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# Are California's Milk Pricing Regulations Exempt from Scrutiny Under Both the Commerce and Privilege and Immunities Clauses?

by *Ralph C. Anzivino*

PREVIEW of *United States Supreme Court Cases*, pages 431-435. © 2003 American Bar Association.

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## ISSUE

Does 7 U.S.C. § 7254 exempt provisions of California's milk pricing regulations from scrutiny under the Commerce Clause and the Privilege and Immunities Clause?

## FACTS

The sale of milk in nearly all of the 48 contiguous states is regulated by the Federal Milk Marketing Program. One major exception is California, which is the leading milk producer in the United States. In 1996, Congress passed the Federal Agriculture Improvement and Reform Act (hereinafter the "1996 Farm Bill"). Section 144 of the 1996 Farm Bill, now 7 U.S.C. § 7254, specifically addresses the authority of the state of California over milk standards, and it provides:

**Section 7254. Effect on Fluid milk standards in State of California**  
Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or contin-

ue to effect any law, regulation, or requirement regarding—(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

In 1997, the California Department of Food and Agriculture (CDFA) amended its pricing regulations arguably to the disadvantage of out-of-state dairy farmers and in favor of in-state dairy farmers. Petitioners are corporations and individuals who operate dairy farms in Nevada and Arizona. In two separate actions (that are now consolidated), they challenge the constitutionality of the 1997 amendments to California's milk regulations. Petitioners contend that the 1997 amendments directly burden and discriminate against out-of-state dairy farmers in violation of the

*(Continued on Page 432)*

*HILLSIDE DAIRY ET AL. V. LYONS*  
AND  
*PONDEROSA DAIRY ET AL. V. LYONS*  
DOCKET NOS. 01-950 AND 01-1018

ARGUMENT DATE:  
APRIL 22, 2003  
FROM: THE NINTH CIRCUIT

# Case at a Glance

Section 7 U.S.C. § 7254 prohibits "any provision of law" from limiting the authority of California when regulating the composition or labeling of "fluid milk products." California has promulgated new pricing regulations that out-of-state dairy farmers claim places them at a competitive disadvantage with in-state farmers. The question for the Supreme Court is whether the federal statute exempts California's new milk pricing regulations from any challenge under the Commerce Clause or the Privilege and Immunities Clause.

Commerce Clause and the Privilege and Immunities Clause. Without reaching the constitutional merits, the district court rejected petitioners' claims. In granting summary judgment for the state on the Commerce Clause claims, the district court relied on *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999). The district court interpreted *Shamrock Farms* as holding that 7 U.S.C. § 7254 immunized California's milk pricing regulations from Commerce Clause challenge. The district court dismissed the claim under the Privilege and Immunities Clause on the ground that the pricing regulations did not discriminate on the basis of residency.

The Ninth Circuit affirmed in *Ponderosa Dairy v. Lyons*, 259 F.3d 1148 (9th Cir. 2001). The circuit court agreed with the district court that *Shamrock Farms* controlled the Commerce Clause claim. The Ninth Circuit broadly interpreted its decision in *Shamrock Farms* so that both pricing and compositional regulations fell within the purview of § 7254. The result was that the pricing regulations were insulated from Commerce Clause scrutiny. The Ninth Circuit also affirmed the dismissal of petitioner's claims under the Privilege and Immunities Clause. The court reasoned that the 1997 amendments did not, *on their face*, create classifications based on any individual's residency or citizenship. Rather, the court observed that the regulations created classifications that were based on where the milk was produced. Petitioner's writ of certiorari was granted on January 10, 2003. *Hillside Dairy Inc. v. Lyons*, 123 S.Ct. 818 (2003).

### CASE ANALYSIS

This case involves the interpretation of 7 U.S.C. § 7254. Petitioners

acknowledge that this federal statute does protect some body of California law against some body of federal law. Further, petitioners admit that Congress may confer upon a state the ability to restrict the flow of interstate commerce that a state would not otherwise enjoy. But, for a state regulation to be removed from the reach of the Commerce Clause, the congressional intent must be unmistakably clear. Petitioners argue that this case falls far short of that standard.

Petitioners maintain that § 7254 does not protect the 1997 pricing amendments. The 1997 amendments are economic regulations of raw milk. "Raw milk" is milk that comes directly from the dairy farmer. Section 7254 specifically refers to "fluid milk products" (processed milk), not raw milk. Therefore, § 7254 has no application to raw milk, only processed milk. Necessarily, section 7254 cannot be used to protect the 1997 amendments from Commerce Clause scrutiny. Further, the statutory text does not unambiguously indicate that Congress intended to exempt any of California's laws from the Commerce Clause. Section 7254 does not refer to the Commerce Clause specifically or to the Constitution more generally. Moreover, its directive that no provision of law "shall be construed" in a particular manner is more naturally read as referring only to nonconstitutional sources of law. In passing legislation, Congress is not ordinarily assumed to have intended to constrain the judiciary's authority to construe the Constitution. Thus, § 7254 is best understood as protecting California's laws against preemption only by "this Act" (the Farm Bill) and any other provisions of federal statutory or regulatory law, but not the Constitution.

Petitioners further assert that the legislative history of § 7254 cannot be used to preclude Commerce Clause scrutiny. First, petitioners assert that a statute's legislative history can never supply "unmistakably clear" evidence of congressional intent when such evidence is lacking from the text of the statute. This principle finds support in both the Supreme Court's decisions and logic. The Supreme Court has stated that evidence of congressional intent must be both "unequivocal and textual." Upon the passage of a law, the only thing before all of the members of Congress and the president who signs it is the text of the statute, not its voluminous legislative history. If something is unclear on the face of the statute, any clearer statement in the legislative history will, at a minimum, raise doubts about why that statement appears in the legislative history rather than the statutory text. The inference is that it appears only in the legislative history precisely because it could not receive the assent of a majority of each House and the signature of the president. Therefore, the very failure to put the clear statement into the text of the statute precludes the conclusion that Congress—as opposed to some subset of its members—has made its intent unmistakably clear.

Second, the statute's legislative history does not support the proposition that § 7254 was intended to preclude Commerce Clause scrutiny. There is no conference report to support the preclusion. There is no committee report to support the preclusion. Finally, there is no mention in any of the legislative history to § 7254 of the Commerce Clause or the Constitution. Clearly, the legislative history to § 7254 does not support the proposition that § 7254 protects California's milk pricing regulations from Commerce Clause scrutiny.

Finally, petitioners believe that the Privilege and Immunities Clause was not properly considered in the lower courts. The lower courts failed to consider the “practical effect” of the economic regulations on the petitioners. The Supreme Court’s application of the Privilege and Immunities Clause has consistently involved an examination of the “practical effect” of state laws and regulations on out-of-state residents. It is the “practical effect” of the state law, whether it produces discrimination against nonresidents, that determines whether a state’s law violates the Privilege and Immunities Clause. Petitioner’s data indicates that the vast majority of persons engaged in the production of raw milk reside on the farms that produce the milk. By discriminating on the basis of the location of the farm where the milk is produced, the California pricing regulations have the “practical effect” of discriminating against producers who do not reside in California. This violates the fundamental guarantee of the Privilege and Immunities Clause—not to be discriminated against based on one’s residency.

Initially, respondent maintains that petitioners are urging the Supreme Court to adopt an inappropriate standard when interpreting § 7254. Petitioners assert that the Supreme Court must use the standard requiring “both unequivocal and textual” evidence of congressional intent to find a Commerce Clause exemption. Respondent asserts that this more stringent standard derives from a line of Supreme Court decisions that involve state sovereignty, and that such a standard has never been applied to Commerce Clause cases. Rather, the correct standard is simply that congressional intent is established by evidence that is “unmistakably clear.”

Despite this disagreement over the appropriate standard, respondent argues that the text of § 7254 shows an “unmistakably clear” intent to exempt California’s milk laws from the Commerce Clause. The text of § 7254 expressly refers to preemption. It also states that no law shall be construed to prohibit or otherwise limit the authority of the state of California. The language of § 7254 is similar in breadth and specificity to the language of other statutes and regulations that have previously been relied upon by the Supreme Court to find a Commerce Clause exemption. Significantly, none of those other statutes or regulations explicitly references either the Commerce Clause or the Constitution. Rather, the language at issue in each of those cases variously authorized the state to engage in regulatory conduct affecting interstate commerce. Similarly, the language of § 7254 allows California to enact laws regarding the content and labeling of fluid milk.

Further, the legislative history of § 7254 demonstrates that Congress did intend to permit California to enforce laws regarding milk content even if those laws affected interstate commerce. When § 7254 was adopted, the federal Nutrition Labeling and Education Act of 1990 (NLEA) prohibited a state from having any composition or labeling standard for any food, including fluid milk, in interstate commerce that was not identical to any existing federal standard for the same product. This prohibition did not apply to intrastate products, only interstate ones. Thus, NLEA preempted California’s more stringent standards for fluid milk that was in interstate commerce. Section 7254 was enacted in response to the NLEA. Having initially exercised its Commerce Clause power to limit the authority of California to affect interstate commerce (the NLEA),

Congress then acted to allow California, directly or indirectly, to regulate fluid milk content and labeling in interstate commerce (§ 7254). Clearly, Congress’s intent was to permit California to promulgate its own milk laws without Commerce Clause challenge.

Respondent further argues that § 7254 is broadly worded to exempt *all* of California’s milk laws from Commerce Clause challenge. The language in § 7254 is very broad. It expressly protects California’s authority, “directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding” fluid milk product content and labeling. Section 7254 covers not only laws that existed when that section was adopted, but new laws as well, whether established directly or indirectly. Indeed, the phrase “directly or indirectly” in § 7254 is so general that it alone could be interpreted to cover all of California’s milk regulatory programs.

The only possible limitation to the scope of § 7254 is that the laws and regulations must relate to fluid milk composition or labeling. In considering this limitation, the Court should accord significant weight to California’s own determination of what laws support its unique fluid-milk content standards. The history of California’s milk standards, basic economic principles, and California judicial and legislative pronouncements all show a close connection between milk pricing laws and fluid milk content. Therefore, the milk pricing regulations are clearly within the scope of § 7254.

Respondent asserts that because California’s milk pricing laws do not discriminate based on residency, petitioners cannot state a claim under the Privilege and Immunities

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Clause. It is well-established that the Privilege and Immunities Clause is violated only if a state law discriminates against nonresidents by depriving them of a protected privilege that is accorded to residents. The founders understood that, to form one nation, states could not discriminate against citizens of other states. A strong union could be formed only if nonresidents entering a state were accorded all the rights of the state's citizens. To carry out this purpose, the Privilege and Immunities Clause requires that a state place the citizens of each state upon the same footing with citizens of other states. Thus, the clause guarantees that, when nonresidents enter a state, they will be permitted to do business on the same basis as the citizens of that state.

The Privilege and Immunities Clause is not applicable to laws that regulate the movement of goods across state lines. Those laws are subject to the Commerce Clause. The primary concern of the Commerce Clause is business that involves more than one state. The core concern of the Privilege and Immunities Clause is the treatment received within a state by the citizens of other states. Thus, the Privilege and Immunities Clause has been applied only to laws that discriminate based on residency. Therefore, the Privilege and Immunities Clause does not apply to laws, such as California's milk pricing regulations, that create classifications based on the location of production. States have broad powers to regulate products produced in-state, as long as the regulations do not unduly burden interstate commerce. In particular, states may regulate milk production. Clearly, these laws may be subject to Commerce Clause challenges but are not subject to scrutiny under the Privilege and Immunities Clause.

Respondent asserts that petitioners improperly attempt to extend the scope of the Privilege and Immunities Clause through the application of the "practical effects" test. Respondent argues that petitioner's extension of the "practical effects" test is not correct for two reasons. First, there are no Supreme Court cases holding that "the practical effects" test is used in determining the application of the Privilege and Immunities Clause. Rather, the cases focus on discrimination based solely on residency. Second, the "practical effects" test is a doctrine developed through Commerce Clause cases, not the Privilege and Immunities Clause. Although the Privilege and Immunities Clause and the Commerce clause have a common origin and a shared vision of federalism, their focuses are quite different.

The two clauses have different aims and set different standards for state conduct. The Commerce Clause acts as an implied restraint upon state regulatory powers. State regulatory powers must give way to the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. The Privilege and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. It is discrimination against out-of-state residents on matters of fundamental concern that triggers the Privilege and Immunities Clause, not regulation affecting interstate commerce. The Privilege and Immunities Clause focuses on comity, not commerce. The Commerce Clause guards against economic protectionism by prohibiting state laws that are designed to benefit in-state economic interests by burdening out-of-state competitors. The "practical effects" test is used to make the often difficult determination of an

undue burden on interstate commerce. It clearly has no connection or application to the Privilege and Immunities Clause.

### SIGNIFICANCE

This case presents a basic question of statutory interpretation. Did Congress intend to insulate California's milk pricing regulations from Commerce Clause and Privilege and Immunities Clause scrutiny? Congressional intent therefore will need to be determined. Interestingly, the justices are not agreed on the utility of consulting a statute's legislative history when interpreting statutory language. This case directly challenges the practice of using legislative history for statutory interpretation. The Supreme Court may provide some insight on this oft-used practice.

The Commerce Clause and the Privilege and Immunities Clause are both raised in this case. The Commerce Clause has been relatively "dormant" in recent Supreme Court jurisprudence. This case presents an opportunity for the Court to indicate whether it will awaken the sleeping giant. Finally, the Supreme Court will revisit the application of the Privilege and Immunities Clause. Traditionally, violations of the Privilege and Immunities Clause arise from discrimination based on one's residency. Now the Supreme Court is asked to extend the doctrine to include discrimination based on the "practical effect" of a state's law.

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