

1993

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### Recommended Citation

Sunstein, Cass R. "Federalism in South Africa--Notes from the American Experience." American University International Law Review 8 no. 2/3 (1993): 421-444.

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# FEDERALISM IN SOUTH AFRICA? NOTES FROM THE AMERICAN EXPERIENCE

Cass R. Sunstein\*

## INTRODUCTION

It is generally agreed that the American Constitution has been a substantial success. We might even agree that the success is attributable in large part to the Constitution's particular institutional arrangements, most notably the remarkable systems of checks and balances, judicial review, and federalism. In any case, it is no surprise that constitution-makers all over the world are consulting those arrangements in designing their own emerging democracies.

A moment's reflection, however, should be sufficient to show that there are great difficulties in evaluating governmental structures in the abstract, or in transplanting the structures designed for one nation for use in another. The effects of such structures often cannot be reliably measured in advance. Even when we can measure effects, it is hard to evaluate them. A system emerging from communism must evaluate checks and balances in a somewhat different way from a system emerging from apartheid; the relevant problems are entirely different.<sup>1</sup> And in light of this, outsiders must be especially cautious in making recommendations for constitution-makers, even if asked to draw on the lessons of their own experience. One needs to know a great deal of detail about the local situation; one needs to know a lot about local hopes and problems. In the context of federalism in particular, one

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1. See Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 917-29 (1993) (arguing that nations in Eastern Europe should adopt constitutions that aggressively protect rights of property and freedom of contract, and that do not contain social welfare guarantees). A different approach may well make sense in South Africa, where property rights and freedom of contract — at least as general, abstract goals — are recognized and accepted.

needs to know an enormous amount about existing units, about the distributions of relevant groups within those units, and about the prospects for creating new entities.

In these circumstances, it seems best to stay with abstractions about the possible functions (and malfunctions) of federalism and to work with goals that seem to be shared by widely divergent people. I work with three such goals here. The first is the *promotion of democratic processes*. The second is stability, in particular, *the containment of racial, ethnic, and other tensions*. The third is *economic prosperity*. I want to explore the possible contributions of federal structures to all three goals.

In brief, my argument is as follows. A federal system contributes to both democracy and prosperity, above all by combining the right of "voice," or political participation, with the right of "exit," or the right to leave.<sup>2</sup> Federalism promotes the right of voice in political life by supplementing national political institutions with smaller local ones, in which self-government can more readily occur. The right of exit consists of the right to leave one smaller unit for another. This right has a valuable checking function on the sorts of legislation that can be proposed and enacted.<sup>3</sup> It is also a natural ally of a decentralized market economy; and a decentralized market economy is an ally of both liberty and property. In addition, there are many ways in which federalism can help diffuse and contain racial and ethnic conflict.

We might therefore understand federalism as one of a number of precommitment strategies by which constitution-makers bind themselves, in advance, to undertake, or not to undertake, certain courses of action.<sup>4</sup> A special point here is that constitutions should be designed to counteract the most threatening aspects of the particular culture for which they are designed. In South Africa, the risk of ethnic and racial strife is a conspicuous one, and it is important to create federal institutions particularly intended to counteract this risk.

This essay is organized as follows. I begin with some remarks on what federalism will not do, and on what harms federalism might cause.

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2. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (providing a classic discussion of voice and exit).

3. See *infra* note 41 and accompanying text (discussing the right of exit and its effect on repressive legislation within political subunits). The right of exit is also a natural ally of a decentralized market economy. See *infra* note 44 and accompanying text (discussing the restraint that the right of exit places on repressive regulation). A decentralized market economy is an ally of both liberty and property.

4. See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 636-43 (1991) (discussing constitutions as pre-commitment strategies).

These points are of special importance to South Africa in light of the distinctive legacy of apartheid. I then outline the American constitutional system, showing that the American framers explicitly rejected the notion of democracy in favor of the notion of republicanism.<sup>5</sup> In the republican system, there are many counter-majoritarian elements; the American republic is not a system of unconstrained majority rule. In this general sense, the Constitution sets forth a series of provisions designed to ensure against factionalism, myopia, and self-interested government.

After outlining those elements, I turn to federalism. I begin by describing what federalism entails in the United States, attempting briefly to set out the roles of the nation and the states. I conclude with a discussion of how federalism might promote democracy and prosperity, while at the same time diffusing ethnic and racial conflict. An important goal of all constitution-makers is to promote democratic institutions without at the same time compromising the prospects for economic prosperity. A suitably designed system of federalism is admirably well-suited to this goal.

#### SOME DISCLAIMERS

Let me begin by discussing some problems that federalism will not cure, and some difficulties that federalism may actually cause. In South Africa, one of the principal current goals of social and constitutional reform is to develop the capacities and life-prospects<sup>6</sup> of people who have been living under the often brutal conditions of apartheid. Federalism will not do anything to promote this goal (except perhaps by indirection<sup>7</sup>). The millions of South Africans who need decent education, medical care, protection from public and private violence, and other forms of government assistance will not be aided by federalism.

This is not, I think, in any way an argument against federalism. It

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5. See THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison) (advocating republicanism as the form of government for the United States and rejecting negative characterizations of historical examples of republicanism).

6. See AMARTYA K. SEN, *COMMODITIES AND CAPABILITIES* (1985); Martha C. Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203-52 (R. Bruce Douglas et al. eds., 1990) (providing a philosophical discussion of Aristotelian principles as they relate to liberalism and social democracy).

7. Thus, for example, federalism might promote economic prosperity, and this might well result in assistance for the disadvantaged. Cf. THE FEDERALIST NO. 45, at 303 (James Madison) (Edward Mead Earle ed., 1937) (stating that the powers reserved to the states will extend to items affecting the prosperity of the people).

only suggests that federalism is part of what must be a complex range of measures. Constitutional design consists of the creation of many interlocking parts. Some of those parts will not address important social problems, and those problems must be taken care of through other means.

There is, however, a harder problem for advocates of federalism, and this problem consists of some social difficulties that federalism might actually cause. In America, federalism has not been an unambiguous good. On the contrary, it has been responsible for three serious difficulties. Those difficulties have been a major source of contention in America during the twentieth century, as eighteenth century understandings of federalism have had to yield in the face of compelling current necessities. All of these problems are likely to arise in a federal system in South Africa.

The first difficulty has to do with the oppression of people in small areas. In small areas with powers of self-government, minorities might be at special risk. A particular group might find it relatively easy to capture a local government in order to redistribute wealth or opportunities in its favor or, more broadly, simply to dominate others. In large areas, by contrast, there should be many minorities and thus further protection against minority oppression. The national government can be much better in this regard. The heterogeneity of the nation might well act as a safeguard against the power of any particular group.<sup>8</sup> In America, local oppression has happened, for example, in some states in which white majorities have oppressed black minorities.<sup>9</sup>

The problem is not limited to the area of race. It appears in many small areas in which a well-organized majority can deprive people of their basic opportunities, their economic well-being, their civil rights, or their civil liberties. There are, however, some possible solutions to this problem of oppression within small areas. The very fact of interstate mobility may be at least a partial safeguard here; people who are oppressed may leave.<sup>10</sup> Moreover, a nation can create a vigorous bill of rights enforceable against local units. If there is a vigorous bill of rights, there is firm protection against oppression. A nation can and should also

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8. THE FEDERALIST NO. 10 (James Madison).

9. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1977) (providing an illuminating discussion of oppression and school segregation).

10. See *infra* note 41 and accompanying text (discussing the right of exit as a restraint against oppression).

empower the national government to stop local oppression, using its own powers and authorities to protect people who are at risk. In the United States, the power of the nation to respond to local oppression has been an important safeguard in the areas of discrimination on the basis of race and gender.

The second difficulty is that federalism might make it more difficult to carry out desirable redistribution of resources and opportunities. People in small subunits sometimes need particular help — a major problem in South Africa as well as in the United States. Federalism might well be an obstacle here, at least if it forecloses efforts by the nation to take from rich areas in order to help poor ones. Local sovereignty can create a “wall” around localities, insulating them from obligations to others who are especially vulnerable. This is a legitimate criticism of some federal systems, including federalism in the United States, where redistribution from rich to poor states has sometimes been inadequate. I think that it might therefore be best for South Africa to build on some ingredients in the German system, which does allow the national government to help poor people in poor subunits, and which does create a degree of protection against large disparities in wealth among subunits. In any case, the Constitution should make clear that there is no special barrier to efforts by the nation to make special provision for poor people, even if they are concentrated in poor areas. It might well suggest that there is an obligation to ensure against a system in which rich subunits are relieved of duties to poor ones.<sup>11</sup>

The third difficulty is that federalism can create an unfortunate lack of coordination and uniformity in regulation. In America, the federal system has sometimes undermined coordinated policy; this has been so with respect to, for example, environmental policy, health care, and the regulation of nuclear power. The result can be inconsistent obligations placed on citizens; costly duplications of time and effort; excessive bureaucracy. But here too a thoughtful Constitution can take care of the problem. There should be clear authority on the part of the national government to bring order out of chaos, by, for example, developing a national environmental policy. The nation should have the authority to preempt state and local law, at least in cases in which there is a plausible need for uniformity and coordination.

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11. Note, however, that it is important to ensure that such provisions do not diminish the wealth-enhancing and democracy-promoting aspects of the right to exit. See *infra* note 44 and accompanying text (discussing the economic benefits of a right to exit).

I conclude that none of the three problems caused by federalism is, in the end, a good argument against a federal system. All three of the problems might be alleviated through a creative and careful Constitution.

#### THE AMERICAN SYSTEM IN GENERAL: DELIBERATIVE DEMOCRACY

A key point should be made at the outset: Despite the conventional wisdom, the American framers did not create a "democracy." On the contrary, democracy was not their favored term. In fact, they were ambivalent about the very concept of democracy and preferred instead the notion of a republic. They explicitly repudiated a system of democracy in favor of a system of republicanism.<sup>12</sup>

For the Americans, a republic is a system in which democratic forces are contained by governmental structures designed to work against the twin problems of public power and private power. Thus a republic attempts to constrain both the government's own self-interest and the self-interest of powerful private groups. It creates a number of protective devices to reduce the risks posed by a system of pure majority rule. It operates as a series of precommitment strategies by which the public ensures against the excesses and pathologies of a majoritarian system.

This understanding leads to an important general point: A well-functioning constitution will be particularly attuned to those pathologies that are especially likely to arise in the system for which the constitution is designed. In Eastern Europe, for example, there is a pressing need to promote the institutions of market ordering with an eye toward the creation of economic prosperity.<sup>13</sup> In South Africa, by contrast, a central goal is to create mechanisms to diminish the likelihood of ethnic and racial strife — to create coordination among diverse groups while allowing a degree of self-governing capacity to each of them. It is often said that constitutions must be well-suited to the culture out of which they grew. This is undoubtedly true, but in a way the opposite point is equally valid. Constitutions should be designed to counteract the most threatening tendencies of the nation for which they are drawn, and in this sense they should be deeply "countercultural."

Because of their insistence on the need for precommitment strategies, the American framers were not operating on the Westminster model,<sup>14</sup>

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12. See THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 39 (James Madison) (advocating a republican form of government).

13. See Sunstein, *supra* note 1, at 904-13.

14. See THE FEDERALIST NO. 39, at 243 (James Madison) (Edward Mead Earle ed., 1937) (differentiating the British form of government from a republican form of

and they did not favor a system of pure majority rule.<sup>15</sup> For them, this system would create an excessive risk of majority tyranny; it would carry with it too little provision for political deliberation and insufficient safeguards against factional power. We might even characterize the American system as a “deliberative democracy.” Under that system, public representatives were to be ultimately accountable to the people; but they would also be able to engage in a form of deliberation without domination through the influence of factions.<sup>16</sup> A law based solely on the self-interest of private groups is the core violation of the deliberative ideal. And the American institutions contained a variety of self-consciously countermajoritarian features — the bill of rights, judicial review, checks and balances, and federalism — designed to promote deliberation and to protect private rights.

#### AMERICA’S FOUNDING INSTITUTIONS

The general commitment to deliberative democracy echoes throughout the founding period. In *The Federalist* No. 10 — James Madison’s and perhaps America’s most outstanding contribution to political thought — the system of national representation is defended as a mechanism with which to “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>17</sup> On this view, national officials, selected from a broad territory, would be uniquely positioned to operate above the fray of private interests. National representation was an intentional departure from the principle of state sovereignty, insofar as it encouraged national officials, equipped with relatively broad powers, to overcome some of the pathologies of local rule, most prominently subjection to faction.

Hence Madison strongly favored a large republic over a small one. In a large republic, no faction would be able to obtain power over the government as a whole. In a large republic, it was likely that public

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government).

15. See CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* (1989) (providing a discussion of various electoral systems).

16. See *THE FEDERALIST* NO. 10 (James Madison); William Bessette, *Deliberative Democracy: The Majority Principle in American Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 102 (Robert Goldwin & William Schambra eds., 1980); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* ch. 1 (1993).

17. *THE FEDERALIST* NO. 10, at 82 (James Madison) (C. Rossiter ed., 1961).



officials would be able to engage in political deliberation, immune from the pressure of factions. This was likely precisely because of the number and heterogeneity of the groups that would operate in the national sphere.

In their aspirations for deliberative government, the framers borrowed from but modernized the classical republican belief in civic virtue. The antifederalists, sharp critics of the proposed Constitution, had invoked traditional republican ideas in order to challenge the Madisonian belief that a large territory was compatible with true republicanism. On the antifederalist view, a genuine republic required civic virtue, or commitment to the public good. Civic virtue, they insisted, could flourish only in small communities united by similar interests and by a large degree of homogeneity. The antifederalists thus favored a greater degree of decentralization and comparatively larger power for states and localities.

The framers fully accepted the goal; but they firmly rejected the prescription.<sup>18</sup> For the framers, as for those in the classical tradition, virtue was indispensable; and the framers continued to understand virtue as a commitment to the general good rather than to self-interest or the interest of private factions. Thus Hamilton urged that the

"aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."<sup>19</sup>

But for the American framers, a large republic would be more, rather than less, likely to serve republican aspirations. It would do so precisely because in a large republic, national representatives would be in a unusually good position to engage in the deliberative tasks of government. A small republic, as history had shown, would be buffeted about by the play of factions. In a large republic, the various factions would offset each other.

In recent years, there has been an extraordinary revival of American academic interest in republican thought.<sup>20</sup> The revival is directed above

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18. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* ch. 1 (1993) (discussing these points in detail).

19. *THE FEDERALIST* NO. 57, at 351 (James Madison) (C. Rossiter ed., 1961).

20. The leading historical sources include GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1972); GORDON WOOD, *THE RADICALISM OF THE AMERICAN REPUBLIC* (1992); JOHN G. A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION*

all against two groups: people who think that the Constitution is designed only to protect a set of identified "private rights"; and people who treat the document as an effort to provide the rules for interest-group struggles among selfish private groups. Many people do indeed understand the Constitution in these ways.<sup>21</sup> But the framers' aspirations were far broader than that. They attempted to carry forward the classical republican belief in virtue — a word that appears throughout the period — but to do so in a way that responded realistically, not romantically, to likely difficulties in the real-world of political life. They continued to insist on the possibility of a virtuous politics. They tried to make a government that would create such a politics without indulging unrealistic assumptions about human nature.

The commitment to these ideas explains many of America's founding institutions, especially those that seem countermajoritarian. It helps explain why in the original system, the Senate and the President were to be chosen by deliberative representatives, rather than directly elected by the people. It helps with the mystery of the Electoral College — the odd body that is entrusted with the task of selecting the President. Currently the Electoral College reflects the will of the voters in the respective states. It ensures that the President is elected not by a national popular referendum but instead through a complex mechanism allocating "electoral votes" to each of the states. In theory, then, it is possible for a President to be elected in the Electoral College even though he has lost in the popular election. At the inception, moreover, the Electoral College was to be a deliberative body, one that would discuss who ought to be President, rather than simply register votes in the states. Its

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(1975); BERNARD BAILYN, *IDEOLOGICAL SOURCES OF THE AMERICAN REVOLUTION* (1967). Legal works include Frank Michelman, *Supreme Court, 1985 Term - Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1986); Suzanne Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). The extent of the republican influence is of course sharply disputed. See JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992); THOMAS PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988); JOHN DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984).

21. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE THEORY OF EMINENT DOMAIN* (1985) (espousing the "rights" view); ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956) (advocating the interest-group view).

members were supposed to discuss the merits. This function has withered over time; but the framers' expectations reveal a great deal about the system they hoped to create.

The commitment to deliberative democracy also helps explain why the framers favored long length of service and large election districts.<sup>22</sup> All of these ideas about government structure were designed to accomplish the same goals, that is, to promote deliberation, to reduce the influence of well-organized private groups, and to limit the risk that public officials would be mouthpieces for constituent interests. It was in this vein Madison attacked Congress in 1785 as "advocates for the respective interests of their constituents,"<sup>23</sup> and complained of "the County representatives, the members of which are everywhere observed to lose sight of the aggregate interests of the Community, and even to sacrifice them to the interests or prejudices of their respective constituents."<sup>24</sup> The new Constitution was designed to reduce this risk. The framers designed a system in which representatives would have the time and temperament to engage in a form of collective reasoning.

These general aspirations also explain two of the crucial decisions in the early period: the rejection of the "right to instruct" and the closing from public view of the Constitutional Convention. In the first Congress, the representatives rejected a proposal to give citizens, as part of the Bill of Rights, a "right to instruct" their constituents. A right to instruct was thought to be inconsistent with the point of meeting, which was deliberation. Sherman's statement was especially clear:

"[T]he words are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to be just, because it would destroy the object of their meeting. I think, *when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation . . .*"<sup>25</sup>

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22. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 42 n.57 (1985) (discussing Madison's preference for large election districts and longer periods of service in order to add stability to the deliberative process).

23. Letter from James Madison to Thomas Jefferson (Oct. 3, 1785), in 8 THE PAPERS OF JAMES MADISON 373, 374 (Robert A. Rutland et al. eds., 1975).

24. *Remarks on Mr. Jefferson's Draft of a Constitution*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 35 (Marvin Meyers rev. ed., 1981).

25. 1 ANNALS OF CONG. 735 (Joseph Gales ed., 1789) (emphasis added).

The point casts light as well on the closing of the Constitutional Convention, a decision that Jefferson denounced as an "abominable . . . precedent" based on "ignorance of the value of public discussions."<sup>26</sup> On Madison's view, it was best

"to sit with closed doors, because opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime the minds of the members were changing, and much was to be gained by a yielding and accommodating spirit . . . . [B]y secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument."<sup>27</sup>

These remarks about the right to instruct and the closing of the convention are extremely revealing. Above all, they show an important feature of political deliberation as it was originally understood. In the process of discussion, there is no effort simply to "aggregate" existing private preferences and the wishes of interest groups, or to treat them as a given. Representatives should not mechanically translate the desires of their constituents into law. Nor should they treat their own beliefs and desires as fixed. The point of the process is not only to protect a given category of rights. Those involved in the process should always maintain "a yielding and accommodating spirit." They should listen to new facts and perspectives and decide accordingly.

Even desires, or current beliefs about what courses of action are best, should not be frozen. The framers insisted that existing views might be a product of partial perspectives, of limited experience, or of incomplete information. People engaged democratic discussion should thus "meet others from the different parts of the Union, and consult." People should be "open to the force of argument." They should be prepared to give up their initial views when shown "the general benefit of the whole community."

The basic institutions of the resulting Constitution were intended to encourage and to profit from deliberation, thus understood. The system of checks and balances — the cornerstone of the constitutional framework — was designed to encourage discussion among different governmental entities. So too with the requirement of bicameralism, which

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26. Letter from Jefferson to John Adams (Aug. 1, 1787), in 1 THE ADAMS-JEFFERSON LETTERS 194, 196 (Lester J. Cappon ed., 1959).

27. 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 479 (1966).

would bring different perspectives to bear on lawmaking. The same goals accounted for the notion that laws should be presented to the President for his signature or veto; this mechanism would provide yet an additional perspective in national laws. The federal system, discussed in detail below, would ensure a supplemental form of dialogue, here between states and the national government.<sup>28</sup>

Judicial review was intended to create a further check. Its basic purpose was to protect the considered judgments of the people, as represented in the extraordinary law of the Constitution, against the ill-considered or short-term considerations introduced by the peoples' mere agents in the course of enacting ordinary law. Constitutionalism and judicial review are often thought to be undemocratic insofar as they counter majority rule. But the tension between constitutionalism and democracy can be dissolved insofar as we think of the judicial review as an effort to protect public judgments against the decisions of mere representatives. In this way, constitutionalism and judicial review can help solve an agency problem introduced by representative institutions. The solution of the agency problem supplements the use of the Constitution as a precommitment strategy.<sup>29</sup>

I have said that the framers' belief in deliberative democracy drew from traditional republican thought, and that it departed from the tradition in the insistence that a large republic would be better than a small one. It departed even more dramatically with its striking and novel rejection of the traditional republican idea that heterogeneity and social differences were destructive to the deliberative process. For the framers, heterogeneity was beneficial, indeed indispensable; discussion must take place among people who were different. It was on this precise score that the framers responded to the antifederalist insistence that homogeneity was necessary to a republic.<sup>30</sup>

Drawing on the classical tradition, the antifederalist Brutus, complaining of the theory behind the proposed nationalist Constitution, wrote, "In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving

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28. See THE FEDERALIST NO. 46, at 307 (James Madison) (Edward Mead Earle ed., 1937) (discussing the relationship between the federal government and the states).

29. See BRUCE ACKERMAN, WE THE PEOPLE (1991) (detailing the idea of the Constitution as a precommitment strategy).

30. See THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (C. Rossiter ed., 1961) (arguing that a clash of opinions can promote deliberation).

against those of the other."<sup>31</sup> Hamilton, by contrast, thought that heterogeneity, as part of the deliberative process, could be a creative and productive force. Thus he suggested that the "differences of opinion, and the jarrings of parties in [in the legislative] department . . . often promote deliberation . . . ."<sup>32</sup> As the framers saw it, the exchange of reasons in the public sphere is a condition for this process.

#### THE PLACE OF FEDERALISM

Where does federalism fit in this complex system? To answer this question, we must first know what American federalism actually prescribes. There are of course many different forms of federalism. Everyone knows that the American Constitution creates a federal system, but by itself this general truth is mostly uninformative. We should distinguish among three features of the federal framework. Taken together, these three features make up the basic features of American federalism.

The first is that the national government is limited to enumerated powers. Instead of receiving permission to act whenever it thinks action is needed, the national government is restricted to the powers expressly listed in the Constitution itself. At least in theory, the central government may exercise those few powers specifically granted to it. It does not have plenary powers. The most important of the national powers are the power to regulate commerce and the power to tax. There are of course other powers, perhaps most notably those relating to international affairs. But the framers rejected the idea that the national government should have the power to veto all state laws.

The notion that the national government was limited to its enumerated powers was extremely important in the founding period. It was a cornerstone of federalism as originally conceived. But the enumerated powers have been interpreted so broadly in the twentieth century that, in practice, the national government has the legal power to do nearly anything that it wants to do.<sup>33</sup> The usual source of broad national power is the commerce clause. Almost everything affects interstate commerce, and if the national government can reach anything that affects such commerce, it can reach very broadly indeed. In theory, then, the national government is one of enumerated powers; in practice, the enumeration is suffi-

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31. 2 THE COMPLETE ANTIFEDERALIST 369 (Herbert Storing ed., 1981).

32. THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (C. Rossiter ed., 1961).

33. In this instance, I speak in rough and general terms. There are some mild limits on Congress' power, but they do not seem relevant for present purposes.

ciently broad as to enable the national government to do much of what it seeks to do. On the other hand, the fact of the enumeration probably has important cultural consequences, inhibiting national representatives from acting on the states unless there is a consensus that it needs to do so.

The second distinctive feature of American federalism is a general understanding that the states will exercise at least concurrent and probably exclusive authority over activities within their territory — unless and until the national government has explicitly ruled otherwise. What this means is that the states have very broad power over their citizens and their territory. Basic lawmaking is left to them. Until the national government has acted, almost all regulation is for the states to choose (subject to the bill of rights). Even when the national government could claim regulatory authority if it wanted, the states may generally act.<sup>34</sup> Since the national government regulates only in selected areas (see below), states often may conduct their affairs without worrying about the nation as a whole. For the states to be foreclosed, Congress must explicitly displace state law, and this is relatively rare.

The third distinctive feature of American federalism is that states, as states, have a certain degree of authority over the operation of the national government itself. Several constitutional mechanisms grant this authority. Whatever its population, each state has two representatives in the Senate; this is a dramatic violation of the supposedly crucial principle of “one person-one vote.” Thus, for example, California and Rhode Island both have two senators, even though Rhode Island is tiny and California is huge. Moreover, the President is selected (as noted above) not through majority rule, but through the outcome in the Electoral College, in which states, as states, are allocated voting power. Thus it is important to reiterate in this connection that it is possible that a candidate will win the presidency in the electoral college, because he has sufficient “electoral votes” there, even though he has received fewer popular votes than his opponent in America as a whole. Many people think that the Electoral College is an anachronism. But it was an important aspect of the original constitutional system. In addition, the Constitution cannot be amended without the approval of three-quarters of the states. These various points of course have nothing to do with state sovereignty over their own territory. They show instead that the states have been given a role as states in national lawmaking. (This role is of

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34. The exception is the so-called dormant Commerce Clause. See GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 250-321 (1st ed. 1990).

course based on geography, not race or ethnicity.)

An important additional point is that in American federalism, the national government is utterly supreme within its sphere. The states have no authority to violate anyone's rights, so long as these rights are guaranteed by national law. This is true of both national constitutional law and national statutory law. If the state of New York decides to discriminate on the basis of race, or to enact an environmental law inconsistent with national environmental law, its action is legally void, and a court would so rule. Even state constitutions must yield before national law. In general, Congress has the power to eliminate state regulatory authority whenever it chooses. Usually Congress does not so choose, and for good reasons; if Congress were to try to regulate all areas of the country, things would be even messier than they are. But Congress does have the power to act very broadly and to displace state law. We should therefore think of the American system as something like *"local sovereignty subject to a national veto."*

In principle the three aspects of American federalism are quite distinct. Another country might adopt one aspect while rejecting the others. I have explained that the first aspect — enumeration of powers — has been relatively unimportant in the second half of the twentieth century, even though the framers believed it crucial in the eighteenth. In the modern period, the crucial aspects of federalism have been the governing powers of states over their territories and the representation of the states in the national government.

In terms of the basic, day-to-day division of functions, I can offer a few generalizations about federalism in America. Many functions are performed exclusively, or nearly so, by states. The most important of these are police and fire protection, provision of education, and design and implementation of law relating to the family. Thus it is that police forces are state and local, and the national government plays relatively little role. The national government gives out money to help with education; but management of education is basically a state and local responsibility. Family law — relating to divorce, child custody, and other matters — is drawn up by the states. Federal interference with these basic functions is exceedingly rare.

Many authorities are shared; here the federal and state governments have mutual and complementary roles. Examples include environmental law, labor law, and the provision of welfare and public assistance. Thus California is subject to national clean air and clean water legislation, but it can go beyond the national law, and it actually does so. Many states have developed innovative environmental programs to add to what the



national government has done. There is national labor law, guaranteeing certain rights for labor unions; but states can add to these rights, by, for example, creating protection against arbitrary discharges from employment, or by disallowing discrimination on the basis of sexual orientation. There are a number of national welfare programs for people who need assistance. But states have flexibility to meet national requirements in their own ways, and they are also authorized to devise separate programs to complement national activity.

Finally, there are some authorities that are exclusively national. The most important of these is international relations, in which state have no power at all. In certain important areas, the national government has preempted state law. Some areas of nuclear power regulation fall in this category. In a few areas of environmental policy, the need for national uniformity has persuaded Congress to eliminate the otherwise coordinate power of the states.

With respect to internal state governance, it is important to understand several basic points. Most states have a form of internal checks and balances, with divided powers among executive, judicial, and legislative branches. States have their own constitutions, with rights that sometimes offer more protection than the national constitution. Of course states have separate court systems. There is, however, a right to appeal from state court to the United States Supreme Court in cases involving federal law and federal rights, and the writ of habeas corpus is available to enable the accused to receive protection in federal court against unconstitutional acts in state court.

Most important for present purposes, states even have a form of "internal federalism," with divisions between state and local authority. There can be multiple tiers of authority, with cities operating within states, and with subunits of cities having a degree of governmental capacity. It is therefore possible for states to subdelegate power so as to increase the advantages of decentralization. There are no constitutional barriers to what states may do in this regard. In most states, for example, there are both state and city police forces, carrying out complementary roles. Local school boards, operating at much smaller levels than states, have substantial power to make educational decisions. Fire departments are often local, setting priorities without substantial state control. Hospitals can be established and funded by cities. Such basic municipal services as the provision of water, the granting and revocation of drivers' licenses, and the provision of electricity are furnished locally. Often state controls are imposed on these processes; these are matters beyond constitutional compulsion. The possibility of local decentraliza-

tion tends to increase the various advantages of federalism. It is to these advantages that I now turn.

### FEDERALISM AND DEMOCRACY

In this section, I briefly discuss the relationship between federalism and democracy. I argue that federalism can serve democratic goals in four distinct ways: (a) by promoting local self-government, (b) by proliferating the points of access to government, (c) by creating competing power centers, and (d) by allowing people to "vote with their feet," and thus to flee tyrannical government. This last point is a key feature — it shows the connections among federalism, the right to travel, and the avoidance of oppressive legislation.

#### 1. *Self-government*

If one of the goals of a constitutional system is self-government, it is crucial to promote a degree of decentralization. In America — or South Africa — the central government is far too large and far too remote to provide a forum for genuine self-governance. Citizen participation in public affairs is highly unlikely at the national level. Because people perceive the national government to be remote, they are unlikely to devote much in the way of time and resources to its improvement. By cultivating government at the lower and smaller levels, a constitutional system can increase participation and responsiveness, and also cultivate citizenship. This is an important democratic advantage insofar as a prime goal of a democracy is to ensure that government is responsive to people's desires and aspirations.<sup>35</sup>

#### 2. *Proliferating the points of access to government*

A federal system increases the points of access to government.<sup>36</sup> It assures one group — whether defined in ethnic, political, or religious terms — that if it loses in one place, it may nonetheless win in others. If environmentalists lose at the national level, at least they may win in some of the states. If programs benefiting one ethnic group are defeated

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35. See THE FEDERALIST NO. 14, at 80 (James Madison) (Edward Mead Earle ed., 1937) (discussing the purpose of a democracy).

36. See *id.* at 81-82 (stating that a federal government increases participation by allowing individuals in distant parts of the country to send their representatives to the seat of government without having to travel themselves).

in Washington, perhaps they may be enacted in Massachusetts. In this way a federal system dramatically diminishes the need to control the center, and it relieves the pressure and momentousness of struggles at the national level (see below). It need hardly be emphasized that this is a crucial function in an area likely to be important in a nation subject to ethnic conflict. In a federal system, the all-or-nothing conflicts, at the center, cease to have that corrosive quality. This is a particular virtue for South Africa or for any country that seeks to diminish ethnic and racial strife.<sup>37</sup>

### 3. *Competing power centers*

In a federal system, the federal and state governments can check each other. If the national government does something oppressive, the states can mobilize against that action. Because they have a degree of power over national action, and because they have a degree of independent lawmaking power, they can furnish checks against national oppression. Moreover, if the national government fails to protect citizens against certain harms — violence, discrimination, poverty, environmental degradation — the states can pick up the slack. All this has happened in the United States on many occasions. In the 1980s, for example, some groups thought that the national government was insufficiently concerned to protect the poor and the environment. States were often highly responsive to these groups.

It is important to emphasize in this connection the constant possibility that a single group or faction will achieve great power over the centralized government, and thus be able to dominate it. The systems of national representation and checks and balances are designed as safeguards here; but they may be inadequate. In a federal system, the risk is further diminished. One group may win in one state, but other groups will win in others. This will have the additional benefit of increasing the pressure on various groups to work together.

### 4. *The right of exit*

A key part of the democratic function of federalism relates to the right of exit.<sup>38</sup> In a federal system, people who are unhappy with gov-

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37. See DONALD HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?* (1991) (discussing the conflicts and obstacles to the transition to democracy in South Africa).

38. See HIRSHMAN, *supra* note 2 (discussing the place of the right of exit in a democratic society).

ernment policies may simply leave. They can "vote with their feet." Under these circumstances, a state that oppresses its citizens will find itself with fewer citizens. People will simply depart from the area in which oppression occurs.

There is therefore a built-in check on oppression. The check operates both retroactively and (perhaps more crucially) prospectively. It does so retroactively when citizens displeased with state law decide to leave. It does so prospectively when states, fearful that citizens will exit, moderate and adjust their laws in accordance with what their people desire. State legislators will be aware in advance of the risk of exit. They will therefore hesitate before enacting oppressive or inefficient laws. It is revealing in this regard that tyrannical nations attempt, as a key part of their strategy, to forbid people from leaving. Their leaders are aware that tyranny cannot easily persist unless the exit option is eliminated.

I emphasize the right of exit because in a nonfederal system, that right may well not exist except in theory. Citizens oppressed by their nation may indeed leave (if there is a right to travel, as there always should be); but to give up one's national citizenship is an exceptionally hard step. It is extremely hard to leave the United States or South Africa if either has been one's home. By contrast, to move from New York to New Jersey may not be easy, but it is far less costly. A large advantage of a federal system is that it makes the right of exit a realistic one, and the realistic risk of exit operates as a barrier to oppressive legislation.

Of course interstate mobility is often limited. For poor people in particular, it may be wrong to expect that people will readily exit. But the very existence of the option can have good effects. It can have some harmful consequences as well, as I discuss below.

#### FEDERALISM AND ETHNIC OR RACIAL CONFLICT

I now deal with the potential for federalism to diffuse ethnic and racial conflict. This is of course an exceptionally important possibility for South Africa, and it is notable that there is growing enthusiasm for federalism, on precisely this ground, in Nigeria. I do in fact believe that federalism can provide important benefits on this score.<sup>39</sup> The reduction of racial and ethnic strife in South Africa may well occupy the same analytic place, in that country, as the establishment of market institutions

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39. Horowitz, *supra* note 40, at 214-31 (providing a discussion of the conciliatory potential of federalism in South Africa and other African nations).

occupies in Eastern European countries. This is so at least if constitutions are precommitment strategies designed to overcome the most likely risks in the nation for which they are designed. It is therefore especially important to ask whether and how federal institutions might be helpful on this score.

1. *Lowering national stakes*

Federalism can dramatically lower the stakes of national resolutions. It allows groups to attain local victories even if they are often or sometimes national losers. Control of the center therefore becomes far less urgent.

The point is related to the point, suggested above, that federalism can proliferate the points of access to power. It is a related point that federalism can allow for the healthy development of positions on which states as such, rather than ethnic groups as such, may disagree. In a federal system, it is possible that fewer issues will run along a single intergroup axis. In the United States, for example, state A may compete with state B for certain benefits, even though state A has a disproportionately high percentage of members of one ethnic group, and state B has a disproportionately high percentage of members of another such group. People in different states can therefore work together across racial and ethnic lines. This is a substantial benefit. A key goal for constitutionalism in South Africa is to design institutions that can help create nonracial coalitions, in which people identify themselves as something other than part of a racial or ethnic group. By dividing people along geographical lines, federalism can provide some help in this regard.

2. *Allowing different ethnic and racial mixes and majorities in different areas*

Federalism makes racial or ethnic hegemony over the nation far more difficult to achieve. In a federal system, different racial groups can be majorities in different areas. No such group should be fenced out of political power. This aspect of federalism works against a potential form of disenfranchisement. It tells each group that even if they lose in the nation, there may well be some place in which they win.

3. *Self-government along lines with implicit racial and ethnic dimensions*

A federal system should not allow geographical lines to turn into

racial and ethnic ones, and indeed it should counteract this risk. But at the same time, it will probably allow at least a degree of self-government by ethnic and racial minorities; and this is an advantage. There will be different racial mixes in different states, and this will provide some desirable diversity in outcomes. A well-functioning federal system can accomplish this so without at the same time preventing national unity, and while providing the protections of constitutional democracy (including a bill of rights) for all citizens. Thus if one group predominates in one area, it can have a high degree of governing power.

#### 4. *Learning and intergroup harmony*

A system of federalism brings citizens and politicians together at state level, where the stakes can be relatively low, before they engage at the national level, where the stakes are extremely high.<sup>40</sup> It therefore allows the formation of intergroup ties at an early stage. In a federal system, people in different groups can work together before things become explosive. This factor can facilitate a process in which people in different ethnic and racial groups see each other as human beings rather than as obstacles or as enemies. It can also help promote compromise solutions.

### FEDERALISM AND PROSPERITY

I now offer some notes on the relationship between federalism and prosperity. The key point here is that some version of a decentralized market economy is usually crucial to economic development. "Nationalization" of industry, and public ownership of the means of production, have generally proved to be dismal economic failures. Federalism can serve valuable economic goals by allowing for competition among states to attract revenue-producing industry. It can thus work as a shield against economically harmful systems of regulation and taxation.

In South Africa in particular, the point has considerable importance. New constitutional arrangements should be focussed not merely on the redistribution of wealth but also and equally fundamentally on its production. A chief goal should be to ensure that new arrangements promote, rather than discourage, economic development. Indeed, one of the many vices of the apartheid system was that it prevented the full development of the capacities of many South African citizens and in that way

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40. See *id.* at 217 (emphasizing that South Africans can benefit from federalism because politicians and leaders must first deal with conflict in a racially divided society on a smaller localized scale).

created a self-defeating obstacle to the full development of the economy. Federalism provides several benefits here.

### 1. *The right of exit*

The first point has to do with the ability to leave. If business enterprises are unhappy where they are, they will move elsewhere. If one state — let us call it New York — starts to impose oppressive regulation of business, it may find itself without business at all. In America, the right of exit has been a sharp deterrent to economically punishing government regulation. Here the right of exit is, I believe, a highly desirable ally of internal economic development, because it provides a healthy check on local regulation that would harm the economy. If the point seems controversial, it might be helpful to know that in Eastern Europe, ideas of this kind have become exceedingly popular of late.<sup>41</sup> To people emerging from communism, it seems especially clear that the right of exit furnishes a check on legislation that dampens individual initiative and thus economic development.

To be sure, competition among states is not always a good thing. This competition can be an obstacle to desirable regulation and to desirable redistribution of resources for the benefit of the poor. For example, a state may find itself deterred from enacting necessary occupational safety and health controls, precisely because of the threat of exit by revenue-producing industry. To solve this problem, a degree of national controls will be necessary. But the basic point remains clear. A federal system works to prevent legislation that seems fair or tempting in the short run, but that might in the long run prove economically disastrous.

### 2. *Local knowledge*

People in particular areas have special knowledge of their economic needs. If, for example, the United States tried to develop a complete environmental policy for the entire nation, it would be grotesquely overloaded. It simply does not have the relevant information. Federalism thus tends to promote prosperity through a healthy division of labor, in which states are allowed to come up with means for carrying out national principles. In a federal system, government can take advantage of local knowledge and local expertise. The self-governing capacity of

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41. See Judith Ingram, *Romanians Rush to Free Enterprise*, S.F. CHRON., June 24, 1992, at A10 (noting the shifting of the workforce into economically beneficial endeavors).

states and localities promotes this fortunate result. And even when some federal role seems indispensable, it is desirable to allow states to have a good deal of power to work out the details. Through this result as well, a system of "cooperative federalism" can take advantage of local knowledge.

### 3. *Experimentation*

A federal system allows a wide range of experimentation. Before the entire nation commits itself to a course of action, it can benefit from experiments in subunits. A range of diverse experiments is an enormous national asset. Many experiments may be misconceived; but even if they are, everyone can learn from them. This has been an important part of the federal system in the United States. Frequently the national government has taken advantage of successful experiments from states and localities.<sup>42</sup> Frequently the national government has been able to avoid mistakes simply because state and local experiments have revealed the mistakes as such.

Here too pressure is relieved on the center. The national government can say, with plausibility, that it will see how the experiments turn out before undertaking a certain course. The center can take advantage of experiments that have worked, and it can discard those that have failed.

## CONCLUSION

The framers of the American system created a republic, not a pure democracy. The American Constitution offers a wide range of countermajoritarian devices, designed to protect against government oppression and private self-interest, and to promote deliberation in government among people with different perspectives. Many of the structures of the Constitution — checks and balances, bicameralism, judicial review, national representation — can best be understood in this light. And in this framework, the system of federalism plays a pivotal role.

Some version of local self-government is, I believe, a nearly universal feature of a well-functioning constitutional regime, at least in a large

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42. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992) (providing a helpful discussion of ways to improve the functioning of government). This discussion, bearing on the United States, South Africa, and other nations as well, is especially helpful. See also CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* ch. 3 (1990) (discussing failures and successes of regulation).



nation. Federalism, thus understood, is closely connected with three crucial goals: promotion of democracy; achievement of stability across ethnic and racial difference; and facilitation of economic prosperity. To be sure, federalism does entail risks for South Africa. It is only part of what must be a large constitutional package designed to promote the capacities of people who have been oppressed under the system of apartheid. Thoughtful structuring of the entire package will be necessary to ensure against the risks of oppression, inadequate redistribution, and failures of coordination. But a federal system could well be designed to counteract these risks.

One final word. Often it seems very hard to reach agreement on principles that operate at a high level of generality — liberty vs. equality, federalism vs. regionalism, minority rights vs. majority rule, equality of opportunity vs. equality of result, delegation vs. devolution. Often disputes over such high level principles should be avoided. Sometimes it is far easier to reach agreement on lower-level ideas, those that do not call up large-scale disagreements about high principle. With creativity about the details, some version of federalism is, I think likely to be an important part of constitutional design in a newly democratic, post-apartheid South Africa.