

1993

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### Recommended Citation

Eizenstat, Stuart E. "Lessons from the American Experience." *American University International Law Review* 8 no. 2/3 (1993): 603-609.

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# LESSONS FROM THE AMERICAN EXPERIENCE

Stuart E. Eizenstat\*

The experience of the United States has much to offer South Africa as it embarks on an exciting experiment to guarantee full citizenship rights for all citizens. But, for several reasons, these remarks are offered with a sense of humility.

First, the United States did not adopt its current constitutional structure immediately after its War of Independence. Before adopting our current constitutional model we struggled through another system of government which proved inadequate. Immediately after the Revolutionary War, we were faced with a crisis of immense proportions, with huge war debts and unclear lines of governmental power.

The leaders of the Revolution created the Articles of Confederation in the first collective effort to address the vast problem of organizing a new government and regulating the affairs of the newly independent states. The Continental Congress drafted the Articles and voted on them on November 15, 1777. They were immediately submitted to the states for ratification, but did not go into effect until March 1, 1781, after Maryland became the last of the thirteen states to ratify.

During the debate, a crucial issue was agreed upon in which states were given enormous powers relative to the central government. Thomas Burke, a delegate from North Carolina, proposed the adoption of an article which would declare that each state would retain "its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assemble."<sup>1</sup> The article was adopted. In theory, the Articles bound the confederation of states together solely for the purpose of defense and foreign policy, with each of the thirteen states retaining separate, sovereign power.

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1. ARTICLES OF CONFEDERATION, art. II.

Immediately, major problems developed. For example, commerce between the states was difficult because each state maintained a separate monetary system. There was no central authority to levy and collect taxes. Instead, quotas assigned to the states were often not met. The antagonism between the states was fierce.<sup>2</sup> State legislatures, unchecked by executive and judicial authority, "inflicted gross inequities in trying to protect their constituents against economic disaster."<sup>3</sup>

Alexander Hamilton foresaw "frequent and violent contests" among the states unless a strong union was created.<sup>4</sup> A small civil war broke out in western Massachusetts in 1786 because of a harsh fiscal policy employed by the state government. Those fiscal policies threatened to ruin many of the farmers in the state. Daniel Shays led the uprising which became known as "Shays' Rebellion." Although it was quickly put down, it became the catalyst for the Constitutional Convention in Philadelphia which met to develop a more cohesive governmental structure.<sup>5</sup>

This experience with the Articles of Confederation is an important one for South Africans to ponder. It is imperative that in the process of dispersing power, sufficient authority remain with the central government to make the government effective. This was true in the 18th century and is even more apparent now.

Thus, it is indispensable that the central government have adequate taxing authority to provide for the common defense; that there be one, and only one, foreign policy for the nation; that the major problems of the country, from the economy to energy and the environment be within the jurisdiction of the central authority. Otherwise, you will have chaos and anarchy.

A second reason why humility is necessary is because we are far from having solved our own racial problems. De Tocqueville noted more than a century and a half ago that "[t]he most formidable of all the ills that threaten the future of the Union arises from the presence of a black population upon its territory."<sup>6</sup> We fought a Civil War over

2. See John Shy, *American Revolution*, in 1 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 52 (Jack P. Greene, ed., 1984) [hereinafter *American Revolution*] (discussing the political process behind the American Revolution and the post-war crisis).

3. *Id.*

4. See THE FEDERALIST No. 6, at 27 (Alexander Hamilton) (Random House ed., n.d.) (addressing what Hamilton foresaw as dangers from personal ambitions of those from small states).

5. *American Revolution*, *supra* note 2, at 52.

6. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 380 (Henry Reeve

slavery in which more American soldiers lost their lives than in any war in which the United States has ever been engaged, including the First and Second World Wars, Korea, and Vietnam. A century later, Gunter Myrdal, a Swede, noted that our racial divisions were the "American dilemma."<sup>7</sup> It was not until the 1960s that the federal government assured basic civil rights, such as the right to vote without impediment, the right to eat or sleep at a public accommodation and the right to rent or purchase a home without discrimination. The riots in Los Angeles are a reminder of how far we have to go to achieve full equality of opportunity for our black citizens.

In his new book, *Two Nations*, Andrew Hacker vividly portrays the remaining vestiges of racial discrimination and the lingering impact of slavery in terms of education and economic gaps, which while closing, nevertheless remain.<sup>8</sup> Indeed, Hacker compares the United States with South Africa:

America is inherently a 'white' country in character, in structure, in culture. Needless to say, black Americans create lives of their own. Yet, as a people, they face boundaries and constrictions set by the white majority. America's version of Apartheid, while lacking overt legal sanction, comes closest to the system even now being reformed in the land of its invention.<sup>9</sup>

I believe Hacker has exaggerated the problem and underestimated the progress black Americans have made in creating a genuine middle class. I also believe Hacker has failed to recognize the amount of genuine good will which exists between the races in America. Nevertheless, his statements are worth pondering.

Of course, in South Africa, you will soon have a majority black government. But this will impose on the black majority the obligation imposed on white America: to fully protect from the outset the economic and political rights of the minority in ways that the minority failed to do with its black majority. This will require a magnanimous spirit and a largeness of vision which will be the real test of South Africa's new government. These projections cannot be left to good will and rhetoric. They must be embodied in solid constitutional projections enforceable

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trans., D. Appleton & Co. 1901).

7. GUNTER MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

8. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE HOSTILE AND UNEQUAL* 4 (1992).

9. *Id.* at 4.

by the executive and judicial branches of government.

A third reason why my advice to you is conditioned with modesty, is that the federal system which we have created—and which I believe is best for South Africa given the diversity of its population and the need to protect minority rights—is hardly without its own problems. One of the reasons for the extraordinary rise of Ross Perot in 1992 as an independent candidate was the perception that our system was not adequately dealing with the major problems facing our country.

The United States Constitution was a vast improvement after the disastrous experiment with the Articles of Confederation. It was signed on September 17, 1787, and was considered the law of the land when the ninth state ratified it on June 21, 1788. Even then our Constitution was not complete. The Bill of Rights, the first ten amendments to the Constitution, was submitted to the states for ratification on September 25, 1789. Three-fourths of the states ratified The Bill of Rights on December 15, 1791, only shortly after the Constitution had been ratified. The Bill of Rights was hotly debated, but Thomas Jefferson made the winning argument. Jefferson stressed that The Bill of Rights would put a “legal check [ . . . ] into the hands of the judiciary as a body which, if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.”<sup>10</sup>

A key difference between the Articles of Confederation and the newly amended Constitution involved the powers of the states relative to the central government. While Article II of the Articles of Confederation states: “Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assemble,”<sup>11</sup> the 10th Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>12</sup> The omission of “expressly” in the Tenth Amendment allowed for usage of implied powers to the federal government, thereby making the federal government stronger.

Our system not only divided power between the federal government and the states, it also divided power within the federal government in ways which are important for South Africa. Our Founding Fathers want-

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10. 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd., 1958) *quoted in* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 4 (2d ed. 1988).

11. ARTICLES OF CONFEDERATION, art. II.

12. U.S. CONST. amend. X.

ed to create a more effective government than the Articles of Confederation had created. Nevertheless, they did not set out to create the most efficient system, but one which checked the excessive use of authority by either the president or the Congress. Every power given to the president was checked and balanced by powers given to Congress and to the independent judiciary.

Unlike a parliamentary system, which merges executive and legislative functions, our system divided the two functions. We pay a very real price in terms of efficiency for this division, particularly when different parties control the two branches, as has been the case for most of the last twenty-four years. The Congress and the president each have had different agendas which has led to a policy impasse on many of the major issues facing the nation.

Within the federal government, there are three independent branches. It is critical that South Africa adopt in its new constitution a federal court system which is capable of interpreting its constitution and protecting individual and group rights against governmental excess. If South Africa did nothing else this would be the most important matter to adopt.

The way in which our Congress is organized may also be of relevance to South Africa given the diversity of its population. The United States Senate is elected in a way which allows small states to have as much representation as the more populous ones. If cantons or tribes are used to divide your country, this might be relevant. The United States House of Representatives is selected in ways which give the larger states more representation than the small states. Thus, California will have fifty-two representatives while Montana will have one in the new Congress.

The key is to have a central authority which can act for the country as a whole, with a united monetary, trade, and customs system, while leaving significant taxing and other governmental authority to states or local subdivisions. In one famous description, federalism has been referred to as "laboratories of experiment."<sup>13</sup> During the Reagan and Bush eras, the federal government withdrew from significant areas of social involvement and substantially cut grants to states and cities. This forced states to be more active. For example, states in the last decade have acted on welfare reform, education, job training. Most innovative of

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13. See Rapaczynski, *From Sovereignty To Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 408-14 (discussing the argument supporting federalism which considers states laboratories of experiment).

these elected officials are governors, from Republican Pete Wilson to Democrat (now President) Bill Clinton. Not coincidentally, three of the last four Presidents, Carter, Reagan and Clinton, came from the ranks of governors. Democrats tend to favor central government action while Republicans favor state action. However, there is broad consensus on basic values. Thus, for example, in the absence of national action on health insurance, the states of Vermont and Minnesota have acted on their own. This is a difficult balance to reach but it is one to seek.

The European Community is another model for South Africa. In the European Community, there is a history of independent nation states trying to confederate. One would expect more authority to be left to those nation states, even as the central European Community forms an economic and monetary union. Interestingly, in my recent visit to the European Community in Brussels, I found that there was a sense that the central authority in Brussels had been trying to take too many powers unto itself; that it should focus only on broad policy issues and matters which require united action while leaving a great deal of authority to implement policy to the nation states.

This is probably not the correct model, unless South Africa believes that its tribal and racial divisions are such that even greater authority should be left to local governmental divisions. But again, while considering the very real advantages of combining a federal system which disperses and divides power with a strong federal government, remember the dangers of the Articles of Confederation before you follow the European Community model.

Thus, I would argue that the most important lessons from our American experience which seem relevant to South Africa are the following:<sup>14</sup>

1. Adopt a bill of rights in your basic constitution with similar protections to those in the first ten amendments to the United States Constitution. Make it clear that those amendments apply to the actions of all subdivisions of government, not simply to the federal government—something which has been left to judicial interpretation over many generations in our system.

2. Establish an independent, unelected judiciary which is empowered to interpret the constitution and your bill of rights.

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14. See Daniel J. Elazar, *Justice is Possible in South Africa*, in *A WAY OUT: FEDERALIST OPTIONS FOR SOUTH AFRICA* 19-32 (Michael Briand ed., 1987) (discussing the differing approaches to federalism). Some of the approaches are similar to the ones proposed in this article.

3. Establish a federal model in which your states, provinces, or cantons have their own legislatures and executives, with significant taxing and governmental powers, so long as those do not conflict with the overriding powers of the central authority. Each local jurisdiction could develop its own character.

4. Make your central authority powerful enough to have sole command over defense, foreign affairs, monetary power, customs, trade, social regulation, and national taxes, with all other powers reserved to the individual states, provinces or cantons.

5. I would not suggest you adopt a presidential system, unless you conclude that your country will be so divided that you will be unable to have two or three stable parties. A parliamentary system is more efficient. South Africa could have both an upper and lower house. The lower house can be selected by population and given the majority power to legislate while the upper house would only have a veto authority.

If, on the other hand, you feel that establishing a party structure will be too difficult, then a presidential system would be more appropriate. The president could be popularly elected and the legislative branch could be divided as ours is. This would reflect the diversity of the country.

It is also critical that you devise a system which not only protects white minority rights, but which also gives whites a stake in the government and the country, to which they can continue to add economic strength.