July 25, 2017

Chairman Bob Goodlatte
Ranking Member John Conyers, Jr.
U.S. House Committee on the Judiciary

Re: Concerns with H.R. 2887 – No Regulation Without Representation Act of 2017

Dear Chairman Goodlatte and Ranking Member Conyers,

As individual academics who specialize in administrative law, constitutional law, and regulatory policy, we are writing to express our deep concerns with H.R. 2887, the "No Regulation Without Representation Act of 2017," which **unconstitutionally ejects states from their role in the federal system**. This bill is anathema to long-settled constitutional law, bedrock principles of federalism, and state innovation.[1]

In this letter, we (1) describe constitutional law on matters of state regulation that impacts interstate commerce; (2) explain why H.R. 2887 upends the constitutional framework, which is rooted in federalism values; and (3) highlight just a few of the serious ramifications of H.R. 2887 should it pass.

1. Constitutional Law

The framers of the U.S. Constitution erected a system of government that preserves for states the power to protect the health, safety, and other needs of their citizens.[2] For nearly two hundred years, the Supreme Court has applied the common-sense principle that "there is a residuum of power in the states to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce, or even, to some extent, regulate it."[3]

[1] Specifically, we object to the bill's regulatory ban and offer no opinion on the tax aspects of the bill.
[2] U.S. Const. amend. X ("The powers not delegated to the United States . . . are reserved to the States respectively . . . .").
[3] S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945) (citing Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829)).

Fundamental principles of federalism are embedded in our constitutional structure. As the Supreme Court recently described, "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect."[4] Congress, of course, may regulate within its broad Commerce Clause power and preempt state law. But if Congress wishes to regulate a matter formerly within the states' sphere, it must do so with precision; the presumption is always that states retain their authority.[5] These and other longstanding norms ensure that federal law sets a floor against which states may experiment, maintaining the states' fundamental role in the constitutional balance.

States' power, in turn, is limited by the dormant Commerce Clause; they cannot directly regulate or discriminate against interstate commerce.[6] But the Constitution permits states to regulate within their borders in ways that indirectly impact interstate commerce, provided the burden is not "clearly excessive" in relation to the local benefits.[7] This so-called "*Pike* balancing test" works hand-in-hand with the pragmatic notion—reflected modernly throughout both statutory and constitutional law—that there is no such thing as solely federal or solely state activity.[8]

2. A Disruption of the Constitutional Framework

H.R. 2887 flouts these deeply rooted principles by banning state activities of the sort that have been indisputably constitutional for hundreds of years. The bill's definition of "regulate" is so broad that it would effectively ***require all state laws to be uniform*** if they impact goods or services in interstate commerce. This extraordinarily far-reaching language would ban the many activities over which states have traditionally—and constitutionally—set their own standards.

Indeed, by erecting a blanket ban on states' experimentation in interstate commerce, H.R. 2887 up-ends the federalism structure. It unravels the traditional constitutional protections for states that regulate neutrally within their borders. It goes far beyond Congress's more typical exercises of the Commerce Power because it is not specific to any subject matter. And because it forbids any state from having standards "in addition" to any other state with respect to interstate commerce, it would make federal law a ceiling, not a floor. That is, states could never experiment with "additional" requirements for products or services sold within their borders. As a result, all states would be required to follow the standards of the least protective or innovative state, or rely on Congress to create new regulatory schemes.

At bottom, H.R. 2887 is repugnant to what Justice Brandeis eloquently described nearly one hundred years ago: "It is one of the happy incidents of the federal system that a single

---

[4] Arizona v. United States, 567 U.S. 387, 398 (2012).
[5] *See, e.g.*, CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (describing presumption against preemption and requiring clear intent of Congress to find preemption).
[6] Gibbons v. Ogden, 22 U.S. 1 (1824); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
[7] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[8] The notion of "dual federalism," which postulates exclusive spheres for state and federal regulation, has long been dead. *See* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 139 (describing "the inevitable overlap of the federal and state spheres"); *see also* Emily Hammond, *Energy Law's Jurisdictional Boundaries: A Call for Course Correction*, Geo. Wash. L. Rev. Docket at n.8 (2015) (collecting examples of mixed federal and state jurisdiction under the Natural Gas Act and Federal Power Act).

courageous 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."[9]

3. Serious Ramifications

The constitutional implications of H.R. 2887 alone should be reason enough to reject it. But there are other serious ramifications. Consider the vast scope of state regulation that would fall under H.R. 2887's prohibitions: licensing for service professions; consumer protections; tort reforms; oil and gas extraction laws; environmental, health, and safety protections; agricultural standards; and even state quarantine laws.

Even this partial list makes the problem obvious. All state laws that neutrally regulate goods and services sold within their borders would suddenly be unlawful if they differed from those of any other state. The ramifications are stunning; there would be no more room for tailoring state law to state-specific needs. State laws previously upheld as constitutional under the dormant Commerce Clause would abruptly be prohibited. The resulting uncertainty for states, businesses, and the public would put commerce itself into disarray.

For all these reasons, we strongly urge you to reject H.R. 2887.

Sincerely,

Emily Hammond
Glen Earl Weston Research Professor of Law
The George Washington University Law School

William W. Buzbee
Professor of Law
Georgetown University Law Center

Joel B. Eisen
Professor of Law
University of Richmond School of Law

Christine Klein
Chesterfield Smith Professor
University of Florida Levin College of Law

Thomas O. McGarity
Long Endowed Chair in Administrative Law
University of Texas School of Law

Sidney Shapiro
Fletcher Chair in Administrative Law
Wake Forest University

A. Dan Tarlock
University Distinguished Professor of Law
Chicago-Kent College of Law

Joseph P. Tomain
Dean Emeritus and the Wilbert & Helen Ziegler
Professor of Law
University of Cincinnati College of Law

* *University Affiliations are for identification purposes only*

[9] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).