

Direct Democracy, State Governments, and the Re-energized GMO Debate: Implications of California's Proposition 37

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It is often convenient to divide the world into those countries that have been generally accepting of agricultural biotechnology and those that are not. While the debate over biotechnology continues to rage where biotechnology has not been accepted, in adopting countries the debate is often seen as being over. This has been the case for the United States. In fact, the debate over agricultural biotechnology has continued but has not had a high profile. The debate in the United States has been re-energized due to California's 2012 Proposition 37, which would have required labeling of GM-foods in the state. Given the importance of California in both the national food system and national politics, Proposition 37 had national and international ramifications. While Proposition 37 was rejected by a narrow margin, it has spurred other state- and municipal-level initiatives regarding the regulation of biotechnology. This article examines the political dynamics underlying Proposition 37 and the economic implications of similar regulatory initiatives becoming law in the future. The article argues that proposed measures can have a major influence on attempts to regulate in other jurisdictions.

Key words: agricultural biotechnology, California, direct democracy, economics, labeling.

Introduction

Genetically modified crops were first produced commercially in the mid-1990s. The use of the technology in food production is controversial; in all countries some consumers eschew the technology, either wishing it was banned or for food where the technology has been used to be clearly labeled. Those with strong anti-biotechnology preferences are, however, typically a relatively small subset of consumers—albeit with strong preferences—whereas the majority of consumers are relatively indifferent or unconcerned regarding the use of the technology (Gaisford, Hobbs, Kerr, Perdakis, & Plunkett, 2001). In the first few years after initial commercialization of GM crops (canola, cotton, soybean, and maize), campaigns were launched by consumer and/or environmental groups in many countries that sought to ban the technology or fetter its use (Kalaitzandonakes, Marks, & Vickner, 2004). A few product casualties of these campaigns have included Calgene's Flavr Savr tomato, NewLeaf potato, and Triffid Flax which—despite receiving approval for food and feed safety—have been removed from the market (Ryan & McHughen, 2014).

The efficacy of these campaigns, however, varied from country to country and by the early 2000s their results were manifest in public policy surrounding genetically modified organisms (GMOs; Isaac, 2002). In the European Union (EU), for example, the public

policy debate swung against the acceptance of products derived from the use of biotechnology in the food system (Perdikis, 2000), resulting first in a ban and subsequently a mandatory labeling regime combined with a strict system for approving new GM crops (Viju, Yeung, & Kerr, 2012). On the other hand, the United States moved toward GM crops not being considered novel, and normal regulatory approval systems were applied. No GM labeling of food was required, and large-scale adoption of GM corn and soybeans took place. These GM crops are widely present in the food system.

The public policy debate over GM crops has continued to rage, primarily in developing countries (Williams, Smyth, & Kerr, 2013), but has also remained robust in the EU. In the United States, while the controversy never completely went away, anti-GM protagonists were marginalized, did not garner much attention from the mainstream media, and were generally perceived as a spent force. The public-policy landscape is, however, far from static and the GM debate returned to the center stage of the public-policy debate in the United States with a ballot initiative in California—Proposition 37, the 'Mandatory Labeling of Genetically Engineered Food Initiative' (or Prop 37 as it would commonly be known) during the 2012 US election. Prop 37 eventually failed, but the result was sufficiently close to warrant an investigation into what it would have meant if it—or

similar future initiatives—passed, how the initiative came about, and the factors that affected the eventual vote.

This article argues that the high profile garnered by Prop 37 re-energized the debate over GM foods in the United States. It discusses a range of anti-GM initiatives working their way through various public-policy avenues to demonstrate how legal processes are used to advance particular views on the acceptability of GM foods in the food system. Even proposed measures concerning the labeling of GM foods that are not ratified can influence policy in other jurisdictions. Given that there is now more prominent activism around GM labeling, as well as a spate of legislative initiatives, suggests that this is not an issue that will quickly fade from the public-policy debate.

What is Special about California?

California is the most populous state in the United States, with more than 38 million residents. The economy of California is larger than all but eight countries (United States, China, Japan, Brazil, Germany, France, and Italy). California is sometimes characterized as the food hub of the United States, where trends in food consumption arise (Linnekin, 2010). California is the number one state in cash farm receipts, with 11.6% of the US total. Approximately 73% of the state's agricultural revenues are derived from crops, while livestock commodities generate 27%. The state produces nearly half of US-grown fruits, nuts, and vegetables. It has a high concentration of both organic and conventional produce operations as well as numerous livestock operations (California Department of Food and Agriculture [CDFA], 2013). It exports these products to other states, Canada, and other countries.

Due to California's large population and commensurate number of Representatives in the US Congress, it exerts influence over federal policies that other states cannot. In some cases, laws passed in California have the effect of influencing the regulatory developments in specific policy areas in other states as well as at the federal level. Sometimes federal legislation uses laws designed in the state as a guide. In 1932, US Supreme Court Justice Louis Brandeis labeled state-level policy making in the United States as 'laboratories of democracy.' He stated that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (*New State Ice Co. v. Liebmann*, 1932). If states are able to be experimental laboratories where

varying combinations of policy can be tried out, then the federal government can use the parts of policy that work and discard the aspects of the policy that do not. In some cases, states will pass legislation that encourages federal agencies to adopt policies if state electorates do not think the federal government is moving fast enough on legislating for a particular issue. For example, in 2006, California sued General Motors and other automakers regarding the carbon emissions of their products, reasoning that that auto emissions contribute to global warming. This lawsuit was based on the public nuisance principle and argued that automakers were violating federal and state laws (Schwartz & Goldberg, 2006). The lawsuit was dropped after the federal Environmental Protection Agency (EPA) enacted carbon emission standards, forcing automakers to adhere to new national standards. In an earlier case in 2004, California forced all automakers to strengthen carbon dioxide emissions standards or face litigation (Gullo & Ohnsman, 2006). Other states soon followed suit, and passed similar legislation.

The "People's Veto"

A somewhat unique feature of California's system of government is the referendum ballot system. The right to hold referendums—meaning the practice of allowing citizens to vote on legislation directly through ballots, thereby circumventing a legislature's role in policy making—was included in the Constitution of California in 1849. California is one of 24 states (along with Washington D.C.) in the United States that allows for some form of direct democracy. This system includes initiatives and referendums collectively known as 'ballot measures' or propositions. A proposition may be introduced by the state legislature or by a petition signed by members of the public under the initiative system. Propositions can cover any policy issue from repealing the death penalty to pollution controls. There are three mechanisms of direct democracy in California: 1) mandatory referendum (the state legislature passes an act, signed by the governor, proposing a constitutional amendment, submitted to the voters at the next election); 2) optional referendum (laws that are already passed can be repealed by the voters; 5% of population signatures must be collected to go forth with this type of referendum); and 3) initiative referendum or the "people's veto."

The initiative referendum is a proposed law (a proposition) that is written as a petition and submitted to the Attorney General along with a submission fee. Eight

percent of the registered voters' signatures must be collected for a constitutional amendment and 5% for a statute. Signed petitions are then sent to the Secretary of State of California for signature verification. In order for a proposition to succeed, the number of 'yes' votes must exceed the number of 'no' votes. Prior to voting, registered voters receive "voter information guides" outlining in detail what each measure included on the ballot is proposing. Each measure listed in the guide is accompanied by an impartial analysis of the proposal, and the potential cost to taxpayers is prepared by the Legislative Analyst's Office. Proponents and opponents prepare arguments in favor and against the proposed amendment, which are included in the information guide (California Secretary of State [CSS], 2012). The Attorney General or the legislature prepares the text and a summary of the proposition. Given California's influence on federal politics and the use of the proposition form of direct democracy to legislate on controversial issues, interest groups play a large role by contributing to lobbying, litigation, and funding advertisements to influence voters and elected officials. If a proposition is passed, it becomes law. Unless otherwise stated, under the California Constitution a proposition introduced through an initiative referendum cannot be amended by the California legislature. It can only be amended through another initiative proposition. Hence, the initiative referendum aspect of policy making in California opens the door to policies that may take a different shape if they were introduced and developed from within the state legislature.

The Genesis and History of Proposition 37

To fully understand the political importance of Prop 37, it is necessary to put this ballot initiative within the context of previous initiative referendums that focused on environmental and health issues. To a considerable degree, because of its importance and the use of initiative referendums, California has become the battleground in the United States where interest groups (e.g., non-governmental organizations, industry associations) can push their political agendas in a formal way. Proposition 65, formally known as the 'California Safe Drinking Water and Toxic Enforcement Act' (or Prop 65), was introduced on the 1986 ballot by a voter initiative and passed (63% yes; 37% no). It amended the California Health and Safety Code and the impetus behind it was a perceived failure of government to protect citizens from toxic substances in products and the environment. The burden of proof is placed on the manufacturer of the

product or the business selling the product as to the safe level of exposure to chemicals in the product. If a product or area houses or contains a harmful or carcinogenic substance found on the harmful chemicals list, it must carry the following label:

WARNING: This product [or area] contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

A review of the summary of settlements brought by private plaintiffs in light of Prop 65, from January 1, 2000 to December 31, 2011 (California Attorney General, 2012) reveals that almost US\$160 million was paid out by businesses in violation of Prop 65 in just over 2,300 separate lawsuits. Prop 65 did not repeal, but rather complemented, product liability lawsuits in that it includes language permitting the legislature to amend it (Caso, 2012). Under products liability, a chemical that causes a provable harm would assuredly be found to have a product defect for which compensation under State of California tort law would provide compensation. Through Prop 65, the liability aspect expanded to labeling and injunctions against unlabeled (but covered) and mislabeled chemical products (D. Kershen, personal communication, April 25, 2013). The model of Prop 65 (initiative referendum; public collection of damages) has been used to fashion other pieces of legislation in California that further entrench the "right to know" mandate regarding substances perceived of as harmful to humans and/or the environment. One such effort is Prop 37.

In November 2011, California lawyer James Wheaton submitted a letter requesting a ballot title for a proposed measure requiring foods with GM ingredients to carry a mandatory label. The Attorney General issued the ballot title and summary in January 2012. It was titled the 'Mandatory Labeling of Genetically Engineered Food Initiative.' Since this was a proposed statute, this ballot initiative required 504,760 valid signatures (5% of the population) to have the petition included on the ballot as a proposition. Approximately 970,000 signatures were collected. The petition was submitted to the Attorney General and the signatures were validated in June 2012. The initiative was certified for the November 2012 ballot in June 2012 (Ballot*Pedia, 2013).

Prop 37 concerned the mandatory labeling of foods containing GM ingredients. It also outlines limitations on the use of the word "natural" on processed food

products sold in California. It requires that raw and processed food sold in California containing GM ingredients carry a label. Article 6.6 of the Act read:

(a) Commencing July 1, 2014, any food offered for retail sale in California is misbranded if it is or may have been entirely or partially produced with genetic engineering and that fact is not disclosed:

(1) In the case of a raw agricultural commodity on the package offered for retail sale, with the clear and conspicuous words “Genetically Engineered” on the front of the package of such commodity or, in the case of any such commodity that is not separately packaged or labeled, on a label appearing on the retail store shelf or bin in which such commodity is displayed for sale;

(2) In the case of any processed food, in clear and conspicuous language on the front or back of the package of such food, with the words “Partially Produced with Genetic Engineering” or “May be Partially Produced with Genetic Engineering.” (California Voter Information Guide, 2012)

There are several exceptions to this rule. Certified organic products, as well as other products that may unintentionally contain GM ingredients are exempt. Further, animals that are injected or fed with GM material (but not themselves GM) are excluded from labeling. GM processing aids and enzymes are also not covered by the labeling requirement (California Attorney General, 2012). If a product does not fall into the aforementioned grouping and the producer does not want the product to carry said label, it must produce sworn statements affirming the absence of GM in processing from every supplier participating in the supply chain. Like Prop 65, Prop 37 allows for private citizens to lodge a formal complaint (and a lawsuit) if a food product is not properly labeled. If passed, it was also presumed that Prop 37 would overtake Prop 65 as a source of consumer litigation in California (Watson, 2012). San Francisco lawyer Michael Jacob Steel has defended several clients against Prop 65 lawsuits. He suggests that Prop 37 would lack the safeguards included in Prop 65 and gives “citizen enforcers more incentives to sue...,” enabling plaintiffs to recover not only attorney fees but the costs of investigation and prosecution actions as well (Watson, 2012).

In contrast, in North America, both the US Food and Drug Administration (FDA) and the Canadian Food Inspection Agency (CFIA) state that mandatory labels should be reserved for those products that carry a documented health risk (e.g., allergens) or represent some substantive change in nutritional composition. Labels, by law, cannot be misleading.¹ The Washington Association of Wheat Growers (WAWG) suggests that mandatory labeling of GM foods “that are indistinguishable from foods produced through traditional methods would mislead consumers by falsely implying differences where none exist” (WAWG, 2013). Independent agencies in both North America and the EU agree that there is a comprehensive body of knowledge that adequately addresses the food-safety issues pertaining to GM crops (European Commission, 2010; National Research Council [NRC], 2004).

Prop 37 also states that the certified organic industry in California is threatened by genetic contamination of GM crops, as co-mingling erodes consumer confidence in the certified organic label and threatens genetic diversity.

Section 1. (j): Organic farmers are prohibited from using genetically engineered seeds. Nonetheless, these farmers’ crops are regularly threatened with accidental contamination from neighboring lands where genetically engineered crops abound. This risk of contamination can erode public confidence in California’s organic products, significantly undermining this industry. Californians should have the choice to avoid purchasing foods whose production could harm the state’s organic farmers and its organic foods industry (KCET, 2012).²

1. See ‘The Fair Package and Labeling Act’ (United States; <http://www.ftc.gov/os/statutes/fplajump.shtm>) and ‘The Consumer Packaging and Labeling Act’ (Canada; <http://laws-lois.justice.gc.ca/PDF/C-38.pdf>). A food is misbranded if its labeling is misleading [21 U.S.C. See: § 343(a)(1); <http://www.law.cornell.edu/uscode/text/21/343>]. It was, however, the claim of proponents of Prop 37 that “natural” was misbranding, and hence, that it was addressing mislabeling.
2. In the exemptions outlined above, accidentally mingled organic crops are exempt from the requirement to label as being genetically modified. The exceptions come first in the proposed Act—meaning whatever comes after does not apply to the exempted product. Organic growers whose products were accidentally co-mingled would not lose their organic certification.

Table 1. Polling results for Proposition 37 throughout 2012 (in percentages).

	Pre-election	October 25	October 30	November 6 (election day)
Yes	67	44	39.1	46.9
No	20	42	50.5	53.1
Other / undecided	13	14	10.4	

Sources: Haro Von Mogel (2012), Herdt (2012), and Lifsher (2012)

It also includes text that further links it to Prop 65, as it claims GM crops cause environmental harm (through the proliferation of herbicide-resistant weeds; Section 1[g]). The language is such that it claims consumers have a right to know if they are purchasing products that may harm California's economy and environment in addition to food products that some claim can be harmful to human health—but with no requirement of scientific evidence to support the latter two claims.

Prop 37 was defeated but if it had passed, it would have become part of the California Health and Safety Code, alongside Prop 65. Table 1 outlines public polling statistics at various dates during 2012.

Advertising was prominent in the campaign—on both sides. The “No” side was able to collectively mobilize \$46 million to be spent on advertising targeting voters. The advertisements for the “No” side ran for 6 weeks, while the TV ads for the “Yes” side ran only 2 weeks. Ads for both the “Yes” and the “No” sides ran nationally. It is somewhat unusual for a state-level vote to be advertised nationally. Since GM labeling, however, is an ongoing national issue in the United States, and California is the testing ground for innovations in policy (most notably environmental policy), it is closely watched by other states. Hence, it was important for both sides to make sure their messages were heard across the country. Although Prop 37 is not the first state-level initiative referendum regarding mandatory labels on GM products (Oregon's initiative referendum Measure 27 failed to pass in 2002), it is uniquely significant because of California's influential position in environmental and product labeling policy-making in the United States.³

These propositions essentially start with very simple and broadly saleable principles such as “we have a right to know” or “reduce risk of harm.” Time and more detailed information (in some cases through advertising) can serve as powerful factors in influencing public opinion. The simplicity and salability of the initial message cannot be understated. It is an incredibly

effective technique to ensure immediate buy-in by the public. As Wheaton (2013) states, “several California statutes have become increasingly prominent weapons in environment groups' arsenals.” After introduction of this type of proposition to the ballot, it appears that it is up to critics and non-supporters to effectively demonstrate the fallacies or deficiencies of such initiatives. In the case of Prop 37, the non-supporters effectively mobilized through media campaigns to defeat the proposed legislation. The “No” side used the simplicity of another message; an economic argument that Prop 37 would ‘cost’ consumers, retailers, and producers in California (Alston & Sumner, 2012; Marsh et al., 2013). This was an effective campaign that quickly turned opinion around and led to the defeat of Prop 37.

Although Prop 37 failed, attempts at legislation to make it mandatory to label foods with GM ingredients continue. In California, Assembly Bill (AB) 88—The Food Labeling of Genetically Engineered Food—was introduced in 2011 to the legislative assembly. AB 88 was limited to a labeling requirement for GE fish and would deem a food misbranded if a fish or fish product that contained GE materials was not properly labeled. It initially passed in the California Health Assembly Committee but failed to pass in the California Appropriations Assembly Committee in 2012. If it had passed, it would have become part of the Health and Safety Code related to labeling (California Legislative Information, 2012).

Prop 37 is not the first effort to require mandatory labels on food products containing GM ingredients or categorize GM ingredients as potentially hazardous substances. Since 2001, 26 states across the United States have attempted to enact legislation to force food processors to label products containing GM ingredients through the introduction of bills in legislatures (Pew Initiative on Food and Biotechnology, 2007).⁴ In 2005, Alaska was the first US state to ratify legislation to label GM foods (specifically GM salmon) if and when it is commercialized in the United States.⁵ In early June 2013, the Connecticut House voted 134 to 3 in favor of

3. Another (reported) key influential factor is tied to an online debate that was facilitated and hosted on San Jose's Mercury News on October 23, 2012. The debate brought together key representatives of the “Yes” side and the “No” side and invited the public to debate the merits and misgivings of Prop 37. The “swing” in public opinion has been connected to the outcomes of this particular online debate. See Lifsher (2012).

4. See <http://www.righttoknow-gmo.org/states> for a summary of state initiatives.

the HB 6527 GM labeling bill. Despite state legislature's approval of the new bill, it represents a significant weakening of the original proposal. It introduced a 'bipartisan compromise' requiring that four additional states—one of which must border Connecticut—pass similar legislation as well in order to 'trigger' the state's labeling requirement. An additional caveat is that the aggregate population of any combination of such states exceed 20 million people.⁶ On June 12, 2013, Maine's House passed LD 718 by a vote of 141 to 4. There have also been several attempts at having GM products labeled through US federal legislation.⁷

What if Proposition 37 Had Passed?

It is evident, by the current activity in other states and at the federal level that the issue of GM labeling is not going away any time soon. Thus, it is worth asking what the implications would be if Prop 37 (or any similar legislation) had passed and become law. GM labeling requirements become an issue both with regards to interstate commerce and the international trade obligations of the United States. Prop 37's provisions would apply to both products moving to California from other states and moving to California either directly or indirectly from other countries. If they did not comply with the labeling requirement, they could either be denied entry to California or subject to private-sector lawsuits. Given the size of the California market, it is not one that could easily be ignored by either out-of-state or international suppliers.⁸ It may be that retailers in California also fear litigation if they sell out-of-state or out-of-country food that is not labeled and, as a result, would no longer purchase such products for sale. In effect, these are barriers to interstate commerce and international trade.

It has long been recognized that labeling requirements can have significant negative impacts on inter-

jurisdictional movements of goods, including international movements (Gaisford & Kerr, 2001; Hobbs, 2001; Hobbs & Kerr, 2006). In general, "consumers' right to know" has not been a widely accepted underpinning of labeling regulations. Instead, the premise for labeling requirements is based on the "consumers' need to know." For example, consumers with allergies need to know if common allergens such as peanuts are contained in the product because there is a scientifically recognized risk. Similarly, consumers need to know if products contain alcohol because there is a risk to, for example, to those who are pregnant.

Consumers' right to know has not been accepted because the simple act of labeling can impart the impression that there is a scientific risk when one has not been identified. Potential consumers may reason, "why would the government require labeling if there is no problem? To be on the safe side, I am not going to buy this product." Hence, an unwarranted negative economic impact arises from labeling (Alston & Sumner, 2012; Marsh et al., 2013). Products that are known to be unsafe would not be licensed to be in the market, so there is no need to label those products that are in the market. The exception is products that are "hazards for some" subset of the general public, such as those with allergies or who are pregnant as suggested above. Outside the identified subset of the population, the product is safe to consume (Isaac, Phillipson, & Kerr, 2002). There is no known scientific evidence indicating that GM food is harmful to human health. It is also important to note that there is nothing to prevent those who wish to sell GM free products from voluntarily labeling as such.

If Prop 37 had passed, there would inevitably be issues pertaining to interstate commerce, as labeling

5. On January 28, 2013, House Joint Resolution (HJR) 5 to "Oppose Genetically Engineered Salmon" was introduced to the Alaska Legislature that "opposes AquaBounty's petition [to the FDA] to produce AquaAdvantage Salmon, a genetically engineered salmon" and, if, "despite strong environmental and human health concerns," GMO salmon is approved by the FDA, calls for "product labeling requirements should include the words "Genetically Modified" prominently displayed on the front of the product's packaging" (Alaska State Legislature, 2013; Right to Know GMO: A Coalition of States, 2013).

6. http://www.ctnewsjunkie.com/ctnj.php/archives/entry/lawmakers_resolve_differences_over_gmo_labeling

7. US Representative Dennis Kucinich (Democrat, Ohio) introduced three pieces of legislation into the US Congress: The Genetically Engineered Right to Know Act, The Genetic Engineered Food Safety Act, and The Genetically Engineered Technology Farmer Protection Act. Kucinich has repeatedly tried to pass these same three pieces of legislation in 2000, 2003, 2006, 2008, 2010, 2011, and 2012, yet all attempts have failed (GovTrack.us, 2013). In 2011, a group of stakeholders presented the FDA with a petition demanding the FDA issue new regulations for foods that contain GM ingredients. In March 2012, 55 members of Congress, led by California Senator Barbara Boxer (Democrat), signed a petition demanding the FDA label GM foods. Later that month, more than 1 million comments were submitted by members of the public to the FDA in support of this effort (Organic Monitor, 2012).

8. In contrast to a small market such as, for example, Vermont.

applies to products originating elsewhere in the United States. The “Dormant Commerce Clause Doctrine” is an implied provision of the US Constitution that bars local and state governments from “restrict[ing] trade in a way that ultimately impacts interstate commerce[,] even when the intention of the political entity enacting the law is to effect a change solely within the boundaries of its particular jurisdiction” (Linnekin, 2010). The Doctrine prohibits states from unduly burdening interstate commerce and has been referenced in terms of what could be used as grounds to sue in California if it decided to pass Prop 37. Thus, future laws similar to Prop 37 could be challenged under the Doctrine. Clarity would have to await a challenge to a future labeling restriction in the courts.

What about other states that have attempted to pass similar GM labeling legislation? In the case of Vermont, for example, companies were threatening to sue long before the labeling legislation got anywhere. Vermont, however, lacks the economic and political clout of California. Since January 1, 2013, more than 35 bills have been introduced into 21 different legislatures across the United States.⁹

Courts have also ruled that forcing companies to label GM products violates their 1st Amendment right of free speech. In a 1996 case, a federal appeals court blocked a Vermont law that required dairy producers to label milk from cows that had been treated with a growth hormone (recombinant bovine somatotropin [rBST]) made using genetically engineered bacteria (Runge & Jackson, 2000). The hormone helped cows produce more milk, but the FDA determined that the milk itself was the same as milk from untreated cows. Since the law required labels to contain information that was not “material” to the product, the 2nd Circuit Court of Appeals ruled in a 2-1 decision that it was unconstitutional.¹⁰

Prop 37—or a similar future labeling law—would also violate the international trade commitments of the United States. Further, these are the commitments on which the United States has based its arguments in its long-running disagreement with the EU over the governing of international trade in the products of biotechnology (Isaac & Kerr, 2007). There are two sub-agreements of the World Trade Organization (WTO)

that apply: (1) the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and (2) the Agreement on Technical Barriers to Trade (TBT).

The SPS pertains to products where there is a risk to human health and the environment. Trade barriers—including those arising from mandatory labeling—are only allowed if there is a scientific justification and a negative risk assessment. In the case of Prop 37, the justification was “consumers’ right to know” and no scientific evidence was put forward regarding a threat to human health or the environment, nor was a risk assessment done—although food safety issues and risks were both implied by those supporting Prop 37. Further, those supporting Prop 37 used the argument that GM crops were a threat to California’s certified organic industry. Under the SPS, socioeconomic considerations are not allowed to inform the risk assessment (Hobbs, Hobbs, & Kerr, 2005).¹¹ In addition, in order for products to be commercialized, US federal regulators must first approve them. Hence, a foreign producer of GM agricultural products forced to label its products as GM under Prop 37 could claim that having to do so represented an unjustified trade barrier and could take the case to the WTO disputes system. Before that point was reached, however, the US government would likely use its powers to make treaties to nullify the California law.

In the case of the TBT, which deals with, among other things, the use of labeling when non-SPS issues are involved, Prop 37’s provisions run contrary to international commitments. The TBT allows labeling to be mandated for imports, but only under a limited set of circumstances (Hobbs, 2007). Labeling is allowed for novel products—products that are “not like” existing products. However, to be considered a different product, the end product must be physically discernible from what was already in the marketplace. What this means is that labeling requirements—which constitute a trade barrier—cannot be required based on how the product was produced, commonly known as production and processing methods (PPMs; Kerr, 2010). Since genetic modification is a production method, making labeling mandatory is an unjustified trade barrier. Further, in most cases, GM products are not physically distinguishable from their non-GM counterparts. Of course, not allowing labeling on the basis of PPMs has been a major contentious issue in international trade since the end of the Uruguay Round in 1995 when the TBT was approved and the WTO came into being. It extends to

9. Summarized from *Right to Know GMO* (2013).

10. See *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996; <http://www.law.uh.edu/faculty/thester/courses/Emerging%20Tech%202011/Amestoy.pdf>).

11. This is a point of disagreement with the EU.

issues such as child labor, animal welfare, environmentally sustainable production, etc. Developing countries have, however, been adamant that this provision of the TBT not be changed, fearing that developing countries would impose technologically-based trade barriers on their products (Kerr, 2010). Thus, labels based on PPMs such as genetic modification would be considered unfair trade barriers and would not withstand a challenge by the WTO.

Summary and Conclusions

Across the globe the debate over the desirability of GM food and how it should be regulated continues to rage. In the United States, which is both a major adopter of biotechnology in food production and the major developer of new GM products, the debate has been much more muted than in many other parts of the world. The consumption of GM food is widespread and appears generally accepted. After almost 20 years of a large-scale “experiment” among the population as a whole, there is no scientific evidence of harmful effects of GM crops on human health or adverse consequences for the environment.

The opposition to GM crops has, however, never entirely gone away in the United States, but the issue has been largely “below the radar” for most consumers, the press, and policy makers. While science-based decision-making has been enshrined in public policy making pertaining to food safety, it does not mean that all consumers are willing to defer to decision-making on the basis of scientific evidence and scientific experts (Smyth, Phillips, & Kerr, 2009). Some consumers wish to have the option—the right—to choose not to consume GM foods and to put forward legislation to meet these desires through direct democratic initiatives. At the moment they have that choice for a range of agricultural products, but not all, by being able to select organic products. The “organic option” may be a reason why the GM food debate in the United States has, until recently, been relatively muted.

In the debate over GM foods, however, a large vested interest has arisen in the form of a contingent of the organic industry. One interpretation of the position held by this segment is that by labeling GM foods, consumer awareness will be raised, and more consumers will choose to purchase organic (i.e., GM free products). As many consumers in the United States may not know they are consuming GM foods, labeling may increase awareness to the benefit of the organic industry. It is the implicit coalition of consumers that wanted the “right to

know” what they are consuming and a mobilized segment of the organic industry that were able to raise the profile of the issue in California. While it would appear that a similar law would be contrary to interstate commerce provisions and the international trade commitments of the United States, any attempt to nullify a GM labeling law would likely be met with virulent resistance. The resulting media attention would further energize the debate.

This article has demonstrated that it is important to understand how ballot initiative campaigns are organized, and in particular the role that modern social media can play in food-labeling campaigns. In the case of Prop 37, the “No” forces appear to have been able to mobilize sufficient support through conventional methods such as advertising by framing the labeling debate in terms of costs passed onto consumers, producers, and retailers. Since January 1, 2013, more than 35 bills for labeling of GM foods have been introduced to state legislatures across the United States. The effort to legislate mandatory labels on foods containing GM ingredients is far from over. Although defeated, Prop 37 was highly visible in the media and has been influential in re-energizing the GM debate in the United States. In combination, the ‘California Effect’ and its unique direct democratic engagement model has served to push the GM labeling issue back into the limelight.

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