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REMARKS OF THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

WHY FEDERALISM MATTERS

Mr. President, members of the bench and bar, Dean Goplerud, members of the faculty, students, and distinguished guests. Thank you for inviting me to campus to deliver this year's Opperman Lecture. And special thanks to Dwight Opperman, whose generosity to this law school has made possible not only these lectures, but the Opperman Student scholarships, the Opperman Distinguished Professor of Law, even the Opperman Hall and the beautiful law library. But beyond his generosity to this law school, Mr. Opperman has, through his work with the West Publishing Company, made American law accessible to a generation of law students, lawyers, the general public, and, now, the entire world. Mr. Opperman, we are all grateful for the good work you have done.

I would like to share with you some of my thoughts about the American Constitution, particularly what makes it different from others in the world. In the last few years I have had the wonderful opportunity to visit other countries and to discuss with them their constitutional systems. I have been left pondering what it is about our Constitution that has allowed this great nation to enjoy unprecedented political stability and economic and social prosperity for more than two centuries. There are two things that stand above all else. First, the principles upon which the American constitutional order is based are universal principles, applicable to all people at all times. And second, our founders made a significant advance in the science of politics, an advance that allowed them to create a government strong enough to defend itself and the liberties of its people, yet limited enough that it would itself not become the destroyer of those selfsame liberties.

Let me turn first to the principles. We find them most succinctly and indeed elegantly stated by Thomas Jefferson in our Declaration of Independence:

> WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among

> these are Life, Liberty, and the pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just powers from the Consent of the Governed . . . .

Just what did Thomas Jefferson mean when he penned these words in defense of the revolution those very words launched? In an era in which cynicism and moral relativism often hold sway, the notion that there are some claims so inherently true as to be self-evident seems almost absurd. Yet, that is precisely Jefferson's claim, and, in our nation, it has assumed the status of a secular tenet. Abraham Lincoln called it "the great fundamental principal upon which our free institutions rest." The Reverend Martin Luther King, Jr. described it as the "promissory note to which every American was to fall heir," and he ultimately gave his life in his successful struggle to have America redeem that promissory note.

Quite obviously, though, Jefferson did not mean that we are all equal in physical or intellectual attributes. Such would be a self-evident delusion rather than a self-evident truth. No. What Jefferson meant, like John Locke before him, is that all men and women, all human beings, are equally created by God, endowed with the capacity to reason and with free will, thus sufficiently sharing in human nature as to render it unjust for any man to rule another without consent. This principle of equality is applicable to all men and women at all times, and applies as much to the greatest king as to the lowest laborer.

A key consequence of this fundamental principle of human equality is that all human beings lay equal claim to the unalienable rights of life, liberty, and the pursuit of happiness. But to be entitled to such rights does not necessarily mean that one is secure in them, the darker side of human nature being what it is. As James Madison once noted, "if men were angels, no government would be necessary." Precisely because men are not angels, therefore, governments are instituted among men, for the purpose of securing the rights to which we all are entitled by virtue of our humanity. Because of the inherent equality of all mankind, however, the only *legitimate* government is one which derives its powers from the consent of the governed.

In order to protect against government tyranny, yet at the same time create a government based on consent, the framers of our Constitution engaged in an unprecedented exercise in popular lawmaking. Rising above ordinary politics, the framers of our Constitution toiled for months in the summer heat of Philadelphia, not to establish a government, but to draft a *proposal* for government, which they then submitted for consideration to the people, who met through their representatives in state ratifying conventions specially convened for the purpose of deliberating on the proposed form of government. Our Federal Constitution was adopted only after an elevated process of popular lawmaking: A constitutional convention called for the explicit purpose of amending the existing Articles of Confederation; submission of the proposed constitution to the people for ratification; and ultimate ratification by

a super-majority of the people, meeting in state ratifying conventions. Since you are all students of the law, you know the result: A Constitution admired throughout the world; a Constitution that aims to provide enough power to government to insure that the rights of the people would be secure from both foreign invasion and domestic unrest; but a Constitution that also aims to prevent government from becoming the destroyer of rights, by granting the government only specified, enumerated powers and by dividing the government into three branches, each of which can check overreaching by the other branches. That is the government to which "We the People" consented. It remains a just, legitimate government only so long as it stays within the bounds established by its charter, our Constitution.

Even though they created government, the framers also feared their creation. Because men are indeed not angels, a government of men will by its very nature tend to become tyrannical and, therefore, destructive of the very rights it was instituted to protect. Hence, the government must itself be limited in its powers, and structured in such a way as to control it and protect the rights of individuals even against a majority. To return to Madison's words, "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

Which brings me to the second great achievement of our nation's founders. We should always remember that the framers rebelled against Great Britain not because the British empire was ineffective, but because it had imposed tyranny through arbitrary government. True to Madison's words, they designed a government that was strong enough to defend the governed, yet structured in such a way as to insure that it would control itself. You are all familiar with the first mechanism that the framers chose to restrain the powers of the federal government: the separation of powers. The framers divided the powers of the national government into three branches—legislative, executive, and judicial—not because they believed this would always lead to a strong government, but because they believed it would create an efficient government. They further divided the legislature into two separate houses; they gave the executive a veto over legislation; and they subjected the entire lawmaking process to judicial review, all in the hopes that the three branches could use their respective powers to check and balance one another. While certain innovations, such as the legislative veto or the line-item veto, might improve the operation of government, they are not permitted by the separation of powers because they would undermine the abilities of the branches to control one another, and thereby obviate the need for government actions to undergo careful thought, scrutiny, and consensus.

At times, this might make the United States Constitution seem like an anachronistic hindrance that prevents the nation from adopting governmental reforms that have become popular in Europe or Asia. But, as Chief Justice Burger wrote for

the Court in *INS v. Chadha*, "The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." By creating inefficient central government, the framers hoped to protect individual liberty and a civil society, which they believed could flourish only without the interference of the government. With governmental efficiency on one side of the ledger and the expansion of public power and a corresponding reduction in the sphere of private activity and liberty on the other, the framers clearly struck the balance in favor of individual liberty. Again, as Chief Justice Burger observed, "with all of the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."

But what has escaped notice of late, and perhaps at one time for very good reason, is that the framers established another structural safeguard for individual liberty: federalism. Federalism sometimes has been used to justify the most terrible tragedies ever inflicted by Americans upon Americans, slavery and segregation. For that reason, the idea of state sovereignty has acquired a negative connotation. Nonetheless, federalism, per se, is not an evil or a good, it is just a construct, just as the separation of powers is a construct—they are both means that serve certain ends. They are not ends in themselves. It was slavery and segregation, and those who perpetuated wrongs, not federalism that perverted the American system of government for their own ends. Rightly understood, federalism can advance the same goal as that pursued by the separation of powers, or the enumeration of limited federal powers, or the Bill of Rights for that matter. I suggest that all of these mechanisms have the same purpose: to protect individual liberty and the private ordering of our lives.

It is time that we rediscovered the role that federalism has to play in guaranteeing individual liberty. The framers did not believe that separating power, alone, would be sufficient to guard against tyrannical government. They saw, for example, that the three branches of the national government could collude in an unconstitutional exercise of power. In order to protect against this possibility, the framers created a federal—not a purely national—system of government. And, federalism was to play a purpose similar to that of the separation of powers. As James Madison wrote in the Federalist No. 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

In other words, federalism provides a check on the national government when the separation of legislative from executive from judicial powers alone cannot or does not. Notice that Madison does not say that federalism necessarily exists to protect the states as institutions, although that is its subsidiary effect. Rather, federalism—like the separation of powers—exists to protect "the rights of the people."

This is a theme that has been unnoticed, but which underlies the Court's current federalism jurisprudence. As early as 1991, when the Court decided in *Gregory v. Ashcroft* that the Age Discrimination in Employment Act did not apply to state judges, Justice O'Connor remarked for the Court that "the principle benefit of the federalist system is a check on abuses of government power." The Court saw its role as maintaining the Constitution's balance between federal and state power not for balance's sake, but for freedom's sake. "In the tension between federal and state power," Justice O'Connor declared, "lies the promise of liberty." *Gregory* was the starting point for the Court's rejuvenation of protections for state sovereignty and for restrictions on the federal government's enumerated powers. A series of cases have followed *Gregory*: *New York v. United States*, in which the Court held that the federal government could not "commandeer" state legislatures to enact certain regulations, *United States v. Lopez*, in which the Court struck down a gun-in-schools law as beyond the Commerce Clause, *Seminole Tribe v. Florida*, in which the Court held that the federal government could not use the Commerce Clause to override state sovereignty, *Printz v. United States*, another anti-commandeering case, and last Term's cases, *Alden v. Maine*, in which state sovereignty was extended to suits in state courts, and the *College Savings Board* cases, in which the Court found federalism interests to be at stake in its restrictions upon Congress's powers under Section 5 of the Fourteenth Amendment. In these cases, the Court has reaffirmed federalism in two ways: by limiting the powers of the federal government, and by defining and protecting the sovereignty of the states.

To be sure, the Court has not always fully explained the larger purposes behind this resurrection of federalism. This is only to be expected; as judges, we are more focused on deciding the case before us, as presented by the facts and as shaped by precedent, rather than articulating broad principles from the outset. Nonetheless, the Court has come in for some sharp criticism, in part because the restoration of federalism seems to some to be senseless, or without purpose. For me, however, federalism promotes the same purpose as that served by the other broad structures of our Federal Constitution—the enumeration of limited federal powers, the Bill of Rights, and the separation of powers. All of these constitutional mechanisms check and control governmental power, so that a sphere of private activity and individual freedom can flourish free from state interference.

Federalism helps to accomplish this goal in a number of ways. It enhances self-government by creating a local decision-making system that is closer to the people, and hence more responsive to their wishes. States still retain jurisdiction over

most of the policies that affect the daily lives of their citizens, and so they can play a creative role in defining individual rights. States not only tailor national programs to local conditions and needs (the rather servile role assigned to them by some); they also provide innovation in recognizing and protecting rights—an insight that Justice Brennan recognized in urging states to recognize rights under state constitutions that went beyond the Federal Bill of Rights. At a broader level, the existence of numerous states, each making certain decisions concerning the allocation of resources and the balance between public power and private rights, creates a beneficial marketplace of sorts. Since people can vote with their feet, by moving to states with whose policies they agree, they force the states into a competition to offer policies that best protect individuals and their rights. States can even virtuously compete with the federal government to better protect the individual rights of their citizens.

But federalism provides more than just a decentralized decision-making system. One might think that federalism serves a purpose in protecting individual liberties simply by diffusing power among many different political centers, such as states. That could be achieved just as easily by creating administrative subdivisions within a larger national government, as is the case with many European nations with strong centralized governments. And these nations, to say the least, have not demonstrated the history of protection for individual liberties that has characterized the American experience. Our system of federalism does more than that. It not only diffuses power, but it also creates independent sovereigns. The state of Virginia, my home state, for example, is sovereign in a way that an administrative division of France is not. Virginia has its own government, it has plenary control over certain subjects, it administers areas such as criminal law and education with substantial, if not complete, policy-making freedom, its governmental operations cannot be "commandeered" or taxed by another sovereign.

Yet, states do not have sovereignty for sovereignty's sake. Instead, the framers believed that these sovereigns would have an interest in monitoring the activities of the federal government and ensuring that it lives within its enumerated authorities. Keeping the government within the written limits on its power is not a goal in itself. Rather, the framers believed that controlling the federal government, through the recognition and protection of independent state sovereigns, was necessary to protect individual liberty itself. These state sovereigns would provide both constitutional and political checks upon the powers of the national government. In helping to constrain the federal government, the states would supplement the protections for individual rights as surely as did the Bill of Rights and judicial review. As James Madison declared when he introduced the Bill of Rights in Congress, "If [these amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of powers in the legislature or executive; they will be naturally led to resist every encroachment upon rights

expressly stipulated for in the constitution by the declaration of rights." Judicial protection of individual rights, however, would not be the only protection. Madison states that, "Besides this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberty."

Madison's comments reveal the last, and perhaps most important, way that federalism protects individual liberty. States do not serve individual rights just by allowing the decentralization of power; they do not protect them merely by being laboratories of democracy, as Justice Brennan so famously argued; they also exist as the organizers of resistance to the unwarranted exercise of federal powers. As Publius wrote in the Federalist No. 26, "the state legislatures, who will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if anything improper appears, to sound the alarm to the people and not only be the VOICE, but if necessary the ARM of their discontent." States provide an alternate source of political loyalty and a training ground for future political leaders. The framers certainly foresaw the possibility that the nation's leaders someday might stray from their duty, and seek to expand federal powers for their own benefit. To guard against this, the framers believed that federalism, by protecting the sovereignty of the states, would create centers of political opposition that could control the excesses of the national government. It is this very sovereignty that the Court continues to protect today; take away that sovereignty and you undermine the ability of the federalist structure to maintain multiple centers of legal and political power.

The role of federalism in providing an additional security for individual rights justifies the Court's expanded exercise of judicial review in the field. Some academics and judges have argued in the past that federalism needs no judicial review, because the "political safeguards of federalism"—primarily the representation of the states in the Senate—would protect state interests in the making of legislation. The Court's recent cases show that it has rejected this proposition. Why? While the Constitution has no clause mandating judicial review at all, the original understanding suggests that judicial review, to the extent it was to exist, should apply with equal force to federalism as to any other type of cases. Remember that when the Constitution was ratified in 1788, it did not even contain a Bill of Rights. So, if judicial review was to exist, it was designed from the beginning to maintain the limits on the powers of the federal government as much as to guard individual rights directly. Ratification of the Bill of Rights in 1791 gave individual rights the same protections that state sovereignty had already received in 1788. And once we

understand that federalism plays the same role as the separation of powers, the enumeration of limited national powers, and even the Bill of Rights, judicial review of federalism questions appears all the more appropriate and justified by the constitutional structure. All of these constitutional mechanisms exist to check the powers of the government so as to protect individual rights and a private civil society.

Now some may see these constitutional checks and balances as bothersome impediments to majority rule. That is certainly the opinion some have in Europe. Every age has its important policies that some people believe must be enacted at any cost, regardless of the cost to the constitutional structure. Far from being a nuisance, however, these checks and balances, the "double security" for our liberties, are the genius of our system of government. The check on the majority is equally a check on governmental tyranny. Surely no one would contend that the majority itself can do no wrong. Our history is replete with all too many instances in which a temporary majority has pursued its own self interest at the expense of the minority's individual rights. At the very least, let us retain and reinvigorate the checks on government power that we have. Surely the lives and liberty of the more than 250 million citizens of this great nation warrant that the "double security" for our liberties designed by our founders should be in working order, so that, to borrow a phrase from Abraham Lincoln, "government of the people, by the people, and for the people shall not perish from this earth."