The attached speech was written and delivered by Judge Kennedy.

Group or Event: Historical Society for the United States District Court for the Northern District of California

Location of Speech: San Francisco, California

Date of Speech: October 26, 1987

Title: Federalism: The Theory and the Reality

FEDERALISM: THE THEORY AND THE REALITY

Judge Schwarzer, Justice Linde, and Professor Foote, and friends of the Constitution. Your lecture series to celebrate the bicentennial of the Constitution has a precise and well-conceived design. It has considered the critical structural elements of the Constitution: its separation of powers; its checks and balances; judicial review; and now federalism.

The framers of the Constitution would find it both fitting and poignant that the lecture on federalism is reserved for last. Fitting, because federalism was the single unique discovery, the most distinctive contribution to political theory that the framers made. Poignant because of all the structural elements in the Constitution, federalism is the only one that has undergone the transformation, the only one whose future is problematic and endangered, it is, potentially, a legal fiction, not the vital constitutional force conceived by the framers. Professor Foote and Justice Linde, I think, will offer explanations of how federalism does remain significant in our system. But all must concede that the present operation of federalism from what the framers had in mind. Let me explore with you the reasons for the design the framers attempted and the difficulties we have had inhering to that conception.

For over a half century before the American Revolution, there was serious examination of some means for the colonies to gain a measure of independence within the English system. The system was hierarchical with the King as sovereign. The effort was to find some way to put the colonies within that vertical

structure while granting them some autonomy in the formulation and implementation of policy. Those attempts failed, not only because of the intransigence of the Crown, but also because of jealousies and mistrust among the colonies. The resulting blow to the British Empire was one from which it could not recover without ultimate recognition of the independent status of all of its possessions.

The revolutionary war having ended, the American nation began its first attempt at self-government under the Articles of Confederation, a system designed on wholly conventional principles. Under the Articles, the United States was called a federal system. As the word was then understood, that designation was correct. Today we would call it a confederation. The separate states were bound together in what was essentially a central alliance, but each state retained its sovereignty. Decisions taken by the combined states were required to be enforced by each of the separate states. For instance, if taxes were required, each state would collect them and make payment to the central government. The nation under the Articles of Confederation, in its legal form, was closer to the United Nations than the structure ultimately adopted.

The abject failure of the Articles of Confederation was, as we know, the driving force for the Philadelphia Convention in 1787. Now the framers used their powerful minds and intellects to find a daring solution for the practical and theoretical obstacles to real unification. The framers were committed to a republican form of government. Republican, with a small "r," meant a

government that was accountable to the people. As the framers progressed with their studies, it came to mean also a government that emanates from the people, rather than being a concession to the people from some overarching sovereign.

Their studies of the rise and fall of societies and civilizations convinced the framers that a critical obstacle to true republican government in the new nation was geographic size. The land mass of the original thirteen states comprised a nation larger than any in the Western world. The framers were haunted by the possibility of failure because the new country was so widespread. History had taught them that if any nation larger than a Greek city-state attempted to have a republic, despotism necessarily would follow. The size and extent of our country was the practical problem. Note, too, that the states were widely divergent in their political and economic interests. William Pinckney of South Carolina said, at the Philadelphia Convention, the interests of the states of the East Coast are more diverse from those of the South than the interests of Russia and Turkey.

There was also a philosophical or metaphysical problem. In the political thought of that time, the concept of sovereignty was central to the definition of any state, be it republic or monarchy. The essential idea was that in all states there must be an identifiable source, a residuum of power, which, by its very definition, is indivisible. Sovereignty was by definition an indissoluble core. The framers dared to challenge that idea. To use a modern metaphor, they split the atom of sovereignty.

The emergent government was novel in conception. Two governments were created, not one; and every citizen had direct relations to both governments without intervention by the other. Within its own sphere of power, the central government could command, punish, or reward the citizen directly. A parallel system of direct rights and responsibilities ran between the citizen and his or her separate state.

So novel was the new design that opponents immediately attacked the government as being not federal at all. At the outset of the ratification debates, it was the opponents of the Constitution who called themselves Federalists. Remember that their concept of a federal government was on the Articles of Confederation or the United Nations model. They said the new scheme had a central government and that it was not federal. Hamilton, Madison, and Jay wanted the Federalist name for themselves. So, adopting a modern political tactic, they simply seized the opposition's argument and made it their own. They got into print with the Federalist papers and monopolized the name. By coincidence, Hamilton delivered Federalist No.1 to the printers just two hundred years ago almost to the hour, for publication the next day. Hamilton and Madison and Jay used an old word, "federal", for a new idea.

And the move was a master stroke. Not only did they turn the name Federalists against the opponents, but also they

turned the whole vexing problem of geographic size against them. Pointing to the dual government, Madison and Hamilton argued that its great size was necessary; size would preserve the union since it contained so many disparate elements that no one faction would garner control.

Federalism was critical, then, both for the philosophic underpinning of the Constitution and for surmounting its greatest practical problem. Federalism united a great, disparate territory into a single constitution, using two governments, each with components of republican responsibility.

Some scientific discoveries emerge as a sudden brilliant revelation, a dramatic single event, accompanied by the shout of "Eureka." Other discoveries occur when the scientist is using the hidden element in the laboratory for months or years unaware of its critical significance. Freud explores the unconscious, but does not understand that it exists. Federalism was a discovery of this latter kind. It was peeking out at the framers from different corners of the Convention hall throughout their debates in Philadelphia.

These men were not novices at writing constitutions, you might remember. After all, they had written at least eleven of them for the separate states and had drafted the Articles of Confederation as well. To borrow a phrase from patent law, they were skilled in the art and science of constitution making. And yet they did not at any one time recognize federalism as the great discovery that it was. They assumed it as an operating principle

and only as the ratification debates unfolded did its independent significance become apparent.

It soon became clear that the framers had some very volatile elements in the new structure. What would happen, for instance, if they were wrong in their political judgment, and the national government were captured by factions or interest groups? That would be the worst of both of Madison's worlds. A large government controlled by factions. Even more fundamentally, what was to keep the federal government from intruding on the powers of the states and disrupting the careful balance that the Constitution supposed by creating two governments for the purpose of preserving more freedom?

One of the most intriguing aspects of the Constitution is that it says very little about the power of the states or their place in the federal system.

One way to study the Constitution is to say that it employs two kinds of restraints, structural mechanisms and rules. Checks and balances consist of various structural mechanism; indeed the veto, the veto override, and judicial independence to declare statutes unconstitutional. A rule is simply a statement that depends on a structural mechanism for enforcement, or else on the good faith of all participants in the system. "No bill of attainder or ex post facto law shall be passed."

We are familiar with the structural mechanism designed for the government at the national level. I have just mentioned the principal ones with checks and balances and separation of powers. But it is difficult to find effective structural

mechanisms designed to protect the states. The Senate is one structural protection, as it provides equal state representation. As the Constitution was drafted, structural protection for the states in the Senate was even greater because Senators were elected by state legislatures. That ended when the sixteenth amendment provided for the direct election of Senators. It is generally accepted, moreover, that present day United States Senators look directly to the people as their constituents, and not the separate states.

The favorite structural device of the framers was to put separate constitutional entities in competition with each other and let them fight for turf. Separation of powers again is the example. It has been suggested that federalism was to be preserved by such competition because both the federal government and the state government would fight for the loyalty and allegiance of the people. It is not clear to me that the framers thought of this as a key structural protection for the states. If this were the design, the federal government was bound to be the winner, for no other reason than its vast and superior capacity to spend money.

Having found few structural protections, we look to see if the Constitution has any rules or declarations to protect the states. Once more, it is difficult to find them. There are a number of specific prohibitions on the states, most of them in Article I, section 10. For instance, states may not make any agreement or compact with another state or with a foreign power. And the Supremacy Clause provides that valid federal laws are

superior to state laws. These prohibitions are designed to protect citizens against the states and were enforceable at the outset directly in the federal courts. Thus, when the fourteenth amendment imposed new obligations on the states, it was consistent with the earlier idea that citizens had rights against the states, enforceable in the courts. The weight of federal authority was thus increased, but there was no structural alteration of powers as a result of the fourteenth amendment. But all of this pertains to prohibitions against the states, not to guarantees of their authority. Few such guarantees are set forth.

The guarantee of a republican form of government and the prohibition against depriving states of equal suffrage in the Senate are there, but nothing more.

The principal protection for the states is that the national government is one of limited powers. Limitation was achieved by a specific enumeration. The principal structural mechanism to enforce the rule that the national government is one of limited authority is judicial review. Federalism concerns underlie most constitutional cases. Suppose, for instance, the issue is whether or not a Miranda warning must be given to a criminal. At bottom lies the issue whether or not the federal courts, an arm of the federal government, can impose an obligation on the states.

At an early date, the courts recognized that federalism was the real issue in cases interpreting the commerce clause. Lurking behind every dispute over the definition of commerce was the ultimate question of federal power vis-a-vis the states. But

the courts were not successful in finding any enduring restrictions under the commerce clause or the other great powers involving the sword and the purse. In part this is because those powers are sweeping in theory, and in part it is because historical and economic necessity seemed to dictate the need to make them sweeping in fact. Let me refer to the commerce power for a moment.

Commerce might be limited in two ways. These are semantic limitations, that is to say the limitations in the word itself; or secondly there might be superseding limitations in the Constitution, provisions such as the first amendment, which would prohibit Congress from regulating even if commerce is present. The superseding limitations prove of little importance, and the semantic limitations could not easily be imposed on the word itself. For a time the court struggled to say that manufacturing and production were not commerce, whereas shipment and sale were; and then tried to devise distinctions between direct and indirect effects on commerce. But reality shapes the law; and the growth of a national economy made these efforts of the court futile. The word "commerce" seems to contain no self-limiting capacity; and our economic history so confirms.

The emergence of a national economy, of course, is but one of the historical events that changed the features of the federal system. Others are familiar to you; the Civil War; the necessity to enforce civil rights against recalcitrant states; vast spending by the government subsidy grants to the states with conditions; and the assumption by the United States of global and

military responsibilities, which involve such a vast commitment of economic and intellectual resources that national measures for both economic and social control necessarily follow.

Interestingly, the courts can take credit for announcing some structural rules within their own sphere, rules which attempt to keep the federal balance. Federal courts must follow state court precedents in determining state decisional law, and there are a series of rules requiring the federal courts to stay their hand, or dismiss a case when it appears the state court can and will resolve the dispute. These are the doctrines of abstention and deferral. These are, nevertheless, but small dikes to stem the flood of federal power.

And the federal courts have been necessary, inevitable participants in announcing interpretations of federal law that diminish the role of the states.

The existence of a national market, of a national culture, of a national consciousness, affects more than our economic life; it also affects constitutional doctrine with respect to essential civil liberties. Consider the First Amendment and the law of defamation.

In 1964, when the New York Times ran a civil rights advertisement and was sued in Alabama courts, it sustained a libel judgment for $500,000. The constitutional necessity to reverse the judgment under the First Amendment was an imperative. But note that the Supreme Court had a multitude of choices on how to do this. It could have forbidden any libel suit against a newspaper; it could allow the defense of substantial truth; it

could carve out an exception for public officials or public affairs or matters of public concern; it could impose rules of malice or knowing falsehoods; it could impose limits on monetary damages or forbid them; or it could choose a combination of those remedies, which is in fact what it did. One way to implement federalism would have been for the Court to permit the states to choose any rule of limitations, provided the end result gave substantial and adequate protection to the press. This would have eliminated the necessity for the court to make narrow and precise defamation rules in a constitutional context.

The problem with that approach is that we have a national press; and to subject it to differing rules of liability in the separate states seems inefficient and inappropriate. And so the Supreme Court has restated much of the substantive law of libel in constitutional terms.

What is just as interesting is that the states have accepted the role of the Supreme Court in the definition of libel, and make no sustained attempt to announce state substantive rules that are disentangled from federal principles. The California cases made it rather clear that so intertwined has federal doctrine become with state law, that the state has given up any attempt to define and articulate a substantive law of defamation that does not incorporate first amendment law at the outset.

The result: We have a defamation law in large part controlled by nine federal justices. We should ask whether this trend is inevitable or irresistible in other substantive areas.

This brings us to some final considerations. Should we be concerned to preserve federalism in a form close to its original conception? If so, how do we do it?

We do not preserve federalism simply because it is an ancient tradition--preserve it out of reverence for the framers. Nor should we keep it because in an age of every-increasing conforming, the idea of separate states with their own speed limits and their own colored license plates is a faint vestige of once proud diversity. Federalism serves values much more fundamental. There remains a moral and ethical content inherent in federalism. I submit the framers were correct to decide it is legally wrong, morally wrong, ethically wrong, for an individual to surrender essential power over his or her own personality to a remote government that he or she cannot control in a direct and practical way. The states, and their subdivisions, with more visible and approachable legislators, and often with an initiative and referendum process, are likely to be more responsive to the citizen than the federal government.

How do we retain federalism? There is no easy answer. It has been suggested that the states should have a veto power over certain types of national legislation, excluding categories such as national defense. But the specific statutes the states propose to overrule remains as yet unidentified, so it is difficult to evaluate this particular proposal. As a necessary first step for federalism, we should insure that state governments do have responsive, efficient, accountable political systems. Only then is there even a plausible alternative to federal power.

Professor Foote and Justice Linde will, I am certain, show us some other important ways in which the states remain a viable, vital, constitutional force. On this occasion of the bicentennial, it does seem that laudatory and celebratory remarks about the Constitution are in order, and perhaps you conclude that my observations are somewhat gloomy for this occasion.

By way of closing in the appropriate vein, let me say that I think Jay, Madison, and Hamilton, though surprised to see federalism in its present outline, would not be discouraged. As marvelous and astute students of human behavior, they knew that no matter how precise the compact they drew for future generations, only a continued commitment to constitutional rule would keep it alive. They knew that no people of strength or vision want to live in a world without a challenge. As Madison said, "Justice is the end of government. It is the end of civil society. It has always been so and always will be so until justice be obtained or liberty be lost in the pursuit." By that he shows us our unremitting duty to examine the Constitution, to implement it, and protect it.