Statement of Peter M. Shane
On "The Constitutional Dimensions of Federalism"
Before the Ohio House of Representatives Committee on Federalism and Interstate Relations
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Chair Roegner and Members of the Committee:

My name is Peter Shane, and I am honored by your invitation to speak to you on what I am calling the constitutional dimensions of federalism. I have been a teacher of U.S. constitutional and administrative law since 1981 and a proud member of the faculty of Ohio State's Moritz College of Law since 2003. In my teaching and scholarly capacity, I have had regular opportunities to reflect and speak on federalism as a legal concept. Federalism, along with the separation of powers, is one of the two key organizational principles that underlie our constitutional design.

The U.S. Constitution addresses the role of states in a number of ways. The two most overarching provisions are, as you no doubt know, the Supremacy Clause and the Tenth Amendment. The Supremacy Clause provides that the "Constitution, and the laws of the United States . . . made in pursuance thereof . . . [are] the supreme law of the land," and binds state judges to obey federal law. The Tenth Amendment states: "The 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." There are other constitutional provisions hugely critical to this committee's potential work, such as the Full Faith and Credit Clause, the requirement of congressional approval for interstate compacts, and many others. But the sparse text of the Supremacy Clause and the Tenth Amendment—along with the founding generation's decision to vest in Congress the authority to regulate interstate commerce—have themselves been enough to

generate a vast and complex body of law, which has bedeviled many a generation of law student, to be sure.

In the few minutes I have with you, I think it might be most helpful to lay out briefly some key elements of this body of law as elaborated by the Supreme Court. The four general areas on which I propose to focus are Congress's authority with regard to the regulation of states, Congress's power to influence state and local practice through federal funding and the incentive of local control, constitutional limits on the power of states to regulate in ways that affect interstate commerce, and the ways in which federal law can preempt state law. I will try to present as accurate a picture of current law as it stands without trying to evaluate the wisdom of any particular Supreme Court doctrine. My aim is just to give you an objective description of the current terrain.

With regard to federal law that regulates the states, three propositions are most critical. First, Congress may include states within the scope of legislation that also governs private firms or individuals engaged in the same activities. For example, because states run public hospitals and Congress provides that all hospitals affecting interstate commerce must pay a minimum wage, state hospitals have to pay the minimum wage just as do private hospitals. The only limit here is really one of statutory interpretation. The Supreme Court has held that, if Congress wants state activities to be covered by a general regulatory statute then, at least if the state's activities fall within traditional areas of state sovereignty, Congress's intent to regulate states must be explicit. But there's no constitutional barrier to this kind of federal regulation.

The second proposition, however, is that Congress is limited in its ability to regulate state and local jurisdictions as such. Specifically, Congress may not enact statutes purporting to compel state legislatures to enact certain laws. They also cannot compel state and local officials

to participate in the enforcement of federal law. This is called the anti-commandeering principle. Congress cannot demand, for example, that state law enforcement agencies assist in carrying out federal immigration or firearms laws.

Congress may—and this is my third point—exercise its legislative powers to provide remedies against state action that might not comply with the individual rights guarantees of the Constitution, but the Supreme Court has said that these remedies must be commensurate with the violations Congress is trying to prevent. Thus, Congress has been able to enact laws against race discrimination pursuant to the Fourteenth Amendment, but not to limit state laws that might incidentally burden the exercise of religion. There is simply no record of widespread Establishment and Free Exercise Clause violations by the states that warrants federal control of state policy.

The principles just stated apply to possible federal laws that regulate state or local jurisdictions directly. However, even when Congress cannot constitutionally compel states to do certain things, it is allowed to make state involvement in federal programs an inviting proposition. For example, under the Affordable Care Act, Congress authorized the creation of a federal health insurance exchange, but states were given the option of creating their own exchanges, if they were willing to meet federal standards and preferred state control. Likewise, Congress may impose requirements on states and local government units as conditions of federal funding. Congress may thus incentivize states through federal grants to work with the federal government in ways Congress could not demand. There are, however, some limits to the federal spending power. The most important in practice are these: When imposing funding conditions on states, Congress must state those conditions unambiguously. The conditions must relate in some way to the purpose of the grant. Congress could not offer funding for public school arts

programs as a way of getting states to improve water pollution standards. Finally, in using its spending powers, Congress may not cross the line from "incentive" to "coercion." That's why Congress could offer new funding as an incentive for Medicaid expansion, but it could not threaten existing funding for states preferring to keep their pre-ACA Medicaid programs in place.

The third set of rules I would emphasize fall under what the Supreme Court calls the "Dormant Commerce Clause." Even though the U.S. Constitution imposes no explicit limits on state commercial regulation, the Supreme Court drew an inference early on that such limits were implicit in the Founders' decision to assign the regulation of interstate commerce to Congress. The bedrock rule is that states may not explicitly discriminate against buyers and sellers from other states, except in three circumstances. First, states may discriminate in favor of in-state interests when Congress expressly permits it. Second, states may impose limited discriminatory regulations to respond to truly compelling public problems, such as protecting the public from the import of contaminated food. Finally, when states enter the market themselves as buyers or sellers, they can give preferential deals to their own residents. That's why state universities can charge less for in-state tuition or state-owned manufacturing plants can give discounts to in-state buyers. This so-called "market participant" exception to the bar against intentional discrimination is limited only by the requirement that states not discriminate against out-of-state residents in a way that deprives them without adequate justification of what Article IV of the Constitution calls the privileges and immunities of citizenship.

Dormant Commerce Clause rules also affect the taxation of interstate commerce. Such taxation is now permissible if the activity taxed has a significant nexus with the taxing state, if the tax is fairly apportioned in order to tax only the activities connected to the state, if it is fairly

related to services provided by the state, and if the tax is not deemed discriminatory against out-of-staters.

There are cases, however, in which state law does not intentionally discriminate against out-of-state commercial interests, but which are still deemed unconstitutional. These cases involve state laws or local ordinances that impose some significantly greater burden on out-of-staters than local actors, and in which the economic burden on interstate commerce cannot be justified in light of the relatively small contribution, if any, to local welfare. The classic case involves an Illinois statute that, alone among the states, required a particular kind of mudguard on trucks. Illinois couldn't demonstrate that its preferred design was really any safer than the more conventional design that was at least an option and sometimes required in other states. Yet some interstate trucks out of compliance with the Illinois law would either have to bypass Illinois or change their mudguards crossing into Illinois as a cost of doing interstate business. The Court found this unconstitutional.

Finally, as you know, federal law may operate to preempt state law. States may not enact laws that make simultaneous compliance with state and federal law literally impossible. There are some limited areas of federal interest that states may not regulate at all. In some cases, such as cigarette labeling, even when literal compliance with both state and federal requirements would be possible, state law is preempted because Congress has explicitly provided that by law federal requirements would be exclusive. Sometimes, the Supreme Court may find implicit congressional intent to make federal law exclusive because the scheme of federal regulation is so extensive and complex as to "occupy the field" with regard to a potential area of regulation. Finally, even when literal compliance with both state and federal requirements would be possible, state law may be preempted if it is determined that the state law makes the achievement

of Congress's goals in enacting particular federal laws more difficult. This area of law can be somewhat unpredictable because the Court's judgments may turn on which characterization of Congress's purposes the Court accepts. Outcomes of these cases are also somewhat less certain because federal courts often apply a rule of statutory construction that tries to limit the preemptive force of federal law.

I hope this mini-tour of the constitutional law of federalism—a body of law yet more extensive and complex than can be covered in so brief a presentation—is of help to you. As you may know, former Justice Sandra Day O'Connor, herself a former state legislator, was perhaps the most eloquent defender of federalism on the Court in recent decades. One of her most famous statements on federalism is this:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[1]

Obviously, our lives as Americans are more interconnected across state lines than our founding generation could ever have envisioned. It is encouraging to see our General Assembly so engaged in the challenging task of maintaining the advantages of federalism, even as new technologies and national needs draw Americans closer together. I hope you find my remarks helpful to you in your work.

[1] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).