LESSONS OF THE AMERICAN EXPERIENCE

By

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I.
INTRODUCTION

It is with the seemingly uncharacteristic humility of an American that I approach this assigned task.

The notion of federalism, and the federal-state relationship – what you refer to as "subsidiarity" – is an integral part of America's tradition and, in important ways, an essential and continuously debated aspect of our current presidential election. In many respects, it always has been. It is as much on our mind as it is on yours. Later in my talk, I intend to explain why that is, what the debate is about and why, within that debate, there are lessons to be learned from the American experience.

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The humility that I sense also comes in part from the fact that, as individual nations, European thought and experience tempered the early formation of the United States. Notions about the rule of law found their origins in Anglo-Saxon traditions and practice: John Locke and Sir William Blackstone's Commentaries were the primary source for the legal training of America's first lawyers and jurists and political leaders.


Alexis de Tocqueville

As you also know, the American Revolution, including those years when it was translated into the written documents that formed our government and principles of law, found considerable support from the military acumen of the Marquis de LaFayette and from the political thought of Rosseau and Montesquieu. To this day, the insights and eloquence of de Tocqueville's description of American democracy, written in the 1830's, retain their power in American political and cultural literature.

There is much, too, in the special traditions of your individual nations, in their support for human rights and individual liberty, in the fierce independence and commitment to national cultures and territorial integrity that have been examples and inspirations to the world, including to those in the United States. The effort you are now engaged in -- to unite Europe, to forge – in unprecedented ways – common notions of civility and practical means of governance, to seek unity and a workable form of federalism, calls strongly on those special traditions. It is a commendable, if not vital effort, and I want to make clear at the outset, that any form of governance that is based on those special traditions – many of which we derive from and share with you – should be encouraged and welcomed.

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The humility I bring to this assigned task, however, also is constrained by other factors:

The effort of America to forge a Union; to take 13 originally independent colonies and now 50 United States and to craft a system of federalism and democracy and liberty has been a unique and formidable accomplishment. It has been tempered by dark, and unenviable moments – some of which, too, are part of the lessons from our experience that I will discuss – but we are now more than 200 years old; and those seeking liberty and opportunity still enter our doorstep, often at great physical and political peril. We, too, have much to offer by way of example and inspiration.


Adolph Hitler and Francisco Franco

I am also constrained by a second factor: namely, the other characteristics in the European experience; those characteristics that have spawned radical ideologies and the harsh and systematic oppression of liberty and human

dignity. For hundreds of years, the nations of Europe have been engaged in warfare; sometimes localized and twice global. The ominous figures of Franco and Salazar, Mussolini and Hitler; and the ideologies of Marx, Lenin, and Engles still find poignant reverberations in contemporary society. We, in America, have felt those characteristics and their reverberations.


Vladimir Lenin

When our first president, George Washington, spoke in his Farewell Address to the nation in 1796, he spoke about the history of Europe and the caution America should exercise in becoming entangled in European affairs. The passage of time and the evolution of circumstances has severely dimmed America's caution but not the legitimacy of Washington's underlying view of Europe's history.

The challenge to Europe in going forward is substantial. Unity of the grand geographical and functional nature you now seek is not in your collective tradition, except as part of monarchies or dictatorship. The means you chose for meeting such a grand challenge are among the most difficult forms of governance, as both our experiences have demonstrated.

It is with this perspective in mind that I offer some thoughts on the lessons of the American Experience.

II.
THE LESSONS

1. The Value of the Idea

America was founded on an Idea: the idea of individual liberty and equality. It was an idea deeply reflective of the 18th Century Enlightenment; and embodied, first and foremost, in our Declaration of Independence, when we said:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are life, liberty and the pursuit of happiness -

It was this Idea – the Idea of individual equality and liberty – that moved men to unite in a common venture. It was a transcendent idea, not empirical. There had been no comparable experience from which we could take comfort. Human history could not justify the Declaration of Independence.

Upon this Idea, however, we founded a Republic that, in geographic terms, was more than 1,000 miles in length – twice the distance between London and the eastern most perimeter of Germany. We did it in 1787.

What we did not do was merely to unify 13 colonies. The common value that we shared – what moved men – was not to declare the existence of a "United" States but to declare the principles upon which it was founded and must strive to attain.

I cannot emphasize strongly enough the importance of the timing and nature of this Idea. We would be a different nation, and I believe our practice of federalism would be dramatically different, if we sought to forge a common venture in politics and government today. The power of the Reagan-Thatcher-Kohl notion of the free-enterprise system and the so-called virtues of the "market forces" have elevated a set of values that appeals to the baser, more self-centered motives of mankind. These are not the values of the Enlightenment or, to me, the values upon which nations endure or men are moved to do good.

The Idea – the existence of the Idea and the means for assuring its attainment – is fundamental to understanding the practice of federalism in America. In order to do so, we must return to our Constitution; to the Amendments we enacted to protect individual rights – what we refer to as the Bill of Rights – and to the most important institution we created to preserve the Idea and to give meaning to federalism: the Supreme Court of the United States.

2. The protection of Individual Rights Against the Action of Government

Throughout the debate over the ratification of our Constitution there existed a deeply-rooted, strongly held belief in the need to add to the Constitution a Bill of Rights: an enunciation of the restrictions imposed on government in order to protect and enhance individual rights, liberty, life and property. Such an effort sought, in large measure, to further transform the principles and rights reflected in the Declaration of Independence into the daily governance of America.

Within a few years twelve such Amendments were added to our Constitution. There are now 27. These Amendments include individual, federally recognized rights directly applicable to the people.

Two of the founders of our nation took the lead in proposing these original Amendments – this Bill of Rights – James Madison and Thomas Jefferson. But it was Jefferson, then serving as Ambassador to France, who understood which institution would now emerge as the guarantor of those federal rights in the context of the federal-state relationship.

George Washington

The "legal check," on the power of government, Jefferson said, has been "put into the hands of the judiciary."

It was among our First President's most important tasks. In 1789, President George Washington wrote 'That the due administration of justice is the firmest pillar of good government. . . [T]he judicial department is essential to the happiness of our country and the stability of its political

system."

The remaining, central question confronting the framers of our Constitution was how to enforce and compel obedience to the Bill of Rights set forth in our Constitution. We chose to do so through the federal judiciary by declaring it to be paramount over all the individuals within the nation, and all the state legislatures and governors that compose it.

In Article VI, Section 2 of the United States Constitution, it is provided that:

> This Constitution and the laws of the United States, which shall be made in pursuance thereof. . . shall be the Supreme Law of the land; and the judges in every state shall be bound thereby; anything in the. . . laws of any state to the contrary notwithstanding.

What this means, simply put, is that federal law, as declared and enforced by federal courts, is the supreme law of the United States and that, as a legal and binding matter, the Supreme Court and the federal judicial system can – as it has on many occasions – protect the rights of individuals against the actions of state legislatures and state governors. And, any final decision of the highest court in any state can be reviewed by the Supreme Court of the United States.

With important exceptions – reflected in our history – this principle has endured and become settled to the proper functioning of federalism.

Oliver Wendell Holmes, who was a member of the Supreme Court from 1902 through 1932, and one of our most highly respected jurists made the following observation:

> I do not think the United States would come to an end if we lost our power to declare an Act of [the federal] Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.

At stake for Holmes was, in large measure, the need to preserve the idea of freedom and liberty and individual rights upon which the nation was founded and federalism defined.

3. The Practice: The Enduring Fight to Preserve the Idea

As a practical matter, how has this worked? How has the Idea of individual rights and the American commitment to preserve it provided a lesson of enduring consequence concerning federalism?

As part of the answer to that question, I would like to state a proposition that has resonance in the American experience. Prejudice and discrimination, based on nationality, race, religion or gender, or the deliberate repression or denigration of political

views that are not shared by the majority are more frequently and intensely felt on the state and local level. I believe it is fair to say that also is the European experience.

There have been exceptions to this proposition, as we both are aware. But those exceptions often have evolved from the failure of national governments and courts of law to intercede promptly and to declare forcefully that individual rights and unpopular political views are legitimately held against the will of the majority, even when that will is expressed through state government.

As America grew geographically, and in population and diversity, this proposition was severely challenged. The challenge has centered on matters of race, nationality and gender.

As you all are aware, the history of the United States – including during its time as colonies – has been tempered by war and organized violence within its own boundaries. From its earliest days, America was prepared to engage those who challenged its territorial integrity, particularly when that challenge was on the geographical periphery of its boundaries.

Prior to the American Revolution, we organized militia to confront the French and hostile native American tribes in the northwestern most part of the colonies. Shortly after the Revolution, we were prepared to fight the French and Spanish in the southeastern United States; what is today Louisiana, Mississippi, Alabama and Florida. We fought the Mexican and French governments on the Western periphery of the nation; what is today Texas, Arizona, New Mexico and California.

Throughout America's entire movement westward in the 19th Century – well beyond the confines of its original colonial boundaries – it was frequently engaged in military conflict on its periphery, mostly against native Americans. We did it with an arrogance and a certain conceit about who we were and what was important to us.

But we learned early on – and supported it with force – that the geographic periphery of the nation, including areas clearly not within our formal authority – were as vital to our integrity and purpose as those geographic areas at the heart of the nation. We did so largely because we believed in the Idea upon which we were founded.

The Civil War

But the greatest challenge to America – reflective of both its darkest and most humiliating characteristics and, in some ways, its brightest, shinning moments – was our Civil War.

There were many, complex reasons for the Civil War but in the end, it was really an intense, bloody conflict over the intellectual soul of the nation's reason for

being; that is,

> What did the Declaration of independence mean? When it spoke to the Idea – that all men are created equal and endowed by their Creator with certain inalienable rights – did it include Negro slaves?

As you all may be aware, for decades prior to 1861 – when the Civil War began – our political institutions – Congress and the President – sought, through compromise and accommodation, to avoid confronting the meaning of the Idea embodied in the Declaration of Independence. They were unable to do so. The states of the south asserted their own independence. They spoke of state's rights. In some respects these efforts at accommodation, and their failure, may be instructive to your own efforts in the former Yugoslavia – which sits squarely within the heart of the European Union.

An opportunity existed within the United States – in 1857, before the Civil War began – for the Supreme Court of the United States to reaffirm the Idea embodied in the Declaration of Independence. Its role in defining the federal-state relationship and in exercising the power granted to it to do so was undisputed. To its discredit, the Court failed to understand and to seize the opportunity.

In what we in America refer to as the Dred Scott Decision, our Supreme Court was confronted with a fugitive slave whose owner wanted him returned. The slave's defense was that he was a free men; the owner's position was that the slave was mere property.


Dred Scott

The Supreme Court concluded that Dred Scott was property. In doing so the Court failed – as did our political institutions – to declare as the law of the land the Idea upon which the nation was founded. It was a dark moment in American history. The preservation of the state's rights were more important than the individual rights upon which federalism was based.

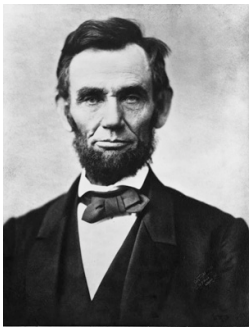
But it was not a cause lost to those who continued to believe in the Idea.

In November 1863, toward the close of our Civil War, President Abraham Lincoln stood amidst the solemnity and death of the battlefield at Gettysburg. He was there to dedicate this site of War as a cemetery. And, as he had throughout his life as a public servant, he sought to reawaken the Idea that was the basis for America's founding.

"Fourscore and seven years ago," Lincoln began, "our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."

He then ended his speech with a call for a renewed dedication to the Idea. He said:

> It is . . . for us to be here dedicated to the great task remaining before us. . . that we here highly resolve that the dead shall not have died in vain, that the nation shall, under God, have a new birth of freedom, and that the government of the people, by the people, and for the people, shall not perish from the earth.


Abraham Lincoln

Within less than a decade after President Lincoln's speech, the nation approved three new Amendments to our Constitution – to that section we originally called our Bill of Rights.

Those three Amendments not only made slavery a violation of our Constitution; they also made clear that the fundamental basis for the federal-state relationship was the dignity and equality and protection of the individual; his life, liberty and property and without regard to his race, religion or national origin. We had fought a War to preserve the Idea.

It has been more than 100 years since this reaffirmation of the Idea and its relationship to federalism was made. It has not been a settled path.


Bartolomeo Vanzetti and Nicola Sacco

In the early years of this century, as millions of Europeans sought to enter the United States, ethnic and political prejudice against those immigrants emerged with great power. This was particularly so among state legislatures, state governors and state courts. Much of this prejudice emerged in the infamous and shameful prosecution of two men, Nicola Sacco and Bartolomeo Vanzetti, accused of bank robbery and murder in the State of Massachusetts. Their real crime, as described by one of our former Supreme Court Justices, was that "both were of alien blood, [with an] imperfect knowledge of English, . . . unpopular social views, and . . . opposition to the [first world] War." They were unjustly convicted and sentenced to death; their individual rights under our federal Constitution deliberately ignored by state officials in order to satisfy local bigotry.

On five occasions, Justices of our Supreme Court were asked to stop the execution of Sacco and Vanzetti because of the prejudicial conduct of the state governor and the state courts. They refused. The primary reason given was the need to protect the state's right to conduct its own affairs. It was a sad moment; an enduring stain on the Court's history.

It failed to vindicate the fundamental Idea for federalism: the protection of individual rights and unpopular political views.

More recently, when our political institutions – federal and state – were unable to agree on the preservation of the Idea, the Supreme Court was the institution that provided definition to the federal-state relationship.

Civil Rights Violence

We experienced this in the 1950's and 1960's, when the nation was confronted with massive resistance – some very violent – to the integration of public schools by African-Americans over the objection of state legislatures, local Boards of Education and state governors. It was the Supreme Court that ruled, and has consistently sought to enforce since that time, that state legislatures and governors must affirmatively guarantee the individual, federal right of all Americans to the equal protection of the law.

The lesson is clear: in the United States, when the federal judiciary, particularly the Supreme Court, has declined to protect individual or minority rights against the actions of state legislatures and governors or the popular will, the effect has been to move the nation away from the fundamental Idea upon which it was founded.

III.
THE ELECTION: THE DEBATE ON FEDERALISM

The debate about federalism that tempers the current Presidential election has deep historical origins. In some respects, it is a debate about what lessons we have learned from our own experience. It centers around the role of the Supreme Court and whether its responsibility is to protect the rights of individuals or to enhance the rights of state governments.

For almost a decade now, the Court has moved away from protecting individual rights. It is a departure from the Idea upon which the nation was founded. That movement coincides with and is largely reflective of the ascendancy of Ronald Reagan. The political and human issue that once symbolized this tension in America was race and nationality. Today, that issue is gender; or the right of a woman to choose the use and fate of her own body and that of her unborn child.

In 1973, the Supreme Court of the United States decided, for the first time, that it would be a violation of a women's individual, federally recognized right for a state government to prohibit her from choosing whether to terminate her pregnancy. In Roe v. Wade, the Supreme Court considered a challenge to a law enacted by the State Legislature of Texas that made it a crime to "procure an abortion". In limiting the right of the state to impose such a restriction, the Court recognized:

> that a right of personal privacy . . ., does exist under our Constitution. In varying contexts, the Court or individual justices have, indeed, found . . . the roots of that right in the [various Amendments – or the Bill of Rights – of the Constitution].

These individual rights included those contained in the 14th Amendment enacted after our Civil War. One Justice who supported the Court's decision explained the notion of individual liberty. He said:

> In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed . . . The Constitution nowhere mentions the specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the . . . Fourteenth Amendment covers more than those freedoms explicitly named in the [original] Bill of Rights.

The Supreme Court did conclude that circumstances might exist where a state legislature could impose restrictions on a woman's individual choice. The important meaning of the Court's decision, however, is its intellectual and practical point of departure: to protect individual, federally recognized rights against state action.

The challenge to this historically based principle came from those who claimed that state governments had the authority to diminish this recognized, individual constitutional right. Preeminent among them was Ronald Reagan.

In his Inaugural Address as President, on January 20, 1981, Ronald Reagan said to the nation:

> It is my intention . . . to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people.

This was a direct, unequivocal effort to assert the rights of states not only at the expense of the federal government but at the expense of those individual rights the federal judiciary and the federal constitution sought to protect.

The most widely recognized statement in President's Reagan's speech was even more emphatic about diminishing the responsibility of government: "Government," the President stated, "is not the solution to our problem; government is the problem." But historically, it is government – particularly the federal judiciary – that provided protection to individual rights and definition to the federal-state relationship.

Since the Reagan Presidency, the composition of the Supreme Court has changed. So, too, has its commitment to individual rights and minority political views. This is particularly clear with respect to abortion.

In a series of decisions, the Supreme Court has taken the individual, federal right enunciated in Roe v. Wade and significantly diminished it by giving to state legislatures the right to intrude upon, and diminish that right. Recently, in Planned Parenthood v. Robert Casey, Governor of Pennsylvania, decided in June, 1992, the Court stated:

> [I]t must be remembered that Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the state's 'important and legitimate interest in potential life' . . . That portion of the decision in Roe has been given too little acknowledgement.
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> * * *
>
> [T]he state is [not] prohibited from taking steps to ensure that this choice is thoughtful and informed.
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> * * *
>
> The Constitution does not forbid a state or city, pursuant to democratic process [i.e., the act of the state legislature] from expressing a preference for normal childbirth.

There can be little question that in 1992 the Supreme Court's intellectual and practical point of departure has changed: it is to enhance the rights and the powers of the state government.

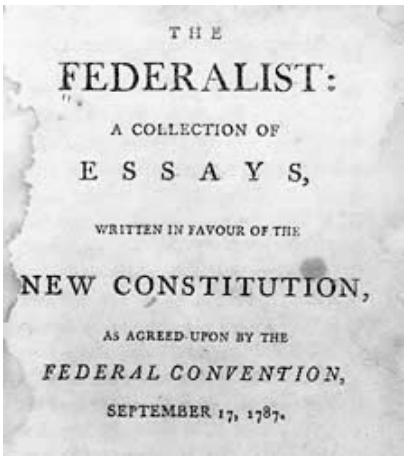
As I said at the outset, the issues involved here also are symbolic of a broader debate about federalism and the nature and extent of the federal government's authority to protect and enhance individual and minority political rights. They should be understood to include much more than the individual, federal right of a woman to chose to terminate a pregnancy. They include the preservation of the Idea upon which the nation was founded.

IV.
CONCLUSION

I have two closing thoughts:

Following the drafting of our Constitution in 1787, it was submitted to each of the 13 states for individual ratification. That debate, within the various states, was strongly affected by publication and dissemination of a pamphlet and series of writings entitled "The Federalist Papers". They were written by three individuals who were members of

the Constitutional Convention and later prominent members of America's first government: James Madison, as a member of Congress; Alexander Hamilton, as Secretary of the Treasury; and John Jay, as the First Chief Justice of the Supreme Court.


THE
FEDERALIST:
A COLLECTION OF
ESSAYS,
WRITTEN IN FAVOUR OF THE
NEW CONSTITUTION,
AS AGREED UPON BY THE
FEDERAL CONVENTION,
SEPTEMBER 17, 1787.

The Federalist Papers reflected an effort by those national figures who believed in Federalism to engage the opponents of ratification in a spirited, intellectual and political debate within the various states.

These Papers – and the manner of their use – made the debate over the fate of the Constitution and the principles that tempered Federalism truly a national debate. It meant, too, that those with confidence in the practical virtue of a federal system could, in turn, be engaged and challenged about the merits of these principles.

The Federalist Paper have retained their intellectual power. They continue to be cited by our Supreme Court as an authoritative source for interpreting the meaning of the Constitution and the hopes of those who wrote and approved it.

I cannot urge you strongly enough to assure that those among you that believe in the virtues of federalism, and the values and special tradition that it reflects, not leave the fate of the European Union to those who seek comfort in the parochialism of state's rights, or, as you refer to it, "subsidiarity." Your grand vision needs forceful and clear advocates.

Finally, I would like to end where I began.

Some time ago, the British philosopher Alfred North Whitehead, spoke with admiration about the meaning of the American experience. He said:

> The men who founded your republic had an uncommonly clear grasp of the general ideas that they wanted to put in here, then left the working out of the details to later interpreters, which has been, on the whole, remarkably successful. I know of only three times in the Western world when statesmen consciously took control of historic destinies: Periclean Athens, Rome under Augustus, and the founding of your American republic.

I believe that today Europe is on the verge of a similar historic destiny. I hope that, in the end, the philosophic successor to Lord Whitehead will speak not of three but of four times in the Western world when statesmen consciously took control of historic destines; and that when it is so proclaimed, we can all truly celebrate the founding and the success of the European Union.