Remember
Roscoe Filburn

Remember Roscoe Filburn

Amending the Constitution: The Only Sure Way to Limit the Federal Government

First up: The Commerce Clause

Douglas J. Lising

Copyright © 2011 by Douglas J. Lising

ISBN: 978-0-578-09443-4

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form, or by any means, electronic, mechanical, recorded, photocopied, or otherwise, without the prior written permission of both the copyright owner and the above publisher of this book, except by a reviewer who may quote brief passages in a review.

The scanning, uploading, and distribution of this book via the Internet or via any other means without the permission of the publisher is illegal and punishable by law. Please purchase only authorized electronic editions and do not participate in or encourage electronic piracy of copyrightable materials. Your support of the author's rights is appreciated.

Printed in the United States of America

Contents

Dedication

I would like to dedicate this book to my family, all of whom have always been supportive and have made my life rich and happy: my wife Rene; mother Lillian; mother-in-law Nora; daughters Janet and Laura; their husbands Howard and David; granddaughters Kendall and Julia; brothers and sisters-in-law Jenny and Eric and Glen and Diane; nephews and nieces Brian and Sharon, Jill and Brandon, Stacey, Jared and Nikki, and Aaron.
Finally, I would like to dedicate this to all members of the military services, past and present — thank you so very much for your service and sacrifice.

PREFACE

This book is for those who believe that our government is too large, spends too much money, and intrudes too much in our personal and business lives and freedoms. A substantial part of that "too much" is justified by an overly expansive interpretation of the Commerce Clause of the United States Constitution. Narrowing federal commerce power is the most effective measure possible to limit the size, scope, and spending appetite of our central government. We can do that by ratifying the Twenty-eighth Amendment to the Constitution.

As this book is being written, debate over the Patient Protection and Affordable Care Act rages. One component of the law, the requirement for citizens to purchase health insurance, is being challenged by individuals, organizations and several states. As of the end of 2010, there have been four rulings on the subject from Federal judges. In Michigan on October 7, 2010, U.S. District Judge George Steeh found that the individual mandate in the Health Care law was within Congress's constitutional authority. In Virginia on November 30, 2010, U.S. District Judge Norman Moon decided that both the individual mandate and the employer mandate fall within the scope of Congressional power. U.S. District Judge Henry Hudson in Virginia and U.S. District Judge Roger

Vinson in Florida both found the individual mandate to be beyond the scope of Congressional authority.

Judge Hudson reasoned that all precedential jurisprudence turned on the fact that some person or organization performed some activity within the sphere of commerce. Citizens not electing to purchase health insurance, on the other hand, have not willingly entered the "stream of commerce" and therefore cannot fall under Commerce Clause authority. We would like to believe that Judge Hudson's interpretation would prevail. However, even he notes that "the final word will undoubtedly reside with a higher court."[1]

Judge Vinson's decision essentially mirrored that of Judge Hudson. In addition, because the mandate was a necessary and essential component, the act, in whole, was found to be unconstitutional.

In contrast, Judge Steeh and Judge Moon cited Congress's powers under the Commerce Clause of the Constitution as authority for this type of legislative activity. Their rationale was, of course, that any individual decision taken in the aggregate affects interstate commerce and therefore falls within federal legislative powers. Needless to say, that reasoning can be extended to just about any human activity. If I decide to turn on a light in my house, flush a toilet, or throw away fingernail clippings, these activities, when viewed in the aggregate, affect electrical power generation, water usage, and trash removal. While clearly it's a stretch to think that Congress would enact any legislation affecting these activities, the legal rationale used by federal judges, including Supreme Court Justices, could support laws limiting operating more than one light

bulb per person in any home, permitting only one toilet flush per day, or requiring fingernail clippings to be buried rather than thrown in the trash.

Certainly, these examples are ridiculous. But it is not too far-fetched to think that Congress might mandate, unbelievable as it may sound, that all citizens, under penalty of law, must purchase a health insurance policy with a specified minimum coverage, whether they might want that policy or not. Oh, that's right: they did that!

WE MUST PUT LIMITS ON THE USE OF THE COMMERCE CLAUSE

That's the purpose of this book: to propose enactment of an amendment to the Constitution of the United States that would more clearly define and limit federal power under the Commerce Clause.

I do not mean this to be a gloom-and-doom book. I am not trying to scare readers by predicting the imminent collapse of the United States. It is not my intention to attack any particular politician, political party, or ideology, although I clearly agree with some and disagree with others. By and large, most who occupy elected office serve with the best of intentions and the interest of their constituents and our country in mind. Unfortunately, that doesn't mean that good decisions are made or the country is going in the right direction. Those that believe in an ever-stronger central government that perpetually expands social programs and increases regulatory control are just dead wrong and will certainly succeed in changing our nation, our culture, and our society, but not for the better.

I firmly believe the best course for this nation is to return to a more limited federal government. This book proposes a reasonable, rational method for permanently moving to a more limited central authority. While there are many benefits that will accrue as a result of this new amendment to limit federal power under the Commerce Clause, four stand out. These constitute very important and critical battles in the fight for limited government:

- The first accomplishment is, obviously, reducing the federal government's ability to use the Commerce Clause as justification for unlimited expansion.
- Just as importantly, we will establish the very necessary procedures within the states to enable the proposal and ratification of this and other Constitutional amendments without (other than perfunctory) federal congressional action.
- We will put in place an organization to coordinate state's rights and constitutionality issues.
- Finally, we will move many domestic government functions closer to the people with greater state and local government authority and responsibility.

These are factors that every Governor and every state legislature should not only wholeheartedly support but earnestly and enthusiastically try to achieve. What state government wouldn't want greater control of its own affairs and finances?

Everyone at every level of government understands how very difficult it will be to add a new amendment to the Constitution, but those things that are really good for

us are rarely easy. Hopefully, you will agree that this is not simply a helpful thing to do but absolutely essential to the preservation of our way of governance, our society, and our culture.

I encourage each reader to discuss this topic with family and friends. Send your opinions to the editor of your local newspaper. Write letters to your local and state political representatives. Get involved with local political groups. Become at least as active in supporting and retaining the unique character of our nation as those who would fundamentally change the country we love.

MR. ROSCOE FILBURN

In this book, I will introduce you to Roscoe Filburn, who, like most of us, went about his business trying to do the best he could to support himself and his family, only to be run over by elitist lawmakers and inflexible bureaucrats. After reading his story, you'll understand why I am proposing him as the rallying cry for this amendment effort. Lest we become the next poster child for government abuse gone wild, we need to

REMEMBER ROSCOE FILBURN

CHAPTER 1

INTRODUCTION

THE STORY OF ROSCOE FILBURN

In 1941 Roscoe Filburn, a farmer in Montgomery County, Ohio, grew wheat on a small portion of his private farm. At that time, the federal government was regulating wheat farming under the Agricultural Adjustment Act of 1938. The government's purpose in passing this act was to try to stabilize the price of wheat in the marketplace by setting quotas on the amounts of wheat produced by farmers across the nation. (In a competitive market the price of wheat is determined by supply and demand forces. Congress sought to stabilize prices by controlling supply.)

Filburn's allotment was established at 11.1 acres at a yield of 20.1 bushels of wheat per acre. The government gave Filburn notice of his allotment before planting and before harvesting. Filburn, however, planted 23 acres. He thereafter harvested 239 bushels of wheat in excess of his allotment. Because he harvested this excess wheat, the government ordered Filburn to destroy his crops and pay a fine.

Under the Commerce Clause of the Constitution, Congress has the power to regulate interstate commerce, and that was the purpose of the Agricultural Adjustment Act. But farmer Filburn refused to destroy his crops or pay a fine, stating that the excess wheat was produced on his own property, for his own private consumption, and never entered commerce at all, much less interstate commerce. Consequently, his position was that the application of the Agricultural Adjustment Act to his situation was unconstitutional. A federal district court ruled in favor of Filburn. The government (Claude R. Wickard, Secretary of Agriculture, et al.) then appealed to the Supreme Court in 1942.

It would seem very reasonable and rational to think that Roscoe Filburn's wheat production would not fall under the aegis of the Agriculture Adjustment Act. The wheat he produced never entered the national marketplace and was grown on his own property for his own use.

The Court, however, reasoned that the federal government had the power to regulate commerce in accordance with the Commerce Clause of the Constitution. They continued to reason that regulating the prices at which commerce occurs is part and parcel of their power to regulate commerce.

The first piece of reasoning in Filburn is, to me, a remarkably gross perversion of logic. Given this rationale—that regulating prices is inherent in regulating commerce—one can then easily extend that argument to say that regulating supply, regulating demand, regulating production facilities, and regulating everything in the economy is inherent in regulating commerce. That leaves

nothing in the economy outside the reach of federal regulation. Congress continues to use this rationale today, from farm and crop subsidies, to regulating utility pricing, to environmental control laws and regulations.

Filburn argued that the wheat he produced was intended only for his own personal use: to feed his livestock, to save seed for future planting, and to make flour for his family's nourishment. It therefore could not be regulated under the Commerce Clause. It was not interstate commerce because it was not commerce at all!

The court disagreed. Their second jump in rationale was equally unbelievable. They stated that if Filburn had not used his own wheat, he would have had to purchase wheat on the open market. This did affect commerce, the court reasoned, and if thousands of other farmers did the same thing, the effect on commerce would be substantial. Therefore, they said, Congress could regulate commerce that was fully intrastate and noncommercial if that activity, viewed in the aggregate, would have substantial effect on interstate commerce. This extends Congress's potential regulatory reach to anything with even the remotest hint of economic effect.

I really feel sorry for Roscoe Filburn. On his own privately owned property, he planted a measly 11.9 acres of wheat above his allotment and harvested just 239 bushels. He was fined, objected to the fine as unconstitutional, and lost at the hands of all nine Supreme Court justices. But my sympathy for farmer Filburn is nothing compared to the outrage I feel at what the government did to him and continues to do, with even greater intensity, to our businesses and our citizens.

While the government had been slowly eating away at our liberties prior to Filburn, this case began an unprecedented intrusion by the federal government into our personal and business affairs, using the Commerce Clause as justification, aided and abetted by a compliant Supreme Court. This is the (in)famous Wickard v. Filburn decision.

In a televised debate between John Eastman, former dean of the Chapman University Law School, and Erwin Chemerinsky, dean of the UC Ervine School of Law, Chemerinsky argued that the federal government had "broad authority to regulate all aspects of the economy."[1] Eastman, conversely, contended that a more "originalist" interpretation of the Constitution was necessary, placing limits on the central authority. Ed Morrissey, who posted the debate on Youtube, makes the very pertinent observation that "the heart of this debate is whether we accept that the Constitution exists to limit the power of the federal government. It's *that* basic. If so, then Wickard has to be overturned at some point."[2]

We must regain control of our government. We hesitate and falter to our detriment and that of our children. Taking back control will not be easy. It will take dedication and perseverance. If we begin to waver or lose heart, we should always

REMEMBER ROSCOE FILBURN

So how do we begin taking back control of our government? How do we renew the founders' idea of limited governance? No court will overturn Wickard. No Congress will sacrifice current powers or return

significant authority back to the states. Perhaps, in the short term, a particular Congress may appear to pull back a bit on its control but over the long run, Congress will never substantially surrender its power. I am convinced that the only way to begin putting some limit on Congressional power is by ratifying a new amendment to the Constitution of the United States.

No one is talking about amending the Constitution. It's too difficult, it's too time consuming, no one will be able to agree, and it's too expensive. Yes, it may be all of these things and more, but the alternative is more and more government and less and less freedom. If you believe in limited government, you must take a very strong and positive stride in that direction. Ratification of an amendment that removes from the federal government its ability to use the Commerce Clause as justification for unfettered growth is a crucial first step toward stopping and stripping back excessive federal power.

Every couple of years we all go to the voting booth hoping that the congressmen that we return to their seats and those whom we seat for the first time will be faithful to the kind of government that we, as Americans, want and expect. But what we get, as history has proven time and again, are politicians who are all too eager to expand their power and the power of the federal government. In my view, the only way to permanently restrict political ambition is to strengthen the constitutional limits of Congress.

Perhaps more importantly, the development and honing of the processes and procedures necessary for the states to propose and ratify a constitutional amendment will

be critical in regaining those powers originally intended for the states. It will serve as a warning to Congress: "We have the procedures in place to amend the Constitution, we've done it before, and if you try to grab too much power, we can and will do it again."

Since its inception, America has been a place of individualism, personal freedom, opportunity, and dedication to our natural right to life, liberty, and the pursuit of happiness. Our citizens have always respected hard work, knowing that through that kind of dedicated effort, individuals, families, communities, and the nation will flourish. We understand that with our labor comes reward. We do not resent that reward when it is earned honestly, and we recognize that we cannot expect to be rewarded if we choose not to work.

We have always tried to be a land of opportunity for all. In many cases, we have not done very well at this, but we are doing better with each passing year. Why have we continued to attract so many immigrants to our shores? Because they recognize that in America, they have the opportunity to make a better life for themselves and their families. The great majority of our contemporary population are descendents of the seventy million or so immigrants to the United States since its founding.

So, what kind of government and society do we want? Do we want a society of hard-working individuals, a society in which effort is respected and expected as the means to get ahead? Do we want a government that respects and protects private property? Or do we want a government regulating our personal lives and controlling every aspect of our economy? Do we want to rely on the

government to take care of all of our needs, to make sure we're healthy, happy, and have a roof over our heads and food on our tables? That sounds really great, but if we're not earning those things, who is paying for them?

I believe we should have a society in which each of us has the *opportunity* to earn and enjoy everything that we might (legally) wish for. Some may elect to seize opportunities, pour their efforts and resources (and maybe those of family and friends) into those opportunities, and then realize the benefits accrued through their labor and investment. Others may make a personal choice to avoid or limit work, and that is an acceptable choice, but those making that choice must take responsibility for it and live with the different benefits resulting from such a decision.

That is not to say that this nation will avoid assisting those who are truly in need. We have always been a very generous and caring country. Direct donations, charities, and religious organizations have provided temporary and crisis assistance. There may be a need for government assistance, but that should be provided by local government agencies that can be more focused and responsive than the federal government.

The job of the federal government should be to provide the conditions within which individuals and businesses can flourish. This can best be accomplished by a limited government that, for example, provides internal security, conducts foreign affairs (including immigration and defense), ensures fair relations among the states, and maintains a monetary system.

However, since our founding as a nation, the federal government has grown in power, size, complexity, and

spending appetite, and generally, in my opinion, at the expense of personal liberties, competitiveness in the commercial marketplace, and the ability of state and local governments to be responsive to their citizenry. This has been done through executive, legislative, and judicial action on the parts of both liberal and conservative politicians and Republican and Democrat administrations and legislatures.

Often, this growth in the federal government was done with the greatest of intentions. However, these good intentions have often resulted in unintended consequences, such as a loss of competitiveness in the domestic and global economy, the growth of future liabilities, excessive debt and debt service requirements, and significant changes in our culture.

Also, because of its size and complexity, it is difficult for the federal government to be responsive to small groups of its citizens, such as those of a state or community. In 1776 the population of the United States was about 2.5 million. Even then, there was concern regarding both the ability and the desirability of the national government to be responsive to all its citizens. Our founders believed in strong local governments to meet the needs of its people. How much more difficult is it now, with a population of over 300 million, to address and balance national, regional, and local requirements?

When it comes to the reach of the federal government, I see no evidence that any political party or ideology has in the past or will in the future effect any meaningful, long-lasting limitation. While many may believe that electing a slate of Democrats or Republicans or Libertarians or

conservatives or liberals or independents will solve our problems, I believe that history has shown that no group of politicians is up to this particular task.

In the following chapters, I will try to present compelling rationale for taking the first step to limit federal authority and return to a greater reliance on state sovereignty and greater competition in the commercial marketplace. I will present what I believe to be substantial advantages in this way of governance and this approach to the national economy. What I am suggesting is not something new or radical. I am suggesting not a remaking of America, but a renewing of our commitment to the America envisioned by our founding fathers.

My goal, in writing this book, is to encourage a dialogue and to make the case for the need to propose and ratify a new amendment, the Twenty-eighth Amendment to the Constitution of the United States, which will serve to curtail the power of the federal government and strengthen the independence of the states.

The focus of this new amendment (perhaps the first of several that may be needed) will be a modification of the Commerce Clause of the Constitution. Article 1, Section 8—Powers of Congress states, "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It is this clause that has been used most extensively to justify the expansion of federal power. Consequently, it is this clause that is in most need of a modification.

In his concurrence in the case of United States v. López, Justice Clarence Thomas felt compelled to write,

> *I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.*
> *We have said that Congress may regulate not only "Commerce ... among the several states," ... but also, anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life.*[3]

Now is a unique time in our history in which the real possibility exists to propose and ratify the Twenty-eighth amendment to the Constitution to limit the power and reach of the federal government and strengthen the sovereignty of the states. The electorate is more engaged than I have seen in my lifetime. Calls for restricting federal power have been heard from all corners of our nation. The Tea Party movement, which I will talk about later, is a strong and growing voice for limited government. We must take advantage, right now, of this sentiment to begin the amendment process.

I would ask the governors and legislatures of the states to seriously consider and debate what is presented herein. The government of the United States of America belongs to its citizens; the people do not belong to the government.

Readers may agree with the entire justification

presented herein, or they may take issue with one or more of the reasons offered. If you find yourself wavering about the need to tighten the Commerce Clause, I would make one suggestion:

REMEMBER ROSCOE FILBURN

CHAPTER 2

THE COMMERCE CLAUSE—A SHORT HISTORY

The Congress shall have Power …To regulate Commerce with Foreign Nations, and Among the several States, and with the Indian Tribes. (U.S. Constitution, Article 1, Section 8, Clause 3)

This is a fairly simple, short, reasonable, and relatively easy-to-understand sentence. But the Commerce Clause is the single-most-used statement in the Constitution to justify the continuous expansion of the federal government.

Congress's use of the Commerce Clause has escalated from refereeing interstate rivalries to efforts to control virtually every aspect of the economy. In this chapter, we will look at some key legislation and subsequent Supreme Court decisions that led to the ever-expanding role of our federal government in regulating the economy. We will start by examining what we mean by the word *commerce*.

What is *commerce*?

The meaning of commerce, as it may be applicable to our Constitution, has been the subject of considerable debate and disagreement. Academics and legal scholars consider several aspects and conditions of the definition:

1. What was the accepted definition of commerce at the time of the writing of the Constitution?
2. What was the intent of the writers of the Constitution?
3. Should the definition of commerce be expanded to reflect the greater complexity of our domestic and global economy?
4. Does the definition of commerce really matter?

Several legal academicians argue that 18th century contemporaries had a very wide understanding of commerce. Professor William Crosskey, in *Politics and the Constitution in the History of the United States*, posited that "commerce ... is used to mean the whole economy, the whole system of exchange, the whole congeries of interrelated gainful activities, which the American nation is to carry on." He further hypothesized that "among the several states" meant "throughout the nation" rather than "between states."[1] Professor Crosskey's interpretation certainly had its adherents, particularly those who championed a more regulatory federal government.

In a 2001 article, Professor Randy Barnett, Professor of Legal Theory at the Georgetown University Law Center, concludes that the word *commerce* was used almost exclusively in the sense of exchange and economic

intercourse.[2] A *St. John's Law Review* article, "The Legal Meaning of 'Commerce' In The Commerce Clause," documents Professor Robert G. Natelson's exhaustive review of both lay and legal dictionaries, documents, writings, newspaper articles, and other related works existing at the time of the Constitution's drafting, debate, and finalization. Professor Natelson, Professor of Law at the University of Montana, notes, "My own immersion in the rhetoric of the founding era seems to confirm Professor Barnett's conclusion that in common discourse, and particularly in the public debates over the Constitution, 'commerce' nearly always meant 'exchange,' and that proffered evidence for a broader non-legal meaning usually dissolves under scrutiny."[3]

But does the common meaning differ from the legal meaning? Again I will quote from Professor Natelson:

> *Was the legal meaning of "commerce" different from the lay meaning? To find out, I examined the legal works used most commonly by the founding generation. The collections I accessed were in the Bodleian library at the University of Oxford, England; in Oxford's Codrington library; and in the library at the Middle Temple in London, one of England's Inns of Court. The works examined included all available legal dictionaries, abridgements, "institutes," and commercial treatises. In addition, using the Justis database of English Reports (Full Reprint), I identified every use of the term "commerce," both in English and in*

> *Law French, in English cases reported during the sixteenth, seventeenth, and eighteenth centuries. Similarly, using the Westlaw database, I identified only uses of "commerce" in American cases before 1790.*
>
> *The process was a lengthy one, but the findings may be summarized quickly: Changing the terms of the debate from the lay meaning to legal meaning of "commerce" makes no difference. In legal discourse that term was almost always a synonym for exchange, traffic, or intercourse. When used economically, it referred to mercantile activities: buying, selling, and certain closely-related conduct, such as navigation and commercial finance. It very rarely encompassed other gainful economic activities, and I found no clear case of it encompassing all gainful economic activities … the sources repeat the same general meanings—even the same specific definitions—over and over again. They must have been burned into the minds of every founding-era lawyer who had even a passing interest in the subject.*[4]

So it appears that our first question has been answered. Both the lay and legal definition of commerce is, at the time of the writing of the Constitution, a narrow one.

Founders' Intent

Because the legal definition was so clearly meant to mean the limited economic areas of exchange or traffic, certainly the founders' use of the word *commerce* was meant to convey that limited meaning.

The Federalist Papers are often used to expand our understanding of the mindset and rationale of the founders of our nation. Professor Barnett's research concludes that

> *In none of the sixty-three appearances of the term "commerce" in The Federalist Papers is it ever used to unambiguously refer to any activity beyond trade or exchange. At the time of the framing, then, for Hamilton, a proponent of broad national powers, the term "commerce" in the Constitution referred to trade or exchange, not to the production of items to be traded, and certainly not to all gainful activities. Even later, with the contentiousness of the Constitution's adoption behind him, Hamilton's usage did not change. As Secretary of the Treasury, Hamilton's official opinion to President Washington advocating a broad congressional power to incorporate a national bank repeatedly referred to Congress's power under the Commerce Clause as the power to regulate the "trade between the states."*[5]

Expanding the Definition of Commerce

Now we come to our third question: "Should the definition of commerce be expanded to reflect the greater complexity of our domestic and global economy?" In my view, the definition, as written in the Constitution, is unchangeable. To allow the meaning of a word to change over time is acceptable in normal discourse and personal intercourse. However, when a word is used as a basis of government, of law, or of other policy or regulation, the use of such a word must be consistent throughout time.

That is not to say that we should not recognize the changing complexity of our economy and the evolution of international economic relationships. But as these things change, do we continually change our system of government and law in reflection? We, in fact, may need to make modifications. We may need to give our federal government additional powers in certain areas of economic activity. Such changes, though, must be made neither by congressional or executive edict nor by Supreme Court jurisprudence.

In granting powers to the government, the people understand that they are purposefully giving up some rights and freedoms in exchange for some social order and protection. In the establishment of the Constitution, there was very strong and serious disagreement and debate before the citizens and the states agreed on the powers to be granted to the federal government. Likewise, before any additional powers are granted to the federal government, there must be substantial deliberation among our citizens and states before such added powers and concomitant loss of liberties are granted.

This required discussion and agreement has not taken place, but it is not too late. We can and must have a serious debate now to propose and ratify the Twenty-eighth amendment to the Constitution, which will more specifically define the federal government's commerce powers.

Does the Definition Really Matter?

The fourth question, "does the definition of commerce really matter," seems like a dumb thing to be asking. The definition is in this nation's most important document, the document describing the powers we have given to our government. But it appears that the current definition is not all that important. The Congress, with the acquiescence of the Supreme Court, adjusts the definition to meet the needs of the moment. In the following section we will see how the federal government has twisted, modified, expanded, warped, and perverted the definition of commerce until it is virtually without effective meaning.

THE MARCH TOWARD UNLIMITED GOVERNMENT

Constitutional scholars and historians would generally agree that the framers of the Constitution intended to create a federal government with limited powers, and for the first hundred years or so of this nation, that principle remained generally intact. As time marched on, however, we experienced a gradual but inexorable usurpation of powers by the federal government. The Commerce

Clause was the foundation used to support this federal expansion.

Any government will attempt to control the activities of its citizens and institutions. In a monarchy this is done by fiat, in a tyranny by force, and in our republic by the adoption of laws, policies, regulations, and rules by the elected officials in Congress. While the desire to control may be based in the best of reasons, such controls seem to continually grow and never retreat.

It is the opinion of many that the ultimate check on the growing power of the federal government is the vote of the people. That opinion has been expressed by the Supreme Court itself. Chief Justice John Marshall, in 1824, believed that the principal limitation on legislative authority is the electoral process. He stated,

> *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections … are the restraints on which the people most often rely solely, in all representative governments.*[6]

Our history has shown that not to be true. It appears not to matter whether we vote for Democrats, Republicans, or Federalists. All wish to fix this, control that, or regulate the other.

Unlike Justice Marshall's opinion, it is clear that legislative limits must be clearly codified in the documents establishing our government. Our nation has, as its foundation, the written Constitution of the United States. Upon it is built our system of government and laws. They

are the set of rules that every citizen understands, and everyone agrees to conduct their affairs in accordance with those rules. Understandably, some rules may have to be modified slightly due to changing conditions. But these need to be small changes, slight modifications that everyone can continue to understand and upon which they can continue to conduct their affairs.

Some argue that the Constitution must evolve as our society evolves, shift as our environment shifts, and grow as the challenges facing our nation grow. The Constitution can, in fact, change to meet new and critical requirements of a changing and growing society. It was built to respond to these kinds of challenges. The mechanism of change is, of course, the amendment process. If our society—our citizenry—wishes to make a major change in the set of rules that it lives by, that change should not be easily or hastily accomplished. Amending the Constitution is an extraordinarily difficult task, and it must be; we all need to understand any new rule and agree to comport ourselves accordingly.

To make major changes in those rules on a continuing basis, however, invites chaos. When we play Monopoly, we all understand the rules of the game and agree to play by those rules. There can be some slight adjustments to which we can easily agree, such as upon landing on a square, how much time do we have to decide whether to put a house or a hotel on that square? But if we were to make major rule changes during the play of the game, there would be absolutely no point in playing.

But that is exactly what the federal government has been doing, in large part using the Commerce Clause

as justification, and key Supreme Court decisions have supported Congress's inexorable encroachment on our now less-than-free market.

McCulloch v. Maryland: The Start of a Progressive Theory of Commerce

Chief Justice John Marshall in McCulloch v. Maryland (1819) laid out the basic theory of implied powers under a written, but living, constitution: "We must never forget that it is a Constitution we are expounding." He stated that the Constitution was intended "to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs …." He believed the federal government possessed the power "on which the welfare of a nation essentially depends."[7] It should be free in its choice of means, not tied to a literal interpretation of the Constitution, and open to change and growth.

So Chief Justice Marshall, the chief arbiter of what should constitute a federal government with "limited powers," was actually a progressive with a belief in implied and extended powers for the federal government, and he had the power and position to act on that belief. Chief Justice Marshall judged over eleven hundred cases during his thirty-four years on the bench, writing the majority opinion in 519 of them. Only in Marbury v. Madison (1803) did he declare an act of Congress unconstitutional, but he did so to establish the concept of judicial review—that is, the function of the Court to interpret the Constitution and set aside any law or actions in violation of it. At no other time during his tenure did he declare any other act of Congress unconstitutional.

In McCulloch v. Maryland, Chief Justice Marshall observed,

> *We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think that sound construction of the constitution, must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*[8]

Marshall makes some outlandish pronouncements here. For him, clearly, the end justifies the means, and all means are acceptable that are not prohibited by the Constitution and meet with its spirit. The Constitution specifies those powers granted to the federal government by the states and the people. Article I, Section 9 of the Constitution, "Powers Forbidden to Congress," lists nine specific areas of authority denied to Congress. No one believes that any power not directly addressed by this prohibiting section is a power retained by Congress. If one were to make that illogical leap, he would crash headlong into Article I, Section 10, which lists only 3

categories of "Powers Forbidden to the States." Surely no one would argue that any power not denied to the states in Section 10 is retained by the states. Therefore, to determine those powers "which are not prohibited" is an exercise in creative thinking. Even more creative is any effort to ascertain the "spirit of the Constitution." A document's "spirit" is certainly in the eye of the beholder, and if those eyes belong to a progressive, anything is possible.

If the legislature is to be accorded the ability to grant itself any authority it feels necessary to carry out expressed powers, and if the Constitution is free to be adapted and changed as conditions change, as Chief Justice Marshall believed, then what could possibly be meant by a federal government with "limited" powers?

Early History: Reasonable Use of the Commerce Clause—Overcoming State Protectionist Activities Recognizing Interstate Commerce as "Trade"

One of the earliest commerce cases to be addressed by the Supreme Court was the 1824 case of Gibbons v. Ogden. The result was a quintessential decision establishing the supremacy of federal regulation over protectionist state law.

New York State granted Robert Fulton and Robert Livingston an exclusive right of navigation of all waters within the state by steam for a period of thirty years beginning in 1808. This was, essentially, a recognition of the invention of the steamboat by Mr.'s Fulton and Livingston. Having been granted that exclusive right, Fulton and Livingston granted a license to Aaron Ogden

to steam the waters between New Jersey and New York. Thomas Gibbons held a federal license and competed with Ogden, steaming the same waters. Ogden brought suit against Gibbons, and after a state court decision, the U.S. Supreme Court agreed to hear an appeal.

The case was argued on two issues. The first was whether the New York State law violated Congress's commerce power. The second was whether the New York State law violated Congress's constitutional power to grant patents. The case was decided on the commerce power alone; the patent issue was ignored.

The court decided that Gibbons's holding of a federal license authorized him to navigate the waters in question. The federal license invalidated any state law that would prohibit Gibbons's operation.

New York argued that it was regulating the navigation of its state's territorial waters. It asserted that this was purely intrastate commerce and therefore could not fall under the federal government's power to regulate commerce among the states. Chief Justice Marshall's opined, "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."[9]

By passing laws serving their own interests, some states endeavored to provide their citizens and businesses some measure of competitive advantage, or even a near-monopoly. This decision, then, deprived the states of the power to pass protectionist laws that would serve to restrict free interstate trade. While this promoted a desirable free enterprise environment, it also established, one might argue, the precedent that in the area of

interstate commerce, federal law supersedes any and all state law. The only question remaining unclear is what constitutes interstate commerce?

In the 1895 United States v. E. C. Knight Co. decision, the court struck down the government's application of antitrust laws to sugar producers. The court held that manufacturing was not part of commerce. Commerce, the court stated, consisted of the buying and selling of goods, not the manufacturing of goods. "Commerce succeeds, to manufacture, and is not part of it,"[10] the court said. This is consistent with the idea of the limited powers of Congress to regulate commerce. At that time, the Commerce Clause was thought to provide the national government with *only* the ability to police any protectionist laws passed by the states and facilitate trade among the states and foreign nations.

Lochner v. New York and the Beginning of the Lochner Era

Joseph Lochner was the owner of Lochner's Home Bakery in Utica, New York. He was charged with and found guilty of violating a New York law that limited the number of hours per day (10) and per week (60) a baker was allowed to work. In passing the law, New York cited bakeshop health and safety. In 1901, Mr. Lochner, for the second time, required and allowed an employee to work more than 60 hours in one week. Lochner was fined $50.

Lochner chose to appeal that conviction (I suppose on principal because the appeal surely cost more than the $50 fine). Finally appearing in the U.S. Supreme Court

in 1905, he argued that the 14th Amendment protected an individual's right to make business contracts and that the act in question was not a fair or reasonable exercise of a state's police power. For its part, New York State argued that it had "a right to safeguard a citizen against his own lack of knowledge."[11] (How typical of an elitist government!)

Supreme Court Justice Rufus Peckham observed that the bakery employees were "able to assert their rights and take care of themselves without the protecting arm of the State interfering with their independence of judgment and of action."[12] The Court invalidated the New York State law.

While not specifically a Commerce Clause decision, this began a period commonly known as the Lochner era during which the Court's decisions, although mixed at times, generally leaned toward individual rights and limited government authority with a relatively narrow view of federal power under the Commerce Clause.

As late as 1936, in Carter v. Carter Coal Co., the court continued to recognize the definition of commerce as equivalent to the phrase "intercourse for the purposes of trade." The court stated, "Extraction of coal from the mine is the aim and the completed result of the local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it."[13]

West Coast Hotel Co. v. Parrish: the End of the Lochner Era

Elsie Parrish worked as a chambermaid in a hotel in Washington State owned by West Coast Hotel Company. She had been receiving wages below the then minimum of $14.50 per week for a 48-hour week set by state law. She sued for the difference, lost in trial, but prevailed on appeal to the Washington Supreme Court.

The hotel appealed to the U.S. Supreme Court in 1936. In 1937, the Court decided that the government may restrict liberty of contract when, in its opinion, the health, safety, morals, or welfare of its citizens is jeopardized. The minimum wage laws were found to be constitutional. This decision was at odds with the majority of similar decisions made since the Lochner decision in 1905, and it is now regarded as signaling the end of the Lochner Era.

Interestingly, this decision occurred at the time that President Franklin D. Roosevelt was pushing his New Deal program. Finding few successes in his legislative attempts due to the relatively limited government stance by the Supreme Court, Roosevelt proposed to expand the Supreme Court, thus allowing him to "pack" the court with like-minded judges. Justice Owen Roberts, who had heretofore voted on the limited government side of the Court, now changed direction and supported most Roosevelt initiatives. This change in the ideology balance of the Court made the court packing scheme unnecessary. Justice Roberts's change of heart is known as "the switch in time that saved nine."

The National Labor Relations Act and NLRB v. Jones & Laughlin Steel: Expansion of the Commerce Clause

The National Labor Relations Act was passed by Congress in 1935. Just two years later, with NLRB v. Jones & Laughlin Steel Co. in 1937, the court began permitting a wider interpretation of commerce, thus expanding the role of the federal government in areas of the economy previously denied to them. It was charged that Jones & Laughlin Steel Co. discriminated against some workers who wanted to join a union. The National Labor Relations Board ruled against the company, ordering that the workers be rehired and given backpay. Jones & Laughlin Steel Co. refused to follow the board's ruling, asserting that the National Labor Relations Act was unconstitutional. The Supreme Court ruled that the act was permitted under the Commerce Clause of the Constitution. Chief Justice Charles Evans Hughes, writing for the majority, stated, "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[14]

Here we see the court beginning to rationalize an extended definition of commerce. This court appears to establish a test to determine the applicability of the government's commerce power to an economic activity. An economic act need only " … have such a close and substantial relation to interstate commerce …" to fall under the government's commerce power.

The Fair Labor Standards Act and United States v. Darby Lumber Co: Congress to Use Its "Judgment" in Exercising Its Power "to the utmost Extent"

Again, Congress, flexing its regulatory muscle, passed the Fair Labor Standards Act of 1938. Then, in 1941, the Darby Lumber Co. was charged with violating that act. The company appealed, asserting that the Congress is barred from interfering in intrastate matters, specifically manufacturing. The court in the United States v. Darby Lumber Co. reasoned that manufacturing, although local in nature, contemplated interstate commerce. Therefore, Congress had the power to regulate the conditions of employment within local manufacturing facilities. The Court further adjudged that the Congress may exercise "to its utmost extent"[15] the powers reserved for it in the Commerce Clause. Remarkably, Justice Harlan Stone argued that "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[16] He is here giving Congress extremely wide latitude in determining the reasons for which Congress may legislate under the commerce clause; the only limitation he sees are *restrictions placed by the Constitution*. Whereas the Constitution grants specified limited powers to the Congress, Justice Stone reasons that the Congress has unlimited powers unless restricted by the Constitution. This turns the Constitution on its head.

The Darby decision essentially overturned the Supreme Court's decision in United States v. E. C. Knight Co. as it related to manufacturing. So now we see the federal

government commandeering to itself power that rightfully, historically, and constitutionally belongs to the states. The Supreme Court is not only complicit in this illegal taking but also seems to be eager to extend Congress's power.

The Agricultural Adjustment Act and Wickard v. Filburn: Personal Behavior, If Aggregated, Affects Commerce

Continuing its assault on the economy, the Congress passed the Agricultural Adjustment Act of 1938. This act sought to stabilize the price for wheat by controlling supply.

The Wickard v. Filburn decision in 1942 opened the floodgates. The Supreme Court here seemed to say to the Congress, "If there's any way we can rationalize some sort of link to interstate commerce, we will let you regulate whatever it is you wish to regulate."

I wrote about farmer Filburn in the Introduction. After an initial argument before the Court, a limited reargument was ordered "to the question whether the Act, insofar as it deals with wheat consumed on the farm of the producer, is within the power of Congress to regulate commerce."

Secretary of Agriculture Wickard responded that "The question … is not whether Congress can regulate consumption on the farm, but whether, as a means of regulating the amount of wheat marketed and the interstate price structure, Congress has the power to control the total available supply of wheat, including … that which is consumed on the farm."[17]

Filburn's counsel argued "that feed, seed, and the food consumed on the farm where it has been raised is a form of competition with commercial products" is an absurd

theory of competition. He warned that the government's interpretation of the Commerce Clause "would not only effectually approach a centralized government but could eventually lead to absolutism by successive nullifications of all Constitutional limitations."[18]

In its decision, the court made its famous "aggregation" argument.

> *The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taking together with that of many others similarly situated, is far from trivial.*[19]

Especially today as Congress makes laws that chip away at our liberties and expand the government, creating hundreds (not an exaggeration) of new regulatory agencies and panels, and increasing the authority of existing government departments, we must

REMEMBER ROSCOE FILBURN

The Consumer Protection Act and Perez v. United States: The Federal Government and Local Law Enforcement

Once again, the federal government believed it was better able to police local matters than the states or local communities. The Consumer Credit Protection Act of 1968 sought to provide users of credit with necessary information so as to be able to make rational borrowing decisions. In the Act's declaration of purpose, Congress stated: " … to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."[20]

Alcides Perez was a loan shark whom the federal government decided to bring to trial under the Consumer Credit Protection Act, rather than allowing him to be tried under local law enforcement. (Apparently, Perez was unable to accurately calculate the annual percentage rate of breaking a leg!) Having been found guilty, he appealed, challenging his conviction on the grounds that the Act was unconstitutional, an impermissible exercising by Congress of Commerce Clause powers.

During the drafting of the legislation, two loan shark amendments were added to the bill. At the time, Senator William Proxmire noted, "Once again these provisions raised serious questions of Federal–State responsibilities. Nonetheless, because of the importance of the problem, and Senate conferees agreed to the House provision … the problem simply cannot be solved by the States alone.

We must bring into play the full resources of the Federal Government."[21]

Writing for the eight-Justice majority, Justice William O. Douglas cited United States v. Darby, Wickard v. Filburn, and others to find the Act constitutional. Once again, the Court reasoned that if an inconsequential local activity can be viewed, in the aggregate, to have an effect on interstate commerce, it can be reached by Congress. They agreed with the government's assertion that loan sharking is a component of organized crime that has an effect on interstate commerce. Further, this single event belonged to the "class of activities" known as loan sharking. Justice Douglas, citing Maryland v. Wirtz, stated, "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.[22]

In his lone dissent, Justice Stewart commented,

> *[…] under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of the facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws. […] Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that*

> *the statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.*[23]

Again, this is not to say that loan sharking is not illegal or that it should not be prosecuted. But there is adequate law, ample police enforcement capability, and sufficient judicial capacity at the state and local levels to address this and any other local criminal activity.

The Federal Gun-Free School Zone Act and United States v. Lopez: a Slight Step Back, but Oh, the Dangers

The Federal Gun-Free School Zone Act of 1990 provided the following: "It shall be unlawful for any individual knowingly to possess a firearm any place that the individual knows, or has reasonable cause to believe, is a school zone." The Act further defined school zone as "in, or on the grounds of, a public, parochial or private school … or within a distance of 1000 feet from the grounds of a public, parochial or private school."[24]

Now we move to 1995, and look at the very interesting case of United States v. Lopez. Alfonso Lopez, a student at Edison High School in San Antonio, carried a .38 caliber revolver to school. School officials, having received a tip about the gun, confronted Mr. Lopez, who admitted to having the weapon. He was charged with violating Texas state law banning firearm possession on school premises. This Texas charge was later dismissed at the insistence of the federal government, and Lopez was charged with

violation of the Federal Gun-Free School Zone Act.

Lopez sought to dismiss on the grounds that the act was unconstitutional, as it is beyond the power of Congress to legislate control over public schools. The trial court denied that motion, and Lopez was tried and convicted. His appeal claimed that the act exceeded Congress's power to legislate under the Commerce Clause. The Court of Appeals agreed with Lopez and reversed his conviction. The Supreme Court consented then to hear an appeal by the federal government.

The Supreme Court upheld the Court of Appeals ruling that the portion of the Gun-Free School Zone act in question was indeed unconstitutional. Writing the majority opinion, Chief Justice William Rehnquist identified three broad categories of activities that Congress may regulate under the Commerce Clause:

1. The use of channels of interstate commerce
2. The instrumentalities of interstate commerce, or persons or things in the interstate commerce
3. Activities having a substantial relation to interstate commerce, that is, those activities that substantially affect interstate commerce.

Chief Justice Rehnquist concluded by saying,

> *To uphold the government's contentions here, we have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by*

> *the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.*[25]

So finally it seems that there is a line not to be crossed. In concurrence, Justice Thomas stated that without boundaries limiting the Commerce Clause to truly commercial activity, we give the federal government a blank check to regulate anything under the guise of the Commerce Clause.

But wait! It was 5-4 decision. Just one vote makes this law constitutional. Let's examine, in particular, the dissent written by Justice Stephen Breyer. He applied three basic principles to be considered:

1. The Commerce Clause included the power to regulate local activities so long as those "significantly affect" interstate commerce.
2. In considering the question, a court must consider not only the individual act being regulated (i.e., a single case of gun possession), but rather the cumulative effect of all similar acts (i.e., the effect

of all guns possessed in or near schools).

3. A court must specifically determine not whether the regulated activity significantly affected interstate commerce, but whether Congress could have had a rational basis for so concluding.[26]

Then Justice Breyer concluded from these principles, that (1) gun-related violence is a problem, (2) that problem has an adverse effect on education, and (3) education is inextricably tied to the economy. Congress, then, could have rationally concluded that the possession of guns in school zones is related to interstate commerce.

Justice Breyer moves from violence in schools, to quality of education, to education's effect on the economy, to an issue of commerce, which can then be regulated by Congress. How many steps removed from actual commerce must an issue be before it is too far to be touched by Congress under the Commerce Clause?

In dissent Justice Souter stated that the only inquiry should be whether the legislative judgment is within the realm of reason. Congress should have plenary power to legislate under the Commerce Clause as long as the law passes the rational basis test.

Justice David Souter happily judged a law to be constitutional under the Commerce Clause as long as he can divine that Congress's judgment was within the "realm of reason."[27] Not a very limiting notion.

Finally, in dissent, we find a particularly disturbing piece of rationale by Justice John Paul Stevens:

Guns are both articles of commerce, and articles

> *that could be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress power to regulate commerce in firearms, includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession, in particular markets.*[28]

Were this standard to be in place … Katie, bar the door! I can't imagine any article that could not be considered an article of commerce. Consequently, any article can be used to interfere with commerce. Therefore, the federal government can regulate any article. Unbelievable! And, clearly, Justice Stevens believes that the federal government has the authority to outlaw the possession of guns by American citizens under the Commerce Clause.

So it seems that by a bare majority, the Supreme Court appears to have decided that there is some limit to congressional power under the Commerce Clause. But wait; Congress was not ready to give up. They decided to make a slight change to the wording of the act and reenact the legislation.

The original wording (a portion) of the 1990 legislation was

> *It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.*[29]

In 1996, after the Lopez decision, Congress changed the wording of that paragraph to

> *It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.*[30]

Congress apparently refuses to allow anything to halt their efforts to control ever increasing aspects of our lives. The reenacted law has yet to be challenged.

Again, we're not talking about allowing children to bring guns to school. The point is there is absolutely no reason for the federal government to be involved. There was a perfectly adequate Texas law which made that activity illegal, and the state's police power is exactly what should control in this situation. We don't need—and don't want—a national law specifying the exact circumstances of this type of crime and its punishment. Each of the states and local communities are eminently capable of addressing the dangers of guns in their schools. Perhaps in a state where gun ownership is not widespread, one set of illegal circumstances and punishments may be defined, while in a city with a gun problem, a somewhat different, local application of law may be called for. National legislation does not allow for the tailoring of legal means to meet local requirements. But more importantly, it removes from state authority powers guaranteed to it by the Constitution.

The Dormant or Negative Commerce Clause

We have discussed the federal government's continued expansion of power under the Commerce Clause. Under a concept referred to as the Dormant or Negative Commerce Clause, the federal government restricts the legislative ability of the states in the area of commerce while doing nothing at all.

While there is no actual dormant or negative Commerce Clause, the idea is that states cannot pass any law which may impinge on interstate commerce even though Congress may not have legislated in the area in question. A couple of cases might clarify the situation.

Kassel v. Consolidated Freightways Corp.: a Dormant Commerce Clause Decision

The State of Iowa passed a law prohibiting sixty-five-foot double tractor-trailers from traveling the majority of highways in that state. The state claimed that these sixty-five-foot vehicles were more dangerous than the fifty-five-foot semis that were allowed on Iowa's roads. Consolidated Freightways Corp., which used the sixty-five-foot doubles, brought suit against the state claiming that Iowa's legislation unconstitutionally burdened interstate commerce. Iowa, on the other hand, held that the statute was a reasonable safety measure, therefore falling under the state's police power. Justice Powell, writing for the majority decision, found that the law placed a great burden on interstate commerce with only an illusory safety interest.

It should be noted that, at the time, sixty-five-foot

doubles were prohibited in seventeen other states.

The point here is that the federal government had not passed any legislation or established any national regulation specifying the permissibility or prohibition of sixty-five-foot double trailers or fifty-five-foot semi trailers in interstate commerce. In spite of this lack of action on the part of the federal government, Iowa's law was found to be in conflict with the elusive concept of the Dormant or Negative Commerce Clause.

In his dissent, Judge William Rehnquist noted that the Commerce Clause is a grant of authority to the Congress and not to the courts. He noted that the use of the Dormant Commerce Clause philosophy would arrogate to the Supreme Court the function of forming public policy, which, in the absence of Congressional action, the Framers of the Constitution left to the States.

Justice Antonin Scalia has since written that "the so-called 'negative' Commerce Clause is an unjustified judicial intervention, not to be expanded beyond its existing domain."[31] Justice Thomas wrote that "the negative Commerce Clause has no basis in the Constitution and had proved unworkable in practice."[32]

So here we have the Courts diminishing the power of the states, even in the absence of Congressional legislation or regulation.

By the way, the Justice Department tried to use Dormant Commerce Clause rationale in its suit against the Arizona Immigration Law.

Too Much Federal Government

How far can this go? Let's take a not-too-far-fetched example. The federal government already regulates many aspects of automobile manufacture and use: emission standards, safety standards, average mileage per gallon of gasoline standards, and so on. Perhaps some future Congress may decide that it is best for the economy if each family had no more than two automobiles or that ownership of a third vehicle carries with it a hefty luxury tax. Their rationale may include fewer accidents and lower health-care costs, reduced greenhouse gas emissions, more efficient use of roads and highways, and other economic and commerce concerns. A law like this, affecting personal property, individual purchase decisions, and personal liberty, may well be upheld by the Supreme Court. With the precedent set that the Congress has the power to regulate any activity in which the aggregate has a substantial effect on commerce, the federal government can make the case for regulating almost every human activity.

Since Gibbons v. Ogden in 1824 to the present, Congress has endeavored to expand its powers under the Commerce Clause while the Supreme Court has tried to determine the extent of federal powers. Inasmuch as these and other powers are granted to the federal government by the states and ultimately by the people, we must not let either the Congress or the Supreme Court define their powers. It is our job to unambiguously specify precisely their powers under the Commerce Clause. I propose we do so by ratifying the Twenty-eighth Amendment to the Constitution of the United States.

We must take action now to limit the federal government's reach.

REMEMBER ROSCOE FILBURN

CHAPTER 3

THE CASE FOR LIMITED FEDERAL GOVERNMENT

The federal government was established to protect individual and states' rights, ensure fair and equitable dealings among the states, and maintain relationships with foreign nations. It seems to have evolved into an organization focused upon control: control of the economy, control of our society, and even control over the individual decisions of our citizens. Some will argue, very persuasively, that this kind of control is essential to promote the general welfare of the nation. Without national oversight, they say, the economy will run amok, the disparity between rich and poor will grow, the environment will be trashed, millions will not receive proper health care, and a myriad of problems, large and small, will continue to dog our society. In making this argument, it is assumed that the politicians and administrators at the national level are best able to make economic and societal decisions and that central planning is the best way to ensure efficient resource utilization and promotion of the general welfare.

Not only has history proven, time and again, that a

governmental authority cannot bring about prolonged prosperity through centralized control, the largest contemporary central governments remind us of this truth. The central government of the former Soviet Union planned and controlled virtually the entire economy from 1928 to 1991. It was a disaster. China's planned economy was equally ineffective until it gradually transformed its economy to one more closely approaching a free market. Central planning does not work!

In this chapter, we will examine many of the factors of our society harmed by an overreaching federal authority, and we will investigate some significant benefits resulting from a decrease in Congressional Commerce Clause power. These include:

- Greater constitutional stability
- Strengthened economy
- Minimizing distortions to the operation of a free market
- The states as a fourth check and balance
- Test base for new programs
- "Voting by feet" and competition among the states
- Lower government spending and reduced taxes
- Reduced federal government bureaucracy
- Reduced lobbying and influence of lobbyists
- Greater responsiveness to citizens

More than any other, the Commerce Clause is used by politicians seeking greater government control over economic activities and consumer choices. And while the commerce clause has been primarily used to affect

economic outcomes, the government has attempted to use it to control many non-economic areas. In Lopez. v. United States, for example, the government tried to use the Commerce Clause to effect a measure of gun control.

In his books *Applied Economics* and *Intellectuals and Society*,[1] Professor Thomas Sowell observes that political elites attempt to establish policies furthering their ideological beliefs or political exigencies, which often results in outcomes far different than those intended. Minimum-wage laws, for example, often result in greater unemployment among the youngest and the least skilled workers. Likewise, rent control laws often result in decreasing availability of rental units, a decrease in maintenance and other services in existing rent controlled units, and higher average rents due to the exemption from rent control of luxury rental units.

Even if politicians were honestly making their best efforts at enhancing the country's economic condition, can we really expect politicians to be able to better allocate an entire spectrum of resources then the millions of consumers who, by their daily choices (demand), in aggregate, call forth those resources needed to meet those choices? A politician's goals are normally short-term (next election cycle), ideologically focused on his or her view of what's best for constituents and society, and often concentrated on maintaining and expanding his/her power and the power of his/her institution. Seldom is a rigorous analysis performed of the likely, long term consequences of their actions. Nor is the history of the results of similar past activities consulted.

The intent of this writing, however, is not to

investigate a better economic system. Again, the aim of this book is to encourage a return to the more limited-government characterization of the Commerce Clause of the Constitution. So, let's look at some of the reasons for and advantages of a limited Commerce Clause.

CONSTITUTIONAL STABILITY

I believe one of the greatest advantages of tightening the scope of the Commerce Clause is in solidifying the basis of our government. Our Constitution is the heart and soul of our government. It should not be alterable upon the whims of politicians or judges.

There must be a foundation upon which a government is built, and that base must be both philosophically and operationally stable. Our citizens, our businesses, and even other foreign nations must be able to conduct their affairs while relying on the constancy of the governmental environment existing at the time of their decisions. There is enough uncertainty in most personal and business decisions without adding the uncertainty of a changing legal or regulatory environment. And there has been entirely too much of that in our past and recent history.

A citizen purchasing a parcel of land for a home or business understands that there is a slight risk that the government may take all or a portion of his property for public use in accordance with Amendment 5 to the Constitution. The applicable wording is, "nor shall private property be taken for public use, without just compensation." However, when the Supreme Court substitutes "public purpose" for "public use," not only is the regulatory environment substantially altered, but

also the stage is set for additional governmental forays into our rights to own private property. In the Kelo v. City of New London decision (2005), the Supreme Court decided that it was constitutionally permissible for the City of New London, Connecticut, to take the property of one private citizen and give that property to a private developer, which they asserted would benefit the community. The Court, as in a few previous cases, determined that this public "purpose" was essentially the same as public "use."

This becomes a very slippery slope. An individual should be able to rely on the government recognizing private property rights. When rights are removed or altered at the whim of the government for some asserted "community benefit," at what point do such intrusions stop, and at what point do we stop making ad hoc modifications to the basis of our government? When do we recognize that a Constitution in flux cannot serve as the foundation for a system of governance? The core of our government and our society should be altered only after very careful debate and agreement by those who vest power in the government: its citizens.

Certainly, our nation has undergone profound changes since its founding. Based on those changes, it may be necessary, from time to time, to modify the Constitution. There is a mechanism to accomplish this. If we need to make a major change, we amend the Constitution. The amendment process was included for this specific reason, and it was made difficult to ensure a thorough debate and approval by an overwhelming majority of the states and their citizens.

If the people by and for whom this government was established wish to provide greater authority to Congress, they may do so by amending the Constitution. Those who desire an increase in federal power—as well as those wanting a smaller federal government—have precisely the same vehicle with which to effect their desires. Using the amendment process ensures that changes are made at the behest of the great majority (three quarters of the states) and not at the caprice of politicians or jurists. We must not allow the Constitution to be hijacked by a Congress wanting to assume more power and a judiciary willing to permit it.

In reducing the Congress's ability to use the Commerce Clause to justify an expansion of their powers, Amendment 28 provides an amount of stability to the Constitution and to the federal government. With a better definition of the reach and limits of federal authority, we can more easily understand our (states and individuals) own rights, capabilities, and limitations within the system. No longer will our reliance upon current laws, customs, and precedents be overridden by an irrational new law or court judgment.

THE ECONOMY

The Twenty-eighth Amendment will minimize the negative effects on the economy of an unlimited federal government. The federal government affects the economy in many ways. The two most important and direct methods are fiscal policy (taxes) and monetary policy (money supply). We would normally think that taxes are used to support the essential functions of the

government. But of course, collecting taxes from individuals and corporations reduces the amount of money they have that could otherwise be invested or saved. This directly affects the economy. Additionally, as more and more entitlement programs, welfare programs, and other activities that benefit one segment of society or the other are enacted, taxing becomes a method of wealth redistribution, especially when a disproportionate amount of taxes are paid by a particular segment of society.

In executing the government's monetary policy, the Federal Reserve Bank sets discount rates, thereby establishing (artificially) interest rates on all types of loans, otherwise known as the price of money. They also regulate the nation's money supply by buying and selling government notes and specifying bank reserve requirements.

It's easy to see that just these two functions of the federal government exert a tremendous influence on the economy. Fair tax advocates propose a simpler and fairer method of collecting the taxes needed by government. However, their proposals do little to stem the spending appetite of Congress (other than substantially reducing the size of the Internal Revenue Service, not an inconsequential or undesirable goal).

On the monetary side, some, most vocal among them Congressman Ron Paul, would like to see the abolishment of the Federal Reserve System, or at least a much more limited role for that agency.

The federal government's activities in exercising fiscal and monetary policy clearly are a tremendous force in determining the current state and future direction

of our economy. While Fair Tax and an overhaul of the Federal Reserve System are legitimate subjects for debate, both address only a single component of the government's massive influence on the economy. The almost innumerable laws, agencies, policies, procedures, administrative measures, compliance requirements, ad infinitum, all exert substantial barriers to market entry, capital formation, and the effective use of resources.

What is being proposed here is a first step in limiting the ability of the federal government to continue to grow and then reducing its current size to that necessary to meet its explicit functions. A government that is too large has become so by bringing more and more power to itself, establishing agencies to control that power and, consequently, needing ever greater tax revenues from its citizens to support itself.

While at the Heritage Foundation, Dr. Daniel Mitchell, currently senior fellow at the CATO Institute, wrote an article called "The Impact of Government Spending on Economic Growth." The article referenced and summarized an extensive amount of academic and economic research, and I will liberally quote from Dr. Mitchell's study. His findings, summarized below, are well-supported by extensively referenced material.

Dr. Mitchell describes eight types of costs to the economy of a large central government and excessive government spending.

THE EXTRACTION COST. Government spending requires costly financing choices. The federal government cannot spend money without first taking that money from someone. All of the options used to finance government

spending have adverse consequences. Taxes discourage productive behavior, particularly in the current U.S. tax system, which imposes high tax rates on work, savings, investment, and other forms of productive behavior. Borrowing consumes capital that otherwise would be available for private investment and, in extreme cases, may lead to higher interest rates. Inflation debases a nation's currency, causing widespread economic distortion.

THE DISPLACEMENT COST. Government spending displaces private sector activity. Every dollar that the government spends means one less dollar in the productive sector of the economy. This dampens growth since economic forces guide the allocation of resources in the private sector, whereas political forces dominate when politicians and bureaucrats decide how money is spent. Some government spending, such as maintaining a well-functioning legal system, can have a high rate of return. In general, however, governments do not use resources efficiently, resulting in less economic output.

THE NEGATIVE MULTIPLIER COST. Government spending finances harmful intervention. Portions of the federal budget are used to finance activities that generate a distinctly negative effect on economic activity. For instance, many regulatory agencies have comparatively small budgets but impose large costs on the economy's productive sector. Outlays for international organizations are another good example. The direct expense to taxpayers of membership in organizations such as the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD) is often trivial compared to the economic damage resulting from the

anti-growth policies advocated by these multinational bureaucracies.

THE BEHAVIORAL SUBSIDY COST. Government spending encourages destructive choices. Many government programs subsidize economically undesirable decisions. Welfare programs encourage people to choose leisure over work. Unemployment insurance programs provide an incentive to remain unemployed. Flood insurance programs encourage construction in floodplains. These are all examples of government programs that reduce economic growth and diminish national output because they promote misallocation or underutilization of resources.

Let me pause for a moment for comment. Some may disagree with the wording above. However, if you disagree that welfare programs encourage people to choose leisure over work, you cannot disagree that without welfare programs, there is much more incentive to search for work. If you disagree that unemployment insurance programs provide an incentive to remain unemployed, you cannot disagree that without unemployment insurance, there is much more incentive to regain employment as soon as possible. And if you disagree that flood insurance programs encourage construction in floodplains, you cannot disagree that providing flood insurance significantly reduces the risk of building in a floodplain. This is not a commentary on the social desirability of welfare, unemployment, or flood insurance programs; it is simply a statement of the economic results of those programs.

Continuing:

THE BEHAVIORAL PENALTY COST. Government spending discourages productive choices. Government programs often discourage economically desirable decisions. Saving is important to help provide capital for new investment, yet the incentive to save has been undermined by government programs that subsidize retirement, housing, and education. Why should a person set aside income if government programs finance these big ticket expenses? Other government spending programs—Medicaid is a good example—generate a negative economic impact because of eligibility rules that encourage individuals to depress their incomes artificially and misallocate their wealth.

THE MARKET DISTORTION COST. Government spending distorts resource allocation. Buyers and sellers in competitive markets determine prices in a process that ensures the most efficient allocation of resources, but some government programs interfere with competitive markets. In both healthcare and education, government subsidies to reduce out-of-pocket expenses have created a "third-party payer" problem. When individuals use other people's money, they become less concerned about price. This undermines the critical role of competitive markets, causing significant inefficiency in sectors such as healthcare and education. Government programs also lead to resource misallocation because individuals, organizations, and companies spend time, energy, and money seeking either to obtain special government favors or to minimize their share of the cost of government.

THE INEFFICIENCY COST. Government spending is a less effective way to deliver services. Government directly provides many services and activities such as education, airports, and postal operations. However, there is evidence that the private sector could provide these important services at a higher quality and lower cost. In some cases, such as airports and postal services, the improvement would take place because of privatization. In other cases, such as education, the economic benefits would accrue by shifting to a model based on competition and choice.

THE STAGNATION COST. Government spending inhibits innovation. Because of competition and the desire to increase income and wealth, individuals and entities in a private sector constantly search for new options and opportunities. Economic growth is greatly enhanced by this discovery process of "creative destruction." Government programs, however, are inherently inflexible, both because of centralization and because of bureaucracy. Reducing government—or devolving federal programs to state and local levels—can eliminate or mitigate this effect.

Dr. Mitchell summarizes:

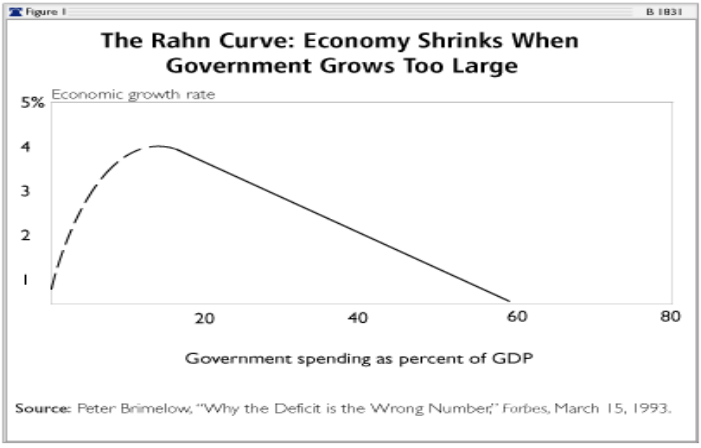
> *This paper concludes that a large and growing government is not conducive to better economic performance. Indeed, reducing the size of government would lead to higher incomes and improve America's competitiveness. There are also philosophical reasons to support smaller government, but this paper does not address*

> *that aspect of the debate. Instead, it reports on—and relies upon—economic theory and empirical research.*[2]

So we see that for many reasons, as the government grows and spends more, economic growth is inhibited. The eminent economist, Dr. Richard Rahn, current chairman of the Institute for Global Economic Growth, proposed a general curve (below) to show the relationship between government spending and economic growth. While the exact numbers on either axis are the subject of debate, empirical studies support the general shape of the curve. That is, there is some level of government spending needed to support the growth of the economy. Such functions as national security, maintenance of a system of laws, and the ability to enforce such laws are examples of necessary government expenditures. As the size of government continues to grow, expenditures for such programs as welfare, environmental regulation, education, and the like remove funds from the private sector, limiting capital formation and leading to lowered growth rates. That is not to say that some level of expenditure in these types of programs cannot be made, but as the government continues to increase spending for social and societal programs, the resulting downward force on the economy results in social and societal degradation.

Again, there is debate concerning the optimum level of government spending. However, there appears to be substantial evidence that government spending should be maintained at the 15 percent to 25 percent of Gross Domestic Product level. The greater the spending is above

that 25 percent level, the more negative impact such spending will have on the economy.



MINIMIZING FREE MARKET DISTORTIONS

This is an important subset of the economy factor discussed above. While our federal government will, undoubtedly, continue to have a substantial effect on the operation of our market economy, each market excursion has its consequences. Some government regulation is good, even necessary. But many or most regulations interrupt or impede the operation of supply, demand, and pricing activities.

Professor Murray Weidenbaum, Director of the Center for the Study of American Business at Washington University, wrote, "the response of the economy to supply-oriented tax policy will be greatly enhanced by reducing the numerous regulatory obstacles to economic activity. Failure to eliminate or at least substantially cut back the

regulatory inhibitions to work, invest, and produce will result in disappointing returns from tax policy changes."[3]

Market distortion occurs when a governmental law, regulation, rule, or policy causes market factors to behave in ways contrary to those in which they would have behaved in a free market. For example, prices may be set by a regulator rather than being determined by the forces of supply and demand; supply may be artificially set or constrained rather than being determined by demand; businesses may be forced to undertake activities favored by the government or some special interest group, which they might have normally avoided; or potential competitors might be denied entry into an industry due to excessive regulatory requirements. While the market is sometimes simply distorted by federal regulations, it is more often bent, smashed, crushed, and beaten to a pulp.

Let's do a quick review of types of economies, and then we'll look at the pulp-producing effect of government regulations.

A Free Market Economy

In a truly free market, goods and services are exchanged between individuals wholly without outside influence. Each participant involved in the exchange is free to negotiate a mutually agreeable transaction. Goods may be exchanged for other goods, for services, or for some medium of exchange such as money. The transaction takes place when each participant believes the exchange to be beneficial.

Of course, these exchanges would take place millions of times a day in far-flung locations, encompassing an almost

unimaginable diversity of products and services. Consumers are said to be voting with their pocketbooks. In a grocery store, if the price of a product is too high, consumers may forgo a purchase or buy a similar but less expensive product, a substitute. If the grocery store finds they cannot sell the product at the stated price, it may reduce the price or add something to the item to make it more attractive. In this way, reasonable prices are fairly established for goods and services. Suppliers are able to determine consumer desires (demand) and devote necessary resources to produce those items or services (supply) desired.

Advocates of the free market system contend that this is the most efficient method to determine the most effective allocation of productive resources. Their reasoning is both logical and supported by study data and history. In the free marketplace, an excess of demand over supply will tend to bid up prices. Higher prices are a signal to producers to increase production to meet that demand. An excess of supply over demand, on the other hand, results in decreased prices as suppliers seek to rid themselves of the excess supply. Resources are removed from the production of those items (or service providers may move to other endeavors) until supply meets demand.

All this may seem almost too simplistic, but it is how business works.

Management, in all segments of the economy, makes assessments of anticipated demand, supply by competitors, their own production potential, and cost versus possible pricing. Armed with these estimates, they plan their product or service offerings. As real-time demand, supply, and pricing data become available, they

make necessary adjustments.

Supply and demand also play an important role in new business startups. When unmet demand is recognized—locally, nationally, or internationally—a new business entry to meet that demand is imminent.

So we see that the factors of supply, demand, pricing, and resource allocation are all relatively efficiently coordinated by free-market activities.

A Regulated or Controlled Market Economy

There are those that contend that the marketplace is much too complicated to work efficiently on its own. They believe that the overall economy must be controlled and that a free market will result in chaos and unfair concentration of wealth. So, on the opposite side of the coin is a controlled market in which the government regulates some combination of productive resources, supply, demand, and prices.

A regulated market assumes that only the government and its agencies can see the "big picture" of the economy. Some highly knowledgeable individuals would be in a better position to determine what type of goods and how much are to be produced, the types and extent of services to be provided, and the prices at which these goods and services are to be offered. Advocates of government intervention also assert that without government regulation, many externalities such as social programs, environmental concerns, and human failings will not be properly addressed.

A Mixed Economy

Somewhere in between a free market and a regulated market is an economy that can be termed *mixed*. A mixed economy has some characteristics of both free and regulated markets. Typically, a mixed economy will provide for private ownership of productive capacity, including agriculture, manufacturing, and service organizations. Included in private ownership is a general freedom to hire and fire employees as necessary. Workers are also free to sell their labor at the highest possible rate. There is at least some element of price determination due to the workings of supply and demand.

The government often provides services such as libraries, schools, infrastructure construction (roads, bridges, power lines, etc.), waste disposal, water systems, mail delivery, and other such services.

Often the government will place restrictions and interventions on economic activities in order to control certain outcomes. These may include environmental regulations to protect land, water, air, and wildlife; minimum-wage laws to protect low-skilled workers; and consumer protection laws to protect buyers from unsafe or undesired products.

Finally, in a mixed economy, the government may wish to provide for societal aims. These may include various subsidies to some sectors of the economy (e.g., agriculture); distribution of wealth, which some may perceive as more fair and equitable; welfare or unemployment payments; and payments to the elderly or infirm.

A mixed economy includes a wide range of government interventions and coercion from very slight to significant.

Normally, however, a mixed economy is not stagnant in terms of government control. Regulatory activities seem always to increase toward more government intrusion but very seldom toward less.

Our Economy

So, on the extreme end of the free market side of economic theory lies the totally free market with absolutely no government control or intervention. In this case, local garbage collection, firefighting, mail delivery, and such would be in private hands. On the extreme end of the regulated market side of economic theory lies an economy totally and absolutely controlled by the government in which supply, demand, prices, productive facilities, capital, and the like would all be regulated by government agencies.

Neither of these extremes exists and probably never will. (History *has* seen totalitarian regimes with virtually absolute control.) The questions before us now are at what point on the totally-free-to-fully-regulated market continuum are we at present, in which direction are we moving, and where on that line do we want to be? Our market system leans toward the "free" end of the spectrum, but over the past half century, we have seen the proliferation of laws, rules, and regulations affecting almost every facet of our economy.

Economics professors John W. Dawson of Appalachian State University and John J. Seater of North Carolina State University studied the relationship between federal regulations and the macro economy. In that study, they measured the extent of federal regulation by actually

counting the number of pages in the Code of Federal Regulations (CFR).

While some laws may stand on their own, many require the development of implementing rules and regulations. Such directives are promulgated by agencies established to implement and oversee the execution and enforcement of the law for which the agency was created. Every regulation established by every federal agency is documented, in full, in the CFR. The CFR is revised as needed, and at least annually. Consequently, it is reasonable to infer that the level of federal regulation, at any time, is represented by the amount of documentation necessary to record such regulation.

While the CFR began codifying federal regulations since its inception in 1938, because of the need to rely on a standard measurement of a CFR page, Professors Dawson and Seater used 1949 as the beginning date of their study. They show an increase in CFR pages from 20,000 in 1949 to more than 118,000 in 1990. The current page count is over 130,000.

Those interested in the statistical analysis performed by Professors Dawson and Seater should access their study online. I will, however, quote their January 2004 conclusion here:

> *We have presented a new time series measuring the extent of federal regulation in the United States. We find that regulation has statistically and economically significant effects on that time path of output, total factor productivity, labor, physical capital, an investment. […]*

> *Regulation's overall effect on all variables is negative.*
> *Regulation's negative effect on output is substantial. In the trend-break model, federal regulations added over the past fifty years have reduced the average annual growth rate of output by seven- to nine-tenths of a percentage point. As a result, annual output now ($11 trillion) is two-thirds of what it would have been ($16.4 trillion) if regulation had stayed at its 1949 level, implying an annual cost in 2003 of $5.4 trillion in foregone output. […] Most striking, perhaps, is the uniformly negative impact on TFP (Total Factor Productivity), which captures technical progress.*
> *Regulation is a dimension of government activity that heretofore has been omitted from macroeconomic analysis. Our findings suggest that omission should cease.*[4]

So we see that the imposition of federal regulations upon our economy and our society has grown significantly in the past half-century (and, I assert, throughout our history, slowly at first and gathering substantial steam as the nation grew.) And those regulations have clearly had a negative effect on our economy as a whole.

The Negative Effects of Regulation

First, let me assert the converse of this section's title. There are many very positive effects of some of the government regulations. We do have less pollution, some products

may be safer, and there is less discrimination in hiring, to name a few. But I contend that the negative effects of individual regulations, coupled with the growing number and scope of regulatory activities, are destructive to the business sector and the nation's consumers.

Professor Weidenbaum lists four key types of induced regulatory costs:

1. *The innovative product and process research and development that is not undertaken. […] [M]any companies report that they devote large and growing shares of their scientific resources—from one-fifth to one-half—to meeting regulatory requirements or avoiding running afoul of regulatory restrictions.*
2. *The new investments in plant and equipment that are not made because of regulatory barriers and the diversion of investment funds to meeting government-mandated social requirements. […] [I]n recent years, outlays mandated by EPA and OSHA have come to about 10 percent of new capital formation in American industry. In a pioneering study, Edward Denison estimated that the diversion of this amount of new capital resulted in business productivity in 1975 being 1.4 percent lower than it otherwise would have been.*
3. *The workers that are not hired because federal regulations have priced them out of labor markets. A variety of serious academic studies have shown that the steady increases in the statutory minimum wage have reduced teenage employment*

significantly below what it otherwise would have been—without a comparable offsetting increase in adult employment.

4. *The immeasurable effects of government regulation on the basic entrepreneurial nature of the private enterprise system. […] [M]any chief executives now report that one third or more of their time is devoted to governmental and public policy matters.*[5]

Clearly, economic regulations such as limiting supplies, setting prices, creating barriers to entry, and the like create distortions in the marketplace. Equally causative of economic effects are "social" regulations such as emissions standards, wildlife protection, wetlands management, and others. Much like the Supreme Court's rationale in Wickard v. Filburn that the activities of Farmer Filburn, when viewed in the aggregate, have a substantial effect on interstate commerce, so too do the economic and social regulations, in the aggregate, represent an enormous drag on the free market.

Let's look at a few specific examples of the microeconomic effects of overregulation: how governmental incursions in the marketplace affect the supply, demand, and prices for goods and services.

Embargo Acts of 1807

After 1803 and until 1814, war in Europe continued, particularly between Britain and France. American ships, trading in Europe, became a pawn in these battles with commercial restrictions, ship seizures, and impressments

of American sailors, causing anger and a call for war in the United States.

Wishing to avoid another war, President Thomas Jefferson sought to influence both Britain and France through economic means. He recommended to Congress the Embargo act of 1807. This act, an addition to the Nonimportation Act of 1806 (prohibiting importation of certain goods from Britain), prohibited all American ships from departing for a foreign port, with the goal of ending foreign trade.

President Jefferson, heretofore a proponent of limited government, felt compelled to inject himself in the functioning of commerce.

The embargo had a devastating effect on American trade and the economy. At once-bustling harbors, American ships decayed through nonuse and lack of maintenance. In the South, crops could not be sold and were destroyed. The embargo encouraged smuggling through Canada of goods carried by privateers from other parts of the world. It also encouraged disregard of the law wherever and whenever possible. Britain continued to export to America through these means. The Act was a commercial, economic, and financial disaster to America.

Not having the desired effect, President Jefferson and his Congress continued to amend the Embargo Act. A supplementary act was passed in January 1808, and another in March of that year. In April 1808, Congress passed the Non-Intercourse Act. Each of these acts, in their own way, further crippled American commerce. The only positive, unintended consequence was the stimulus given to the development of industry in America due to

the scarcity of imported goods.

Having completely failed in our efforts to influence Britain and France, we went to war with Britain in 1812.

Henry Adams, in his book *The Writings of Albert Gallatin*, ascribes to Gallatin, Jefferson's Secretary of the Treasury, the following:

> *As to the hope that it (the embargo act) may induce England to treat us better, I think is entirely groundless. […] government prohibitions do always more mischief than had been calculated; and it is not without much hesitation that a statesman should hazard to regulate the concerns of individuals as if he could do it better than themselves.*[6]

I suspect Mr. Gallatin could have done much to contribute to the writing of this book.

Milk and Sugar

When our parents sent us to the corner store to buy milk and sugar, we didn't realize we were subsidizing these industries by paying prices higher—and in some cases much higher—than they would have been without government regulations.

The federal government has been subsidizing and regulating the dairy industry since the Great Depression. This includes setting the price of milk, ice cream, yogurt, cheese, and butter; providing a price support program; and providing an income-support program. In an article entitled "Agricultural Regulations and Trade Barriers,"

Chris Edwards of the CATO Institute states, "In recent years, dairy subsidies have cost taxpayers anywhere from zero to $2.5 billion annually depending on market conditions. In addition, dairy programs stifled dairy industry innovation and raised milk prices for consumers."

Mr. Edwards continues,

> *In fact, the regulated dairy system does not deliver "reasonable" prices. Because of the controls placed on the dairy industry, milk prices are substantially higher than they would be otherwise, which penalizes millions of American families. The Organization for Economic Cooperation and Development found that the U.S. dairy policies push up the price of milk to consumers by about 26 percent. The U.S. International Trade Commission found that federal dairy policies push up the U.S. price of dry milk by 23 percent, the price of cheese by 37 percent, and the price of butter by more than 100 percent above world prices. The bottom line is that U.S. dairy programs unfairly transfer wealth from U.S. consumers to certain dairy businesses. Artificially high dairy prices also hurt downstream producers in the U.S. food industry that use dairy products as inputs to production.*[7]

The federal government also regulates the sugar industry through the control of the supply of sugar, price supports, and restrictions on trade. Mr. Edwards notes

"in recent years, USDA data show that U.S. sugar prices have been more than twice world market prices."

Mr. Edwards comments on the sugar industry:

> *The big losers from federal sugar programs are U.S. consumers. The Government Accountability Office estimates that U.S. sugar policies cost American consumers about $1.9 billion annually. At the same time, sugar policies have allowed a small group of sugar growers to become wealthy because supply restrictions have given them monopoly power. The GAO found that 42 percent of all sugar subsidies go to just 1 percent of sugar growers.*
>
> *The U.S. Department of Commerce released a damning report on the economic effects of U.S. sugar policies in 2006. The report had five key findings:*
>
> - *U.S. employment in industries that use sugar, such as confectionery manufacturing, is declining.*
> - *For each sugar growing and harvesting job saved due to high U.S. sugar prices, nearly three confectionery manufacturing jobs are lost.*
> - *The sugar costs are a major reason sugar-using companies have relocated their factories abroad.*
> - *Numerous U.S. food manufacturers have relocated to Canada where sugar prices are less than half of U.S. prices and to Mexico*

where prices are two-thirds of U.S. levels.

- *Imports of food products that use sugar as an import are growing rapidly.*[8]

There is so much talk these days about higher taxes for the rich and more payments to the poor and middle-class through unemployment benefits and the like. Why is the government so willing to tax its citizens through increased costs for milk and sugar for the benefit of a small group of rich farmers? Once again, federal government intrusion into the free market system distorts supply and prices to the detriment of average consumers.

Minimum Wage Laws

Minimum wage laws were originally established as one component of the government's efforts to eliminate or at least minimize worker abuse in manufacturing industries. Sweatshops in the garment and other industries routinely paid workers low wages and forced them to work long hours in poor working conditions. The goals of these laws have now evolved to focus on a more socially desirable income distribution, provision of a "fair" or "living" wage, and reduction of poverty.

A minimum wage as an entitlement is now ingrained in American society. But have these laws attained their goals or are there serious negative consequences to this government intrusion in the marketplace? And if there are to be minimum wage laws, is the federal level their proper location, or are the individual states better able to tailor their minimum wage programs?

There is considerable disagreement as to the efficacy of

a minimum wage as an aid to low income workers and as a strategy to fight poverty. On the pro side of the debate, minimum-wage defenders allege the following benefits:

1. Increased standard of living for the poor by providing a higher "living" wage to the lowest earning employees
2. Stimulated economy by putting more money into the economy
3. Decreased cost of government social welfare programs because lowest paid employees would be earning more
4. Increased employee motivation because employees are earning more and employers demand more as a result of the higher wage
5. Greater social good by fighting poverty, providing a wage that will better enable an employee to support his family, and prevent employers from taking indecent advantage of low-skilled and poorly educated employees

On the con side, opponents of the minimum wage claim

1. Economic inefficiency by requiring employers to pay wages greater than that required by supply and demand forces. That is, many less skilled, less experienced, and less desired workers become more expensive and are therefore priced out of the job market.
2. Increased unemployment by employers who

choose not to pay artificially high wages
3. Greater discrimination in employment since artificially higher wages increase the pool of applicants, allowing employers to choose, for example, a man rather than a woman for an available employment position
4. Some increase in inflation as employers raise prices to cover higher wage requirements
5. Negative effect on poverty since the poorest and least skilled are priced out of the job market. Because minimum wage laws constrict employment, the poorest and least skilled are unable to find work.
6. Higher paid workers are unfairly protected from the competition of lower paid workers

So, who's right, who's wrong? In 1995, the Joint Economic Committee of the Congress of the United States surveyed over one hundred studies performed researching the effects of the minimum wage. Their summary, entitled "50 Years of Research on the Minimum Wage, February 15, 1995," resulted in the following:

- Eighty-three studies confirmed negative effects of minimum-wage laws.
- Nine studies attested to positive aspects of the minimum wage.
- Seventeen studies were either definitional or inconclusive as to the effects of the minimum-wage.[9]

In a 2008 book, David Neumark and William L. Wascher described their analysis of nearly two decades of research on minimum wages.

> *Based on the extensive research we have done, and our reading of the research done by others, we arrive at the following four main conclusions regarding the outcomes that are central to policy debate about minimum wages. First, minimum wages reduce employment opportunities for less-skilled workers, especially those who are most directly affected by the minimum wage. Second, although minimum wages compress the wage distribution, because of employment and hours declines among those whose wages are most affected by minimum wage increases, a higher minimum wage tends to reduce rather than to increase the earnings of the lowest-skilled individuals. Third, minimum wages do not, on net, reduce poverty or otherwise help low-income families, but primarily redistribute income among low-income families and may increase poverty. Fourth, minimum wages appear to have adverse longer-run effects on wages and earnings, in part because they hinder the acquisition of human capital. The latter two sets of conclusions, relating to the effects of minimum wages on the income distribution and on skills, come largely from U.S. evidence; correspondingly, our conclusions apply most strongly to the evaluation on minimum wages policies in the United States.*[10]

In 2004, Paul Kersey, Bradley Visiting Fellow of the Heritage Foundation, addressed the Small Business Committee of the House of Representatives regarding a proposed increase in the minimum wage. He testified the following:

> *The average estimate by labor economists is that for a 10% increase in the minimum wage, employment among those affected drops by 5%. If the minimum wage is increased from $5.15 to $6.65 per hour, demand for unskilled labor could drop by as much as 15% in jobs that are at the minimum wage, resulting in the loss of hundreds of thousands of jobs and making it more difficult for poor families to take this escape route out of poverty.*
>
> *Increasing the minimum wage will do little to improve the conditions of poor Americans. Relatively few of those workers who receive wages at or near the minimum are members of poor families. For those poor who are working, wage increases are substantial and come quickly as they accumulate job experience. Increasing the minimum wage will, however, eliminate entry-level jobs for unskilled workers, making it more difficult for those who want to work to find jobs.*
>
> *One final thought about poverty. While it is natural to have sympathy for fellow citizens who work at low-wage jobs and still live in poverty, we should remember that our notion of poverty*

> *is relative. Using U.S. census data, Heritage Foundation scholars examined the living standards of poor Americans and found that the average poor American has a car, air conditioning, at least one color television along with cable or satellite TV, a home that is in decent condition and enough food in the refrigerator. Poverty in America, especially for those who do not work, is less a matter of material deprivation then of emotional and spiritual loss, to pervading worry that comes from knowing that one is dependent on the arcane determinations of state and federal bureaucrats, and the loss of self-esteem that comes from knowing that one is not self-sufficient. But for the working poor, this type of poverty is largely abolished. They are able to face the future with optimism and confidence, however modest their income, precisely because it is earned. They know they are contributing to the national economy and have taken control over their own lives.*[11]

Economist Thomas Sowell has suggested that the real minimum-wage is zero. That is the wage paid to a worker who, because of an artificially set minimum-wage, is unable to find a job or loses his current employment.

Survey after survey clearly confirms the opinions of a majority of economists that minimum wage laws have an overall negative impact on employment and a negative or no impact on poverty. They suggest that there are much better ways to fight poverty and to protect employees.

So again we see federal intrusion in the marketplace that not only fails to meet its goals of reducing poverty but negatively impacts the very citizens it proposes to help. Now a fixture in our society, minimum wage laws are a testament to the inability of politicians and bureaucrats to properly assess the effects of their intrusions into the workings of our economy.

Health Care

There's a lot of controversy concerning the ability of the health care system to meet the needs of our citizens. Some contend that only a government-run system can effectively supply health care services to all. They maintain that the free market in health care has been a failure and that intensive regulation is an absolute necessity.

Others assert, and I agree, that government meddling is the cause of our health care crisis, and more government regulation can only exacerbate the situation. Let's take a look at a little of the history of government intrusion in the health market. (While many state government regulations conspired to make free market medical choices very difficult, we'll look at federal government involvement only.)

During the Second World War, part of the government's efforts to control the wartime economy included wage controls based on the levels existing as of September 1942. These wage controls limited an employer's ability to entice new employees by offering higher wages. So to attract needed labor, employers began to offer fringe benefits, including health insurance. Then in 1943, the Internal Revenue Service issued a ruling that these benefits

would not be considered taxable income. Obviously, this was a tremendous benefit to company employees, a benefit not available to the self-employed, the unemployed, and certain other types of employees. This became a primary reason that health insurance became a responsibility of employers. Even after wage controls were eliminated, health insurance became a standard part of an employee's compensation package.

This had some very serious consequences. First, because the cost of individual insurance coverage would usually be more expensive than the cost of coverage in a group, and the government provided a tax exclusion for the group coverage but none for individual coverage, people tried to affiliate with a group (and still do). Outside of a group, individual policies became almost prohibitively expensive and had to be paid with after-tax dollars. Consequently, employees of firms offering tax-free health insurance and individuals earning wages great enough to afford the more expensive individual policies were covered in the health care system. Those unable to align with a group and those unable to afford costly individual policies remained outside the health care system (except for emergencies). These are, arguably, the ones who most need health insurance and the ones whose lack of health insurance today is touted as one of the primary drivers of the need for government-provided health care.

A second significant consequence of this federal intrusion was the destruction of the very important buyer-seller relationship, typical and critical in a free-market. The buyer (patient or person in need of a medical service) does not negotiate with or pay the seller (physician or

person providing a medical service). Both the buyer and seller deal with the insurance company (or with the government in the case of Medicare, for example). The patient is separated from necessary information regarding the alternatives available and their respective costs. He, therefore, may not be able to select the service or treatment most fitting his circumstances. Likewise, the physician may not be able to offer all of those services or treatments he believes to be necessary.

Finally, because the physician and patient are divorced from direct negotiation of prices for services, the impetus for efficiency, cost effectiveness, quality, and so on, are lacking. This manifests itself in several ways:

- The patient does not negotiate with or pay the physician. Prices are determined and payment is made by a third-party, the insurance provider. Consequently the patient has very little skin in the game. There is nothing to cause him to be frugal regarding his health care choices. He may choose to seek medical care much more frequently than if he were actually paying the entire bill himself. This puts a strain on the system, increasing the demand against a constrained supply.
- Because the patient does not and cannot know the prices of medical services, he is not in a position to make informed decisions regarding the cost of his medical care. If he is paying and has access to price information, he may be better able to question the price of various tests versus expected benefits or other test options which may be performed. He

may also seek other care providers or facilities and compare costs. Without such cost and price information, he will simply accept whatever the physician suggests.

- We all recognize, almost intuitively, that competition results in lower costs and higher quality. Suppose one or two "preferred providers" in a section of town know they have a captive audience. If their facilities are not the cleanest and their clerical staff is not the most polite, there is little incentive for them to improve the quality of their facilities or service. Their patients are constrained by their own insurance companies to accept the services of those preferred providers. On the other hand, if patients were free to vote directly, with their own funds, they may decide to pay a little bit more for cleaner facilities and friendlier staff. All providers would then be forced into higher quality standards and would then compete on price and other factors.

Other federal actions such as the Hospital Construction and the Survey Act, the McCarran-Ferguson Act, and the Taft-Hartley Act had the effect of favoring costly institutional care and the administration of medical benefits and payments through the insurance industry.

While the greatest number of medical insurance plans is, by far, employer provided, there remains a market for individual insurance plans. Even those, however, are tinkered with through government policy. In the early 1950s, a taxpayer could deduct medical expenses that exceeded 5 percent of their adjusted gross income. This

included insurance premiums. This was changed from time to time until 1986, and continuing to the present, when the threshold was changed to 7.5 percent. So now the medical expenses of a taxpayer with an individual plan must be even higher before a tax deduction can be taken. Compare that to the employer-provided plan whose insurance premiums and benefits are tax free.

Now we come to the early 1960s. Let's review the situation. Most full-time workers have a tax-free medical insurance benefit provided by their employer. Some others have individual insurance plans. A group of citizens, disadvantaged by the system in existence, have minimal or no medical insurance. Many of these are primarily the poor, the unemployed, and the elderly.

Then, in 1965, wanting to provide medical care to these poor, unemployed, and elderly, the government created Medicare and Medicaid. Once again, the result has been increased demand for medical services. This, coupled with the relatively unchanged supply (numbers of physicians and medical facilities did not measurably increase), brought on continued increases in prices.

To address this "unexpected" situation, the government hastened to enact more legislation, such as the Federal HMO Act, the National Health Planning and Resources Development Act, the Employment Retirement Income Security Act, and several others. Congress tried to reduce costs by controlling the price of services and limiting supplies.

We now know that these two entitlement programs are in serious financial jeopardy and have become a budgetary ball and chain, dragging both federal and state budgets

toward ever increasing deficits, and still there are millions without medical benefits.

Once again the government steps in with the Patient Protection and Affordable Care Act of 2009. While the debate currently rages, it appears clear that this will become a tremendous burden on the American taxpayer. And with the reported 159 new federal agencies created by the act, there will certainly be a tremendous amount of bureaucratic interference in our medical choices and in our lives. And still there are millions without medical benefits.

So one might ask, "What's the point of this particular healthcare discussion? Like it or not there is a health-care system in place, and there's not much we can do about it." Well, that's not exactly correct. You might want to read about Health Savings Accounts, Health Reimbursement Arrangements, and other consumer and market-oriented programs.

But the real point of this discussion is that the government, through legislation, policy, and regulation, is both unfit and unable to effectively manage a large economic endeavor. Allowing the competitive marketplace to operate, admittedly with some governmental oversight, would much more efficiently and cost-effectively allocate medical resources to meet patient demand.

While those that do not believe in the free market may argue with the above assertion, it is impossible to argue with the conclusion of Mr. Greg Scandlen, founder and president of Consumers for Health Care Choices, who, in a 2006 article entitled "100 Years of Market Distortions," observed,

> *If all these interventions produced a health care system that was efficient, effective, and affordable, a case might be made that government has done the right thing, and we should accept the results despite any misgivings we might have about the role of government.*
> *In fact, we have the very opposite. One hundred years of market distortions has produced a system that offers questionable quality at extremely high costs. Physicians are demoralized, patients feel like cogs in a machine, hospitals fight against competition, information systems are primitive. Bureaucracy prevails and regulations rule.*[12]

It will not be an easy task to change and improve our health care system. But clearly the answer is not more government intervention. By tightening the Commerce Clause, we can begin to slow down the relentless advance of big government and federal interference in the marketplace.

Popcorn?

After all this serious discussion, I thought I might inject a little humor (although some may see this as disturbing). Did you know that under the Department of Agriculture there is a Popcorn Board? It is composed of nine members appointed by the Secretary of Agriculture. The purpose of the board is to administer the Popcorn Promotion, Research, and Consumer Information Order (7CFR1215). It disseminates popcorn information, administers plans

and projects for popcorn promotion, and investigates complaints or violations of the regulation. The board is funded by collecting 5 cents per hundredweight of popcorn (unpopped).

Now maybe I don't understand the intricacies of agricultural commerce, but I've searched the CFR (Code of Federal Regulations) and cannot find any provision for a Gummy Bear Bureau or a Red Licorice Agency. How far into the economy does the federal government wish to venture? If the Popcorn Board is any indication, there is no limit.

A FOURTH CHECK AND BALANCE AND A RETURN TO GREATER STATE AUTONOMY

When we speak about checks and balances, we are normally referring to the separation of powers within the central government. The governments of many nations exhibit this structure. Our government was founded with three branches, each with separate responsibilities and powers. This was done to avoid concentration of power in any individual or group. Each branch was to provide a check on the others. The legislature passed laws, the executive enforced laws, and the judiciary interpreted laws.

But what happens when each of the three branches conspires to expand the power of the central government? Each is, after all, a component of the self-same federal authority. What can we do if all of the branches are peopled by likeminded government elitists who feel they know what's best for the country regardless of the desires of its citizens? Where is there a check and balance on the federal government?

In his book *Making Our Democracy Work*, Supreme Court Justice Stephen Breyer suggests a pragmatic approach to the determination of legislative constitutionality. He believes that a statute's purposes and consequences must be considered. "[B]y emphasizing purpose," Judge Breyer states, "the Court will help Congress better accomplish its own legislative work. […] A court that looks to purposes is a court that works as a partner with Congress."

He goes on, "Furthermore, the judge can try to determine a particular provisions purpose even if no one in Congress said anything or even thought about the matter. In that case the judge […] will determine that hypothetical purpose in order to increase the likelihood that the court's interpretation will further the more general purposes of the statute that Congress enacted."[13]

Justice Breyer quotes four propositions invoked by Justice Brandeis in New State Ice Co. v. Liebmann:

> *First, when government seeks a solution to an economic or social problem, empirical matter is often highly relevant.*
> *Second, comparatively speaking, judges are not well-equipped to find remedies for economic or social problems.*
> *Third, legislatures, comparatively speaking, are far better suited to investigating, to uncovering facts, to understanding their relevance, and to finding solutions to related economic and social problems.*
> *Fourth, the Constitution embodies a Democratic*

> *preference for solutions legislated by those whom the people elect.*[14]

Justice Breyer states that "practical principles of federalism counsel the Court to turn over the lion's share of interpretive responsibility to Congress itself." And finally, Justice Breyer ascribes to yet another (disturbing) principle: "[Y]ou need to interpret statutes in a way that will save them from potential invalidation as unconstitutional."[15]

Justice Breyer is a progressive (author's characterization) Supreme Court Justice, as are several others on the court. Their findings generally sway toward greater control by the central government. This type of judge does not believe in the constancy and limiting nature of our Constitution. They believe that because our nation has expanded and our society has changed, they must, in like fashion, interpret the Constitution to reflect that expansion and change, most normally in concert with an expansive Congress.

So where do we go to put the brakes on federal authority? In Gibbons v. Ogden (1824), Chief Justice John Marshall put forth the idea that the principal limitation on the exercise of legislative authority resides in the electoral process.

> *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints*

> *on which they have relied, to secure them from its abuse. They are the restraints on which the people most often rely solely, in all representative governments.*[16]

Well, it appears that Justice Marshall was wrong. Our citizens have variously voted for Whigs, Federalists, Democrats, Republicans, independents, liberals, conservatives, libertarians, socialists, lawyers, doctors, actors, comedians, men, women, and others from a whole host of categories. All, it seems, have taken part in the continued and continuing expansion of the federal government.

The only thing left for those of us who believe in a more limited government and greater individual liberty is one or more amendments to the Constitution made specifically to halt the onward march of federal authority and move greater power back to the states.

Had the federal government continued with only limited powers, as was originally intended, each of the states would retain much of the authority intended for them in the 10th Amendment. Any State could successfully challenge a federal law whose scope was beyond the "limited" authority of Congress. States would then essentially serve as an additional check and balance on the federal government. States are trying to do that today, challenging the whole or portions of President Obama's health care legislation, the Patient Protection and Affordable Care Act (PPACA), in various federal courts. It is an unfortunate truth that the ultimate success of that effort lies in the proclivity of nine justices rather

than the will of the people and the limitations inherent in a reasonable interpretation of the Constitution.

States Are More Than Federal Administrative Offices

Far from being a check on federal power, the states often serve as administrators of federal requirements and are often heavily burdened by federal laws and regulations. In 1965, the Medicaid program was created out of the Social Security Act. While state participation is voluntary, if a state wished to sponsor any sort of medical program for the neediest of its citizens, it could receive matching federal funds (50 percent or greater) only if its program conformed to federal Medicaid guidelines. (Looks to me like another extortion-based federal program.)

Even worse, in 1986 Congress passed the Emergency Medical Treatment and Active Labor Act, which required medical facilities to provide treatment to anyone needing emergency care regardless of citizenship or ability to pay. Congress did not provide, however, any funding for this requirement. While none of us would wish to deny emergency medical treatment to anyone in need, requiring state or private institutions to provide such services, on a continuing basis, free of charge, is untenable.

State Medicaid costs have become a dangerous drain on state resources, averaging almost 17 percent of a state's General Fund in FY 2006 according to a study published by Georgetown University Health Policy Institute. The Centers for Medicare and Medicaid Services project that, as a result of the PPACA, state and local spending on Medicaid will increase 41.1 percent between 2010 and

2011. We're talking about billions of dollars of expense foisted upon strained state budgets by an unsympathetic federal government.

States are not free to tailor their health care programs to meet the identified needs of their citizens while guarding their own financial health. Neither are they easily able to attempt innovative or alternative approaches to health care. If they wish to receive federal funds (which, by the way, were garnered from that state's own citizens), they must toe the federal line.

Why does the federal government feel so compelled to overrun state authority? Let's look, once again, at United States v. Lopez. Any reasonable person must agree that this is a simple issue of local authority. Certainly the police power of any state is adequately equipped to legislate and enforce gun control measures in the many schools within a state's borders. Perhaps the Congress doesn't trust that states can perform this basic law enforcement job. (Sometimes I think Congressional legislators would be happier if state governments were changed to federal government administrative offices.) The Federal Gun-Free School Zone Act was found to be unconstitutional. Not to be discouraged by any Supreme Court decision, Congress added some language to the Act to appear to more readily conform to the Commerce Clause and reenacted the legislation.

Because so many of the federal government's excursions into the workings of our economy and the autonomy of the states are justified by current interpretations of the Commerce Clause, a more narrow definition of federal power under that clause would return to the states the

authority over their affairs that they once had and should continue to possess. The Commerce Clause is an open door to federal intrusion into state authority. We must slam that door shut.

The Twenty-eighth Amendment will be a permanent check on unwanted federal expansion. It (and perhaps the threat of a potential 29th and 30th) would return to the states a considerable amount of control over their own affairs, the 10th Amendment would gain renewed stature, and the states would become a formidable check on federal overreach.

TEST BASE FOR NEW PROGRAMS

Limiting federal government power and growth by restricting their use of Commerce Clause justification will necessarily lead to greater state government autonomy. When not overburdened by federal rules, regulations, and mandates, state governments would be more readily able to implement new and innovative programs to meet their problems.

By necessity, federal laws address, as they should, national concerns. They are most often the product of a small group of legislators and their staffs trying their best to focus possible resolutions to nationwide problems. The consequences, both good and bad, of their potential solutions, are most often difficult or impossible to anticipate. Allowing the states to attempt to solve some of those problems, on a smaller scale, provides an opportunity to view various alternative solutions over a period of time. Results can be more readily assessed and applicability to national implementation more effectively

determined.

This is an essential tenet of the concept of Subsidiarity. The idea is that any problem is best addressed by the lowest level of government possible, the level closest to its citizens. In the event that a town, city, or county government is unable to resolve the particular issue, it is raised to the next higher level (state, for example).

Justice Brandeis, in his dissent in New State Ice Co. v. Leibmann, while agreeing with a state policy which trampled personal liberty and due process, nevertheless made the following observation:

> *It is one of the happy incidents of the federal system that a single 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.*[17]

There have been some recent and notable state experiments which should have provided very compelling data to the federal government. These include health care, education, and tax structure initiatives, to name a few. Unfortunately, federal legislators are often very reluctant to let contrary evidence sway their legislative notions.

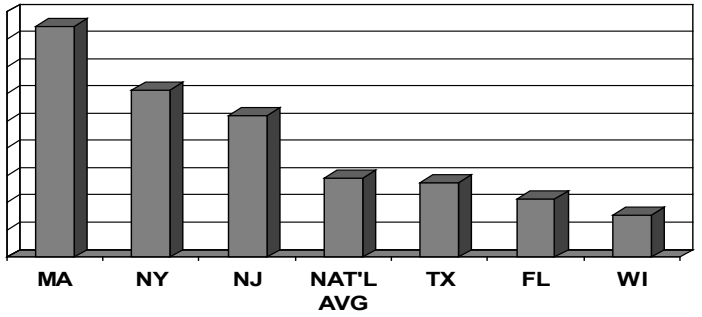
Health Care Reform: Massachusetts and Others

Because of the federal Emergency Medical Treatment and Active Labor Act, federal Medicaid requirements, state medical care requirements, and other factors, hospitals, medical facilities, and many state governments find themselves in extreme financial distress. Uninsured

individuals increasingly use expensive emergency care facilities for routine medical problems. Often, an individual's medical issue, which could have been adequately addressed with early or preventive care, is left untreated until it becomes a more serious and expensive medical emergency.

Different states have taken differing routes in trying to resolve this issue. In an article entitled "Applying the Lessons of State Health Reform," Dr. Michael Bond, senior fellow with the National Center for Policy Analysis, notes that states such as Florida, South Carolina, Rhode Island, Texas, and Tennessee have implemented programs that are more flexible and less regulated than Massachusetts yet very promising in terms of cost effectiveness and coverage for the uninsured. The figure below, from Dr. Bond's article, illustrates the differences in premium costs between some highly and lightly regulated states.[18]

The diverse approaches taken by these and other states is testament to the variability of political and economic philosophy among the legislators of these governments. The methodologies used provide a unique prospective on each tactic employed to attack the health care problem. Each can be viewed as a limited test case before enactment of a national policy (if there even needs to be one!!).



For example, in 2006 and 2007, Massachusetts enacted, corrected, and amended An Act Providing Access to Affordable, Quality, Accountable Health Care. It successfully expanded medical insurance to a great number of Massachusetts's uninsured population. It increased MassHealth coverage for children of low-income parents and included additional benefits such as dental and vision care.

The Act also included some very problematic provisions. There were mandated benefits, a requirement for all individuals to acquire health insurance or face a penalty, a requirement for most employers to provide health insurance plans also under a penalty provision, the linking of the mandates to income tax submissions and tax penalties, and extensive subsidized health insurance programs. Massachusetts quickly found its actual costs significantly greater than estimated with 2011 cost projections at two times the original level. Additionally, the employer and individual insurance requirements have been, and continue to be, challenged in Massachusetts courts.

Other states such as Florida, South Carolina, Rhode Island, Texas, Tennessee, Utah, and Louisiana are experimenting with different paths. Their efforts include

- Making the Medicaid program operate much like private insurance albeit with state assistance
- Providing different coverage options
- Providing a variety of plans types
- Allowing flexible deductibles
- Providing subsidies
- Payment options to providers
- Web-based market exchanges

The goal for each of these states is to provide a customizable health care solution to meet the particular needs of a state's diverse population while controlling costs to the greatest extent possible.

One would hope that each state would learn from the successes and shortcomings of each of the employed methods and learn, thereby, to tailor its program to its best advantage. Likewise, one would hope that the federal government could and would audit the efforts in these states, using a "lessons-learned" approach before devising a system applicable to the nation as a whole. It seems, however, that the Congress selected the least successful, highest cost, and most burdensome system as its model and added even more regulatory provisions and oversight agencies.

Educational Initiatives

Educating our citizens is a critical factor in maintaining and growing our society, culture, economy, and way of life. Most agree that acquiring a good education is the key to greater economic upward mobility, more effective job and managerial performance, and a more engaged, prosperous, and knowledgeable citizenry. In its effort to improve instructional outcomes, the federal government takes a very direct hand in the education system.

In 2002, the No Child Left Behind Act (NCLB) was passed and signed into law. It required states to develop standards with a focus on mathematics, reading, and writing. Federal funding was provided only to those states implementing NCLB. It called for assessment of students by standardized testing and assessment of individual schools through the analysis of the overall test results.

While there is strong support of NCLB, there are criticisms aplenty. Proponents cite benefits such as better standards and testing methods, elevated student accomplishments, and greater attention to at-risk and disabled students.

Critics, however, point to teachers "teaching the test", penalties to schools that need the most help, "gaming" of the system by state authorities, and loss of emphasis on subjects other than math, reading, and writing.

There are other federal educational initiatives. The Elementary and Secondary Education Act seeks to establish priorities for educational reforms, addressing student subgroups, and addressing capacity to improve the educational system. Grants may be provided to those school systems best addressing those priorities. School

Improvement Grants under this act are to address low-performing schools to help them reach the goals required by NCLB. Once again, the goals are developed by the federal government and funds are doled out by them to those school districts which they judge to be most deserving. In education, as in most other functional area in which they get involved, the federal government believes that "father knows best."

I believe the lawmakers and executives in every state are just as concerned, if not more so, in the education of both our young and adult population. The difference is that there are hundreds of groups of minds working on our educational challenges. When the Federal Department of Education (DOE) promulgates edicts, controls some funding, and effects punishments, it places a significant roadblock in the paths of those trying to improve the instructional process. Instead of controlling, DOE should be assisting the states by performing functions such as ensuring that educational information is exchanged, successful programs are adequately publicized, learning technology research is funded and results shared, and pertinent data is collected and disseminated. With greater freedom and assistance by DOE, local schools and school boards will find the best and most cost-effective educational methods.

According to National Education Association Estimates for FY 2005, the five states spending the most per pupil (adjusted for geographic cost differences) were Vermont, Wyoming, New York, New Jersey, and Maine. In the Grade Eight National Assessment and Educational Progress (NAEP) Mathematics Assessment, these states

were ranked (respectively) third, thirty-third, twentieth, fifth, and twenty-sixth. Meanwhile, Utah, which spent the least amount per pupil (ranked fifty-first) was ranked twenty-ninth in the mathematics assessment. While there are many factors that affect both educational spending and mathematics assessments, maybe Utah is doing something cost effectively that could be of some assistance to Wyoming, New York, or Maine.

In Newport News, Virginia, the An Achievable Dream (AAD) program is a school formed by a partnership between Newport News Public Schools, the City of Newport News, and the local business community. Originally established as an after-school tennis and tutoring program for at-risk youth in 1992, it has evolved into a full K–12 grade program. The school is over 95 percent non-white, and almost 80 percent are from single-parent homes. More than 90 percent of AAD's graduates go on to college, with much of the balance selecting military service. They have been visited by U.S. Secretary of Education Arne Duncan who, in presentations, uses the program as an anecdotal example of an innovative method of instruction.

Unfortunately, the DOE has not conducted any research on the program, and neither has it collected data or program specifics. Components of this program are highly innovative, and the methods and results should be provided to schools throughout the United States who might (and should) be seeking new and better ways to teach and motivate their students. That should be a large part of the U.S. DOE's mission. Many schools, both public and private, are serving, right now, as bases

of experimentation in methods of teaching, teacher training and evaluation, and cost-effective approaches to delivering instruction. The DOE must investigate and share innovative and successful program information with state DOEs and local school districts nationwide.

New Taxing Structures

The federal government is empowered to collect taxes by Article I, Section 8, Paragraph 1:

The Congress shall have Power to Lay and Collect Taxes, Duties, Imposts and Excises […] but full Duties, Imposts and Excises shall be uniform throughout the United States

The Sixteenth Amendment to the Constitution further defined this power to include incomes "from whatever source derived". It also removed Section 8's requirement to be uniform throughout the United States, allowing the collection of taxes "without apportionment among the several states, and without regard to any census or enumeration."

According to the U.S. Government Printing Office, Title 26 of the Code of Federal Regulations (the IRS rules) comes in 20 volumes (in 2006) and has 13,458 pages in its 9,833 sections. Title 26 of the U.S. Code (the law) had 3,387 pages. While size does not always mean complexity, there is almost universal agreement that the tax code is complicated and convoluted, bordering on incomprehensible. In the past, Money Magazine constructed an income tax situation and sent it to several tax attorneys, accountants, preparation firms, and academicians to prepare a return. Seldom did any two of

them agree on the amount of tax owed.

For decades, politicians have been talking about "simplifying" the tax code, making compliance and enforcement more straightforward, ensuring the system is "fair", and devising a system that encourages economic growth. Various organizations, economists, and proponents of one system or another have, for years, proposed higher taxes, lower taxes, a flat tax, a national sales tax, a value-added tax, a Fair Tax, and others. But wholly changing or substantially modifying the federal tax system would be an extraordinarily difficult, almost traumatic event, made even more difficult by the lack of compelling data regarding the consequences of such change.

Much like health care reform and education, the states can serve as a test base for new and innovative tax systems and taxing levels. Already we have states with some portions of a flat tax, sales tax, and value-added tax, as well as differing levels of taxable percentages. We can study the results of these alternative tax schemes in terms of revenues, enforceability, effect on job growth and the economy, and other such factors. While clearly not the size and scope of a national tax process, a state-level system can provide valuable insights into the advantages, disadvantages, and problems of a tax structure, which can then be extrapolated to a larger implementation. Again, this "lessons-learned" process can minimize the risks inherent in the initiation of an entirely new or greatly modified national tax configuration.

VOTING BY FEET AND COMPETITION AMONG THE STATES

Unlike individuals, all states are not created equal. Some have considerably greater natural resources, better annual weather conditions to support one industry or another, greater population concentrations, or more advantageous geographical location. But all states have the opportunity to create more attractive conditions competing for the "foot votes" of both businesses and citizens. A favorable tax climate for individual and corporate taxpayers, more effective education and training systems, greater availability and less expensive healthcare, and a host of other differences can be fashioned by any state so inclined, increasing, sometimes dramatically, the desirability of that state over its neighbors.

Federal government activity, however, often intrudes on the states' ability to compete fairly. For example, a state having a relatively large farming sector may be receiving agricultural subsidies that advantage that state financially but, at the same time, hamper its ability to enlarge its industrial sector. Some states with more senior or influential senators and representatives may receive substantially greater federal funding than others. Federal laws, regulations, or mandates may unfairly burden some states over others. Educational funding is often granted based on the ability to write grant proposals rather than more even-handed factors such as student population. And, worst of all in my estimation, federal funding is granted only to those states which "toe the federal line" and bow to federal programs, policies, or rules with which some states might normally, and with good economic reason, disagree.

State taxing policy, for example, is a primary mode of state competition for attracting and retaining residents and businesses. While a state must fashion its tax system to collect the revenues necessary to function, it must not ignore the competitive nature and long-term consequences of its taxing decisions. Taxes do matter, and both companies and people will relocate in response, affecting the growth and well-being of a state's economy.

In September 2001, Dr. Richard Vedder, Professor of Economics at Ohio State University, published a study titled "Taxes and Economic Growth." In it he compared the ten states with the highest increase in income tax burden to the ten states with the lowest over a forty year period. The highest income tax–raising states had a real income growth of 191 percent. The states with the lowest increase in state income tax had 455 percent total growth over the same period.[19]

In a separate taxation and migration study, Dr. Vedder determined that nearly three million people moved from states with an income tax to states without an income tax in the period from 1990 and 1999.[20]

Ms. Julie Borowski of Freedom Works noted, "According to the American Legislative Exchange Council, the nine states without income taxes had an average job growth rate of 18.2 percent over the past decade. Conversely, the nine states that have high income tax rates experienced a mere 8.4 percent rise in jobs."[21]

The *Oklahoman Editorial* ran an article titled "States' Tax Policies Affect Choice of Residence." The article noted that when Oregon raised its income tax on the richest 2 percent of residents, 38,000 Oregonians who

were expected to pay the higher rate fell to 28,000. Similarly, when Maryland instituted a millionaire tax, a third of that state's upper-income households went missing. People who are burdened with more and more tax payments find another place to live, especially the wealthier, who are better able to move or file taxes elsewhere.

The Washington Examiner published several articles citing census and polling evidence showing fastest economic and population growth in states with no or low tax burdens. The Gallup Organization, the Tax Foundation, the Americans for Tax Reform, and others all generally agree. I could go on, but we all get the point. Differences in state policies affect job, economic, and population growth, and states can compete for this growth by effecting policies that have been proven advantageous to the achievement of that goal.

In his *Taxes and Economic Growth* study, Dr. Vedder, concluding an expansive review of state tax policy differences and results, stated,

> *The competition between governments is good, putting some constraints on the taxing propensities of state and local governments. We see enormous variety in the taxation policies of the states. Some states follow sound fiscal policies, while others pursue policies that are harmful for economic growth, thus lowering the income and wealth of present day citizens and leaving their children and grandchildren with a less prosperous future. The massive movement of*

> *Americans to the relatively low tax/pro-growth states provides strong evidence that Americans generally want to live in places where the burden of government is small.*[22]

States compete in other than tax policy. Strong and effective education and training systems may be very attractive to growing businesses that need a steady stream of knowledgeable and skilled workers. It is appealing, as well, to young workers seeking a good learning environment for their children. Minimizing bureaucratic requirements may be attractive to new and growing businesses.

Limiting the federal government's reach, thereby providing greater state autonomy, enhances the state's ability to innovate, try new solutions to old problems, improve state systems and programs, and adjust policies to better compete and win the hearts and minds of businesses and residents alike.

On the other side of that coin, nationwide laws, rules, policies, and regulations severely limit business and personal choices. One cannot simply move to another state if the same restrictions are present throughout the country. Voting with one's feet by moving oneself or a business to another country is a difficult vote to cast. Let's allow the states to experiment with differing policies. The federal government can then enact laws and policies whose consequences, both intended and unintended, have already been illuminated, reported, and studied within statewide contexts, assuring a more reasoned approach to federal action.

There is another aspect to the vote-with-one's-feet concept. State governments are not immune to stupid policies and dumb laws. Far from it; with fifty states each doing quite a bit more of their "own thing", we would expect divergent ideologies to exist, differing approaches to taxation or education policies, various tactics used to attract businesses, and conflicting methods for addressing the needs of citizens. Some of these differences are bound to go wrong.

But when things do go awry, we would quite likely see corrective actions taken in a reasonable time frame. Unlike a bad policy instituted by the federal government, a state government is far more apt to respond to the discontent of its residents. State representatives are closer to their constituents geographically, politically, and even socially, and statewide propositions on topics such as gay marriage, medical marijuana, and taxing alternatives are often referred directly to state voters for approval or disapproval.

Finally, if conditions within a state are depressing enough, citizens will begin to move to neighboring or even distant states where the business, education, and personal environment is more attractive. Even if some states govern poorly, greater state autonomy remains a preferable situation.

Limiting the reach of the federal government by enacting the Twenty-eighth Amendment will permit a much higher level of control and flexibility of the states over their own affairs. Allowing the states greater autonomy and permitting them to compete for the "foot votes" of the nation's citizens is of critical importance, especially

in this age of information availability and personal and family mobility. How do we know that a particular state is stronger with a brighter future than its neighbors? Easy: businesses and the working class are moving in. Establish policies that are conducive to business development, and a state may find its unemployed back to work and state coffers better able to support those in need. Increase corporate taxes and regulatory requirements and provide greater welfare and unemployment benefits, and a state may find employment drifting away and the unemployed and destitute staying or moving in. Our citizens can and will vote with their feet.

LOWER GOVERNMENT SPENDING AND REDUCED TAXES

I could sum up this section with smaller federal government = less need for money = reduced government spending = lower taxes = 'nuff said.

Ratification of the Twenty-eighth Amendment would significantly limit the federal government's ability to continue to grow unabated. The creation of new regulatory agencies and their staffs would at least slow considerably. As time goes on and states take more and more authority to themselves, federal agencies can be reduced or eliminated. The resulting decrease in size will hopefully be reflected in a decrease in the amount of money needed by the federal government to accomplish its functions. That is not to say that this Amendment will result in a lower annual deficit, reduced national debt, and lower taxes, either immediately or in the near future. There is currently too much nondiscretionary (e.g., Social

Security, Medicare) spending for any single action to effect significant improvement. But I strongly believe it is a giant step in that direction.

Let's look at the Department of Education as one example. On its Web site, the department states that "it's important to point out that education in America is primarily a State and local responsibility, and ED's budget is only a small part of both total national education spending and the overall Federal budget." It goes on to say, however, that "[t]he Department's elementary and secondary programs annually serve nearly 14,000 school districts and approximately 56 million students attending some 99,000 public and 34,000 private schools." The Department's total budget for 2010 was over $160 billion (including stimulus dollars) with about the same amount proposed for 2011. It administers dozens of initiatives and programs, provides some educational funding to the states, and makes available numerous grants based on various criteria.

In a function that admittedly belongs primarily to the states, the Federal Government continues to insert itself into virtually every school and school system, collect taxes for that purpose, and distribute funds to advance its own agenda (unfairly, I might add). We have talked about the educational system in an earlier section of this chapter. Here we'll look at a slightly different aspect. The federal government's emphasis and achievement evaluations focus on certain knowledge and skill areas: mathematics, reading, writing, and science. Does concentration in those areas necessarily produce the best educated citizens? Federal Pell Grants

are tuition assistance programs based on financial need. For post-baccalaureate students, only those enrolled in certain specialties (at present only teaching degrees) are eligible; music and art students need not apply. Funding is provided to schools and school districts based on a number of criteria, including compliance with federal programs and guidelines, submission of grant proposals for competitive funding, programs aimed at supporting one or more of ED's initiatives, and, conceivably, influence by a senior Senator or Representative.

None of this is an efficient use of or a fair distribution of taxpayer money!

Here's my take on this. Let's define certain limited and reasonable functions for the Department of Education, perhaps conducting or funding research in instructional technology, learning theories, and teaching strategies. Also, the ED should serve as a gathering and dissemination point for statistical analysis, reports, and data on successful and unsuccessful state or local programs and other educational information. Any ED budget exceeding that necessary for these basic functions should be distributed to the states based on student populations rather than how well they comply with federal rules or how effective their grant writers are.

I would suspect an annual budget of $10 to 20 billion would suffice. So we're talking about saving at least $140 billion, and this in only one department. We'll see later how this applies to the federal government as a whole, facilitating the saving of hundreds of billions or dollars each year.

REDUCING FEDERAL GOVERNMENT BUREAUCRACY

Much of what we consider to be bureaucracy is a necessary component of any society. Businesses, religions, individual congregations, and even families develop bureaucracies to set, administer, and enforce the rules of the organization. It is only undesirable when a bureaucracy becomes onerous, develops too many or unreasonable rules, favors one part of the organization over another, or, generally, causes excessive disruption to the group's ordinary activities.

It could be easily argued that the federal bureaucracy has become grossly overgrown and inefficient. In researching data for this section, I first tried to determine the number of federal agencies in existence thinking that this may be indicative of the amount of federal regulation and bureaucracy. A count of agencies listed on usa.gov totals some 470 federal agencies. Louisiana State University Federal Agency Directory lists over 1,300 distinct organizations of the federal government. Other sources are somewhere between these numbers. (The new health care bill adds another 159 new agencies.)

Federal agencies exist to administer programs established by Congressional authority (laws). Further, they are funded by Congressional budget action. Programs are often created in response to a certain situation that lawmakers wish to correct, a perceived need that they feel needs to be addressed, or some injustice that must be made right. Unfortunately, these programs are almost never removed. New programs and their supporting agencies are added, and existing agencies are expanded:

the bureaucracy grows.

With each administrative agency comes a set of policies and rules. As time goes on, an agency's rules and regulations tend to expand, encompass more and more related areas, overlap other agencies, and become ever more burdensome and difficult to understand, making compliance time consuming and very expensive.

Let's take, for example, the Environmental Protection Agency. A review of www.epa.gov reveals rules in the following topics directly as shown on EPA's Web site. (I have changed font type, size, and color and changed the format a bit, but the information is exactly as it appears on the EPA Web site). What follows is here for illustrative purposes. It's intended to provide some small idea of the amount and complexity of rules and policies from one of the many regulatory agencies of the federal bureaucracy. Extrapolate this, if you will, to the myriad of departments governing so much of our activities. EPA topic areas:[23]

Air

- *Indoor Air*
- *Mold*
- *Radiation*
- *Stationary Sources*
  - *Acid Rain*
  - *Common Air Pollutants - Carbon Monoxide, Ground-level Ozone, Lead, Nitrogen Oxides, Particulate Matter, and Sulfur Dioxide*
  - *New Source Performance Standards (NSPS)*
  - *New Source Review (NSR)/Prevention of Significant Deterioration (PSD)*

    - *Ozone Layer Protection*
    - *Operating Permits/Title V*
    - *Toxic Air Pollutants*
- *Transportation - Vehicles, Engines, and Fuels*

Cross-Cutting Issues

- *Alternative Dispute Resolution (ADR)*
- *Animal Feeding Operations (AFOs) / Concentrated Animal Feeding Operations (CAFOs)*
- *Animal Waste*
- *Asbestos*
- *Children's Health*
- *Climate Change*
- *Conservation*
- *Energy*
- *Endangered Species, Wildlife, and Marine Life*
- *Environmental Justice*
- *Federal Advisory Committees*
- *Import/Export*
- *International Cooperation*
- *Lead*
- *Mercury*
- *Pollution Prevention (P2)*
- *Small Businesses*
- *Supplemental Environmental Projects (SEPs)*
- *Tribal Governments*

Emergencies

- *Chemical Accident Prevention/Risk Management Plans (RMP)*
- *Chemical Reporting/Community-Right-to-Know*
- *Oil Spills/Hazardous Substance Releases*

Land and Cleanup

- *Aboveground Storage Tanks*
- *Brownfields*
- *Resource Conservation and Recovery Act (RCRA) Corrective Action*
- *Superfund*
- *Underground Storage Tanks (USTs)*

Pesticides

- *Endangered Species and Pesticides*
- *Establishments*
- *Food Quality*
- *Importing and Exporting*
- *Labels*
- *Pesticide Tolerances*
- *Registration*
- *Restricted and Canceled Uses*
- *Storage and Disposal*
- *Worker Protection*

Toxic Substances

- *Chemicals and Hazardous Substances*
- *Formaldehyde*

- *Nanotechnology*
- *Polychlorinated Biphenyls (PCBs)*
- *Toxic Release Inventory*

Waste

- *Hazardous Waste*
- *Non-Hazardous Waste/Solid Waste*

Water

- *Biosolids*
- *Coastal Waters*
- *Drinking Water*
- *Ground Water*
- *Impaired Waters*
- *Oceans*
- *Stormwater*
- *Wastewater*
- *Watersheds*
- *Wetlands*

Looking at just one topic, let's pick the last above – Wetlands. Selecting that topic results in:

Wetlands

- ***Laws and Regulations***
  - *Wetlands Laws, Regulations, Treaties: Policy and Technical Guidance Documents*
- ***Compliance***
  - *Wetlands (Section 404) Compliance Monitoring* - Information about inspections, evaluations and investigations

Selecting the "Laws, Regulations …" tab brings:

Policy and Technical Guidance Documents
Section 404 Jurisdiction

Generally

1979 "Civiletti" Memorandum (PDF) *(4 pp, 128K)—U.S. Attorney General opninion on ultimate adminstrative authority under Section 404 to determine the reach of "navigable waters" and the meaning of Section 404(f).*

1989 Memorandum of Agreement*—allocates responsibilities between EPA and the Corps for determining the geographic scope of the Section 404 program and the applicability of exemptions from regulation under Section 404(f).*

Information pertaining to Wetlands Delineation

Geographic Jurisdiction

Information pertaining to Clean Water Act definition of "Waters of the United States"

Dredged Material

Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material" *December 24, 2008, Final conforming rule*

Background Materials

Information pertaining to Revisions to Clean Water Act Regulatory Definition of "Discharge of Dredged Material", January 17, 2001, Final Rule

Revisions to the Clean Water Act Regulatory

Definition of "Discharge of Dredged Material," *May 10, 1999, Final Rule*

Memorandum on Issuance of Final Rule Responding to National Mining Association Decision*, May 10, 1999 joint memorandum from EPA and the U.S. Army Corps of Engineers*

Guidance Regarding Regulation of Certain Activities in Light of American Mining Congress v. Corps of Engineers*, April 11, 1997 guidance from EPA and the U.S. Army Corps of Engineers.*

Dredged Material Management

Comparison of Dredged Material to Reference Sediment

The Environmental Protection Agency (EPA) is proposing to revise the Clean Water Act Section 404(b)(1) Guidelines (Guidelines) to provide for comparison of dredged material proposed for discharge with "reference sediment," for the purposes of conducting chemical, biological, and physical evaluations and testing.

Inland Testing Manual*—This joint EPA and Corps document, "Evaluation of Dredged Material Proposed for Discharge in Waters of the U.S.—Testing Manual" (ITM), provides guidance regarding technical protocols under Section 404 for evaluating proposed discharges of dredged material associated with navigational dredging projects.*

Fill Material

Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material"

Information pertaining to Proposed Revisions To The Regulatory Definition Of "Fill Material," *June 16, 2000*

1986 Memorandum of Agreement*—outlines EPA and Corps approach to controlling discharges of solid waste into wetlands and other waters.*

Dispute Resolution under Section 404(q)

1992 Memorandum of Agreement*—establishes procedures for the Corps and EPA to minimize delays and resolve disputes in the issuance of Section 404 permits.*

Memoranda on 404(q) Coordination

- *2002 Memorandum on Designation of Aquatic Resources of National Importance under Clean Water Act Section 404(q)*
- *2006 Memorandum on Coordination between EPA Regional Offices and Headquarters on Clean Water Act Section 404(q) Actions*
- *2008 Memorandum on Revised Coordination between EPA Regional Offices and Headquarters on Clean Water Act Section 404(q) Actions*

404(q) Fact Sheet

Chronology of 404(q) Actions

Establishing Appeals for Landowners

Final Rule for Appeals Procedure (PDF) *(15 pp, 115K)—Establishes a procedure to appeal a permit denied with prejudice by the District Engineer, as well as appeal of a declined proffered individual permit.*

Compensatory Mitigation/Mitigation Banking

Information pertaining to Section 404 Compensatory Mitigation

Wetlands on Agricultural Lands

1990 Memorandum to the Field*—explains the applicability of the Section 404 program to agriculture and clarifies agricultural exemptions under section 404(f).*

Regulatory Guidance Letter 96-02 (PDF) *(4 pp, 128K) - joint Army Corps/EPA RGL on the applicability of exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands.*

Wetlands and Forestry

Summary of the Forestry Resolution*—outlines the innovative resolution of a long-standing silvicultural issue affecting forested wetlands in the Southeast. The guidance clarifies where a wetlands permit is not needed when certain 'Best Management' practices are conducted in association with forestry site preparation.*

1995 Forestry Guidance *- the full text of the guidance.*

Coral Reef Guidance

1999 Memorandum to the Field—*emphasizes the protection afforded the Nation´s valuable coral reef ecosystems under the Clean Water Act (CWA) Section 404 regulatory program, the Marine Protection, Research, and Sanctuaries Act (MPRSA) Sections 102 and 103 provisions, Rivers and Harbors Act (RHA) Section 10 requirements, and Federal Projects conducted by the Corps.*

Regulatory Flexibility

1995 Memorandum to the Field—*identifies regulatory flexibility under Section 404 of the Clean Water Act to those small landowners impacting less than two acres of wetlands on their property.*

1993 Memorandum to the Field—*clarifies that the level of review associated with a permit application is linked to the nature of anticipated environmental impacts. Thus, small projects with fewer impacts require less review.*

Surface Coal Mining Operations

Surface Coal Mining Initiative Actions—*This page provides updates and background information regarding EPA's recent activities under the Clean Water Act Section 404, Clean Water Act Section 402, and National Environmental Policy Act (NEPA).*

Joint Procedures Framework MOU for Surface Coal Mining Permit Applications—*February 10, 2005—The U.S. Office of Surface Mining (OSM), U.S. Army Corps*

of Engineers (COE), U.S. Environmental Protection Agency (EPA), and U.S. Fish and Wildlife Service (FWS) have coordinated in the development of a Memorandum of Understanding (MOU) to improve coordination and information sharing among the agencies responsible for reviewing and processing Surface Mining Control and Reclamation Act (SMCRA) and Clean Water Act (CWA) Section 404 dredge and fill permits.

***EPA/Corps Memo on CWA Requirements and Coal Mining Operations (PDF)** (5 pp, 179K) - May 5, 2003.*

***1999 Memorandum of Understanding**—establishes a process for improving coordination among the U.S. Office of Surface Mining, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and West Virginia Division of Environmental Protection, in the review of permit applications required for surface coal mining and reclamation operations resulting in the placement of excess spoil fills in the waters of the United States in West Virginia.*

Wetlands and Water Quality

***1990 National Guidance**—Water Quality Standards for Wetlands - assists States in applying their water quality standards regulations to wetlands.*

Wetlands and Non-point Source Control

1990 National Guidance: Wetlands and Non-Point Source Control*—describes how State non-point source programs can use the protection of existing wetlands and the restoration of previously lost or degraded wetlands to meet the water quality objectives of adjacent or downstream water bodies.*

Enforcement

1989 Memorandum of Agreement*—establishes the allocation of enforcement responsibilities between EPA and the Corps for Section 404 of the Clean Water Act.*

Corps Regulatory Guidance Letters

RGLs on the Corps of Engineers Home Page *access to the guidance the Corps issues to its field staff*

(OK, OK, I really just did this to make this book a bit heavier!)

This is not the end of it, but I will not continue to reproduce pages. I think you get the idea. Each section above leads to more references, which lead to more detailed rules and regulation, which lead to more references, and so on.

Admittedly, some of the rules are good and necessary. But many assume that the states are not competent to police their own small portion of the earth, and other rules are unnecessary or even counterproductive. Additionally, EPA's enforcement actions can be illogical, untimely, and oppressive.

In "Swamp Rules: The End of Federal Wetland Regulation," author Jonathan H. Adler, Senior Director of Environmental Policy at the Competitive Enterprise Institute, calls for improving the environment by reducing federal regulation. He cites the example of Mr. James Wilson, a Maryland developer who was indicted by the Justice Department under EPA enforcement action "for depositing fill material in 'waters of the United States' without a federal permit." Adler notes, "Wilson was sentenced to 21 months in federal prison and fined $1 million. The court fined igc (Wilson's company) an additional $3 million." Upon appeal, his conviction was overturned when it was determined that his "wetland" was miles from any of the "waters of the United States." Congress and the EPA cannot control every wet spot in the United States, even though they may very much wish to do that very thing.[24]

Adler cites another typical federal overreach. Under the Clean Water Act, wetlands cannot be filled without permit. The government issued a rule that prohibited the dredging of wetlands with the rationale that it is not possible to dredge or excavate without some of the dredged material falling back into the wetlands. That, in their estimation, constituted "filling" of the wetland, which they then asserted cannot be done without a federal permit. The District Court of Appeals denied that bit of federal authority when it said, "Congress could not have contemplated that the attempted removal of 100 tons of (dredged material) could constitute an addition simply because only 99 tons of it were actually taken away."[25]

And finally Adler notes the bureaucracy involved in

administering federal rules (which we have all come to expect). He observes that

> *It is a rare instance in which the Corps (of Engineers) approves or rejects a permit application within the 60-day window that federal regulations require. In one instance, the Corps sat on an application to fill 0.0006 acres of wetlands—approximately 26 square feet, or half the size of a ping pong table—for 450 days before it was withdrawn.*[26]

It is understood that states are not immune to bureaucracy. Any trip to a typical state Department of Motor Vehicles will attest to that fact (although some states are doing much better these days). But we can at least feel more assured that the rules are more tailored to the distinctive attributes and needs of that state or local community. As businesses and citizens become better aware of differences in regional efficiencies, states and localities will become more sensitive to their effect on a mobile population.

REDUCTION IN LOBBYING AND LOBBYISTS

Lobbying, especially at the national level, has become a persistent and often insidious component of our political system. The Center for Responsive Politics reports an ever increasing level of lobbying spending reaching $3.49 billion in 2009, with over 13,000 active, registered lobbyists. Lobbyists of every persuasion try to convince Congress and federal agencies to effect law and rule

changes that will in some way benefit their particular clients. Those clients are, of course, those organizations and businesses with enough money to pay for the lobbyists and the lobbying activities. What is best for individual citizens is normally not represented by lobbying pursuits.

A more limited government with greater power at the state and local levels would reduce the effect that lobbying can have on federal laws, rules, regulations, and policies. I am not so naive to think that lobbying efforts will dramatically diminish; however, lobbying efforts will have differing degrees of success with each separate state or local effort. Again, each state can tailor its laws and rules to meet its internal objectives, being mindful of the effects upon its citizens and businesses both within the state and in comparison to neighboring and competitive states.

RESPONSIVENESS TO CITIZENS

Let's face it: with over 300 million Americans spread out over a land mass in excess of 3.5 million square miles, it's almost impossible for a national government to be responsive in any meaningful way to any particular citizen or group of citizens (unless that group has a particularly strong lobby). National leadership is concerned with national problems and policies in the aggregate. Sure, politicians will do what is necessary to convince their constituents that they are looking out for their constituents' best interests and, therefore, should most certainly be reelected. But what happens when the desires of the constituents are at odds with the demands of the political party?

We have seen this just recently with the passage of

health care legislation. The legislation was passed in the face of, and in spite of, numerous polls showing that more than 50 percent of Americans did not want the legislation, the growing tea party movement that strongly opposed the legislation, and the outrage expressed at town hall meetings around the country. Congress seemed to be saying either they don't care what you want or that they know what's best for you, even if you don't.

With the current challenges to the constitutionality of health care legislation, Congress and the judiciary need only point to the Commerce Clause. Of the four U.S. District Court Judges issuing opinions on the matter, two point to Congressional Commerce Powers as authority for the legislation. It would be just too simple for the Supreme Court to determine that health care is a significant portion of our economy and involves interstate commerce. Therefore, the health care legislation falls within the powers granted to Congress under the Commerce Clause. Hopefully, the court will find five members who do not believe that Commerce Clause powers include insurance mandates for all citizens.

We have seen Congress involve itself with the regulation of activities at the state, local, and individual levels. Legislators not only believe themselves to be better judges of what is good for all citizens, but they are also unable to tailor legislation so as to account for regional or local differences and desires. We must empower state and local governments with greater authority to fashion solutions to their specific problems. National laws, rules, and policies too often get in the way.

IN SUMMARY

This is perhaps summed up best at the end of *Knowledge and Decisions* (1983):

> *Historically, freedom is a rare and tragic thing. It has emerged out of the stalemates of would-be oppressors. Freedom has cost the blood of millions in obscure places and historic sites ranging from Gettysburg to the Gulag Archipelago. That something that cost so much in human lives should be surrendered piecemeal in exchange for [trendy] visions or rhetoric seems grotesque. Freedom is not simply the right of intellectuals to circulate their merchandise. It is, above all, the right of ordinary people to find elbow room for themselves and a refuge from the rampaging presumptions of their 'betters.*[27]

Finally, I presented here what I believe to be very strong and irrefutable rationale for the passage of the Twenty-eighth Amendment to curb the reach of the Commerce Power of Congress. I recognize that there may be disagreement with many of the points discussed in this chapter. I would encourage readers to investigate, research, discuss, and debate the issues presented here, and others as well. But if you are an advocate of a more limited federal government, join in the effort to propose and ratify the Twenty-eighth Amendment, and always

REMEMBER ROSCOE FILBURN

CHAPTER 4

THE TEA PARTY, TENTH AMENDMENT, AND NULLIFICATION MOVEMENTS

THE TEA PARTY MOVEMENT

The Tea Party Movement in the United States is a growing grassroots phenomenon with a message that resonates with a great many of this nation's citizens. Its goals of a smaller government and controlled spending are certainly laudable.

In *Give Us Liberty: A Tea Party Manifesto*, authors Dick Armey and Matt Kibbe state that the Tea Party movement "stirred into action not out of partisan bitterness but as a reaction to a government that has grown too large, spends too much money, and is interfering with Americans' freedoms. The principles of individual liberty, fiscal responsibility, and constitutionally limited government are what define the Tea Party ethos."[1]

In *A New American Tea Party*, author John O'Hara

describes the philosophy and aims of the Tea Party Movement.

> *They believe that age-old philosophical principles of individual liberty, the pursuit of happiness, and basic property rights, as enshrined in law through the United States Constitution, are the fundamental building blocks of our civil society.*
> *This new, loosely confederated network of activists is committed to defending the free market and protecting individual liberty.*
> *They embrace government as a necessary evil in constant need of being trimmed back like weeds in the spring. They want their highways, cops, firefighters, and military well-funded so they can go about their lives in a free society with basic guidelines within which they can live their lives as they see fit.*
> *The tea party movement represents an alternative to a blind reliance on government for social change. The movement rejects the notion that the less fortunate should be made to be perpetually dependent on the government.*

O'Hara goes on to suggest what the movement must accomplish in the future.

> *To reject policies that inhibit individual liberty is crucial. While absolutely necessary, it is not sufficient, however, to merely hold the line on*

> *policy battles. In other words, we know what we believe; now we have to make the political reality reflect our philosophical reality. We must keep the momentum going beyond the rallies and protests to make real, positive steps toward getting our nation and its leaders back on track.*[2]

He recommends future actions such as honing the message, mastering the art of rallies, utilizing coalitions, promoting principles over personalities, using social networking, and the right ideals with the right people.

I would add to that the goal of proposing and ratifying a new amendment to our Constitution. This would be a very concrete effort resulting in a truly permanent change supporting the goals of the Tea Party Movement. This will result in an enduring legacy of the movement.

Let us say, on the other hand, that the movement is successful in its support of conservative political candidates, whose history and rhetoric are compatible with tea party aims. Let's assume further that they are wildly successful, establishing a third political party that elects several senators and representatives. Our history has shown that the dominance of a particular political party comes and goes; liberal, moderate, and conservative ideologies each take their turn at the helm, and movements, from time to time, gain steam and falter. I believe that the Tea Party Movement, by co-opting the Twenty-eighth Amendment that I am suggesting, can substantially affect its debate, proposal, and ratification. In so doing, the Movement can aid in institutionalizing

the concept of limited government, with a permanence only an amendment to the Constitution of the United States can provide.

THE TENTH AMENDMENT MOVEMENT

There is an effort ongoing to convince each state to pass a resolution affirming its sovereignty under the U.S. Constitution's 10th Amendment. The Tenth Amendment Center (www.tenthamendmentcenter.com) is one of the organizations promoting and monitoring these efforts. They report that in 2009, a Sovereignty Resolution had been considered in thirty-nine states. Of these:

1. Resolutions had been introduced in nineteen states but not voted on by either legislative body:

Alabama	Colorado
Florida	Illinois
Iowa	Kansas
Kentucky	Maine
Minnesota	Nevada
New Jersey	New Mexico
North Carolina	Oregon
Pennsylvania	Virginia
Washington	West Virginia
Wisconsin	

2. Resolutions had been passed in one or both legislative houses in fourteen states:

Arizona	Georgia
Idaho	Indiana
Louisiana	Michigan

Mississippi	Missouri
North Dakota	Ohio
Oklahoma	South Carolina
South Dakota	Texas

3. Resolutions had been introduced and failed in at least one house in three states:

Arkansas	Montana
Vermont	

4. Sovereignty resolutions had passed and been signed by the governor in two states:

Alaska	Tennessee

The resolution signed in Tennessee is typical of those introduced in each of the states so doing.

> *A RESOLUTION to affirm Tennessee's sovereignty under the Tenth Amendment to the Constitution of the United States and to demand the federal government halt its practice of assuming powers and of imposing mandates upon the states for purposes not enumerated by the Constitution of the United States.*
>
> *WHEREAS, the Tenth Amendment to the Constitution of the United States reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; and*
>
> *WHEREAS, the Tenth Amendment defines*

the total scope of federal power as being that specifically granted by the Constitution of the United States and no more; and

WHEREAS, the scope of power defined by the Tenth Amendment means that the federal government was created by the states specifically to be an agent of the states; and

WHEREAS, today, in 2009, the states are demonstrably treated as agents of the federal government; and

WHEREAS, many powers assumed by the federal government and federal mandates are directly in violation of the Tenth Amendment to the Constitution of the United States; and

WHEREAS, the United States Supreme Court has ruled in New York v. United States, *112 S. Ct. 2408 (1992), that Congress may not simply commandeer the legislative and regulatory processes of the states; and*

WHEREAS, a number of proposals from previous administrations and some now pending from the present administration and from Congress may further violate the Constitution of the United States; now, therefore,

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDRED SIXTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE SENATE CONCURRING, that we hereby affirm Tennessee's sovereignty under the Tenth Amendment to the Constitution of the United

States over all powers not otherwise enumerated and granted to the federal government by the Constitution of the United States. We also demand the federal government to halt and reverse its practice of assuming powers and of imposing mandates upon the states for purposes not enumerated by the Constitution of the United States.

BE IT FURTHER RESOLVED, that a committee of conference and correspondence be appointed by the Speaker of the House and of the Senate, which shall have as its charge to communicate the preceding resolution to the legislatures of the several states, to assure them that this State continues in the same esteem of their friendship and to call for a joint working group between the states to enumerate the abuses of authority by the federal government and to seek repeal of the assumption of powers and the imposed mandates.

BE IT FURTHER RESOLVED, that a certified copy of this resolution be transmitted to the President of the United States, the President of the United States Senate, the Speaker and the Clerk of the United States House of Representatives, and to each member of Tennessee's Congressional delegation.[3]

While the intention and sentiment is admirable, these are empty resolutions. They are void of any power and can be easily and safely ignored by federal politicians. Any

law passed by the Congress and found to be constitutional by the Supreme Court becomes the supreme law of the land, trumping any state law to the contrary. In that case, the Tenth Amendment and any Tenth Amendment resolution becomes inapplicable and extraneous.

In *The Federalist*, James Madison wrote,

> *The powers delegated to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, [such] as war, peace, negotiation, and foreign commerce. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.*[4]

I would ask those in the Tenth Amendment Movement and all those who have supported state sovereignty resolutions to consider lending their energies to the proposal and ratification of a Twenty-eighth Amendment as described in these pages.

In order for the states to regain their power to regulate activities in the ordinary course of domestic affairs, they need to take more positive action to ensure that the powers of the federal government are fewer and better defined. They must take action now to begin the constitutional amendment proposal and ratification process.

1. The simple act of thirty-four states making

application to the Congress to establish an amendment convention sends a very strong message to the federal government. Getting thirty-four states to do anything together, much less asking for a constitutional convention, is no easy feat. Not only are they taking a very real and strong step to minimize federal power, but they are telling Congress, in no uncertain terms, that the states are ready to challenge an overaggressive federal government.

2. In establishing an amendment convention, something that has never been done before, the states are defining their internal processes and procedures to call upon Congress to establish a convention, to debate and propose amendments, and to vote on the ratification of amendments. These processes and procedures, once institutionalized, can be used again and again if and when necessary.
3. There appears to be a very strong dissatisfaction with the direction of our nation. The states have a unique opportunity right now to allow their citizens to directly affect the operation of the federal government.

THE NULLIFICATION MOVEMENT

The nullification concept has been with us since the beginning of this nation. In his book *Nullification, How to Resist Tyranny in the 21st Century*, Thomas Woods, Jr., Senior Fellow at the Ludwig von Mises Institute, notes, "The central point behind nullification is that the federal government cannot be permitted to hold a

monopoly on constitutional interpretation. If the federal government has the exclusive right to judge the extent of its own powers, warned James Madison and Thomas Jefferson in 1798, it will continue to grow—regardless of elections, the separation of powers, and other much-touted limits on government power."[5]

Mr. Woods goes on to say that what Jefferson "sought was a mode of resistance […] that would allow a state to […] defend itself against federal usurpation. Nullification, in this view, was not an extreme remedy at all. It was the moderate middle ground. It was a central feature of Jeffersonian thought that 'the true barriers of our liberty […] are our State governments,' and it was via nullification that Jefferson suggested those barriers be employed."[6]

The first paragraph of the Kentucky Resolutions of 1798 provides an eloquent statement of the limited power of the federal government and the judgment of the constitutionality of its laws:

> *1. Resolved, That the several States comprising the United States of America, are not united on the principle of unlimited submission to their general government; but that, by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes—delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; and that whensoever*

> *the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: that to this compact each State acceded as a State, and in an integral part, its co-States forming, as to itself, the other party: that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.*[7]

We are faced now, however, not only with the almost unquestioned acceptance of the Supreme Court's constitutionality decisions, but also many other coercive powers of the federal government.

Consider, for example, the sheer enormity of the body of laws, rules, and regulations promulgated by the federal government and its agencies. A state needs to carefully select the law or rule it wishes to nullify. Each state nullification effort then promises to be a long and expensive fight with a questionable resolution (by the Supreme Court arm of the federal government).

The federal government also holds the purse strings on a considerable amount of funding needed by state governments for such functions as road maintenance and construction, education, and many others. Congress

can and will use that as either a carrot or a stick to "encourage and influence" compliance. For example, in 1974, the Congress passed the National Maximum Speed Law (a provision of the Emergency Highway Energy Conservation Act) setting the maximum speed on certain roads at fifty-five miles per hour. While determining speeds on roads is normally within the regulatory province of the states, Congress included the requirement that a state must agree to the federal speed limit in order to receive federal funding for highway repair. This action was, of course, justified under the Commerce Clause.

Although ripe for nullification, such an action would have been expensive, both in terms of legal costs to the state as well as loss of federal highway funds. Instead, a large majority of the population simply ignored the newly posted speed restrictions, and the disregard for this particular law was abetted by very lax state and local enforcement.

THE ROSCOE FILBURN MOVEMENT

Well, there really is no such movement! But I believe that the Twenty-eighth Amendment, as proposed here, strengthens state sovereignty, significantly aids in limiting the growth and spending of the federal government, and makes it far easier to challenge excursions of the central government into areas not permitted by the Constitution.

One paragraph of the proposed amendment permits a state to void a law that it deems unconstitutional. The burden of taking court action to prove constitutionality then rests with the federal government, strengthening the sovereign nature of the state government.

Again, it is my hope that the Tenth-ers, Tea Partiers, and Nullification-ers adopt, as part of their efforts, the initiative to begin debate leading to the passage of the Twenty-eighth Amendment.

REMEMBER ROSCOE FILBURN

CHAPTER 5

THE TWENTY-EIGHTH AMENDMENT

The Twenty-eighth Amendment wording, proposed below, would tighten the commerce clause, limiting the ability of the federal government to expand its power using said clause.

The wording I'm proposing should be viewed as a starting point for debate. I am not a legal scholar, constitutional or otherwise, and consequently the wording is that of a layman. Again, my only goal is to put forth the idea of the Twenty-eighth Amendment and hope that it begins a serious debate among the leaders of the several states and the Federal Government.

I would propose the following wording for the Twenty-eighth amendment:

Amendment 28: Powers of Congress to Regulate Commerce

1. The portion of Article I, Section Eight of the Constitution of the United States, which reads

"the Congress shall have power […] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" is hereby amended as follows:

2. Commerce is defined as the trade of goods and services. Congress shall have the power to regulate commerce between and among the several states, and with foreign nations, U.S. territories, and other independent governments within the United States. Congress shall have the power to regulate the channels and instrumentalities of such commerce to ensure non-discriminatory interstate commerce by a state or states.

3. The powers granted to Congress herein do not include powers necessary to regulate the national economy or portions thereof when not specifically related to the regulation of trade as above described.

4. Ownership by the federal government of the means and facilities of commerce is strictly limited to those areas of commerce in which the federal government is the only organization capable of performing such manufacturing, trade, transportation, finance, energy, or other usual components of commerce due to national security concerns, special availability of certain resources, or other limited circumstances.

5. At no time shall any law, policy, or regulation enacted by any state abridge the rights and freedoms of the citizens of the United States as

enumerated in the Constitution of the United States and its amendments.

6. This amendment is not intended to immediately invalidate any existing laws, policies, rules, or regulations currently in effect by federal congressional enactment, executive decision, or judicial interpretation. The applicability of such laws, policies, rules, or regulations to any state may be modified, changed, or abolished, from time to time, by legislative action of that state in accordance with the powers granted to the several states under this amendment and the Tenth Amendment.

8. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within twelve years from the date of submission hereof to the States by the Congress.

Paragraph 1:

The portion of Article I, Section Eight of the Constitution of the United States, which reads "the Congress shall have power […] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" is hereby amended as follows:

This identifies the specific section of the constitution to be amended.

Paragraph 2:

> *Commerce is defined as the trade of goods and services. Congress shall have the power to regulate commerce between and among the several states, and with foreign nations, U.S. territories, and other independent governments within the United States. Congress shall have the power to regulate the channels and instrumentalities of such commerce to ensure non-discriminatory interstate commerce by a state or states.*

In *The Constitution in Exile*, author Judge Andrew Napolitano suggested changing the Commerce Clause to read "[t]o keep commerce regular [...] among the several states."[1] I think that wording begs a definition of both *regular* and *commerce*. Because there is so much disagreement, I believe we must start with what we mean by *commerce*, and we need to keep the meaning narrow enough that there is no room for misinterpretation or expansion.

In Perez v. United States, the Supreme Court divided Congress's Commerce power into three distinct domains[2]:

1. Congress can regulate the channels of interstate commerce
2. Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce
3. Congress has the power to regulate activities that substantially affect interstate commerce.

Because congressional power has evolved to include these specific domains, it is convenient to use these divisions as the basis for the wording included in this amendment.

Regulating "persons or things in interstate commerce" is much, much too wide in scope. Consider Justice Stevens' dissenting opinion in United States v. Lopez, in which he stated, "Guns are both articles of commerce, and articles that could be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity."[3] Consequently, he reasoned, because guns are an article of commerce, they may be regulated by the federal government. This reasoning, carried forward ad infinitum, could be applied to virtually every product, bought or sold, in the United States. Additionally, it could be argued that citizens, in the act of making purchases, could be considered "persons […] in interstate commerce." Clearly then, "persons or things in interstate commerce" must be stricken from Congressional power.

The latitude provided by the "substantially affect interstate commerce" domain must be minimized. We should not totally remove from Congressional authority all activities that affect interstate commerce. However, the aggregation argument, as exemplified by *Wickard*, must be disallowed. Further, I would suggest that "substantially affect" could be interpreted, very easily, with an ever widening net. Limiting legislative power to those activities that are discriminatory to interstate commerce by a state or states is reasonable, consistent with the original intent of this paragraph, and leaves the states with necessary

commerce powers so long as they do not treat those in other states unfairly.

This provision will certainly be tested by various legal actions that reach U.S. District Court and Supreme Court levels. I would suggest that a state should be very wary of considering such an action against another state. State-to-state negotiation is, in my opinion, infinitely preferable to court actions that may result in undesirable expanded federal power, even under this restricted definition of federal authority. We must be vigilant and consistently guard against the possibility of enlarging the role of the Congress in the commercial affairs of the states. Likewise, there will be lawsuits initiated by various corporate entities seeking competitive advantage or government support. Tests will be instigated by lobbyists seeking to regain lost influence and organizations with an interest in greater federal power.

States must take strong action to resolve these issues, if possible, before such issues reach national jurisdiction. When federal authorities must be involved, the states must act in concert to challenge any possible degradation of states rights or expansion of federal commerce powers. The States Coordinating Committee may assist in this endeavor (Chapter 5).

Paragraph 3:

> *The powers granted to Congress herein do not include powers necessary to regulate the national economy or portions thereof when not specifically related to the regulation of trade as above described.*

With this paragraph, we are emphasizing the intent of this Amendment to deny both Congress and the Judiciary the ability to assume more authority than is specifically delegated. Again, as challenges arise, this paragraph may assist in continuing the limitations of Congress in the area of commerce. It should certainly clarify to judges in federal courts and the Supreme Court that the will of the people is for a more limited government.

Paragraph 4:

> *Ownership by the federal government of the means and facilities of commerce is strictly limited to those areas of commerce in which the federal government is the only organization capable of performing such manufacturing, trade, transportation, finance, energy, or other usual components of commerce due to national security concerns, special availability of certain resources, or other limited circumstances.*

This paragraph removes the possibility of even baby steps toward socialism. The federal government should not be in the business of business. We must, however, leave open the possibility of government ownership in certain special circumstances. It is my hope that this is still tight enough to avoid expansive interpretation and manipulation.

Paragraph 5:

> *At no time shall any law, policy, or regulation enacted by any state, abridge the rights and freedoms of the citizens of the United States as enumerated in the Constitution of the United States and its amendments.*

With greater authority and autonomy at the state level, I believe we need to make sure that individual liberties are especially protected.

Paragraph 6:

> *This amendment is not intended to immediately invalidate any existing laws, policies, rules, or regulations currently in effect by federal congressional enactment, executive decision, or judicial interpretation. The applicability of such laws, policies, rules, or regulations to any state may be modified, changed, or abolished from time to time by legislative action of that state in accordance with the powers granted to the several states under this amendment and the Tenth Amendment.*

This amendment represents a considerable change to our current method of federal governance. Clearly, immediately nullifying over one hundred years of legislation and jurisprudence would be catastrophic. This paragraph permits a careful review by state authorities and the nullification, if warranted, for that state only, of

federal laws, rules, and regulations previously enacted or justified under the previous wording of the Commerce Clause but clearly unconstitutional under the Twenty-eighth Amendment.

This clause could be the most controversial and potentially troubling within the amendment. Without it, the amendment will be sufficient to halt future governmental expansion based on the Commerce Clause. However, I believe there needs to be a mechanism to allow for a careful drawdown of federal excess. States, I am convinced, will exercise sufficient reason and caution in taking back what should have always been state authority. If this clause were to find substantial use, this would only mean that the federal government would be constrained to focus its attention on those powers granted it in the Constitution, an altogether very desirable result.

Paragraph 7:

> *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within twelve years from the date of submission hereof to the States by the Congress.*

An amendment of this importance must have adequate time for debate within state legislatures. Even though substantial discussion was conducted during the proposal portion, time for further discussion and the legislative schedules of at least thirty-eight states must be allowed. Additionally, this provides for changes in leadership in

the various states. It will ensure that the amendment is carefully considered by state legislatures with differing and changing philosophies. We want the amendment to very clearly represent the will of the people.

CHAPTER 6

THE MECHANICS OF PROPOSING AND RATIFYING THE TWENTY-EIGHTH AMENDMENT

Once we've decided that the Twenty-eighth Amendment must be added to the Constitution, we have to go about the process of getting it proposed and ratified.

Article V of the Constitution reads:

> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, a part of this Constitution, when ratified by the Legislatures of three fourths of the several States,*

> *or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*

So, Article V requires both an amendment proposal process and an amendment ratification process.

There has never been an Article V convention convened in the history of the United States. All Constitutional amendments have been proposed by the national congress. However, the amendment being suggested here involves limiting the power of the federal government. It would be hard to imagine, then, that the national congress would, on its own initiative, propose any amendment to that effect.

So that leaves us with the second method of proposing an amendment in accordance with Article V. The national Congress is required to call a convention for proposing amendments upon the application of the legislatures of two thirds of the several states. Again, this has never been done before, so the process and procedures to accomplish this, especially the calling of a convention by Congress, are in question.

The first half of this undertaking is the application to Congress by two-thirds of the state legislatures. This may seem to be a daunting, almost impossible task. However,

as detailed elsewhere in this book, I believe that right now might be that unique time in this nation's history when this can be accomplished.

Before getting into any specific suggestions, let me say that I do not wish to presume to suggest to state governments, governors, legislators, governors conferences, or potential constitution conventions how to go about their internal business. I only make these suggestions as a starting point for discussion or possible action.

A state may make application to the federal government for a convention by resolution of both houses of a state legislature and approval by the governor. I believe the best first step toward those resolutions is an action item at the next National Governors Convention (perhaps preceded by debate at the Democratic and Republican Governors Association meetings). Prior to the convention, a committee should be established to propose the most appropriate wording for the resolutions, which will ultimately be forwarded to Congress, by each of the states (or at least two-thirds of them) to establish a constitutional convention. (For sake of reference I will call this the States Constitutional Convention Planning Committee, or SCCPC) The National Governor's Convention, then, should have this very specific agenda item: to approve a resolution to be presented to each of the state legislatures. Inasmuch as the Constitution requires that application to Congress be made by the legislatures of the states, it would appear that two methods may suffice:

1. Individual resolutions submitted to Congress by each state. In this case, each resolution must be either identical or sufficiently compatible as to constitute agreement to be included in the required two-thirds of the states. Therefore, relatively little of the resolution may be altered. Differences may lead Congress to determine that the resolutions thus submitted do not, because of those differences, constitute application by three-fourths of the states.
2. A single resolution, submitted at one time, with attachments from each state legislature (totaling at least thirty-four) attesting to its agreement and application to Congress. This would require a coordinating committee, perhaps the follow-on job of the SCCPC, to monitor state activities, collect and compile state legislative approvals, and disseminate pertinent information to the several states.

There is some question as to whether the state legislatures may call upon Congress to call a convention for proposing amendments for specific or limited subject areas, or whether a convention may be called for proposing amendments in unlimited subject areas. As a starting point, I would suggest something like the following:

> *In accordance with Article V of the Constitution of the United States, the State (Commonwealth) of _____ hereby makes (or if a single resolution*

with thirty-four attestations: the below listed States and Commonwealths hereby make) application to the Congress of the United States to call a convention for proposing amendments to the Constitution of the United States to more clearly define the relationships between and among the national government and the governments of the several states, including clarification of the commerce clause of the U.S. Constitution (Article I, Section 8, Paragraph 3), clarification of the necessary and proper clause of the U.S. Constitution (Article I, Section 8, Paragraph 18), clarification of the general welfare clause of the U.S. Constitution (Article I, Section 8, Paragraph 1), clarification of the state's rights clause of the U.S. Constitution (Amendment X), and other such articles, sections, and amendments of the U.S. Constitution as may apply to such relationships between and among the national government and the governments of the several states.

We recommend that in its call for the Constitutional Convention, the Congress specify that this constitutional convention shall be initially composed of one member from each state appointed or elected in accordance with individual state procedures. Organization, operation, policies, and procedures of the constitutional convention shall be determined by initial convention members. Duration of the convention shall be as determined by

Convention members in accordance with their internal voting procedures.

Wording, similar to the above, proposes a convention to debate a relatively limited subject area that is still wide enough to propose any amendments the convention attendees deem appropriate and necessary. It should be noted that, once proper application is tendered, the Congress must call for a convention; it has no leeway in this matter. There is, however, nothing that specifies how the convention is to be organized or conducted, and neither is there any durational requirement or restriction. Therefore, because powers not given by states to the Congress are reserved to the states, I believe the organization, conduct, and duration of the convention, once called, is at the discretion of the states. The option of a standing convention, recessed but not disbanded, would also be an option.

Again, the following are simply some suggestions for discussion among state authorities while considering resolutions, amendments, procedures, and the like. However, inasmuch as there are fifty states, each establishing its own rules for selecting convention members, methods for debate and review of amendment proposals, and ratification voting procedures, I would like to suggest some initial items for consideration.

Although it may be initially organized with one voting member from each state, the constitutional convention may well be organized, finally, in a different fashion. Again, the National Governor's Conference could be a great place to come to agreement on some general

approaches or standards for the number of convention members appointed by each state and the methods for their selection. The SCCPC can research possibilities by coordinating with the leadership in each of the states and make appropriate recommendations to the Governor's Convention at large.

There must be an organization in place, or put in place, to attend to the details of establishing the convention and arranging its initial meeting (perhaps a new follow-on job for the SCCPC). Once the convention is established, it can operate self-sufficiently, and the establishing organization may be abolished.

Each of the states must be ready to attend the Constitutional convention and effect its purposes. The convention must define its procedures for selecting those persons authorized to attend, debate, and vote on various amendment proposals. Clearly, the convention will be a committee composed of a minimum of fifty members. We know how inefficient a committee, especially a large one, can be, so I believe it would be best for each state to designate not more than one voting member to serve on the convention, perhaps the Lieutenant Governor or Attorney General. That member should be given full authority to debate, negotiate, and approve for his or her state the wording to be proposed for an amendment. That member may be accompanied by appropriate legal, economic, political, and other assistance, but voting members must be held to the absolute minimum possible.

Once convened, the amendment convention must define its procedural rules. Since this will be America's first convention, established for the purpose of proposing

a constitutional amendment, the rules of engagement established therein will become the precedent and guide for all that follow. The procedures should encourage participation and debate among all members but must also encourage positive results and general agreement within a reasonable amount of time. Some suggested procedures, with reasons, are as follows:

1. Each state will prepare and distribute, prior to the actual convention meeting, an information booklet containing background information on the state representative to the convention. The booklet should also contain any specific concerns, suggestions, talking points, and any other information that the state legislature has asked to be presented at the convention or that the state representative wishes to present. This will allow for a relatively quick introduction of convention members and state concerns, minimizing the time needed for this function during the convention. The idea here is to "hit the ground running," getting the meeting as productive as possible as quickly as possible.
2. I would suggest that convention meetings be relatively short, perhaps ten working days. This would allow for sufficient debate time and assignment of effort to appropriate committees as may be required. For example, after initial debate, a committee may be designated to draft two or three "strawman" amendments. The convention would then meet again, for a short period, to

discuss amendment wording.

3. To minimize delays and avoid any political considerations in the selection of convention chairman, perhaps that chairman could be appointed for each convention meeting for a period of ninety days and be appointed in the order of the states' admission to the union. The chairman's sole duty is to control the conduct of the meeting in accordance with the procedures established.
4. The selected amendment wording should be sent to several places for review and comment, to be accomplished, perhaps, by a small committee established to handle administrative requirements.
   a. Copies should be sent to experienced constitutional scholars to be reviewed for the potential ramifications and consequences, both intended and potentially unintended, of the amendment as stated. If some or all members of the Supreme Court would be willing to review the document, so much the better.
   b. Copies to Congress for their review and input to the convention. It should be remembered, however, that this is just a courtesy. Congressional action is not necessary, and Congress's views may not even be desired.
   c. Copies to the states for their review and comment.

Once an amendment is proposed, states must take timely action to move the amendment forward toward voting and ratification. However, each state must allow sufficient time for citizens to read, learn about, and

discuss the amendment and its implications. While we might want to move quickly, ratifying an amendment to the Constitution is a tremendously important and serious undertaking. This is not a two-thousand–page congressional bill to be passed with almost no debate or understanding (sarcasm intended). We must do our best to encourage a fully informed and engaged electorate.

The Political Part

The previous section described the technical and organizational mechanics of getting an amendment proposed and ratified. That is the easy part. The really difficult part, as we would expect, has to do with politics.

One might assume that state government officials would generally act in their own best interests and in the interests of their constituents, and it would clearly be in their best interests to ratify this amendment. Each state would have greater autonomy and control over its own affairs. There would be fewer federal regulations to be followed and administered. State and local governments could better tailor policies and programs to meet their specific needs. So the Twenty-eighth Amendment should be a no-brainer for state passage.

But there are politicians involved! I suspect that most state lawmakers and executives are concerned solely with the affairs of their districts and the state in general. Most do not aspire to national political office. Those that do have such aspirations may be hesitant to join the Twenty-eighth Amendment bandwagon. Some state officeholders may believe in a very strong central government, while others may feel dependent on the federal government dole.

Our job then is to fill the governor's mansion and state legislatures with those who will support this change to the constitution. We also need to continue to pressure our state elected officials to make this new amendment a reality. We must make support of this initiative a voting priority.

When we vote for candidates who promise less spending, a balanced budget, a trimmer bureaucracy, and the like, hopefully we get a representative with good intentions and a desire to keep promises. Unfortunately, the goal of less spending and smaller government is nebulous and complex, and there are political party and constituent pressures greatly hindering the accomplishment of that goal. However, when addressing the issue of the Twenty-eighth Amendment, a candidate's response is simple, as is following through after the election. The candidate is either for or against the amendment and promises to vote accordingly. That makes our vote and our representative's action simple.

We must all make the ratification of the Twenty-eighth Amendment to the Constitution a critical factor in our voting decision in state elections.

And don't forget:

REMEMBER ROSCOE FILBURN

CHAPTER 7

THE STATES COORDINATING COMMITTEE

In the previous chapter concerning the mechanics of getting the Twenty-eighth Amendment proposed and ratified, I touched on the need for a small organization to draft "strawman" amendment wordings, distribute copies of documents to the states, and perform other administrative duties. Now I will describe what I believe to be the little gem in all this. This small group could become a very important organization to ensure the future of our limited system of governance and the return of appropriate and necessary power to the states.

The states originally made a deal in establishing the central government. They essentially said, "We will give up some of our sovereignty, and you will concern yourselves with those things, affecting all of us as a group that can only be handled by a central authority. And, by the way, we will spell out those limited powers we are giving you." But as time went on, the central government became more and more powerful at the expense of the

states. Unfortunately, there was no obstacle in the way of that usurpation of power; neither was there a method of redress for the states. In effect, there was no "united states" to serve as a check against the United States as a single federal entity. The United States has ceased to be a union of the states and has become a central and separate governing body. States came to be regarded as subordinate political units for whom the federal government was the source of power. A state that felt its sovereignty being diminished by a federal action would have to go it alone against the might and resources of the central government or try to convince other states to join in the fight.

That very thing happened with the Sedition Act of 1798. (It didn't take long for the federal government to start taking away liberties and assuming greater authority.) The Sedition Act essentially said that any person or organization speaking, writing, or printing anything *false, scandalous, or malicious* (author's emphasis) against the United States, the president, or the Congress, or say or print anything that may cause them to be brought into contempt or disrepute, may be fined or jailed. Being that "false, scandalous, and malicious" is in the eye of the beholder (in this case, the central government) and "contempt and disrepute" may certainly be rightfully earned by any politician, the Sedition Act would seem to be very clearly counter to the First Amendment right to free speech.

Virginia and Maryland each passed a resolution condemning the Act and pronouncing it unconstitutional. Trying to attract other states to this cause proved unsuccessful. It appears that the presidency and both

houses of Congress were controlled by the Whig party, as were most of the states not cooperating with Virginia and Maryland, despite the obvious overrun of a guaranteed liberty. (It appears that the party in power can always ram through its agenda.)

Today, the federal government is all too often at odds with the states, and the Supreme Court, supposedly the guardian of the idea of constitutionality, is really another arm of the federal government, siding with Congress at the expense of the sovereignty of the states. The Senate, which had been the states' voice in Congress, is now just another arm of central authority. Prior to the ratification of Amendment Seventeen in 1913, Senators were appointed by each state to serve as that state's ambassador to the central government. Now, directly elected senators owe allegiance not just to the residents of their state, but to all those who have contributed to their election coffers, to lobbyists who court their favor (and to which roles they, themselves, will enter upon retirement from their office), and to special interest groups and various other voting blocs. There is often very little loyalty to a senator's state government.

The State Coordinating Committee will monitor federal activity, receive and investigate concerns of a state to a federal action, advise states regarding potentially important constitutional matters affecting the states, and coordinate necessary information among the states. It will essentially be an agency of the "united states," performing data compilation, research, and information dissemination.

I would recommend a small committee that would

have to focus only on the most important issues facing the states. An SCC that is too large may become unwieldy and devolve into just another bureaucracy. We don't need more of those.

Staffing should include a chairman and deputy chairman who each may be part-time participants but who will, necessarily, spend a great deal of time when necessary. The selection of the chairman is, potentially, the most difficult, both politically and administratively. Who is to make the selection decision? I would suggest that the first chairman be the same individual as was selected by the Article V convention to head the SCCPC or whatever administrative or coordinating organization is established by that convention. Hopefully, by the time an amendment is proposed, the state representatives to the convention will have developed a level of confidence in the SCCPC chairman to retain his or her services with the SCC. Above all, the Chairman of the SCC must be a person of high moral character and integrity and be an advocate of Constitutional government and state sovereignty. Succeeding chairmen should come from a slate of candidates recommended by the outgoing chairman and from states desiring to submit candidates. State governors may then vote for the candidate of their choice, with the selection made by majority vote.

The full-time staff would include a number of constitutional scholars who may or may not be attorneys. I don't believe that litigating attorneys will be necessary as no litigation should be initiated by the SCC. A number of research personnel and administrative personnel would also be necessary. I am not suggesting here the number of

staff positions needed. This should be determined by the chairman and depends on the stated mission and available funding. Functions such as computer and communications support should be provided by contract.

Funding should be by allotment from each of the fifty states equally. The size, population, or wealth of a state has no bearing to the SCC. Each state is to be represented equally. Inasmuch as I believe in austerity, I would think an annual contribution of just $200,000 per state would be more than sufficient to initially equip, staff, and house the SCC. Follow-on budgets will be developed by the SCC, but extreme care must be taken to maintain the SCC at a relatively small, cost-conscious level.

I would suggest that the SCC be organized under the auspices of the National Governor's Association. Governors and their staff may suggest issues to be researched, or the SCC may originate research into topics as determined by internal SCC policy or direction. Reports and research results, including recommended actions, should be provided to the leadership of every state.

The SCC should become a crucial agency, guarding the sovereignty of the states and monitoring attempted overreach of authority by the federal government.

And we can nickname it …

THE ROSCOE FILBURN COMMITTEE

Notes

Preface

1. Henry Hudson, U.S. District Court for the Eastern District of Virginia, Opinion, Case 3:10-cv-00188-HEH, December 13, 2010.

Chapter 1

1. John Eastman and Erwin Chemerinsky, *Wheat, Weed, and ObamaCare: How the Commerce Clause Made Congress All-Powerful*, www.dboor.com.
2. Ed Morrisey, *The Commerce Clause and the Concept of Limited Power*, August 27, 2010.
3. Clarence Thomas, writing in concurrence, U.S. v. Lopez, 514 U.S. 549 (1995).

Chapter 2

1. William Crosskey, *Politics and the Constitution in the History of the United States*. As quoted in *The Legal Meaning of "Commerce" in the Commerce Clause*, Robert Natelson, St. John's Law Review, Volume 80, p. 793
2. Randy Barnett, as related in *The Legal Meaning of "Commerce" in the Commerce Clause*, Robert Natelson, St. John's Law Review, Volume 80, p. 794

3. Robert Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, St. John's Law Review, Volume 80, pp. 799–800
4. Ibid. pp. 805–6.
5. Randy Barnett, *The Original Meaning of the Commerce Clause*. University of Chicago Law Review, Winter 2001. 68 U. Chi. L. Rev. 101.
6. John Marshall, writing for the majority, Gibbons v. Ogden 22 U.S. 1 (1824).
7. John Marshall, writing for the majority, McColloch v. Maryland 5 U.S. 137 (1803).
8. Ibid.
9. John Marshall, writing for the majority, Gibbons v. Ogden 22 U.S. 1 (1824).
10. Melville Fuller, writing for the majority, U.S. v. E. C. Knight Co. 156 U.S. 1 (1895).
11. Julius Mayer, in his brief in Lochner v. New York 198 U.S. 45 (1905), as reported in "*Landmark Supreme Court Cases*." Gary Hartman, Roy Mersky, Cindy Tate, Infobase Publishing, 2004.
12. Rufus Peckham, writing for the majority, Lochner v. New York 198 U.S. 45 (1905).
13. George Sutherland, writing for the majority, Carter v. Carter Coal Co. 298 U.S. 238 (1936).
14. Charles Evans Hughes, writing for the majority, National Labor Relations Board v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).
15. Harlan Stone, writing for the unanimous court, United States v. Darby Lumber Co. 312 U.S. 100 (1941).
16. Ibid.
17. Claude R. Wickard, Wickard v. Filburn 317 U.S. 111 (1942).
18. Ibid.

19. Wickard v. Filburn 317 U.S. 111 (1942).
20. Consumer Credit Protection Act, 15 USC. 1601.
21. William Proxmire, as quoted in majority decision, Perez v. United States 402 U.S. 146 (1971).
22. William O. Douglas, writing for the majority, Perez v. United States 402 U.S. 146 (1971).
23. Potter Steward, writing in dissent, Perez v. United States 402 U.S. 146 (1971).
24. The Federal Gun-Free School Zone Act of 1990 18 USC Sect 922(q).
25. William Rehnquist, writing for the majority, United States v. Alfonso Lopez Jr. 514 U.S. 549 (1995).
26. Stephen Breyer, writing in dissent, United States v. Alfonso Lopez Jr. 514 U.S. 549 (1995).
27. David Souter, writing in dissent, United States v. Alfonso Lopez Jr. 514 U.S. 549 (1995).
28. John Paul Stevens, writing in dissent, United States v. Alfonso Lopez Jr. 514 U.S. 549 (1995).
29. The Federal Gun-Free School Zone Act of 1990 18 USC Sect 922(q) (1990).
30. The Federal Gun-Free School Zone Act of 1990 18 USC Sect 922(q) reenacted (1996).
31. Antonin Scalia, writing in concurrence, United Haulers Assn, v. Oneida-Kerkimer Solid Waste Management Authority, 550 U.S. ____ 2007.
32. Clarence Thomas, writing in concurrence, United Haulers Assn, v. Oneida-Kerkimer Solid Waste Management Authority, 550 U.S. ____ 2007.

Chapter 3

1. Thomas Sowell, *Applied Economics* (New York: Basic Books.. 2009) *Intellectuals and Society*, (New York: Basic Books 2009).

2. Daniel Mitchell, *The Impact of Government Spending on Economic Growth*. http://www.heritage.org/Research/Reports/2005/03/The-Impact-of-Government-Spending-on-Economic-Growth; http://www.heritage.org/Research/Reports/2005/03/Supplement-to-The-Impact-of-Government-Spending-on-Economic-Growth.
3. Murray Weidenbaum, *The Power of Negative Thinking: Government Regulation and Economic Performance.*
4. John Dawson and John Seater, *Regulation and the Macroeconomy* January 2004.
5. Murray Weidenbaum, *The Power of Negative Thinking: Government Regulation and Economic Performance.*
6. *The Writings of Albert Gallatin*, Edited by Henry Adams, quoting Albert Gallatin (1879).
7. Chris Edwards, *Agricultural Regulations and Trade Barriers.*
8. Ibid.
9. *50 Years of Research on the Minimum Wage*, Joint Economic Committee, Congress of the United States, 1995.
10. David Neumark and William Washer, *Minimum Wages* The MIT Press. December 2008.
11. Paul Kersey, Testimony before the Small Business Committee of the U. S. House of Representatives, 2004
12. Greg Sandlen, *100 Years of Market Distortions, Consumers for Health Care Choices*. 2006
13. Stephen Breyer, *Making Our Democracy Work*, Alfred A. Knoff 2010
14. Ibid.
15. Ibid.
16. John Marshall, writing for the Majority, Gibbons V. Ogden 22 U.S. 1 (1824).
17. Louis Brandeis, writing in dissent, New State Ice Co, v.

Leibmann 285 U.S. 262 (1932).
18. Michael Bond, *Applying the Lessons of State Health Reform*. National Center for Policy Analysis 2009.
19. Richard Vedder, *Taxes and Economic Growth*. The Taxpayers Network. September 2001.
20. Richard Vedder, *Taxation and Migration*. The Taxpayers Network. March 2003
21. Julie Borowski, *Washington's Proposed Income Tax Will Stifle Economic Growth*. November 1, 2010.
22. Richard Vedder, *Taxes and Economic Growth*. The Taxpayers Network, September 2001
23. www.epa.gov
24. Jonathan Adler, *Swamp Rules: The End of Federal Wetland Regulations*. http://www .cato.org/pubs/regulation/regv22n2/swamprules.pdf
25. Ibid.
26. Ibid.
27. Thomas Sowell, *Knowledge and Decisions*. (New York: Basic Books, 1980).

Chapter 4

1. Dick Armey and Matt Kibbe, *Give Us Liberty*. Harper Collins 2010.
2. John O'Hara, *A New American Tea Party* (Hoboken, NJ: John Wiley & Sons. Inc. 2010).
3. Tennessee Sovereignty Resolution, HJR108, June 23, 2009.
4. James Madison, *Federalist # 45*. January 26, 1788.
5. Thomas Woods, *Nullification* (Washington, DC: Regnery Publishing, Inc. 2010).
6. Ibid.
7. Ibid.

Chapter 5

1. Andrew Napolitano, *The Constitution in Exile*. (Nashville, TN: Thomas Nelson, Inc. 2006).
2. Perez v. United States 402 U.S. 146 (1971).
3. John Paul Stevens, writing in dissent, United States v. Alfonso Lopez Jr. 514 U.S. 549 (1995).

Appendix

Constitution of the United States

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous

Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall

be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings,

punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed

by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal

to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the

Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - "I do solemnly swear (or affirm) that I will faithfully execute the Office

of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their

Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of

this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson, Secretary

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names.

Go. WASHINGTON
Presidt. and deputy from Virginia

New Hampshire
JOHN LANGDON NICHOLAS GILMAN

Massachusetts
NATHANIEL GORHAM RUFUS KING

Connecticut
WM. SAML. JOHNSON ROGER SHERMAN

New York
ALEXANDER HAMILTON

New Jersey
WIL: LIVINGSTON DAVID BREARLEY.
WM. PATERSON. JONA: DAYTON

Pennsylvania
B FRANKLIN THOMAS MIFFLIN
ROBT MORRIS GEO. CLYMER
THOS. FITZSIMONS JARED INGERSOLL
JAMES WILSON GOUV MORRIS

Delaware
GEO: READ GUNNING BEDFORD jun
JOHN DICKINSON RICHARD BASSETT
JACO: BROOM

Maryland
JAMES MCHENRY DANL CARROLL
DAN OF ST THOS. JENIFER

Virginia
JOHN BLAIR JAMES MADISON jr
North Carolina
WM. BLOUNT HU WILLIAMSON
RICHD. DOBBS SPAIGHT

South Carolina
J. RUTLEDGE CHARLES PINCKNEY
CHARLES COTESWORTH PINCKNEY
PIERCE BUTLER

Georgia
WILLIAM FEW ABR BALDWIN

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States,

than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI

(Proposed 1794, Ratified 1795)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII

(Proposed 1803, Ratified 1804)

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the

person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall

choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII

(Proposed 1865, Ratified 1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

(Proposed 1866, Ratified 1868)

Section1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers,

counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State

shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

(Proposed 1869, Ratified 1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI

(Proposed 1909, Ratified 1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII

(Proposed 1912, Ratified 1913)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one

vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII

(Proposed 1917, Ratified 1919)

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution

by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX

(Proposed 1919, Ratified 1920)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX

(Proposed 1932, Ratified 1933)

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed

for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI

(Proposed 1933, Ratified 1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. The article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII

(Proposed 1947, Ratified 1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the

States by the Congress.

Amendment XXIII

(Proposed 1960, Ratified 1961)

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV

(Proposed 1962, Ratified 1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV

(Proposed 1965, Ratified 1967)

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the

President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty eight hours for that purpose if not in session. If the Congress, within twenty one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

(Proposed 1971, Ratified 1971)

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII

(Proposed 1789, Ratified 1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Amendment XXVIII

(Proposed herein by the author)

Section 1. The portion of Article I, Section eight of the Constitution of the United States, which reads, "the Congress shall have power... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." is hereby amended as follows:

Section 2. Commerce is defined as the trade of goods and services. Congress shall have the power to regulate commerce between and among the several states, and with foreign nations, US territories, and other independent governments within the United States. Congress shall have the power to regulate the channels and instrumentalities of such commerce to ensure non-discriminatory interstate commerce by a state or states.

Section 3. The powers granted to Congress herein does not include powers necessary to regulate the national economy or portions thereof when not specifically related to the regulation of trade as above described.

Section 4. Ownership, by the federal government, of the means and facilities of commerce, is strictly limited to those areas of commerce in which the federal government is the only organization capable of performing such manufacturing, trade, transportation, finance, energy,

or other usual components of commerce due to national security concerns, special availability of certain resources, or other limited circumstances.

Section 5. At no time shall any law, policy, or regulation enacted by any state, abridge the rights and freedoms of the citizens of the United States as enumerated in the Constitution of the United States and its amendments.

Section 6. This amendment is not intended to immediately invalidate any existing laws, policies, rules, or regulations currently in effect by federal congressional enactment, executive decision or judicial interpretation. The applicability of such laws, policies, rules, or regulations to any state may be modified, changed, and/or abolished, from time to time, by legislative action of that state in accordance with the powers granted to the several states under this amendment and the tenth amendment.

Section 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within twelve years from the date of submission hereof to the States by the Congress.