Mississippi recently passed a law that has the effect of banning terms like "veggie burger." It's easy to imagine other states passing similar laws. From an environmental view, that's problematic, because beef in particular is connected with much higher greenhouse gas emissions than plant products. It's not just the methane from cow-burps, it's also all the carbon emissions connected with growing corn to feed the cattle. But in addition to its environmental drawbacks, the Mississippi law is subject to severe constitutional problems.

I had to do a little digging to find the law itself. It's an amendment to a law requiring truthful labeling of meat products. It reads as follows: "A food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived shall not be labeled as meat or a meat food product. A plant-based or insect-based food product shall not be labeled as meat or a meat food product." The goal is to eliminate terms like "veggie burger" or "soy hotdog", on the theory that burgers and hotdogs are "meat food products."

The most obvious stumbling block is the First Amendment. Laws limiting commercial speech such as advertising and food labels must pass what's called the *Central Hudson test*, after the case where it was created. The Court explained that test as follows:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest."

Using terms like "veggie burger" or "meatless hot dog" does concern a lawful activity. The placement of the provision in the state's food labeling statute suggests that the justification for the statute is supposed to be the misleading nature of these terms. Are terms of that kind misleading? That doesn't seem plausible. Simply labeling a product made from soy or black beans as a "burger" or "hotdog" might well confuse consumers. But adding terms like soy or veggie or meatless to the product name seem to counter any consumer confusion. Maybe the state can gin up some evidence that some clueless people think that a "veggie burger" or "meatless burger" really is made of meat. But it's awfully hard to believe there is any significant number of those people.

At least judging from the press reports, the supporters of the statute did not defend it as a way to protect consumers who might think that a "veggie burger" or "meatless hot dog" was made with meat. Instead, the primary emphasis seemed to be on protecting the meat industry. For instance, in arguing for a similar labeling ban at the federal level, Mississippi's agricultural commission said, "As we have seen with many foods in the past, label names allowed to be on new foods can be detrimental to the foods they attempt to imitate, emulate, follow or profit from." This justification for the statute offers the irony that the more truthful the labels are – the more a "veggie burger" tastes like a beef burger – the more objectionable the labels become to the meat industry, because consumers who try the products are more likely to stick with them.

The *Central Hudson test* does give the state some room to argue that it's harmful to the state's meat industry for sellers to inform consumers they are buying something similar to a familiar meat product. Under *Central Hudson,* the state would then have to show that it has a "substantial" interest in protecting its meat industry from competition and that the new labeling law "directly advances" that interest and is "not more extensive than necessary to serve that interest." Courts have tended to scrutinize regulations of truthful information quite closely and have struck down laws more plausible than this one.

Even apart from the First Amendment problem, there's a reasonable argument that the statute unconstitutionally interferes with interstate commerce. A state law is unconstitutional if it discriminates on its face against interstate commerce, if it has a discriminatory effect or motive, or if it unduly burdens interstate commerce. As discussed above, the reason for the law seems to have been protecting the state's meat industry. Indeed, the moving force behind the rule seems to have been the Mississippi Cattlemen's Association. Thus, the rule seems to have designed to protect local producers from a competing product sold nationally. That seems like a plausible basis for a claim of discrimination against interstate commerce.

Even if a court rejects the claim of discriminatory intent, there still seems to be a viable claim that the law unconstitutionally burdens interstate commerce. The test for that is whether the harm to interstate trade clearly outweighs the benefits of the law to the state. Given that meat-substitute products are prepackaged and sold nationally, the burden of having to sell under a different product name in a small state like Mississippi seems quite substantial. Firms have invested substantially in promoting their product names, and not being able to use the same name in a single jurisdiction undermines that investment. It also involves the expense of

producing separate packaging and dedicated distribution channels for a single jurisdiction. And given the tiny market share of these products compared to meat, the state’s interest doesn’t seem all that strong.

I’m aware of a certain irony in invoking these constitutional doctrines on behalf of an environmentalist cause. In general, liberals have been skeptical of constitutional protections for commercial speech, and industry often uses the rules against interference with interstate commerce as a way of attacking environmental regulation. My own view has long been that commercial speech and interstate commerce doctrines are defensible but have often been used too expansively. These doctrines should not be used to invalidate laws designed to further the public interest. But any public interest justification for the Mississippi law seems tenuous.

Overall, if I were a litigator, I wouldn’t take Mississippi’s case on a contingency fee. The odds don’t seem good that the law will survive constitutional scrutiny. That’s just as well. It’s harmful to consumers who might benefit from healthier products and to the environment. Good riddance.