EPILOGUE

FEDERALISM IN THE TWENTY-FIRST CENTURY: WILL STATES EXIST?

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Will there be states in the Twenty-first Century? Perhaps you thought that was just a catchy title designed to attract you to this article. You were right, that was entirely its purpose. But the question is more than merely rhetorical. As is well-known and as this Symposium has elaborated, the power of state and local government has been continually narrowed over the years by both the federal courts and the federal Congress.[1] This infringement, contrary to the spirit and letter of the Constitution, the Bill of Rights, and *The Federalist Papers*, must cease.

Sixteen years ago, in the first moments of my time as Governor of Delaware, I set forth the case for limiting the encroachment of the federal government:

> If federalism is to survive, responsibility . . . must be shared between the state and federal governments. We must promptly end the practice of writing the rules in Washington and paying the bills in our state capitols.[2]

Unfortunately, as is usual at inaugural addresses, no one was listening—at least not in Washington. As any governor will tell you, federal mandates upon state governments continue to expand rapidly. For example, Medicare mandated services, hospi-

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1. *Cf.* Charles J. Cooper, *"Independent of Heaven Itself": Differing Federalist and Anti-Federalist Perspectives on the Centralizing Tendency of the Federal Judiciary*, 16 HARV. J.L. & PUB. POL'Y 119, 125-26 (1993)("[T]here is literally no area of domestic concern where the states may legislate without fear of federal interference. They act at the sufferance of Washington. . . . [and U.S. Supreme Court review] is much like the coach for the other team calling balls and strikes."); Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129, 135 (1993)("The Anti-Federalists have indeed proven to be prophets in predicting that the new national government would be all-powerful, but it was hardly a difficult call.").

2. Pete du Pont, Inaugural Address as Governor, Dover, Delaware (Jan. 18, 1977).

tal cost controls, environmental standards, welfare regulations, and wetland definitions all are enacted in Washington intentionally to limit behavior in state capitals like Dover. The sweep and reach of federal regulation seemingly knows no boundaries. As it expands, the role of state and local governments, those "laboratories of democracy," in Justice Brandeis's phrase,[3] concurrently contracts. So the question of the role of the states in the Twenty-first Century is neither idle nor academic.

The Constitutional Convention met in Philadelphia in the summer of 1787 to revise the Articles of Confederation and increase the power of the national government. The Articles had affirmed that "each state retains its sovereignty, freedom, and independence,"[4] but they had proven too weak to sustain many of the advantages of mutual association. Separate currencies and retaliatory trade measures hobbled the nation's economy, lack of a national voice in foreign affairs caused international problems, and, most important, the national government had no effective mechanism to raise necessary revenues. So the Founders decided to seek a new system of governance.

In framing that new system, they faced a political dilemma: any national government strong enough to benefit the states and protect individual liberties is also strong enough to control the states and take those liberties away.[5] The Founders solved this dilemma by creating a system of dual sovereignty, with some powers ceded to the national government and the others retained in the states or in the people. By 1787, federalism had already proven itself in Europe, contributing to the immense economic success of Holland in the Sixteenth and Seventeenth Centuries and of Great Britain in the Seventeenth and Eighteenth Centuries. As Barry Weingast observes, the association between federalism and economic success was "not spurious, but central to the successful economic development of each [country]."[6] By prohibiting the national government from regulating local economies, Weingast argues, the political cost of intervention became high enough to ensure "market-preserv-

3. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).
4. ARTICLES OF CONFEDERATION art. II (U.S. 1781).
5. *Cf.* Panel, *How Effective are Bills of Rights in Protecting Freedom and Civil Liberties?*, 15 HARV. J.L. & PUB. POL'Y 53 (1992).
6. Barry R. Weingast, Federalism and the Political Comments Eyed to Sustain Markets (unpublished manuscript, June 15, 1992).

ing federalism."[7]

Therefore, in the U.S. Constitution, the Founders sought to restrain the national government through a variety of structural devices.[8] Among these, the most notable was the Commerce Clause, which gave Congress the limited power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[9] The Bill of Rights, which soon followed the Constitution's ratification, contained further explicit restraints on the powers of the federal government;[10] among these, the Tenth Amendment proclaimed that "[t]he 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."[11] The intentions of the Framers in granting only limited powers to the national government were stated clearly by James Madison, a supporter of the new Constitution, during the ratification debates:

> The powers delegated . . . to the federal government are few and defined. . . . 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, and the internal order, improvement, and prosperity of the State.[12]

But that was then, and this is now. What, in 1993, remains of the Founders' economic federalism, which they believed so crucial to the maintenance of growth and productivity? If the purpose of the written Constitution is to "define and limit" the power delegated to the national government, as Chief Justice Marshall stated in *Marbury v. Madison*,[13] where are the limits on that national government today?

From the outset, the Commerce Clause served to prohibit the states from regulating any economic activity not completely local in character, while the national government regulated activities only truly interstate and commercial in scope. In the

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7. *Id.*

8. *Cf.* Panel, *Liberty and Constitutional Architecture*, 16 HARV. J.L. & PUB. POL'Y 55 (1993).

9. U.S. CONST. art. I, § 8, cl. 3.

10. It is clear that the Bill of Rights was understood by its ratifiers to restrain only the *federal* government, and not the states. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); *see also* Panel, *The Bill of Rights and Governmental Structure: Republicanism and Mediating Institutions*, 15 HARV. J.L. & PUB. POL'Y 99 (1992).

11. U.S. CONST. amend. X.

12. THE FEDERALIST No. 45, at 292-93 (James Madison)(Clinton Rossiter ed., 1961).

13. 5 U.S. (1 Cranch) 137, 176-77 (1803).

turmoil of the New Deal, however, the Supreme Court began to allow Congress to regulate activities within states, as long as Congress could show that the activity had some effect, whether direct or indirect, on interstate commerce.[14] Of course, like the butterfly in Brazil whose motion influences, even if marginally, weather patterns in Texas, every economic activity, no matter how small, can be said to have some effect on interstate commerce.[15]

Then came *United States v. Darby*,[16] reducing the Tenth Amendment to a truism. As time passed, the Supreme Court permitted the Congress more and more latitude to regulate states' economic affairs. In a brief moment of contrition, the Court in 1976 ruled that the federal government could not regulate "traditional government functions" of the state governments themselves,[17] but overturned even this minor limitation in 1985. In *Garcia v. San Antonio Metropolitan Transit Authority*,[18] the Court held that because the Constitution granted the states a role in the selection of the executive and legislative branches of government, there was no need to fashion any "discrete limitations on the objects of federal authority."[19] In short, the Court disavowed any judicial role in protecting the states from federal intrusion, leaving the states to fend for themselves and the national bull free to rampage through state china shops.

Needless to say, the national government has taken full advantage of its court-sanctioned strength. In the early 1980's, the federal government usurped the states' powers under the Twenty-first Amendment with respect to alcoholic beverages. Federal legislation mandated that states raise their minimum drinking age to 21 years or face the denial of road construction

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14. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)(finding that the National Labor Relations Act can be applied within a state if the employer's labor practices affect interstate commerce). *See generally* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW ch. 4 (3d ed. 1986).

15. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964)(holding that a restaurant that purchased from a supplier meat that had been moved in interstate commerce fell within Congress's power under the Commerce Clause); Wickard v. Filburn, 317 U.S. 111 (1942)(holding that wheat grown for personal use affects interstate commerce).

16. 312 U.S. 100 (1941)(holding that Congress may regulate all economic activities that affect interstate commerce, including wages and hours of intrastate employees), *overruling* Hammer v. Dagenhart, 247 U.S. 251 (1918)(holding that intrastate wage and hour regulation was a state, rather than federal function).

17. National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

18. 469 U.S. 528 (1985)(applying federal minimum wage laws to local government employees).

19. 469 U.S. at 552.

funds; the states, naturally, complied.[20] In another example, when the people of New Jersey attempted to limit the importation of trash into their state, the federal courts forced New Jersey to accept garbage from states that did not want it within their own domain.[21] States likewise have been prohibited from barring an influx of hazardous and radioactive waste.[22] Whether the garbage be of the hazardous, medical, radioactive, or household variety, the Supreme Court has used the Commerce Clause to prevent states from maintaining a healthy and clean environment for their citizens.

Unfortunately, it doesn't stop there. Since the great constitutional compact which formed this nation was approved, the power over zoning and building decisions has been vested in the states and their localities. According to the federal courts, however, government housing should be located where the federal courts think is appropriate, rather than where local authorities may place it.[23]

In my home state of Delaware, we know only too well about the overreaching of the federal government into our state and local affairs. For almost fifteen years now, the operations of our public schools have been micromanaged by the U.S. District Court through a series of busing orders. Federally defined racial balance has become the primary goal of the education system, ahead of reading skills, reasoning ability, knowledge, and the pursuit of excellence.

But perhaps the most outrageous act of the Supreme Court in recent history, clearly usurping the powers of the states, is represented by a school desegregation case from Kansas City, Missouri. In that case, the federal district court realigned the school district, finding that it was segregated, and *ordered the school district to raise local taxes to pay for the expenses caused by the*

20. *See* South Dakota v. Dole, 483 U.S. 203 (1987). What makes this type of Congressional action so pernicious is the seemingly unlimited ability of the federal government to take money from the people and businesses of the states through the power of direct taxation, then give a portion of the money thus taken (less overhead expenses, of course) back to the states in the form of "voluntary" grants with "strings" attached. In this manner, Congress can regulate through the taxation and spending power even in areas where an amendment to the Constitution states explicitly that it cannot. *See* U.S. CONST. amend. XXI; *see also* Graglia, *supra* note 1, at 131-32.

21. Philadelphia v. New Jersey, 437 U.S. 616 (1978).

22. Chemical Waste Management, Inc. v. Hunt, 60 U.S.L.W. 4433 (June 1, 1992); Idaho v. United States Dep't of Energy, 945 F.2d 295 (9th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3815 (June 1, 1992).

23. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987).

court's decrees. The Supreme Court upheld this action, finding that it was "plainly a judicial act within the power of a federal court," despite the fact that it violated the Missouri Constitution.[24]

Liquor and garbage may seem trivial to some, but the devastation of local schools through the quotas of federal court-ordered busing and the levying of local taxes by federal courts are not. The power of state governments to deliver education to their citizens and to decide upon the breadth and depth of the taxes they will extract from their citizens go to the heart of governance.

The Founders' design of federalism, then, is effectively dead. As Michael McConnell argues, "what the people ratified [in 1789] is something quite different from what they got";[25] the erosion of state power, however, was inevitable, for "whatever the Founders' intentions, the rules they wrote are skewed in favor of national power."[26] And more national power we are likely to have, often at the expense of state sovereignty, for regulation is to the federal government as heroin is to the addict. More, always more, is needed to satisfy its craving. Consider two recent efforts at the national and international level affecting sensitive local issues—our families and our environment.

One proposal would federalize our child support system, an activity heretofore within the purview of the states, by turning the system over to the federal bureaucracy. A recent proposal, advanced by the unlikely duo of conservative Congressman Henry Hyde and liberal ex-Congressman Thomas Downey, would subject to federal review and modification initial state child support orders. Federal modifications could be appealed through a federal administrative process. The proposal also contains a new child support assurance program, whereby the federal government would guarantee child support payments for children whose non-custodial parents fail to pay as ordered.

Delaware Family Court Judge Battle Robinson serves on the U.S. Commission on Interstate Child Support, which recently reported to Congress that it was far from clear that the federal government could do a better job than the states in establish-

24. Missouri v. Jenkins, 495 U.S. 33, 55 (1990).
25. Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1485 (1987).
26. *Id.* at 1488.

ing and enforcing child support.[27] Federalizing the system would end state-generated creativity and innovation.[28] Furthermore, child support is but one aspect of family law that often arises in the context of other family issues traditionally left to states, such as divorce, custody, alimony, and property division.[29] Federalization would also require the U.S. government to create and fund, at the federal level, a system parallel to one already existing at the state level.[30] Although these arguments weigh against the proposal, it is not yet certain that national child support enforcement is a dead issue.

The other movement against states' power to control their own destinies will come as a surprise, for it comes from a just and good cause: the Uruguay Round of GATT. It will surely surprise most readers to learn that under GATT proposals, state consumer and environmental laws and regulations that are deemed unnecessary obstacles to international trade face revocation. Yes, GATT proposals will limit states' sovereignty by imposing internationally determined norms on state conduct. Federalization of our child support system, as unwelcome as it might be, at least leaves decisions in the hands of a federal government that is *our* government. It is something else again to turn over local power to enhance product safety and environmental quality to faceless GATTeers in placid Geneva.

Under the Sanitary and Phytosanitary Standards (for foods, foodstuffs, and beverages) sections of GATT, member nations would be required to take affirmative steps to make the laws of "subfederal" governments comply with GATT.[31] Thus, states wishing to enact consumer or environmental protection laws would be stripped of the power to do so without first obtaining the blessing of GATT members. To enact a law requiring recycling or a carcinogen-labeling law for food products, Delaware would have to notify the U.S. government, provide foreign GATT contracting parties with an opportunity to object, have the federal government consider these foreign objections without its being required to consult Delaware, and sit

27. *Report to Congress of the U.S. Commission on Interstate Child Support: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 3 (testimony of Marilyn Ray Smith, Assoc. Deputy Comm'r).

28. *Id.* at 8-9.

29. *Id.* at 4.

30. *Id.* at 3, 6.

31. KATHERINE TAMMARO, WHY THE STATES SHOULD WORRY ABOUT GATT 2, *reprinted from* ST. REP. ON ENV'T (Aug. 1992).

back while the federal government confidentially negotiates any such objections with the objecting party (again, without Delaware's participation). California's tough new auto emissions standards could be challenged, perhaps by German luxury car exporters. Oregon's prohibition on the export of unprocessed timber could be challenged, perhaps by the Japanese, the world's largest importer of old-growth raw logs. This development could profoundly change the way states do business.

Whether one personally agrees or disagrees with the wisdom of such laws or the wisdom of prohibiting the states from enacting them is not the issue. To me, the prospect of subjecting "subfederal" legislation to veto by an unelected international bureaucracy, absent the safeguards of state and U.S. constitutions, should give us pause. In this case, however, the federal Constitution clearly gives to the Congress the power "to regulate commerce with foreign nations."[32] Outside America's borders our nation must speak with one voice, and it is a national, not a state, voice.

Within our borders, on the other hand, the opposite rule should apply. States should have the power to experiment and innovate for the very reasons set forth in 1787: smaller units of government are better able to respond to people's interests and concerns,[33] and they are less likely to shift economic burdens from one section of the country to another, or to impose public regulation for private gain.

Regarding economic burdens, Congress regularly plays regional favorites at the expense of the nation as a whole. Amendments to energy legislation, for example, often attempt to protect high-sulfur, "dirty" eastern coal from competition with low-sulfur, "clean" western coal. The Davis-Bacon Act,[34] which mandates union wage scales on public construction projects, and steel and automobile import quotas are examples of public laws used for private gain. Peanut and sugar subsidies

32. U.S. CONST. art. I, § 8, cl. 3.

33. From personal experience, I can attest that it is far easier to explain to one's constituents a vote in Congress through a computerized letter than it is to vote on the floor of the General Assembly in Dover surrounded by highly focused constituents not ten feet away. The withdrawal of the process of legislation from accessibility to the people who will live under the laws being made should trouble anyone concerned with democratic freedoms.

34. 40 U.S.C.S. § 276 (a) *et seq.* (West 1992).

give a regional spin to the same bottle. State and local governments sometimes play these costly games too, but at least they are unable to inflict their damaging consequences on an entire nation.

The costs of the erosion of federalism are not wholly economic. A federalist form of government recognizes that there are a number of fundamental values that we all share in order to exist as a nation. Our collective dedication to constitutional democracy and a republican form of government are among the things that make us all Americans. But a federalist form of government also recognizes that, beyond our shared principles, we are free to diverge. The ability of states to diverge in manners not inconsistent with the national Constitution reflects the true wisdom of federalism: not only the freedom to set a different course, but the power to do so as well.

Of all the states that should mourn the death of federalism, my own state of Delaware should grieve the most, for its people truly enjoy the blessings of the state's power to set a different course. Most obviously, Delaware has a corporate law guarded by its nearly unique Court of Chancery. Because of these constitutional and legislative creations, Delaware is America's corporate capitol. Corporate franchise fees provide over 20 percent of its state revenues, sparing poor and working poor families the ravages of a sales tax so onerous in nearly every other state. Under a federal system, Delaware may make these choices, but under a national system it might not.

Delaware enjoys a quality of justice recognized and emulated across the nation. Delaware's constitution provides for the appointment of judges and requires a political balance on its courts.[35] A stateless America might mandate the election of local judges, as is the practice in California, Pennsylvania, and Texas.[36]

In the 1980's, Delaware innovatively modernized its laws governing banking and financial services. Bell-shaped tax-rate curves and market-regulated credit cards blossomed the state's prosperity beyond its wildest dreams: welfare caseloads halved, individual income tax rates declined, and job opportunities ex-

35. DEL. CONST. art. IV, § 3.

36. Of course, a stateless America might also require California, Pennsylvania, or Texas to appoint their judges, which would be equally as bad for the freedom of those states to set their own courses within our constitutional democracy.

ploded. Would this have been possible under national regulations? I don't believe so.

Consider, finally, the flow of history and the sum of our contemporary experience. From geopolitics to GM, the world has learned the perils of large, inflexible organizations and the burden they place on growth and opportunity.[37] The USSR is gone, replaced by a confederation of fifteen governments, all more representative and more responsive to their peoples. General Motors and IBM are going, hobbled by their size and inflexibility. The monster mills of U.S. Steel could not compete; the flexible boutique mills of USX can both compete and win. Massive mainframe computers have been replaced by PC's, programmed for individual needs and networked to allow rapid exchange of locally developed information. Cafeteria employee benefit plans are replacing the one-size-fits-all plans of the past. By the early 1990's, it had become clear to most of us that market economies served by small, flexible entities capable of rapid innovation are the wave of the future.

It is both unfortunate and contradictory, therefore, that against this flow marches the Congress, set free by the federal judiciary, throttling federalism just as the world is recognizing its worth and centralizing authority just as decentralization is coming to be seen as the better option. Federalism is much more than a historical quirk: it is wisdom proven over 200 years and an organizational scheme crucial to success in the Twenty-first Century. America had best return to it, if it is to prosper in the future as it has in the past.

How, then, is the nation to rediscover the virtues of federalism? One would hope that the executive and legislative branches of national government would be the driving forces in our return to our constitutional roots. With rare exceptions, however, Presidents prefer accumulating power in the national government, and Congress's thirst for control is unlikely ever to be slaked. The Supreme Court, therefore, possesses a unique opportunity—even a duty—to lead America back to a more perfect union.

Both *Darby*'s evisceration of the Tenth Amendment and *Gar-*

37. Of course, not all have listened. The sluggish bureaucracies of America's public education and welfare systems continue to deliver poor-quality service at inflated costs. And not all have learned: I fear Washington is about to create a massive health care bureaucracy, in the face of all evidence to the contrary.

cia's 5-4 decision that municipal mass transit systems are interstate commerce are ripe for rethinking.[38] They are a pair of bright-line opportunities to return, in Madison's phrase, to "the sense in which the [C]onstitution was accepted and ratified by the nation"[39] by returning to the states their Constitutional prerogative of governing local affairs. A bolder Court might disapprove federal gerrymandering of local legislative district boundaries to achieve specific racial or ethnic election outcomes, in contravention of the Constitution.[40] In a burst of intellectual candor, the Court might even overturn *Roe v. Wade*,[41] an exercise in denial of state authority as abundant in political support as it is lacking in Constitutional nexus.

But if all this is too unsettling, there exists one prospective opportunity for the Court that, in a single stroke, would send a powerful warning signal to the Congress and reinforce the Court's legitimacy in the eyes of the common citizen. Fifteen states have now, by large majorities, enacted at the ballot box legislative term limits.[42] Litigation to void these voter-inspired limitations on federal power is already in progress. One cannot envisage a stronger statement to those members of Congress abusing federalism than to empower their victims, the citizens of the states comprising the nation, to limit their opportunity to do so.

So will there be states in the Twenty-first Century? Perhaps. I hope so, for as the governments closest to the people, the states and their local governments have historically represented the most responsive and dependable sources of protection and opportunity for individual Americans. Late in the Twentieth Century, we finally learned that uniformity is the enemy of opportunity and diversity its friend. Former West Ger-

38. *See* John C. Pittenger, *If Federalism is Obsolete, It's Better to Say So*, N.Y. TIMES, Mar. 25, 1985, at A18 (deeming *Garcia* "the end of federalism as a notion with any support in the Constitution").

39. Letter from James Madison to Henry Lee (June 25, 1824), *in* 9 THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed., 1910).

40. *See* U.S. CONST. art. I, § 2, cl. 1 (stating that "the House of Representatives shall be composed of Members chosen . . . by the People of the several States," but not specifying any federal role in deciding how states apportioned more than one Member should be divided into districts, assuming that Equal Protection requirements are met, *cf.* U.S. CONST. amend. XIV, § 1). *See generally* U.S. CONST. art. I, amend. XIV (providing no authority whatever for federally ordered districting of state legislators or other elected officials).

41. 410 U.S. 113 (1973).

42. *Cf.* Debate, *The Federalist and the Contemporary Debate on Term Limits*, 16 HARV. J.L. & PUB. POL'Y 95 (1993).

man Chancellor Konrad Adenauer is said to have observed that it was obvious God had placed limits on man's intelligence, but equally obvious that He had placed no such limits on man's foolishness. The beauty of federalism, of course, is that one state's foolishness need not be adopted by another; Congressional foolishness, however, is universal. We must choose carefully the path we wish to tread, for the path of centralization leads to frustration, calcification, and decline; the path of federalism, to the boundless opportunity our forebears saw in their new country and sought to bequeath to future generations of Americans.