Testimony of Chad DeVeaux,
Atkinson, Andelson, Loya, Ruud & Romo

No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders

July 25, 2017

U.S. HOUSE OF REPRESENTATIVES JUDICIARY SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
Public Hearing on H.B. 2887
Testimony of Chad DeVeaux
July 25, 2017

Mr. Chairman, Ranking Member Cicilline, and distinguished Members of the Committee:

It is a great honor to appear before you today in support of the No Regulations Without Representation Act of 2017.

My name is Chad DeVeaux. I am an attorney at Atkinson, Andelson, Loya, Ruud & Romo in suburban Los Angeles. I specialize in constitutional law, particularly the field of horizontal federalism — the laws governing the delineation of powers between the states. In addition to seven years' experience as a constitutional litigator, I also spent seven years as a law professor, specializing in federalism and the separation of powers. I have litigated multiple cases concerning the dormant Commerce Clause and written extensively on the subject — particularly its application to nationwide class actions, agricultural regulations, and marijuana laws.[1]

"No taxation without representation" — the paradigmatic mantra of the American Revolution — also constitutes an important foundational premise of the Constitution's Commerce Clause. Under the Articles of Confederation, States — beholden only to their own constituencies — routinely engaged in economic warfare with their neighbors. James Madison condemned such "Trespasses of the States on the rights of each other," particularly "[t]he practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations."[2] This spurred "mutual jealousies and aggressions" triggering an ever-escalating series "rivalries and reprisals"[3] — "retaliat[ory] regulations, not less expensive & vexatious in themselves."[4] As Justice Stevens observed, the Commerce Clause "was the Framers' response to the central

[1] *See* Chad DeVeaux, *One Toke Too Far: The Demise of the Dormant Commerce Clause's Extraterritoriality Doctrine Threatens the Marijuana Legalization Experiment*, 58 B.C. L. REV. 953 (2017) (arguing that the Commerce Clause prevents states from regulating extraterritorial marijuana transactions); Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995 (2011) (arguing that the Commerce Clause bars the certification of multi-state class actions under a single state's law); *see also* Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (Congress did not exempt California's Department of Food and Agriculture from dormant Commerce Clause restrictions allowing the agency to enact protectionist regulations or project its regulations into neighboring states); Swords to Plowshares v. Kemp, 423 F. Supp.2d 1031 (N.D. Cal. 2005) (holding that Presidio of San Francisco is a federal enclave outside California's regulatory authority); Hillside Dairy, Inc. v. Kawamura, 317 F. Supp.2d 1194 (E.D. Cal. 2004) (striking down California milk regulation as violative of dormant Commerce Clause).
[2] JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, *in* JAMES MADISON: WRITINGS 69, 70 (Jack N. Rakove ed., 1999) (quoted by Barry Friedman, Daniel T., Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1885 (2011)).
[3] Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 521–22 (1935) (quoting LETTER FROM JAMES MADISON TO J.C. CABELL (Feb. 13, 1829), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478, 547–48 (Max Farrand ed., 1911)).
[4] MADISON, *supra* note 2, at 71 (quoted by Friedman & Deacon, *supra* note 2, at 1885).

problem that gave rise to the Constitution itself."[5] The principal objective of the Constitutional Convention was the establishment of a nationwide free-trade zone.

But as Judge Richard Posner recently observed, the door to rivalries and reprisals can be opened by extraterritorial legislation projecting one State's legislation into neighboring states — even when the law presents "no outright discrimination in favor of local business."[6] Such paternalistic laws are inherently undemocratic because compliance costs "fall on" the citizens "in other states, who have no voice in the politics of the [enacting] state."[7] As the Fourth Circuit noted, "extraterritorial laws disrupt our national economic union just as surely as [protectionist] ones" because "one extraterritorial burden can easily lead to another. When one state reaches into another state's affairs or blocks its goods, 'the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.'"[8]

For this reason, until recently our courts have recognized that even in the absence of congressional action, the Commerce Clause of its own force — the so-called dormant Commerce Clause — prohibits states from directly regulating extraterritorial conduct by "preclude[ing] the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[9] Such regulation "'exceed[s] the inherent limits of the State's power.'"[10] The Clause protects "the autonomy of the individual States within their respective spheres" [11] by dictating that "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted." [12] This so-called extraterritoriality doctrine dictated that "a State may not impose economic sanctions on violators of its laws with the intent of changing [such actors'] lawful conduct in other States" and a state may not "punish [an actor] for conduct that was lawful [in the state] where it occurred."[13] I have referred to this as the Commerce Clause's *sovereign-capacity function*.[14]

From its inception, the extraterritoriality doctrine — which admittedly imposed more modest limitations on state extraterritorial regulatory authority than the bill considered today — has faced unrelenting academic attack.[15] Critics charged that the doctrine "is a relic of the old

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[5] Equal Emp't Opportunity Comm'n v. Wyoming, 460 U.S. 226, 244, (1983) (Stevens, J., concurring).
[6] Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 665 (7th Cir. 2010).
[7] *Id.*; *accord* Edwards v. California, 314 U.S. 160, 174 (1941).
[8] Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 490 (4th Cir. 2007) (quoting *Baldwin*, 294 U.S. at 521–22).
[9] *Id.* at 642–43.
[10] *Id.* at 643 (quoting Shaffer v. Heitner, 433 U.S. 186, 197 (1977)).
[11] Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).
[12] Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 165 F.3d 1151, 1153 (7th Cir. 1999).
[13] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571–73 (1996) (citing *Healy*, 491 U.S. at 335–36).
[14] DeVeaux, *One Toke Too Far*, *supra* note 1, at 961; DeVeaux, *Lost in the Dismal Swamp*, *supra* note 1, at 1006.
[15] Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 1008 (2013); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001); Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1908 (1987); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 863 (2002); Allen Rostron, *The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law*, 2003 L. REV. MICH. ST. U. DET. C.L. 115, 116; Recent Case, *Dormant Commerce*

world with no useful role to play in the new."[16] Yet, despite these challenges, the lower federal courts dutifully adhered to the doctrine for nearly three decades.[17] But in recent years cracks began to develop in this resolve, as jurists, citing academic criticism of the extraterritoriality doctrine began to question its viability in dicta and dissent.[18] Finally, in July 2015, the Tenth Circuit in *Energy and Environment Legal Institute v. Epel*,[19] concluded that the extraterritoriality doctrine is, for all intents and purposes, dead — the victim of constitutional "calcification."[20]

In the absence of any meaningful restraints against extraterritorial regulation, states have enacted laws imposing far-reaching national implications. For example, Massachusetts' voters recently approved a referendum that will require that all pork, veal, and eggs sold in the Commonwealth come from animals housed in pens significantly larger than the current industry standard. I am not qualified to opine whether Massachusetts' views concerning animal welfare are wrong or that Nebraska's very different views are right. Such determinations are above my pay grade. My point is simply this: By closing the doors to its markets to out-of-state farmers who do not comply with these mandates, such laws effectively compel producers to devote significantly greater resources to Massachusetts-bound products. This raises the cost of food for consumers nationwide. Striking the appropriate balance between animal welfare and food prices is a difficult and delicate question. But such laws affect the price of food for families who live outsider the borders of the regulating state. Yet those families have no say in its elections. Choices with such implications should not be left to the voters of a single state — whether that state is a "blue" state like Massachusetts or California or a "red" state like Texas.

Critics contend that prohibitions against extraterritorial regulation "inhibit[] state experimentation with laws that attempt to solve their social and economic problems."[21] For example, one prominent critique condemned the extraterritoriality doctrine, asserting that "regulatory uniformity is often undesirable" because a state's "[p]revailing attitudes . . . may depend on the religious and cultural backgrounds of the local citizenry" and "geographic factors may directly affect the value of regulation."[22] I agree.

But a vibrant extraterritorially doctrine *protects* regional variation. As the Second Circuit noted, "Consumer protection matters are typically left to the control of the states precisely so that

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Clause—American Beverage Ass'n v. Snyder*, 700 F.3d 796 (6th Cir. 2012)*, 126 HARV. L. REV. 2435, 2442 (2013) [hereinafter *Recent Case*].

[16] Am. Beverage Ass'n v. Snyder, 700 F.3d 796, 812 (6th Cir. 2012) (Sutton, J., concurring).

[17] *E.g.*, *Am. Beverage Ass'n*, 700 F.3d at 810; Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 489–92 (4th Cir. 2007); Am. Booksellers Found. v. Dean, 342 F.3d 96, 102–04 (2d Cir. 2003); Dean Foods Co. v. Brancel, 187 F.3d 609, 615–18, 620 (7th Cir. 1999); *Meyer*, 165 F.3d at 1153; Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 379–80 (7th Cir. 1998); Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638–40 (9th Cir. 1993); Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 843–45 (1st Cir. 1988).

[18] *E.g.*, Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013) (the extraterritoriality prohibition is limited to "price control or price affirmation statutes") (quoting Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003)); Am. Am. Beverage Ass'n v. Snyder, 700 F.3d 796, 815 (6th Cir. 2012) (Sutton, J., concurring) ("All told, I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.").

[19] Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173–75, 1169 (10th Cir. 2015).

[20] Denning, *supra* note 15, at 995.

[21] *Recent Case*, *supra* note 15, at 2442 (2013).

[22] Goldsmith & Sykes, *supra* note 15, at 796.

different states can apply different regulatory standards based on what is locally appropriate."[23] But allowing a "state [to] reach[] into another state's affairs" inhibits such variation.[24] How is a State to apply standards that it deems "locally appropriate" if legislators in a distant state can intercede in its affairs?

Worse, as Benjamin Cardozo warned long ago, permitting a State to impose its will on other polities — shifting compliance costs to citizens in other states "invite[s] a speedy end of our national solidarity."[25] Such measures invite "rivalries and reprisals."[26] The Constitution, as Justice Cardozo reminded us, "was framed under the dominion of a political philosophy less parochial in range."[27] The Framers conferred Congress with the plenary power to remove impediments to interstate commerce precisely to stem the tide of Balkanism that nearly doomed our Nation in its infancy; to create a nationwide free-trade zone.

[23] SPGGC, LLC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007) (emphasis omitted); *accord* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570 (1996) (noting that the states have enacted "a patchwork of [consumer-protection laws] representing the diverse policy judgments of lawmakers in [all] 50 States").
[24] *See Carolina Trucks & Equip., Inc*., 492 F.3d at 490.
[25] Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935).
[26] *Id.* at 521–22 (1935).
[27] *Id.*