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FEDERALISM IN NORTH AMERICA: LEGISLATURES, GOVERNORS, AND PREMIERS

Rep. Stephen Buehrer[†]
U.S. Speaker

Thank you very much, Henry, I appreciate that kind introduction. I must say that I am unaccustomed to speaking on Sunday mornings. Normally, I find myself in church, but since I see that most of the seating is in the back today, I feel like I am in church; come in and sit in the back pew, et cetera.

I also have to say that I am not sure, and was not sure, that I was the best person to address this topic, and I was a bit befuddled about how to approach it. I called my friends, George Costaris and his assistant Mary Lynn Becker at the Canadian Consulate, and said I do not think I know much about Canadian Federalism. I am not sure that I am the right one to be addressing a panel on U.S. and Canadian Federalism.

George was out of the office, so I talked to Mary Lynn. She said, "Well, Representative, it really doesn't matter at all what you say, you're a little bit like the talking dog at this meeting." I said, "Well, the talking dog, what's that all about?" She said, "Well, you're kind of like the talking dog. It really won't matter at all what you say, people will just be amazed that you can speak at all."

With that kind of encouragement from my friends, I am pleased to be here this morning to talk to you. It is a little unusual, I must say, in all seriousness, that a legislator would be invited to a scholarly conference of this type. Legislators are not often invited to these sorts of things.

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I am not sure if they are not qualified, or if the legislators personally are so frightened that they did not want to show up and perhaps show their lack of insight on a given topic. Perhaps I am simply too ignorant of either that I was brave enough to be here this morning. I am pleased, of course, to be with you.

I find these topics of exchange between U.S. and Canadian members to be most interesting. I have certainly enjoyed it during my time in the General Assembly.

Let me tell you why I think I was invited first, and then get into the topic this morning. I was invited because I Co-Chair a committee called the "Midwest/Canada Relations Committee of the Council of State Governments."¹ Now, you may ask what that is.

Well, first, the Council of State Governments is a national organization. There is a national structure, as well as regional structures. Here in the Midwest, the Midwest Canadian Relations Committee is a standing committee of the Midwestern CSG. All legislators, at least on the U.S. side, and I believe on the Canadian side, by virtue of being elected, are members of those organizations. Each member has the opportunity to come forward and participate in committees.

I know that even in my time on the Midwest Canadian Relations Committee, the number of Canadians involved has grown exponentially. I think it is becoming a very interesting opportunity for exchange about a variety of topics. I think it is very important for several reasons.

First, it fosters an understanding and wider thinking about U.S.-Canadian relations and how each side perhaps views different issues. It is a good opportunity to study issues. We often talk on trade and travel and tourism and various Federal issues that seem to be relevant to both sides. It gives you tools to help make decisions back home.

Secondly, I think it makes the legislators who are involved better Ambassadors for a growing U.S.-Canada relationship when they get back home. I think this is really one of the keys. Toward the end, I am going to come back to that point because I think it is so important.

With that said, Henry had asked us to speak on Federalism this morning. I conferred with my partner a little bit here today, and he said that he did not plan to spend a lot of time on Federalism. So I felt I better at least touch on it, so nobody goes home that they were not cheated in the advertising of this session.

¹ MLC Midwest-Canada Relations Committee, *available at*: <http://www.csgmidwest.org/About/MLC/Committees/MWCanada.htm> (last visited Oct. 1, 2004).

WHAT IS FEDERALISM?

Well, I stole a Canadian definition of Federalism. Senator Eugene Forsey had a definition that I liked on the net, “A Federal state is one that brings together a number of different political communities with a common government for common purpose and separate state or provincial governments for the particular purposes of each community.”² I thought that was a good definition of what perhaps Federalism is all about.

Speaking strictly from the U.S. side for a few moments, the framers of the U.S. Constitution envisioned a powerful state legislature. There are two mentions, of course, of that matter in the U.S. Constitution, Article VI, Section 2, the so-called supremacy clause, deals with it; and, more importantly, from the state perspective, the 10th Amendment to the U.S. Constitution. I would like to read it to you. I think we spend, especially as legislators, too little time actually thinking about the Constitution, which is the framework for our processes. “The powers not delegated to the United States by the Constitution, nor prohibited by, to the states, are reserved to the states respectively or to the people.”³

Now, I would note one thing of curiosity that I have always found in those words, is that they do not say the Federal government. They say the powers not delegated to the United States by the Constitution. That has always left me with a bit of an impression that the states were a viable, living, and, in fact, were the central actor in government at that time, and were seen as the place where the action was going on. If this was not occurring on at the state level, then it was the Federal level where those types of things might be covered.

I think the framers of the U.S. Constitution certainly felt that way. Examine James Madison, who is regarded widely as the father of the U.S. Constitution, and he said “The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments, are numerous and indefinite.”⁴

Thomas Jefferson, one of the founders, felt the same way. He said, “The states can best govern our home concerns, and the general government our foreign ones.”⁵ He further said, “I consider the foundation of the Constitution as laid on this ground that all powers not delegated to the United States by the Constitution, nor prohibited it to the states, are reserved to the states or

² *How Canadians Govern Themselves* (5th Edition), available at: http://www.parl.gc.ca/information/library/idb/forsey/fed_state_01-e.asp (last visited Oct. 1, 2004).

³ U.S. CONST. amend X.

⁴ The Federalist No. 45, at 313 (James Madison).

⁵ Thomas Jefferson on Politics & Government, available at: <http://etext.lib.virginia.edu/jefferson/quotations/jeff1050.htm> (last visited Oct. 1, 2004).

to the people. To take a single step beyond the boundaries thus specifically drawn around the powers of Congress is to take possession of boundless field of power not longer susceptible of any definition.”⁶

Clearly, the framers of our Constitution felt that states were an important entity. Now, a Constitutional scholar, and perhaps others here today, could give an evolution of that framers’ vision of state power, and how and where perhaps the evolution of a stronger Federal system has begun.

As one who spent some time looking at this, it was clearly in the 1930s, as a powerful Supreme Court redefined the commerce clause and certain other clauses of the U.S. Constitution, that Federal government took on some new powers in the legislative field. Currently, there is an ongoing evolution of preemption doctrine.

There are a few key points where I believe the federal and the state governments touch today, at least as I see them, in the State of Ohio and as a member of the General Assembly there.

I think the states have figured out pretty much what the federal responsibility is in terms of its foreign relations power, and some of the things that it does. Yet, we often still today consider resolutions that deal with national issues. It is very popular for some reason for our members to introduce resolutions that will encourage the Congress to act in a certain way, or encourage the President to do a certain thing.

Already this term we have considered these resolutions that would ask for the voiding of the Kyoto Treaty.⁷ We had one that dealt with trade on Taiwan.⁸ There was one to support President Bush in his tax cuts,⁹ another on the Iraq war.¹⁰

I think these always make for amusing debates in Columbus. The Speaker’s tolerance usually lasts about an hour, and we can talk about some of these federal issues. What ultimately happens is a piece of paper is mailed off to Washington.

It is always been my guess, certainly, that there is very little impact when state legislators send a letter or a commendation asking for some sort of input on a federal issue. However, occasionally, we do it.

Conversely, there is some concern based on the Federal government’s relationship with the states. I do not want to leave the impression that there is a lot of tension, but certainly, members get up on the floor and extol and worry

⁶ Favorite Jefferson Quotes, *available at*:

<http://etext.lib.virginia.edu/jefferson/quotations/jeff4.htm> (last visited Oct. 1, 2004).

⁷ The Ohio House of Representatives, *available at*: <http://www.house.state.oh.us/> (last visited Oct. 1, 2004).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

about the erosion of that 10th Amendment. We have had several instances even this term where that has transpired.

It seems clear to me that states were left with the power to regulate their own roadways - what are the speed limits, what are the traffic controls, etc. Yet, the Feds continue to come into the state purview. One area we saw it just recently where the drunken driving standard was lowered at the federal level from whatever states had had. Most states had something like .10, as Ohio had, to .08.¹¹

It was the carrot and the stick, "we'd like you to do it. And, oh, by the way, we'll start taking away federal highway funding if you did not do it." Ohio faced with the loss of what would have been 40 million dollars this year if we did not lower that standard,¹² went ahead and capitulated to the federal demand, blackmail, if you will, and lowered our standard to .08.¹³

I know that in the past few weeks Michigan talked about it, or is ready to do it, or has done it. A number of states are going to follow suit.

I think you are seeing an evolution in all the criminal laws as more and more laws are being criminalized at the federal level. That was something that would have been unheard of in years passed. I think we have especially seen it in the recent days as the talk about terrorist issues has become more nationalized, and state power and state ability to regulate criminal activities has been preempted in certain areas.

Another instance is in education policy. I think the trend continues to see our federal government in the U.S. more involved in education policy. Some who have been critical of President Bush's No Child Left Behind Act,¹⁴ which is a new set of federal accountability standards for children, have been upset that states are now compelled to follow these federal guidelines.

I think there are several reasons why this is happening, as an aside. One is a certain degree of ignorance about what the state level legislators do. It may be true this way in Canada, as well. I think a number of my constituents still believe that I go to Washington, D.C., every week to represent them. If I go to Washington, D.C., generally I would be lost.

A number of people, almost once a month, still call and think that I can arrange trips to the White House for them. I did not do that. I am always happy to refer them to their Congressman.

Therefore, I think people have become confused about where the appropriate role of the state is, and so they call on any elected official who they

¹¹ Editorial, *The Right Target*, CINCINNATI POST, May 28, 2003, at A14.

¹² Leo Shane III, *New DUI Limit*, THE NEWS-MESSENGER (Fremont, Ohio), Feb. 12, 2003, at 3.

¹³ Yena Peach Hart, *New DUI Law Takes Effect*, THE NEWS-MESSENGER (Fremont, Ohio), July 1, 2003, at 1.

¹⁴ Ruth Mitchell, *Dumbing Down Our Schools*, WASH. POST, April 27, 2004, at A21.

might be familiar with to come and help them. I think that is been true on education policy.

If you polled Ohioans on the most important issues facing Ohio, inevitably education will come forward. Therefore, the people are inclined to raise their concerns about education with whoever is standing there, whether it is their federal Congressman or their state elected legislator.

What I think has happened is the federal elected officials have been more inclined to react on issues that are in the public mind. Thus, you have seen a greater degree of involvement in the Feds on issues that traditionally were reserved strictly for the states.

One other area where I think we have seen it coming in is the whole debate in Ohio, and many other states, on gay marriage. The Court decision in Massachusetts that would have brought gay marriage across the entire country left an out for states. It said, "You must follow this unless there's a strong public policy in your home state against gay marriage."¹⁵ Ohio, as many other states, considered, and we ultimately passed a bill that made gay marriage against the strong public policy of Ohio.¹⁶ Therefore, the tension will continue. I hope that the issue has been settled, at least in this state, where traditionally states set their own standards for marriage and those sorts of things.

Let me step back a minute even further and talk about being a legislator in a state legislative body. I think as U.S. legislators we have a great deal of power, a great deal, even though there have been these federal overlaps I have analyzed, a great deal of ability to bring ideas forward in a bill form and turn them into laws. I think that is one area where it is different from the Canadian system.

Soon after I had become Co-Chair of the U.S.-Canadian Midwestern Committee, I was sitting with one of the Canadian legislators one day, and we were talking about the idea of bringing a bill to our committee and throwing it around and seeing if we could come up with some model legislation that we could take back into our states.

The Canadian legislator, I think, was a little surprised that I would have the idea of doing that. He said to me, "Now, you have the ability to take a bill that we would discuss here back to your state and introduce it and make it the law of your land?"

I said, "Well, of course, that's what we do every day." It was clear to me that the Canadian legislator in this case was not comfortable with that idea, and did not feel as if he would have the power to take that idea back home, at least in bill form, and turn it into legislation.

¹⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass., 2003).

¹⁶ Julie Carr Smyth, *The Week at the Statehouse How They Voted*, PLAIN DEALER (Clev.), Feb. 9, 2004, at B3.

I think that is one of the differences that state legislators have a certain amount of independence and ability to bring these kinds of things forward. Clearly, some of that stems from the whole idea of party loyalty.

I was talking with my partner, and I hope I am not stealing all of his remarks here; there is a high degree of party loyalty, obviously, in the Canadian system. I think that loyalty on the U.S. system, and certainly in Ohio, varies considerably.

There is certainly some dynamic of party loyalty that is important to our political process under sort of a rising ship lifts all boats kind of theory; where, if things are going well for all of us in the same party, that is good, and it helps all of us. Simultaneously, there is still a degree of independence.

I would tell you that it was the practice in the Ohio Senate for a number of years amongst the majority party members that no bill passed until a majority, enough votes to pass a bill on the floor, was brought together within the majority party caucus. There you can see some similarity to the Canadian system. What that does, of course, is to take away power from minority legislators and empower those individuals who are in the majority, which you can see some semblance of that system from the Canadian side. However, in the House, that rule has been certainly less strict. There is not as much of that party discipline. In fact, whatever party discipline exists is normally influenced by the legislative party leaders.

I think our Canadian friends would have been aghast; I certainly was to some degree, on a bill we recently considered in the House floor. There are 99 members in the Ohio House.¹⁷ Currently, there are 62 Republicans and 37 Democrats.¹⁸ We passed a bill in the Ohio House, something the Speaker had wanted to do, with only 25 votes from the majority party. All the rest of those votes came from the minority party side. Two amendments were considered that day where the Speaker voted and was beat, in effect, by the votes of his own party who were voting against him on some key amendments to that bill. What he had to do through a sort of back-door political move was to get the minority Democrats together and help him overrun the will of the majority party as it sat that day on the floor.

I think the Canadians would have flipped their hair, and probably Parliament would have dissolved that very day. Perhaps, we should have dissolved it that very day in Ohio, but this is the kind of thing that has the ability to go on within our system; and, certainly, different from the Canadian system.

Much of this, again, comes down to sort of the whole system of discipline and checks and balances. The nomination process for seats in the General Assembly is very heavily controlled by the party. Although, it is controlled

¹⁷ The Ohio House of Representatives, *available at*: <http://www.house.state.oh.us/> (last visited Oct. 1, 2004).

¹⁸ *Id.*

heavily in our system, it is controlled much differently because you did not have the party caucuses back home where this is done. We have an actual vote through the electoral system in terms of getting our nomination to run as a member of our elected part in our two-party system.

Often what legislative leaders will use to control some amount of discipline is the threat of a party primary. Now, that can also cut two ways. For example, last spring here in Ohio we had a very large tax increase. Ultimately, it was passed by a two or three vote majority. Although, again, the votes that made it the majority were supplied by the minority party, the Democratic Party, so a little different dynamic.

The threat of a primary that might have scared some into following this Speaker so that he could support them in the upcoming election had just the opposite effect on certain other people who did not want to support a tax increase. These individuals felt that they would draw a primary election candidate if they were to follow the leadership and go down the road of a higher tax increase. Therefore, it can cut both ways.

I think ultimately what it says, is that the legislatures in the U.S. are entrepreneurs to a large degree; their success, politically speaking, is on building relationships back home. I have ceased stealing at this point. I just took your term of entrepreneur because I think you hit it very well on the head.

It is for us all about building relationships back home, and being responsive to those people who we represent. That is true both for our popularity on a political side, as well as the fundraising that ultimately comes with political office. The reason for that is that in election time we may or may not have the strong support of our party back home. The political parties and their strength vary by areas, even within a state like Ohio. In a district that is not closely contested in terms of demographics, Republican or Democrat, you often draw your loyalty from those who you have met and had contacts with over the term of your office.

I think the key balance for any of us who serve in the U.S. legislatures is weighing our support for our party leaders versus a certain streak of independence that is often respected by our voters. Clearly, that is a different dynamic than the Canadian system where so much of the decision is made about the national leader, about the provincial leader.

Very often, the decision in our situation is made about who we are as individual legislators. In fact, it has been historic that legislators, such as myself, will run much stronger back home than President Bush will this year, for instance, or Governor Taft, or some of those people will, very often, run stronger. In fact, beat them by 15 or 20 percentage points on a regular basis. Again, I think that shows the independence.

There are a variety of voters, certainly in my district, and we are a good ways from the Capitol, who are upset with government in general and want to know what you are doing to oppose what they are doing down in Colum-

bus, even if you are part of the majority party, as I am. Here in Ohio, we have a Republican legislature and all Republican statewide officeholders, they want to know what you are doing to oppose those people in Columbus who keep doing these things to us. Therefore, there is a certain benefit, although you have to pick a selected benefit, while having a certain degree of independence.

I think there are strengths to that, and there are certainly weaknesses to that as you look at a comparison with the Canadian system. I think one of the real weaknesses for those of us in Ohio is that it causes legislators to be somewhat parochial in nature and not global thinking about their state or their national needs.

In fact, early last year I was up in Toronto on a legislative exchange spending a few days in the Toronto legislature with some of the members there. It was something well worth doing. I called back one day to exchange some information with one of my colleagues and the leadership team back in Columbus.

He said, "Well, where are you?" Of course, the phone is cracking; "we're in Toronto and all this."

"Why are you in Toronto?" In the course of our couple minute discussion, he said, "Well, I did not even think I've ever been to Canada."

How alarming to me that here was a person, although he represents Central Ohio, he is only three hours from the Canadian border. Where it struck me as interesting is that if a factory were coming into his district that might employ 100 new workers, he would very quickly work toward helping get that factory there because of the economic impact on his area. Yet, you look at the trading relationship, that we have with Canada, and you think of the millions and millions of dollars that are flowing every single day between Ohio and Canada, and here is a person, a member, serving, representing almost a hundred and twenty thousand people in the Ohio General Assembly, who probably had never been to Canada. If he had, maybe he was only chasing walleye or northern pike or something like this.

How alarming that we as Americans have that kind of an arrogance about our Canadian brothers and sisters across the border and the real impact. There are many reasons for that, and I will not go into them. However, I would say, I live in the Toledo area, and we are only an hour and 45 minutes from the Canadian border. The Toledo Blade is the major paper in our area and weeks will pass before there is a mention of any Canadian news.

Having traveled in Canada, not extensively, but somewhat, you quickly see that there are daily, if not hourly, reports on U.S. news and U.S. happenings in the Canadian press. In the public, generally, there is an awareness of U.S. news. We get almost none of that here, at least from my experience. I think that hampers us, as well as certain stigmas that continue.

There is a buzzing not only in Columbus, but also in other states, about the foreign job exporting issue, and how alarmed we as Americans should be that jobs are being exported to other countries. I think that misses the entire underlying trade continuity and relationship that is there, and is really sort of a short-sided view of the world economy. I think many of those things contribute to the overall ignorance.

I would just say in closing that for me, the Midwest Canada Relations Committee has been a good opportunity to get away from some of those stereotypes and ignorance about the Canadian system, and see how beneficial a relationship can be with our Canadian brothers and sisters.

Recently in our Midwest Canada Committee, we sat down and we drafted a resolution some of you may have seen on the mad cow disease issue, encouraging that we reopen the border more quickly. I really saw legislators from both sides of the border coming together very quickly around that issue. In fact, there was a Senator from one of the plain states, I believe one of the Dakotas, who sat down and helped draft the resolution that was encouraging officials to open the border to Canada more quickly. He was saying that his family has made thousands of dollars by having that Canadian border shut. He was benefiting. He ran a cattle operation. It is wonderful, but he said it is the right thing to do to open this up and to re-integrate the trade in the area of cattle.

Therefore, I was encouraged to see the legislators work in this sort of international way, willing to put their own views aside for the betterment of all. Certainly, that is one reason I came today. I enjoy these debates. I will look forward to your questions.

Thank you very much.