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On the First Principles of Federalism

by Roger Pilon

I want to thank Congressman Shays for inviting me to testify on the subject of these hearings, "The Federalism Debate: Why Doesn't Washington Trust the States?" I want also to commend the subcommittee for holding these hearings, for the federalism debate is, without doubt, the most important political, legal, and constitutional debate taking place in America today, going to our very roots as a nation.

At the same time, I would have thought, especially following last November's elections, that the proper question was not "Why doesn't Washington trust the states?" but "Why don't the people and the states trust Washington?" For surely, it is distrust of Washington that drives the debate today.

And the answer to that question, I submit, has rather less to do, in the final analysis, with the policy concerns that have infused the subcommittee's statements to date on the subject than with a much more basic concern about political and constitutional legitimacy. In a word, the people and the states no longer trust Washington, not simply because Washington has been doing a less than satisfactory job but, more deeply, because Washington has assumed a vast array of regulatory and redistributive powers that were never its to assume—not, that is, if we take the Constitution seriously.

Thus, the question the people and the states are increasingly putting to Washington is simply this: By what authority do you rule us as you do? That is a question that takes us to first principles of a kind the Supreme Court itself revisited last April when it found, for the first time in nearly 60 years, that the power of Congress to regulate interstate commerce is not the power to regulate anything and everything.

The Court's opinion in *United States v. Lopez* sent shock waves through official Washington, not least because Washington had simply assumed, since the era of the New Deal, that its regulatory powers were plenary. Indeed, in the statute in question, the Gun-Free School Zones Act of 1990, Congress had not even bothered to cite the source of its authority under the Constitution. One can hardly fault the average American for finding in that a certain indifference, if not contempt, for constitutional limits.

Yet it is just such limits that federalism, in the end, is all about. To appreciate the point, however, it is necessary to go beyond the federal-state and states' rights debates that have dominated the federalism discussion. For the issues, at bottom, are not so much jurisdictional as substantive. And nowhere is that more clear than in the Tenth Amendment, properly understood.

The Tenth Amendment and Enumerated Powers

The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

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Mark Fondersmith

José Piñera, architect of Chile's social security privatization and cochairman of Cato's Project on Social Security Privatization, addresses a congressional staff breakfast in the Capitol on an October visit to Washington.

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States, are reserved to the States respectively, or to the people."

By its terms, the amendment tells us nothing about which powers are delegated to the federal government, which are prohibited to the states, or which are reserved to the states or to the people. To determine that, we have to look to the centerpiece of the Constitution, the doctrine of enumerated powers.

That doctrine is discussed at length in the *Federalist Papers*. But it is explicit as well in the very first sentence of article 1, section 1, of the Constitution ("All legislative Powers herein granted . . .") and in the Tenth Amendment's reference to powers "not delegated," "prohibited," and "reserved."

Plainly, power resides in the first instance in the people, who then *grant* or *delegate* their power, *reserve* it, or *prohibit* its exercise, not immediately through periodic elections but rather institutionally—through the Constitution. The importance of that starting point cannot be overstated, for it is the foundation of whatever legitimacy our system of government can claim. What the Tenth Amendment says, in a nutshell, is this: if a power has not been delegated to the federal government, that government simply does not have it. In that case, as Justice Thomas correctly said in his trenchant dissent in *U.S. Term Limits v. Thornton* (1995), it becomes a question of state law whether the power is held by a state or, failing that, by the people, having never been granted to either government.

At bottom, then, the Tenth Amendment is not about federal vs. state, much less about federal-state "partnerships," block grants, "swapping," "turnbacks," or any of the other modern concepts of intergovernmental rule. It is about legitimacy. As the final member of the Bill of Rights, and the culmination of the founding period, the Tenth Amendment recapitulates the philosophy of government first set forth in the Declaration of Independence, that governments are instituted to secure our rights, that they derive their *just* powers from the consent of the governed. Without that consent, as manifested through constitutional ratification, power is simply illegitimate.

It is the doctrine of enumerated powers, then, that gives content to the Tenth Amendment, informs its theory of legitimacy, and limits the federal government. Power is granted in the Constitution, and thus limited by virtue of that delegation and enumeration. The Framers could hardly have enumerated all of our rights—a problem the Ninth Amendment was meant to address. ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.") They could enumerate the federal government's powers, which they did—not simply to empower but to restrain that government. The doctrine of enumerated powers was meant to be the principal line of defense against overweening government. The Bill of Rights, added two years after the Constitution was ratified, was meant as a secondary defense.

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Yet today the federal government exercises powers not remotely found in the Constitution, which leads lawyers and laymen alike to say, increasingly, that those powers are illegitimate. How then did we get to this point, where the federalism debate is increasingly a debate about the very foundations of our system of government? I have discussed that question at length in *The Cato Handbook for Congress* and elsewhere. Let me simply summarize the answer here, then turn to an issue that seems to concern the subcommittee, and not without reason—the connection, historically and prospectively, between federalism and "states' rights."

The Demise of the Doctrine of Enumerated Powers

Our modern regulatory and redistributive state—the state the Framers sought explicitly to prohibit—has arisen largely since 1937, and primarily through just two clauses in the Constitution, the commerce clause and the general welfare clause, respectively. It is striking that this is so, for if the Framers had meant for Congress to be able to do virtually anything it wanted through those two simple clauses, why would they have bothered to enumerate Congress's other powers, much less defend the doctrine of enumerated powers throughout the *Federalist Papers*? That is the question that cries out for explanation.

The explanation, of course, is that the Framers intended no such thing. The modern state arose through judicial legerdemain, following Franklin Roosevelt's notorious 1937 Court-packing scheme.

Simply put, the commerce clause, which gives Congress the power to regulate commerce among the states, arose out of concern that the free flow of such commerce might break down if states, as they did under the Articles of Confederation, had the power to erect protectionist measures on behalf of indigenous enterprises. Thus, the principal aim of the commerce clause was to ensure the free flow of commerce by giving Congress the power to make such commerce regular, the power, essentially, to strike down such state barriers as might arise. Not remotely did the Framers intend that the clause be converted from a shield against state abuse—its use in the first great commerce clause case, *Gibbons v. Ogden* (1824)—into a sword enabling Congress, through regulation, to try to bring about all manner of social and economic ends. Yet for nearly 60 years now, following the Supreme Court's reversal in 1937 *(NLRB v. Jones & Laughlin Steel Corp.)*, that is just what has happened as Congress has claimed power to regulate anything that even "affects" interstate commerce, which in principle is everything.

The general welfare clause of article 1, section 8, was also intended as a shield, to ensure that Congress, in the exercise of any of its enumerated powers, would act for the general rather than for any particular welfare. Here, however, Hamilton stood opposite Madison, Jefferson, and others in thinking that the clause amounted to an independent, enumerated power—albeit limited to serving the general welfare. But as Congressman William Drayton noted in 1828, if Hamilton were right, then whatever Congress is barred from doing because there is no power with which to do

it, it could accomplish by simply appropriating the money with which to do it. That, of course, is precisely what happened, and what the Court sanctioned when it came down on Hamilton's side in 1936 *(United States v. Butler)*, then a year later went Hamilton one better by saying that although the distinction between general and particular welfare must be maintained, the Court would not itself police that distinction *(Helvering v. Davis)*. Congress, the very branch that was redistributing with ever-greater particularity, would be left to police itself.

With the Court's evisceration of the doctrine of enumerated powers, the modern regulatory and redistributive state poured through the opening. One result of the subsequent explosion of federal power, of course, was the contraction of state power where the two conflicted—and the attendant federalism dilemmas. At the same time, individual liberty contracted as well—the preservation of which was supposed to be the very purpose of government. Yet questions about constitutional legitimacy never did go away. As government grew, the idea that a constitution designed for *limited* government had authorized that growth of power became increasingly difficult to sustain.

Federalism and "States' Rights"

But what about the sorry history of "states' rights" as a doctrine that southern states invoked to defend slavery and then, after the Civil War, the reign of Jim Crow? Does this not give weight to the question, "Why doesn't Washington trust the states?" Indeed it does, but here too there has been substantial misunderstanding over the years, with a seminal Supreme Court case at its core.

The tragic compromise that led the Framers to accept slavery in their midst is well known. It took a civil war to abolish that institution, and the Civil War Amendments to secure the legal rights of the freed slaves. Unfortunately, no sooner had those amendments been ratified than the principal vehicle for insuring substantive rights against state action, the privileges and immunities clause of the Fourteenth Amendment, was eviscerated by a deeply divided Court in the *Slaughter-House* cases (1872). The clause has never been successfully revived.

In Blackstone's view, "privileges and immunities" referred to our "natural liberties." More immediately, the debates that surrounded the ratification of the Fourteenth Amendment, as well as the passage of the Civil Rights Act of 1866, which Congress reenacted in 1870, just after the Fourteenth Amendment was ratified, made it clear that the privileges and immunities clause was meant to protect the very rights Jim Crow denied.

The demise, then, of the privileges and immunities clause had nothing to do really with the Tenth Amendment or the doctrine of enumerated powers. It was a blatant case of judicial abdication that eviscerated the clause, thereby leaving the freed slaves in the South to the mercies of state legislatures.

There is nothing in current efforts to revive the Tenth Amendment and the doctrine of enumerated powers that should give pause—provided only that we are clear, and the judiciary is clear, that the Fourteenth Amendment gives the courts, through section 1, and the Congress, through section 5, the power to negate state actions that deny citizens the privileges and immunities of citizens of the United States. Were Congress to move to do that, the promise of the Civil War Amendments would at last be realized, not in opposition to federalism but in harmony with it as perfected through those amendments. ■

Klaus Condemns "Social Engineering" in *Cato Journal*

Czech prime minister Vaclav Klaus, the most accomplished free-market leader to emerge during the transition from communism, condemns "all forms of political constructivism and social engineering" in the latest issue of the *Cato Journal* (vol. 14, no. 2). The transition from plan to market, writes Klaus, "is an evolutionary process and not an exercise in applied economics or political science." For Klaus, there can be no blueprint for successful transformation. Rather, the Czech experience shows that the process of reform "is a complicated mixture of intentions and spontaneity."

Viktor Vanberg, professor of economics at the University of Freiburg, defends F. A. Hayek against criticism that he slid into a blind evolutionary theory of institutional and cultural change without any room for human rationality. According to Vanberg, Hayek accepted the importance of "spontaneous order" but also recognized the need for a "rational liberalism" that rests on "rational arguments in favor of the liberal order." Hayek's contribution to liberal thought, Vanberg argues, should not be viewed narrowly in terms of the apparent "evolutionary agnosticism" in his final book, *The Fatal Conceit*.

Gary Anderson, an economist at California State University, Northridge, considers the question of why state constitutions have failed to limit the growth of government. In "The Constitution of Liberty to Tax and Spend," he notes how "state constitutions (as a group) have become encrusted with pork of almost every variety [as] special interest groups have succeeded in insinuating favorable clauses and amendments." His analysis implies that sending block grants to the states will not solve the problem of the welfare state. What needs to be done is to limit rent seeking by limiting the power of the political class—a task that requires cultural as well as political change.

Other contributors to the issue include George Berger on "Reforming Deposit Insurance," Christopher Schnaubelt on "The Military's Effectiveness in the Drug War," Adam Thierer on "Development of the Bell System Monopoly," Bruce Bartlett on "How Excessive Government Killed Ancient Rome," Kevin Dowd on "The Costs of Inflation and Deflation," and A. Tabarrok on "A Survey, Critique, and New Defense of Term Limits." ■