



Remarks of
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The United States and Switzerland are old friends. I say that for a number of reasons. Switzerland is one of the few countries in Western Europe, from which our social and political traditions spring, with which we have never been at war or even at risk of war. We fought the French in our colonial days, the English in our War of Independence, the Spanish in the Spanish-American War, the Germans and Austrians in World Wars I and II, the Italians in World War II. We even invoked our so-called Monroe Doctrine—our hostility to colonization in the Americas—against the Dutch and the Danes. But we have never gotten sideways with the Swiss.

One reason, of course, is that the Swiss have never had colonial aspirations, and have avoided wars in which their own independence was not at stake. They are sometimes criticized for this policy of neutrality, but it is hard for Americans to criticize them, since they have only followed the policy urged upon his countrymen by George Washington, in his farewell address: avoid foreign entanglements. That advice may no longer make sense for a populous United States that is an economic and military superpower; it remains good advice for the Swiss.

Apart from the fact that we have never fought them, another reason the Swiss are old friends is that, perhaps more than any other country, they share with us that fierce sense of independence epitomized by one of our revolutionary battle-flags in 1776, showing a coiled rattlesnake with the emblem "Don't Tread on Me." Like the American colonies, and like the rattler, Switzerland is small, but not worth messing with. William Tell has long been the embodiment of the spirit of freedom that inspired our Minutemen at Lexington and Concord.

What we also share with the Swiss—and this is the subject to which I intend to devote most of my remarks this evening—is adherence to an unusual form of government called federalism, in which the individual is at one and the same time the citizen of two different but interrelated states. The great political scientist Carl Friedrich had this to say about federalism:

Neither Plato nor Aristotle nor the many political writers following them developed a concept of federalism. It emerged slowly out of vague beginnings in the Middle Ages and was given a first significant general formulation by Johannes Althusius in the early seventeenth century, but without receiving any significant further development; even Montesquieu, though influential in the thought of the American constitution-makers, did not explore the problems of a federal government. That happened only when the drafters of the American Constitution

sat down at Philadelphia to hammer out their compromise...¹

Although Americans are properly credited with “inventing” federalism, Swiss federalism is perhaps more impressive, given the longer history of Canton autonomy and indeed even armed conflict. By comparison, the American political compromise was easy. English was the predominant language, and English political and social culture the dominant culture, in all the American states. There were, to be sure, religious and political differences—but unlike in Switzerland, they had not festered for half a millennium. As one historian has observed: Swiss history “rivals in violence, blood-shed and fanaticism that of any of her larger neighbors. For this reason, the final triumph of democratic federalism, of social equilibrium and religious toleration is all the more remarkable.”²

The experience of Switzerland influenced the American framers. The Swiss Confederation that existed in 1789 had its remote origins in the Perpetual League of 1291, formed by three mountain communities living around Lake Lucern who joined hands in self-defense against the Hapsburgs. That confederation had gradually grown, but growth, religious division, and to some extent external peace had tested the strength of its common bonds. By the time of the French Revolution (which is about the time of the framing of our Constitution) there was, according to one historian, “[n]o such thing as a Swiss People...; political rights were most unevenly distributed, and

¹ Carl J. Friedrich, *The Impact of American Constitutionalism Abroad* 44 (1967).

² Frederick H. Cramer, *Switzerland: Federalism Triumphant*, *Current History*, Mar. 1949, at 143, 143.

there were repeated revolts against oligarchical tyranny.”³ James Madison, perhaps the most important framer of the American Constitution, looked to the Swiss Cantons and resolved that America needed a more perfect union. First he noted that the union of the Swiss Cantons “scarcely amounts to a confederacy,” since they had no common treasury, currency, judiciary, or army.⁴ While he acknowledged the Cantons’ joint efforts in defense and in establishing mechanisms to resolve disputes between themselves, he discounted their stability and ultimately concluded they were too vulnerable to disunity. Madison wrote in the *Federalist Papers*:

Whatever efficacy the Union [of the cantons] may have had in ordinary cases, it appears that the moment a cause of difference sprang up, capable of trying its strength, it failed. The controversies on the subject of religion, which in three instances have kindled violent and bloody contests, may be said in fact to have severed the league. The Protestant and Catholic cantons have since had their separate diets; where all the most important concerns are adjusted, and which have left the general diet little other business than to take care of the common bailages.

That separation had another consequence which merits attention. It produced opposite alliances with foreign powers; of Berne at the head of the Protestant association, with the United

³ Arthur Percival Newton, *Historical Introduction to Federal and Unified Constitutions* 10 (Arthur Percival Newton, ed., 1923).

⁴ The *Federalist* No. 19, at 122 (James Madison) (Jacob E. Cooke ed., 1961).

Provinces; and of Luzerne, as head of the Catholic association, with France.⁵

Madison, and his fellow framers, sought to avoid these weaknesses in the federal system that they established. It *would* have a national treasury supported by a national power of taxation; it *would* have a national monetary system, national courts, and a national army and navy. State alliances with foreign powers would be entirely forbidden, and the entire treaty power given to the federal government.

It is less clear—or at least less clear to me—what effect the American experience had upon the framers of the Swiss constitution of 1848. One must assume it was influential. Word concerning the nature and the success of the American experiment had spread to Europe. In the 1830s the *Federalist Papers* were translated. In 1835 Alexis de Tocqueville's *Democracy in America* was published and by 1836 there were two German editions which were widely read. Thus by 1848 the American example of federalism, which was an easier compromise, almost certainly provided encouragement for the much more difficult compromise among the Swiss Cantons.

Having discussed how federalism came to be in our two systems, let me next address briefly how it is maintained. What is to keep the federation from disintegrating into its constituent parts or the national government from slowly but surely aggrandizing itself and obliterating the local sovereignty and culture of states and Cantons?

⁵ *Id.* at 123.

In the early years of a federation, the former is more of a threat than the latter. What helped create the United States, and what held it together in its earliest years, was quite simply the need for unity in order to repel foreign aggression. We fought a war against the English not only in 1776 but also in 1812, in the course of which they put our capital to the torch. But as external threats disappeared, and internal disagreements—particularly over slavery—magnified, the tendency of the American federation to fall apart was countered (to put it bluntly) simply by force of arms. Our Civil War was not fought about slavery; it was fought over the desire of the Southern states to leave a Union that the Northern states regarded as indissoluble. The battle-cry of the Union armies was not “Freedom for the Slaves” (Lincoln did not propose that until the middle of the war). It was “The Union Forever”—and the victory of the Union forces in the war is memorialized in grandiose Union Stations and Union League Clubs in all major cities of the North. The Swiss federation did not have to resort to force of arms to preserve its unity—perhaps because it has been blessed by external threats to its existence on all sides.

But if centripetal force is the principal threat to a federation in its early years, centrifugal force is the principal threat thereafter—the tendency of the national government to draw all powers to itself. Of course the text of the constitution can forbid that; but words are only words, and will be ignored unless they are reinforced by institutional structures that assure their efficacy. Both the United States and Switzerland have created such structures. First and foremost, both countries made an anti-democratic bargain in designing their national legislature so as to protect state/cantonal

sovereignty. The United States has its Senate, where each state, no matter how small or large its population, has two senators; Switzerland has its Council of States, consisting of two deputies from each full Canton and one each from the six half-Cantons. In the United States the disparity between California, the most populous state, and Wyoming, the least populous state, is 69 to 1; that is more than double the disparity in Switzerland, where Zurich is 29 times more populous than Uri. Of all the federal republics in the world, which now include at least Argentina, Australia, Belgium, Canada, Germany, Great Britain, India and Spain, to my knowledge only the United States, Argentina and Switzerland have this feature of a house unrelated to population. (Argentina copied this feature, like much of the rest of its constitution, directly from the United States. So similar are the texts that in the 19th century the Argentine Supreme Court would cite opinions of my court interpreting various provisions.)

The United States Constitution originally provided that the senators would be elected by the legislatures of the states; that was changed by the Seventeenth Amendment, adopted in 1913, to make the senators electable directly by the people of the states. In the Swiss system, if I understand it correctly, it is up to each Canton how its delegates to the Council of State are to be elected; and currently they are all elected by popular vote. As in most things, I think the founders of our Constitution got it right: it was important to the preservation of the federal system that the senators were elected by the state legislatures. The states of a federation—as states—can only be protected through a body elected *by their governments*. Delegates who are elected by the people of the states can be counted upon to resist federal action that will harm their constituents; but having no connection to

the state government, they cannot be relied upon to resist federal action that infringes upon the prerogatives of their state governments. To the contrary, they have every incentive to expand federal power—introducing bills that go well beyond federal authority, but that show to their constituents what deep concern they have for the general welfare. (Or, as it is put in this era of universal victimhood, “We feel your pain.”) An excellent case in point is the federal Violence Against Women Act, which was declared unconstitutional last Term by my Court. This made domestic violence a federal offense; something further beyond the assigned federal powers could hardly be imagined. But the Act passed overwhelmingly in the Senate—because I am sure the senators pleased more voters than they displeased by voting for it.

The protection of Cantons in the federal legislature also affects the composition of your Executive Branch, the Federal Council, which is selected by the two houses sitting together. The United States—as you have reason to know from recent events—similarly protects states in the selection of the Executive, though not as effectively as Switzerland does. Our system does not provide for direct popular election of the President. Instead, presidential candidates compete, on an all-or-nothing basis, for the electoral votes of individual states. It is thus possible for a candidate to lose the popular vote but still win a majority of electoral votes from the states. Since the number of the states’ electoral votes (unlike the number of their senators) depends upon their population, the most populous states have the most to say; but the all-or-nothing electoral structure makes the capture of individual states the overwhelming focus of our presidential elections.

The United States has yet another anti-democratic safeguard of the boundaries between state and national authority: judicial review. The Swiss Constitution limits judicial review to nonfederal acts, instructing the Federal Tribunal that it “shall apply the laws adopted by the Federal Assembly.”⁶ Judicial review is, in other words, a one-way street: cantonal acts can be invalidated because they exceed cantonal powers, but federal acts are immune. In the United States, by contrast, the courts can also intervene when the national government has overstepped its bounds. This is less of a protection than it seems; in fact, when the federal government is bound and determined to exceed its powers, judicial review is almost worthless. As I mentioned earlier, the only secure guarantees against the arrogance of power are institutional structures, and when it comes to standing up against a determined federal government, the Supreme Court is a feeble institution. Why would anyone in his right mind believe that a federal Supreme Court, whose members are selected by the federal President, and confirmed by the federal Senate, would be a bulwark against the federal government? On minor matters, and perhaps even on major matters for brief periods of time, the political branches will let the Supreme Court have its way. But if the federal political branches remain determined, for a substantial period of time, to shake off the constitutional restrictions, they can readily overcome the opposition of the Supreme Court. This became apparent during the presidency of Franklin Roosevelt, in the early days of the New Deal. When the Supreme Court invalidated some federal measures because they exceeded the federal government’s powers under the Commerce Clause, Roosevelt threatened to push through a bill increasing the size of the Supreme Court beyond its current number of nine, enabling him to appoint

⁶ Switz. Const. §113.

new Justices who would agree with his expansive view of the Commerce Clause. That bill never passed, but under the threat of it the Supreme Court abruptly changed its estimation of the scope of federal powers. (This became known as the switch in time that saved nine.)

Not only is the Supreme Court not, in my estimation, a reliable guarantee against the constant expansion of federal power, there is much to be said for the proposition that in recent years it has been the most significant factor in the breakdown of federalism. Federalism ultimately depends upon the existence of significant cultural and social differences among the constituent states. Those differences cannot be so extreme as to prevent a union; but when they disappear entirely there is no incentive to maintain the complexity of the federal structure. In recent years, the Supreme Court has suppressed social and cultural differences among the states to a greater degree than Congress would ever have dared. It has done this principally through an imaginative interpretation of our Fourteenth Amendment, adopted after the Civil War, which prohibits any state from depriving persons of life, liberty or property without due process of law. The Court has interpreted this to be not merely a guarantee of what it says (*process*), but also to be a guarantee of certain "fundamental liberties," including (but not limited to) those guaranteed in the federal Bill of Rights. Through this device the Bill of Rights, which originally limited only the powers of the federal government, became a leveling tool that has been used against the states. Thus, for example, differences among the states in their attitudes towards public support of religion have been suppressed. Some states used to have prayer in public schools; that is now unconstitutional. (Indeed, my Court has even forbidden a nondenominational prayer at high school graduation ceremonies, or before high school football games.)

Differences among the states in their attitudes towards sexual morality have been suppressed. All states must now permit the sale of contraceptive devices; all states must permit abortion on demand, even so-called “live birth” abortion. Fifty years ago, books and movies used to be promoted with the advertisement “banned in Boston,” since that once stern and puritanical society took a particularly stringent view of how much sex and nudity could be portrayed. That phrase “banned in Boston” has left the language, since the Supreme Court has essentially created a national obscenity standard, at least for works that can claim to have some minimal literary or artistic merit. In the field of criminal justice the Court has, through the Constitution, effectively created a national code of criminal procedure—binding on state as well as federal courts—which Congress would never have enacted. And I could go on. Suffice it to say that, on balance, in the last half-century the Supreme Court has done more to erode the independence of the states than to preserve it.

Well, why does all this matter? What is so good about a federal system, as opposed to a nationally unified government? There are certainly many things to be said against federalism, or else most of the nations of the world would not have rejected it. To begin with, it is terribly difficult to maintain. Any federal system necessarily establishes some division of authority between the state (or Canton) and national governments. And patrolling that line is a major burden. An enormous amount of the time of my Court and of lower federal courts is devoted to considering challenges to state laws on the ground that they exceed state power under the federal Constitution, or that they contradict validly enacted federal statutes; and considering challenges to federal laws on the ground that they exceed federal

power under the Constitution. How much simpler is a unitary national government such as that in France, where all laws enacted by the Assembly are unquestionably binding on all the *departements*, and where the permissibility or nonpermissibility of a local enactment can readily be resolved by a law enacted by the National Assembly.

Another disadvantage of a federal system, of course, is that it leaves in place sovereign governmental structures that can be enlisted *against* the national government. This feature produced, in the United States, the war that has still accounted for more American deaths than any other war in our history: the Civil War. And it is for fear of this feature that the Emperor Napoleon not only eschewed a federal system, but carefully assured that even the administrative departments of his empire did not conform to the traditional regional divisions of France. There was to be no more Normandy, no more Brittany, no more Lorraine.

And finally, a federal system is, in a gross sense, less democratic. If you believe in one-man, one-vote, and if a majority of people in the United States think that the speed limit should be 65 miles an hour, then it is in a sense undemocratic to let the majority of people in one state, who are a minority overall, set the limit at 75.

Against these considerable disadvantages of federalism, the principal advantage is so simple as to be generally overlooked. It is mathematically demonstrable that, insofar as the laws governing oneself and one's immediate neighbors are concerned, a federal system produces more happy

may have gathered from my remarks, it seems to me in precarious health in the United States. Many, however, think it to be the wave of the future internationally. For example, an American law professor (Thomas Merrill) writes:

[I]t does not take too much of a visionary to see the possibility, down the road, of transnational organizations like GATT [General Agreement on Tariffs and Trade] and NAFTA [North American Free Trade Agreement] evolving into genuine, and perhaps overlapping, federal systems. If this happens, federalism will return to the American scene because America itself—increasingly a unitary nation state—will become a kind of regional governmental unit in one or more larger federations.⁷

Merrill goes on to predict a “new age of federalism.”

I doubt it. Dual sovereignty requires dual loyalty. Americans have been willing to lay down their lives, not just for their individual states, but—by the hundreds of thousands—for the Union. The Swiss the same. There is no such attachment, and I think will never be, to GATT or NAFTA—or indeed even to more plausible candidates for world or regional federation, such as the United Nations or the European Union. However convenient the

⁷ Thomas W. Merrill, *A New Age of Federalism?*, 1 Green Bag 2d 153, 162 (1998).

European Union may be as a mechanism for economic integration and perhaps even for military alliance, I doubt whether Europe as an entity has enlisted the affections of the citizens of the separate states of Europe, except for a thin governmental and intellectual elite. These states were at each other's throats, after all, only 50 years ago. It is well and good to fly the EU flag next to the national flag atop the embassies of the various EU states (as has become the custom). But will anyone except the Eurocrats salute it? Will the Frenchman charge into battle with the cry on his lips "the European Union forever!" (assuming he would be willing to speak English); or is he more likely to say, as he has for many centuries, "Pour la Patrie!"? To ask the question is to answer it.

In the last analysis, the decision to choose federalism is not a technical decision that governing elites make in structuring a government—similar to the decision to have a unicameral or a bicameral legislature, to have two-year rather than four-year terms for members of the legislature, or to have a separately elected Chief Executive. Indeed, it may not be too much to say that federalism is not chosen; it simply grows. It requires a delicate balance between unity and diversity; between loyalty to the whole and attachment to the distinctiveness of the part; between the national good and the local interest. Switzerland and the United States are two of the few countries of the world to have successfully achieved and preserved that balance for a protracted period of time. May they both long endure.