The State of Our Federalism

It is a pleasure to join the National Constitution Center for a conversation on the state of our federalism. As is well celebrated, the concept of a division of powers—at the national level between branches of government and between a federal and state government—protects our liberty by preventing any governmental actor from becoming too powerful and contributes to better public policy problem solving. In these prepared remarks, let me share a few reflections on the state of our federalism.

In my talk, I will focus on three points. First, I will explain the concept of "cooperative federalism." Second, I will share my perspective on federalism from my experience serving in both federal and state government. Third, I will identify some emerging challenges and opportunities for federal-state relations.

The Foundation of a Cooperative Federalism

The last fifty years marked an emergence of a new brand of federalism—"cooperative federalism." The premise of this model is that the federal government and the states are not merely separate sovereigns, but interdependent governmental authorities. In short, the modern regulatory state is not merely a story of the growth of regulatory authority at the federal level; it is also the story of "a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law."[1]

The premise of cooperative federalism regimes is that the sharing of federal and state regulatory authority reflects mutual respect and offers a strategy for more effective governance. Core to any such regime is that the federal government declines to engage in "commandeering"—that is, abusing its regulatory authority or its funding authority to coerce state agencies to act as soldiers in a federal army.[2] By contrast, the federal government can invite states to implement a federal regulatory regime, provided states are given a true choice as to whether to participate. Given the choice of participation or exit, state participation—or state forbearance—can act as a constraint on federal regulatory policy decisions and a protection of liberty.

The history of modern environmental protection is one of cooperative federalism in action, highlighting the value of state experimentation and local tailoring. Under the Clean Air Act, states are given latitude and authority to set and oversee air quality standards. This includes states' ability to require more of car manufacturers with respect to clean air than the federal standard requires. In particular, dating back to the 1977 Clean Air Act amendments, all states are given the authority to opt either for the federal vehicle emission standard or a higher one set by California.[3] Just recently, however, the EPA sought to remove this choice, thereby undermining the plans of states like Colorado that opted in to this higher vehicle emission standard. To defend this core principle

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[1] Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).
[2] The classic case setting out this principle is New York v. United States, 505 U.S. 144 (1992).
[3] Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 750 (1977) (codified at 42 U.S.C. § 7507).

of cooperative federalism and protect states' ability to keep their air clean, Colorado and a coalition of other state AGs sued the federal government.[4]

A second key principle of cooperative federalism is that Congress cannot abuse its power of the purse to coerce states to follow its directives. To be sure, if Congress provides funding for a specific program, it can condition the use of such funds—say, federal money for state highways—for purposes related to that program. Congress cannot, as the Supreme Court made plain in South Carolina v. Dole, allow "financial inducement" to be "so coercive as to pass the point at which 'pressure turns into compulsion.'"[5] In evaluating the Affordable Care Act, the Supreme Court applied this principle to the Medicaid expansion, concluding that Congress could provide very generous encouragement for states to expand access to Medicaid, but could not withhold all Medicaid funding (including pre-existing funding levels) if a state refused to expand access.[6]

The bar on coercive funding conditions underlies a principle that guides the interpretation of federal regulatory programs. Consider, for example, that almost all courts that have evaluated challenges to the administration of the Byrne Justice Assistance Grants ("JAG") program rejected the U.S. Department of Justice's ("USDOJ's") attempt to add requirements above and beyond those set forth in the statute. In particular, courts concluded that requiring state and local law enforcement to enforce federal immigration law as a condition of receiving federal funding in a manner wholly unspecified in the statute was invalid.[7]

A third critical principle of some cooperative federalism regulatory regimes is that federal agencies do not have a monopoly on interpreting or implementing federal law when Congress provides concurrent jurisdiction to the federal government and the states. Recently, the USDOJ Antitrust Division failed to respect this principle when the Division assistant attorney general claimed that, once the federal government declined to challenge a merger, states were legally barred from doing so.[8] This argument, which was made to a federal district court as a reason to reject a challenge to the Sprint/TMobile merger by several states—which objected to the merger because it would harm competition and raise prices for consumers—was properly rejected as antithetical to the 1976 amendments that elevated state parallel enforcement of the antitrust laws.[9] As the Supreme Court put it when interpreting those amendments, the states' role in antitrust enforcement "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."[10] Invoking this authority, states like Colorado have taken action and imposed pro-competitive requirements on mergers when the federal government failed to act.[11]

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[4] Complaint, California v. Chao, No. 1:19-cv-02826 (D.D.C. filed Sept. 20, 2019).
[5] 483 U.S. 203, 211 (1987) (internal citation omitted).
[6] National Federation of Independent Business v. Sebelius, 567 U.S. 519, 579-80 (2012).
[7] *See, e.g.*, Colorado v. U.S. Dep't of Justice, 455 F. Supp. 3d 1034, 1054 (D. Colo. 2020). The one outlying decision was rendered by the Second Circuit. *See* State v. U.S. Dep't of Justice, 951 F.3d 84 (2d. Cir. 2020).
[8] Philip J. Weiser, *The Enduring Promise of Antitrust*, 52 LOY. U. CHI. L.J. 1, 4-7 (2020) (discussing this action).
[9] New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 224-26, 225 n. 21 (S.D.N.Y. 2020); see also Weiser, Promise of Antitrust, 1-7 (discussing cooperative federalism nature of antitrust enforcement).
[10] California v. Am. Stores Co. 495 U.S. 271, 284 (1990).
[11] Weiser, *Promise of Antitrust*, 3-4 (discussing Colorado's action in the DaVita-UnitedHealth merger).

Federal-State Collaboration in Practice

When I served as senior counsel at the USDOJ Antitrust Division, I focused on implementation of the Telecommunications Act of 1996. This landmark law is a model cooperative federalism regulatory regime that called for states to implement rules to open local markets up to competition.[12] One of those provisions is Section 271 of the Act, which governed Bell Company entry into long distance and provided for an application process where state agencies, the USDOJ, and, ultimately, the Federal Communications Commission ("FCC") would evaluate the propriety of entry.[13] This application process was a central part of the Telecommunication Act's vision—opening up local telecommunications markets to competition and then allowing local Bell Companies to enter the long distance market.

The Section 271 applications process was managed by a federal agency under federal law, but state agencies played a critical role in implementing this provision. Originally, observers believed that Ameritech (the Midwest local Bell Company now part of AT&T) would be well positioned for long distance entry. After all, Ameritech's earlier experiments in facilitating local competition in Michigan—as part of a planned waiver under the AT&T consent decree—paved the way for the Telecommunications Act of 1996. But when Ameritech applied for entry, the Michigan Public Service Commission surprised the company by refusing to act as a rubber stamp for its application and set forth its own vision of the federal requirements. The FCC ultimately followed the Michigan Public Service Commission's recommendation and rejected the application.

In contrast to Ameritech, the New York Public Service Commission, working closely with New York Telephone (then part of Bell Atlantic, now part of Verizon), devised a workplan to make clear what steps it believed would warrant entry into long distance. While at the USDOJ, I worked with the New York Commission on this workplan. From that experience, I can report that the expertise and on-the-ground judgment of the New York Commission was indispensable to working through the critical issues to enable what became the first successful Bell Company to enter the long distance market.[14] And this step allowed consumers to both benefit from more local competition (because of Bell Atlantic's opening up of the local market) and additional competition in long distance services (as well as new bundled offerings that we now take for granted).

For a second experience of federal-state collaboration, consider the development of the "smart grid." In short, a smart grid fuses communications and computing infrastructure into the

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[12] The cooperative federalism features of the Telecommunications Act of 1996 are discussed in Philip J. Weiser, *Chevron, Cooperative Federalism and Telecommunications Reform*, 52 VAND. L. REV. 1, 16-22 (1999) and *Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

[13] That provision is discussed in Philip J. Weiser, *The Forgotten Core of the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 71 (2016).

[14] I discuss that experience in Philip J. Weiser, Senior Counsel, Antitrust Div., U.S. Dep't of Justice, Remarks before the Consumer Federation of America, The Long Road to Local Competition (published as modified Apr. 22, 1998), https://www.justice.gov/atr/speech/long-road-local-competition.

management of the electric grid to enable a range of consumer benefits and improved grid operations. These benefits include "demand side management"—say, enabling the charging of an electric car at times when demand is otherwise lower—that could even reduce the need for more power plants to cover "peak demand."

The development and management of the electric grid is a quintessential local regulatory function. For this reason, there was a strong negative reaction to the Federal Energy Regulatory Commission's ("FERC") initiative in the early 2000s to impose certain prescriptive requirements related to the introduction of competition into electricity markets.[15] Even with such constraints in place, federal engagement in energy policy and the electric grid can still proceed in a collaborative fashion.[16] In the Energy Independence and Security Act of 2007, for example, Congress called on the FERC to develop a policy framework—including with reference to critical technical standards—for smart grid technologies.[17] And in the 2009 American Recovery and Reinvestment Act, Congress provided valuable funding to build out and develop smart grid technology.[18]

The strategy for supporting the development of smart grid technology resembled that of the Telecommunications Act and is another case study in cooperative federalism. The federal government developed standards, provided critical guidance, and even supplied valuable funding to spur technological development; the specific work moving this project forward, however, occurs on the state and local level. Consequently, the Obama Administration's policy framework on smart grid embraced a productive sharing of authority and division of labor between the federal and state governments.[19]

Finally, and for a recent example in which I was on the state side of the equation, consider the Consumer Financial Protection Bureau's American Consumer Financial Innovation Network. This network advances the model of cooperative federalism where the administration of a federal law—here, the Dodd Frank Act—provides for parallel enforcement by the federal government and the states, allowing the states to exercise complementary and independent authority. In principle and aspiration, this network provides a vehicle for state learning from the federal government as well as from other states. Unfortunately, in the politically polarized world we live in, Colorado

[15] *See* Richard J. Pierce, Jr., *Completing the Process of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451, 479 (2005) ("Every energy bill that has been reported out of committee or enacted in either house of Congress over the last two years has included a provision that bars FERC from implementing the [Standard Market Design or 'SMD'] for two or three years. None of those bills has become law, but FERC has gotten the message that both SMD and its national restructuring effort are politically dead at least for the next few years.").

[16] There are concerns, however, that a recent FERC decision on energy storage breaks from this constraint on federal authority and is odds with the cooperative federalism thrust of the law. *See, e.g.*, Tony Clark & Ray Gifford, *When Cooperative Federalism Becomes Compulsory: FERC Overreaches for Storage*, UTILITY DIVE (May 20, 2019), available at https://www.utilitydive.com/news/when-cooperative-federalism-becomes-compulsory-ferc-overreaches-for-storag/555058 ("when cooperative federalism verges from co-relative jurisdictions and prerogatives into compulsory federal mandates reaching into the states' sphere, the balance has been lost.").

[17] Pub. L. No. 110-140, § 1305(d), 121 Stat. 1788 (2007) (codified at 15 U.S.C. § 17385(d)).

[18] Pub. L. No. 111-5, 123. Stat. 138-39 (2009).

[19] *See* NAT'L SCI. & TECH. COUNCIL, A POLICY FRAMEWORK FOR THE 21ST CENTURY GRID: ENABLING OUR SECURE ENERGY FUTURE (June 2011), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/nstc-smart-grid-june2011.pdf.

was the only state with a Democratic attorney general to join this network, meaning it has yet to realize its potential.

The concept of a network of learning between states and with the federal government is a very promising one. Indeed, the learning network concept has already worked effectively at the international level.[20] The same model holds promise for addressing emerging challenges at the intersection of financial innovation and consumer protection. In Colorado, for example, we addressed the critical question of enforcing interest rate protections in the face of new fintech lending models that claimed to be outside state jurisdiction.[21] In settling our challenge to this practice, we developed a unique and innovative solution available for other states to consider, adapt, and implement. Ideally, there would exist more forums for learning and discussion on such issues, which is what the American Consumer Financial Information Network has sought to advance.

The Challenges and Opportunities for Federalism

As we begin a new presidential administration, we can see how today's level of political polarization challenges federalism as a constitutional principle. Last fall, for example, we witnessed the collision of federalism and political polarization when Texas went to the Supreme Court to challenge other states' election management. Fortunately, the Court turned away this petition. Yet the fact that Texas even brought such an action underscores the importance of ensuring that our constitutional commitment to federalism can weather challenging political winds.

In the summer of 2020, the Supreme Court considered a different kind of challenge to a state's management of its elections. In 2016, both Colorado and Washington enforced state election law requirements mandating that their state's presidential electors represent the will of the public by casting their ballots in the Electoral College for the candidate that won their state's popular vote. Several "faithless electors," however, challenged those state laws, suggesting that the states lacked authority to enforce such requirements. In *Chiafalo v. Washington*, the Court rejected that argument and made clear that the states possess plenary authority—as granted to them in the Constitution—to oversee presidential election results, stating that "Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights."[22] The Court held that states' power to bind electors to reflect the will of the states' voters "accords with the Constitution—as well as with the trust of a Nation that here, We the People rule."[23]

After a presidential election that marked a transition of power like none other, the losing candidate nevertheless undertook several challenges to overturn the election. Every single one

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[20] Russell W. Damtoft and Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 INT'L LAW 137, 137 (2009) (the development of the International Competition Network, established in the 1990s, has produced real progress in bringing "divergent systems closer together without the need to intrude on sovereign control of national antitrust regimes").

[21] I addressed that issue at Philip J. Weiser, Colorado Attorney General, Remarks for LendIt FinTech USA 2020, The Role of States in FinTech and Consumer Protection (Sept. 29, 2020), https://coag.gov/blog-post/prepared-remarks-lendit-fintech-usa-2020-sept-29-2020.

[22] 140 S. Ct. 2316, 2328 (2020).

[23] *Id*.

failed. Just before the Electoral College met, with the threat of faithless electors largely ruled out by the Supreme Court's decision last year, the Texas Attorney General petitioned the Court to take oversight of state election management. As the Idaho Attorney General rightly pointed out, this petition was an attack on federalism because Texas's legal argument:

> could result in other states litigating against legal decisions made by Idaho's legislature and governor. Idaho is a sovereign state and should be free to govern itself without interference from any other state. Likewise, Idaho should respect the sovereignty of its sister states.[24]

Stated differently, the rule of law—and the law of federalism—should not and cannot depend on what political candidate is helped or hurt by its application.[25]

The opportunity side of federalism is that, during a time of dysfunction in Congress on account of political polarization, the states can be engines of progress and, as Justice Brandeis once put it, "laboratories of democracy."[26] Consider, for example, the case of data privacy and data security. Over the last decade, Congress has failed to act to protect consumers' data, leaving it to the states to develop solutions.[27] Several states have enacted laws in this area, including data breach requirements now in place in all 50 states, requiring companies to alert governments authorities when personally identifiable information in their care was accessed or shared without authorization by the consumer. But even with a presidential call to action,[28] and bipartisan support,[29] it is far from clear when—or whether—Congress will protect consumers and their interest in data privacy and security.

The opportunity for Congress in data privacy is to follow the model of the Dodd Frank financial reform law. In Dodd Frank, Congress declined to adopt the sort of broad preemption scheme used in past measures. Rather, Congress developed a special preemption provision, embracing state action that provides protections that are "greater than the protection provided under this title" and making clear that federal law only provides a floor, not a ceiling.[30] Following the model of the Sherman Antitrust Act (as amended in 1976), the Dodd Frank law provided for

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[24] Lawrence Wasden, Idaho Attorney General, Statement on Texas Election Case (Dec. 10, 2020), https://www.ag.idaho.gov/newsroom/wasden-issues-statement-on-texas-election-case.

[25] *See* Phil Weiser and Cynthia Coffman, Opinion, *Texas' Attempt to Undermine Our Constitution Was Rebuked By Those Who Uphold the Rule of Law*, DENVER POST (Dec. 15, 2020), https://www.denverpost.com/2020/12/15/phil-weiser-cynthia-coffman-texas-lawsuit-electoral-college-constitution-trump.

[26] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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.").

[27] To be fair, federal agencies have also found ways during this time to protect the public, but that is a different topic. *See* Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011 (2017).

[28] *See* THE WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD (Feb. 2012), https://obamawhitehouse.archives.gov/sites/default/files/privacy-final.pdf.

[29] *See* Cameron F. Kerry and Caitlin Chin, *How the 2020 Elections Will Shape the Federal Privacy Debate*, BROOKINGS (Oct. 26, 2020), https://www.brookings.edu/blog/techtank/2020/10/26/how-the-2020-elections-will-shape-the-federal-privacy-debate (calling the opportunity to take action in this area "a current opportunity to pass a privacy law 'with real consensus among members of both parties'") (quoting Senator Roger Wicker).

[30] 12 U.S.C. § 5551(d).

concurrent state attorney general enforcement, ending an era "where state attorneys general played a peripheral, ad hoc role in enforcing federal consumer financial protection law."[31]

The Sherman Antitrust and Dodd Frank models of cooperative federalism represent a healthy development that ensures that states remain empowered to enforce federal law to protect consumers even when the federal government lacks the resources, or will, to do so. Unfortunately, there are several places where existing federal regulatory regimes are failing consumers in just this fashion. In the case of protecting airline consumers, federal law arrogates to the U.S. Department of Transportation ("USDOT")—via the Office of Aviation Consumer Protection—authority to protect consumers from abusive and unfair airline practices, but the USDOT has failed to do just that. Consequently, Congress would be wise—as called on by forty state attorneys general—to empower state parallel enforcement of such protections.[32]

Conclusion

Every generation has the opportunity to contest and shape the present and future of "Our Federalism." Over the last two generations, we made considerable progress in the use of cooperative federalism as a regulatory strategy rooted in respect and engagement with state authority. During that same time, the Supreme Court adopted and refined constitutional doctrines to protect state participation in such regimes. Congress, moreover, demonstrated an appreciation for the role of states, developing and advancing the model of concurrent enforcement by state attorneys general.

Our current challenge is to develop and fortify respect for and understanding of federalism as a feature of American governance that can transcend and perhaps even diffuse the toxic effects of political polarization. To the extent that states can provide for more latitude and respect for one another's different policy decisions—whether to legalize cannabis, for example—perhaps differences can be accommodated rather than fought over.[33] For such accommodation to take hold, however, we will need to develop more empathy towards one another and less judgment.[34] Ideally, federalism as a tool for governance can facilitate this very project and state attorneys general acting civilly towards one another and working collaboratively with one another can be a part of such work.

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[31] Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 130-31 (2013).

[32] *See Attorneys General Call for New Consumer Protections to Protect Airline Industry Customers*, NAT'L ASS'N OF ATTORNEYS GEN., Oct. 2, 2020, https://www.naag.org/policy-letter/attorneys-general-call-for-new-consumer-protections-to-protect-airline-industry-customers/.

[33] *See* Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCI. 533, 536 (2020) ("People become less divided after observing politicians treating opposing partisans warmly.").

[34] For a discussion of this theme, see Philip J. Weiser, Colorado Attorney General, Remarks to the Colorado Bar Association (Dec. 11, 2020), https://coag.gov/blog-post/prepared-remarks-attorney-general-phil-weiser-discusses-leading-with-empathy-with-the-colorado-bar-association-dec-11-2020/.