

FEDERALISM AND REGIONALISM: HOT? YES! ENTHUSIASTIC? I'M NOT SO SURE

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SUMMARY: I. *Federalism in the U. S.: law and politic science*. II. *Federalism and Constitutional Law*. III. *The dramatic change*. IV. *Skunk at the garden party?* V. *Ruminations about federalism and regionalism outside the U.S.*

Federalism is a hot topic these days. Not so many years ago, I would have laughed had someone said this. In the United States, the interesting issues of federalism were thought to have been long-settled, and there was little reason to believe that federalism would be a topic of much interest in the rest of the world. Of course, there were federal systems and federalism was important for the day to day functioning of regimes, but as a topic of intellectual interest, it seemed barren. What more could be said about it? My, how things have changed! Devolution, regionalism, the evolution of the European Union, and even U.S. Constitutional Law have brought the topic back to the fore. The organizers of this conference are to be commended for the timely attention to this important topic, and for attracting so many eminent scholars from around the world.

The worldwide spread of democracy is probably the most significant political event of our era, but the allocation of power between the center and the local is an issue of much importance both in the actual construction of regimes and in the scholarly literature. Decentralization, devolution, federalism are words that dominate many discussions about regimes around the world.¹ And surely what is transpiring with regard to the Eu-

¹ As one example, see Rodriguez, Victoria, *Decentralization in Mexico: from Reforma Municipal to Solidaridad to Nuevo Federalismo*, Boulder Co., Westview Press, 1997.

ropean Union is one of the great political experiments of our time. While many Europeanists insist that federalism is an inappropriate way to describe what is going on there, one is tempted to say that if it walks like a duck, and quacks like a duck... Whether or not one calls the European Union a federal system depends upon one's definition of federalism, but the struggles are no doubt about power at the center vs. power at the level of the states. Even as the mess in Iraq is wrestled with, many are talking about the need for a federal structure to accommodate the very different religious and ethnic communities there. Likewise, in other areas of the world where secessionist movements are occurring, some are arguing that the response should be to create federal systems and not allow secession.² There has also been a surprising turn with regard to federalism in the United States. Recent rulings by the U.S. Supreme Court have staged a "revival" of federalism. As would be expected, articles in law reviews have proliferated on the topic in recent years. What had come to be seen as a boring topic, at least among many scholars in the United States, is now a topic of great relevance and interest.

Any topic this important will have many levels of complexity. First, of course is what do we mean by federalism, regionalism, decentralization, etc. Even if we agree on definitions, there will undoubtedly be a range of opinions about the desirability of federal structures; but as a general proposition, there seems to be a fair amount of enthusiasm for increasingly decentralized governing. I fear that I may be perceived to be the skunk at the garden party. This is ironic because I am a student of the country that many credit for having developed the concept of federalism; indeed some have said that federalism is the only original contribution made by the United States to political theory. Moreover, federalism is so much a part of our structure that it would be unthinkable not to have a federal system. However, in a world where decentralization, devolution, and federal-like structures such as the European Union are being celebrated, I come with a somewhat critical, or at least a cautionary tale.

This paper is divided into two main parts. First, I begin by examining the state of federalism in the United States, and I attempt to explain some dramatic recent changes. I then offer reasons for why the experience of the

² See Horowitz, Donald, "Secession as a Problem of Political and Constitutional Theory", Paper presented at Constitutional Theory Seminar, University of Texas Law School, Fall 2003.

United States restrains my enthusiasm about federalism. Then, because of the unique opportunity this conference provides to be with so many distinguished scholars of federalism, I take the opportunity to put forth some ideas for their reaction about federalism and regionalism more generally. I do so humbly, however, because I ruminate about areas other than the United States where these scholars have far more expertise than I.

I. FEDERALISM IN THE U.S.: LAW AND POLITICAL SCIENCE

I write this essay as someone who wears two hats. I am both a professor of law and a professor of political science. In some countries, those disciplines are so separate that to blend the two seems strange. In other contexts, the only thing remarkable about noting that one is a professor in both disciplines is that one chooses to mention it. I do so here because I shall try to perform several separate tasks today, some of which draw more on the law and others that draw on political science. I also make note of different disciplines to point out that in many ways the different literatures on federalism in the United States have very different foci. Depending upon which literature one reads, one might get a very different impression of what is actually happening and what questions are considered important. The literatures often start at the same place the founding. The way the United States was formed from thirteen colonies sets the parameters. Both literatures pay special attention to the theory of federalism, especially as discussed in the *Federalist Papers*,³ and lately, increased attention has been paid to the writings of the antifederalists.⁴ Both law and political science address the values that are to be

³ The *Federalists Papers* were originally pieces written by James Madison, Alexander Hamilton, and John Jay under the pen name of Publius as an effort to convince the people of New York to vote for the U.S. Constitution. Despite their practical purpose, they contain some of the most important political theory about the United States and are still referenced today along side the Declaration of Independence as important documents to help understand the government that was created.

⁴ Terminology can get a bit confusing here. Historically, the Federalists were those who favored creating a nation rather than retaining a loose confederation of states. As such, their arguments were designed to argue for the benefits of giving certain powers to the national government and creating a federal system rather than a confederation. The reality at the time was such that it was unthinkable to move all power to a national government. Of course, after the nation was created, those who had been federalists and supported the creation of the United States did not all agree on how much power should be give to the federal (national) government. The development of political parties led to a

served by a federal structure. Soon, however, the focus of the literatures diverges. This is not unusual given that they are different disciplines. Moreover it is not the case that legal scholars and political scientists completely ignore each other or have completely unrelated concerns, but their foci and perspectives tend to differ. Oversimplifying, the legal literature tends to focus on the question of sovereign power and the role of the courts as referee in such questions, while the social science and economic literatures tend to look at how power is being allocated empirically and how the system actually works.

Legal scholars came to be less and less interested in federalism. Reading the legal literature until the mid-1990's, one might have the impression that issues involving federalism had at one time been very important, but it was no longer a question of great theoretical interest. The important Constitutional and legal issues involved with federalism had theoretically been settled since the late 1930's. To be sure, many legal scholars noted that states retained much power, and there were debates about whether there were "political safeguards" to federalism that would protect states despite the retreat of courts from protecting their sovereignty.⁵ The reality of our federal system also posed some practical considerations for legal scholarship. But given the Supreme Court's long and persistent retreat from enforcing limits on the national government, scholarly interest waned. Meanwhile in the public policy literature, federalism was alive and kicking. Many books and articles were being written about intergovernmental relations and "fiscal federalism" especially as the Nixon administration experimented with new intergovernmental relationships. The federal government was shifting the ways it transferred money to the states. Categorical grants from the federal

Federalist Party, whose members included the likes of John Adams, Alexander Hamilton, and Chief Justice John Marshall, that favored more power for the national government. Their political opponents generally envisioned more powers being retained by the states, the most notable figure being Thomas Jefferson. As such, they were "anti-federalists" as it related to the Federalist political party, but it did not mean that they agreed with the old anti-federalists who had opposed the creation of the United States. Today, when one calls oneself a federalist, it usually means that one is in favor of reducing the power of the federal (national) government in favor of the states, as in the example of the organization known as "The Federalist Society". But saying one is a federal man or has a federal perspective would generally mean one favoring the national government.

⁵ See Wechsler, "The Political Safeguards of Federalism-The Role of the States in the Composition and Selection of the National Government", 54 *Colum. L. Rev.* 543 (1954).

government, which had a high degree of federal control, were being replaced by block grants and general revenue sharing that gave far more control to states and state agencies. These different intergovernmental arrangements led to all sorts of metaphors such a layered cake federalism and marble cake federalism. With the ascent of Ronald Reagan, and the Republican Party becoming controlled by those far more antagonistic to the role of the federal government in providing social services, social scientists were quite attuned to efforts to reallocate power to state governments. Nevertheless, even within political science, such policy studies were not at the center of studies of American government. Within modern political science, there is a bias toward studying the federal government, and there is less attention given to intergovernmental relations and fiscal policy concerns. As stated earlier, however, things have changed.

Political Scientists are paying more attention to federalism and regionalism now for the same reasons that this conference exists. Countries throughout the world are reallocating political power which is of deep interest to political science, but the focus is not so much on the United States. More important in the United States is that federalism is again on the front burner of legal scholarship. What precipitated the change are some dramatic opinions from the U.S. Supreme Court. The result is what has been described as a “revival of federalism”. There is, no doubt, a revival of federalism scholarship. Whether there is a sustainable counterrevolution in legal doctrine or in practice remains to be seen. Nevertheless, in the United States, the role of the Supreme Court and Constitutional Law is so intertwined with the issue of federalism that it is important to understand what the Court has done and what it has not. As Alexis de Tocqueville noted in his oft-quoted aphorism that in the United States, sooner or later every political question turns into a legal one. To understand the current Constitutional revolution requires a brief recounting of the history of the Constitutional law of federalism as expounded by the U.S. Supreme Court.

II. FEDERALISM AND CONSTITUTIONAL LAW

After the Americans won the revolution against Great Britain, there was an effort by the states to continue to work together under Articles of Confederation. The Articles gave little power to the center and they were highly ineffective. Delegates gathered in Philadelphia to amend the Articles of Con-

federation, but they sent out a Constitution for ratification instead. Whether or not they were justified in doing so, the rest is history. The Constitution created a nation, but it still left most power to the states. The national government was limited to acting only upon those powers that were enumerated in the Constitution; all other powers were reserved to the States.⁶ By virtue of the Supremacy Clause,⁷ if a power was delegated to the federal government, the laws of the nation superseded the laws of the state; but the federal government was limited to only those powers that had been delegated, and they were few. The relationship of the nation to the states was one of the main issues in the founding of the United States.

It did not take long for the issues involving sovereignty to reach the Supreme Court. Questions of federal law are heard in both state and federal courts. In a case decided in 1816,⁸ the U.S. Supreme Court held that it had appellate jurisdiction over the Virginia Supreme Court. Virginia did not deny the supremacy of federal law over state law, but Virginia argued that to allow the federal supreme court to act directly upon and reverse rulings of a state supreme court would be to invade the state's sovereignty. The U. S. Supreme Court disagreed. According to Justice Story:

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principle which we cannot admit, and draws conclusions to which we do not yield our assent. It is a mistake to believe that the constitution was not designed to operate on states in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives (emphasis added).

⁶ Though this principle was generally understood, the Tenth Amendment to the Constitution expressed it directly. "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".

⁷ U. S. Const. Article VI Paragraph 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the Contrary notwithstanding".

⁸ *Martin v. Hunter's Lessee* 1Wheat. (14 U.S.) 304 (1816).

The most famous case, however, was yet to come, *McCulloch v. Maryland* (1819).⁹ Chief Justice John Marshall began his opinion with an ominous warning:

In the case now to be determined, the defendant, a sovereign state denies the obligation of a law enacted by the legislature of the Union, and the plaintiff on his part, contests the validity of an act, which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

Unfortunately, we now know that “hostility of a still more serious nature” would come—The Civil War. This case is famous for many reasons.¹⁰ It established that the federal government had “incidental” and “implied” powers. Chief Justice Marshall affirmed that the federal government was limited to the enumerated powers in the Constitution with other powers being reserved to the states, but he noted that the government had the right to use whatever means (*i. e.*, the incidental and implied powers) necessary to accomplish those ends so long as they did not conflict with the Constitution. Such means need not be enumerated. He offered many justifications for this power, among them a broad definition of the “necessary and proper” clause.¹¹ Marshall also made another important move with regard to federalism. He recounted the history of the adoption of the Constitution and made much of the fact that it was submitted to *the people* for ratification (in ratifying conventions) and not to state legislatures. He insists that the Constitution emanates from the people. He notes:

⁹ 4 Wheat. (17 U.S.) 316.

¹⁰ The opinion was also famous for the line “the power to tax is the power to destroy”.

¹¹ Article 1 Sec. 8. “Congress shall have the power to. Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers (that is the enumerated powers)”.

From these conventions, the Constitution derives its whole authority, established” in the name of the people... The assent of the states, in their sovereign capacity, is implied in calling a convention, and submitting that The government proceeds directly from the people; it is “ordained and esinstrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation and bound the State sovereignties (emphasis added).

Fast forward to the 20th Century. As we all know, the power of the national government grew, and it did so at the expense of the states. Though the Civil War in the 19th Century had vanquished claims that states could interpose their will to thwart the national government, the national government was still only a limited government of enumerated powers. So how did it grow? The enumerated power from which the federal government drew most of its authority to legislate was the power to regulate commerce among the states, usually referred to as the Interstate Commerce Clause.¹² Most Americans probably do not know that one little clause is the basis for most federal legislative power. Authority to legislate also comes from some other provisions in the Constitution, but the Commerce Clause has been the source of most federal legislative authority. Most Constitutional struggles over federalism have been about whether or not Congress has exceeded its authority under the Commerce Clause. From the early days of the republic through the first part of the 20th Century, the Court rarely overturned Acts of Congress emanating from the Commerce Clause, though Congress had not legislated all that much until the late 1800’s. With the industrial revolution and other changes, Congress began to regulate, often replacing the State’s powers. When it did, cases came before the Supreme Court arguing that congress was exceeding it authority. For example, the federal government began to regulate *intrastate* railway rates,¹³ because of their effect on interstate commerce. It regulated price fixing in stock-

¹² “The Congress shall have the power to... regulate commerce with foreign nations, and among the several states and with the Indian tribes”, Article I sec. 8.

¹³ *Houston E. & W. Railway Co. v. United States* [The Shreveport Rate Case] 234 U.S. 342 (1914).

yards,¹⁴ unfair, discriminatory, or deceptive practices by meatpackers¹⁵ shipment of tainted foods,¹⁶ and other such things. Previously, such regulations would have belonged to the police powers of the states. The Court often used different rationales to show a relationship to interstate commerce, but once it did that, the Supremacy clause kicked in and allowed the federal laws to supersede those of the states. The Congress also moved into other areas that were even less related to interstate commerce because the purpose of regulation was moral, not really any meaningful effect on commerce. Regulating moral issues was at the core of police powers that had traditionally belonged to the states. So for example, the Congress passed, and the Supreme Court upheld as valid, federal authority to ban the shipment of lottery tickets in interstate commerce.¹⁷ It banned the transportation of women over state lines for immoral purposes.¹⁸ Then comes the first revolution. The authority of Congress to regulate broadly all came to a stop in 1918 when the Court struck down a congressional act that excluded the products of child labor from interstate commerce.¹⁹ The Court dramatically restricted the definition of what counted as interstate commerce. So, for example, it claimed that manufacturing preceded commerce so that regulations involving the manufacture of goods were beyond Congress' power. That power belonged to the states to regulate things such as child labor, minimum wages etc.) It was a new era in American federalism.

With the advent of the Great Depression and the election of Franklin D. Roosevelt as president, the federal government became quite active in seeking to regulate the economy. FDR's "New Deal" produced a torrent of legislation seeking to deal with the problems caused by the Depression. The Supreme Court, however, struck down many of the programs as unconstitutional exercises of federal power. Most laws were struck down by a 5-4 vote. What followed was Roosevelt's famous attempt to pack the Court by increasing its size so that he could appoint enough justices to affirm his programs. The Court-packing plan was defeated in one of FDR's few legislative losses. In 1937, however, one of the justices switched sides and the

¹⁴ *Swift & Co. v. United States*, 196 U.S. 375 (1905).

¹⁵ *Stafford v. Wallace*, 258 U.S. 495 (1922).

¹⁶ *Hippolite Egg Co. v. United States*, 220 U.S. 45 (1911).

¹⁷ *Champion v. Ames* 188 U.S. 321 (1903).

¹⁸ *Hoke v. U.S.* 227 U.S. 308 (1913).

¹⁹ *Hammer v. Dagenhart* 247 U.S. 251 (1918).

New Deal legislation began being upheld.²⁰ Not too long afterward, many of the justices who had opposed federal power retired, and Roosevelt appointed justices who were sympathetic to national power. The Court took the position that it was for Congress to determine what affected interstate commerce and it was not for the Court to second guess.

From 1937 to 1995, there was not a single federal act struck down as exceeding Congress' authority to regulate commerce. The power was used broadly. For example, it was used to pass much of the Civil Rights legislation of the 1960's. The purpose was clearly to ban discrimination, but discrimination affected commerce and that was enough for the Court.²¹ Most people thought that Constitutional Law had evolved such that the federal government was empowered to legislate with little fear of being overturned because of lack of authority to act. To be sure, the Supreme Court might be active in overturning legislation as violative of individual rights, but that was different from suggesting that Congress did not possess the legislative authority to act.

III. THE DRAMATIC CHANGE

Then in 1995 there came a thunderbolt: *United States v. Lopez*.²² Congress passed the "Gun-Free School Zones Act", which made it a federal crime to have a gun within 1000 feet of a school. In a 5-4 decision, the Supreme Court overturned the law declaring that it was not a valid exercise of Congress's power to regulate commerce. Not since 1936 had, the Court struck down a Congressional law as exceeding its authority under the Commerce Clause. There was some reason to believe that this case, dramatic as it was, was an exception for some technical reasons. But the Supreme Court soon showed that it meant business. In 2000, in *United States v. Morrison*²³ the Court struck down another federal law, "The Violence

²⁰ This is often referred to as "the switch in time that saved nine" a pun on the familiar saying "a stitch in time saves nine". The switch was not solely related to Commerce Clause issues, but also with other New Deal efforts. There is a debate among historians about the specifics of Justice Owen Roberts decision to switch sides and whether or not he did so because of the court packing plan.

²¹ See *Heart of Atlanta Motel v. United States* 379 U.S. 241 (1964) and *Katzenbach v. McClung* 379 U.S. 294 (1964).

²² 514 U.S. 549 (1995).

²³ 529 U.S. 598 (2000).

Against Women Act”, as exceeding Congress’s authority to act. Unlike the gun legislation, the Congress extensively documented how violence against women had an impact on interstate commerce. The Supreme Court still wasn’t buying. It opined that anything could be seen as affecting commerce which had the effect of giving the federal government a blanket power to legislate. It made the concept of enumerated powers no longer meaningful. That, said the Supreme Court, undermined the very basis of our governing arrangement. In a post-*Lopez*, post-*Morrison* world, if the activity being regulated is not seen as primarily economic (or somehow involves protecting the channels or instrumentalities of commerce) the regulation exceeds federal authority. There has been a torrent of debate over the Supreme Court’s position, including what the language of the Court actually means. My summary is not nuanced, but no one doubts the extraordinary shift in understanding of federal power *vis a vis* the states by this Supreme Court.

The Court’s dramatic revolution with regard to federal power has come in its interpretation of other Constitutional provisions as well. In 1941, the 10th Amendment to the Constitution had been declared by the Supreme Court to be a “truism” that all is retained except that which is delegated. The Court said that the 10th Amendment had been passed to assure people that the understanding of the federal government being limited to enumerated powers was ensconced in the Constitution. But the Court said it posed no independent authority as a way to strike down legislation. The current Court, however, has now used the 10th Amendment as an independent source to limit the power of the federal government. In two famous cases, *Printz, v. U.S.*²⁴ and *New York vs. U.S.*,²⁵ the Court brought the 10th Amendment back to life. More importantly, what it has done is to reinsert the Court in to making judgments about sovereignty issues that had long been thought to be the prerogative of elected officials to make.²⁶ The cases said that the federal government cannot “commandeer” states to do the work of the federal government. Oversimplifying, in these cases the Court said that the federal government had the authority to act on its own, but

²⁴ 521 U.S. 898 (1997).

²⁵ 505 U.S. 144 (1992).

²⁶ There are numerous articles on this topic. See, e.g., Caminker, Evan H., “Printz, State Sovereignty, and the Limits of Formalism”, *The Supreme Court Review* (1997); Jackson, Vicki, “Federalism and the Uses and Limits of Law: Printz and Principle?” 111 *Harv. L. Rev.* 2180 (1998).

what it could not do was act in a way that placed burdens on states to adopt or enforce federal priorities. One justification was that it might confuse the electorate as to which level of government was responsible. Critics of these holdings go all the way back to the first case I discussed, *Martin v. Hunters Lessee* and note that the federal judiciary can “commandeer” state judges and has done so since the beginning of the Republic. Defenders argue that the two situations are not comparable. Debate rages over many aspects of these decisions, but for our purposes, no one would deny that these cases were important attempts to limit the power of the federal government and shore up the idea of sovereignty among the states.

There is yet another area where the Federalism revolution has manifested itself and the Supreme Court has enhanced the power of the states at the expense of the federal government. It is an area of law that is very complicated, and this paper is not the place to try to explain it. Briefly, however, the Court has held that Congress, through its Article I powers, cannot abrogate state sovereign immunity by authorizing private actions for money damages against states if the states do not consent to be sued. The idea harkens back to British law where the sovereign must consent to being brought into court.²⁷ There have also been rulings restricting Congress’ powers under Section 5 of the Fourteenth Amendment,²⁸ one of the other important sources of Congressional power. Though these rulings do not enhance the power of the states against the federal government *per se*, lessening of national power often increases state power *de facto*.

How does one assess this dramatic move by the Supreme Court? Will power now devolve to the states, and will the federal government be severely limited in its powers? My answer is no. This is not because the revolution on the Supreme Court is not real. It is. And it is not because Supreme Court rulings are of little importance; in the United States they are of huge

²⁷ The principal cases are *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999). For commentaries, see: Young, “State Sovereign Immunity and the Future of Federalism”, *The Supreme Court Review* 1999 (2000); Young, “Alden v. Maine and the Jurisprudence of Structure”, 41 *William & Mary Law Review* 1601 (2000); Jackson, “The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity”, 98 *Yale L. J.* 1 (1988); see Chermersky, “Against Sovereign Immunity,” 53 *Stanford L. Rev.* 1201 (2001).

²⁸ “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article”. The article does many things, but most notable it is the place in the Constitution that prohibits states from denying equal protection of the laws.

importance and effect. Rather there are other factors that will undo the revolution. One is internal to Constitutional Law and Supreme Court doctrine. Another has to do with the external environment. The first has to do with the Spending Clause of the Constitution.²⁹ The Court long ago held that federal government spending need not be related to the enumerated powers. States were free to accept or reject the money, but if they accepted the money, the federal government could put conditions on receiving the money. The conditions must be related to the purpose of the spending, but the Court has not insisted on a very tight fit. So for example, setting the legal drinking age for alcohol is a state function, but the federal government has conditioned receipt of highway building funds upon states setting a particular minimum age. The justification is that there is a federal interest in protecting the nation's highways, and drinking ages are related to that purpose.³⁰ Given the fiscal arrangements of our country, it is increasingly difficult for states ever to reject federal money. If the Supreme Court continues to clamp down on federal legislation, a resourceful Congress can probably achieve many of the same ends through the spending mechanism. As the Supreme Court seeks to reinvigorate federalism, it may narrow Spending Clause doctrine, but it has not yet done so.³¹

There is, I believe another reason to believe that the retrenchment of national power will not go very far. When major problems arise in the United States, the people generally turn to the federal government for solutions. During the Great Depression, people were willing to give unprecedented support to Roosevelt and the national government to try to solve the problem. When natural disasters occur, be they devastating tornados or floods, we turn to the federal government for disaster relief. As the problem of illegal drugs continues to wreck lives and causes increasing crime, politicians give the federal government increasing powers to combat it. This is noteworthy because fighting crime is often used as one of the quintessential examples of police powers reserved to the states. What is even more noteworthy is that it is Republicans who are the primary supporters of federalizing

²⁹ Art. I, Sec. 1. "The Congress shall have Power to lay and collect taxes...to pay the Debts and provide for the common Defence and general Welfare of the United States..."

³⁰ See *South Dakota v. Dole* 483 U.S. 203, 107 (1987)

³¹ See, Baker and Berman, "Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So", 78 *Indiana L. J.* 459 (2003).

crime. Republicans are the party most known for wanting to keep power at the state level.

And now there is September 11. The significance of that event is hard to overstate. Subsequent disagreement by Americans on the Iraq war might obscure the lingering effects of that day. That horrible day did as much to unify Americans and cause them to identify as one people as any event in my lifetime.³² In the wake of “9/11”, the subsequent anthrax scares, and continued threats of terrorism, it is not a good political context in which to try to restrict the powers of the federal government. National defense has always been a federal responsibility, but the effects of 9/11 and the anthrax scare go far beyond national security. It is a Republican President and Congress that are seeking more government control and centralizing it at the national level. Police, firefighters, emergency medical crews, local transit services are all seen as dealing with what are now considered to be national problems. The ability to separate the local from the national is becoming blurred for traditional police powers in the way that a nationalized economy no longer really could be parsed into inter vs. intra state. Especially when people are scared, they expect their national leaders to lead and perform. Questions about allocations of powers between the nation and the state seem to be of less importance.³³ Over time there will be ebb and flow between centralizing and decentralizing power, but I believe there are two many pressures to allow any enduring restriction of national power. If the future brings happier times, and if the Republican Party remains in power, we may well see political choices to lessen the role of Washington, but that is a different issue from structurally restricting federal action.

IV. SKUNK AT THE GARDEN PARTY?

I now turn to why I am a little less enthusiastic about the current enthusiasm for devolution of power. In the United States, federalism has contributed to or caused some of our largest failures. The federal structure was a major factor in leading the country to a civil war that killed more Americans

³² I was not alive during World War II, but the effect seems to be similar.

³³ See Greenhouse, Linda, *New York Times*. For a counter point of view, see Young, Ernest, “The Balance of Federalism in Unbalanced Times: Shoud the Supreme Court Reconsider Its Federalism Precedents In Light of the War on Terrorism?”, *Writ Findlaw’s Legal Commentary*, oct. 10, 2001.

than all of our other wars combined. Unfortunately, John Marshall's ominous warning in *McCulloch vs. Maryland* was realized. State identity and state control was so strong that Southerners were willing to destroy the Union and go to war to assure the primacy of states. And, the federal structure made possible the continuation of America's greatest shame—slavery and the latter day system of racial segregation. Indeed, in the 1950's and 1960's, "states' rights" often became a code word for continuing segregation.

The problems of federalism are not simply from a bygone era. Even today in a United States where the federal government has grown to be one of extraordinary power, federalism makes possible the differential treatment of U.S. citizens on matters of supreme importance. In some parts of the United States, people can be put to death for their actions; in other places, they cannot. Until last year, homosexuals could be convicted of a crime for their sexual activities in some jurisdictions and not others. And now, it appears that in some places gay couples will have the right and the protections of marriage in some places and not in others. Access to education, public health, and other services can vary tremendously depending upon which state one lives in. Though the all would agree that, slavery, the Civil War, and racial segregation were tragedies, the modern examples are more debatable. It is probably true that *but for* federalism, the death penalty would exist throughout the entire United States as would laws restricting the rights for homosexuals. My point here is not to condemn federalism or regionalism per se, but to suggest that the experience of the United States is one that urges caution, not unbridled enthusiasm for decentralization or federal arrangements. It is not always freedom enhancing. It brings about some good things and some bad things. Decisions about the allocation of power are always complex.

Proponents of federalism tout the fact that there are 50 laboratories (the 50 states) for public policy making which enables us to experiment and see what works, what doesn't, and it also allows for creativity. Another justification is that in a country as large as the U.S., it promotes cultural diversity and respects different cultures and traditions. But in many ways, slavery and racial segregation were permitted because of diversity. Slavery was seen by some as acceptable because of the plantation culture of the South. Later it was segregation because it was part of the "Southern way of life". Thankfully, no one today would make such arguments about slavery and segregation, but in some ways they were allowed to flourish

because of a tolerance for diverse cultures. Southerners still talk about “the Southern way of life”. There was and is a different culture in the South, much of which has nothing to do with race, and much of which is quite attractive. Attention to civility, honor, “Southern hospitality”, etc. are all supposedly Southern traits and can be reinforced because of our decentralized nation. But designing political systems to accommodate pluralistic cultures is tricky business. All nations, except perhaps the smallest and/or ones of extraordinary homogeneity, often have to balance contending aspirations. To what extent does one want to foster and protect cultural differences, and to what extent does one want to create a nation where the primary identity is with the nation and its preponderant values. There is even a war of metaphors in the United States on this. Do we want to be a “melting pot” that causes people to forget old prejudices and ways and become more like one another as Americans (as opposed to Irishmen, Mexicans, Italians, Africans, Texans, or New Yorkers); or do we want to be a “patchwork quilt” where we appreciate and encourage our differences and yet are woven into a beautiful whole? Of course we want both. The point, however, is that how one structures society generally, and its governing institutions particularly, can push one way or the other.

Much of our history of expanding liberties has largely been one of wresting power from the states, or trying to make states conform to a national standard. Our sad history of race related issues is the paradigmatic example. Segregation was able to continue for so long not because most Americans were racist; rather it was because where there was profound racism, governing structures made it hard to impose national standards. If one looks to the 1960’s in the United States as a time of great advances in civil liberties, much credit often goes to the Warren Court. The legend that has come to surround it is of a brave court asserting Constitutional principles over democratic tyranny. It did that, but not in the way it is often thought. The Warren Court rarely overturned federal statutes; rather what it did was overturn state practices that were outliers to the national norm.³⁴ The most dramatic example is issues dealing with segregation, but much of what the Warren Court did was to reign in police practices in some states and open up the political process in states that were mal-apportioned. In

³⁴ This point is made brilliantly in L. A., *Powe’s The Warren Court* (Cambridge, Harvard University Press, 200x).

short, the great civil liberties advances came largely by wresting power from states making them conform to national standards.

V. RUMINATIONS ABOUT FEDERALISM AND REGIONALISM OUTSIDE THE U.S.

I now move to shakier ground for me and turn to my ruminations about federalism and regionalism outside the U.S. As one who is not an expert on other nations, concerns that I have arise out of some of what I know as a political scientist and also from the experiences of the United States. I hasten to note, that it is a mistake to generalize from the U.S. experience to the rest of the world. This is especially true for those countries where there is no long tradition of power at the local level. Moreover, it is at this point that one needs to be more precise about terms. It is easy to use words like federalism and regionalism to cover many situations that differ in important ways. For example, there is a significant difference between a situation where the region is given power but can be reigned in as a matter of political choice vs. one in which the Constitutional structure locates the primary power at the regional or local level. Many of the problems for the United States arose because it was of the latter category whereas much of what is going on in the world today is in the former. The European Union is in the latter category, and I do think the experience of the United States is more relevant than most Europeanists believe. All of this simply reminds us of the age-old dilemma for those who study comparative politics or comparative law. To what extent can we learn from the experiences of other countries, and to what extent are things so different that comparison risks doing more harm than good? I leave it to others who know more about their situations than I to make those judgments, but I will put forth ideas for consideration.

Having spent a bit of time in Latin America, I fear that authoritarianism has become linked to centralization of power and anti-authoritarianism is associated with decentralization and regionalism. These associations are certainly understandable given history, and they may capture present day realities. But it is a mistake to assume generally that dispersal of power leads to more democracy, and centralization of power leads to unresponsiveness and/or authoritarianism. Decentralization may in some situations be the best way to overcome authoritarian rule, but it can also work in the

opposite way. Corruption, tyranny, oligarchy, authoritarianism and other ills can come from petty tyrants and local factions as well as national leaders. Indeed, corruption and abuse of power at lower levels can often flourish because the cost of exposing it is too great and the political efforts to check it too costly. At the national level, if there are legitimate functioning, contending political parties, or if there are truly independent legislatures, there are often more protections, and the risks and burdens can often be shared. One of the most important pieces of political theory on the topic of federalism is Federalist #10. James Madison argues that the greatest danger to democracies is the tyranny of factions, especially tyranny of a majority faction over the minority. Creating a larger republic and having decisions made at that level will increase the number of interests at play, and it makes it less likely for one faction to tyrannize a minority factions. I do not want to make my point too strongly. The best way to control authoritarians is to have real checks and balances. That can occur in different ways, and certainly one way is to have governing authority at different levels. Moreover, in societies where concentration of power is abused, surely one would seek to disperse power; and to move power closer to the people is one way to accomplish this. My point, however, is to suggest that it is not a panacea. Authoritarianism can often be worse when power lies in the hands of entrenched local elites. The major advantage is that such local elites usually do not control a military, but they can control the police. In any event, advancing democracy is far more dependent upon an engaged electorate with responsive and responsible elected officials. That, in turn is probably more related to questions such as whether electoral systems are fair and open. Are there vibrant political parties? Is the military under control? Is their separation of power between the executive, the legislative, and the judicial? Is their a free and robust exchange of ideas through a free press and civic institutions where civil society is encouraged? Is their rule of law? The location of power is not nearly as important as these things, however, it may be related to accomplishing them.

One of the strongest arguments for decentralization is that it can encourage citizen engagement. National governments often seem too far removed from people, especially poorer and less powerful people, and that often leads to alienation and disengagement. That, in turn, often opens the doors for demagogues. If people are able to see the effects of their involvement, it reinforces political participation and civic engagement. Robert Putnam in

his famous book *Bowling Alone* (and also his work on Italy) has clearly demonstrated the importance of civic engagement in democracies. Civic engagement for Putnam does not simply mean political participation. Rather it refers to a whole range of behavior, notably participation in civil society. In the United States, so many decisions are already localized—from school boards to zoning boards to police review boards—that one cannot separate civic institutions from governing ones completely. In short, in my opinion the strongest argument for decentralization in emerging democracies is that it reinforces personal civic engagement rather than it prevents authoritarianism.

Fully democratic countries face different challenges, but the idea that decentralization increases responsive and responsible government is an empirical question. Most countries where power is being decentralized are being sure to retain ultimate power at the national level. My caution, however, would be that to the extent the experiment is successful they may have to live with the new thing they have created. It is not always as easy to retrieve power.

Now I turn to the opposite phenomenon—the European Union. I do so to suggest that there are some things to be learned from the U.S. Experience.³⁵ The key issue for Europe, in my opinion, is still, and will be for a long time the question of sovereignty. It manifests itself in phrases such as subsidiarity making it seem less threatening, but it is ultimately a question of sovereignty. The question of sovereignty is related to the other big problem for the EU which is its democratic deficit. Europeans can hardly contain their indignity when someone mentions a United State of Europe (a term, by the way, that was used by many of the original EU founders). That may be understandable, but less clear to me is why so many reject the idea that they are creating a “federal” entity. What is being created is “something new” they insist. Well, yes and no. By most definitions of federalism, the European Union would qualify. In any event, I actually do not think that Europe will go the way of the United States, but I do believe that when a political entity is struggling with sovereignty issues where power is moving from the local to the center, there are some things to learn from the U.S. experience—the bad as well as the good. I do not mean to suggest that there are not significant difference between the states in America in the late

³⁵ See Young, Ernest, “Preserving Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism”, 77 *N. Y. U. L. Rev.* 1612 (2002).

1700's and the modern industrial nation states of Europe. Of course there are, but the centralization that has occurred in the U.S. did not all occur in the 18th century. Indeed much of it occurred quite late. I would posit that when there are strong sovereign entities coming together and ceding power to a higher authority giving up some sovereignty while retaining significant amounts of sovereignty, there are likely to be patterns that might be predictable. I will focus on one. When issues of sovereign authority are at stake rather than political decisions about who should be doing what, a referee is needed. Courts will come to play a key role. Indeed, there are many reasons to believe that they will come to play a role that is more like courts in the United States than the current courts in Europe. Though the notion of parliamentary sovereignty in England and the French aversion to "gouvernement du juges" are at one extreme in Europe, no European national court has played the role of adjudicating sovereignty issues the way courts have in the United States. And adjudication of sovereignty issues has all sorts of spillover effects. When I gave a series of lectures in Europe in 1991, I predicted an expanded role for the European Court of Justice and many people scoffed. Even I was a bit stunned by how easily they announced, and national courts accepted, the supremacy of European Law and the supremacy of European courts to ultimately make that judgment. To be sure, judicialization is occurring worldwide for reasons other than federalism—notably because of written Bills of Rights, or treaties on rights. But when there are issues of the boundaries of sovereignty, there are many political incentives for politicians to defer to courts to make the decision. And the more that this happens, the more that people come to believe that courts are the place to resolve such issues. It is self reinforcing. Of course, there will be some resistance and back and forth, as has already happened, but I predict that the European Courts will come to play increasingly important roles and that will have the effect of reinforcing power at the center. What this suggests, then, if Europe doesn't like what it sees in the United States in terms of the role that courts play in constitutional issues, it has the opportunity to make adjustments or change directions.

I am certainly not arguing some kind of strong path dependence. It remains to be seen how the European Union will evolve. Will a meaningful constitution pass? Will the democratic deficit eventually be eliminated? Will cross-national parties that are real political parties evolve? What happens if Germany, France and some of the most powerful countries begin

persistently to “lose” on issues at the European level? Will the dramatic expansion of member states make the entity fall under its own weight? There are many unknowns. Looking at the United States might provide some understanding that if “x” occurs, there are reasons to believe that “y” rather than “z” will follow. In any event, I believe there is much to be gained from comparative work, and that is precisely the reason why this symposium has been so helpful. Issues are being discussed that range from emerging democracies, to new political orders for old democracies, to a wholly new federal arrangement. Federalism and regionalism is hot.