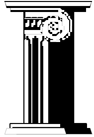

INSTITUTE BRIEF

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Applying the Founders' Meaning to Modern Times — The Commerce Clause Meets Technology

by Amy K. Frantz

Unlike the time when the Founding Fathers drafted the United States Constitution, issues of commerce today are much more complex and technical than the Founders ever could have imagined. Jurisdiction over commerce issues is no longer as easily established as it once was. Adam Thierer's chapter "Federalism and Commercial Regulation" in *FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE* outlines a series of legal tests to determine when federal intervention in commerce issues may be acceptable and necessary.

There are clearly some issues which need to be handled by the federal government, such as international trade policy, national security, the monetary system, and patent and copyright laws. The authority of the federal government over these areas is established in the text of the U.S. Constitution.

Beyond those few areas granted by the Constitution to the federal government, the question can be asked, is there "a clear and overriding national need for Congressional action in a given field or matter"? Whether an issue falls into the category of national need is not as clear-cut as it is for those issues the Founders specifically directed to be overseen by Congress. However, the intent of the Constitution was to limit the powers of the central government. Therefore, the issues that qualify as a national need should remain limited.

In the consideration of whether federal intervention is justified, it may be beneficial to defer to the body that has had jurisdiction over a particular matter or issue in the past. However, that is not to say that such jurisdiction should not be reviewed or revoked, if necessary. Mr. Thierer cites as an example a proposal in the U.S. Congress to reform auto insurance. Regardless of the merits of the proposal, insurance has historically been regulated on the state level, and should remain so unless a compelling reason for change is found. A similar test is applied by the judiciary. In the absence of a compelling reason for change, the courts generally give deference to precedents set in previous legal cases.

"Without a doubt, the one area of traditional federal responsibility that has been the most controversial, problematic, and frequently abused is the provision in...the Constitution that allows Congress to 'regulate commerce...among the several states...'" The authority to regulate interstate commerce is clearly given to Congress in the Commerce Clause of the Constitution. But today, the practical application of this jurisdiction is tricky. What exactly is interstate commerce?

The Founders saw the need for national intervention to prevent the states from establishing unfair barriers to trade that would limit the economic growth of a new nation. However, they also

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intended the powers given to Congress to be used to prevent injustice between the states, and did not intend to give Congress broad powers to intervene in nearly any aspect of the nation.

Essentially, three questions can be asked to justify federal intervention under the Commerce Clause. First, is federal intervention necessary to prevent protectionism? States should not be allowed to prevent the free flow of commerce across their boundaries. Second, is federal intervention necessary to prevent discrimination against the goods or services of out-of-state interests? Finally, is federal intervention necessary to prevent extraterritorial jurisdiction? States should be prevented from exercising their authority outside of their own borders.

Modern technology, however, has made it increasingly more difficult to determine what is commerce and whether the federal government or state governments have jurisdiction over a particular activity. If an activity is to be regulated, it may be more beneficial to the success and prosperity of that activity if the regulation comes from a central source, rather than fifty or more different sources. Internet service is one technologically complex activity that would likely be bogged down by excessive and diverse regulation. FCC Chairman William Kennard warned that allowing the 30,000 local franchising authorities in the United States to establish their own regulatory structures would cause chaos and the breakdown of the Information Superhighway.

Responsibility for regulation or deregulation of an industry does not have to be solely that of the federal government or state governments. The responsibility can be shared, with certain tasks assigned to each entity. Mr. Thierer introduces the Regulatory Responsibility Matrix as a tool to determine which tasks should be done by the federal or state governments and which tasks are shared, requiring cooperation to accomplish the task. The placement of tasks on the matrix is not rigid. Responsibility for a task can change over time, and a task should drop off the matrix once completed. Finally, Mr. Thierer cautions that placement of an issue or task on the matrix does not endorse government action. “Optimally, nothing would appear on these matrices, since private self-regulation is almost always preferable to government regulation at any level.”

This Institute Brief is one in a series on the chapters of a just published book, FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE*, edited by Dr. Don Racheter, President of Public Interest Institute, and Dr. Richard Wagner, Economics Professor at George Mason University and Chairman of the Institute’s Academic Advisory Board.* FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE *looks at the relationship between federalism and liberty and explores the substantive practice of federalism, particularly the centralizing processes at work and the opportunities for decentralization.*

The author of this chapter of FEDERALIST GOVERNMENT IN PRINCIPLE AND PRACTICE *is Adam D. Thierer, Alex C. Walker Fellow in Economic Policy at The Heritage Foundation, Washington, D.C..*

This summary of Mr. Thierer's chapter was written by Amy K. Frantz, a Research Analyst with Public Interest Institute.

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