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# THE STRUCTURES OF FEDERALISM

Martha A. Field\*

The difficult thing about commenting upon Cass Sunstein's work is that I agree with so many of his points, and he makes them about as well as they can be made. Fundamentally, I agree with his conclusion that federalism is likely to play a role in the constitutional design of a democratic, post-apartheid South Africa, and also that it can be a useful structure.

## The Virtues of Federalism

Professor Sunstein reviews many good reasons for adopting a solution involving federalism: the more governments there are, the more participation and the greater variety of voices; having many levels of government serves the same checking function as having levels of courts, or separating legislative, judicial, and executive branches; decentralization in government contributes to decentralization in the economy, which contributes to prosperity.

I was particularly interested in the point that federalism was part of the Framers' intent to create a *deliberative* government, and that this was both central to the United States experience and at the expense of a more democratic structure. Federalism as a structure may promote stability, but if so, it also can slow change. At the same time, because it allows for experimentation—allowing for different systems to exist and varied proposals to be tried in different states—federalism makes it possible for change, when it comes, to be based upon firmer foundations than if it were achieved more swiftly and more easily.<sup>1</sup>

I was also interested in Sunstein's description of the power of exit; the concept is that individuals—as well as companies—leave states whose laws they find oppressive and move to areas in which they are

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1. Federalism is like other counter-majoritarian features of our Constitution inasmuch as it promotes stability and slows change. But not all of the counter-majoritarian characteristics share these attributes. The Bill of Rights and the institution of judicial review, for example, at least in practice, have become promoters of change as much as inhibitors of it.

more comfortable. If it is important to a white man to live where there is a high percentage of whites, for example, he can choose to live in such an area. Then, if residents of that same area want blacks to work there, they will have to make it an attractive place for blacks as well. In order for the power of exit to have any substantial effect, persons must have available both the means to move around and also options that are attractive to them. The right of exit plays much less of a role in a system where it is difficult to move to the good life.

#### Costs

Federalism, then, is a useful tool for encouraging experimentation and diversity—and, adds Professor Sunstein, democracy, prosperity, stability, and deliberation. But federalism is not a tool for all times or all places. For example, sometimes what is needed is nation-building and centralization, not the dispersion of authority. When that is the case, federalism can be counterproductive.

Even when federalism is appropriate, it has its costs. In addition to costs that Professor Sunstein has identified, corruption may be a cost of a federal system. There is both charm and value to the concept, eloquently described by Professor Nicholas Kittrie in his speech, that the best government is the one closest to the people. Ideally, such a government would be the most responsive. But our history would also suggest both that local government may be more subject to corruption and that corruption may be harder to control at the local level.

In addition, a major cost of federalism that must be acknowledged is the duplication and inefficiency it entails. Though not inherent to every federal system, one example that exists in our country is a dual court system. The United States government has a fully developed court system, and each state government also has its own complete court system. In addition, our system of concurrent jurisdiction allows many cases to be heard either in state or federal court. And in this system enormous energy can be spent deciding which forum will hear any particular case.

Sometimes such choice-of-forum litigation precedes trial of the case on the merits. While both systems tackle questions about which of them ought to go forward, the case remains unheard. But some cases are litigated—simultaneously or consecutively—in *both* systems, and then much time and expense may be spent deciding which system's resolution is to prevail.

In short, much time, energy, and money can be spent coordinating state and national systems. The problem is not inherent to federalism, but it is a problem that governments with a federal system must guard

against. The problem is not even inherent in a dual court system. The costs of the American system, for instance, could be greatly reduced by setting clearer boundaries between federal and state jurisdictions; limiting concurrent jurisdiction; or enacting clear rules concerning when one jurisdiction should defer to the other, to give just a few examples.

Federal systems need not have a full dual court system, but there are advantages to it. In the United States, federal law is much better enforced and more uniformly applied because there is a full system of lower federal courts. Moreover, state law is a much more independent body of law because of the existence of state court systems, which interpret and develop the meaning of state law independent of federal authority. The same duality that is costly and inefficient, then, also has advantages that may be worth the costs, particularly if vaguely-defined and overlapping jurisdictions, with their inefficiencies, can be minimized.

Some of what Professor Sunstein referred to as costs of federalism are not to my mind really costs of federalism at all but rather independent problems that in the United States system happen to coexist with federalism. For example, whether government can redistribute wealth in a federal system depends largely upon whether the constitution and laws give government that power. Even though in the United States redistribution has been inadequate, that is not a necessary result of a federal system. Similarly, whether minorities in the various localities will be protected depends, as Professor Sunstein recognizes, upon whether the central government "can create a vigorous bill of rights enforceable against local units."<sup>2</sup> But elsewhere Sunstein characterizes these (and the problems of lack of coordination between different levels of government) as "problems caused by federalism."<sup>3</sup> Federalism does not cause these problems, nor has it been demonstrated that it inherently contributes to them.

### What Is Federalism Anyway?

I find particularly interesting those of Professor Sunstein's points that are about federalism itself. For this purpose, I define federalism as the division of powers of government between national and sub-national levels, with each level possessing and exercising important powers. In his discussion of federalism and its potential for diffusing conflict,

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2. Cass R. Sunstein, *Federalism in South Africa? Notes from the American Experience*, 8 AM. U.J. INT'L L. & POL'Y 421, 425 (1993).

3. *Id.* at 428.

Sunstein is thus describing the structure of federalism as such. Similarly his points about proliferating points of access to government, competing power centers, the right of exit, and local experimentation relate to the structure of federalism. Professor Sunstein also attributes to federalism, however, characteristics found in the federal system of the United States—like the “costs” mentioned above—but which result from the particular distribution of powers between national and state spheres that *our* Constitution adopts but that have nothing to do with federalism as such. Important aspects of our federalism in the United States that may have contributed to the success of our system but that are not necessary components of a federal system include: the states’ role in the composition of the national government—in the election of our President by the electoral college, for example, or in the equal representation of each state in the Senate; states’ participation as such in the process of constitutional amendment, but their lack of any veto over federal legislation; the absence of any state right to secede from the Union; and the operation of federal government directly on the people, not just through the member states.

One reason that I like to use the term “federalism” to describe simply a governmental structure with (at least) two different, significant levels of governments—one national unit and several sub-national units—is to emphasize that federalism is compatible with many different kinds of values and substantive rules. It even is compatible with many different kinds of governmental structures. Moreover, governmental powers can be distributed in very different ways in federal systems.

Canada and the United States, for example, both have federal systems. But the powers of the central government are very different in the Canadian and United States systems. The central government in the United States has authority to regulate virtually all economic activity, but in Canada the federal government cannot impose economic plans and solutions without the participation and assent of the provinces. Similarly, labor law is an important subject of national controls in the United States but is governed by the provinces in Canada. On the other hand, marriage, divorce and criminal law are clearly associated with the states in the United States, but are governed by the central government in Canada. In both nations, the central government controls defense and foreign relations, and one might suppose that in a federal system such powers would be crucial to the central government. But in the European Economic Community—to look at yet another federal structure—the union is devoted primarily to building an economically-integrated community with common commercial policies, but the member nations retain

control over their own foreign affairs.

Clearly, then, one federal system can have a very different governmental structure than other federal systems. How a particular constitution distributes particular powers, and how the authority of the various governments develops in practice, are crucial in determining the way the government works and are at least as significant as a choice for or against federalism. A choice for federalism does not resolve or even address questions of how powerful different levels of government should be *vis à vis* each other.

A constitution can try very precisely to delineate the spheres of authority of each level of government, but unconsidered issues are bound to arise. How the government deals with new issues, and how the national constitution allows for change, are at least as important to peace, stability and dynamism in a constitutional system as federalism is, and the choice of a federal structure does not itself dictate the resolution of these issues. In addition to provision for change, it also is very important that there be in place a system whereby federal law will be enforced.

In the United States our processes for constitutional amendment and the institution of judicial review as it has evolved have been extremely important to the success and durability of our constitutional experiment. One of the greatest changes in the balance of power between the states and the federal government in the United States occurred in the 19th century when the federal government acquired power to legislate concerning civil rights and to make states comply with national standards on civil rights questions. This was accomplished directly by constitutional amendment—the Civil War amendments—and by subsequent congressional legislation and judicial interpretation. But even the constitutional amendments were not adopted until after a civil war had threatened the breakdown of the federal system.

In the United States, the adoption of the Civil War amendments led to greater centralization over civil rights. It is basic to the United States governmental structure today that civil rights will be protected by the national government and the national judiciary. Human rights may indeed be a subject that should be entrusted to a central government—a subject on which diversity should not be tolerated. Nations differ as to what powers they lodge in the central and local governments, but some subjects are more appropriate than others for diverse application. A central inquiry in any federal system, is who is to decide which powers will be reposed in which level. Here also, a choice for federalism does not presuppose any one particular answer.

Certainly the situation of the United States today suggests that a nation can have a federal system and at the same time have a very strong central government.<sup>4</sup> Indeed the central government in the United States has such broad powers today that some question whether it still is appropriate to call it a federal system at all.<sup>5</sup> In the United States there is not actually dual sovereignty, with separate spheres for each level of government, but rather concurrent sovereignty. The original scheme was that the federal government would have limited and specified powers (powers that were usually shared by the states); that when the federal government exercised those powers, its pronouncements would be supreme, but that the residuary powers not placed within the control of the central government would be left to the states. State powers were thus defined primarily as those powers not specifically conferred on the federal government. Initially, the powers this system left solely to states were significant, including the basic police functions of government. But contrary to the original conception of a sharply limited federal government, the development of a strong central government in the United States has left no significant sphere of authority in which the Constitution allows only states to operate.

The Civil War amendments' addition to federal powers contributed to much greater centralization than at the outset of our history. The development of a nationalized economy also put great pressure in the direction of centralization. Centralization was accomplished within the existing constitutional framework by broad definition of the enumerated powers of the federal government. During the past six decades, the limited and enumerated powers of the federal government have been defined so broadly, by courts and by Congress, that there is almost no area to which they do not extend. Accordingly, there is almost no sphere left in which *only* state law can operate. It is this fact that makes some question whether the United States does indeed still have a federal system.

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4. The central government of Canada is more limited in relation to the provinces than the national government in the United States is in relation to the states. There is an irony in this fact: when Canada drafted its Constitution the effort was to create a strong centralized system; the United States' plan, on the other hand, was for substantial states' rights. In both countries, courts and subsequent developments altered the original plan so that the result in Canada was stronger prerogatives for the provinces and in the United States was stronger central government.

5. See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (asserting that *Garcia* surrendered inordinate power to the federal government).

Our system does still fit within my definition of federalism—and within the definition adopted by our Supreme Court—because states do still in fact exercise substantial and significant powers, such as licensing, the regulation of real estate, marriage and family law, and criminal law. But it is not the Constitution as such that is placing the primary limits on where state law will operate and where federal law and government will operate, but instead the Congress. Congress effectively has the choice of which spheres will be governed by the national system and which will be governed by states. What is state and what is federal, then, has become more of an issue of national policy than of constitutional law, at least in the first instance.

The Supreme Court still retains the authority to intercede, and says it will, should the states be obliterated by the national government—should the federal government leave no significant area for the operation of state government. But the first choice as to which areas of law are to left to the states and which will remain to the national government is with Congress, and the courts have adopted a general attitude of deference to congressional judgment in this area. As long as substantial powers are left to the states, as they certainly have been throughout our history, there is “federalism” in one sense, despite Congress’ control over the distribution of powers. This is federalism within the meaning set out above—significant power existing on each of the two levels of government—and that is the definition the United States Supreme Court suggested in the definitive case of *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>6</sup>

In short, the term “federalism” can be used to refer to very different things. There is *bona fide* disagreement about what the term should mean: for example, need there be separate constitutionally-created spheres in which only subunits can operate in order to satisfy the requisites of federalism? Moreover, in our history, debates about federalism have sometimes been used as a smokescreen for debates about other issues. For example, sometimes the term “federalism” is used to describe the political position that states should have greater powers and rights than they do.<sup>7</sup> For another example, there are periods in our history in which “states’ rights” have been associated with racism. Moreover, even those taking strong states’ rights positions favor a national solution on certain issues; a national and uniform solution is likely to be favored

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6. 469 U.S. 528 (1985).

7. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971) (describing “our Federalism” as a system requiring strong states’ rights).

when the national solution that would be adopted is the one they would agree with on the merits. It is not at all unusual for a person's position on the issue of national versus state powers to be much more influenced by their substantive agenda than by their ideas about federalism.

Sensing the difference in what various speakers were describing under the rubric of "federalism," a representative from South Africa's Communist Party asked this morning of one of our speakers, "But what is the essence of federalism?" My response is that there may not be very much "essence" and that federalism is primarily a tool of government and a vessel into which very different substances can be poured. It is a structure which can be useful, and it is a structure which by itself is largely value-neutral.

### Conclusion

What does this tell us that might be useful to South Africa? It does show that a choice for federalism is merely a first step, and a very small first step at that. Federalism is a good choice. It can be an effective tool of government and can play a role in achieving peace and stability, and perhaps even democracy, prosperity, and deliberation. But a choice for federalism still does not answer some of most important questions about what the government's structure will be. It does not tell us which powers will be lodged in which level of government, or how important one level will be *vis à vis* the other. It does not tell us to what extent the government will be democratic or counter-majoritarian. And it does not answer important questions like how the government will respond to change.

Federalism is a good structure to try, but it advances the inquiry in only a tiny way. Not only is it a small piece of the governmental structure; even when the rest of the structure is filled out, all we have is the designation of a tool that can be useful in resolving substantive differences. The real problem is finding a way to deal with important substantive differences that exist—such as the degree of economic redistribution and the degree and methods of protection for the rights of minorities. A choice of federalism says nothing concerning such bedrock issues, in the sense that a system of federalism is compatible with any resolution of such issues. Federalism will not resolve the most pressing problems, but neither will it stand in the way of appropriate substantive solutions. But South Africa will need more than what Professor Sunstein

calls "creativity about the details"<sup>8</sup> to make it work.

It *should* be comparatively easy for a gathering like this one to agree on federalism, in part because of the reasons Professor Sunstein has persuasively put forth. But what kind of government results, and who has power over whom, will depend upon how the so-called details are filled in. It will be understandably more difficult to achieve agreement on those issues.

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8. Sunstein, *supra* note 2, at 444.