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THE USES OF FEDERALISM: THE AMERICAN EXPERIENCE

A. E. Dick Howard*

In recent years, the drafting of new constitutions has become something of a cottage industry. From the Baltic Sea to the Cape of Good Hope there are stirrings of constitutional change in the air. During this period I have had the privilege of sitting at the elbows of drafters at work on bills of rights and other fundamental laws in the countries of Central and Eastern Europe. For an American not able to have been at Philadelphia in 1787, seeing constitutions drafted in Prague and Sofia conveys an unmistakable air of being "present at the creation."¹

As I engage constitution-makers in dialogue about their work, I am always struck by the way in which the enterprise is ultimately one that entails comparisons. A constitution must, of course, be planted in the soil of the country where it is to operate. Every drafter with whom I have talked, however, has taken care to inquire into the constitutional texts and experiences of other countries, especially those which seem to offer useful lessons in working democracy.

In the American founding period, those who wrote the state constitutions of the 1770s and the federal Constitution of 1787 were comparativists by instinct. The pamphlets and resolutions aimed at British policy in the years leading up to the American Revolution were essentially exercises in constitutional argumentation.² By the time drafters went to work on state and federal constitutions, they were adept at drawing on such sources as British constitutionalism and the ideas of the

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1. See DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (1969) (citing the words of Alphonso X, The Learned, King of Spain from 1252 to 1284). King Alphonso is quoted to the effect that, "had he been present at the creation of the universe, [he] would have given some useful hints for the better ordering of the universe." *Id.*

2. See A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 188-202* (1968) (discussing several works that influenced the founding fathers in their constitutional debates).

Enlightenment thinkers.³ The architect of the federal Constitution, James Madison, carefully sifted the lore of the "ancient and modern confederacies" in designing a charter for the American polity.⁴

The Idea of Federalism

Federalism is conspicuous among the topics that have surfaced during the debate over the shape of a future South African constitution. When South Africans and Americans met in Washington, D.C. in the spring of 1992 to compare notes on American federalism, the program referred to "constitutional federalism."⁵ It is interesting how rarely, especially in political science literature, the word "federalism" appears by itself. The noun seems to want to have an adjective attached, as in "cooperative federalism" or (in political rhetoric) the "new federalism."⁶

The temptation to modify the word "federalism" reflects the fact that federalism is a concept fraught with ambiguity. If one were to ask James Madison what he meant when he spoke of federalism, he would, in 1787, no doubt have talked of the need for greater power in the central government. In 1798, however, when he and Thomas Jefferson penned the Virginia and Kentucky Resolutions, he would have voiced concern for the prerogatives of the states.⁷ Today, were one to speak to a member of the Federalist Society, it is not likely that one would hear of the need for a more powerful federal government.

There may be many variations on the federalism theme, but some generalizations are nevertheless possible and important. The basic idea of federalism is that both sovereignty and law-making competence are distributed between central and constituent units. The two levels of

3. *Id.*

4. See 9 JAMES MADISON, THE PAPERS OF JAMES MADISON 3-23 (Robert A. Rutland et al. eds., 1975) (reprinting the notes on ancient and modern confederacies that James Madison utilized in drafting the United States Constitution).

5. The symposium's full title was "Constitutional Federalism: The United States Experience — Implications for South African Reform."

6. When I hear talk of the "New Federalism," I think of New College, Oxford University, founded in 1379.

7. Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145 (1948). The Virginia and Kentucky Resolutions set forth a compact theory of the Constitution and said that each state had the right to be the judge of infractions of the Constitution. The resolutions were aimed at the infamous Alien and Sedition Acts.

Id.

government thus become coordinate, neither, in constitutional theory, being altogether subordinate to the other.

There are features that one may expect to find in a system that calls itself federal. The constituent units may be called states, provinces, or republics, but, whatever their name, they exist in their own right. Both the central government and the constituent units operate directly on the people. Accordingly, the people live under two sets of laws and regulations. Collaboration and coordination between levels of government are essential in a federal system, and there are processes, formal or otherwise, by which the two levels can work more or less in tandem. Federations produce disputes over competence and authority; thus one expects to find some kind of mechanism (for example, a constitutional court) for resolving quarrels between the respective levels of government.

One who surveys countries that call themselves federal, while noting areas of resemblance, will also be struck by the variations. There may be few units or many. The United States are fifty in number; there were only two units in the Czech and Slovak Federal Republic.⁸ The number of units may change with time. For example, the United States grew from thirteen states in the republic's early days to fifty today, some becoming states only in the twentieth century.⁹

Federations vary widely in the degree to which authority is centralized. Power may be so concentrated that the federation resembles a unitary state, or it may be so decentralized that the country seems to be a confederation. The constituent units may be represented in various ways in the institutions of the federal government. For example, there may be a legislative chamber in which representation is based on the units (which, in turn, may be represented equally, as in the United States Senate, or unequally, as in Germany). The designers of a federal system may choose to make it presidential, as in the United States, or

8. See Rob Wilson, *The Week in Review*, FIN. POST, June 29, 1992, at 2, available in LEXIS, Nexis Library, Papers File (reporting on the imminent demise of the Czech and Slovak Federation).

9. See *The 51st and 52nd States - Mr. Bush: Principled, but Mistaken on the District*, N.Y. TIMES, Apr. 1, 1990, §4, at 18 (commenting on former President Bush's support of statehood for Puerto Rico, but not for the District of Columbia). Although statehood proposals have been developed for both, neither seems likely to be successful. See also Ian Murray, *Basic Law Reform Sought by Kohl*, THE TIMES (London), Sept. 10, 1990, available in LEXIS, Nexis Library, Papers File (noting that the Basic Law of West Germany (1949) was written in such a way as to make possible the incorporation of the states of East Germany, as took place with reunification in 1990, without the writing of a new constitution).

parliamentary, as in Canada. Disputes over competence may be resolved in various ways. For example, one may choose between a supreme court having general jurisdiction (the model used in the United States) or a constitutional court having specialized jurisdiction (the approach followed in Germany).

Thus, were South Africa to decide to adopt some kind of federal system, there is no one model which must be followed. South Africans may wish simply to study the experience of federal countries and decide which, if any, of those approaches seem helpful. It is in that spirit that I approach my task here: to give some impressions of how American federalism developed — its historical roots and its evolution.

The Origins of American Federalism

One often hears American federalism described as being a "layercake" — three layers of government (federal, state, and local), each level having its own defined functions and responsibilities. This metaphor masks the reality of American federalism: the functions of government are so intertwined that no important activity of government seems to be the exclusive province of any one level. Today's state governors, for example, undertake missions abroad, for trade and other purposes, no matter what constitutional theory may say about the federal government's preeminence in foreign relations.¹⁰

From the beginning, American federalism has been more the product of circumstances than of any philosophical design. Until 1763 the British empire was essentially federated. The larger questions of foreign affairs, war and peace, and overseas trade were decided in Westminster, but colonial legislatures had considerable *de facto* control over matters of local concern. After the Seven Years War, however, Parliament began exercising a more hands-on approach to governing their expanded empire. Resentful colonists, accustomed to what amounted to home rule, insisted on retaining a high degree of independence. There ensued sharp debates over sovereignty and representation, issues that festered until the outbreak of hostilities and the colonies' declaration of independence.¹¹

10. See RICHMOND TIMES-DISPATCH, July 7, 1992 (reporting that in the summer of 1992 Virginia's Governor L. Douglas Wilder was the first American governor to lead a trade and cultural mission to Africa). In South Africa, Governor Wilder was a guest of the African National Congress. *Id.* The *Richmond Times-Dispatch* declared that the mission "will stand as one of Governor Wilder's finer hours." *Id.*

11. See SAMUEL E. MORISON, ET AL., THE GROWTH OF THE AMERICAN REPUB-

Wary of centralized power, the newly independent states reflected a view that republicanism flourished best in small units where popular control of government was most likely to take hold. Under the Articles of Confederation, each state retained its "sovereignty, freedom, and independence."¹² The central government was given no power with which to enforce its edicts and existed largely at the sufferance of the states.

Problems were soon to test this loose confederation.¹³ Some of the difficulties were events for which the form of government could not be blamed. For example, post-war depression is a regular feature of economic cycles; in the wake of the American Revolution, hard times were fueled by the loss of the profitable West Indies trade and the inevitable dislocation caused by the war. However, the central government's inability to negotiate favorable trade treaties with other nations contributed to continuing economic troubles.

The Articles of Confederation gave rise to other economic problems afflicting the young republic. Congress lacked taxing powers, causing a constant shortfall of revenues and poor credit ratings. States competed against each other for commerce to the point of treating neighboring states as if they were foreign countries. Each state printed its own money, making currency exchange almost impossible.

The conduct of foreign affairs was also vexing under the Articles. The British, hovering at the western edge of the United States, refused to keep faith with the terms of the Paris peace accords. The Spanish closed the port of New Orleans, blocking development of the West. Barbary pirates freely boarded American vessels in the Mediterranean. Congress, hamstrung by a lack of state cooperation, was unable to raise the military power necessary to protect American interests. Weak and disorganized, the new nation presented a tempting target for the established powers of the Old World.

Finally, domestic tranquility was threatened by conflicts among the states and by popular uprisings. Virginians and Pennsylvanians fired

LIC 123-24 (7th ed. 1980) (summarizing colonial political developments in the period prior to the American Revolution).

12. See DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong., 1st Sess. 27-37 (1927) (reproducing the text of the Articles of Confederation).

13. See generally JAMES M. BURNS & JACK W. PELTASON, GOVERNMENT BY THE PEOPLE 283 (7th ed. 1969); MORISON, *supra* note 11, at 227-42 (discussing the political, social, and economic problems of the United States during the period of the Articles of Confederation).

shots over who was rightfully entitled to the area around Pittsburgh. The British sought to entice Vermont to join Canada, and Spanish agents hoped to lure Kentucky into the Spanish empire.¹⁴ Angry debtors, mostly from rural areas, pressured legislatures for relief from their debts; in Rhode Island they took over the legislature. The most noted uprising took place in western Massachusetts in the winter of 1786-87, when Revolutionary War veteran Daniel Shays led discontented farmers to close down courthouses to prevent the judicial sale of debtors' property. Although Shays' Rebellion was quickly suppressed by the state militia, it stirred fear in the hearts of the propertied classes, and it was one of the factors which helped to galvanize support for the proposed convention to revise the Articles of Confederation.

Conflicts over commerce and trade among the states were at the heart of the process that led to the writing and adoption of the Constitution. After the failure of attempts to amend the Articles of Confederation, several states met at Annapolis in 1786 to discuss matters of trade. The Annapolis meeting was inconclusive, and Alexander Hamilton pushed through a resolution calling for a convention to be held in Philadelphia "to render the constitution of the Federal Government adequate to the exigencies of the Union."¹⁵

The Nature of the Federal Union

The Philadelphia Convention opened in May 1787 with Governor of Virginia, Edmund Randolph, proposing a series of resolutions. Largely the work of James Madison, these resolutions framed the discussions that would follow. The Virginia Plan called for Congress to have the power "to legislate in all cases in which the separate states are incompetent" and for representation in Congress to be apportioned on the basis of wealth and population. Congress would be authorized to veto state laws it deemed to be unjust or unconstitutional and, if necessary, to use force to ensure compliance by the states. Congress would be entitled to decide the extent of its own powers and those of the states.¹⁶

14. See RICHARD B. MORRIS, *WITNESSES AT THE CREATION* 124 (1985) (describing interstate border disputes and foreign efforts to detach Vermont and Kentucky from the United States during the 1870s).

15. See Richard Leffler, *The Constitution of the United States: The End of Revolution*, in *THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION* 36 (Stephen L. Schechter ed., 1985) (quoting the Hamilton Resolution).

16. See MADISON, *supra* note 4, at 15-17 (presenting the text of the Virginia

The Virginia Plan's sweeping nationalism provoked sharp debate. Charles Pinckney of South Carolina asked whether Randolph "meant to abolish the state governments altogether."¹⁷ Well might Pinckney have asked this question in light of a letter that Madison wrote in 1787 envisioning "a due supremacy of the national authority" with powers in the state governments only insofar as "they can be subordinately useful."¹⁸

The Philadelphia delegates, however, were ready to accept the need to increase the power of the central government. They approved Gouverneur Morris' motion "that a *national* government ought to be established consisting of a *supreme* Legislative, Executive, and Judiciary."¹⁹ The critical question at the Convention would prove to be, not the need for some central power, but just how much power that government would have and how it was to be limited.

The Virginia Plan favored the larger, wealthier states such as Virginia, Pennsylvania, and Massachusetts. Fearing that their interests would be submerged, the smaller states backed the New Jersey Plan introduced by William Paterson. Congress would still have extensive powers but each state would have the same vote in that federal body.

Ultimately the competing plans of large and small states were bridged in what history has recorded as the Connecticut Compromise. There would be a bicameral legislature, a lower house apportioned on the basis of population and elected directly by the people, and an upper house in which each state would have two seats and whose members would be elected by the state legislatures. The idea of checks and balances no doubt enhanced the appeal of the compromise, but fundamentally it was approved because it became clear that if either side insisted on having its own way, no plan at all would be adopted.

The federal structure of the proposed Constitution, while grounded in political compromise, also reflected the framers' reliance on checks and balances as a guard against the abuse of power generally. Even the nationalists who wanted a stronger central government sought to bring competing interests into play in order to have those interests balance each other and further the common good. The delegates sought to create a new kind of republic, one not dependent upon virtue, because many

Plan).

17. See JAMES M. BURNS, *THE VINEYARD OF LIBERTY* 35 (1982) (quoting Charles Pinckney).

18. See IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION* 13 (1950) (quoting a letter written by James Madison).

19. See MORRIS, *supra* note 14, at 200 (quoting the plan by Gouverneur Morris).

shared George Washington's fear that virtue had "in a great degree taken its departure from our land."²⁰ If safety lay in forcing divergent interests to compete in the arena of government, federalism expanded the loci of that competition.

After Philadelphia, the next hurdle for the proponents of the new Constitution was the state ratifying conventions. Those favoring ratification, who cleverly adopted the name Federalists, faced substantial opposition in many states. Their opponents, the Anti-Federalists, had a litany of complaints. Madison claimed that the Constitution was a hybrid, "neither wholly national nor wholly federal."²¹ In response to this claim, Patrick Henry, a leader of the Anti-Federalists at Virginia's ratifying convention, stated with his usual sarcasm that this could not be: "[t]he brain is national, the stamina federal, this limb national, that limb federal — but what it really signified was that a great consolidated government would be pressing on the necks of the people."²² The Anti-Federalists also worried that the federal government would be one of the aristocracy, a fear heightened by the elitist pro-constitution "Caesar" letters, attributed to Alexander Hamilton.²³

The Anti-Federalists' sharpest objection was to the Constitution's lack of a bill of rights. Hoping to force a second convention, the Anti-Federalists attempted to attach conditional amendments to some states' approval of the Constitution. Concerned that they might lose in key states such as Virginia and New York, the Federalists eventually acquiesced on the question of a bill of rights. Ratification of the Constitution was achieved, and at the first Congress Madison introduced amendments which, upon their approval by the states, came into effect in 1791.

Between 1787 and the Civil War, the nature of the federal union was an endless topic of debate. Even the circumstances surrounding the drafting and adoption of the Constitution contributed to the sense of ambiguity. The Constitution was drafted in a convention whose membership was elected from the states. It was ratified in state conventions. Yet its preamble began with the words, "We the People of the United

20. Letter from George Washington to John Jay (May 18, 1786), in *CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 196 (Henry P. Johnston ed., 1890).

21. *THE FEDERALIST* NO. 39, at 249 (James Madison) (Edward M. Earle ed., 1941).

22. See MORRIS, *supra* note 14, at 237 (quoting the words of Patrick Henry).

23. See Jacob E. Cooke, *Alexander Hamilton's Authorship of the "Caesar" Letters*, 17 WM. & MARY Q. 78, 80 (1960) (explaining that the "Caesar" letters were in fact anomalies in the Federalist literature and that it now appears that Hamilton did not in fact write them).

States" Arguably, this was a major change from the original draft, which read, "We the People of the States of . . ." followed by a list of the states. Indeed, the nature of the federal union ordained by the Constitution can be questioned.

No debate on the relation between federal and state powers was more dramatic than that which took place in the United States Senate in 1830 between Robert Y. Hayne of South Carolina and Daniel Webster of Massachusetts.²⁴ The exchange, which extended over several weeks, began with a dispute about public lands policy but soon moved to larger questions of the nature of the union. At one point, Hayne took the floor for almost two days, using the occasion to defend John C. Calhoun's justifications for nullification or interposition.²⁵ Declaring the Constitution to be a compact among sovereign states, Hayne argued that a state could refuse to enforce a law it deemed invalid if the federal government exceeded its constitutional authority.²⁶

Webster, replying to Hayne, occupied the floor for almost six hours. Invoking arguments advanced by Madison and James Wilson at the Philadelphia Convention, Webster maintained that the Constitution was a compact of the sovereign people, not of the states: "[i]t is the people's constitution, the people's government; made for the people; made by the people; and answerable to the people."²⁷

This view of the Constitution had been advanced over forty years earlier by the Federalists, but as of 1830 it was still not the generally held conception of the union's nature. Even Webster's oldest son, Fletcher, wrote his father that he "never knew what the constitution really was, till your last short speech. I thought it was a compact be-

24. See MERRILL D. PETERSON, *THE GREAT TRIUMVERATE* 170-78 (1987); IRVING H. BARTLETT, *DANIEL WEBSTER* 114-20 (1978); CLAUDE M. FUESS, *DANIEL WEBSTER* 363-86 (1968); MAURICE G. BAXTER, *ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION* 181-91 (1984); FREDERIC BANCROFT, *CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT* 55-74 (1966) (presenting accounts of the Hayne-Webster debates).

25. See BANCROFT, *supra* note 24, at 110-16 (outlining the views of John C. Calhoun regarding the justification for nullification).

26. See THEODORE D. JERVEY, *ROBERT Y. HAYNE AND HIS TIMES* 251-52 (1970) (reciting the details of Hayne's response to Webster in which he argues that states are reduced to "mere petty corporations" if they are not allowed to determine which laws are invalid, and thus unenforceable, when the federal government exceeds the limits of its authority).

27. See WEBSTER AND HAYNE'S SPEECHES 37, 70-71 (1971) (reprinting the texts of Hayne's and Webster's speeches).

tween the states."²⁸ Webster's speech, widely disseminated throughout the land, helped change popular conceptions. His stirring finale — "Liberty and Union, now and forever, one and inseparable" — helped make the union, as Ralph Waldo Emerson would say, "part of the religion of this people."²⁹

The Tendency to Centralization

Shortly after the Hayne-Webster debates, a young Frenchman, Alexis de Tocqueville, arrived in the United States. From May 1831 to February 1832, the French visitor travelled extensively. His chronicles and observations, entitled *Democracy in America*, are more than simply a travelogue. Tocqueville raised fundamental questions about the nature of democracy itself, whether in the Old or New World.

Tocqueville predicted that all modern democratic governments would tend increasingly toward centralization. He saw several forces at work: war and the need to provide for national defense; the drive to promote economic prosperity; and the leveling quest for justice or equality.³⁰

American history portrays telling examples of each of these factors at work. The divisive issues of slavery, sectionalism, and the nature of the union, debated but unresolved by Hayne and Webster, erupted into civil war in 1861. That conflict finally settled the question of a state's right to secede from the Union. What was attempted at Fort Sumpter brought the South to Appomattox.

Some measures adopted during the Civil War, such as conscription for military service, did not survive the war. Others, however, survived and became a permanent part of the American landscape. An example is the enactment of the National Bank Act of 1863.

After Andrew Jackson brought down the Second Bank of the United States, the country's highly decentralized state banking system was unstable and volatile. Although estimates vary, it appears that there were at least 7,000 different bank notes in circulation issued by 1,500 banks operating under the laws of twenty-nine states. Approximately 5,000 more counterfeit notes were in circulation, adding to the general confusion.³¹ Many states had weak banking laws. Because of the number

28. BARTLETT, *supra* note 24, at 120.

29. PETERSON, *supra* note 24, at 178.

30. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191-98 (Phillips Bradley ed., 1945).

31. See MORISON, *supra* note 11, at 682 (suggesting that estimates on the num-

of circulating notes, both authentic and counterfeit, exchange was difficult and business transactions slowed. Speculation and bank failures were all too common.³²

When the Civil War began, the Union had expected a short war and improvised ways of finding money to fund the military effort. Soon it became apparent that the struggle would not end quickly, and the Secretary of the Treasury, Salmon P. Chase, called for the establishment of a national banking system.³³ State banks had their advocates in Congress, but war anxiety and appeals to national unity led to the passage of the National Banking Act in 1863.³⁴ The imposition of a ten percent tax on state bank notes effectively drove those notes out of the market and established the preeminence of the national system.³⁵

The Economy as a Centralizing Force

No factor in American history has had a more powerful centralizing effect than the economy. In *Gibbons v. Ogden*, Chief Justice John Marshall declared the supremacy of the federal government in the regulation of commerce.³⁶ Congress, however, made little use of the commerce power until the 1880s, when it began to regulate the railroads.

During the 1860s farmers in the Midwest became increasingly angry with the practices of the railroads. Above all, they complained of ex-

ber of banks, states, notes, and counterfeits vary widely). For example, at the beginning of the Civil War, there were 1,500 banks in 29 states issuing 7,000 legitimate notes, with an additional 5,000 counterfeits. *Id.* See also THOMAS J. ANDERSON, JR., *FEDERAL AND STATE CONTROL OF BANKING* 63 (1934) (alleging that 1,600 banks in 34 states issued 10,000 notes in 1861); NOBLE F. HOGGSON, *EPOCHS IN AMERICAN BANKING* 183 (1929) (claiming that 7,000 notes and 3,800 counterfeits were in circulation).

32. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA* 723 (1957) (commenting on the difficulties and weaknesses of state banking laws which ultimately led to the downfall of the banks). See also ANDERSON, *supra* note 31, at 65-66 (referring to the states' inadequate control over the jurisdiction of banking and currency as one of the burdens of commerce at that time).

33. ANDERSON, *supra* note 31, at 69.

34. ANDERSON, *supra* note 31, at 71 (stating that although some members of Congress expressed opposition to the national system, support for the system grew due to the financial burdens of the war); see also HAMMOND, *supra* note 32, at 727 (stating that one of the strongest arguments in favor of a proposed system of national banks was the importance of promoting a "sentiment of nationality" necessary during a time of war).

35. JAMES M. BURNS, *THE WORKSHOP OF DEMOCRACY* 18 (1985).

36. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

cessively high rates and discriminatory practices.³⁷ Farmers began to organize into associations like the Grange and soon were able to exercise their political strength in state legislatures. The "Granger Laws," regulatory measures enacted in several midwestern states, forbade railroads to give free passes or rebates, outlawed charging special rates for favored shippers, and prohibited charging more for short hauls than for long ones.³⁸

The railroads went to the courts to challenge the Granger laws. At first it appeared that the laws would pass constitutional muster. In *Munn v. Illinois*, the Supreme Court held that states had the power to regulate industries "in which the public has an interest."³⁹ Surely railroads fell within that test. But just nine years later, in *Wabash, St. Louis & Pacific Railway v. Illinois*, the Court ruled that state regulation of railroad rates violated the commerce clause even in the absence of congressional action.⁴⁰

Even before *Wabash* there had been talk of congressional legislation. The Supreme Court's decision brought greater pressure for national action, and in 1887 Congress passed the Interstate Commerce Act.⁴¹ The statute prohibited pooling, rebates, and discrimination in rates and services, and required that all charges be "just" and "reasonable." The Interstate Commerce Act also created the Interstate Commerce Commission.⁴²

More than one motive may have inspired passage of the Interstate Commerce Act. One view of the statute is that it was intended to address the concerns of consumers of the railroads' services and that the legislation adopted an essentially negative view of the railroads.⁴³ Another view, however, is that Congress was motivated as much by a wish to halt ruinous rate wars between competing railroads as by a desire to

37. SOLON J. BUCK, *THE GRANGER MOVEMENT* 11-14 (1913).

38. See GEORGE H. MILLER, *RAILROADS AND THE GRANGER LAWS* 197 (1971) (commenting that the Illinois laws were not only a model for other states, but also laid the foundation for the content of the Interstate Commerce Act).

39. *Munn v. Illinois*, 94 U.S. 113, 140 (1877).

40. *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 595 (1886).

41. See Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in 49 U.S.C. §§ 10101-11915 (1988)) (regulating transportation and ensuing competitiveness and efficacy in interstate commerce).

42. *Id.*

43. See WINTHROP M. DANIELS, *AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY* 52 (1932) (arguing that imposing rate restrictions on the railroads reflected the negative image of the industry).

protect the public.⁴⁴ Accepting that both of these factors were involved in the passage of the act leads to the interesting conclusion that both railroads and shippers had some incentive to see the regulation of railroad rates and practices nationalized.

The Progressive Era, generally characterized as the early years of the twentieth century, offers another interesting example of the way in which concerns about economic power have tended to expand federal authority and activity. Alarmed by the concentration of power in corporations during the "gilded age" of American capitalism, the Progressives wanted to redress the balance by enlarging government's ability to curb abuses in the private sector.⁴⁵

Allan Nevins and Henry Steele Commager have summed up the way in which the advent of the industrial age changed the character of the American republic and brought the need for new thinking about government's role:

The practices and principles inherited from an eighteenth-century rural republic were no longer adequate to the exigencies of a twentieth-century urban state. This was true in the political realm, where the fear of government persisted into the period when only government could adequately control the forces that machinery had let loose on society.⁴⁶

It is likely that the ordinary person turned to government with more reluctance than enthusiasm in seeking some counterpoise to the power of private business. Teddy Roosevelt, becoming more of a Progressive, caught the rising sentiment:

The man who wrongly holds that every human right is secondary to his profit must now give way to the advocate of human welfare, who rightly maintains that every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.⁴⁷

44. See ALLAN NEVINS & HENRY STEELE COMMAGER, *A SHORT HISTORY OF THE UNITED STATES* 312 (1966) (stating that Congress regulated the railroads in order to prevent the rate wars from destroying the industry).

45. See generally RICHARD HOFSTADTER, *THE AGE OF REFORM* (1969) (analyzing the underlying trends that help explain the impetus behind the Progressive movement); RICHARD L. WATSON, *THE DEVELOPMENT OF NATIONAL POWER* (1982) (detailing the policies and politics of the first two decades of the twentieth century); ROBERT H. WIEBE, *BUSINESSMEN AND REFORM* (1962) (considering the role of businessmen as opponents and, in some cases, advocates of reforms of the Progressive era).

46. NEVINS & COMMAGER, *supra* note 44, at 304.

47. See MORISON, *supra* note 11, at 304 (summarizing the way in which the advent of the industrial age influenced the American people's beliefs concerning the

Chance, in the form of an anarchist's bullet that killed President McKinley, made Roosevelt the first Progressive to hold the presidency. Roosevelt had been given the Vice-President's slot to control his unpredictable nature, which alarmed conservative, pro-business Republican party regulars. Sworn in as president, Roosevelt promised to continue McKinley's policies, but he soon changed course.

By 1903 President Roosevelt had pushed through Congress a measure creating a cabinet-level Department of Commerce and Labor. A Bureau of Corporations within the new department investigated industries and fed information to the Justice Department for use in antitrust prosecutions under the recently reinvigorated Sherman Antitrust Act.⁴⁸ The Elkins Act, also passed in 1903, greatly improved government's ability to regulate the powerful railroad industry.⁴⁹ During Roosevelt's second term in office, the Hepburn Act was passed to increase the authority of the Interstate Commerce Commission in regulating railroad rates.⁵⁰

Perhaps the most significant legislative achievement of the Roosevelt administration was the enactment of the Pure Food and Drug Act of 1906.⁵¹ Supported by popular indignation at shocking stories of conditions in the food and drug industries, Congress sought to ensure that food and drugs moving in interstate commerce would be subject to national regulation.

Roosevelt's second term and the presidency of his successor, William Howard Taft, were less notable for the enactment of progressive measures, but Woodrow Wilson's election in 1912 brought new life to the progressive movement. Wilson rose in politics with the reputation of a reformer, and as president he immediately outlined and went to work on

role of government in their affairs).

48. See Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§1-6a (1988) (protecting trade and commerce against unreasonable restraints of trade and monopolies).

49. See Elkins Act, ch. 708, 32 Stat. 847 (1903) (codified as amended at 49 U.S.C. §§ 11902, 11903, 11915, 11916 (1988)) (regulating commerce with foreign nations among the states).

50. See Hepburn Act, ch. 3591, 34 Stat. 584 (1906) (codified as amended at 49 U.S.C. §§ 10701a-10705 (1988)) (establishing standard rates for rail carriers and providing procedures to address violations of the Act). The Hepburn Act also enlarged the powers of the Interstate Commerce Commission. *Id.* .

51. See Pure Food and Drug Act, ch. 3915, 34 Stat. 768 (1906) (repealed in 1938) (prohibiting the manufacture, shipment, and delivery of adulterated or misbranded foods or drugs in interstate or foreign commerce and providing penalties for violations).

a program to rein in big business. The Federal Trade Commission Act, passed in 1914, declared unfair competition unlawful and authorized the Commission to take action against corporations persisting in anti-competitive practices.⁵²

The collapse of the Progressive Party (under whose banner Teddy Roosevelt had contested the election of 1912) gave Wilson the opportunity to appeal to Progressive Republicans in the 1916 election. Wilson secured enactments of important progressive measures, including child labor laws, workmen's compensation for workers on federal projects, long-term farm loans, and the eight-hour day on interstate railroads.⁵³ Wilson was reelected by a wide margin in 1916, but his second term was dominated by foreign policy issues. Domestic reform took a back seat, from which it would not emerge until the 1930s, the era of the New Deal.

The Great Depression brought still further expansion of federal activity. Upon taking office in 1933, Franklin Delano Roosevelt found among his most immediate problems the need for emergency relief for millions of Americans battered by the economic crisis. "While it isn't written in the Constitution," said Roosevelt, "nevertheless it is the inherent duty of the Federal Government to keep its citizens from starvation."⁵⁴ Some of Roosevelt's programs, undertaken as temporary emergency measures, required federal-state cooperation (typically in the form of matching grants), while others, like the Federal Emergency Relief Administration (FERA) and the Civil Works Administration (the forerunner of the WPA), were outright federal initiatives.⁵⁵

Roosevelt soon came to argue the case for permanent programs aimed at relieving general social distress, even after the Depression had ended.⁵⁶ In addition to his own perspectives, Roosevelt felt political pres-

52. See Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 45 (1988)) (declaring unfair methods of competition in or affecting commerce unlawful and empowering the Federal Trade Commission to prevent persons, partnerships, and corporations from using unfair methods of competition or deceptive acts in or affecting commerce).

53. MORISON, *supra* note 11, at 348.

54. See CHARLES MCKINLEY & ROBERT W. FRASE, *LAUNCHING SOCIAL SECURITY* 7 (1970) (quoting Franklin Delano Roosevelt).

55. *Id.*

56. See ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS IN SOCIAL SECURITY* 4 (1966) (arguing that Roosevelt had a longstanding commitment to "social insurance" programs, dating from his days as a New York legislator, and did not suddenly discover the need for permanent programs in his second year in the White House).

sure fueled by the rising popularity of utopian schemes for economic security represented by Huey P. Long's "Share the Wealth" manifesto and by Francis Townsend's call for monthly lump sum payments to everyone over sixty-five.⁵⁷ In 1934 Roosevelt issued a call for social security to Congress:

[N]ext winter we may well undertake the great task of furthering the security of the citizen and his family through social insurance. This is not an untried experiment. Lessons of experience are available from States, from industries, and from many nations of the civilized world. The various types of social insurance are inter-related; and I think it is difficult to attempt to solve them piecemeal. Hence I am looking for a sound means which I can recommend to provide at once security against several of the great disturbing factors in life—especially those which relate to unemployment and old age.⁵⁸

Acting on the report of his Committee on Economic Security, Roosevelt pushed for bills to be introduced in Congress, and in August 1935 the Social Security Act became law. The omnibus legislation included pensions for the needy elderly, unemployment and old-age insurance, benefits for the blind, dependent mothers and children, and handicapped children, and appropriations for public health.⁵⁹ The Social Security Act may be seen as establishing federal responsibility for taking care of those who lose out in our capitalist system. In Roosevelt's words:

Government has a final responsibility for the well-being of its citizenship. If private cooperative endeavor fails to provide work for willing hands and relief for the unfortunate, those suffering hardship from no fault of their own have a right to call upon the Government for aid; and a government worthy of its name must make fitting response.⁶⁰

Despite their sweeping and innovative nature, the measures that made up the Social Security Act did not represent a complete break with the

57. *Id.* at 10. Huey Long, elected Louisiana's governor by proclaiming to be the champion of the common people against big oil and other vested interests, entered the United States Senate in 1932. See generally T. HARRY WILLIAMS, HUEY LONG (1969) (discussing the life and times of Huey Long). Long wrote his famous tract, *Every Man A King*, followed by *My First Days in the White House* at the height of his national political prominence. Positioning himself for a national campaign in 1936, he was assassinated in 1935. See generally ALAN BRINKLEY, VOICES OF PROTEST: HUEY LONG, FATHER COGLIN AND THE GREAT DEPRESSION (1982).

58. ALTMAYER, *supra* note 56, at 3.

59. MCKINLEY & FRASE, *supra* note 54, at 12-16.

60. MORISON, *supra* note 11, at 506-07.

legacy of federalism. Some parts of the Act called for the involvement of the states, partly because, before the so-called "constitutional revolution" of 1937, there were serious concerns about the constitutionality of strictly national social security programs.⁶¹

Justice and Equality

Alongside the centripetal effects of economic factors, another force tending toward the concentration of government power has been the notion of justice or equality. If all humans are equal, democrats reason, should they not therefore be treated in the same way? By this line of logic, how better to assure that egalitarian outcome than to have a single, central government with one set of laws under which to govern human affairs?

The decisions of the Supreme Court during the era of Earl Warren, especially during the 1960s, offer a classic example.⁶² A taste for egalitarian justice was an *idée fixe* of the Warren Court. The Court's commitment to equality was fueled by the belief that government has an affirmative duty to eliminate inequality and to assist in the exercise of fundamental rights.

Racial inequality was a particular focus of the Court's concern. In *Brown v. Board of Education*, the justices ruled that schools segregated by race "are inherently unequal."⁶³ In a series of per curiam decisions, the Court quickly extended the principle of *Brown* to compel the desegregation of other public facilities such as beaches, parks, and golf courses.⁶⁴

61. Compare *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1926) (striking down the Bituminous Coal Conservation Act) with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act of 1935). In *Schechter* and *Carter*, the Supreme Court took a distinctly restrictive view of federal power while in *NLRB v. Jones & Laughlin Steel* the Court heralded what was soon to become a more permissive attitude toward congressional acts challenged on federalism grounds.

62. Technically the Warren Court began in 1953 when Chief Justice Earl Warren took his seat on the Court, but the Court reached its heyday after Arthur Goldberg replaced Felix Frankfurter in 1962.

63. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

64. See, e.g., *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (requiring the desegregation of public beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (ordering the desegregation of public golf courses); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (compelling the desegregation of public parks).

Using the Fourteenth Amendment's Equal Protection Clause,⁶⁵ the Warren Court changed the face of American politics. Striking down state poll taxes, the Court declared that a state violates equal protection when it makes "the affluence of the voter or payment of any fee an electoral standard."⁶⁶ Earlier, the Court had ruled that representation in state legislatures must be based on population,⁶⁷ brushing aside a dissent in a related case stating that the Court's decision "imports and forever freezes one theory of political thought into our Constitution."⁶⁸

The Warren Court also struck at inequalities in the system of criminal justice. In *Griffin v. Illinois*,⁶⁹ the Court held that a state must provide a trial transcript or its equivalent to an indigent defendant appealing a conviction. Justice Hugo L. Black insisted, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁷⁰

During the 1960s the Supreme Court succeeded in nationalizing many of the standards and procedures that apply to state criminal trials. In 1947 Justice Black had argued that the Fourteenth Amendment was meant to apply all of the guarantees of the Bill of Rights to the states.⁷¹ To this day the Court has never adopted Justice Black's thesis in its entirety. Beginning in the early 1950s, however, the Court, in a brisk series of decisions, applied to the states nearly all of the procedural guarantees of the Bill of Rights.⁷²

The Court's attitude in these cases is aptly illustrated in Justice Ar-

65. U.S. CONST. amend XIV, § 1. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.*

66. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966).

67. *Reynolds v. Sims*, 377 U.S. 533 (1964).

68. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 748 (1964) (Stewart, J., dissenting).

69. 351 U.S. 12 (1956).

70. *Id.* at 19.

71. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

72. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the guarantee against unreasonable searches and seizures applies to the states); *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying the privilege against self-incrimination to the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (upholding the right to counsel in the states); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (safeguarding the right to a speedy trial at the state level); *Pointer v. Texas*, 380 U.S. 400 (1965) (guaranteeing at the state level the right of confrontation of witnesses); *Washington v. Texas*, 388 U.S. 14 (1967) (requiring state compulsory process for obtaining witnesses).

thur J. Goldberg's concurring opinion in *Pointer v. Texas*:⁷³

While I quite agree with Mr. Justice Brandeis that "[i]t is one of the happy incidents of the federal system that a . . . State . . . may serve as a laboratory; and try novel social and economic experiments," I do not believe that this includes the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights.⁷⁴

For the Warren Court, constitutional concepts like due process and equal protection were bound up with notions of fairness. The more activist justices demonstrated a "general impatience with legalisms, with dry and sterile dogma . . . which served to insulate the law and the Constitution it serves from the hard world it is intended to affect."⁷⁵ Critics of the Warren Court complained that the justices' preoccupation with reaching a fair or just result, regardless of the reasoning used to achieve that end, sometimes amounted to nothing more than bald-face assertion masquerading as reason.⁷⁶

"Once loosed," Archibald Cox has written, "the idea of Equality is not easily cabined."⁷⁷ This indeed seems to have been the case since the emergence of the modern civil rights movement. Blacks, shut out of the political process in their localities, went to court invoking various provisions of the Constitution, but none more often than the Equal Protection Clause. What blacks achieved in court, other groups soon sought to emulate. Thus, as the women's movement gained momentum, gender classifications received heightened judicial scrutiny.⁷⁸

Judicial egalitarianism, like other impulses, has its ebbs and flows. In his first term as president, Richard Nixon filled four vacancies on the Supreme Court. As the Burger Court began to emerge, it rebuffed efforts to have the Court apply a stricter standard of scrutiny to state laws and regulations dealing with needy families' access to such "necessities" as housing or welfare benefits.⁷⁹

73. 380 U.S. 400 (1965).

74. 380 U.S. at 413 (Goldberg, J. concurring) (alteration in original) (citations omitted).

75. ARTHUR J. GOLDBERG, *EQUAL JUSTICE* 25 (1971).

76. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13 (1970); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 118-55 (1970).

77. ARCHIBALD COX, *THE WARREN COURT* 6 (1969).

78. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that gender classifications "must serve important governmental objections and must be substantially related to achievement of those objectives").

79. See *Dandridge v. Williams*, 397 U.S. 471 (1970) (rejecting a challenge to

Concern about the values of federalism was one of the factors at play in the Court's drawing the line on how far it was willing to go in applying the Equal Protection Clause. In 1973 the Court refused to hold that the Fourteenth Amendment requires states to equalize expenditures among rich and poor school districts.⁸⁰ Justice Lewis F. Powell, Jr., who wrote the majority opinion, explicitly invoked federalism:

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.⁸¹

Notwithstanding this decision regarding school funding, there can be no doubt as to the extent to which the egalitarian impulses found in much of the modern Supreme Court's equal protection jurisprudence confirm the thesis that the idea of justice as equality has done much to remake the face of American federalism.

The Changing Face of American Federalism

Recapitulating the evolution of American federalism, one finds that from the time of the Constitution's adoption to the Civil War the federal system in actual operation tended to resemble the idea of "dual federalism" — the principle that each government, federal and state, has its own proper sphere. It was an era in which Congress' use of the broad powers suggested by the Marshall Court's opinions still lay in the future. The states took much of the economic initiative, for example, in extending generous (and often imprudent) subsidies to canals, railroads, and other internal improvements.

The Civil War and the subsequent Reconstruction Era laid the basis for a very different federal system. The Reconstruction amendments placed limits on state power, widening the opportunity (not to be fully exploited until the twentieth century) for federal judicial intervention in state affairs. Those amendments also furnished the basis for expanded

Maryland's placing a maximum limit of \$250 per month per family, regardless of the family's size, in making grants under the Aid to Families with Dependent Children program); *Lindsey v. Normet*, 405 U.S. 56 (1972) (sustaining Oregon's summary procedure for evicting tenants for alleged nonpayment of rent).

80. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

81. *Id.* at 44.

congressional power. Between the Civil War and World War I the economy became more national in scope (symbolized by the building of the transcontinental railroad) and Congress began to make greater use of its power to regulate the economy.

Efforts to deal with the Great Depression further transformed American federalism. Even when willing to act, the states proved unable to grapple with the demands of hard times. The federal government undertook social security and other welfare programs, and the Supreme Court, after 1937, stepped aside and let federal initiatives proceed.

By the mid-point of this century one heard much talk of "cooperative federalism" and "intergovernmental relations." But under Republican and Democratic administrations alike, themes like the "New Federalism" could not mask the reality of a continuing growth of federal power at the expense of the states. Federal activity grew with the creation, especially under Lyndon Johnson's Great Society, of income maintenance programs. Several major agencies were created in the 1970s to carry out federal regulation of such areas as environmental quality and workers' safety. Moreover, the civil rights movement brought major federal legislation and other initiatives regarding school desegregation, voting, housing, and employment discrimination. How far the country had travelled away from the days of "dual federalism" could be seen in a statute such as the Voting Rights Act of 1965,⁸² which requires that those states and localities covered by the statute obtain federal approval of proposed changes in voting laws and procedures.⁸³

Two centuries of social and economic change would be bound to affect any political arrangement, including that of American federalism. To some extent, authority was likely to shift away from the American states toward the federal government as an evolving economy created problems whose dimensions exceeded the states' abilities to deal with them. The states were also sometimes part of the problem. Before the Supreme Court's one-person, one-vote decisions, state legislatures were often grotesquely malapportioned. The states were sometimes the very engine of oppression; it took a civil war to eradicate slavery, and it required constitutional amendments, acts of Congress, and federal court decrees to embark on the long and arduous road to racial justice.

Indeed, by the 1950s in the United States, those who spoke up for the place of the states in a federal union ran the risk of being labeled

82. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

83. 42 U.S.C. § 1973c (1988).

"state's righters" at a time when "state's rights" was often a code name for blatant racism and discrimination. By century's end, however, much has changed, and it is once again respectable to weigh, in sober fashion, the merits and shortcomings of federalism.

The states are far more viable, responsible, and responsive entities than they were in the years just after World War II. A quiet revolution of reform has taken place. Paradoxically, some of the changes have taken place because of federal laws and court decisions. The Supreme Court's reapportionment decisions have produced legislatures far better able to represent a state's citizens. Civil rights legislation, especially the Voting Rights Act of 1965, has enlarged the franchise and eliminated many racially discriminatory laws.

Other reforms have come from within the states themselves. Many states have rewritten their own constitutions, thus abandoning charters that often crippled responsible government. State legislatures are better staffed, the executive branches are better organized, and state courts have become more professional. In an era when budget deficits and legislative gridlock seem to thwart efforts at the national level to confront the great problems of the day, the states are manifestly better equipped to face social and economic issues than they were when President Roosevelt embarked on his New Deal.

The Uses of Federalism

An empirical review and assessment of the relative accomplishments and failure of state and federal governments in the United States in the closing years of the twentieth century is beyond the scope of this paper. But what remains at issue, is a more general question about federalism: in a free and democratic society, what are the uses of federalism?

It is inescapable that in the modern age many objects of government require intervention at the level of centralized power. A bill of rights whose writ runs throughout the country is needed to protect every citizen against racial discrimination and other violations of human rights. Foreign affairs and national defense are obvious areas for unified policy. Promoting economic prosperity and dealing with the problems of economic misfortune call, as the lessons of the 1930s suggest, for sufficient energy in the central government.

All this being said, however, federalism brings with it values that can enhance the democratic experience. I do not confine this observation to formal, constitutional federalism. In some measure, there are values that, while most explicit in a federal structure, may be found in any arrange-

ment that entails vigorous local government, regional devolution, or other such approaches.

There is a link between self-government and liberty. Municipal institutions at the local level inspire what Tocqueville called the "spirit of liberty."⁸⁴

Federalism and local institutions have an educational value in that they encourage civic participation. It is one thing to carry out the commands of a distant capital, quite another for citizens to deliberate together in the place where they live in shaping the affairs of government.

Federalism works to distribute power. If power tends to corrupt, then devices that distribute and diffuse power help guard against tyrannical government. The principle of separation of powers works to this end at the level of the central government; federalism distributes power among levels of government.

Federalism invites a continuing dialogue about the premises and limits of government power. The very ambiguity of federalism — its attempt to create a sufficiently powerful central government while also preserving local prerogatives — is one of its merits. Governors and governed alike must, in a federal system, constantly reflect on fundamental questions in order to make that system work.

Federalism both encourages and reflects pluralism. The open society allows individual idiosyncracies to flourish. To the extent that federalism serves as a counter to uniformity and homogeneity, it nurtures pluralism.

The units in a federal system are, in a sense, scientific laboratories. Each can experiment with social or economic solutions to problems. If those experiments work well, other units and indeed the central government can follow suit. If they do not work out, the harm, if any, is localized.

Federalism, properly maintained, bolsters the essence of constitutional democracy: the right to make choices. In the American constitutional system, the right of individuals to participate in the political process is bolstered by such rights as freedom of expression, the right to vote, and equality in legislative representation.

States and local governments in the United States, one must be candid to say, have often violated just such fundamental rights. Racial, religious, or other minorities have frequently been the victims of discriminatory state and local laws. The remedy for such wrongs, in the American system, lies in vigorous judicial enforcement of constitutional guarantees and action by the legislative and executive branches to fur-

84. DE TOQUEVILLE, *supra* note 30, at 61.

ther the ends of equal justice for all.

The need to guard against state or local trespasses on individual liberties does not, however, mean that a country must reject the advantages that can come with a federal structure, assuming federalism otherwise meets that country's needs. Federalism, properly conceived and carefully shaped, can operate as part of the matrix of protection for individual liberties. Any device that can work to that end deserves careful consideration by the architects of a country's constitution.