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KEYNOTE ADDRESS—CONFERENCE ON COMPELLING GOVERNMENT INTERESTS†

*Sandra Day O'Connor**

I. INTRODUCTION BY HON. JAMES L. OAKES**

I have been instructed to make a few remarks and then to get to the more important business of these remarks.

First, I want to congratulate Albany Law School and particularly Dean Belsky, Professor Gottlieb and Dean Baker for honoring Justice Robert H. Jackson in this fashion. You will recall, this evening is in honor of the memory of Justice Jackson. No finer writer ever on the Supreme Court, Justice Jackson is a hero to me because he was the original, you might say, county/country lawyer. Since I come from across the hills here in Vermont, and did a little general practice myself, I appreciate just how far he went with the background that he had. He has been a great inspiration to me and to the rest of us in this business of judging, and he always will be.

Second, I want to particularly congratulate Professor Gottlieb on the choice of a subject matter of burning importance in constitutional law and for assembling the outstanding group of scholars and jurists participating in this conference and who have written some outstanding papers of which I have had the benefit of reading, some, if not all.

The mystery of constitutional analysis is the subtitle of this conference and I think you ought to bear that in mind as you are listening to some of the presentations. I am acquainted with several of the

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 These remarks were based on a paper prepared for the Conference on Compelling Government Interests at Albany Law School, September 26-28, 1991. The full paper, on which these remarks were based, is scheduled to appear in a volume tentatively entitled *Compelling Government Interests: The Mystery of Constitutional Analysis* (Stephen E. Gottlieb ed.) to be published by the University of Michigan Press.

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people who will be here, including Professors Perry, Michelman, Amar, and Stith, and I am certainly familiar with others: Judge Hans Linde, one of the great state supreme court justices in this country and one of the great philosophers, and Owen Fiss of Yale, who has written and has done so much over the years as one of the outstanding scholars in this country. But, of course, you have really made my heart feel good because you have brought here a person who is very dear to my heart, almost like a daughter. An outstanding scholar in her own right, being voted the best professor at a law school in Cambridge, Massachusetts, two or three years running, and a former clerk of mine, Professor Kathleen Sullivan.

I do not want to intrude on either the principal speaker tonight or the subject matter of the conference, compelling interests, except to say two very brief things. One, I have always personally endorsed Justice Thurgood Marshall's view, as stated in *San Antonio School District v. Rodriguez*,[1] that there is a sliding scale of interests and a sliding scale of scrutiny that are really the ends of the analysis in which the Justices engage, although often stated in other terms. But sliding scales, of course, are elusive and they make law, particularly constitutional law, perhaps more art than science. I think that is the way it has always been and I for one happen to think that it is the way it always will be. I agree with Justice Hans Linde that the whole idea of compelling governmental interests is somewhat imprecise. I could give more of my constitutional viewpoints; however, you are not interested in that, and so I will leave it for another time. I want to turn to my really important job this evening, which is to introduce Justice Sandra Day O'Connor.

On September 25, 1981, Justice O'Connor, a native Texan, became the first woman to serve as a Supreme Court Justice. Justice O'Connor came to the Court following a distinguished educational career at Stanford Law School. It happens that during these past few days I was talking to a classmate of Justice O'Connor's at Stanford Law School, and I asked this person whether there was any particular incident he recalled about their relationship at the law school in which he thought people might be interested. He said, "Yes, I remember the first year when, Miss Day, came up to me and asked what I thought about such and such a doctrine, or such and such a case." He said he was thrilled to be asked, and began to expound at some length, giving her all of his views, helping out this fellow student. When he had finished, Ms. Day asked, "Well, don't you think

[1] 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

that such and such might be the case, or suppose the facts were changed slightly and the question was put this way?" Before long he realized that he was sitting at her feet, instead of her at his—and that she done it in such a nice way! The classmate recounting that story was only the Chief Justice of the United States, William Rehnquist.

Justice O'Connor's career has been marked by a strong commitment to public service, which took her to the Arizona Attorney General's Office, the Arizona state courts as a judge, and the Arizona State Legislature as a state senator. Now that Justice O'Connor has completed her first decade on the Supreme Court, we are provided with an appropriate occasion to step back and reflect on some of her noteworthy contributions to the development of our constitutional law. The jurisprudence of Justice O'Connor reflects her strong commitment to preserving equality in our communities. An analysis appearing in the *Virginia Law Review* by Professor Suzanna Sherry noted this aspect of Justice O'Connor's jurisprudence and commented on her reluctance to accept conduct that condemned groups or individuals to outsider status.[2] Her unique insights into the Establishment Clause of the First Amendment perhaps best illustrates this commitment. Beginning with her 1984 concurring opinion in *Lynch v. Donnelly*,[3] Justice O'Connor argued the Establishment Clause exists to protect individuals from government endorsement of religion because, in her own words, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[4] Just a few years ago in *Allegheny County v. Greater Pittsburgh ACLU*,[5] a majority of the Court utilized Justice O'Connor's understanding of the Establishment Clause for analyzing whether governmental action unconstitutionally advances religion. Her contribution helped a majority of the Court in that case to enjoin the placement of a creche in the grand staircase of the Allegheny County Courthouse.

Justice O'Connor's work also reveals the carefulness with which she approaches the task of constitutional adjudication. She often avoids adopting bright-line rules and opts instead for what has been termed contextual or individualized decisionmaking. Justice O'Connor's re-

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[2] Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

[3] 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[4] *Id.* at 688.

[5] 492 U.S. 573 (1989).

cent dissent in *Rust v. Sullivan*[6] provides a fine example of this sensitive approach to decisionmaking. In that case, Justice O'Connor dissented from the Court's majority on the grounds that the regulations placing new restrictions on Title X programs were not authorized by the statute.[7] She avoided reaching the difficult constitutional free speech and privacy issues, absent a more explicit indication from Congress of the intent of the regulations. Congress is now in the process of debating whether the regulations should be overturned.

Finally, I would also like to note Justice O'Connor's contribution in returning intellectual property issues to the domain of the Supreme Court. One example of this accomplishment is a case decided last Term, *Feist Publications v. Rural Telephone Service.*[8] Justice O'Connor wrote for a majority of the Court in holding that white pages of a telephone book limited to basic subscriber information and arranged alphabetically, are not protected by copyright as a constitutional or statutory matter.[9] In so doing, Justice O'Connor reiterated the important principle that originality and not the "sweat of the brow" is the touchstone of copyright protection because the primary objective of copyright is not to reward the labor of authors but, in the words of the Constitution, which she quoted, " 'to promote the Progress of Science and Useful Arts.' "[10]

These are just a few highlights of the lasting contribution that Justice O'Connor has already made in American constitutional jurisprudence. I, for one, look forward to the next decade of her work on the Court and welcome her warmly to the Second Circuit, Albany, New York, and to this conference.

II. Keynote Address by Hon. Sandra Day O'Connor

I am doubly pleased to be here at Albany Law School for this conference. First, like Judge Oakes, I am pleased to take part in honoring the fiftieth anniversary of Justice Robert Jackson's accession to a seat on the Supreme Court. Justice Jackson's experiences as an attorney in Jamestown, New York, as the Solicitor General of the United States, as Attorney General, and as architect of the Nuremberg trials enriched Justice Jackson's jurisprudence and highlighted his life-long commitment to public service. The second reason that I am pleased

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[6] 111 S. Ct. 1759 (1991).
[7] *Id.* at 1788 (O'Connor, J., dissenting).
[8] 111 S. Ct. 1282 (1991).
[9] *Id.* at 1297.
[10] *Id.* at 1290 (quoting U.S. Const. art. I, § 8, cl. 8).

to be here is that the subject of government interests is of particular concern to me. I first gave thought to issues surrounding government action as a law student and then as a lawyer in private practice. Next, my professional interest was that of a government lawyer, when I was so employed. Then as a state legislator and judge, I had still different viewpoints on government initiatives. These experiences have not always made my work as a Justice any easier, but they do help me appreciate the complexity and the tremendous significance of the questions you will be discussing at the conference.

Perhaps I am not very well-qualified to comment on this subject. I spoke a year or so ago at another law school on a subject dear to my heart, my concept of the jurisprudence of the First Amendment and the Free Exercise Clause, and tried to explain all the intricate balancing involved therein. Afterwards there were comments by members of the faculty, and one faculty member stated that he thought that justices should never try to explain their theory or their analysis, but should just decide cases because they did that a lot better than they did trying to explain themselves. So I am not sure that I am going to add much to the scholarly effort that is going to take place during this conference.

This conference has attracted an impressive group of scholars, and I think your discussions will be fascinating. In that respect, we all have an edge over the drafters of the Constitution. When the delegates representing twelve of the thirteen original states met to draft a new national constitution, they could not possibly have anticipated the scope of American government two centuries later. Today, government regulations reach nearly every area of American life, determining the quality of the air we breathe, the water we drink, the contents of our daily diets, the location of our homes, what we do at work, and even aspects of our family relationships.

Delegates to the Philadelphia convention did, however, foresee that the permissibility of government action would be a recurring question before the federal courts. New York's Alexander Hamilton predicted in 1788 that under the proposed constitution, the federal judges would be called upon to guard against "the effects of those ill humors which . . . sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppression of the minor party in the community."[11]

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[11] THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Recognition that we are not the first Americans to perceive a conflict between governmental interests and individual rights should encourage us to scrutinize the solutions reached by prior generations. Indeed, judges are *required* to do so, for it is our duty to apply answers of the immediate and the distant past to questions of the present day.

But to what degree should the past define the proper scope of government authority in our time? History is, of course, relevant in interpreting constitutional or statutory language. If the relevant language becomes clear when read in context, the judge's inquiry is at an end. Even when controlling enactments are ambiguous after close examination, history may play a role. It may, for instance, clarify the nature and the intensity of an alleged government interest. This can be seen by looking at one of the more talked about cases argued during the Supreme Court's 1990 Term, *Barnes v. Glen Theatre, Inc.*[12] You may remember it as the nude dancing case. Writing for a plurality of the Court, the Chief Justice tested Indiana's public indecency statute against the so-called *O'Brien* standard, which asks (i) whether a government regulation that incidentally limits expressive conduct is within the constitutional power of the government, (ii) whether it furthers an important or substantial government interest unrelated to the suppression of free expression, and (iii) whether the incidental restriction on First Amendment freedoms is no greater than necessary to further the government's interest.[13]

In the *Barnes* case, historical inquiry was necessary to answer these questions because Indiana does not record legislative history and the Indiana Supreme Court had not discussed the objectives of the indecency laws.[14] Only the text of the statute indicated the legislative purposes. This language was inconclusive when viewed in isolation, but the purpose of the law became clear in historical context. The law was one in a series of related Indiana prohibitions on public nudity that could be traced to a nineteenth century statute banning notorious lewdness or grossly scandalous indecency.[15] Precedent for these statutes could be found in the common law ban on public indecency, a prohibition that was firmly established in England by the

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[12] 111 S. Ct. 2456 (1991).
[13] United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
[14] *Barnes*, 111 S. Ct. 2461-62.
[15] *Id.* at 2461.

mid seventeenth century. Indiana is one of at least forty-seven states that has incorporated this common law prohibition into its statutory law.[16]

This historical information was useful in two respects. First, it suggested the moral underpinnings of Indiana's law and therefore indicated that the law fell within the police power to provide for public health, safety, and morals. At the same time, the fact of widespread, long-time prohibitions on indecency indicated that Indiana's interest was in fact substantial, allaying fears that the state's most recent statute might have been designed to suppress specific expressive conduct. Second, the *Barnes* plurality decision illustrates how history may inform judicial scrutiny of government action. History can illuminate the nature and the strength of state interests and may also suggest the degree of fit between a challenged regulation and its objective.

There are, however, limits on the utility of historical analysis. Historical investigation should not become a proxy for reasoned scrutiny of governmental and private interests. Consider another case last Term in our Court, *Pacific Mutual Life Insurance Co. v. Haslip*.[17] In that case, the Court was asked to decide whether the Due Process Clause rendered punitive damages, awarded in Alabama against an insurance company, invalid.[18] Alabama procedures relating to punitive damages had deep roots in Anglo-American common law, traceable even to the venerable Blackstone.[19] This was dispositive for one of my colleagues. In his view, the government necessarily affords individuals due process whenever it chooses to follow a historically approved procedure.[20] A second Justice did not go so far as to say that adherence to historical practice would always foreclose further inquiry under the Due Process Clause, but he likewise thought that longstanding approval of Alabama's punitive damages system afforded sufficient assurance of its constitutionality.[21] The *Haslip* majority, however, did not stop its analysis with the conclusion that punitive damages were well established when the Fourteenth Amendment was enacted. Instead, it looked to Alabama's retributive and deterrent purposes in allowing punitive damages, asking whether

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[16] *Id.*

[17] 111 S. Ct. 1032 (1991).

[18] *Id.* at 1037.

[19] *See id.* at 1041-43.

[20] *Id.* at 1048 (Scalia, J., concurring).

[21] *Id.* at 1054-55 (Kennedy, J., concurring).

these were furthered with sufficient rationality and precision to satisfy constitutional standards.[22]

I disagreed with the majority's result in *Haslip*, but I am in fundamental agreement with its approach to due process analysis.[23] In *Mathews v. Eldridge*,[24] the Court recognized that due process is not a technical concept with a fixed content unrelated to time, place, and circumstances. Recent cases leave no doubt about the continued validity of this perspective.

Mathews does not reject the lessons of history; to the contrary, history may create a strong presumption of the continued validity of state practice. The Constitution, however, requires judges to examine even traditionally accepted procedures and, if necessary, to declare them invalid. Ancient practices may in time become severed from the legitimate governmental interests that once supported them, or they may simply clash with evolving principles of constitutional law.

Conversely, reliance on history may fail when the government pursues traditional ends by novel means. In the Fourth Amendment area, for example, technological advances like wiretaps and electronic listening devices have made it possible for the government to obtain the most private information imaginable without ever entering a citizen's home or place of work. Such techniques have little in common with the specific practice that prompted inclusion of the Fourth Amendment in the Bill of Rights: the British policy of conducting unannounced house-to-house searches, known as the Writs of Assistance. In the Fifth Amendment context, biological science has had a similar impact. History tells us that inspiration for the Fifth Amendment's guarantee that no one "shall be compelled in any criminal case to be a witness against himself"[25] can be traced back to the Inquisition, when heretics were tortured until they confessed their sins. Such insights are of limited utility when the government often can determine whether someone is guilty by testing blood or hair samples without any oral confession at all.

When the language of the Constitution is unclear and the normative limits of historical experience are exceeded, judges and lawyers must look elsewhere for guidance in testing claims of governmental authority or assertions of individual liberty. The impulse may be to draw a bright-line rule, but such rules may sacrifice one legitimate claim of entitlement for another in the name of simplicity. The

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[22] *Id.* at 1044-46.

[23] *Id.* at 1056 (O'Connor, J., dissenting).

[24] 424 U.S. 319 (1976).

[25] U.S. CONST. amend. V.

Court's interpretation of the Commerce Clause in *Garcia v. San Antonio Metropolitan Transit Authority*[26] provides a noteworthy example. The *Garcia* Court sought to reconcile a conflict between two constitutional concerns, protecting legitimate state interests and insuring an effective commerce power, that became pressing with the evolution from the local economies of the eighteenth century to the industrialized national economy of the late twentieth century. The majority of the Court in *Garcia* rejected a purely historical approach to the question of state immunity from federal regulation as being unworkable.[27] The historical approach noted would prevent state and local governments from assuming responsibility for once private functions like education. At the same time, the historical standard could not be truly objective because the growth of government functions took place gradually over two centuries. Judges would be put in the position of subjectively deciding how long standing a pattern of state involvement would have to be for federal regulatory authority to be preempted. Having rejected the historical approach, the *Garcia* majority nonetheless declined to face directly the question of whether Congress exceeded its power by imposing overtime and minimum wage requirements on local mass transit workers.[28] Instead, the Court relied on Congress's capacity for self-restraint, deciding that state interests are more properly protected by the federal political process than by the exercise of judicial power.[29]

I dissented from *Garcia*'s holding, and I still believe that it represented an abdication of the judiciary's obligations to ensure that the federal government respects legitimate interests.[30] I also see parallels between *Garcia*'s simplifying impulse and the approach of more recent decisions, from which I also dissented, that upheld enforcement of general laws against religious minorities and the press without evaluating the government justification for burdening free exercise and free speech.[31] Courts frequently employ balancing tests as a way of overcoming the problems associated with using historical, bright-line approaches to resolve constitutional ambiguity. Indeed, the Court on which I sit has balanced competing interests when passing on questions relating to freedom of speech, the Fourth Amendment,

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[26] 469 U.S. 528 (1985).

[27] *Id.* at 531.

[28] *Id.*

[29] *Id.* at 555-57.

[30] *See id.* at 580 (O'Connor, J., dissenting).

[31] *See, e.g.*, Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).

equal protection, substantive and procedural due process, and interstate commerce, to give only a few examples.

Balancing, however, is certainly no panacea. In the area of criminal law, balancing tests make it difficult to provide the clear guidance about what is and is not permitted that can benefit the accused and government alike. Whenever balancing tests are applied inconsistently, confusion spreads throughout the judicial system and there may be a consequent loss of respect for underlying constitutional principles. Thus, the basic assumption of balancing tests, that values and interests can be weighed as if put on scales, may fall short in many constitutional cases. How, for example, can judges quantify a governmental interest in protecting morality, or account for the overlap between one citizen's interests in expressing her own views and the public's interest in the competition of ideas?

Balancing tests are further complicated by the normative element inherent in defining the tests themselves. Thus, when considering government policy that distinguishes among citizens on the basis of race, members of the Court have disagreed just as vigorously about what analysis should be applied as about what the outcome should be. Whereas some believe that the goal of eliminating discrimination cannot be realized as long as factors like race determine the standard of review under the Equal Protection Clause, others are equally convinced that consideration of race and other factors are relevant to remedying the continuing effects of discrimination. Such important debates are too often entangled with discussion about the mechanics of balancing tests. In my view, this complicates issues, obscures common ground, and postpones the achievement of goals like eliminating racism. Where, then, might judges look for guidance in resolving conflicts between state interests and individual rights and opposing assertions of governmental authority? Unsurprisingly, I believe that the appropriate starting point is the Constitution itself.

Our Constitution is the product of a contest between the first two national political parties in American life: the Federalists and the Anti-Federalists. The Federalists generally drew their ranks from the coastal merchant and business classes. They favored a strong central government able to regulate interstate and foreign commerce and provide a powerful Navy. Yet, the Federalists were concerned with limiting the national government as well, both to retain a place for state governments and to safeguard individual rights.

In the Federalists' view, separation of powers within the national government and division of authority between the national government and the state would protect the people against tyranny. As to

the vertical division of government power, the Federalists intended a sort of competition between the states and national government that would benefit the people. "Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not," James Madison wrote in *Federalist Papers No. 46*.[32] "On the first supposition," he said, "it will be restrained by that dependence from forming schemes obnoxious to their constituents."[33] He continued, "On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the state governments who will be supported by the people."[34]

The Anti-Federalists were mainly farmers and others living in the western parts of the thirteen states. They favored state assemblies, which were considered closer to the people and more responsive than the national government. They also feared that a strong national government might trample on cherished personal liberties, and so they supported the Bill of Rights. For the Anti-Federalists, state rights and individual rights were part and parcel of the same program of democratic freedom. The Anti-Federalists believed that, in the state legislatures, democracy was closer to the source, the expression of the people themselves. Thus, like the Federalists, the Anti-Federalists viewed the authority of state government as a critical restraint on federal action and as a central protection for individual rights.

From these competing but nonetheless complementary views came a Constitution grounded on three central ideas: separation of powers within the federal government, federalism, and protection of individual liberties against the national government. With enactment of the Fourteenth Amendment the states also became obligated to uphold fundamental liberties guaranteed in the Bill of Rights, making the constitutional trinity that much more complete. In my view, the tensions inherent in the American constitutional system are more fittingly resolved by reference to this grand design. Specifically, problems pitting governmental interests against individual rights, or placing the federal government at odds with the states, may seem less intractable when federalism concerns are kept in mind. In this context, reference to federalism echoes the holistic approach taken in construing statutes, whereby courts focus not on a single sentence or part of a sentence in isolation, but try to understand contested words

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[32] THE FEDERALIST No. 46, at 300 (James Madison) (Clinton Rossiter ed., 1961).

[33] *Id.*

[34] *Id.*

in light of the provisions and the objects and the policies of the whole law.

One area where the importance of federalism has long been recognized is the review of state court criminal judgments under the federal habeas statute.[35] When reviewing state judgments, the Supreme Court has not viewed protection of individual rights as a wholly federal concern. Rather, it has recognized that state judges take their duty to enforce federal law and to vindicate federal rights seriously. Deference to state court findings of fact, exhaustion requirements, waiver rules, and application of the independent and adequate state ground doctrine to habeas cases all reflect the strong presumptions that state criminal judgments are final and that state proceedings are adequate to resolve federal claims. These presumptions respect the state's power to punish criminal offenders and acknowledge the Founders insight that public welfare and individual liberties are most effectively advanced when the federal government respects state soverignity.

Likewise, the Court invoked federalism concerns when deciding on how quickly after an arrest states must make a determination of probable cause, a question not addressed by the literal words of the Fourth Amendment. In *Gerstein v. Pugh*,[36] decided sixteen years ago, and in *County of Riverside v. McLaughlin*,[37] decided Spring 1991, the Court rejected historical and bright-line approaches to this problem. Instead, the Court acknowledged the value of experimentation at the state level, as well as the deference properly accorded state procedural solutions, and noted that federal judges should not assume the role of overseeing local jailhouse operations.[38] Reference to federalism thus has encouraged development of a constitutional rule that acknowledges not just the state interest in taking criminal suspects into custody and the rights of the suspects themselves, but also a public interest in evolutionary development of criminal justice by the governments that are most familiar with day-to-day law enforcement.

Courts traditionally act on the assumption that state autonomy can be a force for good in areas like education and family law, but there may be room for similar considerations in other fields. In the early 1900s, for example, states like New York and Wisconsin enacted laws setting minimum wages and maximum hours to deal with the terrible

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[35] *See* 28 U.S.C. § 2241 (1988).
[36] 420 U.S. 103 (1975).
[37] 111 S. Ct. 1661 (1991).
[38] *Id.* at 1668.

working conditions in urban factories. When the federal government abandoned its laissez-faire attitude toward business during the Depression, it borrowed from the example of these pioneering states. More recently, a number of states have taken the lead in developing retraining programs for displaced workers, new forms of health and medical insurance, and environmental laws. So too states may, in the exercise of their sovereignty, go beyond the guarantees of individual liberty provided in the Bill of Rights. Our federal system requires accommodation of competing interests, including the interests supporting state innovation, so that federalism is flexible and dynamic by nature. These characteristics are sources of national strength as the people ultimately benefit from competition between federal and state governments and also between the states themselves. To be sure, there are skeptics and critics of federalism in this country and these doubts are not new.

In 1815, the liberator of much of Latin America was trying to choose a system of government for the nations that he helped to create, and he too was skeptical of federalism. Simon Bolivar wrote that "[a]mong the popular and representative systems, I do not favor the federal system. It is over-perfect, and it demands political virtues and talents far superior to our own."[39] I do not embrace Bolivar's notion that federalism is beyond human capacity. While our federal system can never be perfect as long as the United States remains a sovereign union of equally sovereign states, federalism's vitality will be evident, I think, from your debates during this conference. The same tensions and conflicts that render questions relating to government action difficult make our liberty strong.

I wish you success in your discussions and thank you for letting me share this evening with you.

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[39] The Jamaica Letter (Sept. 6, 1815), *in* 1 SELECTED WRITINGS OF BOLIVAR, 1810-1822, at 118 (Harold A. Bierck, Jr. ed. & Lewis Bertrand trans., 1951).