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**CONSTITUTIONAL
ASSEMBLY**

**CAN AMERICAN
FEDERALISM
HELP SOUTH AFRICA**

BY

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Can American Federalism Help South Africa?

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When attempting to compare and learn from the United States, one must begin by noting how different the conceptions and the experiences of Americans and many other peoples are. This problem of understanding can hardly be minimized. It is difficult for Americans to understand how politics is conducted in other countries because the latter are grounded upon the kind of permanent primordial or intergenerational groups with territorial bases or at least aspirations for territorial bases that are absent even from American ethnic politics.

Americans do have an ethnic politics, but it is an ethnic politics that runs counter, in most respects, to the territorial politics of the United States. Indeed, the great political change of the twentieth-century United States has been a movement from a territorially based politics, from the smallest precinct and township up through the federal government to a politics that mixes territorial and ethnic elements. Sometimes both sets of elements benefit one from the other. Sometimes they work at cross-purposes.

Understanding the U.S. Political System in Light of South Africa

How different the situation is in South Africa, where ethnic politics is so closely connected with territory and with disputes over territory.

Moreover, this ethnicity is permanent. Unlike the United States, where people can change identities, in South Africa people see themselves tied to their ethnic group organically, fundamentally, primordially, from generation to generation. No matter where they are, no matter where they might go, no matter what the conditions of their political life or their degree of independence or subordination, these differences are truly great and will not be underestimated. What the United States and South Africa have in common is that both need, each for its own reasons, federal solutions. Federal countries need federal polities, and South Africa for its reasons, like the United States for its, is a federal country.

While the original confederation of the United States may simply have grown out of American experience, the American federal Constitution of 1787 was the product of political theory and thought as much as of experience. On the one hand, I think that is important precisely because the American experience is not transplantable per se. On the other hand, American political thought is worth studying and exploring by all.

Every political society, every polity, has to develop its own system of self-government through some combination of its experience and reflection and choice based on that experience. In *Federalist* 1, Publius (in this case, Alexander Hamilton) comments that it is given to few peoples of this world to choose their form of government not by force or by accident but through reflection and choice. And it is that critical factor, reflection and choice, that involves the combination of experience and thought. We cannot control our experiences. They are part of our heritage. We can only try to direct and control their effects after they occur.

South Africa has had its own historical experience. Its peoples have also had their collective historical experiences, in many cases forced on them. These have already had a tremendous impact on what its polity is likely to become in the future.

The Two Faces of Politics

Human, and hence scholarly, concern with politics focuses on three general themes: (1) the pursuit of political justice to achieve the good political order, (2) the search for understanding the empirical reality of political power and its exercise, and (3) the creation of an appropriate civic environment through civil society and civil community, capable of integrating the first two to produce a good political life. Political science as a discipline was founded and has developed in pursuit of those three concerns. In the course of that pursuit, political

scientists have uncovered or identified certain architectonic principles, seminal ideas, and plain political truths that capture the reality of political life or some significant segment of it, and relate that reality to the larger principles of justice and political order and to practical yet normative civic purposes.

Politics has two faces. One is the face of power; the other is the face of justice. Politics, as the pursuit and organization of power, is concerned (in the words of Harold Lasswell) with "who gets what, when and how." Politics is equally a matter of justice, however, or the determination of who *should* get what, when, how—and why. Power is the means by which people organize themselves and shape their environment in order to live. Justice offers the guidelines for using power in order to live well.

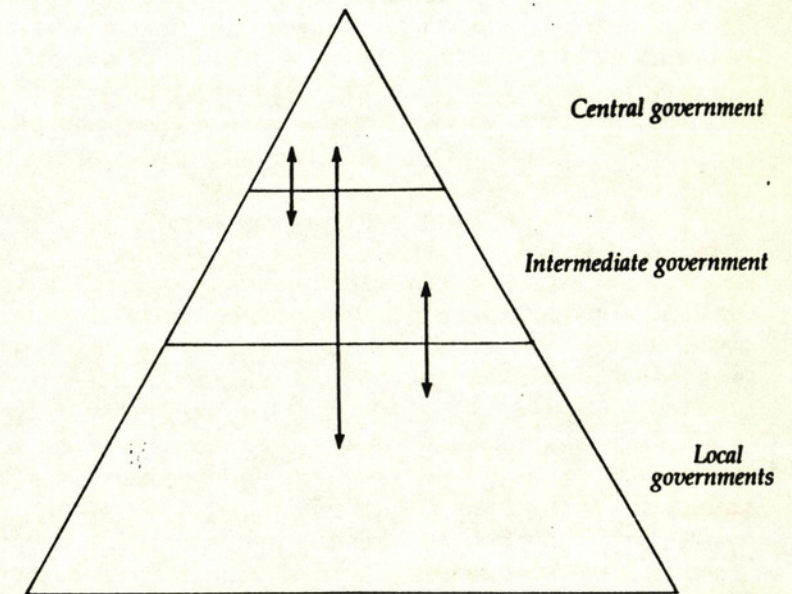
Politics cannot be understood without reference to both faces. On the one hand, without understanding a polity's conception of justice, or who should have power, one cannot understand clearly why certain people or groups get certain rewards, at certain times, in certain ways. On the other hand, one cannot focus properly on the pursuit of justice without also understanding the realities of the distribution of power. Both elements are present in all political questions, mutually influencing each other.

The Origins of the Polity

Since its beginnings, political science has identified three basic ways in which polities come into existence: conquest (force), organic development (accident), and covenant (choice). These questions of origins are not abstract; the mode of founding of a polity does much to determine the framework for its subsequent political life.

Conquest can be understood to include not only its most direct manifestation, a conqueror gaining control of a land or a people, but also such subsidiary ways as a revolutionary conquest of an existing state, a coup d'état, and groups of people—either a minority or a majority—conquering another or others in the land, or even an entrepreneur conquering a market and organizing his control through corporate means. Conquest tends to produce hierarchically organized regimes ruled in an authoritarian manner: power pyramids with the conqueror on top, his agents in the middle, and the conquered underneath the entire structure as portrayed in figure 5-1. The original expression of this kind of polity was the Pharaonic state of ancient Egypt. It was hardly an accident that those rulers who brought the Pharaonic state to its fullest development had the pyramids built as their tombs. Although the Pharaonic model has been

FIGURE 5-1
THE POWER PYRAMID MODEL OF POLITICAL ORGANIZATION



SOURCE: Author.

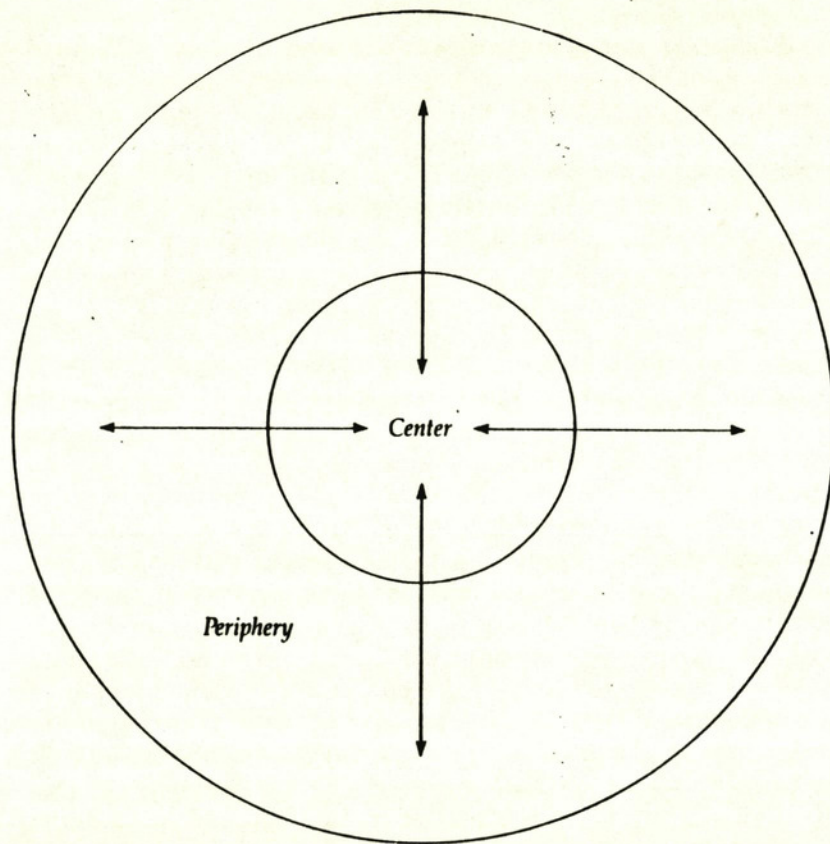
judged illegitimate in Western society, modern totalitarian and racist theories, particularly fascism and Nazism, represent an attempt to give it a certain theoretical legitimacy.

Organic evolution involves the development of political life from families, tribes, and villages into large polities in such a way that institutions, constitutional relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances with the minimum of deliberate constitutional choice. The end result tends to be a polity with a single center of power, as portrayed in figure 5-2.

Classic Greek political thought emphasized the organic evolution of the polity and rejected any other means of polity building as deficient or improper. The organic model is closely related to the concept of natural law in the political order. Natural law informs the world and, when undisturbed, leads in every polity to the natural emergence of power relationships, necessarily and naturally unequal, which fit the character of its people.

The organic model has proved most attractive to many political philosophers precisely because at its best, it seems to reflect the

FIGURE 5-2
THE CENTER PERIPHERY MODEL OF POLITICAL ORGANIZATION

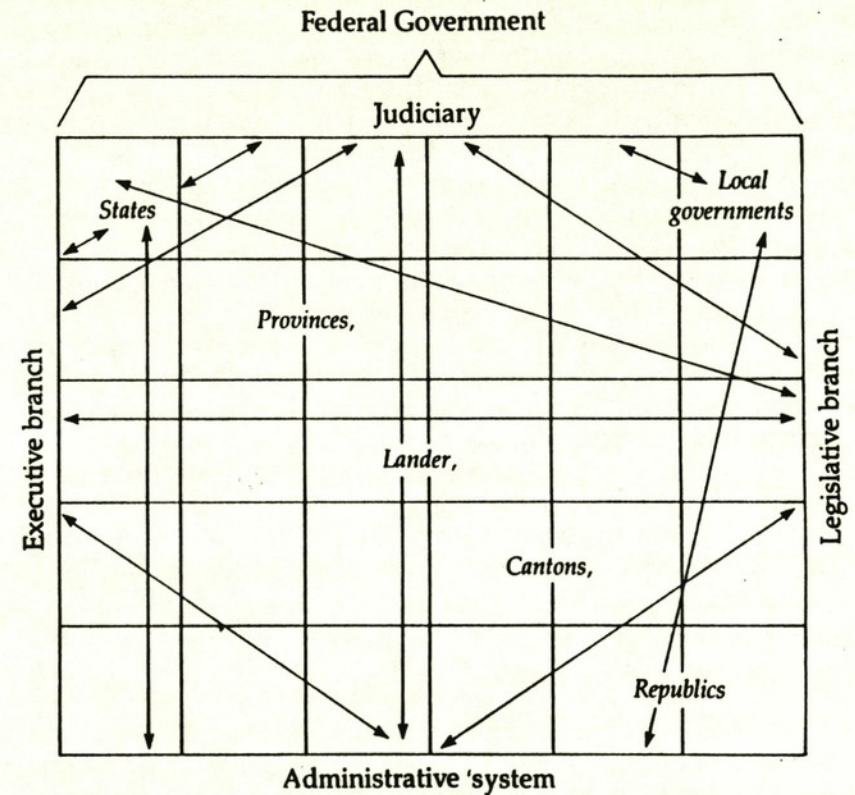


SOURCE: Author.

natural order of things. Thus it has received the most intellectual and academic attention. Just as conquest tends to produce hierarchically organized regimes ruled in an authoritarian manner, however, organic evolution tends to produce oligarchic regimes, which at their best have an aristocratic flavor and at their worst are simply the rule of the many by the few. In the first, the goal of politics is to control the top of the pyramid; in the second, the goal is to control the center of power.

Covenantal foundings emphasize the deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights. Even

FIGURE 5-3
THE MATRIX MODEL OF POLITICAL ORGANIZATION



SOURCE: Author.

the Hobbesian covenant—and he specifically uses the term—which establishes a polity in which power is vested in a single sovereign, in principle maintains this fundamental equality. Polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design. Polities founded by covenant are essentially federal in character, in the original meaning of the term (from *foedus*, Latin for *covenant*)—whether they are federal in structure or not. That is to say, each polity is a matrix (figure 5-3) compounded of equal confederates who freely bind themselves to one another so as to retain their respective integrities even as they are bound in a common whole. Such polities are republican by definition, and power within them must be diffused among many centers or the various cells within the matrix.

We find recurring expressions of the covenant model in ancient Israel, whose people started out as rebels against the Pharaonic model; in the medieval rebels against the Holy Roman Empire; in the Reformation-era rebels against the Catholic hierarchy; in the early modern republicans who were rebels against either hierarchical or organic theories of the state; and in modern federalists. Frontiersmen generally—that is to say, people who have gone out and settled new areas where there were no preexisting institutions of government and who, therefore, have had to enter a compact with one another to create such institutions—are to be found among the most active covenanters.

Each of these forms of founding has real implications for the character of the regime that emerges from it, in the structure of authority, in the mechanisms of governance, and in the forms the regime is likely to take. Thus, in regimes founded by conquest and force, we expect to find hierarchical structures of authority dominant, power pyramids in every sense of the word. In such regimes, administration, which is a matter of a top-down chain of command, takes precedence over politics and constitutionalism. Indeed, the major political arena in such regimes is that of the ruler at the top of the pyramid. In other words, it is court politics, with the kind of intrigue and jockeying for position associated with the politics of courts. If constitutionalism plays any role at all, the constitution takes the form of a charter granted by the ruler, whose status is at least formally controlled by him (although, as we know from feudal systems, under certain circumstances rulers who seem to be on the top of the pyramid can be forced to grant charters of liberties to subsidiary bodies, because there has been a redistribution of force as a result of external factors over which the top of the pyramid has no control).

The apotheosis of such a regime is an army. Indeed, one of the first modern models was Prussia, described by Voltaire as "an army transformed into a state." So, too, was Napoleonic France, where Napoleon's administrative reorganization of the country fixed its internal structure for the next 170 years regardless of wars, revolutions, coups, and regime changes. The worst manifestation of such regimes is the totalitarian dictatorship, whereby those at the top of the pyramid attempt, in the name of an ideology, to bring their pyramided powers to bear on every aspect of private as well as public life.

Organic polities that essentially develop by accident and are marked by their center-periphery configuration, organize their mechanisms of government differently. For them, politics takes precedence over administration, and both over the constitution. Since the

most important political arena is in the center, the politics is the politics of the club or clubs where the elite gather and maintain relationships with one another, regardless of their stand on issues, simply because they belong to a common elite or network of elites. Administration is deemed much less important than politics and exists only to the degree that it is necessary, flowing from the center outward. At first, the same club members who dominate the regime's politics also undertake much of the necessary administration of functions, but as matters grow more specialized, a separate administrative elite is developed, drawn as much as possible from the same sources as the political elite and maintaining a common old-boy network.

The English system, where studies at Oxford and Cambridge are tickets of admission to either the political or the administrative elites, whose members speak the same language or at least in the same accents and belong to the same clubs, typifies this kind of regime. Constitutionalism is not unimportant in such regimes; however, it is not reflected in a single major document but in a set of constitutional traditions that may or may not have been set down in writing and transformed into law, again in the English model. The apotheosis of this model is parliamentary government along the Westminster system, while its excess is to be found in Jacobinism, where a revolutionary cadre seizes control of the center in the name of the masses and concentrates all power within it in the name of the revolution in order to reconstruct the regime. It never relinquishes control.

Covenantal regimes, founded on the basis of reflection and choice to establish a matrix of power centers, so that both its framing institutions and its constituent bodies share authority on a fundamentally equal basis, order the mechanisms of government quite differently. First and foremost come the constitution and the constitutional tradition it fosters. The constitution must, perforce, come first, because it is the basis on which institutions are organized and authority and power are shared and divided. Without the constitution, there can legitimately be neither politics nor administration. Pursuant to the constitution, there develops a politics of open bargaining in which access is guaranteed by the constitution and the constitutional tradition to all citizens who accept the rules of the game. The open competition of parties and factions is encouraged. Administration is subordinate to both constitutional and political standards and is further controlled by being divided between the framing institution and the cells of the matrix.

The apotheosis of this model is a federal democratic republic on the order of the United States or Switzerland. Its excess is anarchy,

where the framing institutions and cells prove incapable of ordering the exercise of power within the structure.

While in real life many polities mix these models to establish their regimes, the classic examples of political organization tend to be relatively pure representations of one or the other. Both the purer cases and the mixtures teach us about important manifestations of political life (table 5-1).

South Africa and the United States—Some Comparisons

What do the American founders have to say that would be of use to the founders of the new South Africa? On the surface, the disparity in the two situations is great, especially since the American founders were faced with a situation like that in old South Africa, where, with some exceptions, nonwhites were excluded from citizenship in the polity. The genius of the American founders was that even if they were not as correct in their assessment of issues in the short run (for example, their belief that the central political issue of the new federal government would be small states versus large states), they knew what would be right in the long run. In other words, they founded a polity on correct fundamental principles, on a correct understanding of human nature.

Beyond that, the constitution that they wrote combines a proper degree of rigidity with a proper use of ambiguity. The times for elections were fixed, for example, unlike in parliamentary regimes. The president, vice president, representatives, and senators were to be elected for fixed terms with no possibility of changing those dates except by constitutional amendment. Where interpretation was necessary, however, a proper ambiguity of language was provided. This ensured that popular government would be maintained and that there could be no excuse for holding off popular elections, while at the same time allowing the kind of flexibility that a constitution needs.

Let me suggest a few comparisons between the United States and the Republic of South Africa. In both cases, we are speaking of one country. The United States was perceived or at least presented by its founders as homogeneous in population. In part, this was because of the exclusion of black slaves and Indians. This representation did not take into consideration the heterogeneity of the European population, which was already great by contemporary standards, or the country's religious heterogeneity, not only with so many Christian sects but also with Jews as full citizens.

The Republic of South Africa, in contrast, is recognized as highly

TABLE 5-1
MODELS OF FOUNDINGS AND TYPES OF REGIMES

<i>Attributes</i>	<i>Conquest</i>	<i>Organic Development</i>	<i>Covenant</i>
Founding	Force	Accident	Reflection and choice
Model	Pyramid	Concentric circles	Matrix
Structure of authority	Hierarchy	Center-periphery	Frame and cells
Mechanisms of governance (in rank order)	Administration: top-down bureaucracy	Politics: club-oligarchy	Constitution: written
	Politics: court	Administration: center outward	Politics: open with factions
Apotheosis	Constitution-charter	Constitution: tradition	Administration: divided
	Army	Westminster system	Federal system
Excess	Totalitarian dictatorship	Jacobin state	Anarchy
Most common form of revolution against	Coup d' état	Civil war among elites	Structural resort to arms

SOURCE: Author.

heterogeneous in several ways, not only in the division among black, white, Asian, and Coloured but also between those of English and those of Afrikaner background, plus European immigrants of many other groups and deep tribal divisions among the blacks.

The United States emphasized territorial democracy from the first. That is to say, citizenship, politics, and government were organized around territories, whether states, counties, townships, cities, or even less permanent electoral districts. In the Republic of South Africa, circumstances have modified its basic territorial democracy

with a combination of other forms of democracy as well, principally resting upon the existence of primordial groups. The United States in 1787 did not have organized political parties; hence the Constitutional Convention was not divided along party lines. The Republic of South Africa in 1992 has well-organized political parties, in most cases reflecting the deepest cleavages in its civil society.

Further, it is well to remember certain points about the U.S. federal Constitution:

1. It was written by a committee. While there were outstanding figures at the Constitutional Convention and James Madison more than any other single person shaped the resulting constitution, still, the United States had no one founder. Rather, the Constitutional Convention functioned as a committee and made its decisions with all the differences of opinion that had to be covered within a committee.

2. The U.S. Constitution is incomplete without the state constitutions. Donald Lutz has made that point most effectively.¹ The U.S. Constitution was not meant to be other than an incomplete document, relying on the state constitutions for the fundamentals of government and relating only to the constitution of the federal government and its basic relationships with the states.

3. The U.S. Constitution has silences that themselves have meaning. The Tenth Amendment, for example, was designed to clarify some of the silences with regard to the continuing status of the states in the new federal Constitution, though in fact it introduced ambiguities of its own. Similarly, there is no mention of local government in the U.S. Constitution, since that is constitutionally a matter for the states.

4. The U.S. Constitution has two dimensions. It reaffirms the rights of the states and their people to self-government and also guarantees them a share in the common government. One might refer to this as a combination of self-rule and shared rule, which is, by the way, an excellent definition of what federalism is all about.

5. The citizens of the United States are citizens as individuals; that is to say, they possess dual citizenship: they are citizens of their states and citizens of the United States. This was understood in the Constitution of 1787 but made explicit after the Civil War through the Fourteenth Amendment.

A central idea of the U.S. Constitution was to establish an extended republic, one in which there were no permanent majorities or minorities. This is the point of Madison's famous *Federalist* 10 extending the sphere of the republic. The founders perceived that the

problem of previous small republics was that a permanent majority of the poor stood against a permanent minority of the rich and believed that with the extended republic, that problem would be solved. In it, there would be many interests, of which poor and rich could be only one, and those interests would constantly be forming coalitions with one another to form temporary majorities around specific issues. This would absorb and diffuse conflict by allowing all permanent interests fair expression.

It was assumed that this extended republic would be established by political compact. Its constitution would be established by a pact among its members. Indeed, the Constitution itself is such a pact. The reason it does not explicitly discuss the compact theory is that it follows in the path of the states, many of which did just that when they reestablished themselves during the Revolutionary War. Moreover, the Declaration of Independence can be read as the original covenant or compact establishing the United States of America. Elsewhere, I have demonstrated the covenantlike character of the Declaration.²

Some Questions

The United States was founded by uniting separate states that felt themselves to be akin to one another and that had conducted a revolution against the mother country together. The question before South Africa is, Can a unitary, highly centralized state be transformed into a federation? The record is not unambiguous. Spain, an example to which I will refer frequently and to which I suggest that South African constitution makers refer, is perhaps the most successful example of such a transformation in our times. After the death of Francisco Franco, and as part of its turn toward democracy, the Spanish political leadership made some critically important decisions to accommodate the country's ethnic minorities, at least two of which—the Basques and the Catalans—had become vociferous in their demands to the point of violence.

The Spanish political leadership brilliantly decided to avoid asymmetrical solutions, that is to say, limiting autonomy to those two or perhaps a few more minorities at the country's periphery, so that the issues would always be framed in the context of Spain versus its peripheral minorities. They determined to divide the entire country into autonomous regions while allowing those that wished to establish their own special constitutional relationships with Madrid to do so through bilateral negotiations. At the same time, the general law

of regionalization required each region to establish a basic quasi-federal constitutional relationship in the intervening half-generation.

This was decided and embodied in the 1978 Spanish Constitution drafted in a convention that was highly partisan where the revived political parties of Spain covered the spectrum of political ideologies and attitudes, yet were able to negotiate a mutually satisfactory arrangement. In the intervening half-generation, the system has proved itself, as the major secessionist tensions have been eliminated or confined to a less-than-popular terrorist underground in the Basque country. The four unique regions—the Basque country, Catalonia, Galicia, and Andalusia—each negotiated its own constitutional status directly with Madrid, and the other regions adopted a common framework for regionalization, as they did not seek anything more than that. The plan, while avoiding the use of the word *federal* because of objections of the right-wing parties, has become essentially a federal one in all but name because the Spanish Constitution and the regional constitutions provide the kind of empowerment and protections that federal constitutions have.

Belgium is trying to do the same but has the problem of a dyadic division between Flemings and Walloons, which invariably leads to sharper confrontation. Nevertheless, because of its position in the European Community, it may be able to do so. The Federal Republic of Germany has had to undertake this task for its newly absorbed eastern part and, indeed, only accomplished unification by first reestablishing the five *Länder* in the east and then reuniting them with the eleven *Länder* of the west.

Austria, after it ceased to be the center of the Austro-Hungarian empire with its power-sharing features, then had to divide itself internally into a federation, which it did along the lines of its traditional provinces. This took place after World War I. Austria has tended to be a very centralized federation, but it is a federation and offers another example to be studied.

Brazil also transformed a unitary state that was quite centralized into a federation in the 1890s, shortly after it had ceased to be a monarchy. Brazilian federalism has had its ups and downs but has remained a powerful means of protecting liberties in that country, if often by unorthodox means themselves fostered by the existence of federalism.

Pakistan also formally transformed itself into a federal system upon achieving independence from the British and partition from India in 1947. Its federation is based on linguistic provinces and has been even more centralized than the others cited. Pakistan has had a

military government for so much of its history that the extent of the existence of true federalism within its borders is questionable.

Even in these cases, it should be clear that the advantage of federalism is to allow a variety of ethnic accommodations. This would be true for South Africa as it has been for these other countries mentioned and still others. Moreover, as in the United States, federal protection of individual rights and the free flow of commerce will probably be essential for the achievement of the kind of liberal democracy that the peoples of South Africa seek.

The Critical Questions

Three critical questions for South Africa are: How will federalism affect economic growth; how will it deal with regional inequalities; and how will it affect redistributive policies?

As far as the United States is concerned, federalism certainly seems to have served the purposes of economic growth. While such growth always has a tendency to promote regional inequalities, in the long run it has kept those inequalities under control in the United States, in part because each region of the country had a strong political voice in national affairs, including national economic affairs. Certainly, federalism has had a redistributive role in the United States, since the existence of the states has ensured that federal government policies would take all states into consideration and thus serve redistributive functions.

The positive role of federalism in this regard may best be seen in the third world. In unitary states in the third world, economic development has generally meant the development of the capital city and the metropolis surrounding it, which have concentrated the wealth, new and old, in their hands. While the same inequities of concentration may have been present in third world federations, the existence of state capitals as well as the federal capital has ensured that at least these capital cities would become development nodes for their respective regions, offering a better distribution of wealth and addressing the problem of regional inequalities to a greater extent than in unitary states.

The economic dimension is a reflection of the difference between federalism and regionalism. In federalism, the subnational units have constitutionally entrenched powers, not easily subject to revocation by the federal government at the whim of those in power in the national capital. This is critically important for all concerned. In that sense, federalism is not functional devolution at the whim of the

center but rather a constitutional division of powers designed to protect all citizens.

Federalism is also a way to overcome the disadvantages of metropolitanism in a country like South Africa, dividing the great metropolitan agglomerations, most specifically the great Pretoria Witwatersrand Verceniging (PVW) metropolitan agglomeration among several regional governments. Its governmental structures would serve a redistributive policy that will address major economic inequalities in the entire polity. Indeed, it may be the only way in which such redress can be brought about in fairness. If the PVW agglomeration is divided among several regional governments, either the regional governments will force the federal government to pursue a redistributive policy, or there will be a general metropolitan authority in which each region will be represented, with redistributive mechanisms and set-asides built in.

The question may be raised as to how important regional identities would be. Fortunately, South Africa has a basis for regionalization in the nine economic regions established several years ago that cut across the usual racial and ethnic lines sufficiently, where necessary, to establish a measure of fairness. These regions are already recognized. It may be necessary to establish one or two more by further dividing the nine, for example, another region in the PVW area or a new, predominantly Xhosa-speaking region based on Ciskei-Transkei and the South African territory in the middle. These regions will, once they are empowered, soon acquire an appropriate regional identity through their actions. As regional bodies of law and histories develop, sufficient regional integrity is established to give them identities but not identities that work against the common South African identity.

Designing a Federal Constitution for South Africa

The foregoing issues lead us to questions of constitutional design. Here I would like to try to emphasize those principles of constitutional design that are most appropriate for decision makers to consider. Several are conceptual, others theoretical, and still others very practical indeed. I will try to stress what I consider most important from the theoretical perspective of constitutional design. Constitutional design is a field in and of itself. Perhaps I can suggest some ways to use the knowledge accumulated in the field of constitutional design through experience in various parts of the world.

Political Will. The main problem to be faced in this regard is how much political will there is to federate, with all that entails—comity,

power sharing, appropriate mutual trust, and respect. Based upon my experiences in South Africa, I believe that with appropriate leadership South Africans of all varieties will be able to find the necessary political will, although there are serious problems of trust among certain groups (not only between blacks and whites). If there is a will to have the political will, it will be possible.

An equally important question is, How much self-rule should be granted to the regions? It seems to me that it should be more rather than less, because the best way to encourage mutual trust is through the exercise of responsibility.

What needs to be ambiguous in the constitution, and what needs to be rigid? In my opinion, all those procedures that guarantee the preservation of democratic self-government need to be rigid—that is, dates of elections and basic issues of rights protection—whereas the exercise of powers or functions can be more ambiguous.

A major issue in the South African constitutional negotiations is the entrenchment of regional powers. The African National Congress wants no entrenchment, and the National party major entrenchment. Joe Slova's proposed compromise at Group Two of the Conference for a Democratic South Africa (CODESA) comes close to being a middle way and should be pursued. While there should be room for interpretation, basic regional powers should be constitutionally entrenched. Today, the trend in most federal states is away from centralization toward greater decentralization, because placing too great a burden on the federal government means that nothing gets done.

If South Africans need to find a word other than *federalism*, that should not be the problem. In Spain, for example, the federated states are called *autonomous communities*. Powers are the real issue.

We should not make ourselves slaves to questions of terminology—many mistakes have been made in both political science and philosophy by trying so hard to agree on terminology that we become slaves to the words. Still, unless we correctly understand not only each other but the things we are talking about as well, then it is difficult to try and communicate messages. In this respect, there are some issues of terminology that cannot be ignored.

Protecting Rights. The first question to be raised underpinning any polity is the question of rights. Is the local or the federal government the best one to protect the individual and private rights of citizens?

It depends on whom we want to protect. The American position, which is not wrong, is that if one wants to protect people who are different, who deviate from the local consensus, then indeed the federal government can do better. But today, there is some question

in the United States as to whether needed local consensus is not at the mercy of every deviate who comes along and claims his or her constitutional rights. This is particularly important where national or group rights are involved because people obviously care passionately about their national rights, even if those national rights might be interpreted in another environment as going against their individual rights. Look today at what was Yugoslavia or the former Soviet Union.

People who care passionately about such things will have different ideas of protection. The problem that is faced in South Africa as in other parts of the world is, How do we find a balance in protecting both? Americans have been able to do that because we have had a clear conviction—a dominant consensus—that we are more interested in protecting the deviant individual than we are in protecting any kind of collective rights, a concept that we do not even formally recognize.

Avoiding the Reified State. The peoples of South Africa, especially those involved in the problems of constitutional design, must jettison the idea of "the state" as a reified entity, as something that exists in and of itself, regardless of its people, regardless of its regime. South African political language, influenced by European models, seems quite wedded to the idea of the state as a reified entity. In fact, the great revolution in modern democratic republicanism was to get rid of that idea of the state and to see the people as the source of political power.

Proper democratic theory holds that the people, in their various institutional combinations, delegate from their powers to governments—in federal systems, to local, state, federal, and special-purpose governments as necessary. Under democratic-republican theory, especially that animated by the principles of federal democracy, all governments are governments of delegated powers only. None possess powers in their own right, only such as their peoples delegate to them, and what can be delegated can be reassumed, transferred, reorganized, or shifted.

This is a conceptual matter but of immense importance, as it makes possible the distribution of powers and their separation and the constitutional protection of rights. If a reified state is "sovereign," then it decides if and how power should be distributed and divided—if it so chooses—but in fact it remains the final point of sovereignty where authority and power come together. Thus the state, which means for all intents and purposes those who run the state, determines who grants or guarantees rights and determines the final organization of powers. Whereas if the people are sovereign, then all

rights, authority, and power inhere in them, and government is merely a vehicle for their exercise. Since rights are inherent, people are inherently protected, and rights do not come to them as a gift from some external state. Moreover, it is easier to understand government or governments as consisting of the governors, those who empower them, and the institutions and mechanisms for keeping those governors in their place, than when we are confronted by the ostensible majesty of the reified state. To restate matters, the three great elements of democratic republicanism—federalism, the separation of powers, and the bill of rights—are all made possible by the idea of popular sovereignty.

The idea of the reified state is a European invention. According to that theory, the only thing that democracy brings to the reified state is the possibility that peoples can change their regimes, sometimes democratically, but the idea that there is such a thing as a reified state makes it impossible to construct properly any kind of constitutional regime that will promise democratic republicanism and self-government, much less federalism.

In place of the state, Americans successfully developed a different approach to understanding how polities are organized. The people as a whole—and in a federal system, the people of their respective entities—are the source of political power or, if you will, political sovereignty. (I am not certain that we should not get rid of that term also simply because of the complications that it brings.) The people are politically sovereign. They are the source of the constituent power (in the words of Johannes Althusius, a great European political theorist of the late sixteenth century, who was ignored for three hundred years by all those who wanted to build reified states). The people delegate the constituent power to those governments to whom they choose to delegate it.

Under the doctrine of state sovereignty, as opposed to popular sovereignty, there is one state with its government. All the other jurisdictions are mere "authorities" subordinate to the sovereign state, not governments. The government is in the hands of the state.

Under the doctrine of popular sovereignty, the people can determine to delegate their powers to both general and constituent governments. The people can determine how they allocate the powers to govern themselves; to whom they entrust those powers; and to what institutions they entrust those powers. They do not grapple with abstract questions such as, Where is "the state"? Who is the state? What does the state do?

Individuals, people do things. Even "the bureaucracy" is an abstraction. There are people who are working in a bureaucratic

framework with certain consequences because of the framework. But they are still people. Anybody who follows the infighting within and among bureaucracies knows how unhelpful it is to talk about a reified state bureaucracy. There are many state bureaucrats and departments and agencies who fight with each other for power as much as they fight with others, maybe more. So it is misleading to think that there is not real diversity even in the most centralized state, even if the words of reification camouflage it. The words of reification, by camouflaging the reality, hide the diversity from the people and allow bureaucrats to act irresponsibly.

Distribution of Powers. Look for the distribution of powers to build a political society that is democratic and republican. Whether federal or not, there needs to be a distribution of powers. In federal systems, the distribution of powers takes three forms. First of all, there is the form of federalism, the distribution of powers among territorial entities. A large, comprehensive entity that we call the federal government is constituted of smaller, comprehensive entities serving pieces of the territory, which we call states or localities. The total is a matrix of governments with the federal government as the framing institution (what earlier generations of Americans referred to as the general government), within which are constitutional regions or states and within those regions, others called local governments.

There is no "central" government, a term that implies that it is the center of all power and communication. As in a cybernetic system, power and communications flow in many directions, as needed. This is a vital distinction.

There also needs to be a separation of powers within each government: executive, legislative, and judicial. There have been efforts on the part of those inspired by certain forms of democracy to eliminate the separation of powers. They have not worked. Indeed, the trend has gone back to making the separation of powers more or less complete in order to preserve democracy in just about every case. The exceptions are in polities where the democratic tradition is so strong that it is able, to some extent, to substitute for a thorough separation of powers.

A Civil Society. Finally, there is the protection of the private rights of individuals through what we properly call *civil society*, a term from the age of democratic revolutions in the seventeenth and eighteenth centuries that has gained new currency in the former communist bloc, since its recent revolutions. *Civil society* is a term that teaches us that not all of society is political, that while framed by the polity,

there is a large private sphere rightfully separate from government. Its revival in the East comes in time to remind us in the West that this is the term that properly describes our own liberties in which there is a separation of governmental and nongovernmental spheres and a distribution of powers between them.

I cannot overemphasize the importance of the idea of civil society, of limited government. The term itself is a great invention of seventeenth-century political philosophy that teaches us two good lessons: that no society exists without government, without some form for establishing order and security and allocation of powers, and at the same time, that government has to be limited so that there is a sufficient private sphere.

Indeed, in the most successful democracies, we have come to understand that civil society actually has three pillars: a governmental pillar, a private pillar, and a public nongovernmental pillar (a *civic sector* we call it in the United States), where people voluntarily come together (truly voluntarily, not coerced voluntarism) to do as much as possible on a cooperative basis, on a coproduction basis, before turning to government. Government does only what cannot be done privately or through the public nongovernmental civic sector. So look to the development of those three sectors.

Constituent Units with Real Powers. The constituent units of a federation need to have real power, including real powers of taxation. These may be implemented in the way that we do in the United States, where we have parallel federal and state officials in institutions working throughout the United States. Or it may be done the way it is done in Switzerland, where the federal government uses the institutions of the constituent units to implement federal legislation, and it has not tried to establish its own institutions throughout the country.

Each system is good in some places and poor in others. In the United States, for example, dual structures have worked rather well. The Latin American countries have allowed federal government, with its greater resources, to work locally, effectively preempting state and local efforts and defeating federalism because of the political culture. In Switzerland, the other system has worked rather well because of the ingrained federal political culture. It is somewhat more problematic in hierarchical Austria. What is necessary in either case is that real powers have to be constitutionally allocated and protected among governments.

Dualism and Cooperation. Federalism works through a combination of competition and cooperation. A dual structure is necessary in one

or another of the forms I have described. But there will always be cooperative relationships within the structure because there are too many items that have to be done cooperatively by the governments involved. The United States learned that early. Cooperative federalism was the norm in this country within a few years after the adoption of the Constitution of 1787. But in our time, this thrust toward intergovernmental sharing has gotten out of hand somewhat, as it has been used by the federal government from time to time for coercive purposes.

A proper balance between cooperation and dualism is critically important, but both will always exist. What makes them work is what in American law is called *comity*; that is to say, a decent respect for the concerns of the other polity. Comity is protected through open bargaining and open government, in addition to formal constitutional provisions. This is critically important. There is no political system in the world that does not have bargaining. Even in the most closed and dictatorial system, at least those people who sit at the top bargain among themselves. The success of democratic systems is that their bargaining is sufficiently open and accessible to the vast majority of people who choose to make use of that access, and it is visible so that not too much can be done to strengthen the hands of the governors at the expense of the governed.

Slower but Firmer Results. Federalism, because it requires consent, is a slower way to get results, but its results are longer lasting. Sometimes a quick fix seems to be possible by the use of force or forceful intervention, but in the long run consensus has the ability of generating a wider and deeper desire to support the result. The history of the American confrontation with the problem of the rights of blacks and other nonwhite minorities is a case in point. The Americans used a combination of federal processes and the limited coercive power of the federal government, and the end result is that today there is sufficient change of heart among Americans in all parts of the country to make the reality of support for civil rights and rights protection much stronger.

I would like to conclude by mentioning three more points. One is that it is obviously easier to build democratic systems, federal systems, where the political culture lends itself to them. It is obviously more difficult where the political culture runs in contrary directions. Where it runs in contrary directions, the constitutional designers must find those elements that are most likely to be in favor of or supportive of democratic and federal institutions. In some cases,

this is a matter of balancing oligarchies instead of securing broad-based participation. It is a matter of working with what is available.

This is especially difficult when it comes to ethnic federations. Some of the problems of unfavorable political culture can be overcome if there is sufficient political will. Such will is best when it can draw from the culture, but at times it is used even to modify and moderate the culture.

Fortunately or unfortunately, accidents of history have their role to play as well. Some have to do with the kind of leadership that appears. One wonders whether Yugoslavia would have been plunged into civil war if there had not been a certain kind of leader in Serbia at the time. But these are the accidents of history over which we have relatively little control. Proper leadership, however, is necessary for federalism to succeed.

Federalism and Democracy

Federalism is a rich and complex thing, a matter of formal constitutional divisions, appropriate institutions, patterns of political behavior, and, ultimately, political culture. Moreover, federal democracy offers a complete and comprehensive theory of democracy that stands in sharp contrast to the theories of democracy regnant in Europe until now—Jacobin democracy and parliamentary democracy on the Westminster model—not to speak of that monstrous development sometimes referred to as totalitarian democracy, where outside of the privileged elites, there is the “democracy” of the equality of repression.

Federal democracy addresses the great questions of political sovereignty and the distribution of powers (competences), the relationships between power and law or right, and the great issues of centralization and decentralization. It does so by vesting political sovereignty in the people who constitute the body politic rather than in states and requiring them to allocate competences or powers constitutionally among the governments of their creation. They must do so in a way that encourages multiple centers of power and in a manner that provides for both centralization and decentralization as needed, but always within a noncentralized framework whereby all exercise of powers is governed by law and related to the rights of the constituents.

What about Efficiency?

One question that is almost certainly to be raised is that, while federalism may be appropriate for accommodating pluralism and

while it may even be helpful in initially promoting democracy, liberty will survive only if democracy can cope efficiently with the serious problems most of the newly liberated countries face. Is federalism not by definition inefficient? Even if justifiable for normative reasons, can it be at all justified when it comes to efficiency, namely, the minimum application of resources for the maximum results? Many claim that federalism, with its duplications, complexities, and redundancies, is a machine designed for waste.

This view is based on a widely accepted but erroneous understanding of what constitutes efficiency in government. That understanding is based on hierarchical thinking about governmental organization. We are now coming to realize that such thinking is not only outmoded but simply wrong. The hierarchies that appear to be so neat on paper do not work in practice. Sometimes the application of a great deal of coercion gets them to work for a while, but we have seen the results, neither fair nor efficient by any reasonable standard.

The development of cybernetics has given us a newer and truer understanding of how to achieve efficiency, one that has proved itself by revolutionizing the world. According to the cybernetic model, redundancies are vitally needed to achieve complex goals. At the least, in a world where people and machines are fallible and inevitably make mistakes or break down, fail-safe mechanisms and alternative channels are needed to keep things moving efficiently. Beyond that, such mechanisms are vital for the promotion of creativity and imagination.

As Martin Landau has pointed out, the American Federalists discovered this principle in patterns of government two hundred years ago.³ Now their "new science of politics" (as they put it) has been confirmed by the new science of cybernetics. As a result, it is now beginning to be possible to talk about a federalist definition of efficiency.

The first step toward joining the issue is a clarification of normative positions. If one begins as a monist, assuming the desirability and feasibility of achieving one pattern of thought and behavior for everyone, then federalism is indeed inefficient and even wrong, because it enables the perpetuation and even the entrenchment of differences. If one begins as a pluralist, seeing the world as a heterogeneous place and properly so, then one must make a different evaluation of federalism as a means to protect and entrench liberty. Thus, monistic Jacobin and Marxian views have constantly rejected federalism as wrong in principle, even if they have had to compromise with reality and accept the temporary existence of pluralism. Federalist views, by contrast, embrace pluralism and seek means to

protect it—one might say efficient means to do so—of which the constitutional division and sharing of power through a combination of self-rule and shared rule is primary.

Going beyond that, one can take as a starting point the human condition, both psychologically and sociologically, namely, that every individual and individual institution has its own goals, although to some extent each will share goals with other individuals and institutions. In recognition of that, the best way to move from A to B is to identify common goals and find a way for those same individuals and institutions to express those shared goals while allowing them to maintain and pursue their individual goals. That, indeed, is what federalism does.

A few years ago, as part of the effort to break through the paralysis of budgets rendered inflexible as a result of cumulative previous commitments, the idea of zero-based budgeting—of starting from scratch every year—was introduced. To implement this new form of budgeting, proponents of managerialism in public administration came up with the idea of Program Policy Budgeting System (PPBS). The premise of PPBS was that it was first necessary to identify agreed-on goals, then it would be possible to evaluate all budget items in light of their efficiency in the pursuit of those goals. PPBS failed precisely because, in any public framework, there is likely to be insufficient agreement on common goals to do that. People come together to pursue different goals, which at best can be harmonized so that they can be pursued through common effort and enterprise. That, indeed, is the federalist way. When forced to try to define a single comprehensive set of common goals, people could not do so, and PPBS could not be implemented except marginally.

Thus, in relatively complex public arenas, efforts to bulldoze directly, which would be termed efficient in other systems, might be the least efficient and might create great static and friction that would greatly waste resources, while the existence of multiple channels penetrating through multiple cracks might be a far more efficient way to achieve even the most common goals. The authors of *The Federalist* understood this.

Right now, all signs point to the fact that democracy and federalism have become closely intertwined and that together they represent the greatest opportunity that humans have yet had to achieve liberty and prosperity. But, as is always the case in human affairs, the problems are great, and the issue remains in doubt. One of the ways in which scholars of federalism can help resolve the issue in the right direction is by developing a federalist theory of efficiency that can be applied to assist the peoples and countries of the world in

their application of the principles of federal democracy to secure life and pursue liberty and happiness.

No federation freely entered into that has lasted for at least fifteen years has ever failed of its own accord. The Soviet and Yugoslav federations were imposed by force. The results speak for themselves. What constitutes "freely entered into" may be a matter of discussion, but no such federation has failed of its own accord. Some have been eliminated by outside conquest, but where the people have chosen this course of political organization, they have generally stayed with it. As South Africa makes its new beginning, one can be hopeful that, whether internally or in their relations with one another, South Africans will be able to move from the government of force of the past to a useful and democratic federation of consent in the future.

6

Liberty, Commerce, and Prosperity—And a Bill of Rights

Dennis Davis

This is Radio South Africa, it's 6:00 P.M. on this the twenty-fourth day of November, 1995, and here is the news:

The chief justice today handed down the unanimous decision of the Constitutional Court in the case of *Die Blanke Boerevereniging and the Government of the Republic of South Africa*. In its judgment, the Constitutional Court declared invalid the Reparation and Reinstatement of the Land Claims Act, which was passed by a narrow majority of Parliament last year. The act purports to authorize the government to expropriate land that had been acquired pursuant to the racist policy of apartheid removals during the 1960s. The Constitutional Court declared that this act was in contravention of Article 13 of the Bill of Rights, which provides for an entrenched right to private property save where the legislature, in the public interest, may authorize an expropriation against payment of reasonable compensation. The court considered that as the legislation authorized the executive to pay compensation in its sole discretion, there had been a contravention of the entrenched right of Article 13.

Reaction has been speedy and mixed. The chairman of the South African Agricultural Union, Mr. Barend du Plessis, and the leader of the opposition Democratic party, Mr. Tony Leon, welcomed the decision as being good for South Africa and even better for international investment. By contrast, the minister of justice announced that the court's decision