products Inspection Act (EPIA). The states argued that the Egg Laws “impose[] a substantial burden on interstate commerce by forcing Plaintiffs’ farmers either to forgo California’s markets altogether or accept significantly increased production costs just to comply with California law,” and therefore violate the Commerce Clause, and that, in addition, Congress intended to “occupy the entire field of regulations governing the quality and condition of eggs” through the EPIA, which implicitly preempted the Egg Laws.

The district court dismissed the case, finding that the plaintiffs lacked standing. The states had asserted standing under the parens patriae doctrine, a doctrine that allows states to litigate on behalf of their citizens under certain circumstances. Parens patriae is a common law doctrine that “at its inception, allowed the king to assume a general guardian role over his subjects.” In its current form, parens patriae standing applies “when the sovereign ‘allege[s] injury to a sufficiently substantial segment of its population,’ ‘articulate[s] an interest apart from the interests of particular private parties,’ and ‘express[es] a quasi-sovereign interest.’” In Alfred L. Snapp & Son, Inc., the Court explained that quasi-sovereign interests fall into two general categories: “First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being denied its rightful status within the federal system.” The states suing California argued that they had sufficiently alleged injury to the economic well-being of their people because their citizens were being economically isolated and were suffering from discrimination, and injury to their ability to participate in the “federal system of government,” because their citizens did not have a voice in “creating the laws that govern our means of production.”

The court held, however, that the states did not satisfy the standards for bringing a parens patriae suit because they did not show injury-in-fact to their citizens, but were rather asserting injury “on behalf of a discrete group of egg farmers.” The states

25 Missouri v. Harris, 2014 WL 4961473, *3-4 (E.D. Cal. 2014). This was not the only challenge to the law. Suit was also brought by a California citizen, alleging that the suit was void for vagueness. The Ninth Circuit affirmed the dismissal of his case in early 2015, finding that the egg-laying hen standards in Proposition 2 could be “readily discerned using objective criteria.” Cramer v. Harris, 591 Fed. Appx. 634 (9th Cir. 2015).
26 Id. at *3.
27 Id. at *1.
29 Table Bluff Reservation v. Philip Morris, Inc., 256 F.3d 879, 885 (9th Cir. 2001) (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982)).
31 Missouri v. Harris, Appellants’ Brief, Mar.4, 2015, p.19, 35, 44.
32 Missouri v. Harris, at *11. The question as to why the egg producers themselves did not sue remains open. One commentator suggested that egg producers did not want to get involved because it
were therefore “attempt[ing] to pursue the interests of a private party . . . only for the sake of real party in interest,” which did not establish a quasi-sovereign interest. 33 The states have appealed.34 In the meantime, several large food producers, such as McDonald’s and Heinz, have pledged to stop using eggs from hens raised in battery cages,35 which may affect the states’ allegations of economic harm.36

2. Genetically Engineered Ingredients Labeling Laws

Over the last half decade, there has been a significant amount of state legislative activity concerning the labeling of foods with genetically engineered (GE) ingredients. 37 Until July 2016, there was no federal rule mandating such labeling.38 Labeling initiatives failed in California and Washington in 2012 and 2013, but passed in Maine and Connecticut in 2013 and 2014. 40 Although now most likely preempted by the federal bill,41 Connecticut’s law would have become effective when four additional states, including one that borders Connecticut, enacted mandatory labeling laws consistent with Connecticut’s, and the population of the states located in the northeast United States that had passed such laws exceeds twenty million people.42 Maine’s law would have gone into effect when at least five contiguous states, including Maine, enacted mandatory labeling legislation.43 If this did not happen by January 1, 2018, the statute will be repealed.44

would be a “public relations debacle,” directing attention to industrial farming practice. Moreover, the egg producing trade organization had supported a provision in the 2014 Farm Bill (eventually eliminated) that would have phased out the use of battery cages, and thus, perhaps, “the house chicken has left the barn.” Did the dismissal of Missouri v. Harris have an unanticipated effect? Agricultural Law blog, Oct. 7, 2014.

33 Snapp, 458 U.S. at 602.
35 See infra 247.
36 If producers have to transition to enriched cages to satisfy large buyers of eggs it may be more difficult to make the argument that the California law independently affects their businesses.
37 Ross H. Pifer, Mandatory Labeling Laws: What Do Recent State Enactments Portend for the Future of GMOs, 118 PENN. ST. L. REV. 789, 790—791 (2014) (“According to the National Conference of State Legislatures, 110 bills on this subject were introduced in 32 different states in 2013. In the early months of 2014, this trend continued as at least 67 bills were introduced in 25 different states.”).
40 Id. at 799–805.
42 CONN. GEN. STAT. § 21a–92c(a) (2015).
44 Id.
In May 2014, the Vermont legislature passed Act 120, “An act relating to the labeling of food produced with genetic engineering”.\(^{45}\) This is the first “no strings attached” mandatory labeling law,\(^ {46}\) and it went into effect on July 1, 2016.\(^ {47}\) The Vermont law mandates that, with certain exceptions,\(^ {48}\) all food offered for sale in Vermont that is “entirely or partially produced with genetic engineering,” must be labeled as such.\(^ {49}\) Foods that fall under the labeling requirement may not be labeled as “natural,” “all-natural,” “or any words of similar import that would have a tendency to mislead a consumer.”\(^ {50}\)

When the legislature passed Act 120, it created a special legal fund to defend the law against challenge,\(^ {51}\) which was needed almost immediately. Several trade associations, including the Grocery Manufacturers Association and the Snack Food Association, brought suit arguing that aspects of Act 120 violate the First Amendment and the Commerce Clause, and are preempted by the FDCA, Nutrition Labeling and Education Act (NLEA), FMIA, and PPIA.\(^ {52}\) A district court dismissed several of plaintiffs’ Commerce Clause claims and the allegations that the Act was preempted by the FDCA and the NLEA. The court permitted claims asserting that the law’s provision prohibiting manufacturers to advertise their products as “natural” in any state would have discriminatory effects under the Commerce Clause, that the law’s disclosure requirement is preempted by the FMIA and the PPIA, and that the Act violated the First Amendment to move forward.\(^ {53}\) Although the Vermont law is also almost certainly preempted by the newly passed federal bill, this case is still currently on appeal.\(^ {54}\)

**B. Attorney General Action**

In February 2015, the office of the Attorney General of New York (NYAG), Eric Schneiderman, sent letters to four major retailers requesting that the stores stop selling several brands of dietary supplements and that they “provide detailed information relating to the production, processing and testing of herbal supplements sold at their stores, as well as set forth a thorough explanation of quality control


\(^{47}\) Id.

\(^{48}\) Tit. 9, § 3044, 9 V.S.A. § 3044.

\(^{49}\) Id. at § 3043 (a), (b).

\(^{50}\) Id. at § 3043 (c).


\(^{53}\) Id. at *48.

measures in place." These letters were sent after the Office of the Attorney General engaged in an investigation where DNA testing showed that the dietary supplements contained less of the herbs on the supplements’ labels than labeled, and included significant amounts of filler and potential contaminants.

In late March 2015, the NYAG signed an agreement with GNC Holdings, Inc., one of the retailers that had been targeted. GNC agreed to use testing on its products, provide information to consumers about its products, and periodically disclose to the Office of the Attorney General regarding its products. The letter noted that the NYAG’s investigation found no evidence that GNC violated FDA rules, and that the “results of this testing likewise indicate that the Tested Supplements were manufactured consistent with FDA [good manufacturing practices] requirement.” The letter was also clear, however, that compliance with FDA standards did not eliminate potential liability under New York’s consumer protection laws. A few months after sending these letters, Attorney General Schneiderman sent a letter to Congress, cosigned by thirteen other attorneys general, requesting an investigation into the dietary supplement industry. In November 2015, seven federal agencies brought joint civil and criminal actions against over 100 manufacturers and marketers of dietary supplements.

While the technique that the NYAG used to test the supplements has been questioned by media sources as well as industry groups, the inadequacy of federal oversight over dietary supplements has been widely noted. Attorneys General are

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58 Id.

59 Id.

60 Id. Were the NYAG to bring suit against the dietary supplement manufacturers and retailers, the issue of preemption by compliance with federal requirements would be litigated.


62 See Dan Flynn, Feds Announce ‘Nationwide Sweep’ of Supplement Makers, Food Safety News, Nov. 17, 2005. The agencies include FDA, the Federal Trade Commission, the U.S. Postal Inspection Service, the Internal Revenue Service, the Department of Defense, and the U.S. Anti-Doping Agency.


trying to fill that gap by applying pressure to private parties to change voluntarily or face court action under state laws by drawing public attention to the issue and by lobbying Congress to increase federal oversight.

C. Marijuana Legalization

Although marijuana manufacture, possession, and distribution have been illegal under the Controlled Substances Act (CSA) since 1970, there has been a sea change in the legal treatment of marijuana by states over the past three years. In November 2012, Colorado and Washington State legalized the possession of marijuana and approved the state regulation of production and sale, and Alaska, Oregon, and Washington D.C. did the same in 2014. Medicinal marijuana is legal in twenty other states. Indeed, as one commentator noted, “[a]t least where marijuana is concerned, states are opting out of the ‘war on drugs.’”

In addition to conflicting with the CSA, the legalization of marijuana for medical purposes may “intersect” with FDA’s authority to approve new drugs because “[a]ny substance that is ‘intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease’—as medical marijuana clearly is—is a drug as defined in the FDCA.” States, however, may be able to avoid FDA authority by restricting laws to “permit[] and regulat[e] only wholly intrastate production and sale of marijuana products.” And, under the CSA, states have had much responsibility over the shaping of marijuana policy: “Since the CSA’s implementation more than forty years ago, nearly all marijuana enforcement in the United States has taken place at the state level.” Moreover, the federal government “has announced an evolving policy of non-enforcement in states with legal marijuana.”

In late December 2014, Nebraska and Oklahoma filed a motion for leave to file a bill of complaint against Colorado with the United States Supreme Court, which was denied in March 2016. The states argued that the Supreme Court has original and

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66 Ernest A. Young, Modern Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction, 65 CASE WEST. L. REV. 769, 774 (2015) (“the federal marijuana ban is thus “the supreme Law of the Land . . . [e]xcept that in Boulder, Colorado, it is easier to find a head shop than a coffee shop”).

67 Id. (collecting laws).


70 Zettler at 47 (pointing to the example of state laws that permitted the intrastate production and sale of laetrile).


exclusive jurisdiction over their assertion that “Colorado’s commercial marijuana scheme is preemted by the CSA, and is thus null and void.” Nebraska filed an opposing brief, arguing that the issues asserted by Nebraska and Oklahoma should be heard by lower federal courts, that the states did not have standing to bring their claims before the Supreme Court, and that there was no cause of action to preempt Colorado’s law here.

The attempt to create a legal state marketplace for a federally banned product presents unique issues of regulatory authority, but in this history we see a nuanced example of the interaction of layers of regulatory authority and shifts with recent state action—much as in the food policy contexts discussed above. Erwin Chemerinsky comments that “[t]he struggle over marijuana regulation is one of the most important federalism conflicts in a generation.”

II. TYPES OF FRICTION

Each state action described above, with the exception of the informal action taken by the New York Attorney General, has been challenged. The suits, brought by private parties and other states, argue that principles of federalism are being violated; that the acting state has overstepped its authority and in doing so has infringed on an abutting authority, whether that of the federal government or another state. The challenges to the humane treatment laws, the GE labeling law, and marijuana legalization assert that these actions are not the states’ to take and that the acting state has harmed either the federal interest or another state’s interest.

Federalism, which is “a shorthand moniker for a complex set of political, legal, and economic relationships within a system of divided sovereignty,” implicates

74 Nebraska v. Colorado, Brief in Support, at P. 10.
76 Colorado points out that there are currently two suits pending in the lower courts, one by private plaintiffs seeking to enjoin Colorado’s regulation of marijuana, and one by sheriffs and county attorneys, alleging that they are facing increased enforcement costs. Id. at 22.
77 Plaintiff states’ claim that Colorado’s law is preempted by the CSA under the Supremacy Clause may be affected by the Supreme Court’s recent decision in Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1384 (2015), holding that the Supremacy Clause does not contain an implied right of action. Colorado suggests as much in its opposition brief. Colorado, Respondent’s Brief at 32 (“The Court, if it does not dismiss this case outright, should at minimum allow additional briefing after it decides Armstrong.”).
78 Indeed, the legalization of marijuana can be seen as different than state action in the humane treatment or food labeling areas, in that the friction with federal law is pronounced.
79 Chemerinsky, 62 U.C.L.A. L. Rev. at 74. Marijuana regulation and issues of federalism have been the subject of much interesting scholarship, including the article cited in this footnote and a Case Western Law Review Symposium held in 2014. See Adler, Introduction, 65 CASE WEST. L. REV 505.
80 Even though there has not yet been legal action, the New York Attorney General begins to lay out a defense to a preemption argument in the March 27, 2015 letter memorializing the agreement between the A.G.’s office and GNC. “Where NYAG and GNC disagree, however, is on the sufficiency of federal rules and testing requirements and their relationship to state consumer protections laws.” Letter available at http://www.ag.ny.gov/pdfs/NYAG-GNC%20AGREEMENT%20FINAL%20AGREEMENT.203.28.2015.pdf.
81 Allan Erbsen, Horizontal Federalism, 93 MINN. L. Rev. 493, 500 (2008).
relationships both between the federal government and the states and between the states themselves. “The Supremacy Clause makes federal/state interactions hierarchical—and thus in a sense ‘vertical’—while state/state interactions are between entities on an equal plane of constitutional status, and are thus ‘horizontal.’”

The challenges to the humane treatment laws, the GE labeling law, and marijuana legalization assert preemption claims and Commerce Clause violation claims or both. The former assert that principles of vertical federalism have been violated—the state is impermissibly regulating within a sphere of federal authority—and the latter argue that principles of horizontal federalism have been violated—the state is encroaching on the authority of other states. But although it is possible to distinguish between the claims as such, as I do below, it is not possible to as cleanly distinguish between the type of friction addressed, nor the interests protected by each claim. Allan Erbsen writes that “federal power is a mechanism for restraining state power,” but it is also important to keep in mind that state coordination can foment national power. Federal legislation can regulate national uniformity, which eliminates interstate friction, but also supports the United States’ power and authority as an international trading partner. States cannot legislate so as to significantly burden interstate commerce because such action adversely affects the interests of other states’ citizens but also because it encroaches on the federal government’s Commerce Clause power. The interests protected by differing regulatory authorities, as well as the interests affected by regulatory spillover are intertwined. This reflects the complexity of the regulated subject matter and enhances the productive possibilities of the friction between these authorities.

A. Federal v. State authority

Questions of vertical federalism “typically concentrate on determining how power is or should be allocated between the federal and state tiers of the government, and how to prevent the federal and state governments from encroaching on each other’s prerogatives.” The benefits of a system of divided authority are well-established, and include the ability of decentralized, smaller units of government to (1) engage in policy innovation, (2) be more accountable to the populace, (3) involve citizens...
more intensely in local governance,\textsuperscript{88} and (4) internalize both the costs and benefits of state activity.\textsuperscript{89}

We can see how these benefits resonate in the recent state action in the area of food regulation. As discussed above,\textsuperscript{90} the state of California has passed three laws over the last decade relating to the humane treatment of animals that are more animal-protective than provided by federal law. The law banning the force-feeding of birds to enlarge their livers was passed in 2004.\textsuperscript{91} The Egg Laws were passed by ballot initiative in 2008 and legislatively amended in 2010.\textsuperscript{92} The law restricting the slaughter of nonambulatory animals was passed in 2008, in direct response to a video released by the Humane Society of the United States “showing workers at a slaughterhouse in California dragging, kicking, and electro-shocking sick and disabled cows in an effort to move them.”\textsuperscript{93} One can argue that this spate of laws reflects a preference in the local population to use the power of the marketplace to change methods of food production,\textsuperscript{94} and a continued willingness to elect legislators that support the passage of legislation regarding the humane treatment of animals. As to policy innovation, Vermont’s GE labeling law was the first of its kind to go into effect, and until the federal bill passed, its performance against legal challenge was closely watched by other states hoping to legislate GE labeling.\textsuperscript{95}

Opponents of these laws, however, argue that the uniformity of a national market is more important than responsiveness to a local populace or policy innovation, that Congress has enacted national legislation to further this purpose, and that this legislation preempts the state regulation, either expressly or impliedly.\textsuperscript{96} For

\begin{footnotesize}
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\item \textsuperscript{88} McConnell, 54 U. CHI. L. REV. at 1510 (citizens more likely to be active and engaged in smaller units of government).
\item \textsuperscript{89} Baude, 65 CASE WESTERN L. REV. at 516; McConnell, 54 U. CHI. L. REV. at 1494 (“The unit of decision making must be large enough so that decisions reflect the full costs and benefits, but small enough that destructive competition for the benefits of central government action is minimized.”).
\item \textsuperscript{90} See supra 231–234.
\item \textsuperscript{91} Russ Parsons and David Pierson, Foie Gras Ban is Overturned, L.A. TIMES, Jan. 7, 2015.
\item \textsuperscript{92} Missouri v. Harris, 58 F. Supp.3d 1059, 1063 (E.D. Cal. 2014) (citation omitted).
\item \textsuperscript{93} National Meat Ass’n v. Harris, 132 S. Ct. 965, 969 (2012).
\item \textsuperscript{94} See National Meat Assoc. v. Harris, 2011 WL 5402757, at *51 (U.S. Sup. CT. Oral Argument) (Susan K. Smith on behalf of Respondents) (Nov. 9, 2011) (“California’s purpose . . . was twofold, to one, protect public health but also to prohibit animal cruelty in an area where – where California legislators were concerned about the humane treatment of nonambulatory animals”).
\item \textsuperscript{95} See, e.g. John Herrick, Vermont will be the first state in the nation to require GMO labeling, Vermont Business for Social Responsibility, Apr. 24, 2014 (“ ‘I do think that this is a model that other states can look to in passing other legislation,’ said Falko Schilling, a lobbyist for the Vermont Public Interest Research Group. ‘This is really a start to a much larger movement across the country.’”), available at http://vbsr.org/news/news_vermont_will_be_first_state_in_nation_to_require_gmo_labeling/cat /vbsr_in_the_news/P35/. Of course, a federal compromise on GE ingredient labeling may preempt any state laws.
\item \textsuperscript{96} For a discussion of preemption, see Winters, Magical Thinking, 89 TUL. L. REV. at 833–834 (citations omitted) (“Under the Supremacy Clause of the Constitution, which states that federal laws are “the supreme Law of the Land,” the Supreme Court recognizes that “state laws that conflict with federal law are ‘without effect.’” Federal law can preempt state law in four different ways, which fall into two broad categories: express and implied preemption. Express preemption . . . it exists when federal legislation or regulation contains language expressly preempting state law . . . Implied preemption can come about in three ways: when Congress occupies the entire field of regulation, when state law and federal law actually conflict, and when state law interferes with the “purposes and objectives” of Congress in establishing regulation.”)
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example, the National Meat Association sued California, arguing that the Federal Meat Inspection Act expressly preempted California’s restrictive slaughterhouse rules, and the Supreme Court agreed.97 During oral argument, the attorney for Petitioner argued that the FMIA contained an express preemption clause because it “was critical to Congress that we had this uniformity and I think it’s critical that this Court find preemption in this case, because otherwise Federal law will appear and disappear [based on state discretion].”98 Producers and sellers of foie gras sued California, arguing that the Poultry Products Inspection Act expressly preempted California law prohibiting the sale of products produced by force-feeding birds to enlarge their livers, and the district court agreed.99 Six states have sued California, arguing that, among other things, the Egg Products Inspection Act impliedly preempts the egg law prohibiting sales of eggs laid by hens not raised in a certain type of cage, though this claim has not yet been heard. The challenges to the GE labeling law and to the decriminalization and regulation of the marijuana market also entailed preemption challenges.100 In all of these suits, petitioners argue that Congress has passed federal legislation, which facilitates the movement of goods and services in a national market. The controversial state action threatens to destroy the uniformity necessary to sustain such a market and will thereby thwart the purpose of the relevant federal legislation.

Where a state is regulating goods and modes of production that move through the national market, federal preemption serves to both forward national interests and to ameliorate interstate tension. The Nutrition Labeling and Education Act, for example, which regulates certain aspects of food labels, contains an express preemption clause. The stated purposes of this legislation are to improve public health, reduce fraud, and foster national uniformity in product labels.101 Uniform labels permit food manufacturers to prepare food products for a national market and permit reliance on a consistent national standard. They are, in addition, a safeguard against the possibility that one state’s citizens will be forced to comply with standards put into place by another state. State A’s citizens have no way to engage with the political process in State B, and therefore have no recourse if unhappy.102 Federal labeling legislation is used to restrain state power,103 which forwards both federal and state interests.

Issacharoff and Sharkey distinguish between “vertical preemption,” which “aims to achieve federal-state uniformity,” and “horizontal preemption,” which attempts to develop “coordinated solutions to matters that cross state lines.”104 These distinctions blur in the preemption arguments we see in the challenges to the humane treatment laws, the GE labeling law, and the marijuana decriminalization laws, which are

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98 Nat’l Meat Assoc., 2011 WL 5402757, at *53 (Oral Arg.).
100 See supra, Part C, at 237–238.
101 Winters, Magical Thinking, at 835.
102 We see this argument in the states’ suit against California in regards to California’s egg law. Missouri v. Harris, 58 F. Supp.3d 1059, 1069-1070 (E.D. Cal. 2014).
103 See Erbsen, at 504.
104 Issacharoff and Sharkey, at 1380.
based on the need to suppress state action for the purpose of federal uniformity (to foster a national marketplace), and to coordinate state action. Coordination is necessary to facilitate the production and movement of goods and services across state lines, and to avoid the infliction of externalities on other states.  

For example, the states challenging California’s egg law argue that they have parens patriae standing to argue a preemption claim (as well as a Commerce Clause violation) because their citizens are being harmed by California’s regulation. California’s alleged thwarting of the federal interest in national uniformity is causing interstate friction. And in regards to marijuana legalization, Nebraska and Oklahoma argued that they should be able to sue Colorado in the Supreme Court because Colorado’s legalization of marijuana is preempted by the CSA, and this harms other states. The spillover from Colorado’s legislation “shifts costs and favors its own citizens while disproportionately affecting out-of-state interests, or . . . imposes externalities on others.” The federal interest in a national drug policy, according to those states, serves to maintain interstate relationships.

Here, the violation of principles of vertical federalism has led to vertical and horizontal friction, and the solution identified is federal regulation. In addition to the preemption arguments, however, some of the challenges to these state actions also argue that the principles of horizontal federalism have been violated.

**B. State v. State Authority**

In his important article on the subject, Allan Erbsen writes that horizontal federalism “encompass[es] the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions,” and also applies when a local regulation is “troubling because of its lack of respect for limits on state authority that flow from the multi-state structure of the Union.” We see this friction in the six-state challenge to California’s egg law and in Nebraska and Oklahoma’s suit challenging Colorado’s decriminalization of marijuana. The former alleges that California’s law interferes with the design of the federal scheme by excluding out-of-state citizens from participating in legislative decisions that affect them, while the latter focused on the law’s extra-territorial effects.

In their suit against California, Missouri, Nebraska, Oklahoma, Kentucky, Iowa, and Alabama explained that when California passed the egg law, they “became concerned that ‘[our] econom[ies] and status within the federal system will be

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105 Issacharoff and Sharkey, at 1370 (horizontal preemption is where “the assertion of a federal interest emerges as a necessary default to prevent states from imposing externalities on each other or to overcome the inability to rationalize coordinated national standards for goods and services”). See also Heather K. Gerken and Ari Holtzblatt, The Political Safeguards of Horizontal Federalism, 113 Mich. L. Rev. 57, 77 (2014) (“Critics of spillovers have convincingly argued that this preference for uniformity relates to spillovers . . . .”).


108 Issacharoff and Sharkey, at 1371.

109 Erbsen, at 503.

110 See supra, 233, 237–238.
irreparably injured if the California Legislature—who were not elected by, and are not answerable to, the people of [our states]—is allowed to regulate and increase the cost of egg production in [our own territory].” 111 They alleged that the egg laws violate the Commerce Clause for three reasons: “(a) they were enacted solely to protect California egg producers from out-of-state competitors, (b) they have the purpose and effect of discriminating against interstate commerce, and (c) they regulate commercial activity occurring entirely within the Plaintiff States.” 112 Erbsen categorized the most common types of interstate friction, 113 and we see three of these in these claims: that California is impermissibly favoring its own citizens over those of other states (favoritism), that California is imposing externalities on other states (externalities), and that California is trying to extend the reach of its authority into other states’ spheres (overreaching).

As noted above, Nebraska and Oklahoma filed a Motion for Leave to File Complaint with the United States Supreme Court against Colorado, alleging that Colorado’s decriminalization and attempt to regulate marijuana is preempted by the CSA. 114 The Supreme Court rejected this motion in March 2016. 115 The states argued that the Supreme Court should accept their complaint because their claim was “of a serious and dignified nature,” and there was no alternative forum for their claim to be heard, 116 which are the two factors the Court considers when deciding whether to take a claim under its original jurisdiction. The states explained that this case was serious and dignified because they, as neighboring states, “bear the brunt of the problems caused by Colorado’s choice to circumvent federal law.” 117 The plaintiff states have diverted “a substantial amount of personnel time, budget, and resources of the Plaintiff States’ law enforcement, judicial system, and penal system” 118 to counteract marijuana trafficking sanctioned by Colorado. In other words, Colorado’s sanctioning of federally prohibited activity imposes externalities on these states. The states argued that Colorado’s obstruction of the purposes and objectives of Congress—which, according to them, should be preempted—violates principles of federalism. The federalism principles the states identified protect the federal interest in “a national, comprehensive, uniform and closed statutory scheme to control the market in controlled substances,” 119 and in the state interest to protect itself from externalities imposed by other states’ decisions.

111 Missouri v. Harris, Appellants’ Brief, No. 14-7111 (9th Cir. Mar. 4, 2015), at 15 (citing brief filed in district court).
112 Id.
113 Erbsen, at 514-528 (categorizing types of interstate friction).
115 Richard Wolf and Trevor Hughes, Justices won’t hear Nebraska, Oklahoma marijuana dispute with Colorado, USA Today, Mar. 21, 2016.
117 Id.
118 Id.
119 Id. at 15.
In both of these suits, the plaintiff states turned to the courts to protect their sovereign authority, arguing that the harmful action is one more properly under the purview of the federal government. California cannot place more restrictions on raisers of egg-laying hens than does the federal government because this imposes harmful externalities on other states and denies the citizens of other states the right to participate in the decision making process. Moreover, according to the plaintiff states, the federal government has already acted in this area, and California’s action is preempted. The argument against Colorado was similar: the area of illegal drugs is one controlled by the federal government, and state action in the field not only impermissibly defies the federal scheme, but also harms other states. In short, these are issues for national resolution, or no resolution, but not individual state action.

III. **The Benefits of Robust State Action & Consequential Adversity**

States are acting in areas that are the subject of national legislation for the purpose of filling gaps or tailoring this national scheme in response to local preference. Is the existence of friction—alleged harm caused to the national scheme and to other states—a matter of alarm? Will state action in food regulation disrupt the national regulatory scheme and destroy the uniformity necessary for a national marketplace? The answer to these questions is no, for two reasons. First, in most of these cases the state action is not taken in isolation, but is rather part of and in response to groups of actors and coalitions of institutions working for policy change. These shifting coalitions are significant in the context of a national marketplace. Second, as an influential group of legal scholars has begun to point out, in this friction lies productivity. In the messy and complicated push and pull between state action, federal legislation, and private actors lies a fruitful way forward for policy development.

**A. Coalitions**

Much of the recent state action in the area of food regulation took place as part of shifting popular sentiment and concerted action to change policy. These actions were not examples of “rogue” behavior, where a state was acting in a manner diametrically opposed to the interests of other states or the nation.

Voters, for example, approved California’s egg laws in 2008 and the legislature amended them in 2010, while national awareness about the use of battery cages for egg-laying hens was increasing. In fact, it seemed as if there was going to be a nationwide change in 2011, when the United Egg Producers, a trade group for egg

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120 It is uncertain whether the states have standing to bring such a claim. See supra note 75.


122 See Erbsen, at 524–525 (during the Founding era, “the possibility of rogue or maverick behavior was a significant threat to interstate harmony . . . there was a risk that states would ignore each other’s civil judgments, threaten each other militarily, or refuse to come to each other’s assistance.”).

farmers, and the Humane Society of the United States, an activist organization, agreed to work together towards a national law that would improve conditions for egg-laying hens.124 Although this law failed,125 other states, including Michigan, Oregon, and Washington, have also raised standards for egg-laying hens in their states.126 The European Union banned battery cages in 1999, effective as of 2011.127

Neither did Vermont act in isolation by passing a GE labeling law. Although it is the only active state law in the country, and although they may now be preempted by federal law, Maine and Connecticut passed laws that go into effect when other states pass similar laws, and the Center for Food Safety writes, “more than 70 bills have been introduced in over 30 states to require GE labeling or prohibiting genetically engineered foods.”128

As to dietary supplements, the New York Attorney General is acting with thirteen other Attorneys General to push Congress to increase oversight of the dietary supplements industry.129 The movement to decriminalize and regulate marijuana has garnered momentum over the last half decade.130

These state level initiatives have also been supported by private entity driven policy change and persistent advocacy group attention. For example, there has been movement in the private sector to stop using chicken products sold by food producers using battery cages. California’s legislation in this area is not peripheral, but rather embraces the current trend away from battery cages.131 In 2014, Heinz committed to purchasing 20 percent of its eggs from producers using hens raised in a cage-free environment.132 General Mills, Nestle, and Starbucks have also announced

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127 Id.


131 Even if California was acting alone, its size would inevitably influence the national market. The plaintiff states write that California residents consume a little less than one-eighth of the eggs produced by American egg producers annually. Missouri v. Harris, Appellants’ Brief, at 4. Because of its size and population, California can drive national policy, and has a long history of doing so in the environmental arena. See, e.g. Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. New York State Dept. of Environmental Conservation, 17 F.3d 521, 525 (2d Cir. 1994) (explaining California’s exemption from the Clean Air Act’s preemption provision).

132 Wayne Pacelle, Heinz Makes New, Important Animal Welfare Commitment, HUFFINGTON POST BLOG (Sept. 9, 2014), http://www.huffingtonpost.com/wayne-pacelle/heinz-makes-new-important_b_5792068.html. The California egg laws do not mandate that eggs be raised by cage-free hens,
they will stop buying eggs from caged hens. They will stop buying eggs from caged hens. McDonald’s has committed to only using eggs from cage-free hens by 2025. In regards to the labeling of GE ingredients, private companies such as Whole Foods and Chipotle have also embraced labeling and/or the exclusion of GE ingredients in their products in response to perceived consumer concern. In each of these contexts, advocacy groups and trade associations too have been visible and consistent actors in driving public and private policy change on both sides of the issues.

It is significant that coalitions of entities are working together—including states, industry, trade organizations, and advocacy groups—to change policy. The challenges to state action in the food regulation context ask whether this is an area best handled by federal regulation, because state legislation harms the federal interest in a uniform national marketplace and other states’ interest in the economic and participatory interests of their citizens. The division between spheres of authority, however, is a false dichotomy. We see here an example of Heather Gerken’s “federalism-all-the-way-down,” where policy is made by a multiplicity of institutions, and where “division and discord are useful components of an integrated policymaking regime.” Policy can develop in these areas of friction caused by state action.

B. Benefits of friction

The lawsuits challenging recent state action in the fields of food regulation and marijuana decriminalization argue that the spillover from these actions is harmful, and that acting states are encroaching on federal authority and the authority of other states. For this reason, these challenges argue, the state action is impermissible and either violates the Commerce Clause, is preempted by federal regulation, or both. Food systems policy does not just develop when the legislation or action stands or falls in court, however. It also exists in the origination of the action, in public attention to and engagement with the action, and in the friction that ensues between


137 Heather K. Gerken, Foreword: Federalism All the Way Down, 124 HARV. L. REV. 4, 7-10 (2010).
the state action and abutting authorities. In the evolution of food system regulation and the challenges to regulation are benefits for food policy, which must reflect local preference and national needs and incorporate profound scientific uncertainty, and for our democracy more generally. These benefits are those deriving from our system of federalism, and from the friction caused by each individual state action.

Heather Gerken writes that we are “intimately familiar” with the benefits of federalism, which promotes “choice, competition, participation, experimentation, and the diffusion of power.” As discussed above, state action in food regulation and marijuana decriminalization exemplifies these benefits by allowing for public participation, accountability, and innovation. What may be harder to see, however, are the benefits of friction, the value that comes from the spillover of state action into other spheres of authority. These include the ability of state-federal friction to check the power of the federal government, and to create a space where dissenters from national policy can manifest ideas and solutions. State-federal friction also alerts policymakers to important gaps in federal regulation and illuminates which of these gaps are most salient to the general populace. For example, California passed the egg laws in an area where a national solution was elusive. Colorado passed its marijuana decriminalization and regulation laws in dissent from the federal government’s controlled substances policy. Vermont enacted GE labeling in response to consumer concern about ingredient transparency.

Interstate friction also carries benefits for our food systems, and for our democracy. State action that entails spillover into the realm of other states can spark dialogue that can help the country reach compromise on divisive issues. This compromise may not necessarily be uniform, “[b]ut ‘checkerboard policies’ . . . should be adopted only after we’ve had the type of debate that national politicking alone can drive.” For example, whether the federal bill is actually a resolution on the labeling of GE ingredients, or whether the discussion continues, the ultimate outcome will not be for lack of dialogue.

The spillover of state regulation—forcing some people to live with other’s rules—also forces individuals to engage with divisive issues. This engagement is valuable in and of itself, and the possibility of reaching compromise is an added benefit. If the six state suit does not succeed, egg farmers in egg-producing states will have to decide whether to switch to enriched cages for their hens or forego the California market. Citizens of neighboring states will, at the very least, think about the implications of marijuana decriminalization. This engagement is important and good.

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138 Id. at 6 (“The Court reels these arguments off as easily as do scholars.”).
139 Gerken and Holtzblatt, The Political Safeguards of Horizontal Federalism, 113 MICH. L. REV. at 81–82.
140 See Zettler, supra note 67, at 69–80 (discussing how state regulation in the field of drug policy can “force the FDA [or Congress] to account for state regulatory interests”).
141 Id. at 86.
142 Id.
143 Id. at 89 (“Spillovers force engagement and thereby spur the process on which our democracy depends.”).
144 See, e.g., See David Markell, “Slack” in the Administrative State and Its Implications for Governance: The Issue of Accountability, 84 OR. L. REV. 1, 10 (2005) (“Proponents of increases in transparency and citizen participation in environmental or other aspects of governance internationally...
Interstate friction can also help get issues on the national policymaking agenda, and spur movement in the federal government.\textsuperscript{145} We have seen state regulation and national policy in the areas of food policy, dietary supplements, and marijuana decriminalization in dynamic interchange. State action causes national movement, which can bring about further state action. The ball is being passed between the states and the national government in the realms of prohibiting battery cages for hens, the oversight over dietary supplements, the labeling of GE ingredients,\textsuperscript{146} and the enforcement of the federal marijuana prohibition.

### IV. Conclusion

Recent state action in food policy and in marijuana decriminalization has caused friction between states and the federal government and between states and other states. Many of these actions have been challenged in court in suits alleging federal preemption and Commerce Clause violations. While not all of these actions have been challenged, and not all will survive challenge, the interchange between states and other authorities in these arenas is important. There is value to be found in state action that causes spillover, and these ongoing conversations are vital to the development of our national food policy, and valuable to the maintenance of a healthy democratic environment.

\textsuperscript{145}Gerken & Holtzblatt, The Political Safeguards of Horizontal Federalism, 113 MICH. L. REV. at 89–93. Think for example the federal movement in the field of dietary supplements. See supra note 137.

\textsuperscript{146}A federal compromise bill is being debated as this article goes to press. See, e.g., \textit{A Flawed Approach to Labeling Genetically Modified Food}, NY TIMES, July 6, 2016, http://www.nytimes.com/2016/07/07/opinion/a-flawed-approach-to-labeling-genetically-modified-food.html.