

Testimony of William A. Galston on the state of federalism before the Committee on Governmental Affairs of the United States Senate, May 5 1999

Mr. Chairman, my name is William Galston, and I am a professor at the University of Maryland's School of Public Affairs. I served in the Clinton administration from January 1993 through May 1995 as Deputy Assistant for Domestic Policy, and my service in that capacity has significantly informed my understanding of federalism. However, I want to emphasize that I appear today as an independent scholar and private citizen, not as an administration representative. I should also emphasize that I have not been a party to recent controversies over particular policies and claim no special competence to address them. I am here to offer a general perspective on the historical evolution of American federalism and, to some extent, on the current state of federal-state relations. I do so in the belief that a sound understanding of constitutional principles and constitutional history can illuminate the issues you face today.

It is an honor to have been invited to testified on a matter of such fundamental importance to our nation. As you know, federalism is not a new question. Indeed, it is the first question our founders faced, first in framing our constitution and then in defending it against its many adversaries. Confronted with the manifest inadequacies of the Articles of Confederation, the founders set out to strengthen the power and authority of the central government. They did so for three reasons that have shaped our history and that remain relevant today: first, to enable the American people to promote the common defense and general welfare of the nation as a whole, as distinct from its parts; second, to build a continental market free of internal barriers to the flow of commerce; and third, to defend the rights and interests of individuals and minorities against the potential injustice of local majorities.

Not surprisingly, the framers' efforts encountered staunch resistance from state officials who feared the loss of prerogatives and power if the new constitution were ratified. In response, the supporters of the constitution formulated a theory of federalism, memorably articulated in the Federalist Papers. In the interests of time, let me briefly summarize the key points. First, the system established by the new constitution is neither a pure federation nor a pure centralized national government, but a historically unprecedented composite in which there would be concurrent jurisdiction over many matters as well as some exclusively reserved to the states or to the federal government. Second, the constitution guarantees an ongoing tension between the states and the federal government, a tension that (like the struggle among the branches of the federal government itself) helps secure the people's liberties. Third, in this ongoing struggle, the states are just as likely to expand their powers at the expense of the Union as is the national government to do so at the expense of the states. Fourth, neither party to this struggle enjoys superior wisdom, virtue, or legitimacy: both are the trustees of the people, constituted with different powers to pursue different public purposes, and ultimately answerable to the people alone.

There is no question that in practice, federal power has grown substantially over the past two centuries. This growth stems in part from classic Supreme Court decisions early in our history that established broad rather than narrow interpretations of the necessary and proper, commerce, and supremacy clauses. Federal authority was further expanded by the Civil War, which led to constitutional guarantees for the privileges and immunities of national citizenship. This growth also reflects key twentieth-century developments, such as the rise of an advanced, interdependent, industrial economy, a national economic emergency that overwhelmed the capacities of states and localities, a series of global military and security challenges, the struggle to secure in practice the rights of equal citizenship guaranteed to all Americans in theory, and the emergence of new challenges--such as environmental protection--that could not be fully addressed by states and localities acting individually. These considerations remain relevant today and argue for continued vigorous federal power in the twenty-first century.

Nonetheless, it is clear that federal authority is not and should not be unlimited. As James Madison says in Federalist 39, under the constitution the states retain "a residuary and inviolable sovereignty." Courts have argued, and no doubt will continue to argue, about the precise extent of the matters reserved to the states, but the general proposition that the framers intended a constitutional system of dual sovereignty is not open to serious doubt.

It is equally clear that from a practical standpoint, states and localities should play a key role in formulating and implementing public policy. Four considerations point in this direction. The first is the familiar idea that variations among different jurisdictions frequently make it inadvisable, or even impossible, to impose top-down, one-size-fits-all requirements. The second is the proposition, also familiar, that states and localities can serve as laboratories of democracy and that it is harmful for the federal government to place them in legislative or regulatory straitjackets that make it impossible for policy experiments to proceed. (For example, it is hard to imagine how the 1996 welfare reform bill could have been drafted without an extensive body of state and local experience on which national policy-makers could draw--experience that could not have developed without waivers from federal requirements.) Third, moving policy out to states and localities can increase opportunities for public participation and empowerment. This is especially important in an era in which so many citizens feel shut out from any meaningful say in public affairs. Finally, it is an unhappy but indisputable fact that today, public trust in national political institutions is at a low ebb; substantial devolution to states and localities may help rebuild confidence in our capacity for self-government.

Roughly speaking, the half-century after World War Two has been divided into two fundamentally different eras. In the first of these eras, for reasons stemming largely from the civil rights struggle, the states were seen as the problem and the federal government took the lead. The second era turned this assumption on its head: the federal government was labeled the problem, and devolution the solution. Each of these assumptions represented at best a partial truth.

It is only recently that our governing institutions have begun to create a new synthesis-- a contemporary federalism that balances distinctive federal and state capacities and is responsive to our changing circumstances. Key examples of this progress include the Unfunded Mandate Reform Act, welfare and Medicaid reforms, and the new children's health insurance program. All of these were enacted with substantial bipartisan support in Congress and could not have succeeded without cooperation between Congress and the executive branch.

The challenge now is to maintain the progress toward this new synthesis. To this end, I would urge the following points:

1. In many areas, it will prove productive to forge a new form of federal-state partnership in which the national government establishes general public purposes and provides resources while the states decide for themselves within very broad guidelines how funds are to be employed to promote these purposes. (This is the philosophy of governance at work in the 1996 welfare reform, and also in the recently enacted Ed-Flex bill.)
2. The national government cannot retreat from its obligation to protect the rights of individual citizens, whether those rights are guaranteed by the constitution or by legislation. The discharge of this obligation will not always be consistent with the preferences of other actors in the federal system.
3. Given the continuing importance of guaranteeing a free and open national market, we must be open to the possibility that economic, technological, and social changes will require the reconsideration of long-established federal-state relations in particular sectors. Telecommunications, the Internet, banking, health care, and education are examples of areas where such rethinking may well be in order.
4. It is likely that not all the necessary changes in the federal system will point in the same direction. In some cases, the role of states and localities will be enhanced. In others, the federal government may be called upon to exercise new leadership. A uniform approach is unlikely to promote the public good in every instance.

Not every assertion of federal power is justified, but not every restriction of state and local authority is unjustified. I would therefore recommend caution in the face of any proposal that reflects a generalized presumption either for or against any particular level of the federal system.

Thank you for giving me this opportunity to present my views. I would be happy to respond to any questions you may have.