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Drew Falkenstein

Raw Milk: An Issue of Safety or Freedom?

Editor's Note: The *Journal* recognizes the importance of providing readers with practical and relevant legal information and is pleased to publish the popular Legal Briefs column. In every other issue of the *Journal* this information will be presented by the attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com). Marler Clark has developed a nationally known practice in the field of food safety. They represent people who have been seriously injured or the families of those who have died after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers.

Drew Falkenstein joined Marler Clark in 2004 and has concentrated his practice in representing victims of foodborne illness. He has worked on landmark cases that have helped shape food safety policy, HACCP protocol, and consumer rights, such as the *E. coli* outbreak in fresh spinach in 2006, the 2008 Peanut Corporation of America outbreak of *Salmonella*, and the nationwide outbreak of *Salmonella* in Iowa eggs in 2010.

Is there any one food that is as frustrating as raw milk? Is there any other food that is a subject of so much passion, politics, and attempted persuasion? Have you ever wondered whether sale of the product could simply be outlawed entirely—or, for that matter, legalized everywhere?

The raging debate over raw milk is largely the product of a grassroots campaign aimed at food decentralization, which has gained a much larger voice in the wake of a long list of food poisoning outbreaks linked to mass-produced food products, including ground beef, baby spinach, cookie dough, and countless others. The brief discussion that follows is intended as a short critique on the authority of state and federal legislatures to do as they choose with this lightning-rod food item.

The federal government's stand on raw milk is unequivocal. The Food and Drug Administration bans the interstate trade of raw milk entirely, and most states heavily regulate the production and intrastate sale of raw milk, if they permit it at all. But many raw milk proponents feel individually, and very personally, wronged by what they see as governmental meddling in private affairs—some going so far as to call the ability to purchase and consume raw milk a fundamental constitutional right:

According to the founding documents of the United States, personal liberties are self-evident and inalienable rights, not privileges endowed by state health departments, federal bureaucracies, or personal injury lawyers. There

is no scientific evidence to justify the singling out of raw milk from among other foods for prohibition or damaging regulation, and there is no legitimate constitutional or philosophical basis on which Americans or anyone else should be deprived of the basic human right to determine what to eat and drink.¹

Regardless of whether one believes he should be allowed to eat whatever he wants, no tool exists to prevent the several states and the federal government from regulating the production and distribution of raw milk. States have the authority in the exercise of their general police powers to enact measures to protect the health, safety, and welfare of their citizens.² This power is bounded only by principles of federalism, generally, and by the protections afforded all persons within a state's borders by the equal protection and due process clauses of the 14th Amendment.

The federal government, in contrast, is one of enumerated powers, meaning that it can act only where it has the constitutional authority to do so. As James Madison wrote,

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.³

Among the powers specifically delegated to the federal government is the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁴ The “commerce clause” has, of course, become a particularly potent regulatory enabler that, as a result, has spawned a notoriously complex body of case law.⁵ For present pur-

poses, however, it suffices to say that the commerce clause has provided the constitutional authority for a great many landmark legislative and regulatory measures.

The commerce clause unquestionably gives Congress the authority to prohibit the interstate distribution of raw milk, by sale or otherwise, even without resort to the Supreme Court's historically disjointed commerce clause analysis. The reason is that the interstate distribution of raw milk is, in and of itself, "commerce . . . among the several States." As a result, it can be regulated "to its utmost extent."⁶ Congress has done exactly this in enacting 21 CFR 1240.61(a), which prohibits the delivery "in interstate commerce [of] any milk or milk product in final package form for direct human consumption unless the product has been pasteurized."

But the more intriguing question is how far Congress's regulatory power actually extends with respect to the manufacture and distribution of raw milk. Is it broad enough to outlaw the sale of raw milk entirely? Stated another way, does the fact that raw milk is produced, and frequently even sold only locally (i.e., not interstate commerce *per se*) insulate it from Congress's potentially, if not theoretically, apocalyptic reach?

Out of the difficult analytical framework has emerged a line of precedents approving Congress's regulatory efforts, even with respect to intrastate commerce, that has a "substantial economic effect on interstate commerce [emphasis added]."⁷ "[E]ven if appel-

lee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."⁸

Thus, under the Court's current commerce clause analysis at least, the question is ultimately whether local production and distribution of raw milk "substantially affects" interstate commerce. Notably, there have been many seemingly local endeavors that did not harmoniously persist as "merely local" upon Supreme Court scrutiny.⁹

Without predicting the precise boundaries of Congress's power to regulate the production and distribution of raw milk, it suffices to say that it has not come close to exhausting its potential reach by merely enacting 21 CFR 1240.61(a). Again, the shipment of raw milk across state lines is interstate commerce in and of itself, and the power of Congress over that particular species of raw milk distribution is bounded only by an as-yet undefined, and at best highly nebulous, personal freedom to consume raw milk. The better question is how far Congress's reach actually extends into the modes and channels of production and distribution; and the answer is that the power is potentially very broad. 🐄

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1 See <http://realmilk.com/documents/Response-toMarlerListofStudies.pdf>.

2 Brecht v. Abrahamson, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993); see also Sligh v. Kirkwood, 237 U.S. 52, 59-60, 35 S.Ct. 501 (1915) ("The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established").

3 The Federalist No. 45, pp. 292-293 (C. Ros-siter ed. 1961).

4 U.S. CONST. art. I, § 8, cl. 3.

5 See generally United States v. Lopez, 514 U.S. 549 (1994) (Kennedy, J., concurring).

6 Gibbons v. Ogden, 9 Wheat. 1, 196 (1824).

7 See Wickard v. Filburn, 317 U.S. 111, 125 (1942).

8 Id.

9 See e.g., Wickard, 317 U.S. 111 (1942) (the production and consumption of home-grown wheat); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurants utilizing substantial interstate supplies); and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inns and hotels catering to interstate guests).

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