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It is a pleasure to be here today. All of us in the Reagan Administration are indebted to AEI for its long contribution to the intellectual foundations of American conservatism. You have been instrumental in helping shape the substance of the political philosophy embraced by the President.

Since I became Attorney General just a little more than six months ago, the Justice Department has continued the involvement of this administration in many areas. It is our belief that there is an intimate connection between the law and the social influences that govern us as a people.

The past several decades of American life have been influenced by an aggressively secular liberalism often driven by an expansive egalitarian impulse. The result has been nothing less than an abandonment of many of the traditional political and social values the great majority of Americans still embrace. This administration took office in 1981 dedicated to the proposition that in a popular form of government the deliberate sense of the community should govern. The hallmark of Ronald Reagan's presidency has been to urge the restoration of fundamental Constitutional values. Foremost among those values — indeed, the common Constitutional denominator of most of the social policies this administration is pursuing — is the principle of federalism.

At the Department of Justice we believe that our policies take their legitimacy from one of the most basic tenets of our constitutional structure: That in a system of popular government, the people have the liberty and the legitimate power within certain limits to define the moral, political, and legal content of their public lives. Federalism, properly understood, is an important means to that end.

Far from being an arcane or archaic doctrine, federalism remains a vital if controversial and often misunderstood part of our public discourse. As Felix Frankfurter and James Landis pointed out more than fifty years ago, "the happy relation of States to Nation — constituting as it does our central political problem — is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined." Indeed, only this past term did the Supreme Court again delve into federalism in *Garcia* v. *San Antonio Metropolitan Transit Authority.*

Once again, the court endeavored to draw a clear and dark line between state power and national power, but the line they drew has all but wiped out any notion of residual sovereignty for the states. According to the majority in *Garcia*, states apparently enjoy no special constitutional status of independence in relation to Congress. They are now held as nothing more sovereign than ordinary private entities when Congress seeks to flex the awesome muscle of its power to regulate commerce.

As I have said before, we disagree with the holding in *Garcia* root and branch. We believe that it misconstrues the meaning of federalism at the level of principle; we also believe that it will prove to be a financial and administrative disaster for the states at the level of practice. As I had occasion to say to the annual meeting of the American Bar Association earlier this year, we hope for a time when the Court returns to the proper understanding of the principle of

federalism, that akin to Justice Rehnquist's opinion in *National League of Cities* v. *Usery* and his dissent in *Garcia.*

At one level, the problem of the holding in *Garcia* is a problem of stability in the law. *Garcia*, it should be remembered, overruled a 1968 holding in *Maryland* v. *Wirtz.* But the deeper problem stems from a general confusion — often public as well as judicial — over precisely what political advantages federalism brings to our constitutional order. In short, we no longer seem sure why federalism matters.

As I pointed out in my remarks in the Great Hall shortly after I was sworn in as Attorney General, federalism is going to continue to be an important initiative in this Administration. Indeed, only last week I formally established the Working Group on Federalism as part of the work being undertaken by the Domestic Policy Council of the Cabinet.

Today I would like to move away from the narrower legal issues raised by particular court cases and dwell on what I see as the more fundamental political issues of federalism.

Certainly the most immediate reason for federalism in the Constitution was to resist the tendency toward a single centralized, and all-powerful national government. The various debates in the Federal Convention produced, as James Madison so famously put it in *The Federalist,* a government that was neither wholly federal nor wholly national but a composition of both. Half a century later, Alexis de Tocqueville would celebrate democracy in America as precisely the result of the political vitality spawned by this "incomplete" national government.

The institutional design was to divide sovereignty between two different levels of political entities, the nation and the states. This would avoid an unhealthy concentration of power in a single government. It would provide, as Madison said, a "double security . . . to the rights of the people." Federalism, along with separation of powers, the Framers thought, would be the basic principled matrix of American constitutional liberty. "The different governments", Madison concluded, "will control each other; at the same time that each will be controlled by itself."

But institutional restraints on power was not all federalism was about. There was also a deeper understanding — in fact, a far richer understanding — of why federalism mattered. And it is this understanding that is too often lost in our judicial shuffles and legal squabbles over federalism.

When the delegates at Philadelphia convened in May 1787 to revise the ineffective Articles of Confederation it was a nearly foregone conclusion that the basic debate would concern the proper role of the states. Those who favored a diminution of state power, the Nationalists, saw unfettered state sovereignty under the Articles as the problem; not only did it allow the states to undermine Congressional efforts to govern, it also rendered individual rights insecure in the hands of "interested and overbearing majorities." Indeed, Madison in defending the Nationalists' constitutional handiwork in The Federalist went so far as to suggest that only by a "judicious modification" of the federal principle was the new Constitution able to remedy the defects of popular, republican government.

But to those who doubted the political efficacy of the new Constitution — those whom we may call the Confederalists — a too severe modification of the federal principle would damage the new nation. In their view, good popular government depended quite as much upon a political community that would promote civic or public virtue as on a set of institutional devices designed to check the selfish impulses of the majority. As Herbert Storing has shown, this con-

cern for community and civic virtue tempered and tamed somewhat the Nationalists' tendency toward simply a large nation. Their reservations, as Storing put it, echo still through our political history.

Today it is this understanding, that federalism can contribute to a sense of political community and hence to a kind of public spirit, that is too often ignored in our public discussions about federalism. But in a sense, it is this understanding that makes the American experiment in popular government truly the "novel" undertaking the Framers thought it to be.

At its deepest level popular government means a structure of government that not only rests upon the consent of the governed, but more importantly a structure of government wherein public opinion can be expressed and translated into public law and public policy. This is the deepest level precisely because public opinion over important public issues ultimately is a public debate over justice. It is naive to think that people only base their opinions on their conceptions of their narrow self-interest. Very often public opinion and political debates do reflect deeper concerns — if you will, moral concerns.

It is the venting of the moral concerns of a people that is the very essence of political life. In a popular form of government it is not only legitimate but essential that the people have the opportunity to give full vent to their moral sentiments. Through deliberation, debate, and compromise a public consensus can be formed as to what constitutes the public good. It is this consensus over fundamental values that knits individuals into a community of citizens. And it is this liberty to debate and determine the morality of a community that is an important part of our liberty protected by the Constitution.

William Schambra of the American Enterprise Institute has recently argued in *The Public Interest* that there is something lacking in the traditional progressive liberal notion that a grand sense of community can be developed at the national level as a result of big, intrusive governmental programs. I believe Mr. Schambra is absolutely right. Big government does not encourage a sense of belonging. An essential sense of community is far more likely to develop at the local level, though state and local politics, and through voluntary private associations. The American commonwealth is a community — a community of communities.

The toughest political problems deserve to have full and open public debate. Whether the issue is abortion, school prayer, pornography, or aid to parochial schools, there is no constitutionally explicit reason why the people within the several states may not deliberate over them and reach a consensual judgment. A proper understanding of federalism would surely permit such a state of affairs.

Here I must mention *Roe* v. *Wade.* The judicially created right to privacy and the attendant right to choose an abortion should not take precedence over the clear constitutional reservation of power to the states to make those determination as to public health and welfare for themselves. I do not think the Tenth Amendment is a dead letter; nor do I think the Ninth Amendment is a blank check for the courts to deny the principle of federalism in the name of new rights thought to be implicitly embedded in the cracks and crevices of the Constitution.

Toward this end we have filed an amicus brief in a case that will be argued before the Supreme Court during the 1985 term. In this case, *Thornburgh* v. *American College of Obstetricians and Gynecologists,* we are asking the Court to reconsider its abortion decision in Roe and upon that reconsideration to abandon that decision.

We have two reasons for seeking the overruling of Roe. First, as I have stated on other occasions, it is our belief that constitutional law should be rooted in principles that are derived from the text and original intention of the Constitution. To attempt to cast constitutional rules in terms of transient scientific or technological findings, as was done in the Roe case, is to render ephemeral what should be permanent. The scientific standards posited in Roe are inherently unworkable as a standard of constitutional interpretation. Since those standards or some new variant of them — which would be equally transient, I must add — are the only standards available, the entire edifice of the abortion decision rests upon a logically cracked and politically precarious foundation. The entire structure should be abandoned.

Our second reason for seeking the abandonment of Roe goes to the heart of what it means to be a self-governing people. The Constitution took account of the fact that — indeed, made provision for the proposition that — there are certain areas best left to the states. The Roe opinion has been interpreted subsequently to all but obliterate any notion of state authority and competence in this area of the law. Whereas Roe endeavored to take account of a "balance of values which include the state's interest in maternal health and in unborn and future life," subsequent interpretations by lower courts as well as the Supreme Court have so tipped the moral scale in favor of an unfettered right to abortion that the necessary balance of values has been lost.

The moral and social theories involved in the issue of abortion are various and complex. There are good and decent people on both sides. Such theories — such fundamental arguments — over what constitutes the good like merit full and robust deliberation and debate. But those who defend the right of abortion as a fundamental *constitutional* right are confusing their moral inclinations with the Constitution. Such disputes are properly resolved within the several states at the level of civil or legal rights, as a matter of statutory law; not at the national level as a matter of constitutional right.

Here as in other areas we would do well to recall the words of Justice Holmes. "The Constitution," as he wrote in 1905 in *Lochner* v. *New York,* "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." The vitality of popular government depends upon the opportunity for such differing views to be aired.

A substantive issue like abortion is a matter of public or civic morality. It should be decided upon through a free and robust discussion at the level most appropriate to its determination. This is the sort of sensitive issue that arouses the strands of public sentiment that should be allowed to be woven into a communal fabric of political liberty.

To suggest that federalism contributes to a sounder political community is not to argue for a misguided notion of "states' rights". The Constitution altered federalism from the original confederalist core of the Articles. The Constitution recognized that states could endanger individual liberty; and it was individual liberty, not state sovereignty, that the Constitution sought to secure. The theory of popular government adopted by the Constitution was a rejection of such simplistic notions; it denied, for example, the legitimacy of Stephen Douglas; notion of "popular sovereignty." Such an "insidious" doctrine, Abraham Lincoln knew, was inconsistent with the nationalism of the Constitution. As Hadley Arkes has pointed out, "Lincoln sought to teach us [that] there are certain substantive things such as slavery, that a democratic people may not choose because those substantive ends would be inconsistent with the fundamental premises that give majorities the right to decide."

But to deny the right — the liberty — of the people to choose certain other substantive ends reduces the American Constitution to moral relativism. In that direction lies the danger, to borrow Lincoln's phrase, of "blowing out the moral lights around us." For as Lord Devlin once said, "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives."

The essence of federalism is the protection of liberty. Federalism is not an end in itself; it is a means to that higher end. As Judge Robert Bork said this past year here in his distinguished Boyer Lecture, "the attempt to define individual liberties by [the] abstract reasoning [of contemporary constitutional theory] though intended to broaden liberties, is actually likely to make them more vulnerable. Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment. They do not rest upon any general theory."

As Judge Bork concluded:

> Attempts to frame a theory that removes form democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning.

By allowing our democracy a forum within which to operate, the federal structure of the Constitution was designed to allow us to be self-governing in the truest, the deepest sense. There is an important principle involved in such cases as Roe and Garcia, a principle that lies at the very heart of our republican politics. It is through this principle that a revival of the American Commonwealth is possible — an America that is a community of communities, with liberty and justice for all.

Thank you.