THE VALUES OF FEDERALISM*

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Political institutions, to survive, must be shaped with a view to the society and culture of which they are a part. Laws and constitutions are not like seeds found in a mail-order catalogue. Nevertheless, in governance as in gardening, one learns from the experience of other people.

The framers of the United States Constitution drew, of course, upon experiences from the public and commercial life of the American colonies. But they looked, as well, to the legacy of British constitutionalism, to the teachings of the Enlightenment, and to the lessons of history. In fact, while preparing for the Philadelphia convention, James Madison made notes on the lessons to be learned from the ancient and modern confederacies.1

Across the Atlantic, especially in France, Europeans watched with keen interest as the foundations were laid for the American constitutional system. George Mason's Declaration of Rights for Virginia2 influenced, not only the other American states and the American Bill of Rights,3 but also France's Declaration of Rights of Man and the Citizen.4

Two centuries later constitutionalists are once again comparing notes on what may be thought to be the building blocks of a democratic society. In Central and Eastern Europe, since the revolutions of 1989-90, the architects of a new order are writing constitutions, creating independent courts, holding free elections, and hoping that they can make a successful transition from one-party rule to freedom.

What relevance might Central and Eastern Europeans find in American constitutionalism? Do such distinctive institutions as American federalism have any lessons which might be useful in the emerging democracies? Some observers, taking a contingent or rela-

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1 Notes on Ancient and Modern Confederacies, in 9 THE PAPERS OF JAMES MADISON 4-22 (1975). During the winter of 1787-88, Madison supplemented his “Notes” with additional memorandums. 10 THE PAPERS OF JAMES MADISON 273-83 (1975).
2 DECLARATION OF RIGHTS FOR VIRGINIA (1776).
3 U.S. CONST. amends. I-X.
4 DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Fr. 1789).
tive view of constitutional arrangements, argue that constitutions are not universal. They point to the particularism of the American experience. By this view the United States Constitution was the result of a homogeneous, liberal culture, shaped in the circumstances of the American historical experience. Thus, they argue, it is foolish to think that the American model can be exported to other cultures, for example, those of Central and Eastern Europe.

Even for those who think the American experience is relevant and useful, there are obvious limits to the extent to which it can be a model for others. The Constitution itself was written in the eighteenth century and rests on assumptions about government’s playing a more limited role than is possible two centuries later.

The value for others of American constitutionalism does not lie, however, in the formal text of the Constitution itself. It is to be found in the general principles that may be distilled from a study of American constitutional history. It lies, as well, in the practical experience of making constitutional democracy work.

Thus, one who sets out to draw lessons for Central and Eastern Europe from American federalism must understand the metes and bounds of the terrain to be travelled. Federalism, as it has evolved in the United States, is not the product of a neat philosophical design. American federalism flows partly from the insight of the English-speaking colonists who, increasingly confident of their ability to enjoy a large measure of home rule, had no trouble supposing that sovereignty could be shared with the mother country. Federalism as a constitutional arrangement is, of course, in good part the result of a compromise struck by large and small states, and by northern and southern interests, at the 1787 convention. Furthermore, in the ensuing two hundred and more years, federalism has been shaped and reconfigured by formal amendments (the Reconstruction amendments being the most important), by technology, and by the forces of economic, social, and political change.

Federalism comes in many shapes and sizes. The number of constituent units may vary—from two in the former Czech and Slovak Federal Republic to fifty in the United States. The units may vary enormously in size and wealth; contrast Canada’s rich Ontario province with its poorer maritime provinces. The degree of centralization may vary so much that a federation may resemble a unitary state, or it may appear to be a confederation. A federation may opt for a presidential system as in the United States or a parliamentary system as in Canada. The means for resolving disputes between the federal gov-
ernment and its constituent units differ; the United States has its Supreme Court, whereas Germany has its Constitutional Court. There are as many faces to federalism as there are notions about the ideal marriage.

Despite such a menu for federations, it is possible to suggest some generalizations. I propose in the pages that follow to consider some of the benefits that may be said to flow from federalism as well as some of the limitations or disadvantages. In doing this, I suggest that one think not simply of formal federalism, but of a cluster of related values—federalism, localism, pluralism, diversity. Federalism as a constitutional arrangement has both advantages and disadvantages that go with formalizing the federal structure. But some of the pros and cons of federalism remain relevant where, short of a formal federal system, it is proposed to have a generous measure of devolution, regional autonomy, home rule, subsidiary, or some other way of institutionalizing pluralistic laws and policies.

I. THE VALUES OF FEDERALISM

A. Restraints on the Concentration and Abuse of Power

It is inevitable that government entails the use of power. Indeed, the idea of law itself turns on the assumption that there are circumstances when, in the pursuit of some social value, an individual must be forced to do that which otherwise he would not do or to refrain from that which otherwise he would do.

It is equally inevitable that to create government with the power over the lives of individuals is to invite abuse of that power. It is no accident that Lord Acton warned: “Power tends to corrupt, and absolute power corrupts absolutely.”5 One of the great challenges of constitutional democracy is how to give government sufficient power to do its job while at the same time creating restraints on the abuse of that power. What troubled the barons at Runnymede—could the king be trusted to keep his promises—troubles us still.

Philosophers, constitution-makers, judges, and others have sought various ways to restrain government’s power in order to protect individual liberty. The drafters of the first American state constitutions, remembering royal power, looked to popular government to safeguard liberty.6 Moreover, the Supreme Court can invoke judicial

5 Letter to Bishop Mandell Creighton (Apr. 3, 1887), in 1 Life and Letters of Mandell Creighton 372 (1904).
6 See Willi Paul Adams, The First American Constitutions: Republican Ide-
review of a state law. But no device is more important or more imbedded in the American experience than structural limitations on government powers in order to guard against their abuse.

One such device is the separation of powers—the creation, at the level of the federal government, of three branches, each having its own independent source of authority in the Constitution. Equally fundamental in the American scheme of things is federalism. James Madison drew the intimate connection between federalism and the separation of powers:

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.8

Alexander Hamilton saw similar virtue in having competing bases of government power:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.9

The dynamics of contemporary politics justify concern about the dangers of powers being used in an irresponsible way at the federal level. If responsible government assumes that decisions will be made in some way by which decision-makers are ultimately accountable to the people, then there is ample reason to be concerned about the bypassing of the democratic process by the "triangle of power"—the making of public policy by federal bureaucracies, congressional committees, and interest groups.10

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7 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
B. The Educational Value of Civic Participation

Alexis de Tocqueville, a great admirer of American democracy, saw the educational dimension of citizens’ intimate participation in local government. The townsperson, he said,

takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions; he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.11

Highly centralized regimes employ prefects or other officers, armed with the writ of the capital, to put laws into effect. Executing such laws is a relatively solitary experience of commands being given by one party and being obeyed by another. That the central government is elected in a democratic fashion may soften the experience (although not if the voice giving the commands is that of the all-powerful people, as in revolutionary France), but local execution of laws made at the center does not invite much by way of dialogue. It is deliberating together, face-to-face debate over the issues of the moment, that makes for reflection. The essence of being a citizen is to have the opportunity, not simply to vote for those who make the laws, but also to have a voice in how decisions are to be fashioned, and what choices are to be made. Local government can thus become a classroom for those who take part in it.

Mark Tushnet makes the useful point that it is in the give-and-take of local government and politics that citizens are most likely to realize the imperative that each must, to some extent, subordinate his or her self-interest if civic projects are to take place at all.12 Pundits and voters alike decry “gridlock” at the federal level. Likewise they deplore the excessive power of special interests. Yet the American people, in election after election, have tolerated divided government, the White House in the hands of one party, Congress in the hands of the other. In addition, special interests continue to flourish, whatever the cost to the common good.

State and local governments may also fail to lay aside partisanship or selfish interests bringing about deadlock. For example, the inability of California’s governor and legislature to agree on an ap-

11 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 68 (Henry Reeve trans., 1963).
approach to that state's troubled economy brought about a budget impasse, in which the state was reduced to issuing IOUs which eventually many banks in turn, refused to honor. The cost of such paralysis at the state or local level is, however, sooner obvious to the ordinary citizen than is deadlock at the national level, where politicians seem to hope to postpone indefinitely the day of reckoning that surely must come because of the mounting federal debt. The pain inflicted when a municipality does not collect the garbage is the kind of cost that quickly engages the attention of even the most acquiescent of citizens.

C. A Sense of Community

An insistence on individual rights tends to emphasize an atomistic view of society. Indeed, one of the great contributions of western constitutionalism has been to give a special place to human rights. The Bill of Rights to the United States Constitution is, above all, a list of "negative" rights, that is, limitations on government action.

There is, however, another important strain to constitutional thinking, one that stresses shared or community values. If the Bill of Rights reflects an individualistic ideal, then the early American state constitutions remind us of the notion that republicanism connotes also the inculcation of a sense of community or shared values.

George Mason's Declaration of Rights for Virginia\footnote{14} included, of course, protections for individual liberty, such as bans on general warrants and on cruel and unusual punishments.\footnote{15} But Mason's declaration also carried the language of aspiration: "That no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue; by frequent recurrence to fundamental principles. . ."\footnote{16}

A centralized government does not necessarily make republican virtues and a sense of community impossible. But such is human nature that distance tends to strain one's sense of benevolence and em-

\begin{footnotes}
\item[13] After California's 36th day without a state budget, the Bank of America, California's largest bank, stopped accepting the state's IOUs. Wells Fargo Bank and Union Bank, the state's second and fourth largest banks, had previously said that they would stop honoring the IOUs. Michael Quint, \textit{Banks Cite Expense in Refusing State I.O.U's}, \textit{N.Y. Times}, Aug. 6, 1992, at A14.
\item[14] \textit{DECLARATION OF RIGHTS (Va. 1776)}. Mason's Declaration of Rights, with some additions and changes effected over the years, appears today in \textit{VA. CONST.} art. I.
\item[16] Id. § 15.
\end{footnotes}
pathy. It almost seems axiomatic that, when newspapers or television report human disasters or misfortunes, the further the distance to the unhappy scene, the greater must be the toll in human life or suffering for the item to be reported—certainly, to be covered in detail. A neighbor’s house burns, and it makes the evening news, but it takes a typhoon or a volcano’s eruption for a disaster halfway around the world to reach our attention.

Ideally, of course, individuals should have the same concern for their fellow human beings wherever they live. Such phenomena as missionary movements and the Peace Corps remind us that human compassion does not stop at national boundaries. But, if it is civic virtue one wishes to instill—as the American founding generation hoped—one must begin with that which is closest at hand.17 Edmund Burke, in his Reflections on the Revolution in France,18 put it this way: “To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.”19

Federalism encourages the need to pay special attention to those people whose problems are closest at hand. There is also plenty of work to do near to home. What community has not seen the “not in my backyard” sentiment surface when it comes to shelters for the homeless or residences for the mentally retarded?

D. The Pluralistic Society

Closed societies seek uniformity—one party, one theology, one road to sacred or secular salvation. The open society allows individual idiosyncrasies to flourish. Individualism has its practical advantages, especially in the economic sphere; progress and invention are encouraged where individual enterprise and initiative are encouraged. There is also a deeper value in pluralism; it permits the human spirit to flower and express itself.

Local communities can often stifle individualism and self-expression. Many of the small towns that dotted nineteenth-century America were anything but models of pluralism. But social mobility offers a way out of such places. Moreover, at the larger geographical

18 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1955).
19 Id. at 71-72.
level, federalism and localism counter uniformity. In the United States, state and local boundaries are to some extent arbitrary. The states' very existence, however, are reminders that mores and attitudes do differ from one part of the country to another. The Federal Constitution and laws place limits, of course, on the extent to which local preferences may prevail. But the fact of federalism's existence encourages diverse attitudes to manifest themselves.

Federalism counters another kind of monopoly—that of political power and political parties. Disparate units having governmental powers offer arenas in which parties and factions finding themselves in the minority on the national stage can have local bases from which to compete and hope that, with luck, they can become majorities in the country at large.

The American states have frequently offered just such opportunities for political figures to hone their skills and marshal their troops for runs at national office. Woodrow Wilson in New Jersey, Franklin Roosevelt in New York, Jimmy Carter in Georgia, Ronald Reagan in California, Bill Clinton in Arkansas—all were state governors before being elected to the presidency.

E. Local Solutions to Local Problems

Federalism has its practical side. Many state and local problems do not require a federal solution. Local circumstances, local traditions, even local tastes may suffice. Consider the Supreme Court's approach to cases in which a state law or regulation is challenged by a party claiming the ordinance to be a burden on interstate commerce. From the early cases onward, the Court has actively policed such state enactments, lest they interfere with the free flow of commerce. Yet, the Court understands that local conditions often require a local formula.

A case in point is Justice Curtis' 1851 decision in Cooley v. Board of Wardens. Aaron Cooley objected to a Pennsylvania law requiring ships entering or leaving the port of Philadelphia to engage a local pilot to guide them through the harbor. Justice Curtis had no doubt that Pennsylvania's statute was a regulation of commerce. He postulated that some subjects would, of course, require a single uniform

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20 Daniel Elazar believes that it is "the dual possibility of state protection and federal intervention that has made federalism in the United States a major bulwark of pluralism." Elazar, supra note 9, at 101.

21 53 U.S. (12 How.) 299 (1851).
rule, but that there were others which are better handled at the state level. In the words of Justice Curtis:

the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.\(^2\)

Congress (which had deferred to the states on the subject of pilotage) was entitled to conclude that there was "no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."\(^2\)

F. States as Laboratories

Justice Louis Brandeis coined the now familiar metaphor of the states as laboratories when, in a 1932 Supreme Court opinion, he said, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."\(^2\)

Some observers might question whether the American states have lived up to Justice Brandeis' attractive portrait. At mid-twentieth century, the ideal of democracy was submerged by glaring malapportionment in state legislatures. State courts delivered opinions that often failed to command the bar's respect, and criminal justice in the states too frequently failed to meet minimum levels of fairness and due process.

Today, the states are far stronger and more responsible entities than they were in the 1950s. Some of the reforms were mandated by federal law. The Supreme Court's reapportionment decisions, requiring that representation be based on population, brought about significant changes in the composition of state legislatures. Civil rights laws, notably the Voting Rights Act of 1965,\(^2\) removed many of the most serious barriers to voting.

Other reforms came from the states themselves. During the

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\(^2\) Id. at 319.
\(^3\) Id. at 320.
1960s and 1970s, a number of states rewrote their constitutions, replacing archaic charters that often resembled statute books with constitutions encouraging responsible and responsive government. State governors may now exercise greater leadership, executive branches have been overhauled, legislatures are better staffed, and state courts are more professional.

Even before these structural reforms took place, the states were the locus of much innovation—spawning ideas that often led to imitation at the federal level. For example, when Wyoming became a state in 1890, it was the only state in which women could vote—anticipating the Nineteenth Amendment, which became effective in 1921. Similarly, Wisconsin pioneered unemployment compensation, while Massachusetts led the way in establishing minimum wage laws for women and for minors. Budget techniques turning on program performance, including the idea of “zero-base budgeting,” were tried out by state governments before being adopted by the federal government. The list of state innovations is a long one. Indeed, as Congress debates proposals ranging from no-fault insurance to containing the cost of hospital and health care, proponents and opponents alike are sure to cite the experience gleaned, both successes and mistakes, from the state capitals.

It is important to note, however, that competition among the states can lead to the lower standards. Harry Scheiber cites Delaware’s corporate law and Nevada’s divorce law as classic examples of minimal legislation designed to give in-state industries the advantage over those in other states. Competition among states may actually stifle innovation, especially where states fear that attempts to deal with a social problem may cause industries to relocate to states with fewer benefits or less regulation.

G. A Continuing Referendum on Fundamental Principles

Any allocation of power among levels of government—whether through formal federalism or through some other device—introduces
ambiguities into the processes of government. Students of American state and local government know the often Byzantine quality of the impact of Dillon's Rule. Moreover, beginning with the earliest decisions of the United States Supreme Court, federalism as a constitutional principle has produced thousands of pages of judicial opinions seeking to strike some balance between national and local interests.

Americans have never ceased to debate and reinterpret the meaning of "federalism." One is reminded of the old adage about a violin's being defined as a small viola, and a viola's being defined as a large violin. What does it mean to believe in "federalism" or to call oneself a "federalist"? When the Articles of Confederation were still in force, those who, like James Madison, saw themselves as being "federalists" were advocates for greater powers in the central government. Indeed, the Virginia plan at the Philadelphia convention called for a national legislative veto over state legislation that might impinge upon national interests.

In the third century of the federal union, however, to speak of "federalism" or to speak of oneself as a "federalist" is usually to advocate more respect for the states as entities and to entrust more powers and functions to state and local governments. Thus, dissenting from the Supreme Court's decision in Garcia v. San Antonio Metro. Transit Auth., Justice O'Connor declared that the Court "cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." Federalism has a dual purpose. It aims at achieving unity while also preserving diversity. Any state that is federal in character must reconcile local preferences and wider demands. Pursuing competing ends often produces tension and conflict. The result is a dialogue regarding the allocation of power. Some of the dialogue goes on between levels of government. It takes place, for example, in Congress, where states' interests may be invoked during a debate on legislation, in court, where state laws are attacked as being burdens on interstate commerce, and in the Supreme Court, where the balance between national and local interests is struck.

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31 Dillon's Rule, first advanced in the nineteenth century, strictly construes the powers given local governments under state law. See generally JOHN F. DILLON, LAW OF MUNICIPAL CORPORATIONS 173 (1873); Clark v. City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423 (1865).

32 For the text of the resolutions proposed by Governor Edmund Randolph at the Philadelphia convention on May 29, 1787, see 10 THE PAPERS OF JAMES MADISON 15-17 (1975).

33 469 U.S. 528 (1985).

34 Id. at 581.
commerce, or as being preempted by federal legislation; and in other forums.\textsuperscript{35}

The conversation about basic principles goes on among the people as well. In a federal system, a citizen has allegiance to more than one level of government; in the United States, one is a citizen of both state and nation. Ordinary people are drawn into the unending debate over federalism. Do the individual states tend to promote individual liberty, or to undermine it? In such debates, abstractions quickly yield to specifics, and citizens, especially when they vote, must make choices. In mulling the uses of federalism and localism versus central solutions, the citizen may hear the echo of the founders' debates. Indeed, Daniel Elazar, one of the great American students of federalism, maintains that, by generating questions that require continuing public attention, "federal arrangements may be sufficiently justified for this reason alone."\textsuperscript{36}

\section*{H. Accountable Government}

A hallmark of democratic government is that those who are elected to public office are accountable to those who elect them. It is equally important to a healthy polity that citizens feel that sense of accountability. Accountability begins with elections, but it does not end there. Representative government requires that the connection between the governors and the governed not simply take place on election day; there must be the continuing opportunity for citizens to tell office-holders just what is on their minds.

The more local the government, the greater the opportunity for communication between those in office and those who put them there. Proximity tends to increase accountability by enhancing access. Jack Kilpatrick, with his usual flair for words, paints this picture:

The county commissioner dwells low on Olympus, and the local alderman is accessible in ways that United States Senators and Cabinet Secretaries are not accessible. When a citizen of Virginia travels to the Capitol at Richmond, he travels with a sure sense of participation and of community; he speaks to the committees of the General Assembly, supporting or opposing particular legislation, as a fellow-citizen in the community of four million that is

\textsuperscript{35} Robert Goldwin notes that the federal system is "a kind of school for statesmen; to do their work well they must seek out and study, again and again, the underlying principles of our form of government." \textit{A Nation of States: Essays on the American Federal System}, \textit{Preface} (Goldwin ed., 3d ed. 1965).

\textsuperscript{36} Elazar, \textit{supra} note 9, at 85.
Virginia. When he travels to the Capitol at Washington, by contrast, he feels insecurity gnawing at his vitals. He finds the palace ringed by the glassy castles of potent baronies—the Machinists, the Mineworkers, the Educationists—and the marbled catacombs of the Senate Office Building are filled with total strangers. In this distant opulence, he stands subdued.  

I. The Right of Choice

Of all the values implicit in federalism, none is more fundamental to self-government by a free people than the right of choice. We place a high value on many interests: the wish to be left alone, the hope for economic prosperity, the opportunity for self-expression. All of these are aspirations that one recognizes as highly valued in most democratic societies. But federalism reminds us of the core value in democratic government: the right to become involved in the public life of a polity.

The touchstone of a democratic government is consent. Alexander Bickel declared that “coherent, stable—and morally supportable—government is possible only on the basis of consent, and . . . the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account.”

In the American constitutional system, the right of individuals to participate in the process of making political choices is reinforced by a cluster of fundamental rights, among them free expression, criticism of public officials, voting, and equality of representation. It is inescapable that state and local governments have often trampled these very rights. State and local laws and ordinances have often operated to deny the vote on grounds of race, to foreclose public forums to disfavored views, or otherwise to oppress racial, religious, or other minorities.

The remedy for wrongs like these lies in judicial enforcement of such constitutional guarantees as the Fourteenth Amendment’s equal protection clause and Congress’ use of its constitutional powers, such as those conferred by Section 5 of the Fourteenth Amendment. Guarding against abuses of individual rights by states and localities does not, however, mean that we should abandon the place that the

39 U.S. Const. amend. XIV, § 5, which provides in pertinent part: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”
right to make political choices must have in the constitutional galaxy. Federalism reinforces this right of choice at levels of government closer to the people, where choices are more likely to have immediate and perceptible impact. Democratic government is healthier when people can see that how they vote, and what their representatives do, actually matters.

II. THE OTHER SIDE OF THE COIN

Any fair assessment of federalism must include its costs and disadvantages. Some of these are discussed below.

A. The Tyranny of Small Places

In the best of all possible worlds, small communities would always be the classrooms for democracy, citizen education, and civic virtue which this essay portrays them to be. History reminds us, however, that life in small towns is not always so gentle. Community life in seventeenth century Massachusetts was one of conformity, in which magistrates imposed their understanding of God's law regardless of complaints that rights under Magna Carta and other English laws were being overridden. In our own time, one has but to read the pages of the U.S. Supreme Court reports to realize how often it is that violations of individual liberties have been perpetuated by states and local governments.

In the post-Reconstruction era, it was southern states, defeated in war but defiant in peace, that imposed Jim Crow laws whose unmistakable purpose was to reduce the recently freed slaves to as near a condition of servitude as possible. The same states enacted restrictive suffrage laws aimed squarely at disenfranchising as many blacks as possible. In addition, states and localities fought the civil rights movement of the 1960s with every legal tool (and some not so legal) they could muster. In the era of "Massive Resistance," calls for "states' rights" were often thinly veiled appeals to racism.

The problem is not confined to one region. Every section of the United States has its unhappy examples of state and local laws being used to the disadvantage of racial, religious, or other minorities. For instance, it was in New England that one saw signs reading, "Irish need not apply," and California enacted laws prohibiting Japanese ownership of land.

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Entrenched rights, available against state and local laws, are important to all citizens. They are, however, especially likely to be invoked on behalf of minorities. Much First Amendment law, for example, has been made in cases where an unpopular group like the Jehovah’s Witnesses has run afoul of a local ordinance or regulation. In the United States, since the adoption of the Fourteenth Amendment, it is just such minorities who have put their greatest hopes in national laws and federal courts to combat discrimination tolerated or even fostered by state and local governments.

Local constituencies are often more homogeneous and cohesive than is the country at large. Thus, a town, city, or even state may be more susceptible to being captured by some powerful local majority (economic or social) and to neglect or oppress local minorities. Charles Fried describes how at local levels a few determined activists—much in the manner of the left wing of Britain’s Labour Party—“seize political power by going to ‘few meetings and staying to the end when the key vote is taken. . . .’”

Reminders of the opportunities for seizing and abusing power in states and localities offer an important antidote to a sentimental attachment to some mythical notion of unalloyed local democracy. But, as students of federalism will remind us, such anecdotes must stand alongside the harsh realities of the ways in which interest groups, lobbyists, and political action committees distort the democratic process at the national level in the United States. Indeed, many interest groups would rather try and work their will with a single level of government in Washington than be forced to compete in fifty state legislatures and state capitals.

B. Varying Rights and the Perception of Injustice

The idea of justice connotes consistency in the law, the notion that all citizens should enjoy the same rights. Ronald Dworkin, in his Law’s Empire, equates the principle of consistency with “a single and comprehensive vision of justice.” Dworkin’s theory of integrity in the law “requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for

41 See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940).
43 RONALD DWORIn, LAW’S EMPIRE 134 (1986).
some." In a similar vein, John Rawls, in *A Theory of Justice*, claims an equal intrinsic value for each citizen and concludes that the "citizens of a just society are to have the same basic rights."\(^{45}\)

No precept has done more to reshape the face of American federalism than the principle of equal justice. The framers at Philadelphia left the issue of slavery to fester until it was resolved by force of arms in the Civil War. The most sweeping of the Reconstruction amendments was the Fourteenth,\(^{46}\) which in time brought about a fundamental shift in the nature of the federal union. The due process and equal protection clauses are the foundation of much of the federal judiciary's modern jurisprudence. Section five of the Fourteenth Amendment\(^{47}\) serves as the basis for important congressional civil rights legislation, such as the Civil Rights Act of 1964.

The Warren Court brought its egalitarian instincts to bear upon a range of state laws. In a series of opinions, the Court extended the procedural requirements of the Bill of Rights to the states, by using the Fourteenth Amendment's due process provision. These rights included: the right to counsel,\(^{48}\) and the privilege against self-incrimination.\(^{49}\) In addition, the justices drew upon the equal protection clause to require desegregation in public education\(^{50}\) and to mandate that state legislatures be apportioned on the basis of population.\(^{51}\)

Appointments to the Supreme Court by Presidents Reagan and Bush have markedly changed the face of that tribunal. It is a decidedly more conservative place than it was in the days of Earl Warren. Yet, even while many doctrines put in place by the Warren and Burger Courts will now undergo scrutiny and revision, it is hard to imagine the new majority on the Court disturbing such egalitarian landmarks as one person, one vote;\(^{52}\) strict scrutiny of laws weighing more heavily on blacks than on whites;\(^{53}\) and decisions "incorporat-

\(^{44}\) Id. at 165.
\(^{46}\) U.S. Const. amend. XIV.
\(^{47}\) See supra note 39.
\(^{52}\) Id.
\(^{53}\) See Loving v. Virginia, 388 U.S. 1, 9 (1967) ("the very heavy burden of justification... required of state statutes drawn according to race").
The staying power of such decisions—many of which provoked sharp dissent and controversy at the time of their writing—illustrates the power of the notion of justice as equality. Proponents of federalism who suppose that rights should be permitted to vary among the units of a federal system must be prepared to reckon with the power of this concept of justice.

It is not just jurists who may be offended by the notion that rights might vary from one political unit to another. Uniform norms may also square better with the laity’s sense of what rights are about. The ordinary person is not surprised to find that speed limits may vary from one state to another. But it might be harder to explain to that person that rights can vary from one part of the country to another. The more mobile the population—as is certainly the case in the United States—the more surprised the ordinary citizen is likely to be if told that one’s protection against overreaching police conduct might not be the same in Georgia as it would be in California.

C. A Sense of Nationhood

A common set of laws, including uniform notions of rights, can aid in developing a sense of nationhood. It may fairly be argued that the first genuine national debate in the United States was the contest, in 1787-88, over ratification of the Constitution. Until that time, politics had a distinctly local flavor. After that time, political parties emerged, the precursors of the parties we now know. It is therefore plausible to argue that the Constitution created the nation, rather than the American nation creating the Constitution.

More generally, one may suppose that uniform laws, uniformly administered, could foster a sense of common ties among people who may otherwise be divided by race, religion, or other barriers. This may have been one of the corollaries of the extension, in ancient times, of Roman citizenship to the multitude of peoples who lived within the Empire. In the modern era, codification (along the lines of the Code Napoleon) and centralized administration (as from Paris)

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are natural handmaidens of an effort to create a single people. The idea of a "political community" may be said to rest on an assumption by people who "accept that their fates are linked in the following strong way: they accept that they are governed by common principles."57

Federalism, of course, rests on a somewhat different assumption: that it is possible to have various political communities, each enacting and enforcing its own laws, within a larger political community. Whether there will be relative equipoise depends on the politics and social fabric of a given country. Sometimes the tendency will be to centralization, as in the history of American federation. Sometimes, centrifugal forces will prove irresistible, as in the breakup of Yugoslavia.

D. The Practical Advantages of Uniformity

A common body of law does have its advantages. Consider, for example, the task of judges and lawyers in interpreting constitutional law. A lawyer's brief may invoke both state and federal constitutions in alleging the invalidity of a governmental action. In such a case the judge must have a sure grasp of two sets of constitutional principles, which may overlap but which often differ.

Uniformity of the laws may make it easier for government officials to apply the law. Police officers, for example, need to have at least a working knowledge of the constitutional restraints on unlawful searches and seizures. It is hard enough for the ordinary law enforcement officer to understand the intricacies of judicial interpretation of the Fourth Amendment. Matters become even more complicated when a state's constitution lays down a different (that is, more restrictive) standard.

The advantages of a single system of law do not, by themselves, add up to a sufficient reason to reject federalism. Uniform laws, whether in a unitary or a federal system, are, after all, not by that token easy to understand or apply. But the added complication of different sets of laws that one finds in a federal system is simply one of the costs to be weighed in deciding whether, and in what measure, a country should be federal.

57 Dworkin, supra note 43, at 211.
III. CONCLUSION

What scorecard would one give to federalism, especially as judged from the perspective of its use and history in the United States? And what place might federalism have in Central and Eastern Europe?

American federalism has had its dark chapters; its association with the unhappy story of race and discrimination is one of those chapters. It has had, at the same time, its rewards; to the extent that it has helped promote pluralism, experimentation, and limits on undue concentration of power, federalism has been a benign force in American history.

Looking to Central and Eastern Europe, we know that federalism is no assurance of a more tolerant or enlightened society. Thomas Masaryk’s hopes for Czechs and Slovaks to become one people, with a unified vision, has foundered on the shoals of national feelings. The Yugoslav federation lasted as long as Communist power held it together; different winds brought dissolution, war, atrocities, and “ethnic cleansing” of a kind we had hoped after the end of World War II never to see again.

Even so, the values that federalism seeks to foster are important if the peoples of Central and Eastern Europe are to live in conditions of democracy, freedom, prosperity, and peace. Some brand of federalism—or its cognates, such as devolution or regional arrangements—may give the breathing space necessary for otherwise unfriendly people to co-exist in circumstances of relative peace. Daniel Elazar has commented on “cultural cleavages” reflecting the aspirations of separate peoples, each “clamoring for its place in the political sun.”59 Creative thinking is required to accommodate such potentially explosive forces.

In their 1990 meeting at Copenhagen, the states of the Conference of Security and Cooperation in Europe (CSCE) pledged their commitment to seeing “pluralistic democracy” flourish in Europe.60 For the first time in a CSCE document, the participating states moved from their traditional concern with human rights to institutional questions such as free elections and an independent judiciary. Among

58 Thomas Masaryk, a distinguished scholar and political leader, campaigned during World War I for the formation of an independent country for the Czechs and Slovaks. Upon the creation of Czechoslovakia, he became the country’s first president.
59 ELAZAR, supra note 9, at 232.
the areas of particular interest in the Copenhagen Document is that of local government and decentralization.\textsuperscript{61}

It is striking that about a quarter of the Copenhagen Document takes up the sensitive and thorny issue of the place of national minorities in a democratic society. The document explores, not only devices to prevent discrimination, but also measures that would promote the exercise of their rights in a community with other members of the group.\textsuperscript{62}

The peoples of Central and Eastern Europe face a multitude of problems—how to promote economic growth, how to build the infrastructure of democratic government, how to nurture civic values. They will need to create government with enough power to deal with troublesome social and economic problems, while hoping to curb power's abuses, remembering, as surely they do, the decades of lawless rule by a party accountable only to itself. In this quest, Central and Eastern Europe, as they sift the lessons of other countries' experience, might draw an idea or two from American federalism. Both time and distance separate the world of the American founders from that of post-Communist Europe. But they are joined by a common concern for the human condition.

\textsuperscript{61} Id. § III.

\textsuperscript{62} See id. § IV.