October 10, 1989

TO: Allan Schmid
FROM: Vincent Ostrom
SUBJ: Some Conjectures on Federalism

I agree with much of what you have to say. To many of your key, and most sweeping statements, (e.g. federalism is not equivalent to minimalist government; the scope of governance is equivalent to the scope of human interdependence) I respond "right on."

On the other hand the win some, lose some rule is acceptable only within the context of a generally accepted frame of reference. Any electoral system involves winning and losing. But, does the aggregate longer term functioning of an electoral system yield what can be regarded as fair results conducive to the maintenance of mutually respectful relationships in a society? And so with majority-vote decisions subject to conditions which allow for and facilitate contestability, binding decisions can be taken provisionally subject to contestability. But critical issues turn upon contextual requirements that pose essential criteria pertaining to winning and losing. These obviously pose great difficulties, so let me try to elaborate.

The meaning of a commerce clause can never be adequately clarified by relying only on words. There has to be some shared community of understanding. We are ultimately confronted with the problem of how human beings might conceptualize the nature of self-governing democratic societies. Is there a basis for conceptualizing such a system of governance? How would it be structured? What structural conditions are necessary for its maintenance? If we use only the rule of win some, lose some, it is doubtful that a system of limited constitutional rule can be maintained over the long-run. Instead we might expect those who exercise the prerogatives of political leadership to become the ultimate winners to the detriment of others in a society.

This problem cannot be resolved on a cumulative score board because the score keepers would have to be omniscient observers to engage in keeping score on all collective choice situations. Our preoccupation must then be with keeping limits with reference to winning and losing so that the integrity of a constitutional system of government can be maintained and this requires that there be an awareness of the proper limits to the exercise of all prerogatives: citizenship, legislative, executive, judicial and all other prerogatives. This is why I look upon chapters 2 and 3 of American Federalism as establishing the rudiments of what it means to think about a system of self-governance. If I am correct then it is such a
community of understanding that provides an appropriate context. Within that context, the principle of win some, lose some can work. If winning and losing seriously impairs that context, we are then in trouble.

Garcia explicitly says the courts can establish no criteria for limiting the substantive powers of the national government: The "federal" structure of national government itself is sufficient. This puts federalism at risk.

Is the taxing and spending power to apply to the "general welfare" of everyone in the U.S. or is it to make provision for the "common defense and general welfare of the United States" -- meaning the shared national community of interest in relation to what is common to that community transcending the communities of interest inhering with the different states. There are obvious grounds for dispute in applying any classificatory schema, but to abandon any effort to establish limits is something else again.

In my judgment, the Supreme Court has abdicated its responsibility for maintaining a continuing dialogue about the place of constitutional limits in the exercise of governmental prerogatives. And this shift, over the last fifty years, has led to the neglect of what constitutional government and constitutional jurisprudence implies in the American system of government. The key question is whether that level of analysis and choice can be revived, or will it be abandoned for Presidential government on the occasion of some future crisis? When is a democracy transformed into an autocracy?

You may say that it can't happen here. My response is that it can happen anywhere if proper limits are not maintained. Winning and losing thus must occur within some context capable of maintaining the limits of a constitutional democracy? Status quo conditions essential to the maintenance of a constitutional system of governance are the essential status quo position to protect. All others should be challengeable, subject to inquiry and critical discourse and an effort to understand how individual interests fit within the configurations of communities of relationships which take account of interdependencies and commonalities.

Are there possibilities that welfare programs designed to provide for everyone from the cradle to the grave can yield highly perverse consequences that contribute to pauperization and demoralization of major portions of a society? What happens to individuals assuming some basic responsibility for planning and arranging for their own lives? Is it "society" that is responsible for me rather than me being responsible for making something of my own life as I associate myself with others? Is Lord Beverage's conception of the welfare state consistent with the requirements of a democratic society? Forty years ago I would not have seen the issue; today Tocqueville's comment, "what remains but to spare them all of the care of thinking and all the trouble of living", rings out loud and clear in this context.
I assume that we now know that all forms of property rights depend upon limits. Even the case of open-access public properties depend upon limits so that one person's use takes cognizance of the use of public streets, thoroughfares, sidewalks, parks, playgrounds, libraries, plazas, waiting rooms, etc. by others. Now what happens when some people begin to intrude upon such spaces for camping out, partying, boozing, drugging, wilding, preying upon others, etc? If no limits apply; the tragedy of the commons prevails. Some uses drive out other uses; and a civilized way of life is abandoned to a jungle.

Do you and I out of some perverse sense of compassion close our eyes and call for more public measures to support these unfortunate ones? If we do it is truly the poor who are forced to protect themselves as best they can with their own resources without appropriate means of taking collective action in their household and neighborhood conditions. These types of depredations reached such proportions in St. Louis that a public housing project which won architectural awards was so vandalized that it had to be demolished within ten years after its construction. Is this the inevitable consequence of public housing, or do we face some serious problems in fundamentally rethinking the rent bargain? Spending money from the Federal treasury does not solve that problem.

If we have individuals who cannot cope with the problem of arranging their own lives in association with others, and "society" is responsible for them, it would seem to me that we confront a problem of how to take care of such people. Does this imply some form of institutionalized care? I presume that the concept of vagrancy applies to some such situations: the improper use of public spaces and an inability to assume responsibility for oneself. What do we now mean by homelessness in light of such contingencies? Are these problems going to be resolved by national programs for "fair" and "adequate" housing? My response is "no." The problem has been grossly misspecified.

If we proceed to misspecify more and more problems and take inappropriate measures to cope with these problems can we anticipate a serious pauperization and demoralization of the whole society? It seems to me that we are advancing along this road if we have an average of 600 births occurring each day where mother and baby are both cocaine dependent with high incidences of genetic damage due to drug abuse. We are building these problems into multigenerational time horizons. When do we realize that Washington-directed wars on drugs won't work and we face an array of problems of quite a different magnitude?

This, it seems to me, calls upon us to draw upon what Tocqueville called "a science of association" to rethink the basic structure of institutional arrangements in American society for addressing many of these problems. There are essential limits to the use of public spaces in any civilized society. No one has a right to intrude upon those spaces in any way they see fit. We need vagrancy laws; but we need to know what those laws imply: there may be people who are incapable of caring for themselves and require someone else to assume responsibility for them. How do we do
that? What are the options? How do we cope with such problems in a reasonably constructive way?

If banks are required to inform upon their customers we can rest assured that suspicions are quite different than knowing that some wrong has been committed. We are now requiring teachers to inform public authorities of all cases where suspicions of child abuse may arise. How far do we go in presuming parents to be child abusers? Is spanking, or punishment, child abuse? Are officials more competent to decide than parents? Is it child abuse to indulge or "spoil" children? Who are the omniscient observers who can resolve those problems? There seems to be no end to the problems for which we are calling upon Big Daddy to solve for us. In the course of doing so, do we begin to presume that everyone has a collective responsibility to inform upon everyone else. This was the basic principle that fueled Stalin's reign of terror and the eclipse of public life in the USSR. If we deal with the basic machinery of justice on a win some, lose some basis where no limits apply, where are we? Can judges tell school officials how to run their schools simply because racial concentrations exist? Given our historical background I understand why we might establish a constitutional principle denying race as a criterion that might apply to the choice of housing and access to other goods, services, and opportunities. Choices based upon ethnicity certainly exist among non-blacks. Middle class whites have their own ethnic biases about the uses of property, what constitutes good fun, etc.

So does everyone else; and I don't see why "fair" housing requires racial quotas or quotas based upon income distribution, religious faith or any other criterion. The question is has someone been excluded on the criterion of race as such? That is a different standard than to presume that equal protection of the laws requires quotas based upon a spectrum of socio-economic variables.

I have reluctantly come to the conclusion that the way that judges, legislators and executive authorities exercise their prerogatives in the Federal government has not only put federalism, but constitutional government itself, at risk. Tocqueville saw this danger as he indicates in book 4 of volume II. A measure of optimism would be justified if we have the occasion to recognize the fundamental constitutional difficulties we face and begin to take appropriate measures. If such a possibility were not to occur we are in deep trouble because the USSR has demonstrated that human societies cannot rely upon central authorities to solve their problems for them. Every one of us is required to come to terms with the proper limits that apply to the conduct of public authorities. We cannot make our choices on the basis of who offers the biggest promises.

How to deal with the termination of pregnancy is indeed a profound moral question that can neither be resolved by abolishing abortions nor by making them freely available. Who is to decide in light of what counselling? Are parents to be denied access to knowledge regarding pregnancies and abortions involving their children? At what age: 12, 14, 16? Again limits seem appropriate. Much the same problem exists with whether help is to be extended in crossing the threshold to death. When is
the prospect of life so impaired that parents, upon proper counsel are entitled to assistance in terminating the life of a genetically damaged child who can never hope to live a minimally tolerable life? Who bears the burden of a genetically damaged life of intolerable proportions? If abortion is justified under any circumstances so is the termination of life under some circumstances, but we need to be careful about limits.

In light of all of this I keep pressing back to the question of whether the most basic issues are methodological ones. What is the method appropriate to rendering moral judgments in human societies? I keep coming back to the conclusion that it is the method of the omniscient observer that puts us most at risk. Is this what happens when we study human societies as a whole? Are my own preoccupations at risk? Obviously! The only safeguard I see is in the metaphor of Jacob wrestling with God. Since I shall never know how to wrestle with God I can do so only with colleagues like you. This is why your comments are so important to me. I much appreciate your comments and the opportunity to get better acquainted. Please give Kay our love. I shall welcome any response you may have.

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