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THE STATE OF FEDERALISM

Thank you for the opportunity to testify about federalism--the cornerstone of our Constitution. I will first show how constitutional federalism provided the greatest charter for liberty, wealth creation, and community in political history. Second, I will outline the sad decline of federalism in the twentieth century. Third, I will offer some thoughts on reviving federalism so that it once again will promote freedom, economic growth, and social solidarity.

Federalism was the Framers' most important contribution to solving the greatest dilemma of political theory. A government needs to be powerful enough to protect liberty and property, but a government sufficiently powerful to accomplish this end is also powerful enough to oppress the liberty of its citizens and expropriate their wealth.[i] Democracy does not dissolve this dilemma: an elected ruling coalition may tax and regulate for the benefit of its members rather than in the public interest. Indeed, in a democracy concentrated groups of citizens, called factions by James Madison and special interests today, possess peculiar leverage to obtain regulation and spending for their private benefit. The resulting excessive taxation and regulation are social evils that both restrict the individual pursuit of happiness and reduce the wealth of the whole nation.

Federalism was the Framers= primary way of assuring that government would act only in the public interest. The happy paradox of federalism is that two

interlocking governments can lead to less and better governance than a unitary state. The key to the structure is to use each level of government to constrain the other. In the original Constitution the states brought the federal government into being but strictly constrained its

authority by granting it only certain enumerated powers. For the Framers, the essential domestic function of the national government was limited to sustaining a free trade zone to facilitate the exchange of goods and services among the former colonies and to provide for a common currency. So circumscribed, the national government posed little threat to liberties and wealth.

The Constitution left the rest of domestic regulation to the states. Although the states were thus repositories of enormous and potentially tyrannical powers, the free movement of goods and people among them restrained their ability to use their power to oppress the liberty or extract wealth from their citizens. If the states exercised their power unwisely free citizens could take themselves or their capital elsewhere.[ii] Thus the federal government was restrained by the strictly enumerated powers of the Constitution and the states were restrained by the competition that the federal government maintained through keeping open the avenues of trade and investment.[iii]

Because of the limits the Constitution placed on regulation and spending for private interests, economists today have explained that the original constitutional design of a federalist free trading system was at the heart of the steady growth of the United States that allowed it to become an economic superpower by the beginning of the twentieth century.[iv] Federalism was thus a large part of what made the Constitution the most wealth producing document in human history.

Federalism not only limits government but also improves the actions government necessarily must undertake. The first way it does this is to create a marketplace for governments. By putting state governments in competition with one another it forces them to innovate in the way they deliver public goods--i.e. goods that the market and the family cannot provide. Because of this competition, useful innovations in governance are readily copied. Federalism created a Alaboratory of democracy@ where the successful experiments of yesterday became the sound public policy of tomorrow.

Second, federalism improved government decisions by pushing them closer to the people they affect. Groups of individuals may have different preferences for public goods. Thus human happiness will be enhanced by letting the smallest feasible unit of government deliver the public good in question. Federalism is the necessary beginning of this principle, called subsidiarity, but not the end of it. Just as federalism should force the national government to devolve appropriate decisions to the states, so too should state constitutions force states to devolve appropriate decisions to their localities.

Third, federalism increases civic responsibility. Political scientists have frequently noted that in large governments citizens behave strategically, making it harder to gain agreement on the public goods that will improve the community. Federalism tempers strategic behavior and substitutes in its place the genuine concern of one citizen for another. As Adam Smith noted, the spirit of genuine benevolence is more likely to operate at a shorter distance.[v] The resulting fellow feeling facilitates sound and harmonious public policy.

Despite these enormous advantages, federalism has one important possible disadvantage. By multiplying the number of governments it permits officials to avoid accountability by making it harder for the public to determine which set of officials is responsible for a given governmental action. The strict enumeration of powers in the original Constitution, however, made it easier for citizens to hold state and federal official accountable for what they did in their respective spheres.

Unfortunately, today the Framers= blueprint for good government has faded. By the early part of this century pressure had developed for a more centralized structure of governance. The Sixteenth Amendment permitting a federal income tax removed a major constraint on the federal government by giving it access to almost unlimited revenues. The Seventeenth Amendment terminating the election of Senators by state legislators stripped the states of their principal institutional protectors in Congress.

In the 1930s the Supreme Court weakened federalism still further. It eliminated the remaining constitutional limitations that prevented the federal government from directly regulating manufacturing, thereby gravely weakening regulatory competition among the states and centralizing power in Washington. The Court also abandoned its effort to limit Congress=s spending power, essentially giving the federal government plenary spending authority.

The dissolution of the limitations on government embodied in federalism has had dramatic and unfortunate consequences. First, the federal government now spends domestically *seventeen* times the percent of Gross National Product as it did at the beginning of this century when federalism was strong. Without the limitations of federalism, the federal government has also imposed far more regulations on our enterprises, both large and small, than it did at height of federalism. Moreover, the marketplace for government among the states works less well because state regulatory and spending programs have relatively small effects compared to those of the federal government.

Thus, because of federalism=s decline, our governments, both state and federal, spend less efficiently and tax and regulate more than they would in a system restrained by constitutional federalism. As a result, our more centralized state hinders economic growth. Less competition among the states has also led to less innovation in solving our social problems.

But even worse are the losses to our civic life. Because a more centralized system has made government less constrained and less close to the people, citizens have become more suspicious--in some cases cynical--of government. Without the constraints of federalism it is easier for interest groups to obtain spending or regulatory transfers for themselves at the expense of others. Such a regime encourages citizens to see one another either as potential targets (of expropriation and taxation) or as threats (to their opportunities and wealth). Thus, the decline of constitutional federalism has divided citizens, embittering our political life. If the evisceration of the constraints on the national government has robbed our constitutional system of

federalism=s many virtues, it has also exacerbated its potential flaw--the reduction of accountability for government officials. Since the responsibilities of the state and federal government are no longer distinct, it has become easier for federal official to avoid blame for the costs of government actions. For instance, Congress can impose mandates on the states, forcing states and their localities to spend their own money on federal objectives.

Thus federalism today is but a shadow of the Framers= structure. I now turn to the steps that are needed to reinvigorate it. The Court and Congress have been making some progress in creating as much governmental accountability as possible within the remaining structures of federalism. Recently, in *New York* v. *United States*, the Court held that the federal government cannot order the state legislature to pass state laws.[vi] The decision was based in part on the Court=s view that federal commandeering of state legislatures would detract from accountability, because citizens would have more difficulty in knowing whether to attribute the regulation of their liberty to the state or federal government. In *Printz* v. *United States*, the Court expanded this holding to forbid the federal government from commandeering state officials, thus requiring the federal government to accept the responsibility for enforcing its own policies.[vii]

Congress has also responded to the need for greater accountability with the Unfunded Mandate Reform Act of 1995.[viii] The Act is very complex but its core feature is to require separate votes before Congress imposes new federal mandates that require the states to spend their own money. This legislation could be improved by requiring Congress to undertake the same procedure before renewing old mandates. Nevertheless it represents a useful first step for promoting accountability in this area.

The Government Partnership Act of 1999, a draft bill of Chairman Thompson, is an even more important step in restoring accountability. The bill would require Congress to provide reasons in a legislative report for its decision to preempt state law. Failure to provide such reasons would make the preempting legislation subject to a point of order. Second, the bill

would declare that no legislation or regulation would preempt state law, unless it expressly so stated or if it conflicted with state law. Finally, the bill would require agencies to undertake a federalism assessment before they preempt state law. This is excellent legislation because it would force the federal government, both legislative and executive, to deliberate before preempting and preempt directly when it preempts at all. Such deliberation and clarity are hallmarks of government accountability.

This draft bill also draws support for its rule of construction and procedural requirements for deliberation from Garcia v. San Antonio Metropolitan Transit Authority.[ix] In that case the Supreme Court rejected the argument that the Tenth Amendment prohibited federal minimum wage requirements from being applied to state transit operations. The Court's core holding is that Congress' power to impose its will on the states should be limited not by *ad hoc* judicial determinations balancing state and federal interests under the Tenth Amendment but by the states= participation in the national political process through the voice of its elected representatives. But states can participate in the national political process only if they know how the federal government is affecting their interests. Thus, by requiring Congress to announce publicly its intention to preempt, the Government Partnership Act helps secure more protection for the states.

Preemption that is not express also conflicts with the spirit of *Garcia,* because such preemption allows state law to be displaced indirectly by the inferences of an unelected federal judiciary. Federal accountability can be enforced only if the legislators elected from the several states are themselves required to displace state law. The abolition of non-express forms of preemption would thus mitigate the lack of legislative accountability that remains federalism=s chief potential flaw.

It is a much harder task, however, to restore federalism=s virtues--its hydraulic pressure for liberty and social solidarity. Only through substantive restraints on the federal

government will states and localities once again become the main repositories of policymaking that thrives through competition. Unless the federal government is constrained constitutionally from spending and regulating, interest groups will bypass the states and obtain spending and regulation on their behalf from the federal government. One-stop shopping is not only easier, but it avoids the competitive pressures that inhibit states from adopting special interest legislation.

Unfortunately, because of precedent the Supreme Court is unlikely to restore the original limitations on federal regulation and spending. A very large number of federal programs now depend on national legislature powers the Framers could not have imagined. In the *Tempting of America* Judge Robert Bork, hardly a friend of the New Deal's transformation of the Constitution, states bluntly that to overrule the Court's expansion of the enumerated powers would be "overturn much of modern government and plunge us into chaos." [x]

But members of Congress need not wait for the Court to restore federalism: they can do it themselves without upsetting current programs. Chairman Thompson took up that challenge when he proposed codifying President Reagan=s executive order on federalism, E.O. 12612. That order required agencies to undertake a federalism assessment before engaging in new regulation. The federalism assessment required agencies, inter alia, to state their constitutional authority for any federal action and demonstrate that the problem they were addressing was national rather than local in scope. Codification would prevent these laudable restraints on federal action from being repealed. It would improve agency compliance which, according to a recent draft GAO report, has been shockingly poor.

Nevertheless, while such a codification would be wholly salutary (particularly if the legislation contained provisions for judicial review), it would still not completely restore constitutional federalism. For instance, the requirement that the executive branch find constitutional authority for its actions will in most cases be readily satisfied through the

expanded powers the Court has given the federal government. Moreover, Congress itself could still invade the province of the states.

Congress has also been considering proposals that would revive constitutional federalism more fully. In my view, the most promising are constitutional supermajority rules that would constrain the federal government=s spending ability. The Balanced Budget Amendment was an example of this approach: it required a supermajority to raise the national debt. Just last month the House considered an amendment which would have required a two-thirds majority to raise taxes. Since either taxes or debt can be used to support more federal spending these amendments should be combined to create an effective check on the national government. As Professor Michael Rappaport and I have suggested, supermajority requirements applied directly to spending levels and to the creation of new entitlements would be simpler and more effective at reviving federalism than supermajority requirements applied to taxes and spending.[xi]

By forcing individuals to go to their states for additional spending and new entitlements, such an amendment would once again restore the benefits of the constitutional federalism of the Framers. States would be reinvigorated as the primary locus of innovation in public spending. The wisdom of their decisions would again be tested by vigorous competition. Yet a federalism reanimated by such supermajority rules on federal spending would still permit Congress to increase spending levels and create new entitlements when its action reflected a very broad national consensus.

For similar reasons, a constitutional amendment reviving the nondelegation doctrine and preventing Congress from delegating excessive regulatory authority to federal agencies would also reinvigorate federalism. The Framers bestowed national regulatory authority on the legislature rather than on the executive precisely because they knew that it would be difficult to obtain from that diverse body the consensus necessary to encroach on liberty and property. Forcing Congress itself to enact regulatory programs will have the advantage of naturally

limiting the yearly agenda of possible national intrusions.[xii] Individuals thus would look to their states in the first instance to obtain government regulations. Yet Congress would remain available to address truly national problems if it could obtain the consensus to pass a determinate set of regulations rather than shift responsibility for its solution to federal agencies.

Of course, constitutional amendments may take a long time to pass. In the interim appropriate supermajority rules for spending, taxes, and debt can be adopted by legislative rule. [xiii] Statutory restraints on excessive federal regulation would also begin to force individuals to look more to their states. Indeed, it is important to remember that besides their other virtues regulatory reform measures always aid federalism. In restricting the scope of federal regulation, they vitalize the states in the precise areas in which federal action has been prohibited or made more difficult.

In recommending such measures, I recognize that I am asking members of this Committee and all members of Congress to give up power. I also recognize that the revival of constitutional federalism will necessarily sometimes prevent national legislators from passing legislation that they believe to be in the public interest. But constitutional government itself rests on the notion that public interest is served in the long run by maintenance of structures that through their very constraints improve governmental action. Federalism is the most important of these structures. Its preservation is thus worthy of our attention and sacrifice.

Endnotes

[i]. Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development,* 11 Econ. J.L. Econ. Org. 1, 1 (1995).

[ii]. Of course, an essential flaw in the original Constitution was its failure to make all citizens free--a precondition for constitutional federalism to work for everyone. The Thirteenth, Fourteenth, and Fifteenth Amendments as well as federal legislation to enforce their promise were essential if the benefits of constitutional federalism were to be made available to all Americans.

[iii]. Some have argued that competition among the states nevertheless has a substantial cost, because it encourages a race to the bottom in such matters as environmental regulation. I cannot agree, because I do not believe there will generally be a race to the bottom. Take for instance the case of environmental pollution. The best recent economic models suggest that where the jurisdictions do not export their pollution (i.e. where there are no substantial spillover effects beyond the jurisdiction) they are likely to provide an appropriate level of regulation for their own citizens even when they are competing to attract businesses from other jurisdictions. The practical point is that people want to work in jurisdictions with a pleasant environment. The simplified essence of the theory is that jurisdictional competition means that the cost of environmental regulations will be reflected directly in lost wages. This connection will be conducive to setting the level of regulation at a point where the marginal cost of a unit of regulation equals the marginal benefit for individuals within that jurisdiction. For an excellent discussion of these models, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the ARace to the Bottom Rationale@ in Environmental Regulation,* 67 N.Y.U. L. Rev. 1210 (1992). Where there are environmental spillover effects among jurisdictions, the federal government would have had authority to address them under even under the original meaning of the Commerce Clause.

[iv]. Weingast, *supra,* at 24-28.

[v]. Michael W. McConnell, *Federalism: Evaluating the Framers= Design,* 54 U. Chi. L. Rev. 1484, 1493 (1987) (quoting Adam Smith).

[vi]. New York v. United States, 505 U.S. 120 (1992).

[vii]. Printz v. United States, 117 S. Ct. 2365 (1997).

[viii]. Pub. L. No. 104-4 (March 22, 1995).

[ix]. Garcia v. Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

[x]. Robert H. Bork, The Tempting of America 159 (1990). To be sure, the Court has made some modest steps in reviving the enumerated powers. Recently in United States v. Lopez, 514 U.S. 549 (1995), the Court held that Congress does not have the authority to regulate activity that is neither commercial nor crosses state lines. Because of fifty years of precedent, however, we can not expect the Court to restore the strict limitations on federal regulatory and spending authority.

[xi]. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution,* 40 Wm. & My. L. Rev. 365 (1999).

[xii]. For further discussion of the reasons to restore the nondelegation doctrine, see Marci A. Hamilton, *Representation and Nondelegation: Back to Basics,* 20 Cardozo L. Rev. 807 (1999).

[xiii].The House of Representatives has already adopted a supermajority rule for taxes. Such rules represent a constitutional use of each House=s authority to set its own rules. *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L. J. 483 (1995).